

**STATE OF TENNESSEE**  
OFFICE OF THE  
**ATTORNEY GENERAL**  
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July 2, 2004

Opinion No. 04-101

Competitive Bidding Requirements for Solid Waste Authorities

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**QUESTION**

Must a solid waste authority, established under the Solid Waste Authority Act of 1991, as amended, competitively bid contracts for solid waste collection and/or disposal services?

**OPINION**

Competitive bidding requirements generally apply when a solid waste authority seeks to contract for solid waste collection and/or disposal services, but a solid waste authority need not competitively bid a contract for solid waste collection and/or disposal services under those circumstances in which the participating counties or municipalities need not competitively bid such a contract.

**ANALYSIS**

This Office has been asked to reconsider a portion of an earlier opinion regarding competitive bidding requirements for a solid waste authority established under the Solid Waste Authority Act of 1991, codified at Tenn. Code Ann. §§ 68-211-901 — 925. In the earlier opinion, this Office concluded that a solid waste authority has the legal right and power to enter into contracts for solid waste collection and/or disposal activities but must advertise and competitively bid such contracts. *See* Op. Tenn. Att’y Gen. 97-145 (October 23, 1997).

The Solid Waste Authority Act of 1991 (“the Act”) was enacted to provide for a systematic and efficient means of solid waste disposal and to encourage the best utilization and conservation of energy and natural resources.<sup>1</sup> Tenn. Code Ann. § 68-211-925. To accomplish its goals, the Act permits counties and municipalities to create “solid waste authorities” to manage the mutual solid

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<sup>1</sup> The Act is closely related to the Solid Waste Management Act of 1991, codified at Tenn. Code Ann. §§ 68-211-801 — 874, the general purpose of which is to institute and maintain a comprehensive, integrated, statewide program for solid waste management. Tenn. Code Ann. § 68-211-803(a). This Office has previously discussed the general tenor and many of the specific provisions of the Solid Waste Management Act of 1991. *See* Op. Tenn. Att’y Gen. 91-88 (November 7, 1991).

waste needs and activities of the participating counties and municipalities. *See* Tenn. Code Ann. §§ 68-211-903, 68-211-906. It bears noting that the Act is permissive rather than mandatory. While the Act permits counties and municipalities to create solid waste authorities to manage their solid waste activities, it does not require counties and municipalities to create solid waste authorities. Tenn. Code Ann. § 68-211-903(a). In fact, counties and municipalities have historically had multiple options for handling their solid waste needs and activities.<sup>2</sup>

The Act specifically provides that a solid waste authority is a public instrumentality of the counties and municipalities participating in its creation or by agreement after its creation. Tenn. Code Ann. § 68-211-906(a). A solid waste authority is created and may be operationally furnished to a large degree by the participating counties and municipalities. Tenn. Code Ann. §§ 68-211-903, 68-211-906(a)(18), 68-211-909, 68-211-918, 68-211-920. Nevertheless, a solid waste authority operates with some degree of independence from its participating counties and municipalities. A solid waste authority has and may use a corporate seal, may sue and be sued, and may incur debts, borrow money and issue bonds. Tenn. Code Ann. §§ 68-211-906(a)(2), 68-211-906(a)(3), 68-211-906(a)(9). Likewise, a solid waste authority is managed by a board of directors, the members of which are appointed by the participating county executives and municipal mayors and approved by the county and municipal governing bodies. Tenn. Code Ann. § 68-211-904(a).

The General Assembly has vested broad powers in solid waste authorities. Principal among them is the power to acquire and operate solid waste disposal facilities and resource recovery facilities.<sup>3</sup> Tenn. Code Ann. § 68-211-906(a)(4). Equally important is the power to collect solid waste and transport it for disposal or processing. Tenn. Code Ann. § 68-211-906(a)(6). Lastly, and perhaps most important for the question presented in this opinion request, a solid waste authority has the power to enter into contracts for the management and operation of any facility or service of the authority. Tenn. Code Ann. § 68-211-906(a)(8). Clearly, then, a solid waste authority may contract with any person, including individuals, firms, associations and corporations, to provide solid waste collection and disposal services for the authority.

The question of exactly how a solid waste authority may contract to provide solid waste

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<sup>2</sup> As this Office previously noted, there is no shortage of statutory enactments relating to local waste disposal services and facilities. *See* Op. Tenn. Att’y Gen. 89-127 (September 29, 1989). In fact, leaving aside the Solid Waste Management Act of 1991 and the Solid Waste Authority Act of 1991, there are no less than nine statutory schemes specifically addressing the issue in some fashion. *See* Tenn. Code Ann. § 5-16-101 *et seq.* (“Urban Type Public Facilities”), Tenn. Code Ann. § 5-19-101 *et seq.* (“Garbage and Rubbish Collection and Disposal Services”), Tenn. Code Ann. § 7-53-101 *et seq.* (“Industrial Development Corporations”), Tenn. Code Ann. § 7-54-101 *et seq.* (“Energy Production Facilities”), Tenn. Code Ann. § 7-58-101 *et seq.* (“Resource Recovery and Solid Waste Disposal”), Tenn. Code Ann. § 7-82-101 *et seq.* (“Utility Districts”), Tenn. Code Ann. § 68-211-501 *et seq.* (“Municipal Resource and Energy Recovery Facilities”), Tenn. Code Ann. § 68-211-601 *et seq.* (“Solid Waste Planning and Recovery”), Tenn. Code Ann. § 68-211-701 *et seq.* (“Local Approval of Solid Waste Facilities”).

<sup>3</sup> In general, the term “resource recovery facilities” refers to land, buildings, facilities and equipment used for the recovery or production of energy from controlled processing or disposal of solid waste or the systematic separation, extraction and recovery of recyclable materials from solid waste. Tenn. Code Ann. § 68-211-902(a)(7).

collection and disposal services, and particularly whether competitive bidding of such contracts is mandatory, requires an examination of not just the Act, but also general laws concerning governmental purchasing and specific laws concerning the collection and disposal of solid waste. There are numerous statutory provisions concerning the purchase of goods or services by governmental units or agencies. Equally numerous are the legislative responses to the issue of solid waste collection and disposal. Not surprisingly, the convergence of these numerous laws is often a complex matter.

The analysis begins with the Act. As mentioned above, the Act provides solid waste authorities with broad contracting powers. Tenn. Code Ann. §§ 68-211-906(a)(8), 68-211-906(a)(13). However, the Act contains no provisions detailing the method in which solid waste authorities are to exercise these contracting powers. In such circumstances, the question becomes whether to look to other provisions, in this case general county and municipal purchasing laws, for applicable procedures or whether the Act alone is responsible for delineating the limits of the contracting powers of solid waste authorities.

Of course, the General Assembly may provide specific purchasing procedures for public instrumentalities to follow directly in the legislation creating such instrumentalities. There are numerous public instrumentalities similar to solid waste authorities, and the General Assembly has indeed outlined specific purchasing procedures for some of them. For example, the General Assembly explicitly specified certain competitive bidding procedures to be used by the Tennessee Education Lottery Corporation in executing procurement contracts. Tenn. Code Ann. § 4-51-126. In the same vein, the General Assembly may also provide specific wholesale exemptions from competitive bidding requirements, as in the case of Energy Acquisition Corporations (Municipal Gas Companies). Tenn. Code Ann. § 7-39-317.<sup>4</sup> Where, as in the case of the Act, the General Assembly has provided neither specific purchasing procedures nor wholesale exemptions, the question remains whether general county and municipal purchasing laws, and their accompanying competitive bidding requirements, apply to the activities of public instrumentalities.

Tennessee courts have seldom considered this issue. The most direct pronouncement on the issue stems from *Shankle v. Bedford Co. Bd. of Education, et al.*, No. 01A01-9609-CH-00387 (Tenn. Ct. App., filed February 28, 1997, at Nashville). The *Shankle* court considered, among other issues, “whether the Public Building Authority Act of 1971, T.C.A. § 12-10-101, *et seq.*, excludes public building authorities from all Tennessee state and local laws, including competitive bidding statutes and [w]hether the 1995 Amendments to the Public Building Authority Act create an exception to the competitive bidding statutes.” *Id.* (internal quotation marks omitted). The *Shankle* court’s analysis focused more on the language of two specific statutory exemptions rather than the general issue of whether public building authorities were subject to general state and local laws, such as those governing competitive bidding. The treatment of the latter issue was by implication.

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<sup>4</sup> Section 7-39-317 states: “Notwithstanding any law to the contrary, [an energy acquisition] corporation may enter into any contract authorized by this chapter without complying with competitive bidding requirements.”

In *Shankle*, the plaintiffs contended that the Public Building Authority of Bedford County violated Tennessee law when it awarded contracts for construction work on public schools without going through competitive bidding or a public invitation for proposals. In its defense, the Authority contended that the Public Building Authority Act exempted it from competitive bidding statutes applicable to counties or municipalities. The controversy centered upon the language of two statutory provisions. The first provision, part of the original Public Building Authority Act enacted in 1971, states, in pertinent part:

*Projects may be acquired, purchased, constructed, reconstructed, improved, bettered and extended and bonds may be issued under this chapter for such purposes, notwithstanding that any other general, special or local law may provide for the acquisition, purchase, construction, reconstruction, improvement, betterment and extension of a like project, or the issuance of bonds for like purposes, and without regard to the requirements, restrictions, limitations or other provisions contained in any other general, special or local law.*

Tenn. Code Ann. § 12-10-122(a) (emphasis added). The second provision, part of a 1995 amendment to the Public Building Authority Act, states, in pertinent part:

An authority in the operation, maintenance, and routine repairs of a project may purchase goods, supplies and services which are generally sold to the public by advertised price without the necessity of competitive bidding; provided, that no purchase shall exceed five thousand dollars (\$5,000) or any larger limit as shall be allowed for such purchases under the regulations of a municipal corporation with which the authority has contracted.

Tenn. Code Ann. § 12-10-124(b).

The *Shankle* court concluded that section 122(a) exempted public building authorities from competitive bidding laws with respect to the acquisition, purchase, construction, reconstruction, improvement, betterment or extension of projects. As a result, the court held that the contracts for construction work on public schools at issue in *Shankle* did not contravene Tennessee law.

The plaintiff had argued against this interpretation of section 122(a), contending that such an interpretation would render section 124(b) mere surplusage. In particular, the plaintiff argued that if section 122(a) wholly exempted public building authorities from competitive bidding requirements, section 124(b), with its specific exemption from competitive bidding requirements, would constitute a pointless amendment. The *Shankle* court rejected this contention, stating that the two sections were aimed at different activities. The exemption of section 122(a) was aimed at the acquisition, purchase, construction, reconstruction, improvement, betterment or extension of projects. Section 122(a) did not exempt public building authorities from other general, special or local laws when it came to the operation, maintenance or routine repairs of a project. On the other hand, the exemption of section 124(b) applied only to the operation, maintenance and routine repairs

of a project.

The *Shankle* court did not in its discussion specifically state as a general principle that public building authorities are subject to the general purchasing and competitive bidding laws applicable to counties and municipalities. This conclusion was, however, implicit in the court's treatment of the issues, particularly the discussion of the distinction between sections 122(a) and 124(b).

The statutes establishing and governing public building authorities and solid waste authorities are similar in many respects, particularly with regard to their operational powers. *Compare* Tenn. Code Ann. § 12-10-109 *with* Tenn. Code Ann. § 68-211-906. As will be discussed below, the statutes even contain identical language in various provisions. Accordingly, given the similarity between public building authorities and solid waste authorities in terms of their creation, function and operation, it is the opinion of this Office that solid waste authorities are generally subject to the purchasing and competitive bidding laws applicable to the participating counties and municipalities.

This conclusion merits a brief examination of general county and municipal purchasing laws, particularly as they relate to collection and disposal of solid waste. As previously mentioned, there are numerous statutes governing county and municipal purchasing. In fact, there are at least three general statutory schemes dealing with purchasing by counties<sup>5</sup>, another general statutory scheme dealing with purchasing by municipalities<sup>6</sup> and various other statutory provisions for differing types of municipalities.<sup>7</sup> Not surprisingly, there is some degree of variation among these statutes. As a general rule, however, county and municipal purchasing statutes express a preference for competitive bidding for purchases of supplies, materials, equipment and contractual services, including services such as solid waste collection and disposal. *See* Tenn. Code Ann. §§ 5-14-108(a)(1), 5-14-204, 5-21-119(b)(3), 6-19-104(b), 6-35-205(b)(1), 6-56-304; *see also* Op. Tenn. Att'y Gen. 89-127 (September 29, 1989).<sup>8</sup> As has often been stated, competitive bidding serves to provide bidders with a fair opportunity to compete for public contracts and to promote the public interest by guarding against favoritism and fraud. *MARTA v. Metro. Gov't of Nashville*, 842 S.W.2d 611, 616-17 (Tenn. Ct. App. 1992).

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<sup>5</sup> The general statutory schemes concerning county purchasing include the County Purchasing Law of 1957, Tenn. Code Ann. § 5-14-101 *et seq.*, the County Purchasing Law of 1983, Tenn. Code Ann. § 5-14-201 *et seq.*, and the County Financial Management System of 1981, Tenn. Code Ann. § 5-21-101 *et seq.*

<sup>6</sup> The general statutory scheme concerning municipal purchasing is the Municipal Purchasing Law of 1983, Tenn. Code Ann. § 6-56-301 *et seq.*

<sup>7</sup> For instance, there are different statutory provisions concerning purchasing by cities operating under a city manager - commission charter, Tenn. Code Ann. § 6-19-104, versus those cities operating under a modified city manager - council charter, Tenn. Code Ann. § 6-35-205.

<sup>8</sup> A typical example of the language of these provisions is as follows: "All purchases of and contracts for purchases of supplies, materials, equipment and contractual services, and all contracts for the lease or rental of equipment, and all sales of county-owned property which has become surplus, obsolete or unusable, shall be based wherever possible on competitive bids." Tenn. Code Ann. § 5-14-108(a)(1).

Of course, there are exceptions to the competitive bidding requirements explicitly set forth in the various purchasing statutes, many of them common to most if not all of the statutory schemes. For example, there are exceptions for emergency purchases of supplies, materials or equipment, purchases of perishable commodities on the open market and purchases of goods or services that may not be procured through competitive means because of the existence of a single source of supply or because of a proprietary product. *See, e.g.*, Tenn. Code Ann. §§ 5-14-108(c)(2), 5-14-110, 5-14-204, 6-56-304. The various purchasing statutes, however, do not contain any exceptions explicitly pertaining to contracts for solid waste collection and disposal services.

The inquiry does not end at this point. As alluded to above, the Act is similar in many respects to the Public Building Authority Act at issue in *Shankle*. In fact, the Act contains language identical to one of the exceptions to competitive bidding requirements at issue in *Shankle*. More specifically, the Act provides as follows:

*Projects may be acquired, purchased, constructed, reconstructed, improved, bettered and extended and bonds may be issued under this chapter for such purposes, notwithstanding that any other general, special or local law may provide for the acquisition, purchase, construction, reconstruction, improvement, betterment and extension of a like project, or the issuance of bonds for like purposes, and without regard to the requirements, restrictions, limitations or other provisions contained in any other general, special or local law.*

Tenn. Code Ann. § 68-211-923(c) (emphasis added). This language is identical to that of section 122(a) of the Public Building Authority Act. Accordingly, this language constitutes an exception to otherwise applicable competitive bidding requirements insofar as the activities at issue are acquisition, purchase, construction, reconstruction, improvement, betterment or extension of a project. Yet the question presented in this request concerns a solid waste authority entering into contracts for solid waste collection and disposal services. Such services do not fall within the parameters of the exception set forth at section 923(c) of the Act.<sup>9</sup>

There is, however, another provision of the Act that has some bearing on the question presented. In particular, the Act provides that a solid waste authority has the power to “[u]se in the performance of its functions the . . . rights and powers of any county or counties, or municipalities with respect to which the authority shall have been created, with the consent of such county or counties, or municipalities and subject to such terms and conditions as may be agreed upon.” Tenn. Code Ann. § 68-211-906(a)(18). This provision is somewhat unique among public instrumentalities. Its existence requires a more detailed examination of the rights and powers of counties and municipalities, particularly as they relate to the collection and disposal of solid waste.

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<sup>9</sup> It bears noting that the Act contains no provision similar to section 124(b) of the Public Building Authority Act, the exception to otherwise applicable competitive bidding requirements with respect to the operation, maintenance or routine repair of a project.

As previously mentioned, there are numerous statutes specifically concerning the collection and disposal of solid waste by counties and municipalities. Obviously, counties and municipalities have a longstanding general authority to collect and dispose of garbage, refuse or other waste themselves, often through a sanitation or public works department. *See, e.g.*, Tenn. Code Ann. §§ 5-19-103(2), 5-19-107(4), 5-19-107(5), 6-2-201(19), 6-19-101(19), 6-33-101(a). Counties and municipalities also have authority to contract with other entities to collect and dispose of solid waste. *See, e.g.*, Tenn. Code Ann. §§ 5-19-103(4), 5-19-106(a), 5-19-107(7), 6-2-201(13), 6-19-101(13), 6-33-101(a). It is this power that has particular bearing on the issue presented in this opinion request.

In 1969, the General Assembly enacted legislation specifically aimed at aiding counties in their management of solid waste. Tenn. Code Ann. § 5-19-101 *et seq.* (commonly known as “Garbage and Rubbish Collection and Disposal Services”). The legislation provides counties with various options to address the collection and disposal of solid waste. One of the options is as follows:

*Contractual arrangements the county may make between itself and any municipality, any utility or other service district, any private organization or any combination of such entities engaged in garbage and rubbish collection and/or garbage and rubbish disposal services. In the event all such county services are to be rendered exclusively by such contractual arrangements, the contracts involved shall be negotiated by the county executive, shall be subject to the approval of the county legislative body or other governing body and may be administered by the county executive without the appointment of a superintendent, as provided for hereafter, being required.*

Tenn. Code Ann. § 5-19-103(4) (emphasis added). This section provides counties the authority, under limited circumstances, to negotiate contracts for solid waste collection and disposal services rather than submit them for competitive bids. *See Op. Tenn. Att’y Gen. 89-127* (September 29, 1989).

Similarly, counties and municipalities are exempted from general competitive bidding requirements in another unique circumstance pertaining to the collection and disposal of solid waste. In 1975, the General Assembly enacted legislation granting counties and municipalities various powers related to the construction and operation of “energy production facilities.” Tenn. Code Ann. § 7-54-101 *et seq.* Energy production facilities include facilities for the recovery and production of energy from solid waste and other materials. Tenn. Code Ann. §§ 7-54-101(2), 68-211-501(2), 68-211-501(4).

The Energy Production Facilities legislation provides counties and municipalities the power to enter into contracts with any person for the disposal of solid waste at an energy production facility

under “such terms and conditions as the municipality shall determine.”<sup>10</sup> Tenn. Code Ann. § 7-54-105(a)(3). The legislation further provides as follows:

All contracts for the construction, operation or maintenance of an energy production facility and all contracts authorized by § 7-54-105(a)(3) [contracts with any person for the disposal of solid waste at an energy production facility] shall be exempted from any applicable competitive bidding laws of this state which shall be applicable to a municipality, and such ordinances or resolutions of any municipality which require competitive bidding . . . .

Tenn. Code Ann. § 7-54-107. This exemption is not a blanket one. Rather, to invoke the exemption, the municipal governing body must find (1) that it is unlikely the exemption will encourage favoritism or substantially decrease competition and that the awarding of contracts pursuant to the exemption will result in substantial cost savings to the municipality, (2) that the exemption will preserve or increase employment within the municipality or otherwise promote the local economy, or (3) that emergency conditions require prompt execution of such contracts pursuant to the exemption. Tenn. Code Ann. § 7-54-107(1). Additionally, the exemption requires the following alternative procedure for contracts:

- (A) Quotations and other relevant information pertaining to the proposed contract shall be solicited through a request for proposals prepared by the municipality which shall be spread upon the minutes and be made a public record of the municipality;
- (B) The award of such contract may be made to a responsive and responsible vendor whose proposal is determined by the proposing municipality to be the best evaluated offer resulting from negotiation and taking into consideration the relative importance of price and other evaluation factors set forth in the request for proposals;
- (C) If provided in the request for proposals, the responding proposal shall be opened so as to avoid disclosure of contents to competing offerors and kept secret during the process of negotiation. However, all proposals that have been submitted shall be open for public inspection after the contract is awarded, except for trade secrets and confidential information contained in the proposals and identified as such;
- (D) As provided in the request for proposals and under rules adopted by the municipality, discussions may be conducted with responsible offerors who submit proposals determined to be reasonably susceptible of being selected for award. Offerors must be accorded fair treatment with respect to any opportunity for discussion and revision of proposals, and revisions may be permitted after submission and before award for the purpose of obtaining the best and final offers.

Tenn. Code Ann. § 7-54-107(2). Thus, as this Office has previously noted, counties and

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<sup>10</sup> “Municipality” as used in this legislation includes both counties and municipalities. Tenn. Code Ann. § 7-54-101(4).



municipalities may contract for the disposal of solid waste at an energy production facility without complying with general requirements for competitive bidding. *See* Op. Tenn. Att’y Gen. 89-127 (September 29, 1989).

The above discussion is not meant to be an exhaustive one with regard to circumstances in which counties or municipalities have the power to contract for the collection and disposal of solid waste without submitting the contract for competitive bidding. Apart from the generally applicable provisions detailed above, various counties and municipalities may be subject to private acts or other legislation of local impact that alters general competitive bidding requirements, either under narrow circumstances or for county or municipal purchasing in its entirety. Yet it is clear from the above discussion that counties and municipalities do have the authority, under certain circumstances, to contract for solid waste collection and disposal services without submitting the contract for competitive bidding.

In the opinion under reconsideration, this Office opined that when a solid waste authority is contracting for collection and disposal services, it is generally subject to the same purchasing laws, including competitive bidding requirements, that govern the counties and municipalities forming the authority. *See* Op. Tenn. Att’y Gen. 97-145 (October 23, 1997). In effect, given the absence of provisions outlining purchasing procedures in the Act itself, solid waste authorities stand in the same shoes as the counties and municipalities forming them. We reiterate that opinion today. Through the course of the above discussion, however, it has become clear that there are exceptions to any competitive bidding requirements applicable to counties and municipalities under those purchasing laws, particularly with respect to contracts for solid waste collection and disposal services. It is the opinion of this Office that solid waste authorities may contract for solid waste collection and disposal services without using a competitive bidding process under the same circumstances in which the participating counties or municipalities have the authority to contract for such services without using a competitive bidding process.<sup>11</sup>

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<sup>11</sup> In the opinion under reconsideration, this Office also considered the issue of which requirements a solid waste authority must follow when its participating counties and/or municipalities do not have equally stringent purchasing laws. This Office opined that, in such circumstances, the solid waste authority must follow the most stringent applicable law. *See* Op. Tenn. Att’y Gen. 97-145 (October 23, 1997). We reiterate that opinion here.

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