

TGFOA 2022 Spring Institute

Purchasing Laws and Audit Application

March 4, 2022

Comptroller of the Treasury
Division of Local Government Audit



What I Want to Accomplish in this Presentation...

- ◆ Cover some of the more prominent purchasing systems and related statutory requirements in local governments in Tennessee
- ◆ Relate our audit application of the statutes in the audits we perform
- ◆ Address some of the more common purchasing deficiencies we include in our audit reports

The "Money Cops"





Director
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Key Points

- ◆ Statutes governing local government operations (including purchasing) are **permissive**, not prohibitive. Therefore, you must have a statute that allows a certain type purchase before you can utilize it.
- ◆ The statute also must address local governments, not other agencies. There are permissions in the statutes governing the state procurement office that are not applicable to local governments.

Key Points

- ◆ Research statutory authority for yourself – do not assume a procurement is legal because someone else told you so.
- ◆ In addition to the statutory provisions, be aware of grant contract and federal uniform guidance provisions when making purchases with grant funding.
- ◆ Salesmen are not your legal counsel...

Disclaimer

- ◆ I have 41 years experience in the Comptroller's Office advising, assisting, and auditing county governments. Therefore, my discussion today will draw from my experience with counties. Many of the general statutes I will discuss are also applicable to cities and other governmental entities. However, unique purchasing guidelines for municipalities are often found in their individual charters, private acts, local ordinances, and policies.

Some Prevalent Statutes

Municipal General Law

- ◆ 6-56-301-307. Municipal Purchasing Law of 1983
- ◆ This statute provides guidance for municipalities that do not have purchasing guidelines provided in charter, private act, local ordinances, or local policies.
- ◆ Provides a default bid limit of \$2,500 with guidelines allowing local ordinances to increase it up to a maximum of \$25,000.
- ◆ This statute, as well as many others we will discuss today, requires that a purchase estimated at 40% or more of your bid limit be made by obtaining 3 non-advertised competitive bids or quotes.

Some Prevalent Statutes

Counties General Law

- ◆ 5-1-125. County officials or employees prohibited from purchasing surplus property except at public auction
- ◆ (a) It is hereby declared unlawful for any county official or employee to purchase from the county any property declared to be surplus by the county except by bid at public auction or competitive sealed bid during the tenure of such person's office or employment, or for six (6) months thereafter.
- ◆ (b) A purchaser who violates this section commits a Class A misdemeanor.

Some Prevalent Statutes

County General Law

- ◆ 5-14-201. "County Purchasing Law of 1983"
- ◆ This law applies only to general county governments who have not adopted the 57 or 81 acts or a private act governing purchases. Highways and School departments are specifically excluded from this statute.
- ◆ Most of the criteria of this act are similar to the requirements we will cover under the 57 act.
- ◆ Limited applicability in the state.

Some Prevalent Statutes

"57 Acts"

- ◆ 5-14-101-116. "County Purchasing Law of 1957."
- ◆ 5-14-105. Purchasing agent -- Powers and duties.
- ◆ The county purchasing agent has exclusive power and it is the purchasing agent's duty to:(1) Contract for and purchase all supplies, materials, equipment and contractual services required by each and every official, agency, office, department or employee of the county government, or that is supported by, or under control of, the county government and that expends or encumbers any of the county's funds. No other official, employee or agent of the county or of any of its departments or agencies shall be authorized to contract for or purchase any such materials, supplies, equipment or contractual services...

Some Prevalent Statutes

“57 Acts” (Cont.)

- ◆ 5-14-107. Rules and regulations.
- ◆ The county purchasing agent, with the assistance of the county purchasing commission, shall adopt, promulgate, and may from time to time amend, rules and regulations for the purchase of supplies, materials, equipment and contractual services...

Some Prevalent Statutes

“57 Acts” (Cont.)

- ◆ 5-14-108. Purchases, sales, etc. -- Bidding, auctions (cont.)
- ◆ “All purchases”...”shall be based wherever possible on competitive bids.”
- ◆ Contracts for legal services, auditing services by certified public accountants, and similar services by professional persons or groups of high ethical standards shall not be based upon competitive bids but shall be awarded on the basis of recognized competence and integrity. The prohibition in this subsection against competitive bidding shall not prohibit the county from interviewing eligible persons or groups to determine the capabilities of such persons or groups.
- ◆ Bids need not be required for services for which the rate or price is fixed by a public authority authorized by law to fix such rates or prices.

Some Prevalent Statutes

"57 Acts" (Cont.)

- ◆ 5-14-108. Purchases, sales, etc. -- Bidding, auctions (cont.)
- ◆ The county may purchase materials, supplies, commodities and equipment from any federal, state or local governmental unit or agency, without conforming to the competitive bidding requirements of this part.
- ◆ The county legislative body by resolution may exempt perishable commodities from the requirements of sealed or competitive bidding when such items are purchased in the open market.
- ◆ The county purchasing agent is authorized to purchase and contract to purchase materials, supplies, equipment and contractual services on a fiscal year basis, but no commitment shall be made that extends beyond the end of the current fiscal year for which appropriations have been made by the county legislative body.

Some Prevalent Statutes

"57 Acts" (Cont.)

- ◆ 5-14-108. Purchases, sales, etc. -- Bidding, auctions (cont.)
- ◆ Fuel and fuel products may be purchased in the open market without public newspaper notice, but shall whenever possible be based on at least three (3) competitive bids. Fuel and fuel products may be purchased from the department of general services' contract where available.
- ◆ 5-14-114. Conflicts of interest -- Illegal payments (**Currently.**)
- ◆ Neither the county purchasing agent, nor members of the county purchasing commission, nor members of the county legislative body, nor other officials of the county, shall be financially interested, or have any personal beneficial interest, either directly or indirectly, in any contract or purchase order for any supplies, materials, equipment or contractual services used by or furnished to any department or agency of the county government.

Some Prevalent Statutes

"57 Acts" (Cont.)

- ◆ 5-14-114. Conflicts of interest -- Illegal payments (Proposed Change.)
- ◆ Neither the county purchasing agent, nor members of the county purchasing commission, nor members of the county legislative body, nor other officials of the county, shall be **DIRECTLY** financially interested, or have any personal beneficial interest, in any contract or purchase order for any supplies, materials, equipment or contractual services used by or furnished to any department or agency of the county government.
- ◆ No indirect interest **UNLESS** the person publicly discloses the interest. If official, in public meeting. If non-official, report the indirect interest in writing to the county mayor.
- ◆ Removes felony penalty provision.

Some Prevalent Statutes

“Financial Management System of 1981”

- ◆ 5-21-118. Director as purchasing agent -- Optional purchasing department.
- ◆ The county can leave purchasing responsibilities with the finance director or hire a separate purchasing agent.
- ◆ If left with the finance director, the director may then appoint a deputy to serve as purchasing agent.

Some Prevalent Statutes

“Financial Management System of 1981 (cont.)”

- ◆ 5-21-119. Purchasing system.
- ◆ The committee, with the assistance of the purchasing agent, shall establish a purchasing system for the county.
- ◆ Purchases and contracts shall be awarded based on the lowest and best bid.
- ◆ Emergency purchases shall be limited to needs arising that are not normally foreseeable. Emergency purchases shall not be permissible if a department or agency fails to properly plan for the need, proper purchasing procedures, and delivery time.

Some Prevalent Statutes

“Financial Management System of 1981 (cont.)”

- ◆ 5-21-120. Bidding.
- ◆ The committee shall authorize the dollar limitation when formal competitive bids are required but not to exceed the amount as authorized by state law for the highway and education departments or other such amounts as established by law.
- ◆ Specifications shall not be written to exclude vendors and contractors or limit the bidding to a specific vendor or contractor.

Some Prevalent Statutes

“Financial Management System of 1981 (cont.)”

- ◆ 5-21-121. Conflicts of interest.
- ◆ The director, purchasing agent, members of the committee, members of the county legislative body, or other officials of the county, members of the board of education, members of the highway commission, and employees of the finance department and purchasing department shall not have a direct interest in the purchase of any supplies, materials, equipment or contractual services for the county.

Some Prevalent Statutes

“Financial Management System of 1981 (cont.)”

- ◆ 5-21-121. Conflicts of interest (cont.)
- ◆ Such persons shall have no indirect interest **UNLESS** the person publicly discloses the interest. If official, in public meeting. If non-official, report the indirect interest in writing to the county mayor.
- ◆ No penalty provision stated in this section.

Some Prevalent Statutes

General Law - Title 12

- ◆ KEY POINT – THE PROVISIONS OF TITLE 12 PRECEDING CHAPTER 3, PART 12 RELATE TO THE STATE PROCUREMENT OFFICE AND GENERAL SERVICES BY DEFINITION IN APPLICABILITY SECTION OF THE CHAPTERS – OTHER THAN A FEW INSTANCES WHERE LOCAL GOVERNMENTS OR POLITICAL SUBDIVISIONS ARE SPECIFICALLY INCLUDED, THESE CHAPTERS DO NOT PROVIDE LOCAL GOVERNMENTS AUTHORITY TO USE PURCHASING AUTHORITY AFFORDED THE CENTRAL PROCUREMENT OFFICE

Some Prevalent Statutes

General Law Title 12 (Cont.)

- ◆ 12-3-1201. Purchases for local governmental units.
- ◆ The central procurement office may, upon request, purchase goods and services for any county, city, municipality, special district, school district, other local governmental unit of the state, or quasi-governmental entity organized under a city, municipality, or county. The purchases shall be made on the same terms and under the same rules and regulations as now provided for the purchase of goods and services by the central procurement office.

Some Prevalent Statutes

General Law Title 12 (Cont.)

- ◆ 12-3-1201. Purchases for local governmental units (Cont.)
- ◆ Where any local or private act, charter, or general law requires that a local governmental unit purchase by competitive procurement method, the local unit of government may, notwithstanding the local or private act, charter, or general law, purchase, without public advertisement or competitive soliciting, under the provisions of contracts or price agreements entered into by the central procurement office.

Some Prevalent Statutes

General Law Title 12 (Cont.)

- ◆ 12-3-1201. Purchases for local governmental units (Cont.)
- ◆ ...the local unit of government may, notwithstanding the local or private act, charter, or general law, purchase, without public advertisement or competitive soliciting, any item from **local sources** if such item is available for purchase under the provisions of contracts or price agreements entered into by the central procurement office, and such item is available at the same or lower cost from such local sources. **This subsection shall apply only in cases where the local governmental entity is not permitted to purchase from an existing contract established by the central procurement office. Any item purchased locally must be of equal or better specifications than the item under the competitive contract.**

Some Prevalent Statutes

General Law Title 12 (Cont.)

- ◆ 12-3-1201. Purchases for local governmental units (Cont.)
- ◆ To the extent permitted by federal law or regulations, local governments may make purchases of goods, except motor vehicles other than those manufactured for a special purpose as defined in § 12-3-1208, or services included in federal general service administration contracts or other applicable federal open purchase contracts either directly or through the appropriate state agency; **provided, that no purchase under this section shall be made at a price higher than that which is contained in the contract between the general services administration and the vendor affected....**

Some Prevalent Statutes

General Law Title 12 (Cont.)

- ◆ 12-3-1202. Purchase of secondhand articles or equipment by municipalities or counties.
- ◆ ...any municipality or any county may purchase used or secondhand articles consisting of goods, equipment, materials, supplies, or commodities from any federal, state, or local governmental unit or agency without public advertisement and competitive soliciting.
- ◆ any municipality or any county may purchase used or secondhand goods, equipment, materials, supplies, or commodities from any private entity without public advertisement and competitive soliciting provided the purchaser documents the general range of value of the purchased item through a listing in a nationally recognized publication or through an appraisal by a licensed appraiser, and the price is not more than five percent (5%) more than the highest value of the documented range.

Some Prevalent Statutes

General Law Title 12 (Cont.)

- ◆ 12-3-1203. Purchases for other local governmental units.
- ◆ Any municipality, county, utility district, or other local governmental unit of the state may, upon request, purchase supplies, equipment, and services for any other municipality, county, utility district, or other local governmental unit.
- ◆ **The purchases shall be made on the same terms and under the same rules and regulations as regular purchases of the purchasing entity.**
- ◆ Any local education agency (LEA) may purchase equipment under the same terms of a legal bid initiated by any other LEA in Tennessee.
- ◆ Any LEA may purchase directly from a vendor the same equipment at the same price and under the same terms as provided in a contract for such equipment entered into by any other LEA.

Some Prevalent Statutes

General Law Title 12 (Cont.)

- ◆ 12-3-1203. Purchases for other local governmental units (Cont.)
- ◆ Any municipality, county, utility district, or other local governmental unit of this state may purchase supplies, goods, equipment, and services under contracts or price agreements entered into by any other local governmental unit of this state. Such purchases shall be made on the same terms and under the same rules and regulations as regular purchases of the purchasing entity.
- ◆ This subsection does not apply to new motor vehicles (except special purpose vehicles) and transportation infrastructure.

Some Prevalent Statutes

General Law Title 12 (Cont.)

- ◆ 12-3-1205. Cooperative purchasing agreements.
- ◆ Any municipality, county, utility district, or other local government of the state may participate in, sponsor, conduct or administer a cooperative purchasing agreement... with one (1) or more other local governments in accordance with an agreement entered into between the participants. Such cooperative purchasing may include, but is not limited to, joint or multi-party contracts between local governments. Where the participants in a joint or multi-party contract are required to advertise and receive bids, it shall be sufficient for those purposes that the purchasing entity comply only with its own purchasing requirements.

Some Prevalent Statutes

General Law Title 12 (Cont.)

- ◆ 12-3-1205. Cooperative purchasing agreements (Cont.)
- ◆ ...any municipality, county, utility district, or other local government of the state may participate in, sponsor, conduct, or administer a cooperative purchasing agreement for the procurement of any goods, supplies, services, or equipment with one (1) or more other governmental entities outside this state...

Some Prevalent Statutes

General Law Title 12 (Cont.)

- ◆ 12-3-1205. Cooperative purchasing agreements (Cont.)
- ◆ A municipality, county, utility district, or other local government of the state may participate in a master agreement by adopting a resolution accepting the terms of the master agreement. If a participant in a joint or multi-party agreement is required to advertise and receive bids, then it will be deemed sufficient for those purposes that the purchasing entity or the entity that procured the bid complied with its own purchasing requirements. The participant shall acquire and maintain documentation that the purchasing entity or entities that procured the bid complied with its own purchasing requirements.
- ◆ This subsection does not apply to new motor vehicles (except special purpose vehicles) and transportation infrastructure.
- ◆ Engineering and architectural services are also excluded.

Some Prevalent Statutes

General Law Title 12 (Cont.)

- ◆ 12-3-1209 Professional Services
- ◆ Contracts...for legal services, fiscal agent, financial advisor or advisory services, educational consultant services, and similar services by professional persons or groups of high ethical standards, shall not be based upon competitive solicitations, but shall be awarded on the basis of recognized competence and integrity. The prohibition against competitive soliciting in this section shall not prohibit any entity enumerated from interviewing eligible persons or entities to determine the capabilities of such persons or entities.
- ◆ In Shelby and Davidson, information management services can be purchased as professional services if such policy is approved by a two-thirds majority of governing body.

Some Prevalent Statutes

General Law Title 12 (Cont.)

- ◆ 12-3-1212. Resolution or ordinance to increase threshold amount for requiring public advertisement and competitive bidding.
- ◆ ...any county, municipality, utility district, LEA in accordance with § 49-2-203(a), or other local governmental entity having centralized purchasing authority with a full-time purchasing agent is authorized, by resolution or ordinance of its governing body, to increase the threshold over which public advertisement and sealed competitive bids or proposals are required to an amount not to exceed (\$25,000) for nonemergency, nonproprietary purchases. At least three (3) written quotations shall be required whenever possible for purchases costing less than the bid threshold established for public advertisement and sealed competitive bids or proposals but more than forty percent (40%) of such bid threshold or some lower amount as may be established by the governing body in the resolution. Purchases of like items shall be aggregated for purposes of the bid threshold.

Some Prevalent Statutes

General Law Title 12 (Cont.)

- ◆ 12-3-1212. Resolution or ordinance to increase threshold amount for requiring public advertisement and competitive bidding.
- ◆ This section was amended last year late in session to state that counties that have adopted the 57 or 81 acts, or a private act of centralization was “deemed to have a full-time purchasing agent.”
- ◆ This was done after the AG had opined in March of last year that a full-time meant devoting their entire efforts to purchasing.

Some Prevalent Statutes

General Law Title 12 (Cont.)

- ◆ 12-3-1212. Resolution or ordinance to increase threshold amount for requiring public advertisement and competitive bidding (Currently proposed legislation.)
- ◆ A bill is currently working through committees (HB2600) that would raise the thresholds on this section to \$50,000 for centralized systems with full-time purchasing agent and \$25,000 for all other systems (including non-centralized.)
- ◆ An amendment has been accepted by the sponsors to include the definition of “full-time purchasing agent” to mean just that – one who devotes full-time on purchasing related duties.
- ◆ These provisions will remain a local option for each government.

Some Prevalent Statutes

General Law Title 12 (Cont.)

- ◆ Some other statutes of interest in Title 12
- ◆ 12-4-107 Awarding contracts for architects, engineering, and construction services
- ◆ 12-4-110. Energy-related services. This statute provides that energy savings contracts that include **both** engineering services and equipment do not have to be bid.
- ◆ 12-4-201. Contractor's bonds -- Securities or cash in lieu of bonds.

Other Statutes of Interest Throughout the Tennessee Code Annotated

- ◆ 29-20-407 Insurance not required to be bid if through a government sponsored entity (the two I know of are Local Government Insurance Pool and TSBA pool)
- ◆ Currently a bill has been filed for all insurance purchases to have no bid requirements
- ◆ 47-2-328 Defines public auction
- ◆ 62-2-107 Any public work project involving architecture, engineering or landscape architecture estimated to cost \$50,000 or more requires the services of a registered architect, registered engineer or registered landscape architect.

Other Statutes of Interest Throughout the Tennessee Code Annotated (Cont.)

- ◆ 62-6-102 and 103 If a construction contract is estimated to exceed \$25,000, it requires the services of a licensed contractor as defined by this statute. Also provides that a construction manager must be a licensed general contractor.
- ◆ 66-34-104 Requires retention of a portion of contract progress payments in escrow for all contracts to exceed \$500,000

A Few Other Audit Issues

- ◆ We still have several audit findings each year identifying **deficiencies in purchasing internal controls**. Some are:
 - ◆ Improper use of purchase orders (many times filled out after the purchase).
 - ◆ No receiving signature to document receipt of the purchase.
 - ◆ Incompatible duties (making purchases, receiving goods, posting disbursement ledgers, and distributing payments)

A Few Other Audit Issues (Cont.)

- ◆ **Improperly Issued Capital Leases**
- ◆ Many of these for patrol cars or school department student computers.
- ◆ Leases (unless a strict rental like a copy machine) are considered a debt instrument and must have the approval of the local governing body. If schools, must have approval of the school board and the local governing body (i.e., county commission).
- ◆ They must also be reported to the Comptroller's Division of State and Local Finance since they are considered a debt of the entity. As of January 2022, they must also be approved by LGF before issuance.

Thank You!!

◆ Questions?



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