



# County Technical Assistance Service

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## Construction Projects

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Dear Reader:

The following document was created from the CTAS electronic library known as e-Li. This online library is maintained daily by CTAS staff and seeks to represent the most current information regarding issues relative to Tennessee county government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with county government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other e-Li material.

Sincerely,

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## Construction Projects

**Reference Number:** CTAS-951

Contractor License Information Requirements—For construction projects, the license information for the general contractor and certain subcontractors must be placed on the outside of the bid envelope or in the electronic bid submission in accordance with T.C.A. § 62-6-119. The following information must appear on the outside of the envelope containing the bid or in the submission of the electronic bid: (1) The name, license number, expiration date thereof, and license classification of the contractor applying to bid for the prime contract; (2) The name, license number, expiration date thereof, and license classification of the contractor applying to bid for the masonry contract where the total cost of the materials and labor for the masonry portion of the construction project exceeds one hundred thousand dollars (\$100,000); (3) The name, license number, expiration date thereof, and license classification of the contractor applying to bid for the electrical, plumbing, heating, ventilation, or air conditioning contracts except when such contractor's portion of the construction project is less than twenty-five thousand dollars (\$25,000); and (4) For each vertical closed loop geothermal heating and cooling project, the company name, department of environment and conservation license number, classification (G, L or G,L) and the expiration date, except when the geothermal portion of the construction project is in an amount less than twenty-five thousand dollars (\$25,000). Prime contractor bidders who are to perform the masonry portion of the construction project which exceeds one hundred thousand dollars (\$100,000), materials and labor, the electrical, plumbing, heating, ventilation or air conditioning or the geothermal heating and cooling must be so designated. Only one (1) contractor in each of the listed classifications shall be written on the bid envelope or provided within the electronic bid document.

Failure of any bidder to comply with these requirements voids the bid and the bid cannot be considered. Upon opening the envelope or acceptance of an electronic bid, the names of all listed contractors must be read aloud at the official bid opening and incorporated into the bid. Prior to awarding a contract, the awarding person or entity and its authorized representatives must verify the accuracy, correctness and completeness of the required information. Any discrepancies found in the spelling of names of bidders, transposition of license numbers, or other similar typographical errors or omissions may be corrected within forty-eight (48) hours after the bid opening excluding weekends and state-recognized holidays.

For design/bid/build procurements where cost is the primary criterion for the contract award, no invitation to bid may require that a subcontractor be identified until the final bid submission, nor require that a contractor accept the bid of any subcontractor until the final bid submission.

Anyone preparing bid documents is required to include a reference to Tennessee Code Annotated, Title 62, Chapter 6 (the Contractors Licensing Act of 1994), and a specific statement informing bidders that it is necessary for the bidder to provide evidence of compliance with the applicable provisions of Title 62, Chapter 6 before the bid may be considered.

Any person who awards a bid to a contractor who is not licensed in accordance with Title 62, Chapter 6, commits a Class A misdemeanor. T.C.A. § 62-6-119 and -120.

Discrimination against Contractors Licensed by the State—Under T.C.A. § 62-6-111, counties and cities cannot discriminate against contractors licensed by the state of Tennessee on the basis of the licensee's nonresidency within the county or municipality. See Op. Tenn. Att'y Gen. 15-69 (October 1, 2015).

Income or Residency Requirements Prohibited—Counties and cities cannot require companies bidding or contracting on public construction projects to employ individuals residing within their jurisdiction or within a specific income range, unless otherwise required by federal law. T.C.A. § 12-4-117.

Employment of Licensed Architect or Engineer on Public Works—If a public works project is expected to cost more than \$50,000 and involves architecture, engineering or landscape architecture, the plans, specifications and estimates for the project must be prepared by a registered architect, engineer, or landscape architect. T.C.A. § 62-2-107.

Drug-free Workplace Requirements for Construction Contracts—Private employers with five or more employees who contract with the county to provide construction services must submit an affidavit stating that they have a drug-free workplace program in effect at the time of submission of a bid, in accordance with T.C.A. § 50-9-113. As long as the county obtains a written affidavit from the principal officer of the covered employer stating that the employer is in compliance with T.C.A. § 50-9-113, the county has no further liability. The form of the affidavit is not prescribed by statute. [An example of an affidavit.](#)

The county is required to include certain information in bid specifications for construction services as set out in T.C.A. § 50-9-114, including a statement as to whether the county operates a drug-free workplace program or drug testing program, a statement describing the program, and a statement requiring bidders to submit an affidavit as part of their bid that the bidder operates a drug-free workplace program at least as stringent as the county's. Any construction contract that does not meet these requirements is subject to challenge in chancery court if such challenge is filed within seven days.

**Construction Contracts Retainage**—Retainage on construction contracts is governed by Title 66, Chapter 34. Retainage amounts on public and private construction contracts cannot exceed 5% of the contract amount, and retainage must be released to the prime contractor within 90 days after completion of the project or within 90 days after substantial completion of the project for work completed, whichever occurs first. T.C.A. § 66-34-103. When the prime contract is \$500,000 or more, retainage amounts must be placed in an interest bearing account, with the interest being paid to the contractor with the retainage amount immediately upon satisfactory completion of the project as evidenced by a written release; each and every time funds are withheld from a contractor's application for payment, the contractor must be notified of the name of the financial institution holding the escrow, the account number, and the amount of funds deposited into the account from that payment. T.C.A. § 66-34-104.

## Bonds on Construction Projects

**Reference Number:** CTAS-939

**Bid Bond**—The National Institute of Governmental Purchasing (NIGP) defines a bid bond as “a written agreement or check by which a third party guarantees that a bidder will accept a contract as a bid, if it is awarded.”<sup>1</sup> If the bidder does not accept the award, the bond is forfeited in whole or in part. A bid bond is issued most often in an amount equal to 5 percent of the total price of the bid.<sup>2</sup> Some Tennessee statutes or local government policies may require a different amount for certain projects or services; e.g., T.C.A. § 62-6-129 states that “no contract for the services of a construction manager shall be awarded for any public work in this state by any city, county, or state authority, or board of education unless there is posted at the time of submittal of a proposal for services by a construction manager a bid bond equal to ten percent (10%) of the value of the services proposed and the value of the work to be managed, or may at the time of contracting provide payment and performance bonds in amounts equal to the combined monetary value of the services of the construction manager and the value of the work to be so managed.”

**Performance Bond**—The National Institute of Governmental Purchasing (NIGP) defines a performance bond as “a contract of guarantee, executed subsequent to award by a successful bidder to protect the buyer from loss due to the bidder's inability to complete the contract as agreed.”<sup>3</sup>

A performance bond is issued to the local government by a surety company at the contractor's request after the contractor has received notice of award; the contract is usually not signed until the local government receives the performance bond.<sup>4</sup> The amount of the performance bond is usually for 100 percent of the contract price; however, some local government's policies may specify the minimum amount of the bond or use considerable leeway to determine the amount and whether it will be issued as a percentage of the contract price or for a specific sum.<sup>5</sup>

**Payment Bond**—A payment bond guarantees that the contractor will pay all suppliers and subcontractors who assist in the performance of the work.<sup>6</sup> A payment bond, issued in the same manner as a performance bond, is a surety company's guarantee that the contractor will pay its subcontractors and the suppliers. Payment bonds are used primarily in construction contracts but are applicable to service contracts under which the contractor contracts all or part of the work to one or more subcontractors.<sup>7</sup> The usual amount of a payment bond is 100 percent of the contract price;<sup>8</sup> however, some Tennessee statutes stipulate the amount of the bond as a percentage of the contract price (T.C.A. § 12-4-201 states that for public works projects over \$100,000 the bond shall be for at least 25 percent of the contract price).

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<sup>1</sup> National Institute of Governmental Purchasing, *The Dictionary of Purchasing Terms*, 3.

<sup>2</sup> Donald F. Harney, *Service Contracting: A Local Government Guide*, ICMA (Washington D.C.: 1992), 61.

<sup>3</sup>*The Dictionary of Purchasing Terms*, 22.

<sup>4</sup>Harney, 61.

<sup>5</sup>*ibid*, 61.

<sup>6</sup>*ibid*, 60-61.

<sup>7</sup>*ibid*, 61.

<sup>8</sup>*ibid*, 61.

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