HOUSE BILL 2000
By McCormick

SENATE BILL 1710

By Norris

AN ACT to amend Tennessee Code Annotated, Title 4, Chapter 56; Title 12, Chapter 3; Title 12, Chapter 4; Title 12, Chapter 2; Title 41, Chapter 22, Part 4; Title 71, Chapter 4, Part 7 and Chapter 1098 of the Public Acts of 2010, relative to state procurement.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 4-56-101, as enacted by Chapter 1098 of the Public Acts of 2010, is amended by deleting the section in its entirety on the effective date of this act and substituting instead the following language to take effect April 1, 2012:

4-56-101. As used in this chapter, unless the context otherwise requires:

(1) "Commission" means the state procurement commission, which replaces the board of standards within title 12, chapter 3, part 4;

(2) "Committee" means the state protest committee, which replaces the board of standards protest authority within § 12-3-214 and the review committee within § 12-4-109(a)(1)(E);

(3) "Council" means the advisory council on state procurement;

(4) "Goods" means all property, including, but not limited to, supplies, equipment, materials, printing, and insurance. Goods does not include leases, acquisitions, and disposals of real property, which are governed under chapter 15 of this title;

(5) "Grant" means any grant awarded to the state or awarded by the state for the furnishing by the state of assistance, whether financial or otherwise, to any person to support a program authorized by law. Grant does not include an award with the primary

purpose of procuring an end product, whether in the form of supplies, services, or construction, or any contract resulting from such an award;

(6) “Procurement” means buying, purchasing, renting, leasing, or otherwise acquiring any goods or services. It also includes all functions that pertain to the obtaining of any goods or service, including the description of requirements, selection and solicitation of sources, preparation and award of a contract, and all phases of contract administration;

(7) “Proposer” includes a “bidder” or “proposer” that is a legal entity that has properly registered as required by the state. The terms “bidder” and “proposer” may be used interchangeably for the term “proposer”;

(8) “Services” means all services and agreements obligating the state, except services for highway and road improvements, which are governed by title 54, and designer and construction services, which are governed under chapter 15 of this title; and

(9) “Vendor” means a legal entity that has been established by the department of finance and administration's division of accounts as a vendor through proper authority for which payment may be made by the state.

SECTION 2. Tennessee Code Annotated, Section 4-56-102, as enacted by Chapter 1098 of the Public Acts of 2010, is amended by deleting the section in its entirety on the effective date of this act and by substituting instead the following language to take effect April 1, 2012:

4-56-102.

(a)

(1) There is created a procurement commission, which shall consist of the commissioners of general services and finance and administration, and the

comptroller of the treasury. The chief procurement officer shall serve as a non-voting member.

(2) The commission shall adopt a procedure governing its proceedings, and the chief procurement officer shall keep a permanent and accurate record of all its proceedings.

(3) All departments and agencies shall submit existing rules related to procurement to the commission for the commission's review, comment, and recommendations for any changes to such rules. Prior to forwarding draft rules related to procurement to the secretary of state, all departments shall submit such draft rules to the commission for the commission's review and comment together with any recommendations for changes to such draft rules.

(4) The attorney general and reporter shall serve as legal counsel to the commission in accordance with the requirements of § 8-6-301.

(b)

(1) The commission has the power and authority, except as otherwise provided in this chapter, to review, comment, and approve draft rules and regulations, policies, standards, and procedures to be followed consistent with this chapter and title 12, chapters 3 and 4, and to make recommendations for changes thereto, governing procurement of goods and services, contracting, agency contract and grant management, training and professional development, and disposal of goods and services by the state.

(2) The commission is authorized to promulgate necessary rules and regulations in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, as well as policies and procedures to implement the provisions of this chapter.

(3) The commission shall not exercise authority over the award or administration of any particular contract or grant.

SECTION 3. Tennessee Code Annotated, Section 4-56-103, as enacted by Chapter 1098 of the Public Acts of 2010, is amended by deleting the section in its entirety on the effective date of this act and by substituting instead the following language to take effect April 1, 2012:

4-56-103

(a)

(1) There is created a state protest committee, which shall consist of the commissioners of general services and finance and administration, and the treasurer.

(2) The committee shall adopt procedures governing its operations, and the chief procurement officer shall keep a permanent and accurate record of all its proceedings.

(3) In the event a member is not available to hear a scheduled protest, the member is authorized to appoint a designee to hear the scheduled protest on the member's behalf.

(b)

(1) The committee is authorized to act on any appeal of the chief procurement officer's decision of a protest.

(2) Any committee member whose department is the requestor of the procurement being protested or resulting contract may not hear the protest.

(c)

(1) Right to Protest. Prior to the commencement of an action in court concerning the controversy, any actual proposer who claims to be aggrieved in

connection with a procurement authorized under title 12, chapter 3 and § 12-4-109, may protest to the chief procurement officer. The protest shall be submitted in writing within seven (7) days after such claimant knows or should have known of the facts giving rise to the protest. Any issues raised by the protesting party after the seven-day period shall not be considered as part of the protest. In the case of a pending award, a stay of award in accordance with subsection (c)(6) may be requested.

(2) Signature on Protest Constitutes Certificate. The signature of an attorney or protesting party on a request for consideration, protest, motion, or other document constitutes a certificate by the signer that the signer has read such document, that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass, limit competition, or to cause unnecessary delay or needless increase in the cost of the procurement or of the litigation. If a request for consideration, protest, pleading, motion, or other document is signed in violation of this subdivision (c)(2) before or after appeal to the chief procurement officer and the protest committee, the chief procurement officer or protest committee, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties, including the affected state department or agency, the amount of the reasonable expenses incurred because of the filing of the protest, a petition for a stay of award, pleading, motion, or other paper, including reasonable attorneys fees.

(3) Protest Bond Required.

(A)

(i) Neither a protest nor a stay of award shall proceed under this section unless the protesting party posts a protest bond. The protesting party shall post with the chief procurement officer, at the time of filing a notice of protest, a bond payable to the state in the amount of five percent (5%) of the lowest cost proposal evaluated or, if a protest is filed prior to the opening of cost proposals, the bond payable shall be five percent (5%) of the estimated maximum liability provided in the procurement document. The protest bond shall be in form and substance acceptable to the state and shall be immediately payable to the state conditioned upon a decision by the protest committee that:

(a) A request for consideration, protest, pleading, motion, or other document is signed, before or after appeal to the chief procurement officer or protest committee, in violation of subdivision (c)(2);

(b) The protest has been brought or pursued in bad faith; or

(c) The protest does not state on its face a valid basis for protest.

(ii) The bond shall be payable to the state for any other reason approved by the protest committee.

(B) The state shall hold the protest bond for at least eleven (11) calendar days after the date of the final determination by the chief

procurement officer. If the protesting party appeals the chief procurement officer's determination to the protest committee, the chief procurement officer shall hold the protest bond until instructed by the protest committee to either keep the bond or return it to the protesting party.

(4) Exemption from Bond Requirement.

(A) At the time of filing notice of a protest of a procurement in which the lowest bid or lowest evaluated cost proposal is less than one million dollars ($1,000,000), a minority business, woman owned business, service disabled veteran owned business, or small business protesting party may submit a written petition for exemption from the protest bond requirement of subdivision (c)(3). The petition must include clear evidence of a minority business, woman owned business, service disabled veteran owned business, or small business status. On the day of receipt, the petition shall be given to the chief procurement officer. The chief procurement officer has five (5) business days in which to make a determination. If an exemption from the protest bond requirement is granted, the protest shall proceed as though the bond were posted. Should the chief procurement officer deny an exemption from the requirement, the protesting party shall post the protest bond with the chief procurement officer as required in subdivision (c)(3) within three (3) business days of the determination.

(B) For purposes of this subdivision (c)(4):

(i) "Minority" means a person who is a citizen or lawful permanent resident of the United States and who is:

(a) African American: a person having origins in any of the black racial groups of Africa;

(*b*) Hispanic: a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race;

(*c*) Asian American: a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands; or

(*d*) Native American: a person having origins in any of the original peoples of North America;

(ii) "Minority owned business" means a minority owned business that is a continuing, independent, for-profit business that performs a commercially useful function, and is at least fifty-one percent (51%) owned and controlled by one (1) or more minority individuals who are impeded from normal entry into the economic mainstream because of past practices of discrimination based on race or ethnic background;

(iii) "Small business" means one that is independently owned and operated, has total gross receipts of no more than ten million dollars ($10,000,000) averaged over a three-year period, and employs no more than thirty (30) persons on a full-time basis;

(iv) "Tennessee service-disabled veteran owned business" means a service-disabled veteran owned business that is a continuing, independent, for profit business located in the state of Tennessee that performs a commercially useful function, and is at

least fifty-one percent (51%) owned and controlled by one (1) or more service-disabled veterans. In the case of a business solely owned by one (1) service-disabled veteran and such person's spouse, is at least fifty percent (50%) owned and controlled by the service-disabled veteran or in the case of any publicly owned business, at least fifty-one percent (51%) of the stock of which is owned and controlled by one (1) or more service-disabled veterans and whose management and daily business operations are under the control of one (1) or more service-disabled veterans; and

(v) "Woman owned business" means a woman owned business that is a continuing, independent, for-profit business that performs a commercially useful function, and is at least fifty-one percent (51%) owned and controlled by one or more women; or, in the case of any publicly owned business, at least fifty-one percent (51%) of the stock of which is owned and controlled by one (1) or more women and whose management and daily business operations are under the control of one (1) or more women.

(5) Authority to Resolve Protests.

(A) The chief procurement officer, in consultation with the head of the affected department or agency, has the authority to resolve the protest. The chief procurement officer shall have no longer than sixty (60) days from receipt of a protest to resolve the protest. The final determination of the chief procurement officer shall be given in writing and submitted to the protestor and the protest committee. In the event that

the chief procurement officer fails to resolve the protest within sixty (60) days, the protesting party may request that the protest committee meet to consider the protest.

(B) If a protest is not resolved by mutual agreement or the chief procurement officer fails to resolve the protest within sixty (60) days, the protesting party may request the matter be considered at a meeting with the protest committee. The request for consideration before the protest committee shall be made in writing within seven (7) days from the date of the chief procurement officer's final determination or within seven (7) days following the chief procurement officer's failure to resolve the protest within sixty (60) days of receipt of the protest.

(6) Stay of Procurements During Protests. Prior to the award of a contract, proposers who have protested may submit to the chief procurement officer a written petition for stay of award. Such stay shall become effective upon receipt by the state. The state shall not proceed further with the procurement process or with the award of the contract until the protest has been resolved in accordance with this section, unless the protest committee makes a written determination that continuation of the procurement process or the award of the contract without delay is necessary to protect substantial interests of the state. It shall be the responsibility of the chief procurement officer, with the assistance of the procuring agency, to seek such a determination by the protest committee.

(7) Nothing in this subsection (c) shall be construed to require a contested case hearing as set forth in the Uniform Administrative Procedures Act, compiled in title 4, chapter 5. The protesting party must exhaust all

administrative remedies provided in this section prior to the initiation of any judicial review of the protest.

(8) Protests Subsequent to Award. Should a protest be received by the state subsequent to a contract being completely executed pursuant to a procurement process, the Tennessee claims commission has exclusive jurisdiction to determine all monetary claims against the state, including, but not limited to, claims for the negligent deprivation of statutory rights pursuant to § 9-8-307(a)(1)(N).

(9) Appeal to Chancery Court. Protests appealed to the chancery court from the protest committee shall be by common law writ of certiorari. The scope of review in the proceedings shall be limited to the record made before the protest committee and shall involve only an inquiry into whether the protest committee exceeded its jurisdiction, followed an unlawful procedure, or acted illegally, fraudulently, or arbitrarily without material evidence to support its action.

SECTION 4. Tennessee Code Annotated, Section 4-56-106, as enacted by Chapter 1098 of the Public Acts of 2010, is amended by deleting the section in its entirety on the effective date of this act and by substituting instead the following language to take effect November 1, 2011:

4-56-106.

(a)

(1) Effective November 1, 2011, there is created an advisory council on state procurement. There shall be five (5) voting members of the council. There shall be seven (7) non-voting members of the council representing the proposer and vendor community and other procurement professionals. All members shall have a demonstrable working knowledge of the state procurement process. In

making the appointments to the advisory council, the appointing authorities shall give due consideration to the need for geographic, age, racial, gender, and ethnic diversity on the council.

(2)

(A) The five (5) voting members of the council shall consist of one (1) representative of state agencies appointed by the commissioner of general services, one (1) representative from the department of general services to be appointed by the commissioner of general services, one (1) representative from the department of finance and administration to be appointed by the commissioner of finance and administration, one (1) representative from the office of the comptroller of the treasury to be appointed by the comptroller of the treasury, and the chief procurement officer who shall serve as chair. The initial appointments by the commissioners shall be made prior to November 1, 2011. The initial appointment by the comptroller of the treasury shall be made prior to November 1, 2011. Any vacancy shall be filled for the unexpired term by the appointing authority making the initial appointment. The pattern established for initial appointments shall be followed for appointments by the appropriate officials when appointments are to fill expired terms.

(B)

(i) Voting members appointed by the commissioner of general services shall serve a staggered four-year term, beginning November 1, 2011. These voting members of the council shall, upon expiration of the member's term, be eligible for reappointment and shall serve until a successor is appointed.

(ii) The terms shall be staggered so that the terms of only two (2) voting members shall terminate at the same time. The term of one (1) voting member initially appointed by the commissioner of general services and the voting member appointed by the commissioner of finance and administration shall be for a two-year term to begin on November 1, 2011, to expire on October 31, 2013, and the successors shall serve a four-year term to begin on November 1, and expire October 31 of the appropriate year. The term of the other voting member initially appointed by the commissioner of general services shall be for a three-year term to begin on November 1, 2011, to expire on October 31, 2014, and the successor shall serve a four-year term to begin on November 1, and expire October 31 of the appropriate year. The chief procurement officer shall be an ex officio member whose term shall begin November 1, 2011, and the one (1) voting member appointed by the comptroller of the treasury shall be appointed for a four-year term to begin on November 1, 2011, to expire on October 31, 2015. The successor shall serve a four-year term to begin on November 1, and expire October 31 of the appropriate year.

(C) Proxy voting is prohibited by voting members of the council; provided, however, in instances where a voting member will be absent from a vote of the council, the member's appointing authority is authorized to appoint an alternate or designee for the vote.

(3)

(A) Except as provided in subdivisions (a)(3)(A)(ii) and (B), the seven (7) nonvoting members shall be selected to serve staggered four-year terms as follows:

(i) The speaker of the house of representatives, the speaker of the senate, and the governor shall each appoint two (2) representatives, with one (1) representative from the bidder/vendor community and one (1) representative recommended by the National Institute of Government Purchasing. The final advisory non-voting member appointment shall be appointed by the chair of the fiscal review committee. The initial appointments to the council shall be made prior to November 1, 2011, by the speaker of the senate and the speaker of the house of representatives. The pattern established for initial appointments shall be followed for appointments by the appropriate officials when appointments are to fill expired terms;

(ii) The non-voting member appointed by the chair of the fiscal review committee shall serve a two-year term, beginning November 1, 2011, until the term expires October 31, 2013. The non-voting member appointed by the chair of fiscal review shall be eligible for reappointment to succeeding two-year terms without limitation; the two-year term of office of successor appointees shall begin November 1 and expire October 31 of the appropriate year; and

(iii) The initial appointments of the non-voting members shall be staggered. The speaker of the senate and the speaker of

the house of representatives shall each initially appoint one (1) member for a two-year term to begin November 1, 2011, and expire October 31, 2013, and one (1) member for a three-year term to begin November 1, 2011, and expire October 31, 2014; and the governor shall initially appoint one (1) member for a two-year term to begin November 1, 2011, and expire October 31, 2013, and one (1) member for a three-year term to begin November 1, 2011, and expire October 31, 2014. All subsequent appointments shall be for a four-year term to begin November 1 and expire October 31 of the appropriate year.

(B) Except as provided in subdivision (a)(3)(A)(ii), each non-voting member of the council, upon expiration of the member's term, shall not be eligible for reappointment for two (2) years after the conclusion of that member's term. In no event shall a non-voting member of the council serve more than four (4) consecutive years as a non-voting member of the council. In the event a member resigns or becomes ineligible for service during the member's term, a successor shall be appointed by the appropriate appointing authority to serve the remainder of the term.

(4) No employer shall discriminate in any manner against an employee who serves on the council because of the employee's service on the council. Employees who serve on the council shall not be denied any benefit from their employer because of the employee's service on the council.

(5) Members of the council shall not be paid but may be reimbursed for travel expenses. All reimbursement for travel expenses shall be in accordance

with the comprehensive travel regulations promulgated by the department of finance and administration and approved by the attorney general and reporter.

(b) The council shall meet at least twice each year for the discussion of problems and recommendations for improvement of the procurement process or any other matter relevant to procurement as determined by the chief procurement officer.

(c) The council shall review and issue a formal comment approved by the council on procurement policies, standards, guidelines, and procedures established by the chief procurement officer prior to being presented for approval by the commission. All reviews and formal comments shall be issued within sixty (60) days of being presented to the council by the chief procurement officer. The formal comments approved by the council shall be provided to the members of the commission, and the officers of the fiscal review committee.

(d) When requested by the chief procurement officer, the council may conduct studies, research, analyses, and make reports and recommendations with respect to subjects or matters within the authority and duties of the chief procurement officer. The chief procurement officer may appoint advisory groups to assist in specific areas, and with respect to any other matters within the authority of the chief procurement officer.

(e) In performing its responsibilities, the council's role shall be strictly advisory, but it may do any of the following:

(1) Make recommendations to the governor, general assembly, fiscal review committee, commissioner of general services, commissioner of finance and administration, and comptroller of the treasury relating to the enactment or promulgation of laws or rules that affect this title and title 12, chapters 3 and 4;

(2) Make recommendations to the commissioner of general services and commissioner of finance and administration regarding the method and form of statistical data collections; and

(3) Monitor the performance of the chief procurement office in the implementation of legislative directives.

(f) The council may develop evaluations, statistical reports, and other information from which the general assembly may evaluate the impact of legislative changes to procurement laws.

(g) Whenever any bill is introduced in the general assembly proposing to amend this chapter, to make any change in public procurement or contract law, or to make any change in the law that may have a financial or other substantive impact on the administration of public procurement and contract law, the standing committee to which the bill is referred may refer the bill to the council. The council's review of bills relating to procurement and contract law should include, but not be limited to, bills that propose to amend this chapter and title 12, chapters 3 and 4. All bills referred to the council shall be reported back to the standing committee to which they were assigned as quickly as reasonably possible. Notwithstanding the absence of a report from the council, the standing committee may consider the bill at any time. The chair making the referral shall immediately notify the prime sponsors of the referral and the council shall not review and comment on the proposed legislation until the prime sponsors have been notified. The comments of the council shall describe the potential effects of the proposed legislation on the procurement and contract process and its operations and any other information or suggestions that the council may determine to be helpful for the sponsors, standing committees, or the general assembly. The comments of the council may include recommendations concerning the proposed legislation. Except for reporting the

recommendations for or against passage of proposed legislation and responding to any inquiries made by the members of the general assembly, council staff shall not lobby or advocate for or against passage of proposed legislation.

SECTION 5. Sections 4 and 6 of Chapter 1098 of the Public Acts of 2011 are amended by deleting the date “October 1, 2011” and by substituting instead the date “April 1, 2012.”

SECTION 6. Tennessee Code Annotated, Section 4-56-104(b), as enacted by Chapter 1098 of the Public Acts of 2010, is amended by deleting the date “March 31, 2011” and by substituting instead the date “July 1, 2011.”

SECTION 7. Tennessee Code Annotated, Section 4-56-105(1), as enacted by Chapter 1098 of the Public Acts of 2010, is amended by deleting the date “July 1, 2011” and by substituting instead the date “January 1, 2012.”

SECTION 8. Tennessee Code Annotated, Section 4-56-105(6), as enacted by Chapter 1098 of the Public Acts of 2010, is amended by deleting the date “October 1, 2011” and by substituting instead the date “April 1, 2012.”

SECTION 9. Tennessee Code Annotated, Title 12, Chapter 2, Part 2 and Part 4, are amended effective April 1, 2012, by changing all references to the “commissioner of general services” to the “chief procurement officer” and all references to the “board of standards” to the “procurement commission.”

SECTION 10. Tennessee Code Annotated, Section 12-3-214, as enacted by Chapter 1098 of the Public Acts of 2010, is amended by deleting the section in its entirety effective April 1, 2012.

SECTION 11. Tennessee Code Annotated, Title 12, Chapter 3, Part 4, as enacted by Chapter 1098 of the Public Acts of 2010, is amended by deleting the part in its entirety effective April 1, 2012.

SECTION 12. Tennessee Code Annotated 12-4-207(b)(2), is amended by changing all references to the “board of standards” to the “procurement commission” effective April 1, 2012.

SECTION 13. Tennessee Code Annotated, Section 12-4-109(a)(1) as enacted by Chapter 1098 of the Public Acts of 2010, is amended by deleting subdivision (E) in its entirety effective April 1, 2012.

SECTION 14. Tennessee Code Annotated, Section 12-4-330, as enacted by Chapter 1098 of the Public Acts of 2010, is amended by changing all references to the “chief procurement officer” to the “commissioner of finance and administration” effective on the date this act becomes a law.

SECTION 15. Tennessee Code Annotated, Title 41, Chapter 22, Part 4, is amended by changing all references to the “board of standards” to the “procurement commission” and all references to the “commissioner of general services” to the “chief procurement officer” effective April 1, 2012.

SECTION 16. Tennessee Code Annotated, Title 71, Chapter 4, Part 7, is amended by changing all references to the “board of standards” to the “procurement commission” effective April 1, 2012.

SECTION 17. Tennessee Code Annotated, Section 12-3-208, as enacted by Chapter 1098 of the Public Acts of 2010, is amended by deleting the language “approved by the board of standards” and changing the language to “adopted pursuant to title 4, chapter 56, part 1”, to take effect April 1, 2012.

SECTION 18. Tennessee Code Annotated, Section 12-3-207, as enacted by Chapter 1098 of the Public Acts of 2010, is amended by deleting the language “approved by the board of standards” and changing the language to “adopted pursuant to title 4, chapter 56, part 1”, to take effect April 1, 2012.

SECTION 19. Unless otherwise stated in this act, this act shall take effect upon becoming a law, the public welfare requiring it.