



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

March 31, 1988

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 88- 45

Mr. Murray E. Anderson
Legal Counsel, Rural Water District No. 2
7589 West 149th Terrace
P.O. Box 23125
Overland Park, Kansas 66223

Re: Waters and Watercourses -- Water Districts; Rural
Water Districts -- Public Letting of Contracts;
Prequalification of Bidders; Lowest Responsible
Bidder

Synopsis: The statutes governing Rural Water District No. 2
of Johnson County do not require the district to
seek competitive bids on construction projects.
For sound policy reasons, however, the district
should award such contracts by public bid-letting.
If such a system is used, the board may reject the
lowest bid if it determines that the bidder is not
responsible. The board should not prequalify or
pre-screen bidders. Cited herein: K.S.A.
19-214; 19-215; K.S.A. 1987 Supp. 19-3516;
68-521; K.S.A. 68-1115; K.S.A. 1987 Supp.
72-6760; K.S.A. 75-3737a; 82a-612.

* * *

Dear Mr. Anderson:

As legal counsel for Rural Water District No. 2 of Johnson
County, Kansas, you ask the following questions:

1) Can the district reject the lowest bid on a public
bid-letting project if the bidder has little or no prior
experience or has a record of poor workmanship?

2) Can the District pre-screen bidders and limit the bidding to bidders who have strong qualifications and a solid experience record on public waterway systems?

Rural Water District No. 2 of Johnson county was organized pursuant to K.S.A. 82a-612 et seq. This act is silent as to the method by which construction contracts must be awarded. In the absence of any statutory mandate, the district is not required to seek competitive bids on construction projects. It is evident from your questions that the district intends to award the contract through a public bid-letting. In our opinion, the district is wise to adopt this procedure.

The State of Kansas strongly favors competitive bidding. For example, K.S.A. 1987 Supp. 19-3516(d), which applies to many of the state's other water districts, requires that contracts be awarded "on a public letting to the lowest responsible bidder. . . ." K.S.A. 75-3737a et seq. requires the Division of Purchases of the State Department of Administration to follow a similar method in awarding contracts. See also K.S.A. 19-214 (county construction contracts); K.S.A. 1987 Supp. 72-6760 (school district contracts). Awarding contracts by public bid-letting encourages competition, allows all contractors an equal opportunity, and avoids any appearance of impropriety or favoritism.

You first ask whether the district can reject the lowest bid on a public bid-letting where the bidder has little or no prior experience or has a record of poor workmanship. You note that K.S.A. 1987 Supp. 19-3516(d) requires contracts to be awarded to the "lowest responsible bidder." There is little case law giving any guidance as to the criteria used to determine the "lowest responsible bidder." In Williams v. City of Topeka, 85 Kan. 857 (1911), the Kansas Supreme Court stated:

"We conclude that the word 'responsible' in the phrase 'lowest responsible bidder' was used by the legislature in the sense in which it had long been interpreted by the courts and text-writers, and must be held to imply skill, judgment and integrity necessary to the faithful performance of the contract, as well as sufficient financial resources and ability." 85 Kan. at 863.

The question becomes, who has authority to determine whether a bidder is responsible, and upon what basis can this

determination be made? Clearly the water district board, since it is the body awarding the contract, has authority to determine whether a bidder is responsible. The court in Williams provides guidance as to the basis upon which the board may make this decision:

"The determination of the question who is the lowest responsible bidder does not rest in the exercise of an arbitrary and unlimited discretion, but upon a bona fide judgment based upon facts tending to support the determination. [Citations omitted]. The statute will not be so interpreted as to afford a cover for favoritism. The city authorities are required to act fairly and honestly, upon reasonable information, but when they have so acted their decision can not be overthrown by the court." 85 Kan. at 863-64.

We discussed this issue in Attorney General Opinion No. 78-341 as follows:

"You ask what evidence is necessary to justify a determination that a bidder is not 'responsible,' and what procedures must be followed in making that determination. . . . [I]t is impossible to generalize as to the quantum or kind of evidence which must be shown. We can only respond that the Director must rely upon reasonable information known to him, which affords a substantial basis for the judgment which he draws therefrom."

You specifically ask whether the lowest bidder may be rejected on the basis of having little or no prior experience or a record of poor workmanship. In our opinion, the water district board may reject a bid from a bidder with a known record for poor workmanship, based on the criteria set forth in Williams. In addition, a bidder with little or no experience may fail to meet the guidelines of a responsible bidder. The board, however, must be able to back up these determinations with facts of some substance.

You also ask whether the board may pre-screen bidders and accept bids only from those with strong qualifications. Attorney General Opinion No. 85-168 deals with this issue in detail. In that opinion a county counselor inquired whether the county may prequalify bidders on the construction of county or public buildings, the construction and maintenance of county roads, and the construction of bridges. We

of county roads, and the construction of bridges. We concluded that prequalification or pre-screening of bidders is not permissible. The statutes granting counties the authority to award such contracts contain no language indicating that the legislature contemplated prequalification of bidders. We noted that the county is adequately protected against an unqualified bidder by the statutory language "lowest responsible bidder." We also stated in the opinion that "strong policy reasons mitigate against prequalification of bidders." Specifically, competitive bidding guards against collusive contracts and favoritism, promotes competition, and affords fairness of opportunity to businesses wishing to bid.

It should be noted that in Attorney General Opinion No. 85-168 we stated that a board of county commissioners may, pursuant to its home rule powers, enact a charter resolution allowing for prequalification of bidders for the construction of bridges as K.S.A. 68-1115 is not uniformly applicable to all counties. This option is not available to the water district board as it is not vested with home rule powers.

In summary, the statutes governing Rural Water District No. 2 of Johnson County do not require the district to seek competitive bids on construction projects. For sound policy reasons, however, the district should award such contracts by public bid-letting. If such a system is used, the board may reject the lowest bid if it determines that the bidder is not responsible. Also, the board should not prequalify or pre-screen bidders.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Rita L. Noll
Assistant Attorney General

RTS:JLM:RLN:bas