



STATE OF KANSAS

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CURT T. SCHNEIDER
ATTORNEY GENERAL

October 23, 1978

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ATTORNEY GENERAL OPINION NO. 78-341

Mr. Richard E. Brown
Legislative Post Auditor
Legislative Division of Post Audit
Mills Building
Topeka, Kansas 66612

Re: Purchases--Competitive Bids--Responsible Bidder

Synopsis: The Director of Purchases is solely authorized by statute to determine the "lowest responsible bidder" under K.S.A. 75-3740, as amended. He has correctly determined that Computer Sciences Corporation is the lowest responsible bidder on quotation no. 33540, and on the basis of the information now available, there is no substantial basis for a finding to the contrary. The bidder determined to be the "lowest responsible bidder" is entitled to the award of the contract, absent rejection of bids for a valid business reason. The Legislative Post Audit Committee has no statutory authority to make findings with respect to the "lowest responsible bidder" regarding procurement subject to the competitive bidding requirements of K.S.A. 75-3740, as amended.

* * *

Dear Mr. Brown:

You inquire concerning the award of a contract for computer services. You advise that the Legislative Division of Post Audit is currently conducting an audit of medical assistance programs in the State of Kansas, this audit being a third in a series. To conduct this audit, your Division will require data processing assistance for the review of approximately 16,000,000 medical assistance claims paid over the last three years. Solicitations for bids were issued by the Division of Purchases on July 20, 1978, and three bids

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were received prior to the closing date, August 16. The bidders, together with the amounts bid, are as follows:

Computer Sciences Corporation	\$ 21,260
Deloitte Haskins & Sells	24,200
Peat, Marwick, Mitchell & Co.	125,000 - \$175,000

You advise that on August 31, you notified the Division of Purchases that the bid of Computer Sciences Corporation, the lowest bidder, was completely satisfactory, pending approval from the Legislative Post Audit Committee. Their proposal, you found, reflected a "good understanding" of the needs of the Division for the audit, and that the bidder was "qualified to perform the data processing" required for the project. On September 5, 1978, the Division of Purchases notified Computer Sciences Corporation that a review of its quotation indicates "complete acceptability for award."

On September 10, 1978, an article appeared in the Topeka Capital-Journal reporting that according to a General Services Administration draft audit report, the qualifications of numerous consultants employed by Computer Sciences Corporation and by two of its sub-contractors had been falsified, thus resulting in higher payments to the contractor than would otherwise have been justified, the alleged overpayments exceeding \$300,000. Apparently entirely in reliance upon this newspaper article, on September 12, 1978, the Legislative Post Audit Committee directed that the bid by Computer Sciences Corporation be rejected, and that the contract be awarded to the next lowest bidder, Deloitte Haskins & Sells.

In order to carry out the direction of the Committee, you wrote the Director of Purchases on September 18, concerning the award. He responded by letter dated September 20, stating in part thus:

"To my knowledge there is no indication that the low bidder has failed or would fail to comply with specifications, that he is in arrears on taxes, that he has failed to perform on a previous contract, or that he is not a responsible bidder -- any of which would allow rejection of his bid under the cited statute."

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You enclose a copy of the GSA audit report issued September 11, entitled Audit Acquisition of Consultant and Analyst Services from Subcontractors Through Infonet, Infonet being a division of Computer Sciences Corporation which was responsible for performing services under the contract which was under audit.

You have reviewed that report, and indicate that it questions "the propriety of about \$303,000 of the amounts paid to Computer Sciences Corporation for hourly consultation services in 1975. The \$303,000 represents payments where the consultant or analyst did not meet the minimum requirements of the position level at which the consultant or analyst was being paid." Included in this amount was about \$40,000 paid to the Systems Division of Computer Sciences Corporation, the remainder being paid to subcontractors of the corporation. On page 23 of the audit, it is recommended that further steps be taken to determine the amount of overcharges billed by the corporation during the life of the contract, in order that the appropriate amount may be deducted from federal payments due the corporation. You advise that GSA is continuing its investigation of billings by Computer Sciences Corporation under the contract.

You pose several questions arising from the foregoing. The first and foremost, of course, is whether the Director of Purchases may reject the bid of Computer Sciences Corporation on the ground that it is not a "responsible" bidder for this contract. K.S.A. 75-3740 was amended by the 1978 legislature, which amendments are effective September 1, 1978. The following language is unchanged by the 1978 legislature:

"All contracts and purchases made by or under the supervision of the director of purchases or any state agency for which competitive bids are required shall be awarded to the lowest responsible bidder, taking into consideration conformity with the specifications, terms of delivery, and other conditions imposed in the call for bids."

Likewise, the legislature did not change the responsibility and authority of the director in this regard:

"The director of purchases shall have power to decide as to the lowest responsible bidder for all purchases"

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Subsection (c) states thus:

"Any or all bids may be rejected, and a bid shall be rejected if it contains any material alteration or erasure. The director of purchases may reject the bid of any bidder who is in arrears on taxes due the state or who has failed to perform satisfactorily on a previous contract with the state."

There is no suggestion that Computer Sciences Corporation is in arrears on any taxes due the state, or that it has failed satisfactorily to perform on any previous contract with an agency of the state. Moreover, its bid is clearly responsive to the specifications on the basis of which bids were solicited. The only ground apparently asserted by the Legislative Post Audit Committee is that the corporation is not "responsible." Accordingly, you inquire what is the meaning of the phrase "responsible bidder," and what evidence must be shown, and what procedures must be followed, before a bidder may be rejected as not being "responsible."

In Williams v. City of Topeka, 85 Kan. 857, 118 Pac. 864 (1911), the court stated thus:

"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.

Under K.S.A. 75-3740, the Director of Purchases is vested with the sole authority and responsibility to determine the lowest responsible bidder. In Williams, supra, the court stated further:

"The next inquiry is how this responsibility is to be determined. Here again the authorities speak with practically one voice The determination of the question

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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. . . . The statute will not be interpreted so as to afford a cover for favoritism. The city authorities are required to act fairly and honestly, upon reasonable information"

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. Neither K.S.A. 75-3740, as amended, nor any other statute, sets forth a formal statutory procedure to be followed in making such determinations. Likewise, it 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.

In this instance, the Director of Purchases has determined that Computer Sciences Corporation is in fact a responsible bidder. In my opinion, that judgment is eminently correct. The bid submitted by the company was apparently responsive to the specifications contained in the solicitation for bids. There is no suggestion that the company lacks the professional and technical competence to furnish the data processing services called for by the specifications. Likewise, the Director has found no substantial basis upon which to determine that the company lacks the skill, judgment and integrity necessary to the faithful performance of this contract.

The overbilling practices discussed in the GSA draft audit report do not justify a categorical judgment that Computer Sciences Corporation necessarily lacks the "skill, judgment and integrity" requisite to the faithful performance of the contract in question here. The Director of Purchases has no evidence to support a finding that the company is not a "responsible" bidder which, if awarded the contract, would perform promptly and as called for in the specifications. In short, in my judgment, the Director has properly determined that the corporation is indeed a "responsible bidder," and on the basis of the foregoing, it is my view that there is no adequate basis for a finding to the contrary. The Legislative Post Audit Committee has no authority whatever to make any finding whether a bidder is "responsible" or not

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responsible under K.S.A. 75-3740, for that authority is vested in the Director of Purchases. Its direction issued at its September 12, 1978, meeting that the bid of Computer Sciences Corporation be rejected provides not the slightest legal basis for the Director of Purchases to refuse to award the contract to that company, which he has determined, as he is solely empowered to do, to be the lowest responsible bidder.

You inquire, also, whether, if there is insufficient evidence to conclude that Computer Sciences Corporation is not a responsible bidder, the Director of Purchases may reject all bids under K.S.A. 75-3740 as amended. Subsection (c) thereof provides in pertinent part thus:

"In any case where competitive bids are required and where all bids are rejected, new bids shall be called for as in the first instance, unless otherwise expressly provided for by law."

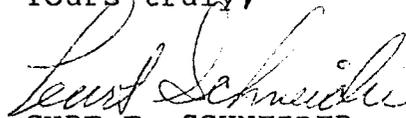
You ask if all bids were rejected, and new bids solicited as "in the first instance," this manner of proceeding would violate the quoted statutory provision. If, of course, the Legislative Post Audit Division decided to abandon the audit for which data processing services were solicited, or determined to reduce the scope of the audit so that those services were no longer required, it would be permissible to reject all bids, without soliciting new ones. Likewise, if it was determined that the kinds of data processing services required for the audit differed from those initially believed to be necessary, for which the existing specifications and bids based thereon were inadequate, the existing bids would be rejected, new specifications issued, and bids solicited anew. There may be other circumstances which would justify rejection of the bids without a solicitation of new bids, but it is difficult to anticipate them and generalize in a helpful fashion merely in the abstract. Generally speaking, of course, the state reserves the right to reject all bids, and upon the showing of a valid business reason, I believe, no new bids need be solicited.

To recapitulate, it is my view that the Director of Purchases is solely vested with the authority to determine whether a bidder is "responsible," that he has correctly determined that Computer

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Sciences Corporation is indeed a "responsible" bidder, and that there is no substantial basis for a contrary determination.

Yours truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj

cc: Mr. James Tolbert
Director of Purchasing