



STATE OF KANSAS

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November 12, 1985

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ATTORNEY GENERAL OPINION NO. 85- 168

Philip S. Harness
Johnson County Counselor
110 S. Cherry, Suite 8
Olathe, Kansas 66061

Re: Counties and County Officers -- Powers and Duties
-- Public Letting of Contracts; Prequalification
of Bidders

Synopsis: Where a county is required to let contracts to the lowest and best, or to the lowest responsible bidder, such bidding must be open to all who wish to offer bids. Prequalification of bidders for the construction of public buildings and county roads would be contrary to both Kansas statutes and to public policy. However, as the statutes providing for the bidding of contracts for the construction of bridges are contained in an act which is not uniform as to all of its sections, a county may employ a charter ordinance to exempt itself from these provisions and substitute language which allows prequalification of bidders. Cited herein: K.S.A. 19-101a, as amended by L. 1985, Ch. 208, §1; 19-214; 19-215; 68-521; 68-1113; 68-1115.

* * *

Dear Mr. Harness:

As County Counselor of Johnson County, Kansas, you inquire whether the county may devise a method or plan for prequalifying bidders pursuant to statutes governing the

public letting of contracts for: (1) the construction of county or public buildings; (2) the construction, servicing, repairing or maintaining of any county road; (3) and the construction of bridges. For the reasons stated below, in our opinion prequalification of bidders for the first two of these types of contracts is not permissible, although for the third (i.e. bridges) it is possible under the scope of county home rule.

Home rule powers of county government are broad. However, such powers are limited by K.S.A. 1984 Supp. 19-101a, as amended by L. 1985, Ch. 208, §1, which states in pertinent part:

"(a) The board of county commissioners may transact all county business and perform all powers of local legislation and administration it deems appropriate, subject only to the following limitations, restrictions or prohibitions: (1) Counties shall be subject to all acts of the legislature which apply uniformly to all counties."

This opinion is limited to a discussion of all acts of the legislature which are applicable to counties. For a discussion of bidding procedures for municipalities in general, see Attorney General Opinion No. 85-121.

Several Kansas statutes are relevant to the determination of the proper procedures for county bidding practices. K.S.A. 19-214 deals in general with the awarding of contracts for the construction of public buildings, and states:

"(a) Except as provided in subsection (b), all contracts for the expenditure of county moneys for the construction of any courthouse, jail or other county building, or the construction of any bridge in excess of \$10,000, shall be awarded, on a public letting, to the lowest and best bid"

K.S.A. 68-521 concerns improvement of county roads, and provides:

"The board shall conduct the letting of all contracts in such a manner as to give free, open competition, and all bidders shall be given an equal opportunity to bid upon the plans and specifications on file"

Finally, K.S.A. 68-1115 regarding bridge construction specifies:

"All bids shall be considered, and accepted or rejected. In case the work is let at such public letting, contract shall be awarded to the lowest responsible bidder"

The above statutory language indicates that prequalification of bidders was not contemplated by the legislature. However, this does not mean that a county is without safeguards in selecting a valid bid from a qualified and responsible bidder. It is clear that, in the absence of arbitrariness, oppressiveness or fraud, counties are not required to accept the lowest bid. Inclusion of the term "responsible" in the phrase "lowest responsible bidder" has been construed to imply "skill, judgment and integrity necessary to the faithful performance of the contract, as well as sufficient financial resources and ability." Williams v. City of Topeka, 85 Kan. 857, 863 (1911). Further, the requirement that performance bonds be posted is another protection for the county against an irresponsible bidder. See K.S.A. 68-521. The interests which justify prequalification are adequately protected by the statutory language and by judicial interpretation of that language. 20 C.J.S. Counties §189 (1940).

This conclusion is further supported by the provisions for publication of notice of the letting of bids. K.S.A. 19-215 states that notice shall be published in some newspaper printed in the county, or if there is no newspaper, by conspicuous posting. While this section applies to the provisions regarding county and public buildings, K.S.A. 68-521, regarding roads, requires at least two consecutive weekly publications of notice of the letting. The requirement

in the bridge and culvert section is less specific, but the language mandates that the county furnish proposal blank forms, and that "all bidders shall be given an equal opportunity to bid upon the plans and specifications on file." K.S.A. 68-1113.

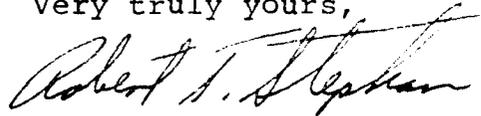
Strong policy reasons mitigate against prequalification of bidders. Competitive bidding protects the public from "collusive contracts; [prevents] favoritism, fraud, extravagance, and improvidence . . ." and promotes "actual, honest and effective competition . . . so that all such public contracts may be secured at the lowest cost to taxpayers." 64 Am.Jur.2d, Public Works and Contracts, §37 (1972) at 889; Williams v. City of Topeka, *supra*, 85 Kan. at 861. Competitive bidding also affords fairness of opportunity to participate in public contracts for businesses. 64 Am.Jur.2d at 889. The legislature has clearly expressed these policies in the aforementioned statutes.

However, as noted above, K.S.A. 1984 Supp. 19-101a, as amended, requires counties to be subject to acts of the legislature which are uniform in their application to all counties. While the legislative intent behind the statutes governing the letting of contracts for the construction of bridges (K.S.A. 68-1113 and 68-1115) is as clear as it is for the other two types of construction discussed herein, they are contained in an act (L. 1975, ch. 427) which contains other sections which are not uniformly applicable to all counties. Section 73, for example, amends K.S.A. 68-151k, which by its terms applies only to counties having a population of over 175,000. While K.S.A. 68-1113 and 68-1115 remain uniformly applicable to all counties, under holdings of the Kansas Supreme Court any non-uniformity renders the entire act, including these two sections, subject to charter resolution. City of Junction City v. Griffin, 227 Kan. 332, 337 (1981). As a result, Johnson County may, if it desires, establish standards for prequalification of bidders for bridge projects.

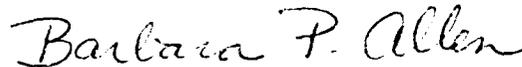
In conclusion, it is our opinion that where a county is required to let contracts to the lowest and best, or to the lowest responsible bidder, such bidding must be made available to all who wish to offer bids. Prequalification of bidders for the construction of public buildings and county roads would be contrary to both the Kansas statutes and to public policy. However, as the statutes providing for the bidding of

contracts for the construction of bridges are contained in an act which is not uniform as to all of its sections, a county may employ a charter ordinance to exempt itself from these provisions and substitute language which allows pre-qualification of bidders.

Very truly yours,



ROBERT T. STEPHAN
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RTS:JSS:BPA:crw