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September 1, 1988

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ATTORNEY GENERAL OPINION NO. 88-126

The Honorable William W. Buntен  
State Representative, Fifty-Fourth District  
1701 West 30th  
Topeka, Kansas 66611

Re: State Departments; Public Officers and  
Employees--Department of Administration; General  
Provisions--Procurement Negotiating Committees,  
Services or Technical Products; Bidding Exemption

Synopsis: K.S.A. 1987 Supp. 75-37,102 authorizes the use of a  
negotiating committee to evaluate competitive  
sealed proposals submitted pursuant to the notice  
required by that statute. The statute requires a  
competitive analysis of the proposals submitted,  
though factors other than price may be taken into  
consideration. The Director of Purchases may, in  
an invitation for bids, reserve the state's right  
to revert to the provisions of K.S.A. 1987 Supp.  
75-37,102. Cited herein: K.S.A. 75-3738; 75-3740;  
K.S.A. 1987 Supp. 75-37,102.

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Dear Representative Buntен:

As State Representative for the Fifty-Fourth District, you  
request our opinion regarding the effect of K.S.A. 1987 Supp.  
75-37,102 on state procurements. Specifically your questions  
are as follows:

- "1. If a procurement negotiating committee is convened  
pursuant to K.S.A. 1987 Supp. 75-37,102, must a

competitive analysis be used in selecting the vendor to whom the contract will be awarded?

- "2. May the Director of Purchases, in a request for quotations made pursuant to K.S.A. 1987 Supp. 75-3738 et seq., reserve in that request the right to utilize the provisions of K.S.A. 1987 Supp. 75-37,102 after competitive bids have been opened? In a recent RFQ, such a reservation had been stated by the Division of Purchases as follows:

'NEGOTIATED PROCUREMENT: The state reserves the right to convene a negotiating committee pursuant to K.S.A. 1987 Supp. 75-37,102 for this procurement and to negotiate with bidders concerning the dollar amount of bids submitted or the modification of the specifications for the items or services being procured.'"

K.S.A. 1987 Supp. 75-37,102 provides in part:

"(a) Upon request of the chief administrative officer of a state agency and subject to the approval of the secretary of administration, the director of purchases may convene a procurement negotiating committee to obtain services or technical products for the state agency.

. . . .

"(c) The negotiating committee is authorized to negotiate for the procuring state agency contracts with qualified parties to provide services or technical products needed by the state agency.

"(d) Prior to negotiating for the procurement, a notice to bidders first shall be published in the Kansas register. Upon receipt of bids or proposals, the committee may negotiate with one or more of the firms submitting bids or proposals and select from among those submitting such bids or proposals the party to contract with to provide the services or technical products.

"(e) Contracts entered into pursuant to this section shall not be subject to the provisions of K.S.A. 75-3738 through 75-3740a and amendments thereto."

(Emphasis added.)

This statute authorizes the use of a negotiating committee, when requested by the chief administrative officer of a state agency and authorized by the secretary of administration, upon providing notice to potential "bidders."

In the absence of a statute or constitutional provision requiring competitive bidding, it is not an essential prerequisite determining the state's capacity to enter into a contract. "Whether a contract for public work, or for furnishing supplies, services, etc., to the public, is to be entered into through private negotiation or only after competitive bidding is a matter of statutory provision and construction." 64 Am.Jur.2d Public Works and Contracts, §34 (1972). Thus, the requirement for competitive bidding in state procurements is statutory rather than inherent. However, because the purpose of statutes requiring competitive bidding is to "protect the public from collusive contracts; to prevent favoritism, fraud, extravagance, and improvidence in the procurement of these things . . ." and promote "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); Williams v. City of Topeka, 85 Kan. 857, 861 (1911); Attorney General Opinions No. 85-168, 86-170], such statutes should be construed in light of public policy in a way "which will avoid the likelihood of their being . . . defeated." 64 Am.Jur.2d Public Works and Contracts, §37 (1972).

In 1986 we were asked to opine on whether the state could make an award based on the analysis of vendor's proposals as opposed to sealed bids. Our response was that Kansas statutes at the time did not allow the use of competitive sealed proposals except when specifically provided for in isolated circumstances, e.g. K.S.A. 1987 Supp. 74-8705(b), major procurement contracts awarded by the Kansas lottery commission; K.S.A. 1987 Supp. 75-4713, acquisition of telecommunications services. See Attorney General Opinion No. 86-170. K.S.A. 1987 Supp. 75-37,102 was subsequently introduced in the 1987 Session. The Assistant Secretary of Administration, a proponent of the legislation, testified as follows:

"Procurements under this statute would be exempt from the competitive bid/low bid statute; however, the bill requires the advertisement of the procurement in the Kansas Register and negotiations are permitted only with parties submitting bids or proposals.

"This type of competitive negotiations is currently authorized for financial services, telecommunications equipment and services, procurement of health care coverage for state employees, major procurements for the Kansas Lottery, and several other specific areas. We believe this alternate method would be a helpful tool for other procurements, particularly ones involving highly technical services or complex computer installations and custom-made software.

"The State of Missouri utilizes a similar approach for some of their procurements. This allows procurement decisions to take into consideration factors beyond the lowest bid meeting the specifications. Such factors include service capability, financial strength, future enhancement capabilities and past track records of the vendor on similar projects for others. Equally helpful is the opportunity for face-to-face meetings with potential contractors. This can help assure that a vendor understands the scope of a state agency's needs. It also gives vendors the opportunity to point out drawbacks of the competitor's offerings and the strengths or unique features of their products or service capability. The successful use of negotiating committees in areas where they are currently authorized lead us to believe that it would be helpful in other areas." Attachment I, Committee Minutes, Senate Ways and Means Committee, April 3, 1987. (Emphasis added.)

The types of procurements referenced in this testimony require competitive analysis of bids or proposals. The term

"competitive analysis" is susceptible to several interpretations. Negotiations and discussions with the vendors competing for a procurement may lead the state negotiating committee members to the conclusion that the initial specifications can be deviated from while still assuring that the needs of the procuring state agency are met. This result is possible and authorized by the terms of K.S.A. 1987 Supp. 75-37,102. Similarly, this negotiation statute gives vendors an opportunity to present, and the negotiating committee the opportunity to consider, alternative methods and equipment to carry out state functions. Matters such as availability of maintenance service, conversion of existing software, technical support, timing constraints, upgrade capability and compatibility with other equipment and procedures are all items which a negotiating committee may take into consideration in their analysis.

Based on the public policy considerations supporting competitiveness in state procurement, and the provisions of K.S.A. 1987 Supp. 75-37,102 requiring notice and limiting negotiations to parties submitting bids or proposals, it is our opinion that a competitive analysis is required when using the competitive sealed proposal method authorized by K.S.A. 1987 Supp. 75-37,102, though the award need not go to the responsible offeror with the lowest price as required by K.S.A. 75-3738 et seq.

With regard to your second inquiry, we find nothing in the statutes which would prohibit the Director of Purchases from reserving the right to utilize the provisions of K.S.A. 1987 Supp. 75-37,102 after competitive bids are opened, when that reservation is made a part of the invitation for bids. K.S.A. 1987 Supp. 75-3740(c) provides that any or all bids may be rejected. K.S.A. 1987 Supp. 75-37,102 speaks to the submission of "bids or proposals," indicating that while initially bids are sought, the State may subsequently wish to make use of a negotiating committee. This should only occur, however, if it is discovered during the bidding process that the procurement is one which is not conducive to the use of competitive sealed bids due to the nature of the services or products to be procured.

In conclusion, K.S.A. 1987 Supp. 75-37,102 authorizes the use of a negotiating committee to evaluate competitive sealed proposals submitted pursuant to the procedure set forth in the statute. These procedures require a competitive analysis of the proposals submitted, though factors other than price may be taken into consideration. The Director of Purchases may,

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in an invitation for bids, reserve the state's right to revert  
to the provisions of K.S.A. 1987 Supp. 75-37,102.

Very truly yours,

  
ROBERT T. STEPHAN  
Attorney General of Kansas

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