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September 4, 1992

ATTORNEY GENERAL OPINION NO. 92-118

Brad L. Jones
Coffey County Attorney
P.O. Box 310
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Re: Counties and County Officers -- County Commissioners -- Awarding of Certain Contracts; Public Letting; Ability to Negotiate with the Low Bidder

Synopsis: The board of county commissioners can modify contracts without being required to rebid the project as long as there is not a material change in the terms, any change is such that it could have been made before the contract had been executed, and if the change does not defeat the purpose of the competitive bidding procedure. Cited herein: K.S.A. 19-214; 19-215; 19-216.

* * *

Dear Mr. Jones:

As Coffey county attorney, you request our opinion as to whether the Coffey county board of commissioners has the authority to negotiate with the low bidder in making the award of a contract subject to the requirement of public letting of bids pursuant to K.S.A. 19-214 et seq., and if so, what scope of change in the project would be allowed.

You state in your request letter that on some occasions all the bids which are submitted pursuant to K.S.A. 19-214 et

seq. exceed the amount budgeted or the engineer's estimate for the project. In this situation Coffey county is faced with the prospect of rejecting all the bids and re-advertising the project unless it is lawful to negotiate with the low bidder and adjust the specifications so as to lower the cost of the project to the amount of the estimate and budget.

The competitive bidding statutes require the construction of certain county projects be awarded by public letting to the lowest and best bid. K.S.A. 19-214. The board of county commissioners are required to publish notice of the public letting (K.S.A. 19-215) and cause plans and specifications of the project to be available for inspection by the bidders. K.S.A. 19-216.

The Kansas Supreme Court has held that a competitive bid statute (regarding first class cities) "is for the protection of the public rather than the bidders." Sutter Bros. Construction Company v. City of Leavenworth, 238 Kan. 85, 88 (1985). We have echoed this sentiment by stating that:

> "Awarding contracts by public bid-letting encourages competition, allows all contractors an equal opportunity, and avoids any appearance of impropriety or favoritism. Attorney General Opinion No. 88-45. The rule requiring public authorities to give out plans and specifications for proposed public works and contracts before receiving bids therefore demands that the plans and specifications be so framed as to secure fair competition upon equal terms to all bidders, and to permit free and open bidding by all interested parties; they should be free from any restrictions the effect of which would be to stifle competition. 64 Am.Jur.2d Public Works and Contracts, § 51, 902." Attorney General Opinion No. 90-23.

In discussing the necessity and sufficiency of having plans and specifications the court in Bridge and Iron Works Co. v. Labette County, 98 Kan. 292, 301 (1916) held:

> "The intent of the requirement that a plan and specifications shall be on file for the inspection of bidders is that all

> bidders shall be placed on an equality, and that each shall know exactly what is required. . . . [T]he plans and specifications on file for the inspection of bidders must, so far as the nature and character of the proposed work will admit, be sufficiently definite and explicit as to enable bidders to prepare their bids intelligently on a common basis. It may be said as a general rule that plans and specifications are sufficient if contractors and others skilled in such matters are able to determine what is required." (Emphasis added.)

In the same case, the court also stated that:

> "None of the cases cited goes so far as to hold that statutes similar to ours can only be complied with by filing detailed working plans for the inspection of bidders. . . . The authorities are practically unanimous in holding that there can be no active,intelligent competition among bidders unless plans and specifications are open to inspection which are sufficiently explicit as to afford to all bidders an equal opportunity to bid upon the same project or proposition." Id. at 304 (Emphasis added). See also Attorney General Opinion No. 81-65.

There is one Kansas Supreme Court case, Lucas v. Lane Co. Commrs., 131 Kan. 589, 592 (1930), which dealt with the issue you raise. The court in Lucas allowed the contract regarding the construction of the county courthouse to be modified based on the following reasons:

> "Plans and specifications for the courthouse and jail had been prepared and filed, bids had been advertised for and had been received. The only thing wrong with the contracts in the first place was that, in the aggregate, by the adding of the sum necessary to furnish the building, they might exceed $115,000. The tentative contracts entered into contained the

> provision, usually in building contracts, providing that the owner, without invalidating the contract, might make changes, altering, adding to, or deducting from the work, the contract sum being adjusted accordingly, the amount to be paid or deducted because of the change to be determined by estimate and acceptance in a lump sum, by unit prices named in the contract or subsequently agreed to, or by cost and percentage, or cost and a fixed fee; in any case the architect to certify to the amount. Many of the changes made were in unit prices for such things as a bronze tablet, Venetian blinds, outside shutters and screens for windows, which were omitted. Some of the items were for alternates, in which the less expensive was selected. Others applied to methods of finish and the like, all being computed and certified by the architect. . . . In short, all changes made in the structure were of a character which did not radically change plans and specifications, and each of them could have been made at any time as the work progressed. [T]he evidence is that changes in the prices of materials and the fact that the construction would have been delayed until the winter season would have substantially increased the cost. It cannot be said, therefore, that the plaintiff, or any other taxpayer of the county, was damaged in any way by the business being handled as it was. This was modified before contracts were finally let in a way that might have been made after the contracts had been executed, and we see nothing seriously wrong with it."

As previously stated, the purpose of competitive bidding is to avoid fraud, favoritism and impropriety. Therefore,

> "[A]ny competitive bidding procedure which defeats this fundamental purpose, even though it be set forth in the initial proposal to all bidders, invalidates the construction contract although subsequent

> events establish, as in the present case, that no fraud was present. It is for this reason that no material change may be made in any bid after the bids have been received and opened since to permit such would be to open the door to fraud and collusion." Griswold v. Ramsey County, 65 N.W.2d 647, 652 (Sup. Ct. Minn. 1954).

Therefore, it is the opinion of this office that the Lucas case gave counties only a narrow window of opportunity to modify contracts without being required to rebid the project. Any modification of the terms of the contract which is not a material change and is such that it could have been made before the contract had been executed is allowable if it does not defeat the purpose of the competitive bidding procedure.

Very truly yours,

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