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PURCHASING & ADVERTISING COMPETITIVE BIDDING

FIRE PROTECTION DISTRICTS

SECTION E OPERATIONAL MANUAL AND LEGAL FORMS COMPENDIUM Jefferson County Fire Chiefs & Trustees Association

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I STATUTORY REQUIREMENT TO ADVERTISE

1. BIDS FOR MATERIALS & SERVICES: KRS 424.260, Bids for materials, supplies, equipment, or services, states that:

(12) Except where a statute specifically fixes a larger sum as the minimum for a requirement of advertisement for bids, no city, county, or district, or board or commission of a city or county, or sheriff or county clerk, may make a contract, lease, or other agreement for materials, supplies except perishable meat, fish, and vegetables, equipment, or for contractual services other than professional, involving an expenditure of more than twenty thousand dollars (\$20,000) without first making newspaper advertisement for bids.

* * * * *

(4) This requirement shall not apply to an emergency if the chief executive officer of the city, county, or district has duly certified that an emergency exists, and has filed a copy of the certificate with the chief financial officer of the city, county, or district, or if the sheriff or the county clerk has certified that an emergency exists, and has files a copy of the certificate with the clerk of the court where his necessary office expenses are fixed pursuant to KRS 64.345 or 64.530, or if the superintendent of the board of education has duly certified that an emergency exists, and has filed a copy of the certificate with the chief state school officer.

2. PURPOSE OF COMPETITIVE BIDDING: "Competitive bidding statute is primarily to protect the public against waste of public funds and with sole reference to the public good. In practical terms --- to get the lowest cost --- that supplies for government may be secured at the most favorable prices -- stressing lowest cost to taxpayers." OAG 78-121.

3. KRS 424.260 PRINCIPLE: The bidding principle of KRS 424.260 involves three important benefits: (a) an offering to the public; (b) an opportunity for competition; and, (c) a basis for an exact comparison of bids. Handy v. Warren County Fiscal Court, Ky., App., 570 S.W.2d 663 (1978); OAG 80-396.

4. CONTRACT VOID IF NOT BID: "A statutory requirement of competitive bidding in the letting of public contracts is mandatory and nonobservance renders the contract void." Board of Education of Floyd County v. Hall, Ky., 353 S.W.2d 194, 195 (1962); OAG 83-316; "It is well to keep in mind that a statutory requirement of competitive bidding in the letting of public contracts is mandatory, and nonobservance renders the contract void." OAG 82-125. Statutory requirements for advertisement for bids is "jurisdictional" and fiscal court without power to enter into a contract without such advertisement where the purchase requires bidding." City of Owensboro v. Evansville & Ohio Val. Tr. Co., Ky., 448 S.W.2d 375 (1969).

5. VENDORS ACT AT PERIL IF NOT ASK: Party deal with a public agency at its peril if it contracts with one and fails to inquire into the power of the agency to execute it. Hacker Bros. Const. v. Board of Ed. of Whitley, Ky. App., 590 S.W.2d 897, 899 (1979).

6. IMPRACTICAL OR UNWISE: "There are many special transactions of such character as to make it impractical or unwise to apply the policy of competitive bidding." Bennett v. City of Mayfield, Ky., 329 S.W.2d 573 (1959); OAG 82-530. Exceptions include when bidding would be "undesirable, impractical, or impossible". McQuillin Municipal Corporations, Vol. 10, Section 29.36. "Bearing in mind that requirement of competitive bids and letting of contracts to low bidders have for their object insuring economy and the exclusion of favoritism and corruption in awarding public contracts and in the furnishing of labor services, property, and materials for public uses, statutes requiring competitive bidding should not be given such construction as to defeat their purpose and public improvements, and their requirements may be dispensed with where such advertisement will not result in competitive bidding for the work ... as stated by a recognized text authority, when competitive proposals work an incongruity and are unavailing as affecting the final results, or where they do not produce any advantage or it is practically impossible to obtain what is required and observe such forms, a statute requiring competitive bidding does not apply.

7. GOOD ESTIMATE NOT ACCEPTABLE: Compliance with the requirement may not, however, be dispensed with because the public authority believes, in good faith, as the result of the inquiries made by them, that no one other than the one to whom the contract is let will be willing to undertake the job and that the contract price is the best price that can be obtained. OAG 67-119

II BID PROCEDURES AND CRITERIA

1. ADVERTISEMENT: The object of advertising for bids is to bring notice to the persons who might reasonably be expected to be interested in furnishing the desired items, and thus to insure fully competitive bidding. Mailing does not constitute advertising. Taylor v. Parker, Ky., 302 S.W.2d 125 (1957).

2. CONTENTS OF NOTICE: The notice must present to the bidders an intelligent and concrete statement of the work to be done. The bid invitation must clearly state the bidder qualifications and the deadline for submitting bids. The advertisement must invite all reasonable competition. 20 C.J.S., Counties, Section 166a.

3. SPECIFICATIONS: It is the duty of the Board of Trustees to adopt, in advance of the advertisement for bids, plans and specifications so definite and detailed as to disclose the thing to be undertaken with circumstantial fullness and precision as a basis on which bids may be

received. The plans and specifications must be on file and available for inspection by the perspective bidders for the entire period of publication of the call for bids, and any attempted alteration during that period is ineffective. 20 C.J.S., Counties, Section 166a.

4. SINGLE OR SEPARATE BIDS: A "single bid" is required if all of the projects or items could involve unified specification and work performance of such nature that bids on the total number of projects or items as a total package could be obtained. Otherwise, separate bids. OAG 83-316. NOT "DRIBBLES AND DABS merely to circumvent advertised bidding." Board of Education of Floyd County v. Hall, Ky., 353 S.W.2d 194 (1962); OAG 82-125.

5. ALTERNATE BIDS: City can invite bids which specify alternate methods of construction and equipment. OAG 77-265.

6. CONSUMPTION PERIOD: "Matter left to the sound administrative discretion of the fiscal court ... left to the good business judgment of the fiscal court in terms of the period of consumption, price fluctuations, availability of the commodity for a definite period, etc." Board of Education of Floyd County v. Hall, Ky., 353 S.W.2d 194 (1962); OAG 82-125; "Consider three important benefits of the bidding process: (a) an offering to the public; (b) an opportunity for competition; and, (c) a basis for an exact comparison of bids." Handy v. Warren County Fiscal Court, Ky., App., 570 S.W.2d 663 (1978); OAG 82-125.

7. TIME LIMIT ON AN AWARDED BID: "No precedent in the area of the longevity of a particular awarded contract under public bidding." OAG 78-121.

8. LOWEST PRICE & BEST RESPONSIBLE BIDDER: "Lowest responsible bidder does not mean lowest financially only, but apply as well to the business judgment, capacity, skill, responsibility, etc. of the bidder." R.G. Wilmott Coal Co. v. State Purchasing Commission, 246 Ky. 115, 54 S.W.2d 634, 635 (1932); OAG 80-396. KRS 424.260 contains no language concerning the "lowest and best responsible bidder" - the fiscal court is entitled to a presumption that the bid accepted by it was the best bid, though it may not have been the lowest, and that the burden of proving otherwise falls on the contesting party." A & W Equipment Company v. Carroll, Ky., 377 S.W.2d 895 (1964); Handy v. Warren County Fiscal Court, Ky., App., 570 S.W.2d 663 (1978); OAG 80-396.

9. LOWEST PARI MATERIA ADVERTISING: Concept of lowest and best bidder does have a place in the consideration of guidelines in applying KRS 426.260 though the concept is not explicitly written into the statute. KRS 162.070 may be considered in pari materia with KRS 424.260 as a matter of legislative intent. OAG 80-396.

10. REJECTION OF ALL BIDS: When all bids are rejected for valid reasons under a statute requiring competitive bidding, the rule appears to be that there must be a second advertisement and opportunity for bidding. OAG 67-119.

"If after advertising for and receiving sealed proposals for the doing of public work for a municipality, none of the bids is found satisfactory, the council has no authority to favor one of the bidders by negotiations with him privately changing the scope of the work to be done or the terms of payment therefore in consideration of the reduction of his offer. All persons desiring to bid upon the work and willing to comply with the terms prescribed must have equal opportunity to do so; and

if the work is not awarded upon the first competition for any legitimate reason, it must be submitted to a second, with full opportunity as before for all persons desiring to participate to do so." OAG 67-119.

"If after re-advertisement no firm bids are received and there is every indication that none can be obtained, we believe that the council would be authorized to privately negotiate for the best contract obtainable for the performance of the required work. OAG 67-119.

11. BURDEN ON CONTESTING PARTY: Presumption that the bid accepted by it was the best bid, though it may not have been the lowest, and that the burden of proving otherwise falls on the contesting party." A & W Equipment Company v. Carroll, Ky., 377 S.W.2d 895 (1964); Handy v. Warren County Fiscal Court, Ky., App., 570 S.W.2d 663 (1978); OAG 80-396; OAG 77-265. "That it is assumed when a governmental agency awards a contract to one other than the lowest bidder, that the award of contract is still to the best bidder, and the burden is on one who challenges the bid to show not just that the award was not, in fact, to the lowest and best bidder, but that there was an abuse of discretion on the agency's part amounting to fraud, arbitrariness or capriciousness in awarding the contract." CONTESTING PARTY must show abuse of discretion on the agency's part amounting to fraud, arbitrariness or capriciousness in awarding the contract. Handy v. Warren County Fiscal Court, Ky., App., 570 S.W.2d 663 (1978); OAG 80-396.

III EXCEPTIONS

1. CONSTRUCTORS NOT EXEMPT: Opinions of the Kentucky Attorney General have held that a "construction inspector" was not exempt as a professional under KRS 92-144. OAG 92-144. . The "contractual services covered by KRS 424.260 are those involving personal service of a manual or mechanical nature." McCloud v. City of Cadiz, Ky. App., 548 S.W.2d 158; OAG 79-377.

2. PROFESSIONAL SERVICES: "Professional services" have been defined as requiring scientific knowledge or professional skill such as that possessed by a lawyer, engineer, physician, artist, or court reporter." Jeffersontown v. Cassin, Ky., 102 S.W.2d 1001, 105 (1937). "Power to contact for personal or professional services of an engineering firm and a finance company without receiving competitive bidding is authorized." City of Hazard v. Salyers, Ky., 224 S.W.2d 420, 421 (1949).

3. MANAGEMENT SERVICES: Hospital management services "involving administrative and ministerial implementation of the decisions, policies and directives of the fiscal court" are in the nature professional under KRS 424.260 and the bidding statute does not apply. Under such "management services" the building and grounds would still be under the ownership of the county and the hospital operation would be expressly subject to the overall control and supervisory management of the fiscal court. Fiscal court must retain and exercise its overall and ultimate control of the county hospital. The "contractual services covered by KRS 424.260 are those involving personal service of a manual or mechanical nature." McCloud v. City of Cadiz, Ky. App., 548 S.W.2d 158; OAG 79-377.

4. BANKING AND INSURANCE SERVICES: Contractual services covered by KRS 424.260 are those involving personal services of a manual or mechanical nature. The generally uniform rates involved in both banking and insurance as well as the professional nature of these

activities support the conclusion that the City of Cadiz was not required to comply with KRS 424.260 before securing these services." McCloud v. City of Cadiz, Ky. App., 548 S.W.2d 158, 162 (1977); 79-377; OAG 79-377.

5. FIRE DISTRICT CONTRACT NOT EXEMPT: A Fire Protection District that contracts pursuant to KRS 75.050 with other Fire Protection District or other fire departments for the receiving of fire protection services must advertise for bids in the newspaper under KRS 424.260. Opinion of the Attorney General dated December 21, 1994; OAG 78-725; OAG 74-698; OAG 72-228; 10 McQuillin Mun. Corp. (3rd Ed.), §29.35; City of New Rockhelle v. Friedman, 190 Misc. 654, 78 N.Y.S.2d 681 (1947); 64 Am.Jur.2d, Public Works and Contracts, §43, 15 ALR3d 733.

6. PURCHASES BETWEEN AGENCIES NOT EXEMPT: No statutory exemption with respect to purchases between cities under the terms of KRS 424.260. OAG 82-530 [See: 45A.425].

7. STATE PURCHASE CONTRACT: KRS 45.365(1) controls state purchase contracts. 200 KAR 5:050; OAG 80-369.