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Office of General Counsel

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July 13, 2017

Richard J. Ornstein
Kentucky Association of Counties
400 Englewood Drive
Frankfort, KY 40601

In Re: Model Procurement Code

Dear Mr. Ornstein:

Butler County has adopted the provisions of the Model Procurement Code (KRS 45A.343 to KRS 45A.460). For all practical times during my tenure as the Butler County Attorney, the County has utilized the Model Procurement Code for the purchase of appropriate goods and services. Historically at the beginning of the fiscal year (July 1st) the County advertises for various materials used primarily by the Butler County Road Department including but not limited to gravel, asphalt, fuel, drainage culverts, etc..

The county recently concluded the purchase process and several questions have arisen with regard to the process. We would like to pose some questions for your review and input.

At the outset, I would like to recite an overview of our understanding of the Model Procurement Code. This is as much for our benefit as it for anyone else's.

1. Under the Model Procurement Code, goods and services may be purchased by means of the following:

- a. Competitive sealed bidding (KRS 45A.365)
- b. Competitive negotiation (KRS 45A.370)
- c. Competitive negotiation, if bids received from competitive sealed bidding exceed available funds (KRS 45A.375)
- d. Noncompetitive negotiation (KRS 45A.380)
- e. Small purchases less than \$20,000.00 (KRS 45A.385)

2. Under competitive sealed bidding (KRS 45A.365) bids may be awarded on the basis of the lowest bid price or the lowest evaluated bid price. If bids are awarded on the basis of the lowest evaluated bid price, the lowest evaluated bid price must be based upon objective measurable criteria which are set forth in the invitation for bids. Thus the Fiscal Court would not be permitted to award a bid based upon the lowest evaluated bid unless that circumstance was included in the invitation for bids and the criteria to be considered were set forth in the invitation.

We have attached several documents as exhibits and they are as follows:

- Exhibit A Invitation for bids published in the Butler County Banner Newspaper (the legal newspaper in Butler County, Kentucky).
- Exhibit B Cold mix bid form received from Green River Materials, Inc.
- Exhibit C Cold mix bid form received from Bluegrass Materials Co., LLC.
- Exhibit D Crushed stone bid form received from Green River Materials, Inc.
- Exhibit E Crushed stone bid form received from Bluegrass Materials Co., LLC.
- Exhibit F Crushed stone bid form received from Charles Deweese Construction, Inc.
- Exhibit G Bid synopsis covering bids received for all items advertised.

In reviewing Exhibit G, I would draw your attention to the bids for cold mix and the bids for crushed stone. In all instances, the bid of Bluegrass Materials Co., LLC., was five cents less per ton than the bid of Green River Materials, Inc. As a result of the bidding process the Fiscal Court awarded the bids to the low bidder Bluegrass Materials Co., LLC, on those items.

At the time the bids were awarded and continuing thereafter, certain questions have arisen concerning the bidding process and the awards thereof. Green River Materials Inc., operates a rock quarry in Butler County and is owned by residents of Butler County. Green River Materials Inc., has employees who live in Butler County and presumably pay taxes, etc... Bluegrass Materials Co., LLC, has a distribution facility located in Butler County but the actual stone is quarried outside of Butler County. Bluegrass Materials Co., LLC, has employees from Butler County but only one or two employees actually employed in Butler County.

A question has arisen as to whether or not the Fiscal Court could give a preference to Green River Materials, Inc., under any circumstance due to the rock quarry actually being located in Butler County. Pursuant to KRS 45A.494, it appears that a preference may be given to resident bidders (residing in the Commonwealth of Kentucky) as opposed to nonresident bidders. It is unclear that this preference extends to the county level.

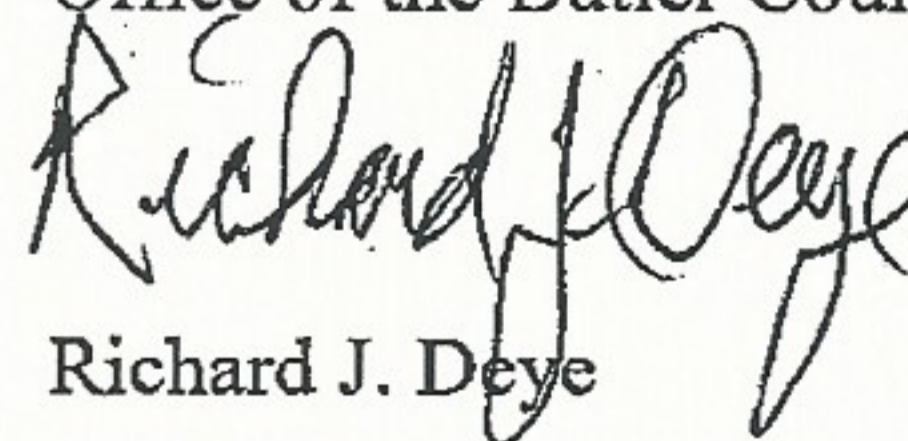
- Question 1** In the competitive bidding process may the Fiscal Court give a preference to a business whose business may have "more ties" to the community in the form of employment, investment, or some other criteria? Presumably there would need to be some notification included in the bid invitation.

In the same way, the bids received from all bidders are for stone to be delivered at the bidder's place of business. The location of the quarry for Green River Materials, Inc., and the location of the distribution facility of Bluegrass Materials Co., LLC, are geographically different and depending upon the location where the gravel will be utilized by the county there may be less freight expense (and thus lower overall costs to the taxpayers) by being able to purchase the gravel at the more favorable location.

- Question 2** If the invitation to bid specifies that the lowest evaluated bid price will be selected and if the invitation to bid included some explanation of the criteria for the lowest delivered costs to the point of usage, could the county have utilized such a factor to accept a lowest evaluated bid price?
- Question 3** Can the county accept more than one bid proposal? Presumably the county can reject all bids conversely may the county accept all bids?
- Question 4** While it didn't happen in this instance, suppose that one bid was less expensive for one product while another bidder was less expensive on another product. Would the county be precluded from accepting parts of the bid from one bidder and parts of the bid from another bidder?
- Question 5** Could the Fiscal Court rebid this matter or is this matter foreclosed until the next fiscal year?
- Question 6** Pursuant to the statute KRS 45A.365, could the county utilize a reverse auction to accomplish this process?

Thank you in advance for taking a few moments to review this matter.

Best Wishes,
Office of the Butler County Attorney



Richard J. Deye

RJD/dmd
enclosures

cc: David Fields, County Judge Executive
Stevie Givens, First District Magistrate
Johnny Tuck, Second District Magistrate
Chad Tyree, Third District Magistrate
David Whittinghill, Fourth District Magistrate
Bobby Moore, Fifth District Magistrate