

KENTUCKY ASSOCIATION OF COUNTIES

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July 19, 2017

Hon. Richard J. Deye
Butler County Attorney
110 North Main Street
Post Office Box 203
Morgantown, KY 42261

RE: July 13, 2017 Correspondence—Procurement Questions

Dear County Attorney Deye:

The Kentucky Association of Counties, Inc. (KACo) is in receipt of the above-referenced correspondence relating to the local government portion of the Kentucky Model Procurement Code (LMPC) (KRS 45A.343-45A.460).

Kentucky mandates that county governments utilize one of two statutory procurement methods: KRS 424.260; or the LMPC. Butler County has adopted the LMPC. In *Handy v. Warren County Fiscal Court*, 570 S.W.2d 663 (Ky. Ct. App. 1978), the Kentucky Court of Appeals set out the procurement standard, or benefit, when bidding is required. The Court stated:

It has been noted that the advertisement requirement and the bidding process itself involves three important benefits:

- (a) an offering to the public,
- (b) an opportunity for competition and
- (c) a basis for exact comparison of bids.

While all three components are important, the third component, '*a basis for exact comparison of bids*', requires an understanding that while counties can do a 'price only' Request for Proposals (RFP) with the subsequent award to the lowest bidder, an option in many instances is the KRS 45A.345(8) '*evaluated bid price*' RFP. In an evaluated bid, price is a component, with fiscal court including other '*objective measurable criteria*' (See KRS 45A.345(15)). For example, if the county were to issue an evaluated bid price RFP for a building project, in addition to price, the *objective measurable criteria* could include: estimated time for project completion, including proposed start date; the contractor's experience with this type of project; the contractor's experience with

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projects within Butler County or the surrounding area; Butler County's experience with the contractor; and other items that the fiscal court determines to be relevant to the project. Fiscal court needs to be able to objectively weigh each component and determine the weight that each component carries within the overall project.

Question 1.

In general, Butler County should utilize caution in simply giving preference to a business within Butler County for the sole purpose that the business has a Butler County business address. While KRS 45A.494 allows the Commonwealth to give a preference to resident bidders over non-resident bidders for state projects, and while that statutory preference for in-state bidders over out-of-state bidders has been incorporated into the LMPC, there is no statutory preference provision relating to resident and non-resident county bidders. That doesn't mean that Butler County is prohibited from giving preference to a resident county bidder, it means that there does not appear to be any case law guaranteeing that Butler County can give preference to a resident county bidder. Should Butler County decide to include a preference for a resident county bidder, Butler County would need to determine the preference weight prior to issuing the RFP. Last, Butler County may have greater success in defending a resident county bidder preference challenge if Butler County adopts a policy mandating this preference be in all county RFPs rather than on an ad hoc basis.

Question 2.

Including a provision relating to lowest delivered costs to the point of usage for gravel appears to be a legitimate *objective measurable criteria* in an *evaluated bid price*.

Question 3.

A county's acceptance of a bid is limited to the RFP requirements. With gravel, if a county includes a statement in the RFP that the county reserves the right to accept one or more bids for the overall tonnage being purchased, the county should be able to accept one or more bids.

Should a county accept all bids, in certain situations the bid process could appear to be a sham. For example, if a county had seven responses to a gravel RFP and chose all seven bids, questions could be raised as to the propriety of the bid process. In that same scenario, if the county then chose to utilize the 4th best bidder (based upon the *objective measurable criteria*) for a road project without going to the three best bidders first in the order in which they ranked, a higher ranked bidder could have a successful cause of action against the county.

Question 4.

Similar to Question 3, a county's acceptance of a bid is limited to the RFP requirements. If the RFP allows a county to accept all or a portion of a bid, a county could accept one component from one bidder and one component from another bidder. A county could have issues with bidders backing out of their bid if they only receive one component rather than having their bid proposal accepted as a whole.

Question 5.

As noted in your correspondence, counties have the right to reject all bids, particularly where the county has included that clause in their RFP. However, once a county has accepted a bid, and where the bidder has relied upon that bid, the county could be liable for damages. If the county has entered into a written contract, beyond acceptance of the bid document, the contractual provisions would be applicable.

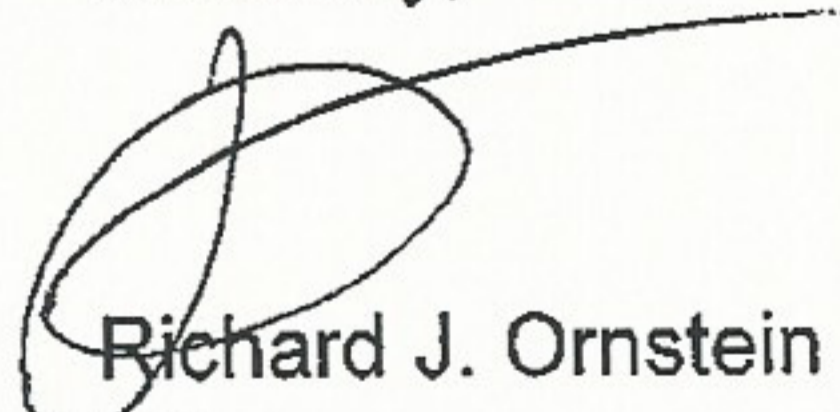
Question 6.

Reverse auctions may be utilized for procurement projects. The only exceptions to the reverse auction process are set out in KRS 45A.370-385, relating to negotiation and small purchases, and possibly KRS 45A.187, which prohibits the reverse auction process in the following three areas:

- ...architectural, engineering, or engineering-related services as described in KRS 45A.730;
- underwriter, bond counsel, or financial advisors as described in KRS 45A.850; or
- contracts for construction as described in KRS 45A.030 which are required to be bonded as described in KRS 45A.185 and 45A.190 or those projects which would require the preparation of stamped drawings.

Should you have further questions, or wish to discuss this matter further, do not hesitate to contact me.

Sincerely,



Richard J. Ornstein
Attorney