

STATE OF KANSAS
HOUSE OF REPRESENTATIVES

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TIMOTHY H. JOHNSON
38TH DISTRICT

February 9, 2024

TO: House Committee on Local Government

RE: Proponent Testimony House Bill 2493
Requiring Rural Water Districts to Let Bids (Cost Over \$25,000)

Dear Chairman Bergquist & Committee:

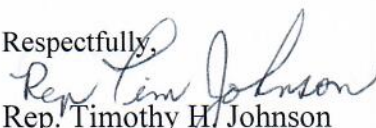
Thank you for allowing me to speak on behalf of the Leavenworth County House delegation in regards to House Bill 2498. This legislation was brought on behalf of the Leavenworth County Commission to alleviate an issue with excessive costs on projects completed by rural water boards.

Some key points regarding this bill are:

1. This legislation impacts only rural water districts and in no way impacts municipal or other local boards of government.
2. This is a requirement that effectively lowers road budget costs for all 105 counties and allows them to better manage their budgets.
3. Rural water boards are the only local governing body currently not required to seek bids on large (over \$25,000) construction projects.
4. While this bill does not have a major impact on taxes, it when coupled with other cost reducing actions meets with the will of citizens who have spoken they desire lower taxes.
5. Competitive bidding on large government projects is a fundamental of open and fair government.

Attached are a formal resolution from the entire board of commissioners of Leavenworth County that initiated our legislative request. Also attached is a Kansas Attorney General Opinion that is applicable to this bill and states on page 2, "*Awarding contracts by public bid-letting encourages competition, allows all contractors an equal opportunity, and avoids any appearance of impropriety or favoritism.*" (Stephan-KAG)

Thank you for your consideration of this legislative proposal.

Respectfully,

Rep. Timothy H. Johnson
38th District (Leavenworth County)



COUNTY OF LEAVENWORTH

Board of County Commissioners

300 Walnut, Suite 225

Leavenworth, Kansas 66048-2815

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November 22, 2023

Re: Request for the Amendment of certain provisions of K.S.A. 82a-601, et seq., and K.S.A. 68-415(c) to require rural water districts to use competitive public bidding in construction projects that involve the use of county funds to relocate district facilities.

Dear Representative Johnson,

As the Board of County Commissioners of Leavenworth County we ask your assistance in enacting necessary amendments to the statutes relating to Kansas rural water districts in order to require that they use the competitive bidding practices when contracting for the relocation of district facilities when required by municipally or state funded road improvement projects. Specifically, the provisions of K.S.A. 82a-601, et seq., do not currently require this practice. We believe that the citizens of the state would benefit from this amendment.

Under Kansas law cities, counties and virtually all other public entities are required to use an open and competitive bidding process when undertaking construction projects over a certain amount. This requirement, based upon the principal that an open and competitive bidding process allows for the best use of public funds, avoids the appearance, or practice, of favoritism in the awarding of contracts. Unlike other public entities, rural water districts organized under K.S.A 82a-601, et seq., are not required to follow this practice. This anomaly has been the subject of an Opinion by the Attorney General in Opinion 88-45, a copy of which is attached.


In 2016 the voters of Leavenworth County voted to impose a county-wide sales tax, the majority of the proceeds to be directed to the improvement of local roads. Since that time, as the county has undertaken these projects, unjustified costs have been incurred. Those costs due to the lack of any competitive bidding process by the local rural water districts when those districts must necessarily relocate facilities due to the road improvement projects. The costs directly impact the amount of the sales tax proceeds available to improve our roads. The lack of a competitive bid process, often coupled with a "sole source" contractor used by the rural water districts, goes against the principle of affording the public the benefit of a competitive bidding process, in the present instance, when county funds are paying for the costs.

Your assistance in working towards the amending of Kansas law to require the use of competitive bidding by rural water districts for material and construction costs associated with any project undertaken by

those districts when the cause of the project is a road improvement project undertaken by the county, is needed. This requirement can be accomplished by the use of language similar to that found in K.S.A. 19-214 and K.S.A. 19-215. A draft of language for the amendment is enclosed. The revisor of statutes can certainly provide any needed changes.

The proposed amendment would not impact the ability of a rural water district to forego competitive bidding in projects that do not involve the use of county funds, leaving the rural water districts the greatest latitude in those matters. The amendment would serve to protect the interests of county citizens who contribute to the cost of rural water district relocation projects.

We appreciate your kind attention to this and we welcome any questions you may have and stand ready to support and assist you in this process.


VICKY KAAZ, CHAIR


JEFF CULBERTSON, MEMBER


MIKE SMITH, MEMBER


DOUG SMITH, MEMBER


MIKE STIEBEN, MEMBER

Awarding of certain contracts; public lettings; notice; exemptions

(a) All contracts for the expenditure of district moneys for the construction, installation, replacement or relocation of district facilities, water lines, pump stations, or buildings, in excess of \$25,000, and which are fully or partially funded by the funds of any municipality or the state, directly or by reimbursement, shall be awarded, on a public letting, to the lowest and best bid.

(b) The person, firm or corporation to whom the contract may be awarded shall give and file with the district a good and sufficient surety bond by a surety company authorized to do business in the state of Kansas, to be approved by the attorney for the district in the amount of the contract, and conditioned for the faithful performance of the contract.

(c) The district shall, not less than twenty (20) days before awarding any contract for such improvements, publish notice of the letting in some newspaper printed in the county, or, if there be no such newspaper in the county, said district shall cause written or printed notices to be posted in at least three conspicuous places in the service area of the district for the same length of time, which notice shall specify with reasonable minuteness the character of the improvement contemplated, the time and place at which the contract will be awarded, and invite sealed proposals for the same. Such other notice may be given as the board may deem necessary or proper.



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

March 31, 1988

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ATTORNEY GENERAL OPINION NO. 88- 45

Mr. Murray E. Anderson
Legal Counsel, Rural Water District No. 2
7589 West 149th Terrace
P.O. Box 23125
Overland Park, Kansas 66223

Re: Waters and Watercourses -- Water Districts; Rural
Water Districts -- Public Letting of Contracts;
Prequalification of Bidders; Lowest Responsible
Bidder

Synopsis: The statutes governing Rural Water District No. 2
of Johnson County do not require the district to
seek competitive bids on construction projects.
For sound policy reasons, however, the district
should award such contracts by public bid-letting.
If such a system is used, the board may reject the
lowest bid if it determines that the bidder is not
responsible. The board should not prequalify or
pre-screen bidders. Cited herein: K.S.A.
19-214; 19-215; K.S.A. 1987 Supp. 19-3516;
68-521; K.S.A. 68-1115; K.S.A. 1987 Supp.
72-6760; K.S.A. 75-3737a; 82a-612.

* * *

Dear Mr. Anderson:

As legal counsel for Rural Water District No. 2 of Johnson
County, Kansas, you ask the following questions:

1) Can the district reject the lowest bid on a public
bid-letting project if the bidder has little or no prior
experience or has a record of poor workmanship?

2) Can the District pre-screen bidders and limit the bidding to bidders who have strong qualifications and a solid experience record on public waterway systems?

Rural Water District No. 2 of Johnson county was organized pursuant to K.S.A. 82a-612 et seq. This act is silent as to the method by which construction contracts must be awarded. In the absence of any statutory mandate, the district is not required to seek competitive bids on construction projects. It is evident from your questions that the district intends to award the contract through a public bid-letting. In our opinion, the district is wise to adopt this procedure.

The State of Kansas strongly favors competitive bidding. For example, K.S.A. 1987 Supp. 19-3516(d), which applies to many of the state's other water districts, requires that contracts be awarded "on a public letting to the lowest responsible bidder. . . ." K.S.A. 75-3737a et seq. requires the Division of Purchases of the State Department of Administration to follow a similar method in awarding contracts. See also K.S.A. 19-214 (county construction contracts); K.S.A. 1987 Supp. 72-6760 (school district contracts). Awarding contracts by public bid-letting encourages competition, allows all contractors an equal opportunity, and avoids any appearance of impropriety or favoritism.

You first ask whether the district can reject the lowest bid on a public bid-letting where the bidder has little or no prior experience or has a record of poor workmanship. You note that K.S.A. 1987 Supp. 19-3516(d) requires contracts to be awarded to the "lowest responsible bidder." There is little case law giving any guidance as to the criteria used to determine the "lowest responsible bidder." In Williams v. City of Topeka, 85 Kan. 857 (1911), the Kansas Supreme Court stated:

"We conclude that the word 'responsible' in the phrase 'lowest responsible bidder' was used by the legislature in the sense in which it had long been interpreted by the courts and text-writers, and must be held to imply skill, judgment and integrity necessary to the faithful performance of the contract, as well as sufficient financial resources and ability." 85 Kan. at 863.

The question becomes, who has authority to determine whether a bidder is responsible, and upon what basis can this

determination be made? Clearly the water district board, since it is the body awarding the contract, has authority to determine whether a bidder is responsible. The court in Williams provides guidance as to the basis upon which the board may make this decision:

"The determination of the question who is the lowest responsible bidder does not rest in the exercise of an arbitrary and unlimited discretion, but upon a bona fide judgment based upon facts tending to support the determination. [Citations omitted]. The statute will not be so interpreted as to afford a cover for favoritism. The city authorities are required to act fairly and honestly, upon reasonable information, but when they have so acted their decision can not be overthrown by the court." 85 Kan. at 863-64.

We discussed this issue in Attorney General Opinion No. 78-341 as follows:

"You ask what evidence is necessary to justify a determination that a bidder is not 'responsible,' and what procedures must be followed in making that determination. . . . [I]t is impossible to generalize as to the quantum or kind of evidence which must be shown. We can only respond that the Director must rely upon reasonable information known to him, which affords a substantial basis for the judgment which he draws therefrom."

You specifically ask whether the lowest bidder may be rejected on the basis of having little or no prior experience or a record of poor workmanship. In our opinion, the water district board may reject a bid from a bidder with a known record for poor workmanship, based on the criteria set forth in Williams. In addition, a bidder with little or no experience may fail to meet the guidelines of a responsible bidder. The board, however, must be able to back up these determinations with facts of some substance.

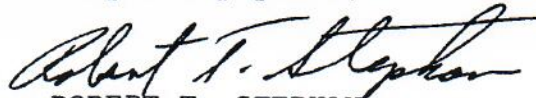
You also ask whether the board may pre-screen bidders and accept bids only from those with strong qualifications. Attorney General Opinion No. 85-168 deals with this issue in detail. In that opinion a county counselor inquired whether the county may prequalify bidders on the construction of county or public buildings, the construction and maintenance of county roads, and the construction of bridges. We

of county roads, and the construction of bridges. We concluded that prequalification or pre-screening of bidders is not permissible. The statutes granting counties the authority to award such contracts contain no language indicating that the legislature contemplated prequalification of bidders. We noted that the county is adequately protected against an unqualified bidder by the statutory language "lowest responsible bidder." We also stated in the opinion that "strong policy reasons mitigate against prequalification of bidders." Specifically, competitive bidding guards against collusive contracts and favoritism, promotes competition, and affords fairness of opportunity to businesses wishing to bid.

It should be noted that in Attorney General Opinion No. 85-168 we stated that a board of county commissioners may, pursuant to its home rule powers, enact a charter resolution allowing for prequalification of bidders for the construction of bridges as K.S.A. 68-1115 is not uniformly applicable to all counties. This option is not available to the water district board as it is not vested with home rule powers.

In summary, the statutes governing Rural Water District No. 2 of Johnson County do not require the district to seek competitive bids on construction projects. For sound policy reasons, however, the district should award such contracts by public bid-letting. If such a system is used, the board may reject the lowest bid if it determines that the bidder is not responsible. Also, the board should not prequalify or pre-screen bidders.

Very truly yours,



ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS



Rita L. Noll
Assistant Attorney General

RTS:JLM:RLN:bas