

Ky. OAG 79-501, 1979 WL 33407 (Ky.A.G.)

*1 Office of the Attorney General

Commonwealth of Kentucky

OAG 79-501

September 18, 1979

Mr. David L. Webb
 Superintendent
 Edmonson County Schools
 P. O. Box 128
 Brownsville, Kentucky 42210

Dear Mr. Webb:

As the Superintendent of the Edmonson County Board of Education you have asked the Office of the Attorney General for an advisory opinion regarding a construction project. You informed us that the board of education is planning to accomplish this construction project through the utilization of what is termed the "Construction Management approach." You stated this method differs from the traditional approach in that the general contractor is replaced by a construction manager, and instead of receiving one master bid for the project, the board of education will receive several bids directly from subcontractors. With this background you have asked the following questions:

1. It is the intention of the Edmonson County Board of Education to employ a general contracting firm as the construction manager for this project. Should this professional service be subject to competitive bidding?
2. Would the firm that is selected as the construction manager for this project be permitted to bid competitively on other phases of the construction?
3. The Edmonson County Board of Education intends to exercise its exempt status as relates to Kentucky Sales Tax throughout this project;

specifically, we intend to purchase items of equipment by competitive bid with a sub-contractor being required to install said equipment. Will this practice be acceptable and consistent with the statutes?

Your first question brings into play the current law on bidding. There are really two sections of statutes to be construed, one a school law provision, and the other a general statute which sets forth the requirements with respect to advertisement by public bodies. The first of these is [KRS 162.070](#) which reads:

"The contracts for the erection of new school buildings, additions and repairs to old buildings, except additions or repairs not exceeding five thousand dollars (\$5,000), shall be made by the board of education to the lowest and best responsible bidder complying with the terms of the letting, after advertisement for competitive bids pursuant to KRS Chapter 424, but the board may reject any or all bids. All necessary specifications and drawings shall be prepared for all such work. The board shall advertise for bids on all supplies and equipment that it desires to purchase, except where the amount of the purchase does not exceed five thousand dollars (\$5,000), and shall accept the bid of the lowest and best bidder, but the board may reject any and all bids."

The latter statute is [KRS 424.260](#):

"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, 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 five thousand dollars (\$5,000) without first making newspaper advertisement for bids. Provided, however, that this requirement shall not apply in an emergency if the chief executive officer of such city, county or district has duly certified that an emergency exists, and has

filed a copy of such certificate with the chief financial officer of such city, county, or district.”

*2 At first blush there may seem to be a partial conflict or, at the least, less than an identical overlap of these two sections. [KRS 424.260](#) certainly covers the same items to be bid as does [KRS 162.070](#) but noticeably missing in the school law is any reference to an exception bidding for “professional services.” We cannot really explain this fact but do say the Kentucky Court of Appeals had no trouble in determining, on another matter concerning these two statutes, that to the extent [KRS 162.070](#) was in conflict with [KRS 424.260](#) it was repealed and superseded. See [Board of Education of Floyd County v. Hall, Ky., 353 S.W.2d 194, 195 \(1962\)](#). We note that when the provisions of the Model Procurement Code ([KRS 45A.335](#) et seq.) come into effect on January 1, 1980, [KRS 162.070](#) will stand fully repealed. Such a fate has been all too long in coming.

Thus, it is our belief the critical statute to be reckoned with is [KRS 424.260](#). We consider your first question to be presenting whether a construction manager over a construction project is one who renders “professional services” as used in the statute. It is our opinion such a position does constitute professional services and would therefore not be subject to competitive bidding. [\[FN1\]](#) As we understand it, this construction manager will be doing things similar to that of an architect or construction engineer, such as making suggestions on design and overseeing bidding. We already know that the services of an architect are “professional” within the meaning of the term in [KRS 424.260](#) and therefore not subject to competitive bidding. [Jeffersontown v. Cassin, 267 Ky. 568, 102 S.W.2d 1001 \(1937\)](#). See also OAG 78-725, copy attached. The Court, in [Cassin](#), supra, quoted from various cases as well as [McQuillin on Municipal Corporations](#). One quote from [McQuillin](#) given at [102 S.W.2d 1005](#) is as follows:

“In [McQuillin on Municipal Corporations](#) (2d Ed.) sec. 1292 [now 3rd Ed., § 29.35], it is said:

‘Provisions as to competitive bidding have been held not to apply to contracts for personal ser-

vices depending upon the peculiar skill or ability of the individual, such as the services of a court stenographer, an attorney-at-law, a superintendent or architect to supervise and make suggestions relative to work let under competitive bidding, or a consulting or supervising engineer. And generally the requirement does not apply to the employment of a professional man, in which case the authorities have a discretion as to his qualifications.’” (Emphasis supplied.)

We believe this supports our conclusion, based upon the information we have and the plan as described in your letter, that the construction manager services would not need to be retained by following competitive bidding procedures.

As to your second question, we see no legal reason why the firm selected as the construction manager for the project could not also bid competitively on other phases of the construction work. We say this under the belief that the services and work to be performed legitimately can be broken down into various parts or phases. We do sound a note of caution to the school system, however, that it consider whether it desires the construction manager firm to become in a position where one part of that firm is overseeing the work done by another part of the same firm.

*3 Your third question does not present any legal problem, the best we can tell. We see involved two distinct operations. The first one would be the competitive purchasing by the school system of various pieces of equipment. The second operation would entail competitive bidding on the manual services of installing the equipment purchased. Regarding this matter as well as other aspects of the question you have asked us, we encourage you to make contact with the Division of Buildings and Grounds of the Department of Education.

Sincerely,
Robert F. Stephens
Attorney General

By: Robert L. Chenoweth
Acting Deputy Attorney General

[\[FN1\]](#). This is our conclusion based upon [KRS 424.260](#). We believe a contrary conclusion would result after January 1, 1980. See 45A.380(1)(c).

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