1984 Ky. Op. Atty. Gen. 2-306, Ky. OAG 84-274, 1984 WL 185674 (Ky.A.G.)

***1** Office of the Attorney General

Commonwealth of Kentucky

OAG 84-274

August 8, 1984

Hon. Phillip Bruce Leslie
Corporate Counsel
City of Flatwoods
Main & Harrison Streets
Greenup, Kentucky 41144

Dear Mr. Leslie:

This is in response to your letter of July 5 in which you as City Attorney for the city of Flatwoods request an opinion concerning a controversy between the city and the Department for Local Government relative to a grant given to the city for the construction and installation of a sewer line. More specifically, you relate the following facts and question:

> "In September of 1982, the Department of Local Government awarded a grant to the City of Flatwoods for sewer line installation in the amount of $20,000 under provisions of KRS 42.350 to 42.370 after recommendation by the Department of Local Government and Fivco Area Development District.
>
> "The total cost of the project exclusive of in kind labor on behalf of the City was approximately $25,000.
>
> "At the time, the City took the position that it was not necessary to publicly advertise for bids since no single supplier would supply goods in excess of the $7,500 bid ceiling (KRS 424.260). A professional engineer was hired to survey and engineer the project and he was paid $10,000, but the City took the position that his services were professional in nature and were exempted from any public bidding requirements.
>
> "In order to insure reasonable prices were obtained, the City solicited private bids from suppliers in the area on each item of material and services. Project records show the largest single expenditure was to a plumbing firm for materials in the amount of approximately $5,500. The City did not attempt to circumvent the public bidding statute by splitting up the purchase of any one item in order that no single supplier would be paid in excess of $7,500. In fact, each of the item's entirety from a single in that item's entirety from a single supplier.
>
> "The project was completed in November of 1983 and the appropriate forms were filed with the Department of Local Government.
>
> "By letter dated May 8, 1984, the Department of Local Government informed the City that the entire $20,000 grant would have to be refunded because of the failure to advertise for bids on the project as required by law.
>
> "The question we wish your office to address is given the fact no single purchase made by the City during the entire project was in excess of $7,500, is the Department of Local Government legally correct in requesting refund of all grant monies under the attendant circumstances?"

In a follow-up letter you submitted the following breakdown of the expenditures made by the city together with the names of the vendors with whom purchases were made through private but not formal bidding:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Capital projects funded by area development funds are done so under KRS 42.350 to 42.370. When a direct grant is made to a city, as in this case when the amount does not exceed $50,000, KRS 42.355(4) contains the following requirement concerning purchases made from the funds authorized by the grant:

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> ***2** "...When a direct grant in aid has been made to a beneficiary agency, all contracts awarded for the purchase of materials, supplies, equipment or services, except professional and technical services, required for the construction or acquisition of the project shall be awarded to the lowest and best bidder in the discretion of the beneficiary agency after public advertisement as required by KRS Chapter 424 or other applicable law...."

We have previously expressed the opinion that KRS 42.355(4), which refers to KRS Chapter 424, specifically adopts the bidding requirements under KRS 424.260. See OAG 84-57. Thus, we will assume the city has operated under the general bidding statute, KRS 424.260, which requires all contracts for material and services, other than professional, involving expenditures of more than $7,500, to be advertised for bids.

In the case of Bd. of Ed. of Floyd County v. Hall, Ky. 353 S.W.2d 194 (1962), the court made it clear that a unit of government in complying with the demands of a bidding statute cannot divide the work and let it under several contracts so as to circumvent the bidding requirements. The court observed that under such circumstances the merchandise was bought in "dribbles and dabs" and thus violated the statute. On the other hand, the court pointed out that where the transactions or contracts are legally and factually separable the material and supplies so purchased did not violate the statute where they remained under the maximum allowed to be free from the bidding process. As a matter of fact, in this case the court held that certain separate purchases made under the maximum ($500) were valid by declaring the following:

> "However, $113.10 of the $551.67 total was for the purchase of a toilet bowl, lavatory faucet, electrical equipment, and such other miscellaneous items as saw blades and pick handles. These, we think, would not ordinarily be advertised for purchase under the same contract as paint and painting supplies, and it was proper for the board in good faith to buy them separately. To require the furnishing of paint, hardware, and plumbing fixtures under the same contract would discriminate against the paint store that does not handle hardware, the plumbing supply house that does not handle paint, etc. Public contracts must be reasonably adapted to the customs and channels of trade, and reason would not demand, nor good faith normally permit, that toilet bowls and pick handles be lumped with paint and brushes under the same procurement contract."

Next referring to McQuillin, Mun. Corps., Vol. 10, Sec. 29.33, we quote the following:

> "Where a municipality is prohibited from letting contracts involving an expenditure of more than a specified sum without submitting the same to competitive bidding, it cannot divide the work and let it under several contracts, the amount for each falling below the amount required for competitive bidding. However, legally separable and factually separate transactions, each of which is below the amount required for competitive bidding, but in the aggregate exceeding such amount, do not require such bidding merely because they were ratified by a single act."

***3** Referring initially to the expenditure of $10,000 for the services of a professional engineer, we believe such expenditure falls within the category of professional services exempt from bidding under the terms of KRS 424.260 and have so held in OAG 78-27, copy attached. See also McQuillin, Mun. Corps. Vol. 10, Sec. 29.35.

As for the other separate items of expenditures it would appear that certainly many of the purchases mentioned are in fact legally and factually separable. For example: manhole units, $3,085.00; sewer pipe, $5,486.51; gravel, $386.89; horizontal boring for the road bed, $1,702.00; asphalt paving, $1000.00 and general labor including manhole installation, $2,850.00. Concerning the separate purchase of manhole units from Armco, Inc. and sewer pipe from Hanco, Inc. which together exceed the $7,500 limitation, you have advised that such was necessary since Armco does not sell sewer pipe.

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However, even if it did and Hanco sold manhole covers, we believe the two items are separable. On the other hand, certain other items purchased separately would not appear separable from a factual standpoint such as the two separate purchases of hardware, gravel and straw. However, these items when lumped together are substantially less than the statutory limitation of $7,500 for purchases that do not require bidding.

There is no hard and fast rule to follow other than that of good faith where the usual customs and channels of trade have been observed and applied in making such purchases. However, under the circumstances and based on the facts furnished, we believe the city acted in good faith in making the separate purchases and did not violate the bidding requirements under KRS 424.260 in the construction of the sewer project. Therefore, we do not believe the Department for Local Government is legally entitled to the requested refund. Of course, the matter being primarily factual in nature, it would ultimately be for the courts to determine.

Sincerely,
David L. Armstrong
Attorney General

Walter C. Herdman
Asst. Deputy Attorney General

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