October 17, 2011

Dear Finance Director:

You have the following question: Is there any legal authority that addresses the question of whether brand names of items needed by the city can be specified in bid specifications (or, I assume, taken into consideration in awarding bids)?

A number of cases have arisen in the United States on bid preferences, a component of which is brad references. A Tennessee case not directly related to the specification of brand names is still important on that subject. The Tennessee Supreme Court in State ex rel. Wright v. Leech, 622 S.W.2d 807 (Tenn. 1981), answered the question of what “competitive bidding” meant:

1. “The request for bids must not unduly restrict competition. All persons or corporations having the ability to furnish the supplies or materials needed, to perform the work to be done, should be allowed to compete freely without any unreasonable restrictions.”

2. “It is essential that bidders, so far as possible, be put on terms of perfect equality so that they may bid on substantially the same proposition and on the same terms.”

3. “In order to attain competitive bidding in its true sense, proposals for bids must be invited under fair circumstances which afford a fair and reasonable opportunity for competition.”

4. Among other things, the advertisement for bids should include “[s]pecifications of the supplies or equipment to be purchased and the quantity thereof.”

Those standards are not optional, continued the Court, they must be followed.

The obvious fundamental principles of Leech are that all bidders must be put on a level playing field, and that the bidding process actually be competitive.

Some very early Tennessee cases upheld the award of brand name purchases. For example, Beasley v. Kennedy, 52 S.W. 791 (1899) upheld the purchase by the City of Nashville of two brand name fire hoses, even though the court acknowledged that there were no differences in quality between those fire hoses and others that were available. [Also see Burns v. City of Nashville, 221 S.W. 828 (1920)]. However, those cases pre-date State ex rel. Wright v. Leech, and the adoption of Tennessee’s Municipal Purchasing Law in 1983.

But it is apparently still not always true that a city cannot specify brand name products in bids, but the circumstances where such is permitted will probably be infrequent. It is said in 10 McQuillin, Municipal Corporations, § 29.34, that:

[C]ompetitive bidding laws may exempt contracts to “sole source” suppliers. For a company to be a “sole source,” its product or service must be unique; the uniqueness must be substantially related to the intended purpose, use, and performance of the good or service being sought; and the supplier seeking to be declared a sole source must show that other similar goods or services cannot perform the government’s desired objective.

Tennessee’s Municipal Purchasing Law of 1983, found at Tennessee Code Annotated, § 6-56-301 et seq., contains a sole source purchasing exception, which provides that “Any goods or services that may not be procured by competitive means because of the existence of a single source of supply or because of a proprietary product… [Tennessee Code Annotated, § 6-56-304(2).] Presumably, the Tennessee courts would give that provision a narrow interpretation consistent with McQuillin, above;

Otherwise, Tennessee’s Municipal Purchasing Law could quickly be made meaningless.

An important case arose in the U.S. Sixth Circuit Court of Appeals, in which Tennessee is located. Generally, a government body has considerable discretion in determining what is the lowest and best bid, but in Owen of Georgia, Inc. v. Shelby County, 648 F.2d 1084, 1992 (6th Cir. 1981), it is said that such discretion is restricted to reasons that affects the city’s bargain “to substantially the same degree that, for example, inferior quality goods or non-conforming goods affect it. Poor workmanship on a previous job is one example of such a factor.” It is also said in 10 McQuillin, Municipal Corporations, § 29.73, that there must be a plausible reason for a rejection of the lowest bid. That case does not directly involve brand name purchases, but in pointing towards the things a municipality can consider in purchasing goods and services it points away from brand name purchases that do not have a true bearing on the quality of the product or service being purchased. Under State ex rel. Wright v. Leech, the specification of brand name goods or services in bid specification is generally inconsistent with the competitive

bidding principles announced in that case. They do not put the sellers of similar goods and services on a level playing field. There are undoubtedly some instances in which brand name specifications are appropriate, but such instances will probably be rare.

If I can help you further in this or any other matter, please let me know.

Yours truly,

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