



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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FILE NO. 02-002

ADMINISTRATIVE LAW:
Sole Source Procurement
of Accounting Services

The Honorable Thomas J. Walsh
Legislative Audit Commission
622 Stratton Building
Springfield, Illinois 62706

The Honorable Julie A. Curry
Legislative Audit Commission
622 Stratton Building
Springfield, Illinois 62706

Dear Senator Walsh and Representative Curry:

I have your letter wherein you inquire whether the Department of the Lottery complied with the requirements of the Illinois Procurement Code (30 ILCS 500/1-1 et seq. (West 2000)) in contracting for the services of certain accounting firms to conduct and observe the midday and evening lottery drawings. For the reasons hereinafter stated, it is my opinion that the Department of the Lottery should have requested competitive proposals from qualified accounting firms for the professional services

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required, rather than procuring those services through the sole source procurement procedure.

The Procurement Code generally requires that State contracts for professional and artistic services, including accounting services, be awarded using a competitive request for proposals process. (See 30 ILCS 500/20-35, 35-5, 35-30 (West 2000), 44 Ill. Admin. Code 1.2035 (2001).) Exceptions are provided, however, for circumstances in which there is only one economically feasible source for the services, in emergency situations and for certain small contracts. (See 30 ILCS 500/20-25, 20-30, 20-35, 35-35 (West 2000).)

With respect to sole source procurements, section 20-25 of the Procurement Code (30 ILCS 500/20-25 (West 2000)) provides:

"Sole source procurements. In accordance with standards set by rule, contracts may be awarded without use of the specified method of source selection when there is only one economically feasible source for the item. At least 2 weeks before entering into a sole source contract, the purchasing agency shall publish in the Illinois Procurement Bulletin a notice of intent to do so along with a description of the item to be procured and the intended sole source contractor."

The Department of Central Management Services has promulgated a rule setting standards for sole source procurement as part of its

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Standard Procurement Rules (44 Ill. Admin. Code Subtitle A,
Chapter I, Part 1 (2001)):

"Sole Economically Feasible Source Procurement

a) Application

The provisions of this Part apply to procurement from a sole economically feasible source (referred to as sole source) unless the estimated amount of the procurement is within the limit set in Section 1.2020 (Small Purchases) or unless emergency conditions exist as defined in Section 1.2030 (Emergency Procurements) of this Part.

b) Conditions for Use of Sole Source Procurement

Sole source procurement is permissible when a requirement is available from only a single supplier or when only one supplier is deemed economically feasible. A requirement for a particular proprietary item does not justify a sole source procurement if there is more than one potential bidder or offeror authorized to provide that item. The following are examples of circumstances that could necessitate sole source procurement:

1) where the compatibility of equipment, accessories, replacement parts, or service is a paramount consideration;

2) where a sole supplier's items are needed for trial use or testing;

3) where a sole supplier's item is to be procured for commercial resale;

4) where public utility regulated services are to be procured;

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5) where the item is copyrighted or patented and the item or service is not available except from the holder of the copyright or patent;

6) the procurement of the media for advertising;

7) the procurement of art or entertainment services; and

8) changes to existing contracts (see subsection (c)).

c) Changes

1) Changes to an existing contract that are germane and reasonable in scope and cost in relation to the original contract or program * * *.

2) A change (whether in cost or rate) that does not exceed the applicable small purchase limit as defined in Section 1.2020 of this Part, or that is an emergency as defined in Section 1.2030 of this Part * * *.

d) Procurement Officer to Determine

1) The determination as to whether a procurement shall be made as a sole source shall be made by the Procurement Officer. Such determination and the basis therefore shall be in writing. Such officer may specify the application of such determination and the duration of its effectiveness.

2) Any purchase request submitted to the CPO suggesting that a procurement be restricted to one potential vendor shall be accompanied by an explanation as to why no other vendor will be suitable or acceptable to meet the need.

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e) Publication of Sole Source Notice

The Procurement Officer shall publish in the Bulletin notice of intent to contract with that vendor at least 14 days prior to execution of the contract.

1) If no challenge to his determination is made by a vendor within the 14 day period, the Procurement Officer may execute a contract with that vendor.

2) If a challenge is received, the Procurement Officer shall consider the information and shall commence a competitive procurement if the Procurement Officer determines that more than one economically feasible source may be available and the sole source designation is, therefore, not appropriate, unless an emergency situation exists.

f) Negotiation in Sole Source Procurement

The Procurement Officer shall conduct negotiations, as appropriate, to reach contract terms including price, and shall maintain a record of each sole source procurement showing:

- 1) the vendor's name;
- 2) the amount and type of the contract;
- 3) what was procured; and
- 4) the identification number of the contract file." (44 Ill. Admin. Code 1.2025 (2001))

In his June 30, 2000, audit of the Department of the Lottery, the Auditor General found that the Department did not comply with the provisions of the Procurement Code when it

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renewed contracts with two of three accounting firms to conduct and observe the midday and evening lottery drawings without engaging in a competitive request for proposal process. The Department renewed the contracts as sole source procurements, and complied with the technical requirements for entering into such contracts. It was concluded in the audit, however, that because the Department contracts with more than one accounting firm to provide the required services, there is necessarily more than one economically feasible source for the services, and the use of the sole source procurement procedure was therefore not appropriate.

Section 1.2025(d) of the Standard Procurement Rules provides that the determination as to whether a procurement shall be made using the sole source exception is to be made by the pertinent procurement officer, in this case the State purchasing officer for the Department of the Lottery. That officer is required to provide a written basis for his or her decision, and did so, in a memorandum to the contract file dated May 20, 1999. The memorandum states, in full:

"In view of the fact that the integrity and well being of the Lottery is based on the game drawings being performed without compromise and [the firm's] experience in performing the highly procedural process, rates charged by this company are below standard billable rates for these services, it is in the best interest of the Lottery and a sole

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source procurement is appropriate and authorized."

When public officials are given discretionary administrative powers, an exercise of that power will ordinarily be upheld in the absence of fraud, corruption, oppression or gross injustice. (People v. Roush (1984), 101 Ill. 2d 355, 365.) When administrative authority is exercised in an arbitrary or capricious manner, however, an action may nonetheless be invalidated. People ex rel. Stephens v. Collins (1966), 35 Ill. 2d 499, 500; Dorfman v. Gerber (1963), 29 Ill. 2d 191, 196.

Initially, I note that the memorandum prepared by the Lottery's procurement officer for filing in the contract file does not refer to any of the standards for sole source procurement found in section 1.2025 of the applicable rules. Sole source procurement is permissible (1) when a requirement is available from only a single supplier or (2) when only one supplier is deemed economically feasible. The Department's explanation refers to the integrity of game drawings, the experience of the current contractor and its below standard billable rates, none of which are among the examples listed in section 1.2025 of the Rules. The Department's response to the audit finding, and additional information provided in connection with the request for this opinion, cite the first example listed in

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the rule, emphasizing that compatibility of service is a paramount consideration for the Lottery; the availability, experience and training of the contractor's personnel with respect to rules and procedures is claimed to be critical to the integrity of lottery drawings.

The rationale provided by the Lottery and its procurement officer is unpersuasive in these circumstances because no claim has been made that the services required are available only from a single supplier, or that only one supplier is deemed to be an economically feasible source, as contemplated by statute. Indeed, because the Department has similar contracts with three different accounting firms, it is unlikely that such a claim could stand.

The Department emphasizes that a number of the contracting firm's officers must be trained, both by the firm and by the Department, in drawing procedures and rules, so that personnel conducting drawings can be regularly rotated, preventing collusion or an appearance of impropriety. These are matters appropriately included in the specifications for a request for proposals for professional services. In the absence of any evidence to the contrary, it cannot be presumed that none of the other large accounting firms with offices in the Chicago area is

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capable of providing the number of officers, trained in the Lottery rules, required by the Department, or what rates such firms might charge for this type of service. Lottery rules and procedures are not proprietary information or trade secrets, but are available to anyone who might wish to study them (11 Ill. Admin. Code Part 1770 (2001)), and it cannot be assumed that they are beyond the understanding of other professional accountants.

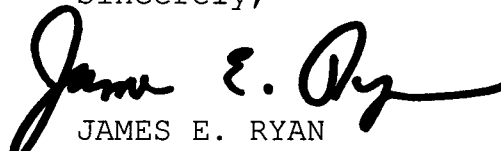
Therefore, it is my opinion that the determination that the Department's contracts with accounting firms to conduct and observe Lottery drawings should be renewed on a sole source basis is not consistent with the requirements of the Procurement Code. It is readily apparent that more than one accounting firm exists which may be capable of supplying the Department's needs, and no evidence has been offered that other firms are not economically feasible sources.

Notice of these procurements was published in the Procurement Bulletin for at least 14 days prior to execution of the contracts, as required by rule 1.2025(e), and no comments or objections to the procurements were received. Thus, any potential competitors for the contracts had notice, and cannot now be heard to complain. The Procurement Code does not require or authorize the suspension of contracts based upon an error in the

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procurement process. Upon expiration of the current contracts,
however, a competitive request for proposals procedure should be
employed for procurement of future services.

Sincerely,


JAMES E. RYAN
Attorney General