

**SOUTH KING FIRE AND RESCUE
KING COUNTY, WASHINGTON**

RESOLUTION NO. 562

**A RESOLUTION OF THE GOVERNING BOARD OF SOUTH KING FIRE AND
RESCUE DECLARING THAT THE PURCHASE OF PORTACOUNT FIT
TESTING EQUIPMENT IS A SOLE SOURCE PROCUREMENT AND
WAIVING COMPETITIVE BIDDING.**

WHEREAS, the Board of Commissioners has been provided with a formal legal opinion by legal counsel that the purchase of the PortaCount Quantitative Respirator Fit Testers Model 8048 is clearly and legitimately limited to a single source of supply, i.e. the manufacturer TSI Incorporated; and

WHEREAS, therefore competitive bidding is not required and is impractical;

NOW THEREFORE BE IT HEREBY RESOLVED AS FOLLOWS:

Section 1.

The District has specified by brand name the above model of fit testing equipment because the purchase of any other fit test equipment, from any other manufacturer, would be incompatible with the existing fit testing equipment used by South King Fire and Rescue and would defeat the need for standardized training on the use of fit test equipment for the district's Self Contained Breathing Apparatus (SCBA). The District therefore accepts and concurs with the legal opinion that purchase of this model of fit testing equipment is a sole source procurement as the item can only be purchase from TSI Incorporated.

Section 2.

The legal opinion on this sole source procurement shall be maintained on file and attached to this Resolution.

ADOPTED by the Board of Fire Commissioners of South King Fire and Rescue, King County, Washington, at a regular meeting this 27th day of December, 2018, with the following Commissioners being present and voting.



CHAIRMAN/COMMISSIONER



VICE CHAIR/COMMISSIONER



COMMISSIONER



COMMISSIONER



COMMISSIONER

ATTEST:



Secretary

Quinn & Quinn, P.S.

PROFESSIONAL SERVICE CORPORATION

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December 17, 2018

By Electronic Mail

King County Fire Protection District No. 39 (the "District")

Attn: Board of Fire Commissioners

Re: Sole Source Purchase; PortaCount Quantitative Respirator Fit Testers Model 8048

Dear Commissioners:

The purpose of this letter is to give my opinion as to whether the District may waive competitive bidding for the purchase of new Portacount fit test equipment (for SCBA) from TSI Incorporated of Shoreview, Minnesota. To answer this question, I will (1) set forth the applicable law; (2) outline the facts as you have relayed them to me; and (3) apply the law to the facts to reach a conclusion. My ultimate opinion is yes: The District may waive competitive bidding in this case.

Applicable Law

As you know, RCW 52.14.110 is the applicable public bidding statute, which requires that insofar as practicable, procurement of equipment valued over \$10,000 shall be accomplished using formal sealed bids. One of the statutory exceptions to this bidding requirement is when the when availability of particular equipment is "clearly and legitimately limited to a single source of supply." *See* RCW 39.04.280 (1)(a). This is called the "sole source" exception.

The leading case on the sole source exception is still *Smith v. City of Seattle* 192 Wn.64, 72 P.2d 588 (1937). In *Smith*, the specifications called for bids for "true Mazda lamps only," which were obtainable from only one source. After reviewing two divergent lines of authority, emanating from the highest courts of various states, the *Smith* court adopted the "liberal rule" of interpreting the sole source exception. The court said the public bidding statutes are meant to promote honesty and economy in the public interest, but not to deprive the public of procuring the "best article available."

Quinn & Quinn, P.S.

December 17, 2018

Letter to Commissioners Regarding Sole-Source Purchase

In AGO 61-62, No. 24, the Attorney General pointed out that the holding in *Smith* is broad enough to support specification of *brand name* when the public interest is served thereby. In this AG opinion, after noting that the weight of authority is in favor of the Washington view [citing 77 A.L.R. 702], the AG notes that the underlying purpose of the bid laws would be defeated if such limited specs were forbidden, when it would clearly aid the public interest to allow it. The AG ultimately opined that a public agency may validly declare a sole-source purchase by "listing items by trade name, brand name, or name of manufacturer." Specifying an item for a sole-source purchase by brand name and/or manufacturer is permissible if the agency has not acted "arbitrarily and capriciously, and [is] acting in good faith." AGLO 1971, No. 128.

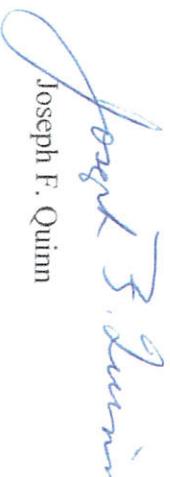
Applicable Facts

The undersigned has been informed as follows: The District wishes to purchase the PortaCount Quantitative Fit Testers Model 8048 equipment from TSI because the existing South King Fire fit test equipment is the same brand. TSI is the manufacturer and sole source of this instrument, which is the only one that uses ambient air particles to calculate a fit factor and this is the only model that can be used with the N95 respirators or any full face respirators. Therefore, to maintain consistency with existing equipment and avoid the need of retraining all applicable personnel on the use of different fit test equipment, specification by brand name is appropriate and not arbitrary or capricious. The purchase of the new fit test equipment will exceed the applicable dollar threshold in the statute.

Application of the Law to the Facts and Recommendation

Because (1) this particular model of fit testing equipment is the only one that will work with your respirators and the District would clearly be specifying this purchase by brand name and manufacturer, which is permitted under *Smith*; and (2) Lauri Perry has informed the undersigned of the importance of maintaining consistency of equipment, the above purchase is "clearly and legitimately limited to a single source of supply" under RCW 39.04.280 (1)(a). Therefore, competitive bidding may be waived in this case by resolution of the Board. Please inform me if you have any questions or concerns.

Very Truly Yours,


Joseph F. Quinn