



STATE OF KANSAS

Office of the Attorney General

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CURT T. SCHNEIDER
Attorney General

August 25, 1975

ATTORNEY GENERAL OPINION NO. 75- 339

Mr. W. Keith Weltmer, Secretary
Department of Administration
2nd Floor - State Capitol
Topeka, Kansas 66612

Re: Department of Administration--Duties and Responsibilities--Clinical Science Facility, KUMC

Synopsis: Contracts executed pursuant to ch. 380, L. 1973 are subject to K.S.A. 75-3739, as amended. The division of architectural services and of purchases, in the performance of any duties under ch. 380, L. 1973, are subject to the general existing laws defining the duties and responsibilities of the respective divisions. The Board of Regents has final authority regarding the approval of contracts for the projects authorized by ch. 380, L. 1973, and may enter into contracts therefor within funds available at the time said contracts are executed.

* * *

Dear Secretary Weltmer:

You inquire concerning the legal responsibilities of the Division of Architectural Services and the Division of Purchases of the Department of Administration under ch. 380, L. 1973, an act providing for the funding and construction of the basic science and clinical facility addition to the University of Kansas Medical Center.

You advise that the total bids for the facility have exceeded appropriations and bond limitations for the project, although within the total bid package, the bids for electrical works, mechanical works and elevators were within the architect's estimates. The question has arisen, thus, whether the Board of

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Regents is empowered to avoid the bidding requirements of the purchasing law and proceed to negotiate with the general contractor who has submitted the low bid, rather than commencing the bidding procedure anew to bring the project within available funds. You indicate it is believed that through negotiation, the bid presently received might be brought within funds available.

You inquire, first, whether the Board of Regents, under the general powers granted in section 3 of ch. 380, L. 1973, may award contracts for the construction of the clinical facility at the University of Kansas Medical Center free from the restrictions of K.S.A. 75-3738 through -3744, as amended by ch. 450, L. 1975. Section 3 is a general grant of "all of the powers necessary or convenient to carry out and effectuate the purposes and provisions of this act," including the power specifically

"(3) to make and execute contracts and other instruments necessary or convenient in the exercise of its powers and functions under this act, payable from funds then available or to be lawfully made available pursuant to the provisions of this act"

For reasons not at all clear from the language of the act itself, special provision is made for the execution of construction and certain other contracts in section 5, which provides thus:

"Notwithstanding any other provisions of law, the director of accounts and reports and the director of architectural services are hereby authorized and empowered at any time after the effective date of this act to execute, cause to be performed and to inspect and supervise the performance of contracts for the construction of the project, including contracts for construction work and the acquisition of supplies, machinery, equipment, fixtures, other real or personal property, professional or other services, landscaping or other purposes. Each of such contracts shall be executed for and in the name of the board but only upon the approval of such contract by the board or its authorized officer or designee and shall be deemed to be the contract of the board payable

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from funds then available or to be lawfully made available pursuant to the provisions of this act." [Emphasis supplied.]

In my opinion, contracts executed pursuant to the foregoing authority are not exempt from the bidding requirements of K.S.A. 75-3739, as amended by ch. 450, L. 1975. This section commences thus:

"In the manner as provided in this act and rules and regulations established thereunder:

(1) All contracts for construction and repairs, and all purchases of and contracts for supplies, materials, equipment and contractual services shall be based on competitive bids"

Nothing whatever in section 3, cited above, exempts contracts executed thereunder from this requirement. Section 5 authorizes the director of accounts and reports and the director of architectural services to execute construction contracts for and on behalf of the Board of Regents, "[n]otwithstanding any other provision of law." They may do so, however, only upon approval by the Board or its authorized officer or designee, and any contract so executed "shall be deemed to be the contract of the board."

All contracts of the Board are, as stated above, subject to the bidding requirements of K.S.A. 75-3739. The construction contracts in question are not exempted from that requirement merely because the execution of such contracts is vested in the directors of the two divisions described above. Surely, if the Legislature had intended to exempt construction contracts for the basic science building and clinical facility addition from the state bidding requirements, it would have found language fairly calculated to say so. It is not clear to what laws the phrase "[n]otwithstanding any other provisions of law" refers. Presumably, this phrase refers only to any existing laws which are contrary to the vesting of powers of execution of such contracts in the director of architectural services and the director of accounts and reports. K.S.A. 75-3739 is not such a law. It applies uniformly to contracts regardless of the agency or officer executing them. Certainly, the director of architectural services and the division of accounts and reports do not, by virtue of their respective offices, enjoy any general contractual power which is exempt from K.S.A. 75-3739.

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In response to your second question, it is my opinion that the divisions of architectural services and of purchases, and the directors thereof, are not free from their normal statutorily prescribed duties and liabilities in the performance of duties vested in them under ch. 380, L. 1973. On the contrary, they must, in my judgment, perform the duties vested in them under this act in accordance with the general laws defining the divisions and their respective duties and responsibilities.

The question arises concerning the duties of the director of accounts and reports and the director of architectural services under section 5 of ch. 380, L. 1973. In my judgment, the authority of these officers to execute any contract under this section is dependent upon the direction and authorization given by the Board of Regents, or its designee. The two officers may execute a contract for construction only after the contract has been agreed upon and approved by the Board or its designee. The question arises whether their duties to execute contracts under this section are mandatory or permissive. Although they are "authorized and empowered . . . to execute, cause to be performed and to inspect and supervise the performance of contracts for the construction of the project," they are not directed to do so. When they do execute a contract, they do so only "for and in the name of the board," and only after such contracts are approved by the Board or its designee. There is little in the section which warrants a construction that their duties are mandatory thereunder. Indeed, the Board remains fully authorized, so far as appears, to execute any and all contracts for the project. These two division directors are given no power of approval or disapproval of contracts submitted for their execution, and if either or both of them chose to refrain from the exercise of the power to execute contracts thereunder, the Board remains fully competent and empowered to execute such contracts in its own behalf. Certainly, nothing in the entire enactment suggests that if the Board proceeded to execute a construction contract in its own behalf, and forebore to obtain the signatures of either of the two division directors, there would have been omitted any single step necessary to insure the validity of that contract.

You ask whether the divisions of architectural services, purchases and accounts and reports may assist the State Board of Regents in architectural drawings, preparation of bidding specifications, publishing bids, accepting bids and awarding contracts to implement ch. 380, L. 1973, and either refuse, after receiving bids and before August 25, 1975, to provide further assistance, and allow the responsibility of awarding contracts to fall solely on

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the Board, or whether these divisions must continue to assist the Board. In my judgment, these respective divisions continue to have, respecting the project authorized by ch. 380. L. 1973, all those statutory powers, duties and responsibilities prescribed by existing law. For example, under K.S.A. 75-3741

"Subject to the applicable provisions of section 39 and 40 [75-3730 and -3740] of this act, all contracts for the construction of buildings . . . or improvements specifically authorized by the legislature for the use and benefit of any state agency shall be let by the director of purchases to the lowest responsible bidder based on plans and specifications prepared or approved and submitted by the state architect and approved by the administrative head of the state agency concerned.

The director of purchases under the supervision of the executive director shall have charge of the erection of all such buildings, . . . , except that the inspection and interpretation of plans and specifications shall be the responsibility of the state architect, and except that the original construction contracts may be changed only by the director of purchases with the consent of the administrative head of the state agency concerned"

Similarly, the director of architectural services continues to have those duties and responsibilities respecting this project which are set forth at K.S.A. 75-1203 *et seq.*

No language in the enactment operates expressly to displace the existing important responsibilities of these state agencies with respect to the basic science and clinical facility additions. Section 15 states in pertinent part thus:

"Insofar as the provisions of this act are inconsistent with the provisions of any general or special laws, or parts thereof, the provisions of this act shall be controlling."

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The existing requirement that the director of purchases shall have charge of the erection of all buildings under K.S.A. 75-3741 is in no wise inconsistent with the provision of section 5 of the 1973 enactment that two other officers, the director of accounts and reports and the director of architectural services are authorized and empowered to "inspect and supervise the performance of contracts for the construction of the project. . . ." Once again, their duties in this regard, as in the matter of execution of such contracts, are cast in permissive terms. The language of an enactment is not always conclusive, but it is often instructive in determining whether a particular requirement shall be regarded as mandatory or directory. *Paul v. City of Manhattan*, 212 Kan. 381, 511 P.2d 244 (1973). Here, the language is directory, and there is no feature of the act which compels, or indeed warrants, an inference that the duties of these two officers in the supervision of construction are mandatory. In my judgment, the director of purchases is required under K.S.A. 75-3741 to let the contracts for the project to the lowest responsible bidders, based on plans and specifications approved by the director of architectural services and by the administrative head of the Board of Regents, and is required to supervise the construction, under the supervision of yourself. The director of accounts and reports and the director of architectural services are entitled, but not required, to share with the director of purchases the performance of construction contracts.

You ask whether the Board of Regents has final authority and decision-making power regarding the awarding of contracts for the clinical facility at Kansas University Medical Center authorized by chapter 380, L. 1973, notwithstanding the advice of the divisions of architectural services and purchases. Under K.S.A. 75-3741, the administrative head of the state agency is authorized to approve plans and specifications, and the letting of the contract is vested in the director of purchases. Those powers remain intact, in my judgment, under ch. 380, L. 1973. The authority and decision-making power of the Board with respect to the clinical and basic science facilities are those reserved to any state agency under K.S.A. 75-3741 for which a building is being constructed. In addition, under section 5 of the 1973 enactment, the Board is reserved the power to approve or disapprove any contract within the compass of that section. This power of approval and disapproval, however, does not entitle the Board to supersede the power of any state official or department regarding the construction of public buildings under K.S.A. 75-3741, as concerns the basic science and clinical facilities.

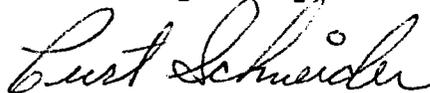
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You inquire whether the Board may "enter into negotiations with the low bidders for the Kansas University Medical Center clinical facility to bring the project within available funds, either before signing and awarding the contracts, or after signing and awarding the contracts, where the scope of such negotiations may result in a departure from the concept of the original bid specifications." The question, as you acknowledge, may be somewhat general, and perforce, my response must be likewise general. I cannot but conclude that the Board has no authority to enter into negotiations with the low bidder on this project which lead to a departure from the concept of the original bid specifications. Obviously, as a practical matter, there is great room for differences whether particular negotiated changes result in a departure from bid specifications. The paramount principle, however, is that there be no negotiations which subvert the bidding process so as to deny to every interested and competent bidder equal opportunity for consideration in the contractual process.

Lastly, you ask whether contracts may be awarded for the clinical facility under ch. 380, L. 1973, and other applicable state laws, which create total contractual obligations exceeding the funds appropriated and made available by revenue bonds, when it is anticipated that the change order process would be used to bring the project within available funds. Under section 3(c) of the 1973 enactment, the Board of Regents is authorized to "make and execute contracts and other instruments . . . payable from funds then available or to be lawfully made available pursuant to the provisions of this act" Under this section, the Board is authorized to enter into contractual obligations which do not exceed funds available at the time of the contract, and funds which are anticipated to become available from bonds, fees and the like, which the Board is authorized under the 1973 enactment to commit to this purpose.

I hope that the foregoing is responsive to each of the questions posed in your letter of August 18. If further questions remain, please do not hesitate to contact me.

Yours very truly,



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CURT T. SCHNEIDER
Attorney General

September 11, 1975

Mr. Max Bickford
Executive Officer
Kansas Board of Regents
Suite 1416 - Merchants National
Bank Tower
Topeka, Kansas 66612

Dear Mr. Bickford:

I write in response to your letter of September 2, 1975.

In Opinion No. 75-339, I concluded that all contracts entered into by the Board of Regents pursuant to ch. 380, L. 1973, for the construction of the clinical facility at the University of Kansas Medical Center were subject to the competitive bidding requirements of K.S.A. 75-3739 *et seq.* In my letter to you of September 2, 1975, I wrote to correct the erroneous public impressions then being circulated that this office had taken some action to delay or stop further progress with the project, reiterating therein that the opinion does not "prevent the Board from entering into a contract with the general contractor if the bidding process is not circumvented." Inexplicably, this letter has been regarded by some zealous parties as permitting negotiating to proceed with the general contractors whose bids have been received.

It is my understanding that estimates for the contracts in question approximated \$14,000,000, while the lowest bid received for general construction work for both exterior and interior work exceeded \$20,000,000. It is apparently urged by some that the Board should proceed to negotiate with one or more of the contractors submitting bids with the view to reduce the final cost of the contract eventually executed, and that this course of action is now permitted by my letter of September 2.

At its meeting on September 2, the Board voted to authorize negotiations "with the available low bidders on the general contract to try to bring the project within the budget." Wisely, however, the minutes reflect, it was further the "consensus that notwithstanding the negotiation proceedings, efforts should

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continue toward document revision for rebids on the general at the earliest possible date."

In order to dispel the entirely unjustifiable confusion on this score, I wish to reiterate categorically and emphatically that no contract may lawfully be entered into by the Board for the construction of the clinical facility except in compliance with the competitive bidding statutes of K.S.A. 75-3739 *et seq.* The elementary principle of competitive bidding which is controlling here is stated at 64 Am.Jur.2d, *Public Works and Contracts*, § 66 thus:

"After bids have been made upon the basis of plans and specifications prepared by public authorities and given out to all interested bidders, no material or substantial change in any of the terms of such plans and specifications will be allowed without a new advertisement giving all bidders opportunity to bid under the new plans and specifications."

In other words, the contract which is finally executed must be that same contract which was offered to the lowest responsible bidder by advertisement.

The bids received to date were based on the plans and specifications approved as the basis for the bid solicitation. Any negotiation to reduce a contractor's offer in excess of \$20,000,000 by several million dollars, or by one million dollars, for that matter, will necessarily result in altered plans and specifications. I have no hesitation in concluding purely as a matter of law that those changes necessary to realize the savings which will be required to bring the contract within budget would constitute material and substantial changes and departures from the contract which was offered by advertised solicitation pursuant to the competitive bidding statutes of this state.

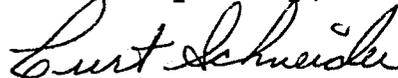
I share the concern of the Board that the project not be unduly delayed. The state purchasing procedures are prescribed, however, to assure the state the maximum economies possible from fair and open competitive bidding. In a project of this magnitude, strict adherence to these procedures is particularly important. We have not been asked to date concerning any of the bids in particular. The questions posed by Secretary Weltmer were necessarily general, and accordingly, my responses have been

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accordingly general in nature. However, in order to alleviate the persistent uncertainty concerning this matter, it is clear that negotiation with either Thomas or Universal toward the execution of a contract which would achieve the necessary savings in these circumstances is fundamentally incompatible with the mandatory bidding procedures applicable to this contract. If the Casson bid is within the funds available, as appears to be the case, and is otherwise acceptable in the judgment of the Board, it is within the legal authority of the Board to act upon that bid.

As further questions arise, my staff and myself will be available at any time to meet with the Board as well as with other state officials having responsibilities regarding this matter.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

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