



STATE OF KANSAS

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Attorney General

November 10, 1976

ATTORNEY GENERAL OPINION NO. 76-340

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

Re: Transportation, Secretary of--Contracts--Bidding

Synopsis: Contracts for services of professional consulting engineers entered into by the Secretary of Transportation pursuant to K.S.A. 1975 Supp. 68-407 are subject to the competitive bidding requirements of K.S.A. 1975 Supp. 75-3737, and may not be obtained by negotiation.

\* \* \*

Dear Secretary Weltmer:

You inquire whether contracts for the services of professional engineers entered into by the Secretary of Transportation are subject to the state purchasing and bidding procedures at K.S.A. 1975 Supp. 75-3737a *et seq.* K.S.A. 1975 Supp. 75-3739(1) states in pertinent part 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 . . . ."

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Subsection (6) of this section exempts highway construction contracts thus:

"Notwithstanding anything herein to the contrary, all contracts with independent concerns for the construction, improvement, reconstruction and maintenance of the state highway system and the acquisition of rights-of-way for state highway purposes shall be advertised and let as now or hereafter provided by law."

K.S.A. 1975 Supp. 68-410 specifies the procedure to be followed in the letting of such contracts as fall within this subsection (6). A contract for professional engineering services is not itself a contract for the "construction, improvement, reconstruction, and maintenance of the highway system," and thus is not exempt from K.S.A. 1975 Supp. 75-3739(1) by subsection (6) thereof.

The question is raised whether contracts for such services may be obtained by negotiation by the Secretary under K.S.A. 1975 Supp. 68-407, without resort to the bidding requirements cited above. K.S.A. 1975 Supp. 68-407 states thus:

"The secretary of transportation is authorized to perform all work, or to enter into, perform and require the performance of all contracts incident to the construction, improvement, reconstruction and maintenance of the state highway system and shall take such steps as will give the provisions of this act full force and effect and do and perform all other duties required by law . . . ."

First, it is suggested that professional engineering services are "professional services," and do not fall within the "contractual services" which are required by K.S.A. 1975 Supp. 75-3737(1) to be obtained by competitive bidding. In my judgment, the term "contractual services" as it appears in that statute clearly includes professional engineering services. Professional services are just as contractual as are quasi-professional or nonprofessional services. The bidding requirement of K.S.A. 1975 Supp. 75-3737 (1) applies not only to contracts for "construction and

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repairs," but also to "all purchases of and contracts for supplies, materials, equipment and *contractual services*." [Emphasis supplied.] It is suggested by counsel for the Secretary of Transportation that the term "contractual services" relates only to construction and repairs, supplies, materials, and equipment, and that "contractual services" which are subject to competitive bidding are similarly restricted, *i.e.*, the services sought to be bid must relate to construction and repair, or the furnishing and maintenance of supplies, materials and equipment. In my judgment, there is no basis whatever for such a restrictive interpretation. The statute is clear, unambiguous, and comprehensive. The word "all" appears twice in the opening words of K.S.A. 1975 Supp. 75-3739(1) to emphasize that not only "[a]ll contracts for construction and repair," but also "all purchases of and contracts" for not only supplies, materials and equipment, but also contractual services, shall be based upon competitive bids. Professional engineering services are plainly contractual services and as such are subject to this provision.

We are referred to the use of the phrase "consultant or professional services" in the Research Foundation Act, K.S.A. 76-2a01 *et seq.*, repealed in 1974. The act was not *in pari materia* with the Kansas purchasing law, and if it were so regarded, it reflects no legislative purpose to qualify or restrict the scope of the term "contractual services" as it was first enacted in 1953 in that law.

The further question remains whether, even if professional services are subject to the competitive bidding procedures administered by the Purchasing Division, they are exempted therefrom by K.S.A. 1975 Supp. 68-407, *supra*. That provision authorizes the Secretary to enter into all contracts "incident to the construction, improvement, reconstruction and maintenance of the state highway system." Nothing in this section exempts *any* contract from competitive bidding. The bidding requirements of K.S.A. 1975 Supp. 75-3737 apply to all contracts of the Secretary of Transportation, as well as to all contracts of other state agencies, except when and as particular classes of contracts are exempted by the terms of that provision itself, as are highway construction contracts, or when otherwise expressly exempted by some other provision of law. K.S.A. 1975 Supp. 68-407 is not such a provision. It is no more than the contractual authority which the Secretary must have in order to administer the affairs of the Department. Contracts entered into thereunder are subject to all other laws of the state, including the purchasing laws, as are contracts of other state agencies. If any exemption from the purchasing laws was intended by the legislature in its enactment of K.S.A. 1975 Supp. 68-407, it was expressed with excessive subtlety, for any such intention is entirely concealed. That provision empowers the Secretary of Transportation to execute all contracts "incident to the construction, improvement,

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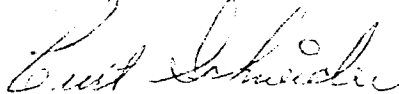
reconstruction and maintenance of the state highway system," when all other applicable laws of the state, including those requiring competitive bidding, have been followed. As this statute clearly indicates, the Secretary of Transportation, and not the Director of Purchases is the proper party to contracts executed thereunder, and any action for breach would be maintained in the name of the Secretary. Clearly, the fact that the Secretary is the proper party to execution of the contract does not exempt the contract from the procedural steps required to be performed by the Director of Purchases prior to its execution, including the receipt of competitive bids.

Our attention has been invited to *Providence Teachers Union, Local 958, A.F.T. v. McGovern*, 112 R.I. 169, 319 A.2d 358 (1974). That case involved the construction of the Providence, Rhode Island, Finance Act, P.L. 1945, ch. 1665, which is neither helpful nor analogous here.

Lastly, it is suggested by counsel for the Secretary of Transportation that the legislature has granted "unlimited power" to the Secretary, and that any requirement that the Secretary utilize the competitive bidding procedures of the state purchasing law represents an "unreasonable restraint" on the power of the Secretary, making him "subordinate" to the Director of Purchases. Of course, the legislature has not granted "unlimited authority" to the Secretary. The legislature *has* granted the Secretary broad authority to perform the duties of the office. The legislature has also deemed it appropriate to require that construction contracts be awarded only "at a public letting to the lowest responsible bidder . . . ." Certainly the requirement that other contracts of the Secretary be awarded similarly on a competitive bid basis represents no greater constraint on the power and authority of the Secretary. The Secretary of Transportation is not "subordinate" to the Director of Purchases, but only to the provisions of article 37, chapter 75, K.S.A. 1975 Supp., which are administered by him.

To recapitulate, it is my opinion that contracts for services of consulting professional engineers entered into by the Secretary of Transportation pursuant to K.S.A. 1975 Supp. 68-407 are subject to the competitive bidding requirements of K.S.A. 1975 Supp. 75-3737, and may not be obtained by negotiation.

Yours very truly,

  
CURT T. SCHNEIDER  
Attorney General

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