

STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

August 22, 1977

ATTORNEY GENERAL OPINION NO. 77-280

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

Re: State Contracts--Arbitration--Liability

Synopsis: K.S.A. 75-3025 prohibits the execution of any construction contract by or on behalf of the State of Kansas which includes an agreement to submit to arbitration unless claims which may be submitted thereunder are limited by the express terms of the agreement to amounts which do not exceed the monies lawfully appropriated and available for encumbrance at the time of execution of the contract.

* * *

Dear Mr. Weltmer:

K.S.A. 75-3025 provides thus:

"That any officer or agent of the state who shall be empowered to expend any public moneys, or to direct such expenditures, is hereby prohibited from making any contract for the erection or repair of any building, or for any other purpose, whereby the expenditure of any greater sum of money shall be contemplated, agreed to, or required, than is expressly authorized by law; and any officer or agent of the state violating this law shall be deemed guilty of embezzlement

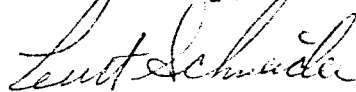
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of the amount in excess of that expressly authorized by law, and upon conviction shall be punished by confinement and hard labor not exceeding five years, or in the county jail not less than six months."

This office has been prompted to consider the legality of arbitration clauses in state construction contracts in view of recent arbitration and resulting litigation. An arbitration clause which permits the arbitration of claims leading to a finding against the state for any amount which is in excess of the amount appropriated and authorized by law for expenditure on the project involved violates both the spirit and letter of this law, in my judgment. Such a clause certainly contemplates, and exercise of the arbitration rights granted thereby may lead to, liability of the state in excess of the lawfully appropriated sums, as demonstrated in the recent Truog-Nichols claim.

It is not my purpose to suggest any culpability on the part of any officials who participated in the execution of contracts including such clauses in the past. I believe, however, that no further contracts should be executed which include an arbitration clause unless the contract specifically provides that no claim may be submitted to arbitration for any amount in excess of a prescribed amount, representing money lawfully appropriated and available at the time of execution of the contract for encumbrance to satisfy any potential obligation arising from an arbitration claim. Arbitration provides a convenient and expeditious vehicle for the resolution of contract disputes, certainly. However, under the cited provision, an agreement to arbitrate without a prescribed limitation of the amount which may be claimed thereunder is unlawful, in my judgment, and no further contracts should be executed with any arbitration clause unless it includes the limitation described above.

Yours truly,



CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj