



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

October 19, 1977

ATTORNEY GENERAL OPINION NO. 77-340

Mr. James W. Bibb
Director of the Budget
Department of Administration
1st Floor - State Capitol Building
Topeka, Kansas 66612

Re: Architectural Services--Negotiation--Construction Administration

Synopsis: If the negotiating committee enters into a contract with an associate architect for construction administration services, they are the responsibility of said associate architect. Those services are the responsibility of the Director of Architectural Services when and only when a contract for those services has not been entered into with an associate architect. The Director may employ a job representative on a project only when no contract for construction administration services has been entered into. If the total contract cost of the project exceeds \$50,000, and no such contract has been entered into, he must employ a job representative. If the total contract cost of the project does not exceed \$50,000, the Director may, but is not required, to employ a job representative. The scope of services comprising "construction administration services" for which a contract may be entered into is defined by K.S.A. 1976 Supp. 75-5408, and no contract for such services is authorized which omits any of those services from the responsibility of the associate architect and purports to vest responsibility for the omitted services in the Director of Architectural Services. Existing contracts for construction administration services which provide a reduced fee therefor, on the assumption that the Director of Architectural Services retains responsibility for certain of those services, such as issuance of change orders, approval of dates

of partial and final completion for payment determinations, and the like, should be renegotiated within a reasonable period of time to provide compensation to the associate architect based upon the performance of all those services enumerated in K.S.A. 1976 Supp. 75-5408. In such instances, the Director has no authority to employ a job representative on any project for which construction administration services has been contracted.

* * *

Dear Mr. Bibb:

You inquire concerning the selection of associate architects and the responsibility for construction administration services under K.S.A. 1976 Supp. 75-5401 et seq.

The question is raised concerning the responsibility for construction administration services, as defined by K.S.A. 1976 Supp. 75-5408(a)-(f), when the negotiating committee enters into an agreement with the associate architect to provide construction administration services, as it is authorized to do by that section. The question is whether responsibility for those services rests with the associate architect who has contracted with the negotiating committee to provide them, or whether the responsibility for those services remains with the director of architectural services.

K.S.A. 1976 Supp. 75-5408, as indicated above, authorizes the negotiating committee to retain the associate architect to provide construction administration services:

"Any firm employed as associate architect to prepare working drawings and specifications may, with the approval of the negotiating committee, also be employed to perform construction administration services"

Those services are enumerated to include the following:

"(a) Advise, consult, and represent the director of architectural services in the administration of the construction contracts;

(b) make periodic visits to check the progress and quality of work for compliance with contract documents;

(c) review and approve shop drawings of fabricators and manufacturers, and samples of materials for conformance with drawings and specifications;

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- (d) prepare change orders and issue field orders to provide for adjustments or changes in work;
- (e) determine dates of substantial and final completion; and
- (f) issue certificates of payment in the amount determined as due the contractor."

You advise that to date, upon the advice of legal counsel for the Department of Administration, K.S.A. 1976 Supp. 75-5408 has been interpreted to provide that, respecting those projects for which the associate architect has been engaged to provide construction administration services, the director of architectural services remains responsible for those services, including issuance of change orders, determining dates of substantial and final completion and issuance of certificates of payment determined to be due, either through his own staff or through a job representative which that section was thought to require on certain projects. That section provides in pertinent part thus:

"If a contract to provide construction administration services as permitted in K.S.A. 1976 Supp. 75-5408, and amendments thereto, is not entered into, such construction administration services shall be the responsibility of the director of architectural services. Whenever any contract is let for the construction, reconstruction or improvement of any state building, and the total contract price for such construction, reconstruction or improvement exceeds fifty thousand dollars (\$50,000), the director of architectural services shall employ a job representative for such project. Whenever any contract is let for any project, the total contract price of which does not exceed fifty thousand dollars (\$50,000), the director of architectural services may employ a job representative for such project and the compensation of such job representative shall be paid from funds appropriated to the division of architectural services for such purpose Job representatives shall be solely responsible to, and shall perform their duties under the direction and supervision of, the director of architectural services."

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The second sentence of this section thus requires the director of architectural services to employ a job representative on any project the contract price of which exceeds \$50,000. The following sentence makes such employment discretionary on lesser projects. According to the interpretation followed in the past, you indicate, the sentence has been abstracted from the section, as it were, and applied to require employment of a job representative on any project costing in excess of \$50,000, whether the associate architect had been retained to provide construction administration services pursuant to K.S.A. 1976 Supp. 75-5408.

Under K.S.A. 1976 Supp. 75-5408(a), the architect who undertakes to provide construction administration is employed expressly to "represent the director of architectural services in the administration of the construction contracts. . . ." Nevertheless, you indicate, the view has been taken that K.S.A. 1976 Supp. 75-5409 requires the director of architectural services to employ a job representative on every project the contract price of which exceeds \$50,000, even though the associate architect has been retained to provide construction administration services; that the director could not delegate to the construction administrator the authority to prepare change orders, issue field orders, determine dates of substantial and final completion and issue certificates of payment, but is responsible for those tasks himself, either through his staff or through the job representative; and that fees, therefore, for construction administration services have been negotiated at less than the full rate authorized therefor because the associate architect could not, under the act thus construed, provide the full range of construction services which the act otherwise contemplates.

This construction is not, in my judgment, justified by the language of the act, creates ambiguity which is not inherent in its language, and effectively frustrates both the purpose and implementation of the provision for retaining associate architects as construction administrators. A literal construction of statutory language should not be followed when the result operates to frustrate an express legislative purpose. Moreover, a "particular paragraph of a statute should not be given an arbitrary construction according to the strict letter but rather it should be reasonably construed with reference to the essential purpose of the entire statute." Wagner v. Mahaffey, 195 Kan. 586, 408 P.2d 602 (1965). In this instance, K.S.A. 1976 Supp. 75-5408 and -5409, enacted as sections 8 and 9 of the 1974 act, are the critical provisions, and they must be construed together. The former permits, but does not require, the associate architect to be employed also to provide construction administration services, and enumerates

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expressly the scope of those services. Obviously, an associate architect who enters into a contract to provide construction administration services is responsible for those services. The following section provides that when a contract for construction administration services is not entered into, they shall be the responsibility of the director of architectural services. The remaining language of this section in its entirety prescribes in what manner the director shall discharge this responsibility. I.e., if the total contract price does not exceed \$50,000, he may do so through his own staff or he may employ a job representative; if the total contract price exceeds \$50,000, he must appoint a job representative.

The view that a job representative is required where construction administration services have been contracted for with the associate architect and that the director through that representative remains responsible for, e.g., preparation of change orders, issuance of field orders, determination of dates of substantial and final completion, and issuance of certificates of payment, simply ignores the fact that the associate architect is contractually legally responsible for those services under -5408. Moreover, this view disregards sections 5408 and 5409 as complementary and alternative provisions. The former authorizes employment of the associate architect to provide certain services which are denominated as construction administration, for which, obviously, that architect is responsible. The latter section fixes responsibility for those services on the director of architectural services when and only when the associate architect has not been engaged to provide them, and proceeds further to specify when the director may and when he must employ a job representative through whom he shall discharge that responsibility. Employment of a job representative to be responsible for change orders, field orders, certifying dates of completion and issuing certificates of payment when an associate architect has been employed for those tasks obviously compromises the express legislative purpose is authorizing employment of associate architects for construction administration in the first instance. The associate architect who is employed for construction administration is the job representative of the state on that project, for that architect is alone legally responsible for all those tasks for which the director of architectural services is otherwise responsible when there is no construction administration contracted for.

To recapitulate and to respond to your specific questions, it is my opinion, first, that if the negotiating committee enters into an agreement with an associate architect to provide construction administration services, it is the associate architect and not

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the director of architectural services who is responsible for construction administration. Where such a contract is entered into, the director of architectural services has no authority to employ a job representative under K.S.A. 1976 Supp. 75-5409, regardless of the project contract price.

Secondly, you advise that the negotiating committee in the past has negotiated contracts for construction administration, but has contracted for fewer than the full range of services described at K.S.A. 1976 Supp. 75-5408. You ask whether this is an acceptable practice, or whether the committee must negotiate for all of the services outlined therein. The term "construction administration services" is used in both K.S.A. 1976 Supp. 75-5408 and -5409 to describe categorically the group of services enumerated in the former statute. Under the latter, when a contract for those services is entered into they are no longer the responsibility of the director of architectural services. In my judgment, there is no authority for fragmentation of the services, by contracting with the associate architect for one or more but less than all, and requiring the director to assume responsibility for the remainder. The statutory scheme of these two sections is clear, in my judgment, that construction administration is to be provided categorically by the associate architect when the negotiating committee chooses to contract for them. When no such contract is entered into, they remain the responsibility of the director of architectural services, whose authority to employ job representatives exists when and only when no such contract is entered into. There is no authority for fragmentation of these services, in my judgment, vesting responsibility for some of them in the associate architect, and for others in the director of architectural services, for he is responsible therefor only when those services are not contracted for, that contract under K.S.A. 1976 Supp. 75-5408 refers to those services categorically, all as comprising the tasks and responsibilities of the associate architect who enters into a contract for construction administration.

You ask if there is any conflict between the responsibility of the director of architectural services and the associate architect where a contract has been negotiated for construction administration services encompassing all of those responsibilities as defined by K.S.A. 1976 Supp. 75-5408. I find no conflict whatever.

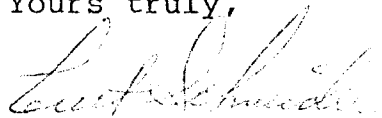
You ask when may, and when must, the director employ a job representative for construction projects. As indicated above, he may do so only when construction is his responsibility, which is only when a contract for construction administration services has not

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been entered into with the associate architect. When no such contract has been entered into, the director may appoint a job representative when the total contract price for the project does not exceed fifty thousand dollars, and must appoint a job representative when the total contract price does exceed that sum.

Lastly, you inquire concerning the status of those projects for which the negotiating committee has negotiated a fee for construction administration services for less than the maximum amount permitted by law, said lesser sum being based on the belief that the director of architectural services retained authority over several of the important tasks described in K.S.A. 1976 Supp. 75-5408, notwithstanding the contract for those services. I suggest that those contracts for construction administration services be renegotiated within a reasonable period in accordance with the foregoing, on the basis that the associate architect will provide the entire range of those services, and that the director of architectural services, either through his own staff or through a job representative employed under K.S.A. 1976 Supp. 75-5409 has no authority or responsibility for those services.

Yours truly,



CURT T. SCHNEIDER
Attorney General

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