



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

December 15, 1977

ATTORNEY GENERAL OPINION NO. 77-390

Mr. John J. Conard
Executive Officer
State Board of Regents
Suite 1416 - Merchants National
Bank Tower
Topeka, Kansas 66612

Re: Contracts--State Agencies--Competitive Bidding

Synopsis: Contracts which are entered into between two state agencies with the approval of the State Finance Council pursuant to K.S.A. 1976 Supp. 75-3711a are subject to the competitive bidding requirements of K.S.A. 1976 Supp. 75-3739.

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Dear Mr. Conard:

You inquire, first, whether contracts which are entered into between two state agencies with the approval of the State Finance Council pursuant to K.S.A. 1976 Supp. 75-3711a are subject to the competitive bidding requirements of K.S.A. 1976 Supp. 75-3739. The latter provision states in pertinent part thus:

"(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"

You state that you have been advised that K.S.A. 1976 Supp. 75-3711a and 3711b were enacted "to provide a means for state agencies

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to contract with other state or federal agencies as a part of responsibilities undertaken through the administration of grants." You ask then, assuming this information to be correct and that the authorization to contract is limited to other state or federal agencies, you inquire as to the purpose to be served by bidding such contracts when only a state or federal agency could be the successful bidder.

K.S.A. 1976 Supp. 75-3711a states in pertinent part thus:

"(b) Any state agency not otherwise specifically authorized by law may, with the approval of the state finance council, contract with and receive, and/or spend or transfer, moneys from other state or federal agencies." [Emphasis supplied.]

The enactment of this section was occasioned by a particular state agency's lack of legal authority to enter into a contract with another state agency, a contractual relationship which was necessary if the state were to be able to participate fully in a particular federal program. The purpose of the statute was, thus, to enable the state agency which did not have specific legal authority to enter into a contractual relationship with another state agency but which needed or wished to do so, to seek the legal authority therefor in approval granted by the State Finance Council, rather than await the next legislative session, and face the possibly protracted delays entailed in seeking legislation. There is nothing in K.S.A. 1976 Supp. 75-3711a which exempts any contracts entered into under State Finance Council authority from any other law regarding the state procurement process. A primary purpose to be served by bidding any contract is economy, to obtain the services described in the specifications at the lowest possible cost. Nothing in K.S.A. 1976 Supp. 75-3711a restricts its application to contracts "when only a state or federal agency could be the successful bidder." It may happen, for example, that a state agency wishes to enter into a contract with another state agency for contractual services which might be available in the private sector. In such an instance, there will be a number of potential interested parties, and perhaps obvious competition. Under the existing K.S.A. 1976 Supp. 75-3739, the competitive bidding process need not be required "[f]or contractual services where no competition exists." Where competition does exist, however, a contract is not exempt from the competitive bidding process merely because the proposed vendor is another state agency.

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In addition you ask "is it not reasonable to assume that since section 75-3711a is silent on the question of competitive bidding and that section 75-3739 was in effect and subsequently reenacted, the legislature through its silence and through presumed knowledge of existing practice did not intend section 75-3739 to be applicable to section 75-3711a?" It is not. You adduce no factual basis for attributing to the legislature any awareness whatever of the existing practice at the time K.S.A. 75-3739 was most recently enacted. Certainly, without some affirmative indication of legislative awareness, there is no basis at all for imputing legislative approval. Moreover, there is no occasion to resort to legislative intention or purpose in the first instance to resolve a question of statutory interpretation where there is no ambiguity or indefiniteness in the language of the statute itself, and there is none in either K.S.A. 1976 Supp. 75-3711a or -3739 on this point.

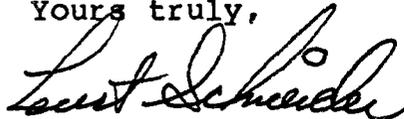
You also inquire concerning a memorandum from John R. Martin of this office dated August 3, 1977, to Acting Director of Purchasing Richard Hart and Mr. Hilton Kennedy. You ask, first, whether certain language therein suggests that there are areas where competitive bidding of contracts either between agencies or with the private sector are not required. There are instances in which competitive bidding is not required. Several such categories appear in K.S.A. 1976 Supp. 75-3739. Secondly, you ask "in that the phrase 'contractual services' can be said to have a specific meaning which excludes 'professional services', are not agency contracts involving professional services exempt from the bidding statute." As used in K.S.A. 1976 Supp. 75-3739, the term "contractual services" does not exclude professional services. The fact that services proposed to be contracted for may be professional in nature does not, in and of itself, exempt that contract from the statutory procurement procedure. You ask whether "all consulting contracts with professionals, including those proposed to be entered into with independent third persons, subject to bidding." Many such contracts are not entered into on the basis of the competitive bidding process, and when and as the Purchasing Division determines that meaningful specifications may be prepared for any given proposed consulting program or project, the contract therefor is properly entered into on the basis of the statutory competitive bidding procedure. You ask whether services provided to the state by private attorneys are subject to competitive bidding. It is impossible to answer the question categorically, without some information regarding the nature of the services proposed to be provided. If, for example, an attorney's services were sought to represent the interests of the state in pending litigation, the nature of the services to be provided may make

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it impossible to prepare specifications which describe in any meaningful and definite fashion the scope, extent and duration of the services proposed to be sought.

You ask with respect to inter-agency contracts for services, whether it would not be appropriate to consider these contracts "to be more in the nature of fund transfers or internal grants administration, rather than formal contracts subject to the competitive bidding requirements." In my judgment, it would not be more appropriate. Mere jargon cannot be used to circumvent the plain requirements of K.S.A. 1976 Supp. 75-3739 and -3711a. While the governor has certain authority to implement transfers of funds, I know of no authority for any agency unilaterally to transfer funds duly appropriated to it to another state agency, whether with or without the consent of the proposed transferee. When one agency enters into a written agreement for the purchase of goods or services from another state agency, the resulting payment therefor pursuant to the contract is not merely a "fund transfer," nor can that contractual relationship properly and fairly be characterized as "internal grants administration," whatever that phrase entails.

Yours truly,



CURT T. SCHNEIDER
Attorney General

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