



STATE OF KANSAS

Office of the Attorney General

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Curt T. Schneider
Attorney General

February 17, 1978

ATTORNEY GENERAL OPINION NO. 78-75

Mr. B. D. Watson
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109 West Laurel Street
Independence, Kansas 67301

Re: Contracts--Public Improvements--Bonds

Synopsis: The bond required by K.S.A. 60-1111(a) is mandatory, and there is no authority for a waiver of that requirement by any governing body or any public official. There is no existing basis upon which to conclude that any member of a governing body or public official who willfully and deliberately fails to require the filing of the bond is immune from personal liability against a claim by any materialmen or worker on such project for any indebtedness which the contractor or subcontractor has failed to satisfy.

* * *

Dear Mr. Watson:

We have your letter of February 9, 1978, concerning K.S.A. 60-1111(a), which provides thus:

"Whenever any public official shall, under the laws of the state, enter into contract in any sum exceeding one thousand dollars (\$1,000) with any person or persons for the purpose of making any public improvements, or constructing any public building or making repairs on the same, such officer shall take,

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from the party contracted with, a bond to the state of Kansas with good and sufficient sureties in a sum not less than the sum total in the contract, conditioned that such contractor or the subcontractor of said contractor shall pay all indebtedness incurred for labor furnished, materials, equipment, or supplies, used or consumed in connection with or in or about the construction of said public building or in making such public improvements."

Under subparagraph (b) of this section, the bond must be approved by and filed with the clerk of the district court of the county in which the work is to be performed. When the bond is filed, no lien shall attach under article 11, ch. 60, K.S.A., and any person to whom there is due any sum for labor or materials may bring an action on said bond for said indebtedness within six months of completion of the improvement or building.

You inquire, first, whether the city, for example, may waive the bond requirement of this statute. At 13 McQuillin, *Municipal Corporations*, § 37.196a, the writer states thus:

"Statutory and charter provisions exist expressly requiring the municipality to compel the contractor for public work to give bond to secure laborers, mechanics and materialmen, and this is held to be a legitimate exercise of legislative power. Statutes requiring a contractor to give bond which shall inure to the benefit of all persons who shall perform labor on or furnish materials to be used on the improvement have been held constitutional, since this is a public purpose. *Such a requirement, it has been held, is mandatory, and may not be waived.*" [Emphasis supplied.]

There is no language in K.S.A. 60-1111 which expressly permits the governing body, or any public official, to waive the bond requirement, and there is no language which, by any necessary or reasonable implication, permits such a waiver. The bond is required in mandatory terms, and in my judgment, there is no authority for any waiver of the filing of the bond.

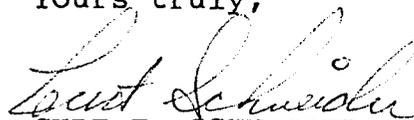
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Secondly, you ask whether the members of the governing body might be personally liable if that body were to enter into contracts described in the referenced statute, without requiring the contractor to furnish the bond required thereby. At 13 McQuillin, *Municipal Corporations*, § 37.205, the writer states thus:

"Neglect to require a contractor of public work to provide bond to protect materialmen and laborers, when imperatively required by law, is held by some courts to create liability for damages in behalf of those injured by reason of such omission. Decisions on such liability are the result, of course, of the construction of the particular statutes involved. Failure of the municipal authorities to exact a bond as directed by statute, may render them liable in their individual capacity to the persons injured." [Footnotes omitted.]

Decisions from Florida and Michigan are cited in reference to members' liability. As you point out, there are no Kansas decisions on this precise question. Obviously, anticipation of liability based upon hypothetical and unknown facts is a hazardous venture. In order to conclude that the members of the governing body clearly were or were not subject to liability, it would be necessary for us to anticipate the facts and circumstances upon which the claim was based, the arguments of the lienholder, materialmen or laborer, and the arguments raised in defense in behalf of the governmental body. At this point, it is sufficient to point out that I know of no clear principle of law extant in Kansas which absolutely assures the members of the governing body of immunity from personal liability for willful and deliberate failure to require the bond which K.S.A. 60-1111(a) mandates.

Yours truly,


CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj