



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

CURT T. SCHNEIDER
ATTORNEY GENERAL

November 22, 1978

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751

ATTORNEY GENERAL OPINION NO. 78- 371

Mr. Donald S. Simons
Chief Attorney
Kansas Department of Transportation
State Office Building
Topeka, Kansas 66612

Re: Highways--Contracts--Retainage

Synopsis: The Secretary of Transportation may not invest funds, validly held as retainage on construction contracts pursuant to K.S.A. 1977 Supp. 68-411, for the benefit of the contractor of the construction project.

*

*

*

Dear Mr. Simons:

You inquire concerning the authority of the Secretary of Transportation to invest money retainage due contractors on Department of Transportation construction contracts, withheld pursuant to K.S.A. 1977 Supp. 68-411, for the benefit of the contractor. You state that the Secretary presently withholds five percent (5%) of total contract payment until a project is completed. The Secretary wishes to invest the retainage so that interest on those sums may also be paid to the contractor upon completion of the contract.

K.S.A. 1977 Supp. 68-411 provides that:

"The secretary of transportation shall make partial payment to a contractor performing any road or bridge work under

Mr. Donald S. Simons
Page Two
November 22, 1978

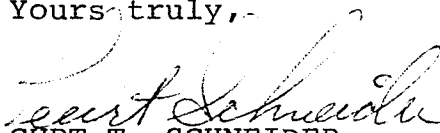
contract with it, as the work may progress, said partial payment not to be less than ninety percent (90%) of the contract price of the material delivered and work done and accepted. The secretary shall provide by regulation, to be made a part of all specifications, for the withholding of not more than ten percent (10%) of the full contract price of any such work until the work is satisfactorily completed and approved by the secretary and the provisions of the contract and bond therefor have been fully satisfied."

There is no statutory authority, however, of any kind, relating to the investment of this retainage by the Secretary. No statutes authorize such investment, prescribe permissible kinds of investments, or direct the disposition of the interest earned thereon. Likewise, there are no statutory provisions from which such authority may be reasonably and necessarily implied.

Assuming, *arguendo*, that such investment authority was to be somehow implied, there would still be no authority for turning the interest earned on such retainage over to the contractor at the time the retainage is paid. The interest would necessarily accrue to the holder of the principal, i.e., the State of Kansas, for until payment of the retainage, it remains in the ownership of the State. Indeed, K.S.A. 75-4210a directs that "[a] moneys received from interest earned on state moneys shall be credited to the state general fund, unless required by law, contract or bequest to be credited to a fund other than the state general fund."

I suggest that the practice be discontinued forthwith, and that all contractors from whom retainage is being withheld be notified accordingly. Certainly, the investment of the retainage may well be a desirable practice, which the legislature may wish to authorize. Such authority should be sought during the forthcoming session, if the Secretary wishes to renew the practice.

Yours truly,


CURT T. SCHNEIDER
Attorney General

CTS:SDT:jm