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ATTORNEY GENERAL OPINION NO. 79-32

The Honorable Norman E. Gaar  
State Senator  
Room 356-E, State Capitol  
Topeka, Kansas 66612

Re: Department of Administration--Contracts for  
State Building Projects--Listing of Sub-  
contractors in Bids

Synopsis: Even though the provisions of K.S.A. 1978 Supp. 75-3741(b), relating to identification of sub-contractors in a general contractor's bid, is [sic] phrased with plural words and terms, it is the manifest legislative intent that a general contractor is required by these provisions to list a single electrical subcontractor and a single mechanical subcontractor. The bid submitted by the low bidder on the Grace Wilke Hall remodeling project at Wichita State University was in compliance with said statutory provisions.

\* \* \*

Dear Senator Gaar:

By your letter of January 29, 1979, you requested an opinion of this office regarding the interpretation and proper application of certain provisions of K.S.A. 1978 Supp. 75-3741(b). Specifically, you asked that we respond to the following two questions:

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"1. Does the section of K.S.A. 1978 Supp. 75-3741(b) requiring general contractors on state building projects to submit the names of their contractors mean that the general contractor must submit the name and address of one electrical subcontractor and one mechanical subcontractor?

"2. Is the general contractor who is the low bidder on the Grace Wilke Hall remodeling project at WSU in compliance with K.S.A. [1978] Supp. 75-3741(b) when he submitted with his bid the names and addresses of two electrical subcontractors?"

The pertinent provisions of K.S.A. 1978 Supp. 75-3741(b) which have prompted your request read as follows:

"Upon any project for which plans and specifications will be prepared and bids let for the project as a whole the general contractor shall submit with the bid, the names and addresses of the subcontractors for electrical work portions of the project and the mechanical work portions of the project and if there are alternative specifications prescribed in the bid documents the general contractor shall submit the names and addresses of any subcontractors therefor. All changes and substitutions in listed subcontractors shall be subject to approval of the secretary of administration."  
(Emphasis added.)

The foregoing quoted provisions were added to K.S.A. 75-3741 by the 1978 Legislature as part of a comprehensive enactment effecting significant changes in the state's laws regarding the construction, repair and improvement of state buildings and facilities. See L. 1978, ch. 337. You indicated in your letter that, by the emphasized portion of the foregoing quoted statutory provisions, the legislature intended to "effectively stop bid shopping by general contractors," by requiring every general contractor to submit with his bid, on building projects to be let under a single contract, the name of the subcontractor for the electrical work portions of the project and the name of the subcontractor for the mechanical work portions of the project.

In support of your contention, you submitted with your letter informal written statements by several members of the 1978 and 1979 Legislatures who, collectively, had major responsibility for the preparation of the legislation in question. We have noted that each such statement buttresses your interpretation. However, we also have noted your recognition of the fact that "the statutory wording of the requirement is open to interpretation."

We concur with your conclusion that the above-quoted statutory provisions are reasonably susceptible of more than one interpretation. Due to the use of plurals ("names," "addresses," "subcontractors" and "portions"), we believe that, in considering these statutory provisions in isolation from the remaining provisions of this statute, they are capable of differing constructions, including the interpretation that more than one subcontractor may be listed for electrical work portions of the project and more than one subcontractor may be listed for mechanical work portions of the project.

While the use of plural words and phrases in the referenced statutory provisions lends support to the latter interpretation, we do not believe such construction accurately reflects the manifest legislative intent underlying these statutory requirements. In reaching this conclusion, we have applied various generally-accepted rules of statutory construction to discern legislative intent. Of course, the only justification for resorting to a discernment of legislative intent, in ascertaining the meaning of the statutory provisions in question, is that the meaning thereof cannot be discerned precisely from the words employed. Absent plain and unambiguous language, the meaning must be determined by ascertaining the legislative intent underlying such provisions.

Initially, it should be noted that, even though plural words and terms are used in statutory provisions, they may be interpreted to include the singular number. 73 Am. Jur. 2d Statutes §220. Such construction is authorized by K.S.A. 77-201, which reads in pertinent part:

"In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature or repugnant to the context of the statute:

. . . .

"Third. Words importing the singular number only may be extended to several

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persons or things, and words importing  
the plural number only may be applied  
to one person or thing . . . ."

The foregoing rule was applied in State v. Watson, 92 Kan. 983, 984 (1914), to find that plural words in a criminal statute included the singular.

While this rule is not determinative of the question presented here, it is cited to indicate that the plural words and terms employed in the statutory provisions at issue do not preclude a finding that the legislature intended that a single subcontractor be listed for the electrical work and a single subcontractor be listed for the mechanical work.

As noted in 73 Am. Jur. 2d Statutes §156, in determining legislative intent "it has been declared that the reason of the law, as indicated by its general terms, should prevail over its letter when the plain purposes of the act will be defeated by strict adherence to its verbiage." (Footnote omitted.) Such rule was quoted with approval in Commerce Trust Co. v. Paulen, 126 Kan. 777 (1928), following which the court added:

"Statutes must have a rational interpretation, to be collected not only from the words used, but from the policy which may be reasonably supposed to have dictated the enactment, and the interpretation should be rigorous or liberal, depending upon the interests with which it deals. It is a familiar principle that rules of strict and literal construction may be departed from in order that absurd results may be avoided, and to the end that a statute shall be effective for the purposes intended.' (25 R.C.L. 1077.)" Id. at 780.

As we understand the practice of "bid shopping," which you suggest was the mischief sought to be eliminated by this legislation, where a state building project is let under a single contract, it has been somewhat customary for a general contractor to use subcontractors on the project who are different from the subcontractors whose bids or estimates were included in the general contractor's successful bid.

Normally, such practice has resulted in a financial benefit to the general contractor and a corresponding financial detriment to the state, not to mention the dissatisfaction among the various groups of specialized contractors.

Under any of the reasonably possible interpretations of the statutory provisions in question, we have no difficulty in discerning a manifest legislative intent to eliminate "bid shopping." We find that the requirements that subcontractors be identified in the bid documents and that changes or substitutions in the identified subcontractors be approved by the Secretary of Administration are designed to accomplish this end. The question, then, is whether this objective can be met by listing multiple, alternative subcontractors for each of the specialized portions of the project. We have concluded it cannot.

In our judgment, unless a general contractor is required to identify in the bid requirements a single electrical subcontractor and a single mechanical subcontractor, the manifest legislative intent will be thwarted. The listing of multiple, alternative subcontractors for each of the specialized work portions of the project will not preclude "shopping around" among the listed subcontractors for the lowest bid after the contract has been awarded, and it will eliminate any real basis the Secretary of Administration might have for preventing such practice.

Our conclusion in this regard is supported by a reading of the statute in its entirety, which is consonant with one of the principal rules of statutory construction, that

"[t]he purpose of a statute is to be gathered from the whole act. In determining such purpose, resort may be had, not only to the context, but to the structure and scheme of the act, and in some cases, to its historical background or legislative history."  
(Footnotes omitted.) 73 Am. Jur. 2d  
Statutes §158.

In applying the foregoing rule of construction, we have examined the previously quoted provisions of K.S.A. 1978 Supp. 75-3741(b) in context with the remainder of this

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subsection. In the paragraph of subsection (b) which immediately precedes the referenced provisions, the following language appears:

"[T]he state building advisory commission shall . . . determine if plans and specifications will be prepared and bids let for the project as a whole or if plans and specifications will be prepared and bids let independently for (1) electrical work portions of the project, (2) mechanical work portions of the project, and (3) all other work required for completion of the project."

Further, in the sentence immediately succeeding the above-quoted provisions, it is provided that, when architectural services are not provided by a project architect, "the secretary of administration shall determine if plans and specifications will be prepared and bids let for the project as a whole or if plans and specifications will be prepared and bids let for each of the three portions of the project independently." (Emphasis added.)

Finally, immediately succeeding the paragraph of the statute here being construed, the statute continues:

"Upon any project for which plans and specifications will be prepared and bids let independently for each of the three portions of the work for the project, the state building advisory commission . . . shall designate the contractor for one of the three portions of the project as the prime contractor for the project." (Emphasis added.)

Even though each of the three paragraphs of K.S.A. 1978 Supp. 75-3741(b) previously quoted deal with different aspects of the submission of bids for a state building project, when they are considered in context with each other, it is apparent that the legislature has conceived of a state building project being divisible into three distinct portions and, where bids are let independently for each of these three portions, that a single contractor

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shall be responsible for each of such portions. When applied to the statutory provisions encompassed by your inquiry, we think it unreasonable to conclude that this same underlying intent does not apply where bids are let for the project as a whole.

Thus, we have concluded that, even where bids are let for the project as a whole, the legislature has recognized three distinct parts of the entire project and that each part should be the responsibility of a single, specialized contractor, regardless of whether such contractor's obligations are directly to the state or to a general contractor. Thus, in our opinion, even though the statutory provisions about which you inquire are phrased with plural words and terms, it is the manifest legislative intent that a general contractor who submits a bid on a state building project, where bids are let on the project as a whole, is required to list the name and address of a single subcontractor for the electrical work portion of the project and the name and address of a single subcontractor for the mechanical work portions of the project.

In responding to your second question, whether the low bidder on the Grace Wilke Hall remodeling project at Wichita State University was in compliance with K.S.A. 1978 Supp. 75-3741(b), we have reviewed the bid documents prepared and submitted on this project. In so doing, we have confirmed your observation that the low bidder on this project submitted the names of two electrical subcontractors. In addition, our review of these documents also revealed that they were not artfully drawn.

For example, while the bid documents required a bidder to list the names and addresses of "major subcontractors," and space was provided, with respect to plumbing, mechanical and elevator portions of the work, for listing a single subcontractor for each such portion of the work, the space provided for electrical portions of the work contained the heading "ELECTRICAL SUBCONTRACTORS." Further, even though bidders were to bid on seven "alternatives," no space was provided for listing any subcontractors for these alternatives, even though K.S.A. 1978 Supp. 75-3741(b) provides that "if there are alternative specifications prescribed in the bid documents the general contractor shall submit the names and addresses of any subcontractors therefor." (Emphasis added.)

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The files of the Division of Purchases pertaining to this project reveal that, upon opening the bids and discovering that the low bidder on the base bid had submitted names and addresses of two electrical subcontractors, Richard A. Hart, Assistant Director of Purchases, sent a letter to the low bidder on January 24, 1979, requesting clarification. The low bidder's reply of January 25, 1979, indicated that "our firm included the names of both firms on our bid form because the award of the electrical contract would be changed if alternate four is accepted." That is, the electrical subcontractor first listed was to be used if the project covered by the base bid was the only project to be accomplished by the contract, but the second electrical subcontractor would be used if the base bid plus the bid on alternate four were accepted. With that explanation, the contract was awarded to said low bidder.

We believe the awarding of the contract under these circumstances was proper and does not reflect any material non-compliance with the bid documents or statutory provisions relating thereto. We believe such action to be an appropriate exercise of the Director of Purchases' discretionary authority, particularly where the opportunity for the discrepancy in the listing of subcontractors was created by the bid documents themselves.

Public officials having the duty to determine the awarding of contracts are vested with wide discretion.

"Public officers in awarding contracts for the construction of public works, the purchase or supplying of materials, etc., perform not merely ministerial duties, but duties of a judicial and discretionary nature, and the courts, in the absence of fraud or a palpable abuse of that discretion ordinarily will not interfere with their decisions as to the details of entering into a contract, or the acceptance of bids therefor, so long as they conform to the requirements of controlling constitutional or statutory provisions, ordinances, or other governing legislative requirements." (Footnote omitted.) 64 Am. Jur. 2d. Public Works and Contracts §64.

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In our opinion, the actions of the Director of Purchases represent a proper exercise of his discretion. Before awarding the contract, he took appropriate steps to assure himself that the statutory requirements of listing a single electrical subcontractor for a project had been satisfied. We find that the inquiry made of the low bidder was consonant with generally accepted authority to make factual inquiries and investigations prior to awarding a contract (64 Am. Jur. 2d. Public Works and Contracts §69), and that the defect in the low bidder's bid was not of a material nature such that it could be deemed "to destroy the competitive character" of the bid. 64 Am. Jur. 2d. Public Works and Contracts §59.

The awarding of the contract in this instance was tantamount to a decision by the Director of Purchases that the low bidder had listed a single electrical subcontractor for the base bid and a single electrical subcontractor for alternate four. Finding no abuse of discretion or authority in making that decision, we find no reason to deviate therefrom. Thus, we are satisfied that the bid submitted by the low bidder on the Grace Wilke Hall remodelling project at Wichita State University was in compliance with the provisions of K.S.A. 1978 Supp. 75-3741(b), in accordance with our interpretation thereof in this opinion.

Very truly yours,



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Attorney General of Kansas



W. Robert Alderson  
First Deputy Attorney General

RTS:WRA:gk