



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

August 10, 1979

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 79-173

Mr. Virgil E. Boatwright, Ed. D.
Superintendent
Unified School District No. 321
P. O. Box 160
St. Marys, Kansas 66536

Re: Schools--School Unification Acts--Bids on Building
Projects Encompassed Within Authorized Bond Issue

Synopsis: Pursuant to K.S.A. 72-6761 voters must receive adequate notice of the purpose for which general obligation bonds of the school district are to be issued. Thus, projects not mentioned in the bond proposition may not be completed with bond proceeds. However, the details of construction on building projects are left to the discretion of the school board. Therefore, where the bond proceeds are sufficient, a board may accept alternatives to upgrade the project. However, if the bond proposition does not so state, bond proceeds may not be supplemented with capital outlay funds in order to pay for alternatives merely designed to upgrade the bond projects.

* * *

Dear Mr. Boatwright:

You request our opinion on several questions regarding the proper procedure for letting of construction contracts relative to a building project which is to be financed with the proceeds of a bond issue. It appears that the following facts give rise to your request for an opinion:

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1. Pursuant to an order issued by the State Board of Education of the State of Kansas on June 13, 1978, the school board of Unified School District No. 321 was authorized to hold an election on the question of issuing bonds.
2. The purpose of the bond issue was to acquire sites and building, equipment, remodel and make additions to Delia and Emmett elementary schools, remodel and make additions to the central kitchen at Rossville Elementary School and to acquire sites and build two new secondary schools, one each at Rossville and St. Marys.
3. On July 18, 1978, the school bond election was held and a majority of the voters approved the bond issue for the above-stated purpose.
4. Said bonds have been sold and the proceeds are now available to the Board.
5. The Board has received bids from contractors for all building projects contemplated. In addition, prices for alternates were also included.
6. Some repair items that were not mentioned as part of the bond issue proposition were bid with the bond project items. Your procedure was to require these repair items to be treated separate from the bond project items, write a separate contract for the completion of these items and provide for payment thereof with capital outlay funds which the district had on hand.

Based upon these facts, you request our opinion on the following questions:

1. Did the school board act properly in removing the repair items from the bond project items?
2. Is accepting an alternate bid proposal for upgrading a permissible expenditure of bond proceeds?
3. Is it proper to use capital outlay funds to obtain an alternate bid proposal, or may action be taken at a later date to make the improvements from capital outlay funds?

In regard to your inquiries, K.S.A. 72-6761 sets forth the purposes and procedure to be followed when a board of education proposes to issue general obligation bonds. This statute states in pertinent part:

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"The board shall have authority to select a school site or sites. When a board determines that it is necessary to purchase or improve a school site or sites, or to acquire, construct, equip, furnish, repair, remodel or make additions to any building or buildings used for school purposes, or to purchase school buses, such board may submit to the electors of the unified district the question of issuing general obligation bonds for one or more of the above purposes, and upon the affirmative vote of the majority of those voting thereon, the board shall be authorized to issue such bonds. The board shall adopt a resolution stating the purpose for which bonds are to be issued and the estimated amount thereof. The board shall give notice of said bond election in the manner prescribed in K.S.A. 10-120 and said elections shall be held in accordance with the provisions of the general bond law"

K.S.A. 1978 Supp. 10-120 requires in general that notice by publication of the bond election be given. Further, the notice must set forth the purpose for which the bonds are to be issued and also the time and place of the election.

The Supreme Court of Kansas has had occasion to consider the purpose of K.S.A. 72-6761. In West v. Unified School District, 204 Kan. 29 (1969), the Court states:

"The obvious intent of the legislature, in requiring the notice to state the purpose for which bonds are to be issued, was to make certain the question to be voted upon was clearly stated so that the electors would not be misled thereby. Equally important is that the ballot state the purpose with clarity. Since bonds may be issued only for such purposes as authorized by statute, with the approval of the electors, each voter must have a fair opportunity to register an intelligent expression of his will. The fundamental principle running through all the cases is that the election laws contemplate that when a special proposition is submitted to a popular vote, the ballot (as well as the notice) shall clearly state the substance of the question to be voted upon by the electors. [Citations omitted.]"
(Emphasis by the Court.) Id. at 38, 39.

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It is clear from the authority presented that the school board derives its authority to issue bonds from the affirmative vote of the electorate. Moreover, as discussed in West, supra, the voters must be given notice of the "purpose for which bonds are to be issued." It is our understanding that the repair items contemplated were not mentioned in the bond issue. As the notice did not inform the electorate that repairs were to be financed by part of the bond proceeds, it is our opinion that the voters of the school district have not approved the expenditure of said proceeds for the purpose of making the repairs contemplated. Therefore, we are constrained to conclude that the Board may not expend bond proceeds for these repair items. Thus, it is our judgment that you acted properly in separating these repair items from the bond project items.

Your second question raises the issue whether accepting an alternate bid proposal for upgrading is a permissible expenditure of bond proceeds. The example you present concerns bleachers. The initial construction plans call for bleachers without back supports. However, the contractors have submitted bids for construction of bleachers without backs and alternative bids for constructing of bleachers with back supports. Now under consideration is the alternative for addition of backs to the bleachers. Your letter indicates there are sufficient proceeds to allow the alternate.

In Rimsey v. Board of Education, 211 Kan. 618 (1973), the Court had occasion to consider a similar question. There, the argument was advanced that construction details were not spelled out in the bond proposition. In response, the Court states:

"We there [referring to Baker v. Unified School District, 206 Kan. 581] took note of a school board's fiscal facts of life - until the bonds are authorized it has no funds to hire an architect, and until plans are drawn final details are necessarily uncertain. As we there said (pg. 583):

"Discretion and responsibility for construction of the school building are vested by the legislature in the school board. Discretion and responsibility for construction of the building are not vested in the appellants and not in this court. (See Warner v. City of Independence, 121 Kan. 551, 558, 247 Pac. 871.)"

"Here we are not surprised at testimony indicating that the board is not yet settled on one building or two - it will depend on what can be built with

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the money available

. . . .

"The choice is, as noted, to be exercised by the board." (Emphasis added.) Id. at 626.

Given these judicial pronouncements, we are of the opinion that, within the confines of the "moneys available," a board of education, in concluding the "details of construction," may properly accept alternative bids for upgrading of the bond projects. Thus, in direct response to your second inquiry, it is our judgment that the Board of Education of Unified School District No. 321 may accept alternate bids for upgrading the projects contemplated by the Board and approved by the voters. However, such alternatives may be accepted only to the extent that sufficient moneys to pay therefor are raised by the sale and issuance of the bonds approved by the voters.

The above conclusion is directly related to your third inquiry. Specifically, you inquire whether it is permissible to supplement, with capital outlay funds, the funds made available by the bond issue in order that alternate bids for upgrading may be accepted. In our judgment, such supplementation is not permissible.

Our conclusion is founded upon the ruling of the Court in Unified School District v. Hedrick, 203 Kan. 478 (1969), where the Court states:

"In an election to authorize issuance of bonds to provide funds for the improvement, enlargement and construction of attendance center facilities in a unified school district, the notices of election and the ballots used must state the proposition submitted so as to clearly inform the voters, and must be informative of the whole and not of a part only of the proposed improvements and state the sources of other funds, if any, applicable to payment of the total cost of the improvements and the amount of bonds to be issued." (Emphasis added.) Syl. para. 1.

In Hedrick, the Court ultimately ruled:

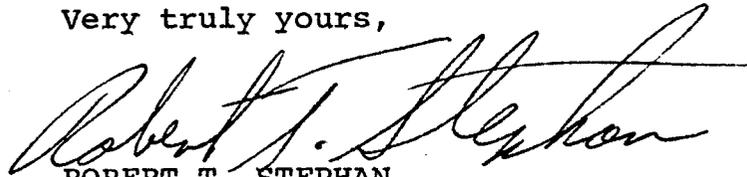
"[T]he election notice and the ballot proposition failed to sufficiently advise a voter as to the proposition upon which he was voting, specifically because the voter was not informed of the conjunctive use of other funds" (Emphasis added.) 203 Kan. at 487.

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A review of the proposition submitted to the voters of Unified School District No. 321 reveals that no mention was made of the "conjunctive use" of bond proceeds and capital outlay funds. Thus, we are of the opinion that such use of funds is not permissible in order to supply the necessary finances to accept alternate bids for upgrading the bond projects. This conclusion, however, should not be interpreted as stating that the board may not, at a later date and upon proper budget procedures, provide for capital improvements with the use of capital outlay funds.

In summary, we are of the opinion that repair items, not included in the bond proposition submitted to the voters of Unified School District No. 321, may not be bid as part of, and paid from, the proceeds of the bond issue made by said district. Further, it is our judgment that, where and to the extent that the bond proceeds are sufficient to so allow, the Board of Unified School District No. 321 may accept alternates for upgrading the projects approved by the voters. However, capital outlay funds of the district may not be used in conjunction with said bond proceeds in order to obtain alternate proposals.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Elsbeth D. Schafer
Assistant attorney General

RTS:TDH:EDS:gk