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ATTORNEY GENERAL OPINION NO. 90- 103

The Honorable Leroy F. Fry
State Representative, 105th District
Route 1, Box 117
Little River, Kansas 67457

Re: State Departments; Public Officers and Employees --
State Engineering Services -- State Policy;
Negotiation of Contracts for Engineering Services

Synopsis: A state agency may not utilize the state
engineering services act as a mechanism to
negotiate with firms for the performance of land
survey work. However, if survey work is incidental
to a project which requires engineering services,
the act may be used. Cited herein: K.S.A.
74-7003; 75-3739; 75-5801; 75-5802; 75-5803.

* * *

Dear Representative Fry:

As representative for the 105th district, you ask our
opinion whether the state engineering services act precludes a
survey firm which does not employ a staff engineer from
contracting with the state for survey work.

Your question arises in the following factual context:
Pursuant to the state engineering services act, K.S.A. 75-5801
et seq., the Kansas department of transportation
(KDOT) solicited engineering consulting firms for
consideration for performance of survey work. A surveying
firm which also received one of the letters of invitation was

subsequently disqualified by KDOT because the survey firm did not employ a staff engineer. You question the propriety and legality of KDOT's requirement in these circumstances.

K.S.A. 75-5801 et seq. provides a mechanism by which a state agency may negotiate with an engineering firm for engineering services. This is in marked contrast to K.S.A. 75-3739 which requires the state to purchase certain supplies, materials, equipment and contractual services through the solicitation of competitive bids. The policy of the state engineering services act is expressed in K.S.A. 75-5801:

"The legislature hereby declares it to be the policy of this state to publicly announce all requirements for engineering services, and to negotiate contracts for engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable fees."

The mechanism by which this policy is put into effect is provided by K.S.A. 75-5803:

"In the procurement of engineering services, each agency head which utilizes engineering services shall encourage firms engaged in the lawful practice of their profession to annually submit a statement of qualifications and performance data to the agency head and to the state building advisory commission. The agency head shall thereafter cause to be prepared annually a list of firms qualified, based upon criteria established and published by such agency head, to provide such engineering services."

K.S.A. 75-5801 makes the act specifically and singularly applicable to "engineering services" which are defined in K.S.A. 75-5802(b) as:

"Any service or creative work, the adequate performance of which requires engineering education, training, and experience in the application of special knowledge of the mathematical, physical,

and engineering sciences to such services or creative work as consultation, investigation, evaluation, planning or design of engineering works and systems, engineering, surveying, and the inspection of construction for the purpose of assuring compliance with drawings and specifications; and which include such service or creative work in connection with any utilities, structures, buildings, machines, equipment, processes, work systems, or projects and such architectural work as is incidental to the practice of engineering."

While "surveying" is mentioned within the definition of "engineering services," as an aspect of engineering, the practice of land surveying is a distinct and separate vocation involving

"the application of mathematics and the principles of law and methods of land measurement for the location or relocation of land boundaries and land monuments; the measurement and calculation of land areas; the preparation of original descriptions of real property for conveyance or recording; and the preparation of maps or certificates of survey thereof." K.S.A. 74-7003(k).

The issue thus becomes whether an agency is authorized to contract for land survey services pursuant to the negotiation process provided by the state engineering services act. In our opinion a state agency is not so authorized. The state engineering services act by its stated policy is applicable only to negotiating "contracts for engineering services."


Although engineering services may involve surveying as an incident of the adequate performance of an engineering project, the permissible negotiation process pertains only to engineering services and not to land surveying services per se.

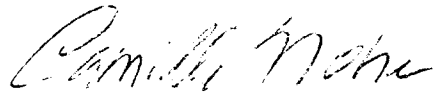
It may be argued that because the term "project" in the state engineering services act means "any capital improvement project or any study, plan, survey or program activity of a state agency. . .," the act permits negotiation of contracts

for survey work, thus triggering the staff engineering requirement. Common sense dictates otherwise. "Perhaps the law need not always align itself with common sense, but when that happy coincidence occurs, lawyers and judges should not reflexively recoil from it." Communication Workers of America v. Western Electric, 860 F.2d 1137, 1142 (1st Cir. 1988). The term "project" must be understood to be within the context of engineering services as announced in the policy statement of the act. To assume that a state agency conducting "any study, plan, survey or program activity" may avail itself of the contract negotiation provisions of the state engineering services act and then pursuant to that act require competing firms to employ a staff engineer flies in the face of all rationale and logic as well as the stated purpose of the act.

We conclude that the state engineering services act pertains only to the negotiation of contracts for engineering services and does not permit the negotiation of contracts solely for performance of land survey work. Therefore, a state agency, such as KDOT, may not utilize the state engineering services act as a mechanism to negotiate with firms for the performance of land survey work. However, if survey work is incidental to a project which requires engineering services, the act may be used.

Very truly yours,


ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS


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