



STATE OF KANSAS

## Office of the Attorney General

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Attorney General

August 2, 1978

ATTORNEY GENERAL OPINION NO. 78-253

Mr. W. Keith Weltmer  
Secretary of Administration  
Department of Administration  
2nd Floor - State Capitol  
Topeka, Kansas 66612

Re: Architectural Services--Secretary of Administration--  
-Powers

Synopsis: Under K.S.A. 75-5404 as amended by ch. 337, § 17, L. 1978, the Secretary of Administration must convene a negotiating committee for the selection of an architect for any project the total cost of which is estimated to exceed \$250,000. If the Secretary believes that a negotiating committee is necessary for the selection of a project which is not estimated to cost in excess of \$250,000, the Secretary may proceed to convene a negotiating committee for the selection of an architect therefor. If no negotiating committee is convened, the Secretary may not negotiate a contract for architectural services, but must provide the needed architectural services through the Department of Administration or must designate a qualified employee of the agency for which the project is undertaken as agency architect to provide those services.

\* \* \*

Dear Secretary Weltmer:

You inquire concerning the negotiation of contracts for architectural services pursuant to K.S.A. 75-5401 et seq., as amended and supplemented by 1978 House Bill No. 2722, found at ch. 337, L. 1978. K.S.A. 75-5401, left intact by the recent legislature, states thus:

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

Prior to its amendment by § 17 of ch. 337, L. 1978, K.S.A. 75-5404 provided in pertinent part thus:

"(a) Whenever it becomes necessary in the judgment of the director of architectural services, and whenever the total cost of a building, rebuilding or construction project is expected to exceed one hundred thousand dollars (\$100,000), the director of architectural services or his or her designee shall convene a negotiating committee."

You advise that under this provision, it has been the practice of the Director of Architectural Services to convene a negotiating committee to select an associate architect for projects expected to exceed \$100,000 in total costs; for projects of lesser cost, the Director has negotiated directly with a firm to provide architectural services, without seeking selection of an associate architect by the negotiating committee under this section. Section 17 of ch. 337, L. 1978, amends the quoted language of K.S.A. 75-5404 to provide thus:

"Whenever it becomes necessary in the judgment of the secretary of administration and whenever the total cost of a project for the construction of a building or for major repairs and improvements to a building for a state agency is expected to exceed two hundred fifty thousand dollars (\$250,000), the secretary of administration shall convene a negotiating committee."

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New section 23 of ch. 337, L. 178, provides for the furnishing of architectural services when a negotiating committee is not convened. In that event, the Secretary of Administration shall provide all architectural services for the project, including construction administration services, or shall designate a qualified employee of the agency for which the project is being undertaken, to provide all such services.

You inquire, first, if a project is estimated to exceed \$250,000 in total costs, whether the Secretary of Administration may convene a negotiating committee without a determination that, in his judgment, it is necessary to do so. You inquire, secondly, whether, if the Secretary determines that it is necessary to convene a negotiating committee, he may do so for a project the total cost of which is expected to be less than \$250,000. Lastly, you ask whether, if a project is expected to cost less than \$250,000 and a negotiating committee is not convened, the Secretary may negotiate directly with an architectural firm for the furnishing of needed architectural services.

Under K.S.A. 75-5404, as amended by ch. 337, § 17, L. 1978, a negotiating committee must be convened "[w]henever it becomes necessary in the judgment of the secretary of administration and whenever the total cost of a project . . . is expected to exceed . . . \$250,000 . . . ." The question is whether a negotiating committee shall be convened when, and only when, these two circumstances concur, *i.e.*, when the total estimated project cost exceeds \$250,000 and the Secretary of Administration deems it necessary, or whether each is a separate alternative basis for convening the committee. The two conditions are stated in grammatically separate phrases, but are stated conjunctively, joined by the word "and" rather than "or." Yet, the two grounds bear no necessary relation to each other: one is based upon a subjective determination of the Secretary, and the other on an objective test, the estimated dollar cost of the project. Moreover, the apparent purpose of the act is frustrated, at least to some extent, by construing the conditions to be necessarily concurrent, rather than alternative, grounds for convening a negotiating committee.

One purpose of the architectural selection law, in general, and the negotiating committee, in particular, was to avoid, insofar as possible, the opportunity for the influence of partiality and favoritism in the selection of architects for state construction projects. The greater the cost of the project, the greater the value of the architectural services contract, and accordingly, the greater the need for safeguards against political chicanery.

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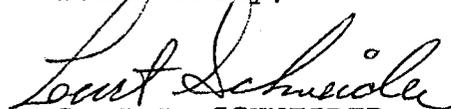
Hence, the legislature very likely settled upon the sum of \$250,000, as the point at which the neutral hand of the negotiating committee was deemed a necessary safeguard. And also very likely, the legislature may have deemed the negotiating committee to be a useful and needed medium of architectural selection in some lesser projects, to be invoked when thought necessary in the judgment of the Secretary of Administration. If the two conditions were construed as necessarily concurrent, the Secretary of Administration would be free to deem a negotiating committee unnecessary for a project which was estimated to cost millions of dollars, thus eliminating the neutral role of the negotiating committee in the selection of an architect therefor, a role which the legislature surely intended that it play in such circumstances. At the same time, the importance of this safeguard may well have been greatly diminished in the deliberations of the most recent legislature due to the enactment of section 23 of the bill, which appears virtually to foreclose the negotiation of any contract for architectural services by the Secretary with any architect who has not been selected by a duly convened negotiating committee. When a negotiating committee is not convened for the selection of a project architect, the Secretary of Administration must provide the architectural services or designate a qualified employee of the agency for which the project is being constructed to provide all of the architectural services for the project. When no negotiating committee is convened, thus, no contract with an independent architect may be negotiated. As a result, the decision whether to convene a negotiating committee entails some consideration of the resources of the agency for which the project is being considered, and whether its staff includes architectural personnel qualified the project under consideration. For these reasons, the legislature might very well have intended to permit the Secretary of Administration to make judgment whether a project architect was needed, independently of the cost of the project. Even if the project exceeded \$250,000 in estimated cost, the Secretary might well determine that a qualified employee of the agency involved could and should be responsible for the architectural services needed in a particular project. In such circumstances, a negotiating committee might very well be deemed unnecessary by the Secretary. Although they are stated conjunctively, each separate condition is set forth independently of the other, and there is no natural or necessary relation between them. Considering the other provisions of the act described above, and particularly in view of the lack of authority for the Secretary of Administration to contract separately with any architect for architectural services except with those who have been selected by the negotiating committee, the legislature might well have intended that the Secretary be authorized to determine

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that "outside" architectural services are needed for a project which costs less than \$250,000, and thus to permit the Secretary to determine that the committee is necessary regardless of the cost of the project.

Ordinarily, where several grounds which are stated as a prerequisite for some official action are stated conjunctively in a series, they will be construed to be cumulative or concurrent rather than alternative requirements. Where, as here, the two grounds are stated in distinctly separate phrases, the nature of the conditions and the context of the act should be taken into consideration in determining whether they are cumulative or alternative requirements. In the context of the act, most important, in my judgment, is the severely circumscribed authority of the Secretary of Administration to negotiate contracts for architectural services, except with persons selected by the negotiating committee. It is difficult, if not entirely idle, to speculate about legislative intent when the legislature troubles so little over the language it adopts to express that intent. Presumably, however, the legislature did not intend to limit contracts with outside architects to only those projects costing in excess of \$250,000. Considering the limited number of agencies who employ architects who would be eligible to serve as agency architects under section 23(a), and the limited capability of the Secretary of Administration to furnish substantial architectural services, the capability of the state to furnish its agencies with architectural services for its many and varied projects might be seriously crippled if resort to outside architects were limited only to projects in excess of \$250,000. Without more specific guidance from the legislature, it is my judgment that the two conditions set out in K.S.A. 75-5404 as prerequisites for convening a negotiating committee are alternative rather than concurrent grounds, and that if a project is expected to exceed \$250,000 in cost, the Secretary must convene a negotiating committee, even if he should deem it unnecessary to do so. By the same token, if the Secretary deems it necessary to convene a negotiating committee for a project the total cost of which does not exceed \$250,000, he may do so. If, however, the project is expected to cost less than \$250,000, and a negotiating committee is not convened, the Secretary has no authority to negotiate a contract for architectural services. In that instance, the Secretary must provide the needed architectural services from the Department of Administration, or must designate a qualified person who is an employee of the agency for which the project is being undertaken to provide the needed architectural services.

Yours truly,

  
CURT T. SCHNEIDER  
Attorney General

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