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July 17, 1981

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ATTORNEY GENERAL OPINION NO. 81-169

Louis A. Klemp, Jr.
Chairman
Board of County Commissioners
4th and Walnut
Leavenworth, Kansas 66048

Re: State Departments; Public Officers, Employees --
Department of Administration -- Real Estate Leases;
Competitive Bids

Synopsis: Real estate leases entered into by state agencies
need not be contracted for by competitive bids as
such leases are not "contracts for services" with-
in the meaning of K.S.A. 1980 Supp. 75-3739.
Cited herein: K.S.A. 1980 Supp. 75-3739, 75-3740,
K.S.A. 77-201.

* * *

Dear Mr. Klemp:

You request our advice on the applicability of the state bid laws to leases entered into by the state Department of Social and Rehabilitation Services. Specifically, you ask if that agency violated the law by entering into a lease for real estate without strictly complying with K.S.A. 1980 Supp. 75-3739. That section provides in pertinent part:

"(1) All contracts for construction and repairs, and all purchases of and contracts for supplies, materials, equipment and contractual services shall be based on competitive bids, and sales of property shall be to the highest responsible bidder, at an advertised public auction or after advertising for sealed bids in the same manner provided for purchase of property herein as may be determined by the director of purchases" (Emphasis added.)

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The competitive bid law does not, by its terms, specifically refer to leases of real property, except in a recent addition to the statute, now contained at subsection (8) and providing as follows:

"(8) Except as otherwise specifically provided by law, no state agency shall enter into any lease of real property without the prior approval of the secretary of administration. Such state agency shall submit to the secretary of administration such information relating to any such proposed lease as the secretary may require. The secretary of administration shall either approve, modify and approve or reject any such proposed lease."

Hence, the question for resolution is whether K.S.A. 1980 Supp. 75-3739 requires leases of real property to be entered into only after competitive bid.

The general rule of law regarding state contracts is as follows:

"Under some constitutional and statutory provisions, specified state contracts must be let to the lowest responsible bidder pursuant to public competitive bidding. In the absence of such constitutional or statutory requirement, or in the case of contracts not within their provisions, a state contract need not be awarded pursuant to public competitive bidding, but such procedure is proper even where it is not required" (Footnotes omitted.) 81A C.J.S. States §161 (1977).

Whether the legislature intended "contractual services," as used in the above cited provision, to include leases of real property will be the deciding issue, since the other types of purchases referenced are clearly inapplicable. No published Kansas judicial rulings have determined leases of real property to be "contractual services," as used in K.S.A. 1980 Supp. 75-3739, and previous Kansas Attorneys General have not opined as to this statute's applicability to such leases. Normally, real estate leases are not thought of, or referred to, as "contractual services."

Thus, in construing the phrase "contractual services" as used in the competitive bid law, we have considered general authorities, as follows:

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"In accordance with the general rules of statutory construction, state competitive bidding statutes must be construed so as to ascertain and give effect to the intention of the legislature as expressed in the statutes. They must be construed in the light of their primary purpose to protect the public interest. Since competitive bid statutes are in derogation of the common law they should be strictly construed. So, they must be interpreted as enacted and omissions may not be supplied by the judicial department." (Footnotes omitted.) 81A C.J.S. States §161 (1977).

Further, K.S.A. 77-201 Second provides:

"Words and phrases shall be construed according to the context and the approved usage of the language; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed according to such peculiar and appropriate meaning."

As a matter of historical practice and precedent, the state division of purchases has not required leases of real property to be let only by competitive bid. In addition, the above-quoted language of K.S.A. 1980 Supp. 75-3739(8) grants authority to the Secretary of Administration to approve the lease of real property. Such authority is not granted to the Director of Purchases, the person who normally accepts and approves competitive bids for goods and services. (See K.S.A. 1980 Supp. 75-3740.) Further, subsection (8) grants authority to "approve, modify and approve or reject" any proposed lease. The power to modify with reference to real estate leases is discretionary in nature and goes beyond the ministerial powers granted to the director of purchasing in approving contracts for services, materials, supplies, equipment, etc. Normally, when a competitive bid is received, it may be accepted or rejected; it can not be negotiated or modified. See, generally, K.S.A. 1980 Supp. 75-3740. These facts and legislative directives identify a pattern of handling real estate leases dissimilar to other purchases and acquisitions.

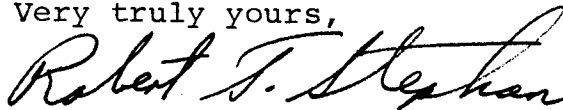
Hence, upon examination of the laws governing the contracting process and procedures of state agencies, competitive bidding must be viewed as an integral component but one which is not universally applicable. In light of the fact that real estate leases are not normally thought of as "contractual services,"

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nor defined as such, and the legislature has provided a distinct procedure for the handling of such lease agreements which permits modification of real estate lease agreements by the Secretary of Administration, we are unable to ascertain a legislative intent that the phrase "contractual services" as used in K.S.A. 1980 Supp. 75-3739, is to include leases of real property.

Therefore, we can not say as a matter of law that the Kansas legislature has required the use of competitive bidding procedures in the acquisition of real estate interests.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Bradley J. Smoot
Deputy Attorney General

RTS:BJS:hle