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ATTORNEY GENERAL OPINION NO. 90- 23

The Honorable Bob Vancrum
State Representative, Twenty-Ninth District
State Capitol, Room 112-S
Topeka, Kansas 66612

Re: State Boards, Commissions and Authorities--State
Board of Technical Professions--Rules and
Regulations; Specifications; Public Policy

Synopsis: Although an "or equal" clause is not statutorily
required to be included in the specifications of an
architect, the public policy of the state of Kansas
dictates that the specifications for projects
subject to competitive bidding cannot be drafted in
such a manner as to exclude the possibility of
competition.

The practice of architecture, as a technical
profession, is subject to the rules of professional
conduct located at K.A.R. 66-6-4. The board of
technical professions has authority to determine if
a violation of those rules has occurred. Cited
herein: K.S.A. 19-214; 19-3516; 50-112; 50-113;
K.S.A. 1989 Supp. 72-6760; K.S.A. 74-7001; 74-7003;
74-7013; 74-7026; 74-7029; 75-3739; 77-425.

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Dear Representative Vancrum:

As representative for the twenty-ninth district, you ask our
opinion regarding certain practices of an architect who was
hired by a school district for a multi-facility roofing

project. A manufacturer of roofing materials, identified by you as Manufacturer X, agreed to provide architectural errors and omissions insurance for any architect who specified its product by name. Apparently, the architect in question specified that either the product of Manufacturer X or an approved equivalent be used for the roofing project, and was provided with the errors and omissions insurance by Manufacturer X. You state that the architect failed to disclose to the school district that another manufacturer had submitted a lower priced product, deemed by a contractor of the roofing project to be an equal to the product of Manufacturer X, and that Manufacturer X was providing the architect with errors and omissions insurance. You ask whether the situation you present would result in a violation by the architect of either the rules of professional conduct for technical professions or public policy. You also ask whether the specifications of an architect must contain an "or equal" clause when the product of a named manufacturer is specified.

The practice of architecture is classified as a "technical profession" under K.S.A. 74-7003, thereby subjecting it to regulation by the the state board of technical professions. The board has the authority to adopt all bylaws and rules and regulations, including rules of professional conduct, which are necessary for performance of its powers, duties and functions in the administration of K.S.A. 74-7001 et seq. K.S.A. 74-7013. The board has the power to reprimand or otherwise discipline, suspend or revoke the license of any person who is found guilty of violating the rules of professional conduct adopted and promulgated by the board. K.S.A. 74-7026. Such rules and regulations which are filed in the office of the secretary of state have the force and effect of law. K.S.A. 77-425.

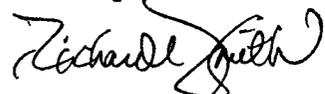
The rules of professional conduct for the technical professions are located at K.A.R. 66-6-4. A violation of any of these rules may result in action by the board. Because the Attorney General is required to render to the board such legal assistance as may be necessary for it to carry out the provisions of K.S.A. 74-7001 et seq., K.S.A. 74-7029, it is necessary for us to defer to the board to make a determination as to whether a violation of the rules of professional conduct has occurred. It must be remembered that those individuals involved in the technical professions are required to police themselves as any professional having

professional conduct shall report that knowledge to the board and shall cooperate with the board in furnishing any information or assistance that may be required. K.A.R. 66-6-4(r).

The "public policy" of a state is the law of that state as found in its Constitution, its statutory requirements, and its judicial records. McAllister v. Fair, 72 Kan. 533, 540 (1906). A review of state statutes indicates that Kansas strongly favors competitive bidding. See K.S.A. 19-214 (county construction contracts); K.S.A. 19-3516 (water districts); K.S.A. 1989 Supp. 72-6760 (school districts); K.S.A. 75-3739 (Division of Purchases of the State Department of Administration). Awarding contracts by public bid-letting encourages competition, allows all contractors an equal opportunity, and avoids any appearance of impropriety or favoritism. Attorney General Opinion No. 88-45. The rule requiring public authorities to give out plans and specifications for proposed public works and contracts before receiving bids therefore demands that the plans and specifications be so framed as to secure fair competition upon equal terms to all bidders, and to permit free and open bidding by all interested parties; they should be free from any restrictions the effect of which would be to stifle competition. 64 Am.Jur.2d Public Works and Contracts, § 51, 902. Although an "or equal" clause is not statutorily required to be included in the specifications of an architect, the public policy of the state of Kansas dictates that the specifications cannot be drafted in such a manner as to effectively exclude the possibility of competitive bidding. Therefore, if an architect chooses to specify the product of a named manufacturer, it would be necessary to include a clause in the specifications permitting the consideration of bids submitted by competing manufacturers unless there is no equivalent to the product named. A failure to do so could be interpreted as a violation of the public policy of the state of Kansas.

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas


Richard D. Smith
Assistant Attorney General