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ATTORNEY GENERAL OPINION NO. 91- 40

The Honorable Don Montgomery
State Senator, 21st District
State Capitol, Room 128-S
Topeka, Kansas 66612

Re: Roads and Bridges -- County and Township Roads;
County Road Unit System -- Bid Letting

Synopsis: K.S.A. 1990 Supp. 68-521 and K.S.A. 19-214
mandate public bid letting when the project exceeds
the dollar amounts set forth therein. Cited
herein: K.S.A. 19-214; K.S.A. 1990 Supp. 68-521;
K.S.A. 68-1113

* * *

Dear Senator Montgomery:

As Chairman of the Senate local government committee, you request our opinion as to whether the dollar thresholds set forth in K.S.A. 1990 Supp. 68-521, K.S.A. 19-214, and K.S.A. 68-1113 regarding bid letting on county roads and bridges are mandatory or discretionary.

The pertinent parts of these statutes are as follows:

"The board of county commissioners before awarding any contract for the construction, surfacing, repairing or maintaining of any road as provided in K.S.A. 68-520, and amendments thereto, when the county engineer's estimated cost

of such improvement is more than \$5,000, shall have the estimate and the approved plans and specifications which have been adopted by order of the board for such work filed in the county clerk's office or in some other county office designated by the board at least 20 days prior to the time of the letting. . . ." K.S.A. 1990 Supp. 68-521.

"(a) Except as provided in subsection (b), all contracts for the expenditure of county moneys for the construction of any courthouse, jail or other county building, or the construction of any bridge in excess of \$10,000, shall be awarded, on a public letting, to the lowest and best bid. The person, firm or corporation to whom the contract may be awarded shall give and file with the board of county commissioners a good and sufficient surety bond by a surety company authorized to do business in the state of Kansas, to be approved by the county attorney or county counselor, in the amount of the contract, and conditioned for the faithful performance of the contract. . . ." K.S.A. 19-214.

"All bids shall be made on the proposal blanks furnished by the county, signed by the bidder, sealed and presented by the bidder, his or her agent or attorney (or sent by mail), to the county clerk. The form of said county proposal blanks shall be approved by the secretary of transportation and shall be uniform for each county in the state. The board shall conduct the letting of all contracts for bridge and culvert work in such a manner as to give free, open competition, and all bidders shall be given an equal opportunity to bid upon the plans and specifications on file, and they shall be required when bidding a lump sum on two or more bridges or culverts to also submit a separate proposal on each of said bridges

or culverts included in their proposals."
K.S.A. 68-1113.

In determining whether a statute is directory or mandatory, the court in Bell v. City of Topeka, 220 Kan. 405, 411 (1976) cited the following test as set forth in Wilcox v. Billings, 200 Kan. 654 (1968):

"No absolute test exists by which it may be determined whether a statute is directory or mandatory. Each case must stand largely on its own facts, to be determined on an interpretation of the particular language used. Certain rules and aids to construction have been stated. The primary rule is to ascertain legislative intent as revealed by an examination of the whole act. Consideration must be given to the entire statute, its nature, its object, and the consequences which would result from construing it one way or the other. It has been said that whether a statute is directory or mandatory depends on whether the thing directed to be done is of the essence of the thing required, or is a mere matter of form. Accordingly, when a particular provision of a statute relates to some immaterial matter, as to which compliance with the statute is a matter of convenience rather than substance, or whether the directions of a statute are given merely with a view to the proper, orderly, and prompt conduct of business, it is generally regarded as directory, unless followed by words of absolute prohibition; and a statute is regarded as directory where no substantial rights depend on it, no injury can result from ignoring it, and the purpose of the legislature can be accomplished in a manner other than that prescribed, with substantially the same results. On the other hand, a provision relating to the essence of the thing to be done, that is, to matters of substance, is mandatory, and when a fair interpretation of a statute, which directs acts or proceedings to be

done in a certain way, shows that the legislature intended compliance with such provisions to be essential to the validity of the act or proceeding, or when some antecedent and prerequisite conditions must exist prior to the exercise of power or must be performed before certain other powers can be exercised, the statute must be regarded as mandatory."

The dollar amounts set forth in these statutes cannot be viewed as immaterial facts or only set out as guidelines to be followed when convenient. They direct bidding to be done whenever the cost of the work exceeds these amounts. Therefore, this "shows that the legislature intended compliance with such provisions to be essential to the act or proceeding" and therefore to be mandatory.

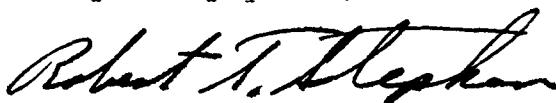
Although there are times and circumstances where "shall" is interpreted as directory language, it is the general rule that "where strict compliance with the provision is essential to the preservation of the rights of the parties affected and to the validity of the proceeding, the provision is generally interpreted as mandatory." U.S.D. No. 252 v. South Lyon County Teachers Ass'n., 11 Kan.App.2d 295, 297 (1986); Griffin v. Rogers, 232 Kan. 168, 174 (1982); Paul v. City of Manhattan, 212 Kan. 381, Syl. ¶ 1 (1973); Board of Lincoln County Comm'rs v. Berner, 5 Kan.App.2d 104, 111, rev. denied 228 Kan. 806 (1980); 73 Am.Jur.2d Statutes § 22(1974); and 82 C.J.S. Statutes § 380 (1953). Furthermore, "in determining the consequences of failure to comply with a statute courts necessarily consider the importance of the literal and punctilious observance of the provision in question with regard to the ultimate object which the legislature sought to serve." City of Kansas City v. Board of County Commissioners, 213 Kan. 777, 783 (1974); and 2A Sutherland Statutory Construction [4th Edition], § 57.01, p. 412.

The objective in setting the dollar amounts in K.S.A. 1990 Supp. 68-521 and K.S.A. 19-214 at \$5,000 and \$10,000 respectively, is to insure that the counties are not overburdened by having to conduct public bid letting on minor work, but at the same time make sure that the more expensive work is awarded on a fair and impartial basis. If these amounts are viewed as only directory, then the object of the statute and the intent of the legislature may never be achieved and the purpose and validity of these statutes would

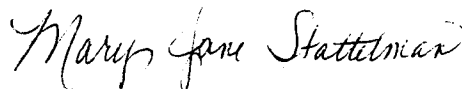
be totally undermined. The only way to accomplish the objectives of these particular statutes and protect the rights of the contractors and the constituents of each county, is to interpret these statutes as mandating public bidding whenever a project, as set forth in these particular statutes, exceeds the dollar amount set out in the statute.

This opinion is specific to the circumstances or projects set forth in the statutes which you have asked about. Other statutes may require different results.

Very truly yours,



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