



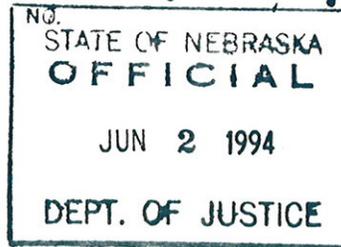
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#94043



DATE: May 31, 1994

SUBJECT: Fees Charged by the Auditor of Public Accounts for
Conducting Audits of Political Subdivisions

REQUESTED BY: John Breslow, Auditor of Public Accounts

WRITTEN BY: Don Stenberg, Attorney General
Fredrick F. Neid, Assistant Attorney General

This is in response to your questions relating to amounts charged by the Auditor of Public Accounts for conducting audits of political subdivisions provided for in Neb. Rev. Stat. § 84-304 (Supp. 1993). The Auditor of Public Accounts is authorized under section 84-304(1)(d) to contract with political subdivisions to perform their audits and charge the political subdivisions for completion of the examination. The fees charged are statutorily provided to "be in an amount sufficient to pay the cost of the audit."

The first question you ask is whether the meaning utilized by the Auditor of Public Accounts in determining costs of the audit is appropriate. You indicate that it is the practice of your office to charge fees that include amounts for actual hours worked by staff and certain expense amounts including mileage, car rental, meals and lodging. The amounts included in the fee charged include those expenses directly related to conducting a particular audit of a political subdivision. We believe the application of the statutory language, "amount sufficient to pay the cost of the audit", by the Auditor of Public Accounts is a reasonable construction of the statutory language.

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This issue apparently arises from an audit of your office conducted by audit staff of the Department of Revenue pursuant to Neb. Rev. Stat. § 81-106 (1987). Reportedly, audit staff of the Department of Revenue assert that the Office of the Auditor of Public Accounts "should include overhead and overtime costs" in amounts charged to political subdivisions. You also indicate that it is not the practice of your office to include indirect expenses and other costs not directly related to the audit such as office overhead and overtime costs. You further point out the direct costs recovered in fees charged to political subdivisions are coordinated with amounts appropriated by the Legislature through the budgeting process.

Neither the term, "cost", nor the phrase, "an amount sufficient to pay the cost of the audit," are further defined or explained in the statutes. However, the plain meaning of the language of the statute supports the interpretation of the Auditor of Public Accounts. Generally, statutory language will be given its plain and ordinary meaning. *State Bd. of Ag. v. State Racing Comm.*, 239 Neb. 762, 478 N.W.2d 270 (1992); *Contact, Inc. v. State*, 212 Neb. 584, 324 N.W.2d 804 (1982). The key words, "cost of the audit," means those expenses directly related and associated with performing a particular audit of a political subdivision. The language of the statute is not qualified expressly nor by necessary implication to include all indirect costs or other expenses of the Auditor's office not associated with a particular audit. The Auditor of Public Accounts performs significant duties other than examination of political subdivisions for which funds are appropriated to the office by the Legislature.

Section 84-304 was amended in 1985 by Legislative Bill 29, Laws 1985, Second Spec. Sess., to authorize the Auditor of Public Accounts to contract for the performance of audits of political subdivision and charge the costs of the audit to the political subdivision. The legislative history reflects that the Legislature reduced funding of the office of the Auditor of Public Accounts for conducting audits of political subdivisions. To makeup for the funding shortfall, the Auditor of Public Accounts was authorized to charge the political subdivision amounts sufficient to pay the cost of the audit. INTRODUCER'S STATEMENT OF INTENT; Summary of Purpose and/or Changes, COMMITTEE STATEMENT, LB 29. We believe the interpretation of the Auditor regarding amounts charged for audits is consistent with the legislative intent.

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You indicate that the practice of your office in charging direct costs was also the practice and policy of the previous Auditor of Public Accounts. It is significant that the Auditor of Public Accounts is the executive officer of the state charged with the responsibility for examination of political subdivisions and for establishing minimum audit standards for those purposes. In construing statutes, the courts appropriately accord deference to interpretation and application of legislative acts by administrative agencies and officers charged with enforcement of the statutory provisions and the interpretations are entitled to weight. *Vulcraft v. Karnes*, 229 Neb. 676, 428 N.W.2d 505 (1988); *ATS Mobil Tel., Inc. v. Curtin Call Communications, Inc.*, 194 Neb. 404, 232 N.W.2d 248 (1975). Accordingly, a reasonable construction of the statutory provisions by the Officer charged with implementation of the provisions is entitled to deference.

You also inquire whether "cost recovery" clauses should be included in agreements used by your office in contracting with political subdivisions for the performance of audit examinations. By cost recovery clause, we understand you mean a contract provision that generally provides that fees to be charged shall be an amount sufficient to pay the cost of the audit. This question is a practical drafting question and we advise that contract provisions should be utilized which serve to state the amounts to be charged as specifically as possible. We are mindful that certain contracts that included a cost recovery clause have previously resulted in some confusion and controversy as to the amount of fees charged. While a cost recovery clause generally comports with the provisions of section 84-304, the language is open-ended and political subdivisions cannot ascertain the fee amounts to recover costs of the audit with any degree of certainty.

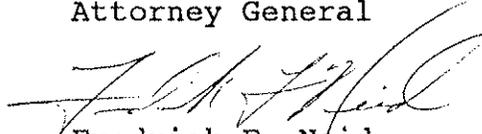
An elementary rule governing contracts is that there be a "meeting of the minds" of the contracting parties and contractual provisions must be understood by both parties to be enforceable. *Moore v. National Development of Omaha, Inc.*, 176 Neb. 25, 125 N.W.2d 9 (1963). Accordingly, we recommend that cost recovery clauses not be included in letter agreements used by your office. The current practice of stating the amount of fee in specific estimated dollar amounts in agreements should be continued. Statutory intent is complied with since estimated fees are based on directly-related costs of the audit. It is our conclusion that fee

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amounts to be charged should be stated as specifically as possible to facilitate construction and enforcement of the contracts.

Sincerely yours,

DON STENBERG
Attorney General



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Approved By:



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21-577-6.9