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STATE OF NEBRASKA
OFFICIAL
MAY 20 1992
DEPT. OF JUSTICE

DATE: May 19, 1992

SUBJECT: Authority for Construction of Privately-Owned Facility on Property of the State.

REQUESTED BY: Lawrence S. Primeau, Director
Department of Administrative Services, State of Nebraska

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

You have indicated that the State Department of Health is in need of additional "laboratory space" for performance of testing services and certain alternative plans are under consideration to accomplish this objective. A plan you have briefly described involves construction of a new building, or addition to existing state laboratory facility, by a third party on property owned by the state for use by the Department of Health. Under the proposal, it is contemplated that the newly constructed facility would be owned by a third party and the state would lease the property from the third party. Ultimately, ownership of the facility may vest in the state since the lease agreement would include a purchase option which would permit the state to purchase the property upon expiration of the lease.

Under these facts, you inquire whether the Department of Administrative Services is authorized under existing statutes to contract for construction of the facility on state property for use by the state. The distinguishing feature of the proposal as outlined is that the facility to be constructed on state property

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would be privately-owned. It is our opinion that existing statutory authority is insufficient and additional legislative enactment would be necessary to authorize private ownership of newly constructed facilities on property owned by the state.

At the outset, we point out that it is highly important to establish the authority of a state agency or office to perform specific acts. State officials and public officers may act for the state only as authorized by the constitution or statutes and contracts executed by authority thereof, and cannot waive such provisions. Appeal of Roadmix Const. Corporation, 143 Neb. 425, 9 N.W.2d 741 (1943); State v. Home Ins. Co. of New York, 59 Neb. 524, 81 N.W. 443 (1900). Further, it has been held by the Nebraska Supreme Court that the state is not bound by contracts made in excess of their authority, State v. Cochran, 113 Neb. 846, 205 N.W. 568 (1925). Thus, it is necessary that specific and express statutory authority be in place for construction of the facility you have described.

You have referenced certain statutes which you indicate may be applicable to the question you have asked. Generally, the Department of Administrative Services through the Building Division is the manager of state facilities and properties. See Neb. Rev. Stat. § 81-1108.10 (Reissue 1987). Three primary functions of the Building Division which are statutorily described include facilities management, construction, and administration. Neb. Rev. Stat. § 81-1108.15 (Reissue 1987) sets out the duties and powers related to these functions. The duties for the most part include inspections, contract performance, and evaluation and coordination of the construction process of the state facilities. Other duties include serving as the state leasing administrator, procurement, management, and assignment of office space and parking for state offices. The generalized duties described do not constitute express and unequivocal authorization for completion or construction of a specific building project but details duties, functions, and oversight responsibilities of the Building Division.

Certain statutes relating to cooperative ventures by public hospitals, Neb. Rev. Stat. §§ 71-2056 to 71-2061 (Reissue 1990) also have been reviewed. The statutes authorize state agencies, political subdivisions and other governmental entities which own or operate a hospital or hospital health service to enter into cooperative ventures including the erection of buildings for medical services. We do not believe these provisions are applicable to the Department of Health since it does not own or operate a hospital or hospital health service. It is clear that the provisions are applicable to those governmental entities engaged in the direct ownership and operation of public hospitals and these purposes are expressed in Neb. Rev. Stat. § 71-2056

(Reissue 1990). While the testing laboratory operated by the Department of Health performs testing for health-related purposes, the facility is not a hospital nor are the testing services directly incident to hospital services. Accordingly, we do not believe that these provisions constitute authority for construction of a state health laboratory or addition to the existing facility.

Neb. Rev. Stat. § 72-811 (Reissue 1990) and succeeding sections also have been reviewed. These sections establish a process for disposition of vacant buildings and excess land of the state. It would appear that the project under consideration does not consist of vacant and unused property. Rather, the proposed project is to construct a new facility.

The only generalized authority we have found which permits ownership of facilities to be constructed by third parties is found in Neb. Rev. Stat. §§ 72-1401 to 72-1412 (Reissue 1990). These sections provide authorization for cities, villages, and counties to assist the state by making available facilities for use by the state, and the political subdivisions may appropriate funds for this purpose. Specific building projects, such as the state office building initially owned by the City of Lincoln, were authorized by express and specific legislative authorization.

After review of pertinent statutes, we have found no express authority which permits construction, on property owned by the state, of a laboratory facility to be owned by a private third party for use by the Department of Health.

Sincerely yours,

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Approved By:

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