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STATE OF NEBRASKA
OFFICIAL
OCT 30 1992
DEPT. OF JUSTICE

DATE: October 28, 1992

SUBJECT: Procurement Authority of the Materiel Division of the Department of Administrative Services

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

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

This is in response to the questions you have asked regarding the authority of the bureaus of the Materiel Division of the Department of Administrative Services. There are five bureaus established under the provisions of Neb. Rev. Stat. § 81-1118 (Cum. Supp. 1992) which include central stores, traffic, reproduction services, standards and specifications, and purchasing. Section 81-1118 in general fashion details the responsibilities of the bureaus and the services to be provided.

PURCHASING BUREAU

You first inquire whether any agency of state government shares the purchasing bureau's responsibility for "all purchases by all state agencies" other than the University of Nebraska. In connection with this question you have referenced Section 81-1118(5) which states:

(5) The purchasing bureau shall be responsible for all purchases by all state agencies other than the University of Nebraska. The materiel division shall administer the public notice and bidding procedures and any other areas designated by the Director of Administrative Services to carry out the lease or

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purchase of personal property. All purchases of and contracts for materials, supplies, or equipment and all leases of personal property shall be made in the following manner except in emergencies approved by the Governor:

(a) By a competitive formal sealed bidding process through the materiel division in all cases in which the purchases are of an estimated value of five thousand dollars or more;

(b) By a competitive informal bidding process through the materiel division in all cases in which the purchases are of estimated value equal to or exceeding twenty-five hundred dollars but less than five thousand dollars;

(c) By unrestricted open market purchases through the materiel division in all cases in which purchases are of estimated value of less than twenty-five hundred dollars;

(d) All requisitions for whatever purpose coming to the purchasing bureau shall be in conformance with the approved budget of the requisitioning department or agency; and

(e) All contracts for purchases and leases shall be bid as a single whole item. In no case shall contracts be divided or fractionated in order to produce several contracts which are of an estimated value below that required for competitive bidding.

Generally, other agencies of the state do not share the bureau's responsibilities set out in Section 81-1118 regarding procurement processes for the state. For the most part, contracting responsibilities are reposed in the purchasing bureau of the Materiel Division. However, other statutes provide that certain other agencies have responsibilities for specific procurement activities.

The Director-State Engineer for the Department of Roads is authorized by statute to supervise purchasing and expenditure activities and to execute or supervise the execution of all documents for the purchase of equipment and materials. Neb. Rev. Stat. § 81-701.02 (Reissue 1987) states:

The Director-State Engineer, for the Department of Roads, shall:

(1) Have charge of the records of the department;

(2) Cause accurate and complete books of account to be kept;

(3) Supervise the signing of vouchers and orders for supplies, materials, and other expenditures;

(4) Contract for consulting services;

(5) Employ all engineers, assistants, clerks, agents, and other employees required for the proper transaction of the business of his office or of the department and fix their titles, determine their duties and compensation, and discharge them in his discretion; and

(6) Sign and execute or supervise the signing and executing of all documents and papers, including contracts and agreements for highway construction and the purchase of machinery, materials, and supplies.

The duties of the Nebraska Aeronautics Commission include protecting and insuring the public interest and safety regarding aeronautics activities; and designation of airport site selection and allocation of state funds for the construction of airports. The Commission also has the specific duty under Neb. Rev. Stat. § 3-104(3) (Reissue 1991) to arrange and authorize the purchase of aircraft for the state.

Following our review of the statutes, we conclude that the Department of Roads and the Nebraska Aeronautics Commission have direct responsibility described and established by statute for certain purchasing activities of their respective departments. Further, the duties and powers of the Materiel Division do not extend to certain purchasing and contracting activities of a specialized nature. Neb. Rev. Stat. § 81-146 (Cum. Supp. 1992) states:

Sections 81-145 to 81-162 and 81-1118 to 81-1118.03 shall not apply:

(1) To the erection, construction, or original equipment of any building or addition thereto, to the construction of any road or bridge, or to the performance of like work;

(2) To the purchase or use of the products of the labor of the inmates of any charitable, reformatory, or

penal institution of the state, but section 83-146 shall apply to such products; or

(3) To the leasing by the state or a using agency of real property.

REPRODUCTION SERVICES BUREAU

The second question you have asked is whether any agency of state government shares the responsibility of the reproduction services bureau for specifications and for receiving bids for all printing, reproduction, and mailing operations for the state. Neb. Rev. Stat. § 81-1118(3) (Cum. Supp. 1992) has been referenced which states:

> (3) The reproduction services bureau shall be responsible for specifications and for receiving bids and placing orders to the lowest and best commercial printer for all printing, reproduction, and mailing operations for the state. The reproduction services shall also be responsible for coordinating all printing, reproduction, and mailing operations of the state which shall be limited to existing state facilities; . . .

We have found no statutory provisions which expressly impose duties and responsibilities on other state agencies, boards, and commission for completion or performance of these services. Accordingly, we believe that the Materiel Division of the Department of Administrative Services, through the reproduction services bureau, is primarily responsible for purchasing activities for all printing, reproduction, and mailing operations of the state. While we have concluded that these activities are primarily the responsibility of the Materiel Division, this does not mean that another agency may not participate or play any role in the performance of these services. It is obvious from a business management viewpoint that a using agency appropriately may participate in establishing specifications and standards regarding printed materials for use and or distribution by that using agency.

DUTIES AND AUTHORITY OF THE MATERIEL DIVISION

The related inquiry you have posed is whether any agency shares the duty and power of the Materiel Division set forth in Neb. Rev. Stat. § 81-153 (Cum. Supp. 1992). Subsections (1) and (4) of Section 81-153 have been referenced which provide that the Materiel Division has the power and duty to purchase or contract for, in the name of the state, the personal property required by the using agencies and the state; and to determine the utility,

quality, fitness, and suitability of all personal property tendered or furnished. We have not found other statutory provisions which expressly establish that this duty and power are shared by other state agencies other than the provisions previously set out in question one relating to the Department of Roads and the Nebraska Aeronautics Commission.

The statutes which repose purchasing responsibilities in the Materiel Division do not negate other statutory provisions regarding the purchasing authority or responsibilities of other state agencies. Rather, all the statutes should be construed together to give effect to all legislative provisions regarding purchasing responsibilities and authorities of state agencies. It is a basic rule of statutory construction that statutes pertaining to the same subject matter should be construed together; such statutes, being in pari materia, must be construed as if they were one law and effect given to every provision. Coleman v. Chadron State College, 237 Neb. 491, 466 N.W.2d 526 (1991); Wahlers v. Frye, 205 Neb. 399, 288 N.W.2d 29 (1980). To the extent there may be any conflict between statutes setting out similar duties for several agencies, the courts consistently have held that a specific statute should be given precedence over general provisions in other statutes so far as there is conflict. Matter of Nuttleman, 117 B.R. 975 (1990); Hall v. Cox Cable of Omaha, Inc., 212 Neb. 887, 327 N.W.2d 595 (1982). Thus, we believe these duties and powers generally are reposed in the Materiel Division to the exclusion of other state agencies including using agencies except to the extent other statutory provisions provide otherwise.

While we have concluded that procurement responsibilities are generally reposed in the materiel Division, it is clear that the purchasing function is not the exclusive province of the Materiel Division. Neb. Rev. Stat. § 81-161.03 (Cum. Supp. 1992) in part states:

> The materiel division may, by written order, permit purchases, contracts, or leases to be made by any using agency directly with the vendor or supplier whenever it appears to the satisfaction of the materiel division that, because of the unique nature of the personal property, the price in connection therewith, the quantity to be purchased, the location of the using agency, the time of the use of the personal property, or any other circumstance, the interests of the state will be served better by purchasing or contracting direct than through the materiel division. . . .

> The Department of Correctional Services may purchase raw materials, supplies, component parts, and equipment perishables directly for industries established pursuant to section 83-183, whether such purchases are made to fill specific orders or for general inventories. Any such purpose shall not exceed twenty-five thousand dollars. The department shall comply with the bidding process of the materiel division and shall be subject to audit by the materiel division for such purchases.

These statutes contemplate and authorize the direct procurement of personal property by using agencies under certain circumstances. From a business viewpoint, it is appropriate and necessary that a using agency play an active role in the procurement process particularly with regard to establishing standards and specifications and in determining the suitability of materials or products. As a practical necessity using agencies have knowledge and expertise concerning their programs, i.e. printing of tax forms, which require that an agency such as the Department of Revenue participate in establishing specifications and format for the printed materials.

Accordingly we believe that while the primary responsibility for procurement matters resides with the Materiel Division, a using agency appropriately may participate in the procurement process and the extent of that participation would be dependent on the nature of the property or service to be procured.

PRIOR OPINION OF THE ATTORNEY GENERAL

You also inquire whether a letter Opinion of the Attorney General, dated December 4, 1981, would be modified in any manner by the conclusions reached in this opinion. The earlier opinion generally concluded that the Director-State Engineer is vested with authority for purchasing responsibilities for the Department of Roads and that all construction activities pertaining to highways, including purchasing, are exclusively within the jurisdiction of the Department of Roads.

Following review of current statutes, we have reached similar conclusions regarding the authority of the Director-State Engineer. Accordingly, the conclusions set forth in the prior opinion with regard to purchasing responsibilities are confirmed.

SUMMARY

It is our conclusion that responsibilities for procurement of personal property and services for the state is reposed in the

Materiel Division except to the extent otherwise provided by statute. Certain other state agencies including the Nebraska Aeronautics Commission, the Department of Roads and the Department of Correctional Services have partial or full authority to conduct the procurement process for their respective agencies.

While we have concluded that the authority and responsibility for purchasing primarily resides with the Materiel Division, we believe that a using agency appropriately may participate in the purchasing process dependent on the nature and circumstances of the property or services to be contracted for. Further, the opinion regarding purchasing authority of the Department of Roads set forth in the letter Opinion of the Attorney General, dated December 4, 1981, is consistent with the conclusions reached in this opinion.

Sincerely yours,

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Approved By:

Attorney General

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