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NO.
STATE OF NEBRASKA
OFFICIAL
APR 2 1993
DEPT. OF JUSTICE

DATE: March 29, 1993

SUBJECT: Authority to Contract for Data Processing and Computer Hardware Equipment for State Agencies

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

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

You have requested our opinion concerning the statutory authority of agencies to procure services which authorize a vendor (outside contractor) to purchase computer hardware "to supply to the State of Nebraska." Specifically, you inquire whether "this situation would be in violation of the authority granted to State Purchasing to competively bid commodities through a sealed bid process. . . ."

For the most part, the authority and responsibility for purchasing for using agencies of the state primarily resides with the Materiel Division of the Department of Administrative Services.[1] Neb. Rev. Stat. § 81-1118 (Cum. Supp. 1992) requires that competitive bidding procedures through the Materiel Division be utilized in all cases in which the purchases are of an estimated

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[1]Certain other state agencies including the Nebraska Aeronautics Commission, the Department of Roads, and the Department of Correctional Services have limited or full authority to conduct the procurement process for their respective agencies. *See* Opinion of the Attorney General No. 92119, October 28, 1992.

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value in the amount of five thousand dollars or more. Generally, state officers and employees are authorized to enter into contracts only to the extent expressly authorized by the Constitution or statutes. *See In re Appeal Roadmix Construction Corporation*, 143 Neb. 425, 9 N.W.2d 741 (1943). Accordingly, the contract proposals you have described generally would be subject to the competitive bidding procedures mandated by statute if the purchases would have a value of five thousand dollars or more.

While procurement responsibilities and authority are generally reposed in the Materiel Division and competitive bidding procedures are mandated, purchases and contracts may be entered into without following competitive bidding procedures. Neb. Rev. Stat. § 81-153 (Cum. Supp. 1992) expressly authorizes that purchases and contracts be negotiated "when conditions exist to defeat the purpose and principles of public competitive bidding." Further, certain contractual proposals may be entered into directly by the using agency due to the nature of the equipment or materials to be purchased. 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 an using agency 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 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 statutory provisions outlined above authorize direct purchases whenever it appears the best interests of the State would be served; and public bidding procedures need not be utilized depending on the nature of the contract proposal. The determination whether the proposal you have described may be conducted directly by the using agency without following public bidding procedures is inherently judgmental. Factors for consideration in this determination include the nature of the article or property to be purchased, quantities to be purchased, location of the using agency, the time of use, and any other relevant circumstances.

No violations of purchasing statutes would occur if the materiel division would approve the direct purchase by a using agency because the circumstances reflect that this method is in the best interests of the state and conditions exist which defeat

competitive bidding procedures. Obviously, the materiel division appropriately would withhold approval if application of these statutory standards reflect that public competitive bidding procedures should be followed.

Sincerely yours,

DON STENBERG
Attorney General

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Approved By:

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