STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2682
TDD (402) 471-2682
CAPITOL FAX (402) 471-3297
1235 K ST. FAX (402) 471-4725

DON STENBERG
ATTORNEY GENERAL

STEVE GRASZ
LAURIE SMITH CAMP
DEPUTY ATTORNEYS GENERAL

#98025

NO.
STATE OF NEBRASKA
OFFICIAL
MAY 4 1998
DEPT. OF JUSTICE

DATE: April 30, 1998

SUBJECT: Contract for Audit of Political Subdivisions; Payment of Audit Fees

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 regarding the authority of the Auditor of Public Accounts to contract for the performance of audits of political subdivisions and related questions regarding payment for the audit services.

As you have noted, it is the duty of the Auditor of Public Accounts "to examine or cause to be examined, at the expense of the political subdivision . . . " the financial records of political subdivisions when examination is determined necessary by the Auditor of Public Accounts under the provisions of Neb. Rev. Stat. § 84-304(3)(b) (Supp. 1997). In furtherance of the statutory authorization, section 008 of rules and regulations of the Auditor of Public Accounts, 42 NAC 1, states:

> Should any political subdivision fail or refuse to either cause a complete audit to be made and filed or obtain a waiver of the audit requirement as required by state statute or regulation, the Auditor shall have the authority, after due notice and a hearing to show cause, to appoint a certified public accountant or public accountant to conduct the audit of the subdivision. The fee for such audit shall be an obligation of the subdivision and shall become a lien against the subdivision.

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By way of background, certain political subdivisions of the state, three townships and two fire protection districts, have failed to submit audit reports or to obtain a waiver of audit requirements from the Auditor of Public Accounts. As a consequence, your office is proceeding to appoint a certified public accountant to perform the audit. The initial question(s) you ask is whether the contract for performance of the audit and the bill for audit services would be between the accountant and the Auditor of Public Accounts.

In the absence of cooperation by the political subdivisions, the contract would be between the accountant or accounting firm and the Auditor of Public Accounts since your office is proceeding to effect the appointment. As a matter of practical necessity, the Auditor of Public Accounts would be a party to the contract and provision for payment of audit fees would be included in the contract. Of course, the contract appropriately may include provision that the obligation for payment of the audit services is the statutory responsibility of the political subdivision under § 84-304.

The related question you ask is whether the state would be able to withhold amounts from the payment of state aid to the political subdivisions to satisfy the billings if the political subdivisions refused to pay the billing for audit services. We believe the statutory procedures set forth in Neb. Rev. Stat. §§ 72-1501 to 72-1503 (1996) would be appropriately utilized to collect audit fee amounts if the political subdivisions would decline to pay the audit costs. Neb. Rev. Stat. § 72-1502 (1996) provides, "(u)nless otherwise specifically provided by law, delinquent accounts shall be collected in the manner provided by sections 72-1501 to 72-1503." The statutes authorize and describe the procedure for withholding of specified amounts from state aid payments to political subdivisions to satisfy delinquent amounts owing to state agencies and offices in excess of one thousand dollars that have been delinquent for a period of sixty days or more.

The audit costs would constitute obligations of the political subdivisions. The Nebraska Supreme Court, in ***County of York v. Johnson***, 230 Neb. 403, 432 N.W.2d 215 (1988) addressed the issue whether a county is obligated to satisfy the costs of a county audit conducted by the Auditor of Public Accounts. In finding that the county was responsible for the costs, the Court observed that political subdivisions derive a benefit from an audit of its activities involving public monies and that auditing the records of a political subdivision was mandatory upon order of the Auditor of Public Accounts. Accordingly, it is our opinion that the costs of

audit of political subdivisions upon order of your office would constitute delinquent accounts subject to withholding from state aid payments if not satisfied by the political subdivisions within sixty days of billing.

You also inquire whether "any other types of payments" may be withheld. Other amounts owed by the state may be withheld. Neb. Rev. Stat. § 72-1601 (1996) authorizes withholding of other amounts from any debt owing by the state to "any person" indebted to the state on account of any tax or other obligation.

Sincerely,

DON STENBERG
Attorney General

Fredrick F. Neid
Assistant Attorney General

Approved:

DON STENBERG, Attorney General

21-31-16