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SPRINGFIELD

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FILE NO. S-1454

STATE MATTERS:
State Contracts

Dan K. Webb
Director
Department of Law Enforcement
103 Armory Building
Springfield, Illinois 62786

Dear Director Webb:

I have your letter wherein you ask questions relating to contracts entered into by the Illinois State Fair Agency. You first inquire whether the agency may enter into a contract with a corporation which does not possess a certificate of authority to do business in this State. You also inquire whether the agency may validly make an agreement with a lessee under which the lessee agrees to contract for improvements to be made to Fair property and is permitted to deduct the cost of the improvements from its lease payments. If such contract is invalid, you inquire as to the effect of its invalidity.

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With regard to your first question, section 102 of The Business Corporation Act (Ill. Rev. Stat. 1977, ch. 32, par. 157.102) provides in pertinent part as follows:

"A foreign corporation organized for profit, before it transacts business in this State, shall procure a certificate of authority so to do from the Secretary of State. * * * "

It is clear that a corporation must have a certificate of authority prior to "transacting business" in this State, but whether a particular act constitutes transaction of business is a question of fact upon which I cannot advise.

The Supreme Court of Illinois has held that entering into a single contract or transacting an isolated business act does not constitute transacting business in this State. (Charter Finance Company v. Henderson (1975), 60 Ill. 2d 323, 327; Plew v. Board (1916), 274 Ill. 232, 236.) Therefore, if the corporation with which the agency contracted transacted no other business within this State, it is quite likely that such corporation could properly enter into a contract with the agency without obtaining a certificate of authority. The answer, however, would turn on the facts.

A corporation actually transacting business in this State without a certificate of authority is subject to the disabilities and penalties set forth in section 125 of The Business Corporation Act. (Ill. Rev. Stat. 1977, ch. 32,

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par. 157.125.) Failure to obtain a certificate of authority does not, however, "impair the validity of any contract or act of such corporation, and does not prevent such corporation from defending any civil action in any court of this State". (Ill. Rev. Stat. 1977, ch. 32, par. 157.125.)

Therefore, even if it were to be concluded that the corporation in question should have obtained a certificate of authority prior to entering into a contract with the Illinois State Fair Agency, the contract itself would not be impaired.

With regard to your second question, it is my opinion that an agreement providing for the improvement of Illinois State Fair property to be paid for by deductions from lease payments owed the State, is invalid under The Illinois Purchasing Act (Ill. Rev. Stat. 1977, ch. 127, par. 132.1 et seq.), if the cost of the improvement is \$2500 or more and the contract is let without competitive bidding. Because the agreement in question resulted in the deduction of \$27,000 from lease payments owed to the State, that agreement was made in violation of the Illinois Purchasing Act.

The policy of The Illinois Purchasing Act is set forth in section 2 of the Act (Ill. Rev. Stat. 1977, ch. 127, par. 132.2) as follows:

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"It is the purpose of this Act and is hereby declared to be the policy of the State that the principle of competitive bidding and economical procurement practices shall be applicable to all purchases and contracts by or for any State Agency."

Section 6 of the Act (Ill. Rev. Stat. 1977, ch. 127, par. 132.6) provides in pertinent part as follows:

"The rules and regulations required by Section 5 of this Act may provide that prospective bidders be prequalified to determine their responsibility, as required by this Act, and shall provide, among other matters which are not in conflict with the policies and principles herein set forth:

a. That all purchases, contracts and expenditure of funds shall be awarded to the lowest responsible bidder considering conformity with specifications, terms of delivery, quality and serviceability except as provided in paragraphs e., f. and g. of this Section.

However, bidding is not required in the following cases:

* * *

(5) Contracts for repairs, maintenance, remodeling, renovation, or construction of a single project involving an expenditure not to exceed \$5,000 and not involving a change or increase in the size, type or extent of an existing facility. Where an expenditure of more than \$2,500 but not exceeding \$5,000 is involved, however, the work shall be advertised for bids in a local newspaper by the using agency in an effort to obtain competitive bids based on a standard specification acceptable to the authorizing agency. The contract shall be awarded to the lowest responsible bidder considering conformity with specifications, terms of delivery, quantity and serviceability.

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(6) Contracts for repairs, maintenance, or any other services not specifically exempt from bidding by this Act where expenditures for such services do not exceed \$2,500 for the same type of service at the same location for the same agency during any fiscal year, provided that where a State agency occupies more than one location within any single county the \$2500 limitation of this paragraph shall apply in the aggregate to all the locations within such county.

* * *

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Because the improvement undertaken by the State's lessee under the agreement in question cost more than \$2500, the competitive bidding process should have been used. The fact that the cost was deducted from rental payments owed to the State, does not exempt an expenditure from the provisions of the Act. To say that it does exempt the expenditure would be condoning a subterfuge to avoid the Purchasing Act and to thwart its policy.

I note in examining the agreement which you have presented that it is contemplated that the lessee will hire a contractor to perform grading and resurfacing work on Fair property and then be reimbursed through deductions from its lease payments to the State. The lessee is apparently not engaged in providing services such as those for which it is to be reimbursed. I can see no valid reason for an agreement such as the one in question, and find it to be in violation of both the spirit and letter of The Illinois Purchasing Act.

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Under section 10 (Ill. Rev. Stat. 1977, ch. 127, par. 132.10) any contract entered into in violation of the Act is void and of no effect. Furthermore, violators of the Act are guilty of a Class A misdemeanor. Ill. Rev. Stat. 1977, ch. 127, par. 132.12.

Very truly yours,

A T T O R N E Y G E N E R A L