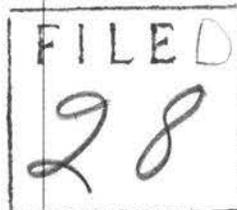


PURCHASING AGENCY: Purchasing agent may enter into contract, the terms of which are carried into the next biennium.

August 31, 1942

Mr. Ted Ferguson
State Purchasing Agent
Jefferson City, Missouri



Dear Sir:

We are in receipt of your request for an opinion, under August 29, 1942, which reads as follows:

"Will you please give me your opinion as to whether it is possible for me as State Purchasing Agent to enter into contracts for the furnishing of supplies for state departments and/or institutions extending beyond the biennium.

"I am particularly interested at this time in the matter of entering into contracts for the supplying of coal for the various state institutions for a period of approximately a year beginning sometime during the month of September. This, as you know, would carry the contract over into the next biennium.

"Enclosed is a copy of our contract form used for the past year's contract, and the form for our contract for the coming year would be approximately the same. I wish especially to call your attention to the fact that although estimates of our requirements are given, the period of the contract is the deciding factor instead of the amount. We specifically state in the second paragraph of 'Miscellaneous

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Conditions'; 'The tonnage requirements for the various institutions as shown on the proposal sheet are approximate and are subject to the actual amount of coal required by the institution for the contract period'. * * * * *

Section 48, Article IV, Constitution of Missouri, reads as follows:

"The General Assembly shall have no power to grant, or to authorize any county or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor, after service has been rendered or a contract has been entered into and performed in whole or in part, nor pay nor authorize the payment of any claim hereafter created against the State, or any county or municipality of the State, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

Under the above section of the Constitution the state cannot be bound by any contract not authorized by law.

In the contract attached to your request, we find the following clause:

" * * * In the event the appropriation for any Institution or Institutions shall become exhausted before completion

of the contract and until further funds are available, the contractor may upon 30 days' notice to the State Purchasing Agent cancel the remaining portion of the contract; or the contractor may complete the contract as awarded without any recourse against the State of Missouri for interest charges or damages for failure to receive payment, as outlined in the preceding paragraph."

This clause specifically releases the State from any liability on the contract if the appropriation for any institution or institutions shall become exhausted before completion of the contract. All that is necessary is that the contractor give thirty days' notice to the State Purchasing Agent cancelling the remaining portion of the contract. It is true that the contract carries over into the next biennium, but the State does not pay out any money until the coal is delivered.

Section 14594 R. S. Missouri, 1939, which is a part of the State Purchasing Act, and which was enacted in the Laws of Missouri, 1939, Page 410, reads as follows:

"On or before November first of each year, each department shall submit to the purchasing agent a classified list of its estimated needs for supplies for the following year. The purchasing agent shall consolidate these and may purchase the entire amount or such part thereof at one time as he shall deem best. Any contract for such purchases may provide only the price at which the supplies needed during the year shall be purchased and that the supplies shall be delivered in such amounts and at such times as ordered throughout the year

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and be paid for at such time and for such amounts as delivered. In such case, certification from the auditor shall be required only for the amount ordered at any time.

Under this section the State Auditor is not required to certify as to the full amount of the contract, but only certifies for the amount ordered at the time of delivery.

Section 19, Article X of the Constitution of Missouri, partially reads as follows:

"No moneys shall ever be paid out of the treasury of this State, or any of the funds under its management, except in pursuance of an appropriation by law; * * * *."

Since, under Section 14594, supra, the certification of the Auditor is only made at the time of the partial delivery which does not violate Section 19, Article X, of the Constitution of Missouri, supra, for the reason that at the time of the certification there was sufficient money in the appropriation to the certain institutions to pay for the delivery at that time.

If the next General Assembly, which appropriates for the next biennium does not appropriate for the purchase of coal under the contract which you intend to enter into, then the contract is void as to the payments for further deliveries, even though, under the terms of the contract, the contract is voidable, in case there is not sufficient money appropriated, or the appropriation has been exhausted.

We are not holding that the State is bound for the full amount of the contract under the appropriation made for this biennium, or that a later legislature can appropriate for the full amount of the contract, if the State was bound for the full amount of the contract during this biennium.

We are holding that since the State is only bound at the time of the delivery of the coal, then the contract is not in violation of Section 19, Article X of the Constitution of Missouri.

It has been held in this State, that where the validity of the contract depends upon the delivery of a certain article, at a different biennium, it is not creating a debt against the State during the time of the biennium in which the contract was entered into by the State.

In the case of State ex rel. v. Geiger, 246 Mo. 74, 1. c. 95, the court said:

"But in passing, in order to show the deep desire of the people of the State to observe and live up to those constitutional prohibitions against the State or any of its political subdivisions going in debt, except as therein provided, the Legislature duly enacted Sec. 1378, R. S. 1909, which under severe pains and penalties, stated therein, also prohibits the board of managers, and all other officers and agents of such institutions, from contracting any debt in the name of any such institution for the payment of which there had not previously been made an adequate appropriation.

"Under this view of the law, counsel for relator, notwithstanding the stringency of its provisions, further insists that since the contract in question expressly stipulates that the hospital agreed to take its entire water supply from the water company for a period of ten years from December 31, 1905, said water to be supplied by meter measurements, at the rate of ten cents per thousand gallons, to be paid for monthly, clearly comes within the rulings of this court as announced in the cases previously cited. In other words, that no debt was incurred on behalf of the hospital, when the contract in controversy was entered into, nor until the water was furnished by the relator and actually received and used by the former, which under the terms of the contract, was to be paid for monthly, and consequently the indebtedness was incurred monthly, and not from year to year, nor for a period of ten years."

The court further said, at l. c. 100:

"We are, therefore, of the opinion, that the eleemosynary institutions of the State are public corporations and are embraced within the provisions of Sec. 12, Art. 10 of the Constitution, and that the contract made and entered into, by and between the water company and the board of managers of Hospital Number 2 was valid when made, and that the debts incurred thereunder were from month to month, for the water furnished and used from month to month, and

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not from year to year, nor for a period of ten years, as contended for by counsel for respondents; and since the appropriation approved March 24, 1911, for the support and maintenance of this institution for the years 1911 and 1912, was sufficient for all purposes, and made prior to the time the debts were incurred, they are valid, or rather were not prohibited by said section 12 of the constitution."

This case is very similar to the facts set out in your request, and the court held that since the State was not liable under the contract until the delivery of a certain supply of water, it did not violate the Constitution in regard to creating a debt against the State.

CONCLUSION

It is, therefore, the opinion of this department, that even though, under the terms of the contract, the compliance with the contract is carried over into the next biennium, there is no law that prevents the purchasing agent from entering into such a contract, so long as proper appropriations are made by the legislature to pay the amount due for the delivery of the coal under the contract during this biennium.

Under the contract, the payment for the delivery of the coal in another biennium is not a violation of the Constitution for the reason that the delivery is made in

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another biennium when the purchase price is paid through
an appropriation made for another biennium.

Respectfully submitted

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APPROVED:

ROY McKITTRICK
Attorney General of Missouri

WJB:RW