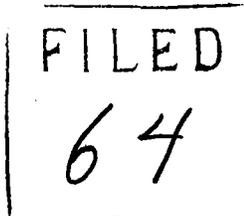


STATE PURCHASING AGENT:

Purchases of certain supplies and printing for Missouri State Highway Commission to be made through Division of Procurement.

February 4, 1947



Mr. M. E. Morris  
Director of Revenue  
State of Missouri  
Jefferson City, Missouri

Dear Sir:

Reference is made to your inquiry of recent date, requesting an official opinion of this office, and reading as follows:

"Enclosed herewith please find copy of letter under date of January 27th from Lou C. Lozier, Chief Counsel for the Missouri State Highway Department.

"This letter requests that I officially ask you for an opinion relative to the applicability to the State Highway Commission of the Purchasing Agent provisions of S.C.S.S.B. 297, Sixty-Third General Assembly.

"Since the letter sets out a brief in this connection, I am enclosing a copy herewith and I request your opinion in this connection, as suggested."

Reference to the letter received by you from Mr. Lozier indicates that the Missouri State Highway Commission is primarily concerned at this time with purchases of printing and binding. The following is taken from Mr. Lozier's letter:

"The State Highway Commission respectfully requests you, as Director of Revenue, to request a ruling from the Attorney General relative to the applicability to the State Highway Commission of certain provisions of S.C.S.S.B. No. 297, 63rd General Assembly. This request is prompted by a recent ruling of the State Purchasing Agent reversing his previous ruling under which the State Highway Department was

authorized to procure all or any part of its own printing and binding."

The 63rd General Assembly of Missouri enacted S.C.S.S.B. No. 297, containing among its other provisions one establishing the Division of Procurement. The following sections of the Act mentioned are deemed pertinent to the question presented:

"Section 64. The purchasing agent shall purchase all supplies for all departments of the state, except as in this act otherwise provided. The purchasing agent shall negotiate all leases and purchase all lands, except for such departments as derive their power to acquire lands from the constitution of the state."

"Section 73. The term 'supplies' used in this act shall be deemed to mean supplies, materials, equipment, contractual services and any and all articles or things, except as in this act otherwise provided. Contractual services shall include all telephone, telegraph, postal, electric light and power service, and water, towel and soap service. The term 'department' as used in this act shall be deemed to mean department, office, board, commission, bureau, institution, or any other agency of the state, except the legislative and judicial departments."

"Section 76. The state purchasing agent shall purchase all public printing and binding of the state, including that of all executive and administrative departments, bureaus, commissions, institutions and agencies, the general assembly and the supreme court. In such capacity the state purchasing agent is hereby empowered and authorized to take over as a part of the records of his office, all books, documents, and records which are now in the hands of the Commissioners of Public Printing and the Secretary of State relative to public printing. It shall be the duty of all state officers to order all of their printing and binding through the state purchasing agent. The pur-

chasing agent may authorize any state penal, eleemosynary or educational institution, to procure all or any part of its own printing and binding."

The plain terms of these various provisions would quite definitely require the State Purchasing Agent to negotiate the purchases of all supplies for the State Highway Commission, unless there be other or further constitutional or special statutory provisions having the effect of exempting such department from the application of the statutes quoted.

The provisions of the Constitution of Missouri of 1945 applicable to the Department of Highways are found as Sections 29 to 34, inclusive, of Article IV. These provisions are similar to those contained in Section 44a of Article IV of the Constitution of 1875, adopted in 1928.

Under each Constitution the State Highway Commission has been endowed with broad discretionary powers in the use of the funds provided for enumerated purposes in connection with the location, construction and maintenance of state highways. These provisions are quite lengthy and are not set out here, except that your attention is directed to one significant change appearing as a part of Section 29 of Article IV of the Constitution of Missouri of 1945, relating to the authority of the Highway Commission, and reading as follows:

" \* \* \* It shall have authority over and power to locate, relocate, design and maintain all state highways; and authority to construct and reconstruct state highways, subject to limitations imposed by law as to the manner and means of exercising such authority; \* \* \*" (Emphasis ours.)

You will immediately note that the new matter added in the current Constitution secures to the General Assembly the power to enact laws imposing limitations and conditions upon the manner and means of the exercise of the authority granted to the State Highway Commission.

It is conceded that under the provisions of the Constitution of Missouri of 1875 the State Highway Commission was not subjected to the provisions of the State Purchasing Agent Act of 1933 with respect to its contracts for materials and supplies, etc., incident to the actual construction and maintenance of state highways. It was so held in the case of State

ex rel. v. Smith, 67 S. W. (2d) 50. We quote from the case mentioned:

" \* \* \* In such inquiry it is to be postulated that the Legislature was, in passing the later act, seeking, just as in obedience to the constitutional mandate it sought to do in the enactment of the Highway Act, to observe the intent of the mandate with respect to the control by the commission of its purchases, together with the incidents thereof, of road material, and to aid, not hinder, the carrying out of that intent. The mandatory power conferred by the constitutional amendment is plenary in respect of the commission's power to purchase road construction material for the purposes stated therein. The grant conferring this power contains no delegation to the Legislature, or authority for legislative delegation, of that power or any part of it to any other state officer or agent. Results of the application of the State Purchasing Agent Act upon the commission's purchases of road construction materials, such, among others, as the duplication of work and of records to be kept, which would ensue in both the highway department and in such agent's department will be passed. It need only be noted that the negotiation of a purchase by advertisement for bids and the acceptance of the bid and the entering accordingly into a contract in writing are parts of the transaction and together constitute the purchase, and that the commission cannot be shorn of any part of its plenary discretion and power in the premises. Said Purchasing Agent Act not only purports to apply to supplies, but defines that term to mean 'supplies, materials, equipment,' etc., and is in seeming conflict, in respect of materials, with said Highway Act, and also, if construed to include materials purchased for highway construction, would impinge on said constitutional amendment, a result which should not be regarded as according with the legislative intent. In such situation subsidiary rules of statutory construction need be invoked."

Following this statement, the court cited applicable rules of statutory construction, and thereafter arrived at the follow-

ing conclusion:

"In view of these considerations and the established rules of construction to which reference has been made, it seems altogether clear that the purchase represented by the claim in suit does not come within the operative effect of the State Purchasing Agent Act aforesaid, and that the relator herein was and is, under the controlling law, entitled to the warrant sought at the hands of the respondent."

It will be remembered that this case was decided under a constitutional provision which did not contain the grant of authority found in Section 29 of Article IV of the Constitution of Missouri of 1945, quoted supra. It will also be remembered that the decided case involved only the purchase of certain materials incident to the actual construction of a state highway. The Supreme Court of Missouri recognized this distinction in the case mentioned, as is apparent from the following portion of the opinion, l. c. 57:

"The Purchasing Agent Act discloses on its face that it was intended to apply to some extent to the state highway commission, as the commission is specifically mentioned in the provision which requires that one of its members in conjunction with representatives of other designated departments and institutions act with the state purchasing agent in the adoption and promulgation of certain standards relative to supplies. Also the commission is referred to by necessary implication elsewhere in the act. Granting that, we are in this proceeding concerned with only the effect of the act with respect to its operation vel non upon the purchases by the commission of materials for use in road construction, as only such are involved in the claim in suit." (Emphasis ours.)

Here at least is a strong intimation that had the action then before the court been one in which it was sought to apply the provisions of the State Purchasing Agent Act of 1933 to a purchase of an item not directly connected with actual highway construction, a different result might have been reached. The provision referred to in the above quotation, relative to the requirement that one of the members of the State Highway Com-

mission act in conjunction with representatives of other designated departments and institutions in the adoption and promulgation of certain standards relative to supplies, has been carried forward into S.C.S.S.B. NO. 297, appearing as a part of Section 70. It reads, in part, as follows:

" \* \* \* In the preparation of such rules, regulations, classifications, standards and specifications, the purchasing agent shall consult with and have the assistance of a committee to be appointed by the governor and to consist of one representative from the department of highways, one from the department of education, one from the department of public health and welfare, and two representing other departments. \* \* \*"  
(Emphasis ours.)

The retention of this provision and the fact that at no place in the entire statutory provisions relating to the Division of Procurement has the Department of Highways been exempted indicate to us a legislative intent that, in so far as is permitted by the Constitution of 1945, all purchases of materials and supplies must be made through the Division of Procurement.

#### CONCLUSION

In the premises, we are of the opinion that the State Highway Commission is not required to acquire through the Division of Procurement materials and supplies directly incident to the construction and maintenance of state highways.

We are of the further opinion that all supplies and materials, including printing and binding, which are not to be used directly by the Department of Highways for the actual construction and maintenance of state highways, but which are merely incident to the operation of the department, are to be acquired through the Division of Procurement.

Respectfully submitted,

WILL F. BERRY, JR.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

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