

LIBRARY STATE : 1) Purchases of supplies made without certification of Comptroller and Auditor are void and State not liable for payment. 2) Title to void purchase remains in seller and State may later purchase such supplies.

APPROPRIATIONS:

November 9, 1948



Mrs. George Rozier
President
State Library Advisory Board
Jefferson City, Missouri

11-23

Dear Mrs. Rozier:

This Department is in receipt of your request for an official opinion which reads as follows:

"Books were purchased direct by the State Librarian during the fiscal year 1947-1948, without the Purchasing Agent asking for bids, and without the Comptroller and the Auditor certifying that there was money available in the appropriation to cover such purchase. Further, the appropriation for the purchase of books for the fiscal year 1947-1948 has been entirely spent. The books have been distributed to the various bookmobiles and libraries in this State and it would be very difficult to trace and recover them. The State Library Advisory Board requests an opinion upon the following questions:

"1) Are the contracts for the purchase of the books void, or is the State liable for payment?

"2) If an answer to the first question is that the contracts are void and the State is not liable then may the Board request that the Purchasing Agent ask for bids upon used books of the same titles as the books contracted

for by the State Librarian, and if the companies who originally sold such books submit the lowest bids which would be accepted by the Purchasing Agent, may the 1948-1949 appropriation of this Board be used in payment of such used books which are purchased?"

Section 14733, Laws of Missouri, 1945, page 1132, provides for a State Library Advisory Board, and states, in part, that: "All bills of the Division properly certified, shall be paid as other bills of the state departments and divisions are paid."

Section 14736, Laws of Missouri, 1945, provides that the State Library may provide bookmobile service, and that: "All expenses of the State Librarian or assistants of the division shall be certified and paid in the same manner as other obligations incurred in the division."

A reading of the two sections, quoted above, shows that the expenses and obligations of the Missouri State Library are to be certified and paid as expenses and obligations of the other state departments are paid.

Section 64, Laws of Missouri, 1945, page 1428, provides that the purchasing agent shall purchase all supplies for all departments of the State.

Section 65 of the same law, provides that all purchases must be based on competitive bids.

Section 72, Laws of Missouri, 1945, provides, in part, as follows:

"Whenever any department or agency of the state government shall purchase or contract for any supplies, materials, equipment or contractual services contrary to the provisions of this act or the rules and regulations made thereunder, such order or contract shall be void and of no effect. * * * ."

Under the provisions of the above three sections, the books in question should have been purchased by the purchasing agent upon competitive bids, and the failure to follow such procedure makes the contracts or orders in question void and of no effect.

Further, Section 60, Laws of Missouri, 1945, page 1448, states that:

"No expenditure shall be made and no obligation incurred by any department without the following certifications: (1) Certification by the comptroller pursuant to the provisions of Section 36 of this act; (2) certification by the auditor that the expenditure is within the purpose of the appropriation and that there is in the appropriation an unencumbered balance sufficient to pay it. * * * ."

It will be seen that the State Librarian in attempting to contract for books directly and without going through the purchasing agent and without obtaining the certification from the comptroller and auditor, violated the statutes of this State, and such contracts are void.

The effect of a void contract of the State or a municipal corporation is, as stated in *Central Transportation Company vs. Pullman's Palace Car Company*, 139 U.S. 24, 59, 11 S. Ct. 478, 35 L. Ed. 55, l.c. 68:

"* * * not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

The reason for this view is given by the United States Supreme Court in the case of *Thomas vs. Richmond*, 12 Wall. 349, 79 U.S. 349, 356, 20 L. Ed. 453, as follows:

"But, in the case of municipal and other public corporations, another consideration intervenes. They represent the public, and are themselves to be protected against the unauthorized acts of their officers and agents, when it can be done without injury to third parties. This is necessary in order to guard against fraud and speculation. Persons dealing with such officers and agents are chargeable with notice of the powers which the corporation possesses, and are to be held responsible accordingly. * * * The protection of public corporations from such unauthorized acts of their officers and agents is a matter of public policy in which the whole community is concerned. And those who aid in such transactions must do so at their peril."

In the case of *Donovan vs. Kansas City*, 175 S.W. (2d) 874, the Supreme Court of Missouri had before it a contract entered into by officers of Kansas City, which did not comply with the charter provision that all orders must carry a written certification by the Director of Finance that credit existed in the appropriation, or that a cash balance was in the treasury sufficient for payment. The Court held that this provision was mandatory, and that, absent such certification, the contract was illegal and void and not within the scope of the corporate powers of Kansas City, and further that such City incurred no liability under such contract.

Therefore, in answer to your first question it is held that the contract in question is void, and the State is not liable for the payment of the same.

In your second question you ask, if the contracts are void and the title to the books are still in the book companies, may the Missouri State Library purchase the used books from the book companies and pay for the same out of this year's appropriation.

The rule is, as stated in 17 C.J.S., page 662, that: " * * * goods that have been delivered under an illegal agreement or for an illegal purpose may be reclaimed and recovered back so long as the agreement or purpose remains unexecuted. * * * "

Therefore, the title to the books remains in the book companies if they do not desire to hold the State Librarian personally responsible for the purchase. If the State Library Advisory Board now desires to purchase these used books and pay for the same out of this year's appropriation, we see no constitutional or statutory inhibition against the same if the statutory procedure as to certification and requisitions to the purchasing agent are followed.

It is true that Section 39 of Article III of the Constitution of Missouri, 1945, provides as follows:

"The general assembly shall not have power:

(4) To pay or to authorize the payment of any claim against the state or any county or municipal corporation of the state under any agreement or contract made without express authority of law; "

However, in the instant case the payment would not be of the claim made without express authority of law, to-wit: the purchase of the new books to be paid out of the 1947-1948 appropriation, but would be a payment of a claim for used books to be made out of the 1948-1949 appropriation.

CONCLUSION.

It is, therefore, the opinion of this Department that:

Purchases made direct by a department without the purchasing agent asking for bids, and without certification of the comptroller and auditor, are illegal purchases and are void, and the State is not liable for the payment of the same.

It is further the opinion of this Department that:

The title to supplies purchased by State department under a void and illegal contract does not vest in the State but remains in the seller, and the State Department may later purchase such supplies if the statutes relating to the purchasing agent and the certification by the comptroller and state auditor are followed.

APPROVED:

Respectfully submitted,

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