WILLIAM J. SCOTT
ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD
62706

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FILE NO. S-977

APPROPRIATIONS:
Payments Authorized
By Public Act 79-273

Honorable Robert G. Cronson
Auditor General
State of Illinois
Springfield, Illinois 62706

Dear Mr. Cronson:

This responds to your request for an opinion concerning section 5 of Public Act 79-273. Section 5 was enacted in response to the fact that during the 1974 Illinois State Fair the State Fair Agency overspent its appropriation by almost $1,000,000. As a result, many vendors who furnished goods or services to the State Fair Agency have not been fully compensated for those goods and services. Section 5 provides in part as follows:

COPY

"Section 5. Whereas, numerous vendors furnished goods and services for the use of the State Fair Agency prior to, during, and immediately following the 1974 Illinois State Fair; and

Whereas, these vendors for many months have remained unpaid for the goods and services furnished in good faith without such vendors being aware that sufficient monies were not available to pay their just due debts at the time goods and services were furnished; and

Whereas, to have to seek redress in the courts for the many vendors involved would, in the judgment of the General Assembly, constitute an unwarranted expense and burden; therefore

The following named sums are appropriated to pay for goods and services previously rendered, such payment to be made by the Comptroller upon the joint certification in writing by the Governor and the Auditor General, as to the amount due to each individual vendor as follows:

* * * "

Thereafter follows a list of vendors with a specific dollar appropriation to each vendor.

You state further that the State Fair Agency never filed any rules concerning purchasing until November 20, 1974. These rules did not become effective until December 1, 1974. Section 5 of the Illinois Purchasing Act (Ill. Rev. Stat. 1973,

ch. 127, par. 132.5) provides that all purchases, contracts, obligations or expenditures of funds shall be in accordance with rules and regulations concerning such agency procurement, practices and procedures and that such rules and regulations shall become effective in accordance with "AN ACT concerning administrative rules". (Ill. Rev. Stat. 1973, ch. 127, par. 263.) Section 5 of the Illinois Purchasing Act further provides that:

> " * * *
>
> The Secretary of State shall annually send to each State agency subject to this Act a notice requesting up-to-date filings of such rules and regulations. By July 1 of each odd-numbered year the Secretary of State shall file with the Department of General Services a certificate of compliance of each State agency subject to this Act. Such certificate must be on file before a State agency may be authorized to expend funds under appropriations for purchases and contracts subject to this Act."

Under section 10 of the Illinois Purchasing Act (Ill. Rev. Stat. 1973, ch. 127, par. 132.10) "any contract entered into or purchase or expenditure of funds by a State agency

in violation of this Act or the rules and regulations adopted in pursuance of this Act is void and of no effect".

With this background you ask for opinions on the following three questions:

> (1) Are contracts entered into by the State Fair Agency prior to December 1, 1974, valid?
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> (2) Can any claims arising out of procurement by the State Fair Agency prior to December 1, 1974, be certified for payment pursuant to section 5 of Public Act 79-273?
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> (3) Is section 5 subject to applicable fiscal requirements of the State of Illinois, including particularly the Illinois Purchasing Act, and if so, to what extent?

In answer to your first question, I am of the opinion that all contracts subject to the Illinois Purchasing Act entered into before December 1, 1974, are void. This is so for several reasons. First, as recognized by section 5, many contracts were entered into for which there was no appropriation. Section 30 of "AN ACT in relation to State finance" (Ill. Rev. Stat. 1973, ch. 127, par. 166) provides:

> "§ 30. No officer, institution, department, board or commission shall contract any indebtedness on behalf of the State, nor assume to bind the State in an amount in excess of the money

appropriated, unless expressly authorized by law." Contracts entered into in excess of an appropriation have always been considered void. See Fergus v. Brady, 277 Ill. 272; 1952 Ill. Att'y. Gen. Op. 51; 1945 Ill. Att'y. Gen. Op. 19.

Secondly, the Illinois Purchasing Act clearly provides that no agency, subject to the Illinois Purchasing Act, is authorized to expend funds under appropriations for purchases and contracts if the Secretary of State has not filed with the Department of General Services a certificate of compliance for that agency. Furthermore, section 10 provides that all contracts entered into in violation of the Act are void.

From the language of the Act it is clear that the contracts involved here are void since the State Fair Agency had no rules or regulations under which the contracts could have been let. That this is the case, is clear from the decision of the Illinois Supreme Court in Dement et al. v. Rokker et al., 126 Ill. 174. In that case partners sought to recover payment under a contract that had been let in violation of a State purchasing act. Even though the State had received the benefits of the contract, the

Supreme Court held that the contract was void and the State was not bound to pay under it. The court stated at page 193:

> "* * * The rule is, those dealing with persons exercising a special statutory power are charged with knowledge of the statute, and they are bound to know, at their peril, the extent of the power conferred. Parr v. Village of Greenbush, 72 N.Y. 463; Bishop on Contracts, (enlarged edition,) sec. 992.
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> The law requires that every prerequisite to the exercise of such a power, as stated in the statute, must actually precede its exercise. (Williams v. Peyton's Lessee, 4 Wheat. 79.) And on these principles it has been held, that where the charter or incorporating act requires officers of the city to award contracts to the lowest bidder, a contract made in violation of its requirement is illegal, and in an action brought on such contract, for the work, the city may plead its illegality in defense. Dillon on Mun. Corp. (1st ed.) 388, and cases cited in note 1, and Parr v. Village of Greenbush, supra. * * *"

Furthermore, the State is not estopped from denying the legality of a contract even though it has accepted the benefits. In the Dement case, at page 199, the court stated:

> " * * *
>
> Although the commissioners may have assumed the contracts to be valid, since they were made, and done acts upon the faith of that assumption

> prejudicial to these defendants in error, if their legality be now denied, the question of the validity of the contracts is still open. 'The State is never estopped, as an individual or private corporation may be, on the ground that the agent is acting under an apparent authority which is not real, — the conclusive presumption that his powers are known rendering such a consequence impossible.' Bishop on Contracts, (enlarged ed.) sec. 993, and authorities there cited.
>
> * * * "

See also Brownell Improvement Co. v. Highway Com'r., 280 Ill. App. 43.

Private individuals dealing with the government must be aware of the statutory authority of persons with whom they deal. With due diligence these vendors could have discovered that the State Fair Agency had no rules or regulations on file with the Secretary of State. It is a general rule that when a party has notice of facts appearing in a recorded document such as would put a prudent person upon inquiry, he is chargeable with the knowledge of such other facts which by diligent inquiry, he would have ascertained had he investigated. (In re Greer College & Airways, 53 F. 2d 585.) The fact that the

contract may have been valid if entered into with a private individual instead of the government, is not relevant. The Supreme Court has stated in Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380 at 383, that it is too late in the day to urge that the government is just another private litigant for purposes of charging it with liability and that anyone entering into an arrangement with the government takes the risk of having accurately ascertained that he who purports to act for the government stays within the bounds of his authority.

Even acceptance of goods and services by the State under a void contract does not create a legal liability upon the State to pay for such goods and services. If this were not the case, then the State would be obligated to pay for what its departmental officials had irregularly and illegally obligated it to do. The object of the Illinois Purchasing Act is to prevent favoritism, corruption and extravagance in the awarding of public contracts and a determination that there was a legal obligation to pay for goods and services obtained in violation of the Illinois Purchasing Act would encourage a disregard of the provisions of the Act and make it a nullity.

See Dement et al. v. Rokker et al., supra; Schnepp & Barnes, a corporation v. State of Illinois, 10 Ill. Ct. Cl. 609; and 1959 Ill. Att'y. Gen. Op. 84.

Even though there is no legal obligation to pay contractors on a void contract, the General Assembly may recognize claims arising out of a moral obligation or founded in equity and justice in the largest sense of these terms. Although section 1(a) of article VIII of the Illinois Constitution of 1970 provides that public funds shall be used only for "public purposes", "public purposes" has been defined by the Illinois Supreme Court so that it would include payments of the kind addressed in section 5 of Public Act 79-273. In Hagler v. Small, 307 Ill. 460, the Supreme Court stated as follows at 474, 475:

> " * * *
>
> Whether a tax or an appropriation is for a public or private purpose is a question not always easy of determination. In deciding whether such purpose is public or private, courts must be largely influenced by the course and usage of the government, the object for which taxes and appropriations have been customarily and by long course of legislation levied and made, and what objects have been considered necessary to the support and for the proper

> use of the government. Whatever lawfully pertains to this purpose and is sanctioned by time and the acquiescence of the people may well be said to be a public purpose and proper for the maintenance of good government. (Loan Ass'n. v. Topeka, 20 Wall. 655.) What is for the public good and what are public purposes are questions which the legislature must in the first instance decide. * * * The power of the State to expend public moneys for public purposes is not to be limited, alone, to the narrow lines of necessity. * * *"

There need be no legal basis for the claim. In the same case the court at pages 477 and 479 stated:

> "* * * [I]t cannot well be doubted that if it [a moral obligation] does exist the State may provide for it. In United States v. Realty Co. 163 U.S. 427, the court said: 'The power to provide for claims upon the State founded in equity and justice has also been recognized as existing in the State governments. For example, in Gilford v. Chenango County Supervisors, 13 N.Y. 143, it was held by the New York Court of Appeals that the legislature was not confined in its appropriation of public moneys to sums to be raised by taxation in favor of individuals in cases in which the legal demands existed against the State, but that it could recognize claims founded in equity and justice in the largest sense of these terms, or in gratitude, or in charity.' * * *"

In The People v. Barrett, 370 Ill. 465, the court gave examples of the kind of claims which have been paid. It stated at page 467:

" * * *

Appropriations made to discharge such an obligation are for public purposes and are within the power of the legislature. (Hagler v. Small, 307 Ill. 460; Wyoming v. Carter, 215 Pac. 477; Opinion of Justices, 240 Mass. 616; see, also, People v. Westchester Nat. Bank, 231 N.Y. 465.) A moral or equitable claim against the State may arise out of many varying circumstances. Thus, public money may be lawfully appropriated to pay for injury to land by a public improvement, although no liability existed when the injury occurred (In re Borup, 182 N.Y. 222) or to pay a bounty which had been earned but not paid when the statute authorizing the payment of the bounty was repealed (United States v. Realty Co., 163 U.S. 427) or to grant bonuses to soldiers. * * *"

Therefore, in partial answer to your second question, I am of the opinion that the General Assembly can recognize claims based on the procurements by the State Fair Agency for the 1974 Illinois State Fair and appropriate money to pay such claims even though they arose out of void contracts.

Whether such claims can be certified for payment pursuant to section 5 of Public Act 79-273 depends on the extent to which the fiscal requirements of the State of Illinois, including particularly the Illinois Purchasing Act, apply to these claims. It is clear from the provisions of section 5 that the General Assembly was well aware that many of the

contracts were void for lack of appropriation and that in enacting section 5 of Public Act 79-273 the General Assembly clearly intended that all claims arising out of contracts which were void for lack of appropriation, be paid. Thus, to this extent it is clear that the fiscal requirements of the State of Illinois do not apply to these claims.

There is nothing in section 5, however, to indicate that other fiscal requirements do not apply or that the claims may be based on contracts which are not otherwise in all respects, valid.

The section as written is not ambiguous. It appropriates money to pay the vendors' "just, due debts". As previously discussed, these contracts are void, thus debts arising out of the contracts are not just, due debts. Just, due debts generally means those debts which are valid under the law or which are legally binding. While the General Assembly clearly meant to appropriate money to pay debts which were otherwise void because of lack of appropriation, there is no indication on the face of the bill that they intended to pay debts based on contracts which were void for any other reason.

Section 5 becomes ambiguous with regard to the application of the fiscal requirements of the Purchasing Act, only if one is aware of the background of the section. Some of the contracts which should have been let to the lowest responsible bidder, were not bid at all. These contracts would be void for this reason. With regard to the Purchasing Act, however, most contracts are void only because the State Fair Agency had no rules and regulations under which to contract. It could be argued that there are two classes of void contracts and that the General Assembly only intended that those which should have been bid not be paid.

At the time of the passage of Public Act 79-273, it was a matter of general and common knowledge that some of the vendors had not complied with the Illinois Purchasing Act. It was not generally known that probably none of them had. The reason and purpose for the General Assembly providing in the Act that the payments be certified by the Governor and the Auditor General, as I see it, was to assure that the appropriation would not be used for the payment of any illegal contracts. If the General Assembly had intended otherwise, it would merely have provided

for the payments without any certification or only on certification that the contracts had been performed. The certification required by the Auditor General and the Governor connotes that the two officers should exercise and perform the same judgment and responsibility with regard to such payments as they and other State officers are required to do with other payments, with the exception here of the non-existence of an appropriation at the time of the contracts. There is no indication that only those which should have been bid are not to be paid.

I am, therefore, of the opinion that all fiscal requirements such as those found in the State Comptroller Act (Ill. Rev. Stat. 1973, ch. 15, pars. 209 et seq.), those in "AN ACT in relation to State finance" (Ill. Rev. Stat. 1973, ch. 127, pars. 137 et seq.), other than in section 30 as previously discussed, and those in the Illinois Purchasing Act do apply.

Very truly yours,

ATTORNEY GENERAL