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CONTRACTS:
Illinois Purchasing Act

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Springfield, Illinois 62706

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State of Illinois
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Gentlemen:

This responds to your requests for opinions for clarification of your responsibilities with regard to section 9.02 of the Illinois Purchasing Act. (Ill. Rev. Stat. 1973, ch. 127, par. 132.9b.) This section provides as follows:

> "§ 9.02 (a) No amount of funds in addition to that provided for in a contract for repairs, maintenance, remodeling, renovation

or construction may be obligated or expended unless the additional work to be performed or materials to be furnished is germane to the original contract.

Even if germane to the original contract, no additional expenditures or obligations may, in their total combined amounts, be in excess of the percentages of the original contract amount set forth in subsection (b) of this section, unless they have received the prior written approval of the Capital Development Board.

In the event that the total of the combined additional expenditures or obligations exceed the percentages of the original contract amount set forth in subsection (b) of this section then the Capital Development Board shall investigate all the additional expenditures or obligations in excess of the original contract amount and shall in writing approve or disapprove subsequent expenditures or obligations and state in detail the reasons for such approval or disapproval.

(b) Whenever the contract amount is between $0 and $75,000, the percentage shall be 9% (Maximum $6,750).

Whenever the contract amount is between $75,001 and $200,000 the percentage shall be 7% of the amount above $75,000 plus $6,750, but not to exceed 7% of $200,000 (Maximum $14,000).

Whenever the contract amount is between $200,001 and $500,000, the percentage shall be 5% of the amount above $200,000 plus $14,000, but not to exceed 5% of $500,000 (Maximum $25,000).

Whenever the contract amount is in excess of $500,000, the percentage shall be 3% of the amount above $500,000 plus $25,000."

Since the total combined amounts of change orders in each of the mechanical contracts let for the rehabilitation of the capitol building has exceeded the percentage limitation

set forth in this section, the Secretary of State, who entered into these contracts, sent to the Capital Development Board for its approval, five change orders in these contracts. The Capital Development Board approved the change orders subject to a determination that they were germane. The Board has since determined they are not germane.

Based on this factual background, I interpret your requests as asking two questions:

What is the meaning of the term "germane"?

Does the Capital Development Board have authority to determine germaneness?

The term "germane" is not defined in the Illinois Purchasing Act. (Ill. Rev. Stat. 1973, ch. 127, pars. 132.1 *et seq.*) Section 9.02, *supra*, merely provides that additional work to be performed or materials to be furnished must be germane to the original contract. Any change order which provides for additional work or material which is not germane to the original contract would be void under section 10 of the Illinois Purchasing Act. Ill. Rev. Stat. 1973, ch. 127, par. 132.10.

"Germane" is defined in Webster's Third International Dictionary as meaning "having a close relationship; appropriate,

pertinent". The term has been legally defined in Campe v. Cermak, 330 Ill. 463, to mean "akin" or "closely allied". In Hoyne v. Ling, 264 Ill. 506, "germane" was interpreted to mean incidental or auxiliary or subservient to the general subject or purpose. Both these cases, however, deal with whether a particular section of a bill is germane to the title. The only Illinois cases I have been able to find which define the term "germane" relate to whether the subject matter of a bill is germane to the title or to whether a particular defense is germane to a law suit. No case defines the term in relation to a public works contract.

In order to understand what the General Assembly meant by the term "germane" one must consider the purpose of the Illinois Purchasing Act, supra, and the state of the law before this particular section was added. The purpose of the Purchasing Act is to promote the principle of competitive bidding and economical procurement practices for all purchases and contracts by or for any State agency. Any contract which is not let in compliance with the Act is void. In an earlier opinion (1957 Ill. Att'y. Gen. Op. 213) one of my predecessors advised that substantial changes in a contract would constitute a new contract and would have to be bid. He stated at pages 214-215:

" * * *

> It is the general rule that where a statute requires public contracts to be let to the lowest bidder, the public body or agency cannot substantially vary the terms and conditions of the contract unless new bids are secured. [cites omitted.]
>
> However, where the alteration, change order, or furnishing of extra work or materials does not constitute a substantial deviation from the original plans and specifications, it has been held that it is not necessary to readvertise for bids. [cites omitted.]

* * * "

Thus, any changes in a contract which are substantial are void unless new bids have been secured.

Section 9.02 was added as an additional protection for the State. It does not in any way abrogate this prior interpretation of the Purchasing Act by the Attorney General. This section then operates only with respect to those changes which are not substantial.

While it might be possible to define "germane" as meaning merely "related to" that would not accomplish the objectives of the Illinois Purchasing Act. Obviously, "germane" must be construed as meaning not only "related to" but also "insubstantial". Substantial changes cannot be germane because,

being substantial, they so depart from the original as to constitute a new contract. Such a contract would have to be rebid. Germane changes then are only those which are insubstantial and do not have to be rebid. In other words, additional work or material, or other changes, are germane to the original contract if they are incidental to the original contract or are of small or minor importance, or are "ordinary and comparatively unimportant departures from the details in the plans and specifications". (See County of Cook v. Harms, 101 Ill. 151, and City of Elgin v. Joslyn, 136 Ill. 525.) Whether a change is germane is a question of fact.

Since the Capital Development Board gave several reasons why the change orders were not germane, I will discuss such reasons for the purpose of establishing some criteria for determining whether change orders are germane. One reason for its determination was the past abuses with regard to the capitol rehabilitation project. The project itself has been divided into four phases, each with separate contracts. A number of the abuses discussed in the letter deal with situations arising under Phase I. These, of course, are irrelevant to these particular contracts. I note further that there has been a change in public officials since most of the abuses occurred.

We must presume that public officials perform their duties in good faith. (Owens v. Green, 400 Ill. 380.) The corrupt practices of past officials are irrelevant to the practices of the present officials.

Another reason given for determining that the change orders were not germane was the sheer number of change orders. It was specifically stated in the letter that the previous change orders were excessive. The number of change orders is not relevant to whether a particular change order is germane. All such change orders could deal with minor changes. One change order, however, could be substantial. Each change order must be examined individually.

Another reason cited for its determination was that there have been significant percentage increases in the original costs of the contracts. The percentage increase over the original costs may be relevant to whether a change is germane, however, it alone is not a sufficient reason on which to base a determination. In fact, section 9.02 permits change orders in contracts in any amount if they are germane and if they are approved by the Capital Development Board.

The final reason for determining that the change orders were not germane, was the fact that they result from a change in occupancy of the mezzanine level of the capitol building.

The original contracts provided that the mezzanine be rehabilitated for use as meeting rooms and offices for the legislative council. The present plans call for using the area for the press corps and a television studio. Such change in use might involve significant changes in the specifications of the contracts. If the contracts involved were limited to rehabilitating the mezzanine for offices and meeting rooms, there would be little question in my mind that a change order to rehabilitate them for use by the press corps and as a television studio would not be germane to the original contract. However, that is not the situation. The original contracts provided for rehabilitation of the southwest quarter of the capitol building, not just the mezzanine area. The changes must be considered with regard to the whole original contract, not just the particular area to which the additional work relates. A change could be insignificant in that it changes neither the overall use of the building nor the cost. If there were provisions in the original contracts for comparable press corps headquarters and a television studio, the change orders would not involve a change in use of the building. Theoretically, if the use of two areas is reversed, the changes should result in no change in cost.

increase in costs in one area would be balanced by reduced costs in the other.

Whether the particular changes which led to your requests are germane depend on the scope and purpose of the original contract and the extent of additional work and materials involved in the change order. Examples of changes which have been found to be substantial and thus not germane are contained in the quoted prior Attorney General's opinion and 69 A.L.R. 697.

In Pells v. City of Paxton, 176 Ill. 318, it was determined that a change in the width of a pavement from 61 feet to 53 feet was a substantial change. In Smith v. Sanitary District of Chicago, 108 Ill. App. 69, it was determined that a change in specifications to require a cement retaining wall in place of a dry rubble wall was a substantial change. In Warren v. Chandos, 47 P. 132 (Cal. 1896) it was determined that changing the grade line of a street was substantial. In Cohn v. Metz, 101 N.Y. Supp. 392 (Sup. Ct., App. Div., 1906), changing the material used in paving a street from asphalt blocks to sheet asphalt was determined to be a substantial change and in Ely v. Grand Rapids, 47 N.W. 447 (Mich. 1890) adding the laying of gutters

to a contract for paving of streets was determined to be a substantial change.

At 135 A.L.R. 1247, cases in which changes have been found to be matters incidental to the original contract and thus germane, are discussed. Changes caused by defects in the plans and specifications or by newly discovered physical conditions, are in general considered incidental. Changes in minor details, such as type of brick, doors and windows, are also considered incidental. However, no important changes in the general plan or a new departure which so varies from the original plan or is of such importance as to constitute a new undertaking where fairness could be achieved only through competitive bidding, are allowed.

The second question to be considered is whether the Capital Development Board has authority to determine germaneness. In general, the person who enters into the contract as "Owner" makes the initial determination of germaneness. The Secretary of State is the person who entered into the contracts now under consideration, and is the "Owner". He, therefore, determines whether a change order is germane. It is implicit in his forwarding such change orders to the Board that he has made such a determination. The Capital Development Board

could make such determination with regard to contracts of which it is the "Owner". The problem raised by your request, however, is whether the Capital Development Board has an additional authority to determine the germaneness of all change orders which it is required to review.

The powers and duties of a statutory body or commission, such as the Capital Development Board, are regulated by statute. "It is a well-settled rule that since such a commission exercises purely statutory powers it must find within the statute its warrant for the exercise of any authority which it claims". (Hesseltine v. State Athletic Com., 6 Ill. 2d 129.) Such powers are often limited. In State v. Reeves, 81 P. 2d 860 (Wash. 1938) the Washington Supreme Court held that where a candidate for the Supreme Court was required to file a declaration of candidacy with the Secretary of State, the Secretary was not authorized to reject it on grounds of disqualification.

There is no explicit authority for the Capital Development Board to determine germaneness, either in the Illinois Purchasing Act, supra, or in the Capital Development Board Act. (Ill. Rev. Stat. 1973, ch. 127, pars. 771 to 792.) The purposes of the Board are set forth in sections 4.01 to 4.05

of article I of the Capital Development Board Act. (Ill. Rev. Stat. 1973, ch. 127, pars. 774.01 to 774.05):

> "§ 4.01. To build or other wise provide hospital, housing, penitentiary, administrative, recreational, educational, laboratory, parking, environmental equipment and other capital improvements for use by the State of Illinois."
>
> "§ 4.02. To conduct continuous studies into the costs of building or otherwise providing the facilities described in Section 4.01."
>
> "§ 4.03. To conduct research on improvements in choice and use of materials and in construction methods for reducing construction costs and operating and maintenance costs of the facilities described in Section 4.01."
>
> "§ 4.04. To review and recommend periodic revisions in established building and construction codes to promote public safety and reduce construction costs and operating and maintenance costs of the facilities described in Section 4.01."
>
> "§ 4.05. To advise State agencies, units of local government and school districts, on request, on any matter related to the purposes of this Act."

It is evident from these purposes that the area of expertise of the Board is in the costs of buildings, the choice and use of materials and construction methods.

Under section 9.02 of the Illinois Purchasing Act, once the percentage limitations set forth in the Act have been reached, it is the duty of the Capital Development Board to

review all prior change orders and to approve or disapprove all subsequent change orders. It is implicit that the reasons for approval or disapproval must relate to the Board's area of expertise: materials, the choice and use of materials and the construction methods required by the change orders. It is the duty of the Board to approve or disapprove for reasons related to these matters regardless of its opinion as to germaneness.

It is presumed in the statute that only germane change orders will be submitted to the Board. No officer or body is given the explicit authority to make such determination or enforce such requirement. Similarly, there are no explicit enforcement provisions relating to the requirement that contracts be bid. If the determination that a change order is germane or that a contract need not be bid is wrong, such change order or contract is void and the official violating the Act is potentially liable for criminal prosecution. (Ill. Rev. Stat. 1973, ch. 127, par. 132.12.) Such determinations are usually made in suits to recover payment for work done or to enforce the penal provisions, and not by administrative determination.

However, even though the Capital Development Board has no authority to determine germaneness, its prior approval

of the change orders subject to a determination as to germaneness, is not a sufficient approval. Under section 9.02 the Board is required to give detailed written reasons for its approval or disapproval. To my knowledge, the prior tentative approval was not accompanied by detailed written reasons for approval. The Capital Development Board must therefore give further consideration to the change orders.

Very truly yours,

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