

**LETTER OPINION
2011-L-02**

February 4, 2011

The Honorable Merle Boucher¹
The Honorable Kenton Onstad
The Honorable David O'Connell
The Honorable Carolyn Nelson
North Dakota State Legislature
Bismarck, ND 58505

Thank you for your letter requesting my opinion whether the chairman of the 17-member governing body of the Legislative Council² and the Council's appointed director had authority to spend funds appropriated by the Legislative Assembly at the time they executed a contract on behalf of the Council in 2009. For the reasons stated below, it is my opinion that the Chairman of the Legislative Council and the Council's director both had statutory authority, and authority delegated by the Council through the Supplemental Rules of Operation and Procedure, to expend appropriated funds on this particular contract, without the need for additional approval from the governing body of the Council.

ANALYSIS

You indicate in your letter that after the 2009 Regular Legislative Session, the Chairman of the Legislative Council's governing body, Representative Al Carlson, and the Council's Director, Jim Smith, entered into a contract with a company named Propylon for development of software to be used by the Legislative Council and the Legislative Assembly. You question whether the Chairman of the Council and the Director of the Council's staff had authority to spend Legislative Assembly funds at the time they entered into this contract in 2009 without approval by motion of the 17-member governing body of the Council.

¹ The Honorable Merle Boucher was a member of the House of Representatives at the time this opinion was requested.

² In 2009, the Legislative Council's chapter (N.D.C.C. ch. 54-35) was amended to create a distinction between the 17-member governing body composed of legislators, now referred to as Legislative Management, and the appointed director and his staff, referred to as the Legislative Council.

As a preliminary matter, I must first address whether the Attorney General may issue an opinion on an issue involving the internal management of the Legislative Assembly. The Attorney General is an officer of the executive branch of government. “The legislative, executive, and judicial branches are coequal branches of government.”³ Each house of the Legislative Assembly may establish procedural rules under the Constitution.⁴ And, although the procedural rules governing interim legislative action are statutorily based, the principle that “there is an implied exclusion of each branch from the exercise of the functions of the others”⁵ is applicable to this situation. The North Dakota Supreme Court has held that the construction of a procedural rule is left to the internal operation of the Legislature, and no other branch of government may enforce those rules absent a constitutional violation.⁶

This would imply that your question is beyond the scope of an Attorney General’s opinion.⁷ However, this office has provided advice in the past concerning the legal authority of certain interim committees.⁸ Therefore, while noting that a court would likely find a controversy over these issues nonjusticiable, and would thus not reach the merits of the issue, I will provide advice concerning the application of the 2007 rules to a succeeding interim period.⁹

Turning to your question, during any legislative session the speaker of the house and the president pro tempore of the senate are required to jointly approve vouchers for payment of “compensation, salaries, and other costs of operation and expenses of the legislative assembly, its committees, and its employees”¹⁰ The law applicable during the 2007 interim, and first few months of the 2009 legislative interim provided that “[t]he legislative council shall act as the custodial agency to ensure the proper storage and safekeeping of

³ N.D. Const. art. XI, § 26.

⁴ N.D. Const. art. IV, § 12.

⁵ Ranta v. McCarney, 391 N.W.2d 161, 165 (N.D.1986).

⁶ State ex rel. Spaeth v. Meiers, 403 N.W.2d 392, 394 (N.D. 1987), see also N.D.A.G. Letter to Hoffner (July 7, 1989).

⁷ In State ex rel. Spaeth, the Supreme Court noted that the Senate’s construction of its own rules is a legislative function, and if it does not exceed constitutional authority, its action “is open only to political challenge.” Id. at 394.

⁸ N.D.A.G. 2007-L-08, see also N.D.A.G. Letter to Hoffner (July 7, 1989).

⁹ See Haw. Op. Atty. Gen. No. 05-1 (May 20, 2005), Kan. Op. Atty. Gen. No. 87-92 (June 18, 1987). (The Kansas Attorney General noted that the Legislature has authority to establish its own rules, of which it is the sole judge, and it would not be appropriate for the Attorney General to interpret or apply legislative rules, nonetheless the Attorney General provided advice to a state senator concerning the possible application of legislative rules.)

¹⁰ N.D.C.C. § 54-03-11.

legislative supplies and equipment during the interim periods between legislative sessions, and is authorized to approve vouchers on behalf of the legislative assembly, or may authorize its director to do so, for the payment from legislative appropriations of the delayed billings or other billings for legislative expenses during periods when the legislative assembly is not in session.”¹¹ In addition, prior to its amendment in 2009, N.D.C.C. § 54-35-06 provides that “[e]xpenditures of funds made available to the council by legislative appropriation must be made in accordance with rules or motions duly approved by the council.”¹²

In June 2007, the Legislative Council’s governing body approved operating rules and procedures to be used during the legislative interim known as The Supplementary Rules of Operation and Procedure.¹³ The 2007 rules state that “[i]n addition to the provisions of North Dakota Century Code Chapter 54-35, and in addition to present rules and policies previously established, the Legislative Council, its committees, and its staff are governed by the following rules: . . .” The policies and rules of the Legislative Council continue until amended or repealed by the governing body of the Council.¹⁴ The rules do not include an expiration date.

Among other items, the rules delegate authority to the Legislative Council’s chairman and the director. Specifically, the rules provide that the Legislative Council’s chairman or the chairman’s designee or designees must approve and sign vouchers for the expenditure of funds under the jurisdiction of the Council.¹⁵ The rules further state that the appointed director of the Legislative Council shall provide assistance as may be necessary to carry out the objectives of the Council and further provide that the director “is responsible for the

¹¹ N.D.C.C. § 54-35-11. This section was amended in 2009 by the Legislature by H.B. 1436, 2009 N.D. Sess. Laws ch. 482, § 66. This amendment became effective on August 1, 2009. See N.D. Const. art. IV, § 13.

¹² The legislative branch of government is exempt from the statutes and rules governing purchases applicable to the executive branch of government. N.D.C.C. § 54-44.4-01(4) (defining “[p]urchasing agency” as “a governmental entity in the executive branch of government.”) Therefore there are no other laws applicable to the legislative council’s governing body which provide any additional requirements for contracts or vouchers.

¹³ Copy on file with Legislative Council. Legislative Management approved new rules containing substantially similar provisions in June 2009, after the contract was signed.

¹⁴ Supplementary Rules of Operation and Procedure of the N.D. Legis. Council, ¶ 7(a), June 2007.

¹⁵ Supplementary Rules of Operation and Procedure of the N.D. Legis. Council, ¶ 4(a), June 2007.

operation of the Council offices, the provision of staff services to the Council and its committees, and for carrying out policies and directives of the Council."¹⁶

Although the contract you reference was signed in 2009, this project dates back to June 2004, when the chairman and director signed a contract with a local company for infrastructure analysis.¹⁷ The project continued to develop and on February 13, 2009, the North Dakota Information Technology Department ("ITD") presented a report to the Legislative Council explaining ITD's search for vendors in the marketplace with legislative business process and document drafting expertise; ITD found one acceptable company named Propylon.¹⁸ ITD recommended that the state establish a partnership with Propylon to implement its program named Legislative Workbench Suite, for the North Dakota Legislature.¹⁹ On February 26, 2009, Director Smith provided testimony to the House Approp. Comm. – Gov't Operations Div. explaining that the Legislative Council's \$3,910,827 line item appropriation for legislative applications replacement was included for one-time funding to replace the Legislative Assembly's mainframe-based computer system.²⁰

From February to April Propylon worked with the Legislative Council and ITD staff on the framework of the proposed project.²¹ On April 8, 2009, Propylon provided the results of a "fit" analysis and ITD provided its recommendation to the Legislative Council that the State establish a partnership with Propylon to implement the company's Legislative Workbench Suite for the North Dakota Legislature.²² The Legislative Council's appropriations bill, S.B. 2001, was subsequently passed by both houses of the Legislature on May 4, 2009, with a line item of \$3,910,827 in one-time funding for replacing the Legislative Assembly's mainframe-based computer system.²³

¹⁶ Supplementary Rules of Operation and Procedure of the N.D. Legis. Council, ¶ 6(a) & (c), June 2007.

¹⁷ N.D. Legis. Council Staff Memo, "Legislative Applications Replacement System Update," June 24, 2010.

¹⁸ Id.

¹⁹ N.D. Info. Tech. Dep't, N. D. Legis. Council Application Replacement Study Recommendation Document, Revision 1, p. 2 (Feb. 12, 2009).

²⁰ Hearing on S.B. 2001 Before the House Approp. Comm. – Gov't Operations Div., 2009 N.D. Leg. (Feb. 26) (Testimony of Jim W. Smith, Director).

²¹ N.D. Legis. Council Staff Memo, "Executive Summary – LEGEND," Apr. 8, 2009.

²² April 8, 2009, Legislative Enterprise System North Dakota ("LEGEND") meeting (described in N.D. Legis. Council Staff Memo, "Legislative Applications Replacement System Update," June 24, 2010).

²³ S.B. 2001, 2009 N.D. Leg.; 2009 N.D. Sess. Laws ch. 29, § 2.

Since the contract you reference was signed after the 2009 session, the requirements in N.D.C.C. § 54-03-11, which outline the procedures for paying vouchers and expenses during a legislative session, do not apply. Rather, because the Propylon contract was executed during the interim between the 2009 and 2011 sessions, the requirements in N.D.C.C. §§ 54-35-11 and 54-35-06 apply to the payment of expenses in addition to any rules of operation and procedure approved by the 17-member Legislative Council. These laws, and the rules promulgated pursuant to these laws, authorize either the Legislative Council chairman or its director to enter into contracts on behalf of the legislative assembly. As previously explained, in 2007 the Legislative Council approved the Supplementary Rules of Operation and Procedure that continue until amended or repealed by the 17-member Council.²⁴ Since the rules continue until they are amended or repealed, and no expiration date is specified, the 2007 rules did not automatically expire at the end of the interim between legislation sessions and thereby were applicable at the time the contract with Propylon was signed.

Both the applicable laws and rules provide authority for the Chairman and Director to enter into contracts on behalf of the Council during a legislative interim.²⁵ Accordingly, it is my opinion that the chairman and the director of Legislative Council had authority to sign the Propylon contract.

You indicate that there could have been confusion with respect to the application of N.D.C.C. § 54-35-11, because the law states that the “legislative council” is hereby authorized, on behalf of the legislative assembly, to act on its behalf during a legislative interim and because there had been a delegation of certain duties by the 17-member governing body of the legislative council to its staff. It is possible that the references to “legislative council” in N.D.C.C. § 54-35-11 could be confusing because the law does not distinguish between the 17-member governing body or its staff which makes up the custodial agency and operates the day-to-day affairs of the council.²⁶ Regardless, the

²⁴ Supplementary Rules of Operation and Procedure of the N.D. Legis. Council, ¶ 7(a), June 2007.

²⁵ Note that the present Supplementary Rules of Operation and Procedure of the N.D. Legis. Mgmt. ¶ 6(c), approved in June 2009, further provide that the director of the Legislative Council is responsible for the approval and signature of vouchers for the expenditure of funds under the jurisdiction of the Legislative Management.

²⁶ This perceived ambiguity was arguably cured during the 2009 Legislature which created a statutory distinction between the 17-member governing body, named Legislative Management, and the Legislative Council, which is the custodial agency authorized to manage specific affairs of the Legislature.

continuing effect of the 2007 Supplementary Rules provided the necessary authority for the Chairman and Director to enter into the aforementioned contract.²⁷

The applicable laws and rules demonstrate that the Chairman of the Legislative Council and the Director of the Council had authority to enter into the contract on behalf of the State of North Dakota with Propylon without approval by motion of the Legislative Council's governing body.

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.²⁸

²⁷ Even if the 17-member governing body had asserted its authority to approve or disapprove various aspects of the contract or project, the governing body would have to carefully prescribe its actions so as to not veto acts of the legislative assembly because the authority to approve necessarily includes that the authority to reject or disapprove. Wisdom v. State ex rel. N. D. Real Estate Comm'n, 403 N.W.2d 19, 22 (N.D. 1987); see N.D.C.C. § 31-11-05(27); N.D.A.G. 2004-L-02, N.D.A.G. 2003-L-44, and N.D.A.G. 2003-L-54; see also N.D.A.G. 2007-L-08

²⁸ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).