

**OPINION  
74-305**

July 15, 1974           (OPINION)

The Honorable Robert Martinson  
State Representative  
32nd District  
900 Summit Boulevard, No. 39  
Bismarck, ND 58501

Dear Representative Martinson:

This is in reply to your letter of June 28, 1974, in which you state the following facts and questions:

"Some weeks ago your office issued an opinion requested by me regarding the legality of the bidding procedure being followed in connection with the State Laboratories building. At that time it was the conclusion of your office that the director of the State Laboratories Department was not complying with the competitive bidding requirements of our state law by negotiating directly with a contractor. Subsequently, the State Laboratories Department has called for new bids.

"Since the opinion of your office was made public I have been contacted by numerous persons in the Bismarck area regarding certain practices which appear to exist in the leasing of space by state agencies. Enclosed is a copy of my letter to the chairman of the Legislative Council outlining the reports which have been made to me and some of the issues which such practices might appear to raise.

"I would appreciate it very much if your office could advise as to whether these practices, if they do exist, appear to violate any of our state laws. In this connection I am particularly concerned with our state laws regarding competitive bidding as well as the application of legislative intent in the use of appropriated funds."

The copy of the letter which you enclosed is addressed to Representative Bryce Streibel as Chairman of the North Dakota Legislative Council and the pertinent portions thereof reads as follows:

"I am advised that the building owner or developer is given a two year lease to expire at the end of the fiscal biennium, but that an informal understanding generally exists that the lease will be continued indefinitely. Apparently, such an arrangement permits the construction or expansion of office space to be assured long term tenants which is usually necessary in order to secure the financing for construction. In a recent instance the builder then applied to the Bank of North Dakota for financing of the building.

"If such a practice does exist it would appear to raise at least two serious questions.

1. Would such a practice either legally or for all practical purposes avoid competitive bidding requirements that we have in our state laws?
2. Does the entering into such a relationship by the state agency in effect avoid legislative intent and control either by making informal long term commitments beyond the normal period of appropriations or by securing of space equivalent to the construction of state office buildings which have not been authorized?"

This office has consistently recommended that public bidding be used even in those instances in which the statutes do not require same. However, as a legal matter, if the statutes do not require public bidding in certain instances we cannot, as a matter of law, state that it is required.

In the instances outlined in your letter we find no statutes which would require public bidding for the rental of office space by the state of North Dakota or any of its agencies or institutions. North Dakota has no general bidding law. Chapter 48-02 requires public bidding in the case of construction or repair of buildings owned by the state or its political subdivisions when the amount involved exceeds \$25,000.00. That chapter does not apply to lease of space. There are other bidding statutes concerning purchasing of supplies by schools, counties, etc. We note, as an example, that the Department of Accounts and Purchases which is the central purchasing agency for state departments is not required to use public bidding. Section 54-44-04(21) of the North Dakota Century Code, as amended, provides:

"The director of the departments of accounts and purchases, or such subordinate officer as he shall designate:

\* \* \*

1. Shall be vested with the duties, powers, and responsibilities involved in the operation of a centralized purchasing service. This purchasing service shall include the purchase, lease or rental of all equipment, furniture, fixtures, printing, materials, supplies, insurance and other commodities for all state departments, institutions, office, and agencies, excluding land, buildings, or space, or the rental thereof and excepting emergency purchases that are impossible of execution by the department of accounts and purchases within the required time, highly specialized equipment which can be better purchased by the department, institutions or office which is to utilize such equipment, and such specific items and minor purchases as the director may exempt;

\* \* \* ."

While the statute does not require public bidding the Department of Accounts and Purchases does, as we understand, use a form of competitive bidding in many of the purchases.

Insofar as the lease of office space is concerned, there may be a distinction between the rental of space which has been in existence for some time and which requires little renovation for state use and that which is built to specifications for the state. As a legal matter, however, there is no difference. Section 54-21-24 of the North Dakota Century Code, as amended, provides as follows:

"ADDITIONAL OFFICE SPACE MAY BE OBTAINED OUTSIDE STATE CAPITOL. In the event that office space in the state capitol building becomes insufficient to accommodate the various state departments, agencies and boards, the director of institutions may contract for and obtain such additional office space outside the state capitol in the city of Bismarck or in the Bismarck area as is necessary in order to provide accommodations for all state departments, agencies and boards. When office space is obtained in this manner, any department, agency or board which occupies such office space shall be deemed to be located at the state capitol for purposes of statutes which require that a department, agency or board must be maintained at the state capitol, and the director shall charge an amount equal to the fair value of the office space and other services rendered to all departments which receive and expend monies from other than the general fund, except that for good cause the amounts charged may be waived by the director for a one-year period of time with such waiver being subject to further annual renewals after proper application has been filed with the director."

We also note the provisions of section 54-21-24 of the North Dakota Century Code, as enacted by the 1973 Legislative Assembly, which provides:

"LEASE OF ADDITIONAL SPACE BY STATE AGENCIES, DEPARTMENTS, OFFICES, OFFICERS, BOARD, AND INSTITUTIONS. No lease or rental agreement or renewal of such lease or rental agreement for the lease or rental of buildings or portions of buildings for use by the state shall be entered into by state agencies, departments, offices, officers, boards, and institutions, other than institutions under the board of higher education, the adjutant general and state highway department office and storage space for field engineering and maintenance crews, unless approved by the director of institutions and unless the attorney general has determined the legal sufficiency of such lease or rental agreement. To assure economy, efficiency, and cooperation between the state and its political subdivisions, and to limit the number of locations of state offices for the convenience of persons traveling to such offices, the director of institutions shall promulgate rules and regulations governing the lease or rental of additional buildings or portions thereof by such state agencies, departments, offices, officers, boards, and institutions other than those under the board of higher education, the adjutant general and state highway department office and storage space for field engineering and maintenance crews."

As noted above, we find nothing in the statutes which requires public bidding for the lease of office space by the state. That may be due,

in part, to the fact that real property has usually been considered unique, i.e., no two pieces of property are exactly alike, at least with respect to location. Thus it is uncommon to advertise for bids for the purchase of land when location is a prime factor since bids on land which is not in the required location would be meaningless. However where location of the office space is not the determining factor the Legislature may wish to prescribe public bidding for the lease thereof.

While we are not aware of the arrangements which have been made as to the "informal understanding" between the state agency (lessee) and the lessor, as to continuation of the lease agreement for a period of years, it is the position of this office that such "understanding" is not binding in law upon the state agency. Thus, for example, if the state determined to erect an office building and move all state agencies now leasing privately owned office space into that building, the lease agreement could not be binding beyond the biennium for which moneys were appropriated for such rental. If the determining factor in financing that building is the lease by the state and it takes longer than two years to pay the loan, we are somewhat surprised that the lending agencies would rely upon an "informal understanding" since, as noted above, it is not binding in law in our estimation.

In direct response to your questions, the present practice of leasing office space without public bidding is not contrary to law. It would not appear such practice would avoid the bidding requirements as a practical matter either, since not such requirements are found in the statutes. In this regard we note that section 54-21-24.1, quoted above, specifying the procedures for the lease of office space by the state, was initially enacted in 1973. Had the Legislature intended public bidding in this instance it would seem they would have included that as part of the bill. The bill was a result of the recommendation of the Legislative Audit and Fiscal Review Committee. The Committee was apparently aware of the situation since, in their 1973 report, they stated, page 8:

"A number of agencies had leased space designed and constructed according to their specifications. The Committee also observed that provisions in leases vary considerably. Also heard by the Committee were reports regarding the rental agreements for space in the Randal Building located north of Bismarck which houses Area Social Service Center and Division of Vocational Rehabilitation offices along with the State Library Commission. In the opinion of the Committee, \$2.25 per square foot - an annual rental cost of \$24,345 - is too expensive for the type of space needed for a state library. \* \* \* "

In view of the report we must conclude the Committee was aware of the situation and enacted a bill to put some restraints upon leasing of office space by State agencies. The bill did not, however, include a requirement for public bidding and therefore we must conclude that the present practice does not avoid legislative intent. Since the "long term commitments" are not binding we do not believe it can be said that space equivalent to the construction of state office buildings which have not been authorized has been secured.

While the present status of the law does not require public bidding for the lease of office space by state agencies, the Legislature may, or course, enact statutes to require such bidding in the future.

I trust this will adequately set forth our position on the legal status of the questions presented.

Sincerely yours,

Allen I. Olson

Attorney General