

OFFICIAL OPINION NO. 67-68 pg. 435, Gift for Museum of Natural History at University of South Dakota. Expenditure of such funds under competitive bidding.

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

February 20, 1968

Elgie B. Coacher
Executive Director, Board of Regents
Pierre, South Dakota 57501

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Gift for Museum of Natural History at University of South Dakota. Expenditure of such funds under competitive bidding.

Dear Mr. Coacher:

This is to advise that I have studied the materials furnished me relative to the gift of Carl A. Norgren to the University of South Dakota of One Hundred Thousand Dollars, which, in his letter of December 22, 1965 he advised I.D. Weeks, then president of the University, that:

"It was my purpose in contributing \$100,000 to the University that this money should be used to prepare the present library building in whatever manner within the structure to make it completely suitable for a Museum of Natural History."

There has been presented to the Board of Regents a proposal by which a foreign corporation, for a consideration of \$85,000 will construct and install in the "W. H. Over" Dakota Museum at the University of South Dakota, a natural history exhibit, consisting of four dioramas and one electric relief map. (The details and drawings of such construction, design and the like follows).

Under the provisions of SDC 1960 Supp. 15.0734, there is no question that although this gift may be directly to the University, its acceptance, and the administration of such gift is exclusively lodged in the Board of Regents. This statute requires a certification by the Attorney General that such gift is free and clear from imposing any present or future

obligation upon the state, before the Regents may accept and administer such gift. After acceptance, such may be administered only for the purpose for which such was given.

I assume, and I believe I am correct, that the "present library" referred to in Mr. Norgren's letter, is the old library building (not the newly constructed "I.D. Weeks Library,") and that the W. H. Over Dakota Museum is located within the structure of such old library building,

It is my opinion that the limitation on acceptance of gifts, as above stated, must be interpreted with reality, and that such statute states that if any present or future legal obligation to expend public funds is placed upon the state, the Regents cannot accept such gift, the Attorney General should refuse to certify such gift, and its acceptance or rejection then must be determined by the Legislature itself. However there can be no question that many, if not all, gifts for a particular purpose may, for convenience, require the Legislature in the future to expend public funds. Such a gift, at most, may create a "moral obligation to expend public funds in the future. However, it is my opinion that such a moral obligation cannot be considered a ground to refuse to certify such gift as violative of the statute.

I hereby certify that the gift of Carl A. Norgren, which at most might possibly create a moral obligation on the part of the state to expend public funds in the future for the purposes of such Museum of Natural History is free and clear from imposing any present or future obligation upon the part of the state, and the Board of Regents may, consistent with SDC 1960 Supp. 15.0734, accept and administer such money.

The statute itself, consistent with the decision of **Patrick v. Blake** (1945) 70 SD 494, 19 W 2d 494 requires that such money may be used only for the purposes for which such funds were given. Mr. Norgren's gift, and its purposes, as he explained in his letter of December 22, 1965, is broad. Its use is not precise. The Board of Regents, it is my opinion, must determine initially whether or not the construction of such a "natural history exhibit" comes within the language "to prepare such building to make it completely suitable for a Museum of Natural History."

There is one troublesome feature of this proposed agreement which should be called to your attention. In Article 3(a) the private corporation attempts to classify this contract as a "personal service" contract, but there seems no question from a reading of Articles 6, 7, and 10 that the contractor is furnishing materials or supplies for the purposes of such contract. The actual cost of such materials or supplies is not specified in the contract, as only a single price for the initial contract is mentioned.

SDC and SDC 1960 Supp. 65.07 requires that all contracts of public corporations for public improvements or for the purchase of materials, supplies or equipment exceeding Fifteen Hundred Dollars (See SDC 1960 Supp. 65.0701-2, as amended by Ch. 227 of the Session Laws of 1964) with certain exceptions not here material, must be let on competitive bidding, with the admonition of SDC 1960 Supp. 65.0704-1 that contracts let in violation of such statutes are void.

SDC 1960 Supp. 65.0701-1 (2) defines a "public improvement" to be one, "the cost of which is payable from taxes or other funds under the control of the public corporation." (The Board of Regents and the institutions under its control amount to a public corporation within the meaning of SDC 1960 Supp. 65.0701-1(1).) It is significant to notice that the Legislature has said "all funds under the control," not all "public funds."

It is my opinion, that after considering the public purpose behind such statutes requiring competitive bidding, that as long as the funds to be used for the Museum of Natural History at the University of South Dakota are actually in the possession of the Board of Regents the fact that such have come into its possession by way of a gift from a private donor is immaterial, and the statutes requiring competitive bidding applies.

I believe the opinions of my predecessors are in accord with this holding. You will notice that in an opinion reported in 1939-40 AGR 420 it was ruled that in a public contract, labor furnished by the WPA need not be considered in determining the value of such contract for competitive bidding. Likewise, in 1959-60 AGR 381, this office ruled that if federal funds for a particular contract were paid directly to the contractor then our public competitive bidding statute did not apply.

There is no question that this office has consistently ruled that the competitive bidding statutes do not apply to "personal service" contracts.

See my opinion reported in 1965-66 AGR 121, and the decision of our court of **Foss v. Spitznagel**, 77 SD 633, 97 2d 856. However, consistent with such rulings, this office has previously held that when materials or supplies are furnished along with such personal service contracts, such materials and supplies are subject to competitive bidding if such amount exceeds the statutory minimum. See 1947-48 AGR 165, and 1949-50 AGR 16L

In view of these rulings, it is my suggestion that the Board of Regents must examine this proposal with care and ascertain as correctly as possible what monetary value is placed

upon the materials and supplies to be furnished under the proposal. If such amounts to more than \$1,500 for its own protection, and the protection of the individual awarded the contract, such should be let on competitive bidding.

I would also suggest that even if the Board determines that there is no necessity of invoking competitive bidding, it should familiarize itself, as far as possible, with contracts regarding the creation of natural history exhibits, to determine whether or not the proposal in question is fair and consistent with other contracts of this kind, to the end that the expenditures of such money received as a gift is not extravagantly made.

Respectfully submitted,

Frank Farrar

Attorney General