

\*1 Office of the Attorney General  
Commonwealth of Kentucky

OAG 86-18  
March 19, 1986

Mr. Gordon C. Duke  
Secretary  
Finance and Administration Cabinet  
Frankfort, Kentucky 40601

Dear Secretary Duke:

In your letter of February 5, to our office, you report that the Department for Facilities Management has undertaken an extensive program to identify and contain or remove asbestos from State-owned buildings. You report that this job has become complicated by the unavailability of professional liability insurance coverage for this type of work to engineering consulting firms employed to assist the Department in these projects. As a result, consultants are reluctant to undertake the work or to continue their services without insurance protection, and they have requested relief from the State through indemnity agreements. You have provided our office with one version of such a proposed indemnity agreement submitted by one consultant, and you state that others have proposed variations on this theme.

The question which you have submitted to our office is whether the state may legally enter into an agreement which includes such an indemnity clause. To respond to your question, we first look to the language of the proposed indemnity clause:

". . . Accordingly, the First Party hereby agrees to bring no claim for negligence, breach of contract, indemnity or otherwise against the Second Party, his principals, employees, agents and consultants if such claim in any way would involve the Second Party's services for the investigation of or remedial work related to asbestos covered by this Agreement.

"The First Party further agrees to defend, indemnify and hold the Second Party and his principals, employees, agents and consultants harmless from any such asbestos-related claims that may be brought by third parties as a result of the services provided by the Second Party pursuant to this Agreement."

First we will comment on the second provision of the proposed agreement. The Commonwealth is clearly prohibited from entering into such an indemnity or "hold harmless" clause under [Sections 50, 171, and 177 of the Kentucky Constitution](#). [Section 50 of the Kentucky Constitution](#) prohibits any "agency of the state, including its legislature" from placing "an obligation against the general funds otherwise available for appropriation and expenditure by a future legislature." [McGuffey v. Hall, Ky., 557 S.W.2d 401, 409 \(1977\)](#). [Section 177 of the Kentucky Constitution](#) prohibits lending the credit of the Commonwealth to any person or corporation for any purpose - public or otherwise. See, [McGuffey v. Hall, supra](#) at 410. Additionally, payment of private claims would violate [Kentucky Constitution Section 171](#), which requires that public funds be used only for public purposes. [McGuffey v. Hall, supra](#).

This conclusion that the Commonwealth is constitutionally prohibited from indemnifying asbestos-related claims is supported by the reasoning in OAG 84- 55 (copy enclosed). In OAG 84-55, the issue was whether the state can and would indemnify a public, non-profit organization against libel suits arising from the publication of final disciplinary actions received from a licensing board. In that opinion, our office concluded that the proposed indemnification by the state is prohibited by [Sections 50, 171 and 177 of the Kentucky Constitution](#). The reasoning found in OAG 84-55 is directly applicable to the issue you have raised, and we affirm the reasoning in that Opinion in concluding that the proposed indemnification

agreement as to third party claims would clearly violate [Kentucky Constitution Sections 50, 171](#) and [177](#).

**\*2** As to the first agreement provision quoted above, which would involve waiver by the Commonwealth of any right to sue the contractor, this also appears troublesome. The language of the clause in question is drafted very broadly, and in its present form appears to violate [Kentucky Constitution Sections 50, 171](#), and [177](#), under the same reasoning discussed above. For example, as previously mentioned, [Section 177 Constitution Section 177](#) "seeks to prevent transactions that might result in future liabilities against the general resources of the state and thereby encroach upon the freedom of another generation to utilize those resources as it then deems necessary or appropriate. *McGuffey v. Hall*, supra at 411. This provision would prohibit the Commonwealth from seeking indemnity against the contractor, and as a result, the liability for a claim for which the contractor would otherwise be responsible would fall upon the shoulders of the Commonwealth. In effect, this would involve the lending of the credit of the Commonwealth in violation of [Constitution Section 177](#).

Furthermore, the waiver of the right to sue provision, in its present form, is overly broad and would prohibit the Commonwealth from taking action against the contractor for even nonperformance of the contract.

Even if the waiver of right to sue provision were re-drafted narrower to resolve these legal problems, the best interests of the Commonwealth must be considered. [KRS 45A.135](#) provides:

"Subject to the limitations of [KRS 45A.125](#) and [45A.130](#), any type of contract which would promote the best interests of the Commonwealth may be used."

One could argue that given the need by the Commonwealth for asbestos inspection and abatement work, and the inability of asbestos engineers to obtain professional liability insurance, that this waiver of right to sue provision would be in the best interests of the Commonwealth, and therefore permissible under [KRS 45A.135](#). However, this office is unwilling to conclude such provision would be in the best interests of the Commonwealth.

Unfortunately, we cannot propose alternative language for the waiver of right to sue provision, as we cannot think of any language that would be acceptable under the Constitutional provisions cited above as well as serve the best interests of the Commonwealth as required by [KRS 45A.135](#). Anyway, without inclusion of the indemnity provision, which we have concluded is clearly unconstitutional, it is doubtful that an asbestos contractor's inability to obtain professional liability insurance coverage for state work would be affected.

Although it is our conclusion that the Commonwealth should not enter into such a proposed agreement, we are at a loss to suggest any alternative measures that might be taken within existing legal authority. If it is true that professional liability insurance coverage for asbestos work is no longer available, it may be that in order to accomplish this type of work by contract, the Commonwealth will have to utilize competent contractors who do not have professional liability insurance coverage.

**\*3** We regret not being able to provide you with a response that includes an attractive solution to this dilemma. However, the limitations of the Kentucky Constitution are clear.

If you want to discuss this further, or need additional information, please feel free to contact our office.

Sincerely,

David L. Armstrong

Attorney General

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