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Question Submitted by: The Honorable George Nigh, Governor of the State of Oklahoma

1984 OK AG 135

Decided: 09/19/1984

Oklahoma Attorney General

Cite as: 1984 OK AG 135, __ __

¶0 The Attorney General has received your request for an official opinion asking, in effect:

1. Are state beneficiary public trusts, created pursuant to 60 O.S. 176 (1981) et seq., required to comply with the Central Purchasing Act, 74 O.S. 85.1 (1981) et seq., and amendments thereto?
2. If question number 1 is answered in the affirmative, must the services of the underwriter, trustee bank, and bond insurer, in bond issues of such trusts, satisfy the competitive bid requirements in the Central Purchasing Act?

I.

¶1 Your first question is whether state beneficiary public trusts are subject to the Oklahoma Central Purchasing Act (Central Purchasing Act), as codified at 74 O.S. 85.1 (1981) et seq., and amendments thereto. In answering this question, we must examine both the Central Purchasing Act and the Oklahoma Public Trust Act Public Trust Act, 60 O.S. 176 (1981) et seq. Section 74 O.S. 85.2 of the Central Purchasing Act provides, in part:

"When used in this act the following terms, in addition to their usual definitions, shall have the meanings ascribed to them in this section unless context otherwise requires:

"(1) The terms '*state agency*' and '*agency*' shall include any office, officer, bureau, board, counsel, court, commission, institution, unit, division, body or house of the executive or judicial branches of the state government, whether elected or appointed, excluding only municipalities, counties and other governmental subdivisions of the state." (Emphasis added).

¶2 Public trusts are not expressly mentioned in 74 O.S. 85.2. However, in keeping with the proviso that the specific definitions are in addition to the "usual definitions," it is necessary to look at the dictionary definition of "state agency" and "agency." "Agency" is defined as "the capacity, condition, or state of acting or of exerting power." *Webster's New Collegiate Dictionary*, p. 22 (1981). "State agency" is not defined in this dictionary, but the fifth definition under "agency" provides, "an administrative division (as of government)." *Id.* This definition would seem to include "state agency." Still, none of these definitions leads expressly to the conclusion that public trusts are subject to the Central Purchasing Act.

¶3 However, 60 O.S. 178(a) (1981) of the Public Trust Act provides, in part, that:

"Trustees, who are public officers, shall serve without compensation, but may be reimbursed for actual expenses incurred in the performance of their duties as trustees.... Every person hereafter becoming a trustee of a public trust first shall take the oath of office required of an elected public officer and every officer and employee who handles funds of a public trust shall furnish a good and sufficient fidelity bond in an amount and with surety as may be specified and approved by the persons constituting a majority of the governing body of the beneficiary of the trust, such bond to be in a surety company authorized to transact surety business in the State of Oklahoma but in no event shall any bond be required of a trustee. The cost of said bond shall be paid from funds of the trust authority. The oaths of office shall be administered by any person authorized to administer oaths in the State of Oklahoma, and shall be filed with the Secretary of State in trusts wherein the State of Oklahoma is the beneficiary; in the office of the county clerk in a trust wherein any county is beneficiary; and in the office of the clerk of the municipality in a trust wherein any municipality is the beneficiary."

¶4 Clearly, trustees of a state beneficiary public trust, as *public officers*, fall within the definition of "agency" and "state agency" in 85.2 of the Central Purchasing Act. They are officers of the executive branch of state government and are not excluded from the Central Purchasing Act's requirements. See, 74 O.S. 85.12 (1983). Therefore, we conclude that state beneficiary public trusts are subject to the Central Purchasing Act.

II.

¶5 Your second question asks whether the services of the underwriter, trustee bank, and bond insurer in bond issues of state beneficiary public trusts must be competitively bid under the Central Purchasing Act. To answer this question, we must first determine to what activities this Act applies.

¶6 The scope of the Central Purchasing Act is defined in 74 O.S. 85.3 (1983) which provides, in part:

"All activities of any state agency, department, or institution relating to purchasing shall be under the direction of the Purchasing Division, except such acquisitions as are excluded by the Oklahoma Central Purchasing Act." (Emphasis added).

¶7 A plain reading of the foregoing language leads to the conclusion that only agency purchases (not including those specifically exempt) are covered by the Act. This conclusion, however, is further defined by the statutory definition of "acquisition" in 74 O.S. 85.2(3) of title 74:

"The term 'acquisition' shall include all types of purchases and rentals, whether bought or leased by contract or otherwise, and include every means by which a state agency obtains for its use any materials, supplies, service or equipment covered by this act, except those specifically excluded in this act." (Emphasis added).

¶8 Moreover, with regard to the applicability of the Act to the underwriters, trustee banks, and bond insurers involved in bond issues of state beneficiary public trusts, the definition of "services" in 74 O.S. 85.2(7) of the Act is relevant:

"The terms 'services' and 'contractual services' shall include any type of personal or professional service, employment or undertaking, including such services as utilities, pest control, maintenance and repairs, except the employment of regular officers and employees by a state agency or such extra seasonal help as is authorized by law and is regularly used."

¶9 These three statutes provide that the Central Purchasing Act applies to purchases (acquisitions) by state agencies of any materials, supplies, services, or equipment covered by the Act.

¶10 Due to the myriad of functions and the peculiar circumstances associated with any one bond issue, it is impossible to state with certainty whether, as a matter of law, the Central Purchasing Act either applies or does not apply to an underwriter, trustee bank, or bond insurer involved in a bond issue of a state beneficiary public trust. However, it is apparent from the foregoing statutes, that to the extent no materials, supplies, services, or equipment are acquired by the state beneficiary public trust from the underwriter, trustee bank, or bond insurer, the Central Purchasing Act, including the competitive bid requirement therein, does not apply. For example, where the underwriter performs its role of purchaser of the bonds, without providing any attendant services to the state beneficiary public trust, the underwriter would not be subject to the requirements of the Central Purchasing Act.

III.

¶11 In arriving at this decision, we are not unmindful of the general distinction between a trust and an agency. A trust consists of:

1. The trust property or *res* which is the interest in property which the trustee holds for the benefit of another;
2. The settlor or trustor who creates the trust;
3. The trustee which holds the *res* (legal title) for the benefit of another; and
4. The beneficiary or *cestui que trust* for whose benefit the *res* (equitable title) is held by the trustee. G. Bogert, *Law of Trusts and Trustees*, § 1 at 4-5 (rev. 2d ed. 1984).

¶12 An agency consists of a principal and an agent. G. Bogert at § 15. The distinction between the two is that an "[a]gency is formed with the thought of constant supervision and control by the principal. Trust is based on the idea of discretion in the trustee and guidance by the settlor or beneficiary only to the limited extent expressly provided in the trust instrument." G. Bogert at § 15, 167-68.

¶13 The distinction between an agent and a trustee was discussed by the Oklahoma Supreme Court in *Riedell v. Stuart*, 2 P.2d 929 (Okla. 1931). This case involved an action to recover for services rendered after the dissolution of a corporation. Under Oklahoma law, the defendants (the director and sole stockholders of the corporation) were trustees for the creditors and stockholders of the corporation. *Id.* at 931. The plaintiff argued that defendants, as trustees, were personally liable on the contract since, in executing the contract, they did not state that they were not to be personally liable. *Id.* In resolving this issue, the Court quoted the following language from *Taylor v. Davis*, 110 U.S.330, 334-35, 4 S. Ct. 147, 150, 28 L. Ed. 163 (1884):

"A trustee is not an agent. An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined generally as a person in whom some estate interest or power in or affecting property is vested for the benefit of another. When an agent contracts in the name of his principal, the principal contracts, and is bound, but the agent is not. When a trustee contracts as such, unless he is bound, no one is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee." *Id.* at 932.

¶14 Notwithstanding these general principles, it is clear that the Legislature intended public trusts to be agencies of their beneficiaries for some purposes. For example, 60 O.S. 178(D) (1981) of the Public Trust Act provides, in part:

"Meetings of trustees of all public trusts shall be open to the public to the same extent as is required by law for other public boards and commissions. Such meetings shall also be open to the press and any such equipment deemed necessary by the press to record or report the activities of the meetings. In such trusts wherein the State of Oklahoma is the beneficiary, a written notice of trustees' meetings shall be filed with the office of the Secretary of State at least three (3) days prior to the meeting date. Records of the trust and minutes of the trust meetings of any public trust shall be written and kept in a place, the location of which shall be recorded in the office of the county clerk of each county, wherein the trust instrument shall be recorded. Such records and minutes shall be available for inspection by any person during regular business hours."

¶15 Moreover, 25 O.S. 304(1) (1981) of the Open Meeting Act specifically requires public trusts to comply with that Act, and 75 O.S. 324 (1981) of the Administrative Procedures Act specifically requires state beneficiary public trusts to comply with its provisions.

¶16 This idea of a public entity being an agency for some purposes and not for others is not novel. For example, in *State v. Grand River Dam Authority*, 154 P.2d 946 (Okla. 1945), the Court rejected the argument that the Grand River Dam Authority, as a governmental agency, could not issue revenue bonds because the incurring of such indebtedness violated Okla. Const., Article X, Section 23. *Id.* at 949-50. In arriving at this decision, the Court wrote:

"That the Grand River Dam Authority is a governmental agency is clear because it is expressly declared to be such by the law creating it (O.S.1941, Tit. 82, 861) and expressly held to be such by this court in *Sheldon v. Grand River Dam Authority*, supra, as stated. *That the term 'agency of the State' used in the cited second paragraph of the amendment is sufficiently broad to include such a governmental agency as said Authority is beyond question. But whether it is so included depends upon whether it is within the purview of the amendment.* [Article X, § 23] It is to be borne in mind that the subject matter of the amendment is not to afford a definition of the powers of state agencies but only an aspect thereof, and that only to the extent same would be involved in the policy of retrenchment outlined in the amendment. The then progressively mounting public indebtedness and the undeniable and notorious fact that same was due to the practice of incurring indebtedness through appropriations that exceeded probable revenues was the impelling reason for the amendment which was designed to correct the evil." (Emphasis added).

¶17 In fact, for similar reasons, public trusts are not included within the prohibitions of Okla. Const., Article X, § 23 and § 26 and Okla. Const., Article XVIII, § 7. *State v. Garrison*, 348 P.2d 859 (Okla. 1959); *Board of County Commissioners v. Warren*, 285 P.2d 1034, 1042 (Okla. 1955).

¶18 Thus, due to the unique and dual status of public trusts, it is necessary, in every case, to ascertain whether it was the intention of the Legislature to include public trusts within the purview of any particular act. In the instant case, it is apparent that public trusts are within the purview of the Central Purchasing Act. The Public Trust Act expressly makes trustees public officers and the Central Purchasing Act expressly applies to officers of state government.

¶19 This is also true in the case of A.G. Opin. No. 80-145 which held that trustees of public trusts are public officials for purposes of Okla. Const., Article X, Section 11; of A.G. Opin. No. 81-109 that said public trusts were to comply with the Open Meeting Act, 25 O.S. 301 (1981) et seq.; and of *Cartwright v. Oklahoma Industries Authority*, 629 P.2d 1244 (Okla.

1981), which held that the Authority was required to keep and make available for public inspection public records of the trust. However, the present opinion is manifestly different from these earlier opinions and the Supreme Court case.

¶20 The sole purpose of a public trust is stated in 60 O.S. 176(a) (1981):

"Express trusts may be *created to issue obligations and to provide funds* for the furtherance and accomplishment of any authorized and proper public function or purpose of the state or of any county or municipality in real or personal property, . . . or in any estate or interest in either or both, with the state, or any county or municipality as the beneficiary thereof...." (Emphasis added).

¶21 Subjecting state beneficiary public trusts to the Central Purchasing Act directly impacts on at least one of the two functions of such trusts, i.e., the issuance of obligations. This is clear from the language in 74 O.S. 85.5 (1983):

"*Subject to the provisions of Section 85.4 of this title, the State Purchasing Director, under the supervision of the Director of Public Affairs, shall have sole and exclusive authority and responsibility for the acquisition of all materials, supplies, equipment, and services acquired, used or consumed by agencies of the state government. The State Purchasing Director, after consultation with the requesting or purchasing agency, shall have authority to determine the particular brand, model, or other specific classification of each item or group of materials, supplies, equipment, or services to be acquired* for such use or consumption, and to draft specifications establishing the requirements for all such purchases under the restrictions provided in the Oklahoma Central Purchasing Act." (Emphasis added).

¶22 The danger inherent in subjecting state beneficiary public trusts to the Central Purchasing Act is that this foregoing language could be interpreted as vesting in the beneficiary, the State of Oklahoma, the duties delegated to the trustees. Such a construction could raise the specter of a merger. This well-recognized trust doctrine concerns situations where the legal and equitable title of the res are held by a single entity. G. Bogert's, *Law of Trusts and Trustees*, § 129 at 397 (rev. 2d ed. 1984). The effect of merger was discussed in the leading case of *Greene v. Greene*, 26 N.E. 739 (N.Y. 1891):

"To the constitution of every express trust there are essential these elements, namely, a trustee, an estate devised to him, and a beneficiary. *The trustee and the beneficiary must be distinct personalities, or otherwise there could be no trust*, and the merger of interests in the same person would effect a legal estate in him of the same duration as the beneficial interest designed. [Citations omitted.] That the legal and the beneficial estates can exist and be maintained separately in the same person is an inconceivable proposition." *Id.* at 740. (Emphasis added).

¶23 Moreover, the possible applicability of the doctrine to public trusts was recognized by the Supreme Court of Oklahoma in *Morrison v. Ardmore Industrial Dev. Corp.*, 444 P.2d 816,820 (Okl.1968); *Woodward v. City of Anadarko*, 351 P.2d 292, 298 (Okl. 1960).

¶24 It is true, however, that the doctrine of trust merger is not to be applied with rigidity, nor where it would result in serious injustice or frustrate the intent of the trustor. G. Bogert's, *supra* at § 129, p. 398. This fact, coupled with the language in 74 O.S. 85.4 (1983), obviates the danger that requiring public trusts to utilize the services of Central Purchasing could result in a merger of the legal and beneficial estates of the trust. Section 74 O.S. 85.4 provides:

"Every state agency shall have the authority to determine its own quantitative needs for services, supplies, equipment, and materials, insofar as it has such authority under existing law and shall have the authority to determine the general class or nature of supplies, equipment, materials, or services, subject to the provisions of section 85.5 of this title." (Emphasis added).

¶25 As was noted in A.G. Opin. No. 84-066, the Central Purchasing Act merely creates an agency relationship between the Office of Public Affairs and the Purchasing Director as agent and the state beneficiary public trusts as principals. In accordance with principles of agency law, state beneficiary public trusts retain power and control over their agent, and as an agent, the Office of Public Affairs and the Purchasing Director must make every effort to act in accordance with the wishes of the principal. To act otherwise could raise the troubling specter of merger.

¶26 It is, therefore, the official opinion of the Attorney General that:

1. State beneficiary public trusts created pursuant to 60 O.S. 176 (1981) et seq., must comply with the Central Purchasing Act, 74 O.S. 85.1 (1981) et seq., and amendments thereto. It should be noted, however, that the scope of this opinion is limited to state beneficiary public trusts, and we are expressing no opinion as to the applicability of the Central Purchasing Act to public trusts having beneficiaries other than the State.

2. Whether underwriters, trustee banks, and bond insurers of bond issues of state beneficiary public trusts are subject to the provisions of the Central Purchasing Act, including the competitive bid requirements therein, depends upon whether a state beneficiary public trust is purchasing (acquiring) materials, supplies, equipment, or services from these entities. If such an acquisition is occurring, then the Central Purchasing Act applies. Where, however, an underwriter is solely purchasing the bonds and is providing no attendant services, the Central Purchasing Act does not apply. 74 O.S. 85.4 and 74 O.S. 85.5 (1983).

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Title 25. Definitions and General Provisions

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<u>25 O.S. 304,</u>	<u>Definitions</u>	Cited

Title 60. Property

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60 O.S. 176, Trusts for Benefit of State, County or Municipality - Approval - Expenditures - Discussed at Length
Bylaws - Amendments - Indebtedness - Bonds - Contracts.

60 O.S. 178, Trustees Discussed

Title 74. State Government

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74 O.S. 85.1, Short Title Discussed at Length

74 O.S. 85.2, Definitions Discussed at Length

74 O.S. 85.3, Purchasing Division - State Purchasing Director - Employees - Cited
Encouragement of Certain Purchases - Conflict of Interest

74 O.S. 85.4, Requisitions - Determination Of Quantitative Need By Agencies - Forms - Discussed at Length
Information Required - Lease-Purchase Agreements - Change Order Or
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74 O.S. 85.12, Act Not To Affect Nonconflicting Procedures - Acquisitions Excluded Cited

Title 75. Statutes and Reports

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75 O.S. 324, Renumbered as 75 O.S. § 250.5 by Laws 1987, HB 1493, c. 207, § 27 Cited

Title 82. Waters and Water Rights

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82 O.S. 861, District Created and Territory Included - Governmental Agency and Body Cited
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