5. As my answer to question 4 indicates that state and local law enforcement officers already have been delegated such powers by 18 U.S.C.A § 3041, no additional response is required.

FRANK J. KELLEY,
Attorney General.

680306.2

SCHOOLS: Powers of board of education over construction contracts.

LABOR: Prevailing wage clause in construction contracts of school districts.

Board of education of second class school district is lawfully authorized to insert prevailing wage clause in school construction contract executed in behalf of district.

No. 4371

March 6, 1968.

Dr. Ira Polley
Superintendent of Public Instruction
Lansing, Michigan

You have requested my opinion on the following question:

> "Does the Grand Rapids Board of Education have legal authority to insert in their construction contracts a clause requiring that contractors pay their laborers the prevailing wage in the Grand Rapids area as determined by the United States Department of Labor?"

Article VIII, Section 2 of the 1963 Michigan Constitution commands the legislature to provide for a public elementary and secondary school system. Act 269, P.A. 1955, as amended,[1] hereinafter referred to as the School Code of 1955, has established various types of school districts, generally by designation of a particular class, and entrusted their government to boards of education. Boards of education have only such powers as are expressly or impliedly conferred upon them by statute. *Jacox v. Board of Education, Van Buren Consolidated School District,* 293 Mich. 126, 128 (1940).

Sections 26, 77 and 113 of the School Code of 1955 empower boards of education to erect or build and equip such buildings in primary, fourth and third class school districts respectively. Sections 154 and 192 of the School Code of 1955 grant boards of education authority to "erect and maintain or lease all buildings" in second and first class school districts respectively. The legislature has, in clear and unambiguous terms, conferred authority upon boards of education to enter into construction contracts.

The powers of the board of education of the School District of the City of Grand Rapids to construct buildings must be sought in Section 154 of the School Code of 1955 since the school district of the City of Grand

[1] C.L.S. 1961, § 340.1 et seq.; M.S.A. 1959 Rev. Vol. § 15.3001 et seq.

Rapids is a school district of the second class. Sections 370 through 373 of the School Code of 1955 require, except in first and second class school districts, that boards of education obtain competitive bids on construction contracts of two thousand dollars or more.

Although an examination of the provisions of the School Code of 1955 reveals no express grant of authority to boards of education of the school districts of the second class to include prevailing wage clauses in their construction contracts, it is necessary, however, to give consideration to Act 166, P.A. 1965,[2] a statute requiring prevailing wages and fringe benefits on state construction projects. Pertinent sections of the statute read as follows:

"Section 1. As used in this act: . . .

"(b) 'State project' means any new construction, alteration, repair, installation, painting, decorating, completion, demolition, conditioning, reconditioning or improvement of public buildings, works, bridges, highways or roads authorized by a contracting agent.

"(c) 'Contracting agent' means any officer, board or commission of the state, or any state institution supported in whole or in part by state funds, authorized to enter into a contract for a state project or to perform the same by the direct employment of labor."

"Sec. 2. *Every contract executed between a contracting agent and a successful bidder as contractor and entered into pursuant to advertisement and invitation to bid for a state project which requires or involves the employment of construction mechanics,* other than those subject to the jurisdiction of the state civil service commission, *and which is sponsored or financed in whole or in part by the state shall contain an express term that the rates of wages and fringe benefits to be paid to each class of mechanics by the bidder and all of his subcontractors, shall be not less than the wage and fringe benefit rates prevailing in the locality in which the work is to be performed.* Contracts on state projects which contain provisions requiring the payment of prevailing wages as determined by the United States secretary of labor pursuant to the federal Davis-Bacon act (United States Code, title 40, section 276a et seq.) or which contain minimum wage schedules which are the same as prevailing wages in the locality as determined by collective bargaining agreements or understandings between bona fide organizations of construction mechanics and their employers are exempt from the provisions of this act." (Emphasis supplied)

In interpreting this statute, to decide whether it applies to school district construction contracts, the goal is to ascertain the intent of the legislature. *County of Wayne v. State Department of Social Welfare,* 343 Mich. 475, 479 (1955). One method of determining legislative intent is by recourse to the Legislative Journals. *Ellis v. Boer,* 150 Mich. 452, 455 (1907).

Act 166, P.A. 1965 originated in the House of Representatives as House Bill No. 2101. As introduced, what later became Section 1(c), a critical definitional section regulating the scope of the bill, read as follows:

[2] M.S.A. 1965 Cum. Supp. §17.256(1) et seq.

"Sec. 1. As used in this act: . . .

"(c) 'Contracting agent' means any officer, board or commission of the state, *or political subdivision thereof,* or any state institution supported in whole or in part by state funds, authorized to enter into a contract for a state project or to perform the same by the direct employment of labor." (Emphasis supplied)

In the House an unsuccessful attempt was made to amend the bill by striking out "or political subdivision thereof." Following that the House passed the bill.[3] Next, Representative Arnett made the following remarks in protesting passage of the bill:

". . . because in section (c), page 2, it is pretty wide in its definition and inclusive in contracting agent. It gets down into the local areas and down to the Board of Education. It seems to me it places a burden upon them. . . ."[4]

The Senate, after amending the bill by striking out "or political subdivision thereof,"[5] passed it.[6] This version was subsequently concurred in by the House.[7]

The protest remarks of Representative Arnett would seem to indicate that the phrase "or political subdivision thereof" was thought to include boards of education. However, it is not entirely clear that he was referring to the phrase "political subdivision," when he indicated the bill reached down to the "Board of Education." This sparse and somewhat ambiguous legislative history is not, by itself, persuasive that deletion of the phrase "or political subdivision thereof" removed boards of education from the ambit of the bill.

The decided cases in Michigan do not categorize school districts and boards of education as political subdivisions. Rather, they refer to school districts and boards of education as state agencies. School District of the *City of Lansing v. State Board of Education,* 367 Mich. 591 (1962). This categorization of school districts as state agencies is well illustrated by the following quote from *Williams v. Primary School District No. 3, Green Township,* 3 Mich. App. 468 (1966), at pages 472-73.

"The case of *Sayers v. School District #1, Fractional* (1962), 366 Mich. 217, is authority for the proposition that a school district is an agency of the State and as such, is clothed with sovereign immunity. (footnote omitted) This postulate is founded upon sound precedent. The cases of *Attorney General v. Board of Education of City of Detroit* (1908), 154 Mich. 584; *Attorney General v. Thompson* (1912), 168 Mich. 511; *In re School District No. 6, Paris and Wyoming Twps., Kent County* (1938), 284 Mich. 132, and *School District of the City of Lansing v. State Board of Education* (1962), 367 Mich. 591, hold that education, its regulation and control, are no part of local self-

[3] Michigan House Journal 1965, Vol. 1, p. 433.
[4] Michigan House Journal 1965, Vol. 1, p. 434.
[5] Michigan Senate Journal 1965, Vol. 2, pp. 1566-67.
[6] Michigan Senate Journal 1965, Vol. 2, p. 1580.
[7] Michigan House Journal 1965, Vol. 2, pp. 2262-63.

> government but a subject of State concern, differently treated in separate articles of the State Constitution. It may be noted that article 7 of the Michigan Constitution of 1963 deals with local government: i.e., municipal corporations and political subdivisions, while article 8 specifically deals with education."

There is also some authority treating school districts and boards of education as municipal corporations. *Hall v. Ira Township*, 348 Mich. 402, 405 (1957).

The language in Section 1(c) reading "officer . . . of the state", deserves close attention to determine whether it includes members of boards of education. *Schobert v. Inter-County Drainage Board*, 342 Mich. 270, 281 (1955), holds that "it is equally clear that the term 'State officer' will vary in content with its use and context, and that the same officeholder may be an officer of the State for one purpose and not for another."

In opinion No. 4555, issued April 12, 1967, I held that member of boards of education are "state officers" within the meaning of Article IV, Section 10 of the Michigan Constitution dealing with conflict of interest. The determining factor in so holding, also relevant in this context, is that education is a state function rather than a local matter.

One rule of statutory construction is that the language employed should be read in light of the general legislative purpose behind the enactment. *Ballinger v. Smith*, 328 Mich. 23, 31 (1950). Act 166, P.A. 1965, reveals a general legislative purpose to require prevailing wages and fringe benefits on construction projects financed wholly or partially by state funds. In the education area we find constitutional[8] and statutory provisions[9] establishing a systematic flow of large sums of state money to school districts. Further, school districts may spend up to five percent of the money they receive out of the state school aid fund for construction purposes.[10] Moreover, funds expended by school districts that are derived from other sources, e.g., revenue from the property tax or from the sale of bonds, are also state funds,[11] since they are being received by state agencies, held by state agencies and expended by state agencies.[12]

In summary, what little relevant legislative history exists is not altogether clear on whether the deleted phrase, "or political subdivision thereof," was thought to encompass boards of education. The case law consistently refers to school districts and boards of education as state agencies or municipal corporations rather than political subdivisions. There is sound authority for including members of boards of education within the meaning of state

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[8] 1963 Michigan Constitution, Article IX, Section 11.

[9] Act 312, P.A. 1957, as amended, being C.L.S. 1961 § 388.611 et seq.; M.S.A. 1959 Rev. Vol., and M.S.A. 1965 Cum. Supp. § 15.1919(51) et seq. Act 312, P.A. 1957 was last amended by Acts 271 and 341, P.A. 1966.

[10] Ibid, Sec 34, last amended by Act 285, P.A. 1964.

[11] The *Williams case*, supra, in Footnote 2 at p. 472 only states that school districts are treated as municipal corporations for the purpose of imposing the property tax.

[12] *State Licensing Board of Contractors, et al.; v. State Civil Service Commission, et al.*, 110 So. 2d 847, 851 (La. App. 1959) Aff'd. 123 So. 2d 76 (La. 1960).

officers since education is a state function. The fact that funds expended by school districts, regardless of their source, are state funds indicates that holding the act applicable to school construction contracts would be consistent with the general purpose of imposing these requirements where state funds are used for construction. Finally, the administrative interpretation places school construction within the ambit of the act.

Therefore, it is my opinion that Section 1(c), containing the language "officer . . . of the state," includes members of boards of education. Thus, this statute applies to school construction contracts entered into by boards of education. However, the act does not apply unless the contract is entered into pursuant to advertisement and bidding. As earlier stated, Sections 370 through 373 of the School Code of 1955 require competitive bidding only for primary, fourth and third class school districts on contracts of two thousand dollars or more. First and second class districts, including Grand Rapids as a second class district, have discretion in the matter of competitive bidding, but if they use the competitive bidding process, the prevailing wage clause must be inserted and bidders should be so advised.

This brings us to the final problem posed by your question; namely, is there a conflict between the statutory requirement of competitive bidding in the School Code of 1955 and the mandatory prevailing wage and fringe benefit contract term called for on school construction contracts falling under Act 166, P.A. 1965?

Section 370 of the School Code of 1955 requires competitive bidding. Does this mean that the board of education must accept the lowest bid? Section 373 allows the board to reject any or all bids. This is some indication that the board does not have to accept the lowest bid. This question has never been decided by the Michigan courts.[13] In Attorney General's opinion No. 3303, O.A.G. 1959-60, Vol. I, p. 169, which discussed these competitive bidding requirements, it was stated that the board does not have to accept the lowest bid. However, the opinion states that if the board accepted any bid it was obliged to accept the lowest responsible bid.

Other jurisdictions have dealt with this question. Two cases holding that minimum or prevailing wage contract clauses were not in conflict with competitive bidding requirements are *Spahn, et al., v. Stewart et al.*, 103 S.W. 2d 651, 659-60 (1937), and *Wagner v. City of Milwaukee*, 192 N.W. 994, 996 (1923).

Another rule of statutory construction is that statutes in pari materia, i.e., statutes dealing with the same general subject matter, are to be reconciled, if at all possible, by any reasonable construction that will allow both to stand without being in conflict. *State Highway Commissioner v. Detroit City Controller*, 331 Mich. 337, 358 (1951). This is not difficult to accomplish in this situation. The competitive bidding sections of the School Code of 1955 require, at most, that the contract go to the lowest responsible bidder. No responsible bidder would submit a bid based in part on labor costs below those legally required, in terms of prevailing wages and fringe

[13] Michigan cases dealing with the competitive bidding requirement are *Hatch v. Township Unit School*, 310 Mich. 516 (1945) and *Kutsche v. Ford*, 222 Mich. 442 (1923).

benefits, by Act 166, P.A. 1965. This reasonable interpretation of responsible bidder eliminates any possible conflict between the two statutes in question.

To summarize the effect of the legal conclusions reached above, it is my opinion that the boards of education of primary, fourth and third class school districts, having no discretion regarding competitive bidding, must insert prevailing wage clauses in construction contracts for two thousand dollars or more. Boards of education of second and first class school districts, including Grand Rapids as a second class school district, have discretion in the matter of competitive bidding. If competitive bids are invited, these boards must insert prevailing wage clauses in the contracts. If competitive bids are not invited, these boards may not insert prevailing wage clauses in the contracts.

FRANK J. KELLEY,
Attorney General.

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CONSTITUTIONAL LAW: Power of legislature to require deduction of costs of collection from sales tax.

TAXATION: Deduction of costs of collection from sales tax.

The legislature is without authority to require collection costs to be deducted from state sales tax moneys to be paid to townships, cities, villages and school districts in accordance with Article IX, Section 10 and 11 of the Michigan Constitution of 1963. Such statutory provision found in Act 49, P.A. 1964 is unconstitutional.

No. 4501 March 8, 1968.

Hon. Albert Lee
Auditor General
567 Hollister Building
Lansing, Michigan

You request my opinion on the following question:

"Whether Act 49, P.A. 1964 is in conflict with Sections 10 and 11 of Article IX of the Michigan Constitution of 1963.

Act 49, P.A. 1964 amended Section 25 of Act 167, P.A. 1933, as amended. Prior to amendment by Act 49, P.A. 1964, Section 25 of Act 167, P.A. 1933, as amended, being C.L.S. 1961 §205.75; M.S.A. 1960 Rev. Vol. § 7.546, read:

"All sums of money received and collected under the provisions of this act shall be deposited by the department in the state treasury to the credit of the general fund, to be disbursed only on an appropriation or appropriations by the legislature."