

of the state to protect its citizens and provide for the safety and good order of society."

Therefore, it is my opinion that state colleges and universities are subject to the provisions of 1965 PA 290, *supra*.

FRANK J. KELLEY,
Attorney General.

76/215.2

COUNTIES: Audit of accounts.

ACCOUNTS AND ACCOUNTING: Audits of county accounts.

STATE TREASURER: Audits of county accounts.

The state treasurer has the duty to formulate a uniform system of accounts for counties and the responsibility of auditing these accounts.

The state treasurer may arrange for performance of audits of county accounts by state personnel or by a private CPA firm on an independent contractor basis in accordance with civil service rules for the employment of independent contractors.

Opinion No. 5139

December 15, 1976.

Gerald H. Miller, Director
Department of Management and Budget
Lewis Cass Building
Lansing, Michigan 48913

You have requested my opinion on the following question:

May a county engage a CPA firm to perform the yearly state audit of county accounts required by the constitution and statutes?

It should first be noted that the predecessor to the current State Constitution, Const 1908, art 10, § 18 provided:

"The legislature shall provide by law for the keeping of accounts by all state officials, boards and institutions, and by all county officials; and shall also provide for the supervision and audits thereof by competent state authority and for uniform reports of all public accounts to such authority. Such systems of account shall provide for accurate records of all financial and other transactions and for checks upon all receipts and disbursements of all such officials, boards and institutions; and shall be uniform for all similar boards, institutions and county officials. All public accounts and the audit thereof shall be public records and open to inspection."

The parallel provision in the current Constitution, Const 1963, art 9, § 21 provides:

"The legislature shall provide by law for the annual accounting for all public moneys, state and local, and may provide by law for interim accounting.

"The legislature shall provide by law for the maintenance of uniform accounting systems by units of local government and the auditing of county accounts by competent state authority and other units of government as provided by law."

The Convention Comment on the language change stated:

"This is a revision of Sec. 18, Article X of the [1908] constitution, providing adequately for accounting for public moneys. The only changes proposed give the legislature authority to provide for interim accounting where desirable, and broader authority to provide for the audit of public accounts." II Official Record, Constitutional Convention 1961, p 3402.

The constitutional mandate of the 1908 Constitution was implemented by 1919 PA 71; MCLA 21.41 *et seq*; MSA 3.591 *et seq*. This act gave the Auditor General¹ the authority and responsibility to promulgate a uniform system of accounting and the methods by which such audits shall be performed.

The continued viability of 1919 PA 71, *supra*, results from Const 1963, art 3, § 7 which provides that statute laws in force at the time of their adoption remain in force until they either expire by their own limitations or are changed, amended or repealed.

In *County Road Association of Michigan v State Highway Commission*, 68 Mich App 390, 399-400; ... NW2d ... (1976), the Court of Appeals noted that the Treasurer, as successor to the duties of Auditor General, is given the duty to formulate a uniform system of accounts for counties and has the responsibility of auditing these accounts. The Court noted that the Treasurer may appoint others to perform this duty under "its express, correlative power to appoint such auditors as may be necessary."

It is clear that the intent of the constitutional mandate and the statute implementing the Constitution requires an agency relationship to be established directly between the State authority and the person performing the audit. This is not to say, however, that the Department of Treasury may not utilize the services of a private CPA firm on an independent contractor basis.² It does require, however, that the CPA performing the audit be directly responsible to the State Treasurer and not to the county in accordance with the following statutory provision:

"The [state treasurer] shall hereafter be the supervisor of the accounts of all state departments, institutions and offices, and of all county offices. . . . The [state treasurer] is hereby authorized to employ such

¹ Section 80 of the Executive Organization Act of 1965, 1965 PA 380, § 80; MCLA 16.180; MSA 3.29(80) transferred all powers, duties and functions of the Auditor General conferred by 1919 PA 71, *supra*, to the Department of Treasury.

² Such contracts would, of course, require approval by the Civil Service Commission. See attached Civil Service Information Bulletin.

auditors, examiners and assistants as he deems necessary, the number and compensation of whom shall be subject to the approval of the state administrative board and shall be within the limits of the amount of money appropriated for such purpose." 1919 PA 71, *supra*, § 5.

It is therefore my opinion that the Department of Treasury and not the county is responsible for the performance of audits of county accounts irrespective of whether State personnel or independently contracted CPAs perform the service.

FRANK J. KELLEY,
Attorney General.

Attachment

State of Michigan
Department of Civil Service

I N F O R M A T I O N B U L L E T I N

Lewis Cass Bulding, Lansing, Michigan 48913
Franklin K. DeWald, State Personnel Director

April 6, 1971

**TO: ALL APPOINTING AUTHORITIES, PERSONNEL
 OFFICERS, RECOGNIZED EMPLOYEE
 ORGANIZATIONS AND OTHERS**

FROM: C. J. HESS, ACTING STATE PERSONNEL DIRECTOR

SUBJECT: CONTRACTUAL EMPLOYMENT

The purpose of this Information Bulletin is to assess the area of contractual employment in the State of Michigan. With this, we will indicate both the role of Civil Service in exercising its constitutional obligation, and the responsibilities of the various operating agencies.

The first consideration in evaluating a request for contractual or special personal service employment is whether the duties to be performed constitute a position in the classified service. The Civil Service Commission has adopted the following definition:

A position in the State Classified Service is any state employment which: (1) requires personal services, (2) can be performed practicably by state employees, and (3) is not specifically excepted or exempted in accordance with Article XI, Section 5 of the Constitution.

If the duties outlined in the request fall within this definition, the request is denied and arrangements are made to establish a classified position. If the duties are deemed to fall outside the classified service, the request is processed in accordance with the constitutional directive and the Rules of the Civil Service Commission.

The Constitution of the State of Michigan, Article XI, Section 5, indicates the Civil Service Commission shall "approve or disapprove disbursements for all personal services." Commission Rule 17.10a indicates "no

disbursement for contractual personal service may be made unless the contract for such service shall first have been approved by the State Personnel Director." This is implemented by requiring *prior* approval for contractual services, including an explanation as to the necessity of employment outside the classified service.

Personal Services

Agencies have the responsibility to use classified services whenever possible. The use of personal services outside the classified service can be allowed only when a CS-138 has been submitted and approved prior to commencement of employment. The Agency decision to request personal services outside the classified service should be governed by the nature of the services to be performed as meeting one or more of the following criteria:

Criteria for Approval of Personal Services Outside the Classified Service

1. Services that are so urgent, temporary, special or highly technical that the work could not properly be performed by resorting to civil service procedures;
and/or
2. Services that are of such a unique or peculiar character that they could not be secured through civil service procedures;
and/or
3. Services that are so intermittent or irregular in nature that they could not be secured through civil service procedures;
and/or
4. Services that depend in part on the use of equipment or materials not possessed by the state agency at the time and place required and the cost to the state in procuring such materials or equipment would be disproportionate for the result obtained;
and/or
5. Services that are to be performed are insufficient in volume; or the amount of work to be performed is such that sufficient persons cannot be obtained through Civil Service procedures to properly do the work.

The above list is not exhaustive, but most cases will be found to fall within these categories or some combination of them.

If the services to be performed meet one or more of the above criteria, then a (1) Special Personal Service Employee or (2) Independent Contractor should be requested. The distinction as to which type an agency should request depends upon certain criteria as set forth below:

A. Special Personal Service Employee

To justify a special personal service employee the department must have the right to supervise the methods and details of performance. The employee is paid on regular state payrolls for each department. Social Security, Employees' Retirement, and other deductions are withheld.

B. Independent Contractor

If the department does not have the right to supervise the methods and details of performance, and if the following statements apply, the person is an independent contractor:

1. The contractor provides supplies, tools and equipment, if any.
2. The contractor hires, supervises, trains, and pays the persons who assist him, if any.
3. The contractor is not restricted to set hours, place of work, and work rules applicable to regular employees.
4. The contractor holds himself out to the public as an independent contractor.
5. If this is a job contract, or other than hourly service contract, neither party may terminate the contract before completion, except for legal cause.
6. The employer does not provide the contractor with instructions in the methods and details of performance.

If neither A nor B apply, an explanation is required. In these cases the person's status is determined by the Department of Civil Service.

Once the agency has determined that the service to be requested meets one or more of the criteria that defines personal service; and the selection of either special personal service or independent contractor has been made, all that is required prior to employment is the completion and approval of the CS-138.

Completing the CS-138

1. All requests must be made and approved prior to any employment (note—see Exception List that follows).
2. All request forms (CS-138's) should be fully completed in detail.
3. No voucher should be submitted for payment without prior approval having been granted.
4. Contracts will be approved for a duration based on the completion date of a project or until the end of the fiscal year.
5. Contracts need not accompany the CS-138. The CS-138 will usually suffice. In some instances, where additional detail is needed, a copy of the contract will be requested.

EXCEPTION LIST

The following criteria constitute exceptions to the contractual employment requirement and no CS-138 is required if any of these apply:

1. If the employment of service involved (and the subsequent voucher) is for an amount less than \$50.
2. If the contract involves vendor service, such as service contracts for maintenance of office machinery, typewriters, copiers, elevators, air conditioners, etc.
3. If the service is a construction contract previously approved by the State Administrative Board.

4. Also excluded are highway construction contracts (but not maintenance agreements with local units of government, design or research contracts).
5. Instances where the department serves as a fiscal intermediary rather than as an employer or contracting agent. Examples are stipends, third-party agent for disbursement of grant monies to clients (not employees).
6. Routine maintenance services such as rubbish removal, snow removal, window washing, cleaning services, and exterminating services when such services cannot practicably be performed by classified employees.
7. The Department of Civil Service reserves the right to demand completion of form CS-138 when there is any question as to nature or duration of the service.

The amount for personal services approved by the Civil Service Commission for fiscal 1969-70 exceeded \$22,000,000. Obviously, this level of expenditure dictates a precise responsibility as to the proper and necessary use of these services. Toward this end, we ask for your cooperation in observing these requirements.

Any questions regarding contractual arrangements may be addressed to Ed Perkowski, Compensation Admin., Bureau of Classification (33072).

761216.2

MORTGAGES: A mortgagor may borrow additional funds from a mortgagee and this additional loan may be secured by a previously executed mortgage. The additional funds borrowed that are secured by a previously executed first mortgage constitute a first lien unless the mortgagee has notice of an intervening lien.

USURY: A borrowing of additional funds secured by a previously executed first mortgage, if evidenced by an instrument executed after August 11, 1969, qualifies for the exception to the general usury rate.

USURY: In computing the rate of interest on a borrowing of additional funds, any increase in the interest rate on a previously executed note is considered to be part of the interest on the additional funds borrowed and must be fully disclosed as such to the borrower.

Opinion No. 5085

December 16, 1976.

Russell S. Kropschot
 Chief Deputy Commissioner
 Financial Institutions Bureau
 Department of Commerce
 Law Building
 Lansing, Michigan

You have requested my opinion on the following questions:

1. "... [M]ay a borrower seek an advance of additional funds from an association, such borrowing to be secured by a previously recorded mortgage, and agree in writing to pay a higher rate of interest on the