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Robert K. Corbin

July 30, 1986

Mr. Richard A. Colson
Director, Division of Emergency
Dept. of Emergency & Military Affairs
5636 East McDowell Road
Phoenix, Arizona 85008-3495

Re: I86-084 (R86-034)

Dear Mr. Colson:

As Director of the Division of Emergency Services of the Department of Emergency and Military Affairs you are charged under A.R.S. § 26-306 with responsibility for air search and rescue operations and missions relating to declared states of emergency which require the use of aircraft. To discharge these responsibilities you have been utilizing the services of the Arizona Wing of the Civil Air Patrol ("CAP"). A large portion of the value of these services is donated by CAP volunteers, but the Division has available to it funds appropriated yearly for "air search and rescue," which are paid to the CAP and which defray some of its fixed expenses. In addition, when the CAP flies search and rescue missions at the request of the Division, the CAP is reimbursed for its operating expenses under assigned mission numbers, just as are governmental agencies which participate in search and rescue operations. The CAP is also reimbursed for its operating expenses with available federal or state funds when it flies missions at the request of the Division during declared states of emergency. Because of legal questions raised by the Department's auditor, you have requested our opinion as to the legal status of the CAP and have asked if the following statutes govern your relationship with the CAP:

1. Appropriate competitive bidding provisions of the Arizona Procurement Code, A.R.S. §§ 41-2531 through 41-2552.

2. The intergovernmental procurement provisions of the Arizona Procurement Code A.R.S. §§ 41-2631 through 41-2637.

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3. The provisions for joint exercise of powers by public agencies, A.R.S. §§ 11-951 through 11-954.

We conclude that your contract or agreement with the CAP for the described services is not subject to the Arizona Procurement Code, to the statutory provisions regulating agreements for joint exercise of powers or to any other statutes regulating public contracting. To reach this conclusion we must determine the legal status of the CAP and analyze the nature of your agreement with the CAP.

I.

The Legal Status of the Civil Air Patrol

The CAP is a federally-chartered corporation created in 1946 by 36 U.S.C.A. § 201. The CAP is organized into a national headquarters, eight regional headquarters, and a "wing" in each state. The wings are the primary operational units, and they are further divided into groups and squadrons. The wings are akin to corporate divisions, and are not legal entities apart from the CAP itself.

Prior to 1980, it had been consistently held by the federal courts that the CAP was not an agency or instrumentality of the United States, notwithstanding the enactment in 1956 of 10 U.S.C.A. § 9441, which designated the CAP as "a volunteer civilian auxiliary of the Air Force"; permitted the Air Force to provide equipment, supplies, training aids, services and facilities to the CAP; and authorized the Secretary of the Air Force to "use the services of the Civil Air Patrol in fulfilling the noncombat mission of the Department of the Air Force. . . ." See, e.g., Pearl v. United States, 230 F.2d 243 (10th Cir. 1956), and Kiker v. Estep, 444 F.Supp. 563 (N.D. Ga. 1978).

In 1980, Congress effectively overruled Pearl and Kiker by amending 10 U.S.C.A. § 9441(c) to provide that, when the CAP is engaged in fulfilling the noncombat mission of the Air Force, for civil liability purposes, "the Civil Air Patrol shall be deemed to be an instrumentality of the United States." This amendment was interpreted in Williamson v. Sartain, 555 F.Supp. 487 (D. Mont. 1982), which limited the recovery of an injured CAP employee to the Federal Employees Compensation Act, because the injury occurred on an Air Force-authorized mission.

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The most recent enlargement of the CAP's "instrumentality" status occurred October 1, 1983, when the Department of the Air Force issued the first of its yearly "M"1 series orders, which provide that all CAP flying is designated as "authorized Air Force mission flying", and further divides such flying missions into "reimbursed Air Force missions", which are flights occasioned at the direction of the Air Force, and "non-reimbursed Air Force missions", which include, for example, the kinds of missions the Division of Emergency Services contracts with the CAP to provide. These latter missions are encompassed by the definition of "USAF Authorized Non-Reimbursable Missions" in paragraph 1-4g of Civil Air Patrol Regulation 60-1 (15 February 1985), and specifically subparagraph (f): "Missions to support requests from a local, county, state, or federal governmental agency." The effect of the M series orders is to make the CAP an "instrumentality" or "agency"² of the United States in all of its flying missions.

Although 10 U.S.C.A. § 9441(c) makes the CAP a federal "instrumentality" for purposes of "civil liability" and the interpretive case law is concerned with applicability of the Federal Tort Claims Act and the Federal Employees Compensation Act to CAP missions, we think Congress' statement that the CAP is an instrumentality of the United States for civil liability purposes is sufficiently broad to constitute the CAP an "agency of the United States".

¹The order currently in effect is denominated Special Order M-15.

²The terms "agency" and "instrumentality" were treated in Kiker v. Estep, 444 F.Supp. 563 (N.D. Ga. 1978), as synonymous, the court citing 28 U.S.C.A § 2671, which now reads, in pertinent part:

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

(Emphasis added.)

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II.

The Nature of the Agreement with the CAP

The history of the relationship of the CAP to the State of Arizona is sufficiently obscure that it may be well to review that relationship to put our present opinion into historical context. Understanding that history is also helpful in determining whether the agreement is one for the procurement of services from the CAP or rather is an agreement for joint exercise of powers by two public agencies.

In 1952, when the CAP was still a private, though federally-chartered, corporation with no status as an agency or instrumentality of the United States, the Legislature created the "Department of Civil Air Patrol", which was declared to consist of the Arizona Wing of the CAP. Laws 1952 (2nd Reg. Sess.) Ch. 38, § 1. An appropriation was made to the Department for conducting search and rescue and other missions, and to provide for clerical and administrative expenses. This legislation was codified in the predecessors to A.R.S. §§ 2-141 and 2-142.³ For 18 years air search and rescue in Arizona was funded in this manner.

In 1966, a civil action captioned "Neal v. Civil Air Patrol, Arizona Wing" was filed as Cause No. 97208 in the Pima County Superior Court by a taxpayer against the CAP and the State, alleging, among other things, that appropriations to the CAP violate the provisions of Ariz. Const., art. IX, § 7, which prohibits donations or grants to private corporations. In January 1970 a judgment was entered in Neal which, among other things, enjoined further appropriation of funds to the Arizona Department of Civil Air Patrol for use of the CAP.

Apparently in reaction to the judgment in Neal, the Legislature enacted Chapter 53 of the 1970 Arizona Session Laws, as an emergency (effective April 16, 1970); it provided, in section 1:

³These sections were repealed by the legislation creating the Department of Transportation, Ch. 146, § 85, Laws 1973 (1st Reg. Sess.) Ch. 146, § 85, though they had effectively become a nullity in 1970, as discussed below.

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The unexpended and unencumbered monies remaining on the effective date of this act from the appropriation made by chapter 144, section 1, subdivision 58, Laws of 1969, to the Arizona department of civil air patrol are appropriated to the governor for the purpose of contracting with Civil Air Patrol, Incorporated, or other qualified organizations to provide stand-by emergency air and ground search and rescue and other emergency services to the state of Arizona.

Consistent with Chapter 53, the general appropriation bill for 1970-71, Laws 1970 (2nd Reg. Sess.) Ch. 162, § 1, subdiv. 30, appropriated nearly \$45,000 to the Arizona Department of Aeronautics for "air search and rescue."⁴ Since 1970, appropriations have been made, first to the Department of Aeronautics, later to its successor, the Department of Transportation, and most recently to the Division of Emergency Services, for "air search and rescue." It is our understanding that these appropriations have been used each year since 1970 to procure the services of the Arizona Wing of the CAP for air search and rescue.

III.

Applicability of the Arizona Procurement Code's Competitive Selection Procedures

The following exception to the applicability of the Arizona Procurement Code is found in A.R.S. § 41-2501(B):

This chapter applies to every expenditure of public monies, including federal assistance monies except as otherwise specified in § 41-2647, by this state, acting through a state governmental unit as defined in this

⁴On August 24, 1970, pursuant to stipulation, the judgment entered on January 5, 1970 in Neal was vacated and the complaint dismissed with prejudice. On July 2, 1970, a related petition for special action, Supreme Court No. 9910, in a matter entitled "State of Arizona v. Superior Court", was also dismissed pursuant to stipulation.

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chapter, under any contract, except that this chapter does not apply to either grants or contracts between this state and its political subdivisions or other governments, except as provided in article 10 of this chapter.

[Emphasis added.]

We think the term "other governments" must reasonably be construed to encompass agencies of the United States. Support for this position is found in Article 10 of the Arizona Procurement Code, which is referenced in the quoted language and which applies to cooperative purchasing by more than one "public procurement unit", which is defined in A.R.S. § 41-2631(4) as including "an agency of the United States." See also the statutes authorizing agreements for joint exercise of powers by "public agencies", which define "public agency" in A.R.S. § 11-951 to include "the federal government or any federal department or agency. . . ."

Because, as we determined in part I above, the CAP is an agency or instrumentality of the United States, the Arizona Procurement Code has no applicability to contracts between agencies of the State and the CAP for services of the nature discussed in this opinion.⁵

⁵Of course, because the Arizona Procurement Code does not apply at all to your contract with the CAP, the intergovernmental procurement provisions of Article 10 of the Arizona Procurement Code a fortiori are not applicable. However, even if the Arizona Procurement Code did apply generally to your contract with the CAP, Article 10 would still be inapplicable. Article 10 is concerned with "cooperative purchasing", and serves to permit two or more public procurement units to join together to make purchases of goods and services from non-governmental suppliers. The apparent purposes of these provisions are to save duplication of effort by authorizing one purchasing organization to act as agent for other public procurement units to permit governmental entities to avoid duplication of procurement expenses, to take advantage of routine volume discounts, and to permit concerted actions which otherwise might be violative of antitrust laws. Article 10 does not exempt cooperative purchasing from the competitive selection requirements of A.R.S. §§ 41-2531 through 41-2552; it merely permits one public procurement unit to perform those procedures on behalf of the group.

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IV.

Applicability of the Statutes Relating to Joint
Exercise of Powers

The provisions regulating the joint exercise of powers by public agencies were first enacted in Laws 1968 (2nd Reg. Sess.), Ch. 94, § 1, which provided in part that "[t]he purpose of this article is to permit public agencies, if authorized by their legislative or governing body, to enter into agreements for the joint exercise of any power common to the contracting parties as to governmental functions necessary to the public health, safety and welfare. . . ." Section 11-952(A) provides in part that "[i]f authorized by their legislative or other governing bodies, two or more public agencies by direct contract or agreement may contract for services or jointly exercise any powers common to the contracting parties and may enter into agreements with one another for joint or cooperative action. . . ."

In Ariz. Atty. Gen. Op. 183-057 we held that these provisions read together do not encompass mere agreements for services. We said that "if two agencies are charged with performing the same duty, it obviously is economically efficient to avoid duplication of services and allocate responsibilities between the parties."⁶

We think that in no way can your contract with the CAP be characterized as a "joint exercise of powers." Discharge of the governmental function of coordinating search and rescue activities and the activities of all State agencies (except the

⁶Ariz. Atty. Gen. Op. 183-057 preceded the Arizona Procurement Code, before which contracts for services between governmental units were not exempt from competitive selection unless they were exempt as agreements for joint exercise of powers. See the now-repealed A.R.S. §§ 41-1051 through 41-1056. We think, however, that even though A.R.S. §§ 11-951 through 11-954 no longer are needed to exempt inter-governmental purchase contracts from competitive selection requirements, the scope of those statutes has not changed and the reasoning of 183-057 is still applicable.

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National Guard) in declared emergencies rests with the Director of the Division of Emergency Services. See, e.g., A.R.S. §§ 26-305 and 26-306, as well as various Executive Orders delegating to the Director and the Division extensive coordination and liaison functions with federal agencies in emergency situations.

The functions of the CAP are clearly support activities. The CAP carries out missions at the request of agencies, such as the Division and the Director, which have legal responsibility for the missions. The CAP itself has no direct legal responsibility for conducting search and rescue missions, for example, in the State of Arizona. Those duties are imposed by statute on local sheriffs and, indirectly, on the Director, who in his discretion calls upon the CAP for assistance. The statutes and regulations applicable to the CAP bear out this support role.

For example, 36 U.S.C.A. § 202, which lists the objects and purposes of the CAP says, in subsection (b), that it is "to provide an organization of private citizens with adequate facilities to assist in meeting local and national emergencies." (Emphasis added) Also, 10 U.S.C.A. § 9441(c) permits the Secretary of the Air Force to use the services of the CAP in fulfilling the noncombat mission of the Air Force. Finally, Civil Air Patrol Regulation 60-1, part 1-4.g.(1) lists "[m]issions to support requests from a local county, state or federal governmental agency" as Air Force non-reimbursable missions. [Emphasis added]

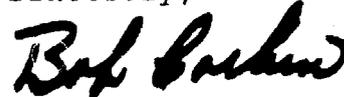
Furthermore, as noted in part II above, when the Legislature in 1970 retreated from the position of appropriating money to the CAP as an agency of the State, it authorized the Governor to use those appropriations "for the purpose of contracting with Civil Air Patrol, Incorporated, or other qualified organizations . . ." to provide air search and rescue services. Laws 1970 (2nd Reg. Sess.) Ch. 53, § 1. This language very clearly contemplates a contract for services, and the language used by the Legislature in appropriations since 1970 for air search and rescue operations gives no indication that the legislature since then has taken a different view.

For these reasons, we think it clear that your contract with the CAP is one for services, and does not constitute a joint exercise of powers. Accordingly, the contract is not

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subject to the requirements of A.R.S. § 11-952, nor are you required to put it out for competitive bidding under the Arizona Procurement Code or otherwise.⁷

Sincerely,



BOB CORBIN
Attorney General

BC:CSP:mch

⁷In our opinion, the explicit exemption of contracts between governmental entities in A.R.S. § 41-2501(B) overrides statements, such as those in Ariz. Atty. Gen. Op. 75-11, that competitive bidding should be used by governmental entities even though not expressly required by statute, because of the advantages to the public.