



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

January 8, 1999

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State Budget and Control Board
Post Office Box 12444
Columbia, South Carolina 29211

Elizabeth S. Mabry, Director
Department of Transportation
Post Office Box 191
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Re: Informal Opinion

Dear Dr. Carter and Ms. Mabry:

On behalf of the Department of Transportation and the Budget and Control Board, you have jointly requested an opinion to "clarify the scope of the statutory exemptions, § 11-35-710 (1997 cum. supp.) which is part of the South Carolina Procurement Code." You note that "the immediate concern giving rise to our opinion request is the contract for maintenance services for rest areas and welcome centers." You have enclosed correspondence between the Department and the Board "which illustrates the conflicting interpretations of this exemption by the Department and the Board, respectively." Further, you state that "[i]n addition, whether this exemption applies to other items and services has arisen in the past, such as present bridge segments."

Law / Analysis

S. C. Code Ann. Sec. 11-35-710 provides in pertinent part as follows:

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[t]he [Budget and Control Board], upon the recommendation of the Office of General Services, may exempt governmental bodies from purchasing certain items through the respective chief procurement officer's area of responsibility. The board may exempt specific supplies or services from the purchasing procedures required in this section and for just cause by unanimous written decision limit or may withdraw exemptions provided for in this section. The following exemptions are granted in this chapter:

(1) the construction, maintenance, and repair of bridges, highways and roads; vehicle and road equipment maintenance and repair; and any other emergency type parts or equipment utilized by the Department of Transportation or the Department of Public Safety;

Thus, the issue here is whether the contract for maintenance services for rest areas and welcome centers is covered within the aforementioned exemption for "the construction, maintenance, and repair of bridges, highways and roads."

A number of principles of statutory construction are relevant to your inquiry. First and foremost, is the time-honored tenet of construction that the intent of the General Assembly must prevail in the interpretation of any statute. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). A statutory provision should be given a reasonable and practical construction which is consistent with the purpose and policy expressed therein. Jones v. S.C. State Highway Dept., 247 S.C. 132, 146 S.E.2d 166 (1966). Words used in an enactment should be given their plain and ordinary meaning. Smith v. Eagle Const. Co., 282 S.C. 140, 318 S.E.2d 8 (1984). Moreover, exceptions contained in a statute give rise to a strong inference that no other exceptions were intended. Pa. Natl. Mut. Cas. Ins. Co. v. Parker, 282 S.C. 546, 320 S.E.2d 458 (S.C. App. 1984). The statute must be construed as a whole, Browning v. Hartvissten, 414 S.E.2d 115 (S.C. 1992), and if remedial in nature, it must be liberally construed in order to effectuate its purpose. S.C. Dept. of Mental Health v. Hanna, 270 S. C. 210, 241 S.E.2d 563 (1978).

This Office has frequently commented upon the nature of the Consolidated Procurement Code as a statute which is remedial in purpose and thus requiring a broad and

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expansive construction. In Op. Atty. Gen., Op. No. 84-8 (Jan. 24, 1984), for example, we expressed this opinion as follows:

[t]he Consolidated Procurement Code is set forth in § 11-35-10 et seq. The legislative purposes and objectives of the Code, which requires competitive bidding, are expressed in § 11-35-20. Among these are the consolidation and clarification of procurement law in the State; the promotion of increased public confidence in the procedures followed in public procurement; the insuring of fair and equitable treatment of all persons who deal with the State's procurement system; the provision of maximum purchasing power of State expenditures; the encouragement of broad-based competition for public procurement; and the insuring of a procurement system of quality and integrity. In construing the applicability of statutes full effect must be given the legislative purpose. Bankers Trust of South Carolina v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980).

The above legislative purposes are in complete accord with the objectives of bidding requirements and public procurement codes, generally. Bidding requirements in public procurement

are for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of . . . [government] contracts, and to secure the best work or supplies at the lowest price practicable, and are enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to public interest.

Yohe v. City of Lower Burrell, 418 Pa. 23, 208 A.2d 847, 850 (1965), quoting 10 McQuillin, Municipal Corporations, §

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29.29. There is indeed a strong public policy which favors competitive bidding. See, Terminal Const. Co. v. Atlantic City Sewerage Auth., 67 N. J. 403, 341 A.2d 327 (1975).

Accordingly, procurement statutes such as South Carolina's Consolidated Procurement Code are frequently held to be remedial in nature and are construed broadly to achieve their purpose. In discussing a competitive bidding statute, one court has held that

the courts will not, by strict construction, narrow the scope of a statute and limit its application, in cases where such construction is against the legislative policy.

Reiter v. Chapman, (Wash.), 31 P.2d 1005, 1007 (1934).

In short, this Office is of the view that all doubt must be resolved in favor of the Procurement Code's applicability in a given situation.

Turning now to the specific question at hand, it is evident that the South Carolina Department of Transportation and the Budget and Control Board hold conflicting views as to the Procurement Code's applicability in the aforementioned situation. The Executive Director of DOT summarized that agency's interpretation of § 11-35-710 (1) in a letter of May 30, 1997. Stressing certain policy considerations, she stated as follows:

S.C. CODE ANN. § 11-35-710 (1) (1976 as amended) specifically provides that "the construction, maintenance and repair of bridges, highways and roads . . . by the Department of Transportation is exempt from the South Carolina Consolidated Procurement Code. S. C. CODE ANN. § 57-3-210 defines "highway", "street" or "road" as "general terms denoting a public way for the purpose of vehicular travel, including the entire area within the right of way, and the terms shall include roadways, pedestrian facilities, bridges, tunnels, viaducts, drainage structures, and all other facilities commonly considered component parts of highways, streets or roads." In

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addition to the fact that the Safety Rest Areas and Welcome Centers are located entirely upon SCDOT right of way, they are also common components of the interstate highway which exist in every state of the country.

The standard specifications for interstate highway design are set forth in the American Association of State Highway and Transportation Officials (AASHTO) "policy on Design Standards - Interstate System" which is adopted in the Federal Regulations at 23 CFR 625 (a) (2). I am attaching two (2) pages from the Policy which refer to the Safety Rest Areas. This Policy provides, in part, at page 309 of the attached, "(s)afety rest areas, information centers, and scenic overlooks are functional and desirable elements of the complete highway development and are provided for the safety and convenience of the highway user." Also, as indicated on the attached page 522, the Policy states that Safety Rest Areas are a desirable feature on principle rural arteries, allowing breaks for relief from the publicly recognized condition of driver hypnosis.

In addition to providing areas to rest and stretch, the Safety Rest Areas and Welcome Centers also provide ready access to restroom facilities and other necessities such as drinking water, telephones, food and drink vending machines. These are important on high speed controlled access facilities. Without such facilities, drivers would have to exit the interstate and utilize restrooms at privately owned and operated facilities which can result in the loss of significant travel time. This could result in drivers failing to take breaks frequently enough to counter the effects of driver hypnosis. In addition, there are rural areas of the State where such facilities are not available off the right of way. Therefore, if such Safety Rest Areas were not provided as an integral part of the interstate highway system, there would be little alternative but to continue driving, even when fatigued.

Therefore, maintenance of SCDOT Safety Rest Areas and Welcome Centers which includes keeping the restrooms

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clean and maintaining the grounds is exempt under the provisions of § 11-35-710 on the grounds that they are within the right of way and are common components of the interstate highway system.

The Budget and Control Board's response to Ms. Mabry's letter was one of disagreement with DOT's legal position. In a letter, dated July 10, 1997, the Director of the Office of General Services enunciated the following interpretation of § 11-35-710 (1):

[t]he exemption process is designed to provide a means for procuring goods and services outside of established procurement processes when those goods and services cannot be effectively procured utilizing the Code's procedures. As the agency that must interpret and determine the scope of exemptions to the Procurement Code, we look very carefully at the plain language of the exemption and the good or service at question to determine if it is encompassed by the exemption by the exemption.

The language of the exemption does not speak specifically to service contracts to Safety Rest Areas and Welcome Centers. Since the definition of highway contained in § 57-3-120 is not a common and ordinary definition of that term to the extent that it includes buildings, it does not govern the scope of this exemption. It has been my understanding in discussions with the staff that the purpose of the language at issue in the part of the exemption addressing construction, maintenance and repair of bridges, highways and roads, was to relieve your agency of the necessity of following two different sets of procurement procedures since federal government requirements also apply to highway and road construction. It has not been my understanding that the federal procedures that you must follow extend to the service contracts for the Safety Rest Areas and Welcome Centers. If there are federal requirements that you must follow in contracting for these types of services that put you in a similar position of having both federal and state laws governing your contracting process, we should take to this matter to the Budget and Control Board to

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have the exemption language clarified to include these aspects of your operation. Otherwise, I know of no reason that these contracts should be exempted from the Procurement Code. Contracts of this type are successfully procured utilizing our State's procurement procedures regularly, and in the absence of clear direction from either a statute or an exemption approved by the Budget and Control Board, we cannot advise you that these contracts are exempt. The staff of the State Procurement Office will gladly assist you in procuring these through established State procurement processes.

If there are circumstances which would lead you to need an exemption for this or any other matter that cannot be effectively procured through our State's Procurement Code, let me know so we can work with you on a resolution.

As a matter of policy, this Office typically defers to the administrative interpretation by the agency charged with enforcement of the statute in question. As was emphasized in an earlier Opinion,

“construction of a statute by the agency charged with executing it is entitled to the most respectful consideration [by the courts] and should not be overruled absent cogent reasons.”

Op. Atty. Gen., October 20, 1997. The courts have stated that it is not necessary that the administrative agency's construction must be the only reasonable one, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. Ill. Commerce Comm. v. Interstate Commerce Commission, 749 F.2d 825 (D.C. Cir. 1984).

With respect to the interpretation or applicability of the State Procurement Code, this Office has typically deferred to the construction given by the Budget and Control Board or its subordinate divisions charged with procurement matters and responsibilities. See, e.g., Op. Atty. Gen., April 4, 1996 [deferring to Budget and Control Board's interpretation of applicability of § 11-35-1590 of the Procurement Code]; Op. Atty. Gen., March 19, 1982 [outlining procedures governing Procurement Review Panel – to review all appealed decisions rendered by Chief Procurement Officer – with report of its findings to the Budget and Control Board which may then affirm, alter or deny the decision of the Review Panel]; Op. Atty. Gen., Feb. 16, 1989 [discussing § 11-35-70 which defers to the Division of

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General Services to determine if a school district has its own Procurement Code which is substantially similar to the State Procurement Code]; Op. Atty. Gen., Op. No. 83-89 (Nov. 15, 1983) [discussing § 11-35-50 providing for a task force appointed by the Budget and Control Board to draft a Model Procurement Ordinance to be used as a guideline for counties or other political subdivisions in adopting their procurement codes]. See also, § 11-35-540 [Budget and Control Board given express statutory authority to promulgate governing the procurement, management, control and disposal of all supplies, services and construction to be procured by the State.]

Moreover, our Supreme Court has recognized the deference which must be given to agency expertise with respect to the Procurement Code. Logan v. Leatherman, 290 S.C. 400, 351 S.E.2d 146 (1986) involved a prime contractor's appeal from an order requiring it to report a portion of profit from a contract that it had been awarded under the Procurement Code. On appeal, the Court upheld the Procurement Review Panel's determination that a May 15, 1985 amendment to the Procurement Code should apply even though the protest prior to the enactment of the amendment. The Procurement Review Panel determined that the amendment to the Procurement Code was remedial or procedural in nature and thus could be applied retroactively. The Supreme Court, in upholding the Procurement Review Panel's interpretation of the Code concluded that

[c]onstruction of a statute by the agency charged with executing it is entitled to most respectful consideration and should not be overruled without cogent reasons. Faile v. South Carolina Employment Security Commission, 267 S.C. 536, 230 S.E.2d 219 (1976). The circuit court correctly determined that the remedies provided in the 1985 amendment to S.C. Code Ann. § 11-35-4210 (1976, as amended) can be applied retroactively.

290 S. C. at 402.

Thus, deference must be given the Budget and Control Board's interpretation of the Procurement Code in this matter, unless such interpretation is patently unreasonable. Clearly, General Services' statutory interpretation is not unreasonable in this instance, particularly in light of the remedial purpose of the Procurement Code.

The fact that rest areas and welcome center were not specifically mentioned as part of the exemption contained in § 11-35-710 (1) is, as noted by the Director of General Services, striking. Moreover, the fact that a rest area or welcome center may be included

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as a part of the "highway" for other purposes is not necessarily controlling in determining whether the Legislature intended to exempt contracts relating to the construction and maintenance of welcome centers and rest areas from the Procurement Code. What is most persuasive would be the common and ordinary understanding of words such as "highway" or "road" as well as the construction which would best effectuate the Legislature's intent. There is simply no persuasive evidence present that the General Assembly contemplated including such contracts when enacting the pertinent exemption from the Procurement Code. If indeed the General Assembly had envisioned this broader, more technical meaning of a "highway" or "road", it could have certainly said so when enacting this particular exemption. Yet, it did not.

When the average person thinks of a "highway" or "road", he or she usually does not necessarily consider the "rest area" or "welcome center" as part and parcel thereof. For example, in Jacobsen v. Bonine, 123 F.3d 1272, (9th Cir. 1977), the Ninth Circuit Court of Appeals concluded that the Interstate rest stop area was not part of the traditional public forum for First Amendment purposes, as compared to which sidewalks adjacent to streets, which had always occupied such a status. The Court noted that

[t]he only circuit to consider whether interstate rest stop areas are public fora has concluded that they are not. Sentinel Communications Co. v. Watts, 936 F.2d 1189 (11th Cir.1991). Quoting Perry [Educ. Assn. v. Perry Local Educator's Assn.], 460 U.S. at 45, 103 S.Ct. at 955, 74 L.Ed.2d 794 (1983)] . . . the Eleventh Circuit in Sentinel explained that as a component of the national Interstate System of Highways, a safety rest area is "hardly the kind of public property that has 'by long tradition or by governmental fiat . . . been devoted to assembly and debate'" Sentinel, 936 F.2d at 1203. That court further observed that rest stop areas are relatively modern creations that have "never existed independently of the Interstate System; they are optional appendages that are intended, as part of the System, to facilitate safe and efficient travel by motorists along the System's highways." Id. See generally, 23 U.S.C. §§ 101(b) and 103(e)(1). We agree.

123 F.3d at 1274. Likewise, in State ex rel. Highway Comm. v. Pinkley, 474 S.W.2d 46 (1971), the Court of Appeals of Missouri stated the following:

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[t]he Commission first seeks to justify its action on the grounds that by Article IV, § 30(b), subsection (3)(b), Const. 1945, it may expend state road funds for the purpose of constructing 'state highways and bridges in, to and through state parks. . . .' That provision may empower the Commission to build a state highway in, to and through a park established by the Missouri State Park Board but it obviously does not authorize the State Highway Commission to provide a new park, or even a rest area.

In other words, the interpretation of § 11-35-710 (1) by the General Services Division of the Budget and Control Board, the agency which implements the Procurement Code on a day-to-day basis, is certainly a reasonable construction and appears to be one in keeping with the intent of the Procurement Code. By its terms, § 11-35-710 empowers the Board (upon the recommendation of General Services Division) to exempt governmental bodies from purchasing certain items through the chief procurement officer's area of responsibility. The Board is further authorized to exempt specific supplies or services from the Procurement Code and for "just cause by unanimous written decision limit or may withdraw exemptions provided for in this Section." Here, the Board has not to date granted DOT an exemption for construction and maintenance of rest areas or welcome centers. To the contrary, the Board, through General Services, deems the exemptions contained in § 11-35-710 (1) not to be applicable in this situation. Notwithstanding the viable arguments which have been made by DOT to the contrary, particularly application of the definition contained in § 57-3-210, the interpretation rendered by General Services here would be considered reasonable, one which promotes the purpose and intent of the Procurement Code and thus legally controlling. While there may well be other broader definitions which would include rest areas and welcome centers, General Services' application of the common and ordinary understanding of these terms for purposes of the Procurement Code must be given deference by this Office. Thus, in my opinion, because the General Services Division of the Budget and Control Board is the agency charged with implementing and administering the Procurement Code, a court would follow this agency's interpretation thereof.¹

¹ I would add that if there are overriding policy reasons which necessitate an exemption from the Procurement Code for the referenced services, § 11-35-710 authorizes the Budget and Control Board to provide for such an exemption. The referenced letter of Ms. Zeigler fully recognizes such authority. Thus, DOT may proceed to the Board for exemptions if it believes such is necessary or warranted. Again, this Office expresses no

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This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,



Robert D. Cook
Assistant Deputy Attorney General

RDC/ph

opinion upon the wisdom of or policy considerations concerning such an exemption.