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The State of South Carolina

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December 6, 1988

C. Dennis Aughtry, Esquire
Richland County Attorney
Post Office Box 192
Columbia, South Carolina 29202

Dear Mr. Aughtry:

You have requested the opinion of this Office as to whether the Richland County Procurement Code, as it existed prior to enactment of the Farley amendment in May 1988, was broad enough to authorize utilization of the "design/build" concept of procurement, as outlined in the Request for Proposal attached to your letter.

Background

Richland County Council has determined that a new administrative complex for county agencies should be constructed on county property located at 2020 Hampton Street in Columbia. As stated in Request for Proposal No. 261-q-88:

Richland County will enter into a contract with the successful bidder who is to perform a "turnkey" project that will include all architectural and engineering services and construction to provide a complete facility. The Contractor shall coordinate all activities of designers, subcontractors, suppliers and others involved in the project to provide a completed facility meeting contract requirements.

The Request for Proposal ("RFP") covers space requirements, siting, construction documents, construction phase, codes and ordinances, bonds, project schedule, and contract price. The date of the RFP is unknown to this Office, but we understand the RFP to have been issued in April 1988.

Payment to the successful contractor is specified in the RFP to be on a lump sum basis for the "turnkey" project. The final fee is to be negotiated following evaluation of all proposals, though prospective bidders were to submit fee estimates with their proposals. The fees were to be broken into several categories to reach the total bid to design and construct the administrative complex: (1) fee for architectural and engineering services; (2) fee for construction of an 85,000 square foot administrative complex (to be adjusted on the basis of actual square footage times average cost per square foot); and (3) fee for site development beyond a five-foot line around the building.

The question to be addressed is whether the Richland County Procurement Code permitted such a building scheme, known as "design/build," at the time the RFP was issued. Thus, the following discussion will not take into account the Farley amendment as adopted in May 1988, subsequent to the issuance of the RFP. After a brief discussion of statutory construction principles, the Richland County procurement provisions will be analyzed.

Statutory Construction

In interpreting a legislative enactment such as a statute or an ordinance, it is the primary obligation of the courts and this Office to determine and effectuate legislative intent if at all possible. Bankers Trust of South Carolina v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980). Full effect must be given to each part of the legislative act, and words used therein must be given their plain and ordinary meanings. Federal Ins. Co. v. Speight, 220 F.Supp. 90 (D.S.C. 1963). In addition, words of a legislative enactment must be applied literally in the absence of ambiguity. Green v. Zimmerman, 269 S.C. 535, 238 S.E.2d 323 (1977). Enumeration of certain things in legislative enactments implies the exclusion of all other things not mentioned. Jones v. H.D. & J.K. Crosswell, Inc., 60 F.2d 827 (4th Cir. 1932)

Richland County Procurement Code

The policy of Richland County with respect to competitive bidding is stated in section 2-598 of the Richland County Code, in part (a):

All public purchases shall be made in a manner which provides for the greatest economy for the taxpayer, the fairest selection of vendor, and the prevention of conflict of interest. Towards this end, it shall be the policy of the county that, whenever practical, goods and services required by county agencies shall be procured through competitive bidding. Professional services shall be procured through competitive bidding, unless otherwise prohibited by law; provided, however, that architectural and engineering services shall be procured through procedures developed by the county administrator and approved by the council. Said procedures outlined in section 11-35-3210 et seq. of the South Carolina Code of Laws. 1/

The plain language of this section requires that competitive bidding be used "whenever practical."

A review of subsequent sections shows that the following procurement procedures were in place at the time the RFP was issued: vending machines, pay telephones, food services, and concessions (section 2-599); procurement of professional services (section 2-600) 2/; centralized purchasing (section 2-606); procedural regulations (section 2-607); formal contract procedures (section 2-608); negotiation procedures (section 2-612); and others. Nowhere in the Richland County Procurement Code, as presented to this Office as it was supposed to have existed at the time the RFP was issued, is there any specific or implied provision for the "design/build" procurement concept as described earlier.

1/ The South Carolina Consolidated Procurement Code is inapplicable to counties, Section 11-35-50, Code of Laws of South Carolina (1976), though counties may certainly use the Consolidated Procurement Code as a model for adopting their own procurement ordinances or procedures.

2/ A regulation of the State Board of Architectural Examiners, R.11-17, precludes the procurement of architectural services by a manner other than a direct negotiation; participation in a system requiring comparison of compensation for architectural services is thus not permitted.

Section 2-608 of the Richland County Code provides the following:

All purchases of supplies, materials, equipment or contractual services, when the estimated cost thereof shall exceed fifteen thousand dollars (\$15,000.00), shall be made according to prescribed procedures from the lowest responsible bidder after due notice inviting bids.

Subsequent parts of section 2-608 provide the procedures for giving notice inviting bids, submission of bids, bid surety, opening of bids, award of contract, handling identical bids, and forfeiture of bid surety. While certain services may be procured in this fashion, as noted in footnote 2 the procurement of architectural services (a part of the concept outlined in RFP) may not be accomplished in this manner; the procedures specified in section 2-600 as to procurement of professional services would have been required to procure architectural services as the procurement code existed in April 1988.

Section 2-600 of the county's procurement code covers the procurement of professional services and is actually a negotiation process. County staff are to develop a description of a proposed project and prepare a cost estimate. Then, the county administrator is to establish a selection committee, which first determines whether the services are available from a sole source or on an at-large basis. If the latter is recommended, then a negotiation process begins; a public invitation to provide information to the committee is extended, firms submit the required information, and an evaluation of each firm is made by the committee. Ultimately, county council or its designee would then negotiate a contract with the most qualified firm at a price deemed fair and reasonable to the county.

Inherent in this method of procurement is that the same conception of the project would be presented to all interested firms, rather than leaving the conception of the project to the discretion of the interested firm. Thus, all comparisons are made on the same basis and qualification of the firm to carry out the project, rather than evaluation of numerous conceptions of the project, becomes the issue.

After the architectural services have been obtained, the next step, according to the procurement procedures in existence in April 1988, would be to solicit bids for construction of the administrative complex. Thus, a two-step procedure would have been suggested by the Richland County Procurement Code in existence at the time the RFP was issued.

Farley Amendment

While evaluation of the Farley amendment is not necessary to dispose of your question, it is nevertheless worthy of mention. Effective from and after May 17, 1988 (and subsequent to issuance of the RFP), Richland County Council amended its procurement code by adding section 2-601 on competitive sealed proposals. The opening paragraph sets forth the policy as to such proposals:

When the purchasing agent, or the county administrator, determines, in writing, that the use of competitive sealed bidding as set forth in Section 2-608, infra, is either not practicable or not advantageous to the County, a contract may be entered into by competitive sealed proposals. Subject to the requirements of Section 2-600, Procurement of professional services, the County Council may provide by ordinance that it is either not practicable or not advantageous to the County to procure specified types of supplies, services or construction by competitive sealed bidding.

The procedure is then outlined: proposals are to be solicited from "at least three qualified sources, when such sources are available, through a request for proposals." (Emphasis added.) The procedure to invite proposals is specified; opening and tabulating proposals, the various evaluation factors, and other procedures are also provided.

A legislative body is presumed to be familiar with prior legislative enactments dealing with the same or similar subjects. Bell v. South Carolina State Highway Department, 204 S.C. 462, 30 S.E.2d 65 (1944). In construing an enactment such as the Farley amendment, it must further be presumed that the legislative body intended to accomplish something and did not intend to do a futile act. State ex rel. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964). Following these presumptions, it must be concluded that council did not feel that a procurement process utilizing a request for proposals (inherent in the "design/build" concept) was included in Richland County's Procurement Code as it existed prior to May 17, 1988. 3/

3/ This Office was not asked to address retroactive enforcement of the Farley amendment. We note that current County Attorney C. Dennis Aughtry has provided an opinion to council dated May 24, 1988, disposing of that issue.

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Conclusion

Based on the foregoing, it is the opinion of this Office that the Richland County Procurement Code, as it existed when Request for Proposal No. 261-g-88 was issued, did not appear to be broad enough to encompass procurement of services by a "design/build" concept. Instead, the procedure which most probably should have been followed would have been a two-step process, the first following section 2-600 to procure professional services (i.e., architectural services) and the second following section 2-608 to procure construction services. In this regard, this Office concurs with the opinion of former Richland County Attorney William F. Able dated April 5, 1988.

It is our understanding that certain contracts may have been negotiated or entered into with respect to this building project. By the issuance of this opinion, it is not our intent to interfere with the contractual procedures or obligations of Richland County. Our only intent is to address the questions posed to this Office concerning the status of the Richland County Procurement Code at the time the Request for Proposal was issued. Further questions by Richland County Council concerning this matter should be resolved by you as the County Attorney.

With kindest regards, I am

Sincerely,



T. Travis Medlock
Attorney General

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