

The State of South Carolina



Office of the Attorney General

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November 18, 1986

The Honorable Joe Wilson
State Senator
P. O. Box 142
Suite 606, Gressette Senate Office Bldg.
Columbia, South Carolina 29202

Re: Lease Between The South Carolina State Budget
and Control Board ("Tenant") and Wade Hampton
Associates ("Lessor") dated June 25, 1985.

Dear Senator Wilson:

You have asked whether the above referenced lease ^{1/} is "binding". Further, you have asked "whether or not by Budget and Control or Legislative action [the Lease] can be rescinded." By separate cover you have asked about the validity of certain letters of agreement (contracts) to supply design services between various State agencies and P.T.I., Associates, Inc. I shall analyze these three questions hereinafter.

CAN THE LEASE BE RESCINDED?

You have asked whether the Lease can be rescinded either by Budget and Control Board action or by Legislative action. Certainly under particular circumstances either the Budget and Control Board or the General Assembly could take steps to "rescind" the Lease.

^{1/} Your request addressed several agencies which have leased space in the AT&T Building under construction. The terms of each of these leases are substantially similar--the premises leased are different and the amount of space leased varies but in all essential terms the leases are identical. Thus, I shall address only the Lease by the Budget and Control Board.

The Honorable Joe Wilson
November 18, 1986
Page 2

Budget and Control Board Action. The Budget and Control Board is a tenant pursuant to the terms of the Lease. As a tenant, the Board has the same rights as any tenant to take steps to terminate a lease under appropriate facts. This Lease sets out the rights of the parties in the event of a default. See paragraphs 14 and 19 of the Lease. If a breach of a material term of the Lease were to occur, the Board could, as one of its options, sue to dissolve the Lease; however, this option would depend totally on future factual events. This Office cannot speculate on future events nor are we authorized or empowered to make factual determinations. 2/

Legislative Action. The specific terms of the Lease provide that the rental payments are subject to the availability and/or appropriation of funds. The General Assembly could choose expressly not to fund the Lease. This is a prerogative of the General Assembly. Paragraph 7 of the Lease sets out terms under which the Lease may be canceled. This paragraph contains both a "non-appropriations" clause and a "non-substitution" clause. Any definitive interpretation of the relationship between a "non-appropriations" clause and a "non-substitution" clause would have to be made by a court.

Obviously, the Lease must be construed to operate constitutionally. Thus, any analysis of the Lease must take into account the fact that the Lease cannot commit revenue beyond the current fiscal year. 3/ This fact is the raison d'etre for the existence of the "non-appropriations" clause found in paragraph 7 of the Lease. Our Office has earlier opined, in the context of a lease-purchase agreement, on the effect of a "non-substitution" clause and its relationship to a "non-appropriations" clause. This letter opinion is enclosed for your review as "Attachment A" hereto. I shall not duplicate the extensive research and analysis contained in that opinion; however, in sum, that opinion provided that until the South Carolina Supreme Court addresses the question to the contrary, we cannot say that the inclusion of a "non-substitution" provision in a State lease would render the agreement unconstitutional.

2/ The scope of an Attorney General's opinion is to address questions of law rather than investigations of fact. Ops. S.C. Atty. Gen. April 5, 1984 and December 12, 1983.

3/ This conclusion is consistent with earlier Opinions of this Office. See letter opinion dated February 22, 1982, to Senator Hugh K. Leatherman.

The Honorable Joe Wilson
November 18, 1986
Page 3

IS THE LEASE BINDING?

The purpose of the Lease is for the State Budget and Control Board to lease office space for its operations for a term of 10 years. See paragraph 2 of the Lease. The South Carolina Legislature specifically has recognized that the leasing of space for State purposes is a valid public purpose. The General Assembly has established the State Budget and Control Board as the single central broker for leasing real property for governmental bodies. See S.C. Code §11-35-1590 (1976, as amended). Pursuant to S. C. Code §11-35-1590, Regulation 19-445.2120A has been promulgated. That Regulation provides in part that:

The Division of General Services shall negotiate all leases of non-State-owned real property unless a governmental body has been certified by the Materials Management Office.

A provision of the lease that may create a potential question is the attorneys' fee provisions found in paragraph 19 (b) and (d). Basically, these provisions allow the prevailing party in a suit brought because of any breach of the Lease to recover expenses, including "reasonable attorneys' fees based on the prevailing rates in Columbia, South Carolina." If the Lessor 4/ were to be awarded fees and costs in a law suit, such an event may have the effect of committing revenues beyond the current fiscal year thus triggering a potential violation of Article X of the South Carolina Constitution. Nevertheless, if these "attorney fees" provisions were held invalid, 5/ the remainder of the Lease would still be valid as the doctrine of severability in contracts would operate. 6/

4/ An award to a State tenant would not raise a constitutional concern.

5/ Only a court could rule invalid or unconstitutional any provisions of this Lease.

6/ The South Carolina courts have recognized the doctrine of severability in contracts. See Scruggs v. Quality Electric Service, Inc., 320 S.E. 2d 49 (S.C. App. 1984); Packard & Field v. Byrd, 51 S.E. 678 (S.C. 1905); and Evans v. Centry Insurance Company, 22 S.E. 2d 877 (S.C. 1942). These cases recognize that severability is a matter of intent.

The Honorable Joe Wilson
November 18, 1986
Page 4

Other clauses which are often found in commercial, real estate leases, such as liquidated damages provisions, rental acceleration provisions and indemnification provisions, may create problems under Article X of the South Carolina Constitution; however, these problems are not present in this instance. This Lease, at paragraph 10, specifically provides that the State tenant:

shall not be required to furnish, provide, or pay for any of the following:

- (a) a security deposit for rental, or any other services;
- (b) the payment of liquidated, punitive or penalty damages;
- (c) any kind of indemnity, public liability, fire protection, accident or other insurance for the protection of the LESSOR (except to the extent required by this Lease and/or defined by this Lease as part of the Operating Cost for the Building);
- (d) any indemnification, release, waiver, (except as provided in paragraph 30) or hold harmless agreement, for any cause or reason, it being expressly understood that the AGENCY in regards to these matters does not waive, either expressly or implied, the State's sovereign immunity as to torts (unless waived under the appropriate laws of the State of South Carolina now existing or enacted in the future) or any other affirmative or defensive right or claim it may have under law; and
- (e) pay any late charges for past due rental.

As has been earlier discussed, this Lease contains a "non-appropriations" clause and a "non-substitution" clause. The ultimate determination as to the relationship of these two clauses must rest with the courts.

Therefore, after reviewing the Lease between the South Carolina Budget and Control Board and Wade Hampton Associates dated June 25, 1985 (referred to herein as the AT&T Lease), and

The Honorable Joe Wilson
November 18, 1986
Page 5

subject to the qualifications set out herein, it is probable that a court would find that the above referenced Lease is a valid and legally binding obligation of the State of South Carolina enforceable in accordance with its terms.

This Office expresses no opinion as to the following:

- A. Any and all other documents not attached as Exhibits to the Lease whether executed by and between the parties to the Lease or by other parties.
- B. Any tax limitations or tax aspects of the Lease.
- C. Any aspects of the business wisdom, business judgments or financial decisions regarding the negotiation and/or terms of the Lease including, but not limited to, the rental rates involved, cost reimbursements charged and other financial considerations.
- D. The relationship of the terms of this Lease to any other leases to which the State of South Carolina is a party.

CONTRACTS FOR DESIGN SERVICES

You have also asked about certain letters of agreement or contracts between various State agencies and P.T.I. Associates, Inc. Specifically, you have focused on the procurement methods of entering into the contracts and the effect, if any, on the validity of these contracts.

It is impossible to opine on the legal validity of these contracts without factual investigation and analysis. As previous opinions of this Office and other State's Attorney Generals conclude, the scope of an Attorney General's opinion is to address questions of law rather than investigations of facts. Ops. Atty. Gen. (South Carolina, April 5, 1984, and December 12, 1983; California, August 24, 1978; Iowa, July 16, 1981, August 14, 1981 and June 29, 1984; Minnesota, April 25, 1985; Nevada, November 19, 1981; Oklahoma, June 6, 1982; Tennessee, March 16, 1982; Texas, July 25, 1983; West Virginia, August 7, 1979; Wisconsin, June 1, 1978.) Nevertheless, I shall address the general statutory scheme which controls procurements of the type addressed by these contracts.

The Honorable Joe Wilson
November 18, 1986
Page 6

You indicate in your letter of November 3, 1986, that P.T.I. "is not an architect anyway." While this statement is certainly true in the conventional sense, P.T.I. does appear to fall within the definition of "architect-engineering and land surveying services" as defined in the Procurement Code. That definition is found at S. C. Code §11-35-2910(1) and provides as follows:

(1) "Architect-engineer and land surveying services" are those professional services associated with the practice of architecture, professional engineering, land surveying, landscape architecture and interior design pertaining to construction, as defined by the laws of this State, as well as incidental services that members of these professions and those in their employ may logically or justifiably perform, including studies, investigations, surveys, evaluations, consultations, planning, programming conceptual designs, plans and specifications, cost estimates, inspections, shop drawing reviews, sample recommendations, preparation of operating and maintenance manuals and other related services. (emphasis added)

Thus, it appears that a possible technique to procure the services of P.T.I. would be to utilize S. C. Code §11-35-3230. I have attached §§11-35-2910 and 11-35-3230 hereto respectively as "Attachment B" and "Attachment C." Also I have attached Regulation 19-445.2145 as "Attachment D." As you can see from these statutes and regulations it would have been possible to use this approach to procure the services of P.T.I. As you can see from the statutes and regulations a number of procedures are to be followed.

Another possible approach which could have been utilized to procure the P.T.I. contract is the mechanism set out in S.C. Code §11-35-1270, enclosed as "Attachment E" and its accompanying regulation, Regulation 19-445.2025, enclosed as "Attachment F." As you can see this approach would allow the state agency to contract for up to \$2500.00 of services without utilizing competitive bidding or utilizing the sole source approach or requiring the approval of the state engineer's office.

The Honorable Joe Wilson
November 18, 1986
Page 7

As discussed earlier, this Office can not engage in fact finding in the context of issuing advice; however, you have provided certain facts which I shall assume for the purposes of further analysis. You have advised that the state engineer's office did not approve the P.T.I. contract. This lack of approval appears to violate the provisions of S. C. Code §11-35-3230(3) which provides:

(3) Approval of Contracts by State Engineer's Office. All contracts negotiated pursuant to this section shall be submitted for approval to the state engineer's office in accordance with regulations to be established by the board prior to the awarding and execution of the contracts.

If this failure to approve were not cured, one of the consequences could be that the contract would be invalid; however, the final result would depend on the specific facts of the transaction.^{7/} Regulation 19-445.2015, enclosed as "Attachment G," provides the mechanism to ratify unauthorized procurements. If the agencies involved were to follow the procedure set out in Regulation 19-445.2015, the failure to obtain the approval of the state engineer's office could be cured. ^{8/}

I hope the above analysis will aid you.

Sincerely yours,



Charles W. Gambrell, Jr.
Assistant Attorney General

CWGjr:ss

Attachments

^{7/} As I have stated earlier, only a court can invalidate a contract.

^{8/} Of course, appropriate legislation could be proposed which would mandate competitive bidding in all such contracts.