

1984 WL 249981 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

September 12, 1984

*1 Tony R. Ellis
Director
Division of General Services
Budget and Control Board
300 Gervais Street
Columbia, South Carolina 29201

Dear Mr. Ellis:

By your letter of August 10, 1984, you have asked for an opinion of the Attorney General on the following question:
Is the South Carolina Deferred Compensation Commission a governmental body as defined by the Procurement Code?

Because the answer to your question is not free from doubt, a declaratory judgment or legislative clarification may be advisable.

The South Carolina Consolidated Procurement Code, Act No. 481 of 1981, is codified as [Section 11-35-10 et seq., Code of Laws of South Carolina \(1983 Cum. Supp.\)](#). Applicability of the Code is addressed in Section 11-35-40; subsection (2) provides that [t]his code shall apply to every expenditure of funds by this State under contract acting through a governmental body as herein defined irrespective of the source of the funds, including federal assistance monies, except as specified in § 11-35-40(3) (Compliance with Federal requirements) and except as provided in Article 19 (Intergovernmental Relations). . . .

The term 'governmental body' is defined by Section 11-35-310(18) to mean any state government department, commission, council, board, bureau, legislative body, agency, government corporation, or other establishment or official of the executive, judicial or legislative branches of this State. Governmental body excludes the General Assembly and all local political subdivisions such as counties, municipalities, school districts or public service or special districts.

The question thus presented is whether the State Deferred Compensation Commission is within this definition, so that the Procurement Code must be followed. For the reasons following, a court faced with this question could well conclude that the Commission is a state commission within the above definition.

In construing statutes, the primary objective is to ascertain and give effect to the intent of the legislature. [McCollum v. Snipes](#), 213 S.C. 254, 49 S.E.2d 12 (1948). Language in a statute should be given its plain and ordinary meaning. [Merchants Mutual Insurance Company v. South Carolina Second Injury Fund](#), 277 S.C. 604, 291 S.E.2d 667 (1982). Using these tenets of statutory construction, I will review the law relative to procurement and the Deferred Compensation Commission to attempt to determine legislative intent and give effect thereto.

The Deferred Compensation Commission was created by Act No. 97, 1977 Acts and Joint Resolutions. The purpose of creating the Commission was declared by the legislature in Section 1 of the Act, codified as [Section 8-23-10 of the Code](#):

The purpose of this chapter is to enable employees of the State, its agencies and political subdivisions to participate in voluntary deferred compensation plans authorized by the United States Internal Revenue Code as interpreted and administered by the

Internal Revenue Service, thereby permitting such employees to obtain the advantage inherent in such plans relative to the income tax treatment of the contributions and disbursements made pursuant to tax sheltered voluntary income deferral plans.

*2 The Commission itself is provided for by [Code Section 8-23-20](#) and is comprised of seven members including the Director of the South Carolina Retirement System, the Executive Director of the State Employees' Association and five other public employees to be appointed by the Budget and Control Board.¹ The Commission is empowered to adopt rules and regulations, make administrative appointments, enter into contracts, and to do other such acts which would be necessary to implement and administer the deferred compensation program. The Commission is also required to utilize competitive bidding to select annuities, insurance, or such other investments. See [Section 8-23-10](#) and [Op. Atty. Gen.](#) dated November 15, 1979. The foregoing authorities and functions of the Commission would certainly suggest that the Commission is a governmental body for purposes of the Procurement Code.

An examination of [Section 8-23-10 et seq.](#) of the Code, the chapter in which Act No. 97 is codified, reveals many factors which would suggest that the Commission should not be considered a governmental body. The purpose of the Act, in [Section 8-23-10](#), does not specify that a state agency is being created.² There is no appropriation of public funds to the Commission by the legislature; by [Section 8-23-20](#), costs of administration may be taken care of in either of two ways, neither of which would use public funds.³ Moreover, Section 8-23-90 provides that [t]he Deferred Compensation Plan shall operate without cost or liability to the State, any of its departments, agencies, boards, commissions, institutions or political subdivisions except for the incidental expense of administering the deduction of the deferred funds and the remittance thereof.

The use of the term 'shall' connotes mandatory compliance. 2A [Sutherland Statutory Construction](#) § 47.23. Because no state funds are appropriated to the Commission, this Code section appears to be followed. As a practical matter, this Office notes that the program reimburses the State for the costs incurred in the deduction and remittance.⁴ However, a court may look beyond factors such as these to determine the true nature of a governmental body. 81A C.J.S., [States](#), § 141.

It has been argued that the Commission is not a state agency of commission because personnel of the management organization, PEBSCO (Public Employees Benefit Service Corporation), are not paid by state funds, are not state employees, and are not within the state employee classification system. While all of the facts are assumed to be true, it would appear that the focus of the inquiry is the Commission itself and not the management organization contracted under authority of Section 3-23-20 to administer the plan. It should also be pointed out that PEBSCO may be reached by a state government telephone number (758-2000).⁵ As a practical matter, it should be noted that General Services contracts with private entities on a routine basis. The employees of such entities do not become state employees, nor the entity a state entity, yet the contract is subject to the Procurement Code due to the expenditure of public funds.

*3 Just as there are factors suggesting that the Commission is not a governmental body, other factors suggest that the Commission may well be a state commission. The Commission is referred to as the '[State](#) deferred Compensation Commission' in Section 8-23-70 (emphasis added); though use of the term 'State' is not conclusive, such use suggests that a state commission or body was intended. State involvement may be noted throughout Act No. 97: the State Budget and Control Board appoints Commission members; the State Treasurer advises the Commission and approves whatever investments the Commission may select; and the State is financially liable to a limited degree by Section 8-23-80. Finally, the funds being invested are technically state funds, since to characterize the funds otherwise would result in constructive receipt of such funds by an employee, thus defeating the purpose of the tax shelter.⁶ See [Op. Atty. Gen.](#) dated February 13, 1979 and footnote 5, [supra](#). That the Commission is required by [Section 8-23-20](#) to utilize competitive bidding is also significant. The 1977 Act predates adoption of the Procurement Code: such a substantive provision was probably necessary to bring the Commission under the procedural procurement rules specified in Section 1-1-440 of the Code. Thus, while arguments can be made that the Commission is not a

governmental body for purposes of the Procurement Code, we believe the better arguments rest on the side of the Commission's inclusion within this definition.

This Office issued an extensive opinion, well-supported, on January 24, 1984, stating that the Procurement Code should be utilized by a private entity acting for the benefit of Clemson University. That opinion noted that public policy favors competitive bidding; that procurement statutes are to be construed broadly; and that procurement or competitive bidding statutes are to be construed strictly against public authorities. The private foundation addressed by that opinion had even more remote connections to the State itself than does the Commission; thus, the authority and conclusion of that opinion could not be disregarded in this instance. The fact that technically no public funds may be expended by the Commission should not be used to avoid the Procurement Code. See especially *In the Matter of Signacon Controls, Inc. v. Mulroy*, 32 N.Y.2d 410, 298 N.E.2d 670 (1973), and *McKim v. Village of South Orange*, 133 N.J.L. 470, 44 A.2d 784 (1945), also discussed in the opinion of January 24, 1984.

Based on the rules of construction governing the Procurement Code, a court could conclude that the Commission is a governmental body subject to the terms of the Procurement Code.

Sincerely,

Patricia D. Petway
Assistant Attorney General

Footnotes

- 1 This Office is advised that the five public employees are representatives of the employees who have elected to participate in the deferred compensation program.
- 2 For contrast, see Act No. 179 of 1981, establishing the Family Farm Development Authority; [Code Section 46-47-30](#) refers to 'an agency of the State to be known as the South Carolina State Family Farm Development Authority.' See also Act No. 145 of 1983; Section 4 states, 'There is created the South Carolina Jobs-Economic Development Authority, a public body corporate and politic and an agency of the state . . .'. Act No. 97 of 1977 does not contain such express language as to the Commission. On the other hand, Act No. 83 of 1983, creating the Health and Human Services Finance Commission, does not contain such express language, yet there is no doubt that HHFSC is a state commission or agency. But see, as to the South Carolina Research Authority, Act No. 51 of 1983; Section 3 describes the entity as 'the nonprofit entity known as the South Carolina Research Authority.'
- 3 [Section 8-23-20](#), third paragraph:
Costs of administration may be paid from the interest earnings of the funds accrued as a result of deposits or as an assessment against each account.
- 4 This Office does not know when the Commission meets or whether Commission members who are public employees conduct Commission business during State working hours. The State may incur certain indirect costs if Commission business is conducted on State time; this Office cannot comment further but points out the possibility of an indirect cost.
- 5 It would appear that the employment of a management organization to administer the deferred compensation plan would be necessary to avoid the possibility of control, by commission members, over the funds administered by the plan. Otherwise it might be said that certain employees had constructively received their funds, thus defeating the purpose of the plan. See *Op. Atty. Gen.* dated February 13, 1979; also 33 Am.Jur.2d, [Federal Taxation](#), ¶3172 (1984).
- 6 Such constitutional considerations as pledging the credit of the State to individuals or the use of public funds for private purposes were apparently considered by the legislature. The result was Section 8-23-50:
Notwithstanding any other provision of law, those persons designated to administer the Deferred Compensation Program are authorized to make payment of premiums for the purchase of fixed or variable annuities, savings, mutual funds and insurance contracts under the Deferred Compensation Program. Such payments shall not be construed to be a prohibited use of the general assets of the State or political subdivision.

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