

1981 S.C. Op. Atty. Gen. 103 (S.C.A.G.), 1981 S.C. Op. Atty. Gen. No. 81-81, 1981 WL 96607

Office of the Attorney General

State of South Carolina

Opinion No. 81-81

September 23, 1981

**\*1 SUBJECT: Requests to architectural and design firms to state desired fees when responding to an invitation to submit a response following the advertisement of a prospective State project by a public agency.**

(1) Under Section 11-35-3210, it is the policy of the South Carolina Procurement Code to obtain architectural services on the basis of demonstrated competence and qualifications for a particular service at fair and reasonable prices.

(2) Under the Procurement Code, Section 11-35-3220(3), design firms must furnish any information which a particular invitation may require.

(3) Pursuant to Section 11-35-3220(4), at least five (5) firms must be interviewed, unless less than five (5) respond. Under Section 11-35-3220(5), the firms interviewed must be selected and ranked based on certain statutory criteria. A contract may then be negotiated under Section 11-35-3220(7).

(4) While the State does not require Architects to bid on State construction projects, the Code does not prohibit a State agency from requesting a design firm to inform that agency of the fee which it will seek if selected to provide services on a prospective project for information purposes.

TO: Mr. Harold Langbehn, Jr., CSI  
Anderson Council of Architects

DISCUSSION:

As I assist in the representation of the South Carolina Board of Architectural Examiners, and deal primarily with construction litigation, General McLeod has referred your question concerning the propriety of using 'bidding' or cost of services as a factor in the selection of an architectural firm by a public entity. While 'bidding' is perhaps not technically utilized in obtaining professional services, the laws of this State do not prohibit a public agency from ascertaining a design firm's desired fee in regard to a proposed project for information purposes. This is especially true in view of the policy of the South Carolina Procurement Code emphasizing competence obtained at a 'fair and reasonable price'. Section 11-35-3210(2).

QUESTION:

1. May Architects be required by State agencies to submit a statement of desired fees for their services on upcoming projects?

OPINION:

Yes. Formerly, South Carolina Code of Laws (1976), Section 10-5-50 required that a State agency select three (3) interested Architectural firms considered most qualified to develop a certain project and to consider in the selection of a firm:

1. The ability of professional personnel;

2. Past performance;

3. Willingness to meet time and budget requirements;
4. Location;
5. Recent, current, and projected work loads of the firms; and
6. The volume of work previously awarded to the firm by the agency.

Under Section 10-5-10, the public agency could then negotiate a contract for design services with the most qualified firm at a price or fee which the agency determined to be fair and reasonable to the State.

\*2 On July 31, 1981, the South Carolina Consolidated Procurement Code became effective. This Code applies to every expenditure of funds by the State or its agencies, Section 11-35-40(2). By July 1, 1983, all political subdivisions of the State must adopt ordinances and procedures encompassing principles of competitive procurement, Section 11-35-50. Draft regulations and manuals will be submitted for consideration by political subdivisions. But again, at the present time only State agencies are bound by the requirements of the Code. Article 9, Subarticle 5 of the Code, deals with the procurement of Architectural services. This new law, Section 11-35-3210(2), states that it is the policy of the State to publicly announce all requirements for Architectural services and to negotiate contracts for these services on the basis of demonstrated competence and qualification to provide the services sought taking into account 'fair and reasonable prices'. Under [Section 11-35-3220\(2\)](#), a State agency is required to publicly advertise a project description, and, under [Section 11-35-3220\(3\)](#), any interested firm must within thirty (30) days of the publication respond on Federal Standard Form 254, Architect-Engineer and Related Services Questionnaire, and Federal Standard Form 255, Architect-Engineer and Related Services Questionnaire for Specific Project, together with any other information sought through the particular invitation.

Following the receipt of all qualifying responses, under [Section 11-35-3220\(4\)](#), the agency must select and interview at least five (5) responding firms. In the selection and ranking of those firms, the agency, under [Section 11-35-3220\(5\)](#), must look to:

- (a) Past performance;
- (b) The ability of professional personnel;
- (c) The willingness to meet time and budget requirements;
- (d) Location;
- (e) Recent, current and projected work loads of the firms; and
- (f) Related experience on similar projects.

Under [Section 11-35-3220\(6\)](#), following selection and ranking, all responding Architectural firms must be notified in writing of the order of preference. Under [Section 11-35-3220\(7\)](#), the agency may then negotiate a contract for Architectural services with the most qualified firm at a compensation fair and reasonable to the State.

The new Code does not prevent a State agency from requesting that a firm responding to an Invitation state the fee which would be sought should the firm be selected. Following selection, that fee would then be subject to negotiation by the firm and the agency. The policy of the new Code is founded on the acquisition of competence at fair and reasonable prices and an agency may request in a particular invitation any information which it may require in regard to a specific project.

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