



ALAN WILSON  
ATTORNEY GENERAL

July 19, 2022

The Honorable Shane Massey  
Member  
South Carolina Senate  
District No. 25  
P.O. Box 142  
Columbia, SC 29202

Dear Senator Massey:

Attorney General Alan Wilson has referred your letter to the Opinions section. Your letter forwards a constituent's questions regarding whether specific examples of Lexington School District One's procurement practices comply with the South Carolina Procurement Code. Generally, these concerns involve amendments to architectural, engineering, or construction contracts that increase the scope of work awarded to onsite contractors rather than following a competitive sealed bidding procedure. The letter quotes from section 11-35-3070 of the South Carolina Code of Laws which permits such changes when specific circumstances are present.

Consistent with any applicable regulation of the board, a governmental body may approve and pay for amendments to architectural/engineering contracts and change orders to construction contracts, within the governmental body's authority, which do not alter the general scope or intent of the project and which do not exceed the previously approved project budget.

S.C. Code § 11-35-3070. The letter also quotes a second statute in the Procurement Code regarding informing the Attorney General's Office about "anticompetitive conduct."

When any information or allegations concerning anticompetitive practices among any bidders or offerors, come to the attention of any employee of the State, immediate notice of the relevant facts shall be transmitted to the Office of the Attorney General.

S.C. Code § 11-35-2420(A) (emphasis added). Finally, your constituent poses a number of questions about these statutes.

1. Are allegations of anticompetitive practices of governmental bodies only allowed to be transmitted to the Attorney General through employees of the State?
2. If allegations of anticompetitive practices of governmental bodies are only allowed to be transmitted to the Attorney General through employees of the State, to whom and how would an elected school board member transmit allegations outside of the body they were elected to?
3. Consistent with any applicable regulation of the governing board, may a governmental body approve and pay for amendments to architectural/engineering contracts, within the governmental body's authority, which alter the general scope or intent of the project if the project exceeds the previously approved project budget?
4. Consistent with any applicable regulation of the governing board, may a governmental body approve and pay for change orders to construction contracts, within the governmental body's authority, which alter the general scope or intent of the project if the project exceeds the previously approved project budget?
5. If a Construction Management at Risk contractor is currently performing work under an existing contract, may a governmental body award a new project to that contractor without competitive procurement methods? If no, are there any exceptions that would allow anticompetitive procurement methods, such as: the new project will take place at the same address of the existing contract?

### **Law/Analysis**

#### **1. School District Procurement Codes.**

The South Carolina Procurement Code applies to “every procurement or expenditure of funds by this State under contract acting through a governmental body as herein defined.” S.C. Code § 11-35-40(2) (emphasis added). The South Carolina Procurement Code defines “governmental body” to mean:

[A] state government department, commission, council, board, bureau, committee, institution, college, university, technical school, agency, government corporation, or other establishment or official of the executive or judicial branch. Governmental body excludes the General Assembly or its respective branches or its committees, Legislative Council, the Legislative Services Agency, and all local political subdivisions such as counties, municipalities, school districts, or public service or special purpose districts or any entity created by act of the General Assembly for the purpose of erecting monuments or memorials or commissioning art that is being procured exclusively by private funds.

S.C. Code Ann. § 11-35-310(18) (emphasis added). This statutory definition explicitly excludes school districts from the Procurement Code's application. However, a separate statute requires that if a school district has over seventy-five million dollars in annual expenditures it must comply with the South Carolina Procurement Code or develop its own procurement code.

Irrespective of the source of funds, any school district whose budget of total expenditures, including debt service, exceeds seventy-five million dollars annually is subject to the provisions of Chapter 35, Title 11, and shall notify the Director of the Division of Procurement Services of the State Fiscal Accountability Authority of its expenditures within ninety days after the close of its fiscal year. However, if a district has its own procurement code which is, in the written opinion of the Division of Procurement Services of the State Fiscal Accountability Authority, substantially similar to the provisions of the South Carolina Consolidated Procurement Code, the district is exempt from the provisions of the South Carolina Consolidated Procurement Code except for a procurement audit which must be performed every three years by an audit firm approved by the Division of Procurement Services. Costs associated with the internal review and audits are the responsibility of the school district and will be paid to the entity performing the audit.

S.C. Code § 11-35-5340 (emphasis added). The South Carolina Code of Regulations describes how school districts can modify a model school district procurement code to an individual district's organizational structure and the Materials Management Officer is delegated authority to evaluate such proposed codes.

To qualify for approval, a district code should largely mirror, but need not be identical to, the Consolidated Procurement Code. Because a district code needs only to be substantially similar to the consolidated procurement code and regulations, a district code may accommodate the differing context of school districts (e.g., differences between state government and local school district operations, including size, purchasing staff resources, volume and type of procurements, and structure of its governing body and executive hierarchy) as long as it preserves the sound procurement policies and practices underlying the rules found in the consolidated procurement code and regulations.

S.C. Code Regs. 19-445.3000; see also Charleston Cnty. Sch. Dist. v. Leatherman, 295 S.C. 264, 368 S.E.2d 76 (Ct. App. 1988) (affirming the Division of General Service's and S.C. Procurement Review Panel's rejection of Charleston County School District's proposed procurement code because it was not "substantially similar" to the S.C. Consolidated Procurement Code.). Because the request letter quotes from a section of the Lexington District One Model Procurement Code (2008), this Opinion acknowledges that the school district's

procurements are subject to its own procurement code rather than the South Carolina Procurement Code. For purposes of analysis, however, we will presume that the district's code largely mirrors the provisions of the State code.

**2. Circumstances where procurement contracts may be approved without a competitive sealed bidding process.**

The South Carolina Procurement Code generally authorizes governmental bodies to award contracts according to a competitive sealed bid process. Yet, as described in the request letter, section 11-35-3070 also authorizes change orders to previously authorized construction contracts if the change orders meet two conditions: they must (1) not alter the scope or intent of the project, and (2) not exceed the approved project budget. Moreover, the South Carolina Procurement Code authorizes governmental bodies to award emergency contracts as follows:

Notwithstanding any other provision of this code, the chief procurement officer, the head of a purchasing agency, or a designee of either officer may award or authorize others to award emergency contracts only when there exists an immediate threat to public health, welfare, critical economy and efficiency, or safety under emergency conditions as defined in regulations promulgated by the board; and provided, that such emergency procurements shall be made with as much competition as is practicable under the circumstances. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file.

S.C. Code § 11-35-1570(A) (emphasis added). When the value of an emergency contract exceeds \$50,000, notice must be posted in South Carolina Business Opportunities (SCBO) as soon as practicable and contain a statement regarding the right to protest. See S.C. Code § 11-35-1570(B). Lastly, all such emergency procurements are required to be submitted quarterly to the chief procurement officer and annually to the State Fiscal Accountability Authority. See S.C. Code § 11-35-2440.

**3. Appropriate action for procurement code violations.**

If there is a violation of the South Carolina Procurement Code, bidders and offerors, citizens with standing, and employees of public bodies can bring administrative and judicial challenges for such violations. The South Carolina Procurement Code directs the State Fiscal Accountability Authority to promulgate regulations establishing “appropriate action where it is discovered” that the award of or a modification to a contract is unauthorized or otherwise violates the code. S.C. Code § 11-35-4315. In addition to this administrative process, our state courts have upheld the right of citizens to bring declaratory judgement actions challenging the

award of alleged emergency procurements. In Sloan v. School District of Greenville County, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000), the South Carolina Court of Appeals upheld a resident taxpayer's standing to challenge the award of such an emergency procurement. The District's regulation defining emergency conditions provided:

[S]uch emergency conditions, include[] floods, epidemics, riots, equipment failures, and fire loss. The regulation also requires the condition "must create an immediate and serious need for supplies, services, equipment, or construction[,] ... the lack of which would seriously threaten: (1) the functioning of the District; (2) the preservation or protection of property; or (3) the health or safety of any person."

Id. at 517, 537 S.E.2d at 300. The Court explained the basis for finding taxpayers have standing to challenge allegedly illegal contracts caused by a school district's failure to follow the competitive sealed bidding requirements in its procurement code.

[T]he public interest involved is the prevention of the unlawful expenditure of money raised by taxation. "Public policy demands a system of checks and balances whereby taxpayers can hold public officials accountable for their acts.... Taxpayers must have some mechanism of enforcing the law." *Eastern Missouri Laborers Dist. Council*, 781 S.W.2d at 47.

Id. at 523, 537 S.E.2d at 303.

The expenditure of public funds pursuant to a competitive bidding statute is of immense public importance. Requiring that contracts only be awarded through the process of competitive sealed bidding demonstrates the lengths to which our government believes it should go to maintain the public's trust and confidence in governmental management of public funds. The integrity of the competitive sealed bidding process is so important that in some states "once a contract is proved to have been awarded without the required competitive bidding, a waste of public funds [is] presumed ... without showing that the municipality suffered any alleged injury." 18 Eugene McQuillin, *The Law of Municipal Corporations* § 52.26 (3d ed.1993)...

Id. at 524, 537 S.E.2d at 303. Therefore, if a court finds a contract violates the provisions of the South Carolina Procurement Code, it may well enjoin performance and payments under the contract.

Finally, S.C. Code § 11-35-2420(A) directs state employees to report "anticompetitive practices among any bidders or offerors" to the Office of the Attorney General. As described above, when a governmental body fails to comply with the South Carolina Procurement Code,

violations are often addressed according to the regulatory procedures issued by the State Fiscal Accountability Authority or by our state courts as the result of a declaratory judgment action. Section 11-35-2420 is concerned with a different circumstance where the “bidders or offerors” conspire to fix the price of their bids on a project or otherwise engage in anticompetitive practices. See S.C. Code § 11-35-1410(9) (“‘Responsive bidder or offeror’ means a person who has submitted a bid or proposal which conforms in all material aspects to the invitation for bids or request for proposals.”). In such a case, these anticompetitive practices may be violations of the South Carolina Unfair Trade Practices Act, S.C. Code § 39-5-10 *et seq.* This Office’s Consumer Protection and Antitrust Division represents the interests of the State South Carolina and its citizens through enforcement of the South Carolina Unfair Trade Practices Act whether a violation is required to be reported by S.C. Code § 11-35-2420 or otherwise.<sup>1</sup>

### **Conclusion**

For the reasons discussed more fully above, this Office’s responses to the questions presented are as follows:

1. Are allegations of anticompetitive practices of governmental bodies only allowed to be transmitted to the Attorney General through employees of the State?

No. While S.C. Code § 11-35-2420(A) only requires employees of the State to report anticompetitive practices among bidders and offerors, allegations of price collusion among bidders or offerors can be reported to the Consumer Protection and Antitrust Division by anyone with knowledge of relevant facts.

2. If allegations of anticompetitive practices of governmental bodies are only allowed to be transmitted to the Attorney General through employees of the State, to whom and how would an elected school board member transmit allegations outside of the body they were elected to?

Refer to the answer to question 1. Allegations of violations of the South Carolina Procurement Code by governmental bodies can be reported according to the procedures established by the State Fiscal Accountability Authority. S.C. Code § 11-35-4315.

3. Consistent with any applicable regulation of the governing board, may a governmental body approve and pay for amendments to architectural/engineering contracts, within the governmental body's authority, which alter the general scope or intent of the project if the project exceeds the previously approved project budget?

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<sup>1</sup> The Consumer Protection and Antitrust Division files lawsuits involving an array of unfair or deceptive trade practices, such as fraudulent marketing of pharmaceutical products, deceptive billing practices, and price collusion by competing manufacturers.

As discussed more fully above, in many cases school districts have adopted procurement codes that largely mirror the South Carolina Procurement Code. See S.C. Code Regs. 19-445.3000 (detailing how a school district may gain approval of a customized procurement code). If a school district's approved procurement code largely mirrors S.C. Code § 11-35-3070, amendments thereunder generally should not alter the general scope or intent of the project. However, the South Carolina Procurement Code authorizes emergency procurements in certain circumstances. See S.C. Code § 11-35-1570(A). These emergency procurements must still be made "with as much competition as is practicable under the circumstances." Id. Such an emergency procurement may authorize exceeding the scope of a previously approved project.

4. Consistent with any applicable regulation of the governing board, may a governmental body approve and pay for change orders to construction contracts, within the governmental body's authority, which alter the general scope or intent of the project if the project exceeds the previously approved project budget?

Refer to the answer to question 3. An emergency procurement may authorize exceeding the scope or budget of a previously approved project.

5. If a Construction Management at Risk contractor is currently performing work under an existing contract, may a governmental body award a new project to that contractor without competitive procurement methods? If no, are there any exceptions that would allow anticompetitive procurement methods, such as: the new project will take place at the same address of the existing contract?

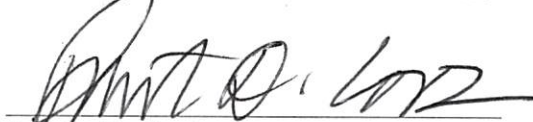
Refer to the answer to question 3 and 4.

Sincerely,



Matthew Houck  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Solicitor General