ALAN WILSON
ATTORNEY GENERAL

December 23, 2024

The Honorable G. Murrell Smith, Jr.
Speaker
South Carolina House of Representatives
P.O. Box 11867
Columbia, SC 28211

Dear Speaker Smith:

You seek an opinion "regarding the applicability of the South Carolina Consolidated Procurement Code, S.C. Code Ann. §§ 11-35-10, et seq. (Procurement Code) to a proposed student housing project. . . ." Based upon the facts as you outline in your letter, we believe a court would most probably find the Procurement Code to be inapplicable.

The facts provided by you are as follows:

> A for-profit private company or a related nonprofit corporation affiliate company (Developer) is prepared to construct student apartments (Apartments) near a public institution of higher education (Institution) in South Carolina. There is a private nonprofit corporation organized under the South Carolina Nonprofit Corporation Act and under Internal Revenue Code (Code) as a tax-exempt organization under Section 501(c)(3) (Foundation). The Foundation is an organization operating under section 509(a)(3) of the Code for the exclusive benefit and support of the Institution, an entity described in section 170(b)(l)(A)(v) and 509(a)(l) and (2) of the Code.
>
> After the Apartments are constructed, the Developer and the Foundation anticipate entering into a contract where the Foundation would assume the role as property manager, with a commensurate fee, to manage the Apartments (Management Agreement). It is anticipated that the Institution will have a contract with the Foundation where the Institution provides the following services (Service Contract), for which the Foundation would pay a fee to the Institution as part of the Management Agreement: (1) the Institution would list the Apartment on its website as a housing option for its students; and (2) the Institution would allow scholarship and grant funding the Institution receives for any student choosing to reside in the Apartments to flow through the Institution to the Foundation to cover the rental cost associated with the student lease. The fees paid by the Foundation to the Institution would be agreed in advance as part of the Service Contract.

Your argument in the letter you have submitted is that you do not believe that "the Procurement Code is implicated. . . ." Your legal analysis – which we agree with – is as follows:

1. Section 11-35-40(2)

Section 11-35-40(2) provides, in pertinent part:

> This code applies to every procurement or 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, ... and except that this code does not apply to gifts, to the issuance of grants, or to contracts between public procurement units, except as provided in Article 19 (Intergovernmental Relations).

(Emphasis added).

The Code defines "governmental body", in pertinent part, as: "state government ... college, university, technical school, ... or official of the executive or judicial branch." S.C. Code Ann. § 11-35-310(18). The Institution is a governmental body. However, a private company such as the Developer is not a governmental body. The Foundation is incorporated pursuant to the South Carolina Non-Profit Corporation Act. While it exists for the benefit of the Institution, it is not a governmental body. The South Carolina Court of Appeals opined that another similarly situated foundation that existed for the benefit of The Citadel was not a governmental body. Citadel Dev. Found. v. City of Greenville, 279 S.C. 443, 308 S.E.2d 797 (Ct. App. 1983). See also 1987 WL 245452, Opinion No. 87-43 (S.C.A.G.).

As to § 11-35-40(2), the question is whether there is either a procurement or expenditure of funds by a public body as part of the contemplated transactions. The only contracting entity that is a public body is the Institution. The Service Contract between the Foundation and the Developer will be a fee for service contract[ ] and will not involve either a procurement of goods or services or the expenditure of funds by the Institution, since the Institution will be paid for the services it provides to the Foundation.

As to the Management Agreement between the Foundation and the Developer, again, the Procurement Code appears not to be implicated. Both parties are private corporations and not public bodies. Of course, the Foundation operates for the benefit of the Institution and some may argue that it is the "alter ego" of the Institution-thus should be considered a public body. Even assuming for the purpose of this opinion that the Foundation were the alter ego of the Institution, since the Management Agreement is a fee for service contract where the Foundation is providing a service and getting paid for those services, it does not involve a procurement[ ] or expenditure of funds or the disposal of supplies, etc.

The only Procurement Service Division Audit (State Procurement) regarding student housing transactions between an institution of higher learning and its foundation I have

found involves Coastal Carolina University (CCU). See: https://procurement.sc.gov/files/CCU07.pdf (CCU Audit), CCU contracted with the Coastal Housing Foundation, LLC (Coastal Housing Foundation) and the Coastal Carolina University Student Housing Foundation (Coastal Development Foundation) pursuant to the Management Agreement Between the Coastal Housing Foundation and CCU. The CCU Audit findings stand for the proposition that generally, "contracts between state agencies and their foundations are not exempt from the competitive requirement of the Code," noting that§ 11-35-40(2) applied to the expenditure of funds by a governmental body. The CCU Audit found that the agreements between CCU and the Coastal Housing Foundation and the Coastal Development Foundation required CCU to expend non-exempt funds. Thus, the CCU Audit concluded that CCU is subject to the Procurement Code in the expenditure of all funds necessary to implement the contract regardless of the source of funds, unless the expenditures are expressly exempt under § 11-35-40. Unlike the CCU matter, the Institution in this case is not expending funds but receiving funds for services rendered and is not procuring goods or services.

2. S.C. Code Ann. § 11-35-40(4).

Section 11-35-40(4) is not discussed in the CCU Audit and I have not been able to find an Attorney General's Opinion that addresses this section. It provides:

> (4) The acquisition of a facility or capital improvement by a foundation or eleemosynary organization on behalf of or for the use of any state agency or institution of higher learning which involves the use of public funds in the acquisition, financing, construction, or current or subsequent leasing of the facility or capital improvement is subject to the provisions of this code in the same manner as a governmental body. The definition and application of the terms "acquisition", "financing", "construction", and "leasing" are governed by generally accepted accounting principles.

(Emphasis added).

Looking at the clear and unambiguous language of § 11-35-40(4), in order for the above transactions to be subject to this section, the Project must involve the use of public funds either in the acquisition, financing, construction, or current or subsequent leasing of the facility.

The Procurement Code does not define "public funds" as used in § 11-35-40(4). The facts in these transactions simply do not appear to fit within the language of the section. The Project involves the acquisition of land, construction of multi-family housing and the subsequent leasing of the housing facilities.

- Acquisition. The Developer will have a contract on and will purchase the land. No structure is being purchased.

- Financing. The Apartments will be financed with private money from the Developer, not from tax exempt bonds issued on behalf of a governmental body or other public monies.
- Capital Improvement. While the Apartments are a capital improvement, they are not being acquired or leased by the Foundation. The Developer will continue to own the Apartments.
- Construction. The Apartments will be constructed with private money from the Developer, not from tax exempt bonds issued on behalf of a governmental body or other public monies.
- Leasing. The only lease for the units will be between the Developer and the student lessee. Neither the Institution nor the Foundation will lease the Apartments.

As discussed above, the Management Agreement between the Foundation and the Developer will be a fee-for-service contract and will not involve either the expenditure of public funds or a procurement by the Foundation. The fees paid to the Foundation will be paid by the Developer from private funds. Since it is a fee-for-service contract where the Foundation is providing a service, not procuring a service, even if the Foundation were an "alter ego" of the Institution, as discussed above, it does not involve a procurement of goods or services or expenditure of public funds.

Further, in construing § 11-35-40(4), a court must presume that the Legislature did not intend a futile act but rather intended its statutes to accomplish something. See, e.g., TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998). An "alter ego" theory would render the provision in § 11-35-40(4) requiring that the acquisition of a facility by an eleemosynary organization to involve the use of public funds in the acquisition, financing, construction thereof a nullity. By the express terms of the Code, even though an eleemosynary foundation operates for the benefit of a governmental body, only those actions that involve the use of public funds in the acquisition, financing and construction of a facility are covered by the Code.

Law/Analysis

In Op. S.C. Att'y Gen., 1999 WL 92410 (Jan. 8, 1999), we stated the governing principles for interpretation of the Procurement Code as follows:

> [t]his Office has frequently commented upon the nature of the Consolidated Procurement Code as a statute which is remedial in purpose and thus requiring a broad and expansive construction. In Op. Att'y Gen., Op. No. 84-8 (Jan. 24, 1984), for example we expressed this opinion as follows:
>
> > [t]he Consolidated Procurement ode is set forth in § 11-35-10 et seq. The legislative purposes and objectives of the Code, which requires competitive bidding, are expressed in § 11-35-20. Among these are the consolidation and clarification of procurement law in the State; the promotion of increased public confidence in the procedures followed in public procurement; the insuring of fair and equitable treatment of all persons who deal with the State's procurement system; the provision of maximum purchasing power of state

> expenditures; the encouragement of broad-based competition for public procurement; and the insuring of a procurement system of quality and integrity. In construing the applicability of statutes full effect must be given the legislative purpose. . . . [citation]. The above legislative purposes are in complete accord with the objectives of bidding requirements and public procurement codes, generally. Bidding requirements in public procurement are for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of . . . [government] contracts, and to secure the best work or supplies at the lowest price practicable, and are enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest.

On the other hand, while the Procurement Code must be broadly construed, it may not be interpreted so as to exceed the scope of its terms or in contradiction to the purpose of the Legislature. In other words, the Procurement Code is inapplicable where there is no "entering into a contract for the expenditure of funds by the State." Op. S.C. Att'y Gen., 1987 WL 342793 (January 6, 1987). The Procurement Code is designed to control "the acquisition of goods and services by the State and its agencies...." Op. S.C. Att'y Gen., 1987 WL 342708 (October 16, 1987). Personal services are not encompassed. Moreover, a university's foundation, which is a private corporation, is generally not considered a "governmental body" for purposes of the Procurement Code. Op. S.C. Att'y Gen., Op. No. 87-43, 1987 WL 245452 (May 11, 1987).

Turning to your specific question, and applying these guiding principles, we believe that the legal analysis in your letter is correct. As you state, the Foundation is not a governmental body but is instead an eleemosynary corporation. And, as you correctly recognize, "[t]he South Carolina Court of Appeals opined that another similarly situated foundation that existed for the benefit of the Citadel was not a governmental body. Citadel Dev. Found. v. City of Greenville, 279 S.C. 443, 308 S.E.2d 797 (Ct. App. 1983)." Moreover, as you further note, "[t]he Service Contract between the Foundation and the Developer will be a fee for service contract . . and will not involve either a procurement of goods or services or the expenditure of funds by the Institution, since the Institution will be paid for the services it provides to the Foundation."

Further, you correctly note that while the Foundation "operates for the benefit of the Institution and some may argue that it is the 'alter ego' of the Institution . . . since the Management Agreement is a fee for service contract where the Foundation is providing a service and getting paid for those services, it does not involve a procurement . . . or expenditure of funds or the disposal of supplies, etc." We believe this to be the correct legal analysis.

It is well recognized as an exception to public bidding that "where the contract is for personal services of a specialized nature requiring the exercise of peculiar skill," such bidding does not apply. State ex rel. Doria v. Ferguson, 60 N.E.2d 476, 478 (Ohio 1945). Moreover, a "contract for personal services, such as services of architects, engineers and surveyors, is not subject to

competitive bidding statutes because the services are not subject to uniform specifications." McMaster Const., Inc. v. Bd. of Regents of Oklahoma Colleges, 934 P.2d 335, 338 (Okl. 1997). Thus, in a contract for management services, the manager is providing personal services rather than affording goods or commodities.

In Shively v. Belleville Twp. High Sch. Dist. No. 201, 769 N.E.2d 1062, 1069-70 (Ill. 2002), the Court noted, citing decisions by the Pennsylvania Supreme Court, that there is a "long-standing history of exempting from the normal statutorily required competitive-bidding process those personal service contracts requiring a certain degree of personal skill and professional expertise." Id. (citing Malloy v. Boyertown Area Sch. Bd., 657 A.2d 915, 919 (Pa. 1995)). In Malloy, the Court concluded that the "construction management contract at issue in this case falls within the long-recognized professional skill/personal service exception to the competitive bidding requirement. . . ." 657 A.2d at 920.

We have also located an earlier opinion of this Office which is particularly instructive. In Op. S.C. Att'y Gen., Op. No. 87-43, 1987 WL 245452 (May 11, 1987), we addressed the question of the applicability of the Procurement Code to the construction of the Koger Center by the Carolina Research and Development Foundation, and the subsequent lease back to the University of South Carolina. In our opinion, the Procurement Code was found to be inapplicable. With respect to the construction contract by the Foundation, we concluded:

> [t]he Procurement Code provides by its own terms that "[t]his code shall apply to every expenditure of funds by this State acting through a governmental body as herein defined irrespective of the source of funds. . . ." § 11-35-40(a), SC Code, 1976 (as amended). A "governmental body" is further defined as "any state government department, commission, council, board, bureau, committee, institution, college, university, technical school, 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. . . ." § 11-35-310(18), supra. We are advised that the Carolina Research and Development Foundation, Inc. is a privately chartered eleemosynary corporation. As such it does not fall with the comprehensive statutory definition of a governmental body as set out in the Procurement Code. Another similar type foundation has been held by the court to be legally distinct from the state institution for whose benefit if expended funds and therefore, by inference, it was not a governmental body. Citadel Development Foundation v. City of Greenville, 279 S.C. 443, 308 S.E.2d 797 (Ct. App. 1983). A public policy argument may nonetheless be made that, when a private entity expends funds for the benefit of a governmental body, that the public bidding requirements of the Procurement Code should apply. We are sympathetic with that argument, but we are unable to construe the current provisions of the Procurement Code to reach that result. . . .

(emphasis added).

The opinion did not reference § 11-35-40(4) which you cite in your letter. Such provision states:

> [t]he acquisition of a facility or capital improvement by a foundation or eleeomosynary organization on behalf of or for the use of any state agency or institution of higher learning which involves the use of public funds in the acquisition, financing, construction, or current or subsequent leasing of the facility or capital improvement is subject to the provisions of this code in the same manner as a governmental body. The definition and application of the terms "acquisition", "financing", "construction", and "leasing" are governed by generally accepted accounting principles.

(emphasis added).

Your view is that this provision is inapplicable inasmuch as "the Management Agreement between the Foundation and the Developer will be a fee-for-service contract and will not involve either the expenditure of public funds or a procurement by the Foundation. The fees paid to the Foundation will be paid by the Developer from private funds. Since it is a fee-for-service contract where the Foundation is providing a service, not procuring a service, even if the Foundation were an 'alter ego' of the Institution . . . it does not involve a procurement of goods or services or expenditure of public funds." We agree with this analysis.

Conclusion

In short, we concur with your analysis that the Procurement Code is inapplicable to the situation you reference. The Procurement Code is not implicated in either the service contract between the Foundation and Developer, nor will it be invoked in the Management Agreement between the Foundation and Developer. The services agreement whereby the Institution provides certain services to the Foundation also does not trigger the Procurement Code because the Institution is being paid for its services rather than paying funds to the Foundation or other entity.

Moreover, while a Foundation serving the University of South Carolina has been found to be a "public body" for purposes of the Freedom of Information Act, see Weston v. Carolina Research and Development Foundation, 303 S.C. 398, 401 S.E.2d 161 (1991), we do not believe a court would consider a Foundation as the "alter ego" of a public University for purposes of the Procurement Code. As we concluded in Op. S.C. Att'y Gen., Op. No. 87-43, 1987 WL 245452 (May 11, 1987), a Foundation "does not fall within the comprehensive statutory definition of a governmental body as set out in the Procurement Code." See also Citadel Development Foundation v. City of Greenville, 279 S.C. 443, 308 S.E.2d 797 (Ct. App. 1983).

Finally, you distinguish the procurement audit involving Coastal Carolina, which you reference in your letter. There, the audit findings concluded that generally speaking "contracts between state agencies and their foundations are not exempt from the competitive requirements of the Code. As you note, "[u]nlike the CCU matter, the Institution in this case is not expending funds but receiving funds for services rendered and is not procuring goods or services."

Generally speaking, public policy favors competitive bidding and universities are subject to bidding laws under certain circumstances. But if the construction and management are "not being done at the cost of the University," then public bidding is not applicable. Alexandria Real Estate Equities, Inc. v. University of Washington, 539 P.3d 54, 62-63 (Wash. 2023). In the situation set forth in your letter, private entities are involved, except for the Public Institution; as we understand it, the Public Institution itself is expending no public funds, but is receiving payment for its services. Further, the agreements between the private entities do not involve the procurement of goods. This is not, in our opinion, the sort of arrangement that the Procurement Code was designed to address. In our view, therefore, the Procurement Code is likely inapplicable to the situation you present.

Sincerely,

Robert D. Cook
Solicitor General