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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

May 25, 2004

The Honorable John M. Knotts, Jr.
Senator, District No. 23
608 Gressette Building
Columbia, South Carolina 29202

The Honorable Greg Gregory
Senator, District No. 16
305 Gressette Building
Columbia, South Carolina 29202

Dear Senators Knotts and Gregory:

You have each requested an opinion concerning the authority of the State Election Commission (SEC) to procure the implementation of a Uniform Statewide Voting System for South Carolina. Such System would involve more than \$36 million, consisting primarily of federal funding. Both of you reference S.C. Code Ann. Section 7-13-1660 which preserves the right of each county and municipality to use "any kind or type of voting machine that fulfills the requirements of this article and has been approved by the State Board of Voting Machine Commissioners" In addition, you each cite the fact that H.3777, legislation which would expressly grant the SEC the authority to purchase machines and the guidelines for doing so, has not yet been approved by the Senate Judiciary Committee. Nevertheless, according to your letter, "the Election Commission is moving forward with their plan to purchase, with HAVA (Help America Vote Act of 2002) funds, one voting system for statewide use." Thus, your concern is whether SEC currently possesses the necessary authority to do so.

Law / Analysis

The relevant facts involving the particular procurement at issue are set forth in the Order of the Procurement Review Panel (Case No. 2003-9) in the case of In Re: Protest of METS Corporation, Appeal of METS Corporation (February 3, 2004). This decision expressly addressed the issue of the SEC's authority to make the procurement. The relevant facts are stated in the Procurement Review Panel's Order as follows::

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On October 10, 2003, the Information Technology Management Office (ITMO) of the South Carolina Budget and Control Board issued Solicitation 04-S6230 on behalf of the State Election Commission (SEC). The SEC is a state agency governed by a commission with its daily functions performed by an executive director and staff.

The solicitation sought proposals for services and products for a uniform statewide voting system for South Carolina. The SEC intended to fund the system in large part with federal appropriations provided under the Help America Vote Act of 2002 (HAVA). Currently, the counties of South Carolina solicit for and provide their voting machines and voting systems. There is no requirement that the counties be uniformed in their systems. Some counties have indicated a desire to participate in this statewide system and some have indicated the desire to participate under certain conditions. A state HAVA committee is responsible for establishing the parameters of the program for the state.

The solicitation sought among other things to find a company that could provide five voting units per 1000 voters. Ms. Andino, Executive Director of the State Election Commission, testified that the reason for this was to ensure enough machines for each precinct. She said that other states who have purchased machines under this program indicated they did not buy enough machines. Plus, she said with the growth in the state, she wanted to be sure that the machines would serve the state for many years. Also, she testified that this will mean the state will spend about \$3,300 per machine which is the average nationwide for machine expense.

Order of Procurement Review Panel at 4 - 5.

Turning now to the background of law involved in your question, we note that Section 7-3-10 creates the State Election Commission, consisting of 5 members. Furthermore, § 7-3-20 authorizes the Commission to elect an Executive Director who is to serve at the pleasure of the Commission. Section 7-3-20(A) designates the executive director of the Election Commission to be "the chief administrative officer for the State Election Commission." There is express language in § 7-3-10(d) which provides that "[t]he Commission shall have the powers and duties as enumerated in this title." (emphasis added). Pursuant to § 7-3-20, the specific duties of the Executive Director of the SEC are enumerated as follows:

(C) the executive director shall:

(1) maintain a complete master file of all qualified electors by county and by precincts;

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- (2) delete the name of any elector
 - (a) who is deceased,
 - (b) who is no longer qualified to vote in the precinct where currently registered,
 - (c) who has been convicted of a disqualifying crime,
 - (d) who is otherwise no longer qualified to vote as may be provided bylaw, or
 - (e) who requests in writing that his name be removed;
- (3) enter names on the master file as they are reported by the county registration boards;
- (4) furnish each county registration board with a master list of all registered voters in the county, together with a copy of all registered voters in each precinct of the county, at least ten days prior to each election. The precinct copies shall be used as the official list of voters;
- (5) maintain all information furnished his office relating to the inclusion or deletion of names from the master file for four years;
- (6) purchase, lease, or contract for the use of such equipment as may be necessary to properly execute the duties of his office, subject to the approval of the State Election Commission;
- (7) secure from the United States courts and federal and state agencies available information as to persons convicted of disqualifying crimes;
- (8) obtain information from any other source which may assist him in carrying out the purposes of this section;
- (9) perform such other duties relating to elections as may be assigned by him by the State Election Commission;
- (10) furnish at reasonable price any precinct lists to a qualified elector requesting them; and

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(11) serve as the chief state election official responsible for implementing and coordinating the state's responsibilities under the National Voter Registration Act of 1993.

The statutory authority for the purchase and procurement of voting machines is also addressed in the Code, specifically by § 7-13-1660. Such provision states:

[t]he governing body of any county or of any city or town in this State may provide for use at elections any kind or type of voting machine that fulfills the requirements of this article and has been approved by the State Board of Voting Machine Commissioners, and the commissioners of elections and other electoral board may use such voting machine at any and all general or special elections held in such county, city or town, or any part thereof, or in any one or more voting precincts therein, for voting, registering and counting votes cast at such elections. Any such governing body may purchase, lease or otherwise acquire such voting machines and provide for the payment therefor in such manner as such governing body may deem proper. Voting machines of different kinds may be adapted for use and used in different districts of the same city, town or county.

See also, § 7-13-1310 (authority of County to procure and authorize use of vote recorders); § 7-13-1350 (governing body of county which adopts vote recorders shall "upon the purchase thereof, provide for payment therefor by the County.").

Section 7-13-1620 establishes the process for the approval of voting machines which may be used by the counties and municipalities of the State. Such provision reads in pertinent part:

(A) [b]efore any kind of voting machine, including an electronic voting machine, is used at any election, it must be approved by the State Election Commission which shall examine the voting machine and make and file in the commission's office a report, attested to by the signature of the commission's executive director, stating whether, in the commission's opinion, the kind of voting machine so examined can be accurately and efficiently used by electors at elections, as provided by law. No voting machine may be approved for use in the National Association of State Election Directors and the State Election Commission as meeting or exceeding the minimum requirements of the Federal Election Commission's national voting system standards.

See also, Op. S.C. Atty. Gen., April 15, 2003.

In a previous opinion, we noted that § 7-3-1660 provides "that the governing body of a county or municipality may provide voting machines for use at elections" Op. S.C. Atty. Gen.,

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May 6, 1986. Thus, the issue which you have raised is whether there exists any statutory authority which might override § 7-13-1660 as well as the other related statutes, referenced above, which would empower the State Election Commission to procure a statewide, uniform system of voting machines.

A number of principles of statutory interpretation are relevant to your inquiry. First and foremost, is the cardinal rule of statutory construction that the primary purpose in interpreting statutes is to ascertain the intent of the General Assembly. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). A statute must receive a practical, reasonable, and fair interpretation consonant with the purpose, design and policy of the lawmakers. Caughman v. Columbia Y.M.C.A., 212 S.C. 337, 47 S.E.2d 788 (1948). Words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. State v. Blackmon, 304 S.C. 270, 403 S.E.2d 660 (1990). Any statute must be interpreted with common sense to avoid unreasonable consequences. United States v. Rippetoe, 178 F.2d 735 (4th Cir. 1995). A sensible construction, rather than one which leads to irrational results, is always warranted. McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964).

Moreover, we have also recognized consistently that "[g]overnmental agencies or corporations, municipal corporations, counties and other political subdivisions can exercise only those powers conferred upon them by their enabling legislation or constitutional provisions, expressly, inherently, or impliedly." Op. S.C. Atty. Gen., September 9, 2002; Op. S.C. Atty. Gen., January 8, 1999; Op. S.C. Atty. Gen., September 22, 1988. Likewise, as was observed in Medical Society of S.C. v. MUSC, 334 S.C. 270, 513 S.E.2d 352, 355 (1999), "[a]n agency created by statute has only the authority granted it by the legislature." [Citing Nucor Steel v. S.C. Pub. Ser. Comm., 310 S.C. 539, 426 S.E.2d 319 (1992).] Specifically, we have applied this rule to the State Election Commission, noting that the Commission "as any administrative agency, derives its authority and jurisdiction from the statutes creating it; its powers include those expressly granted by statute and those powers necessarily and reasonably implied therefrom." Op. S.C. Atty. Gen., December 20, 1990, citing 1 Am.Jur.2d, Administrative Law, § 72, 73, 91. See also, Op. S.C. Atty. Gen., Op. No. 3411 (November 14, 1972) [State Election Commission possesses no discretion to order a recount when the difference between the number of votes received by the candidate declared to have been elected is more than one percent more than the number of votes received by the candidate receiving a lesser number votes]; Op. S.C. Atty. Gen., December 15, 1969 [no express constitutional or statutory authority authorizes either the State Election Commission or a board of registration to delete the name of an elector from the roster of qualified voters simply because the elector no longer wishes to be registered].

In our opinion, while only a court may make such determination, inasmuch as legislation is pending which would given the State Election Commission the necessary authority, it is doubtful whether the SEC possesses the statutory power to procure a Uniform Voting System.

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First, we examine the current State Appropriations Act (Act No. 91 of 2003) for such authority. Section 62 of the Act relates to the State Election Commission. Section 62.7 states that "[f]unds provided to the agency as state match for purchasing automated voting systems shall be carried forward to be expended for the same purposes in the current fiscal year." Section 62.9 further provides that

[a]ny remaining funds may be carried forward and used to help defray the costs of conducting subsequent General Elections and to aid counties in the purchase of Automated Count Voting Systems on a 50/50 match basis with the State paying 50% of the base price of the equipment and the counties paying 50% plus taxes and shipping.

In addition, § 62.11 authorizes "[t]he State Election Commission ... [to] utilize the funds transferred to the commission in FY 01-02 for the Statewide Voter Registration System and any funds carried forward related to general and primary elections to fund the Fiscal Year 02-03 General Election."

The only proviso which expressly deals with the Help America Vote Act (HAVA) and the funding thereof is § 62.13. Such proviso states that

[o]f funds appropriated to the commission for primary elections, the commission shall utilize any excess funds to match the Help America Vote Act program to the greatest extent possible.

We have also examined the State Plan, dated September 22, 2003, which was forwarded to the Federal Election Commission by the State Election Commission. Such State Plan was submitted, together with an accompanying letter from Governor Sanford, dated September 16, 2003, certifying the State Plan to be "in compliance with the applicable laws and requirements of the Help America Vote Act of 2002." Contained in the State Plan is an Executive Summary from the Executive Director of The State Election Commission noting that the State Plan "will be accomplished over the next four years, utilizing approximately \$48.5 million in funding." State Plan at 5.

Section 1.2 of the State Plan also enumerates various options for use of the federal HAVA monies which were considered. Three options "were presented to the entire HAVA State Plan task force for consideration." State Plan at 12. These three options are as follows:

Option 1: Upgrading existing systems to meet or exceed HAVA requirements

As indicated above, the myriad systems currently in use in South Carolina create problems in the area of voter education, programming, candidate uniformity on ballots, election night reporting of results to the State, etc. This option would not solve the current shortcomings of the numerous systems.

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Option 2: Electronic voting systems in all counties

This option would require each county to go to federal and state approved DRE system of their choosing. Although this option would achieve the goals under the HAVA Act, the State would continue to have a variety in the types of equipment it uses.

Option 3. Statewide uniform electronic voting system

This option would provide a uniform system of voting for every county in the State. This option would standardize the election process including voter education in the State, poll worker training, uniformity of Federal and State offices in ballot and machine programming, etc.

It is our understanding that the HAVA task force and the State Election Commission chose "Option 3." As stated in the State Plan, "the entire task force decided on a statewide uniform electronic voting system to best meet the needs of HAVA and the State of South Carolina." State Plan at 12. Thus, the State Plan proposes "the following approach to select a statewide system:"

- A consultant experienced in conducting needs assessments and writing Requests for Proposal (RFP) will be contracted.
- A committee consisting of the State Election Commission, county election commissions and boards of registration, and other stakeholders such as organizations for the disabled, will be assembled to work with consultant to determine the specifications for a statewide system.
- State procurement codes and bidding process will be followed for the issuance of the RFP.
- An evaluation committee will be assembled for meetings to evaluate vendor responses to the RFP. The membership of the committee will be made up of state and county election officials.

On January 14, 2004, the Procurement Review Panel heard a protest and an appeal from METS Corporation. This protest specifically raised the issue that the State Election Commission lacked the necessary statutory authority to procure a Uniform Statewide Voting System. METS argued that such statewide system conflicted with § 7-13-1660, which insures that each county possesses the authority to purchase its own voting machine subject to such machines having been approved by the State Election Commission. The protest by METS was based upon the grounds set

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forth below. We quote these grounds as contained in the Order of the Chief Procurement Officer, as follows:

We believe that the South Carolina-Election Commission (SC SEC) has no authority to request that the Office of CIO issue this solicitation.

Currently, SC Code §7-13-1660 grants each individual governing body of any County, City, or Town the authority to choose and purchase its own voting system or systems. Further, it specifically states that different kinds of voting machines may be adopted and used within those jurisdictions. An Act permitting the SEC to purchase failed in June 2003 and to date, no legislation has passed changing that:

- Removes this sole authority from the local jurisdictions,
- Authorizes the purchase of any voting equipment by any individual, group, or state agency other than those individual Counties, Cities, or Towns already specifically outlined in SC Code, or
- Grants any individual, group, or state agency the right to dictate what voting equipment any jurisdiction must use.

Order of Chief Procurement Officer at 1 - 2. The Chief Procurement Officer, however, ruled against METS, concluding that § 7-13-1660 was not contravened. The reasoning of the Chief Procurement Officer was stated in his Order as follows:

[t]his solicitation is for an agency term contract for the SED, a state agency. Local governing bodies have an option to sue this contract but are not compelled to do so. There is nothing in the solicitation that indicates that local governing bodies must adopt the system being solicited. Prior to release of this solicitation, SEC polled the counties and 41 indicated their intention to use the contract resulting from this solicitation without condition. No counties indicated a desire to be excluded from using this contract. So while it is not mandatory that the local governing bodies use this contract, it appears that nearly all intend to do so.

METS points to H3777, introduced in the last Legislative session, which would specifically authorize the State Election Commission to adopt one voting system to be used to conduct elections in this State and proposes to repeal Section 7-13-1660 relating to the acquisition and use of approved voting machines by a county or municipality. Since H3777 was not passed into law, METS argues that the SEC does not have the authority to mandate one voting system nor purchase voting machines for use by the local governing bodies. As explained above, there is nothing

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in this solicitation to indicate that SEC is compelling local governing bodies to adopt the system being solicited as a uniform statewide voting system.

Finally, under § 7-3-20(A) the Executive Director of the SEC is the chief administrative officer of the agency and under § 7-3-20(C)(11) the State's chief election official. The Executive Director of the SEC has the authority to request ITMO to issue this solicitation on behalf of SEC and award the subsequent contract.

The CPOIT finds that the SEC does have the authority to contract for that equipment and services that are the subject of this solicitation.

The Procurement Review Panel, in its Order of February 3, 2004, which affirmed the Chief Procurement Officer, also addressed METS' arguments as to the lack of authority of the State Election Commission. The Panel concluded that the State Election Commission's authority exists "to issue this solicitation." We quote from the Procurement Review Panel's Order as follows:

The solicitation in this matter is one made by ITMO for the benefit of the State Election Commission. The State Election Commission and its executive director have broad powers as set out in S.C. Code Ann. §7-3-10 and §7-3-20 and throughout Title 7. These provisions allow the commission and its executive director to be involved in the election process throughout the State. Historically, counties have provided their own voting equipment pursuant to the authority at S.C. Code Ann. §7-13-1660. However, the choice of that equipment it is still subject to approval of the State pursuant to the same statute. In this instance, the State is purchasing equipment through a federal program for the benefit of the entire state. There is nothing in Title 7 that prohibits them from doing so. In fact, §7-3-20 (C)(6) allows the executive director of the Commission to "...purchase, lease, or contract for the use of such equipment as may be necessary to properly execute the duties of his office...." There is also nothing that mandates that the counties participate in the program. We conclude that it is within the authority of the State Election Commission to issue this solicitation.

Order of Procurement Review Panel at 5.

Next, we review H.3777. This legislation passed the House on May 1, 2003. Such legislation was Recommitted to the Senate Judiciary Committee on February 4, 2004 where it lies now. The Bill specifically amends § 7-13-1655 and authorizes the State Election Commission to "approve and adopt one voting system to be used by authorities charged by law with conducting elections" Section 1(B)(1). Section 1(B)(5) requires the Election Commission to "comply with the provisions of Chapter 35 of Title 11 (Procurement Code) in procuring a voting system or systems, as defined in subsection (A)." Moreover, Section 1(B)(3) mandates that the Commission

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“support all aspects of creating the ballots and the database of the voting system which is approved and adopted.” A “voting system” is defined in the Bill by Section (1)(A) as

- (1) the total combination of mechanical, electro mechanical, or electronic equipment, including the software, firmware, and documentation required to program, control, and support the equipment that is used to:
 - (a) define ballots;
 - (b) cast and count votes;
 - (c) report or display election results; and
 - (d) maintain and produce audit trail information;
- (2) the practices and associated documentation used to:
 - (a) identify system components and versions of these components;
 - (b) test the system during its development and maintenance;
 - (c) maintain records of system errors and defects;
 - (d) determine specific system changes to be made to a system after the initial qualification of the system; and
 - (e) make available to the voter, such as notices, instructions, forms or paper ballots.

Section 4 of the Bill sets forth a number of criteria relating to establishment of a “voting system” in South Carolina.

Significantly, Section 5 expressly would repeal §§ 7-13-1310 and 7-13-1660. Section 7-13-1310, as noted above, would provide the authority of each county to purchase or otherwise procure voter recorders. As also discussed above, § 7-13-1660 authorizes counties and municipalities to purchase voting machines which have been approved by the State Election Commission. If H.3777 were to be enacted, § 7-13-1660 would no longer exist.

Article II, § 10, of the South Carolina Constitution provides that

[t]he General Assembly shall provide for the nomination of the candidates, regulate the time, place and manner of elections, provide for the administration of elections and for absentee voting, insure secrecy of voting, establish procedures for contested elections, and enact other provisions necessary to the fulfillment and integrity of the election process.

(emphasis added). To this end, we have consistently recognized that “[t]he power to enact legislation on election matters is vested in the General Assembly by Article II, Section 10” Op.

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S.C. Atty. Gen., December 13, 1982. And, in Op. S.C. Atty. Gen., Op. No. 87-25 (March 23, 1987), we stated that “[t]he General Assembly does have the authority to regulate elections, within reason, by virtue of Article II, Section 10”

While there is disagreement among courts as to the impact of a federal funding program upon state law requirements, it is unlikely that a court would conclude that, in and of itself, the federal HAVA Act provides the necessary authority to the SEC to procure a statewide voting system. Compare, Anderson v. Regan, 53 N.Y.2d 356, 442 N.Y.S.2d 404, 425 N.E.2d 792 (1981) [New York Constitution prohibits monies being paid from state treasury without a legislative appropriation, notwithstanding federal funds involved]; Legislative Research Comm v. Brown, 664 S.W.2d 907 (Ky. 1984) [federal tax dollars delivered to state become state controlled money to be spent in accordance with state law]; La. Associated General Contractors v. State, 669 So.2d 1185 (La. 1996) [federal funds must be spent in accordance with the Louisiana Constitution]; Lee v. State of Montana, 635 P.2d 1282 (Mont. 1981) [state Constitution forbids delegation to Attorney General to set speed limits consistent with federal program for receipt of federal funds; Court gives Legislature opportunity to enact statute “comporting with the federal requirements and complying with our State Constitution”) with Application of State ex rel. Dept. of Transp. 646 P.2d 605 (Okl. 1982) [federal grant funds not state money subject to legislative appropriation]; Colorado General Assembly v. Lamm, 738 P.2d 1156 (1987) [constitutional requirement of legislative appropriation not applicable to federal funds].

In other words, the requirements of state law must still be met, notwithstanding that a federal funding program is involved. In Creative Displays, Inc. v. S.C. Highway Department, 272 S.C. 68, 248 S.E.2d 916 (1978), our Supreme Court noted that a particular federal funding program “cannot and does not change the South Carolina Constitution and statutory law.” Moreover, in Op. S.C. Atty. Gen., Op. No. 4234 (January 16, 1976), we concluded that the South Carolina Constitution precluded the expenditure of federal funds under the Federal Disaster Relief Act of 1974. Thus, it is probable that a court would conclude that the mandates of the federal Supremacy Clause or HAVA do not vitiate the state law requirements that the State Election Commission possess the necessary statutory authority to procure a Uniform Statewide Voting System. Indeed, the “Help America Vote Act” (HAVA) does not specify the methods which must be used to implement the Act” As discussed above, the State Plan itself noted that Option 2 (“Electronic voting systems in all counties” wherein “each county to go to a federal and state approved DRE system of their choosing.”) In our view, therefore, nothing in HAVA purports to override the need for the SEC to possess the necessary statutory authority to procure a Uniform Statewide Voting System.

While it is certainly arguable that no independent statutory authority is necessary because the receipt of HAVA monies is voluntary with each county, and thus there is no conflict with § 7-13-1660, we believe a court may well conclude otherwise. Although each county may decide for itself whether to participate, the program describes itself as a “Uniform Statewide Voting System.” (emphasis added). Very few counties have chosen not to participate. See, Order of Chief

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Procurement Officer at 5. ["No counties indicated a desire to be excluded from using this contract ..."; 5 counties "indicated a desire to use this contract under certain conditions."] This is clearly a situation where a "financial inducement might ... pass the point at which 'pressure turns into compulsion.'" South Dakota v. Dole, 483 U.S. 203, 212 (1987), quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937).

Further, the fact that each county may at its own option decline the HAVA funds may not necessarily be controlling. A "local option" program is generally considered to be of general applicability and uniform. See, Martin v. Condon, 328 S.C. 183, 478 S.E.2d 272, 276-279 (1996) (Toal, J. dissenting); Murph v Landrum, 76 S.C. 21, 56 S.E. 850 (1907).

The fact that legislation is currently pending which would expressly give SEC the authority to provide a single uniform voting system and which would repeal § 7-13-1660 as part of that process also leads us to conclude that a court might determine statutory authority to be lacking here. Our Supreme Court in State v. Blackmon, supra took note of the fact that unpassed legislation may be juxtaposed with current law to determine the scope of the present enactment. In this instance, efforts to repeal § 7-13-1660 and provide specific statutory authority to the State Election Commission with respect to a statewide voting system have thus far proven unsuccessful. A court would likely give strong consideration to that fact.

We do not read Proviso 62.13 as contained in Act No. 91 of 2003 as providing such authority. This Proviso simply authorizes excess funds "to match the Help America Vote Act program to the greatest extent possible." Such legislation does not specify that the SEC may use these funds to procure a Uniform Statewide Voting System.

We have also been directed to a document, dated November 17, 1987, entitled State Election Commission Report to Joint Bond Review Committee Uniform State Electronic Voting System. This Report states that

[t]he statewide system will be initiated through a pilot project in the November 4, 1986 general election in seven counties that currently use paper ballots. The SEC will request that the General Assembly provide funding for the remainder of the counties in the State in succeeding years in such amounts as can be made available for this project."

Report at 1. At page 3 of the Report, it is stated that "[t]he plan submitted by the State Election Commission proposing a uniform electronic voting system for the State was approved in 1986 by the State Budget and Control Board and General Assembly and the initial phase of the program was funded by the issuance of \$984,810 in State Capital Improvement Bonds." We have been unable to locate the authorizing legislation for this project. In any event, it appears that bonds may have been approved issued simply as a means for eliminating paper ballots in those counties still using them

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at that time. We have seen no evidence that the project involved in 1986 was on the same order as the one in question here.

Conclusion

In summary, we doubt that a court would conclude that the SEC currently possesses the necessary statutory authority to procure a Uniform Statewide Voting System. While we respect the SEC (and its Executive Director), as the principal election agency in South Carolina, nevertheless, we have consistently concluded that the SEC, like any other state agency, derives its authority only from statutes enacted by the General Assembly. Section 7-13-1660 expressly provides counties and municipalities the right to purchase their own voting machines. This statute, together with the lack of any express authority in the SEC to impose a statewide system, constrains us to conclude that it is doubtful whether the SEC possesses the authority to create a Uniform Vote System under present law. The fact that the General Assembly is currently considering legislation which would enable SEC to procure a single statewide system, indicates a thinking by the Legislature that such authority does not currently exist, and lends strong credence to our conclusion herein.

We recognize that the majority of the funds involved in the proposed procurement are federal funds. We also note that a county is free to reject such funding if it so chooses. This fact may well avoid a direct conflict with § 7-13-1660. Even so, there must still exist the necessary state authority to procure a single uniform system by the SEC. It is doubtful in our mind, whether such authority can be found in present state law, particularly where, as here, express authority to do so in the form of pending legislation remains unenacted. While § 62.13 of the current Appropriations Act authorizes the SEC to spend certain monies to match HAVA funding, such proviso does not comment upon a Uniform Statewide Voting System as the means for spending such HAVA monies. The authority to spend federal HAVA funds is not the same thing in terms of state law as developing a Uniform Statewide Voting System. The submission of a State Plan, signed by the Governor, for federal grant monies cannot in itself provide the Election Commission with authority it does not otherwise possess under state law. In other words, without express authority, the SEC cannot do indirectly what § 7-13-1660 states cannot be done directly.

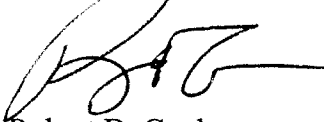
We also fully respect the opinions of the two administrative bodies – the Chief Procurement Officer and Procurement Review Panel – which have concluded that SEC at present possesses the requisite statutory authority to procure a Uniform Statewide Voting System. Those rulings were not appealed and thus are binding upon the parties in those proceedings. Moreover, these Orders constitute the rulings of quasi-judicial bodies and officers which are entitled to be given considerable weight in any determination of this issue by a court.

However, we believe that there is such doubt regarding the issue of the SEC's authority to procure a Uniform Statewide Voting System, that a court's decision concerning this question is advisable before moving forward with the implementation of the Uniform Statewide Voting System.

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Authority regarding election matters must be clear and specific as provided in the governing statutes and such is not the case here. In our opinion, it would thus be prudent to obtain a declaratory judgment before moving forward.

Very truly yours,

A handwritten signature in black ink, appearing to be "RDC", written over a horizontal line.

Robert D. Cook
Assistant Deputy Attorney General

RDC/an