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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY MCMASTER
ATTORNEY GENERAL

October 1, 2004

The Honorable Inez M. Tenenbaum
State Superintendent of Education
1429 Senate Street
Columbia, South Carolina 29201

Dear Superintendent Tenenbaum:

You note that "[t]he State Department of Education recently revised its rules regarding school construction and procurement." You further state that "[t]wo of the changes to the rules included the addition of the following methods of school building procurement: design-build and construction manager at risk." An opinion is sought "as to the legality of using these methods of procurement for school building construction."

By way of background, the following information is provided:

> These methods were previously not allowed under the State Board of Education rules governing school facility construction. In 2003, the School Facilities Committee (Committee) was established by S.C. Code Ann. § 59-23-210 (Supp. 2003) and was given the task of updating the rules that govern school facility construction. This Committee recommended and approved changes that allow construction manager at risk arrangements and design-build construction, in limited situations. One of the reasons that the Committee recommended these changes was that the State Engineer's Office recognizes these methods of procurement in their manual. Recently an issue was brought to our attention that raises a possible conflict between the newly adopted rules by the SDE, the State Engineer's Rules, state law, and the licensing standards, which apply to construction managers. Specifically, S.C. Code Ann. § 11-35-3245 (Supp. 2003) states:
>
> > No architect or engineer performing design work, or construction manager performing construction management services as described in Section 11-35-2910(3), pursuant to a contract awarded under any provision of this chapter may perform other work on that project as a contractor or subcontractor either directly or through a business in which he or his architectural engineering or construction management firm has greater than a five percent interest. For purposes of this section, safety compliance and other incidental construction support

> activities performed by the construction manager are not considered work performed as a contractor or subcontractor. Should the construction manager perform or be responsible for safety compliance and other incidental construction support activities, and these support activities are in noncompliance with the provisions of Section 41-15-210, then the construction management firm is subject to all applicable fines and penalties.

In addressing this section of the code, Section 4.3 of the *State Engineer's Manual* (see, www.state.sc.us/mmo/ose/2001/osepag4.htm) states:

> A. In accordance with SC Law Section 11-35-3245, no A/E performing design work, or construction manager performing construction management services as defined in SC Law Section 11-35-2910(3), may perform work or supply goods on that project as a contractor or subcontractor either directly or through a business in which that professional has greater than five percent interest.
> B. Safety compliance and other incidental construction support activities performed by the construction manager are not considered work performed as a contractor or subcontractor.
> *C. This restriction does not preclude the State from soliciting and awarding contracts for design-build, construction management-at risk or other forms of project delivery which combine the services of design professionals and constructors.* (Emphasis Added)

The issue that has been raised is the apparent conflict between Section 11-35-3245 and the State Engineer's interpretation with regard to design-build and construction management-at risk.

The laws governing the licensing of contractors and construction managers are found in S.C. Code Ann. § 40-11-10, (2001) *et seq*. The question that has been raised is whether, using the definitions in S.C. Code Ann. § 40-11-20, a construction manager can enter into a construction manager at risk arrangement with the State or a school district, and not violate S.C. Code Ann. § 11-35-3245 or jeopardize the individual's license.

Law / Analysis

S.C. Code Ann. Section 11-35-3245, which is part of the Consolidated Procurement Code and relates to Architect-Engineers, Construction Management and Land Surveying Services, provides in pertinent part as follows:

> [n]o architect or engineer performing design work, or construction manager services as described in Section 11-35-2910(3), pursuant to a contract awarded under any provision of this chapter may perform other work on that project as a contractor or subcontractor either directly or through a business in which he or his architectural engineering or construction management firm has greater than a five percent interest.

Section 11-35-2910(3) defines "construction management services" as

> ... those professional services associated with a system in which the using agency directly contracts with a professional construction manager to provide that group of management services required to plan, schedule coordinate, and manage the design and construction plan of a state project in a manner that contributes to the control of time, cost, and quality of construction as specified in the construction management contract.

Section 11-35-3210(1) also requires that "[a]rchitect-engineer, construction management, and land surveying services shall be procured as provided in Section 11-35-3210 except as authorized by Section 11-35-1560, 11-35-1570 and 11-35-3230." Subsection (2) of § 11-35-3210 states that "[i]t is the policy of this State to announce publicly all requirements for architect-engineer, construction management, and land surveying services and to negotiate contracts for such services on the basis of demonstrated competence and qualifications for the particular type of services required and at fair and reasonable prices."

The Procurement Code also defines the terms "contractor" and "subcontractor." Section 11-35-310(10) defines a "contractor" as "any person having a contract with a governmental body." A "subcontractor," pursuant to § 11-35-310(30), is "any person having a contract to perform work or render service to a prime contractor as part of the prime contractor's agreement with a governmental body." The term "contract" "means all types of state agreements, regardless of what they may be called, for the procurement of disposal of supplies, services, or construction." Section 11-35-310(8). "Construction" is

> the process of building, altering, repairing, remodeling, improving, or demolishing any public structure or building or other public improvements of any kind to any public real property. It does not include the routine operation, routine repair or routine maintenance of existing structures, buildings, or real property.

§ 11-35-310(7).

Section 11-35-3210(1) further provides that "[a]rchitect-engineer, construction management, and land surveying services shall be procured as provided in Section in Section 11-35-3210 except as authorized by Section 11-35-1560, 11-35-1570 and 11-35-3230." Subsection (2) of § 11-35-3210 states that "[i]t is the policy of this State to announce publicly all requirements for architect-engineer, construction management, and land surveying services and to negotiate contracts for such services

on the basis of demonstrated competence and qualifications for the particular type of services required and at fair and reasonable prices."

In Op. S.C. Atty. Gen., Op. No. 80-94 (September 8, 1980), we commented at length upon the role of a construction manager in South Carolina. There, we recognized that:

> 'Construction Management' is a concept or a method of construction which ordinarily eliminates the single prime contractor and replaces him with multiple prime contractors whose activities are scheduled and coordinated by the 'Construction Manager'. A 'Construction Manager' does not assume the role of the single prime contractor but is the agent of the Owner. In this manner, construction costs are expected to be reduced in that the general contractor's mark-up on subcontract work is eliminated and the Owner receives the benefit of the lower multiple sub-contractor bids. The 'Construction Manager' serves exclusively on the basis of a professional fee and should be isolated from any profit motive relative to the cost of construction which he is to supervise.
>
> A 'Construction Manager' furnishes a professional service and is normally employed from the inception of the project. The 'Construction Manager' should give advice to the Owner and coordinate with the Owner's architect concerning the design of the project, plans and specifications for that project, the construction feasibility of the project, and information and advice as to the time, labor, materials, costs, and methods of construction which may be needed. A professional 'Construction Manager' also supervises and coordinates the work of the 'multiple prime contractors' who replace the usual one general constructor. However, there are many variations of this theme. A 'Construction Manager' may guarantee the total cost of the project to the Owner and provide construction services directly to the Owner; ... he may provide more or less than the services mentioned herein. The variations may be as numerous as the projects referred to.
>
> 'Construction Management' may be strictly a professional service providing services including design and project analysis, scheduling of design and construction, value engineering and advice to the Owner on the cost factors of various construction materials and methods, cost analysis in estimating services, and assistance in obtaining price proposals and the awarding of contracts; and may also inspect, supervise and coordinate the work of ... contractors. The professional 'Construction Manager' is in effect a coordinator of the project. In those cases where the 'Construction Manager' has undertaken the duties of inspection or supervising of construction, a license to practice architecture or engineering would be required.

Moreover, we also noted that

> [i]n the 'Construction Management' utilizing the Construction Manager in place of the General Contractor, where the Construction Manager directly takes the contracts in his own name for the Owner, or where the Construction Manager directs the labor and work crews, or where he provides any equipment, or guarantees the cost of the project and provides the bond, a contractor's license would be required. The point at which a General Contractor's license is necessary is the point which separates 'superintending' from 'supervision.'

Furthermore, in Shiveley v. Belleville Township High School District No. 201, 329 Ill.App.3d 1156, 769 N.E.2d 1062, 1065 (2002), the Appellate Court of Illinois discussed the various types of project-delivery systems for the construction of school buildings. The Court noted that the testimony in that case demonstrated that:

> ... there are three types of recognized project-delivery systems: (1) the traditional general-contractor delivery system, (2) the construction-manager-at-risk delivery system, and (3) the construction-manager-advisor delivery system. With the general-contractor delivery system, the architect prepares the plans and specifications and the general contractor is then selected by competitive bidding where bidding is required. Under the construction-manager-at-risk delivery system, the construction manager serves as the owner's consultant during the design phase but then becomes a "contractor" by providing the owner a lump sum or guaranteed maximum price to construct the work per the plans and specifications. Under the construction-manager-advisor delivery system, the construction manager remains the owner's agent and advisor throughout the project.

Another authority has commented upon a construction manager-at-risk arrangement as follows:

> [t]he second type of construction manager is virtually indistinguishable from a general contractor. This type of construction manager, sometimes called a construction manager "at risk" is not the owner's representative or agent, but rather the person or entity responsible for completing the construction. Usually, the biggest distinction between a construction manager at risk and a general contractor is that the CM at risk typically does little or none of the trade work using its own employees. Instead, all or most of the trade work is done through subcontractors, all of whom as in privity with the CM.

Cushman and Hackenbrach, Construction Project Risk Allocation: The Owner's Perspective," 480 PLI/REAL 7, 31-32 (April 2002).

Typically, construction manager "at risk" arrangements for public construction projects are specifically authorized by statute. See, e.g. A.R.S. § 34-602 (Arkansas); 5 M.R.S.A. § 1743 (Maine); M.G.L.A. 149(A) § 2 (Massachusetts); N.C.G.S.A. 143-128.1 (North Carolina); SDCL § 5-18-47 (South Dakota).

With respect to the so-called "design-build" method of procurement, our Court of Appeals recently described this process in Sloan v. Greenville County 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003):

> [t]he design-build method differs from traditional competitive sealed bidding in two important ways. First, under the design-build method, the County enters into a single contract for design and construction of the project. This arrangement condenses the two-step process of competitive sealed bidding in which the County procures design services and then contracts separately for the actual construction. Design-build's single source procurement also enables design and construction to proceed concurrently, thereby shortening project duration. Once a design "footprint" for a structure has been prepared, a contractor may begin work such as grading and excavating a site, while a designer continues to design the structure.
>
> Second, the design-build method allows comparative subjective evaluations to be made when determining acceptable proposals for negotiation and award of the contract. Price need not be the sole or primary criterion for evaluating competing proposals–it may be only one of several factors considered. The County may select the design-build team based on other factors such as experience, project team members, and expertise.
>
> It is design-build's lack of objective, bright-line criteria that raises concerns about its use. Critics espouse that design-build vests too much discretion with the governing body regarding when and to whom public contracts are awarded. Because price is not a controlling factor in design-build source selection, the public entity may not always receive the lowest, most competitive price possible. See e.g., Sloan v. Sch. Dist. of Greenville County, 342 S.C. 515, 521, 537 S.E.2d 299, 302 (Ct.App.2000) (opining that "[t]his court has long maintained that '[m]unicipal competitive bidding laws are enacted to guard against such evils as favoritism, fraud or corruption in the award of contracts, to secure the best product at the lowest price'"). Without proper guidelines and oversight, design-build may foster the impression that the government is somehow less accountable for its decisions as to how it spends taxpayer money.

356 S.C. at 541.

We turn now to an interpretation of § 11-35-3245. For purposes of construing this statutory provision, several principles of interpretation are pertinent. 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, 203 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). However, the Supreme Court has cautioned against an overly literal interpretation of a statute which may not be consistent with legislative intent. Greenville Baseball, Inc. v. Bearden, 200 S.C. 363, 20 S.E.2d 813 (1942). If a statute's language is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and a court has no right either to look for or impose another meaning. Chestnut v. S.C. Farm Bureau Mut. Ins. Co., 298 S.C. 151, 378 S.E.2d 613 (Ct. App. 1989). By contrast, where the statute is ambiguous "[c]onstruction of a statute by the agency charged with executing it is entitled to most respectful consideration and should not be overruled, without cogent reasons." Logan v. Leatherman, 290 S.C. 400, 403, 351 S.E.2d 146, 148 (1986). If the administrative interpretation is reasonable, courts will defer to that construction, even if it is not the only reasonable one or the one the court would have adopted in the first instance. Ill. Commerce Comm. v. Interstate Commerce Comm., 749 F.2d 875 (D.C.Cir. 1984). Similarly, "this Office typically defers to the administrative interpretation of the agency charged with the enforcement of the statute in question." Op. S.C. Atty. Gen., July 1, 2004.

Section 11-35-3245, was first enacted in 1991 by Act No. 4 to address architects or design engineers performing design work, and then amended in 1994 by Act No. 345 to add the prohibition relating to "construction management services." The statute does not directly mention so-called "construction management-at risk" or "design-build" contracts. Nor is the phrase "other work on that project as a contractor or subcontractor" defined. No decision of the Supreme Court or the Court of Appeals or an opinion of this Office has construed this provision. Moreover, the statute does not speak specifically to whether the prohibition contained therein applies where one contract involving "construction management at risk" services are involved or only when a person or entity who has a construction management contract as a contractor is involved. Thus, we deem the statute to be somewhat ambiguous.

The State's Chief Procurement Officer has commented upon the purpose of § 11-35-3245 in In the Matter of ... State Project H59-9851-PG Trident Technical College (October 15, 2003) as follows:

> [a]s with an individual, a firm may not serve two masters. The reality of organizational conflict of interest is addressed in § 11-35-3245 of the Code, wherein A/Es and construction managers are, under certain circumstances, forbidden to perform the construction work ... of a project for which they have design or construction management responsibilities. While not all-inclusive, some additional examples where an organizational conflict of interest may arise, and must be addressed and mitigated, include:
>
> (1) The AE's services involve the preparation and furnishing of complete or essentially complete specifications which are to be used in the competitive acquisition of products or services. The primary concern in this case is that an A/E so situated could slant key aspects of

procurement in its own favor, to the unfair disadvantage of competitors.

(2) The A/E's services involve the preparation and furnishing of a detailed plan for specific approaches or methodologies that are to be incorporated in a competitive acquisition. Again, the primary concern in this case is that the A/E so situated could slant key aspects of a procurement in its own favor, to the unfair disadvantage of competitors.

(3) The A/E's services involve access to internal information not available to the public concerning agency plans or programs and related opinions, clarifications, interpretations, and positions. Such an advantage could easily be perceived as unfair by a competitor who is not given similar access to the relevant information.

(4) The A/E's services involve either self-assessment, or the assessment of another business division or a subsidiary of the same corporation, or of another entity with which it has a significant financial relationship. The concern in this case is that the A/E's ability to render impartial advice to the agency would appear to be undermined by the contractor's financial or other business relationship to the entity whose work product is being assessed or evaluated.

We have been advised that the Materials Management Office (MMO) of the Budget and Control Board interprets § 11-35-3245 as applicable "only ... if the A/E or CM performs this other work under a contract other than the one under which they have performed A/E or CM services. Any other reading would render the phrase 'as a contractor or subcontractor' superfluous." At our request, MMO has submitted to us a Memorandum explaining its interpretation of the statute. That Office reads the "other work" provision contained in § 11-35-3245 as "brick and mortar work." The Memorandum of MMO continues:

> ... a professional performing design related services on a project pursuant to an existing contract from performing brick and mortar work on that project pursuant to a different contract. The mischief to be avoided is obvious: any firm that participates in developing a project's design specifications would have an unfair advantage in bidding on those specifications. Such mischief is only possible when there are two contracts and only when the contractor on the first contract bids on the second contract. Prior to 1991, the Procurement Code did not prohibit such mischief; however, given the frequent use of design-build as a project delivery method in the construction context, such a restriction is particularly appropriate.

In its Memorandum, MMO provides a number of illustrations of situations in which the statute would be violated. These potential violations include:

> (1) An owner simultaneously hires one firm to serve as a CM and another to serve as an architect. While the architect prepares the actual plans and specifications, the CM is deeply involved in the entire process. After the design is complete, the owners bids the project on a "low bid" basis. If the CM bid for the construction phase, any award to the CM would violate section 11-35-3245.
>
> (2) Using the facts above, an award of the construction project to the architectural firm that designed the project would also violate section 11-35-3245.
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> (3) An owner hires an architectural firm to provide a preliminary design, which the owner will incorporate into a subsequent design-build request for proposals. "This approach is sometimes known as 'bridging,' 'design/design-build,' or 'design-draw-build." Id. at § 6:15, at 517. If, under this arrangement the firm providing the preliminary design were awarded the design-build contract, the award would violate section 11-35-3245.

MMO further states:

> As these examples illustrate, the number of combinations is nearly limitless. No one definition can adequately describe any project delivery method, including construction management and design-build. At best, the general parameters of these arrangements can be outlined. When section 11-35-3245 is applied to these outlines, it becomes clear that it does not prohibit any one category. Rather, the statute prohibits a specific type of conduct that may appear in some variations of these basic project delivery methods. Thus, the statute should be read not to prohibit a particular form of project delivery but rather to address the potential for conflicts of interest and self-service. and to promote the integrity of public contracting.

Thus, MMO interprets § 11-35-3245 as prohibiting "both construction management and design firms from performing certain non-design work on a project if the firm has already performed pre-construction services on that project." However, in the opinion of that Agency, no absolute prohibition of "design-build" contracts or "construction management at risk" contracts is mandated by § 11-35-3245."

Case law is generally supportive of MMO's interpretation. For example, in R&A Construction Corp. v. Queens Boulevard Extended Care Facility Corp., 290 A.D.2d 548, 736 N.Y.S.2d 423 (2002), the Court noted in that case that "[a] general contractor and a construction manager are separate and distinct titles with different responsibilities and different relationships to the parties to a construction project ...." And, in Balthazar v. Full Circle Construction Corp., 268 A.D.2d 96, 707 N.Y.S.2d 70 (2000), the Court stated:

> [t]he terms "general contractor" and "construction manager" are not synonymous. As construction manger, under an American Institute of Architects form contract, which is different form that for a general contractor, Full Circle worked with the architect to plan the renovations, hired subcontractors, obtained bids and work permits, and supervised the subcontractor's work.

707 N.Y.S.2d at 72. Moreover, the Fourth Circuit, in Hartford Ins. Co. v. American Automatic Sprinkler Systems, Inc., 201 F.3d 538, 542 (4th Cir. 2000) commented that "[t]he AIA recommends a different contract form for each participant in a construction project, including the architect, general contractor, construction manager, and subcontractor, reflecting the distinct role each performs."

Similarly, in an opinion of this Office, dated March 30, 1980, we observed the following:

> Further, in the opinion of this Office, if a state agency should decide that ... [circumstances warrant] the use of a construction manager on a public project, then those services should be the subject of advertisement and invitation to bid pursuant to Section 1-1-440. In view of the duties of the construction manager as coordinator, inspector, and general overseer of project construction this appears mandatory. Further, it is the recommendation of this Office that:
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> 1. A written definitive statement of the criteria used in the selection of a construction manger should be promulgated.
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> 2. When it is determined that a proposed project requires the use of a construction manager the specific services sought in that regard should be advertised for at least once in a newspaper of general circulation in the State.
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> 3. Pursuant to advertisement, the submission of resumes should be required as to the qualifications of those replying in response to the advertisement for construction management services.
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> 4. The agency seeking construction management services should consider the previous experience in construction management of those firms submitting resumes and bids together with their ability to furnish qualified personnel, familiarity with the management of the construction of the type of project to be built, the past record on timely completion and projects managed, knowledge of local conditions, and current work load. Additional consideration should be given to the ability of the firm to act impartially with respect to design and construction of the proposed project.

5. Following review of the responses and resumes, the agency should select at least three firms which in their judgment are most qualified. These firms should then be listed in order of qualification.

6. Then, pursuant to Section 1-1-440, the agency should invite bids for the construction management services derived on such proposed public project from at least three of the qualified firms or individuals compiled as outlined above.

Finally, I would point out that care should be taken to insure that the architect, the engineer, the contractor or contractors, and the construction manager are all separate and distinct entities. While the AIA has removed its ethical prohibition against an architect acting as a contractor or construction manager on a project that he designs, the possibility of conflict of interest is inherent. Federal regulation proposed in 1978 does not prohibit the design architect from providing construction management services but does prohibit the design architect from receiving construction contracts and subcontracts in an attempt to lessen the possibility of conflict. This, of course, applied to the contractor as well. On February 8, 1979, the Indiana Senate passed and sent to the House a bill permitting State or local government entities to hire a 'project consultant' to manage, coordinate, and supervise the work of trades contractors working on public projects. However, the proposed bill prohibited the project consultant from being affiliated with or under the control of any architect or engineer who has a contract to perform any design services for the project. This bill was also an attempt to alleviate the possibility for conflicts of interests.

The construction manager is viewed by law as the agent of the owner as is the architect and engineer. If the architect detects an error in the construction due to construction manager then he is under a duty to warn the owner. If the construction manager detects a design error, etc. by the architect it would be his duty to report that finding to the owner. Where the architect and the construction manager are one and the same the danger of a conflict between the interests of the owner and the well-being of the architect/construction manager becomes too great. The same is of course true where the construction manager and a prime contractor or a subcontractor are one and the same. If the construction manager is deriving benefit and compensation from the owner and also from his participation in the construction of the project itself, the possible conflict between self-interest and the interest of the owner must be given grave consideration, especially in the public sector.

All of those authorities recognize that, as a general rule, there is one contract awarded for construction management services and a separate contract awarded to the general contractor. It is against this background that § 11-35-3245 must be construed.

Thus, while, at first blush, the language of § 11-35-3245 may seem all-prohibitive, See, Roberts and Smith, 25 Pub. Cont. L.J. 645, 688 (1996), legislative intent must also be reconciled here. In our opinion, it is thus reasonable for MMO to construe the statute as having been enacted in the context of foreclosing a construction manager seeking a second contract to perform the work of constructing the building when he has also been awarded the contract to participate in its drafting and planning. It is also not unreasonable for MMO to determine that the General Assembly did not seek to prohibit the "construction manager at risk" or the "design build" contract as an entire category. The agency's construction is buttressed by the fact that case law generally is supportive of the fact the role of the construction manager and general contractor are separate and distinct. We are also advised that the State has procured a number of "design build" contracts over the years. The fact that the General Assembly has not addressed "design build" or "construction management at risk" contracts expressly, having the knowledge that "design build" contracts are being procured and awarded by the State is also significant. If the General Assembly had intended absolutely to prohibit "construction manager at risk" agreements or "design build", it could have expressly mentioned such contracts as part of § 11-35-3245's prohibition.

Conclusion

Accordingly, consistent with the general longstanding policy of this Office, we defer to MMO's interpretation. In light of the context in which § 11-35-3245 was enacted, as well as the fact that the statute certainly appears to be designed to prohibit the situation in which the construction manager possesses one contract as construction manager, and then seeks the award of a separate contract as contractor, we cannot conclude that MMO's construction is unreasonable. So read, the "construction manager at risk" contract or the "design build" contract are not addressed by the statute.

We caution, however, that while it is our opinion that § 11-35-3245 does not prohibit "construction management at risk" contracts, the statute is not entirely clear. Thus, we suggest legislative clarification as a means of resolving the issue with finality.

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/an