



ALAN WILSON  
ATTORNEY GENERAL

January 14, 2011

Micki Fellner  
Interim Town Administrator, Surfside Beach  
115 US Highway 17 North  
Surfside Beach, SC 29575-6034

Dear Ms. Fellner:

We received your letter requesting an opinion of this Office regarding procurement issues. You explained in the request letter that Surfside Beach is organized under the council form of government as provided in S.C. Code § 5-11-10 *et seq.* and has “adopted procurement procedures that are intended to comply with the State Procurement Code, pursuant to S.C. Code § 11-35-50.”

The request letter further explains that the town of Surfside beach acquired the Surfside Pier from a private owner in August 2008, making this parcel publicly-owned property. The pier had two commercial tenants at the time of acquisition. The lease of one tenant terminates on December 31, 2010 without an option to renew or extend. The town has advertised the new lease twice through the Request for Proposal (RFP) procedures. However, the RFP process did not result in a responsive bid.

Specifically you asked the following three questions:

1. In circumstances where the Town is acting as a commercial landlord of property, must the Town first seek tenants and lease renewals through its procurement procedures, including a publicly advertised RFP?
2. In circumstances where the Town is acting as a commercial landlord of property and all bids received from prospective tenants during the normal procurement process have been deemed nonresponsive, must the Town continue to seek tenants and lease renewals through standard procurement procedures, including a publicly advertised RFP?
3. In circumstances where the Town is acting as a commercial landlord of property and all bids received from prospective tenants during the normal procurement process have been deemed nonresponsive, may the Town Administrator seek to negotiate with prospective tenants if the final draft lease is approved by Ordinance of Town Council?

### Law/Analysis

The State Procurement Code is found in Chapter 35 of Title 11 of the South Carolina Code of Laws of 1976. S.C. Code § 11-35-50 explains that political subdivisions must adopt procurement laws:

**All political subdivisions of the State shall adopt ordinances or procedures embodying sound principles of appropriately competitive procurement** no later than July 1, 1983.

...

S.C. Code § 11-35-50.

The term “procurement” is defined as:

buying, purchasing, renting, leasing, or otherwise acquiring any supplies, services, information technology, or construction. It also includes all functions that pertain to the obtaining of any supply, service, or construction, including description of requirements, selection, and solicitation of sources, preparation and award of contracts, and all phases of contract administration.

S.C. Code § 11-35-310(24).

The Town of Surfside Beach has set forth procurement policies in the Town Code of Ordinances, Chapter 2. In seeking a tenant for the Surfside Pier, the town must follow its normal procurement policies. Specifically, the Town of Surfside Beach Code of Ordinances § 2-208(a) requires any contract with a value of more than \$5,000 to be subject to a formal bidding process, as set forth in § 2-209(a). However, § 2-210 of the Town Code of Ordinances provides exceptions for following the bidding process. For example, if the Town Manager finds that there is an advantage to acquire goods or services on the basis of a previously awarded bid or contract, if only one known source of supply exists, or if the administrator is contracting for professional services as directed by the town council to conduct the town’s business, the administrator may waive procurement requirements under the condition that prior to the next council meeting the administrator has informed council in writing of the terms of such waiver. § 2-210(a), (b), and (f).

This Office is not a fact finding entity; investigations and determinations of facts are beyond the scope of an opinion of this Office and are better resolved by a court.” Op. S.C. Atty. Gen., September 14, 2006; April 6, 2006. However, from the request letter and conversations with municipal officials of Surfside Beach, it is the understanding of this Office that the Town of Surfside Beach acquired the Surfside Pier from a private owner. The pier had two commercial tenants at the time of acquisition. The lease of one tenant terminates on December 31, 2010 without an option to renew

or extend. After three attempts following the RFP procedures, there was no successful bid.<sup>1</sup> As a general rule, the Town of Surfside Beach should follow its procurement procedures, including a publically advertised RFP. However, if a court finds that an exception found in § 2-210 of the Town Code of Ordinances applies, the town would be exempt from following the normal bidding procedures.

In an opinion of this Office dated January 8, 1999 we explained as follows:

This 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. Atty. Gen., Op. No. 84-8 (Jan. 24, 1984), for example, we expressed this opinion as follows:

[t]he Consolidated Procurement Code 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. Bankers Trust of South Carolina v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980).

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<sup>1</sup> S.C. Code § 11-35-1540 governs negotiations after unsuccessful competitive sealed bidding, but does not likely apply in this situation. The statute reads as follows: "When bids received pursuant to an invitation for bids under Section 11-35-1520 are considered unreasonable by the procuring agency, or are not independently reached in open competition, or the low bid exceeds available funds as certified by the appropriate fiscal officer, and it is determined in writing by the chief procurement officer, the head of a purchasing agency, or the designee of either officer above the level of procurement officer, that time or other circumstances will not permit the delay required to resolicit competitive sealed bids, a contract may be negotiated pursuant to this section, provided that: (1) each responsible bidder who submitted a bid under the original solicitation is notified of the determination and is given reasonable opportunity to negotiate; (2) the negotiated price is lower than the lowest rejected bid by any responsible and responsive bidder under the original solicitation; (3) the negotiated price is the lowest negotiated price offered by any responsible and responsive offeror." S.C. Code § 11-35-1540.

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 public interest.

Yohe v. City of Lower Burrell, 418 Pa. 23, 208 A.2d 847, 850 (1965), quoting 10 McQuillin, Municipal Corporations, § 29.29. There is indeed a strong public policy which favors competitive bidding. See, Terminal Const. Co. v. Atlantic City Sewerage Auth., 67 N. J. 403, 341 A.2d 327 (1975).

Accordingly, procurement statutes such as South Carolina's Consolidated Procurement Code are frequently held to be remedial in nature and are construed broadly to achieve their purpose. In discussing a competitive bidding statute, one court has held that

the courts will not, by strict construction, narrow the scope of a statute and limit its application, in cases where such construction is against the legislative policy.

Reiter v. Chapman, 31 P.2d 1005, 1007 (1934).

In short, this Office is of the view that **all doubt must be resolved in favor of the Procurement Code's applicability** in a given situation.

Op. S.C. Atty. Gen., January 8, 1999 (emphasis added).

### Conclusion

This Office concurs with the conclusions reached by the town attorney for Surfside Beach, Michael T. Smith; he has provided very able counsel to the Town of Surfside Beach's Town Council and Mayor. We share in his conclusion that the Town of Surfside Beach must follow its normal procurement policies, found in Chapter 2 of the Town of Surfside Beach Code of Ordinances, in seeking a tenant for the Surfside Pier. Where the town is acting as a commercial landlord of property, the town must seek tenants and lease renewals through its procurement procedures, including a publically advertised RFP. See, Town of Surfside Beach Code of Ordinances §§ 2-201, 2-208 and 2-209.

Question 1

This Office has previously held that “all doubt must be resolved in favor of the Procurement Code’s applicability.” Op. S.C. Atty. Gen., January 8, 1999. Also, the Town of Surfside Beach Code of Ordinances § 2-208 explains that the formal bidding procedures must be followed. Therefore, it is the opinion of this Office that a court would likely find that the bidding procedures under § 2-209(a) must be followed for nonbudgeted<sup>2</sup> expenditures \$5,000 and over unless an exception applies.

Question 2

Even though all bids received from prospective tenants during the normal procurement process have been deemed nonresponsive, the Town must continue to seek tenants and lease renewals through standard procurement procedures, including a publicly advertised RFP, unless an exception under § 2-210 applies.

Town Council should contact the Town Attorney to raise further questions about the applicability of an exception. This Office is not a fact finding entity, but based on conversations with Surfside Beach municipal officials, it is the understanding of this Office that the town may simply want to hire a professional, such as a broker, to handle the town’s business, falling under the Professional Services exception, § 2-210(f) of the Town Code of Ordinances.<sup>3</sup> The court could logically conclude that a broker would be considered a professional. Therefore, if the court found this exception was applicable, the administrator may contract for professional services as directed by town council for professionals as appropriate to conduct the town’s business.

Question 3

It is the opinion of this Office that the Town Administrator may not seek to negotiate with prospective tenants even if the final draft lease is approved by Ordinance of Town Council. The legislative purposes of the South Carolina Procurement Code are in complete accord with the objectives of bidding requirements and public procurement codes. Bidding requirements in public

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<sup>2</sup> Based on conversations with municipal officials for Surfside Beach, it is the understanding of this Office that the Surfside Pier is part of the town’s enterprise fund, and therefore is intended to pay for itself.

<sup>3</sup> “*Professional services.* Administrator shall, subject to section 2-209 set forth hereinabove, contract for professional services as directed by town council for physicians, attorneys, engineers, certified public accountants, information technology consultants and other professionals as appropriate to conduct the town’s business. The administrator may select eligible candidates and after interviews award the contract to the best responsive and responsible professional, or if the contract amount exceeds the administrator’s authority set forth in section 2-209 hereinabove or at the administrator’s discretion he shall present the professionals to town council for selection. Special considerations shall include desired expertise, experience, and quality of performance needed to perform the required services.” Town of Surfside Beach Code of Ordinances § 2-210(f).

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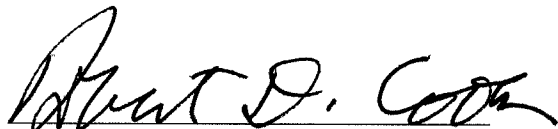
procurement are “for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of . . . [government] contracts, and to secure the best work or supplies at the lowest price practicable, and are enacted for the benefit of property 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 public interest.” Op. S.C. Atty. Gen., January 8, 1999. Of all the purposes of the South Carolina Procurement Code, insuring “fair and equitable treatment of all persons who deal with the State's procurement system” is of the utmost. See, S.C. Code § 11-35-2420. Therefore, it would be improper for the Town Administrator to directly or indirectly negotiate with prospective tenants; all should be given a fair and equal chance.

Sincerely,



Leigha Blackwell  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Deputy Attorney General