



HENRY McMASTER  
ATTORNEY GENERAL

January 21, 2009

E. Brandon Gaskins, Deputy Chief Counsel  
Office of the Governor  
P. O. Box 12267  
Columbia, South Carolina 29211

Dear Mr. Gaskins:

In a letter to this office you indicated that a question has been raised regarding Marlboro County's procurement practices and procedures. Specifically, concerns have been raised as to the soundness and fairness of the protest procedure in the procurement ordinance.

Pursuant to S.C. Code Ann. § 11-35-50, political subdivisions, including counties, are to "adopt ordinances or procedures embodying sound principles of appropriately competitive procurement...." You indicated that the Marlboro County procurement ordinance creates a protest board, consisting of the county administrator, county purchasing officer, and a third member appointed by the county administrator which has the responsibility of making the "final, conclusive, and binding" determination regarding any protest. You stated that the Marlboro County administrator is also responsible for "conduct[ing] the final analysis and prepar[ing] the final recommendation for the [County] council" which has the final authority regarding procurement awards. You stated that "there is a concern whether the protest procedure under the Marlboro County procurement ordinance is independent and fair because of the county administrator's dual role in recommending procurement awards and determining protests and because of the lack of judicial review for procurement awards."

As referenced in an opinion of this office dated March 10, 2008,

an ordinance... is presumed to be both reasonable and otherwise valid, and not to be struck down unless 'palpably arbitrary, capricious or unreasonable...' "U.S. Fid. & Guar. Co. v. City of Newberry, 257 S.C. 433, 186 S.E.2d 239 (1972) (quoting Colonial Life & Accident Ins. Co. v. South Carolina Tax Comm'n, 233 S.C. 129, 103 S.E.2d 908, 917 (1958)). Furthermore, only a court, not this Office, has the power to declare an ordinance invalid.

Mr. Gaskins  
Page 2  
January 21, 2009

See also: Op. S.C. Atty. Gen., January 29, 1997. Therefore, consistent with such, it is presumed that the Marlboro County ordinance is valid and only a court may declare the ordinance invalid.

With regard to the particular ordinance, another opinion of this office dated June 1, 2005 indicated that

...a county is not required to follow the State Procurement Code...(but instead)...must “...adopt ordinances or procedures embodying sound principles of appropriately competitive procurement....

As referenced in that opinion, in Glasscock Company Inc. v. Sumter County, 361 S.C. 483, 490, 604 S.E.2d 718, 721 (Ct.App. 2004), the State Court of Appeals stated that

...we note that Section 11-35-50 does not impose a specific requirement that all public procurement in our state be carried out by way of a single, narrowly defined procedure. While its mandate that all government bodies adopt some form of competitive procurement policies is unambiguous, the statute’s broad directive that the processes “embody sound principles of appropriately competitive procurement” clearly was intended to afford local governments needed flexibility to determine what is “appropriately competitive” in light of the public business they must transact.

The opinion further noted the Court’s conclusion that

...the fact that “...local governments should be afforded a reasonable degree of latitude in devising their own individual procurement ordinances and procedures is entirely consistent with our state’s now firmly rooted constitutional principle of ‘home rule’.”

361 S.C. at 490.

As to the issue of fairness with regard to the Marlboro County procurement procedure, the State Supreme Court in Garris v. Governing Board of the South Carolina Reinsurance Facility, 333 S.C. 432, 443-444, 511 S.E.2d 48, 54 (1998) that

[a] fair trial in a fair tribunal is a basic requirement of due process...The fact that investigative, prosecutorial and adjudicative functions are performed within the same agency, or even performed by the same persons within an agency, does not, without more, constitute a violation of due process. “That is not to say that there is nothing to the argument that those who have investigated should not then adjudicate,” and a court facing special facts and circumstances in a particular case may determine that dual roles are impermissible...(However)...[a]gency officials or members who adjudicate a matter are presumed to be honest, fair and unbiased. A party challenging

Mr. Gaskins  
Page 3  
January 21, 2009

the combination of investigative and adjudicative functions must convince the court that, under a realistic appraisal of psychological tendencies and human weakness, conferring both functions on the same individuals poses such a risk that it is likely to violate due process.

Consistent with such, in considering any procurement process, there must be a showing by someone challenging that process that the process is biased.

With regard to the Marlboro procurement process, the county administrator is only one of three individuals comprising the protest board and, therefore, he alone is a minority member. Moreover, as stated in Garris, supra, it is presumed that he is "honest, fair and unbiased." There would have to be a showing to refute such presumption. As stated in the June 1, 2005 opinion, local governments are afforded latitude in establishing their own individual procurement ordinances and procedures. As noted in Glasscock Company, Inc., supra, counties are afforded "flexibility" in determining what is "appropriately competitive" as to the public business transacted. As a result, in the opinion of this office, it cannot be determined categorically that the Marlboro County procurement ordinance is inconsistent with the requirement that the county procurement ordinance embody "sound principles of appropriately competitive procurement." There must be a showing of the county administrator being unfair or biased with regard to the role he plays with regard to the protest procedure. This office cannot in an opinion conclusively make such a determination.

With kind regards, I am,

Very truly yours,

Henry McMaster  
Attorney General



By: Charles H. Richardson  
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Deputy Attorney General