ALAN WILSON
ATTORNEY GENERAL

May 5, 2011

George L. Schroeder, Inspector General
Office of the Inspector General
1200 Senate Street
Columbia, SC 29201

Dear Mr. Schroeder:

We received your letter requesting an opinion of this Office regarding the legality and constitutionality of provisions of S.C. Code §§ 23-9-310 through 23-9-470 pertaining to the Office of the State Fire Marshal and specifically Article 3 which deals with the Fireman's Insurance and Inspection Fund. You asked whether "these provisions violate the Constitution of the State of South Carolina and its subordinate laws."

As background, you provided that certain provisions of this Article require as follows:

1. Section 23-9-370 requires fire departments be members of the S.C. State Firemen's Association to participate in the fund.
2. Section 23-9-430 requires the county treasurer to pay 5% of the 1% tax on fire insurance and the S.C. Firemen's Association.
3. Section 23-9-370 allows the S.C. State Firemen's Association to supervise and inspect the operations of the ordinance.
4. Section 23-9-450 requires written approval from the S.C. State Firemen's Association as to the manner and method of the disbursement of funds from a fireman's insurance and inspection fund.
5. Section 23-9-470 prohibits an agency of the state including the Budget and Control Board from reducing the amounts required to be distributed to counties and municipalities.

You also suggest in your request letter that these "provisions raise concerns about state funds being paid to a lobbyist's principal, the transfer of public funds to a private association, and potential violations of the State Procurement Code, S.C. Code 11-35-10 *et. seq.* In our opinion, a court would likely conclude that the statutes in question are constitutionally valid, and the Legislature, pursuant to its plenary powers, may expressly authorize the Association's duties and powers, irrespective of other statutes, such as the State Procurement Code and Ethics Act.

**Law/Analysis**

We begin our analysis with the understanding that "all statutes are presumed constitutional and, if possible, will be construed to render them valid." State v. Neuman, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009). Moreover, only a court, not this Office, may declare a statute unconstitutional. Ops. S.C. Atty. Gen., October 18, 2010; February 24, 2010.

"A law will be considered constitutional so long as the South Carolina Constitution does not expressly or by clear implication prohibit that law." 19 S.C. Jur. Constitutional Law § 6 (citing Johnson v. Piedmont Mun. Power Agency, 277 S. C. 345, 287 S. E. 2d 476 (1982); Nolletti v. Nolletti, 243 S. C. 20, 132 S. E. 2d 11 (1963); see also, Floyd v. Parker Water & Sewer Sub-District, 203 S. C. 276, 17 S. E. 2d 223 (1941)).

The South Carolina State Firemen's Association was formed on May 30, 1905.[1] This Association was incorporated by the Secretary of State on January 18, 1906. The express purpose of the Association was and is:

> Promoting the betterment and maintenance of skillful and efficient fire departments; to establish harmony, unity of action and cooperation among various fire departments of the state; to promote the general welfare and fraternal fellowship of firefighters; to operate the Firemen's Insurance and Inspection Fund; and to improve the working conditions, education, qualifications, and general skills of firefighters in the business of protecting the public from hazards of fire.

South Carolina Firefighter's Association, (April 20, 2011), http://scfirefighters.org/. According to the S.C. Secretary of State's Office, the S.C. State Firefighters' Association is organized as a nonprofit corporation.

The Firemen's Insurance and Inspection Fund is addressed in Title 23, Chapter 9, Article 3 of the Code. Specifically, the statutes at issue, mentioned above, read as follows:

> **S.C. Code § 23-9-370.** Membership in South Carolina State Firemen's Association required; supervision of operation of building and inspection code.
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> For the purpose of supervision and inspection and as a guaranty that the provisions of this article are administered as herein set forth, every fire department enjoying the benefits of this article must be a member of the South Carolina State Firemen's Association. The association may supervise and inspect the operation of the ordinance required in this article to be passed in each of the several towns and cities enjoying the benefits of this article.

[1] The name was changed upon the 100th anniversary to the SC State Firefighters' Association.

**S.C. Code § 23-9-430.** Payment by county treasurers to State Firemen's Association of portion of proceeds received from tax on fire insurance; use of funds.

For the purposes of Section 23-9-370 and to defray the expenses thereof, each county treasurer shall pay over to the treasurer of the South Carolina State Firemen's Association the sum of five percent of the gross proceeds received annually by each county, town, or unincorporated community from the one percent tax on fire insurance allocated to the city, town, or community. The sums so paid must be expended for the sole purpose of the betterment and maintenance of skillful and efficient fire departments within the county.

**S.C. Code § 23-9-450.** Disbursements of funds from firemen's insurance and inspection fund; approval.

Before any disbursements exceeding one hundred dollars of the funds of any firemen's insurance and inspection fund are made by the treasurers of the counties, they shall first submit to the supervising trustees of the South Carolina State Firemen's Association a statement of how the funds are to be expended and shall receive from the trustees their written approval of the manner and method by which the funds are to be disbursed, so that the South Carolina Firemen's Association shall know that the funds are being expended solely for the benefit of the firemen of each particular fire department in the State. If a proposed disbursement is to be expended legally and in accordance with the law, it is mandatory upon the supervising trustees to give their approval. Failure upon the part of any treasurer to comply with the foregoing makes him liable on his official bond.

**S.C. Code § 23-9-470.** Funds to be use for purposes prescribed in; to reduce amounts required to be distributed.

No funds from the firemen's insurance and inspection fund may be withheld or used for any purpose except as prescribed in this article, and no agency of the State, including the Budget and Control Board, has the authority to reduce the amounts required to be distributed to counties and municipalities under the provisions of this article.

S.C. Code §§ 23-9-370, -430, -450, and -470. We will now address the application of the Constitution to these statutory provisions.

**Mandatory Membership to Receive Funds**

Among your concerns is the statutory requirement that fire departments must be members of the S.C. State Firemen's Association to participate in the fund. It is important to note that this

mandatory provision encompasses fire departments rather than individual firemen. In a North Carolina Attorney General Opinion, dated March 14, 1996, the question of whether it was constitutional or not to "require that a fire department or its members be a member of the State Firemen's Association . . . in order to receive any portion of a premium tax" was addressed. We believe that opinion is sound. The opinion explained that "[s]o long as the Association serves a public purpose, which it clearly does, the Association may receive public funds." The Fourth Circuit Court of Appeals agreed that "it is difficult to conceive of a service associated more closely with the state than the provision of fire protection services . . . ." Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 344 (4th Cir. 2000). Therefore, the S.C. State Firemen's Association would likely be categorized as serving a public purpose. The N.C. Attorney General opinion concluded that "it is not unconstitutional to require that a fire department or its members be a member or members of the Association in order to receive a portion of the tax." Op. N.C. Atty. Gen., March 14, 1996. Similarly, it is the opinion of this Office that such a membership requirement of fire departments, as set forth in the referenced statutes, is constitutional.

**Unlawful Delegation & The Issue of Supervision**

In the request letter, you mentioned that the statute allows the S.C. State Firemen's Association to supervise and inspect the operations of the ordinance; in fact, "written approval" from the S.C. State Firemen's Association is required before the "manner and method" of fund disbursement from a fireman's insurance and inspection fund can be made. S.C. Code § 23-9-450. You also addressed the prohibition under S.C. Code § 23-9-470 where no state agency may reduce the amounts required to be distributed to counties and municipalities. The heart of these concerns is the lack of oversight over the S.C. State Firemen's Association. You expressed concern that even assuming the S.C. State's Firemen's Association is in total compliance with the statute, there is no supervision to ensure such compliance. In essence, your concern may be summarized as being that the General Assembly has unlawfully delegated governmental powers to a private corporation or association. We addressed the law in this area in an August 8, 1985 opinion, in which this Office explained:

> [A] private corporation 'may be employed to carry a law into effect.' 16 C.J.S., Constitutional Law, § 137. As stated in Amer. Soc. P.C.A. v. City of N.Y., 199 N.Y.S. 728, 738 (1933),
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> > While it is true that strictly governmental powers cannot be conferred upon a corporation or individual . . . still it has been held by a long line of decisions that such corporations may function in a purely administrative capacity or manner.
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> While 'an administrative body cannot delegate quasi judicial functions, it can delegate the performance of administrative and ministerial duties . . . .' Krug v. Lincoln Nat. Life Ins. Co., 245 F.2d 848, 853 (5th Cir. 1957); see also, 73 C.J.S., Public Adm. Law and Procedure, § 53; McQuillin, Municipal Corporations, § 29.08, n. 6. This is consistent with the law in South Carolina. See, Green v. City of Rock Hill, 149 S.C. 234, 270, 147 S.E. 346 (1929) (contract between a city and private company for the control, management and operation of waterworks plant is valid).

This law has been applied to analogous situations such as the administration of hospitals. In Robinson v. City of Phil., 400 Pa. 80, 161 A.2d 1 (1960), for example, the Supreme Court of Pennsylvania upheld a contractual agreement between a municipality and two private universities relating to the operation, management and control of the city's general hospital. Reviewing the contract in detail, the Court concluded:

> It will suffice us to say that our study of the contract convinces us that neither the city of Philadelphia nor the Board of Trustees of Philadelphia General Hospital has unlawfully delegated their powers and responsibilities in and by the above mentioned contract.

161 A.2d at 4. In Government and Civic Emp. Etc. v. Cook Co. School of Nursing, 350 Ill.App. 274, 112 N.E.2d 736 (1953), the Court upheld a contract between a county and a nonprofit corporation which required the corporation to 'furnish, direct and perform the nursing services required for the proper care and nursing of all patients in the County Hospital . . . .' 112 N.E.2d at 737. And in Bolt v. Cobb, 225 S.C. 408, 415, 82 S.E.2d 789 (1954), out own Supreme Court upheld a contract between a county and a private entity for the 'performance of a public, corporate function', i.e. medical services in the form of a hospital. Only recently, in S.C. Farm Bureau Marketing Assoc. v. S.C. State Ports Auth., 278 S.C. 198, 293 S.E.2d 854 (1982), our Court found a contract between a private association and the State for the management and operation of a grain elevator and storage facilities to be constitutionally valid. As mentioned earlier, our Court has upheld a contract between a city and a private corporation for the management of a water plant. Green v. City of Rock Hill, *supra*. See also, 16 C.J.S., Constitutional Law, § 137 (a State may validly use a private corporation as an agent for the treatment of inebriates). See also, Murrow Indian Orphans Home v. Children, 171 P.2d 600 (Okl. 1946). In these instances, the governmental entity maintained supervision and control over the corporation by virtue of a contractual agreement.

Moreover, a governmental body frequently employs both public and private entities in the administration of its penal institutions. Here too, principles of agency and contract serve to maintain adequate supervision and control by the governmental entity.

Op. S.C. Atty. Gen., August 8, 1985. **Similar to a county hospital rightfully delegating functions to a non-profit corporation, the state has delegated certain administrative functions to the S.C. State Firemen's Association.**

In Maryland, the "Maryland State Firemen's Association, a state-funded association, conducts annual inspections of all fire and rescue apparatus, equipment, and facilities." Goldstein, 218 F.3d 337, 345. The Fourth Circuit concluded that there are "different considerations at stake once it has been determined that an actor is carrying out functions traditionally and exclusively

reserved to the state. We thus conclude that when it has been established that the State has empowered, or is permitting, a private actor to homestead on territory that has heretofore been the exclusive, traditional province of the State, there need be no specific demonstration of a nexus to the alleged constitutional violation. We previously recognized that requiring such a nexus under these circumstances would represent an untoward leap of logic: 'If the [actor] were held to be performing a public function for purposes of state action doctrine, then it would be difficult to conclude that personnel decisions reached during the performance of that public function were not subject to constitutional strictures.' *Andrews,* 998 F.2d at 219 n. 1; *see also supra* note 4." Goldstein, 218 F.3d at 348. Thus, the Fourth Circuit deemed the Chestnut Ridge Volunteer Fire Company, which was required to be a member of the Baltimore County Fire Association, to be a state actor for purposes of § 1983.

As discussed above, the delegation of authority by the General Assembly to the S.C. State Firefighters' Association appears to be valid and in accord with the approach taken by other jurisdictions. In Groff v. Continental Ins. Co., the court held that:

> voluntary fire associations are in reality quasi-governmental units, and the policy issued by S.R.I. was essentially a fleet policy issued to a government unit. This Court recently affirmed the prohibition against allowing a non-designated individual to stack uninsured motorist coverage under a fleet policy, Miller v. Royal Insurance Company, 354 Pa.Super. 20, 510 A.2d 1257 (1986), *aff'd per curiam,* 517 Pa. 306, 535 A.2d 1049 (1988); and this prohibition against fleet stacking has been applied where the policy holder was a governmental unit. *See* Flamini v. General Accident Fire & Life Assurance Corp., 328 Pa.Super. 406, 477 A.2d 508 (1984). We detect no compelling reason to distinguish the current situation from those situations."

Groff v. Continental Ins. Co., 741 F.Supp. 541 E.D.Pa. (1990). The fact that the S.C. State Firefighters' Association is private does not indicate that the government cannot entrust such an organization with a public function. So long as a public purpose is being carried out,[2] and fire service has commonly been held as a public purpose, then the legislature may create or delegate authority to agencies, unless expressly prohibited by the Constitution. This Office is unaware of any such prohibition.

We note that with respect to a somewhat similar law, the South Carolina Supreme Court, in Aetna Fire Ins. Co. v. Jones, 78 S.C. 445, 59 S.E. 148 (1907), was asked to enjoin the Comptroller General "from proceeding to collect certain taxes provided for by an act of the General Assembly approved May 9, 1906, on the ground that the said act is unconstitutional, null, and void." However, "the **respondent contends that the present enactment is a lawful exercise of the police power inherent in the state as a sovereignty, the exercise looking to**

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[2] "[I]nvestigations and determinations of facts are beyond the scope of an opinion of this Office and are better resolved by a court." Ops. S.C. Atty. Gen., September 14, 2006; April 6, 2006. Therefore, this Office can only speak to the constitutionality of the statutes on their face.

**the protection of the property of all the citizens of the state.**" Aetna, 78 S.C. 445 (emphasis added). The court explained as follows:

> [I]nsurance companies regulate their rate by the risk and expense relative to the insurance of a certain piece of property. Therefore the only reasonable view is that the insurance companies would in the end make the insured pay gratuities to the associations. It is likewise well known that in all cities and towns there are numerous persons who do not carry insurance. Now, it cannot be denied that such persons are even more benefited by the fire departments than those who carry insurance, for their entire risk is [e]ntrusted to the efficiency of such departments. Under the enactment being considered, the class of citizens who carry insurance must pay the whole of the imposition, while the latter get the benefits and have no burden to bear. On this reasoning the tax is not uniform.

Aetna, 78 S.C. 445. The court found that the act was unconstitutional; however, Aetna is readily distinguishable from the situation at hand. In Aetna, the funds were going directly to the firemen as individuals as opposed to a collective fund which would now be classified as a public purpose. Even using the same analysis of Aetna, today, a court would likely find that the statutes at issue are constitutionally valid because a public purpose is being accomplished.

Our Supreme Court has set forth the standards by which a statute is deemed to be an unlawful delegation. In Cole v. Manning, 240 S.C. 260, 125 S.E.2d 621 (1962), the Court stated:

> [I]t is apparent, from consideration of the numerous cases on the subject, that the degree of authority that may lawfully be delegated to an administrative agency must in large measure depend upon such circumstances, including the legislative policy as declared in the statute, the objective to be accomplished, and the nature of the agency's field of operation.
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> 'It is well settled that it is not always necessary that statutes and ordinances prescribe a specific rule of action. On the other hand, some situations require the vesting of some discretion in public officials, as, for instance, where it is difficult or impracticable to lay down a definite, comprehensive rule or the discretion relates to the administration of a police regulation and is necessary to protect the public morals, health, safety and general welfare.' 11 Am.Jur., Constitutional Law, Section 234, at page 948.

Cole v. Manning, 240 S.C. 260, 265. The analysis of Cole v. Manning suggests that sufficient guidelines are provided in the statutes at issue. Specifically, the S.C. Firemen's Association is instructed to use all funds for the "betterment and maintenance of skillful and efficient fire departments within the county." S.C. Code § 23-9-430. Here, the "delegation of authority . . . is sufficiently definite by the express terms of the Act which provide a clearly intelligible administrative guideline . . . ." Grain Dealers Mut. Ins. Co. v. Lindsay, 279 S.C. 355, 361, 306 S.E.2d 860, 863 (1983).

**Payment of Funds**

You also mentioned concern with the requirement that the county treasurer pay 5% of the 1% tax on fire insurance and the S.C. Firemen's Association under S.C. Code § 23-9-430.

S.C. Code § 23-9-410 states that "[a]ll monies so collected must be set apart and equitably used by each of the treasurers solely and entirely for the betterment and maintenance of skilled and efficient fire departments within the county." To defray expenses, "each county treasurer shall pay over to the treasurer of the South Carolina State Firemen's Association the sum of five percent of the gross proceeds received annually by each county, town, or unincorporated community from the one percent tax on fire insurance allocated to the city, town, or community. The sums so paid must be expended for the sole purpose of the betterment and maintenance of skillful and efficient fire departments within the county." S.C. Code § 23-9-430.

In the North Carolina Attorney General Opinion, dated March 14, 1996, referenced above, a similar question was presented regarding the constitutionality of "a portion of a premium tax to be disbursed to the State Firemen's Association, a private, nonprofit corporation." The opinion explained that "direct disbursement of public funds to private entities is a constitutionally permissible means of accomplishing a public purpose provided there is statutory authority to make such appropriation." Op. N.C. Atty. Gen., March 14, 1996 (citing Hughey v. Cloninger, 297 N.C. 86, 95 (1979). The opinion concluded that the provision was constitutional. Op. N.C. Atty. Gen., March 14, 1996.

In the New York Court of Appeals, Trustees of Exempt Firemen's Benev. Fund of City of New York v. Roome, the court explained that "[t]he precise relation of these firemen to the municipality and the State it is not easy to describe. They were not civil or public officers within the constitutional meaning (*People v. Pinckney,* 32 N. Y. 392), and yet must be regarded as the agents of the municipal corporation. Their duties were public duties; the service they rendered was a public service; their appointment came from the common council and was evidenced by the certificate of the city officers; they were liable to removal by the authority which appointed them; and were intrusted with the care and management of the apparatus owned by the city. They were, at least, a public body, and, perhaps, are best described as a subordinate governmental agency." Trustees of Exempt Firemen's Benev. Fund of City of New York v. Roome, 93 N.Y. 313, 319-320 (1883).

Similarly, in a Superior Court of New Jersey case, Szabo v. NJ State Firemen's Association, 230 N.J.Super. 265, 553 A.2d 371 (1988), a firefighter was denied membership in the local relief association because of an eye condition. This firefighter challenged the constitutionality of the relevant statutory plan. The statutes established the NJ State Firemen's Association as well as local firemen's relief associations throughout the state. The associations were to hold and administer the "Firemen's Relief Fund" contributed by a 2% tax on fire insurance premiums charged by non-New Jersey insurers on policies insuring property within the state. The Superior

Court held that the payment of tax money to state and local firefighters' relief associations was not an unconstitutional donation or appropriation of public money to private organizations.

As it is commonly established that firemen's associations carry out a public purpose, nothing indicates that the statutes at issue should be considered unconstitutional.

**State Procurement Code**

Your questions concerning the State Procurement Code are answered by the plenary power of the General Assembly. It is well recognized that "the General Assembly may enact any law not expressly, or by clear implication, prohibited by the state or federal Constitutions." City of Rock Hill v. Harris, 391 S.C. 149, 154, 705 S.E.3d 53, 54 (2011) (quoting Moseley v. Welch, 204 S.C. 19, 39 S.E.2d 133 (1946)). It is the opinion of this Office that the State Procurement Code is inapplicable in this situation. The Legislature has mandated that the funds are to be spent through the use of the Association by virtue of creating the statutory provisions that allowed the S.C. State Firemen's Association to spend the money as instructed in Title 23, Chapter 9, Article 3. The Legislature has precisely determined what must be done and specified in the statutes guidelines for how the money should be allocated. See, *e.g.*, S.C. Code § 23-9-430. Therefore, no bidding process is necessary. One legislature is not bound by another.

The U.S. District Court for the District of Columbia held in Fortec Constructors v. Kleppe that "the general policy of competitive bidding in federal procurement is wholly inapplicable to a contract which SBA [Small Business Act] has specific statutory authority to enter." Kleppe, 350 F.Supp. 171, 173 (1972). In the situation before us, the Legislature has authority to distribute funds to the S.C. State Firemen's Association; hence the procurement bidding process is inapplicable. Similarly, the U.S. District Court for the District of Kansas explained in Interior Contractors, Inc. v. Board of Trustees of Newman Memorial County Hospital, that "[b]ecause there are specific statutes governing county hospitals and construction projects involving county hospitals and because these statutes give the authority to the hospital board of trustees to contract for such projects and do not incorporate or reference any other provisions on bidding procedures, the court finds that K.S.A. § 19-214 which sets forth the competitive bidding law governing contracts awarded by county commissioners is inapplicable here." Interior Contractors, 185 F.Supp.2d 1216, 1223 (2002). As mentioned above, a county hospital has the authority to delegate functions to a non-profit corporation, just like the state has delegated certain administrative functions to the S.C. State Firemen's Association. Because of this authority to delegate specifically to the S.C. State Firemen's Association, the State Procurement Code need not be invoked.

Not only does the Legislature have the authority to determine where the money goes, but under the rules of statutory construction, it is commonly held that a specific statute should be followed over a general statute. The South Carolina Supreme Court has consistently recognized that "[w]here there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be

considered an exception to, or a qualifier of, the general statute and given such effect. Wilder v. South Carolina Hwy. Dept., 228 S.C. 448, 90 S.E.2d 635 (1955). See also, Wooten ex rel. Wooten v. S.C. Dept. of Transp., 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999) (a specific statutory provision prevails over a more general one); Atlas Food Sys. And Servs. v. Crane Nat'l Vendors Div. of Unidynamics Corp., 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995) (general rule of statutory construction is that a specific statute prevails over a more general one)." Op. S.C. Atty. Gen., January 10, 2011 (citing Capco of Summerville v. J. H. Gayle Const. Co., Inc., 368 S.C. 137, 141, 628 S.E.2d 38, 41 (2006)). The statutes specifically governing the Fireman's Insurance and Inspection Fund would govern over the general Procurement Code statutes.

As for the concern that money is going directly to the lobbyist principal, this Office sees no improper action as the Legislature has plenary power to decide where the money is allocated. For the same reasons that the Legislature may exempt certain functions from the Procurement Code, it may also do so with respect to the Ethics Laws governing lobbyist principals. Of course, the policy considerations and the wisdom of these laws are for the Legislature to determine.

**Conclusion**

Of course, only a court, not this Office, may determine the constitutionality of a statute. However, based upon the information provided, and the authorities referenced herein, it is the opinion of this Office that the provisions in Article 3 which deal with the Fireman's Insurance and Inspection Fund neither violate the S.C. Constitution nor the subordinate laws of our State. The Legislature possesses plenary powers not limited by the Constitution. We thus are of the Opinion that neither the Constitution nor statutes is here violated.

Sincerely,

Leigha Blackwell

Leigha Blackwell
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General