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The State of South Carolina



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January 14, 1994

The Honorable Edgar A. Vaughn, Jr.
State Auditor
P. O. Box 11333
Columbia, South Carolina 29211

Dear Mr. Vaughn:

You have requested the opinion of this Office upon two questions. You first reference S. C. Code Ann. § 11-35-710 (a) (1993 Cum. Supp.)¹ and inquire whether the phrase,

'and any other emergency type parts or equipment utilized by the Department of Highways and Public Transportation;' means that 'The construction, maintenance and repair of bridges, highways and roads; vehicle and road equipment maintenance and repair;' must be of an emergency type nature to be exempt from the S. C. Procurement Code. Or is each one of the categories considered separate. . . .?

¹ Section 11-35-710 exempts certain procurements from the jurisdiction of the respective chief procurement officer. Among these exemptions is the exemption for:

the construction, maintenance and repair of bridges, highways and roads; vehicle and road equipment maintenance and repair; and any other emergency type parts or equipment utilized by the Department of Transportation;

Section 11-35-710 (a), as last amended by Act 181, § 93 of 1993.

Request Letter

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I note at the outset that the statutory language is not artfully drafted and, thus, § 11-35-710 (a) is susceptible to various interpretations. However, both the Budget and Control Board Division of General Services, and the Department of Transportation have consistently interpreted the first phrase relative to "the construction, maintenance and repair of bridges, highways and roads" as a discrete exemption not limited or qualified by the third phrase that relates to the procurement of "any other emergency type parts or equipment." See attached Department of Transportation letter of administrative interpretation. This administrative interpretation by the Board and by the Department of Transportation is reasonably supported by the statutory language. The construction of a statute by the agency[ies] charged with its administration will be accorded the most respectful consideration by the courts and, absent compelling reasons, the courts will not interfere with an agency's construction of a statute that it is charged with administering. Dunton v. South Carolina Board of Examiners in Optometry, 291 S.C. 221, 353 S.E.2d 132 (1987); Emerson Electric Co. v. Wasson, 287 S.C. 394, 339 S.E.2d 118 (1986); Faile v. South Carolina Employment Security Commission, 267 S.C. 536, 230 S.E.2d 219 (1976). There are no compelling reasons to reject the long-standing administrative interpretation of this provision.

You also inquire as to our opinion whether the South Carolina Department of Transportation is "bound by [Federal Public Law 92-582, Title IX - Selection of Architects and Engineers; Section 902] concerning the selection process of engineering firms to perform projects for the State when the funding source is primarily Federal. Or does this Section pertain only to Federal agencies?"

The federal law referenced in your request is codified at 40 U.S.C.A. § 541, et seq., and is known as the "Brooks Architect-Engineers Act" (the Brooks Bill). The Brooks Bill generally requires a two-step qualifications-based process for procuring architectural and engineering services. The process first involves a determination of the best qualified firm to provide the required services with a sequential rating of the most qualified firms. Price negotiation then occurs, with the guidepost being a compensation that is fair and reasonable to the federal government. Should the highest qualified firm be unwilling to perform the services for a fee that is determined to be fair and reasonable to the government, negotiations with that firm are terminated, and the government then enters into negotiations with the next most qualified firm. Generally, this is the process that continues until a contract is negotiated with a qualified firm. See Senate Report No. 92-1219 (Congressional Record, Volume 118 (1972)). Parenthetically, the State procurement process for selection of architects and engineers is a qualification-based process that is essentially

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the same as the Brooks Bill. See S. C. Code Ann. § 11-35-3220, as last amended by Act No. 178, Section 33, of 1993.

The Brooks Bill, pursuant to its literal terms and consistent with its reported history, is not, per se, applicable to federally funded highway contracts procured by the State Department of Transportation. See 40 U.S.C.A. § 541, et seq.; Congressional Record, Volume 118 (1972); 59 Comp. Gen. 251 (Op. Comp. Gen. B-195614). Nonetheless, and more importantly, the Federal Aid-Highway Act expressly incorporates the Brooks Bill procurement processes where the construction is to be performed by the State Highway Department pursuant to the Federal Aid-Highway Act.

Each contract for program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or architectural related services with respect to a project subject to the provisions of Subsection (a) of this section shall be awarded in such manner as a contract for architectural and engineering services is negotiated under Title IX of the Federal Property and Administrative Services Act of 1949 or equivalent State qualifications-based requirements.

23 U.S.C.A. § 112 (b) (2) (A). Again, the reference in this provision is to the Brooks Bill. Thus, in those instances where the Department of Transportation procures architectural and engineering services for a federal-aid systems construction project, the Department must comply with either the Brooks Bill processes or equivalent State qualifications-based requirements. Competitive bid procedures, as those terms are understood in the procurement context, would not be authorized.

With best regards, I am

Very truly yours,


Edwin E. Evans
Chief Deputy Attorney General

EEE/shb

Enclosure

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REVIEWED AND APPROVED:



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Executive Assistant for Opinions