

The State of South Carolina



Office of the Attorney General

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March 16, 1994

The Honorable E. B. McLeod, Jr.
Member, House of Representatives
432-B Blatt Building
Columbia, South Carolina 29211

Dear Mac:

The Attorney General requested that I research and respond to your opinion request of February 1, 1994. I first apologize for the delay in delivering my response. The questions you have raised relate to procurement programs administered by the State Department of Transportation and the Budget and Control Board, Division of General Services and, thus, I needed to obtain information from these departments before I could prepare a response. In addition, you have raised questions relative to a federal program and I needed to obtain information from the United States Department of Transportation for the purpose of responding to these inquiries. There was some delay in obtaining this necessary information. I will address the questions in the order presented in your request.

- (1) If construction, maintenance and repair of bridges, highway and roads is exempt from State procurement procedures, how can the South Carolina Department of Transportation be considered or said to be using procedures codified in South Carolina statutes to select consulting firms for these purposes?

For the purpose of responding to your inquiry, I will assume, as you have, that the Department of Transportation is exempted pursuant to S. C. Code Ann. § 11-35-710 (a) (1993 Cum. Supp.) from the purchasing standards prescribed by the Consolidated Procurement

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Code.¹ The federal law applicable to the procurement of engineering and other consulting services for a federal-aid system construction project by the Department of Transportation provides:

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 the same 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) [emphasis added]. This federal Act, pursuant to its literal terms, does not mandate that the "equivalent State qualifications-based requirements" be a process enacted by State statute. The federal regulations promulgated by the Federal Highway Administration clarify that the equivalent State qualifications-based procedure does not have to be dependent upon a State legislative enactment. See 23 C.F.R. §§ 172.3 (a) and 172.7 (a) (3). In that regard, I reference the definitive interpretation of this language by the Federal Highway Administration:

Federal Law, Section 112 of Title 23 USC, provides the South Carolina Department of Transportation (SCDOT) with three options for the procedures to be utilized in the contracting for engineering and design services on Federal-aid projects. The options are: (1) to utilize the federal procedure under Title IX of the Federal Property and Administrative Services Act Of 1949, (2) an equivalent State qualifications-based procedure, or (3) a formal procedure established by State statute. The

I emphasize that neither the Office of Attorney General nor the courts have authoritatively resolved this precise point, although the Department of Transportation and the Budget and Control Board, Division of General Services, the respective agencies charged with executing Section 11-35-710 (a), have generally interpreted this provision as exempting the Department of Transportation from the purchasing standards of the Consolidated Procurement Code, at least for those procurements subject of the exemption. The Office of Attorney General has previously resolved that at a minimum this particular exemption removes certain Department of Transportation procurements from the jurisdiction of the respective chief procurement officer. Op. Atty. Gen. (January 14, 1994); Op. Atty. Gen. (August 31, 1983).

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Federal law permits acceptance of both codified and non-codified procedures. Only a non-qualifications-based procedure must be established (codified) by State statute before its use is permitted on Federal-aid projects.

Federal Highway Administration Opinion of Division Administrator (March 2, 1994). The interpretation of this federal statutory requirement by the Federal Highway Administration is authoritative and the courts are obligated to regard the federal agency's interpretation as controlling unless it is plainly erroneous. Cf. Allen v. Bergland, 661 F.2d 1001 (4th Cir. 1981). Of course, the General Assembly could enact a legislatively mandated process for the procurement of consulting services by the Department of Transportation.

- (2) If the South Carolina Department of Transportation is not using procedures codified in State statutes, i.e., the South Carolina Consolidated Procurement Code, is the manner in which the Department of Transportation contracts with consultants for engineering and design services for the construction, maintenance and repair of bridges, highways and roads in compliance in all respects with the requirements of Section 112, Title 23, United States Code, and other applicable provisions of federal law?

The Federal Highway Administration has determined that the State Department of Transportation's qualifications-based selection process for procurement of consulting services for federal-aid systems construction projects is in compliance in all respects with 23 U.S.C. § 112. See attached letters from the Federal Highway Administration to Robert L. White, State Highway Engineer, dated April 1, 1993, and September 23, 1993. Again, I note that the federal agency's interpretation of this federal requirement is controlling. Allen v. Bergland, supra.

- (3) With construction, maintenance and repair of bridges, highways and roads exempted from South Carolina's statutory procurement procedures, does the federal law intend that the South Carolina Department of Transportation spend millions of dollars in public funds by supplements to highway construction contracts without bidding or competitive opportunity?

I first reference the same assumptions heretofore noted in response to question number one. The Federal Highway Administration has determined that the procurement process employed by the

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State Department of Transportation comports with the federal law. In a March 2, 1994, letter from the Federal Highway Administration the Division Administrator approves the State Department of Transportation's processes.

Federal law, Title 23 USC, requires the SCDOT to utilize one of the three permitted procurement options when using federal funds in contracting for engineering and design services. SCDOT utilizes an equivalent State qualifications-based procedure permitted by Title 23 USC. The use of bidding (price based) procedures for contracting for engineering and design services including supplements on Federal-aid projects in South Carolina is not permitted since bidding (price based) procedures have not been adopted by State statute. Regarding competitive opportunities, the SCDOT practice is for consultant firms to compete on qualifications for providing all engineering and design services for an entire highway project. After selection of the consultant firm, the required engineering and design services, including fair and reasonable compensation, are negotiated and contracted in phases. This practice is permitted by applicable federal regulations.

I can only comment upon whether the Department of Transportation's procurement process generally complies with the federal law and I offer no comment concerning any specific procurement. However, in that regard, I do note for your information that the State Auditor, in his recently completed audit of the Department of Transportation, concluded that the Department of Transportation's consulting procurement process appeared to be adequate. Again, the General Assembly could enact a different process to be used by the Department of Transportation in the procurement of consulting services.

Please accept my best regards.

Very truly yours,


Edwin E. Evans
Chief Deputy Attorney General

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Enclosures

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REVIEWED AND APPROVED:

A handwritten signature in cursive script, reading "Robert D. Cook", written over a horizontal line.

ROBERT D. COOK
Executive Assistant for Opinions