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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

June 9, 1995

The Honorable Thomas H. Comerford
Clerk of Court of Lexington County
139 E. Main Street
Lexington, South Carolina 29072-3494

RE: Informal Opinion

Dear Mr. Comerford:

By your letter of May 25, 1995, to Attorney General Condon, you have sought an opinion as to whether you must follow Lexington County's purchasing procedures to expend funds commonly referred to as "IV-D" funds, received pursuant to contract with the South Carolina Department of Social Services. It is my understanding that Lexington County officials are not advising you that the funds may not be spent, but rather you are being advised that the county procurement procedures must be followed for these funds to be expended.

Consideration of several state statutes is in order. One such statute is S.C. Code Ann. §20-7-1317, which provides:

> Notwithstanding existing county funds allocated to the clerks of court, any federal funds earned by the clerks of court under a contract with the Department of Social Services pursuant to Title IV-D of the Social Security Act must first be used by the family court section of the respective offices of the clerks of court to provide adequate staff and equipment to implement and operate the provisions of §20-7-1315. Thereafter, excess funds shall revert to the general fund of the county.

While this statute plainly specifies the purposes to which the IV-D funds may be put, the statute does not address the mechanism of how the funds are to be spent. The statute

neither requires that a certain procurement policy be followed nor prohibits a county from requiring that such a policy be followed.

A related statute is §43-5-235, which provides in relevant part:

> To the extent permitted by federal law, the department [of social services] may enter into annual agreements with county governments, clerks of court, sheriffs, and other law enforcement entities having jurisdiction in that county to reimburse and to pay federal financial participation and incentives pursuant to the terms of the agreement to the appropriate contracting entity for a portion of the cost of developing and implementing a child support collection and paternity determination program for: [various specified programs]. ... To the extent permitted by federal law, a fiscal incentive and federal financial participation must be paid to the department and provided to the entity providing the service for the collection and enforcement of child support obligations. These monies must be paid to the appropriate county treasurer or county finance office on a monthly basis and deposited into a separate account for the entity providing the service for the exclusive use by this entity for all activities related to the establishment, collection, and enforcement of child support obligations for the fiscal year in which the payments are earned and may be drawn on and used only by the entity providing the service for which the account was established. Monies paid to the contracting entity pursuant to this section may not be used to replace operating funds of the budget of the entity providing the service. Funds in the special account not encumbered for child support activities revert to the general fund of the county at the end of the fiscal year in which they were earned. Each local entity shall enter into a support enforcement agreement with the department [of social services] as a condition of receiving the fiscal incentive and federal financial participation. To the extent that fiscal incentives are paid to the department and are not owed under the agreement to the contracting entity, these fiscal incentives must be reinvested in the department's Child Support Enforcement Program to increase collections of support at the state and county levels in a manner consistent with the federal laws and regulations governing incentive payments.[1]

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[1]By an opinion of this Office dated October 6, 1986, this Office opined that federal funds received by the Department of Social Services under the auspices of the Child

(continued...)

While this statute is specific as to uses to which these funds may be put, again the issue of whether a county's procurement policy must be followed is simply not addressed. This statute likewise neither requires that a county's procurement policy be followed nor prohibits a county from requiring that its policy be followed.

I have examined Chapter 17 of Title 14, South Carolina Code of Laws, and have not found any provision of law therein which would require the Clerk of Court to utilize his county's procurement policy or ordinance or prohibit the county council from requiring the Clerk of Court to follow such policy or ordinance.

A provision of the Home Rule Act, S.C. Code Ann. §4-9-160, requires:

> The [county] council shall provide for a centralized purchasing system for procurement of goods and services required by the county government.

This Code section was interpreted in an opinion of this Office dated November 21, 1975, which opinion provides in relevant part:

> While our office is of the opinion that the intent of Section [4-9-160] is to ensure that all county departments and agencies within a specific county utilize uniform procedures in purchasing by requiring the centralization thereof, we do feel that the [Home Rule] Act contemplates that the method used to achieve centralization can vary from county to county. The only requirement imposed by Section [4-9-160] is that county purchasing be centralized, presumably under one department or agency of the county.

I am of the opinion that the office of the Clerk of Court would fall within the phrase "county government," as that phrase is used in §4-9-160, despite the fact that the Clerk of Court is arguably a judicial officer of sorts, as well. Thus, the terms of §4-9-160 would be applicable to the Clerk of Court.

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[1](...continued)
Support Enforcement Act must be placed under the custody of the appropriate county treasurer. Only such funds as are necessary to implement and operate the provisions of §20-7-1315 are to be used by the county clerks of court. Any excess funds should be placed in the counties' general funds. The opinion did not address applicability of any county's procurement policy or ordinance, however.

It is observed that the requirements of the South Carolina Consolidated Procurement Code, S.C. Code Ann. §11-35-10 et seq., do not apply to counties. Section 11-35-40 states that the Consolidated Procurement Code is to apply to

> every expenditure of funds by this State under contract acting through a governmental body as herein defined irrespective of the source of the funds, including federal assistance monies, except as specified in §11-35-40(3) (Compliance with Federal requirements) and except as provided in Article 19 (Intergovernmental Relations). ...

The phrase "governmental body" is defined in §11-35-310(18); the definition specifically excludes counties and other local political subdivisions of the State. It was suggested to this Office that because federal funds are involved in the instant question, §11-35-40(3) would be applicable to this situation; that section provides:

> Where a procurement involves the expenditure of federal assistance or contract funds, the governmental body shall also comply with such federal law and authorized regulations as are mandatorily applicable and which are not presently reflected in the code. Notwithstanding, where federal assistance or contract funds are used in a procurement by a governmental body as defined in §11-35-310(18), requirements that are more restrictive than federal requirements shall be followed.

As observed earlier, counties are excluded from the definition of "governmental body." It is our understanding that applicable federal law and regulations do not provide a mechanism or requirement regarding procurement. If §11-35-40(3) were relevant, the more restrictive requirements would need to be followed.

Another provision of the Consolidated Procurement Code, §11-35-50, requires all political subdivisions of the State to "adopt ordinances or procedures embodying sound principles of appropriately competitive procurement" by July 1, 1983. Lexington County Council has adopted such a policy or ordinance. Article V, Purchasing Regulations, states the purposes of such regulations in Sec. 2-78:

> The purpose of this article is to secure for the county taxpayers the advantages and economies which will result from centralized control over the expenditures of county funds for supplies, materials, equipment and contractual services; from the application of modern, business-like methods

> to such expenditures; and from better utilization of the articles procured at public expense.[2]

The purchasing regulations provide for the powers and duties of the county purchasing agent, including the following:

> Purchase all supplies, materials, equipment and contractual services required by the agencies[3] in amounts or estimated amounts of fifteen thousand dollars ($15,000.00) or less; and submit to the county administrator for award, and thereafter execute contracts for all purchases of supplies, materials, equipment and contractual services in amounts or estimated amounts greater than fifteen thousand dollars ($15,000.00) and less than twenty five thousand dollars ($25,000.00); and submit to county council for award and thereafter execute contracts for all purchases of supplies, materials, equipment and contractual services in amounts or estimated amounts in excess of twenty five thousand dollars ($25,000.00). In order to procure supplies, materials, equipment and services in such a manner as to promote competition while considering the administrative cost of such procurement, the following methods of source selections are described. [There follow methods for small purchases, competitive sealed bidding, competitive sealed proposals, etc.]

Thus, a centralized purchasing procedure, with competitive methods of procurement, has been specified for the agencies of Lexington County.

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[2]It is observed that the language of Sec. 2-78 refers to "county funds." As acknowledged earlier, IV-D funds are provided by the federal government through the contracting procedure specified above. As these funds are received by the State of South Carolina and are then transferred to the county treasurers for the various contracting entities, the funds become county funds, even though they may be used only for the purposes specified by statute and contract. Op. Att'y Gen. dated March 25, 1985. Hence, the funds would be considered county funds for purposes of the county's procurement policy or ordinance.

[3]The term "agency" is defined in Sec. 2-79 as "any of the departments, offices, or other organization units of the county government." I am of the opinion that the office of the Clerk of Court would fit within this definition.

Moreover, Sec. 2-85(a) of the procurement policy provides as to contracts, purchases, and sales, in relevant part:

> All purchases of, and contracts for supplies, materials, equipment and contractual services, ... shall be based, wherever possible, on competitive bids. If the amount of the expenditure for a contractual service or for a commodity, or for a class of commodities normally obtainable from the same sources of supply, ... is estimated to exceed fifteen thousand dollars ($15,000.00), contract bids shall be solicited by public notice and written contracts shall be awarded. The method and extent of public notice shall be prescribed by the county council. If newspaper advertisements are employed as public notice, such notice shall include a general description of the commodities or services to be purchased ...; shall state where contract bids and specifications may be secured; and shall specify the time and place for opening of bids.

This provision reiterates the county policy that competitive bids be used whenever possible.

There are apparently some exemptions from centralized purchasing in Lexington County. Section 2-82 provides:

> With the approval of the county administrator, the county purchasing agent may, and where legally required to do so, shall authorize, in writing, any agency to purchase or contract for certain specified classes of supplies, materials, equipment, or contractual services, independently of the county purchasing agent's office; but such purchases or contracts shall be made in conformity with the applicable provisions of this article. The county purchasing agent may also rescind such authorization to purchase independently, by written notice to the agency or agencies concerned unless otherwise prohibited by law.

With your request, you have forwarded a copy of the circuit court's order in McCrea v. Williamsburg County Council et al., No. 94-CP-45-173 (Williamsburg Co., S.C., Ct. Common Pleas, October 18, 1994), which you have cited for the position that a county is not to control the use of IV-D funds. I would first advise that "[o]nly opinions appearing in the official advance sheets, the South Carolina Reports, or the South Eastern Reporter should be cited as binding authority... . [T]rial court orders may be useful for their reasoning, but do not have significant precedential value." Benson and Davis, A Guide to South Carolina Legal Research and Citation 17 (1991). It is observed that this

order was not appealed. You highlighted a portion of the order which indicated that the county was not a party to the contract and that its only beneficial involvement in the contract was that part concerning reversion of unspent funds to the county's general fund at the end of a fiscal year. I would advise that in matters involving competitive bidding, the benefit is to the taxpayers, ultimately. That the contract is with the Clerk of Court in this instance, for his exclusive use (except as those funds may revert to the county's general fund at the end of the fiscal year) is undisputed; what is at issue here is a mechanism for competitive bidding to promote sound financial management rather than an attempt to direct that the funds be spent on items or services other than those specified by the Clerk of Court. The county here is not failing or refusing to authorize that funds be spent; instead, the county is providing a mechanism to ensure that the funds are spent in accordance with a sound fiscal policy. Thus, while the Williamsburg County decision would not be of precedential value, the issues appear to be somewhat different in Lexington County and were not addressed in the Williamsburg County order.

One other point raised in the Williamsburg County case was application of various state laws relative to the council-supervisor form of government to the situation involving use of IV-D funds by the sheriff in that case. Similar statutes exist with respect to the council-administrator form of government which is followed in Lexington County. In particular, S.C. Code Ann. §4-9-650 provides:

> With the exception of organizational policies established by the governing body, the county administrator shall exercise no authority over any elected officials of the county whose offices were created either by the Constitution or by the general law of the State.

Thus, except with respect to organizational policies established by Lexington County Council, the county administrator is limited with respect to the authority he may exercise over certain elected officials, which would include the Clerk of Court. By an opinion of this Office dated February 7, 1978, the Honorable Karen LeCraft Henderson, then Assistant Attorney General, opined:

> First, there is no language in the provisions of the "home rule" legislation that would provide the [county] council with the authority to add to the duties of, or alter the functioning of, an elected official other than in areas such as employee grievances [§4-9-30(7), CODE OF LAWS OF SOUTH CAROLINA, 1976], the establishment of an accounting and reporting system [§4-9-30(8), CODE OF LAWS OF SOUTH CAROLINA, 1976] and of a centralized purchasing system [§4-9-160, CODE OF LAWS OF SOUTH CAROLINA, 1976] and the submission to it of annual fiscal

> reports from all county offices, departments, boards, commissions or institutions receiving county funds [§4-9-140, CODE OF LAWS OF SOUTH CAROLINA, 1976]. ...

Citing to §4-9-650, supra, she further opined that the phrase "organizational policies" would include "those areas in which the Council is expressly authorized to act, e. g., in handling employee grievance matters, in establishing accounting, reporting and purchasing systems and in formulating budgetary matters." Again, this was not an issue addressed in the Williamsburg County case, causing the Williamsburg County order to be of even less precedential value in the instant situation.

To conclude that the procurement policies or regulations of Lexington County should be followed in this instance is in accord with the general principles applicable to the expenditure of public or tax funds nationwide. Many courts have opined that the purpose of competitive bidding is to protect against fraud, collusion, and favoritism in the issuance of public contracts. General Engineering Corp. v. Virgin Islands Water and Power Authority, 805 F.2d 88 (3d Cir. 1986). Such policies give the broadest possible opportunity for public bidding on a governmental contract, to secure competition and guard against favoritism, improvidence, extravagance, or corruption. D'Annunzio Bros. Inc. v. New Jersey Transit Corp., 245 N.J. Super. 527, 586 A.2d 301 (1991). Competitive bidding is for the benefit of the public. Steelgard, Inc. v. Jannsen (Aurora Modular Industries), 171 Cal. App. 3d 79, 217 Cal. Rptr. 152 (1985). Still another court has stated the purpose of competitive bidding to be protection against contracts entered into because of favoritism and possibly involving exorbitant and extortionate prices. Alexander and Alexander, Inc. v. State, 470 So.2d 976, writ granted 476 So.2d 338 (La. App. 1985). Put yet another way, competitive bidding practices prevent favoritism, improvidence, extravagance, fraud, and corruption; promote economy in public administration and honesty, fidelity, and good morality of administrative officers. District Council No. 9, Int'l Broh. of Painters & Allied Trades v. Metropolitan Transit Authority, 115 Misc.2d 810, 454 N.Y.S.2d 663 (1982).

This Office has been advised by copy of correspondence from an attorney with the Child Support Enforcement Division of the Department of Social Services dated June 8, 1995, in relevant part:

> It appears that there is no specific federal requirement that county procurement procedures be utilized in the expenditure of Title IV-D funds.
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> ....
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> Even were state law to compel utilization of the county procurement process however, we maintain that it would be inappropriate for the procedures to

be used in a manner so as to inhibit the expenditure of Title IV-D funds in any manner permitted by S.C. Code Ann. §43-5-235 (Supp. 1994).

Whether Lexington County's procurement policies are being used "in a manner so as to inhibit the expenditure of Title IV-D funds in any manner permitted" by the South Carolina Code would be questions of fact, which are outside the scope of an opinion of the Office of the Attorney General. Op. Att'y Gen. dated December 12, 1983.

In conclusion, I am of the opinion that the applicable statutes neither require nor prohibit that competitive bidding practices be followed with respect to IV-D funds received by the Clerk of Court pursuant to contract with the Department of Social Services. I am of the opinion that Lexington County's procurement policies or regulations should be followed in the expenditure of these funds, due to the Clerk of Court being an agency of the county and due further to the strong public policy inherent in the sound fiscal management of public funds. I am further of the opinion that the IV-D funds are for the exclusive use of the Clerk of Court, in this instance, unless such funds revert to the county's general fund at the end of the fiscal year; the county may not, by application of its procurement policies or regulations, take actions which would deny the exclusive use of the funds to the Clerk of Court. Whether such actions taken by the county would amount to a denial of the exclusive use of the funds by the Clerk of Court would be questions of fact which are or would be beyond the scope of an opinion of this Office.

This letter is an informal opinion only. It has been written by a designated Senior Assistant Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Senior Assistant Attorney General