

The State of South Carolina



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January 26, 1990

Thomas L. Moore, Chairman
Joint Legislative Committee on Energy
Senator, District No. 25
P. O. Box 11867
Columbia, SC 29211

Dear Senator Moore:

You have requested an opinion as to the following questions relating to oil overcharge funds received by the State from various sources:

- (1) Are the funds to be considered state funds subject to the State Procurement Code?
- (2) Are the funds to be considered Federally appropriated funds subject to OMB Circular A-102 or State Procurement Code?
- (3) Are the funds to be considered "grant funds" under §11-35-40, 1976 Code of Laws, as amended?

There have been basically four sources of oil overcharge funds. The first, the Warner Amendment, is part of a federal statute (P.L. 97-377) enacted in 1982. The second source is the case of U.S. v. Exxon; the final judgment in that case was entered in early 1986, and the funds were distributed shortly thereafter. The third source consists collectively of the so-called "Stripper Well" litigation and other cases which were either part of that case or whose funds have been distributed with the condition that the States spend them in the same manner as if they were Stripper Well funds. The fourth source consists of refunds made in miscellaneous relatively small cases.

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The State has received these funds under the theory that payment of the funds to the State constitutes the only practical way to make restitution to the citizens of the State for illegal overcharges made by oil companies between 1974 and 1981. The legislation and court orders provide that the funds shall be used in a manner which will directly or indirectly benefit consumers of petroleum products within each state.

The General Assembly has established procedures for the expenditure of those funds. Act No. 680 of 1988 (§§11-39-10, et seq., 1976 Code of Laws, as amended). Section 11-39-20 provides in pertinent part:

Pursuant to the guidelines established by the Department of Energy, decisions of the federal courts, and the Joint Legislative Committee on Energy, the Governor's Office shall make decisions on the allocation of energy program funding. After consultation with the Governor's office, the Joint Legislative Committee on Energy shall review the projects approved by the Governor for funding.

(Emphasis added).

Based on the facts as we understand them, the word "allocation" in §11-39-20 accurately describes the function performed by the Governor's Office and the Joint Legislative Committee on Energy ("JLCE"). The funds may be allocated to entities which are part of the State government or local governments, or the funds may be allocated to private entities.

As we understand it, your question is essentially whether the Procurement Code applies in any way to the expenditure of these funds. For purposes of this question, the source of these funds or the label attached to them is immaterial, because §11-35-40(2) provides that the Procurement Code applies 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" (emphasis added). See, Op. Atty. Gen., No. 84-8 (January 24, 1984), referenced in your letter of January 17, 1990.

The issue instead is whether the disbursements of oil overcharge funds are "expenditure[s] of funds by the State under contract acting through a governmental body" In other words, are the allocation decisions, made by the Governor's Office, subject

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to JLCE review, "procurements" under §11-35-310(22), or are they "grants" under §11-35-310(19)?

Section 11-35-310(22) defines "procurement" as "buying, purchasing, renting, leasing or otherwise acquiring supplies, services or construction." A "grant," by contrast, is defined in §11-35-310(19) as "the furnishing by the State . . . of assistance, whether financial or otherwise, to any person to support a program authorized by law." This definition of a "grant" specifically excludes a "procurement contract," that is, "an award the primary purpose of which is to procure specified end products, whether in the form of supplies, services, or construction."

From the foregoing, it can be clearly seen that each allocation of funds by the Governor's Office subject to JLCE review is a "grant," for which there is no requirement in the Procurement Code that source selection procedures be used. 1/ The Governor's Office does not purchase "supplies, services or construction" when it allocates oil overcharge funds to a particular entity. Instead, the funds furnish assistance to those to whom the funds are allocated.

The entity which makes a "procurement" using these funds is the state, local, or private entity which receives the funds and expends them to purchase something. At this point, the usual rules concerning the application of the Procurement Code apply: The state and local entities which receive the funds must follow the procedures of the Code before making any purchase, but nothing in the Code requires private entities who receive public grant funds to follow those procedures.

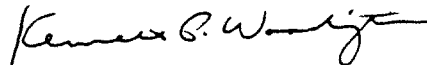
Of course, the General Assembly could, if it so desired and to the extent consistent with federal court orders and legislation, enact legislation which would establish additional rules governing the allocation of these funds by the Governor's Office and/or the JLCE.

1/ Even §11-35-1530, which governs requests for proposals, speaks only in terms of the State's procuring "supplies, services or construction." §11-35-1530(1).

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If additional information is needed, please do not hesitate to let me know.


Sincerely yours,



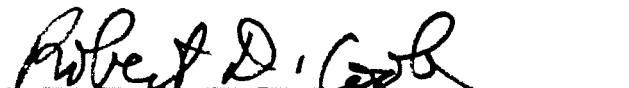
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