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January 18, 1991

The Honorable Joe Wilson
Senator, District No. 23
P. O. Box 5709
West Columbia, South Carolina 29171

Dear Senator Wilson:

You have asked this Office for an opinion as to whether the Drug-Free Workplace Act extends to subcontractors. The Act in question, which applies to contracts or grants made after December 31, 1990 provides that

(n)o person, other than an individual, may receive a domestic grant or be awarded a domestic contract for the procurement of any goods, construction, or services for a stated or estimated value of fifty thousand dollars or more from any state agency unless the person has certified to the using agency that it will provide a drug-free workplace ... (emphasis added).

The Act provides that a drug-free workplace shall be accomplished by publishing and giving to employees a statement concerning the prohibition of unlawful manufacture, distribution, dispensation, possession or use of a controlled substance, establishing an awareness program, requiring employees to meet the conditions of the statement and notifying the employer of any drug conviction for conduct occurring in the workplace, and requiring convicted employees to participate in drug abuse assistance programs. See § 44-107-30, S.C. Code Ann. (1990 Cum. Supp.)

The Act also provides that

(n)o state agency may enter into a domestic contract or make a domestic grant with any individual for a stated or estimated value of fifty thousand dollars or more unless the contract or grant includes a certification by the

individual that the individual will not engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in the performance of the contract. S.C. Code Ann. § 44-107-40 (1990 Cum. Supp.) (Emphasis added).

The Act also defines the following:

(1) Drug-free workplace means a site for the performance of work done in connection with a specific grant or contract of an entity at which employees of the entity are prohibited from engaging in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in accordance with the requirements of this chapter.

(2) 'Employee' means the employee of a grantee or contractor engaged in the performance of work pursuant to the provisions of the grant or contract.

....

(6) 'Grantee' means the department, division, or other unit of a person responsible for the performance under a grant.

(7) 'Contractor' means the department, division, or other unit of a person responsible for the performance under a contract with a state agency. S.C. Code Ann. § 44-107-20 (1990 Cum. Supp.) (Emphasis added).

In the event of violations of the Act,

(e)ach domestic contract or domestic grant awarded by a state agency is subject to suspension of payments or termination or both, and the contractor or grantee under the contract or grant or the individual who entered the contract with or received the grant from the state agency, as applicable, is subject to suspension or debarment in accordance with Section 11-35-4220 ... S.C. Code Ann. § 44-107-60 (1990 Cum. Supp.) (Emphasis added).

In resolving the question you have asked, statutory interpretation becomes important and in the interpretation, legislative intent is controlling. State v. Martin, 293 S.C. 46, 358 S.E.2d 697 (1987). When the terms of a particular statute are clear and unambiguous, the literal meaning should be applied. Duke Power Co. v. S.C. Tax Com'n, 292 S.C. 64, 354 S.E.2d 902 (1987). It is important "to give words their plain and ordinary meaning without resort to subtle or forced construction for the purpose of limiting or expanding its operation. Walton v. Walton, 282 S.C. 165, 318 S.E.2d 14 (1984)." S.C. Atty. Gen. Op. dated May 4, 1989. "The legislature is presumed to have fully understood the import of words used in a statute and intended to use them in their ordinary and common meaning, unless that meaning is vague and indefinite, or in their well-defined legal sense, if any. Powers v. Fidelity and Deposit Co. of Maryland, 180 S.C. 501, 186 S.E.2d 523 (1936)." Id. "In construing a statute, it is proper to consider legislation dealing with the same subject matter. Fidelity and Casualty Ins. Co. of New York v. Nationwide Ins. Co., 278 S.C. 332, 295 S.E.2d 783 (1982)." Id.

A review of the terms found in the pertinent statutes reveals that the legislature appears to have expressly limited application of the Act to those who directly enter contracts with or receive grants from the state as reference is made solely to those entities and as subcontractors are not provided for in these statutes but are treated with particularity by the legislature in other instances. See S.C. Code Ann. §§ 42-1-420 to 42-1-450 (worker's compensation); 29-5-20 (mechanic's liens); and 11-35-410(2) (procurement code definition of subcontractor). Contrary to the Act's requirements, the subcontractor neither receives a grant nor is awarded a contract from the State.

Furthermore, there is no contractual basis upon which to include subcontractors within the meaning of the Act. A subcontractor is defined in the Procurement Code as

any person having a contract to perform work or render service to a prime contractor as a part of the prime contractor's agreement with a governmental body. S.C. Code Ann. § 11-35-410(2) (1990 Supp.) (Emphasis added).

With regard to construction contracts, a prime contractor is "... a person who has a contract with the State ...". 23 S.C. Code Ann. Regs. 19-445.2145(A)(3) (1976). As distinguished from a prime contractor, a subcontractor is generally an independent contractor who contracts with the prime contractor to perform a part of the work the prime contractor has agreed to complete. Murray v. Aaron Mizell Trucking Co. 286 S.C. 351, 334 S.E.2d 128 (S.C. App. 1985). See also 72 C.J.S. Supp. Public Contracts, § 23; 40 Words and Phrases Subcontracts. The subcontractor contracts not with the

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State but, rather, with the prime contractor. There would generally be no privity of contract between the State and a subcontractor and the prime contractor would have no control over the employees of a subcontractor. See 41 Am.Jur.2d Independent Contractors, § 24; Harrison & Burrows, Inc. v. State of New York, 87 Misc.2d 637, 386 N.Y.S.2d 551 (1976); Tulley and DiNapoli Inc. v. State of New York, 51 Misc.2d 11, 272 N.Y.S.2d 667 (1966). Normally, provisions found in a public works contract between a prime contractor and a public entity do not bind a subcontractor unless it is also contained in the contract between the prime contractor and the subcontractor. 72 C.J.S. Supp. Public Contracts § 31, p. 210. A subcontractor generally

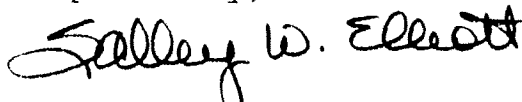
is the sole employer of his own workmen, having exclusive right of hiring, controlling and discharging them and exclusive responsibility for their wages, and such workmen are not "employees" of the principle employer ...

Id., p. 524.

Therefore, it is our opinion that the General Assembly did not require that the Drug Free Workplace Act be extended to subcontractors. Of course, if it subsequently desired, the General Assembly could expressly so require; moreover, the State could require by express grant condition or contract with prime contractors or grantees that Drug Free Workplace provisions be included in all subcontracts with subcontractors. Finally, we make no comment concerning whether, in a particular instance, the underlying relationship between the contractor and subcontractor is actually one of an agent of the prime contractor rather than an independent contractor or one of a prime contractor serving as a conduit for a grantee.

If there are other questions, please advise.

Respectfully,



Salley W. Elliott
Assistant Attorney General

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REVIEWED AND APPROVED BY:



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Executive Assistant for Opinions