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Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE: 803-734-3970
FACSIMILE: 803-253-6283

January 28, 1992

The Honorable Louis P. Batson, III
Chairman
State Board of Architectural Examiners
Suite 206
3710 Landmark Drive
Columbia, South Carolina 29204

Dear Mr. Batson:

Referencing a 1990 amendment to the South Carolina Code, § 40-3-165, you have described several different circumstances and have asked for the opinion of this Office as to applicability of § 40-3-165 in those circumstances. Each will be set forth separately, with questions then addressed. Section 40-3-165 provides the following:

Architects shall not enter into a contract for professional services on any basis other than direct negotiation thereby precluding participation in any system requiring a comparison of compensation. Provided, however, an architect may state compensation to a prospective client in direct negotiation where architectural services necessary to protect the public health, safety, and welfare have been defined.

This provision has been the subject of a previous opinion of this Office. Op. Atty. Gen. dated April 16, 1990. 1/

1/ It is assumed, for purposes of this opinion, that projects subject to the South Carolina Consolidated Procurement Code, § 11-35-10 et seq., are excluded from consideration of your questions. The Procurement Code provides a comprehensive selection procedure for projects subject to it, as well as an administrative procedure for adjudicating disputes that may arise with respect to projects subject to it. Thus, today's opinion considers only proposals by architects for projects not subject to the Procurement Code.

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A. You have advised that South Carolina architects are often asked by public and private prospective clients, who are considering the selection of an architect to render professional services, to submit qualification resumes and statements within an allotted time. Many times, the prospective client requires that a compensation proposal be submitted as part of the qualification package. Proposal requests usually include a brief description of the client's needs and the scope of work desired, according to your letter. You then asked:

1. If an architect submits compensation information or price proposal, is the architect in violation of § 40-3-165? Has the architect been placed into a system requiring the comparison of compensation?

Response: The plain language of § 40-3-165 requires direct negotiation. While we cannot address a specific procurement situation in this necessarily general opinion, it appears that the circumstances which you have outlined do not involve a direct negotiation. Thus, it is quite possible that submission of a price proposal as you have outlined would constitute a violation of the requirements of § 40-3-165 by the architect.

2. Section 40-3-165 permits an architect to state compensation if the architect and the prospective client are engaged in "direct negotiations." What actions constitute "direct negotiations?"

Response: The statute does not define the phrase "direct negotiation," nor does any South Carolina case of which we are aware. Because each procurement situation must be individually reviewed and facts must be considered, we can offer only general guidance as to actions which might constitute "direct negotiations."

To negotiate is to "communicate or confer with another so as to arrive at the settlement of some matter: meet with another so as to arrive through discussion at some kind of agreement or compromise about something: come to terms esp. in state matters by meetings and discussions" King v. Dean, 15 Ohio App. 2d 15, 238 N.E.2d 828, 831 (Ohio Ct. App. 1968). Indeed, the "act of negotiating is not a single act but a process. It involves a dialogue or back and forth communication with a purpose" Id. Negotiation is defined as a "deliberation which takes place between the parties touching a proposed agreement; the deliberation, discussion, or conference on the terms of a proposed agreement; ... a treating with another with a view to

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coming to terms Negotiations look to the future, and are preliminary discussions; the preliminaries of a business transaction." International Plastics Development, Inc. v. Monsanto Co., 433 S.W.2d 291, 296 (Mo. 1968).

The definition of "direct" includes such concepts as "immediate; proximate; ... without circuitry; ... in the usual or regular course or order, as distinguished from that which diverts, interrupts, or opposes; ... without any intervening medium, agency or influence" Black's Law Dictionary 413 (5th Ed. 1979).

Based on the foregoing, we advise that "direct negotiations" would involve discussions, deliberations, conferences, or similar dialogue directly between the architect and the prospective client as to terms and conditions. Obviously, what actions would involve "direct negotiations" would require consideration on a case-by-case basis, but the foregoing should offer guidance as to the general notion of "direct negotiations."

3. Section 40-3-165 also requires that the architectural services needed be defined adequately to protect the public health, safety, and welfare before compensation terms may be stated by the architect. What minimum actions would be required by the architect and the prospective client to satisfy such a definition of services?

Response: An opinion of the Attorney General would be inadequate to comment on such "minimum actions," because each proposed project would necessarily vary and no opinion could encompass all possibilities. As stated in Op. Atty. Gen. dated April 16, 1990, the "description of the proposed project's dimensions, locations, functions, and costs would most probably constitute an adequate definition of 'architectural services necessary to protect the public health, safety, and welfare'" in the course of direct negotiations between an architect and a prospective client. For purposes of advising you on "minimum actions," we reaffirm that opinion.

B. South Carolina architects are also often asked to submit a qualification package including a firm price proposal to provide a "feasibility study" or "study" to determine a particular scope of need for facility improvements. In that circumstance, you have asked:

1. How does § 40-3-165 apply in this situation?

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Response: Section 40-3-165 regulates a part of "architectural practice," as that term is defined in § 40-3-10(2). Whether the provision of a study (however denominated) to determine a particular scope of need for facility improvements would constitute "architectural practice" involves questions of fact which cannot be resolved by an opinion of this Office. See Op. Atty. Gen. dated December 12, 1983. Such a determination that a particular activity might constitute a proposal to provide architectural services, would be left to the Board of Architectural Examiners in a particular case, keeping in mind that § 40-3-160(2) expressly provides that nothing in chapter 3 of Title 40 "prevents or affects the practice of any other legally recognized profession." If the action described above does constitute a proposal to provide architectural services, § 40-3-165 is applicable.

2. Referencing R.11-15(D)(2), as to professional conduct, you have asked: when an architect submits a compensation proposal for a "study" knowing that future work opportunities are available, would a bid of "\$0.00" or a "rebated" bid be in violation of R.11-15(D)(2)?

3. Would a "substantially low" bid be in violation of R-11-15(D)(2)?

Responses: Regulation 11-15(D)(2) provides the following:

An architect, firm, corporation, professional association or partnership shall neither offer nor make any gifts, other than gifts of nominal value (including, for example, reasonable entertainment and hospitality), with the intent of influencing the judgment of an existing or prospective client in connection with a project in which the architect, firm, corporation, professional association or partnership is interested. [Emphasis added.]

It is difficult to provide a legal opinion about no-fee, discounted, or "substantially low" fee study proposals, because R.11-15(D)(2) turns on the intent of the architect. The Board of Architectural Examiners may wish to consider formulating interpretive guidelines to clarify these matters.

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We trust that the foregoing has adequately responded to your inquiries. Please advise if clarification or additional assistance should be necessary.

With kindest regards, I am

Sincerely,

Patricia D. Petway
Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:

Robert D. Cook

Robert D. Cook
Executive Assistant for Opinions