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The State of South Carolina



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June 26, 1992

Mr. Elliott E. Franks, III
Chief Executive Officer
South Carolina Jobs-Economic
Development Authority
1201 Main Street, Suite 1750
Columbia, South Carolina 29201

Dear Mr. Franks:

By your letter of June 9, 1992, you have asked whether the South Carolina Jobs-Economic Development Authority ("JEDA") may sub-lease its office facilities to Carolina Capital Investment Corporation ("CCIC") as well as contract with CCIC for CCIC to assume other major leases and for CCIC to rent from JEDA certain of its equipment, furniture, and fixtures.

At the outset it must be noted that the undertaking herein is novel and there is no specific statutory or judicial guidance governing your questions; these are questions of first impression. Only the legal questions will be addressed herein; no comment is made as to policy matters or as to the wisdom of the undertaking. No leases or contracts have been examined, and no comment is made as to how your questions impact on a given contract or lease.

By way of background, it is our understanding that JEDA is currently a state agency, established by the General Assembly pursuant to S.C. Code Ann. § 41-43-10 et seq. (1986, as amended), to promote and develop the business and economic welfare interests of the State. JEDA's enabling legislation has been amended by Act No. 404, 1992 Acts and Joint Resolutions, in part to make the Authority self-sustaining, to remove it from the requirements of the South

Mr. Franks
Page 2
June 26, 1992

Carolina Consolidated Procurement Code, § 11-35-10 et seq., and in other respects. Act No. 404 is to be effective on July 1, 1992.

Current § 41-43-240 permits JEDA to "establish profit or not-for-profit corporations as the authority considers necessary to carry out the purposes of this act." Act No. 404, in § 10, amended the first paragraph of § 41-43-240 to add: "Officials or employees of the authority may act as officials or employees without additional compensation of a corporation created pursuant to this section. A corporation established pursuant to this section is considered a 'public procurement unit' for purposes of Article 19, Chapter 35 of Title 11." This amendment also becomes effective July 1, 1992.

Clearly, until July 1, 1992, JEDA is an agency of this State; as of July 1, JEDA will be a state agency for only limited purposes, such as tort liability. As a present state agency, JEDA would appear to be a "governmental body" as defined by the Procurement Code:

a state government department, commission, council, board, bureau, committee, institution, college, university, technical school, legislative body, agency, government corporation, or other establishment or official of the executive, judicial, or legislative branches of this State. Governmental body excludes the General Assembly, Legislative Council, the Office of Legislative Printing and Information Technology Resources, and all local political subdivisions
...

§ 11-35-310 (18) (emphasis added). As noted, Act No. 404 of 1992 excludes JEDA from application of the Procurement Code from and after July 1.

JEDA would anticipate subleasing as described above by way of cooperative purchasing as permitted by the Procurement Code. Section 11-35-4830 provides:

Any public procurement unit may sell to, acquire from, or use any supplies belonging to another public procurement unit or external procurement

Mr. Franks
Page 3
June 26, 1992

activity in accordance with the requirements of Articles 5 and 15 of this chapter; provided, that such procurement shall take place only when the procuring entities have good reason to expect the intergovernmental procurement to be more cost effective than doing their own procurement.

A "public procurement unit" is defined by § 11-35-4610 (5) to mean "either a local public procurement unit or a state public procurement unit." A "state public procurement unit" is defined in § 11-35-4610 (6) to mean "the offices of the chief procurement officers and any other purchasing agency of this State" (emphasis added). A "purchasing agency" is defined in § 11-35-310 (24) to mean "any governmental body other than the chief procurement officers authorized by this code or by way of delegation from the chief procurement officers to enter into contracts" (emphasis added). This Office has noted previously that whether an entity would be a "public procurement unit" would be a decision to be made by appropriate officials at the Division of General Services, Op. Atty. Gen. dated December 11, 1990 and April 19, 1983; however, it appears in our view that JEDA would be a public procurement unit until July 1. Of course, only the officials at General Services could find that fact conclusively or determine JEDA's status after July 1.

Cooperative purchasing of "supplies" is contemplated; that term is defined in § 11-35-310 (29) to mean "all personal property, including but not limited to equipment, materials, printing, insurance, and leases of real property, excluding real property or an interest in real property other than leasehold interests." Subleasing of office space, assumption of other major leases, and rental of equipment, furniture, and fixtures would be undertaken, we understand. These items appear to fit within the definition of "supplies."

It must then be decided whether CCIC is a "public procurement unit." Clearly, after the effective date of Act No. 404, CCIC will be such an entity; these arrangements are anticipated to be entered into prior to July 1, however. We understand that CCIC was granted a Certificate of Incorporation as a nonprofit corporation on May 21, 1992. The Declaration and Petition for Incorporation were signed by you and Robert L. Mobley, chairman of JEDA's Board of Directors. The purposes for which CCIC was incorporated were stated to be: "To act as a development finance institution to promote

Mr. Franks
Page 4
June 26, 1992

the growth of productive private investment, and to assist business enterprises that will contribute to the economic development of the State of South Carolina." 1/ Bylaws have been enacted, and the initial board of directors has been selected, consisting of the JEDA Board Chairman and six other members appointed by the JEDA Board Chairman. In keeping with opinions as noted above, the final decision as to whether an entity constitutes a "public procurement unit" prior to July 1 remains with the Division of General Services; this Office cannot decide factual questions by way of an opinion. See Op. Atty. Gen. dated December 12, 1983.

If it should be determined that CCIC is a public procurement unit and thus entitled to participate in cooperative purchasing prior to July 1, § 11-35-4830 requires that the procuring entities have good reason to expect the intergovernmental procurement to be more cost effective than doing their own procurement.

Finally, R 19-445.2120 (A) must be taken into account; that regulation provides:

A. Lease of Non-State-owned Real Property.

No governmental body shall contact for the lease, rental, or use of non-State-owned real property without approval of the Division of General Services, except as specified in Subsection C. Requests shall be directed to the Division of General Services, Real Property Management Section. The Division of General Services shall negotiate all leases of non-State-owned real property unless the governmental body has been certified by the Materials Management Office.

The leasing of real property is further governed by R 19-445.2121. Thus, if the subleasing is permitted by way of cooperative purchasing, the Division of General Services would be required to approve certain leases, pursuant to R 19-445.2120.

1/ These expressed purposes are similar to the functions and duties of JEDA as specified in § 41-43-70.

Mr. Franks
Page 5
June 26, 1992

The foregoing expresses the opinion of this Office, to the extent possible, based on the circumstances existing until July 1; no opinion is expressed as to the circumstances existing from and after July 1. We must respectfully refer you to the appropriate officials at the Division of General Services to make the determinations pointed out above.

With kindest regards, I am

Sincerely,

Patricia D. Petway

Patricia D. Petway
Assistant Attorney General

PDP/an

REVIEWED AND APPROVED BY:



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