

The State of South Carolina



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September 19, 1989

The Honorable Richard M. Quinn, Jr.
Member, House of Representatives
1703 Gervais Street
Columbia, South Carolina 29201

Dear Representative Quinn:

By your letter of August 14, 1989, you have asked for the opinion of this Office as to whether Richland County Council might extend the contracts for franchised garbage collectors in the unincorporated areas of the county without requiring new bids. You have asked whether this practice would violate Richland County's competitive bidding policy or ordinance. It is necessary to examine state law, county ordinances, and judicial decisions to respond to your inquiry.

The purpose of competitive bidding laws or practices of political subdivisions is well-stated in 10 McQuillin, Municipal Corporations, §29.29:

The provisions of statutes, charters and ordinances requiring competitive bidding in the letting of municipal contracts are for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable, and they are enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest. ...

A strong public policy is enunciated in favor of public bidding. See, Terminal Const. Co. v. Atlantic City Sewerage Authority, 67

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N. J. 403, 341 A.2d 327 (1975). We support this policy. With this background in mind, your question will be examined.

State Law

A. South Carolina Consolidated Procurement Code

The South Carolina Consolidated Procurement Code is found in Section 11-35-10 et seq., Code of Laws of South Carolina (1976, as revised). The Procurement Code applies to "every expenditure of funds by this State under contract acting through a governmental body as herein defined... ." Section 11-35-40(2). The term "governmental body" is defined in Section 11-35-310(18) and specifically excludes counties. Instead, a county is required by Section 11-35-50 to adopt its own ordinance or procedure "embodying sound principles of appropriately competitive procurement." Thus, the Consolidated Procurement Code does not apply to Richland County, which must have adopted its own procurement ordinance or procedure.

B. Home Rule Act

While the Home Rule Act, Act No. 283 of 1975, codified at Section 4-9-30 et seq., does not contain any provisions concerning competitive bidding, it does contain the following which is relevant to your inquiry. Section 4-9-30(11) empowers a county government

to grant franchises in areas outside the corporate limits of municipalities within the county in the manner provided by law for municipalities and subject to the same limitations, to provide for the orderly control of services and utilities affected with the public interest... .

In addition, Section 4-9-30(3) authorizes a county government to make and execute contracts.

C. Section 44-55-1210 of the Code

A county is authorized to engage in collection and disposal of solid wastes by Section 44-55-1210 of the Code:

The governing body of any county may by ordinance or resolution provide that the county shall engage in the collection and disposal of solid waste. Such collection and disposal may be accomplished either by use of county employees and equipment or by contract with private agencies or municipalities of the county. Service charges may be levied against persons for whom

collection services are provided whether such services are performed by the county, a municipality or a private agency.

Additionally, Section 44-55-1220 authorizes a county government to promulgate rules and regulations relative to solid waste disposal:

The governing body of any county which engages in the collection and disposal of solid waste is authorized to promulgate such rules and regulations as it may deem necessary to carry out the functions authorized by this article. Provided, that no rule or regulation shall become effective until the tenth day after it has been both filed with the county clerk of court and published in a newspaper having general circulation in the county. Provided, further, that the governing body of any county may exercise the eminent domain procedures in §28-5-10 for the acquisition of land necessary for landfill purposes in disposing of such solid waste.

Neither of these statutes require competitive bidding practices to be followed in the collection and disposal of solid waste by a county.

County Ordinances

A. Section 12-14

The Richland County Code, in Section 12-14 (Supp. No. 4, page 686), provides general conditions for granting contracts for residential solid waste collection. Section (a) divides the county into seven roll cart service areas. Section (b) provides a procedure for the awarding of bids; in particular, if all service areas were not successfully bid under this part of the County Code, resort was to be had to the county's competitive bidding policies. There are other provisions relative to subcontractors, bonds, insurance, payments to the county, and so forth. Contracts with the franchisee were to be for a three-year period beginning January 1, 1987.

It is our understanding that personnel in Richland County have interpreted Section 12-14 as applying only to the first time the contracts were issued for collection of solid waste, effective January 1, 1987.

B. Competitive Bidding Policy

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Richland County Council has a competitive bidding policy in effect at the present time, as is required by Section 11-35-50 of the Code, cited supra. Article X of the Richland County Code must be read with an ordinance adopted recently by Richland County Council which modifies the county's competitive bidding policy.

Section 2-598 (in Supp. No. 8) sets forth the general provisions of Richland County's policy:

(a) All public purchases shall be made in a manner which provides for the greatest economy for the taxpayer, the fairest selection of vendor, and the prevention of conflicts of interest. Towards this end, it shall be the policy of the county that, whenever practical, leases, goods, and services required by county agencies shall be procured through a competitive purchasing policy which may be achieved through competitive bidding or through requests for proposals.

...

Section 2-612 of the County Code applies to purchase negotiations, to be used

[i]n case of emergencies, or when lack of price or product competition renders the purposes of competitive procurement ineffective, the purchasing agent may purchase supplies, materials, equipment, or contractual services through negotiation with the vendor.

Several conditions are set forth to limit the instances in which purchases may be negotiated. In particular, subsection (10) was added to Section 2-612(c) by Ordinance No. 1860-89 HR, as follows:

A contract for residential solid waste collection may be renewed or renegotiated regardless of any terms therein if the County Council determines that renewal to promote continuity of service is in the best interest of the County.

Thus, Richland County Council has itself apparently removed the negotiation or contractual arrangements relative to solid waste collection from the purview of its procurement policy, instead permitting the contracts for solid waste collection to be negotiated with the individual vendors. Of course, following the competitive bidding policy in this particular instance certainly is not precluded.

Because Richland County Council has as a matter of policy apparently decided to exclude the negotiation or letting of solid waste collection contracts from the county's competitive bidding policy and further because no state law governs how a county is to grant franchises or operate its procurement policy, it must be concluded that Richland County Council has not violated its own procedures in failing to take bids on the renegotiation of the contracts set to expire at the end of this year. As noted above, Richland County Council could follow its competitive bidding policy if it wished.

C. Multi-Term Contracts

Enclosed with your letter was page 20 of some publication unknown to this Office relative to the letting of multi-term contracts. Because the paragraph refers to "appropriation and availability of funds" and the contingency that funds not be available for any succeeding fiscal period, it would appear that this paragraph deals with the expenditure of public funds. It is extremely difficult to evaluate a document out of the context in which it is written, and thus it is uncertain whether this paragraph applies to the letting of garbage collection contracts. Thus, no comment is made as to whether Richland County Council has violated any portion of this policy.

Other Jurisdictions

The remaining question to be resolved is whether contracts let by a political subdivision for the collection of solid waste must be subject to the competitive bidding practices of the political subdivision. Because the courts of this State have apparently not considered the question, resort is made to the decisions of other jurisdictions. As will be seen, there is a difference of opinion among the various jurisdictions and involved political subdivisions.

A. Competitive Bidding Not Required

Several judicial decisions have been located in which competitive bidding was not required in the instance of letting garbage collection or disposal contracts by a political subdivision. In SCA Services of Georgia, Inc. v. Fulton County, 238 Ga. 154, 231 S.E.2d 774 (1977), the Supreme Court of Georgia examined two competing statutes: one, a county purchasing act, applied to the purchase of supplies, materials, and equipment by bidding, while the other was a local act relating specifically to Fulton County's contracting for garbage disposal. The court held that the county purchasing act applied to contracts as described above but was not applicable to contracts for the furnishing of garbage disposal services. Hence, there was no requirement that the contract be awarded to a lowest bidder since the local act authorized Fulton County officials to

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"contract with any private individual, firm or corporation, who in the judgment of the governing authorities of Fulton County is qualified to render the required service." 231 S.E.2d at 776.

The court in Browning-Ferris, Inc. v. City of Leon Valley, 590 S.W.2d 729 (Tex. Civ. App. 1979), construed two similar statutes. One statute required that a contract requiring the expenditure of \$3,000.00 or more of public funds be let by competitive bidding, in essence. On the other hand, the County Solid Waste Control Act permitted a political subdivision (city or county) to enter into operating agreements for solid waste disposal services. The court noted that the competitive bidding statute contained an exemption or exclusion for matters involving the preservation or protection of public health and decided that contracts relative to solid waste disposal, being a matter of public health, could be awarded for the collection, hauling, and disposal of solid waste without competitive bids.

Similarly, the court in Davis v. City of Santa Ana, 108 Cal. App. 2d 669, 239 P.2d 656 (1952), construed two statutes. One statute provided that the city could itself collect and dispose of rubbish or it could grant the collection and disposal privileges to others by contract, or it might permit private collectors to contract with private citizens for rubbish removal. Another statute required that if expenditures for a public project should exceed \$1,000.00, the contract therefor could be let only after notice had been given and bids accepted. The court declared that that the collection of rubbish was not a public project and thus competitive bidding was not required. The court noted that in the absence of statutory requirements, a municipality was not required to let its contracts by competitive bidding. Construing a statute permitting a municipality to collect or dispose of garbage by contract under whatever terms it deemed advisable, the court said:

The accumulation of garbage and trash within a city is deleterious to public health and safety. The collection and disposal of garbage and trash by the City constitutes a valid exercise of police power and a governmental function which the City may exercise in all reasonable ways to guard the public health. It may elect to collect and dispose of the garbage itself or it may grant exclusive collection and disposal privileges to one or more persons by contract, or it may permit private collectors to make private contracts with private citizens. The gathering of garbage and trash is considered to be a matter which public agencies are authorized to pursue by the best

means in their possession to protect the public interest.

239 P.2d at 660-61. The court also declared that the wisdom or discretion of the city's awarding the contracts without competitive bidding was not before the court.

Other cases in which garbage collection or disposal contracts were permitted to be let without the benefit of competitive bidding include: Universal By-Products, Inc. v. City of Modesto, 43 Cal. App. 3d 145, 117 Cal. Rptr. 525 (1974); Young v. Village of Glen Ellyn, 120 Ill. App. 3d 692, 458 N.E.2d 1137, 76 Ill. Dec. 483 (1983) (the Illinois Municipal Code did not require a village to submit garbage collection contracts to competitive bidding; the village's competitive bidding policy excluded "utility service" therefrom, the collection of garbage being a "utility service"); Schwandt Sanitation of Paynesville v. City of Paynesville, 423 N.W.2d 59 (Minn.App. 1988) (statute requiring competitive bidding was not applicable to a contract for refuse collection and hauling services; the statute is for the purchase of merchandise, materials, or equipment); and Shaw Disposal, Inc. v. City of Auburn, 15 Wash. App. 65, 546 P.2d 1236 (1976) (garbage collection was not a public work or improvement subject to statutory requirement that competitive bidding be sought for such things).

B. Competitive Bidding Required

A line of cases from New Jersey consistently holds that competitive bidding is required when a political subdivision plans to let a contract for garbage collection or disposal. See, for example, McKim v. Village of South Orange, 133 N.J.L. 470, 44 A.2d 784 (1945); Application of Borough of Saddle River, 71 N. J. 14, 362 A.2d 552 (1976); Capasso v. L. Pucillo and Sons, Inc., 132 N.J. Super. 542, 334 A.2d 370 (1974). New Jersey has had, over the years, various statutes which required public bidding on all contracts made by municipalities for "scavenger services" which exceeded a certain dollar amount. The court in McKim v. Village of South Orange noted that the public policy was implicit in the statutes which required that public works exceeding a certain sum not be awarded "except upon advertisement and to the lowest responsible bidder." 44 A.2d at 786. Due to the statutory requirements of competitive bidding for "scavenger services," these cases are readily distinguishable from the instant situation.

In Smith v. City of Springdale, 291 Ark. 63, 722 S.W.2d 569 (1987), a statute was construed which provided that when an amount was to be expended for any purpose or contract in excess of \$2,000.00, competitive bidding was to be invited. A city ordinance tracked the language of the statute. The garbage contract

under consideration therein was in excess of \$2,000.00. The court did not decide that competitive bidding was required in that instance but reversed and remanded to the lower court, deciding that a cause of action had been stated as to the question of whether competitive bidding was required in that instance.

Competitive bidding was ordinarily required in entering into contracts of \$5,000.00 or more by the City of Baltimore. In Hylton v. Mayor and City County of Baltimore, 268 Md. 266, 300 A.2d 656 (Md. App. 1972), however, an exception was made for obtaining an object which was so unique that one and only one source would be able to provide it. Had this unique factual situation not existed with respect to a solid waste disposal system, competitive bidding would have been required.

In Yohe v. City of Lower Burrell, 418 Pa. 23, 208 A.2d 847 (1965), a statute required that when services were required by a city, when the amount of the contract exceeds \$1,000.00, such must be accomplished by a written contract after advertisement and acceptance of bids, awarding the contract to the lowest responsible bidder. Garbage collection was deemed to be a service and a contract therefor subject to the competitive bidding requirements.

For additional cases holding that competitive bidding would be required, by statute, in the letting of contracts for garbage collection and disposal, see Maintenance, Inc. v. Houston County, Alabama, 438 So.2d 741 (Ala. 1983) and Clark Sanitation, Inc. v. Sun Valley Disposal Co., 487 P.2d 337 (Nev. 1971).

Conclusion

Based on the foregoing, this Office concludes:

1. Public policy strongly favors competitive bidding practices insofar as is possible and practicable. This Office also favors such policy.
2. The South Carolina Consolidated Procurement Code is not applicable to counties but instead directs counties and other political subdivisions to adopt their own competitive bidding ordinances or policies. Richland County Council has done so.
3. No other provision of state law relative to collection and disposal of solid waste by a county specifically requires a contract to be let by a competitive bidding process.
4. Richland County's competitive bidding ordinance contains a provision relative to "purchase negotiation," which applies to renewal contracts for residential solid waste collection and removes same from the competitive bidding requirements if Richland County Council "determines that renewal to promote continuity of service is in the best interest of the County."

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5. On the other hand, Richland County's competitive bidding policy does not preclude Richland County Council from renewing the residential solid waste collection contracts according to its competitive bidding policy.

6. There is no uniform practice followed in other jurisdictions which have contracted for the removal of residential solid waste. In several jurisdictions in which competitive bidding was required, there was a statutory requirement which was not found in other jurisdictions in which competitive bidding was not required.

7. It cannot be said with certainty that Richland County Council has violated its own competitive bidding policy in renewing contracts for residential solid waste collection. This Office does not comment on the wisdom or policy in the decision making process as exercised by Richland County Council in so concluding. Only a court could conclude with finality that Richland County Council has not violated its own policy.

8. Notwithstanding the foregoing, the General Assembly would have the authority to adopt a statute (perhaps in the amendment of Section 44-55-1210 of the Code) to require that counties wishing to enter into contracts relative to collection of residential solid waste must do so by competitive bidding.

With kindest regards, I am

Sincerely,

Patricia D. Petway

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Assistant Attorney General

PDP/nnw

REVIEWED AND APPROVED BY:

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