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Office of the Attorney General

State of South Carolina
Opinion No. 84-8
January 24, **1984**

***1** The Honorable James M. Waddell, Jr.
Senator
District No. 15
213 Gressette Building
Columbia, South Carolina 29202

Dear Senator Waddell:
You have requested an opinion as to the applicability of the Consolidated Procurement Code, § 11–35–10 et seq., Code of Laws of South Carolina (1976 as amended) to particular aspects of a proposed development of a portion of property located on the Clemson University campus. We understand the facts are as follows. As part of an overall plan for the construction of the Strom Thurmond Center and development of a portion of the Clemson campus, Clemson proposes to lease certain parcels of land to a non-profit corporation; the principal purpose of the corporation is the support and benefit of Clemson. In turn, the corporation would contract with a certain developer to construct the Strom Thurmond Institute to house the papers of Senator Thurmond. These papers have already been donated to Clemson by Senator Thurmond. Also to be constructed on the property leased are a continuing education center, performing arts auditorium, golf course and marina. In addition, numerous hotel suites and townhouses will be constructed for lease or sale by the corporation to the general public.

In the words of the developer, the objective of the proposal is to 'develop a multi-use complex responsive to the purposes of The Strom Thurmond Center and complementary to the Clemson University Master Plan.' Moreover, the development of 'important income for Clemson University from lands presently providing no revenue . . .' is a major goal. Further, the developer notes, '. . . there will be provided in time a potential endowment for the University approaching $100,000,000 in value.' Projected cost of the venture is 44.5 million dollars. Capitalization with private funding entirely is envisioned, but the developer himself recognizes that public credit would be relied upon 'as a last resort.'

As noted, the project would be constructed upon land owned (for the most part) by Clemson. Moreover, we understand that it is anticipated that the project itself will also wind up as Clemson property. Either Clemson would be donated the project in whole or in part by the corporation (foundation) prior to the end of the lease or Clemson would receive an option to purchase the project from the foundation at a later date. It also has been suggested that the terms and specifications of the contract between the foundation and developer would be made a part of the lease. In any event, however, we understand and the documents presented to us reveal that the reason Clemson is leasing the land to the foundation is to enable this particular project to be developed on its property. From what has been presented, both Clemson and the foundation have a clear understanding that 'the developer will not have carte blanche concerning the use of money and administrative and architectural decisions.' The developer understands that '[t]here would be clear limits on both money and time.'

***2** Moreover, the documents presented clearly reveal that all parties understand that Clemson, through its Board of Trustees, must give its final approval to the project before it proceeds. Certain documents presented state that when the foundation and the Clemson Board of Trustees are prepared to give their approval to the developer 'to build the Strom Thurmond Center' then, at that time, the developer 'and designated representatives of Clemson University' will enter into a two-week 'exercise'; during that time, such preliminary steps as a market feasibility study of the project, as well as a draft development contract will be completed. The document continues:

Only after all of these services have been performed and a suitable draft of the contract has been negotiated and agreed upon by all the parties would . . . further phases of the project [be entered into]. In other words, after phase I has been completed, the [foundation] or the [Clemson] Board of Trustees would have the election of continuing with the project or not. If the [foundation] decided not to continue with the [developer] beyond Phase I, there would be no further obligation by the [foundation] or Clemson University to the [developer].

The developer notes that this preliminary work is part of an effort to have the foundation 'and Clemson University . . . to protect themselves against the indiscriminate spending of their funds until they are sure the entire project is economically, financially and administratively feasible [sic].'

In addition, the proposal presented to us plans to have the development contract 'ready to sign at the completion of Phase I.' While this contract will, technically, be between the foundation and developer, there is little doubt that Clemson will be its principal beneficiary and will have a major role in its negotiation and execution. The developer proposes that in 'the contract, stringent conditions, limitations, guarantees and check, points would be set out in some detail for the complete protection of the [foundation] and Clemson University.' Among those conditions would be that the '. . . location of the project and architectural design would be subject to the approval of the [foundation] . . . and the [Clemson] Board of Trustees.' Moreover, the Board of Trustees would participate in the appointment of a construction committee to 'work with the developer on all matters arising during the construction period.' It is further contemplated that the developer will consult with the various departments of Clemson University, including the School of Architecture, the School of Engineering, the Horticulture Department and other appropriate departments for their input into the planning and development process.' Finally, we understand the developer will have no further involvement with the project once construction is completed. He will be paid a designated amount by the foundation. It will then be the foundation's responsibility to pay all construction loans, liabilities, etc. The foundation will lease or sell the townhomes, hotel suites, etc. to the general public, following construction.

***3** In essence then, the thrust of the proposal is this. Clemson is lending its name, as well as the exclusive use and enjoyment of a portion of its property, and is granting the the exclusive right to make a substantial profit from the development of that property. In return, Clemson will receive some rental compensation; more importantly, from Clemson's standpoint, it will have its property extensively developed, in the following manner: (1) establishment of the Strom Thurmond Institute to house the papers of Senator Thurmond, among other things; (2) complementing '. . . the natural beauty of the Clemson campus . . .'; (3) environmentally protecting that portion of the campus which is developed; (4) augmenting 'the University's recreational, educational, and athletic capabilities with pedestrian nature trails, bicycle paths, golf course, marina, tennis courts, horticultural gardens, and picnic areas'; (5) creating '. . . a physical and financial asset for the University and the region through the appeal of lakeside continuing education and performance; (6) strengthening 'cash flow with highly attractive home sites . . .'. In other words, from Clemson's point of view, this proposal cannot be viewed simply as an ordinary unrestricted lease agreement, one which is unrelated to the subsequent major development of the property which is leased. Although Clemson is able, in this instance, to pass the costs of the development in terms of actual expenditures, along to the foundation and thus the public, it is clear that Clemson also fully expects to receive substantial ultimate benefits and improvements from the use and enjoyment of its property. The question then becomes whether the Consolidated Procurement Code is applicable to the proposal.

We first note that the foregoing facts are presumed to be true for purposes of this opinion. This office does not possess the authority or the resources to gather or adjudicate facts. Op. Atty. Gen., (Dec. 9, 1983). Thus, any opinion expressed relates only to the particular project proposed and does not necessarily govern other factual situations or projects. Moreover, we express no opinion one way or the other concerning the merits of this project. Our only concern is the applicability of the Procurement Code to the facts presented to us.

The Consolidated Procurement Code is set forth in § 11–35–10 et seq. The legislative purposes and objectives of the Code, which requires competitive bidding, are expressed in § 11–35–20. Among these are the consolidation and clarification of procurement law in the State; the promotion of increased public confidence in the procedures followed in public procurement; the insuring of

fair and equitable treatment of all persons who deal with the State's procurement system; the provision of maximum purchasing power of State expenditures; the encouragement of broad-based competition for public procurement; and the insuring of a procurement system of quality and integrity. In construing the applicability of statutes full effect must be given the legislative purpose. Bankers Trust of South Carolina v. Bruce, 275 S.C. 35, 267 S.E.2d 424 (1980).

***4** The above legislative purposes are in complete accord with the objectives of bidding requirements and public procurement codes, generally. Bidding requirements in public procurement
are for the purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of . . . [government] contracts, and to secure the best work or supplies at the lowest price practicable, and 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 public interest.

Yohe v. City of Lower Burrell, 418 Pa. 23, 208 A.2d 847, 850 (1965), quoting 10 McQuillin, Municipal Corporations, § 29.29. There is indeed a strong public policy which favors competitive bidding. See, Terminal Const. Co. v. Atlantic City Sewerage Auth., 67 N. J. 403, 341 A.2d 327 (1975).

Accordingly, procurement statutes such as South Carolina's Consolidated Procurement Code are frequently held to be remedial in nature and are construed broadly to achieve their purpose. In discussing a competitive bidding statute, one court has held that the courts will not, by strict construction, narrow the scope of a statute and limit its application, in cases where such construction is against the legislative policy.

Reiter v. Chapman, (Wash.), 31 P.2d 1005, 1007 (1934). A New Jersey court, in Lill v. Director, Div. of A.B.C., 361 A.2d 89, 90 (1976), referred to the general rule in that state which requires 'the reasonable extension of the literal terms of such legislation to accomplish that purpose [favoring competitive bidding] and bring within the legislative ambit as many public contracts or arrangements as may be reasonably appropriate.' In Webster v. Belote, (Fla.), 138, so. 721. 724 (1931), the court, citing numerous cases, concluded that competitive bidding statutes
. . . are of a highly remedial character, and should receive a construction always which will fully effectuate and advance their true intent and purpose and which avoid the likelihood of [the] same being circumvented, evaded or defeated.

Thus, competitive bidding statutes are strictly construed against public authorities. Cosentino v. City of Omaha, 186 Neb. 407, 183 N.W.2d 473 (1971). That public officials acted in good faith and without corruption or favoritism in avoiding the requirements of a competitive bidding statute or that such avoidance had no actual adverse impact on the competitive bidding process is not controlling; such statutes will be deemed applicable regardless of good faith intentions or motives so long as the effect of the transaction in question falls within the intent of the statute. Mayes Printing Co. v. Flowers (Fla.), 154 So.2d 859, 863 (1963); Terminal Const. Corp. v. Atlantic City Sewerage Auth., 341 A.2d, supra.

The applicability provision of the Consolidated Procurement Code is found at § 11–35–40(2). That provision states in pertinent part that
***5** This code shall apply 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 . . ..

At first blush, it could be argued that the Procurement Code would technically not be applicable to the proposed contract with the developer, because the development contract will be between the developer and the foundation, not Clemson University. Read literally, the terms of § 11–35–40(2) would perhaps not be met since there may not be any 'expenditure of founds' by Clemson in the proposed development project. However, as will be seen, the authorities in other jurisdictions are ample to support the conclusion that the Procurement Code is probably applicable here.

First, we note that, generally speaking the absence of any actual expenditure of funds by the governmental body in question will not necessarily defeat the applicability of bidding statutes or procurement codes, even where such an expenditure is technically a requirement of the statute in question; the courts generally look beyond the literal requirements of an act and consider the relationship between the governing body and the contractor. See, Lill v. Director, Div. of A.B.C., 361 A.2d, supra; Yohe v. City of Lower Burrell, 208 A.2d supra; In the Matter of Signacon Controls, 32 N.Y.2d 410, 298 N.E.2d 670 (1973); McKim v. Village of South Orange, 133 N.J.L. 470, 44 A.2d 784 (1945); Kurman v. City of Newark, 124 N.J.Super. 89, 304 A.2d 768 (1973); Schnell v. Township of Millburn, 127 N.J.Super. 155, 316 A.2d 708 (1974); Pied Piper Ice Cream, Inc. v. Essex County Park Commission, 132 N.J.Super. 480, 334 A.2d 337 (1975). Moreover, courts have consistently found bidding statutes applicable, even though, technically, the requirements of the statute were not met, where examination of the entire transaction in question revealed the statute had simply been circumvented. Mayes Printing Co. v. Flowers, (Fla.), 154 So.2d 859, 863 (1963) [invoices for purchases 'may not be split and the statute thus avoided']; Menzl v. City of Milwaukee, (Wis.), 145 N.W.2d 198 (1966) [bidding statute cannot be avoided by dividing the work so that each individual contract falls below the amount required under the statute]; S.H. Roemer Co. v. Bd. of Chosen Freeholders of Camden Co., 91 N.J.Sup. 336, 220 A.2d 211, 215 (1966) [all of the individual contracts were for 'the same immediate purpose and [thus] public bids were required.']; Armco Drainage and Metal Products Inc. v. Co. of Pinellas, (Fla.), 137 So.2d 234 (1966) [court goes behind the individual transactions and concludes that all three are part of the same]. In each of these cases, either the work performed in essence was being done for the benefit of the public body and its costs simply passed along to others; or the public body in reality exercised control over the selection of the contractor or the price he charged; or public officials simply attempted to do indirectly what the statute prohibited them from doing directly, without competitive bidding. In all of these cases, the courts would not permit a literal reading of the procurement statutes to defeat the remedial nature of the act in question. And, in every instance, the Court recognized in principle that the public bidding statute must be construed with 'sole reference to the public good and rigidly adhered to by the court to guard against favoritism, improvidence, extravagance and corruption.' Kurman, 304 A.2d, supra at 771.

***6** In McKim, for example, the City of South Orange granted a license to a single garbage collector, selected by the city's trustees. The city expended no funds whatever, but simply passed the costs along to individual householders. The Court recognized that if the city had contracted directly, competitive bidding would have been required. The court noted that the evils attendant upon an award without open bidding are not less under license than under direct contract. Said the Court,

Splitting the total cost among the property-users by a system that leaves them no choice but to incur and pay the expense does not alter the fact that in essence an award of public work at a price of many thousands of dollars is being made to a private contractor without competition in in bidding . . .. The governing body has simply entered upon this course as a solution of the disposal problem.

44 A.2d, supra at 786.

Likewise, in Kurman, the city contracted with a local garage for the removal from its streets of stolen and abandoned vehicles. The city allowed the garage to make a profit for removal, and excess monies were to become the property of the city. New Jersey law required that every government contract where public monies in excess of $2,500 were expended required competitive bidding. The city argued that since it expended no money, but instead would receive money, the statute was inapplicable. The Court disagreed, stating:

Rather than do the work itself, Newark has elected to contract for the performance of the same . . .. Simply because Newark by virtue of the proposed contract is passing the charge on to the owner, does not alter the basic fact that the work is being performed for Newark by the contractor, [emphasis added]

304 A.2d, supra at 771.

In Schnell, supra the same conclusion was reached, under similar circumstances. The Court, there observed:

If a contractor performed a function within the police power of a municipality, it is immaterial that the public will bear the expense directly; the particular arrangement does not alter the basic fact that the work is being performed for the municipality.

316 A.2d, supra at 710. Then, in Pied Piper, supra, the Court concluded that 'police power' included those measures within the 'public convenience' and was not confined to public health, safety and morals.

The court again held a competitive bidding statute applicable in Yohe v. City of Lower Burrell, supra, even though the service offered, garbage collection, was to be paid for directly by citizens rather than from the city treasury. In Yohe, the statute in question applied only to 'the . . . amount which the city pays.' (emphasis added). There, the court stated that '[i]t would be ironic indeed to construe a section so obviously intended to prevent circumvention of bidding requirements in a manner which would encourage such evasion.' 208 A.2d, supra at 849.

In the Lill case, supra, the Court noted:
***7** Patently, where public officials have the determinative voice in the selection of an exclusive contractor and/or the price which he is to charge, there exists the milieu for favoritism and corruption whether the consideration is paid by the governmental entity or the members of the public who are part of that entity. In such a setting the insistence upon competitive bidding is wholly in accord with the purpose and philosophy underlying the rigid legislative requirements. 361 A.2d, supra at 90. The public officials must be in a 'neutral position with respect to' the decision-making function, in order for the procurement statute to be deemed inapplicable. Id.

Finally, the case, In the Matter of Signacon Controls, Inc. v. Mulroy, supra is particularly instructive. There, a corporation offered free of charge to supply the county with a central control console worth $35,000 for fire protection. In return, the corporation would be allowed to charge up to $675 override cost on each transmitter sold to a non-county purchaser and the county would assist in promoting the sales. At the point the corporation recouped its costs for the console given the county, title to the console would vest in the county.

First, it was argued that the transaction represented merely a conditional gift to the county. But the New York Court of Appeals rejected the argument, noted there was indeed 'a distinct material consideration.'
The county wanted a county-wide fire protection system, in return for which it was willing to help Interstate make a profit by helping it sell transmitters.

298 N.E.2d supra at 671. Next, the relevant competitive bidding statute was examined; it required an actual expenditure of funds by the governing body. The Court of Appeals examined the transaction in its entirety, concluding that '. . . no matter how one views this agreement, it is still a public contract given to a private contractor without competitive bidding.' Continuing, the Court stated:
To exempt this type of agreement from the competitive bidding requirements of Section 103 . . . would allow public officials to do indirectly what they cannot do directly. Such an exemption would make it quite simple for most sellers and public officials, who wish to avoid the statute's requirement to adopt an 'arrangement' whereby the governmental unit would pay no money but would be used as a rental or percentage conduit through which a seller could make large profits without having to subject his wares and price to the salutary effect of competitive bidding.

298 N.E.2d, supra at 673.

We regard the motives of Clemson University officials in considering this venture to be nothing but the highest and most proper. However, as has been shown, good faith is not the determining factor in the Procurement Code's applicability. Thus, we believe that based upon the foregoing cases, a court would most probably conclude that the Consolidated Procurement Code applies

to the construction work and development proposed, at least as it has been presented to us. While it is true that Clemson will likely not expend any funds in the venture (although under certain circumstances it may), we note the following conclusions are inescapable, based upon the facts submitted. It is apparent that Clemson is intimately involved in this entire project from start to finish; that Clemson will be expected and expects to give its final approval before the project proceeds; that the single reason Clemson is allowing others the long term use and enjoyment of its property and name, as well as permitting others to profit from such use and enjoyment is that it expects that property to be fully developed and the Strom Thurmond Institute to be constructed to house the papers of Senator Thurmond; [1] and that the basic facts here reveal that the proposed work will be performed by the developer for the benefit of Clemson.

***8** It appears that here, Clemson is simply passing along the actual costs of the development to the foundation and therefore to the public at large; through donations to the foundation, as well as the purchase and lease of townhomes and condominiums, the cost of development will be met. While it might be argued that this is simply a gift to Clemson, it is evident that Clemson is willing to expend the use of its property, its name and the time and resources of its staff, so that the development may come to fruition. Importantly, Clemson is granting the exclusive right to develop its campus and the corresponding right to profit thereon. While it could be argued that Clemson is being compensated through lease payments, we believe that the lease cannot be viewed in a vacuum, since it is clear that the lease is simply the first step in the overall proposal; indeed, the expected return to Clemson is far greater than the market value of the land through any lease agreement.

Although, we have found no case with precisely the same set of facts as these, certainly those cases cited above are analogous to this situation and we believe a court would find them persuasive in concluding that the Procurement Code governs. We believe the New York Court of Appeals language in the Signacon case particularly pertinent here. '[N]o matter how one views this agreement, it is still a public contract given to a private contractor . . ..' 298 N.E.2d, supra at 673. Accordingly, we believe a court would likely determine that the requirements of the Consolidated Procurement Code are applicable to the proposal presented to us.

With kindest regards, I am
Sincerely yours,

T. Travis Medlock
Attorney General

Footnotes

1 It is noted further that in two places, § 11–35–310(7) and § 11–35–2910(2), 'construction' is defined in the Procurement Code as including 'public improvements of any kind to any public real property.' Section 11–35–3020(1) provides competitive sealed bidding is required for '[a]ll state construction contracts.' It could be argued that a contract to build structures on Clemson property, which structures will eventually belong to Clemson, is a contract for state construction, even in view of the applicability requirements contained in § 11–35–40(2). It is difficult to conceive that the General Assembly intended to permits sole-source procurements for state construction merely because a lease and a temporary financing arrangement would place title in private parties for a time. In addition, § 11–35–830 provides that '[a]ll procurements involving construction . . . shall be conducted in accordance with regulations promulgated by the board . . .. This provision does not treat privately-financed construction of permanent improvements on State property any differently from projects financed initially by the State.

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