

1984 WL 249923 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

July 9, 1984

\*1 Honorable Moses H. Clarkson  
Chairman  
Board of Health and Environmental Control  
c/o M. H. Clarkson Co., Inc.  
1122 Lady Street  
Suite 910  
Columbia, South Carolina 29201

Dear Mr. Clarkson:

You have inquired of this Office whether [§ 11-35-5230, of the South Carolina Code](#) of Laws, 1976 (1983 Cum.Supp.) contemplates that certain contracts be 'negotiated' instead of let through the competitive bid process generally described at § 11-35-1520 of the amended Code. We conclude that contracts identified by the Budget and Control Board in accordance with its regulations and determined to be appropriate for negotiation should be let by negotiation as distinguished from competitive sealed bidding.

[Section 11-35-5230](#) provides that certain contracts which are designated by identifiable criteria prescribed by regulations of the Budget and Control Board may be negotiated with certified South Carolina-based minority firms as those terms are defined by subarticle 3 of Article 21, Chapter 35, Title 11 of the South Carolina Code of Laws of 1976 (1983 Cum.Supp.). The cardinal rule in the interpretation of a statutory provision is to identify and ascertain the intent of the General Assembly and construe the provision to effectuate that intent. [Merchants Mutual Insurance Co. v. S.C. Second Injury Fund](#), 277 S.C. 604, 291 S.E.2d 667 (1982). The term 'negotiate' as used in the contractual sense has a generally accepted, technical meaning. This meaning, being consistent with the purposes of [§ 11-35-5230](#) and the Procurement Code should be adopted as the controlling interpretation of this provision. [Purdy v. Moise](#), 223 S.C. 298, 75 S.E.2d 605 (1953). The term "negotiate" is generally used in connection with the consummation of business transactions, and in this sense the term is defined as meaning to procure or arrange for by negotiation; . . . ' 65A C.J.S. 'Negotiate.' Additionally, 'negotiation' is a process of submission and consideration of offers until an acceptable offer is made and accepted. 66 C.J.S. 'Negotiation.' The terms 'negotiate' and 'negotiation' generally imply a discussion of terms, a bargaining, and the consummation of business matters. [Nichols v. Pendley](#), 331 S.W.2d 673 (Mo.App. 1960). And with particular relation to competitive sealed bidding, it has been held that 'a negotiated contract is one in which the contractor is chosen on a non-bid basis. . . ' [Kayell Development Co. v. Carney](#), 480 P.2d 857, 859 (Colo.Ct.App. 1970).

Moreover, the use of the term 'negotiate' within other parts of the Procurement Code likewise indicates an intent on the part of the General Assembly to use this term in its ordinary, technical sense. See, e.g., §§ 11-35-1540 and 11-35-3220(7). These provisions most clearly demonstrate that the General Assembly did not contemplate that 'negotiate' and 'competitive sealed bidding' were to be used interchangeably.

As further support of this conclusion, the American Bar Association's Coordinating Committee on a Model Procurement Code (6/25/76) which provided the basis for the South Carolina Code, defines 'negotiation' and 'negotiate' in a manner distinct from competitive bidding. See, § 1-107 of the Model Procurement Code. The Model Act prescribes, in addition, a distinct procedure for entering into contracts by 'negotiation' which may be compared and distinguished from the procedure for entering into contracts by competitive bidding. See, § 2-105 of the Model Procurement Code. Thus, we conclude that the General Assembly

intended that those contracts designated as appropriate pursuant to § 11-35-5230 are to be let by competitive negotiation<sup>1</sup> rather than competitive sealed bidding.<sup>2</sup>

\*2 With best wishes,

Very truly yours,

Edwin E. Evans

Senior Assistant Attorney General

Footnotes

<sup>1</sup> Section 11-35-5230 requires, inter alia, that the negotiated price be fair and reasonable, and competitive.

<sup>2</sup> We note that this conclusion is consistent with that reached in the letter from Barbara McMillan, then Director of the Contracts and Audit Management Division of the Budget and Control Board, to Johnny D. Dowd of your agency dated August 24, 1982.

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