

1983 S.C. Op. Atty. Gen. 147 (S.C.A.G.), 1983 S.C. Op. Atty. Gen. No. 83-89, 1983 WL 142758

Office of the Attorney General

State of South Carolina

Opinion No. 83-89

November 15, 1983

***1 Re: Binding Effect of Multi-Year Contracts Upon Counties**

Peter D. Hyman, Esquire
Hyman, Morgan, Brown, Jeffords, Rushton & Fallon
Post Office Box 1770
Florence, South Carolina 29503

Dear Mr. Hyman:

By your letter of August 9, 1983, you have asked whether contracts executed by County Council and agencies of the county for terms in excess of one year would be binding upon the county inasmuch as appropriations are made by County Council annually, for a period of up to one year. Based on the following discussion, it is the opinion of the Attorney General that contracts executed for terms in excess of one year will be binding; however, the contract should contain a proviso to the effect that the contract is subject to cancellation if funds are not appropriated or otherwise made available for the contract after the first year.

With the exception of the South Carolina Consolidated Procurement [Code, Section 11-35-10](#), *et seq.*, Code of Laws of South Carolina (1982 Cum. Supp.), the constitutional and statutory provisions pertaining to state and county fiscal matters specify annual acts by the appropriate legislative bodies. For example, Article X, § 7 specifies that counties, as political subdivisions, shall prepare and maintain annual budgets. Section 4-9-140 further mandates that counties are to adopt annually and prior to the beginning of the fiscal year operating and capital budgets for the operation of county government. Levying taxes on an annual basis is also provided for in the two sections cited above. The county is also given the power by Section 4-9-30(5) to, *inter alia*, levy taxes and make appropriations for functions and operations of the county and by Section 4-9-30(3) to make and execute contracts, though no time periods are specified in the latter two Code sections.

The South Carolina Consolidated Procurement Code, applicable to State contracts for services, supplies, and construction, is evidence of the legislature's intent that contracts executed for multi-year terms be valid, with a proviso that payment and performance obligations for succeeding fiscal years are subject to the availability and appropriation of funds for the contract.¹

The State Procurement Code is not applicable to political subdivisions such as a county, leaving the adoption of a procurement code to the political subdivision. Pursuant to Section 11-35-50, a task force appointed by the Budget and Control Board drafted a Model Procurement Ordinance to be used as a guideline for counties or other political subdivisions in adopting their procurement codes. Section 3-4-2 of the model ordinance contains language very similar to Section 11-35-2030 of the State Code, concerning multi-year contracts:

(1) Specified Period. A contract for supplies or services may be entered into for a period of time not to exceed five (5) years, provided the term of the contract and the conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor.

***2 (2) Determination Prior to Use**. Prior to the utilization of a multi-term contract, it shall be determined in writing:

(a) that estimated requirements cover the period of the contract and are reasonably firm and continuing; and

(b) that such a contract will serve the best interest of the (_____) by encouraging effective competition or otherwise promoting economies in (_____) procurement.

(3) **Cancellation Due to Unavailability of Funds in Succeeding Fiscal Periods.** All multi-term contracts shall contain a clause stating that when funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be cancelled.

By utilizing the model ordinance or adopting an ordinance containing substantially similar provisions, the county could enter into binding multi-year contracts. The county should be protected by the inclusion of a provision within the contract subjecting the contract's continuance to the availability and appropriation of funds in succeeding years.

Enclosed please find a prior opinion of this Office dated February 22, 1982, which concludes that an agency of the State cannot bind the State over a multi-year period unless there is a valid appropriation according to [Article X, § 8 of the Constitution of South Carolina](#). The same principle is analogous to counties. See, [Grimball v. Beattie](#), 174 S.C. 422, 177 S.E. 668 (1934) and other cases cited in that opinion.

I trust that the above discussion has answered your question concerning the binding effect of multi-year contracts on Florence County Council. Please contact me if further clarification is needed.

Sincerely,

Patricia D. Petway
Staff Attorney

Footnotes

¹ Section 11–35–2030 provides:

(1) Specified Period. Unless otherwise provided by law, a contract for supplies or services shall not be entered into for any period of more than one year unless approved in a manner prescribed by regulation of the board; provided, that the term of the contract and conditions of renewal or extension, if any, are included in the solicitation and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods shall be subject to the availability and appropriation of funds therefor.

(2) Determination Prior to Use. Prior to the utilization of a multi-term contract, it shall be determined in writing by the appropriate governmental body:

(a) that estimated requirements cover the period of the contract and are reasonably firm and continuing;

(b) that such a contract will serve the best interests of the State by encouraging effective competition or otherwise promoting economies in state procurement.

(3) Cancellation Due to Unavailability of Funds in Succeeding Fiscal Periods. When funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be cancelled.

See also Regulation 14 –445.2135 (Volume 23 of the Code of Laws of South Carolina, 1976) for conditions for use of multi-term contracts at the state level.

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