

1981 S.C. Op. Atty. Gen. 78 (S.C.A.G.), 1981 S.C. Op. Atty. Gen. No. 81-52, 1981 WL 96578

Office of the Attorney General

State of South Carolina

Opinion No. 81-52

June 8, 1981

***1 SUBJECT: Regulations; Administrative Procedures Act; Contract Provisions; Standard Specifications for Highway Construction.**

Contract provisions, such as those found in the Standard Specifications for Highway Construction, are not regulations within the meaning of [Code Section 1-23-10\(4\)](#) and therefore do not have to undergo public or legislative scrutiny pursuant to the Administrative Procedures Act.

To: Member
House of Representatives

QUESTION:

Whether the SCDHPT has violated the Administrative Procedures Act in modifying its bid proposal documents by a May 17, 1981 amendment to its Standard Specifications for Highway Construction concerning the Deferral and Cancellation of Contracts?

OPINION:

You have requested an opinion as to whether the South Carolina Department of Highways and Public Transportation has violated the Administrative Procedures Act in modifying its bid proposal documents with its May 27, 1981 Addendum to Special Provisions covering Deferral and Cancellation of Contracts. A brief review of the facts is necessary to answer your inquiry.

The Department has recently submitted to the General Assembly regulations disqualifying contractors from bidding if they are convicted of bidding crimes. As you know, the Department has proposed to disqualify contractors from the basis of indictments but upon receiving objections from the House Judiciary Committee and the Senate Transportation Committee, that portion of the regulations was modified and resubmitted to the General Assembly. Thereafter, the House and Senate failed to either disapprove or approve the regulations, and they became effective on May 8, 1981, pursuant to the Administrative Procedures Act. The regulations now in effect provide:

‘An indictment of any contractor . . . shall not be the sole grounds for the Department to find that a contractor has violated any contract provisions, pursuant to these regulations.’ [Reg. 63-309\(h\)](#).

On May 27, 1981, the Department modified its Standard Specifications for Highway Construction (Ed., 1973) by an addendum to its special provisions in the standard bid proposal form. The changes reserve to the Department the right to defer the award and execution of a contract to a low bidder who is under indictment until the criminal charges are resolved; allow an indicted low bidder to withdraw its bid proposal without forfeiture of its proposal guarantee; and permit the Department to terminate the contract upon conviction of the contractor. The question is whether the amendment of the Department's bid proposal is the promulgation of a regulation within the meaning of the Administrative Procedures Act and, therefore, subject to public hearing and legislative scrutiny before it can become effective.

[Code of Laws of South Carolina Section 1-23-10\(4\)](#) (Administrative Procedures Act) defines a regulation as ‘each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency . . .’ The Standard Specifications For Highway Construction (Ed. 1973) include definition of terms, bidding procedures, allocation of duties between the contractor and the State, payment terms, technical information concerning construction methods and techniques and details touching all aspects of highway construction work for which the Department might contract. The Addendum of May 27, 1981, modified and supplemented those Standard Specifications. Relevant portions of the specifications are routinely incorporated by reference in the Department construction contracts. [L-J, Inc. vs. SCSHD](#), 242 S.E.2d 656 (1978). The process of incorporation avoids the necessity of reproducing the highly detailed information in every separate contract and enables prospective bidders to know in advance the bid requirements and construction specifications which will apply if they did upon a State highway construction project.

*2 The United States Supreme Court has stated that the government has the right to determine with whom it will deal. [Perkins vs. Luken Steel](#), 310 U.S. 113 (1940). Accordingly, the government may withhold the award of government services from any company for violation of federal statutes to protect the integrity of the particular governmental process. [West vs. Bergland](#), 611 F.2d 710 (8th Cir. 1970); [Gonzales vs. Freeman](#), 334 F.2d 570, 574 (D.C. Cir. 1964); [Trap Rock Industries, Inc. vs. Kohl](#), 59 N.J. 471, cert. denied 405 U.S. 1065 (1972) (Trap Rock I). [Code of Laws of South Carolina Sections 57-3-620](#) authorizes the Department to enter into such contracts as may be necessary for the proper discharge of its functions and duties. The right to contract includes the right to agree upon designated terms. [City of Glendale vs. Chapman](#), 108 Cal. App. 2d 74, 238 P.2d 162 (1952).

The question as to whether the Standard Specifications are regulations has been determined in other jurisdictions. [Greenfield Construction Company, Inc. vs. Michigan Department of State Highways](#), 402 Mich. 172, 261 NW2d 718 (1978) (Greenfield II); [Greenfield Construction Company, Inc. vs. Michigan Department of State Highways](#), 58 Mich. App. 49; 227 N.W.2d 223 (1975) (Greenfield I); [Williams vs. Tillet Brothers Construction Co., Inc.](#), 319 F.2d 300 (1963). In the Michigan cases cited above, the definition of the term regulation was almost identical to that found in [Code Section 1-23-10\(4\)](#) and the court held that the provisions of the Standard Specifications were not regulations within the meaning of the Administrative Procedures Act. In [Greenfield I](#), it was noted that the specifications lack legal significance until they are incorporated into a contract upon receipt and acceptance of the bidder's offer contained in its bid proposal form. The Administrative Procedures Act is clearly concerned with those regulations which upon promulgation have the force and effect of law. See [Code Sections 1-23-40\(4\), 1-23-40\(1\), 1-23-60, and 1-23-610](#). Similarly, the Federal Court in Tennessee found that the specifications were not administrative regulations, the violation of which would constitute negligence *per se*. [Williams vs. Tillet Brothers Construction](#).

Based on the foregoing analysis, it is the opinion of this office that contract provisions, such as those in question here, are not regulations within the meaning of [Code Section 1-23-10\(4\)](#) and therefore do not have to undergo public or legislative scrutiny pursuant to the Administrative Procedures Act. Any prospective bidder who does not wish to be bound by any of the special provisions may simply decide not to bid on contracts containing those provisions.

You have also questioned whether the Department is attempting to do indirectly that which the General Assembly has said it cannot do directly. The Department did attempt to disqualify and remove indicted contractors from its list of prequalified bidders. In its present action, the Department is not precluding the privilege of those contractors to bid but is only ensuring that the public interest is protected by reserving to itself the discretionary right to delay the award of a contract to those bidders under indictment until the criminal charges have been resolved. The objections raised by the House and Senate Committees were primarily based on a contractor's right of a presumption of innocence. These contract provisions preserve that presumption.

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