

1981 WL 158021 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

October 21, 1981

*1 Mr. George L. Schroeder
Director
Legislative Audit Council
620 Bankers Trust Tower
Columbia, South Carolina 29201

Dear Mr. Schroeder:

This is in response to your opinion request of September 17, 1981, wherein you asked the following questions regarding the Management Agreement between the South Carolina Ports Authority (Authority) and the South Carolina Farm Bureau Marketing Association (Association):

1. Does Article IV(B) of the Management Agreement unequivocally obligate the Association to an expenditure of \$2,000,000.00 to improve the equipment and facilities in a manner that will improve the capabilities of the grain elevator and increase the through-put capacity during the terms of the agreement?
2. Would Articles II and IV(B) of the Agreement provide that an additional \$2,000,000.00 or more be spent for improvements if the Association renews or extends the present lease for an additional fifteen years following the initial six year term?
3. What does Article IV(B) mean in requiring the Association to '... make such improvements and adaptations as are necessary to keep the equipment suitable for use in the then current trade ...?' Would this require that at the termination of the Management Agreement that the grain elevator and storage facilities be up to the state-of-the art technology at that time or that they be maintained and in a satisfactory operation condition as indicated in Article VI?

In answer to your first question, when words of a contract are clear and unambiguous, the intention expressed and indicated thereby controls. 17 Am.Jur.2d 'Contracts' § 241, [Hartford Accident and Indemnity Co. v. Hood](#), 266 N.C. 706, 40 S.E.2d 198. Article IV(B) obligates the Association to 'spend a substantial amount (approximately two million dollars [\$2,000,000.00]) to improve the equipment and facilities in a manner that will improve the capabilities of the grain elevator and increase the through-put capacity during the term of this Agreement.' The ambiguous term 'substantial amount' is rendered unambiguous by the parenthetical definition 'approximately two million dollars.' The Agreement contains no language which would limit, qualify, or otherwise reduce or excuse the expenditure of this amount during the term of the Agreement. Therefore, it is the opinion of this office that the Association is unequivocally bound by the terms of the Management Agreement to expend approximately two million dollars during the term of the Agreement to improve the equipment and facilities in such a manner that will improve the capabilities of the grain elevator and increase the through-put capacity thereof.

Your second question is answered in much the same way as your first, as the terms of the Agreement regarding contract period and renewal option are clear and unambiguous. Article II states that the lease period shall run for a period of six years and grants the Association an option to renew or extend the lease 'on the same terms and conditions' for an additional period of fifteen years. If the Association chooses to exercise its option at the termination of the present contract term, it must thereby accept and effectuate the identical terms of the original Agreement, including the requirement for expenditures found in Article IV(B). It is the opinion of this office that the Association would be bound to spend an additional two million dollars over the term of the extension consistent with the terms of Article IV(B) in the event that the Association exercises the option available to it under Article II.

*2 In answer to your final question, the intention of the parties to a contract is to be gathered from the whole scope and effect of the language used in the contract. [Greenwood Manufacturing Co. v. Worley](#), 222 S.C. 156, 71 S.E.2d 889 (1952). In order to accomplish this with the matter at hand, it is necessary to reconcile or explain the apparent differences in the wording of Articles IV(B) and VI with respect to maintenance of equipment and facilities.

Article VI deals with routine maintenance and further requires the Association to surrender the equipment and facilities at the end of the term in 'operating condition.' Article IV(B), as stated above, deals with maintaining and improving the equipment and facilities in such a manner as to keep them suitable for use in the 'then current trade.'

Article IV(B) protects the authority against the functional obsolescence of its equipment and facilities by imposing a spending requirement upon the Association for improvements in capability and through-put capacity. Functional obsolescence is 'the loss in value which occurs within a structure as a result of its inability to perform adequately the function for which it should be used.' [Real Property Appraiser's Handbook](#), U.S. Army Corps of Engineers, October, 1955. For example, if changes in the size or configuration of the grain vessels over the term of this agreement were to make it difficult or impossible to load them at the Authority's facility, Article IV(B) contemplates modifications or other improvements in the equipment and facilities at the expense of the Association to render the facility capable of operating in the 'current trade.'

Article VI protects the Authority from premature depreciation of facilities and equipment because of neglect or lack of maintenance. It places the duty of routine maintenance squarely upon the Association and further requires the facilities and equipment to be surrendered at the end of the lease term in 'operating condition.'

The problem to be inferred from your third question is whether or not there is a possibility under this Management Agreement that the facilities and equipment could at some future time be surrendered which are technically in working order, but are not suitable for use in the 'then current trade.' The answer to this problem is found by adhering to the requirement of considering the entire scope and effect of the contract. Articles IV(B) and VI, read together protect against two separate problems and are, therefore, not inconsistent. It is the opinion of this office that these two Articles, read together, require that upon termination of the agreement, the Association must surrender the equipment and facilities to the Authority in proper working order and in such a condition that they are suitable for use in the 'then current trade,' which is defined as not being functionally obsolete.

I trust that this has satisfactorily answered your questions. If not, please feel free to call at your convenience.

Sincerely,

*3 Clifford O. Koon, Jr.
Assistant Attorney General

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