

1980 WL 121038 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

March 13, 1980

**\*1 Re: Procurement of Construction Management Services**

John A. McPherson  
Chief Engineer  
State Auditor's Office  
207 Wade Hampton Office Building  
Post Office Box 11333  
Columbia, South Carolina 29211

Dear Mr. McPherson:

You have recently contacted this Office requesting an opinion on the following issues:

1. Should the State utilize the services of a construction manager on public projects?
2. Must the services of a construction manager be sought by advertisement in a newspaper of general circulation?
3. If such services are sought, how should the selection of a construction manager be accomplished?

Section 10-5-30 of the South Carolina Code of Laws (1976) requires that a description of a proposed project and the required services shall be developed and published at least once in one or more newspapers of general circulation throughout the State along with a request for the submission of a resume of qualifications by architectural or engineering firms interested in the proposed project. Section 1-1-440 of the South Carolina Code of Laws (1976) states that notwithstanding any other provision of law, all State agencies and departments before contracting for fifteen hundred (\$1,500.00) dollars or more with private individuals or companies for products or services, shall invite bids on such contracts from at least three qualified sources. This statute, however, does contain the proviso that the provisions of this section shall not apply to professional services where the person employed is customarily employed on a fee basis rather than by competitive bidding. Section 10-1-80 of the South Carolina Code of Laws (1976) requires competitive bidding on the construction of any public building costing more than thirty thousand (\$30,000.00) dollars subsequent to advertisement in a newspaper of general circulation in the State on three occasions. These bids are required to be opened in public with the award going by law to the lowest responsible bidder.

The term construction management is a term without definitive meaning. Generally the term connotes the utilization of numerous separate prime contractors rather than one general prime contractor and numerous subcontractors during the construction phase of a building project. Construction management gained popularity when in the early 1970's the General Services Administration of the Federal government began to use phased construction or fast track construction which requires great coordination of those engaged in the phased project throughout the design and construction of that project. At the present time the General Services Administration no longer uses construction management and has announced that it does not consider construction management a viable method for the construction of Federal building projects. Albert R. Marshall, Commissioner of the General Services Administration's Public Building Service has stated, 'There is no substitute for lump sum, competitive bid contracting and best of all is a single contract.'

**\*2** On March 6, 1978, the American Consulting Engineers Council, the American Institute of Architects, and the Associated General Contractors of America met in joint conference and issued a joint statement on construction management. In that

statement it was asserted that neither architects, engineers, or contractors should take any action which would in effect reserve construction management to themselves.

The Carolina Branch of the Associated General Contractors of America, Inc. has stated in its Bulletin of January 10, 1980, that it does not ‘. . . except under unusual circumstances, endorse the use of the construction management concept of contracting for publicly funded projects and maintains its long standing policy that the public interest is best served by the competitive bid, single contract type of contracting method.’

While there is no prohibition against the use of construction management in public projects, it should be considered in light of the individual circumstance of each project for which it is to be considered. The complexity of the project, the need for speedy construction, and the cost of the proposed project should be given due consideration.

Further, in the opinion of this Office, if a State agency should decide that circumstance warrants the use of a construction manager on a public project, then those services should be the subject of advertisement and invitation to bid pursuant to Section 1-1-440. In view of the duties of the construction manager as coordinator, inspector, and general overseer of project construction this appears mandatory. Further, it is the recommendation of this Office that:

1. A written definitive statement of the criteria used in the selection of a construction manager should be promulgated.
  2. When it is determined that a proposed project requires the use of a construction manager the specific services sought in that regard should be advertised for at least once in a newspaper of general circulation in the State.
  3. Pursuant to advertisement, the submission of resumes should be required as to the qualifications of those replying in response to the advertisement for construction management services.
  4. The agency seeking construction management services should consider the previous experience in construction management of those firms submitting resumes and bids together with their ability to furnish qualified personnel, familiarity with the management of the construction of the type of project to be built, the past record on timely completion of projects managed, knowledge of local conditions, and current work load. Additional consideration should be given to the ability of the firm to act impartially with respect to design and construction of the proposed project.
  5. Following review of the responses and resumes, the agency should select at least three firms which in their judgment are most qualified. These firms should then be listed in order of qualification.
- \*3** 6. Then, pursuant to Section 1-1-440, the agency should invite bids for the construction management services derived on such proposed public project from at least three of the qualified firms or individuals compiled as outlined above.

Finally, I would point out that care should be taken to insure that the architect, the engineer, the contractor or contractors, and the construction manager are all separate and distinct entities. While the AIA has removed its ethical prohibition against an architect acting as a contractor or construction manager on a project that he designs, the possibility of conflict of interest is inherent. Federal regulation proposed in 1978 does not prohibit the design architect from providing construction management services but does prohibit the design architect from receiving construction contracts and subcontracts in an attempt to lessen the possibility of conflict. This, of course, applied to the contractor as well. On February 8, 1979, the Indiana Senate passed and sent to the House a bill permitting State or local government entities to hire a ‘project consultant’ to manage, coordinate, and supervise the work of trades contractors working on public projects. However, the proposed bill prohibited the project consultant from being affiliated with or under the control of any architect or engineer who has a contract to perform any design services for the project. This bill was also an attempt to alleviate the possibility for conflicts of interests.

The construction manager is viewed by law as the agent of the owner as is the architect and engineer. If the architect detects an error in the construction due to construction manager then he is under a duty to warn the owner. If the construction manager detects a design error, etc. by the architect it would be his duty to report that finding to the owner. Where the architect and the construction manager are one and the same the danger of a conflict between the interests of the owner and the well-being of the architect/construction manager becomes too great. The same is of course true where the construction manager and a prime contractor or a subcontractor are one and the same. If the construction manager is deriving benefit and compensation from the owner and also from his participation in the construction of the project itself, the possible conflict between self-interest and the interest of the owner must be given grave consideration, especially in the public sector.

In conclusion, the State may utilize construction management services where it is determined by the agency seeking such services and the Budget and Control Board that circumstance warrants construction management as the project in question. These services' should be sought by public advertisement and the selection of a construction manager should be made according to the procedures outlined above. Appropriate legislation, rules and regulations or directives from the Budget and Control Board may be justified to establish guidelines and policy in the complex field of construction management. This letter is not intended as a formal opinion, but as a broad overview of construction management as it relates to state-funded projects. It should not be construed as dictating the preferred State policy as to construction management. Apart from legal questions addressed herein and in a separate formal opinion, we would suggest a complete review and revision of the existing AIA contracts as used heretofore on State-funded projects, as well as a study to determine the best type of contract to be utilized in construction management projects. It might be advisable to seek independent consultation in reviewing our contracts to maximize State interests. Our Office will be happy to further discuss construction management problems with you upon request.

Sincerely,

**\*4** Judith Evans Finuf  
Assistant Attorney General

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