

1980 WL 120724 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

June 18, 1980

\*1 H. R. Caughman, Jr.  
Deputy State Highway Engineer  
S. C. Department of Highways and Public Transportation  
Post Office Box 191  
Columbia, South Carolina 29202

Dear Mr. Caughman:

You have asked for advise concerning two questions which have been raised because of Minority Business Enterprise regulations promulgated by the United States Department of Transportation. The first question asks whether the Department, under existing State law, could award a contract to a bidder other than the lowest-qualified bidder? The second question was whether the Department, under existing State law, could restrict the bids received on a proposed project to those submitted by Minority Business Enterprise contractors only?

[Code of Laws of South Carolina § 57-5-1620](#) requires that awards by the Department of construction contracts for \$10,000 and more shall be made only after the work to be awarded has been advertised, and the award shall be made in each case to the lowest qualified bidder. The requirements of the statute are mandatory in nature. [Pennell & Harley, Inc. vs. Hearon, et al., 189 S.C. 16, 168 S.E. 188 \(1933\)](#). Since the language of the statute is clear as to the intent of the General Assembly, it is the opinion of this office that the Department may not award a contract to a bidder other than the lowest qualified bidder.

The second question posed anticipates that the Department would construe its bidder qualification requirements to allow only Minority Business Enterprise contractors to submit bids on a particular project. [Code of Laws of South Carolina § 57-5-1650](#), authorizes the Department to establish such reasonable regulations as the Department may deem appropriate with respect to the qualifications of contractors allowed to bid on work of the Department. (emphasis added). It is a well-known rule of statutory construction that any regulations promulgated by the Department must be within the terms of the statute, and must be rationally related to the purposes and goals of the statute. The second sentence of that statute defines the parameters of the type of regulations which may be promulgated by the Department on this subject. It provides: 'Such regulations may fix eligibility requirements for bidders according to available capital, and with due regard to experience and records of past performance. A pre-qualification requirement, based on the factors of either race or sex, in the opinion of this office is not rationally related to the factors of available capital, experience or records of past performance as required by the General Assembly of South Carolina.

In summary, present statutes and regulations governing the Department of Highways and Public Transportation would prohibit the Department from awarding a contract to a bidder other than the lowest qualified bidder, and would prohibit the Department from enacting regulations which attempt to limit qualifications of contractors to eligibility requirements other than those enumerated in the statute. It should also be noted that any changes in this regard would have to be initiated by the General Assembly of South Carolina. Furthermore, assuming that such changes are initiated and approved by that body, any regulations promulgated thereunder would have to be enacted in compliance with the Administrative Procedures Act and its requirements of public hearing and approval by the General Assembly.

\*2 I trust that this information is useful to you.

Very truly yours,

Richard D. Bybee

Assistant Attorney General

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