

1976 WL 30621 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

January 20, 1976

*1 Mrs. Mary D. McDonald
Chairman
South Carolina Department of Social Services
Columbia, South Carolina

Dear Mrs. McDonald:

You have requested my opinion as to whether a proposed contract to be entered between the South Carolina Department of Social Services and Robert B. Carleson & Associates, Inc., must be let on public bids pursuant to the provisions of Section 1-24 of the Code of Laws, as amended in 1974.

The contract is not in being yet, but I assume that it will follow the general tenor of the proposal submitted to Governor Edwards by Carleson & Associates by letter dated December 15, 1975. That proposal is to 'provide consulting assistance to the State of South Carolina in its efforts to improve the administration and services provided by the South Carolina Department of Social Services' by implementing the report 'Welfare in South Carolina.' The effort would be directed in three general areas:

- (1) Management/Organization;
- (2) Welfare Policy/Legal; and
- (3) Data Processing/Systems.

The cost submitted by Carleson & Associates is in the amount of One Hundred Fifty Thousand (\$150,000.00) Dollars, including travel costs.

Section 1-24 requires that 'all State agencies and departments, before contracting for Fifteen Hundred (\$150.00) Dollars or more with private individuals or companies for products or services, shall invite bids on such contract from at least three qualified sources.' A proviso to the statute grants an exemption therefrom in the following terms:

'Provided, however, 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.'

The statute does not require that contracts for products or services in excess of \$1500.00 be awarded to the lowest bidder. It only requires that before entering such contracts, invitations to bid shall be invited from at least three qualified persons. In this respect, it differs from the majority of similar laws of this State pertaining to contracts for public work which almost invariably provide that contracts of this nature be let to the 'lowest bidder' or the 'lowest responsible bidder.' Only a few statutes, generally applicable to specific counties only, omit provisions relating to public advertising and awarding of contracts to the lowest bidder or the lowest responsible bidder.¹ The conclusion seems apparent that where the Legislature has intended that contracts of this nature be awarded to the lowest bidder or the lowest responsible bidder, it has clearly so stated, and that, as in this instance, where the Legislature fails to impose such a restriction, it did not intend that the lowest price be the sole or primary criterion in determining to whom the contract must be awarded.²

I, therefore, conclude that compliance with Section 1-24 is obtained when invitations to bid are invited from at least three qualified sources. This, in my opinion, is what the statute contemplates by use of the term 'competitive bidding' as used in the exemption proviso. As noted, this proviso makes the statute inapplicable to 'professional services where the person is customarily employed on a fee basis rather than by competitive bidding.'

*2 In my opinion, the work contemplated in the Carleson contract constitutes 'professional services.' The following definition seems appropriate to describe that term:

'A 'profession' is a vocation, calling, or employment involving labor, skill, education, special knowledge and compensation or profit, but the labor and skill involved is predominantly mental or intellectual, rather than physical or manual, the education or special knowledge involved is characterized by its use for others as distinguished from self and the profits are dependent mainly upon the personal qualification of the person by whom it is carried on. 34 WORDS AND PHRASES Professional Services at 401 (1957).

It is my opinion that Management Consultant firms throughout the country participate in 'competitive bidding' as that term is used in Section 1-24. The usual practice appears to be for the agency involved to prepare a description of the work to be accomplished by the Specifications and to submit to prospective bidders a 'Request for Proposals.' Persons interested then submit 'Proposals,' setting forth their qualifications and the basis upon which compensation is to be paid. Such a procedure, irrespective of the words used, is, in my opinion, an invitation to bid and a responsive bid thereto as contemplated by Section 1-24.

Responses to the same inquiry made of two national associations of management consultants gave inconsistent answers.

One stated:

'The general practice of a consulting firm is to quote a fee on the basis of time required to do the assignment rather than on a competitive bid basis.'

The other responded:

'Management Consultants in North America bid for client assignments on a competitive basis. This is common practice in this professional field.'

Discussion by telephone with these persons, as well as with a number of local and national consulting firms, leaves no doubt in my mind that they customarily participate in competitive bidding as that term is used in Section 1-24. Accordingly, they do not come within the exemption proviso to Section 1-24.

If the Department of Social Services desires to enter into a contract to provide services, such as are contemplated in the proposal of Mr. Carleson, it should:

- a. Prepare a description of the work it desires accomplished;
- b. Request bids thereon from at least three qualified sources; and
- c. Award the contract to the firm which the Department considers is the most qualified at a compensation determined to be fair and reasonable to the State.

Among the factors which the Department may consider are the ability of professional personnel, past performance, willingness to meet time and budget requirements, location, recent, current and projected workload of the firms and the volume of work

previously awarded to the firm by the agency, with the object of effecting an equitable distribution of contracts among qualified firms without violating, however, the principle of selection of the most highly qualified firms. Your agency may additionally consider such other relevant factors as it may determine applicable.

Very truly yours,

*3 Daniel R. McLeod
Attorney General

Footnotes

- 1 Section 1-466. 'Lowest responsible bidder.'
Section 1-468.5. 'Board of Education must approve contract for construction of buildings financed by it if lowest bid is not accepted.'
Section 1-522. 'Public printing.'
Sections 14-1366.2, 1514, 1516, 1772, 2243, 1332, 2584, 2971, 3467.1.
- 2 64 Am. Jur.2d Public Works and Contracts ¶68
[80 A.L.R. 1386](#)
27 A.L.R.2d 926

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