

1979 WL 43544 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

August 27, 1979

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Dear Mr. Thompson:

Thank you for your letter of August 16, 1979, in which, as attorney for the Cherokee County School Board, you requested an Opinion of this Office as to whether the school district should have advertised for bids on milk purchased for the district.

Three sets of federal laws provide assistance for school lunch program, [42 USCS § 1751](#), *et seq.* and the amendments thereto, special milk programs, [42 USCS § 1772](#), as amended and school breakfast programs, [42 USCS § 1773](#), as amended. The total quantity of milk purchased by a district would receive assistance under all of these programs.

From June 1, 1978, to June 30, 1979, District One of Cherokee County operated under School Food Service Agreements with the Department of Education. These agreements covered the Special Milk Program, and the School Breakfast and Lunch Programs. My understanding is that new agreements are currently under negotiation.

Both the lunch and breakfast agreements impose on the district the duty to purchase food and supplies. These provisions are not contained in the milk agreement but, because this agreement reimburses the school district for the cost of milk, it necessarily implies that the district is the purchaser. This conclusion is supported by the fact that the lunch and breakfast agreements are also reimbursement agreements.

The federal regulations adopted for all of these programs contain similar provisions for procurement. 7 CFR §§ 210.19a, [215.14a](#), [220.16](#). Under these provisions, the state educational agency, here the State Department of Education, must establish procurement procedures which comply with the federal regulations. Because the Department of Education, by agreement, has delegated procurement duties to the Cherokee County School District, the duty to comply with the procurements regulations falls on the district.

Under [§ 215.14a\(j\)](#)¹, '[f]ormal advertising, with adequate purchase description, sealed bids and public openings shall be the required method of procurement unless negotiation pursuant to paragraph (j)(4) of this section is necessary to accomplish sound procurement.' Paragraph (j)(4) states that procurements may be negotiated by the state agency if formal advertising is not practicable or feasible but, even if negotiation is justified, 'competition shall be obtained to the maximum extent practicable.' This paragraph sets out certain conditions which will generally permit negotiation.

One of these factors under paragraph (j)(4) is that the materials are 'highly perishable' or that they are '... material for which prices are established by law.' [§ 215.14a\(j\)\(4\)\(vi\)](#). Because most procurements under part 215 would be of milk, the 'perishable materials' must refer to materials other than milk purchases. As for milk prices, while they are regulated in South Carolina, *see* §§ 39-33-410, 39-33-420 and 39-33-1030 of the Code, Dairy Commission regulations of wholesale

milk prices have been enjoined since March 19, 1979. Order of Judge Paul Moore, March 19, 1979, Parker v. S. C. Dairy Comm., et al. Thus, milk prices were not 'fixed by law' for the purposes of § 215.14a(j)(4)(vi) when bids were received for milk in Cherokee County. More recently, under § 79 of the Appropriations Act, distributors and sub-distributors of milk are expressly allowed to bid for the milk and milk products required by any state, county or municipal agency or institution and the bid is not to be restricted to any minimum price established by the Dairy Commission.

*2 Negotiation is generally permitted under the federal regulations if it is otherwise authorized by applicable federal or state law, rules, or regulations. § 215.14a(j)(4)(vii). Here, no state laws or published rules and regulations authorize negotiation. Although the school lunch agreement requires the district to ' . . . purchase foods, supplies, and equipment at prices no higher than those generally prevailing in the area, and to give preference to foods domestically produced insofar as economically possible,' this clause would not appear to be a sufficient authorization for negotiation under § 215.14(a)(j)(4)(vii).² Moreover, it is not contained in the breakfast and milk agreements and would not be binding on milk purchased under them.

Other conditions permitting negotiation are not applicable here. The aggregate amount of procurement here totaled more than \$10,000.00 § 215.14(a)(j)(4)(iii) and no indication is given that public exigency would not have permitted the delay incident to advertising. § 216.14a(j)(4)(i). All remaining conditions are clearly inapplicable here. § 215.14a(j)(4)(ii), (iv), and (v).

Because no conditions justifying negotiations under the above regulations appear to have been present, the district should have advertised for bids;³ however, the list of conditions-justifying negotiations under § 215.14a(j)(4) does not appear to be exclusive. If, for a sound reason, formal advertising was not 'practicable or feasible,' § 215.14a(j)(4), negotiation might have been permitted but competition should have been 'obtained to the maximum extent practicable.' Id.

In conclusion, unless one of the cited conditions under 7 CFR § 215.14a(j)(4) is present or if, for a sound reason, formal advertising was not or would not be 'practicable or feasible,' advertising should have been and should continue to be the proper mode of soliciting bids for milk purchases for Cherokee County School District 1.

If I can be of further assistance to you, please do not hesitate to contact me.

Yours very truly,

J. Emory Smith
State Attorney

Footnotes

- 1 Reference is made to the special milk regulations, but identical provisions are made for the lunch and breakfast programs.
- 2 Under § 79 of the Appropriations Bill, all fluid milk or fluid milk products purchased with public funds by any state, county or municipal agency or institution must be processed and packaged in the State. Of course, this provision would not have been applicable to a bid accepted prior to the passage of this Act. Its application to future milk purchasers would not prevent bidding but could restrict the class of bidders. No opinion is expressed as to the constitutionality of this provision.
- 3 No applicable South Carolina law requires advertising for bids here. As noted above, § 79 of the Appropriations Bill does allow bidding; however, this provision does not require formal advertising and its primary purpose appears to have been to prevent any restrictions on bidding by the Dairy Commission. Section 1-1-430 of the Code of Laws of South Carolina (1976) requires bidding on certain contracts by 'state agencies and departments' but this provision would not apply to a school district. Also, unless the governing body of the school district has adopted the South Carolina State Budget and Control Board's manual 'Purchasing Policies and Procedures,' the manual would not be applicable here. R 19-19(2) of the Code as amended.

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