

1979 WL 43586 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

September 12, 1979

***1** Mr. H. B. Ross

South Carolina Licensing Board for Constructors

Post Office Box 5737

Columbia, South Carolina 29205

Dear Mr. Ross:

In a letter to this office you asked for an opinion concerning the legality of a school district awarding a contract to a construction management firm without competitive bidding. You stated that a construction management firm has been hired by various school districts throughout the State to oversee construction on various school projects.

I have been informed that typically a construction management firm is hired to manage or oversee a particular construction project with particular emphasis placed on coordinating the subcontractors. For instance, it is their responsibility to control a job and have the various subcontractors scheduled to come in to do the work contracted at the proper time and to make sure that a particular job is completed on time. The subcontractors who do certain jobs, such as the site work, the masonry work, and the painting and finishing work, have separate contracts between themselves and the school district. Contracts to do such work are awarded to these subcontractors by the school district and the construction management firm has no input or responsibility in selecting the subcontractors themselves, but instead oversee the work done by such subcontractors. Typically, there are no further contracts between a subcontractor and a construction management firm. It was indicated to me that construction management firms 'sell themselves' on the concept of their ability to save money and time on a construction project.

In providing a response to your request, your attention is directed to several code sections. As to construction of public buildings generally, Section 10-1-80 of the 1976 Code of Laws states:

'No public building, or addition thereto, constructed from State funds, costing more than thirty thousand dollars shall be constructed in the State unless competitive bids for the contract thereof shall have been advertised in a newspaper of general circulation in the State, at least three times over a period of thirty days. All bids shall be opened at the same time, and a performance bond shall be required from the successful bidder. All proposals shall be opened in public and shall be recorded in the minutes of the board or governing body, and the award shall be made to the lowest responsible bidder, taking into consideration the quality of workmanship, past performance of low bidder and time specified in the proposals for the performance of contract. The right to reject any and all bids shall be reserved.'

As to school buildings financed from State funds generally, [Section 59-21-410 of the 1976 Code](#) of Laws expressly provides the manner in which funds from the State public school building fund may be expended. Such section states:

'Any construction to be financed from funds received from the State public school building fund, pursuant to the approval of the Board, shall be on public contract, such contract to be let by the trustees of the school district, and the awarding of the necessary contracts shall be in the sole province of the school district concerned. Contracts shall be let on public advertisement thereof, and on such conditions and within such limitations as the Board may approve.'

***2** As to any question of which of the above-referenced statutes control as to school construction, [Section 59-21-410](#) takes precedence inasmuch as it directly addresses the matter of school construction. It is a well recognized principle of

statutory construction that a specific statute will prevail over a general statute where both cover the same topic. See [South Carolina Electric & Gas Company, et al. v. South Carolina Public Service Authority](#), 215 S.C. 193, 54 S.E.2d 777 (1949).

Based on the above, it is apparent that as to any contracts for any 'construction' of a public school building financed from the State public school building fund, competitive bids must be taken before permitting the work to be performed. However, a determination must be made as to whether that work or service provided by a construction management firm comes within the mandate of [Section 59-21-410](#).

It is generally held that:

'whether a contract for public work, or for furnishing supplies, services, etc., to the public, is to be entered into through private negotiation or only after competitive bidding is a matter of statutory provision and construction. In the absence of some controlling constitutional or statutory provision, or of some municipal ordinance or other legislative requirement, competitive bidding is not an essential prerequisite to the validity of contracts for public work, contracts to furnish materials to public bodies, or other contracts by and with public bodies.' 64 Am.Jur.2d, Public Works and Contracts, Section 34, pp. 885-886.

While it is generally provided that competitive bidding is required in the letting of construction contracts, such as contracts for building construction, street and highway construction, and certain other public improvements and works, especially where the contract price exceeds a particular figure, contracts for services, especially those in the nature of professional services and those which would require special training and skill, generally are not included in those provisions which mandate competitive bidding prior to awarding public contracts. (See: 64 Am.Jur.2d, Public Works and Contracts, Section 41, p. 894.) Such a principle is specifically provided by statute as to State agencies and departments. Section 1-1-440 of the 1976 Code of Laws provides:

'Notwithstanding any other provision of law, all State agencies and departments, before contracting for fifteen hundred dollars or more with private individuals or companies for products or services, shall invite bids on such contract from at least three qualified sources. 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.'

As to what constitutes 'professional services,' a previous opinion of this Office, a letter from Mr. McLeod to Mrs. McDonald dated January 20, 1976, stated:

'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).

*3 In several cases the question has arisen as to whether a contract employing a construction superintendent to supervise public work is subject to statutory provisions which require contracts for public works to be submitted to competitive bidding. In the case of [Gulf Bitulithic Company v. Nueces County](#), 11 S.W.2d 305 (1928), a Texas court held that a contract entered into by a commissioner's court which employed a road contracting company as its agent and representative to supervise and manage the construction of a road did not come within the provisions of a statute which required the commissioner's court to submit proposed contracts to competitive bids where the amount involved exceeded a specified amount. In its opinion the court stated:

'To hold that contracts for the supervision of work done directly by the county must be let to the lowest bidder would result in the county obtaining the least competent supervision, as those possessing the necessary skill, experience and business judgement to supervise a large construction program in the most efficient and economical manner could not hope to successfully compete with those of lesser skill, experience or business judgement. . . . Our courts have repeatedly

recognized that contracts of the nature involved in this case, involving special skill and experience, were not within the contemplation of the statute as to competitive bids.' 11 S.W.2d at 309.

A similar holding was made in the case of [Krohnberg et al. v. Pass et al.](#), 244 N.W. 329 (1932). In that case the Minnesota court held that the employment of a superintendent of construction by a school district did not come within the mandate of a statute which provided that 'no contract for work or labor, or for the purchase of furniture, fixtures, or other property, or for the construction or repair of school houses' exceeding a certain amount should be made without first advertising for bids. In [Krohnberg](#), it was noted that the construction superintendent was a personal representative of the school district and it was his duty observe the various contractors to see that the work was done in accordance with plans and specifications of the architects and engineers.

A contrary result has been reached in two other cases that have come to my attention. In the case of [City of Colorado Springs v. Coray](#), 139 P. 1031 (1914), the court held that a superintendent of construction was not excepted from the provisions of a statute which required that all work done by a city in the construction of public improvements should be done by contract by the lowest possible bidder. In [Dalby v. City of Longmont](#), 256 P. 310 (1926), the court construed a statute requiring all construction of public improvements to be done under contract by the lowest possible bidder and which further provided that advertisements for bids for technical or professional assistance on public improvement contracts were not required. In construing the statute, the Colorado court held that a contract for the employment of an individual to superintend the finishing of a municipal reservoir was invalid inasmuch as the court concluded that the work contemplated by the contract was not wholly technical or professional due to the fact that the individual was to employ and did employ his own machinery and tools. Therefore, in the court's opinion he did not come within the exception of the statute.

*4 In two recent cases the specific question of whether a construction management firm must be hired pursuant to statutes which mandate bidding prior to the awarding of contracts was raised. In [Mongiovi v. Doerner](#), 546 P.2d 1110 (1976), the Oregon Court of Appeals held that a contractor who the county hired as a construction manager to coordinate the solicitation and acceptance of bids on a construction project and who shared general supervisory authority over the work performed with the architects was exempt from statutory bidding and bonding requirements. It was noted that the construction manager performed none of the actual construction work on the project nor supplied any of the materials. According to the court, what he did provide were professional services involving peculiar skills, knowledge and expertise. According to the court, the construction manager was selected on the basis of his qualifications and prior experience. In reaching its decision, the court noted that:

' . . . courts in other jurisdictions have almost unanimously held that statutes requiring competitive bidding for public works contracts are not intended to apply to professional service contracts like those here in question . . . The rationale is that since construction materials and work must conform to specifications . . . and performance can be measured by a relatively objective standard, the legislature intended the lowest price to be the ultimate determining factor making such contracts, but when making a contract involving professional or esthetic judgement, the legislature could not have intended lowest price to be the ultimate determining factor.' 546 P.2d at 1113.

A contrary result was reached in the case of [City of Inglewood—Los Angeles County Civic Center Authority v. The Superior Court of Los Angeles County](#), 500 P.2d 601 (1972). In that case the California Supreme Court held that where a management contractor in addition to providing certain services and lending experience and expertise in the preparation of final plans for the construction of a civic center project was also to perform other duties and obligations which included the guaranteeing of outside prices based on subcontract bids, such management contract was not exempt from the statutory competitive bidding requirements. The court in its opinion stated:

'It is true that the management contractor was to perform services and to lend his experience and expertise in the preparation of the final plans, and in that respect may be likened to an engineer or an architect whose services may be procured without strict compliance with competitive bidding requirements . . . However, our review of the other duties

and obligations which were required of the management contractor in this case, including his guarantee of the outside price based on the subcontract bids, persuades us that management contracting procedure as proposed and followed here is too closely akin to traditional lump sum general construction contracting to be held exempt from the statutory competitive bidding requirements.’ [500 P.2d at 604](#).

***5** It appears that before an answer can be provided as to whether a construction management firm can be retained without competitive bidding, an understanding of the actual duties and involvement of the firm in a particular project is necessary. As was indicated by the above referenced cases, matters such as the amount of control over a particular project, the involvement of a construction management firm in supplying materials and equipment, and whether the firm is to do any of the actual construction work itself are objective criteria that may be used in evaluating whether or not a particular construction management firm can be retained without competitive bidding. Therefore, as to your request, this Office is unable to provide a general opinion as to the legality of a school district awarding a contract to a construction management firm without competitive bidding.

If there are any questions, do not hesitate to contact me.

Sincerely,

Charles H. Richardson
Assistant Attorney General

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