ALAN WILSON
ATTORNEY GENERAL

April 24, 2017

The Hon. Raye Felder
South Carolina House of Representatives
414D Blatt Bldg.
Columbia, SC 29201

Dear Representative Felder:

Attorney General Alan Wilson referred your letter dated June 20, 2016 to the Opinions section for a response. Please find following our understanding of your questions and our response.

Issue:

You have asked to consider a potential conflict that touches on corporate formation, licensing of two professions, and state procurement and exemptions. Because the matter is rather complex, we will set out a substantial amount of background information before focusing on a few specific questions. We begin by quoting in part from your letter, edited slightly for clarity:

[T]here appears to be a potential conflict with a state professional corporation statute (that professional corporations may only engage in business activities they are licensed to do; S.C. Code Section 33-19-140), a provision that requires general construction projects over $5,000 to have a general contractor (S.C. Code Section 40-11-30), and a SCDHEC exemption dated October 24, 1995 that purports to exempt environmental remediation projects from state procurement requirements.

[The constituent] does not want to violate state law by subcontracting out some of the work SCDHEC needs to be done by non-engineers on environmental remediation projects, but he does want to submit proposals requested by SCDHEC for environmental remediation work.

I am requesting your review of [the constituent's] concerns and an opinion on how a SCDHEC agency-issued exemption can validly conflict with state law.

Also I need to know whether this exemption allows professional engineers to subcontract out non-engineering work for environmental remediation projects and not run afoul of S.C. Code Sections 33-19-140, 40-11-20, and related sections.

Your letter includes an attachment from your constituent which helpfully describes that it is the common practice in the industry for environmental engineers to contract with the state on environmental remediation projects, and to subcontract portions of such projects to licensed construction contractors. When considering a bid on a particular SCDHEC project, however, your constituent approached the matter cautiously, reviewed the law cited above, and reached out to various state agencies for guidance.

Your constituent states that "[t]he SCDHEC representative verified that the selected consultant would be expected to perform all of the tasks as stated in the RFQ, including hiring contractors to perform remediation work," and that "all other firms have been complying with the scope in past [contracts and would] be expected to do so with this contract." A representative of the Office of State Engineer "verified that typically we are prohibited from hiring contractors for the stated work. However, the representative believed that SCDHEC had an exemption for such situations and that exemption would need to be obtained from SCDHEC."[1]

Upon request, a SCDHEC representative provided your constituent with a schedule of "Current Procurement Code Exemptions," which included "Environmental Remediation (2)." That exemption reads in its entirety:

> [t]he Board, in accordance with Code Section 11-35-710, exempted environmental remediation projects from the purchasing policies and procedures of the Procurement Code, provided that these contracts will be procured under the authority of and in accordance with procedures established by the Office of State Engineer with the work effort to be monitored by the State Engineer.

Your constituent notes that he was informed by the representative that this exemption "has been used by our professional services contractors to self-perform construction services as well as to competitively bid construction services to other firms."[2]

Your constituent then describes some of the activities involved in environmental remediation, and concludes by asking several questions relating to the interpretation and enforcement of the statutes you cite in your letter.

Having set out this background, we believe that the legal issues set out in your request and in your constituent's letter may be distilled down to the following questions:

1. Does the SCDHEC exemption conflict with South Carolina law?

---

[1] Your constituent noted that he also contacted the Office of Advice Counsel for SCLLR, but that Office was "prohibited from providing [him] with legal advice regarding scope of practice issues."

[2] We offer no opinion on this specific exemption, except to note that on its face, it references only the Procurement Code. It does not purport to alter any licensing requirements found in Chapters 11 or 22 (contracting and engineering, respectively) of Title 40.

2. Does environmental remediation fall under the statutory definition of construction so as to require performance by a licensed contractor?
3. If environmental remediation does fall under the statutory definition of construction, may a professional corporation subcontract portions of the remediation process to licensed contractors to satisfy the statute?

We answer these questions in turn.

Law/Analysis:

It is the opinion of this Office that a court would find that at least some environmental remediation activities unambiguously constitute "construction" as defined in S.C. Code Ann. § 40-11-20(8) (2011); and that the SCDHEC exemption in question is a valid exemption from the Procurement Code which does not impact licensing requirements. We also believe that a court most likely would defer to SCDHEC's interpretation of the environmental remediation statutes to find that the industry practice of a professional corporation subcontracting portions of the remediation process to licensed contractors does not violate South Carolina law. This opinion should not be read to imply that any unlicensed person may seek and engage in construction contracts merely by subcontracting out the work. Rather, it is the opinion of this Office that where a project is broadly and accurately described as "environmental remediation" in nature and some portion of the project involves construction, a person or company qualified to perform environmental remediation may obtain and administer a contract for that project, provided that all portions which fit the statutory definition of "construction" and do not fall under the *de minimis* exception are performed by a licensed construction contractor.

1. Does the SCDHEC exemption conflict with South Carolina law?

It is the opinion of this Office that a court would find that the SCDHEC exemption quoted above does not conflict with South Carolina law. While there may be some confusion related to this exemption, it is helpful to distinguish here between two separate arms of the South Carolina government.

SCDHEC is statutorily charged with offering and administering environmental remediation projects. See, e.g., S.C. Code Ann. § 44-56-405 (2016) ("The Department of Health and Environmental Control shall administer the fund to ensure that the sites that pose the greatest threat to human health and the environment are remediated first and that the remediation is accomplished in compliance with this article"). State contracts generally must comply with the South Carolina Procurement Code per S.C. Code Ann. § 11-35-40(2), unless they are given an exception by statute or by the governing body of the State Fiscal Accountability Authority, which Section 11-35-310(2) defines as the "Board."

This Board has discretionary power to exempt certain contracts from the procurement code for good cause, as set out in S.C. Code Ann. 11-35-710 (2016):

> "The board, upon the recommendation of the designated board office, may exempt governmental bodies from purchasing certain items through the respective chief procurement officer's area of responsibility. The board may exempt specific supplies, services, information technology, or construction from the purchasing procedures required in this chapter and for just cause by unanimous written decision limit or may withdraw exemptions provided for in this section."

As quoted above, the SCDHEC exemption reads:

> [t]he Board, in accordance with Code Section 11-35-710, exempted environmental remediation projects from the purchasing policies and procedures of the Procurement Code, provided that these contracts will be procured under the authority of and in accordance with procedures established by the Office of State Engineer with the work effort to be monitored by the State Engineer.

On its face, the exemption only addresses the Procurement Code. The exemption does not purport to exempt environmental remediation from any other portion of the South Carolina Code, including professional licensing and regulation. The exemption affects only how environmental remediation contracts are offered and entered, and does not affect what qualifications or licenses are required to perform the underlying work. To the extent that unlicensed persons or companies are relying upon this exemption to seek contracting work that normally requires a license, we believe that reliance is misplaced.

We believe that a court would find that the exemption from the Procurement Code is a proper exercise of the Board's statutory authority, and would find the exemption consistent with South Carolina law. See Glasscock Company, Inc. v. Sumter County, 361 S.C. 483, 490, 604 S.E.2d 718, 721 (2004) (noting that the law "recognize[es] some flexibility at the state level" to make exceptions the statutory procurement process).

2. Does environmental remediation fall under the statutory definition of construction so as to require performance by a licensed contractor?

It is the opinion of this Office that a court would find that at least some environmental remediation activities unambiguously constitute "construction" as defined in S.C. Code Ann. § 40-11-20 (2011). Section 40-11-20(8) defines construction to mean "the installation, replacement, or repair of a building, structure, highway, sewer, grading, asphalt or concrete

paving, or improvement of any kind to real property." S.C. Code Ann. § 40-11-30 (2016) prohibits unlicensed person from performing contracting work, with a *de minimis* exception:

> No entity or individual may practice as a contractor by performing or offering to perform contracting work for which the total cost of construction is greater than five thousand dollars for general contracting or greater than five thousand dollars for mechanical contracting without a license issued in accordance with this chapter.

Determining whether a particular activity falls under the statutory definition of "construction" depends on the facts of a particular case, in light of the language and purpose of Section 40-11-20(8). As our Office has opined previously:

> The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. *State v. Morgan*, 352 S.C. 359, 574 S.,E.2d 203 (Ct. App. 2002) (citing *State v. Baucom*, 340 S.C. 339, 531 S.E.2d 922 (2000)). All rules of statutory interpretation are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute. *State v. Hudson*, 336 S.C. 237, 519 S.E.2d 577 (Ct. App. 1999).
>
> The legislature's intent should be ascertained primarily from the plain language of the statute. *Morgan*, supra. Words must be given their plain and ordinary meaning without resort to subtle or forced construction which limits or expands the statute's operation. *Id.* When construing an undefined statutory term, such term must be interpreted in accordance with its usual and customary meaning. *Id.* When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and a court has no right to look for or impose another meaning. *City of Camden v. Brassell*, 326 S.C. 556, 486 S.E.2d 492 (Ct. App. 1997). The statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers. *Id.*

Op. S.C. Att'y Gen., 2005 WL 1983358 (July 14, 2005). As noted above, determining whether a particular activity falls under the statutory definition of "construction" depends on the facts of a particular case; however, a prior opinion of this Office and South Carolina case law do give helpful guidance in this assessment.

In 1978, this Office concluded in an opinion for Rep. Alex Harvin, III that:

> (1) A company engaged in unloading, moving, and securing certain machinery to the foundation of a building previously constructed to house such machinery is not required to have a South Carolina general contractor's license to do such work.
>
> (2) It would appear, however, that the work involved in hooking up certain machine supply lines, such as water, air, and vacuum, necessitates that it be performed by a licensed contractor assuming that the financial requirements of the statutes regulating contractors in this State are met.

Op. S.C. Atty. Gen., 1978 WL 22553 (April 12, 1978). That initial conclusion was followed by an analysis of the language of Section 40-11-10[3] as applied to the facts presented by the questioner, together with an exploration of the applicable case law. *Id.* The opinion also examined the definition of a mechanical contractor, and concluded that "the nature of certain aspects of the work, which admittedly is somewhat vague to someone not totally informed in such processes, may be such as to bring it within the scope of mechanical contracting." *Id.* The 1978 opinion is only one example of applying Section 40-11-20(8) to a particular set of facts, but it also demonstrates that some portions of a project may qualify as construction even if other portions do not.[4]

South Carolina law also recognizes that some activities may or may not qualify as construction based upon the purpose of those activities. In Skiba v. Gessner, 374 S.C. 208, 648 S.E.2d 605 (2007), our state Supreme Court heard a mechanic's lien case which turned in part on the definition of construction. We discuss Skiba extensively here because it helps illuminate how our courts approach the question of whether a particular activity qualifies as construction.

In Skiba v. Gessner, Mr. Skiba, who did not have a contractor's license, performed "lot clearing and the removal of unmarked trees, roots, and ground debris." A dispute arose, and Mr. Skiba attempted to perfect a mechanics lien upon the property and foreclose. Id. at 209, 648 S.E.2d at 605. The trial court found that the lot clearing to prepare the site for a home foundation fell under definition of construction in Section 40-11-20, and dismissed the case because only a licensed contractor could perfect a mechanics lien on the property. Id. at 209-10, 648 S.E.2d at 605 (citing S.C. Code Ann. § 40-11-370 (Supp.2006)).

---

[3] S.C. Code Ann. § 40-11-10 (1978) defined a general contract as: "one who for a fixed price, commission, fee or wage undertakes or offers to undertake the construction or superintending of construction of any building, highway, sewer, grading, improvement, reimprovement, structure, or part thereof, when the cost of the undertaking is thirty thousand dollars or more."

[4] See also Op. S.C. Att'y Gen., 1979 WL 29008 (January 3, 1979), which concluded that "a person who contracts to sell and installs carpet, the cost of which is in excess of thirty thousand ($30,000.00), is not required to be licensed by the South Carolina Licensing Board for Contractors as a general contractor," because "installation of carpeting apparently does not come within the definition of 'construction.'"

Mr. Skiba moved to reconsider, and on rehearing asserted that the site work was to prepare for landscaping, not a foundation. Id. at 210, 648 S.E.2d at 606. He also presented a deposition of the administrator of the South Carolina Contractor's Licensing Board, who "concluded no building was involved in the contract [and Mr. Skiba] was simply 'moving dirt,'" which did not require a contractor's license. Id. The trial court held in Mr. Skiba's favor and awarded him damages. Id.

That verdict was overturned on appeal by the South Carolina Supreme Court, which held that because, on the facts presented to them, the work was performed for landscaping purposes, it did not qualify under the mechanic's lien statute. S.C. Code Ann. § 29-5-10(a) (2016) permits a mechanic's lien for labor or materials "actually used in the erection, alteration, or repair of a building or structure upon real estate," which includes the "work of making the real estate suitable as a site for the building or structure." Our Supreme Court held that because Mr. Skiba now asserted his work was preparation for landscaping, and not for the actual improvement on the property (as the trial court found initially), his work did not qualify under the language of the statute.

In other words, Mr. Skiba found himself in a double bind: on the one hand, if he characterized the work as preparation for a structure, that qualified as construction and he could not legally perfect and foreclose on a mechanic's lien because he did not have a contractor's license. On the other hand, when he characterized the same work as done for another purpose to avoid the licensure requirement, the work fell outside of the mechanic's lien statute. This double bind demonstrates how our courts do not simply categorize a particular activity as always or never qualifying as "construction" or not. South Carolina law looks not just at a specific activity to assess whether it constitutes construction, but also looks at the purpose of that activity.

For these reasons, we cannot opine as to whether any particular component of an environmental remediation project will always or never qualify as construction. Instead, we set out the law here to aid your constituent in assessing each project on a case-by-case basis.

Mindful of this caveat, we understand from our phone conversations with your constituent that he believes, and we agree, that some portions of environmental remediation often will qualify as construction under Section 40-11-20(8). For example, we discussed a typical remediation project where an underground storage tank (UST) might be removed from the site of an old gas station. The hole left by the removal of the UST must be filled, and the fill dirt must be tamped down and compacted at periodic intervals to ensure that it is sufficiently compacted and dense to build upon when the hole is filled. We believe that, at a minimum, the filling and tamping of the dirt in preparation for a foundation is one component of environmental

remediation which a court would find constitutes "construction" as defined in Section 40-11-20(8), consistent with the opinion of our state Supreme Court in Skiba.

Therefore, while this Office cannot opine on every factual scenario that any environmental remediation project might present, it is the opinion of this Office that environmental remediation in general will necessarily involve components which a court would find qualify as construction and require performance by a licensed contractor.

3. If environmental remediation does fall under the statutory definition of construction, may a professional corporation subcontract portions of the remediation process to licensed contractors to satisfy the statute?

It is the opinion of this Office that a court would find that a professional corporation may subcontract portions of the environmental remediation process to licensed contractors to satisfy the requirement in Section 40-11-30 that only a licensed contractor "perform contracting work for which the total cost of construction is greater than [the applicable threshold]."

First, so long as all construction work is performed by a licensed contractor, we see no reason why this practice violates the letter or the spirit of Section 40-11-30. Even if an engineer contracts the entire remediation with SCDHEC, it is still a licensed contractor who is "performing . . . contracting work for which the total cost of construction" meets or exceeds the applicable threshold. We are not aware of any requirement in Chapter 11 of Title 40 which would prohibit a non-contractor from subcontracting a portion of a larger remediation project which that person is otherwise licensed to perform to satisfy this requirement.[5]

Our Office's 1978 opinion to Rep. Harvin (discussed above) examined a factual scenario which this Office concluded included both construction and non-construction activities. That opinion concluded in part "that the work [which falls under the statutory definition of construction] necessitates that it be performed by a licensed contractor." Op. S.C. Atty. Gen., 1978 WL 22553 (April 12, 1978). The opinion also noted that "Of course, the cost requirements would have to be met in order for it to be necessary that a licensed general or mechanical contractor complete the work." Id. While the question presented here was not presented in that opinion, it is reasonable to infer that our 1978 opinion anticipated that the company in question could and would perform that portion of the job which did not qualify as construction, and an appropriately-licensed contractor would perform that portion of the job which did. Id. At a

[5] We note that but for the SCDHEC exemption discussed *supra*, portions of the Procurement Code may place restriction on certain contracts such that the prime contractor otherwise would be required to hold a contracting license. Because the Board has issued a standing exemption for environmental remediation, we do not explore that possibility here.

minimum, this inference supports your constituent's representation that this is the practice in the industry.

Given that this is the longstanding practice in the industry (apparently for several decades), and based upon your constituent's conversations with the regulating state agencies, it is reasonable to infer that this practice also is consistent with those agencies' interpretation of the same statute. Of course, the failure to act against a practice is not synonymous with approval of a practice. But if this widespread and pervasive practice were offensive an agency's interpretation of the Section 40-11-30, we believe that agency would have pursued some enforcement action before now, and SCDHEC would not continue issuing environmental remediation contracts to engineering companies engaged in this practice.

This Office has previously opined:

> It is this Office's longstanding policy (as it is the courts') to defer to the administrative agency charged with the regulation concerning the subject matter. As this Office stated in a previous opinion, "as a general matter, it is well recognized that administrative agencies possess discretion in the area of effectuating the policy established by the Legislature in the agency's governing law. As our Supreme Court has recognized, 'construction of a statute by the agency charged with executing it is entitled to the most respectful consideration [by the courts] and should not be overruled absent cogent reasons.' Op. S.C. Atty. Gen., October 20, 1997, quoting Logan v. Leatherman, 290 S.C. 400, 351 S.E.2d 146, 148 (1986). The Courts have stated that it is not necessary that the administrative agency's construction be the only reasonable one or even one the court would have reached if the question had initially arisen in a judicial proceeding. Ill. Commerce Comm. v. Interstate Commerce Comm., 749 F.2d 825 (D.C.Cir. 1984). Typically, so long as an administrative agency's interpretation of a statutory provision is reasonable, we defer to that agency's construction." Op. S.C. Atty. Gen., 2006 WL 269609 (January 20, 2006).

Op. S.C. Att'y Gen., 2013 WL 3133636 (S.C.A.G. June 11, 2013). Given that environmental remediation and construction in general are regulated professional occupations, this Office does not see any reason to upset the longstanding practice in the industry when that practice complies with a reasonable interpretation of the South Carolina Code.

As to your constituent's specific question regarding professional corporations, we understand that the primary concern is the rule found in S.C. Code Ann. § 33-19-140(a) that "[a] professional corporation may not render any professional service or engage in any business other than the professional service and business authorized by its articles of incorporation." This follows an earlier code section, S.C. Code Ann. § 33-19-110(a), which states in relevant part that

"a corporation may elect professional corporation status . . . solely for the rendering of professional services, including services ancillary to them, within a single profession." The specific concern is that an administrative agency enforcement authority might construe subcontracting the construction portion of an environmental remediation project to a licensed contractor as an activity not "authorized by its articles of incorporation," even where those articles would permit environmental remediation not involving construction.

A few caveats are in order. First, this Office has not examined your constituent's articles of incorporation, and any opinion on those specific articles would necessarily be a factual inquiry and would amount to the practice of law on behalf of a private citizen – neither of which this Office may do. We encourage your constituent to consult a private attorney with any specific questions regarding his corporate structure. Second, as stated above, it is this Office's longstanding policy to defer to the administrative agency charged with the regulation concerning the subject matter. Moreover, we cannot opine on the merits of any current or anticipated administrative enforcement action. For these reasons, this advisory opinion should not be interpreted as a conclusive shield against any administrative agency's enforcement action against any person or company properly within that agency's jurisdiction.

With those caveats noted, as a general question of law, it is the opinion of this Office that where a professional corporation may properly engage in environmental remediation consistent with its articles of incorporation, it also may (and should) subcontract the construction portion of the remediation project to a licensed contractor. As discussed earlier in this opinion, some construction activities are necessarily involved in environmental remediation, and the inclusion of those activities generally would be implied in any articles of incorporation which expressly permit remediation. Moreover, provided that the project is broadly and accurately described as environmental remediation, we believe that a court most likely would find that subcontracting the construction portion to a licensed contractor is a "service[] ancillary" to the broader remediation project. See S.C. Code Ann. § 33-19-110(a) (2016).

We also note that the SCDHEC procurement exemption for environmental remediation required "that these contracts will be procured under the authority of and in accordance with procedures established by **the Office of State Engineer** with the work effort to be monitored by **the State Engineer**." See *supra* (emphasis added). While not dispositive, these references to regulation and oversight by the State Engineer, in the exemption crafted by the state agency statutorily charged with environmental remediation, reasonably supports the conclusion that such remediation typically is primarily an engineering project with a construction component, as opposed to primarily a construction project with an engineering component.[6] Therefore, we believe it is proper for a professional corporation made up of qualified engineers who are

[6] We offer no opinion on whether a person who holds another, non-engineering professional license may seek and oversee environmental remediation contracts.

engaged in environmental remediation to subcontract the construction portion to a licensed contractor.

Conclusion:

For these reasons, still mindful of the caveats above, it is the opinion of this Office that a South Carolina court would find that the SCDHEC exemption provided to us does comply with state law, and that certain components of environmental remediation projects will meet the definition of construction set out in Section 40-11-20(8). It is also the opinion of this Office that a South Carolina court would find that a professional corporation which is authorized by its articles of incorporation to engage in environmental remediation may and should subcontract the construction portion of those projects to a licensed contractor. We reiterate that this opinion should not be read to imply that any unlicensed person may seek and perform construction contracts merely by subcontracting out the work to licensed contractors. Our opinion here turns on the particular nature of environmental remediation as a complex and atypical activity which requires the expertise of persons who are licensed and experienced in different fields to accomplish.

We note that this advisory opinion is based only on the question presented, the current law, and the information which you provided to us. This opinion is not an attempt by this Office to establish or comment upon public policy. This opinion is not an attempt to comment on any pending litigation or criminal proceeding. Until a court or the General Assembly specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in this matter. You may also choose to petition a court for a declaratory judgment, as only a court of law can interpret statutes and make such determinations. See S.C. Code Ann. § 15-53-20 (2005). If it is later determined that our opinion is erroneous in any way, or if you have any additional questions or issues, please do not hesitate to contact our Office.

Sincerely,

David S. Jones
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Solicitor General