

1978 WL 34953 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

June 21, 1978

*1 Mr. John A. McPherson, Jr.
Chief Engineer
State Auditor's Office
Wade Hampton Office Building
Columbia, South Carolina 29211

Dear Mr. McPherson:

You have requested the opinion of this Office as to interpretation of Sections 10-5-50 and 10-5-80 of the 1976 Code of Laws, and the proper procedure to be observed by State agencies in selection of architectural and engineering firms under Act No. 1136 of 1974, Section 10. (Now Code Sections 10-5-10 to 10-5-80).

Section 10-5-50 provides:

After reviewing and evaluating qualifications, the agency shall select the three which, in its judgment, are the most qualified, ranking the three in priority order.

The agency shall consider the ability of professional personnel, past performance, willingness to meet time and budget requirements, location, recent, current and projected work loads 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; provided, however, that such distribution does not violate the principle of selection of the most highly qualified firms.

Applying these principles the agency then must negotiate a contract with the most qualified firm, as required by Section 10-5-60, and submit the proposed contract to the State Budget and Control Board with the additional supporting information required by Section 10-5-70. The Board is then to proceed as provided in Section 10-5-80:

After review of the data submitted, the Budget and Control Board shall determine its position with respect to the particular firm recommended for approval by the agency. The Board shall formally notify the agency of its approval or rejection. In event of approval, the agency is authorized to execute a contract with the selected firm. In the event of rejection, the agency shall submit the name of another firm for the Board's consideration, selected in accordance with the procedure outlined herein. The agency shall not enter into a contract for architectural or engineering services without the approval of the Budget and Control Board.

It is the opinion of this Office that the intent of the Act is clearly expressed in its language. While the agency negotiates a proposed or tentative contract with only the 'most qualified' firm as selected under the criteria provided in the Act, it must provide to the Board a list of all firms considered, as required by Section 10-5-70; and it is the plain intent of the language of all sections taken together that this list should show the agency's determination of the three most qualified firms in priority order.

It does not follow, however, that the Board can make the selection of another firm from the list in the event it does not approve the selection recommended by the agency. Instead, as Section 10-5-80 clearly indicates, the agency then must review the matter and submit a proposed contract with another firm for the Board's consideration.

*2 The statutory scheme does not admit any other procedure, for the reason that the agency does not negotiate a proposed contract with another firm until the Board has rejected the first. It follows that the Board has no implied power under the Act to make its own selection from the list supplied. Even if the Act could be so read the Board would not have proposed contracts before it from which it could make a selection and approve one for final execution.

Very truly yours,

Frank K. Sloan
Deputy Attorney General

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