



ALAN WILSON
ATTORNEY GENERAL

April 9, 2018

The Honorable Chip Huggins, Member
South Carolina House of Representatives, District No. 85
202 Blatt Building
Columbia, SC 29201

Dear Representative Huggins:

You have requested our opinion as to whether the South Carolina Contractors' Licensing Board ("SCCLB") possesses statutory authority to consider financial information pertaining to an applicant's Employee Stock Ownership Plan ("ESOP") to the extent such information affects the applicant's net worth. By way of background, you state the following:

The SCCLB is administered by the Division of Professional and Occupational Licensing, South Carolina Department of Labor, Licensing and Regulation, S.C. Code Ann. § 40-1-40, and governed by the South Carolina Contractor Licensing Act, S.C. Code Ann. §§ 40-11-5 to -570. With regard to whether the SCCLB has statutory authority to consider financial information pertaining to an ESOP established by the applicant or licensee, South Carolina law provides that, regarding financial information and net worth requirements for general contractor's license applicants, the SCCLB may consider: (1) deviations from the standard accountant's report; (2) notes to the financial statement; (3) additional financial information submitted by the applicant or licensee for renewals; and (4) personal financial statements of an entity's principals for an entity with less than two year's operating experience. S.C. Code Ann. § 40-11-260(C)(1)-(4).

I understand that, in simple terms, an ESOP is a form of an employee benefit program in which employees are given the opportunity to invest in their employer's stock during their employment and subsequently receive the fair market value of said stock at retirement. I am informed that ESOPs generally confer beneficial federal tax consequences for employees as well as employers. But, due to the requirements of financial accounting standards and conventions, the failure to consider an ESOP in assessing a sponsoring entity's financial condition is likely to create a misleading picture of such entity's net worth.

As noted above, the statute allows the SCCLB to consider matters outside the financial statements, such as the nature and impact of an ESOP, in assessing the applicant's qualification for a contractor's license. However, I am informed that the SCCLB has been willing to consider information pertaining to an applicant's ESOP only if such information would negatively impact such applicant's net worth and thus qualification for a particular licensure category. In other words,

relevant financial information is considered only when the information is adverse to an applicant; it is never used to help the applicant, even though the information may be of a type contemplated by § 40-11-260(C) and would serve to support the applicant's qualification for a particular license.

Accordingly, under the approach taken by the SCCLB, contractors that undertake to provide the benefit of an ESOP to their employees are unfairly and negatively impacted when providing financial information to the SCCLB for the purpose of qualifying for a particular licensing category because, according to my understanding, the SCCLB has routinely declined to consider information pertaining to an applicant's ESOP if such information would be beneficial to said applicant's qualification for a particular licensure category. In short, the sponsoring entity is disadvantaged for establishing a system recognized and encouraged by federal law as a vehicle for benefitting employees at retirement. I do not believe this result is what the General Assembly contemplated when it enacted § 40-11-260.

It would seem to me that financial information pertaining to an ESOP may positively impact an applicant's licensure category qualification and would merit consideration by the SCCLB under § 40-11-260(C) as providing a complete picture of the applicant's financial condition and its ability to meet the statutory requirements for obtaining a specific general contractor's license. Accordingly, I would appreciate your opinion as to whether the SCCLB may and should consider financial information regarding an applicant's ESOP in determining an applicant's qualifications under a particular licensure category.

Law/Analysis

Background

An ESOP is, in simple terms, an employee benefit program in which employees invest primarily in the stock of their employer and receive the fair market value of their stock at retirement. More specifically, an ESOP is defined as “an individual account plan – (A) which is a stock bonus plan which is qualified, or a stock bonus plan and money purchase plan both of which are qualified, under section 401 of Title 26, and which is designed to invest primarily in qualifying employer securities, and (B) which meets such other requirements as the Secretary of the Treasury may prescribe by regulation.” 29 U.S.C.A. § 1107(d)(6).¹ An ESOP is a trust formed by an employer that is separate from the company itself. The employer contributes new shares of its stock (or money to purchase existing shares) into the ESOP for the benefit of its employees. Thereafter, at an employee's retirement, the employer is required to buy the employee's stock at fair market value, unless there is a public market for the shares. Further,

¹ ESOPs are described in section 407(d)(6)(A) of the Employee Retirement Income Security Act of 1974 (ERISA). See also 29 C.F.R. § 2550.407d-6 (providing additional requirements of ESOPs). In addition, the Internal Revenue Code defines an ESOP as “a defined contribution plan - (A) which is a stock bonus plan which is qualified, or a stock bonus and a money purchase plan both of which are qualified under section 401(a) [of the Internal Revenue Code], and which are designed to invest primarily in qualifying employer securities; and (B) which is otherwise defined in regulations prescribed by the Secretary.” 26 U.S.C. § 4975(e)(7).

contributions to ESOPs receive favorable federal tax treatment for the employer and the employee in that the employer's contribution is deductible and the employee is not taxed on his or her share of the contribution until the stock is "cashed in" at retirement. Importantly, the exclusion of relevant financial information regarding an ESOP on an entity's balance sheet may create a misleading account of said entity's net worth and thus negatively impact its qualifications for particular licensing categories.

South Carolina Law

The SCCLB is administered by the Division of Professional and Occupational Licensing, South Carolina Department of Labor, Licensing and Regulation ("LLR")² and governed by S.C. Code Ann. §§ 40-11-5 to -570 ("Contractor Licensing Act"). Unless otherwise provided in the Contractor Licensing Act, Board Regulation of Professions and Occupations³ specifically applies to the regulation of licensed contractors. S.C. Code Ann. § 40-11-5. However, in the event of conflict between the Contractor Licensing Act and Board Regulation of Professions and Occupations,⁴ the provisions of the Contractor Licensing Act control. S.C. Code Ann. § 40-11-5.

With regard to your question as to whether the SCCLB possesses statutory authority to consider financial information pertaining to an ESOP established by the applicant or licensee, S.C. Code Ann. § 40-11-260(A)(5), which addresses financial statements and net worth requirements for general contractor's license applicants or license renewal applicants which seek "bids and jobs unlimited,"⁵ provides, as follows:

(A) An applicant for a general contractor's license or a general contractor's license renewal who performs or offers to perform contracting work for which the total cost of construction is greater than five thousand dollars, and an applicant for license group revisions must provide an acceptable financial statement with a balance sheet date no more than twelve months before the date of the relevant application showing a minimum net worth for each license group as follows:

(5) Group Five

- (a) bids and jobs unlimited;
- (b) required net worth of \$250,000.00;
- (c) on initial application, a financial statement audited by a licensed certified public accountant or a licensed public accountant in accordance with GAAP, including all disclosures required by GAAP;

² S.C. Code Ann. §40-1-40.

³ See S.C. Code Ann. §§ 40-1-10 to -220.

⁴ Id.

⁵ Net worth requirements for varying licensure groups depend on the monetary amount of the bids and jobs that an applicant intends to pursue. See S.C. Code Ann. § 40-11-260. The categories range from "Group One," which is applicable to bids and jobs that do not exceed \$50,000 per job and "Group Five," which does not limit the amount of the bids or jobs that the contractor may pursue. Id.

- (d) on renewal, a financial statement reviewed by a licensed certified public accountant or a licensed public accountant in accordance with GAAP, including all disclosures required by GAAP.

S.C. Code Ann. § 40-11-260 (A)(5)(a)-(d). Further, [i]n reviewing an entity's balance sheet to determine the net worth of the applicant or licensee, the board may consider:

- (1) deviations from the standard accountant's report;
- (2) notes to the financial statement;
- (3) additional financial information submitted by the applicant or licensee for renewals; and
- (4) personal financial statements of an entity's principals for an entity with less than two year's operating experience.

S.C. Code Ann. § 40-11-260(C)(1)-(4).

A number of principles of statutory construction are applicable to your question. First and foremost, "[t]he cardinal rule of statutory interpretation is to ascertain and give effect to legislative intent," and "[t]ypically legislative intent is determined by applying the words used by the General Assembly in their usual and ordinary significance." See Op. S.C. Att'y Gen., 2010 WL 4391640 (Oct. 7, 2010) (internal citations omitted). Further, it is clear that "[u]nder the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." C-Sculptures, LLC v. Brown, 403 S.C. 53, 56, 742 S.E.2d 359, 361 (2013) (quoting Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). With regard to financial statements and net worth requirements for general contractor's license applicants, South Carolina law plainly provides that the SCCLB may consider (1) deviations from the standard accountant's report, (2) notes to the financial statement, (3) additional financial information submitted by the applicant or licensee for renewals, and (4) personal financial statements of an entity's principals for an entity with less than two year's operating experience. S.C. Code Ann. § 40-11-260(C)(1)-(4). The statute does not constrain the SCCLB to consider only financial information which could be construed as detrimental to such applicant's qualifications for a particular licensure category or, conversely, solely information which could be interpreted as beneficial. Rather, the plain words of the statute unambiguously enunciate the additional financial information which may be considered. Such statute does not establish that such information must either positively or negatively impact an applicant's licensure category qualifications. Simply put, the statutory language does not support an interpretation that the SCCLB is precluded from considering beneficial information regarding an applicant and is limited to considering only detrimental information. Brown v. Bi-Lo, Inc., 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("We recognize the Court generally gives deference to an administrative agency's interpretation of an applicable statute or its own regulation. Nevertheless, where, as here, the plain language of the

The Honorable Chip Huggins
Page 5
April 9, 2018

statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation.") (internal citations omitted). As we have noted, previously with respect to the Contractors Licensing Board, "[t]he object of requiring a statement of net worth and a financial statement is the protection of the public against insolvent contractors or those unable to successfully meet the financial burdens of large scale general contracting." Op. S.C. Att'y Gen., 1982 WL 189237 (April 5, 1982). That being the case, both the plain language, as well as purpose, of the statutes in question permit the consideration of all financial information, both negative and positive, which go to the licensee's net worth.

Conclusion

Accordingly, as the financial status of an applicant's ESOP may impact an applicant's net worth, and, thus its qualification for particular licensure categories, financial information evidencing an applicant's ESOP – even if that information is beneficial to the applicant's qualification for a particular licensure category – falls squarely within the plain words of S.C. Code Ann. § 40-11-260(C), which permits consideration of supplemental financial information in determining an applicant's net worth. As we have noted previously, the purpose of the financial requirement is to protect the public. Thus, both negative and positive information bear upon the net worth requirement.

We recognize that the Contractor's Licensing Board has primary jurisdiction in this matter. It is the Board which issues licenses subject, of course, to judicial review. See infra. However, in this instance, the plain words, as well as purpose, of the relevant statute provide authority for the SCCLB to consider an initial or renewal applicant's ESOP financial statement in order to determine whether such applicant meets the statutory requirements to obtain or renew its general contractor's license.

Sincerely,



Robert D. Cook
Solicitor General