

1975 S.C. Op. Atty. Gen. 218 (S.C.A.G.), 1975 S.C. Op. Atty. Gen. No. 4149, 1975 WL 22444

Office of the Attorney General

State of South Carolina

Opinion No. 4149

October 6, 1975

\*1 Where the South Carolina Parks, Recreation and Tourism Commission has determined there is no competitive and qualified agency located in South Carolina, the Commission may legally select an out-of-state advertising agency.

TO: Assistant Director of Operations

South Carolina Department of Parks, Recreation and Tourism

QUESTION INVOLVED:

Pursuant to the provisos contained in Section 65 of Act No. 237 (1975), may the South Carolina Parks, Recreation and Tourism Commission legally award its contract for 'Advertising and Promotion' to an out-of-state advertising agency?

AUTHORITIES INVOLVED:

Section 65 of Act No. 237 (1975); 35A Words and Phrases; 15A CJS 113–115; 1A Sutherland Statutory Construction; Webster's Third New International Dictionary; 202 S.C. 363; 73 CJS 1267.

DISCUSSION:

Section 65 of Act No. 237 (1975) provides in pertinent part:

Provided, That all the amount appropriated under Item IV of this section for 'Advertising and Promotion' shall be on a competitive bid basis and placed with an advertising agency in this State. Provided, however, that if in the judgment of the Commission no competitive, qualified advertising agency is located in South Carolina, an out-of-state advertising agency may be employed on a competitive bid basis.

In an earlier opinion, this Office stated that in order to spend the monies appropriated pursuant to Item IV of Section 65 for 'Advertising and Promotion,' the Commission had to follow the requirements set forth in the above quoted provisos.

Accordingly, the Director of the PRT Division of Tourism discussed the advertising account with seventeen (17) South Carolina advertising agencies and one out-of-state agency. All of these agencies were invited to make presentations to PRT; six (6) South Carolina agencies and the out-of-state agency expressed interest in being considered for the account. Each agency was sent a questionnaire and given an appointment to meet with the Director of the Division of Tourism. These meetings were held in Columbia on August 27th and 28th. After evaluation of the questionnaires and the discussions during the meetings, three (3) South Carolina agencies and the out-of-state agency were asked to return on September 11 to make formal presentations to a three-member panel consisting of the chairman of the Commission's Tourism Committee, the PRT Assistant Director of Operations and the PRT Division of Tourism Director. Two of the three (3) South Carolina agencies and the out-of-state agency appeared before the panel on September 11th. The third South Carolina agency chose not to make a formal presentation.

The panel reviewed the three presentations. Furthermore, upon recommendation of the Chairman of the Commission, a panel of four advertising experts from private industry reviewed and evaluated the agencies' presentations. Both the PRT panel and the panel from private industry agree that the out-of-state agency made the superior presentation.

\*2 Bearing in mind the above outlined selection procedure, the Commission may legally select the out-of-state agency under the following circumstances. First, by virtue of the language 'if in the judgment of the Commission,' the Commission has been delegated the responsibility of determining whether or not there is a 'competitive, qualified advertising agency in South Carolina.' The agencies must be both 'competitive' and 'qualified' because the comma between 'competitive' and 'qualified' is used conjunctively rather than disjunctively. See: 1A Sutherland Statutory Construction Section 21.14, 90-91 (1961); [Tedars v. Savannah River Veneer Co.](#), 202 S.C. 363, 25 SE2d 235 (1943). Therefore, the Commission must find that the South Carolina agencies are both competitive and qualified; it is not sufficient that they be either competitive or qualified.

'Competitive' has been defined to mean 'of or relating to competition; characterized by, arising from or designated to exhibit rivalry among two or more equally matched individuals of forces, esp. for a particular goal, position, or reward . . . .' Webster's Third New International Dictionary at 464 (1961). See also: 15A CJS 'Competitive' at 115 (1967). "Qualified" is synonymous with 'susceptible;' 'capable;' 'competent;' 'fitting;' . . . ' 35A Words and Phrases 'Qualified' at 366. 'Qualified' is further defined as: 'Possessed of certain qualities or capacities, especially good qualifies; fitted by accomplishment or endowments for certain purposes; competent; fit; . . . '

#### CONCLUSION:

It is solely the responsibility of the Commission to judge whether the South Carolina advertising agencies meet the 'competitive' and 'qualified' requirements of the provisos. If there is a South Carolina agency, which the Commission determines to be both 'competitive' and 'qualified,' then the Commission must award the 'Advertising and Promotion' contract to that State advertising agency. However, after studying the recommendations and findings of the two panels, if the Commission makes a find that neither of the two South Carolina advertising agency is both 'competitive' and 'qualified' for the particular contract to be awarded, the Commission may legally award the contract to an out-of-state advertising agency on a competitive bid basis.

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