

1973 S.C. Op. Att. Gen. 210 (S.C.A.G.), 1973 S.C. Op. Att. Gen. No. 3567, 1973 WL 21024

Office of the Attorney General

State of South Carolina

Opinion No. 3567

July 11, 1973

***1 The Department of Education may enter into a contract for the printing, development and updating of materials for a curriculum in graphic communications without a submission of the contract to public bidding.**

State Superintendent of Education

Recently, you requested through the Office of Research that we advise you as to whether or not the Department of Education was to submit for public bids a contract relating to the printing, development, and updating of materials to be used in a curriculum in graphic communications.

The Printing Industry of the Carolinas Foundation has proposed an agreement with the Department of Education for the continual development and improvement of certain graphic communications curriculum materials. The proposal involves the publishing of these materials for sale with all proceeds designated for developmental projects on a non-profit basis. Under this agreement, the Department would derive certain financial benefits.

The method by which public contracts are entered, either by private negotiation or public competitive bidding, is usually established by statutory or constitutional provisions. When such provisions exist, a contract, to be valid, must be entered through the prescribed mode unless the prescribed manner is merely directory rather than mandatory. See 81 C. J. S. *States* § 116 at 1093. If, however, neither controlling statutory nor constitutional provisions exist, the manner by which state agencies enter contracts will be largely left to their discretion:

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* § 34 at 885.

When statutory or constitutional provisions require that contracts be let to the lowest responsible bidder pursuant to public competitive bidding, bids are mandatory and a contract not so let does not bind the state even though the contract made is more beneficial to the state than if let as required. 81 C. J. S. *States* § 116 at 1093. Where statutory or constitutional requirements of competitive bidding exist and contracts are made without the letting of bids, the contracts are rendered void unless they come within some recognized exception of the rule. 64 Am. Jur. 2d *Public Works and Contracts* § 34 at 885.

Several important exceptions to statutory requirements of competitive bidding have been recognized. These include:

(1) Contracts for professional services and contracts for services requiring special skill or training are not required to be let on bids under a statutory or constitutional provision that contracts with a state or municipality must not be entered into without first advertising for bids. *Annot.*, 44 A.L.R. 1150 (1926).

***2** (2) It is generally, although not universally, held that contracts for printing and advertising are not within statutory requirements relative to competitive bidding for public 'work,' 'labor,' or materials. 64 Am. Jur. 2d *Public Works and Contracts* § 46 at 899.

(3) In emergency situations the state may also dispense with competitive bidding. 64 Am. Jur. 2d *Public Works and Contracts* § 39 at 891.

Despite the enumerated exceptions, practically all public contracts of major importance are let upon competitive bidding if the nature of the contract reasonably permits that procedure. Even when there is no statutory authority compelling a competitive bidding procedure, it is generally considered that the interests of the public are best served by submitting contracts, if of important size to competitive bidding. *Taylor v. County Board of Arlington Co.*, 53 S. E. 2d 34 (Va. 1949). However, when no controlling statute exists, public officials are only required to act in good faith and to the best interest of the public. Despite the recognized soundness of competitive bidding on public contracts as public policy it is universally held that, in the absence of a constitutional or statutory mandate, competitive bids are not necessary. See *Price v. Fargo*, 139 N. W. 1054 (N. D. 1913).

Competitive bidding statutes have been enacted in South Carolina but are restricted to specified areas. A general competitive bidding statute embracing all public contracts has not been enacted. Thus, whether competitive bidding will be required on a contract proposed by a state agency will be determined by the nature of the contract itself.

To determine whether the Department of Education can contract without competitive bidding, examination must be made of the nature of the contract in the light of relevant statutes. The contract in question concerns the printing, development, and updating of instructional materials to be used in a statewide curriculum in graphic communications.

Three particular statutes and their possible application to this contract, as proposed, should be examined.

(1) Section 1–466. This section requires competitive bids on public buildings constructed with state funds and costing more than \$10,000. As written, this section clearly applies only to permanent improvements and has no bearing upon contracts relating to classroom instructional materials.

(2) Section 1–521. This section requires advertisements for competitive bidding in regard to contracts for public printing. The term ‘public printing’ is generally interpreted to be that which is directly ordered by the legislature. *Ellis v. State*, 4 Ind. 1, 5. There is no authority to indicate that materials to be used as classroom instructional aids could be embraced by the term ‘public printing’.

(3) Section 21–501. This section concerns contracts for the purchase or rental of state adopted textbooks and provides, in part, for the purchase of textbooks:

*3 . . . at the lowest possible prices and, so far as existing contracts for State-adopted books will permit, pursuant to competitive bidding.

Since the contract in question concerns teaching materials and other instructional aids for a graphic arts curriculum rather than classroom textbooks adopted by the State Schoolbook Commission, this section would not bar a contract regarding such teaching materials and instructional aids entered by private negotiation instead of competitive bidding.

Very little case law concerning the question of competitive bidding exists in South Carolina. In *Hall v. Richards*, 159 S. C. 164 (1930), the Court held that competitive bids were not necessary for a contract for the engraving of highway bonds. The rationale of the Court in this decision, however, was based upon the statute authorizing the issuance of the bonds. The decision was nevertheless consistent with the general principle that the state need not resort to competitive bidding unless required to do so by statute. In *Dillingham v. Spartanburg*, 75 S. C. 549 (1907), the Court upheld the validity of a contract for street improvements entered through private negotiation rather than competitive bidding. The Court said:

No statute has been cited or found which requires competitive bidding as a condition precedent to the making of a valid contract by the City of Spartanburg for street improvements.

In further support of this argument the Court said:

But a conclusive reason for sustaining the validity of the contract in question is that there is no statute in this state which compels the City of Spartanburg to submit this matter to competitive bidding.

Thus, on two occasions, the Supreme Court of South Carolina has recognized the general rule that public contracts may be entered by public agencies without resort to competitive bidding in the absence of a statutory mandate.

The question of competitive bidding requirements for public contracts has been frequently litigated in other jurisdictions. Courts have consistently held that a public body is not obligated to submit proposed contracts to competitive bidding unless there exists a statutory requirement. In *Hertz v. Tucson Airport Authority*, 229 P. 2d 1071 (Ariz. 1956), the plaintiff brought an action to compel cancellation of an automobile rental franchise awarded by the defendant to a rival of the plaintiff. The Court said:

In the absence of some controlling, constitutional or statutory provisions, municipal ordinances, or other legislative requirement, competitive bidding is not an essential prerequisite to validity of contracts for public works, contracts to furnish materials to public bodies, or other contracts by and with public bodies.

The discretion of the public agency in awarding contracts is not unlimited, however. In *Hertz* the Court noted the general standards by which a public agency must act even though no statutory requirement of competitive bidding exists:

*4 Even though a (public) corporation has no absolute duty to require bids in letting contracts, it must act in the public interest, and must be fair, honest, prudent and exercise a wise discretion in awarding of contracts.

Thus, as a general rule, it is clear that a state agency has no obligation to submit proposed contracts to public bidding in the absence of a controlling statute. There is, accordingly, no apparent obstacle to the State Department of Education entering into a contract for the printing, developing, and updating of materials for a curriculum in graphic arts through private negotiation rather than public competitive bidding.

Cases not cited which support the rule that the state need not resort to competitive bidding in the absence of controlling statutory or constitutional provisions.

Trap Rock Industries, Inc. v. Kohl, 284 A. 2d 161 (N. J. 1971).

Behigh Construction Co. v. Housing Authority of City of Orange, 267 A. 2d 41 (N. J. 1970).

Berbusse v. North Broward Hospital Dist., 117 So. 2d 550 (Fla. 1960).

Cimarron Utilities Co. v. Guymon, 43 P. 2d 143 (Okla. 1935).

Parker v. Panama City, 151 So. 2d 469 (Fla. 1963).

Inskip v. Board of Trustees, 187 N. E. 2d 201 (Ill. 1963).

Parkin v. Day, 463 S. W. 2d 656 (Ark. 1971).

Swanton v. Corby, 100 P. 2d 1077 (Calif. 1940).

Annotations

Annot., 53 A. L. R. 2d 498.

Annot., 44 A. L. R. 1150.

Annot., 142 A. L. R. 542.

Annot., 71 A. L. R. 173.

Annot., 15 A. L. R. 3d 733.

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