

7948 L. Wang



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

HENRY McMASTER
ATTORNEY GENERAL

June 1, 2005

John M. Tolar, Esquire
Georgetown County Attorney
Post Office Drawer 421270
Georgetown, South Carolina 29442

Dear Mr. Tolar:

In a letter to this office you indicated that Georgetown County disseminates accommodation tax money to various entities which promote tourism in the County. Currently, those receiving accommodation tax funds are not required to comply with the County's procurement procedures nor are they required to present proof of compliance with any other recognized procurement procedures when expending accommodation tax funds. Noting that accommodation tax funds are public monies flowing through a public entity and used for a public purpose, you have asked whether those in receipt of these funds should be required to follow established Georgetown County procurement procedures.

The allocation of accommodation tax revenues received by a county or municipal government is set forth by S.C. Code Ann. § 6-4-10 (2004). The first twenty-five thousand dollars is to be allocated to the general fund of a municipality or county, with five percent of the balance to the municipal or county general fund. Pursuant to subsections (3) and (4)(a),

(3) Thirty percent of the balance must be allocated to a special fund and used for advertising and promotion of tourism to develop and increase tourist attendance through the generation of publicity. To manage and direct the expenditure of these tourism promotion funds, the municipality or county shall select one or more organizations, such as a chamber of commerce, visitor and convention bureau, or regional tourism commission, which has an existing, ongoing tourist promotion program. If no organization exists the municipality or county shall create an organization with the same membership standard in Section 6-4-25. To be eligible for selection the organization must be organized as a nonprofit organization and shall demonstrate to the municipality or county that it has an existing, ongoing tourism promotion program or that it can develop an effective tourism promotion program. Immediately upon an allocation to the special fund, a municipality or county shall

Mr. Tolar
Page 2
June 1, 2005

distribute the tourism promotion funds to the organizations selected or created to receive them. Before the beginning of each fiscal year, an organization receiving funds from the accommodations tax from a municipality or county shall submit for approval a budget of planned expenditures. At the end of each fiscal year, an organization receiving funds shall render an accounting of the expenditure to the municipality or county which distributed them.

(4)(a) The remaining balance plus earned interest received by a municipality or county must be allocated to a special fund and used for tourism-related expenditures. This section does not prohibit a municipality or county from using accommodations tax general fund revenues for tourism-related expenditures.

Without question, accommodation tax funds should be considered to be public funds. As set forth in a prior opinion of this office dated February 1, 1996, the term "public funds" is defined generally as

(m)oneys belonging to the United States or a corporate agency of the Federal Government, a state or subdivision thereof, or a municipal corporation. They represent moneys raised by the operation of law for the support of the government or for the discharge of its obligations. In other words, they constitute "revenue," which in turn is defined as "the income of the government arising from taxation, duties, and the like." ...The term "public funds" is further defined in Droste v. Kerner, 34 Ill.2d 495, 217 N.E.2d 73 (1966), as "[m]oneys belonging to a government, or any department of it, in the hands of a public official." 217 N.E.2d at 78.

This office has repeatedly recognized that public funds must be used for public and not private purposes. See, e.g., Opinion of the Attorney General dated October 8, 2003 citing decisions of the South Carolina Supreme Court in Elliott v. McNair, 250 S.C. 75, 156 S.E.2d 421 (1967); Haesloop v. Charleston, 123 S.C. 272, 115 S.E.2d 596 (1923). In an opinion dated August 29, 2003, we advised that, "...the Due Process Clause of the Constitution (federal and state) requires that taxes (public funds) be spent for public purposes." Moreover, Article X, Section 5 of the State Constitution requires that taxes (public funds) be spent for public purposes. While each case must be decided on its own merits, the notion of what constitutes a public purpose has been described by our Supreme Court in Anderson v. Baehr, 265 S.C. 153, 162, 217 S.E.2d 43, 47 (1975) as follows:

(a)s a general rule a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity and contentment of all the inhabitants or residents, or at least a substantial part thereof...Legislation (i.e., relative to the expenditure of funds) does not have to benefit all of the people in order to serve a public purpose.

Mr. Tolar
Page 3
June 1, 2005

See also: WDW Properties v. City of Sumter, 342 S.C. 6, 535 S.E.2d 631 (2000); Nichols v. South Carolina Research Authority, 290 S.C. 415, 351 S.E.2d 155 (1986); Carll v. South Carolina Jobs-Economic Development Authority, 284 S.C. 438, 327 S.E.2d 331 (1985); Caldwell v. McMillan, 224 S.C. 150, 77 S.E.2d 798 (1953). In Nichols, the Court set forth the following standard for the "public purpose" requirement to be met:

[t]he Court should first determine the ultimate goal or benefit to the public intended by the project. Second, the Court should analyze whether public or private parties will be the primary beneficiaries. Third, the speculative nature of the project must be considered. Fourth, the Court must analyze and balance the probability that the public interest will be ultimately served and to what degree.

290 S.C. at 429, 351 S.E.2d at 163.

The South Carolina Consolidated Procurement Code, codified at S.C. Code Ann. § 11-35-10 et seq. applies to "every expenditure of funds by this State under contract acting through a governmental body as herein defined irrespective of the source of funds...." S.C. Code Ann. § 11-35-40(2). The definition of a "governmental body" for purposes of the procurement code expressly excludes "...all local political subdivisions such as counties, municipalities, school districts, or public service or special purpose districts...." S.C. Code Ann. § 11-35-310(18). Therefore, a county is not required to follow the State Consolidated Procurement Code. See: Op. Atty. Gen. dated November 15, 1983. However, another provision of the Consolidated Procurement Code, Section 11-35-50, requires all political subdivisions in this State to "...adopt ordinances or procedures embodying sound principles of appropriately competitive procurement" by July 1, 1983. While you have not forwarded a copy of any county procurement procedures, I am assuming that Georgetown County has complied with such mandate and, therefore, has in place an established procurement policy regarding the expenditure of public funds.

In Glasscock Company, Inc. v. Sumter County, 361 S.C. 483, 490, 604 S.E.2d 718, 721 (Ct.App. 2004), the State Court of Appeals stated that

...we note that Section 11-35-50 does not impose a specific requirement that all public procurement in our state be carried out by way of a single, narrowly defined procedure. While its mandate that all government bodies adopt some form of competitive procurement policies is unambiguous, the statute's broad directive that the processes "embody sound principles of appropriately competitive procurement" clearly was intended to afford local governments needed flexibility to determine what is "appropriately competitive" in light of the public business they must transact.

Mr. Tolar
Page 4
June 1, 2005

The opinion further noted the fact that "...local governments should be afforded a reasonable degree of latitude in devising their own individual procurement ordinances and procedures is entirely consistent with our state's now firmly rooted constitutional principle of 'home rule'." 361 S.C. at 490, 604 S.E.2d at 722.

As to the expenditure of funds by a public body, a prior opinion of this office dated April 26, 1984 stated that "...both by common law and by statutes and ordinances, the expenditure of funds by a public body must conform to procurement laws and regulations in the absence of specific exemptions or conditions." As noted, pursuant to Section 11-35-40 of the State Procurement Code, every expenditure of funds by the State or its agencies must be in accordance with the Code "irrespective of the source of the funds". The referenced April, 1984 opinion also concluded that statutory procurement procedures and procurement ordinance procedures "...should be followed by a State or local governmental body when making purchases unless the purchases are exempt."

As noted in a prior opinion of this office dated June 9, 1995,

(t)o conclude that the procurement policies or regulations of...(a particular)...county should be followed...is in accord with the general principles applicable to the expenditure of public or tax funds nationwide....(For instance)...(m)any courts have opined that the purpose of competitive bidding is to protect against fraud, collusion and favoritism in the issuance of public contracts...Such policies give the broadest possible opportunity for public bidding on a governmental contract, to secure competition and guard against favoritism, improvidence, extravagance, or corruption...Competitive bidding is for the benefit of the public...Put yet another way, competitive bidding practices prevent favoritism, improvidence, extravagance, fraud, and corruption; promote economy in public administration and honesty, fidelity, and good morality of administrative officers.

That opinion also indicated that a county's procurement policies or regulations should be followed in the expenditure of funds due in part to the "strong public policy inherent in the sound fiscal management of public funds".

Referencing the above, in my opinion, inasmuch as the accommodation tax funds funneled by Georgetown County to organizations for tourism promotion are public funds, those organizations in receipt of such funds should follow established county procurement procedures in expending such funds. However, as indicated above, local governments are afforded latitude in establishing their own individual procurement ordinances and procedures. As noted, pursuant to Glasscock Company, Inc., supra, counties are afforded "flexibility" in determining what is "appropriately competitive" as to the public business transacted. Therefore, it would be a matter for resolution by the County as to the exact procurement procedures to be followed. As a result, in my opinion, Georgetown County would have flexibility in determining matters regarding the relevancy of its particular procurement

Mr. Tolar
Page 5
June 1, 2005

policies as to the expenditure of accommodation tax funds, such as the dollar amount at which point there must be compliance with such policies.

If there are any questions, please advise.

Sincerely,



Charles H. Richardson
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Assistant Deputy Attorney General