

The State of South Carolina

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April 16, 1990

The Honorable Larry L. Koon
Member, House of Representatives
420-C Blatt Building
Columbia, South Carolina 29211

Dear Representative Koon:

Referencing Act No. 316 of 1990, you have requested the opinion of this Office on the following scenarios and questions.

1. Assume that a school district not subject to the state procurement code wishes to hire an architect. Further assuming that it issues a Request For Proposals for such services, may the school board select a "short list" pursuant to its selected criteria?
2. If the school board interviews each architect on the short list and describes to each the proposed project's dimensions, location, functions, and cost, may each architect propose his or her fee?
3. Under Act No. 316, would it be necessary for the board to terminate negotiations with the top-rated architect on the short list before the next-ranked architect could state his or her fee?

After a brief discussion of Act No. 316 and rules of statutory construction, each of your questions will be examined.

Act No. 316

Act No. 316 of 1990 amends the South Carolina Code of Laws to add Section 40-3-165, which provides:

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Architects shall not enter into a contract for professional services on any basis other than direct negotiation thereby precluding participation in any system requiring a comparison of compensation. Provided, however, an architect may state compensation to a prospective client in direct negotiation where architectural services necessary to protect the public health, safety, and welfare have been defined.

Statutory Construction

In construing any statute, the primary objective of both the courts and this Office is to ascertain and effectuate legislative intent, if at all possible. If the terms of a statute are plain and unambiguous, such terms must be applied in their plain and ordinary sense unless there is some indication that another meaning is intended. Etiwan Fertilizer Co. v. South Carolina Tax Commission, 217 S.C. 354, 60 S.E.2d 682 (1950). If the terms of a statute are clear, such terms will be applied literally. Mitchell v. Mitchell, 266 S.C. 196, 222 S.E.2d 499 (1976). In the absence of ambiguity, words must not be added to or taken from a statute. Federal Ins. Co. v. Speight, 220 F. Supp. 90 (D.S.C. 1963).

Question 1

You inquire whether a school district not subject to the state procurement code 1/ may issue a Request For Proposals for architectural design services and, from the architects responding, select a "short list." We advise that no provision of Act No. 316 would prohibit such a school district from establishing a short list after evaluating responses to its Request For Proposals.

Question 2

Next, you inquire whether, if such school district interviews each architect on the short list and describes to each the project's dimensions, location, functions, and costs, each architect may propose his or her fee. We advise that Act No. 316 permits architects to propose a fee in such cases, because in our opinion such interview would constitute "direct negotiation." The description of the proposed project's dimensions, location, functions, and costs would

1/ See Sections 11-35-50 and 11-35-310(18) of the Code as to the Consolidated Procurement Code not being applicable to school districts generally. But see Section 11-35-70 of the Code.

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most probably constitute an adequate definition of "architectural services necessary to protect the public health, safety, and welfare" as provided in the second sentence of new Section 40-3-165; it is beyond argument that construction of facilities by a school district must take into account public health and safety factors due to the use of the facilities and also the population using such facilities.

Question 3

Finally, you inquire whether, under Act No. 316, it would be necessary for such school district to terminate negotiations with the top-rated architect on the short list before the next-ranked architect could state his or her fee. We advise that Act No. 316 does not require a school district to terminate negotiations with the top-rated architect before negotiating with and receiving a proposal from all other architects on the short list, where the others on the short list have been interviewed and have had the project described to them as indicated above, i.e., direct negotiations have taken place.

Conclusion

In conclusion, we advise that the second sentence of new Section 40-3-165 qualifies the first sentence, with the result that, under the facts described above, an architect is permitted to participate in a selection process wherein a school district, or other appropriate client, knows the fee proposal of each architect on the short list before it finalizes its negotiations with the architect ultimately selected.

With kindest regards, I am

Sincerely,

Patricia D. Petway

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Assistant Attorney General

PDP/nnw

REVIEWED AND APPROVED BY:

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