



ALAN WILSON
ATTORNEY GENERAL

January 14, 2014

Andrew J. Savage, III, Chairman
Charleston County Aviation Authority Board
5500 International Boulevard, #101
Charleston, South Carolina 29418-6911

Dear Chairman Savage:

Attorney General Alan Wilson has referred your letter dated December 21, 2013 to the Opinions section for a response. The following is this Office's understanding of your question and our opinion concerning the issue based on our understanding.

Issue: Does the Charleston County Aviation Authority have to go through the process under the South Carolina Consolidated Procurement Code ("S.C. Procurement Code") pursuant to S.C. Code 11-35-10 et seq. for a written contract with its legal counsel where counsel will work pursuant to contract and not as an employee?¹

Short Answer: This Office believes a court will likely find that the Charleston County Aviation Authority ("Aviation Authority") is a political subdivision not subject to the S.C. Procurement Code applicable to State agencies, but is instead subject to its own procurement ordinances and procedures adopted pursuant to S.C. Code § 11-35-50.

Law/Analysis:

In regards to procurement law, this Office has previously stated:

On July 31, 1981, the South Carolina Consolidated Procurement Code became effective. This Code applies to every expenditure of funds by the State or its agencies, Section 11-35-40(2). By July 1, 1983, all political subdivisions of the State must adopt ordinances and procedures encompassing principles of competitive procurement, Section 11-35-50. Draft regulations and manuals will be submitted for consideration by political subdivisions. But again, at the present time only State agencies are bound by the requirements of the Code.

¹ It is this Office's understanding the attorney works for the Aviation Authority in the context of an independent contractor rather than an employee of the Aviation Authority, as the compensation of employees of political subdivisions would be governed by statute. See, e.g., S.C. Code § 8-15-10.

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Op. S.C. Atty. Gen., 1981 WL 96607 (September 23, 1981) (emphasis added). The limitations to the application of the S.C. Procurement Code are found in S.C. Code § 11-35-40. As referenced in the 1981 opinion, the S.C. Procurement Code applies to:

(2) Application to State Procurement. This code applies to every procurement or expenditure of funds by this State under contract acting through a governmental body as herein defined irrespective of the source of the funds, including federal assistance monies, except as specified in Section 11-35-40(3) (Compliance with Federal Requirements) and except that this code does not apply to gifts, to the issuance of grants, or to contracts between public procurement units, except as provided in Article 19 (Intergovernmental Relations). It also shall apply to the disposal of state supplies as provided in Article 15 (Supply Management). No state agency or subdivision thereof may sell, lease, or otherwise alienate or obligate telecommunications and information technology infrastructure of the State by temporary proviso and unless provided for in the general laws of the State.

S.C. Code § 11-35-40(2) (1976 Code, as amended) (emphasis added). The S.C. Procurement Code defines a governmental body as:

(18) “Governmental Body” means a state government department, commission, council, board, bureau, committee, institution, college, university, technical school, agency, government corporation, or other establishment or official of the executive or judicial branch. Governmental body excludes the General Assembly or its respective branches or its committees, Legislative Council, the Legislative Services Agency, and all local political subdivisions such as counties, municipalities, school districts, or public service or special purpose districts or any entity created by act of the General Assembly for the purpose of erecting monuments or memorials or commissioning art that is being procured exclusively by private funds.

S.C. Code § 11-35-310 (18) (1976 Code, as amended) (emphasis added). It defines a political subdivision as “all counties, municipalities, school districts, public service or special purpose districts.” S.C. Code § 11-35-310 (23) (1976 Code, as amended); see, also, Sloan v. Greenville Hosp. System, 388 S.C. 152, 694 S.E.2d 532 (2010).

This Office previously stated concerning the Charleston County Aviation Authority:

By way of background, the Charleston County Aviation Authority governs the Charleston County Airport District in order to perform the District's functions. Torgerson v. Craven, 267 S.C. 558, 230 S.E.2d 228 (1976); www.chs-airport.com/About-the-CCAA/Airport-Authority.aspx. The South Carolina General Assembly created the Charleston County Airport District (“District”) by Act No. 1235 of 1970. It was created as a political subdivision of the State. 1970 S.C. Acts 1235, p. 2634ff (1970). The District was given authorization to “appoint officers, agents, employees and servants, and to prescribe the duties of such, including the right to appoint persons charged with the duty of enforcing the rules and regulations promulgated pursuant to the provisions of this act, to fix their compensation, and to determine if, and to what extent they shall be bonded for the faithful performance of

their duties.” 1970 S.C. Acts 1235, p. 2638 (1970). Act No. 1235 of 1970 was amended by Act No. 329 of 1971.

Op. S.C. Atty. Gen., 2013 WL 4636665 (July 26, 2013). That opinion made clear that the Aviation Authority is a political subdivision. See, also, Op. S.C. Atty. Gen., 1976 WL 23045 (August 20, 1976) (opining that the Charleston County Aviation Authority is a political subdivision); Op. S.C. Atty. Gen., 1972 WL 26113 (December 19, 1972) (opining that the Charleston County Aviation Authority is a political subdivision of the State and an “employer” under the S.C. Retirement Act); Op. S.C. Atty. Gen., 1977 WL 37425 (September 15, 1977) (opining that an airport commission is not a state agency and is subject to its own procurement specifications).

As the 1981 opinion and the Sloan case reference, South Carolina Code Section 11-35-50 states:

All political subdivisions of the State shall adopt ordinances or procedures embodying sound principles of appropriately competitive procurement no later than July 1, 1983. The Budget and Control Board, in cooperation with the Procurement Policy Committee and subdivisions concerned, shall create a task force to draft model ordinances, regulations, and manuals for consideration by the political subdivisions. The expenses of the task force shall be funded by the General Assembly. The task force shall complete its work no later than January 1, 1982. A political subdivision's failure to adopt appropriate ordinances, procedures, or policies of procurement is not subject to the legal remedies provided in this code.

S.C. Code § 11-35-50 (1976 Code, as amended) (emphasis added). See D.W. Flowe & Sons, Inc. v. Christopher Const. Co., 326 S.C. 17, 482 S.E.2d 558 (1997) (concerning the S.C. Procurement Code's requirement that all political subdivisions adopt ordinances for competitive procurement) (overruled by Evins v. Richland Co. Historic Preservation Com'n, 341 S.C. 15, 532 S.E.2d 876 (2000) in that home rule only applies to counties and municipalities, not special purpose districts). Therefore, since the Charleston County Aviation Authority is a political subdivision, its procurement procedures would be limited to those it established pursuant to S.C. Code § 11-35-50.² Id.

However, even if the Aviation Authority were considered a State agency (which it clearly is not), state agencies are not required to go through the procurement process to hire an attorney pursuant to S.C. Code § 11-35-1510(2) and § 11-35-1260, as long as the Attorney General's Office approves such a hiring pursuant to S.C. Code §§ 1-7-160 and 1-7-170 or unless provided otherwise by law.³

While your question did not address other issues, please be aware that there may be other issues involved in such a contract. Those issues could include compliance with the South Carolina Freedom of Information Act, S.C. Code § 30-4-10 et seq., in addition to compliance with the Aviation Authority's

² As an aside, guidelines by the Procurement Policy Committee are available on the South Carolina Procurement website at <http://procurementlaw.sc.gov>.

³ As a general principle, selection of an attorney is not the type of process this Office sees as one that a governmental entity would want to go merely to the lowest bidder, as there are many factors in such a decision that should be left in the discretion of the hiring body (notwithstanding this Office must approve the hiring of legal counsel for all state government pursuant to S.C. Code § 1-7-160 and § 1-7-170, unless otherwise provided by law, as stated above). Nevertheless, there are other statutes which also govern such contracts. See, e.g., S.C. Code § 11-9-105.

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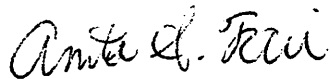
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own rules and regulations and other such law (e.g. S.C. Code § 8-15-10, S.C. Const. Art. III, Section 30, et al.).⁴ However, pursuant to compliance with its policies and ordinances, this Office believes the Aviation Authority may also seek independent legal counsel in creating such a contract to avoid any conflict of interest in seeking legal advice on the contract itself. See, e.g., Op. S.C. Atty. Gen., 1985 WL 259128 (February 15, 1985) (discussing the hiring of additional separate counsel where the county attorney was conflicted from representing either party).

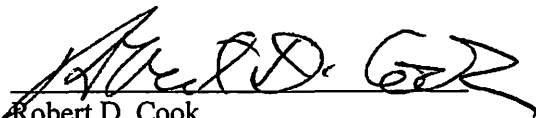
Conclusion: As stated above, this Office believes a court will likely find that the Charleston County Aviation Authority is not a State agency subject to the S.C. Consolidated Procurement Code but is instead a political subdivision subject to its own ordinances and procedures concerning procurement adopted pursuant to S.C. Code Section 11-35-50. However, this Office is only issuing a legal opinion. Until a court or the legislature specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,



Anita Smith Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General

⁴ This Office has not reviewed any ordinances by the Charleston County Aviation Authority, nor has it investigated its procurement guidelines. See, e.g., Op. S.C. Atty. Gen., 2012 WL 216828 (May 30, 2012) for an opinion concerning the City of Columbia's procurement process.