

1981 S.C. Op. Atty. Gen. 82 (S.C.A.G.), 1981 S.C. Op. Atty. Gen. No. 81-55, 1981 WL 96581

Office of the Attorney General

State of South Carolina

Opinion No. 81-55

June 15, 1981

***1 SUBJECT: Public Funds, State Ports Authority**

(1) The management agreement between the State Ports Authority and Farm Bureau Marketing Association regarding the operation of the grain elevator at the North Charleston Terminal is not a legal contract based upon information provided to this office by the Legislative Audit Council.

(2) A management agreement between the State Ports Authority and a private corporation which calls for an annual leasing amount which is less than the total costs to the State is violative of Section 8, Act 1272 (1970).

TO: George L. Schroeder
Director
Legislative Audit Council

QUESTIONS:

1. Is the management agreement between the State Ports Authority and Farm Bureau Marketing Association regarding the operation of the grain elevator at the North Charleston Terminal a legal contract?
2. Can the State Ports Authority lease a facility constructed with State funds for a lease amount that does not cover all costs to the State?

STATUTE AND CASES:

Act 1272 § 8, Acts and Joint Resolutions (1970); § 33-47-10 Code; § 54-3-130 Code; § 54-3-140 Code; § 54-3-1010 Code; [Elliott v. McNair](#), 250 S.E. 75, 156 S.E.2d 421 (1967); [Harper v. Schooler](#), 258 S.C. 486, 189 S.E.2d 284 (1972).

OTHER MATERIALS CITED:

[Article X, § 8, Constitution of South Carolina.](#)

I.

This opinion is based upon certain factual information provided to this office by the staff of the Legislative Audit Council. Although this opinion is based upon those premises, it makes no representations as to their accuracy or to the accounting principles upon which they were formulated. The facts provided to this office are as follows: First, you have indicated that bonds were issued by the State to raise funds for the construction and equipping of the grain elevator in the State Ports Authority's (Authority) facility at the North Charleston terminal. Secondly, the principal and interest upon those bonds are being paid by the Treasurer of South Carolina out of public funds generated by taxation. Third, under the management agreement between the Authority and the Farm Bureau Marketing Association (Association) the grain elevator is being leased at an annual fee which does not cover the total costs to the State, but the Association (which is organized as an eleemosynary non-profit corporation

under [Section 33–47–10, et. seq.](#)) is now showing a profit under the agreement. Fourth, the State has shown a net loss during the entire duration of the management agreement and the loss is projected to continue throughout the life of the agreement. Fifth, there has been non-compliance with [Section 8](#) of Act 1272 (1970), which mandates annual reviews, audits, and reports to the Budget and Control Board. Sixth, the association has accumulated retained earnings of approximately 3.5 million dollars.

II.

The answer to your first question requires a two-pronged analysis. First, it must be determined whether or not the action taken by the Authority was for a public purpose. It is undisputed that no public funds may be appropriated or expended for private purposes. [Article 10, Section 8, Constitution of South Carolina](#); [Attorney General's Opinions](#), 1962 #1363, pg. 136.

*2 The Authority was created by statute to, among other things, 'do and perform any act or function which may tend to or be useful toward the development and improvement of such harbors and seaports of this State and to the increase of water-borne commerce, foreign and domestic, through such harbors and seaports.' [Section 54–3–130, SOUTH CAROLINA CODE OF LAWS](#), 1976. To this end, the Authority may rent, lease, buy, or sell real or personal property as it may deem proper. [Section 54–3–140, CODE](#). The Authority may issue bonds for the financing of its mandated functions provided the issuance of the bonds meets constitutional and statutory guidelines. [Section 54–3–1010, CODE](#).

Bonds were issued in 1956 for the construction and equipping of new port facilities, including a grain elevator in the Authority's North Charleston terminal. Thereafter, the Authority executed a management agreement with the Association for the operation of the grain elevator.

It is clear from a review of the relevant case law that the promotion of trade, commerce, and industrial development is a proper public purpose. [Elliott v. McNair](#), 250 S.C. 75, 156 S.E.2d 421 (1976); [Harper v. Schooler](#), 258 S.C. 486, 189 S.E.2d 284 (1972).

In the [Elliott](#) case the Board of Administrators of Richland County issued bonds in conjunction with an arrangement which allowed a large manufacturing firm to locate in Richland County. In a buy and lease-back arrangement, the Board used the funds to allow the company to, in effect, build a plant at very favorable interest rates. The Supreme Court held that the action taken by the Board was in promotion of the industrial development of Richland County and was, therefore, a proper public purpose.

In the [Harper](#) case the Georgetown County Board of Commissioners negotiated a bond agreement which allowed the construction of pollution control facilities at a privately owned paper mill which had been discharging a harmful amount of effluents into the Sampit River. In spite of plaintiff's arguments that the paper mill was required by federal law to clean up the pollutants in any case, the Supreme Court held that protection of the environment from water pollution and the efforts to assure that the paper mill remained operative in Georgetown County were proper public purposes. Applying the same analysis to the matter at hand leads to the inescapable conclusion that the efforts of the Authority in this instance constituted the proper public purpose of promoting the water-borne commerce in agricultural products through the harbor at Charleston.

Although the contract was entered into for a valid public purpose, it would nevertheless be necessary to determine whether or not this public purpose is being carried out within the statutory and constitutional provisions which control the Authority's activities. Viewed from this perspective the agreement appears to be constitutionally suspect because, according to facts provided by your staff, this agreement has caused a net loss to the State while providing a private corporation with a profit. This not only is violative of [Section 8](#), Act 1272 as not being in this best interest of the State, but has the appearance of using State funds for the benefit of a private corporation.

*3 Although you have presented two questions, they are answerable as one, in that it is the opinion of this Office that the agreement between the Authority and the Association appears not to be valid because this arrangement seems to require a yearly expenditure of State funds to subsidize the operation of an enterprise upon which a private corporation is making a profit. Therefore, the agreement does not constitute a legal contract, based on the information provided in your letter.

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