

1977 S.C. Op. Atty. Gen. 167 (S.C.A.G.), 1977 S.C. Op. Atty. Gen. No. 77-214, 1977 WL 24556

Office of the Attorney General

State of South Carolina

Opinion No. 77-214

July 8, 1977

\*1 TO: William S. Hall, M.D.

State Commissioner of Mental Health

S. C. Department of Mental Health

2414 Bull Street

Columbia, SC 29202

QUESTION:

Does the State Dairy Commission's regulation which requires milk distributors to file the prices they will bid for the milk requirements of state, county and municipal governments and which also prohibits them from altering the prices without advance notice to the Commission contravene Section 79 of the 1977–78 General Appropriations Act?

STATUTES AND CASES

1977–78 General Appropriations Act, § 79;

[Wester v. Belote](#), 103 Fla. 976, 138 S. 721 (1931);

64 Am Jur 2d Public Works and Contracts, § 30 (1972);

10 C. J. S., Bidding (1938);

72 C. J. S., Public Contracts, § 9 (Supplement 1975)

DISCUSSION:

Prior to July 1, 1976, the purchase price of milk and fluid milk products was regulated by an ‘Institutional’ wholesale unit price established by the State Dairy Commission (See Regulation 4, as filed on January 24, 1975). On July 1, 1976, the following proviso was included in § 79 of the 1976–77 General Appropriations Act:

Provided, further, That notwithstanding the provision of any statute, distributors and sub-distributors of milk, licensed by the State Dairy Commission, shall be allowed to bid for the milk and milk products required by any state, county and municipal agency or institution in its day-to-day operations. Such bid shall not be restricted to any minimum price established by the Commission and the agency or institution involved shall comply with the applicable laws as pertain to accepting merchandise on bid. . . .

This proviso has been carried forward in the 1977–78 General Appropriations Act.

On September 1, 1976, the State Dairy Commission revised its Regulation No. 4 to comply with the above-cited provision, but further required each distributor as a pre-requisite to obtaining a license each year to file with the Commission the net wholesale

unit price at which all processed milk products will be offered for sale and sold to agencies of state, county or municipal governments. (See Regulation No. 4, paragraph B). This net wholesale unit price must be applied uniformly to all such agencies regardless of location or quantities requested. (See Subparagraph B(1)). The regulation provides further that:

'prices duly filed with the Commission may be changed for any market (including additions to the distributor's product line of a new product or a new unit of an existing product on which prices are required to be filed) by filing a complete new schedule of prices to be applicable in such market; PROVIDED, the new schedule is sent by certified mail to the Commission and any decrease or increase in the established prices is received 30 days and 10 days, respectively, prior to sale or offer to sell at the changed price established by the new schedule.' (See Subparagraph B(4)).

**\*2** The question presented is whether the above regulation contravenes § 79 of the General Appropriations Act?

The primary purpose of purchasing goods through competitive bidding is to protect the public against waste of public funds. 72 C. J. S., Public Contracts, § 9 (Supplement 1975). Furthermore, a bidding requirement implies an open competition for priority. 10 C. J. S., Bidding, p. 356 (1938). Generally, a bidding procedure involves three vital elements: . . . an offering to the public, an opportunity for competition, and a basis for an exact comparison of bids; and a regulation of the matter which excludes or ignores any of these factors destroys the distinctive character of the system and thwarts the purpose of its adoption. 64 Am Jur., Public Works and Contracts, § 30 (1972). (Emphasis Added)

Section 79 of the General Appropriations Act permits the submission of bids for milk and milk products required by any state, county or municipal government for its day-to-day operation. It is apparent that this provision contemplates bidding on an individual basis. Under the regulation imposed by the State Dairy Commission each distributor must offer its 'government' bid price to every agency or institution. Therefore, there is no competition for a particular agency or institution's business, but rather the mere offering of this 'governmental' price. Moreover, the filing requirement with the Commission permits each distributor to know in advance at what price the other distributors offer particular dairy products. The result has been the establishment of essentially one industry-wide price list for dairy products, which is offered by all distributors to every agency or institution.

Finally, the Commission's regulation requires 30 days notice before a price can be decreased and 10 days notice before it can be increased, resulting in a frozen price for at least those periods of time. It should be noted that § 79 specifically prohibits a 'government' price from being set by the Dairy Commission. Although the prices in this instance are set by the distributor, once the prices are filed they become in fact the established prices of the Commission and the distributors lose all control over the prices at least for the above-cited periods of time.

The State Dairy Commission's regulation effectively thwarts the competition envisioned by a bidding procedure. Not only are competitors' prices known in advance, but also there is no competition for a particular agency or institution's business since the price must be uniform to all government agencies or institutions. The letting of bids becomes a mere formality not unlike the system which existed when a minimum price was set by the Commission. The provision authorizing bids for state agencies and institutions' milk requirements expressly provides that 'notwithstanding the provision of any statute' competitive bidding will be allowed. Provisions which authorize competitive bidding 'should receive a construction always which will fully effectuate and advance their true intent and purpose and which will avoid the likelihood of same being circumvented, evaded, or defeated.' [Wester v. Belote](#), 103 Fla. 976, 138 So. 721 (1931). Therefore, no statute or regulation should inhibit the competition envisioned by § 79 and the Dairy Commission's regulation discussed above should not be applied to bids submitted by state agencies and institutions.

#### CONCLUSION:

**\*3** Because the State Dairy Commission's Regulation No. 4 unduly restricts the competitive situation intended by the legislature it is in contravention of § 79 of the General Appropriations Act.

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