

1979 WL 43150 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

November 5, 1979

***1 RE: Interpretation of Sections 10-5-10, et seq., of the 1976 Code, Pertaining to Selection of Architectural and Engineering Firms to Provide Services to State Agencies or Departments**

Mr. George L. Schroeder
Director
Legislative Audit Council
500 Bankers Trust Tower
Columbia, South Carolina 29201

Dear Mr. Schroeder:

Reference is made to your letter of November 2, 1979, requesting an opinion from this Office interpreting Sections 10-5-10, et seq., of the 1976 Code, relating to the selection of architectural and engineering firms to provide services to State agencies and departments. Your letter reflects that the Legislative Audit Council is conducting an audit of the methods and procedures the State uses toward architectural/engineering (a/e) contracts, with the audit period being, 1969 through 1978. The 1974 legislation which is the subject of your opinion request would govern the architectural and engineering contracts negotiated since 1974.

It is mandatory upon all State agencies and Departments to follow the procedure set forth in 1974 legislation when selecting an architectural or engineering firm to provide services to the particular agency or department. Section 10-5-10 of 1976 Code. Section 10-5-30 of the 1976 Code contemplates publication in a newspaper of general circulation throughout the State relative to a description of the proposed project and required services of the architect or engineer. The publication of the project description and the request for resumes of qualifications is mandatory on the agency. In addition to mandatory publication, the agency may, if it so elects, mail the project description and request directly to architectural or engineering firms, provided that the mailing include all eligible South Carolina firms. Eligible firms would include architects or engineers registered with the State Board of Architects or Engineers, respectively.

Following receipts of resumes of qualifications, it is mandatory on the agency to hold conferences 'with at least three firms submitting resumes, for the purpose of obtaining further information relative to the qualifications of the interested firms. (See Section 10-5-40 of the 1976 Code.)

Section 10-5-50 pertains to the selection of the three most qualified applicants. This section is the most important section of the 1974 Act, in that it states that the agency shall select the three applicants which, in the judgment of the agency, are the most qualified, ranking the three in priority order. It is mandatory on the agency to consider such matters as the ability of professional personnel; past performance; willingness of the applicant to meet time and budget requirements of the agency; location of the applicant in relation to the project; recent, current and projected workloads of the applicants; and the volume of work previously awarded to the applicant by the particular agency, with the objective of effecting an equitable distribution of contracts among qualified firms provided, however, that such equitable distribution does not violate the key principle of selection of the most 'highly qualified firms.' Thus, equitable distribution of contracts contemplates that qualified firms have submitted applications for the project work, as the agency must select on qualification as the primary criterion, with equitable distribution only coming into focus if all applicants are equally qualified. Section 10-5-50 of the 1976 Code places high priority on the ability of an applicant to perform in selecting the three most qualified applicants.

*2 Section 10-5-60 requires the agency to negotiate a preliminary contract for services with the most qualified firm at a compensation which the agency determines is fair and reasonable to the State. This section contemplates negotiation with the highest priority applicant, proceeding to the second priority applicant only if the agency is unable to negotiate a satisfactory contract with the first priority applicant. If no agreement is reached with any of the three priority applicants, additional firms in order of their competence and qualifications shall be selected by the agency with negotiations continuing until a negotiated tentative agreement is reached. Section 10-5-60, of the 1976 Code.

After selection of a firm and negotiation of a tentative contract, Section 10-5-70 requires the agency to submit the name of the selected firm and the tentative contract to the State Budget and Control Board for approval, with a list of all other firms considered. The agency also must submit to the Budget and Control Board a statement of construction projects undertaken in the preceding two years identifying the architectural or engineering firm involved, the nature of the project, and the amount of the construction contract. Finally, the documents submitted to the Budget and Control Board also must include a certification that the newspaper announcement required by Section 10-5-30 of the Code was duly published.

Section 10-5-80 of the 1976 Code, as amended in 1978, contemplates Budget and Control Board review of the data submitted, and formal notification to the agency of its approval or rejection of the applicant selected by the agency. The 1978 amendment required the Board to state in writing reasons for rejection of any applicant, with a copy of the rejection report to the rejected applicant. In the event of approval of the applicant selected and recommended by the agency, the agency is authorized to execute a contract with the selected firm, with further proviso that the agency under no circumstances can enter into a contract for architectural or engineering services without the prior approval of the Budget and Control Board. In the event of rejection, the agency must submit the name of another firm for the Budget and Control Board's consideration, selected in accordance with the other sections recited and reviewed above. In the final analysis, Section 10-5-80 requires Budget and Control Board approval as a condition precedent to the entry of any valid contract for architectural and engineering services between a State agency or Department and a private firm.

In addition to the foregoing sections of the Code, you may be interested in a policy regulation or circular which, I understand, has been approved by the Budget and Control Board. This policy requirement is to the effect that the State Engineer, who is a representative of the Budget and Control Board, must participate in the conferences between agency and applicant firms, with input into the questions, relative to the qualifications and ability to perform of the interested firms. This policy requirement of the Budget and Control Board relates to contracts having an estimated value in excess of a minimum amount, and I would suggest that you confer with John McPherson to acquire more details concerning this recent procedural policy implementation by the Budget and Control Board.

*3 I will be happy to further amplify upon any points raised by the foregoing letter, or by your auditors.

Yours very truly,

Victor S. Evans
Deputy Attorney General

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