

AUDIT REPORT
BY
THE MATERIALS MANAGEMENT OFFICE
OF
THE STATE BUDGET AND CONTROL BOARD
REGARDING
THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION'S
EXEMPTION FROM THE CONSOLIDATED PROCUREMENT CODE
UNDER SECTION 11-35-710(1)

October 15, 2008

Audit conducted pursuant to Section 57-1-490(B)

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October 15, 2008

Delbert H. Singleton, Jr., Esq.
Assistant Executive Director
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Wade Hampton Building, 6th Floor
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Columbia, South Carolina 29201

Dear Mr. Singleton:

We have completed the first audit of the Department of Transportation as required by Section 57-1-490, which provides as follows:

Section 57-1-490 (B) The Materials Management Office of the State Budget and Control Board annually must audit the department's internal procurement operation to ensure that the department has acted properly with regard to the department's exemptions contained in Section 11 35 710. The audit must be performed in accordance with applicable state law, including, but not limited to, administrative penalties for violations found as a result of the audit. The results of the audit must be made available by October fifteenth to the Department of Transportation Commission, the Department of the Transportation's chief internal auditor, the Governor, the chairmen of the Senate Finance and Transportation Committees, and the chairmen of the House of Representatives Ways and Means and Education and Public Works Committees. The costs and expenses of the audit must be paid by the department out of its funds.

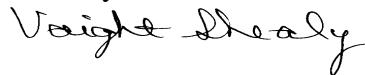
The South Carolina Department of Transportation's administration is responsible for establishing and maintaining a system of internal control over procurement transactions. The objectives of such a system are to provide management with reasonable, but not absolute, assurance that the procurement process is conducted with integrity; that transactions are executed in accordance with the law and with management's authorization; and, that transactions are recorded properly.

Because of inherent limitations in any system of internal control, errors or irregularities may occur and not be detected. Also, projection of any evaluation of the system to future periods is subject to the risk that procedures may become inadequate because of changes in conditions or that the degree of compliance with the procedures may deteriorate.

Our study and evaluation of the system of internal control over procurement transactions, as well as our overall examination of procurement policies and procedures, was conducted with professional care. However, because of the nature of audit testing, they would not necessarily disclose all weaknesses in the system.

The audit did disclose some procurements that did not meet the criteria of the exemption. However, in my opinion, no administrative penalties are warranted.

Sincerely,

A handwritten signature in black ink that reads "Voight Shealy". The signature is written in a cursive style with a large, prominent "V" and "S".

Voight Shealy
Materials Management Officer

EXECUTIVE SUMMARY

The South Carolina Department of Transportation ("DOT") has a very broad exemption from the Consolidated Procurement Code ("Procurement Code"). In 2007, the General Assembly enacted a law that requires the Materials Management Office ("MMO") to audit DOT with regard to DOT's use of this exemption. MMO has completed its audit and prepared this report.

DOT is exempt from using the Procurement Code for all contracts for the construction, maintenance, and repair of bridges, highways, and roads; vehicle and road equipment maintenance and repair; and other emergency-type parts or equipment. As noted by the Attorney General, this exemption "is not artfully drafted and . . . is susceptible to various interpretations." For 27 years, MMO and DOT have often disagreed about the use of this exemption. Attempts to reach agreement on its meaning have generally been unsuccessful in achieving a long term solution. Our audit sample of DOT's expenditures for the period of June 27, 2007 through June 30, 2008 confirms that this failure persists. While our audit was limited and, thus identified only a limited number of exceptions, it confirms that DOT continues to conduct procurements as exempt that are covered by the Procurement Code.

Unless the law is changed, we therefore continue to recommend DOT process all non-exempt procurements in accordance with the Procurement Code; that DOT and MMO try again to develop a mutual understanding of DOT's exemption; and that DOT revise its internal policies and procedures in order to provide staff with clear guidance regarding which procurements are subject to the Consolidated Procurement Code and which procurements are exempt.

Unfortunately, these recommendations differ little from those provided over the past 27 years. A lasting resolution requires legislative action. Therefore, MMO has, as a part of this audit, conducted an in-depth review of the exemption's history, the reasons given for having the exemption, the application of the Procurement Code, the state laws governing DOT's procurements, and the federal laws applicable to federally funded DOT projects. Based on our analysis, we have reached the following conclusions, each of which is explained in greater detail in the body of this report:

- DOT's exemption is inconsistent with South Carolina's sound approach to uniform and centralized public procurement policy and authority.
- Historical assumptions about the need for the exemption are flawed.
- Federal laws that govern federally funded highway contracts expressly contemplate that state procurement laws will apply.
- Applying the Procurement Code to DOT does not endanger the State's grants of federal highway funds.
- A substantial number of DOT procurements are not governed by any significant,¹ enforceable laws as to how DOT awards those public contracts.

¹ While some state statutes govern, these laws say very little regarding how the contracts must be awarded and primarily serve as a grant of authority to contract. E.g., S.C. Code Ann. §§ 57-3-200 (grant of authority), 57-5-1620 (requiring advertising and award to lowest qualified bidder), 57-5-1625 (authorizing design-build and the use of evaluation criteria), 57-5-1630 (creating limits on post-award change orders), and 57-5-1650 (authorizing pre-qualification of DOT contractors). MMO understands that DOT has internal procedures for such contracts.

In summary, we have determined that DOT's exemption is unnecessary. As better explained in the General Recommendations appearing at the end of this report, we believe that DOT should retain the authority to conduct most, if not all, the procurements it currently conducts, but should do so without an exemption from the procurement laws that govern almost every other executive agency.

However, such internal procedures do not provide either contractors or the public with the safeguards of the Consolidated Procurement Code.

INTRODUCTION

In 1979, the American Bar Association adopted the first model procurement law in the country, the ABA's Model Procurement Code for State and Local Government. On the forefront of procurement reform, the South Carolina General Assembly enacted a modified version of this model law in 1981, the South Carolina Consolidated Procurement Code, codified in the South Carolina Code of Laws at Title 11, Chapter 35. As the name suggests, this comprehensive statutory scheme consolidated all the various laws governing procurement by state government and applied them to almost every state-level executive or judicial agency. The Department of Transportation is a notable exception. Since its initial enactment, the Consolidated Procurement Code has expressly exempted broad categories of DOT procurements from any aspect of the Consolidated Procurement Code. That exemption appears in Section 11-35-710 and has remained virtually unchanged since its initial enactment:

The following exemptions are granted from this chapter: (1) the construction, maintenance, and repair of bridges, highways, and roads; vehicle and road equipment maintenance and repair; and other emergency-type parts or equipment utilized by the Department of Transportation or the Department of Public Safety;

Twenty-five years after granting this exemption, the General Assembly asked the South Carolina Legislative Audit Council to audit DOT's management of the Department's resources. The LAC performed that audit and issued its report in November 2006. The following legislative session, the General Assembly enacted a law requiring a more specific audit: an annual audit of DOT's use of its Procurement Code exemption.

The Materials Management Office of the State Budget and Control Board annually must audit the department's internal procurement operation to ensure that the department has acted properly with regard to the department's exemptions contained in Section 11-35-710. The audit must be performed in accordance with applicable state law,² including, but not limited to, administrative penalties for violations found as a result of the audit. The results of the audit must be made available by October fifteenth to the Department of Transportation Commission, the Department of the Transportation's chief internal auditor, the Governor, the chairmen of the Senate Finance and Transportation Committees, and the chairmen of the House of Representatives Ways and Means and Education and Public Works Committees. The costs and expenses of the audit must be paid by the department out of its funds.

2007 Act No. 114, § 5 (codified in S.C Code Ann. § 57-1-490(B)) (emphasis and footnote added). The Materials Management Office (MMO) of the State Budget and Control Board issues this report pursuant to that mandate.

² Applicable state law includes Section 11-35-1230, which requires that a procurement audit include a "review the adequacy of the system's internal controls in order to ensure compliance with the requirement of this code and the ensuing regulations."

BACKGROUND

Section 57-1-490(B) requires that MMO audit DOT "to ensure that the department has acted properly with regard to the department's exemptions contained in Section 11-35-710." Such an audit must begin with an understanding of the exemption's meaning, and an understanding of the exemption requires a look at how the interpretation of that exemption has developed over time.

As noted above, the exemption appears in Section 11-35-710(1) and has remained virtually³ unchanged since its initial enactment:

The following exemptions are granted from this chapter: (1) the construction, maintenance, and repair of bridges, highways, and roads; vehicle and road equipment maintenance and repair; and other emergency-type parts or equipment utilized by the Department of Transportation or the Department of Public Safety;

On its face, the statute grants a number of exemptions. The second and third exemptions -- the one for equipment maintenance and the one for emergency-type parts and equipment -- have received relatively little discussion. In large measure, the people involved have treated these exemptions as unambiguous. In contrast, the exemption for "the construction, maintenance, and repair of bridges, highways, and roads" has been the subject of much discussion.

Over time, the discussion has centered on the meaning of the various phrases in the statute. Does construction include professional design services, or only the actual building of the road? What constitutes the road? Is it the road itself or everything within the right-of-way, such as rest areas, welcome centers, and toll booths? Does the exemption include a rest-area constructed as a stand alone contract, after the roadway is complete? What is maintenance of the road? Is it limited to repairing the asphalt, or does it include service contracts for mowing the entire right-of-way?

A review of how these issues have arisen, and how they have been resolved, sheds light both on the exemption's meaning and the significant ambiguity inherent in its wording.

³ As originally enacted, the exemption read as follows: "The following exemptions are hereby granted in this chapter: (a) The construction, maintenance and repair of bridges, highways and roads; vehicle and road equipment maintenance and repair; and any other emergency type parts or equipment utilized by the Department of Highways and Public Transportation." 1981 Act No. 148, § 1.

HISTORY OF ADMINISTRATIVE INTERPRETATION

1984 Audit Report

The issue first arose in 1984. As it does with all agencies,⁴ MMO conducted a procurement audit of DOT. The resulting report, issued May 2, 1984, addressed the period from July 31, 1981 to January 31, 1983. In that report, MMO outlined DOT's interpretation of the exemption:

SCDHPT has broadly interpreted this [exemption] to include the purchase of materials and supplies to be used in the construction, maintenance and repair of bridges, highways and roads. Included here are such items as sand, aggregate, asphalt and culvert pipe bought in large quantities to be used, as needed, by SCDHPT personnel. Also, we found this to include all items used in, around or for maintenance of highways including guard rails, specialized traffic paint, signs and markers, lumber, etc.

MMO advised as follows:

The exemption "covers contractual services for construction, maintenance and repair of bridges, highways, and roads but not materials and supplies bought to be used, as needed, by in-house personnel. In other words, when the SCDHPT awards a contract specifically to construct a road or to repair a bridge, they are not required to purchase the construction services through the respective [CPO] nor follow the purchasing provisions of the Code."

Based on meetings with DOT, MMO made the following observation:

After several productive meetings with the Department of Highways and Public Transportation, we feel that we have reached an agreement on the scope of the department's exemption for the construction, maintenance and repair of bridges, highways and roads. In addition to the clarifications listed . . . above, it is our agreement with the Department of Highways and Public Transportation that the exemption contained in Section 11-35710(a) for the "construction, maintenance and repair of bridges, highways and roads." is restricted to the procurement of contractual services of construction firms. Further, we have also included within the preview [sic] of this exemption those services enumerated in Section 11-35-2910(1) (architect - engineer and land surveying services) and Section 11-35-2910(3) (construction management services) as they relate to the construction, maintenance and repair of bridges, highways and roads.

This exemption, therefore, specifically [does] not apply to procurements of materials and supplies to be used by in-house personnel. In addition, the exemption does not apply to professional services such as those described in B. 2., above [consultant services for the design of a pre-construction engineering management system], which do not relate to a specific highway, bridge or road project but rather to

⁴ Since 1981, the Consolidated Procurement Code has required that the Materials Management Office conduct periodic audits of each agency's procurement operation. S.C. Code Ann. § 11-35-1230.

the general functioning or purpose of the Department of Highways and Public Transportation as a whole.

Letter from Kelly to Campbell dated 4/30/84 (exhibit to Audit Report dated May 2, 1984).

Lastly, MMO advised that "[t]he permanent improvement programs of the SCDHPT for the construction, renovation and repair of buildings are subject to the Procurement Code and regulations. The only construction exempted is the construction of bridges and roads." The report concluded that DOT improperly treated construction of the Kershaw County Rest Area as exempt.

1986 Audit Report

MMO conducted its next audit in 1986. The resulting report, issued August 8, 1986, addressed the period from February 1, 1983 to December 31, 1985. In that report, MMO took exception with DOT's award of consultant contracts "for a supportive services program to increase the level of minority business participation in Federal-aid program contract work" and for "on-the-job training to develop, conduct and administer highway construction training, including skill improvement programs." After noticing DOT's legal department had advised that the contracts were exempt "on the basis that they directly related to the construction of roads and bridges," DOT agreed that "[a]ll subsequent contracts of this nature have been handled by MMO and will continue to be handled by that office."

1989 Letter to DOT

In response to an inquiry from DOT seeking clarification of its exemption, MMO informed DOT that items procured through its exemption "are exempted from the purchasing procedures of the Procurement Code."

1991 Memo

DOT again sought clarification of this issue in 1991 with regard to clearing vegetation along the right of way of highways and roads. In a memo from the Materials Management Office to DOT, MMO explained that "[t]his exemption has been held to be an exemption from the C.P.O.'s area of responsibility," . . . "[h]owever, the procurement must be done in accordance with the S.C. Consolidated Procurement Code and the Regulations."⁵

⁵ Memorandum from V. Carlsen to E. Johnson of 8/15/91. *See, also*, S.C. Att'y Gen. Op. of August 31, 1983 (directed to V. Evans at DOT) ("However, it is clear to us that, at a minimum, the exemptions would permit the agency involved to procure the exempted item or items itself without going through the Chief Procurement Officer at General Services. This opinion does not address . . . the question as to whether the exemption applies to the procurement procedures set forth in the Code.).

1992 Audit Report

The next audit to address the exemption took place in 1992.⁶ The resulting report, issued September 3, 1992, addressed the period from July 1, 1988 to September 30, 1991. In that report, MMO and DOT agreed as follows:

- (1) That "the exemption applies to all contractual services in preparation for and during construction, maintenance, and repair of bridges, highways and roads."
- (2) That "the exemption applies to contracts for construction of precast and prestressed replacement bridges."
- (3) That the exemption "does not apply to the purchase of supplies to be used by Department employees for these purposes."

In addressing the appropriate definition of the term "highways," the report cites to Section 56-5-430. At the time, Section 56-5-430 read: "The entire width between boundary lines of every way publicly maintained when any part thereof is open to the use of the public purposes of vehicular travel is a 'street' or 'highway.'"

1994 Att'y Gen. Opinion (January 14, 1994)

Two years later, the Attorney General issued an opinion⁷ in response to an inquiry from the State Auditor regarding the meaning of DOT's exemption. After observing that the statutory language "is not artfully drafted and . . . is susceptible to various interpretations," the opinion relies on longstanding administrative interpretations by the Board and DOT for its conclusion that "the first phrase relative to 'the construction, maintenance and repair of bridges, highways and roads' formed a discrete exemption not limited or qualified by the third phrase that related to the procurement of 'any other emergency type parts or equipment.'"

1994 Meeting

According to staff memory, the topic next arose in a 1994 meeting between Board and DOT officials. At that meeting, the Director of the Budget and Control Board's Office of General Services informed DOT that its procurement of pre-cast and pre-stressed bridges did not fall within the scope of DOT's procurement exemption. The Director explained that the exemption applied only to contractual services, and since the items acquired were supplies, DOT would have to procure such items under the Procurement Code.

1995 Letter to DOT

On July 12, 1995, MMO's Manager of Audit and Certification wrote to DOT's Director of Procurement Services regarding application of DOT's exemption. The letter concludes that "construction materials testing contracts specifically for steel and pressure treated lumber" are exempt "provided the testing services are to be performed on products destined for use in highway or bridge construction, repair or maintenance" and provided that they are procured

⁶ An earlier audit report was issued on July 6, 1989, covering the period of January 1, 1986 to September 30, 1988, but the 1989 Audit Report included no analysis relevant to scope of DOT's exemption.

⁷ S.C. Att'y Gen. Op. No. 94-9, dated January 14, 1994.

using the written procedures established by DOT for compliance with the Brook's Law, a federal law that governs the qualifications-based selection process for acquiring professional design services.

1999 Att'y Gen. Opinion (January 8, 1999)

The next major activity regarding DOT's exemption culminated in a lengthy AG opinion, an opinion jointly requested by the executive director's of both DOT and the Budget and Control Board.⁸ The opinion arose from a dispute between the Board and DOT regarding the applicability of DOT's procurement exemption to maintenance services (restroom cleaning and grounds maintenance) for rest areas and welcome centers. While the immediate concern was somewhat narrow, the underlying construction of DOT's exemption was much broader, i.e., did the exemption extend to all contracts regarding anything done inside the right-of-way. In resolving the question, the opinion states as follows:

In short, [the Attorney General's Office] is of the view that all doubt must be resolved in favor of the Procurement Code's applicability in a given situation.

....

With respect to the interpretation or applicability of the State Procurement Code, this Office has typically deferred to the construction given by the Budget and Control Board or its subordinate divisions charged with procurement matters and responsibilities.

....

Thus, deference must be given the Budget and Control Board's interpretation of the Procurement Code in this matter, unless such interpretation is patently unreasonable. Clearly, General Services' statutory interpretation is not unreasonable in this instance, particularly in light of the remedial purpose of the Procurement Code.

The fact that rest areas and welcome centers were not specifically mentioned as part of the exemption contained in § 11-35-710 is . . . striking. Moreover, the fact that a rest area or welcome center may be included as a part of the 'highway' for other purposes is not necessarily controlling in determining whether the Legislature intended to exempt contracts relating to the construction and maintenance of welcome centers and rest areas from the Procurement Code. What is most persuasive would be the common and ordinary understanding of words such as 'highway' or 'road' as well as the construction which would best effectuate the Legislature's intent. . . . If indeed the General Assembly had envisioned this broader, more technical meaning of a 'highway' or 'road', it could have certainly said so when enacting this particular exemption. Yet, it did not.

....

While there may well be other broader definitions which would include rest areas and welcome centers, General Services' application of the common and ordinary understanding of these terms for purposes of the Procurement Code must be given deference by this Office.

⁸ S.C. Att'y Gen. Op. of January 8, 1999, 1999 WL 92410.

1999 Audit Report

Later that year, MMO finalized its next routine audit. The report, issued February 19, 1999, addressed the period from April 1, 1995 to December 31, 1997. In the report, MMO quoted DOT's response to the Audit Report and the 1999 AG's Opinion: "The South Carolina Department of Transportation has agreed to abide by the opinion that has been rendered by the Attorney General's Office in this matter."

1999 Letter to DOT

The 1999 Attorney General's Opinion mentioned above adopted an interpretation of DOT's exemption that had implications well beyond the immediate issue of the cleaning and grounds maintenance contracts. To address those issues, the Board's Director of General Services wrote to DOT with the follow summary of the agency's position:

[I]t is the position of General Services that the Procurement Code applies to all structures not directly connected with the construction, maintenance, and repair of bridges, highways, or roads; including, but not limited to, rest areas, welcome centers, and weigh stations. Structures such as toll booths would not be covered by the Code. General Services also interprets the Code to apply to any construction beyond the limits of the entrance and exit ramps. Such construction would include landscaping, parking, underground utilities, and exterior lighting. I believe this position is in agreement with the intent of section 11-35-710 and with the Attorney General's opinion.

Letter from Zeigler to Mabry of 6/3/99.

2001 Audit Report

MMO conducted its next audit in 2001. The resulting report, issued December 7, 2001, addressed the period from January 1, 1998 to September 30, 2001.⁹ In that report, MMO observed that DOT "has continued to procure construction and renovation of rest areas and welcome centers under exemption (1) of Section 11-35-710 of the Code" despite the Attorney General's opinion and the agency's agreement to abide by that opinion. DOT explained that it would seek clarification from the Board.

2002 Letter from DOT

In response to the 2001 audit report, DOT did 'request' clarification. In a letter to the Board's Executive Director, DOT reiterated its position that the phrase "highways and roads" includes the entire right-of-way and implied that any other approach could compromise its access to federal-aid highway funds.¹⁰

⁹ This was the last MMO audit report to directly discuss DOT's exemption. MMO has continued to audit DOT every three years. Audit Reports have been issued for the period of October 1, 2001 to June 30, 2004 and for the period of July 1, 2004 to June 30, 2007.

¹⁰ An earlier letter to The Honorable E.B. "Mac" McLeod, Jr. from the Special Assistant to the Director of SCDOT stated that "It is not the position of the Department that federal funds will be lost if the Department is not exempt

In our audit response we stated we would pursue a clarification of this exemption through the Budget and Control Board. The clarification comes from the definition used for "highways and roads". The SCDOT when receiving Federal-aid highway funds must follow the Federal Highway Administration's requirement of having a transportation agency which is authorized to make final decisions for the state, enter into contracts and agreements for projects, provide project oversight and supervision, and to take necessary actions on behalf of the state to ensure compliance with the Federal laws and regulations. These requirements are set forth in 23 USC 302 and further codified in 23 CFR 1.3 and 23 CFR 635. This includes appropriate oversight and control on any Federally funded highway project. Federal highway projects are considered any project within, or to be constructed within the highway right of way. This would include rest area, weigh station, and welcome center construction or improvements; these are considered an integral part of the highway system and funded through Federal-aid highway funds.

To continue to receive Federal-aid highway funds for these projects we must follow the guidelines stated above. It is our opinion these projects fall within the original intent of the exemption in question. We are therefore requesting that when Federal-aid funds are used for projects that are within the highway right of ways that the SCDOT be allowed to apply this exemption. When State funds are used we will follow the Procurement Code.

....

We are looking at the most efficient way to do business for the State and for SCDOT. By applying the exemption as it was originally intended, we will not be duplicating efforts and will be in compliance with the Federal requirements. Your consideration of this request is appreciated.

Letter from Probst to Fusco of 5/24/01.

from the Procurement Code." Letter from Joye to McLeod dated 4/20/94 (copied to all members of the General Assembly). A copy is attached.

2002 Letter to DOT

MMO responded to DOT's letter as follows:

Frank Fusco asked me to respond to your letter (copy attached) regarding the Department of Transportation's interpretation of exemption number 1 to the Consolidated Procurement Code. (SC Code Section 11-35-710.) We concur with the Department's application of the exemption when Federal aid funds are used for projects that are within the highway right of ways. This would include rest area, weigh station, and welcome center construction and improvements as they are considered an integral part of the highway system and funded through Federal aid highway funds. When these projects must be completed in accordance with the Federal Highway Administration's laws and regulations, it is not our intent to impose potentially duplicitous State procurement requirements as well. As I understand it, when state funds are used, SCDOT will follow the Consolidated Procurement Code.

Letter from Shealy to Probst of 12/6/02.

2008 Exemption Request

In 2008, DOT inquired of MMO whether its procurement exemption would cover the procurement of a single contract for the design, right-of-way services and acquisition, finance, construction, operation, and maintenance of a road. DOT was advised that the scope of such a procurement would not fall within the scope of DOT's exemption under Section 11-35-710(1).

In September 2008, DOT submitted a letter to the Budget and Control Board requesting that it grant DOT an exemption under Section 11-35-710 "for the procurement of agreements and contracts entered into pursuant to S.C. Code Sections 57-3-200 and 57-5-1625." Prior to any action by the Board, DOT withdrew its request.

2008 REVIEW & AUDIT EXCEPTIONS

Scope of Review

We conducted our review of the Department's records to test the appropriateness of the Department's use of the exemption in accordance with Generally Accepted Auditing Standards that apply to compliance audits. Accordingly, we selected a limited number of samples from the period of June 27, 2007 through June 30, 2008 for compliance testing. We reviewed these samples and performed other audit procedures that we considered necessary to determine whether the Department acted properly with regard to the Department's exemption. Primarily, our samples were limited to active contracts and procurement transactions identified by SCDOT as exempt. As an additional check, we selected a sample of expenditures from DOT's general ledger to identify any contracts conducted as exempt that were not identified as such by DOT.

The scope of our audit included, but was not limited to, a review of the following, with the results included.

Sample, Exceptions & Findings

1. Supply Items

The Department procured a supply item to be used by Department staff. Such procurements are not exempt.

Item	Purchase Order	Description	Amount
1	353516	Supply purchase of five acoustracrete panels delivered by the vendor to the site in Horry County	\$12,733

Recommendation

MMO recommends that procurements of supplies be processed in accordance with the Consolidated Procurement Code and in accordance with long standing agreement with DOT.

2. Road Construction Contracts

We sampled eighty-four contracts from a total population of four hundred thirty-six contracts to determine if the Department acted properly with regard to the exemption for road construction contracts. We noted no exceptions that these procurements are not for the construction, maintenance, and repair of bridges, highways and roads.

3. Services Contracts - Scope of Work

We reviewed the scope of work on 48 solicitations to determine if the Department properly applied the exemption to non-professional service contracts. We noted exceptions in four instances. While we found no instances where work was performed that would not be exempt,

the scope of the four contracts were not expressly limited to bridges, highways or roads and should have been procured under the Consolidated Procurement Code. Therefore, these contracts were not exempt.

Item	Contract	Scope of work	Amount
1	A00240383	Tree removal within right-of-way or other areas designated by the resident management engineer	\$ 100,000
2	A00222044	Tree removal and stump removal anywhere in Orangeburg County	\$ 1,000,000
3	A00218765	Underground utility locations	\$ 78,000
4	A00218765	Cutting and disposal of dead, diseased or potentially dangerous trees that may pose a hazard to right-of-way, Department property, and private property or traveling public	\$ 1,000,000

Recommendation

MMO recommends that the scope of exempt contracts be limited to work within the scope of DOT's exemption.

4. Consultant / Design Related Professional Services

We sampled 48, from a total of 141 projects to determine if the Department acted properly with regard to the exemption and its application to consultant services and design related professional services. As explained further below, the following contracts were not properly procured because they were not incidental to a professional services contract. For the exemption to apply, the contracts would have to be procured as incidental to services provided by a licensed professional in the category defined in Section 11-35-2910(1) as "architect/engineer or land surveying services" and tied to a specific construction project to be covered by the exemption. In addition, and as explained below, we identified other concerns specific to one or more items below.

Item	Project	Scope of Work	Amount
1	54	Hazardous Environmental Investigation Services	\$4,500,000
2	S-11-07	On call concrete and steel testing and inspection	\$600,000
3	62	On call photogrammetric services	\$1,200,000
4	70	Statewide multimodal transportation plan	\$1,719,521
5	85	On call transportation modeling services	\$150,000
6	S-42-08	Mussel surveys	\$23,489
7	72	Facilitation services for South Carolina Partnering Program	\$750,000
8	58	Develop maintenance operations manual	\$628,000

a. Item Specific Concerns

For Item No. 1 above, the hazardous environmental investigation services, the contract scope did not limit services to work performed under the exemption. While we noted no instances that work outside the exemption occurred, such non-exempt services could be performed under the current contract scope. Therefore, this contract is not exempt.

Recommendation

MMO recommends that the scope of exempt contracts be limited to work within the scope of DOT's exemption.

b. General Concerns

More than any other area tested, our review of consultant and design related professional services contracts shows a difference in the application of the exemption between DOT and MMO where disagreement continues to occur. DOT appears to extend the exemption to any services related to highway or bridge construction. MMO finds that the Procurement Code dictates a somewhat narrower interpretation, as follows:

CONSTRUCTION INCLUDES DESIGN

Section 11-35-710(1) provides DOT an exemption for "the construction, maintenance, and repair of bridges, highways, and roads". The exemption must be read in conjunction with the definitions provided by the Procurement Code. The following four definitions are relevant.

“Construction” means the process of building, altering, repairing, remodeling, improving, or demolishing any public structure or building or other public improvements of any kind to any public real property. It does not include the routine operation, routine repair or routine maintenance of existing structures, buildings, or real property.¹¹

“Services” means the furnishing of labor, time, or effort by a contractor not required to deliver a specific end product, other than reports which are merely incidental to required performance. This term includes consultant services other than architectural, engineering, land surveying, construction management, and related services. This term does not include employment agreements or services as defined in Section 11–35–310(1)(d).¹²

“Architect-engineer and land surveying services” are those professional services associated with the practice of architecture, professional engineering, land surveying, landscape architecture, and interior design pertaining to construction, as defined by the laws of this State, as well as incidental services that members of these professions and

¹¹ Sections 11-35-310(7) and 11-35-2910(2), as defined in 2007. In 2008, the definition of construction was amended. 2008 Act No. 174. Under either definition, the exceptions taken in this audit are the same.

¹² Section 11-35-310(29).

those in their employ may logically or justifiably perform, including studies, investigations, surveys, evaluations, consultations, planning, programming conceptual designs, plans and specifications, cost estimates, inspections, shop drawing reviews, sample recommendations, preparation of operating and maintenance manuals, and other related services.¹³

“Construction management services” are those professional services associated with a system in which the using agency directly contracts with a professional construction manager to provide that group of management activities required to plan, schedule, coordinate, and manage the design and construction plan of a state project in a manner that contributes to the control of time, cost, and quality of construction as specified in the construction management contract.¹⁴

Read together, these definitions clearly distinguish construction services from non-construction services, both those related to construction and those not. Looking only at these definitions, DOT's exemption does not extend to any non-construction services because the term construction does not include architectural and engineering, construction management, and land surveying services.¹⁵ However, parts of a larger statutory scheme cannot be considered in isolation. Statutes that are part of the same act must be read together and sections that are part of the same general statutory scheme must be construed together. While the definitions are controlling, they must be read in conjunction with the purpose of the whole statute and given a reasonable construction consistent with the purpose of the statute. Consistent with these general rules of statutory construction, Section 11-35-310 expressly provides that the definitions in that section apply "[u]nless the context clearly indicates otherwise"

A careful reading of the Procurement Code reflects that the term "construction" is used in two different contexts. In one context, construction includes architect-engineer, construction-management, and land surveying services. In another, it does not. In no circumstance does it include services other than architect-engineer, construction-management, and land surveying services. Several examples illustrate.

In the broader context, the Procurement Code ties many of its rules to four generally applicable categories: supplies, services, information technology, and construction. These categories are used to define the Code's concept of a contract (11-35-310(8)) and a procurement (11-35-310(24)), to define the Board's authority to grant exemptions (11-35-710) and promulgate

¹³ Section 11-35-2910(1).

¹⁴ Section 11-35-2910(3), as defined in 2007. In 2008, the definition of "construction management services" was amended. 2008 Act No. 174 (codified as Section 11-35-2910(4)). Under either definition, the exceptions taken in this audit are the same.

¹⁵ For example, the following statutes show that the General Assembly clearly knew how to differentiate between construction services and these other services, both in other exemptions and throughout the code: §§ 11-35-710(6) ("except as the funds are used for the procurement of construction, architect-engineer, construction-management, and land surveying services;"), -310 (defining State Engineer as CPO for the "areas of construction, architectural and engineering, construction management, and land surveying services;"), -530 ("The board shall appoint a construction, architect-engineer, construction management, and land surveying services advisory committee comprised of"), -830 (defining the State Engineer's authority to include "[a]ll procurements involving construction, architectural and engineering, construction management, and land surveying services, as defined in Section 11-35-2910,").

regulations (11-35-540(1)), to specify what can be awarded by sole source (11-35-1560) or emergency (11-35-1570), and to define the scope of both the CPO's (11-35-4230) and the Procurement Review Panel's authority (11-35-4410(1)(b)) over disputes.

In the narrower context, the Procurement Code expressly distinguishes construction from all other services, including architect-engineer, construction-management, and land surveying services. As quoted above, each concept has a separate definition. The importance of these distinctions is most obvious when looking at the Code's different source selection procedures. By default, construction is acquired on a low-bid basis using competitive sealed bidding. (11-35-3020) In contrast, architect-engineer, construction-management, and land surveying services -- when acquired separately from construction -- are acquired using a qualifications based selection process. (11-35-3220) Even the small purchase procedures differ for each. Section 11-35-1550 governs small purchases of construction. Section 11-35-3230 governs small purchases for architect-engineer or land surveying service. This distinction also appears elsewhere, e.g., 11-35-3015 (addressing differing project delivery methods) and 11-35-3245 (restricting firm from submitting a construction bid on work it designed under separate contract).

As it has since 1981, MMO applies the broader definition of construction to DOT's exemption. MMO interprets that exemption to include construction related professional design services, as defined by law.

DESIGN IS LIMITED

To determine the breadth of DOT's exemption for design services, the statutory definitions for "architect-engineer and land surveying services" and "construction management services" must be considered.

Architectural, Engineering, Land Surveying

These concepts are not limited to the services of the licensed professionals. As the following definition makes clear, they include incidental services "that members of these professions and those in their employ may logically or justifiably perform," if they pertain to construction and are provided by or through one of the listed licensed professionals.

“Architect-engineer and land surveying services” are those professional services associated with the practice of architecture, professional engineering, land surveying, landscape architecture, and interior design *pertaining to construction, as defined by the laws of this State, as well as incidental services that members of these professions and those in their employ may logically or justifiably perform, including studies, investigations, surveys, evaluations, consultations, planning, programming conceptual designs, plans and specifications, cost estimates, inspections, shop drawing reviews, sample recommendations, preparation of operating and maintenance manuals, and other related services.*¹⁶

¹⁶ S.C. Code Ann. § 11-35-2910(1) (emphasis added).

In the larger context of the Consolidated Procurement Code, these services are those acquired by the qualifications based selection process required by Section 11-35-3220. To illustrate, consider the following example: General aerial mapping services are not acquired under Section 11-35-3220. Rather, an agency acquires such services using the code's standard procurement procedures, e.g., 11-35-1520 or 11-35-1530. However, if a licensed engineer were hired to design a structure, and the engineer employed a firm to conduct aerial mapping to be used in providing those design services, the contract with the engineer, including the incidental aerial mapping services, could be acquired under Section 11-35-3220. The same distinction applies to DOT's exemption. If DOT hires an aerial mapping firm to provide aerial mapping services, that contract is not exempt; it does not fit the definition of construction as used in Section 11-35-710(1). However, if DOT hired an engineering firm to design a road and, in order to provide his design, the engineering firm provided aerial mapping services, those services would fall within the exemption.

Construction Management Services

Unlike architectural, engineering, and land surveying services, the concept of construction management services is much more limited. As the following definition makes clear, it is limited to specific projects and does not include incidental services provided by sub-consultants.

“Construction management services” are those professional services associated with a system in which the using agency directly contracts with a professional construction manager to provide that group of management activities required to plan, schedule, coordinate, and manage the design and construction plan of a state project in a manner that contributes to the control of time, cost, and quality of construction as specified in the construction management contract.¹⁷

Recommendation

MMO recommends that procurements of non-exempt consultant and design related services be processed in accordance with the Consolidated Procurement Code.

¹⁷ The 2008 changes to this definition do not impact the results of this audit. However, the revised definition clearly refers to construction management services only as they relate to a single construction project.

SUMMARY OBSERVATIONS & BASIS OF RECOMMENDATIONS

Our recent review of DOT's procurement records, as well as our study of its exemption, the exemption's history, and the applicable federal laws leads to the following five observations. These observations serve as the basis for our recommendations.

1. Oversight & Uniform State Procurement Policy

Just two years after the ABA issued its original Model Procurement Code for State and Local Government, the General Assembly enacted South Carolina's Consolidated Procurement Code.¹⁸ While the Model Code strongly favors the centralization of procurement policy and authority, it includes optional, alternate text by which the legislature can delegate to the relevant purchasing agency the authority for certain types of procurements -- *subject to all the procurement code's purchasing procedures*. Of the four areas expressly contemplated, one was "bridges, [and] highway."¹⁹ The ABA's revisions to the Model Code in 2000 reiterate this option, though the wording was revised as follows to reflect developments in the intervening twenty years: "the design, construction, maintenance, operation, and private finance of bridge[s], [and] highway[s] . . ."²⁰ Despite providing this optional alternate, the ABA's commentary makes clear its recommendation for centralized procurement authority and uniform procurement procedures:

[These categories] represent examples of types of procurements which a legislature may see fit to exempt from centralized procurement. These types of procurements would then remain with the Purchasing Agencies which require these supplies, services, or construction. However, *centralized responsibility for procurement is preferred, and procurement functions vested in the Chief Procurement Officer can always be delegated to other agencies or officials*. Again, experience has shown that a cohesive and integrated procurement system rather than one which is fragmented or diffused, will promote efficiency and economy and will best conserve the taxpayers' monies.²¹

Consistent with this recommendation, South Carolina has adopted a strong, centralized approach to public procurement. Authority and policy are centralized in the Board, with purchasing authority delegated back to purchasing agencies consistent with their capabilities. DOT's exemption is a major exception to this basic policy.²²

¹⁸ "The General Assembly finds that: (1) it adopted a modified version of the 1979 ABA Model Procurement Code for State and Local Governments when it enacted 1981 Act No. 148. Since then, the ABA has revised its recommended model by adopting the 2000 ABA Model Procurement Code for State and Local Governments, which it developed in cooperation with, among others, the National Association of State Procurement Officials, the National Institute of Governmental Purchasing, the American Consulting Engineers Council, the Design Professionals Coalition, the Council on the Federal Procurement of A/E Services, the Engineers Joint Contracts Document Committee, and the National Society of Professional Engineers." 2008 Act. No. 174, § 1.

¹⁹ ABA Section of Urban, State and Local Government Law, Model Procurement Code for State and Local Governments § 2-303 (1979).

²⁰ American Bar Association, 2000 ABA Model Procurement Code for State and Local Governments § 2-303 (2000).

²¹ ABA Section of Urban, State and Local Government Law, Model Procurement Code for State and Local Governments § 2-303 commentary (1979) (emphasis added).

²² With two exceptions, the only other entities that have been granted such sweeping exemptions are quasi-governmental authorities -- entities frequently given special treatment by the law. Specifically, the State Ports

2. Policy Behind Exemption / Conflicts with Federal Laws

The reason for granting DOT an exemption for "construction, maintenance, and repair of bridges, highways, and roads" is unknown. Apparently, those involved assumed that the exemption "was to relieve [DOT] of the necessity of following two different sets of procurement procedures since the federal government requirements also apply to [federally subsidized] highway and road construction."²³

Even if the assumption is correct, the justification is flawed for several reasons. First, federal law contemplates, in part, that state laws will govern.²⁴ Second, the federal laws that do apply often expressly contemplate that states will have their own rules that govern, in addition to, or as a gap-filler for, the federal rules.²⁵ Third, the federal law does not provide participating contractors with a practical and effective avenue of relief. Unlike the Consolidated Procurement Code, which provides an inexpensive and speedy administrative review process, contractors concerned with the integrity of a highway contract award must go to court and seek an injunction.²⁶

These reasons aside, the Consolidated Procurement Code expressly provides for conflicts between federal and state rules -- by requiring agencies to comply with any applicable federal law.²⁷

Authority, the Public Service Authority (Santee Cooper), the South Carolina Research Authority, the Medical University Hospital Authority, the Jobs-Economic Development Authority (JEDA), Midlands Authority, Midlands Technical College Enterprise Authority, Trident Technical College Enterprise Campus Authority, Venture Capital Authority, and the Edisto Development Authority all have exemptions. *See, generally*, S.C. Code Ann. § 11-35-710. The exceptions are the Division of Public Railways of the Department of Commerce and non-construction procurements by higher education using certain athletic, student, and canteen funds. S.C. Code Ann. § 11-35-710(4)&(6). *See, generally*, A Statewide Review of Noncompetitive Procurements (S.C. Legislative Audit Council April 20, 1988).

²³ Letter from Zeigler to Mabry of 7/10/97. *See, also*, Letter from Probst to Fusco of 5/24/01 (quoted earlier).

²⁴ See discussion in text below in third paragraph under heading "Unregulated Procurements". *See, also*, 23 C.F.R. § 636.110 (2008) ("You may use your own procedures for the solicitation and receipt of proposals and information . . ."). Title 23, Part 636 of the CFR contains the FHWA's policies and procedures for approving, and the contracting procedures for conducting, all design-build projects funded under title 23 of the U.S. Code. 23 C.F.R. § 636.101 (2008). *See, generally*, 23 U.S.C. 112(b)(3)(A) (2008) ("A State transportation department or local transportation agency may award a design-build contract for a qualified project described in subparagraph (C) using any procurement process permitted by applicable State and local law.").

²⁵ *E.g.*, 23 C.F.R. 636.119(a) (2007) ("In order for a project being developed under a public-private agreement to be eligible for Federal-aid funding . . . the contracting agency must have awarded the contract to the public-private entity through a competitive process that complies with applicable State and local laws."), and Design-Build Contracting; Final Rule, 67 Fed. Reg. 75902, 75904 (2002) ("While notifications and debriefings are a very important part of the overall procurement process, the FHWA believes that the goals of this rulemaking can still be achieved if contracting agencies rely on State approved procedures in this area . . ."). Reference should be made to the discussion in the text below in the third paragraph under heading "Unregulated Procurements".

²⁶ *See, e.g.*, *Clark Construction Co. v. Pena*, 895 F. Supp. 1483 (M.D. Ala. 1995).

²⁷ S.C. Code Ann. § 11-35-40(3). Text of this statute appears in the second general recommendation at the end of this report.

3. Single State Agency

For purposes of receiving federal highway funds, federal law requires that each state have a central state transportation department.

The Administrator shall cooperate with the States, through their respective State highway departments, in the construction of Federal-aid highways. Each State highway department, maintained in conformity with 23 U.S.C. 302, shall be authorized, by the laws of the State, to make final decisions for the State in all matters relating to, and to enter into, on behalf of the State, all contracts and agreements for projects and to take such other actions on behalf of the State as may be necessary to comply with the Federal laws and the regulations in this part.

23 C.F.R. § 1.3 (2008).²⁸

Citing to this "single state agency" requirement, DOT has argued that its procurement exemption must be read broadly and implied that any other approach might jeopardize its federal funding.²⁹ DOT's concern is misplaced.

First, the law cannot be read without any qualification. If read literally and in isolation, the regulation would prohibit a governor, a legislature, a court, an administrative law court, or any other entity from having the authority to review, oversee, or approve any actions of that department because the department's decision would not then be final. To the contrary -- no one would argue that South Carolina courts cannot resolve a breach of contract case between DOT and a highway construction contractor.

Second, MMO is unaware of the Federal Highway Administration (FHWA) having ever stated that the use of a centralized procurement office would endanger a state's federal-aid highway funds. To the contrary, in a letter to the General Assembly, DOT has expressly stated "[i]t is not the position of the Department that federal funds will be lost if the Department is not exempt from the Procurement Code."³⁰

The real purpose of the "single state agency" requirement appears to be the need to facilitate federal oversight and system-wide accountability.³¹

²⁸ The following statute provides the authority for this regulation.

Any State desiring to avail itself of the provisions of this title shall have a State transportation department which shall have adequate powers, and be suitably equipped and organized to discharge to the satisfaction of the Secretary the duties required by this title. In meeting the provisions of this subsection, a State may engage, to the extent necessary or desirable, the services of private engineering firms.

23 USC § 302(a) (2008).

²⁹ Letter from Probst to Fusco of 5/24/01 (relevant excerpt quoted above).

³⁰ Letter from Joye to McLeod dated 4/20/94 (Letter to The Honorable E.B. "Mac" McLeod, Jr., and copied to all members of the General Assembly, from the Special Assistant to the Director of SCDOT) (copy attached).

³¹ See, generally, *San Lázaro Association, Inc. v. Connell*, 286 F.3d 1088 (9th Cir. 2002) (discussing the purpose behind the "single state agency" requirement of the Medicaid Act). Even if the "single state agency" requirements created a real conflict, federal law provides for a waiver. 31 U.S.C. § 6504 ("Notwithstanding a law of the United States providing that one State agency . . . must be . . . designated to carry out or supervise the administration of a grant program, the head of the executive agency carrying out the program may . . . waive the one State agency . . . provision . . ."). See, also, Office of Mgmt. & Budget, Executive Office of the President, OMB Cir. No. A-102,

The lack of any real conflict is also suggested by the fact that there are other federally funded programs with a "single state agency" requirement that use the Board's central procurement offices to solicit and award federally funded procurement contracts.³² Moreover, at least one FHWA regulation appears to contemplate a separation of the procurement and contract administration functions.³³

Third, even if the Consolidated Procurement Code applied to all highway and road construction, the Board's role in construction procurements is relatively narrow. The Board's Chief Procurement Officer for Construction (CPOC) does not enter into contracts for other state entities and is not a party to those contracts. Likewise, the CPOC does not issue procurements, select contractors, make awards, or handle day-to-day administration of agency contracts. Rather, the CPOC provides oversight, auditing, certain procurement-related approvals (e.g., use of pre-qualification), policy, and a quasi-judicial administrative review process for procurement protests and contract disputes.

Even if the "single state agency" requirement created an irreconcilable conflict with the CPOC's role, Section 11-35-840 provides a means by which authority can be delegated.

Grants and Cooperative Agreements with State and Local Governments (1997), Attachment ¶ (1)(h) (directing that any request for a waiver of the single state agency requirement "shall be given . . . , whenever possible, an affirmative response.").

³² For example, the South Carolina Department of Health and Human Services is the single state agency responsible for the state's Medicaid program, and it routinely uses the Board's procurement offices. 42 U.S.C. § 1396a(a)(5) ("A State plan for medical assistance must-- (5) either provide for the establishment or designation of a single State agency to administer or to supervise the administration of the plan"), and 42 C.F.R. 431.10 (2007). *See, also*, 15 C.F.R. 923.47(a) (2008) ("For program approval, the Governor of the state must designate a single state agency to receive and administer the grants for implementing the management program."), and 34 C.F.R. 692.21 (2008) ("To receive a payment under the LEAP Program for any fiscal year, a State must have a program that--(a) Is administered by a single State agency").

³³ 23 C.F.R. § 636.103 (2008) ("*Contracting agency* means the public agency awarding and administering a design-build contract. The contracting agency may be the STD [state transportation department] or another State or local public agency.").

4. Unregulated Procurements

Grouped by which *laws* dictate procedures governing how a public contract is awarded, DOT's procurements can be divided into four groups:

- Awards governed by the state's Consolidated Procurement Code.
- Awards governed by federal procurement laws.
- Awards governed by both federal laws and the state's Consolidated Procurement Code.
- Awards not governed by any law dictating how the contract is awarded.³⁴

A review of applicable federal rules explains these categories. In the federal regulations that dictate the procurement rules for contracts involving federal grant money, the default rule is that states must use their own procurement procedures.³⁵ This default rule yields to any program-specific, federal statutory requirements.³⁶ For example, federal law establishes certain aspects of the procurement process to be used for entering into a federal-aid, design-build highway construction contract.³⁷ In the absence of any program-specific federal statutory requirements, federal regulations do not dictate how states award federally funded public contracts. If state law does not provide any procurement rules, there are none.³⁸ **Stated differently, if no program-specific federal statutory requirements apply to a procurement, and if that procurement falls within the scope of DOT's exemption, then no significant, ³⁹ enforceable laws govern how DOT awards the resulting public contract.**⁴⁰ Examples would include DOT road construction projects that use no federal funds, such as primary or secondary roads. The

³⁴ MMO understands that DOT has internal procedures for such contracts. However, such internal procedures do not provide contractors or the public the safeguards provided by laws. While some state statutes govern, these laws say *very little* regarding how the contracts must be awarded and primarily serve as a grant of authority to contract. *E.g.*, S.C. Code Ann. §§ 57-3-200 (grant of authority), 57-5-1620 (requiring advertising and award to lowest qualified bidder), 57-5-1625 (authorizing design-build and the use of evaluation criteria), 57-5-1630 (creating limits on post-award change orders), and 57-5-1650 (authorizing pre-qualification of DOT contractors).

³⁵ *Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments*, 49 C.F.R. § 18.1 & 18.36(a) (2007) (often called the "Common Rule") ("When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds."). *See, generally, City of Cleveland v. Ohio*, 508 F.3d 827 (6th Cir. 2007).

³⁶ 49 C.F.R. § 18.4(a) (2007) ("[This 'Common Rule' applies] to all grants and subgrants to governments, except where inconsistent with Federal statutes or with regulations authorized in accordance with the exception provision of § 18.6 . . .").

³⁷ 23 C.F.R. § 636.104 (2007). Federal regulations also provide a limited set of rules regarding the award of low bid, federal-aid highway construction work. 23 C.F.R. Part 635. In large measure, these rules are consistent with, but much more limited than, the rules provided for in the Consolidated Procurement Code.

³⁸ *See* 49 C.F.R. § 18.36(a) (2007).

³⁹ While some state statutes govern, these laws say *very little* regarding how the contracts must be awarded and primarily serve as a grant of authority to contract. *E.g.*, S.C. Code Ann. §§ 57-3-200 (grant of authority), 57-5-1620 (requiring advertising and award to lowest qualified bidder), 57-5-1625 (authorizing design-build and the use of evaluation criteria), 57-5-1630 (creating limits on post-award change orders), and 57-5-1650 (authorizing pre-qualification of DOT contractors). MMO understands that DOT has internal procedures for such contracts. However, such internal procedures do not provide either contractors or the public with the safeguards provided by laws.

⁴⁰ *See, generally, FHWA Policy Memorandum, Procurement of Federal-aid Construction Projects* (June 26, 2008) (explaining relationship between the "common rule" and the program-specific statutes and regulations) (copy attached), and *FHWA Policy Memorandum, Procurement of Transportation Enhancement Projects* (November 12, 1996). FHWA Policy Memoranda are available at <http://www.fhwa.dot.gov/legsregs/eledirs.htm>.

following table identifies a variety of contracts, by subject, that do not involve federal-aid highway funds and thus do not trigger federal rules.⁴¹

DOT Exempt Contracts With No Federal Funds			
<u>DOT File Number</u>	<u>Project Number</u>	<u>Description</u>	<u>Amount</u>
4752.037090A	08M2	Pavement Markings	\$153,976
07.370803R2	CB08	Catch Basin Repair	\$461,211
32.229B	CR32	Widening	\$2,740,206
45.220701	CS07	Chip Seal	\$505,441
47.390710	FR07	Pavement Markings	\$322,238
30.100801	MR08	Resurfacing	\$844,472
11.56072	MT11	Bridge Repair	\$157,900
01.290702	MTN-DP07	Full Depth Patching	\$1,484,296

Even when federal law does provide certain procedures for a DOT procurement, significant aspects of those procurements either remain unregulated or expressly contemplate that some state law will dictate the appropriate procurement process.⁴² For example, the federal regulations governing the award of federal-aid, design-build highway construction contracts expressly provide for states to use their own procedures for the advertisement, solicitation, receipt, evaluation, and award of proposals.⁴³ Federal regulations also provide some rules regarding the award of low bid, federal-aid highway construction work; however, these rules are, in large

⁴¹ DOT's internal policies appear to confirm this point. *See* SCDOT Departmental Directive No. 13, dated March 25, 2008 ("Bridge, highway and road construction contracts are procured through SCDOT's Office of Construction using the procedures set forth in S.C. Code Section 57-5-1610, et seq. Where federal funds are involved, applicable federal laws and regulations must also be followed (ex., 23 C.F.R. 635 for construction and maintenance contracts and 23 CFR 636 for design-build contract). . . . Other exempt procurements are handled by the SCDOT's Director of Procurement pursuant to SCDOT's Procurement Internal Policies and Procedures Manual.").

⁴² *E.g.*, 23 C.F.R. § 636.119(a) (2008) ("In order for a project being developed under a public-private agreement to be eligible for Federal-aid funding (including traditional Federal-aid funds, direct loans, loan guarantees, lines of credit, or some other form of credit assistance), the contracting agency must have awarded the contract to the public-private entity through a competitive process that complies with applicable State and local laws.") (emphasis added), and 23 C.F.R. § 635.110(f) (2008) (allowing states to use their own qualification or prequalification procedure for any phase of a design-build procurement).

⁴³ 23 C.F.R. § 635.113(c)(1) (2008) (providing for the state to use its own process for handling proposals and information; reviewing and evaluating proposals; allowing the submission, modification, revision and withdrawal of proposals; and announcing awards), 23 C.F.R. § 636.110 (2008) ("You may use your own procedures for the solicitation and receipt of proposals and information . . .").

measure, consistent with, but much more limited than, the rules provided for in the Consolidated Procurement Code.⁴⁴

5. Unresolved Ambiguities

In 1994, the Attorney General's Office observed that Section 11-35-710(1) "is not artfully drafted and . . . is susceptible to various interpretations."⁴⁵ As the above chronicle reflects, twenty-seven years of administrative interpretation has yet to resolve the ambiguity inherent in DOT's procurement code exemption.

Allowing this ambiguity to continue has real costs. First, as this report illustrates, the agencies involved have spent considerable time addressing this issue. Second, private businesses seeking to contract with the State make assumptions on such matters at their own risk, as the courts have long saddled business with the risk of knowing whether or not the agency with which they do business has the proper authority.⁴⁶ Third, a lack of clarity in procurement laws can lead to expensive litigation, with consequences for all involved.⁴⁷

Only legislative action can fully conclude this matter.⁴⁸

⁴⁴ 23 C.F.R. Part 635.

⁴⁵ S.C. Att'y Gen. Op. No. 94-9, dated January 14, 1994, at 2.

⁴⁶ *E.g.*, *Service Management, Inc. v. State Health and Human Services Finance Commission*, 298 S.C. 234, 379 S.E.2d 442 (Ct. App. 1989) ("Finally, parties entering into agreements with the state assume the risk of ascertaining that he who purports to act for the state stays within the bounds of his authority.").

⁴⁷ *E.g.*, *Sloan v. Department of Transp.*, 365 S.C. 299, 618 S.E.2d 876 (2005) (interpreting DOT's authority to conduct competitive sealed proposals), *Sloan v. Department of Transp.*, 2008 WL 3890145, Op. No. 26534 (S.C. filed August 25, 2008) (Shearouse Adv. St. No. 33, at 73) (interpreting the scope of DOT's authority to conduct emergency procurements).

⁴⁸ To date, our state courts have had little opportunity to address this issue. *See, generally*, *Sloan v. Department of Transp.*, 2008 WL 3890145, Op. No. 26534 (S.C. filed August 25, 2008) (Shearouse Adv. St. No. 33, at 73) ("Contracts for the construction, maintenance, and repair of highways and roads are specifically exempted from the South Carolina Consolidated Procurement Code (Procurement Code). See S.C. Code Ann. § 11-35-710 (Supp. 2007). The procurement of construction contracts for the state highway system is governed by [§ 57-5-1620].").

SPECIFIC RECOMMENDATIONS TO SCDOT

1. MMO recommends that procurements of supplies be processed in accordance with the Consolidated Procurement Code.
2. MMO recommends that the scope of exempt contracts be limited to work within the scope of DOT's exemption.
3. MMO recommends that procurements of non-exempt consultant and design related services be processed in accordance with the Consolidated Procurement Code.
4. MMO recommends that DOT revise its internal policies and procedures. Generally, the Department's policies and procedures should provide staff with clear guidance regarding which procurements are subject to the Consolidated Procurement Code and which procurements are exempt. We have not been able to identify such guidance in the Department's policies and procedures.⁴⁹ For example, we have not identified any guidance regarding where the distinction has been made regarding consultant and design related professional services that are exempt versus those that are subject to the Procurement Code. MMO therefore recommends the Department revise its internal policies and procedures to resolve this deficiency.
5. MMO recommends that DOT and MMO cooperate to develop a mutual understanding of DOT's exemption. In doing so, we recommend applying the exemption exactly as written, using ordinary meanings for any words not defined by the Consolidated Procurement Code, rather than relying on historical agreements between the agencies.

⁴⁹ E.g., SCDOT Departmental Directive No. 13, dated March 25, 2008 (attached), *superseding* SCDOT Departmental Directive No. 13, dated June 1, 1997 (attached).

GENERAL RECOMMENDATIONS

Consistent with these observations and South Carolina's history of centralizing procurement policy and authority in the Budget & Control Board, MMO makes the following four interrelated recommendations. These recommendations do not stand alone. Rather, they are intended to be adopted together as a coordinated approach to addressing this long-standing problem.

General Assembly

1. Consider repealing DOT's existing exemption, as provided by Section 11-35-710(1), to make the Consolidated Procurement Code applicable to all DOT procurements.
2. Consider amending Section 11-35-40(3), as shown below, to add clarity to a statute that makes state procurement rules yield to mandatory federal rules:

Compliance with Federal Requirements. Where a procurement involves the expenditure of federal assistance, grant, or contract funds, the governmental body ~~shall~~ also shall comply with ~~such federal law and laws (including authorized regulations)~~ as are mandatorily applicable and which are not presently reflected in ~~the~~ this code. Notwithstanding, where federal assistance, grant, or contract funds are used in a procurement by a governmental body as defined in Section 11-35-310(18), this code, including any requirements that are more restrictive than federal requirements shall, must be followed, except to the extent such action would render the governmental body ineligible to receive federal funds whose receipt is conditioned on compliance with mandatorily applicable federal law. In those circumstances, the solicitation must identify and explain the impact of such federal laws on the procurement process, including any required deviation from this code.

At a minimum, MMO recommends that the General Assembly consider clarifying DOT's exemption. For 27 years, debate over the application of this exemption has consumed countless hours of staff time, both at DOT, MMO, and the Attorney General's Office. If the General Assembly chooses only to clarify the exemption, MMO recommends that DOT and MMO cooperate to jointly recommend appropriate clarifying language.

Budget & Control Board

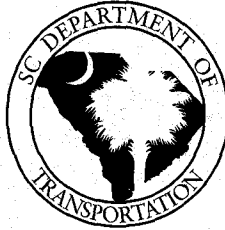
3. Under Section 11-35-1210, consider granting DOT unlimited certification in those areas where DOT currently has unlimited authority under its exemption.

Chief Procurement Officers

4. Under Section 11-35-840, consider delegating appropriate authority to SCDOT e.g., authority to administratively review contract disputes under Sections 11-35-4230 and 11-35-4320 regarding the construction and design of roads and bridges.

ATTACHMENTS

1	Letter to Larry G. Sorrell, Manager, Audit and Certification Materials Management Office, dated October 15, 2008	Representations by DOT management regarding information provided to MMO for audit.
2	Letter to Linda C. McDonald, Chief Counsel, dated September 10, 2008	Follow up to MMO's request for information.
3	Letter to The Honorable H. B. Limehouse, Jr., dated July 2, 2008	Engagement letter to DOT initiating MMO's audit.
4	Letter to The Honorable E. B. "Mac" McLeod, Jr., dated April 20, 1994 (including four exhibits)	DOT response to legislative inquiry regarding comparison between procedures of Consolidated Procurement Code and those of DOT
5	SCDOT Departmental Directive No. 13, dated March 25, 2008.	Providing overview of procurement of goods, services and supplies, including required Commission authorization for certain actions
6	SCDOT Departmental Directive No. 13, dated June 1, 1997.	Establish Policy for Procurement Internal Policies and Procedures Manual
7	FHWA Policy Memorandum, <i>Procurement of Federal-aid Construction Projects</i> , dated June 26, 2008.)FHWA Memorandum	FHWA memo explaining relationship between the "common rule" and the program-specific statutes and regulations
8	23 United States Code of Laws, Section 112	-----
9	SCDOT's Response to Audit Report of Materials Management Office	-----



SECRETARY OF TRANSPORTATION

955 Park St (29201), PO Box 191, Columbia, SC 29202-0191
Phone: 803 737 1302, Fax: 803 737 2038

October 15, 2008


Mr. Larry G. Sorrell
Manager, Audit and Certification
Materials Management Office
1201 Main Street, Suite 600
Columbia, South Carolina 29201

Re: Procurement Audit required by Section 57-1-490 (B)

Dear Mr. Sorrell:

Based on your examination of the Department of Transportation for the purpose of conducting the audit required by Section 57-1-490 (B), we confirm, to the best of our knowledge and belief, and after all due diligence, the following representations made to you during your examination.

1. We have made available to you all procurement records and related data report as requested.
2. Except as disclosed to you, there have been no --
 - a. Irregularities involving management or employees who have significant roles in the system of internal control over exempt procurements.
 - b. Irregularities involving employees that could have a material effect on the exempt procurement practices.
 - c. Communications from federal agencies or state agencies concerning non-compliance with or deficiencies in the exempt procurement practices or payment.
3. We have properly recorded, prepared and/or disclosed our exempt procurement actions in the procurement records.
4. We have fully disclosed to you all information and documents requested by you and do not claim a privilege or other right to withhold any information or documents requested by you. Specifically, we have provided to you all documents and information requested in Exhibit A and Exhibit B to your letter dated July 2, 2008.


H. B. Limehouse Jr.
Secretary of Transportation

STATE OF SOUTH CAROLINA
State Budget and Control Board
PROCUREMENT SERVICES DIVISION

MARK SANFORD, CHAIRMAN
GOVERNOR

CONVERSE A. CHELLIS III, CPA
STATE TREASURER

RICHARD ECKSTROM, CPA
COMPTROLLER GENERAL



HUGH K. LEATHERMAN, SR.
CHAIRMAN, SENATE FINANCE COMMITTEE

DANIEL T. COOPER
CHAIRMAN, WAYS AND MEANS COMMITTEE

FRANK W. FUSCO
EXECUTIVE DIRECTOR

DELBERT H. SINGLETON, JR.
DIVISION DIRECTOR
(803) 734-2320

MATERIALS MANAGEMENT OFFICE
1201 MAIN STREET, SUITE 600
COLUMBIA, SOUTH CAROLINA 29201
(803) 737-0600
Fax (803) 737-0639

R. VOIGHT SHEALY
MATERIALS MANAGEMENT OFFICER

September 10, 2008

Ms. Linda C. McDonald, Chief Counsel
South Carolina Department of Transportation
955 Park Street
Columbia, South Carolina 29202

Dear Linda:

I appreciate your meeting with Jimmy and me on September 5 to discuss our audit of the Department's application of the exemption in Section 11-35-710(1).

One item of our discussion was the Department's position that the exemption for highway construction was needed to comply with federal requirements, federal regulations, opinions of the South Carolina Attorney General and inter-departmental correspondence. In our letter of July 2, 2008 to Secretary Limehouse (copy enclosed), we requested documents that would assist us on these points (see items III, IV, and V of Exhibit A to that letter). As stated in that letter, we will require the Department to sign a management representation letter, which will be included in our audit report, attesting that all documents requested by us have been provided by the Department.


To both assist in our audit and for a comprehensive understanding of your contentions, please furnish us with any of these documents, including any memoranda or legal opinions written by your office which discuss the applicability or the need for the exemption as it applies to any applicable law that you have not already given us.

As we approach the deadline of October 15, 2008 per Section 57-1-490, I request that the documents be available for our review no later than September 16, 2008.

Ms. Linda C. McDonald, Chief Counsel
September 10, 2008
Page 2

I thank you in advance for your assistance.

Sincerely,



Larry G. Sorrell, Manager
Audit and Certification

Enclosure: Engagement letter July 2, 2008 with Exhibit A

C: Delbert Singleton, Division Director
Voight Shealy, Materials Management Officer
John White, State Engineer
Mike Spicer, Chief Procurement Officer for Information Technology
Keith McCook, Assistant General Counsel
Frank Potts, Assistant General Counsel
Jimmy Aycock, Audit Manager

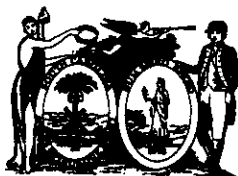
STATE OF SOUTH CAROLINA
State Budget and Control Board
PROCUREMENT SERVICES DIVISION

Audit Attachment #3

MARK SANFORD, CHAIRMAN
GOVERNOR

CONVERSE A. CHELLIS III, CPA
STATE TREASURER

RICHARD ECKSTROM, CPA
COMPTROLLER GENERAL



HUGH K. LEATHERMAN, SR.
CHAIRMAN, SENATE FINANCE COMMITTEE

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COLUMBIA, SOUTH CAROLINA 29201
(803) 737-0600
Fax (803) 737-0639

R. VOIGHT SHEALY
MATERIALS MANAGEMENT OFFICER

July 2, 2008

The Honorable H. B. Limehouse, Jr.
Secretary of Transportation
South Carolina Department of Transportation
955 Park Street
Columbia, South Carolina 29201

Re: Procurement Audit required by Section 57-1-490(B)

Dear Secretary Limehouse:

As you know, last year the General Assembly enacted *S.C. Code Ann. § 57-1-490(B)* which requires the Materials Management Office to audit DOT's "internal procurement operation to ensure that the department has acted properly with regard to the department's exemption" from the South Carolina Consolidated Procurement Code. We are required to produce the first report by October 15, 2008. We request to begin our work in your office on July 10, 2008.

In order to provide the designated officials with the most accurate and comprehensive audit report possible, we will need your assistance and cooperation in obtaining a great deal of historical and current information -- particularly for this initial audit. Your support of our efforts in this mutual endeavor to provide reliable and accurate information cannot be overstated.

The audit will be performed in two phases to allow us to meet the deadlines established in Section 57-1-490(B). Phase one will review expenditures from June 27, 2007 to April 30, 2008. Phase two will review expenditures from May 1, 2008 to June 30, 2008. As detailed on Exhibit A, we request a list of all expenditures made by DOT during phase one be submitted to our office by July 10, 2008. A list of expenditures for phase two should be submitted by August 1, 2008.

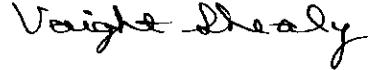
As an integral and critical part of our task, it will be necessary for our auditors to have unrestricted access to all of DOT's contract, payment, management and legal files which pertain to purchases, expenditures, solicitations, and interpretations of applicable law, regulations, policies and

other procedures. A preliminary list of the individuals from whom we may request information and whose cooperation will be essential are listed on Exhibit B.

Also included is a draft of the management representation letter which will be presented to you at the completion of our work and when signed by you, included with our report to those required by law.

Thank you for your attention to this matter and please contact me at 737-0635 with any questions.

Sincerely,

A handwritten signature in cursive script that reads "Voight Shealy".

Voight Shealy
Materials Management Officer

cc: Delbert Singleton, Esq.

**Materials Management Office
Procurement Audit required by Section 57-1-490(B)
Documents and Information Requested**

I. A list of all disbursements made by DOT from June 27, 2007 to June 30, 2008. If possible, please provide this information in a Microsoft Excel spreadsheet. Include, at least, the following information for each disbursement, if applicable:

- Vendor name
- Voucher date
- Voucher number
- Voucher total
- Purchase order / Requisition number
- Amount of Purchase order / Requisition
- Fund source
- Object code
- Object code amount
- Purchase order type
- Department code
- Exemption status - items coded by DOT as exempt

[Note: Using this information, MMO will select transactions for testing. For each contract identified, MMO will need complete documentation and a representation by DOT regarding which procurement laws - state, federal, both; with citations - governed the transaction.]

II. Chart of accounts to include object codes with descriptions, and funding source with descriptions

III. All documents expressing or referencing an interpretation or application of Section 11-35-710(1) since the enactment of the Code in 1981. Examples may include correspondence, internal emails, instructions to staff, internal opinions from legal counsel, operating procedures or policies and federal policy and regulatory interpretations.

IV. All documents which relate or refer to the scope of Section 11-35-710 (1)

V. All documents, including legal memoranda and correspondence, which refer to the effect or applicability of federal laws, regulations, or policies with respect to the procurement laws and regulations of the State of South Carolina

VI. All audit reports of the DOT

VII. A list of each employee with authority to execute contracts on behalf of the DOT for the period June 27, 2007 to June 30, 2008 by name, department, types of contracts, and level of authority

**Materials Management Office
Procurement Audit required by Section 57-1-490(B)**

Contacts with Department of Transportation

Mike Burk and the employees in the office of Mike Burk with phone numbers

Danny Shealy and the employees in the office of Danny Shealy with phone numbers

Doug McFarland and the employees in the office of Doug McFarland with phone numbers

Suzette Porter and the employees in the office of Suzette Porter with phone numbers

Doug Harper and the employees in the office of Doug Harper with phone numbers

Wendy Hollingsworth and the employees in the office of Wendy Hollingsworth with phone numbers

Internal audit staff with phone numbers

List of any employee involved in exempt procurements with phone numbers



South Carolina
Department of Transportation

P.O. Box 191
Columbia, S.C. 29202

Daniel P. Fanning, P.E.
Director

April 20, 1994

The Honorable E. B. "Mac" McLeod, Jr.
District No. 67 - Clarendon-Sumter Counties
Route 1, Box 28
Pinewood, South Carolina 29125

Dear Representative McLeod:

Thank you for your letter of March 30, 1994. We appreciate the opportunity to furnish information which may explain the procurement procedures followed by the South Carolina Department of Transportation (Department). Following is the Department's response to your inquiries. Each response is under the category delineated in your letter of March 30.

PROCUREMENT PROCESS

You have asked for a "side-by-side comparison of the Department's actual procurement process and the procurement process followed by other State agencies as set forth in the Procurement Code." As you are aware, there are other State agencies in addition to the Department of Transportation which are granted exemptions from the South Carolina Consolidated Procurement Code (Procurement Code) for either all purchases or certain purchases. For instance, the Department of Corrections is exempt for the purchase of raw materials, state institutions of higher learning are exempt in the expenditure of certain funds and the Arts Commission and Museum Commission are exempt for the purchase of one-of-a-kind items. Purchases of livestock, feed and veterinary supplies, fresh fruits, vegetables, meats, fish, milk, eggs and published books, periodicals and technical pamphlets are exempt from the Procurement Code. The State Ports Authority, the Division of Public Railways of the Department of Commerce, the Public Service Authority and the South Carolina Research Authority are exempt for all contracts of goods or services. The Budget and Control Board has granted exemptions to numerous other agencies.

The Honorable E. B. Mac McLeod
Page 2
April 20, 1994

The Department is exempt from the Procurement Code procedures only in the areas of construction, maintenance and repair of highways and bridges; maintenance and repair of vehicles and road equipment; and purchase of emergency type parts and equipment. For all other contracts and purchases of services and goods, the Department follows the provisions of the Procurement Code. The Department is audited by the Division of General Services to assure adherence to the Procurement Code, and has been granted procurement certification.

I am enclosing a chart, marked "Exhibit A", which sets out the procedures followed by the Department for various categories of purchases and contracts for goods and services. The chart also sets out the authority for the process. I am enclosing copies of the authorities cited in Exhibit A.

You have asked that we especially address procurement of architects, engineers and contractors. Procurement for these services for projects which are not exempt from the Procurement Code (such as designing and building offices or facilities off the right of way) is accomplished in accordance with the Procurement Code and regulations, under the auspices of the State Engineer. Contracts for the construction and maintenance of roads and bridges are awarded by the Department in conformance with the provisions of Title 57, Chapter 5, of the South Carolina Code of Laws, 1976, as amended. This Chapter, entitled "Construction Contracts and Purchases", sets out the procedures which the Department must follow, and which the Department does follow, for advertising and awarding contracts for the performance of construction or maintenance work. I am enclosing a chart, marked "Exhibit B", which sets out the procedure used by the Department for contracting for design and engineering services on road and bridge projects, which are exempt from the Procurement Code. As you will see by the chart, and as set out in Department Policy and Procedure Memorandum R-1, the Department follows procedures almost identical to the Procurement Code procedures.

You have asked "how and in what way the Department would be hurt if the Department was required to follow the State's Consolidated Procurement Code procedures for all procurement in general, except in emergencies, and for the procurement of architects, engineers and contractors in particular, especially in cases where contracts are extended, added to or renewed." The Department, or the public, may not be "hurt" if the Procurement Code process in all respects met the same time tables and schedules as those currently met by the Department for all contracts and purchases. However, the Department cannot meet the required timetables and schedules for design, construction and maintenance

The Honorable E. B. Mac McLeod
Page 3
April 20, 1994

projects under the provisions of the Procurement Code as currently written and administered. Delay can mean substantial costs and inconvenience to the public, and may also create or perpetuate safety problems.

COSTS COMPARISONS

You have asked several questions concerning how comparisons are made between the Department's costs and expenses for certain services and other South Carolina agencies' costs and expenses for similar purchases. Other South Carolina state agencies do not design and construct major bridge and road contracts. Therefore, there are no comparisons to be drawn for these services. However, there is active and continuous oversight of the Department's procurement processes through audit by the South Carolina Division of General Services and review by the Division Administrator of the Federal Highway Administration. There are audits performed, in accordance with the Federal OMB A-128, by outside independent auditors selected by the State Auditor. Also, the Department's internal auditors have continuous oversight of the Department's procurement practices.

As to a comparison of the Department's procurement costs and expenses to the costs and expenses of other state agencies, Federal Highway Administration (FHWA) statistics show our comparison and ranking with other states for maintenance and capital expenditures (which includes design and construction). I am enclosing a copy of the excerpts from 1992 Selected Highway Statistics and Charts (marked "Exhibit C") published by the FHWA, showing that the SCDOT's expenditure of dollars per mile for capital outlay (design and construction) was the lowest of all the states. The SCDOT's expenditures per mile for maintenance was the second lowest of all the states. Under the Department's current procedures, the Department has been successful in building and maintaining highways at less cost per mile than almost every state in the United States!

FEDERAL FUNDS

It is not the position of the Department that federal funds will be lost if the Department is not exempt from the Procurement Code.

As to your request for a copy of any document or legal opinion concerning the Department's exemption from the Procurement Code, to the best of my knowledge there are no opinions, oral or written, which state that the Department does not have an exemption from the Procurement Code for certain purchases. In 1984, the Department was advised by audit report and letter from Richard W. Kelly (copy

The Honorable E. B. Mac McLeod
Page 4
April 20, 1994

attached as "Exhibit D") that the Department's exemption from the Procurement Code did not include the purchase of supplies used by Department employees in the construction and maintenance of bridges and highways. After receiving that interpretation, the Department began following the Procurement Code for the purchase of these supplies (such as sand, gravel, pipe, etc.).

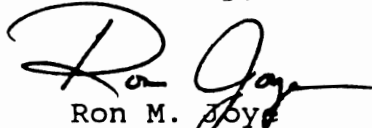
FUNDS
COMPETITION AND COMPETITIVE BIDDING

The information you have requested in these sections cannot be provided quickly and without substantial costs. In order for us to respond with the strongest degree of credibility in answering your inquiries on funds, competition and competitive bidding, we recommend that an independent certified public accountant be engaged to review our procedures, costs, and expenses and report the findings to you, the Department and anyone else you deem appropriate. If you and the other members of the General Assembly believe that this expense is necessary, we will certainly make our records available.

CONCLUSION

The Department is anxious to meet with you and the other members of the General Assembly to discuss this response.

Sincerely,



Ron M. Joye
Special Assistant to the Director

RMJ/ESM:dm

cc: The Honorable Carroll Campbell
The Honorable Nick Theodore
All Members of the General Assembly
All Members of the Commission on Transportation

EXHIBIT A

	<u>TYPE OF GOODS OR SERVICES</u>	<u>EXEMPT FROM PROCUREMENT</u>	<u>AUTHORIZATION FOR EXEMPTION</u>	<u>PROCEDURES FOLLOWED BY DEPARTMENT</u>
1.	Highway and bridge construction and maintenance work contracts	Yes	§11-35-710(a) S.C. Code of Laws, 1976, as amended	(A) Title 57, Chapter 5 S.C. Code of Laws (B) 23 CFR 635
2.	Design and engineering consultant contracts for highway and bridge construction	Yes	§11-35-710(a) S.C. Code of Laws, 1976, as amended	(A) Department Policy and Procedure Memorandum R-1 (B) 23 USC 112(b)(2) as amended by § 111(b) of Surface Trans- tation and Uniform Reloca- tion Assist- ance Act of 1987 (C) "Brooks Law" (Public Law 92-582,86 STAT. 1278 (1972), 40 USC 541, et seq. (D) 23 CFR 172
3.	Precast and prestressed replacement bridges	Yes	§11-35-710(a) S.C. Code of Laws, 1976, as amended	Same procedures as used with non-exempt purchases with exception statement that the procurement is exempt from the Code requirements and is being solicited for the purpose of obtaining competition
4.	Supplies used by Department employees for construction, maintenance repairs of highways and bridges (sand, gravel, pipe, etc.)	No	N/A	S.C. Consolidated Procurement Code

5.	Equipment repair and parts	Yes	§11-35-710(a) S.C. Code of Laws, 1976, as amended	<p>Various procedures depending on parts availability</p> <p>(A) When numerous sources of supply are available and time permits, bids are solicited. When time is an issue, manufacturers printed price lists on file at DOT are checked and, depending on availability, the lowest price vendor is utilized.</p> <p>(B) When only one authorized dealer is available DOT obtains manufacturers printed price lists and negotiates discounts, freight and other terms and conditions.</p> <p>(C) When only the manufacturer is available DOT tries to obtain favored customer pricing to obtain the lowest national price available to like customers.</p>
6.	Emergency parts and equipment	Yes	§11-35-710(a) S.C. Code of Laws, 1976, as amended	<p>Each procurement is reviewed and procedures are determined based on the nature of the emergency. When possible, competition is solicited.</p>
7.	All other contracts for purchases of goods and services	No	N/A	<p>S.C. Consolidated Procurement Code</p> <p>EXHIBIT A, pg 2</p>

EXHIBIT B

PROCEDURES FOR SELECTION OF
DESIGN & ENGINEERING
CONSULTANT BY DEPARTMENT
FOR CONTRACTS EXEMPT FROM
PROCUREMENT CODE
 (See Policy and Procedure
 Memorandum R-1)

PROCEDURES PROVIDED BY
THE S.C. CONSOLIDATED
PROCUREMENT CODE

- | | |
|--|---|
| <p>1. Selection Committee Members are appointed as follows:
 A - Director appoints one non-voting member
 B - Deputy Director for Construction, Engineering, and Planning appoints chairman and a minimum of 2 additional members (voting members)
 C - Deputy Director of Finance and Administration appoints one non-voting member</p> | <p>Each agency establishes an agency selection committee composed of individuals whom agency head determines to be qualified</p> |
| <p>2. Selection committee develops a description of the proposed project and required services. The description is published in the S. C. Business Opportunities</p> | <p>Selection committee is responsible for preparing a description of the project, enumerating all required professional services for the project and preparing a formal invitation to firms for submission of information, which is published in S. C. Business Opportunities</p> |
| <p>3. Date for submission of information shall be not less than 21 days after publication. Interested firms must respond by submission of Federal Standard Form 254 and 255</p> | <p>Date for submission of information shall be not less than 15 days after publication. Interested firms must respond by submission of Federal Standard Form 254 and 255</p> |
| <p>4. Selection committee selects and interviews at least 3 firms determined to be the most qualified, based on the criteria identified and weighted in the advertisement. If less than 3 firms submit information, all 3 firms are interviewed. All firms which submit information are informed of their selection status</p> | <p>Selection committee selects and interviews at least 5 firms determined to be the most qualified. If less than 5 firms submit information, all 5 firms are interviewed.</p> |

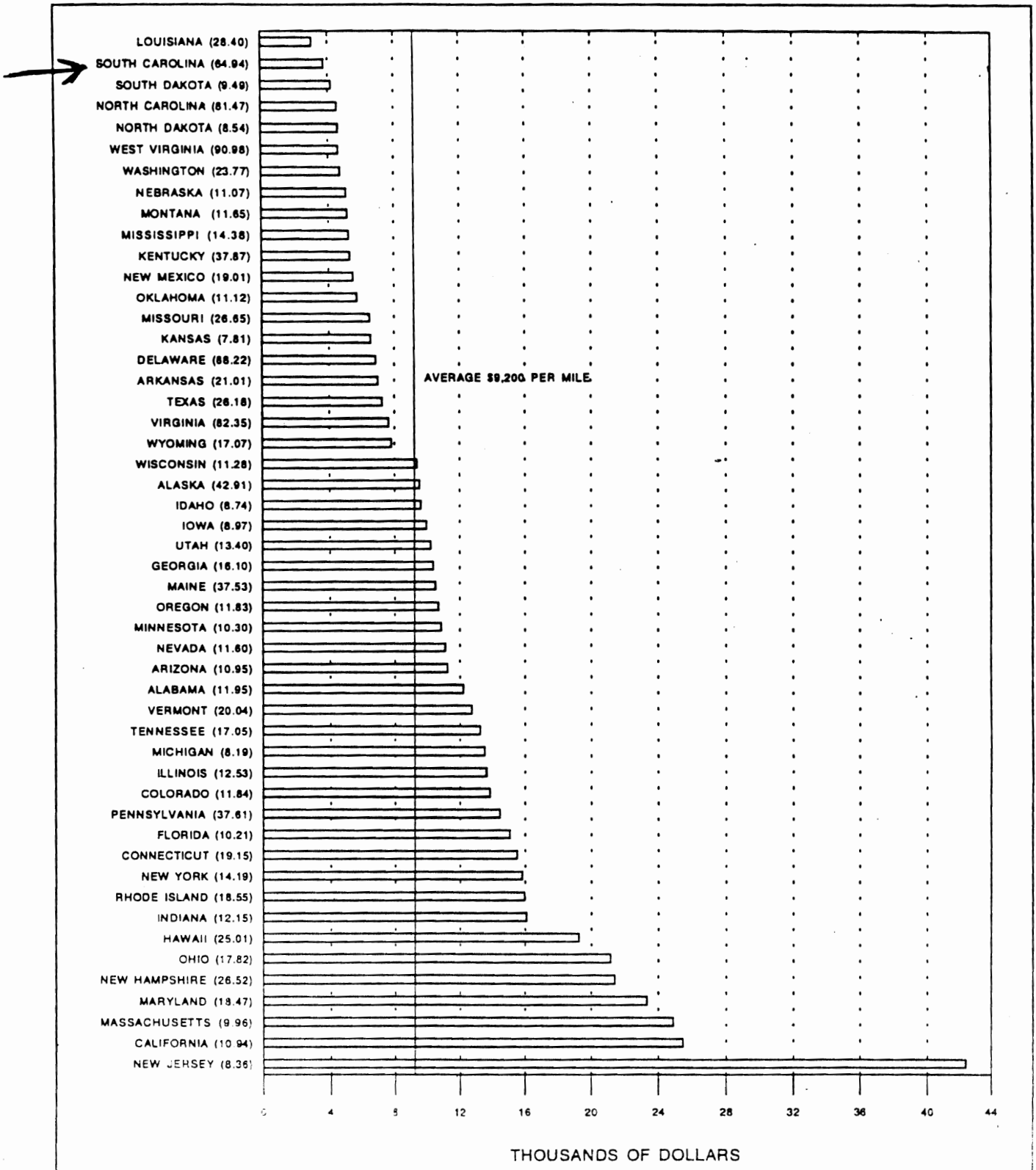
5. Selection committee ranks in priority order the firms interviewed based on the criteria identified and weighted in the advertisement. The criteria includes:
- (a) ability of professional personnel
 - (b) recent, current and profiled work loads
 - (c) volume of work previously awarded to the firm by the Department
 - (d) location of firm
 - (e) financial, accounting, insurance and other areas of concern related to the project
6. When the Department determines that the ranking is final, written notification of the selection status is sent to the firms interviewed
7. The Department enters into negotiations with the top ranked firm for compensation which is fair and reasonable to the state. If unable to negotiate a satisfactory contract with the top ranked firm, the agency enters into negotiation in the same manner with the second, and then the third most qualified firms until a satisfactory contract is negotiated. As part of the negotiation process the Department's Engineering Division performs a quantitative and technical analysis of the proposed costs and the Department auditors perform a pre-award audit to determine (1) if proposed costs are reasonable allowable and allowable under state and federal guidelines; (2) that the consultant's accounting system is capable of appropriately segregating costs; and (3) that the consultant has the financial capabilities to fulfil the terms of the proposed contract
- Selection committee ranks in priority order the firms interviewed based on:
- (a) past performance
 - (b) ability of professional personnel
 - (c) willingness to meet time and budget requirements
 - (d) location of firm
 - (e) work load of firm
 - (f) creativity and insight related to the project
 - (g) related experience on similar projects
- When the agency determines that the ranking is final, written notification of the election and order of preference is sent to all firms that responded to the request to submit information
- The agency enters into negotiations with the top ranked firm for compensation which is fair and reasonable to the state. If unable to negotiate a satisfactory contract with the top ranked firm, the agency enters into negotiation in the same manner with the second, and then the third, fourth and fifth most qualified firms until a satisfactory contract is negotiated

8. The proposed negotiated contract is submitted to the Department's Deputy Director of Construction, Engineering and Planning, the SCDOT Director, and the Deputy Director of Finance and Administration for approval and execution

A written report of the selection, ranking and proposed contract is submitted by the agency to the State Engineer's Office for review. The State Engineer's Office has 10 days to review the agency's selection committee's report. If the State Engineer's Office disagrees with the proposal, it may contest the proposal to the State Budget and Control Board for decision at its next regularly scheduled meeting. In the event of approval, the State Engineer shall notify the agency and the selected firm thereby authorizing execution of the contract. If the Board disapproves, the agency shall submit the name of another firm.

1992 STATE EXPENDITURES PER MILE FOR MAINTENANCE ON STATE-ADMINISTERED ROADS AND STREETS (EXCLUDING TOLL FACILITIES)

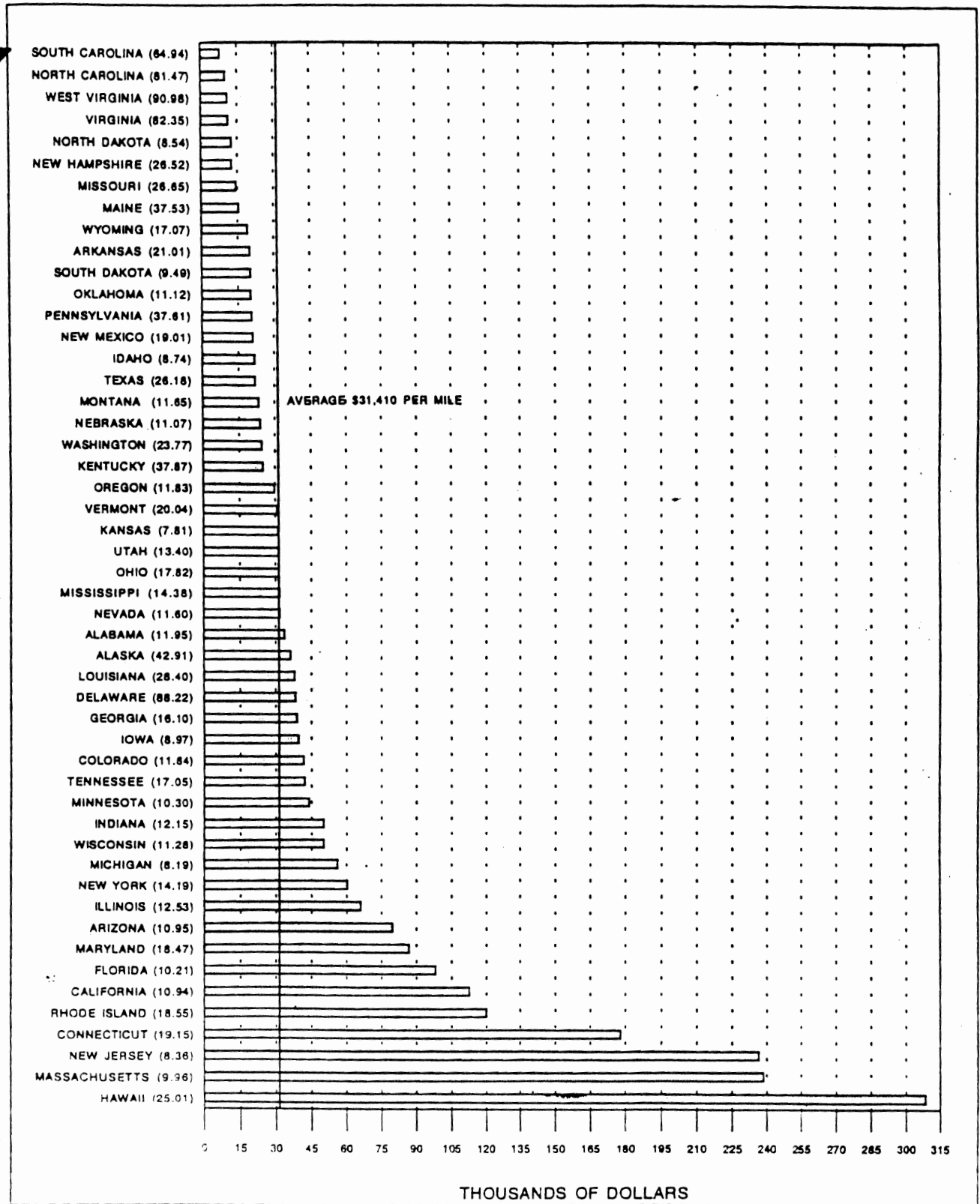
FIGURE 15



NOTE: THE NUMBERS IN PARENTHESES SHOW THE PERCENTAGE OF TOTAL MILEAGE UNDER STATE JURISDICTION.

1992 STATE CAPITAL OUTLAY PER MILE ON STATE-ADMINISTERED ROADS AND STREETS (EXCLUDING TOLL FACILITIES)

FIGURE 14



NOTE: THE NUMBERS IN PARENTHESES SHOW THE PERCENTAGE OF TOTAL MILEAGE UNDER STATE JURISDICTION.

"Exhibit D"

STATE OF SOUTH CAROLINA
BUDGET AND CONTROL BOARD
DIVISION OF GENERAL SERVICES
100 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
(803) 754-3150

RICHARD W. RILEY, CHAIRMAN
GOVERNOR
GRADY L. PATTERSON, JR.
STATE TREASURER
EARLE E. MORRIS, JR.
COMPTROLLER GENERAL



TONY R. ELLIS
DIVISION DIRECTOR

REMBERT C. DENNIS
CHAIRMAN,
SENATE FINANCE COMMITTEE
TOM G. MANGUM
CHAIRMAN,
HOUSE WAYS AND MEANS COMMITTEE
WILLIAM T. PUTNAM
EXECUTIVE DIRECTOR

April 30, 1984

Mr. Richard J. Campbell
Materials Management Officer
Materials Management Office
800 Dutch Square Boulevard
Suite 150
Columbia, South Carolina 29210

Dear Mr. Campbell:

We have returned to the Department of Highways and Public Transportation to determine the progress made toward implementing the recommendations in our audit report covering the period July 1, 1981 - January 31, 1983. During this review, we followed up on each recommendation made in the audit report through inquiry, observation and limited testing.

The Audit and Certification Section observed that the Department has made progress toward correcting the problem areas found and improving the internal controls over the procurement system.

In addition to our normal follow-up review, particular attention during the follow-up period has been directed by our

office and yours toward resolving conceptual and definitional problems in the following areas:

A. As stated in the report, we discovered, during the audit, that the department's interpretation of the exemption provided them under Section 11-35-710(a) of the Consolidated Procurement Code was much broader than our own. This difference of opinion led to many of the exceptions enumerated in the audit report.

B. Subsequent to the field audit period, we learned of delegated procurement authority within the department that we had not encountered previously because of their unique nature and the audit sampling procedures used. The following contractual services have been procured, as items exempted from the Consolidated Procurement Code, by the department in the past:

1. The Environmental Program Administrator of the Engineering Division contracted for archeological services for approximately \$300,000 annually. These services are not exempt except when performed by an architect, engineer or other construction related ~~professional addressed in Section 11-35-2910 of~~ the Procurement Code.

2. The Engineering Division was prepared to contract for consultant services for the design

of a pre-construction engineering management system until we informed them that the transaction was subject to the Procurement Code. This is now being procured by the Division of General Services.

3. The South Carolina Interagency Council on Public transportation was determined to be subject to the provisions of the Procurement Code. Previously, they had operated as an exempted agency within the department.

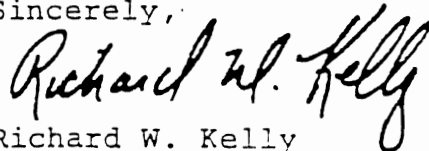
After several productive meetings with the Department of Highways and Public Transportation, we feel that we have reached an agreement on the scope of the department's exemption for the construction, maintenance and repair of bridges, highways and roads. In addition to the clarifications listed in B. 1., 2., and 3., above, it is our agreement with the Department of Highways and Public Transportation that the exemption contained in Section 11-35-710(a) for the "construction, maintenance and repair of bridges, highways and roads." is restricted to the procurement of contractual services of construction firms. Further, we have also included within the preview of this exemption those services enumerated in Section 11-35-2910(1) (architect - engineer and land surveying services) and Section 11-35-2910(3) (construction management services) as they relate to the construction, maintenance and repair of bridges, highways and roads.

This exemption would, therefore, specifically not apply to procurements of materials and supplies to be used by in-house personnel. In addition, the exemption does not apply to professional services such as those described in B. 2., above, which do not relate to a specific highway, bridge or road project but rather to the general functioning or purpose of the Department of Highways and Public Transportation as a whole.

Of course, we consider that all purchases other than those referred to as exempt in this letter must be made in accordance with the Consolidated Procurement Code or fall within other exemptions provided therein.

Because of these agreements and understandings and because of the aforementioned general progress made toward correcting the problem areas found in the procurement system, we recommend that the certification limits for the Department of Highways and Public Transportation, as outlined in the audit report, be granted for a period of two (2) years subject to the specific conditions pointed out in the recommendation.

Sincerely,



Richard W. Kelly
Director of Agency Services

RWK:kl

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

DEPARTMENTAL DIRECTIVES

Directive Number: 13 **Date:** March 25, 2008

Subject: Procurement of Goods, Services and Supplies;
Required Commission Authorization

Referrals: S.C. Code Section 11-35-10, et seq. (S. C. Consolidated
Procurement Code); S. C. Code Section 57-5-1610, et seq.;
S. C. Code Section 57-1-370

Purpose: Provide overview of procurement of goods, services and supplies,
including required Commission authorization for certain actions

The South Carolina Department of Transportation (SCDOT) is subject to various laws and regulations in procuring goods, services and supplies. Some procurements are covered by the S. C. Consolidated Procurement Code (S. C. Code Section 11-35-10, et seq.) and some are exempt from the Procurement Code requirements.

Exempt Procurements

Procurements of the following goods and services are exempt from the Procurement Code by the specific exemption set forth in S. C. Code Section 11-35-710(1):

- A) the construction, maintenance, and repair of bridges, highways and roads;
- B) vehicle and road equipment maintenance and repair;
- C) other emergency-type parts and equipment utilized by the Department.

Bridge, highway and road construction contracts are procured through SCDOT's Office of Construction using the procedures set forth in S. C. Code Section 57-5-1610, et seq. Where federal funds are involved, applicable federal laws and regulations must also be followed (ex., 23 CFR 635 for construction and maintenance contracts and 23 CFR 636 for design-build contracts). Emergency construction and repair work are procured through the SCDOT's Director of Maintenance pursuant to S. C. Code Section 57-5-1620 and Engineering Directive Memorandum No. 35. Engineering consulting contracts are handled through SCDOT's Office of Contract Services pursuant to the procedures established by Departmental Directive 41. Other exempt procurements are handled by the SCDOT's Director of Procurement pursuant to SCDOT's Procurement Internal Policies and Procedures Manual.

Non-exempt Procurements

Procurements subject to the Procurement Code requirements are handled by different SCDOT and State offices depending on what is being procured and dollar amounts.

A) SCDOT's Director of Procurement - Handles and procures non-exempt procurements in-house up to certification dollar limits granted by the Budget and Control Board. Current certifications are as follows:

- 1) up to \$1M for supplies
- 2) up to \$500,000 for services
- 3) up to \$100,000 for information technology
- 4) up to \$100,000 for consultant services.

Non- exempt procurements over the above limits are handled through SCDOT's Director of Procurement, but procured through the State Budget and Control Board's Materials Management Office or Information Technology Management Office, unless delegated authority to procure in-house is granted to SCDOT by those authorities. Procurements handled in-house by SCDOT's Director of Procurement follow SCDOT's Procurement Internal Policies and Procedures Manual.

B) SCDOT's Capital Improvements Manager – Handles non-exempt procurements in-house up to \$10M for building construction services. Procurements over this limit must be procured through the State Budget and Control Board's Office of State Engineer.

All SCDOT procurements will follow the requirements of the South Carolina Consolidated Procurement Code unless covered by an exemption.

Required Commission Authorization for Certain Actions

S. C. Code Section 57-1-370 requires the Commission to give prior authorization for certain procurement actions as follows:

- 1) *Consultant Contracts* - The Commission must give prior authorization for the advertisement for any consultant contracts, selection of consultants by SCDOT personnel, and final award of the contract. See Section 57-1-370(E).
- 2) *Contracts in excess of \$500,000* - The Commission must give prior authorization for SCDOT to enter into any contract with a value in excess of \$500,000. See Section 57-1-370(L).
- 3) *Additional contracts to same entity exceeding \$500,000 in the aggregate in a fiscal year* – The Commission must give prior approval to any additional contracts SCDOT wishes to enter into during a fiscal year with an entity that has already received individual contracts during that fiscal year that in the aggregate are at least \$500,000 in value. See Section 57-1-370(M).

These requirements shall be followed whether or not the procurement is exempt or non-exempt, unless the contract is exempt from Commission approval by other law or regulation.



Secretary of Transportation

Office of Primary Responsibility: Division of Finance & Administration, Procurement

History: Issued on June 1, 1997
First Revision on March 25, 2008

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

DEPARTMENTAL DIRECTIVES

Directive Number: 13 **Date:** June 1, 1997

Subject: Procurement Internal Policies and Procedures Manual

Referrals: S. C. Code Section 11-35-10, et. seq.
 S. C. Code Sections 2-47-50, et seq.; 8-1-15, et. seq.;
 11-35-310.

Purpose: Establish Policy for Procurement Internal Polices and
 Procedures Manual

All procurements made by the Department of Transportation will follow the requirements of the South Carolina Consolidated Procurement Code unless covered by exemption. The purpose of the Procurement Internal Policies and Procedures Manual is to give guidance and instructions to all SCDOT personnel in the proper implementation of policies and procedures for procurement of all goods, services and supplies for the Department. The policies and procedures set forth in the manual are governed by the South Carolina Consolidated Procurement Code and the State Government Accountability and Reform Act of 1993. All Department personnel are expected to follow these policies and procedures.

Effective Date: June 1, 1997

[Handwritten Signature]
 Executive Director

Office of Primary Responsibility: Procurement



Memorandum

U.S. Department
of Transportation

**Federal Highway
Administration**

Subject: **INFORMATION:** Procurement of Federal-aid
Construction Projects

Date: June 26, 2008

Dwight A. Horne

From: Dwight A. Horne
Director, Office of Program Administration

Reply to
Attn. of: HIPA-30

To: Directors of Field Services
Acting Resource Center Manager
Division Administrators

Over the years, a number of questions have been brought to our attention concerning the procurement of Federal-aid construction projects under 23 U.S.C. 112. This statute defines the FHWA requirements for awarding Federal-aid construction contracts and design-build contracts. In addressing these questions, this office has issued a number of memorandums, e-mails and letters to communicate the decisions regarding these questions. As a result, the FHWA's guidance on the procurement of construction contracts is contained in different sources. The purpose of this memorandum is to consolidate and briefly restate existing guidance and policy.

All grants and subgrants from the United States Department of Transportation, including those under the Federal-aid highway program, are subject to 49 CFR Part 18 – Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments (referred to as the Common Rule). Specifically, under 49 CFR 18.4(a), the Common Rule applies to all grants and subgrants to State, local and Tribal governments, except where inconsistent with Federal statutes. While 49 CFR 18.36 specifies the procurement standards to be followed, this provision is inconsistent with 23 U.S.C. 112. Thus, 23 U.S.C. 112 applies to any procurement contract for highway construction or architect/engineering (A/E) services related to a Federal-aid highway project. This is also reflected in 49 CFR 18.36(j) and (t).

In general, Federal-aid highway construction projects must be awarded on the basis of the lowest responsive, responsible bidder (23 U.S.C. 112) unless the State DOT is able to demonstrate that some other method is more cost effective or that an emergency exists. The State DOT's process for advertising, letting, and awarding highway construction contracts must comply with 23 CFR Parts 635 or 636. As a condition of receiving Federal-aid assistance for A/E services in the design or construction management phases of construction projects, State DOTs must comply with the procurement requirements of 23 CFR Part 172.

On November 12, 1996, the FHWA issued a policy memorandum titled: [“Procurement of Transportation Enhancement Projects.”](#) This memorandum clarified that the State DOTs may procure transportation enhancement projects not located within the highway right-of-way using State-approved procedures under the Common Rule. For consistency, this same rationale applies



to all other Federal-aid construction projects that are not within the right-of-way of a public highway. In these situations, the procedures in 49 CFR 18.36(a) apply and a State DOT may use State-approved procurement procedures (or a local public agency may use State-approved local procurement procedures) for these types of projects. This includes:

- Construction projects physically located outside the right-of-way of a public highway. Examples include the restoration of historic railroad stations, shared use paths, recreational trails, landscaping and scenic beautification, railroad mainline improvements, rail yard improvements, etc. However, the procurement of any contract for a non-highway construction project that is linked to, dependent upon, or would not exist except to fulfill a separate requirement of another highway project (i.e. an environmental commitment) must comply with 23 CFR Part 635 or Part 636.
- Operational improvements or service related projects that take place within the right-of-way of a public highway, but the scope of the contract does not meet the definition of “construction” in 23 U.S.C. 101. Examples include operational improvement projects such as service patrols, route diversion and evacuation routing, 911/ 511 telephone systems, computer-aided dispatch systems, highway advisory or other radio systems for communicating with vehicles, etc.

Special procurement considerations:

Force account by a public agency: This procedure may be used when an State DOT can demonstrate to the satisfaction of the Division Administrator that it is more cost effective to allow the work to be completed by force account using the personnel and resources of a public agency (State, local or Tribal). The requirements for a cost effectiveness finding are detailed in 23 CFR 635 Subpart B. The public agency must be able to complete the work using personnel and equipment already on the agency’s rolls. Materials used to complete the work must meet the requirements in 23 CFR 635 Subpart D. Reimbursement is limited to the Federal share of the actual costs to the agency. Note: if the State DOT can demonstrate to the Division Administrator’s satisfaction that the work can most cost effectively be done by a nonprofit organization, the procurement process under any grant or subgrant to a nonprofit organization must fulfill the requirements of 49 CFR Part 19 – Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Learning, Hospitals, and Other Non-Profit Organizations. See 49 CFR 19.1 and 19.5. The stewardship/oversight agreement between the State DOT and the Division Office must address the review and approval of all public agency force account requests.

Emergency repair work: Emergency repair work may be accomplished by contract, negotiated contractor or public agency force account methods under 23 CFR 668.105(i). The term emergency repair is defined in 23 CFR 668.103 as “Those repairs including temporary traffic operations undertaken during or immediately following the disaster occurrence for the purpose of: (1) Minimizing the extent of the damage, (2) Protecting remaining facilities, or (3) Restoring essential traffic.” The emergency finding must meet the requirements of 23 CFR 635.204. Materials used to complete the work should meet the requirements of 23 CFR 635 Subpart D to the maximum extent possible under the emergency, however, waivers may be considered where appropriate.

Permanent repair and reconstruction work following an emergency: Under 23 CFR 668.105(i), all projects for permanent repair or reconstruction must be procured in accordance with 23 CFR Part 635 or Part 636.

Ferry Boats: Projects for the construction of ferry boats, dock construction or ferry terminals must comply with the procurement requirements of 23 CFR Part 635 or Part 636 if the ferry route is part of a public highway system.

High Priority and other Congressionally-designated projects: Unless specifically exempted by law from the requirements of Title 23, Federal-aid highway construction projects must be procured in accordance with 23 CFR Parts 635 or 636.

Railroad-highway projects: The procurement requirements in 23 CFR 646.216(f) apply to all railroad-highway projects.

Force account by a railroad or utility: Railroad and/or utility work done by the affected railroad or utility as a result of a Federal-aid highway construction project (for example, the improvement of a railroad crossing or relocation of utility lines) has been established as cost effective in 23 CFR 635.205(b). Materials used to complete the work must meet the requirements in 23 CFR Part 635, Subpart D.

Rail-only projects: Construction projects that provide for the construction, relocation, adjustment or alteration of rail facilities that are not associated with a highway construction project may be procured using State-approved procedures in accordance with 49 CFR Part 18. Minor construction activities (such as grade transition, advance construction warning signs, drainage connections, etc.) that are necessary to provide a connection to a Federal-aid highway would not result in a requirement to use highway procurement procedures.

Recreational Trails Program (RTP): RTP projects not located within a public highway right-of-way must use procurement procedures under 49 CFR 18.36. Procurement for an RTP project within a public highway right-of-way must use procedures under 23 CFR Parts 635 and 636, including projects that are administered by an agency other than the State DOT. Where Parts 635 and 636 mention State, State Transportation Department, or STD, this may be interpreted as meaning the State agency administering the RTP.

Safe Routes to School and Nonmotorized Transportation Pilot Projects: Congress required that States treat these projects as if they were on the Federal-aid system despite their functional classification or location. Therefore, these projects must comply with the procurement and contracting requirements of 23 CFR Part 635 or Part 636. See: [P.L. 109-59, Section 1404\(j\)](#).

Projects with Title 23 funds transferred to other Federal agencies: Mr. Park's July 19, 2007, memorandum titled "Fund Transfers to Other Agencies and Among Title 23 Programs" indicates that other Federal Agencies may use their own construction contracting requirements in lieu of those imposed on a State under Title 23. Therefore, other Federal Agencies may use their own procurement requirements instead of those in 23 CFR Part 635 or Part 636.

If you have any questions regarding the applicability of FHWA's procurement requirements for Federal-aid construction projects, please contact Mr. Gerald Yakowenko at 202-366-1562.



Effective: November 30, 2005

United States Code Annotated [Currentness](#)

Title 23. Highways ([Refs & Annos](#))

▢ [Chapter 1. Federal-Aid Highways \(Refs & Annos\)](#)

→ **§ 112. Letting of contracts**

(a) In all cases where the construction is to be performed by the State transportation department or under its supervision, a request for submission of bids shall be made by advertisement unless some other method is approved by the Secretary. The Secretary shall require such plans and specifications and such methods of bidding as shall be effective in securing competition.

(b) Bidding requirements.--

(1) **In general.--**Subject to paragraphs (2) and (3), construction of each project, subject to the provisions of subsection (a) of this section, shall be performed by contract awarded by competitive bidding, unless the State transportation department demonstrates, to the satisfaction of the Secretary, that some other method is more cost effective or that an emergency exists. Contracts for the construction of each project shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting established criteria of responsibility. No requirement or obligation shall be imposed as a condition precedent to the award of a contract to such bidder for a project, or to the Secretary's concurrence in the award of a contract to such bidder, unless such requirement or obligation is otherwise lawful and is specifically set forth in the advertised specifications.

(2) Contracting for engineering and design services.--

(A) **General rule.--**Subject to paragraph (3), each contract for program management, construction management, feasibility studies, preliminary engineering, design, engineering, surveying, mapping, or architectural related services with respect to a project subject to the provisions of subsection (a) of this section shall be awarded in the same manner as a contract for architectural and engineering services is negotiated under chapter 11 of title 40.

(B) **Performance and audits.--**Any contract or subcontract awarded in accordance with subparagraph (A), whether funded in whole or in part with Federal-aid highway funds, shall be performed and audited in compliance with cost principles contained in the Federal Acquisition Regulations of part 31 of title 48, Code of Federal Regulations.

(C) **Indirect cost rates.--**Instead of performing its own audits, a recipient of funds under a contract or subcontract awarded in accordance with subparagraph (A) shall accept indirect cost rates established in accordance with the Federal Acquisition Regulations for 1-year applicable accounting periods by a cognizant Federal or State government agency, if such rates are not currently under dispute.

(D) Application of rates.--Once a firm's indirect cost rates are accepted under this paragraph, the recipient of the funds shall apply such rates for the purposes of contract estimation, negotiation, administration, reporting, and contract payment and shall not be limited by administrative or de facto ceilings of any kind.

(E) Prenotification; confidentiality of data.--A recipient of funds requesting or using the cost and rate data described in subparagraph (D) shall notify any affected firm before such request or use. Such data shall be confidential and shall not be accessible or provided, in whole or in part, to another firm or to any government agency which is not part of the group of agencies sharing cost data under this paragraph, except by written permission of the audited firm. If prohibited by law, such cost and rate data shall not be disclosed under any circumstances.

(F)(F) [FN1] Subparagraphs (B), (C), (D) and (E) herein shall not apply to the States of West Virginia or Minnesota.

[(G) Redesignated (F)(F)]

(3) Design-build contracting.--

(A) In general.--A State transportation department or local transportation agency may award a design-build contract for a qualified project described in subparagraph (C) using any procurement process permitted by applicable State and local law.

(B) Limitation on final design.--Final design under a design-build contract referred to in subparagraph (A) shall not commence before compliance with section 102 of the National Environmental Policy Act of 1969 ([42 U.S.C. 4332](#)).

(C) Qualified projects.--A qualified project referred to in subparagraph (A) is a project under this chapter (including intermodal projects) for which the Secretary has approved the use of design-build contracting under criteria specified in regulations issued by the Secretary.

(D) Regulatory process.--Not later than 90 days after the date of enactment of the SAFETEA-LU, the Secretary shall issue revised regulations under section 1307(c) of the Transportation Equity Act for 21st Century (23 U.S.C. 112 note; 112 Stat. 230) that--

(i) do not preclude a State transportation department or local transportation agency, prior to compliance with section 102 of the National Environmental Policy Act of 1969 ([42 U.S.C. 4332](#)), from--

(I) issuing requests for proposals;

(II) proceeding with awards of design-build contracts; or

(III) issuing notices to proceed with preliminary design work under design-build contracts;

(ii) require that the State transportation department or local transportation agency receive concurrence from the Secretary before carrying out an activity under clause (i); and

(iii) preclude the design-build contractor from proceeding with final design or construction of any permanent improvement prior to completion of the process under such section 102.

(E) Design-build contract defined.--In this paragraph, the term “design-build contract” means an agreement that provides for design and construction of a project by a contractor, regardless of whether the agreement is in the form of a design-build contract, a franchise agreement, or any other form of contract approved by the Secretary.

(c) The Secretary shall require as a condition precedent to his approval of each contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, a sworn statement, executed by, or on behalf of, the person, firm, association, or corporation to whom such contract is to be awarded, certifying that such person, firm, association, or corporation has not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action in restraint of free competitive bidding in connection with such contract.

(d) No contract awarded by competitive bidding pursuant to subsection (b) of this section, and subject to the provisions of this section, shall be entered into by any State transportation department or local subdivision of the State without compliance with the provisions of this section, and without the prior concurrence of the Secretary in the award thereof.

(e) Standardized contract clause concerning site conditions.--

(1) General rule.--The Secretary shall issue regulations establishing and requiring, for inclusion in each contract entered into with respect to any project approved under [section 106](#) of this title a contract clause, developed in accordance with guidelines established by the Secretary, which equitably addresses each of the following:

(A) Site conditions.

(B) Suspensions of work ordered by the State (other than a suspension of work caused by the fault of the contractor or by weather).

(C) Material changes in the scope of work specified in the contract.

The guidelines established by the Secretary shall not require arbitration.

(2) Limitation on applicability.--

(A) State Law.--Paragraph (1) shall apply in a State except to the extent that such State adopts or has adopted by statute a formal procedure for the development of a contract clause described in paragraph (1) or adopts or has adopted a statute which does not permit inclusion of such a contract clause.

(B) Design-build contracts.--Paragraph (1) shall not apply to any design-build contract approved under subsection (b)(3).

(f) Selection process.--A State may procure, under a single contract, the services of a consultant to prepare any environmental impact assessments or analyses required for a project, including environmental impact statements, as well as subsequent engineering and design work on the project if the State conducts a review that assesses the objectivity of the environmental assessment, environmental analysis, or environmental impact statement prior to its submission to the Secretary.

(g) Temporary traffic control devices.--

(1) Issuance of regulations.--The Secretary, after consultation with appropriate Federal and State officials, shall issue regulations establishing the conditions for the appropriate use of, and expenditure of funds for, uniformed law enforcement officers, positive protective measures between workers and motorized traffic, and installation and maintenance of temporary traffic control devices during construction, utility, and maintenance operations.

(2) Effects of regulations.--Based on regulations issued under paragraph (1), a State shall--

(A) develop separate pay items for the use of uniformed law enforcement officers, positive protective measures between workers and motorized traffic, and installation and maintenance of temporary traffic control devices during construction, utility, and maintenance operations; and

(B) incorporate such pay items into contract provisions to be included in each contract entered into by the State with respect to a highway project to ensure compliance with [section 109\(e\)\(2\)](#).

(3) Limitation.--Nothing in the regulations shall prohibit a State from implementing standards that are more stringent than those required under the regulations.

(4) Positive protective measures defined.--In this subsection, the term “positive protective measures” means temporary traffic barriers, crash cushions, and other strategies to avoid traffic accidents in work zones, including full road closures.

CREDIT(S)

(Pub.L. 85-767, Aug. 27, 1958, 72 Stat. 895; Pub.L. 90-495, § 22(c), Aug. 23, 1968, 82 Stat. 827; [Pub.L. 96-470, Title I, § 112\(b\)\(1\)](#), Oct. 19, 1980, 94 Stat. 2239; [Pub.L. 97-424, Title I, § 112](#), Jan. 6, 1983, 96 Stat. 2106; [Pub.L. 100-17, Title I, § 111](#), Apr. 2, 1987, 101 Stat. 147; [Pub.L. 104-59, Title III, § 307\(a\)](#), Nov. 28, 1995, 109 Stat. 581; [Pub.L. 105-178, Title I, §§ 1205](#), 1212(a)(2)(A)(i), 1307(a), (b), June 9, 1998, 112 Stat. 184, 193, 229, 230; [Pub.L. 107-217, § 3\(e\)\(1\)](#), Aug. 21, 2002, 116 Stat. 1299; [Pub.L. 109-59, Title I, §§ 1110\(b\)](#), 1503, Aug. 10, 2005, 119 Stat. 1170, 1238; [Pub.L. 109-115, Div. A, Title I, § 174](#), Nov. 30, 2005, 119 Stat. 2426.)

[FN1] So in original.

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1958 Acts. Senate Report No. 1928, see 1958 U.S. Code Cong. and Adm. News, p. 3942.

1968 Acts. Senate Report No. 1340 and Conference Report No. 1799, see 1968 U.S. Code Cong. and Adm. News, p. 3482.

1980 Acts. [House Report No. 96-1268](#), see 1980 U.S. Code Cong. and Adm. News, p. 4675.

1983 Acts. House Report No. 97-555 and [House Conference Report 97-987](#), see 1982 U.S. Code Cong. and Adm. News, p. 3639.

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION'S
RESPONSE TO AUDIT REPORT OF
MATERIALS MANAGEMENT OFFICE
October 15, 2008

The South Carolina Department of Transportation (SCDOT) appreciates the opportunity to respond to the State Budget and Control Board's Materials Management Office ("MMO") Audit Report, dated October 15, 2008, regarding SCDOT's application of its exemption from the State Consolidated Procurement Code ("Procurement Code") found in S. C. Code Section 11-35-710(1).

The Audit Report identifies very few instances in which SCDOT has not complied with the exemption as it has been historically interpreted and applied pursuant to understandings between MMO and SCDOT. The exceptions that have been noted are understood and SCDOT will take action to correct these issues in the future.

MMO concludes that SCDOT's exemption may be unnecessary. SCDOT does not agree with this conclusion. Because of the short time frame in which it has had to respond to MMO's final recommendations, SCDOT has been unable to obtain a response from the Federal Highway Administration to MMO's audit and recommendations, to complete the necessary close review of its internal procedures to understand how they would conflict with Procurement Code requirements, or to fully compare its requirements with other states. However, SCDOT is willing and ready to adopt MMO's recommendations to (1) develop and document a mutual understanding of the application and interpretation of the exemption, (2) revise SCDOT's internal procedures and guidelines to provide staff with clear guidance regarding which procurements are subject to the Procurement Code, and (3) to use its best efforts to ensure that it processes all non-exempt procurements in accordance with these understandings and guidelines in the future. SCDOT believes that, with MMO's cooperation, the documentation of the agreed upon interpretation and application of the exemption and the revised SCDOT internal guidelines can be accomplished by November 14, 2008.

When SCDOT's exemption was enacted, the South Carolina Department of Transportation ("SCDOT")¹ had been procuring highway and bridge construction and maintenance contracts for almost 60 years pursuant to its own procurement procedures. These procedures were based on federal laws and regulations since most of the funding for highway construction came from federal funds. The exact reasons the General Assembly granted SCDOT an exemption for highway construction and maintenance related contracts is unknown. However, it is likely that the General Assembly saw no need to require SCDOT to comply with a new set of procedures or to transfer purchasing authority away from SCDOT's staff that was knowledgeable and experienced in highway construction and maintenance procurements.

¹ At that time the agency was known as the "South Carolina Department of Highways and Public Transportation."

SCDOT's exemption is similar to procurement exemptions granted to Departments of Transportation in other states for highway construction and maintenance related contracts. North Carolina², Virginia³ and Georgia's⁴ Departments of Transportation have independent authority and internally developed procedures for highway construction and maintenance contracts. There seems to be little understanding in other states why these DOT exemptions exist, other than a concern that State purchasing procedures are "one size fits all" procedures which do not lend themselves well to highway construction and maintenance related contracts and create unnecessary and costly delays to the award of such contracts through bid protests.

The concern over the cost of unnecessary delays from bid protests is legitimate.⁵ Requiring SCDOT construction and maintenance contracts to be procured pursuant to Procurement Code procedures will provide a bidder a new avenue and forum for protest, with another level of appeal to the Procurement Review Panel. Even if no protest is filed, the possibility of delay is likely to increase the cost of the bid prices. Current bid prices on SCDOT highway construction contracts are limited to a period of 30 days because the cost of highway construction work escalates so quickly. Requiring bidders to extend the

² See North Carolina General Statutes Section 136.28.1(a) (authorizing the Department of Transportation to let all contracts over \$1.2M for construction or repair of roads and highways under rules and regulations to be made and published by the Department of Transportation); Section 136.28.1(d) (deeming the construction, maintenance, and repair of the highway rest area buildings and facilities, weight stations and Department of Transportation's participation in the construction of welcome center buildings as highway construction, maintenance and repair within the Department of Transportation's power to procure); Section 136-28-1(e) (authorizing the Department of Transportation to solicit proposals under its own rules and regulations for all contracts for professional engineering services and other kinds of professional or specialized services necessary in connection with highway construction, maintenance, or repair).

³ See Section 2.2-4322 of the Code of Virginia (authorizing the Department of Transportation to procure highway and maintenance contracts by competitive sealed bidding in accordance with specifications adopted by the Department).

⁴ See Code of Georgia Section 50-5-72 (requiring all construction and public works contracts to be conducted and negotiated by the Department of Administrative Services, but exempting the Department of Transportation); Section 32-2-61 (authorizing the Department of Transportation to enter into contracts for the purchase of "services ancillary to the construction and maintenance of a public road").

⁵ Under the Procurement Code procedures, a disappointed bidder can delay the award of a highway construction project at least 35 days by filing a letter of protest. (See S. C. Code Section 11-35-4210.) In the event a timely protest is filed, there is an automatic stay against the solicitation or award of the contract until the protest is resolved. The Code permits the Chief Procurement Officer to lift the stay upon a finding that the solicitation or award of the contract without further delay is necessary to protect the best interests of the state, and to require a bond from the protester to cover reasonable costs of the state if he does not ultimately prevail, but the process is readily available and the burden is on the State to overcome the stay and request the bond. In addition, the protestant can appeal the Chief Procurement Officer's decision to the Procurement Review Panel. This creates another level of review. Under current SCDOT procedures, a disappointed bidder is less likely to file a protest because his only forum is the Circuit Court. To stop the award of the contract under Circuit Court rules, the contractor bears a high burden of proving his entitlement to an injunction against the project and he is required to post a bond to cover the costs of the State in the event he does not eventually prevail. See Rules of Civil Procedure, Rule 65. If SCDOT contracts were subject to the Procurement Code protest procedures, the mere possibility of a delay due to the filing of a protest is likely to cause a contractor to limit his risk due to protest by increasing the bid price.

period in which their bid prices are valid for even 30 additional days could cause a significant increase in the cost to the taxpayer for the contract.

SCDOT readily acknowledges and agrees that there have been various interpretations and applications of SCDOT's exemption to individual procurements over the years, some of which have been conflicting, and that these conflicting interpretations have caused difficulties. However, SCDOT would note that most of these conflicts, although certainly not all, have been resolved amiably between the parties. SCDOT also agrees that it is time to resolve these conflicting interpretations with MMO and develop and document a mutual understanding of the exemption for use by both parties. The historical summary of the administrative interpretations provided in MMO's audit provides an excellent starting place for this effort. SCDOT also agrees that SCDOT's internal procedures should be revised to clarify what procurements are subject to the Procurement Code and which are exempt. We also welcome the comments of MMO on this undertaking. Finally, SCDOT agrees that once established, SCDOT should consistently follow these guidelines. We believe that once clarification is obtained and guidelines are established, this can be more easily accomplished.