ALAN WILSON
ATTORNEY GENERAL

June 30, 2023

The Honorable Jay Kilmartin
Member
South Carolina House of Representatives
320A Blatt Building
Columbia, South Carolina 29201

Dear Representative Kilmartin:

We received your letter requesting an Attorney General's opinion as to the legality of a contract entered into by School District Five of Lexington and Richland Counties (the "District") and a private company, Total Comfort Solutions, Inc., to provide heating, ventilation, and air conditioning ("HVAC") services. According to your letter and the meeting minutes provided with your request, on September 12, 2022, the District's board voted to "solicit a third-party inspector to evaluate the HVAC systems across the district to recommend a plan of action for HVAC upkeep, repairs, preventive and replacements." However, you state that instead of issuing a request for proposal ("RFP") for an evaluation and plan of action,

> the district issued an RFP for a maintenance contract on December 21, 2022 [included with your request]. The award was made on February 2nd [included with your request]. With a contract value of at least $1,398,284 per year [included with your request].

You also informed us that "[t]he required funding for this maintenance contract was not included in the 2022-2023 budget, as per the district administration's notation in the 2023-2024 budget, $800,000 would need to be added to the budget year for the new HVAC maintenance contract [included with your request]." You state that a school district trustee requested a copy of the contract but was told the RFP was the contract. Based on this information you ask the following questions:

1) Per Section 59-19-290 of the South Carolina Code of Laws was it lawful for the district to enter into the contract for HVAC maintenance prior to approving a budget that included the necessary funding?

   If it was not lawful, should the district void the contract?

2) Is the vendor's response to the RFP a proper contract? The RFP response is quite lengthy but can be found on the district's website: https://www.lexrich5.org/Page/29433 Specific concerns with using the RFP response as the contract include:

   - The vendor offered two options in their bidding schedule [included with your request] but there is no indication as to which option was selected.
   - Other standard contract provisions such as invoicing requirements and payment terms are not included in the bidder's response.
   - While the district issued an Intent to Award, that document is not signed and the vendor's RFP response is also not signed by the district.

3) Does the attached AG Opinion [included with your request] apply in this situation?

Law/Analysis

A. Can the District enter into a contract without prior budgetary funding?

Section 59-19-90(1) of the South Carolina Code (2020) states school trustees are responsible for providing schoolhouses and to "make them comfortable." Additionally, school trustees are given the power "to purchase, rent, lease, or otherwise acquire the supplies and equipment necessary for the operation of the public schools and other school facilities of the district." S.C. Code Ann. § 59-19-130 (2020). They are also required to "keep its equipment in good repair." S.C. Code Ann. § 59-19-150. We note that according to our Supreme Court:

> In general, courts will not disturb matters within the school board's discretion unless there is clear evidence of corruption, bad faith, or a clear abuse of power. H.H. Singleton v. Horry County Sch. Dist., 289 S.C. 223, 227–28, 345 S.E.2d 751, 753-54 (1986) (citing Laws v. Richland County Sch. Dist. No. 1, 270 S.C. 492, 495, 243 S.E.2d 192, 193 (1978)). Furthermore, an appellate court will not substitute its judgment for that of the school board's in view of the powers, functions, and discretion that must necessarily be vested in such boards if they are to execute the duties imposed upon them. Id. at 228, 345 S.E.2d at 754.

Davis v. Greenwood Sch. Dist. 50, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005).

We understand the District sought the services of a company to service and make repairs to the District's HVAC systems, which we believe is generally a matter within the discretion of the District. However, your concern appears not to be whether the District can enter into such an

agreement, but whether it did so in violation of section 59-19-290 of the South Carolina Code (2020).

Section 59-19-290 provides: "All contracts which boards of trustees may make in excess of the funds apportioned to their districts shall be void." You state the District did not include funds for this contract in its 2022-2023 budget and therefore, you are concerned this contract is void. You based your belief that it was not included on a notation to the 2023-2024 budget that $800,000 would need to be added for the new HVAC contract. However, in our discussions with the District's attorney, we were told the District had allocated funds to the 2022-2023 budget sufficient to cover repairs and maintenance pursuant to the contract for that fiscal year as those services were being provided by a different company prior to entering into the contract in question. Whether or not appropriations were made for HVAC maintenance and repair services is a question of fact. As we stated on numerous occasions, "factual determinations are beyond the scope of an opinion of this Office." Op. Att'y Gen., 2006 WL 1207271 (S.C.A.G. Apr. 4, 2006). Therefore, we cannot say whether or not the funding for this particular contract is included in the District's 2022-2023 budget. Such a determination is best left to a court that can make factual determinations to determine whether the contract is void.

B. Is the vendor's response to the RFP a proper contract?

As we previously explained, school districts have the authority to contract for services related to the upkeep of schools. How school districts go about selecting the providers of such services is rooted in the individual district's procurement code.[1] In regard to the District, its procurement manual indicates the District uses term contracts to purchase supplies and services. District 5 of Lexington and Richland Counties Procurement Code Manual *available at* https://www.lexrich5.org/cms/lib/SC01916806/Centricity/Domain/2706/District%20Five%20Procurement%20Manual%20Revised.pdf. For purchases greater than $50,000 the District requires competitive sealed bidding. Id. The procurement manual specifies the District shall prepare a written solicitation detailing the specifications and listing all the contract terms and conditions. Id. The District then invites bids, which "are evaluated based on the requirements set forth in the solicitation." Id. Contracts are "awarded to the lowest responsive and responsible bidder. Procurements in excess of $50,000 require an Intent to Award and the contract is not effective for 10 days." Id. The award is then posted and "the purchase order and/or contract is issued to the contractor." Id. Based on the information you provided, the District appears to have followed its procurement procedures by posting the RFP, selecting one of the bids, and posting an intent to

[1] As we explained in a 2022 opinion, section 11-35-310(18) of the South Carolina Code explicitly excludes school districts from the South Carolina Procurement Code. Op. Att'y Gen., 2022 WL 2975162 (S.C.A.G. July 19, 2022). "However, a separate statute requires that if a school district has over seventy-five million dollars in annual expenditures it must comply with the South Carolina Procurement Code or develop its own procurement code." Id. (citing S.C. Code § 11-35-5340). It appears the District opted to develop its own procurement code, which can be accessed through the District's web page.

award indicating the selection of Total Comfort Solutions, Inc.[2] However, you are concerned the bidder and the District did not create a signed contract separate from the bidding process.

> Under South Carolina law, "a contract does not always require the signature of both parties; it may be sufficient, if signed by one and accepted and acted on by the other." Jaffe v. Gibbons, 290 S.C. 468, 351 S.E.2d 343, 346 (Ct. App. 1986). "A written contract, not required to be in writing, is valid if one of the parties signs it and the other acquiesces therein. Acceptance of a contract by assenting to its terms, holding it and acting upon it, may be equivalent to a formal execution by one who did not sign it." Coves Darden, LLC v. Ibanez, 2016 WL 4379419, at *9-10 (S.C. Ct. App. 2016) (quoting Peddler, Inc. v. Rikard, 266 S.C. 28, 221 S.E.2d 115, 117 (1975)).

Dan Ryan Builders W. Virginia, LLC v. Main St. Am. Assurance Co., 452 F. Supp. 3d 338, 349 (D.S.C. 2020).

Whether or not the actions of the District and Total Comfort Solutions, Inc. were sufficient to form a valid contract involve the determination of facts surrounding the formation of such a contract. As we previously stated, this Office does not have the ability to make factual determinations. See Op. Att'y Gen., 2023 WL 3034522 (S.C.A.G. Apr. 6, 2023) (stating "this Office, in a legal opinion cannot make factual determinations."). Therefore, a court would ultimately need to decide whether these parties entered into a valid contract. Nonetheless, according to the terms of the RFP:

> BID/PROPOSAL AS OFFER TO CONTRACT: By submitting Your Bid or Proposal, You are offering to enter into a contract with District Five of Lexington and Richland Counties. Without further action by either party, a binding contract must result upon final award. Any award issued will be issued to, and the contract will be formed with, the entity identified as the Offeror on the Cover Page. An Offer may be submitted by only one legal entity; "joint bids" are not allowed.

By submitting a bid, the service provider is making an offer to perform in accordance with their bid. Per the Intent to Award, "Unless otherwise provided in the solicitation, the final statement of award serves as acceptance of your offer." Thus, language used in both the bid and the award indicate an offer and acceptance of that offer. But, we advise a court would have to make a final determination as to the validity of such a contract.

You note a concern that Total Comfort Solutions, Inc. provided two options in the bid, but the District did not indicate which option they chose. According to our Supreme Court, "South Carolina common law requires that, in order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to *all* essential and material terms of the

[2] We note that based on our review of the District's procurement manual, board approval is not required for HVAC contracts. Contracts requiring board approval are determined by board policy and the District's procurement code.

agreement." Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989) (emphasis in original). Thus, one could argue the parties have not settled on all the essential terms of the agreement. However, according to the RFP, the bidder is bound by the terms of the bid regardless of which option the District choses and as long as the bid is responsive to the RFP, it may be selected by the District. Additionally, the RFP contains a provision stating, "CONTRACTOR MUST NOT PERFORM ANY WORK PRIOR TO THE RECEIPT OF A PURCHASE ORDER FROM THE DISTRICT." This requirement is also reiterated in the Intent to Award, which states the recipient of the award "should not perform any work or deliver any product prior to the receipt of a purchase order from the District." Therefore, the District has an opportunity to approve the work prior to its performance.

From your letter, you are also concerned about the lack of standard contract provisions such as invoicing and payment terms. However, in our review of the RFP, we found a provision covering these terms titled "PAYMENT & INTEREST." Thus, we direct you to the RFP for clarification on these terms.

C. Does the June 18, 1996 Attorney General Opinion apply?

You attached our June 18, 1996 opinion with your request and ask about its application the District's contract for HVAC services. That opinion addressed whether state colleges and universities could offer contracts to their presidents, athletic directors, and coaches that were longer than one year. Op. Att'y Gen., 1996 WL 452747 (S.C.A.G. June 19, 1996). It cites extensively to a 1982 opinion interpreting section 11-1-40 of the South Carolina Code, which is similar to section 59-19-290 discussed above, and provides:

> (A) It is unlawful for an authorized public officer to enter into a contract for a purpose in which the sum is in excess of the tax levied or the amount appropriated for that purpose.
>
> (B) It is unlawful for an authorized public officer to divert or appropriate the funds arising from any tax levied and collected for any one fiscal year to the payment of an indebtedness contracted or incurred for a previous year.
>
> (C) A person who violates the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than five thousand dollars and not less than five hundred dollars or imprisoned not more than three years, or both.

The 1982 opinion explained that under South Carolina law,

> "a contract made by a public officer, which seeks to obligate state funds beyond the fiscal year, where there is no existing appropriation providing for the expenditure of such funds is invalid. Unless the Legislature subsequently

> authorizes or ratifies the contract in the form of an appropriation . . . the contract may not be enforced."

Id. (quoting Op. Att'y Gen., 1982 WL 189182 (S.C.A.G. Feb. 22, 1982)). Our 1996 opinion goes on to consider several South Carolina court decisions.

> We further noted that state officials possess no authority to obligate the State of South Carolina beyond the life of an appropriation, almost always the fiscal year. We referenced State ex rel. Edwards v. Osborne, 193 S.C. 158, 173, 7 S.E.2d 526, where our Supreme Court stated that "it may be conceded that the legislature has plenary power . . . to change its mind from year to year as to the purpose to which in each year it will apply the proceeds of particular sources of revenue . . . ." Further, we noted that the case of Long v. Dunlap, 87 S.C. 8, 68 S.E. 801 concluded that Section 11-1-40 "represents a limitation or constraint upon an agency's general authority to contract." Section 11-1-40 makes it unlawful for any public officer "to enter into a contract for any purposes whatsoever in a sum in excess of the tax levied or the amount appropriated for such purposes . . . ." Our reading of the Long case, which held that so long as an agency possesses appropriated funds in its hands, the agency may contract and obligate those funds pursuant to its general power, was that "it would not represent an unfair extension of Long to conclude that a contract beyond the life of the agency's appropriation "would be invalid pursuant to Sec. 11-1-40."

Id. Nonetheless, we explained:

> The 1982 opinion recognized, however, that inclusion of the so-called "non-appropriations" clause in any contract rendered it valid for purposes of agency authority. As was stated in the opinion,
>
> > [t]he only basis on which the State or an agency thereof could validly enter into a contract obligating public funds for a period beyond the fiscal year as determined by the constitution and statutes of this State, would be the inclusion of a proviso which would make continuation of the contract term contingent upon the fact that the General Assembly appropriated sufficient funds, from year to year, to pay the consideration under the contract as to be solely determined by the State or its agency.
>
> Since the 1982 opinion was written, both this Office as well as our Supreme Court have reaffirmed the fact that a "non-appropriations" clause is necessary for multi-year contracts entered into by a governmental agency. In Op. No. 83-89 (November 15, 1983), we reaffirmed the 1982 opinion and applied it to counties. There, we noted

> . . . contracts executed for terms in excess of one year will be binding; however, the contract should contain a proviso to the effect that the contract is subject to cancellation if funds are not appropriated or otherwise made available for the contract after the first year.

Id. (quoting Op. Att'y Gen., 1982 WL 189182 (S.C.A.G. Feb. 22, 1982)). Accordingly, we concluded "a multi-year contract by a state agency is valid, but must be 'subject to' the continuing appropriation of funds therefore by the General Assembly." Id.

We understand you are concerned about the fact that the contract with the HVAC service provider runs for multiple years. According to the Intent to Award, the maximum contract period runs from February 14, 2023 to February 13, 2028. Section 59-19-29, as considered above, is similar to section 11-1-40 discussed in our 1982 and 1996 opinions and generally prohibits the District from entering into multi-year contracts. However, like our 1982 and 1996 opinions, we also recognize that a "non-appropriations clause" acts to render such contracts valid. The RFP contains the following provision:

> Payment and performance obligations for succeeding fiscal periods must be subject to the availability and appropriation of funds therefore. When funds are not appropriated or otherwise made available to support continuation of performance in a subject fiscal period, the contract must be canceled . . . .

As such, the contract is contingent upon the receipt of funding. Therefore, we do not believe the multi-year nature of the contract renders it void under section 59-19-290.

Conclusion

We understand you are concerned about issues surrounding the District's contract for HVAC services with Total Comfort Solutions, Inc. As you mentioned in your letter, section 59-19-290 of the South Carolina Code prohibits school districts from entering into contracts in excess of a corollary appropriation. While you note that a subsequent budget indicated a need to increase the budget for account for the contract, we were told the District had sufficient funding for the contract for the 2022-2023 fiscal year. This Office does not have the ability to make factual determination regarding what was and was not included in the District's 2022-2023 budget. Op. Att'y Gen., 2023 WL 3034522 (S.C.A.G. Apr. 6, 2023). Therefore, a court would need to determine if the District ran afoul of section 59-19-290 voiding the contract with Total Comfort Solutions, Inc.

You are also concerned that a valid contract does not exists between the District and Total Comfort Solutions, Inc. As we explained above this is also a factual determination, which must be made by a court of competent jurisdiction. Nonetheless, based on the documents you provided, it appears Total Comfort Solutions, Inc. made an offer by submitting a bid, which the District appears to have accepted in its Intent to Award. Moreover, the terms of the agreement, including those related to invoicing and payments appear to be included in the RFP, which Total Comfort Solutions, Inc. is

bound by. While there is some question as to which of the two proposals submitted by Total Comfort Solutions, Inc. the District selected, we note that Total Comfort Solutions, Inc. would be bound by either proposal. Additionally, the RFP and the Intent to Award require a purchase order from the District prior to the performance of any work or the delivery of any product.

Lastly, in our 1982 and 1996 opinions, we explain public officers are prohibited from entering into multi-year contracts. We believe this holds true for school districts based on section 59-19-290. The District's contract with Total Comfort Solutions, Inc. spans multiple years and therefore, would appear to be an invalid multi-year contract. However, like we discussed in our prior opinions, the inclusion of a non-appropriations clause in the contract acts to render such contracts valid. We note the District included such a clause in its RFP as a term of the contract. Therefore, we believe a court would likely find such a contract valid.

Sincerely,

Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
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