

**AUDIT REPORT  
BY  
THE MATERIALS MANAGEMENT OFFICE  
OF  
THE STATE FISCAL ACCOUNTABILITY AUTHORITY  
REGARDING  
THE SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION'S  
EXEMPTIONS FROM THE CONSOLIDATED PROCUREMENT CODE  
UNDER SECTION 11-35-710(1)**

**November 3, 2015**

**Audit Conducted Pursuant to Section 57-1-490(B)**

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September 18, 2015

Delbert H. Singleton, Jr., Esq.  
Assistant Executive Director and Authority Secretary  
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1200 Senate Street, Suite 600  
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Dear Mr. Singleton:

We have completed our audit of the South Carolina Department of Transportation exemptions from the South Carolina Consolidated Procurement Code as required by Section 57-1-490. The South Carolina Department of Transportation's administration is responsible for establishing and maintaining a system of internal controls 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 controls, 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 controls over procurement transactions, as well as our overall examination of procurement policies and procedures, were conducted with professional care. However, because of the nature of audit testing, they would not necessarily disclose all weaknesses in the system.

We performed the audit for the period July 1, 2014 through June 30, 2015 and made one recommendation to the Legislature. No administrative penalties are warranted.

Sincerely,



John St. C. White

Interim Materials Management Officer

## INTRODUCTION

Since its initial enactment, the South Carolina Consolidated Procurement Code has expressly exempted broad categories of procurements of the South Carolina Department of Transportation, hereinafter referred to as DOT, from all aspects of the Procurement Code. Those exemptions appear in Section 11-35-710 and have remained virtually unchanged since its initial enactment: The exemptions state:

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 these exemptions, the General Assembly asked the South Carolina Legislative Audit Council (LAC) to audit DOT's management of its resources. The LAC performed that audit and issued its report in November 2006. The following legislative session, the General Assembly enacted Section 57-1-490, a law requiring a more specific audit, an annual audit of DOT's use of its Procurement Code exemptions. An excerpt from that law states:

The Materials Management Office of the State Budget and Control Board<sup>1</sup> 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, the Department of 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 cost and expenses of the audit must be paid by the department out of its funds.<sup>2</sup>

This report represents the eighth annual audit under this law by the Materials Management Office.

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<sup>1</sup> Act 121 of 2014 (SC Restructuring Act of 2014) abolished the Budget and Control Board and established the State Fiscal Accountability Authority effective July 1, 2015.

<sup>2</sup> 2007 Act No. 114, Section 5 (codified in S.C. Code Ann. Section 57-1-490(B))

## BACKGROUND

Section 11-35-710(1) provides DOT the following exemptions from all aspects of the procurement requirements of Title 11, Chapter 35:

(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;

Section 57-1-490(B) requires that the Materials Management Office (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 exemptions' meanings.

The exemptions have remained virtually unchanged since its initial enactment. On its face, the statute contains 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 over the years. 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. Of primary concern is the meaning of the phrase "construction, maintenance, and repair of bridges, highways, and roads," and what each word encompasses.

To understand the standard we apply for evaluating DOT's contracts under the exemptions, we refer to the first DOT exemption audit report dated October 15, 2008<sup>3</sup>. As noted, the second and third exemptions for equipment maintenance and for emergency-type parts and equipment have been treated as unambiguous and need no further explanation. The breadth of DOT's exemption for construction, maintenance, and repair of bridges, highways, and roads however, needs further discussion.

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<sup>3</sup> The October 15, 2008, DOT Exemption Report is available on the web at: [http://www.mmo.sc.gov/MMO/webfiles/MMO\\_audit/Audit%20Reports/DOT08.pdf](http://www.mmo.sc.gov/MMO/webfiles/MMO_audit/Audit%20Reports/DOT08.pdf). Our discussion of the definition of construction titled "CONSTRUCTION INCLUDES DESIGN" begins on page 14 of that report.

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 a public infrastructure facility, including any public structure, public building, or other public improvements of any kind to real property. It does not include the routine operation, routine repair, or routine maintenance of an existing public infrastructure facility, including structures, buildings, or real property."<sup>4</sup>

"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).

"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.

"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.

Read together, these definitions clearly distinguish construction services from non-construction services, both those related to construction and those not. Narrowly looking at these definitions, one might conclude DOT's exemption for construction does not extend to any construction related professional services because the term construction does not include architectural and engineering, construction management, and land surveying services. However, for reasons stated at length in the October 15, 2008

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<sup>4</sup> 11-35-310(7) In 2008, the definition of construction was amended. 2008 Act No. 174.

audit report, MMO applies a broader definition of construction to DOT's exemption. MMO concluded the exemption includes construction related professional design services, as defined by law. Further, the exemption applies to contractual services for maintenance and repair of bridges, highways, and roads. However, the exemption does not apply to procurements of materials and supplies used by in-house personnel for such activities.



## SCOPE

We conducted our review in accordance with Generally Accepted Auditing Standards as they apply to compliance audits. We conducted our on-site review from August 18 through September 3, 2015. We selected samples from the period July 1, 2014 through June 30, 2015, for compliance testing. We reviewed these samples and performed other audit procedures that we considered necessary to determine whether DOT acted properly with regard to the exemptions in 11-35-710(1). Our scope was limited to the application of the exemptions and did not include a review of the procurement processes used. Most of our samples were limited to contracts awarded under DOT's exemptions since our last audit as follows:

### 1. Road Construction Contracts

We sampled sixty-eight out of five hundred and ninety-three contracts, or 11%, of road construction contracts awarded since our last audit to determine if DOT acted properly with regard to the exemptions. We noted no exceptions.

### 2. Consultant and Design Related Professional Services

We sampled eleven out of twenty-two contracts, or 50% of consultant and design related professional services contracts awarded since our last audit to determine if DOT acted properly with regard to the exemptions. We noted no exceptions.

### 3. Review of Non-Professional Service Contracts

We sampled twelve of one hundred and twenty or 10%, non-professional service contracts awarded since our last audit relating to vehicle and road equipment maintenance and repair, and other emergency-type parts or equipment, and non-professional services provided within the right-of-way. We also sampled six of fifty-nine or 10% of the solicitations awarded since our last audit relating to the above. We noted no exceptions.

### 4. Review of DOT Expenditure Files

We selected a statistical sample of expenditures from the general population of 54,777 transactions using a confidence level of 95% with a standard error of 5% resulting in a sample size of ninety-six expenditures each exceeding \$2,500. From this sample, we traced each transaction back to SCEIS (source) documentation to identify exempt transactions and then traced those exempt transactions back to exempt listings provided to us by DOT to ensure the accuracy of the exempt listings. We noted no exceptions.

### 5. Review of DOT Capital Improvements

We sampled twelve out of one hundred and twenty-one, or approximately 10%, of the capital improvement projects awarded to determine if DOT acted properly with regard to the exemptions. We noted no exceptions.

## **RESULTS OF EXAMINATION**

DOT has very broad exemptions from the Procurement Code. In 2007, the General Assembly enacted a law that requires MMO to audit DOT annually with regard to DOT's application of these exemptions. With this report, MMO has completed its eighth annual audit under this law.

DOT exemptions from the Procurement Code apply to procurements for construction, maintenance, and repair of bridges, highways, and roads; vehicle and road equipment maintenance and repair; and other emergency-type parts or equipment. Our testing of DOT's internal procurement operation of procurement transactions for the period July 1, 2014 through June 30, 2015 to ensure that DOT acted properly with regard to its exemptions resulted in no findings.

## **SUMMARY OBSERVATIONS**

Our audit of DOT's exemptions, as well as our study of its history, the Procurement Code, and the applicable federal laws leads to the following observations.

### **Oversight and 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.<sup>5</sup> 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."<sup>6</sup> The ABA's revisions to the Model Code

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<sup>5</sup> "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.

<sup>6</sup> ABA Section of Urban, State and Local Government Law, Model Procurement Code for State and Local Governments § 2-303 (1979).

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] . . . ." <sup>7</sup> Despite providing this alternate option, the ABA's commentary makes clear its continued 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. <sup>8</sup>

Consistent with this recommendation, South Carolina has adopted a strong, centralized approach to public procurement. Authority and policy are centralized in the State Fiscal Accountability Authority (SFAA), with purchasing authority delegated back to purchasing agencies consistent with their capabilities. DOT's exemptions are a major exception to this basic policy. <sup>9</sup>

#### Policy Behind Exemptions and Conflicts with Federal Laws

The reason for granting DOT exemptions 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 highway and road construction." <sup>10</sup>

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<sup>7</sup> American Bar Association, 2000 ABA Model Procurement Code for State and Local Governments § 2-303 (2000).

<sup>8</sup> ABA Section of Urban, State and Local Government Law, Model Procurement Code for State and Local Governments § 2-303 commentary (1979) (emphasis added).

<sup>9</sup> 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 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).

<sup>10</sup> Letter from Zeigler to Mabry of 7/10/97, and Letter from Probst to Fusco of 5/24/01.

Even if the assumption is correct, the justification is flawed for several reasons. First, federal law contemplates, in part, that state laws can govern.<sup>11</sup> Second, the federal laws that do apply often contemplate expressly that states will have their own rules that govern, in addition, or as a gap-filler for, the federal rules.<sup>12</sup> 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 must go to court and seek an injunction.<sup>13</sup>

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.<sup>14</sup>

Even if the Consolidated Procurement Code applied to all highway and road construction, the SFAA's role in construction procurements is relatively narrow. The SFAA's Chief Procurement Officer for Construction (CPO) does not enter into contracts for other state entities and is not a party to those contracts. Likewise, the CPO does not issue procurements, select contractors, make awards, or handle day-to-day administration of agency contracts. Rather, the CPO 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.

### Unregulated Procurements

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

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<sup>11</sup> See discussion in text below 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) (year) ("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.").

<sup>12</sup> *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."). Also see discussion in text above under heading "Unregulated Procurements".

<sup>13</sup> *See, e.g.*, *Clark Construction Co. v. Pena*, 895 F. Supp. 1483 (M.D. Ala. 1995).

<sup>14</sup> *S.C. Code Ann.* § 11-35-40(3).

- Awards governed by state procurement code laws.
- Awards governed by federal procurement laws.
- Awards governed by a mix of federal and state procurement laws.
- Awards not governed by any law dictating how the contract is awarded.<sup>15</sup>

Of primary concern are awards not governed by any law dictating how contracts are awarded. A review of applicable federal rules explains. 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.<sup>16</sup> This default rule yields to any program-specific, federal statutory requirements.<sup>17</sup> 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.<sup>18</sup> 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 such as we find from DOT's procurement code exemptions found in 11-35-710(1), there are none.<sup>19</sup> Stated differently, no significant,<sup>20</sup> enforceable laws govern how DOT awards public contracts that fall within the scope of DOT's procurement code exemptions

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<sup>15</sup> MMO understands that DOT has internal procedures for such contracts. However, such internal procedures do not provide the safeguards provided by law. 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).

<sup>16</sup> *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 (6<sup>th</sup> Cir. 2007).

<sup>17</sup> 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 . . .").

<sup>18</sup> 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.

<sup>19</sup> *See* 49 C.F.R. 18.36(a) (2007).

<sup>20</sup> 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 the safeguards provided by laws.

that are not governed by a program-specific federal statutory requirement.<sup>21</sup> Examples would include DOT road construction projects that use no federal funds, such as primary or secondary roads.

Even when federal law dictates 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.<sup>22</sup> 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.<sup>23</sup> Federal regulations also provide some rules regarding the award of low bid, federal-aid highway construction work; however, these rules are, in large measure, consistent with, but much more limited than, the rules provided for in the Consolidated Procurement Code.<sup>24</sup>

### 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."<sup>25</sup> Years of administrative interpretation has yet to resolve the ambiguity inherent in DOT's procurement code exemptions.

Allowing this ambiguity to continue has real costs. First, 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

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<sup>21</sup> 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), and FHWA Policy Memorandum, *Procurement of Transportation Enhancement Projects* (November 12, 1996). FHWA Policy Memoranda are available at <http://www.fhwa.dot.gov/legregs/elecdirs.htm>.

<sup>22</sup> 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), 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).

<sup>23</sup> 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 . . .").

<sup>24</sup> 23 C.F.R. Part 635

<sup>25</sup> S.C. Att'y Gen. Op. No. 94-9, dated January 14, 1994, at 2.

knowing whether or not the agency they do business with has the proper authority.<sup>26</sup> Third, a lack of clarity in procurement laws can lead to expensive litigation, with consequences for all involved.<sup>27</sup> Only legislative action can fully conclude this matter.<sup>28</sup>

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<sup>26</sup> *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.").

<sup>27</sup> *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).

<sup>28</sup> *See, generally*, Letter from Representative E.B. McLeod, Jr. to Ron Joye, Department of Transportation dated 3/30/94 (implicitly recognizing the need for legislative action and requesting an explanation of DOT's procurement processes and a side by side comparison of those processes with those required by the Consolidated Procurement Code) (copy attached). 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].").

## RECOMMENDATION

These recommendations are interrelated and intended to be adopted together as a coordinated approach to addressing the challenges of the exemptions. Consistent with South Carolina's history of centralizing procurement policy and authority in the Budget & Control Board and now the State Fiscal Accountability Authority, MMO makes the following recommendations:

### *General Assembly*

1. Repeal DOT's existing exemptions, as provided by Section 11-35-710(1), to make the Consolidated Procurement Code applicable to all DOT procurements.

### *State Fiscal Accountability Authority*

2. After the exemptions are repealed, pursuant to Section 11-35-1210 grant DOT unlimited certification in the area of bridge, highway and road construction projects. Also, pursuant to Section 11-35-1210, grant DOT unlimited certification in certain defined areas specifically related to highway construction and for which DOT has considerable expertise and staff. *Until the exemptions are repealed, no action is required by the State Fiscal Accountability Authority.*

### *Chief Procurement Officers*

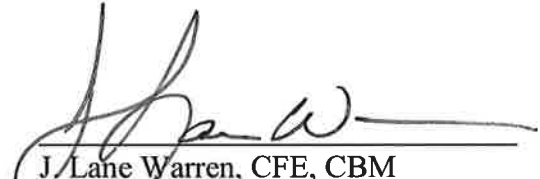
3. After the exemptions are repealed, pursuant to Section 11-35-840, all three Chief Procurement Officers should delegate their authority under Sections 11-35-4230 and 11-35-4320 to the State Highway Engineer or other appropriate DOT official.

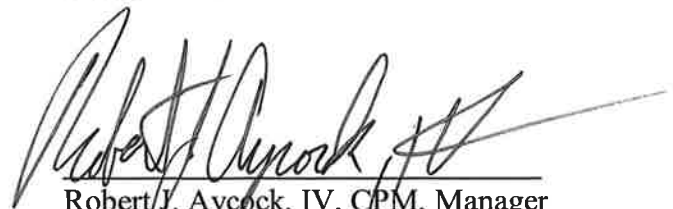


## CONCLUSION

Section 57-1-490(B) of the South Carolina Code of Laws requires the Materials Management Office of the State Budget and Control Board, now the State Fiscal Accountability Authority, to annually audit the South Carolina Department of Transportation's internal procurement operation to ensure that the department has acted properly with regard to its 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 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.

Our audit found DOT acted properly with regard to its exemptions contained in Section 11-35-710. No administrative penalties are warranted.

  
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J. Lane Warren, CFE, CBM  
Audit Manager

  
\_\_\_\_\_  
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October 30, 2015

Mr. Robert J. Aycock, IV  
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RE: SCDOT Procurement Code Exemption Audit

Dear Mr. Aycock:

Thank you for your letter of October 15, 2015 including a draft audit of the South Carolina Department of Transportation's (SCDOT) legislative procurement exemptions in compliance with state law Section 57-1-490 (B). SCDOT is pleased no exceptions were noted and that a determination the agency acted properly with regard to South Carolina state law (11-35-710 (1)) is cited. Staff is committed to continued cooperation with the Materials Management Office (MMO) of the State Fiscal Accountability Authority.

With regard to the recommendations to eliminate the exemption, SCDOT respectfully disagrees. It should be highlighted that in recent years, staff has coordinated diligently with MMO to strengthen policies and procedures ensuring the highest levels of integrity and transparency. MMO's determination of no findings in this audit is a reflection of effective internal controls and procedures. Furthermore, documented consideration of Federal Highway Administration (FHWA) applications related to the design, construction and maintenance of roads and bridges contracts is applicable and should be considered as part of any recommendation. Finally, time is of the essence in large construction contracts. As part of MMO protest procedures, burden is on the State to overcome a stay against any contract award and to demand a bond. Furthermore, there exists the possibility of a protestant to request an additional review by a Procurement Review Panel. Under SCDOT procedures, a protestant bears high burden of proving entitlements to an injunction as well as posting a bond for costs of delay should the protest not prevail.

Again, thank you for your guidance and assistance in this process.

Regards,

Brian W. Keys, P.E.  
Deputy Secretary for Finance and Procurement

BWK: clb

ec: MMO Audit Manager Lane Warren  
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