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July 8, 2005

Honorable Joseph C. Mitchell
Member, House of Representatives
465 Dexter Avenue
Mobile, Alabama 36604

Board of Education – Leases –
Instructional Programs –
Competitive Bid Law – Franchises

The lease by a board of education, of unused frequencies it is licensed to use by the Federal Communications Commission (“FCC”), to a commercial wireless provider is an exclusive franchise that is subject to the Competitive Bid Law.

The exemption in section 41-16-51(a)(13) of the Competitive Bid Law is not satisfied simply because only one provider approaches the board to lease the frequencies.

The contractual term limitations found in section 41-16-57(e) of the Competitive Bid Law do not apply to the lease of excess capacity in FCC license wireless spectrum.

Dear Representative Mitchell:

This opinion of the Attorney General is issued in response to your request.

QUESTIONS

1. Must the lease for profit by a board of education, of unused frequencies it is licensed to use by the Federal Communications Commission, to a commercial wireless provider be competitively bid?

2. If only one provider approaches the board to lease the frequencies, would that provider be a sole provider of services, exempting the lease from competitive bidding under section 41-16-51(a)(13) of the Code of Alabama?

3. Is the lease subject to the term limitation in section 41-16-57(e) of the Code of Alabama?

FACTS AND ANALYSIS

This Office understands that, for many years, educational institutions and county and city school boards have been licensed by the FCC to use a number of frequencies for educational purposes, and allowed to lease their excess frequencies that they do not use.

The Competitive Bid Law, codified at section 41-16-50, *et seq.*, of the Code of Alabama, applies generally to contracts in an amount of at least \$7500 for labor, services, work, or for the purchase or lease of materials, equipment, supplies, or other personal property. ALA. CODE § 41-16-50(a) (2000). This Office has stated that the leasing of the frequencies in question for television use is not subject to competitive bidding. Opinion to Honorable Larry Beaty, President, George C. Wallace State Community College, dated December 13, 1991, A.G. No. 92-00080.

The *Beaty* opinion, however, did not consider the seminal Alabama exclusive franchise case, *Kennedy v. City of Prichard*, 484 So. 2d 432 (Ala. 1986). In *Kennedy*, the Supreme Court of Alabama held that, even if there is no expenditure of funds, the Competitive Bid Law still applies if there is the grant of an exclusive franchise. Thus, the Court held that a city contract for wrecker services in which the owners of the towed vehicles paid for the service was subject to competitive bidding.

More recent opinions of this Office have followed *Kennedy* in considering similar facts. Opinions to Honorable Darwin Clark, Chairman, Lawrence County E-911 Communications Board, dated October 20, 2003, A.G. No. 2004-009 (emergency management communications district contract for an ambulance provider to receive dispatch calls); Honorable Mark D. Berson, Director, Bureau of Tourism and Travel, dated November 20, 2001, A.G. No. 2002-068 (permitting one company to provide on-line reservations on the Alabama Bureau of Tourism and Travel's website in exchange for a percentage of the profits); Honorable Thomas M. Little, Attorney, Talladega County Board of Education, dated April 1, 1999, A.G. No. 99-00158 (contract in which corporate sponsors provided a school scoreboard in exchange for the sole right to sell concessions). Accordingly, the *Beaty* opinion is overruled to the extent that it conflicts with this opinion.

Section 41-16-51(a) (13) of the Code of Alabama exempts from the Competitive Bid Law "contractual services and purchases of commodities for which there is only one vendor or supplier." ALA. CODE § 41-16-51(a)(13) (Supp. 2004). This section is not applicable simply because only one commercial wireless provider happens to approach the school board about leasing its excess frequencies. It contains no qualification. Thus, this Office has stated that section 41-16-51(a)(13) "does not state that the exemption is available if a vendor is the only vendor in a confined area, but allows the exemption if there is only *one vendor in existence* that provides the service." Opinion to Honorable Dewey D. Mitchell, Chairman, Lauderdale County Commission, dated July 22, 2003, A.G. No. 2003-197, at 4 (emphasis added).

The term limitation on certain public contracts in section 41-16-57(e) of the Competitive Bid Law applies only to contracts that must be competitively bid. Section 41-16-57(e) addresses term limitations for the following contracts that must be competitively bid – contracts for the *purchase* of personal property, contracts for the *purchase* of contractual services, and *lease-purchase* contracts. A lease of excess capacity of a federally granted license is neither a contract to purchase personal property nor personal services. Similarly, these leases of excess capacity to non-educational entities are not – and cannot be, "lease-purchase" contracts in that these licenses, as granted to educational entities by the Federal Communications Commission, may not be owned by the commercial wireless providers seeking to lease them. See, *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 Mhz Bands; Part 1 of the Commission's Rules -- Further Competitive Bidding Procedures;*

Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 And 74 (WT Docket No. 03-66 and RM 1058, WT Docket No. 03-67, MM Docket No. 97-217, WT Docket No. 02-68 and RM 9718, WT Docket No. 00-230); *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd. 1465 (Jul. 29, 2004), *supplemented by* 19 FCC Rcd. 22, 284 (Oct 29, 2004) (retaining existing ITFS spectrum rules that limit eligibility for licensing to qualified educational institutions). Thus, neither the 3-year term limitation nor the 10-year term limitation set forth in section 41-16-57(e) of the Competitive Bid Law applies to the excess capacity leases described herein.

CONCLUSION

The lease by a board of education, of unused frequencies it is licensed to use by the Federal Communications Commission, to a commercial wireless provider is an exclusive franchise that is subject to the Competitive Bid Law.

The exemption in section 41-16-51(a)(13) of the Competitive Bid Law is not satisfied simply because only one provider approaches the board to lease the frequencies.

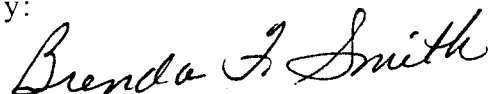
The contractual term limitations found in section 41-16-57(e) of the Competitive Bid Law do not apply to the lease of excess capacity in FCC license wireless spectrum.

I hope this opinion answers your questions. If this Office can be of further assistance, please contact Ward Beeson of my staff.

Sincerely,

TROY KING
Attorney General

By:



BRENDA F. SMITH
Chief, Opinions Division