

NIKKI HALEY, CHAIRMAN
GOVERNOR

CURTIS M. LOFTIS, JR.
STATE TREASURER

RICHARD ECKSTROM, CPA
COMPTROLLER GENERAL



SC BUDGET AND CONTROL BOARD

Office of the Executive Director
Marcia S. Adams

(803) 734-2320 • Phone
(803) 734-2117 • Fax

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

W. BRIAN WHITE
CHAIRMAN, HOUSE WAYS AND MEANS
COMMITTEE

June 27, 2014

Caroline Overcash
Office of the Inspector General
1301 Gervais Street, Suite 710
Columbia, SC 29201

RE: "Review of Suspicious Indicators at South Carolina State University Foundations"

Dear Caroline:

On June 6, 2014, Inspector General Patrick J. Maley issued his draft report titled "Review of Suspicious Indicators at South Carolina State University Foundations." The report as titled suggests that its purpose is to chronicle "suspicious" activity at SCSU. However, the report goes to great length to impose upon the Procurement Services Division that which the Procurement Code does not authorize. Among its recommendations were the following:

Recommendation #1c: The Budget and Control Board, through its Procurement Services Division, should promulgate and communicate policy to all state agencies to require all vendor monetary rebates from existing agency contracts be directed towards the agency and not to foundations; any exception should require the Budget and Control Board approval.

Procurement Services Division (PSD) has long declined to conduct a procurement that would require a contractor to "rebate" or make a "donation" to any third party—foundation or otherwise—unless expressly authorized by law. Absent unusual circumstances,¹ the Procurement Code does not differentiate between foundations and any other non-governmental third-party.

Recommendation #2b: The Budget and Control Board, through its Procurement Division, should establish a policy for new vendor contracts to prohibit rebates with the exceptions of those directly connected to commissions which incentivize vendors' productivity, operational revenue, or capital expenditures with a nexus to the contract.

This recommendation appears related to the report's observation that "[t]he current rebate process creates a relaxed, tolerating, and open exchange of consideration that has no nexus to contract performance...." PSD would never approve a contract that includes "below-the-table" benefits if what is meant by that term is illegal or illicit benefits. Contract "rebates" included in a valid procurement can be diverted to improper purposes regardless of any nexus to contract performance if the end user is intent on misappropriating funds. More importantly, the General

Ms. Overcash
June 27, 2014
Page Two (2)

Assembly enacts the rules governing an agency's allocation, transfer or expenditure of funds, and the responsibility to follow those rules falls on the agency, not PSD. While as mentioned above PSD will not conduct a procurement requiring rebates or donations to third parties, PSD is unaware of any basis for it to impose a general restriction on an agency's expenditure of funds without concrete direction from the legislature. Said another way, the legislature is the appropriate authority to authorize or restrict an agency's expenditure of funds. Therefore, the PSD does not intend to establish a policy as set out in Recommendation #2b.

General Maley seems to recognize that the PSD lacks the authority to direct expenditures of funds buy agencies as his next recommendation calls for legislative action:

Recommendation #2c: The South Carolina legislature should consider legislation to require new vendor contracts to prohibit rebates with the exceptions of those directly connected to commissions to incentivize vendors' productivity, operational revenue, or capital expenditures with a nexus to the contract.

Efforts to use the Procurement Code as a vehicle for non-procurement policy have fueled agency requests for relief or outright exemption from the Code's basic competitive framework; accordingly, Procurement Services cautions against using the Procurement Code to impose rules that are not directly related to its core requirements for competition and transparency.

Finally, adoption of the policies General Maley advocates may have significant implications for institutions other than South Carolina State University. Procurement Services reiterates its suggestion to the Inspector General that he consult additional public entities prior to finalizing these recommendations.

Thank you for the opportunity to respond to the report concerning South Carolina State University.

Sincerely,



Delbert H. Singleton, Jr.
Director, Procurement Services Division

cc: Marcia Adams

¹ S.C. Code Ann. § 11-35-40(4).