STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

March 2, 2017

Opinion No. 17-16

Fall Creek Falls Concession Contract

Question

Would the Commissioner of the Tennessee Department of Environment and Conservation be in violation of Tenn. Code Ann. § 11-3-112 if he were to enter into an agreement with a concessionaire for the operation of Fall Creek Falls State Park as provided for in the Fall Creek Falls Concession Contract RFP (SBC Project No. 126/036-03-2016)?

Opinion

Tennessee Code Annotated § 11-3-112 is not applicable to the proposed transaction. But Tenn. Code Ann. § 12-2-116 is applicable and provides specific and separate authority for the Tennessee Department of General Services to enter into an agreement for the private redevelopment, construction, and operation of the facilities at Fall Creek Falls State Park.

ANALYSIS

Fall Creek Falls State Park is owned by the State of Tennessee. The Tennessee Department of General Services ("TDGS"), on behalf of the Tennessee Department of Environment and Conservation, Division of State Parks ("TDEC"), issued a Request for Proposals ("RFP") for a concession contract for the Redevelopment and Operation of Hospitality Facilities at Fall Creek Falls State Park ("Concession Contract"). It is anticipated that this procurement will be completed in May 2017. As stated in the RFP, the purpose is to engage a concessionaire with expertise in lodging redevelopment, private-sector-hospitality best-management practices, and service delivery for a public-private partnership consistent with the mission of the Tennessee State Parks.

The RFP asks for a redevelopment plan for the design, demolition, and construction of the redeveloped lodge; a facilities improvement plan for the redevelopment of the park including all proposed construction projects, curing of deferred maintenance, and overview of the replacement of personal property; and an operating plan for the operation of the park facilities. The Concession Contract grants the winning proposer ("Concessionaire") the right, privilege, and duty to develop, maintain, and operate all of the facilities located at Fall Creek Falls State Park, including but not limited to the inn, restaurant, gift shop, conference space, cabins, and golf course.

The Concessionaire will operate the park facilities through subcontractors, vendors, and Concessionaire employees. State employees who meet the professional qualifications of the Concessionaire may be hired to work for the Concessionaire. The State reserves the right to review the hiring procedures prior to implementation by the Concessionaire. The Concession Contract

sets forth certain requirements for salary and benefits for the state employees who may be hired by the Concessionaire.

Purchases of goods and services for the State are generally made under the jurisdiction of the Central Procurement Office and are governed by Tenn. Code Ann. §§ 12-3-101 *et seq*. Departments, institutions, and agencies of the State are generally required to contract for the purchase of supplies, materials, equipment, and services through the Department of General Services. *See* Tenn. Code Ann. § 12-2-105(a).

TDEC is an agency of the State and, thus, is required to contract for the purchase of supplies, materials, equipment, and services through the Department of General Services. The Code section referenced in your opinion request, Tenn. Code Ann. § 11-3-112(a), authorizes an exception to this general requirement. It allows—but does not require—TDEC to make purchases for goods and services related to state park operations that would otherwise have to be made with the approval of and through the Department of General Services.

> Notwithstanding any law to the contrary, the commissioner of environment and conservation has the authority to cause to be purchased and to develop the method for purchasing, without the approval of any other agency of state government, services, raw materials, merchandise or resale, supplies and equipment necessary for provision of quality services for state park operations. *This section shall not be construed to allow the department to contract for services previously accomplished for the parks by state employees or for services that could reasonably be expected to be accomplished by state employees.*

Tenn. Code Ann. § 11-3-112(a) (emphasis added).

The last, italicized, sentence of Tenn. Code Ann. § 11-3-112(a) clarifies that the purchasing authority given to the TDEC commissioner under Tenn. Code Ann. § 11-3-112 does not extend to allow TDEC to contract on its own and without approval of another state agency for services that have been or could be provided by State employees. In other words, if TDEC wants to contract for services previously accomplished for the parks by state employees or for services that could reasonably be expected to be accomplished by state employees, the § 112(a) exception does not apply, and TDEC must, for such a contract, go through the usual procurement process of contracting for such services through the Department of General Services.

Taken in context, then, the last sentence of Tenn. Code Ann. § 11-3-112(a) does not prohibit all contracts for services for state park operations that have been or could be performed by State employees; it just prohibits TDEC from entering into such contracts on its own outside the otherwise required procurement process through the Department of General Services. And it appears that with respect to the Concession Contract, TDEC will not be contracting on its own. Rather, as both the RFP and the Concession Contract indicate, TDEC would be contracting through the Department of General Services.

In short, because TDEC would not be contracting on its own without approval of any other state agency, but would be contracting through and with the approval of General Services, Tenn. Code Ann. § 11-3-112(a) does not apply to the RFP or the Concession Contract.

Moreover, there is separate statutory authority, namely Tenn. Code Ann. § 12-2-116(a)(1), that does apply and that specifically allows *the TDGS commissioner*, with the approval of the State Building Commission, to enter into agreements concerning state-owned or state-controlled lands and facilities, such as the proposed RFP and Concession Contract for the operation of Fall Creek Falls State Park.

> Notwithstanding any other provisions of this part, *the commissioner of general services*, with the approval of the state building commission and subject to the policies and procedures of the commission, *may* in order to provide utilization of state-owned lands and facilities in the public interest, *enter into agreements for the private development, redevelopment, construction and operation of facilities on lands owned by or under the control of the state.*

Tenn. Code Ann. § 12-2-116(a)(1) (emphasis added).

Thus, the applicable statute is Tenn. Code Ann § 12-2-116(a)(1). It specifically authorizes TDGS to enter into an agreement, like the Concession Agreement, for the private redevelopment and operation of state-owned or state-controlled lands and facilities like Fall Creek Falls State Park.

To the extent that there may be any conflict between Tenn. Code Ann. § 11-3-112(a) and Tenn. Code Ann. § 12-2-116(a)(1), a court will apply the harmonious-reading cannon of statutory construction. That imperative instructs that statutory provisions should be interpreted in a way that renders them compatible, not contradictory; one section or part should not be allowed to defeat another if, by any reasonable construction, the two can be made to stand together. Courts will, as this opinion does, ultimately seek the most reasonable construction that avoids statutory conflict and provides for harmonious operation of the laws. *Frazier v. E. Tenn. Baptist Hosp., Inc*., 55 S.W.3d 925, 928, (Tenn. 2001); accord, *In re Akins*, 87 S.W.3d 488, 493 (Tenn. 2002).

In sum, since TDEC is the contracting through TDGS with regard to the RFP and the Concession Agreement, Tenn. Code Ann. § 12-2-116, not Tenn. Code Ann. § 11-3-112, is the applicable and controlling statute. And under the applicable statute, TDGS has statutory authority to enter into the RFP and Concession Contract.

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