

Fw: SD Attorney Generals Office Letter of Response

From: Brad K <bradsgateway@yahoo.com>

Sent: Tue, Mar 14, 2023 at 1:16 pm

To: Director

Ruth

I talked with Brian Walsh about the proper way to share this letter with the board.

He said the best procedure is for the Executive Director to send it out to all the board members.

And also he said we should include a copy of the letter state website

Feel free to give me a call

Brad,

This is in response to the questions in your email below regarding grant proposals of the American Pulse Association and the USA Dry Pea and Lentil Council.

1. Do the powers granted to the SD Council give us the right to enter into and conduct the practices outlined in these Grant proposals?

The main powers of the SD Pulse Crops Council are set forth in SDCL 38-34-37, which states as follows:

“Powers and duties of council.

The council shall promote the development, marketing, processing, and production of pulse crops in South Dakota. In the administration of this chapter, the council may:

- (1) Contract and cooperate with any person or with any governmental department or agency for research, education, promotion, and transportation;
- (2) Expend the funds collected pursuant to this chapter and appropriated for its administration;
- (3) Appoint, discharge, fix compensation for, and prescribe the duties of personnel as necessary, subject to approval of the secretary;
- (4) Accept donations of funds, property, services, or other assistance from public or private sources for the purpose of furthering the objectives of the council.”

The SD Council can contract and cooperate with the American Pulse Association (“APA”) and the USA Dry Pea and Lentil Council (“USADPLC”), as long as it concerns research, education, promotion or transportation. The SD Council’s purpose is to promote the development, marketing, processing and production of pulse crops in South Dakota. Although I don’t understand all the technical details in the grant proposals, it sounds like all of the activities that the SD Council would perform fall within the limits of these powers.

2. Would there be any concern that we could lose our nonprofit status?

I would think that, as a state entity, the SD Council does not file tax returns and does not have any official tax status. The tax status of APA and USADPLC could be affected if a large profit resulted from these grants without being spent for other pulse related activities, but I can’t imagine that happening.

3. The Grants refers to SD board members helping to educate SD farmers on how they can participate. Is it an allowable practice for the board members or its staff to do so?

Yes. Education is one of the enumerated powers in SDCL 38-34-37 mentioned above.

4. Would the States Errors and Omissions Insurance cover any possible liabilities arising from the Councils participation and implementing the Grants?

To my knowledge the State does not have Errors or Omissions Insurance. There is a Public Employee Pool for Liability Program ("PEPL") which is a form of State self-insurance. It is limited to the amount of funds appropriated by the State Legislature. As concerns torts (such as negligence) PEPL does not cover discretionary acts or tasks. That is because tort suits against the state for discretionary acts are barred by sovereign immunity.

PEPL does not cover breach of contract claims. There are several South Dakota Supreme Court cases that say the State, by entering into a contract, waives sovereign immunity to liability for breaching the contract. I don't see the SD Council entering into contracts with farmers, researchers, etc. I am concerned with contracts entered into by the SD Council with the APA or the USADPLC (referred to hereinafter interchangeably as the "National.") Under South Dakota law, a farmer or researcher cannot sue the SD Council on the basis of a contract between the SD Council and the National. Since the farmer or researcher is not a party to the contract he cannot sue for its breach unless he is a third-party beneficiary. To be a third-party beneficiary the contract must expressly state that he has the right to sue for its enforcement. The SD Council will not enter into any contract that expressly confers this right to sue, and so, it need not be concerned about third party beneficiary lawsuits.

The greater concern is for SD Council liability for the actions of the National. The grant proposals call for the calculation and certification of a net-zero carbon footprint for pulse crops. There have been lawsuits by consumer groups over the accuracy and methodology of carbon footprint calculations. The Federal Trade Commission Act prohibits "unfair or deceptive acts or practices" 15 U.S.C. § 45(a)(1). The FTC is empowered to enforce the Act. Some states have their own unfair trade practices acts which permit citizens to sue for damages. The National, which is not a state agency, does not have sovereign immunity to protect it from liability. The National could be subject to unfair trade practices lawsuits by the FTC, by citizens groups or by whomever is harmed by erroneous and misleading calculations and zero carbon footprint calculations. Much depends on the state law of the state where the lawsuit is filed. Also, potential liability of the SD Council for lawsuits against the National depends upon any contract between the SD Council and the National, the type of organization the National is (e.g., non-profit corporation), the National's governing documents (e.g. Articles of Incorporation and By-laws) and the laws of the National's home state. Without this information I would have to advise you to consider that there is a real risk of SD Council liability for the actions of the National. (Even if I had this information, I am only licensed to practice in South Dakota and cannot advise on the law of other states.)

Hopefully this addresses all of your questions.

Thanks!

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