THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
William C. McMaster, Circuit Court Judge

Trial Court Case No. 2025-CP-23-00389

Appellate Case No. 2025-001151

Southern Painting and Maintenance Specialists, LLC .....Appellant,

v.

Greenville County, ...Respondent.

FINAL BRIEF OF RESPONDENT

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3. Should this Court review the appeal of the Trial Court's denial of the Appellant's motion for declaratory judgment?

STATEMENT OF THE CASE AND FACTS

The Respondent Greenville County (the "County") issued Request for Proposals # 25029, "Animal Care Services – Shelter Flooring Installation" (the "RFP"). The RFP described the goal of the project as follows:

> The goal of this project is to enhance the shelter's functionality while improving the health and safety of both animals and personnel. This will involve replacing existing flooring – currently a mix of sealed concrete, VCT tile, ceramic tile, and epoxy-coated concrete – with a material that is moisture-resistant, scratch-resistant, and capable of withstanding frequent cleaning using accelerated hydrogen peroxide, stiff-bristle brushes, water hoses, and squeegees. The new flooring should also contribute to the facility's overall aesthetic.

(RFP, Section 1.1, included as Exhibit A to the Affidavit of Robert Brewer ("Brewer Affidavit", R. at 0227). The expected duration of the project was roughly two months. *See* October 21, 2024, 4:45 pm answer to vendor questions. (Exhibit B to Brewer Affidavit, R. at 0285). *See also id.* ("Ideally the project in its entirety will begin in January and will be completed by the end of February."). Three vendors submitted proposals: Tailor Made Services, Inc. ("TMS"), the Appellant Southern Painting and Maintenance Specialists, LLC ("Southern Painting"), and HRP Innovations ("HRP"). (Brewer affidavit at ¶ 3, R. at 0221-22).

Because TMS' proposal contained no indication that TMS held a South Carolina contractor's license, Robert Brewer, the County's Director of Procurement, contacted personnel from the South Carolina Contractor's Licensing Board to determine whether a contractor's license was needed. (Brewer affidavit at ¶ 5, R. at 0222). He asked on December 3, 2024:

> Good morning, I'm reaching out to obtain license requirement for a County project. Our Animal Care Services buildings are having a flooring system installed. The floor system is a 3/16''– x'' resin slurry that is installed over current concrete floor. Aggregate flakes are broadcast to provide texture and then seal-coated. Does this project require any sort of license for the vendor?

(Exhibit C to Brewer Affidavit, R. at 0296). On December 4, Rhonda C. Jackson, Program Coordinator with the Contractor's Licensing Board, responded:

> Please refer to our January 2017 Board Minutes wherein the board approved allowing contractors to perform non-concrete/non-asphalt fill-ins and coatings to concrete and/or asphalt surfaces without a license requirement…. However, if there is any concrete and/or asphalt in the product … a general contractor's license would be required for either the Concrete of the Asphalt classification….
>
> The decision also applies to sealants for roofs and flooring. No license would be required for projects considered "cosmetic work." A license would only be required for work involving installation, repair, or any other type of structural modification to the roof or floor….

(Exhibit C to Brewer Affidavit, R. at 0295). Based on this communication, Mr. Brewer understood that a South Carolina contractor's license was not required to perform the work, and therefore, he determined that TMS was a responsible vendor. (Brewer affidavit at ¶ 5, R. at 0222). Mr. Brewer also determined that Southern Painting and HRP were responsible vendors. *Id.*

The County's evaluation committee evaluated the vendors' proposals and deemed TMS' proposal to be the most advantageous to the County. Therefore, the County awarded the contract to TMS. (Brewer Affidavit at ¶ 6, R. at 0222). Southern Painting protested this award on the grounds that (i) TMS did not have a required South Carolina contractor's license, and (ii) Southern Painting could not confirm bid amounts. (Brewer Affidavit at ¶ 7, R. at 0223). *See also* Southern Painting's Protest (Exhibit B to Brewer Affidavit, R. at

0289-0290). Because he was the initial reviewer of the Protest, Mr. Brewer again contacted the Contractor's Licensing Board. He inquired on January 6, 2025:

> We need a little more clarification as we are handling a protest from a responder to our RFP. The protest is that the awarded vendor does not have the proper license for the work. The project is applying a sealant coating (specifications attached if you need them) to a concrete floor. There is no demolition needed to the current flooring or any concrete repair work. The protest states that a GC license with a classification of Nonstructural Renovation (NR) is needed.
>
> I am also attaching the following link to our project in case you need more information….
>
> ***Please clarify if a GC license with a NR classification is needed.***

(Exhibit C to Brewer affidavit, R. at 0294) (emphasis added). Ms. Jackson responded eight days later that "[s]ealants ***do not require a license*** from our board as stated in my 12/04/2024 e-mail below." (Exhibit C to Brewer affidavit, R. at 0293) (emphasis added). Based upon this latest communication with the Contractor's Licensing Board, the County concluded that TMS was not required to hold a South Carolina contractor's license. (Brewer Affidavit at ¶ 8, R. at 0223). Mr. Brewer denied Southern Painting's protest. (Brewer Protest Denial, R. at 0074-75). Southern Painting appealed, and the County Administrator denied this appeal. (Protest appeal denial, R. at 0076).

Southern Painting filed a lawsuit against the County on January 23, 2025, seeking declaratory and injunctive relief. (Complaint, R. at 0022). The next day, Southern Painting filed two motions, one seeking a preliminary injunction and the other a declaratory judgment against the County on the grounds that the County's award of the Project to TMS was improper because TMS did not have a South Carolina contractor's license and because TMS was not authorized to do business in South Carolina. (Motions for Declaratory

Judgment and Preliminary Injunction, R. at 0215, 0218). The County filed a timely answer, (Answer, R. at 0029), and later filed a memorandum in opposition to Southern Painting's motions. (Memorandum in Opposition, R. at 0322). The Trial Court heard arguments on these motions on April 14, 2025. (Transcript, R. at 0035). The Trial Court denied Southern Painting's motions. (Order dated May 8, 2025, R. at 0007). Southern Painting filed a Motion to Alter or Amend the Judgment on May 16, 2025. The Trial Court denied this motion, (Order dated June 3, 2025, R. at 0018), noting that "this order does not end the case." *Id.* This appeal followed.

As of April 9, 2025 -- five days before the April 14 hearing -- TMS had completed over half of the work described in the RFP, and the anticipated completion date for the project was on or before April 28, 2025. (Brewer Affidavit at ¶ 10, R. at 0223).

STANDARD OF REVIEW

"An order granting or denying an injunction is reviewed for [an] abuse of discretion. An abuse of discretion occurs when the trial court's decision is unsupported by the evidence or controlled by an error of law." *Hazel v. Blitz U.S.A., Inc.*, 425 S.C. 361, 367, 822 S.E.2d 338, 341 (2018) (*quoting Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006)).

ARGUMENT

I. The Trial Court Properly Denied Southern Painting's Motion for a Preliminary Injunction.

For a preliminary injunction to be granted, the plaintiff must establish that (1) it would suffer irreparable harm if the injunction is not granted; (2) the party seeking injunction will likely succeed in the litigation; and (3) there is an inadequate remedy at law." *Strategic Resources Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006); *Scratch Golf Co. v. Dunes West Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004). The party seeking a temporary injunction has the burden of demonstrating facts and circumstances satisfying each of these elements. *Strategic Res. Co.*, 367 S.C. at 544, 627 S.E.2d at 689. If there is a failure by the movant to establish even one of these three elements, a request for a temporary injunction must be denied. *Shapemasters Golf Course Bldrs., Inc. v. Shapemasters, Inc.*, 360 S.C. 473, 477-478, 602 S.E.2d 83, 85-86 (2004) (affirming trial court's denial of restraining order because moving party did not show irreparable harm). The granting of a temporary injunction is a drastic remedy and ought to be applied with caution. *Strategic Resources Co.*, 367 S.C. at 544, 627 S.E.2d at 689 (citing *Forest Land Co. v. Black*, 216 S.C. 255, 57 S.E.2d 420 (1950)). *See also Scratch*

Golf Co. v. Dunes W. Residential Golf Props., 361 S.C. at 121, 603 S.E.2d at 907 (2004). ("An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff.").

A. The Trial Court Properly Found that Southern Painting Failed to Demonstrate a Likelihood of Success on the Merits.

This case presents an appeal from the County's denial of Southern Painting's protest of the County's determination finding TMS to be a responsible vendor.[1] In reviewing procurement decisions of this nature, the standard for Southern Painting to meet is a high one, as it must show that the County's determination was "clearly erroneous, arbitrary, capricious, or contrary to law." *IN RE: Appeal by CBN Secure Technologies, Inc.*, Case No. 2024-4, 2024 WL 5325242 (S.C. Proc. Rev. Panel 2024); *In re: Protest of Brantley Construction Co., Inc.*, Case No. 1993-3, 1999 WL 33590765 (S.C. Proc. Rev. Panel 1999) ("[t]he protesting bidder must prove the determination of responsibility is clearly erroneous, arbitrary, capricious, or contrary to law."). *See also Sloan v. Greenville Cnty.*, 356 S.C. 531, 555-56, 590 S.E.2d 338, 351 (Ct. App. 2003) (the standard for judging the sufficiency of written determinations required by Greenville County's Design-Build Ordinance was whether such determinations were "arbitrary, unreasonable, in obvious abuse of discretion, or an excess of lawfully delegated power."). Southern Painting did not meet this high standard.

[1] Under the County's competitive sealed proposals procurement process, the County may only award a contract to a bidder that is responsive and responsible. *See* Greenville County Procurement Ordinance ("GCPO") § 7-307 (8) - (10). The GCPO defines a responsible bidder as a "person who has the capability in all respects to perform fully the contract requirements, and the tenacity, perseverance, experience, integrity, reliability, capacity, facilities, equipment, and credit which will assure good faith performance." GCPO § 7-198(46), and it defines a responsive bidder as a "person who has submitted a bid which conforms in all material respects to the requirements set forth" in the solicitation documents. GCPO § 7-198(47).

1. Southern Painting Failed to Demonstrate that the County Abused its Discretion in Determining that TMS Was a Responsible Vendor.

As the affidavit of Robert Brewer, the County's Director of Procurement, demonstrates, the County's determination concerning the responsibility of TMS was the opposite of "clearly erroneous, arbitrary, capricious, or contrary to law." To the contrary, Mr. Brewer investigated on two separate occasions the issue of whether TMS was required to hold a South Carolina contractor's license. Mr. Brewer carried out the first investigation upon receipt of TMS's proposal. TMS did not submit a license with its proposal, and so as a part of determining whether TMS was responsible, Mr. Brewer's office contacted the South Contractor's Licensing Board, a division of the South Carolina Department of Labor Licensing & Regulation and the authority having jurisdiction over the licensing of contractors. *See* Brewer Affidavit at ¶ 5 and Exhibit C to Brewer Affidavit (R. at 0222, 0292). Based on the response of the Contractor's Licensing Board, Mr. Brewer deemed TMS responsible. Brewer affidavit at ¶ 5 (R. at 0222).

After Southern Painting protested the award of the RFP project to TMS, Mr. Brewer made another inquiry concerning the need for a license to perform the work described in the RFP. Mr. Brewer again contacted the Contractor's Licensing Board, asking the Board to "clarify if a [contractor's] license … is needed." Brewer Affidavit at ¶ 8 and Exhibit C to Brewer Affidavit, (R. at 0223, 0294). The Program Coordinator of the South Carolina Contractor's Licensing Board, replied: "Sealants do not require a license from our board as stated in my 12/04/2024 email below." (R. at 0293).

In summary, on two separate occasions the County contacted the authority having jurisdiction about the need for a contractor's license for this project. Both times that agency informed the County that a license was not required. Case law makes clear that Mr. Brewer

acted reasonably in following the conclusions and reasoning of the SCLLR, as the "construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." *Ruocco v. South Carolina State Bd. of Registration for Professional Engineers and Land Surveyors*, 314 S.C. 111, 115, 441 S.E.2d 829, 831 (Ct. App. 1994) (citing *Dunton v. South Carolina Bd. of Examiners in Optometry*, 291 S.C. 221, 353 S.E.2d 132 (1987)). [2]

In the case of In *re: Protest of Monroe Construction Co., LLC*, Case No. 2011-3, 2011 WL 7068068 (S.C. Proc. Rev. Panel 2011), the protesting contractor argued that the winning contractor had improperly listed an unlicensed subcontractor in its bid. The representative of the state agency (the University of South Carolina) who had prepared the bid documents testified "that she checked the licenses of [the plumber] prior to award and determined that [the plumber] possessed a valid plumbing license, which is all that was required by the bid form." The Procurement Review Panel held that "this inquiry satisfied the requirements of the Procurement Code with regard to responsibility"' and therefore, the protesting contractor "failed to show that USC's determination of responsibility … 'clearly erroneous, arbitrary, capricious, or contrary to law.'" *Id.* In the present case, Mr.

[2] Southern Painting cites *Colonial Pipeline Company v. South Carolina Department of Revenue*, 443 S.C. 448, 905 S.E.2d 129 (Ct. App. 2024) and notes that the court of appeals stated in that case stated that it was "cognizant" of *Loper Bright Enters. V. Raimondo*, 603 U.S. 369 (2024). Nowhere does the court in the *Colonial Pipeline Company* opinion, however, overrule or even question *Ruocco v. South Carolina State Bd. of Registration for Professional Engineers and Land Surveyors*, 314 S.C. 111, 115, 441 S.E.2d 829, 831 (Ct. App. 1994) or *Dunton v. South Carolina Bd. of Examiners in Optometry*, 291 S.C. 221, 353 S.E.2d 132 (1987), both cited in the Court's May 8 Order (Order at 8, R. at 0014). Moreover, as the United States Supreme Court noted in *Loper*, the *Chevron* standard "demand[ed] that courts mechanically afford **binding deference** to agency interpretations, including those that have been inconsistent over time … [and] even when a pre-existing judicial precedent holds that an ambiguous statute means something else," 603 U.S. at 398 (emphasis added). This former federal standard is a far cry from the "the most respectful consideration" standard described in *Ruocco.* 314 S.C. at 115, 441 S.E.2d at 831. The *Colonial Pipeline Company* opinion, therefore, does nothing for Southern Painting's case.

Brewer did much more than the University of South Carolina representative in *In re: Protest of Monroe*. Mr. Brewer made inquiries – not once but twice – with the Contractor's Licensing Board – the authority having jurisdiction over contractor licensing in South Carolina -- concerning the licensing issue. Both times SCLLR gave the same answer: a license was not required.

Based on this record, it is clear that the County acted reasonably. But this is not the standard. Instead, Southern Painting must show that the County's award to TMS and the County's denial of Southern Painting's protest was clearly erroneous, arbitrary, capricious, or contrary to law. Southern Painting comes nowhere close to meeting this high standard, and an opinion that Southern Painting tried to elicit from a lawyer with the South Carolina Labor, Licensing and Regulation illustrates this point. Southern Painting presented to the Court an e-mail from Carolyn Sutherland, Advice Counsel for the South Carolina Labor, Licensing and Regulation, and in its papers quoted Ms. Sutherland as stating:

> The project in question appears to refer to the installation of a flooring system that utilizes a "slurry" with a waterproofing technology rather than a typical "seal coating". As pointed out in the email, the license would be required for installation of or flooring if the work is over $10,000.

(Exhibit C to Southern Painting's Memorandum in Support of Motion for Declaratory Judgment, R. at 0477 – 0478). Unlike the County's e-mail to Ms. Jackson of the Contractor's Licensing Board, where the County provided the specifications provided by TMS for the Project and also a link to a Project description, the record does not show what Southern Painting provided to Ms. Sutherland by way of a description of the Project. More telling, however, is the part of Ms. Sutherland's e-mail that Southern Painting did not

quote: “That said, waterproofing and sealcoating are pretty similar in nature and I am not qualified to interpret the distinction here.” *Id.*

In summary, on two separate occasions the County contacted the Contractor’s Licensing Board about the need for a contractor’s license for this Project. Both times, the Licensing Board, the authority having jurisdiction over contracting licensing matters in this state, informed the County that a license was not required. The evidence that Southern Painting offered to rebut these two communications was a communication from Advice Counsel of South Carolina Labor, Licensing and Regulation who stated that she was not qualified to opine on the issue. The granting of a temporary injunction is a drastic remedy and ought to be applied with caution. *Strategic Resources Co.*, 367 S.C. at 544, 627 S.E.2d at 689. Based on this record, the Trial Court did not err in denying Southern Painting’s motion for a preliminary injunction.

2. Southern Painting Waived Any Right to Protest Based upon TMS’ Certification to Perform Business in Southern Carolina, but in any event TMS was Properly Registered to Perform Business in Southern Carolina.

Although it did not protest this issue, *see* Southern Painting’s Protest (Exhibit B to Brewer Affidavit, R. at 0289-0290), Southern Painting nevertheless alleged in its complaint that it was entitled to relief because TMS was not certified to do business in South Carolina. (Complaint at ¶¶ 21 and 27, R. at 0024-0025). The Trial Court found Southern Painting waived this argument: “As an initial matter, Southern Painting did not raise this issue in its protest, … and therefore, this issue is waived.” (May 8 Order at 9, R. at 0015). First, Southern Painting has not appealed or taken any exception to the Trial Court’s ruling on waiver in its brief, and therefore, this issue is waived. *Carolina Attractions, Inc. v. Courtney*, 287 S.C. 140, 143, 337 S.E.2d 244, 246 (Ct. App. 1985) (“Failure to raise an

issue by exception constitutes a waiver and a provision in an order neither excepted to nor briefed is not properly before the Court on appeal.") (citing *Amick v. Hagler*, 286 S.C. 481, 334 S.E.2d 525 (Ct.App.1985)).

Second, the Trial Court's finding of a waiver was appropriate. It is axiomatic that the failure to raise an issue initially in a protest acts as a waiver. *See Hitachi Data Systems Corp. v. Leatherman,* 309 S.C. 174, 179, 420 S.E.2d 843, 846 (1992) (stating that in appeals to the South Carolina Procurement Review Panel, "the avenue of written protest remains the sole procedure by which a matter is brought before the Panel for consideration.").

Third, the Trial Court properly ruled that nothing in S.C. Code Ann. § 33-15-101, *et. seq.* (the "Certification Statute") prevented TMS from carrying out its work on the project. Mr. Brewer established in his affidavit that TMS was registered to do business in South Carolina before it signed its contract with the County and before it began work on the Project. (Brewer Affidavit at ¶ 9 and Exhibit D to Brewer Affidavit, R. at 0223, 0321). Unlike the South Carolina Contractor's Licensing Statute, which provides that general contractors must be licensed before even submitting a bid, *see* S.C. Code Ann. § 40-11-200(B), nothing in the Certification Statute contains this sort of prohibition. S.C. Code Ann. § 33-15-101(a) states only that foreign corporations must be registered before it "transact[s] business." Mr. Brewer's affidavit plainly shows that TMS was registered before it signed a contract with the County. Moreover, the Certification Statute provides that "soliciting or obtaining orders" does not constitute the transacting of business. S.C. Code Ann. § 33-15-101(b)(6). Even if a foreign corporation does not become registered, which was not the case with TMS, the recourse against that corporation is a "civil penalty of ten dollars for each day but not to exceed a total of one thousand dollars for each year it

transacts business in this State without a certificate", the inability to bring a lawsuit in this state "until it obtains a certificate of authority," and other minor inconveniences. *See* S.C. Code Ann. § 33-15-102.

B. The Trial Court's Order Denying Southern Painting's Motion for Preliminary Injunction Should Be Affirmed Because The Project Is Complete.

The project at issue in this case is over. Its expected duration was roughly two months, (Exhibit A to Brewer Affidavit, R. at 0287), and on April 9, 2025 (over five months ago), the project was over half-way complete. (Brewer Affidavit at ¶ 10, R. at 0223). Moreover, the anticipated completion date for the project was on or before April 28, 2025. *Id.* As such, the request for injunctive relief is moot and should be denied. *See Shah v. Richland Memorial Hosp.*, 350 S.C. 139, 564 S.E.2d 681 (2002).

Our appellate courts "will not pass on moot and academic questions or make an adjudication where there remains no actual controversy." *Shah*, 350 S.C. at 150, 564 S.E.2d at 687 (*quoting Mathis v. South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713, 714 (1973)). "A case becomes moot when judgment, if rendered, will have no practical legal effect upon [an] existing controversy. This is true when some event occurs making it impossible for [a] reviewing [c]ourt to grant effectual relief." *Shah*, 350 S.C. at 150, 564 S.E.2d at 687 (quoting *Mathis* at 346, 195 S.E.2d at 715). In *Shah*, the circuit court refused to consider a request to permanently enjoin a contract because the contract had expired. *Shah*, 350 S.C. at 150, 564 S.E.2d at 687 ("[n]othing remains to be enjoined. No contract remains to be construed. The disputed Radiology Contract has expired."). The Court of Appeals agreed. *Id.* at 152, 564 S.E.2d at 688 ("we find that the request for a permanent injunction is no longer viable as the disputed contract has now expired, and thus

there is nothing for the court to enjoin."). Similarly, in this case there is nothing left to enjoin.

II. The Trial Court Properly Denied Southern Painting's Motion for Declaratory Judgment, But this Ruling is Not Appealable.

For the same reasons discussed above that support the Trial Court's decision to deny Southern Painting's Motion for Preliminary Injunction, the Trial Court's denial of Southern Painting's Motion for Declaratory Judgment was proper. This motion, however, was heard at the pleadings stage, without an evidentiary hearing, and thus was procedurally in the same posture as a motion for summary judgment. As the Trial Court's June 3 Order noted, this order did not end the case. (June 3 Order, R. at 0018). "A denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial." *Skywaves I Corporation v. Branch Banking and Trust Company*, 423 S.C. 432, 459, 814 S.E.2d 643, 658 (2018) (quoting *Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994). The order denying Southern Painting's Motion for Declaratory Judgment, therefore, is not appealable. *Skywaves I Corporation*, 423 S.C. at 460-61, 814 S.E.2d at 658-59.

CONCLUSION

For the forgoing reasons, the County respectfully requests that the Court affirm the Trial Court's Orders.

Respectfully submitted,

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