

Thirty Six Million, Three Hundred Twenty Five Dollars and No Cents (\$36,325,000). A binding Performance Agreement was executed by the County, Giti and the Council on September 4, 2014, in which Giti agreed to build manufacturing facilities and create a specified number of jobs in exchange for the use of the grant funds to assist in the acquisition and improvement of real property where Giti would locate its manufacturing facilities. This Performance Agreement required Giti to utilize the Chester County Procurement Code in its selection of contractors for “all or any part of the scope of work of any portion of the Grant Project...” It is typical and common practice, for such grants from the Council to allow the incoming industry to select the procurement code they wish to apply.

On July 2, 2014, Alliance Consulting Engineers, Inc. (“Alliance”) acting on behalf of Giti published an advertisement in the newsletter of the South Carolina Business One Stop (“SCBO”), seeking Contractor’s Prequalification Statements for the Project. SCBO is a standard venue used by the County to advertise these offerings. The advertisement was very clear that a ‘short list’ of bidders would be selected and that Giti would “select *up to five (5) Contractors for the invitation to bid...*”. (Emphasis added.) The solicitation provided for the prequalification of bidders through the Prequalification Statements² requested. Between the time of the advertisement for Statements of Qualifications and the receipt of the Statements, Alliance was replaced by Gresham Smith as the Project Engineer (“Engineer”) for reasons irrelevant to this matter. Gresham Smith continues on at this time as the Project Engineer. Mr. Clyde Fish, Giti’s Director of Projects and Manufacturing (“Mr. Fish”), along with three (3) other Engineers, evaluated the Statements of Qualifications and ranked the applicants to determine who

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would receive an invitation to bid. To give preference to local businesses, all applicants who were based in South Carolina were automatically awarded ten (10) points, including Richardson. The overall scoring was predicated upon the Statements of Qualifications information regarding previous work strength, safety records, number of employees, etc. All applicants completed the same questionnaire. At the review, Mr. Fish actually ranked Richardson higher than all but two of the other applicants, but the other three reviewers did not rank Richardson with enough points for the company to be included in the top five selected to bid.

Notice of the decision to not invite Richardson to bid was received by Richardson on October 30, 2014, and a timely protest was filed by Richardson with a supplemental protest filed on November 20, 2014.

The County's Procurement Code (Exhibit D) states that a protest, "...shall set forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided (§11-35-4210)." Under §11-35-4210(4), the County did conduct an administrative review of the protest on November 21, 2014, after making an attempt to settle the matter by mutual agreement. The County sent notice of its Response and Findings of the review to Richardson on November 24, 2014, and posted this Response and Findings document at the R. Carlisle Roddey Government Center, 1476 J.A. Cochran Bypass, Chester, South Carolina, in a prominent location for the general public to review. The County voluntarily included in its findings a ten-day stay on the bidding process, in a good-faith interest in attempting to settle this matter. On December 1, 2014, the County was served with a Temporary Restraining Order, signed by the Honorable Brian M. Gibbons, Chief Administrative Judge for the Sixth Judicial Circuit.

² These are also referred to as Statements of Qualifications herein.

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The protest was concurrently filed by Richardson with the State of South Carolina Department of Commerce, and following a review by the South Carolina Chief Procurement Officer for Construction, the State issued a Dismissal to Richardson's protest, based on the fact that the South Carolina Consolidated Procurement Code (the "Code") does not apply to the issuance of grants, as provided under §11-35-40(2). The Chief Procurement Officer further held that "procurement" is the acquisition of supplies, services, information technology, or construction. §11-35-310(24). Therefore, without an acquisition of construction by the State under a contract acting through a governmental body, the State held that the South Carolina Procurement Code is not applicable to this solicitation for site preparation work.

A hearing was held on December 12, 2014, during which oral arguments were heard by this Court.

The purpose of the Chester County Procurement Code is to insure that there is no self-dealing, fraud or favoritism in the procurement of goods and services. And, that there is accountability, including paperwork, evidencing the process. There is no allegation of self-dealing, favoritism or fraud in this case. There is accountability for these funds. Chester County Council has to approve expenditures. A written accounting has to be provided to the South Carolina Coordinating Council for Economic Development, which in turn, reports to the South Carolina General Assembly.

ANALYSIS

The cornerstone to the analysis of whether the State Procurement Code applies is §11-35-40, wherein the application of the Code is defined. The Code in this section states that it applies to, "...every procurement or expenditure of funds by this State under

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contract acting through a governmental body...except that this code does not apply...to the issuance of grants..." §11-35-40(2). This money was awarded to Chester County. Chester County is not a governmental body by clear definition of the law. We see this to be true under §11-35-310(18), which states, "Governmental body excludes the General Assembly or its respective branches or its committees, Legislative Council...and all local political subdivisions such as counties...". Thus, the County is excluded from the definition of governmental body and is not subject to the Code.

Plaintiff argued that the issuance of these funds is an 'award' and not a grant. The argument offered is that a grant is "the furnishing by the State or the United States government of assistance, whether financial or otherwise, to a person to support a program authorized by law." §11-35-310(19). Plaintiff further contends that a grant does not include an award that requires specific procurement of supplies, services, information technology or construction. Relying on the definition of a grant within the statute, the County was given the grant money under a program that is authorized by law. The Court looks to §12-28-2910 to analyze this grant award. Section 12-28-2910(A) established the South Carolina Coordinating Council for Economic Development whose primary responsibility is to expend monies that are set aside specifically for economic development projects and to, "...establish project priorities." The Council was formed in response to a general need for improved coordination of efforts in the area of economic development, and designed to strategically coordinate economic development efforts for the State. It is this Council that awarded the grant dollars to the County for the Giti project. Further, the Council is expected to utilize the set-aside funds for the purpose of "...location or expansion of an industry or business facility in South Carolina." §12-28-

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2910(E). The statute provides us with guidance as to what expenditures may be authorized under the grant money and includes, "...water and sewer projects, road or rail construction and improvement projects, land acquisition, fiber-optic cable, relocation of new employees, pollution-control equipment, environmental testing and related due diligence reports, acquiring and improving real property and *site preparation*." *Id.* Site preparation is defined under this statute as, "...surveying, environmental and geotechnical study and mitigation, clearing, filling and grading. Clearly, this defines the Giti project, and is squarely in the wheelhouse of the Council's authority to award grant money for such projects. The statute clearly refers to the money as "grant" awards. Thus, while §11-35-310(19) may define "grant" as something that does not include money that has a specified purpose, §12-28-2910 governs this situation since the grant award is from the Council under that statute. Either way one considers this, the money was given under a program authorized by law, and the Council has the authority to provide grant money for specific projects and to establish the priorities of the projects. As grants are exempted from the Code, it is further defined that the Code does not apply here.

The State's position in its dismissal of this protest supports this analysis by holding that without an acquisition of construction by the State under contract acting through a governmental body, the State Code does not apply. Their defining statement from the Chief Procurement Officer is, "The State is acquiring nothing, and no governmental body is paying a contractor for construction work." The Plaintiff acknowledges this in the protest, recognizing the fact that "Giti is a private company utilizing a private engineering firm...and one of Giti's own employees...to run the

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procurement for the mass site work for the Project. This does not involve the State nor does it involve the County. The County is merely the gatekeeper of the grant money and is assisting in the procurement process. Nothing more.

The Court has determined that this project is not a Design-Bid-Build project. The engineers for Giti are responsible for the design of the project, creating a single entity control for the project, and not multiple as we would typically see with the Design-Bid-Build concept. Further, the grant is clear in that the money is to be used for site preparation and acquisition. There is nothing being built and nothing will be received by the State or Chester County at the conclusion of the project. This money provided by the State cannot be viewed as an award in light of this analysis and must be held as a grant.

The final argument for analysis is whether the County Procurement Code was followed during the process of identifying a contractor. The Courts looks to the Procurement Code for guidance, and in this case, Procedure #PP-040 which is Exhibit K of Plaintiff's argument, Bates #CCPP037-38. In there, the County Procurement Code states that the County may make an exception to competitive bidding under sealed bids where the purchase is through a state contract. This project is clearly under a State contract and thus this exception applies.

The Procurement Policy also states that the County reserves the right to determine if "offerors" have the minimum qualifications it seeks to perform the project. The definition of the word "offer" refers to "the bid or *proposal* submitted in response to this solicitation." (Emphasis added.) Plaintiff responded to a request for a prequalification statement. His submission to the County of a completed prequalification statement was a *proposal* submitted to the County in response to the advertisement. It is telling that the

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Policy uses both terms, instead of just “bid” indicating an intent to broaden the definition of this term. Further, Plaintiff argues that this should obligate the County to award a contract. Under its Procurement Policy, Section III (6.01), the County specifically states that receipt of any proposal does not obligate the County to award a contract.

Plaintiff contends that prequalification is prohibited under the County Policy. There is no prohibition to be found in the Chester County Procurement Policy that would preempt prequalification. In fact, the Chester County Solicitation Outline, §9.0 reserves the right for Chester County to determine minimum qualifications and thus limit the number of bidders. The statement of the desire to “foster competition among suppliers” does not indicate any requirement for the County to accept each and every vendor who wishes to bid on a project, and the County does have the right to determine the number of qualified bidders it wishes to invite to bid on a project. It would be unreasonable and is not required under its Procurement Policy to prohibit the County from prequalifying potential bidders and to create a short list for projects. The County anticipated receiving hundreds of proposals from companies requesting the opportunity to bid on this project. While only eighteen were received, they were all submitted with the understanding that a short list would be created. The prequalification process utilized by the County is not expressly prohibited by the Chester County Procurement Policy, the governing document for the Project. It has been argued in the courts that statutory silence may arise since the drafter of the legislation cannot be expected to anticipate and address all issues that may arise.³ Certainly, Chester County had not anticipated being the recipient of such a large project when it drafted the Procurement

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Policy. Further, it is important for this Court to consider the overriding objective of statutory construction is to effectuate statutory purpose. Justice Jackson stated that, “[h]owever well these rules may serve at times to decipher legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy.”⁴ The purpose for the County was to provide for an efficient and expeditious process for this project. By prequalifying candidates for bidding on the Project, the County utilized its Policy appropriately and correctly in trying to ensure this purpose.

The County’s advertisement was very clear in that there would be a short-list and that only up to five (5) entities would be invited to bid. Everyone who submitted a prequalification statement did so under the same terms and conditions as Richardson. All but five of them were not invited to bid. All knew that they were submitting a prequalification statement as a proposal and that they may not receive an invitation to bid. Plaintiff did not put forth any argument during the initial process. It was only when he was not selected to bid that he filed a protest. The County Procurement Policy provides a multitude of venues for questions, additional information and the like. None was utilized by Plaintiff until he was not selected to bid.

The evaluation process was comprised of four individuals who reviewed the capacities of the potential bidders. This ‘capacity’ review was not limited to bonding capacity, which is one of Richardson’s arguments. The invited bidder must be able to

³ *Elkins v Moreno*, 435 U.S. 647, 666 (1978).

⁴ *SEC v. Joiner*, 320 U.S. 344, 350-51 (1943).

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have the capacity to staff the project successfully. There were several concerns, without limitation to this one in particular, that due to Richardson's staffing levels, he would not be able to sufficiently staff the work and thus would fall behind on schedules. While this was not the only concern of the evaluators, it was one of them. This is a large project and it is critical to have more than just sufficient bonding capacity in order to perform the work.

Richardson's argument for the temporary and permanent relief is that there will be no significant delay, harm or risk to the Project is without merit.

The Council has very significant time constraints and deadlines, including without limitation a deadline for the beginning of the Project (six months) and completion of the Project (twenty-four months). Missed deadlines will put the grant award in peril and the monies could be called back by the Council if certain deadlines are missed. The best interest of the County and the State are better served by moving forward with a release of the Temporary Restraining Order and allowing the County to move forward with the bid openings.

SUMMARY

The Court by its analysis does hereby find that the funds utilized in the Project were not governed by the South Carolina Procurement Code as supported by the South Carolina Chief Procurement Officer for Construction. Further, this Court holds that under South Carolina law, a county entity is exempt from the South Carolina Procurement Code.

The funds given by the South Carolina Coordinating Council for Economic Development are held to constitute a grant and not an award, and therefore are not subject

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to the South Carolina Procurement Code. The funds are being appropriated for a specific purpose which is in keeping with the requirements of the grant, and the Project does not include something that will constitute a Design-Bid-Build project.

Chester County will not receive or own any property nor receive any services as a result of this grant. More than half of the grant was used to purchase the land for Giti. The remaining part of the funds will be used for site preparation.

The Court does hereby find that Chester County did follow its Procurement Policy in the selection of a contractor for the Project when it advertised for a statement of qualifications with the explanation that the applicants would be short-listed of up to five potential candidates. The County reserves the right in its Policy to review minimum qualifications which is exactly what it did by the review of the statement of qualifications submitted by the respondents. The County also has the ability, under its Procurement Policy, to make exceptions to the Policy when operating under a state contract. It is very clear that this Project is under a state contract and thus the County did have the ability to make exceptions.

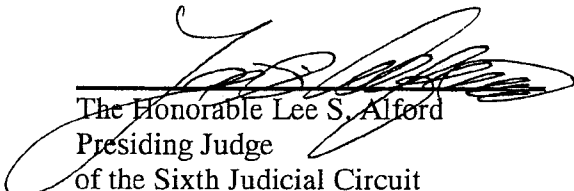
The Chester County Procurement Code provides that the County preserves the right to make decisions with regards to minimum qualifications for bidders. The Plaintiff is asking the Court to determine minimum qualifications for contractors on this project, which is extensive. The Court declines to review qualifications and make the determination which company has the minimum qualifications. This is a matter for Chester County in conjunction with the company receiving the grant in this case.

Concluding the analysis, it is determined that any further delay in this Project would be detrimental to both the State of South Carolina and Chester County. The

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County has definitive deadlines that are already in jeopardy as a result of this protest and the Court has determined that the immediate removal of the temporary restraining order previously issued from the County, thus allowing the County to continue to process of bid submission, is in the best interest of both the State and the County.

IT IS SO ORDERED.


The Honorable Lee S. Alford
Presiding Judge
of the Sixth Judicial Circuit

This the 17th day of December, 2014.

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CERTIFICATE OF SERVICE BY MAIL
Case No. 14-CP-12-565

I, the undersigned employee with the law firm of Rogers Townsend & Thomas, PC, do hereby certify that I have served a copy of the foregoing document upon counsel of record by U.S.

Mail, postage prepaid, on December 19, 2014, at the following address:

RECEIVED

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Document:

NOTICE OF APPEAL

SC Court of Appeals

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