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RECEIVED

DEC 23 2014

SC Court of Appeals
Emergency Consideration Requested

December 23, 2014

VIA HAND DELIVERY

The Honorable Jeanette F. Barber
Clerk of Court
The South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: Richardson Construction Company v. Chester County
Appeal No. 2014-002687
Civil Action No. 14-CP-12-565
RTT File No. 14473.3

Dear Ms. Barber:

Enclosed are an original and eight copies of our Petition for Rehearing in this matter. Please file the original Petition and return two clocked copies to my courier.

Also enclosed is our check for \$25 for the filing fee.

Our petition asks Judge Konduros to reconsider her decision denying our motion for a temporary injunction enjoining Chester County from opening bids for site work on the Giti plant in Chester County. We have been informed that the bids will be opened on Monday, December 29. **If Judge Konduros is not willing to grant an injunction, we humbly ask for an order to that effect so that we may seek relief in the Supreme Court.**

With kind personal regards, I am,

Sincerely,

A handwritten signature in black ink, appearing to read "R. P. Wood".

Robert P. Wood

Enclosures

cc:

Via regular mail and email LAlfordlc@sccourts.org

The Honorable Lee S. Alford
Moss Justice Center
1675-1J York Highway
York, SC 29745-7434

Via regular mail and email joanie@winterslawsc.com

Joanie Winters, Esquire

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appellate Case No. 2014-002687

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

RECEIVED
DEC 23 2014
SC Court of Appeals

The Honorable Lee S. Alford, Circuit Court Judge
Case No. 14-CP-12-565

Richardson Construction Company.....Appellant

vs.

Chester CountyRespondent

Appellant's Petition For Rehearing

--EMERGENCY CONSIDERATION REQUESTED--

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ATTORNEYS FOR APPELLANT,
RICHARDSON CONSTRUCTION COMPANY

00001

INTRODUCTION

A grave injustice is about to happen if this court does not stop the bid process Chester County is following. Over \$36,000,000 in state money is being used to procure site work in a way that is expressly disallowed by the South Carolina Consolidated Procurement Code ("State Code") and a Regulation. The State Code says all qualified bidders must be allowed to bid. The Regulation says the same thing. However, Chester County decided it only wanted five bidders and prevented all others, including Appellant, from bidding. Chester's action is contrary to the State Code and the County's own procurement policy ("County Policy").

Appellant, Richardson Construction Company ("Richardson"), petitions this court to rehear and reconsider its two orders of December 22, 2014 (attached), denying Appellant's petition for a stay or temporary injunction. The reason a rehearing is necessary is that Appellant did not because it could not provide the Court of Appeals with specific errors made by the Trial Court in Appellant's initial petition. Appellant recognized the possibility that the Trial Court would rule against it and that bids could be opened within hours, if not minutes, of the Trial Court's ruling. Therefore, Appellant prepared a petition to this court asking this court to stay the opening of bids long enough for the order to be analyzed and a more targeted brief filed with this court.

Appellant now seeks a stay or temporary injunction prohibiting Respondent, Chester County, from opening bids, identifying an apparent low bidder, awarding a contract, or issuing a notice to proceed with respect to the site work for the construction of a multi-million dollar tire manufacturing plant in Chester County.

Ultimately the issue in this appeal is whether governmental procurement rules can be ignored when a state agency provides millions of taxpayer dollars to attract an industry to the

State. The issue raised by this motion in particular is whether the bidding process should be stayed just long enough for the legitimacy of the bidding process to be determined and for the aggrieved bidder (Appellant) to be allowed to bid the project. Appellant can submit a bid within 5 days of receiving a bid package. *See* Ex. 4E (Bates No. 000080).

Because these are issues of such great public importance, and because if the bidding process is not stayed the protections of the Procurement Code for the public and for Appellant will be rendered moot, the requested stay should be entered.

FACTS

Appellant, Richardson Construction Company (“Richardson”), appealed the order of the Honorable Lee S. Alford entered December 19, 2014, denying Plaintiff’s Motion for Temporary Injunction. A copy of Judge Alford’s Order is attached. Both the order and our notice of appeal were executed within about an hour of each other. Richardson sought a stay or temporary injunction prohibiting Respondent, Chester County, from opening bids, identifying an apparent low bidder, awarding a contract, or issuing a notice to proceed with respect to the site work of a project in Chester County for the construction of a multi-million dollar tire manufacturing plant in Chester County.

In an agreement between the South Carolina Coordinating Council for Economic Development (“Council”) and Chester County, the Council awarded Chester County \$35,775,000 in public funds to be used for land acquisition and real property improvements for the construction of the Giti tire plant in Chester County (“Grant Award Agreement”). *See* Grant Award Agreement attached to our petition for stay or temporary injunction as Ex.4A, Bates No.

000040.¹ On June 5, 2014, the Council, Chester County, and Giti Tire Holdings (USA) Ltd. (“Giti”) entered into a contract governing the use of public funds awarded by the Council for the Project (“Performance Agreement”). *See* Performance Agreement, Ex. 4B, Bates No. 000049. Thus, the use of public funds provided for the Project by the Council is governed by the Grant Award Agreement and the Performance Agreement.

The Grant Award Agreement and the Performance Agreement provide that the subject public funds are awarded only for the specific purpose of assisting with the cost of land acquisition, site preparation, and site infrastructure improvements for the Project. *See* Ex. 4A, at §2 (Bates No. 000041); and Ex. 4B, at ¶¶1.0, 3.0 (Bates No. 51). The funds were not a gift to Chester County. **Any surplus funds must be returned to the Council.** *See* Ex. 4A, at §6 (Bates No. 000042). The Grant Award Agreement provides that the selection of contractors for the Project “must follow applicable procurement laws, regulations and guidelines.” Ex. 4A, at §8 (Bates No. 000043). The Performance Agreement provides that the selection of contractors must take place in accordance with the Chester County Policy. Ex. 4B, at ¶5.0 (Bates No. 000052).

On July 2, 2014, the Columbia, South Carolina, firm Alliance Consulting Engineers, Inc. (“Alliance”), acting on behalf of Giti, published an advertisement in South Carolina Business Opportunities (“SCBO”) seeking Contractor’s Prequalification Statements for the Project. *See* SCBO advertisement, attached hereto as Exhibit 4C (Bates No. 000069); *see also* Verified Compl., ¶12, Ex. 2 (Bates No. 000011). The SCBO advertisement stated that interested contractors must have completed five projects within the past five years, with at least one having an Earthwork value of \$2,500,000 or more. *See* Ex. 4C (Bates No. 000070). Appellant timely

¹ The Grant Award Agreement was subsequently amended to provide for the award of an additional \$550,000 for the Project, bringing the total amount of public funds awarded for the Project to \$36,325,000. *See* Ex. 4A, Addendum to Original Contract, Bates No. 000048.

submitted a completed Prequalification Statement. *See* Richardson's Contractor Prequalification Statement, Ex. 4D (Bates No. 000072); *see also* Verified Compl., ¶13 (Bates No. 000012). Appellant has completed forty projects within the past five years, including four having an Earthwork value of at least \$2,500,000. *See* Affidavit of Robert M. Richardson, Ex. 4E (Bates No. 000080) at ¶¶15, 16; *see also* Ex. 4D (Richardson's Prequalification Statement, Bates No. 000072). Therefore, Appellant greatly exceeds the minimum qualifications for the Project listed in the SCBO advertisement. There has never been a finding that Richardson is not qualified to perform the work which is the subject of this action.

Subsequent to the publication of the SCBO advertisement, Alliance was replaced by Gresham, Smith and Partners ("Gresham Smith") as the Project Engineer. *See* Response of Chester County Chief Procurement Officer, Ex. 4F (Bates No. 000087). Mr. Clyde Fish (Giti's Director of Projects and Manufacturing) and three individuals from Gresham Smith reviewed the Prequalification Statements submitted and ranked them using a point system. *See* October 29, 2014, email from Stephen Brown, PE, and Prequalification Scoring Sheet, Ex. 4G (Bates No. 000125); *see also* Ex. 4F (Bates No. 000087). Only the top five ranked firms were permitted to submit a bid for the Project. *See* Exs. 4G and 4F. Because Appellant was ranked seventh, it was not allowed to bid. *See* Exs. 4F and 4G. In other words, a well-qualified contractor was denied an opportunity to bid on a multi-million-dollar project funded with state money.

On October 30, 2014, Appellant received notice from Mr. Fish at Giti that it would not be allowed to submit a bid for the Project. *See* October 29, 2014, letter from Clyde Fish to Appellant, Ex. 4H (Bates No. 000128). Notably, the letter from Mr. Fish contained no determination that Appellant was not minimally qualified to perform the work for the Project. *See id.*; *see also* Ex. G.

On November 12, 2014, Appellant timely submitted a bid protest to Ms. Susan Cok, the Chester County Chief Procurement Officer (“Chester County CPO”), objecting to the decision not to allow Richardson to submit a bid for the Project. *See* Protest to the Chester County CPO, Ex. 4I (Bates No. 000130).²

The Chester County CPO conducted an administrative review of Appellant’s protest on November 21, 2014. *See* Ex.4F (Bates No. 000087); *see also* Verified Compl., ¶18 (Bates No. 00013). On November 24, 2014, Appellant received notice of the Chester County CPO’s decision on its protest. *See* Verified Compl., ¶19 (Bates No. 000013). In its response to the protest, the Chester County CPO concluded that the Chester County Policy, not the South Carolina Consolidated Procurement Code, governs the Project and that all procedures followed in the procurement of mass site work services for the Project were proper under the provisions of the Chester County Policy. *See* Ex. 4F (Bates No. 000094 and 95).

Procedure in the Circuit Court

Having exhausted its administrative remedies under the Chester County Policy, Appellant filed a verified complaint in Circuit Court on December 1, 2014, requesting a temporary restraining order. *See* Verified Compl. (Bates No. 000011). Appellant also filed an Application and Motion for Temporary Restraining Order and Temporary Injunction the same day. *See* Application and Mot. for TRO and Temporary Inj. (Bates No. 000346). After a hearing, the Court of Common Pleas for the Sixth Judicial Circuit, the Hon. Brian M. Gibbons presiding, entered an order temporarily granting the very relief requested here: An order restraining Chester County from opening bids, identifying an apparent low bidder, awarding a contract, or issuing a

² As a result of new information learned from documents received in response to a Freedom of Information Act (“FOIA”) request submitted to the South Carolina Department of Commerce, Appellant filed a supplement to its protest with the Chester County CPO on November 20, 2014. *See* Supplement to Protest, Ex. 4J (Bates No. 000146).

notice to proceed with respect to the site work of the Project. Gibbons TRO, App. Pet. Ex. 1, Bates No. 00009. In issuing his temporary restraining order Judge Gibbons found “sufficient evidence of the risk of immediate and irreparable injury to [Appellant]” if Chester County were allowed to deny Appellant the right to bid on the site preparation work. *Id.* Judge Gibbons also found that Appellant had met the requirements of Rule 65 for the issuance of a temporary restraining order. *Id.*

On December 12, 2014, the Hon. Lee S. Alford held a hearing on the motion for temporary injunction. While he had the matter under advisement, he issued his own temporary restraining order continuing Judge Gibbons’ TRO in place until he (Judge Alford) ruled on the Motion for Temporary Injunction. Alford TRO, App. Pet. Ex. 1A, Bates No. 00010A. In addition, he found, “because these issues are of great public important and to prevent these issues from becoming moot, if the court’s order serves to deny Plaintiff a temporary in junction, the temporary restraining order will remain in place for forty-eight (48) hours after its entry to give Plaintiff an opportunity to present the issues to the South Carolina Court of Appeals.” *Id.*

On December 19, 2014, at about 2:35 PM, Judge Alford emailed to the parties an order he had signed denying Plaintiff a temporary injunction. Appellant served and filed its appeal at about 4:30 PM that afternoon. A copy Judge Alford’s Order is attached. At the same time, Appellant sought a stay or temporary injunction prohibiting Chester County from opening bids, identifying an apparent low bidder, awarding a contract, or issuing a notice to proceed with respect to the site work for the plant. Later December 19, 2014, this Court served an order temporarily granted the petition until Monday, December 22, 2014 at 5 PM. During the morning of December 22, this court served an order denying the petition for stay or for temporary

injunction. A few minutes later, this court entered an order clarifying that the temporary stay was lifted immediately.

Chester County stated yesterday that it will open the bids on December 29, 2014.

ARGUMENT

The Court of Appeals was presented with a statement of facts that urged the court to delay the bid opening. Enough time was needed for Richardson to analyze the trial court's order and present the errors to the Court of Appeals with clarity. Much of the following argument could not be presented on December 19, 2014 because the petition had to be written before the judge even issued his order so that it could be filed within about an hour of the order denying the injunction. The order has been issued, and the following explains how the trial court erred.

The trial court erred in three rulings: It determined the State Code did not apply, the Chester County Policy did apply and that the process that eliminated qualified bidders before they were allowed to bid complied with the County Policy.

In order to obtain a temporary injunction Appellant needs to show that it would suffer irreparable harm without the injunction and that it has no adequate remedy at law. The Trial Court did not assert that either of these elements had not been met. Rather, the Trial Court's Order focused on interpretations of the State Code and County Policy, both of which amount to issues of law on the merits. Thus, it should be treated as established that Appellant will suffer irreparable harm and that it has no inadequate remedy at law if it is not allowed to submit a bid.

I. The Court of Appeals Should Have Enjoined the Opening of Bids Because the Trial Court Erroneously Concluded that the State Code Does Not Apply.

a. S.C. CODE ANN. §13-1-25 Expressly Makes the Money at Issue Subject to the State Code.

The Department of Commerce, acting through the Council, provided \$36,325,000 of State money to Giti to entice Giti to build a tire manufacturing plant in South Carolina. Judge Alford ruled that the money is not subject to the State Code. Put simply, the General Assembly has spoken: if it is State money for economic development, then State rules apply.

Richardson seeks an injunction because in the absence of this injunction, bids for a contract to spend millions of State dollars³ will be opened December 29, 2014, and a contract awarded shortly thereafter, directly in contravention of S.C. CODE ANN. §13-1-25 and 13-1-1720(a)(4).

Both S.C. CODE ANN. §13-1-25 and 13-1-1720(a)(4) were enacted by Act 86, 2003, SC General Assembly. The pre-amble to the act reads:

AN ACT TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 13-1-25 SO AS TO **DEFINE PUBLIC MONIES AS MONIES IN A FUND USED BY THE DEPARTMENT OF COMMERCE** IN CARRYING OUT CERTAIN DESCRIBED PURPOSES AND TO ESTABLISH SPECIFIC REPORTING REQUIREMENTS FOR THOSE MONIES; TO AMEND SECTION 13-1-1720, RELATING TO THE PURPOSE AND DUTIES OF THE COORDINATING COUNCIL FOR ECONOMIC DEVELOPMENT, **SO AS TO RESTATE THE PUBLIC NATURE OF THE SUBJECT FUNDS, INCLUDING THE ACCOUNTABILITY, DISCLOSURE, REPORTING AND PROCUREMENT REQUIREMENTS;** (emphasis added)

In order to remove any confusion about whether monies passing from the Council through political subdivisions to private industry are subject to the State Code, and all other state

³ Grant Award Agreement at paragraph 19 (“...funds awarded hereunder are payable by appropriations from the State.”)

laws and requirements, the General Assembly passed S.C. CODE ANN. §§13-1-25 and 13-1-1720(a)(4) - two code sections that are entirely unique in South Carolina and which were passed twenty-two years after the State Code was enacted in 1981. No other State agency has needed its own special statute to “restate” (See title of Act 86 above) it that the money it is using is public money. In order to avoid any doubt, the law says those monies, whether they come from the State or a private source, must be treated like public monies for all purposes.

S.C. CODE ANN. §13-1-25 states:

The monies constituting a fund of any kind used by the department in carrying out a purpose described in Section 13-1-20 are public monies, notwithstanding their public or private source, and must be treated like public monies for all purposes. *These monies are subject to all accountability requirements governing public monies, including compliance with the South Carolina Consolidated Procurement Code, unless exempt by formal approval of the State Budget and Control Board.* (emphasis added)

S.C. CODE ANN. §13-1-25 was enacted to prevent exactly the legal gymnastics that are being used in this case to avoid the mandatory accountability that goes hand in hand with the use of the public’s money. With regard to using public money for contracting and construction, competitive sealed bidding where all qualified bidders are allowed to bid is a cornerstone of our state’s procurement law.

The facts of the case before the court track the language of the statute. The money at issue in this case is an award by the Council on Economic Development (“Council”). The Council is a division of the Department of Commerce. The money is an award to Chester County

as the State's agent.⁴ The purpose is to pay for construction of the Giti Tire plant site improvements.⁵

The money comes from a fund created by S.C. Code Ann. §12-28-2910 and is being used for one of the stated purposes of the Department in S.C. Code Ann. §13-1-20 i.e., to "conduct an adequate statewide program for the stimulation of economic activity to develop the potentialities of the State"; and "enhance the economic growth and development of the State through strategic planning and coordinating activities." The language of §13-1-25 is also repeated specifically in §13-1-1720 which created the Council and defined its functions.

Judge Alford ruled that the State Code does not apply because the construction being purchased is for a private industry. Judge Alford looked to the State Code itself as the only authority on whether the State Code applies. While Richardson disagrees for reasons detailed below, the clearest view is directly from the General Assembly which found it necessary to unequivocally speak to that issue shortly after the Council was created.

The General Assembly amended the statute controlling the Department of Commerce and Council, 13-1-10 et seq., to say that the monies that flowed through the Council are subject to the State Code. 13-1-25. The Trial Court erred by treating the amendment to the statute as if it said these Council monies are subject to *sometimes* being outside the State Code due to exceptions in the State Code. However, that is not what the amendment to the statute required. The amendment to the statute flatly said the monies are subject to the State Code. No exception.

⁴ See the attached Invitation to Bidders (Bates No. 000359 at 1.2.C).

⁵ Grant Award Agreement at paragraph 2 ("Funds will be used for land acquisition and real property improvements for Giti Tire holdings (USA) Ltd.").

The clarity of the amendment is similar to the implicit repeal of portions of the Tort Claims Act 20 years ago when the Uniform Contribution Among Joint Tortfeasors Act was passed. In *Southeastern Freight Lines v. City of Hartsville*, 443 S.E.2d 395 (1994) the Supreme Court stated “when two statutes are incapable of reasonable reconciliation, the latest statute passed repeals any earlier statute to the extent of repugnancy between the two statutes. *Chris J. Yahnis Coastal, Inc. v. Stroh Brewery Co.*, 295 S.C. 243, 368 S.E.2d 64 (1988).

In the matter before this court, the General Assembly has said that “all” monies used for economic development flowing through the Council are subject to the State Code - no exceptions. Given the statement from *Sloan v. Greenville County* below, it is not hard to understand the General Assembly’s motivation:

The expenditure of public funds pursuant to a competitive bidding statute is of immense public importance. Requiring that contracts only be awarded through the process of competitive sealed bidding demonstrates the **lengths to which our government believes it should go to maintain the public’s trust and confidence in governmental management of public funds.** (Emphasis added)

Sloan v. Greenville County, 356 S.C. 531 at 550-551, 590 S.E.2d 338 at 348-349 (2003) (citation and quotation omitted).

b. The Money Was Not Given to Chester County. Therefore, the Money is Not Exempt from the Code

The Trial Court asserted that the money had been given to Chester County and counties are exempt from the State Code. However, the Trial Court ignored a crucial fact: The money was not given to Chester County. Rather Chester County was a conduit for the money that the county received as agent for the Council. See Instructions for Bidders (000359 at paragraph 1.2 point C) ("Chester County, South Carolina will perform certain activities as part of the bidding procedure pursuant to the State's agreement with the owner as the agent of the State.").

The correct analysis is that the money came from the Council and the Council is subject to the State Code. The State Code "applies to every procurement or expenditure of funds by this State under contract acting through a governmental body . . . except that this code does not apply . . . to the issuance of grants" S.C. CODE ANN. §11-35-40(2). The Code defines the term "governmental body" as a state government department, commission, council, or other similar body. §11-35-310(18). Since the South Carolina Coordinating Council for Economic Development is a state government council, it is a governmental body subject to the provisions of the Code.

c. The Money is an Award and, Therefore, Subject to the State Code.

A "grant" is defined by the Code as "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). The Code further provides that the definition of a grant "does not include an award, the primary purpose of which is to procure specified end products, whether in the form of supplies, services, information technology, or construction. A contract resulting from such an award must not be considered a grant but a procurement contract." *Id.* Thus, the Code does not apply to grants, but it does apply to awards. As defined in §11-35-

310(19), the distinction between a grant and an award under the Code is the specificity of the purpose for which the funds are given. Funds given to generally support a program authorized by law constitute a grant, whereas funds given for the purpose of procuring a specified end product constitute an award.

The degree of specificity indicated for the use of public funds given by the Council for the Project, as outlined in the Grant Award Agreement and the Performance Agreement, reveal that the public funds at issue for this Project constitute an award, not a grant. The funds are available only for the purpose of procuring a specified end product - the acquisition and preparation of the site for the construction of the Giti tire plant in Chester County. See Ex. A, at §§2, 3, 6; Ex. B, at ¶3.0. The Grant Award Agreement and Performance Agreement make it clear that the funds may not be used for any other purposes. Exs. A and B. Because the funds are being issued to procure a specified end product, the funds constitute an award under the State Code, not a grant. Therefore, the Project is subject to the requirements of the State Code.

d. S.C. CODE ANN. §12-28-2910 is Irrelevant to the Issue of Whether The Council's Money is Subject to the State Code

The Trial Court found that the money was a grant because it was given pursuant to S.C. CODE ANN. §12-28-2910, which is a program authorized by law. The mere fact an award is lawful does not mean that it is a grant. Section 12-28-2910 simply establishes the South Carolina Coordinating Council for Economic Development and allows it to use certain monies for the location or expansion of industry in South Carolina. 12-28-2910(E). These broad powers do not address whether monies specified for projects are a grant or an award. Section 11-35-310(19) makes it clear that the difference between a grant and an award is the specificity of the purpose of the money. In the case before the court, the money is not a gift to support a program generally;

it is an award with strict guidelines to requiring that specific items be procured i.e., site preparation. See the Grant Award Agreement and the Performance Agreement. The fact that the money came from a funding mechanism authorized by statute does not mean that it is a grant.

e. The Trial Court's Assumption that the State Had to Own the Building in Order for the State Code to Apply was an Error.

The trial court asserted in its order that the State Code does not apply because the State did not acquire a building. The Trial Court misunderstood the State Code.

First, implicit in the definition of an award is that the State itself will not acquire something directly. If the State had to acquire something directly, an award would require the State to give money to itself to procure a specified end product. This makes no sense.

In the matter before the court, the State is awarding money to be used for a specific purpose so that the State can receive something specific in return i.e., a \$500,000,000 investment and 1,700 jobs. This is a quintessential "award" as contemplated by the State Code See 11-35-310 (19).

Section 11-35-40(2) says the State Code applies to every expenditure by the State under contract acting *through* a governmental body. The action under the present circumstances is *through* a governmental body -- the Council. The money passes through the Council and through the County and to Giti. The statute does not require the State to procure something directly.

II. If the State Code Applies the Procurement Process was Clearly Flawed

As noted above, Giti and the County sought Statements of Qualification from contractors, ranked them and then asked the top five to bid. The use of a prequalification process to eliminate Richardson and other qualified prospective bidders from the bidding process violates §11-35-3023(B) of the South Carolina Consolidated Procurement Code.

Section 11-35-3023(A) of the Code allows a governmental body to issue a request for qualifications and limit participation in the bidding for a project through a prequalification process. §11-35-3023(A). Although §11-35-3023(A) permits the use a prequalification process, §11-35-3023(B) states that, in a design-bid-build procurement, “offers must be sought from **all** businesses that meet the published minimum requirements for prequalification.” §11-35-3023(B) (emphasis added). For purposes of the Code, a design-bid-build project is one for which the “governmental body sequentially awards separate contracts, the first for architectural and engineering services to design an infrastructure facility and the second for construction of the infrastructure facility according to the design.” §11-35-2910(6). Thus, the Code requires that all businesses meeting the published minimum prequalification requirements for a design-bid-build project must be permitted to submit bids. Section 11-35-3023(B) of the Code is clarified by Regulation 19-445.2132: “The pre-qualification process shall not be used to unduly limit competition In a competitive bid, the pre-qualification process is not intended to eliminate bidders capable of completing the work being procured” S.C. Reg. 19-445.2132(A).

A prequalification process was utilized for the bidding of the mass site work services contract for the Project. Richardson timely submitted a completed Prequalification Statement on July 18, 2014. *See* Ex. D. This Project is a design-bid-build project since the engineer was retained first to provide design services, and bids are now being solicited for construction services based on the design. *See* Ex. C. Therefore, bids must be sought from *all* businesses meeting the published minimum prequalification requirements pursuant to S.C. Code §11-35-3023(B) and Reg. 19-445.2132.

The SCBO advertisement seeking Prequalification Statements provided that contractors must have completed at least five projects within the past five years as a contractor, with at least one having an Earthwork value of \$2,500,000 or more. *See* Ex. C. Richardson meets these published minimum requirements. *See* Ex. E. The decision to solicit bids from only the top five ranked firms that were prequalified and eliminate the remaining firms meeting the published minimum qualifications, including Richardson, **directly violates S.C. Code §11-35-3023(B) and Reg. 19-445.2132**. Since this is a design-bid-build project, all firms satisfying the published minimum prequalification requirements, including Richardson, must be allowed to submit bids under the Code.

III. The Court of Appeals should have Enjoined the Opening of Bids Because the Trial Court Erroneously Concluded that the County Policy was Correctly Applied.

The Petition the Court of Appeals reviewed expressed the facts that the Trial Court used to reach its erroneous decision, but because the Petition had to be drafted prior to the Trial Court's Order having been received, the Trial Court's specific errors were not clearly communicated to nor perceived by the Court of Appeals. The Trial Court's Order was rife with errors.

a. The Trial Court Erroneously Seized Upon an Exception to the County Policy on Purchase Requisitions and let the County Ignore its Own Policy.

The Trial Court found that the State Code did not apply and that the County Policy did apply yet the Court then found that the County Policy did not apply.

The Trial Court asserted that County Policy states the County may make an exception to competitive bidding under sealed bids where the purchase is through a state contract. The provision the Trial Court referred to is found in Procedure #: PP-040.

The scope of Procedure #: PP-040 in the Policy is so limited that it would not affect the procurement of mass grading, a construction service. PP-040 states: "SCOPE This procedure applies to all *purchase requisitions*." (Emphasis added.) The procurement of mass grading is not a purchase requisition; it is construction. The County Policy at P-010 Rev 1 contains definitions. "Purchasing" is defined as "Identification and recognition of the needs for goods and services throughout the organization...." The definition does not include construction and within the same policy where it means construction it uses the word construction. See P-010 Rev 1 see section II. ("The ordinance applies to contracts for the procurement of supplies, services and construction entered into by the County of Chester").

The arrangement before the court is not purchasing through state contracts. The Trial Court has already determined that the funds are a grant. The State is acquiring no land, buildings, etc. (See p. 6 of the Trial Court Order: "The County is merely a gatekeeper of the grant money....nothing more.") The Performance Agreement is merely a mechanism for moving money from the state through the County and on to Giti.

b. The Trial Court Relied Upon a Correct Statement Concerning the County Policy but Misapplied it to the Facts Before it.

The Trial Court asserted that the County Policy allows the County to determine if Offerors have the minimum qualifications it seeks to perform the project. The statement is true but inapplicable to the facts because **Richardson was not an Offeror. An Offeror is one who has turned in a bid.** See the Definition of Offeror at PP-140 Solicitation Outline Section i.1.01.6. (Bates No. 000259.) Richardson had not turned in a bid. **It had only submitted a statement of qualifications.**

c. The Trial Court Erred in Equating a Resume' with a Bid.

The County Policy at section 9.0 allows the County to determine whether Offerors have the minimum qualifications to complete the project. The Trial Court found that Richardson's Statement of Qualifications (SOQ) was a proposal. Since proposal is synonymous with Offer under the Policy, the Trial Court found that the County could exclude a contractor before bidding.

However, an SOQ is not a proposal; it is a resume'. The County Policy says bid, proposal and Offeror are all interchangeable. In order to be a bid, the offer must have enough information to be accepted by the government as a contract. The SOQ simply was a resume' and not an offer to make a contract.

d. The Trial Court Erred in Basing a finding on a Conclusion without Foundation

The Trial Court stated that the County Policy does not prohibit prequalification and cites section 9.0 wherein the County reserves the right to determine minimum qualifications. Without citing any authority the court says "the County does have the right to determine the number of qualified bidders it wishes to invite to bid on a project."

The County does not have unlimited authority to exclude bidders. It only has authority to limit bidders AFTER they have turned in their bids. 9.0 gives the County the right to determine whether *offerors* (i.e. those who have bid) meet minimal qualifications. See Definition of Offeror at PP-140 Solicitation Outline Section i.1.01.6. Bates No. 000259.

e. The Trial Court Erroneously Asserts that What Is Not Prohibited May be done.

The Trial Court asserted that the prequalification process used by the county is not expressly prohibited by the policy as if that were a license to violate the express requirement of

section 9.0 which provides the only way to limit bidders i.e., the County may determine whether Offerors (those who have submitted bids) have minimum qualifications. See Definition of Offeror at PP-140 Solicitation Outline Section i.1.01.6.

f. The Trial Court Relied Upon an Irrelevant Finding When it Asserted that the County's advertisement for qualification stated only Five Contractors would be invited to Bid

The Trial Court asserted that the County's advertisement for qualifications stated that only five contractors would be invited to bid. The Trial Court gave no basis for suggesting that an advertisement could expand the County's powers under its Procurement Policy. Furthermore, the advertisement contemplated a private not a public bid. The engineers who drafted the advertisement either did not know or did not care that the County Policy applied. See exhibit C to the Motion for a temporary injunction which shows that for this multi-million dollar project the advertisement did not even require a payment bond or a performance bond even though the County policy expressly required both.

g. The Trial Court Erred when it Mischaracterized Richardson's Argument by Asserting that Richardson was Asking the Court to Review whether Richardson was Minimally Qualified

The Trial Court misunderstood Richardson to be asking the court to review whether it had minimum qualifications. Such would be addressed at a hearing on the merits. The court was simply confronted with Richardson's position that the issue of minimum qualifications can only be determined after the bids are turned in. See section 9.0 of the County Policy.

CONCLUSION

The Court of Appeals failed to recognize the extent to which the Trial Court erred in finding that the State Code did not apply, the County Policy did apply and that the County had complied with its Policy. The primary reason for this misapprehension is that given the urgency

of the situation (a bid opening), the Petition was written before the order was issued so that it could be presented to the Court of Appeals before the bids were opened. Consequently, although the facts relating to the County's error-filled handling of the process leading up to bids being submitted were presented to the Court of Appeals, the Court failed to recognize the errors embedded in those facts. For that reason, Richardson urges the Court of Appeals to enter an injunction preventing the County from opening bids, and awarding a contract until Richardson is heard on the merits.



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*ATTORNEYS FOR APPELLANT, RICHARDSON
CONSTRUCTION COMPANY*

December 23, 2014

CERTIFICATE OF SERVICE BY MAIL

Appeal No. 2014-002687

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 23, 2014, at the following address:

Document:

Appellant's Petition For Rehearing

Counsel Served:

Joanie Winters, Esquire
Winters Law Firm
105 Main Street
Chester, SC 29706



Attorney for Appellant

INSTRUCTIONS TO BIDDERS

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1.1 DEFINITIONS

- A. Owner: Giti Tire Manufacturing (USA) Ltd.
- B. Architect: Gresham, Smith and Partners.
- C. Project: Site Mass Grading.

1.2 SPECIAL PROCEDURES

- A. This Project is preparatory Work for future construction under separate contract, and will be completed before other construction work on site begins.
- B. The Owner is a private corporation that is receiving some State funds per an incentive agreement.
- C. Chester County, South Carolina will perform certain activities as part of the bidding procedure pursuant to the State's agreement with the Owner as the agent of the State.
- D. Prohibition of Gratuities: Section §8-13-420 of the 1976 Code of Laws of South Carolina states in part as follows: "Whoever gives or offers to any public official or public employee any compensation including a promise of future employment to influence his action, vote, opinion or judgment as a public official or public employee, or such public official solicits or accepts such compensation to influence his action, vote, opinion or judgment shall be subject to the punishment as provided by Sections §19-9-210 and §19-9-220. Gratuities in any form are strictly prohibited."

1.3 SECURING DOCUMENTS

- A. Copies of the Bidding Documents may be obtained at the office of the Architect for bidding purposes upon the conditions set forth in the Invitation for Bids.

Gresham, Smith and Partners
1400 Nashville City Center
511 Union Street
Nashville, Tennessee 37219-1733
Telephone: 615-770-8100

- B. The Bidding Documents may be amended by Addendum. No Addendum will be issued later than 72 hours of the time established for receipt of Bids unless it also includes a delay for the date and time for receiving Bids.

1.4 BONDS

- A. Bid Bonds: Not required.
- B. Before signing the Contract, the Owner will require the selected Contractor to secure and post a Labor and Materials Payment Bond and a Performance Bond, each in the amount of 100 percent of the Contract Sum, and each on forms referenced in the Bidding Documents.
 - 1. All such bonds shall be issued by Surety acceptable to Chester County and the Owner. Include the costs of all such bonds in the proposed Contract Sum.

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INSTRUCTIONS TO BIDDERS

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1.5 EXAMINATION OF BIDDING DOCUMENTS AND PROJECT SITE

- A. Before submitting a Bid, each Bidder shall carefully examine the Drawings, the Project Manual, and all other Bidding Documents, and visit the Project site. The Bidder shall secure permission from the Owner prior to accessing the site.
- B. Each Bidder shall fully inform itself before bidding as to all existing conditions and limitations under which the Work is to be performed, and include in its Bid a sum to cover all costs of all items necessary to perform the Work as set forth in the Bidding Documents.
 - 1. Include cost of applicable taxes, including sales tax.
- C. Allowance will not be made to any Bidder because of lack of such examination or knowledge.
- D. The submission of a Bid will be construed as conclusive evidence that the Bidder has made such examination.
- E. Each Bidder shall notify the Architect of any conflicts or discrepancies found in the Bidding Documents.
- F. **PRE-BID CONFERENCE**
 - 1. A mandatory pre-bid conference will be held at the Chester County Economic Development Office, Gateway Commons Business Park, 3200 Commerce Drive, Richburg, SC 29729 at 2:00 P.M. EST on Monday, November 10, 2014, with a site visit immediately thereafter.

1.6 INTERPRETATION OF BIDDING DOCUMENTS BEFORE BIDDING

- A. If Bidder is in doubt as to the meaning of any part of the Bidding Documents, or finds conflicts or discrepancies in any part of the Bidding Documents, submit to the Architect a written request for interpretation.
- B. The person submitting the request is responsible for its prompt delivery.
- C. Requests for interpretation must be received by the Architect not later than close of business November 12, 2014. Requests may be submitted by mail or e-mail; verbal requests are not permitted.
 - 1. The Architect will respond to requests for interpretation relating to documents it prepared.
 - 2. The Architect will forward requests for interpretation to the Chester County Office of Purchasing or the Owner for responses relating to Bidding Documents prepared by them.
- D. Interpretation or correction of the Bidding Documents will be made only by Addendum, and will be mailed or otherwise provided to each Bidder of record.
- E. The Owner will not be responsible for any other explanations or interpretations of the Bidding Documents.
- F. Verbal or other interpretations or clarifications will be without legal effect.

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INSTRUCTIONS TO BIDDERS

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- G. Address requests for interpretation to both of the following:

Stephen A. Brown, P.E.
Gresham, Smith and Partners
511 Union Avenue, Suite 1400
Nashville, TN 37219
E-Mail: stephen_brown@gspnet.com

Helga Bolyard
Gresham, Smith and Partners
511 Union Avenue, Suite 1400
Nashville, TN 37219
E-Mail: Helga_bolyard@gspnet.com

- H. Send concurrent copies of requests for interpretation to:

Susan M. Cok, Director of Contracts and Procurement
PO Drawer 580
Chester, SC 29706
E-Mail: scok@chestercounty.org

1.7 SUBSTITUTIONS

- A. The materials, products and equipment described in Bidding Documents establish a standard of required function, dimension, appearance and quality to be met by any proposed substitution.
- B. The Architect will consider written requests for substitution, submitted in accordance with Specification Section 01 2500 Substitution Procedures, if received at least 10 calendar days before Bid Opening Date. Requests received after that time will not be considered.
- C. If Architect approves a proposed substitution before receipt of Bids, such approval will be issued in an Addendum issued to all Bidders of record.
- D. No substitutions will be considered after Contract Award unless specifically provided for in the Bidding Documents.

1.8 BID FORM

- A. Address Bids to:

Giti Tire Manufacturing (USA) Ltd.
c/o Chester County Office of Purchasing
PO Drawer 580
Chester, SC 29706

- B. In order to receive consideration, comply with the following requirements:
1. Bid must be signed by an individual with actual authority to bind the Bidder.

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INSTRUCTIONS TO BIDDERS

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2. Make Bids upon the forms provided therefore, properly executed and with all items filled out.
 3. Do not change the wording of the Bid Form, and do not attach additional text that affects the Bid.
 4. Unauthorized conditions, limitations, or provisions attached to the Bid shall be cause for rejection of the proposal.
 5. Electronic Bid modifications will not be considered.
 6. Bids received after the time fixed for receiving them will not be considered.
 7. Late bids will be returned to the sender unopened.
 8. Each bid shall be addressed to the Owner and shall be delivered as stated above on or before the date and time stated in the Advertisement for Bids.
 9. Each bid shall be enclosed in a sealed envelope bearing the title of the Work, the name of the Bidder and address, Bidder's license number, classification of license, limits of classification if relevant, and the date and hour of the bid opening.
 10. It is the sole responsibility of the bidder to see that its bid is received on time.
 11. If the Bid is sent through the mail or other delivery method, enclose the sealed envelope containing the Bid documents within a separate envelope with the notation "Bid Enclosed" on the outer envelope.
- C. Confidential Information: Bidders shall visibly mark as "Confidential" each part of their Bid that they consider to contain proprietary information. All unmarked pages will be subject to release in accordance with the guidelines set forth under Chapter 4 of Title 30 (The Freedom of Information Act) South Carolina Code of Laws and Section §11-35-410 of the South Carolina Consolidated Procurement Code. Privileged and confidential information is defined as "information in specific detail not customarily released to the general public, the release of which might cause harm to the competitive position of the part supplying the information." The examples of such information provided in the statute are:
1. Customer lists;
 2. Design recommendations and identification of prospective problem areas under an Invitation for Bid;
 3. Design concepts, including methods and procedures;
 4. Biographical data on key employees of Bidder.

1.9 BIDS

- A. Submit two copies bearing original signatures.
- B. Bids transmitted by facsimile or electronic means will not be considered.
- C. Withdrawal of Bid:
 1. Bidder may withdraw its Bid, either personally or by written request, received by the Chester County Office of Purchasing at any time before the scheduled time for receiving Bids.
 2. Withdrawal requests transmitted by facsimile or electronic means will not be considered.
 3. Bidders may not withdraw Bids for a period of 45 days after the date set for receiving thereof. Bids are be subject to acceptance by the Owner during this period.

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INSTRUCTIONS TO BIDDERS

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- D. Chester County, South Carolina will receive on behalf of the Owner. Sealed proposals from invited bidders will accepted until 3:00 P.M. on Monday, November 17, 2014, at the Chester County Office of Purchasing, 1476 J.A. Cochran Bypass, Chester, SC 29706. Bids will be opened and publicly read aloud in the Conference Room of the Chester County Government Complex, 1476 J.A. Cochran Bypass, Chester, SC 29706.
- E. Award of Contract: It is the intent of the Owner to award a contract for construction to the Bidder who has proposed the lowest Contract Sum and who has complied with requirements for Bidding. The Chester County Office of Purchasing will review bids for responsiveness and advise the Owner as to which bids are acceptable under the State's agreement with the Owner.
 - 1. The Owner reserves the right to negotiate with the most responsive Bidder before awarding the contract.
- F. Evidence of Competency: Any Bidder may be required to provide evidence satisfactory to the Chester County Office of Purchasing and the Owner that it and its proposed Subcontractors have sufficient experience in the types of work called for to complete the Work of Contract in a satisfactory manner.

1.10 PROTESTS

- A. Any prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest in writing within fifteen (15) days of the date of issue of the applicable solicitation document at issue. Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award shall protest within fifteen (15) days of the date of award intent is posted in accordance with this code. A protest shall be in writing, submitted to the Contracts and Procurement Director, and 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] Direct all correspondence to Director Contracts and Procurement, P. O. Drawer 580, Chester, SC 29706.

1.11 EXECUTION OF AGREEMENT

- A. The Notice of Award issued to the successful Bidder will be accompanied by the required number of unexecuted counterparts of the Agreement including all other Contract Forms and Agreements.
- B. The form of Agreement, which the successful Bidder will be required to execute, is included in the Bidding Documents.
- C. The Bidder to whom the Contract is awarded by the Owner shall, within 15 days after notice of award and receipt of Agreement forms from the Owner, sign and deliver to the Owner all required copies.
- D. At or before delivery of the signed Agreement, the Contractor shall deliver to the Owner the Labor and Materials Payment Bond, the Performance Bond, and the policies of insurance or insurance certificates as required by the Bidding Documents.
- E. The Chester County Office of Purchasing and Owner must approve all bonds and policies of insurance before the successful Bidder can proceed with the Work.

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Site Mass Grading Package
Giti Tire Manufacturing (USA), LTD.
Tire Manufacturing Plant – Phase 1
Chester County, South Carolina
GS&P Project No.: 40303.00

INSTRUCTIONS TO BIDDERS

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- F. Failure or refusal to furnish bonds or insurance policies or certificates in a form satisfactory to the Owner shall subject the Bidder to loss of time from the allowable construction period equal to the time of delay in furnishing the required material.

1.12 CONTRACT TIME

- A. The Agreement will include a stipulation that the Work be substantially completed by May 15, 2015.

END OF DOCUMENT

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