

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

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

Orders of the Hon. Aphrodite K. Konduros Filed December 22, 2014

Richardson Construction Company.....Petitioner

vs.

Chester CountyRespondent

Petition For a Writ of Certiorari
And
Petition for Temporary Injunction

--EMERGENCY CONSIDERATION REQUESTED--

RECEIVED

DEC 23 2014

S.C. SUPREME COURT

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on December 23, 2014.

QUESTIONS PRESENTED

- I. Did the Trial Court Erroneously Conclude that the State Procurement Code Does Not Apply to This Expenditure of Public Funds?**
- II. If the State Procurement Code Applies, was the Code Followed?**
- III. Did the Trial Court Err in Concluding that the County Policy was Correctly Applied?**
- IV. Should This Court Enter a Temporary Injunction?**

STATEMENT OF THE CASE

Introduction

Appellant, Richardson Construction Company (“Richardson”), petitions this court to grant a writ of certiorari to the Court of Appeals and to issue a 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 (“Project”). This matter involves novel questions of law, significant matters of public interest, and millions of dollars in public funds.

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 the protections of the Procurement Code for the public and for Appellant will be rendered moot if the bidding process is not stayed, 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 Richardson’s 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 (“Project”).

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 a Giti Manufacturing (USA) Ltd. (“Giti”) tire plant in Chester County (“Grant Award Agreement”). *See* Grant Award Agreement, attached to Richardson’s petition for stay or temporary injunction as Ex.4A, Bates No. 000040.¹ On June 5, 2014, the Council, Chester County, and Giti entered into a contract governing the

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.

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); 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”) 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 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* Aff. 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 for the Project that 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 Purchasing Policy and Procedure Manual (“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* Appl. and Mot. for TRO and Temporary Inj. (Bates No. 000346). After a hearing, the Court of Common Pleas for the Sixth Judicial Circuit, the

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).

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 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 injunction, 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, the Court of Appeals, the Hon. Aphrodite K. Konduros presiding, issued an order temporarily granted the petition until Monday, December 22, 2014 at 5 PM. During the morning of December 22, Judge Konduros served an order denying the petition for stay or for temporary injunction. A few minutes later, she, for the Court of Appeals, entered an order clarifying that the temporary stay was lifted immediately. We submitted to her a petition for rehearing, which she denied earlier today.

We have now learned that Chester County will open the bids on Monday, December 29. Once the bids are opened, the benefit of any review of the bidding process will be lost. Hence, Judge Konduros's orders denying our petition for stay or temporary injunction and denying our Petition for Rehearing are final orders entitled to immediate review.

ARGUMENT

The trial court erred in three rulings: It determined that the State Code did not apply, that the Chester County Policy did apply, and that the process that eliminated qualified prospective 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 Coordinating Council for Economic Development, provided \$36,325,000 of State money to Giti to incentivize Giti to build a tire manufacturing plant in South Carolina. *See* Ex. 4A. Judge Alford ruled that this public money is not subject to the State Code. This conclusion is erroneous because the General Assembly has spoken clearly on this issue: if State money is provided for economic development, then State rules apply, including the requirements of the South Carolina Consolidated Procurement Code.

If Richardson's requested temporary injunction is not granted, bids for the Project will be opened on December 29, 2014, and a contract to spend millions of South Carolina taxpayer dollars³ will be 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-

³ Grant Award Agreement, at ¶19 ("funds awarded hereunder are payable by appropriations from the State.")

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;**

2003 S.C. Laws Act 86 (S.B. 34) (emphasis added). In order remove any confusion about whether monies passing from the Council through political subdivisions to private industry are subject to the State Code, as well as to all other state laws and regulations governing public money, 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 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) that the money it is using is public money. In order to avoid any doubt, the law says that monies used by the Department of Commerce and the Council, whether coming from the State or even 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.*

§13-1-25 (emphasis added). S.C. CODE ANN. §13-1-25 was enacted to prevent exactly the type of legal gymnastics 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 in which 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 Coordinating Council for Economic Development. The Council is a division of the Department of Commerce. §13-1-10(A). The money is an award to Chester County as the State's agent.⁴ The purpose of the award is to pay for construction of the Giti Tire plant site improvements.⁵

The money awarded for the Project comes from a fund created by S.C. Code Ann. §12-28-2910.⁶ The money awarded is being used for one of the stated purposes of the Department of Commerce in S.C. Code Ann. §13-1-20 – 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." §13-1-20. The language of §13-1-25 is also repeated specifically in §13-1-1720, which outlines the purpose and duties of the Council.

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 state shortly after the Council was created that money used by the Department and the Council for economic development is public money subject to the State Code.

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.").

⁶ Grant Award Agreement.

The General Assembly amended the statute controlling the Department of Commerce and the Council, §13-1-10 *et seq.*, to say that monies flowing 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 that 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 requires. The amendment to the statute flatly states the monies used by the Department are subject to the State Code. No exception.

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* 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." *Se. Freight Lines v. City of Hartsville*, 313 S.C. 466, 469, 443 S.E.2d 395, 397 (1994) (citing *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 in mandating that all monies used by the Department and the Council for economic development must comply with the requirements of the State Code:

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.

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

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 was given to Chester County and that counties are exempt from the State Code. The Trial Court ignored a crucial fact: the money was not given to Chester County. Rather, Chester County was a conduit for the money being awarded for the Project 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 a governmental body 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 is, 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. §11-35-40(2). 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, reveals 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 authorizes the Council 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 requiring that specific items be procured i.e., site preparation. *See* Grant Award Agreement and 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 Must 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 is not acquiring a building. The Trial Court misunderstood the State Code.

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 when issuing an award under the Code, 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 - 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 that the State Code applies to every expenditure by the State under contract acting *through* a governmental body. The expenditure of public funds for Project is *through* a governmental body - the Council. The money passes

through the Council, to the County as agent of the Council, and to Giti. Section 11-35-40(2) does not require the State to procure something directly in order for the State Code to apply to an expenditure of public funds.

II. If the State Code Applies to the Project, The Procurement Process was Clearly Flawed.

As noted above, Giti and the County sought Statements of Qualification from contractors, ranked them, and then allowed the top five ranked contractors to bid. The use of a prequalification process to eliminate Richardson and other qualified prospective bidders from the bidding process directly 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 further 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 submitted Statements of Qualifications 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 does not apply and that the County Policy does apply, yet the Court then found that the County Policy does not apply.

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

The scope of Procedure #: PP-040 in the Policy is so limited that it does not apply to 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 as agent of the State 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 §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. Section 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 §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 §9.0 of the County Policy.

PETITION FOR TEMPORARY INJUNCTION

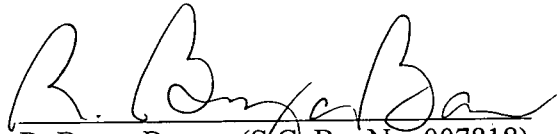
The issues presented are complicated and novel. We submit that the South Carolina Consolidated Procurement Code applies here, yet it was not followed. Even if it were determined that the State Code does not apply and the County Policy applies instead, the County Policy was certainly not followed. These are issues of great public importance, and they will be lost if an injunction is not entered giving the Supreme Court a chance to rule on whether the General Assembly meant what it said when it enacted S.C. Code Ann. §13-1-125 (reiterating that public funds used by the Department of Commerce are subject to the State's Procurement Codes). Appellant is likely to win on the merits. Appellant has no adequate remedy at law. Appellant will suffer irreparable injury if this motion is not granted. More importantly, public monies will be squandered

unless the law is followed and ALL qualified bidders are allowed to bid on this multi-million-dollar project financed with state funds.

CONCLUSION

Richardson urges this Court to grant certiorari to review the orders of the Court of Appeals and to enter a temporary injunction preventing the County from opening bids, and awarding a contract until Richardson is heard on the merits.

All of which is respectfully submitted.



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COMPANY

CERTIFICATE OF SERVICE BY MAIL

Appeal No. 2014-002687

Case No. 14-CP-12-565

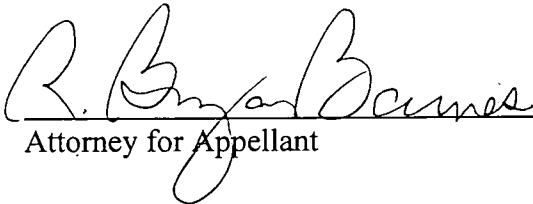
I, the undersigned employee with the law firm of Rogers Townsend & Thomas, PC, do hereby certify that I have served a copy of the foregoing document upon counsel of record by U.S. Mail, postage prepaid, on December 23, 2014, at the following address:

Document:

Appellant's Petition For Writ of Certiorari and for Temporary Injunction

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