

BECK Powell

STATE OF SOUTH CAROLINA)
COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS

South Carolina Public Interest)
Foundation, Edward D. Sloan, Jr,)
individually and on behalf of all others)
similarly situated,)

Plaintiff,

vs.

Jasper County School District and the)
Hon. Berty Riley, in her official capacity)
as Chairman of the Board of Trustees of)
the Jasper County School District,)

Defendant.

RECEIVED
C.A. No. 2014-CP-27-468
Order MAY 31 2016
SC Court of Appeals

Now before the Court is Defendants' motion for summary judgment. The motion was heard before the undersigned on August 4, 2015.¹ "Summary judgment is proper where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Sims v. Amisub of S. Carolina, Inc.*, _ S.E.2d. __, 2015 WL 4751030, at *3 (S.C. Aug. 12, 2015).

The Complaint

The complaint's "First Cause of Action" section states that, "procurement of construction services of \$50,000 or more by Exhibit E violates the District's Procurement Code Policy, and is unlawful." The complaint's "Second Cause of Action" section states that, "Defendants' undated determination (Exhibit D) is insufficient to satisfy the requirements of Procurement Code Policy § 2- 103 [and therefore the] procurement violates the District's Procurement Code Policy, and is unlawful." *Id.* To their complaint, Plaintiffs attached the Jasper County School District (JCSD)

¹ The defendants made clear at the hearing that their motion for Summary Judgment is founded upon the allegations of the Complaint and the numerous documentary exhibits submitted therewith by the plaintiffs, and that defendants are not, for purposes of this motion, relying upon their factually-driven affirmative defenses of lack of standing, laches, or unclean hands.

POSTED
BY [initials] DATE 11/8/15

Procurement Code (exhibit B), the JCSD's Request for Proposals (exhibit C), the JCSD's Written Determination (exhibit D), and the contract between the JCSD and M.B. Kahn Construction Company, Inc. for design-build delivery of the "Renovation of 3776 Bees Creek Rd Property for use as Centralized District Administrative Offices (Owner solicitation #14-06-01)" (exhibit E). The complaint also attacks the efficacy of the defendants' May 11, 2015 Resolution. (exhibit G).

Discretion of the Defendants

In *Glasscock Company v. Sumter County*, 361 S.C. 483, 604 S.E.2d 718, 722 (2004), the Supreme Court stated that procurement decisions are "a function of [the governing body's] discretion, the exercise of which they are accountable for as publicly elected officials." A guiding principle is that, "In reviewing discretionary decisions of a legislative body, our courts have been loath to substitute their judgment for that of elected representatives. Such decisions should not be upset on appeal unless they are arbitrary, in obvious abuse of discretion, or in excess of lawfully delegated power." *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338, 351 (2003) (internal quotation omitted). "[L]ocal governments should be afforded a reasonable degree of latitude in devising their own individual procurement ordinances and procedures" *Glasscock*, 604 S.E.2d at 722.

In addition, "The boards of trustees of the several school districts may prescribe such rules and regulations not inconsistent with the statute law of this State as they may deem necessary or advisable to the proper disposition of matters brought before them." S.C. Code Ann. § 59-19-110. "The official record of a school board meeting imports verity, and, except where fraud or mistake is shown, it is conclusive as to the matters set forth therein." 78 C.J.S. Schools and School Districts § 209.² "If the facts and circumstances are such that reasonable

² Consequently, because South Carolina school boards do not operate through "ordinances" in the way that local governments (cities and counties) do, the distinction between an "ordinance" and a "resolution" is not relevant to the effect of the adopted school board Resolution attached as Complaint Exhibit G.

men may differ as to the wisdom and expediency of the decision, the decision must be upheld. A clear abuse of discretion is required to warrant judicial interference.” *Gamble v. Williamsburg County School District*, 305 S.C. 288, 290, 408 S.E.2d 217, 218 (1992).

Design-Build is Permissible

Jasper County School District (“JCSD”) Procurement Code (“Code”) Article 4 pertains specifically to procurement of construction. Section 4-101 provides, “The school district will utilize the South Carolina School Facilities Planning and Construction Guide prepared by the South Carolina Department of for new construction, additions, or renovations used in connection with public education.” In South Carolina, the State Department of Education Office of School Facilities controls school construction. S.C. Code Ann. § 59-23-210 . This is done through its Planning and Construction Guide, which is established and incorporated by statute. *Id.* The Planning and Construction Guide contains a section on Procurement which states, “The [Office of School Facilities] recognizes all procurement methods authorized and defined in South Carolina Code Ann. Section 11-35-2910 and 11-35-3005.” Design-Build is one of these recognized “procurement methods.” S.C. Code Ann. § 11-35-3005.

JCSD’s Code § 4-101 states, “The school district must have discretion to select the appropriate construction contracting method for a particular project. In determining which method to use, the school district must consider its requirements, resources, and potential contractor capabilities.” Section 4-101, pertaining specifically to construction and tied directly to the OSF Guide (and thereby to the design-build method), permits to the JCSD any construction delivery method listed in S.C. Code Ann. §11-35-2910 and 11-35-3005.

Section 4-101 would be rendered meaningless by the Plaintiffs’ that JCSD Code § 2-102 supersedes JCSD Code § 4-101 when procurement is for construction, requiring only low-bid “competitive sealed bidding” (a.k.a. “design-bid-build”) for construction contracts. Such an interpretation is also inconsistent with the legislative discretion noted in *Glasscock, supra*.

Competitive sealed proposals are the method of source selection for design-build delivery. "Generally, there are two ways through which a construction contract may be awarded: 1) RFPs or Design/Build process; and 2) Invitation for Bids or Design/Bid/Build process, also referred to as competitive sealed bidding." *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005). The State Procurement Code provides that, "Contracts for design-build *must* be procured by competitive sealed proposals" S.C. Code Ann. § 11-35-3015(5) (emphasis added). The General Assembly has thus determined that competitive sealed proposals are sufficiently competitive for this delivery method. The latitude given to JCSD pursuant to S.C. Code Ann. § 11-35-50 certainly includes following State Code's listed source selection and delivery methods.

The Board has the legal discretion, enshrined in § 4-101 of its Procurement Code, to utilize design-build construction and procure such construction accordingly. *See, Glasscock*, 604 S.E.2d at 722. No allegation is made that the exercise of this discretion to use the design-build delivery method was arbitrary or an obvious abuse of discretion, only that it was outside the lawful authority of the Defendants.

JCSD's Written Statement is Sufficient

JCSD Procurement Code § 4-101 also states, "The school district must include in the contract file a written statement setting forth the facts *which led to the selection of a particular method* of construction contracting for each project. In selecting the construction contracting method, the school district should consider the results achieved on similar projects in the past and methods used." JCSD issued this written statement setting forth facts which led to the selection of design-build. (Complaint Exhibit D) (emphasis added). This requirement is written in the past tense. Page 2 of Exhibit D to the Amendment Complaint explains why the JCSD determined that competitive sealed bidding was not advantageous, and why the JCSD determined that its design-build source selection had been successful and appropriate for the

award of a contract.

Section 2-103 of the JCSD Code provides that when the “school district determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the school district, a *contract may be awarded* by competitive sealed proposals.” (Complaint Exhibit B) (emphasis added). This requirement is written so as to apply to the *award* of a contract, which occurs at the *end* of a procurement; it is not, as contended by plaintiffs, written to require a “written determination” *prior* to commencing a procurement.

If the governing body “and the public can look to the written determination and comprehend the [entity’s] rationale in utilizing the design-build method as arguably the most timely, economical, and potentially successful option, then the determination is sufficient.”

Sloan v. Greenville County, supra,

Exhibit D was issued October 10, 2014 (agreed in oral argument). The contract was awarded November 14, 2015 (Complaint ¶ 15). Exhibit D satisfies the *pre-construction* requirement of § 4-101 and the *pre-contract* requirement of § 2-103.

The Resolution

While this case was pending, the Board of Trustees of the JCSD adopted a Resolution on May 11, 2015. (Complaint Exhibit G) (the “Board Resolution”). The Board Resolution reads as follows

Whereas, S.C. Act No. 476 of 1998 provides that, “The central authority of Jasper County's education system is the Jasper County Board of Education (board) which is, *ex officio*, the board of trustees of the Jasper County School District, and all powers and functions vested in school trustees by general or special enactment are vested in the board;” and

Whereas, S.C. Act No. 288 of 1989 provides that, “In addition to those powers and duties of the county board of trustees now devolved on the board and those already provided for by general and special legislation, the board has the following powers and duties relative to the public schools of the district: (10) purchase and sell land, plan and construct new school facilities, and maintain and repair existing facilities;” and

Whereas, the Bees Creek Facility has been vandalized and damaged since the District ceased to occupy the site, and is in need of work to remove the dangers presented by its current conditions; and

Whereas, the current district administrative offices are split between three locations; and

Whereas, the main central administrative office is in an older, wood-frame building not owned by the District, which building does not comply with modern building codes, including most importantly accessibility for the disabled; the electrical, plumbing, heating and air conditioning are all in poor condition for the central office functions of the district; and

Whereas, the administration has given several public presentations on the planned renovation of the Bees Creek Facility as a new central administrative office and, budget permitting, space for community use, since at least January of 2014; and

Whereas, the District advertised a competition for Design-Build Services in South Carolina Business Opportunities, for the renovation of the Bees Creek Facility on June 2, 2014; and

Whereas, the Bees Creek Facility design-build project procurement competition was held, respondents were shortlisted; and shortlisted respondents submitted design-build proposals for the Board's consideration; and

Whereas, no protests were filed of the solicitation, the short listing, or the proposals; and

Whereas, on September 8, 2014, the Board adopted a motion that, "pursuant to Solicitation Number 14-06-01 for design-build services at the Bees Creek facility, award be made to MB Kahn, that notice of intent to award be issued, that the contract be drafted in accordance with the solicitation and proposal during the notice period, and that the contract be executed by the District at the end of the protest period;" and

Whereas, no protest of the intended award was filed during the protest period; and

Whereas, during this time the contractor made public presentations on its plans for the Bees Creek Facility; and

Whereas, on November 10, 2014, the Board adopted a motion "to accept the agreement for the Bees Creek Road Property between Jasper County School District and M.B. Kahn;" and

Whereas, the District and Contractor have commenced the work of the project; and

Whereas, subsequent to all of the foregoing events, third parties have initiated litigation in an attempt to invalidate the procurement of the design-build contract, which litigation has caused the progress of this project to halt because of uncertainty over payment to the contractor for the services it is to provide under the contract;

NOW THEREFORE BE IT RESOLVED by the Board, in its full legislative authority:

1. The Board confirms the contract for design-build delivery of services for the Bees Creek Facility project is acceptable and proper to the Board as the means to achieve the purpose of carrying out the Board's powers and duties under law with regard to the Bees Creek facility and the provision of suitable central administrative offices for the District and Board.
2. The Board hereby ratifies the procedures and results of Solicitation #14-06-01 (Renovation of Bees Creek) and waives any alleged procedural irregularity therein.
3. To any extent Resolution #2 above does not remove from any doubt the validity of the contract between the District and M.B. Kahn already approved by the Board on November 10, 2014, the Board also hereby exercises its legislative power to affirm and ratify, to the extent necessary, if any, the contract between the District and M.B. Kahn already approved by the Board on November 10, 2014.
4. To any extent Resolutions #2 and #3 above do not remove from any doubt the validity of the contract between the District and M.B. Kahn already approved by the Board on November 10, 2014, the Board also, to the extent necessary, if any, exercises its exemption authority to remove from any doubt the validity of the contract between the District and M.B. Kahn already approved by the Board on November 10, 2014.
5. To any extent the contract is found void or voidable, the Board commits to the full extent of its authority to pay under principles of *quantum meruit* the value conferred upon the District by M.B. Kahn, up to the contract sum, for its performance under the contract in the event the contract is subsequently invalidated.
6. The Board does not interpret its District Procurement Code § 2-102(1) to require competitive sealed bidding for all construction procurement over \$50,000, but rather interprets Article 4 of that Code to control the process and availability of construction delivery methods and construction source selection methods, so as to permit the use of any appropriate delivery method suitable to the needs of the project, and to permit the source selection method to be derived from the needs of the delivery method. Moreover, the Board interprets the written statement required by § 4-101 as equivalent to the written determination for purposes of § 2-102(1) when the procurement is for construction.
7. The Board interprets its District Procurement Code § 2-103(7) as satisfied by the written minutes of the Board when the Board itself makes the determination of the most advantageous competitive sealed proposal.
8. The Board does not interpret its District Procurement Code § 2-103(1) to require a written determination prior to the solicitation of competitive sealed proposals, but rather interprets § 2-103(1) to require a written determination prior to the entry into an actual contract whose source was selected via competitive sealed proposals.
9. By these Resolutions the Board in no way admits that any element of procedure

under Solicitation #14-06-01 was defective, and in no way admits that the contract between the District and M.B. Kahn is in any way ultra vires.

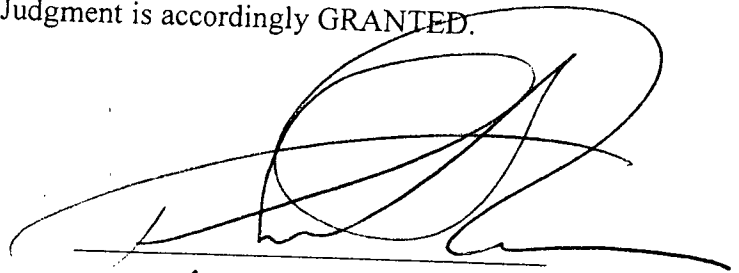
The Board has the legislative power and discretion to interpret its own Procurement Code, and has the legislative power and discretion to exercise all of the powers noted in the Resolution. (See "Discretion of the Defendants" *supra*). S.C. Code § 11-35-50 "does not impose a specific requirement that all public procurement be carried out by way of a single, narrowly defined procedure. ... We find no logic or consistency in recognizing some flexibility at the state level while handcuffing local governments with none." *Glasscock Company v. Sumter County*, 361 S.C. 483, 604 S.E.2d 718 (2004). Procurement decisions are "a function of [the governing body's] discretion, the exercise of which they are accountable for as publicly elected officials." *Id.*

In both the regular course of the procurement activity and in the Board Resolution, the *Board itself* made the decision to proceed with design-build delivery, and the *Board itself* made the decision to award the contract to M.B. Kahn. These are not mere administration decisions. Thus, even if the administration of the JCSD somehow misconstrued the Board's procurement policies in the manner alleged by the plaintiffs, the Board's direct participation, and later its Resolution, were each effective to cement the validity of the contract.

Conclusion

The defendants' motion for Summary Judgment is accordingly GRANTED.

SO ORDERED.



Thomas ^A Russo, Circuit Judge

Florence S.C.

October 30, 2015

STATE OF SOUTH CAROLINA)
)
COUNTY OF Jasper)

IN THE FAMILY COURT
14 JUDICIAL CIRCUIT

2015 NOV 20 AM 10:00

SOUTH CAROLINA PUBLIC)
INTEREST FOUNDATION, ETC)
JASPER COUNTY SC)

AFFIDAVIT OF MAILING

vs.)

JASPER COUNTY SCHOOL DISTRICT)
AND THE HON. BERTY RILEY)
Defendant.)

Docket No. 2014-CP-27-468

RECEIVED
MAY 31 2016
SC Court of Appeals

Personally appeared Cierra Gregory who states that (s)he served the ORDER with a copy of the Affidavit by mailing:

(Check one)

- First class mail
- Certified mail
 - restricted delivery
 - return receipt requested

in the United States Mail, with proper postage attached and receipt attached (if applicable), on NOVEMBER 20, 2015 (date) addressed as follows:

JAMES G. CARPENTER
819 E. NORTH ST, STE 230
GREENVILLE, SC 29601

Sworn to before me this

20th day of November, 2015

Dore M. Hill
Notary Public of South Carolina

Cierra Gregory
Affiant

My Commission expires: 1-13-21