

THE STATE OF SOUTH CAROLINA

In the Court Of Appeals

APPEAL FROM JASPER COUNTY

Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2016-001148

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SC Court of Appeals

South Carolina Public Interest Foundation and Edward D. Sloan, Jr., Denise G. Davidson, and Milton Woods, Jr., individually, and on behalf of all others similarly situated,
Appellants,

V.

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

APPELLANTS' INITIAL REPLY BRIEF

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STATEMENT OF THE CASE

Appellants-Taxpayers allege that the Respondents (“District”) had procured nearly \$3 million of design services and construction services in violation of the District Procurement Policy.

The District Procurement Policy § 2-103 (1) states:

Conditions for use: 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**. . . . Proposals must be solicited through a request for proposals.

Id. (emphasis added).

July 14, 2014, the District issued Request for Proposals 14-06-01 (Exhibit C), soliciting nearly \$3 million of design-build services to renovate its long-abandoned Bees Creek facility, which included construction services and architectural services, without having issued a written determination to enable it to use competitive sealed proposals.

On September 10, 2014, the District issued an intent to award letter (Exhibit F) without having issued a written determination to enable its use of competitive sealed proposals.

On September 30, the Plaintiff Mr. Sloan issued a request under the Freedom of Information Act requesting four kinds of public records, including **all determinations** related to the procurement of construction and architectural services for the Bees Creek facility. A few days later, on October 10, 2014, nearly 3 months after issuing the Request for Proposals, and one month after it had issued a notice of intent to award the contract, the District issued and posted a written determination to enable its use of competitive sealed proposals (Exhibit D). On October 11, the District sent the written determination to Mr. Sloan.

The Appellants-Taxpayers filed suit contending that this procurement was unlawful and that it violated the District Procurement Policy. The District contended otherwise.

On or about May 11, 2015, the District purported to ratify its unlawful procurement, without admitting that there had been anything improper in the procurement process, as required by District Procurement Policy § 6-403.

After the parties had briefed and argued the Motions for Summary Judgment, the District suspended all construction activities on the Bees Creek Project, seemingly leaving nothing for the Court to decide. Nevertheless, the Circuit Court granted Summary Judgment to the District. The Taxpayers appealed.

ARGUMENT

I. THE DISTRICT VIOLATED ITS OWN PROCUREMENT POLICY.

The District violated its Procurement Policy in several ways.

A. The District Improperly Used the Request for Proposals Method.

The District's determination (Exhibit D) is insufficient to satisfy the requirements of the District Procurement Policy § 2-103 because it was issued after the District had issued the Request for Proposals, and after the District issued the notice of intent to award. It was also issued after Mr. Sloan requested a copy of all determinations related to the construction project. The purpose of a written determination is to enable the use of the selection of source method called a "request for proposals." Section 2-103 (1) states that when the school district determines in writing, . . . a contract may be awarded by competitive sealed proposals. In order to use the competitive sealed proposal method, the District must issue a request for proposals. The written determination must establish that "the use of competitive sealed bidding is either not practicable or not advantageous to the school district." *Id.* In other words it must establish that the better course of action for the District is the competitive sealed proposals method to select the source of procurement. Accordingly, the determination must **precede** the issuance of the request for proposals, in order to enable the use of this method. *See Sloan v. Greenville County*, 356 S.C. 531, 556, 590 S.E.2d 338, 351-52 (Ct. App. 2003).

The District attempted to justify the use of competitive sealed proposals long after the process had begun, nearly 3 months after the District had issued the Request for Proposals, and one month after the notice of intent to award letter, in violation of § 2-103 (1).

B. The District Violated Other Provisions of Its Procurement Policy.

1. The District neither evaluated nor ranked the proposals.

The District failed to evaluate or rank the proposals as required by the District Procurement Policy § 2-103(6).

Evaluation factors: The request for proposals shall state the evaluation factors in relative order of importance. Price may but need not be an initial evaluation factor. **Each** responsive and responsible offeror's **proposal must be evaluated**. The **proposals must then be ranked** in accordance with the results of such evaluation.

Id. (emphasis added). This failure to evaluate and rank the proposals is another violation of the District Procurement Policy.

2. The District did not “determine in writing” which proposal was “the most advantageous to the school district.”

Next, the District failed to “determine in writing” which proposal was the most advantageous, as required by District Procurement Policy § 2-103(7):

Award: The award must be made to the responsible offeror whose proposal is **determined in writing** to be the most advantageous to the school district, taking into consideration the evaluation factors set forth in the request for proposals. No other factors or criteria must be used in the evaluation. The contract file shall contain the basis on which the award is made.

Id. (emphasis added). A written determination requires an analysis and an articulation of the rationale that led to the selection of one of the proposers. It allows the subsequent evaluation of the decision-making process by the public, by other officials, and by the court. *See Sloan v. Greenville County*, 356 S.C. 531, 556, 590 S.E.2d 338, 351-52 (Ct. App. 2003). This failure to make a written determination is another violation of the District Procurement Policy.

3. The District did not keep a copy of the written determination in the contract file.

The District Procurement Policy requires, “The contract file shall contain the basis on which the award is made.” *Id.* § 2-103(7). The District did not issue a written determination, it did not show any rationale for the selection of one contractor over another, and finally, the contract file does **not** “contain the basis on which the award was made” all in violation of § 2-103(7).

In all these ways, the District violated its own Procurement Policy.

II. THE ALLEGED RATIFICATION WAS INEFFECTIVE.

After the District repeatedly violated its own Procurement Policy, the District attempted to ratify its unlawful procurement. The District Procurement Policy allows for a ratification in the event of an acknowledged a violation, but first there must be an acknowledged violation. The District Procurement Policy § 6-403 states the following: “If after an award it is **determined** that a solicitation or award of a contract **is in violation** of this policy, then . . . (a) the contract may be ratified and affirmed *Id.* (emphasis added).

The alleged ratification (Exhibit G), fails to comply with the District Procurement Policy ratification process and is unlawful and ineffective for several reasons. First, the District failed to determine or acknowledge that any violation occurred, and indeed, it repeatedly contended just the opposite. Throughout the alleged ratification, the District repeatedly stated that there had been no violation. Without acknowledging a violation, the alleged ratification fails to comply with the Policy. Without an acknowledged violation, there is **no need** for a ratification.

Second, the District Procurement Policy requires a separate, written “determination” to ratify “the solicitation or award of a contract.” The District did not make a separate, written “determination,” thereby failing to meet the requirements of the District Procurement Policy.

Third, the Resolution fails to determine that ratifying the unlawful solicitation and award would be “in the best interest of the school district.” Because the District failed to follow its own ratification process, the alleged ratification is ineffective, and the illegal procurement remains unratified.

Finally, in the Resolution, the Board attempts to usurp the judicial functions of this Court by interpreting the District Procurement Policy § 2-102(1) and § 4-101 in paragraph 6 of the Resolution. Furthermore, in paragraph 7 of the Resolution, the Board purports to interpret the District Procurement Policy § 2-103(7). Finally, in paragraph 8 of the Resolution, the Board purports to interpret the District Procurement Policy § 2-103(1). All these interpretations are the province of this Court, and not the Board. The Board’s interpretations are inaccurate, and they do not bind this Court.

III. THE BOARD SUSPENDED ALL ACTIONS ON THE CONTRACT, MAKING THE MATTER NOT RIPE FOR DECISION.

After the parties argued the Motions for Summary Judgment, the composition of the Board changed. The District suspended all actions on the Bees Creek contract. The Taxpayers notified the Circuit Court of the suspension, and suggested that because of the suspension, the case was not ripe for decision. Nevertheless, the Court entered an Order granting Summary Judgment to the District.

The Taxpayers respectfully suggest that the Circuit Court erred, in that there was no live controversy at the time of the ruling. Accordingly, this Court should reverse the Circuit Court both on this procedural rule, and on the merits.

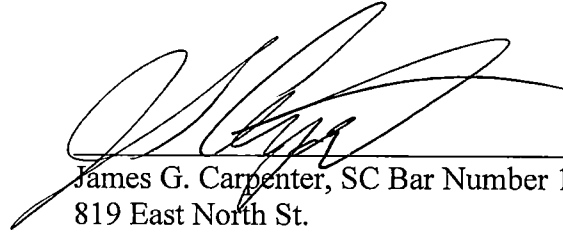
CONCLUSION

WHEREFORE, Appellants-Taxpayers pray this Court to reverse the Circuit Court's order granting the District's Motion for Summary Judgment, and to rule that the matter is not ripe for ruling, because the District Board terminated all actions on the Bees Creek contract, the subject of this lawsuit.

In the event the Court determines that the matter is ripe for ruling, this Court should:

- (1) declare that the District's belated determination (Exhibit D) is insufficient to satisfy the requirements of District Procurement Policy § 2-103;
- (2) declare that the District unlawfully failed to rank and evaluate the proposals;
- (3) declare that the District unlawfully failed to "determine in writing" which proposal was "the most advantageous to the school district," in violation of § 2-103(7);
- (4) Declare that the Resolution dated May 11, 2015 (Exhibit G) is ineffective to ratify the unlawful solicitation and award of the contract at issue;
- (5) enjoin the District from procuring design-build services through the contract (Exhibit E);
- (6) award the Appellants-Taxpayers attorneys' fees and costs pursuant to § 15-77-300; and
- (7) grant the Appellants-Taxpayers such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, PC

A handwritten signature in black ink, appearing to read 'J. Carpenter', is written over a horizontal line.

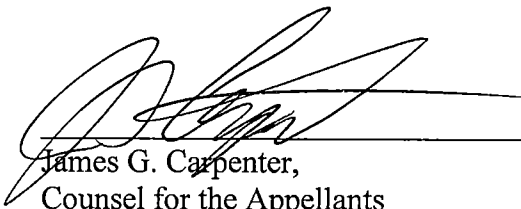
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September 17, 2016

PROOF OF SERVICE

The undersigned attorney for the Appellants certifies that he served a copy of the foregoing Appellants' Initial Reply Brief upon counsel for the Respondents by first class mail, postage prepaid, this September 17, 2016, addressed as follows:

Keith R. Powell, Esq.
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WHEN IT'S WORTH FIGHTING FOR

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September 17, 2016

Jenny Abbott Kitchings, Clerk
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SC Court of Appeals

Re: *South Carolina Public Interest Foundation, et al. v. Jasper County School District, et al.*
Appellate Case Number 2016-001148

Dear Ms. Kitchings:

We enclose an original and one copy of the Appellants' Initial Reply Brief. Please file stamp the extra copy and return it in the enclosed envelope. Thank you very much for your help.

If you need anything else, please telephone me.

Respectfully submitted,

James G. Carpenter

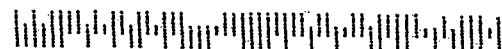
CC w/ encl. Keith R. Powell

JC
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