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SC Court of Appeals

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. 2016-00148

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

Appellants,

V.

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,

Respondents.

RESPONDENTS' FINAL BRIEF

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Statutes and Rules

Cases

II. Statement of Issues on Appeal

1. The court should affirm the order on appeal on any basis appearing in the record pursuant to SCACR 220(c).

2 Whether the Respondents conducted a valid procurement of a design-build contract.

3. Whether, even if the Respondents' procurement contained some error or omission, the Respondents' board of trustees adopted a valid resolution of ratification and/or exemption of the contract at issue.

4. Whether this declaratory judgment action is ripe for disposition.

III. Statement of the Case

A. Matters Pertaining to the Briefs

"If a respondent does not include his own statement of the case, he shall be bound by the matters stated or alleged in appellant's statement of the case." SCACR 208(B)(2). Therefore:

1. Respondents object to the Appellants' "Statement of the Case" and its "Statement of the Facts" insofar as they deviate from the requirement that an appellant's "statement shall not contain contested matters." SCACR 208(C). Respondents object to the conclusory statements therein.

2. Respondents also object to the shorthand "Taxpayers" as a descriptor of the Appellants, insofar as the status of both Appellant South Carolina Public Interest Foundation and Appellant Edward D. Sloan as "taxpayers" of the Jasper County School District is denied in the Answer and unresolved. It must be understood that the Appellants' choice of "Taxpayers" as a convenient abbreviation does not amount to or imply a judicial finding of

taxpayer status as the law of the case.[1]

Finally, it is important to note that although this is a summary judgment appeal, the trial court had the relevant documentary record before it within the scope of SCRCP 56 as the case pertains to the claims in the complaint. Appellants attached all the documents at issue in this appeal to the several versions of their complaints.[2] The documents incorporated into the complaint are not contested - only their legal effect is the subject of the appeal. The trial court noted that the facts before it were drawn from incorporations into the *plaintiffs'* pleading, and that the court was not considering the potentially disputed factual issues raised by the defendants' equitable affirmative defenses, upon which no factfinder has ruled. (Order of November 18, 2015, at n.1) (R.1).

B. Outline of the Case

The Jasper County School District conducted a "design-build" construction services contract procurement during the summer and fall of 2014, for the renovation and conversion of a former school facility the District owns, located on Bees Creek Road in its district (the "Bees Creek School"). The Board of Trustees ("Board") of the District participated throughout the process of evaluating the proposals, and eventually the Board itself determined the proposal most advantageous to itself, issued an intent to award ("ITA"), and finally approved a contract

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[1] Obviously one plaintiff is sufficient to proceed in this appeal of a summary judgment order adverse to all the plaintiffs equally, but insofar as the plaintiffs are demanding attorneys fees on some as-yet undisclosed basis, the standing of each plaintiff and the potential differential effects of the equitable defenses upon each plaintiff remain relevant should there be subsequent proceedings in this case.

[2] The exceptions being the Appellants' references to the post-hearing Board elections and Board actions referenced in their two e-mails to Judge Russo on October 21, 2015 and November 6, 2015. These will be addressed *infra* in the Argument section.

after successful post-ITA contract negotiations. The Board's approval and the District's execution of the contract occurred on November 10, 2014.

Subsequent to execution of the contract, the service of Appellants' first complaint was effected by an Acceptance of Service dated November 21, 2014. (R. 23). Both a Motion to Dismiss by the defendants and a Motion for Temporary, Preliminary and Permanent Injunctive Relief and Summary Judgment by the plaintiffs were denied by the trial court after separate motion hearings.

At its Board meeting of May 11, 2015, the Board adopted its May 11, 2015 Resolution, quoted at pp. 5--8 of the trial court's November 18, 2015 Order on appeal. (R.5-8).[3] The Respondents moved for summary judgment on June 15, 2015. (R.153). This motion was heard August 4, 2015. (R.1). The Order granting summary judgment on that motion was entered November 18, 2015. (R.1-8). The Appellants' November 24, 2015 motion to alter or amend was denied by Order dated April 27, 2016. (R.9-10). This appeal followed.

Through all the foregoing, the fundamental issues presented for disposition have remained the same:

a. The Respondents contend they conducted a valid procurement of a design-build contract for work on the Bees Creek School facility. Appellants state this as, "The Taxpayers contend this procurement was unlawful." (App. Brief at 3.)

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[3] The Board Resolution of May 11, 2015, should not be confused with Appellant's characterization of Board action of October 12, 2015 as the "Board's Resolution." (App. Brief at 3.) The October 12, 2015 board action will be addressed in the Argument section.

b. The Respondents contend that, even if the Respondents' procurement contained some procedural error or omission, the Respondents' board of trustees adopted a valid resolution of ratification and/or exemption of the contract at issue. Appellants state this as, "The Taxpayers contend this attempted ratification was unlawful and insufficient." (App. Brief at 3.)

IV. Argument

A. Respondents request the court to affirm for any ground appearing on the record as provided by Rule 220(c).

Affirmance on any ground appearing in the record is requested. In addition, "[a] respondent 'may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.'" *Sims v. Amisub of S. Carolina, Inc.*, 408 S.C. 202, 214–15, 758 S.E.2d 187, 194 (Ct. App. 2014), *reh'g denied* (May 19, 2014), *cert. granted* (Nov. 19, 2014),, *aff'd*, 414 S.C. 109, 777 S.E.2d 379 (2015), *reh'g denied* (Oct. 22, 2015) (*quoting I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000)).

In this case, it is important to note the "hands on" involvement of the actual governing body in the actual procurement activity being challenged. These are not decisions being handled, as they can be in larger governments, solely by administrative employees tucked away in a secured building on a weekday morning. This aspect of direct decision-making and control is touched upon in the November 18, 2015 Order on appeal, and shows itself in the numerous Board minutes used by the Appellants to make their case. (Sequence of events listed in Third Affirmative Defense to Second Supplemental Complaint (R.170-171)) Thus, it bears keeping

in mind that the major milestone events of this procurement occurred before the Board itself, and at public meetings under the FOIA, S.C. Code § 30-40-10 *et seq*. Perhaps the best illustration of this is that, as Appellants point out, an election occurred and the Board paused the work in October of 2015.(R.198)[4]

"In general, courts will not disturb matters within the school board's discretion unless there is clear evidence of corruption, bad faith, or a clear abuse of power. … Furthermore, an appellate court will not substitute its judgment for that of the school board's in view of the powers, functions, and discretion that must necessarily be vested in such boards if they are to execute the duties imposed upon them." *Davis v. Greenwood School Dist. 50*, 365 S.C. 629, 635, 620 S.E.2d 65, 68 (2005). "The court has recognized that judicial review of such decisions must be limited to allow educational authorities to exercise the discretion necessary to carry out the duties imposed upon them." *Palms v. School Dist. of Greenville County*, 408 S.C. 576, 578-579, 758 S.E.2d 919, 920 (Ct. App. 2014) (internal quotations and citations omitted), *rehearing denied* (July 10, 2014), *certiorari denied* (May 7, 2015).

In addition to the general duties and responsibilities of all school boards to "[p]rovide suitable schoolhouses in its district and make them comfortable," S.C. Code § 59-19-90(1), and "[t]ake care of, manage and control the school property of the district," S.C. Code Ann. § 59-19-90(5), the Board is specially charged with the "powers and duties relative to the public schools of the district: … plan and construct new school facilities, and maintain and repair

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[4] These events are not properly in the record, but if considered they simply prove the point of *Glasscock*, *supra*, that the governing legislative body is *politically* responsible to its constituents for its decisions. Note that, in 2015, Federal District Judge Gergel created a court-ordered single-member seats redistricting plan for the Board and ordered all nine Board seats to be re-elected at a special election in September of 2015.

existing facilities[.]" S.C. Act No. 288 of 1989. *See also, Redmond v. Lexington Cty. Sch. Dist. No. Four,* 314 S.C. 431, 435-436, 445 S.E.2d 441,444 (1994).

Hence there are two bodies of cases that both instruct the courts to defer to the discretion and powers of school boards in cases such as this one: the precedents above concerning the discretion and powers the school boards need to carry out their prescribed mission, *and* the more narrowly focused "procurement cases" (e.g, *Glasscock Co., v. Sumter County*, 316 S.C. 483, 604 S.E.2d 718 (2004) *and Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (2003) more expressly relied upon in the November 18, 2015 Order on appeal.

Finally, Respondents suggest that there is enough chronology provided by the Appellants' own materials to support *laches*. This is included as an affirmative defense in the Answer (R.170) but the Respondents advised the Circuit Court that they were not addressing it in *this* summary judgment motion, because the Respondents did not want the trial in any way confused or led astray from the uncontested documentary record on the merits of the plaintiffs' claims. "The equitable defense of laches is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. In order to establish laches as a defense, a party must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the party asserting the defense of laches." *State v. Policao*, 402 S.C. 547, 556, 741 S.E.2d 774, 778 (Ct. App. 2013) (internal quotations and citations omitted).

JCSD's South Carolina Business Opportunities ("SCBO") advertisement of the design-build solicitation ran in the June 2, 2014 SCBO edition. (R.145). JCSD issued its

"short list" notification on July 14, 2014, for this design-build solicitation. (R.63; R.141; R.145). The two "short list" design-build proposers gave presentations to the Board on August 28, 2014. (R.92; R.145.) JCSD published a document entitled "An Introduction to the Bees Creek Project" on its webpage on September 3, 2104, referencing the solicitation. (R.145.) The two short-listed design-build proposers' electronic presentations were posted on the JCSD web page on September 8, 2014. (R.145). Plaintiff Sloan sent a FOIA request dated September 24, 2014, inquiring about the contract "to provide design/build services for the Bees Creek Project." (R.37). Advertised and well-attending public meetings were held on October 9, 2014, for public presentations and questions about the project and the design-build delivery approach. (R.144-145). The Written Determination was sent to Mr. Sloan by the JCSD on October 10, 2014. (R.68; R89; R.149). Sloan made a second FOIA request on October 15, 2014, which was answered on October 22, 2014 and indicated that contract had yet been executed for the design-build work (R.37.) The Board approved executing the contract with the design-builder upon the minutes of its November 10, 2104, public meeting, and the contract was executed on November 10, 2104 (R.157; R.71-79.) The Plaintiffs' original summons and complaint was filed in the court on October 29, 2014, and it sought to prevent the procurement from proceeding. (R.17-18). However it was not served upon the Defendants until after the contract was executed. The Defendants' Acceptance of Service is dated November 21, 2014. (R.23.)

Appellants knew their rights in the subject matters raised by the Amended and Supplemental Complaint and did not timely assert them. Appellants' delay in asserting their claims caused the defendants to incur expenses and otherwise detrimentally change their

position. Equity should refuse to enforce the asserted rights of the plaintiffs in this case on account of their *laches* as an additional sustaining grounds.

B. Whether the Respondents conducted a valid procurement of a design-build contract.

S.C. Code Ann. § 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, supra.*. Procurement decisions are "a function of [the governing body's] discretion, the exercise of which they are accountable for as publicly elected officials." *Id.* It is important to remember that the Board itself made the decision to proceed with design-build delivery, and the Board made the decision to award the contract to M.B. Kahn. These are not administration decisions.

The Board and JCSD did not violate its policy in this procurement. In South Carolina, the State Department of Education controls all 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." (R.112.) Design-Build is one of these recognized "procurement methods." S.C. Code Ann.§ 11-35-3005.

The Design-Build delivery method has been "widely sanctioned for use in public construction." 1 Bruner & O'Connor Construction Law § 2:171. "[R]ecent legislation at both the federal and state levels, together with court decisions, have encouraged the use of design-build on public work." *Id.*, § 2:21. "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). "Contracts for design-build must be procured by competitive sealed proposals …." S.C. Code Ann. § 11-35-3015(5).

The JCSD Procurement Code has an article that pertains specifically to "Procurement of Construction, Architect-Engineer and Land Surveying Services." (R.56). This is Article 4, which is separate from the Article 2 (R.45) items cited by the Complaint. Section 4-101 of the JCSD Code provides, "The school district will utilize the South Carolina School Facilities Planning and Construction Guide prepared by the South Carolina Department of Education for new construction, additions, or renovations used in connection with public education." Section 4-101 also 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." (emphasis added).

Section 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." Section 4-101, pertaining specifically to construction, is tied directly into the Planning and Construction Guide, which permits any delivery method permitted to the State (including design-build). Section 4-101 would be rendered meaningless by the Complaint's position that § 2-102 supersedes § 4-101. Such an interpretation eliminates the legislative discretion noted in *Glasscock, supra.*

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." (emphasis added). The written determination precedes the *contract* under this clause, but the clause does not require the written determination to precede the *solicitation*. Even the Appellants' Original Complaint dated October 29, 2014, says, "this procurement is prospective." (R.22.)

The Written Determination explains why the JCSD determined that competitive sealed bidding was not advantageous. 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.* Pursuant to Section 4-101, the JCSD did issue a "written statement setting forth facts which led to the selection of" design-build. This writing satisfies the code requirements and the public information concerns noted in *Sloan v. Greenville County*. It is attached to the Complaint.

Note that this requirement is stated in the past tense: "which *led* to the selection." There is nothing in the JCSD Code which requires the JCSD to issue this written statement *in advance of all procurement* activity. Procurements are not "set in stone" and inevitable once begun. The government can always cancel a solicitation, even after award and prior to performance. The government must have the flexibility to see whether an acceptable proposal can be received – and even then the government is not required to accept it. It is the contract, not the shopping process, that affects taxpayers. "In other words, if County Council and the public can look to the written determination and comprehend the County'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*. The Written

Determination thus satisfied both the pre-*construction* requirement of § 4-101 and the pre-*contract* requirement of § 2-103.

The Appellants cannot read the Procurement Code hyper-literally and out of context when it comes to Section 2-102(1), while simultaneously disregarding the text of Section 2-103(1) that a written determination need only precede the "contract" - not the solicitation. (App. Brief at 7). Further, the Board itself heard the final presentations, of which there were only two. (R.144.) When the Board entered its conclusion about the most suitable proposal on its minutes, the result was both written and, given that there was only one "winner" and only one "loser" (subject to an agreeable contract being negotiated), the rank order of proposals was clearly established. Complaint Exhibits G (R.145) and F (Letter to Participants re Intent to Award) (R.92) also confirm in writing the Board's deliberations and decision.

In sum, the Board has discretion, and has enshrined that discretion in § 4-101 of its Procurement Code, to authorize JCSD to utilize design-build construction. The JCSD issued a written statement explaining, in depth, why design-build would be used that is more than sufficient for board members and the public to understand why design-build was most suitable to the Board's objectives.

C. Whether, even if the Respondents' procurement contained some error or omission, the Respondents' board of trustees adopted a valid resolution of ratification and/or exemption of the contract at issue.

After the Board approved the award and JCSD and the Contractor executed the contract, the Plaintiffs commenced this action seeking to set aside that contract. This case creates a "cloud" over the contract - work is not proceeding, but neither party to the contract knows what its rights and obligations may be in the event the contract was invalid *ab initio*, as claimed. Therefore, while this case was pending, the Board of Trustees of the JCSD adopted a Resolution on May 11, 2015. (R.5-8; R.161-162) (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.

In reaction to the Board Resolution, Appellants forget that they are not "protestants" under the Procurement Code. Had a *protest* occurred, then Procurement Code 6-403 could have been relevant.

"Ratification, as it relates to the law of agency, means the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent." *Lincoln v. Aetna Cas. & Sur. Co.*, 300 S.C. 188, 191, 386 S.E.2d 801, 803 (Ct.App.1989). Once a ratification has occurred, it is equivalent to original, prior, or previous authority. *See, Certus Bank, N.A. v. Bennett*, No. 2014-001248, 2016 WL 757501, at *3 (S.C. Ct. App. Feb. 24, 2016). "While it has been said that ratification cannot be accurately defined, generically the word always expresses the same idea; and, it is variously defined as the act of giving sanction and validity to something done by another; the adoption by a person as binding upon himself of an act done in such relations that he may claim it as done for his benefit, although done under such circumstances as would not bind him but for his subsequent assent." *First Carolinas Joint Stock Land Bank v. Stuyvesant Ins. Co.*, 168 S.C. 37, 166 S.E. 883, 886 (1932) (*quoting* 886 Corpus Juris, vol. 52, p. 1144).

Confirming, adopting and/or ratifying prior acts, as a form of legislative action, is common. The practice does not necessarily connote a finding that the prior public act was in some manner unauthorized as a matter of law. The subsequent act often serves the function, present in the Board Resolution, of removing doubts or clouds over the prior act that (as in the case of the Appellants' suit) could thwart the functioning of government in carrying out its mission. For example, the General Assembly adopted the following: "All conveyances or transfers made prior to February 25, 1954 to trustees even though not elected as formerly provided in this article are hereby validated, ratified and confirmed according to the terms and conditions of such deeds of conveyance." S.C. Code Ann. § 59-23-320; *see also, e.g.*, "The United States approves, ratifies, and confirms the Settlement Agreement," 25 U.S.C.A. § 1750b (West); "the legislature hereby signifies in advance its approval and ratification of the compact when the compact has been enacted into law by any three of the compact states, including South Carolina, and the consent of Congress to the interstate compact has been obtained," S.C. Code Ann. § 46-50-20; "Any and all actions taken by a commissioner of public works whose term of office expired prior to the adoption of the ordinance provided for by § 5-15-160 are ratified, validated and confirmed," S.C. Code Ann. § 5-15-170; S.C. Code Ann. § 62-5-409 (Protective arrangements and single transactions authorized); S.C. App. Ct. R. RULE 407 RPC 5.3 ("the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved").

Moreover, the Appellants simply do not address the powers of the legislative governing body - acting in that capacity and not merely as a procurement office - to take the steps in parts 3 and 4 of the Board Resolution. *See, Glassock, supra.*

Sections 6, 7 and 8 are merely the Board interpreting its own policies - an interpretation which is not a *post hoc* invention, but instead is clearly evidenced in Respondents' practices as

they carried out this procurement. *C.f., Sloan v. S. Carolina Bd. of Physical Therapy Examiners*, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006) (construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons); *S. Carolina Dep't of Revenue v. Anonymous Co. A*, 401 S.C. 513, 516, 678 S.E.2d 255, 257 (2009) (same); *Trident Med. Ctr. v. S. Carolina Dep't of Health & Envtl. Control*, 412 S.C. 341, 354 n. 10, 772 S.E.2d 177, 184 n.10 (Ct. App. 2015) (collecting similar cases), *cert. denied* (Dec. 18, 2015).

The Circuit Court properly ruled that the Board Resolution was "effective to cement the validity of the contract." (R.8).

D. Whether this declaratory judgment action is ripe for disposition.

Appellants asked to alter or amend the judgment, but not by showing errors in the judgment. Instead they claim that the Board had "suspended" the contract's use, and that this caused the case to be unripe. This argument is without merit.

First and foremost, obviously this Brief is evidence that the Board desires to conclude this case and have its successful judgment affirmed. Second, nothing that happened at or after the election bears upon the merits of the case before the court. Third, the Board is party to a contract whose validity is unknown. The Board Resolution contains a Section 5 (R.7) which reflects the uncertainty of obligations on account of this case.

"A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute. In determining a ripeness issue under the 'case or controversy' requirement of Article III of the United States Constitution, federal courts use a two-factor test: (1) the fitness

of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration." *Waters v. S. Carolina Land Res. Conservation Comm'n*, 321 S.C. 219, 227–28, 467 S.E.2d 913, 917–18 (1996) (internal quotations and citations omitted). "The Declaratory Judgments Act is a proper vehicle in which to bring a controversy before the court when there is an existing controversy or at least the ripening seeds of a controversy. The basic purpose of the Act is to provide for declaratory judgments without awaiting a breach of existing rights. The Act should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships, without awaiting a violation of the rights or a disturbance of the relationship." *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423–24, 593 S.E.2d 462, 466 (2004).

The Board might or might not proceed with the project, but it is already a party to a contract that contains provisions for payment in case of termination. (R.71-79). The Board could also be exposed to a breach action by the contractor. Even if the Appellants succeed in reversing the summary judgment ruling, protracting the case, and prevailing, a finding that the contract is *invalid* would leave unresolved the issue of the legallity of *quantum meruit* remedies. Would the same plaintiffs sue again to stop a *quantum meruit* payment? The Board does not know.

One key purpose of the Board Resolution, as stated therein (R.161), is to deal with current and deteriorating conditions at the administrative offices and the Bees Creek School site. While the Board's finances are encumbered by both the contract and the costs and contingent liabilities of this case, the Board is impaired in addressing those needs, and so impaired in its

statutory duties. Settling with the contractor may be the best option at this point, given a myriad of factors that go beyond the mere change of Board membership, but in order to do that this case desperately needs to end. The case is ripe for the requested declaratory judgment.

V. Conclusion

For the foregoing reasons, (1) the procurement is valid and (2) the Board Resolution is valid. The case is ripe and the Circuit Court should be affirmed in all respects.

Respectfully submitted,
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CERTIFICATION: THIS FINAL BRIEF COMPLIES WITH SCACR 211(B).

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