

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )  
 )  
RICHARDSON CONSTR. CO. INC., )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
RICHLAND COUNTY, AND )  
 )  
MCCLAM & ASSOCIATES, INC., )  
 )  
Defendants. )

IN THE COURT OF COMMON PLEAS

Docket No.: 2016-CP-40-7353

**ORDER DENYING  
PLAINTIFF'S  
REQUEST FOR  
TEMPORARY  
RESTRAINING  
ORDER**

**RECEIVED**

JAN 23 2017

SC Court of Appeals

2016 DEC 22 PM 3:55  
JEANNETTE W. MCBRIDE  
C.C.P. & G.S.  
RICHLAND COUNTY  
FILED

**INTRODUCTION**

This matter came before this Court for a hearing on December 16, 2016 at the request for a Temporary Restraining Order by Plaintiff Richardson Construction Company, Inc. Prior to the hearing, Plaintiff and Defendant Richland County reached an agreement regarding the Temporary Restraining Order, which was memorialized in an Order issued by the Honorable Jean H. Toal, part of which states the parties were to set a hearing on Plaintiff's request for a Temporary Restraining Order for the week of December 19, 2016. Plaintiff's request for a Temporary Restraining Order was heard by the Honorable DeAndrea Gist Benjamin on December 21, 2016.

**FACTS**

The Plaintiff seeks a temporary injunction prohibiting Defendants' from executing a \$24,000,000 road construction contract with the responsive bidder, selected by Richland County Council for the extension of Shop Road. The Plaintiff was one of three bidders to Richland County on Phase I of the Shop Road Extension construction project, and the other two bidders were C.R. Jackson, Inc. and McClam & Associates, Inc. (Complaint, ¶6 & 11). The Invitation for Bids for the Shop Road Project contained, in pertinent part, the following instructions:

- “The [Small and Local Business Enterprise "SLBE] goal for this Project is 4.37%. Accordingly, the Contractor will complete the SLBE Participation Sheet included in this document and accompany it with his Application for Payment Each month.” (p. 6).
- “INSTRUCTIONS TO BIDDERS. ... 7. CORRECTION OF ERRORS ON THE BID FORM: .... No bid shall be altered or amended after specified time for opening.” (p. 8)
- “SMALL LOCAL BUSINESS ENTERPRISE (SLBE) PARTICIPATION SHEET...BIDDER is required to complete the SLBE Identification Forms and submit it with the Proposal. Any SLBE company identified must be certified in accordance with the certification program of the Richland County Government.” (Affidavit of Christy Swofford, ¶7, Ex. A.)

In the Shop Road Project bid package, Richland County’s goal for bidder was that that Disadvantaged Business Enterprise (“DBE”) participation be Seven (7%) Percent of the amount of the bid and SLBE participation be Four (4.37%) and Three Seventh Percent. (Complaint, ¶14). The County determined that C.R. Jackson, Inc.’s bid was non-responsive. (Complaint, ¶41, Exhibit 3). The Plaintiff in its bid “inadvertently” submitted as its SLBE subcontractor LAD, Inc., which was not a certified SLBE contractor. (Complaint, ¶¶23-25). Plaintiff admits it inadvertently submitted an earlier internal draft of the SLBE with LAD, Inc.'s name and address for a different contractor, Herndon. (Complaint, ¶41, Page 2 of Exhibit 1 [10/31/16 Letter] to Exhibit 4). The Plaintiff in its bid, swore under oath that LAD, Inc. was its SLBE. (Affidavit of Christy Swofford, ¶4, Ex. B.). Thus, the Plaintiff’s bid was deemed non-responsive by the County because it failed to list a certified SLBE at bid opening. (Complaint, ¶41, Exhibit 3); (Affidavit of Christy Swofford, ¶¶8-12.) Plaintiff appeared before the Richland County Council at its meeting on December 6, 2016 and argued the merits of awarding the contract to Plaintiff. (Complaint, ¶47). Richland County Council at its December 6,

2016 meeting voted 9-2 to award the Shop Road Project to co-defendant McClam & Associates, Inc. (Complaint, ¶148). The McClam bid for the Shop Road Project accepted by the County was for \$24,539,282.95. (Complaint, ¶11.) On December 6, 2016 Plaintiff filed a Procurement Protest with the Richland County Procurement Review Panel. On December 15, 2016 Plaintiff filed a Verified Complaint for Temporary Restraining Order in Richland County. On December 16, 2016 Plaintiff filed a Procurement Protest with the Richland County Procurement Director.

### DISCUSSION

Plaintiff requests the Court to issue a Temporary Injunction to stay execution of the bid contract between Defendants'. A preliminary injunction is a measure that is taken to preserve the status to prevent irreparable harm to the party requesting it. *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973). An applicant for a preliminary injunction must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation. *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct.App.2002). A preliminary injunction may only be issued upon a showing by the moving party that "[1] without such relief it will suffer irreparable harm, [2] that it has a likelihood of success on the merits, and [3] that there is no adequate remedy at law." *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586-87, 694 S.E.2d 15, 17 (2010).


However, when a party attempts to enjoin the acts of a governmental entity or its agency, as is the case here, the public interest is an important factor to be considered. "For the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases." *Hecht Co. v. Bowles*, 321 U.S. 321, 331, 64 S. Ct. 587, 592, 88 L.Ed. 754 (1944). Even if other factors weigh heavily in favor of the plaintiff, public interest may control.

“Since the public interest is involved, a showing of irreparable injury does not necessarily entitle the [plaintiff] to relief.” *National Dairy Products Corp. v. Greene*, 210 F. Supp. 798, 800 (D. Md. 1962). *Accord*, 43A C.J.S. *Injunctions*, § 114. “Where an important public interest would be prejudiced, the reasons for denying the injunction may be compelling.” *City of Harrisonville, Mo. v. W. S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 338, 53 S. Ct. 602, 603-4, 77 L.Ed. 1208 (1933). South Carolina Courts set forth the following rule: “[I]t is a serious matter to enjoin the construction of great public works without a strong showing by the complainant, establishing, *prima facie*, a clear right to such injunction; and the burden is upon the plaintiff to make such a showing.” *Moss v. South Carolina State Highway Department*, 223 S.C. 282, 75 S.E.2d 462, 464 (1953).

**I. Demonstrate Likelihood of Success on the Merits.**

Plaintiff argues that its likelihood of success on the merits hinges on the interpretation of the word "material," as listed by the Richland County Code Section 2-608(e). According to this provision, a contract shall be awarded to the “lowest responsive and responsible vendor whose bid complies materially with the specifications publicized.” Plaintiff argues that by correcting only the name of the subcontractor, LAR, Inc., this correction had no effect on the amount of Plaintiff's bid or its performance of the contract. Plaintiff argues that because it was the lowest bidder, its corrections do not prejudice the other bidders and are to the advantage of Richland County. Further, Plaintiff argues exact compliance to the bid is not required.

Defendants' argue that Plaintiff's claim will likely not succeed on the merits. Defendants' contend that there is no dispute that Plaintiff's bid incorrectly listed, LAR, Inc., a non-SLBE certified subcontractor as its designated SLBE subcontractor. The Invitation for Bids required a listing of the SLBE-certified subcontractor in the bid as does Richland County Code Section 2-644(a)(4)c. Defendants' argue that the conclusion of the County that the Plaintiff's bid was non-responsive, is

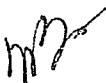


consistent with well-established case law. *See Carol Bolander & Sons Co. v. Minneapolis*, 438 N.W.2d 735, 738 (Minn. Ct. App. 1989) ("Although arguably not a matter affecting the factors determining the amount of the bid, the omission of listing a [minority owned enterprise] is taken out of the minor defect category by the plans and specifications which deem the failure to comply with [minority owned enterprise] participation requirements as grounds for nonresponsiveness.").

**a. Plaintiff Fails to Demonstrate Likelihood of Success on the Merits**

First, this Court emphasizes that Plaintiff admits that it submitted a non-responsive bid by submitting a bid that identified LAD, Inc. as its certified SLBE vendor. The Richland County Code states in relevant part: "[a] prospective bidder on a county contract shall submit at the time of bid SLBE - Form S providing the name of the SLBE or emerging SLBE subcontractor or subcontractors." *See Richland County Code* Section 2-644(a)(4)(c). The Code allows a waiver of this requirement, *only if* the bidder seeks a waiver at the time of the bid. *See id.* at 2-644(a)(4)(d). Plaintiff has not submitted any evidence of its request for a waiver at the time it submitted its bid on July 20, 2016. Rather, Defendants' Affidavit of Christy Swofford, the Acting Richland County Procurement Director, states, "[a]t bid opening, Plaintiff identified LAD, Inc. as its certified SLBE vendor. Five days after bid opening, Plaintiff stated that its SLBE submission was in error and submitted documentation for a Certified SLBE vendor." *See Affidavit of Christy Swofford* ¶8-9.

Further, this Court finds that the determination of the Richland County Procurement Director not to waive Plaintiff's bid error as rationally based. A governmental agency holds the right to "determine whether a variance from bid specifications is material or whether to waive it as a mere irregularity, and that determination must be upheld by the courts if supported by any rational basis." *Varsity Transit, Inc. v. Bd. of Educ.*, 130 A.D.2d 581, 582, 515 N.Y.S.2d 520, 521 (App. Div. 1987). *See also Acme of Precision Surgical Co., Inc. v. Weinberger*, 580 F. Supp. 490 (E.D. Pa. 1984)

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(If a court determines that an agency procurement decision was rational, inquiry is at an end and preliminary injunction will be rejected.); *And see, Sloan v. Greenville Cty.*, 356 S.C. 531, 555–56, 590 S.E.2d 338, 351 (Ct. App. 2003) (reviewing the discretionary decision 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, unreasonable, in obvious abuse of discretion, or in excess of lawfully delegated power.”

In this case, the acting Procurement Director, determined that Plaintiff's error was not non-material. In her Affidavit, Ms. Swofford states "the acting Procurement Director, . . . pursuant to the Richland County Code of Ordinances, . . . ha[s] the discretion to waive non-material errors in a bid submission; however . . . the failure to meet an important bid requirement and making a false statement under oath . . . [is] a material failure, and any waiver would be contrary to the ordinance of Richland County, the spirit of those ordinances, and prejudicial to the other bidders." In its bid submitted on July 20, 2016, Plaintiff listed LAD, Inc. as its SLBE certified vendor, but LAD, Inc. is not a Certified SLBE vendor. The determination that such an error does not constitute a non-material error, is reasonable, in light of the SLBE requirements as stated under the Shop Road Project Invitation to Bid, where a prospective bidder is required to complete SLBE Identification Forms with the bid proposal, where any SLBE company identified *must be certified* by Richland County Government. Further, Richland County Code states that a prospective bidder on a county contract shall provide the name of the SLBE contractor at the time of bidding. *See Richland County Code Section 2-644(a)(4)(c).*

## II. Adequate Remedy At Law

Plaintiff argues there is no adequate remedy at law in this bid dispute. Plaintiff argues that the Richland County Procurement Review Panel may choose to award relief to Plaintiff. One

measure of relief may consist of terminating the contract between the Defendants, and awarding a contract between Defendant Richland County and Plaintiff. Plaintiff's primary support for the contention that there is no adequate remedy at law is that, if the contract is executed between Defendants, then it will become increasingly difficult for Defendant, Richland County to terminate the contract with Defendant McClam & Associates, Inc., and award the contract to Plaintiff. Plaintiff concludes that a failure to stay the execution of the contract between the Defendants results in a divestment of the Procurement Review Panel's ability to order a re-bid on the project, or to award a reimbursement of bid preparation costs.

Defendants' argue that there is an adequate remedy at law for Plaintiffs. Defendants assert that if Plaintiff prevails on the merits of its protest with the Procurement Review Panel, injunctive relief is not appropriate. At the TRO hearing on December 21, 2016, Attorney Smith summarized the procedure for submitting a Bid Protest to the Richland County Procurement Review Panel. According to Mr. Smith a protestant must submit a protest to the Director of the Procurement office, and if no settlement is reached by the Director of the Procurement office, the aggrieved protestant may file a written appeal to the Richland County Procurement Review Panel.

**a. Plaintiff Has an Adequate Remedy at Law**

First, there is an adequate remedy at law for the Plaintiff in this dispute pursuant to Richland County Code Article X, Section 2-621.1 (a)-(f). The Code grants the Procurement Director the authority to review procurement protests prior to the commencement of formal review, and additionally, "the director of the office of procurement or designated representative may administratively settle the protest of an aggrieved bidder. See Richland County Code Article X, Section 2-621.1 (b). In this dispute, the Plaintiff filed a Procurement Protest with the Richland Count Review Panel on December 6, 2016 appealing the determination of Richland County to

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recommend awarding the bid contract to Defendant McClam & Associates, Inc. Plaintiff initially sent its procurement protest letter to the Procurement Review Panel, but not to the Procurement Director. On December 16, 2016 Plaintiff filed a Protest to the Procurement Director. To present date, Plaintiff submitted no evidence to demonstrate that the Procurement Director has released a determination of its protest.

After the Procurement Director issues a finding on the protestant's protest, within ten days following its issuance, the protestant shall file a written appeal to the Richland County Procurement Review panel, setting forth the grounds for appeal. *See Richland County Code Article X, Section 2-621.1(e)*. If the Procurement Review Panel finds that the appeal is meritorious, there are clear remedies for the aggrieved party. No more than "thirty days from receipt of an appeal, the review panel shall consider and determine the matter and shall file its written decision . . . Upon a finding that the appeal is meritorious, the review panel may direct an award of contract to the protestant, may require that a contract be re-bid, and may award reimbursement to the protestant of reasonable bid preparation costs." *See Richland County Code Article X, Section 2-621.1(f)*.

It is well settled that where under a government procurement system a party has the statutory remedy of being reimbursed its bid preparation costs, that party has an adequate remedy at law so that there can be no injunction. Fairplain Development Co. v. Freeman, 512 F. Supp. 201, 203-4 (N.D. Ill. 1981). This rule applies under the South Carolina Procurement Review Panel, in In Re: Protest by Gregory Electric Company, Inc., Case No. 1989-17, 1990 WL 10008052 (S.C. Procure. Rev. Panel Jan. 26, 1990) (denied injunctive relief under the same reasoning where only bid preparation costs were the remedy: "It has been repeatedly held, however, that injunctive relief is not the appropriate remedy for a disappointed bidder when public interest considerations are present and when a claim for damages is available." The Panel also stated:

It has been repeatedly held, however, that injunctive relief is not the appropriate remedy for a disappointed bidder when public interest considerations are present and when a claim for damages is available. This is true even though the bidder is limited to recovery of bid preparation costs. ...

In this case Gregory does have an adequate remedy at law. The Procurement Code in § 11-35-4210 provides that a bidder who claims it should have been awarded a contract but is not may be awarded a "reasonable reimbursement amount, including reimbursement of bid preparation costs, and ... such other and further relief as justice dictates . . . ."<sup>1</sup>

*Id.* Thus, the arbitral authority in South Carolina that deals most often with procurement disputes follows this well-established law. The procedural process outlined in the Code demonstrates that there is an adequate remedy for Plaintiff to receive reasonable reimbursement for bid costs if the Procurement Review Board were to find that Plaintiffs' appeal is meritorious. Consistent with current case law a temporary injunction is not an appropriate action when a party has the statutory right of being reimbursed bid costs and the public interest is at play.

### III. Enjoining a Public Entity

Plaintiff has not met the heightened burden for Plaintiff's attempting to enjoin a public entity. In such cases, the Plaintiff must establish a *prima facie*, case, a clear right to such injunction." *Moss v. South Carolina State Highway Department*, 223 S.C. 282, 75 S.E.2d 462, 464 (1953). As discussed by the Court in Sections I and II in this Order, Plaintiff has not established a likelihood of success on the merits, or demonstrated no adequate remedy at law, thus Plaintiff cannot establish a *prima facie* case for the Court to issue a Temporary Restraining Order. Further, Defendants' present a compelling argument that a loss of the bid contract would result in harm to the public of Richland County with a total economic loss of \$785,000,000. Any delay on the bid contract could affect the timely completion of the bid project, which could lead to a in a total loss of the project. Considering the consequences


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<sup>1</sup> This section has been renumbered as S.C. Code § 11-35-4310(4).

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of any delay to beginning completion of the project presents a strong disfavor of issuing a Temporary Restraining Order to stay the execution of the contract between Defendants.

Pursuant to the reasons set forth in this Order, Plaintiff's request for Temporary Restraining Order pursuant to Rule 65 of the South Carolina Rules of Civil Procedure is hereby **DENIED**.

  
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The Honorable DeAndrea G. Benjamin  
Presiding Judge  
Fifth Judicial Circuit

December 22, 2016 at 3:42 o'clock pm  
Richland County, South Carolina

Columbia

