

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge
Trial Court Case No. 2014-CP-10-02946

Appellate Case No.: 2016-002003

RECEIVED

APR 11 2017

SC Court of Appeals

Terratec, Inc.,Appellant,

v.

Charleston County School District,.....Respondent.

BRIEF OF RESPONDENT

H. Brewton Hagood, Esquire, Bar # 2438
Elizabeth F. Nicholson, Esquire, Bar # 12402
Rosen, Rosen & Hagood, LLC
151 Meeting Street, Suite 400
Post Office Box 893
Charleston, SC 29402
(843) 577-6726
bhagood@rrhlawfirm.com
enicholson@rrhlawfirm.com
Attorneys for Respondent
Charleston County School District

TABLE OF CONTENTS

Table of Authorities	ii
Statement of Issues on Appeal	1
Statement of the Case	1
Facts	2
Argument	7
I. Standard of Review.....	7
II. The Circuit Court’s finding that the decision of the Panel was supported by substantial evidence should be affirmed	11
III. The Circuit Court’s finding that the appointment of a member of the CCSD Board of Trustees as Chair of the Panel was not a denial of due process to Terratec and is not grounds for reversal of the Panel’s Order.	14
Conclusion	16

TABLE OF AUTHORITIES

Cases

<u>Aetna Life Ins. Co. v. Lavoie</u> , 475 U.S. 813 (1986)	14, 15
<u>Babcock Center, Inc. v. Office of Audits</u> , 286 S.C. 398, 334 S.E.2d 112 (1985).....	15, 16
<u>Baldwin v. Dept. of Highways and Public Transportation</u> , 297 S.C. 232, 233 376 S.E.2d 259, 260 (1989).....	15
<u>Bass v. Kenco Group</u> , 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005).....	10
<u>Brown v. Peoplease Corp.</u> , 402 S.C. 476, 481-82, 741 S.E.2d 761, 763-64 (Ct. App. 2013)	7
<u>Consolo v. Federal Maritime Commission</u> , 383 U.S. 607, 620, 16 L Ed. 2d 131, 140 S. Ct. 1018, 1026).....	10
<u>Deese v. S. Carolina State Bd. of Dentistry</u> , 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985)	11
<u>Goss v. Lopez</u> , 419 U.S. 565, 581–584 (1975).....	15
<u>Hall v. United Rentals, Inc.</u> , 371 S.C. 69, 79, 636 S.E.2d 876, 881-82 (Ct. App. 2006).....	10, 11
<u>Hamm v. A T & T</u> , 302 S.C. 210, 394 S.E.2d 842 (1990)	8
<u>Kizer v. Dorchester County Vocational Educ. Bd. of Trs.</u> , 287 S.C. 545, 552–53, 340 S.E.2d 144, 148 (1986)	16
<u>Lark v. Bi-Lo, Inc.</u> 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)	10, 11
<u>Liljeberg v. Health Servs. Acquisition Corp.</u> , 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988).....	16
<u>Palmetto Alliance, Inc. v. S. Carolina Pub. Serv. Comm’n</u> , 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984)	7, 8, 9

<u>Pressley v. Lancaster Cnty</u> , 343 S.C. 696, 704, 542 S.E.2d 366, 370 (Ct. App. 2001)	11
<u>Tall Tower, Inc. v. South Carolina Procurement Review Panel</u> , 294 S.C. 225, 232, 363 S.E.2d 683, 687 (1987)	9, 10, 15
<u>Tuney v. Ohio</u> , 273 U.S. 510, 523 (1927)	14
<u>Ward v. Village of Monroeville</u> , 409 U.S. 57 (1972)	14, 15
<u>Waters v. S. Carolina Land Res. Conservation Comm'n</u> , 321 S.C. 219, 226, 467 S.E.2d 913, 917 (1996)	8
<u>Withrow v. Larkin</u> , 421 U.S. 35, 54 (1975)	15

Statutes

S.C. Code Ann. §§ 1-23-380(5)	7, 8
S.C. Code Ann. § 11-35-4410	7, 9

Other Authorities

Charleston County School District Consolidated Procurement Code § 4410.....	4, 7, 9, 10, 11, 14, 15
--	-------------------------

STATEMENT OF ISSUES ON APPEAL

1. The Circuit Court's Order filed August 29, 2016, affirming the April 10, 2014 decision of the Charleston County School District ("CCSD") Procurement Review Panel, should be affirmed as the Circuit Court correctly found that CCSD Procurement Review Panel decision was reasonable under the substantial evidence standard of review.
2. The Circuit Court's Order filed August 29, 2016, finding that there was no due process violation, should be affirmed because the Appellant failed to offer any evidence to prove that the appointment of the Vice-Chairman of CCSD Board to serve as one of five members of the CCSD Procurement Panel and to chair the administrative proceeding as prescribed by the CCSD Consolidated Procurement Code violated any due process rights of the Appellant.

STATEMENT OF THE CASE

The Appellant, Terratec, Inc. (hereinafter "Terratec" or "Subcontractor") filed a Summons and Complaint in the Court of Common Pleas for Charleston County on January 14, 2013, Civil Action No. 2013-CP-10-0252, naming M.B. Kahn Construction, Inc. (hereinafter "Kahn" or "General Contractor"), Heery International, Inc. (hereinafter "Heery" or "Construction Manager"), CCSD, and Travelers Casualty and Surety Company of America (hereinafter "Travelers" or "Surety"), as Defendants. CCSD filed a Motion to Dismiss Terratec's Complaint as to CCSD on the grounds, among others, that Terratec had failed to exhaust its administrative remedies under Article 17, Sections 4230 and 4210 of the CCSD Consolidated Procurement Code, Version 1.5 effective

July 21, 2008, as revised January 7, 2011. Following a hearing on July 15, 2013 before the Honorable Kristi Lea Harrington, a Consent Order Staying Case And Establishing Scheduling Order was signed by Judge Harrington and filed on September 17, 2013. (R. pp. 4-7).

A full day hearing was held before the five member CCSD Procurement Review Panel (hereinafter "Panel") on March 11, 2014. Terratec was represented by counsel and had an opportunity to present witnesses and documentary evidence and cross examine the witnesses presented by CCSD. CCSD was represented by counsel and presented witnesses and documentary evidence and was allowed to cross examine Terratec's witnesses. The Panel issued a nineteen-page Order dated April 10, 2014, which contained finding of facts and conclusions of law which was signed by all five members of the Panel. (R. pp. 8- 27).

Circuit Court Judge J.C. Nicholson, Jr. heard oral arguments on Terratec's appeal on July 18, 2016, and, on August 29, 2016, issued the Order ruling against Terratec and affirming the Panel's Order. Terratec timely appealed the Circuit Court's Order affirming the Order of the Panel. (R. p. 3).

FACTS

The initial claims asserted by Terratec, which were the basis for the hearing before the Panel on March 11, 2014, stemmed from the general contract between Kahn and CCSD. Terratec was a subcontractor to Kahn which contracted with CCSD to serve as general contractor for the project known as the Rivers Education Center Seismic Retrofit, Exterior Restoration and Core Utilities ("Project"). (R. pp. 34-35). CCSD's contract with Kahn dated March 28, 2011 was marked as CCSD Exhibit 1. (R. pp. 413-31). The contract sum set forth in Article 4.1 was \$9,323,000, prior to adjustment for change orders. (R. p. 416). Heery was the Program Manager for CCSD for the Project and Davis and Floyd, Inc. ("Davis and Floyd") was the Architect for the Project. (R. p. 432). WPC,

Inc. (“WPC”) was the testing company hired by CCSD to conduct independent testing regarding the work by Terratec and other subcontractors of Kahn. (R. pp. 477-78). Representatives of these entities attended the hearing held on March 11, 2014 to explain their involvement in the project and their opinions regarding the claims asserted by Terratec. (R. pp. 103-70).

General Conditions for the Contract are contained in a separate document and Article 15 entitled Claims and Disputes was marked as CCSD Exhibit 2. (R. pp. 432-36). Article 15 sets forth the requirements for Notice of Claims (§15.1.2) for both additional cost (§15.1.4) and additional time (§15.1.5) and provides that claims are initially referred to the Architect for decision (§15.2). Id. Subject to a duty of good faith and fair dealing, claims against the Architect and Program Manager are waived under § 15.1.7. (R. p. 434). A Dispute Resolution Board (“DRB”) is provided for in §15.3 of the General Conditions as a non-binding attempt to resolve project disagreements and is an express condition precedent to the filing of a claim in the Court of Common Pleas for Charleston County. (R. pp. 435-36).

Terratec entered into a subcontract with Kahn dated February 22, 2011 to provide all labor and supervision, coordination, materials, tools, equipment, loading and unloading, hoisting, hauling, taxes, insurance, licenses, permit fees, inspections, tests, certifications, warranties, guarantees, training, design and any other appurtenances needed to accomplish the Micropile scope of work per plans and specifications as defined in the contract documents for a price of \$1,992,835. (R. pp. 34-5). A copy of Terratec’s subcontract with Kahn was marked as CCSD Exhibit 3. (R. pp. 437-43). Terratec retained the services of GS2 Engineering and Environmental Consultants and Kyzer & Timmerman, LLC to perform the engineering work necessary to design the micropiles to be furnished and installed by Terratec to meet the performance specifications required by the plans and

specifications for Terratec's scope of work. (R. pp. 149, 123-24). The description of the scope of work provided in Terratec's subcontract with Kahn stated that "shoring and concrete floor demolition required for Micropiles will be accomplished by others". (R. p. 437). Article VIII, § 1 of Terratec's subcontract with Kahn provided that the Subcontractor shall be bound to the Contractor by the terms of the Contract Documents and the Subcontract and assume toward the Contractor all of the obligations and responsibilities that the Contractor, by those documents, assumes toward the Owner. (R. p. 439). Article VIII, §29 provided that the Subcontractor agrees to be bound by the dispute resolution procedure for resolving disputes between the Contractor and Owner. (R. p. 442). However, claims and disputes between the Contractor and the Subcontractor which do not involve the owner are to be decided by arbitration between Terratec and Kahn. Id. This was important since Terratec's largest claim item listed on Terratec's Cost Accounting Break Down as TTI to MBK/CCSD CO# 5 in the amount of \$473,626.34 related to assumptions apparently made by Terratec that it would have the support of the existing concrete floor to stage its equipment during the performance of Terratec's work. (R. pp. 10, 90). It was CCSD's position at the hearing that this item was a dispute solely between Kahn and Terratec related to the means and methods by which Terratec and Kahn would perform their work and was not a dispute to be considered by the Procurement Review Panel. Id. The Panel accepted CCSD's position on this issue and made a ruling at the hearing as to which portions of Terratec's claims would be considered at the hearing. (R. pp. 94, line 22 – p. 95, line 17). Terratec has not appealed from this portion of CCSD's decision.

Page 1 of the Order of the Panel, dated April 10, 2014, identified the members of the Panel, who were appointed in accordance with the provisions of Section 4410.2 of the CCSD Procurement Code, as: (a) Mr. Tom Ducker, member of CCSD Board appointed by the CCSD Board of Trustees

and who served as Chair of the Panel; (b) Ms. Denise Badillo, Procurement Director for the City of North Charleston, SC; (c) Mr. Matt Brewer, Vice President, Division Manager for Choate Construction Company; (d) Mr. Jason McKinney, Joint Venture Audit Director for Roper Saint Francis Healthcare; and (e) Mr. Chip Stehmeyer, P.E., retired structural engineer. (R. p. 8). The Order also noted that all of the members of the Panel were present for the entire hearing and that John A. Massalon had been selected as an independent attorney to advise the Panel. Id.

At the outset of the hearing, Mr. Ducker informed counsel and the parties of the procedures which had been established by the Panel to govern the conduct of the hearing by reading these procedures into the record. (R. p. 74, line 35- p. 75, line 19). Mr. Ducker then asked if any members of the Panel would like to make any disclosures regarding any contacts or relationships with any of the parties or the persons who had been disclosed as potential witnesses. (R. p. 75, lines 19-22). Mr. Stehmeyer disclosed that he had worked closely with William Lewis of CCSD when Mr. Lewis was a Captain in the U.S. Navy in charge of construction projects and Mr. Stehmeyer was a civilian engineer working on projects for the U.S. Navy. Mr. Stehmeyer also disclosed that he had worked as a consulting engineer for an independent engineering firm which had conducted some seismic studies for CCSD, but these studies did not involve the project which is the subject of Terratec's claim. (R. p. 75, line 23- p. 76, line 9). Neither party objected to Mr. Stehmeyer's continued service on the Panel after these disclosures were made. (R. p. 75, lines 10-13).

Terratec presented the following claims to the Panel:

1) Additional testing and engineering work made necessary by incorrect information provided on ground conditions.

Changer Order #2 (47) Tests	\$65,000.00
-----------------------------	-------------

Change Order #3 (48) Engineering	\$46,143.27
----------------------------------	-------------

2) Additional footage of micropiles.

Original contract called for 66 foot micropiles with cost for each extra foot of \$45/foot. Piles were required to be 86 feet. Terratec alleged they have been paid for 8 extra feet, but not the remaining 12 feet.

Change Order #1B Contract Adjustment	\$338,580.00
--------------------------------------	--------------

(R. pp. 8- 19).

The Panel ruled against Terratec on both claims by written order dated April 10, 2014. Id.

ARGUMENT

I. STANDARD OF REVIEW

CCSD has a Consolidated Procurement Code which is modeled after the South Carolina Procurement Code. Excerpts from CCSD's Consolidated Procurement Code were marked as CCSD Exhibit 19 at the Panel Hearing. (R. pp. 659-65). Pursuant to Section 4410.7 of the CCSD Consolidated Procurement Code following S.C. Code Ann. § 11-35-4410, "the decision of the Procurement Review Panel is final as to administrative review and may be appealed only to the circuit court. The standard of review is as provided by the provisions of the South Carolina Administrative Procedures Act." (R. pp. 664-65). The court's review of an administrative agency's findings of fact are limited by section 1-23-380(5) of the Administrative Procedures Act. A court can reverse an agency's findings, inferences, conclusions or decisions only if they are, as appellants argue here, "in violation of constitutional or statutory provisions; in excess of the statutory authority of the agency; made upon unlawful procedure; affected by other error of law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. §§ 1-23-380(5)(a)-(f) (West 2014).

South Carolina courts adhere to the well-accepted substantial evidence standard for judicial review of administrative agency decisions. Palmetto Alliance, Inc. v. S. Carolina Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). Under the "substantial evidence" standard of review, the factual findings of the agency are presumed correct and will be set aside only if unsupported by substantial evidence. Brown v. Peoplelease Corp., 402 S.C. 476, 481-82, 741 S.E.2d

761, 763-64 (Ct. App. 2013). “Substantial evidence is not a mere scintilla of evidence, not evidence viewed blindly from one side, but is evidence which, when considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency reached in order to justify its action.” Palmetto, 282 S.C. at 432, 319 S.E.2d at 696. The possibility of drawing two inconsistent conclusions from the evidence will not mean the agency’s conclusion was unsupported by substantial evidence. Id. Furthermore, the burden is on appellants to prove convincingly that the agency’s decision is unsupported by the evidence. Waters v. S. Carolina Land Res. Conservation Comm’n, 321 S.C. 219, 226, 467 S.E.2d 913, 917(1996). See also Hamm v. A T & T, 302 S.C. 210, 394 S.E.2d 842 (1990).

Pursuant to S.C. Code Ann. § 1-23-380(5), the court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Terratec contends that the Panel's decision was in violation of constitutional or statutory provisions, in excess of their statutory authority, and made upon unlawful procedure. See Initial Brief of Appellant. Any party in an administrative agency proceeding is entitled to certain procedural opportunities of notice and a fair hearing. Palmetto, 282 S.C. at 435, 319 S.E.2d at 698. If the Appellants contend they were denied due process guaranteed them by the South Carolina Constitution, they must demonstrate a substantial prejudice to establish a claim. Id. Due process does not mandate any particular form of procedure, but is a flexible concept changing with the circumstances. Tall Tower, Inc. v. South Carolina Procurement Review Panel, 294 S.C. 225, 232, 363 S.E.2d 683, 687 (1987). In Tall Tower, the South Carolina Supreme Court held that where a litigant has notice of the issues, an opportunity to be heard, and a right to cross-examine witnesses, substantial prejudice cannot result from litigating before the Procurement Review Panel. Id.

Section 4410 of the CCSD Consolidated Procurement Code, which is modeled after S.C. Code Ann. § 11-35-4410, created the Panel and provides in Section 4410.5 that "the Panel is vested with the authority to establish its own procedures for the conduct of its business and the holding of its hearings." Section 4410.2 of the CCSD Consolidated Procurement Code prescribes the number of members of the Panel, by whom each member shall be appointed and the professions and businesses from whom four (4) members of the panel should be selected. In its appeal, Terratec does not argue that the Panel was improperly appointed or that the members did not come from the designated professions and businesses identified. Instead, Terratec argues that the fact that the Chair of the Panel was a member of the CCSD Board of Trustees taints the entire process. See Initial Brief of Appellant. However, this is exactly what is prescribed in Section 4410.2.1 of the CCSD Consolidated Procurement Code.

A similar argument was made in Tall Tower, in which the appellants contended that the Procurement Review Panel was composed and operating in violation of the separation of powers mandated by the South Carolina Constitution. 294 S.C. at 228-29, 363 S.E.2d at 685. In finding for the respondent, the court held that legislative presence on the panel did not represent unconstitutional encroachment on executive function in violation of separation of powers; therefore, the Procurement Code did not substantially prejudice the appellants' rights. Id.

Terratec also contends that the Panel's findings, inferences, conclusions, or decisions were clearly erroneous. See Initial Brief of Appellant. A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Hall v. United Rentals, Inc., 371 S.C. 69, 79, 636 S.E.2d 876, 881-82 (Ct. App. 2006) (citing Bass v. Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005)). The United States Supreme Court defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981) (citing Consolo v. Federal Maritime Commission, 383 U.S. 607, 620, 16 L Ed. 2d 131, 140 S. Ct. 1018, 1026). Furthermore, substantial evidence "must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." Id. The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Lark, 276 S.C. 130, 136, 276 S.E.2d 304, 307. In Lark, the court found that the statute clearly indicates that the "substantial evidence" rule applies only in cases where a manifest or gross error of law has been committed by the administrative agency. Id. In addition, the court held that they would not overturn a

finding of fact by an administrative agency “unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based.” Id.

Terratec further contends that the Panel’s decision was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. See Initial Brief of Appellant. A decision is arbitrary if it is without a rational basis, is based alone on one’s will and not upon any course of reasoning and exercise of judgment, is made at pleasure, without adequate determining principles, or is governed by no fixed rules or standards. Deese v. S. Carolina State Bd. of Dentistry, 286 S.C. 182, 184-85, 332 S.E.2d 539, 541 (Ct. App. 1985). The party challenging a decision bears the burden of proving the decision is arbitrary. Pressley v. Lancaster Cnty, 343 S.C. 696, 704, 542 S.E.2d 366, 370 (Ct. App. 2001). In Deese, the court found that a State Board’s decision was not arbitrary or capricious because they were clearly authorized under South Carolina Code to sanction and reprimand the appellant as they did in their decision. 286 S.C. at 184-85, 332 S.E.2d at 541. Under the South Carolina Procurement Code and the Administrative Procedures Act, the Panel was clearly authorized to make the decisions at issue; therefore, the court will not find that these decisions were arbitrary or capricious. Terratec’s contention that the Panel abused their discretion is unfounded because South Carolina courts recognize that “the construction of a statute by the agency charged with its administration should be accorded great deference and will not be overruled without a compelling reason.” Hall, 371 S.C. 69, 81, 636 S.E.2d 876, 883.

II. THE CIRCUIT COURT’S FINDING THAT THE DECISION OF THE PANEL WAS SUPPORTED BY SUBSTANTIAL EVIDENCE SHOULD BE AFFIRMED.

In its Initial Brief, Terratec contends that the Panel lacked substantial evidence to deny Terratec compensation for additional work done at The Rivers Educational Center. Terratec repeats

all of the arguments it made at the hearing before the Panel and suggests that the Court should ignore the factual findings made by the five- member Panel. See Initial Brief of Appellant. CCSD submits that a review of the 19-page Order issued by the Panel will demonstrate that the Panel indeed considered all of the testimony and documentary evidence presented by Terratec and CCSD and that there is substantial evidence to support the decision of the Panel.

Findings of Fact 10 through 24 in the Panel's Order show that the Panel discharged its duty to conduct a *de novo* review of Terratec's claim for additional engineering and testing for the load test conducted by Terratec. (R. pp. 15-20). All of the testimony and evidence presented on this issue was outlined in detail, and the Panel reached its decision, set forth in Finding of Fact number 24, that Terratec had failed to meet its burden of proof to show entitlement for the additional costs requested by Terratec on these claims. (R. p. 20). The Panel included a retired structural engineer and a Vice President for a local construction company, so there is no doubt that the Panel had the necessary background to understand the issues presented by Terratec and to evaluate this claim. (R. pp. 74-5). There was no evidence that the data supplied by CCSD regarding the soils at the site was inaccurate and no evidence that CCSD or its architect, engineer or consultants directed Terratec where it should perform its first load test. (R. pp. 69-70). The Court should find that there was substantial evidence to support the findings by the Panel on this issue and should affirm the decision of the Panel.

A review of Findings of Fact 25 through 39 of the Order issued by the Panel shows that the Panel considered all of the evidence and testimony presented by both Terratec and CCSD regarding its claim for additional length of the micropiles designed and installed on the project and that there is substantial evidence to support the Panel's decision on this portion of Terratec's claim. (R. pp. 20-5). The Panel noted in Finding of Fact 29 that Terratec had submitted a change order request for

additional length of micropiles during the project and had been granted a change order for an additional \$247,874.00 during the course of performing its work. (R. p. 21) . Notwithstanding CCSD's position that Terratec's claim for an additional length of micropiles was untimely, the Panel reviewed all of the documents and testimony presented by the parties on this issue. (R. pp. 21-5). The Order of the panel recounted the pertinent documents and testimony presented by engineers for both Terratec and CCSD on this issue, and the Panel set forth its reasoning as to how it reached its decision on this issue in Finding of Fact number 39. (R. pp. 24-5). CCSD submits that these detailed Findings of Fact demonstrate that there was substantial evidence to support the denial of Terratec's claim for additional compensation of \$338,530.00 for the additional length of micropiles on top of the \$247,874.00 which had already been granted by a previous change order.

All of the above evidence was available for review by Circuit Court Judge Nicholson when he heard oral arguments on Terratec's appeal on July 18, 2016. (R. pp. 28-70). In addition, counsel for both Terratec and CCSD provided legal memoranda in support of their arguments. Id. Judge Nicholson did not rule from the bench but took the matter under advisement to consider the record which had been presented for review. (R. p. 70). Although Judge Nicholson's Order is very brief, CCSD submits that there was an ample record to support his finding that the decision of the Panel was reasonable under the substantial evidence standard. (R. p. 3). Accordingly, CCSD submits that Judge Nicholson's Order should be affirmed.

III. THE CIRCUIT COURT'S FINDING THAT THE APPOINTMENT OF A MEMBER OF THE CCSD BOARD OF TRUSTEES AS CHAIR OF THE PANEL WAS NOT A DENIAL OF DUE PROCESS TO TERRATEC AND IS NOT GROUNDS FOR REVERSAL OF THE PANEL'S ORDER.

Terratec argues that the fact the Chair of the five- member Panel was a member of the CCSD Board of Trustees is sufficient to reverse the decision of the Panel. As previously noted, the CCSD Consolidated Procurement Code, which is modeled after the Procurement Code for the State of South Carolina, specifies how the members of the panel are to be selected. The pertinent provisions of the CCSD Procurement Code were marked as CCSD Exhibit 19. (R. pp. 659-65). Section 4410.2.1 provides that a member of the CCSD Board should be appointed to serve on the panel and is to serve as the Chair of the Panel. (R. p. 664). Terratec ignores the fact that the other four (4) members of the Panel are members of the community who are not in any way associated with CCSD and offers no evidence or argument that the Chair of the Panel exerted any undue influence over the other members of the Panel. See Initial Brief of Appellant.

The Supreme Court cases Terratec principally relies upon do not support Terratec's argument on this issue because, unlike the facts here, they involved adjudicators who stood to reap a benefit to their personal finances. See Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986) (determining that a Alabama Supreme Court Justice acted "as the judge in his own case," when he received \$30,000 from an insurance company to settle his claim shortly after he set precedent on an identical issue); Ward v. Village of Monroeville, 409 U.S. 57 (1972) (explaining that the mayor, who exercised all executive functions, had an impermissible incentive due to his sole responsibility for the city's finances from which his own salary was paid); see also Tumey v. Ohio, 273 U.S. 510, 523 (1927) (holding that a judge may not preside over a case in which he or she has a "direct, personal,

substantial, pecuniary interest”). In Ward, for example, the court specifically said “the mere union of the executive power and the judicial power in him cannot be said to violate due process of law.” 409 U.S. at 60; see also Withrow v. Larkin, 421 U.S. 35, 54 (1975) (“The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication ... must overcome a presumption of honesty and integrity in those serving as adjudicators.”); Goss v. Lopez, 419 U.S. 565, 581–584 (1975) (allowing a single individual to act as investigator, prosecutor, and decision maker). Furthermore, the Ward court emphasized the distinction between cases which involve adjudicators with limited executive authority—as opposed to full control and authority of the mayor in Ward—explaining that “[i]n those circumstances ... the finances and financial policy of the city [is] too remote to warrant a presumption of bias.” 409 U.S. at 60-61. Put another way, “the law will not suppose a possibility of bias or favor in a judge ... whose authority greatly depends upon that presumption and idea.” Aetna, 475 U.S. at 820.

Terratec has not alleged, much less produced, any evidence of a “direct, personal, substantial, pecuniary interest.” It contends that the mere fact that the Panel complied with Sections 4410.2 and 4410.2.1, “exhibited the appearance of bias and partiality.” See Initial Brief of Appellant. However, as mentioned above, South Carolina law requires a showing of “substantial prejudice” to constitute a due process violation. Tall Tower, supra. South Carolina law allows an administrative agency to serve as the adjudicator when the panel is composed of persons removed from the controversy. Babcock Center, Inc. v. Office of Audits, 286 S.C. 398, 334 S.E.2d 112 (1985) (holding that administrative agency may adjudicate appeals by panels composed of other persons within the same agency who did not participate in investigative or prosecutorial capacities); Baldwin v. Dept. of

Highways and Public Transportation, 297 S.C. 232, 233 376 S.E.2d 259, 260 (1989) (“In [Babcock] we held that both prosecution and adjudication within an agency does not preclude, as a due process violation, an administrative agency from adjudicating appeals by panels composed of other persons within the same agency who did not participate in investigation or prosecutorial capacities.); see also Kizer v. Dorchester County Vocational Educ. Bd. of Trs., 287 S.C. 545, 552–53, 340 S.E.2d 144, 148 (1986) (“Unless there is evidence that preformed opinions of board members are fixed and unchangeable, or that in the deliberations after hearing all the evidence, the result was dictated by such a preformed opinion, the appellant cannot successfully maintain that he was deprived of a fair and impartial hearing.”).

In sum, Terratec offers no South Carolina or United States Supreme Court authority for its proposition that a panel of volunteers, with no direct or pecuniary interest, violate due process by adjudicating an administrative proceeding, nor does it provide any evidence of actual bias or substantial prejudice. Terratec’s remaining cases offered in support have no application to this case. See e.g., Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988) (interpreting whether judge’s constructive notice was enough to violate a *federal statute*) (emphasis added).

CONCLUSION

CCSD respectfully submits that Judge Nicholson correctly found that the April 10, 2014 Order issued by the five-member Panel was supported by substantial evidence and that Terratec was not denied due process at the hearing. Terratec was allowed to present all of the evidence it wished at the hearing and was allowed to cross examine all of the witnesses presented by CCSD. The Order

of the Panel contained 39 separate findings of fact indicating that the Panel considered each of the arguments presented by Terratec. There has been no evidence presented to support a finding by this Court that the fact that the Chair of the Panel was a member of the CCSD Board, which is prescribed by the CCSD Consolidated Procurement Code, constituted a denial of due process to Terratec. Judge Nicholson's August 29, 2016 Order affirming the April 10, 2014 Order of the Panel should be affirmed.

Respectfully submitted,

ROSEN, ROSEN & HAGOOD, LLC

By: H. Brewton Hagood
H. Brewton Hagood, Esq., Bar # 2438
Elizabeth F. Nicholson, Esq., Bar #12402
151 Meeting Street, Suite 400
Post Office Box 893
Charleston, SC 29402
(843) 577-6726
bhagood@rrhlawfirm.com
enicholson@rrhlawfirm.com
Attorneys for Respondent
Charleston County School District

Charleston, South Carolina
April 7, 2017

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge
Trial Court Case No. 2014-CP-10-02946

Appellate Case No.: 2016-002003

RECEIVED
APR 11 2017
SC Court of Appeals

Terratec, Inc.,Appellant,

v.

Charleston County School District,.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent complies with Rule 211(b), SCACR.

H. Brewton Hagood

H. Brewton Hagood, Esquire, Bar # 2438
Elizabeth F. Nicholson, Esquire, Bar # 12402
Rosen, Rosen & Hagood, LLC
151 Meeting Street, Suite 400
Post Office Box 893
Charleston, SC 29402
(843) 577-6726
bhagood@rrhlawfirm.com
enicholson@rrhlawfirm.com
Attorneys for Respondent
Charleston County School District