THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Civil Action No. 2016-CP-40-07353
Appellate Case No. 2017-000134

RECEIVED
JUN 02 2017
SC Court of Appeals

Richardson Construction Company, Inc. .... Appellant,

v.

Richland County, a political subdivision, and
McClam & Associates, Inc. .... Respondents.

APPELLANT'S REPLY TO RESPONDENTS' RETURN TO MOTION FOR EXPEDITED TEMPORARY INJUNCTION PENDING APPEAL

Appellant Richardson Construction Company, Inc. ("RCC") filed a motion requesting that this Court issue a temporary injunction directing Richland County and McClam & Associates, Inc. ("McClam") (collectively "Respondents") to stop construction work on the Shop Road Extension construction project during the pendency of this appeal. This request for temporary injunction was made pursuant to Rule 62(c), SCRCP. Richland County and McClam have filed Returns to RCC's motion for temporary injunction. RCC provides this brief reply to the points raised Richland County and McClam's returns that were not already addressed in RCC's motion for temporary injunction.

1. **Timing of request for temporary injunction and request to this Court**

As an initial matter, Richland County contends that RCC's request should be denied because RCC did not file its motion for temporary injunction until some time after Judge Benjamin's ruling and the filing of RCC's Notice of Appeal. As set forth in RCC's motion for temporary injunction, it was the discovery that Richland County no longer had a procurement director and the apparent fading possibility of a resolution through the administrative procedures provided for in the Richland County Procurement Code that necessitated the request for a temporary injunction. Once RCC became aware of the departure of Chris Younts as Procurement Director, RCC evaluated whether filing for the temporary injunction in the trial court would be practicable. RCC's determination that it would not be practicable is based upon the fact that as work progresses on the Shop Road Extension construction project and where there is no proper administrative procedure, to which RCC is entitled, then seeking relief first from the trial court would not be practical due to the time required to seek such relief and the possibility of RCC obtaining any meaningful remedy diminishing dramatically.

2. **There is no higher standard for a temporary injunction against a public body.**

Respondents contend there is a higher standard for granting a temporary injunction against a public body than other parties. This is incorrect. The key cases cited by Respondents do not clearly articulate a particular higher standard for injunctions against public bodies. Respondents city *Hecht Co. v. Bowles*, 312 U.S. 321, 331 (1944), for the statement, "For the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases." However, *Hecht* is inapposite. In *Hecht*, the United States Supreme Court examined whether the federal government could obtain injunctive relief against a private company for violations of the Emergency Price Control Act during World

War II. *Id.* In this case, it is the government entity which is sought to be restrained not the one seeking the restraint; thus, *Hecht* does not support the trial court's decision.

Respondents also rely upon a South Carolina case, *Moss v. S.C. Department of Transportation*, 223 S.C. 282, 75 S.E.2d 464 (1953), for the proposition that there is a heightened burden for a plaintiff in seeking to enjoin a public entity. In fact, in *Moss*, the Supreme Court applied the standard elements for a temporary injunction in upholding the lower court's denial of a temporary injunction. *Id.* Specifically, the Supreme Court held that because the plaintiff could pursue damages, she had an adequate remedy at law and a temporary injunction was not appropriate. *Id.* It was only in dicta that the Supreme Court stated that it 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." *Id.* This language does not set forth the higher burden imposed by the trial court.

In fact, there is contrary authority demonstrating that there are no particular higher or additional standards necessary for obtaining a temporary injunction against a public body. In *Funderburg Builders, Inc. v. Abbeville Cty. Mem'l Hosp.*, 467 F. Supp. 821, 825 (D.S.C. 1979), the United States District Court for the District of South Carolina held that "injunction and mandamus are the proper remedies to compel compliance with public contract award procedures." *Id.* (citing *Carpet City, Inc. v. Stillwater Municipal Hospital Authority*, 536 P.2d 335 (Okl.1975); *Federal Electric Corp. v. Fasi*, 527 P.2d 1284 (Haw.1974); *City of Phoenix v. Wittman Contracting Co.*, 20 Ariz.App. 1, 509 P.2d 1038 (1973); *City of Inglewood v. Superior Court*, 7 Cal.3d 861, 103 Cal.Rptr. 689, 500 P.2d 601 (1972); *Cf. Gulf Oil Corp. v. Clark County,* 575 P.2d 1332 (Nev.1978). In deciding to grant the temporary injunction against the public entity, the District Court did not hold the plaintiff to any standard other than three

common elements for a temporary injunction. Thus, there is no generally accepted authority that a plaintiff must overcome a higher standard for obtaining a temporary injunction against a public body.

3. **The emails of Richland County personnel evidence a policy against double-counting the work of a single subcontractor to meet DBE and SLBE requirements.**

As set forth in RCC's motion for temporary injunction, it was the policy of Richland County, stated by an employee, Brenda Parnell, that a bidder could not use the same work of a subcontractor to meet the DBE and SLBE requirements. Respondents contend that RCC relies solely on this statement and that such policy is not supported by the Richland County Procurement Code. In fact, the purpose of the SLBE contracting requirements provides support of the policy against what RCC terms "stacking." The purpose of the SLBE provisions is to:

> provide a race- and gender-neutral procurement tool for the county to use in its efforts to ensure that all segments of its local business community have a reasonable and significant opportunity to participate in county contracts for construction, architectural and engineering services, professional services, non-professional services, and commodities. The small local business enterprise ("SLBE") Program also furthers the county's public interest to foster effective broad-based competition from all segments of the vendor community, including, but not limited to, minority business enterprises, small business enterprises, and local business enterprises. This policy is, in part, intended to further the county's compelling interest in ensuring that it is neither an active nor passive participant in private sector marketplace discrimination, and in promoting equal opportunity for all segments of the contracting community to participate in county contracts. Moreover, the SLBE program provides additional avenues for the development of new capacity and new sources of competition for county contracts from the growing pool of small and locally based businesses.

Richland County Code § 2-639. Note that the promotion of competition is mentioned twice within this single section. Providing the same work to a single subcontractor does **not** foster competition from all segments and contradicts the purpose of promoting competition. Thus, the plain language of the Procurement Code supports RCC's

interpretation and apparently the emphatic interpretation of Richland County staff that "stacking" is not permitted.

Richland County also contends that "stacking" has generally been permitted in the past under projects that have been administered by the PDT and under the PDT's guidelines. However, the requirements of the Richland County Procurement Code and the guidelines used by the PDT are not the same. This was pointed out specifically by Gerald Seals in his letter dated December 2, 2016, where he notes that a provision in the PDT "Transportation Program Procurement Manual" is inconsistent with the Richland County Procurement Code and that the Code would control over the guidelines. (Letter from Gerald Seals, dated Dec. 2, 2016, RC-222.) In the same way, if the PDT guidelines for whatever reason would permit stacking—which RCC does not agree that they do—it would not matter because the Richland County Procurement Code controls and that, along with the policy of Richland County reflected in the statements of its employee, would not permit stacking. Thus, McClam's bid was non-responsive.

4. Re-bid of the contract is not a sufficient remedy at law.

Richland County contends that the Procurement Review Panel does not have the authority to re-bid a contract or award a contract to a protesting bidder if work on the contract has already begun because the scope of the new award or re-bid would be different than original contract award. This cannot be the case.

The Procurement Code states that "[a]ppeal to the procurement review panel shall not stay issuance or execution of a contract." Richland County Code § 2-621.1(e). Thus, the Procurement Code contemplates that work will begin and move forward during the time that a procurement dispute is working its way through the administrative process. Nevertheless, the

Procurement Review Panel is empowered to direct award to the protestant or require that a contract be re-bid in addition to awarding bid preparation costs. Richland County Code § 2-621.1(f). There is no limitation on this authority for situations where work has already begun or the scope of the work or re-bid contract might change. Thus, there is nothing that prevents the Procurement Review Panel from cancelling the contract to McClam so as to award the contract to RCC or to require the remainder of the project be re-bid.

CONCLUSION

RCC reiterates is previous position that it has no adequate remedy at law, that it is likely to succeed on the merits of its procurement dispute, and that it will suffer irreparable harm if a temporary injunction pending this appeal is not granted. Based upon the foregoing, RCC requests that this Court issue a temporary injunction directing Richland County and McClam to stop work on the Shop Road Extension construction project during the pendency of RCC's appeal.

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May 31, 2017

Columbia, South Carolina

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PROOF OF SERVICE

I certify that I have served Appellant's Reply to Respondents' Return to Motion for Expedited Temporary Injunction Pending Appeal on May 31, 2017, on the following by causing a copy to be delivered via the U.S. Postal Service to Counsel for the Respondents to addresses shown below:

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May 31, 2017

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Richardson Construction Company, Inc. v. Richland County, a political subdivision, and McClam & Associates, Inc.
Appellate No: 2017-000134
Case No: 2016-CP-40-07353
Firm No: 6344.012

Dear Ms. Kitchings:

Enclosed for filing please find the original and one copy of Appellant's Reply to Respondent's Return to Motion for Expedited Temporary Injunction Pending Appeal along with the original and one copy of the Proof of Service. Please file the originals and return the clocked-in copies to our office by the enclosed addressed, postage pre-paid envelope.

By copy of this letter, I am serving same upon all counsel of record.

With kind regards, I am

Sincerely yours,

Kathleen McDaniel

KMM/jrw

cc: Ned Nicholson, Esq.
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