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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM JASPER COUNTY

Court of Common Pleas

Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2016-001148

23053

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SC Court of Appeals

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

v.

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

RECORD ON APPEAL

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JECK Powell

STATE OF SOUTH CAROLINA)
COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS

South Carolina Public Interest)
Foundation, Edward D. Sloan, Jr,)
individually and on behalf of all others)
similarly situated,)

C.A. No. 2014-CP-27-468

Order

Plaintiff,

vs.

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,)

Defendant.

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JUL 16 2015
CLERK OF COURT

Now before the Court is Defendants' motion for summary judgment. The motion was heard before the undersigned on August 4, 2015.¹ "Summary judgment is proper where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Sims v. Amisub of S. Carolina, Inc.*, _ S.E.2d. __, 2015 WL 4751030, at *3 (S.C. Aug. 12, 2015).

The Complaint

The complaint's "First Cause of Action" section states that, "procurement of construction services of \$50,000 or more by Exhibit E violates the District's Procurement Code Policy, and is unlawful." The complaint's "Second Cause of Action" section states that, "Defendants' undated determination (Exhibit D) is insufficient to satisfy the requirements of Procurement Code Policy § 2- 103 [and therefore the] procurement violates the District's Procurement Code Policy, and is unlawful." *Id.* To their complaint, Plaintiffs attached the Jasper County School District (JCSD)

¹ The defendants made clear at the hearing that their motion for Summary Judgment is founded upon the allegations of the Complaint and the numerous documentary exhibits submitted therewith by the plaintiffs, and that defendants are not, for purposes of this motion, relying upon their factually-driven affirmative defenses of lack of standing, laches, or unclean hands.

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BY DATE 8/15

Procurement Code (exhibit B), the JCSD's Request for Proposals (exhibit C), the JCSD's Written Determination (exhibit D), and the contract between the JCSD and M.B. Kahn Construction Company, Inc. for design-build delivery of the "Renovation of 3776 Bees Creek Rd Property for use as Centralized District Administrative Offices (Owner solicitation #14-06-01)" (exhibit E). The complaint also attacks the efficacy of the defendants' May 11, 2015 Resolution. (exhibit G).

Discretion of the Defendants

In *Glasscock Company v. Sumter County*, 361 S.C. 483, 604 S.E.2d 718, 722 (2004), the Supreme Court stated that procurement decisions are "a function of [the governing body's] discretion, the exercise of which they are accountable for as publicly elected officials." A guiding principle is that, "In reviewing discretionary decisions 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, in obvious abuse of discretion, or in excess of lawfully delegated power." *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338, 351 (2003) (internal quotation omitted). "[L]ocal governments should be afforded a reasonable degree of latitude in devising their own individual procurement ordinances and procedures" *Glasscock*, 604 S.E.2d at 722.

In addition, "The boards of trustees of the several school districts may prescribe such rules and regulations not inconsistent with the statute law of this State as they may deem necessary or advisable to the proper disposition of matters brought before them." S.C. Code Ann. § 59-19-110. "The official record of a school board meeting imports verity, and, except where fraud or mistake is shown, it is conclusive as to the matters set forth therein." 78 C.J.S. Schools and School Districts § 209.² "If the facts and circumstances are such that reasonable

² Consequently, because South Carolina school boards do not operate through "ordinances" in the way that local governments (cities and counties) do, the distinction between an "ordinance" and a "resolution" is not relevant to the effect of the adopted school board Resolution attached as Complaint Exhibit G.

men may differ as to the wisdom and expediency of the decision, the decision must be upheld. A clear abuse of discretion is required to warrant judicial interference.” *Gamble v. Williamsburg County School District*, 305 S.C. 288, 290, 408 S.E.2d 217, 218 (1992).

Design-Build is Permissible

Jasper County School District (“JCSD”) Procurement Code (“Code”) Article 4 pertains specifically to procurement of construction. Section 4-101 provides, “The school district will utilize the South Carolina School Facilities Planning and Construction Guide prepared by the South Carolina Department of for new construction, additions, or renovations used in connection with public education.” In South Carolina, the State Department of Education Office of School Facilities controls 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.” Design-Build is one of these recognized “procurement methods.” S.C. Code Ann. § 11-35-3005.

JCSD’s Code § 4-101 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.” Section 4-101, pertaining specifically to construction and tied directly to the OSF Guide (and thereby to the design-build method), permits to the JCSD any construction delivery method listed in S.C. Code Ann. §11-35-2910 and 11-35-3005.

Section 4-101 would be rendered meaningless by the Plaintiffs’ that JCSD Code § 2-102 supersedes JCSD Code § 4-101 when procurement is for construction, requiring only low-bid “competitive sealed bidding” (a.k.a. “design-bid-build”) for construction contracts. Such an interpretation is also inconsistent with the legislative discretion noted in *Glasscock, supra*.

Competitive sealed proposals are the method of source selection for design-build delivery. "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). The State Procurement Code provides that, "Contracts for design-build *must* be procured by competitive sealed proposals" S.C. Code Ann. § 11-35-3015(5) (emphasis added). The General Assembly has thus determined that competitive sealed proposals are sufficiently competitive for this delivery method. The latitude given to JCSD pursuant to S.C. Code Ann. § 11-35-50 certainly includes following State Code's listed source selection and delivery methods.

The Board has the legal discretion, enshrined in § 4-101 of its Procurement Code, to utilize design-build construction and procure such construction accordingly. *See, Glasscock*, 604 S.E.2d at 722. No allegation is made that the exercise of this discretion to use the design-build delivery method was arbitrary or an obvious abuse of discretion, only that it was outside the lawful authority of the Defendants.

JCSD's Written Statement is Sufficient

JCSD Procurement Code § 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." JCSD issued this written statement setting forth facts which led to the selection of design-build. (Complaint Exhibit D) (emphasis added). This requirement is written in the past tense. Page 2 of Exhibit D to the Amendment Complaint explains why the JCSD determined that competitive sealed bidding was not advantageous, and why the JCSD determined that its design-build source selection had been successful and appropriate for the

award of a contract.

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.” (Complaint Exhibit B) (emphasis added). This requirement is written so as to apply to the *award* of a contract, which occurs at the *end* of a procurement; it is not, as contended by plaintiffs, written to require a “written determination” *prior* to commencing a procurement.

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,

Exhibit D was issued October 10, 2014 (agreed in oral argument). The contract was awarded November 14, 2015 (Complaint ¶ 15). Exhibit D satisfies the *pre-construction* requirement of § 4-101 and the *pre-contract* requirement of § 2-103.

The Resolution

While this case was pending, the Board of Trustees of the JCSD adopted a Resolution on May 11, 2015. (Complaint Exhibit G) (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.

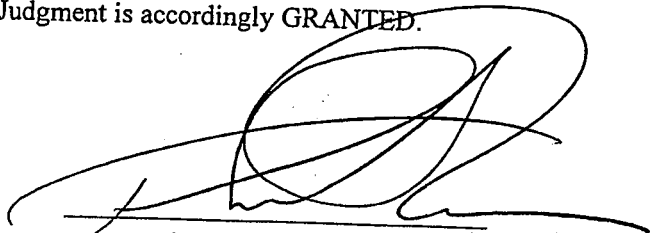
The Board has the legislative power and discretion to interpret its own Procurement Code, and has the legislative power and discretion to exercise all of the powers noted in the Resolution. (See "Discretion of the Defendants" *supra*). S.C. Code § 11-35-50 "does not impose a specific requirement that 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 Company v. Sumter County*, 361 S.C. 483, 604 S.E.2d 718 (2004). Procurement decisions are "a function of [the governing body's] discretion, the exercise of which they are accountable for as publicly elected officials." *Id.*

In both the regular course of the procurement activity and in the Board Resolution, the *Board itself* made the decision to proceed with design-build delivery, and the *Board itself* made the decision to award the contract to M.B. Kahn. These are not mere administration decisions. Thus, even if the administration of the JCSD somehow misconstrued the Board's procurement policies in the manner alleged by the plaintiffs, the Board's direct participation, and later its Resolution, were each effective to cement the validity of the contract.

Conclusion

The defendants' motion for Summary Judgment is accordingly GRANTED.

SO ORDERED.



Thomas ^A Russo, Circuit Judge

Florence S.C.

October 30, 2015

STATE OF SOUTH CAROLINA)
)
COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS

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

C.A. No. 2014-CP-27-468

ORDER

Plaintiffs,

**Denying Plaintiffs' Motion to
Alter or Amend Order
Granting Summary Judgment**

vs.

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,)

Defendants.

Now before the Court is Plaintiffs' motion to alter or amend this Court's Order dated October 30, 2015, granting Defendants summary judgment. Under S.C. R. Civ. P. 59(f), this Court retained jurisdiction over the motion.

The Plaintiffs essentially argue, outside the record, that the current political landscape is such that the Jasper County School District's Board of Trustees is considering not proceeding with the project for which the challenged design-build construction contract procurement *sub judice* was conducted.

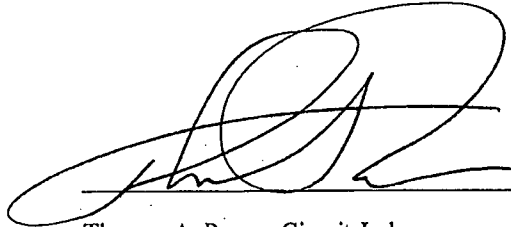
The Defendants counter that the summary judgment granted in their favor was ripe and appropriately brings finality to the dispute, ^{which} ~~with~~ ^{THK} is necessary for the Defendants in their dealings with the design-builder that is already under the challenged contract, regardless of whether or not the Board proceeds with either or both of the contract or the project.

The Court finds that the order granting summary judgment to the Defendants is not in need ^{of} ~~for~~ ^{THK} alternation or amendment, and that keeping this case open for trial when dispositive issues exist would serve only to impede and/or delay the Board of Trustees in its exercise of its

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JASPER COUNTY SC

powers and political discretion as explained in the summary judgment order.

Accordingly the Plaintiffs' Motion to Alter or Amend Order Granting Summary Judgment is DENIED.

A handwritten signature in black ink, appearing to read 'Thomas A. Russo', written over a horizontal line.

Thomas A. Russo, Circuit Judge

Florence, S.C.
APRIL 13, 2016
March



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*LICENSED IN S.C. & N.C.

March 23, 2015

The Hon. Margaret Bostick
Clerk of Court
PO Box 248
Ridgeland, SC 29936

Re: *South Carolina Public Interest Foundation et al. v. Jasper County School District*
Civil Action Number 2014-CP-27-468

Dear Ms. Bostick:

We enclose for filing in this action an original and one copy of an Order from Judge Buckner denying the Defendants' Motion to Dismiss.

Please file the original and return the extra copy to me, file stamped, in the enclosed postage-paid envelope.

Thank you for your help and cooperation.

Sincerely yours,

James G. Carpenter

Enclosures

CC w/ enclosures: Keith R. Powell, counsel for the Defendants

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF JASPER)	CIVIL ACTION NO. 14-CP-27-468
)	
South Carolina Public Interest Foundation,)	
Edward D. Sloan, Jr, Denise G. Davidson,)	
and Milton Woods, Jr., individually and on)	
behalf of all others similarly situated,)	Order Denying Defendants'
Plaintiffs,)	Motions to Dismiss
)	
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)	
Defendants.)	
)	

This matter came before the Court on March 4, 2015 at the Jasper County Courthouse on the Defendants' Motion to Dismiss. Present for the Plaintiffs was James Carpenter, and present for the Defendants was Keith Powell. In the Complaint, Plaintiffs allege that the Defendants procured design and construction services in violation of the District Procurement Code Policy. Defendants moved to dismiss under SCRCP 12(b)(6) and (7). The Court will consider the dismissal under SCRCP 12(b)(6) and then consider dismissal under SCRCP 12(b)(7).

In considering a motion to dismiss a Complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on the allegations set forth in the Complaint. Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the Plaintiff, would entitle the Plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper. Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). The Complaint should not be dismissed merely because the Court doubts the Plaintiff will prevail in the action. Toussaint v. Hamm, 292 S.C. 415, 416, 357 S.E.2d. 8, 9 (1987).

#1
PMB


As stated in Spence, the Court is confined to looking at the allegations in the Complaint. The Plaintiffs' Complaint incorporates the District Procurement Code Policy by reference. The Plaintiffs allege that District's Procurement Code Policy § 2-102(1) requires, "Contracts of \$50,000 or more must be awarded by competitive sealed bidding . . . except as provided herein." The District Procurement Code Policy § 2-103(1) states:

Conditions for use: When the school district determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the school district, a contract may be awarded by competitive sealed proposals. . . . Proposals must be solicited through a request for proposals.

The Complaint then alleges that the Defendants unlawfully used the procedure for competitive sealed proposals, in violation of the District Procurement Code Policy.

Only looking at the four corners of the Complaint, if the allegations made by the Plaintiffs are true, then there would be a violation of the District Procurement Code Policy. Therefore, the Motion to Dismiss is denied as to SCRPC 12(b)(6).

#2
The Defendants also move to dismiss on the ground that the Plaintiffs have failed to join a necessary party under SCRPC 19. Specifically, the Defendants contend that this action must be dismissed because Plaintiffs failed to join the contractor, M.B. Kahn. If the Defendants believe that the contractor should be joined, they are free to join the contractor as a party, but the Court finds the absence of the contractor is not a reason to dismiss the case. Therefore, the Motion to Dismiss is denied as to SCRPC 12(b)(7).


Perry M. Buckner III, Circuit Judge

March 19, 2015
Walterboro, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS

South Carolina Public Interest)
Foundation, Edward D. Sloan, Jr,)
individually and on behalf of all others)
similarly situated,)

C.A. No. 2014-CP-27-468

**DUPLICATE ORIGINAL ORDER
DENYING PRELIMINARY INJUNCTION**

Plaintiffs,)

vs.)

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,)

Defendants.)

JASPER COUNTY SC
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This matter came before the Court on March 30, 2015, at the Jasper County Courthouse, on the Plaintiffs' Motion for a Preliminary Injunction pursuant to SCRCP 65. James G. Carpenter represented the Plaintiffs, and Kenneth L. Childs and Keith R. Powell represented the Defendants. Plaintiffs allege that the Defendants procured design and construction services in violation of the District Procurement Code Policy.

The standard for a preliminary injunction is established by Poynter Invs. v. Century Builders of Piedmont, Inc., 387 S.C. 583, at 586-87, 694 S.E.2d 15, at 17 (2010): A preliminary injunction should issue only if necessary to preserve the status quo ante, and only upon a showing by the moving party that without such relief it will (1) suffer irreparable harm, (2) that it has a likelihood of success on the merits, and (3) there is no adequate remedy at law.

#1
PMB

The Court will first address the likelihood of the Plaintiffs succeeding on the merits. According to the Plaintiffs, the District's Procurement Code Policy § 2-102(1) requires, "Contracts of \$50,000 or more must be awarded by competitive sealed bidding . . . except as provided herein." It is stated in the Amended Complaint and admitted in the Answer that the

contract at issue was worth more \$50,000, with a guaranteed maximum price of \$2.9 million, and the Defendants used a method of selection of source other than competitive sealed bidding. Amended Complaint, at paragraph 15.


However, the District Procurement Code Policy allows for selection by competitive sealed proposals under §2-103, which states: "when the school district determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the school district, a contract may be awarded by competitive sealed proposals. . . Proposals must be solicited through a request for proposals."

The Plaintiffs allege that the Defendants have violated the District Procurement Code Policy because the written determination required by §2-103 must be issued prior to the Defendants issuing a request for proposals. The Plaintiffs further allege and the Defendants admit that on July 14, 2014, the District issued Request for Proposals 14-06-01. Amended Complaint, at paragraph 14. The Plaintiffs argued at the hearing that the written determination must be issued before the request for proposals, and that the Defendants issued the written determination nearly three months after the District issued the request for proposals, in violation of the District Procurement Code Policy.

#2
PMB
The Plaintiffs are asking the Court to imply that a written determination must precede the solicitation of proposals, but this requirement is not clearly stated in the District Procurement Code Policy. While the Plaintiffs' argument has practical appeal, there is no explicit timeliness requirement in the District Procurement Code Policy. The Court must hear testimony to determine whether there is a timeliness requirement for the written determination. The Defendants argued that the written determination can be issued after the request for proposals, and, if true, the Plaintiffs would have difficulty succeeding on the merits.

The Court must hear testimony from all the parties involved in the contract before it is able to determine whether the Plaintiffs have presented sufficient evidence of a likelihood of

success on the merits. Additionally, a hearing on the merits is needed to allow all parties whose rights are affected to be heard. Since the Court must determine whether the Plaintiffs have sufficient evidence of a likelihood of success on the merits, the Plaintiffs' Motion for a Preliminary Injunction is denied and a hearing for a declaratory judgment is to be scheduled as soon as reasonably practicable.



Hon. Perry M. Buckner, Circuit Judge

Walterboro, South Carolina

April 10, 2015

#3

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

South Carolina Public Interest Foundation, et al.
Plaintiff(s)

vs.

Jasper County School District, et al.
Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2014 - CP - 27 - 468

(Please Print)
Submitted By: James G. Carpenter
Address: 819 E. North St., Suite 230
Greenville, SC 29601

SC Bar #: 1136
Telephone #: 864-235-1269
Fax #: 864-331-3083
Other:
E-mail: james.carpenter@carpenterlawfirm.net

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint. NON-JURY TRIAL demanded in complaint.
- This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
- This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
- This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|---|--|--|
| <input type="checkbox"/> Contracts | <input type="checkbox"/> Torts - Professional Malpractice | <input type="checkbox"/> Torts - Personal Injury | <input type="checkbox"/> Real Property |
| <input type="checkbox"/> Construction (100) | <input type="checkbox"/> Dental Malpractice (200) | <input type="checkbox"/> Assault/Battery/Libel (300) | <input type="checkbox"/> Claim & Delivery (400) |
| <input type="checkbox"/> Debt Collection (110) | <input type="checkbox"/> Legal Malpractice (210) | <input type="checkbox"/> Conviction (310) | <input type="checkbox"/> Eminent Domain (410) |
| <input type="checkbox"/> Employment (120) | <input type="checkbox"/> Medical Malpractice (220) | <input type="checkbox"/> Motor Vehicle Accident (320) | <input type="checkbox"/> Foreclosure (420) |
| <input type="checkbox"/> General (130) | <input type="checkbox"/> Other (299) | <input type="checkbox"/> Premises Liability (330) | <input type="checkbox"/> Mechanic's Lien (430) |
| <input type="checkbox"/> Breach of Contract (140) | | <input type="checkbox"/> Products Liability (340) | <input type="checkbox"/> Partition (440) |
| <input type="checkbox"/> Other (199) | | <input type="checkbox"/> Personal Injury (350) | <input type="checkbox"/> Possession (450) |
| | | <input type="checkbox"/> Other (399) | <input type="checkbox"/> Building Code Violation (460) |
| | | | <input type="checkbox"/> Other (499) |
| <input type="checkbox"/> Inmate Petitions | <input type="checkbox"/> Judgments/Settlements | <input type="checkbox"/> Administrative Law/Relief | <input type="checkbox"/> Appeals |
| <input type="checkbox"/> PCR (500) | <input type="checkbox"/> Death Settlement (700) | <input type="checkbox"/> Reinstite Driver's License (800) | <input type="checkbox"/> Arbitration (900) |
| <input type="checkbox"/> Sexual Predator (510) | <input type="checkbox"/> Foreign Judgment (710) | <input type="checkbox"/> Judicial Review (810) | <input type="checkbox"/> Magistrate-Civil (910) |
| <input type="checkbox"/> Mandamus (520) | <input type="checkbox"/> Magistrate's Judgment (720) | <input type="checkbox"/> Relief (820) | <input type="checkbox"/> Magistrate-Criminal (920) |
| <input type="checkbox"/> Habeas Corpus (530) | <input type="checkbox"/> Minor Settlement (730) | <input type="checkbox"/> Permanent Injunction (830) | <input type="checkbox"/> Municipal (930) |
| <input type="checkbox"/> Other (599) | <input type="checkbox"/> Transcript Judgment (740) | <input type="checkbox"/> Forfeiture (840) | <input type="checkbox"/> Probate Court (940) |
| | <input type="checkbox"/> Lis Pendens (750) | <input type="checkbox"/> Other (899) | <input type="checkbox"/> SCDOT (950) |
| | <input type="checkbox"/> Other (799) | | <input type="checkbox"/> Worker's Comp (960) |
| | | | <input type="checkbox"/> Zoning Board (970) |
| <input type="checkbox"/> Special/Complex/Other | <input type="checkbox"/> Pharmaceuticals (630) | TRUE COPY
MARGARET BOSTICK
CLERK OF COURT
JASPER COUNTY, SC | |
| <input type="checkbox"/> Environmental (600) | <input type="checkbox"/> Unfair Trade Practices (640) | BY: <u>[Signature]</u> | |
| <input type="checkbox"/> Automobile Arb. (610) | <input type="checkbox"/> Other (699) | DATE: <u>11-19-14</u> | |
| <input type="checkbox"/> Medical (620) | <input type="checkbox"/> Procurement law violation | | |

Submitting Party Signature: [Signature]

Date: October 29, 2014

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

South Carolina Public Interest Foundation, et al.
Plaintiff(s)

vs.

Jasper County School District, et al.
Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2014 - CP - 27 - 468

(Please Print)
Submitted By: James G. Carpenter
Address: 819 E. North St., Suite 230
Greenville, SC 29601

SC Bar #: 1136
Telephone #: 864-235-1269
Fax #: 864-331-3083
Other:
E-mail: james.carpenter@carpenterlawfirm.net

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint. NON-JURY TRIAL demanded in complaint.
- This case is subject to ARBITRATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
- This case is subject to MEDIATION pursuant to the Circuit Court Alternative Dispute Resolution Rules.
- This case is exempt from ADR (certificate attached).

NATURE OF ACTION (Check One Box Below)

- Contracts**
- Constructions (100)
 - Debt Collection (110)
 - Employment (120)
 - General (130)
 - Breach of Contract (140)
 - Other (199)

- Torts - Professional Malpractice**
- Dental Malpractice (200)
 - Legal Malpractice (210)
 - Medical Malpractice (220)
 - Other (299)

- Torts - Personal Injury**
- Assault/Slander/Libel (300)
 - Conversion (310)
 - Motor Vehicle Accident (320)
 - Premises Liability (330)
 - Products Liability (340)
 - Personal Injury (350)
 - Other (399)

- Real Property**
- Claim & Delivery (400)
 - Condemnation (410)
 - Foreclosure (420)
 - Mechanic's Lien (430)
 - Partition (440)
 - Possession (450)
 - Building Code Violation (460)
 - Other (499)

- Inmate Petitions**
- PCR (500)
 - Sexual Predator (510)
 - Mandamus (520)
 - Habeas Corpus (530)
 - Other (599)

- Judgments/Settlements**
- Death Settlement (700)
 - Foreign Judgment (710)
 - Magistrate's Judgment (720)
 - Minor Settlement (730)
 - Transcript Judgment (740)
 - Lis Pendens (750)
 - Other (799)

- Administrative Law/Relief**
- Reinstatement Driver's License (800)
 - Judicial Review (810)
 - Relief (820)
 - Permanent Injunction (830)
 - Forfeiture (840)
 - Other (899)

- Appeals**
- Arbitration (900)
 - Magistrate-Civil (910)
 - Magistrate-Criminal (920)
 - Municipal (930)
 - Probate Court (940)
 - SCDOT (950)
 - Worker's Comp (960)
 - Zoning Board (970)
 - Administrative Law Judge (980)
 - Public Service Commission (990)
 - Employment Security Comm (991)
 - Other (999)

- Special/Complex /Other**
- Environmental (600)
 - Automobile Arb. (610)
 - Medical (620)
 - Pharmaceuticals (630)
 - Unfair Trade Practices (640)
 - Other (699)

Procurement law violation

Submitting Party Signature: 

Date: October 29, 2014

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

STATE OF SOUTH CAROLINA)

COUNTY OF JASPER)

South Carolina Public Interest)
Foundation, Edward D. Sloan, Jr,)
individually and on behalf of all others)
similarly situated, and)
Plaintiffs,)

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)
Defendants.)

IN THE COURT OF COMMON PLEAS

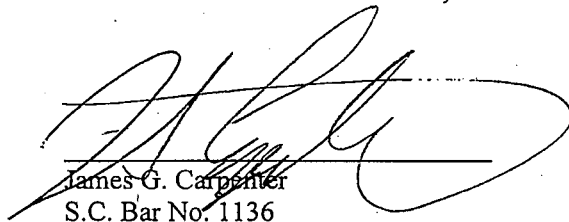
CIVIL ACTION NO. 14-CP-27-_____

Summons

TO THE DEFENDANTS:

You are hereby summoned and required to serve upon the attorney at the address below an Answer to the attached Complaint within 30 days of the date of service hereof. If you fail to do so, judgment by default will be entered against you for the relief demanded in the Complaint.

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.



James G. Carpenter
S.C. Bar No. 1136
819 E. North Street
Greenville, SC 29601
Telephone: (864) 235-1269
Facsimile: (864) 242-5500
Attorneys for Plaintiffs

STATE OF SOUTH CAROLINA)
)
COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 14-CP-27-_____

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

**Complaint for Enforcement of
District Procurement Code**

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)
Defendants.)
_____)

Plaintiffs, complaining of the Defendants, would show unto the Court:

1. Plaintiff South Carolina Public Interest Foundation is a corporation not for profit, organized and existing under the laws of the State of South Carolina and dedicated to the public interest, including the proper enforcement of procurement codes and the Constitution of the State of South Carolina.
2. Plaintiff Edward D. Sloan, Jr, is a citizen, resident, taxpayer, and registered elector of Greenville County, South Carolina.
3. Plaintiffs Denise G. Davidson and Milton Woods, Jr., are citizens, residents, taxpayers, and registered electors of Jasper County, South Carolina.
4. Defendant Jasper County School District ("District"), was created by and exists pursuant to an Act of the General Assembly.
5. Plaintiffs possess standing to bring this action as citizens, residents, taxpayers, and registered electors; and because the great public importance and manifest urgency of the matters they allege in this action.

6. South Carolina Consolidated Procurement Code, S.C. Code Ann. § 11-35-10, *et. seq.*, requires a political subdivision to use its own procurement policy adopted pursuant to S.C. Code Ann. § 11-35-50.
7. S.C. Code Ann. § 11-35-50 requires all political subdivisions to adopt policies and procedures embodying “sound principles of appropriately competitive procurement.”
8. S.C. Code Ann. § 11-35-310(23) defines political subdivisions to include school districts.
9. District’s letter to Sloan dated October 22 (**Exhibit A**) indicates that § 11-35-50 applies to District.
10. May 5, 2010, pursuant to § 11-35-50, Defendants’ adopted a Procurement Code Policy (**Exhibit B**), which is now in force.
11. District’s Procurement Code Policy § 2-102(1) requires it to use competitive sealed bidding to select its source of procurement of construction services exceeding \$50,000.
12. District’s Procurement Code Policy § 4-301 requires it to use negotiations to select its source of procurement of architectural services.
13. Competitive sealed bidding requires an Invitation for Bids, but Defendants have not issued an Invitation for Bids for this procurement of construction services.
14. The simultaneous use of competitive sealed bidding and negotiations or any other method to select a source of procurement is impossible.
15. July 14, 2014, District issued Request for Proposals 14-06-01 (**Exhibit C**), soliciting more than \$2 million design-build services to renovate its Bees Creek Project, which includes more than \$50,000 of construction services; it also includes architectural services.
16. If District’s Procurement Code Policy enables it to procure construction services using a Request for Proposals, its undated determination (**Exhibit D**) is insufficient to satisfy the

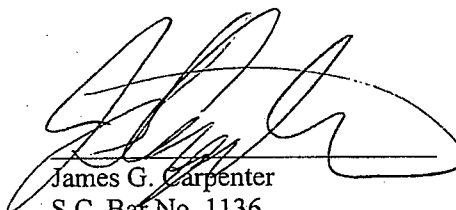
requirements of Procurement Code Policy § 2-103.

17. The proposed procurement described above violates the District's Procurement Code Policy, and is unlawful
18. Although this procurement is prospective, the District has selected a contractor and, upon information and belief, has entered into negotiations with that contractor.
19. The issue of the legality of this procurement is likely to ripen before this action concludes, and Defendants' long-term interests are likely to be well served if this Court adjudicates the merits of this issue prior to the Defendants' planned procurement.

WHEREFORE, Plaintiffs pray the Court for an Order:

1. Declaring that Defendants are not authorized to procure design-build services;
2. Enjoining Defendants from procuring design-build services for their Bees Creek Project;
3. Awarding the Plaintiff attorneys' fees and costs of litigation pursuant to S.C. Code Ann. § 15-77-300 *et seq.*
4. Granting Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.



James G. Carpenter
S.C. Bar No. 1136
819 E. North Street
Greenville, SC 29601
Telephone: (864) 235-1269
Facsimile: (864) 331-3083
Attorney for Plaintiffs

3

STATE OF SOUTH CAROLINA)
)
COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS

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

C.A. No. 2014-CP-27-468

ACCEPTANCE OF SERVICE

Plaintiff,

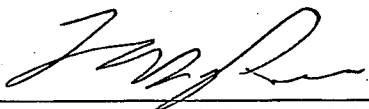
vs.

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

Defendant.

I hereby accept service of the Summons and Complaint on behalf of Defendants Jasper County School District and Bertie Riley, in regards to the above-captioned action, at Columbia, South Carolina, this the 21st day of November, 2014.

CHILDS & HALLIGAN, P.A.

By: 
Keith R. Powell, S.C. Bar No. 69292
kpowell@childs-halligan.net

P.O. Box 11367
Columbia, South Carolina 29211
(803) 254-4035

Attorney for Defendants Jasper County School District and Bertie Riley

November 21, 2014

Columbia, South Carolina

CHILDS & HALLIGAN

A PROFESSIONAL ASSOCIATION
ATTORNEYS AND COUNSELORS AT LAW

Kenneth L. Childs
William F. Halligan
Kathryn Long Mahoney
Allen D. Smith†
Shirley M. Fawley*
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Vernie L. Williams
Thomas K. Barlow**

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Allison Aiken Hanna
Keith R. Powell***
Connie P. Jackson
Kimberly Kelley Blackburn
Jasmine Rogers Drain**
Dwayne T. Mazyck
Tyler R. Turner
Mary Allison Caudell

December 18, 2014

The Honorable Margaret Bostick
Clerk of Court, Jasper County
265 Russell Street
Ridgeland, SC 29936-0248

†Certified Specialist in Employment
and Labor Law
*Also admitted in District of Columbia
**Also admitted in North Carolina
***Also admitted in Missouri
**Also admitted in Georgia

Re: South Carolina Public Interest Foundation, Edward D. Sloan, Jr., Denise G. Davidson, and Milton Woods, Jr., individually and on behalf of all others similarly situated 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
C.A. No. 2014-CP-27-468

Dear Ms. Bostick:

Our law firm represents Defendants Jasper County School District and the Honorable Berty Riley, in her official capacity as Chairman of the Board of Trustees of the Jasper County School District, in the above-referenced litigation. Enclosed for filing please find an original and one copy of Defendants' Motion to Dismiss, along with a completed Motion Information Form and a check in the amount of \$25.00 for the motion fee. Please file the original motion and return a file-stamped copy to our office in the enclosed self-addressed envelope.

By copy of this letter we are today serving a copy of Defendants' motion on James C. Carpenter, Esq., counsel for Plaintiff.

With kind regards, I am

Sincerely yours,

Mary Allison Caudell
Mary Allison Caudell
macaudell@childs-halligan.net

/rml
Enclosures

c: James C. Carpenter, Esq.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS
 FOURTEENTH JUDICIAL CIRCUIT

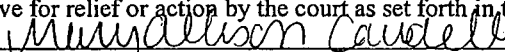
South Carolina Public Interest Foundation,)
 Edward D. Sloan, Jr, individually and on)
 behalf of all others similarly situated,)
 Plaintiff,)

C.A. No. 2014-CP-27-468

vs.)

**MOTION AND ORDER INFORMATION
 FORM AND COVER SHEET**

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

Plaintiff's Attorney James C. Carpenter, Esq. S.C. Bar No. 1136 Carpenter Law Firm, PC 819 E. North Street, Suite 230, Greenville, SC 29601 telephone: (864)-235-1269 fax: (864)-331-3080 e-mail: james.carpenter@carpenterlawfirm.net	Defendant's Attorney Mary Allison Caudell S.C. Bar No. 101187 Childs & Halligan, P.A. PO Box 11367, Columbia, SC 29211 telephone: (803) 254-4035 fax: (803) 771-4422 e-mail: macaudell@childs-halligan.net
<input checked="" type="checkbox"/> <input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
<p style="text-align: center;">SECTION I: Hearing Information</p> Nature of Motion: Estimated Time Needed: 30 Minutes Court Reporter Needed: YES	
<p style="text-align: center;">SECTION II: Motion/Order Type</p> <input checked="" type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. <div style="display: flex; justify-content: space-between;"> <div style="text-align: center;">  Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant </div> <div style="text-align: right;"> 12/18/14 Date submitted </div> </div>	
<p style="text-align: center;">SECTION III: Motion Fee</p> <input checked="" type="checkbox"/> PAID – AMOUNT: \$ 25.00 <input type="checkbox"/> EXEMPT: (check reason) <ul style="list-style-type: none"> <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ <input checked="" type="checkbox"/> Other: _____	
<p>JUDGE'S SECTION</p> <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by: _____

Date Filed: _____

MOTION FEE COLLECTED: \$ _____

CONTESTED – AMOUNT DUE: \$ _____

SCCA/233 (11/2003)

STATE OF SOUTH CAROLINA)
)
COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS

South Carolina Public Interest)
Foundation, Edward D. Sloan, Jr,)
individually and on behalf of all others)
similarly situated,)

C.A. No. 2014-CP-27-468

**MOTION TO DISMISS COMPLAINT
AGAINST DEFENDANTS**

Plaintiff,)

vs.)

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,)

Defendants.)
_____)

Defendants Jasper County School District and the Honorable Berty Riley, by and through its undersigned counsel, hereby move this Court for an order pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, dismissing Plaintiff's complaint against Defendants for failure to state facts sufficient to constitute a claim. The grounds for this motion are as follows:

1. Defendants have already executed a contract with M.B. Kahn Construction Co., Inc., for their design-build services on the Bees Creek project, rendering the above-referenced action moot (A copy of the Notice to Proceed sent to M.B. Kahn is attached as Exhibit A); and
2. Defendants did not violate the South Carolina Consolidated Procurement Code, S.C. Code Ann. § 11-35-10, *et. seq.* or the District's Procurement Code Policy.

In support of this motion, the Defendants will rely upon the pleadings on the file, the applicable statutory and case law, and a Memorandum of Law that will be filed with the Court in advance of the hearing on this motion.

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

By: Mary Allison Caudell
William F. Halligan, S.C. Bar No. 2607
bhalligan@childs-halligan.net

Keith R. Powell, S.C. Bar No. 69292
kpowell@childs-halligan.net

Mary Allison Caudell, S.C. Bar No. 101187
macaudell@childs-halligan.net

P.O. Box 11367
Columbia, South Carolina 29211
(803) 254-4035

Attorneys for Defendants Jasper County School
District and Bertie Riley

December 18, 2014

Columbia, South Carolina

EXHIBIT A

Jasper County School District
Division of Operations & Facilities

Post Office Box 848 - 10942 North Jacob Smart Blvd. - Ridgeland, South Carolina 29936

(843) 489 - 8892 ext.2999 Telephone

(843) 717 - 1699 Fax

Email: dowens@jcsd.net

Website: www.jcsd.net

Yashti K. Washington, Ed.D.
Superintendent

Darryl A. Owens
Chief of Operations

November 10, 2014

M.B. Kahn Construction Co., Inc.
101 Flintlake Road
Columbia, SC 29223

Attn: William W. Cram, Exec. V.P.

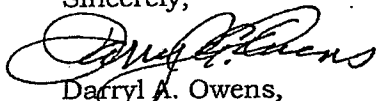
Re: Renovation of 3776 Bees Creek Rd Property
For use as Centralized District Administrative Offices
(Owner solicitation #14-06-01)

Notice to Proceed

Mr. Cram;

This letter will serve as your official Notice to Proceed with all services as defined in the Agreement Between Owner and Design-Builder dated November 10, 2014. Please coordinate all activities with and direct all communications to Chief of Operations. We look forward to a successful collaboration with M.B. Kahn on this important project.

Sincerely,



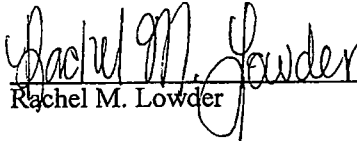
Darryl A. Owens,
Chief of Operations - Jasper County School District

"Sharing Our Strengths to Produce Great Results for Our Students"

CERTIFICATE OF SERVICE BY MAIL

The undersigned of Childs & Halligan, P.A., hereby certifies that she has served the following counsel of record with the foregoing **MOTION TO DISMISS** by mailing a copy of same, postage prepaid and return address clearly indicated, to the following on this 18th day of December, 2014:

James C. Carpenter, Esq.
Carpenter Law Firm, PC
819 E. North Street, Suite 230
Greenville, SC 29601



Rachel M. Lowder

STATE OF SOUTH CAROLINA

FILED

COUNTY OF JASPER

2015 JAN 12 AM 10:11

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 14-CP-27-468

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

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
Defendants.

Amended and Supplemental Complaint
for the Enforcement of the
District Procurement Code

NOW COME the Plaintiffs, by their undersigned attorney, and as an Amended and Supplemental Complaint, pursuant to SCRCP 15 (a) and (d) against the Defendants, allege as follows:

1. Plaintiff South Carolina Public Interest Foundation is a corporation not for profit, organized and existing under the laws of the State of South Carolina and dedicated to the public interest, including the proper enforcement of procurement codes and the Constitution of the State of South Carolina.
2. Plaintiff Edward D. Sloan, Jr. is a citizen, resident, taxpayer, and registered elector of Greenville County, South Carolina.
3. Plaintiffs Denise G. Davidson and Milton Woods, Jr., are citizens, residents, taxpayers, and registered electors of Jasper County, South Carolina.
4. Defendant Jasper County School District ("District"), was created by and exists pursuant to an Act of the General Assembly.
5. Plaintiffs possess standing to bring this action as citizens, residents, taxpayers, and

registered electors; and because the great public importance and manifest urgency of the matters they allege in this action.

6. This Court possesses jurisdiction under the following decisions, which address public interest and taxpayer standing: *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013), *American Petroleum Institute v. S.C. Dep't. of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009), *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008), *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008), *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005), *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003), *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000), *Baird v. Richland County*, 333 S.C. 519, 511 S.E.2d 69 (1999), *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997); and under S.C. Code Ann. § 15-53-10 *et seq.*, known as the Uniform Declaratory Judgment Act.
7. S.C. Code Ann. § 11-35-310(23) defines political subdivisions to include school districts.
8. South Carolina Consolidated Procurement Code, S.C. Code Ann. § 11-35-10, *et. seq.*, requires a political subdivision to use its own procurement policy adopted pursuant to S.C. Code Ann. § 11-35-50.
9. S.C. Code Ann. § 11-35-50 requires all political subdivisions to adopt policies and procedures embodying "sound principles of appropriately competitive procurement."

10. District's letter to Sloan dated October 22, 2014 (**Exhibit A**) indicates that § 11-35-50 applies to District.
11. May 5, 2010, pursuant to § 11-35-50, Defendants' adopted a Procurement Code Policy (**Exhibit B**), which is now in force.
12. District's Procurement Code Policy § 2-102(1) requires, "Contracts of \$50,000 or more must be awarded by competitive sealed bidding" (emphasis added).
13. Unlike S.C. Code Ann. § 15-35-1520 (the comparable section in the South Carolina Consolidated Procurement Code), the District's Procurement Code Policy § 2-102(1) does not contain an exception. Thus, § 2-102(1) is mandatory for "Contracts of \$50,000 or more." *Id.*
14. July 14, 2014, District issued Request for Proposals 14-06-01 (**Exhibit C**), soliciting more than \$2 million design-build services to renovate its Bees Creek Project, which includes more than \$50,000 of construction services; it also includes architectural services.
15. On November 10, 2014, Defendants procured construction services of \$50,000 or more, with a guaranteed maximum price of \$2.9 million, using a method of selection of source other than competitive sealed bidding (**Exhibit E**).
16. Competitive sealed bidding requires an Invitation for Bids, but Defendants have not issued an Invitation for Bids for this procurement of construction services of \$50,000 or more.
17. District's Procurement Code Policy § 4-301 requires it to use negotiations to select its source of procurement of architectural services.
18. Defendants procured architectural services through the contract attached as **Exhibit E**.
19. The simultaneous use of competitive sealed bidding and negotiations, or any other method to make a single procurement, is impossible.

FIRST CAUSE OF ACTION

20. Plaintiff incorporate by reference all the foregoing paragraphs.
21. The procurement of construction services of \$50,000 or more by **Exhibit E** violates the District's Procurement Code Policy, and is unlawful.

SECOND CAUSE OF ACTION

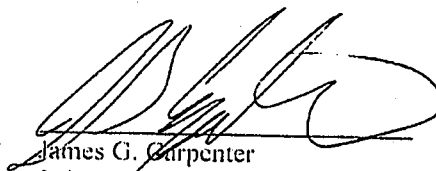
22. Plaintiff incorporate by reference all the foregoing paragraphs.
23. If the Court determines that contrary to Procurement Code Policy § 2-102(1), District's Procurement Code Policy enables Defendants to procure construction services of \$50,000 or more using a Request for Proposals, Defendants' undated determination (**Exhibit D**) is insufficient to satisfy the requirements of Procurement Code Policy § 2-103.
24. The procurement violates the District's Procurement Code Policy, and is unlawful.

WHEREFORE, Plaintiffs pray the Court for an Order:

1. Declaring that the procurement by contract dated November 10, 2014 (**Exhibit E**), in which Defendants procured construction services of \$50,000 or more using a method of source selection other than competitive sealed bidding violates the District's Procurement Code Policy, and is unlawful;
2. Declaring that Defendants are not authorized to procure design-build services which include construction services of \$50,000 or more;
3. Declaring that Defendants' undated determination (**Exhibit D**) is insufficient to satisfy the requirements of Procurement Code Policy § 2-103
4. Enjoining Defendants from procuring design-build services through the contract attached as **Exhibit E**;

5. Awarding the Plaintiff attorneys' fees and costs of litigation pursuant to S.C. Code Ann. § 15-77-300 *et seq.*
6. Granting Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.



James G. Carpenter
S.C. Bar No. 1136
819 E. North Street
Greenville, SC 29601
Telephone: (864) 235-1269
Facsimile: (864) 331-3083
Attorney for Plaintiffs

January 8, 2015

Jasper County School District
A NEW DAY... A NEW WAY...
OFFICE OF PUBLIC INFORMATION

10842 N. Jacob Smart Blvd.
(843) 489-8892 (Ext. 1600) Office
Vashti K. Washington, Ed.D.
Superintendent

Post Office Box 848

Ridgeland, South Carolina 29836
(843) 717-1191-Fax
Shellie Murdaugh
Public Information Officer

October 22, 2014

Edward D. Sloan, Jr.
P.O. Box 25999
Greenville, SC 29616-0999

Re: FOIA Request - Bees Creek Renovation Project

Dear Mr. Sloan:

Regarding your follow-up FOIA request, received today:

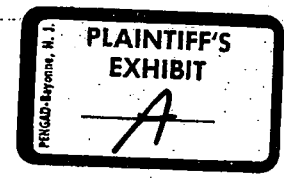
1. The contract with M.B. Kahn will be formed using the AIA A141-2004 series. Project-specific terms are being finalized, and it has not been executed. It is therefore currently exempt from FOIA disclosure. See S.C. Code § 30-4-40(5). The Board of Education intends to take up the contract on November 10, 2014, and the contract documents will be available per S.C. Code Ann. § 30-4-40(5)(a) when and if executed.
2. Jasper County School District is not within the scope of S.C. Code Ann. § 11-35-70, but rather S.C. Code Ann. § 11-35-50. The State Engineer has no role in District capital project procurement or implementation, and accordingly no communications with the State Engineer about the Bees Creek Renovation Project occurred.

Sincerely yours,

Shellie Murdaugh
Public Information Officer

cc: Ms. Bertie Riley, Board Chair
Dr. Vashti Washington, Superintendent

Equal Opportunity Employer



PURCHASING

Code **DJ-R** Issued **5/10**

JASPER COUNTY BOARD OF EDUCATION

PROCUREMENT CODE POLICY

Adopted 5/28/85; Revised 5/10/10

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ARTICLE 1 - GENERAL PROVISIONS

Part A - Purposes and application

- 1-101 Purpose

The purpose of this policy is to provide for the fair and equitable treatment of all persons involved in public purchasing by this school district, to maximize the purchasing value of public funds in procurement, and to provide safeguards for maintaining a procurement system of quality and integrity.

- 1-102 Application

This policy applies to all procurements not presently being solicited and to all contracts and contract renewals for the private sector procurement of supplies, services and construction entered into, unless the parties also agree to its application to contracts entered into prior to the effective date. The school district maintains, at its sole discretion, the prerogative to provide such items internally or, alternatively, by and through arrangements with other public entities as herein elsewhere provided. It shall apply to public expenditures of funds irrespective of their source. Nothing in this policy shall prevent any school district department or division from complying with the terms and conditions of any grant, gift or bequest which are otherwise consistent with law.

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1-103 Exemptions

The school board may exempt specific supplies or services from this policy. The following supplies and services are exempted from this policy:

- (a) Books, periodicals, newspapers, technical pamphlets, standardized tests and testing materials, copyrighted educational materials including software, CD ROMs, videos, filmstrips, slides, and transparencies;
 - (b) Public utilities;
 - (c) Travel;
 - (d) Workshops, seminars, conferences;
 - (e) Professional journals;
 - (f) Taxes, social security, annuities, credit union;
 - (g) Life insurance or supplemental insurance;
-
- (h) Oil company credit cards: purchases for gas and oil and emergency repairs;
 - (i) Professional services normally obtained on a fee basis, such as attorneys, accountants, physicians, or dentists, provided that no such services may be awarded without approval of the school district board of trustees;
 - (j) Clergy;
 - (k) Court reporters;
 - (l) Professional dues, registration and membership fees;
 - (m) Instructional training seminars or staff development offered by the district to district employees and those contractual services necessary to provide the services for the seminar;
 - (n) Diplomas;
 - (o) U.S. postage stamps and post office boxes;
 - (p) Art reproductions;
 - (q) Expert witness services;
 - (r) Furniture refurbishing services of the Department of Corrections;
 - (s) Services and/or supplies provided by the Division of General Services to public procurement units;
 - (t) Livestock, feed and veterinary supplies and services; and
 - (u) Local school funds (not allocated funds).

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1-104 Specific repealer

This policy repeals all previously issued policies, rules or regulations pertaining to procurement for this school district, except those dealing with the procurement of items exempted from this policy.

1-105 Effective date

This policy shall become effective at 12:01 a.m. on July 1.

Part B - Definitions of terms used in this policy

1-201 Definitions

- (1) Business: Any corporation, partnership, individual, sole proprietorship, joint stock company, joint venture, or any other private legal entity.
- (2) Catalogue price: The price, including any applicable discount available, included in a catalogue price list, schedule or other form that:
 - (a) is regularly maintained by a manufacturer or contractor;
 - (b) is either published or otherwise available for inspection by customers; and
 - (c) states prices at which sales are currently or were last made to a significant number, or any category of buyer or buyers constituting the general buying public for the supplies or services involved.
- (3) Construction: The process of building, altering, repairing, improving, or demolishing any structure or building owned by the school district. It does not include operation, routine repair or routine maintenance of existing structures, buildings or real property.
- (4) Contract: All types of agreements, regardless of what they may be called, for the procurement or disposal of supplies, services, or construction.
- (5) Contract modification: Any written alteration in specifications, delivery point, date of delivery, period of performance, price, quantity, or other provisions of any contract accomplished by mutual action of the parties to the contract.
- (6) Contractor: Any person having a contract with the school district.
- (7) Cooperative purchasing: Procurement conducted by, or on behalf of, more than one "Public Procurement Unit."
- (8) Cost reimbursement contract: A contract under which a contractor is reimbursed for costs which are allowable and allocable in accordance with the contract terms and the provisions of this policy, and a fee, if any.
- (9) Data: Recorded information, regardless of form or characteristics.
- (10) Days: Calendar days. In computing any time prescribed by this code, the day of the event from which the designated period of time begins to run is not included. If the final day of the designated period falls on a Saturday, Sunday, or a legal government holiday, then the period must run to the end of the next business day.

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- (11) Debarment: The disqualification of a person to receive invitations for bids, or requests for proposals, or the award of a contract, for a specified period of time commensurate with the seriousness of the offense or the failure or inadequacy of performance.
- (12) Emergency procurement: A method of procurement used only when there exists an immediate threat to public health, welfare, critical economy and efficiency, or safety under emergency conditions.
- (13) Employee: An individual drawing a salary from this school district, whether elected or not, and any volunteer.
- (14) Invitation for bids: All documents, whether attached or incorporated by reference, utilized for soliciting bids.
- (15) Non-expendable supplies: All tangible supplies having an original acquisition cost of over \$100 per unit and a probable useful life of more than one (1) year.
- (16) Person: Any business, individual, committee, club, other organization, or group of individuals.

- (17) Procurement: Buying, purchasing, renting, leasing, or otherwise acquiring any supplies, services, or construction. It also includes all functions that pertain to the obtaining of any supply, service, or construction, including description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.
- (18) Public procurement unit: Any state, county, municipality, school district, and any other subdivision of the state or subdivision thereof, public authority, educational, health, or other institution, any other entity which expends public funds for procurement of supplies, services, or construction.
- (19) Purchase description: The words used in a solicitation to describe the supplies, services or construction to be purchased, and includes specifications attached to, or made a part of, a "solicitation."
- (20) Quotation: A statement of the market price of securities, goods, or services; or the price specified to the correspondent. Often shortened to "quote."
- (21) Request for proposals (RFP): All documents whether attached or incorporated by reference, utilized for soliciting proposals.
- (22) Request for qualifications (RFQ): A request for qualifications from prospective offers issued prior to soliciting proposals. The RFQ must contain a description of the goods and services to be solicited by the request for proposals, the general scope of the work, the deadline for submission of information, and how prospective offerors may apply for consideration.
- (23) Response: Any bid, offer or proposal, without regard to the source selection method, which is submitted in reply to a "solicitation."
- (24) Responsible "vendor": A person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which will assure good faith performance.
- (25) Responsive "vendor": A person who has submitted a response which conforms to, in all material respects, an invitation for bids or a request for proposals.

Jasper County Board of Education

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- (26) School district: As herein used, school district is intended to include the board of trustees or their authorized agent, such as, but not limited to, the superintendent, director of finance or, where applicable, director of procurement or other official responsible for procurement activity.
- (27) Service: The furnishing of labor, time or effort by a contractor. This term includes consultant services other than architectural, engineering, land surveying, construction management, and related services. This term does not include employment agreements or the providing of consultant assistance for any aspect of information technology, systems and networks.
- (28) Sole source: A method of procurement used where the district's needs can only be met by one method, means or item. Price is not an operative factor, inasmuch as the cost is not pertinent where the needs are unique and can only be satisfied through a unique one-of-a-kind acquisition.
- (29) Solicitation: Any effort, without regard to the source selection method, to obtain supplies, services or construction by the school district.
-
- (30) Solicitation document: The document(s) used in connection with a particular solicitation.
- (31) Supplies: All personal property including, but not limited to, equipment, materials, printing, insurance, information technology equipment and software packages.
- (32) Surplus supplies: Any supplies other than expendable supplies no longer having any use to the school district. This includes obsolete supplies, scrap materials and non-expendable supplies that have completed their useful life cycle.
- (33) Term contract: A contract established for a specific product or service for a specified time and for which it is mandatory that all governmental bodies procure their requirements for the goods and services during its term.
- (34) Vendor: Any person submitting a response to a solicitation.

Part C - Compliance with state and federal regulations

1-301 Public access to procurement information

Procurement information shall be a public record to the extent required by Chapter 4 of Title 30 (The Freedom of Information Act), South Carolina Code of Laws, 1976, with the exception that proprietary commercial or financial information supplied in response to a solicitation which is marked privileged and confidential is not to be disclosed.

1-302 Compliance with federal requirements

Where procurement involves the expenditure of federal assistance or contract funds, the school district must also comply with such federal law and authorized regulations which are mandatory and which are not otherwise contained therein.

1-303 Standards of conduct

In all procurement actions for this school district, the provisions of Chapter 13, Title 8 (State Ethics Law), South Carolina Code of Laws, 1976, must be complied with.

Jasper County Board of Education

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ARTICLE 2 - SOURCE SELECTION AND CONTRACT FORMATION

Part A - Methods of source selection

2-101 Methods of source selection

Unless otherwise required by law or this policy, all school district contracts must be awarded by competitive sealed bidding, pursuant to Section 2-102, except as provided herein:

- (1) Section 2-103(Competitive sealed proposals);
- (2) Section 2-104(Small purchases);
- (3) Section 2-105(Sole procurement);
- (4) Section 2-106(Emergency procurement);
- (5) Section 4-301(Architect-engineer or land surveying services).

2-102 Competitive sealed bidding

- (1) Conditions for use: The preferred procurement technique, competitive sealed bidding, should not be used in all instances. This is a price determinate method of procurement and is best applied where the needs of the district are precise and certain and may be secured from any number of potential suppliers. Contracts of \$50,000 or more must be awarded by competitive sealed bidding.
- (2) Invitation for bids: The invitation for bids must be the document used to initiate a competitive sealed bid procurement and must include the following:
 - (a) instructions and information to bidders concerning the bid submission requirements, including the time and date set for receipt of bids, the individual to whom the bid is to be submitted, the address of the office to which bids are to be delivered, and any other special information;
 - (b) the purchase description, specifications, delivery and performance schedule, and such inspection and acceptance requirements as are not included in the purchase descriptions;
 - (c) all contract terms and conditions, including warranty and bonding or other security requirements as applicable;
 - (d) instructions to bidders to visibly mark as confidential each part of their bid which they consider to be proprietary information; and
 - (e) a statement of a bidder's right to protest under 6-201.
- (3) Public notice: Public notice of the invitation for bids must be given. Such notice may include publication in a newspaper of general circulation a reasonable time prior to bid opening. Bidding time will be set to provide bidders a reasonable time to prepare their bids. A minimum of seven (7) days shall be provided unless a shorter time is deemed necessary for a particular procurement, as determined by the school district.
- (4) Bid opening: Bids must be opened publicly in the presence of one or more witnesses at the time and place designated in the invitation for bids. The dollar

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amount of each bid and such other relevant information, together with the name of each bidder, must be recorded; the record and each bid must be open to public inspection at that time. Only the information disclosed at the bid opening is considered to be public information until an award is actually made. An amendment postponing bid openings may be issued only when emergency or unanticipated events beyond the control of bidders interrupt normal government operations. The date and location for the posting of the notice of an intended award must be announced at bid opening.

- (5) Bid acceptance and bid evaluation: Bids must be accepted without alteration or correction, except as authorized in this policy. When necessary for the best interest of the school district, the invitation for bids may include criteria to determine acceptability, such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award must be measurable, such as discounts, transportation costs and total or life cycle costs. The invitation for bids must set forth the cost criteria to be used. No cost criteria may be used in bid evaluation that are not set forth in the invitation for bids.
- (6) Correction or withdrawal of bids; cancellation of awards: Corrections or withdrawal of inadvertently erroneous bids before or after award, or cancellation of awards or contracts based on such bid mistakes, may be permitted where appropriate. After bid openings, no change in bid prices or other provisions of bids prejudicial to the interest of the school district or fair competition must be permitted. A bidder must submit a written request to either correct or withdraw a bid to the school district. Each written request must document the fact that the bidder's mistake is clearly an error that will cause him substantial loss. In order to maintain the integrity of the competitive sealed bidding process, a bidder must not be permitted to correct a bid mistake after bid opening that would cause such bidder to have the low bid, unless the mistake, in the judgment of the school district, is clearly evident from examining the bid document; for example, extension of unit prices or errors in addition. All decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts based on bid mistakes, must be supported by a written determination.
- (7) Award: Notice of an award or an intended award to the lowest responsive and responsible bidders must be given by posting the notice at a location specified in the invitation for bids. Prior to the posting of the award, the school district may negotiate an adjustment in the bid price, with the lowest responsive and responsible bidder to bring the bid within the scope of the invitation for bids. The notice shall contain a statement of a bidder's right to protest under 6-201. If a contract exceeds \$50,000, but is less than \$100,000, notice of award must also be sent to all bidders responding to the solicitation on the same day that the notice is posted in accordance with this section. For contracts of \$100,000 or greater, the school district may contract with the bidder named in the notice 10 days after notice is posted and sent to responsive bidders. The posting date must appear on the face of all these notices. The notice of intent to award and the 10-day delay of award may be waived when only one response is received.
- (8) Request for Qualification: The district may follow the process set forth under 2-103(4).

2-103 Competitive sealed proposals

- (1) Conditions for use: When the school district determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the

Jasper County Board of Education

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school district, a contract may be awarded by competitive sealed proposals. Competitive sealed proposals should be used when both the needs of the school district and the costs to satisfy those needs are important, and the methods or items to satisfy those needs are not clear and precise. While price is an important factor, it is considered less significant than fully meeting the district's needs. The ultimate purpose of this method of procurement is to provide flexibility to the district, while taking into consideration various options and the costs of each. Proposals must be solicited through a request for proposals.

- (2) Public notice: Public notice of the request for proposals must be given in the same manner, as provided in Section 2-102(3).
- (3) Proposal opening: Proposals must be publicly opened, but only the names of the offerors disclosed at the proposal opening. Contents of competing proposals must not be disclosed during the process of opening or negotiation. All proposals shall be recorded at the time of opening and must be opened for public inspection after contract award. Proprietary or confidential information marked as such in each proposal must not be disclosed without written consent of the offeror.
- (4) Request for qualifications: Prior to soliciting proposals, and after giving adequate public notice, the district may issue a request for qualifications, experience and ability to perform the requirements of the contract from prospective offerors. At a minimum, the request must contain a description of the goods or services to be solicited by the invitation for bids and the general scope of the work. The request must also contain the deadline for submission of information and how prospective offerors may apply for consideration.

After the district receives the responses, it will rank prospective offerors from most qualified to least qualified on the basis of the information provided. The district must then invite bids from at least the top two prospective offerors in accordance with section (2) above.

- (5) Negotiations with responsible offerors and revisions to proposals: As provided in the request for proposals, negotiations may be conducted with any offeror submitting a proposal appearing to be eligible for contract award pursuant to the selection criteria set forth in the request for proposals. All apparently eligible offerors must be afforded the opportunity to submit best and final proposals, if negotiations with any other offeror result in a material alteration to the request for proposals and such an alteration has a cost consequence that may alter the order of offerors' price quotations contained in their initial proposals. In conducting negotiations, there must be no disclosure of information derived from proposals submitted by any competing offerors.
- (6) Evaluation factors: The request for proposals shall state the evaluation factors in relative order of importance. Price may but need not be an initial evaluation factor. Each responsive and responsible offeror's proposal must be evaluated. The proposal must then be ranked in accordance with the results of such evaluation.
- (7) Award: The award must be made to the responsible offeror whose proposal is determined in writing to be most advantageous to the school district, taking into consideration the evaluation factors set forth in the request for proposals. No other factors or criteria must be used in the evaluation. The contract file shall contain the basis on which the award is made.

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2-104 Small purchases

Any single procurement not exceeding \$50,000 may be made by the school district in accordance with this paragraph; provided, however, that such procurements shall not be artificially divided so as to constitute a small purchase. Related items (such as small hardware items or spare parts for vehicles) may be included in one solicitation and the award made on an "all or none" basis. In such cases, suppliers must be advised of this award procedure at the time quotations are requested.

- (a) Small purchases not exceeding \$2,500 may be accomplished without competitive quotations, if the prices are considered to be reasonable. The district shall annotate the purchase requisition as follows: "Price is fair and reasonable" and sign such purchase requisition. Such purchases must be distributed equitably among qualified suppliers. When practical, a quotation will be solicited from other than the previous supplier prior to placing a repeat order.
- (b) Small purchases from \$2,500.01 to \$10,000 may be accomplished, if verbal or written quotes from a minimum of three qualified sources of supply are made and it is documented that the procurement is to the advantage of the school district, price and other factors considered, including the administrative costs of the purchase. Such documentation must be attached to the purchase requisition.
- (c) Small purchases from \$10,000.01 to \$50,000 may be accomplished, if written solicitation of written bids, proposals or quotes from five qualified sources of supply are obtained and it is documented that the procurement is to the advantage of the school district, price and other factors considered, including the administrative costs of the purchase. Such documentation shall be attached to the purchase requisition. When prices are solicited by telephone, the vendors must be requested to furnish written evidence of such quotation.

2-105 Sole source procurement

- (1) Conditions for use: This method of procurement is the least competitive and, therefore, should have limited use. In those instances, however, where the district's needs can only be met by one method, means or item, sole source is an appropriate and necessary method of procurement. Price is not an operative factor, inasmuch as the cost is not pertinent where the needs are unique and can only be satisfied through a unique one-of-a-kind acquisition. Such determination as to whether a procurement must be made as a sole source must be made by the school district. Such determination and the basis thereof must be in writing and must include an explanation as to why no other source will be suitable or acceptable to meet the need.
- (2) Award: A contract may be awarded for a supply, service or construction item without competition when the school district determines in writing that there is only one source for the required supply, service or construction item. The following are examples of circumstances which could necessitate sole source procurements:
 - (a) where the compatibility of equipment, accessories or replacement parts is the paramount consideration;
 - (b) where a unique item is needed for trial use or testing;
 - (c) where a unique item is to be procured for resale;

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- (d) where the item is one of a kind; and
- (e) printed forms, pamphlets, and brochures, exclusive of printing equipment.

2-106 Emergency procurement

Notwithstanding any other provision of this policy, the school district may make or authorize others to make emergency procurements when there exists a threat to public health, welfare or safety under emergency conditions, or where normal daily operations are affected; provided that such emergency procurements must be made with such competition as is practicable under the circumstances. If emergency considerations exist after an unsuccessful attempt to use competitive sealed bidding, an emergency procurement may also be made. A written determination must be made stating the basis for an emergency procurement and for the selection of the particular vendor. Emergency procurements shall be limited to that of supplies, services or construction items necessary to meet the emergency.

2-107 Rejection of responses

(1) Rejection of all responses: A compelling reason should exist to reject all responses. Every effort must be made to anticipate changes in a requirement prior to the date of opening and to notify all prospective vendors of any resulting modifications or cancellation, thereby permitting vendors to change their responses and preventing the unnecessary exposure of responses. As a general rule, a solicitation should not be canceled and readvertised after opening, due solely to increased requirements for the items being procured; an award should be made on the initial solicitation, and the additional quantity required should be treated as a new procurement. When it is determined prior to an award, but after opening, that the requirements relating to the availability and identification of specifications have not been met, the solicitation must be canceled. The solicitation may be canceled after opening, but prior to an award, when it is determined in writing that:

- (a) inadequate or ambiguous specifications were cited in the solicitation;
- (b) specifications have been revised;
- (c) supplies or services being procured are no longer required;
- (d) the specification did not provide for consideration of all factors of costs to the school district, such as cost of transportation;
- (e) responses received indicate that the needs of the school district can be satisfied by a less expensive article differing from that on which the responses were invited;
- (f) all otherwise acceptable responses received are at unreasonable prices;
- (g) the responses were not independently arrived at in open competition, were collusive or were submitted in bad faith; or
- (h) for other reasons, cancellation is clearly in the best interest of the school district.

(2) Rejection of individual responses: Any response which fails to conform to the essential requirements of the specification, such as bid security, must be rejected.

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Any bid which does not conform to the specifications contained or referenced in the invitation for bids may be rejected, unless the invitation for bids authorized the submission of alternate bids and said alternates meet the requirements specified in the invitation for bids. Any response which fails to conform to the delivery schedule or permissible alternates thereto stated in the solicitation may be rejected as non-responsive. Ordinarily, a response should be rejected when the vendor attempts to impose conditions which would limit his liability to the school district, since to allow the vendor to impose such conditions would be prejudicial to other vendors. For example, responses should be rejected in which the vendor:

- (a) attempts to protect against future changes in conditions, such as increased costs, if total possible cost to the school district cannot be determined;
 - (b) fails to state a price or states a price but qualifies such price and states that the price shall be subject to the "price in effect at time of deliveries";
 - (c) when not authorized by the solicitation, conditions or qualifies a response by stipulating that the response is to be considered only if, prior to the date of award, the vendor receives (or does not receive) an award under a separate procurement;
 - (d) requires the school district to determine that the vendor's product meets the school district's specifications; or
 - (e) limits the rights of the school district under any contract clause.
- (3) Any response received after the school district has declared that the time set for opening has arrived shall be rejected unless the response was in the possession of the school district and was misplaced. In such an event, the misplaced response shall be considered along with other previously received responses.
- (4) Minor informalities or irregularities in bids or offers: A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the solicitation, having no effect or merely a trivial or negligible effect on price, quality, quantity, or delivery of the supplies or performance of the services being procured, and the correction or waiver of which would not affect the relative standing of, or be otherwise prejudicial to, other vendors. The school district must either give the vendor an opportunity to cure any deficiency resulting from a minor informality or irregularity in a response, or waive any such deficiency where it is to the advantage of the school district. Such communication or determination must be in writing. Examples of minor informalities or irregularities include, but are not limited to:
- (a) failure of a vendor to return the number of copies of signed responses required by the solicitation;
 - (b) failure to furnish the required information concerning the number of the vendor's employees or failure to make a representation concerning his size status;
 - (c) failure of a vendor to sign his response, but only if (i) the firm submitting the response has formally adopted or authorized the execution of documents by typewritten, printed or rubber-stamped signature and submits evidence of such authorization and the response carries such a signature; or (ii) the

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unsigned response is accompanied by other material indicating the vendor's intention to be bound by the unsigned response, such as the submission of a price guarantee with the response, or a letter signed by the vendor with the response referring to and clearly identifying the response itself.

- (d) failure of a vendor to acknowledge receipt of an amendment to a solicitation, but only if (i) the response received clearly indicates that the vendor received the amendments, such as where the amendment added another item to the solicitation and the vendor submitted a response thereon, or (ii) the amendment clearly would have no affect or merely a trivial or negligible affect on price, quality, quantity, delivery or the relative standing of vendors, such as an amendment correcting a typographical mistake in the name of the school district, or (iii) there is a failure to furnish an affidavit concerning affiliates, if required.

Part B - Vendor qualifications and duties

2-201 Responsibility of vendors

A written determination of non-responsibility of a vendor must be made. The unreasonable failure of a vendor to promptly supply information in connection with an inquiry with respect to responsibility may be grounds for a determination of non-responsibility with respect to such vendor. Factors to be considered in determining the responsibility of a vendor include whether the prospective contractor has:

- (1) the appropriate financial, material, equipment, facilities, personnel resources, and expertise available, or the ability to attain them, necessary to indicate its capability to meet all contractual requirements;
- (2) a satisfactory record of past performance;
- (3) a satisfactory record of integrity;
- (4) qualified legally to contract with the school district; and
- (5) supplied all necessary information in connection with an inquiry concerning responsibility. A copy of the written determination of non-responsibility shall be sent promptly to the non-responsible bidder or offeror. The final determination must be made a part of the procurement file.

2-202 Cost or price data

- (1) Required submission relative to the award of contracts: A prospective contractor shall submit cost or pricing data when the contract is expected to exceed \$100,000. The submission of such cost or pricing data relating to the award of a contract is not required where:
 - (a) the contract price is based on adequate price competition;
 - (b) the contract price is set by law or regulation; or
 - (c) it is determined in writing that such requirement may be waived and the determination states the reasons for such waiver.
- (2) Required submissions relating to change orders or contract modifications: A contractor must submit cost or pricing data prior to the pricing of any change order or contract modification, including adjustments to contracts awarded by

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competitive sealed bidding. The submission of such cost or pricing data relating to the pricing of a change order or contract modification is not required where:

- (a) unrelated and separately priced adjustments for which cost or pricing data would not be required are consolidated for administrative convenience; or
 - (b) it is determined in writing that such requirement may be waived and the determination states the reason for such waiver.
- (3) Certificate required: A contractor, actual or prospective, required to submit cost or pricing data in accordance with this section, must certify that, to the best of its knowledge and belief, the cost or pricing data submitted was accurate, complete and current as of a mutually specified date prior to the award of the contract or the pricing of the change order or contract modification.
- (4) Price adjustment provision required: Any contract awarded, change order or contract modification under which submission and certification of cost or pricing data are required must contain a provision stating the price to the school district, including profit or fee, must be adjusted to exclude any significant sums by which the school district finds that such price was increased because the contractor-furnished cost or pricing data was inaccurate, incomplete or not current as of the date agreed upon between the school district and the contractor.

Part C - Types of contracts

2-301 Types of contracts

Subject to the limitations of this section, any type of contract which will promote the best interest of the school district may be used; provided that the use of cost-reimbursement or a cost-plus-percentage-of-cost contract may not be used unless the school district makes a determination in writing approved by the board that such contract is likely to be less costly to the school district than any other type, or that it is impracticable to obtain the supplies, services or construction required except under such a contract.

2-302 Multi-year contracts

- (1) Specified period: A contract for supplies or services may be entered into for a period of time not to exceed five (5) years, provided the term of the contract and the conditions of renewal or extension, if any, are included in the solicitation, and funds are available for the first fiscal period at the time of contracting. Payment and performance obligations for succeeding fiscal periods must be subject to the availability of funds therefore.
- (2) Determination prior to use: Prior to the utilization of a multi-year contract, it must be determined in writing:
 - (a) that established requirements cover the period of the contract and are reasonably firm and continuing; and
 - (b) that such a contract will serve the best interests of the school district by encouraging effective competition or otherwise promoting savings in school district procurement.

The following factors are among those relevant to such a determination:

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- (a) vendors are not willing or able to compete because of high start-up costs or capital investment;
 - (b) lower production costs because of larger quantity or service requirements and substantial continuity of production or performance over a longer period of time can be expected to result in lower unit prices;
 - (c) stabilization of the contractor's workforce over a longer period of time may promote economy and consistent qualities; and
 - (d) the cost and burden of contract solicitation, award and administration of the procurement may be reduced.
- (3) Evaluation: Care should be taken when evaluating multi-year against prices for the first fiscal period that a determination on the basis of prices for the first period does not permit the successful bidder or offeror to "buy in" so as to give such bidder or offeror an undue competitive advantage in subsequent procurements.
- (4) Solicitation document: The solicitation document must state the following:
- (a) the estimated amount of supplies or services required for the proposed contract;
 - (b) that a unit price must be given for each supply or service, and that such unit prices shall be the same throughout the contract term (except to the extent price adjustments are authorized in the solicitation or the resulting contract);
 - (c) that the multi-year contract will be terminated if funds are not appropriated or otherwise made available to support continuation of performance in any fiscal period succeeding the first fiscal year; provided, however, this does not affect either the school district's rights or the contractor's rights under any other termination clause in the contract;
 - (d) that the school district must notify the contractor on a timely basis that the funds are not available for the continuation of the contract for a subsequent fiscal year;
 - (e) whether vendors may submit prices for the first fiscal period only, the entire time of performance only, or both the first fiscal period and the entire time of performance; and
 - (f) that a multi-year contract may be awarded and how such an award will be determined, including, if prices for the first fiscal period and the entire time of performance are submitted, how such prices will be compared.
- (5) Termination due to unavailability of funds in succeeding fiscal period: All multi-year contracts must contain a clause stating that when funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract shall be terminated.

2-303 Blanket purchase agreements

- (1) Conditions for use: A blanket purchase agreement is a simplified method of filling anticipated repetitive needs for supplies or services by establishing

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"charge accounts" with qualified sources of supply. Blanket purchase agreements are designed to reduce administrative costs in accomplishing small purchases by eliminating the need for issuing individual solicitation documents. To the extent practicable, blanket purchase agreements for items of the same type should be awarded concurrently with more than one supplier.

(2) Contract terms: Blanket purchase agreements must contain the following provisions:

- (a) terms and conditions of the agreement, including a statement that the supplier must furnish supplies or services commonly described in general terms, if and when requested by the school district during a specified period and within a stipulated aggregate amount, if any. Blanket purchase agreements may encompass all items that the contractor is in a position to furnish.
- (b) the extent of the obligation, including a statement that the school district is obligated only to the extent of authorized costs actually placed against the blanket purchase agreement, i.e., there are no minimum volume requirements.
- (c) a list of names of individuals authorized to place orders under the blanket purchase agreement, identified by organizational component, and the dollar limitation per order for each individual to be furnished by the school district.
- (d) the statement that all shipments under the blanket purchase agreement, except subscriptions and other charges for newspapers, magazines and other periodicals, must be accompanied by delivery tickets or sales slips which must contain the following minimum information:
 - (i) name of contractor;
 - (ii) blanket purchase agreement number;
 - (iii) date of order;
 - (iv) order number;
 - (v) itemized list of supplies or services furnished;
 - (vi) quantity, unit price and extension of each item less applicable discounts; and
 - (vii) date of delivery or shipment.
- (e) an itemized and a summary invoice must be submitted at least monthly or upon expiration of the blanket purchase agreement, whichever occurs first, for all deliveries made during a delivery period, identifying the delivery tickets covered therein, stating their total dollar value and supported by receipted copies of the delivery tickets.

Part D - Audits of records

2-401 Right to audit records

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- (1) Audit of cost or pricing data: The school district may, at reasonable times and places, audit the books and records of any person who has submitted cost or pricing data pursuant to Section 2-202 to the extent that such books and records relate to such cost or pricing data. Any person who receives a contract, change order or contract modification for which the cost or pricing data is required, must maintain such books and records that relate to such cost or pricing data for three (3) years from the date of the final payment under the contract, unless a shorter period is otherwise authorized in writing.
- (2) Contract audit: The school district must be entitled to audit the books and records of a contractor or subcontractor under any contract or subcontract other than a firm fixed-price contract, to the extent that such books and records relate to the performance of such contract or subcontract. Such books and records must be maintained by the contractor for a period of three (3) years from the date of final payment under the prime contract and by the subcontractor for a period of three (3) years under the subcontract, unless a shorter period is otherwise authorized in writing.

Part E - Reports and records

2-501 Reporting of anti-competitive practices

When for any reason collusion or other anti-competitive practices are suspected among any bidders or offerors, the relevant facts must be transmitted to the school district attorney and the superintendent.

2-502 Procurement records

- (1) Contract file: All determinations and other written records pertaining to the solicitation, award or performance of a contract must be maintained in a contract file.
- (2) Retention of procurement records: All procurement records must be retained and disposed of in accordance with records retention guidelines and schedules recommended by the South Carolina Department of Archives and History. If a contract is being funded in whole or in part by assistance from a federal agency, then all procurement records pertaining to that contract must be maintained for three (3) years from the close-out date of the assistance agreement or the final disposition of any controversy arising out of the assistance agreement, or for a longer period if required by such federal agency.

ARTICLE 3 - SPECIFICATIONS

Part A - Specifications

3-101 Importance of specifications

The school district must prepare and issue specifications for supplies, services and construction required by the school district. Specifications must, to the extent practicable, emphasize functional or performance criteria, while limiting design or other detailed physical descriptions to meet the needs of the school district. All specifications must be drafted so as to promote overall economy for the purpose of satisfying the school district's needs, and to encourage maximum free and open competition in satisfying the school district's needs, and may not be unduly restrictive. It is recognized, however, that the preference for use of functional or performance specifications is primarily applicable to the procurement of supplies and services. Such preference is not often practicable in construction, apart from the procurement of supply

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type items for a construction project. Specifications for construction may be prepared on a project-by-project basis by the architect and/or engineer retained by the school district.

ARTICLE 4 - PROCUREMENT OF CONSTRUCTION, ARCHITECT/ENGINEER AND LAND SURVEYING SERVICES

Part A - Management of construction contracting

4-101 Selection of method of construction contract

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 of structures used in connection with public education. 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. 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 the methods used.

4-102 Contract administration

The school district must maintain a contract administration system designed to insure that a contractor is performing in accordance with the solicitation under which the contract was awarded, and the terms and conditions in the contract.

Part B - Construction contract clauses and fiscal responsibility

4-201 Standard clauses

The school district may establish standard contract clauses for use in its contracts. Such contract clauses and additional clauses or variations must be stated in the invitation for bids or request for proposals.

4-202 Modifications

Every contract modification, change order or contract price adjustment under a construction contract with the school board in excess of \$5,000 must be subject to prior approval by the school board after receiving a report from the fiscal officer of the school district as to the effect of the contract modification, change order or contract price adjustment on the total project budget or the total contract budget.

Part C - Architect/Engineer and surveying services

4-301 Public announcement and selection process

- (1) Public announcement: It is the policy of the school district to publicly announce all requirements for architect/engineer and land surveying services and to negotiate such contracts on the basis of demonstrated competence and qualification of fair and reasonable prices. In the procurement of architect/engineer and land surveying services, the school district must submit a statement of qualifications and performance data.
- (2) Selection process: The school district must conduct discussions with no less than three firms regarding the contract and must select the firm deemed most qualified

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to provide the required services. The selection must be made in order of preference, based on criteria established and published by the school district.

- (3) Negotiation: The school district must negotiate a contract with the highest qualified firm for architect/engineer and land surveying services at a compensation which is considered to be fair and reasonable to the school district. In making this decision, the school district must take into account the established value, scope, complexity, and professional nature of the services to be rendered. Should the school district be unable to negotiate a satisfactory contract with the firm considered to be most qualified, negotiations with that firm must be terminated, and the school district must then undertake negotiations with the second most qualified firm. Failing accord with the second most qualified firm, the school district must terminate negotiations. The school district must then undertake negotiations with the third most qualified firm. Should the school district be unable to negotiate a contract with any of the selected firms, the school district must select additional firms in order of their competence and qualifications, and the school district must continue negotiations in accordance with this section until an agreement is reached.

ARTICLE 5 - PROPERTY MANAGEMENT

Part A - Disposition of surplus property

5-101 Sale

- (1) Surplus supplies and property must be disposed of through competitive sealed bids or public auction. In the event some types and classes of items can be sold or disposed of more readily and advantageously by other means, the school district may employ such other means including, but not limited to, barter or appraisal.
- (2) When making sales by competitive sealed bidding, notice of the sale should be given by at least 15 days before the date set for opening bids. Newspaper advertisement or notice in other publications may also be used. Bids must be publicly opened. The notice of sale must include the provisions upon which the award must be made to the highest responsive and responsible bidder, provided that the price offered by such bidder is acceptable to the school district. Where such price is not acceptable, the school district may reject the bids in whole or in part and negotiate the sale provided that the negotiated sale price is higher than the highest responsive and responsible bidder.

NOTE: SC Code Annotated Section 59-19-250 provides that school trustees may sell or lease school property after first obtaining the consent of the county board of education or, in those counties which do not have a county board of education, the governing body of the county. SC Code Annotated Section 59-19-190 requires that a board obtain prior written approval of the state board of education prior to the reassignment or disposal of land purchased after 1952 with any state funds.

Part B - Proceeds

5-201 General fund

Proceeds from the sale, lease or disposal of surplus supplies and property must be deposited in the school district general fund.

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ARTICLE 6 - LEGAL AND CONTRACTUAL REMEDIES

Part A - Exclusive remedies

6-101 Waiver and exhaustion

The remedies provided in this article to actual or prospective bidders, offerors and contractors shall be exclusive and must be exhausted prior to the commencement of an action at law or in equity against the school district, its officers or employees. Nothing herein should be construed as a waiver of sovereign, or other, immunity, either partially or fully, if otherwise available and applicable.

Part B - Resolution of protests

6-201 Authority to resolve protested solicitations and awards

- (1) Right to protest: Any actual or prospective bidder, offeror or contractor who is aggrieved in connection with the solicitation or award of a contract may protest. The protest must be submitted in writing to the superintendent, setting forth the grounds and facts applicable thereto for the protest, and the relief requested, within 10 days of the date notification of the award is posted in accordance with this policy. The filing of a protest must not stay solicitation or award of a contract unless fraudulent.
- (2) Authority to resolve protests: The superintendent shall have authority to settle and resolve a protest of an aggrieved bidder, offeror or contractor, actual or prospective, concerning the solicitation or award of a contract. The remedies, if any, must be in accordance with part D of this article.
- (3) Decision: If the protest is not resolved by mutual agreement, the superintendent must conduct a review and issue a decision in writing within 10 days. The decision must:
 - (a) state the reasons for the action taken; and
 - (b) inform the protestant of its appeal rights, as provided in part C of this article.
- (4) Notice of decision: A copy of the decision under subsection (3) of this section must be mailed or otherwise furnished immediately to the protestant and any other party intervening. A copy must be posted at a date and place communicated to all parties in the administrative review. This copy will have on it the date of posting and statement of the right to appeal.
- (5) Finality of decision: A decision under subsection (3) of this section shall be final and conclusive, as to administrative review, unless any adversely affected person appeals administratively, as provided in part C of this article.

6-202 Authority to debar or suspend

- (1) Authority. After reasonable notice to the person involved and reasonable opportunity for that person to be heard, the school district, after consultation with the school district attorney, shall have authority to debar a person for cause from consideration for award of contracts or subcontracts. The debarment must not be for a period of more than three (3) years. The school district, after consultation

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with the school district attorney, shall have authority to suspend a person from consideration for award of contracts if there is probable cause for debarment. The suspension must not be for a period exceeding three (3) months.

- (2) Causes for debarment or suspension: The causes for debarment or suspension include the following:
- (a) conviction for commission of a criminal offense as an incident to obtaining or attempting to obtain a public or private contract or subcontract, or in the performance of such contract or subcontract;
 - (b) conviction under State or Federal statutes of embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, or any other offense indicating a lack of business integrity or professional business honesty which currently, seriously, and directly affects responsibility as a school district contractor or subcontractor;
 - (c) conviction under State or Federal antitrust laws arising out of the submission of bids or proposals;
-
- (d) violation of contract provisions, as set forth below, of a character which is so serious as to justify debarment or suspension action:
- (1) deliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract;
or
 - (2) a recent record of failure to perform or of unsatisfactory performance in accordance with the terms of one or more contracts; provided that failure to perform or unsatisfactory performance caused by acts beyond the control of the contractor must not be considered to be a basis for debarment or suspension.
 - (e) any other cause which is so serious and compelling as to affect responsibility as a school district contractor or subcontractor, including debarment or suspension by another governmental entity for cause.
 - (f) for violation of the ethical standards set forth in South Carolina State Ethics Act.
- (3) Decision: The superintendent must issue a written decision within ten (10) days to debar or suspend. The decision must:
- (a) state the reasons for the action taken; and
 - (b) inform the debarred or suspended person involved of his rights to administrative review as provided in Part C of this article.
- (4) Notice of decision: A copy of the decision under subsection (3) of this section must be mailed or otherwise furnished immediately to the debarred or suspended person and any other party intervening.
- (5) Finality of decision: A decision under subsection (3) of this section shall be final and conclusive unless the debarred or suspended person appeals administratively as provided in Part C of this article.

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6-203 Authority to resolve contract and breach of contract controversies

- (1) Applicability: This section applies to controversies between the school district and a contractor and which arises under, or by virtue of, a contract between them. This includes without limitation controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission.
 - (2) Authority: The superintendent is authorized to settle and resolve a controversy described in subsection (1) of this section.
 - (3) Decision: If such a controversy is not resolved by mutual agreement, the superintendent must promptly conduct an administrative review and issue a decision in writing within ten (10) days. The decision must:
 - (a) state the reason for the action taken; and
 - (b) inform the contractor of its rights to review, as provided in part C of this article.
-
- (4) Notice of decision: A copy of the decision under subsection (3) of this section must be mailed or otherwise furnished immediately to all parties participating in the administrative review proceedings.
 - (5) Finality of decision: The decision under subsection (3) of this section shall be final and conclusive, unless the contractor appeals administratively, as provided in this article.
 - (6) Failure to render timely decision: If the written decision required under subsection (3) of this section is not entered within ten (10) days after written request for a said decision, or within such longer period as may be agreed upon, then the contractor must proceed as if an adverse decision had been received.

Part C - Administrative appeals

6-301 School district superintendent

Prior to commencing any other action at law or in equity, a party aggrieved from a determination by the superintendent which is authorized in Section 6-201, 6-202, or 6-203 of this article must seek review of such determination to the school district board of trustees.

6-302 Procedures

- (1) Time limit for filing an appeal: A determination by the superintendent shall be final and conclusive unless any person adversely affected by the decision requests a review by the school district board of trustees, in writing, setting forth the reasons for such review, to the school district superintendent within 10 (ten) days of its receipt of the decision.
- (2) Upon receipt of an appeal from an aggrieved party, the school district superintendent must schedule a review of the appeal. The protestant may also request an appearance before the school district board of trustees. The board of trustees, within 10 days of completion of its review, must, in writing, affirm, alter or deny the decision. Such decision must include findings of fact and conclusions of law, including a statement of the underlying facts supporting such findings. The decision must also state whether the:

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- (a) solicitation or award being contested was in accordance with this policy and the terms and conditions of the solicitation documents;
 - (b) debarment or suspension being contested was in accordance with this policy and in the best interest of the school district; and
 - (c) contract and breach of contract determination being contested was in accordance with this policy and in the best interest of the school district.
- (3) The administrative review by the school district board of trustees must not be limited to any prior determination. Any prior staff determination must not be conclusive as to any findings and conclusions. Any person who is aggrieved by a final decision must have exhausted all administrative remedies available within this article prior to seeking judicial review. The decision of the board of trustees must be presumed final and conclusive unless such proceedings for review are instituted by filing a petition in the Circuit Court within 30 days after such final decision.

Part D - Solicitations or awards in violation of law

6-401 Applicability of this part

The provisions of this part apply where it is determined administratively or upon administrative review, that a solicitation or award of a contract is in violation of this policy.

6-402 Remedies prior to an award

If prior to award it is determined that a solicitation or proposed award of a contract is in violation of this policy, then the solicitation or proposed award must be:

- (1) canceled;
- (2) revised to comply with this policy and rebid; or
- (3) awarded in a manner that complies with the provisions of this policy.

6-403 Remedies after an award

If after an award it is determined that a solicitation or award of a contract is in violation of this policy, then:

- (1) if the person awarded the contract has not acted fraudulently or in bad faith:
 - (a) the contract may be ratified and affirmed, provided it is determined that doing so is in the best interest of the school district; and
 - (b) the person who should have been awarded the contract may be reimbursed for the actual expenses reasonably incurred in connection with the solicitation, including reparation, not to exceed \$5,000.
- (2) if the person awarded the contract has acted fraudulently or in bad faith:
 - (a) the contract may be declared null and void; or

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- (b) the contract may be ratified and affirmed, if such action is in the best interest of the school district, without prejudice to the school district's right to such damages as may be appropriate.

ARTICLE 7 - INTERGOVERNMENTAL RELATIONS

Part A - Cooperative purchasing

7-101 Cooperative purchasing authorized

The school district may either participate in, sponsor, conduct, or administer a cooperative purchasing program for the procurement of supplies, services or construction with one or more public procurement units in accordance with an agreement entered into between the participants. Such cooperative purchasing may include, but is not limited to, joint or multi-party contracts between public procurement units, including use of state contracts.

The school district must, prior to conducting procurement activities hereunder, explore the availability of satisfying its needs through utilization of pre-existing contracts between the state's ~~Division of General Services and private vendors, and must use such arrangements, if cost effective and otherwise advantageous to the school district.~~ The school district may procure services, supplies or construction items through the contracts established by the General Services Division of the state of South Carolina, as provided in Chapter 35 of Title 11 (State Consolidated Procurement Code), South Carolina Code of Laws, 1976, independent of the requirements of this policy.

7-102 Sale, acquisition, or use of supplies

The school district may sell to, acquire from, or use any supplies belonging to another public procurement unit independent of the requirements of this policy.

7-103 Cooperative use of supplies and services

The school district may enter into an agreement with any public procurement unit for the cooperative use of supplies or services under the terms agreed upon between the parties, independent of the requirements of this policy.

7-104 Joint use of facilities

The school district may enter into agreements for the common use or lease of warehousing facilities, capital equipment and other facilities with another public procurement unit under the terms agreed upon between the parties.

ARTICLE 8 - MINORITY BUSINESSES

Part A - Minority businesses

8-101 Minority businesses

The school district will maintain the list of minority businesses compiled by the Governor's Office of Small and Minority Business Assistance and where appropriate will solicit those businesses on such list for each procurement for which they are qualified.

Issued 5/28/85; Revised 5/10/10

Jasper County Board of Education

Jasper County School District

A NEW DAY... A NEW WAY...

Division of Operations & Facilities

DARRYL A. OWENS, Chief of Operations

Dr. Vashti K. Washington, Superintendent

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Phone: (843) 717-1624

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REQUEST FOR PROPOSAL IN DESIGN/BUILD SOLICITATION

SOLICITATION # 14-06-01 (Renovation of 3776 Bees Creek Property for Use as Centralized District Administrative Offices)

TO: Short-Listed Entities

FROM: Darryl A. Owens, Chief of Operations

DATE: July 14, 2014

Each of the proposing entities short-listed in this solicitation is hereby invited to submit its Proposal Development Documents and related information described below. Please contact me immediately if you decide not to submit a proposal.

Responses are requested to arrive at the District by August 11, 2014 at or before 4:00 pm.

This office welcomes *written* inquiries, which may be answered by an addendum, a joint meeting or conference call to *all* proposing parties as an aid to fully developing the "Design Requirements." This office will also assist proposers with accessing the site of the Project at mutually convenient times for examination of the existing conditions. This office will refuse to engage in pre-submittal discussions with only one party concerning substantive matters.

1. **"Design Requirements"** The purpose and intent of including design requirements is to provide a common, and transparent, written description of the starting point for the competition and to provide the District with the benefit of having responses from competitors that meet the same RFP requirements.

The Jasper County School District is seeking a firm to perform Design-Build Services for its 3776 Bees Creek Rd Property. The project consists of renovations, remodeling, demolition, other miscellaneous projects and improvements to include:

Phase I

Assess and determine if current facility can be salvaged/remodeled or demolished in sections.

- Design approval.
- Identify functional and well located existing spaces, demolish / renovate.



- Demolition (if warranted).
- Renovation of front façade.
- Renovation of office areas and meeting space areas (to limit of 2014-2015 funding).
- Conversion from Educational Spaces to Office and Assembly Space.
- Potential Joint Use: District Office, Board Meeting Assembly Room/Partitioned Professional Development Training Room, Purchasing Distribution Center, Departmental Conferencing Areas, Community Gathering, etc.

(1) *Renovate and improve the front of the facility facing the main highway.*

- Assess to determine if sewer system and plumbing is adequate.
- Upgrade technology to provide secured environment with card access control capability, video surveillance system, wireless network, etc.
- Security and Separation.
- Assess to determine if public entry, parking, and drive circulation is adequate.
- Administrator's circulation.
- Code Compliance.
- ADA Upgrades
- Interior Finishes
- Energy Efficiency.
 - HVAC Replacement
 - Window / Door Replacement
 - Plumbing Fixtures & Services
 - Electrical & Technology
- Security of the Property and Building.

Phase II

- (1) Completion of Phase I (a)
- (2) Renovation of the gymnasium for public use separate of the administrative wing.
- (3) Appropriate parking and grounds design.

This project will be phased according to the availability of funding and the approval of the Jasper County School District's Board of Trustees.

b. Schedule

1. Start – the District expects (and proposals should assume) award will be made by September 3, 2014, and that site will be available for Work commencing September 8, 2014.
2. Duration & Completion –Substantially complete all Phase I (*as funded*) Work no later than May 29, 2015, with final completion of all Work no later than June 30, 2015.
3. Duration and Completion – Substantially complete all Phase II work o later than March 16, 2016, with final completion of all Phase II work no later than June 30, 2016.

c. **Budget**

The all-inclusive maximum budget for Phase I of the Project is *one million, two hundred and fifty thousand dollars (\$1,250,000)* within which must be included all Fee, all Cost of the Work, allowances, contingencies for design and construction, bonds, insurance, and all of Owner's costs for performance of Owner-supplied services. It is the Owner's desire that the budget should be prudently invested in the facilities to maximize value to the Project from the available resources. Life-cycle costs should be considered.

Phase II work will begin July 1, 2015 (*anticipated*).

Phase II funding is \$1,650,000.

Total project funding is estimated at \$2,900,000.

2. **PROPOSAL DEVELOPMENT DOCUMENTS**

Your "Proposal Development Documents" must be drawings and other design-related documents that are sufficient to fix and describe the size and character of an infrastructure facility as to architectural, structural, mechanical and electrical systems, materials, and such other elements as may be appropriate to the applicable project delivery method. The purpose and intent of including the requirement for submittal of proposal development documents is to provide a common, and transparent, written description of the finish point for the competition. To be responsive, each offeror must submit drawings and other design related documents that are sufficient to fix and describe the size and character of the infrastructure facility to be acquired, including price.

3. **ADDITIONAL INFORMATION**

Proposers should advise of any change or update in the information submitted at the qualifications stage of this solicitation.

4. **EVALUATION CRITERIA IN DESCENDING ORDER OF IMPORTANCE:**

- (1) demonstrated compliance with the design requirements,
- (2) value the proposal delivers within the budgeted amount, including life-cycle costs
- (3) offeror qualifications
- (4) project schedule
- (5) financial capacity of proposer

5. **MISCELLANEOUS.** All other provisions of the District's Procurement Code, as applicable to requests for proposals of this nature, are incorporated herein.

END

DISTRICT OFFICE STAFFING AND ACCOMODATIONS

Department/Divisions	No.of Staff	Special Accomodations
Superintendent	3	Conference Rm/File & Storage area/Restroom
District Receptionist	1	
Public Relations	2	
Guidance-Testing Coordinator/Community Liason	1	Testing records storage space
Chief of Operations	1	
Athletic Director	1	
Academics/HR	4	Conference Area/Records Room
Finance	7	Vault Room/Records Room/Conference space
Food Services	4	Storage Area/Kitchen
Technology Dept	5	Storage Area
Student Services	4	<i>Shared Conference Area</i>
Exceptional Services & GT	5	<i>Shared Conference Area</i>
Curriculum	7	<i>Shared Conference Area</i>
Board/Staff Professional Development Rm.		seating for @ 150-200 (<i>partitioned space</i>)
Mailroom/Lounge	1	
Purchasing Warehouse	1	

TOTAL STAFFING	47
-----------------------	-----------

Centralization of District Staffing / Facility

DEPARTMENTS:

Office of Superintendent (3)

1. Superintendent
2. Administrative Asst.
3. Board Secretary

Public Relations / Community Liaison (4)

1. District Receptionist (*main entrance*)
2. Public Relations Officer
3. Community Liaison/Testing Coordinator
4. Admin. Asst.

Office of Operations /Facilities & Athletics (3)

1. Chief of Operations
2. Admin. Asst.
3. Athletics Director

Office of Academics & Human Resources (4)

1. Chief Officer of Academics and HR
2. Admin. Asst.
3. Benefits Coordinator
4. HR Office Manager

Office of Finance (7)

1. Chief Officer of Finance and Data Man.
2. Admin. Asst.
3. Director of Business Operations
4. Payroll Officer
5. Payroll/Accounts Asst.
6. Accounts Payable
7. PowerSchool Cord.

Food Services (4)

1. Director
2. Admin. Asst.
3. Compliance Clerk
4. Office Clerk

Office of Technology (5)

1. Director
2. Admin. Asst.
3. Systems Engineer
4. Tech I
5. Tech II

Office of Student Services (5)

1. Director
2. Office Manager
3. MAPPS Supervisor
4. Nurse Supervisor
5. Truancy Officer

Office of Exception Children & Gifted and Talented (5)

1. Director
2. Admin. Asst.
3. Medicaid Billing
4. Psychologist I
5. Psychologist II

Division of Curriculum (7)

1. Executive Director of Mid/High
2. Director of Primary & Elem.
3. Admin. Asst.
4. Director of Federal Programs
5. Title I Office Mgr./Coordinator
6. Webmaster
7. TBD

Staff Professional Development & Training Center / Board Room

TOTAL:

Divisions (10)

Suggested Staff / Office Space (47)

Jasper County School District

Division of Operations & Facilities

Post Office Box 348 – 10942 North Jacob Smart Blvd. – Ridgeland, South Carolina 29936

(843) 489 – 8892 Telephone (843) 717 – 1699 Fax

Email: dowens@jcsd.net Website: www.jcsd.net

Vashti K. Washington, Ed.D.
Superintendent

Darryl A. Owens
Chief of Operations

WRITTEN DETERMINATION

BEES CREEK PROPERTY RENOVATION DELIVERY METHOD

The purpose of this written determination is to provide the citizens of the Jasper County School District ("District") with a view of the District's decision-making process, so as to safeguard the quality and integrity of the contract awards through public accountability, by providing factual grounds and reasoning for the Board of Trustees and the public to make an informed, objective review of these decisions. The District's decision is meant to allow it to accomplish its goals and deadlines in a timely manner. *C.f., Sloan v. Greenville County, 590 S.E.2d 338 (S.C App. 2003).*

The current District office is in an older wood-frame building which does not meet Americans With Disabilities Act ("ADA") public access or workplace standards. The age and susceptibility of the structure to fire and weather are less than ideal for maintaining core District permanent records. The board room at the District office frequently has been too small to accommodate the number of members of the public who would like to attend board meetings. District administrative staff cannot all be housed at this location, and have been dispersed in several properties.

The District owns the former school and property at the Bees Creek Road site. The site has been abandoned for several years, during which time the property has been invaded by vagrants and by thieves who have stripped the property of most of its copper. Damage done by vandals and thieves has opened the building to the elements at various places. In sum, the property as it exists now is a blight and a growing danger to its neighbors. The condition of the property also presents premises liability concerns to the District, should anyone be injured there. The property needs attention from the District in some form.

The District determined that the Bees Creek Property might be a candidate for renovation for use as a new centralized District office, where all administrative functions could be centralized efficiently in buildings that compliant with modern codes. The property is not far distant from the site of the current central District office. Upon determining that the Bees Creek Property should be examined for this purpose, the District examined the financial capacity it has for undertaking such a project. It was determined that approximately \$2.9 million could be allocated to such a project without increasing the debt burden on the taxpayers.

"Sharing Our Strengths to Produce Great Results for Our Students"



Thus the District had two core findings in hand: (1) the need for a new central office adequate to the District's functional requirements; (2) the resources of the existing property and \$2.9 million in financing. The needs and resources have been subjected to Board review and approval.

"It has generally been recognized that the selection of the appropriate delivery system plays a significant role in whether the project is ultimately successful." 2 Bruner & O'Connor on Construction Law § 6:21. Some of the factors that need to be considered in evaluating delivery approaches include financial considerations, the sophistication of the owner and its in-house staff, financing alternatives, local market conditions, contractor selection alternatives, the specific technical demands of the project, the known scope of the project and the ability to communicate that scope to those responsible for carrying out the work, the available risk management and transfer mechanisms available for the project (e.g., insurance bonding, guarantees, etc.).

The District has a highly *functional* program for the project and it has a financial constraint to achieve this functionality. ~~If the project is not feasible, the District needs to know sooner rather than later.~~ Obviously the end product also must meet all building, environmental, and other regulatory requirements typical to any construction project. The primary building official over this project is the South Carolina Department of Education's Office of School Facilities ("OSF"). Pursuant to S.C. Code Ann. § 59-23-210 *et seq.*, the OSF publishes the "South Carolina School Facilities Planning and Construction Guide" and reference to all the regulatory requirements may be found therein, online at <http://ed.sc.gov/agency/os/School-Facilities/>

Design-bid-build delivery is not the most appropriate method for solving this problem and arriving at a functional solution within the budget, if one is feasible. Had the District used this approach, it would have been required to engage an architect first, incurring the architect's fee regardless of the feasibility of the project. Moreover, the feasibility of the project within the financial constraint might not be known until "bid day" because there would be nothing but estimates to depend upon. "The actual feasibility of the design is therefore not known until late in the process." 2 Bruner & O'Connor on Construction Law § 6.4. In design-bid-build, the expertise of contractors in evaluating the potential for renovations and suggesting appropriate strategies would have been lost. And, the design-bid-build process would have taken much longer. Because little construction work can begin until the design, and then the bidding, are completed, the traditional approach will often take relatively longer to conclude than other approaches. Actual prices are not known until the design is completed and bids are received. Finally, in design-bid-build, when a problem does occur, it is not uncommon for the contractor to insist that the root of the problem is a design error, while the designer insists that the problem is caused by a construction deficiency. While the designer and the contractor point fingers at each other, nothing gets done to resolve the problem, causing critical delay to the project. Or the owner may require the contractor and designer to proceed, not knowing whether the selected course is the correct one or who will be responsible for the costs of any remedial measures taken.

Construction management at-risk offers some advantages over design-bid-build, particularly the introduction of construction expertise early into the process. However, this delivery method

would still have required the District to enter into contracts with, and incur the cost of, a designer and a construction manager for preconstruction services, while the basic feasibility of the Bees Creek renovation project under the available funds was worked out.

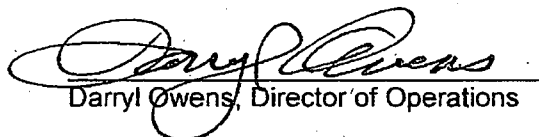
In both of the foregoing cases, the District's limited funds would not justify the high outlay of up-front design costs that need to be conserved for use in the actual building.

Design-Build delivery can be conceived of "problem solving" by the market, because the government focuses on publishing its "design requirements" in terms of the facility's ultimate function and the government's budget and schedule constraints. Contestants are narrowed first by qualifications, and then by the end product they propose to build in compliance with the design requirements. Under the South Carolina Procurement Code, "design requirements" include, "the written description of the infrastructure facility to be procured pursuant to this article, including: (a) required features, functions, characteristics, qualities, and properties that are required by the State; (b) the anticipated schedule, including start, duration, and completion; and (c) estimated budgets as applicable to the specific procurement, for design, construction, operation, and maintenance. ~~The design requirements may, but need not, include drawings and other documents illustrating the scale and relationship of the features, functions, and characteristics of the project.~~" S.C. Code Ann. § 11-35-2910.

As noted above, the District had its essential "design requirements" – the functional spaces of a district office, the existing parcel with its improvements, and the financial constraint under which the functionality had to be achieved. These are on the District's webpage under "Centralization of District Staffing / Facility." Obviously the other "design requirements" are compliance with everything in the OSF Guide. Other than the District's own investment in time to establish design requirements and manage the procurement process, the District does not incur costs to determine the feasibility of the project at Bees Creek site, as well as the approximate scope of work that can be accomplished within the financial constraints. This work is done at the competitor's own risk.

From the competition it has been determined that both of the finalist qualified entities were able to propose a solution in accordance with the design requirements. The Board of Trustees has selected its preferred solution.

For the above stated reasons, the District is therefore proceeding with a design-build delivery of the Bees Creek site within the design requirements established in consultation with the Board.


Darryl Owens, Director of Operations



Document A141™ – 2004

Standard Form of Agreement Between Owner and Design-Builder

AGREEMENT made as of the tenth day of November in the year Two Thousand Fourteen
(In words, indicate day, month and year.)

BETWEEN the Owner:
(Name, legal status, address and other information)

Jasper County Schools
10942 North Jacob Smart Blvd
P.O. Box 848
Ridgeland, SC 29936
Telephone: 843-717-1100 / Fax: 843-717-1699

and the Design-Builder:
(Name, legal status, address and other information)

M. B. Kahn Construction Co., Inc., Construction Management Division
101 Flintlake Road
Columbia, South Carolina 29223
Tel: 803-736-2950
Fax: 803-736-9501
Bill Cram – bcram@mbkahn.com

for the following Project:
(Name, location and detailed description)

Renovation of 3776 Bees Creek Rd Property for use as Centralized District
Administrative Offices (Owner solicitation #14-06-01)

The Owner and Design-Builder agree as follows.

ADDITIONS AND DELETIONS:
The author of this document has added information needed for its completion. The author may also have revised the text of the original AIA standard form. An *Additions and Deletions Report* that notes added information as well as revisions to the standard form text is available from the author and should be reviewed. A vertical line in the left margin of this document indicates where the author has added necessary information and where the author has added to or deleted from the original AIA text.

This document has important legal consequences. Consultation with an attorney is encouraged with respect to its completion or modification.

Consultation with an attorney is also encouraged with respect to professional licensing requirements in the jurisdiction where the Project is located.

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TABLE OF ARTICLES

- 1 THE DESIGN-BUILD DOCUMENTS
- 2 WORK OF THIS AGREEMENT
- 3 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION
- 4 CONTRACT SUM
- 5 PAYMENTS
- 6 DISPUTE RESOLUTION
- 7 MISCELLANEOUS PROVISIONS
- 8 ENUMERATION OF THE DESIGN-BUILD DOCUMENTS

TABLE OF EXHIBITS

- A TERMS AND CONDITIONS
- B DETERMINATION OF THE COST OF THE WORK
- C INSURANCE AND BONDS

ARTICLE 1 THE DESIGN-BUILD DOCUMENTS

§ 1.1 The Design-Build Documents form the Design-Build Contract. The Design-Build Documents consist of this Agreement between Owner and Design-Builder (hereinafter, the "Agreement") and its attached Exhibits; Supplementary and other Conditions; Addenda issued prior to execution of the Agreement; the Project Criteria, including the "design requirements" published July 14, 2014 and changes to the Project Criteria proposed by the Design-Builder and accepted by the Owner, if any; the Design-Builder's Proposal and written modifications to the Proposal accepted by the Owner, if any; other documents listed in this Agreement; and Modifications issued after execution of this Agreement. The Design-Build Documents shall not be construed to create a contractual relationship of any kind (1) between the Architect and Owner, (2) between the Owner and a Contractor or Subcontractor, or (3) between any persons or entities other than the Owner and Design-Builder, including but not limited to any consultant retained by the Owner to prepare or review the Project Criteria. An enumeration of the Design-Build Documents, other than Modifications, appears in Article 8.

§ 1.2 The Design-Build Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral.

§ 1.3 The Design-Build Contract may be amended or modified only by a Modification. A Modification is (1) a written amendment to the Design-Build Contract signed by both parties, (2) a Change Order, (3) a Construction Change Directive or (4) a written order for a minor change in the Work issued by the Owner.

ARTICLE 2 THE WORK OF THE DESIGN-BUILD CONTRACT

§ 2.1 The Design-Builder shall fully execute the Work described in the Design-Build Documents, except to the extent specifically indicated in the Design-Build Documents to be the responsibility of others.

ARTICLE 3 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

§ 3.1 The date of commencement of the Work shall be the date of this Agreement unless a different date is stated below or provision is made for the date to be fixed in a notice issued by the Owner.

(Insert the date of commencement if it differs from the date of this Agreement or, if applicable, state that the date will be fixed in a notice to proceed.)

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The date of commencement will be fixed in a Notice to Proceed.

If, prior to the commencement of Work, the Owner requires time to file mortgages, documents related to mechanic's liens and other security interests, the Owner's time requirement shall be as follows:
(Insert Owner's time requirements.)

Not applicable.

§ 3.2 The Contract Time shall be measured from the date of commencement, subject to adjustments of this Contract Time as provided in the Design-Build Documents.
(Insert provisions, if any, for liquidated damages relating to failure to complete on time or for bonus payments for early completion of the Work.)

§ 3.3 The Design-Builder shall achieve Substantial Completion of the Work
(Paragraphs deleted)
by March 16, 2016 and shall achieve Final Completion by June 30, 2016 or in accordance with the project schedule that will be developed in conjunction with the project design and approved by the Owner.

(Table deleted)

ARTICLE 4 CONTRACT SUM

§ 4.1 The Owner shall pay the Design-Builder the Contract Sum in current funds for the Design-Builder's performance of the Design-Build Contract. The Contract Sum shall be one of the following:
(Check the appropriate box.)

- Stipulated Sum in accordance with Section 4.2 below;
- Cost of the Work Plus Design-Builder's Fee in accordance with Section 4.3 below;
- Cost of the Work Plus Design-Builder's Fee with a Guaranteed Maximum Price in accordance with Section 4.4 below.

(Based on the selection above, complete either Section 4.2, 4.3 or 4.4 below.)

(Paragraphs deleted)

(Table deleted)

(Paragraphs deleted)

(Table deleted)

(Paragraphs deleted)

§ 4.4 COST OF THE WORK PLUS DESIGN-BUILDER'S FEE WITH A GUARANTEED MAXIMUM PRICE

§ 4.4.1 The Cost of the Work is as defined in Exhibit B, plus the Design-Builder's Fee.

§ 4.4.2 The Design-Builder's Fee is

(State a lump sum, percentage of Cost of the Work or other provision for determining the Design-Builder's Fee and the method of adjustment to the Fee for changes in the Work.)

A lump sum of Two Hundred Forty Thousand Dollars (\$240,000.00) payable in equal monthly installments over the duration of the Contract, commencing upon issuance of a Notice to Proceed by the Owner.

§ 4.4.3 GUARANTEED MAXIMUM PRICE

§ 4.4.3.1 The sum of the Cost of the Work and the Design-Builder's Fee is guaranteed by the Design-Builder not to exceed Two Million Nine Hundred Thousand Dollars inclusive of the Design-Builder's Fee and all other Owner costs to accomplish the Owner's design requirements (\$2,900,000.00), subject to additions and deductions by changes in the Work as provided in the Design-Build Documents. Such maximum sum is referred to in the Design-Build Documents as the Guaranteed Maximum Price. Costs which would cause the Guaranteed Maximum Price to be exceeded shall be paid by the Design-Builder without reimbursement by the Owner.

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(Insert specific provisions if the Design-Builder is to participate in any savings.)

The Owner shall retain all savings. The Design-Builder does not participate in any savings.

§ 4.4.3.2 The Guaranteed Maximum Price is based on the following alternates, if any, which are described in the Design-Build Documents and are hereby accepted by the Owner:

§ 4.4.3.3 Unit Prices, if any, are as follows:

Description	Units	Price (\$0.00)
-------------	-------	----------------

§ 4.4.3.4 Allowances, if any, are as follows:

(Identify and state the amounts of any allowances, and state whether they include labor, materials, or both.)

Allowance	Amount (\$0.00)	Included Items
-----------	-----------------	----------------

§ 4.4.3.5 Assumptions, if any, on which the Guaranteed Maximum Price is based, are as follows:

(Identify the assumptions on which the Guaranteed Maximum Price is based.)

The Owner has available only the \$2,900,000 budget for the entire project. The parties desire to accomplish the creation of as much functionality and value from the project as practicable, while maintaining compliance with all regulatory requirements. On a continuing basis the parties will consult and collaborate on the use of the Owner's resources to this end. Equipment and materials, including finishes, will be evaluated jointly on the basis of initial cost and lifecycle cost and in the context of the overall project budget. The Owner and Design-Builder agree to adjust the scope of the project as necessary to remain within the Guaranteed Maximum Price.

§ 4.5 CHANGES IN THE WORK

§ 4.5.1 Adjustments of the Contract Sum on account of changes in the Work may be determined by any of the methods listed in Article A.7 of Exhibit A, Terms and Conditions.

§ 4.5.2 Where the Contract Sum is the Cost of the Work, with or without a Guaranteed Maximum Price, and no specific provision is made in Sections 4.3.2 or 4.4.2 for adjustment of the Design-Builder's Fee in the case of Changes in the Work, or if the extent of such changes is such, in the aggregate, that application of the adjustment will cause substantial inequity to the Owner or Design-Builder, the Design-Builder's Fee shall be equitably adjusted on the basis of the Fee established for the original Work, and the Contract Sum shall be adjusted accordingly.

ARTICLE 5 PAYMENTS

§ 5.1 PROGRESS PAYMENTS

The Owner shall "set aside" or escrow funds in a manner acceptable to the Design-Builder, in an amount equal to or greater than the Control Estimate to insure availability of funds for payment to Design-Builder. Such "set aside" or escrow shall take place prior to the execution of any construction subcontract by the Design-Builder, and prior to commencement of any construction activity.

§ 5.1.1 Based upon Applications for Payment submitted to the Owner by the Design-Builder, the Owner shall make progress payments on account of the Contract Sum to the Design-Builder as provided below and elsewhere in the Design-Build Documents.

§ 5.1.2 The period covered by each Application for Payment shall be one calendar month ending on the last day of the month.

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§ 5.1.3 Provided that an Application for Payment is received not later than the last day of month, the Owner shall make payment to the Design-Builder not later than the tenth day of the following month. If an Application for Payment is received by the Owner after the application date fixed above, payment shall be made by the Owner not later than ten (10) days after the Owner receives the Application for Payment.

§ 5.1.4 With each Application for Payment where the Contract Sum is based upon the Cost of the Work, or the Cost of the Work with a Guaranteed Maximum Price, the Design-Builder shall submit payrolls, petty cash accounts, receipted invoices or invoices with check vouchers attached, and/or any other evidence required by the Owner to demonstrate that cash disbursements already made by the Design-Builder on account of the Cost of the Work equal or exceed (1) progress payments already received by the Design-Builder, less (2) that portion of those payments attributable to the Design-Builder's Fee; plus (3) payrolls for the period covered by the present Application for Payment.

§ 5.1.5 With each Application for Payment where the Contract Sum is based upon a Stipulated Sum or Cost of the Work with a Guaranteed Maximum Price, the Design-Builder shall submit the most recent schedule of values in accordance with the Design-Build Documents. The schedule of values shall allocate the entire Contract Sum among the various portions of the Work. Compensation for design services shall be shown separately. Where the Contract Sum is based on the Cost of the Work with a Guaranteed Maximum Price, the Design-Builder's Fee shall be shown separately. The schedule of values shall be prepared in such form and supported by such data to substantiate its accuracy as the Owner may require. This schedule of values, unless objected to by the Owner, shall be used as a basis for reviewing the Design-Builder's Applications for Payment.

§ 5.1.6 In taking action on the Design-Builder's Applications for Payment, the Owner shall be entitled to rely on the accuracy and completeness of the information furnished by the Design-Builder and shall not be deemed to have made a detailed examination, audit or arithmetic verification of the documentation submitted in accordance with Sections 5.1.4 or 5.1.5, or other supporting data; to have made exhaustive or continuous on-site inspections; or to have made examinations to ascertain how or for what purposes the Design-Builder has used amounts previously paid on account of the Agreement. Such examinations, audits and verifications, if required by the Owner, will be performed by the Owner's accountants acting in the sole interest of the Owner.

§ 5.1.7 Except with the Owner's prior approval, the Design-Builder shall not make advance payments to suppliers for materials or equipment which have not been delivered and stored at the site.

5.2 Deleted

(Paragraphs deleted)

§ 5.4 PROGRESS PAYMENTS - COST OF THE WORK PLUS A FEE WITH A GUARANTEED MAXIMUM PRICE

§ 5.4.1 Applications for Payment where the Contract Sum is based upon the Cost of the Work Plus a Fee with a Guaranteed Maximum Price shall show the percentage of completion of each portion of the Work as of the end of the period covered by the Application for Payment. The percentage of completion shall be the lesser of (1) the percentage of that portion of the Work which has actually been completed; or (2) the percentage obtained by dividing (a) the expense that has actually been incurred by the Design-Builder on account of that portion of the Work for which the Design-Builder has made or intends to make actual payment prior to the next Application for Payment by (b) the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values.

§ 5.4.2 Subject to other provisions of the Design-Build Documents, the amount of each progress payment shall be computed as follows:

- .1 Take that portion of the Guaranteed Maximum Price properly allocable to completed Work as determined by multiplying the percentage of completion of each portion of the Work by the share of the Guaranteed Maximum Price allocated to that portion of the Work in the schedule of values. Pending final determination of cost to the Owner of changes in the Work, amounts not in dispute shall be included as provided in Section A.7.3.8 of Exhibit A, Terms and Conditions;
- .2 Add that portion of the Guaranteed Maximum Price properly allocable to materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work, or if approved in advance by the Owner, suitably stored off the site at a location agreed upon in writing;

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- .3 Add the Design-Builder's Fee, less retainage of three and one-half percent (3.50%). The Design-Builder's Fee shall be computed at the rate stated in Section 4.4.2;
- .4 Subtract the aggregate of previous payments made by the Owner;
- .5 Subtract the shortfall, if any, indicated by the Design-Builder in the documentation required by Section 5.1.4 to substantiate prior Applications for Payment, or resulting from errors subsequently discovered by the Owner's accountants in such documentation; and
- .6 Subtract amounts, if any, for which the Owner has withheld or nullified a Certificate for Payment as provided in Section A.9.5 of Exhibit A, Terms and Conditions.

§ 5.4.3 Except with the Owner's prior approval, payments for the Work, other than for services provided by design professionals and other consultants retained directly by the Design-Builder, shall be subject to retainage of not less than three and one-half percent (3.50%). The Owner and Design-Builder shall agree on a mutually acceptable procedure for review and approval of payments and retention for Contractors.

§ 5.4.4 Retainage shall be reduced to one percent (1.00%) upon achievement of Substantial Completion.

§ 5.5 FINAL PAYMENT

§ 5.5.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be made by the Owner to the Design-Builder no later than 30 days after the Design-Builder has fully performed the Design-Build Contract, including the requirements in Section A.9.10 of Exhibit A, Terms and Conditions, except for the Design-Builder's responsibility to correct non-conforming Work discovered after final payment or to satisfy other requirements, if any, which extend beyond final payment.

ARTICLE 6 DISPUTE RESOLUTION

§ 6.1 The parties appoint the following individual to serve as a Neutral pursuant to Section A.4.2 of Exhibit A, Terms and Conditions:

(Insert the name, address and other information of the individual to serve as a Neutral. If the parties do not select a Neutral, then the provisions of Section A.4.2.2 of Exhibit A, Terms and Conditions, shall apply.)

The parties will select an agreed-upon neutral.

§ 6.2 If the parties do not resolve their dispute through mediation pursuant to Section A.4.3 of Exhibit A, Terms and Conditions, the method of binding dispute resolution shall be the following:

(If the parties do not select a method of binding dispute resolution, then the method of binding dispute resolution shall be by litigation in a court of competent jurisdiction.)
(Check one.)

- Arbitration pursuant to Section A.4.4 of Exhibit A, Terms and Conditions
- Litigation in a court of competent jurisdiction unless otherwise agreed by both parties.
- Other *(Specify)*

(Paragraphs deleted)

ARTICLE 7 MISCELLANEOUS PROVISIONS

§ 7.1 The Architect, other design professionals and consultants engaged by the Design-Builder shall be persons or entities duly licensed to practice their professions in the jurisdiction where the Project is located and are listed as follows:

(Insert name, address, license number, relationship to Design-Builder and other information.)

Name and Address	License Number	Relationship to Design-Builder	Other Information
<i>(Row deleted)</i>			
The Brownstone Group 1310 Lady Street, Suite 204	ARF100797	Architect	

Columbia, SC 29201
(803) 786-6044

§ 7.2 Consultants, if any, engaged directly by the Owner, their professions and responsibilities are listed below:
(Insert name, address, license number, if applicable, and responsibilities to Owner and other information.)

Name and Address	License Number	Responsibilities to Owner	Other Information
<i>(Row deleted)</i>			
Jumper Carter Sease Architects, PA 412 Meeting Street West Columbia, SC 29169 (803) 791-1020	CARC.74002	Design Team Support	

Additional consultants, as needed, to be selected later by Design-Builder with concurrence of the Owner.

§ 7.3 Separate contractors, if any, engaged directly by the Owner, their trades and responsibilities are listed below:
(Insert name, address, license number, if applicable, responsibilities to Owner and other information.)

Not applicable.

Name and Address	License Number	Responsibilities to Owner	Other Information
------------------	----------------	---------------------------	-------------------

§ 7.4 The Owner's Designated Representative is:

Darryl A. Owens
Chief of Operations- Jasper County Schools
PO Box 848
10942 N. Jacob Smart Blvd.
Ridgeland, SC 29936
Phone: (843) 489-8892 ext 2999 / Fax: (843) 717-1699
Email: dowens@jcsd.net

§ 7.4.1 The Owner's Designated Representative identified above shall be authorized to act on the Owner's behalf with respect to the Project.

§ 7.5 The Design-Builder's Designated Representative is:
(Insert name, address and other information.)

Bill Cram
M. B. Kahn Construction Co., Inc.
101 Flintlake Road
Columbia, SC 29223
Phone: 803-736-2950 / Fax: 803-736-9501
Email: bcram@mbkahn.com

§ 7.5.1 The Design-Builder's Designated Representative identified above shall be authorized to act on the Design-Builder's behalf with respect to the Project.

§ 7.6 Neither the Owner's nor the Design-Builder's Designated Representative shall be changed without ten days written notice to the other party.

§ 7.7 Other provisions:

Not applicable.

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User Notes: (2033660505)

§ 7.7.1 Where reference is made in this Agreement to a provision of another Design-Build Document, the reference refers to that provision as amended or supplemented by other provisions of the Design-Build Documents.

§ 7.7.2 Payments due and unpaid under the Design-Build Contract shall bear interest from the date payment is due at the rate stated below, or in the absence thereof, at the legal rate prevailing from time to time at the place where the Project is located.

(Insert rate of interest agreed upon, if any.)

(Paragraph deleted)

Five percent (5.00%) per annum

(Usury laws and requirements under the Federal Truth in Lending Act, similar state and local consumer credit laws and other regulations at the Owner's and Design-Builder's principal places of business, the location of the Project and elsewhere may affect the validity of this provision. Legal advice should be obtained with respect to deletions or modifications, and also regarding requirements such as written disclosures or waivers.)

ARTICLE 8 ENUMERATION OF THE DESIGN-BUILD DOCUMENTS

§ 8.1 The Design-Build Documents, except for Modifications issued after execution of this Agreement, are enumerated as follows: To be added by contract modification upon completion of design.

§ 8.1.1 The Agreement is this executed edition of the Standard Form of Agreement Between Owner and Design-Builder, AIA Document A141-2004.

§ 8.1.2 The Supplementary and other Conditions of the Agreement, if any, are as follows:
(Either list applicable documents below or refer to an exhibit attached to this Agreement.)

(Table deleted)

Exhibits A, B and C.

§ 8.1.3 The Project Criteria, including changes to the Project Criteria proposed by the Design-Builder, if any, and accepted by the Owner, consist of the following:

(Either list applicable documents and their dates below or refer to an exhibit attached to this Agreement.)

"Centralization of District Staffing / Facility" provided to Design-Builder competitors.

S.C. Department of Education Office of School Facilities *Guide*.

(Table deleted)

Budget of \$2,900,000.00.

§ 8.1.4 The Design-Builder's Proposal, dated _____, consists of the following:

(Either list applicable documents below or refer to an exhibit attached to this Agreement.)

Design-Builder's "Option B" approved by the Board of Education, subject to such refinement and adjustment as necessary to carry out the intention to maximize value and functionality in the end product expressed in the conceptual presentation of "Option B" while remaining within the Owner's stated budget of \$2,900,000.00.

§ 8.1.5 Amendments to the Design-Builder's Proposal, if any, are as follows:

(Either list applicable documents below or refer to an exhibit attached to this Agreement.)

As and if agreed.

§ 8.1.6 The Addenda, if any, are as follows:

(Either list applicable documents below or refer to an exhibit attached to this Agreement.)

Not applicable.

(Table deleted)

§ 8.1.7 Exhibit A, Terms and Conditions.

(If the parties agree to substitute terms and conditions other than those contained in AIA Document A141-2004, Exhibit A, Terms and Conditions, then identify such terms and conditions and attach to this Agreement as Exhibit A.)

§ 8.1.8 Exhibit B, Determination of the Cost of the Work, if applicable.

(If the parties agree to substitute a method to determine the cost of the Work other than that contained in AIA Document A141-2004, Exhibit B, Determination of the Cost of the Work, then identify such other method to determine the cost of the Work and attach to this Agreement as Exhibit B. If the Contract Sum is a Stipulated Sum, then Exhibit B is not applicable.)

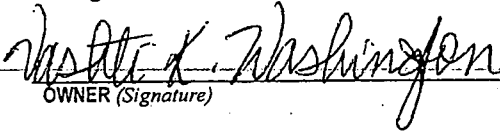
§ 8.1.9 Exhibit C, Insurance and Bonds, if applicable.

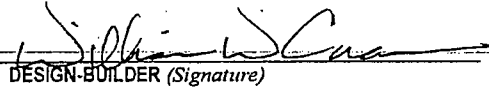
(Complete AIA Document A141-2004, Exhibit C, Insurance and Bonds or indicate "not applicable.")

§ 8.1.10 Other documents, if any, forming part of the Design-Build Documents are as follows:

(Either list applicable documents below or refer to an exhibit attached to this Agreement.)

This Agreement entered into as of the day and year first written above.


OWNER (Signature)


DESIGN-BUILDER (Signature)

Dr. Vashti K. Washington, Superintendent
(Printed name and title)

William W. Cram, Executive Vice President
(Printed name and title)

Init.

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User Notes:

(2033680505)

STATE OF SOUTH CAROLINA)
)
COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 14-CP-27-468

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

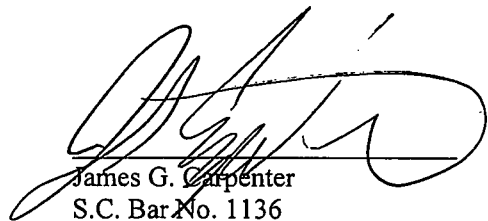
Certificate of Service

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)
Defendants.)
_____)

The undersigned attorney hereby certifies that he served a copy of the foregoing **Amended and Supplemental Complaint for the Enforcement of the District Procurement Code** upon opposing counsel by first-class mail this January 8, 2015, addressed as follows:

Keith R. Powell
Childs & Halligan
PO Box 11367
Columbia, SC 29211-1367

THE CARPENTER LAW FIRM, P.C.



James G. Carpenter
S.C. Bar No. 1136
819 E. North Street
Greenville, SC 29601
Telephone: (864) 235-1269
Facsimile: (864) 331-3083
Attorney for Plaintiffs

January 8, 2015

STATE OF SOUTH CAROLINA)
)
 COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS
 FOURTEENTH JUDICIAL CIRCUIT

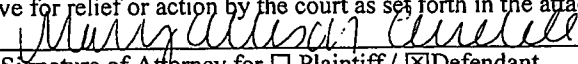
South Carolina Public Interest Foundation,)
 Edward D. Sloan, Jr, individually and on)
 behalf of all others similarly situated,)
 Plaintiff,)

C.A. No. 2014-CP-27-468

vs.)

**MOTION AND ORDER INFORMATION
 FORM AND COVER SHEET**

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,)
 Defendant.

Plaintiff's Attorney James C. Carpenter, Esq. S.C. Bar No. 1136 Carpenter Law Firm, PC 819 E. North Street, Suite 230, Greenville, SC 29601 telephone: (864)-235-1269 fax: (864)-331-3080 e-mail: james.carpenter@carpenterlawfirm.net	Defendant's Attorney Mary Allison Caudell S.C. Bar No. 101187 Childs & Halligan, P.A. PO Box 11367, Columbia, SC 29211 telephone: (803) 254-4035 fax: (803) 771-4422 e-mail: macaudell@childs-halligan.net
<input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
<p style="text-align: center;">SECTION I: Hearing Information</p> Nature of Motion: Estimated Time Needed: 30 Minutes Court Reporter Needed: YES	
<p style="text-align: center;">SECTION II: Motion/Order Type</p> <input checked="" type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. <div style="text-align: center;">  Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant Date submitted 1/23/14 </div>	
<p style="text-align: center;">SECTION III: Motion Fee</p> <input checked="" type="checkbox"/> PAID – AMOUNT: \$ 25.00 <input type="checkbox"/> EXEMPT: (check reason) <ul style="list-style-type: none"> <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ <input type="checkbox"/> Other:	
JUDGE'S SECTION <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	JUDGE CODE _____ Date: _____

CLERK'S VERIFICATION

Collected by: _____

Date Filed: _____

MOTION FEE COLLECTED: \$ _____

CONTESTED - AMOUNT DUE: \$ _____

SCCA/233 (11/2003)

STATE OF SOUTH CAROLINA)
)
COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS

South Carolina Public Interest)
Foundation, Edward D. Sloan, Jr,)
individually and on behalf of all others)
similarly situated,)

C.A. No. 2014-CP-27-468

**MOTION TO DISMISS AMENDED AND
SUPPLEMENTAL COMPLAINT AGAINST
DEFENDANTS**

Plaintiff,)

vs.)

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,)

Defendants.)

Defendants Jasper County School District and the Honorable Berty Riley, by and through its undersigned counsel, hereby move this Court for an order pursuant to Rules 12(b)(6) and 12(b)(7) of the South Carolina Rules of Civil Procedure, dismissing Plaintiff's Amended and Supplemental Complaint, filed January 8, 2015, against Defendants for failure to state facts sufficient to constitute a claim and for failure to join a necessary party under Rule 19. The grounds for this motion are as follows:

1. Defendants did not violate the District's Procurement Code Policy or South Carolina Consolidated Procurement Code, S.C. Code Ann. § 11-35-10, *et. seq.*
2. Plaintiff is requesting that the already executed contract with M.B. Kahn Construction Co., Inc. be enjoined. (A copy of the signed Contract is Exhibit E to Plaintiff's Amended and Supplemental Complaint). As such, M.B. Kahn is an indispensable party to this action and should have been joined as a Defendant, but was not.

In support of this motion, the Defendants will rely upon the pleadings on the file, the applicable statutory and case law, and a Memorandum of Law that will be filed with the Court in advance of the hearing on this motion.

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

By: Mary Allison Caudell
William F. Halligan, S.C. Bar No. 2607
bhalligan@childs-halligan.net

Keith R. Powell, S.C. Bar No. 69292
kpowell@childs-halligan.net

Mary Allison Caudell, S.C. Bar No. 101187
macaudell@childs-halligan.net

P.O. Box 11367
Columbia, South Carolina 29211
(803) 254-4035

Attorneys for Defendants Jasper County School
District and Berty Riley

January 23, 2015

Columbia, South Carolina

CERTIFICATE OF SERVICE BY MAIL

The undersigned of Childs & Halligan, P.A., hereby certifies that she has served the following counsel of record with the foregoing **MOTION TO DISMISS AMENDED AND SUPPLEMENTAL COMPLAINT AGAINST DEFENDANTS** by mailing a copy of same, postage prepaid and return address clearly indicated, to the following on this 23rd day of January, 2015:

James C. Carpenter, Esq.
Carpenter Law Firm, PC
819 E. North Street, Suite 230
Greenville, SC 29601



Andrea E. Shull

STATE OF SOUTH CAROLINA
COUNTY OF JASPER

IN THE COURT OF COMMON PLEAS
JUDICIAL CIRCUIT

FILED

CASE NO.: 2014-CP-27-00468

South Carolina Public Interest Foundation, et al.

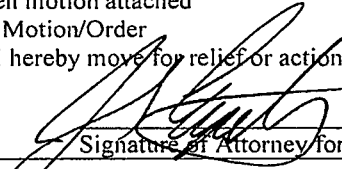
2015 FEB -9 AM 8:30
MARIALETT BOSTICK
CLERK OF COURT
JASPER COUNTY SC

vs.

Jasper County School District

Defendant.

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney: <u>James G. Carpenter</u> , Bar No. <u>1136</u> Address: <u>819 East North St., Greenville, SC 29601</u> Phone: <u>864-235-1269</u> Fax <u>864-331-3083</u> E-mail: <u>James.Carpenter@carpenterlawfirm.net</u> Other: _____	Defendant's Attorney: <u>Keith R. Powell</u> , Bar No. _____ Address: <u>PO Box 11367 Columbia, SC 29211-1367</u> Phone: <u>803-254-4035</u> Fax _____ E-mail: _____ Other: _____
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: <u>Injunctive relief and summary judgment</u> Estimated Time Needed: <u>45 minutes</u> Court Reporter Needed: <input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO	
SECTION II: Motion/Order Type	
<input checked="" type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for <input checked="" type="checkbox"/> Plaintiff / <input type="checkbox"/> Defendant	
February 4, 2015 Date submitted	
SECTION III: Motion Fee	
<input type="checkbox"/> PAID - AMOUNT: \$ _____ <input type="checkbox"/> EXEMPT: (check reason) <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ <input type="checkbox"/> Other: _____	
JUDGE'S SECTION	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE CODE _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____ <input type="checkbox"/> MOTION FEE COLLECTED: \$ _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: \$ _____	

SCCA 233 (11/2003)

STATE OF SOUTH CAROLINA)
)
 COUNTY OF JASPER)
)
 South Carolina Public Interest Foundation,)
 Edward D. Sloan, Jr, Denise G. Davidson,)
 and Milton Woods, Jr., individually and on)
 behalf of all others similarly situated,)
 Plaintiffs,)
 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)
 Defendants.)
 _____)

IN THE COURT OF COMMON PLEAS
 CIVIL ACTION NO. 14-CP-27-468

**Plaintiffs' Motion for Temporary,
 Preliminary, and Permanent Injunctive
 Relief and Summary Judgment for the
 Enforcement of the Defendant School
 District Procurement Code Policy**

FILED
 2015 FEB -9 AM 8:39
 MARGARET POSTICK
 CLERK OF COURT
 JASPER COUNTY SC

NOW COME the Plaintiffs, by their undersigned attorney, and move the Court pursuant to SCRPC 56 and 65 for temporary, preliminary, and permanent injunctive relief and summary judgment against the Defendants. In support of this Motion, Plaintiff's would show the Court the following:

1. Plaintiff South Carolina Public Interest Foundation is a corporation not for profit, organized and existing under the laws of the State of South Carolina and dedicated to the public interest, including the proper enforcement of procurement codes and the Constitution of the State of South Carolina.
2. Plaintiff Edward D. Sloan, Jr, is a citizen, resident, taxpayer, and registered elector of Greenville County, South Carolina.
3. Plaintiffs Denise G. Davidson and Milton Woods, Jr., are citizens, residents, taxpayers, and registered electors of Jasper County, South Carolina.
4. Defendant Jasper County School District ("District"), was created by and exists pursuant to an Act of the General Assembly.

5. Plaintiffs possess standing to bring this action as citizens, residents, taxpayers, and registered electors; and because the great public importance and manifest urgency of the matters they allege in this action.
6. This Court possesses jurisdiction under the following decisions, which address public interest and taxpayer standing: *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013), *American Petroleum Institute v. S.C. Dep't. of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009), *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008), *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008), *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005), *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003), *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000), *Baird v. Richland County*, 333 S.C. 519, 511 S.E.2d 69 (1999), *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997); and under S.C. Code Ann. § 15-53-10 *et seq.*, known as the Uniform Declaratory Judgment Act.
7. May 5, 2010, pursuant to § 11-35-50, Defendants' adopted a Procurement Code Policy (**Exhibit B1**), which is now in force.
8. District's Procurement Code Policy § 2-102(1) requires, "Contracts of \$50,000 or more must be awarded by competitive sealed bidding . . . except as provided herein."

¹ Exhibits A through E are attached to the Amended and Supplemental Complaint.

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

Conditions for use: When the school district determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the school district, a contract may be awarded by competitive sealed proposals. . . . Proposals must be solicited through a request for proposals (emphasis added).

10. The purpose of the written determination is to enable the Defendant District to use a Request for Proposals, as the method of selection of source, and therefore, the written determination should be issued prior to the Defendant District issuing a Request for Proposals.
11. On July 14, 2014, District issued Request for Proposals 14-06-01 (**Exhibit C**), soliciting more than \$2 million design-build services to renovate its Bees Creek Project.
12. On September 10, 2014, the District issued an intent to award letter (**Exhibit F**).
13. One month later, on October 10, 2014, the Defendant School District posted **Exhibit D**, the written determination, to its website. (*See Exhibit G*, Document Uploads from Defendant District Website).
14. Defendants entered into a contract with a guaranteed maximum price of \$2.9 million (**Exhibit E**).
15. The language of the written determination (**Exhibit D**) indicates that the District issued the written determination subsequent to the selection process:

From the competition it has been determined that both of the finalist qualified entities were able to propose a solution in accordance with the design requirements. The Board of Trustees has selected its preferred solution.

For the above stated reasons, the District is therefore proceeding with a design-build delivery of the Bees Creek site within the design requirements established in consultation with the Board.

(**Exhibit D**, p. 3) (emphasis added).

16. The Defendant District issued written determination to enable the subsequent use of a Request for Proposals nearly 3 months after the District issued the Request for Proposals, and one month after the intent to award letter, meaning that when the District issued the Request for Proposals and when the District issued the intent to award letter, **it had not made any written determination** to enable the use of a Request for Proposals, in violation of § 2-103(1).
17. Furthermore, the District Procurement Code Policy § 2-103(6) requires:

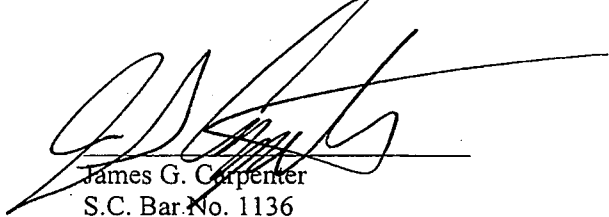
Evaluation factors: The request for proposals shall state the evaluation factors in relative order of importance. Price may but need not be an initial evaluation factor. **Each** responsive and responsible offeror's **proposal must be evaluated**. The proposal **must then be ranked** in accordance with the results of such evaluation (emphasis added).
18. Upon information and belief, the Defendant District **neither evaluated nor ranked** the proposals it received, in violation of § 2-103(6).
19. District Procurement Code Policy § 2-103(7) requires:

Award: The award **must be made** to the responsible offeror whose proposal is **determined in writing** to be the most advantageous to the school district, **taking into consideration the evaluation factors** set forth in the request for proposals. No other factors or criteria must be used in the evaluation. **The contract file shall contain the basis** on which the award is made (emphasis added).
20. Upon information and belief, the Defendant School District did **not** "determine[] in writing" which proposal was "the most advantageous to the school district," in violation of § 2-103(7).
21. Upon information and belief, the contract file does **not** "contain the basis on which the award [was] made," in violation of § 2-103(7).
22. The written determination, **Exhibit D**, does **not** satisfy § 2-103(1), (6), or (7).

WHEREFORE, Plaintiffs pray the Court for an Order:

1. Declaring that the contract dated November 10, 2014 (**Exhibit E**), in which Defendants procured construction services of \$50,000 or more using a Request for Proposals, violates the District's Procurement Code Policy, and is unlawful;
2. Declaring that Defendants' undated determination (**Exhibit D**) is insufficient to satisfy the requirements of Procurement Code Policy § 2-103(1), (6), or (7);
3. Awarding the Plaintiff attorneys' fees and costs of litigation pursuant to S.C. Code Ann. § 15-77-300 *et seq.*; and
4. Granting Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.



James G. Carpenter
S.C. Bar No. 1136
819 E. North Street
Greenville, SC 29601
Telephone: (864) 235-1269
Facsimile: (864) 331-3083
Attorney for Plaintiffs

February 4, 2015

Jasper County School District
Division of Operations & Facilities

Post Office Box 848 - 10942 North Jacob Smart Blvd. - Ridgeland, South Carolina 29936
(843) 717 - 1624 Telephone (843) 717 - 16999 Fax
Email: ops@jasd.net Website: www.jasd.net

Vashti K. Washington, Ed.D.
Superintendent

Darryl A. Owens
Chief of Operations

September 10, 2014

Joseph B Fraser III
Fraser Construction Company, LLC
12-B Arley Way
Bluffton, SC 29910
www.fraserconstruction.com

Emailed: 09/10/14
USPS: 09/10/14

Ben Thompson
AAG Associates, LLC
37 Marshellen Drive
Beaufort, SC 29902
ben@accessAAG.com

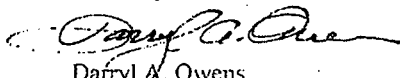
Re: Solicitation #: 14-06-01 Renovation of 3776 Bees Creek Property for Use as Centralized District Administrative Offices

Dear Mr. Sirs:

We wish to take this opportunity to thank you for submitting a proposal for the Design-Build: Renovation of 3776 Bees Creek Rd Property for use as Centralized District Administrative Offices. Upon review of each Short-List presentations, the Jasper County Board of Trustees voted at its September 8, 2014 Board Meeting that a notice of intent to award be issued to M.B. Kahn Construction Co., Inc., in accordance with the solicitation as Design-Build Contractor for the project.

Please be advised that your name will remain on our bidders list for any future bids of this nature. Should you wish to Protest this Notice of Intent to Award by submitting written protest to the Chief of Operation at Jasper County Schools within ten (10) calendar days after the date of this notice.

Sincerely,


Darryl A. Owens
Chief of Operations

Cc: Dr. Vashti K. Washington, Superintendent
Mr. Gary West, Chief Officer of Finance & Data Management

"Sharing Our Strengths To Produce Great Results For Our Students"



CHILDS & HALLIGAN

A PROFESSIONAL ASSOCIATION
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March 2, 2015

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Keith R. Powell***
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†Certified Specialist in Employment
and Labor Law
*Also admitted in District of Columbia
**Also admitted in North Carolina
***Also admitted in Missouri
**Also admitted in Georgia

VIA FEDERAL EXPRESS

The Honorable Margaret Bostick
Clerk of Court, Jasper County
265 Russell Street
Ridgeland, SC 29936-0248

Re: South Carolina Public Interest Foundation, Edward D. Sloan, Jr., Denise G. Davidson, and Milton Woods, Jr., individually and on behalf of all others similarly situated 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
C.A. No. 2014-CP-27-468

Dear Ms. Bostick:

Our law firm represents Defendant, Jasper County School District and the Honorable Berty Riley, in the above-referenced matter. Enclosed for filing please find an original and one copy of Defendants' Memorandum of Law in Support of its Motion to Dismiss. Please return the extra clocked-in copy of the Memorandum of Law to our office in the self-addressed, postage-paid envelope enclosed. By copy of this correspondence, I am notifying, James C. Carpenter, counsel for Plaintiff, of this communication and filing with the Court.

Sincerely,



Keith R. Powell
kpowell@childs-halligan.net

/aes
Enclosures

c: James C. Carpenter, Esq. (w/ encl.) (via e-mail and U.S. Mail)
William F. Halligan, Esq. (w/o encl.)
Mary Allison Caudel, Esq. (w/o encl.)
Dr. Vashti K. Washington (w/ encl.)

STATE OF SOUTH CAROLINA)
)
COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS

South Carolina Public Interest)
Foundation, Edward D. Sloan, Jr,)
individually and on behalf of all others)
similarly situated,)

C.A. No. 2014-CP-27-468

**DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION TO
DISMISS**

Plaintiff,

vs.

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,)

Defendant.

1. The Amended Complaint fails to state a cause of action. SCRCP 12(b)(6).
2. Procurement codes are remedial and must be construed liberally to carry out their purposes. *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (2003) (JCSD-MTD-025).
3. Section 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 Company v. Sumter County*, 361 S.C. 483, 604 S.E.2d 718 (2004) (JCSD-MTD-028).
4. Plaintiff “urges this Court to construe section 11-35-50 as mandating sealed bids in virtually every instance of public procurement. This approach would effectively strip our state’s local governments of any flexibility in determining the competitive procurement policies and procedures appropriate for them to adopt.” *Glasscock, supra* (JCSD-MTD-029).
5. Procurement decisions are “a function of [the governing body’s] discretion, the exercise of which they are accountable for as publicly elected officials.” *Id.* (JCSD-MTD-029).

6. It is important to remember that the Board 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 decisions of administrative functionaries, but elected officials. "A discretionary decision of a legislative body should not be upset on appeal unless such determination is arbitrary, unreasonable, in obvious abuse of discretion, or in excess of legally delegated power. Since the use of the design-build method may raise concerns among citizens of the County, it is limited under the Code to those situations in which it is properly justified." *Sloan v. Greenville County* (not reported) (JCSD-MTD-030).

7. Under the Board's own procurement policy, "if after an award it is determined that a solicitation or award of a contract is in violation of this policy, the: (1) if the person awarded the contract has not acted fraudulently or in bad faith: (a) a contract may be ratified and affirmed, provided it is determined that doing so is in the best interest of the school district" (JCSD Policy DJ-R) (JCSD-MTD-008).

8. The Board has the power to ratify any contract found not to be awarded under the policy, just as the Sumter County Council had the power to award the contract in *Glasscock, supra*, by exemption. Setting aside the contract award is an overly drastic remedy in derogation of the Board's power to award contracts even if they are not done under the Procurement Code.

9. Nonetheless, the Board did not violate its policy. In South Carolina, the State Department of Education controls all school construction. S.C. Code Ann. § 59-23-210 (JCSD-MTD-002). This is done through its Planning and Construction Guide, which is established and incorporated by statute. *Id.*

10. The Planning and Construction Guide contains a section on Procurement (JCSD-MTD-010) 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." (JCSD-MTD-011).

11. Design-Build is one of these recognized “procurement methods.” S.C. Code Ann. § 11-35-3005.

12. The Design-Build delivery method has been “widely sanctioned for use in public construction.” 1 Bruner & O’Connor Construction Law § 2:171 (JCSD-MTD-014). “[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 (JCSD-MTD-019).

13. “Designation of a project delivery method usually dictates the source selection and contract formation procedures available for forming the various contracts, subcontracts, and purchase orders required for any construction project.” *Id.* (JCSD-MTD-017).

14. “The design-build method differs from traditional competitive sealed bidding in two important ways. First, under the design-build method, the County enters into a single contract for design and construction of the project. This arrangement condenses the two-step process of competitive sealed bidding in which the County procures design services and then contracts separate for actual construction. Design-build’s single source procurement also enables design and construction to proceed concurrently, thereby shortening project duration.” *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (2003) (JCSD-MTD-020).

15. “Second, the design-build method allows comparative subjective evaluations to be made when determining acceptable proposals for negotiation and award of the contract. Price need not be the sole or primary criterion for evaluating competing proposals – it may be only one of several factors considered. The County may select the design-build team based on other factors such as experience, project team members, and expertise.” *Id.* (JCSD-MTD-020-021).

16. “Professionals in the field of public construction variously refer to this method of source selection as ‘design-build,’ ‘competitive sealed proposal,’ or ‘request for proposal.’ Though these terms are generally interchangeable, for ease of reference we will refer exclusively to ‘design-build’ when discussing this alternative to traditional competitive sealed bidding

procurement.” *Id.*, n.1 (JCSD-MTD-027).

17. “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) (JCSD-MTD-012).

18. “Contracts for design-build must be procured by competitive sealed proposals” S.C. Code Ann. § 11-35-3015(5) (JCSD-MTD-013).

19. The JCSD Procurement Code has an article that pertains specifically to “Procurement of Construction, Architect-Engineer and Land Surveying Services.” (JCSD-MTD-007). This is Article 4, which is separate from the Article 2 items cited by the Amended Complaint.

20. 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.” (JCSD-MTD-007).

21. 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.” (JCSD-MTD-007).

22. 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.” (JCSD-MTD-007).

23. Section 4-101, pertaining specifically to construction and tied directly into the

Planning and Construction Guide, which permits any delivery method permitted to the State (including design-build), would be rendered meaningless by the Amended Complaint's position that § 2-102 supersedes § 4-101. Such an interpretation eliminates the legislative discretion noted in *Glasscock, supra*. (JCSD-MTD-029).

24. Pursuant to Section 4-101, the JCSD issued a "written statement setting forth facts which led to the selection of" design-build. This is attached to the Amended Complaint. Not 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 "shop around" for the approach that proves most promising, and see whether an acceptable proposal can be received – and even then the government is not required to accept it. The important thing is to communicate the reasons why the contracting is being done with any particular method. 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*, (JCSD-MTD-031).

25. In sum, the Board has the discretion, and has enshrined that discretion in § 4-101 of its Procurement Code, 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 what is happening. The public can respond to this discretionary activity at the ballot box, but disagreement with the policy, procedures, and rationale does not amount to a civil action under South Carolina law. Accordingly the Amended Complaint must be dismissed pursuant to the defendants' Rule 12(b)(6) motion before the court.

26. In addition, the Amended Complaint fails to join an indispensable party: the contractor. The executed contract is attached to the Amended Complaint. The Amended Complaint seeks declaratory and injunctive relief that not only affects the contractor's rights in the contract, but which would put the defendants in a position of conflicting legal obligations if granted.

27. "When declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." S.C. Code Ann. § 15-53-80. (JCSD-MTD-035).

28. "The Court cannot proceed to enter a judgment in the absence of such a party." 24 CJS Declaratory Judgments § 139. (JCSD-MTD-036).

29. "[A] declaratory judgment action normally cannot be maintained without complying with such a statutory requirement." *Id.* (JCSD-MTD-036).


30. SCRCR Rule 19(a) also requires joinder of the contractor. Both branches of 19(a)(2) apply: impairment of the contractor's interest, and leaving the defendant parties with "inconsistent obligations by reason of his claimed interest." (JCSD-MTD-037).

31. Plaintiffs know who the contractor is, as evidence by their attachment of the contract to the Amended Complaint. Therefore, the plaintiffs have also failed to comply with SCRCR 19(c) by failing to "state the names ... of any persons described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined." (JCSD-MTD-037).

For the reasons set forth above, this Court should dismiss Plaintiff's claims against Defendant School District and Defendant Riley.

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

By: 
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Attorneys for Defendants Jasper County School
District and Bertie Riley

March 2, 2015

Columbia, South Carolina

CERTIFICATE OF SERVICE BY MAIL

The undersigned of Childs & Halligan, P.A., hereby certifies that she has served the following counsel of record with the foregoing **DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS** by mailing a copy of same, postage prepaid and return address clearly indicated, to the following on this 2nd day of March, 2015:

James C. Carpenter, Esq.
Carpenter Law Firm, PC
819 E. North Street, Suite 230
Greenville, SC 29601



Andrea E. Shull

1 Cases that cite this headnote

[15] Negligence

✓ Duty as question of fact or law generally

The existence of a duty owed is a question of law for the courts.

6 Cases that cite this headnote

Attorneys and Law Firms

**306 Gregg E. Meyers, of Charleston, for Appellants.

Christopher R. Antley, of Devlin & Parkinson, of Greenville, for Respondent.

Opinion

Chief Justice TOAL:

*66 John Doe and Jane Doe ("Mr. and Mrs. Doe") sued the Greenville County School District ("the School District") asserting several causes of action arising from incidents of sexual activity between Mr. and Mrs. Doe's minor daughter and a substitute teacher employed by the School District. The trial court granted the School District's motion to dismiss all causes of action, and Mr. and Mrs. Doe appealed. We affirm in part and reverse in part.

FACTUAL/PROCEDURAL BACKGROUND

In 2001, Mr. and Mrs. Doe discovered that their fourteen-year old daughter was involved in a sexual relationship with a substitute teacher from her school. The substitute teacher was charged and convicted of criminal sexual conduct with a minor as a result of this inappropriate relationship. Ultimately, Mr. and Mrs. Doe sued the School District alleging several causes of action based upon the alleged negligent supervision on the part of the School District.¹ Specifically, Mr. and Mrs. Doe allege that the School District had prior complaints and warnings regarding the substitute teacher's inappropriate interest in young girls, and that the School District knew or should have known about the development of this relationship.

The School District filed a motion to dismiss all causes of action, and the trial court granted the motion. Mr. and Mrs. Doe appealed, and this Court certified the case from the court of appeals pursuant to Rule 204(b), SCACR. Mr. and Mrs. Doe raise the following issue for this Court's review:

Did the trial court err in granting the School District's motion to dismiss Mr. and Mrs. Doe's claims?

**307 STANDARD OF REVIEW

[1] [2] Generally, in considering a Rule 12(b)(6), SCRCR, motion to dismiss, the trial court must base its ruling solely upon allegations set forth on the face of the complaint, *Stiles v. Onarato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995). The motion may not be sustained if the facts alleged in the *67 complaint and the inferences that can be drawn therefrom would entitle the plaintiff to any relief under any theory. *Id.*

LAW/ANALYSIS

Mr. and Mrs. Doe argue that the trial court erred in granting the School District's motion to dismiss. We agree that the trial court erred in granting the School District's motion to dismiss Mr. and Mrs. Doe's action for negligent supervision. We disagree, however, with Mr. and Mrs. Doe's argument that the trial court erred in granting the School District's motion to dismiss the causes of action for negligent infliction of emotional distress, loss of consortium, breach of fiduciary duty, and breach of an assumed duty *in loco parentis*.

A. Negligent Infliction of Emotional Distress

[3] Mr. and Mrs. Doe argue that the trial court erred in dismissing their claim against the School District for negligent infliction of emotional distress. Specifically, Mr. and Mrs. Doe argue that the trial court mistakenly perceived their claim for negligent infliction of emotional distress as a bystander liability claim similar to that discussed in *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 582, 336 S.E.2d 465, 467 (1985). Mr. and Mrs. Doe contend that their claim should have been regarded as another basis upon which emotional distress could be inflicted through negligent acts. We disagree.

CHAPTER 23
School Buildings and Other School Property

ARTICLE 1
School Building Code [Repealed]

SECTIONS 59-23-10 to 59-23-190. Repealed by 2003 Act No. 87, Section 2, eff July 16, 2003.

ARTICLE 2
School Building Codes, Specifications, and Inspections

SECTION 59-23-210. Construction, improvement, and renovation of public schools; compliance with the South Carolina School Facilities Planning and Construction Guide; committee members; submission of plans.

(A) All construction, improvement, and renovation of public school buildings and property on or after the effective date of this section shall comply with the latest applicable standards and specifications set forth in the South Carolina School Facilities Planning and Construction Guide as published by the South Carolina Department of Education.

This guide must be reviewed and updated on an annual basis by a committee appointed by the South Carolina Department of Education. The committee shall consist of a minimum of two architects and one engineer who are all registered in South Carolina and experienced in K-12 design, one K-12 school administrator, one representative of the K-12 construction industry, the State Fire Marshal or his designee, a representative of the Traffic Engineering Division of the South Carolina Department of Transportation, and two representatives of the South Carolina Department of Education. In addition, the Chairman of the House of Representatives Education and Public Works Committee or his designee and the Chairman of the Senate Education Committee or his designee shall also serve as members of the committee, ex officio.

(B) All construction, improvement, and renovation of public school buildings and property on or after the effective date of this section must have plans and specifications submitted to the State Superintendent of Education or the superintendent's designee. Approval of the plans and specifications by the State Superintendent of Education or the superintendent's designee must be received before public bidding before the construction can begin. Plans and specifications must be coordinated with county officials such as traffic engineers and zoning administrators.

HISTORY: 2003 Act No. 87, Section 1, eff July 16, 2003.

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ARTICLE 2 - SOURCE SELECTION AND CONTRACT FORMATION

Part A - Methods of source selection

2-101 Methods of source selection

Unless otherwise required by law or this policy, all school district contracts must be awarded by competitive sealed bidding, pursuant to Section 2-102, except as provided herein:

- (1) Section 2-103(Competitive sealed proposals);
- (2) Section 2-104(Small purchases);
- (3) Section 2-105(Sole procurement);
- (4) Section 2-106(Emergency procurement);
- (5) Section 4-301(Architect-engineer or land surveying services).

2-102 Competitive sealed bidding

- (1) Conditions for use: The preferred procurement technique, competitive sealed bidding, should not be used in all instances. This is a price determinate method of procurement and is best applied where the needs of the district are precise and certain and may be secured from any number of potential suppliers. Contracts of \$50,000 or more must be awarded by competitive sealed bidding.
- (2) Invitation for bids: The invitation for bids must be the document used to initiate a competitive sealed bid procurement and must include the following:
 - (a) instructions and information to bidders concerning the bid submission requirements, including the time and date set for receipt of bids, the individual to whom the bid is to be submitted, the address of the office to which bids are to be delivered, and any other special information;
 - (b) the purchase description, specifications, delivery and performance schedule, and such inspection and acceptance requirements as are not included in the purchase descriptions;
 - (c) all contract terms and conditions, including warranty and bonding or other security requirements as applicable;
 - (d) instructions to bidders to visibly mark as confidential each part of their bid which they consider to be proprietary information; and
 - (e) a statement of a bidder's right to protest under 6-201.
- (3) Public notice: Public notice of the invitation for bids must be given. Such notice may include publication in a newspaper of general circulation a reasonable time prior to bid opening. Bidding time will be set to provide bidders a reasonable time to prepare their bids. A minimum of seven (7) days shall be provided unless a shorter time is deemed necessary for a particular procurement, as determined by the school district.
- (4) Bid opening: Bids must be opened publicly in the presence of one or more witnesses at the time and place designated in the invitation for bids. The dollar

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(see next page)

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amount of each bid and such other relevant information, together with the name of each bidder, must be recorded; the record and each bid must be open to public inspection at that time. Only the information disclosed at the bid opening is considered to be public information until an award is actually made. An amendment postponing bid openings may be issued only when emergency or unanticipated events beyond the control of bidders interrupt normal government operations. The date and location for the posting of the notice of an intended award must be announced at bid opening.

- (5) Bid acceptance and bid evaluation: Bids must be accepted without alteration or correction, except as authorized in this policy. When necessary for the best interest of the school district, the invitation for bids may include criteria to determine acceptability, such as inspection, testing, quality, workmanship, delivery, and suitability for a particular purpose. Those criteria that will affect the bid price and be considered in evaluation for award must be measurable, such as discounts, transportation costs and total or life cycle costs. The invitation for bids must set forth the cost criteria to be used. No cost criteria may be used in bid evaluation that are not set forth in the invitation for bids.
- (6) Correction or withdrawal of bids; cancellation of awards: Corrections or withdrawal of inadvertently erroneous bids before or after award, or cancellation of awards or contracts based on such bid mistakes, may be permitted where appropriate. After bid openings, no change in bid prices or other provisions of bids prejudicial to the interest of the school district or fair competition must be permitted. A bidder must submit a written request to either correct or withdraw a bid to the school district. Each written request must document the fact that the bidder's mistake is clearly an error that will cause him substantial loss. In order to maintain the integrity of the competitive sealed bidding process, a bidder must not be permitted to correct a bid mistake after bid opening that would cause such bidder to have the low bid, unless the mistake, in the judgment of the school district, is clearly evident from examining the bid document; for example, extension of unit prices or errors in addition. All decisions to permit the correction or withdrawal of bids, or to cancel awards or contracts based on bid mistakes, must be supported by a written determination.
- (7) Award: Notice of an award or an intended award to the lowest responsive and responsible bidders must be given by posting the notice at a location specified in the invitation for bids. Prior to the posting of the award, the school district may negotiate an adjustment in the bid price, with the lowest responsive and responsible bidder to bring the bid within the scope of the invitation for bids. The notice shall contain a statement of a bidder's right to protest under 6-201. If a contract exceeds \$50,000, but is less than \$100,000, notice of award must also be sent to all bidders responding to the solicitation on the same day that the notice is posted in accordance with this section. For contracts of \$100,000 or greater, the school district may contract with the bidder named in the notice 10 days after notice is posted and sent to responsive bidders. The posting date must appear on the face of all these notices. The notice of intent to award and the 10-day delay of award may be waived when only one response is received.
- (8) Request for Qualification: The district may follow the process set forth under 2-103(4).

2-103 Competitive sealed proposals

- (1) Conditions for use: When the school district determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the

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(see next page)

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school district, a contract may be awarded by competitive sealed proposals. Competitive sealed proposals should be used when both the needs of the school district and the costs to satisfy those needs are important, and the methods or items to satisfy those needs are not clear and precise. While price is an important factor, it is considered less significant than fully meeting the district's needs. The ultimate purpose of this method of procurement is to provide flexibility to the district, while taking into consideration various options and the costs of each. Proposals must be solicited through a request for proposals.

- (2) Public notice: Public notice of the request for proposals must be given in the same manner, as provided in Section 2-102(3).
- (3) Proposal opening: Proposals must be publicly opened, but only the names of the offerors disclosed at the proposal opening. Contents of competing proposals must not be disclosed during the process of opening or negotiation. All proposals shall be recorded at the time of opening and must be opened for public inspection after contract award. Proprietary or confidential information marked as such in each proposal must not be disclosed without written consent of the offeror.
- (4) Request for qualifications: Prior to soliciting proposals, and after giving adequate public notice, the district may issue a request for qualifications, experience and ability to perform the requirements of the contract from prospective offerors. At a minimum, the request must contain a description of the goods or services to be solicited by the invitation for bids and the general scope of the work. The request must also contain the deadline for submission of information and how prospective offerors may apply for consideration.

After the district receives the responses, it will rank prospective offerors from most qualified to least qualified on the basis of the information provided. The district must then invite bids from at least the top two prospective offerors in accordance with section (2) above.

- (5) Negotiations with responsible offerors and revisions to proposals: As provided in the request for proposals, negotiations may be conducted with any offeror submitting a proposal appearing to be eligible for contract award pursuant to the selection criteria set forth in the request for proposals. All apparently eligible offerors must be afforded the opportunity to submit best and final proposals, if negotiations with any other offeror result in a material alteration to the request for proposals and such an alteration has a cost consequence that may alter the order of offerors' price quotations contained in their initial proposals. In conducting negotiations, there must be no disclosure of information derived from proposals submitted by any competing offerors.
- (6) Evaluation factors: The request for proposals shall state the evaluation factors in relative order of importance. Price may but need not be an initial evaluation factor. Each responsive and responsible offeror's proposal must be evaluated. The proposal must then be ranked in accordance with the results of such evaluation.
- (7) Award: The award must be made to the responsible offeror whose proposal is determined in writing to be most advantageous to the school district, taking into consideration the evaluation factors set forth in the request for proposals. No other factors or criteria must be used in the evaluation. The contract file shall contain the basis on which the award is made.

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- (1) Audit of cost or pricing data: The school district may, at reasonable times and places, audit the books and records of any person who has submitted cost or pricing data pursuant to Section 2-202 to the extent that such books and records relate to such cost or pricing data. Any person who receives a contract, change order or contract modification for which the cost or pricing data is required, must maintain such books and records that relate to such cost or pricing data for three (3) years from the date of the final payment under the contract, unless a shorter period is otherwise authorized in writing.
- (2) Contract audit: The school district must be entitled to audit the books and records of a contractor or subcontractor under any contract or subcontract other than a firm fixed-price contract, to the extent that such books and records relate to the performance of such contract or subcontract. Such books and records must be maintained by the contractor for a period of three (3) years from the date of final payment under the prime contract and by the subcontractor for a period of three (3) years under the subcontract, unless a shorter period is otherwise authorized in writing.

Part E - Reports and records

2-501 Reporting of anti-competitive practices

When for any reason collusion or other anti-competitive practices are suspected among any bidders or offerors, the relevant facts must be transmitted to the school district attorney and the superintendent.

2-502 Procurement records

- (1) Contract file: All determinations and other written records pertaining to the solicitation, award or performance of a contract must be maintained in a contract file.
- (2) Retention of procurement records: All procurement records must be retained and disposed of in accordance with records retention guidelines and schedules recommended by the South Carolina Department of Archives and History. If a contract is being funded in whole or in part by assistance from a federal agency, then all procurement records pertaining to that contract must be maintained for three (3) years from the close-out date of the assistance agreement or the final disposition of any controversy arising out of the assistance agreement, or for a longer period if required by such federal agency.

ARTICLE 3 - SPECIFICATIONS

Part A - Specifications

3-101 Importance of specifications

The school district must prepare and issue specifications for supplies, services and construction required by the school district. Specifications must, to the extent practicable, emphasize functional or performance criteria, while limiting design or other detailed physical descriptions to meet the needs of the school district. All specifications must be drafted so as to promote overall economy for the purpose of satisfying the school district's needs, and to encourage maximum free and open competition in satisfying the school district's needs, and may not be unduly restrictive. It is recognized, however, that the preference for use of functional or performance specifications is primarily applicable to the procurement of supplies and services. Such preference is not often practicable in construction, apart from the procurement of supply

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(see next page)

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type items for a construction project. Specifications for construction may be prepared on a project-by-project basis by the architect and/or engineer retained by the school district.

ARTICLE 4 - PROCUREMENT OF CONSTRUCTION, ARCHITECT/ENGINEER AND LAND SURVEYING SERVICES

Part A - Management of construction contracting

4-101 Selection of method of construction contract

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 of structures used in connection with public education. 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. 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 the methods used.

4-102 Contract administration

The school district must maintain a contract administration system designed to insure that a contractor is performing in accordance with the solicitation under which the contract was awarded, and the terms and conditions in the contract.

Part B - Construction contract clauses and fiscal responsibility

4-201 Standard clauses

The school district may establish standard contract clauses for use in its contracts. Such contract clauses and additional clauses or variations must be stated in the invitation for bids or request for proposals.

4-202 Modifications

Every contract modification, change order or contract price adjustment under a construction contract with the school board in excess of \$5,000 must be subject to prior approval by the school board after receiving a report from the fiscal officer of the school district as to the effect of the contract modification, change order or contract price adjustment on the total project budget or the total contract budget.

Part C - Architect/Engineer and surveying services

4-301 Public announcement and selection process

(1) Public announcement: It is the policy of the school district to publicly announce all requirements for architect/engineer and land surveying services and to negotiate such contracts on the basis of demonstrated competence and qualification of fair and reasonable prices. In the procurement of architect/engineer and land surveying services, the school district must submit a statement of qualifications and performance data.

(2) Selection process: The school district must conduct discussions with no less than three firms regarding the contract and must select the firm deemed most qualified

Jasper County Board of Education

(see next page)

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- (a) solicitation or award being contested was in accordance with this policy and the terms and conditions of the solicitation documents;
 - (b) debarment or suspension being contested was in accordance with this policy and in the best interest of the school district; and
 - (c) contract and breach of contract determination being contested was in accordance with this policy and in the best interest of the school district.
- (3) The administrative review by the school district board of trustees must not be limited to any prior determination. Any prior staff determination must not be conclusive as to any findings and conclusions. Any person who is aggrieved by a final decision must have exhausted all administrative remedies available within this article prior to seeking judicial review. The decision of the board of trustees must be presumed final and conclusive unless such proceedings for review are instituted by filing a petition in the Circuit Court within 30 days after such final decision.

Part D - Solicitations or awards in violation of law

6-401 Applicability of this part

The provisions of this part apply where it is determined administratively or upon administrative review, that a solicitation or award of a contract is in violation of this policy.

6-402 Remedies prior to an award

If prior to award it is determined that a solicitation or proposed award of a contract is in violation of this policy, then the solicitation or proposed award must be:

- (1) canceled;
- (2) revised to comply with this policy and rebid; or
- (3) awarded in a manner that complies with the provisions of this policy.

6-403 Remedies after an award

If after an award it is determined that a solicitation or award of a contract is in violation of this policy, then:

- (1) if the person awarded the contract has not acted fraudulently or in bad faith:
 - (a) the contract may be ratified and affirmed, provided it is determined that doing so is in the best interest of the school district; and
 - (b) the person who should have been awarded the contract may be reimbursed for the actual expenses reasonably incurred in connection with the solicitation, including reparation, not to exceed \$5,000.
- (2) if the person awarded the contract has acted fraudulently or in bad faith:
 - (a) the contract may be declared null and void; or

**2014 SOUTH CAROLINA SCHOOL FACILITIES
PLANNING AND CONSTRUCTION GUIDE**

Prepared by
OFFICE OF SCHOOL FACILITIES

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DIVISION OF OPERATIONS AND SUPPORT
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Effective January 1, 2014

SOUTH CAROLINA DEPARTMENT OF EDUCATION
Mick Zais, Ph.D.
State Superintendent of Education
An Equal Opportunity Agency

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SECTION 111 BOARD OF APPEALS

111.1 In order to hear and decide appeals of orders, decisions or determinations made by the OSF relative to the application and interpretation of the codes referenced in this *Guide*, there must be established a board of appeals whose members must be appointed by and who must serve at the pleasure of the SC State Superintendent of Education. The OSF must establish procedures for conducting the board's business.

111.2 An application for appeal must be based on a claim that the true intent of the referenced codes has been incorrectly interpreted, the provisions of the referenced codes do not fully apply or an equally good or better form of construction is proposed. The board does not have the authority to waive requirements of the referenced codes or the *Guide*.

111.3 The board of appeals must consist of members who are qualified by experience and training to pass on matters pertaining to building construction and are not employees of the SC Department of Education or a school district.

SECTION 112 PROCUREMENT

112.1 Procurement of professional design services, construction and goods and services is the responsibility of each school district in accordance with their established procurement code. The OSF recognizes all procurement methods authorized and defined in South Carolina Code Ann. §11-35-2910 and §11-35-3005. If the district would propose a plan submittal and approval process that differs from the procedures in the *Guide*, the district must coordinate new procedures prior to and bidding.

112.2 Pre-qualification: Project delivery methodology may be subject to pre-qualification as prescribed by the district's procurement code.

112.3 The requirements of this *Guide*, while written primarily for the single contract method of design-bid-build construction must also apply to each contract of the multi-prime or fast track method except where otherwise waived by the OSF.

112.4 The scope and schedule for a guaranteed energy savings contract must be coordinated with the OSF prior to signing of a contract. Heating, ventilating, or air conditioning system modifications or replacements, replacement or modification of lighting and/or electrical systems, energy recovery systems, and/or measures that are affected by any applicable codes, must be submitted as complete drawings and specifications with a professional seal of an Design Professional licensed to practice in South Carolina to the OSF for approval prior to installation of those measures. Drawings are not required if the scope of work is defined, in writing, to the approval of the OSF. Third party inspections are required for all applicable work. The OSF notification, inspection and acceptance of the work will be as outlined in the *Guide*.

SECTION 113 OTHER RELATED STANDARDS

113.1 Building automatic sprinkler systems are to be submitted to the State Fire Marshal's Office for review and approval in accordance with the State Fire Marshal's Rules and Regulations.

113.2 Any project which requires asbestos or other hazardous material mitigation is subject to AHERA and SCDHEC regulation

113.3 Schools must be in compliance with OSHA Standards. For further information, contact SCLLR OSHA.

trial court may affect future events, ... an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case." *Id.* Clearly, this issue is capable of repetition, yet will usually evade review. Accordingly, despite mootness, we will address the merits.

*304 2) Standing

[5] [6] The circuit court found the issues raised by Sloan were of such public importance that standing should be conferred upon him. The Court of Appeals reversed and held Sloan did not have standing because, even though raising an issue of public importance, he failed to show a nexus between himself and the actions. Sloan contends this was error. We agree.

[7] Under the public importance exception, standing may be conferred upon a party "when an issue is of such public importance as to require its resolution for future guidance." *Baird v. Charleston Cty.*, 333 S.C. 519, 531, 511 S.E.2d 69, 75 (1999). This Court has never held that there must be no other potential plaintiffs with a greater interest in the case or some other nexus, as the respondents now argue.

This Court recently noted that standing is not inflexible and standing may be conferred upon a party when an issue is of such public importance as to require its resolution for future guidance. *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005) (holding Sloan had standing to challenge legislative enactment). Additionally, both this Court and the Court of Appeals have found standing in other cases of important public interest without requiring the plaintiff to show he has an "interest greater than other potential plaintiffs." *See id.*; *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004) (holding standing to challenge governor's commission as officer in Air Force reserve); *Sloan v. Greenville Cty.*, 356 S.C. 531, 548, 590 S.E.2d 338, 347 (Ct.App.2003) (holding plaintiff had standing to bring declaratory judgment action alleging county failed to comply with ordinances governing procurement). Furthermore, in an extremely similar case, *Sloan v. School Dist. of Greenville Cty.*, the Court of Appeals held that in addition to Sloan's standing as a taxpayer, Sloan had standing because the "issues involved 'are of such wide concern' that this declaratory judgment action should be decided for future guidance in the expenditure of public funds pursuant to competitive sealed bidding requirements." 342 S.C. 515, 524, 537 S.E.2d 299, 304 (Ct.App.2000). None of these cases required the plaintiff show the absence of any other potential plaintiffs with a greater interest or any

other nexus. Accordingly, *305 despite the mootness in the present case, we find Sloan has standing to raise this issue.

3) Merits

[8] 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. The Court of Appeals recently addressed the differences between these two processes in *Sloan v. Greenville Cty.*, 356 S.C. 531, 540, 590 S.E.2d 338, 343. In that case, Sloan brought an action against Greenville County alleging it failed to comply with county ordinances governing the procurement of construction services when it awarded contracts for the completion of three public works projects. As explained by the Court of Appeals, contracts awarded by the competitive sealed bidding proceed in multiple stages. *Id.* An architect or other design professional is hired to prepare initial plans and specifications for the project and after approval of these initial plans, a bid package is developed to publicly solicit bids from contractors to perform the work. The lowest bidder is awarded the project. *Id.*

However, the RFP or Design/Build procurement method differs from traditional competitive sealed bidding in two important ways. First, under the Design/Build method, there is only one contract for both the design and construction of the project. Second, the Design/Build method allows for subjective evaluations to be made when awarding the contract. Price does not have to be the sole or primary criterion for evaluating the proposals. *Id.* "It is design-build's lack of objective, bright-line criteria that raises concerns about its use. Critics espouse that design-build vests too much discretion with the governing body regarding when and to whom public contracts are awarded. Because price is not a controlling factor in design-build source selection, the public entity may not always receive the lowest, most competitive price possible." *Id.* at 541, 590 S.E.2d at 344. Sloan contends that using the Design/Build method also limits the number of potential vendors who can submit proposals because construction companies without design capability cannot make proposals.

*306 The DOT's discretion to use Design/Build method instead of competitive sealed bidding was limited by S.C.Code § 57-5-1620. This section provides:

Awards by the department of construction contracts for ten thousand

Code of Laws of South Carolina 1976 Annotated
Title 11. Public Finance (Refs & Annos)
Chapter 35. South Carolina Consolidated Procurement Code
Article 9. Construction, Architect-Engineer, Construction Management, and Land Surveying Services
Subarticle 3. Construction Services

Code 1976 § 11-35-3015

§ 11-35-3015. Source selection methods assigned to project delivery methods.

Effective: February 4, 2008

Currentness

(1) **Scope.** This section specifies the source selection methods applicable to procurements for the project delivery methods identified in Section 11-35-3005 (Project delivery methods authorized), except as provided in Sections 11-35-1550 (Small Purchases), 11-35-1560 (Sole Source Procurement), and 11-35-1570 (Emergency Procurements).

(2) **Design-bid-build:**

(a) **Design.** Architect-engineer, construction management, and land surveying services. The qualifications based selection process in Section 11-35-3220 (Qualifications Based Selection Procedures) must be used to procure architect-engineer, construction management, and land surveying services, unless those services are acquired in conjunction with construction using one of the project delivery methods provided in Section 11-35-3015 (3), (5), (6), (7), and (8).

(b) **Construction.** Competitive sealed bidding, as provided in Section 11-35-1520 (Competitive Sealed Bidding), must be used to procure construction in design-bid-build procurements.

(3) **Construction Management at-risk.** Contracts for construction management at-risk must be procured as provided in either Section 11-35-1520 (Competitive Sealed Bidding) or Section 11-35-1530 (Competitive Sealed Proposals).

(4) **Operations and Maintenance.** Contracts for operations and maintenance must be procured as set forth in Section 11-35-1510 (Methods of Source Selection).

(5) **Design-build.** Contracts for design-build must be procured by competitive sealed proposals, as provided in Section 11-35-1530 (Competitive Sealed Proposals), except that the regulations may describe the circumstances under which a particular design-build procurement does not require the submission of proposal development documents as required in Section 11-35-3024(2)(b).

(6) **Design-build-operate-maintain.** Contracts for design-build-operate-maintain must be procured by competitive sealed proposals, as provided in Section 11-35-1530 (Competitive Sealed Proposals).

1 Bruner & O'Connor Construction Law § 2:171

Bruner and O'Connor on Construction Law
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§ 2:171. Contract formation by competitive "two-step" procedures—Two-step design-build source selection procedure

Design-build is a project delivery method that places "single point responsibility" for preparation of the project design and construction upon one party under a single contract.¹ Although design-build has been used in construction for millennia from the days of the early "master builders,"² only within the past decade has the design-build project delivery method been accepted in modern private construction and widely sanctioned for use in public construction.³ Through the late 20th century, sealed bidding has been the preferred method of public construction contract source selection, and design of public construction projects has been developed by public employees or by hired architects and engineers. In World War II, the need for design services exceeded those available within the government and led to the development of and federal procedures for selecting and contracting with qualified architectural and engineering firms. Those procedures ultimately were refined and codified in the Brooks Architect-Engineers Act of 1972.⁴ The Brooks Act, sensitive to organizational conflicts of interest,⁵ mandated continued separation of design and construction functions under the traditional design-bid-build contract formation procedure by prohibiting with limited exceptions the award of both design and construction contracts to the same party.⁶ Interest in use of design-build in public construction was stimulated by congressional enactment of the Competition in Contracting Act of 1984,⁷ which confirmed that sealed bidding was not the exclusive procedure for obtaining competitive construction prices. Even prior to that time some federal agencies experimented with the award of contracts under a turnkey or design-build selection process.⁸ In 1996, Congress authorized⁹ the use of a two-phased design-build contract formation procedure for the purpose of promoting "efficient competition."¹⁰

The use of a two-phased design-build source selection procedure is suitable where:

1. 1. Three or more offers are anticipated;
2. 2. Design work must be performed by the offerors before price or cost proposals can be developed, and will involve substantial expense to the offerors; and
3. 3. Project requirements, and time constraints, and capabilities and experience of both potential contractors and the public agency, are sufficient to ensure suitability of the two-phased selection process.¹¹

In the first phase, proposals are solicited from design-builders.¹² The proposals are expected to address the government's project requirements through detailed submission of information about technical approach, technical qualifications, past performance and capabilities of the design-build team. Exclusion of price information from phase one reduces a design-builder's proposal preparation costs and permits the government to focus on evaluation of technical design experience and qualifications. From proposals submitted, up to five are selected for participation in phase two, during which technical proposals are subjected to detailed evaluation of design concepts, management approach, key personnel, proposed technical solutions, and overall price.¹³ Evaluation of price and design factors in phase two is necessarily subjective.¹⁴ Contract award is based on overall evaluation of best value to the government after consideration of design, price and all other relevant factors.

The use of one or two step design-build source selection procedure for state and local public works contracts has been slow to develop because of the need for legislative modification of competitive bidding statutes.¹⁵ Recent legislation in some states,¹⁶ together with creative court decisions in other states,¹⁷ have encouraged the trend toward use of design-build. Paramount among the forces promoting a perceived paradigm shift from design-bid-build to design-build in public construction has been the extraordinary growth in the use of design-build project delivery method. From roughly 1983 to 1998, use of the method has increased from roughly 5% to 30% of the U.S. non-residential construction market.¹⁸ This growth has been fueled by the widely-held perception that design-build:

1. 1. Offers owners single-source accountability for design and construction problems;
2. 2. Promotes a cooperative problem-solving attitude among project participants;
3. 3. Minimizes the risk of litigation; and
4. 4. Produces substantial savings of time and money.¹⁹

An extensive study conducted by Pennsylvania State University under the auspices of the Construction Industry Institute²⁰ found that design-build was:

1. 1. 33% faster in planning, design and construction than design-bid-build and 23% faster than construction management at risk;
2. 2. 12% faster in construction time than design-bid-build and 7% faster than construction management at risks; and
3. 3. 6% lower in unit cost than design-bid-build and 4% lower than construction management at risk.

Moreover, design-build scored higher in all quality areas measured. When these hard facts are combined with advantages of single-source responsibility, heightened cooperation and reduced litigation, the growth of design-build in both public and private construction markets is likely to continue.²¹

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Footnotes

- 1 See, generally, Loulakis, *Single Point Responsibility in Design-Build Contracting*, in *Design-Build Contracting Handbook 1* (1992 and 1997 Supp.); Roberts and Smith, *Design-Build Contracts Under State and Local Procurement Laws*, 25 *Pub. Cont. L. J.* 645 (1996); Friedlander, *A Primer on Industrial Design-Build Construction Contracts*, 14 *Constr. Law 2* (1994). See also §§ 6:24 to 6:56.
- 2 See 1 Corinthians 3:10 ("According to the grace of God which was given to me, as a wise master builder I have laid the foundation ...").
- 3 See Didier, *Construction Contracting in the New Two-Phase Design-Build Selection Procedures: Balancing Efficiency with Full and Open Competition*, 27 *Pub. Cont. L.J.* 589, 591, 592 (1988):

The practice of employing one contractor to design and build a facility existed as early as 1800 B.C. when kings and emperors commissioned "master builders" to design and build works within their kingdoms and empires. This precursor to modern day "design-build" was the traditional method of construction contracting. It became "nontraditional," however, when the economic concepts of maximizing competition and obtaining reasonable prices in government procurement were introduced by the Continental Congress' establishment of the first Commissary General in 1775. Thereafter, design-build fell into disuse as procurement law maximized competition through formal advertising (currently known as "sealed bidding") and in certain projects, by formally splitting the design and construction stages into separate contracts.

4 See 10 U.S.C.A. § 2855.

5 See § 2:51.

1 Bruner & O'Connor Construction Law § 2:14

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§ 2:14. Modern "contextual" contract—Source selection procedures

"Source selection" refers to procedures by which contractors are selected. Such procedures include (1) competitive sealed bidding, (2) competitive negotiation and (3) a qualifications-based selection process followed by negotiation solely with the selected party.

The most advantageous source selection procedure depends upon the project delivery method. Competitive sealed bidding is a source selection procedure used in procuring mandated for most public construction work under the design-bid-build project delivery method.¹ Competitive negotiation typically is used to form contracts awarded without competitive bidding under the design-bid-build project delivery method, and contracts utilizing all other project delivery methods except for selection of professional services. Under federal contracting procedures, source selection for design-build contractors involves a two-phase process under which the most highly qualified contractors are selected under phase 1 and technical and price proposals are evaluated under phase 2 with a selection being made on the basis of stated evaluation factors.² State and local governments that have adopted the 2000 Model Procurement Code follow a similar procedure.³ Noncompetitive negotiations are conducted only with parties selected under a qualifications-based selection process. For private construction work, noncompetitive negotiation may be utilized with any party. In public construction, noncompetitive negotiation typically is limited to firms or persons providing architectural, engineering or other professional services following selection under a qualifications evaluation process.⁴

Recent growth of Internet use and public acceptance of online auction web sites has led some public and private owners and large prime contractors to experiment with a novel source selection procedure known as a "reverse auction." Under this procedure, prequalified contractors and subcontractors bid against each other in a continuing "auction" in which the lowest bid wins.⁵ The "reverse auction" has been roundly criticized by contractor and subcontractor organizations as not suited to procurement of construction services⁶ and as constituting a disguised form of unethical "bid shopping."⁷

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Footnotes

- 1 See F.A.R. § 36.103(a), 48 C.F.R. § 36.103(a) ("Contracting officer shall acquire construction using sealed bid procedures if the conditions in 6.401(a) apply ..."); 2000 Model Procurement Code for State and Local Governments § 5-202(2)(b) ("competitive sealed bidding... shall be used to procure construction and design-bid-build procurements ..."). The 2000 Model Procurement Code was updated by the issuance of the 2007 Model Code for Public Infrastructure Procurement.
- 2 See, generally, F.A.R. § 36.300, 48 C.F.R. § 36.300 (describing 2-phase design-build selection procedures). See also §§ 6:39 to 6:41.
- 3 See 2000 Model Procurement Code for State and Local Governments § 5-204 (requiring request for proposals for design-build contracts to list detailed "evaluation factors" and the relative importance of each to be used in contractor selection). The 2000 Model Procurement Code was updated by the issuance of the 2007 Model Code for Public Infrastructure Procurement.
- 4 See F.A.R. § 36.600, 48 C.F.R. § 36.600, Federal Architect-Engineer Selection Process; 2000 Model Procurement Code for State and Local Governments § 5-205 (selection of architectural and engineering services). The F.A.R. regulations implement that Brooks Architects-Engineers Act (40 U.S.C.A. § 541, et seq.). The 2000 Model Procurement Code follows the federal practice in utilizing a selection committee to pick the best qualified professional services provider with whom to enter into contract negotiations. The 2000 Model Procurement Code was updated by the issuance of the 2007 Model Code for Public Infrastructure Procurement.

1 Bruner & O'Connor Construction Law § 2:21

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§ 2:21. Objective of construction contract formation: Best value

One objective of contract formation in the construction industry is to select the contract type and source selection procedure most suitable to the designated project delivery method¹ in order to obtain quality workmanship and timely performance at the lowest and best price—"best value."² Success in achieving this objective demands careful consideration of competing variables of price, quality, quantity, and time.^{2,50} Designation of a project delivery method usually dictates the source selection and contract formation procedures available for forming the various contracts, subcontracts, and purchase orders required for any construction project.

In terms of annual expenditure of construction dollars in the United States, roughly one-fourth is spent on public construction of buildings, highways, sewer systems, and other public works, and three-fourths is spent on private construction of residential and nonresidential buildings and other private improvements.³ At the turn of this century, the traditional design-bid-build project delivery method is employed to form perhaps two-thirds of the commercial construction contracts awarded throughout the United States. In overall context of the construction process negotiation procedures (either competitive or noncompetitive) predominate when the dollar value of all negotiated prime contracts, subcontracts, purchase orders, and change orders are added together. Competitive negotiation is utilized to form a majority of all trade subcontracts and purchase orders for material and equipment on public projects, as well as in the pricing of change orders issued to the prime contractor.

Beyond legal mandates requiring selection of one project delivery method over another, the crucial practical selection consideration is which procedure best creates "value." The objective of price competition can be achieved only where (1) two or more contractors are willing to compete for the work, and (2) the quality of workmanship and duration of performance are defined in sufficient detail to permit contractors to prepare competitive pricing for the same scope of work. Dollar size and complexity of the contract work also can affect competition.⁴ Where contract terms or technical specifications cannot be defined sufficiently to assure submission of comparable pricing by competing contractors, "best value" is dependent upon source selection and contract formation by negotiation procedures. Negotiation can achieve the "best value" objective where (1) the negotiation process includes evaluation of technical proposals and analysis of cost and pricing data, and (2) the negotiated contract pricing mechanism may be tailored to foreseeability and quantification of risk.⁵ Professors Nash and Cibinic have identified the legal "fault line" between sealed bidding and negotiation by these "basic prerequisites":

1. A complete, adequate and realistic specification or purchase description must be available.
2. There must be two or more suppliers available, willing, and able to compete effectively for government business.
3. The selection of the successful bidder must be made on the basis of price alone.
- ...
4. There must be sufficient time to prepare a complete statement of the government's needs and the terms upon which it will do business, and to carry out [its] administrative procedures. ...

Formal advertising [now called "sealed competitive bidding"] is an excellent method of procurement when these criteria are met. When any one of these essentials cannot be satisfied, it is a completely

ineffective method of procurement. These criteria have been likened to a four-legged stool. Remove one leg and the stool is ineffective.⁶

The first prerequisite for consideration is whether definitive specifications, able to convey to all bidders an understanding of what is to be constructed, can be written by the owner and its design professionals. If so, contractors are obliged simply to "follow the plans and specifications,"⁷ and have no right or obligation to share their ingenuity, creativity and experience in design development. As explained by Professors Nash and Cibinic:

The real problem in writing specifications for technical items (and to a lesser extent for standard items) which are suitable and adequate for use in formal advertising is to convey a complete understanding of what is required. The same word or expression is subject to varying interpretations by different people. The prospective bidder in formal advertising will invariably interpret the specification requirement to his own advantage. It is essential that he do this, otherwise he will lose out in the fierce price competition. A specification is essentially the transfer of knowledge between minds. Each mind will test the words of a specification against his own experience. In formal advertising, the prospective bidder must make his own interpretation in advance with no assistance from the Government. The implication of this situation when buying complicated technical material by formal advertising requires no further elaboration.

Thus, specifications for use in formal advertising must be much more precise than in the case of negotiation. This is so because in advertised procurement there can be no opportunity after the opening of bids to discuss various possible interpretations to be sure of mutual agreement, as there is in negotiated procurements. Also, because competition in formal advertising is limited to price alone, bidders are likely to offer the minimum quality item which will be responsive. This means that the specifications must be impervious to any corner cutting by bidders which might result in the Government's getting an inferior product.⁸

Specification inadequacy or ambiguity in sealed bidding that impacts competition or permits favoritism invariably will result in avoidance of the bid solicitation or the awarded contract. In *Gale v. City of St. Paul*,⁹ for example, the Supreme Court of Minnesota vacated an award of a competitive bid contract for 8,000 tons of buried lime for the reason that the advertised specifications were impermissibly vague. The terms of the invitation required that lime be priced "F.O.B. point of delivery," but also said "delivery to be F.O.B. point of shipment" and "to be delivered to Water Department—Filtration Plant—St. Paul, Minnesota." After bid opening, a dispute arose as to what constituted "point of delivery," since all three bidders had interpreted the specification differently. Because of the ambiguity and the inherent potential for abuse, the court vacated the award of the contract:

It is our opinion that there was such ambiguity and uncertainty in the specifications as to constitute a violation of the requirements of competitive bidding in that the dual interpretation which the contract-making officials could place on the bids could provide an opportunity for favoritism.¹⁰

The second crucial prerequisite for consideration is availability of a sufficient number of bidders to assure adequate price competition with some minimum level of experience and "responsibility," which sometimes leads to "prequalification" of bidders.¹¹ Where the number of contractors available to bid on a contract is insufficient to assure adequate competition, negotiation should be used as the contract formation procedure.

Time is another crucial prerequisite for consideration. There needs to be time to prepare adequate plans and specifications; time to prepare a careful bid; time to evaluate submitted bids; and time to award a contract. Because competitive sealed bidding is a cumbersome procedure typically requiring months for preparation of a complete set of construction documents prior to contract formation, weeks or months for issuance of the invitation to bid, for bidders' review of the bid documents and for preparation of bids, time availability is essential to assuring that adequate competition is achieved and the lowest and best price is obtained.

Under the competitive sealed bidding method, selection of the successful bidder is based on price alone—evaluated on the basis of the fixed bid price and other factors related to price. The contract then is formed by (1) a bidder's fixed price "offer" to perform the work as required by the terms and details described in the invitation to bid and (2) an owner's subsequent "mirror acceptance" of the low bid. If a firm-fixed price is not offered, a negotiated form of cost contract may be necessary.¹²

While still the most widely used approach to project delivery,¹³ the competitive sealed bid method is being challenged by the design-build method,¹⁴ under which all design and construction responsibilities are placed on a "single source" entity. Design-build is seen as promoting the orderly development of standards of performance, minimizing disputes, and encouraging the use of "fast track" construction practices under which separate "bid packages" are awarded for sequential construction of the work.¹⁵ Because of its efficacy as a project delivery method, the use of design-build since 1985 has increased from roughly 5% to 30% of the non-residential construction market in the United States.¹⁶ Although the use of design-build initially was stunted by contractor and design professional licensing requirements¹⁷ and, in public construction, by competitive bidding statutes that mandated the use of traditional design-bid-build project delivery methods,¹⁸ recent legislation at both the federal¹⁹ and state²⁰ levels, together with court decisions,²¹ have encouraged the use of design-build on public work.²² Selection of contractors, even under authorized two-step design-build procedures, can be a source of controversy because of necessary use of subjective evaluation requirements beyond mere comparison of price.²³ Construction contract formation by negotiation, although seemingly less complex than competitive bidding, is subject to its own special considerations.²⁴ Negotiation of contracts with a "sole source" requires extensive "cost analysis," whereas competitive negotiation among competing contractors or competing products with established market prices can be limited to "price analysis."²⁵ The objective of any negotiation is to establish a "fair and reasonable price"²⁶ from the perspective of the parties' own viewpoints and objectives.²⁷

Paramount to contract formation is whether use of one particular form of contract is legally mandated. Because sealed bidding procedures are mandated by statute or regulation to be used for award of most public contracts at the federal, state and local levels, and because those legal mandates typically are riddled with exemptions for specific agencies or types of construction work, it is crucial to know whether a contract is "public" or "private," and if "public," whether sealed bidding is the mandated source selection procedure.

Whether a contract is "private" or "public" has significant legal consequences:

1. 1. Formation of "private" construction contracts and subcontracts typically is governed by traditional common-law principles of "offer and acceptance" or, where the contract involves predominantly the sale of "goods," by the contract formation concepts of the Uniform Commercial Code;
2. 2. Formation of "public" construction contracts must follow procedures dictated by statute and regulation, which typically require contractors to be selected on the basis of competitive sealed bidding or competitive negotiation, and which in a few jurisdictions mandate the award of major subcontracts on the same basis.²⁸

The line between "private" and "public" contracts may be blurred by the use of innovative project development practices that blend public and private responsibilities for construction, funding, and ultimate use of the completed work.²⁹ As a practical matter, competitive bidding and negotiation procedures each are widely used in both public and private formation and modification. In addition, "public" contracts are subject to numerous statutory and regulatory requirements for requiring payment and performance bonds, payment of prevailing wages, numerous preference programs for classes of small business and disadvantage contractors, special insurance obligations and limitations, mandatory contract terms, actual authority of representatives, "pay when paid" mandates, funding limitations, prohibitions against lobbying and a host of other strictures. The contract formation process thus may be viewed as a continuum—on one end is simple "offer and acceptance" negotiation and on the other the formal strictures of competitive sealed bidding, with various "hybrid" contract formation methods in between. Hybrid methods seek the "best of both worlds"—the benefits of competition but in a negotiated environment. "Competitive negotiation" takes many forms including (1) solicitation of competitive proposals from selected offerors, with final selection after negotiation based on perceived "best value,"³⁰ and (2) two-step selection process, the first step of which

by taxpayer against county seeking declaration that county failed to comply with procurement code on three design-build public works projects.

1 Cases that cite this headnote

[44] Counties

↪ Validity and Sufficiency

Public Contracts

↪ Validity and Sufficiency of Contract

Design-build contract for renovation of county forensic lab complied with county procurement code provision requiring that contracts be sufficiently definite to define the responsibilities and rights of the parties, though county failed to append the contract with a project scope, payment schedule, or project schedule, where construction drawings were developed for the project reflecting in substantial detail the project scope contemplated by the design-build team, contract incorporated by reference the request for proposal criteria used to solicit design-build proposals, contract provided that project would not exceed a specific amount, contract addressed the terms of payment, and contract provided a 120-day completion schedule.

Cases that cite this headnote

Attorneys and Law Firms

**343 *540 Jennifer J. Miller and James G. Carpenter, of Greenville, for Appellant-Respondent.

Boyd B. Nicholson, Jr. and Thomas H. Coker, Jr., of Greenville, for Respondents-Appellants.

Opinion

ANDERSON, J.

Edward D. Sloan, Jr., individually, and as a citizen, resident, taxpayer and registered elector of Greenville County, and on behalf of all others similarly situated, brought this action against Greenville County alleging it failed to comply with county ordinances governing the procurement of construction services when it awarded contracts for the completion of three public works projects. The trial court ruled the procurement

processes met the statutory standard with respect to two of these projects, while the third project did not. Both Sloan and the County appeal. We affirm.

FACTS/PROCEDURAL BACKGROUND

The Greenville County Code ("G.C.C." or "the Code") prescribes the methods the County may use to award contracts for construction services. As a general rule, the code requires that all contracts must be awarded by the "competitive sealed bidding" method. G.C.C. § 7-212. This method of source selection proceeds in multiple stages. The County must first hire an architect or other design professional to prepare the initial plans and specifications for the new construction project. After the County has approved these initial plans, the design professional will typically draft a detailed set of construction drawings and specifications that will become part of a "bid package." The County will then use the bid package to publicly solicit bids from contractors to perform the work. The lowest responsible, responsive bidder is awarded the project.

Under the Code, the County must use the competitive sealed bidding method to procure construction services over \$15,000 unless one of several specific exceptions applies. See G.C.C. §§ 7-212—7-242.5. One of these exceptions—the focal *541 point of this case—is known as the "design-build" procurement method.¹ See § 7-242.5.

The design-build method differs from traditional competitive sealed bidding in two important ways. First, under the design-build method, the County enters into a single contract for design and construction of the project. This arrangement condenses the two-step process of competitive sealed bidding in which the County procures design services and then contracts separately for the actual construction. Design-build's single source procurement also enables design and construction to proceed concurrently, thereby shortening project duration. Once a design "footprint" for a structure has been prepared, a contractor may begin work such as grading and excavating a site, while a designer continues to design the structure.

Second, the design-build method allows comparative subjective evaluations to be made when determining acceptable proposals for negotiation and award of the contract. Price need not be the sole or primary criterion for evaluating competing proposals—it may be only one of

several factors considered. The County may select the design-build team based on other factors such as experience, project team members, and expertise.

****344** It is design-build's lack of objective, bright-line criteria that raises concerns about its use. Critics espouse that design-build vests too much discretion with the governing body regarding when and to whom public contracts are awarded. Because price is not a controlling factor in design-build source selection, the public entity may not always receive the lowest, most competitive price possible. *See e.g., Sloan v. Sch. Dist. of Greenville County*, 342 S.C. 515, 521, 537 S.E.2d 299, 302 (Ct.App.2000) (opining that "[t]his court has long maintained that '[m]unicipal competitive bidding laws are enacted to guard against such evils as favoritism, fraud or corruption in the award of contracts, to secure the best product at the '542 lowest price' "). Without proper guidelines and oversight, design-build may foster the impression that the government is somehow less accountable for its decisions as to how it spends taxpayer money.

For these reasons, the use of design-build is limited under the Code to those situations in which it is properly justified. Greenville County's design-build ordinance sets out when it may be used:

The county administrator or his designee shall have the discretion to use construction management services, design-build services, or turnkey management services as alternatives for construction contracting administration. In exercising such discretion, the county administrator or his designee shall consider the method which is the most advantageous to the county and will result in the most timely, economical, and successful completion of the construction project. The determination for the method of source selection utilized shall be stated in writing and included as part of the contract file.

G.C.C. § 7-242.5(a). The County's discretion to use design-build instead of competitive sealed bidding source selection is therefore limited to those occasions when it is in the best interests of the County—a determination that must be in

writing and available for public consumption in the contract file.

At issue before us is whether Greenville County properly justified its decision to use the design-build method to award three multi-million dollar construction contracts. Specifically, we must decide whether the written determinations were sufficient under section 7-242.5 of the Code.

The Construction Projects

The contracts for the three construction projects were awarded in 1999 and 2000. Construction services for all three were obtained using the design-build method.

Two of these contracts were for road-building projects that were part of a special infrastructure improvement program called the "Prescription for Progress" plan. This plan, approved by Greenville County Council in 1997, called for the expenditure of eighteen million dollars for the repair and *543 resurfacing of approximately 148 lane miles on more than 400 county roads through the year 2010. The two projects at issue are Prescription for Progress road improvement programs for years 2000 and 2001 (hereinafter referred to as the "Roads 2000" and "Roads 2001" projects). For the Roads 2000 project, the County procured \$6,759,100 of road construction services. In the Roads 2001 project, the County obtained \$12 million in road construction services.

The third construction contract was for the renovation of the criminal forensics lab at the County's law enforcement center in 1999. The County procured \$290,000 in construction services to complete this project.

This Action

After each of these contracts was awarded, Sloan brought suit seeking declaratory and injunctive relief, contending the procurements violated the Code. The primary issue—common to all three cases—was the validity of the County's determination to use design-build source selection rather than competitive sealed bidding in awarding the contracts. As additional causes of action, Sloan asserted the County did not obtain sufficient performance and payment bonds for the Roads 2000 project, and he claimed the Forensics Lab contract did not properly define the responsibilities and rights

to the courts consideration of this question of exceptional public interest.

[34] [35] This court may take jurisdiction of a case, "despite mootness, if the issue raised is capable of repetition, but evading review." *Curtis*, 345 S.C. at 568, 549 S.E.2d at 596; *see also Byrd*, 321 S.C. at 431-32, 468 S.E.2d at 864 (clarifying that South Carolina recognizes an exception to the mootness doctrine allowing the court to retain jurisdiction when an issue is capable of repetition, yet evading review); *Treasured Arts, Inc. v. Watson*, 319 S.C. 560, 564, 463 S.E.2d 90, 92 (1995) (Under the mootness doctrine of capable of repetition yet evading review, a case is not rendered moot when a challenged action was in its duration too short to be fully litigated prior to its completion and there was a reasonable expectation that the same complaining party would be subjected to the same action again.); *South Carolina Dep't of Mental Health v. State*, 301 S.C. 75, 76, 390 S.E.2d 185, 185 (1990) ([A]lthough the issue presented was moot, "appeal was allowed because it raises a question that is capable of repetition, but which usually becomes moot before it can be reviewed"); *Evans v. South Carolina Dep't of Soc. Servs.*, 303 S.C. 108, 110, 399 S.E.2d 156, 157 (1990) (addressing a moot question because the controversy presents a "recurring dilemma" which needed clarification for future guidance); 1 Am.Jur.2d *Actions* 50 (2003) (noting the general rule that "courts will not decide moot questions is subject to an exception where the "351 question, though moot, is ... likely to recur and evade judicial resolution in the future"). The party bringing the action need only show the issue raised is capable of repetition and is not required to prove there is a "reasonable expectation" the issue 355 will arise again. *Byrd*, 321 S.C. at 431-32, 468 S.E.2d at 864 (finding South Carolina has adopted the "lenient" approach to evading review analysis).

We find the present case presents an issue that is likely to recur but evade review. By design, the procurement code's exception allowing use of design-build source selection accelerates the process of awarding public works contracts and the ultimate completion of the projects themselves. Sloan initiated the actions in the present case within one week after the contracts were executed or the County's written determination was filed. Nevertheless, construction on all three projects was complete prior to the beginning of trial in this case. Because the fundamental inquiry in this case concerns the validity of using an expedited procurement process, it is improbable similar challenges can navigate

the litigation process before the question becomes a purely academic one.

For these reasons, we find a justiciable controversy exists in the present case despite the mootness of the questions presented.

H. SUFFICIENCY OF THE WRITTEN DETERMINATIONS

Having found Sloan's claims to be properly reviewable by this court, we review whether the written determinations published by the County are sufficient under the Greenville County Code. The County's decision to use design-build source selection rather than the traditional competitive sealed bidding method is discretionary. G.C.C. § 7-242.5(a). The Code provides little guidance, however, as to what the County should consider when making its decision—couching its directives in the most general terms: "In exercising such discretion, the county administrator or his designee shall consider the method which is the most advantageous to the county and will result in the most timely, economical, and successful completion of the construction project." *Id.*

[36] In 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 356 power." *Smith v. Georgetown County Council*, 292 S.C. 235, 238-39, 355 S.E.2d 864, 866 (Cl.App.1987) (citing *Bob Jones Univ. v. City of Greenville*, 243 S.C. 351, 133 S.E.2d 843 (1963)); *see also* 62 C.J.S. *Municipal Corporations* § 196(b) (1999) (commenting that "discretionary action on the part of a municipality is subject to judicial review where the action is manifestly arbitrary or discretion is clearly abused").

Our review must be guided by the express legislative intent underlying Greenville County's procurement code:

It is the intent of the county council that the primary concern of county government be the effective provision of services to the citizens of the county in the most efficient and economical way possible, and that all purchases of goods and services needed to provide these services be conducted with primary concern for the efficient and

economical use of revenues provided
by those citizens.

G.C.C. § 7-192. Included among the "underlying purposes and policies" of the procurement ordinances, is the direction to "promote increased public confidence in the procurement regulations, procedures, and practices used by this county," "maximize the purchasing value of public funds," and "provide safeguards for maintaining a procurement system of quality and integrity." § 7-192(b)(2), (3) & (6).

In light of the Code's express mandate and guiding policy, it is apparent the written determination required under section 7-242.5 must serve a dual function: The determination must first effectively inform county council of the reasons why design-build source selection works to the County's best advantage for the project at issue. Equally important, the determination must provide the citizens of Greenville County a window into the County's decision-making process—safeguarding the quality and integrity of the ^{**352} contract awards through public accountability. If the written determination provides sufficient factual grounds and reasoning for the County Council and the public to make an informed, objective review of these decisions, then it has accomplished its purpose.

Bearing these twin aims in mind, we examine each of the written determinations for the Roads 2000, Roads 2001, and Forensics Lab projects.

***557 A. Roads 2000 Determination**

The written determination to use design-build source selection for the Roads 2000 project was prepared by Gerald Seals, the Greenville County Administrator from 1993 to 2000. Seal's determination addresses the County Council's time, budget, and quality requirements and sets forth the project-specific reasons why design-build rather than traditional competitive sealed bidding procurement serves to better meet the County's goals.

The determination first addressed the Roads 2000 project's particular time and budget requirements. Seals described how the special, expedited road paving needs outlined by the Prescription for Progress plan significantly exceeded the County's timeline and budget capacity for road improvements. He also noted that, less than four months before the date of this determination, the County Council reaffirmed its commitment to the Prescription for Progress program and "its goal and commitment to improve County roads by 2010."

Given these requirements, Seals concluded the design-build method of source selection would best address the County Council's mandate under the Prescription for Progress program that extensive road improvements be completed rapidly while not affecting any other County services. Seals cited his particular experience using the design-build method in past projects: "These projects were fast-tracked and let using the [design-build] procurement method to satisfy tight time schedules, quality and budget requirements." Seals then offered several reasons why traditional low-bid, competitive sealed bidding procurement would hinder the County's ability to achieve its project objectives. He noted:

Low bid is a slower process that [will] require[] the County [to] subdivide the varied aspects of the 1999-2000 Road Improvement Program into specific and disparate sections and individually solicit a low bid for each service component and each individual road. It should be noted that the 1999-2000 Road Improvement Program encompasses more than one-hundred (100) roads. Broad service components include: general engineering, specific individual engineering of each of the one-hundred roads included in the program, quality control, drainage inspection and engineering, inspections, ^{*558} and paving. Individualized low bid solicitation for each road and/or service components means that completing the 1999-2000 Road Improvement Program would likely take more than one (1) year, not the twelve (12) months mandated by County Council.

Additionally, Seals found that "[s]trict low bid procurement solicitation does not eliminate bid rigging or fraud" and can result in "low ball bidding" in which the vendor who submitted the lowest bid "knowingly or as a result of inexperience, increases the actual contract using change orders or refusing to proceed until the government corrects its program by increasing the contract." He stated: "The factors for analysis under low bid procurement [are] limited—specifically, the ability to analyze a vendor's history of change orders due to the submission of unrealistically low

bids, or vendor's actual history of performance track record, is restricted" and that "[l]ow bid procurement will require excessive staff time and thus adversely affect other services, such as pothole and drainage repair."

[37] We find this determination provided ample grounds to support the County Council's decision to approve use of the design-build method. It addressed the specific needs of the project and weighed the alternative methods for procuring construction services, providing the County Council and interested members of the public clear insight into the rationale underlying its decision to use design-build. Accordingly, the trial **353 court properly ruled this determination was sufficient under section 7-242.5.

B. Roads 2001 Determination

The written determination for the Roads 2001 project was prepared by John Hansley, who was serving at the time as acting county administrator. Hansley sets forth a detailed basis for the decision to use design-build.

As with the Roads 2000 determination, this determination addressed the special challenges presented by the extensive, expedited roads improvement program called for under the Prescription for Progress plan. Hansley affirmed: "The department is faced with budget limitations, increased workloads, three major construction projects and seven designs of *559 projects, as well as a one-year timeframe for the program coupled with overlapping roadwork and special projects from the previous fiscal year."

To meet the goals of the road improvement program for 2001, Hansley made project-specific findings that additional staff would need to be hired to ensure proper engineering, quality control, and inspection for the various components of the project if the County used the traditional procurement methods. The determination contains specific projections of these additional costs which Hansley estimated would total over a million dollars.

Hansley discussed the County's past success using design-build source selection for large, complex and expedited construction projects. The determination provided specific details about past projects in the form of comprehensive empirical evidence showing six design-build construction contracts where the project was completed on time and on budget. Hansley concluded:

Additionally, the County has utilized this process [design-build] since the inception of the Prescription for Progress Road Program in 1997. In my opinion, it can be firmly stated that the competitive proposal method has proven to be valuable to the County.

... Thus, the public/private partnership will afford the County an opportunity to continue its commitment to providing optimal public services. At the same time, the aggressive road improvement program will continue to meet Council's expectations.

[38] The determination addressed the project-specific needs of the County, the County's previous experience with design-build, and a comparison of the alternative methods. An ample factual basis therefore exists, supporting the conclusion that design-build source selection "should benefit the County by allowing it to accomplish its goals and deadlines in a timely manner, while providing day-to-day services to citizens." The County Council and the public were well served by Hansley's written determination, and the trial court correctly ruled it satisfied the requirements of section 7-242.5.

*560 C. Forensics Lab Determination

[39] The written determination for the Forensics Lab project was prepared by Rick Brookey, the facilities project manager for Greenville County. The entire determination is limited to a single paragraph, and reads:

Due to the nature of this project (no detailed defined scope of work), it is the opinion of Public Services that this project will best be served using the turn key/design build methodology. Also, due to the budget (already established & approved) and having both, contractor and architect as a team, this approach will give the project the best opportunity to get the most value for the needed renovation for our budget. Having a team consisting of a contractor, architect and user groups, will be the most feasible way to get a defined scope of work and succeed in accomplishing the user's needs within the budget and time frame for this project.

question before us is whether the trial court overstepped its authority by entertaining evidence at trial—the parties' "first bite" at the apple.

[41] We find the evidence admitted was material and probative to the trial court's inquiry into the sufficiency of the County's written determination. Part of the function of presenting evidence at trial is to educate the finder of fact as to the surrounding circumstances giving rise to the narrow issues raised. There is no question that there was much that was outside the expectable realm of knowledge of the trial court judge. Government procurement and its guiding policies are unfamiliar territory to all but a few. Collateral or background information presented by way of testimonial, documentary, and demonstrative evidence would be necessary to fill in the gaps of understanding. This type of information is an important part of the trial court's process of educating itself. "In *563 addition to evidence that bears directly on the issues, leeway is allowed even on direct examination for proof of facts that merely fill in the background of the narrative and give it interest, color, and lifelikeness." 1 *McCormick on Evidence* § 185 (5th ed.1999).

We conclude the trial court did not err in admitting the complete testimony of Seals and Hansley.

IV. ROADS 2000 BONDING

[42] The County argues the trial court erred in ruling the County failed to obtain the appropriate payment and performance bonds for the Roads 2000 project. We disagree.

Section 7-238 of the County Code provides "[w]hen a construction contract is awarded in excess of twenty-five thousand dollars (\$25,000.00)" a "performance bond" and a "payment bond" "shall be delivered to the county and shall become binding on the parties upon the execution of the contract." Each of these bonds "shall be in an amount equal to one hundred (100) percent of the price specified in the contract." G.C.C. § 7-238.

The total amount of compensation agreed upon under the contract for the Roads 2000 project was \$6,759,100. The County, however, obtained a bond for only \$4,666,000, the amount listed as the "total construction budget" in an exhibit attached to the contract. The additional \$2,093,100 covered the costs for engineering (\$816,900), "quality assurance" (\$201,200), and "program management" (\$1,075,000).

The County asserts the "price specified in the contract" under section 7-238 need not include items in the contract other than the actual, direct costs of construction. We find this argument is in error.

We look first to the language of the Code provision. The words of a statute or regulation "must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation." *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992); accord *Durham v. United Cos. Fin. Corp.*, 331 S.C. 600, 604, 503 S.E.2d 465, 468 (1998); *Adkins v. Comcar Indus., Inc.*, 323 S.C. 409, 411, 475 S.E.2d 762, 763 (1996). *564 The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose. *Hitachi Data Sys.*, 309 S.C. at 178, 420 S.E.2d at 846 (citations omitted). A statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. *Davis v. NationsCredit Fin. Servs. Corp.*, 326 S.C. 83, 484 S.E.2d 471 (1997); *Georgia-Carolina Bail Bonds, Inc. v. County of Aiken*, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct.App.2003); *Stephen v. Avins Constr. Co.*, 324 S.C. 334, 478 S.E.2d 74 (Ct.App.1996). If a statute's language is plain, unambiguous, and conveys a clear meaning the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Hodges v. Ratney*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); **356 *Paschal v. State Election Comm'n.*, 317 S.C. 434, 454 S.E.2d 890 (1995); *Georgia-Carolina Bail Bonds*, 354 S.C. at 24, 579 S.E.2d at 337.

By its plain meaning, section 7-238 affords the County no discretion to deliver payment and performance bonds for any amount less than the amount specified in the contract. There is no limiting language which would indicate the provision was intended to apply only to the portion of the contract price specifically related to the cost of construction.

[43] The County's procurement code is remedial in nature, and its provisions should be construed liberally to carry out its purposes. See *South Carolina Dep't of Mental Health v. Hanna*, 270 S.C. 210, 213, 241 S.E.2d 563, 564 (1978) ("A remedial statute should be liberally construed in order to effectuate its purpose."); *Spencer v. Barnwell County Hosp.*, 314 S.C. 405, 408, 444 S.E.2d 538, 540 (Ct.App.1994) ("In considering a remedial act designed to protect a class of persons or the public at large, the courts liberally construe the act to carry out its purposes."). Because the express

purpose of the procurement code is to ensure the "efficient and economical use of revenues" provided by the taxpayers (§ 7-192), the bonding requirements of section 7-238 should be read to afford the greatest protection to the citizens of Greenville County.

We are bolstered in our reading of section 7-238 by evidence presented at trial regarding the general industry practice concerning the delivery of performance and payment *565 bonds. Included in the record before the court is an industry publication, *Design-Build RFQ/RFP Guide for Public Sector Projects*. Under the heading "Contract Bond Must Include Design," this guide instructs the government procurer to:

Indicate to the proposers that the contract bond (performance and payment bond) must cover the entire contract between the owner and the design-builder, including any and all necessary professional architectural and engineering services. The bond must not be limited to construction value and associated risks.

Expert testimony was also presented which confirms that the general practice in the field of public procurement is to obtain bonds for the full amount of the contract price, inclusive of design and other non-construction cost items.

We conclude the language of section 7-238, supported by evidence regarding industry practice, clearly requires the delivery of performance and payment bonds for the full amount of the contract price, not simply the contract costs for construction alone. The trial court, therefore, correctly ruled the Roads 2000 project was not properly bonded.

V. SUFFICIENCY OF FORENSICS LAB CONTRACT

[44] Sloan argues the Forensics Lab contract fails to comply with section 7-240(a) of the County Code because the County failed to append the contract with a project scope, payment schedule, or project schedule. We disagree.

Section 7-240 provides: "All contracts for ... construction shall include provisions necessary to define the responsibilities and rights of the parties to the contract." Based on our review of the contract, we find this standard was met. Although no additional documents were attached to the original contract further defining the project scope, payment schedule, or project schedule, the contract was sufficiently

definite to "define the responsibilities and rights of the parties to the contract."

With respect to the project scope, construction drawings were developed for the project, reflecting in substantial detail the project scope contemplated by the design-build team. The contract also incorporated by reference the Request for Proposal criteria used to solicit design-build team proposals, providing a further indication of the planned project scope.

*566 The contract also contains sufficient details regarding compensation and terms of payment. Article 3.1 provides that the price of the contract shall not exceed \$290,000. Additionally, Article 4.1 addresses the terms of payment—outlining in substantial detail when the contractor is required to submit **357 payments each month and the timeframe in which the County must make payments.

Finally, while the contract does not provide a comprehensive project schedule, it does contain a 120-day completion schedule. We conclude, therefore, that the contract is sufficiently definite to "define the responsibilities and rights of the parties."

CONCLUSION

We find the trial court ruled correctly with respect to all of the issues presented: The case was properly justiciable. The written determinations to use design-build source selection for the Roads 2000 and Roads 2001 projects were sufficient under the Code, while the determination prepared for the Forensics Lab project was not. The trial court did not err by admitting witness testimony regarding the written determinations. The County did not obtain sufficient performance and payment bonds for the Roads 2000 project. Finally, the trial court correctly found the Forensics Lab contract was sufficient under the Code. Accordingly, the rulings of the trial court are

AFFIRMED.

GOOLSBY and CONNOR, JJ., concur.

Parallel Citations

590 S.E.2d 338

Footnotes

- 1 Professionals in the field of public procurement variously refer to this method of source selection as "design-build," "competitive sealed proposal," or "request for proposal." Though these terms are generally interchangeable, for ease of reference, we will refer exclusively to "design-build" when discussing this alternative to traditional competitive sealed bidding procurement.

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substance there is no difference between a resolution, order, and motion"); see also 56 Am Jur.2d *Municipal Corporations* § 296 (2000) (commenting that "an ordinance is distinctively a legislative act, while a resolution may simply be an expression of opinion or mind concerning some particular item of business coming within the legislative body's official cognizance ..."); 62 C.J.S. *Municipal Corporations* § 247 (Supp.2004) (commenting that "a resolution ordinarily is an act of a special or temporary character, not prescribing a permanent rule of government, but is merely declaratory of the will or opinion of a municipal corporation in a given matter ...").

It is clear here that the adoption of the resolution was simply a first step in the process of County Council's formal, public consideration of the contract amendments. As noted above, following the adoption of the resolution, the contract amendments proposed by the resolution were given formal first, second, and third readings at public County Council sessions followed by a public hearing on the matter noticed several weeks in advance. Indeed, in order to carry out this public process, the Council and Waste Management needed to reach at least a tentative understanding regarding the details of any contract amendments that would ultimately be agreed upon. Such an understanding was needed prior to the period for public comment and hearings in order for specific ordinances to begin their journey through the deliberative process.

Accordingly, we concur with the referee's ruling that County Council complied with the applicable provisions of the Sumter County Procurement Ordinance in adopting the contract amendments through the enactment of Ordinances 01-436 and 01-437.

II. Compliance with State Statutory Procurement Law

[4] Alternatively, Glasscock contends that, even if County Council's adoption of the contract amendments complied with the requirements of the Sumter County Procurement Ordinance, *490 that Procurement Ordinance is contrary to and preempted by applicable state procurement laws.

Section 11-35-50 of the South Carolina Consolidated Procurement Code provides that "[a]ll political subdivisions of the State shall adopt ordinances or procedures embodying sound principles of appropriately competitive procurement no later than July 1, 1983." S.C.Code Ann. § 11-35-50 (Supp.2003). Glasscock contends the Sumter County Procurement Ordinance's exemption from competitive bid

requirements for contracts that are specifically approved by county ordinance violates the mandate of section 11-35-50 and is therefore invalid. As such, Glasscock argues, County Council's adoption of the contract amendments by enacting Ordinances 01-436 and 01-437 violated the state procurement code. We disagree.

First, we note that section 11-35-50 does not impose a specific requirement that all public procurement in our state be carried out by way of a single, narrowly defined procedure. While its mandate that all government bodies adopt some form of competitive procurement procedures is unambiguous, the statute's broad directive that the processes chosen "embody[] sound principles of appropriately competitive procurement" clearly was intended to afford local governments needed flexibility to determine what is "appropriately competitive" in light of the public business they must transact.

The state government, for example—operating under the same general approach prescribed by section 11-35-50—provides certain exceptions to the competitive sealed bid rule for state purchases in its procurement code. See S.C.Code Ann. § 11-35-710 (Supp.2003). We find no logic or consistency in recognizing some flexibility at the state **722 level while handcuffing local governments with none.

That local governments should be afforded a reasonable degree of latitude in devising their own individual procurement ordinances and procedures is entirely consistent with our state's now firmly rooted constitutional principle of "home rule." By the ratification of Article VIII of our state constitution in 1973, substantial responsibility for city and county affairs devolved from the General Assembly to the individual local governments. "[I]mplicit in Article VIII is the realization *491 that different local governments have different problems that require different solutions." *Hospitality Ass'n of South Carolina v. County of Charleston*, 320 S.C. 219, 230, 464 S.E.2d 113, 120 (1995); see also *Knight v. Salisbury*, 262 S.C. 565, 571, 206 S.E.2d 875, 877 (1974) (opining that the constitutional amendment providing for home rule was "prompted by the feeling that Columbia should not be the seat of county government, and that the General Assembly should devote its full attention to problems at the state level"). In addition, Article VIII mandates that "all laws concerning local government shall be liberally construed in their favor." S.C. Const. art. VIII, § 17. Coordinate with the principle of home rule, South Carolina Code section 4-9-

25 empowers counties to enact regulations, ordinances, and other laws provided they are consistent with the general laws of our state. S.C.Code Ann. § 4-9-25 (Supp.2003).

Glasscock urges this Court to construe section 11-35-50 as mandating sealed competitive bids in virtually every instance of public procurement. This approach would effectively strip our state's local governments of any flexibility in determining the competitive procurement policies and procedures appropriate for them to adopt. Indeed, such a reading of section 11-35-50 runs wholly contrary to the home rule authority vested in local government by our constitution. We reject Glasscock's argument.

[5] [6] In reaching this conclusion, we do not intend to diminish the vital role sealed bidding procurement procedures play in ensuring open, accountable government. To be sure, we recognize the general applicability of competitive sealed bids under the Sumter County Procurement Ordinance. In the present case, however, we address only a narrow exception to that general rule. Whether a contract should be approved by ordinance and therefore exempt from the sealed bid requirement is a function of County Council's discretion, the exercise of which they are accountable for as publicly elected officials. "In 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." *492 *Sloan v. Greenville County*, 356 S.C. 531, 555-56, 590 S.E.2d 338, 351 (Ct.App.2003) (quoting *Smith v. Georgetown County Council*, 292 S.C. 235, 238-39, 355 S.E.2d 864, 866 (Ct.App.1987)).

CONCLUSION

For the foregoing reasons we conclude the contract amendments at issue here were validly executed in accordance with the procedures prescribed by the Sumter County Procurement Ordinance. Furthermore, we hold that the exemption from sealed competitive bidding provided for under the Sumter County Procurement Ordinance is valid under our state's mandate that all government bodies employ appropriately competitive procurement procedures. The order of the special referee is therefore

AFFIRMED.

HEARN, C.J., and HUFF, J., concur.

Parallel Citations

604 S.E.2d 718

Footnotes

- 1 Although termed a "sale," the then proposed conveyance of the transfer station provided that title to the property would revert to the County in the event Waste Management "ceases to operate the transfer station at the termination of the either of two existing contracts, or any extensions thereof, either through the passage of time or default by [Waste Management] in its performance of the two existing contracts" (footnote omitted).
- 2 Sumter County Code §§ 2-171 to -268.

to confer standing to sue on behalf of his fellow taxpayers. *Id.* at 548-49, 590 S.E.2d at 347.

As in *Sloan I*, we find Sloan has standing in this case. He has the same interest as a taxpayer in how public funds were spent on large projects requiring the expenditure of millions of taxpayer dollars, this burden was borne exclusively by the taxpaying citizens of Greenville County, and Sloan therefore had a real, material, and substantial interest in whether the County properly followed the procurement procedures set out in the county code. *Id.* at 551, 590 S.E.2d at 349. The issue in the present case is also of sufficient public importance to confer taxpayer standing. *See id.* at 551, 590 S.E.2d at 349 (finding taxpayer public importance standing in similar case involving issue of competitive bidding procurement because public entities must be accountable under the laws and regulations which govern how they spend public money). For these reasons, we conclude that the trial court correctly determined Sloan had standing to pursue this declaratory judgment action.

III. ADMISSIBILITY OF EVIDENCE REGARDING THE WRITTEN DETERMINATIONS

Sloan argues the trial court erred by allowing the county to present evidence regarding the written determinations for the use of the design-build/CSP method of source selection. He contends that since the trial court was seeking to determine the sufficiency of a written determination, its inquiry should be limited to the facts contained within the four corners of that writing. We disagree.

Again, this issue was decided under a nearly identical factual scenario in the *Sloan I* decision. As in *Sloan I*, the testimony in question in this case extended beyond the confines of the written determinations that were submitted to County Council. *Sloan I*, 356 S.C. at 560-62, 590 S.E.2d at 354-55. As we did in the prior case, we find that this evidence was material and probative to the trial court's inquiry into the sufficiency of the written determination, and its admission was proper in order to educate the court, as the finder of fact, of the surrounding circumstances and fill in the gaps so that the court might have a better understanding. *Id.* at 562, 590 S.E.2d at 355. Just as in *Sloan I*, Sloan's reliance here on *Piedmont Natural Gas Co. v. Hamm*, 301 S.C. 50, 389 S.E.2d 655 (1990), and *Parker v. South Carolina Pub. Serv. Comm'n*, 288 S.C. 304, 342 S.E.2d 403 (1986), is misguided, for [b]oth *Piedmont Natural Gas* and *Parker* stand for the rule that after a case has been remanded by an appellate court, a party cannot submit additional evidence unless the appellate

court has given leave to do so. *Id.* at 562, 590 S.E.2d at 354. The present case does not concern the admission of additional evidence upon remand from appeal, but the trial court's initial consideration of evidence at trial. As such, the cases cited by Sloan are not applicable to this analysis.

IV. SUFFICIENCY OF THE WRITTEN DETERMINATION

*4 Having found Sloan's claims to be properly reviewable by this court and the disputed testimony to be properly admitted at trial, we now review whether the written determination published by the County is sufficient under the Greenville County Code and this Court's prior decision in *Sloan I*.

The Greenville County Code grants the County the discretionary power to use design-build/CSP source selection rather than the traditional CSB method. County Code § 7-242.5(a). A discretionary decision of a legislative body should not be upset on appeal unless such determination is arbitrary, unreasonable, in obvious abuse of discretion, or in excess of lawfully delegated power. *Sloan I*, 356 S.C. at 555-56, 590 S.E.2d at 351; *Smith v. Georgetown County Council*, 292 S.C. 235, 238, 355 S.E.2d 864, 866 (Cl.App.1987). Since the use of the design-build method may raise concerns among citizens of the County,⁵ it is limited under the Code to those situations in which it is properly justified. In justifying the exercise of this discretionary power, the county administrator or his designee must consider the method which in [his or his designee's] discretion, is the most advantageous to the county and will result in the most timely, economical, and successful completion of the construction project. G.C.C. § 7-242.5(a). Additionally, the determination of this method of source selection must be stated in writing and included in the contract file. *Id.*

Considering the underlying legislative intent and guiding policies of the Greenville County Code, this Court has held that a written determination, required by section 7-242.5, must serve the following dual function:

The determination must first effectively inform county council of the reasons why design-build source selection works to the County's best advantage for the project at issue. Equally important, the determination must provide the citizens of Greenville County a window into

the County's decision-making process-safeguarding the quality and integrity of the contract awards through public accountability.

Sloan I, 356 S.C. at 556, 590 S.E.2d at 351-52. If the written determination provides sufficient factual grounds and reasoning for the County Council and the public to make an informed, objective review of these decisions, then it has accomplished its purpose. *Id.* at 556, 590 S.E.2d at 352. 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.

The written determination to use design-build source selection for the Roads 2001-2002 project was prepared by Greenville County Administrator Steven Stewart. Like the prior years' projects at issue in *Sloan I*, Stewart's determination addresses County Council's time, budget, and quality requirements and sets forth the project-specific reasons why design-build rather than traditional competitive sealed bidding procurement serves to better meet the County's goals. See *Sloan I*, 356 S.C. at 557, 590 S.E.2d at 352.

*5 Stewart's written determination first addresses the underlying plan of the County behind this particular project, an expedited road-paving plan meant to improve County roads by the year 2010 (the Prescription for Progress, Paving County Roads program). He also noted that the 2001-2002 Road Improvement Program outweighed the capacity of the current staff. Considering the one-year timeframe for completion of the project and the limited staff available, Stewart concluded the design-build/CSP method would best address the road program's needs, while maintaining the quality level of other county services. Stewart also cited the success of past design-build/CSP county projects, including previous Prescription for Progress road projects, for the proposition that the design-build method could again be

successfully utilized by the County. The determination continues by pointing out how the design-build method, as opposed to the traditional CSB method, would be particularly advantageous to the County in this specific large scope project. It speaks to one of the goals being to ensure the roads are built and maintained in such a manner to maximize life expectancy and riding surface condition. It notes that, under the current process of public/private partnership, the strain on County staff is alleviated, and the County can provide a full time inspector to travel the roads and insure proper inspection procedures are being followed. Further, the determination states that, due to staffing requirements, it would cost the County an extra \$1,075,000 should the design-build/CSP method not be used. It also indicates that utilization of an alternative method (such as CSB) would mean the project would take at least one additional year to complete compared to the design-build method. These assertions go directly to the frugality, timeliness and quality of the design-build method as opposed to the traditional CSB method in this particular project.

Based on the foregoing, we find this determination provided ample grounds to support County Council's decision to approve use of the design-build method. Since it addressed the specific needs of the project and weighed alternative methods for procuring construction services, the determination provided County Council and members of the public clear insight into the rationale underlying its decision to use [the] design-build [method]. *Sloan*, 356 S.C. at 558, 590 S.E.2d at 352. Accordingly, the trial court properly ruled this determination was sufficient under § 7-242.5 of the Greenville County Code.

For the foregoing reasons, the decision of the trial court is

AFFIRMED.

GOOLSBY, HUFF, and CURETON, A.J., concur.

Footnotes

- 1 The Code references § 7-236 within § 7-212(10), but this is apparently a scrivener's error and the parties agreed the section should reference § 7-242.5 instead.
- 2 The portion of Greenville County Code § 7-242.5 most at issue reads as follows:
 - (a) The county administrator or his designee shall have the discretion to use construction management services, design-build services, or turnkey management services as alternatives for construction contracting administration. In exercising such discretion, the county administrator or his designee shall consider the method which in the administrator or his designee's discretion is the most

advantageous to the county and will result in the most timely, economical, and successful completion of the construction project. The determination of the method of source selection utilized shall be stated in writing and included as part of the contract file.

- 3 In an action in equity, tried by a judge alone, without a reference, on appeal the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).
- 4 In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).
- 5 See *Sloan I*, 356 S.C. at 541, 590 S.E.2d at 344 (It is [the] design-build [method]'s lack of objective, bright-line criteria that raises concerns about its use.... Because price is not a controlling factor in design-build source selection, the public entity may not always receive the lowest, most competitive price possible.).

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Challenged Provisions

On appeal, Sloan contends several provisions in the Hospital Policy do not embody sound principles of appropriately competitive procurement as required by section 11-35-50. For example, Sloan asserts the Hospital Policy generally sets thresholds of \$100,000 and \$350,000 for application of the policy, whereas the state's Procurement Code, and other, regional codes, contain a \$25,000 threshold.² Sloan also asserts the Hospital Policy "fails to require competitive sealed bidding as the presumptive method of source selection." Sloan argues competitive sealed bidding is provided for in the state's Procurement Code, the Model Procurement Ordinance for Local Governments prepared by the Special Task Force on Local Government Procurement of the South Carolina Budget and Control Board, and in other local codes; therefore, the Hospital's "departure from this presumption cannot be deemed to embody 'sound principles of appropriately competitive procurement.'"

The circuit court ruled Sloan failed to meet his burden of proving the challenged provisions did not comply with section 11-35-50 and granted judgment to the Hospital.

The court began by noting that "Sloan essentially argues that because the Hospital's Policy does not follow several other procurement codes, most notably the State's Consolidated Procurement Code, the State Local Model Procurement Code, and the ABA Model Procurement Code, the [Hospital] Policy fails to embody sound principles of appropriately competitive procurement and thus conflicts with State law."

The court observed that Sloan argues that these are "community standards" that demonstrate a collective "legislative judgment" as to whether or not certain procurement policies are appropriately competitive. The court rejected Sloan's argument, stating the general assertion that these other codes set some formula that South Carolina is compelled to follow must fail in the absence of other proof.

The court stated that requiring local government to follow the "collective judgment" of other codes would effectively stifle innovation in the procurement practices of local government. The court noted both the state's Procurement Code and the Model Procurement Ordinance were adopted in the early 1980s, so relying upon these sources in determining if something meets the "appropriately competitive" standard

would result in stagnation and the inability to adopt newer and more innovative procurement methods.

Moreover, the court found that Sloan's argument conflicts with the Procurement Code itself as "there is simply no requirement that entities like the Hospital enact [procedures] that are the same as, or even similar to, the State Consolidated Procurement Code." The court explained, "By conscious decision of the legislature, ... local governments are not subject to the State Procurement Code" and "[n]either are local governments required to adopt provisions similar to those of the State Code."

^{*168} In *Colleton County Taxpayers Association v. School District of Colleton County*, 371 S.C. 224, 638 S.E.2d 685 (2006), this Court held that the legislature's repeal of a provision in the Procurement Code had no relevance to the validity of an identical provision contained in the School District's procurement policy. We rejected the plaintiffs' suggestion that the repeal amounted to a determination that the School District's provision no longer embodied "sound principles of appropriately competitive procurement" within the meaning of section 11-35-50. *Id.* at 241, 638 S.E.2d at 694. We further held that the plaintiffs' "blanket conclusion" that the School District's provision must be inappropriate because it was no longer in the Procurement Code, without incorporating any supporting authority, effectively constituted a waiver of their argument. *Id.*

In the current appeal, the circuit court relied upon the *Colleton County* case in finding the provisions of the Procurement Code are "irrelevant" to what constitutes "sound principles of appropriately competitive procurement" and in determining local "procurement codes need not mirror the State Consolidated Procurement Code, the Local Model Code, or any other code."

This determination is supported by the fact that the chairman of the Task Force expressly stated in his cover letter presenting the Model Procurement Ordinance to the chairman of the South Carolina Budget and Control Board that the "ordinance is a recommended model and in no way is to be construed as a document which must be mandatorily adopted by any political subdivision." The chairman expressly stated: "There is no ^{**541} requirement that the political subdivision would even have to consider this particular model. It is to be used for assistance and information only."

We hold the circuit court properly ruled Sloan has not met his burden of establishing that any of the challenged provisions failed to meet the requirements of section 11-35-50. Sloan's sole objection to these provisions is that the Hospital Policy does not mirror the terms of the Procurement Code, the Model Procurement Ordinance, and other regional codes. Sloan appears to apply a reverse presumption, i.e., that the challenged provisions in the Hospital Policy are *presumptively* *169 *invalid* because they vary from the terms contained in the sources used for comparison. We agree with the circuit court that this difference, standing alone, is not enough to deem the Hospital Policy in violation of the statute's mandate to adopt "sound principles of appropriately competitive procurement."

As our courts have recognized, section 11-35-50 does not specify any particular procedures that are considered to embody the "appropriately competitive" standard; rather, the statute "clearly was intended to afford local governments needed flexibility to determine what is 'appropriately competitive' in light of the public business they must transact." *Glasscock Co. v. Sumter County*, 361 S.C. 483, 490, 604 S.E.2d 718, 721 (Ct.App.2004).

In *Glasscock*, the court rejected the argument that section 11-35-50 should be construed to mandate sealed competitive bidding in almost every instance of public procurement, explaining: "This approach would effectively strip our state's local governments of any flexibility in determining the competitive procurement policies and procedures appropriate for them to adopt. Indeed, such a reading of section 11-35-50 runs wholly contrary to the home rule authority vested in local government by our constitution." *Id.* at 491, 604 S.E.2d at 722; cf. *Charleston County Sch. Dist. v. Leatherman*, 295 S.C. 264, 368 S.E.2d 76 (Ct.App.1988) (observing state law

requires a school district's proposed procurement code to be "substantially similar" to the state Procurement Code, a requirement that is not imposed universally). Accordingly, we find no merit to Sloan's argument that the Hospital Policy is improper because it varies from the provisions contained in other local procurement and model codes.

IV. CONCLUSION

Based on the foregoing, we affirm the circuit court's orders, which found the Hospital is not a state governmental body subject to the Procurement Code, but rather, is a local political subdivision, and that its own procurement procedures, as contained in its Hospital Policy, complied with state law.

AFFIRMED.

*170 TOAL, C.J., KITTREDGE and HEARN, JJ., concur.
PLEICONES, J., concurring in a separate opinion.

Justice PLEICONES.
I concur in the majority's decision to uphold the trial judge's ruling in favor of the respondents, but would do so on the ground that appellant lacks standing to bring this action. Rule 220(c), SCACR; compare *Sloan v. Dept. of Transp.*, 379 S.C. 160, 666 S.E.2d 236 (2008) (Pleicones, J., dissenting); *Sloan v. Dept. of Transp.*, 365 S.C. 299, 618 S.E.2d 876 (2005) (Pleicones, J., dissenting).

Parallel Citations
694 S.E.2d 532

Footnotes

- 1 See S.C.Code Ann. § 6-11-410(a) (2004) (" 'Special purpose district' shall mean any district created by act of the General Assembly prior to March 7, 1973, and to which has been committed prior to March 7, 1973, any local governmental function."); *id.* § 6-11-810(d) (" 'Special purpose district' shall mean any district created by act of the General Assembly prior to March 7, 1973, and to which has been committed prior to March 7, 1973, any local governmental power or function."); *id.* § 6-11-1610 ("For the purposes of this article [governing special purpose or service districts], 'special purpose district' means any district created by an act of the General Assembly or pursuant to general law and which provides any local governmental power or function....").
- 2 The Procurement Code currently provides that "[c]ontracts greater than fifty thousand dollars must be awarded by competitive sealed bidding except as otherwise provided in Section 11-35-1510." S.C.Code Ann. § 11-35-1520(1) (Supp.2009) (emphasis added). This threshold was increased from \$25,000 after the time the contracts at issue here were executed. 2006 S.C. Acts 376, § 25 (effective June 13, 2006).

Code of Laws of South Carolina 1976 Annotated
Title 15. Civil Remedies and Procedures
Chapter 53. Declaratory Judgments

Code 1976 § 15-53-80

§ 15-53-80. Parties.

Currentness

When declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise the municipality shall be made a party and shall be entitled to be heard. If the statute, ordinance or franchise is alleged to be unconstitutional the Attorney General shall also be served with a copy of the proceeding and be entitled to be heard.

Credits

HISTORY: 1962 Code § 10-2008; 1952 Code § 10-2008; 1948 (45) 2014.

Notes of Decisions (7)

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Code 1976 § 15-53-80, SC ST § 15-53-80

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24 C.J.S. Declaratory Judgments § 139

Corpus Juris Secundum
Database updated January 2015
Declaratory Judgments

James Buchwalter, J.D., John J. Dvorske, J.D., M.A., and John R. Kennel, J.D., of the National Legal Research Group, Inc.,

III. Practice and Procedure
C. Parties
1. In General

Topic Summary References

§ 139. Joinder of necessary and indispensable parties

West's Key Number Digest

West's Key Number Digest, Declaratory Judgment C-293, 293.1, 294 to 299

Generally, all necessary and indispensable parties must be joined in an action for declaratory judgment, and the requirement is a jurisdictional one that cannot be waived by the parties.

The rule of civil procedure requiring that all necessary and indispensable parties to an action who are competent be joined in the action and brought before the court applies to actions for a declaratory judgment.¹ The requirement that all necessary and indispensable parties be present in the action is a jurisdictional one² that cannot be waived by the parties.³ The court cannot proceed to enter a judgment in the absence of such a party.⁴

As a general rule, all persons who have or claim an interest in the subject matter of the action for a declaratory judgment, or who may be affected by the result of the action, must be joined as necessary parties,⁵ and a declaratory judgment action normally cannot be maintained without complying with such a statutory requirement.⁶ A declaratory judgment that is entered in the absence of certain persons as parties defendants will not ordinarily affect the rights of interested those persons,⁷ even if the court is not deprived of jurisdiction by virtue of the failure to join them.⁸ Where the interest involved is indirect or incidental in an action seeking a declaratory judgment, joinder may not be required.⁹ When a person's official designee is already a party to an action seeking a declaratory judgment, the participation of that designee may alone be sufficient to satisfy the mandatory joinder provision of a declaratory judgments act.¹⁰

Whenever possible, all interested parties should be joined in the declaratory judgment action in order to avoid a piecemeal litigation of the matters in controversy.¹¹ However, jurisdiction over a declaratory judgment action is not destroyed by the absence of a party who has an interest in the litigation but who is not a necessary party.¹² To require the participation of all parties having any interest that could potentially be affected by the invalidation of a statute would be impractical under a declaratory judgments act.¹³ Applying such a statutory provision in an excessively literal manner in the context of constitutional challenges to legislative enactments containing a wide range of topics that potentially affect many classes of citizens, institutions, organizations and corporations, could sweep in hundreds of parties and render the litigation unmanageable.¹⁴

Code of Laws of South Carolina 1976 Annotated
South Carolina Rules of Civil Procedure
IV. Parties

Rule 19, SCRCP

RULE 19. JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

Currentness

(a) **Persons to Be Joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

(b) **Determination by Court Whenever Joinder Not Feasible.** If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) **Pleading Reasons for Nonjoinder.** Any pleading asserting a cause of action for relief shall state the names, if known to the pleader, of any persons described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) **Exception of Class Actions.** This rule is subject to the provisions of Rule 23 in class actions.

Notes of Decisions (18)

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Rules Civ. Proc., Rule 19, SC R RCP Rule 19
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STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS)

COUNTY OF JASPER)

CIVIL ACTION NO. 14-CP-27-468)

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

**Plaintiffs' Memorandum of Law in
Opposition to Defendants'
Motions to Dismiss**

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)
Defendants.)

FILED
2015 MAR -3 AM 9:12
MARGARET BOSSTICK
CLERK OF COURT
JASPER COUNTY SC

NOW COME the Plaintiffs, by their undersigned attorney, and submit this Memorandum of Law in opposition to the Defendants' Motions to Dismiss. Defendants filed a Motion to Dismiss the original Complaint and another Motion to Dismiss the Amended Complaint. Both motions are conclusory and are not supported by a Memorandum of Law at this time. In opposition to the Motions to Dismiss, Plaintiffs would show the Court the following:

1. Plaintiff South Carolina Public Interest Foundation is a corporation not for profit, organized and existing under the laws of the State of South Carolina and dedicated to the public interest, including the proper enforcement of procurement codes and the Constitution of the State of South Carolina.
2. Plaintiff Edward D. Sloan, Jr, is a citizen, resident, taxpayer, and registered elector of Greenville County, South Carolina.
3. Plaintiffs Denise G. Davidson and Milton Woods, Jr., are citizens, residents, taxpayers, and registered electors of Jasper County, South Carolina.
4. Defendant Jasper County School District ("District"), was created by and exists pursuant

to an Act of the General Assembly.

5. Plaintiffs possess standing to bring this action as citizens, residents, taxpayers, and registered electors; and because the great public importance and manifest urgency of the matters they allege in this action.
6. This Court possesses jurisdiction under the following decisions, which address public interest and taxpayer standing: *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d521 (2013), *American Petroleum Institute v. S.C. Dep't. of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009), *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008), *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008), *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005), *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003), *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000), *Baird v. Richland County*, 333 S.C. 519, 511 S.E.2d 69 (1999), *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997); and under S.C. Code Ann. § 15-53-10 *et seq.*, known as the Uniform Declaratory Judgment Act.
7. May 5, 2010, pursuant to § 11-35-50, Defendants' adopted a Procurement Code Policy (**Exhibit B1**), which is now in force.
8. District's Procurement Code Policy § 2-102(1) requires, "Contracts of \$50,000 or more

¹ Exhibits A through E are attached to the Amended and Supplemental Complaint.

must be awarded by competitive sealed bidding . . . except as provided herein.”

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

Conditions for use: When the school district determines in writing that the use of competitive sealed bidding is either not practicable or not advantageous to the school district, a contract may be awarded by competitive sealed proposals. . . . Proposals must be solicited through a request for proposals (emphasis added).

10. The purpose of the written determination is to enable the Defendant District to use a Request for Proposals, as the method of selection of source, and therefore, the written determination should be issued prior to the Defendant District issuing a Request for Proposals.
11. On July 14, 2014, District issued Request for Proposals 14-06-01 (**Exhibit C**), soliciting more than \$2 million design-build services to renovate its Bees Creek Project.
12. On September 10, 2014, the District issued an intent to award letter (**Exhibit F**).
13. One month later, on October 10, 2014, the Defendant School District posted **Exhibit D**, the written determination, to its website. (*See Exhibit G*, Document Uploads from Defendant District Website).
14. Defendants entered into a contract with a guaranteed maximum price of \$2.9 million (**Exhibit E**).
15. The language of the written determination (**Exhibit D**) indicates that the District issued the written determination subsequent to the selection process:

From the competition it has been determined that both of the finalist qualified entities were able to propose a solution in accordance with the design requirements. The Board of Trustees has selected its preferred solution.

For the above stated reasons, the District is therefore proceeding with a design-build delivery of the Bees Creek site within the design requirements established in consultation with the Board.

(**Exhibit D**, p. 3) (emphasis added).

16. The Defendants issued written determination to enable the subsequent use of a Request for Proposals **nearly 3 months after** the District issued the Request for Proposals, and **one month after** the intent to award letter, meaning that when the District issued the Request for Proposals and when the District issued the intent to award letter, **it had not made any written determination** to enable the use of a Request for Proposals, in violation of § 2-103(1).
17. Furthermore, the District Procurement Code Policy § 2-103(6) requires:

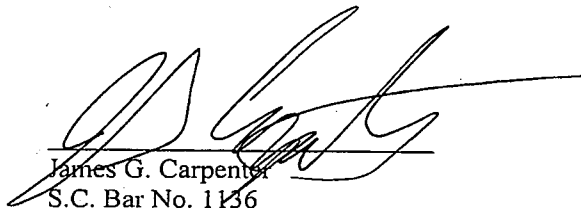
Evaluation factors: The request for proposals shall state the evaluation factors in relative order of importance. Price may but need not be an initial evaluation factor. **Each** responsive and responsible offeror's **proposal must be evaluated**. The proposal **must then be ranked** in accordance with the results of such evaluation (emphasis added).
18. Upon information and belief, the Defendants **neither evaluated nor ranked** the proposals it received, in violation of § 2-103(6).
19. District Procurement Code Policy § 2-103(7) requires:

Award: The award **must be made** to the responsible offeror whose proposal is **determined in writing** to be the most advantageous to the school district, **taking into consideration the evaluation factors** set forth in the request for proposals. No other factors or criteria must be used in the evaluation. **The contract file shall contain the basis** on which the award is made (emphasis added).
20. Upon information and belief, the Defendants did **not** “determine[] in writing” which proposal was “the most advantageous to the school district,” in violation of § 2-103(7).
21. Upon information and belief, the contract file does **not** “contain the basis on which the award [was] made,” in violation of § 2-103(7).
22. The written determination, **Exhibit D**, does **not** satisfy § 2-103(1), (6), or (7).

WHEREFORE, Plaintiffs pray the Court for an Order:

1. Denying the Defendants' Motions to Dismiss;
2. Declaring that Defendants' undated determination (**Exhibit D**) is insufficient to satisfy the requirements of Procurement Code Policy § 2-103(1), (6), or (7);
3. Declaring that the contract dated November 10, 2014 (**Exhibit E**), in which Defendants procured construction services of \$50,000 or more using a Request for Proposals, violates the District's Procurement Code Policy, and is unlawful;
4. Enjoining the performance of the contract illegally procured;
5. Awarding the Plaintiffs' attorneys' fees and costs of litigation pursuant to S.C. Code Ann. § 15-77-300 *et seq.*; and
6. Granting Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.



James G. Carpenter
S.C. Bar No. 1136
819 E. North Street
Greenville, SC 29601
Telephone: (864) 235-1269
Facsimile: (864) 331-3083
Attorney for Plaintiffs

February 25, 2015

Jasper County School District

Division of Operations & Facilities

Post Office Box 848 – 10942 North Jacob Smart Blvd. – Ridgeland, South Carolina 29936
(843) 717 – 1624 Telephone (843) 717 – 16999 Fax
Email: dowens@jcsd.net Website: www.jcsd.net

Vashti K. Washington, Ed.D.
Superintendent

Darryl A. Owens
Chief of Operations

September 10, 2014

Joseph B Fraser III
Fraser Construction Company, LLC
12-B Arley Way
Bluffton, SC 29910
jfraser@fraser-construction.net

Emailed: 09/10/14
USPS: 09/10/14

Ben Thompson
AAG Associates, LLC
37 Marshellen Drive
Beaufort, SC 29902
ben@accessAAG.com

Re: **Solicitation #: 14-06-01 Renovation of 3776 Bees Creek Property for Use as Centralized District Administrative Offices**

Dear Mr. Sirs:

We wish to take this opportunity to thank you for submitting a proposal for the Design-Build: Renovation of 3776 Bees Creek Rd Property for use as Centralized District Administrative Offices. Upon review of each Short-List presentations, the Jasper County Board of Trustees voted at its September 8, 2014 Board Meeting that a notice of intent to award be issued to M.B. Kahn Construction Co., Inc., in accordance with the solicitation as Design-Build Contractor for the project.

Please be advised that your name will remain on our bidders list for any future bids of this nature. Should you wish to Protest this Notice of Intent to Award by submitting written protest to the Chief of Operation at Jasper County Schools within ten (10) calendar days after the date of this notice.

Sincerely,



Darryl A. Owens
Chief of Operations

Cc: Dr. Vashti K. Washington, Superintendent
Mr. Gary West, Chief Officer of Finance & Data Management

"Sharing Our Strengths To Produce Great Results For Our Students"



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Operations
Document Uploads
Links
Staff
Request for Proposal
School Dude - Maintenance Request

Quick Links
Request for Proposal
School Dude - Maintenance Request



Document Uploads

[+] Expand All

[-] Collapse All

Bees Creek Project

(19 Files)

- Public Forum Notes from Ridgeland (10/13/2014)
- Public Forum Notes from Hardeewille (10/13/2014)
- Written Determination (10/10/2014)
- PublicForum-Presentation (10/9/2014)
- Intent-to-Award Letter (9/10/2014)
- Bees Creek Project Model (9/9/2014)
- Responses to Media Questions (9/8/2014)
- Motions to Select Vendor/Option (9/8/2014)
- Board Presentation (9/8/2014)
- Attorney Opinion 2 (9/8/2014)
- Introduction to Project
- Space Needs
- Process
- Proposal #1 Presentation
- Proposal #2 Presentation
- Attorney Opinion 01
- Bees Creek RFP Design Solicitation (7/14/2014)
- Bees Creek RFQ Short Listing
- Bees Creek RFQ Public Notice

Forms and Documents

(7 Files)

[Webmaster](#)



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STATE OF SOUTH CAROLINA)

COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 14-CP-27-468

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

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)
Defendants.)

Certificate of Service

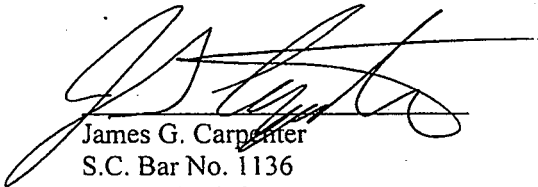
2015 MAR -3 AM 9:12
MARGARET BOSTICK
CLERK OF COURT
JASPER COUNTY SC

FILED

The undersigned attorney hereby certifies that he served a copy of the foregoing **Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions to Dismiss** upon opposing counsel by first-class mail this February 25, 2015, addressed as follows:

Keith R. Powell
Childs & Halligan
PO Box 11367
Columbia, SC 29211-1367

THE CARPENTER LAW FIRM, P.C.



James G. Carpenter
S.C. Bar No. 1136
819 E. North Street
Greenville, SC 29601
Telephone: (864) 235-1269
Facsimile: (864) 331-3083
Attorney for Plaintiffs

February 25, 2015

STATE OF SOUTH CAROLINA)
)
COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS

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

C.A. No. 2014-CP-27-468

**ANSWER AND AFFIRMATIVE
DEFENSES TO PLAINTIFF'S AMENDED
AND SUPPLEMENTAL COMPLAINT**

Plaintiff,)

vs.)

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,)

Defendant.

Defendants Jasper County School District and the Hon. Berty Riley ("Defendants"), by and through its undersigned counsel, hereby respond to the allegations of Plaintiff's Complaint, in accordance with the numbered paragraphs thereof, as follows:

1. Admitted upon information and belief.
2. Admitted upon information and belief.
3. Admitted upon information and belief.
4. Denied as stated.
5. Denied.
6. Denied.
7. Admitted.
8. Admitted.
9. Admitted.
10. Admitted.

11. Admitted.
12. Denied as stated. Defendants crave reference to the entirety of Exhibit B.
13. Denied.
14. Admitted.
15. Admitted.
16. This is a legal conclusion to which no responsive averment is required.
17. Denied as stated. Defendants crave reference to the entirety of Exhibit B.
18. Admitted.
19. Denied as stated. Defendants crave reference to the entirety of Exhibit B.
20. Defendants restate their responses to the incorporated averments.
21. Denied.
22. Defendants restate their responses to the incorporated averments.
23. Denied.
24. Denied.

FIRST AFFIRMATIVE DEFENSE

25. Plaintiff South Carolina Public Interest Foundation is not a taxpayer of the Jasper County School District affected by the alleged activities of the defendants and therefore lacks standing to bring the causes of action alleged in the Amended and Supplemental Complaint.

SECOND AFFIRMATIVE DEFENSE

26. Plaintiff Edward D. Sloan is not a taxpayer of the Jasper County School District affected by the alleged activities of the defendants and therefore lacks standing to bring the causes of action alleged in the Amended and Supplemental Complaint.

THIRD AFFIRMATIVE DEFENSE

27. Plaintiffs' causes of action are each and individually barred by *laches*. "Under *laches*, if a party who knows his rights does not timely assert them, and by his delay, causes

another party to incur expenses or otherwise detrimentally change his position, then equity steps in and refuses to enforce those rights.” Sloan v. Dep’t of Transp., 618 S.E.2d 876, 880 (S.C. 2005).

28. Defendant JCSD’ South Carolina Business Opportunities (“SCBO”) advertisement of the design-build solicitation ran in the June 2, 2014 SCBO edition.

29. Defendant JCSD issued its “short list” notification on July 14, 2014, for this design-build solicitation.

30. The two “short list” design-build proposers gave presentations to the Board on August 28, 2014.

31. JCSD published a document entitled “An Introduction to the Bees Creek Project” on its webpage on September 3, 2104, referencing the solicitation.

32. Minutes of the JCSD Board meeting of September 8, 2014 included a public discussion of the Bees Creek Project and the design-build procurement, as well as noting that Plaintiff Davidson and Plaintiff Woods were noted as present at the meeting as revealed by their being listed as having given “Public Comments” at the same meeting.

33. The two short-listed design-build proposers’ electronic presentations were posted on the JCSD web page on September 9, 2014.

34. Plaintiff Sloan sent a FOIA request dated September 24, 2014, inquiring about the contract “to provide design/build services for the Bees Creek Project.” 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.

35. The Written Determination was sent to Mr. Sloan by the JCSD on October 10, 2014.

36. Plaintiff 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 (Amd. Complaint Exhibit A).

37. The Board approved executing the contract with the design-builder upon the minutes of its November 10, 2104, public meeting.

38. The contract was executed on November 10, 2104 (Plaintiffs' Exhibit E).

39. The Plaintiffs' original summons and complaint was filed in the court on October 29, 2014, and it sought to prevent the procurement from proceeding. However it was not served upon the Defendants until after the contract was executed. The Defendants' Acceptance of Service is dated November 21, 2014.

40. The Defendants moved to dismiss the original complaint as moot, whereupon the Plaintiffs filed their Amended Complaint dated January 8, 2015.

41. Plaintiffs knew their rights in the subject matters raised by the Amended and Supplemental Complaint and did not timely assert them.

42. Plaintiffs' delay in asserting their claims caused the defendants to incur expenses and otherwise detrimentally change their position.

43. Equity should refuse to enforce the asserted rights of the plaintiffs in this case on account of their *laches* as herein demonstrated.

FOURTH AFFIRMATIVE DEFENSE

44. Plaintiffs Davidson and Woods are barred from equitable relief by the doctrine of unclean hands.

FIFTH AFFIRMATIVE DEFENSE

45. The approval on its minutes of the final contract between the Jasper County School District and the design/builder by the Board of Trustees of the Defendant Jasper County School District constitutes a waiver of any procurement procedural defect, a ratification of the procurement, and an independent exercise of legislative power by the Board of Trustees affirming the contract and exercising its legitimate scope of discretionary legislative authority

under South Carolina law.

SIXTH AFFIRMATIVE DEFENSE

46. Defendants are not entitled to attorneys' fees and costs of litigation pursuant to S.C. Code Ann. § 15-77-300 et seq.


SEVENTH AFFIRMATIVE DEFENSE

47. Defendants deny each and every allegation in the Complaint except those expressly admitted herein.

WHEREFORE, having fully answered the Amended and Supplemental Complaint, Defendants respectfully prays that the Court dismiss Plaintiffs' claims against it, with all costs and expenses awarded to Defendants, together with any and all further relief that the Court deems equitable and just.

Respectfully submitted,

CHILDS & HALLIGAN, P.A.



By: _____

Keith R. Powell, S.C. Bar No. 69292
kpowell@childs-halligan.net

P.O. Box 11367
Columbia, South Carolina 29211
(803) 254-4035

Attorney for Defendants Jasper County School
District and Berty Riley

April 8, 2015

Columbia, South Carolina

CERTIFICATE OF SERVICE BY MAIL

The undersigned of Childs & Halligan, P.A., hereby certifies that she has served the following counsel of record with the foregoing **ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S AMENDED AND SUPPLEMENTAL COMPLAINT** by mailing a copy of same, postage prepaid and return address clearly indicated, to the following on this 8th day of April, 2015:

James C. Carpenter, Esq.
Carpenter Law Firm, PC
819 E. North Street, Suite 230
Greenville, SC 29601



Andrea E. Shull

STATE OF SOUTH CAROLINA)

COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS

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

Plaintiffs,

vs.

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,

Defendants.

C.A. No. 2014-CP-27-468

**Defendants' Notice of Motion and Motion
for Summary Judgment**

2015 JUN 15 10 17 15
CLERK OF COURT
JASPER COUNTY, SC

TO JAMES C. CARPTENTER, ESQ., ATTORNEY FOR THE PLAINTIFFS, PLEASE TAKE
NOTICE:

Ten (10) days after service hereof, or as soon thereafter as it may be reached, the
Defendants hereby move for SUMMARY JUDGMENT pursuant to S.C. R. Civ. P. 56(b) as to
all claims of the Plaintiffs. The grounds for the Defendants' motion will be more fully set forth
in its memorandum of law, which will be filed with the Court prior to a hearing on this motion.
In addition to its memorandum of law, the Defendants will rely on the pleadings, papers, records
in this case, affidavits, as well as the applicable statutory and case law and the South Carolina
Rules of Civil Procedure.

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

By:



Keith R. Powell, S.C. Bar No. 69292
kpowell@childs-halligan.net

P.O. Box 11367
Columbia, South Carolina 29211
(803) 254-4035

Attorneys for Defendants Jasper County School
District and Berty Riley

June 11, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF JASPER)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 14-CP-27-468

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

Second Supplemental Complaint

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)
Defendants.)

FILED
2015 JUL 17 AM 9:17
MARGARET POSTON
CLERK OF COURT
JASPER COUNTY SC

NOW COME the Plaintiffs, by their undersigned attorney, and as a second supplemental complaint against the above named Defendants would show to the Court as follows:

1. Plaintiff South Carolina Public Interest Foundation is a corporation not for profit, organized and existing under the laws of the State of South Carolina and dedicated to the public interest, including the proper enforcement of procurement codes and the Constitution of the State of South Carolina.
2. Plaintiff Edward D. Sloan, Jr, is a citizen, resident, taxpayer, and registered elector of Greenville County, South Carolina.
3. Plaintiffs Denise G. Davidson and Milton Woods, Jr., are citizens, residents, taxpayers, and registered electors of Jasper County, South Carolina.
4. Defendant Jasper County School District ("District"), was created by and exists pursuant to an Act of the General Assembly.
5. Plaintiffs possess standing to bring this action as citizens, residents, taxpayers, and registered electors; and because the great public importance and manifest urgency of the

matters they allege in this action.

6. This Court possesses jurisdiction under the following decisions, which address public interest and taxpayer standing: *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013), *American Petroleum Institute v. S.C. Dep't. of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009), *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008), *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008), *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005), *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003), *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000), *Baird v. Richland County*, 333 S.C. 519, 511 S.E.2d 69 (1999), *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997); and under S.C. Code Ann. § 15-53-10 *et seq.*, known as the Uniform Declaratory Judgment Act.
7. S.C. Code Ann. § 11-35-310(23) defines political subdivisions to include school districts.
8. South Carolina Consolidated Procurement Code, S.C. Code Ann. § 11-35-10, *et. seq.*, requires a political subdivision to use its own procurement policy adopted pursuant to S.C. Code Ann. § 11-35-50.
9. S.C. Code Ann. § 11-35-50 requires all political subdivisions to adopt policies and procedures embodying “sound principles of appropriately competitive procurement.”
10. District’s letter to Sloan dated October 22, 2014 (**Exhibit A**) indicates that § 11-35-50

applies to District.

11. May 5, 2010, pursuant to § 11-35-50, Defendants' adopted a Procurement Code Policy (**Exhibit B**), which is now in force.
12. District's Procurement Code Policy § 2-102(1) requires, "Contracts of \$50,000 or more **must be awarded by competitive sealed bidding**" (emphasis added).
13. Unlike S.C. Code Ann. § 15-35-1520 (the comparable section in the South Carolina Consolidated Procurement Code), the District's Procurement Code Policy § 2-102(1) does not contain an exception. Thus, § 2-102(1) is mandatory for "Contracts of \$50,000 or more." *Id.*
14. July 14, 2014, District issued Request for Proposals 14-06-01 (**Exhibit C**), soliciting more than \$2 million design-build services to renovate its Bees Creek Project, which includes more than \$50,000 of construction services; it also includes architectural services.
15. On November 10, 2014, Defendants procured construction services of \$50,000 or more, with a guaranteed maximum price of \$2.9 million, using a method of selection of source other than competitive sealed bidding (**Exhibit E**).
16. Competitive sealed bidding requires an Invitation for Bids, but Defendants have not issued an Invitation for Bids for this procurement of construction services of \$50,000 or more.
17. District's Procurement Code Policy § 4-301 requires it to use negotiations to select its source of procurement of architectural services.
18. Defendants procured architectural services through the contract attached as **Exhibit E**.
19. The simultaneous use of competitive sealed bidding **and** negotiations, or any other method to make a single procurement, is impossible.
20. The procurement of construction services of \$50,000 or more by **Exhibit E** violates the

District's Procurement Code Policy, and is unlawful.

21. If the Court determines that contrary to Procurement Code Policy § 2-102(1), District's Procurement Code Policy enables Defendants to procure construction services of \$50,000 or more using a Request for Proposals, Defendants' undated determination (**Exhibit D**) is insufficient to satisfy the requirements of Procurement Code Policy § 2-103.
22. The procurement violates the District's Procurement Code Policy, and is unlawful as set out more fully below.
23. **Exhibit D**, the written determination, was posted to the school district website on October 10, 2014, nearly 3 months after the District issued the request for proposals, and one month after the District issued an intent to award letter on September 10, 2014 (**Exhibit F**).
24. The purpose of the written determination is to justify the use of the Request for Proposals, and the written determination should be issued before the Request for Proposals.
25. District Procurement Code Policy § 2-103, paragraph (6) states:

(6) Evaluation factors: the request for proposals shall state the evaluation factors in relative order of importance. Price may but need not be an initial evaluation factor. Each responsive and responsible offeror's proposal must be evaluated. The proposal must then be ranked in accordance with the results of such evaluation.
26. On or about May 11, 2015, Defendants resolved by which they purported to ratify their procurement at issue in this case, and all of its processes (**Exhibit G**).
27. Defendants' procurement policy § 6-403 states the following:

If after an award it is **determined** that a solicitation or award of a contract is in **violation** of this policy, then:

 - (1) if the person awarded the contract has not acted fraudulently or in bad faith:
 - (a) the contract may be ratified and affirmed, provided it is **determined** that doing so is in the **best interest of the school district**; . . .

Id., (emphasis added).

28. **Exhibit G** fails to comply with the District Procurement Policy ratification process and is unlawful and ineffective for the following reasons:

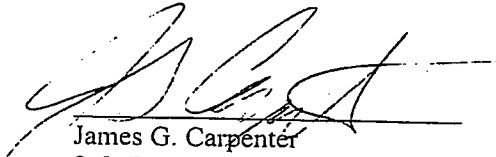
- a. The District Procurement Policy requires as a precondition to a ratification a *determination* that “the solicitation or award was in violation of [the District Procurement] policy;” but the Defendants failed to make such a determination, and indeed contended just the opposite throughout their Resolution.
- b. The District Procurement Policy requires a separate, written “determination” to ratify “the solicitation or award of a contract,” and the Defendants did not make a separate, written “determination.”
- c. If the Defendants contend that the Resolution is actually the same thing as the written determination, the Resolution fails to comply with the District Procurement Policy in that it makes no written “determination” that ratifying the unlawful solicitation or award is “in the best interest of the school district.”

WHEREFORE, Plaintiffs pray the Court for an Order:

1. Declaring that the procurement by contract dated November 10, 2014 (**Exhibit E**), in which Defendants procured construction services of \$50,000 or more using a method of source selection other than competitive sealed bidding violates the District’s Procurement Code Policy, and is unlawful;
2. Declaring that Defendants are not authorized to procure design-build services which include construction services of \$50,000 or more;
3. Declaring that Defendants’ undated determination (**Exhibit D**) is insufficient to

- satisfy the requirements of Procurement Code Policy § 2-103;
4. Declaring that the Resolution dated May 11, 2015 (**Exhibit G**) is ineffective to ratify the unlawful solicitation and award of the contract at issue;
 5. Enjoining Defendants from procuring design-build services through the contract (**Exhibit E**);
 6. Awarding the Plaintiff attorneys' fees and costs of litigation pursuant to S.C. Code Ann. § 15-77-300 *et seq.*
 7. Granting Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,
THE CARPENTER LAW FIRM, P.C.



James G. Carpenter
S.C. Bar No. 1136
819 E. North Street
Greenville, SC 29601
Telephone: (864) 235-1269
Facsimile: (864) 331-3083
Attorney for Plaintiffs

June 16, 2015

STATE OF SOUTH CAROLINA
COUNTY OF JASPER

)
)
)

JASPER COUNTY BOARD
OF EDUCATION

RESOLUTION

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

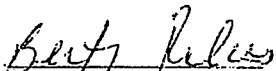
Whereas, subsequent to all of the foregoing events, third parties have initiated litigation in an attempt to invalidate the procurement of the design-build contract, which litigation has caused the progress of this project to halt because of uncertainty over payment to the contractor for the services it is to provide under the contract;

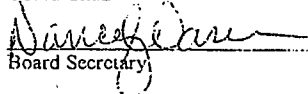


NOW THEREFORE BE IT RESOLVED by the Board, in its full legislative authority:

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*.

May 11, 2015.


Board Chair


Board Secretary

Signed by Board Clerk at the request of the Board Secretary.

STATE OF SOUTH CAROLINA)

COUNTY OF JASPER)

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

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)
Defendants.)

IN THE COURT OF COMMON PLEAS

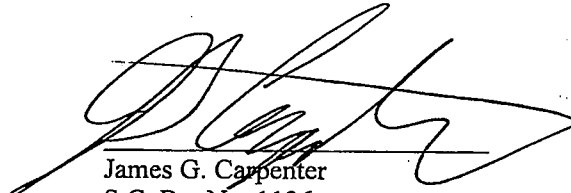
CIVIL ACTION NO. 14-CP-27-468

Certificate of Service

The undersigned attorney hereby certifies that he served a copy of the foregoing **Plaintiffs' Supplemental Complaint** upon opposing counsel by first-class mail this July 15, 2015, addressed as follows:

Keith R. Powell
Childs & Halligan
PO Box 11367
Columbia, SC 29211-1367

THE CARPENTER LAW FIRM, P.C.



James G. Carpenter
S.C. Bar No. 1136
819 E. North Street
Greenville, SC 29601
Telephone: (864) 235-1269
Facsimile: (864) 331-3083
Attorney for Plaintiffs

July 15, 2015

James Carpenter

From: Keith R. Powell <kpowell@childs-halligan.net>
Sent: Wednesday, July 15, 2015 11:00 AM
To: James Carpenter
Subject: RE: Motion "MSUMJM-Motion/Summary Judgment" for Case "2014CP2700468- South Carolina Public Interest Foundation, Etal , plaintiff, et al VS Jasper County School District, Etal , defendant, et al" was added to a Motions Roster for 8/13/2015 at 12:00 PM

Go ahead.

Keith R. Powell
Childs & Halligan, P.A.
Columbia, South Carolina
www.childs-halligan.com
(803) 254-4035

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-----Original Message-----

From: James Carpenter [mailto:james.carpenter@carpenterlawfirm.net]
Sent: Wednesday, July 15, 2015 10:36 AM
To: Keith R. Powell
Subject: RE: Motion "MSUMJM-Motion/Summary Judgment" for Case "2014CP2700468- South Carolina Public Interest Foundation, Etal , plaintiff, et al VS Jasper County School District, Etal , defendant, et al" was added to a Motions Roster for 8/13/2015 at 12:00 PM

Keith,

Any word on this?

Jim

-----Original Message-----

From: Keith R. Powell [mailto:kpowell@childs-halligan.net]
Sent: Monday, July 13, 2015 3:43 PM
To: James Carpenter
Subject: RE: Motion "MSUMJM-Motion/Summary Judgment" for Case "2014CP2700468- South Carolina Public Interest Foundation, Etal , plaintiff, et al VS Jasper County School District, Etal , defendant, et al" was added to a Motions Roster for 8/13/2015 at 12:00 PM

Please hold for confirmation of #7 (amendment of complaint) per my last message or take it out if you want to send the continuance today.

Keith R. Powell
Childs & Halligan, P.A.

Columbia, South Carolina
www.childs-halligan.com
(803) 254-4035

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-----Original Message-----

From: James Carpenter [mailto:james.carpenter@carpenterlawfirm.net]
Sent: Monday, July 13, 2015 3:39 PM
To: Keith R. Powell
Subject: RE: Motion "MSUMJM-Motion/Summary Judgment" for Case "2014CP2700468- South Carolina Public Interest Foundation, Etal , plaintiff, et al VS Jasper County School District, Etal , defendant, et al" was added to a Motions Roster for 8/13/2015 at 12:00 PM

Keith,

I attach a copy of the Motion I plan to file. Please let me know if you have any problems with it. Thank you for your cooperation.

Jim

-----Original Message-----

From: Keith R. Powell [mailto:kpowell@childs-halligan.net]
Sent: Monday, July 13, 2015 11:04 AM
To: James Carpenter
Cc: Dwayne T. Mazyck
Subject: RE: Motion "MSUMJM-Motion/Summary Judgment" for Case "2014CP2700468- South Carolina Public Interest Foundation, Etal , plaintiff, et al VS Jasper County School District, Etal , defendant, et al" was added to a Motions Roster for 8/13/2015 at 12:00 PM

Jim -

We don't have to do this exactly the week they have it scheduled, but I know the district wishes to proceed expeditiously. Certainly I consent to rescheduling to avoid your conflicts, but soon I would like to see if the admin judge can get us set up to be heard sooner than September, wherever and whenever any of the judges can squeeze us in. (Judge Mullen did an intergovernmental Jasper SJ motion for us between criminal bond hearings in Beaufort last year, for example.)

I have been out on vacation myself, and from what I recall of your motion to amend the complaint, I think upon review I will conclude we can just consent to that and then get a revised answer in by the time of the ad-hoc hearing I hope we can get on the SJ motion. Effects of the board's recent resolution are going to be in issue either with or without the amended complaint.

In short - go ahead and deal with the current scheduling conflict you have, with consent. Give me a couple days to catch up on everything here, and I'll do what I can to posture this as only one hearing, on the merits, at a convenient time, and not too far out in the future.

Keith R. Powell
Childs & Halligan, P.A.
Columbia, South Carolina
www.childs-halligan.com
(803) 254-4035

NOTICE: This e-mail may contain information that is personal and confidential, non-disclosable and protected by attorney-client privilege. If you have received this e-mail in error, this does not constitute permission to examine, copy or distribute the accompanying material. If you receive this message in error, please notify us by telephone as listed above immediately.

-----Original Message-----

From: James Carpenter [mailto:james.carpenter@carpenterlawfirm.net]
Sent: Friday, July 10, 2015 6:19 PM
To: Keith R. Powell
Subject: FW: Motion "MSUMJM-Motion/Summary Judgment" for Case "2014CP2700468- South Carolina Public Interest Foundation, Etal , plaintiff, et al VS Jasper County School District, Etal , defendant, et al" was added to a Motions Roster for 8/13/2015 at 12:00 PM

Keith,

I just got back in the office today and got the notices for the hearings on our motions in the Jasper County School District case. I have a scheduling conflict for the week of August 10.

First, our family is supposed to be in Hilton Head on a vacation with my brother-in-law's family.

Second, we just learned that the trial for Michael Juan Smith, the man who shot my niece, Martha Childress, is scheduled to start August 10 in Columbia, and the trial expected to go all week. (She is the college girl who was shot in Five Points nearly 2 years ago.) I have been the family spokesman to deal with the news media during this whole ordeal, and I think the family wants me to attend the trial with them.

Would you consent to postponing the hearing of these two motions to the next term of court?

Thanks,

Jim

-----Original Message-----

From: Courtmail27_DoNotReply@sccourts.org
[mailto:Courtmail27_DoNotReply@sccourts.org]
Sent: Friday, July 10, 2015 11:18 AM
To: james.carpenter@carpenterlawfirm.net
Cc: mbostick@jaspercountysc.gov
Subject: Motion "MSUMJM-Motion/Summary Judgment" for Case "2014CP2700468- South Carolina Public Interest Foundation, Etal , plaintiff, et al VS Jasper County School District, Etal , defendant, et al" was added to a Motions Roster for 8/13/2015 at 12:00 PM

This case appears on the Jasper County Common Pleas Motions Roster. Hearings will be held on Thursday, August 13, 2015 at 12:00 p.m. before The Honorable Judge Carmen T. Mullen at the Jasper County Courthouse on 265 Russell Street Ridgeland, SC 29936. Attendance is mandatory unless your case is settled.

If your case is settled, please not s immediately. Failure to appear or s a representative on your behalf may result in dismissal of the case.

Any request for a continuance is considered a Motion and requires a \$25.00 Motion fee. The Roster is available at www.sccourts.org. AUGUST 6, 2015 MOTION ROSTER MEETING HAS BEEN CANCELED AND IS RESCHEDULED FOR AUGUST 13, 2015 AT 12:00 PM, THE HONORABLE CARMEN T. MULLEN PRESIDING. PLEASE SEE ROSTER NEWS FOR MORE INFORMATION.

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF JASPER )

IN THE COURT OF COMMON PLEAS

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

C.A. No. 2014-CP-27-468

**ANSWER AND AFFIRMATIVE  
DEFENSES TO PLAINTIFF'S SECOND  
SUPPLEMENTAL COMPLAINT**

Plaintiff, )

vs. )

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, )

Defendant.

Defendants Jasper County School District and the Hon. Berty Riley ("Defendants"), by and through its undersigned counsel, hereby respond to the allegations of Plaintiff's Second Supplemental Complaint, in accordance with the numbered paragraphs thereof, as follows:

1. Admitted upon information and belief.
2. Admitted upon information and belief.
3. Admitted upon information and belief.
4. Denied as stated.
5. Denied.
6. Denied.
7. Admitted.
8. Admitted.
9. Admitted.
10. Admitted.

11. Admitted.
12. Denied as stated. Defendants crave reference to the entirety of Exhibit B.
13. Denied.
14. Admitted.
15. Admitted.
16. This is a legal conclusion to which no responsive averment is required.
17. Denied as stated. Defendants crave reference to the entirety of Exhibit B.
18. Admitted.
19. Denied as stated. Defendants crave reference to the entirety of Exhibit B.
20. Defendants restate their responses to the incorporated averments.
21. Denied.
22. Denied.
23. Admitted.
24. Denied.
25. Admitted.
26. Admitted.
27. Admitted, except bold-underlining emphasis is denied.
28. Denied.

**FIRST AFFIRMATIVE DEFENSE**

29. Plaintiff South Carolina Public Interest Foundation is not a taxpayer of the Jasper County School District affected by the alleged activities of the defendants and therefore lacks standing to bring the causes of action alleged in the Amended and Supplemental Complaint.

**SECOND AFFIRMATIVE DEFENSE**

30. Plaintiff Edward D. Sloan is not a taxpayer of the Jasper County School District affected by the alleged activities of the defendants and therefore lacks standing to bring the

causes of action alleged in the Amended and Supplemental Complaint.

**THIRD AFFIRMATIVE DEFENSE**

31. Plaintiffs' causes of action are each and individually barred by *laches*. "Under *laches*, if a party who knows his rights does not timely assert them, and by his delay, causes another party to incur expenses or otherwise detrimentally change his position, then equity steps in and refuses to enforce those rights." *Sloan v. Dep't of Transp.*, 618 S.E.2d 876, 880 (S.C. 2005).

32. Defendant JCSD' South Carolina Business Opportunities ("SCBO") advertisement of the design-build solicitation ran in the June 2, 2014 SCBO edition.

33. Defendant JCSD issued its "short list" notification on July 14, 2014, for this design-build solicitation.

34. The two "short list" design-build proposers gave presentations to the Board on August 28, 2014.

35. JCSD published a document entitled "An Introduction to the Bees Creek Project" on its webpage on September 3, 2104, referencing the solicitation.

36. Minutes of the JCSD Board meeting of September 8, 2014 included a public discussion of the Bees Creek Project and the design-build procurement, as well as noting that Plaintiff Davidson and Plaintiff Woods were noted as present at the meeting as revealed by their being listed as having given "Public Comments" at the same meeting.

37. The two short-listed design-build proposers' electronic presentations were posted on the JCSD web page on September 9, 2014.

38. Plaintiff Sloan sent a FOIA request dated September 24, 2014, inquiring about the contract "to provide design/build services for the Bees Creek Project." 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.

39. The Written Determination was sent to Mr. Sloan by the JCSD on October 10, 2014.

40. Plaintiff 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 (Amd. Complaint Exhibit A).

41. The Board approved executing the contract with the design-builder upon the minutes of its November 10, 2104, public meeting.

42. The contract was executed on November 10, 2104 (Plaintiffs' Exhibit E).

43. The Plaintiffs' original summons and complaint was filed in the court on October 29, 2014, and it sought to prevent the procurement from proceeding. However it was not served upon the Defendants until after the contract was executed. The Defendants' Acceptance of Service is dated November 21, 2014.

44. The Defendants moved to dismiss the original complaint as moot, whereupon the Plaintiffs filed their Amended Complaint dated January 8, 2015.

45. Plaintiffs knew their rights in the subject matters raised by the Amended and Supplemental Complaint and did not timely assert them.

46. Plaintiffs' delay in asserting their claims caused the defendants to incur expenses and otherwise detrimentally change their position.

47. Equity should refuse to enforce the asserted rights of the plaintiffs in this case on account of their *laches* as herein demonstrated.

#### **FOURTH AFFIRMATIVE DEFENSE**

48. Plaintiffs Davidson and Woods are barred from equitable relief by the doctrine of unclean hands.

#### **FIFTH AFFIRMATIVE DEFENSE**

49. The approval on its minutes of the final contract between the Jasper County

School District and the design/builder by the Board of Trustees of the Defendant Jasper County School District constitutes a waiver of any procurement procedural defect, a ratification of the procurement, and an independent exercise of legislative power by the Board of Trustees affirming the contract and exercising its legitimate scope of discretionary legislative authority under South Carolina law.

**SIXTH AFFIRMATIVE DEFENSE**

50. Defendants are not entitled to attorneys' fees and costs of litigation pursuant to S.C. Code Ann. § 15-77-300 et seq.

**SEVENTH AFFIRMATIVE DEFENSE**

51. Defendants deny each and every allegation in the Complaint except those expressly admitted herein.

**EIGHTH AFFIRMATIVE DEFENSE**

52. The May 11, 2015, Resolution of the Jasper County Board of Education (Exhibit G to the Second Supplementary Complaint) is action taken in the legislative discretion of the political subdivision's governing body. It waives all infirmities in the solicitation and award, ratifies the solicitation and award, and exempts the solicitation and award from the requirements of the Procurement Code, all through the governing body's exercise of its legitimate governmental legislative authority.

53. Accordingly, the Complaint fails to state a cause of action.

54. Additionally, even if the Complaint states a cause of action, it is moot.

WHEREFORE, having fully answered the Amended and Supplemental Complaint, Defendants respectfully prays that the Court dismiss Plaintiffs' claims against it, with all costs and expenses awarded to Defendants, together with any and all further relief that the Court deems equitable and just.

Respectfully submitted,

CHILDS & HALLIGAN, P.A.

By: 

Keith R. Powell, S.C. Bar No. 69292  
kpowell@childs-halligan.net

P.O. Box 11367  
Columbia, South Carolina 29211  
(803) 254-4035

Attorney for Defendants Jasper County School  
District and Berty Riley

July 21, 2015

Columbia, South Carolina

**CERTIFICATE OF SERVICE BY MAIL**

The undersigned of Childs & Halligan, P.A., hereby certifies that she has served the following counsel of record with the foregoing **ANSWER AND AFFIRMATIVE DEFENSES TO PLAINTIFF'S SECOND SUPPLEMENTAL COMPLAINT** by mailing a copy of same, postage prepaid and return address clearly indicated, to the following on this 21 day of July, 2015:

James C. Carpenter, Esq.  
Carpenter Law Firm, PC  
819 E. North Street, Suite 230  
Greenville, SC 29601

*Sheri Wainscott*

---

Sheri Wainscott

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF JASPER )

IN THE COURT OF COMMON PLEAS

South Carolina Public Interest )  
Foundation, *et al.*, )

C.A. No. 2014-CP-27-468

Plaintiff, )

**DEFENDANTS' MEMORANDUM OF LAW  
IN SUPPORT OF ITS MOTION FOR  
SUMMARY JUDGMENT**

vs. )

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, )

Defendant. )

This case is ready for disposition on the documents and the law. S.C. R. Civ. P. 56(b).

First, the case has been made moot by the Board Resolution discussed below. Second, even in the absence of the Board Resolution, the defendants did not violate their procurement code.

Judge Buckner denied the Plaintiffs a preliminary injunction, but the Contractor has nonetheless all but stopped work on the contract because the JCSD cannot give firm assurances of payment on account of the Plaintiffs' demand that the contract be invalidated. The unsatisfactory state of JCSD facilities noted in both the Written Determination and the Board Resolution therefore remains unaddressed until this case is concluded.

The Jasper County School District (JCSD) conducted a "design-build" procurement last year to award a contract for the renovation and conversion of its Bees Creek facility. 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.

While this case was pending, the Board of Trustees of the JCSD adopted a Resolution on May 11, 2015. (Complaint Exhibit G) (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.

The Board has the legislative power and discretion to interpret its own Procurement Code. Moreover, the Board has the legislative power and discretion to exercise all of the powers noted in the Resolution. Procurement codes are remedial and must be construed liberally to carry out their purposes. *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (2003). S.C. Code § 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 Company v. Sumter County*, 361 S.C. 483, 604 S.E.2d 718 (2004). 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.

Under the Board’s own procurement policy, “if after an award it is determined that a solicitation or award of a contract is in violation of this policy, the: (1) if the person awarded the contract has not acted fraudulently or in bad faith: (a) a contract may be ratified and affirmed, provided it is determined that doing so is in the best interest of the school district ....”

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(JCSD Policy DJ-R). The Board has the power to ratify any contract found not to be awarded under the policy, just as the Sumter County Council had the power to award the contract in *Glasscock, supra*, by exemption. Setting aside the contract award is an overly drastic remedy in derogation of the Board's power to award contracts even if they are not done under the Procurement Code.

Nonetheless, the Board and JCSD did not violate its policy in the original 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." 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." This is Article 4, which is separate from the Article 2 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

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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 OSF 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*. 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

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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.

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. The public can respond to this discretionary activity at the ballot box – and will in fact have that opportunity in September 2015 as to all nine board seats (pursuant to a federal court-ordered special election of all seats).

This Court should grant the Defendants' motion.

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Respectfully submitted,

CHILDS & HALLIGAN, P.A.

By:



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Attorneys for Defendants Jasper County School  
District and Berty Riley

July 31, 2015

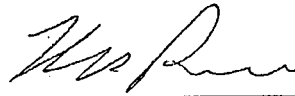
Columbia, South Carolina

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**CERTIFICATE OF SERVICE BY MAIL**

The undersigned of Childs & Halligan, P.A., hereby certifies that ~~she~~ has served the following counsel of record with the foregoing **DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS** by mailing a copy of same, postage prepaid and return address clearly indicated, to the following on this 31 day of July, 2015:

James C. Carpenter, Esq.  
Carpenter Law Firm, PC  
819 E. North Street, Suite 230  
Greenville, SC 29601

  
\_\_\_\_\_



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\*LICENSED IN S.C. & N.C.

July 30, 2015

2015 AUG -3 AM 10: 21

MARGARET BOSTICK  
CLERK OF COURT  
JASPER COUNTY SC

The Hon. Margaret Bostick  
Clerk of Court  
PO Box 248  
Ridgeland, SC 29936

Re: *South Carolina Public Interest Foundation et al. v. Jasper County School District*  
Civil Action Number 2014-CP-27-468

Dear Ms. Bostick:

We enclose for filing in this action an original and one copy of **Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment** and a Certificate of Service.

Please file the originals and return the extra copy to me, file stamped, in the enclosed postage-paid envelope.

Thank you for your help and cooperation.

Sincerely yours,

James G. Carpenter

Enclosures  
CC w/ enclosures: Keith R. Powell

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF JASPER )  
 )  
 South Carolina Public Interest Foundation, )  
 Edward D. Sloan, Jr, Denise G. Davidson, )  
 and Milton Woods, Jr., individually and on )  
 behalf of all others similarly situated, )  
 Plaintiffs, )  
 )  
 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 )  
 Defendants. )  
 )

IN THE COURT OF COMMON PLEAS  
 CIVIL ACTION NO. 14-CP-27-468

**Plaintiffs' Memorandum of Law in  
 Opposition to Defendants'  
 Motion for Summary Judgment**

2015 AUG -3 AM 10: 21  
 MANUARET BOSTICK  
 CLERK OF COURT  
 JASPER COUNTY SC

**NOW COME** the Plaintiffs, by their undersigned attorney, and submit this Memorandum of Law in opposition to the Defendants' Motion for Summary Judgment. As of this filing, Defendants have not supported their Motion with a Memorandum of Law, nor have they articulated the reasons for their Motion for Summary Judgment. Therefore, Plaintiff is left to surmise the Defendants' reasons, based on prior statements and arguments to this Court.

**Statement of the Case**

Plaintiffs filed this action alleging that the Defendants had procured nearly \$3 million worth of construction services in violation of the school district procurement policy. Defendants filed a Motion to Dismiss the original Complaint and another Motion to Dismiss the Amended Complaint. The Court, Judge Buckner, denied the Motions to Dismiss. Plaintiffs also moved for a Preliminary Injunction, and the Court, Judge Buckner, denied that motion as well.

On June 15, 2015, Defendants moved for Summary Judgment. On June 16, Plaintiffs served a Motion to file a Second Supplemental Complaint to allege matters that had transpired

after the filing of the earlier Complaints. Eventually Defendants consented to the filing of the Second Supplemental Complaint. It was file stamped July 17, 2015. Defendants filed an Answer to the Second Supplemental Complaint on or about July 21, 2015. Defendants contend that their Motion for Summary Judgment, filed in June, is sufficiently broad to address the Second Supplemental Complaint.

The following Statement of Facts comes from the Plaintiffs' allegations in the Second Supplemental Complaint.

#### **Statement of Facts**

1. Plaintiff South Carolina Public Interest Foundation is a corporation not for profit, organized and existing under the laws of the State of South Carolina and dedicated to the public interest, including the proper enforcement of procurement codes and the Constitution of the State of South Carolina.
2. Plaintiff Edward D. Sloan, Jr, is a citizen, resident, taxpayer, and registered elector of Greenville County, South Carolina.
3. Plaintiffs Denise G. Davidson and Milton Woods, Jr., are citizens, residents, taxpayers, and registered electors of Jasper County, South Carolina.
4. Defendant Jasper County School District ("District"), was created by and exists pursuant to an Act of the General Assembly.
5. Plaintiffs possess standing to bring this action as citizens, residents, taxpayers, and registered electors; and because the great public importance and manifest urgency of the matters they allege in this action.
6. This Court possesses jurisdiction under the following decisions, which address public interest and taxpayer standing: *South Carolina Public Interest Foundation v. South*

*Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d521 (2013), *American Petroleum Institute v. S.C. Dep't. of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009), *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008), *Sloan v. Department of Transportation*, 379 S.C. 160, 666 S.E.2d 236 (2008), *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005), *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003), *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000), *Baird v. Richland County*, 333 S.C. 519, 511 S.E.2d 69 (1999), *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997); and under S.C. Code Ann. § 15-53-10 *et seq.*, known as the Uniform Declaratory Judgment Act.

7. S.C. Code Ann. § 11-35-310(23) defines political subdivisions to include school districts.
8. South Carolina Consolidated Procurement Code, S.C. Code Ann. § 11-35-10, *et. seq.*, requires a political subdivision to use its own procurement policy adopted pursuant to S.C. Code Ann. § 11-35-50.
9. S.C. Code Ann. § 11-35-50 requires all political subdivisions to adopt policies and procedures embodying “sound principles of appropriately competitive procurement.”
10. District’s letter to Sloan dated October 22, 2014 (**Exhibit A**) indicates that § 11-35-50 applies to District.
11. May 5, 2010, pursuant to § 11-35-50, Defendants’ adopted a Procurement Code Policy (**Exhibit B**), which is now in force.

12. District's Procurement Code Policy § 2-102(1) requires, "Contracts of \$50,000 or more must be awarded by competitive sealed bidding" (emphasis added).
13. Unlike S.C. Code Ann. § 15-35-1520 (the comparable section in the South Carolina Consolidated Procurement Code), the District's Procurement Code Policy § 2-102(1) does not contain an exception. Thus, § 2-102(1) is mandatory for "Contracts of \$50,000 or more." *Id.*
14. July 14, 2014, District issued Request for Proposals 14-06-01 (**Exhibit C**), soliciting more than \$2 million design-build services to renovate its Bees Creek Project, which includes more than \$50,000 of construction services; it also includes architectural services.
15. On November 10, 2014, Defendants procured construction services of \$50,000 or more, with a guaranteed maximum price of \$2.9 million, using a method of selection of source other than competitive sealed bidding (**Exhibit E**).
16. Competitive sealed bidding requires an Invitation for Bids, but Defendants have not issued an Invitation for Bids for this procurement of construction services of \$50,000 or more.
17. District's Procurement Code Policy § 4-301 requires it to use negotiations to select its source of procurement of architectural services.
18. Defendants procured architectural services through the contract attached as **Exhibit E**.
19. The simultaneous use of competitive sealed bidding and negotiations, or any other method to make a single procurement, is impossible.
20. The procurement of construction services of \$50,000 or more by **Exhibit E** violates the District's Procurement Code Policy, and is unlawful.
21. If the Court determines that contrary to Procurement Code Policy § 2-102(1), District's Procurement Code Policy enables Defendants to procure construction services of \$50,000

or more using a Request for Proposals, Defendants' undated determination (**Exhibit D**) is insufficient to satisfy the requirements of Procurement Code Policy § 2-103.

22. The procurement violates the District's Procurement Code Policy, and is unlawful as set out more fully below.
23. **Exhibit D**, the written determination, was posted to the school district website on October 10, 2014, nearly 3 months after the District issued the Request for Proposals, and one month after the District issued an intent to award letter on September 10, 2014 (**Exhibit F**).
24. The purpose of the written determination is to justify the use of the Request for Proposals, and the written determination should have been issued prior to when the Request for Proposals was issued.
25. District Procurement Code Policy § 2-103, paragraph (6) states:

(6) Evaluation factors: the request for proposals shall state the evaluation factors in relative order of importance. Price may but need not be an initial evaluation factor. Each responsive and responsible offeror's proposal must be evaluated. The proposal must then be ranked in accordance with the results of such evaluation.
26. On or about May 11, 2015, Defendants resolved by which they purported to ratify their procurement at issue in this case, and all of its processes (**Exhibit G**). Plaintiffs contend this attempted ratification was unlawful and insufficient.

#### **Legal Discussion**

Defendants' procurement policy § 6-403 states the following:

If after an award it is **determined** that a solicitation or award of a contract is in **violation** of this policy, then:

- (1) if the person awarded the contract has not acted fraudulently or in bad faith:
  - (a) the contract may be ratified and affirmed, provided it is **determined** that doing so is in the **best interest of the school district**; . . .

*Id.*, (emphasis added).

**Exhibit G** fails to comply with the District Procurement Policy ratification process and is unlawful and ineffective for the following reasons:

- a. The District Procurement Policy requires as a precondition to a ratification a **determination** that “the solicitation or award was in violation of [the District Procurement] policy,” but the Defendants failed to make such a determination, and indeed contended just the opposite throughout their Resolution.
- b. The District Procurement Policy requires a separate, written “determination” to ratify “the solicitation or award of a contract,” and the Defendants did not make a separate, written “determination.”
- c. If the Defendants contend that the Resolution is actually the same thing as the written determination, the Resolution fails to comply with the District Procurement Policy in that it makes no written “determination” that ratifying the unlawful solicitation or award is “in the best interest of the school district.”

South Carolina courts have ruled that local procurement codes are to be construed for the benefit of the taxpayers.

The County’s procurement code is remedial in nature, and its provisions should be **construed liberally to carry out its purposes**. See *South Carolina Dep’t of Mental Health v. Hanna*, 270 S.C. 210, 213, 241 S.E.2d 563, 564 (1978) (“A **remedial statute should be liberally construed** in order to effectuate its purpose.”); *Spencer v. Barnwell County Hosp.*, 314 S.C. 405, 408, 444 S.E.2d 538, 540 (Ct.App.1994) (“In considering a remedial act designed to protect a class of persons or the public at large, the courts liberally construe the act to carry out its purposes.”). Because the express purpose of the procurement code is to ensure the “efficient and economical use of revenues” provided by the taxpayers (§ 7-192), the bonding requirements of section 7-238 should be read **to afford the greatest protection to the citizens** of Greenville County.

*Sloan v. Greenville County*, 356 S.C. 531, 565, 590 S.E.2d 338, 356 (Ct. App. 2003) (emphasis added).

The Court of Appeals ruled that taxpayers were subset of citizens specifically harmed by the wrongful expenditure of taxpayer funds.

In *Mauldin v. City Council*, 33 S.C. 1, 11 S.E. 434 (1890), the South Carolina Supreme Court examined the issue of taxpayer standing. In *Mauldin*, taxpayers challenged the purchase of an electric plant by the city council as *ultra vires*, claiming the purchase increased their tax burden. *Id.* at 15, 11 S.E. at 434. The Court explained how taxpayers differ from other members of the general public and how taxpayers suffer harm from ultra vires acts. *Id.* at 18-21, 11 S.E. at 435-36. The *Mauldin* court stated:

“The injury charged as the result of the acts complained of is a private injury in which the tax-payers of the county . . . are the individual sufferers, rather than the public. The people out of the county bear no part of the burden; nor do the people within the county, except the tax-payers, bear any part of it. It is therefore an injury peculiar to one class of persons, namely the tax-payers of the county . . . .”

*Id.* at 20, 11 S.E. at 436 (quoting *Newmeyer v. Missouri & Miss. R.R. Co.*, 52 Mo. 81 (1873)). The Court held the taxpayers were “not the whole public, but comparatively a small part of it.” *Id.* at 18, 11 S.E. at 435. The taxpayers “constitute a class specially damaged by the alleged unlawful act,” and therefore have “a special interest in the subject-matter of the suit, distinct from that of the general public.” *Id.* at 19, 11 S.E. at 436 (quoting *Mayor and City Council of Baltimore v. Gill*, 31 Md. 375, 394 (1869)).

*Sloan v. School District of Greenville County*, 342 S.C. 515, 519-20, 537 S.E.2d 299, 301 (Ct. App. 2000) (footnote omitted) (emphasis added).

The Court of Appeals also reasoned:

In this case, the public interest involved is the prevention of the unlawful expenditure of money raised by taxation. “Public policy demands a system of checks and balances whereby taxpayers can hold public officials accountable for their acts . . . . Taxpayers must have some mechanism of enforcing the law.” *Eastern Missouri Laborers Dist. Council*, 781 S.W.2d at 47.

*Sloan v. School District of Greenville County*, 342 S.C. 515, 523, 537 S.E.2d 299, 303 (Ct. App. 2000) (emphasis added). The Court of Appeals reasoned further:

The expenditure of public funds pursuant to a competitive bidding statute is of immense public importance. Requiring that contracts only be awarded through the process of competitive sealed bidding demonstrates the lengths to which our

government believes it should go to maintain the public's trust and confidence in governmental management of public funds. The integrity of the competitive sealed bidding process is so important that in some states "once a contract is proved to have been awarded without the required competitive bidding, a waste of public funds [is] presumed . . . without showing that the municipality suffered any alleged injury." 18 Eugene McQuillin, *The Law of Municipal Corporations* § 52.26 (3d ed.1993); see 5 Sandra M. Stevenson, *Antieau on Local Government Law* § 73.04 [11] (2d ed.1999) (stating that where a bid statute has been disregarded, injury to taxpayers is almost conclusively presumed). The Missouri Supreme Court went a step further and held, "Even though an expenditure might produce a net gain, if the expenditure is not contemplated by the enabling legislation, it is illegal and should be enjoined." *Eastern Missouri Laborers Dist. Council*, 781 S.W.2d at 47.

*Sloan v. School District of Greenville County*, 342 S.C. 515, 524, 537 S.E.2d 299, 303-304 (Ct. App. 2000) (emphasis added). After the funds are spent illegally, the taxpayers have little or no chance to recover the misspent funds.

Defendants have asserted that the Plaintiffs lack standing, and that laches should prevent a finding of likelihood of success on the merits.

In support of their argument that the Plaintiffs lacked standing, Defendants cited and presented the Circuit Court Opinion of the Hon. G. Thomas Cooper in *Sloan v. Department of Transportation*, Civil Action No. 05-CP-40-0062 (Order entered May 18, 2006), 2006 WL 665-6104 (S.C.Com.Pl.) (Trial Order). Judge Cooper ruled that the plaintiff Sloan lacked standing as a taxpayer to challenge the DOT's emergency procurement of construction services to repair Ladson Road in Charleston County. After the Circuit Court ruling, the Plaintiff appealed to the South Carolina Supreme Court, which reversed the judgment of the Circuit Court, and ruled that Sloan did possess both taxpayer standing and public importance standing.

Sloan argues his status as a taxpayer grants him standing to bring this case. Additionally, Sloan contends that the issue in this case is one of great public importance which justifies standing. We agree.

Generally, "a private individual may not invoke the judicial power to determine the validity of an executive or legislative act unless the private individual can show that, as a result of that action, a direct injury has been sustained, or that there is immediate danger a direct injury will be sustained." *Sloan v. Wilkins*, 362 S.C. 430,

436, 608 S.E.2d 579, 582-83 (2005). Nonetheless, “[a] **taxpayer’s standing to challenge unauthorized or illegal governmental acts has been repeatedly recognized in South Carolina**,” *Sloan v. School Dist. of Greenville County*, 342 S.C. 515, 520, 537 S.E.2d 299, 301 (Ct.App.2000), **and indeed has been repeatedly recognized as to Sloan himself**.

*Sloan v. Department of Transportation*, 379 S.C. 160, 169, 666 S.E.2d 236, 240-41 (2008) (“Ladson Road”) (emphasis added). Thus, the Supreme Court reversed the opinion of the Circuit Court on the very issue for which the Defendants cited the Circuit Court opinion.

The courts of South Carolina have granted taxpayer and public interest standing to taxpayers and specifically to the South Carolina Public Interest Foundation on numerous occasions. *South Carolina Public Interest Foundation v. South Carolina Transportation Infrastructure Bank*, 403 S.C. 640, 744 S.E.2d 521 (2013), *American Petroleum Institute v. S.C. Dep’t. of Revenue*, 382 S.C. 572, 677 S.E.2d 16 (2009), *South Carolina Public Interest Foundation v. Harrell*, 378 S.C. 441, 663 S.E.2d 52 (2008), *Sloan v. Hardee*, 357 S.C. 495, 640 S.E.2d 457 (2007); *Cornelius v. Oconee County*, 369 S.C. 531, 633 S.E.2d 492 (2006); *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005), *Sloan v. Wilkins*, 362 S.C. 430, 608 S.E.2d 579 (2005); *Sloan v. Sanford*, 357 S.C. 431, 593 S.E.2d 470 (2004); *Sloan v. Greenville County*, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003), *Sloan v. School District of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000), *Baird v. Richland County*, 333 S.C. 519, 511 S.E.2d 69 (1999), *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997). On the basis of these authorities, the Plaintiffs possess standing both as taxpayers and based on the public importance of the issues they raise.

Second, Defendants argue that laches should bar the claims of the Plaintiffs.<sup>1</sup> As set out

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<sup>1</sup> In support of their argument on laches, Defendants cited another Circuit Court case, also called *Sloan v. Department of Transportation*, Civil Action Number 05-CP-40-2816 (November 22, 2005). The South Carolina Supreme Court

above, Defendants issued Request for Proposals on July 14, 2014. Defendants issued a notice of intent to award on September 10, 2014. Defendants first issued a written determination on October 10, 2014. Plaintiffs filed suit November 3, 2014, one week **before** Defendants signed the unlawful procurement contract on November 10, 2014. After the Defendants executed the contract, the Plaintiffs filed an Amended and Supplemental Complaint on January 12, 2015. Because the Plaintiffs filed suit **before** the Defendants signed the procurement contract, Defendants have failed to demonstrate the kind of unreasonable delay and resulting prejudice necessary to invoke the doctrine of laches.

Plaintiffs Woods and Davidson are taxpayers of Jasper County. *Sloan v. School District* and many similar cases have held that taxpayers have a significant interest in seeing that their taxpayer funds are spent lawfully. As demonstrated above, the School District has procured in violation of the School District Procurement Code, and as a result, these taxpayers have no adequate remedy at law. Their only remedy is an action in equity to enjoin the unlawful expenditure of taxpayer funds. This expenditure “**is illegal and should be enjoined.**” *Sloan v. School District*, 342 S.C. 515, 524, 537 S.E.2d 299, 303-304 (Ct. App. 2000) *quoting Eastern Missouri Laborers Dist. Council*, 781 S.W.2d 43, 47 (Mo. 1989) (emphasis added).

**WHEREFORE**, Plaintiffs pray the Court for an Order denying the Defendants Motion for Summary Judgment; **AND**

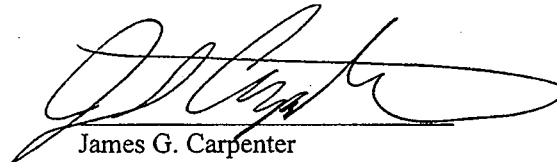
1. Declaring that the procurement by contract dated November 10, 2014 (**Exhibit E**), in which Defendants procured construction services of \$50,000 or more using a method of source selection other than competitive sealed bidding violates the

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reversed the Circuit Court ruling in this case as well, but on grounds other than those cited by the Defendants. *Sloan v. Department of Transportation*, 365 S.C. 299, 618 S.E.2d 876 (2005) (Ravenel Bridge).

- District's Procurement Code Policy, and is unlawful;
2. Declaring that Defendants are not authorized to procure design-build services which include construction services of \$50,000 or more;
  3. Declaring that Defendants' undated determination (**Exhibit D**) is insufficient to satisfy the requirements of Procurement Code Policy § 2-103;
  4. Declaring that the Resolution dated May 11, 2015 (**Exhibit G**) is ineffective to ratify the unlawful solicitation and award of the contract at issue;
  5. Enjoining Defendants from procuring design-build services through the contract (**Exhibit E**);
  6. Awarding the Plaintiff attorneys' fees and costs of litigation pursuant to S.C. Code Ann. § 15-77-300 *et seq.*
  7. Granting Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,  
THE CARPENTER LAW FIRM, P.C.



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Attorney for Plaintiffs

July 30, 2015

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF JASPER )

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 14-CP-27-468

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

**Certificate of Service**

v. )

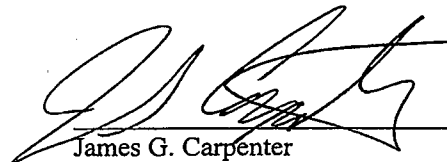
Jasper County School District and the Hon. )  
Berty Riley, in her official capacity as )  
Chairman of the Board of Trustees of the )  
Jasper County School District )  
Defendants. )

2015 AUG -3 AM 10:  
MARGARET POST  
CLERK OF COURT  
JASPER COUNTY

The undersigned attorney hereby certifies that he served a copy of the foregoing Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment upon opposing counsel by first-class mail this July 30, 2015, addressed as follows:

Keith R. Powell  
Childs & Halligan  
PO Box 11367  
Columbia, SC 29211-1367

THE CARPENTER LAW FIRM, P.C.



James G. Carpenter  
S.C. Bar No. 1136  
819 E. North Street  
Greenville, SC 29601  
Telephone: (864) 235-1269  
Facsimile: (864) 331-3083  
Attorney for Plaintiffs

July 30, 2015

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF JASPER )  
 )  
South Carolina Public Interest Foundation, et al. )  
 Plaintiff, )  
 vs. )  
 )  
Jasper County School District )  
 Defendant. )

IN THE COURT OF COMMON PLEAS  
 14th JUDICIAL CIRCUIT  
 CASE NO.: 2014-CP-27-00468

**MOTION AND ORDER INFORMATION  
 FORM AND COVERSHEET**

2015 NOV 30 AM 10:54  
 MARGARET HOSSTICK  
 CLERK OF COURT  
 JASPER COUNTY SC

FILED

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                             |                                                                         |                                                         |                                                              |                                                 |                                          |                                                        |                                                        |                                                                |                                                                                                                                                           |  |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------|---------------------------------------------------------|--------------------------------------------------------------|-------------------------------------------------|------------------------------------------|--------------------------------------------------------|--------------------------------------------------------|----------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------|--|
| Plaintiff's Attorney:<br><u>James G. Carpenter, Bar No. 1136</u><br>Address:<br><u>819 East North St., Greenville, SC 29601</u><br>Phone: <u>864-235-1269</u> Fax <u>864-331-3083</u><br>E-mail:<br><u>James.Carpenter@carpenterlawfirm.net</u> Other: _____                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | Defendant's Attorney:<br><u>Keith R. Powell, Bar No. 6929</u><br>Address:<br><u>PO Box 11367 Columbia, SC 29211-1367</u><br>Phone: <u>803-254-4035</u> Fax _____<br>E-mail: <u>KPowell@childs-halligan.net</u> Other: _____ |                                                                         |                                                         |                                                              |                                                 |                                          |                                                        |                                                        |                                                                |                                                                                                                                                           |  |
| <input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)<br><input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)<br><input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                             |                                                                         |                                                         |                                                              |                                                 |                                          |                                                        |                                                        |                                                                |                                                                                                                                                           |  |
| <b>SECTION I: Hearing Information</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                             |                                                                         |                                                         |                                                              |                                                 |                                          |                                                        |                                                        |                                                                |                                                                                                                                                           |  |
| Nature of Motion: <u>To Alter or Amend Order</u><br>Estimated Time Needed: <u>30 minutes</u> Court Reporter Needed: <input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                             |                                                                         |                                                         |                                                              |                                                 |                                          |                                                        |                                                        |                                                                |                                                                                                                                                           |  |
| <b>SECTION II: Motion/Order Type</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                                                                                             |                                                                         |                                                         |                                                              |                                                 |                                          |                                                        |                                                        |                                                                |                                                                                                                                                           |  |
| <input checked="" type="checkbox"/> Written motion attached<br><input type="checkbox"/> Form Motion/Order<br>I hereby move for relief of action by the court as set forth in the attached proposed order.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                             |                                                                         |                                                         |                                                              |                                                 |                                          |                                                        |                                                        |                                                                |                                                                                                                                                           |  |
| <div style="display: flex; justify-content: space-between;"> <div style="text-align: center;"> <br/>           Signature of Attorney for <input checked="" type="checkbox"/> Plaintiff / <input type="checkbox"/> Defendant         </div> <div style="text-align: right;">           Nov. 24, 2015<br/>           Date submitted         </div> </div>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                                             |                                                                         |                                                         |                                                              |                                                 |                                          |                                                        |                                                        |                                                                |                                                                                                                                                           |  |
| <b>SECTION III: Motion Fee</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                             |                                                                         |                                                         |                                                              |                                                 |                                          |                                                        |                                                        |                                                                |                                                                                                                                                           |  |
| <input checked="" type="checkbox"/> PAID - AMOUNT: \$ _____<br><input type="checkbox"/> EXEMPT: (check reason) <table style="width: 100%; border: none;"> <tr> <td><input type="checkbox"/> Rule to Show Cause in Child or Spousal Support</td> <td><input type="checkbox"/> State Agency v. Indigent Party</td> </tr> <tr> <td><input type="checkbox"/> Domestic Abuse or Abuse and Neglect</td> <td><input type="checkbox"/> Post-Conviction Relief</td> </tr> <tr> <td><input type="checkbox"/> Indigent Status</td> <td><input type="checkbox"/> Motion for Stay in Bankruptcy</td> </tr> <tr> <td><input type="checkbox"/> Sexually Violent Predator Act</td> <td><input type="checkbox"/> Motion for Execution (Rule 69, SCRPC)</td> </tr> <tr> <td><input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions</td> <td></td> </tr> </table> Name of Court Reporter: _____<br><input type="checkbox"/> Other: _____ |                                                                                                                                                                                                                             | <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support | <input type="checkbox"/> State Agency v. Indigent Party | <input type="checkbox"/> Domestic Abuse or Abuse and Neglect | <input type="checkbox"/> Post-Conviction Relief | <input type="checkbox"/> Indigent Status | <input type="checkbox"/> Motion for Stay in Bankruptcy | <input type="checkbox"/> Sexually Violent Predator Act | <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) | <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions |  |
| <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | <input type="checkbox"/> State Agency v. Indigent Party                                                                                                                                                                     |                                                                         |                                                         |                                                              |                                                 |                                          |                                                        |                                                        |                                                                |                                                                                                                                                           |  |
| <input type="checkbox"/> Domestic Abuse or Abuse and Neglect                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | <input type="checkbox"/> Post-Conviction Relief                                                                                                                                                                             |                                                                         |                                                         |                                                              |                                                 |                                          |                                                        |                                                        |                                                                |                                                                                                                                                           |  |
| <input type="checkbox"/> Indigent Status                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | <input type="checkbox"/> Motion for Stay in Bankruptcy                                                                                                                                                                      |                                                                         |                                                         |                                                              |                                                 |                                          |                                                        |                                                        |                                                                |                                                                                                                                                           |  |
| <input type="checkbox"/> Sexually Violent Predator Act                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC)                                                                                                                                                              |                                                                         |                                                         |                                                              |                                                 |                                          |                                                        |                                                        |                                                                |                                                                                                                                                           |  |
| <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                             |                                                                         |                                                         |                                                              |                                                 |                                          |                                                        |                                                        |                                                                |                                                                                                                                                           |  |
| <b>JUDGE'S SECTION</b><br><input type="checkbox"/> Motion Fee to be paid upon filing of the attached order.<br><input type="checkbox"/> Other: _____                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     | JUDGE CODE _____<br>Date: _____                                                                                                                                                                                             |                                                                         |                                                         |                                                              |                                                 |                                          |                                                        |                                                        |                                                                |                                                                                                                                                           |  |
| <b>CLERK'S VERIFICATION</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                             |                                                                         |                                                         |                                                              |                                                 |                                          |                                                        |                                                        |                                                                |                                                                                                                                                           |  |
| Collected by: _____ Date Filed: _____<br><input type="checkbox"/> MOTION FEE COLLECTED: \$ _____<br><input type="checkbox"/> CONTESTED - AMOUNT DUE: \$ _____                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                             |                                                                         |                                                         |                                                              |                                                 |                                          |                                                        |                                                        |                                                                |                                                                                                                                                           |  |

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

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

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  
Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 14-CP-27-468

**Plaintiffs' Motion to Alter or Amend  
Order Granting Summary Judgment**

2015 NOV 30 AM 10:54  
MARGARET BOSTICK  
CLERK OF COURT  
JASPER COUNTY SC

FILED

**NOW COME** the Plaintiffs, by their undersigned attorney, and move the Court to alter or amend the order and judgment granting summary judgment to the Defendants entered November 18, 2015, mailed November 20, 2015, and received by these Plaintiffs November 23, 2015.

Plaintiffs filed this action alleging that the Defendants had procured nearly \$3 million worth of construction services in violation of the School District Procurement Policy. On June 15, 2015, Defendants moved for Summary Judgment. The Court granted summary judgment to the Defendants.

Before the Court signed the Order, Jasper County held an election that substantially changed the composition of the School District Board of Trustees. The Board of Trustees is the governing body of the Defendant District. In a meeting on October 12, 2015, the Board voted to suspend all actions on the Bees Creek property, including any actions on the contract, which is the subject of this lawsuit. The minutes record a motion that states as follows:

**12.2 BEES CREEK PROPERTY TIMELINE** (*Enclosed In Separate Binder*)

After discussion and questions a motion was made by Dr. Butler that **no further actions be taken** on Bees Creek Property's contract and **that the contract be suspended** until the board has a chance to review all pertinent documents. Before a vote was made another discussion took place in which the board members, and the Superintendent expressed their questions, concerns and comments.

Mr. Moyd entertained that a motion was on the floor. A request was made to have motion repeated. Dr. Butler repeated her motion that **no further actions be taken on Bees Creek Property's contract and that the contract be suspended** until the board has a chance to review all pertinent documents. Dr. Butler also asked to amend her motion to add that the district staff ensure that the property is appropriately marked with the no trespass signs and secured so people cannot get into the building, seconded by Mr. Horton.

THE MOTION PASSED 5-4.  
(AYES – HORTON/BUTLER/MURRAY/GREEN/KARG)  
(NAYS – RILEY/MODD/MITCHELL/HAZEL)

Jasper County School District Board Meeting Minutes October 12, 2015, Section 12.2 (emphasis added).

On October 21, 2015, Plaintiffs notified the Court by email of the actions of the October 12, 2015 Board meeting, as reported in a newspaper account. When the minutes of the October 12, 2015 meeting were adopted and publicized, Plaintiffs again notified the Court of the actual wording of the Board's action by email dated November 6, 2015.

With this action by the Board, Plaintiffs respectfully suggest that the Order of this Court is improper because the action of the Board on October 12, 2015, made this civil action unripe for decision by this Court, because the Board had suspended all actions on the contract at issue.

In the Order of this Court signed October 30, 2015, and entered November 18, 2015, this Court ruled, in effect, that it should defer to the discretion and decision-making responsibility of the Board, stating as follows:

**The Board has the legislative power and discretion to interpret its own Procurement Code**, and has the legislative power and discretion to exercise all of the powers noted in the Resolution. (See “Discretion of the Defendants” *supra*). S.C. Code § 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 Company v. Sumter County*, 361 S.C. 483, 604 S.E.2d 718 (2004). Procurement decisions are “a function of [the governing body’s] discretion, the exercise of which they are accountable for as publicly elected officials.” *Id.*

In both the regular course of the procurement activity and in the Board Resolution, **the Board itself made the decision** to proceed with design-build delivery, and **the Board itself made the decision** to award the contract to M.B. Kahn. These are not mere administration decisions. Thus, even if the administration of the JCSD somehow misconstrued the Board’s procurement policies in the manner alleged by the plaintiffs, **the Board’s direct participation**, and later its Resolution, were each effective to cement the validity of the contract.

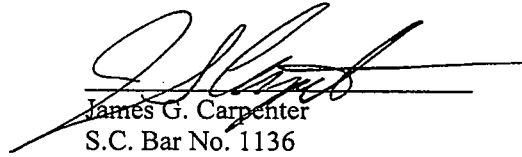
Order entered November 1, 2015, p. 8 (emphasis added).

Now, it appears, that the Board has utilized its “legislative power and discretion to interpret its own Procurement Code” and has decided to suspend all activities related to the contract. Furthermore, **“the Board itself made the decision”** to suspend all actions related to the contract, and **“the Board itself made the decision”** to suspend the contract itself. Just as with the earlier action, the Board’s later action to suspend all activities and the contract itself, involved **the Board’s direct participation**.

Just as the Court upheld the prior discretion and judgment of the Board, this Court should again defer to the discretion and judgment of the Board, newly elected, and withhold a decision in this case, as the matter is not yet ripe for review.

**WHEREFORE**, Plaintiffs pray the Court to alter or amend the Order granting the Defendants’ Motion for Summary Judgment, to deny the Defendants’ Motion at this time, to reconsider the Motion after the District has had time to act, and to grant Plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,  
THE CARPENTER LAW FIRM, P.C.



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Facsimile: (864) 331-3083  
Attorney for Plaintiffs

November 24, 2015

STATE OF SOUTH CAROLINA )

COUNTY OF JASPER )

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

v. )

Jasper County School District and the Hon. )  
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IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO. 14-CP-27-468

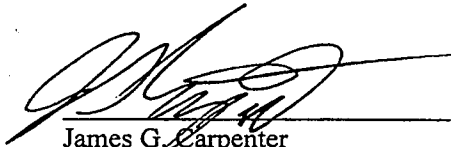
**Certificate of Service**

FILED  
2015 NOV 30 AM 10:56  
MARGARET BOSCHIC  
CLERK OF COURT  
JASPER COUNTY SC

The undersigned attorney hereby certifies that he served a copy of the foregoing Plaintiffs' Motion to Alter or Amend upon opposing counsel by first-class mail this November 24, 2015, addressed as follows:

Keith R. Powell  
Childs & Halligan  
PO Box 11367  
Columbia, SC 29211-1367

THE CARPENTER LAW FIRM, P.C.



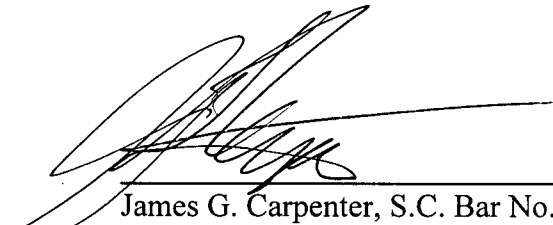
James G. Carpenter  
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Telephone: (864) 235-1269  
Facsimile: (864) 331-3083  
Attorney for Plaintiffs

November 24, 2015

**Certificate of Counsel**

The undersigned Counsel for the Appellants certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

December 15, 2016



---

James G. Carpenter, S.C. Bar No. 1136  
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819 E. North Street  
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(864) 235-1269  
Attorneys for Appellants

**RECEIVED**

DEC 16 2016

SC Court of Appeals