THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

J.C. Nicholson, Jr., Circuit Court Judge

Appellate Case No. 2016-002003

Terratec, Inc., ... Appellant,

v.

Charleston County School District, ...Respondent.

BRIEF OF APPELLANT

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Jean H. Toal, *Appellate Practice in South Carolina* (2nd ed. 2002) 3, 12

2 Donald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law:* 9
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STATEMENT OF ISSUES ON APPEAL

1. The Trial Court erred in finding that the Procurement Panel's decision was supported by substantial evidence.
2. The Trial Court erred in finding there was no due process violation by the School District in appointing its own vice chairman to chair the Procurement Panel.

STATEMENT OF THE CASE

Terratec appeals the Charleston County School District Procurement Panel's Order of April 10, 2014, because the decision is not supported by substantial evidence and was made upon unlawful procedure. In particular, the Panel lacked substantial evidence to deny Terratec compensation for work done on the Rivers Education Center. Also, the Panel improperly included a member of the Charleston County School Board as its chair. As a result, this Court should reverse the Panel's denial of payment to Terratec.

FACTS

The Charleston County School District hired M.B. Kahn Construction as general contractor to renovate the Rivers Education Center. The work included installing micropiles to supplement the center's foundation. M.B. Kahn hired Terratec to design and install the micropiles based upon the specifications in the plans and the geotechnical information provided. (R. p. 34, l.17 – p. 35, l.6).

Terratec designed, tested and installed the micropiles at the Rivers Education Center. (R. p. 35, ll. 3-6). Neither Kahn nor the school district disputes that the micropiles are properly designed, tested and installed. (R. p. 43, ll. 9-11; R. p. 85, ll. 9-10; p. 226, ll.

7-9). Terratec has not been paid for the work done. Terratec has not been paid for additional testing it conducted of the soil conditions and the micropiles. And it has not been paid for the full length of the micropiles it designed, tested and installed.

Terratec filed its claim for payment with the Charleston County School District Procurement Review Panel as required by the Charleston County School District Procurement Code. On March 11, 2014, the Panel convened to hear Terratec's claim. (R. pp. 72-242). Under Charleston County Procurement Code Version 1.5, Section 4410.2.1, the Panel contained a member of the Charleston County School Board. (R. p. 39, ll. 9-12). This member, Tom Ducker, chaired the Panel. He is also vice-chair of the Charleston County School Board which entered the contract. (R. p. 37, ll. 1-3; R. p. 74, ll. 3-10).

Terratec presented the following claims to the Panel:

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

Change Order #2 (47) Tests	$65,000.00
Change Order #3 (48) Engineering	$46,143.27

ii. Additional footage of micropiles.

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

Change Order #1B Contract Adjustment	$338,580.00

(R. pp. 72-242).

On April 10, 2014, the Panel ruled against Terratec on both claims by written order. (R. pp. 8-27). Terratec appeals because the Panel lacks substantial evidence to rule against Terratec, and the Panel improperly included as its chair a member of the opposing party Charleston County School Board.

ARGUMENTS

I. THE COURT SHOULD OVERTURN THE PANEL DECISION TO NOT PAY TERRATEC FOR THE FOUNDATION AT THE RIVERS EDUCATION CENTER BECAUSE THE PANEL DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. Standard of Review.

This matter is an appeal from the findings of the Charleston County School District Procurement Review Panel. The Charleston County School District operates under its own Consolidated Procurement Code Version 1.5 as permitted by South Carolina Code Section 11-35-70. Section 4410.7 of the Charleston County School District Procurement Code Version 1.5 sets forth the standard of review as follows:

> Notwithstanding another provision of law, the decision of the Procurement Review Panel is final as to administrative review and may be appealed only to the circuit court. The standard of review is as provided by the provisions of the South Carolina Administrative Procedures Act.

The Administrative Procedures Act requires the circuit court to reverse or modify a decision when its findings are:

> a) in violation of constitutional or statutory provisions;
>
> ...
>
> c) made upon unlawful procedure;
>
> d) affected by other error of law;
>
> e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record;
>
> ....

S.C. Code Ann. § 1-23-380(A)(6).

This section establishes the "substantial evidence" rule as the standard of judicial review for findings of fact. Jean H. Toal, Appellate Practice in South Carolina 52 (2nd ed.

2002) (citing *Heater of Seabrook v. Public Serv. Comm'n*, 332 S.C. 20, 503 S.E.2d 739 (1998)). Substantial evidence is not a mere scintilla of evidence viewed blindly for one side. Instead, substantial evidence is evidence which "would allow reasonable minds to reach the conclusion" below. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981).

B. Based on the Substantial Evidence, the School District Should Pay For the Additional Testing Because the School District Provided Faulty Data And Required the Tests to Be Done in an Inappropriate Location.

The contract requires that Terratec design the micropiles based upon the project plans and the soil sampling information provided by the school district. Section 1.2.2 of the micropile conditions requires that the micropile design rely on the geotechnical information provided to Terratec. (R. pp. 444-451).

Terratec designed the micropiles based on this information and submitted a load test program to Davis & Floyd for approval. Davis & Floyd was the school district's architect. (R. pp. 227-304). The proposal set forth the purpose of the test, how the test was to be carried out, the data upon which the test relied, and the location of the test. The test was to take place near the job trailer, close to the Rivers Education Center.

Terratec was not allowed to conduct the test as approved in its test submittal. Instead, Terratec had to conduct the test a significant distance away from the Rivers Education Center. The micropiles did not perform as anticipated. There was significant disagreement regarding why the micropiles did not perform as anticipated. This disagreement is documented in the job site notes of June 23, 2011. (R. pp. 373-412). Terratec believed the geotechnical information provided by the school district was incorrect and suggested additional geotechnical testing. The architects Davis & Floyd refused to perform additional testing, insisting that the geotechnical information was

correct. Nevertheless, Terratec conducted standard penetration tests to assess the soil conditions at the test site and closer to the Rivers Education Center. These tests showed a significant sand deposit at the test site and that the Cooper Marl was significantly deeper than shown in the geotechnical reports provided to Terratec. The Cooper Marl is a clayish underground geological formation upon which the foundation was to rest. According to the job site minutes, the school district's architects and engineers were to observe and confirm this information, but they did not. (R. p. 374, ¶ 6).

Terratec also conducted a new load test closer to the Rivers Education Center. Based on the additional geotechnical information, this load test passed. Terratec's additional site testing showed the soil conditions differed from represented in the information provided by the school district. The Cooper Marl was deeper than the school district's geotechnical report indicated, the initial test site had a significant sand formation, and the weight bearing capacity of the Cooper Marl at the Rivers Education Center was less than forecast by the school district.

The school district presented testimony from its architects and engineers addressing Terratec's request for payment of the engineering costs and second load test. William Camp testified that they did not agree with Terratec's conclusions or geotechnical borings though they did not observe Terratec's tests. No school district witness provided a criticism of Terratec's boring log or methodology. No witness for the school district observed the additional testing or pointed to any flaws observed in the testing. The school district does not contest that Terratec's micropiles passed the load test after the additional testing and engineering. The school district does not contest that the micropiles are in place in the project and functioning appropriately.

C. The School District Should Pay Terratec for the Additional Length of the Micropiles Because the Original Quote Relied on the School District's Drawing.

Terratec requests payment for the additional length of micropiles. As a result of the additional engineering work, geotechnical exploration, and tests run by Terratec, Terratec concluded the micropiles would need to be 86 feet long rather than the initial 66 feet indicated in the school district's drawing S-402 and in Terratec's bid. As required, Terratec installed the 627 micropiles to depths of at least 86 feet.

The Panel's Order erroneously finds that Terratec made a unilateral mistake when bidding for the job as follows: "Terratec's alleged assumption in its bid to Kahn limiting its price to a pile length of 66 feet was a unilateral mistake by Terratec." (R. p. 24). The bid document from Terratec states that it anticipates an "installation depth of 78 feet. However, the project specifications and drawings dictate that our proposal include a bid for the installation of the micropiles to depths of 66 feet...." (R. p. 246). There was no mistake by Terratec. Terratec acknowledged that it anticipated a greater depth but conformed its bid to the specifications required by the school district through its architect. Terratec's subcontract anticipates that additional footage may be necessary as follows: "any additional footage of piles will be put in place at a unit price of $45.00 per linear foot." Despite this evidence, the Panel erroneously determined this was a "fixed priced" contract. (R. p. 20).

The Panel erroneously found the 66 feet used for the bid was "not based on any representation or misrepresentation made by CCSD or its consultants." (R. p. 24). The school district's architect, John Orvin, testified that drawing S-402 listed a 66 foot pile tip elevation. He stated this was the page with the data for the bid. He also testified that only

one drawing out of 100 indicated the actual elevation. (R. pp. 236-239). As architect for the school district, Mr. Orvin provided this information to Terratec as a bidder. Therefore, the bid sent in by Terratec, which stated that it was based on the 66 foot depth indicated by the documents, relied on the school district's representation.

Terratec bid $1,992,835 to complete the foundation work with a micropile length of 66 feet. The subcontract provides for an additional $45 per foot. (R. pp. 249-269). Terratec's bid references 66 foot micropiles. (R. pp. 246-248). Drawing S-402 shows micropile embedment of 66 feet. (R. p. 244). And, the school district's program manager's email of September 15, 2011, references 66 foot micropiles. (R. p. 471). The request for additional compensation for the extra length of the micropiles is in Change Order 1B. (R. pp. 328-329).

In August 2011, Terratec submitted a change order for an additional 8 feet of micropile length to bring the length from 66 to 74 feet. The change order was granted for $247,874.80. The school district's program manager analyzed the change order and the projected costs for the micropiles. His email of September 15, 2011, indicates that the additional length did not include the original bid of 66 feet. It also estimated the entire cost of micropiles at $2,592,000. (R. p. 471).

Terratec's initial change order request was for 8 feet of the necessary 20 feet. Terratec submitted the original 8 foot change order at the request of M.B. Kahn, the general contractor. Kahn told Terratec it would submit the additional footage at the end of the job. Terratec submitted its request for the additional length in 2012 before the job was complete.

In response, the school district maintained that the second request was untimely. The school district did not show any damage or prejudice from the later filing. And it did

not contest that the micropiles are 86 feet long and placed beneath the Rivers Education Center.

The school district argues that Terratec is entitled only to payment for the additional 8 feet it has already received. To support this, the school district maintains that its drawing S-402 shows micropile lengths of 78 feet because this drawing is based on sea level measurements such that an extra 12 feet must be added to the notation on the drawing. The drawing contains no such designation. It does not dispute Terratec's bid document reflecting the 66 feet or later correspondence from its project manager acknowledging Terratec's original 66 feet number.

There is no dispute that the micropiles supporting the Rivers Education Center are at least 86 feet in length. There is no dispute that the subcontract requires that Terratec be paid $45 per additional foot. There is no dispute that Terratec's original bid was based upon 66 foot long micropiles as confirmed in its own bid.

II. THE COURT SHOULD REVERSE THE PANEL DECISION BECAUSE THE PANEL WAS CHAIRED BY THE VICE-CHAIRMAN OF THE SCHOOL DISTRICT'S BOARD ALLOWING THE SCHOOL DISTRICT TO SERVE AS BOTH JUDGE AND ADVERSE PARTY.

A. The School District, By Serving as Judge And Adverse Party, Denied Terratec Procedural Due Process.

The due process clause of the Fourteenth Amendment provides "nor shall any state deprive any person of life, liberty, or property without due process of law...." U.S. Const. Amend. XIV, §1. Similarly, the South Carolina Constitution provides no "person [shall] be deprived of life, liberty, or property without due process of law...." S.C. Const. Art. I, §3. "The essential guarantee of the due process clause is that of fairness. The procedure must be fundamentally fair to the individual in the resolution of the factual and legal basis

for government actions which deprive him of life, liberty or property." 2 Donald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 17.5, at 656 (2d ed. 1992); *In re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process.")

Article I, Section 22 of the South Carolina Constitution addresses procedural due process in administrative proceedings. It provides for notice, an opportunity to be heard, an impartial adjudicator, and judicial review as follows:

> No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

S.C. Const. Art. I, § 22.

The adjudication was not impartial because a member of the school district's board served as both a judge and adverse party and the board selected all members of the Panel. Under Section 4410.2 of the Charleston County School District Procurement Code Version 1.5, the school district picked all members of the Panel. In addition, it picked its own vice-chairman Tom Drucker as the chair of the Panel. Section 4410.2 of the Procurement Code requires that "The panel must be comprised of [a] member of The [School] Board appointed by The [School] Board who will chair the panel." Sections 4410.2 and 4410.2.1 Charleston County School Procurement Code Vers. 1.5. Thus, the school district's code requires a member of its board chair the panel that decides disputes between private entities and the school district. In compliance with this requirement, the school district appointed its vice-chairman Tom Drucker to chair the Panel.

The school district has a pecuniary interest in the outcome of the hearing, since a finding for Terratec would cause a significant monetary loss for the school district. As a school board member, the chair of the Panel has as well. Because of this interest, the Panel exhibited the appearance of bias and partiality. Terratec has been denied due process, and the Court should reverse the decision of the Panel.

Of all the bias that can affect adjudication, pecuniary interest is held in high scrutiny. As the United States Supreme Court explained in *Tumey v. Ohio,* 273 U.S. 510, 522 (1927):

> [A]ll questions of judicial qualification may not involve constitutional validity...But it certainly violates the Fourteenth Amendment...to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.

A reviewing court does not have to decide whether in fact an adjudicator challenged for financial interest was influenced, but only whether hearing the case would offer a possible temptation to the average person to show partiality. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986), quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) and *Tumey*, 273 U.S. at 532. "[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." 273 U.S. at 532.

The court considers only whether the adjudicator's financial interest would offer a *possible* temptation. *Aetna*, 475 U.S. at 824-825; *Connally v. Georgia,* 429 U.S. 245, 249 (1977) (emphasis added); see also *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 865 (1988) (vacating a decision by a judge who was not conscious of the circumstances giving a university, on whose board of trustees he served, a financial interest

in the case). The court explains that "the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable" when the judge has a pecuniary interest in the outcome of a hearing. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

A Wyoming court faced a similar dilemma. The court was asked to review the decision of an administrative tribunal. There, the agency sat as adjudicator on its own contract. *Brasel & Sims Const. Co., Inc. v. State Highway Comm'n of Wyoming*, 655 P.2d 265, 266 (Wyo. 1982). The court stated: "[w]e perceive a good deal of danger in the proliferation of a rule which would have the effect of granting to one of the parties to a contract the authority to decide disputes over the amounts due under the contract." *Id.* at 267. Because reviewing courts give deference to the weight and credibility given to evidence by an agency, the court would be giving deference to a litigant but not the adversary. "Such a picture is unbecoming the fairness which must permeate an acceptable structure for the administration of justice. We do not permit judges to sit on cases in which they are parties." *Id.* at 267-68. The court did not allow the agency to conduct a hearing and make a decision in a dispute between itself and one of its contractors. *Id.* at 268. Other courts also agree that a tribunal should not sit as judge when it is also an adversary. *See Idaho Mut. Ben. Ass'n v. Robison*, 154 P.2d 156, 160-61 (1944).

The United States Supreme Court in *Williams v. Pennsylvania*, 136 S.Ct. 1899 (2016), found the reviewing judge and adverse party cannot be one and the same. Pennsylvania District Attorney Castille approved Williams' death penalty prosecution. Castille was later appointed to the Pennsylvania Supreme Court and became Chief Justice of the Pennsylvania Supreme Court. After his appointment, Chief Justice Castille was asked to review Williams' death sentence which placed the former district attorney in the

position of being both adverse party and reviewing judge as chief justice. The United States Supreme Court found this to be a due process violation in that "no man can be a judge in his own case." *Id.* at 1906, citing *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955).

The chairman of the Procurement Panel was also the vice chair of the School District's Board of Trustees making him adverse party and judge in violation of due process. This Court should vacate the trial court's order and send this matter back before an unbiased panel.

B. As Required by South Carolina Procedure, Terratec Challenged in Circuit Court the School Board Policy of Appointing Its Member to Chair the Panel.

Terratec did not challenge the makeup of the Panel or Procurement Code Section 4410.2 at the hearing because the Panel could not decide these issues. The Panel cannot rule on the constitutionality of the school district's Procurement Code, practices, and actions. Issues of constitutionality cannot be resolved by an administrative panel. These issues need only be raised to and ruled upon by the Circuit Court. Jean Toal, Appellate Practice in South Carolina 47 (2nd ed. 2002) (citing *Video Gaming Consultants v. South Carolina Dep't of Revenue*, 342 S.C. 34, 535 S.E.2d 642 (2000)). Terratec has properly raised the constitutionality of the Panel makeup for the first time to the Circuit Court.

CONCLUSION

The Court should reverse the decision of the Procurement Panel for the following reasons:

A. The Panel did not have substantial evidence to support the school district's refusal to pay Terratec for its work benefiting the school district; and

B. The school district improperly appointed the entire Panel and its own vice chairman to chair the Panel making him judge and adverse party.

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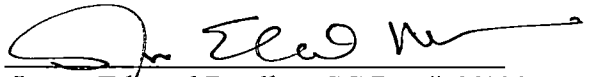
By: 

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CERTIFICATE OF COUNSEL

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

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