STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

C.A. No.: 00-CP-40-3753
(Carolina Bays Parkway)

C.A. No.: 00-CP-40-4171
(Highway 170)

C.A. No.: 00-CP-40-3752
(Cooper River Bridge)

Edward D. Sloan, Jr., individually and as a Citizen, Resident, Taxpayer and Registered Elector of the State of South Carolina, and on behalf of all others similar situated,

Plaintiff,

vs.

The Department of Transportation, an agency of the State of South Carolina, and the Commission of the Department of Transportation, Robert W. Harrell, John N. Hardee, Eugene Stoddard, F. Hugh Atkins, B. Bayles Mack, L. Morgan Martin, and J. M. Truluck, in their capacities as Commissioners thereof,

Defendants.

ORDER

Before the Court are three consolidated cases which involve an effort by the plaintiff to enjoin the construction of three large highway construction projects: the Carolina Bays Parkway ("Carolina Bays"); the widening of Highway 170 ("Highway 170"); and the construction of a new bridge over the Cooper River ("Cooper River"). The parties have filed cross motions for summary judgment in all cases.[1] A hearing was held before me on June 1, 2001. The plaintiff was represented by James A. Carpenter of The Carpenter Law Firm. The defendants were represented by William A. Coates and Chace D. Campbell of Love, Thornton, Arnold & Thomason, P.A. and Franklin J. Smith, Jr. of Richardson, Plowden, Carpenter and Robinson, P.A. For the reasons set forth below, defendants' motions for summary judgment are granted.

[1] Both parties have filed affidavits and depositions in support of their motions. The parties agree, and the Court concurs, that there are no material facts at issue, but rather legal conclusions to be drawn from facts presented. Thus, these matters are ripe for decision.

BACKGROUND

The plaintiff, Edward D. Sloan, Jr. ("Sloan") is a resident of Greenville County. The projects involved in these suits are located in Horry County (Carolina Bays), Beaufort County (Highway 170) and Charleston County (Cooper River). The South Carolina Department of Transportation ("DOT") has awarded contracts on both Carolina Bays and Highway 170. A contract has not been let on Cooper River; however, three entities have responded to the DOT's request for proposals. At the time of argument, final funding was in the process of being secured for Cooper River.[2] Construction has begun and monies expended on both Carolina Bays and Highway 170.

Sloan is a former contractor who claims that S.C. Code § 57-5-1620 requires the DOT to use the design/bid/build process, including its system of competitive sealed bidding. Sloan also claims that the DOT failed to comply with §57-5-1660 regarding certain bonding requirements on these projects.

The DOT contends that Sloan lacks standing to bring these cases; that the DOT has the authority to procure these projects using the design/build process; that the process used and results obtained by the DOT comply with § 57-5-1620 and § 57-5-1660; and that as to the Carolina Bays and Highway 170 projects, Sloan's suits are barred by the doctrine of laches.

FACTUAL BACKGROUND

South Carolina, as many other states, has in the past used the traditional design/bid/build process in procuring and building highway construction projects. Under this process, a project is designed and then put out for competitive sealed bids by entities which have been deemed qualified to bid. A contract is then awarded to the lowest responsive bidder, who then builds the project. Under the design/build process, the DOT issues a request for qualifications ("RFQ") which is

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[2]Based on news accounts, it appears funding is now in place for Cooper River. This development does not affect the opinions of the Court.

advertised in a number of publications, along with a general description of the project to be constructed. The DOT then reviews the qualifications submitted and determines which entities are qualified to handle the project. The DOT then issues these entities a request for proposal ("RFP"). The RFP lists requirements of the project and, importantly, the maximum price to be paid for the project. After reviewing the responses to the RFP, the DOT selects the proposal which provides the best value within the available budget.

On January 15, 1999, the DOT issued an RFP for the Carolina Bays Project. Four firms submitted qualifications. Of the four forms, the DOT determined three to be qualified and invited them to submit proposals. Three proposals were submitted. The DOT selected the proposal of Palmetto Transportation Constructors as the proposal most advantageous to the State. Palmetto Transportation Constructors proposed to perform all elements of the desired project for a price of $225.5 million. This was the lowest bid. The next lowest bid proposed to accomplish all of the project for $232 million. The third bid proposed to perform only a portion of the design project for $232 million.

On February 3, 1999, the DOT issued an RFQ for the Highway 170. Nine firms responded to the RFQ. The DOT determined six of the submitters to be the most qualified and invited them to respond to an RFP. The DOT determined that the proposal by Balfour Beatty Construction was the most advantageous to the State. The Balfour Beatty bid was the lowest bid by over $24 million.

The State issued an RFQ on the Cooper River Project on July 14, 2000. Three entities responded to the RFQ. The DOT determined all three entities to be qualified and on February 23, 2001 issued an RFP. All three entities have responded to the RFP with separate proposals. While final funding for Cooper River has not been completed, the RFP requires that if there is sufficient

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funding for the DOT to issue an unlimited notice to proceed, the DOT is required to select the responsive proposal which is the least costly to the State.

All three projects have been or will be financed by the South Carolina Transportation Infrastructure Bank ("State Infrastructure Bank" or "SIB"). The State Infrastructure Bank is a state agency created in 1997 to assist government units and private entities in financing major transportation projects. In creating the SIB, the General Assembly intended for the SIB to focus greater attention on larger transportation projects and thereby allow the DOT's resources to be devoted to smaller, but yet important, rural transportation systems.

The establishment of the SIB was a response to a report issued in 1993 by the Transportation 2000 Committee, a panel chaired by Senator Isadore E. Lourie, established to identify critical transportation needs in South Carolina and recommend a plan for funding those needs. The report concluded that current highway department revenues were not adequate to fund large projects and recommended that tolls or other local participation be utilized.

The authorized sources of SIB capital are set forth in S.C. Code § 11-43-160 and include (1) an annual contribution not to exceed the equivalent of one cent a gallon of the tax on gasoline (this amount would otherwise go to DOT); (2) federal funds made available to the State; (3) federal funds made available to the State for the Bank; (4) contributions from government units, private entities, and other sources including appropriations from the General Assembly; (5) repayments on the bank's loans and the bank's investment earnings; (6) bond proceeds; (7) other lawful sources; (8) one-year loans from DOT; and (9) truck registration fees.

Funds actually entering the SIB's accounts at this date are an amount equal to one-cent gas tax on an annual basis from DOT, the truck registration fees annually, the 1.5% Horry hospitality fee revenues as explained above, the Beaufort County one-cent sales tax, interest, installments on the

$209 million DOT committed for the Conway Bypass, and the proceeds of two revenue bond issues. Additionally an appropriation of $65,503,706 was made by the General Assembly in 1997 as the initial capitalization of the Bank.

The SIB has issued three bond series since its inception: $275,000,000 SCTIB Revenue Bonds, Series 1998A; $308,900,000 SCTIB Revenue Bonds, Series 1999A; and $230,000,000 SCTIB Revenue Bonds, Series 2000A. The pledged revenues include truck registration fees, Horry County hospitality fees, and payments from DOT in repayment of the loan on the Conway Bypass project (all federal funds).

Due to its immense cost, Cooper River will require the combined contributions of the SIB, Charleston County, the South Carolina Port's Authority, the DOT, and the United States Department of Transportation ("USDOT"). The USDOT has agreed to contribute up to one-third the total cost of the project under the Federal Transportation Infrastructure Finance and Innovation Act ("TIFIA"). If the financing package is completed, no general South Carolina taxpayer funds will be used in the Cooper River project.

I. STANDING

Defendants argue Sloan lacks sufficient standing to bring these actions. In order to bring an action, a plaintiff must have standing. To have standing, a plaintiff must have a personal stake in the interest matter of the lawsuit. *Glaze v. Grooms*, 324 S.C. 249, 478 S.E.2d 841 (1996); *Townsend v. Townsend,* 323 S.C. 309, 474 S.E.2d 424 (1996). A private person may not invoke the judicial power to determine the validity of executive or legislative action unless he has sustained, or is in the immediate danger of sustaining, prejudice therefrom. *Blandon v. Coleman*, 285 S.C. 472, 330 S.E.2d 298 (1985). As set forth below, Sloan's interest in these matters is at best tenuous; however, in light of previous decisions granting standing because an issue is of great public importance, Sloan

may maintain these actions.

A. Sloan's status as a taxpayer.

Sloan argues that his prior case *Sloan v. School Dist. of Greenville County*, 342 S.C. 515, 537 S.E.2d 299 (Ct. App. 2000), stands for the proposition that a taxpayer, by sole virtue of being a taxpayer, has standing to challenge state actions. While the courts in this state recognize standing for a municipal or county taxpayer, no court has recognized standing for a plaintiff for merely being a state taxpayer. In fact cases suggest otherwise. In *Mayor and City Council of Baltimore v. Gill*, 31 Md. 375 (1869), the case relied upon by our Supreme Court to recognize municipal taxpayer standing in *Mauldin v. City of Greenville*, 33 S.C. 1, 11 S.E. 434 (1890), the Maryland court noted that state taxpayers differ from municipal taxpayers. While the Attorney General represents and may bring suits to protect state taxpayers, municipal taxpayers have no similar representative to pursue such actions on their behalf. The court reasoned that if it did not recognize standing for municipal taxpayers, they would have no recourse for misappropriation of taxpayer funds. This is not the case for state taxpayers. *Gill*, 31 Md. at 395.

In *Ramsey v. Hamilton*, 181 Ga. 365, 182 S.E. 392 (1935), the Supreme Court of Georgia ruled that a state taxpayer did not have standing to enjoin the executive government from disbursing funds. The *Ramsey* court observed that "[u]nless the conclusions we have reached are correct, any taxpayer of the State could set himself up as the *censor morum* of the Governor and other public officers of the State, and undertake to supervise their official action as to matters in which he had no personal interest whatever." *Ramsey*, 181 Ga. at 375, 182 S.E. at 397 *quoting Peeples v. Byrd*, 98 Ga. 688, 25 S.E. 677 (1896).

Similarly, the North Carolina Supreme Court in *Nicholson v. State Education Assistance Authority*, 275 N.C. 439, 168 S.E.2d 401 (1969) held that although the plaintiff was a taxpayer and

might be injured monetarily by wrongful use of his tax dollars, the plaintiff did not have standing as a mere taxpayer to challenge legislative acts. *Nicholson*, 275 N.C. at 448, 168 S.E.2d at 406. While a county or municipal taxpayer may have standing, this Court finds that a state taxpayer does not, *ipso facto,* have standing without having sustained a particular harm.

B. Sloan's lack of a particularized interest in these projects.

As a taxpayer, Sloan has no particular stake in the matter not common to the public at large. *Berry v. McLeod*, 328 S.C. 435, 447, 492 S.E.2d 794, 801 (Ct. App. 1997) ("a private citizen cannot test the validity of executive or legislative action unless he or she has sustained or will sustain prejudice *not common to the public* . . . .") (emphasis added); *Florence Morning News v. Building Comm'n*, 265 S.C. 389, 398, 218 S.E.2d 881, 885 (1975) (court refused to grant the plaintiff's request because the plaintiff had an "interest common to all members of the public"). The responsibility to represent the interests of the public at large is reserved for the Attorney General on behalf of the State, not a private citizen. *Mauldin v. Greenville*, *supra*; *see also Manson v. Southbound R.R.*, 64 S.C. 120, 41 S.E. 832 (1902).

A taxpayer cannot have an interest to protect when the taxpayer is not protecting money raised by his taxes. *Crews v. Beattie*, *supra*. The court in *Crews* held that the "petitioner has no special or peculiar interest to protect. The funds in question never accrued from taxation . . . ." *Crews,* 197 S.C. 49, 14 S.E.2d 358. The sources of funds for these projects do not come from general tax revenues of the State. Payments to the design/build contractor on Carolina Bays have been made from the proceeds of the sale of revenue bonds by the SIB. Revenue bonds differ from general obligation bonds in that general obligation bonds are secured by the taxing power of the State. Revenue bonds are secured by a particular stream of revenue, in this case by truck registration fees and hospitality fees. In other words, Carolina Bays is not being funded by state taxpayers.

Likewise, Highway 170 is generally being financed by revenue bond proceeds, not general obligation bonds. While some of the expenses of the design/build contract on Highway 170 have been paid from the SIB's cash account, the portion of those payments that can be attributed to the General Assembly's initial capitalization grant to the SIB is *de minimis*.

While the financing for Cooper River has not been finalized, it was represented to this Court that none of the funding for Cooper River would come from general state tax revenues.

Even if Sloan has an interest to protect, this Court finds that any interest he might protect is *de minimis*. *Crews v. Beattie,* 197 S.C. at 49, 14 S.E.2d at 358 ("The general rule is that a taxpayer may not maintain a suit to enjoin the action of State officers when he has no special interest and his only standing is the exceedingly small interest of a general taxpayer.") As the *Crews* court observed regarding *Sligh v. Bowers*, 62 S.C. 409, 40 S.E. 885 (1901), in distinguishing between a state taxpayer and a school district taxpayer "the case involved the well-established distinction between resident taxpayers of a municipality whose interest in municipal services is necessarily a substantial one, and, on the other hand, the very remote and minute interest of a general taxpayer who has no special or peculiar interest.") Likewise, the case *Massachusetts v. Mellon*, 262 U.S. 447 (1923), is persuasive. In *Mellon* the United States Supreme Court held that while a municipal taxpayer can enjoin the misuse of money by the municipality, a taxpayer of the United States cannot; his interest in the federal government's money is so minute, so indeterminable that it cannot serve as a basis to appeal to a court to enjoin its misuse. Approximately 1.7% of the funding of Highway 170 came from state taxpayer money. When divided by the number of taxpayers in the state this amounts to approximately $0.35 per taxpayer, a *de minimis* amount. The remainder, the vast majority of the funds for Highway 170, does not come from state taxes but comes from revenue bond proceeds. Accordingly, Sloan has no interest in these matters, which does not differ from the interest of any

citizen of this state. Again Sloan's status does not, *ipso facto*, confer standing.

C. Public Importance

Sloan argues that he is entitled to standing because this matter is of great public importance and therefore, this Court should grant him standing on that basis alone. Based upon recent decisions of our appellate courts, this Court agrees.

Earlier courts indicated that even if a matter were of great public importance, unless the plaintiff had a particular personal interest, standing was lacking. *Crews v. Beattie*, 197 S.C. 32, 14 S.E.2d 358 (1940) ("The mere fact that the issue is one of public importance does not confer upon any citizen or taxpayer the right to evoke per se a judicial determination of the issue."). Even some later cases seem to indicate the need of a particular nexus to the case by the plaintiff. For example, in *Thompson v. S. C. Comm'n on Alcohol & Drug Abuse*, 267 S.C. 463, 229 S.E.2d 718 (1976), standing was granted to law enforcement officers who were seeking guidance on how to enforce conflicting laws. In *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999), the plaintiffs were doctors who were challenging the unfair advantage of the Medical University of South Carolina in using tax free bonds to fund a practice to complete with the plaintiffs.

Recently, however, it appears that the requirement of a personalized nexus has been lessened. In *Carolina Alliance for Fair Employment v. S.C. Dept. of Labor, Licensing & Regulation*, 337 S.C. 476, 523 S.E.2d 795 (1999), an individual employee as well as the Carolina Alliance for Fair Employment ("CAFÉ") brought an action for declaratory judgment claiming a temporary employment agency did not satisfy a particular code section in given notice of wages. Our Court of Appeals *sua sponte* addressed the issue of standing. The Court held that even though the plaintiffs did not have standing because they did not suffer any particular injury, due to the proliferation of temporary employees in this state and the ensuing confusion over the statute involved, the matter was

of great public importance and granted standing.

Similarly, in *Sloan v. School District of Greenville County, supra*, the Court of Appeals addressed the issue of a taxpayer's standing to challenge governmental failure to comply with the competitive bidding statute.

> Although South Carolina has allowed taxpayer standing in other context, we have not been confronted with a case wherein a taxpayer challenges a violation of a statute requiring competitive bidding in the award of governmental contracts. However, other states have addressed this issue and held that taxpayers have standing because competitive bidding laws are for the benefit of taxpayers. The taxpayers of Greenville County have a direct interest in the proper use and allocation of tax receipts by the District. Therefore, we find Sloan, as a taxpayer of Greenville County, has standing to challenge the District's award of the allegedly illegal contracts due to the District's failure to abide by the competitive sealed bidding requirements in its procurement code.

342 S.C. 515, 521, 522, 537 S.E.2d 299, 302-303. *See also, Evins v. Richland County Historic Preservation Comm'n*, 341 S.C. 15, 532 S.E.2d 876 (2000).

As set forth above, this Court believes there is a distinction between a municipal or county taxpayer and a state taxpayer. The fact that a plaintiff is as a state taxpayer is not, *ipso facto*, sufficient to confer standing to challenge any action of any department of state government. Nevertheless, the present actions involve the alleged failure of the DOT to comply with competitive bidding requirements. Without question, these are matters of immense public importance. The ability of the DOT and the SIB to fund and administer large highway projects in this state is at issue. The Cooper River project is clearly one of the largest, if not the largest, projects of its kind to be undertaken in South Carolina. The SIB is a functioning entity, and it appears to this Court that the design/build process will be used in the future. Accordingly, despite the Court's finding that Sloan has no particular nexus to these projects, the Court finds that the question is of such immense public importance that standing should be conferred. The Court now turns to the merits of these matters.

II. Statutory Authority

Sloan contends that the DOT lacks statutory authority to use the design/build process. The Court disagrees and finds that the DOT has authority to use the design/build process. As set forth below, several statutes provide this authority.

A. S.C. Code § 57-3-110

Under S.C. Code § 57-3-110, The DOT is given broad powers to construct and maintain the public highways and bridges and to "do all other things required or provided by law."

At the time Horry County, the SIB, and the DOT entered into the intergovernmental agreement on Carolina Bays, they had a set amount of money to build the project, but they did not know how much the project would cost. It was necessary for the parties to use the design/build method to ensure that the project could be built for the budgeted amount.

It was also necessary to use the design/build process on Highway 170. Highway 170 was a joint venture among the SIB, the USDOT, and Beaufort County. Knowing that they had a finite amount with which to work, the parties submitted the project out as a fixed-scope, fixed-budget project to determine if the project was feasible; therefore, the design/build method was necessary.

Cooper River, due to its immense cost, requires the combined contributions of several contributors. The absence of any one of the contributors will jeopardize financial viability of the project. However, the various contributors are not willing to commit funds until they know what their particular share of the total cost will be. Given that commitments from all parties are essential before beginning the project, it is necessary to establish the total cost prior to the bidding.

In addition, since the State of South Carolina (including its subsidiaries, Charleston County, the Ports Authority, and the DOT) could not fund the cost of Cooper River without a loan, the

USDOT agreed to lend to the SIB up to one-third the total cost of the project. In order to qualify for the federal loan, the DOT will have to provide a final cost of the project and show that the State can pay back the loan. The only way to establish the full cost of the project before the design was completed was through a design/build contract. Thus, the design/build method was necessary to proceed.

Without receiving the necessary federal funds on the projects, the DOT cannot carry out its obligations under S.C. Code § 57-3-110. Thus, in order to carry out its duty to "lay out, build, and maintain public highways and bridges," as well as to "seek and receive . . . federal aid and assistance," pursuant to S.C. Code § 57-3-110(1) and (6), it was necessary for the DOT to use the design/build process on these projects.

B. S.C. Code § 57-3-200

Furthermore, this Court finds that S.C. Code § 57-3-200 permits the DOT to enter into innovative contracts for financing highways and bridges. S.C. Code § 57-3-200 gives the DOT authority to finance construction projects by tolls and other financing methods when it enters into a partnership agreement to construct roads and bridges. The legislature gave the DOT authority to "enter into such contracts as may be necessary for the proper discharge of its functions and duties." *Brashier v. South Carolina DOT*, 327 S.C. 179, 192, 490 S.E.2d 8, 15 (1997). In order to build the three highway projects challenged here, it was necessary for the DOT to enter into innovative financing agreements with other governmental partners. The design/build process was an integral part of the financing agreements. The DOT entered into an intergovernmental agreement with Horry County and the SIB to fund the construction of Carolina Bays. As part of that agreement, the contract itself required the use of the design/build process. Beaufort County had already

commenced with the design/build process of Highway 170 when the DOT was brought in to manage the project. On Cooper River, it is expected that the DOT will enter into an agreement with the SIB to fund the project. Cooper River also requires the design/build method in order to comply with the financing requirements. Just as the Court in *Brashier* recognized that the DOT had broad authority to "enter into such contracts as may be necessary for the proper discharge of its functions and duties," this Court finds that the DOT has broad authority to enter into contracts with other governmental entities to carry out its duty to build large highway projects, even when such contracts require a design/build procurement process.

C. S.C. Code § 57-3-670

Highway projects are exempt from the State Consolidated Procurement Code. S.C. Code § 11-35-710(a). One of the reasons for this exemption is the Department utilizes federal assistance in its construction program and must follow the contracting rules of the Federal Highway Administration ("FHWA") in order to qualify for those funds. This exemption protects the DOT from having to follow two sets of rules in its contracting and thereby risk the loss of federal funding should those rules conflict. S.C. Code § 57-3-670 states in relevant part, "The department may cooperate and enter into contracts with the United States and *do any and all things necessary* to carry out the provisions of any Federal-Aid Highway Act . . ." (emphasis added). The DOT procures highway and bridge projects by contracts with design consultants and construction firms following the federal rules. Moreover, the DOT policy is to follow FHWA rules on all projects regardless of federal participation. If a project is constructed without following FHWA engineering standards or procurement procedures, the state is forever barred from seeking reimbursement in the future should it ever desire to do so on that project.

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This Court finds that in accordance with 23 U.S.C. § 112, the FHWA approved the DOT to use the design/build method under the Special Experimental Project No. 14 ("SEP-14"). The FHWA in conjunction with awarding grants to the states is encouraging the states to use design/build process with the grant money.

The General Assembly, recognizing the need to allow flexibility with federal funding, allowed the SIB to also follow federal guidelines. S.C. Code § 11-43-180(A) ("The terms and conditions of a loan or other financial assistance from federal accounts shall comply with applicable federal requirements."); *see also* S.C. Code § 11-43-150(A)(20) (SIB is authorized to "apply for, receive, and accept from any source, aid, grants, and contributions of money, subject to the conditions upon which the aid, grants or contributions are made.") This further evinces the General Assembly's approval of the DOT's policy of constructing bridge and highway projects under federal guidelines, especially on SIB-funded projects such as the ones in question here. Clearly, federal guidelines allow the use of the design/build method of contracting.

D. State Infrastructure Bank

Furthermore, this Court finds that these projects are not required to be bid by the traditional method of design/bid/build because SIB projects are not subject to the restrictions of S.C. Code § 57-5-1620.

All three projects are or will be financed by the SIB. The SIB is an agency of the state created "to assist government units and private entities in financing major transportation projects." H.B. 3665, 1997 Reg. Sess. §1(6) (1997). The purpose of the SIB is "to select and assist in financing major qualified projects" by providing loans and other forms of capital. S.C. Code § 11-43-120(C). The SIB has a separate and distinct function apart from the DOT. H.B. 3665 § 1(6). "It is the General Assembly's intent for [the SIB] to focus greater attention on larger transportation

projects, and thereby allow the South Carolina Department of Transportation's resources to be devoted to smaller, but yet important, rural transportation projects." *Id.*

The SIB has the authority to fund construction projects with methods like the design/build process. The General Assembly created the SIB in 1997 because it found that the traditional ways of constructing highways and bridges were not effective enough. *Id.* at § 1(2). In creating the SIB, the General Assembly made specific findings. The General Assembly found that the "*traditional transportation financing methods* in South Carolina cannot generate the resources necessary to fund the cost of transportation facilities which are required for continued economic viability and future economic expansion." *Id.* at § 1(1) (emphasis added). The General Assembly further found that "alternative methods of financing projects would be necessary." *Id.* at § 1(2). In other words, our legislature realized that the traditional method of building highways involving design followed by competitive price bids for the construction phase all funded by the DOT from fuel tax receipts was inadequate for major construction projects. To remedy this situation, the legislature gave the SIB authority to use innovative financing methods to participate in projects outside the traditional DOT construction program.

In creating the SIB, the General Assembly gave the SIB broad authority, *see* S.C. Code § 11-43-150, and instructed that the SIB's authority and functions are to be liberally construed. S.C. Code § 11-43-150(A)(21). The SIB is given authority to "do all other things necessary or convenient to exercise powers granted or *reasonably implied* by this chapter." *Id.*; S.C. Code § 11-43-260 ("This chapter, being for the welfare of this State and its inhabitants, must be liberally construed to effect the purposes specified in this chapter."); *see City of Columbia v. Board of Health and Environmental Control*, 292 S.C. 199, 202, 355 S.E.2d 536, 538 (1987) ("[T]he authority of an administrative agency is to be liberally construed when it is 'concerned with the protection of

the health and welfare of the public.'").

Further, the enabling legislation for the SIB was enacted far later than S.C. Code § 57-5-1620 and is thus presumed to supercede § 57-5-1620. *See e.g. Vernon v. Harleyville Mut. Cas. Co.*, 244 S.C. 152, 135 S.E.2d 841 (1964); *Whiteside v. Cherokee Co. School Dist. No. 1*, 311 S.C. 341, 428 S.E.2d 886 (1993); *South Carolina Elec. & Gas Co. v. South Carolina Public Serv. Auth.*, 215 S.C. 193, 209, 54 S.E.2d 777, 784 (1949) ("[I]n case of conflict, the last legislative expression ordinarily governs.")

E. S.C. Code § 57-5-1700

S.C. Code § 57-5-1700 provides that "[n]othing in Sections 57-5-1620 . . . shall affect the dealings of the Department with the Federal Government, the State government or any political subdivisions thereof or any agency or department of any of them." S.C. Code § 57-5-1700 clearly contemplates that S.C. Code § 57-5-1620 does not apply on every project. In comparing S.C. Code § 57-5-1700 with other legislative enactments such as the public-private partnership legislation, S.C. Code § 57-5-200, and the authority to enter into cooperation with the federal government, S.C. Code § 57-3-110(6), it is clear that the General Assembly has prescribed that S.C. Code § 57-5-1620 does not apply in certain circumstances. One of these circumstances, as stated above, is when the federal government has particularized guidelines or programs with which the DOT can comply to obtain federal money either now or in the future. S.C. Code § 57-5-1700 exempts the DOT from S.C. Code § 57-5-1620 when it is partnering with the federal government or a government in the state on a particular project. On these projects, the DOT has partnered with the federal government through the USDOT, the state government through the SIB, and the counties in which the projects are situated for funding; therefore, the procurement provisions of S.C. Code § 57-5-1620 do not apply to these projects.

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Additionally, the statutory scheme applicable to the DOT combined with the statutes passed subsequent to S.C. Code § 57-5-1620 indicates that the General Assembly intended to give the DOT flexibility in selecting project delivery systems. Given the creation of the SIB, the broad authority to meet federal requirements to obtain federal funds and the language of S.C. Code § 57-5-1700, this Court finds that the legislative intent was to allow the DOT to use the design/build process as necessary to construct public highways and bridges. Any finding to the contrary would render the SIB ineffective and would substantially reduce the DOT's ability to meet its obligations to the traveling public.

III. DOT COMPLIED WITH BOTH § 57-5-1620 AND § 57-5-1660

A. S.C. Code § 57-5-1620

Sloan's argument that the DOT has failed to comply with S.C. Code § 57-5-1620 is based upon a very narrow definition of the term "bid." As utilized on these projects, there is no difference between a proposal and a bid. Both a proposal and a bid are "a written or published solicitation issued by an authorized procurement officer . . . which will ordinarily result in the award of the contract." The only difference is whether the contract is awarded to the "responsible bidder which makes the lowest responsive bid" or the "responsible bidder which makes the proposal most advantageous to the state." *See* S.C. Code Ann. § 11-35-310 (20) and (28). In fact, the Consolidated Procurement Code uses the terms interchangeably. S.C. Code § 11-35-310(28) states

> "Request for Proposals (RFP)" means a written or published solicitation issued by an authorized procurement officer . . . which will ordinarily result in the award of the contract to the responsible *bidder making the proposal* determined to be most advantageous to the State.

(emphasis added).

Here, there is no distinction as the contracts were awarded to the entities that submitted the lowest bid, which were also the contracts most advantageous to the state. Even if there is a technical distinction between a "bid" and a "proposal," the DOT complied with S.C. Code § 57-5-1620. The statute states that the contract will be awarded to the "lowest qualified bidder whose bid shall have been formally submitted in accordance with the requirements of the department." In these projects, the DOT required the bid to be submitted in the form of a proposal, rather than the traditional bid form. And in each case, the contract was or will be awarded to the "proposer" or "bidder" who could provide the project for the lowest cost to the state.

As discussed above, four firms submitted their qualifications in response to the DOT's Requests for Qualifications for Carolina Bays. Of the four firms, three were determined to be qualified and invited to submit proposals. The DOT awarded the contract to the firm that submitted the a proposal to do the entire project at the lowest cost: $225.5 million. The next lowest bid proposed to all of the desired project for $232 million. The third bid proposed to perform only a portion of the desired project for $232 million. Thus, the contract for Carolina Bays was awarded to the lowest bidder.

Likewise, when the DOT issued the Request for Qualifications on Highway 170, nine firms submitted their qualifications to the DOT to be considered. Of the nine submissions, the DOT determined that six were the most qualified and invited them to submit proposals. The DOT awarded the contract to the lowest bid, which was $24 million less than the next lowest bid.

It has been represented to this Court that Cooper River will follow a similar pattern to the two other projects. The RFP requires the DOT to award the contract to the lowest responsive and responsible bidder.

I find that the DOT complied with S.C. Code § 57-5-1620 on each project.

B. S.C. Code § 57-5-1660

Sloan contends that the DOT violated S.C. Code §57-5-1660 on Carolina Bays and Cooper River. This statute requires that the DOT obtain from contractors performance and payment bonds. Sloan contends (1) the DOT failed to comply with the statute because on Carolina Bays the DOT obtained a Parent Company Guaranty and the Parent Company Guaranty is not the same as performance and (2) payment bonds and the Parent Companies are not acceptable sureties.

This Court finds that the Parent Company Guaranty that the DOT received on Carolina Bays satisfies the requirement of § 57-5-1660. Although it is not the traditional type of performance and indemnity bond or payment bond, the Parent Company Guaranty provides the State the same protection that a performance and indemnity bond and payment bond would provide. Black's Law Dictionary defines "performance bond" as follows:

> Type of contract bond which protects against loss due to the inability or refusal of a contractor to perform his contract. Such are normally required on public construction projects. See completion bond; contract bond, supra.

A "completion bond" is defined as

> A form of surety or guaranty agreement which contains the promise of a third-party, usually a bonding company, to complete or pay for the cost of a construction contract if the construction contractor defaults.

A "contract bond" is defined as

> A guaranty of the faithful performance of a construction contract and the payment of all material and labor costs incident thereto. A contract bond covering the faithful performance is known as a "performance bond" and one covering payment of labor and materials, a "payment bond."

As Black's Law Dictionary noted under the definition of "guaranty," the terms "guaranty" and "suretyship" are often used interchangeably. The DOT obtained a guaranty which satisfies all the requirements of a bond as defined *supra*.

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Because S.C. Code § 57-5-1660 allows the DOT, as the "awarding authority," to accept bonds from such sureties as are "satisfactory" to the DOT, I find that the DOT did not abuse its discretion in accepting the Parent Company as a satisfactory surety and that the requirements of S.C. Code § 57-5-1660 have been met.

The parent companies of the contractor, HBG Constructors, Inc. and Tidewater Skanska Group, Inc., offered an unlimited guaranty to satisfy all of the obligations and liabilities of the contractors in lieu of a traditional performance bond and payment bond. The guaranty states that "if the contractor shall fail to satisfy any of its obligations under the agreement or any of its liabilities arising out of or in connection with the agreement, guarantors [HBG Constructors, Inc. and Tidewater Skanska Group, Inc.] shall . . . satisf[y] such obligations and liabilities on the same terms and conditions as stated in the agreement or the guarantor shall cause a thirty-party . . . to satisfy such obligations or liabilities." HBG Constructors, Inc. and Tidewater Skanska Group, Inc. have guaranteed the faithful performance of the contract and the payment of all materials and labor costs incident thereto because these items are necessary for the contractor, Palmetto Transportation Constructors, to satisfy its obligations and liabilities of the agreement. The DOT evaluated the net worth of the parent companies and determined that their net worths were sufficient to satisfy this guaranty. In addition, the DOT required the contractor to provide payment and performance bonds from all of its major subcontractors. With the unlimited guaranty and the performance and payment bonds from the major subcontractors, the DOT was satisfied the state was adequately protected. S.C. Code § 57-5-1660 states that the bond must be issued by surety or sureties that are "satisfactory to the awarding authority." S.C. Code § 57-5-1660(a). This language allows the DOT discretion to determine by whom the guaranty will be provided. A review of the legislative history of S.C. Code § 57-5-1660 confirms that it was the legislative intent to give the DOT discretion in selecting an

acceptable surety. The predecessors to S.C. Code § 57-5-1660 were S.C. Code §3-224 (1962) and S.C. Code §3-225 (1962). S.C. Code § 33-224 required a flat fifteen percent (15%) bond, and S.C. Code § 33-225 required the bond to be issued "through some surety company authorized to do business in this State and in the particular county in which such road or highway" is being constructed. In 1963 the General Assembly substantially amended S.C. Code § 33-224 and included the language that the bond would be issued by "a surety or sureties satisfactory to the authority awarding the contract." S.C. Code § 33-224 (1963). At the same time the General Assembly repealed S.C. Code § 33-225 which had required that the bond be issued by a surety company. The General Assembly clearly gave the DOT discretion to choose how the state would be protected. I find that the requirements of S.C. Code § 57-5-1660 have been met.

Regarding Cooper River, the DOT has stated that it will require performance and payment bonds in the full amount of the contract. Therefore, compliance with S.C. Code § 57-5-1660 is moot on Cooper River.

IV. LACHES

Finally, this Court finds that Sloan's actions regarding Carolina Bays and Highway 170 are barred by laches. "Under the doctrine of laches, if a party, know his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights." *Chambers of S.C., Inc v. County Council*, 315 S.C. 418 (1993). The determination of when laches should be applied rests largely within the discretion of the trial court. *Jannino v. Jannino,* 234 S.C. 352 (1959). Sloan did not seasonably assert his rights. On January 15, 1999 the DOT issued an RFQ for Carolina Bays. The RFQ was advertised in The State, the Sun

News, and the South Carolina Business Opportunities. The South Carolina Business Opportunities is the standard publication in which all government procurements are advertised. It is common practice for contractors to subscribe to and read the South Carolina Business Opportunities. The bid was awarded, and the contract with Palmetto Transportation Constructors was signed March 1, 2000. To date, $132 million has been paid to Palmetto Transportation Constructors under the contract. The Plaintiff knew or should have known about the plan to use the design/build process on or around January 15, 1999 when the RFQ was published. However, the Plaintiff waited until May 24, 2000 to institute this action against the DOT.

Likewise, on February 3, 1999 the DOT issued an RFQ for Highway 170. The bid was awarded and the contract with Balfour Beatty was signed September 28, 2000. To date, $43.3 million has been paid on this project. The Plaintiff knew or should have known about the design/build process on or around February 3, 1999 when the RFQ was published. The RFQ was advertised in The State, the Beaufort Gazette, the Island Packet, and the South Carolina Business Opportunities. The Plaintiff waited until February 19, 2001 to institute this action against the DOT. In both Carolina Bays and Highway 170, the plaintiff knew or should have known his rights in a timely manner. The Plaintiff unreasonably delayed in asserting his causes of action. These delays resulted in the DOT entering into obligations and incurring irrecoverable expenses; therefore, the Plaintiff's actions should be barred by laches.

Sloan argues that the time for laches should begin at the time the contracts were signed. However, Sloan is complaining about the design/build process, not the resulting contracts. Sloan knew or should have known that the projects were going to be done by the design/build process on the dates the respective RFQ's were issued. Therefore, Sloan unreasonably delayed to bring these actions on Carolina Bays and Highway 170 and is barred by laches. This is in keeping with the

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procedure for protest under the State Consolidated Procurement Code, where a person aggrieved in connection with the solicitation of a contract must protest "within fifteen days of the date of issuance of the Invitation to Bids or Requests for Proposals or other solicitation documents . . . ." S.C. Code § 11-35-4210(1).

CONCLUSION

Sloan has standing to bring these suits because of their public importance. As set forth herein, Defendant is entitled to summary judgment for several reasons: (1) South Carolina law allows the DOT to use the design/build method; (2) the DOT has, in fact, awarded the contracts for the projects at issue to the lowest qualified bidder; (3) the DOT has complied with the statutory bonding requirements; and (4) two of Sloan's suits are barred by laches. Accordingly, Defendant's motions for summary judgment are granted on all causes of action in all these cases and Plaintiff's motions are denied.

IT IS SO ORDERED.

G. Thomas Cooper, Jr.
Circuit Judge, Fifth Judicial Circuit

Columbia, South Carolina

July 6, 2001