

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Edward D. Sloan, Jr.,
individually, and a Citizen,
Resident, Taxpayer and
Registered Elector of Greenville
County, Appellant,

v.

Greenville County, a Political
Subdivision of the State of South
Carolina, Dozier Brooks, Scott
Case, Bob Cook, Joseph Dill,
Cort Flint, Lottie Gibson, Phyllis
Henderson, Allen "Bunk"
Johnson, Mark Kingsbury,
Xanthene Norris, Stephen Selby,
and Robert Taylor, Respondents.

Appeal From Greenville County
John C. Few, Circuit Court Judge

Unpublished Opinion No. 2004-UP-277
Submitted April 6, 2004 – Filed April 22, 2004

AFFIRMED

James G. Carpenter and Jennifer J. Miller, both of
Greenville, for Appellant.

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

PER CURIAM: Edward D. Sloan, Jr., suing as a taxpayer and citizen of Greenville County, brought this action challenging the sufficiency of a written determination by the county for the procurement of design-build services for the county's 2001-2002 Roads Paving Program. Sloan alleged that the county's written determination was insufficient and, was therefore "arbitrary, capricious, ultra vires and an abuse of discretion." He appeals the ruling of the trial court, finding the determination was sufficient, granting judgment to the County, and dismissing the case with prejudice. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

The Greenville County Code ("G.C.C." or "the Code") prescribes the methods the County may use in awarding contracts for construction services. Generally, under the Code, the County must procure construction services that exceed \$15,000 through the competitive sealed bidding ("CSB") process. G.C.C. § 7-213. However, the County may forego the CSB method and utilize an alternative procurement and construction method if one of several exceptions set out in the code applies. One of these alternative methods is the "design-build services, turnkey management services, or construction management services" method (hereinafter collectively referred to as "design-build services"). Specifically, Greenville County Code § 7-212 provides in pertinent part as follows:

Unless otherwise required by law, all county contracts shall be awarded by competitive sealed bidding, pursuant to section 7-213 (competitive sealed bidding), except as provided in:

...
(10) Section [7-242.5]¹ (design-build services, turnkey management services, or construction management services).

G.C.C. § 7-212. The Code defines these services as “approaches to construction contract management that allow for the selection of a single firm to perform and/or manage the complete design and construction of a project.”
G.C.C. § 7-198.

Greenville County Code § 7-242.5 sets out the guidelines that the county administrator shall follow when exercising his discretionary right to utilize the design-build construction method in lieu of the CSB method. The administrator is to consider the method which, in his or her discretion, is “the most advantageous to the county and will result in the most timely, economical and successful completion of the construction project.” This determination must be stated in writing and included as a part of the contract file. G.C.C. § 7-242.5(a).² If the county administrator determines use of

¹The Code references § 7-236 within § 7-212(10), but this is apparently a scrivener's error and the parties agree the section should reference § 7-242.5 instead.

²The 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

design-build services is most advantageous, and the project exceeds \$5 million, the administrator's written determination must be submitted for review to the county council's committee of the whole. Notice of review must be presented to the public, and an interested party has fifteen days to submit written comments to the committee of the whole. At the next committee meeting, members of the public who submitted written comments may address the committee. Following comments, County Council may reject the design-build method. If County Council does not vote to reject the design-build method, the project goes forward. G.C.C. § 7-242.5(b).

In October 2001, the county administrator of Greenville County made a written determination to use design-build service for the County's 2001-2002 Roads Project. This determination called for the procurement of these services through the competitive sealed proposal (CSP) method. The County gave public notice of the determination, inviting the public to make comment upon it. The administrator submitted the determination to county council at its committee of the whole meeting and council did not reject the proposal. Following a selection process pursuant to G.C.C. § 7-215, governing the CSP method, the County entered into a contract with a contractor for the performance of the project.

In November 2001, Sloan filed a summons and complaint challenging the sufficiency of the determination and seeking declaratory and injunctive relief. While admitting that the County had prepared a written determination, Sloan alleged that the County "failed to include sufficient facts and rationale based on those stated facts to justify an exception to competitive sealed bidding." Thus, he alleged that the determination was "arbitrary, capricious, ultra vires and an abuse of discretion."

The trial judge held that Sloan had "utterly failed to meet his burden of proof on [the] claim." Instead of concluding that the document arbitrarily triggered the exception, the trial judge found that the written determination

selection utilized shall be stated in writing and included as part of the contract file.

contained several well-reasoned conclusions supported by empirical data and prior County experience to support the county administrator's decision to use the design-build/CSP method. This appeal followed.

LAW / ANALYSIS

The action before us now is nearly identical to a suit recently ruled on by this Court concerning the same parties of the present case. The current case differs from the previous suit, also brought by Sloan against Greenville County, only in that it challenges a different written determination for use of the design-build/CSP method than the three determinations in prior years challenged by the previous case. Sloan v. Greenville County, 356 S.C. 531, 590 S.E.2d 338 (Ct. App. 2003) (hereinafter "Sloan I"). As in the previous case, the primary issue here is the validity of the County's determination to use design-build/CSP source selection instead of competitive sealed bidding. Since the present action was brought before the filing of the first case's opinion, several issues extensively discussed and conclusively determined by the prior case are raised again here. As such, we give these matters only a cursory treatment here and focus instead on the sufficiency of the particular written determination at issue in this case.

I. STANDARD OF REVIEW

As in Sloan I, Sloan contends this is an action in equity such that this court has jurisdiction to find facts in accordance with our own view of the preponderance of the evidence.³ The county argues this action is one at law and this court should, accordingly, apply an "any evidence" standard of review.⁴ We agree with Sloan that this action is properly characterized as one

³In 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).

⁴In 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

in equity, and we should therefore apply the preponderance of the evidence standard of review.

In Sloan I, after considering that the main purpose of the suit was to enjoin the County from awarding contracts in a manner which Sloan claims is ultra vires under Greenville County's procurement code, and the fact that Sloan did not seek monetary damages, but instead sought a judgment to prevent the County from awarding future public works contracts in the manner employed, we held this type of action is appropriately characterized as equitable, and should be reviewed under the preponderance of the evidence standard. We further noted, however, that under this broad scope of review, we are not required to disregard the findings of the trial judge. Id. at 544-46, 590 S.E.2d at 345-46.

II. JUSTICIABILITY OF SLOAN'S CLAIMS

Greenville County contends that this case is not properly justiciable because Sloan lacks standing to challenge the County's contract awards. This same issue was raised in Sloan I. There we noted, while generally 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, the rules of standing are flexible, and one may assert taxpayer standing if he demonstrates some overriding public purpose or concern 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

Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

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

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 (Ct. 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:

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.").

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.

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.