

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )

IN THE COURT OF COMMON PLEAS

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, )  
Plaintiff, )

Civil Action No. 98-CP-23-2816

vs. )

**Declaratory Judgment Order**

The School District of Greenville County, )  
South Carolina, an Agency of the State of )  
South Carolina, J. Coleman Shouse, Vivian )  
Richardson, Debra Bush, Margaret Burch, )  
Ralph Chandler, Marilyn Hendrix, Valerie )  
Hollinger, Roger Meek, Tommie Reece, )  
William Renninger, Leola Robinson, and )  
Ann Southerlin, )  
Defendants. )

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMFR

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This action came before the Court, sitting without a jury, for trial on January 16, 2003. James G. Carpenter and Jennifer J. Miller, both of the Carpenter Law Firm, represented Plaintiff. Ward Lambert, of the Harper Law Firm, represented Defendants. The Court received testimony by deposition, and from witnesses. Having heard the testimony and considered the evidence, the Court makes the following findings of fact.

**Findings of Fact**

Plaintiff is a citizen, resident, taxpayer, and registered elector of Greenville County, South Carolina, and brings this action individually on his behalf, and on behalf of all others similarly situated. Defendant School District of Greenville County, South Carolina, (District) is an agency of the State of South Carolina. The individual Defendants are members of the Board of Trustees of the District.



In 1998, the District entered into three contracts dated June 16, to procure construction of the Greer Middle School, Mauldin Middle School, and Riverside Middle School, each exceeding \$12 million. The District procured this construction without using competitive sealed bidding, as required by The District Procurement Code (“Code”).

The traditional required method for public bodies to select the source of procurement has been competitive sealed bidding. The public entity using this method hires an architect or design professional pursuant to a public selection process. The design professional prepares plans and specifications for the project, subject to the public entity’s approval. Then, a design professional will prepare a bid package that will include detailed construction drawings and specifications for the project. The public entity then publicly solicits bids to perform the work. It procures from the lowest responsible, responsive bidder.

The first required step in “competitive sealed bidding” is to issue an “Invitation for Bids.” The Code requires, “An invitation for bids shall be issued in an efficient and economical manner to at least three qualified sources.” Code, VI. B. 2. b. The Code defines an “Invitation for Bids” as “a written or published solicitation issued by the Purchasing Agent or Buyer for bids to contract for the procurement or disposal of stated supplies, services, equipment or construction, which will ordinarily result in the award of the contract to the responsible bidder with the lowest responsive bid.” Code, III.A.18. Defendants failed to issue an Invitation for Bids. Instead Defendants issued Requests for Proposals. The District wrote letters to contractors, making a Request for Proposals and published an “Advertisement for Proposals” in the *Greenville News* and a Request for Qualification Statements and Fee Proposals in *South Carolina Business Opportunities*.

A "Request for Proposals" is not an Invitation for Bids. The Code defines "Request for Proposals" ("RFP") as follows:

a written or published solicitation issued by the Purchasing Agent or Buyer for proposals to provide supplies, services, equipment, or construction which will ordinarily result in the award of the contract to the responsible bidder making the proposal determined to be most advantageous to the District. The award of the contract shall be made on the basis of evaluation factors which shall be stated in the RFP, and which shall include but not be controlled alone by the factor of price proposed to be charged.

Code, III. A. 22. Thus, these Requests for Proposals were not an Invitation for Bids, which the Code requires.

To issue the Requests for Proposals, instead of Invitations for Bids, Defendants relied on the Emergency Exception to the competitive sealed bidding requirement. The Emergency Exception is found in the Code at § VI.B.7. The District may use "emergency procurements only when there exists an immediate threat to public health, welfare, critical economy and efficiency, or safety under emergency conditions as defined in regulations." *See also* Regulation 20.

On February 23, 1998, the District purported to make three essentially identical written determinations of the basis for the emergency. The "emergency" was to "assure completion of construction prior to school opening in August of 1999, as required by the 'Long-Range Facilities Plan.'"

The District had begun planning for the construction of the schools in 1989. The first Long Range Facilities Plan, issued in 1993, included plans for the three middle schools. Initially, two of the three schools were slated for occupancy in August 1997, and the other was slated for occupancy in August 2000. Thereafter, the District decided to build new middle

schools, rather than convert high schools to middle schools. That decision delayed the completion date for two of the three schools from 1997 to 1999.

Dr. Fred Moehlenbrock, former head of the Facilities Planning Department, completed the educational specifications for these schools by 1996. By 1996, the District had cost estimates for the three middle schools. Architects completed design of the three schools by March 1997. By October 1997, the Long Range Facilities Plan listed the three schools as having construction underway. In the fall of 1997, three elementary schools were moved above the three middle schools on the priority list of school construction. These three elementary schools were built at the same time as the three middle schools, but were not procured under the emergency exception.

Beginning in February 1998, the District confirmed the availability of funds to procure construction of the three middle schools. The District received advice that using normal procurement of construction, it could not have the schools completed by August 1999. The District began looking for a way to complete the construction of these three middle schools by August 1999. The District decided to declare an emergency and procure the construction of these three middle schools using the emergency exception to competitive sealed bidding requirements.

The District's expert testified that the District's use of the normal procurement procedure would have delayed the opening of these schools by no more than two months. Thus, the District could have either started the process two months earlier, or if as it contends, it could not do so, it could have opened the schools a month or two later. To justify the use of the emergency exception, the District argued, "These three middle schools were needed to alleviate critical overcrowding conditions in certain existing middle schools."

The problem of overcrowding and the use of portable classrooms is a condition that became progressively worse over many years. In 1990, the District projected that it would serve 60,000 students by the year 2000, and that growth was part of the impetus for the Long Range Facilities Plan. By the year 2000, the District served about 58,700 students. The Long Range Facilities Plan now is preparing to serve 70,000 students.

The District contends that the student population growth began in 1990 and accelerated in the mid-1990's. The Court finds the District's statistical data belies this contention. District records show that from 1992 to 2002 middle school population increased by an average of 207 students per year. During the three-year period from 1996 to 1999, the middle school population in the District increased by fewer than 200 students. From 1998 to 1999, the middle school population in the District increased by only 69 students. In the 1998-99 school year, 8 middle schools in the District were below capacity. The District admits that had these three schools not been built, the students would have remained in portable classrooms, or the District would have transported students to other, less crowded, middle schools.

The District identified the emergency requiring a detour around the required procurement process as needing to comply with the Long Range Building Plan. The Long Range Building Plan lists the following goals: "provide permanent classroom space to serve the Districts increasing student population, reduce the use of portable classrooms and allow students to attend school closer to home." These goals may be appropriate and laudable goals, and the circumstances the District faced might constitute a crisis, but even taken together, they do not constitute an emergency.

## Conclusions of Law

The District has “[a]ll rights, powers, duties, and authority relating to the procurement of . . . equipment [and] services, . . . and to the management [and] control . . . of . . . construction.” Code, V.A.1. The Board of Trustees has a nondelegable duty to promulgate policies to implement procurement in compliance with the Code. The Board of Trustees also has authority to oversee the procurement process, and to audit and monitor compliance with the Code. Code, V.A.2.

This Court possesses jurisdiction pursuant to S.C. Code Ann. § 15-53-10 et seq. known as the “Uniform Declaratory Judgment Act” and under the common law of South Carolina as set out in *Shillito v. City of Spartanburg*, 214 S.C. 11, 51 S.E.2d 95 (1948), and in *Newman v. Richland County Historic Preservation Commission*, 325 S.C. 79, 480 S.E.2d 72 (1997). Venue is properly placed in Greenville County.

The Code establishes a uniform method of procurement of goods and services and requires the District to award all contracts by “competitive sealed bidding,” with certain exceptions. Code, VI.B. The underlying purposes of the Code include:

1. to provide increased economy in procurement activities and to maximize to the fullest extent practicable the purchasing values of the District.

\* \* \*

4. to consolidate, clarify and modernize the regulations governing procurement by this District.
5. to require the adoption of competitive procurement practices by the District.

\* \* \*

8. to develop an efficient and effective means of delegating roles and responsibilities.
9. to promote increased public confidence in the procedure followed in public procurement.



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10. to permit the continued development of explicit and thoroughly considered procurement policies and practices.

Code, I.A.

The South Carolina Consolidated Procurement Code requires the District to adopt a procurement code that is substantially similar to the Consolidated Code. Under the District Code, “Contracts amounting to twenty-five thousand dollars or more shall be awarded by competitive sealed bidding” with certain statutory exceptions. Code, VI.B.2.a. Paragraph VI.B.7 defines an emergency as “an *immediate* threat to public health, welfare, critical economy and efficiency, or safety.” School District Procurement Regulation 20 refines the definition to include “such as may arise by reason of floods, epidemics, riots, equipment failures, fire loss, or such other reason as may be proclaimed either by the Superintendent or his designee.”

The common characteristic of the phrase “floods, epidemics, riots, equipment failures, fire loss” is something that comes upon the District suddenly, which makes it impossible for the District to address the circumstance using normal procurement procedures. The District’s Procurement Code requires that the emergency be “an immediate threat.” An immediate threat is one that is at hand, not an anticipated threat, but one that arose suddenly, with no delay or lapse of time in its generation.

The overcrowding situation in the middle schools did not arise suddenly, so that it was impossible for the District to use normal procurement procedures to address the overcrowding. The District had articulated the need for these schools as early as 1993, seven years before the 1999 opening. Two of the schools were initially scheduled to open in 1997, but the District delayed action on them when it decided to build completely new schools rather than convert two high schools. This factual record shows a clear lack of immediacy and suddenness.

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In 1997, Judge Patterson ruled that Greenville County could not procure \$18 million in roads repairs under the County's emergency exception to its procurement code, when the roads had fallen into disrepair through normal wear and tear over many years, and it was the County's duty to provide road repair and upkeep. *Sloan v. Greenville County Council, et al*, Civil Action No. 97-CP-23-2209, Orders entered July 27, 1997, and August 14, 1997. The Court finds this authority to be persuasive and the analysis applicable to the case at bar. Like the County, the School District had an ongoing duty to address the overcrowding that had developed over many years. Just as it was impermissible for the County to declare an emergency to deal with the repair of the roads, is likewise impermissible for the District to declare an emergency to build three schools to comply with the Long Range Building Plan.

The Court finds further guidance in the State Engineer's Manual. The Office of General Services in the State Budget and Control Board developed a Manual for Planning and Execution of State Permanent Improvements Projects. S.C. Code Ann. § 11-35-3240. "Part II of this manual, covering the procurement of construction for the projects, will be the responsibility of the Office of the State Engineer." S.C. Regulation R19-445.2145 F. This second part of the manual is also known as the State Engineer's Manual. The State Engineer's Manual interprets and applies the Emergency Exception of the Consolidated State Procurement Code, which is identical to the District Code's emergency procurement section.

The State Engineer's Manual provides the following guidance in section 8.5,

EMERGENCY PROCUREMENTS:

- A. Types of Emergency Procurements:
  - 1. Emergency procurements shall only be made when there exists an immediate threat to public health, welfare, critical economy and efficiency, or safety.
  - 2. Emergency conditions under safety include natural disasters, epidemics, riots, equipment failures, fire loss, or other reasons as may be proclaimed

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- by either the chief procurement officer or the head of a governmental body or a designee of either office.
3. In order to qualify for an emergency procurement, a true emergency must exist. Use of emergency procurement procedures to circumvent normal procurement procedures will not be tolerated.
  4. Emergency procurements are limited to supplies, services and other construction items as required to meet only the emergency condition.
- B. Conditions that are not emergency procurements:
1. Installing or replacing equipment to meet schedules is not normally an emergency condition. For example, an agency should not declare an emergency in order to install a new air conditioning system prior to the start of a new semester or some other event.
  2. Poor scheduling or planning should not be an excuse for an emergency condition. If emergency conditions exist after an unsuccessful attempt to use competitive sealed bidding, then an emergency procurement may be made.

State Engineer's Manual, dated 9/97, page 8-4.

If declaring an emergency to install an air conditioning system prior to the start of a semester is an invalid use of the emergency exception, then certainly spending over \$36 million, without competitive sealed bidding, to procure construction of three schools in compliance with the Long Range Building Plan is not an emergency. The Court finds that the District improperly used the emergency exception.

Voight Shealy, State Materials Management Officer, testified that an actual emergency must exist to justify the use of the emergency exception. Expediting the construction process, by itself, is an insufficient reason to declare an emergency. Failure to start on time does not make an emergency. Poor planning does not create a valid emergency. Shealy routinely cited agencies for using the emergency exception when there was no actual emergency, and when they exceeded the scope of the actual emergency with the procurement.

The District acknowledged in internal memoranda that it would be cited by the State for its use of the emergency exception, but that there would be no practical consequences. The District further noted in another internal memorandum that in this use of the emergency

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exception, it was not following the procedures of the Office of District Facilities Management, but again there were no practical consequences. The District was required to report to the state auditors the emergency expenditure of \$36 to 40 million, but instead, the District reported about \$1.2 million. The auditors did not cite the District for the improper use of the emergency exception, but Larry Sorrell, of the State Budget and Control Board, testified that had he known that the expenditure was \$36 to \$40 million, that information would have made a difference to him in the audit.

The Court finds that the facts presented clearly show that the District was not faced with an emergency, and furthermore, that the District knew it was not faced with an emergency. Therefore, the use of the emergency exception to avoid the normal procurement process was an invalid and illegal use of the emergency exception.

The District contends that the language “such other reason as may be proclaimed either by the Superintendent or his designee” allows the District wide latitude or virtually unlimited discretion to decide if a particular circumstance is sufficient justification for the emergency exception.

This interpretation of the Regulation is contrary to the rule that the Supreme Court adopted in *State v. Four Video Slot Machines*, 317 S.C. 397, 453 S.E.2d 896 (1995):

[T]he meaning of general words . . . may be restricted by words of specification which precede them . . . on the theory that, had the legislature intended the general words be used in their unrestricted sense, there would have been no mention of the particular class.

317 S.C. at 400, 453 S.E.2d at 898.

Professor Thomas R. Haggard of the University of South Carolina School of Law, explains the proper interpretation of such a phrase:

When a sentence lists several specific items and concludes with a catch-all phrase like *and others*, the rule of *ejusdem generis*—meaning *of the same kind*—provides that the

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general phrase is limited by the specific words that preceded it. The rule is applied by identifying the common denominator of the specific items and then limiting *others* to entities also possessing that characteristic.

*Legal Drafting in a Nutshell*, West Publishing Co., St. Paul MN, 1996, pp. 256-57. As noted above the common characteristic is the suddenness and the lack of opportunity for planning that sets apart a true emergency.

Furthermore, the Court finds that determination is insufficient because it lacks adequate justification for an emergency. The emergency exception is a departure from the otherwise required method to select the source of procurement of construction: competitive sealed bids. The Code requires a written determination to afford the District and the public sufficient information to intelligently and objectively review the decision. The decision to use the emergency exception must be sufficiently detailed to satisfy an audit, and it must be made available to the public. The purpose of the determination is to provide the basis of the decision to the school board and to the public. If the determination provides, in sufficient detail, the information necessary for the school board and the public to make an intelligent, objective review of these decisions, then it has accomplished its purpose. This Court is empowered to determine whether the written determination is sufficiently detailed to accomplish this purpose.

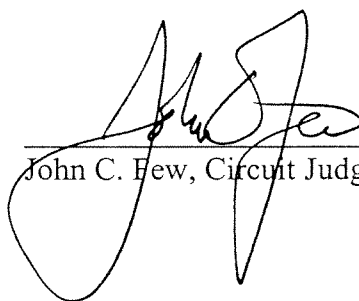
This Court finds the determination insufficient under the Procurement Code of the School District of Greenville County. It does not afford the School Board and the public an adequate basis to intelligently and objectively review the decision to use the emergency exception. The determination states in a conclusory fashion that the emergency exception is needed to comply with the Long Range Building Plan. The determination fails to set forth the factual basis of this conclusion in sufficient detail to allow the School Board and the public to make an intelligent review of the decision.



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In conclusion, the Court grants the plaintiff declaratory judgment that the District illegally declared an emergency, when no emergency existed, and that each of the three identical determinations is invalid in its form, for lack of a sufficient factual justification for using an emergency exception, and that the contracts procuring the construction are "unquestionably void" for failure to strictly comply with the procurement statutes. *Pennell & Harley, Inc. v. Heron*, 169 S.C. 16, 168 S.E. 188, 191 (1933).

SO ORDERED, this 14<sup>th</sup> day of July, 2003.

  
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John C. Few, Circuit Judge Presiding

Order drafted by Counsel.

A Certified Copy  
Paul B. Wislenski  
Clerk of Court C.P. & G.S.  
Greenville County, SC  
Dated 7/15/03