

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 JACOBS/BEERS YORK, a joint venture )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 THE SCHOOL DISTRICT OF )  
 GREENVILLE COUNTY, SOUTH )  
 CAROLINA, a body politic organized )  
 and existing under the law of )  
 South Carolina )  
 )  
 Defendant. )

IN THE COURT OF COMMON PLEAS  
 CIVIL ACTION NO. 2000-CP-23-5375

SEP 23 P 1:47

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CLERK OF COURT  
 GREENVILLE CO. S.C.  
 100 S. WILKENS BLVD.

TEMPORARY RESTRAINING  
 ORDER AND TEMPORARY  
 INJUNCTION

ENTERED COMPUTER

This matter comes before the Court pursuant to Plaintiff's Motion for Temporary Restraining Order and Temporary Injunction, pursuant to Rule 65 of the South Carolina Rules of Civil Procedure, on the grounds that Jacobs/Beers York ("Jacobs/Beers") would suffer irreparable harm unless the School District of Greenville County, South Carolina ("School District") was enjoined from (1) closing the award protest period in which Jacobs/Beers, and other offerors, may file protests to the School District's Intent to Award the contract for RFP Number 299-83-9-2, until fifteen (15) days following the date which the School District provides the proposed contract referenced in the School District's Intent to Award to Jacobs/Beers and other offerors; and, (2) awarding the contract as contemplated by the School District's Intent to Award until such time as Jacobs/Beers', and other offerors', protests can be filed and heard in accordance with the School District's Procurement Code. For the reasons stated herein, Plaintiff's motion is granted.

This case arises out of the School District's procurement of construction services for the School District's Long Range Facilities Plan. On September 11, 2000, the School District posted

*[Handwritten signature]*

*Ads - will serve copy on Defendant*

an Intent to Award, stating that the School District intended to award a contract for these construction services to Institutional Resources, L.L.C. The School District's Intent to Award stated that the contract would be awarded to Institutional Resources effective sixteen (16) days from the date that the Intent to Award was posted.

The School District's Procurement Code ("Procurement Code") provides for a process whereby other bidders, or offerors, may protest the award of a proposed contract. The Procurement Code provides that "[a]ny . . . offeror . . . who is aggrieved in connection with the intended award or award of a contract shall protest to the Purchasing Agent . . . within fifteen days of the date notification of award is posted. . . ." (Procurement Code, p. 42, ¶ A. 1.) The Procurement Code also provides that any such protest must set forth the grounds of the protest, and the relief requested, in sufficient detail to provide notice of the issues to be decided. (Procurement Code, p. 43, ¶ A. 2.) The Procurement Code's award protest procedure provides the sole remedies and rights available to an aggrieved bidder to the exclusion of any other claims, at common law or otherwise, against the School District. (Procurement Code, p. 42, ¶ A. 1.)

Upon the posting of the Intent to Award, Jacobs/Beers, an offeror for the work, immediately began preparing its award protest pursuant to the provisions of the Procurement Code. Jacobs/Beers asserted that, to comply with the Procurement Code regarding protests, Jacobs/Beers needed a copy of the proposed contract between the School District and Institutional Resources, L.L.C. Jacobs/Beers submitted a formal request to the School District, pursuant to the South Carolina Freedom of Information Act ("FOIA"), for copies of the proposed contract. Jacobs/Beers then filed this action on September 25, 2000 after the School District refused to provide Jacobs/Beers with copies of the requested documents. Jacobs/Beers' Summons, Verified Complaint and Motion for

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Temporary Restraining Order/Temporary Injunction were served upon the School District on September 26, 2000 at 8:51 a.m. as evidenced by the Affidavit of Service filed with the Clerk of Court.

This Court granted Jacobs/Beers an expedited hearing on September 26, 2000, the last day of the protest period as provided in the Procurement Code. At this hearing, the Court received oral arguments from Jacobs/Beers and the School District, as well as testimony from Mack Woods, the President of Beers/York Construction Company, Inc., and Oby Lyles, the School District's Executive Director for Communications. Institutional Resources also appeared before the Court and asked to intervene or alternatively to address the Court as amicus. The Court did not grant Institutional Resources' requests, but allowed Institutional Resources to assert arguments. The Court also received into evidence, without objection, copies of a transcript of the Minutes of the September 8, 2000 Special Called Meeting of the School District Trustees, and the Affidavits of Mack Woods and L. Franklin Elmore.

#### FINDINGS OF FACT

Based upon the testimony and evidence presented to the Court, the Court finds that:

1. The School District issued the Notice of Intent to Award the contract for RFP 299-83-9-2 to Institutional Resources on September 11, 2000.
2. It is clear from the review of the transcript of the September 8, 2000 Special Called Meeting of the Board of Trustees that the Board of Trustees considered the contract negotiations with Institutional Resources to be complete when the Board voted to issue the Notice of Intent to Award.
3. The Procurement Code award protest provisions provide the sole remedy to an aggrieved bidder against the School District.
4. Jacobs/Beers intends to protest the contract award pursuant to the Provisions of the Procurement Code. The failure of the School District to provide a copy of the

proposed contract between Institutional Resources and the School District deprives Jacobs/Beers of the ability to set forth all the grounds for its protest as required by the Procurement Code.

5. Jacobs/Beers submitted a FOIA request to the School District on September, 11, 2000, requesting a copy of the proposed contract between the School District and Institutional Resources.
6. Mr. Oby Lyles orally denied Jacobs/Beers FOIA request on September 19, 2000. At the time that Mr. Lyles denied Jacobs/Beers FOIA request, Mr. Lyles did not assert that the proposed contract was privileged, confidential or proprietary information as set forth in the School District's Request for Proposal or Procurement Code.
7. The School District, through Mr. Lyles, did not assert, in denying Jacobs/Beers FOIA request, that the materials were exempted under S.C. Code Ann. § 30-4-40 (Law. Co-op 1999).
8. The School District intends to make a summary of the proposed contract between Institutional Resources and the School District available to the public the day after the award protest period expires.

#### CONCLUSIONS OF LAW

The School District's actions have caused Jacobs/Beers irreparable injury because the School District's refusal to provide a copy of the proposed contract to Jacobs/Beers is fundamentally unfair and deprives Jacobs/Beers of due process by not allowing Jacobs/Beers to file a meaningful bid protest, setting forth fully the grounds in detail, as required by the Procurement Code.

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Due process does not mandate any particular form of procedure. Instead, due process is a flexible concept, and the requirements of due process in a particular case are dependant upon the importance of the interest involved and the circumstances under which the deprivation may occur.

South Carolina Nat'l Bank v. Central Carolina Livestock Market, Inc., 345 S.E.2d 485 (S.C. 1986)(internal citations and quotations omitted). As an offeror, Jacobs/Beers has a protected interest in protesting the award as provided in the School District's Procurement Code. This interest is

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important because the protest process is Jacobs/Beers' sole remedy against the School District. If the School District is allowed to withhold the proposed contract between the School District and Institutional Resources until after the bid protest time expires, Jacobs/Beers will be denied the ability to identify and evaluate all potential grounds upon which Jacobs/Beers may protest the intended contract award. The School District's refusal to provide Jacobs/Beers with a copy of the proposed contract between the School District and Institutional Resources clearly deprives Jacobs/Beers of the information it needs to avail itself of, and comply with, the Procurement Code's protest procedures. By denying Jacobs/Beers access to the required documents, the School District is depriving Jacobs/Beers the opportunity for its protest to be heard at a meaningful time and in a meaningful manner. The School District's refusal to provide a copy of the proposed contract is a denial of Jacobs/Beers' right to due process under the South Carolina and United States Constitutions.

The balance of equities also dictates that the School District must provide a copy of the proposed contract to Jacobs/Beers. The decision to issue injunctive relief must be based upon a balancing of the equities. Smith v. Phillips, 458 S.E.2d 427 (S.C. 1995) See Kneale v. Bonds, 452 S.E.2d 840 (S.C. Ct. App. 1994).

Here, Jacobs/Beers stands to suffer a loss of its right to protest the contract award at a meaningful time and in a meaningful manner. The School District, on the other hand, stands to suffer only a brief suspension of the protest process. Further, since the evidence indicates that the School District had already completed contract negotiations with Institutional Resources at the time it issued the notice of Intent to Award. Neither the School District, nor Institutional Resources will be prejudiced by the disclosure of the proposed contract. In light of the relative harms and

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Jacobs/Beers' rapid response to the School District's Intent to Award, equity favors the issuance of an injunction.

The public's interest in competitive procurement of public facilities will also be promoted by the issuance of injunctive relief. "[A]n injunction and declaratory judgment are the only adequate means of protecting the public interest, the integrity of the competitive bidding process, and the rights of the individual bidder." Funderburg Builders, Inc. v. Abbeville County Memorial Hospital, 467 F. Supp. 821, 825 (D.S.C. 1979) Id. at 825. Cf. Sloan v. School Dist. of Greenville County, 2000 S.C. App. LEXIS 153 (S.C. Ct. App. Aug. 21, 2000)(granting taxpayer standing to challenge School District's award of construction contracts, which were allegedly *ultra vires* to the School District Procurement Code, because the issue was of great public importance). The injunctive relief which Jacobs/Beers seeks is in the best interests of the citizens of Greenville County. Not only will such relief ensure integrity of the competitive bidding process, but it will assure that the School District obtains competitive bids in the future. The general provisions of the School District's Procurement Code provide that the purposes and policies of the procurement code are, in part:

2. to foster effective broad-based competition for public procurement within the free enterprise system; . . .
6. to ensure fair and equitable treatment of all persons who deal with the procurement system of this District; . . .
9. to promote increased public confidence in the procedure followed for public procurement. (Procurement Code, pp. 1-2, ¶ A.).

The Procurement Code imposes an obligation of good faith in negotiation, performance, and enforcement of the duties set forth in the Procurement Code. (Procurement Code, p. 2, ¶ B.). By



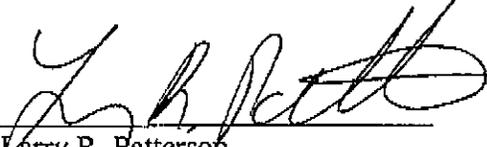
allowing Jacobs/Beers, and other offerors, to review a copy of the proposed contract prior to the expiration of the award protest period, the stated purposes and policies of the Procurement Code will be furthered. Such review will allow Jacobs/Beers to prepare a meaningful award protest, and thus receive fair and equitable treatment in dealing with the School District. Public confidence in the enforcement of the Procurement Code will be enhanced. Finally, enforcement of the Procurement Code policies and purposes, by insuring that there is a fundamentally fair and meaningful protest process, will help insure that School District will maintain the benefit of interested competitive bidders in the future.

Based on the foregoing reasons, it is ordered that: (1) the School District of Greenville County shall provide a copy of the proposed contract between the School District and Institutional Resources to Jacobs/Beers and other offerors for the project; (2) Jacobs/Beers, and other offerors, may file protests to the Intent to Award for a period of fifteen (15) days following the date which the School District provides the proposed contract; and, (3) the School District is enjoined from awarding the contract until such time as Jacobs/Beers', and other offerors', protests can be filed and heard in accordance with the School District's Procurement Code.

AND IT IS SO ORDERED

September 28, 2000  
Greenville, South Carolina

*Memorandum  
September 26, 2000*

  
Larry R. Patterson  
Circuit Court Judge  
Thirteenth Judicial Circuit