

STATE OF SOUTH CAROLINA	)	BEFORE THE SOUTH CAROLINA
	)	PROCUREMENT REVIEW PANEL
COUNTY OF RICHLAND	)	
	)	
	)	ORDER
IN RE:	)	
Appeal by Richardson Construction, Inc.;	)	Case No. 2014-15
	)	
	)	
Giti Tire Manufacturing, (USA) LTD and	)	
Alliance Consulting Engineers, Inc.;	)	
Site Preparation Work for Giti Tire	)	
Manufacturing, (USA) LTD	)	

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This matter came before the South Carolina Procurement Review Panel (the Panel) for a hearing on February 3, 2015, pursuant to a request for review by Richardson Construction, Inc. (Richardson) under section 11-35-4410(1) of the Consolidated Procurement Code (the Procurement Code). Richardson sought review of the December 2, 2014, written determination of the Chief Procurement Office for Construction (the CPOC) dismissing Richardson’s protest for lack of jurisdiction under the Procurement Code. At the Panel’s hearing, R. Bryan Barnes, Esquire, and Mary Lucille Dinkins, Esquire, represented Richardson. Karen B. Manning, Esquire, represented the South Carolina Department of Commerce (the DOC); and W. Dixon Robertson, III, Esquire, represented the CPOC. Joan E. Winters, Esquire, appearing on behalf of Chester County; and Amber B. Carter, Esquire, appearing on behalf of Giti Tire Manufacturing, (USA) LTD, were present at the Panel hearing, but did not participate in the argument.

**Background**

The dispute before the Panel involves a tire manufacturing plant to be constructed and operated in Chester County by Giti Tire Manufacturing, (USA) Ltd. (Giti). In June of 2014, the

South Carolina Coordinating Council for Economic Development (the Council)<sup>1</sup> awarded Chester County (the County) a grant in the amount of \$35,775,000<sup>2</sup> with the stipulation that “Funds will be used for land acquisition and real property improvements for Giti Tire Holdings (USA) Ltd.” Record at PRP27. The Grant Award Agreement further provided:

If [the County] desires to select a Contractor to undertake all or any part of the scope of work of the Project, then the selection of that Contractor by the Grantee must follow applicable procurement laws, regulations and guidelines. [The County] warrants that it will adhere to all such applicable procurement laws, regulations and guidelines in the selection of the Contractor.

Record at PRP29.

The Council, the County, and Giti also executed a “Performance Agreement.” Record at PRP35 – PRP51. This agreement contained the following provisions:

2.0 **Project Description.** [Giti] will establish and equip tire manufacturing plants and support operations of a corporate facility, a research and development facility and a distribution facility through the acquisition, construction and purchase of certain land, buildings, furnishings, apparatuses and equipment in [Chester] County, hereinafter referred to as the “Project.”

3.0 **Use of Proceeds.** The [County] will use the Grant to assist [Giti] with the costs of site acquisition, site preparation, site infrastructure improvements and other related capital expenditures for real property improvements at the Project site in Chester County (collectively, “Grant Project”). . . . .

\* \* \* \*

5.0 **Contractor Selection.** If [Giti] desires to select a private contractor to undertake all or any part of the scope of work of any portion of the Grant Project, then the selection of that contractor by [Giti] must take place in accordance with the Chester County procurement ordinance.

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<sup>1</sup> Pursuant to statute, the Council is a division of the S.C. Department of Commerce. S.C. Code Ann. § 13-1-10(A) (Supp. 2014). One of the Council’s duties is to provide “approval of infrastructure and other economic development grants for local units of government pursuant to Section 12-28-2910.” S.C. Code Ann. § 13-1-1720(6) (Supp. 2014). The grant Chester County received was given pursuant to Section 12-28-2910, which authorizes the Council to expend monies to support economic development from a fund created by State gasoline and fuel user fees. Record at PRP27; S.C. Code Ann. § 12-28-2910 (2014). Section 12-28-2910(E) specifically lists “site preparation” as an authorized expenditure. S.C. Code Ann. § 12-28-2910(E) (2014). The Council must report annually to the General Assembly regarding expenditures from the fund. *Id.* The Panel notes that Section 12-28-2910 is silent with regard to the Procurement Code.

<sup>2</sup> The grant was increased to \$36,325,000 by an addendum approved by the Council on September 4, 2014.

Record at PRP35 – PRP36; PRP41.

On July 7, 2014, Giti solicited bids for site preparation by placing an advertisement in South Carolina Business Opportunities. Record at PRP16 – PRP17. The advertisement identified Giti as the Agency/Owner and stated, “This project is being funded by County & State grants.” *Id.* The advertisement requested prospective bidders to submit prequalification statements to Giti’s engineer and advised “Based on the Contractor Prequalification Statements, GITI Tire Manufacturing will select up to five contractors for the invitation to bid on the site preparation for the project.” Record at PRP16. Apparently, no prospective bidder objected to this process.

Although Richardson submitted a prequalification statement, Giti informed Richardson that it was not selected to receive an invitation to bid by letter dated October 29, 2014. Record at PRP70. On November 11, 2014, Richardson filed a document with both the DOC and the CPOC “protest[ing] the decision of Giti Tire Manufacturing, (USA) Ltd. (“Giti”) and [Giti’s engineer] to prevent Richardson from bidding on the mass site work project for the construction of the Giti tire plant in Chester County, South Carolina.” Record at PRP8. In its protest, Richardson sought “all relief available to an aggrieved party under the South Carolina Consolidated Procurement Code.” *Id.* Thereafter, on November 17, counsel for Richardson sent a letter to the DOC’s procurement officer, the CPOC, Giti, and the County’s procurement director informing them that Richardson believed that the Project should be stayed based on its protests under the Procurement Code and/or Chester County’s procurement ordinance.<sup>3</sup> Record at PRP18 – PRP20. Richardson supplemented its protest on November 20, 2014. Record at PRP22 – PRP26.

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<sup>3</sup> This letter indicates that on the same date it filed its protests with the DOC and the CPOC, Richardson simultaneously filed a protest with the Chester County Purchasing Department based on Chester County’s procurement policy.

The DOC's attorney sent a letter to the CPOC on November 18th asking the CPOC to dismiss Richardson's protest because neither the County nor Giti is a "governmental body" as defined by the Procurement Code and because the County and Giti have been following the County's procurement rules, not the Procurement Code. Record at PRP21.

The CPOC dismissed Richardson's protest on December 2, 2014, finding that he lacked jurisdiction because the Procurement Code did not apply. Record at PRP4 – PRP6. In his decision, the CPOC observed:

The Code defines "procurement" as the acquisition of supplies, services, information technology, or construction. S.C. Code Ann. § 11-35-310(24). In other words, absent an acquisition of construction by the State under contract acting through a governmental body, the Code is inapplicable to Giti's solicitation of site preparation work.

In this case, Giti, not the State, purchased the real property. Giti, not the State, will own and operate the facility once the project is complete. Giti, not the State, will contract for the construction work that Richardson wants to bid. Giti, not the State conducted the solicitation Richardson protested. By Richardson's own acknowledgement, "Giti is a private company utilizing a private engineering firm . . . and one of Giti's own employees . . . to run the procurement for the mass site work for the Project." The State is acquiring nothing, and no governmental body is paying a contractor for construction work.

Record at PRP6. Richardson timely appealed the CPOC's written determination to the Panel, and the Panel requested the parties to brief and present oral argument on the issue of jurisdiction under the Procurement Code.

### **Conclusions of Law**

In its appeal to the Panel, Richardson argues that the Council falls within the definition of a "governmental body" in section 11-35-310(18) of the Procurement Code and that its "expenditure" of economic development funds, such as the grant given to Chester County, are subject to the Procurement Code under section 13-1-25(A) of the South Carolina Code. Section 13-1-25(A) characterizes the monies in any fund used by the DOC as "public monies" and

establishes that they are subject to accountability requirements, including compliance with the Procurement Code. S.C. Code Ann. § 13-1-25(A) (Supp. 2014). Thus, Richardson argues that the Council's grant to Chester County is an "expenditure of funds" subject to the application of the Procurement Code. However, this argument overlooks the jurisdictional requirements contained within the Procurement Code itself and the fact that not all State expenditures are subject to the Procurement Code.

The Procurement Code's application is set forth as follows:

This code applies to every procurement or expenditure of funds by this State under contract acting through a governmental body as herein defined irrespective of the source of the funds . . . except that this code does not apply . . . to the issuance of grants, or to contracts between public procurement units, except as provided in Article 19 (Intergovernmental Relations).

S.C. Code Ann. § 11-35-40(2) (2011). The term "procurement" is defined by the Procurement Code as "buying, purchasing, renting, leasing, or otherwise acquiring any supplies, services, information technology, or construction." S.C. Code Ann. § 11-35-310(24) (2011). Although the term "expenditure of funds" is not defined by the Procurement Code, both procurements and expenditures must be "by this State under contract acting through a governmental body" in order for the Procurement Code to apply. The Procurement Code defines "contract" to mean "all types of state agreements, regardless of what they may be called, for the *procurement* . . . of supplies, services, information technology or construction." S.C. Code Ann. § 11-35-310(8) (2011) (emphasis added). Thus, reading all of these provisions together, the State must acquire something, specifically construction in this case, under contract for the Procurement Code to apply. Absent such acquisition by the State, the Procurement Code does not apply.

It is undisputed in this case that Giti, a private company, acquired the land for its planned tire manufacturing plant, which it will also own and operate once the project is complete. Giti,

not the State, conducted the solicitation Richardson has protested, and Giti, not the State, will contract and pay for the construction work. In short, the State – whether through the DOC, the Council, or Chester County – is acquiring nothing, and the Procurement Code simply does not apply. Therefore, the Panel concludes it does not have jurisdiction over Richardson’s protest.<sup>4</sup>

For the reasons discussed above, the Panel hereby affirms the written determination of the CPOC and dismisses Richardson’s protest.

**IT IS SO ORDERED.**

**SOUTH CAROLINA PROCUREMENT REVIEW PANEL**

BY:   
**C. BRIAN MCLANE, SR., CHAIRMAN**

This 17<sup>th</sup> day of February, 2015.

Columbia, South Carolina

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<sup>4</sup> Having determined that there is no jurisdiction under the Procurement Code, the Panel need not address Richardson’s remaining arguments. In addition, the Panel declines to impose sanctions as requested by the DOC and Chester County. The Panel has never addressed this precise issue and finds that Richardson presented its claims in good faith.