THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Case Nos. 00-CP-23-3752, 3753, 4171
Opinion No. 2003-UP-416 (S.C. Ct. App. filed June 19, 2003)

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, ...Petitioner,

v.

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,.....Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

On May 24, 2000, October 12, 2000, and July 18, 2000, respectively, Edward D. Sloan, Jr. ("Sloan"), a resident of Greenville County, filed three separate actions against the South Carolina Department of Transportation and its Commissioners (collectively the "SCDOT") seeking to enjoin the construction of three large highway construction projects: The Carolina Bays Parkway in Horry County ("Carolina Bays"), the widening of Highway 170 in Beaufort County ("Highway 170"), and the construction of a new Cooper River Bridge in Charleston County ("Cooper River"). The actions regarding Carolina Bays and Cooper River were originally filed in Greenville County, but they were later transferred to Richland County. The action regarding Highway 170 was filed in Richland County.

The three actions were consolidated and heard on June 1, 2001, before the Honorable G. Thomas Cooper, Jr., on cross-motions for summary judgment. In an order dated July 6, 2001, Judge Cooper ruled that Sloan had neither standing as a taxpayer of this state, nor any particularized interest in this matter which would afford him standing to proceed with these suits. Judge Cooper did, however, rule that Sloan should be granted standing to bring the actions under the "public importance" exception. Having found standing, Judge Cooper then granted the SCDOT's motion for summary judgment on the merits; thereby ending the case. On July 17, 2001, Sloan served his Notice of Appeal, and on July 19, 2001, the SCDOT served its Notice of Cross-Appeal, limited to the issue of standing.

On June 19, 2003, the Court of Appeals in an unpublished per curiam opinion affirmed the trial court's findings that Sloan had neither taxpayer standing nor a particularized interest in this matter. The Court then reversed the trial court's determination that Sloan had standing based on the public importance of the lawsuit. Having ruled Sloan lacked standing, the Court of Appeals did not reach the trial court's ruling on the merits favoring SCDOT. Sloan filed a petition for rehearing on July 7, 2003, which was unanimously denied on August 21, 2003.

On September 22, 2003, Sloan filed a petition for *writ of certiorari*, which was granted by this Court on May 26, 2004. On July 26, 2004, Sloan filed his Initial Brief, which was received by SCDOT's counsel on July 29.

STATEMENT OF FACTS

The Petitioner is a former contractor who claims that the State is obligated to use the design/bid/build process for procuring the construction services needed to complete three major highway and bridge projects. On these three projects (and on others as well), the SCDOT has used the design/build process. Under the traditional design/bid/build process, a project is designed and is 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 SCDOT issues a Request for Qualifications ("RFQ") which is advertised in a number of publications, along with a general description of the project to be constructed. The SCDOT then reviews the qualifications submitted and determines which entities are qualified to

handle the project. The SCDOT then issues the qualified 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 SCDOT selects the proposal which provides the best value within the available budget. (A. 211-216.)

On January 15, 1999, the SCDOT issued an RFQ for the Carolina Bays Parkway. (A. 190.) Four firms submitted qualifications. Of the four firms, the SCDOT determined three to be qualified and invited them to submit proposals. Three proposals were submitted. The SCDOT selected the proposal of Palmetto Transportation Constructors as the proposal most advantageous to the State. Id. 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 desired project for $232 million. The third bid proposed to perform only a portion of the desired project for $232 million. Id.

On February 3, 1999, the SCDOT issued an RFQ for Highway 170. (A. 215.) Nine firms responded to the RFQ. The SCDOT determined six of the submitters to be the most qualified and invited them to respond to an RFP. Id. The SCDOT determined that the proposal by Balfour Beatty Construction was the most advantageous to the State. The Balfour Beatty bid was the lowest bid by approximately $24 million. Id.

The State issued an RFQ on the Cooper River Project on July 14, 2000. Three entities responded to the RFQ. (A. 194.) The SCDOT determined all three entities to be qualified and on February 23, 2001, issued an RFP. All three entities responded to the RFP with proposals. (A. 194.) While at the time of the summary judgment hearing final funding for Cooper River had not been completed, the RFP required that if sufficient funding could be obtained for the SCDOT to issue an unlimited notice to proceed, the SCDOT would be required to select the responsive proposal which is the least costly to the State.[1] (A. 154.)

All three projects have been or will be financed by the South Carolina Transportation Infrastructure Bank ("State Infrastructure Bank" or "SIB"). (A. 181, 182, 193.) The State Infrastructure Bank is a state agency created in 1997 to assist governmental units and private entities in financing major transportation projects. (A. 195.) In creating the SIB, the General Assembly intended for the SIB to focus greater attention on larger transportation projects and thereby allow the SCDOT's resources to be devoted to other transportation systems. (H.B. 3665, 1997 Reg. Sess. § 1(6) (1997), A. 282.)

The SIB was established in response to a report issued in 1993 by the Transportation 2000 Committee, a panel chaired by Senator Isadore E. Lourie, established to identify critical transportations needs in South Carolina and recommend a plan for funding those needs. The report concluded that current

[1] On June 15, 2001, the SCDOT selected the lowest responsive proposal for the Cooper River Bridge.

highway department revenues were not adequate to fund large projects and recommended that tolls or other local participation be utilized. (A. 195.)

The authorized sources of SIB capital are set forth in S.C. Code Ann. § 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 the SCDOT); (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 SIB's loans and the SIB's investment earnings; (6) bond proceeds; (7) other lawful sources; (8) one-year loans from the SCDOT; and (9) truck registration fees. Id.

Funds actually entering the SIB's accounts as of the date of the hearing were an amount equal to one-cent gas tax on an annual basis from SCDOT; truck registration fees annually; revenues from a 1.5% Horry County hospitality fee; a Beaufort County one-cent sales tax; interest; installments on the $209 million the SCDOT 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. (A. 196.)

At the time of the trial court hearing, the SIB had 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 the SCDOT in repayment of the loan on the Conway Bypass project (federal funds). Id. The bonds will be repaid from truck registration fees, Horry County hospitality fees, and federal funds. Id.

Due to its immense cost, Cooper River will require the combined contribution of the SIB, Charleston County, the South Carolina Ports Authority, the SCDOT, and the United States Department of Transportation ("USDOT"). The USDOT has agreed to contribute up to one-third of the total cost of the project under the Federal Transportation Infrastructure Finance and Innovation Act ("TIFIA"). (A. 194.) If the financing package is complete, no general South Carolina taxpayer funds will be used on the Cooper River project. (A. 129, 130.)

ARGUMENT

Sloan is a citizen of Greenville County. He filed suit to enjoin construction of three (3) SCDOT projects located in Horry County, Beaufort County, and Charleston County. Sloan claims the SCDOT acted unlawfully in the manner it procured the construction of these projects; although, he did not seek a contract on any of the projects. With one small exception, no general state taxpayer funds have been used to fund any of the projects. While certain local taxes in the counties involved were included in the financing packages, no resident of the three (3) counties has challenged the actions of the SCDOT regarding projects. Likewise, no firm which sought a contract to build any of the projects has challenged the actions of the SCDOT.

The trial court and the Court of Appeals found that Sloan had no particularized interest in these projects sufficient to confer standing to prosecute these cases. The trial court and the Court of Appeals found that the mere fact Sloan is a South Carolina taxpayer did not provide him standing to enjoin actions of the SCDOT. The Court of Appeals also ruled that while the issue was one of public importance, that fact alone did not confer standing upon Sloan, as there were other potential plaintiffs, directly affected by the actions of the SCDOT who would have a greater interest in the issue than he.

The Court of Appeals was correct in its rulings, as this Court has never allowed a state taxpayer, without more, to bring suit to challenge actions of a state agency.

I. THE COURT OF APPEALS CORRECTLY RULED THAT SLOAN HAD NO STANDING.

A. The Court of Appeals correctly ruled that the fact that Sloan pays taxes in South Carolina is insufficient to confer standing in this instance.

In finding that Sloan had no standing as a mere taxpayer of the state, the Court of Appeals noted:

> 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 in his own standing is the exceedingly small interest of the general taxpayer. Nevertheless, [a] citizen and taxpayer has standing as such to contest expenditure of public funds under an alleged unconstitutional statute. (A. 614, citations omitted.)

Sloan contends that he is entitled to bring this action as a state taxpayer "to contest the illegal expenditures of state tax funds, just as a local taxpayer possesses standing to contest an illegal expenditure of local tax funds." (Brief at 11.) Sloan contends a state taxpayer, ipso facto, has standing to challenge an ultra vires act. As the Court of Appeals noted, the trial court did not rule on this issue. As Sloan failed to raise the issue in any post-trial motions, the Court of Appeals correctly ruled that this issue was not properly before it. (A. 615n.7.) Sloan has not asserted the Court of Appeal's failure to address this issue as a reason for *certiorari*; therefore, this issue is not before the Court at this time.

Should the Court reach this issue, the cases Sloan relies upon in support of his argument are of no avail to him. Sloan fails to recognize there is a distinction between a municipal or county taxpayer and a state taxpayer in terms of the interest required in order to be afforded standing. As the Court of Appeals observed:

> The cases cited by Sloan as authority for the proposition that he has taxpayer standing to bring this action all involve standing for a municipal or county taxpayer. Here, however, Sloan bases his standing on his status as a state taxpayer. (A. 614.)

The Court of Appeals noted:

> As this court observed in *Sloan v. The School District of Greenville County*, there is a difference between a municipal county taxpayer and a state taxpayer in terms of what must be demonstrated in order to have standing. In that case, the county taxpayers whom the plaintiff purported to represent were deemed to constitute only a comparatively small part of the general public; hence, their interest in the lawsuit was

> distinct from that of the general public which included people outside the county. In contrast, the taxpayers of South Carolina, on whose behalf Sloan has filed the present action, comprise a class that represents a very large portion of the general public. We therefore hold Sloan's interest in this case is not specific or distinct from that of the general public; therefore, his status as a taxpayer of the State of South Carolina would be insufficient to confer standing in this instance. (A. 614-615, citations omitted.)

In reality, Sloan's interest is even smaller. The vast majority of "taxes" at issue is a small portion of the gasoline tax. Taxes on gasoline are paid not only by South Carolina residents, but by any person who purchases gasoline in this state. In reality, the class of individuals affected is not limited to South Carolina citizens, but rather any individual who has bought gas within this state. This fact gives even greater credence to the Court of Appeals reliance upon long-standing South Carolina law that state taxpayers have no standing to challenge an *ultra vires* act of a state agency unless the taxpayer has a special or particularized interest.

Sloan next argues this Court's decision in *Myers v. Patterson*, 315 S.C. 248, 433 S.E.2d 841 (1993) grants standing to a taxpayer to address an allegedly *ultra vires* act of a state agency. Sloan misinterprets *Myers*, as well as prior decisions of this Court and the Court of Appeals.

Sloan claims *Myers* stands for the proposition that a state taxpayer has standing merely because he may have "contributed to the sum jeopardized." (Brief at 11.) Sloan fails to recognize that *Myers* involved a constitutional challenge.

In *Myers*, certain taxpayers brought an action alleging that actions of the general assembly regarding gasoline tax revenue contained in the 1992 Appropriations Act violated the South Carolina constitution. This Court acknowledged, as has the Court of Appeals, that as a general rule "private citizens may not restrain official acts when they fail to allege and prove damage to themselves different in character from that sustained from the public generally" 433 S.E.2d at 842. This Court then found that inasmuch as *Myers* had alleged the actions of the legislature were unconstitutional, he had standing to challenge the enforcement of the Appropriations Act ("Because the plaintiffs have alleged that the challenge expenditure of tax revenues violates the constitution, we find that they have standing to bring this action ... " *Myers* at 251, 843).

Sloan does not challenge the constitutionality of the procurement statutes at issue. Rather, he claims that as a taxpayer of the state, he has standing to challenge an ultra vires act of a state agency. Sloan's connection to these cases is no more than anyone purchasing gasoline in South Carolina, or, at best, as a taxpayer of this state. This alone, without any specialized interest to protect, is insufficient to confer standing.

B. The Court of Appeals Correctly ruled that Sloan does not have any special interest in this litigation which would accord him standing to bring this lawsuit as a state taxpayer.

Sloan argues that the Court of Appeals opinion sets forth a new "*de minimis*" test for standing, and that application of this test will "eliminate all taxpayer actions except those brought by the absolute wealthiest of our citizens"

and that this rule "may end taxpayer standing in South Carolina." (Brief at 16.) Sloan fails to appreciate the context of the Court of Appeals ruling; fails to appreciate the distinction between municipal taxpayers and state taxpayers; and fails to appreciate the previous decisions of this Court.[2]

In order to have standing, a plaintiff must have a personal stake in the interest matter of the lawsuit. *Glaze v. Brooms*, 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 party may not envoke 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). The Court of Appeals found that Sloan had no interest which differed from any other South Carolina taxpayer. As such, he had no "special interest" so as to confer standing. (A. 615.)

Sloan argues this Court has allowed standing "to challenge an illegal expenditure even though his taxes contributed only $6.28 to the illegal fund." (Brief at 14, citation omitted.) Sloan relies on *Shillito v. Spartanburg*, 214 S.C. 11, 51 S.E.2d 95 (1948), as support for his argument. Sloan fails to recognize that *Shillito* involved a challenge on constitutional grounds to a special tax law enacted by the general assembly for the city of Spartanburg. Sloan raised no constitutional challenge here. While *Shillito* involved a constitutional challenge to an act of the

[2] This Court and the Court of Appeals have consistently recognized a distinction between the nexus necessary for standing as a municipal or county taxpayer, as opposed to the nexus for standing as a mere taxpayer of the State. See discussion, *supra*.

legislature, and the law challenged was a municipal tax levy. In other words, not only did *Shillito* involve a constitutional challenge, it was a suit by a municipal taxpayer against a municipality. While this Court has allowed suits by taxpayers challenging municipal or county actions, it has never allowed a challenge to the allegedly unlawful actions by state officials without some particularized nexus possessed by the challenger. Here, Sloan has no particularized interest apart from the general public.

The cases relied upon by Sloan involve challenges to municipal or county actions. *Mauldin v. City of Greenville*, 33 S.C. 1, 11, S.E. 434 (1890) was a challenge against an alleged misappropriation of city funds. *Sligh v. Bowers*, 62 S.C. 409, 40 S.E. 885 (1901) involved a suit against the Board of Education of Newberry County. *Kirk v. Clark*, 191 S.C. 205, 4.S.E.2d 13 (1939) involved a suit against the Board of Commissioners of Chesterfield County. *Brown v. Wingard* involved a case against the mayor and members of the city council of the City of Greenwood regarding expenses to attend a convention. Finally, his own case, *Sloan v. School District of Greenville County, supra.*, involved a challenge to expenditures made by the county council of Greenville County.

The trial court and the Court of Appeals found that the cost of the Highway 170 project amounted to $0.35 per taxpayer in South Carolina. This is simply not sufficient to accord standing to Sloan. This is particularly true when vast majority of the funds utilized in no way accrue from taxpayer funds. As discussed *infra*, the SIB has issued several series of revenue bonds to pay for Carolina Bays, and

Highway 170. The revenue sources pledged for repayment of those bonds are truck registration fees as well as hospitality taxes.

Since at least 1906, a taxpayer with no special interest to protect and only the small interest of a general taxpayer has not been allowed standing to enjoin the actions of a state agency. *Crews v. Beattie, supra; Duncan v. State Board of Education*, 74 S.C. 560, 566, 54 S.E. 760, 763 (1906). In *Duncan*, this Court refused to enjoin the creation of a central book depository noting "the personal interest of the petitioners is exceeding small, it being impossible that it could amount to more than five ($5.00) or six ($6.00) dollars a year." This concept has also been followed by the United States Supreme Court in *Massachusetts v. Melon*, 262 U.S. 447, 43 S. Ct. 597, 67 L. Ed. 1078 (1923) (while a municipal taxpayer can enjoin the misuse of money by 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 enjoy its misuse). It is submitted that the sum of thirty-five cents is *de minimis* compared to the five ($5.00) or six ($6.00) dollars per year deemed insufficient for standing in the year 1906.

C. The Court of Appeals correctly found that Sloan should not be granted standing due to the public importance of the issue, as there were others with a more identifiable nexus to the litigation than Sloan.

Sloan argues he should be granted standing based on the public importance of "respondents expenditure of more than $800 Million Dollars of public funds, in

a manner not authorized by law." (Brief at 7.) As set forth below, $800 Million Dollars of "public funds" are not involved. Even so, the issue is not "public funds" but taxpayer funds, or the general obligations of the State of South Carolina.

Elizabeth S. Mabry, the Executive Director of the SCDOT, testified regarding the funding sources for Carolina Bays and Highway 170. Carolina Bays and Highway 170 are being financed from the proceeds of the sale of revenue bonds by the SIB. The revenue sources pledged for repayment of these bonds are truck registration fees, Horry County hospitality fees, and some federal funding.[3] (A. 183-184.)

Revenue bonds differ from general obligation bonds in that general obligation bonds are secured by the taxing power of the state. On the other hand, revenue bonds are secured by a particular stream of revenue, in the case of Carolina Bays, by truck registration fees and hospitality fees.

Due to its immense cost, Cooper River will require the combined contributions of the SIB, the County of Charleston, the South Carolina Ports Authority, SCDOT, and the USDOT. The USDOT has agreed to contribute up to one-third of the total cost of the project under the federal Transportation Infrastructure Finance and Innovation Act ("TIFIA"). (A. 194.) When the financing package is complete, no general South Carolina taxpayer funds will be

[3] The mere fact that funds are received by the SIB does not mean those funds are "general taxpayer funds." See discussion *supra* at 5-6.

used on the Cooper River project. (A. 129.) Accordingly, there is not the expenditure of $800 million dollars of public funds involved. Rather, the combination of a federal grant, revenue bonds, and funds generated by hospitality taxes in counties where Sloan is not a resident make up the funding for Cooper River.

As this court noted in *Crews*, the mere fact that an issue is one of public importance does not, *ipso facto*, confer standing upon any plaintiff who wishes to bring suit. Something more must be present. As the Court of Appeals recognized, in each of the cases relied upon by Sloan there was an additional factor or factors present which inclined the Court towards standing. For example, in *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999), the plaintiffs were physicians challenging the use of tax-free bonds by the Medical University to fund medical practices to compete with the plaintiffs. In *Thompson v. South Carolina Comm'n on Alcohol & Drug Abuse*, 267 S.C. 463, 229 S.E.2d 718, this Court granted standing to law enforcement officers seeking guidance as to how they should deal with the enforcement of conflicting statutes. In both these cases, the plaintiffs were directly affected in their professional life by the outcome of the case. Sloan, on the other hand, will be affected no more or no less than any other citizen of South Carolina by a decision involving SCDOT's procurement of large capital highway projects.

The question then becomes what type of nexus is sufficient to bring an issue of public importance to the attention of a court. In *Jenkins v. Swan*, 675 P.2d

1145 (Utah 1983), the Supreme Court of Utah addressed the issue of what is a sufficient nexus for standing to be granted under the "public importance" exception. The Court set forth a two-part test. First, a court must inquire whether the plaintiff is adversely affected by the governmental action (a causal relationship between the injury to the plaintiff, the governmental action, and the relief requested). If so, then the plaintiff is granted standing. If not, the court asks whether there is anyone with a greater interest in the outcome of the case than the plaintiff. If there is such a person, the plaintiff is not entitled to standing.

The Court of Appeals implicitly recognized this latter test in *Carolina Alliance for Fair Employment v. South Carolina Department of Labor, License, and Regulation*, 337 S.C. 476, 523 S.E.2d 795 (Ct. App. 1999), and explicitly recognized it in its decision below:

> In *Carolina Alliance for Fair Employment v. South Carolina Department of Labor, License and Regulation*, this court found the plaintiff had standing based on the public importance of the issue of a worker's right to notice of the wage being offered. Although the plaintiff has not suffered any specific harm, there were no other potential plaintiffs with a greater interest in the case. (A. 616.)

As the Court of Appeals found, there were a number of potential plaintiffs directly affected by SCDOT's actions. Any firm which submitted a proposal but was unsuccessful on any of the projects had a far greater interest in SCDOT's procurement policy than Sloan. Yet, only Sloan asks the Court to set aside the projects. None of those who failed to receive a contract have done so.

Likewise, Carolina Bays is being constructed in Horry County with some utilization of county funds. The same is true for Highway 170 in Beaufort County, and Cooper River in Charleston County. Any taxpayer of any of those three counties has a greater interest in SCDOT's procurement and its use of county tax money than does Sloan, who is a resident of Greenville County. Yet, no taxpayer in any of these three counties has come forward to protest these projects.

Sloan contends that none of the disappointed firms would have standing to bring suit. This is a truly circular argument. As the Court of Appeals correctly noted, there is already a readily available class of potential plaintiffs to challenge SCDOT's actions that Sloan complains of, i.e. those disappointed proposers on the request for proposals, none of whom came forward. In fact, the potential class with a vested interest in asserting the arguments made by Sloan herein, that the use by SCDOT of the design-build form of contract is *ultra vires*, is much broader. Any firm with the capability of performing either the construction or design services solicited under the design-build RFP but not both could easily submit a bid or a proposal to perform those services only, be rejected as non-responsive, and sue to challenge the legality of the solicitation. Any firm who submitted a proposal would have far more standing than Sloan, because it would have been directly affected by SCDOT's procurement policies. A taxpayer in any of the three counties would be more directly affected than Sloan, as his money would have been utilized in the procurement. The taxpayer would have a particularized

interest in how his/her money was spent. See *Sloan v. School District of Greenville County, supra.*

Clearly, there are classes of firms and individuals who are more directly affected by the actions of the SCDOT than Sloan. Had one of these brought suit, he would have a better claim to standing than Sloan. Sloan is in no different position than any other member of the public of South Carolina. This court has never recognized that a member of the public, without more, may bring an action challenging the actions of state officials, when the challenge is not based on constitutional grounds.

II. THE TRIAL COURT CORRECTLY RULED THAT THE SCDOT HAS THE AUTHORITY TO USE THE DESIGN/BUILD PROCESS.

Sloan contends that the contracts for Carolina Bays, Highway 170, and Cooper River must be awarded by competitive bids instead of competitive proposals. The trial court correctly found that the SCDOT had authority under several statutes to use the design/build process.

A. S.C. Code Ann. Section 57-3-110 – General Powers.

Under S.C. Code Ann. § 57-3-110 the SCDOT is given broad powers to construct and maintain the public highways and bridges and to "do all other things required or provided by law." S.C. Code Ann. § 57-3-110(12). The trial court correctly ruled that under these broad general powers the SCDOT has the authority to use the design/build process. S.C. Code Ann. § 57-3-110 states in relevant part: The Department of Transportation shall . . .

> (1) lay out, build, and maintain public highways and bridges . . .
>
> (6) cooperate with the federal government in the construction of federal-aid highways . . . and seek and receive such federal aid and assistance as may from time to time become available except for funds designated by statute to be administered by the Chief Executive Officer of the State;
>
> (10) enter into such contracts as may be necessary for the proper discharge of its functions and duties . . .

Horry County and the SIB entered into an intergovernmental agreement regarding the funding of Carolina Bays. The SCDOT entered into the intergovernmental agreement when it agreed to manage the construction contracts for Carolina Bays. (A. 188-189.) At the time Horry County, the SIB, and the SCDOT were entering into the intergovernmental agreement on Carolina Bays, they did not know whether there was sufficient money to complete the project. (A. 189.) The trial court correctly found it was necessary for the parties to use the design/build method to ensure that the project could be built for the budgeted amount.

The trial court also found it was necessary to use the design/build process on Highway 170. Highway 170 was a joint venture among the SIB, the Federal Highway Administration ("FHWA"), and Beaufort County. The SIB was able to contribute $86.5 million, and the FHWA contributed $13.5 million. (A. 191.) Beaufort County provided matched funds up to $40 million. (A. 192.) Knowing that they had a finite amount with which to work, the parties decided to submit the project out as a fixed-scope, fixed-budget project to determine if the project was

feasible. Id. This also permitted the cost to be locked-in. The parties were concerned that if the project was not locked-in, the impact of inflation could drive up the price, and because the parties could not commit more money to the project, the project would have to be decreased or ultimately discarded. Id. Thus, as the trial court correctly found, the design/build method was necessary.

The trial court also found that Cooper River, due to its immense cost, required the combined contributions of several entities: Charleston County, the SIB, the South Carolina Ports Authority, the SCDOT, and the FHWA. The absence of any one of the contributors would have jeopardized the financial viability of the project; however, the various contributors were not willing to commit funds until they knew what their particular share of the total cost would be. (A. 194.) Given that commitments from all parties were essential before beginning the project, the trial court correctly found that it was necessary to establish the total cost prior to the bidding of the project. This was only possible by using the design/build method.

In addition, since the State of South Carolina (Charleston County, the Ports Authority, and the SCDOT) could not fund the total cost of Cooper River, the FHWA agreed to contribute up to one-third of the total cost of the project under TIFIA. Id. In order to qualify for the TIFIA funds, the SCDOT had to provide a final cost of the project and show that the State had contributed the balance of the cost. The final cost could not be projected until the design was completed. Id. As the trial court correctly found, the only way to establish the full cost of the project

before the design was completed was through a design/build contract. The trial court correctly concluded that the design/build method was necessary to proceed.

Without receiving the necessary federal funds on the projects, the SCDOT could not carry out its obligations under S.C. Code Ann. § 57-3-110. The trial court found, in order for the SCDOT 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 Ann. § 57-3-110(1) and (6), it was necessary for the SCDOT to use the design/build process on these projects.

B. These contracts are allowed pursuant to S.C. Code Ann. Section 57-3-200 – Public/Private Partnership Statute.

The trial court correctly found that S.C. Code Ann. § 57-3-200 permits the SCDOT to enter into innovative contracts for financing highways and bridges. Section 57-3-200 gives the SCDOT authority to finance construction projects by tolls and other financing arrangements when it enters into a partnership agreement to construct roads and bridges. The legislature gave the SCDOT authority to "enter into such contracts as may be necessary for the proper discharge of its functions and duties" and to do "all other things required or provided by law." *Brashier v. South Carolina DOT*, 327 S.C. 179, 490 S.E.2d 8 (1997).

The trial court correctly found that in order to build the three highway projects challenged here, it was necessary for the SCDOT to enter into innovative financing agreements with other governmental partners. The design/build process was an integral part of the financing agreements. The SCDOT 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. (A. 189.) Beaufort County had already commenced with the design/build process on Highway 170 when the SCDOT was brought in to manage the project. (A. 214.) Under this contract the SCDOT would continue with the design/build method. Id. On Cooper River, it was expected that the SCDOT would enter into an agreement with Charleston County, the SIB, the Ports Authority, and the FHWA to fund the project. Cooper River also required the design/build method in order to comply with the financing requirements. Just as the Court in *Brashier* recognized that the SCDOT had broad authority to "enter into such contracts as may be necessary for the proper discharge of its functions and duties," the trial court correctly ruled that the SCDOT had broad authority to enter into contracts with other governmental entities to carry out its duty to build large highway projects, even when such contracts required the design/build procurement process.

Sloan argues that S.C. Code Ann. § 57-3-200 is limited to contracts regarding financing. S.C. Code Ann. § 57-3-200 is not limited to financing contracts. In *Brashier v. South Carolina DOT, supra,* this Court ruled that under S.C. Code Ann. § 57-3-200 the SCDOT had authority to barter away its right to construct a highway that would compete with the Southern Connector. *Brashier,* 327 S.C. at 192, 490 S.E.2d at 18. The Court noted that the legislature gave the SCDOT authority "enter into such contracts as may be necessary for the proper

discharge of its functions and duties," and "do all other things required or provided by law." *Brashier*, 327 S.C. at 192, 490 S.E.2d at 15, citing S.C. Code Ann. § 57-3-110.

C. S.C. Code Ann. Section 57-3-670 – Cooperation with Federal Government to Receive Federal Funds.

Highway projects are exempt from the State Consolidated Procurement Code. S.C. Code Ann. § 11-35-710(a). As the trial court found, one of the reasons for this exemption is the SCDOT 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. (A. 21.) This exemption protects the SCDOT from having to follow two sets of rules in its contracting and thereby risk the loss of federal funding should those rules conflict. (A. 210.) S.C. Code Ann. § 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 SCDOT procures highway and bridge projects by contracts with design consultants and construction firms following the federal rules. These rules are contained in statutes, regulations, and various agreements entered into by the SCDOT and the FHWA. Moreover, it is the SCDOT's policy 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. Id.

In general, 23 U.S.C. § 112 governs contracts on all federal-aid highway projects. The trial court correctly found that in accordance with 23 U.S.C. § 112, the FHWA approved the SCDOT 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 the design/build process with the grant money. Originally design/build projects were approved by the FHWA on a case by case basis, but in March 1999 the SCDOT received blanket approval to use design/build under SEP-14. In its approved application, the SCDOT proposed that:

> The process will be similar to those previously awarded in South Carolina under SEP-14. The process will include an advertisement and request for qualifications (RFQ) to short list technically qualified proposers. A request for proposals (RFP) will be solicited from short-listed qualified proposers. Proposals will consist of two parts, a Technical Proposal and a Cost Proposal. Technical Proposals will be evaluated before opening Cost Proposals. Technical scoring criteria will generally be similar to those used in previous SEP-14 projects. Criteria for individual projects may vary to fit specific projects needs. Cost proposals for short-listed firms will be reviewed after scoring technical proposals.

(A. 279.) The approved procedures are designed to incorporate the protections inherent in the qualifications-based procedures for design consultation selection and the cost-based procedures of construction contractors resulting in the best value for the state. The projects in this case, Carolina Bays, Highway 170, and Cooper River, are proceeding under the SEP-14 approval of March 1999.

Sloan argues S.C. Code Ann. § 57-3-670 does not apply because the federal guidelines did not require the design/build process. This argument is incorrect. If a project is not constructed according to federal requirements regarding engineering and procurement, the State is barred forever from using federal funds on that project. (A. 210.) Under 23 U.S.C. § 112, there are two permitted means to construct a highway project in conformity to federal guidelines: design/bid/build and design/build. The federal government designated $13.5 million to be used on Highway 170. (A. 191.) As discussed above, since Beaufort County, the SIB, and the SCDOT had a finite amount of money with which to work, it was necessary to know whether Highway 170 could be constructed with the available funds or lose the federal funds. Thus, federal guidelines necessitated that the design/build format was used on Highway 170.

Likewise on Cooper River, as discussed above, the FHWA agreed to contribute up to one-third of the total cost of the project. The State (including its agencies) had to demonstrate that they would contribute the balance of the cost. It was impossible to know the total cost of Cooper River without using design/build. Thus federal guidelines necessitated that the design/build format was used on Cooper River.

D. State Infrastructure Bank.

The trial court found that all three projects are or will be financed by the SIB. (R. p. 22, line 18.) Projects that are funded through the SIB are not required

to use the competitive design/bid/build process outlined in S.C. Code Ann. § 57-5-1620. The SIB is an agency of the state created "to assist governmental units and private entities in financing major transportation projects." (A. 195.) 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 Ann. § 11-43-120(C). The SIB has a separate and distinct function apart from the SCDOT. (H.B. 3665, 1997 Reg. Sess. § 1(6) (1997), A. 282.) "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.

In creating the SIB, the General Assembly gave the SIB broad authority, *see* S.C. Code Ann. § 11-43-150, and instructed that the SIB's authority and functions are to be liberally construed. S.C. Code Ann. § 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. (emphasis added); S.C. Code Ann. § 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."); s*ee City of Columbia v. Board of Health and Environmental Control*, 292 S.C. 199, 355 S.E.2d 536 (1987). In *Columbia*, the Board of Health and Environmental Control (the "Board") ordered the City of Columbia to either purchase two private sewer systems or allow the owner of the sewer systems to tie into the City's trunk line as a wholesaler. The City refused arguing that the Board

had no authority to require the City to comply with the Board's order. This Court held that the Board had implied authority to issue such an order since the Board was "charged with the responsibility of insuring" that the state had clean water and the 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." *Columbia*, 292 S.C. at 202, 355 S.E.2d at 538.

The trial court found that the SIB has the authority to fund construction projects with methods like the design/build process. (A. 23.) The General Assembly created the SIB in 1997 because it found that the traditional ways of constructing highways and bridges were not effective enough. (H.B. 3665, 1997 Reg. Sess. § 1(2) (1997), A. 282.) In creating the SIB, the General Assembly made specific findings. The General Assembly found that the "traditional transportations 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. The General Assembly further noted that "alternative methods of financing" will allow the state to address its transportation needs. (H.B. 3665, 1997 Reg. Sess. § 1(3) (1997), A. 282.) 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 SCDOT 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 SCDOT construction program.

Furthermore, the trial court correctly ruled that the enabling legislation for the SIB was created far later than S.C. Code Ann. § 57-5-1620 and is thus presumed to supercede § 57-5-1620. *See e.g. Vernon v. Harleyville Mut. Case Co.*, 244 S.C. 152, 135 S.E.2d 841 (1964); *Whiteside v. Cherokee Co. School Dist. No. 1*, 311 S.C. 335, 428 S.E.2d 886 (1993); *South Carolina Elec. & Gas Co. v. S.C. 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.")

Likewise, in *State ex rel. Crawford v. Stevens*, 173 S.C. 149, 175 S.E. 213 (1934), our Supreme Court was faced with the question of whether serial certificates of indebtedness were allowed to be issued. The original State Highway Bond Act passed in 1929 required serial certificates of indebtedness. In 1933 the General Assembly allowed callable certificates of indebtedness to be issued. In construing whether *only* callable certificates could be issued, our Supreme Court held that the purpose of the statute controls. The Court found that the 1933 act was passed because the bond market in 1933 would not purchase serial bonds, so the General Assembly created another type of bond that could be issued. *Crawford*, 173 S.C. at 155, 175 S.E. at 216. In the present case, the General Assembly created the SIB because traditional transportation financing methods were not effective, (H.B. 3665, 1997 Reg. Sess. § 1(1)(1997), A. 282); therefore, "alternative methods of financing projects" were necessary. (H.B. 3665,

1997 Reg. Sess. § 1(2) (1997), A. 282.) Even if Sloan's argument that § 57-5-1620 requires the SCDOT use the design/bid/build method is correct, the fact that the General Assembly subsequently created the SIB to provide alternative financing methods would control.

Sloan argues that the SIB enabling legislation only deals with financing rather than procurement. Sloan misunderstands the purpose of the SIB. The General Assembly created the SIB in response to the finding of Senator Isadore Lourie's Transportation 2000 Committee that the SCDOT could not adequately deal with the transportation needs of the state. (A. 195.) The General Assembly in creating the SIB allocated the larger transportation projects to the SIB and allocated the remaining transportation projects to the SCDOT. (H.B. 3665, 1997 Reg. Sess. § 1(6) (1997), A. 282.) "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 is not merely a financier, but an integral part of the highway infrastructure of the State.

E. S.C. Code Ann. Section 57-5-1700.

The trial court correctly found that S.C. Code Ann. § 57-5-1700 exempts these projects from the requirements of S.C. Code Ann. § 57-5-1620. S.C. Code Ann. § 57-5-1700 provides that "[n]othing in [section] 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." Section 57-5-1700 clearly contemplates that S.C. Code Ann. § 57-5-1620 does not apply to every project. In comparing Section 57-5-1700 with other legislative enactments such as the private-public partnership legislation, S.C. Code Ann. § 57-3-110(6), it is clear that the General Assembly has prescribed that S.C. Code Ann. § 57-3-1620 does not apply in certain circumstances. The trial court found that one of these circumstances occurs when the federal government has particularized guidelines or programs with which the SCDOT can comply to obtain federal money either now or in the future. (A. 24.) Section 57-5-1700 exempts the SCDOT from S.C. Code Ann. § 57-5-1620 when it is partnering with the federal government or a part of the state government on a particular project. On these projects, the SCDOT partnered with the federal government through the FHWA, the state government through the SIB, and the counties in which the projects are situated for funding. Therefore, the trial court was correct in ruling that the procurement provisions of S.C. Code Ann. 57-5-1620 do not apply to these projects.

Additionally, the statutory scheme applicable to the SCDOT combined with the statutes passed subsequently to S.C. Code Ann. § 57-5-1620 indicates that the General Assembly intended to give the SCDOT 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 Ann. § 57-5-1700, the trial court correctly found that the legislative intent was to allow

the SCDOT to use the design/build process as necessary to construct public highways and bridges. As the trial court observed, any finding to the contrary would render the SIB ineffective and would substantially reduce the SCDOT's ability to meet its obligations to the traveling public. (A. 25.)

It is essential to Sloan's argument that the General Assembly, in its enactment of S.C. Code Ann. § 57-5-1620[4], intended to prevent SCDOT from utilizing the design-build method of procurement and to mandate the design-bid-build method. The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 580 S.E.2d 100 (2003). Clearly, this was not the General Assembly's intent. Nowhere in the laws governing highway procurements in this State is design-build contracting prohibited nor design-bid-build made the only system for procuring services for highway improvements.

The General Assembly has provided the SCDOT with statutory authority to use the design/build process to procure contracts through all of the above statutes. The legislature's clear intent is that the SCDOT have the flexibility in its contracting practices so as to secure for the state the maximum amount of available federal funding as well as to maximize the available revenue from all private and local federal and state sources to complete large infrastructure projects. In his brief, Sloan notes that the section of the State Consolidated Procurement Code governing construction contracting by other state agencies has mandated a

[4] Act No. 746, 1956 Acts 1752.

strictly defined methodology including competitive sealed bids. S.C. Code Ann. § 11-35-3020. His argument demonstrates only that the General Assembly knows how to restrict state agencies' procurement practices to narrowly defined methods when it desires to do so. In the case of highway procurements, it has not so legislated. Plaintiff's request for an "advisory opinion" (*see* discussion *infra*) therefore is nothing more than an invitation to this Court to legislate in a very specific and detailed manner where the General Assembly has clearly declined to so do. The Court should reject this invitation.

III. THE TRIAL COURT CORRECTLY RULED THAT THE SCDOT COMPLIED WITH SECTION 57-5-1620 OF THE SOUTH CAROLINA CODE.

Sloan's argument that the SCDOT failed to comply with S.C. Code Ann. § 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. As the trial court correctly noted, both a request for proposals and an invitation for bids 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). (R. p. 25, lines 12-17.) As the Court of Appeals noted, the Consolidated Procurement Code uses the terms interchangeably. S.C. Code Ann. § 11-35-310(28) states

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

(Emphasis added.)

In his affidavit, Sloan's witness Marion Dorsey tried to draw a distinction between the definitions of a bid and a proposal (A. 70); however, Mr. Dorsey admitted that the language of his definition of a bidder is not taken from any statute but is a "common knowledge statement." (A. 295, lines 12-14.) He also admitted that his definition of a proposer is not taken from a statute but from a reading of the statutes and "a collective knowledge." Id. Mr. Dorsey tried to distinguish a proposal from a bid based on the "proposal can be viewed as an invitation to negotiate;" however, he again admitted that this language "was created" and it came "from experience." (A. 296, line 8.) Mr. Dorsey made these generalized statements without having reviewed the requests for proposals for these projects or without knowing whether his statements applied in this case. (A. 296, lines 9-12.) Likewise, Mr. Dorsey has never handled an SCDOT procurement. (A. 298, lines 5-7.) There is, then, a complete lack of objective support for Mr. Dorsey's opinion.

Mr. Dorsey admitted there is no substantial difference between a bid and a proposal. As in a request for proposals, in order to bid, the bidder must be qualified. (A. 297, lines 1-17.) The determination of who is qualified is made by "someone that is in charge of this procurement." (A. 297, lines 6-10.) This

qualification must be more than merely whether the bidder is responsive to the bid package. (A. 297, lines 10-12.) Finally, Mr. Dorsey admitted that both a proposal and a bid were a "written or published solicitation," (A 300, lines 6-12), "issued by an authorized procurement officer" (A. 300, lines 13-20), which "will ordinarily result in the award of a contract," (A. 301, lines 4-13), "to the responsive bidder." (A. 301, lines 14-20.) The only difference is whether the contract is awarded to the "responsible bidder which makes the lowest responsive bid" or the "responsive bidder which makes the proposal most advantageous to the state." (A. 301, line 21 – A. 302, line 4.)

In this case, there is no distinction because the contracts were awarded to the entity that submitted the lowest bid that was also the most advantageous to the state. Even if there were a technical distinction between a "bid" and a "proposal," the SCDOT complied with S.C. Code Ann. § 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." The trial court found in each case, the contract was awarded to the lowest qualified bidders.

On January 15, 1999, the SCDOT issued RFQs for Carolina Bays Parkway. (A. 190.) Four firms submitted their qualifications to the SCDOT to be considered. Of the four firms, three were determined to be qualified and invited to submit proposals. The SCDOT selected Palmetto Transportation Constructors as the "proposal most advantageous to the State." Id. Of the three proposals,

Palmetto Transportation Constructors proposed to perform all of the desired project for $225.5 million. The next lowest bid proposed to construct all of the desired project for $232 million. The third bid proposed to perform only a portion of the desired project for $232 million. Id. Thus, the contract for Carolina Bays was awarded to the lowest bidder.

Likewise on Highway 170, the SCDOT issued a request for qualifications on February 3, 1999. (A. 215.) Nine firms submitted their qualifications to the SCDOT. Of the nine submissions, the SCDOT determined that six were the most qualified and invited them to submit proposals. Id. The SCDOT determined that the proposal by Balfour Beatty was the most advantageous proposal for the State. The Balfour Beatty bid was the lowest bid. It was $24 million less than the next lowest bid. Id.

At the hearing, it was represented to the trial court that Cooper River would follow a similar pattern to the two other projects. The RFP required the SCDOT to award the contract to the lowest responsive and responsible bidder. (A. 154.)

Sloan attempts to argue semantics and draw a distinction between a bid and a proposal. As these cases have demonstrated, the two concepts are really indistinguishable. Sloan contends that the SCDOT is required to award the contract to the lowest bidder. On each one of the projects, Carolina Bays, Highway 170, and Cooper River, the contracts were awarded to the company which submitted the lowest responsive and responsible proposal, the proposal

which was the least costly to the State. Thus, the trial court correctly found that the SCDOT complied with S.C. Code Ann. § 57-5-1620.

The SCDOT has authority to use the design/build process pursuant to Section 57-5-1620. Section 57-5-1620 provides that the SCDOT shall award construction contracts of $10,000 or more to the "lowest qualified bidder whose bid shall have been formally submitted in accordance with the requirements of the Department." Nothing in Section 57-5-1620 prevents the SCDOT from establishing requirements that bids on certain contracts shall also include design plans. That is basically the only difference between the design/bid/build process and the design/build process.

As discussed above, in design/bid/build, the SCDOT first designs the project. The design plans are prepared either by the SCDOT's own staff or by an outside contractor. Then the SCDOT puts the fully designed project out for bids, soliciting bids from pre-qualified contractors. The construction contract is then awarded to the lowest bidder.

In design/build, the SCDOT solicits proposals to both design and build the project. The solicitation is made only to proposers who have been determined to be qualified to bid on the project through a prequalification process. Then the SCDOT awards the contract to the proposer whose proposal is most advantageous to the state, *i.e.*, "the lowest qualified bidder."

Nothing in Section 57-5-1620 prohibits the SCDOT from combining the contract for design with the contract for construction. In fact, Section 57-5-1620

authorizes the SCDOT to establish the "requirements" of the bid submittals. All Section 57-5-1620 requires is that: (1) the SCDOT establish the requirements of the bid submittals (and communicate these to the bidders prior to the submission of bids); (2) qualify the bidders (through a process determined by the SCDOT); and (3) award the contract to the "lowest qualified bidder." Nothing prohibits the SCDOT from interpreting the bid most advantageous to the state to be the "lowest qualified bid." In fact, in the three projects challenged here, all the contracts were awarded to the "lowest qualified bidder."

IV. THE TRIAL COURT CORRECTLY FOUND THAT THESE ACTIONS ARE BARRED BY THE DOCTRINE OF LACHES.

As the Court may recall, the SCDOT moved to strike all portions of Sloan's Brief except those dealing with the issue of standing. The SCDOT contended standing issue was the only issue upon which this Court granted *certiorari*. This Court disagreed, and required the SCDOT to file its fully responsive brief.

A review of the decision of the Court of Appeals discloses the Court did not feel it necessary to address those portions of the trial court's decision dealing with both the merits and laches. The trial court found for the SCDOT on the merits, and also found that Sloan's claim was barred by the doctrine of laches. Sloan has fully briefed his position as to the trial court's decision on the merits of his claim. Neither in his petition for *certiorari*, nor in his brief, did Sloan except to the trial court's decision that his claim was barred by laches. As he made no such exception, nor briefed such an exception, Sloan has abandoned his contention that

the trial court was in error in ruling that his claim was barred by laches. Having abandoned this argument, the trial court's decision that Sloan's claim is barred by laches is now the law of the case. *Baker v. Chavis*, 306 S.C. 203, 410 S.E.2d 600 (1991); *Foster v. Greenville County Medical Society*, 295 S.C. 190, 367 S.E.2d 468 (1988). As the trial court's decision that Sloan's reactions regarding Carolina Bays and Highway 170 are barred by laches, that is the law of the case, regardless of how this Court decides the issue of standing, or the issue on the merits. In an abundance of caution, the SCDOT provides this argument regarding laches.

"Under the doctrine of laches, if a party, knowing 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. Lee County Council*, 315 S.C. at 421, 434 S.E.2d at 280. In *Chambers,* the plaintiff knew that the parties (the county and the landfill company) entered into a contract in February. The plaintiff waited until October to file an action to declare the contract void. The Supreme Court upheld the trial court's determination that the plaintiff's claim was barred by laches. The determination of when laches should be applied rests largely within the discretion of the trial court. *Jannino v. Jannino*, 234 S.C. 352, 108 S.E.2d 572 (1959).

Likewise, in the present case Sloan did not seasonably assert his rights. On January 15, 1999 the SCDOT issued RFQs for Carolina Bays. (A. 190.) 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. (A. 170.) The bid was awarded, and the contract with Palmetto Transportation Constructors was signed March 1, 2000. (A. 190.) As of the date of the trial court hearing, $132 million has been paid to Palmetto Transportation Constructors under the contract. (A. 30.) Sloan knew or should have known about the plan to use the design/build process on or around January 15, 1999, when the RFQs were published. However, he waited until May 24, 2000, to institute this action against the SCDOT.

Likewise, on February 3, 1999, the SCDOT issued RFQs for Highway 170. (A. 215.) The bid was awarded and the contract with Balfour Beatty was signed September 28, 2000. (Id.) As of the date of the trial court hearing, $43.3 million has been paid to Balfour Beatty. (A. 192.) Sloan knew or should have known about the design/build process on or around February 3, 1999, when the RFQs were published. The RFQs were advertised in The State, the Beaufort Gazette, the Island Packet, and the South Carolina Business Opportunities. He waited until February 19, 2001, to institute this action against the SCDOT.

The trial court found that in both Carolina Bays and Highway 170, Sloan knew or should have known his rights in a timely manner. He unreasonably delayed in asserting his causes of action. These delays resulted in the SCDOT

entering into obligations and incurring irrecoverable expenses (A. 30); thus, the trial court correctly ruled that Sloan's actions should be barred by laches.

The trial court correctly rejected Sloan's assertions that the time for laches should begin to run when the contracts were signed not when the RFQs were issued. Sloan argues that *Chambers of S.C., Inc. v. Lee County Council, supra*, stands for the proposition that laches begins to run from the date of the contract not from the date the RFPs (not the RFQs) are issued. Sloan's interpretation of *Chambers* is incorrect. In *Chambers*, the plaintiff brought an action to declare a contract void because it had not been given the opportunity to properly present its proposal. The *Chambers* plaintiff suffered damage when the contract was awarded, not when the RFPs were issued. *Chambers* did not involve the awarding of the contract by use of an RFP. The county-defendant initially requested proposals under RFPs but later decided to reject all proposals submitted under the RFPs and awarded an exclusive 90-day option to a fourth company to develop a proposal. The *Chambers* plaintiff brought suit when the county-defendant rejected plaintiff's proposal and awarded the contract to the option holder. In the present cases, Sloan is challenging the use of proposals not the awarding of the contracts themselves. Thus, the trial court correctly ruled that laches began to run when the RFQs were issued.

Finally, Sloan argued that the trial court erred because it never addressed how a four day or 14-week delay in filing suit after the execution of the contract

would prejudice the SCDOT. This argument is not preserved for appeal since the court did not address it below. *Trivelas v. South Carolina Dept. of Transp., supra.*

Because Sloan delayed for so long in challenging this process of awarding contracts under the RFP process, the trial court correctly found that Sloan was barred by laches.

V. SLOAN HAS ABANDONED HIS REMEDIES IN THESE CASES AND NOW SEEKS AN ADVISORY OPINION.

Sloan recognizes that all the contracts in these cases have been awarded. The conclusion to his Brief indicates he is seeking declaratory relief and prospective injunctive relief. (Brief at 34.) In reality, Sloan is requesting an advisory opinion. In the Carolina Bays and Cooper River cases, Sloan did not pray for declaratory relief. (*See* Complaint for Carolina Bays;[5] *see also* Complaint for Cooper River.[6]) There is then, no declaratory relief available to Sloan. Likewise, Sloan cannot ask from this Court what he did not ask of the trial court. In the trial court, Sloan prayed for an injunction as to all three cases. Realizing the contracts he sought to enjoin have been awarded, Sloan now prays for a "prospective injunction." As all three contracts have been awarded, this case is

[5] "Wherefore, plaintiff prays the court for an order, which would preliminarily and permanently enjoin defendants from awarding a contract for construction of this bridge to one other than the lowest qualified bidder, and without obtaining a performance bond and a payment bond in the amounts required by law; and that the court award plaintiff his costs and attorneys fees, and grant such other and further relief as the court deems just and proper."[*sic*]. (Complaint for Carolina Bays at 3, A. 34.)

[6] "Wherefore, plaintiff prays the court for an order, which would preliminarily and permanently enjoin defendants from awarding a contract for construction of this bridge to one other than the lowest qualified bidder, and without obtaining a performance bond and a payment bond in the amounts required by law; and that the court award plaintiff his costs and attorneys fees, and grant such other and further relief as the court deems just and proper." (Complaint for Cooper River at 3, A. 37.)

now moot. "A case becomes moot when judgment, if rendered, will have no practical legal affect upon [t]he existing controversy. This is true when some event occurs making it impossible for [t]he review in court to grant effectual relief." *Mathis v. South Carolina State Highway Dep't.*, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973). An appellate court will not pass on moot and academic questions or making adjudication where there remains no actual controversy. *Jackson v. State*, 331 S.C. 486, 489, S.E.2d 915 (1997). Inasmuch as there remains no actual controvery, this matter is now moot. Any opinion issued by this Court would be advisory only, and this Court does not issue advisory opinions. *Biter v. S.C. Employment Security Comm'n*, 276 S.C. 493, 280 S.E.2d 60 (1981).

As Sloan has abandoned his request for relief and seeks only an advisory opinion, his appeal should be dismissed as moot.

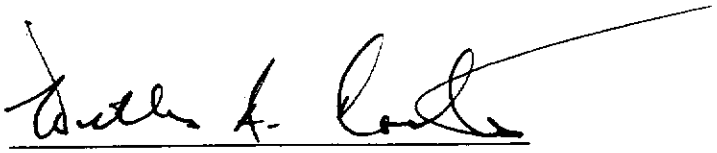
CONCLUSION

For the reasons set forth above, the SCDOT submits:

1. This appeal should be dismissed as moot;
2. Alternatively, this Court should affirm the Court of Appeals ruling on the issue of standing; and
3. Should this Court address the merits and the issue of laches, it is submitted that the decision of the trial court should be affirmed as to these issues.

Respectfully submitted,

ROE CASSIDY COATES & PRICE, P.A.



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October 28, 2004

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Case Nos. 00-CP-23-3752, 3753, 4171
Opinion No. 2003-UP-416 (S.C. Ct. App. filed June 19, 2003)

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, ...Petitioner,

v.

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, ...Respondents.

PROOF OF SERVICE

I certify that I have caused to be served this date three copies of **Brief of Respondents** to the following individual(s) by hand delivery to Petitioner's attorneys as addressed below:

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Respectfully submitted,

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