STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FEIMSTER-PETERSON, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 91-1426BID
	)	
FLORIDA A & M UNIVERSITY,	)	
	)	
Respondent,	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, this matter came on for hearing in Tallahassee, Florida, before the Division of Administrative Hearings by its duly designated Hearing Officer, Diane Cleavinger, on March 25 and 26, 1991.

APPEARANCES

For Petitioner: Nicholas S. Papleacos, Esquire
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Atlanta, Georgia 30383-1301

For Respondent: Bishop C. Holifield, Esquire
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Office of General Counsel
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STATEMENT OF THE ISSUES

The issue addressed in this proceeding is whether Petitioner submitted the lowest and best bid on CTB 5998.

PRELIMINARY STATEMENT

This case concerns Florida A & M University's (FAMU) attempt to secure a contractor to repaint and renovate Bragg Stadium (the repainting project), Bid 5998. Respondent, FAMU, issued a Call to Bid (CTB) for the repainting project on November 5, 1990. Petitioner submitted its bid. On December 21, 1990, FAMU opened the bids, but did not post the results. On December 23, 1990, Petitioner filed its Notice of Protest with the Respondent. On January 13, 1991, Respondent posted the bid tabulations. By letter dated January 14, 1991, Respondent rejected all of the bids and ignoring the bid protest filed by Petitioner, simultaneously re-let the repainting project. On January 16, 1991, Petitioner filed a Formal Written Protest of the bid award. On March 5, 1991, after considerable effort on Petitioner's part to gain a formal administrative hearing and after forcing the issue by the filing of a mandamus action against FAMU, the protest was forwarded to the Division of Administrative Hearings for purposes of holding an administrative hearing.

At the hearing, Petitioner presented two witnesses and offered thirty six exhibits into evidence. Respondent presented eight witnesses and offered nine exhibits into evidence.

Petitioner and Respondent filed their Proposed Recommended Orders on June 3, 1991, and June 4, 1991, respectively. The parties' Proposed Findings of Fact have been considered and utilized in the preparation of this Recommended Order except where such proposals were not supported by the weight of the evidence or were immaterial, cumulative or subordinate. Specific rulings on the parties' proposals are contained in the Appendix to this Recommended Order.

FINDINGS OF FACT

1. On November 5, 1990, Florida A & M University, acting as the agent of the Board of Regents, issued a Call to Bid (CTB) for the repainting and renovation of Bragg Stadium (repainting project). The total project was estimated to cost $595,000.00. The funds for the project would come from the Public Education Capital Outlay and Debt Service Trust Fund appropriated by the legislature and passed into law in the State's budget. 1/

2. Specifically, the funds for the repainting project were appropriated by the legislature as a specific line item in the 1990-1991 budget. The line in the budget read, "Fire Code Corrections/Repainting-Bragg Stadium (includes $490,000.00 Reimb. to Aux. Fund), of $682,000.00." The $682,000.00 figure was obtained from several documents submitted by FAMU to the Board of Regents. The Board of Regents then submitted the University's budget requests to the Commissioner of Education who, in turn, submitted an integrated budget to the governor and legislature. See Chapter 216 and 235, Florida Statutes, for the specifics of this budgetary process.

3. The beginning of the budgetary process in relation to the repainting project occurred on October 16, 1989, when Louis A. Murray, the Associate Vice President of Florida A&M sent a document titled "the University's 1990-91/1992-93 Capital Improvement Fee Project List for Legislative Consideration" to Dr. Carl Blackwell, the Vice Chancellor for Budgets. The document contained two attachments entitled "Capital Improvement Fee Project List, Project Information Sheet" (Project Information Sheet) for the fire code corrections at Bragg Stadium and the repainting of Bragg Stadium. It also included a Project Information Sheet for the remodeling of the Commons Building.

4. The Project Information sheet dealing with the repainting and renovation of Bragg Stadium contained the amount of funding being requested by FAMU for the repainting project and a breakdown of the project's estimated costs. The project cost detail for the repainting of Bragg Stadium states:

Construction	$495,000.00
(Assumes bid date of 1991)	
Professional Fees	43,000.00
Resident Supervision	(No entry)
Equipment	30,000.00
Contingency	27,000.00
Total Project Cost:	$595,000.00

5. Importantly, the Project Information Sheet for the repainting of Bragg Stadium contains the basis utilized by FAMU to arrive at the repainting

project's estimate. FAMU represented in the Project Information Sheet as follows:

> The basis for the estimate is the bid experience of a prior advertisement of the project by our own Plant Operations Maintenance Office, which came in at over $400,000. 2/

6. This estimate was again verified in a letter, dated October 25, 1989, from Dr. Murray to Dr. Blackwell. The letter states, in part, as follows:

. . . .

> Since the opportunity for completing this project is between football seasons, the University wishes to advance dollar requirements from its Auxiliary Trust Fund with expected reimbursement from Capital Improvement Trust Fund after Legislative approval on July 1, 1990. This action will permit us to proceed with the Bid process and construction contract through completion before the 1990 football season.
>
> The scope of this project is summarized as follows: This project includes sandblasting, repainting and structural repairs for Bragg Stadium. Sandblasting and repainting is estimated at $415,000, while structural repair, primarily isolated rust spots, will cost approximately $75,000.

. . . .

7. The total estimate in Dr. Murray's October 25, 1990, letter was $490,000.00. It was this letter which prompted the parenthetical language in the line item of the General appropriations act for 1990-1991, passed by the legislature and enacted it to law.

8. The Project Information Sheet for the fire code corrections to Bragg Stadium (fire code project) contained a project cost detail as follows:

Construction	$70,000.00
Professional	7,000.00
Resident Supervision	(No entry)
Equipment	(No entry)
Contingency	10,000.00
Total Project Cost:	$87,000.00

9. The contract for the fire code corrections was let for bid prior to the repainting project. The amount of the contract for the fire code project was approximately $107,000.00. This contract amount exceeded the amount of the construction portion of the Project Cost Detail of $70,000.00 shown in the Project Information Sheet for the fire code project. Dr. Murray testified that this action was acceptable because it was within the discretion of Florida A&M to use the $682,000.00 appropriation to perform the fire code project in any amount it deemed appropriate, without regard to the break-outs shown in the Project Information Sheets. However, even assuming the correctness of Dr.

Murray's position and deducting the amount of the fire code project's contract and the architectural fees of $7,000.00 listed in the Project Information Sheet, $568,000.00 of the original budgeted amount of $682,000.00 would remain for use on the repainting project.

10. Florida A&M University, also prepared a document titled, "Summary of Capital Improvement Fee Projects for 1990-91/1992-93." The document is a summary of Florida A&M's budget requests for those years. This document also lists the fire code project and the repainting project along with the requested funding for those projects for the years 1990 through 1991. The funds requested for the projects are broken into three categories; Planning, Construction and Equipment. The entries for the repainting project show that the amount of $522,000.00 is for "Construction". The $522,000.00 figure was obtained by taking the $495,000.00 figure for construction contained within the Project Information Sheet for the repainting project, and adding the amount of the contingency cost ($27,000.00) for the project which was also shown on the Project Information Sheet.

11. The combined total for the two projects was $682,000.00, the exact amount appropriated by the legislature for the two projects.

12. Once the legislature had appropriated the money, FAMU, on November 5, 1990, requested that A Capital Outlay Implementation Plan be established with the Capital Outlay Trust Fund. The establishment of such a Plan is similar to creating a special account within the trust fund from which the University can draw. On November 26, 1990, the Plan was established for both projects in the amount of $682,000.00, as had been appropriated by the legislature. 3/ The Capital Outlay Implementation Plan contained a section titled, "estimated budget". The estimated budget contained estimates for the various phases of both projects as follows:

Construction.....	$565,000
Professional Fees.....	50,000
Furnishings and Equipment.....	30,000
Contingencies.....	37,000
.....	$682,000

13. Significantly, these documents were the only pre-established construction budgets developed by FAMU prior to the opening of the bids in this case. 4/ The specific pre-established construction budget for the repainting project was $522,000.00. Later, after the filing of the bid protest, FAMU would attempt to render a strained interpretation of the phrase "pre-established construction budget" contained in the bid specifications and engage in some inappropriate accounting in order to create several lower budget estimates.

14. The Bid Package for CTB 5998 provided in the "Instructions to Bidders", Item D-21, Rejection of Bids, as follows:

> The owner reserves the right to reject any and all bids when in the opinion of the owner such rejection is in the best interest of the owner.

15. The Bid Package further provided in the "Instructions to Bidders" at B-23, Contract Award, page 16 of 106, in relevant part:

> The contract will be awarded by the Florida Board of Regents for projects $500,000 or more, and by the President of the University, on behalf of the Florida Board of Regents, for projects of less than $500,000.00, to the lowest qualified and responsible bidder provided the bid is reasonable and it is in the best interest of the owner to accept it.
>
> . . .
>
> The contract award will be made to the responsible bidder submitting the lowest responsible aggregate bid within the pre-established construction budget. The aggregate bid shall consist of the base bid plus accepted active alternate bids, or less accepted deductive alternate bids, applied in the numerical order in which they are listed on the bid form. If the base bid exceeds the amount of the pre-established construction budget, the owner may reject all bids. (Emphasis added)

16. A mandatory pre-bid conference was held on December 6, 1990, and was attended by seventeen contractors, including Petitioner. By the terms of the bid package, the bid opening date was set for December 18, 1990. However, by addendum, the bid opening date was extended to December 21, 1990.

17. Seven bids were submitted in response to the original solicitation. 5/

18. The bids were opened at 10:00 a.m. on December 21, 1990, at the conference center of Florida A&M University. The bids were opened by Chuks Onwunli on behalf of Florida A&M, and tabulated by William Sabella, a representative of the architectural firm , Barnett, Fronczak Architects, the consulting architects for the repainting project. The opening and tabulation of all the bids was recorded on a document titled "Bid Tabulation".

19. The result of the opening was that Phoenix Coating was the low bidder with a bid of $419,000.00. Feimster-Peterson, Inc., was the second lowest bidder with a bid of $474,320.00, and Monoko, Inc., was the third low bidder with a bid of 487,462.00. The four other bidders listed on the bid tabulation sheet were all over the amount of $490,000.00. 6/ As can be seen from the numbers, the top three bids were well within the pre-established construction budget for the repainting project.

20. On December 21, 1990, Feimster-Peterson sent a Notice of Protest by telecopy and overnight delivery for delivery on Monday, December 24th. The basis of the protest was that the low bidder, Phoenix Coating, was not responsive because it had not attended the mandatory pre-bid conference and had not complied with the minority participation requirements of the specifications. On December 28, 1990, Feimster-Peterson sent its formal protest to Forrest Kelly, the Director of Capital Programs at the Florida Board of Regents by telecopy and by overnight delivery with delivery on December 31, 1990. The formal protest was filed in a timely manner.

21. On or about January 14, 1991, Oscar Martinez, the Purchasing Director for Florida A&M issued a letter regarding Bid No. 5927 for the repainting and renovation of Bragg Stadium. 7/ The letter rejected all seven bids. Phoenix Coating's bid was found to be nonresponsive because it did not meet the 15% minority participation requirements of Bid 5998 and because the company had not attended the December 6, 1990, mandatory pre-bid meeting. Because Phoenix Coating's bid was non-responsive, Petitioner became the lowest responsive bid on CTB 5998. The letter further advised that the other six bids, including Petitioner's bid, were rejected because all six bids allegedly exceeded the pre-existing construction budget estimate for the project. The letter did not contain any language affording Petitioner a clear point of entry as required by Section 120.53, Florida Statutes.

22. The letter did indicate that the University would modify the scope of work. Attached to the same letter was a new invitation to bid.

23. Clearly, at this point in time, FAMU knew or should have known that there was a bid protest filed with it which was unresolved and which required a formal administrative hearing. However, during this time instead of following its statutory duties under Chapter 120, Florida Statutes, FAMU, at its peril, chose to re-let the project for bids. The new bid opening was set for February 28, 1991, and a new mandatory pre-bid meeting was also set for February 28, 1991. The bid deadline was extended to March 21, 1991. The scope of the work was not significantly altered in the re-bid. 8/

24. On or about January 16, 1991, counsel for Feimster-Peterson sent a letter to the Florida Board of Regents. The letter was prompted by Robert Petersen's, president and stockholder of Petitioner, belief that something was not right about the monetary and funding claims that FAMU was putting forth as its basis for rejecting all the bids. In essence, the numbers Mr. Petersen was aware of, which did not include any of the Project Information Sheet figures referenced above, did not make any sense to him. The letter stated, in part, as follows:

> Re-bidding the Project is unfair to all bidders now that the results of the first bid have been made public. Each bidder now has a target . . . to shoot at which will override the customary free market environment. Rewriting the Specifications will not eliminate this effect.
>
> Be advised that Feimster-Peterson requests the opportunity to either see the estimates or negotiate with the Board to reach a mutually acceptable scope of work. I request that you delay re-bidding until this option can be explored. (Emphasis added).

25. On January 23, 1991, counsel for Feimster-Peterson again wrote to the Office of General Counsel at Florida A&M University and stated in relevant part:

> This letter is to reiterate our concern for the actions taken by the Florida A&M Purchasing Department and regarding the painting contract for Bragg Stadium. We

filed bid protest for the Florida Board of Regents filed on December 28, 1990 pursuant to paragraph B-22 of the bid documents. Neither the Florida Board of Regents or the administration of Florida A&M has acted upon our bid protest. The bid protest remains unresolved and we intend to pursue the administrative remedies provided to us through the bid protest procedure. Moreover, it is our position that the decisions taken by the Florida A&M Purchasing Department subsequent to our filing may be included and adjudicated within the administrative procedures of the original bid protest . . .

Mr. Martinez apparently takes the position that a new bid protest filing is necessary to formally dispute his decision [about the University's available budget]. As indicated, we disagree and intend to dispute this action within the existing, unresolved bid protest . . .

By indicating the precise amount of the budget, Mr. Martinez has eliminated the basic purpose of competitive bidding, which is to achieve the lowest responsive price. All bidders now have a target price, and a minor modification of the specifications will not eliminate this effect. This serves neither Florida A&M's interest nor the interest of the original responsive bidders.

Feimster-Peterson has requested that negotiations be commenced so that a mutually beneficial contract price be determined and the contract work commenced. To date, Mr. Martinez has refused to enter such negotiations and have given several oral, unsatisfactory reasons for this position. The Purchasing Department's refusal to negotiate with Feimster-Peterson, the lowest responsible bidder, should be clearly articulated in writing and sent to us. Feimster-Peterson believes such negotiations may prove successful, and work could commence without further delay or expense to Florida A&M . . . .
(Emphasis added).

Feimster-Peterson intends to pursue its rights under the bid protest originally filed on December 28, 1990. As low responsive bidder, Feimster-Peterson is entitled to an award of the contract . .

This letter was sent by both telecopy and Federal Express to Mr. Holifield at the Office of the General Counsel and added the additional issues of whether FAMU's action in regard to this bid constituted bid shopping and whether Petitioner's bid, in fact, exceeded the estimated construction budget for Bid 5998. 9/

26. Significantly, the Martinez letter did not mention that Respondent was rejecting Petitioner's bid because the University believed that it could increase the number of contractors participating in a re-bid and could achieve a lower price by re-bidding the project. This issue was raised for the first time at the hearing.

27. In that regard, the evidence clearly indicates that Respondent was attempting to shop its bid in order to obtain a lower price by re-bidding the project. Bid shopping is a process by which the general contractor or, as in this case, the owner of a project attempts to play off one bidder against another bidder in order to obtain a lower price. Bid shopping is done either by establishing a target figure which is represented to bidders to be a number which must be beaten in order to obtain the contract; or by the bid shopper relaying the amount of a competitor's bid to a bidder or group of bidders in order to encourage the bidder or group of bidders to lower its bid to below that of the competitor in order to secure the contract. A basic assumption in bid shopping is that the scope of the work is not significantly altered in order to lower the cost of the project. Bid shopping is considered to be unethical in a public competitive bidding situation and has been disapproved of by the Florida courts.

28. In this case, Respondent established a target price in its letter of January 14, 1991, by communicating the amount of the alleged overage, enabling a bidder to calculate the budget figures to shoot for and, at the same time, keeping the scope of the work substantially the same in the re-bid. Additionally, the amount of the bids, as well as details involving those bids became public once the bids were opened, converting the possibility of unfair advantage accruing to potential bidders on the re-bid to a probability of such unfair advantage in this instance. 10/ Such a reason for rejecting the bids in this case strikes at the very heart of the bid process, which is to ensure that bidders have an equal and fair opportunity to have their bids considered and prevent an agency from picking and choosing among various bidders or potential bidders. There was absolutely no evidence which indicated that the number of contractors participating in Bid 5998 was non-competitive or was in any way fundamentally unfair. 11/ By rejecting all the bids in order to attempt to shop its bid, Respondent acted in an arbitrary and capricious manner and therefore, its rejection of the bids in this case cannot stand.

29. Additionally, Respondent's attempt to reject the bids in order to allegedly increase the number of bidders participating in the re-bid and thereby reduce the price, violated its own specification in the bid documents which states:

> The contract award will be made to the responsible bidder submitting the lowest responsible aggregate bid within the pre-established construction budget. (emphasis supplied)

By going outside the scope of its bid specifications, Respondent has acted in an arbitrary and capricious manner and may not reject Petitioner's bid on this basis.

30. After the protest of Feimster-Peterson raised the issue of the amount of the budget/estimate and after its request to see the budget, Florida A&M began to review documents to determine its response to Feimster-Peterson. The basis underlying the figures cited in Mr. Martinez's letter of January 13, 1991, was arrived at by subtracting amounts spent by Florida A&M from the $682,000.00 appropriated by the legislature for the fire code and repainting projects. The overage of $55,000.00 claimed in Mr. Martinez's letter of January 14, 1991, was calculated by taking the "proposed budget" of $682,000.00 and subtracting the amount of $257,105.00 "in expenses for the stadium", for an "available balance" of $424,895.00. 12/ It was this account balance which was being claimed by FAMU to be the pre-existing construction budget referred to in the bid documents. Such an account balance does not constitute a pre-established construction budget because the balance was not established prior to the submission or opening of the bids. Additionally, an account balance is simply not a budget as that term is normally defined and used in the bid documents.

31. Mr. Martinez did not identify the source of the expenses or the purpose for those expenditures. Mr. Martinez deferred all questions as to verification of the figures or the purpose of the expenditures to "Bob", which referred to Robert Goodwin, Jr. Mr. Goodwin was and still is, the Director of the Facilities Planning Office of Florida A&M and is responsible for the various purchase orders involved in this case. Mr. Goodwin took his instructions on which purchase order numbers to use from Dr. Murray and/or Dr. Humphries, Associate Vice President and President of Florida A&M University, respectively. For reasons outlined later in this Recommended Order, the expenditures claimed for the stadium are highly suspect.

32. On or about February 6, 1991, Mr. Holifield, General Counsel of Florida A&M University, responded to Petitioner by enclosing a statement of budget estimate for Bid No. 5998. 13/ Attached to Mr. Holifield's letter of February 6th was a memorandum addressed "[t]o whom it may concern" dated February 5, 1991, from Robert Goodwin, Jr., the Director of Facilities & Planning for Florida A&M. The memo stated that the "budget estimate" for the Project was $367,351.00. Mr. Holifield's letter noted that Feimster-Peterson's bid "exceeded the budget estimate by $106,969.00." (emphasis added). He further noted that FAMU had chosen to re-bid the repainting project rather than accept the bid of the Petitioner. Mr. Holifield also addressed the pending bid protest by Feimster-Peterson as follows:

> Florida A&M University feels that it is the best interest of the citizens and taxpayers of the State of Florida to re-bid this Project rather than to award the job to your client. In view of the discrepancy between the bidder and the client and the estimated budget it would seem that now that you have been provided with the budget estimate, that you and your client would be willing to forego the bid protest which you are attempting to pursue. Rather, it would appear to be far more appropriate for you to simply join in the rebidding process. (emphasis added).

33. Again, the basis for the decreasing budget figure was the legislatively appropriated funds available for the project less amounts which were supposedly attributable to the repainting and fire code projects, i.e. the account balance. However, what the evidence clearly showed was that, like the budget figures underlying Mr. Martinez's assertions in his letter of January 14, 1991, the latest budget figure of $367,351.00 was calculated by Florida A&M subtracting sums for expenditures which were made for projects unrelated to the fire code or repainting projects. In fact, several of the expenditures were for improvements to the public address system at Bragg Stadium. Similarly, some of the amounts claimed to have been expended for the repainting and fire code projects were expended for architectural fees on other projects. 14/ FAMU's officials were aware that such accounting was inappropriate. From this evidence, it appears that FAMU is attempting to spend or has spent money specifically appropriated for two certain purposes on projects unrelated to the appropriation and not approved for such use by either the legislature or the Board of Regents. Since these expenditures are all part of other projects separate and distinct from the fire code and repainting projects, they should not have been subtracted from the amount of money available to FAMU for the repainting project. 15/

34. There is no doubt that this "budget estimate" and the budget underlying the assertions made by Mr. Martinez in his letter of January 14, 1991, were false and were red herrings, developed after the fact, in an attempt by Respondent to throw Petitioner off the track of an otherwise valid bid protest. Moreover, beyond utilizing improper accounting, one of the most significant facts in this proceeding was that FAMU created no less than eight separate figures which it claimed to be the budgets for this project. Which figure FAMU used depended on who FAMU was dealing with at the time and the result FAMU desired to achieve. Such tactics by an agency are totally unacceptable and the use of such false figures to justify rejection of a bidder's bid is nothing short of bad faith on the part of an agency akin to fraud. Since Petitioner submitted the lowest and best responsive bid, Petitioner, at this point in time, was entitled to the award of Bid 5998.

35. Another point not directly raised by FAMU in this proceeding, but suggested by the underlying facts and necessary to the resolution of this bid protest, is the question of whether bids may be rejected by an agency if the funds necessary to complete the project are no longer available, i.e. the agency has run out of money. On the surface, given the constraints of Florida's finance system, an honest lack of funds would appear to be an appropriate basis for an agency to reject all the bids. See Section 235.42, Florida Statutes. However, in this case, the evidence does not support a finding that the University no longer has the necessary funds to pay for the repainting project since the actual money from the trust fund has not been disbursed to FAMU and since FAMU's representations in regards to the status of the repainting project's account balance appear to be based on unlawful accounting and are less than credible. Since the evidence did not establish that FAMU no longer has the funds necessary to complete the project, Petitioner was entitled to the award of Bid 5998.

36. However, because of FAMU's actions regarding Petitioner's bid protest which actions were highly prejudicial to Petitioner, time had moved on and, on February 25, 1991, FAMU discovered that there was lead in some portion of the paint on Bragg Stadium, in the amount of 1.9% by weight. The test was conducted by Professional Services Industries, Inc. on some paint chips from the stadium. The test utilized by Professional Services is known as the TCLP test.

37. This discovery began a review by Florida A&M, in conjunction with Barnett, Fronczak Architects, of what changes, if any, needed to be made to the Specifications and what options were available for carrying out the repainting of the stadium. 16/ On March 19, 1991, the Project was "cancelled" by Addendum number 4 until the fall of 1991.

38. Presently, it appears uncontradicted that the paint which is on Bragg Stadium contains lead. It is probable that the lead is contained in the primer coat, which is the first coat on the steel. In fact, the current specifications for the repainting project call for a red lead and oil primer coat to be placed on the steel structure of the stadium. Of the options which have been proposed by the architect, two of them assume that the lead paint will not be removed from the structure, but will essentially be sealed in by the new coatings. These options will avoid the creation and need for disposal of any hazardous waste containing lead and should result in either the same cost to perform the work or in a reduction in cost to perform the work.

39. The third option is to completely remove all the paint and possibly create material which may be hazardous waste. This option is essentially the same type of sandblasting called for in Bid 5998, but may require more money to perform. Any possible increase in the cost of Bid 5998 would be due to the greater expense of disposing of any hazardous waste, if any such waste is created by the blasting operation, and whether the presence of the lead is an unforeseen condition as defined in the proposed contract which would entitle Petitioner to an increase of the bid price caused by the potential cost of disposal to it. In this case, the evidence did not demonstrate that the presence of the lead was an unforeseen condition. Article 3.15 of the proposed contract when compared to Article 10.1 appears to comtemplate the discovery of potentially hazardous materials. Additionally, as indicated earlier, the current specifications of Bid 5998 call for a lead primer coat. Under all the facts of this case, the presence of lead or lack of lead in the paint on Bragg Stadium would appear to be a circumstance the risk of which is assumed by the bidder in bidding the project; and therefore, would not be a changed or unforeseen condition which would justify rejecting all the bids.

40. Importantly, the scope of the work, i.e. sandblasting and structural repair, would not change. Sandblasting is the same whether the surface being removed contains lead or does not contain lead. The structural repair required by Bid 5998 is not effected by the presence of lead in the paint on Bragg Stadium. The only differences would occur in the type of equipment used and the type of respirators worn by the workers. The equipment for lead removal has vacuums incorporated in its operation and uses a steel grit instead of sand. The steel grit actually reduces the amount of any potential hazardous waste by compacting it into a smaller volume. The respirators differ in the type of filters. Neither of these differences affect the cost of the work required in Bid 5998.

41. Similarly, disposing of the end product of the blast operation would still be required under Bid 5998 whether the debris contains lead or does not contain lead. The only difference would be the ultimate disposal site of the barrels of debris, i.e whether at a regular landfill or at a disposal site for hazardous waste.

42. All of these differences are already required under EPA, OSHA and DER rules regulating lead abatement, toxic chemicals and hazardous waste and are utilized by Petitioner when it encounters lead in its paint removal operations. Moreover, the bid documents contemplate that the bidder is familiar with all

federal, state and local laws and regulations which affect the project in any manner. See Section B-3 "Instructions to Bidders."

43. While it is uncontroverted that the paint contains lead, it is also not clear whether the end product created by a blasting operation would be hazardous waste requiring expensive disposal in a hazardous waste landfill and what amount, if any, would need to be placed in a hazardous waste landfill. The TCLP tests performed by Professional Service Industries were run on paint chips and not the abrasive debris that remains after a blasting operation. Therefore, the TCLP test results have no relevance as to what amount of hazardous waste, if any, would need to be removed from the site. In fact, it is impossible to determine whether the debris left over from the blast operation will be hazardous waste until the blast operation has begun and produced debris sufficiently representative of what may be expected during the course of the work and which is capable of being tested.

44. The issue of lead arose long after the rejection of the bids on the basis of Feimster-Peterson's bid being over the budget and would not have become a potential basis had FAMU acted in a responsible manner in the award of this bid. It is understood that the University and its architects are still trying to determine what, if any, action needs to be taken regarding the presence of lead in the paint. The evidence established that at a minimum the architect would have suspended the project to give them time to study the lead and determine what course of action should be taken. At the most, the architect would have cancelled the project. Added to such an analysis is the fact that the Bid specifications appear to require a red lead and oil primer paint to be placed on the structural steel of the stadium and that under the facts of this case, the presence of lead in the paint on the stadium would not be an unforeseen condition. In either event, the discovery of the lead did not undermine the scope of the repainting project as it is comtemplated in the bid documents and may have only resulted in change orders under the terms of the proposed contract. 17/

45. The General Conditions of the contract provide in Article 3, Administration of the Contract, paragraph 4.3, Claims and Disputes, subparagraph 4.3.6, Claims for Concealed or Unknown Conditions, as follows:

> If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the contract documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than twenty-one days after the first observance of the conditions. The Architect/Engineer will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the contractor's cost of, or time required for, performance of any part of the work, will recommend an equitable

> adjustment in the Contract Sum or Contract Time, or both . . . .

46. Article 7, Changes in the Work, also provides a mechanism by which the Architect/Engineer and the Owner may order changes in the work after execution of the contract. Paragraph 7.3, Construction Change Directives, provides the mechanism by which the amount of a construction change directive is determined.

47. A change order is simply a revision of the scope of the contract, requiring that something be done differently, that more be done, or that less be done, than what is within the original scope of work of the contract.

48. Article 14, Termination or Suspension of the Contract, paragraph 14.3, Suspension by the Owner for Convenience, provides in relevant part:

> 14.3.1 The owner may, without cause, order the contractor in writing to suspend, delay or interrupt the work in whole or in part for such period of time as the owner may determine.
>
> 14.3.2 An adjustment shall be made for increases in the cost of performance of the contract including profit on the increased cost performance, caused by suspension, delay or interruption . . . . (Emphasis added).

49. It is clear that conditions, such as the lead in this case, are contemplated by both the bid and the contract which is part of that bid. In this case, but for FAMU's actions, Petitioner would have been awarded the contract prior to the discovery of the lead. Had Florida A&M entered into a contract with Feimster-Peterson to perform the repainting project when it should have, it would have been guided by Article 14.3 of the specifications, "Suspension by the Owner for Convenience." The evidence did not demonstrate that the discovery of the lead would sufficiently change the scope of the repainting project to the extent that a new bid would have to be developed and that the contract terms of Bid 5998 were inadequate to handle any changes in the scope of the work for the repainting project. Such a result is especially desirable where, as in this case, the University has acted in such a way so as to undermine the fairness of the competitive bidding process and is attempting to spend appropriated money in a manner not authorized by statute. In essence, FAMU has undermined the competitive bidding process to the extent that it would be unfair to re-bid the project since it is impossible to remove FAMU's past conduct from any rebid on any re-vamped specifications. The only remedy, in this case is to award Bid 5998 to Petitioner as the lowest and best responsible bid.

CONCLUSIONS OF LAW

50. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of this proceeding. Sections 120.53 and 120.57(1), Florida Statutes (1989).

51. The system of competitive bidding protects against collusion, favoritism and fraud in the award of public contracts. Liberty County v. Baxter's Asphalt and Concrete, Inc., 421 So.2d 505 (Fla. 1982). A public body has wide discretion in soliciting and accepting bids for public improvements and

its decision, when based on an honest exercise of its discretion, will not be overturned by a Court even if it may appear erroneous and even if reasonable persons do not agree. Id.

52. The legislative intent regarding the use of competitive bidding in public contracting is stated in Section 287.001, Florida Statutes. It reads:

> The legislature recognizes that fair and open competition is a basic tenet of public procurement; that such competition reduces the appearance and opportunity for favoritism and inspires public confidence that contracts awarded equitably and economically; and the documentation of the acts taken and effective monitoring mechanisms are important means of curbing any improprieties and establishing public confidence in a process by which commodities and contractual services are procured. It is essential to the effective and ethical procurement of the commodities and contractual services that there be a system of uniform procedures to be utilized by state agencies in managing and procuring commodities and contractual services; that detailed justification of agency decisions in procure-ment of commodities and contractual services be maintained; and that adherence by the agency and the contractors to specific ethical considerations be required.

In Hotel China and Glassware Co. v. Board of Public Instruction of Alachua County, 130 So.2d 78 (Fla. 1st DCA 1961), the First District Court of Appeal explained the public policy of the bid statute as:

> The system confers upon both the contractor and the public authority reciprocal benefits, and extracts from each of them reciprocal obligations. The bidder is assured fair consideration of his offer, and is guaranteed the contract if his is the lowest and best bid received. The principal benefit flowing to the public authority is the opportunity of purchasing goods and services required by it at the best possible price obtainable. Under this system, the public authority may not arbitrarily or capriciously discriminate between bidders, or make the award on the basis of personnel preference. (Emphasis added).

53. The scope of the administrative hearing in a challenge to the agency's decision to award or reject bids is limited to whether the purpose of competitive bidding has been subverted or whether the agency has acted fraudulently, arbitrarily, illegally, or dishonestly. Department of Transportation v. Groves-Watkins Constructors, 530 So.2d 912 (Fla. 1988). The burden is on the Petitioner to show by a preponderance of the evidence that the

actions of FAMU were fraudulent, arbitrary, illegal or dishonest or in some way subverted the competitive bidding process.

54. In this case, the bid documents represented that the contract would be awarded to the lowest, responsible bidder within the pre-established construction budget. The phrase "pre-established construction budget" is not defined in any of bid documents or Board rules. Therefore, the phrase should be given its ordinary or common meaning.

55. "Budget" is defined by Websters II New Riverside University Dictionary (1983) as:

> a. An itemized summary of probable expenditures and income for a given period; b. A systematic plan for meeting expenses in a given period; c. The total sum of money allocated for a particular purpose or time period.

56. As can be seen from the above definition, a budget is a plan on how to spend certain funds. It is not an account balance, which the amount of money remaining after monetary transactions attributable to that account have occurred and which balance may result as part of an on-going budgetary process. A construction budget would be the plan of expenditures for, or the total sum of money allocated to, the construction phase of a given project. The term "pre-established" means "to establish beforehand." Id. In this case, since the construction budget is being used to compare the bids submitted for Bid 5998, the phrase "pre-established construction budget" can only refer to a construction budget for the repainting project developed before the solicitation of bids or at most the opening of the bids. The pre-established construction budget for Bid 5998 was $522,000.00, as shown by the documents which are required to be submitted by FAMU to the Board of Regents and the legislature in order to obtain capital outlay funds. See Chapters 216 and 235, Florida Statutes. Clearly, Petitioner's bid was well within the pre-established construction budget for Bid 5998. Therefore, since Petitioner was the lowest, responsible bidder for Bid 5998, the Petitioner is entitled to the award of that bid, unless there is a valid reason not to award the contract.

57. In that regard, FAMU asserted, although not directly, that it did not have the necessary funds to complete the project, that it believed that a re-bid would obtain a lower price by allowing more contractors to participate in the re-bid, and that the discovery of lead in the paint on Bragg stadium was a change in the underlying conditions of the bid sufficient to allow it to reject all the bids and re-bid the project.

58. It is undisputed that the money for this project is derived from the capital improvement trust fund. Those funds are appropriated by the legislature to pay for specific capital outlay projects, such as the fire code and repainting projects involved in this action.

59. Section 216.011(1)(b), Florida Statutes, defines appropriation as "a legal authorization to make expenditures for specific purposes within the amounts authorized in the appropriations act. Section 216.292(1), Florida Statutes, states:

> Funds provided in the general appropriations act or is otherwise expressly provided by law

> shall be expended only for the purposes for which appropriated, except that if deemed necessary such monies may be transferred as provided in subsections (2) and (3) when it is determined to be in the best of the state. [The exceptions noted in subsections (2) and (3) are not applicable to fix capital outlays] Appropriations for fixed capital outlay may not be expended for any other purpose. (Emphasis added).

60. Section 235.42, Florida Statutes, provides that:

> (5) No Board shall, during any fiscal year, expend any money, incur any liability, or enter into any contract which, by its terms, involves expenditure of money in excess of the amounts appropriated and budgeted or in excess of the cash that will be available to meet the disbursement requirements.

Clearly, the funds appropriated for the repainting and fire code projects must be expended only on items which are a part of those projects and Florida A&M may not expend capital improvement funds on expenditures which are not included in the appropriation for the repainting project. Additionally, neither FAMU nor the Board of Regents may spend money or enter into contracts which exceed the amount of money available to meet its disbursement requirements. 18/

61. The evidence demonstrated that Florida A&M improperly attributed expenditures for other projects to the repainting project in an attempt to fabricate a lower budgetary figure and create a reason to reject all the bids. FAMU's officials were aware of the statutory limitations on the use of the repainting funds, but chose to attempt to follow an unauthorized course of accounting in order to try to demonstrate in this proceeding that it did not have the funds available to complete the repainting project. Moreover, the evidence did not demonstrate that the award of this contract would be in excess of the funds available for this project since the funds have not been transferred to FAMU and the claim by FAMU that it does not have the necessary funds is less than credible. Such financial manipulation is totally unacceptable and the use of such false figures to justify rejection of a bidder's bid is nothing short of bad faith on the part of an agency akin to fraud. Under the standard set forth in Groves-Watkins, Florida A&M's decision to reject all bids on the basis of lack of funds cannot be allowed to stand.

62. The evidence also revealed that Florida A&M rejected all the bids in an effort to shop its bid in a rebid of the repainting project in order to obtain a better price. Bid shopping destroys the competitive environment and is inherently unfair to the initial low responsive bidder. Once bids are published, the advantage gained by a competitor is considerable and results in an anti-competitive atmosphere in any re-bid situation. For that reason, rejection of all the bids by an agency after they have been opened must be based on a reason which outweighs the anti-competitiveness created in the re-bid by the earlier bid opening. Bid shopping is not such a reason and constitutes arbitrary and capricious behavior on the part of an agency. E. M. Watkins & Company, Inc. v. Board of Regents, 401 So.2d 583 (Fla. DCA 1st 1982); Continental Water Systems, Inc. v. Dept. of Agriculture and Consumer Services,

12 F.A.L.R. 3520 (July 17, 1990). Again, such a reason cannot support FAMU's decision to reject all bids in Bid 5998.

63. Moreover, FAMU's decision to reject all bids in order to shop its bid violated its obligation to accept the lowest bidder who is below the pre-established construction budget as required by section B-23 of the bid specifications. The argument proposed by Florida A&M that its discretion to reject all bids also gives it the discretion to ignore this provision would create an illusory offer. In essence, it would render the obligation created in section B-23 meaningless. Swinerton & Walberg Co. v. City of Inglewood, Etc., 114 Cal. Rptr. 834 (Ct. App. 2nd 1974); Baxter's Asphalt, Etc. v. Liberty County, 406 So.2d 461 (Fla. 1st DCA 1981) quashed on other grounds, 421 So.2d 505 (Fla. 1982). Groves-Watkins Constructors v. Florida Department of Transportation, supra; Wood-Hopkins Contracting Co. v. Roger J. Au & Son, Inc., 354 So.2d 446, 450 (Fla. 1st DCA 1978). Matthews v. Dept. of Health and Rehabilitative Services, 11 FALR 4776(a)(1989); Eccelston Properties, Ltd. v. Dept. of Health and Rehab. Serv., 11 FALR 1184 (1989). Central to the integrity and reciprocity of the competitive bidding process is the requirement that an agency's action on a bid be expressed within the bid specifications and evaluation criteria which it created. Eccelston Properties, Ltd. v. Department of Health and Rehabilitative Services, 11 F.A.L.R. 1184 (Feb. 8, 1989). See Philip J. Procacci v. Dept. of Health and Rehabilitative Services, 12 F.A.L.R. 501 (Sept. 27, 1990). Bids are expensive to prepare and require a considerable amount of time and effort on the part of the bidder. In Hotel China and Glass, supra, the 1st District Court of Appeal noted the mutually reciprocal obligations between the public agency and the bidder. The public authority not only promises compliance with the competitive bidding statutes, but also promises compliance with applicable bid protest procedures when a contractor invokes their use to protect its interests. In short, an agency may not ignore its own bid documents and reject all bids in violation of those documents. Such action by an agency is arbitrary and capricious and cannot be used by FAMU to support a decision to reject all bids in Bid 5998.

64. Finally, Florida A&M contends the discovery of lead in the primer coat currently existing on Bragg Stadium provides grounds for rejecting all bids, cancelling the project and rebidding at a later time. The lead is not sufficient grounds to reject all bids. First, had Florida A&M correctly evaluated the pre-established construction budget, Feimster-Peterson would have been awarded the contract prior to the discovery of lead. Second, the bid documents through the terms of the proposed contract provide a mechanism by which problems raised by additional work are resolved. Article 7 provides a mechanism for change orders. Mr. Fronczak conceded that allowing the contract with its provisions for change orders to govern in this case was an option.

65. Further, it is not clear what additional costs, if any, will accrue because of the presence of lead. There were at least three potential methods as to handling the presence of lead in the paint. One of them contemplated a potential savings to Florida A&M. The third method, which involved a "brush off" blast of the structure, may result in some increase only if the lead is an unforeseen condition under the contract which the bidder did not assume the risk of in bidding the contract. In this case the lead would not be such an unforeseen condition. Moreover, the amount of any increase was not clear and would result only if the end product of the blast operation constituted a hazardous waste and had to be disposed of as a hazardous waste. The scope of the work would remain the same. Additionally, the record is presently unclear as to whether any increase in the cost of Bid 5998 would exceed the amount of the remaining budget and the contingency and take Feimster-Peterson's contract

from $474,320 past the $522,000 in the budget. Article 14 allows suspension of the contract until a resolution is reached. See also Rule 6C-14.020(3), Florida Administrative Code. The contract and rules also contemplate change orders that exceed the pre-established budget by providing for an application to increase the existing budget. Moreover, Section 216.311(1), Florida Statutes makes it impossible for this contract to exceed the amount appropriated for the repainting project by making any such contract null and void. Therefore, the provisions of the contract and the governing regulations, which are part of the bid documents, are already in place and capable of solving any problem arising from the lead in the paint on Bragg Stadium. See also Rule 6C-14.020(3), Florida Administrative Code. Therefore, the effect of the presence of the lead on Bid 5998 does not sufficiently undermine the scope of Bid 5998 to the extent that a new project is called for. Moreover, FAMU's conduct in regards to Bid 5998 has so undermined the competitive bidding process that to allow FAMU to reject all the bids would be inherently unfair and leave in place, without correction, the appearance of an atmosphere lacking in fair dealing. Such an atmosphere or the appearance of such an atmosphere upsets the reciprocity established in the competitive bidding statutes and cannot be permitted to exist. Hotel China, supra. A re-bid, on any terms, would not correct the atmosphere created in this case and would not overcome the anti-competitiveness created by rejecting all the bids after they were opened. Therefore, the only remedy in this case is to award Bid 5998 to Petitioner as the lowest, responsible bidder on the project. Courtenay v. Department of Health and Rehabilitative Services 16 F.L.W. D1511 (Fla. 5th DCA 1991).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that Florida A&M University enter, on behalf of the Board of Regents, a Final Order awarding Bid 5998 to Petitioner as the lowest, responsible bidder on the repainting project.

RECOMMENDED this 18th day of September, 1991 in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904)488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of September, 1991.

ENDNOTES

1/ The trust fund is administered by the State Board of Education under the supervision of the Commissioner of Education.

2/ The repainting project had been the subject of at least one other bid solicitation prior to the solicitation at issue here.

3/ The establishment of such a Plan also enabled FAMU to establish, at the University level, an auxilary account for the fire code and repainting projects, as well as, set up numbers for each project which would be used on purchase orders. The purpose of the purchase order numbers was to act as a shorthand way of designating an expenditure to be paid out of a given account or be attributed to a certain project.

4/ There was a letter dated March 30, 1990, from Dave Fronczak, a representative of Barnett, Fronczak Architects, the consulting architect for the repainting project, referencing a schematic cost estimate of the work. However, the cost estimate outlined in the letter does not appear to be broken down in a manner which allocates the work between the fire code project and the repainting project as that work was reflected in each project's respective bids. Therefore, the information in this letter in regards to any pre-existing cost estimates is of limited value and not given any weight. What this letter does demonstrate, however, is that, in conjunction with Bid 5998, there are detailed plans which set forth the nature of the work for the fire code and repainting projects and which will be paid for by the $682,000.00 appropriation.

5/ As can be seen, the number of contractors participating in a mandatory pre-bid meeting is not necessarily probative of the number of contractors who will ultimately submit bids on a given project.

6/ The bid documents required that the bid tabulations be posted on December 21, 1990. However, the bid tabulation sheet was not posted by FAMU until sometime around January 13, 1991. The tabulation had the following notation written upon it, "The University exercises its right to reject all bids." The bid tabulation sheet did not contain any language affording Petitioner a clear point of entry as required by Section 120.53, Florida Statutes. The failure of FAMU to post the bids within a reasonable time of their opening was not explained by the evidence introduced at the hearing on this matter.

7/ The discrepancy in the bid numbers contained in this letter appears to be a typographical error.

8/ Feimster-Peterson sent representatives to the mandatory pre-bid conference on February 28, 1991, in order to protect itself from FAMU's failure to act on its bid protest and its apparent intention to ignore that protest. At the same time, Petitioner made it clear to Respondent that it was pursuing an administrative remedy in its bid protest. Such activity on the part of Petitioner does not estop it from continuing to assert its rights in this bid protest. See Global Water Conditioning v. Department of Agriculture and Consumer Affairs, 521 So.2d 126 (Fla. 1st DCA 1987).

9/ A finding of timeliness in regards to these issues is unnecessary since FAMU never provided a clear point of entry to Petitioner. Capital Copy v. University of Florida, 526 So.2d 988 (Fla. 1st DCA 1988). Moreover, a bid protest can be an evolving entity as other facts come to light. Caber Systems,Inc. v. Department of General Services, 530 So.2d 325 (Fla. 1st DCA 1988).

10/ See Douglas Printing Company, Inc., v. Department of Agriculture and Consumer Services, 5 FALR 2225-A (Dept.A. and C.S. 1983).

11/ See Caber Systems, Inc. v. Department of General Services, 530 So.2d 325 (Fla. 1st DCA 1988).

12/ The account balance was less than the amounts bid in the earlier bid solicitations for this project. FAMU's position in this case places the University in the uncomfortable position of soliciting bids for a project which it was aware would not meet its claimed budget. Such action on the University's part would be nothing more than an illusory solicitation, which cannot be presumed to have been the University's desire.

13/ After numerous demands by Petitioner, the February 6, 1991, letter was the first time that FAMU disclosed any "budget" figures on which it was relying.

14/ All of these expenditures were represented by purchase orders with numbers on them attributing them to the repainting project. Irrespective of the purchase order numbers, it was clear that these expenditures were not a part of this project.

15/ Mr. Sharma, the Comptroller, noted in a memorandum dated February 22, 1991, that "any expenditures not reimbursed from the Capital Improvement Trust Fund should be reimbursed by the Athletic Fund to insure compliance with the BOR Rules." When asked about the memorandum, Mr. Sharma noted that the BOR rules referenced are requirements that the athletic program be self supporting. The evidence did not show that this requirement plays any significant role in regards to this bid protest or that any other athletic expenditures were required to be deducted from a specific line item appropriation for capital improvements to the facilities of the University. The memorandum also referenced the Capital Improvement Trust Fund. Mr. Sharma explained that this reference related to the fact that the $682,000.00 appropriated by the legislature for the fire code corrections/repainting projects have not, as of the date of the hearing, been released to Florida A&M.

16/ The architects were not experienced in the methods, techniques or legal requirements involved in lead abatement. Petitioner's expert witness was much more persuasive in regards to lead abatement.

17/ Section B-1 of the "Instructions to Bidders" includes the proposed contract in the definition of bid documents.

18/ All of the statutory requirements regarding expenditure of money by a state agency are incorporated into every bid solicitation and are part of the bid specifications for any project, including the repainting of Bragg Stadium.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 91-1426BID

The facts contained in paragraphs 1, 2, 3, 4, 5, 10, 12, 13, 14, 15 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 35, 36, 38, 40, 41, 42, 43, 45, 47, 48, 50, 51, 54, 55, 56, 58, 60, 62, 63, 64, 65 and 66 of Petitioner's Proposed Findings of Fact are adopted in substance, insofaras material.

The facts contained in paragraphs 6, 7, 8, 9, 11, 24, 31, 32, 33, 34, 37, 39, 44, 46, 49, 52, 53, 57, 59 and 61 of Petitioner's Proposed Findings of Fact are subordinate.

The facts contained in paragraphs 15, 16, 23, 30, 33, 34, 38, 46, 47, 48, 49, 51, 54, 55, 61 and 62 of Respondent's Proposed Findings of Fact were not shown by the evidence.

The facts contained in paragraphs 1, 2, 4, 10, 37, 45, 56, 57 and 60 of Respondent's Proposed Findings of Fact are adopted in substance, insofaras material.

The facts contained in paragraphs 5, 7, 9, 12, 13, 17, 18, 19, 20, 21, 22, 24, 26, 27, 28, 29, 31, 32, 35, 36, 39, 40, 41, 44, 50, 52, 53, 58 and 59 of Respondent's Proposed Findings of Fact are subordinate.

The facts contained in paragraph 43 of Respondent's Proposed Findings of Fact are subordinate. However, the figure is rejected as representing the budget for the project because it was not for the entire scope of the work in Bid 5998.

The facts contained in paragraph 3 of Respondent's Proposed Findings of Fact are adopted in substance, except as to the toxic level of the lead which was not shown by the evidence.

The facts contained in paragraph 25 of Respondent's Proposed Findings of Fact are adopted in substance, except as to the extent of the lead problem which was not shown by the evidence.

The facts contained in the last sentence of paragraph 6 of Respondent's Proposed Finding of Fact are subordinate. The remainder of the paragraph was not shown by the evidence.

The facts contained in the first sentence of paragraph 11 of Respondent's Proposed Finding of Fact are subordinate. The remainder of the paragraph was not shown by the evidence.

The facts contained in the first four sentences of paragraph 14 of Respondent's Proposed Finding of Fact are subordinate. The remainder of the paragraph was not shown by the evidence.

The facts contained in paragraph 63 and 64 of Respondent's Proposed Finding of Fact are immaterial.

The facts contained in paragraph 42 of Respondent's Proposed Findings of Fact were ruled on in paragraph 14.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS:

ALL PARTIES HAVE THE RIGHT TO SUBMIT WRITTEN EXCEPTIONS TO THIS RECOMMENDED ORDER. ALL AGENCIES ALLOW EACH PARTY AT LEAST 10 DAYS IN WHICH TO SUBMIT WRITTEN EXCEPTIONS. SOME AGENCIES ALLOW A LARGER PERIOD WITHIN WHICH TO SUBMIT WRITTEN EXCEPTIONS. YOU SHOULD CONTACT THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE CONCERNING AGENCY RULES ON THE DEADLINE FOR FILING EXCEPTIONS TO THIS RECOMMENDED ORDER. ANY EXCEPTIONS TO THIS RECOMMENDED ORDER SHOULD BE FILED WITH THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE.

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AGENCY FINAL ORDER

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FEIMSTER-PETERSON, INC.,

Petitioner,

v. CASE NO.: 91-1426B1D

FLORIDA A & M UNIVERSITY,

Respondent,
_____/

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on March 25 and 26, 1991, in Tallahassee, Florida, before the Division of Administrative hearings, by its designated hearing officer, Diane Cleavinger. A recommended order was rendered on September 18, 1991. Petitioner filed exceptions to the recommended order on September 25, 1991. Respondent filed exceptions to the recommended order on September 26, 1991. A copy of the recommended order, Petitioner's exceptions and Respondent's exceptions are attached hereto.

A. RULINGS ON PETITIONER'S EXCEPTIONS

1. Petitioner excepts to portions of the Hearing Officer's Finding of Fact, paragraph 39. specifically, the Petitioner excepts to the findings that (a) In this case, the evidence did not demonstrate that the presence of lead was an unforeseen condition; (b) Article 3.15 of the proposed contract when compared

with Article 10 appears to contemplate the discovery of potentially hazardous materials; (c) ... the current specifications of Bid 5998 call for a lead primer coat; (d) Under the facts of this case, the presence of lead or the lack of lead in the paint on Bragg Stadium would appear to be a circumstance the risk of which is assumed by the bidder in bidding the project.

The Petitioner concurs in the Hearing Officer's Finding of Fact, paragraph 39 in part, i.e., that under all the facts of the case, the presence of lead or lack of lead in the paint at Bragg Stadium would not be a changed or unforeseen condition which would justify rejecting all bids.

After a review of the complete record, it is found that the Hearing Officer's Findings of Fact, paragraph 39, are supported by competent, substantial evidence; therefore, the exception is denied. (Respondent's Exhibit #2, Article 3.15, Article 6.3 and Article 10.1 and 10.2; T - 68-69, 99-100, 122-132; 143-146, 163, 168).

2. Petitioner excepts to the last sentence of the Hearing Officer's Finding of Fact, paragraph 40, which reads: "Neither of these differences [in the type of equipment used and the type of respirators worn by the workers) affect the cost of the work required in Bid 5998." After a review of the complete record, it is found that the Finding of Fact made in the last sentence of paragraph 40, is supported by competent, substantial evidence; therefore, the exception is denied. (T-68-70, 122-123, 126-127, 129-135, 146).

3. Petitioner excepts to Hearing Officer's Finding of Fact, paragraph 44, specifically to the finding that: "Added to such an analysis is the fact that the Bid specifications appear to require a red lead and oil primer paint to be placed on the structural steel of the stadium and that under the facts of this case, the presence of the lead in the paint on the stadium would not be an unforeseen condition." After a review of the complete record, it is found that the Hearing Officer's finding is supported by substantial, competent evidence. (T - 24-38, 68-69, 99-100, 122- 132; 143-146, 163, 168, 261-265, 294, 310, 331-334, 339-342; petitioner's Exhibit 4, Petitioner'S Exhibit 9, Petitioner' Exhibit 32, Respondent's Exhibit #2, Article 3.15, Article 6.3 and Article 10.1 and 10.2)

4. Petitioner excepts to the fact that Hearing Officer's recommended order contains no award of attorney fees to Petitioner. After a review of the complete record, it is found that the Hearing Officer was correct in her decision not to recommend an attorney's fee in this case. In this case, the nonprevailing (in significant part) adverse party, Florida Agricultural and Mechanical University is an agency; therefore, the Petitioner is not entitled to recover attorney's fees. See, Section 120.59(6)(a) and (c), Florida Statutes.

B RULINGS ON RESPONDENT' S EXCEPTIONS

1. Respondent excepts to all findings of fact or statements by the Hearing Officer to the effect that Florida A & M University acted in a manner "akin to fraud" in its handling of Bid 5998. This finding of fact by the hearing officer appears to be more akin to a conclusion of law than a finding of fact. This finding of fact and/or conclusion of law is rejected. Assuming arguendo that the Hearing Officer properly labeled this a finding of fact, the finding is rejected. After a review of the complete record, it is found that the Hearing Officer's finding that the University's actions were "akin to fraud" is not supported by substantial, competent evidence. (T-70, 154-160, 165-170, 183-184, 215--221, - 248-253, 255-257, 266-269, 276-279, 392-396). The conclusions of

law below adequately address the issue concerning the conduct of the University in handling this matter.

2. A complete review of the record leads me to the conclusion that Respondent's Exceptions at paragraphs 2, 3 and 4 should be denied.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues presented in this proceeding are whether Petitioner submitted the lowest and best bid on CTB 5998 and whether Petitioner is entitled to the bid award.

PRELIMINARY STATEMENT

This case involves Florida A & M University (FAMU) and its attempt to secure a contractor to repaint and renovate Bragg Stadium (the repainting project) pursuant to, Bid 5998.

Respondent, FAMU, issued a Call to Bid (CTB) for the repainting project on November 5, 1990. Petitioner, Feimster- Peterson, submitted its bid. On December 23, 1990, Petitioner filed its Notice of Protest with the Respondent. On January 13, 1991, Respondent posted the bid tabulations.

By letter dated January 14, 1991, Respondent rejected all of the bids, ignored the bid protest filed by Petitioner, and simultaneously re-let the bidding on the repainting project. On January 16, 1991, Petitioner filed a Formal Written Protest of the bid award.

On March 5, 1991, after considerable effort on Petitioner's part to gain a formal administrative hearing and after forcing the issue by the filing of a mandamus action against FAMU, the protest was forwarded to the Division of Administrative Hearings for purposes of holding an administrative hearing.

At the hearing, Petitioner presented two witnesses and offered thirty six exhibits into evidence. Respondent presented seven witnesses and offered nine exhibits into evidence.

Petitioner and Respondent filed their proposed recommended orders on June 3, 1991, and June 4, 1991, respectively. The parties' proposed findings of fact were considered and utilized in the preparation of the Hearing Officer's recommended order except where such proposals were not supported by the weight of the evidence or were immaterial, cumulative or subordinate. Specific rulings on the parties' proposals are contained in the Appendix to the Hearing

Officer's recommended order. A transcript of the hearing was filed with the Division of Administrative Hearings on May 17, 1991.

FINDINGS OF FACT

Florida A & M University hereby adopts and incorporates by reference the findings of fact set forth in the Recommended Order except all findings of facts that FAMU acted in a manner "akin to fraud".

The following findings of fact rendered by the Hearing Officer are conclusions of law and are therefore are not adopted as findings of fact: See in pertinent part the bindings of Fact at paragraph 34.

C. CONCLUSIONS OF LAW

Florida A & M University hereby adopts and incorporates by reference the conclusions of law set forth in the Recommended Order, except as follows:

Paragraph 5 is modified in part and the following is adopted: 5. In this case, the bid documents represented that the contract would be awarded to the lowest, responsible bidder within the pre- established construction budget. The phrase "pre-established construction budget" is not defined in any of the bid documents or Board rules. Therefore, the phrase should be given its ordinary or common meaning.

Paragraph 8 is rejected in its entirety.

Paragraphs 9, 10 and 11 are renumbered and now become paragraphs 8, 9 and 10, respectively.

Paragraph 12 is renumbered and now becomes paragraph 11. Paragraph 12 (now paragraph 11) is also rejected and the following is adopted:

11. Under the standard set forth in Groves-Watkins and based on the aforementioned statutory restrictions on the use of repainting funds, FAMU's decision to reject all bids on the basis of a lack of funds cannot be allowed to stand.

Paragraph 13, 14 and 15 are renumbered and now become paragraphs 12, 13 and 14, respectively.

Paragraph 15 is added and adopted as follows:

15. In this case, the presence of lead was not an unforeseen condition. Nothing doubtful or ambiguous exists about the language contained in Article 10.1, which states as follows:

> "The Contractor shall be responsible for initiating, maintaining and supervising all safety precautions and programs in connection with the performance of the contract.''

As used here, "all" is a word of extension or enlargement rather than one of limitation or enumeration. The reasonable construction of the contract is that Petitioner (i.e., the bidder) assumed the risk of the presence of lead, including the responsibility for providing all safety precautions and programs

necessary to prevent any damage, injury or loss that the presence of lead could cause.

In addition, words of exclusion or exception must be presumed to have been used for a specific purpose. See international Erectors, Inc. v. Wilhoit Steel Erectors & Rental Service, 400 F.2d 465, 469 (5th Cir. 1968). The language in Article 10.1 states as follows:

> "Unless asbestos abatement is specifically included as part of the Work elsewhere in the Contract Documents, then in the event the Contractor encounters on the site material reasonably believed to be asbestos or polychlorinated biphenyl (PCB) which has not been rendered harmless, the Contractor shall immediately stop Work in the area affected and report the condition to the Owner and Architect/Engineer in writing."

This language can neither be struck from the contract nor ignored. See Id. The crystalline purpose of this language is to limit the otherwise broad provision of "initiating, maintaining and supervising all safety precautions and programs" clause by excluding from its scope certain express provisions of this contract. See Id. In short, this specific language simply creates an exception that limits the responsibilities of Petitioner only in the event asbestos or PCBs are discovered. Therefore, the effect of the presence of the lead does not sufficiently undermine the scope of Bid 5998.

Paragraph 16 is accepted and rejected in part, and the following is adopted:

16. Further, it is not clear what additional costs, if any, will accrue because of the presence of lead. There were at least three potential methods as to handling the presence of lead in the paint. One of them contemplated a potential savings to FAMU. The third method, which involved a "brush off blast of the structure, may result in some increase only if the lead is an unforeseen condition under the contract which the bidder did not assume the risk of in bidding the contract. (Third method) In this case the presence of lead would not be such an unforeseen condition.

Paragraph 17 is added and adopted as follows:

17. Moreover, Section 216.311(1), Florida Statutes, makes it impossible for this contract to exceed the amount appropriated for the repainting project by making any such contract null and void. Therefore, the provisions of the contract and the governing regulations, which are part of the bid documents, are already in place and capable of solving any problem arising any potential increase in the contract pricelead in the paint on Bragg Stadium. See also Rule 6C-14.020(3), Florida Administrative Code.

Paragraph 18 is added and adopted as follows:

18. Therefore, the only remedy in this case is to award Bid 5998 to Petitioner as the lowest, responsible bidder on the project. Courtenay v. Department of Health and Rehabilitative Services, 16 F.L.W. D1511 (Fla. 5th DCA 1991).

Paragraph 19 is added and adopted as follows:

19. Pursuant to Section 120.59, F.S., a party shall be entitled to recover a reasonable attorney fee where:

(1) In any proceeding pursuant to section 120.57(1), F.S., the party is prevailing; however, this subsection does not apply to a prevailing party or nonprevailing adverse party that is an agency. Section 120.59(6)(a),F.S.

(2) The party is prevailing and the nonprevailing adverse party has been determined by the hearing officer to have participated in the proceeding for an improper purpose. Section 120.59(6)(b), F.S.

(3) In any proceeding, the hearing officer has determined that a party participated in the proceeding for an improper purpose. Section 120.59(6)(d), F.S.

As used in the Administrative Procedure Act, each state department and each other unit of government in the state is defined as an "agency." Section 120.52(1)(b) and (c), F.S. "Improper purpose" is defined as the participation in a proceeding pursuant to section 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of an activity. Section 120.59(6)(e)(1), F.S.

Pursuant to 120.59(6)(a,b,d), Petitioner is not entitled to reasonable attorney fees for two reasons. First, FAMU is an agency. Section 20.15, F.S., establishes that the Department of Education is a state department. Section 240.2011(4), F.S., includes FAMU as a unit of the Department of Education. Second, FAMU did not participate in these proceedings for an improper purpose as defined in the statute. Therefore, the Recommended Order properly excluded the award of attorney fees to Petitioner.

ORDER

The recommendation of the Hearing Officer that the Petitioner be awarded Bid 5998 as the lowest, responsible bidder on the project is adopted and incorporated herein by reference.

NOTICE OF RIGHTS

This FINAL ORDER constitutes final agency action and an order under Chapter 120 of the Florida Statutes. Petitioner and Respondent may obtain judicial review of this Final Order in the District Court of Appeal, in accordance with Section 120.68, Florida Statutes, and the Florida Rules of Appellate Procedure. Commencement of an appeal may be made by filing a Notice of Appeal with the Office of the Agency Clerk of Florida A & M University and a copy of that Notice, together with the filing fee prescribed by law, with the Clerk of the Court, within thirty (30) days after this order is dated as being filed in the Office of the Agency Clerk.

This FINAL ORDER entered this 23rd day of December, 1991.

BY: _____
Frederick S. Humphries
President
Florida A & M University

COPIES FURNISHED:

Nicholas S. Papleacos, Esquire
Bishop C. Holifield, Esquire
Gregg Gleason, Esquire

DOAH

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DISTRICT COURT OPINION

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

FEIMSTER-PETERSON, INC.,

Appellant,

vs.

FLORIDA A&M UNIVERSITY,

Appellee.
_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 92-00214
DOAH CASE NO. 91-1426BID

Opinion filed December 31, 1992.

An Appeal from an Order off Florida Agricultural and Mechanical University.

Nicholas S. Papleacos and Connie H. Buffington of Shapiro, Fussell, Wedge & Smotherman, Atlanta, and Earl Thomas Brushwood of Brushwood & Gruver, Tallahassee.

Bishop C. Holifield, General Counsel, and George W. Butler, Jr., Associate General Counsel, Tallahassee, for Appellee.

BOOTH, J.

This cause is before us on appeal from a final order of the Florida Agricultural and Mechanical University (FAMU) awarding a bid to Feimster-

Peterson, Inc. (Feimster). Feimster contends, inter alia, that the hearing officer erred in exceeding the scope of the issues Presented at the bid protest hearing.

The facts are essentially undisputed. Appellant, the second-lowest bidder on the project to repaint and renovate Bragg Stadium, was successful in having the low bidder disqualified. Thereafter, however, FAMU rejected all bids because appellant's bid was allegedly in excess of the amount budgeted for the project. Appellant protested and requested a hearing.

Meanwhile, in late February 1991, FAMU discovered that there was lead in the existing coating on Bragg Stadium. Citing the problems presented by the presence of lead, FAMU canceled the project, and the bid protest was transmitted to the Division of Administrative Hearings.

Final hearing was held, and the HO entered a recommended order finding that appellant was the lowest responsible bidder and entitled to award of the bid. The HO found that FAMU's attempt to manipulate the preestablished construction figures was akin to Fraud. In addition, the HO found that the presence of lead was not a sufficient reason for rejecting all the bids. Finally, the HO determined that under the contract, the bidders assumed the risk of the presence, with the result that the bid was awarded to appellant but with the attendant obligation of lead removal.

FAMU adopted the HO's recommended order in part but rejected, without explanation, the finding that FAMU's actions were akin to fraud.

Feimster correctly contends that the HO exceeded the scope of the bid protest in ruling that under the contract the bidder assumed the risk of lead and thus had to absorb the cost of its removal. This issue was not before the HO. The only issue relating to the presence of lead was whether FAMU could reject all bids based on the discovery of lead in the structure. Once this issue was decided adversely to FAMU, all issues were resolved. The finder of fact may not rule upon issues which are outside the scope of the hearing. Sanders v. Bureau of Crimes Compensation, 474 So.2d 410 Fla. 5th DCA 1985); Leonard Brothers Transfer & Co. v. Douglass, 32 So.2d 156 (Fla. 1947) (agency order may not extend beyond scope of hearing). That portion of the order below holding that the bidder assumed the risk of lead in the structure rust be and is reversed.

Feimster's request for fees below was denied. On appeal, Feimster argues that the agency's egregious actions entitle it to recover fees and costs in prosecuting the matter below. Courtenay v. Department of Health and Rehabilitative Services, 581 So. 2d 621 (Fla. 5th DCA 1991); Nest v. Department of Professional Regulation, 490 So. 2d 987, appeal after remand, 522 So. 2d 857 (Fla. 1st DCA 1987). We agree and award fees and costs incurred in the proceedings below. See Baxter v. Florida Career Service Commission, 380 So. 2d 1044, 1047 (Fla. 1st DCA 1980).

Accordingly, the order is reversed in part, affirmed in part, and remanded for proceedings consistent herewith.

SHIVERS AND WEBSTER, JJ., CONCUR.

ENDNOTE

1/ There was no timely request for appellate fees and costs, and such fees and costs are not included in this award.

MANDATE
From
DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

To the Honorable Frederick S. Humphries, President

WHEREAS, in that certain cause filed in this Court styled: Florida A & M University

FEIMSTER-PETERSON, INC.

v. Case No. 92-214
Your Case No. 91-1426BID

FLORIDA A & M UNIVERSITY

The attached opinion was rendered on December 31, 1992.

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rules of this Court and the laws of the State of Florida.

WITNESS the Honorable James E. Joanos

Chief Judge of the District Court of Appeal of Florida, First District and the Seal of said court at Tallahassee, the Capitol, on this 12th day of April, 1993.

_____
Clerk, District Court of Appeal of Florida,
First District

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FEIMSTER-PETERSON, INC.	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 91-1426B1D
	)	
FLORIDA A & M UNIVERSITY,	)	
	)	
Respondent,	)	
_____	)	

ORDER TO SHOW CAUSE

On May 14, 1993, the Division of Administrative Hearings received a letter from Respondent remitted the record in the above-styled matter to the Division of Administrative Hearings for further proceedings. After reviewing the appellate court's mandate, opinion and remand to the Respondent Agency, it is:

ORDERED:

1. That the parties show cause why the file of the Division of Administrative Hearings should be reopened and further formal evidentiary proceedings before the Division should be held in this matter.

2. Failure to file a response to this Order To Show Cause with the Division of Administrative Hearings within ten days from the date of this Order, will result in closure of the Division of Administrative Hearing's file in this matter.

DONE and ORDERED this 27th day of May, 1993, in Tallahassee, Florida.

_____
DIANE CLEAVINGER
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of May, 1993.

COPIES FURNISHED:

Nicholas S. Papleascos
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Florida A & M University
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Tallahassee, Florida

Alena T. Harris
Deputy Agency Clerk
Florida Agricultural
and Mechanical University
Tallahassee, Florida 32307

==========

RECOMMENDED ORDER ON REMAND

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FEIMSTER-PETERSON, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 91-1426B1D
	)	
FLORIDA A & M UNIVERSITY,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER ON REMAND

This action was heard on a written joint motion for entry of a recommended consent order pursuant to a mutual release and settlement agreement reached by the parties, Petitioner, Feimster-Peterson, Inc., and Respondent, State Board of Regents, by and for Florida A & M University.

APPEARANCES

For Petitioner: Nicholas S. Papleacos
Attorney at Law
SHAPIRO, FUSSELL, WEDGE & SMOTHERMAN
One Midtown Plaza, Suite 1200
1360 Peachtree Street
Atlanta, Georgia 30309

For Respondent: George W. Butler, Jr.
Associate General Counsel
Florida A & M University
300 Lee Hall
Tallahassee, Florida 32307

RECOMMENDATION

Based upon the foregoing, it is

RECOMMENDED that Florida A & M University enter, on behalf of the Board of Regents, a Final Order which approves and confirms the parties' Mutual Release and Settlement Agreement.

DONE and ENTERED this 30th day of June, 1993.

_____

DIANE CLEAVINGER
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of June, 1993.

COPIES FURNISHED:

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Gregg A. Gleason
General Counsel
Board of Regents
Florida Education Center
Suite 1522
325 West Gaines Street
Tallahassee, Florida 32399-1950

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.

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AGENCY FINAL ORDER ON REMAND

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STATE OF FLORIDA
FLORIDA A&M UNIVERSITY

FEIMSTER-PETERSON, INC.,

Petitioner,

vs. Case No.: 91-1426 BID

FLORIDA A&M UNIVERSITY,

Respondent.
_____/

FINAL ORDER ON REMAND

The Recommended Order dated June 30, 1993, including the Mutual Release and Settlement Agreement is hereby adopted and fully incorporated herein by this reference.

All Final Orders of the University are appealable to the First District Court of Appeal, Tallahassee, Florida 32301. An appeal should be directed to

the Clerk of said Court within thirty (30) days of the date this Final Order is filed with the Agency Clerk.

ORDERED this 6th day of July, 1993.

Frederick S. Humphries
President

Filed with the Agency this
6th day of July, 1993.

Allena T. Harris
Deputy Agency Clerk

cc Dr. Robert Carroll
Nicholas S. Papleacos, Esquire

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MUTUAL RELEASE AND SETTLEMENT AGREEMENT

==========

STATE OF FLORIDA
FLORIDA A&M UNIVERSITY

FEIMSTER-PETERSON, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO: 91-1426
	)	
FLORIDA A & M UNIVERSITY,	)	
	)	
Respondent.	)	
	)	

MUTUAL RELEASE AND SETTLEMENT AGREEMENT

The undersigned parties Feimster-Peterson, Inc. and Florida A&M University are agreed on a mutual release and settlement of the above entitled action which they deem just and equitable to all concerned and hereby entered into this Mutual Release and Settlement Agreement.

I. RECITATIONS:

A. Florida A&M University has a facility on its campus known as Bragg Stadium. In 1990, Florida A&M University put into action a process by which it would solicit bids for the painting of Bragg Stadium.

B. Florida A&M University issued solicitation for Bid 5998, which called for the removal of all paint on Bragg Stadium and the repainting of Bragg Stadium.

C. Feimster-Peterson, Inc. filed a bid protest on Florida A&M University Bid number 5998 arising out of the low bid of Phoenix Coating. Florida A&M University rejected the bids on the grounds that the bids had exceeded their estimate. Later, Florida A&M University cancelled Bid number 5998 given the presence of toxic lead paint on Bragg Stadium.

D. A hearing was held by the State of Florida Division of Administrative Hearings on Feimster-Peterson, Inc.'s bid protest. A Recommended Order was issued on September 18, 1991.

E. The Final Order was issued by Florida A&M University on December 23, 1991.

F. Feimster-Peterson, Inc. filed an appeal with the First District Court of Appeals. The First District Court of Appeals issued its opinion on or about December 31, 1992 and issued its mandate on or about April 12, 1993.

G. Feimster-Peterson, Inc., and Florida A&M University desire to resolve and forever settle and compromise their present disputes by entering into this agreement, calling for mutual obligations on the parties.

II. RELEASE AND OBLIGATION OF THE PARTIES:

A. Respondent, Florida A&M University, will pay to Feimster-Peterson, Inc., by and through its attorneys Shapiro, Fussell, Wedge & Smotherman, the total sum of Seventy-Five Thousand Dollars ($75,000).

B. Petitioner, Feimster-Peterson, Inc., and Respondent, Florida A&M University agree to execute and submit to the State of Florida Division of Administrative Hearings Hearing Officer a joint motion that a consent order be entered in pursuance of this Mutual Release and Consent Settlement Agreement.

C. Petitioner, Feimster-Peterson, Inc., will file a dismissal with prejudice, of the above-entitled action against Florida A&M University.

D. Florida A&M University at some point will issue a solicitation or solicitations for the repainting and/or recoating of Bragg Stadium and lead abatement of Bragg Stadium. Feimster- Peterson agrees that it will not submit a bid for the next repainting of Bragg Stadium or any contemplated repainting, recoating or lead abatement of Bragg Stadium. This will include any projects for the repainting and/or recoating of Bragg Stadium, lead abatement of Bragg Stadium, or in any way concerning the renovation or repair of Bragg Stadium, which are either presently contemplated or being planned. The purpose of this paragraph is to permit Florida A&M University to have the paint removed from Bragg Stadium, including any lead abatement, and to have Bragg Stadium repainted without the bidding or participation of Feimster-Peterson, Inc., or any of its officers, agents or employees. This paragraph does not bar Feimster-Peterson,

Inc. from bidding on any other work at Florida A&M University, nor does it prohibit bidding by Feimster-Peterson, Inc. on Bragg Stadium on work other than the presently contemplated or planned repainting and lead abatement of Bragg Stadium.

E. Feimster-Peterson, Inc. understands, acknowledges and agrees that the sums paid pursuant to paragraph 1, when paid, is a fair and reasonable amount to compensate Feimster-Peterson, Inc. for any and all claims or damages Feimster-Peterson, Inc. contend it has as a result of the bid protest and any subsequent action, claim, or damage which grew out of the bid protest, and any rights it may have on any contemplated or planned solicitations for the removal and repainting of Bragg Stadium or lead abatement of Bragg Stadium.

F. In further consideration of the payment referenced in paragraph II(a), Feimster-Peterson, Inc. hereby releases and relinquishes any and all right, title and interest it may have to the contract to perform the work contained in Bid 5998 and any contemplated or planned solicitations for the removal of paint and repainting, or lead abatement of Bragg Stadium. Feimster-Peterson, Inc. will not initiate any legal action in any court, federal or state, or any administrative proceeding of any kind, whether arbitration or before the State of Florida Division of Administrative Hearings, or any other entity for any claims arising out of the issuance of Florida A&M University Bid 5998 or any contemplated or planned solicitation for either the repainting of Bragg Stadium or the lead abatement of Bragg Stadium.

G. Florida A&M University hereby relieves and releases Feimster-Peterson, Inc. from any and all claims of responsibility or obligation to repaint Bragg Stadium or to perform the work or any other obligation it may claim Feimster-Peterson, Inc. has under Bid 5998. Florida A&M University will not commence any legal action in any court, state or federal, or any administrative proceeding or demand for arbitration for any claims arising out of obligations it alleges arose under Bid 5998.

H. This agreement is for the purpose of compromise and settlement. Neither Feimster-Peterson, Inc. nor Florida A&M University concede or admit to the claims of the other.

I. Petitioner, Feimster-Peterson, Inc., and Petitioner's attorney of record and Respondent, Florida A&M University, and Respondent's attorney of record, join in this agreement.

J. This Mutual Release and Settlement Agreement shall be governed by the laws of the State of Florida.

K. The undersigned warrant and represent that they have the authority to execute this Agreement on behalf of their respective entity.

L. This Mutual Release and Settlement Agreement will only be effective upon execution by all persons listed below. Feimster-Peterson, Inc. will deliver, upon execution of this document, the dismissal with prejudice referenced in paragraph II(c), above to counsel for Florida A&M University. The dismissal will be held in trust by counsel until counsel is prepared to make payment to Feimster-Peterson, Inc. Counsel will cause payment to be delivered to Feimster-Peterson, Inc.'s counsel and will then file the dismissal with prejudice.

FEIMSTER-PETERSON, INC.

BY:
Robert E. Peterson
President

Date: 5/18/93

FLORIDA A&M UNIVERSITY

BY:
Frederick S. Humphries
President

Date: 5/25/93

SHAPIRO, FUSSELL, WEDGE
& SMOTHERMAN

By:_____
Nicholas S. Papleacos
Attorney for Petitioner

Date: 5/19/93

By:_____
George W. Butler, Jr.
Associate General
Counsel
Florida Bar No. 297186
Attorney for Respondent

Date: 5/21/93