

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ALBERT H. HALFF ASSOCIATES, )  
INC., )  
 )  
           Petitioner, )  
 )  
vs. )       CASE NO. 91-5788  
 )  
ST. JOHNS RIVER WATER )  
MANAGEMENT DISTRICT, )  
 )  
           Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

This matter came on for hearing in Palatka, Florida, before Robert T. Benton, II, Hearing Officer of the Division of Administrative Hearings, on December 19, 1991. The Division of Administrative Hearings received the transcript on January 6, 1992. The parties filed proposed recommended orders on January 21 and 24, 1992.

APPEARANCES

For Petitioner: William Lon Allworth, Esquire  
1301 Gulf Life Drive, Suite 200  
Jacksonville, Florida 32207

For Respondent: John W. Williams, Esquire  
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STATEMENT OF THE ISSUE

Whether respondent should first negotiate with petitioner or a competitor for a contract to perform environmental engineering services, or order presentations by the three top-ranked contenders before reconsidering its decision as to which firm should be given priority?

PRELIMINARY STATEMENT

On August 14, 1991, the Governing Board (Board) of the St. Johns River Water Management District (SJRWMD) met to consider which of three respondents to a request for qualifications (No. 91H157) SJRWMD should engage to perform or oversee environmental audits on land SJRWMD purchased; and chose Jammal & Associates, Inc. (Jammal) as most qualified.

Petitioner Albert H. Halff Associates, Inc. (Halff) filed a notice of protest on August 16, 1991, and a formal protest on August 26, 1991. SJRWMD referred the matter to the Division of Administrative Hearings, which received the protest on September 9, 1991.

The parties originally agreed to submit the matter for decision on stipulated facts. Subsequent efforts produced the joint stipulation of the parties filed at the Division of Administrative Hearings on November 8, 1991, which established many pertinent facts. But the parties ultimately decided an evidentiary hearing was needed.

#### FINDINGS OF FACT

1. SJRWMD caused "Request for Qualifications No. 91H157" to be published in the Jacksonville Business Journal on May 3 through 9, 1991. In part, the request stated:

Interested firms shall submit a letter of interest (three (3) copies) which contains, but is not limited to, the following:

- A. Experience in assessing the environmental fate of pollutants.
- B. Familiarity with current and historical agricultural practices employed by vegetable farms in Florida. In particular, knowledge of the storage and application of pesticides and herbicides is required.
- C. Ability to perform environmental chemistry and to assess the toxicological, chemical, and physical properties of hazardous materials.
- D. Ability to evaluate and/or develop site monitoring plans, industrial hygiene plans, site safety plans, decontamination plans, remediation plans, and abatement measures.
- E. Experience in performing environmental audits at potential hazardous waste sites. Staff must have the OSHA required 40 hours Hazardous Waste Site Safety Training pursuant to 29 CFE 1910.120.
- F. Documentation of experience in sampling of surface water, ground water, soil, sediment, including installation of temporary and permanent wells and split-spoon borings while following current state and federal approved procedures, and must be capable of preparing and implementing a quality assurance project plan specific to each site assessment.
- G. At least \$5,000,000 of professional liability insurance.

Evaluation of submitted letters of interest will be pursuant to Section 287.055, Florida Statutes. Contracts shall be negotiated pursuant to provisions of Section 287.055, Florida Statutes.

Petitioner's Exhibit No. 1. Halff, Jammal and Geraghty & Miller, Inc. (G & M) among others, responded to the request for qualifications with letters of interest.

2. SJRWMD staff evaluated the letters of interest and ranked the respondents in order: Halff was first; Jammal was second; and G & M was third. Staff recommended beginning negotiations with Halff.

3. After tabling the matter at the first Board meeting at which it came up, the Board discussed the staff recommendation on August 14, 1991, and, it seemed from a tape recording of the meeting in evidence, was unfavorably impressed with the fact that Halff had only one full-time employee in Florida, Robert Barnard. (Three other people are in petitioner's Jacksonville office on "a sub-contract basis." T.50.)

4. Mr. Barnard, who would have had charge of the work for SJRWMD if Halff had been chosen, spoke at the Board meeting. He came up to the podium and answered questions, but did not make a formal presentation. No other contender was represented at the Board meeting.

5. As far as the evidence shows, each Board member had read all letters of intent carefully: The record is silent on the point. The Board voted to rerank Jammal and Halff first and second, respectively, and directed staff to begin negotiations with Jammal.

#### CONCLUSIONS OF LAW

6. Since the SJRWMD referred petitioner's hearing request to the Division of Administrative Hearings, in accordance with Section 120.53(5)(d)2., Florida Statutes (1991), "the division has jurisdiction over the formal proceeding." Section 120.57(1)(b)3., Florida Statutes (1991).

7. Involved in the present case is a request for qualifications under the Consultants' Competitive Negotiation Act, Section 287.055, Florida Statutes (1991) rather than an invitation to bid or a request for proposals. See generally *System Development Corporation v. Department of Health and Rehabilitative Services*, 423 So.2d 433 (Fla. 1st DCA 1982). Attaching no significance to this distinction, SJRWMD cites *Department of Transportation v. Groves Watkins Constructors*, 530 So.2d 912 (Fla. 1988) in which the Court held that an agency's decision to reject all bids must stand, in the absence of a showing that "the agency acted fraudulently, arbitrarily, illegally or dishonestly." 530 So.2d at 914.

8. SJRWMD urges extending the Groves-Watkins standard of review to situations like this where an agency is choosing a firm with which to negotiate for professional services.

But it is one thing to defer to an agency's judgment that budgetary constraints, a reordering of agency priorities or external economic conditions make it wise for the agency to defer or forgo goods or services. . . and it is another to strip the Division of Administrative Hearings of its traditional role in formulating agency action on the basis of fact, policy and law established in a neutral forum, when the question is which of two (or more),

Southeast Roofing and Sheet Metal, Inc. v. School Board of Leon County, Florida, No. 91-2820BID (DOAH; May 23, 1991) at p.6 (citations omitted), competitors should be chosen to provide professional services.

9. In any event, the thrust of petitioner's argument is that the selection process did proceed illegally, in that the Board acted contrary to SJRWMD rules when it reranked the competitors, because staff alone has this authority under the rules; and because, even if it does not, the Board was obliged, under Rule 40C-1.704(1), Florida Administrative Code, to "require presentation[s] by no less than three firms," whether to the Board itself or to staff, before reranking.

10. Taking the latter contention first, the necessity for presentation arises only in "those instances in which further clarification of qualifications or additional information is needed." Rule 40C-1.70.4(1), Florida Administrative Code. The only evidence that the present case is such an instance is that Board members asked questions of Mr. Barnard. Halff's Mr. Barnard answered questions from Board members at the August 14, 1991 meeting.

11. But Halff should not be heard to complain of the opportunity it received (denied to all other competitors) to speak. If Mr. Barnard's remarks deviated from rule requirements regarding information gathering, the deviation was immaterial as to Halff, as far as the evidence shows. See Tropabest Foods, Inc. v. State Department of General Services, 493 So.2d 50 (Fla. 1st DCA 1986).

12. The remaining question is whether SJRWMD's rules deny the Board authority to reorder staff's ranking of competitors. Pertinent to this inquiry are the following rules:

40C-1.703 Letter of Interest. Pursuant to the public notice, a firm desiring to provide professional services for a project shall timely submit a letter of interest containing evidence of current professional status, capabilities, adequacy of personnel, past record and related experience, list of subconsultants, and other information required by the notice necessary for District evaluation under subsection 287.055(4), Florida Statutes.

40C-1.704 Competitive Selection.

(1) District staff will evaluate each letter of interest submitted regarding qualifications and performance ability. In those instances in which further clarification of qualifications or additional information is needed, the District shall require presentation by no less than three firms regarding their qualifications, approach to the project and the ability to furnish the required service.

(2) District staff shall select and list not less than three firms, in order of preference, deemed to be the most highly qualified to perform the required professional service after consideration of the factors set forth in subsection 287.055(4), Florida Statutes, and such other necessary factors.

(3) District staff will then recommend to the Board that competitive negotiations be instituted with the firms selected.

40C-1.705 Competitive Negotiations.

(1) After the Board has authorized the beginning of competitive negotiations, the Executive Director, or his designee, shall begin contract negotiations for professional services with the designated firms in order of rank for fair, competitive and reasonable compensation.

Although the matter is not completely free from doubt, the foregoing rules do not, on balance, seem intended to deprive the Board of ultimate authority to rank competing proposals recommended by staff. Rule 40C-1.704(4), Florida Administrative Code, requires staff to "recommend . . . negotiations with the firms selected." (Emphasis supplied.)

13. While Rule 40C-1.704(3), Florida Administrative Code, may be read to require that staff recommend negotiations, but not rank order, deference is owed an agency's interpretation of its own, internal procedural rules. Cf. *Ebba Dampier v. Department of Banking and Finance, Division of Finance et al.*, No. 90-3735 (Fla. 1st DCA; Jan. 31, 1991). In reranking competitors, the Board is constrained to consider only the criteria enunciated in Rule 40C-1.703, Florida Administrative Code, among which are "capabilities" and "adequacy of personnel," both of which figured in the Board's decision in the present case.

#### RECOMMENDATION

It is, accordingly, recommended that SJRWMD proceed with negotiations with Jammal, Halff and G & M in that order.

RECOMMENDED this 4th day of March, 1992, in Tallahassee, Florida.

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ROBERT T. BENTON, II  
Hearing Officer  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 4th day of March, 1992.

#### COPIES FURNISHED:

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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. 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.