

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARY ANN TALMADGE and)
DUNBAR ELECTRIC SUPPLY, INC.,)
)
Petitioners,)
)
vs.) CASE NO. 95-3362RX
)
DADE COUNTY SCHOOL BOARD,)
)
Respondent.)
)
-----)
THOMAS W. TALMADGE,)
)
Petitioner,)
)
vs.) CASE NO. 95-4834RX
)
DADE COUNTY SCHOOL BOARD,)
)
Respondent.)
-----)

FINAL ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Claude B. Arrington, held a formal hearing in the above-styled case on October 17, 1995, in Miami, Florida.

APPEARANCES

For Petitioners: John A. Margolis, Esquire
Case 95-3362RX: Law Office of John A. Margolis
9990 Southwest 77nd Avenue
Miami, Florida 33156-2699

For Petitioner: Thomas W. Talmadge, pro se
Case 95-4834RX 7065 Southwest 46th Street
Miami, Florida 33155

For Respondent: Phyllis O. Douglas, Esquire
Twila Hargrove Payne, Esquire
1450 Northeast Second Avenue, Suite 400
Miami, Florida 33132

STATEMENT OF THE ISSUES

As to Case 95-3362RX: 1. Whether the portion of School Board Rule 6Gx13-3C-1.08 pertaining to vendors who have defaulted on contracts for commodities is an invalid exercise of delegated legislative authority. 2. Whether the instructions to bidders issued by the School Board as part of its invitation to bid on commodities constitute inadequate, unpromulgated rules.

As to Case 95-4834Rx: Whether an amendment to School Board Rule 6Gx13-3C-1.08 (adopted July 12, 1995) that purports to disqualify as bidders for 14 months the principals of defaulted vendors is an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

These proceedings, consolidated without objection, challenge the validity of portions of School Board Rule 6Gx13-3C-1.08 and portions of the School Board's "Instructions to Bidders." The challenged rule pertains to vendors who have been awarded a contract for the sale of commodities as a result of an invitation to bid (ITB) and who subsequently default on the contract.

Dunbar Electric Supply, Inc. (Dunbar) has, over the years, been a regular bidder on School Board contracts. Mary Ann Talmadge has also been a bidder on School Board ITBs. Ms. Talmadge is the president and one of the principal shareholders of Dunbar. Thomas W. Talmadge, the husband of Mary Ann Talmadge, is a corporate officer and the other principal shareholder of Dunbar. That the Petitioners have standing to bring these challenges is not at issue.

Succinctly stated, the challenged rule gives a defaulted vendor of commodities two options. As the first option, the defaulted vendor can pay to the School Board a sum of money that is based on a calculation set forth in the rule. The School Board considers this payment to be liquidated damages. The Petitioners consider this payment to be a penalty that is unduly harsh and contrary to public policy. If this option is exercised and the payment is made, the defaulted vendor remains in good standing with the School Board and is permitted to bid on subsequent ITBs. If the first option is not exercised, the rule authorizes the School Board to disqualify the defaulted vendor from bidding on ITBs for a period of 14 months. 1/

By letter dated June 19, 1995, the Petitioners in Case 95-3362RX challenged the validity of School Board Rule 6Gx13-3C-1.08, and the matter was referred to the Division of Administrative Hearings. Thereafter, the School Board timely

moved for a more definite statement. That motion was granted and Petitioners' filed an amended pleading consisting of three counts that purported to clarify their positions. The School Board timely moved to dismiss Count I of the amended pleading, which was an untimely proceeding over which the undersigned would not have final order authority. After it was determined that Count I was improperly brought, a recommended order of dismissal of Count I was thereafter entered. The remaining issues as to Case 95-3362RX are set forth above in the statement of issues.

Prior to July 12, 1995, the challenged rule barred only the bidding entity in circumstances where a defaulted vendor elected not to pay what the School Board considers to be liquidated damages. The amendment of July 12, 1995, added to the rule a provision extending the 14-month disqualification to the principals of a defaulted vendor and defines the term "principal". It is the addition to the rule by this amendment that Mr. Talmadge challenges in Case 95-4834RX. In his petition, Mr. Talmadge also attempted to challenge certain bid awards over which the Division of Administrative Hearings had no jurisdiction. The undersigned ruled that the award of those bids were not properly at issue in this proceeding, and the only matter at issue at the formal hearing as to Case 95-4834RX is set forth above in the statement of issues.

At the formal hearing, Mr. Talmadge testified and offered, on behalf of all Petitioners, nineteen exhibits, numbered sequentially from 1 through 19. Of these Petitioners' exhibits, numbers 5, 6, 8, 10, 11, 12, 13, 17, and 19 were admitted into evidence. The remaining Petitioners' exhibits were rejected. The School Board presented the testimony of Donnie Carter and Peri Cushman. Mr. Carter is the School Board's Associate Superintendent Bureau of Procurement Management. Ms. Cushman is the School Board's clerk. The School Board introduced eleven exhibits, marked Exhibits 1, 1a - 1i and 2. All School Board exhibits were admitted into evidence. At the request of the School Board, Official Recognition was taken of Rule 6A-1.012, Florida Administrative Code, 48 C.F.R. Section 14.404-2(1994), 48 C.F.R. Subpart 9.1 (1994), 48 C.F.R. Subpart 9.4 (1994), Division of Purchasing Rules 60A-1.006, Division of Purchasing Clause entitled "Acknowledgment, Delivery and Liquidated Damages", pertinent School Board rules in 6Gx13-8C.

A transcript of the proceedings has been filed. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the filing of the transcript. Consequently, the parties waived the requirement that a final order be rendered within thirty days after the transcript is filed. Rule 60Q-2.031, Florida

Administrative Code. Rulings on the parties' proposed findings of fact may be found in the Appendix to this Final Order.

FINDINGS OF FACT

THE PETITIONERS

1. Petitioners Mary Ann Talmadge and Dunbar Electric Supply, Inc., are vendors who have bid on invitations to bid (ITBs) issued by the School Board. Ms. Talmadge is an officer and principal shareholder of Dunbar. Thomas W. Talmadge is the husband of Ms. Talmadge and is also a principal shareholder and officer of Dunbar. The Petitioners have standing to bring these rule challenges.

THE SCHOOL BOARD - GENERAL AUTHORITY

2. The Respondent is a duly constituted school board with the authority to enact rules, including those relating to the procurement of commodities.

3. Article IX, Section 4, Florida Constitution, provides, in pertinent part, as follows:

4.(a) Each county shall constitute a school district. . . . In each school district there shall be a school board. . . .

(b) The school board shall operate, control and supervise all free public schools within the school district. . . .

4. Section 230.03, Florida Statutes, provides, in pertinent part, as follows:

The district school system shall be managed, controlled, operated, administered, and supervised as follows:

* * *

(2) SCHOOL BOARD. - In accordance with the provisions of s. 4(b) of Art. IX of the State Constitution, district school boards shall operate, control, and supervise all free public schools in their respective districts and [may exercise any power except as expressly prohibited by the State Constitution or general law.] [Emphasis added.]

5. Section 230.22(2), Florida Statutes, confers rulemaking authority on school boards as follows:

(2) ADOPT RULES AND REGULATIONS. - The school board shall adopt such rules and regulations to supplement those prescribed by the state board as in its opinion will contribute to the more orderly and efficient operation of the district school system.

SCHOOL BOARD PURCHASES - IN GENERAL

6. Section 230.23(2), Florida Statutes, confers upon school boards the authority to contract, to sue, and to purchase commodities as follows:

The school board, acting as a board, shall exercise all powers and perform all duties listed below:

* * *

(2) CONTROL OF PROPERTY. - Subject to regulations of the state board, retain possession of all property to which title is now held by the school board and to obtain possession of and accept and hold under proper title as a body corporate by the name of "The School Board of _____ County, Florida," all property which may at any time be acquired by the school board for educational purposes in the district; manage and dispose of such property to the best interests of education; [contract, sue, receive, purchase], acquire by the institution of condemnation proceedings if necessary, lease, sell, hold, transmit, and convey the title to real and personal property, all contracts to be based on resolutions previously spread upon the minutes of the school board; receive, hold in trust, and administer for the purpose designated, money, real and personal property, or other things of value granted, conveyed, devised, or bequeathed for the benefit of the schools of the district or any one of them. [Emphasis added.]

7. Section 237.02(1)(a), Florida Statutes, pertains to purchases by school boards and provides as follows:

(1) PURCHASES. -

(a) Each district school board shall develop and adopt policies establishing the plan to be followed in making purchases as may be prescribed by the state board.

8. The state board rule pertinent to this proceeding is Rule 6A-1.012, Florida Administrative Code, which provides, in part, as follows:

Purchasing Policies. Each district school board shall establish purchasing rules which shall include but not be limited by the following:

* * *

(6) Except as authorized by law or rule, bids shall be requested from three (3) or more sources for any authorized purchase or contract for services exceeding ten thousand (10,000) dollars. . . . The school board shall have the authority to reject any or all bids and request new bids. In acceptance of bids, the school board shall accept the lowest and best bid from a responsive and responsible bidder. . . .

9. The School Board's Department of Procurement Management is responsible for administering and managing all of the purchases of materials and services for the school district of Dade County, Florida. School Board Rule 6Gx-3C-1.14 designates the Department of Procurement Management as the official purchasing agency for the School Board and requires it to make such purchases in compliance with Florida Statutes, State Board of Education Rules, School Board Rules, and administrative directives and manuals.

10. The School Board has the authority to determine which bidders are responsible, the authority to reject bids from irresponsible bidders, and the authority to enact rules pertaining thereto.

THE CHALLENGED RULE

11. Rule 6Gx13-3C-1.08, is styled "Performance and Payment Security, Declining a Bid Award, and Bonding Company Qualifications". The rule, initially adopted in 1974 and subsequently amended, was adopted pursuant to the authority of Section 237.02(1)(a), Florida Statutes, and Rule 6A-1.012, Florida Administrative Code. The rule is divided into three parts. Part I pertains to performance security on construction bids and awards. Part II, the portion of the rule being challenged in this proceeding, pertains to performance security on awards other than construction. Part III pertains to bonding company qualifications.

12. The rule, as amended on July 12, 1995, has been duly adopted by the School Board following all pertinent rulemaking procedures.

13. The rule reasonably relates to one subject matter, protecting the School Board against defaults by parties who have been awarded contracts.

14. Prior to its amendment on July 12, 1995, School Board Rule 6Gx13-3C-1.08 provided for performance security on awards other than construction, in pertinent part, as follows:

Bid security is not required. However, a bidder who declines an award shall either (1) pay a bid default penalty of five percent of the unit price bid times the quantity, or \$10, whichever is greater, or (2) lose eligibility to transact new business with the Board for a period of 14 months from date of award by the Board.

A bidder who accepts an award but fails to perform shall either (1) pay a performance default penalty of 25 percent of the unit price of the item(s) awarded times the quantity, or \$25, whichever is greater, (where partial shipment of items awarded has been made, the default penalty shall be applied to the balance remaining after items received have been deducted from the estimated quantity(ies),) or lose eligibility to transact new business with the Board for a period of 14 months from date of the cancellation of award by the Board.

15. The School Board amended Rule 6Gx13-3C-1.08 on July 12, 1995, to provide as follows:

Bid security is not required. However, a bidder who declines an award shall either (1) pay a bid default penalty of five percent of the unit price bid times the quantity, or \$10, whichever is greater, or (2) lose eligibility to transact new business with the Board for a period of 14 months from date of award by the Board.

A bidder who accepts an award but fails to perform shall either (1) pay a performance default penalty of 10 percent of the unit price of the item(s) awarded times the quantity, or \$25, whichever is greater, (where partial shipment of items awarded has been made, the default penalty shall be

applied to the balance remaining after items received have been deducted from the estimated quantity(ies),) or lose eligibility to transact new business with the Board for a period of 14 months from date of the cancellation of award by the Board. [The ineligibility shall be applicable to the principals individually and the entity, as well as any other firm in which a principal of a defaulting firm is a principal.

For purposes of this rule principal is defined as an executive officer of a corporation, partner of a partnership, sole proprietor of a sole proprietorship, trustee of a trust, or any other person with similar supervisory functions with respect to any organization, whether incorporated or unincorporated]. [Emphasis added.]

THE AUTHORITY OF THE SCHOOL BOARD TO IMPOSE LIQUIDATED DAMAGES OR TO DISQUALIFY DEFAULTED VENDORS FOR FOURTEEN MONTHS

16. A provision for liquidated damages is not against public policy and is not prohibited by law or by state board rules. Pursuant to the provisions of Sections 230.03(2), 230.22(2), and 230.23(2), and 237.02(1)(a), Florida Statutes, the School Board has the authority to provide for liquidated damages in its purchasing contracts.

17. A provision disqualifying vendors for a reasonable period of time based on prior performance is not uncommon in government contracts. The period of disqualification for defaulted vendors was for a one year period when the rule was first adopted. In 1987, the period of disqualification was extended from one year to fourteen months. The notice of intended action pertaining to this amendment provided, in pertinent part, as follows:

PURPOSE AND EFFECT: This amendment extends the period of time a vendor is penalized for failing to accept a bid award or performing (sic) after a bid award has been made. This will give the Board more leverage in penalizing a vendor when necessary.

SUMMARY: This amendment extends the penalty period for declining a bid award or failing to perform once a bid is awarded, from the current one (1) year period to a fourteen (14) month

period, which will result in the vendor being precluded from the current contract and the subsequent contract.

18. Such a provision disqualifying vendors for a reasonable period of time is not against public policy and is not prohibited by law or by state board rules. The period of fourteen months is a reasonable period for the term of disqualification. The School Board selected a period of fourteen months because many of its contracts are for one year terms. The rationale was to prevent a defaulted vendor from bidding on the ensuing year's contract. Pursuant to the provisions of Sections 230.03(2), 230.22(2), and 230.23(2), and 237.02(1)(a), Florida Statutes, the School Board has the authority to provide for the disqualification of defaulted vendors for a fourteen month period.

19. The determination that a bidder has failed to perform the terms of a contract is initially made by a buyer in the School Board's Department of Procurement Management. Efforts are made to bring a defaulted vendor into compliance with the contract. If that cannot be done, the defaulted vendor is informed that it may either perform the contract, pay liquidated damages, or face disqualification. If the vendor performs or pays liquidated damages, the matter is ended. If the vendor refuses to perform or to pay liquidated damages, the School Board determines whether the vendor should be disqualified. A vendor who is subject to disqualification has the opportunity to address the School Board on that matter and has the right to challenge the agency action pursuant to Section 120.57(1), Florida Statutes. A principal of a disqualified vendor who is also being disqualified also has the right to address the School Board on that matter and has the right to challenge the agency action pursuant to Section 120.57(1), Florida Statutes. 2/

LIQUIDATED DAMAGES OR PENALTY

20. Petitioners assert that the provision that gives a defaulted vendor the option to pay a sum equal to 10 percent of the bid price of undelivered commodities constitutes a penalty and is void. 3/ In support of their position, Petitioners correctly assert that the rule itself refers to this provision as a "default penalty." Notwithstanding that reference, the greater weight of the competent evidence in this proceeding established that the purpose of this provision of the challenged rule is to provide for reasonable liquidated damages so that the School Board can recoup its damages when a contract is breached. That the School Board has made an effort to set a reasonable amount is established by the research done by Mr. Carter in reviewing similar provisions in other government contracts and by the action of the School Board on July 12, 1995, in reducing the

percentage from 25 percent to 10 percent. What has been referred to as a defaulted vendor's Option 1 is the payment of liquidated damages, not the payment of a cash penalty.

21. The default provision serves three valid School Board purposes. First, it discourages vendors from defaulting on contracts. Second, it provides for liquidated damages if a vendor wants to keep its good standing as a vendor. Third, it prevents a vendor that has defaulted on its contract and thereafter has declined to pay the School Board's liquidated damages from securing other School Board contracts for at least 14 months following the default, thereby ensuring that the School Board will not have to deal with such a vendor during the period of disqualification.

THE EXTENSION OF THE DISQUALIFICATION TO PRINCIPALS OF DEFAULTED VENDORS

22. The extension of the disqualification to the principals of a defaulted vendor was enacted in response to problems the School Board experienced with the principals of certain vendors who, having defaulted on contracts in the name of one bidding entity, thereafter obtaining contracts under other vendor names and defaulted on the subsequent contracts. The extension of the disqualification serves a valid School Board purpose in that it prohibits the individuals who control various bidding entities from defaulting on a contract by one bidding entity while continuing to bid on other contracts through other entities. The amendment was duly adopted. The rule provides a definition of the operative term "principal" so that it is not vague and does not vest unbridled discretion in the School Board. It is within the School Board's authority to adopt this amendment pursuant to the provisions of Sections 230.03(2), 230.22(2), and 230.23(2), and 237.02(1)(a), Florida Statutes. Petitioner, Thomas Talmadge, has failed to demonstrate that the amendment is an invalid exercise of delegated legislative authority within the meaning of Section 120.52(8), Florida Statutes.

THE INSTRUCTIONS TO BIDDERS

23. Each ITB contains "Instructions to Bidders" that become part of the contract once the contract is awarded. Pertinent to this proceeding, the Instructions to Bidders that accompany each ITB for commodities, contain "instructions" as to the filing of objections to bid specifications (Section I.C.2.), the place, date, and hour for the submission of bids (Section II.C.), the method for filing objections for the award of bids (Section IV.D.), and the default provision (Section IV.F.).

24. Section I.C.2. contains an agency statement of general applicability that is not found in any promulgated rule as follows:

2. OBJECTION TO BID/SPECIFICATION. Any objections to specifications and/or bid conditions must be filed in writing and must be received by the Superintendent of Schools no later than 9:00 A.M. on the date specified for acceptance of bid.

25. Section II.C. contains an agency statement of general applicability that is not found in any promulgated rule as follows:

C. PLACE, DATE AND HOUR. Bids shall be submitted by U.S. Mail, Courier/Express Service, or deposited in the BID receiving slot located in Room 352, 8:00 A.M. to 4:30 P.M., Monday through Friday, SCHOOL BOARD ADMINISTRATION BUILDING, 1450 N.E. Second Avenue, Miami, Florida 33132. Bids received after the date and hour specified in the BIDDER QUALIFICATION FORM will not be considered.

26. Section IV.D. contains an agency statement of general applicability that is not found in any promulgated rule as follows:

D. FILING OF OBJECTION. Any objections to an award by the Board must be filed in writing and must be received by the Superintendent of Schools no later than 9:00 A.M. on the first Monday following the award. 4/

27. Section IV.F. contains three sentences. The first two sentences merely repeat the default provisions contained in School Board Rule 6Gx13-3C-1.08. The final sentence, however, contains an agency statement of general applicability that is not found in any promulgated rule. The rule does not state that the vendor will be disqualified if it does not pay the liquidated damages within fifteen days of the default. Section IV.F. of the Instructions to Bidders is as follows:

F. DEFAULT: In the event of default, which may include, but is not limited to non-performance and/or poor performance, the awardee shall pay to the Board as liquidated damages an amount equal to 10 [percent] of the unit price times the quantity, or \$25,

whichever amount is larger. Where partial shipment of items awarded has been made, the default penalty shall be applied to the balance remaining after the items received have been deducted from the estimated quantity(s). [Where no performance bond or check has been acquired (sic), each awardee who fails to pay the penalty within 15 days after it is invoked shall lose eligibility to be awarded new business by the Board for a period of 14 months from the date of cancellation of award by the Board]. [Emphasis added.]

CONCLUSIONS OF LAW

28. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to these consolidated proceedings. Chapter 120, Florida Statutes.

29. Petitioners have the burden of proving by a preponderance of the evidence that the challenged rules are invalid exercises of delegated legislative authority. Rule 28-6.08(3), Florida Administrative Code. See also, Florida Department of Transportation v. J.W.C., Co., 396 So.2d 778 (Fla. 1st DCA 1981). Petitioners have failed to meet that burden.

30. The term "invalid exercise of delegated legislative authority", is defined by Section 120.52(8), Florida Statutes, as being:

(8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one or more of the following apply:

(a) The agency has materially failed to follow the applicable rulemaking procedures set forth in s. 120.54;

(b) The agency has exceeded its grant of rule-making authority, citation to which is required by s. 120.54(7);

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(7);

(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency; or

(e) The rule is arbitrary or capricious.

31. School Board rule 6Gx13-3C-1.08, as amended, does not meet the foregoing definition of "invalid exercise of delegated legislative authority". All actions pursuant to this rule are acted upon by the School Board and are subject to being challenged like other agency action pursuant to Chapter 120, Florida Statutes. The rule is not against public policy and has not been shown to be unduly harsh.

32. Section 120.52(16), Florida Statutes, defines the term "rule" and provides, in part, as follows:

(16) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency and includes any form which imposes any requirement or solicits information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. . . .

33. Section 120.535, Florida Statutes, provides, in pertinent part, as follows:

(1) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule under s. 120.52(16) shall be adopted by the rulemaking process provided by s. 120.54 as soon as feasible and practicable. . . .

* * *

(4) When a hearing officer determines that all or part of an agency statement violates subsection (1), the agency shall immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.

(5) Subsequent to a determination that an agency statement violates subsection (1), if an agency publishes, pursuant to s. 120.54(1), proposed rules which address the statement and proceeds expeditiously and in good faith to adopt rules which address the statement, the agency shall be permitted to rely upon the statement or a substantially similar statement as a basis for agency action. . . .

34. Petitioners assert that the School Board is required to adopt rules that mirror the procedural protection afforded bidders by the provisions of Section 120.53(5), Florida Statutes. 5/ This assertion is based on the argument that the provisions of Section 120.53(5), Florida Statutes, apply to school boards

because they make purchases of commodities pursuant to the provisions of Chapter 287, Florida Statutes. Contrary to Petitioners' assertion, school boards do not purchase commodities "pursuant to" the provisions of Chapter 287, Florida Statutes. Chapter 287, Florida Statutes, pertains to purchasing by agencies of the executive branch of state government. A school district is separately created by Section 4 of Article IX, Florida Constitution and is specifically authorized to make adopt rules and regulations pursuant to Section 230.22(2), Florida Statutes, and to contract and make purchases pursuant to Section 230.22(4), Florida Statutes. Although a school board may make purchases of commodities consistent with the provisions of Chapter 287, Florida Statutes, its authority to make such purchases is found in Chapter 230, Florida Statutes. It is pursuant to that authority that school boards purchase commodities.

35. While a school board is required to adopt procedural rules that afford bidders due process, it is not required to adopt rules that mirror the provisions of Section 120.53(5), Florida Statutes.

36. The "instructions" found in Sections I.C.2., II.C., IV.D., and the final sentence of IV.F. of the Instructions to Bidders are "rules" as that term is defined by Section 120.52(16), Florida Statutes. These "instructions" meet the statutory definition of rules found at Section 120.52(16), Florida Statutes, in that they impose procedural requirements on bidders and purport to limit bidders' rights by provisions that are not found in a statute or a duly promulgated rule. These "rules" have not been promulgated as required by the provisions of Section 120.535, Florida Statutes. Consequently, it is concluded that Sections I.C.2., II.C., IV.D. the final sentence of IV.F. of the Instructions to Bidders are unpromulgated rules within the meaning of Section 120.535, Florida Statutes.

37. Because the balance of Section IV.F. of the Instructions to Bidders recites the content of the default provisions enacted as School Board Rule 6Gx13-3C-1.08 and does not impose any requirement or solicit information not specifically by this existing rule, that portion of the "instructions" is not a separate, unpromulgated rule within the definition of Section 120.52(16) or the meaning of Section 120.535, Florida Statutes.

38. The School Board's right to rely on these unpromulgated rules is limited by the provisions of Section 120.535(4) and (5), Florida Statutes. The issue as to whether the procedural requirements set forth in the instructions to bid provide bidders due process needs not be reached in this proceeding because the

School Board cannot rely upon those provisions until the School Board has undertaken rulemaking as required by Section 120.535, Florida Statutes.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the challenges by the Petitioners to School Board Rule 6Gx13-3C-1.08 are DISMISSED. It is further ORDERED that Sections I.C.2., II.C., IV.D., and the final sentence of IV.F. of the Instructions to Bidders are unpromulgated rules within the meaning of Section 120.535, Florida Statutes, and that the School Board shall refrain from relying on said unpromulgated rules as required by the provisions of Section 120.535, Florida Statutes.

DONE AND ENTERED this 29th day of February, 1996, in Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON, 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 29th day of February 1996.

ENDNOTES

1/ There was testimony that the School Board requires each vendor that has been disqualified to appear before and be approved by a committee before its disqualification is lifted even if the 14-month period has expired. This School Board policy is not part of the challenged rule or the instructions to bidders and, consequently, is not at issue in this proceeding. The existence of such an unwritten policy would likely constitute an unpromulgated rule in contravention of Section 120.535, Florida Statutes.

2/ The School Board is in the process of revising its rules pertaining to formal administrative hearings.

3/ Provisions for liquidated are permitted by the Uniform Commercial Code. Pertinent to this provision, Section 672.718(1), Florida Statute, provides:

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof or loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

The following general statement is taken from 45 Fla. Jur. 2d, Sales and Exchanges of Goods, Section 193:

It is well settled that parties to a contract of sale may provide for liquidated damages in case of a breach of contract. The courts give effect to such provision when under the circumstances the provision is reasonable and it is apparent that it was not the intention of the parties to provide for a penalty.

. . .

* * *

There is no fixed or general rule to determine whether a stipulation is a penalty or for liquidated damages; each case must be governed by its own facts and circumstances. Whether the amount mentioned in a sales contract to be paid on a breach by nondelivery thereof is to be considered as liquidated damages, or as a penalty merely, is a question of law for the court to determine from the nature of the contract, the terms and purpose of the whole instrument, the natural and ordinary consequences of a breach, and the peculiar circumstances attending each case as it arises. (Footnotes omitted).

4/ Bid awards are usually made by the School Board on Wednesdays.

5/ Section 120.53(5), Florida Statutes, provides as follows:

(5) An agency which enters into a contract pursuant to the provisions of ss. 282.303-282.313, chapter 255, chapter 287, or chapters 334-349 shall adopt rules specifying procedures for the resolution of protests arising from the contract bidding process. Such rules shall at least provide that:

(a) The agency shall provide notice of its decision or intended decision concerning a bid solicitation or a contract award as follows:

1. For a bid solicitation, notice of a decision or intended decision shall be given by United States mail or by hand delivery.

2. For any decision of the Division of Purchasing of the Department of General Services concerning a request by an agency for approval of an exceptional purchase under part I of chapter 287 and the rules of the Division of Purchasing, notice of a

decision or intended decision shall be given by posting such notice in the office of the Division of Purchasing.

3. For any other agency decision, notice of a decision or intended decision shall be given either by posting the bid tabulation at the location where the bids were opened or by certified United States mail or other express delivery service, return receipt requested.

The notice required by this paragraph shall contain the following statement: "Failure to file a protest within the time prescribed in s. 120.53(5), Florida Statutes, shall constitute a waiver of proceedings under chapter 120, Florida Statutes."

(b) Any person who is affected adversely by the agency decision or intended decision shall file with the agency a notice of protest in writing within 72 hours after the posting of the bid tabulation or after receipt of the notice of the agency decision or intended decision and shall file a formal written protest within 10 days after the date he filed the notice of protest. With respect to a protest of the specifications contained in an invitation to bid or in a request for proposals, the notice of protest shall be filed in writing within 72 hours after the receipt of notice of the project plans and specifications or intended project plans and specifications in an invitation to bid or request for proposals, and the formal written protest shall be filed within 10 days after the date the notice of protest is filed. Failure to file a notice of protest or failure to file a formal written protest shall constitute a waiver of proceedings under this chapter. The formal written protest shall state with particularity the facts and law upon which the protest is based.

(c) Upon receipt of the formal written protest which has been timely filed the agency shall stop the bid solicitation process or the contract award process until the subject of the protest is resolved by final agency action, unless the agency head sets forth in writing particular facts and circumstances which require the continuance of the bid solicitation process or the contract award process without delay in order to avoid an immediate and serious danger to the public health, safety, or welfare.

(d) The agency, on its own initiative or upon the request of a protestor, shall provide an opportunity to resolve the protest by mutual agreement between the parties within 7 days, excluding Saturdays, Sundays, and legal holidays, of receipt of a formal written protest.

1. If the subject of a protest is not resolved by mutual agreement within 7 days, excluding Saturdays, Sundays, and legal holidays, of receipt of the formal written protest, and if there is no disputed issue of material fact, an informal proceeding shall be conducted pursuant to s. 120.57(2) and applicable agency rules before a person whose qualifications have been prescribed by rules of the agency.

2. If the subject of a protest is not resolved by mutual agreement within 7 days, excluding Saturdays, Sundays, and legal holidays, of receipt of the formal written protest, and if there is a disputed issue of material fact, the agency shall refer the protest to the division for proceedings under s. 120.57(1).

(e) Upon receipt of a formal written protest referred pursuant to this subsection, the division director shall expedite the hearing and assign a hearing officer who shall conduct a hearing within 15 days of the receipt of the formal written protest by the division and render a recommended order within 30 days after the hearing or within 30 days after receipt of the hearing transcript by the hearing officer, whichever is later. The provisions of this paragraph may be waived upon stipulation by all parties.

(f) The Administration Commission shall promulgate model rules of procedure pursuant to the provisions of s. 120.54(10) for the filing of notice of protests and formal written protests.

APPENDIX TO THE FINAL ORDER,
CASES NO. 95-3362RX AND 95-4834RX

The following rulings are made as to the proposed findings of fact submitted by the Petitioners.

1. The proposed findings of fact in paragraphs 1, 2, 3, and 55 are adopted in material part by the Final Order.

2. The proposed findings of fact in paragraphs 4, 5, 6, 25, 62, and 64 are subordinate to the findings made.

3. The following paragraphs consist of recitation of testimony, commentary on evidence, or argument: 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 27, 28, 30, 31, 32, 33, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47, 49, 51, 52, 53, 54, 56, 57, 58, 59, 60, 61, 63, 65, 67, 68, 69, 70, 71, 72, and 73.

4. The proposed findings of fact in the paragraphs 21, 24, 26, 29, and 66 are unsubstantiated by the record, refer to exhibits that were not admitted into evidence, or fail to appropriately reference the record.

5. The proposed findings of fact in paragraphs 34, 35, and 46 are, in part, subordinate to the findings made, but are rejected to the extent they are contrary to the findings made.

6. The proposed findings of fact in paragraph 48 are rejected as being unsubstantiated by the record or as being argument.

7. The proposed findings of fact in paragraph 50 are adopted in part, but are rejected to the extent they are unnecessary to the findings made.

The following rulings are made as to the proposed findings of fact submitted by the Respondent.

1. The proposed findings of fact in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 22, 23, 24, 26, 27, 29, 31, 32, 33, 34, 35, 36, 37, 38, 39, and 40 are adopted in material part by the Final Order.

2. The proposed findings of fact in paragraphs 10, 11, 12, 13, 14, 15, 17, and 30 are subordinate to the findings made.

3. The proposed findings of fact in paragraphs 16, 18, 19, 20, and 21 are rejected as being unnecessary to the conclusions reached or are treated as preliminary matters.

4. The proposed findings of fact in paragraph 25 are adopted in part by the Final Order or are subordinate to the findings made.

5. The proposed findings of fact in paragraph 28 are adopted in part by the Final Order. The proposed findings are rejected to the extent they infer that the Instructions to Bidders are merely informative or advisory.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this final order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.

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DISTRICT COURT OPINION
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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
JANUARY TERM, A.D. 1997

DUNBAR ELECTRIC SUPPLY, INC.,
MARY ANN TALMADGE, and THOMAS
W. TALMADGE,

Appellants,

vs.

THE SCHOOL BOARD OF DADE
COUNTY, FLORIDA,

Appellee.

CASE NO. 96-834
LOWER
TRIBUNAL NO. 95-3362RX

Opinion filed March 19, 1997.

An appeal from The Florida Division of Administrative Hearings and The School Board of Dade County, Florida.

John A. Margolis, for appellants Dunbar Electric Supply, Inc. and Mary Ann Talmadge; Thomas W. Talmadge, in proper person.

Twila Hargrove Payne, for appellee.

Before COPE, GODERICH, JJ., and BARKDULL, Senior Judge.

COPE, J.

Appellants Dunbar Electric Supply, Inc., Mary Ann Talmadge and Thomas W. Talmadge appeal orders entered by the Florida Division of Administrative Hearings and the School Board of Dade County.

We conclude that School Board Rule 6Gx13-3C-1.08, as amended, is a valid exercise of delegated legislative authority. The School Board and the hearing officer properly rejected appellants' challenges to the validity of the Rule. See §§ 230.03, 230.22(2), 230.23(2), 237.02(1)(a), Fla. Stat. (1995); Fla. Admin. Code R. 6A1.012.

Appellants have made claims against the School Board on the premise that the School Board violated subsection 120.53(5), Florida Statutes (1995), relating to "resolution of protests arising from the contract bidding process." *Id.* Appellants point out that subsection 120.53(5), Florida Statutes, is applicable for purchasing which takes place under chapter 287, Florida Statutes. Appellants argue that School Board purchasing is governed by part I of chapter 287, Florida Statutes. The parties agree that (with one exception) chapter 287, part I, is addressed to the executive branch of state government. 1/ See *id.* §§ 287.001, 287.012(1). Appellants claim that school boards are part of the executive branch of state government.

Appellants are incorrect. School boards are constitutional entities created by Article IX, Section 4 of the Florida Constitution. School boards do not fall within the executive branch of the state government. *Op. Att'y. Gen. Fla. 84-68* (1984); See Art. II, § 3, Art. IV, Art. IX, § 4, Fla. Const.; ch. 20, Fla. Stat. (1995); see also *Canney v. Board of Public*

Instruction, 278 So. 2d 260, 263 (Fla. 1973). That being so, part I of chapter 287 does not apply to the School Board. 2/ This in turn means that the School Board is not covered by subsection 120.53(5), Florida Statutes, and relief under that subsection was correctly denied.

We find no merit in appellants' remaining arguments on appeal.

Affirmed.

ENDNOTES

1/ The School Board concedes that it is covered by section 287.055, Florida Statutes, which regulates the purchase of certain professional services, because by its express terms, section 287.055 applies to school boards. See Id. § 287.055(2)(b). That provision has no application to the present case, because the present case involves the School Board's purchase of electrical supplies.

2/ Subject to the exception mentioned in footnote 1.

M A N D A T E DISTRICT COURT OF APPEAL OF FLORIDAA THIRD DISTRICT

DCA# 96-834

DUNBAR ELECTRIC SUPPLY, INC., et al.
vs.
THE SCHOOL BOARD OF DADE COUNTY, FLORIDA

This cause having been brought to this Court by appeal, and after due consideration the Court having issued its opinion;

YOU ARE HEREBY COMMANDED that further proceedings be had in said cause in accordance with the opinion of this Court attached hereto and incorporated as part of this order, and with the rules of procedure and laws of the State of Florida.

Case No. 95-3362RX, 95-4834RX DEPT.

WITNESS, The Honorable Alan R. Schwartz

Chief Judge of said District Court and seal of said Court at
Miami, this 9th day of May, 1997.

(SEAL)

LOUIS J. SPALLONE, Clerk
District Court of Appeal of Florida, Third District