

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CATALFUMO CONSTRUCTION AND)
DEVELOPMENT, INC.; CATALFUMO)
CONSTRUCTION L.L.C.; CATALFUMO)
CONSTRUCTION, LTD.; AND)
CATALFUMO CONSTRUCTION, INC.,)
)
Petitioner,)
)
vs.) Case No. 02-1494BID
)
MARTIN COUNTY SCHOOL BOARD,)
)
Respondent,)
)
and)
)
MORGANTI GROUP, INC.,)
)
Intervenor.)
_____)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Stuart, Florida, on May 8-9, 2002.

APPEARANCES

For Petitioner: Gary M. Dunkel, Esquire
Susan Fleischner Kornspan, Esquire
Greenberg, Traurig, P.A.
777 South Flagler Drive, Suite 300 East
West Palm Beach, Florida 33401

For Respondent: Douglas G. Griffin, Esquire
School Board of Martin County
500 East Ocean Boulevard
Stuart, Florida 34994

For Intervenor: Joseph Ianno, Jr., Esquire
Michael Winston, Esquire
Carlton Fields, P.A.
Post Office Box 150
West Palm Beach, Florida 33402-0150

STATEMENT OF THE ISSUE

The issue is whether Respondent's tentative decision to attempt to negotiate with Intervenor a contract for services as a construction manager at risk is contrary to statutes, rules, policies, or the request for qualifications, in violation of Section 120.57(3)(f), Florida Statutes.

PRELIMINARY STATEMENT

By Formal Written Protest and Petition for Administrative Hearing filed April 16, 2002, Petitioner protested Respondent's selection of Intervenor with which to negotiate a contract for Intervenor to serve as Respondent's construction manager at risk for the construction of the Port Salerno Elementary School and Jensen Beach High School.

Petitioner alleged that it and 13 other applicants submitted to Respondent a package in response to a request for qualifications issued by Respondent. Using criteria published in the Guidelines for Selection of Construction Management At Risk for Martin County Schools, Respondent's Short List Committee selected five applicants, including Petitioner and Intervenor, for interviews by the Professional Services Selection Committee.

Petitioner alleged that, following interviews, the Professional Services Selection Committee ranked the five applicants, naming Petitioner as the top-ranked applicant and Intervenor as the second-ranked applicant.

Petitioner alleged that applicable law, including the documents constituting the request for qualifications, required Respondent to commence negotiations with Petitioner. Instead, Petitioner alleged that the Martin County School Board required Petitioner, Intervenor, and the third-ranked applicant to make presentations, so that the School Board could select the applicant with whom Respondent would commence negotiations.

Petitioner alleged that the School Board voted upon the applicants immediately after the third presentation and, using unknown criteria and point values, declared that, under a system in which each School Board member ranked each of the applicants, the vote was a tie because Petitioner had two first-place votes and three second-place votes and Intervenor had three first-place votes, one second-place vote, and one third-place vote. School Board chair David Anderson then allegedly announced that he would break the tie by selecting Intervenor because it had three first-place votes.

Petitioner alleged that Respondent's selection of Intervenor was arbitrary, capricious, fraudulent, anti-competitive, and unreasonable; violated Section 287.055,

Florida Statutes, administrative rules and Respondent's guidelines; and constituted unfair dealing.

At the hearing, Petitioner called four witnesses and offered into evidence 30 exhibits: Petitioner Exhibits 1-30. Respondent called no witnesses and offered into evidence no exhibits. Intervenor called one witness and offered into evidence four exhibits: Intervenor Exhibits 1-4. All exhibits were admitted.

The court reporter filed the Transcript on May 22, 2002. The parties filed their Proposed Recommended Orders on June 5, 2002.

FINDINGS OF FACT

1. In 2001, Respondent began to investigate various options for the construction of Jensen Beach High School and reconstruction of Port Salerno Elementary School. The recent, sudden departure of Respondent's Director of Facilities and several of his employees left Respondent with few employees sufficiently experienced to deal with a general contractor constructing substantial projects, such as the construction of these two schools.

2. Respondent thus considered the use of a construction manager and construction manager at risk (CMAR) contract. Under these types of contracts, Respondent would hire a construction manager to serve as its representative in entering into

contracts with subcontractors and suppliers. Although not relevant to this case, the CMAR contract imposes upon the construction manager greater risks for increased construction costs.

3. Initially, Superintendent Wilcox and School Board Attorney Griffin investigated the CMAR form of contract. After they had decided to recommend the use of a CMAR, on January 14, 2002, Respondent hired Rodger Osborne as the new Director of Facilities, and Mr. Osborne assumed from them the primary responsibility for investigating and later implementing the CMAR procurement in this case.

4. Immediately prior to his employment with Respondent, Mr. Osborne had been the Director of Maintenance and Operations for the Charlotte County School District. In this capacity, Mr. Osborne managed construction, maintenance, and operations for the school district. Among his duties was the procurement of construction contracts. The Charlotte County School District has used the CMAR form of contract seven or eight times. Managing the process, Mr. Osborne borrowed provisions and procedures from various sources, including state statutes and provisions used by Sarasota County.

5. Four days after Mr. Osborne began employment with Respondent, Mr. Griffin submitted a memorandum to the Martin County School Board in which he recommended that it approve the

use of a CMAR for the construction of Jensen Beach High School and Port Salerno Elementary School. Eight days after Mr. Osborne began employment with Respondent, the Martin County School Board approved Mr. Griffin's recommendation and authorized Respondent to advertise for applicants to serve as the CMAR for these projects.

6. Mr. Osborne's first task as Director of Facilities was to prepare the legal advertisement. On January 28, 2002--two weeks after Mr. Osborne had started working for Respondent--a local newspaper published the first of three legal advertisements for submittals from interested parties. The advertisement states:

MARTIN COUNTY PUBLIC SCHOOLS will select a qualified Construction Manager at Risk under the Consultants' Competitive Negotiation Act to provide preconstruction and construction services for the Port Salerno Elementary Replacement School and Jensen Beach High School. The School District will award both projects to a single Construction Manager at Risk.

Firms interested in being considered are requested to submit a letter of interest, resumes of key personnel who would be used on the project, proof of professional liability insurability as required by Martin County Public Schools and a copy of Florida Registration Certification. Each applicant must submit a completed Professional Qualification Supplement (PQS). Copies of the PQS Format and project information are available through the Facilities Department by calling [telephone number omitted]. All data must be current as of date of

submission and received no later than 4 P.M.
February 15, 2002.

Submissions to be received by:

Director of Facilities
Martin County Public Schools
500 East Ocean
Stuart, Fl. 34994

Anticipated award date is, March 19, 2002,
with work to begin immediately.

Estimated construction cost of \$43,500,000.

In accordance with School Board Rule
6Gx43-8.01, the Professional Services
Selection Committee will rank the top three
(3) firms and submit the ranking of firms to
the Superintendent and School Board.

MARTIN COUNTY PUBLIC SCHOOLS
Dr. Sara Wilcox, Superintendent

7. Fifteen potential applicants timely submitted responses
to the advertisement. Mr. Osborne supplied each of these
applicants a package consisting of another copy of the
advertisement and "Guidelines for Selection of Construction
Manager at Risk for Martin County Schools" (Guidelines).

8. The Guidelines state:

Complete all items of the Professional
Qualifications Statement (PQS) for
Construction Manager at Risk.

Submit not less than three copies of the PQS
along with any supporting information to
Director of Facilities, Martin County Public
Schools, 500 East Ocean, Stuart, Fl 34994.

SHORT LIST

Within approximately seven (7) days after the submission date of 4 P.M. February 15, 2002, for the purpose of reducing the number of applicants qualifying for interviews to no more than six (6), a short list committee will be formed. The Short List Committee will include one School Board Member, one Superintendent's designee, one representative from Operation Services, one Program Staff Member, the Director of Facilities and Supervisor of Construction. The Director of Facilities will serve as chairperson.

The following criteria and point values will be used to determine a number rating for each applicant:

- | | |
|---------------------------------|-------------|
| 1. Letter of Interest | 0 points |
| 2. [PQS] | 0 points |
| 3. Certified Minority Business | 5 points |
| 4. Location | 1-5 points |
| 5. Current Work Load | 0-10 points |
| 6. Capability | 0-10 points |
| 7. Professional Accomplishments | 0-10 points |

Up to six (6) firms with the highest rankings will be interviewed by the Professional Services Selection (Ranking) Committee.

9. The package supplied to potential applicants contained blank scoring sheets with specific points assigned to different factual scenarios. The package also contained a fact sheet describing each of the schools to be constructed and a set of forms seeking specific information; the forms were part of the Professional Qualification Statement for Construction Manager At Risk (PQS).

10. PQS Paragraph E states:

RELATED EXPERIENCE

List the three (3) projects in the last five (5) years for which your firm has provided/is providing construction management and/or general contracting services which are most similar in scope to this project. In determining which projects are more related, consider: related size and complexity; how many members of the proposed team worked on the listed project; and how recently the project was completed. List the projects in priority order, with the most related project listed first.

11. The PQS form provides one box that asks for specific information about the three listed projects, such as the size, type of construction, and construction cost. The PQS form supplies another box for a "detailed description of projects." PQS Paragraph F requires the disclosure, for each of the three projects, the owner budget, final budget, schedule status, and impact of firm on the final results.

12. PQS Paragraph G states:

PROPOSED TEAM

Describe your proposed organization structure for this program indicating key personnel and their relationship to this project and other team members. Give brief resumes of key persons to be assigned to the program.

13. The PQS form provides one box for office staff and one box for onsite staff. Each box asks for specific information about the listed key personnel, such as the percentage of time they will be assigned fulltime to the subject projects; their

experience in terms of "types of projects, size of projects, [and] project responsibilities"; and "other experience and qualifications relevant to this project."

14. Mentioned in the legal advertisement, although not included in the package, Respondent's Rule 6Gx43-8.01 provides:

FACILITIES AND OPERATIONS

6Gx43-8.01 Professional Services

1. Professional Service Contracts between the Board and architects, engineers and surveyors shall follow the following procedures if the basic construction cost for the project is estimated to be greater than \$120,000 or if the fee for professional service for planning or study is estimated to exceed \$8,500 (except valid emergencies so certified by the Superintendent of Schools):

- a. Publicly announce each project indicating:
 - i. general project description
 - ii. how interested parties can apply
- b. Certify firms or individuals wishing to provide professional services while considering:
 - i. General Services Administration Forms 254 and 255.
 - ii. Past performance
 - iii. Willingness to meet requirements of:
 - (1) time
 - (2) budget
 - (3) availability--planning--construction
 - (4) ability to furnish required service
 - iv. Firm's workload in relation to job under construction.
 - v. Volume of work previously awarded to the firm.

c. A committee, comprised of the Superintendent of Schools and/or his/her designee, appropriate staff members, and an annually appointed School Board Members [sic] shall recommend to the School Board a minimum of three (3) "certified" firms or individuals which shall be recommended in order of preference 1, 2, and 3, with the object of effecting an equitable distribution of contracts, providing the selection of the most highly qualified firm is not violated.

d. The School Board, or its designee, shall negotiate a contract with the most qualified firm for professional services at compensation which the School Board, or its designee, determines if fair, competitive, and reasonable. In making such determination, a detailed analysis of the cost of professional services shall be conducted in addition to considering the scope and complexity of the services required for the project.

Should the School Board, or its designee, be unable to negotiate a satisfactory contract with the firm considered to be the most qualified at a price the School Board, or its designee, determines to be fair, competitive and reasonable, negotiation with that firm shall be formally terminated. Negotiations shall then be undertaken with the second most qualified firm. Failing accord with the second most qualified firm, negotiations shall be undertaken with the third most qualified firm.

If unable to negotiate with any of the selected firms, three more firms shall be selected in the order of preference and negotiations will be continued until an agreement is reached.

1. For professional services when the basic construction cost for the project is estimated to be less than \$120,000 or planning or study fees estimated to be less

than \$8,500, the procedure shall be as follows:

Follow steps B, C, and D outlined under preceding 1 for purpose of selecting the agency best to accomplish the project.

2. The use of a continuing contract may be approved provided the following provisions are met. A continuing contract is for professional services for projects in which construction costs do not exceed \$500,000; or for study activity, the fee for which professional service does not exceed \$25,000; or for work of a specified nature as outlined in the contract required by the School Board, or its designee. The contract requires no time limitation but shall provide a termination clause.

Footnote: All professional firms are encourage [sic] to submit their statements of qualifications and performance data using Govt. Service Adm. Forms 254 and 255. The submission will be valid for one year beginning July 1. A reminder for this purpose will be made in the form of an annual public announcement.

15. Superintendent Wilcox selected a Short List Committee, whose task was to score the submittals and, based on these scores, select the five applicants that would make presentations to the Professional Services Selection Committee. The Short List Committee comprised Mr. Osborne, chair; Bob Sanborn, Supervisor of Operations; Darrel Miller, Director of Educational Technology; Dr. David Anderson, School Board chair; Tracey Miller, principal of Port Salerno Elementary School; and John Dilworth, Supervisor of Construction.

16. The Short List Committee met on February 21, 2002. After examining the submittals of the applicants in response to the Guidelines, the Short List Committee scored the submittal of each applicant. The highest-ranking applicant received 185 points. Intervenor was ranked third with 160 points, and Petitioner was ranked fourth with 158 points. The Short List Committee selected five applicants to make presentations to the Professional Services Selection Committee.

17. By letter dated February 22, 2002, Mr. Osborne supplied each of the five short-listed applicants with a document entitled, "Interview and Selection for Construction Manager At Risk" (Selection Criteria). The Selection Criteria states that the Professional Services Selection Committee will use the following criteria to "reduc[e] the number of qualified applicants to three . . .":

- | | | |
|-----|-------------------------------|-------------|
| 1. | Letter of Interest | 0 points |
| 2. | Professional Qualification | |
| | Supplement forms | 0 points |
| 3. | Certified minority business | 5 points |
| 4. | Location | 0-5 points |
| 5. | Current work load | 0-10 points |
| 6. | Capability | 0-10 points |
| 7. | Professional accomplishments | 0-10 points |
| 8. | Schedule & budget | 0-10 points |
| 9. | Approach and methods | 0-10 points |
| 10. | Understanding of project | 0-10 points |
| 11. | Previous work for MCS D | 0-10 points |
| 12. | Progressive use of technology | 0-10 points |
| 13. | Warranty period | 0-10 points |
| 14. | Construction administration | 0-10 points |

18. The Selection Criteria states: "The Professional Services Selection Committee will present to the Superintendent for approval and presentation to the Board a ranked list of the top three qualifying firms." Separate pages of the Selection Criteria detail the scoring guidelines for each of the scored criteria. For example, the Selection Criteria states under Professional Services Evaluation: "Current and past records of those projects successfully completed which are similar in scope to project(s) under consideration. References listed and check [sic]. Review PQS form." Ratings of 9 and 10 are for "extremely qualified for project"; ratings of 7 and 8 are for "very qualified for project"; ratings of 5 and 6 are for "qualified--experienced with project type"; ratings of 2, 3, and 4 are for "not very qualified--questionable abilities for project"; and ratings of 0 and 1 are for "unqualified--no experience with project type."

19. After sending the February 22 letter, Mr. Osborne called each of the applicants to confirm that each had received the letter. During these conversations, Mr. Osborne informed each applicant that only the applicant ranked first by the Professional Services Selection Committee would make a presentation to the School Board. As Mr. Osborne understood the selection process, the Board would have the final decision whether to accept the top-ranked applicant. If it did so, the

School Board would then try to negotiate a CMAR contract with the top-ranked applicant. If the parties could not reach an agreement, the School Board could then try to negotiate a contract with the applicant ranked second by the Professional Services Selection Committee.

20. Superintendent Wilcox, with Mr. Osborne's assistance, selected the Professional Services Selection Committee. The Professional Services Selection Committee comprised Leighton O'Connor, Executive Director of Operations Services and immediate supervisor of Mr. Osborne; Hank Salzler, Assistant Superintendent and designee of Superintendent Wilcox; Ms. Miller; Mr. Dilworth; Dr. Anderson; and Mr. Osborne.

21. On March 5, 2002, Mr. Osborne informed the members of the Professional Services Selection Committee that they would rank the applicants and the top-ranked applicant would make a presentation to the School Board. No member of the committee voiced an objection to the process.

22. After Mr. Osborne had addressed the Professional Services Selection Committee, the representatives of the five short-listed applicants made their presentations. Based on these presentations and the earlier submittals, the Professional Services Selection Committee, on March 5, 2002, ranked Petitioner first with 513 points and Intervenor second with 487 points.

23. Immediately after the meeting of the Professional Services Selection Committee, Assistant Superintendent Salzler visited Superintendent Wilcox and told her that Mr. Osborne had told the committee members that only the top-ranked applicant would make a presentation to the School Board. For professional services contracts, the top three-ranked applicants customarily made presentations to the Board, which would then select the applicant that the Board felt was most qualified. Superintendent Wilcox had thought that the same process would apply to the selection of the applicant with which to negotiate the CMAR contract.

24. Superintendent Wilcox immediately visited Mr. Osborne and informed him that the School Board would want the top three applicants to make presentations. Mr. Osborne replied that he had told the applicants that only the top-ranked applicant would make a presentation to the Board. Superintendent Wilcox told him to telephone the top three applicants and tell them that all of them would be making presentations to the Board, so that the Board could make the final ranking. Later the same day, Mr. Osborne telephoned the top three applicants and informed them of the new procedure.

25. Dr. Anderson had had to leave the meeting of the Professional Services Selection Committee before it was finished, so, later the same day, he telephoned Mr. O'Connor to

learn the results of the voting. Mr. O'Connor informed Dr. Anderson of the three top-ranked applicants and expressed his opinion that the key criterion was not the general ranking that resulted from the guidelines and criteria that Mr. Osborne had developed, but the quality of the personnel who would manage the actual construction. Acknowledging that the School Board would not have adequate time to view the applicants' presentations and evaluate their submittals, Mr. O'Connor asked Dr. Anderson if Mr. O'Connor should undertake an analysis for use by the School Board. Dr. Anderson agreed that such an analysis would be helpful and asked him to prepare one.

26. Mr. O'Connor prepared a 24-page document entitled "Construction Manger [sic] at Risk Finalist Comparisons" (O'Connor Finalist Comparisons). Mr. O'Connor provided the O'Connor Finalist Comparisons to each School Board member prior to the March 19 meeting.

28. The O'Connor Finalist Comparisons introduces a new element to the procurement criteria--cost. The document advises the School Board members that the "number of team members and percentage of time devoted to the project may impact the cost of services." The document also relates, in an unspecified manner, "pre-construction services" to "cost saving alternative."

29. The O'Connor Finalist Comparisons emphasizes some published selection criteria at the expense of others--without

regard to their relative point value. Admittedly reflecting only Mr. O'Connor's opinion, the O'Connor Finalist Comparisons states that the "key consideration [sic] for this project" are "pre-construction services," "onsite construction service," and "experiences of assigned project staff." The document adds: "Our architect indicated that the Project Superintendent was the most important team member."

30. The O'Connor Finalist Comparisons analyzes the proposals of the three applicants in terms of two criteria-- "credentials" and experience of selected members of the onsite project team in school construction.

31. The emphasis upon school--construction experience also reflects Mr. O'Connor's opinion--this time clearly without the smallest support in the Guidelines or Selection Criteria, which ask for experience of similar scope, not merely school-construction experience.

32. For Intervenor and Petitioner, the O'Connor Finalist Comparisons compares two employees per job site. For the high school, Intervenor's two employees have handled six school-construction projects, and their credentials consist of one bachelor's of arts degree in business administration. For the elementary school, Intervenor's two employees have handled 12 school-construction projects, and their credentials consist of one of them holding a bachelor's of science degree and master's

degree in civil engineering. For the high school, Petitioner's two employees have handled one school, and their credentials consist of one bachelor's of science degree in business administration. For the elementary school, Petitioner's two employees have handled 11 school-construction projects, and their credentials consist of no four-year degrees.

33. In this part of his analysis, Mr. O'Connor does not disclose his rationale for excluding from his analysis other key team members assigned 100 percent to the school projects, such as the two assistant project superintendents for the Jensen Beach High School project. These two persons have handled a total of seven school-construction projects. Interestingly, Mr. O'Connor included a third member of the third applicant's high-school team, and this person was an assistant superintendent.

34. Mr. O'Connor fails to explain why he omitted analysis of project engineers assigned fulltime to the sites. From his charts, Intervenor did not assign such a person to either site, Petitioner assigned one to the elementary school and two to the high school, and the third applicant assigned one to each site. Petitioner's project engineer for the elementary school has handled two school-construction projects, and the sole person identified by name as a project engineer for the high school has handled one school-construction project.

35. Again without explanation, Mr. O'Connor identifies Petitioner's project manager for the high school as someone other than the person whom Petitioner named in its proposal. The person identified by Mr. O'Connor has handled only one school-construction project. Although it is possible that Petitioner had had to change assigned personnel in the month since it first named its anticipated key personnel, nothing in the record indicates that such a change in personnel actually took place.

36. Sometime after March 5, Superintendent Wilcox, Dr. Anderson, and Mr. Osborne informed each of the top three applicants that each of them would make a 20-minute presentation to the School Board and that the Board would use the Selection Criteria for ranking the applicants.

37. On March 19, 2002, at a regularly scheduled School Board meeting, each of the top three applicants made its 20-minute presentation, interrupted by few, if any, questions from Board members. Petitioner's presentation covered the 14 criteria stated in the Selection Criteria.

38. Petitioner complains that its presentation occurred at the end of the evening, long after the presentations of Intervenor and the third applicant, but this occurrence did not confer competitive advantage or disadvantage. Equally without meaning is the contention of Respondent and Intervenor that

Petitioner never objected to any change in the procurement criteria. Nothing in the record suggests that Petitioner was ever aware, prior to the March 19 meeting, of the O'Connor Finalist Comparisons. Nothing in the record suggests that Respondent gave Petitioner a point of entry to challenge the changes that Respondent made during the course of this procurement.

39. At no time during the March 19 meeting did anyone present the School Board with the rankings of the Professional Services Selection Committee. At no time during the March 19 meeting did anyone move that the School Board try to negotiate a contract with Petitioner. At the end of the meeting, without any public discussion, each School Board member voted his or her first, second, and third preference.

40. Intervenor received three first-place votes, one second-place vote, and one third-place vote. Petitioner received two first-place votes and three second-place votes. Dr. Anderson, who ranked Intervenor first, announced that the vote was a tie, but that Intervenor should be declared the winner because it received more first-place votes. In response, another Board member moved to rank Intervenor first, Petitioner second, and the third applicant third and authorize Respondent to commence negotiations with Intervenor. The School Board unanimously passed the motion.

41. The procurement documents are unambiguous, although they are less than comprehensive in their treatment of the procurement procedure. Rule 6Gx43-8.01.c provides that a committee shall recommend, in order of preference, three applicants to the School Board, which shall negotiate a contract with the most "qualified" applicant. The legal advertisement states only that the Professional Services Selection Committee shall rank the top three applicants and submit them to the Superintendent and School Board. The Selection Criteria states that the Professional Services Selection Committee will present to the Superintendent for approval and presentation to the School Board a ranked list of the top three "qualifying" applicants.

42. Citing past practices--although none involves the procurement of a CMAR--Intervenor and Respondent contend that the School Board was authorized to re-rank the applicants and begin negotiations with any of the three applicants submitted to the Board. Citing the reference in the Selection Criteria that the Professional Services Selection Committee ranks the top three "qualifying" applicants and the language in the other documents requiring the School Board to negotiate first with the most "qualified" applicant, Petitioner contends that the Board has no right to change the ranking of the Professional Services Selection Committee, but must deal first with the top-ranked

applicant. Due to the interpretation of Mr. Osborne, Respondent's interpretation of its rules and procurement documents is clearly erroneous and arbitrary.

43. Until the telephone calls from Mr. Osborne to the applicants on March 5 after Superintendent Wilcox told Mr. Osborne that all three top-ranked applicants would make presentations to the Board, the applicants perceived correctly that Mr. Osborne was in charge of implementing the procedures for this procurement. And, from the start through his meeting with Superintendent Wilcox on March 5, Mr. Osborne consistently understood that the Professional Services Selection Committee would rank the top three applicants, and a committee member or the Superintendent would present to the School Board only the top-ranked applicant, which would then make a presentation to the Board. As Mr. Osborne envisioned the process, the Board could reject the top-ranked applicant and proceed to the second-ranked applicant, although this was unlikely, but the Board could not re-rank the top three applicants, without ever formally rejecting the applicant ranked first by the Professional Services Selection Committee.

44. Mr. Osborne consistently communicated his understanding of the procurement process to the applicants. Mr. Osborne's understanding of the procurement process is the correct interpretation of the procurement documents. Among

other things, Mr. Osborne's interpretation of the procurement documents lends meaning to the task of the Professional Services Selection Committee in ranking the top three applicants. Under Respondent's interpretation, the Professional Services Selection Committee performs a useless act when, in addition to naming the top three applicants, it ranks them. Respondent's departure from this procedure at the moment of decision clearly violates the standards governing this procurement.

45. Exacerbating the situation is the O'Connor Finalist Comparisons. This document distorts the Selection Criteria by omitting many criteria, reassigning weights among other criteria, and adding two criteria--cost and school-construction experience. This document distorts Petitioner's qualifications by its arbitrary selection of personnel for comparison purposes.

46. Presumably, Respondent and Intervenor resist the inference that the O'Connor Finalist Comparisons influenced any of the School Board members. The administrative law judge infers that the document influenced one or more members; given the close outcome of the vote, the administrative law judge infers that the document was a material factor in the selection of Intervenor. These inferences are supported by numerous facts, including the following. The School Board chair, Dr. Anderson, endorsed the preparation of the document. Dr. Anderson preferred Intervenor over Petitioner. The O'Connor

Finalist Comparisons appears to be the only document presented to School Board members that was not part of the formal procurement process. The School Board members did not extensively discuss at the meeting the merits of the three applicants before voting. Petitioner tried to elicit testimony from the School Board members, but at Respondent's request, the administrative law judge entered a prehearing order denying Petitioner the opportunity to compel testimony from any of them except Dr. Anderson, who had served on the Professional Services Selection Committee. The inference of materiality is eased by the magnitude of the distortions contained in the O'Connor Finalist Comparisons as to the Selection Criteria and Petitioner's qualifications and the closeness of the Board vote; the extensive distortion contained in the O'Connor Finalist Comparisons means that it was material if it had even the slightest influence on one of the School Board members.

47. Under these facts, Petitioner proved that Respondent's selection of Intervenor was contrary to Respondent's rule, Respondent's policies (as stated by Mr. Osborne), and the other procurement documents. Under these facts, Petitioner proved that the deviations from Respondent's rule, Respondent's policies, and the other procurement documents rendered the selection of Intervenor clearly erroneous, contrary to competition, and arbitrary.

48. As a remedy, Petitioner contends that Respondent should commence negotiations with Petitioner. However, by the time Respondent issues a final order, six months will have passed since each applicant submitted a proposal. The ability of applicants to meet various criteria, such as the availability of key personnel, may have changed dramatically.

49. Also, contrary to Petitioner's contention, this procurement is not fundamentally flawed due to bad faith or favoritism. The change in procurement procedures was indisputably due to an innocent, mutual mistake among Respondent's employees. The newly hired Mr. Osborne intended to handle the procurement his way, and Dr. Anderson, Superintendent Wilcox, and District staff intended Mr. Osborne to handle the procurement their way. Nothing in the record suggests that the O'Connor Finalist Comparisons is anything more than Mr. O'Connor, as Mr. Osborne's supervisor, injecting himself into a process that was not going as smoothly as Mr. O'Connor would have liked. Relying on the advice of an architect, Mr. O'Connor belatedly rewrote the procurement criteria to emphasize school-construction experience and cost; it is easy to indulge the presumption that Mr. O'Connor was motivated by a desire to help Respondent, not an applicant. Absent other evidence in the record, Mr. O'Connor's distortion of Petitioner's qualifications, which was not of the same magnitude

as his distortion of the procurement criteria themselves, may presumably be attributed to haste or carelessness, rather than favoritism toward Intervenor.

CONCLUSIONS OF LAW

50. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1) and (3), Florida Statutes. (All references to Sections are to Florida Statutes.)

51. Section 120.57(3)(f) provides:

. . . the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. In any bid-protest proceeding contesting an intended agency action to reject all bids, the standard of review by an administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent.

52. Section 120.57(3)(f) thus identifies the ultimate issue in an award case as whether the proposed agency action is contrary to statutes, rules, policies, or the specifications. The same statutory provision identifies the standard of proof as

whether the proposed agency action is clearly erroneous, contrary to competition, arbitrary, or capricious (Clearly Erroneous Standard).

53. Typically, a standard of proof governs the determination of the basic facts that underlie the determination of the ultimate facts, and the determination of the ultimate facts underlies the determination of the legal issues. However, Section 120.57(3)(f) applies the Clearly Erroneous Standard only to the proposed agency action, such as whether the proposed award is contrary to statutes, rules, policies, or the specifications. The statutes are not silent as to the standard of proof for other purposes. Section 120.57(3)(f) provides that an award case is to be de novo. Section 120.57(1)(j) provides that the preponderance standard governs the determination of the basic facts, such statements made by an agency's representative.

54. There are also ultimate questions of fact to which the Clearly Erroneous Standard applies. Ultimate questions of fact--express and implied--link the basic facts to the final legal conclusion, which is whether the proposed decision to award is contrary to statutes, rules, policies, or the specifications. In some cases, the question arises whether a deviation in a bid or proposal is a material variance or a minor irregularity or whether a bid or proposal is responsive. These are ultimate questions of fact, and the Clearly Erroneous

Standard requires the administrative law judge to defer to these policy-influenced determinations.

55. The Clearly Erroneous Standard also applies to subordinate questions of law and mixed questions of fact and law, such as interpretations of an agency rule or specifications, and questions of fact requiring the application of technical expertise, such as whether a specific product or service qualitatively complies with the specifications.

56. This approach is consistent with State Contracting and Engineering Corporation v. Department of Transportation, 709 So. 2d 607 (Fla. 1st DCA 1998). In State Contracting, the court affirmed the agency's final order that rejected the recommendation of the administrative law judge to reject a bid on the ground that it was nonresponsive. The bid included the required disadvantaged business enterprise form, but, after hearing, the administrative law judge determined that the bidder could not meet the required level of participation by disadvantaged business enterprises. The agency believed that responsiveness demanded only that the form be facially sufficient and compliance would be a matter of enforcement. Rejecting the recommendation of the administrative law judge, the agency reasoned that the administrative law judge had failed to determine that the agency's interpretation of its rule was clearly erroneous.

57. In affirming the agency's final order, the State Contracting court quoted the provisions of Section 120.57(3)(f) for evaluating the proposed agency action against the four criteria of contrary to statutes, rules, policies, and the specifications and against the Clearly Erroneous Standard. Addressing the meaning of a de novo hearing in an award case, the court stated, at page 609:

In this context, the phrase "de novo hearing" is used to describe a form of intra-agency review. The [administrative law judge] may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency.

58. Significantly, the State Contracting court did not apply the Clearly Erroneous Standard merely to the agency decision to award. The court concluded that the agency's interpretation of one of its rules and determination that the bid was responsive were not "clearly erroneous."

59. In the subject case, then, the preponderance standard applies to all basic facts and the Clearly Erroneous Standard applies to the ultimate questions of fact, mixed questions of fact and law, subordinate questions of law, and questions of fact involving agency expertise. Based on the resulting findings, the conclusions of law determine whether the proposed agency decision to award the contract to Intervenor is

consistent with statutes, rules, policies, and the specifications.

60. Petitioner has proved by the Clearly Erroneous Standard that Respondent's decision to negotiate first with Intervenor is inconsistent with applicable rules, policies, or the specifications.

RECOMMENDATION

It is

RECOMMENDED that the Martin County School Board enter a final order setting aside the proposed decision to enter into negotiations with Intervenor to provide services as a construction manager at risk in the construction of the Jensen Beach High School and Port Salerno Elementary Replacement School and restart the procurement process, if Respondent still seeks to proceed with these projects under this construction method through a competitive procurement.

DONE AND ENTERED this 28th day of June, 2002, in
Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of June, 2002.

COPIES FURNISHED:

Dr. Sara Wilcox, Superintendent
Martin County School Board
500 East Ocean Boulevard
Stuart, Florida 34994-2578

Honorable Charlie Crist
Commissioner of Education
Department of Education
The Capitol, Plaza Level 08
Tallahassee, Florida 32399-0400

Gary M. Dunkel, Esquire
Susan Fleischner Kornspan, Esquire
Greenburg Traurig, P.A.
777 South Flagler Drive, Suite 300 East
West Palm Beach, Florida 33401

Douglas G. Griffin, Esquire
School Board of Martin County
500 East Ocean Boulevard
Stuart, Florida 34994

Joseph Ianno, Jr., Esquire
Michael Winston, Esquire
Carlton Fields, P.A.
Post Office Box 150
West Palm Beach, Florida 33402-0150

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order must be filed with the agency that will issue the final order in this case.