

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

BETANCOURT CASTELLON )  
ASSOCIATES, INC., )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 04-3248BID  
 )  
MIAMI-DADE COUNTY SCHOOL )  
BOARD, )  
 )  
Respondent, )  
 )  
and )  
 )  
MAGNUM CONSTRUCTION )  
MANAGEMENT CORPORATION, )  
 )  
Intervenor. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division  
of Administrative Hearings, conducted the final hearing in  
Miami, Florida, on October 13, 2004.

APPEARANCES

For Petitioner: Ira Libanoff  
Ferencik Libanoff Brandt  
Bustamante and Williams, P.A.  
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For Respondent: Luis M. Garcia  
Miami-Dade County School Board  
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For Intervenor: J. Alfredo de Armas  
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STATEMENT OF THE ISSUE

Pursuant to Section 120.57(3)(f), Florida Statutes, the issue is whether Respondent's proposed rescission of an award of a design-build contract to Petitioner for the construction of additions to two high schools was contrary to the Respondent's governing statutes, rules or policies or contrary to the specifications of Respondent's request for qualifications.

PRELIMINARY STATEMENT

On March 30, 2004, Respondent issued a Request for Qualifications of design-build firms for the design and construction of additions to two high schools. Petitioner and Intervenor timely submitted responses.

On July 18, 2004, Respondent's School Board awarded the contract to Petitioner. Intervenor timely protested the award, claiming that a conflict of interest existed between Petitioner's design-build team and Respondent's design criteria professional team.

Following receipt of Intervenor's protest, Respondent's legal counsel concluded that the conflict precluded the award to Petitioner, and he recommended that Respondent's School Board rescind the award, evidently implying that the School Board

should award the contract to Intervenor. Petitioner timely protested the proposed agency action of rescinding the award of the contract to Petitioner, and the case proceeded on the issue set forth above.

At the hearing, Petitioner called three witnesses and offered into evidence four exhibits: Petitioner Exhibits 1-4. Respondent called no witnesses and offered into evidence seven exhibits: School Board Exhibits 0-6. Intervenor called two witnesses and offered into evidence four exhibits: Intervenor Exhibits 1-4. All exhibits were admitted except School Board Exhibit 4, which was not admitted for the truth. Respondent proffered the exhibit for all purposes for which it was not admitted.

The court reporter filed the transcript on December 2, 2004. The parties filed their proposed recommended orders on December 13, 2004.

#### FINDINGS OF FACT

1. On March 30, 2004, Respondent issued a Request for Qualifications (RFQ) for design-build firms to design and construct additions at Southwest Miami Senior High School and Miami Killian Senior High School. The RFQ invites parties to submit proposals, if they are interested in performing the design and construction of three-story additions at each school (the subject projects).

2. Respondent had used the design-build approach for school construction for the past seven to ten years. In this process, the contractor assumes the responsibility for most of the project, as well as, of course, the project construction.

3. For the subject projects, Respondent entered into a contract with a Design Criteria Professional (DCP) to represent Respondent, as the owner, in certain aspects of the construction project. The DCP for these projects is Santos/Raimundez Architects, P.A.

4. The contract between Respondent and the DCP states that Respondent has selected the DCP based, in part, on its designation of specialists, including Fraga Engineers for the mechanical and electrical work. The contract provides that any such specialists that are subconsultants to, rather than employees of, the DCP will enter into subcontracts with the DCP, but not Respondent.

5. The DCP and its designated specialists form the DCP Team, which performs various tasks in connection with each project. These tasks include site investigations to determine project feasibility, the production of project-specific Phase I or schematic drawings from the master specifications that Respondent maintains for school construction, and the issuance of a building permit for the schematic design.

6. Once the contractor commences construction, the DCP Team visits the site to protect Respondent, as the owner, from deviations from the approved design. The DCP Team also approves draws based on the percentage of work completed and change orders, as appropriate.

7. The DCP Team performs about 10-15 percent of the overall design for a project. For the subject projects, the DCP Team spent seven months in performing its responsibilities prior to Respondent's selection of a contractor.

8. The only involvement of Fraga Engineers with the subject projects is for the mechanical and electrical work noted above, as well as plumbing and fire-suppression work of a similar nature for which the DCP also contracted.

9. For the subject projects, Petitioner retained Silva Architects as its architect and primary team member, and Silva Architects entered into a subcontract with Louis Aguirre for the mechanical, electrical, plumbing, and fire-suppression design and construction.

10. The principal of Silva Architects and the principal of Fraga Engineers are, respectively, husband and wife. There is no indication in this record of any improper communications between Mr. Silva and Ms. Fraga concerning the contents of the RFQ or the Phase I drawings, as prepared by Respondent, or the contents of the proposal, as prepared by Petitioner. However,

at the time of this solicitation, Fraga Engineers was serving as the engineering firm on at least two of Petitioner's projects, although her firm probably was under contract with Silva Architects, not Petitioner.

11. Except for the following provision, the RFQ does not address potential conflicts between an offeror and Respondent.

RFQ Paragraph I.H provides:

Any proposer desiring to participate in this process must not have as part of its team an A/E [architectural/engineering] firm presently under contract with the Board for a specific project for which the proposer, or any member thereof, is performing as the general contractor. The Board considers this a conflict of interest and such proposals will not be eligible for award under this RFQ.

12. Petitioner and Intervenor submitted timely proposals to Respondent. Among several offerors submitting proposals, Petitioner submitted the lowest bid, at \$17,536,000, followed closely by Intervenor's second-lowest bid, at \$17,556,000.

13. Finding Petitioner's proposal acceptable in all respects, Respondent's School Board awarded the contract to Petitioner at its meeting of June 16, 2004. On the same day, Intervenor filed a notice of protest, followed by a timely formal written protest.

14. The formal written protest, which is in the form of an undated letter from Intervenor's counsel to Respondent and

Respondent's counsel, states that Intervenor was not allowed to bid on projects where its architect/engineer was on Respondent's DCP Team for another project. The formal written protest argues that Ms. Fraga, or her company, is part of Petitioner's team on other pending projects while she, or her company, is part of Respondent's DCP Team.

15. Respondent conducted an informal conference with Intervenor and later with Petitioner in an attempt to resolve the matter. Failing in that effort, Respondent's counsel issued a letter, dated August 25, 2004, in which he recommended that Respondent's School Board rescind the proposed award to Petitioner. In his letter, Respondent's counsel reasoned that the spousal relationship between Petitioner's architect and the engineering firm under contract with Respondent's architect "would create a continuing and unavoidable conflict of interest that will inure to the benefit of either of these parties in violation of the General Requirements of the Bid, or at a minimum, could create a perceived or potential conflict of interest."

16. In his letter, Respondent's counsel stated that "we disagree" with the recommended order entered in SBR Joint Venture v. Miami-Dade County School Board, DOAH Case No. 03-1102BID (August 1, 2003), in which the Administrative Law Judge concluded, among other things, that a bidding contractor's

team did not include subcontractors under contract with the contractor's architect, rather than directly with the contractor. Unless the pronoun refers to the legal counsel's office or a committee formed to resolve the bid dispute, the "we" in the letter of Respondent's counsel is unclear because Respondent's School Board entered a final order on August 20, 2003--one year and five days before the letter of Respondent's counsel--adopting the recommended order.

17. Another confusing part of counsel's letter is an explanatory footnote, in which Respondent's counsel unsuccessfully distinguishes the present case, in which Silva Architects is directly under contract with Petitioner, from SBR Joint Venture, in which the third-tier subcontractor was under contract with the general contractor's architect, not the general contractor. (In SBR Joint Venture, as in the present case, the so-called "third tier" subcontractor has a contract with the "second tier" architect, but not the "first tier" contractor.) The question in this case is not whether the second-tier Silva Architects is part of Petitioner's team--clearly, it is. A major question in this case is whether Fraga Engineers is part of Petitioner's team--clearly, it is not, unless Ms. Fraga and Mr. Silva are interchangeable due to their marriage or her company's third-tier participation in other projects of Petitioner is attributed to the subject projects.



18. In any event, before Respondent's School Board could take up its counsel's recommendation, Petitioner protested the recommendation, and this case ensued.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569 and 120.57(3)(e), Fla. Stat. (2004).

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

In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, 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 solicitation specifications.

21. Pursuant to Section 120.57(3)(f), Florida Statutes, the burden of proof is on "the party protesting the proposed agency action," and the standard of proof is: "whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious."

22. Section 1013.46(1)(a), Florida Statutes, requires Respondent to award the contract to the "lowest responsible bidder." Section 1013.45(1)(b), Florida Statutes, provides that Respondent may use the design-build procedure, as described in Section 287.055, Florida Statutes, for the construction of new facilities or major additions to existing facilities.

23. This case is unusual because of the existence of two proposed agency actions opposing each other (or, in the alternative, the absence of the proposed agency action on which this case is purportedly based). Initially, the agency tentatively awarded the contract to Petitioner, as the lowest offeror. Intervenor protested this action. Subsequently, the agency's counsel agreed with Intervenor's contention that Petitioner should be disqualified due to a conflict of interest, and he recommended the rescission of the agency's earlier action. Petitioner protested this action.

24. Although Respondent's School Board has never taken up its counsel's recommendation, the parties agree that this case is ripe and presents for determination the sustainability of the recommendation of Respondent's counsel, rather than the sustainability of the proposed agency action of Respondent's School Board.

25. The Administrative Law Judge has accepted the parties' agreement on the procedural posture of this case, but respectfully points out shortcomings of the procedure in which a bid protest concerns the recommendation of legal counsel or a committee formed to resolve bid protests informally, rather than the proposed action of the contract-awarding entity--here, the School Board. The parties have effectively denied the School Board the opportunity to consider counsel's recommendation prior

to an administrative hearing. The School Board might have rejected counsel's recommendation, perhaps on grounds including those set forth in this recommended order. The School Board might have accepted counsel's recommendation, perhaps awarding the contract to Intervenor--an action, at best, implied by counsel's letter, but necessary to Intervenor's standing--or rebidding the subject projects, with more explicit conflict-of-interest provisions addressing the tiers of participants and the effect of marriage between two principals of any of the participants, at whatever tier. The incompleteness of counsel's recommendation in selecting one of these two options, if Petitioner's proposal were rejected, would have been even more problematic in this case, if Intervenor had prevailed.

26. However, accepting the parties' understanding of the posture of this case, Petitioner bears the burden of proving that the rescission of the award to it, and implicit award to Intervenor, would be contrary to statutes, rules, or policies or the RFQ.

27. The material facts of this case are not in dispute. Petitioner submitted the lowest bid and would have received the award, but for the issue raised by Intervenor concerning a conflict of interest involving Fraga Engineers.

28. Fraga Engineers works indirectly with Respondent on the subject projects and works with Petitioner on other

projects, but does not work even indirectly with Petitioner on the subject projects, unless Ms. Fraga and Mr. Silva are interchangeable due to their marriage. For these projects, Fraga Engineers is a second-tier consultant to Respondent's DCP. Although Fraga Engineers is on Respondent's DCP Team for the subject projects and Respondent retains the right not to allow its DCP to remove Fraga Engineers, the DCP, not Fraga Engineers, is under contract with Respondent for these projects. Contractually, Fraga Engineers' only relationship with these projects is under a subcontract with the DCP.

29. Fraga Engineers serves as a third-tier consultant to Silva Architects on projects for which Petitioner is the first-tier contractor. However, as noted above, for the subject projects, Fraga Engineers' only relationship with Petitioner's team is that Ms. Fraga--claimed by Intervenor to be better known as Mrs. Silva--is married to Mr. Silva.

30. None of these relationships among Petitioner, Respondent, Silva Architects, and Fraga Engineers violates any applicable statutes, rules, or policies or any specifications of the RFQ, with respect to the creation of a conflict of interest that would necessitate or justify the disqualification of Petitioner or the rejection of its proposal.

31. The only conflict-of-interest provision in the RFQ is Paragraph I.H. This conflict-of-interest provision requires two

conditions for a determination of the ineligibility of the offeror or rejection of its proposal. In this case, neither of these conditions is met.

32. First, Fraga Engineers is not part of Petitioner's team for these projects. For these projects, the little-mentioned Mr. Aguirre, not Fraga Engineers, serves as the mechanical, electrical, plumbing, and fire-suppression engineer. RFQ Paragraph I.H covers the current members of Petitioner's team for the two high-school additions that are the subject of this RFQ. Nothing in the RFQ or Respondent's rules or policies extends the disqualification from the members of the offeror's team on the subject projects to members of its team on past projects or other ongoing projects. Nor do the RFQ or Respondent's rules and policies require or permit Respondent to treat Silva Architects as though it were Fraga Engineers due to the marriage of the principals of the two entities. The RFQ and Respondent's rules and policies contain no attribution rules, under which Ms. Fraga would be treated as the principal of Silva Architects due to her marriage with Mr. Silva.

33. Second, Fraga Engineers is not presently under contract with Respondent for any project, including the subject projects, for which Petitioner is the general contractor. The participation of Fraga Engineers on the DCP Team for these projects is irrelevant under RFQ Paragraph I.H, which limits its

scope to entities under contract with Respondent. Fraga Engineers is not under contract with Respondent, so its involvement fails to trigger the RFQ's conflict-of-interest provision.

34. The parties stipulated at the start of the hearing that Respondent had no rule or policy that would define a conflict of interest based on a spousal relationship, except for such a relationship with an employee of Respondent. So, the sole remaining source of authority for disqualifying Petitioner or rejecting its proposal, on the basis of a conflict of interest, would be a state statute or rule.

35. The only applicable conflict-of-interest provision in the statutes is Section 287.055(9)(b), Florida Statutes, which Section 1013.45(1)(b), Florida Statutes, applies to design-build contracts for School Board building construction. Section 287.055(9)(b), Florida Statutes, states: "A design criteria professional who has been selected to prepare the design criteria package is not eligible to render services under a design-build contract executed pursuant to the design criteria package." Respondent's Rule 6Gx13-7B-1.021(III)(A) states the same prohibition.

36. The present arrangement does not violate Section 287.055(9)(b), Florida Statutes. The statute speaks of the DCP, not a member of the DCP Team. This statute merely prohibits the

DCP, Santos/Raimundez Architects, P.A., from rendering design-build services for the subject projects.

37. As Intervenor noted in its formal written protest, Florida Administrative Code Rule 60D-5.0071(9) provides that "an agency" may reserve the right to reject a bid when it determines that a "conflict of interest exists." In RFQ Paragraph I.H, Respondent reserved the right to reject a bid if a conflict existed, and, as noted above, no such conflict exists.

38. More importantly, though, Florida Administrative Code Rule 60D-5.0071(9) is inapplicable to this case. This rule is promulgated by the Florida Department of Management Services, pursuant to Section 255.29, Florida Statutes, which applies to the construction of state buildings, not School Board buildings. Chapter 1013, Florida Statutes, authorizes the Florida Department of Education to exercise certain supervisory responsibilities over the construction of School Board buildings. The Florida Department of Education rule applicable to such construction is at Florida Administrative Code Rule 6-2.001, and it does not address conflicts of interest.

39. Lacking any authority for rejecting Petitioner's proposal on the basis of a conflict of interest set forth in any statute, rule, School Board policy, or the RFQ, Respondent's counsel necessarily based his rescission recommendation on a perceived or potential conflict of interest not stated in the

statutes, rules, policies, or RFQ. However, this conflict of interest lacks any definition, even after the hearing in this case, and emerged only after the opening of the proposals.

40. In the abstract, conflicts of interest find little support due to the obvious potential for misdealing between the persons with the conflict. Respondent's counsel was trying to bolster the competitive-bidding process by adding this ill-defined conflict-of-interest provision after the proposals had been opened. Unfortunately, the effect of counsel's action is the opposite. Allowing agencies to add new, vague conflict-of-interest requirements to a procurement after the bids or proposals are opened invites manipulation of the bidding process and subverts competitive bidding when, as here, the agency selects a higher bid over the lowest bid of an offeror that failed to comply with this new, vague requirement. As must bidders, so must agencies abide by the specifications of their bid packages and may not select a bidder that has conformed to an undisclosed, poorly defined bid specification, to which a lower bidder failed to conform.

41. Petitioner has proved that no conflict-of-interest provision requires or permits the disqualification of Petitioner or rejection of its proposal and that Respondent's proposed disqualification of Petitioner and rejection of Petitioner's proposal subverts the competitive bidding process. Petitioner



has thus proved that the proposed agency action adverse to Petitioner is contrary to Section 1013.46(1)(a), Florida Statutes, which requires Respondent to award the contract to the "lowest responsible bidder."

RECOMMENDATION

It is

RECOMMENDED that Respondent enter a final order awarding the contract to Petitioner.

DONE AND ENTERED this 14th day of December, 2004, in Tallahassee, Leon County, Florida.



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ROBERT E. MEALE  
Administrative Law Judge  
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Filed with the Clerk of the  
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this 14th day of December, 2004.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 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.