

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SOUTHERN ATLANTIC COMPANY, LLC,)
)
 Petitioner,)
)
vs.) Case No. 10-9684BID
)
ORANGE COUNTY SCHOOL BOARD,)
)
 Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, an evidentiary hearing was held in this case on November 1, 2010, by video teleconference in Tallahassee and Orlando, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Daniel Matthew Greene, Esquire
 Daniel M. Greene, P.A.
 Post Office Box 3092
 Orlando, Florida 32802

For Respondent: Brian Kirwin, Esquire
 Claire A. Ashington-Pickett, Esquire
 Kirwin Norris, P.A.
 200 South Orange Avenue, Suite 1950
 Orlando, Florida 32801

STATEMENT OF THE ISSUE

The issue is whether the intended award of the electrical subcontract for Phase 2 of the Comprehensive Needs Project at

Oak Ridge High School (the Project) is a decision or intended decision of an "agency" as that term is defined in Subsection 120.52(1), Florida Statutes (2010).¹

PRELIMINARY STATEMENT

Petitioner, Southern Atlantic Company, LLC (Southern Atlantic), filed a Petition against Respondent, Orange County School Board (School Board), protesting the intended award of an electrical subcontract for Phase 2 of the Project. On October 18, 2010, the School Board forwarded the Petition to the Division of Administrative Hearings with the caveat that the School Board did not believe that "the petitioner has properly asserted [the] petition against the Agency."

Along with the referral of the Petition, the School Board filed a Motion to Dismiss Petition. The basis for the Motion to Dismiss is that Southern Atlantic lacks standing to bring the protest because the intended award of the electrical subcontract was not action by the School Board, but was an action by Wharton-Smith, Inc., the construction contractor for the Project. On October 20, 2010, Southern Atlantic filed a Response to Motion to Dismiss, stating that the School Board was "responsible for the actions of Wharton-Smith, Inc.," and the School Board had "retained complete control over the subcontract bidding process and award."

On October 29, 2010, the School Board filed a Supplemental Memorandum of Law. On October 31, 2010, Southern Atlantic filed a Supplemental Argument in Response to Motion to Dismiss.

An evidentiary hearing was held on the Motion to Dismiss to determine whether the intended award of the electrical subcontract was an agency action. At the evidentiary hearing, Joint Exhibit 1 was admitted in evidence. Southern Atlantic called Edward Hutchins as its witness. Petitioner's Exhibits 1 and 2 were admitted in evidence. The School Board called David Lewis as its witness. The School Board did not submit any exhibits for admission in evidence.

The Transcript was filed on November 8, 2010. The parties agreed to submit and did file their proposed recommended orders by November 8, 2010. The parties' post-hearing submittals have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The School Board entered into a Standard Construction Management Contract with Wharton-Smith, Inc. (Wharton-Smith), for the Project. Wharton-Smith is a private corporation. The construction management contract provides that Wharton-Smith is to perform all work in connection with the management and construction of the Project. The work to be performed by Wharton-Smith is composed of two phases: the pre-construction phase services and the construction phase services. For the

construction phase, Wharton-Smith is required to "furnish and pay for all management, supervision, financing, labor, materials, tools, fuel, supplies, utilities, equipment and services of every kind and type necessary to diligently, timely, and fully perform and complete in a good and workmanlike manner the construction of the [Project] (or designated portions thereof) in accordance with the terms and conditions of the Contract Documents."

2. The construction management contract called for Wharton-Smith to provide the School Board with a guaranteed maximum price (GMP) proposal for the total sum of the construction management fee and the cost of the work, which included the subcontractor costs. Prior to determining the GMP, Wharton-Smith is required to competitively bid the subcontracts. The use of competitive bids is to foster competition and to select the most economical, qualified bidder to perform the work.

3. Paragraph 36.2 of the construction management contract provides:

A subcontractor is any person or entity who is performing, furnishing, supplying or providing any portion of the Work pursuant to a contract with Construction Contractor. Construction Contractor shall be solely responsible for and have control over the subcontractors.

4. Paragraph 36.3 of the construction management contract provides:

When Construction Contractor submits its guaranteed maximum price proposal to Owner, Construction Contractor also shall submit to Owner a list of the names, addresses, licensing information and phone numbers of the subcontractors Construction Contractor intends to use for each portion of the Work, as well as identifying in writing those portions of the Work it intends to perform with its own employees. The list identifying each subcontractor cannot be modified, changed, or amended without prior written approval from Owner. . . . Construction Contractor shall continuously update that subcontractor list, so that it remains current and accurate throughout the entire performance of the Work. Construction Contractor shall not enter into a subcontract with any subcontractor, if Owner reasonably objects to that subcontractor. Construction Contractor shall not be required to contract with anyone that it reasonably objects to. . . . All subcontracts between Construction Contractor and its subcontractors shall be in writing and are subject to Owner's approval.

5. The following provisions of the construction management contract are relevant to the solicitation and award of subcontracts:

37.1 The purpose of this Paragraph is to insure that Construction Contractor [Wharton-Smith] makes a genuine effort to stimulate subcontractor interest in the Project and maximize participation of potential qualified subcontractors in the bidding process. At all times Owner [School Board] shall have access to and the right to require copies of all correspondence, records, files and other bid documents

(including all bid responses) with respect to the bidding process. Further, Construction Contractor shall notify Owner of the date, time and place of all bid openings and Owner shall have the right to attend any and all such bid openings. All bid openings shall be conducted in Orange County, Florida. Finally, Construction Contractor shall develop in writing subcontract bidding procedures for Owner's review and approval. Once those procedures have been approved by Owner, Construction Contractor shall not deviate from such procedures without obtaining Owner's prior written consent.

* * *

37.1.2 Within thirty (30) days after execution of this Contract, Construction Contractor shall submit a written "Construction Market Analysis and Prospective Bidders Report" setting out recommendations and providing information as to prospective bidders. As various bid packages are prepared for bidding, Construction Contractor shall submit to Owner and Design Professional [architect and/or engineer] a list of potential bidders for their review and approval. Construction Contractor shall be responsible for promoting and encouraging bid competition.

* * *

37.2 Construction Contractor shall prepare invitations for bids and all other appropriate bid documents for all procurement of long lead items, materials and services, for subcontractor contracts and for site utilities. All such invitations for bids and bid packages shall be submitted to Design Professional and Owner for their review and approval prior to distribution to bidders.

37.2.1 Except as hereafter provided in Paragraph 37.5, all subcontractors are to be awarded to the lowest responsive and responsible bidder.

* * *

37.2.3 Subcontracts exceeding \$25,000.00 must be publically advertised for at least two (2) consecutive weeks prior to the established bid opening time and date. All such bids must be in writing and shall be received and opened in the manner and at the location, date and time established in the bid documents. All such bids received by Construction Contractor shall be entered on a bid tabulation sheet and a copy of both the bids and the tabulation sheet shall be sent to Owner and Design Professional for their review and comment prior to Construction Contractor awarding the subcontract.

* * *

37.4 For each subcontract that exceeds \$25,000, Construction Contractor shall, unless waived in writing by Owner, conduct a pre-bid conference with prospective bidders and pre-award conference with the successful bidder. Design Professional and Owner shall be invited to all such meetings. In the event questions are raised which require an interpretation of the bidding documents or otherwise indicate a need for clarification or correction of the invitation, Construction Constructor shall transmit these to the Design Professional in writing and upon receiving clarification or correction in writing from Owner or Design Professional shall issue an addendum to the bidding documents to all the prospective bidders.

37.5 Notwithstanding the provision above requiring award of subcontracts to the lowest responsive and responsible bidder,

Construction Contractor may award a subcontract to someone other than the lowest responsive and responsible bidder provided Construction Contractor has first received Owner's express written consent to such award. Owner's consent to any such award will be at Owner's sole discretion. Whenever Construction Contractor wishes to award a subcontract to someone who is not the lowest responsive and responsible bidder, Construction Contractor must notify Owner in writing, setting out in detail the reasons and justification for the suggested award.

6. The subcontract for electrical work for Phase 2 of the Project was for more than \$25,000.

7. Wharton-Smith did the following in the procurement of the electrical subcontract for the Project: prepared the bid packages, advertised, issued the invitation for bids, held the pre-bid conference, collected the bids, opened and reviewed the bids, analyzed the bids for compliance with the scope of work, determined which bidder was the lowest responsive and responsible bidder, and selected the subcontractor.

8. The bid form included in the invitation to bid provided:

The Bidder understands and agrees that the Construction Manager and/or Owner reserves the right to reject this Bid or any and all bids for the Project, and to waive minor irregularities or informalities in any bid and to award Alternates in any order that in the Construction Manager's judgment will be in the Owner's best interests.

This wording was prepared by Wharton-Smith without regard to the provisions of the construction management contract.

9. Southern Atlantic had done the electrical work for Phase 1 of the Project. Southern Atlantic submitted a bid for the electrical subcontract for Phase 2 of the Project.

10. Edwin Hutchins, the president of Southern Atlantic, was advised by David Lewis, who was employed by Wharton-Smith, that Southern Atlantic was not the lowest responsive and responsible bidder.

11. The construction management contract provides that the School Board may review and comment on the bids that are submitted. Based on Petitioner's Exhibit 2, which is a bidder summary, the School Board did make some comments on the bids that were submitted for all subcontracts. No comments were made by the School Board concerning Southern Atlantic's bid.

12. The School Board did not issue the invitation to bid, did not conduct the pre-bid conference, did not open the bids, and did not determine which was the lowest responsive and responsible bidder. The School Board will not be entering into a subcontract with the lowest responsive and responsible bidder for the electrical work on the Project and will not control or be responsible for the work of the subcontractor.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.

14. Subsection 120.57(3)(b), Florida Statutes, provides that any person who is adversely affected by an agency decision or intended decision regarding a contract solicitation or award process may file a bid protest. The term "agency" is defined in Subsection 120.52(1), Florida Statutes, and provides:

(1) "Agency" means the following officers or governmental entities if acting pursuant to powers other than those derived from the constitution:

(a) The Governor; each state officer and state department, and each departmental unit described in s. 20.04; the Board of Governors of the State University System; the Commission on Ethics; the Fish and Wildlife Conservation Commission; a regional water supply authority; a regional planning agency; a multicounty special district, but only when a majority of its governing board is comprised of nonelected persons; educational units; and each entity described in chapters 163, 373, 380, and 582 and s. 186.504.

(b) Each officer and governmental entity in the state having statewide jurisdiction or jurisdiction in more than one county.

(c) Each officer and governmental entity in the state having jurisdiction in one county or less than one county, to the extent they are expressly made subject to this act by general or special law or existing judicial decisions.

This definition does not include any municipality or legal entity created solely by a municipality; any legal entity or agency created in whole or in part pursuant to part II of chapter 361; any metropolitan planning organization created pursuant to s. 339.175; any separate legal or administrative entity created pursuant to s. 339.175 of which a metropolitan planning organization is a member; an expressway authority pursuant to chapter 348 or any transportation authority under chapter 343 or chapter 349; or any legal or administrative entity created by an interlocal agreement pursuant to s. 163.01(7), unless any party to such agreement is otherwise an agency as defined in this subsection.

15. "The above definition does not in terms encompass a private entity which contractually agrees to provide services for a state agency." Vey v. Bradford Union Guidance Clinic, Inc., 399 So. 2d 1137, 1139 (Fla. 1st DCA 1981). Wharton-Smith is a private corporation which contracted with the School Board to construct the Project. It is not an agency as that term is defined in Subsection 120.52(1), Florida Statutes. See First Quality Home Care, Inc. v. Alliance for Aging, Inc., 14 So. 3d (Fla. 3rd DCA 2009).

16. In order to have standing to protest a decision or intended decision to award a contract award pursuant to Subsection 120.57(3), Florida Statutes, the decision or intended decision must be an agency decision or intended decision. The School Board is defined as an agency pursuant to

Subsection 120.52(1), Florida Statutes. Southern Atlantic contends that the intended contract award for the electrical subcontract for Phase 2 of the Project was made by the School Board through its agent, Wharton-Smith.

17. Section 1013.45, Florida Statutes, allows school boards to contract for the construction or renovations of facilities by a variety of methods and provides:

(1) Boards may employ procedures to contract for construction of new facilities, or for additions, remodeling, renovation, maintenance, or repairs to existing facilities, that will include, but not be limited to:

(a) Competitive bids.

(b) Design-build pursuant to s. 287.055.

(c) Selecting a construction management entity, pursuant to s. 255.103 or the process provided by s. 287.055, that would be responsible for all scheduling and coordination in both design and construction phases and is generally responsible for the successful, timely, and economical completion of the construction project. The construction management entity must consist of or contract with licensed or registered professionals for the specific fields or areas of construction to be performed, as required by law. At the option of the board, the construction management entity, after having been selected, may be required to offer a guaranteed maximum price or a guaranteed completion date; in which case, the construction management entity must secure an appropriate surety bond pursuant to s. 255.05 and must hold construction subcontracts. The criteria for selecting a construction management entity shall not

unfairly penalize an entity that has relevant experience in the delivery of construction projects of similar size and complexity by methods of delivery other than construction management.

(d) Selecting a program management entity, pursuant to s. 255.103 or the process provided by s. 287.055, that would act as the agent of the board and would be responsible for schedule control, cost control, and coordination in providing or procuring planning, design, and construction services. The program management entity must consist of or contract with licensed or registered professionals for the specific areas of design or construction to be performed as required by law. The program management entity may retain necessary design professionals selected under the process provided in s. 287.055. At the option of the board, the program management entity, after having been selected, may be required to offer a guaranteed maximum price or a guaranteed completion date, in which case the program management entity must secure an appropriate surety bond pursuant to s. 255.05 and must hold design and construction subcontracts. The criteria for selecting a program management entity shall not unfairly penalize an entity that has relevant experience in the delivery of construction programs of similar size and complexity by methods of delivery other than program management.

(e) Day-labor contracts not exceeding \$280,000 for construction, renovation, remodeling, or maintenance of existing facilities. Beginning January 2009, this amount shall be adjusted annually based upon changes in the Consumer Price Index.

18. If the School Board had wanted a contractor to act as the agent of the School Board, the Legislature provided a method

of procurement that would allow that, a contract with a program management entity. The School Board determined that it would use a construction management contract for the Project, not a program management contract, and awarded the construction management contract to Wharton-Smith. The intent of the Legislature was that a construction management contractor would not act as the agent for a school board.

19. The First District Court of Appeal discusses factors to be considered in determining whether a contractor is an independent contractor or an agent in Del Pilar v. DHL Global Customer Solutions (USA), Inc., 993 So. 2d 142, 146 (Fla. 1st DCA 2008).

A particularly significant factor in the determination of status is "the degree of control exercised by the employer or owner over the agent. More particularly, it is the *right* of control, and not *actual* control, which determines the relationship between the parties." Nazworth v. Swire Fla. Inc., 486 So. 2d 637, 638 (Fla. 1st DCA 1986) (internal citations omitted); see generally Restatement (Second) of Agency § 220(2)(a) (1958); Harper ex rel. Daley v. Toler, 884 So. 2d 1124, 1131 (Fla. 2d DCA 2004) (observing that extent of principal's control is "most important factor"). "If the employer's right to control the activities of an employee extends to the manner in which a task is to be performed, then the employee is not an independent contractor," but rather is an agent for whose negligence the principal is vicariously liable. Parker [v. Dominos Pizza] 629 So. 2d 1026, 1027 (Fla. 4th DCA 1993)]; see also Cawthon v. Phillips

Petroleum Co., 124 So. 2d 517, 519 (Fla. 2d DCA 1960).

In most cases, the terms of a contract between the parties is a pertinent index of the principal's right of control and should factor heavily into the inquiry, "unless other provisions of the agreement, or the parties' actual practice, demonstrate that it is not a valid indicator of status [or] . . . belie the creation of the status agreed to by the parties." Keith v. News & Sun Sentinel Co., 667 So. 2d 167, 171 (Fla. 1995). In that case, "the actual practice and relationship of the parties should control." *Id.*

20. Wharton-Smith was awarded the construction management contract. Pursuant to the construction management contract, Wharton-Smith is responsible for the construction of the Project, including the work of the subcontractors. The construction management contract calls for Wharton-Smith to submit a GMP to the School Board. The GMP is similar to a cost-plus contract in which the contractor is paid the actual costs of the work plus a certain percentage of the costs as its fee. In the case of the GMP, the School Board will pay Wharton-Smith the actual costs of the subcontracts; thus, the School Board requires Wharton-Smith to competitively bid the subcontracts in order to foster competition and to award to the most economically-qualified bidder, which should equate to savings to the School Board.

21. Wharton-Smith is required by the construction management contract to prepare a report within 30 days of executing the construction management contract which includes a list of potential bidders for the School Board and the design professional's review and approval. Because the electrical subcontract is for more than \$25,000, the solicitation process requires a two-week advertising period. There could be bidders who bid based on the advertisement and who were not included in the potential list of bidders previously submitted to the School Board and the design professional. There is nothing in the construction management contract which requires that the School Board approve bidders who were not in the list of potential bidders.

22. Wharton-Smith prepared the solicitation documents for the electrical subcontract. The construction management contract requires that the invitation to bid be submitted to the School Board and the design professional for review and approval. Wharton-Smith issues the invitation to bid, opens the bids, and tabulates the bids. A copy of the bids and the bid tabulation are sent to the School Board and design professional for review and comment. Wharton-Smith determines which subcontractor is the lowest responsive and responsible bidder. The School Board does not determine which subcontractor is the lowest responsive and responsible bidder.

23. The construction management contract requires that subcontracts be awarded to the lowest responsive and responsible bidder. If Wharton-Smith wants to deviate from this contract requirement, it must seek approval from the School Board.

24. The competitive bidding of the subcontracts occurs prior to the determination of the GMP. When the GMP is submitted to the School Board for approval, a list of the subcontractors which Wharton-Smith intends to use is also presented to the School Board. Wharton-Smith will not enter into a contract with a subcontractor if the School Board has a reasonable objection to the subcontractor. Similarly, if Wharton-Smith reasonably objects to a subcontractor, it is not required to contract with that subcontractor. Thus, neither the School Board nor Wharton-Smith has exclusive control over which subcontractors will be used on the Project.

25. Wharton-Smith enters into the subcontracts, not the School Board. Wharton-Smith has control over the subcontractors and is responsible for the work of the subcontractors, not the School Board.

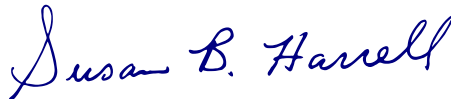
26. Viewing the construction management contract as a whole, Wharton-Smith is not the agent of the School Board. The intended award of the electrical subcontract is not an agency decision. Therefore, Southern Atlantic has no standing to

protest the intended award pursuant to Subsection 120.57(3),
Florida Statutes.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of
Law, it is RECOMMENDED that a final order be entered dismissing
Southern Atlantic's Petition.

DONE AND ENTERED this 10th day of November, 2010, in
Tallahassee, Leon County, Florida.



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

Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of November, 2010.

ENDNOTE

^{1/} Unless otherwise indicated, all references to the Florida
Statutes are to the 2010 version.

COPIES FURNISHED:

Daniel Matthew Greene, Esquire
Daniel M. Greene, P.A.
Post Office Box 3092
Orlando, Florida 32802

Brian Kirwin, Esquire
Claire A. Ashington-Pickett, Esquire
Kirwin Norris, P.A.
200 South Orange Avenue, Suite 1950
Orlando, Florida 32801

Deborah K. Kearney, General Counsel
Department of Education
Turlington Building, Suite 1244
325 West Gaines Street
Tallahassee, Florida 32399-0400

Dr. Eric J. Smith, Commissioner of Education
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

Ronald (Ron) Blocker, Superintendent
Orange County School Board
445 West Amelia Street
Orlando, Florida 32801

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 should be filed with the agency that will issue the Final Order in this case.