

2002-2003 SANTA CLARA COUNTY CIVIL GRAND JURY

**REVIEW OF THE CUPERTINO UNION SCHOOL DISTRICT'S
HIRING OF CONSTRUCTION MANAGERS**

Summary

Based upon a citizen complaint of potential wrongdoing, the 2002-2003 Santa Clara County Civil Grand Jury (Grand Jury) reviewed the Cupertino Union School District's process of hiring construction management companies, with specific emphasis on the district's recent hiring of two particular companies. The Grand Jury finds that the district has a thorough process that is in compliance with applicable laws, that the process is consistent with structured decision-making approaches, and was implemented without any improprieties in the recent hiring of the two construction management companies.

Background

Voters in the Cupertino Union School District recently passed a major bond issue, Measure C, to raise funds for several school construction projects throughout the district. In the course of executing those projects, the district decided to obtain construction management assistance. After district staff solicited, received, and reviewed proposals, they recommended two specific construction management companies for various jobs within the school district. The Cupertino Union School District Board of Education voted in October 2002 to accept the district staff's recommendation and to award contracts to Kitchell Corporation and Turner Construction Company. Subsequent to that formal action, three citizens filed complaints with the district attorney and two later filed with the Grand Jury, contending that the jobs were not sent out for bid and that no firm quotes were presented. The citizens also charged that there were improprieties associated with the Board of Education's selection of construction management companies that had donated to the YES on Measure C Campaign for the bond issue that funded the construction projects. The citizens asserted that selection of companies that had donated to the campaign was illegal, according to California Government Code Section 4529.12.

Discussion

Construction Management is the term given to the job of overseeing or managing an actual construction project. Any entity, such as a school district, which intends to sign a major construction contract with a large construction contractor, will often also contract for a separate organization to act as a construction manager, overseeing the actual construction contract in the best interests of the entity. An experienced construction management company is often desired, since many entities, such as school districts, do not have full-time staff knowledgeable in the management of large construction projects, particularly if the entity is rarely involved in such large projects.

California Government Code Section 4529 deals with the process that is to be followed in obtaining construction management services that involve California state funding. Some portion of most school district construction projects involves a measure of state funding. Hence, the entire construction management industry in the state has developed in concert with those applicable laws. All reputable organizations offering construction management services are expected to be familiar with those laws and equipped to perform accordingly. The Grand Jury learned that those legal guidelines are followed even if the project does not use state funds.

Specifically, the California code dealing with construction management states that the services “shall be procured pursuant to a fair, competitive process.” Since construction management is defined as a management service, as opposed to actual construction (bricks, mortar, plumbing, heating, ventilation, air conditioning), the selection process needs to be fair, but there is no requirement to select the lowest bidder. This is because other criteria, such as experience and judgement, are considered as important as cost. See Appendix for more complete references from this Section of the California Government Code.

Based upon the citizen’s complaint, members of the Grand Jury interviewed the Cupertino Union School District’s purchasing manager and the assistant superintendent for business services, to review their knowledge of the applicable laws and the process the district used to award the two construction management contracts.

Cupertino Union School District’s process began with a thorough Request for Qualification (RFQ) that outlined the description and requirements of the construction management services desired. Thus, this RFQ set the criteria that any construction management company would need to meet to qualify to perform the contract. Next, the district, through its purchasing department, solicited proposals from organizations in the construction management business. Solicitation was done via both formal public notice and by directly soliciting specific companies in the construction management industry. Some of these companies had previously been used by the district for similar jobs and had

performed acceptably. As a result of those solicitations, four companies submitted proposals. The four proposals were screened for acceptability (company experience, background, approach and budget) by a panel of district staff and all four were invited for interviews. The in-depth interviews allowed the companies to make formal presentations that amplified their written inputs and permitted the district staff to question the companies' staff directly about their proposals.

The construction management companies' proposals and presentations were then reviewed, rated, and ranked in response to the RFQ. These reviews followed a standard, formalized, decision-making process. Several criteria were used in the review, including proposed costs. Some of the other criteria were experience in similar projects, qualifications of key individuals, and effective budget and construction management strategies. The review teams consisted of not only those involved with construction and purchasing, but also the instructional staff that will work in the final buildings. Each team member individually scored and ranked the proposals, based on both individual criteria and overall acceptability. Individual scores were then summed and averaged, to determine a final rating for each construction management company.

Based on the size of the construction projects, Cupertino Union School District split the projects into two groupings and recommended that the school board enter into construction management contracts with two different companies to oversee those groupings. The two construction management companies selected scored the highest during the structured review process. On October 22, 2002, the Cupertino Union School District Board of Education voted to accept the recommendation.

School districts do not often undertake large construction projects, and many years may elapse between such projects. During that time, laws governing those projects can change. Thus, it should also be noted that upon two occasions, the Cupertino Union School District requested and received legal reviews of the processes they were using to obtain construction management services. The reviews were performed by the law firm of Miller, Brown and Dannis, which compared the district's processes to the applicable laws. In each case, the law firm's conclusion was that the district was in compliance.

Relative to the assertion of improprieties associated with selecting companies which had donated to the Measure C Campaign, California Government Code Section 4529.12 "prohibits governmental agency employees (Grand Jury emphasis) from participating in the selection process when they have a financial or business relationship with any private entity seeking the contract." Therefore, public employees are prohibited from participating in the process if they stand to gain financially from the selection. However, there is no law prohibiting private companies from making monetary contributions, and there is no law to prohibit public entities (such as school districts) from selecting such companies. The

Santa Clara County District Attorney's Office has determined that there was no impropriety in the hiring process of the Cupertino Union School District, citing a California Supreme Court Decision: "Political contribution involves an exercise of fundamental freedom protected by the First Amendment to the Constitution of the United States."

Finding

The Cupertino Union School District has a thorough process for selecting construction management companies that is in compliance with applicable laws, is consistent with structured decision-making approaches, and which was implemented without any improprieties in the October, 2002 hiring of two construction management companies.

Recommendation

None

PASSED and **ADOPTED** by the Santa Clara County Civil Grand Jury on this 24th day of April, 2003.

Fred de Funiak
Foreperson

Ron R. Layman
Foreperson Pro Tem

Patricia L. Cunningham
Secretary

References

Cupertino Union School District Interviews

Assistant Superintendent, Business Services, February 28, 2003.

Purchasing Manager, February 28, 2003.

Documents

Cupertino Union School District, *Request for Qualifications Construction Management Service—RFQ Number 0103*, May 1, 2002.

Kitchell Corporation, *Statement of Qualifications for Construction Management Services for Cupertino Union School District*, May 24, 2002.

Kitchell Corporation, *Interview for Construction Management Services for Cupertino Union School District*, June 14, 2002.

Turner Construction Company, *Request for Qualifications for Construction Management Services submitted to Cupertino Union School District*, May 24, 2002.

Turner Construction Company, *A Presentation for Construction Management Services*, June 14, 2002.

Letters, Memos

Cupertino Union School District, Purchase Request for Legal Ad (public solicitation) for Construction Management, May 1, 2002.

Cupertino Union School District, Letter to Construction Management Firm providing invitation to and instructions for formal proposal interview.

Cupertino Union School District, Construction Management Screening Criteria, no date.

Cupertino Union School District, Final Construction Management Interviews Criteria, June 14, 2002.

Cupertino Union School District, Extract from Board Agenda June 25, 2002.

Cupertino Union School District, Extract from Board Minutes of October 22, 2002.

Miller, Brown & Dannis, Letter to Cupertino Union School District, December 4, 2002.

Miller, Brown & Dannis, Letter to Cupertino Union School District, February 28, 2003.

San Jose Post Record, Proof of Publication of Legal Notice for Construction Management Services, May 3, 2002.

Santa Clara County Office of the District Attorney, Letter subject Re: Cupertino Union School District – Kitchell CEM, January 6, 2003.

Appendix: Selected Sections of California Government Code

Section 4529. This chapter shall not apply where the state or local agency head determines that the services needed are more of a technical nature and involve little professional judgement and that requiring bids would be in the public interest.

Section 4529.5. Any individual or firm proposing to provide construction project management services to this chapter shall provide evidence that the individual or firm and its personnel carrying out onsite responsibilities have expertise and experience in construction project design review and evaluation, construction mobilization and supervision, bid evaluation, project scheduling, cost-benefit analysis, claims review and negotiation, and general management and administration of a construction project.

Section 4529.12. All architectural and engineering services shall be procured pursuant to a fair, competitive selection process which prohibits governmental agency employees from participating in the selection process when they have a financial or business relationship with any private entity seeking the contract, and the procedure shall require compliance with all laws regarding political contributions, conflicts of interest or unlawful activities.