



District School Board

Ronald Davis
Betty Smedley
Claudia Bradshaw
Kevin DiStefano
Robert Salazar

May 7, 2002

Superintendent of Schools

Terry E. Shoemaker

Business Administrator

Keith Johnson

H. Richard Heindel
Design West
230 East South Temple
Salt Lake City, Utah 84111

Re: Wasatch County School District's North School

Dear Mr. Heindel:

In early September, 2001, Wasatch County School District (the "District") was notified that Design West aka Architectural Design West ("Design West") did not have a valid contractor's license and work would have to be stopped on the renovation of the District's North School (the "Project"). Since that time, Design West and the District have worked to resolve numerous disputes and issues related to the Project. Unfortunately, we have been unable to agree on a comprehensive resolution of those problems.

Accordingly, pursuant to Utah Code Ann. §63-56-50, I hereby issue my written decision as the Chief Procurement Officer for the District regarding the contract controversy between the District and Design West. This decision is based on my personal knowledge, information gathered through interviews and discussions with District employees and Board members, and my review of District records.

Factual Background

The District first retained Design West in conjunction with the construction of its middle school. During that construction, the District and Design West discussed the District's future building needs. These discussions lead to Design West preparing information regarding a proposed rehabilitation of the North School. That information was submitted to the Board of Education of Wasatch County School District (the "Board") in April 2000. The rehabilitation as proposed by Design West was divided into two phases. The first phase included the rehabilitation of a multi-story building built in 1905 and landscaping for the entire block. The second phase was to be the rehabilitation of an adjoining classroom wing built in 1950.

In April 2000, Design West estimated that the total project cost for Phase 1, including architectural fees, construction, furniture and equipment, and contingencies, would be between \$2,376,360 and \$2,862,960. Based on those estimates and the fact the Board had approximately \$2,800,000 available to spend in its capital account budget, the Board voted to have Design West proceed with the planning and design of the Project.

WASATCH COUNTY SCHOOL DISTRICT

H. Richard Heindel
May 7, 2002
Page 2

As that process moved forward, Design West and the District discussed having Design West provide construction management or general contractor services to the District in addition to architectural services. Design West provided a draft design/build contract to the District whereby Design West would act as both the architect and general contractor. Design West also provided financial information regarding cost savings if it acted as construction manager. Although Design West's architectural services had been properly procured, the District had not gone through a procurement process for either design/build or construction management services. Despite this procurement shortfall, Design West began demolition activities on the Project to assess necessary work for the rehabilitation.

In May and in June, Design West revised its estimates for the costs of completing Phase 1, including furniture and equipment. The May estimates ranged from \$2,679,657 to \$3,278,748 and the June estimates ranged between \$2,670,954 to \$3,268,065. Although these estimates may have been given to District administrators, they were not provided to the Board.

At some point during these discussions, Gary Accord, Design West's principal architect for the Project contacted Keith Johansen, the District's business administrator. Mr. Accord asked if he could drop the contracts by the District's offices for Mr. Johansen's signature. Mr. Accord informed Mr. Johansen that the contracts were a mere formality. When Mr. Accord arrived, Mr. Johansen informed him that he did not have authority to sign the contracts, but that they would need to be signed by the Board. Mr. Accord asked Mr. Johansen to sign them since they were mere formality. Mr. Johansen signed them and Mr. Accord took them with him. Rather than being the design/build contract previously supplied to Mr. Johansen, the new contracts were for architectural services and construction management services. The contracts were dated as of June 21, 2000.

Subsequent to the execution of the contract, the District and Design West did solicit proposals for construction management services. That solicitation was completed in December of 2000, more than six months after the construction management contract was signed by Mr. Johansen.

When it became time to enter the construction phase of the Project, the District prepared to go through the procurement process with the assistance of Design West as contemplated by the June 2000 contract. However, Design West insisted that that procedure would be overly time consuming and that it should be allowed to hire the trade contractors directly. Without any written documentation or modification to the contracts, Design West proceeded in that manner.

Despite repeated questioning as to Design West's procedures for selecting contractors and entering into contracts, the District has not been provided any such information. As Chief Procurement Officer, the only thing I have been able to determine is that Design West, did in fact enter into subcontract agreements with numerous contractors whereby Design West held itself out as the general contractor for the Project.

As construction activities began, the District was never supplied with a list of the contractors, the total amount of the contracts, or any revised estimates for the cost of construction of the Project.

possible
gap



H. Richard Heindel
May 7, 2002
Page 3

In July 2001, I replaced Danny Talbot as the District's Superintendent as a result of Mr. Talbot's retirement. At that time, I became the District's Chief Procurement Officer. Prior to the change in District Superintendents, Gary Accord who had been Design West's architect responsible for the Project left Design West and the responsibility for the Project at some point was transferred to Richard Heindel.

After the State ordered Design West to halt construction on the Project, I began to look into the procurement history of the Project. While that investigation was ongoing, the District and Design West agreed that it would be in the best interest of everyone to have work continue on the Project. This was accomplished by an agreement whereby Design West assigned necessary contracts to the District so that the District could act as its own general contractor for the period of time required for Design West to obtain a valid contractor's license.

During the months of October and November, a limited amount of work continued on the Project. During that same period, it became apparent that there were few, if any, records which documented how Design West procured the services of subcontractors. It also became apparent that the cost of completing phase 1, including furniture and equipment, would be substantially in excess of the estimates given in April 2000.

Design West contended that these additional costs were the result of changes in the scope of the Project and change orders. I have reviewed the documents supplied by Design West in April, May and June of 2000. I have not found documentation that supports Design West's contentions regarding the scope of the Project. More importantly, there is no written documentation in the District's files of either a change in scope or change orders that pre-date the current dispute.

During the course of construction, Design West submitted bills to the District which purported to base charges for construction costs on the percentage of construction completed. After the State ordered work stopped in September 2001, it became apparent to the District that the amount of work for which it had been billed was not the amount of work which had actually been completed. It also became apparent to the District that Design West viewed the District as responsible for paying it whatever actual costs Design West incurred, plus profit in form of a construction management fee.

Determinations

Based on the foregoing factual background, I make the following determinations:

1. The June 2000 contract was never properly approved by the Board and Mr. Johansen had no authority to sign it binding the Board.
2. The parties did not follow procurement practices for construction management services until after the June 2000 contract was signed.

H. Richard Heindel
May 7, 2002
Page 4

3. To the extent Design West has treated the relationship between the parties regarding the construction of the Project as a cost plus contract, such contracts are prohibited by the Utah Procurement Code. Utah Code Ann. § 63-56-29.
4. To the extent Design West treated its duties as those of a construction manager, it failed to follow the requirements of the Utah State Procurement Code as required by Utah Code Ann. § 63-56-36(2).
5. To the extent Design West treated its responsibilities as those of a general contractor, it was not authorized to do so because the District never, either before or after the fact, properly procured services of a general contractor.
6. All of the contracts entered into between Design West and the subcontractors violate the Utah Procurement Code.
7. Design West did not comply with Utah Code Ann. § 63-56-41 requiring written change orders.
8. Design West is not entitled to seek reimbursement for such changes in services or scope of the work absent compliance with the Utah Procurement Code.
9. There is substantial work that remains to be done on the Project.
10. The District currently does not have sufficient funds to complete the Project.
11. Some of the work for which the District has been billed has not been properly performed.

Decision

Based on the foregoing facts and determinations, it is my decision that no additional monies will be paid to Design West on the Project. It is also my decision to immediately terminate any and all contractual relationships between Design West and the District.

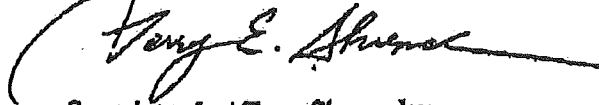
As Chief Procurement Officer, I recognize that these findings show that some of the violations of the Utah Procurement Code and related laws were either known by or could have been known by some District employees. There is no information, however, that these violations were known by the Board at any time prior to September 2001. In addition, these violations should have been known by Design West and at times the violations were made at the recommendation of Design West.

The District is in the process of trying to resolve claims that Design West's subcontractors may have for work performed or materials delivered to the Project. The District has previously asked Design West if it wanted to be involved in that process and Design West has declined to be involved.

H. Richard Heindel
May 7, 2002
Page 5

Pursuant to the Utah Procurement Code, this decision is final unless and until challenged in court pursuant to Utah Code Ann. § 63-56-59.

Sincerely,



Superintendent Terry Shoemaker

cc: Board of Education
John Robson
Mark Robinson
Gary Anderson