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STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

November 7, 2001

Mr. Edward S. Nelson
Chairman
State University Construction Fund
State University Plaza
Albany, NY 12201

Re: Consultant Contract D004265
Report 2001-S-29

Dear Mr. Nelson:

Pursuant to the State Comptroller's authority as set forth in Section 1, Article V of the State Constitution and Section 8, Article 2 of the State Finance Law, we audited the State University Construction Fund's (Fund) evaluation of the qualifications of firms seeking the award of a consultant contract for a program study related to a proposed police training facility on the campus of the State University of New York's College at Old Westbury. We also audited the timing of the decision to award this contract and the support for payments resulting from it. Our audit covered the period January 1, 1997 through May 1, 2001.

A. Background

The Fund was created in 1962 as a public benefit corporation established within the State University of New York (SUNY). The purposes of the Fund are: to provide academic buildings and other facilities for SUNY; to reduce the time lag between the determination of need and actual occupancy; to expedite the construction, acquisition, reconstruction and rehabilitation or improvement of such facilities; and to ensure they are ready for the purposes intended when needed and when scheduled under SUNY's master plan. The Fund is governed by a three-member Board of Trustees appointed by the Governor. The Fund is currently responsible for the implementation of SUNY's \$1.575 billion, multi-year capital plan.

The Fund contracts with consultant architects and engineers to design and oversee construction-related projects. Section 136-a of the State Finance Law requires State agencies and authorities to negotiate contracts for architectural/engineering and surveying services in excess of \$25,000 with the highest qualified professional firm at a fair and reasonable price. Section 2879 of the Public Authorities Law requires that the Fund adopt comprehensive guidelines which detail the Fund's operative policy and instructions for the award of consultant contracts. According to the Fund's Guidelines for the Award of

Procurement Contracts (Guidelines), the Fund uses an evaluation process to select the most qualified firm for a specific contract before it awards the contract.

The Fund negotiated a consultant contract (D004265) with Hudson Design for a program study for a police training facility at the SUNY College at Old Westbury. The Fund refers to this type of procurement contract as a "letter agreement." The amount of this contract was \$102,000. The contract term began effective December 1, 1998 and extended through March 30, 2000. Fund records indicate that contract work commenced December 23, 1998. However, a February 3, 1999 Fund memorandum stated that the Fund's decision to award the contract to Hudson Design had not been made until January 25, 1999 - - almost two months after the contract became effective with this firm. The news media reported this discrepancy, but further reported receiving a copy of a November 25, 1998 Fund memorandum indicating that the award decision had been made on November 18, 1998, in advance of the contract's effective date.

Based on forensic analysis from expert sources, the media concluded that the signature of the Fund Controller that appeared on the November 25 memorandum was forged by replicating the signature of the Fund Controller that appeared on the February 3 memorandum. Media accounts also suggested that the decision to award the contract to Hudson Design could have been the result of a relationship between the proprietor of Hudson Design and the Governor. The New York State Inspector General's Office is now investigating the circumstances surrounding the award of contract D004265, including the authenticity of the November 25, 1998 Fund memorandum, and other state contracts to Hudson Design.

B. Audit Scope, Objectives and Methodology

We audited the Fund's evaluation of the qualifications of firms seeking the award of consultant contract D004265. We also audited the timing of the decision to award this contract and the support for the payments resulting from it. One objective of our financial-related audit was to determine if contract D004265 became effective only after the formal selection process decision to award to Hudson Design had been made. Another objective was to determine whether the Fund appropriately followed adequate policies, procedures and practices when evaluating the qualifications of firms seeking the award of contract D004265. We also sought to determine whether payments made to Hudson Design were consistent with the service requirements of the contract and were supported by records that documented the satisfactory completion of the work. Our audit covered the period January 1, 1997 through May 1, 2001.

To accomplish our objectives, we reviewed relevant laws, rules and regulations; examined Fund consultant contract award policies, procedures and practices; and reviewed the terms of contract D004265 and the contract payments made to the consultant, Hudson Design. We also interviewed Fund officials and reviewed relevant news media reports. In addition, we attempted to secure the cooperation of the New York State Inspector General's Office to coordinate our respective audit and investigative efforts. Since the Inspector General's Office had already begun an investigation and taken statements under oath, we did not want to duplicate their work. However, despite our auditors' attempts, to date we have obtained no information from the Inspector General's staff regarding the findings of their investigation. The results of their investigation could be relevant to our audit results, especially if that investigation identifies illegal activities or intentions related to our audit findings.

We conducted our audit in accordance with generally accepted government auditing standards. Such standards require that we plan and perform our audit to adequately assess those Fund operations which are included within the audit scope. Further, these standards require that we understand the Fund's internal control structure and compliance with those laws, rules and regulations that are relevant to the operations which are included in our audit scope. An audit includes examining, on a test basis, evidence supporting transactions recorded in the accounting and operating records and applying such other auditing procedures as we consider necessary in the circumstances. An audit also includes assessing the estimates, judgments, and decisions made by management. We believe that our audit provides a reasonable basis for our findings, conclusions and recommendations.

C. Summary Results of Audit

The audit evidence that was provided to us indicates that Hudson Design had already begun work on this project before the Fund's process to select a contractor was completed. Since a contract cannot be let until after the highest qualified professional firm has been determined, we conclude that the contract with Hudson Design may be in violation of Section 136-a of the State Finance Law and would, therefore, be invalid. We believe a final determination on this matter should await the results of the State Inspector General's investigation. We also found that the Fund's policies, procedures and practices that were relevant to the evaluation of firms seeking consultant contract D004265 were inadequate in several important respects. Moreover, our review of the practices and related documentation (or absence thereof) for contract D004265 disclosed several problematic conditions which cause us to question the propriety of this contract award. For example, the Fund's pre-evaluation form, which ranked Hudson Design first among competing firms, is unsigned and no Fund staff acknowledge preparing it. Also, errors in the pre-evaluation may have inappropriately raised the ranking for Hudson Design. In addition, members of a selection committee who signed off on the pre-evaluation that ranked Hudson Design first, did so without receiving and reviewing the qualifications of all firms as required by Fund guidelines. As a result, we could not conclude that the decision to select Hudson Design was the appropriate one. Lastly, we determined that Hudson Design had been paid \$92,917 based upon duly signed vouchers and evidence of completed work on this project.

D. Timing of Completion of the Evaluation and Award Decision

Section 136-a of the State Finance Law states that it is the policy of New York State to negotiate contracts for architectural services and/or engineering services and/or surveying services on the basis of demonstrated competence and qualifications for the type of professional services required and at fair and reasonable fees. The Fund Guidelines for awarding procurement contracts state that the Trustees of the Fund shall appoint a selection committee of at least three officers or employees of the Fund to review and recommend a consultant for each contract awarded by the Fund. According to the Guidelines, the recommendation of the selection committee should be made only after the committee has reviewed the proposed nature and scope of the project, the Fund's pre-selection list of consultants, the contractors' responses, submittals and proposals, and any other information the Fund may have obtained from interviews or otherwise.

The effective date of the Fund's contract with Hudson Design was December 1, 1998, and Fund records indicate that Hudson Design was doing project work related to consultant contract D004265 as early as December 23, 1998. However, we found that a February 3, 1999 Fund memorandum specifically indicates that the Fund completed the evaluation process for contract D004265 on January 25, 1999. Thus, the contract's effective date of December 1, 1998 pre-dates the selection committee's evaluation process decision by almost two months. As a result, the process the Fund followed in awarding this contract to Hudson Design did not conform to the Guidelines, and by extension, appears not to conform to the State Finance Law.

A copy of a November 25, 1998 memorandum with the signature of the Fund's Controller asserts that the evaluation process was completed November 18, 1998. However, the validity of this memorandum is questionable for several reasons as follows:

- News media accounts discredit the November 25, 1998 memorandum based upon forensic analysis of the signature of the Fund Controller on the memorandum. The analysis reportedly indicates the signature is copied from the February 3, 1999 memorandum. We understand that the State Inspector General's staff is seeking additional forensic analysis of the November 1998 memorandum to establish its validity.
- The original of the memorandum cannot be located and the available copy was reportedly found in a discard pile by a copier machine.
- The Controller told us he does not recall signing the November 25 memorandum and he cannot attest to the reliability of it. He said that he did remember signing an earlier document for this contract, but could not confirm whether this signature related to the consultant selection approval memo which certifies the award or another document which verifies the project budget. Neither of these documents were available in the Fund's files.
- The February 3, 1999 memorandum makes neither a mention of an earlier completion of the evaluation process for consultant contract D004265 nor provides a reference to any other record that would corroborate such an earlier process.
- A selection committee member who participated in the January 25 evaluation process noted that, prior to signing off on the evaluation, he had heard Hudson Design was working at Old Westbury. He indicated he was surprised at this, because he had never heard of this firm and did not remember having selected this consultant in the past.
- None of the staff involved in the evaluation and award decision processes for the contract with Hudson Design recollect the evaluation process being completed in November 1998. Further, there is no written documentation that the November 18 evaluation process took place.

Consequently, no evidence could be found to authenticate the November 25 memorandum and no adequate audit support exists to substantiate that the Hudson Design contract became effective only after

evaluation and decision award processes were completed. The only sufficient and competent audit support that is available indicates that work on the contract began before the formal decision to award was made. Therefore, we conclude that the contract with Hudson Design may be in violation of Section 136-a of the State Finance Law and would, therefore, be invalid. We believe that a final determination on the contract's validity should await the results of the State Inspector General's investigation.

E. Consultant Contract Award Policies and Procedures

As noted earlier, Section 2879 of the Public Authorities Law requires that the Fund adopt comprehensive guidelines which detail operative policy and instructions regarding the award of procurement contracts. Further, Section 136-a of the State Finance Law states that it is State policy to negotiate contracts for architectural services and/or engineering services and/or surveying services on the basis of demonstrated competence and qualifications for the type of professional services required and at fair and reasonable fees. The State entity is required to negotiate a contract with the highest qualified professional firm for consultant services at compensation which the entity determines in writing to be fair and reasonable. The legislation applies only to engineering and/or architectural services and/or surveying services in excess of \$25,000.

Clearly, compliance with these statutes requires a high level of attention to the establishment of and documented adherence to policy and procedures for procurement contracts such as the Hudson Design contract. The Fund has developed Guidelines which state that, for each consultant contract awarded by the Fund, a selection committee appointed by the Trustees should review the proposed nature and scope of the project, the Fund's pre-selection list of consultants and their responses, submittals and proposals, and any other information that the Fund may have obtained from interviews or otherwise. The Guidelines state that, after completing this review and evaluation, the selection committee should recommend a consultant for the contract.

(It should be noted that, in addition to consultant contracts, such as D004265 with Hudson Design, the Fund also awards construction contracts. As opposed to consulting contracts, construction contracts pertain to the actual physical construction, acquisition, reconstruction, rehabilitation or improvement of facilities and are covered by Article 8A, Section 376 of the Education Law. This statute requires the Fund to award construction contracts to the lowest bidder most qualified to perform the work and who is considered reliable and responsible. Also, the Fund Guidelines that we have cited for consulting contracts do not apply to construction contracts. The Fund has other written guidelines that pertain to the award of construction contracts. We previously prepared audit report, 2000-S-34, that addresses selected aspects of Fund **construction** contracting practices. This audit report, 2001-S-29, addresses one **consulting** contract, D004265 to Hudson Design.)

In addition to the Guidelines, the Fund follows specific evaluation and award practices that vary depending on contract type. For example, for "letter agreement" procurement contracts, such as this Hudson Design contract, Fund officials told us that the practices listed below applied.

- The Fund receives a campus request for services, or the project is already part of the Fund's multi-year plan.
- The Fund puts requests for qualifications in the Contract Reporter. Consultant firms are required to submit three sets of written qualifications (one copy for the campus, one for the Fund and a file copy) by date certain.
- The campus may review qualifications and submit a short list of potential firms for the Fund's consideration. (Old Westbury did not elect to submit a list for contract D004265.)
- Using a standard form with eight categories (proximity, experience on campus, Fund work capacity, similar projects, W/MBE staffing, rating average, campus input and staffing), the Fund's Regional Design Director pre-evaluates the qualifications of the consultants and ranks them by assigning a numeric rating to each category.
- The pre-evaluation results are given to a consultant selection coordinator, who provides the three-person selection committee with the names and rankings of the top five firms.
- Selection committee members can indicate their concurrence with the highest ranked candidate. If they do not concur with the highest ranked candidate, they must complete the numerical evaluation. (For this contract, each committee member received a listing of the top five firms and the pre-evaluation performed for all eleven firms.) The selection committee members then send their evaluation results back to the consultant selection coordinator.
- The selection coordinator tallies the results to form the basis for a recommendation of contract award to the Fund's Counsel and General Manager for final approval.

Even though the Public Authorities Law calls for detailed operating policies and instructions and the State Finance Law requires contracts to be negotiated with the most qualified firms, the unique Fund practices for letter agreements have not been incorporated into the Guidelines or otherwise set forth in writing to best assure accomplishment of the intent of these statutes. Moreover, our examination disclosed a number of problematic conditions with the evaluation and award practices for the Hudson Design contract. Certain of these problems appear to result from intentional or unintentional error in following the Guidelines and/or the established practices for letter agreements. Other problems appear to be related to the absence of formal procedures for the evaluation and award decision processes and the related documentation requirements for letter agreements. The problems we found with the Hudson Design consultant contract include those listed below.

- There is no documentation establishing who completed the pre-evaluation for contract D004265 and who forwarded it to the consultant selection coordinator.

The consultant selection coordinator told us that the pre-evaluation form was provided by a senior Fund official who has since retired. The coordinator also believes this official did the pre-evaluation rating. However, this former senior Fund official told us he has no specific

recollection of doing a pre-evaluation that ranked Hudson Design first among the eleven firms submitting proposals. The official told us he was sure it happened the way the Fund said it did, but noted that the selection process befuddled him. At the time this pre-evaluation was done, the former Fund official was not among those officials identified by the Fund as a pre-rater. Further, the pre-evaluation form contained no signature or initials of the person who completed it, and there was no written transmittal document to establish who provided the pre-evaluation to the consultant selection coordinator.

- The pre-evaluation form ranked Hudson Design first. However, certain ratings for Hudson Design do not appear to accurately reflect Hudson Design's qualifications relative to the other firms, and may have inappropriately raised its ranking.

Although Hudson Design indicated no previous experience with training facilities or police projects, it received the same rating score in the "similar projects category" as other firms that had previously done such work. In fact, a member of the selection committee agreed that a firm that had academic, training and police project experience would probably be rated higher than a firm with academic experience alone. Also, Hudson Design was not located as near to the campus as other firms that submitted proposals, but Hudson Design received the same ratings as these firms did for the "proximity category." In addition, Hudson Design received higher ratings for the "staffing category" than other firms with more staff and similar qualifications. Accordingly, the pre-evaluation appears to have erroneously ranked Hudson Design first, based on the objective assessment of the qualifications of all the firms. The Finance Law states the contract should be negotiated with the most qualified firm.

- The selection committee approved the results of the pre-evaluation process, but did so without reviewing the submissions from the competing firms as required by the Fund's Guidelines.

The three selection committee members who received the memo from the coordinator indicating the top five rankings stated that they initialed this memo to reflect their general agreement with the selection of Hudson Design. However, the members indicated that they did not review the submissions of all eleven firms as required by the Fund's Guidelines, even though they were unfamiliar with some of the firms on the pre-evaluation. One committee member told us that, when there is a short list of five firms, selection committee members usually conduct interviews and review the proposals of each firm. He said it was very unusual, but not unheard of, that proposals are not provided, as was the case in the evaluation for contract D004265. To confirm what Fund officials told us, we asked Fund officials to provide us with five other program studies and we found that, for four of the five program studies, the selection committee had requested proposals and/or interviews from the top five consultants. These contracts ranged in value from \$83,000 to \$287,000.

- One selection committee member participated in the selection process after working with the consultant on the project.

According to documentation on file at the Fund, one of the selection committee members involved with the January 25, 1999 evaluation process for contract D004265 had been working with Hudson Design several weeks before on activities related to the work contemplated under the contract. At a minimum, this creates an appearance of favoritism, and should have prompted this committee member to withdraw from the selection process. This member's involvement calls into question the objectivity and fairness of the contract award process.

Based upon these conditions, we cannot conclude that the decision to award the consultant contract to Hudson Design was an appropriate one. However, we are also unable to unequivocally conclude it was inappropriate. If the members of the selection committee had conducted their review in accordance with the Guidelines, the problems with the ratings for Hudson Design may have been detected and resolved. However, the Fund has no procedures defining the rating categories and offers no guidance on determining numeric scores for each category. The evaluation process is entirely subjective. Accordingly, even if the selection committee members reviewed all qualifications, conducted all follow-up and detected and resolved the problems with the pre-evaluation ratings for Hudson Design, it is possible (although we think unlikely) they would still have given Hudson Design the top ranking. To ensure it selects the most qualified consultants in conformance with the State Finance Law and Fund Guidelines, the Fund should establish comprehensive procedures to help the committee members complete uniform reviews of consultants' qualifications.

F. Payments to Hudson Design

Pursuant to contract D004265 between the Fund and Hudson Design, \$92, 917 has been paid for work commencing December 23, 1998 and completed approximately November 1999. Our audit determined that the payments made to Hudson Design are supported with duly signed vouchers and with evidence of completion of the assigned work. We believe that any further actions that might be taken with respect to the validity of this contract and the status of resulting payments be pended until the results of the Inspector General's investigation are known.

Recommendations

1. *Complete all evaluation and award decision processes prior to the award and start of work for a consultant contract.*
2. *Establish formal, comprehensive, written procedures to specify the steps and related documentation requirements that must be followed when performing evaluation and contract award processes for letter agreement contracts. At a minimum, these procedures should address real and perceived conflicts of interest, definitions of rating categories, guidance on numeric scores for rating categories, required sign-offs and formal transmittal memoranda.*

3. *Ensure that the selection committee members for letter agreement contracts follow Fund Guidelines and written procedures and that they review all materials, submissions, etc. associated with a particular evaluation.*

We provided Fund officials with a draft of the matters presented in this report for their review and comment. Their comments have been considered in the preparation of this report and are included as Appendix A. Fund officials indicated that the recommendations presented are reasonable and will be included in the review and design of procurement procedures already underway. However, the response of Fund officials also disagrees with many aspects of our auditing and several conclusions of our report. Our rejoinders to the Fund response are included as Appendix B, State Comptroller's Notes.

Within 90 days after the final release of this report, as required by Section 170 of the Executive Law, the Chairman of the Fund will report to the Governor, the State Comptroller, and the Leaders of the Legislature and Fiscal Committee, advising what steps are taken to implement the recommendations contained herein, and where recommendations were not implemented, the reasons therefor.

Major contributors to this report were Michael Solomon, Arthur Smith, Nadine Morrell, Emily Lonczak, Kara Mitchell and Nancy Varley.

We wish to thank the management and staff of the State University Construction Fund for the courtesies and cooperation extended to our auditors during this audit.

Very truly yours,

Jerry Barber
Audit Director

cc: Deirdre A. Taylor
Donald Dunn

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August 1, 2001

Hon. H. Carl McCall
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Albany, New York 12236

**WORKING DRAFT
RESPONSE**

Attn: Jerry Barber, Audit Director

Re: Consultant Contract D004265
Report 2001-S-29

Dear Mr. Barber:

Pursuant to your letter of July 2, 2001, the following is the response of the State University Construction Fund (Fund) to your proposed letter to Chairman Edward S. Nelson (captioned "WORKING DRAFT") concerning the award and administration of a contract for a program study at the State University College at Old Westbury, valued at \$102,100. It should be noted that in the audit period, January 1, 1997 to May 1, 2001, the Fund awarded and administered design contracts with a total value of \$123,175,800, as well as construction contracts with a total value of \$720,074,700. Each of these contracts, including D004265, and each of the payments under them, was approved by the Office of the State Comptroller (OSC or the Comptroller).

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Note
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A. Background

OSC routinely audits selected accounts and practices of the Fund. To the best of our knowledge, none of these audits has taken the form of the present draft. Your staff described this form as a "letter audit"; this term is not defined by OSC in its Protocols.

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Note
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The background statement summarizes unsubstantiated newspaper allegations of improprieties in the award of the subject contract. It omits other contemporaneous newspaper reports on this subject that questioned the motives of OSC in ordering this audit and its ability to conduct the audit with the required professionalism and impartiality.

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Note
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Despite these published reports, the Fund had hoped, particularly as the fieldwork progressed in an orderly and expeditious manner, that the final report would overcome these concerns. You were provided unprecedented and unfettered access to all records, papers, and employees of the Fund, and even provided materials not specifically requested to ensure that OSC had access to all materials relevant to the audit or provided to the State Inspector General (IG). Unfortunately, the nature and content of the present draft have revived those concerns.

* See State Comptroller's Notes, Appendix B

Appendix A

B. Audit Scope, Objectives and Methodology

Despite OSC's unlimited access to the records of the Fund, and over six weeks of fieldwork, in the audit of this single small contract, the report relies extensively upon interviews with Fund staff. In keeping with the desire to provide the fullest cooperation possible with OSC, the Fund honored OSC's request to conduct informal interviews with Fund staff, including senior managers, with no other Fund representative present.* The audit's reliance on these interviews raises several serious concerns.

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Note
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First, generally accepted government auditing standards require that an audit be based on audit evidence, ultimately traceable to auditable documents and procedures. The Fund does not understand how this standard can be met with a Report based largely on interviews especially when, as in this Report, results of interviews have been mischaracterized or are inaccurate, e.g., Audit, p. 4, 8th paragraph, p. 7, 2nd paragraph.

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Note
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Second, no record of these interviews was provided and therefore the Fund cannot verify the accuracy of the Report, nor can third parties replicate or confirm its findings.

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Note
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Third, the Report states that the audit provides a reasonable basis for your findings, conclusions and recommendations. The Report, however, contains no conclusions.

Based on the foregoing, the Fund believes that the audit's methodology and implementation are inconsistent with generally accepted government auditing practices. This only reinforces the concern of the Fund and the public about the motivation for, and reliability of, the audit.

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Note
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Please note that this section contains a descriptive statement of the scope of the IG's investigation which appears to be inconsistent with the statement at the bottom of the page: "... to date we have obtained no information from the Inspector General's staff".**

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Note
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C. Summary Results of Audit

The second sentence of this section states, "... we conclude that the contract with Hudson Design may be in violation of Section 136-a of the State Finance Law and would, therefore, be invalid". We take strong exception to the presentation of a serious alleged impropriety which the Comptroller cannot substantiate, but can only state "may be" the case. This is the first of many instances of this practice (another appears on the twelfth line of this section)*** which would clearly lead the lay reader to believe that these improprieties have occurred, even though OSC is unprepared to state unequivocally that any of them did. Generally, the Report contains vague language, inconclusive statements and innuendo. For example, your Report states that it "cannot conclude that the decision to award the consultant

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Note
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*A Fund representative attended the interview with the General Manager.

**See also, last sentence, 3rd paragraph, Audit, p. 4, and the conclusion of the "Timing..." Section D, Audit, p. 5.

***These occur on almost every page: p. 3 (see above), p. 5, line 4; p. 6, lines 25-26 and 27; p. 7, lines 8-9, 20; p. 8, lines 7-9 and 15.

* See State Comptroller's Notes, Appendix B

contract ... was appropriate ...”, while in the very next sentence it states that “... we are unable to unequivocally conclude it was inappropriate”.

Another major fault with the Report is its misplaced reliance on section 136-a of the State Finance Law. That provision of law is referred to at least five times in the approximately eight page Report. The Report, citing that statute, questions the validity of Contract D004265. By its express terms, section 136-a of the State Finance Law does not apply to the Fund and the Comptroller’s Office has acknowledged this since the statute’s enactment in 1980. The statute applies to “...state government departments, divisions or commissions empowered by the state to enter into contractual agreements on behalf of the state of New York” (emphasis added). The Fund is not the State of New York nor is it empowered by the State to enter into contracts on behalf of the State. The Comptroller’s Office has routinely approved Fund design contracts where the consultant’s fee is based on a “Schedule of Fees” attached to Fund design contracts where the fee is based on the value of the construction project and not the result of negotiation between the Fund and the Consultant.

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Note
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Even if section 136-a of the State Finance Law were applicable to the Fund, the statute’s requirement to negotiate with design consultants prior to award does not go to the validity of the contract. As noted by Senator Padavan in his supporting memorandum, the purpose of the statute is to permit the State to negotiate fees with consultants rather than leaving the provision of architectural and engineering services to the “... vagary of competitive bidding”. In other words, the statute’s purpose is to exempt the provision of such services from the competitive bidding statutes. There is no question that consultant Contract D004265 was approved by the Attorney General and the Comptroller. It is, therefore, a legally binding contract between the Fund and the consultant.

Finally, there is no justification for deferring to the Inspector General on an important issue that is within the audit authority of the State Comptroller (the “validity” of the contract). The auditors had access to exactly the same materials and personnel as the Inspector General, and OSC has no reason to assume that the Inspector General will issue findings on this subject, or even that it is part of their inquiry.* Further, it is paramount among the standards governing audits that they be independent and free from the influence of other parties.

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Note
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D. Timing of Completion of the Evaluation and Award Decision

The Fund agrees that its staff began work on this contract before the selection process was complete. This error occurred very early in the implementation of the current Capital Program, when new procedures and controls were being implemented and when the staff involved was experiencing an overwhelming increase in workload. This mistake has been widely reported, and has resulted in an extensive review and revision by the Fund of the applicable procedures. We do not object to the report repeating it here, but it adds nothing to the practices and procedures of the Fund, or the public perception of them.

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Note
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This section contains an extensive discussion of a disputed copy of a November 25, 1998 memorandum. As OSC was advised in writing during the audit, this copy is not a part of any auditable file or transaction. A copy was provided in keeping with our policy of cooperating in every way possible with the audit. A description of it, and the issues surrounding it, have no place in the audit report, and this section should be deleted. Even if the Inspector General finds

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Note
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*Part C, last sentence, see p. 3 of this response.

* See State Comptroller's Notes, Appendix B

that this copy is authentic and that there was a November 1998 selection, it clearly was superseded by the February 3, 1999 selection, and has no relevance to this audit or the subject contract.

E. Consultant Contract Award Policies and Procedures

As noted above, and in the response to Recommendations below, the Fund recognizes the need to review its procurement guidelines and procedures and make appropriate changes. However, this section is based on a flawed understanding of the procedures currently in place. This is particularly distressing in light of the exhaustive review of the subject contract, and the unlimited access that OSC had to the relevant documents and staff.

The Report objects that the words used in the rating categories are not defined in the Guidelines. These are words of common usage and understanding in the field, and the categories containing them have been in regular use by Fund staff for over twenty years.

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Note
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The rating criteria used by the Selection Committee were properly applied in this case. The report suggests (p. 7, 2nd full paragraph) that they be applied in a purely ministerial way, e.g., the highest "proximity" score should go to the candidate closest to the job site in miles and the highest "staffing" score should go to the candidate with the largest staff. This interpretation is inconsistent with the information provided to OSC, impractical and unreasonable. The selection process requires the Selection Committee members to use their judgment to identify not the nearest or largest consultant firm, but the one most qualified and most available for the project. Although very large architectural firms are presumably capable of almost any design-related project, they may be unwilling or unable to provide the attention or resources that a smaller firm would to a small study project, such as the one under review here. There is no suggestion in the Report that the ratings were on their face, numerically incorrect or questionable.

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Note
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The Report also alleges that one Selection Committee member had a conflict of interest. The alleged conflict is simply a manifestation of the same mistake referred to earlier: a staff member mistakenly began the start-up procedures for this project (convened a meeting at the campus) before the selection of the contractor was complete. There is no evidence or allegation that this employee had any interest in the contract or the firm involved; therefore, there was no "conflict of interest" when that employee participated as a Selection Committee member in the selection of this firm. Moreover, there is no conflict or impropriety when an employee participates in a selection process in which one of the candidates has previously been supervised by that employee. The Committee members are required to have and apply experience and judgment. The reference to a conflict of interest of one of the Selection Committee members, in Section E of the Report, should be deleted.

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Note
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The final paragraph of this section again states no clear findings or conclusions. It raises an inference that the procedures followed resulted in the selection of a contractor who was not the most qualified one. If the audit cannot substantiate this inference, it is unprofessional, and highly prejudicial to the Fund, to present it in the audit report.

One unequivocal statement in this paragraph is simply untrue. It states that, because the terms in the categories used to rate procurement candidates are not defined in the Guidelines, "the evaluation process is entirely subjective". Even if the selection process could be improved by adopting definitions of the terms used in the rating categories, which we

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Note
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* See State Comptroller's Notes, Appendix B

question, there is no justification in fact, or presented in the report, for the statement that the process is “entirely subjective” (concluding paragraph of this section, p. 8).

F. Payments to Hudson Design

The report correctly concludes that payments under this contract were properly supported and made.

Recommendations

The Recommendations presented are reasonable and will be included in the review and redesign of procurement procedures already underway. Clearly the recommendations would have greater weight if they were backed up by separate, clearly stated conclusions, and specific findings supported by audit evidence. In light of the publicity, which the Report states was responsible for the initiation of the audit, a Report that substitutes innuendo for documented findings undercuts the confidence of the Fund and the public in the recommendations, and in the audit process.

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Notes
7 and 4

The Report notes, following the Recommendations, that the Fund commented on an earlier draft of this report. Those comments were not appended to the present draft. The use of the caption “WORKING DRAFT”, which we have not seen at this stage in prior audits, leaves us uncertain as to whether there will be additional drafts and whether we will have an opportunity to comment. Executive Law § 170 requires us to submit comments on the “tentative copy” of your report, and requires you to append a copy of such comments to your final report. Since your cover letter expressly relies on this statute, these comments are expressly based on your representation that, notwithstanding the caption, the document you have provided is such a “copy” and not a “WORKING DRAFT”. We reserve the right to further respond, if the final report contains material changes from the present copy.

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Note
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Our earlier comments specifically objected to the absence of separately stated conclusions. In addition, those comments objected to the use of interviews and attributions that invade personal privacy by making the individual employee identifiable. The present draft continues this practice and adds a paragraph (pp. 6-7) quoting a clearly identifiable retired employee in a manner that is unprofessional and insulting, as well as irrelevant.

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Note
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Conclusion

Although the Fund generally agrees with your Recommendations, the Report does not conform to professional standards. The present draft is fundamentally flawed and highly prejudicial to the Fund. It should be revised consistent with these comments.

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Note
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Very truly yours,


Donald G. Dunn
President

State Comptroller's Notes

1. When presenting the contract for approval, the Fund did not disclose that it engaged the consultant before it completed the award decision process. This information would have affected the Office of the State Comptroller's approval process.
2. We met with Fund officials on June 19, 2001 and explained that the audit report would be prepared as a letter. This format has no impact on the protocols or statutory requirements for the audit process, including the handling of agency responses.
3. Because the newspaper accounts provide relevant audit background, this information is included in the audit report. Professional auditors who are also civil servants conducted this audit in accordance with generally accepted government auditing standards.
4. Section 6.47 of the Government Auditing Standards for fieldwork states that evidence may be physical, documentary, analytical and **testimonial**. Section 6.54 of the fieldwork standards states that testimonial evidence where persons may speak freely is more competent than testimonial evidence obtained under compromising conditions. Section 6.54 also states that testimonial evidence is more competent if it is obtained from an individual who is not biased and who has complete knowledge about the area.

As the Fund response notes, we obtained our testimonial evidence from individuals without the presence of senior Fund officials. The persons we obtained testimony from had responsibility in the areas being audited and, in our opinion, were not biased. Also, there was no Fund documentation available to corroborate the testimony gathered and several of the practices described to us were not included in written procedures. Moreover, neither Government Auditing Standards nor common sense require that testimonial evidence ultimately be traceable to documents and procedures.

5. It also seems contradictory for Fund officials to respond that the interviews in the report are mischaracterized or are inaccurate and then to also respond that neither the Fund nor third parties can verify the accuracy of the interviews in the report. In addition, the Fund response does not clarify any inaccuracies that purportedly exist with the interviews.

Most of the interviews we conducted were scheduled in conjunction with the Fund audit liaison and were attended by two audit staff. All interviews are documented in our audit working papers. Our written preliminary audit findings and our draft audit report provided the Fund with the testimony that we intended to use to present audit findings. Therefore, Fund officials had information that could have been used to follow up with Fund staff to corroborate the accuracy and characterization of the testimonial audit evidence in this report.

6. It is inaccurate to state that this report has no conclusions. For example, the report concludes that the consultant worked on the project before the formal decision to award the contract was made, policies and procedures were inadequate in several important respects, problems existed with practices and documentation for contract D004265, there were errors in the pre-evaluation and payments were made based upon duly signed vouchers and evidence of completion of work. These are all audit conclusions.
7. The Fund is simply wrong regarding compliance with government auditing standards. The motivation for the audit was to provide independent, objective, fact-based information regarding how this contract was awarded.
8. The existence of the Inspector General's investigation has been publicly reported. As a point of clarification, we have obtained no information on the results or findings of the Inspector General's investigation.
9. In its comments on a preliminary draft of this report, the Fund contended that the Comptroller should determine the validity of the contract without awaiting the Inspector General's findings. However, as described elsewhere in this report, there is an unresolved question about whether the Fund's records related to Contract D004265 were falsified. Given that fact, and our understanding that this question is under investigation by the Inspector General, we believe it is appropriate that the Comptroller await the results of that investigation before making his determination whether the contract is void or voidable. It did not make sense for OSC to duplicate the investigative work being done by the IG.
10. In its response to a preliminary draft of this report, the Fund contended that Section 136-a does not apply to the Fund because "[t]he Fund is not the State of New York nor is it empowered by the State to enter into contracts on behalf of the State of New York." We disagree with the Fund's legal analysis, since Section 372 of the Education Law provides that the Fund has the authority "to act as agent for the state university," which is a State agency; and Section 376(8)(d) of the Education Law provides that the Fund's contracts for university facilities must be approved by Comptroller, which conforms with the policy of State Finance Law Section 112 that no contract on behalf of the State is valid without the Comptroller's approval. Furthermore, the Fund has been judicially recognized as an instrumentality of the State. See Simkin & Sons v. State University Construction Fund, 352 F.Supp. 177, 179 (S.D.N.Y., 1973) ("It is inescapable that the State University Construction Fund in its functions, purposes and operations is designed to perform a State obligation and does so as an arm or alter ego of the State."). Nevertheless, it is ultimately unnecessary to reach agreement on whether Section 136-a directly applies to the Fund because the procurement guidelines adopted by the Fund pursuant to statutory mandate (Public Authorities Law § 2879) closely parallel the provisions of Section 136-a. Therefore, even if the requirements of Section 136-a were technically inapplicable they would still be relevant because their substance has been incorporated into the Fund's own guidelines.

11. The audit adds to public accountability by confirming that work on a publicly funded contract began before the required process to award the contract had been completed. This irregularity is not minimized by explaining it as the result of new procedures and controls or increases in workload. The fairness and the integrity of the Fund's control environment for consultant contracts comes into question when the required consultant selection process is circumvented.
12. The audit seeks to determine whether or not the contract award to Hudson Design occurred only after a proper award decision was made. To fully address this objective the audit needs to take this memorandum into account since it contains the signature of a Fund official and it suggests the completion of the selection process at an earlier date.
13. The Public Authorities Law calls for the Fund to have **comprehensive** guidelines. Defining the rating categories would be consistent with this requirement. Presently, neither the rating categories nor the assignment of numeric scores are defined or otherwise addressed in written guidelines. We maintain that the process is, therefore, entirely subjective. While the Fund indicates that the rating categories have a common understanding and usage, the Fund also agrees with our recommendation for definitions and guidance in this area.
14. We examined the ratings and scores that were assigned for the Hudson Design contract to see if these appeared accurate on their face. Our results, as presented in the report, conclude that the ratings may be incorrect or questionable. Had the Fund's selection committee members performed the required interviews and follow up procedures, these problems may have been addressed and resolved. Yet, these requirements were not complied with.
15. We agree that a selection committee member may not necessarily have a conflict of interest just because the member supervised a consultant **in the past** and is now part of a selection committee that is evaluating the same consultant on **another project**. However, in this instance the selection committee member was meeting with the consultant on the start-up of the project even before the determination to award the contract for this same project was completed. By not withdrawing from the selection process under these conditions, at a minimum, the selection committee member creates the perception of favoritism and calls into question the fairness and objectivity of the contract award process.
16. We maintain that it is accurate to conclude that a rating process that includes undefined categories and numeric scoring is "entirely subjective."
17. We have not included the names of individuals in this report. However, we believe it is appropriate to identify the titles and positions of those people who were paid with public funds to accomplish official business of the State.