FLORIDA
COMMISSION ON ETHICS
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BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

In re: Cara Higgins

Respondent.

Complaint Nos. 21-001 and 21-178
Consolidated

RESPONSE TO PETITION FOR ATTORNEY'S FEES AND COSTS

Tom Walker, through undersigned counsel, submits this response to Cara Higgins' ("Higgins") Petition for Attorneys' Fees and Costs which seeks to recover attorneys' fees and costs from Tom Walker ("Walker") the complainant in Complaint No. 21-001.

Legal Standard for Award of Attorneys' Fees and Costs

An award of attorneys' fees in favor of the person complained against in a complaint filed with the Commission on Ethics is governed by Section 112.317(7), Florida Statutes (2020), which reads, in pertinent part, as follows:

> In any case in which the commission determines that a person has filed a complaint against a public officer or employee with a malicious intent to injure the reputation of such officer or employee by filing the complaint with knowledge that the complaint contains one or more false allegations or with reckless disregard for whether the complaint contains false allegations ***of fact material*** to a violation of this part, the complainant shall be liable for costs plus reasonable attorney fees incurred in the defense of the person complained against, including the costs and reasonable attorney fees incurred in proving entitlement to and the amount of costs and fees. (emphasis added)

The elements of a claim for attorneys' fees and costs under Section 112.317(7) are that: "(1) the complaint was made with a malicious intent to injure the official's reputation; (2) the person filing the complaint knew that the statements made about the official were false or made the statements about the official with reckless disregard for the truth; and (3) the statements were

material." *Brown v. Comm'n Ethics,* 969 So. 2d 553, 555, 560 (Fla. 1st DCA 2007). "The statute sets a very high burden for recovery of fees." *Id. at* 560.

Succinctly stated, Higgins' Petition for Attorneys' Fees and Costs does not meet the high burden established by the statute and the Petition should be denied.

This Response to the Petition for Fees filed by Cara Higgins proves 1) that all factual allegations made by Mr. Walker were true 2) provides undisputable documentation to support those allegations and 3) that the petition fails to even state sufficient grounds to entitle Higgins to attorney's fees.

I. Allegations in the complaint

1. Allegation:

Mr. Walker alleged that Ms. Higgins:

> "Rebuked Florida Keys Aqueduct Authority (FKAA) staff and adamantly argued against staff's recommendation to approve a $288,715 professional services (architecture/engineering) agreement on legal grounds. Ms. Higgins asserted her legal interpretations in contradiction of the legal opinion of the FKAA general counsel, and proceeded to exercise undue influence over FKAA Board Members, resulting in their acquiescence in rejecting the proposed contract. Ms. Higgins' assertions were in contravention of the standard FKAA procurement process."

Response:

During the board meeting of October 28, 2020, both the video and the transcript of that meeting clearly show Ms. Higgins "arguing against staff's recommendations", "asserting her legal opinion that resulted in the board rejecting the proposal". Documentation of this is found in the video of the meeting beginning at time stamp 43:22 and in the transcript of the meeting beginning on line 632. This was "in contravention of the standard FKAA procurement process because FKAA procedures allowed for procuring consulting services as conducted for services contained in Agenda Item DOE-04.

Agenda item DOE-04 was for a contract with K2M for independent project management and inspection services on a CIP project titled Key West Administration Building. K2M is one several firms which were selected by FKAA through the competitive process of advertising a Request for Qualifications -RFQ- for FKAA CIP program in February 2017; open to all qualified firms. Seven of twelve firms were selected by staff, approved by the Board, and were available for continuing contracts for CIP projects, as needed.

FKAA staff vetted the qualifications of the selected firms for the services required for the Administration Building, and determined that K2M was the best qualified firm for the work. Department of Engineering staff negotiated a reasonable scope and budget ($288,715) for the work, Director of Engineering recommended and approved the proposed contract, senior management (Board Attorney, Internal Auditor, and Mr. Walker - Executive Director) reviewed and signed-off on the proposed contract for Board Action at the October 28, 2020 meeting.

During the meeting, Ms. Higgins objected to the following:

- At video time stamp 45:56 (Transcript Line Numbers 658-661), she said the list of CIP projects advertised in the RFQ 2017 did not include the Administration Building, so the project should be advertised as a separate project.
    - At video time stamp 46:58 (Transcript Line Numbers 686-687), Jolynn Reynolds, Director of Engineering stated that in late 2017, hurricane Irma damaged the old building, and FKAA added a new administration building onto the CIP list of short-term project needs.
- At video time stamp 46:20 (Transcript Line Numbers 664-668), she said there was redundancy with what we were going to pay the architect, Tom Pope under the next agenda item D0E-05. That it was outrageous.

- At video time stamp 47:10 (Transcript Line Numbers 693-699), Jolynn Reynolds explained the differences in scope of service the two firms would be responsible to provide. There was no redundancy as Pope was serving as Architect-of-Record (AOR) while K2M would be performing Owner representative services as 3rd party services.
- If Cara Higgins read and understood the scope of service, she would know there was not redundancy. Board members rarely get into such specifics; that is typically for staff to have reviewed and approved. Certainly, this was not consistent with Board comments on such matters.
- CCNA, FS 287.055 requires selection of firms on qualifications, not price. The Auditor General made that statement in his 2006 audit report of FKAA practices. Ms. Higgins comments here and earlier (video time stamp 43:12 Transcript Line Number 623 and video time stamp 43:19 Transcript Line Number 629) were made without specific detail or knowledge of technical scopes of services and reasonable pricing. Ms. Higgins public discussion about redundant costs (video stamp 46:20 Transcript Lines 664-668) as outrageous for independent construction management and inspection services without discussion of facts was not normal protocol for Board input on such matters.
- Typical Industry standards recommend independent Owner Representation on public CIP projects. FKAA staff was not available for project management or qualified for certain inspections required for this type of project, thus the need for independent qualified firm such as K2M services in this case.

- At video time stamp 54:53 (Transcript Line Numbers 829-831), she asks how staff gets around the limitation in the statute (CCNA continuing service contract) of $4 million for a project when the administration building is $14 million.
- At video time stamp 55:14 (Transcript Line Numbers 840-850, 855-858, and 861-864), Robert Feldman, Board attorney presents a lengthy discussion about the process, beginning with an audit conducted by the Auditor General (2005) and a report issued in 2006 with recommendations for compliance with certain items including compliance with FS 287.055, CCNA and to create policies and procedures for such. The FKAA responded and adopted Procedures for Consulting services under Resolution 07-08 on February 22, 2007, and updated on June 26, 2008. Robert Feldman stated that in order to handle the workload of purchasing numerous projects, the Board adopted within their policies, an allowance to select a group of qualified firms to do certain things for the Aqueduct.
- At video time stamp 56:57 (Transcript Line Numbers 861-864), Robert Feldman tells the Board that they have approved numerous projects as provided by FKAA policy.
- At video time Stamp 57:35 (Transcript Line Numbers 886-897), Tim Esquinaldo, Internal Auditor (reporting directly to the Board) discusses policy and attorney general's opinion – who cites the statute. Mr. Esquinaldo stated that we agreed to disagree (on the use of continuing contracts on certain CIP projects over $4 million).

- Tim Esquinaldo – Internal Auditor is responsible for auditing of the FKAA including review of Chapter 287. Mr. Esquinaldo provides the Board and the Audit Committee with quarterly and annual reports. As the FKAA internal Auditor, his responsibilities and job functions include identifying issues, review compliance and suggested improvements for proper operational and contractor controls. Prior FKAA years annual audit and quarterly audit Reports to the Board for FY 2016, FY 2017, FY 2018, FY 2019 and FY 2020 (example excerpt below, in part Pages 1 and 2) state the following or similar statements in the audit reports:

> - Procurement practices adhere and comply with Chapters 287 and 112 of the Florida Statutes, policy; and that payment for goods and services are duly authorized, supported and evidenced receipt.
>
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> Florida Keys Aqueduct Authority
> Internal Compliance Audit Report
> For the Period from 10/1/19 to 9/30/20
>
> - Customer payments received are promptly processed and accredited.
> - Customer account charges (including consumptive and base facility rates), deposits and adjustments are accurate, pursuant to governance, adequately documented and approved.
> - Contracts are properly administered in accordance with policy to ensure that the specified work was performed within the approved price of the contract and schedule of values, and that change orders and amendments and are accurate and have been approved.

> **Results:**
>
> The results did not identify any significant deficiencies and/or weaknesses in management's system of internal control. The details of the evaluation for the period from October 1, 2019 to September 30, 2020 were presented to management along with recommendations for improvement and have been summarized for your review and consideration. The attached report details the finding, the recommendation for improvement, management's response, person responsible for implementation and management's target date for the implementation of corrective action. Follow-up procedures will then be scheduled at a later date to determine whether management's corrective action is achieving desired results in the following areas:
>
> Payroll and Hiring Practices
> Information Technology
> Construction/Consultant Contracts

The past 5 years of Audit Reports do not note discrepancies or irregularities with the CCNA and FKAA procurement procedures.

Even the Audit Report FY21 (reporting 10/01/2020 to 09/21/2021) only notes a minor suggestion for paperwork documentation:

> **Construction and Consultant Contracts:**
>
> a. Comment:
>
> While testing construction and consultant signature documents, i.e., executed contracts were not available in Laser Fiche and/or E-Builder.

- At video time stamp 58:44 (Transcript Line Numbers 909-915), Cara Higgins said the Board was being asked to do something illegal.
- At video time stamp 1:00:53 (Transcript Line Numbers 962-965), Robert Feldman states that the Auditor General and the Attorney General approve this method by not writing us up or citing us.
- No FKAA Audit Reports (FY 16 through FY 21) note Chapter 287 - CCNA or FKAA procurement irregularities (illegal) as stated by Cara Higgins.

Conclusion:

The allegations made by Mr. Walker are true and do not entitle Higgins to attorneys' fees.

2. Allegation:

Higgins retaliated against Mr. Walker by initiating a process with the intent to terminate his employment.

Response:

It is undisputed that Higgins initiated a process to terminate Mr. Walker's employment. In her response to the complaint, Higgins admitted that "the day after the Board meeting she informed FKAA's counsel and internal compliance auditor that she lost all confidence in Mr.

Walker and...made a motion to terminate his contract...." Allen Norton and Blue letter on behalf of Higgins Jan 27, 2021.

Conclusion:

The allegations made by Mr. Walker are true and do not entitle Higgins to attorneys' fees.

3. Allegation:

These actions led to a series of events allowing a firm, All Aspects Inspection Services, LLC, to be selected for engineering inspection and construction management services for the FKAA Administration Building project. Ms. Higgins orchestrated a process resulting in an inappropriate award of the contract to an engineering firm who is ineligible because a vested owner is married to FKAA's Director of Engineering. This is a conflict with section C-Code of Ethics and FKAA's nepotism policy. This vested owner is known to maintain a close relationship with Ms. Higgins.

Response:

The factual allegations of these statements are true. All Aspects Inspection Services, LLC was selected for the project management and inspection services engineering contract. All Aspects provided only inspection services and no project management qualifications as advertised yet was selected with no qualifications discussion. An owner of All Aspects was married to FKAA's Director of Engineering. The owner of All Aspects to which the allegation refers is Reynolds who is the paramour of Cara Higgins. See Report of investigation. All other allegations are legal conclusions or opinions which Mr. Walker reasonably believed at the time to be true and he still believes them to be true.

Only knowingly false allegations of fact may entitle a respondent to fees. Legal conclusions or opinions based on true facts, even if incorrect, do not qualify one to receive fees.

A similar distinction was made by the 2d DCA in *Rasmussen v. Collier County Publishing Company*, 946 So.2d 567 (2DCA 2006) wherein the court distinguished between opinions based on true facts and a libelous statement of fact, holding that opinions based on true facts are not libelous.

Conclusion:

The allegations made by Mr. Walker are true and do not entitle Higgins to attorneys' fees.

II. **Allegations in the Petition for Fees.**

The petition for fees contains several specific allegations of alleged false statements of fact. This section of the response will show that these alleged false statements of fact are either true or opinions formed by Mr. Walker based on set of true facts.

Allegation in the Petition

A. <u>Paragraph 23 of the petition states:</u>

> "23. First, Mr. Walker stated that at the October 28, 2020 board meeting. Ms. Higgins exercised undue influence over FKAA Board Members resulting in their acquiescence in rejecting the proposed contract."

Response:

The allegation in paragraph 23 regarding "undue" influence is a conclusion based on a set of true facts. It should be uncontested that Higgins inserted herself into the procurement process. It should be uncontested that following her questioning of the process the staff recommended was disregarded and it should be uncontested that a different firm was chosen for the contract. Finally, it should be uncontested that the firm that was chosen was owned in part by Ms. Higgins paramour. (See Report of investigation). These are facts from which a reasonable person could conclude that the influence she asserted was "undue influence". Whether or not the influence was "undue" is an unactionable opinion. These facts are certainly circumstantial evidence of wrongdoing.

Conclusion

The allegations made by Mr. Walker are true and do not entitle Higgins to attorneys' fees.

B. Paragraph 24 of the petition states:

"24. Second, Mr. Walker stated in his complaint the Project's architect received an "unsolicited price proposal" on September 28, 2020 from Mr. Reynolds firm for providing the inspection services. The Petition then argues that because the witnesses now say that it was the architect who asked for the price proposal that Mr. Walker should have known that Reynolds did not do the unsolicited proposal.

Response.

It is absolutely true that Reynolds firm submitted multiple proposals both verbal and written to get the contract. Whether it was solicited or unsolicited is not material and is irrelevant. Additionally, Mr. Walker had no way of knowing that what the architect told him about the September 28th proposal was true or not. What is also true is that these proposals eventually led to the contract being awarded to Reynolds firm. It boggles one's mind to think that Higgins and Reynolds spending many hours together with both being involved in the award of the contracts did not discuss the possibility of Reynolds firm getting the award. Again, this is circumstantial evidence of the wrongdoing perpetrated by Higgins and Reynolds. The ROI and petition discuss that there is no direct evidence and thus certain things were false. If that were the standard there would be no need for circumstantial evidence rules and many of the criminals now in prison would be free. If it walks like a duck, quacks like a duck and looks like a duck, it's probably a duck. In this case if Higgins and Reynolds were lovers, and if Higgins inserted herself into the procurement process (whether rightly or wrongly) and if the award subsequently went to Reynolds, it is a reasonable conclusion that she used her influence on the board to get the contract for Reynolds firm.

Conclusion

The allegations made by Mr. Walker are true and do not entitle Higgins to attorneys' fees.

C. Paragraph 25 states:

"25. Third Mr. Walker stated in his complaint that the FKAA executive staff received an email from Ms. Higgins two hours prior or the October 28, 2020 board meeting in which Higgins requested certain documents be provided to board members prior to the meeting."

Response

This allegation, on its face, is insufficient for Higgins to qualify for an award of attorney's fees. The statue only allows fees for false allegations of material fact. There is no authority for awarding fees for facts allegedly not stated. No further discussion is necessary.

Conclusion

The allegations made by Mr. Walker are true and do not entitle Higgins to attorneys' fees.

D. Paragraph 26 states:

"26. Fourth. Mr. Walker stated in his complaint that the FKAA"s procurement procedure was "considered by the Auditor General and looked at by the Attorney General years ago and no problem was noted." *See* Walker Complaint at p. 5. Significantly, this statement made by Mr. Walker in his complaint is contradicted by his interview with Investigator Powell in which Mr. Walker stated that two state agencies have questioned the FKAA in the past about the same practice that Ms. Higgins questioned at the board meeting--specifically, whether the FKAA violated Section 287.055 of the Florida Statutes by not placing the Project's inspection services contract up for bid – and that the FKAA and the two state agencies have "agreed to disagree."

Response

This allegation is totally false. An accurate review of the complaint shows that Mr. Walker stated that the board attorney, Mr. Feldman stated that the procedure was considered and no problem was noted. Mr. Walker never stated what is alleged. The allegation is frivolous and not deserving of further response. However, a review of the transcript and video of that meeting shows that Mr. Feldman did, indeed, state what is alleged.

Conclusion

The allegations made by Mr. Walker are true and do not entitle Higgins to attorneys' fees.

E. Paragraph 27 alleges:

"Ms. Higgins discussed with FKAA Counsel Bob Feldman and FKAA Internal Auditor Tim Esquinaldo that FKAA could not proceed with the selection of K2M based on the established procedure and needed to advertise for these services," and thus, the FKAA published another RFQ which was published on November 6, 2020 for inspection services... "

Response.

It is true that based on Ms. Higgins objections at the meeting that FKAA did not proceed with the award of the contract to K2M. It is also true that FKAA published an RFQ for these services on November 6, 2020. Whether the RFQ was "another" is not material. The material allegation is that an RFQ was published on November 6, 2020 and that allegation is true.

III. Malice

The allegation that Mr. Walker had a vendetta or that there was bad blood between Mr. Walker and Mr. Reynolds is frivolous. It is true that Mr. Reynolds disciplined Mr. Walker in 2011.

In addition to the above, Mr. Walker was advised by several governmental agencies to file a complaint with the Commission on Ethics. What is untrue is that there was any ill-will known or shown by Mr. Walker as a result of that discipline. Mr. Walker had Outstanding or Exceeds Expectations Performance Reviews from Mr. Reynolds from 2006 until Mr. Reynolds left the FKAA - including the 2011 year of the discipline. This is just another unfounded allegation intended to cause Mr. Walker further harm.

Conclusion

The allegations made by Mr. Walker are true and do not entitle Higgins to attorneys' fees.

Respectfully submitted October 3, 2022 by:

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