

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

FLORIDA A.G.C. COUNCIL, INC. and
SOUTH FLORIDA CHAPTER OF THE
ASSOCIATED GENERAL CONTRACTORS;

Plaintiffs,

Civil Action Number

v.

4:03CV59-SM

JOHN ELLIS BUSH, a/k/a "JEB" BUSH,
as the Governor of the State of Florida;
CYNTHIA A. HENDERSON, as the former Secretary
of the Florida Department of Management Services,
WILLIAM SIMON, as the present Secretary of the
Florida Department of Management Services,
and as a representative of all persons
similarly situated as heads of departments and agencies; and
DR. CHARLES YOUNG, as the president of the
University of Florida; and
DR. FRED GAINOUS, as the president of
Florida A&M University, and as representatives
of all persons similarly situated as the chief executive
officers of State institutions of higher learning;
THE UNIVERSITY OF FLORIDA BOARD OF TRUSTEES,
d/b/a "The University of Florida"; and
THE FLORIDA A&M UNIVERSITY BOARD OF TRUSTEES,
d/b/a "Florida A&M University",
on their own behalf and as representatives
of institutions of higher learning that are similarly
situated; and THE FLORIDA DEPARTMENT OF
MANAGEMENT SERVICES, on its own behalf and
as a representative of all agencies and departments
that are similarly situated;

Defendants.

SETTLEMENT AGREEMENT

Plaintiffs and certain State Parties, in order to amicably resolve any existing disputes and settle all claims asserted in the First Amended Complaint, and in order to secure dismissal of this action, hereby stipulate and agree as follows (the "Agreement"). This Agreement is for a term of 99 years from the date of its execution:

1. The One Florida Equity in Contracting Initiative ("One Florida") implemented by Governor Jeb Bush in Executive Order 99-281 on November 9, 1999 recognizes that the goal of increasing diversity in the allocation of state contracts can and should be realized without the use of racial and gender set-asides, preferences and quotas. The goals of One Florida are to provide equal state contracting opportunities to all qualified businesses, to eliminate discrimination in state contracting based upon race, ethnicity or gender, and to institute all-inclusive procurement practices that remove barriers to all small businesses, including those owned by women and minorities, thereby ensuring all interested vendors have a full opportunity to participate in state contracting.

2. The parties agree that ensuring and increasing small business participation in state construction projects, including particularly the participation of small businesses owned by women and minorities, is a desirable goal, but that, in keeping with the principles of One Florida, state construction contracts will not be awarded upon the basis of race, ethnicity or gender. Plaintiffs' members and others should be able to bid on all contracts for which they qualify and to select partners and subcontractors as dictated by the needs of the project.

3. As used in this agreement, the words "State Parties to the Agreement" includes only the named defendants, as well as all four year colleges and universities, all executive departments and agencies under the control or direction of the Governor, as well as all

executive departments and agencies for which the Department of Management Services presently (or in the future) provides any oversight or services with regard to construction services. As used in this Agreement the word “contractor” includes contractors, construction managers, design/build firms, vendors, consultants (including architects and engineers), subcontractors, sub-vendors or sub-consultants (or of the owners of any such business) engaged in public construction contracting. As used in this Agreement, “state construction contracts” includes all contracts with contractors for goods and services.

4. Plaintiffs and State Parties to the Agreement, individually and collectively, will use their best efforts to encourage small business participation in state construction contracts, including participation of small businesses owned by women and minorities, and to remove any existing barriers to small business participation in state contracting through the following:

- a. The parties will work together to explore the establishment of a small business enterprise contracting program and/or other programs or laws aimed at promoting the participation small business, including those owned by women and minorities, in state construction contracts.
- b. State Parties to the Agreement may conduct “outreach” activities targeted toward small businesses, including women- and minority-owned firms to inform such firms of the availability of particular public contracting opportunities and to encourage such firms to seek work on public construction projects through the normal procurement process as applied to all businesses.
- c. State Parties to the Agreement may conduct programs to educate business owners in the various processes used by State agencies, departments, and

institutions of higher learning and may take steps in an attempt to ensure that such programs reach small businesses, including those owned by minorities and women.

- d. State Parties to the Agreement may encourage contractors engaged for construction or construction-related services to actively recruit the widest practicable participation in the procurement process (including specifically efforts to ensure reasonable notice to small businesses, including women- and minority-owned businesses, of opportunities available), but may not require contractors to enter into contracts or subcontracts with any entity on the basis of race, ethnicity or gender, except as such contractor, in its reasonable discretion, deems it best for the accomplishment of the contract objective. Further, State Parties to the Agreement may not directly or indirectly encourage contractors engaged for construction or construction-related services to achieve specific participation percentages based upon race, ethnicity or gender, or otherwise use racial or gender set asides, preferences and quotas in existing or future construction or construction-related services contract(s).
- e. State Parties to the Agreement may require the provision of information concerning the employment of minority- and women-owned contractors, and may maintain data on the use of minority- and women-owned contractors on public construction contracts. State Parties to the Agreement may not use such information in making any decision concerning the hiring of, employment of, or contracting with any particular contractor.

5. State Parties to the Agreement will not permit or require the consideration of race, ethnicity, or gender of contractors in public construction contracting.
6. State Parties to the Agreement shall, upon the execution of this Agreement, reimburse the Plaintiffs' attorney's fees and costs as agreed upon by the parties by separate agreement.
7. Each of the parties hereto acknowledges that it has been represented by independent counsel of its own choice throughout all negotiations that have preceded the execution of this Agreement and that the execution of it has been made with the consent of and upon the advice of said independent counsel.
8. Each of the parties hereto, individually and collectively, as the case may be, acknowledges that no other party, or agent or attorney of any other party or member of the putative class, has made any promise, representation, or warranty whatsoever, express or implied, not contained herein concerning the subject matter hereof, to induce the other party to execute this Agreement or any of the other documents referred to herein, and each party hereto acknowledges that it has not executed this Agreement or such other documents in reliance upon any such promise, representation, or warranty not contained herein.
9. Each of the parties hereto knowingly, voluntarily and intentionally waives the right any of them may have to a trial by jury in respect of any litigation brought by any party hereto arising out of, under or in connection with the First Amended Complaint, or any course of conduct, course of dealing, statement (whether verbal or written) or action of Plaintiffs and State Parties to the Agreement. This provision is a material inducement for each of the parties entering into this Agreement.

10. This Agreement does not constitute and shall not be taken or construed as an admission of liability on the part of any party, but rather, such liability has been and is expressly denied by all parties.

11. This Agreement shall, for contract interpretation purposes, be construed in accordance with the laws of the State of Florida.

12. Upon the receipt by the Plaintiffs of a copy of this Agreement executed on behalf all State Parties to the Agreement and the reimbursement by State Parties to the Agreement to the Plaintiffs of the amount specified in paragraph 6, above, Plaintiffs shall promptly dismiss the above-captioned action presently pending in the U.S. District Court for the Northern District of Florida. Such dismissal, no matter how characterized, shall not constitute adjudication on the merits of the allegations of the complaint and amended complaint in that action.

13. By executing this Agreement, Plaintiffs, in their own and in their representative capacities, hereby jointly and severally release and forever discharge the State Parties to the Agreement, their successors, assigns, directors, officers, employees, representatives, agents, subsidiaries or affiliates, persons employed or engaged by State Parties to the Agreement, whether past or present, of and from all actions, judgments, claims and demands whatsoever, which Plaintiffs, their successors, assigns, directors, officers, employees, or any person or entity for whom the Plaintiffs are authorized to act in a representative capacity, or anyone claiming by, through, or under Plaintiffs, or any one or more of them (collectively referred to as "the Plaintiffs"), has had, now has, or may have against the State Parties to the Agreement or any one or more of them, arising out of or related to claims asserted or which could have been asserted relative to the subject matter of the First Amended Complaint in the litigation styled Florida A.G.C. Council,

Inc., et. al. v. State of Florida, et al., pending in the United States District Court for the Northern District of Florida, Case No. 4:03CV59-SM. Any alleged breach of the Agreement by State Parties to the Agreement will be addressed and remedied as specified in paragraph 14 herein.

14. Plaintiffs shall notify State Parties to the Agreement in writing of any breach of this Agreement of which Plaintiffs are aware and for which they have concern, within two weeks of any alleged breach. Such notice shall be sent via certified mail– return receipt requested and facsimile to both the Governor’s General Counsel and the Department of Education’s General Counsel, or their successors in office.

- a. Plaintiffs' required notice shall contain sufficient detail for State Parties to the Agreement to understand the nature and scope of the alleged breach, to investigate it and to take necessary corrective action.
- b. State Parties to the Agreement shall provide a written response to Plaintiffs within ten (10) working days of receipt of such notice.
- c. Plaintiffs will promptly advise State Parties to the Agreement in writing, as specified in this paragraph, of their acceptance or rejection of State Parties to the Agreement’s response within five (5) working days of their receipt of State Parties to the Agreement’s response.
- d. In the event that the parties cannot agree on the sufficiency of any corrective actions taken by State Parties to the Agreement in response to Plaintiffs’ notice, the parties agree to attempt mediation of the dispute within fifteen (15) working days of receiving such notice from Plaintiffs using a mutually agreed upon mediator.

e. In the event that mediation is unsuccessful in resolving the alleged breach, Plaintiffs may bring suit in the Circuit Court of Leon County, Florida, and each and every State Party to the Agreement waives any defense of venue or personal jurisdiction in such an action. In any such action, Plaintiffs will be entitled to an order redressing the violation in an equitable manner. Such order may include, in appropriate cases, but is not necessarily limited to requiring a “do over” of the process in which the violation occurred. The prevailing party in any such action shall be entitled to costs and attorneys fees.

15. This Agreement may be executed in several counterparts and all counterparts so executed shall constitute one Agreement binding on all the parties hereto, notwithstanding that all the parties are not signatories to the original or the same counterpart. Each counterpart shall constitute an original of this Agreement.

16. This Agreement is intended by the parties as a final expression of their agreement with respect to the subject matter hereof and is intended as a complete and exclusive statement of the terms and conditions thereof, and, as to its subject matter, this Agreement supersedes and replaces all prior negotiations and agreements between the parties hereto, or any of them, whether written or oral. The parties agree that they have not, with respect to the subject matter hereof, entered into, nor have they relied upon any agreements or representations not expressly contained in this Agreement.

17. The State Parties to the Agreement individually and collectively, in their official capacities, represent to the Plaintiffs that they have the authority to enter into this Agreement on behalf of the entities they purport to bind, and to bind the State Parties to the Agreement (as defined above) to the terms of this Agreement, and the State Parties to the Agreement and their undersigned attorneys represent that – to the best of their

information, knowledge and belief – this Agreement is enforceable according to its terms against the State Parties to the Agreement in their official capacities only. State Parties to the Agreement and their undersigned attorneys understand that this representation by each State Party to the Agreement and attorney is a material inducement in obtaining Plaintiffs' agreement as reflected herein.

Undersigned counsel stipulate and agree, on behalf of their respective clients, to the foregoing, this 11th day of FEBRUARY, 2004.

FOR PLAINTIFFS:



Herbert P. Schlanger
Ga. Bar Number 629330
Counsel for plaintiffs

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– and –

FOR STATE PARTIES TO THE AGREEMENT:

CHARLES J. CRIST, Jr.
ATTORNEY GENERAL



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Agreement

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