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July 22, 2021

Members of the Arizona Legislature

The Honorable Doug Ducey, Arizona Governor

Governing Board
Higley Unified School District

The Honorable Mark Brnovich, Arizona Attorney General

The Honorable Kathy Hoffman, Arizona State Superintendent of Public Instruction

We have conducted a financial investigation of certain Higley Unified School District transactions for the period May 2012 through April 2016. We performed the investigation to determine the amount of public monies misused, if any, during that period.

The investigation consisted primarily of inquiries, observations, examinations of selected financial records and other documentation, and selected tests of internal control over Higley Unified School District's operations. The investigation was not conducted in accordance with U.S. generally accepted auditing standards and was more limited than would be necessary to ensure we discovered all misused public monies or to give an opinion on internal controls. Accordingly, we do not express an opinion on the effectiveness of internal controls or ensure that all deficiencies are disclosed.

The Financial Investigation Report describes our findings and recommendations resulting from this investigation.

Sincerely,

Lindsey A. Perry

Lindsey A. Perry, CPA, CFE
Auditor General

Higley Unified School District Criminal Indictment—Conspiracy, Procurement Fraud, Fraudulent Schemes, Misuse of Public Monies, False Return, and Conflict of Interest

SYNOPSIS: The Arizona Attorney General's Office requested our assistance with its investigation of Higley Unified School District's (Higley) possible misuse of public monies while having 2 new schools built (Project). Our investigation revealed that from May 2012 through December 2012, former Higley superintendent Dr. Angela Denise Birdwell and 3 individuals employed by 2 Higley vendors may have violated State procurement laws related to a \$2,557,125 Project development services contract. Specifically, at either the direction of or with the knowledge of Dr. Birdwell, Higley staff provided material information regarding Higley's Project development services procurement to Gary Aller and Steven Nielsen of Educational Facilities Development Services, LLC (EFDS) and to a now-deceased former president of Hunt & Caraway Architects, Ltd. (Hunt & Caraway), who acted as Higley's procurement advisor and was part of EFDS' development team. After failing to provide other prospective vendors with this same information and allowing EFDS to influence the request for proposals (RFP) requirements, Higley awarded the \$2,557,125 contract to EFDS. Dr. Birdwell, Mr. Nielsen, and Mr. Aller may have also violated a State law related to fraudulent schemes when they seemingly concealed their wrongdoing by certifying false information on Higley records, making what appear to be false attestations regarding following School District Procurement Rules for the Project.

Additionally, Dr. Birdwell may have violated the misuse of public monies statute and circumvented voters' decisions when, in December 2012 and November 2013, she authorized or caused the unlawful use of restricted public monies totaling \$6 million to pay for some of the Project's costs.

Finally, Dr. Birdwell may have violated State conflict-of-interest laws when, from August 2014 through April 2016, she received \$43,000 indirectly from Hunt & Caraway, \$1,000 from Hunt & Caraway's former president's personal checking account, and \$2,500 from CORE Construction, a Higley vendor that was also part of EFDS' development team, yet participated in decisions related to their services and failed to disclose her substantial interest.¹ Similarly, Dr. Birdwell and her close acquaintance, Ms. Hartwell Hunnicutt, may have violated State income tax laws when they failed to claim these and other Hunt & Caraway payments as income on their respective State income tax returns.

We submitted our report to the Arizona Attorney General's Office, which on July 13, 2021, presented evidence to the State Grand Jury. The action resulted in the indictment of:

- Dr. Birdwell on 18 felony counts related to procurement fraud, fraudulent schemes and practices, fraudulent schemes and artifices, misuse of public monies, conflict of interest, filing a false return, and conspiracy.
- Mr. Aller on 3 felony counts related to fraudulent schemes and practices, fraudulent schemes and artifices, and conspiracy.
- Mr. Nielsen on 3 felony counts related to fraudulent schemes and practices, fraudulent schemes and artifices, and conspiracy.
- Ms. Hartwell Hunnicutt on 3 felony counts related to filing a false return.

Overview

Higley Unified School District in 2012 determined it had grown beyond the capacity of its existing facilities and needed to build 2 new middle schools and related facilities to meet its educational goals and objectives but could not use a traditional bonding structure because it was at or near its debt/bonding limit. Accordingly, Higley issued an RFP to procure a private developer working in conjunction with a nonprofit corporation to design, finance, construct, and manage the 2

¹ Of the \$43,000 Dr. Birdwell received indirectly from Hunt & Caraway, \$28,000 was received between October 2014 through June 2015 while she was employed as the superintendent at Higley Unified School District and \$15,000 was received in April 2016 while she was employed as superintendent at Scottsdale Unified School District. These checks were paid to Dr. Birdwell's close acquaintance, Kay Hartwell Hunnicutt, or to the Law Offices of Kay Hunnicutt and deposited in a joint checking account Dr. Birdwell shared with Ms. Hartwell Hunnicutt.

middle schools. Beginning in July 2012, EFDS proposed and was awarded a contract for using a complex, alternative financing structure that involved lease-purchase agreements, a nonprofit corporation—The James Megellas Foundation, Inc. (Foundation)—and a limited liability company formed by the Foundation for the Project’s purpose (JMF-Higley 2012 LLC), which held the debt and was responsible for making loan payments. In December 2012, Dr. Birdwell authorized 2 Facilities Use Agreements with JMF-Higley 2012 LLC in which Higley agreed to 40-year lease-purchases of the 2 schools at a total cost of nearly \$160 million.

Dr. Angela Denise Birdwell started at Higley in 2007 as an associate superintendent, becoming superintendent in 2009 and holding that position until her June 2015 retirement. Scottsdale Unified School District (Scottsdale) contracted with Dr. Birdwell as its superintendent from January 2016 through June 2019; however, in March 2018, the Scottsdale Governing Board approved a motion to provide Dr. Birdwell with a notice of intent to dismiss after hearing a statement of charges that she had, in part, received money from and failed to disclose a substantial, personal interest with Hunt & Caraway. In April 2018, the Scottsdale Governing Board entered into a severance agreement in which Dr. Birdwell ended her employment a year early and was provided a \$150,000 lump sum severance payment.

Kay Hartwell Hunnicutt and Dr. Birdwell had financial and personal associations, including sharing a home, co-owning a timeshare, jointly serving as parent/guardian/monitor of Ms. Hartwell Hunnicutt’s grandson, sharing a joint checking account, naming each other as sole beneficiary on a personal bank account, and Dr. Birdwell naming Ms. Hartwell Hunnicutt as the emergency contact on a Higley employment form. Additionally, in 2016, Ms. Hartwell Hunnicutt in her professional capacity as an attorney helped negotiate Dr. Birdwell’s superintendent contract at Scottsdale.

Educational Facilities Development Services, LLC was incorporated on June 6, 2012, 14 days prior to Higley issuing an RFP to procure the Project development services. Higley ultimately awarded EFDS the \$2,557,125 Project development services contract through its affiliate, EFDS Higley I, LLC. Gary Aller filed articles of organization with the Arizona Corporation Commission for EFDS with himself as statutory agent and 3 principal members including himself, Steven Nielsen, and a Nevada limited liability company.² For 22 years prior to founding EFDS, Mr. Aller was the director of Arizona State University’s (ASU) Alliance for Construction Excellence. From 2003 through 2014, Mr. Nielsen was the assistant vice president of ASU’s University Real Estate Development.

Hunt & Caraway Architects, Ltd. employed the now-deceased former president in that capacity from 2011 through his 2017 resignation. He was not an Arizona registered architect and had a 1998 felony conviction for theft. From June 2011 through July 2015 (1 month after Dr. Birdwell retired from Higley), Hunt & Caraway received more than \$6 million from Higley and was contracted to receive \$3.275 million from EFDS for Project work. From February 2016 (1 month after Dr. Birdwell was hired by Scottsdale) through December 2017, Hunt & Caraway billed Scottsdale for about \$2 million in services.

Dr. Birdwell, Mr. Aller, Mr. Nielsen, and Hunt & Caraway’s former president may have conspired to circumvent school district procurement rules in order to improperly award Higley’s \$2,557,125 Project development services contract to EFDS

From May through July 2012, Dr. Birdwell, Mr. Aller and Mr. Nielsen of EFDS, and Hunt & Caraway’s former president, who was acting as Higley’s procurement advisor and was also part of the EFDS development team, seemingly skewed the procurement process for Higley’s \$2,557,125 Project development services contract to disadvantage other prospective vendors and ensure the contract was awarded to EFDS by:

- Having knowledge of or participating in meetings and email presolicitation communications in May and June 2012 that included seeking and receiving material Project information not provided to other prospective vendors such as Higley financial and enrollment data, estimated Project costs, and proposed architectural details and site plans, or directing Higley staff and other associates to do the same. Some of these emails included Higley employees, reportedly at Dr.

² In July 2014, Mr. Aller removed the Nevada limited liability company as a member, leaving himself and Mr. Nielsen as the only 2 members. Additionally, in September 2016, Mr. Aller changed the name from Educational Facilities Development Services, LLC to Facilities Development Services Group, LLC. Finally, on December 1, 2020, the Arizona Corporation Commission listed EFDS’ status as inactive and voluntarily terminated. For report purposes, we refer to this company as EFDS, the name it used during our investigation period.

Birdwell's direction, sharing RFP drafts with Mr. Aller, Mr. Nielsen, and Hunt & Caraway's former president who then made successful efforts to influence the RFP's requirements such as decreasing the time that other vendors had to prepare and respond from 30 to 19 calendar days. Because of the Independence Day holiday and weekends, only 12 of these days were business days. Moreover, Mr. Aller and Mr. Nielsen drafted the exact language Higley ultimately used in the RFP's scope of work.

- Having knowledge of or participating in email postsolicitation communications in June and July 2012 that included seeking and receiving material Project information not provided to other prospective vendors such as data about Higley's middle school operations, maintenance, and utilities' costs, or directing Higley employees and other associates to do the same. Some of these emails included notifications about other vendors' questions and potential addendum answers before they were issued to all prospective vendors.

Moreover, on July 3, 2012, just 3 business days prior to the proposal due date, Higley issued its only addendum, which did not answer all the prospective vendors' questions or accommodate many prospective vendors' requests to extend the proposal due date. The addendum also made it falsely appear as if the site plans, renderings, or architectural specifications requested by prospective vendors were not available. In fact, Hunt & Caraway's former president reportedly had already provided those drawings and plans exclusively to EFDS.

As a result of EFDS having early and exclusive Project information, EFDS likely secured an advantage over other prospective vendors and was therefore the most prepared and responsive prospective vendor. Dr. Birdwell was 1 of 3 selection committee members, and she evaluated EFDS with the only perfect score and recommended Higley award EFDS the Project development services contract, which the Higley Governing Board approved on July 12, 2012.³

Dr. Birdwell, Mr. Aller, and Mr. Nielsen may have concealed their wrongdoing by certifying false information on Higley records

Helping to conceal their actions described above, Dr. Birdwell's, Mr. Aller's, and Mr. Nielsen's signatures are on Higley documents dated from July through December 2012 in which they falsely certified to following School District Procurement Rules (Rules) for the Project. Specifically, Dr. Birdwell's signature is on 4 documents, including an Evaluation Committee Member Statement in which she agreed to maintain strict confidentiality of the proposal contents, which she did not do, and 2 Facilities Use Agreements asserting Higley complied with the Rules, which was also false. Likewise, a Project agreement making similar false assertions about Rules compliance had Mr. Nielsen's signature. Finally, Mr. Aller's signature is on 1 document in which he certified that EFDS' RFP proposal did not involve collusion or anti-competitive practices, which was false.

Dr. Birdwell may have misused \$6 million of public monies by authorizing or causing restricted Adjacent Ways Fund monies to improperly pay for Project costs

After the voters defeated Higley's November 2012 Maintenance and Operations and Capital Outlay overrides that were intended to help finance the Project and pay for the schools' furniture, fixtures, and equipment (FF&E) costs, Dr. Birdwell was quoted in a newspaper as saying "...Now, we will have to come up with some creative solutions to address our challenges..." It appears she then circumvented voter decisions by authorizing or causing the use of Higley's restricted Adjacent Ways Fund monies totalling \$6 million for FF&E costs inaccurately labeled "Prepaid Use Fees" in the 2 Facilities Use Agreements she authorized in December 2012. The Adjacent Ways Fund holds monies from a Higley Governing-Board-approved special tax assessment that does not need voter approval. However, those monies can be used only for purposes described in Arizona Revised Statutes (A.R.S.) §15-995, which generally relate to improving public ways adjacent to land owned or leased by a school district. Nonetheless, in December 2012, Dr. Birdwell authorized the wire transfer of \$3 million of restricted Adjacent Ways Fund monies to the bond trustee for the Project's first payment required by the Facilities Use Agreements. In November 2013, Higley staff followed her example and made the second \$3 million payment from the Adjacent Ways Fund.

³ The Higley Governing Board authorized Dr. Birdwell to sign the October 2, 2012, \$2,557,125 Project development services contract, which she and Mr. Nielsen signed on behalf of Higley and EFDS, respectively.

As described in the Overview on pages 1 through 2, Higley did not use traditional financing to design and build the 2 schools and instead opted for a more complex, alternative financing and development structure. Higley contracted with EFDS through its affiliate, EFDS Higley I, LLC, to develop the Project, and in turn, EFDS sought a Project owner, JMF-Higley 2012 LLC, which held the debt and was responsible for making loan payments.⁴ Higley leased the 2 schools' property to JMF-Higley 2012 LLC and then entered into a 40-year lease-purchase agreement with JMF-Higley 2012 LLC for the yet-to-be-built schools. As a result, the Project was not part of Higley's debt, which helped Higley stay technically within its statutory bond debt limit. Ultimately, JMF-Higley 2012 LLC, not Higley, is responsible for repaying the debt for the school buildings. Without the restricted Adjacent Ways Fund monies, the Project may have failed as JMF-Higley 2012 LLC may not have been able to secure bond funding or may have defaulted on the loan. After the bonds were issued, Higley's \$3 million restricted Adjacent Ways Fund monies and JMF-Higley 2012 LLC's bond proceeds totaling nearly \$70.6 million were comingled and used to fund the educational facility revenue bond and Project costs.

Dr. Birdwell initially denied knowing that Adjacent Ways Fund monies were used for these unauthorized Project purposes at the time, but when investigators presented her with a copy of her December 2012 wire transfer authorization letter, she claimed that it was an appropriate use. Additionally, a Higley consultant reported to investigators that Dr. Birdwell told her "What are they going to do, slap my hand?" after she told Dr. Birdwell that this use of Adjacent Ways Fund monies was illegal, that Dr. Birdwell needed to produce documentation to support the amount, which she did not provide, and that Higley's auditors would find it, issue a finding, and Higley would have to repay the Fund.

Dr. Birdwell may have engaged in conflicts of interests when she received \$46,500 from Hunt & Caraway, Hunt & Caraway's former president, and CORE Construction, and she may have violated State income tax laws when she failed to claim these payments and an additional \$59,000 from Hunt & Caraway and Hunt & Caraway's former president on her State income tax returns

Although Dr. Birdwell denied to investigators that she had ever received money or compensation from any Higley or Scottsdale vendor, between August 2014 and April 2016, Dr. Birdwell received \$43,000 indirectly from Hunt & Caraway, \$1,000 directly from Hunt & Caraway's former president's personal checking account, and \$2,500 directly from

Source of check payments	Higley	Retirement	Scottsdale	Total
Hunt & Caraway	\$28,000	\$57,000	\$15,000	\$100,000
Hunt & Caraway's former president's personal bank accounts	1,000	2,000		\$3,000
CORE Construction	2,500			\$2,500
Total	\$31,500	\$59,000	\$15,000	\$105,500

CORE Construction, a Higley vendor that was also part of EFDS' development team, yet participated in decisions related to these vendors, first at Higley and later at Scottsdale, and failed to disclose her substantial interest. As illustrated in the table above, Dr. Birdwell also received \$57,000 directly from Hunt & Caraway and \$2,000 from Hunt & Caraway's former president's personal bank account after her retirement from Higley and before her employment at Scottsdale. None of these payments totaling \$105,500 were claimed as income on the relevant State income tax returns.

Hunt & Caraway check payments totaled \$100,000

While employed at Higley, from October 2014 through June 2015, Dr. Birdwell received monies from 4 Hunt & Caraway checks totaling \$28,000 and, while employed at Scottsdale, in April 2016, received monies from a \$15,000 check. These checks were paid to Kay Hartwell Hunnicutt or the Law Offices of Kay Hunnicutt and deposited in a joint checking account Dr. Birdwell shared with Ms. Hartwell Hunnicutt. Dr. Birdwell was the principal user of this account, and she primarily expended this combined \$43,000 within a few weeks of each deposit by either withdrawing cash or transferring the money to her solely controlled personal checking account. Although the memo section on 1 of these checks said "Consultation Retainer," neither Ms. Hartwell Hunnicutt nor Hunt & Caraway were able to produce documents such as

⁴ The Industrial Development Authority of the City of Phoenix issued \$69,250,000 of Series 2012 Educational Facility Revenue Bonds in December 2012.

contracts or invoices supporting the purposes of these checks, and neither Ms. Hartwell Hunnicutt nor Dr. Birdwell claimed these payments as income on their respective State income tax returns. The Hunt & Caraway executive vice president told investigators that her understanding was Ms. Hartwell Hunnicutt was providing legal services to Higley through Hunt & Caraway, and Higley would pay or reimburse Hunt & Caraway for those services. From March 2012 through February 2017, Hunt & Caraway paid Ms. Hartwell Hunnicutt \$520,260.⁵ During Dr. Birdwell's tenure at Higley, Hunt & Caraway provided more than \$6 million in services to or on behalf of Higley, often at Dr. Birdwell's recommendation or approval. Likewise, after being hired by Scottsdale, Dr. Birdwell immediately retained Hunt & Caraway to provide services to Scottsdale totaling almost \$2 million.

After her retirement from Higley and before her Scottsdale employment, from July 2015 through January 2016, Dr. Birdwell received 8 Hunt & Caraway checks totaling \$57,000 that were deposited in her personal checking account and used for her personal purposes. On January 14, 2016, the eighth Hunt & Caraway check totaling \$15,000 was deposited in Dr. Birdwell's personal checking account, which was the same day that the Scottsdale Governing Board approved Dr. Birdwell's superintendent contract. Although the memo section on 2 of the checks said "Consulting," Hunt & Caraway was unable to produce documents such as contracts or invoices supporting the purposes of these checks, and Dr. Birdwell did not claim these payments as income on her 2015 and 2016 State income tax returns.

Hunt & Caraway's former president's personal check payments totaled \$3,000

During her Higley employment, in August 2014, Dr. Birdwell received a \$1,000 check and after retirement, in October 2015, a \$2,000 check from the former Hunt & Caraway president's personal bank accounts. These checks were deposited in her personal checking account and used for her personal purposes. The check memos were blank, and Dr. Birdwell did not claim these payments as income on her 2014 or 2015 State income tax returns.

CORE Construction \$2,500 check payment

During her Higley employment, in September 2014, Dr. Birdwell received a \$2,500 check from CORE Construction that was deposited in her personal checking account and used for her personal purposes. The check stub for this payment said "Sponsorship," and a CORE Construction vice president initially told investigators the payment was for consulting but later stated that it was most likely a mistake. Dr. Birdwell did not claim this payment as income on her 2014 State income tax returns. Higley paid CORE Construction nearly \$28 million from April 2012 through May 2016, and EFDS had a \$55.775 million contract with CORE Construction for the Higley Project. As mentioned above, Dr. Birdwell helped evaluate, recommend, and award the Project development services contract to EFDS, and Core Construction was part of EFDS' development team.

Higley officials should take action to help prevent similar occurrences

Public officials with oversight authority have a responsibility to properly manage the administration of money and property entrusted to them and must ensure that sufficient internal controls are designed and implemented to protect those assets. Nevertheless, a system of internal controls will not succeed when those in a position to oversee those operations are perpetrating unlawful behavior and concealing their misconduct.

In this instance, Dr. Birdwell's position as superintendent seems to have influenced Higley employees to comply with her directions to perform problematic functions such as providing material Project information to specific prospective vendors and spending \$6 million of restricted Adjacent Ways Fund monies on unauthorized purposes. For example, some of these employees viewed Dr. Birdwell's actions as questionable or were concerned about questioning her decisions because they feared retribution.

⁵ Of the \$520,260 Hunt & Caraway paid Ms. Hartwell Hunnicutt, neither Hunt & Caraway nor Ms. Hartwell Hunnicutt were able to provide contracts, invoices, or any other documents supporting the purposes of Ms. Hartwell Hunnicutt's apparent services totaling \$328,898 from February 2013 through February 2017. Only \$191,362 for services from February 2012 through January 2013 was supported by a contract and invoices. Moreover, Dr. Birdwell may have improperly participated in this February 2012 contract, as her personal email account was used to send the contract to Hunt & Caraway's former president on May 30, 2012. In particular, the email stated in part "attached is the contract that needs to be on your letterhead and signed by you and Kay for her to deposit the check. Thanks. See you this afternoon. Denise." Additionally, in April and July 2012, Dr. Birdwell's personal email account was used to send Ms. Hartwell Hunnicutt's \$17,235 invoice and \$50,000 retainer letter to Hunt & Caraway's former president.

Recommendations

Higley officials reported that they implemented certain improvements to controls over conflict-of-interest procedures such as requiring all employees to take an online conflict-of-interest training and annually submit a conflict-of-interest form. However, Higley officials, including governing board members, should take additional actions to improve controls over public monies and help deter and detect fraud. Specifically, Higley officials should:

- Create an environment in which employees feel confident in reporting potential misconduct without fear of retribution. This may include creating a strong whistleblower system as well as conducting trainings that reinforce the governing board's support for, and insistence on, adherence to strong internal control procedures.
- Ensure staff follow the Arizona Procurement Code, School District Procurement Rules, and the *Uniform System of Financial Records for Arizona School Districts* (USFR) related to issuing invitations for bids or requests for proposals when purchasing goods or services exceeding the competitive sealed bid threshold. These requirements prescribe procedures for competitive procurement, such as preparing a request for proposal and using a procurement consultant, preproposal conferences, discussions with individual offerors, procurement timelines and addendums, publishing notices, and procedures to prevent collusion and anticompetitive practices. These requirements exist, in part, to ensure the fair and equitable treatment of all persons who deal with the State's procurement system; to maximize to the fullest extent practicable the State's purchasing value of public monies by prohibiting the restraint of free trade and unreasonable reduction of competition among vendors; to foster effective broad-based competition within the free enterprise system; and to provide safeguards for the maintenance of a procurements system of quality and integrity.
- Ensure restricted Adjacent Ways Fund monies are used in accordance with A.R.S. §15-995, including only making expenditures for the described allowable purposes, which generally relate to improving public ways adjacent to land owned or leased by a school district, and consult with appropriate legal authorities to determine what actions should be taken regarding the \$6 million of inappropriately used Adjacent Ways Fund monies.
- Comply with statutory conflict-of-interest requirements and best practices, including:
 - Requiring all employees and public officers to complete an annual conflict-of-interest disclosure form. These statements should disclose all substantial interests as outlined in governing board policy and should require a deliberate indication of "none" if no such conflict exists.
 - Using a conflict-of-interest disclosure form that addresses both financial and decision-making conflicts of interest.
 - Storing all substantial interest disclosures in a special file in accordance with A.R.S. §38-509.
 - Establishing a process to review and remediate disclosed conflicts and ensure employees and public officers with disclosed conflicts refrain from voting upon or otherwise participating in any manner as an officer or employee in such contract, sale, or purchase, in accordance with A.R.S. §38-503.
 - Update and implement its policies and procedures to comply with all the State's conflict-of-interest requirements and best practices.
 - Continue to provide periodic training on its conflict-of-interest requirements, process, and form, including providing training to all employees and governing board members on how the State's conflict-of-interest requirements relate to their responsibilities.