STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MID AMERICA GOVERNMENTAL GROUP,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 96-1335F
	)	
DAYTONA BEACH COMMUNITY COLLEGE,	)	
	)	
Respondent.	)	
_____	)	

FINAL ORDER

On July 30, 1996, a formal administrative hearing was held via video teleconference to Orlando, Florida before Administrative Law Judge, Daniel M. Kilbride, Division of Administrative Hearings.

APPEARANCES

For Petitioner: John L. Wendel, Esquire
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For Respondent: Judson I. Woods, Jr., Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner is a prevailing small business party entitled to attorney's fees pursuant to Section 57.111, Florida Statutes, and Rule 60Q-2.035, Florida Administrative Code, in connection with the bid protest proceeding styled Mid-America Governmental Group, Inc. v. Daytona Beach Community College, Division of Administrative Hearings Case Number 95-4043BID.

PRELIMINARY STATEMENT

Petitioner requested that the Administrative Law Judge take official notice of all of the depositions, pleadings and exhibits in Case Number 95-4043BID and the Prehearing Stipulation. Petitioner offered one exhibit in evidence, the contract of employment regarding the Petitioner and the law office of Wendel, Chritton and Parks, dated August 15, 1995.

Respondent presented the testimony of Dr. Charles Mojock, Vice President of Administration, Daytona Beach Community College. Respondent also requested all of the exhibits in Case No. 95-4043BID be considered by the Judge.

A transcript of the proceeding was filed on August 12, 1996. The parties requested additional time in which to file Proposed Findings of Fact and Conclusions of Law. Petitioner filed its proposals and argument on September 3, 1996, Respondent filed its proposals on August 30, 1996. On September 11, 1996,

Petitioner filed an Objection to Post-Hearing Procedure and Respondent filed its Response on September 13, 1996.

Petitioner's Objection to Post-Hearing Procedure is DENIED. Petitioner's reliance on Hanson v. Hanson, ___ So.2d ___, 21 FLW D1939 (Fla. 5th DCA, August 30, 1996) is misplaced. Post-hearing procedure in administrative hearings is controlled by the Subsections 120.57(1)(b)4. and (1)(b)6.e, Florida Statutes (1995) [Subsections 120.57(1)(b) and (1)(f)5. as amended by the 1996 Session] and pursuant to Rules 28-5.402 and 60Q-2.031, Florida Administrative Code.

Based on the stipulations and the evidence, the following finding of facts are determined:

FINDINGS OF FACT

1. Petitioner is a "small business party" within the meaning of Section 57.111(3)(d)1.b., Florida Statutes (1995).

2. In April 1995, the Respondent prepared and circulated a Request for Proposal, RFP 96-001, Alternative Social Security Plan.

3. The RFP was sent to various companies thought to be qualified by Respondent to submit responses to the RFP.

4. The purpose of the RFP was to solicit competitive proposals from qualified companies to provide an alternative plan to the Federal Social Security Program for part time and temporary employees of the college subject to Internal Revenue Code, Section 3121(b)(7)(f).

5. The RFP specifically provided that:

> Scope - The plan selected must be a governmental plan whose contributions are tax qualified under the Internal Revenue Code and can be made on both a mandatory and pre-tax basis. The organization selected must demonstrate that the proposed plan has been implemented by an employer and obtained a favorable determination letter(s) from the Internal Revenue Service as a governmental plan under section 414(d) and 3121(b)(7)(F) of the code. Any contracts will be contingent upon Daytona Beach Community College (and each other cooperating Institution) receiving a favorable determination letter from their IRS key district office. The plan selected will be trusteed and provide complete administration, marketing, employee enrollment and communication, investment management, plan compliance and record keeping.

6. The RFP also contained the following paragraph:

> 1.5 PROPOSAL ACCEPTANCE/REJECTION
> The College reserves the right to accept or reject any or all proposals received as a

> result of this RFP, or to negotiate separately with competing proposers, and to waive any informalities, defects or irregularities in any proposal, which in the judgment of the proper College officials, is in the best interest of the College. This RFP does not commit the college to award a contract, nor shall the College be responsible for any cost or expense incurred by the Proposer in preparing or submitting a proposal, or any cost incurred prior to the execution of a contract agreement.

7. On April 25, 1995, the Respondent held a pre-proposal conference to discuss the RFP which was attended by representatives of Petitioner Mid-America as well as other interested parties. There were no questions or protests about the terms and conditions of RFP 96-001. Neither the IRS favorable determination letter specified under "Scope" on page 1 of the RFP, nor the Respondent's right to reject any and all proposals, specified under 1.5 of the RFP, were challenged.

8. Petitioner did not file a protest of Respondent's specifications in a timely fashion as required by Section 120.53(5), Florida Statutes, referenced under Section 1.4 of the RFP.

9. Upon receipt of the proposals from Mid-America and Poe and Brown, the Respondent convened an evaluation committee composed of Dr. Charles Mojock, Vice President of Administration of the Respondent; Clare Birkenmeyer, Director of personnel of the Respondent and Yvonne Horner of Florida Community College of Jacksonville, who was also in personnel. The purpose of the evaluation committee was to select the best proposal to the Respondent's RFP.

10. On the scoring matrix, the committee noted that Poe and Brown, Inc. "has fav. determin. letter." The letter actually tendered was not a determination letter, but a volume submitter letter. The volume submitter letter states that it "does not constitute reliance for an employer adopting the approved plan. To obtain reliance, an adopting employer must apply to the key district office for a favorable determination letter and must individually amend its plan to remain in compliance."

11. Petitioner, in its response to the RFP, stated that it will obtain a favorable determination letter upon the award of the bid.

12. A favorable determination letter may only be obtained upon adoption of a plan and submittal of it to the Internal Revenue Service for review and approval.

13. The members of the evaluation committee lacked detailed understanding of the nuances of the IRS determination letter and did not know that a favorable determination letter could not be obtained until after a plan had been adopted. This caused a mistake which resulted in an "over award" in Poe and Brown's favor of a maximum of 11.67 points (the difference between Mid-America's 8.33 points and Poe and Brown's 20 points in the category "Plan Design"). The total point difference was 81.67 minus 68.30 = 13.37 points. Poe and Brown was still the highest rated proposal with a score of 70 to 68.33 for Mid-America.

14. On June 15, 1995, a presentation was made regarding RFP 96-001 by Dr. Mojock to the Daytona Beach Community College Board of Trustees. It was explained while both Mid-America and Poe and Brown could offer a 401(a) plan, the Poe and Brown 401(a) plan had been implemented by five school boards, whereas Mid-America did not have any 401(a) plans in place and only one Alternative Social Security 403(b) Plan in place.

15. At the June 15th board meeting, the concerns primarily centered on the "Investment" criteria. The return on investment for participants was the biggest concern of the Board of Trustees.

16. The Mid-America formal written protest did not contest the evaluation committee's scoring on the "Investment" criteria.

17. At the June 15, 1995 board meeting, the Board authorized the board attorney and the president of the community college to draw up a contract with Poe and Brown.

18. Before the contract with Poe and Brown could be formalized, Mid-America filed its bid protest.

19. Respondent initiated the bid protest proceeding within the meaning of the law by advising Mid-America that it could contest the decision to award the contract.

20. On October 19, 1995, the Committee recommended to the Board that it reject all bid proposals because: (1) the Board was unable to resolve the Board's question concerning the rate of return on investments that participants would receive under the plan proposed by Poe and Brown since the Respondent could not communicate with Poe and Brown because of the bid protest; (2) other providers had developed the 3121 alternate social security plan between April 9, 1995, when the Respondent requested proposals and October, 1995 when the decision to reject all bids was made, and (3) the Board of Trustees had just approved a contract for a new administrative computing system for the Respondent and it was not known at that time whether the new system could accommodate the alternate social security implementation as delivered or whether the Respondent would need additional customization which would take additional time.

21. At the Daytona Beach Community College Board of Trustees' meeting on October 19, 1995, the Board voted unanimously to reject all bids regarding RFP 96-001.

22. The services rendered for attorney's fees and costs incurred by counsel for Petitioner were reasonable and necessary and the fees and costs incurred exceeded the statutory limit of $15,000.

23. The Respondent's initial decision to award the bid to Poe and Brown was substantially justified.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding, and the parties thereto, pursuant to subsections 57.111(4)(b)1. and 120.57(1), Florida Statutes (1995).

25. The Florida Equal Access to Justice Act (FEAJA), Section 57.111, Florida Statutes, provides in pertinent part:

> (4)(a) Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to Chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust.

26. The FEAJA, enacted by the Florida Legislature in 1984, is patterned after a federal law on the same subject - The Federal Equal Access to Justice Act (the Federal Act), 5 U. S. C., Section 504 Enacted in 1981, the Federal Act provides in pertinent part:

> (a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust . . .

27. The federal and state statutes use similar language, and the legislative history of the Florida Act shows that legislators were aware of the federal prototype. Gentele v. Department of Professional Regulation, 9 FALR 311, (DOAH, June 20, 1986) citing Senate Staff Analysis and Economic Input Statements CS/SB 438 (5-2-84); and the record of the 5-2-84 meeting of the Senate Governmental Operations Committee, sponsor of the bill.

28. When, as in this case, a Florida statute is patterned after a federal law on the same subject, it will take the same construction in the Florida courts as its prototype has been given in federal courts insofar as such construction is harmonious with the spirit and policy of Florida legislation on the subject. Gentele v. Department of Professional Regulation, 513 So.2d 672, 673 (Fla. 1st DCA 1987).

I

29. Section 57.111, Florida Statutes, provides for an award of attorney's fees from the state to a "small business party" under certain circumstances in order to diminish the detrimental effect of seeking review of, or defending against governmental action. This section states in part:

> (3)(d) The term "small business party" means:
> 1.b. A partnership or corporation, including a professional practice, which has its principal office in this state and has at the time the action is initiated by a state agency, not more than 25 full-time employees or a net worth of not more than $2 million . . .

30. In order to recover attorney's fees and costs under FEAJA, Petitioner must establish that it is a corporation with its principal office in this state and has not more than 25 full-time employees. The parties stipulated that Petitioner is a small business party.

II

31. Since Petitioner qualifies as a small business party under the Florida Equal Access to Justice Act, a state agency must have initiated some action against a small business party.

32. Respondent is a state agency pursuant to Part III, Chapter 240, Florida Statutes. See: ESP Security and Satellite Engineering, Inc. v. University of Florida, DOAH Case No. 96-3753F (November 20, 1995).

33. Section 57.111(3)(b) provides as follows:

> The term "initiated by a state agency" means that the state agency: . . . (3) was required by law or rule to advise a small business party of a clear point of entry after some recognizable event in the investigatory or other free-form proceeding of the agency.

34. In the instant case, after going through the bid proposal process, the Petitioner requested a review of the Respondent's decision to award a contract to provide an alternate social security plan for temporary employees to Poe & Brown rather than the Petitioner. The recognizable event in the Respondent's proceeding was the Respondent's decision to award a contract to Poe & Brown, another insurance carrier, and the Respondent was required by law to advise Petitioner of a clear point of entry into the adjudicatory process.

35. The Legislature intended that awards available under the Act (Section 57.111) apply both when a small business party is defending itself against actions by the agency and when it is seeking review of some free-form agency action, such as the bid award process. See generally: Home Health Care of Bay County v. Department of Health and Rehabilitative Services, 10 FALR 5167 (1988); Miller v. Department of Health and Rehabilitative Services, 10 FALR 5160 (1987). In Union Trucking, Inc. v. Department of Transportation, 10 FALR 6039 (1988), a denial of Petitioner's request for certification as a minority business enterprise was sufficient to be considered agency initiated action.

36. An agency action in the form of awarding a bid is sufficient to constitute agency-initiated action for the purposes of recovering attorney's fees and costs. The Petitioner's request for a review of the agency's action when it did not award it the contract to provide an alternate social security plan is among the protected class of review that the Legislature has specifically set forth. Therefore, the challenge to the bid award can be considered action "initiated by a state agency." ESP Security and Satellite Engineering, Inc. v. University of Florida, supra.

III

37. Section 57.111(3)(e) of the Act states: A proceeding is "substantially justified" if it had a reasonable basis in law and fact at the time it was initiated by a state agency. It is instructive to look to the

decisions of federal courts which have construed the meaning of the language of the Federal Act. Structured Shelters Financial Management Inc. v. Department of Banking, 10 FALR 389, (DOAH 1987); Gentele v. Department of Professional Regulation, Board of Optometry, 513 So.2d 572 (Fla. 1st DCA 1987); Department of Professional Regulation, Division of Real Estate v. Toledo Realty, Inc., 549 So.2d 715 (Fla. 2d DCA 1989).

38. In discussing the meaning of the term "substantially justified," the court in Ashburn v. U. S., 740 F.2d 843 (11th Cir. 1984), said:

> The government bears the burden of showing that its position was substantially justified. (citation omitted) The standard is one of reasonableness; the government must show "that its case had a reasonable basis both in law and fact." (citations omitted)

39. Ashburn went on to say that the fact that the government lost its case does not raise a presumption that the government's position was not substantially justified. Neither is the government required to establish that the decision to litigate was based on a substantial probability of prevailing. White v. U. S., 740 F.2d 836 (11th Cir. 1984).

40. In this case, Respondent rejected all bids pursuant to the authority contained in paragraph 1.5 of the RFP. The Board had the authority to do so at any time prior to the signing of a contract. Although Petitioner alleged that the board rejected all bids due to its efforts, the testimony was persuasive that the bids were rejected on other grounds, as well. Therefore, Petitioner was not a "prevailing small business party" as defined by the Act. Section 57.111(3)(e), Florida Statutes.

41. Further, the evaluation committee reviewed the bid submittals in good faith. Although the committee's review was flawed, there was no evidence that the committee's recommendation was arbitrary, illegal, fraudulent or dishonest. See: Department of Transportation v. Groves-Watkins Construction, 530 So.2d 912 (Fla. 1988).

42. Therefore, when the Board followed the Committee's recommendation, it had reason to believe that its selection was proper. Accordingly, at the time the selection was made, the Respondent had a reasonable basis in both law and fact for its selection and was, therefore, substantially justified when it made the selection. Gentele v. Department of Professional Regulation, Board of Optomtery, 513 So.2d 672, 673 (Fla. 1st DCA 1987).

CONCLUSION

For purposes of the Act, the Respondent initiated the action and Petitioner is a "small business party" within the meaning of the Florida Equal Access to Justice Act. In addition, the Respondent had a reasonable basis in both law and fact for its selection and was substantially justified in its position.

Therefore, it is

ORDERED that the Petition for Attorney's Fees and Costs is DENIED.

DONE and ORDERED this 18th day of October, 1996, in Tallahassee, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DIVISION OF ADMINISTRATIVE HEARINGS AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.