

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

TELECOM RESPONSE, INC.,                    )  
  )  
      Petitioner,                                )  
  )  
vs.    )     Case No. 01-1099F  
  )  
DEPARTMENT OF MANAGEMENT                )  
SERVICES,                                     )  
  )  
      Respondent.                             )  
\_\_\_\_\_                                        )

FINAL ORDER

This cause came before the undersigned for consideration of a Petition for Attorney's Fees and Costs filed on March 16, 2001, on behalf of Petitioner, Telecom Response, Inc. (TRI), pursuant to Section 57.111, Florida Statutes.

APPEARANCES

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For Respondent: Terry A. Stepp, Esquire  
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STATEMENT OF THE ISSUE

The issue presented is whether TRI should be awarded attorney's fees and costs pursuant to the Florida Equal Access to Justice Act (FEAJA), Section 57.111(4)(a), Florida Statutes.

PRELIMINARY STATEMENT

On or about July 20, 2000, Respondent, Department of Management Services (Department), posted a bid tabulation sheet, rejecting TRI's bid as non-responsive, and noticing the intent to award a contract for video teleconferencing equipment to Frebon International Corporation (FREBON).

On August 3, 2000, TRI timely filed a Formal Written Protest to contest the Department's intent to award a contract pursuant to Invitation to Bid (ITB), Bid No. 33-840-980-E, to FREBON, the second low bidder by price discount, and to reject the bid offered by TRI, the low bidder by price discount. The Formal Written Protest was forwarded to the Division of Administrative Hearings (Division) for the assignment of an Administrative Law Judge. A final hearing was held in the matter on September 11, and 19-20, 2000.

On December 14, 2000, a Recommended Order (RO) was issued with the following recommendation:

RECOMMENDED that the Department of Management Services enter a final order and award the contract to TRI because TRI

offered the lowest [sic] [highest] discount for the required Tandberg products. If the Department declines to award the contract to TRI, it is further recommended that the Department re-bid the contract because an award to FREBON cannot be justified as a "single bid negotiated."

(RO, page 34).

On January 16, 2001, the Department filed a Final Order adopting the findings of fact (FOF) and conclusions of law set forth in the Recommended Order. The Department also concluded that "[t]he Department of Management Services shall either award the contract to Telecom [TRI], or, in the alternative, re-bid the contract." TRI did not seek judicial review of the Final Order.

On March 16, 2001, TRI filed a Petition for Attorney's Fees and Costs. The Department filed a Response to the Initial Order issued by the Division, which also responds to the Petition. TRI and the Department waived an evidentiary hearing. TRI also filed a Reply.

On April 16, 2001, a telephone conference was held to discuss the status of the case, and the record which would be considered. This Final Order is based upon a review of TRI's Petition and Reply and the Department's Response filed in DOAH Case No. 01-1099F. The undersigned has taken official recognition of the Division's file in Telecom Response, Inc. v. Department of Management Services, Case No. 00-3439BID. The

Transcripts of the final hearing in Case No. 00-3439BID have been re-filed in Case No. 01-1099F and have also been considered. The parties agreed that the final hearing exhibits filed in Case No. 00-3439BID, which were forwarded to the Department with the Recommended Order on December 14, 2000, would not be re-filed in Case No. 01-1099F.

#### FINDINGS OF FACT

1. During the Spring of 2000, the Department developed an ITB, including specifications, for video teleconferencing equipment and video bridging equipment for all State of Florida agencies and other eligible users. The ITB was a revision of the existing contract held by TRI. During the ITB/specifications review process, a new condition was added to require vendors to give a percentage discount from a manufacturer's product list price to assist users in getting more choices and complete systems.

2. On May 9, 2000, the Department advertised ITB 33-840-980-E actively soliciting bids. The stated "purpose of this bid [was] to establish a 12-month contract for the purchase of Video Teleconferencing Equipment & Video Bridging Equipment by all State of Florida agencies and other eligible users . . ."

3. The staff of the Department drafted the specifications and intended that each vendor offer a complete line of a manufacturer's video teleconferencing equipment and systems,

which might be included under these categories. No specific manufacturer was required. The Department's Mr. Steve Welsh knew that state agencies have differing needs for video teleconferencing equipment and systems to communicate more effectively. Importantly, it was his intent to draft flexible and wide-open specifications to meet the various needs of the agencies. It was equally important, from the Department's standpoint, that each vendor offer a complete line of the manufacturer's products with an appropriate discount. In this manner, the Department could compare each vendor's manufacturer's price list and then apply the vendor's discount in order to appropriately compare their bids.

4. Four vendors, including TRI and FREBON, submitted bids offering discounts for the Tandberg line of video teleconferencing equipment. Each vendor offered different discounts for the Tandberg line of products offered in each bid. However, TRI submitted a one-page price list for Tandberg video teleconferencing systems. Global Communications Technologies, Inc. offered a discount for eight (8) pages of Tandberg products. Digital Video Systems, a Division of NuPhase Electronics, provided multiple discounts for twelve (12) pages of Tandberg products and FREBON offered a discount for twenty-two (22) pages of Tandberg products.

5. Ultimately, the Department chose FREBON as the only responsive bidder to have submitted a discount for the complete line of Tandberg products. The Department justified the intended award of the contract to FREBON as a "single bid negotiated."

6. Notwithstanding the resolution of this matter as set forth in the Recommended and Final Orders, the undersigned finds that the Department, in drafting the ITB and specifications, was well intentioned and attempted to deal with a highly technical subject in a professional manner. If the ITB and specifications were ambiguous, the vendors had the opportunity to timely request clarification. Yet, no vendor challenged the specifications nor timely sought clarification. See, e.g. (RO, FOF 16 and 17).

7. Although the Department expressed its intent during the final hearing regarding the scope of the ITB, that intent was not clearly articulated in the ITB. There is a fair inference that the four vendors must have been confused because each submitted what they necessarily believed was a discount for the complete price list for the Tandberg products.<sup>1</sup> The evidence showed that only FREBON offered the complete Tandberg line of products although, in retrospect, FREBON's price list included products which were not required to be offered at a discount by the ITB.

8. As of the posting of the initial bid tabulation, there was a legitimate dispute regarding whether any vendor, including TRI, submitted the complete line of Tandberg products within the meaning of the ITB. It was clear, however, that each vendor, offering Tandberg products, was required to offer a percentage discount for the complete line of Tandberg video teleconferencing equipment. The problem was, which Tandberg systems, equipment, or products? See (RO, FOF 62-64).

9. The protest could not be definitively resolved until representatives of the parties and Tandberg explained, during the final hearing, the various components of the Tandberg product line within the meaning of the ITB. Mr. Richard Grace, of Tandberg, explained that TRI's one-page price list included all of the video teleconferencing systems manufactured and sold by Tandberg which included only desktop, set-top, and room systems manufactured by Tandberg, the only systems required to be offered for a discount pursuant to the ITB. (RO, FOF 33-42, 63). However, TRI was the only vendor offering a discount for one page of Tandberg products. The Department, at the time of the initial posting of the bid tabulation, reasonably determined that the TRI's one-page submission was not the complete Tandberg line, given the Department's interpretation of the ITB.

10. Based upon the foregoing, although the ultimate resolution of the bid protest by the Department was contrary to

the Department's initial position, the Department's action, to initially reject TRI's bid as non-responsive, was "substantially justified."

11. Nevertheless, the Department suggests that TRI was not a prevailing small business party pursuant to Section 57.111, Florida Statutes. The ultimate issues presented in the bid protest were whether the Department's intent to award the contract to FREBON, and to reject the bid offered by TRI, was contrary to the Department's governing statutes, rules, policies, or the ITB and, further, whether the Department's proposed action was clearly erroneous, contrary to competition, arbitrary, or capricious. See (RO, Statement of the Issues, page 2).

12. As a matter of fact and law, TRI prevailed in its bid protest pursuant to the Final Order because TRI's bid was found to be responsive, and the Department did not award the contract to FREBON. See n. 1.

13. In its Final Order, the Department chose to award the contract to TRI, or, in the alternative, to re-bid the contract. The Department advises that it has elected to re-bid the contract, part of the relief requested by TRI. See n. 1. In any event, TRI prevailed in the bid dispute because the contract was not awarded to FREBON as a direct result of TRI's successful



bid protest. Stated differently, the Final Order was in TRI's "favor." Therefore, TRI is a "prevailing small business party."<sup>2</sup>

14. The bid protest process was "initiated" by the Department when the initial bid tabulation was posted. The Department concedes the reasonableness of the fees and costs requested by TRI, which, by statute, may not exceed \$15,000. The Department also admits that TRI is a small business party within the meaning of Section 57.111, Florida Statutes. The Department also admits that it was not a nominal party.

#### CONCLUSIONS OF LAW

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

16. Section 57.111 (4)(a), Florida Statutes, states:

(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.

(emphasis added).

17. Material here, Section 57.111(3)(c)1., Florida Statutes, defines "prevailing small business party" as follows:

(c) A small business party is a "prevailing small business party" when:

1. A final judgment or order has been entered in favor of the small business party and such judgment or order has not been reversed on appeal or the time for seeking judicial review of the judgment or order has expired[.]

(emphasis added).

18. "The purpose of [Section 57.111] is to diminish the deterrent effect of seeking review of, or defending against, government action by providing in certain situations an award of attorney's fees and costs against the state." Section 57.111(2), Florida Statutes. 'The [FEAJA] is designed to discourage unreasonable governmental action, not to paralyze the necessary and beneficial work of government.' State, Department of Health and Rehabilitative Services v. South Beach Pharmacy, Inc., 635 So. 2d 117, 121 (Fla. 1st DCA 1994)(citation omitted).

19. TRI has the burden to prove that the Department initiated the main or underlying administrative proceeding and that it is a prevailing small business party pursuant to the Department's Final Order, i.e., the Final Order was entered in TRI's "favor." Once TRI proves that it qualifies as a prevailing small business party, the Department "has the burden to show substantial justification or special circumstances . . . in order to avoid liability for fees and costs." South Beach Pharmacy, Inc., 635 So. 2d at 121.

20. By law, the Department posted the initial bid tabulation and advised TRI, and other vendors, of a point of entry to challenge the agency action. TRI requested an administrative proceeding pursuant to pursuant to Section 120.57(1) and (3), Florida Statutes. Therefore, the underlying administrative proceeding was initiated by the Department. Sections 57.111(3)(b)3. and 120.57(3)(a), Florida Statutes. See also Mid American Governmental Group v. Daytona Beach Community College, Case No. 96-1335F, 1996 WL 1060269, at \* 5 (Fla. Div. Admin. Hrgs. Final Order Oct. 18, 1996).

21. Also, TRI is a "prevailing small business party" because the Final Order was entered in TRI's "favor." Rudloe v. Department of Environmental Regulation, Case No. 88-3421F, 1988 WL 617627, at \* 5 (Fla. Div. Admin. Hrgs. Final Order Nov. 8, 1988).

22. Section 57.111(3)(e) of the FEAJA 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." The FEAJA is generally modeled after its federal counterpart, 5 U.S.C. Section 504 (the Federal Act). It is instructive to look to the decisions of federal courts, which have construed the meaning of the language of the Federal Act. Gentele v. Department of Professional Regulation, 513 So. 2d 672, 673 (Fla. 1st DCA 1987).

23. In discussing the meaning of the term "substantially justified," regarding the Federal Act, the United States Supreme Court in Pierce v. Underwood, 487 U.S. 552, 565-566 (1988) stated:

We are of the view, therefore, that as between the two commonly used connotations of the word "substantially," the one most naturally conveyed by the phrase before us here is not "justified to a high degree," but rather "justified in substance or in the main"--that is, justified to a degree that could satisfy a reasonable person. That is no different from the "reasonable basis both in law and fact" formulation adopted by the Ninth Circuit and the vast majority of other Courts of Appeals that have addressed this issue . . . . To be "substantially justified" means, of course, more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve.

(citations omitted). See also Helmy v. Department of Business and Professional Regulation, 707 So. 2d 366, 368 (Fla. 1st DCA 1998)(quoting Pierce).

24. Similarly, under Florida Law, "'the substantially justified' standard falls somewhere between the no justiciable issue standard of section 57.105, Florida Statutes (1991), and an automatic award of fees to a prevailing party." Helmy, 707 So. 2d at 368. It is also erroneous to equate "a finding of 'no frivolous purpose' with a finding of 'substantial justification,' as that phrase is defined in subsection

57.111(3)(e)." Department of Health and Rehabilitative Services v. S.G., 613 So. 2d 1380, 1386 (Fla. 1st DCA 1993).

25. Based upon the findings of fact made herein and the legal standard to be applied, the Department had a reasonable basis in law and fact to believe that the rejection of TRI's bid was consistent with the Department's interpretation of the ITB and specifications. Therefore, the action of the Department was "substantially justified."

ORDER

Based upon the foregoing, TRI's Petition for Attorney's Fees and Costs is denied.

DONE AND ORDERED this 19th day of April, 2001, in Tallahassee, Leon County, Florida.

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CHARLES A. STAMPELOS  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 19th day of April, 2001.

ENDNOTES

1/ In paragraph 7 of its Formal Written Protest, TRI suggested that "[a]s a consequence of the ambiguity of the ITB, all bids

should be rejected and the ITB should be re-bid." The Department seems to agree.

2/ Notwithstanding the Department's decision to re-bid the contract, the undersigned's intent was to recommend that the Department accept TRI's bid as a responsive bid, award the contract to TRI because TRI offered the highest discount for the required Tandberg products, and to re-bid the contract only if the Department rejected ["declines to award"] TRI's bid by rejecting one or more findings of fact and conclusions of law in the Recommended Order, regarding the responsiveness of TRI's bid or other material issues.

COPIES FURNISHED:

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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 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.