STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RHC AND ASSOCIATES, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 02-3922F
	)	
HILLSBOROUGH COUNTY SCHOOL BOARD,	)	
	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

This cause came before T. Kent Wetherell, II, the designated administrative law judge of the Division of Administrative Hearings, on Petitioner's Amended Motion for Attorney's Fees and Costs, filed on October 29, 2002.

APPEARANCES

For Petitioner: George P. Kickliter, Esquire
RHC and Associates, Inc.
Post Office Box 17326
Clearwater, Florida 33762-0326

For Respondent: W. Crosby Few, Esquire
Few & Ayala
501 East Kennedy Boulevard
Suite 1401
Tampa, Florida 33602

and

Jason L. Odom, Esquire
Thompson, Sizemore & Gonzales, P.A.
501 East Kennedy Boulevard
Suite 1400
Tampa, Florida 33602

ISSUE PRESENTED

The issue is whether Petitioner is entitled to an award of attorney's fees and costs under Section 57.111, Florida Statutes, as a prevailing small business party in DOAH Case No. 02-2230BID.

PRELIMINARY STATEMENT

On October 7, 2002, Petitioner filed a motion for attorney's fees and costs in DOAH Case No. 02-2230BID. The motion sought an award of attorney's fees and costs against the Hillsborough County School Board (Respondent, School Board, or District) pursuant to Sections 57.041, 57.071, 57.105, 57.111, and 120.595(3), Florida Statutes. In accordance with the standard practice of the Clerk of the Division of Administrative Hearings (Division), in cases where the underlying Recommended Order does not reserve jurisdiction on the issue of attorney's fees and costs, Petitioner's motion was assigned a new case number as reflected above.

On October 11, 2002, Respondent filed a motion to dismiss Petitioner's motion for attorney's fees and costs. Respondent's motion was disposed of through an Order dated October 15, 2002.

The October 15, 2002 Order denied Petitioner's request for attorney's fees and costs under Sections 57.041, 57.071, 57.105, and 120.595(3), Florida Statutes. The Order also dismissed

Petitioner's motion without prejudice with respect to the request under Section 57.111, Florida Statutes, and gave Petitioner leave to file an amended petition for attorney's fees and costs which complied with Section 57.111, Florida Statutes.

On October 29, 2002, Petitioner filed an Amended Motion for Attorney's Fees and Costs (Amended Motion) with supporting affidavits. In compliance with October 15, 2002 Order, Respondent filed a response to the Amended Motion on November 12, 2002. The response included some, but not all of the information required by the Initial Order issued in this case on October 9, 2002. Accordingly, a telephonic case management conference was held on November 21, 2002, to discuss the scope of the issues remaining to be litigated and the need for an evidentiary hearing.

At the case management conference, the parties stipulated that an evidentiary hearing was not necessary. The parties further agreed that the disposition of this case should be based upon the record of DOAH Case No. 02-2230BID (which is hereby officially recognized)[1] ; the Final Order in DOAH Case No. 02-3138RP (which is hereby officially recognized); and the pleadings, affidavits and legal memoranda filed in this case, along with the parties' stipulations outlined below.

The School Board stipulated at the case management conference that Petitioner is a small business party (in light

of the uncontested affidavit of Petitioner's president and majority owner), that Petitioner was a prevailing small business party in DOAH Case No. 02-2230BID (in light of the final order issued by the School Board adopting the Recommended Order in that case), and that the attorney's fees and costs incurred by Petitioner in DOAH Case No. 02-2230BID were reasonable (in light of the uncontested affidavit of Petitioner's attorney). The School Board disputed that it "initiated" DOAH Case No. 02-2230BID for purposes of Section 57.111, Florida Statutes; however, the School Board did stipulate that the request for qualifications (RFQ) at issue in DOAH Case No. 02-2230BID did not include any language advising substantially affected persons of their right to challenge the specifications of the RFQ (putting aside the question of whether it was required to do so).

The parties were given an opportunity to file supplemental legal memoranda on their respective positions no later than December 13, 2002. Neither did so.

FINDINGS OF FACT

Based upon the pleadings, affidavits, stipulations, and the matters officially recognized, the following findings are made:

A. Parties

1. Petitioner is an engineering firm whose principal office is located in Tampa, Florida.

2. Petitioner is certified as a minority-owned business by the State of Florida and the School Board. Petitioner's majority owner and president is an African-American male. At all times material hereto, Petitioner had less than 25 full-time employees or a net worth less than $2 million.

3. Respondent is a local school district of the State of Florida.

4. Respondent is responsible for the construction, renovation, management, and operation of the public schools in Hillsborough County. To fulfill those responsibilities, Respondent is often required to obtain the services of architects, engineers, and other professionals through competitive procurement under Section 287.055, Florida Statutes, the Consultants' Competitive Negotiation Act (CCNA).

B. DOAH Case No. 02-2230BID

5. On May 21, 2002, the School Board published a notice in the Tampa Tribune announcing its need for professional architectural and/or engineering services to supplement its in-house staff of architects and inspectors in order to provide increased on-site supervision, management, and inspection on ongoing school construction projects.

6. The notice is a request for qualifications (RFQ), and is subject to the provisions of the CCNA.

7. A report prepared by the Ernst & Young consulting firm based upon its “forensic evaluation and analysis of the District’s construction and maintenance policies, practices, and procedures” had recommended augmenting the District’s staff in the manner described in the RFQ.

8. At the time the RFQ was advertised, the only adopted policy governing the School Board's acquisition of professional services was Section 7.14 of the Hillsborough County School Board Policy Manual (Policy Manaual). Section 7.14 did not specifically reference the CCNA and simply included a general authorization for the Superintendent of the District or his or her designee to “contract for professional or educational services to complete projects or activities authorized or approved by the school board.”

9. The only other description of Respondent’s procurement process under the CCNA in existence at the time the RFQ was advertised was a document entitled "Capital Projects Standard Procedures" which was presented to but never adopted by the School Board. That document references the CCNA in connection with the selection of architects and construction managers, but not engineers, and it only provided a general outline of the selection process.

10. The RFQ did not specifically reference or otherwise incorporate Section 7.14 of the Policy Manual or the “Capital

Projects Standard Procedures" document, nor did the RFQ explain the criteria or factors upon which the responses to the RFQ would be evaluated or the weight that would be given to each factor.

11. The RFQ did not specifically inform potential Respondents of their right to file a protest challenging the specifications, nor did it include the language provided in Section 120.57(3)(a), Florida Statutes.

12. Petitioner timely filed a notice of protest and formal written protest challenging the specifications in the RFQ pursuant to Section 120.57(3)(b), Florida Statutes. Among other things, Petitioner challenged the absence of evaluation criteria in the RFQ and the absence of a formally-adopted policy governing the procurement process. Petitioner's protest was referred to the Division, where it was assigned DOAH Case No. 02-2230BID.

13. A formal administrative hearing was held on the protest, and on September 6, 2002, a Recommended Order was issued in DOAH Case No. 02-2230BID (hereafter "Specification Protest Recommended Order"). The Specification Protest Recommended Order agreed with Petitioner that the specifications in the RFQ were deficient and, more specifically, concluded that:

> the School Board's current selection process is deficient because neither the RFQ or the School Board's existing policies and procedures specify in advance the factors upon which the responses will be evaluated nor do they identify the weight which the School Board will give to each criteria. The process is also deficient because the selection committee members do not utilize a uniform method of evaluating the respondents. These deficiencies affect the integrity of the School Board's selection process and subvert the policies underlying Section 287.055 and competitive procurement generally. Accordingly, Petitioner met its burden of showing that the RFQ specifications are arbitrary and contrary to competition.

Specification Protest Recommended Order, at 36 (paragraph 85) (emphasis in original).

14. That conclusion was consistent with the report prepared by Ernst & Young, the following excerpts from which are pertinent here:

> [W]e have identified significant shortcomings related to ranking the professional service providers that have submitted bids for either architectural design, engineering, or construction management services.
>
> * * *
>
> [T]he architects and construction managers within the [architectural/ engineering/construction (A/E/C)] community do not understand how vendors are evaluated or ultimately rank ordered [sic] by the District to arrive at a list of the three highest ranked respondents. As a matter of fact, the District has moved away from using a score sheet or "score card"

with pre-established evaluation criteria and a weighted point structure, and toward a rather subjective process whereby a selection committee simply appoints professional service providers either based upon past performance on a similar type of project (i.e. replicate design) or based upon the District's desire to equitably distribute work amongst the A/E/C community. This type of evaluation and selection process, as currently utilized by the District, while effective at distributing work amongst the A/E/C community, does not ensure that the best or most qualified vendor will be selected for each of the proposed school district projects. The current vendor selection process could permit abuse and favoritism as the selection committee could be influenced by School Board input, personal relationship [sic] and lack of objective criteria. Although we found no evidence of undue influence, the subjective nature of the process offers the District little credibility.

* * *

E&Y [Ernst & Young] found that the vendor selection process being utilized by [the District] lacks credibility in that it remains highly subjective as new projects are allocated without respect to numerical analysis of prior performance, company financial condition, proposed project management team, etc. Moreover, the selection committees do not rotate sufficiently to eliminate the possible influence from senior [District] Administrators or Board Members.

* * *

Upon comparison to each of the peer and contiguous school districts, Ernst & Young found that only [the District] engages in a vendor selection process in the absence of pre-established or pre-determined evaluation

> criteria and a numerically-based scoring system which permits a numerical ranking of each interested professional service provider. E&Y found that the vendor selection process being utilized by [the District] lacks credibility in that it remains highly subjective as new projects are allocated without respect to numerical analysis of proper performance, company financial condition, proposed project management team, etc. . . .
>
> * * *
>
> The District's vendor selection process can be more objective and better understood within the A/E/C community by developing standard evaluation criteria and a numerically-based scoring system. Such a system will permit the District to numerically rank each interested professional service provider and thus eliminate bias and potential favoritism of the [District] selection committee. Evaluation criteria should include, among other things, prior performance, company financial condition, proposed project management team, etc. . . .

E&Y Report, at 27-29, 107, 117.

15. The Ernst & Young report was formally transmitted to the School Board on May 17, 2002, which is four days prior to the date that the RFQ was published in the Tampa Tribune.

16. The Specification Protest Recommended Order and the Ernst & Young report were not critical of all aspects of Respondent's procurement process. Both concluded that the procedural elements of the evaluation process utilized by the

School Board were consistent with the procedural requirements in the CCNA.

17. Specifically, the Ernst & Young report stated "[o]ur review of [the District's] vendor's [sic] selection process indicates in many respects, that the process follows traditional requirements established by SREF [State Requirements for Educational Facilities] and Florida Statute[s] . . . [and], in many instances, the procedures mirror those utilized by peer and contiguous school districts" (E&Y Report, at 27), and the Specification Protest Recommended Order similarly concluded that:

> the School Board's current selection process, although not detailed in a formally-adopted rule or policy, is consistent with the procedural requirements of the CCNA. The only material difference is that the School Board has consolidated the second and third steps in the process -- i.e., qualification and competitive selection -- by interviewing every respondent and not just three pre-qualified firms as required by Section 287.055(4)(a). Accordingly, Petitioner failed to show that specifications of the RFQ are contrary to the School Board's governing statutes (i.e., Section 287.055) or its rules or policies.

Specification Protest Recommended Order, at 35-36 (paragraph 84).

18. Nevertheless, based upon the deficiencies in the RFQ described above, the Specification Protest Recommended Order recommended that:

> the School Board issue a final order that rescinds the request for qualifications published May 21, 2002, and reformulates the specifications of the request in a manner that, at a minimum, advises potential respondents in advance of the factors upon which the responses will be evaluated and the weight that will be uniformly given to each factor by the selection committee.

Id. at 37.

19. The School Board adopted the Specification Protest Recommended Order at its meeting on October 1, 2002, and consistent with the recommendation therein it rescinded the RFQ.

C. DOAH Case No. 02-3138RP

20. In response to the Ernst & Young report and Petitioner's challenge to the RFQ specifications (and while DOAH Case No. 02-2230BID was pending), the School Board initiated the rulemaking process under Chapter 120, Florida Statutes, to adopt new policies and summaries of procedures to govern the acquisition of professional services pursuant to the CCNA.

21. Petitioner timely challenged the proposed new policies and summaries of procedure pursuant to Section 120.56(2), Florida Statutes. The challenge was assigned DOAH Case No. 02-3138RP.

22. A formal administrative hearing was held, and on October 11, 2002, a Final Order was issued in DOAH Case No. 02-3138RP (hereafter "Rule Challenge Final Order"). The Rule Challenge Final Order dismissed Petitioner's challenge to all of

the proposed new policies and summaries of procedures except for that portion of proposed Section 7.31 of the Policy Manual which provided that interviews are optional for projects costing less than $1 million.

23. The procedural aspects of the new policies and summaries of procedure are essentially the same as the practice followed by the School Board in the past pursuant to Section 7.14 of the Policy Manual and the unadopted "Capital Project Standard Procedures" document. However, the new policies and summaries of procedure addressed the deficiencies in the substantive elements of the School Board's procurement process. In this regard, the Rule Challenge Final Order included the following observation:

> [T]he Proposed Rules address the fundamental deficiencies in the School Board's procurement process that were identified in the Ernst & Young report and the Recommended Order in DOAH Case No. 02-2230BID. The Proposed Rules require the factors/criteria upon which the applicants will be evaluated and the weights [sic] that will be given to each factor to be formulated and provided to the applicants in advance of each solicitation, and they require uniformity in the evaluation and scoring of the applicants by the Committee. The Proposed Rules also provide the necessary framework for the preparation of the project-specific forms and materials which will be prepared in connection with each RFQ/RFP, and they provide a discernable standards against which to judge those materials in the event of a Section 120.57(3) protest of the

> specifications of the RFQ/RFP or the award of the contract arising therefrom.

Rule Challenge Final Order, at 57-58 (paragraph 145).

24. The Rule Challenge Final Order was not appealed.

D. Attorney's Fees and Costs Incurred by Petitioner

25. Petitioner was represented in DOAH Case No. 02-2230BID by attorney George Kickliter.

26. Mr. Kickliter spent 25 hours on Petitioner's behalf in DOAH Case No. 02-2230BID, and he charged Petitioner a fee of $200.00 per hour. Accordingly, Petitioner incurred a total of $5,000.00 in attorney's fees in DOAH Case No. 02-2230BID.

27. Petitioner incurred costs in the amount of $563.00 in DOAH Case No. 02-2230BID. That amount is attributable to the cost of the Transcript of the final hearing in that proceeding.

28. Respondent stipulated that the attorney's fees and costs incurred by Petitioner in DOAH Case No. 02-2230BID were reasonable.

CONCLUSIONS OF LAW

A. Jurisdiction

29. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 57.111, 120.569, and 120.57(1), Florida Statutes. (All references to Sections are to the

Florida Statutes (2001), except as otherwise indicated. All references to Rules are to the Florida Administrative Code.)

B. Section 57.111

30. The purpose and intent of Section 57.111, the Florida Equal Access to Justice Act (FEAJA), is as follows:

> The Legislature finds that certain persons may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense of civil actions and administrative proceedings. Because of the greater resources of the state, the standard for an award of attorney's fees and costs against the state should be different from the standard for an award against a private litigant. The purpose of this section is to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in certain situations an award of attorney's fees and costs against the state.

Section 57.111(2). And see Dept. of Health and Rehabilitative Servs. v. South Beach Pharmacy, Inc., 635 So. 2d 117, 121 (Fla. 1st DCA 1994) ("The Act is designed to discourage unreasonable governmental action, not to paralyze agencies doing the necessary and beneficial work of government.").

31. In furtherance of the stated legislative purpose and intent, Section 57.111(4)(a) provides:

> 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.

32. Section 57.111(3)(f), which defines "state agency" for purposes of the FEAJA, specifically cross-references Section 120.52(1) which defines “agency” to include "educational units," see Section 120.52(1)(b)7., which in turn is defined in Section 120.52(6) to include local school districts. And cf. Witgenstein v. School Board of Leon County, 347 So. 2d 1069, 1071 (Fla. 1st DCA 1977). Accordingly, Respondent is a "state agency" for the purposes of the FEAJA.

33. The School Board stipulated that Petitioner is a small business party and that Petitioner was a prevailing small business party in DOAH Case No. 02-2230BID. Accordingly, the only issues in this proceeding are (1) whether DOAH Case No. 02-2230BID was initiated by the School Board for purposes of the FEAJA, and (2) whether the actions of the School Board in DOAH Case No. 02-2230BID were substantially justified or whether special circumstances exist which would make and award of attorney's fees and costs to Petitioner unjust. Each issue will be addressed in turn.

1. Initiation of DOAH Case No. 02-2230BID

34. A proceeding is "initiated by a state agency" for purposes of the FEAJA when that the state agency:

1. Filed the first pleading in any state or federal court in this state;

> 2. Filed a request for an administrative hearing pursuant to chapter 120; or
>
> 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.

Section 57.111(3)(b) (emphasis supplied).

35. Subparagraphs 57.111(3)(b)1. and 2. are clearly inapplicable. Accordingly, only if Subparagraph 57.111(3)(b)3. applies can it be determined that DOAH Case No. 02-2230BID was initiated by the School Board for purposes of an award under the FEAJA.

36. It is undisputed that the School Board did not provide Petitioner or other substantially affected parties a "point of entry" in connection with the publication of the RFQ. However, the issue is not whether it did so, but whether it "was required by law or rule to do so."

37. Section 120.57(3)(a) requires agencies subject to Chapter 120 (which includes local school districts pursuant to Sections 120.52(1)(b)7. and 120.52(6)) to provide notice of their decision or intended decision concerning a competitive procurement solicitation or contract award.[2] Section 120.57(3)(a) further provides that:

> The notice required by this paragraph shall contain the following statement: "Failure to file a protest within the time prescribed

> in s. 120.57(3), Florida Statutes, shall constitute a waiver of proceedings under chapter 120, Florida Statutes."

38. As noted in the Specification Protest Recommended Order (Pages 20-21, Paragraphs 53-55), there are two types of protests that can be filed under Section 120.57(3) to challenge an agency's competitive procurement decision or intended decision: (1) protests to the specifications in the procurement document and (2) protests to the agency's intended award. And see Section 120.57(3)(b) (describing the time for filing a notice of protest at each point in the competitive procurement process).

39. It is clear that an agency is required to provide a point of entry to challenge its intended award of a competitively-procured contract. That point of entry is provided through the statement required by Section 120.57(3)(a), and that has been considered to be the initiation of a proceeding by the state agency for purposes of the FEAJA even though the disappointed bidder initiated the protest in the traditional sense by filing the protest. See, e.g., Reymore v. Department of Revenue, DOAH Case No. 96-1123F, 1996 WL 1060258 (Oct. 31, 1996); Mid America Governmental Group v. Daytona Beach Community College, DOAH Case No. 96-1335F, 1996 WL 1060269 (Oct. 18, 1996); Pickett, Fanelli & O'Toole v. Department of Revenue, DOAH Case No. 96-1122F, 1996 WL 1060257 (Aug. 14, 1996); Belveal

v. Department of Revenue, DOAH Case No. 94-3926F, 1994 WL 1028217 (Dec. 19, 1994); Proctor v. Department of Health and Rehabilitative Services, DOAH Case No. 93-0263F, 1993 WL 943745 (Sept. 3, 1993).

40. The same result is appropriate with respect to a specification protest. Indeed, because the purpose of a specification protest is to ensure fair competition amongst potential Respondents, see Capaletti Bros., Inc. v. Department of Transportation, 499 So. 2d 855, 857 (Fla. 1st DCA 1986), the competitive procurement process is equally undermined by vague, arbitrary, or otherwise unreasonable project specifications (whether in a RFQ or other solicitation) as it is by an arbitrary or otherwise improper award of the contract. See Specification Protest Recommended Order, at 33-34 (paragraph 82) (citing Deloitte & Touche LLP v. Department of Health & Rehabilitative Services, DOAH Case No. 95-0727BID, Recommended Order (May 12, 1995), and other decisions describing the importance of adequate specifications to the competitive procurement process).

41. The Uniform Rules of Administrative Procedure, which are adopted pursuant to Section 120.54(5) and are referenced in Section 120.57(3)(a), support the conclusion that notice and a point of entry must be provided at both points in the procurement process, i.e., publication of the specifications and

publication of the intended award. Specifically, Rule 28-110.002(2)(a) defines "decision or intended decision" (which is the phrase used in Section 120.57(3)(a) to trigger the notice requirement) to include "[t]he contents of an [invitation to bid] or a [request for proposals] or other specifications, including addenda." (emphasis supplied).

42. Read together, Section 120.57(3)(a) and Rule 28-110.002(2)(a) require agencies to advise adversely affected persons (through the statement provided in Section 120.57(3)(a)) of their opportunity to file a protest the specifications as well as the intended award of the contract. Accordingly, the School Board was required by statute and rule to provide a point of entry to persons such as Petitioner in connection with its posting of the RFQ, and as a result, the School Board initiated DOAH Case No. 02-2230BID for purposes of the FEAJA. See Section 57.111(3)(b)3.

2. Substantial Justification or Special Circumstances

43. The School Board has the burden to demonstrate that its actions were substantially justified or that special circumstances exist that would make an award of attorney's fees and costs to Petitioner unjust. See Helmy v. Department of Business & Professional Reg., 707 So. 2d 366, 368 (Fla. 1st DCA 1998); South Beach Pharmacy, 635 So. 2d at 121; Department of

Professional Reg. v. Toledo Realty, Inc., 549 So. 2d 715, 717-18 (Fla. 1st DCA 1989).

a. Substantial Justification

44. Section 57.111(3)(e) provides that 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." This standard has been described as "fall[ing] somewhere between the no justiciable issue standard in Section 57.105 . . . and an automatic award of fees to a prevailing party." Helmy, 707 So. 2d at 368. See also Department of Health & Rehabilitative Services v. S.G., 613 So. 2d 1380, 1386 (Fla. 1st DCA 1993) (explaining that non-frivolous does not equate to substantially justified).

45. To demonstrate that its actions were substantially justified, the agency must show that it had "a solid though not necessarily correct basis in fact and law for the actions that it took." S.G., 613 So. 2d at 1386 (quoting McDonald v. Schweiker, 726 F. 2d 311, 316 (7th Cir. 1983)); Fish v. Department of Health, 825 So. 2d 421, 423 (Fla. 4th DCA 2002) (same). At the very least, the agency must "have a working knowledge of the applicable statutes under which it is proceeding." Helmy, 707 So. 2d at 370.

46. Applying the foregoing standards to this case presents a close question. On one hand, the procurement practice

followed by the School Board at the time the RFQ was published was found to be "consistent with the procedural requirements of the CCNA," even though it was not formally adopted through rule or policy (Specification Protest Recommended Order, at 35-36), which clearly suggests that Respondent had at least a working knowledge of the CCNA. However, the School Board's failure to articulate in advance the standards by which the responses to the RFQ would be evaluated was found to be inconsistent with well-established competitive procurement law (id. at 32-35), and had also been criticized by the Ernst & Young just days before the RFQ was published (E&Y Report, at 27-29, 107, 117). These factors strongly undercut the reasonableness of the School Board's decision to publish the RFQ.

47. On balance, it is concluded that the School Board was not substantially justified for purposes of Section 57.111 when it published the RFQ without any explanation as to the factors that it would use to evaluate the responses or the weight that would be given to those factors despite well-established law requiring such and despite the findings of the Ernst & Young report. In this regard, the School Board could have avoided DOAH Case No. 02-2230BID altogether by simply rescinding the RFQ upon receipt of Petitioner's notice of protest or formal written protest (which alleged deficiencies nearly identical to those detailed in the Ernst & Young report) while it addressed the

deficiencies through the adoption of new polices and summaries of procedures. Had it done so, Petitioner would not have been forced to incur the attorney's fees and costs that it incurred in seeking review of the RFQ through the specification protest. On this point, the following observations from Courtenay v. Department of Health & Rehabilitative Servs., 581 So. 2d 621 (Fla. 5th DCA 1991), are relevant:

> The bid procedure was fashioned to discourage discriminatory governmental awards and to assure the procurement of the best value in exchange for public funds. When the procedure is not followed, those objectives are not achieved. Potential bidders either may decline to participate in bidding or may be tempted to add premiums to the bids for having to deal with the bureaucracy. The best that this court can do is to award attorney's fees to the challenging bidder who must have more courage than a Mississippi riverboat gambler. The bidder must gamble on winning during the original bidding procedure, but if he loses as a result of an unfair bid procedure, he must then gamble that he will prevail in a three-stage procedure-- once before the hearing officer, once before the agency, and, finally, before the appellate court. The stakes of the gamble are that he will be reimbursed the costs and attorney's fees to obtain that which he was originally guaranteed statutorily-- an opportunity to obtain an award in a fair arena.

Id. at 623-24.

48. In making the foregoing determination that the School Board was not substantially justified when it published the RFQ,

the undersigned has not given any weight to the fact that the new policies and summaries of procedures were upheld in DOAH Case No. 02-3138RP because Section 57.l11(3)(e) limits that determination to the circumstances in existence "at time [the proceeding] was initiated by the state agency," which in this case is the publication of the RFQ. As a result, subsequent events are not relevant in determining whether the School Board was substantially justified when it published the RFQ. See Romaguera v. Dept. of Professional Reg., DOAH Case No. 87-3604F, 1988 WL 618003, at **3-4 (Jan. 4, 1988). See also Wisotsky, Practice and Procedure Under the FEAJA, Florida Bar Journal, April 1996, at 31 (noting that the FEAJA differs from the federal Equal Access to Justice Act in that "substantial justification" under the federal Act is based upon the "record as a whole" whereas under the FEAJA it is determined only at the time the action is initiated); Toledo Realty, 549 So. 2d at 718 (noting the same distinction).

49. In sum, Respondent failed to demonstrate that its actions were "substantially justified" and therefore cannot avoid an award of attorney's fees and costs to Petitioner under the FEAJA on that ground.

b. Special Circumstances

50. Despite the foregoing determination that Respondent's actions were not substantially justified, it can still avoid an

award under the FEAJA if it proves that special circumstances exist that would make an award to Petitioner unjust. See Section 57.111(4)(d) (providing that fees shall be awarded to prevailing small business party "unless the actions of the agency were (1) substantially justified or (2) special circumstances exist which would make the award unjust") (emphasis supplied).

51. There is no definition of "special circumstances" in Section 57.111(4)(d). Nor do there appear to be any Florida cases construing that defense.

52. There is, however, federal authority construing the "special circumstances" defense that is codified in the federal Equal Access to Justice Act, 5 U.S.C.A. Section 504. Because the FEAJA was patterned after the federal Equal Access to Justice Act, cases construing the federal Act are persuasive authority in construing the FEAJA. See Gentele v. Dept. of Professional Reg., 513 So. 2d 672 (Fla. 1st DCA 1987).

53. In Grayson Electric Co. v. N.L.R.B., 951 F.2d 1100, 1103 (9th Cir. 1981), the court quoted from a Congressional report which explained that the "special circumstances" defense in 5 U.S.C.A. Section 504(a)(1) "provides a safety valve where unusual circumstances dictate that the government is advancing in good faith a credible, though novel, rule of law." And see Animal Lovers Volunteer Ass'n v. Carlucci, 867 F.2d 1224, 1226

(9th Cir. 1989) (finding no special circumstances because "[t]he litigation on the merits did not involve a close or novel question"); United States v. Gavilan Joint Community College Dist., 849 F.2d 1246, 1249 (9th Cir. 1988) (finding no special circumstances that would permit denial of an award because the case did not involve a novel but credible interpretation of law, an issue on which reasonable minds could differ, or an important and doubtful question).

54. Unlike the substantial justification defense which, by virtue of Section 57.111(3)(e), is limited to circumstances in existence "at time [the proceeding] was initiated by the state agency," the special circumstances defense is grounded in equity and therefore appears to require a broader view of the circumstances of the proceeding which generated the fee request. Accordingly, in determining whether an award under the FEAJA would be equitable (or "unjust"), all of the circumstances of the DOAH Case No. 02-2230BID, including events subsequent to the initiation of the proceeding such as the School Board's successful defense of its new policies and summaries of procedures in the related DOAH Case No. 02-3138RP, are appropriate to be considered.

55. In this regard, the School Board identified three special circumstances which it contends would make an award to Petitioner unjust. First, the School Board contends that it

acted in good faith in adopting the new policies and summaries of procedures to cure the identified deficiencies in its procurement practices. Second, the School Board argues that Petitioner suffered no prejudice in connection with DOAH Case No. 02-2230BID because the RFQ was rescinded prior to an award of the contract. And, third, the School Board points out that new policies and summaries of procedures were upheld in the related DOAH Case No. 02-3138RP.

56. The first and third circumstances relied upon by Petitioner are related and are a variation of the mootness argument previously rejected in the Specification Protest Recommended Order, at pages 26-29. Those circumstances do not constitute "special circumstances" for purposes of the FEAJA. Cf. Martin v. Heckler, 773 F.2d 1145 (11th Cir. 1985) (en banc)(holding that prompt adoption of remedial legislation which provided plaintiffs relief they sought did not constitute special circumstances which would allow agency to avoid a fee award under 42 U.S.C.A. Section 1988 or 28 U.S.C.A. Section 2412), disapproved on other grounds by Texas State Teachers Ass'n v. Garland, 489 U.S. 782, 784, 790 (1989):

> Defendants' good faith, lack of culpability, or prompt remedial action do not warrant a denial of fees under the special circumstances preclusion.
>
> * * *

> The general concept that governmental defendants will accede to complaints that show clear error in the statutes and regulations under which they operate is not sufficient to bar a fee award, if in fact the litigation was the catalyst necessary to bring about governmental action at the time.

Id. at 1150.

57. Moreover, the issue in the DOAH Case No. 02-2230BID -- i.e., whether the specifications in the RFQ were inconsistent with the provisions of Section 287.055, are arbitrary, or are otherwise contrary to competition -- did not involve novel issues of law as referenced in Grason and the cases and Congressional report cited therein. While the question as to whether the School Board's existing practice was consistent with Section 287.055 despite the absence of a formally adopted policy was a close question, the question as to whether the RFQ was arbitrary and contrary to competition was not. Indeed, the latter issue was decided based upon long-standing principles of competitive procurement law and well-settled case law. See Specification Protest Recommended Order, at 32-35.

58. Nor is the second alleged "special circumstance" a sufficient basis to avoid an award of fees and costs under the FEAJA. Indeed, in every case where the small business party prevails in the underlying proceeding, it could be argued that the business suffered no prejudice or injury since it ultimately prevented or defeated the agency action. However, the prejudice

which the FEAJA seeks to remedy is the cost of seeking review of or defending against the agency action. See Section 57.111(2). And cf. Courtenay, supra. In this regard, as discussed above, the fact that the School Board did not rescind the RFQ until after the issuance of the Specification Protest Recommended Order (and after Petitioner was forced to incur over $5,500.00 in attorney's fees and costs) weighs against the School Board not in its favor.

59. In sum, none of the circumstances identified by Respondent constitute "special circumstances," as the counterpart language in the federal Equal Access to Justice Act has been narrowly construed by the federal courts. Therefore, Respondent failed to demonstrate that "special circumstances exist that would make the award [of fees and costs to Petitioner] unjust," and it cannot avoid an award of attorney's fees and costs to Petitioner under the FEAJA on that ground.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is

ORDERED that:

1. Petitioner's Amended Motion for Attorney's Fees and Costs is GRANTED.

2. Respondent shall pay to Petitioner within thirty (30) days of the date of this Order the sum of $5,563.00, which

represents the reasonable attorney's fees and costs incurred by Petitioner in DOAH Case No. 02-2230BID.

DONE AND ORDERED this 3rd day of February, 2003, in Tallahassee, Leon County, Florida.

T. KENT WETHERELL, II
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of February, 2003.

ENDNOTES

1/ Because the School Board, and not the Division, issued the final order in DOAH Case No. 02-2230BID, the Division only retained the pleadings filed in that case. The remainder of the record in DOAH Case No. 02-2230BID -- i.e., Transcript, exhibits, and matters officially recognized -- was transmitted to the School Board with the Recommended Order issued in that case. Respondent filed the exhibits from DOAH Case No. 02-2230BID with the Division on December 13, 2002, and filed the Transcript from that case with the Division on December 23, 2002.

2/ Section 120.57(3) was amended in the 2002 Session. See Chapter 2002-207, Section 2, Laws of Florida (effective July 1, 2002). That Act replaced references to "bidding" in Section 120.57(3), including those references in Section 120.57(3)(a), with the more generic "contract solicitation or award process." The 2002 amendments appear to be clarifying in nature since the Uniform Rules of Administrative Procedure adopted in 1997 interpreted the prior version of Section 120.57(3) to apply to

all competitive procurement decisions and not just those arising out of the competitive bidding process. See Rule 28-110.001(1).

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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 the original notice of appeal with the Clerk of the Division of Administrative Hearings and a 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.