EFiled: Sep 28 2012 03:39PM EDT
Transaction ID 46710388
Case No. 5574-VCN

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September 28, 2012

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Re: *Marra v. Brandywine School District*
C.A. No. 5574-VCN
Date Submitted: June 14, 2012

Dear Counsel:

Plaintiffs Flooring Solutions, Inc. ("Flooring Solutions") and Dominic Marra[1] (collectively, the "Plaintiffs"), seek an award of attorneys' fees from Defendant Brandywine School District (the "District"), its Superintendent, and its school board members (collectively, the "Defendants").[2] The parties have filed cross-motions for summary judgment and, during oral argument, substantially

[1] Dominic Marra is the President of Flooring Solutions.
[2] In addition to the District, the other named defendants are: Dr. Mark A Holodick (Superintendent), Brandywine School Board (the "Board"), and its members, Debra Heffernan, Olivia Johnson-Harris, Joseph Brumskill, Patricia Hearn, Cheryl Siskin, Mark Huxsoll, and Ralph Ackerman. Verified Complaint for Injunctive Relief and Declaratory Judgment. ("Compl.") ¶ 6.

agreed that there are no material facts in dispute.[3] This is the Court's decision on those motions.

I. BACKGROUND

This action arises from a bidding dispute between Flooring Solutions (the bidder) and the District (the owner) over a contract to install rubber flooring for the Brandywood Elementary School renovation project (the "project"). In accordance with 29 *Del. C.* §6923, the District followed a competitive bidding process to solicit bids for the project. The District hired Tetra Tech Architects and Engineers ("Tetra Tech") to be the project design professional and delegated to it the responsibility to secure adequate bids for the project.[4] The project specifications called for three types of rubber flooring: RF1, RF2, and RF3.[5] According to the District, architects often design project specifications around a manufacturer and use the manufacturer's product as a basis of design. For this project, bidders were

[3] Counsel for Plaintiffs stated: "I think the Court is guided by the summary judgment standard. I don't think there are facts in dispute. I think we agree what happened happened." Tr. of Oral Argument ("Tr.") at 17. Counsel for Defendants concurred: "So I do agree that there are no facts in dispute. But as they are applied, I think there are big facts in dispute." Tr. at 20.
[4] Skibicki Dep. 20, Jan. 28, 2011.
[5] Compl. ¶ 9. Each type of flooring has different specifications. For example, RF1 was to be roll (or sheet) flooring for installation in corridors. RF2 was to be rubber tile for installation in classrooms, and RF3 was to be rubber tile for installation in the gymnasium. *Id.*

advised to base their bids on products from Nora Flooring.[6] However, the bidding procedure afforded bidders an opportunity to propose a substitute product by completing a substitution request form.[7] The bid specifications also prescribed at least two performance requirements, including compliance with FloorScore, an industry certification, and that the materials meet certain low emission standards.[8]

On May 10, 2010, before the deadline for the submission of bids, Flooring Solutions timely filed a product substitution request on the form provided by the District. It proposed to utilize products manufactured by Estrie for the three rubber floor types specified in the project specifications. Flooring Solutions included in its request both Nora Flooring product data and Estrie product data so that the characteristics of each could be easily compared. According to the Plaintiffs, the

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[6] Skibicki Dep. 14.

[7] Compl. ¶ 15. The project specification (Section 00100 Instructions to Bidders, Paragraph 3.3.1) states: "Substitutions of products for those named will be considered, providing that the Vendor certifies that the function, quality and performance characteristics of the material offered is equal to or superior to that specified." Paragraph 3.3.2 states: "Requests for substitutions . . . shall include a complete description of the proposed substitution, drawings, performance and test data, explanation of required installation modifications due the substitution, and any other information necessary for an evaluation. The burden of proof of the merit of the proposed substitution is upon the proposer." *Id.*

[8] *Id.* Plaintiffs point out, and Defendants do not contest, that the Nora Flooring products identified for RF1, RF2, and RF3 are not FloorScore certified, even though the project specifications called for this certification. *Id.* at ¶ 13; Answer to Compl. & Mot. for Prelim. Inj. ("Answer") ¶ 13.

Estrie products were FloorScore certified and met the low emission standards required in the bidding specifications.[9]

The District delegated to Tetra Tech the responsibility to evaluate Flooring Solutions' substitution request, albeit with modest supervision. According to the District, Tetra Tech, upon receiving the substitution request, sought to decline the request based solely on the fact that the District was using Nora Flooring as the design basis. However, the District required Tetra Tech's architect to evaluate the request on its merits, which the architect attempted to do by utilizing the information provided on the substitution request form, checking its in-house library of product data, and conducting an Internet search.[10] Ultimately, Tetra Tech's architect deemed the Estrie products as not equivalent to the Nora Flooring product and therefore, the District rejected Flooring Solutions' substitution request on May 18, 2010.[11]

The next day, Flooring Solutions, through counsel, objected to the District's rejection of the substitution request, argued that the proposed Estrie products met

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[9] *Id*. at ¶¶ 16-19.
[10] Skibicki Dep. 22-24, 31-32. Tetra Tech did not find any information on Estrie products in its in-house library or on the Internet. Consequently, it relied solely on the information provided by Flooring Solutions in its substitution request. *Id*.
[11] Compl. ¶ 20.

all the technical requirements, and threatened litigation to preclude a contract award.[12] The District, however, did not respond to the objection or postpone the bidding because bids were slated for opening the following day, May 20, 2010.[13] Consequently, Flooring Solutions was forced to submit an unsuccessful bid based on Nora Flooring products.[14] Thereafter, on May 21, Flooring Solutions, by letter, continued to object to the rejection of the substitution request, and again warned the District of imminent legal action. In response, the District provided a detailed basis for its denial in a letter to counsel for Flooring Solutions on May 24.[15]

The District offered four reasons why it rejected the substitution request. First, the District claimed that the raw rubber material percentage was not identified in the substitution request.[16] Second, the District claimed that the substitution request only proposed two product styles to replace the three Nora

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[12] *Id.* at ¶ 24, Ex. L.

[13] Apparently, the District did not postpone the bid opening (May 20, 2010) because it believed that Delaware law precludes an agency from postponing a bid opening without at least two calendar days' notice. *See* 29 *Del. C.* § 6923(b)(2).

[14] Compl. ¶ 22. Because Flooring Solutions was forced to use Nora Flooring products in its bid, Flooring Solutions' bid increased from $387,340 (based on the Estrie products) to $516,405. Had the substitution request been granted, Flooring Solutions would have been the lowest bidder and presumably would have been awarded the contract. *Id.* at ¶¶ 22-23; Woodruff Aff. ¶ 3.

[15] Compl. ¶ 25, Ex. M.

[16] Compl. ¶ 26. Plaintiffs argue that the bidding specifications did not require a delineation of the rubber percentage, while the defendants claim that it was implied because the bidding specifications called for rubber flooring.

Flooring products identified in the project specifications.[17] Third, the District found that for RF3 rubber floor type, the proposed Estrie product was 0.375mm thinner than the specified Nora Flooring product.[18] Finally, the District stated that Estrie products did not offer sufficient color options for the project, even though no colors had been selected for the project yet.[19]

Not satisfied with the District's basis for denial, Flooring Solutions' counsel again objected, warned of its intention to file a complaint, and inquired as to whether (and when) the District would award the floor covering contract under the problematic product specifications.[20] The District responded by stating only that the floor covering contract would not be awarded within the next two weeks.[21] Consequently, Flooring Solutions delayed seeking a temporary restraining order.[22] However, because the District did not thereafter respond to Flooring Solutions' continued objections, and Plaintiffs were concerned that the District would award

[17] *Id.* at ¶ 27. Plaintiffs argue that the substitution request did include an equivalent Estrie product for each of the three Nora Flooring products.
[18] *Id.* at ¶ 28. Plaintiffs contend that the difference in thickness is nominal. The District has not countered this assertion. Answer ¶ 28.
[19] *Id.* at ¶ 29. Plaintiffs note that the Estrie products have a wide variety of colors and, for some types, more colors than the comparable Nora Flooring product.
[20] Petrone Aff. Ex. G.
[21] *Id.*
[22] *Id.*

the contract before the statutorily imposed thirty-day deadline,[23] Flooring Solutions filed its complaint on June 17, 2010 (the "Complaint") and then, on June 29, 2010, a Motion for Preliminary Injunction. In its Complaint, Flooring Solutions alleged that the bidding specifications were ambiguous, the bidding process was unfair, and that the District improperly imposed a sole source specification in violation of 29 *Del. C.* § 6965.[24] Plaintiffs also sought recovery of attorneys' fees incurred in bringing this action. On July 8, the District notified, by letter, counsel for Flooring Solutions that the project would be rebid at a later date. Then on August 2, 2010, the District filed an Answer to Complaint and Motion for Preliminary Injunction in which it stated that the solicitation had been withdrawn, rendering the Plaintiffs' Complaint and Motion for Preliminary Injunction moot.[25]

According to the District, the project was rebid because it was over budget, and not because of Flooring Solutions' suit against the District.[26] The Plaintiffs, on

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[23] *See* 29 *Del. C.* § 6962(d)(13).

[24] Compl. ¶¶ 39-40, 42. This statute forbids sole source specification unless there is "sufficient evidence that there is only 1 source for the required public works project and that no other type of public works project will satisfy the requirements of the agency."

[25] Answer ¶¶ 47-48.

[26] Read Dep. 43, Jan. 14, 2011. Plaintiffs contest this assertion by pointing to the fact that the project was subsequently rebid for more than the original bid amount. However, this fact alone does not prove that the District was disingenuous as to its reasons for rebidding the project. In any event, the District's construction manager testified that the ambiguous bidding specifications

the other hand, believe that the decision to rebid the project was a direct consequence of their lawsuit and objective evidence of Defendants' bad faith.[27]

II. CONTENTIONS

Plaintiffs argue that Defendants, over the course of the bidding process and in a variety of ways, acted in bad faith. For example, they assert that the District thoughtlessly rejected their substitution request and had, in fact, no intention of allowing any substitute products at all. As a result, Plaintiffs argue, they were forced to take action to secure their legal right to a fair and competitive bidding process, incurring substantial legal fees and costs as a result. They further contend that Defendants improperly reviewed and rejected the substitution request, failed to respond timely to their objections, and waited until after the Complaint and Motion for Preliminary Injunction had been filed to notify Flooring Solutions that the job would be rebid.[28] Finally, as further evidence of bad faith, Plaintiffs allege that

played a small part in the decision to rebid. *Id.* at 47. He also testified that he was not aware of the suit when he called for the project to be rebid. *Id.* at 42.

[27] *See* Pls.' Cross Opening Br. Supp. Claim for Attorneys' Fees at 18, 20-21.

[28] *Id.* at 16.

Defendants' rationale for dismissing the substitution request was contrived after the fact and with the help of a competitor of Flooring Solutions.[29]

Defendants, in turn, contest these allegations of bad faith by arguing that the proposed substitute products were not equivalent to the specified Nora Flooring product, and therefore the decision to reject the substitution request was not improper. Even if that decision were incorrect, Defendants contend that the decision to reject the substitution request was not done in bad faith and that the evidence in the record does not clearly show that they acted in bad faith.[30] Defendants further contend that their review of the substitution request was adequate, that they responded timely and appropriately to Flooring Solutions' objections, and that the bid award was canceled because of cost over-runs, not because of the pending lawsuit against the District.[31] Finally, Defendants argue that the District did not engage in sole source procurement.[32]

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[29] *Id.*
[30] Defs.' Cross Opening Br. Supp. Mot. Summ. J. at 10-12.
[31] *Id.* at 7.
[32] *Id.* at 12-13. The District provided two other manufacturers' products (Roppe and Johnsonite) that Tetra Tech deems equivalent to the Nora Flooring products and that the District has used in the past. Skibicki Dep. 55.

III. ANALYSIS

A. *Summary Judgment Standard*

Defendants and Plaintiffs have each filed cross-motions for summary judgment. As noted above, during oral argument, both sides substantially agreed that there are no facts in dispute.[33] Although some factual differences may still exist between the parties, those differences are immaterial.

"Summary judgment is granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[34] Pursuant to Court of Chancery Rule 56(h), if the parties filing cross-motions for summary judgment have not presented an argument that "there is an issue of fact material to the disposition of either motion, 'the Court shall deem the motions to be the equivalent of a stipulation for decision on the

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[33] *See supra* note 3.
[34] *Twin Bridges Ltd. P'ship v. Draper*, 2007 WL 2744609, at *8 (Del. Ch. Sept. 14, 2007) (citing Ct. Ch. R. 56(c)).

merits based on the record submitted with the motions.'"[35] Thus, the usual standard for drawing inferences in favor of the nonmoving party does not apply.[36]

B. *Request for Attorneys' Fees and Costs*

In considering the Plaintiffs' request for an award of fees, the Court notes that typically litigants must pay their own attorneys' fees and expenses under the American Rule.[37] Only rarely do Delaware courts deviate from this standard.[38] Nevertheless, a well-established equitable exception to the American Rule is the bad faith exception.[39] "Although there is no single definition of bad faith conduct, courts have found bad faith where parties have unnecessarily prolonged or delayed litigation, falsified records, or knowingly asserted frivolous claims."[40] The party invoking the bad faith exception "bears the stringent evidentiary burden of producing 'clear evidence' of bad-faith conduct" by the opposing party.[41] "The

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[35] *Farmers for Fairness v. Kent County*, 940 A.2d 947, 954-55 (Del. Ch. 2008) (quoting Ct. Ch. R. 56(h)).
[36] *Id*. at 955.
[37] *Goodrich v. E.F. Hutton Group, Inc.,* 681 A.2d 1039, 1043-44 (Del. 1996).
[38] *See Weinberger v. UOP, Inc.,* 517 A.2d 653, 654 (Del. Ch. 1986) (noting that "Delaware courts have been very cautious in granting exceptions" to the American Rule).
[39] *Johnston v. Arbitrium (Cayman Islands) Handels AG,* 720 A.2d 542, 546 (Del. 1998) (citations omitted).
[40] *Id*.
[41] *Beck v. Atl. Coast PLC*, 868 A.2d 840, 850-51 (Del. Ch. 2005) (citing *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225, 232 (Del. Ch. 1997), *aff'd*, 720 A.2d 542 (Del.

standard is arduous: situations in which a party acted vexatiously, wantonly, or for oppressive reasons."[42] Generally, a party acting merely under an incorrect perception of its legal rights does not engage in bad-faith conduct;[43] rather, the party's conduct must demonstrate "an abuse of the judicial process and clearly evidence[ ] bad faith."[44] Although the Court has broad discretion,[45] it will not award attorneys' fees lightly under this exception.[46]

1998) ("A finding of bad faith involves a higher or more stringent standard of proof, i.e., 'clear evidence.'"); *see also Paradee v. Paradee*, 2010 WL 3959604, at *16 (Del. Ch. Oct. 5, 2010) (awarding attorneys' fees for egregious pre-litigation conduct); *Weinburger*, 517 A.2d at 656 (the pre-litigation conduct must have been in "bad faith, . . . totally unjustified, or the like.").

[42] *Branson v. Branson*, 2011 WL 1135024, at *1 (Del. Ch. Mar. 21, 2011) (quoting *Merrill Lynch Trust Co. FSB v. Campbell*, 2009 WL 2913893, at *13 (Del. Ch. Sept. 2, 2009); *see also Judge v. City of Rehoboth Beach*, 1994 WL 198700, at *2 (Del. Ch. Apr. 29, 1994) ("to constitute bad faith, the defendants' action must rise to a high level of egregiousness.")

[43] *Mother African Union First Colored Methodist Protestant Church v. Conference of African Union First Colored Methodist Protestant Church*, 1992 WL 83518, at *10 (Del. Ch. Apr. 22, 1992).

[44] *In re SS & C Techs., Inc. S'holders Litig.,* 948 A.2d 1140, 1151 (Del. Ch. 2008); *see also Kaung v. Cole Nat'l Corp.*, 884 A.2d 500, 506 (Del. 2005) ("The purpose of this so-called bad faith exception is to deter abusive litigation in the future, thereby avoiding harassment and protecting the integrity of the judicial process.") (internal quotations omitted); *Montgomery Cellular Holding Co., Inc. v. Dobler*, 880 A.2d 206, 227 (Del. 2005) ("The bad faith exception is applied in 'extraordinary circumstances' as a tool to deter abusive litigation and to protect the integrity of the judicial process.").

[45] *SS & C Techs., Inc.,* 948 A.2d at 1149.

[46] *Nagy v. Bistricer*, 770 A.2d 43, 64 (Del. Ch. 2000).

C. *What Constitutes Bad Faith?*

Plaintiffs cite two primary cases in support of their allegations that the District acted in bad faith. First, Plaintiffs cite *Arbitrium*[47] for the proposition that fees may be awarded "where the defendant in bad faith has forced the plaintiff to bring the lawsuit to enforce a legal claim that the defendant knew was valid."[48] In *Arbitrium*, the Court did not find that defendants' pre-litigation conduct, which involved pervasive deception that obscured plaintiff's investment, alone was enough to justify a determination of bad faith. However, the Court did conclude that the combination of conduct before and during litigation was sufficiently egregious to warrant an award of attorneys' fees. That conclusion was based on evidence that defendants falsified documents, altered testimony, deceived the Court, breached a standstill agreement, repudiated prior representation made to the Court, and disavowed prior litigation positions.[49]

Second, Plaintiffs cite *Judge* to show that bad faith conduct occurs when a defendant's "obstinate refusal to grant a plaintiff her clear legal rights forces the

[47] *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225 (Del. Ch. 1997), *aff'd*, 720 A.2d 542 (Del. 1998).
[48] *Id*. at 231.
[49] *Id*. at 233-37.

plaintiff into a judicial forum to vindicate those rights."[50] The Court found that the defendants acted in bad faith because they acted "contrary to substantial legal authority, the advice of independent counsel, and a judicial declaration."[51]

D. *Is There Clear Evidence That Defendants Acted in Bad Faith?*

Plaintiffs' evidence of Defendants' alleged bad faith conduct simply does not rise to the level of egregiousness required to obtain an award of attorneys' fees. Rather, the evidence suggests that the District's actions, albeit frustrating and perhaps mistaken, were not obstinate, deceptive or inherently unreasonable. For the reasons that follow, the Court concludes that the Defendants' conduct was not so egregious as to warrant an award of attorneys' fees.

First, Plaintiffs do not provide any clear evidence that Defendants purposefully sought to thwart Flooring Solutions' substitution request or impair Flooring Solutions' legal rights. Instead, the evidence tends to show that Defendants rejected it because they believed that it was not equivalent to the Nora Flooring products. Although that belief, perhaps, was not as informed as Floorings

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[50] *Judge*, 1994 WL 198700, at *2.
[51] *Id*. at *5. ("The [defendants'] failure to take notice of this evidence, and in fact, its decision to fly in the face of these authorities, forcing plaintiffs into litigation to vindicate their legal rights, raises a fair inference that defendants acted in bad faith."). *Id*. at *2.

Solutions may have liked, it was not an unreasonable belief, based on the information provided to the District. Moreover, Flooring Solutions, as the proposer of the substitute products, had the burden to provide information on each product.[52]

As for the District's first reason for rejecting the Estrie products, Tetra Tech's architect had a legitimate reason to question whether or not the Estrie products even contained rubber. Even though the substitution request form did not specify that a bidder should include the products' rubber content percentage, the bidding specifications did, in fact, call for rubber flooring. The omission of this information—while including the clay content of the Estrie products—could have reasonably created doubt as to whether the Estrie products were made of rubber.[53] Furthermore, Tetra Tech's concern about Estrie's product colors, although incorrect, was a reasonable concern at the time because the flooring designs for the project anticipated a wide range of colors.[54]

[52] McMackin Aff. Ex. H (Delaware Bidding Instructions); *see supra* note 7.
[53] Plaintiffs contend that the rubber content is proprietary and refused to disclose it to the District. *See* Compl. ¶ 26.
[54] The District, to be fair, should have notified bidders that floor coloring was a consideration upon which the substitution request would be evaluated. But the District's mistake does not show that the District acted in bad faith.

Plaintiffs also contend that the District's rejection of the Estrie products because of their thickness and style reflects bad faith on the part of the District. The Court cannot determine, based on the facts in the record, whether those factors provided a sufficient basis for rejection. Nonetheless, the District had no reason not to rely upon the advice of Tetra Tech as the design professional. Moreover, even if those reasons were not correct, they do not, alone, or in combination with the other reasons the District cited for its rejection of the substitution request, clearly show that the District was acting in bad faith.

Plaintiffs further allege that the District's reasons for rejecting the substitution request were contrived after the fact by pointing to an email written by a Tetra Tech architect. In that email, the architect wrote: "I know last week Tom [a Nora Flooring representative] gave a few quick blurbs over the phone on why it is not equivalent, but now it's time to prove it."[55] This statement, however, is far from supporting a strong inference that the District's reasons for denying the request were made after the fact. At best, it proves that the District's initial reasons for rejecting the substitution request needed elaboration and further documentation. Plaintiffs make much of the fact that the District's reasons for rejecting the

[55] Petrone Aff. Ex. E.

substitute products were allegedly made with scant investigation and with the help of Nora Flooring representatives. That conduct, however, does not demonstrate, either clearly or necessarily, that Defendants engaged in bad faith conduct, and even if their actions were motivated by bad faith, their actions do not approach the bad faith conduct at issue in *Judge* or *Arbitrium*.

Plaintiffs also complain that the Defendants did not respond to Flooring Solutions' objections and did not inform them as to whether re-bidding was being considered. In this regard, the record is ambiguous. The District may not have always responded to Flooring Solutions' objections promptly or with perfect transparency, but it did respond. The District made sure that Tetra Tech evaluated the Estrie product on its merits and communicated to Flooring Solutions the reasons why the substitution request was denied. It informed Flooring Solutions that it would not award the contract for at least two weeks. And, it eventually notified Flooring Solutions that the project would be rebid, although this occurred after the lawsuit was filed. Plaintiffs have not countered these facts to raise an inference of bad faith.

Furthermore, there is conflicting evidence in the record as to whether or not the District's decision to rebid the flooring project at a later date was due to Plaintiffs' legal actions, as the Plaintiffs suggest, or because of cost overruns, as the District avers.[56] Even if the District did make the decision to rebid because of the pending lawsuit, the Court is not persuaded that this would show bad faith on the part of the District. That might raise a strong inference that the District incorrectly rejected Flooring Solutions' substitution request, but it would not necessarily show that mistake was done in bad faith. Unlike *Judge*, where defendants acted against significant authority to the contrary, the District's rejection of Flooring Solutions' substitution request was, as explained above, at least partly reasonable. In addition, there was no prior adjudication of wrongdoing on the part of the District.[57]

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[56] While the timing of the decision certainly raises an inference that it was done in response to the litigation, as noted above, the District's construction manager testified that he was unaware of the pending lawsuit when he called for the project to be rebid. *See supra* note 26.

[57] Defendants cite *Arbitrium* for the proposition that, in order to shift fees, there must first be an adjudication of wrongdoing. In *Arbitrium*, the Court stated: "without the benefit of an adjudication or (at the very least) a more developed presentation of the defendants' defenses to the § 220 action, the present record is insufficient to support the conclusion that the defendants' opposition was in bad faith." *Arbitrium*, 705 A.2d at 233.

To be sure, the District could have done a better job administering the bidding process. As it admitted, it could have been clearer in the bidding specifications and the criteria upon which it would rely in evaluating a substitution request.[58] It could have responded more timely and transparently to Flooring Solutions' repeated objections. One can understand why the District's actions were so frustrating to Flooring Solutions. It was about to lose a valuable contract because of a potentially erroneousness decision.

But the Court is not convinced that the totality of Defendants' actions amounted to a consistent effort arbitrarily to reject the Estrie products or to engage in sole source procurement. Moreover, Plaintiffs have not provided any evidence evincing deception, abuse of the judicial process, or other unjustified conduct by the Defendants that would rise to the high level of egregious behavior found in *Arbitrium* and the related cases regarding the bad faith exception. Thus, without more, the District's actions are not sufficient to support an award of attorneys' fees to Plaintiffs.

[58] Answer ¶ 40.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs have failed to demonstrate that Defendants' conduct warrants an award of attorneys' fees and expenses. Therefore, Plaintiffs' motion for summary judgment is denied, and Defendants' motion for summary judgment is granted.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K