

Office of Dispute Resolution for Acquisition
Federal Aviation Administration
Washington, D.C.

FINDINGS AND RECOMMENDATIONS

Matter: **Contract Dispute of Condor Reliability Services, Inc.**
 Under Contract No. DTFA04-00-C-20017

Docket No.: **00-ODRA-00162**

Appearances:

For the Contractor, Condor Reliability Services, Inc.: Herman Patel, Field Services Manager; and Rodney Geiman, Contract Administrator

For the FAA Alaska Region: Glenn H. Brown, Esq.

I. Introduction

Condor Reliability Services, Inc. (“Condor”) filed a contract dispute with the Office of Dispute Resolution for Acquisition (“ODRA”) by letter dated and received on August 11, 2000. The dispute was under Contract No. DTFA04-00-C-20017 (the “Contract”), a weather observation services contract administered by the FAA Alaska Region (“Region”). To conform to the requirements of the ODRA Procedural Rule regarding content of contract disputes, 14 C.F.R. §17.25, at the ODRA’s request, Condor provided a supplemental contract dispute filing by letter dated September 7, 2000, and received on September 8, 2000. Thereafter, on September 20, 2000, the Region filed a motion seeking a summary decision that the contract dispute be denied. Condor provided a brief written response to that motion on September 27, 2000. For the reasons set forth herein, the ODRA Dispute Resolution Officer (“DRO”) recommends that the Region’s motion be granted and that the contract dispute be dismissed summarily pursuant to 14 C.F.R. §17.29(a)(3), for failure to state a matter upon which relief may be had.

II. Findings of Fact

1. On July 7, 1999, the Region issued Solicitation No. DTFA04-99-R-20096 for Weather Observation Services at various locations in Alaska, including Deadhorse Airport, Deadhorse, Alaska (the "Solicitation"). (Condor September 7, 2000 letter, page 1). Condor, among others, bid on this Solicitation.
2. The Solicitation contained the following information regarding the Deadhorse Airport work site:

Deadhorse, Alaska – Located approximately 5 miles south of Prudhoe Bay on Alaska's North Slope. Approximate population is 2750 in the Deadhorse/Prudhoe area. Extreme temperatures range from 65 degrees F below zero to 75 degrees F above zero, with average being 21 degrees F below zero and 46 degrees F above zero. There are no food stores. All passenger service is by air.

(*Id.*, Solicitation page C-6).

3. The Solicitation did not indicate anything about airfare, additional lodging costs or the kinds of vehicles the contractor might require in order to traverse the worksite. In its September 7, 2000 letter, Condor implies that it was not aware of such items at the time it bid the contract and that, accordingly, nothing was included for such items within Condor's bid price. (*Id.*)
4. Prior to any award, the Region's Contracting Officer asserts that, on September 13, 1999, she: (1) contacted Condor's Technical/Field Services Manager, Mr. Hemant Patel; (2) notified him that there was a "wide spread" between Condor's bid and that of others as well as a disparity between the Condor bid and the Government's estimate; (3) stated that she hoped that Condor "had not overlooked anything when preparing the proposal"; and (4) requested that Condor verify and confirm its bid amount. The Contracting Officer also alleges that, on

September 15, 1999, not having heard from Condor, she sent Condor a letter seeking bid verification and that, on the afternoon of September 15, 1999, she received a telephone call from Mr. Patel during which he stated that “Condor’s figures were absolutely correct and that nothing had been missed.” Declaration of Barbara Heatherington. Condor’s response of September 27, 2000 contests these assertions, but does not include a counter-affidavit from Mr. Patel. The response, which was transmitted in letter under the signature of its Contract Administrator, Mr. Rodney T. Geiman, denies any conversation between the Contracting Officer and Mr. Patel on September 13, 1999, because “Mr. Patel was out on [sic] the country (India) and therefore was not so notified.” Condor’s September 27, 2000 response also asserts that Condor never received a letter requesting bid verification and that “no call was made confirming figures and that nothing had been missed.” The unsworn assertions by Condor are contradicted in a material respect by an earlier letter from Mr. Patel himself to the Contracting Officer dated May 2, 2000. In that letter, Mr. Patel had made the following admission regarding the Region’s bid verification request:

Condor understands that your office requested that we verify our bid **and we did so**

Condor May 2, 2000 letter. (Emphasis added).

5. On September 15, 1999, the Region awarded Condor a contract for two locations, Deadhorse and Iliamna, Alaska in the aggregate amount of \$93,489.00. (*Id.*, Notice of Award dated September 15, 1999).

6. After award, in a letter from Condor to the Contracting Officer dated September 24, 1999, Condor sought a contract price adjustment in the amount of \$13,500.00 for the base year and for each subsequent option year to cover items that allegedly it only discovered after award would be necessary in order to perform the contract work at Deadhorse. *Id.*, Condor letter of September 24, 1999. The September 24, 1999 letter

explains the \$13,500.00 amount as covering: “(1) cost of personnel’s air fare between Fairbanks and Deadhorse; (2) financial assistance to partially offset the cost of lodging in Deadhorse; and (3) the cost of a dedicated transportation vehicle specifically equipped for arctic use.”

7. In a letter to the Contracting Officer dated January 3, 2000, Condor inquired as to the status of its September 24, 1999 claim. Condor provided a copy of that January 3, 2000 follow-up letter to the ODRA and, thereafter, the ODRA, with the agreement of both parties, undertook to facilitate resolution of the matter as a “Pre-Dispute”. In this connection, the ODRA provided the services of the its Dispute Resolution Officer, William R. Sheehan, Esq. to do informal mediation. *Id.*, ODRA letter dated January 7, 2000.

8. In her March 10, 2000 letter to Condor, the Contracting Officer rejected Condor’s claim outright, asserting that to provide the requested price adjustment could compromise “the integrity of the competitive bidding process”:

A thorough review and research of the solicitation prior to providing an offer would have verified that Deadhorse is a remote site as stated in paragraph 11, page C-6. There is no convincing evidence to suggest that you did not consider these items, and to allow an increase may compromise the integrity of the competitive bidding process.

Prior to making the award, I requested that you verify the amount of your offer due to a wide spread between your company and other offers and you did so. Your offered price will remain as proposed, accepted and awarded.

9. By letter dated May 1, 2000, the ODRA confirmed that no further “pre-dispute” efforts would be scheduled and notified the parties that the “pre-dispute” file was being closed.

10. Condor, by letter dated May 2, 2000 to the Contracting Officer, sought reconsideration of the claim denial. As noted above (Finding 4), the May 2, 2000 letter, signed by Condor's Mr. Patel, acknowledged that Condor had been asked to verify and confirm its bid prior to contract award and further acknowledged that it had done so. Nevertheless, it stressed that, as a small disadvantaged business entity, Condor could not bear the "increase[d] expenditure" and maintained that it had confirmed the bid prior to becoming aware of the extra costs in question:

Condor Reliability Services, Inc. is a small disadvantaged business entity and under this basis, we cannot continue to absorb increase [sic] expenditure under this contract. Condor understands that your office requested that we verify our offer and we did so, but this was before we discovered through the prior contractor and present employee about the extra expenses involved.

Condor's May 2, 2000 letter closed with the following request:

Condor requested [sic] that you reconsider you [sic] position on this matter and propose [sic] the following remedies:

1. Based on your verbal request that we continue services, Condor is granted the increased cost of \$13,500.00 for the base year.
2. Federal Aviation Administration does not exercise the next option year and rebid the contract.

11. Some further informal mediation with Mr. Sheehan followed and, by letter dated July 31, 2000, the Contracting Officer formally notified Condor that, although it would exercise its option for the renewal of the contract for Iliamna, it would refrain from exercising its option for Deadhorse. *Id.*, Contracting Officer letter of July 31, 2000.

12. By its contract dispute letter to the ODRA dated August 11, 2000, Condor stated that it “would like to file a formal contract dispute and reopen settlement discussions” and requested ODRA’s assistance in the following manner:

Based on the information provided to us, our original quotation, dated July 26, 1999, is low by \$13,500 per year for the base year and for each option year thereafter.

13. The ODRA Director, by letter dated August 14, 2000, acknowledged receipt of the contract dispute and directed Condor in particular to Section 17.25 of the ODRA Procedural Regulations, 14 C.F.R. §17.25, requesting that Condor provide as a supplement the information specified in subsection (a) of the Section. Condor, by the aforesaid letter of September 7, 2000, furnished the supplemental information – including a detailed chronology, relevant documentation, and a statement of the claim in an amount certain. In the September 7, 2000 letter, the amount of claim was increased from \$13,500.00 to \$16,286.00, together with interest (raising the total for the base year to \$17,000.00), and the item for personnel airfare was specified, not as between Fairbanks and Deadhorse (the departure and destination points mentioned in the September 24, 1999 letter), but rather between Anchorage and Prudhoe Bay. The \$16,286.00 was broken down as follows:

Cost of airfare for personnel between
Anchorage and Prudhoe Bay, AK \$564 (Round
Trip) – Four round trips = \$2,256.00

Financial assistance to partially offset the cost of
lodging in Deadhorse, AK
\$455.00 per week – Condor’s share 40% =
\$182.00 per week – 52 weeks x \$182.00 = 9,464.00

Cost of dedicated transportation vehicle
Original Cost \$13,700.00 amortized over 3 years =
\$13,700/3 years = 4,566.00

Total (not including interest) **\$16,286.00**

Condor provides no further explanation regarding the factual basis for its claim. For example, Condor does not explain what it intended in bidding the contract in terms of transportation to and from Deadhorse and why it was not reasonable for it to plan on the air travel that ultimately was required. It also does not explain what efforts it undertook prior to bidding to determine the conditions of the jobsite and the availability and costs of lodging for its personnel.

In its motion, entitled “FAA’s Response to Contractor’s Claim,” the Region argues that Condor “is simply contending it did not realize that Deadhorse was a remote location that would require these additional expenses.” In this regard, the Region asserts that the remote nature of the site was not only apparent from information set forth in the Solicitation, but would have been “readily discoverable” by Condor, had it referred to a map of Alaska or to the website address expressly provided by the Solicitation for additional information about the project site. That information, which the Region printed out and appended to its motion, clearly indicates Deadhorse to be remote and subject to temperature extremes.

III. Discussion

The ODR Procedural Rule allows for the ODR to recommend that a contract dispute be dismissed summarily, where the contractor has failed to state a matter upon which relief may be had. 14 C.F.R. §17.29(a)(3). In the present case, Condor, in its August 11, 2000 contract dispute and sparsely worded September 7, 2000 supplement, is utterly silent as to any legal basis for its \$16,286.00 claim. It seems that there may be two possibilities in a case such as this. First, Condor

might argue that the contract requires reformation due to its bidding mistake. Second, Condor might suggest that the Government had superior knowledge with respect to the unique requirements at Deadhorse and breached its contractual obligations in failing to share that knowledge with Condor and other bidders. The September 27, 2000 response submitted by Condor indicates that it is relying upon the “superior knowledge” theory as the basis for its claim. In either case, even considering the material facts in a light most favorable to Condor, they nonetheless fall short of stating or supporting a legal theory of recovery.

A. Mistake Theory

The mistake here could only be described as “unilateral” on the part of Condor. Certainly, there is no allegation of a mutual mistake of fact that the Government shared with Condor. The case law relating to unilateral bid mistake makes clear first that only certain kinds of mistakes may be remediable by way of post-award contract reformation:

The Federal Circuit made it very clear that a contract will not be reformed because of a unilateral mistake in bid based upon a mistake in judgment. The court stated that a contract will not be reformed for a unilateral bid mistake except for a “clear cut clerical or mathematical error, or a misreading of the specification.”

W.B.&A., Inc., ASBCA No. 32524, 89-2 BCA §21,736.

Second, reformation will only be allowed where it can be shown that the Government had actual or constructive knowledge of the mistake, *see Aydin Corp. v. United States*, 669 F.2d 681 (Ct. Cl. 1982):

The equitable remedy of reformation to correct a unilateral mistake in a plaintiff’s bid is available only if “the government knew or should have known of a mistake in a bid costly to the bidder.” [citations omitted]. In *Ruggiero v. United States*, 190 Ct. Cl. 327, 335, 420 F.2d 709, 713 (1970), the rationale and policy behind allowing reformation in such cases was stated in pertinent part as follows:

* * * * what we are really concerned with is the overreaching of a contractor by a contracting officer when

the latter has the knowledge, actual or imputed as something he ought to know, that the bid is based on or embodies a disastrous mistake, and accepts the bid in face of that knowledge.

Carrier Corporation v. United States, 6 Cl. Ct. 169. The prohibition against such “overreaching” may be avoided where the Government notifies the bidder of its suspicion of a mistake and takes “adequate” measures to have the bidder verify his bid:

[T]here is no overreaching by the government, and the contract will not be reformed, in cases where the government requests and receives adequate verification of the bid price from the bidder before the contract is awarded. *Alabama Shirt & Trouser Co. v. United States*, 121 Ct. Cl. 313 (1952).

The Government’s request for verification, to be legally “adequate,” must include the reasons for the contracting officer’s suspicion that the bid may contain a mistake. *United States v. Hamilton Enterprises, Inc.*, 711 F.2d 1038, 1045-1046 (Fed. Cir. 1983). In this regard, the case law indicates that the nature of the inquiry is to be judged by the amount of information available to the contracting officer at the time of the request for verification. *See Bromley Contracting Company, Inc.*, GSBCA No. 6965, 85-3 BCA ¶18,428 (“The message [of the verification request] conveyed all that we can be sure the contracting officer knew – not only that the bid was out of line, but also that it was out of line with other bidders . . . and that the Government wished to confirm no error was made.”)

Finally, a unilateral mistake will give rise to reformation only where a contractor can establish by “clear and convincing evidence” what the bid price would have been but for the error. *W.B.&A., Inc.*, *supra*, citing *Bromley Contracting Co.*, *v. United States*, 596 F.2d 448 (Ct. Cl. 1979).

In the present case, the nature of the mistake cannot be described as a “clear cut clerical or mathematical error, or a misreading of the specification.” By its own admission, Condor failed to appreciate the kinds of costs that would be entailed in performing work at a remote arctic site and to include sufficient monies in its bid

to cover such costs. Such an error would be in the nature of a mistake of judgment, the kind of unilateral error that cannot be remedied by means of contract reformation. *W.B.&A., Inc., supra*. In this regard, the Region has correctly summarized the situation:

The clear picture that emerges from the facts is that Condor simply didn't do its homework prior to submitting its bid. It apparently assumed that Deadhorse was not a remote location and that its costs to perform the contract there would be no greater [than] costs at other locations. This is a classic error in judgment for which there is no recovery. See *Appeal of Teximara Corporation*, ASBCA, 98-1 B.C.A. ¶29,543 (1998).

Motion, page 3. Further, even if the mistake at issue were the sort that would warrant reformation, we have found (Findings 4 and 10) that the contractor was asked to verify its bid and had done so prior to award. Here, the verification notice described by the Contracting Officer, noting the suspicion of mistake and the reason for it, *i.e.*, that there was a "wide spread" in bids between that of Condor and that of the others as well as between the Condor bid and the Government's own estimate (*See* Declaration of Barbara Heatherington), contained all the information apparently available to the Contracting Officer at the time and hence was legally "adequate." See *Bromley Contracting Company, Inc.*, GSBCA No. 6965, 85-3 BCA ¶18,428.

Finally, there is no "clear and convincing evidence" here as to the amount of the intended bid. *W.B.&A., Inc., supra*. The amount claimed for correction shifted between Condor's letters of September 24, 1999 and August 11, 2000 and that of September 7, 2000 – from \$13,500.00 to \$16,286.00, and there is no support for the calculation of either figure. For example, the ODRA cannot determine that Condor's claim for anything above 40% of the actual lodging cost has any sort of relationship to what would have been included in Condor's bid for lodging. Also, as to the alleged additional airfare, it is not clear whether the intended bid would have included costs from Fairbanks to Deadhorse or from Anchorage to Prudhoe Bay. (*See* Finding 13). In sum, then, there is absolutely no basis either in fact or

in law to allow contract reformation here for a unilateral mistake on Condor's part.

B. Superior Knowledge Theory

The second possible theory, *i.e.*, that of "superior knowledge", a theory that Condor's September 27, 2000 response appears to adopt, is equally of no avail to the contractor in this case. To prevail under such a theory, a contractor must allege and demonstrate not only that the Government had and withheld information vital to contract performance, but also that the contractor had no other reasonable means of obtaining such information. *See Maxwell Dynamometer Co. v. United States*, 386 F.2d 855, 181 Ct. Cl. 607, 630 (1967); *Helene Curtis Industries, Inc. v. United States*, 312 F.2d 774, 778, 160 Ct. Cl. 437, 444 (1963). Here, the Government furnished information in the Solicitation regarding the remote nature of the site at Deadhorse and the kinds of extreme conditions that could be expected there. Condor does not allege that further information about Deadhorse was solely in the Government's possession and was unavailable to it when bidding. Indeed, readily available Internet research (of the website called out in the Solicitation and numerous others) yields the following information about Deadhorse and Prudhoe Bay:

Deadhorse, Alaska

Location. Deadhorse is known as the land base for Prudhoe Bay offshore oil drilling, and lies 206 miles southeast of Barrow and 625 miles north of Anchorage. It is 265 miles north of the Arctic Circle.

Transportation. Prudhoe Bay is the only location in the North Slope Borough served by a full range of transportation modes, but aircraft is by far the most important. Deadhorse is the site of a State-owned 6,500' airport. The airport will be undergoing \$10 million in improvements, beginning in 1996. A private heliport is located at Seal Island.

The [Dalton] Highway, though deserted and potentially dangerous in winter months, provides road access and transportation of cargo from Fairbanks. During the summer, barges offload cargo at the 9,000' dock.

Climate. The climate of the North Slope is arctic. Temperature range from -56 to 78. Precipitation is light, averaging 5 inches, with snowfall of 20 inches.

Facilities. Only two houses were recorded by the U.S. Census at Deadhorse in 1990, both with complete plumbing and septic tanks. BP and Arco have developed their own water and sewer systems. BP derives water from two reservoirs constructed in the Kuparuk River, and two smaller reservoirs in Big Lake. Arco pumps water from the Sagavanirktok River during summer months. The Borough operates a water treatment plant and storage reservoir.

<http://www.ilovealaska.com/alaska/Deadhorse/>

Prudhoe Bay, Alaska.

Prudhoe Bay and Deadhorse are at the end of the Dalton Hwy. Which ends at Mile 414. There is a security gate and travel beyond this checkpoint is on oil company roads in the public access section.

The North Slope includes several oilfields The Deadhorse airport serves the area with scheduled flights to Anchorage and Fairbanks.

<http://www.akohwy.com/p/prudhoeb.htm>

Maps showing the locations of Deadhorse and Prudhoe Bay are located at: http://www.dot.state.ak.us/external/state_wide/planning/assessments/nhs.htm and <http://www.siteatlas.com/Maps/Maps/103.htm> [Note: This site no longer exists, as of 3/19/01]. These both clearly show the jobsite as extremely remote, along Alaska's Northern Slope on the coastline of the Arctic Ocean.

The Alaska Airlines website shows commercial airline flights to Prudhoe Bay from Fairbanks, Alaska as well as Anchorage, Alaska. *See* <http://www2.alaskaair.com/Destinations/RouteMap.asp>.

The FAA website (materials posted on March 6, 1996 by the Alaska Region) offers even more information:

Introduction

The Arctic Region is that area that lies north of the Brooks Mountain Range. It reaches from the Brooks Mountain Range 300 miles north to Point Barrow. The terrain consists mainly of tundra, which is wet in the summer because of underlying permafrost. There are countless lakes. In some river valleys there are thickets of alder, willow and resin birch. Summers are short and cool, with average temperatures of 30 to 40 degrees. Winter temperatures are commonly minus 50 to 60 degrees below zero. Strong winds throughout this region make the chill factor extremely cold. The Prudhoe Bay oil fields are located on the Arctic Ocean. * * *

Deadhorse and Prudhoe Bay

Deadhorse is the northern terminal for construction and operation of the Trans-Alaska Pipeline and is located 5 miles south of Prudhoe Bay on Alaska's North Slope.

Commercial food and lodging are very limited and are only available during the summer months. The oil companies maintain several camps in the Deadhorse/Prudhoe Bay area that provide quarters and meals for their employees. There is no actual town or village of Prudhoe Bay. ***Lodging and meals should be arranged prior to departure to Deadhorse/Prudhoe Bay.*** There is no taxi cab service available, although most camps provide transportation to and from the airport for their employees. Rental vehicles are available from several oil companies.

Airports/Landing Areas/Fuel and Services

The Deadhorse Airport is a public use airport owned by the State of Alaska. The airport has one runway, 4-22, a 6,500- foot paved lighted runway. Two scheduled air carriers provide daily jet service from Anchorage and Fairbanks.

<http://www.alaska.faa.gov/flytoak/arctic.htm>. (Emphasis added).

Three photographs of the Deadhorse Airport are also available as links from the FAA website. See <http://www.airnav.com/airport/SCC>. These clearly indicate the jobsite to be a remote location that is subject to extreme climate conditions. Thus, even accepting Condor's allegations as true, there is no basis upon which to conclude that the Government withheld vital contract information that was otherwise unavailable to the contractor.

IV. Conclusion And Recommendation

For the reasons set forth above, the contract dispute fails to state a matter upon which relief may be granted. It is therefore recommended that the Region's motion be granted and that the contract dispute be dismissed summarily on that basis, pursuant to 14 C.F.R. §17.29(a)(3).

/s/

Richard C. Walters
Dispute Resolution Officer
Office of Dispute Resolution for Acquisition

APPROVED:

/s/

Anthony N. Palladino
Associate Chief Council and Director

Office of Dispute Resolution for Acquisition