

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

FINDINGS AND RECOMMENDATIONS

Matter: **Ridge Contracting, Inc.**
 Under Solicitation DTFAAL-04-R-00102

Docket No.: **04-ODRA-00312**

Appearances:

For the Protester, Ridge Contracting, Inc.: William K. Renno, Esq. and Julia M. I. Holden, Esq., Oles Morrison Rinker & Baker LLP

For the FAA Alaskan Region: Glenn H. Brown, Esq., Office of Regional Counsel

I. Introduction

On August 2, 2004, Ridge Contracting, Inc. (“Ridge”) filed a Protest (“Protest”) with the FAA Office of Dispute Resolution for Acquisition (“ODRA”) against a determination made by FAA Alaskan Region (“Region”) with respect to Solicitation DTFAAL-04-R-00102 (“the Solicitation” or “SIR”) for a construction project in Tanana, Alaska. The Protest arises from the fact that, after notifying Ridge that it had submitted the lowest bid, the Region discovered that MTNT Development, Inc. (“MTNT”) had attempted to submit a bid and in fact was the apparent low bidder. The Ridge Protest alleges that the MTNT bid was not submitted in accordance with the requirements of the Solicitation and therefore MTNT cannot be considered for award of the contract. Ridge requests that its bid be recognized as the low responsive bidder and that award of the contract be directed to Ridge. For the reasons discussed below, the ODRA recommends that the Protest be sustained and the contract be awarded to Ridge, provided the requirement still exists.

II. Findings of Fact

1. The SIR was issued by the FAA Acquisition Management Branch, AAL59A, which is located at 222 W. 7th Ave, Anchorage, AK. The SIR instructs bidders that hand carried bids would be received “in the depository located in the **Anchorage Federal Office Building, 222 W. 7th Ave, Anchorage, AK – Room 358** until **3:00 PM** local time **7/26/04**” and provides “**FOR INFORMATION CALL: LESLIE R BOEHLER (907)271-5842.**” Protester’s Comments, Exhibit A, Standard Form 33, Items 6 – 9 (emphasis in original).
2. Six contractors, including Ridge and MTNT, responded to the SIR. With the exception of MTNT, all of the bidders hand delivered their bids to the Contracting Officer, Leslie R. Boehler, at Room 358 on the third floor of the Anchorage Federal Office Building by the designated deadline in accordance with the SIR instructions. Agency Response, Declaration of Leslie R. Boehler (“Boehler Declaration”). MTNT left its bid with the FAA Human Resources Management Division, which is located in a different area on the third floor of the Anchorage Federal Office Building. The bid was left in a box used for the submission of employment applications. Agency Response, Exhibit 3.
3. At bid opening on July 26, 2004, Ridge was determined to have submitted the lowest bid. At the time of bid opening, the contracting personnel were not aware of the bid left by MTNT with Human Resources. Two days later, however, the Region revised the bid results to show that MTNT was the apparent low bidder. Comments, Exhibit C.
4. Ridge filed the instant Protest on July 30, 2004 and it was docketed as 04-ODRA-00310. The Region filed its Agency Response on September 13, 2004, and Ridge filed an Opposition to the Agency Response and Request for Expedited Ruling on September 15, 2004. Thereafter, the record was closed.

5. The general manager for MTNT submitted a declaration in support of the Agency Response describing the facts associated with his submission of the MTNT bid. Agency Response, Declaration of Louis C. Hala, Jr. (“Hala Declaration”). In pertinent part, the general manager declares that the day he delivered the MTNT bid to the Anchorage Federal Building was the first time he had ever been inside the building. The Hala Declaration further states:

I now know that the sign indicating a visitor ID badge and escort are necessary to go further was not intended to keep visitors from going down the hallway to the left. At the time, however, I did not know we could continue, and given security concerns, I was apprehensive we would be in trouble if we went any further.

Agency Response, Hala Declaration at ¶ 2..

6. The sign, referenced in the Hala Declaration, is located in the entrance to the Human Resources Management Division and states as follows:

NOTICE

**ALL PERSONS ENTERING
HUMAN RESOURCE MGMT DIVISION
AREAS, MUST WEAR AT ALL TIMES
A VALID FAA ID OR
A VALID NFBUSCH ID OR
OBTAIN A VISITORS BADGE,
WHICH ARE AVAILABLE BY FOLLOWING
ARROWS TO CHECK-IN**

**(If you are visiting another division, please
check-in with the division you are visiting)**

Agency Response, Declaration of Roberta “Bobbie” Gossweiler, (“Gossweiler Declaration”), Exhibit 2.

7. According to Mr. Hala, he asked an FAA employee, who was later identified as a personnel management specialist, where to deliver MTNT’s bid package. Specifically, Mr. Hala says he asked this employee “where to ‘drop off’ the

contract bid package” and “used the term ‘contract bid’.”¹ Agency Response, Hala Declaration, attached letter, dated August 13, 2004. Mr. Hala further indicated that he had concerns when he noted that the sign at the deposit box where he placed his bid indicated that the box was for applications, but was assured that “to the FAA, applications are the same thing as bids.” Agency Response, Hala Declaration at ¶ 3.

8. The FAA employee involved, Ms. Gossweiler, has a different account of the conversation with the MTNT representatives. She states: “I asked if they were applying for a *job* with the FAA and they answered yes.” Agency Report, Gossweiler Declaration, attached statement (emphasis added). Another FAA employee, David E. Holmes, Manager of the Materiel and Services Branch, who was present at the time, states:

Ms. Gossweiler asked if they were applying for a job and they responded “yes.” Ms. Gossweiler proceeded to explain to them that they could date stamp them and drop them in the box labeled application.

Agency Response, Declaration of David E. Holmes, attached Memo for the Record, dated July 29, 2004.

9. The record shows that at no time on July 26, 2004 did Ms. Gossweiler understand that the MTNT’s representatives were delivering a *bid* for a contract in response to a *solicitation*. She states: “I believed the gentlemen were applying for a position vacancy with the FAA and were trying to drop off an application for employment.” Agency Response, Gossweiler Declaration, attached Exhibit 1.
10. The Hala Declaration stated that because the bid submission instructions referenced a “depository” and did not specify the need for a visitor’s badge and escort, he assumed that any such depository would be in a location accessible to

¹ Mr. Hala was accompanied by his field superintendent, who also states “We went in and asked an FAA employee where to put a contract bid.” Agency Report, Declaration of John McFarland, attached letter, dated August 10, 2004.

the public.² Agency Response, Hala Declaration at ¶ 4. That assumption, combined with the statements of the employee, caused him to believe that he had deposited MTNT's bid in the correct location. Agency Response, Hala Declaration at ¶ 4.

11. A letter attached to the Hala Declaration indicates that Mr. Hala himself stamped MTNT's bid prior to the 3 p.m deadline. Agency Response, Hala Declaration, attached letter from Louis C. Hala, Jr., dated August 13, 2004.
12. The box in which MTNT deposited its bid was located in the Self-Service Job Information Center of the FAA Human Resources Management Division. The box itself is located directly beneath the "Human Resources" sign. A notice in the Self-Service Center states that "job applications" are to be dropped in the application box in the area. In addition, the Self-Service Center displays various publications and pamphlets regarding employment with the FAA. Agency Response, Gossweiler Declaration, Exhibits 1 and 2 (photographs).
13. A sign conspicuously located in the Self-Service Center informs applicants that the telephone located adjacent to that sign is available to them for the purpose of contacting other FAA employees. Comments, Exhibit D. It is undisputed, however, that that MTNT did not attempt to contact the Contracting Officer, who had been identified in the Solicitation for the provision of information and who was available at her desk at the time, *see* Agency Report, Declaration of Leslie R. Boehler ("Boehler Declaration"), or otherwise seek direction to Room 358, which was specified in the Solicitation.
14. The Contracting Officer also submitted a declaration in support of the Agency Response. Agency Response, Boehler Declaration. The Boehler Declaration states that Room 358 is an "area" that is irregularly shaped and only partially bounded by walls, as it is mainly divided into work-area cubicles for about 20

² In fact, it is undisputed that the depository area specified in the Solicitation was accessible to the public.

persons. The Declaration also states that notwithstanding the fact that there are no signs on the 3rd floor directing prospective bidders to any specific location therein, by 3 p.m. on July 26, 2004, the contracting officer had received five offers while she was at her desk in her cubicle in the area designated as “358.” Essentially, the Contracting Officer served as the “depository” referenced in the Solicitation. Agency Response, Boehler Declaration.

15. The entrance to the cubicle area described in the Boehler Declaration has a sign clearly indicating the number 358. The entrance sign also states “Acquisition Management Branch.” Agency Response, Exhibit 5.

III. Discussion

It is well-established that, where the ODRA finds that a Product Team’s decision has a rational basis and is neither arbitrary, capricious, nor an abuse of discretion and is supported by substantial evidence, the ODRA will not recommend that the Administrator overturn such a decision. 14 C.F.R. Part 17; *Consolidated Protests of Consecutive Weather, Eye Weather, Windsor Enterprises and IBEX Group, Inc.*, ODRA Docket No. 03-ODRA-00250, *et al.*, citing *Protest of Information Systems and Networks Corporation*, 98-ODRA-00095 and 99-ODRA-00116, *affirmed* 203 F.3d 52 (D.C. Cir. 1999). The Protester bears the burden of proof under this standard. *See Protest of L. Washington & Associates, Inc.*, 02-ODRA-00232; *Protest of Glock, Inc.*, 03-TSA-003. Finally, the Protester must demonstrate that it was prejudiced by the Product Team’s actions. *A&T Systems, Inc.*, 98-ODRA-00097

The only case in which the ODRA has addressed the issue of improperly submitted bids was the *Protest of JACO Electric, Inc.*, FAA Order and Decision, 96-ODR-0002(b), wherein a protest against the rejection of a bid was denied based on the fact that the protester failed to submit its bid in conformance with the “rules of competition” clearly incorporated into the solicitation. The Government Accountability Office (“GAO”), whose decisions the ODRA generally considers to be persuasive authority, has addressed

this issue numerous times. As summarized in the Ridge Comments, the general rule at the GAO with respect to the treatment of such bids is as follows:

[I]t is the responsibility of the bidder to deliver its bid to the proper place at the proper time; the late delivery of a bid requires its rejection and there are only limited exceptions to this rule. A late hand carried bid may be only considered where the **paramount cause** of the late receipt is improper action of the government and where consideration of the late bid would not compromise the integrity of the competitive procurement system. This exception to the late-bid rule can **only** be invoked where there is affirmative government action that makes timely delivery of the hand-carried bid to the bid opening location **impossible** and the bidder acted reasonably in fulfilling its responsibility to ensure timely delivery and did not significantly contribute to the lateness.

Braceland Brothers, Inc. B-248,234, 92 CPD ¶ 69 (Emphasis added) (further citations omitted).

When evaluating the acceptability of a late bid outside the strict confines of the late bid regulations, we are guided by the general principal that where a bidder has done **all it could and should** to fulfill its responsibility, it should not suffer if the bid was untimely because the government failed in its own responsibility, so long as acceptance of the bid would not cast doubt on the integrity of the bidding process.

Weeks Marine, Inc. B-292,758, 2003 CPD ¶ 183 (Emphasis added).

Comments, page 6- 7 (Emphasis in original).

The Region contends that MTNT's bid did not timely reach the contracting officer due to:

a combination of factors most of which are attributable to the FAA. The solicitation instructed offerors to place offers in a depository in a certain room when there was no depository, and the "room" was a large, partially defined area with no signs directing persons to any particular location in the area. Persons unfamiliar with the intended process had to ask for help, and the person MTNT's employees asked provided very plausible but incorrect instructions as to where to leave the offer. Additional questions

could have been asked, but there was nothing that made it unreasonable not to do so.

Agency Response, p. 7.

Notwithstanding the Region's position, the ODRA concludes that, while the Region's human resources personnel may unwittingly have contributed to what occurred, the paramount cause was MTNT's failure, in the face of admitted concerns, to take available reasonable actions to ensure that its bid was submitted properly. The Solicitation accurately described the location of the bid depository area and there is no evidence in the record of any government action that made timely delivery of MTNT's hand-carried bid impossible.

The record shows that the MTNT General Manager had concerns when he deposited MTNT's bid in the job application box in the Self-Service Job Information Center of the Human Resources Management Division. Finding of Fact ("FF") 7. These concerns were understandable, since the FAA employee initially asked whether MTNT was applying for a "job" and directed MTNT to a job application box in the Human Resources Management Division Self-Service Job Information Center, which featured displays of various publications and pamphlets regarding employment with the FAA. FFs 7 and 12.

In addition, there is nothing in the record that establishes that MTNT was prevented from looking for and accessing Room 358. The sign located at the entrance of the Human Resources Management Division should have dissuaded MTNT of any apprehension of getting "in trouble" for doing so. FF 6. Rather, MTNT could have and should have heeded the advice on the sign and checked-in with the Acquisition Management Division.

Furthermore, MTNT could readily have resolved any questions by contacting the Contracting Officer, who was at her desk at the time, by using the telephone in the Self-Service Job Information Center of the Human Resources Management Division. FF 13.

Moreover, this case does not fall within the recognized exception involving affirmative misdirection by the Government leading to an improper submission of a bid. In this case, the two Government employees who had direct interaction with MTNT stated that the MTNT representatives communicated that it was their intention to apply for a “job.” See Agency Response, Gossweiler Declaration, attached Exhibit 1, and Holmes Declaration, attached Exhibit 1. According to the FAA employees involved, MTNT never indicated an intent to bid on a contract. The ODRA finds the declarations of the two FAA employees, who do not work for the contracting office and have no direct interest in the outcome of this litigation, to be clear and more credible than that of the MTNT representatives. Thus, even though the FAA Personnel Management Specialist, Ms. Gossweiler, showed MTNT where they could deposit a job application, the record shows that she did not direct them as to how to submit a bid on the contract involved. FFs 8 and 9. Ms. Gossweiler’s actions were proper based on the information that she was given, *i.e.*, that the individuals wished to apply for a job with the Agency. The ODRA concludes therefore that there was no affirmative misdirection concerning how to properly submit a bid for the contract. See *Weeks Marine Inc., supra*.

In the final analysis, it is the responsibility of MTNT to communicate its intentions and to follow the directions expressly set forth in the Solicitation in order to ensure that the bid was properly submitted. See *Protest of International Services, Inc.*, 02-ODRA-00224. The ODRA finds that MTNT did not do all it could and reasonably should have done to ensure its bid was submitted correctly.³ Having failed to take reasonable steps to ensure that it satisfied its obligation to correctly submit its bid in accordance with the clear terms of the Solicitation, MTNT assumed the risk that its bid would not timely come to the attention of the contracting personnel. In fact, that is precisely what occurred.

Under the unique circumstances here, the ODRA concludes that MTNT’s bid was improperly submitted and the Region did not have the discretion to consider it.

³ The ODRA notes that five offers were timely received by the contracting officer in the cubicle area located behind the door, which would be expected, since the entrance to the area is clearly marked with the number 358 and words “Acquisition Management Branch.” FF 14 and 15.

IV. Recommendation

For the foregoing reasons, the ODRA recommends that the Ridge Protest be sustained on the grounds that MTNT failed to submit its bid in compliance with the Solicitation and thus cannot be considered for award. As a remedy, the ODRA recommends that, if there is a present requirement for the work, a directed award to Ridge should be made.

_____-S-_____
Marie Collins
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FAA Office of Dispute Resolution for Acquisition

APPROVED:

_____-S-_____
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