

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

**RECOMMENDATION**

**Matter:**        **Equal Access to Justice Act Application of  
Ridge Contracting, Inc.**

**Regarding Protest Under the Solicitation No. DTFAAL-04-R-00102**

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

*Appearances:*

For the Applicant, Ridge Contracting, Inc.: William K. Renno, Esq., Oles Morrison  
Rinker & Baker, LLP.

For the Federal Aviation Administration Alaskan Region: Glenn H. Brown, Esq.

**I.        Introduction**

This matter currently is before the Office of Dispute Resolution for Acquisition (“ODRA”) on the application (“Application”) of Ridge Contracting, Inc. (“Ridge”) for an award of attorneys’ fees under the Equal Access to Justice Act, 5 U.S.C. §504 (“EAJA”). The EAJA Application follows an Order issued on behalf of the FAA Administrator by the Director of the ODRA on September 24, 2004, in the Protest of Ridge Contracting, Inc., 04-ODRA-00312 (“the Protest”). In the Protest, Ridge had challenged the decision of the Alaskan Region (“Region”) to award a contract for a construction project to a third party, MTNT, rather than to Ridge. Ridge alleged that MTNT’s bid had not been submitted in accordance with the requirements of the Solicitation and therefore could not be considered for award; and that, as the low responsive bidder, Ridge was entitled to an award of the contract in question. At the conclusion of the adjudication, the Ridge Protest was sustained on grounds that the third party had: “failed to submit its bid in compliance with the Solicitation and thus cannot be considered for award.” ODRA

Findings and Recommendations at 10. As a remedy, the Region was directed that “if there is a present requirement for the work, a directed award to Ridge should be made.” *Id.* Thereafter, Ridge filed the instant EAJA Application with supporting materials, seeking reimbursement of attorneys’ fees and expenses in the total amount of \$6,304.80.

As is more fully discussed below, the ODRA finds that Ridge is an eligible, prevailing party, within the meaning of the EAJA. The ODRA concludes, however, that Ridge is not entitled to recover the claimed attorneys’ fees and expenses because the position of the Region was substantially justified in fact and in law. The ODRA therefore recommends that the Ridge Application be denied.

## **II. Factual Background**

Ridge filed the Protest underlying its EAJA request on July 30, 2004. The Region’s Agency Response was filed on September 13, 2004. Ridge filed Comments to the Agency Response and requested an expedited ruling on September 15, 2004. *See* ODRA Findings of Fact (“FF”) 4. The Solicitation had instructed that bids will be received “in the depository located in the Anchorage Federal Office Building, 222 West 7<sup>th</sup> Avenue, Anchorage, AK, Room 358, until 3:00 p.m. local time 7/26/04” and further provided **“FOR INFORMATION CALL: LESLIE BOEHLER (907) 271-5842.”** *See* FF at 1.

Six contractors responded to the Solicitation and all of them, with the exception of MTNT, delivered the bids to the designated Contracting Officer in Room 358 of the Anchorage Federal Office Building, by the designated date and time in accordance with the Solicitation. *See* FF 2. MTNT deposited its bid in a separate area on the third floor of the building in a box designated for submission of employment applications. *See* FF 2. When the bids were opened, Ridge was found to be the lowest bidder. The Region revised the bid results two days later, however, after it became aware of the submission of MTNT and declared MTNT to be the apparent low bidder. Thereafter, Ridge submitted its Protest. *See* FF 3.

The record developed in the Protest reflects that representatives of MTNT had become confused on entering the Federal Office Building to submit MTNT's bid. The representatives sought assistance from an FAA employee who was a Personnel Management Specialist and from another FAA employee. The record reflects a divergence in the testimony of the MTNT representatives and the FAA employees concerning the specifics of their conversations. *See* FF 7, 8. The MTNT representatives indicated that they had told the FAA employees they wished to submit a contract bid, while the FAA employees involved stated unequivocally that the MTNT representatives communicated an intent to apply for a "job" with the Agency. After reviewing the statements of the witnesses, the ODRA found:

According to the FAA employees involved, [MTNT representatives] never indicated an intent to bid on a contract. The ODRA finds that 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.

*See* Findings and Recommendations at 9. The ODRA further concluded that:

Thus, even though the FAA Personnel Management Specialist, Ms. Gossweiler showed [MTNT's representatives] 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.

*Id. citing* FF 8 and 9. Finally, the ODRA found: "Ms. Gossweiler's actions were proper based on the information she was given, *i.e.*, that the individuals wished to apply for a job at the Agency. The ODRA concludes therefore that there was no affirmative misdirection concerning how to properly submit a bid for the contract." Findings and Recommendations at 9.

In concluding that "MTNT's bid was improperly submitted and the Region did not have the discretion to consider it", the ODRA stated the following:

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. 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.

*Id.*

### **III. The EAJA Analysis**

The applicability of the EAJA to adjudications at the ODRA expressly is recognized by statute, regulation, and caselaw. The most recent FAA Reauthorization Act, Public Law 108-176 confirmed in Section 224(b)(4) that ODRA adjudications are subject to Section 504 of Title IV, *i.e.*, the EAJA statute. Moreover, the FAA's EAJA Regulations expressly contemplate ODRA adjudications. *See* 14 C.F.R. §§14.21, 14.27(b), 14.28 b. Finally, long established ODRA case precedent confirms the ODRA's EAJA authority. *See Findings regarding Equal Access to Justice Act Application of Weather Experts, Inc.*, 96-ODRA-00013 EAJA; *Findings regarding Equal Access to Justice Act Application of IBEX Group, Inc.*, 02-ODRA-00054 EAJA. In addition, the FAA Administrator has delegated to the ODRA Director final decision authority in EAJA adjudications. *See* Delegation of Authority dated March 10, 2004, which is published on the ODRA website at: [www.faa.gov/agc/odra/DELEG2.HTM](http://www.faa.gov/agc/odra/DELEG2.HTM).

In this case, the Region does not dispute that Ridge filed a timely EAJA application or that it is an eligible, prevailing party within the meaning of the EAJA statute. The only issues to be considered, therefore, include: (1) whether the Government's position was "substantially justified" as a matter of fact and law; (2) whether any special

circumstances exist that would make an award unjust; and (3) whether the fees and costs claimed by Ridge are recoverable under the EAJA.<sup>1</sup>

The Ridge EAJA Application (“Application”) seeks to recover a total of \$6,304.80. This amount is comprised of the following:

Attorney hours	45.5	x	\$125	=	\$5,687.50
Paralegal hours	2.6	x	\$ 85	=	221.00
Costs & expenses				=	396.30
Total				=	\$6,304.80

The Ridge Application is supported by the affidavit of its President, Drew McCaughlin, which addresses the size and net value of Ridge as of the time the Protest was initiated; and billing statements from the law firm of Oles Morrison, Rinker & Baker LLP counsel for Ridge in the Protest (“Billing Statements”). *See* Ridge Application, Attachments 1, 2.

Under the EAJA statute, an applicant such as Ridge is required to: make a showing that it is an eligible, prevailing party within the meaning of the EAJA statute, provide support for the fees and expenses it is claiming, and allege that that the Agency position was not substantially justified. The ODRA finds that Ridge has satisfied this requirement with its Application.

Once the EAJA applicant’s initial showing has been made, the burden shifts to the Government to challenge any portions of the Application and to show that the Government’s actions were substantially justified in fact and in law. *See Findings in Equal Access to Justice Act Application of IBEX Group, Inc., supra*. In this case, the Region filed its Response to the Application on or about November 29, 2004

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<sup>1</sup> In this regard, the Region’s Response to the EAJA Application generally does not challenge the fees or costs claimed; but rather points out that the Application includes fees that are expressly identified as relating to alternative dispute resolution (“ADR”) as opposed to the adjudication phase of the Protest. It is well established that such ADR-related fees generally are not recoverable under the EAJA. *See Findings regarding Equal Access to Justice Act Application of IBEX, Group, Inc., supra*.

(“Response”). The Response focuses primarily on the Region’s argument that its position was substantially justified. The Region relies heavily on the novelty of the issue presented, *i.e.*, the circumstances under which a bid that was not submitted in accordance with requirements of the Solicitation, and which may have been the subject of a misdirection by an Agency employee, must be rejected. As counsel for the Region notes:

Prior to this case, however, Odra had never taken the opportunity to address what standard applies under an AMS procurement. Under the circumstances, the Agency had no clear guidance as to whether “paramount cause” is the proper standard, and, if so, how blameless the prospective contractor must be.

*See* Response at 9.

The Region’s Response goes on to note that authority outside of the FAA’s Acquisition Management System (“AMS”) can reasonably be viewed as supporting the position and the arguments made by the Region in the Protest. *See* Response at 9. Counsel for the Region cites to the inexperience of the contractor, who had never before been in the building involved; the alleged lack of clarity in the instructions for bid submission; and the conversation that the Contractor had with FAA employees concerning how to apply for a “job” with the FAA. *See* Response at 11, 12, and 13. Counsel for the Region further asserts that “under these circumstances, it was certainly reasonable for the Agency to view this misdirection by Ms. Gossweiler as being far more than a minor contributing factor in the late receipt of the proposal.” *See* Response at 15.

The Odra previously has recognized the long established principle in EAJA law that “the novelty of a legal issues weighs in the Government’s favor in analyzing the reasonableness of its position under the EAJA.” *See Findings and Recommendations regarding the Equal Access to Justice Act Application of Weather Experts, Inc.*, 98-ODRA-00013 EAJA, *citing to Marcus v. Shalala*, 17 F.3d. 1033, 1037(7<sup>th</sup> Cir. 1994). As was true in *Weather Experts*, the instant case involves a novel issue. In both cases, neither the Odra nor the AMS provided any guidance that the Region could have employed in the particular situations.

The ODRA concludes that the Region's position on the underlying facts was reasonable under the circumstances. Key facts concerning the directions given to the MTNT personnel by FAA personnel were in dispute and the versions of events were directly conflicting. MTNT claimed that it specifically made known its desire to submit a bid on a contract. By contrast, the two FAA employees involved indicated that MTNT had stated that they were interested in a "job" and the FAA employees therefore directed the MTNT representatives to place what the FAA employees believed were job applications in the box in the Human Resources area for that purpose. Ultimately, the ODRA in its Findings and Recommendations credited the FAA employees' version of events and concluded that there was no active mis-direction by the FAA employees with respect to how to submit a bid for the contract in question and that MTNT's actions were "the paramount cause" of the improper submission of the MTNT bid.

[T]he "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.

#### ODRA Findings and Recommendations at 8.

Notwithstanding these ultimate conclusions by the ODRA, it was not unreasonable for the Region to have believed it was acting correctly in accepting the bid of MTNT and then defending its actions against the Protest. The ODRA looks to the entirety of the Government's conduct, as reflected in the administrative record, and previously has stated that, in considering an EAJA Application, "the actions and positions taken by FAA contracting officials must be judged not by twenty/twenty hindsight but, rather by the policy guidance available to them at the *relevant time*." *See Recommendations of the ODRA on Application of Camber Corporation under the Equal Access to Justice Act*, ODRA Docket No. 98-ODRA-00102, *quoting from Camber Corporation*, 98-ODRA-00079 EAJA at page 4 (emphasis added). It fairly can be said that, as of the time of its

decision to accept the MTNT bid, the Region acted reasonably in assessing the facts regarding the bid submission and “mis-direction” and making its decision in consideration of the facts and the legal guidance available to it at the time. Based on the above, the ODRA concludes that the Region’s actions were justified “in the main” and thus were substantially justified in law and in fact for EAJA purposes. *Pierce v. Underwood*, 487 U.S. 552 (1988).

#### **IV. Conclusion**

For the reason stated above the ODRA recommends that Ridge’s Application for attorneys’ fees and expenses, pursuant to EAJA be denied. The ODRA notes that in its Reply brief, Counsel for Ridge states that “the Agency still does not have funding for the project and, consequently, contrary to the ODRA’s Order the contract has not been awarded to Ridge.” Reply at 3. The ODRA recommends that the Region be directed to report to the Administrator through this Office, within 10 business days, on the status and plan for implementing the remedy mandated in the Order entered in this case on September 24, 2004.

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FAA Office of Dispute Resolution for Acquisition