BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL BY THE COMMISSIONER OF TRANSPORTATION AND PUBLIC FACILITIES

LAKLOEY, INC)
)
v.)
)
DOT&PF, SOUTHCOAST REGION)
) OAH No. 19-0084-PRO
)

DECISION

I. Introduction

Lakloey, Inc., protested a procurement process for a construction contract issued by the Southcoast Region of the Department of Transportation and Public Facilities. Lakloey's protest raised many different arguments regarding the bid offered by the successful bidder, Jolt Construction and Traffic Maintenance, Inc. Lakloey did, indeed, find some inconsistencies and errors among the bid documents, the information in the state's computer database, and even in the power of attorney submitted by Jolt's surety. None of these issues, however, is material. None would cause the bid or the bid bond to be unenforceable. All are minor informalities. Therefore, the decision of the contracting officer that Jolt's bid was responsive and responsible is affirmed.

II. Facts

From time to time, the Department of Transportation and Public Facilities will undertake a project to review and improve the highway road signs in a region. The technical name for this type of signage project is a "horizontal alignment sign compliance" project.[1]

In 2018, the Department prepared a sign alignment project for the Southcoast Region of Alaska. The Southcoast Region includes Southeast Alaska, the Aleutian Islands, the Alaska Peninsula, and Kodiak Island:[2]

On September 28, 2018, after identifying the new or improved signs needed in the Southcoast Region, the Department issued an "Invitation to Bid" (ITB), inviting construction

[1] Record at 1.

[2] Jenkins testimony. The map is taken from the Department's webpage, *available at*: http://dot.alaska.gov/sereg/.

companies to bid on the project.[3] Three companies submitted bids: Jolt Construction & Traffic Maintenance, Inc., Lakloey, Inc., and ACME Fence Company.[4]

The low bidder was Jolt at $1,898,000.[5] The other two companies' bids were much higher: Lakloey bid $4,206,250, and ACME bid $4,653,654.50.[6] The Department's engineer had estimated that project should cost around $2.7 million.[7]

The bids were opened by the Southcoast Region procurement specialists who were overseeing the procurement, Contract Officer Kami Barness and her supervisor, Chief of Contracts Jeff Jenkins. After opening these bids, Mr. Jenkins noticed that Jolt had incorrectly written down its vendor number. Having a vendor number was required by the ITB.[8] It is important in part because computer records are kept under the number.[9] Jolt had written its vendor number as "JCP05285" when its actual number was "JCT05285."[10] It repeated this number in the footer of all seven pages of the bid forms.[11] Mr. Jenkins, however, was able to lookup the correct number by doing a search by name, instead of number.[12] He confirmed that the error made by Jolt was substituting a "P" for what should have been a "T." He hand wrote the correct number on page one of Jolt's paper bid form.[13]

For one of the other bidders, Acme, Mr. Jenkins had to go through a similar process.[14] Acme also submitted a paper bid. Although Acme had a vendor number, it left blank the space on footer that requested the vendor number.[15] Lakloey, on the other hand, had submitted an electronic bid. Because the electronic form required that every space be populated, and that the vendor number reflect the bidder's name, Lakloey's bid form did not require that the contracting officer do further research.[16]

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[3] Record at 1-131.
[4] Jenkins testimony; Record at 289-90.
[5] Jenkins testimony; Record at 290.
[6] *Id.*
[7] *Id.*
[8] Jenkins testimony; Record at 5. Mr. Jenkins testified that if a vendor did not have a vendor number at the time of bid opening, the Region would have allowed the vendor a day or two to acquire a vendor number. If the vendor failed to do so, the bid would be considered nonresponsible. *Id.*
[9] Jarvis testimony.
[10] Record at 150-56.
[11] *Id.*
[12] Jenkins testimony.
[13] *Id.*
[14] *Id.*
[15] Record at 139-44.
[16] Record at 164-72.

Once Mr. Jenkins had the correct vendor ID number for all three bidders, he was able to enter the vendor numbers and their corresponding bids into an electronic "bid tabulation" form.[17] This form populated four columns—one for each vendor, plus one "dummy" vendor column in which Mr. Jenkins could enter the engineer's estimate for the cost of each bid item.[18] The computer put a label on each column. The labels for Lakloey and Acme matched their names.[19] The label for the Jolt column, however, did not match its name—instead, the computer labeled Jolt's column "Maintenance Inc."[20] Mr. Jenkins was not concerned about this mismatch, however, because his previous research had already verified that the vendor number "JCT05285" was the identifier for Jolt in the state accounting system.[21]

Mr. Jenkins determined that Jolt's bid was "responsive" to the ITB, and that Jolt was a "responsible" bidder.[22] Accordingly, the Region moved forward with taking the steps to award a contract to Jolt for the project.

Under Alaska's Procurement Code, an important step that must an agency must take before awarding a contract is issuing a "Notice of Intent to Award."[23] For a construction contract, the notice must be provided to *all* the bidders at least five days before the contract is awarded.[24] Then, if a bidder wishes to protest the proposed award of the contract, the bidder has 10 days to file a protest.[25]

Mr. Jenkins sent the Notice of Intent to Award to Jolt on November 26, 2018.[26] The Notice was not, however, sent to the other bidders.[27]

On November 29, 2018, Allan Vezey, the Secretary-Treasurer of Lakloey, called the Southcoast Region to inquire about the status of the project. He left a message on the Region's answering machine. His call was never returned.[28]

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17 Jenkins testimony.

18 *Id.,* Record at 289-90.

19 Record at 289.

20 *Id.*

21 Jenkins testimony. *See also* Record at 288; Jarvis testimony. Sara Jarvis is a project manager for the Department who worked on contract management software installation. She explained that Record 288 is a screen shot that verified that Jolt was the vendor tied to vendor number JCT 05285. Jarvis testimony.

22 Jenkins testimony. Being a responsive and responsible bidder are two requirements for virtually every procurement. *See, e.g.,* AS 36.30.170. These terms are explained in the discussion section of this decision, but in general responsiveness relates to submitting a bid that conforms to the ITB, and responsibility relates to having the capacity to complete the job. 12 AAC 12.290; *Black's Law Dictionary* 1312 (6th ed. 1990).

23 AS 36.30.365.

24 *Id.*

25 AS 36.30.565.

26 Record at 177-78.

27 Jenkins testimony; Record at 176, 178.

28 Record at 199.

The contract was awarded to Jolt on December 14, 2018.[29]

On December 19, 2018, Mr. Vezey called the region a second time to inquire about the status of the project. He spoke to Ms. Barness, and later to Mr. Jenkins. He learned that the contract had been awarded. He also learned (and Mr. Jenkins also became aware for the first time) that the Notice of Intent to Award had not been sent to all bidders.[30] Mr. Vezey followed up his discussion with a detailed letter to Mr. Jenkins that described what he considered to be serious problems with Jolt's bid.[31]

Two days later, the Region sent a letter to the three bidders regarding its failure to send the Notice of Intent to Award to Lakloey and Acme.[32] The letter acknowledged that the disappointed bidders did not receive the opportunity to protest—an opportunity that is required by law.[33] To remedy this shortcoming, the letter provided Lakloey and Acme ten days in which to file a protest.[34] The letter did not, however, advise the bidders that the contract had been awarded.[35] It did not say that they could request that action on the contract be stayed during the ten days.[36]

Two days after Christmas, December 27th, Lakloey filed a protest.[37] With supporting exhibits, the protest was 85 pages long.

On January 14, 2019, Mr. Jenkins denied Lakloey's protest. Lakloey appealed the denial to the Commissioner.[38] The Commissioner referred the appeal to the Office of Administrative Hearings. A one-day in-person hearing was held in Juneau on March 28, 2019.

III. Discussion

In broad summary, Lakloey's appeal raises three main arguments. First, Lakloey cites the error in failing to send the Notice of Intent to Award to the bidders other than Jolt.[39] Lakloey further notes that the contracting officer had failed to stay the award while considering an appeal.[40]

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29 Record at 279.
30 Record at 179; Jenkins testimony.
31 Record at 179-81.
32 Record at 176.
33 *Id.*
34 *Id.*
35 *Id.*
36 *Id.*
37 Record at 196-280.
38 Letter from Allan Vezey to Commissioner John MacKinnon (Jan. 22, 2019) (Lakloey Appeal).
39 *Id.* at 1.
40 *Id.*

Second, Lakloey points to flaws in Jolt's bid documents, and with Jolt's registration with the State's and the Department's accounting and contracting software.[41] For many different reasons, Lakloey concludes that due to these alleged flaws, Jolt's bid was "irregular, ambiguous, and not legally enforceable."

Third, Lakloey argues that Jolt had submitted irregular bonding documents in violation of the requirements of the ITB.[42] Lakloey concludes that the alleged irregularities render the bid guarantee invalid. In Lakloey's view, this makes Jolt's bid unacceptable. Based on these three arguments, Lakloey asks that the contract award be rescinded and a Notice of Intent to Award be issued to Lakloey.[43]

These three arguments (each with various threads) are discussed below. The arguments regarding the irregularities in the bid forms and the bonding documents will be discussed first because these issues can be resolved on their merits. The concern about the failure to send the Notice of Intent to Award, however, involves an admitted error. This issue is not about the merit of the claim, but rather whether the admitted error has been cured by allowing Lakloey to file a protest after the normal protest period had lapsed. This question is more difficult to analyze and will be discussed last. Before turning to these arguments, however, this decision will explain the standards that govern when irregularities in a bid may be overlooked, and when they must result in rejection of the bid.

A. When do irregularities or errors in a bid mean that the bid must be rejected?

As stated earlier, the procurement officer must determine whether a bid is "responsible" and "responsive" before awarding a contract.[44] In general, a bidder is responsible if the bidder has the financial capacity, and the competence, to complete the job.[45] A responsive bidder is "a firm or person who has submitted a bid that conforms in all material respects to the solicitation."[46]

Here, Lakloey has raised questions regarding inconsistencies between the name on the bid form and the name on the vendor ID number—both of which are required elements of the bid. Whether the procurement officer can correct or overlook those inconsistencies is governed by the procurement regulations. Under 2 AAC 12.170, inadvertent errors in a bid may not be corrected

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41 *Id.* at 3-7; 8-10.
42 *Id.* at 7-8.
43 *Id.* at 10.
44 AS 36.30.170.
45 *See, e.g. Black's Law Dictionary* 1312 (6th ed. 1990) (defining "responsible bidder" to mean "[o]ne who is capable financially and competent to complete the work"); *see also e.g., In re Waste Management of Alaska, Inc.* (Dep't of Admin. Case No. 01.08 2002) ("DOT's concerns regarding WMAI's capacity or ability to perform on the terms stated in its bid raise questions of responsibility").
46 12 AAC 12.290.

unless they are "minor informalities."[47] "Minor informalities" are defined to mean "matters of form rather than substance which are evident from the bid document, or are insignificant matters that have a negligible effect on price, quantity, quality, delivery, or contractual conditions and can be waived or corrected without prejudice to other bidders."[48]

The irregularities in Jolt's bid raised by Lakloey do not affect the price, quantity, quality, or delivery terms of the ITB. These irregularities do, however, go directly to one key issue—the enforceability of the bid. This is an important issue— if a vendor's bid is not enforceable, the vendor could, if it chose, walk away from the bid after the opening.

In general, once a vendor submits a responsive bid, the vendor is bound by that bid. Should the vendor try to walk away from the bid, the Department has the right to take action against the vendor's bid bond. The bid bond is a required element of a responsive bid. The bond is for a set percentage of the overall bid price—here, it was five percent. As Mr. Jenkins explained, that bid bond serves as a type of liquidated damages, approximating the expected amount that the low bid would be below the next highest bid.[49] Ambiguity or other legal flaw that would allow the vendor to wriggle out of liability for the bid would mean that the bid is nonresponsive.[50] Therefore, when discussing the irregularities raised by Lakloey, whether the deficiencies make Jolt's bid unenforceable will be a key issue.

B. Do the issues with Jolt's vendor registration or bid documents make Jolt's bid nonresponsive, nonresponsible, or otherwise not enforceable?

Lakloey raises many arguments regarding ambiguity and irregularity in Jolt's bid. The first set of these arguments are based on two issues: the incorrect notation of Jolt's vendor ID on its paper bid, and the inconsistent name ("Maintenance Inc.") that was in the Department's computer for Jolt's vendor ID number.

1. Does the difference in names make Jolt's bid unenforceable?

Lakloey presents several reasons for why, in its view, the mismatch between Jolt's actual name and the name reflected by its vendor ID number must mean that Jolt is not a responsive or

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47 12 AAC 12.170(a) ("Inadvertent errors discovered after opening but before award, other than minor informalities, may not be corrected. If a bidder submits proof that clearly and convincingly demonstrates that an inadvertent error other than a minor informality was made, the bidder may withdraw the bid.").

48 2 AAC 12.990(8).

49 Jenkins testimony.

50 *Cf., e.g., In re BW JV1, LLC,* B-401841 (GAO, Dec. 4, 2009) *available at* Record at 249-53 (Appendix P to Lakloey's protest). The decisions of the GAO are not binding in this proceeding but the reasoning and holding of these decisions can be informative when interpreting Alaska procurement law. *Cf., e.g., Earthmovers of Fairbanks, Inc. v. State, Dep't of Trans. and Pub. Fac.,* 765 P.2d 1360, 1364 (Alaska 1989) ("State courts often turn to decisions of the federal Court of Claims and the federal boards of contract appeals for guidance in public contract law.").

responsible bidder. In Lakloey's view, Jolt's bid is not responsible because it relies on a nonexistent company, "Maintenance, Inc.," and a nonexistent company would not have the capacity to do the work. In the alternative, Lakloey presents several different arguments for the proposition that Jolt's bid was nonresponsive. For example, Lakloey argues that if Maintenance, Inc., did exist, then the bid must be the bid of an unknown entity—possibly a joint venture. Whatever that entity is, Lakloey concludes, the entity did not properly identify itself. After explaining these different logical reasons for why the bid nominally submitted by Jolt did not conform to the requirements of the ITB, Lakloey asserts the bid should be found nonresponsive because the ambiguity means it cannot be enforced.

Lakloey has presented logical and consistent arguments. As Lakloey itself has framed the issue, the ultimate question here is whether Jolt's bid was legally enforceable against Jolt. Analyzing this issue involves asking a hypothetical question—if Jolt had tried to walk away from the bid, would Jolt have succeeded? Or would a court allow the Department to enforce the bid and foreclose on Jolt's bid bond?

Lakloey's arguments about the ambiguity of Jolt's name are all formal arguments—arguments based strictly on the fact that the form of Jolt's name entry on its vendor ID registration is irregular. And Lakloey is correct that in some legal disputes, technical compliance with proper form can be controlling.[51] In most cases, however, the law does not favor elevating form over substance.[52]

Applying this standard to the question of whether Jolt's bid is enforceable, all of Lakloey's numerous arguments regarding the ambiguity of Jolt's name become beside the point. ***Jolt's bid was the paper bid.*** It clearly identifies the bidder as "Jolt Construction & Traffic Maintenance, Inc."[53] It is signed by Jolt's president, and provides Jolt's address. Without regard to the name tied to Jolt's vendor ID number, Jolt could not escape liability for this paper bid document. Any other result would elevate form over substance.

Thus, enforceability is a straightforward analysis. The bid was enforceable based on the paper documents. This disposes of Lakloey's main concern, which is that the ambiguity in Jolt's

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[51] *Cf., e.g., Croxton v. Crowley Mar. Corp.,* 817 P.2d 460, 466 (Alaska 1991) (citing "this court's previous decisions placing corporate form over substance").

[52] *See, e.g., Laidlaw Transit, Inc. v. Anchorage Sch. Dist.,* 118 P.3d 1018, 1033 (Alaska 2005) (rejecting "rigid enforcement" of acknowledgement requirement because it "would have elevated form over substance, frustrating the district's and the regulation's clear intent to create a competitive bidding process for pupil transportation."); *cf. also, e.g., City and Bor. of Sitka v. Construction and Gen. Laborers Local 942,* 644 P.2d 227, 232 (Alaska 1982) (rejecting argument because it "unduly exalts form over substance").

[53] Record at 150.

bid allowed Jolt to have two bites at the apple. This is not the case, however, because neither the Department nor the court would not have allowed Jolt to walk away from its bid based on any ambiguity in a computer database.

2. Did Jolt have a vendor ID number?

Turning to the issue of Jolt's vendor ID number, Lakloey is correct that having a vendor ID number is required and important.[54] Therefore, Lakloey is correct that if Jolt did not have a ID number, Jolt's bid would be nonresponsive. To analyze whether having Jolt's ID number tied to the name "Maintenance Inc." means that Jolt did not have an ID number requires some explanation of the vendor ID number.

The manager of the Department's business software, Sara Jarvis, testified that the vendor ID number is used to identify the vendor in both the state accounting system (called "IRIS") and the contract management software used by the Department (called "AASHTOware"). Because these programs interface with each other, and with other programs that generate public records, having correct information regarding a vendor's name and address stored in the state's database is important. It has become more important recently because 2018 was the first year in which the Department rolled out its current management software package.[55]

Ms. Jarvis was able to provide a possible explanation for the mysterious appearance of the name "Maintenance Inc." instead of "Jolt Construction and Traffic Maintenance, Inc." on computer-generated documents. Her research established that Jolt had applied for its vendor ID number at a time when a legacy accounting system was still in place.[56] The data tied to Jolt's ID number had then been electronically transferred to the current accounting system. The accounting system has an entry for both a legal name and a trade name (otherwise known as a "dba"—"doing business as"). By looking at the two name lines in the accounting system, it appeared to Ms. Jarvis that perhaps when Jolt had first keyed in its name, it had keyed in "Jolt Construction & Traffic Maintenance, Inc." Then, perhaps because this name was too long to fit on one line, the the first words "Jolt Construction & Traffic" appeared on the "legal name" line and the last two words, "Maintenance Inc." appeared on the trade name line.[57] That error, possibly made in the legacy system, then showed up again in the current accounting database, and was subsequently transferred to the Department's contract management database.

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54 The ITB requires that "[b]idders must have a vendor ID or your bid may not be accepted." Record at 5.

55 Jarvis testimony.

56 *Id.*

57 *Id.* Ms. Jarvis emphasized that this possible explanation was speculation. *Id.* It was, however, speculation based on her expertise, which was helpful to the ALJ in trying to make sense out of this situation.

Without regard to how the naming error may have occurred, however, it simply is not an issue of substance. Whether "Maintenance Inc." was a deliberately fictitious name or an inadvertent mistake does not matter one iota. Courts are used to seeing fictitious "doing business as" names for businesses, and have no trouble assigning liability to the real party in interest.[58] Thus, Jolt could not escape liability from the binding nature of its paper bid by arguing that the name in the computer database under its vendor ID established that the vendor ID was assigned to a different entity.

For the same reason, having a fictitious or erroneous name in the computer database does not mean that Jolt did not have a vendor ID number. All the evidence—which includes the full name, once both name lines are considered, and the address, establishes without question that JCT05285 was the vendor ID number for Jolt Construction and Traffic Maintenance, Inc.[59] The error in the name in the state's database is not a material error. It does not make Jolt's bid nonresponsive.

3. Does the mistake in Jolt's entry of an incorrect number in the footer make the bid unenforceable or nonresponsive?

Lakloey has also raised the issue of the incorrect entry of Jolt's vendor ID number in the footer of Jolt's paper bid form. Lakloey argues that this error means that Jolt did not properly respond to the bid. Lakloey questioned whether the error might make the bid unenforceable because nothing identified pages 2-5 of the bid form as Jolt's other than the vendor ID number in the footer.

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[58] *Duval v. Midwest Auto City, Inc.,* 425 F. Supp. 1381, 1387 (D. Neb. 1977), *aff'd,* 578 F.2d 721 (8th Cir. 1978) ("The designation "d/b/a" means "doing business as" but is merely descriptive of the person or corporation who does business under some other name. Doing business under another name does not create an entity distinct from the person operating the business. The individual who does business as a sole proprietor under one or several names remains one person, personally liable for all his obligations. So also with a corporation which uses more than one name."); *See also* 57 Am. Jur. 2d Name § 66 ("The use of a fictitious or assumed business name does not create a separate legal entity, and the designation "doing business as" is merely descriptive of the person or corporation who does business under some other name; it signifies that the individual is the owner and operator of the business whose trade name follows his or hers and makes him or her personally liable for the torts and contracts of the business." (Citation omitted.)).

[59] Lakloey has found a federal procurement case in which one company using two different identifying code numbers was found to have made the bid nonresponsive. *In re BDO USA, LLP,* File No. B-416504 (GAO 2018), *available at* appendix 1 to Lakloey appeal. In *BDO,* however, the problem was that the vendor had incorrectly identified the two numbers as being assigned to different entities—a subsidiary and a parent. The GAO decision actually fully supports the decision here, because it acknowledges that if "information readily available" had "reasonably establish[ed] that differently identified entities are in fact the same concern," then the bid would be responsive and responsible. That is precisely what occurred here—Mr. Jenkins was easily able to determine by the name and address in the computer that the differently identified entities were both Jolt and the vendor ID number was Jolt's number. It would have been error for him to have found the bid nonresponsive or nonresponsible based on the name.

There is, however, no substance to this argument. The pages of the bid were all received in one bid packet from Jolt. Each footer contained the same, consistent error. The alleged ambiguity here is ephemeral, not real. If it had become necessary to prove that these pages were Jolt's bid, the Department would have had no trouble in marrying Jolt to its paper bid.

C. Is Jolt's bonding documentation irregular so that its bid guarantee could not have been enforced?

Lakloey's second line of argument focuses on Jolt's bid bond form. This form requires identification of a surety, signed by a person with authority to bind the surety, and, if a corporation, affixed by seal. It commits the surety to being liable for the amount of the bid bond should the vendor (the principal) fail to enter into a contract after the bid was accepted. The forms also require that the surety furnish a power of attorney that certifies that the person signing the bid bond has authority to commit the surety.

Lakloey raises three claims regarding Jolt's bid bond form and the attached power of attorney:

- The name of the surety on the bid bond, "Developers Surety and Indemnity Company," is different from the name of the surety on the Power of Attorney, which is "Developers Surety and Indemnity Company and Indemnity Company of California."[60] To Lakloey, based on the word "and," the name of the surety on the Power of Attorney form appears to be a joint venture (or some other type of joint arrangement), and no such joint venture appears on the bid bond.[61]
- Because the Power of Attorney form was certified on October 25, 2018, the same date that it was filed in Juneau, it appears to Lakloey that the form must have been faxed or emailed. In Lakloey's view, that is not permissible under the Department's Standard Specifications.
- In the alternative, if the Power of Attorney was not transmitted by an unauthorized means, it must have been postdated by the person who certified it.

Again, Lakloey has raised formal arguments—arguments that find fault with the form of the documents used to record the transaction. In surety law, however, form is very important.[62] A mismatch between the surety on the bid bond and surety on the Power of Attorney, for example, could very well doom the enforceability of the bond.

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60 *Compare* Record at 158 with Record at 159.

61 Lakloey appeal at 7.

62 *Cf., e.g., SKW/Eskimos, Inc. v. Sentry Automatic Sprinkler Co.*, 723 P.2d 1293, 1296 (Alaska 1986) ("a surety cannot be held liable beyond the scope of the principal's duty").

Here, however, Lakloey's first two arguments are easily addressed. With regard to the identification of two sureties being governed by the same Power of Attorney, that in no way undercuts the authority of the Power of Attorney to bind the individual surety that is guaranteeing the bond. That the Power of Attorney applies to two entities that are separate and not a joint venture or partnership is made clear because the Power of Attorney clearly states that "each" entity appoints the named individuals as their "Attorney(s)-in-fact.[63]

With regard to the concern that the Power of Attorney form was transmitted in an unauthorized way, the documents establish that the bid packet was transmitted as a paper packet and received on October 25, 2018 by the Region in Juneau.[64] Therefore, even if Lakloey were correct about whether the ITB forbids electronic transmission of documents (a point the parties vigorously dispute), no unauthorized transmission occurred.

The fact that the Power of Attorney was in the packet, however, confirms Lakloey's alternative argument that certification was postdated. An Assistant Secretary for the two sureties, Cassie J. Berrisford, certified that the Power of Attorney remains in full force and has not been revoked.[65] The document states that "This Certificate is executed in the City of Irvine, California, this 25th day of October, 2018."[66] That, however, is not possible because the certificate was in the packet delivered to Alaska Airlines in Anchorage on October 24, 2018.[67] It follows that Ms. Berrisford must have postdated the certificate.

Although the postdating of the certificate raises some concern, the question here is whether this postdating means that the bond was unenforceable. The cases cited by Lakloey do not establish that a postdating of a certificate makes a bid bond unenforceable. Moreover, Ms. Berrisford's action was reasonable because the purpose of the certification is to provide assurance that the Power of Attorney was valid. Yet, this purpose sets up a catch-22. If the Power of Attorney was certified as valid before the bid opening, presumably it could have been invalidated during the intervening time, and thus be invalid on the day of the opening. Ms. Berrisford addressed this dilemma by postdating the certification.

The entire point of a certificate is to convey that the Power of Attorney will be valid on the day of the bid opening. What Ms. Berrisford did was to put the date of that expectation in

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63 Record at 159. Lakloey's point that the disjunctive "or" would make more sense than the conjunctive "and" is well taken. It is not, however, fatal to use the word "and" because the text makes clear the entities are separate.

64 Record at 298.

65 Record at 159.

66 *Id.*

67 Record at 297.

writing and certify it. Although the language used on her form is incorrect (the Certificate was not executed in Irvine on the 25th—it was signed in Irvine some time before the 25th), invalidating the bid based on this error would again be a matter of form over substance. Because nothing in this record establishes that the bid bond form was made unenforceable by her error, the contracting officer did not err by finding Jolt's bid responsive and responsible.

D. Has the Region's error in failing to timely send the Notice of Intent to Lakloey been sufficiently cured?

The remaining issue here is the most difficult. The Region has acknowledged its error in failing to provide the disappointed bidders with a copy of the Notice of Intent to Award. At the hearing, Mr. Jenkins further acknowledged that this error was, in his words, "a big deal."[68] The Region argues, however, that the error was cured by providing the disappointed bidders with the opportunity to protest.

As Lakloey has pointed out, the opportunity to protest is cold comfort when a contract award has already been made. Had the process been correctly followed, Lakloey would have had the opportunity to protest before the award was made. In Lakloey's view, a contracting officer will almost always be more receptive to an argument that he or she made an error when the argument is received before the contract has been awarded. Once the award is made, however, the contracting officer will feel much more locked in. Lakloey argued that the only adequate remedy is to rescind the contract award.

In determining an appropriate remedy for a procurement violation, the procurement officer must consider the circumstance of the procurement, including the following six factors:

(1) the seriousness of the procurement deficiencies;

(2) the degree of prejudice to other interested parties or to the integrity of the procurement system;

(3) the good faith of the parties;

(4) the extent to which the procurement has been accomplished;

(5) costs to the agency and other impacts on the agency of a proposed remedy; and

(6) the urgency of the procurement to the welfare of the state.[69]

At the outset, Lakloey's requested remedy of rescission is clearly not warranted because it would cause significant prejudice to Jolt. The error made by the Region in failing to notify

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68 Jenkins testimony.

69 AS 36.30.585(b).

bidders had nothing to do with Jolt. Jolt's bid was the low bid and it was responsive and responsible. The prejudice to Jolt precludes rescission.

The question remains, however, whether a lesser remedy, such as an award of bid preparation costs, is warranted by the Region's error. Given that Lakloey did eventually receive the opportunity to protest, the question comes down to two issues—first, whether Lakloey truly suffered a detriment in the quality of the process that warrants the remedy of an award of bid preparation costs, and second, whether the reputation of the procurement system would be blemished based on this mistake unless an award was made.

I agree with Lakloey that the ability to protest would be more potent before the award of a contract than after. In that regard, the Region's failure to return Mr. Vezey's telephone call on November 29th looms large. That call was made three days before the Notice of Intent to Award was sent, and more than two weeks before the contract was awarded. Had the call been returned, the Region could have avoided the error, and Lakloey would have been offered an unblemished process.

Yet, although I agree with Lakloey that the ability to protest would be more potent before the award of a contract than after, the law does not give any protester the ability to force the contracting officer to ponder the protest before an award. For a contract other than construction, the contracting officer need only wait 10 days after the Notice of Intent to Award before awarding the contract.[70] That means the contract could be awarded on the same day that the protest is received. For a construction contract, the time is even less—the contract can be awarded five days after the notice.[71] Thus, to avoid the detriment that Lakloey sees in having an award made before the protest is considered, the protestor must request that the Region stay the award.

The same is true here. Had Lakloey wanted the contracting officer to be able to ponder the protest without the burden of knowing that work on the project might be proceeding, Lakloey could have requested a stay. Lakloey did not do so. Therefore, even though Lakloey is correct that the delay in notice did cause some slight detriment to its ability to strike while the iron is hot, the actual difference between Lakloey's position and the position of a timely protestor who also did not receive a stay is so small that it does not warrant a remedy.[72]

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[70] AS 36.30.365.

[71] *Id.*

[72] Nothing in this discussion implies that the contracting officer in this case did not give Lakloey's arguments the same scrutiny he would have given had they been received before the award had been made. This discussion is purely hypothetical, based on viewing the situation from the vantage of a protestor.

Finally, we must consider Mr. Vezey's argument that the errors made in this case reflect on the integrity of the procurement process. If true that the totality of the circumstances here would cause the public to lose faith in the process, and if an award of a remedy could restore that faith, then an award of some type of remedy could be considered.[73]

A general principle that keeps people's faith in government processes, however, is that like people should be treated alike. Here, Lakloey is in the same shoes as other disappointed bidders who bring a well-presented, but ultimately unsuccessful, protest appeal. Because those protestors do not receive a remedy, Lakloey should not either unless the need for a remedy is compelling. Although this a close question—particularly because the simple act of returning a telephone call could have avoided the error—nothing in this record implies any favoritism or lack of commitment to the principles of even-handed and fair procurement. Here, once the error was discovered, it was addressed, and the process provided was a full, genuine procedure. The mistakes here should not cause the general public to lose sleep over the procurement process. Therefore, no remedy is needed to address the errors made by the Region.

IV. Conclusion

The contracting officer did not err in finding the bid submitted by Jolt Construction and Traffic Maintenance, Inc., to be responsive and responsible. Errors or irregularities in the bid documents, and in the related entries in the state computer database, were all minor informalities. The bid documents were enforceable. Therefore, the decision of the contracting office is affirmed.

DATED: April 6, 2019.

By: *Signed*

Stephen Slotnick
Administrative Law Judge

[73] Mr. Vezey did not state or imply any personal dissatisfaction with Region personnel. He acknowledged that mistakes will happen. Further, the evidence at the hearing confirmed Mr. Vezey's view that Region personnel acted in good faith and are competent administrators of the procurement code.

Adoption

Under the authority of AS 44.64.060(e)(1), I adopt this decision as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 13th day of May, 2019.

By: *Signed*
Signature
John MacKinnon
Name
Commissioner
Title

[This document has been modified to conform to the technical standards for publication. Names may have been changed to protect privacy.]