

Black Micro Corp. v. Rengulbai, 14 ROP 196 (Tr.Div.)(2007)
BLACK MICRO CORPORATION,
Plaintiff,

v.

TECHUR RENGULBAI in his capacity as Director of Public Works, and REPUBLIC OF PALAU¹,
Defendants.

CIVIL ACTION NO. 07-145

Supreme Court, Trial Division
Republic of Palau

Decided: August 15, 2007

[counsel names not listed]

LARRY W. MILLER, Associate Justice:

On May 21, 2007, Plaintiff Black Micro Corporation filed a complaint against the Republic of Palau and Techur Rengulbai in his capacity as Procurement Officer and Director of the Bureau of Public Works. The complaint alleged that Defendants had violated the procurement law by awarding a public works contract to a competing bidder who, misadvised by the government as to the correct date and time of the bid opening, had submitted a late bid. Plaintiff requested this Court to declare the acts of the procurement officer in accepting the late bid void and further requested a permanent injunction barring the award of the contested contract tot the late bidder. Following a brief trial and submission of written and oral arguments, the Court now issues this opinion.

The parties have stipulated to most of the facts in this case. On or about January 4, 2007, the Bureau of Public Works issued a Notice to Bidders soliciting bids for the Palau International Airport Loading Bridges and Concourse project (“Airport Project”). The bidding process was handled by the Capital Improvement Program (CIP) of the Bureau of Public Works. After several postponements of the bid opening, a notice was issued on March 22, 2007, which informed interested parties that the bid opening date was extended again until April 11, 2007, at 2:00 p.m. Only two parties submitted bids for the Airport Project: Black Micro and Surangel and Sons Construction Co. (“Surangel”).² Black Micro submitted its bid prior to the 2:00 p.m. **L197** deadline, but Surangel submitted its bid at or around 3:30 p.m., nearly one and a half hours after the deadline.

¹The Court has stricken the reference to “John Doe” defendants from the caption. See *Melimarang v. Debesol*, 7 ROP Intrm. 263 (Tr. Div. 1998).

²Although the stipulated facts refer to Surangel and Sons as a corporation, it is the Court’s understanding that it is instead an unincorporated family-owned business.

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The Court accepts as true Defendant's and Surangel's contention that its late bid was due to misinformation transmitted by the CIP office. Surangel's representative, Mason Whipps, testified that he called the CIP office on April 10 or 11 and was misadvised that the bid opening date had been rescheduled to April 13. Although Mason subsequently learned that there had been no rescheduling,³ it was by then too late to timely submit a bid and he instead hand delivered a sealed bid proposal to the CIP office at about 3:30 p.m. While Black Micro does not factually contest this version of the events, it argues that the reason Surangel submitted a late bid is irrelevant to the Court's analysis.

After receiving the late bid, the CIP office held both bids unopened and advised both parties that the bids would be opened on April 25, 2007. In CIP's letter to the parties explaining the rescheduling, it stated that the bid opening had not been carried out at the scheduled date and time because the government was concerned about the confusion over the date and time of the opening. The letter also stated that, in light of the purposes of the procurement law, the CIP office did not believe that the integrity of the procurement process would be compromised by accepting Surangel's late bid. When the bids were publicly opened on April 25, 2007, Surangel's bid was nearly \$75,000 lower than Black Micro's bid.

On May 7, 2007, Black Micro submitted an administrative protest to the Bureau of Public Works. In its protest, Black Micro cited 40 PNC § 620, which states, *inter alia*, that "[t]he bids will be opened publicly . . . at the time and place designated in the invitation," as supporting its position that late bids should not be accepted. The protest also drew attention to Section A-2 of the solicitation which states, in part, "Any bids submitted by hand after the time set for receipt will not be accepted." On May 11, 2007, Defendant Rengulbai wrote a letter to Black Micro stating that he had reviewed its objections and decided that "the Government stands by the decision to accept and open the bid for the subject property by Surangel & Sons Co." A notice of award to Surangel was issued on May 18, 2007, and Black Micro's complaint was filed with this Court on May 21, 2007. On June 5, 2007, the parties agreed to a preliminary injunction stopping Defendants from entering into a contract with Surangel for the Airport Project pending final resolution on the merits of this case.

Black Micro argues that the government mistake in this matter is irrelevant and that the pertinent statutes and bid solicitation materials allow no discretion to accept late bids. Defendants argue to the contrary that the government possesses the discretion to accept late bids, particularly where the late bid is caused by the government's mistaken communication. After reviewing the relevant statutes and case law, the Court agrees with Defendants that the mistake is not irrelevant and the government had the authority to accept Surangel's late bid **¶198** in the circumstances presented in this case.

Generally, courts will not interfere with an agency's decision to award a contract to a bid which presents the most advantageous terms to the government, unless there is a showing that government officials abused their discretion in awarding the contract. *See* 64 AM. JUR. 2D *Public Works and Contracts* § 67 (2001). Here, Black Micro does not allege fraud, collusion, or

³According to the testimony, when 2:00 p.m. on April 11 passed without the submission of a bid by Surangel, a CIP official called Surangel's bonding agent who, in turn, informed Mason.

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other serious abuse of discretion, but instead urges that the integrity of the procurement process can only be maintained by strict adherence to the statutes controlling government procurement. But although it urges that the Court must not look beyond the plain language of the statute, its argument ultimately rests not on any provision absolutely barring the consideration of late bids in any circumstances—because there is no such provision— but rather on the proposition that such a bar arises “by necessary implication” from the provision that “bids will be opened . . . at the time and place designated in the invitation [for bids].” See 40 PNC § 620. That is a possible implication, but it is an unlikely, and certainly unnecessary, one given the permissive language of 40 PNC § 622 (a), which provides that “a bid *may* be rejected for . . . failure to comply with the material requirements of the invitation for bids such as specifications or time of delivery.” (Emphases added.) Rather, the Court is inclined to agree with the cases that have held that where statutory law does not address the specific details of the bidding process or the agency’s power to accept late bids, this silence signifies a legislative decision to leave specific aspects of the bidding process to the discretion of the government agency. See, e.g., *Power Systems Analysis v. City of Bloomer*, 541 N.W.2d 214, 216 (Wisc. App. 1995).⁴

To be sure, that discretion is not unbounded. But having rejected Black Micro’s contention that Defendants had no discretion to accept Surangel’s late bid, the Court need not go further than to conclude that it was not an abuse of discretion for them to do so in the circumstances of this case. A long line of decisions considering protests to procurement decisions by U.S. federal agencies have held that acceptance of an untimely bid was appropriate where the untimeliness resulted directly and principally from the government’s misdirection:

As a general rule, an offeror has the responsibility for assuring the timely arrival of its proposal at the place designated in the solicitation. However, a hand-carried offer that is received late may be accepted where improper government action was the paramount cause for the late delivery, and the integrity of the procurement process would not be compromised by acceptance of the offer.

Hospital Klean v. United States, 65 Fed. Cl. 618 (2005) (quoting a decision by the U.S. Government accountability office). Here, **¶199** there is no reason to doubt that, absent the mistaken information provided by the CIP office, Surangel’s bid was ready to go and would have been submitted in a timely fashion. Nor has there been any contention that Surangel’s late delivery provided it with some improper advantage such that acceptance of its bid would compromise the integrity of the procurement process. Accordingly, the Court concludes that Black Micro’s challenge to that acceptance must be rejected.

An appropriate judgment is entered herewith this 15th day of August, 2007.

⁴As noted above, Black Micro also points out that the Notice to Bidders explicitly stated that late bids would not be accepted. But the Court does not believe that this general warning served to tie Defendants’ hands and withdraw their discretion to deal with the circumstances that arose here.