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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Kesser International

File: B-296294

Date: June 30, 2005

Christopher Solop, Esq., Armstrong Allen PLLC, for the protester.
Capt. Peter G. Hartman, Department of the Army, for the agency.
Peter Verchinski, Esq., and John M. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Agency properly rejected proposal as late where it was received minutes after closing time; 20 minute delay at a security checkpoint did not constitute improper government action and, in any case, was not paramount cause of late receipt, since delay took place 2 hours before closing time, leaving courier sufficient time to deliver proposal.

DECISION

Kesser International protests the rejection of its proposal as late under request for proposals (RFP) No. W911SF-05-R-0001, issued by the Department of the Army, for grounds maintenance services at Fort Benning, Georgia.

We deny the protest.

The solicitation informed potential offerors that initial proposals were to be received in Building 6, Room 313, Fort Benning, Georgia, by 2:00 p.m., March 31, 2005. The solicitation included the standard late proposal clause for commercial items, Federal Acquisition Regulation (FAR) § 52.212-1(f), which generally states that any offer received at the office designated in the solicitation after the exact time specified for receipt will not be considered.

On March 30, the day before proposals were due, Kesser sent its proposal by FedEx priority overnight mail. While delivering packages on the base the next morning, according to FedEx, the courier was stopped and delayed for approximately 20 minutes at a military police random vehicle stop. (The Army states it has no record of this stop.) After the courier was allowed to proceed, he returned to

delivering packages, and--according to the FedEx records--ultimately delivered Kesser's package at 2:02 p.m. The agency recorded delivery at 2:04 p.m. Since the package arrived after the time set for receipt of proposals in the RFP, the contracting officer (CO) rejected the proposal as late.

Kesser primarily argues that the security delay made it impossible for the courier to deliver its proposal on time, and that its proposal therefore should be accepted on the basis that improper government action was the paramount cause of the late delivery.¹

An offer is late if it does not arrive in the office designated in the solicitation by the time specified in the solicitation. Sencland CDC Enters., B-252796, B-252797, July 19, 1993, 93-2 CPD ¶ 36 at 3. An offer that arrives late may only be considered if it is shown that the paramount reason for late receipt was improper government action, and where consideration of the proposal would not compromise the integrity of the competitive procurement process. Caddell Constr. Co., Inc., B-280405, Aug. 24, 1998, 98-2 CPD ¶ 50 at 6.

Here, FedEx records provide the only evidence that the FedEx truck was stopped at a random security checkpoint on the base; the agency maintains it has no record of such a stop. Agency Report (AR), Tab 16. However, even assuming there was a security stop, this would not necessarily constitute improper government action, since a 20 minute security delay on a military base is not on its face unreasonable. Rather, we think this is a situation where an offeror should reasonably anticipate such a delay. We have recognized that delays in gaining access to government facilities are not unusual and should not be unexpected. See, e.g., Einhorn Yaffee Prescott, B-259552, Mar. 20, 1995, 95-1 CPD ¶ 153 at 3.

In any case, we do not view the government's actions here as the paramount cause of the late receipt of Kesser's proposal. In this regard, the alleged security delay took place at approximately 11:40 a.m. Thus, the courier still had 2 hours to timely deliver the package once he was allowed to proceed. The courier explained to the CO that, after he was stopped by the military police, he continued to follow his usual route until he received a call from his dispatcher, instructing him to deliver to Building 6 before making his scheduled stop at Building 4. AR, Tab 11. He then proceeded to

¹ Kesser also argues that its proposal should have been considered for award because the proposals here were not publicly opened, so that there would be no competitive prejudice to other offerors if the agency accepted Kesser's late proposal. This argument is, in effect, a challenge to the late proposal provisions laid out in the solicitation, which do not allow for consideration of late proposals under these circumstances. See FAR § 52.212-1(f). Consequently, Kesser was required to protest on this basis before the initial closing time for receipt of proposals; its protest of this issue now is untimely. 4 C.F.R. § 21.2(a)(1) (2005).

deliver Kesser's package at that time. Given these circumstances, the paramount cause for the package's late delivery was the courier's decision to continue on his normal route after the alleged security delay--rather than deliver Kesser's proposal at that time--and not the government's actions.

Kesser states that its courier may have relinquished control of Kesser's proposal prior to the time for submission of proposals. However, Kesser offers no support for this statement, and the individual at the agency who received the package states that she "immediately clocked [the proposal] in" at 2:04, and the courier also recorded delivery after 2:00 p.m. AR, Tab 13. We conclude that Kesser's proposal was late, and that the government properly rejected it.

The protest is denied.

Anthony H. Gamboa
General Counsel