



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Family Stress Clinics of America

File: B-270993

Date: May 10, 1996

Clifford K. Brickman for the protester.

Mike Colvin and Steven L. Zangwill, Department of Health and Human Services, for the agency.

Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

An oral amendment extending the closing date for submission of proposals indefinitely is in full force and effect, even though it was not confirmed in writing, where the amendment was issued under exigent circumstances accompanying the shutdown of the contracting agency and the terms of the oral amendment are not in dispute.

DECISION

Family Stress Clinics of America protests request for proposals (RFP) No. 240-BPHC-8(6), issued by the Department of Health and Human Services (HHS), Health Resources and Services Administration, for counseling services for the Employee Assistance Program for the western region of the United States Postal Service. Family Stress contends that the agency orally amended the RFP by indefinitely extending the closing date for receipt of proposals and then failed to honor the terms of that amendment.

We sustain the protest.

The RFP contemplated the award of a cost-plus-award-fee contract for 1 year with 4 option years. HHS issued two written amendments, the second of which set the closing date for receipt of proposals as December 29, 1995.

Because of the budget impasse, the agency was shut down from December 18 through January 5, 1996. Additionally, due to snow emergencies, the shutdown was extended for all but 1 day thereafter until normal operations resumed on January 16. According to the agency, the duties and responsibilities of the contracting staff during this period, including answering of telephones and receipt of mail, were primarily performed by the contracting officer.

On December 21, the contracting officer contacted ROW Sciences, Inc., a technical support contractor of the agency, and instructed ROW to call all of the 125 firms on the RFP distribution list, obtain their fax numbers, and provide an explanation about extending the closing date for submission of proposals, if necessary. The ROW employees making the calls read the following prepared statement to each firm on the list:

"I am calling for the contracts office at [HHS].

"The due date this week for proposals in response to the Postal Service Employee Assistance Program RFPs has been extended. We do not have a firm date yet, but the extension will be for at least a couple of weeks.

"We will fax the amendment to the RFP in the next day or so. The amendment will identify who you can call if you have questions."

The ROW employees were instructed that, in the event someone persisted with questions, they should repeat the last sentence of the statement and should not give out HHS phone numbers.

On December 28, ROW contacted Family Stress and read the statement into the Family Stress's voice mail. ROW repeated the statement during several telephone conversations with Family Stress in early January. ROW states that Family Stress was persistent in requesting more information about the extension and that ROW only repeated the prepared statement, as instructed. ROW states that after the shutdown was over, it obtained permission to provide Family Stress with an HHS phone number.

Prior to the end of the shutdown, Family Stress faxed a letter on January 11 to the contracting specialist on this RFP. This letter referenced previous letters faxed on December 22 and 27, which raised questions about the RFP and requested a response. The letter stated that attempts to reach the contracting specialist by phone in the interim had been unsuccessful.

On January 17, the contracting specialist left a voice mail message for Family Stress answering its questions and stating that HHS had not extended the closing date. In a later phone conversation with Family Stress, the contracting officer confirmed that the agency had not extended the closing date. Six proposals were received in response to the RFP.

Family Stress protests that the oral statement disseminated by ROW amended the solicitation to extend the closing date indefinitely. In response, HHS contends that the oral statement is not an amendment because it was never followed by written

confirmation. We find that the oral statement read by ROW to prospective offerors constituted an oral amendment extending indefinitely the closing date for submission of proposals and that the agency's failure to confirm this amendment in writing does not preclude its enforceability.

When the closing date for receipt of proposals is to be changed, the RFP is to be amended prior to the closing date. Federal Acquisition Regulation (FAR) § 15.410(a)(3). Where the time available before the closing date is insufficient for issuance of a written amendment, prospective offerors are to be notified by electronic data interchange, telegram, or telephone of an extension of the closing date. FAR § 15.410(b). While such telephonic and telegraphic notices are required to be confirmed in a written amendment to the solicitation, *id.*, we have long recognized that an agency may need to orally amend a solicitation and require offerors to act on the terms of the amendment before the agency can disseminate a written amendment confirming those terms. See Porta-Fab Corp., B-213356, May 7, 1984, 84-1 CPD ¶ 511; Chrysler Motors Corp., B-186600, Sept. 29, 1976, 76-2 CPD ¶ 294. When such exigent circumstances exist, an oral amendment is effective. See Porta-Fab Corp., *supra*.

Here, such exigent circumstances clearly existed—the agency was shut down and the notification of closing date extension was provided only one day prior to that date. Obviously, with the agency closure and the repeated statements from ROW during early January, a prompt written confirmation of the extension could not reasonably have been expected shortly after December 28.¹ See Porta-Fab Corp., *supra*.

The facts also are not in dispute. In response to the contracting officer's instruction, ROW contacted the firms on the distribution list and unambiguously

¹In addition, because of the unusual exigent circumstances and ROW's declination to give HHS phone numbers, we do not think that the protester should have been greatly concerned that no written amendment, confirming the closing date extension and establishing a new closing date, was issued until normal HHS operations resumed in mid-January.

Moreover, the record evidences that Family Stress attempted to contact the contracting office telephonically during the shutdown and was unsuccessful on every attempt, as evidenced by its unanswered faxes to the contracting specialist for this RFP. Although the contracting officer states that he was performing all of the duties of his laid off staff, including answering phones, it is not surprising under the extreme demands of the shutdown that some phones, fax messages, and even attempts by couriers to deliver packages went unanswered, as the record evidences occurred here.

stated that it was calling for HHS, that the closing date for proposals “had been extended” indefinitely, that “the extension will be for at least a couple of weeks,” and that an amendment to the RFP confirming this extension would be issued. The agency does not assert that ROW disseminated this statement without the authority of the contracting agency. Under the circumstances, we think that this statement clearly constituted an oral amendment extending the closing date indefinitely.

HHS nevertheless alleges that the fact it received six proposals demonstrates that ROW's oral statement did not confuse any other offeror into not submitting a proposal. The record shows that only two proposals were received by HHS on or before December 29; three others were received on January 3, and one was received on January 23. Two of the proposals were submitted by offerors who were not on the list of 125 prospective offerors from which ROW made its calls, and of the remaining four, the agency states, one was delivered by courier the morning of December 28 and two were in the possession of couriers as early as December 27 or 28. Since ROW first made its call to Family Stress on December 28, it appears that at least three of these four proposals may have left the offerors' hands prior to ROW's calls advising of the extended closing. Thus, the number of proposals received does not negate the unequivocal nature or effect of ROW's message on behalf of HHS' extending of the closing date.

Finally, HHS alleges that Family Stress's protest should not be sustained because that firm was not ready to submit a proposal either on December 29, or in January when the shutdown ended. Family Stress responds that it was in the process of preparing its proposal for submission at the time of the oral amendment and, when notified of the indefinite extension of the closing date, it gave its subcontractors additional time to provide information for the proposal. Under the circumstance, we cannot find that Family Stress could not have submitted a timely proposal if the agency had not extended the closing date. Nevertheless, in view of the indefinite extension, Family Stress's readiness to submit a proposal by either December 29 or in January would not be controlling.

We recommend that the agency reopen the competition, issue an amendment establishing a closing date for submission of proposals, and proceed with the procurement. We also recommend that the protester be reimbursed its costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (1996). The protester should submit its certified claim for costs to the contracting agency within 90 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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