



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Caddell Construction Company, Inc.

File: B-280405

Date: August 24, 1998

Timothy Sullivan, Esq., and Katherine S. Nucci, Esq., Adduci, Mastriani & Schaumberg, for the protester.

Edward P. Meyerson, Esq., and Stanley W. Logan, Esq., Berkowitz, Lefkovits, Isom & Kushner, and Laurence Schor, Esq., McManus, Schor, Asmar & Darden, for Bill Harbert Construction Company, an intervenor.

Carlton A. Arnold, Esq., and Robert W. Pessolano, Esq., Department of the Army, for the agency.

Adam Vodraska, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency reasonably rejected hand-carried proposal as late where a preponderance of the evidence establishes that the protester did not deliver the proposal to the designated location prior to the time set for closing.

DECISION

Caddell Construction Company, Inc. protests the rejection of its proposal as late under request for proposals (RFP) No. DACA27-98-R-0020, issued by the U.S. Army Corps of Engineers, Louisville District, for construction of the 3rd Brigade Barracks Complex, Phase III, at Fort Campbell, Kentucky.¹

We deny the protest.

BACKGROUND

The RFP required offerors to submit their original proposals, and the requisite number of copies, to Room 821 of the Corps of Engineers offices at 600 Dr. Martin Luther King, Jr. Place (the Federal Building), Louisville, Kentucky, no later than 4:30 p.m. local time, April 21, 1998. RFP at A-1, L-7. The solicitation included the full text of the late proposal provision of the standard "Instructions to Offerors--Competitive Acquisition (Oct 1997)," Federal Acquisition Regulation (FAR) § 52.215-1(c)(3). RFP at L-3.

¹This decision is made under our express option procedures, 4 C.F.R. § 21.10 (1998).

The agency received a proposal from Bill Harbert Construction Company prior to the 4:30 p.m. closing time,² but maintains that it did not receive Caddell's proposal until after 4:30 p.m., when the Chief of Contracting for the Louisville District accepted Caddell's proposal (noting that it was late) from Caddell employees who had been denied entry to Room 821 when the doors to that room were locked by agency personnel at 4:30 p.m. The Corps subsequently rejected Caddell's proposal as late because its late submission did not meet any of the criteria of FAR § 52.215-1(c)(3) for acceptance of late proposals. Caddell then filed an agency-level protest, which the Corps denied on June 9. This protest followed.

Caddell contends that its employees reached the door to Room 821 with its proposal at 4:29 p.m., and thus prior to the 4:30 p.m. deadline, but that agency personnel did not allow Caddell to timely submit its proposal because they prematurely locked the door to Room 821, apparently because they earlier used one clock to advise a Caddell representative of the time (which he used to synchronize his watch while finalizing Caddell's proposal), but then used a different time-keeping device to determine that the proposal submission deadline had passed. Caddell attributes the incident to the lack of an "official clock" in plain view, on which the Corps could base its determination that the deadline had arrived and by which offerors could verify the time. The Corps, supported by the intervenor, Harbert, counters that the evidence does not support Caddell's contention that its employees reached Room 821 prior to 4:30 p.m. and maintains that agency personnel did not use different times or prematurely lock the door to the room where proposals were to be submitted.

In view of the inconsistencies among the protester's, the agency's, and the intervenor's accounts of the events of April 21, our Office conducted a hearing at the Corps's offices in Louisville to ascertain the facts and to assess the credibility of the respective parties' witnesses to the events of that day.

The reception area of Room 821, which contains the contracting offices of the Louisville District, is a large space broken up by numerous cubicles. A receptionist's desk faces the main door to Room 821, which is a glass door opening onto a hallway. On the receptionist's desk is a telephone with a digital clock, a personal computer, and a time/date stamp machine which audibly clicks on the minute every 60 seconds as the minutes advance. Hearing Transcript (Tr.) at 5-10. The official time used by the contracting division is that kept by the time/date stamp machine. Tr. at 5-6, 216, 269; Agency Report at ¶ 4. The time/date stamp machine does not have a clock face. Protest at 9 n.1; Agency Report at ¶¶ 4, 26. The receptionist, Connie Senne, testified that to tell the time she synchronizes the time/date stamp machine with the digital clock displayed on her telephone (hereinafter "clock"). Tr. at 5-8, 269-70. She explained that to do so she

²Besides Caddell, Harbert was the only firm that submitted a proposal.

sticks a piece of paper into the time/date stamp machine, obtains a stamp of the time (hours/minutes), sets the clock 1 minute ahead of the time/date stamp, and then activates the clock when she hears the time/date stamp machine click to the next minute, ensuring that when the time/date machine next clicks the clock will read the same hour and minute. Tr. at 8-9, 269-70. Ms. Senne testified that on the day proposals were due, April 21, she did not need to adjust the time on her clock with the time of the time/date stamp machine because they were already synchronized. Tr. at 298.

Across from the receptionist's area in Room 821 near the door to the hallway is the cubicle of Linda Hunt-Smith, a contract specialist who was the designated proposal receiving agent for this RFP. Her desk holds a telephone with a digital clock and her personal computer. Tr. at 12-13. Ms. Hunt-Smith testified that when she first arrived at work on the day proposals were due she called the time service on the telephone and checked it with the time/date stamp, her computer, and her clock to verify that all times read the same. Tr. at 214. To verify that the time/date stamp machine was synchronized with her clock, Ms. Hunt-Smith had Ms. Senne insert a piece of paper in the time/date stamp machine and read aloud the time indicated on the resulting stamp. Tr. at 213. When the machine clicked to the next minute, Ms. Hunt-Smith obtained another readout from Ms. Senne of the time on the time/date stamp machine in order to verify that their clocks read the same. Tr. at 214. Both Ms. Senne and Ms. Hunt-Smith testified that they checked the synchronization of Ms. Hunt-Smith's clock in this manner several times on April 21. Tr. at 11-12, 214.

At approximately 3 p.m., two Caddell employees, Dick Greaves and James Gage, arrived at Room 821 of the Corps's offices, introduced themselves to the receptionist, and were directed to Ms. Hunt-Smith. Tr. at 73-75, 138-40. The Caddell employees asked Ms. Hunt-Smith to see the official bid opening clock but she responded that there is no official clock.³ Tr. at 75, 140-43. She told them that she had just set her own clock by calling the time on the telephone and that at 4:30 p.m. she would lock the door to Room 821 and not accept any more proposals. Tr. at 75-76, 141-42. When Mr. Greaves asked Ms. Hunt-Smith what time her clock had, she glanced to the left of her computer (at her telephone clock) and said that it was 3:13 p.m. Tr. at 75-76, 142, 173. The Caddell representatives did not see her clock but Ms. Hunt-Smith stated that she gave them the synchronized time she had on her clock. Tr. at 75-76, 142, 173, 216, 271-72. Mr. Greaves synchronized his

³According to Ms. Hunt-Smith, the Caddell representatives were advised that, although there is no official clock, there is an official time, which was the time/date stamp, and that the clock on her desk is synchronized to the time/date stamp machine. Tr. at 216, 232-233. Caddell disputes that its employees were told that the official time was based on the time/date stamp machine or that the clock on Ms. Hunt-Smith's desk was synchronized with it. Tr. at 86, 173.

watch by setting it to 3:13 p.m. based on the time Ms. Hunt-Smith told him. Tr. at 76, 142-44; Protest at 3.

Mr. Greaves then asked Ms. Hunt-Smith if he and Mr. Gage could use a room to finish preparing Caddell's proposal and, after checking, Ms. Hunt-Smith led the Caddell employees to the bid opening room, Room 809, approximately 20 feet down the hall from Room 821. Tr. at 76, 144; Protest at 3. Once in the bid opening room, Mr. Greaves used his cellular telephone to make several calls to his company and at about 4:10 p.m. was told by the company president to call back at 4:15 p.m., at which time the final prices would be provided. Tr. at 83, 146-51; Protest at 3. Because he had a few spare minutes, Mr. Greaves returned to Room 821, where he again asked Ms. Hunt-Smith for the time. Tr. at 83, 152-54. She told him that the time was 4:12 p.m, Tr. at 154, which was consistent with the time on Mr. Greaves's watch. Protest at 3-4. Ms. Hunt-Smith testified that when she told Mr. Greaves this time she was looking at her telephone clock and that she also verified this time with Ms. Senne. Tr. at 217, 236-37. Mr. Greaves returned to the bid opening room and telephoned the company president at 4:20 p.m., who provided the names of subcontractors to be used in the proposal and the final prices. Tr. at 155-57; Protest at 4. As indicated by telephone records from Caddell's cellular phone carrier, this telephone call was completed at about 4:25 p.m. and the Caddell employees proceeded to finish preparing the proposal.⁴ Tr. at 157-60. They kept the doors to this room shut while they did so. Tr. at 83-84.

As 4:30 p.m. approached, Ms. Hunt-Smith, Ms. Senne, and two other Corps employees, Contract Specialist Lisa Frazier and Procurement Technician Janet Lee, were in the reception area of Room 821 discussing among themselves whether Caddell would get its proposal in on time. Tr. at 218, 240-41, 272-73, 315, 335, 344-45, 354. Ms. Hunt-Smith then sat at her desk, and when she heard the time/date stamp click and observed her clock change to 4:29 p.m., decided to notify the Caddell employees of the time. Tr. at 218-19, 355. She left her cubicle, opening the door leading into the hallway and called out, "It's 4:29. Are there any other proposals?" Tr. at 218-19, 242-43, 273, 319-20, 335, 355, 399. This was also witnessed by two Harbert employees, who were returning to Room 821 after submitting their proposal to see if any other offerors were submitting proposals. Tr. at 219, 398-99.

What happened next is in dispute. According to the accounts of Ms. Hunt-Smith and the other Corps employees, after Ms. Hunt-Smith announced that it was 4:29 p.m., she waited in the hallway briefly, then proceeded to walk down the hallway, disappearing from the view of the other employees in Room 821.

⁴There is, however, no evidence that the times shown on the telephone bill were exactly the same as those on Mr. Greaves's watch or on the time-pieces in the Corps's contracting division.

Tr. at 218-19, 273, 319-20, 335, 355. Ms. Hunt-Smith claims that she then opened the door to Room 809, went in, faced the Caddell employees, and asked them, "Are you going to turn in your proposal?" (they answered "Yes") and stated to them, "It was 4:29 when I left the door and the clock was still ticking." Tr. at 220, 249-251. The Harbert employees, who were standing in the hallway, testified that Ms. Hunt-Smith opened the door to Room 809, announced that it was 4:29, shut the door, and walked back to Room 821. Tr. at 178-79, 399, 431. The Caddell employees deny that Ms. Hunt-Smith opened the door to Room 809 and came in and warned them of the time, Tr. at 443, 446-47, but state that they did hear a voice in the hallway shout, "It's 4:29!" Tr. at 88, 106, 115, 159-60, 176.

During Ms. Hunt-Smith's absence, Ms. Senne observed the time/date stamp machine click from 4:29 p.m. to 4:30 p.m., which her clock confirmed. Tr. at 273, 276-77, 310. Then Ms. Senne, who is responsible for locking the door to Room 821 for the day at the 4:30 p.m. close of daily office hours, considered whether she should do so in Ms. Hunt-Smith's absence. Tr. at 273. Lisa Frazier, who was in Ms. Hunt-Smith's cubicle, observed the time on Ms. Hunt-Smith's clock and on her computer read 4:30 p.m., and said out loud that the time was 4:30 p.m. and that someone should lock the door. Tr. at 335-36. Since no one appeared to be going to the door she proceeded to lock it. Tr. at 273, 336. After she locked the door, Ms. Frazier heard the time/date stamp clock click 4:31 p.m. Tr. at 336. This time frame is confirmed by Ms. Senne, who witnessed Ms. Frazier lock the door. Tr. at 273-74.

Meanwhile, the two Harbert employees who were waiting in the hallway near Room 821 complained to Ms. Hunt-Smith as she returned that the deadline for receipt of proposals had arrived. Tr. at 220-21, 400-01, 432. Ms. Hunt-Smith then returned to Room 821, found the door to the room locked, knocked, and was admitted, she believes, by either Ms. Frazier or Ms. Senne. Tr. at 221. Although it is not clear which Corps employee unlocked the door to admit Ms. Hunt-Smith, she recalled that either Ms. Senne or Ms. Frazier then said, "Well, you weren't in here at 4:30 to lock the door and we waited until 4:31 and we locked the door." Tr. at 221, 244-45. Ms. Senne observed from her desk that the time was 4:31 p.m. when the door was locked and Ms. Hunt-Smith returned. Tr. at 273-74. Ms. Hunt-Smith then sat at her desk, observing that her clock read 4:32 p.m. Tr. at 221. Ms. Senne also testified that the time/date stamp machine clicked to 4:32 p.m. Tr. at 274. They then heard and saw the Caddell employees at the door. Tr. at 221, 274, 326, 327. Ms. Hunt-Smith then went to the door and, according to her, said through the locked door, "I'm sorry, but you're late." Tr. at 221, 255. After the Caddell employees went back down the hallway Ms. Hunt-Smith went to notify Joseph Theobald, the Chief of Contracting for the Louisville District, about the situation. Tr. at 222, 326-27, 372.

The Caddell employees testified that after they heard the voice in the hallway announce that it was 4:29, they "scribbled in" the remaining three prices on the last copy of the schedule, picked up their proposal and "sprinted" to Room 821.

Tr. at 89-90, 159-60. They noticed the two Harbert employees waiting outside Room 821 but did not see any Corps employees in the hallway. Tr. at 90-91, 161. As Mr. Greaves drew close to Room 821, he heard the door being locked. Tr. at 161. One of the Caddell employees tried to push the door open and Messrs. Greaves and Gage observed through the glass Ms. Hunt-Smith, with her hands in the air, backing away from the locked door. Tr. at 92, 161-62. Mr. Greaves looked at his watch and saw that the minute hand was not yet on 4:30 p.m. but still on 4:29 p.m. Tr. at 92, 162; Protest at 4-5. Because the door was locked, the Caddell employees were unable to enter the room to view Ms. Hunt-Smith's clock or any other Corps time-piece to verify the time. Tr. at 93, 162.

The Caddell employees returned to Room 809 and were joined by Mr. Theobald. Tr. at 163. Mr. Theobald asked the Caddell employees what had happened and they recounted the incident to him. Id. Mr. Greaves told Mr. Theobald that no more than 30 seconds could have elapsed between the time he heard the voice in the hallway shout "It's 4:29" and the moment he heard the door lock click. Tr. at 113, 163. Mr. Greaves also complained about the lack of an official clock. Tr. at 163-64. The Caddell employees requested that Mr. Theobald take their proposal, which he did, but Mr. Theobald told them he would treat it as late. Tr. at 164-65, 363.

ANALYSIS

It is an offeror's responsibility to deliver its proposal to the proper place at the proper time, and late delivery generally requires rejection of the proposal. The Staubach Co., B-276486, May 19, 1997, 97-1 CPD ¶ 190 at 3. In determining whether a proposal was submitted late, we consider all relevant evidence in the record, including statements by parties on behalf of the protester and the agency, to ascertain whether a preponderance of the evidence shows that the proposal was at the designated location for receipt prior to the time set for closing. Med-National, Inc., B-277430, Sept. 8, 1997, 97-2 CPD ¶ 67 at 3; IPS Group, B-235988, Oct. 6, 1989, 89-2 CPD ¶ 327 at 2; International Steel Erectors, B-233238, Feb. 13, 1989, 89-1 CPD ¶ 146 at 3.

A hand-carried proposal that arrives late may be considered if improper government action was the paramount cause for the late submission, and where consideration of the proposal would not compromise the integrity of the competitive procurement process. Med-National, Inc., supra, at 3. Improper government action in this context is affirmative action that makes it impossible for the offeror to deliver the proposal on time. Id. Even in cases where the late receipt may have been caused, in part, by erroneous government action, a late proposal should not be considered if the offeror significantly contributed to the late receipt by not acting reasonably in fulfilling its responsibility to deliver a hand-carried proposal to the proper place by the proper time. International Steel Erectors, supra, at 4. In our view it is within the agency's discretion to initially determine whether or not it may have been the paramount cause of the late receipt of a proposal, and our Office will not substitute

its judgment in this regard, but will review the reasonableness of the agency's determination.

We agree with Caddell that the Louisville District has an "odd timekeeping procedure" for receipt of proposals on RFPs. Hearing Comments at 17. However, we disagree with Caddell that the Corps used one basis (Ms. Hunt-Smith's clock) to inform Mr. Greaves of the time, which he used to synchronize his watch, but used another basis (the time/date stamp machine) for purposes of determining when the 4:30 p.m. deadline for proposal submission had arrived and for locking the doors to Room 821. As described above, the time/date stamp machine used to keep the official time and Ms. Hunt-Smith's telephone clock were purportedly synchronized to read the same time. However, even if, as the protester asserts, the Corps has failed to demonstrate that its synchronization of the clocks was accurate, the record shows that the agency's basis for determining Caddell's proposal late was not the time/date stamp machine itself, but the clock on Ms. Hunt-Smith's desk, the same clock used earlier by Ms. Hunt-Smith to tell Caddell's representative, Mr. Greaves, the time, and which he used to synchronize his watch.

Specifically, as described above, before venturing into the hallway to announce "It's 4:29," Ms. Hunt-Smith observed that her clock read 4:29 p.m. While Ms. Hunt-Smith was out in the hallway, Ms. Frazier noticed that the time had reached 4:30 p.m. on Ms. Hunt-Smith's clock and that the doors to Room 821 should be locked. In this regard, the record shows that this Corps's office standard procedure was to lock the doors to the office at the close of business at 4:30 p.m., even when proposals were due to be submitted by that time. Tr. at 243-44, 277-78, 322, 347. When Ms. Hunt-Smith returned to her cubicle she observed that her clock read 4:32 p.m. before she heard Caddell's employees at the door. Although the record indicates that these times were verified by Corps employees on the basis of the time/date stamp machine and Ms. Senne's clock, the record also shows that the basis for locking the door to Room 821 and concluding that the time set for closing had passed was Ms. Hunt-Smith's clock rather than the time/date stamp machine itself (although the two time-pieces were allegedly synchronized), notwithstanding the latter's status as the keeper of the official time. Since Ms. Hunt-Smith's clock was used as the common basis on which Mr. Greaves synchronized his watch and on which the Corps locked the door to Room 821 at 4:30 p.m. and gauged the time of arrival of Caddell's employees at the door, we find no merit to Caddell's objection that a different time-keeping device was used by the Corps to advise Caddell of the time than that used to determine the closing deadline.

Caddell nonetheless maintains that the Corps failed to provide offerors with an official clock in plain view, which could have been used to prevent such incidents, despite the fact that the Corps was aware that the lack of such a clock had caused similar problems in the recent past. Protest at 14. While such a clock may be desirable and commonly used elsewhere, as claimed by the protester, we are aware of no requirement that the Corps have a clock in plain view to determine deadline

times for receipt of proposals, and the protester has cited no supporting authority in this regard. Rather, in analogous situations under advertised procurement procedures, the decisive event in determining the time for bid opening is not the ticking of a clock, but the agency's reasonable declaration of the start of bid opening that demarcates the point in time at which a hand-carried bid will be determined either timely or late. See Nueva Constr. Co., Inc., B-270009, Jan. 16, 1996, 96-1 CPD ¶ 84 at 4. Similarly, in negotiated procurements, we have held that, unless it is shown to be unreasonable, the contracting official's declaration that a procurement is closed is determinative. See Pat Mathis Constr. Co., Inc., B-248979, Oct. 9, 1992, 92-2 CPD ¶ 236 at 3; Seer Publishing, Inc., B-237359, Feb. 12, 1990, 90-1 CPD ¶ 181 at 6.

Here, whether or not Ms. Hunt-Smith actually entered Room 809 to warn the Caddell employees that the time for submitting proposals was almost up, the record shows that when she observed that the time was 4:29 p.m. by her clock, she decided to warn the Caddell employees about the time, got up and opened the door to Room 821, stood in the doorway, called out that the time was 4:29 p.m., walked down the hallway to further warn Caddell, returned to Room 821, locked the door (after initially finding the door locked and being admitted back into the room where other employees explained to her that they waited until after 4:30 to lock the door), returned to her cubicle, and observed that her clock read 4:32 p.m. before hearing the Caddell employees at the door. Accordingly, we cannot conclude that Ms. Hunt-Smith's determination that the time for submission of proposals had passed--her locking of the door and refusal to admit the Caddell employees to the room--was premature or otherwise unreasonable. The protester has not suggested any persuasive reason why Ms. Hunt-Smith would announce "It's 4:29" before her clock actually displayed 4:29 p.m., or why she subsequently would lock the door to Room 821 prior to 4:30 p.m., especially after warning Caddell about the time, a courtesy she was under no obligation to give.

We also find that the preponderance of the evidence does not show that Caddell's proposal was at the designated location for receipt prior to the time set for closing. In this regard, Caddell's self-serving statement that when Mr. Greaves reached the locked door to Room 821 his watch read 4:29 p.m. is counterbalanced by the observations of several Corps employees, who the record shows were keenly interested in whether Caddell would submit its proposal on time, that Ms. Hunt-Smith's clock reached 4:30 p.m. before the door was locked and that the Caddell employees reached the door to Room 821 at 4:32 p.m.

Moreover, the record establishes that Mr. Greaves's synchronized his watch, which had an analog dial but no second hand, only to the hour and minute.⁵ Tr. at 127, 183. Thus, when Mr. Greaves synchronized his watch with the time on Ms. Hunt-Smith's clock, his watch could have been off by almost a minute. For example, such a discrepancy could have occurred if the time on Ms. Hunt-Smith's clock was actually 58 seconds into the minute of 3:13 p.m. and Mr. Greaves set his watch to the beginning of that minute.⁶ Since by Caddell's own admission, Mr. Greaves watch indicated 4:29 p.m. when he and Mr. Gage reached the door of Room 821, Ms. Hunt-Smith's clock could very well have already reached 4:30 p.m., making the proposal late, notwithstanding that Mr. Greaves's watch still read 4:29 p.m.⁷

While the Caddell employees claim that after they heard the voice in the hallway announce "It's 4:29" it took them no longer than 30 seconds to fill in their last prices and take their proposal to the door of Room 821 (and not the 3 minutes that would result in their arrival at Room 821 at 4:32 p.m.), Tr. at 163, this does not mean they tendered the proposal in a timely manner. In this regard, Caddell does not dispute that when its employees heard the voice in the hallway announcing "It's 4:29," that the time on Ms. Hunt-Smith's clock had already reached 4:29 p.m.⁸ Given that it obviously took Ms. Hunt-Smith some time to leave her office and issue the warning, as well as the conceivable difference described above in the synchronization between Mr. Greaves's watch and the time used to determine the proposal

⁵None of the time-keeping devices involved in this case--the time/date stamp machine, Ms. Senne's and Ms. Hunt-Smith's telephone and computer clocks, the telephone time service, and Mr. Greaves's watch, provided time displays in seconds--they only indicated the hour and the minute. Tr. at 13, 127, 305.

⁶We note that, as described above, Mr. Greaves checked the time again with Ms. Hunt-Smith and, according to him, the time she gave him then was consistent with the time on his watch. However, Mr. Greaves did concede the possibility that his watch could have been off by as much as 20 seconds. Tr. at 202-03.

⁷Because seconds may make the difference between the timely or late submission of a proposal, it was unreasonable for Caddell not to take into account such a narrow margin of error when synchronizing its time to the agency's and not to turn in its proposal with sufficient time to allow for possible variances in seconds between its time and the time used by the agency. See generally Pat Mathis Constr. Co., Inc., supra, at 4 (by allowing itself less than 1 minute to assemble and deliver its proposal, protester assumed the risk that any number of events might intervene to prevent the timely submission of its proposal).

⁸Mr. Greaves did not look at his watch when he heard the announcement from the hallway because "I guess when I heard 4:29 I knew we were cutting it off close." Tr. at 159-60.

submission deadline, it is certainly possible, if not likely, that Ms. Hunt-Smith's clock, from which Mr. Greaves had synchronized his watch and which served as the basis for determining the deadline for proposal submission, could have reached 4:30 p.m. by the time the Caddell employees reached the door to Room 821.

While we cannot say definitively that Messrs. Greaves and Gage had not reached Room 821 prior to 4:30 p.m., at least by Mr. Greaves's watch, the preponderance of the evidence shows that Caddell's proposal was not at the designated location for receipt prior to the time set for closing, and Caddell's proposal was therefore reasonably rejected as late. See Med-National, Inc., supra, at 12; IPS Group, supra, at 3.

The protest is denied.

Comptroller General
of the United States