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# Decision

**Matter of:** National Beef Packing Co. LLC

**File:** B-415754; B-415773

**Date:** February 16, 2018

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Charles A. Weiss, Esq., Bryan Cave LLP, for the protester.  
Brian M. Lucero, Esq., Department of Defense, for the agency.  
Jonathan L. Kang, Esq., and Laura Eyester, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Protests that the agency unreasonably rejected the protester's proposals as late are denied where the record shows that the proposals were not under government control prior to the deadline established in the solicitation for receipt of proposals and where normal government operations were not interrupted in a manner that required the agency to extend the deadline for receipt of proposals.

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## DECISION

National Beef Packing Co. LLC, of Kansas City, Missouri, challenges the rejection of its proposals submitted in response to request for proposals (RFP) Nos. HDEC02-16-R-0005 (RFP-0005) and HDEC02-17-R-0002 (RFP-0002), which were issued by the Department of Defense, Defense Commissary Agency (DeCA) for fresh and frozen beef products. The protester contends that the agency unreasonably rejected its proposals as late.

We deny the protests.

## BACKGROUND

DeCA issued RFP-0005 on May 1, 2017, seeking proposals to provide fresh and frozen beef products for commissaries located in the agency's west and pacific areas, including Alaska and Hawaii. Agency Report (AR), Tab 2, RFP-0005, at 1, 65. The agency issued RFP-0002 on June 13, seeking proposals to provide fresh and frozen beef products for commissaries located in the agency's east and central areas, including Puerto Rico, and Guantanamo Bay, Cuba. AR, Tab 12, RFP-0002, at 1, 69. The solicitations were issued as commercial item procurements under the provisions of

Federal Acquisition Regulation (FAR) part 12. Each solicitation anticipated the award of an indefinite-quantity requirements contract, with fixed unit prices, for a 2-year base period and three 1-year options. RFP-0005 at 65, 98; RFP-0002 at 69, 109. The combined estimated value of the two contracts is \$[DELETED]. Contracting Officer's Statement (COS) at 1. After several amendments, the final deadline for receipt of proposals for both solicitations was established as November 15, 2017, at 3:00 p.m.<sup>1</sup> AR, Tab 11, RFP-0005 amend. 9, at 1; Tab 14, RFP-0002 amend. 2, at 2. Proposals were to be delivered to the DeCA offices at Fort Lee, Virginia. RFP-0005 at 1, 44-45; RFP-0002 amend. 2, at 1, 5.

DeCA received three timely proposals in response to RFP-0005: proposal 1 was received via Federal Express on November 13 at 11:31 a.m.; proposal 2 was received via UPS on November 14 at 3:02 p.m., and proposal 3 was received via Federal Express on November 14, at 1:05 p.m. AR, Tab 15, RFP-0005 Proposal Receipts, at 1-12. The agency received two timely proposals for RFP-0002: proposal 1 was received via Federal Express on November 14 at 1:05 p.m.; and proposal 2 was received via Federal Express on November 15 at 1:03 p.m. AR, Tab 16, RFP-0002 Proposal Receipts, at 1-4. The details of the delivery of National Beef's proposals are as follows.

DeCA states that deliveries to Fort Lee by carriers such as Federal Express and UPS are directed to the Shop Gate, which is located near the base security headquarters, from 6:00 a.m. to 2:00 p.m. AR, Tab 27, Decl. of Lead Security Officer, Dec. 21, 2017, at 1. The agency states that the Shop Gate was open as usual from 6:00 a.m. until 2:00 p.m. on November 15, and that the Sisisky Gate was used for deliveries for the rest of the day. AR, Tab 28, Decl. of Supervisor of Security, Dec. 21, 2017, at 1.

National Beef prepared proposals for RFP-0005 and RFP-0002, which were shipped in three packages via UPS. Protest, exh. D, Decl. of National Beef Account Manager, at 1. Tracking information from UPS shows that the protester's proposals were accepted by UPS at 7:14 p.m. (CT) in Kansas City, Kansas, on November 14. Protest, exh. D-1, UPS Tracking Slip (RFP-0002); exh. D-2, UPS Tracking Slip (RFP-0005). On the morning of November 15, the packages containing the proposals were noted as "Out For Delivery Today" at 8:36 a.m. Id. In a letter to the contracting officer sent after the closing date, National Beef stated that "[o]ur discussions with UPS indicate that the proposal arrived at the Ft. Lee entrance gate around 9:30 a.m. on November 15, 2017 before passing through Military Police inspection." Protest, exh. E, Letter from National Beef to Contracting Officer, Nov. 21, 2017, at 1. The protester, however, does not provide any information from UPS regarding this assertion, and the UPS tracking data does not identify any events at 9:30 a.m. on November 15. The UPS tracking information states that the packages were "Delivered" on November 15 at 3:27 p.m., but also contains the following notation for 3:27 p.m.: "A required security check has delayed delivery." Protest, exh. D-1, UPS Tracking Slip (RFP-0002); exh. D-2, UPS

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<sup>1</sup> All times cited herein are Eastern Time zone, unless otherwise noted.

Tracking Slip (RFP-0005). Apart from the tracking data, the protester does not provide any other information from UPS.

On November 16, the protester requested confirmation of the receipt of the proposals. AR, Tab 18, Email from National Beef to DeCA, Nov. 16, 2017. On November 17, the agency advised the protester that the proposals had been received, but that “[a]dditional communication will be forthcoming regard[ing] the acceptance of National Beef’s proposal.” AR, Tab 19, Email from Agency to Protester, Nov. 17, 2017 (6:58 a.m.); Email from Agency to Protester, Nov. 17, 2017 (9:07:53 a.m.). On November 21, the agency advised the protester that the proposals have been rejected as untimely because they had been received after the RFP’s deadline. AR, Tab 22, Letter from Agency to Protester, Nov. 21, 2017, at 1 (RFP-0002); Letter from Agency to Protester, Nov. 21, 2017, at 1 (RFP-0005).

On November 24, a National Beef employee visited Fort Lee and spoke with the lead security officer who was on duty at the Shop Gate on November 15. The protester’s employee stated the following in a declaration that was included with the protest:

I made a visit to Fort Lee, VA on Friday, Nov. 24, and spoke to the head of the police unit and asked about the gate security when National Beef’s proposal was being delivered by UPS specifically on Nov. 15, 2017. I was told by [the lead security officer]<sup>2</sup> that there was extensive construction on Fort Lee near the commercial gate to the base. He said that trucks were being held up close to 2 1/2 hrs. before they could get onto the base. This is the gate where the UPS truck delivering National Beef’s proposals to the above-referenced solicitation had to enter the base. The delays and difficulties caused by the construction were so bad that the base stopped using that entrance a couple of days later and had all commercial vehicles use a different gate.

Protest, exh. C, Decl. of National Beef Sales Representative, Nov. 28, 2017, at 1.

National Beef filed these protests on November 30. In response to the protests, the agency filed a declaration by the lead security officer, an employee of the Department of the Army, who was on duty from 6:00 a.m. to 2:00 p.m. on November 15. This individual stated that inspection of a UPS vehicle “typically takes no longer than 2 minutes.” AR, Tab 27, Decl. of Lead Security Officer, Dec. 21, 2017, at 1. With regard to November 15, the individual stated that there was “nothing particularly remarkable about that day,” and further stated that “I do not recall any significant delays at the Shop Gate, which was my appointed place of duty that day.” Id. The lead security officer disputed several key details of the protester’s declaration, as follows:

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<sup>2</sup> The agency notes that although the lead security officer acknowledges that this conversation took place, the protester’s declaration incorrectly identifies his position and name.

I did not tell [National Beef's representative] I had specific recollection of delays accessing base on November 15, 2017. I have no recollection, because there were no unusual delays that morning. I also never said there was extensive construction on base that day. I know this because there was not extensive construction on base that day. In fact, there was no construction on base that day (November 15). There was tree cutting going on in the woods outside the gate, in preparation for scheduled construction that was to begin later in November.

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I have also seen the log of the UPS driver who made a note that his delivery was late due to a security delay. I cannot explain why the driver made that notation, but I can say it is not accurate. I do not recall any particular delivery vehicle being subjected to a 2.5 hour delay, but if it had happened I would not only recall it, but I would have had to take action on it, as described below. . . . [A] delay at the gate of 2.5 hours is an absolutely extraordinary, highly noteworthy event, that would have required remedial action on the part of my office and [program management office (PMO)]. . . . If there was a delay even remotely approaching 2 hours, I would have been required by my training to notify my chain of command, coordinate with PMO, and find a solution to the delay, which could include opening another gate, or re-routing traffic to an already open gate. No such action was required or taken on November 15, 2017.

Id. at 2-3.

In response to the protester's request for documents concerning potential delays at Fort Lee on November 15, the agency subsequently clarified that there was no tree cutting activity on that day. Instead, the agency explained that there was tree cutting activity on October 31, and work on November 15 related to the construction of a new building near the gate. Supp. Documents, Tab 07, Email from Directorate of Public Works, Jan. 10, 2018; see Tab 08a, Contractor Quality Control Report, Nov. 15, 2017, at 1; Tab 08b, Contractor Quality Control Report, Oct. 31, 2017, at 1. The contractor responsible for the work stated the following in an email to the agency in response to the protester's request for information:

Here are the daily reports you asked for. One for the 15th of November and one for the 31th of October, which is the day we removed the trees at Shop Rd. We did not perform any work on November 15th that would have caused any delays to any commercial traffic entering or leaving Fort Lee. The Rebar cage was assembled in the laydown area. After the gate closed at 1400, we moved it to the excavation area and placed it. There was no concrete placement, or any other work perform[ed] in the roadway during gate operating hours.

## DISCUSSION

National Beef argues that DeCA improperly rejected its proposals as late. The protester does not dispute that the packages containing its proposals were delivered to the agency by UPS after the solicitation deadline, but raises two arguments for why its proposals should be considered timely: (1) the proposals should be considered under the custody of the government based on the time the UPS driver entered the government installation, and (2) government processes at Fort Lee were interrupted in a manner that made it impossible to deliver the proposals by the solicitation deadline. The protester also argues that because award has not been made, accepting the protester's late proposals would not unduly delay the procurement or prejudice any other offeror. For the reasons discussed below, we find no basis to sustain the protest.<sup>3</sup>

The RFPs incorporated by reference FAR provision 52.212-1, which includes the following relevant terms regarding late proposal submissions:

(f) Late submissions, modifications, revisions, and withdrawals of offers.

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(2)(i) Any offer, modification, revision, or withdrawal of an offer received at the Government office designated in the solicitation after the exact time specified for receipt of offers is "late" and will not be considered unless it is received before award is made, the Contracting Officer determines that accepting the late offer would not unduly delay the acquisition; and—

\* \* \* \* \*

(B) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of offers and was under the Government's control prior to the time set for receipt of offers;

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(3) Acceptable evidence to establish the time of receipt at the Government installation includes the time/date stamp of that

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<sup>3</sup> National Beef also raises other collateral arguments. Although we do not address every argument, we have reviewed them all and find that none provides a basis to sustain the protest.

installation on the offer wrapper, other documentary evidence of receipt maintained by the installation, or oral testimony or statements of Government personnel.

(4) If an emergency or unanticipated event interrupts normal Government processes so that offers cannot be received at the Government office designated for receipt of offers by the exact time specified in the solicitation, and urgent Government requirements preclude amendment of the solicitation or other notice of an extension of the closing date, the time specified for receipt of offers will be deemed to be extended to the same time of day specified in the solicitation on the first work day on which normal Government processes resume.

FAR provision 52.212-1 (emphasis added); see RFP-0005 at 77; RFP-0002 at 84.

As our Office has explained, it is an offeror's responsibility to deliver its proposal to the proper place at the proper time. FAR provision 52.212-1(f)(1); Washingtonian Coach Corp., B-413809, Dec. 28, 2016, 2016 CPD ¶ 378 at 4. Moreover, in addressing protests challenging an agency's rejection of late bids or proposals, we have noted that delays in gaining access to government facilities are not unusual and should be expected. U.S. Aerospace, Inc., B-403464, B-403464.2, Oct. 6, 2010, 2010 CPD ¶ 225 at 11 n.17 (citing Econ, Inc., B-222577, July 28, 1986, 86-2 CPD ¶ 119 at 4; National Blower & Sheet Metal Co., Inc., B-194895, Oct. 3, 1979, 79-2 CPD ¶ 240 at 4). Although the rule may seem harsh, it alleviates confusion, ensures equal treatment of all offerors, and prevents one offeror from obtaining a competitive advantage that may accrue where an offeror is permitted to submit a proposal later than the deadline set for all competitors. See Inland Serv. Corp., Inc., B-252947.4, Nov. 4, 1993, 93-2 CPD ¶ 266 at 3.

Our Office has also explained that a late hand-carried offer may be considered for award if the government's misdirection or improper action was the paramount cause of the late delivery and consideration of the offer would not compromise the integrity of the competitive process. See, e.g., ALJUCAR, LLC, B-401148, June 8, 2009, 2009 CPD ¶ 124 at 3; Palomar Grading & Paving, Inc., B-274885, Jan. 10, 1997, 97-1 CPD ¶ 16 at 3. Nonetheless, 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 doing all it could or should have done to fulfill its responsibility. See ALJUCAR, LLC, supra; Palomar Grading & Paving, Inc., supra.

#### Government Control of the Proposals

National Beef argues that an exception to the late proposal rule applies here because the UPS driver carrying its proposals entered Fort Lee prior to the solicitation deadline.

The record does not establish, however, that the government had control of the proposals prior to the deadline.

As discussed above, the FAR states that a proposal received at the place designated for receipt of proposals may be accepted after a solicitation deadline, provided “[t]here is acceptable evidence to establish that it was received at the Government installation designated for receipt of offers and was under the Government’s control prior to the time set for receipt of offers.” FAR provision 52.212-1(f)(2)(i)(B). As our Office has explained, the exception applies where the proposal has been accepted by government personal, thereby putting it under government control. B&S Transport, Inc., B-404648.3, Apr. 8, 2011, 2011 CPD ¶ 84 at 4.

Here, National Beef contends that the UPS delivery truck arrived at Fort Lee sometime around 9:30 a.m. on November 15. Protest, exh. E, Letter from National Beef to Contracting Officer, Nov. 21, 2017, at 1. The protester, however, provides no evidence that the agency took custody of the proposals prior to the 3:00 p.m. deadline. Instead, National Beef contends that its proposals should be accepted as timely because the protester “relinquished control of its proposals when it delivered them to UPS,” that the UPS truck entered Fort Lee prior to 3:00 p.m., and that the entry of the truck onto Fort Lee constituted government receipt and control of the proposals. Protester’s Comments at 1-2, 11-12.

The protester misstates the applicable standard for receipt and control of a proposal under FAR provision 52.212-1(f). Even if there was evidence that established the time the UPS truck entered Fort Lee, and even if the entirety of Fort Lee is considered the government installation for purposes of FAR provision 52.212-1(f)(2)(i)(B), there is no evidence that the government took control of the proposals prior to 3:27 p.m. Protest, exh. D-1, UPS Tracking Slip (RFP-0002); exh. D-2, UPS Tracking Slip (RFP-0005). As our Office has explained, a hand-delivered proposal must be physically relinquished to government control by the offeror or its agent; interaction between the offeror or its agent and the agency’s security personnel, or mere access to the installation does not establish government control over the proposal. See B&S Transport, Inc., *supra*; Immediate Sys. Resources, Inc., B-292856, Dec. 9, 2003, 2003 CPD ¶ 227 at 4. On this record, we find no basis to conclude that the government had control of National Beef’s proposals prior to the 3:00 p.m. deadline, and therefore find no basis to sustain the protest.

#### Interruption of Normal Government Processes

Next, National Beef argues that, even if the proposals were not in government custody prior to the deadline, an interruption of “normal Government processes” precluded delivery, which required the agency to extend the time for receipt of proposals. The record does not establish, however, whether delivery of the protester’s proposals was actually delayed or that the government was responsible for any such potential delay.

As discussed above, FAR provision 52.212-1(f)(4) states that if an “emergency or unanticipated event interrupts normal Government processes so that offers cannot be received at the Government office designated for receipt of offers by the exact time specified in the solicitation,” and government requirements do not allow for amendment of the solicitation or notice to offerors, the deadline for receipt of proposals must be extended to the same time the following day. Where the government office designated for receipt of proposals is open for business and able to accept receipt of proposals, we will not conclude that normal government processes are interrupted. See CFS-INC, JV, B-401809.2, Mar. 31, 2010, 2010 CPD ¶ 85, at 2-3; Hunter Contracting Co., B-402575, Mar. 31, 2010, 2010 CPD ¶ 93 at 2-3. Instead, a protester must provide evidence establishing that there was an interruption and that it resulted in the protester’s inability to deliver its proposal. See id.

In a letter submitted after the solicitation closing date, National Beef stated to DeCA that “[o]ur discussions with UPS indicate that the proposal[s] arrived at the Ft. Lee entrance gate around 9:30 a.m. on November 15, 2017 before passing through Military Police inspection.” Protest, exh. E, Letter from National Beef to Contracting Officer, Nov. 21, 2017, at 1. The protester, however, does not explain who provided the information, e.g., the UPS truck driver or some other UPS representative. Moreover, the protester does not provide any statements from UPS or any other information from UPS aside from the tracking information. This tracking information shows the following relevant entries for November 15: (1) at 8:36 a.m., “Out For Delivery Today,” (2) at 3:27 p.m., “Delivered,” and (3) also at 3:27 p.m., “A required security check has delayed delivery.” Protest, exh. D-1, UPS Tracking Slip (RFP-0002); exh. D-2, UPS Tracking Slip (RFP-0005).

Although National Beef contends that security and/or construction activities near the Shop Gate delayed access by the UPS truck to the base, the protester does not provide any information that could possibly explain a delay from 9:30 a.m. until 3:27 p.m., nor is there any evidence that the UPS driver was actually delayed at Fort Lee for 6 hours. In this regard, aside from the protester’s unsupported statement that UPS arrived at the Fort Lee gate at 9:30 a.m., the protester does not specifically state when or how many times UPS attempted delivery of the proposals. With regard to the notation in the UPS tracking information regarding a delay associated with a security check, the tracking information entry for this event is 3:27 p.m., the same time as the delivery. Id. The tracking information, however, does not establish when the delay occurred or the length of the delay. Thus, even if there was a delay associated with security or construction, the protester has not provided adequate information to establish that there was an interruption of normal government processes in a manner that precluded submission of proposals.



In sum, National Beef does not establish that there were emergency or unanticipated events that precluded delivery of its proposals.<sup>4</sup> See U.S. Aerospace, Inc., supra. In contrast, the agency states that the office for receipt of proposals was open during regular business hours on November 15, through the time for receipt of proposals specified in the solicitation. Memorandum of Law at 15. The agency also states that any construction occurring on November 15 did not affect traffic at the Shop Gate.<sup>5</sup> See AR, Tab 27, Decl. of Lead Security Officer, Dec. 21, 2017, at 2-3; Supp. Documents, Tab 08a, Contractor Quality Control Report, Nov. 15, 2017, at 1. On this record, we find no basis to conclude that there was an interruption of normal government processes that prevented the protester from delivering its proposal, and therefore find no basis to sustain the protest.

The protests are denied.

Thomas H. Armstrong  
General Counsel

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<sup>4</sup> We also note that the record shows that another offeror was able to deliver its proposal for RFP-0002 to DeCA via Federal Express on November 15 by 1:03 p.m. AR, Tab 16, Federal Express Tracking Receipt, at 3; COS at 5. In an analogous sealed bid decision by our Office, which interpreted similar language concerning interruption of normal government processes in FAR § 14.402-3(a)(2), our Office concluded that where the government facility was open at all times and the agency was able to receive and open at least four bids, there was no interruption of normal government processes. Educational Planning & Advice, Inc., B-274513, Nov. 5, 1996, 96-2 CPD ¶ 173.

<sup>5</sup> As discussed above, the lead security officer disputes the account of the conversation he had with National Beef's sales representative on November 24, as set forth in the declaration filed by the protester. We need not resolve the differences between these declarations, as the protester does not provide other necessary details to demonstrate the possibility of an interruption of normal government processes.