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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: CCSC, Inc.
File: B-404802.3
Date: July 18, 2011

Sam Z. Gdanski, Esq., and Scott H. Gdanski, Esq., Gdanski & Gdanski, LLP, for the protester.

John Sabatino, Esq., and Christian Butler, Esq., Department of Homeland Security, for the agency.

Paul N. Wengert, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly rejected proposal as late is denied where the protester failed to allow adequate time for proposal to be processed through agency screening procedures at off-site location.

DECISION

CCSC, Inc., doing business as NaplesYacht.com, of Fort Myers, Florida, a small business, protests the rejection of its proposal by the Department of Homeland Security (DHS), United States Customs and Border Protection (CBP), under request for proposals (RFP) No. HSBP1011R0009 for an indefinite-delivery/indefinite-quantity contract to supply coastal interceptor vessels and associated equipment and training. CCSC argues that its proposal was improperly rejected as late for reasons primarily due to government misdirection.

We deny the protest.

BACKGROUND

The CBP issued the RFP on November 5, 2010, seeking commercial item proposals for a law enforcement variant of a commercially available vessel to be used in the CBP's maritime interdiction efforts. Agency Report (AR) at 2. Among other things, the vessel was required to carry a crew of three to four people, maneuver at high speed in close quarters, and have machine gun mounts. RFP, Statement of Work (SOW) at 1. The RFP provided that the CBP anticipated ordering up to 70 vessels, and that the Coast Guard might order additional vessels for its needs. Id.

The RFP provided for a two-phase evaluation process. The first phase would evaluate “technical and managerial capability” based on written proposals, while the second phase would evaluate a “waterborne demonstration/evaluation . . . in an operational environment.” RFP at 58. The RFP provided that award would be based on three factors, in descending order of importance: technical and management capability, past performance, and cost/price. The technical and management capability factor was divided into six subfactors, with the waterborne demonstration subfactor identified as more important than the other five subfactors combined. RFP at 58.

The RFP provided specific directions for offerors to follow when submitting initial proposals, as follows:

Proposal must be submitted to the following address by the closing date indicated in the Solicitation.

US Mail – If the proposals are submitted by US Mail, the address for receipt is:

US Customs and Border Protection
Office of Procurement
1300 Pennsylvania Avenue, NW
National Place - Suite 1310
Washington, DC 20229
Attn: [Contracting Officer’s name] - Mail Stop NP 1310

Express Courier – If the proposals are submitted by expedited means (e.g. FEDEX, USPS Express Mail, etc.) or courier, the address for receipt of the submitted proposal is:

US Customs and Border Protection
Office of Procurement
1331 Pennsylvania Avenue, NW - Suite 1310
Washington, DC 20229
Attn: [Contracting Officer’s name] - Mail Stop NP 1310

Regardless of the method of delivery of proposals, they must be received by the date indicated in the solicitation.

RFP at 49.

As amended, the closing time for receipt of proposals was “December 14th, 2010 at 10:00 am Eastern.” RFP amend. 2, at 1.

As of 2009, under DHS security policy, express couriers (including FedEx) are not permitted to make deliveries directly to the building in Washington, D.C. at the

address listed in the RFP.¹ Instead, DHS has arranged for each express courier company to make deliveries to a different location: the “consolidated remote delivery site” (CRDS) in [DELETED].² AR at 3. DHS has also arranged for each express courier to make deliveries at a regularly scheduled time, which differs for each courier; for FedEx, the daily scheduled time for delivery is between [DELETED] a.m.³ Id. at 4. At the CRDS, after clearing the delivery vehicle for entry, individual items are received by the CRDS contractor for screening, and then delivered to the location addressed on the package within the CBP. Id.

Among other things, the screening process at the CRDS includes opening and testing packages for hazards, and therefore, in general, the CBP has informed its employees that a “best case scenario” will have an item from an express courier “staged and ready for delivery” to the employee on [DELETED] after arrival at the CRDS. AR, Tab C1, Printout of CBP Intranet Page “New CBP Mail Service: Parcel Opening Process,” at 1. Consistent with this, DHS policy informs employees that “[t]here is effectively no overnight delivery for DHS packages undergoing the required [DELETED] screening.” AR, Tab C7, CRDS Customer Call Center FAQ, at 2. The policy also tells employees to expect all FedEx deliveries to be made to CRDS at around [DELETED], and to expect that items will not reach them for approximately [DELETED] after arrival at the CRDS. Id.

CCSC and eight other firms submitted proposals. Contracting Officer’s Statement at 3. CCSC submitted two proposals, each packaged separately.⁴ CCSC tendered its proposal to FedEx after 6 p.m. on December 13, and ordered “FedEx First Overnight” service, which FedEx describes as providing delivery to an address within the 20229 zip code (such as the CBP delivery address specified in the RFP) by 8:30 a.m. on the following business day.⁵ Protest exh. 4, Letter from FedEx to CCSC, Apr. 6, 2011, at 1.

¹ This policy was not disclosed to offerors in the RFP.

² The CRDS is a contractor-operated facility that provides “daily mail pick-up and delivery as well as Chemical, Biological, Radiological, Nuclear, and Explosives . . . screening for all incoming DHS mail.” AR, Tab C8, CRDS Customer Mail Guide, at 5; see generally www.crdsmail.com.

³ The CBP argues that the CRDS can also accommodate additional deliveries outside the policy “as needed.” AR at 4. FedEx states that DHS allows one daily delivery. Protest exh. 4, Letter from FedEx to CCSC, Apr. 6, 2011, at 1.

⁴ CCSC has only continued to pursue one of its proposals. Accordingly, the remainder of our decision refers only to that proposal.

⁵ The RFP did not specify any particular marking for proposals. CCSC marked its package “DELIVER BEFORE 930 AM EST,” but did not identify the contents as a

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The contracting officer reports that on December 14, at some time between 9 a.m. and 9:45 a.m., he received a telephone call from FedEx. The caller explained that FedEx had a delivery to make to the contracting officer at his location (1331 Pennsylvania Avenue, N.W., Suite 1310), but that the delivery had been redirected to the DHS CRDS. The contracting officer responded that FedEx “should follow any policy that they have to abide by.” Contracting Officer’s Statement at 3.

FedEx proceeded to route the package to the CRDS. DHS records list the arrival of the FedEx vehicle carrying CCSC’s proposal at the CRDS at **[DELETED]** a.m. on December 14. AR, Tab D1, CRDS Vendor Delivery Log, at 1. FedEx package tracking records list the time of delivery of the package containing CCSC’s proposal as 10:16 a.m. Protester’s Document Production, Tab 6, FedEx Tracking Records, at 1, 7. CRDS package tracking records list the time of delivery as 10:14 a.m. AR, Tabs D2 & D3, CRDS Package Tracking Records, at 1.

The following day (December 15), CCSC’s proposal was delivered by the CRDS contractor at 8:31 a.m. to the contracting officer at his location (1331 Pennsylvania Avenue, N.W., Suite 1310). Contracting Officer’s Statement at 3. The contracting officer noted that the proposal was late. Id. However, he did not notify CCSC or reject the proposal then. Rather, CCSC’s proposal was opened and evaluated. Id.

Based on the evaluation, CCSC’s proposal was rejected as technically unacceptable. Id. CCSC filed an agency-level protest, and then a protest to our Office, challenging the evaluation. The CBP proposed corrective action by advancing CCSC’s proposal to Phase 2 of the evaluation, in-water testing. E-Mail from CBP Counsel to GAO, Feb. 18, 2011, at 1. CCSC responded by withdrawing that protest. E-Mail from Protester’s Counsel to GAO, Feb. 18, 2011, at 1.

Next, the CBP requested a revised proposal from CCSC. CCSC submitted a revised proposal to the CBP dated March 24, 2011, but before doing so, on March 15, CCSC filed a second protest with our Office, alleging that by requesting the revised proposal the CBP was not complying with the corrective action.

On April 5, the CBP notified our Office and CCSC that the agency had determined that CCSC’s initial proposal had been late and thus the pending revised proposal would have to be rejected. E-Mail from CBP to GAO, Apr. 5, 2011, at 1. On April 8, the CBP requested dismissal of the protest challenging the evaluation of the revised proposal on the grounds that rejection of the proposal rendered the protest academic. After hearing argument from the parties, our Office dismissed the protest as academic on April 13. CCSC, Inc., B-404802.2, Apr. 13, 2011. Also on April 13,

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contract proposal. Protester’s Document Production, Tab 6, FedEx Airbill Tracking Data, at 7.

CCSC filed this protest--its third--objecting to the rejection of its revised proposal and the agency's assertion that the initial proposal was late.

DISCUSSION

CCSC's current protest argues that the firm followed the delivery directions in the RFP which permitted the use of FedEx but did not make offerors aware of the existence of either the CRDS or the attendant screening delay. CCSC argues that following the RFP directions was the paramount cause of the late delivery of the firm's proposal. Protester's Comments at 3, 13. CCSC emphasizes that its proposal was addressed as specified in the RFP, submitted to FedEx for delivery by 8:30 a.m. on December 14, and that FedEx sought permission from the contracting officer to complete the delivery before the closing time. Protest at 2; Protester's Comments at 4. Thus, CCSC argues, its actions would have resulted in timely delivery of the proposal at issue except that the CBP procedures allegedly made that impossible. Protester's Comments at 19.

The CBP responds that RFP proposal submission instructions were "appropriate" and were not the primary cause of CCSC's late proposal. AR at 1. The CBP argues that it did not mishandle the proposal or make delivery impossible. AR at 7. Instead, the agency maintains that CCSC should have expected security delays due to package screening, and thus it should not have delayed shipping the proposal until after 6 p.m. on December 13, the night before it was due. AR at 8.

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. Federal Acquisition Regulation (FAR) § 15.208; O.S. Sys., Inc., B-292827, Nov. 17, 2003, 2003 CPD ¶ 211 at 3. A proposal delivered to an agency by FedEx or other commercial carrier is considered to be hand-carried and, if it arrives late, can be considered if it is shown that some government impropriety during or after receipt at the government installation was the sole or paramount cause of the late arrival at the designated place. Chappy Corp., B-252757, July 20, 1993, 93-2 CPD ¶ 44 at 3. Improper government action in this context is affirmative action that makes it impossible for the offeror to deliver the proposal on time. Lani Eko & Co., CPAs, PLLC, B-404863, June 6, 2011, 2011 CPD ¶ 118 at 3.

To establish that government mishandling was the sole or paramount cause of the late receipt of a proposal, an offeror must first establish that it did not significantly contribute to the late delivery by not allowing enough time to permit a timely submission. Wyatt & Assocs., B-243349, July 1, 1991, 91-2 CPD ¶ 5 at 2-3. 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 to deliver a hand-carried proposal to the specified

place by the specified time. ALJUCAR, LLC, B-401148, June 8, 2009, 2009 CPD ¶ 124 at 3; O.S. Sys., Inc., supra., at 3.

Offerors are responsible for allowing a reasonable time for proposals to be delivered from the point of receipt to the location designated for receipt of offers; failure to do so, resulting in late arrival at the designated location, cannot be attributed to governmental mishandling. CSLA, Inc., B-255177, Jan. 10, 1994, 94-1 CPD ¶ 63 at 2-3. Furthermore, delays in gaining access to a government building are not unusual and should be expected. Bergen Expo Sys., Inc.; Techniarts Eng'g, B-236970; B-236970.2, Dec. 11, 1989, 89-2 CPD ¶ 540 at 3; see also ALJUCAR, LLC, supra., at 4 (proposal properly rejected as late when delivered after closing time although courier arrived at security gate 8 minutes before closing time); Kesser Int'l, B-296294, June 30, 2005, 2005 CPD ¶ 127 at 2 (proposal properly rejected as late when delivered after closing time although courier was delayed 20 minutes at security checkpoint); Wyatt & Assocs., B-243349, July 1, 1991, 91-2 CPD ¶ 5 at 3 (proposal properly rejected as late when delivered after closing although courier arrived at security desk 10 minutes before closing time). Therefore, an offeror that does not submit a proposal sufficiently in advance of the closing time runs the risk that the agency's reasonable internal delivery procedures will not get the proposal to the proper location by the required time. Bay Shipbuilding Corp., B-240301, Oct. 30, 1990, 91-1 CPD ¶ 161 at 3 (bid sent overnight was properly rejected as late when it arrived late at bid opening room, even though delivered to agency mailroom 6 hours before bid opening time); see also CSLA, Inc., supra., at 3; cf. Power Connector, Inc., B-256362, June 15, 1994, 94-1 CPD ¶ 369 at 4 (agency reasonably considered late bid where mishandling by agency mailroom caused late arrival at bid opening room).

The record here provides several significant facts demonstrating that CCSC was, in large part, responsible for its proposal arriving late. First, the protester did not bring its proposal to FedEx until after 6 p.m. on the day before it was due, and CCSC has not shown that it was impossible for it to have sent its proposal earlier to allow for potential security screening.⁶ Second, CCSC placed no identification on the packaging identifying that a proposal was inside, and there is no evidence that the FedEx representative identified to the agency that the company was attempting to deliver a proposal when the representative called the contracting officer on the morning of delivery. Third, the protester should have expected delays due to

⁶ The protester does not allege, nor is there any evidence suggesting, that FedEx was unaware of the DHS requirement for deliveries to be made at the CRDS after [DELETED] a.m., since FedEx had been following such procedures since 2009.

security screening, particularly considering that the proposal was being submitted to DHS, an agency involved in national security that would be expected to have tight security. Finally, the RFP did not warrant that delivery by FedEx or any other express courier would actually reach the contracting officer on the day of delivery. On these facts, we cannot conclude that the agency's conduct was the paramount cause of the late receipt of CCSC's proposal.

CCSC argues that the rerouting of its proposal to Maryland is akin to the situation addressed by our decision in Dale Woods, B-209459, Apr. 13, 1983, 83-1 CPD ¶ 396. In that decision, we determined that an agency improperly changed the location for the submission of bids without adequately informing prospective bidders. Although all other bidders noticed a sign specifying the new location, the protester arrived only 20 minutes before the closing time, and it did not notice the signs. Our Office concluded that the agency had not satisfied its duty to establish reasonable procedures for the timely receipt of bids when it changed the delivery location without adequate notice, and we therefore sustained the protest. Id. at 3, 5. CCSC argues that the CBP's actions were similar. Protest at 11. We disagree.

Unlike in Dale Woods, the CBP here did not change the location for submission of proposals, but rather only required deliveries to be screened off-site prior to delivery to the specified location in the RFP. Mail screening is common in government facilities, and should have been expected in an agency such as DHS. Accordingly, our decision in Dale Woods is distinguishable and is not persuasive here.

CCSC also argues that our decision in Hospital Klean of Texas, Inc., B-295836, B-295836.2, Apr. 18, 2005, 2005 CPD ¶ 185, provides support for its protest. In that case, we held that an agency properly considered proposals that were due on a Saturday, but were not delivered by FedEx until Monday, because the agency had not provided adequate means for the FedEx courier to obtain entry into the building on Saturday. Protest at 12. CCSC argues that the CBP similarly failed to provide a means for FedEx to deliver to the specified address for receipt of proposals here.

However, unlike the situation in Hospital Klean where the delivery courier encountered a locked door preventing his entry, CCSC has not shown that it was physically impossible for its proposal to reach the contracting officer at the designated location by the closing time set forth in the RFP. Rather, the delivery of CCSC's proposal was delayed for security screening, which CCSC should have expected. By not allowing sufficient time for screening at the CRDS, CCSC bears the responsibility for its late proposal.

In sum, the CCSC has not shown that the RFP's failure to describe the agency's mail screening policy was the primary cause of the late proposal submission.

Instead, as described above, the protester failed to take reasonable steps to ensure timely delivery.⁷

The protest is denied.

Lynn H. Gibson
General Counsel

⁷ We note that even though CCSC's late proposal was initially evaluated, and the CBP later requested and received a timely revised proposal, the CBP's actions cannot waive the lateness of the proposal. Trimmer Marina, B-223107, June 23, 1986, 86-1 CPD ¶ 578 at 2. In addition, we are not persuaded by CCSC's argument that equitable principles of laches or estoppel should be applied by our Office to advance the protester's case.