



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: The Haskell Company

File: B-292756

Date: November 19, 2003

Tenley A. Carp, Esq., and Edward M. Whelan, Esq., McGuire Woods, for the protester.

Damon Martin, Esq., Naval Facilities Engineering Command, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Under request for proposals that designated closing time for submission of proposals as 14:00 hours, agency reasonably declined to reject as late a proposal received before the time 14:01 was displayed on the time/date stamp clock used by the agency for determining timeliness of proposal submissions.

2. In circumstances of this case, offeror relinquished control of proposal package to government by placing package on desk of proposal receipt official in her presence.

DECISION

The Haskell Company protests the award of a contract to James N. Gray Company under request for proposals (RFP) No. N62474-03-R-4020, issued by the Naval Facilities Engineering Command (NAVFAC) for infrastructure upgrade and construction of a new aircraft parts store, flight simulator facility, and squadron operations/aircraft maintenance unit facility at Travis Air Force Base. Haskell contends that Gray's proposal should have been rejected as late.

We deny the protest.

The RFP instructed offerors to submit their proposals in two parts; part 1, consisting of offerors' responses to technical factors 1 and 2 (past performance and technical qualifications), was due by "14:00:00 local time" on May 1, 2003, while part 2, consisting of offerors' responses to technical factors 3 and 4 (management approach and commitment to small business) and proposed prices, was due "on/about" July 2.

RFP at 1, 11. Amendment No. 5, issued on May 7, revised the language pertaining to part 2 proposals, providing that “[t]he solicitation closing date for submission of Part 2 Proposals is **25 June 2003, 1400 hours (Pacific time).**” RFP amend. 5, at 2.

The agency received 12 part 1 proposals and nine part 2 proposals. Among the offerors to submit both part 1 and part 2 proposals were Haskell and Gray. The agency evaluated the proposals in accordance with the evaluation scheme set forth in the RFP and selected Gray’s proposal for award.¹ Upon receipt of notification of the award to Gray, Haskell requested a debriefing; after the debriefing, Haskell protested to our Office.

Haskell alleges that Gray’s proposal was received at the designated government office after 14:00 Pacific Time on June 25 and should therefore have been rejected as late. Haskell bases its allegation on the observations of its project manager, who was present at the office designated for receipt of proposals on June 25. The project manager relates that:

After 14:00 Pacific Time, a representative from James N. Gray Company submitted a proposal in response to the Solicitation. I personally observed the James N. Gray Company representative submit the proposal after 14:00 Pacific Time.

I observed that the James N. Gray Company proposal was submitted late by looking at my watch and the clock located in the room where the bids were received. According to both my watch and the clock located on the wall, the James N. Gray Company proposal was received by the Navy after 14:00 Pacific Time.

Affidavit of Haskell’s Project Manager, Aug. 25, 2003 at 1.²

The Navy responds that Gray’s proposal package was received by the appropriate contracting official before the time 14:01 was displayed on the time/date stamp clock

¹ The RFP provided for award to the offeror whose proposal was determined most advantageous to the government, with the four equally-weighted technical evaluation factors, when combined, of approximately equal importance to price.

² The Haskell project manager’s allegation that, according to the wall clock located in the office designated for receipt of proposals, Gray’s proposal was submitted after 14:00, is corroborated by a statement from a representative of a second offeror, who notes that he “observed that the James N. Gray Company proposal was submitted late by checking the clock located in the room where the bids were received.” Affidavit of S.J. Amoroso Construction Co., Inc. Area Manager, Oct. 1, 2003, at 1.

she was using for purposes of determining timeliness, and that, accordingly, the proposal was not late. In this connection, the NAVFAC management assistant tasked with receiving proposals recounts that on the day in question, the contracting officer furnished her with a time/date stamp containing a 3-½ inch wide digital clock display, which she placed on her desk and used continuously throughout the day to check the time and affix time/date stamps to proposal packages. Statement of Management Assistant, Sept. 29, 2003, at 1-2. The contracting officer relates that prior to furnishing the time/date stamp to the management assistant, she dialed the local telephone time service, noted the local time, and set the digital clock to that time. Statement of the Contracting Officer, Sept. 29, 2003, at 1. The management assistant describes the circumstances surrounding her receipt of Gray's proposal package as follows:

One contractor GRAY, did enter the office at 1400 hrs. I had the proposal in my control before the turning of the time/date stamp turned 14:01. The Gentleman who delivered the proposal came through the office doors bleeding pretty bad, his nail had ripped from his finger, in route to our office. When he did reach my desk, I looked at the clock and it had NOT turned to 14:01 as of yet, but due to the amount of blood that was coming from his hand, I hesitated to touch the box as it was put down, and I took additional seconds to adjust the angle of the box so I wouldn't get his blood on me and just as I stamped the box the time turned to 14:01.

I truly know, if I had not taken those additional seconds to adjust the angle of the box, so I wouldn't get his blood on me, it would have been stamped in at the required time of 2:00PM.

Statement of Management Assistant, June 25, 2003.

It is the responsibility of an offeror to deliver its proposal to the proper place at the proper time, and late delivery generally requires that a proposal be rejected. See Federal Acquisition Regulation (FAR) § 52.215-1(c) (incorporated into the RFP here); Pat Mathis Constr. Co., Inc., B-248979, Oct. 9, 1992, 92-2 CPD ¶ 236 at 3. As explained below, in this case we find that the agency reasonably concluded that Gray's offer was not delivered late, and thus the agency properly considered it for award.

As a preliminary matter, regarding the protester's allegation that according to both his watch and the clock located on the NAVFAC office wall, the James N. Gray Company proposal was received by the Navy representative after 14:00 Pacific Time, the time displayed on the wall clock and the watch of the protester's representative is not dispositive since the proposal receipt official reasonably elected to rely on the time/date stamp clock as the official timing device. See Pat Mathis Constr. Co., Inc., supra.

To resolve this protest, we must address two questions: (1) did the RFP's designation of the closing time as 14:00 hours mean that proposals had to be received at or before 14:00:00, or did it mean that they had to be received at or before 14:01:00 (that is, by 2 p.m. and 59 seconds), and (2) at precisely what time was Gray's proposal received?

In the context of sealed bid procurements, the bid opening officer must decide when the time set for opening bids has arrived and must inform those present of that decision. FAR § 14.402-1(a). While bids received in the office designated in an invitation for bids after the exact time set for opening are late bids, FAR § 14.304(b)(1), the bid opening officer's declaration of bid opening is determinative of lateness unless it is shown to be unreasonable under the circumstances. J.C. Kimberly Co., B-288018.2, Feb. 8, 1994, 94-1 CPD ¶ 79 at 2. In the context of negotiated procurements, such as the one at issue here, there is, of course, no bid opening and thus no requirement that a government official announce when the time for receipt of submissions has arrived. However, just as we believe that it would have been reasonable for a government official, had this been a sealed bid acquisition, to announce bid opening at any point between 14:00:00 and 14:00:59, we believe that the RFP's reference to a closing time of 14:00 hours could reasonably be interpreted either as requiring that proposals be received by 14:00:00, or as requiring that they be received by 14:00:59. To the extent that is viewed as an ambiguity in the solicitation, it was one that was obvious from the face of the RFP, and we have repeatedly held that an offeror who chooses to compete under a patently ambiguous solicitation does so at its peril and cannot later complain when the agency proceeds in a manner inconsistent with one of the possible interpretations. Wackenhut Servs., Inc., B-276012.2, Sept. 1, 1998, 98-2 CPD ¶ 75 at 5.

The protester contends that the fact that the RFP referenced the closing time for receipt of the part 1 proposals as "14:00:00" indicates that the agency intended the reference to "1400 hours" in the instructions for receipt of part 2 proposals to be interpreted as 14:00:00. This argument is not persuasive. It could be argued equally reasonably that the agency's dropping of the zeroes in the seconds place in the time specified for receipt of part 2 proposals signified that it did not intend that reference to be interpreted as 14:00:00. Accordingly, if the record establishes that Gray's proposal was received prior to 14:01:00, we think that the agency need not have rejected it as late.

Turning then to our second question, we think that the record here establishes that Gray's proposal was received by the agency prior to 14:01:00. A proposal is received at the time that the offeror relinquishes control of it to the government. See Weeks Marine, Inc., B-292758, Oct. 16, 2003, 2003 CPD ¶ __; Carothers Constr., Inc., B-235910, Oct. 11, 1989, 89-2 CPD ¶ 338 at 4. Gray's messenger relinquished control of Gray's proposal package to the designated contracting official by placing it on her desk in her presence, which, according to the contracting official's uncontroverted statement, occurred prior to the time/date stamp clock turning to 14:01. The fact that the contracting official may not have picked up the package prior to 14:01 is

irrelevant since an individual may gain effective control over an item without actually taking it into his or her hands. The case cited by the protester for the proposition that an offeror does not relinquish control of its proposal by placing it on a desk in the opening room, George W. Kane, Inc., B-245382.2, Feb. 4, 1992, 92-1 CPD ¶ 143, is distinguishable from the case at hand. In the Kane case, no government official was present at the desk at the time the bidder placed its bid on it; thus, placing the bid on the desk did not transfer it to the control of an appropriate government official.

On the basis of the record before us, we are not persuaded that Gray's proposal was received late. Accordingly, Haskell's protest is denied.

Anthony H. Gamboa
General Counsel