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**Comptroller General
of the United States**

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

Decision

Matter of: Noble Supply and Logistics

File: B-404731

Date: March 4, 2011

Michael A. Hordell, Esq., and Heather Kilgore Weiner, Esq., Pepper Hamilton LLP, for the protester.

Gary R. Allen, Esq., Department of the Air Force, for the agency.

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DIGEST

Protest challenging agency's rejection of the protester's proposal as late is denied where the protester unreasonably disregarded closing date established by solicitation and instead relied on oral advice from the contracting officer indicating that the protester's proposal would be considered if submitted one day after the solicitation's closing date.

DECISION

Noble Supply and Logistics, of Rockland, Massachusetts, protests the rejection of its proposal as late under request for proposals (RFP) No. FA4528-11-R-0001, issued by the Department of the Air Force for operation of the civil engineer supply store at Minot Air Force Base (AFB) in North Dakota. Noble argues that the agency unreasonably rejected its proposal as late.

We deny the protest.

The RFP set the closing date for receipt of proposals as 4:30 p.m. on December 22, 2010. The protester explains that on December 21, it delivered its proposal package to UPS to be shipped using "Next Day" service, but that when it checked on the status of the delivery the following morning, UPS advised it that severe weather

would delay delivery of the package to the 23rd.¹ According to Noble, it then located a UPS store in Minot, North Dakota and spoke with an employee of the store, who advised it that he would be able to print, package, and deliver a copy of the proposal to the base prior to the 4:30 p.m. closing time.

Before implementing this alternative plan for delivering its proposal, however, the protester contacted the contracting officer and explained its situation. According to Noble, the contracting officer advised that she understood the protester's problem and stated "that if the proposal was delivered on December 23, it would still be evaluated." Protest at 5. Based on this advice, the protester elected not to implement its alternative plan for proposal delivery. UPS delivered the proposal to Minot AFB at 11:05 a.m. on December 23.

By letter of January 3, the contracting officer notified Noble that its proposal had been received after the specified closing time and would not be considered. On January 13, Noble protested to our Office.

The protester argues that its proposal was not late because the contracting officer orally amended the RFP on December 22 to extend the closing date to December 23. In the alternative, Noble argues that even if its proposal was late, the agency should have considered it, because the late delivery was the result of incorrect information furnished by the contracting officer.

The protester's first argument is without merit. While it is true that a contracting officer may provide oral notice of a solicitation amendment "when time is of the essence," see Federal Acquisition Regulation (FAR) § 15.206(f), Noble has not alleged that the contracting officer ever in fact advised Noble that she would "amend" the solicitation to extend the closing date until December 23.² Rather, Noble essentially argues that it understood the contracting officer's oral assurance that its proposal would be evaluated even if submitted on the 23rd as implying that the RFP would be amended since there would not otherwise have been any basis for the contracting officer to consider its proposal. However, absent an unambiguous statement from the contracting officer conveying her intent to amend the closing

¹ The agency notes that the severe weather in question did not disrupt operations at Minot AFB, and that the base contracting office was open and able to receive proposals on the closing date.

² The agency does not deny that the contracting officer advised Noble that its proposal would be evaluated if it was received on December 23; the agency does, however, assert that the contracting officer did not advise Noble that she would amend the solicitation to extend the closing date until the 23rd for all offerors, and Noble has not rebutted the agency's position.

date for all offerors,³ Noble could not reasonably disregard the solicitation's express closing date and instead rely on an implied understanding of the contracting officer's oral assurances, which were otherwise inconsistent with the terms of the RFP. We have repeatedly held that oral advice that would have the effect of altering the written terms of a solicitation, even from the contracting officer, does not operate to amend a solicitation or otherwise legally bind the agency, ESCO Marine, Inc., B-401438, Sept. 4, 2009, 2009 CPD ¶ 234 at 8, and that an offeror relies on such oral advice at its own risk. TRS Research, B-274845, Jan. 7, 1997, 97-1 CPD ¶ 6 at 3.

Turning then to Noble's second argument, while 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, see FAR § 15.208, O.S. Sys., Inc., B-292827, Nov. 17, 2003, 2003 CPD ¶ 211 at 3, a hand-carried proposal that arrives late may be considered if improper government action was the paramount cause of the late submission and consideration of the proposal would not compromise the integrity of the competitive procurement process.⁴ Hospital Klean of Texas, Inc., B-295836, B-295836.2, Apr. 18, 2005, 2005 CPD ¶ 185 at 4-5.

The protester argues that it was the incorrect information furnished by the contracting officer regarding the acceptability of submitting its proposal a day after the specified closing date that led it to forego its alternative approach to delivering the proposal by the December 22 deadline, and that improper government action was thus the paramount cause for the late submission. We disagree. Even assuming that the contracting officer did incorrectly advise the protester regarding the acceptability of delivery on the 23rd, this misinformation did not prevent the protester from delivering its proposal on time, and thus was not the paramount cause of the late submission;⁵ rather, it was the protester's decision to rely on the contracting officer's erroneous oral advice, which was at Noble's own peril as explained above, and thereby forego its alternative approach to delivering its proposal that resulted in the proposal being received late. Because the agency's

³ Amendments issued before the established time and date for receipt of proposals are required to be issued to all parties receiving the solicitation. FAR § 15.206(b).

⁴ A bid or proposal that is delivered by a commercial carrier is regarded as hand-carried. Select, Inc., B-245820.2, Jan. 3, 1992, 92-1 CPD ¶ 22 at 3.

⁵ In contrast, where a firm has acted reasonably in relying on incorrect information furnished by an agency regarding the location to which bids/proposals are to be delivered (e.g., the incorrect information is contained in the solicitation), thereby frustrating the firm's ability to timely submit its bid/proposal, the agency's action has been considered to be the paramount cause of the submission's lateness. See, e.g., Weeks Marine, Inc., B-292758, Oct. 16, 2003, 2003 CPD ¶ 183; Palomar Grading & Paving, Inc., B-274885, Jan. 10, 1997, 97-1 CPD ¶ 16; AABLE Tank Servs., Inc., B-273010, Nov. 12, 1996, 96-2 CPD ¶ 180; and Select, Inc., supra.

actions were not the paramount cause for the late receipt of Noble's proposal, the agency properly rejected it as late.

The protest is denied.

Lynn H. Gibson
General Counsel