



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: U.S. Aerospace, Inc.

File: B-403464, B-403464.2

Date: October 6, 2010

John C. Kirkland, Esq., Luce, Forward, Hamilton & Scripps, LLP, for the protester.
Col. Mark S. Teskey, Lt. Col. Won K. Lee, Sharon A. Jenks, Esq., and Ross W.
Branstetter, Esq., Department of the Air Force, for the agency.
Glenn G. Wolcott, Esq., Cherie J. Owen, Esq., and Sharon L. Larkin, Esq., Office of
the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably concluded that protester's proposal was received after the established closing time where agency's conclusion is supported by contemporaneous email from protester's representative and telephone records, and protester's messenger did not dispute the stated time of receipt at the time the proposal was submitted.
 2. The delay accompanying admission of protester's messenger to a secure military facility, and the alleged misdirection by the facility's entry gate guards, were not the paramount cause of protester's late submission of its proposal where protester's messenger did not attempt to enter the facility at the gate designated for entry of non-military visitors, did not seek advance entry approval, and failed to determine the location of, and directions to, the building designated for proposal submission.
 3. Protester's proposal was not under government control prior to the time set for receipt of proposals where protester's messenger did not relinquish physical custody of the proposal until after the proposal submission deadline.
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DECISION

U.S. Aerospace, Inc. (USAI), of Santa Fe Springs, California, protests the Department of the Air Force's rejection of the proposal USAI submitted in response to request for proposals (RFP) No. FA8625-10-R-6600 for the KC-X tanker

modernization program.¹ The agency rejected USAI's proposal on the basis that it was not received by the submission deadline. USAI's protest challenges the agency's rejection of the proposal on various bases, including an assertion that delivery of the proposal was "intentionally delayed" by Air Force personnel. Protest at 3. As discussed below, we previously dismissed the portion of USAI's protest alleging intentional agency misconduct; our decision today denies the remaining protest allegations.

BACKGROUND

In April 2010, the agency issued the RFP, as modified by amendment No. 0002, seeking proposals for the KC-X tanker modernization program. The RFP clearly advised offerors that proposals must be received at "1755 Eleventh Street, Building 570, Wright-Patterson AFB [Air Force Base], OH," by 2:00 p.m. on July 9, 2010. RFP at 1, 3. The parties agree that USAI's messenger delivered USAI's proposal to a contracting officer's representative (COR) at some time during the afternoon of July 9 and that, at that time, the COR gave the messenger a receipt indicating that the proposal was received at 2:05 p.m. Protest ex. 21, Memorandum from Air Force to USAI, July 22, 2010, at 1-2. On July 22, the agency gave USAI formal notice that its proposal was considered late and would not be considered. Id.

On August 2, USAI filed an initial protest with this Office, asserting that rejection of its proposal was improper for various reasons, including that the proposal was "arbitrarily" marked as having been received at 2:05 p.m.; that Air Force personnel gave USAI's messenger "incorrect directions to 1755 Eleventh Street Building 570"; that the proposal was "under Air Force control" prior to the 2 p.m. deadline; and that Air Force personnel "intentionally delayed" USAI's messenger. Protest at 2-3.² Thereafter, in response to a specific request from this Office, USAI submitted a written statement from its messenger addressing the events that occurred on July 9.³

¹ Counsel for the protester states that the protest is submitted "on behalf of . . . U.S. Aerospace, Inc. and its subsidiary, Precision Aerostructures, Inc." Protest at 1. For the sake of simplicity, our decision refers only to USAI.

² On September 1, USAI filed a supplemental protest expanding on its allegations of intentional agency misconduct. Among other things, USAI's supplemental protest asserted that agency personnel "intentionally destroyed or negligently failed to preserve crucial evidence"; that the COR "wrote a false or erroneous time on a delivery receipt that did not correspond to the actual delivery time"; and that the contracting officer was "intentionally deceptive with regard to the procurement process." Supplemental Protest at 1-2.

³ This Office subsequently presented follow-up questions regarding the messenger's actions and interactions with Air Force personnel. In response, USAI's messenger submitted a supplemental statement.

Specifically, the messenger stated that he arrived at one of the base entrance gates at 1:15 p.m.;⁴ that he had a box containing USAI's proposal and told the guard he was there to "deliver the tanker bid"; that he was denied entry and told that he needed to have someone from the office to which he was delivering documents call the gate to authorize his admission; and that he was instructed to wait in a nearby parking area. Statement of USAI Messenger at 2; Supplemental Statement of USAI Messenger at 1. The messenger stated that he understood that the guard would call the contracts office to facilitate the messenger's admission. Supplemental Statement of USAI Messenger at 1. The messenger also stated that, while he waited, as instructed by the guard, he (the messenger) called other U.S. Aerospace representatives "to tell them what was going on." Id. at 2.

The messenger stated that, following various conversations between himself, gate personnel, and other USAI representatives, he was permitted to enter the base "just after" 1:40 p.m. Statement of USAI Messenger at 2. The messenger asserted that the gate guard gave him directions to 1755 Eleventh Street, building 570, that he followed those directions, and that "[u]pon turning onto Eleventh Street as instructed, [he] noticed the address provided did not exist, as the road dead ended into a building." Id.

The messenger stated that he then parked his car at a particular intersection. He asserted that, at 1:53 p.m., he received a call on his cell phone from the contracting officer's representative (COR).⁵ The messenger stated that he told the COR where

⁴ Because the messenger's statement did not identify which entry gate the messenger used, this Office sought further clarification regarding that matter. In response, counsel for the protester stated that the messenger entered at the gate designated as "19B," just off of National Road. The messenger's choice of an entry gate is contrary to the guidance provided on the agency's publicly available Internet website, which states that non-military visitors must report to "Gate 1B off Springfield Street," in order to obtain a visitor's pass. Agency Report (AR), Tab 6c, Screenshot of Visitors Information; see also www.mybaseguide.com/air-force/wright-patterson-afb/arrival.aspx.

⁵ The record indicates that another USAI representative, who the messenger had contacted, had sent an email to the agency's contracting office that stated, "Messenger with Bid is lost," and provided the messenger's name and cell phone number; however, the face of that email indicates that it was sent at 1:58 p.m. Agency Report (AR), Tab 8, Email from USAI representative to Agency, July 9, 2010, at 1. Accordingly, the COR could not have called the messenger's cell phone prior to 1:58 p.m., when agency personnel first received the messenger's cell phone number. Consistent with the time reflected on the USAI email, the COR's cell phone records show that the COR first placed a call to the USAI messenger's cell phone at 1:59 p.m. AR, Tab 12, Verizon Wireless Record.

he was, that the COR told him to wait there, and that he (the COR) would come to the messenger's location and "take the bid to Building 570 before the deadline." Id. The messenger asserted that, a few minutes later, the COR pulled alongside the messenger's car and, when he (the messenger) "made mention of the fact that the address [the messenger] was looking for was not there," the COR responded to the effect of, "[t]hey just built that building at the end of the road, unless you knew to go around the new building you never would have found #570 because it sits behind the new building and is not visible." Id.

The messenger further stated that he told the COR that he had USAI's proposal but that, rather than taking the proposal, the COR instructed the messenger to follow him (the COR) to a parking lot near building 570, which the messenger did. Id. at 3. The messenger stated that when he got out of the car at the parking lot, he handed USAI's proposal to the COR,⁶ who placed it on the messenger's car while he (the COR) made two telephone calls.⁷ Id. The messenger stated that the COR then advised the messenger that he (the COR) wanted to sign a receipt, instructed the messenger to accompany the COR inside the lobby of building 570, where the COR obtained a blank receipt, completed it to show that the proposal had been received at 2:05 p.m., and gave a copy to the messenger. Id. The messenger stated that the COR did not seek any input from the messenger regarding the information placed on the receipt. Id. The messenger's statement also does not indicate that he expressed any disagreement with the 2:05 p.m. delivery time reflected on the receipt.

In its initial protest, USAI asserted that "certain Air Force personnel may have intentionally delayed the messenger from delivering [USAI's] proposal, in order to create a pretext for refusing to consider it because they have political issues with [USAI's] supplier, Antonov Company of Ukraine." Protest at 3. With its protest, USAI submitted multiple document production requests, including requests for production of guard gate records and security camera footage; internal agency emails, correspondence and memoranda;⁸ and the proposals of the competing offerors. Id. at 5.

On August 6, this Office conducted a conference call with counsel for the parties, advising the protester that we would not require the agency's production of various

⁶ At this point in his statement, the messenger asserted that USAI's proposal "was delivered before 2:00 p.m." Id.

⁷ The COR's cell phone records indicate that the COR placed two calls to the agency's contracting office at 2:05 p.m. AR, Tab 12, Verizon Wireless Record.

⁸ For example, USAI's protest sought production of: "Memoranda, letters, emails, notes and other documents containing or referencing opinions concerning Eastern European countries, Ukraine or [two other countries that had been referenced in prior USAI correspondence with the agency]." Protest at 5.

requested documents, including the competing offerors' proposals. On August 20, the agency submitted its written response to USAI's document production requests, opposing several of those requests, and identifying certain information that was unavailable.⁹

On August 26, the agency submitted its report responding to USAI's protest, providing various documents responding to USAI's document production requests, and maintaining that the paramount cause of USAI's late proposal submission was "USAI's decision to wait until less than one hour before proposals were due to request assistance for entry onto a large and secure Air Force Base." Agency Memorandum of Law/Contracting Officer's Statement at 2. In this regard, the agency referred to the publicly available Internet website for visitors at Wright-Patterson AFB, which provides that "[b]ase visitors who do not have proper entry credentials must report to one of the Visitor Centers to obtain [] personal passes and must be sponsored by a military member or DoD Civilian," further warning that "[n]on-base connected personnel may be denied entry without prior notice due to increased Force Protection Conditions." See Wright-Patterson AFB Internet website at www.mybaseguide.com/air-force/wright-patterson-afb/arrival.aspx. As noted above, the Wright-Patterson AFB Internet website also identified gate 1B--not gate 19B where USAI's messenger arrived--as the only designated visitor center for Area B.¹⁰ Finally, the agency report included copies of maps of Wright-Patterson AFB that are posted on the agency's website, and which depict various AFB buildings, along with their associated building numbers, including building 570.¹¹

⁹ For example, with regard to USAI's request for guard gate log records, the agency stated, "[d]ue to a hard drive crash, the database of visitors processed through Gate 1B on July 9, 2010 does not exist." Agency Notice of Contents of Agency Report, Aug. 20, 2010 at 2. As discussed above, USAI's messenger entered the base at gate 19B, not 1B; accordingly, data regarding gate 1B is not relevant to USAI's protest. With regard to USAI's request for security camera footage, the agency stated: "For operational security reasons, the Air Force will not provide the actual surveillance footage of the gates," and further notes that the agency "will not disclose for base security purposes the locations and coverage of security cameras, their hours of operation or whether the cameras are monitored on a real-time basis or recorded." *Id.* Nonetheless, the agency stated, "we can represent that security camera footage of [various specific locations including the lobby of building 570 and the nearby parking lot] is not available. *Id.*

¹⁰ There is no dispute that 1755 Eleventh Street, building 570, is within Area B of Wright-Patterson AFB. Although the agency website identifies additional visitor centers for entering Areas A and C (which are physically separate from Area B), the website identifies gate 1B as the only visitor center for entry to Area B.

¹¹ Following submission of the agency report, this Office sought the agency's clarification regarding the location of building 570, noting that publicly available

(continued...)

AR, Tab 6a, Map of Wright Patterson AFB; see also www.wpafb.af.mil/shared/media/document/AFD-070524-046.pdf.

Thereafter, this Office advised counsel for the protester that we were considering dismissal of the portions of the protest that alleged bad faith and intentional agency misconduct, including the protester's assertion that Air Force officials may have intentionally delayed USAI's messenger because of "political issues" with USAI's Ukrainian supplier.

On September 7, USAI submitted its opposition to dismissal, referring to various alleged flaws or omissions in the agency report that, according to USAI, provided support for its accusations of intentional misconduct. First, USAI challenged the accuracy of the website map provided with the agency report, suggesting that the map is "incorrect and/or outdated." USAI Opposition to Dismissal at 2. In this regard, USAI complained that currently available photographic maps of Wright-Patterson AFB reflect a "missing section of Eleventh Street, which has been . . . removed since the Air Force maps were drawn," further noting that USAI's photographic maps indicate that another building has been "built over the missing section of Eleventh Street." *Id.* USAI's opposition to dismissal further complained that the sign in front of building 570, which identifies both the building number and the address of "1755 Eleventh Street," is located "some 50 to 100 yards from Eleventh Street," and is "impossible for anyone to see without the assistance of a sniper spotter with a high-powered spotting scope." *Id.* Accordingly, USAI maintained that

(...continued)

information on Internet mapping websites suggested that the physical location of "1755 Eleventh Street" did not correspond with the location of building 570, as identified on the agency-provided map. The agency responded that it "does not control internet mapping services," provided a picture of the sign in front of building 570 that reflects both the building number and the words "1755 Eleventh Street," maintained that the map provided with the agency report showed the correct location of building 570, and further stated that "had USAI's messenger actually arrived at 1755 Eleventh St., he would have been at Building 570." Email from Air Force to GAO, Sept. 3, 2010.

its messenger “could not fairly be blamed for being unable to find Building 570.”¹² Id. at 3.

USAI’s opposition to dismissal also referred to the agency’s statements of unavailability regarding the visitor log records and security camera footage, asserting that the agency “willfully failed to comply with its evidence preservation obligations”; further asserted that, in communicating with USAI several days after the July 9 closing date, the contracting officer made “false statements” regarding the extent of her knowledge of the events on July 9; and, finally, argued generally that the record contains “other items of circumstantial evidence” which create “reasonable inferences” of intentional agency misconduct.¹³ Id. at 3, 5, 6.

On September 16, 2010, this Office issued a partial dismissal of USAI’s protest, dismissing USAI’s allegations of intentional agency misconduct. In that decision, we noted that our Bid Protest Regulations require that a protester provide a statement of legal and factual grounds that are sufficient to establish a reasonable potential that the protester’s allegations have merit, and that bare allegations or speculation are insufficient to meet this requirement. See 4 C.F.R. §§ 21.1(c)(4), 21.1(f), 21.5(f) (2010); View One, Inc., B-400346, July 30, 2008, 2008 CPD ¶ 142 at 2-3; Saturn

¹² We note that, in the statement submitted by USAI’s messenger, he stated:

I am personally very familiar with Wright-Patterson Air Force Base, its location and layout, and the Air Force’s protocols and procedures for entering the base in order to effectuate service of documents, having done so many times myself. . . .

I advised U.S. Aerospace, Inc. that, based upon my professional knowledge and experience, early on a Friday afternoon it should take 10 to 15 minutes after arrival at the gate to make delivery within Area B of Wright-Patterson Air Force Base. As such, arriving 20 minutes early would ensure more than adequate time for delivery before the deadline. I was told to be sure to arrive at least half an hour before the deadline.

Statement of USAI Messenger at 1.

Apparently, the messenger’s knowledge and experience regarding Wright-Patterson AFB did not extend to the location of, or directions to, building 570, which is indisputably located within Area B of the Base.

¹³ For example, USAI asserted that “Air Force personnel illegally leaked information to the press,” and that the agency “waited until close of business on the day before the bid due date” to deny USAI’s request for an extension of the proposal due date that USAI had sought approximately 1 week earlier. USAI Opposition to Dismissal at 2.

Landscape Plus, Inc., B-297450.3, Apr. 18, 2006, 2006 CPD ¶ 70 at 9; Siebe Envntl. Controls, B-275999.2, Feb. 12, 1997, 97-1 CPD ¶ 70 at 2.

In partially dismissing USAI's protest, we concluded that, while many of USAI's complaints were potentially relevant to the protester's proposition that its messenger was understandably confused as to the location for submitting USAI's proposal, such complaints did not support USAI's allegations of intentional agency misconduct; to the contrary, we viewed the indications of the messenger's confusion as tending to refute such allegations. Further, we noted that it was USAI's decision--not that of the Air Force--to have its messenger arrive at Wright-Patterson AFB entry gate 19B with less than an hour remaining before proposals were due; it was USAI's decision not to seek advance agency approval for its messenger to be admitted to the AFB; and it was USAI's decision not to confirm in advance the precise location of, and directions to, the building at which proposals were to be received. Based on our review of the protest allegations and the record submitted, we concluded that USAI's allegations of intentional agency misconduct were insufficient to warrant further consideration, advising the parties that we would continue to consider, and subsequently resolve, USAI's remaining bases for challenging the agency's rejection of its proposal.

USAI thereafter submitted its comments responding to the agency report, essentially challenging the agency's rejection of its proposal on three bases: (1) that the proposal was, in fact, submitted by 2 p.m.; (2) that the delay associated with the messenger's admission to the AFB and the gate guard's alleged misdirection were the paramount cause of the late submission; and (3) that the proposal was "under the Air Force's control" prior to the time set for receipt of proposals. As discussed below, USAI's various arguments provide no bases for sustaining its protest.

DISCUSSION

Agency Determination that Proposal was Not Timely Submitted

USAI first protests that its proposal was, in fact, delivered by 2 p.m. on July 9. In this regard, USAI offers no evidence to support its assertion other than its messenger's representations regarding the timing of events prior to proposal submission, and the messenger's conclusion that "the proposal was submitted by 2 p.m."¹⁴ Statement of USAI Messenger at 2. Rather, USAI notes that the COR relied on his wrist watch in determining that the proposal was late and argues that the evidence the agency considered, including the COR's wrist watch, is inadequate to establish the time of receipt, arguing, among other things, that the agency has failed to present a "standard *metered* timestamp showing the exact Coordinated Universal Time

¹⁴ For example, USAI has not submitted any of its own or its messenger's phone or email records to challenge the documents submitted by the agency in response to USAI's document requests.

(‘UTC’) of actual receipt of the bid.” Comments at 1 (*italics in original*). USAI asserts that the agency’s determination was unreasonable because the agency has not demonstrated that the COR’s wrist watch reflected the “exact [time], accurate or synchronized to UTC.” *Id.* at 2. Thus, USAI maintains that “the purported time shown on the watch is not legally trustworthy, cannot establish the exact time of receipt, and is not admissible to support the determination that the bid was late.” *Id.* We disagree.

This Office has repeatedly held that the declaration of the agency official responsible for receiving bids or proposals is determinative with regard to the time a bid or proposal is received, absent a showing that the agency official’s declaration was unreasonable. See, e.g., Pat Mathis Constr. Co., Inc., B-248979, Oct. 9, 1992, 92-2 CPD ¶ 236 at 3; Robert R. Nathan Assocs., Inc., B-230707, June 28, 1988, 88-1 CPD ¶ 615 at 2-3; Chattanooga Office Supply Co., B-228062, Sept. 3, 1987, 87-2 CPD ¶ 221 at 2.

Here, as discussed above, the agency COR specifically concluded that USAI’s proposal was not received until 2:05 p.m., advised USAI’s messenger of that determination, and provided the messenger written notification reflecting the 2:05 p.m. receipt. USAI’s messenger did not dispute the accuracy of the COR’s determination at that time. Further, as noted above, the record contains an email from another USAI representative to agency personnel stating that “Messenger with Bid is lost” and providing the messenger’s name and cell phone number; the face of that email states that it was sent at 1:58 p.m. AR, Tab 8, Email from USAI representative to Agency, July 9, 2010, at 1. Consistent with the time reflected on the USAI email, the COR’s cell phone records show that the first call he placed to the messenger was made at 1:59 p.m. AR, Tab 12, Verizon Wireless Record. Thereafter, the COR drove to the messenger’s location, spoke with him, directed the messenger to follow him (the COR) back to the building 570 parking lot, and drove to that lot—at which point the messenger handed the proposal to the COR. Statement of USAI Messenger at 2-3. On this record, we find nothing unreasonable in the agency’s determination that the proposal was received after the 2 p.m. deadline. USAI’s protest to the contrary is denied.

Alleged Government Delay and Misdirection

As noted above, USAI’s messenger complains that he was delayed in entering the AFB and asserts that he was provided directions by the Wright-Patterson guard to 1755 Eleventh Street, building 570, which he followed, but that, upon turning onto Eleventh Street, “the road dead ended into a building.” Statement of USAI Messenger at 2. Additionally, USAI complains that maps provided by the agency in response to USAI’s protest are “incorrect and/or outdated.” USAI Opposition to Dismissal at 2. USAI states that currently available photographic maps of Wright-Patterson AFB reflect a “missing section of Eleventh Street, which has been . . . removed since the Air Force maps [provided in response to the protest] were drawn,” further noting that USAI’s photographic maps indicate that another building

has been “built over the missing section of Eleventh Street.” *Id.* Accordingly, USAI asserts that:

[T]he paramount cause of delay here is the fact that the street address listed on the RFP does not exist (or, incredibly, the address still exists, even though the street no longer does), and that the Air Force maps of Area B are wrong. . . . [T]he pertinent section of Eleventh Street was removed years ago; a new building was built where the road used to be, and the street now dead ends more than a block before Building 570.¹⁵ It is impossible to find [building 570] without already knowing where it is.

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The time that [USAI’s] messenger arrived on base is not the determining factor here. [USAI’s] messenger could have arrived minutes—or hours—earlier, and he still never would have found the building until Air Force personnel either provided accurate directions or took him there.

Comments at 7.

It is an offeror’s responsibility to deliver its proposal to the proper place at the proper time; proposals that are received after the exact time specified are “late” and must generally be rejected.¹⁶ Federal Acquisition Regulation (FAR) § 15.208(a); O.S. Sys., Inc., B-292827, Nov. 17, 2003, 2003 CPD ¶ 211 at 3; Integrated Support Sys. Inc., B-283137.2, Sept. 10, 1999, 99-2 CPD ¶ 51 at 2. The late proposal rules include

¹⁵ The relevance of USAI’s complaints regarding the alleged inaccuracy of the maps provided in response to the protest is not readily apparent, as neither USAI nor its messenger have represented that the messenger obtained, considered, or otherwise relied on any maps in connection with the delivery of USAI’s proposal. In any event, we disagree with USAI’s characterization of the agency-provided maps. Based on our review, the agency-provided maps, in fact, reflect the existence of a building over a section of Eleventh Street. AR, Tab 6a, Map of Wright-Patterson AFB.

¹⁶ While application of the late proposal rules may sometimes seem harsh, the rules are aimed at ensuring equal treatment of all offerors, and promoting confidence in the competitive system, thereby protecting the integrity of the procurement process—goals that are of greater importance than the possible advantage gained by considering a late proposal in a single procurement. See, e.g., Inland Serv. Corp., Inc., B-252947, B-252947.4, Nov. 4, 1993, 93-2 CPD ¶ 266 at 3; Phoenix Research Group, Inc., B-240840, Dec. 21, 1990, 90-2 ¶ 514 at 5; Siemens Hearing Instruments, Inc., B-225548, Dec. 30, 1986, 86-2 CPD ¶ 721 at 1-2.

limited exceptions under which late proposals may be considered. Specifically, this Office has held 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; AABLE Tank Servs., Inc., B-273010, Nov. 12, 1996, 96-2 CPD ¶ 180 at 3; Select Inc., B-245820, Jan. 3, 1992, 92-1 CPD ¶ 22 at 4. 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*; O.S. Sys., Inc., *supra*; Palomar Grading & Paving, Inc., *supra*.

Here, USAI has not demonstrated that the alleged government misdirection and/or delays associated with its messenger's entry at gate 19B was the paramount cause of the late delivery of USAI's proposal. To the contrary, the record indicates that, even accepting USAI's assertions that the gate guard provided inaccurate directions which delayed the submission of USAI's proposal, USAI's own actions significantly contributed to the late submission of its proposal. As discussed above, it was USAI's decision to attempt entry to Wright-Patterson AFB, a secure military facility, at gate 19B—a gate designated for admission of personnel with military credentials—rather than at gate 1B—the entrance at which visitors without military credentials were directed to arrive. In addition to its decision to attempt entry at a gate not designated for use by non-military visitors, USAI's messenger arrived at the entrance gate with less than an hour remaining before proposals were due,¹⁷ did not obtain advance approval for entry, and failed to previously ascertain the location of, and directions to, the building designated for proposal submission. On this record, we conclude that USAI's own actions were significant contributing factors to the late receipt of its proposal, and we reject USAI's assertion that any delay in obtaining admission through gate 19B and/or the gate guard's alleged misdirection was the paramount cause of the late proposal submission. USAI's protest that the agency was required to accept its proposal because of the government's actions is denied.

Agency Control of the Proposal

Finally, USAI protests that USAI's proposal was "under Air Force control" prior to the 2 p.m. closing time. Protest at 2. In this regard, USAI refers to FAR

¹⁷ In addressing protests challenging an agency's rejection of late bids or proposals, we have long noted that delays in gaining access to government facilities are not unusual and should be expected. See, e.g., Econ, Inc., B-222577, July 28, 1986, 86-2 CPD ¶ 119 at 4; National Blower and Sheet Metal Co., Inc., B-194895, Oct. 3, 1979, 79-2 CPD ¶ 240 at 4.

§ 52.215-1(c)(3), which was incorporated into the solicitation and addresses the late submission of proposals.¹⁸ In pertinent part, FAR § 52.215-1(c)(3) states:

(ii)(A) Any proposal, modification, or revision 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—

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(2) 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; or

(3) It is the only proposal received.¹⁹

FAR § 52.215-1(c)(3).

In determining whether a late-submitted proposal was “under the Government’s control” prior to the time set for receipt of proposals, it is clear that an offeror must, at a minimum, have relinquished physical custody of the proposal. See, e.g., ALJUCAR, LLC, supra; Einhorn Yaffe Prescott, B-259552, Mar. 20, 1995, 95-2 CPD ¶ 153; see also Shirlington Limousine & Transp., Inc. v. United States, 77 Fed. Cl. 157 (2007). This requirement is an obvious necessity in order to preclude any potential that an offeror could alter, revise, or otherwise modify its proposal after other offerors’ competing proposals have been submitted.

Here, as discussed above, USAI’s messenger did not relinquish physical custody of its proposal until it handed the proposal to the COR in the parking lot outside of building 570. As also discussed above, the agency reasonably determined that such

¹⁸ Block 9 on page 1 of the solicitation established the time and date for submission of proposals and stated: “Proposal receipt after the due date and time shall be governed by the provisions of FAR 52.215-1(c)(3).” RFP at 1.

¹⁹ The protest record contains statements from representatives of two other contractors indicating that a proposal has been submitted by each of these contractors. Similarly, in responding to this protest, the agency has stated: “By the morning of July 9, 2010, the Contracting Office had received proposals from multiple offerors.” Agency Memorandum of Law/Contracting Officer’s Statement at 3. Accordingly, the provision contained in FAR § 52.215-1(c)(3)(ii)(A)(3) that permits consideration of a late proposal where only one proposal was received is inapplicable here.

transfer of physical custody did not occur until after the 2 p.m. proposal submission deadline. Accordingly, the prerequisite for consideration of a late proposal contained in FAR § 52.215-1(c)(3)(ii)(A)(2)—that is, that the proposal “was under the Government’s control prior to the time set for receipt of offers”—has not been met, and USAI’s assertion that the agency was required to consider USAI’s proposal on the basis of that FAR provision is without merit.

The protest is denied.

Lynn H. Gibson
Acting General Counsel