

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY THE COMMISSIONER OF ADMINISTRATION**

KALEN & ASSOCIATES, INC.)	
)	
v.)	
)	
DEPARTMENT OF NATURAL RESOURCES)	OAH No. 08-0123-PRO
_____)	RFP No. 2007-0600-6772

DECISION

I. Introduction

Kalen & Associates, Inc., submitted a proposal in response to a request for proposals issued by the Department of Natural Resources. The proposal arrived approximately one hour after the closing time identified in the request for proposals, and the department rejected it as late.

Kalen & Associates filed a protest, which the department denied; this appeal followed. Because no material facts are at issue, and Alaska law provides that an untimely proposal may not be accepted, the department's decision is affirmed.

II. Facts

The Department of Natural Resources issued RFP No. 2008-1000-7470 to obtain proposals for a professional services contract for surveying and platting land within the Taylor Mountain North Remote Recreational Cabin Sites staking area. The online public notice of the request for proposals states: "Proposals must be received in writing at the Issuing Office by December 5, 2007 no later than 1:30 P.M. Failure to meet the deadline will result in disqualification of the proposal without review." Section 1.01 of the request for proposals designated the delivery location for proposals as 550 West 7th Avenue, Suite 650, Anchorage and states:

Proposals must be received no later than 1:30 P.M. on December 5, 2007. Fax proposals are acceptable but not encouraged. Oral proposals are not acceptable.

An offeror's failure to submit its proposal prior to the deadline will cause the proposal to be disqualified. Late proposals or amendments will not be opened or accepted for evaluation.

Kalen & Associates is located in Fairbanks. For many years, the firm has used an express delivery firm, DHL, for overnight delivery services from Fairbanks to Anchorage, and it has never experienced a late delivery. Kalen & Associates delivered its proposal to DHL in Fairbanks at 1:00 p.m. on Tuesday, December 4, 2007, with explicit instructions to deliver it by 12:00 noon the next day. DHL marked the proposal for noon delivery the next day, and assured Kalen & Associates that the proposal would be delivered by that time.

Seven proposals were timely submitted to the Department of Natural Resources, including five from Anchorage respondents, all hand delivered between 10:00 a.m. and 1:07 p.m., one from a Fairbanks respondent, delivered at 10:00 a.m. by another express delivery service (FedEx), and one from a Homer respondent, delivered at 11:10 a.m. by a delivery service.

Due to events beyond Kalen & Associates' control, DHL failed to timely deliver the Kalen & Associates proposal as it had promised. The proposal was delivered to the Department of Natural Resources at approximately 2:30 p.m. on Wednesday, December 5, about one hour after the closing time for proposals.

III. Discussion

Kalen & Associates argues that it exercised reasonable care to provide for timely delivery of its proposal, and that it should not be held responsible for the error, negligence or default of an express delivery service.

Alaska Statute 36.30.210(a) states in part: "A request for competitive sealed proposals must contain the date, time and place for delivering proposals...." 2 AAC 12.250 states:

Unless otherwise provided in the request for proposals, a proposal, correction, modification, or withdrawal received after the date and time set for receipt of proposals is late, and may not be accepted unless the delay is due to an error of the contracting agency.

Alaska law, as set forth in the cited regulation, does not provide a contracting agency with discretion to disregard the time for receipt of proposals stated in the request

for proposals: the only exception is for error by the contracting agency. Kalen & Associates has not pointed to any error by the contracting agency in this case. The firm argues that the time and day of the week set for delivery of proposals can make it difficult for respondents from the remote areas of the state to submit timely proposals. However, any objection to the time and date of week or method of delivery stated in the request for proposals must be made prior to the date for submitting proposals, and in any event this particular request for proposals allowed fax delivery.

The provision in Alaska law forbidding acceptance of late-delivered proposals in the absence of an error by the contracting agency is consistent with well-established principles of federal procurement law.¹ It does not unduly restrict competition and it ensures that all respondents are treated equally with respect to the timeliness of their submissions. In sum, the Department of Natural Resources complied with applicable law and Kalen & Associates has not shown a legal or factual ground for disregarding the express requirement of 2 AAC 12.250.

IV. Conclusion

The purchasing agency followed the express requirements of law and did not abuse its discretion in rejecting the late-delivered proposal. For these reasons, the protest appeal is denied.

DATED April 15, 2008.

Andrew M. Hemenway
Administrative Law Judge

¹ See, e.g., In Re Northwest Heritage Consultants, No. B-299547 (Comptroller General, May 10, 2007 (late delivery by United State Postal Service express mail through no fault of responding party; agency correctly rejected late proposal); In Re Shirlington Limousine & Transportation, Inc., No. B-299241.2 (Comptroller General, March 30, 2007) (hand carried proposal delivered to wrong address after amendment to RFP had changed address; late delivery not fault of contracting agency, late proposal properly rejected).

Adoption

On behalf of the Commissioner of the Department of Administration, the undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 13 day of May, 2008.

By: [Signature]
Signature
Andrew M. Hemmeny
Name
Administrative Law Office
Title

The undersigned certifies that this date an exact copy of the foregoing was provided to the following individuals:

Patrick Kalen

Marlys Hagen, DWR
Signature

Date
5/14/08