



# FEDERAL CONTRACTS



## REPORT

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### Proposal Evaluation

## The Late Proposal Rule Needs Updates to Reflect New Electronic Environment

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For decades, proponents of the Late Proposal Rule (“the rule”) have attempted to justify its harsh and rigid application by proclaiming that it alleviates confusion, ensures equal treatment and helps to maintain the integrity of the competitive procurement system. A recent decision at the United States Court of Federal Claims, however, demonstrates that the rule is not well-structured to assess today’s electronic proposal submissions.<sup>1</sup> Fundamental principles in this rule, such as when a proposal is “received,” is under the government’s “control,” or has been delayed due to an “unanticipated event,” have all been convoluted by firewalls,

servers, security certificates and electronic mailbox limitations. Moreover, the factual inquiries of where, when, why and which electronic proposal submissions were disrupted cannot be easily resolved by contracting officers, the Government Accountability Office or the courts. It is time for the Federal Acquisition Regulation Council to reconsider the rule and alleviate the growing confusion on how or if the Late Proposal Rule can be fairly applied to today’s electronic proposal submissions.<sup>2</sup>

**The Late Proposal Rule and Its Exceptions.** Pursuant to the Late Proposal Rule, a contracting officer must not consider any proposal, modification or revision that is received after the exact time for receipt of proposals unless an exception applies. The current version of the rule contains six relevant exceptions and exclusions:

**(1) Electronic Commerce Safe Harbor:** Where the proposal “was transmitted through an electronic commerce method authorized by the solicitation, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals;”

**(2) Government Control Exception:** Where “there is acceptable evidence to establish that it was received at

<sup>1</sup> *Watterson Construction Co. v. United States*, — Fed.Cl. —, 2011 WL 1137330 (March 29, 2011).

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<sup>2</sup> The FAR clause that is most commonly cited as the Late Proposal Rule is found at FAR 52.215-1(c)(3)(ii)(A). Although this specific clause is only used in certain FAR Part 15 acquisitions, there are nearly identical provisions that apply the Late Proposal Rule to other acquisitions set forth at FAR 14.304, FAR 15.208, FAR 52.212-1, FAR 52.214-3 and FAR 52.214-7.

the Government installation designated for receipt of offers and was under the Government's control prior to the time set for receipt of offers;"

**(3) Only Proposal Exception:** Where it is the only proposal received;

**(4) Improving an Otherwise Successful Proposal:** A late modification of an otherwise successful proposal that makes its terms more favorable to the Government will be considered any time;

**(5) Correcting a Mistake:** Offerors may submit modifications to correct a mistake any time before award;

**(6) Emergency or Unanticipated Event Exception:** Where an emergency or unanticipated event interrupts normal Government processes so that proposals cannot be received at the designated office and urgent requirements preclude amendment, the time will be deemed to be extended to the same time of day specified but "on the first work day on which normal Government processes resume."

Also, although not specifically stated in the FAR, the GAO 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."<sup>3</sup>

Absent from this list of exceptions, however, is the vesting of authority in the contracting officer to exercise discretion to fairly and reasonably apply the rule based on the particular circumstances and to accept proposals where it would be in the Government's best interest to do so. As part of the FAR Part 15 re-write in 1996, the FAR Council issued proposed revisions to the Late Proposal Rule that would have given contracting officers such discretion, at least for negotiated procurements. The proposed rule stated in relevant part that: "Offers, and requested revisions to them, that are received in the designated Government office after the time for receipt are 'late' and shall be considered at the Source Selection Authority's discretion."<sup>4</sup> Additionally, revised FAR 15.207(b) would have provided: "Proposals, modifications, and revisions received in the designated Government office after the exact time specified are 'late' but may be considered if doing so is in the best interests of the Government." Both of these proposed rules were rejected in the final version of the FAR Part 15 revisions.<sup>5</sup> The FAR Council yielded to concerns that deviation from the longstanding rule would create too much discretion in the hands of the contracting officers and could compromise the integrity of the competitive process.

**History of Harsh Application of Rule.** In light of the mandatory language of the Late Proposal Rule, contracting agencies enforce its terms unforgivingly. For their part, the GAO and the Court of Federal Claims have supported contracting agencies by adhering to the literal terms of the rule as well — regardless of how close to "timely" an offeror may have been or how unfair the result might seem.

The GAO's decision in *WESPAC SERCO*, B-233883, Jan. 13, 1989, 89-1 CPD ¶ 39, provides one example of the harsh nature of the rule. In that case, the offeror submitted its initial proposal on time, but its hand-carried best and final offer ("BAFO") was rejected by the Air Force because it was received one minute late. In another example, *Hausted, Inc.*, B-257087, July 28, 1994, 94-2 CPD ¶ 49, the procurement proceeded over the course of 19 months after initial proposal submission, through discussions, a competitive range determination, and two BAFO's before a problem involving the rule arose. When the source selection authority recommended an award to Hausted in the best value procurement, a final review revealed that the agency had retained no evidence establishing when Hausted's initial proposal was received, and the agency concluded that the award could not be made to Hausted under the Late Proposal Rule's restrictions.

Years ago, contracting agencies would often avoid the harsh application of the rule by simply issuing an amendment to the solicitation that extended the proposal deadline in circumstances where one or more proposals were received after the initial deadline, and the GAO stood behind these *post-hoc* extensions.<sup>6</sup> However, in *Geo-Seis Helicopters, Inc. v. United States*, 77 Fed.Cl. 633 (2007), the Court of Federal Claims rejected this long time practice as being akin to the 1996 proposed "best interest" rules, which had been specifically considered and rejected by the FAR Council. This decision reinforced the rigid application of the Late Proposal Rule.

Since then, agencies have rejected late proposals without exception. In *CFS-INC, JV*, B-401809.2, Mar. 31, 2010, 2010 CPD ¶ 85, proposals were due on February 9, 2010 at 2 p.m. in Washington, D.C. On that day, however, the Washington area was blanketed in several feet of snow, and federal agencies were closed from February 8 through February 11. On February 12, federal agencies reopened, but in light of the weather disruptions, federal employees were allowed to take unscheduled leave or arrive two hours late. In strict compliance with the Emergency or Unanticipated Event Exception, the contracting officer determined that the due date had been extended to February 12 at 2 p.m. When the protester arrived at 2:24 p.m., its offer was rejected as late. The GAO affirmed the agency's decision, stating that "normal processes" had resumed on the morning of February 12 — despite the lingering disruptions caused by the snow and the ability of federal employees to go to work late or not at all.

The rule was also strictly applied in *Metters, Inc.*, B-403629, Nov. 10, 2010, 2010 CPD ¶ 273, where the GAO upheld the agency's rejection of the protester's proposal as late. In that case, offerors were required to submit their proposals on compact discs no later than 3 p.m. on the closing date, and they were warned that paper copies, e-mails and facsimiles were not acceptable. For subcontracts valued over \$650,000, the solicitation instructed offerors to submit subcontractor cost proposals, which could be submitted directly by the subcon-

<sup>3</sup> See *B&S Transport, Inc.*, B-404648.3, Apr. 8, 2011, 2011 WL 1367957 (declining to apply this exception because the offeror "significantly contributed to the late receipt by not doing all it could or should have done to fulfill its responsibility.")

<sup>4</sup> 61 Fed.Reg. 48,380-81, 48,392 (Sept. 12, 1996).

<sup>5</sup> 62 Fed.Reg. 51,224-01, 51,235 (Sept. 30, 1997).

<sup>6</sup> E.g., *Ivey Mechanical Co.*, B-272764, Aug. 23, 1996, 96-2 CPD ¶ 83 (affirming agency decision to issue a *post-hoc* due date extension in the interest of enhancing competition); *Fort Biscuit Co.*, B-247319, May 12, 1992, 92-1 CPD ¶ 440 (same); *Geo-Seis Helicopters, Inc.*, B-299175, March 5, 2007, 2007 CPD ¶ 135 (same).

tractors to protect the confidentiality of the cost information. On the closing date, one of the protester's subcontractors attempted to deliver its cost proposal directly to the government by e-mail. After being notified that the e-mail could not be accepted, the protester met with a contract specialist at 2:57 p.m. to submit the protester's proposal on CDs, but it delivered two subcontractor proposals in printed form. The contract specialist refused to accept the hard copies of the subcontractor cost proposals. Although the protester returned later with the subcontractor proposals on CDs, the agency determined that the protester's complete proposal was late and could not be accepted.

**GAO's Application of Late Proposal Rule to Electronic Submissions.** Although the Late Proposal Rule provides a relatively clear-cut test for hand-carried, faxed or mailed proposals, with exceptions applied where appropriate for government mishandling, the part of the rule applicable to electronic submissions is particularly harsh and unrealistic. The Electronic Commerce Safe Harbor portion of the rule is construed by the GAO as the only exception applicable to electronic submissions and provides that a proposal may be considered timely only if it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the proposal due date. This seemingly arbitrary requirement is almost never satisfied because of the nearly instantaneous nature of electronic communications and the tendency of offerors to fine-tune their proposals, particularly their offered prices, up to an hour or two (and sometimes much less) before the deadline.

GAO decisions demonstrate the array of factual complications arising from application of the rule to electronic submissions. In *PMTech, Inc.*, B-291082, Oct. 11, 2002, 2002 CPD ¶ 172, offerors were required to upload their proposals to the agency's website. For security purposes, the agency had distributed security certificates to each offeror that would encrypt data as it passed through the agency's servers. When the protester attempted to upload its proposal 13 minutes prior to the proposal deadline, it received an ambiguous error message related to its security certificate. The protester continued to attempt uploading files, but the agency website only accepted the proposal cover sheet before the deadline. Although the protester, using written testimony of an information technology scientist, tried to invoke the government mishandling exception by arguing that the application errors and website malfunctions were the government's fault, the GAO was unconvinced and concluded that, regardless of any computer malfunctions, the primary cause of the late delivery was that the protester submitted the offer unreasonably close to the deadline, *i.e.*, not within the Electronic Commerce Safe Harbor cut-off of 5:00 p.m. on the prior day.<sup>7</sup>

<sup>7</sup> See also *Urban Title, LLC*, B-311437.3, Jan. 7, 2009, 2009 CPD ¶ 31 (protest denied where offeror submitted its proposal via e-mail twelve minutes before the deadline, but it did not arrive in the contracting officer's e-mail inbox until five weeks later – without even requiring an explanation from the agency); *Alalamiah Technology Group*, B-402707.2, June 29, 2010, 2010 CPD ¶ 148 (protest denied where proposals were sent via e-mail shortly before the deadline, but due to e-mail transmission delays in Kuwait, all files were not received on time).

In fact, the GAO has long regarded the Electronic Commerce Safe Harbor as the only exception for electronic submissions. In *Sea Box, Inc.*, B-291056, Oct. 31, 2002, 2002 CPD ¶ 181, the offeror submitted its proposal via seven e-mail messages 11 minutes before the deadline. Although these messages arrived at the agency server before the deadline, they were held there for 17 to 33 minutes, then forwarded to a virus scanning server, then to a mail distribution server, and finally to the contracting officer's e-mail inbox well after the deadline. The protester argued that although the Electronic Commerce Safe Harbor exception did not apply, the Government Control Exception should. The GAO concluded that if the Government Control Exception applied to electronic commerce it would render the safe harbor exception a nullity. To give effect to each provision of the rule, the GAO determined that the only exception for electronic submissions was the Electronic Commerce Safe Harbor.

**Court of Federal Claims Exposes Flaws in Late Proposal Rule Related to Electronic Submissions.** While the GAO has consistently applied the rule to uphold rejections of late electronic proposals if they were submitted after 5 p.m. on the day before the due date, the Court of Federal Claims recently examined the underpinnings of the Electronic Commerce Safe Harbor exception and applied the Late Proposal Rule in a manner that makes sense in today's electronic environment. In *Watterson Construction Co. v. United States*, — Fed.Cl. —, 2011 WL 1137330 (March 29, 2011), final proposal revisions were due by noon on March 15, and the protester e-mailed its revised proposal at 11:01-11:02 a.m. that day. Although the agency logs established that the proposal was "received" by an agency server (directly past the firewall) at 11:29 a.m., the proposal did not arrive in the contracting officer's e-mail inbox until 12:04 p.m. – four minutes late. The agency records revealed that a "mail storm," *i.e.*, a flood of e-mail activity, caused the delayed delivery by the server to the contracting officer's inbox. Believing that the Electronic Commerce Safe Harbor was the only exception applicable to electronic submissions, the agency rejected the proposal as late.

After conducting a comprehensive analysis of the Late Proposal Rule, the court found several reasons that the proposal should have been accepted. The court first noted that, although the FAR does not define when a proposal is "received," the ordinary meaning of the term dictates that a proposal should be considered "received" when the sender relinquishes control. Thus, according to the court, since the proposal reached the agency's initial servers before the deadline and control had been relinquished at that point, the proposal was not late regardless of when it subsequently arrived in the contracting officer's e-mail inbox. Second, the court explained that the regulatory history of the Electronic Commerce Safe Harbor exception establishes that it was only added to the Late Proposal Rule in order to address overnight batch-processed submissions, which was an electronic transmission methodology that now serves little purpose in today's nearly instantaneous electronic commerce.<sup>8</sup>

<sup>8</sup> The court cited regulatory history stating that the safe harbor was targeted "to accommodate the use of electronic systems which batch-process communications overnight and

The court went on to find that since the 5:00 p.m. one-day-ahead deadline has no meaningful application to electronic submissions that are not batch-processed, there is no reason that the other exceptions to the Late Proposal Rule should not apply. Significantly, the court's finding here calls into question the foundation of nearly every GAO decision addressing late electronic submissions, namely, that the rule's other exceptions cannot be applied to electronic submissions. The court explained that "neither the text of FAR 52.215-1(c)(3)(ii)(A) nor the regulatory history supports a construction that would require an offeror, after relinquishing control of an e-mail proposal, to be responsible for the risk of late delivery when technical problems arise after an e-mail proposal reaches the e-gateway to a designated Government office." *Watterson Construction, supra*, 2011 WL 1137330 at \*11. Accordingly, the court held that the Government Control Exception and the Emergency or Unanticipated Event Exception (*i.e.*, the unusual "mail storm") each provided alternative reasons to excuse the late receipt of the proposal in the contracting officer's inbox.

**Lingering Issues Remain Unresolved.** *Watterson Construction* has brought to light the significant flaws and inequities in the Late Proposal Rule with respect to electronic submissions and, thus, the need to update the rule to reflect the state of the current electronic environment. If the guiding principles for the Late Proposal Rule of ensuring the integrity of the procurement process through consistency and fairness are to continue, the FAR Council must address these issues soon.

The *Watterson Construction* decision itself highlights that there is no administrative guidance on when an electronic submission is deemed "received" or under the government's "control." In *Watterson Construction*, the court indicated that reaching the agency's outermost server was the relevant point of transmission. However, the facts surrounding that decision may be difficult to extend to other cases. Each agency is likely to have different server processes and restrictions, which bounce electronic submissions through multiple firewalls and servers before reaching the intended destination. Each of these systems contains potential traps that could delay or block transmission of a proposal. Without further administrative guidance, it will be difficult going forward for agencies, GAO, and the courts to reach consistent and fair conclusions regarding when proposals make it past a firewall on time, but are delayed or rejected at some point thereafter. It will also be difficult to understand how to extend the court's find-

therefore, require receipt of information one day in advance to ensure timely delivery to the designated address." 60 Fed.Reg. 12,384-01, 12, 384 (Mar. 6, 1995).

ings to situations where a proposal is uploaded to a website instead of e-mailed.

In addition, it remains to be seen whether the GAO will follow the Court of Federal Claim's example when faced with a similar situation. As noted above, the court's findings call into question many of the GAO decisions relating to the lateness of an electronically-submitted proposal, but the court's decision does not have the effect of overruling GAO's decisions. Although the GAO and the court perceive each other as persuasive authorities, their respective decisions are not binding on one another.<sup>9</sup>

As a result of the court's decision, contracting officers may now be in a quandary as to how to respond to a similar situation, especially since the electronic tools are available to establish when an electronic proposal transmission is "received" at the government's outermost server and what happens to the transmission after that point when the submitter has relinquished control. Do they faithfully adhere to the Late Proposal Rule, only applying the Electronic Commerce Safe Harbor exception if the proposal was transmitted before 5 p.m. on the day before the due date and thereby follow GAO precedent? Or do they follow the court's reasoned guidance and accept a "late" submission where the government's computer system establishes that the proposal was "received" by the server before the deadline? The latter course of action would be the more reasonable and fairer approach, particularly given that offerors have no ability to predict or control whether their electronic proposal submissions may be delayed beyond the initial point of entry for minutes, hours or even weeks before reaching the designated recipient. But it is likely that most contracting officers will hew to GAO precedent. Therefore, the FAR Council should answer the message of the court's ruling in *Watterson Construction*, namely, that the Electronic Commerce Safe Harbor exception needs to be updated to reflect today's electronic environment, and promptly take steps to overhaul the Late Proposal Rule. By doing so, the FAR Council will ensure that the integrity and fairness of the procurement process are maintained while accounting for the expedencies and complexities of electronic commerce in the federal contracting arena.

<sup>9</sup> *E.g.*, *Global Computer Enterprises, Inc. v. United States*, 88 Fed.Cl. 350, 412 (2009) (GAO decisions are not binding on the court, but are accorded deference in recognition of GAO's expertise in resolving contested procurement decisions); *Bureau of Indian Affairs Questions on Payments to Indians*, 65 Comp. Gen. 533, B-219235, Apr. 29, 1986 ("This Office is not bound to follow precedents set by the United States Court of Claims; however, we do give them careful consideration and generally will follow those that are consistent with long-standing administrative interpretations of law.")