

When Submitting a Proposal, Late Is Late. Even Early Submissions Can Be Late If the Proposal Gets “Spammed,” Except Perhaps at the Court of Federal Claims.

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In a recent case, *Federal Acquisition Services Team, LLC v. United States*, the Court of Federal Claims (COFC) ruled in a pre-award bid protest that where a contractor’s timely proposal gets caught in the receiving agency’s security server and does not reach the intended recipient’s email inbox, it is unreasonable for the agency to consider the proposal untimely. This case is particularly interesting because, as we have written about previously, on similar facts, the Government Accountability Office (GAO) adopted a strict interpretation of the “late is late” rule and found that a contractor’s proposal was untimely submitted when it was blocked by the agency’s email security system from reaching its intended recipient. Indeed, the GAO had reached the same result here when the plaintiff initially brought its protest to GAO.

In *Federal Acquisition Services Team*, the offeror, FAST, was submitting a proposal in response to a U.S. Special Operations Command (SOCOM) solicitation for acquisition, procurement, and financial management support services. According to the solicitation, offerors were to submit their proposals by email to a particular email address at a particular time. The solicitation advised offerors that the maximum size of any files should be 20 MB. FAST had emailed its less-than-18 MB proposal to the specified email address about 4.5 hours early. The email was first received by the Defense Information Systems Agency’s (DISA) server, which screens SOCOM’s emails for

Authors

Philip J. Davis
Senior Counsel
202.719.7044
pdavis@wiley.law

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security purposes and which then attempted to forward the email to the SOCOM server for delivery to the designated email address in the solicitation. Delivery to SOCOM’s server failed, and the DISA server generated a notification to FAST that the size limit was exceeded, apparently because the agency’s system increases the size of emails upon receipt. FAST missed the opportunity to re-submit its proposal by the deadline, and the agency refused to accept the plaintiff’s proposal. After an unsuccessful protest at the GAO, FAST filed suit at the COFC.

In granting FAST’s motion for judgment on the administrative record, the COFC first rejected the agency’s claim that the “Government control” exception to the FAR’s “late is late” rule did not apply to these facts. Under the relevant portion of the Government Control exception, a late proposal may be considered if it is received before award is made, the contracting officer determines that accepting the late offer would not unduly delay acquisition, and 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. FAR 52.215-1(c)(3)(ii)(A)(2). Here, there was evidence from the agency’s computer records indicating that FAST’s emailed proposal was received by the DISA server approximately 4.5 hours before the deadline. Furthermore, because of the stay triggered by the GAO protest, and the agency’s voluntary stay to accommodate the COFC protest, an award had not yet been made, nor would the procurement be unduly delayed. Lastly, the COFC ruled that receipt by the DISA server was sufficient to qualify as receipt “at the government installation designated for receipt of offers” and establish that the proposal was under the Government’s control prior to the time set for receipt of offers, as it was the server designated within the Government to receive emails directed to the address contained in the solicitation.

Second, the COFC concluded that the agency’s arbitrary actions resulted in additional prejudice to FAST beyond the harm FAST suffered from the agency’s refusal to consider the plaintiff’s proposal. These arbitrary actions included the agency’s decision to refuse to consider the plaintiff’s proposal in light of the systemic failure on the part of the agency to accept emails totaling up to 20 MB as advertised. Typically, an agency’s negligent loss of singular proposal information does not entitle the offeror to relief, but where the loss is the result of a “systemic” failure resulting in multiple or repetitive instances of lost proposals, the protest must be sustained. At the COFC, the record revealed that seven offerors’ proposals were initially rejected by the DISA server, and only thirteen were received in full at the proper address by the deadline. Moreover, the agency had considered the proposal sent by one offeror even though there was no record of any email sent by that offeror to the email address designated in the solicitation. Notably, not all of these facts were revealed to the GAO and only became apparent at the COFC as a result of the parties’ supplementation of the record and a deposition of the contracting officer by written questions. The COFC even commented that the GAO decision was decided on “less than a full record.”

There are two key takeaways from this case that disappointed offerors may want to consider should they find themselves in a similar situation in the future:

- The GAO apparently does not apply the Government control exception to electronic delivery methods, while the COFC does, as FAST’s protests at GAO and the COFC demonstrate. In the contractor’s initial

protest at the GAO, the GAO eschewed any discussion of this exception. On the other hand, the COFC is friendlier to contractors whose emails have been caught by a security server by its application of the Government control exception to electronic transmissions.

- The opportunity for an expanded record at the COFC can be a boon to contractors attempting to prove a systemic failure. At the GAO, when the contractor sought documents from DISA regarding emails accepted or rejected by the DISA server in connection with the solicitation, the information was only "produced in fits and starts, and never completely."

Given the protest tribunals' differing receptivity to the Government control exception and expanded records, and the outcome-determinative nature such legal and evidentiary matters may have, as evidenced by the tribunals' diametrically opposed results here, it is important to consult with outside counsel to choose the forum that is most appropriate to the circumstances, especially when dealing with an allegedly "late" proposal submitted electronically.