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Proposal Evaluation

What To Do When Your Proposal Is Late?



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You weren't expecting this phone call. Your multi-million contract proposal is due at the contracting officer's office in just minutes. But now the messenger is telling you he's lost. He's made it to the facility already, but with traffic, a lengthy delay at the security desk, and confusing directions, he's now somewhere in a maze of buildings set well back from any street. Further, the solicitation emphasized the requirement for hand delivery of 3 hard copies rather than electronic delivery of a soft copy.

So what do you tell him? And what do you do?

The actions you take in the subsequent moments are crucial. This is no time to scold, blame, panic, or resign yourself to failure. Rather, you need to be single-mindedly focused on one objective: placing the pro-

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posal "under government control." That might mean directing the messenger to find the nearest government employee, perhaps a security guard, and leaving it on that employee's desk until the contracting officer is dispatched to come pick it up. You also should immediately attempt to transmit an electronic version to the agency. Worry about complying with the solicitation's submission instructions some other time. For now, however, your proposal needs to be "under government control" before the deadline.

And if it isn't? Then make delivery anyway. By doing so you may be preserving other possible grounds by which the contracting official may accept your proposal. If the electronic portal is shut down, send it by e-mail. If the office is locked, find one that's open. It's still in your interest to make delivery that same business day—even if it's hours late.

Following is a discussion of the late bid rules and the exceptions to them, as well as case law applying those rules to particular situations. Of particular interest is Judge Braden's recent decision in *Watterson v. United States* (U.S. Court of Federal Claims). Her well-reasoned opinion effectively stands twelve years of GAO case law on its head, and offers new hope to "late" bidders.

What are the Late Bid Rule and its Exceptions? The general rule is quite simple: offerors are responsible for ensuring that proposals reach the designated office by the "exact time" stated in solicitation (or 4:30 PM if no time is specified), and a late proposal "will not be consid-

ered” unless it falls under a recognized exception. FAR 15.208.

There are six recognized exceptions to the late bid rule:

1. The proposal was at the installation and under government control prior to the deadline.
2. Government misdirection or improper action was the paramount cause of the delay (derivative of no. 1).
3. An emergency or unanticipated event interrupted normal government process so that proposals could not be received.
4. If allowed by the solicitation, an electronic submission was received within the government infrastructure by 5:00 PM the prior working day.
5. The submission in question is a more favorable revision to an otherwise successful proposal.
6. Only one proposal is received.

The following review of the most recent and relevant GAO protest decisions reflects its approach to applying these exceptions to specific circumstances. These decisions are then compared to Judge Braden’s recent holding in *Watterson*. Together, the case law sets forth a set of procedures that late bidders should follow in order to maximize their chances of falling under one of the recognized exceptions to the late bid rule.

A. Under Government Control.

Two recent GAO decisions illustrate the difficulty protester’s have in successfully applying this exception. First, in *B&S Transport*, B-404648.3, April 8, 2011, the offeror’s courier arrived at the designated agency facility only to learn that he was not on the list of expected visitors. The process by which he was “cleared” took an unexpectedly long time. Surveillance video showed the messenger leaving the guard gate three minutes after the proposal submission deadline. And from there the courier apparently was directed to the wrong building. By all accounts, the messenger arrived at the security gate prior to the submission deadline, but was late in delivering the proposal to the designated building. The Army determined that the proposal could not be considered for award.

On these facts, B&S protested to the GAO, arguing that the commercial courier was “under government control” because he was at the facility and (at least for some of the time) under surveillance. The GAO made short work of the case, holding that to be “under government control” the proposal must be in the custody of a government official. Because the courier never actually relinquished control of the proposal, it was properly rejected as late.

A similar fate befell U.S. Aerospace, Inc. (“USAI”). Its proposal was due at Wright-Patterson AFB, 1755 11th Street, Build. 570 at 2:00 PM. At 1:50 PM, the protester’s messenger called USAI to report that he was lost. It turns out that “because 11th street was removed years ago and the street now dead ends blocks before the building,” the maps were out of date, and Wright-Patterson officials allegedly offered bad directions. USAI’s internal e-mails during those moments reflect their real-time comprehension of the messenger’s plight.

Unfortunately, the messenger did not locate Building 570 in time to make the 2:00 PM deadline, and USAI’s proposal was rejected. Protesting that decision to the GAO, USAI tried to invoke the “government mishandling or misdirection” exception, citing the fact that the maps were out of date and the directions faulty. The GAO disagreed, noting that such delays are somewhat

typical, and any government misdirection was not the “paramount cause” of the delay. On those facts, it found that the protester’s failure to arrive earlier was the paramount cause of the delay, and endorsed the Air Force’s decision to reject the proposal. See *U.S. Aerospace, Inc.*, B-403464, October 6, 2010.

But what if the courier in either of those two cases had not left the security office? What if instead he convinced the guard or other government employee to take possession of the proposal or allow it to be left in plain sight while the contracting officer was dispatched to come and accept delivery. Under such facts, the case of *The Haskell Company* is instructive.

In *The Haskell Company*, B-292756 (2003), the offeror handed its proposal to the government attendant, who affixed a time stamp of “14:00,” which was to the minute of the 2:00 PM deadline. Haskell, a competing offeror, filed a GAO protest challenging the agency’s decision to consider the awardee’s “late” proposal.

Haskell’s reasoning was that since proposals were due at 14:00 hours, the actual deadline was 14:00:00, not 14:00:59. Therefore, argued Haskell, a time stamp reading “14:00” necessarily was affixed between 1 and 59 seconds after the “14:00:00 deadline.

The GAO dispensed with Haskell’s argument (perhaps tacitly extending all government deadlines for proposals by 59 seconds). But more importantly, the GAO went on to say that because the proposal was on the attendant’s desk prior to the moment it was time stamped, it was “under government control” for some time, perhaps minutes, prior to deadline. The GAO pointed out that the offeror had relinquished control of its proposal when it handed it to the government official.

By that logic, B&S and USAI might have been successful had the messenger relinquished control of its proposal at the guard desk rather than leaving with the proposal in hand in search of the proper building. At least the government would have had a basis for consider the proposal rather than reject it. And, both would have had a basis to protest the rejection of their proposal.

B. Emergency or unanticipated event.

The GAO has addressed the “emergency” exception on a number of occasions. For a late bidder, this exception is particularly noteworthy because the resulting remedy is to extend the submission deadline by a full working day. Thus, even if the bid is late by a full day it still may be considered by the agency if the circumstances qualify as an “emergency or unanticipated event.”

The GAO has held that the event in question must have actually precluded delivery at the time proposals were due. It is not enough that proposal submission was rendered merely more difficult. The GAO reiterated this rule in its recent decision in *Hunter Contracting Company*, B-402575 (March 2010).

In *Hunter*, the Department of Homeland Security required proposals be submitted by 10:00 AM, February 12, 2010, at its Washington, D.C. office. Hunter, an Arizona company, mailed its proposal on February 10 by U.S. Mail “next-day noon” delivery. On that day, however, a snowstorm struck Washington, D.C., which was closed on that day and the following day. On February 12, the day proposals were due, the federal government was open under a “late arrival/unused leave” policy, but

DHS staffed a single person at its office to receive proposals (two were actually submitted).

Hunter's proposal arrived February 16th—the next working day. The GAO denied the protest because while the snow storm undoubtedly caused the late delivery, it did not make it impossible for bids to be delivered on the day they were due.

C. Prior electronic submission.

FAR 15.208 provides an exception to the late bid rules where a prior electronic submission was made before 5:00 PM on the preceding work day. In order to invoke this rule, one must establish that (1) electronic submission was permitted by the solicitation, and (2) the submission hit the government's "infrastructure" by 5:00 PM on the prior business day. With that, the proposal will be considered timely even if it is not received in the intended e-mail recipient's in-box by the actual deadline. The rule has the effect of eliminating arguments about whether the government's server caused the delay, and precludes offerors from waiting until the last minute before hitting the "send" button.

Historically, the GAO has interpreted this rule to mean that the "under government control" exception cannot be applied to electronic deliveries. GAO first articulated this approach in its 2002 decision in *Sea Box, Inc.*, B-291056 (2002).

In *Sea Box*, the Army Materiel Command required proposals by July 15 at 1:00 PM. Hand-delivery and electronic means were both acceptable methods of delivery. *Sea Box* began transmitting the first of its 7 e-mails at 12:49 PM. By 12:52 PM, all 7 transmissions had hit AMC's Unix mail relay host server. The e-mails did not begin to reach the contracting officer's e-mail in-box, however, until 1:17 PM. The last of the 7 transmissions was received at 1:33 PM. AMC therefore rejected *Sea Box*'s proposal.

Protesting to the GAO, *Sea Box* argued that its bid was "under government control" because the e-mails had hit the government's server prior to the deadline. At that point, *Sea Box* could not have made any changes or gained any advantage, and AMC was not prejudiced in any way (such as having to delay a bid opening).

The GAO nonetheless denied the protest. Its reasoning was that if it were to find that the e-submission was "under government control," it essentially would be rendering meaningless the FAR 15.208 exception for prior electronic submissions. That is to say that because the FAR expressly states that the electronic submission must have contacted the government infrastructure by 5:00 PM on the prior business day, the GAO would be re-writing the regulations if it found that an e-submission received any time before the actual proposal deadline was "under government control" and therefore not late. The GAO recently took the same approach in *Alalamiah Technology Group*, GAO B-402707.2 (March 2010), a case with a fact pattern similar to *Sea Box*.

D. Watterson takes a different approach to exceptions.

The U.S. Court of Federal Claims' recent decision in *Watterson v. United States* adopts a more expansive reading of the exceptions, thereby giving more hope to otherwise late bidders. See Ct. Fed. Claims (March 29, 2011). From a single fact pattern, Judge Braden invoked both the "government control" and the "emergency or unanticipated event" exceptions to find that the protester's offer was in fact not late.

In *Watterson*, the Corps of Engineers required that proposals be submitted by 12:00 PM. The solicitation allowed for either e-mail or hand delivery. *Watterson* "sent" its e-mail proposal at 11:02 A.M. The Army Corps of Engineers' server received it at 11:29 A.M, but it did not reach the contracting officer's in-box until 12:04 P.M.—four minutes late. *Watterson*'s proposal therefore was rejected.

Watterson filed its protest with the U.S. Court of Federal Claims, presumably after familiarizing itself with the GAO's cases in *Sea Box* and *Alalamiah* before choosing its forum. *Watterson* argued that several hours prior to deadline a "mail storm" caused e-mail delivery to "come to a crawl." It did not deny that proposals still could have been delivered by hand without impediment.

Judge Braden held that such a "mail storm" constituted an "emergency or unanticipated event" notwithstanding the fact that other proposals were received during that same time. Consequently, she extended the deadline by a full business day. Her ruling is difficult to reconcile with the GAO's prior holdings that the "event" in question must have actually prevented timely delivery and not just made delivery more difficult.

But her judgment did not rest on that finding alone. She also held that because the e-mail contacted the government's server a half hour prior to the submission deadline it was "under government control," and she applied that exception as well. The government argued that such a finding rendered meaningless the FAR 15.208 provision, and of course cited GAO cases directly on point. Judge Braden analyzed the legislative history of the "prior electronic submission" exception, and determined that it no longer had any usefulness.

The effect of *Watterson* was to widen the reach of the "government control" and "emergency or unanticipated event" exceptions to the late bid rule. It now appears that offerors who manage to transmit an e-mail proposal prior to the deadline can successfully argue that their proposals were "under government control" regardless of when they are actually received in the designated in-box. Further, if a "mail storm" now constitutes an "unanticipated event" or "emergency," what then of snow storms, power outages any number of other IT problems that make it more difficult, but not impossible, to send or deliver a proposal. *Watterson* provides otherwise late bidders with new hope that they can qualify under these exceptions in order to have their proposals considered.

E. Government mishandling or misdirection.

The GAO's *USAI* decision discussed above illustrates that the "government mishandling" exception cannot be grounds for accepting an otherwise late proposal where the offeror did not leave sufficient time to allow for typical delay. Those cases can be read to mean that anytime the offeror's submission is near the deadline, the offeror is responsible for being late and its proposal must be rejected.

The "misdirection" exception also has proved to be an elusive argument for late bidders. This is exemplified by the GAO's decision in *The Staubach Company*, B-276486 (1997). GSA had required proposal submission by February 21 at 4:30 P.M. Staubach was diligent. It arranged for DHL same day delivery on February 20, a day earlier. Late that same afternoon, Staubach telephoned the contracting officer to ask whether the pro-

posal was received, and the contracting officer advised that a large package from Staubach had been delivered to her.

On Feb. 24, Staubach was notified that its proposal had been rejected because only 1 of the 3 required volumes had been received. Staubach later discovered that 2 of 3 volumes (4 copies of each) were at LaGuardia Airport's lost and found.

Staubach protested to the GAO, arguing that government "misdirection" caused the lateness, citing the fact that the contracting officer incorrectly confirmed that she had received the proposal rather than accurately stating that she had received an incomplete submission. The GAO refused to apply the "government misdirection" exception. The GAO found that contractors may not rely upon the statements of agency officials in that manner and ultimately are responsible for submitting their proposals on time—citing the general rule.

Staubach is a hard-luck result for a diligent offeror. So is the case in *Aquaterra Contracting, Inc.*, B-400065 (2008). In *Aquaterra*, the Army Corps of Engineers requested sealed bids by 2:00 P.M. on February 11, 2008. Bids were to be addressed to the contracting officer at a New Orleans post office box. At 2:00 P.M., the contracting officer collected all the bids that had been delivered to her office, and brought them to the bid opening room. There, she announced the award to the low bidder.

Upon returning to her office she found *Aquaterra's* bid on her desk along with that of another bidder. She reasoned that because the mailroom workers in her own office were late in delivering all the bids, "government mishandling" was the cause. She then opened the two bids, and finding that *Aquaterra's* in fact was the lowest of all submitted, she renounced the first award decision and instead awarded the contract to *Aquaterra*.

The original awardee protested to the agency. In responding to that protest, the contracting officer discovered that *Aquaterra's* envelope did not bear the contracting officer's name as required by the IFB. Concluding that the failure to properly address the envelope at least contributed to the mailroom's mishandling, she rejected *Aquaterra's* bid as late.

Aquaterra then protested to the GAO, arguing that the failure to include the contracting officer's name on the envelope did not impair the government's ability to deliver the bid to the proper mailbox. *Aquaterra* pointed out that the second of the two bids that the contracting officer found on her desk after the initial award announcement in fact was labeled correctly. The GAO, however, did not look past *Aquaterra's* misstep, finding that *Aquaterra's* omission caused the delay and its argument regarding the second bid "unpersuasive."

The lesson is clear. The offeror bears responsibility for a late proposal unless it is submitted plenty of time prior to the deadline and all fault for late delivery rests with government officials. A fairly rare example of 'government mishandling' can be found in the recent protest of *CT Construction JV*, B-405575, November 21, 2011. In *CT Construction*, the protester sent its proposal by U.S.P.S. Express Mail overnight delivery to the designated post office box. Delivery to the box was attempted hours before the submission deadline but after the agency had collected mail from the box that day. The proposal was not actually delivered to the designated official until the following day.

The agency argued that the proposal was properly rejected because it was addressed to the wrong official, even though it was addressed and delivered to the designated mail box. The GAO simply pointed to the fact that had the agency simply checked the box later in the day it would have had the proposal on time—regardless of whether it was properly addressed. On those facts, the GAO found that the proposal was delivered on time, and that the fault for late delivery rested entirely with the agency officials, who failed to simply check the mailbox in the hours prior to the deadline. The GAO sustained the protest on that basis.

F. More favorable revision to an otherwise successful proposal.

The fifth exception to the late bid rule is a more favorable revision, or "BAFO," to an otherwise favorable proposal. Strictly speaking, this is not an exception to the late bid rule so much as the 'revision' is simply regarded as something other than a proposal. To succeed under this exception the offeror must have some level of cooperation from the agency itself, lest one could not argue that its proposal was "otherwise successful."

This is illustrated by the GAO's decision in *Omega-Systems, Inc.*, B-298767 (2006). The Marine Corps required proposals to be submitted on "August 22 at 2:00 PM EST" at Quantico, VA. *Omega's* bid, however, was submitted at 2:15 PM, fifteen minutes late due to the messenger having taken the wrong train and getting lost on the base. *Omega's* proposal was therefore rejected as late.

Undeterred, *Omega's* first argument was to cleverly point out that because Virginia operates on daylight savings time in August, and not "EST." According to *Omega*, this meant that its proposal was submitted at 1:15 PM standard time (albeit 2:15 PM daylight time). Ergo, *Omega's* proposal actually was not 15 minutes late, but rather 45 minutes early. The GAO rejected that argument, citing authority that all time is implicitly "local time," regardless of whether standard or daylight savings time is correctly referenced.

More relevant here, however, *Omega* also argued that its initial proposal submitted weeks earlier still was more advantageous than the awardee's, and therefore its BAFO was merely a revision. The GAO simply pointed out the obvious—there had been no determination that its earlier submission was "otherwise successful."

G. Only one other proposal received.

Ordinarily, this "exception" is there for use by the government agency, and not the late bidder. After all, an agency does not actually have to make an award in the first place. And this exception merely frees the agency to make award to the only interested offeror, rather than re-issuing the solicitation. Offerors might be able to bring this to the agency's attention where the solicitation stated that more than one awards would be made, and the number of offerors does not exceed the number of intended awardees.

What's Next? When FAR 15.208 became effective in 1999, there were no wide-spread post 9/11 security measures restricting access to Government facilities, there was much less use of electronic communications, and there were no earthquakes in Washington, DC. Maybe the time has come to rewrite the rule for late proposals.

There are two objectives that must be considered:

1. The Government should maximize competition to the greatest extent possible. Excluding proposals is inconsistent with that objective.

2. Offerors should compete on a level playing field – one offer should not be given additional time to improve its proposal.

With those objectives in mind, why not amend the FAR to permit submission of proposals by email, and proposals will be deemed timely submitted if the offeror can prove that it sent the entire proposal at least 60 minutes before the proposal due date and time? That would move us away from paper and closer to equity.

What Should You Do For Now? Taken as whole, the body of case law from both the GAO and the U.S. Court of Federal Claims provides several possible arguments that late bidders can effectively pursue. Knowing the exceptions to the late bid rule, you can position your company to make use of them. The following is intended as something of a best practices guide.

1. Be familiar with the solicitation's stated delivery methods, page requirements, number of copies, and file size limitations. Electronic submissions may have to be divided into smaller files.

2. Obtain advance clearance and approval for delivery personnel admittance to the agency facility.

3. Send e-submissions with confirmation request by 5:00 PM prior business day (one should not depend entirely upon the CFC's ruling just yet).

4. If time is running out, attempt to get the proposal in possession of an agency employee—even if it means leaving it with an attendant until the proper contracting official meets you there.

5. If necessary, make delivery by any means required to meet the deadline, regardless of the number of copies required or the method prescribed in the solicitation.

6. Even if late—make delivery anyway to preserve arguments. If it later can be shown that an “emergency or unanticipated event” caused the delay, the proposal submission deadline can be extended by a full business day.

Adherence to these practices along with a working knowledge of the late bid rules may be of great consequence to your business. Learn them now, for when the time comes to make use of them there may not be time then.