

Reproduced with permission from Federal Contracts Report, 107 FCR, 4/11/17. Copyright © 2017 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

## Timeliness

### 'Late is Late' Won't Abate When E-Protests Begin at GAO

BY DANIEL SEIDEN

**T**echnophobia and allegraphobia (the fear of being late) might form an unpleasant tag team when contractors and their attorneys think about electronic contract protest filings, and the e-filing system the Government Accountability Office (GAO) plans to activate this year.

The fear is that contractors will timely click their protests into the GAO's impending system, the system will delay the protest's receipt so it misses a deadline, and the GAO's harsh treatment of untimely electronic filings will unfairly cut off a protester from relief — often a recommendation that an agency reconsider a contract award.

The GAO says, however, that:

- the new filing system will provide users with an easy and efficient experience when testing results allow for its activation; and
- the "late is late" policy ensured equality in competitions, and adheres to current law.

Perhaps the best advice for practitioners is to plan ahead and prepare for complications. A steady stream of GAO and court protest decisions show that technological hiccups will happen.

**'Valid Concern.'** A GAO official at a recent government contracts conference in Annapolis, Md., said the anticipated electronic protest filing system is "still in the security testing phase" and made "no promises" as to when it will become active.

A concerned conference attendee asked if "late is late" will also apply to the new system, the Electronic Protest Docketing System (EPDS).

The GAO official assured the audience of the system's effectiveness.

Yet, the GAO may take the same hard-and-fast approach with e-filed protests as it does with proposals, and until more is known, "we are certainly not going to wait until the last minute to file," Timothy Sullivan, a partner with Thompson Coburn LLP, Washington, told Bloomberg BNA.

Being the first test case wouldn't be preferable, said Sullivan, a former contracting officer for the CIA.

A harsh timeliness approach with a new system is a "valid concern," said Steven J. Koprince, managing partner of Koprince Law LLC in Lawrence, Kan.

"I hope that the GAO builds in some safeguards in recognition that any system — and particularly any new system — is likely to suffer from some occasional problems," Koprince said. "It wouldn't be fair to penalize a protester if the GAO's system is down."

"I guess we'll have to wait and see, but the GAO should be well aware of the potential problem," he said.

**Glitch Procedures.** The GAO is aware of potential problems and concerns, said Kenneth E. Patton, managing associate general counsel at the GAO.

EPDS testing continues with the aim to ensure the system operates as designed, he told Bloomberg BNA.

"The GAO wants EPDS to provide as easy and as efficient a user experience as possible," he said. "We remain hopeful that we will be able to deploy the system with minimal disruption to the procurement community as soon as we are satisfied with the testing results."

The GAO published instructions in June 2016 to help practitioners prepare for the new system.

They state that "should there be a technical failure with EPDS, a filer should contact GAO to determine EPDS's operating status and file its submission through our bid protest email address," Patton said. "The filer must include a detailed description of the nature of the technical error with its filing."

The instructions also say filers must refile their submissions through EPDS by the close of business on the second day after making their submission through GAO's bid protest email address, he said.

The GAO will apply its timeliness regulations to the EPDS, "which strike the correct balance between helping to ensure that GAO decides bid protest cases as expeditiously and as inexpensively as possible, as well as ensuring fairness to all the parties," Patton said.

**Testing Continues.** A 2014 law authorized the creation of the EPDS. The GAO issued proposed regulations and received public comments on them last spring.

The system was in its final testing stages in February, the GAO said, and hoped to unveil it this year, according to a Bloomberg BNA report. The GAO will issue final regulations before rolling out the system, Patton said.

Authorized users will automatically receive emails when they file documents, the instructions say. However, the user is responsible for ensuring that its email settings allow for delivery and receipt of the system's notice.

A filing must be completed by the times set forth in the GAO's bid protest regulations or as otherwise directed by the GAO, the instructions say.

**'Harsh' Rule.** Perhaps that prompted the Annapolis conference attendee's question — the GAO is admittedly "harsh" on timeliness and electronic filings, at least with regard to bid proposals.

A service-disabled veteran-owned business's proposal for transportation services was untimely for consideration even though the business emailed the proposal 40 minutes before the deadline, the GAO ruled in December.

The email's size prevented smooth transmittal through the agency's information technology systems and caused the proposal to be received late. The GAO then upheld the agency's rejection of the proposal as reasonable even though the solicitation lacked email size restrictions.

"While the rule may seem harsh, it alleviates confusion, ensures equal treatment of all offerors, and prevents one offeror from obtaining a competitive advantage that may accrue where an offeror is permitted to submit a proposal later than the deadline set for all competitors," the decision said.

The "late is late" rule is based on Federal Acquisition Regulation requirements, Patton said. "Until the regulation changes, the GAO must apply the regulation as it is currently written," he said.

Applying that approach to a new electronic system — despite efforts to produce an easy and efficient user experience as Patton said — could become a new source of stress for protesters.

**Plan for Complications.** Many courts use electronic filing, and attorneys who file electronically "understand that technical glitches are possible and that filings should be made early enough that there is time to address those glitches," said Shlomo D. Katz, counsel at Brown Rudnick LLP in Washington.

Protest filings at the GAO have been done primarily by email since the anthrax scare in 2001, and attorneys understand that the GAO insists upon a "hard-and-fast deadline," Katz said.

Most courts provide timely notice as to when their systems will be down for maintenance, and "may even allow extra time in the event of a major system crash," Katz said. "I suspect — and hope — the GAO will take similar precautions," he said.

To contact the reporter on this story: Daniel Seiden in Washington at [dseiden@bna.com](mailto:dseiden@bna.com)

To contact the editor responsible for this story: Jerome Ashton at [jashton@bna.com](mailto:jashton@bna.com)