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Why Delay? Submit Proposals Early

By Laura Durity

A well-known adage advises: "To be early is to be on time, to be on time is to be late, to be late is unacceptable." Too often, however, this warning goes unheeded by contractors submitting proposals. Despite countless graphic illustrations of the consequences of missed deadlines, contractors continue to submit proposals within minutes of deadlines. Given that agencies, in accordance with FAR 52.215-1(c), will reject late proposals out of hand with very few exceptions, cutting it too close can be a big mistake.

One of these "very few exceptions" is the rule that a late 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.

U.S. Aerospace, B-403464, B-403464.2, October 6, 2010, 2010 CPD ¶ 225. But even here, a contractor's significant contribution to the lateness of a proposal trumps any erroneous government action and usually results in the rejection of the proposal.

As you can image, most late proposals involve some measure of "contractor contribution." Whether it's faxing the proposal at the last minute, arriving at the Government facility with minutes to spare, or any other illustration of remarkably poor planning, contractors often are the makers of their own undoing. But every now and then a contractor misses a deadline where it is not to blame. The Court of Federal Claims came upon such a case recently in *Watterson Construction Company v. United States*, No. 10-587C (March 29, 2011).

In *Watterson*, Judge Braden concluded that a proposal sent via email should not have been disqualified for lateness because it reached the designated government email address by the noon deadline, although delivery of the proposal to the appropriate official's inbox was delayed until 12:04 pm by an unexplained "mail storm." Judge

Braden defines a mail storm as an "email sent to a large number of users, a sufficient number of whom reply to all, flooding an e-mail system and disabling it." Even though Watterson submitted its proposal via email at 11:01-11:02 am, less than an hour before the deadline, in this rare instance, the agency was found to be entirely culpable for the proposal's untimely arrival.

Watterson argued that its proposal was timely filed because it had relinquished control over it before 12:00 pm. Judge Braden agreed. Judge Braden held that the contracting officer's email address constituted the designated government office and that the proposal "was both reached and received by" the government's email servers prior to noon. The fact that it remained in cyberspace for approximately an hour and arrived past the deadline to the contracting officer's inbox could not be blamed on Watterson. Moreover, the court found that, even if the proposal were late, it should be excused under the "Government Control" exception, FAR 52.215-1(c)(3)(A)(2), despite the fact that (as Judge Braden acknowledges) the GAO has found this exception to be inapplicable to emails. The "Government Control" exception allows for the consideration of a late proposal if "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 the receipt of offers." Because the exception does not expressly exclude emails, Judge Braden concluded Watterson's proposal was covered.

Judge Braden further maintained that, pursuant to FAR 52.215-1(c)(3)(iv), the "mail storm" constituted an "emergency" or "unanticipated event" disrupting "normal Government processes," which entitled Watterson to a one-day extension, making its submission timely. Significantly though, in *Watterson*, two offerors' proposals were delayed by the "mail storm" and excluded from consideration by the contracting officer, leaving only one remaining offeror, whose proposal had some issues requiring discussions. Had Watterson been the only offeror impacted by the email server problems, this case could have come out differently.

Before all you procrastinators out there take too much comfort in the *Watterson* case, keep in mind that this deviation from the traditional "late is late" standard has very limited application, and the case books are filled with examples of contractors who have not fared quite so well.

In 2009, for example, the GAO upheld an agency's decision to reject the proposal of a contractor which arrived (in person) just minutes late. The contractor's representative arrived at the Lyndon B. Johnson Space Center in Houston, Texas only eight minutes before a 2:00 pm deadline to file its proposal in response to a NASA solicitation. The representative (surprise, surprise) found it difficult to clear security and make it across the base in eight minutes, and, consequently, submitted its proposal 29 minutes late. The agency rejected the proposal as untimely.

Against this backdrop, the GAO concluded that the contractor should have anticipated delays in gaining access to the government facility, and that the delays encountered could not be blamed on the agency. The GAO wrote: "It is an offeror's responsibility to

deliver its proposal to the proper place at the proper time, and late delivery generally requires rejection of the proposal."

The GAO in October 2010 repeated its message that "timeliness is of the essence" in rejecting the protest of U.S. Aerospace, Inc. U.S. Aerospace, which teamed with Ukrainian state-owned Antonov to propose an An-70 tanker to replace the KC-135, protested the Air Force's removal of its proposal from the KC-X bidding for tardiness. The RFP clearly advised offerors that proposals must be received in person at Wright-Patterson Air Force Base by 2:00 pm on July 9, 2010. A U.S. Aerospace messenger delivered U.S. Aerospace's proposal on July 9 to the contracting officer's representative and received a receipt indicating that proposal was delivered at 2:05 pm. A few days later, the Air Force notified U.S. Aerospace that its proposal was late and would not be considered. In its initial protest, U.S. Aerospace argued, among other things, that its messenger had been given bad directions by the Government guard.

GAO held that, even if the guard's inaccurate directions did delay the submission of U.S. Aerospace's proposal, U.S. Aerospace was responsible for its late submission. It was U.S. Aerospace's "decision to attempt entry at a gate not designated for non-military visitors" less than an hour before the deadline, to "not obtain advance approval for entry," and to not "previously ascertain the location of, and directions to, the building designated for proposal submission."

The record books are filled with countless other examples of "almost made it" submissions. While it is comforting to see the Court recognize that not all late submissions are the fault of the contractor, this recognition should not obscure the real lesson here. Late usually is late, and demonstrating that a late submission is the Government's fault is a steep uphill task. So file early folks. No contractor (or counsel) wants to be in the position of having to say to the boss (to quote the late great secret agent Maxwell Smart) "*missed it by that much*."

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