

LEGAL ADVISOR

A PilieroMazza Update for Federal Contractors and Commercial Businesses

Government Contracting

LESSONS LEARNED FROM PROTESTS INVOLVING “LATE” PROPOSALS

By Julia Di Vito

Most, if not all, proposals for government contracts are submitted electronically, whether by email or through a third party-website, such as FedConnect. However, electronic submission of proposals can face stumbling blocks due to website crashes, server blockages, and even user error. Bid protests in recent years have shed light on some of the issues with electronic proposal submission that can result in an offeror’s proposal being deemed untimely even when submitted on time. These protests provide some lessons of what to do to ensure your proposal is timely, and what not to do.

The bid protests before the GAO and the Court of Federal Claims illustrate various scenarios that have befallen offerors, and how the two adjudicative bodies have treated these scenarios. The GAO and the Court of Federal Claims recognize exceptions to the typical rule that a late proposal is simply late, although they treat these exceptions differently. The Court of Federal Claims has recognized the Government Control exception, where it finds that a proposal is not “late” if the electronic proposal is received by a Government server and is under the agency’s “control” prior to the deadline. This exception has been applied even when a proposal was ultimately rejected by an agency’s email server, as long as it was, at some point before the deadline, received by a government server.

In general, the GAO imposes a more rigid standard for finding an exception to the “late is late” rule. The GAO has never recognized the Government Control exception in the context of submission by email. It also has resisted concluding that a government agency received a proposal when there is only a record that the offeror submitted the proposal, and no record that the agency actually received the proposal. This rule obviously creates problems for offerors protesting a rejection as untimely, because the

offeror normally would not have a record of the government server receiving its submission. However, the GAO has applied the Government Control exception in a protest where the proposal reached the appropriate government personnel through the wrong method, because the agency’s receipt was documented by the agency personnel contacting the offeror to notify it of the incorrect submission.

Several lessons can be learned from these protests to help prevent a proposal from being deemed late. First, it is vital that an offeror, including the person actually submitting the proposal, read the instructions for proposal submission very carefully. If submission is by email, make sure to look for specific instructions regarding the time zone for when proposals are due and the maximum file size for attachments to emails. Some government agencies have rejected proposals as over the maximum file size, even when the file size was under the limit when the email was sent. If submission is through a third-party website, make sure to review and understand how to submit proposals through that website. There have been several protests recently regarding issues caused by a failure to understand how to submit proposals through FedConnect, including submitting proposals through the messaging feature of FedConnect and uploading documents but failing to click “submit.” When in doubt about the instructions, ask the agency for guidance or consider filing a pre-award protest, if the agency will not clarify ambiguous instructions.

Next, make sure to leave enough time before proposals are due to account for any issues that arise in the submission of the proposal. For example, if an email fails to send because the file size is too large, that issue is fixable if the files can be broken down and sent in multiple emails. Some solicitations provide that the agency will notify the offeror if the proposal is received. If that is the case, make sure to submit your

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proposal far enough in advance to address issues in the event the agency does not confirm receipt. If there is any doubt that your proposal was received, it is best to follow up with the agency as soon as possible, as your ability to challenge the proposal being deemed late may suffer if the agency has already awarded the contract.

Lastly, if you end up in a situation where an agency rejects your proposal as untimely, reach out to the agency to find out as much information as you can. Depending on when you learn of the agency's rejection of your proposal, request a preaward or postaward debriefing and ask for a basis of the rejection. For example, did the agency receive your proposal after the deadline for submission, or not receive it at all? Even if a debriefing is not required, the agency may be willing to shed some light on why the proposal was found to be untimely.

Depending on the information received from the agency, consider filing a protest with the GAO or the Court of Federal Claims. In recent years, the Court of Federal Claims has been more receptive to this type of protest, and typically allows a protester to receive more information from the agency than would a protester before GAO. More information would be helpful if the agency's computer server received the proposal but it was rejected as too large or caught in a spam filter. Finally, consider whether you had any role in the agency rejecting your proposal as untimely. If you knew or should have known that your proposal could be untimely or submitted incorrectly, while not necessarily fatal to your protest, the GAO or the Court of Federal Claims might weigh that information in favor of the agency's rejection of your proposal. Overall, keep these lessons in mind to make sure your proposal is timely and correctly submitted, so that the agency can focus on the merits of your proposal. □

About the Author: Julia Di Vito, an associate at PilieroMazza, practices in the areas of government contracts, litigation, and labor and employment. She can be reached at jdivito@pilieromazza.com.

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