

## **Alert** | Government Contracts



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### **Government Contractor Considerations on the ‘Late is Late’ Rule for Electronic Proposal Submissions**

**This GT Alert covers the following:**

- The U.S. Government Accountability Office (GAO) considers “late” even a timely proposal submission sent to and received by the agency’s server, but not delivered to the designated point(s) of contact for agency receipt of proposals by the due date and time because of an agency system quarantine procedure.
- The GAO and certain Court of Federal Claims (COFC) Judges interpret the Federal Acquisition Regulation (FAR) differently for transmission issues involving electronic proposals.
- Contractors can closely track solicitation quarantine policies and file type or size limitations if specified in the solicitation. If no such policies or size limitations are indicated, appropriate inquiries should be made to the agency.
- Contractors should plan to submit electronic proposals at least 24 hours before a proposal submission deadline. According to GAO, regardless of what the agency has or has not said about its system security protocols and capacities, submitting at least 24 hours in advance is the only defense to its admittedly harsh “late is late” rule.

For nearly two decades, contractors relied on email to submit their proposal submissions to the Government. Despite the conveniences of modern technology, prospective offerors often face issues with the timely delivery of their electronic proposals. Sometimes proposals are quarantined for containing macro files or rejected for exceeding file size limitations. Even when an offeror seeks to confirm receipt of its proposal, there is no guarantee that these follow-up communications will reach the intended agency representative.

In a recent matter, GAO upheld the agency rejection of a proposal as “late” even though the offeror’s trace logs showed timely email transmissions to the agency points of contact and their correct email addresses as stated in the solicitation. Unfortunately, while the agency’s system received the proposal at its server, the proposal was immediately quarantined because it contained a macro file.

Some agencies advise offerors of their system’s limitations and their particular security protocols in their solicitations. However, not all solicitations provide such warnings, and offerors who are not aware of such security protocols and other system limitations may fall victim to the admittedly harsh “late is late” rule, as discussed below.

The quarantine of an electronic proposal would appear to have the same practical effect as a hard-copy proposal that is not received by the designated agency points of contact on time because of mishandling at the initial point of entry to the agency facility. Whether quarantined in a server or delayed by a gate guard, in both cases the proposal has passed from the offeror’s control to the Government’s control, so there is no real risk of a compromise to the integrity of the proposal process.

GAO has not seen it that way, and has held that a “late” electronic proposal may only be accepted if it was submitted no later than 5:00 p.m. on the day **before** the scheduled submission date. GAO does not believe that proposals received at the Government’s server before the due date and time (but not by the designated agency points of contact) can be accepted, unlike a “late” physical proposal that is only “late” because of Government mishandling after timely receipt at the initial point of entry to the Government facility.

However, certain COFC Judges materially differ from GAO in their interpretations of the FAR in matters of the timely submission of electronic proposals. FAR 52.215-1(c)(3)(ii)(A) allows for the consideration of a late proposal if accepting the late offer would not unduly delay the acquisition and: (1) it was sent electronically and received by the Government no later than 5:00 p.m. one day before the proposal deadline; (2) acceptable evidence establishes receipt at the initial point of entry at the Government installation, and the proposal was under the Government’s control before the submission deadline; or (3) it was the only proposal received. These three exceptions permitting a contracting officer to consider a late proposal are known, respectively, as (1) the Electronic Commerce exception, (2) the Government Control exception, and (3) the Only Proposal exception.

GAO has held that the Government Control exception does not apply to electronic proposal submissions because the FAR Council in drafting the relevant FAR provisions did not specifically apply the Government Control exception to electronic proposals.

Certain COFC Judges, on the other hand, have taken the view that the Government Control exception may be applied to electronic proposal submissions to the same extent it applies to proposal submissions by non-electronic means. The court places the onus on the agency once a proposal reaches a Government server, thus shifting the risk of non-receipt by the designated agency points of contact from the offeror to the Government. Some argue that GAO should modify its position and allow the Government Control

exception to apply to those situations where, through no fault of the offeror, the proposal was “late” because of unknown security protocols or size limitations affecting the agency’s system and potentially impairing the timely submission of offers.

Indeed, the COFC’s – perhaps more thoughtful – analysis is based upon the premise that the advancement of technology necessitates that once an offeror hits “Send,” the offeror should not be responsible for any subsequent technical problems with the delivery or e-gateway of the Government office. The COFC’s holding suggests that the offeror would not be at fault when the offeror has no knowledge of potentially restrictive security protocols or size limitations to the agency’s system that heighten the risk of delay beyond the due date and time, or non-receipt altogether.

### Key Takeaways

GAO’s present position that the Government Control exception cannot be applied to electronic proposals regardless of the circumstances causing their alleged “lateness” means that offerors preparing to submit an electronic proposal should plan to do so before 5:00 p.m. on the day before proposals are due. We recognize that it is not the usual practice for offerors to submit electronic proposals appreciably in advance because of, among other issues, fears that the integrity of their offer may somehow be compromised if submitted early.

Therefore, offerors should strongly heed any quarantine protocols or file size limitations stated in a solicitation and, if not stated, raising the matter with the Government through the customary Q/A procedures. Otherwise, even the most well-crafted proposals risk elimination from a competition because of unknown quarantine policies or file-size limitations that may have required additional precautions from offerors.

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