feature

The Hydra of the "Late is Late" Rule



Introduction

Slashing haphazardly at the Federal Acquisition Regulation (FAR) is akin to attacking the mythical hydra. Hacking away one complex rule often creates two new ferocious problems in its place. The "Revolutionary" FAR Overhaul's (FAR 2.0) efforts to slice away ambiguities with the "Late is Late" Rule (the Rule) have created more uncertainty for contractors.

There's a lot of litigation over the timeliness of bids. The Court of Federal Claims (COFC) and the Government Accountability Office (GAO) hear "Late is Late" protests multiple times per year.[1] FAR 2.0 could have cleanly cut through a long-standing divide in interpretation of the Rule between the COFC and the GAO. Instead, new hydra heads continue to rise from the mangled FAR language.

FAR 2.0

The FAR 2.0 aspires to "return the FAR to its statutory roots, rewrite it in plain language, and remove most non-statutory rules."[2] But why have these "non-statutory rules" arisen? The FAR has grown more voluminous over the years because litigation and other disputes over interpretation benefit from clarity. Over many years, these small revisions accumulate to fill gaps in the statutory framework that lead to unintended outcomes. In other words, complexities arise to resolve the edge cases when procurement theory clashes with reality.

Simplicity is a worthy but difficult goal. Removing "non-statutory rules" and rewriting jargon in plain language sounds good on paper. However, such rewrites (or "overhauls") often reset the status quo. Removing the "non-statutory" clauses also removes the incremental clarity those rules provide, opening the door for re-litigation of previously settled disputes.

Even in the best-case scenario, well-intended revisions can lead to additional litigation and uncertainty.

The "Late is Late" Rule (and its Exceptions)

For decades, a seemingly self-explanatory FAR rule has led to a durable split in bid protest outcomes at GAO and COFC. The "Late is Late" Rule intends to clarify bid acceptability after the deadline established in the solicitation. The Rule says: bids are "late" and "will not be considered" if they are "received at the Government office designated in the solicitation after the exact time specified for receipt of offers." *See, e.g.*, FAR 52.212-1(f)(2)(i). The Rule, which is non-statutory, exists in six separate places in the FAR, each clause to be inserted into different types of procurements like Invitations for Bids or Requests for Proposals.[3]

The Rule has notable exceptions, including, among others: (1) the Electronic Commerce Exception and the (2) Government Control Exception.

Under the "Electronic Commerce" exception, a bid is timely if sent by 5 p.m. local time on the working day before the deadline. The exception is a relic from a time when computers processed electronic information in "batches" all at once at the end of the day.

The "Government Control" exception says, if there is "acceptable evidence" that the Government had control of the bid at a "Government installation" "prior to the time set for receipt of bids," then the bid is considered timely.

This seems simple, but much can happen between *sending* a bid and its *receipt.* This is especially true now that email, rather than hand or mail delivery, has become the default method for bid submission. Here are a few examples: an email (1) sent immediately prior to the deadline, delivered to inbox shortly after the deadline; (2) sent well before the deadline but rejected by server due to size limits; (3) sent well before the deadline, but "quarantined" by a server and never delivered to inbox; and (4) sent before the deadline, but other technical



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Current "Late is Late" Clauses	FAR 2.0 Revisions
52.212-1 (via 12.301(b)(1)) Commercial Products & Services	**Government Control/Electronic Commerce Removed** 12.301(b)(1) now discusses Postaward Notifications
52.214-7 (via 14.201-6(c)(3)) Invitation for Bids	**Unchanged** 14.201 now discusses Preparation of invitations for bids
52.214-23 (via 14.201-6(r)) Invitation for Bids, Two-Step	**Unchanged** 14.201 now discusses Preparation of invitations for bids
14.304(b)(1)(ii) Invitation for Bids, General	14.304 now discusses Mistakes in Bids
15.208(b)(1)(ii) Requests for Proposal—Negotiation	15.208 no longer exists
52.215-1 (via 15.209(a)) Requests for Proposal—Negotiation	**Unchanged** 15.209 no longer exists

Source: Burr & Forman

issues prevent or delay final delivery to the inbox.

A Durable Split in Interpretation

The timeliness of email bids has been litigated at GAO and COFC for more than 20 years. GAO and COFC have *concurrent* jurisdiction over bid protests, meaning contractors can choose where they protest.

In 2002, GAO said a multi-part email bid, submitted "11 minutes" before the deadline and arriving at the designated inbox "between approximately 7 and 24 minutes" after the deadline was late.[4] In 2004, one judge at COFC initially agreed with GAO's position, but since then, decisions at COFC have diverged.

Consider the case *Insight Systems*.[5] In *Insight*, the contractor sent their email submission before the deadline, and it was received by one of two government servers. A technical processing error meant that the email was not forwarded to the second server and never reached the Contracting Officer's inbox. The contractor protested soon thereafter, and COFC said the Government had control over the email submission prior to the deadline via the server.

The question is whether the "Government Control" exception applies to email submissions. GAO says that this exception **does not** apply to email submissions because "Electronic Commerce" applies instead. GAO reasons the electronic commerce exception would become "surplusage" if both exceptions apply to emails. In interpreting rules, courts follow a principle that disfavors surplusage, which is when reading a clause in one way would make language irrelevant or unnecessary.

COFC judges mostly disagree with GAO. The 2022 COFC case *eSimplicity* noted that GAO's interpretation also renders the "control" requirement in the Government Control exception irrelevant or "surplusage."[6] "The rule against surplusage does not apply in circumstances where all competing interpretations of a text make terms superfluous."

This is not a simple issue, but it has been clear for many years that a revision to the FAR would resolve the split between GAO and COFC.[7] A judge for the Federal Circuit was "baffled" about why the FAR council has not resolved this two-decade long split between GAO and COFC.[8] To be clear, there is no reason for this uncertainty to exist. And the "Revolutionary" FAR Overhaul had the perfect opportunity to fix this problem.

The Hydra Rears Its Head(s)

There are many viable solutions to the problem. The most obvious choice to resolve the split is to pick between GAO and COFC's interpretation and revise the language accordingly so that contractors can enjoy more certainty about the result of litigation regardless of the forum.

For instance, the FAR Council could remove the vestigial Electronic Commerce exception altogether. After all, computers don't batch process incoming emails anymore. Alternatively, the exceptions could be combined. That would make bids submitted one day before the deadline within the Government's control timely.

Unfortunately, FAR 2.0 has decided to make the issue even more complex. Rather than uniformly revising each (identical) clause that contains the Rule and the Government Control Exception language (found in six different clauses), the "Revolutionary" Far Overhaul hacked off just one hydra head.

The table above lists the six clauses where the Rule (and its exceptions) currently are located. The second column shows how the FAR 2.0 revised clauses differ from the original. Simply put, FAR 2.0 only revised language in FAR 52.212-1. This section applies to Commercial Products and Services.

The revised language in FAR 52.212-1(c) says that "late is late" unless the offer is "received before award" and "the Contracting Officer determines that accepting the late offer would not unduly delay the acquisition." Thus, it is fully within the discretion of the Contracting Officer whether to accept late offers. This is a viable solution. A rule with more certainty for contractors might be preferable, however. The revised clause also preserves the "Unanticipated Event" exception, which deals with technical events disrupting receipt of offers that affect multiple offerors.

Even though the revisions in FAR 52.212-1 resolve the Late is Late Rule controversy between GAO and

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COFC for Commercial Products and Services, it does not do so for any of the remaining types of procurements like Requests for Proposal or Invitations for Bids. To be clear, FAR 2.0 squandered a perfect opportunity to end a contentious and wasteful split between GAO and COFC.

Conclusion

Recall that a goal of FAR 2.0 is to "remove most non-statutory rules." The interpretation of the Late is Late Rule, which is non-statutory, has real consequences for contractors and the Government. It results in frequent, wasteful litigation. A clear rule befitting the name "Late is Late" is long overdue. While FAR 2.0 solves this problem for procurements involving Commercial Products and Services, it fails to resolve the issue for all. Instead of providing a broad rule and resolution, contractors will have to be even more mindful of the exact language in the solicitation when considering a protest over timeliness.

Contractors should adhere to the following best practices regarding bid submission:

- Email proposals should be sent at least one working day ahead of the deadline before 5:00 p.m. local time.
- Turn on delivery and read receipts.
- Immediately email and call the Contracting Officer to confirm receipt.
- If the Contracting Officer does not confirm receipt, prepare an alternative delivery method like hand delivery, if allowed by the solicitation.
- If a dispute over the timeliness of the bid arises, protest at COFC rather than GAO.

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End Notes

1 COFC has had more than 20 protests discussing the Rule. *See e.g., Conscoop Consorzia Fra Cooperative Di Prod. E. Lavoro v. United States,* 62 Fed. Cl. 219 (2004); *Watterson Constr. Co., v. United States*, 98 Fed. Cl. 84 (2011); *Insight Systems Corp., v. United States*, 110 Fed. Cl. 564 (2013); *Federal Acquisition Services Team, LLC v. United States*, 124 Fed. Cl. 690 (2016); *eSimplicity, Inc. v. United States*, 162 Fed. Cl. 372 (2022). GAO does not make every decision public, but also frequently dismisses "Late is Late" protests. *See e.g., Sea Box, Inc.*, B-291056, 2002 CPD ¶ 181 (Comp. Gen. Oct. 31, 2002); *Versa Integrated Solutions, Inc.,* B-420530 2022 CPD ¶ 98 (Comp. Gen. April 13, 2022); *Guidehouse, Inc.* B-422115.2 2024 CPD ¶ 38 (Comp. Gen. Jan. 19, 2024).

2 The promulgated FAR Deviations have not yet undergone formal notice and comment rulemaking.

3 FAR 52.212-1 (via 12.301(b)(1)(Commercial Products & Services)), 52.214-7 (via 14.201-6(c)(3)(IFB)), 52.214-23 (14.201-6(r) (IFB, Two-Step)), 14.304(b)(1)(ii), 15.208(b)(1)(ii), and 52.215-1 (via 15.209(a))(Requests for Proposal).

4 *Sea Box, Inc.*, B-291056, 2002 CPD ¶ 181 (Comp. Gen. Oct. 31, 2002)

5 *Insight Systems Corp. v. United States*, 110 Fed. Cl. 563 (2013).

6 *eSimplicity, Inc. v. United States*, 162 Fed. Cl. 372 (2022).

7 *See e.g.,* Ralph C. Nash, Vernon J. Edwards, *POSTSCRIPT VI: Late Electronic Bids and Proposals*, 37 The Nash & Cibinic Report 3 (2023).

8 Hon. Judge Dyk pointed out during oral arguments that a FAR amendment would resolve the question. https://www.cafc.uscourts.gov/09-05-2024-2023-1216-es-implicity-inc-v-us-audio-uploaded/

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