

# You've Got Mail Problems: The Safety Net For 'Late' Proposals

By **Amy Conant**

The U.S. Government Accountability Office takes a hard line when it comes to proposal submissions: Late is late. This policy often proves frustrating to contractors who press “send” before the submission deadline but nevertheless end up with a late proposal submission because of transmission delays. Many contractors do not realize, however, that the Federal Acquisition Regulation provides a safety net for proposals that get lost (or delayed) in cyberspace, provided that the offerors submit a day early.



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## Did You Get My Email?

- The email attachment was too large.
- The email got stuck in a spam filter.
- The email took three hours to show up in the recipient’s inbox.

What do these issues have in common? Yes, they constitute technical difficulties we regularly face with electronic communications. But more importantly for government contractors, they also represent circumstances that, according to the GAO, do not excuse a late proposal submission.

## According to GAO, “Late is Late”

When addressing late proposal submissions, the GAO has adopted a strict “late is late” rule, regularly citing that “it is an offeror’s responsibility to deliver its proposal to the proper place at the proper time,” regardless of extenuating circumstances. For instance, in *Washingtonian Coach Corp.*, the GAO rejected the argument that an unspecified size limit on attachments prevented an offeror from timely submitting a proposal.[1] In that case, an offeror submitted a proposal 40 minutes prior to the deadline, but its attachments exceeded the size limit allowed by the agency’s information technology policy. The offeror protested, maintaining that the agency should have accepted its proposal because the solicitation instructions did not mention an attachment size limit. The GAO denied the protest based on the “late is late” rule, stating that “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.”[2]

In *Advanced Decisions Vectors Inc.*, an offeror submitted a proposal prior to the deadline for submissions, but the agency’s spam filter blocked the transmission of the email to the designated inbox.[3] The GAO determined that the agency’s spam filter did not excuse the offeror’s failure to ensure that its proposal was received by the agency by the time specified in the solicitation. In fact, the GAO noted that the agency could not properly accept the proposal even if it desired to do so: “Where, as here, the RFQ contains a late submission

provision that quotations must be received by a stated deadline to be considered, quotations cannot be considered if received after the deadline.”[4]

The GAO reiterated this rule again in Western Star Hospital Authority.[5] There, the GAO ruled that the agency properly rejected a proposal as late when it did not reach the initial point of entry to the government infrastructure prior to the deadline for proposal submissions. The GAO did not find it persuasive that the proposal had been sent prior to the deadline but inexplicably took three hours to reach the agency. Citing to Washingtonian Coach Corp., the GAO again stated that “we have repeatedly found that it is an offeror’s responsibility to ensure that an electronically submitted proposal is received by — not just submitted to — the appropriate agency email address prior to the time set for closing.”[6]

## **The Late Proposal Safety Net**

The facts of these cases demonstrate what could be construed as an inherent unfairness in the system. These offerors, it seems, did everything right. How could they be punished for circumstances beyond their control? As the GAO noted in all three of these decisions, however, offerors do have a tool to protect themselves against the perils of email communication that none of the protesters in these cases elected to use. The FAR provides an exception to the “late is late” rule, allowing agencies to accept a late proposal “[i]f it was transmitted through an electronic commerce method authorized by the solicitation, [and] it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals.”[7]

In other words, the late submissions in all three scenarios above could have been excused had the offerors submitted by 5 p.m. the day before proposals were due. Submitting early, thereby allowing more time to correct technical difficulties, may seem like an obvious solution. The early submission rule, however, offers more protection than a mere 24 hours to fix a transmission glitch. FAR § 52.215-1(c)(3)(ii)(1) protects against situations in which a proposal, rather than simply arriving late, never arrives at all. Thus, FAR § 52.215-1(c)(3)(i)(1) would have remedied scenarios one and two above (the attachment size rejection and the spam filter block) despite the fact that in both situations the agency never received and could not retrieve the offeror’s original email.

## **Key Takeaways**

We understand the desire to take advantage of the full time allotted by an agency, but contractors should nevertheless consider the cost-benefit analysis of using the FAR late proposal safety net. In some situations, use of the FAR late proposal safety net does not even sacrifice a whole day of proposal preparation; for instance, in Advanced Decision Vectors, submission by 5 p.m. would have cured the late submission of a proposal due at 10 a.m. the following day.

Contractors should be aware that FAR § 52.215-1(c)(3)(ii) contains several additional late proposal exceptions, which have received different analyses at the GAO and from some judges at the Court of Federal Claims. The two forums also differ on their review of an agency’s post-hoc deadline extensions to allow the acceptance of otherwise untimely proposals.

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[1] Washingtonian Coach Corp., B-413809, Dec. 28, 2016, 2016 CPD ¶ 378.

[2] *Id.* at 4.

[3] Advanced Decisions Vectors, Inc., B-412307, Jan. 11, 2016, 2016 CPD ¶ 18.

[4] *Id.* at 7 (citing Data Integrators, Inc., B 310928, Jan. 31, 2008, 2008 CPD ¶ 27).

[5] B-414216.2, May 18, 2017, 2017 CPD ¶ 152.

[6] *Id.* at 3.

[7] FAR § 52.215-1(c)(3)(ii)(1).