
Reprinted with permission from *The Nash & Cibinic Report*, Volume 37, Issue 3, ©2023 Thomson Reuters. Further reproduction without permission of the publisher is prohibited. For additional information about this publication, please visit <https://legal.thomsonreuters.com/>.

THE NASH & CIBINIC REPORT

government contract analysis and advice monthly
from professors ralph c. nash and john cibinic

Author: Ralph C. Nash, Professor Emeritus of Law, The George Washington University
Contributing Author: Vernon J. Edwards

MARCH 2023 | VOLUME 37 | ISSUE 3

¶ 19 POSTSCRIPT VI: Late Electronic Bids And Proposals

Vernon J. Edwards

Today more than ever, the government must ensure that it spends money wisely and eliminates waste and abuse of taxpayer dollars. With approximately one out of every ten dollars of Federal government spending going to contractors, it is imperative that contract actions result in the best value for the taxpayer.

— Office of Federal Procurement Policy

<https://www.whitehouse.gov/omb/management/office-federal-procurement-policy/>

With that official admonition in mind, let us consider the policy about the handling of late electronically submitted proposals stated in Federal Acquisition Regulation 15.208, *Submission, modification, revision, and withdrawal of proposals*, paragraph (b):

(b)(1) Any proposal, modification, or revision, that is received at the designated Government office after the exact time specified for receipt of proposals is “late” and will not be considered unless it is received before award is made, the contracting officer determines that accepting the late proposal would not unduly delay the acquisition; and—

(i) *If it was transmitted through an electronic commerce method authorized by the solicitation, 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; or*

(ii) *There is acceptable evidence to establish that it was received at the Government installation designated for receipt of proposals and was under the Government's control prior to the time set for receipt of proposals; or*

(iii) It was the only proposal received.

(2) However, a late modification of an otherwise successful proposal, that makes its terms more favorable to the Government, will be considered at any time it is received and may be accepted. [Emphasis added.]

That policy is implemented in Requests for Proposals by the solicitation provision at FAR 52.215-1, “Instructions to Offerors—Competitive Acquisition (NOV 2021),” paragraph (c), which reads in pertinent part as follows:

(3) Submission, modification, revision, and withdrawal of proposals. (i) Offerors are responsible for submitting proposals, and any modifications or revisions, so as to reach the Government office designated in the solicitation by the time specified in the solicitation. If no time is specified in the solicitation, the time for receipt is 4:30 p.m., local time, for the designated Government office on the date that proposal or revision is due.

(ii)(A) Any proposal, modification, or revision received at the Government office designated in the solicitation after the exact time specified for receipt of offers is “late” and will not be considered unless it is received before award is made, the Contracting Officer determines that accepting the late offer would not unduly delay the acquisition; and—

(1) *If it was transmitted through an electronic commerce method authorized by the solicitation, 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; or*

(2) *There is acceptable evidence to establish that 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 receipt of offers; or*

(3) It is the only proposal received.

(B) However, a late modification of an otherwise successful proposal that makes its terms more favorable to the Government, will be considered at any time it is received and may be accepted.

(iii) Acceptable evidence to establish the time of receipt at the Government installation includes the time/date stamp of that installation on the proposal wrapper, other documentary evidence of receipt maintained by the installation, or oral testimony or statements of Government personnel.

(iv) If an emergency or unanticipated event interrupts normal Government processes so that proposals cannot be received at the office designated for receipt of proposals by the exact time specified in the solicitation, and urgent Government requirements preclude amendment of the solicitation, the time specified for receipt of proposals will be deemed to be extended to the same time of day specified in the solicitation on the first work day on which normal Government processes resume.

(v) Proposals may be withdrawn by written notice received at any time before award. Oral proposals in response to oral solicitations may be withdrawn orally. If the solicitation authorizes facsimile proposals, proposals may be withdrawn via facsimile received at any time before award, subject to the conditions specified in the provision at [FAR] 52.215-5, Facsimile Proposals. Proposals may be withdrawn in person by an offeror or an authorized representative, if the identity of the person requesting withdrawal is established and the person signs a receipt for the proposal before award. [Emphasis added.]

Longstanding Issues Of Interpretation

As our readers know, the Government Accountability Office has long held that FAR 52.215-1(c)(3)(ii)(A)(2) (“There is acceptable evidence to establish that 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 receipt of offers;”) does not apply to electronically transmitted proposals. See *Sea Box, Inc.*, Comp. Gen. Dec. B-291056, 2002 CPD 181, 2002 WL 31445297, 44 GC ¶ 442, and *People Technology & Processes, LLC*, Comp. Gen. Dec. B-419385, 2021 CPD ¶ 100, 2021 WL 873350. One judge at the U.S. Court of Federal Claims has agreed with the GAO. See *Conscoop-Consorzia Fra Cooperativa Di Prod. E. Lavoro v. U.S.*, 62 Fed. Cl. 219 (2004), 46 GC ¶ 424. Other judges have not, holding that it does apply. See *Watterson Construction Co. v. U.S.*, 98 Fed. Cl. 84 (2011), 53 GC ¶ 210, and *Insight Systems Corp. v. U.S.*, 110 Fed. Cl. 564 (2013). Yet another judge recently supported the application of subparagraph (c)(3)(ii)(A)(2) to electronically transmitted proposals, but for somewhat different reasons than everybody else. See *eSimplicity, Inc. v. U.S.*, 162 Fed. Cl. 372, 381–387 (2022), 64 GC ¶ 314. The disagreements have now persisted for more than 20 years, and bid protest litigation delays acquisitions and costs money.

We have published several pieces about this issue, most recently in *Postscript V: Electronic Bids and Proposals*, 36 NCRNL ¶ 60, written by Ralph. His piece was accompanied by a guest addendum written by Nathaniel E. Castellano and Scott E. Whitman of Jenner & Block, LLP, in which they concluded: “Perhaps one day the FAR will be revised, or the U.S. Court of Appeals for the Federal Circuit will provide a binding answer. Until then, one of the most quotidian aspects of the procurement process remains a legal house of mirrors.”

After 20 years of controversy and an ever growing list of GAO and Court of Federal Claims protest decisions, why haven't the FAR councils clarified the rule? How hard could it be? What is the problem? We assume that the FAR councils would say that they have not clarified the rule because the bureaucratic process of getting something published in the *Federal Register* is arduous and time consuming and they have a lot of work on their desks. To be fair, they do have a lot of work. According to the list of February 24, 2023, they have 56 open FAR cases, two of which date back to 2015. See <https://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf>. The DAR Council lists 74 open Defense Federal Acquisition Regulation FAR Supplement cases as of the same date. See <https://www.acq.osd.mil/dpap/dars/opencases/dfarscasenum/dfars.pdf>. Well, we're here to help.

How About A Clarifying Technical Amendment?

In the interest of putting the issue of late electronically submitted proposals to bed, we suggest the following simple fixes. Let's first assume that the FAR councils meant for the rule to be interpreted as interpreted by the GAO: the second exception, FAR 52.215-1(c)(3)(ii)(A)(2), *does not* apply to electronically submitted proposals. If that is the case, then all it would take to clarify the rule would be to make a minor editorial change, from this:

(2) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of proposals and was under the Government's control prior to the time set for receipt of offers;

to this, with added language in italics:

(2) *If it was submitted by any other method*, there is acceptable evidence to establish that 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 receipt of offers;

If, however, the councils meant for the second exception to apply to electronically submitted proposals, then the subparagraph should be edited to state:

(2) *Regardless of how it was submitted*, there is acceptable evidence to establish that 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 receipt of offers;

That should do it. The edits we recommend are designed to clarify the rule, not to change it, and we therefore suggest that the FAR councils publish the edits as technical amendments, rather than a rule change, so no need for public comments.

Other Suggested Clarifications

While they are at it, the councils could further clarify the rule by making some additional minor edits to the late proposal rule:

- For the sake of consistency throughout subparagraph (c)(3), replace “offer” and “offers” with: *proposal* and *proposals*.

- In subparagraph (c)(3)(ii)(A), replace “Government office” with “Government *location*.”
- In subparagraph (c)(3)(ii)(A)(1), replace “was received at the initial point of entry to the Government infrastructure” with “*entered the Government's information processing system*.”
- In subparagraph (c)(3)(ii)(A)(2), replace “Government installation” with “Government *location*.”

Fixing the late proposal rule is not just a matter of linguistic nicety. The litigation over the rule's interpretation costs time and money. *VJE*