

PROTESTER HAS BURDEN OF SHOWING TIMELY ELECTRONIC DELIVERY

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E-mail is a very useful tool, especially in government contracting. But the Government Accountability Office (“GAO”) recently confirmed a long line of cases where an offeror contended that it had sent in its proposal by e-mail, but the agency did not receive it and could find no evidence in its email servers of receipt. *Ghazanfar Neft Gas LTD*, B-414636, July 21, 2017. In this and similar cases, the GAO concluded that the protester had failed to satisfy its burden of showing that it timely delivered its proposal to the agency by email.

Two sections of the FAR are important here:

- (1) FAR 15.208(a) which states “[o]fferors are responsible for submitting proposals, and any revisions, and modifications, so as to reach the Government office designated in the solicitation by the time specified in the solicitation. Offerors may use any transmission method authorized by the solicitation (i.e., regular mail, electronic commerce, or facsimile).”
- (2) FAR 52.215-1(c)(3), Instructions to Offerors—Competitive Acquisition (mandatory for all competitive solicitations), which states “[o]fferors 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.”

Three cases show the trend:

- In *Lakeshore Eng’g Svcs*, B-402434, July 24, 2009, 2009 CPD ¶ 155, an offeror attempted to submit a part of its proposal by e-mail, and obtained a “sent” receipt from its (the offeror’s) server, but the agency never received it, even after scouring its servers. The agency then eliminated Lakeshore from the competitive range. The GAO noted that it is an offeror’s responsibility to deliver its proposal to the proper place at the proper time, and denied Lakeshore’s protest.
- *Latvian Connection Trading and Const., LLC*, B-402410, Feb. 25, 2010, 2010 CPD ¶ 58, a similar situation occurred as in *Lakeshore*, (transmission of proposal by e-mail but no evidence of agency receipt), and the GAO again concluded that the protester had failed to satisfy its burden of showing timely delivery of its proposal to the agency and denied the protest.
- Finally, in *Ghazanfar Neft Gas LTD*, B-414636, July 21, 2017, the protester alleged it had submitted a timely proposal, provided copies of its emails, and also provided declarations from its deputy chief executive officer and information technology officer, as well as a screenshot demonstrating that the email transmitting the proposal had been sent to the proper agency office. The agency searched its mailboxes and tracing logs, but found no evidence of receipt. The GAO concluded that Ghazanfar had failed to establish that its proposal was

actually received by the agency, and Ghazanfar's evidence only showed that the protester sent the email to the agency, but not that the agency had received it. Again, the GAO concluded that the protester failed to satisfy its burden of showing that it timely delivered its proposal to the agency, and denied the protest.

The takeaway: internal notations in your email system that an email has been "sent" do not establish that the agency ever received that email on the date/time shown in the email. There are two conclusive ways to establish receipt: (1) receipt of an email or facsimile from the agency acknowledging receipt at the date/time; or (2) following transmission of the email, an immediate telephone call to the agency contracting officer (or a contract specialist, or even a secretary) and receiving a telephonic confirmation of receipt of your complete email. When you receive the telephonic confirmation, make a memorandum to the file of the call that includes the date, telephone number, time of call, name and title of person to whom you spoke. Keep the memorandum in your proposal file in case there is any question of receipt.