

Court of Federal Claims Judge Rules That Agency Cannot Accept Late Proposal by Extending Receipt Deadline After Deadline Has Passed

In a ruling contrary to GAO case law, Judge Charles F. Lettow of the Court of Federal Claims (COFC) issued a decision holding that an agency's amendment of a solicitation to extend the closing time for receipt of proposals *after* the closing time has passed and proposals have been received, ostensibly for the purpose of enhancing competition, is contrary to the "late is late" rule. See FAR 52.215-1(c)(3)(ii)(A). In *Geo-Seis Helicopters, Inc. v. United States and Presidential Airways, Intervening Defendant*, COFC No. 07-155C, 2007 WL 2206855 (Fed. Cl. July 30, 2007), Judge Lettow held that the awardee's proposals were submitted late and should not have been considered by the government.

The court refused to adopt the rulings in a series of GAO decisions that permit the issuance of post-expiration amendments to a solicitation extending the closing dates to enhance competition, including *Micromass, Inc.*, B-278869, 98-1 CPD ¶ 93 (Mar. 24, 1998); *Varicon Int'l, Inc.*, B-255808, B- 255808.2, 94-1 CPD ¶ 240 (Apr. 6, 1994); *Fort Biscuit Co.*, 71 Comp. Gen. 392, B- 247319, 92-1 CPD ¶ 440 (May 12, 1992); and *Institute for Advanced Safety Studies*, B-221330, B- 221330.2, 86-2 CPD ¶ 110 (July 25, 1986). The court explained that "[a]lthough GAO decisions support the government's position as to the *nunc pro tunc* effect of *post-hoc* amendments...those GAO precedents reflect 'one of those Comptroller-General-created rules that is not reflected in the FAR.'"

Judge Lettow's rationale was that: (1) the plain language of the rule precluded the government's consideration of the awardee's revised proposals because the awardee did not satisfy any of the exceptions contained in the rule; (2) such solicitation amendments extending the closing date or time do not trump the rule; and (3) there is no basis in the FAR to support the idea that the contracting officer had discretion to render the rule a nullity.

The court rejected the government's interpretation that the "late is late" rule does not bind government agencies and always operates in the government's favor, noting that the plain language of the rule does not support such an interpretation. Judge Lettow noted that "the policy reasons for or against the 'late is late' rule are matters within the purview of the FAR Councils...[and] [t]he FAR Councils specifically addressed and resolved those policy issues in the 1997 reconsideration of the FAR." Therefore, the court stated, "[we] should not undercut that resolution by a contrary decision in this case." The court concluded that it will apply the FAR "as written, not as the government and [the awardee] urge that it should have been written."

The *Geo-Seis* decision will apply to similar protest situations where a disappointed offeror challenges an agency's acceptance of a late proposal – so long as other judges of the COFC adopt it. In situations where a party protests an agency's post-deadline decision to extend the proposal submission deadline, the protester should file its protest at the COFC rather than the GAO to take advantage of this ruling.

CONTACTS

If you would like more information, please contact any of the McKenna Long & Aldridge attorneys or public policy advisors with whom you regularly work. You may also contact:

Richard B. Oliver
213.243.6169

John A. Burkholder
213.243.6145

Amy D. Deng
213.243.6111

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