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FEATURE COMMENT: Extending Solicitation Deadlines At GAO Versus The COFC: It's Not Over 'Til It's Over (Unless The COFC Says It Is)

As every Government contractor knows, "late is late," and a proposal received after the time set for receipt of proposals is ineligible for award—or is it? At the Government Accountability Office, an agency's discretion to extend a solicitation's due date may continue even *after* the solicitation closes. But at least one judge of the U.S. Court of Federal Claims has a different perspective from GAO, and the court's view, correct or not, might influence your choice of forum in a bid protest.

Retroactive Extension of Deadlines at GAO—GAO long has held "there is no prohibition against a procuring agency issuing an amendment to extend the closing time for receipt of proposals after that time has passed to accommodate even one offeror, where the motivation for the extension is enhanced competition." *Nat'l Disability Rights Network, Inc.*, Comp. Gen. Dec. B-413528, 2016 CPD ¶ 333.

In GAO case law, retroactive extensions of proposal deadlines can occur after one or more offerors miss a deadline, and the agency in its discretion issues a nunc pro tunc amendment to establish a new date for proposal submission sometime in the future. See, e.g., *Fort Biscuit Co.*, Comp. Gen. Dec. B-247319, 92-1 CPD ¶ 440 (upholding an extension of the closing date for the submission of best and final offers to allow one of four offerors more time to submit its best and final offer); 34 GC ¶ 573; *Varicon Int'l, Inc.; MVM, Inc.*, Comp. Gen. Dec. B-255808 et al., 94-1 CPD ¶ 240 (allowing an extension of the closing date post expiration of the original date by permitting two offerors to submit late proposals to compete against the two offerors that submitted timely proposals in order to enhance competition).

In *National Disability Rights Network, Inc.*, for example, only one offeror submitted a proposal by the solicitation's initial deadline. To increase the number of competitors, the agency then retroactively amended the proposal due date to allow an additional week for proposal submission, by which time eight offerors responded. The protester argued that it was improper for the agency to change the due date after it had passed (thereby increasing the protester's competitors from zero to seven). GAO disagreed, citing its long-standing precedents allowing retroactive extensions to enhance competition.

Not only does GAO permit retroactive extension of proposal deadlines to accommodate multiple otherwise-late offerors, it also permits accommodation of individual offerors. In *Geo-Seis Helicopters, Inc.*, Comp. Gen. Dec. B-299175 et al., 2007 CPD ¶ 135, GAO denied a protest objecting to an agency's retroactive extension of proposal deadlines *twice* after the ultimate awardee missed two separate proposal deadlines. From the protester's point of view, the agency treated offerors disparately by changing the deadline to transform a late proposal into a timely one. GAO disagreed, finding that the goal of enhanced competition justified the retroactive extensions.

The COFC Strikes Back—The protester was not deterred. After losing at GAO, Geo-Seis Helicopters Inc. went to the COFC for a second bite at the apple and received a very different judgment from Judge Lettow. See *Geo-Seis Helicopters, Inc. v. U.S.*, 77 Fed. Cl. 633 (2007); 49 GC ¶ 313.

The court observed that the solicitation included Federal Acquisition Regulation provision 52.215-1, Instructions to Offerors—Competitive Acquisition, which codifies the late-is-late rule and provides that a proposal, modification or revision received after the exact time specified for proposal receipt is late and will not be considered unless one

of three exceptions applies. Inclusion of the clause, coupled with the fact that none of the three exceptions applied, was enough for the court to find the agency's acceptance of the awardee's proposal revisions improper.

Thus, according to the court, the solicitation required the agency to reject the awardee's proposal and select another (timely) offer for award. The court also noted that the FAR Councils had considered and rejected proposed regulatory language that would have allowed source selection authorities the discretion to accept late proposal revisions. The court reasoned that allowing deadline extensions after the deadline had passed, as GAO permits, effectively gives contracting officers the very discretion the FAR Councils rejected, and renders FAR 52.215-1's late-is-late rule a nullity.

The court acknowledged Professor Ralph Nash's opinion that the late-is-late rule is "dumb," and that GAO's retroactive amendment case law is a clever way to circumvent the rule, but it also noted Nash's concession that this GAO precedent reflects "one of those Comptroller-General-created rules that is not reflected in the FAR." The court held that, in the face of the plain language of FAR 52.215-1, "[t]hose GAO decisions are not persuasive and they will not be adopted." Thus, in the circumstances of *Geo-Seis*, there is a clear split between GAO's precedents and at least one COFC judge.

Other COFC judges have followed Judge Lettow's holding in varying degrees, but not as forcefully as articulated in *Geo-Seis*, and none has addressed the issue of extending a deadline retroactively for all offerors. For example, in *Progressive Indus., Inc. v. U.S.*, 129 Fed. Cl. 457 (2016), Judge Campbell-Smith cited *Geo-Seis* to support a holding that an agency could not extend the due date for one offeror's late proposal without extending the deadline for other offerors. The court grounded this holding not in the late-is-late rule, but in the general prohibition on unfair treatment detailed in FAR 3.101-1—a holding with which GAO likely would agree.

In *Guardian Moving & Storage Co., Inc. v. U.S.*, 122 Fed. Cl. 117 (2015), Judge Kaplan cited *Geo-Seis* in a footnote for the proposition that an agency may not "accept [a] late proposal revision and then, after the deadline ha[s] passed, issue a post-hoc extension." This reference was dictum, however, because the agency in *Guardian* extended the deadline before it had passed, which the court found unobjectionable.

In *Centech Grp., Inc. v. U.S.*, 78 Fed. Cl. 496 (2007); 49 GC ¶ 410, Judge Williams cited *Geo-Seis* in passing with a parenthetical description: "abjuring GAO holdings which nullified the FAR's late is late rule." Judge Horn has cited *Geo-Seis* as support for holding that the Government lacked the discretion to waive a solicitation's requirements for the method of transmitting proposals. *Labatt Food Serv., Inc. v. U.S.*, 84 Fed. Cl. 50 (2008); 50 GC ¶ 431, rev'd on other grounds by 577 F.3d 1375 (Fed. Cir. 2009); 51 GC ¶ 320. In *Allied Materials & Equipment Co., Inc. v. U.S.*, 81 Fed. Cl. 448 (2008); 50 GC ¶ 205, Judge Hewlitt cited *Geo-Seis*, but found it inapplicable because the agency extended the proposal deadline before it had passed, although it failed to notify all offerors of that fact.

So, although the court subsequently has not had occasion to apply the *Geo-Seis* rule, no published opinion has criticized *Geo-Seis* or suggested that GAO's rule might be preferable.

Applicability of *Blue & Gold Fleet*?—The court in *Geo-Seis* did not address another issue that likely should have resulted in dismissal of the protest: timeliness. Under the U.S. Court of Appeals for the Federal Circuit's precedent in *Blue & Gold Fleet, L.P. v. U.S.*, 492 F.3d 1308 (Fed. Cir. 2007), if an offeror is aware of a patent error in a solicitation and fails to object "prior to the close of the bidding process," it "waives its ability to raise the same objection subsequently in a bid protest action in the Court of Federal Claims."

The agency in *Geo-Seis* issued both of the retroactive deadline extensions to all offerors by formal amendments of the solicitation. Those amendments made the protester aware of the allegedly improper nunc pro tunc deadline extensions months before contract award, but the protester did not object until after it lost the competition. Under *Blue & Gold Fleet*, the court arguably should have dismissed the case because the protester waived any objections. Nothing in the *Geo-Seis* opinion suggests that the parties briefed this timeliness question or that the court considered it.

Competitive Prejudice—GAO's and the court's differing treatments of retroactive deadline extensions also may reflect different approaches to prejudice. In a bid protest, the ordinary rule (followed by both the court and GAO) is that a protester must show not only that the agency acted contrary to law or without a rational basis, but also that the agency's error prejudiced the protester. See *Bannum,*

Inc. v. U.S., 404 F.3d 1346, 1351 (Fed. Cir. 2005); 47 GC ¶ 266; *Advanced Data Concepts, Inc. v. U.S.*, 216 F.3d 1054, 1057 (Fed. Cir. 2000); see also *GeoSystems Analysis, Inc.*, Comp. Gen. Dec. B-413016, 2016 CPD ¶ 190 at 6 ("Competitive prejudice is an essential element of every viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found."); 58 GC ¶ 288. In *Geo-Seis*, Judge Lettow held that the protester was prejudiced by the retroactive deadline extension because, but for that extension, the awardee would have been ineligible for award, and the protester's ratings vis-à-vis the remaining offerors gave it a substantial chance of being awarded the contract.

In the context of a waiver, however, GAO has a somewhat different prejudice rule: Waiver of a solicitation requirement is not prejudicial if the requirement is waived for all offerors, and the only "harm" suffered by the protester is increased competition. See, e.g., *SunGuard Data Sys., Inc.*, Comp. Gen. Dec. B-410025, 2014 CPD ¶ 304 at 7 n.8 ("[A] protester cannot demonstrate prejudice by showing only that the awardee would have been unsuccessful had the agency not waived the requirement; rather, the pertinent question is whether the protester would have submitted a different proposal, had it known that the requirement would be waived."); *Optex Sys., Inc.*, Comp. Gen. Dec. B-408591, 2013 CPD ¶ 244 at 9; *Geonex Corp.*, Comp. Gen. Dec. B-274390.2, 97-1 CPD ¶ 225 at 5.

Indeed, even if a requirement is waived for only one offeror, a protester must show how it would have acted differently to improve its chances for award if it had been provided the same waiver. See *Tech. & Telecomms. Consultants, Inc.*, Comp. Gen. Dec. B-413301 et al., 2016 CPD ¶ 276 at 14; *Vocus Inc.*, Comp. Gen. Dec. B-402391, 2010 CPD ¶ 80 at 6.

If GAO were to begin treating retroactive extension of deadlines as a deviation from a solicitation's terms (as the COFC has done), it likely would analyze prejudice under this special waiver rule. As long as all offerors are afforded an equal opportunity to submit revised proposals by the extended deadline, GAO likely would find no prejudice, even if it considered such an extension as a waiver of the solicitation's terms.

Take-Aways—What does all this mean? If you intend to object to a retroactive extension of the proposal due date, you should file your protest at the COFC rather than at GAO, and you probably should do so before the next date set for receipt of proposals. If the competition is a task or delivery order procurement, over which the court lacks jurisdiction, you are out of luck.

If, on the other hand, you are an agency or awardee facing a protest on this ground, you have long-standing, common-sense GAO precedent on your side; if you find yourself at the COFC, you should consider a *Blue & Gold* waiver defense, and attempt to convince the judge that the GAO case law is more persuasive than *Geo-Seis* under your facts.

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