

DON'T MAKE THE EMAIL MISTAKE

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Do you believe your computer's email program which says "delivery complete" a few seconds after you hit the "send" button? If you do, you have made the classic email mistake. Your computer may think it has been "sent," but that isn't the real question. The real question is whether or not the email has been *received*.

Let's examine the rules from two forums: First, the appeal rules from the Small Business Administration ("SBA") Office of Hearings and Appeals ("OHA"), which adjudicates appeals from size protests. Second, the bid protest rules of the Government Accountability Office ("GAO"), which adjudicates most bid protests:

OHA: (a) Methods of filing and service. E-mail, mail, delivery and facsimile are all permitted unless a Judge orders otherwise...
(b) Filing. Filing is the **receipt** of pleadings and other submissions at OHA. Filers may call OHA to verify receipt. OHA's telephone number is 1 (202) 401-8200....
13 C.F.R. § 132.204 (emphasis added).

GAO: [Definitions] (f) A document is *filed* on a particular day when it is **received** by GAO by 5:30 pm Eastern Time on that day. Protests may be filed by hand delivery, mail, commercial carrier, facsimile transmission (202-512-9749) or email (*protests@gao.gov*)....The filing party bears the risk that the delivery method chosen will not result in a timely receipt at GAO.
4 C.F.R. §21.0 (emphasis added).

The touchstone of both of these rules is the *receipt* by OHA or GAO, not the *sending* by the protester. You might send a document five hours in advance of the due date/time, but if the forum doesn't *receive* that document until six hours later, your document has been filed late, and lateness is not excused. There is only one way to know if someone has received your email—telephone them and verify receipt! OHA specifically recommends that procedure, and the following suggestion should be followed: When phoning OHA or GAO, ask for the name, title and phone number of the person who has confirmed the receipt, and be sure to confirm that they received all of the pages. Make a note of the phone call, time, person, and what was received, and keep it with your protest.

Here's what happens when you fail to confirm the forum's receipt of your email. In *Size Appeal of Supplies, Now*, SBA No. Siz-5655, 2015 WL 2149481 (April 20, 2015), Supplies Now attempted to appeal a size determination that they believed was wrong (it had been dismissed as untimely because it was filed more than five business days after award notification). Supplies Now received the size determination on February 3, 2015. On February 18, 2015, Supplies Now filed its appeal by email, and obtained an acknowledgement from its email account that said

“Delivery to recipients or groups is complete, but no delivery notification was sent by the destination server. [OHA’s email address is listed among those in the acknowledgement].” After about six weeks, and hearing nothing from OHA, Supplies Now called OHA and was advised that the appeal had not been received. Supplies now retransmitted its appeal petition on April 9, 2015.

In dismissing the appeal as untimely, OHA noted that, in accordance with 13 C.F.R. § 134.304(a), a size appeal must be filed at OHA within 15 days of receipt of the size determination, and Supplies Now had failed to do so, since nothing had been received within 15 days. “[H]aving chosen to submit its appeal by email, Appellant was responsible for ensuring that the email successfully reached OHA. Nor could Appellant reasonably rely solely upon the acknowledgement from its email system, particularly given that Appellant received no response, over a period of several weeks from OHA or other intended recipients of the appeal.”

Note that the GAO rules (set forth above) similarly stress that a document is *not filed until it is received by the GAO*, including emailed documents.

TIPS. If you email something to OHA or the GAO, *always* confirm by telephone that it has been received. Do not trust a computer generated confirmation, or even a “return receipt” sent by an email program. Telephone the forum, get the name and phone number of the person at GAO or OHA, and be sure all pages were received. Federal officials are unlikely to falsely deny receipt after they have specifically acknowledged it.