

MISSING DEADLINES IN PROTESTS

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During the Civil War, at the famous Andersonville Prison, on the inside of the stockade and twenty feet from it, there was a deadline established, over which no prisoner was allowed to go, day or night, under penalty of being shot. After the Civil War, deadlines were primarily associated with newspapers. In the newspaper business, to have the latest news and still get a newspaper printed and distributed on time requires adherence to strict time limits (deadlines). In government contracting, there are deadlines both before and after a contract is awarded. This article discusses protest deadlines. A second article will discuss contract administration and claims deadlines.

Why are deadlines important for government contractors? Because there are so many of them, and woe will be to any government contractor who misses them. Although the penalty is not being shot, it might as well be, for missing deadlines will make the contractor feel like he's been shot and run over by an Abrams tank! Agencies and courts demand strict compliance with deadlines.

IMPORTANT BID PROTEST DEADLINES AND EXAMPLES

Bid Protests: (1) Any protest of the terms of a solicitation must be submitted *before* the closing date for a Request for Proposals (“RFP”), or before the opening date for an Invitation for Bids (“IFB”). 4 C.F.R. § 21.2(a)(1). This is true for agency protests, and protests at the Government Accountability Office (“GAO”) and the U.S. Court of Federal Claims.

The GAO publishes many cases per year where protests of solicitation matters (ambiguities, improper sole source procurements, etc.) were dismissed because they were submitted *after* source selection was complete. A recent example is *IAP World Servs, Inc.; Jones Lang LaSalle Americas, Inc, B-411659 et al.*, September 23, 2015. The Court of Federal Claims has adopted this rule as well, under the guidance of the Federal Circuit. (Challenges to the terms of a solicitation must be raised prior to the closing date for receipt of proposals. *See Blue & Gold Fleet, L.P. v. United States*, 492 F.3d 1308, 1313 (Fed.Cir.2007))

Bid Protests: (2) Other protests must be filed at the GAO or agency not later than 10 days after the basis of protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) There is no hard and fast deadline for filing at the Court of Federal Claims, but if a contractor waits too long, and causes disadvantage (usually costs) on the part of the government or the winner, the protest may be dismissed as untimely.

Dismissal because of protest submission after the 10 day period is found in numerous GAO decisions. GAO generally doesn't even publish most of these decisions, but they are kept internally.

The Court of Federal Claims does not have a hard and fast deadline, but it adheres to the principle of “laches,” which bars a protest when neglect or delay in bringing the protest causes prejudice to the adverse party. In a recent case, a protester waited six months after official notice of award, and nearly 10 months after it exhausted its agency appeals, before it protested at the court. The court dismissed the protest as untimely because the protester had “slumbered” on its rights to the disadvantage of the Government and the awardees (both incurred significant costs that could have been avoided.) *Nat’l Telecommuting Inst. Inc. v. United States*, No. 15-293C (Fed. Cl. Oct. 28, 2015).

Size Protests by contractors: (no time limit for a response that is submitted by a contracting officer): Within 5 working days of bid opening for IFBs, or within 5 days of receipt of the notice of award by the contractor for RFPs.

Size Appeal cases frequently discuss the timeliness of size protests (which must be submitted to the contracting officer), and strictly apply the 5 working day rule. For example, a recent appeal dismissed as untimely a size protest that had been filed 3½ months after receipt of the notice of award. *EFT Architects, Inc., SBA No. SIZ-5460* (April 3, 2013). The appeal noted that a timely appeal could not cure an *untimely* size protest.

Size Appeals to the Small Business Administration (“SBA”) Office of Hearings and Appeals must be filed within 15 days of receipt of the size determination. 13 CFR § 134.304(a).

Even one day late is too late. A contractor received an SBA size determination on May 11, 2015, and decided to appeal, but the SBA Office of Hearings and Appeals (“OHA”) did not *receive* the appeal by certified mail until May 27, 2015, sixteen days later. The SBA dismissed the appeal as untimely by one day, and refused to reconsider its dismissal. The SBA rules state that “filing is the receipt of pleadings and submissions at OHA [not the mailing date].”¹ *Kemron Environmental Servs., Inc., SBA No. SIZ-5663*, 2015 (June 8, 2015)

The consequences of missing a protest deadline, regardless of the type of protest or forum, are very harsh. The contractor will lose not only the protest, but the contract award as well. So be forewarned, and always submit protests on time. Any mistake in failing to understand or meet the deadline can be fatal to a bid protest.

The next article will discuss important deadlines in contract administration and claims.