

TRAPPED BY TECHNOLOGY: PROOF OF FILING

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Modern Government contractors, Government personnel and their attorneys have many ways to file important documents, including hard copy (hand delivered), mail, messenger or UPS/Fedex, and growing even more important today, by email or even old-fashioned facsimile (fax). But the latter two electronic methods carry a significant risk: how can the sender prove that the recipient *actually received* the electronic transmission? In *B&S Transport, Inc.*, B-407589, Dec. 27, 2012, the Government Accountability Office (“GAO”) demonstrated once again the importance of showing real proof that a letter or filing was received. And, as explained below, *B&S* is just a poster boy for similar electronic filing traps that both the Government and contractors have fallen into over the years. There is a relatively simple solution, as explained by GAO and the courts, and it merely involves the use of a simple 140-year old technology: the telephone. Read on so you won’t get “trapped” by technology.

In *B&S*, the protester submitted the second lowest quote on an Army requirement for high performance tires in support of the evasive driving course in Missouri. (The contract was to be awarded on a “lowest priced, technically acceptable” basis). The Army found that the three lowest quotes were unreasonably low compared to the independent government estimate. To ensure that there had been no mistake, Army contacted the lowest priced vendor and discovered its product did not meet agency needs, so it was rejected. *B&S* was next lowest, and on Friday September 21, 2012, the Army sent an email to *B&S* requesting quote verification. Because it received no response, the Army sent a second verification email later that day, but again received no response. On Monday September 24, 2012, Army sent a third verification email and specifically advised *B&S* that “failure to reply [by 3:00 pm] will constitute a withdrawal of your quote.” The Army received no reply, and then moved on to verify the third lowest quoter, which received the contract.

B&S alleged (and showed a copy of) an email reply that it had sent to the Army at 2:54 pm (6 minutes before the reply deadline), but the agency’s information technology staff traced all email messages and could not confirm that *B&S*’s email was received. In denying the protest, GAO said “although protester has presented evidence that it timely sent an email verifying information, there is no question that the agency received [it] prior to the deadline....In short, there is no evidence in the record to show actual timely receipt of *B&S*’s verification email” and therefore, GAO concluded that the agency’s decision not to award to *B&S* was reasonable. GAO also cited *Int’l Garment Processors*, B-200674, July 17, 2007, 2007 CPD ¶ 130, which states that an agency’s rejection of a revised quote was reasonable where the protester only demonstrated that the quote was *transmitted*, but not that it was actually timely *received* by the agency.

The Courts and the Boards of Contract Appeal have followed the same basic approach as GAO—someone filing a claim, a complaint, a protest, or a contracting officer’s final

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decision (sent to a contractor) must be able to demonstrate receipt by the intended recipient—not mere transmission of an email or a fax. For example, in *Trygve Dale Westergard*, CBCA 2522, 2011 WL 4389077, Sept. 15, 2011, a contracting officer transmitted a final decision by email. There was no proof of the date of receipt of the decision, and the Board found that the contracting officer had no proof of the date of receipt by “objective indicia” when seeking to declare a notice of appeal was late.

In *Riley & Ephrian Const. Co. v. United States*, 408 F 3d 1369 (Fed. Cir. 2005), the Court considered a CO final decision. The Court stated:

Proof of message exit from a transmitting machine cannot serve as a proxy for proof of actual receipt of the sent message by a remote receiving terminal.

The Court rejected a fax cover sheet as evidence that the fax was received. The same type of analysis (no proof of receipt, only proof of transmission) occurred in *Public Service Cellular, Inc.*, ASBCA No. 52,489, 00-1 BCA ¶ 30832, and in *David Grimaldi Co.*, ASBCA No. 49795, 97-2 BCA ¶ 29201.

SOLUTION: The Courts have made it crystal clear that there is one effective way to ensure *receipt* of your filing—confirm its receipt by telephone with the recipient. This is repeatedly mentioned in the caselaw, and provides you with two things, as long as you obtain the name of the person to whom you speak:

- The knowledge that the intended recipient received it
- The knowledge that you can go back to that specific person and request that they acknowledge what they said over the phone (it is unlikely that a government official will make a false statement).

There is one other solution for fax or emails—request that the recipient email or fax you a written confirmation of receipt of your document. Many government offices are too busy to do this, which is why the telephone confirmation is probably the most practical way.