

A TRIO OF SHORT CASES WITH A MESSAGE

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DON'T RELY ON COMPUTER-GENERATED DELIVERY CONFIRMATIONS OF YOUR PROPOSAL

This blog has discussed computer-generated confirmations of agency receipt of your proposal, and urged contractors to obtain a “human-generated” confirmation. In *Firebird Analytical Sols and Techs.*, B-420238, Jan. 10, 2022, the Government Accountability Office (“GAO”) again held that a computer generated delivery confirmation did not establish that the offer was “actually received” by the agency at the email address specified in the solicitation.

After sending its email and attached proposal, Firebird received delivery confirmation through its Microsoft Outlook Delivery receipt feature. The receipt stated “Delivery to these recipients or groups is completed, but no delivery notification was sent by the destination server.” Firebird did not follow up with the agency to confirm receipt. The email that Firebird received was from an “intermediate server” and not the “final destination mail server.” Only the final destination represented the “email address specified in the solicitation.”

Takeaway. Always follow up immediately to confirm the agency received your computer-submitted offer on time.

YOUR LAWYER CAN CERTIFY YOUR CLAIM AND YOU DON'T NEED PERSONAL KNOWLEDGE OF THE FACTS TO CERTIFY THE CLAIM

In *Sungwoo E&C Co, Ltd, ASBCA Nos. 61144, 61219 and 62738*, the Board considered three questions:

- 1) Are you required to certify a claim concerning correctness of Contractor Performance Assessment Reporting System (“CPARS”) ratings. (Answer: “no”)
- 2) Do you need personal knowledge of the facts to certify your claim? (Answer: “no”)
- 3) Can your lawyer certify your claim? (Answer: “yes”).

On the CPARS claim, the Board held that since no monetary amount was sought in the claim, and only claims of \$100,000 or more required certification, then no certification is required.

On the personal knowledge claim, the Board noted that the Contract Disputes Act merely requires that the certification include a statement that the supporting data are accurate and complete to the best of the knowledge and belief of the contractor, and the amount reflected accurately reflects the contract adjustment for which the contractor believes the government is liable. The Board held that there is no requirement that a certifying individual have “sufficient personal knowledge of the details of the claim” as asserted by the Government.

On the question of whether your lawyer can certify a claim, the Board held that the Contract Disputes Act permits anyone authorized to bind the contractor to provide the certification. 41 USC Sec. 7103(b)(2). Furthermore, there is no requirement that the person certifying be an employee or have any involvement with the administration or performance of the contract. In this case. The President/Resident Director provided appellant's attorney with power of attorney to execute all claims. That was all the Board needed to hold that the attorney had authority to bind the company.

Takeaway: see the answers to the questions at the beginning of this section.

PRICE REALISM VS. PRICE REASONABLENESS

In *Zafer Taahhut Insaat Ve Tiaret AS*, B-420280, Jan. 19, 2022, a protester asserted that the Army Corps of Engineers failed to perform a price realism evaluation for a fixed price construction contract. Zafer argued that the awardee's price was so low that it reflected a lack of understanding of the work required. GAO found no merit in this argument, explaining that the protester had conflated price reasonableness and price realism. In a fixed price environment, a price reasonableness determines whether the offered prices are too high, rather than too low. By contrast, a price realism review is to determine whether prices are too low such that there may be a risk of poor performance. In this case, the price reasonableness techniques set forth in the solicitation are not applicable to whether the awardee's proposed prices were too low.

GAO noted that unless there is an express price realism provision in the solicitation, it will only conclude that a solicitation contemplates such an such an evaluation where the RFP expressly states that the agency will review prices to determine whether they are so low that they reflect a lack of technical understanding and where the RFP states that a proposal can be rejected for offering low prices. Here, the solicitation did not expressly state it would make such an analysis, and GAO denied the protest.

Takeaway. Understand the difference between price reasonableness and price realism determinations.

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By Richard D. Lieberman, Consultant & Retired Attorney**