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THE NASH & CIBINIC REPORT

government contract analysis and advice monthly
from professors ralph c. nash and john cibinic

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FEBRUARY 2025 | VOLUME 39 | ISSUE 2

¶ 6 POSTSCRIPT VIII: LATE ELECTRONIC BIDS AND PROPOSALS

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The Department of Justice hoped that by appealing its loss in the *eSimplicity* protest, the U.S. Court of Appeals for the Federal Circuit might do the Federal Acquisition Regulation Council's job by providing a single interpretation of the so-called “late-is-late” rule for electronically submitted proposals. No dice. Instead, the Federal Circuit dismissed the case, finding that the Government mooted its own appeal during corrective action. *eSimplicity, Inc. v. U.S.*, 122 F.4th 1373 (Fed. Cir. 2024).

The “Late-Is-Late” Rule And *eSimplicity*

This REPORT has been covering the needless litigation over the “late-is-late” rule for nearly 20 years. And we have already discussed the *eSimplicity* protest on several occasions along its journey through the National Courts. See *Electronic Bids and Proposals: The Absurd FAR Rule*, 17 N&CR ¶ 10, and *Postscripts* at 25 N&CR ¶ 28, 27 N&CR ¶ 9, 32 NCRNL ¶ 39, 35 NCRNL ¶ 50, 36 NCRNL ¶ 60, 37 NCRNL ¶ 19, and 38 NCRNL ¶ 53. See also *Keeping Up With the National Courts: September 2024 Developments*, 38 NCRNL ¶ 60; *Dateline November 2024*, 38 NCRNL DATE NOV.

In short, the Navy rejected an emailed proposal submission on the basis that the proposal was not received early enough to qualify under the FAR's “electronic commerce” exception for late proposals (FAR 15.208(b)), and, consistent with Government Accountability Office precedent, the agency refused to consider whether the delayed proposal qualified as timely under the “Government control” exception to the FAR rule. Court of Federal Claims Judge Schwartz—departing from the GAO's longstanding position, as several of his colleagues on the court have in previously cases—concluded that the plain language of the relevant FAR provisions permit a late electronic proposal submission to be considered timely under the “Government control” exception. *eSimplicity, Inc. v. U.S.*, 162 Fed. Cl. 372 (2022), 64 GC ¶ 314.

Critically, Judge Schwartz did not go so far as to hold that the Navy had to accept eSimplicity's proposal under the "Government control" exception; the court just held that the Navy failed to undertake the full analysis required by the regulatory text. So, Judge Schwartz remanded the case to the Navy with two options: (1) reconsider the timeliness of eSimplicity's proposal or (2) issue a revised solicitation with clarified submission requirements.

The Navy never analyzed whether eSimplicity's proposal would qualify as timely under the "Government control" exception. Instead, the Navy canceled the solicitation that eSimplicity's proposal was rejected under ("Solicitation I"), the very solicitation that was before the court when Judge Schwartz issued his order.

Rather than reconsidering whether eSimplicity submitted a timely proposal under Solicitation I, the Navy issued a new Solicitation ("Solicitation II"), invited new proposals, and selected eSimplicity as the best value offeror.

The Government's Appeal

The Navy got its contract, but the Government wanted more. The Government wants—and very much needs—a clear answer as to whether the "Government control" exception to the late-is-late rule applies to electronically submitted proposals. So, the Government appealed, hoping the Federal Circuit might finally give a single interpretation of the rule that could govern protest at the GAO and the Court of Federal Claims. While the Department of Justice has in some cases argued before the court that the Government control exception does apply to electronically submitted proposals, in its *eSimplicity* appeal the Government urged the Federal Circuit to adopt the GAO's interpretation of the relevant FAR clauses, under which a late electronic proposal submission cannot qualify as timely under the Government control exception.

The case was assigned to a merits panel of Judges Timothy B. Dyk, Raymond T. Chen, and Tiffany P. Cunningham. As previously reported, it was clear from oral argument that the Federal Circuit panel understood the long history behind this issue, and the panel's questions appeared critical, to say the least, of the Government's position and GAO's interpretation:

Judge Dyk: I am baffled. You say this issue has been around for two decades. It could be solved by an amendment to the FAR, making clear your position.... Why has that not happened if this is so important?

Government Counsel: ... I don't have an answer to why the FAR Council has not acted on this.... Even the trial court itself recognized ... that either the Supreme Court, or this Court, or certainly the FAR Council ... is all we have at this point in terms of a final resolution on this. And that is why we are here, to ask for a final resolution on this legal question.... As GAO has held, by its explicit terms, the electronic commerce exception covers electronic submission methods, like email, and the more general Government control exception covers all non-electronic submissions.

Judge Dyk: But it doesn't say that. It doesn't say that it is limited to paper submissions.

Government Counsel: It doesn't say that it is limited, but the specific should control over the general....

A recording of the argument is available on the Federal Circuit's website: https://oralarguments.caf.c.uscourts.gov/default.aspx?fl=23-1216_09052024.mp3.

The Federal Circuit's Decision

Ultimately, the Federal Circuit declined to give the Government a final answer to the "late-is-late" riddle. In a unanimous decision authored by Judge Chen, the court dismissed the case and

found that the Navy mooted the appeal through its chosen corrective action of cancelling Solicitation I:

This case is moot because there is no longer a live issue. The issues presented on appeal are whether the Claims Court erred in concluding that Solicitation I contained an unstated file-size criterion or erred in concluding that the government control exception can apply to eSimplicity's proposal submitted for Solicitation I. *But the government does not dispute that Solicitation I no longer exists, that Solicitation I's accompanying offers are now expired, or that the Navy has awarded a contract to eSimplicity for Solicitation II, which requested the same services as Solicitation I.* [Emphasis added.]

The Federal Circuit explained that a ruling on the merits would not provide effective judicial relief, emphasizing the Government's noncommittal responses on this issue during oral argument:

[E]ven if we were to find that the Claims Court erred in its decision regarding Solicitation I, our decision would not affect the separate award of eSimplicity's contract for Solicitation II...

...At oral argument, we pressed the government on whether the Navy would cancel eSimplicity's contract for Solicitation II if the government prevailed in this appeal. ... *The government refused to state that the Navy would cancel the contract—instead saying that “it very well may” terminate the contract but “there are no guarantees.” ... This hedging by the government further confirms our doubts that any decision by our court would provide effective judicial relief to the parties; rather, it makes it more likely that our decision would be an advisory opinion answering the two questions the government poses on appeal without resolving a case or controversy.* [Emphasis added.]

The court rejected the Government's argument that the case met the “capable of repetition yet evading review” mootness exception. It emphasized that mootness resulted from the Navy's own decisions and that the Government could have appealed this issue in prior cases:

[I]t was the Navy's own choice to issue and award a contract for Solicitation II that prevented review of the Claims Court's decision concerning Solicitation I. ...

The government also could have appealed at least the government-control-exception issue in other cases yet did not do so. In *Watterson Construction Co. v. United States*, 98 Fed. Cl. 84, 95–97 (2011), and *Insight Systems Corp. v. United States*, 110 Fed. Cl. 564, 581 (2013), the Claims Court ruled that the government control exception can apply to proposals submitted by e-mail. Though the government argued the opposite position in those cases, *Watterson*, 98 Fed. Cl. at 95; *Insight Sys.*, 110 Fed. Cl. at 575, it did not appeal those decisions. That the government could have appealed the government-control-exception issue in those cases yet chose not to do so suggests that the government merely wants to appeal this issue now—not that the issue has evaded review.

What is Next?

This one is easy: Next, the FAR Council does its job and fixes the rule. Any day now.... C.f. Castellano & Kramarczyk, *Postscript: FAR Council Fixes “Dumb Rule,”* 38 NCRNL ¶ 73. *NEC & Ginsey V. Kramarczyk*

