

Late Is Late: Should the GAO Continue to Employ GAO Created Exceptions to the FAR?

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I. Introduction

Recently, the U.S. Court of Federal Claims (COFC) refused to follow well-established Government Accountability Office (GAO) precedent regarding the “late-is-late” rule.¹ This article explores the history and rationale behind a GAO-related exception to the late-is-late rule from a procurement perspective. The article contrasts the GAO’s view with the COFC’s opinion that late is late, without exception. After examining the two views, the article briefly discusses the likely effect of the COFC’s position on contracting officers in the field.

The article concludes that the GAO and the COFC decisions reflect institutional differences: GAO focused its efforts on meeting the spirit of the Competition in Contracting Act of 1984’s (CICA) enhanced competition mandate,² while the COFC adopted a plain-meaning judicial interpretation of the Federal Acquisition Regulation (FAR).³ Ultimately, the results of the COFC’s recent decision in *Geo-Seis Helicopters, Inc. v. United States*⁴ may transform GAO’s decisions and internal policies, not only in competitive negotiations, but across the spectrum of procurement statutes and regulations. An isolated award of attorneys’ fees and costs against a federal agency for failing to follow the plain language of the FAR is one thing; however, multiple awards against the Government will likely draw the Comptroller General closer to COFC’s approach.

II. *Seis Helicopters, Inc. v. United States*

In 2005, the Military Sealift Command (MSC) issued a solicitation to procure three two-helicopter detachments to provide vertical replenishment services in support of U.S. Navy operations in the Pacific and Indian Oceans and adjacent areas.⁵ The MSC solicited for a firm, fixed-price contract⁶ and received six proposals that were evaluated by a source selection evaluation board (SSEB).⁷ Geo-Seis Helicopters, Presidential Airways, Inc., and four other companies submitted timely proposals, but the agency deemed the initial proposals to be unsatisfactory.⁸ After further discussions with the bidders, the agency set 22 March 2006 at 2:00 p.m. as the date and time for receipt of final proposal revisions.⁹

Revisions by several offerors were timely received on 22 March, but Presidential Airways’ proposal arrived thirty minutes late.¹⁰ Earlier in the day, however, Presidential Airways e-mailed the MSC’s contracting officer and contract specialist stating that weather delays might delay its revised submission.¹¹ The contracting officer amended the solicitation by extending the closing date and time to 23 March at 11:00 a.m., although she did not issue an amendment to the offerors

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¹ See *Geo-Seis Helicopters, Inc. v. United States* (*Geo-Seis Helicopters, Inc.*), 77 Fed. Cl. 633, 639–40 (2007).

² 31 U.S.C. §§ 3551–3556 (2006).

³ GEN. SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. (Nov. 2009) [hereinafter FAR].

⁴ *Geo-Seis Helicopters, Inc.*, 77 Fed. Cl. 633.

⁵ *Id.* at 635–36.

⁶ *Id.* at 636.

⁷ *Geo-Seis Helicopters, Inc.*, Comp. Gen. B-299175, B-299175.2, Mar. 5, 2007, 2007 CPD ¶ 135, at 3.

⁸ *Geo-Seis Helicopters, Inc.*, 77 Fed. Cl. at 636.

⁹ *Id.*

¹⁰ *Id.* at 637.

¹¹ *Id.*

extending the closing date and time until after the original date and time for receipt.¹² Presidential Airways' proposal was accepted in light of the extension.¹³

In July 2006, the MSC concluded technical evaluations of the proposals, and on 4 August, the MSC announced that the date and time to receive a second round of revised submissions would be 15 August at 2:00 p.m.¹⁴ As before, Presidential Airways' revised proposal arrived thirty minutes late, and as before, it contacted the agency stating that bad weather might delay delivery of its revision.¹⁵ After the closing time for receipt of proposals, the contracting officer amended the solicitation *nunc pro tunc*¹⁶ to extend the closing time to 4:00 p.m., notifying Geo-Seis Helicopters and Presidential Airways by e-mail at 3:29 p.m. and 3:31 p.m., respectively.¹⁷ Presidential Airways' proposal arrived at 2:30 p.m.¹⁸ The agency conducted a best value analysis of the second final revised proposals (FRPs), and while Geo-Seis Helicopters' past performance rating was higher, it could not overcome Presidential Airways' better price.¹⁹ On 2 November 2006, the MSC awarded the contract to Presidential Airways.²⁰

On 27 November 2006, Geo-Seis Helicopters challenged the agency's award by filing a bid protest with the GAO²¹ alleging that the contracting officer's extension of the closing times was "improper and that MSC instead should have rejected the FRPs and eliminated Presidential from the competition."²² The GAO denied Geo-Seis Helicopters' protest on 5 March 2007 citing a longstanding GAO-created exception to the late-is-late rule:²³ "the agency's motivation in extending the deadline was to enhance competition by keeping Presidential's proposal in the competition."²⁴ In response, Geo-Seis Helicopters brought a protest action in the U.S. Court of Federal Claims on 9 March 2007.²⁵ Geo-Seis Helicopters contended that the agency disregarded the Federal Acquisition Regulation's (FAR) late-is-late rule "by accepting Presidential's untimely submissions of its . . . proposals and that the Sealift Command had no authority to extend the deadlines."²⁶

III. The Late-Is-Late Rule

A. The FAR Provision

The FAR was established in 1984²⁷ to provide "uniform policies and procedures for acquisition by all executive agencies."²⁸ For nearly four decades, federal procurement law was guided by the Armed Services Procurement Act of 1947 (ASPA) and the Federal Property and Administration Services Act of 1949.²⁹ The FAR governs all Federal Government

¹² *Id.*

¹³ *Id.* at 637, 639.

¹⁴ *Id.* at 637.

¹⁵ *Id.*

¹⁶ Latin "now for then," meaning, "having retroactive legal effect through a court's inherent power." For example, "to correct a clerical error in the record." BLACK'S LAW DICTIONARY 1097 (7th ed. 1999).

¹⁷ *Geo-Seis Helicopters, Inc.*, 77 Fed. Cl. at 637.

¹⁸ *Id.*

¹⁹ *Geo-Seis Helicopters, Inc.*, Comp. Gen. B-299175, B-299175.2, Mar. 5, 2007, 2007 CPD ¶ 135, at 3.

²⁰ *Geo-Seis Helicopters, Inc.*, 77 Fed. Cl. at 638.

²¹ *Id.*

²² *Geo Seis Helicopters, Inc.*, 2007 CPD ¶ 135, at 5.

²³ *Id.* Although the Comptroller General cited Varicon Int'l, Inc., MVM, Inc., Comp. Gen. B-255808, B-255,808.2, Apr. 6, 1994, 94-1 CPD 240 at 4, the exception was first announced in the decision of Solar Resources Inc., Comp. Gen. B-193264, Feb. 9, 1979, 79-1 CPD ¶ 95, where the Comptroller General decided in favor of the Veterans Administration's extensions of the closing date for receipt of proposals when "the effect of which is to enhance competition." *Solar Resources Inc.*, 79-1 CPD ¶ 95.

²⁴ *Geo Seis Helicopters, Inc.*, 2007 CPD ¶ 135, at 5.

²⁵ *Geo-Seis Helicopters, Inc.*, 77 Fed. Cl. at 635.

²⁶ *Id.* at 635.

²⁷ W. NOEL KEYES, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATION 37 (3d ed. 2003).

²⁸ 48 C.F.R. § 1.101 (2008).

²⁹ KEYES, *supra* note 27, at 34 (citations omitted).

purchases or leases of supplies or services (including construction) with appropriated funds.³⁰ The FAR is issued and maintained by a FAR Council consisting of the administrator for Federal Procurement Policy, the Secretary of Defense, the administrator of National Aeronautics and Space, and the administrator of General Services Administration.³¹

The FAR provides that all bids, proposals, or modifications submitted by contractors to a government agency office are deemed late if they are received after the agency solicitation's deadline.³² This rule is often referred to as the late-is-late rule because the contractor's submissions are not considered by the agency. However, there are three regulatory exceptions which contractors may employ.

The FAR's late-is-late rule states that:

Any proposal, modification, or revision received at the Government office determined in the solicitation after the exact time specified for receipt of offers is "late" and will not be considered unless it is received before award is made, the Contracting Officer determines that accepting the late offer would not unduly delay the acquisition, and—

1. If it was transmitted through an electronic commerce method authorized by the solicitation, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals; or
2. There is acceptable evidence to establish that it was received at the Government installation designated for receipt of offers and was under the Government's control prior to the time set for receipt of offers; or
3. It was the only proposal received.³³

The main language is nearly identical for sealed bidding, competitive negotiations, solicitation provisions, and contracting clauses.³⁴ The reason for the rule lies with protecting the integrity of the structure in a sealed bidding system. Examining how and why the rule developed sheds light on the history and rationale behind one of GAO's exceptions to the late-is-late rule.

B. History of the Late-Is-Late Rule

1. Sealed Bidding

The Federal Government first required sealed bidding by statute during the Civil War.³⁵ Sealed bidding is a process that seeks competitive bids for goods or services, opens the bids publicly, and awards contracts.³⁶ Its purpose is to "give all qualified contractors the opportunity to compete for government contracts while avoiding favoritism, collusion, or fraud and to obtain for the government the benefits of competition."³⁷

In sealed bidding, a bidder delivers a bid to the bid opening room and hands it to either the contracting officer (the agency's representative that is granted authority to enter into contracts on behalf of the U.S. Government)³⁸ or to a bid opening officer.³⁹ Bids are also commonly transmitted by mail, delivery service, electronically, or by facsimile, depending on the parameters of the agency's invitation for bid (IFB).⁴⁰ All bids timely received are kept secure in a locked bid box,

³⁰ 48 C.F.R. § 2.101.

³¹ Office of Mgmt. and Budget, FAR Council Members, http://www.whitehouse.gov/omb/procurement/far/farc_members.html (last visited July 10, 2009).

³² FAR, *supra* note 3, § 15.208(b)(1).

³³ *Id.*

³⁴ *Id.* § 14.304 (sealed bidding), § 15.208 (competitive negotiations).

³⁵ KEYES, *supra* note 27, at 34.

³⁶ *Id.* at 304.

³⁷ *Id.* at 305.

³⁸ FAR, *supra* note 3, § 1.602-1.

³⁹ *Id.* § 14.402-1(a).

⁴⁰ *Id.* § 14.304(a). Invitations for bids are employed in sealed bidding to describe the requirements of the Government to prospective bidders. Invitations are "publicized through distribution to prospective bidders, posting in public places, and other such means as may be appropriate." *Id.* § 14.101(b).

safe, or a secured electronic bid box until the time set for the opening of bids,⁴¹ which sometimes occurs immediately after the proposal deadline.⁴² Once the time for opening bids arrives, bids that were timely submitted are publically opened and, if practical, read aloud to the persons present.⁴³ Award of the contract is based upon price alone.⁴⁴

The late-is-late rule developed to “protect the integrity of the competitive procurement system” in sealed bidding.⁴⁵ It ensures bidders compete on a level playing field by requiring them to submit bids under the same general market conditions.⁴⁶ Prices for goods and services may change weekly, daily, or hourly, so without the rule, a bidder who submits a timely bid may lose an award to another bidder who obtained more competitive prices by waiting beyond the solicitation due date.⁴⁷

A second reason supporting the nearly inflexible late-is-late rule in sealed bidding is simplicity. Sealed bidding rules were “designed so that they could be administered by personnel who would not be required to exercise judgment.”⁴⁸ Permitting the receiving officer to simply reject all bids submitted after the deadline, without consideration of the best interests of the Government, simplifies the process.

2. Competitive Negotiations

With passage of the FAR in 1984, competitive negotiations became the law of the land, alongside sealed bidding.⁴⁹ The FAR drafters applied the same late-is-late rule for sealed bidding and competitive negotiations regulation.⁵⁰ However, in competitive negotiations, bids are not opened publicly, nor are awards based upon price alone.⁵¹ Additionally, competitive negotiations require judgment and an actual evaluation of offers to determine which proposal provides the best deal for the Government.⁵² The active assessment of bids distinguishes competitive negotiations from sealed bidding, where personnel do not exercise judgment.

Inflexibility in competitive negotiations runs the risk of “depriv[ing] the Government of significant advantages. The rationale for more flexibility is to allow the Government to take advantage of a better offer when lateness would not give the offeror an unfair competitive advantage.”⁵³ Nevertheless, the same lateness provisions that apply to sealed bidding continue to apply to competitive negotiations.⁵⁴ In response to the FAR’s rigid standard, GAO decisions in bidder protest actions evolved to provide some leeway for late proposals.

⁴¹ *Id.* § 14.401(a).

⁴² *See, e.g.*, States Roofing Corp., Comp. Gen. B-286052, Nov. 8, 2000, 2000 CPD ¶ 182.

⁴³ FAR, *supra* note 3, § 14.402-1(a).

⁴⁴ *Id.* § 14.101(e).

⁴⁵ Ralph C. Nash & John Cibinic, *Late Proposals: In Search of a Sensible Rule*, 12 NASH & CIBINIC REP. NO. 11, ¶ 57 (1998) (quoting letter from William H. Butterfield to authors) (n.d.)).

⁴⁶ Timothy Sullivan et al., *The Government’s Even More In “The Driver’s Seat” Under FAR Part 15 Proposal*, 38 GOV’T CONTRACTOR NO. 36, ¶ 450 (1996).

⁴⁷ *Id.*

⁴⁸ Nash & Cibinic, *supra* note 45, at 7.

⁴⁹ FAR, *supra* note 3, § 6.401.

⁵⁰ *Id.* § 15.208(b).

⁵¹ Ralph C. Nash & John Cibinic, *Postscript: Late Proposals*, 13 NASH & CIBINIC REP. NO. 2, ¶ 11 (1999).

⁵² *Id.* at 4.

⁵³ *Id.*

⁵⁴ Nash & Cibinic, *supra* note 45, at 7.

IV. The GAO's Approach—The Exception to Enhance Competition

A. The GAO

The GAO is an independent agency under the Comptroller General of the United States.⁵⁵ Since 1925, the Comptroller General has decided federal contract bid protests under its settlement authority.⁵⁶ Settling “bid protests became a sizeable part of the GAO’s duties because for many years it was the only venue available to frustrated bidders.”⁵⁷ Not until the passage of CICA in 1984 was the GAO was “statutorily authorized for the first time to formally adjudicate bid protests.”⁵⁸

Approximately 130 attorneys at the GAO’s Office of the General Counsel hear bid protests and prepare decisions, which the Comptroller General ultimately renders to the disputing parties.⁵⁹ While the attorneys are not judges and do not preside over courts, they render decisions after either reviewing the parties’ record or upon conducting a hearing, which may be requested by the parties or initiated by the GAO.⁶⁰ A protest in this context is a plea by an interested party (i.e., an actual or perspective bidder) stating that an agency’s solicitation for offers, the cancellation of a solicitation, or the termination of a contract violated applicable statutes and regulations.⁶¹ Decisions are not binding, however, because federal law only grants the GAO the authority to recommend a remedy.⁶²

The GAO dispute process limits standing to protest an award by a federal agency to “an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.”⁶³ Since 1991, hearings have been used and “are usually conducted either to assess witness credibility or due to the complexity of the issue.”⁶⁴ A protest file includes the offeror’s protest and documents from the procuring agency against which the protest has been filed.⁶⁵ Decisions by the Comptroller General must be issued within one hundred days of the protest.⁶⁶ In fiscal year 2008, GAO received 1563 protests and closed 1506 protests.⁶⁷

B. GAO’s Exception to the Late-Is-Late Rule

Since the adoption of the late-is-late rule, the GAO has regularly enforced both the rule and the written exceptions to the rule; it has also created an additional exception. The GAO-created exception permits an agency to consider a late bid proposal in order to enhance competition between the bids offered before the deadline and bids offered after the deadline.⁶⁸

The GAO’s exception to the late-is-late rule appears to have derived from a 1979 sealed bidding protest by Solar Resources, Inc. (Solar).⁶⁹ Solar Resources protested two closing date extensions for the receipt of proposals for a solar

⁵⁵ “The [GAO] is an instrumentality of the U.S. Government independent of the executive departments The head of the Office is the Comptroller General of the United States.” 31 U.S.C. § 702(a)–(b) (2006).

⁵⁶ Alexander J. Brittin, *The Comptroller General’s Dual Statutory Authority to Decide Bid Protests*, 22 PUB. CONT. L.J. 636, 638 (1993).

⁵⁷ Robert S. Metzger & Daniel A. Lyons, *A Critical Reassessment of the GAO Bid-Protest Mechanism*, 2007 WIS. L. REV. 1225, 1229 (2007) (quoting *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940) (holding that a disappointed bidder lacked standing to sue the Government in federal court; the result was GAO became the only venue for disappointed bidders)).

⁵⁸ Brittin, *supra* note 56, at 636–37 (citation omitted).

⁵⁹ U.S. Gov’t Accountability Office, Office of the General Counsel, <http://www.gao.gov/about/workforce/ogc.html> (last visited July 10, 2009).

⁶⁰ 4 C.F.R. § 21.7(a) (2009).

⁶¹ *Id.* § 21.1.

⁶² Metzger & Lyons, *supra* note 57, at 1232 (citation omitted).

⁶³ FAR, *supra* note 3, § 33.101.

⁶⁴ See KEYES, *supra* note 27, at 750–51.

⁶⁵ FAR, *supra* note 3, § 33.104. The documents include the offer submitted by the protestor, the offer being considered for award or being protested, relevant documents, the solicitation, the abstract of offers, and other documents the agency determines are relevant. *Id.*

⁶⁶ KEYES, *supra* note 27, at 305.

⁶⁷ Letter from Gary L. Kepplinger, General Counsel, U.S. Gov’t Accountability Office, to Nancy Pelosi, Speaker, U.S. House of Representatives (Dec. 22, 2008), available at <http://www.gao.gov/special.pubs/bidpro08.pdf>.

⁶⁸ Ivey Mech. Co., Comp. Gen. B-272764, Aug. 23, 1996, 96-2 CPD ¶ 83.

⁶⁹ Solar Res. Inc., Comp. Gen. B-193264, Feb. 9, 1979, 79-1 CPD ¶ 95.

heating and cooling system issued by the Veterans Administration Hospital.⁷⁰ The Comptroller General's decision to deny Solar Resources' protest rested on the theory that when the purpose of permitting late proposals is to "enhance competition," the agency is justified in accepting late bids.⁷¹ The GAO uses the same rationale to justify accepting late proposals in competitive negotiations.

After *Solar Resources*, the exception became institutionalized in a series of cases where GAO permitted late bids to enhance competition.⁷² The "enhance competition" exception to the late-is-late rule makes sense from a procurement standpoint; allowing more bidders to compete for a contract increases opportunity for competition and prevents "undue restriction in solicitations."⁷³ One of GAO's missions is to meet CICA's mandate for full and open competition by offering recommendations in bid protests.⁷⁴ The logic behind accepting late bids is therefore obvious: more bids translates to more competition, resulting in lower costs to the Government.

The late-is-late rule is a creature of sealed bidding, and the same need for timeliness does not exist in competitive negotiations. In sealed bidding, proposals are opened publicly, so it makes sense that all proposals arrive on time and remain unopened until the time set for opening bids.⁷⁵ In contrast, in competitive negotiations, written and oral discussions often take place between the agency and offerors, and offerors are provided the chance to submit final proposal revisions.⁷⁶ These differences highlight the significant distinctions between the two contract methods and the need for different rules on late proposals. To appreciate the application of the GAO's exception to the late-is-late rule, three decisions are analyzed below.

C. Three GAO Interpretations of the Exception

1. *Varicon International, Inc.; MVM, Inc.*

In 1994, the GAO issued a protest decision in *Varicon International, Inc.; MVM, Inc.*⁷⁷ The protest involved an Air Force solicitation for a cost-plus-award-fee contract to manage and conduct personnel security investigations.⁷⁸ By the deadline for proposal submissions on 13 August 1993, the agency had received proposals from Varicon and MVM.⁷⁹ On 18 August, the contracting officer extended the due date for initial proposals to 26 August "in order to accept . . . two proposals received after the initial due date" of 13 August.⁸⁰

After evaluating the proposals, the agency found the incumbent contractor, MSM Security Services, Inc., "showed a comprehensive understanding of the processes and procedures necessary to accomplish the yearly investigation caseload in the time periods allotted."⁸¹ In contrast, the agency's evaluators concluded that while MVM proposed the lowest cost, its prior poor performance with the Federal Emergency Management Agency coupled with concerns about its ability to "obtain timely security clearances for its investigators" weighed heavily against selection⁸²

On 16 November, the agency awarded the contract to MSM Security Services based upon its technically superior proposal.⁸³ In response, MVM protested the award contending that the Air Force improperly accepted a late proposal from

⁷⁰ See *id.*

⁷¹ *Id.* at 5.

⁷² See Nash & Cibinic, *supra* note 51 (discussing several GAO decisions including Institute for Advanced Safety Studies-Recon., Comp. Gen. B-221330.2, July 25, 1986, 86-2 CPD ¶ 110).

⁷³ *Solar Res., Inc.*, 79-1 CPD ¶ 95, at 5.

⁷⁴ Brittin, *supra* note 56, at 637 (citations omitted).

⁷⁵ See, e.g., Ralph C. Nash & John Cibinic, *Late Proposals: Still Fighting*, 14 NASH & CIBINIC REP. NO. 12, ¶ 66, at 3 (2000).

⁷⁶ See KEYES, *supra* note 27, 386-91.

⁷⁷ *Varicon Int'l, Inc.; MVM, Inc.*, Comp. Gen. B-255808, B-255808.2, Apr. 6, 1994, 94-1 CPD ¶ 240.

⁷⁸ *Id.* at 2.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 3.

⁸² *Varicon Int'l, Inc.; MVM, Inc.*, 94-1 CPD ¶ 250, at 5.

⁸³ *Id.* at 3.

the awardee.⁸⁴ It asserted that “the contracting officer ha[d] no authority to extend the proposal due date where there [was] no change in requirements and no basis for the extension apart from the desire to accommodate . . . offerors who failed to submit proposals on time.”⁸⁵ In its decision, GAO developed the exception first enunciated in *Solar* by “finess[ing] the [FAR’s late] rule merely by extending the closing date.”⁸⁶ The GAO noted that the FAR did not prohibit extending the closing date and that extending the closing date when done to enhance competition is proper.⁸⁷ The GAO’s ingenuity in expanding its in-house exception demonstrated its concern with CICA’s overall mandate: open and full competition in federal procurement. Consistent with prior decisions, the GAO continued to invoke its own exception to the late rule, as exemplified in the following protest by a disappointed bidder.

2. *Fort Biscuit Co.*

In 1991, the Defense Personnel Support Center (DPSC) requested proposals to provide salted soda crackers as part of meals-ready-to-eat (MRE).⁸⁸ Fort Biscuit Company and three other contractors (including Interbake) submitted initial proposals before the 26 August closing date and were subsequently asked to provide best and final offers (BAFO) by 30 December at 2:00 p.m.⁸⁹ Interbake had not submitted a BAFO by the deadline, so the contracting officer extended the closing date to 3 January 1992.⁹⁰ Subsequently, DPSC awarded Interbake the contract.⁹¹ The GAO dismissed Fort Biscuit’s protest against the closing time extension on the familiar theme that enhancing competition justified extending the closing date in order to accept additional proposals.⁹² Yet only a year later, the exception took a back seat to the rule, if only for a day.

3. *The Staubach Co.—Embracing the Late-Is-Late Rule*

The GAO’s decisions on late proposals are not as monolithic as they may appear. Consider the decision to dismiss The Staubach Company’s bid protest against the General Services Administration (GSA).⁹³ The GSA issued a competitive negotiation solicitation for real estate services and set the closing date for proposals as 21 February 1997.⁹⁴ Although Staubach’s price proposal was submitted by 21 February, the required technical and key personnel portions were not delivered to the GSA bid room until a week later.⁹⁵ The contracting officer did not consider Staubach’s additional material because the additional submission was late.⁹⁶ Staubach protested, yet GAO agreed with the agency’s rejection determining that allowing a protestor to submit technical and key personnel proposals after “would be tantamount to improperly allowing the submission of a late proposal.”⁹⁷ It applied a strict reading of the regulation by explaining that the late rule “alleviate[s] confusion, assure[s] equal treatment of all offerors, and prevent[s] one offeror from obtaining any unfair advantage that might accrue where an offeror is permitted to submit a proposal later than the deadline set for all competitors.”⁹⁸ Of note, the decision argued against the enhance competition standard invoked in many GAO decisions.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Nash & Cibinic, *supra* note 45, at 3.

⁸⁷ *Varicon Int’l, Inc.; MVM, Inc.*, 94-1 CPD ¶ 250, at 3. Prior to major revisions to the FAR in 1997, FAR § 15.410(a)(3) permitted an agency to extend the closing date at any time prior to the date set for receipt of proposals; however, in the revised FAR, FAR § 15.206(c) states that “[a]mendments issued after the established time and date for receipt of proposals shall be issued to all offerors that have not been eliminated from the competition.” FAR, *supra* note 3, § 15.206(c).

⁸⁸ Fort Biscuit Co., Comp. Gen. B-247319, May 12, 1992, 92-1 CPD ¶ 440.

⁸⁹ *Id.* at 2.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 3.

⁹³ The Staubach Co., Comp. Gen. B-276486, May 19, 1997, 97-1 CPD ¶ 190.

⁹⁴ *Id.* at 2.

⁹⁵ *Id.* The four boxes containing the materials were located at New York’s La Guardia Airport’s Lost and Found. *Id.* at 3.

⁹⁶ *Id.* at 3.

⁹⁷ *Id.* at 5.

⁹⁸ *The Staubach Co.*, 97-1 CPD ¶ 190, at 5.

While the government's application of the late proposal rules sometimes may seem harsh, and the government may lose the benefit of proposals that offer terms more advantageous than those that were timely received, protecting the integrity of the procurement process by ensuring that fair and impartial treatment is guaranteed and maintaining confidence in the competitive system are of greater importance than the possible advantage to be gained by considering a late proposal in a single procurement.⁹⁹

Staubach, however, represents the exception rather than the rule. Generally, GAO decisions reflect a desire to consider late proposals in order to provide the contracting officer with potentially better bids.¹⁰⁰

D. GAO's Interpretation is in Line with CICA's Goals

As mentioned above, CICA formally authorized the GAO to adjudicate bid protests,¹⁰¹ yet it also requires executive agencies to use "full and open competition."¹⁰² The GAO's enhance competition exception to the late-is-late rule meets CICA's competition requirements by ensuring the Government considers all proposals, thereby acquiring goods or services at the most competitive price. In sum, the GAO decisions overwhelmingly reflect an internalization of CICA's intent. Now consider the judicial forum's approach to the GAO's exception to the FAR's late-is-late rule.

V. COFC's Approach—Plain Meaning Judicial Interpretation

A. Introduction to COFC

The COFC is an Article I tribunal first established in 1855 with specific congressional grants of jurisdiction found largely in the Tucker Act, passed in 1887.¹⁰³ The COFC gained "broad government-contracts-related jurisdiction over bid protests" with the passage of the Administrative Dispute Resolution Act of 1996 (ADRA).¹⁰⁴ Prior to the ADRA, judicial bid-protest jurisdiction was generally split between the COFC (pre-award protests) and federal district courts (post-award protests).¹⁰⁵ Its regulatory standard of judicial review for agency actions is to determine if an agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."¹⁰⁶ Recently, the court addressed the GAO's internal precedent in providing late bidders exceptions to the FAR's late-is-late rule. The COFC's bright line determination stands in sharp contrast to the GAO's approach.

B. COFC's Concern with the GAO's Enhanced Competition Exception to the Late-Is-Late Rule

1. *A Return to the Black Letter FAR*

As recounted earlier, Geo-Seis Helicopters submitted a proposal to the MSC to provide three two-helicopter detachments to support U.S. Navy operations in the Pacific and Indian Oceans.¹⁰⁷ The agency awarded the contract to a late bidder, and resulted in Geo-Seis Helicopters protest to the GAO.¹⁰⁸ The GAO denied the protest.¹⁰⁹ In response, Geo-Seis Helicopters brought an action at the COFC on 9 March 2007.¹¹⁰

⁹⁹ *Id.* (citing Phoenix Res. Group, Inc., B-240840, Dec. 21, 1990, 90-2 CPD ¶ 514, at 5).

¹⁰⁰ *E.g., Ivey Mech. Co.*, Comp. Gen. B-272764, Aug. 23, 1996, 96-2 CPD ¶ 83.

¹⁰¹ 31 U.S.C. § 3553 (2006).

¹⁰² 10 U.S.C. § 2304.

¹⁰³ Hannah Brody & David Hickey, *Jurisdiction in the U.S. Court of Federal Claims: A Primer*, 20 ANDREWS GOV'T CONT. LITIG. REP. 11, 12 (2006).

¹⁰⁴ *Id.* at 14.

¹⁰⁵ Metzger & Lyons, *supra* note 57, at 1225.

¹⁰⁶ Administrative Procedure Act, 5 U.S.C. § 706 (2006).

¹⁰⁷ Geo-Seis Helicopters, Inc., Comp. Gen. B-299175, B-299175.2, Mar. 5, 2007, CPD ¶ 135.

¹⁰⁸ *Id.* at 2.

¹⁰⁹ *Id.*

¹¹⁰ *Geo-Seis Helicopters, Inc.*, 77 Fed. Cl. 633, 637 (2007).

In *Geo-Seis Helicopters v. United States*, the COFC ruled in favor of Geo-Seis Helicopters holding that the contracting agency circumvented the FAR's late-is-late rule.¹¹¹ The court stated that the FAR must be interpreted by its plain meaning: "As with a statute, this court presumes that an agency or other regulatory body says in a regulation what it means and means in a regulation what it says."¹¹² The plain language of the late-is-late rule requires submissions to be on time with few exceptions, reasoned the court.¹¹³ It noted several GAO decisions where the GAO agreed that late proposals were acceptable if one of the exceptions applied.¹¹⁴ Furthermore, the COFC held that the agency violated the late-is-late rule by issuing "post-expiration amendments to [Presidential's] solicitation extending the closing dates."¹¹⁵ It dismissed the GAO's contention that extending the deadline was not prohibited by declaring the extension unwarranted because "a standard rule of statutory construction—and one equally applicable to interpreting regulations—is that a court must not give an enactment a construction that has been specifically considered and rejected."¹¹⁶

The "construction" that had been "specifically considered and rejected" turns out to be a rule the FAR Council had proposed but abandoned when revising the FAR in 1996 and 1997. As the next section will show, the court took a long look at the regulatory history of this FAR section when deciding the case.

2. Amendments to Solicitation Explicitly Rejected by FAR Council

In 1997, the FAR Council revised FAR Part 15, Contracting by Negotiation.¹¹⁷ During the redrafting in 1996 and 1997, the Council proposed including a provision granting the contracting officer discretion to "accept late proposals when [it] . . . was in the government's interest."¹¹⁸ A second rewrite limited the contracting officer's discretion to accept late proposals in cases when the Government or a third party was at fault for the late submission.¹¹⁹ After considering public comments, especially those concerning the draft rule giving contracting officers more discretion, the FAR Council promulgated a hard and fast late-is-late rule without granting the contracting officer authority to deviate from the rule.¹²⁰

Consequently, in deciding *Geo-Seis Helicopters*, the COFC reasoned that the agency must "adhere to the categorical reality of the 'late is late' rule" and not ask the court for an application of the FAR as "it should have been written."¹²¹ The court then considered whether the agency's decision was arbitrary and capricious.

3. Arbitrary & Capricious in Application

The court viewed the agency's interpretation of the late rule as "allow[ing] the government arbitrarily to claim in some circumstances that the rule precludes it from considering a late proposal and in other circumstances to assert that the rule is not a bar to issuing amendments to the solicitation that would permit such consideration."¹²² The court also validated the practical value of the late-is-late rule in the competitive negotiation system claiming that "it alleviates confusion, ensures equal treatment of all offerors, and prevents an offeror from obtaining a competitive advantage that may accrue where an offeror is permitted to submit a proposal later than the deadline set for all competitors."¹²³ This article next explores the potential broader application of the court's holding.

¹¹¹ FAR, *supra* note 3, § 52.215-1(c)(3)(ii)(A).

¹¹² *Geo-Seis Helicopters, Inc.*, 77 Fed. Cl. at 640.

¹¹³ *Id.*

¹¹⁴ *Id.* at 641.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 643.

¹¹⁷ Ralph C. Nash & John Cibinic, *The FAR Part 15 Rewrite: A Final Scorecard*, 11 NASH & CIBINIC REP. NO. 12, ¶ 63 (1997).

¹¹⁸ *Id.* at 67.

¹¹⁹ *Id.* at 63.

¹²⁰ *Id.*

¹²¹ *Geo-Seis Helicopters, Inc.*, 77 Fed. Cl. at 646.

¹²² *Id.*

¹²³ *Id.* (quoting *Argencord Mach. & Equip., Inc. v. United States*, 68 Fed. Cl. 167, 173 (2005)).

VI. Effect of COFC Decision on GAO's Exceptions to the Late-Is-Late Rule

Contracting officers are unlikely to rely on GAO's created exceptions to the late-is-late rule because any protest to GAO may be further filed at the COFC for judicial adjudication.¹²⁴ In all probability, the *Geo-Seis Helicopters* decision will be followed by other COFC judges in future bid protest decisions because the FAR's language is unambiguous and the FAR Council's rejection of the exception is clear. In comparison, the GAO's internal exception is little more than precedence created and maintained by its attorneys.

Furthermore, contracting officers may be justified in expanding the interpretation of *Geo-Seis Helicopters* and forego any "reliance on internally developed [GAO] doctrines that are at odds with judicial interpretation of procurement statutes and regulations."¹²⁵ If a GAO-created rule is outside the black letter law, it may run aground if challenged at COFC.¹²⁶ Consider the aftermath of *Geo-Seis Helicopters*' victory at the COFC.¹²⁷ *Geo-Seis Helicopters* filed for attorneys' fees and costs under the Equal Access to Justice Act (EAJA).¹²⁸ Eligibility for fees is based upon meeting a four-prong test, of which one prong is relevant to this discussion: the Government's position was not "substantially justified."¹²⁹

The Government responded by arguing that its position on the issue (the GAO-created exception to the late-is-late rule) was "substantially justified" because there was "significant GAO precedent."¹³⁰ Nonetheless, the COFC awarded attorney's fees and costs to *Geo-Seis Helicopters* holding that "the government's reliance on the set of GAO decisions is problematic"¹³¹ because "there is no justification for the government's position when clear, unambiguous regulations directly contradict that position."¹³² The court reasoned that the "explicit, unambiguous regulations [late-is-late rule] directly contradict" the agency's position that following GAO precedents was substantially justified.¹³³

In the wake of the COFC's recent holding, the GAO should provide contracting officers clear guidance by incorporating COFC precedent into its decisions and internal rules, thereby "avoid[ing] conflicting guidance and [facilitating a] more unified procurement-law jurisprudence."¹³⁴ The GAO should do this even though it is not bound by COFC decisions.

VII. Conclusion

This article examined the development of the FAR's late-is-late rule in sealed bidding and competitive negotiations. It also considered how the GAO and COFC view its applicability, specifically in the matter of *Geo-Seis Helicopters*' protest of an award given to a competitor after the contracting officer extended submission deadlines. The differing conclusions of the GAO and COFC are institutional: GAO focused its efforts on meeting the spirit of CICA's enhanced competition mandate, while COFC responded with a letter-of-the-law, plain-meaning judicial interpretation.

The results of the COFC's decision in *Geo-Seis Helicopters* may transform GAO's decisions and internal policies, not only in competitive negotiations, but across the spectrum of procurement statutes and regulations. Ultimately, an isolated award of attorneys' fees and costs for failing to follow the plain language of the FAR is one thing; multiple awards are likely to bring the GAO closer to the COFC's way of thinking.

¹²⁴ 28 U.S.C. § 1491(b)(1) (2006).

¹²⁵ Metzger & Lyons, *supra* note 57, at 1266.

¹²⁶ *Id.* at 1267.

¹²⁷ Ralph C. Nash, *Following Government Accountability Office Guidance: A Risky Move?*, 21 NASH & CIBINIC REP. NO. 12, ¶ 68 (2007).

¹²⁸ Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A).

¹²⁹ *Geo-Seis Helicopters, Inc. v. Unites States*, 79 Fed. Cl. 74, 76 (2007).

¹³⁰ *Id.* at 77.

¹³¹ *Id.* at 78.

¹³² *Id.* at 79 (quoting *Filtration Dev. Co. v. United States*, 63 Fed. Cl. 612, 621 (2005)).

¹³³ *Id.* at 78.

¹³⁴ Metzger & Lyons, *supra* note 57, at 1267.