

## Note from the Field

### Limiting Application of the Late Proposal Rule: One Time, One Place, One Method

Major Gregg A. Engler<sup>1</sup>

*A government agency has issued a solicitation requiring interested contractors to submit electronic copies of their proposals to a digital location, along with three paper copies to two different geographic locations. The solicitation instructs the contractors that they must submit the electronic and paper copies to the designated locations by the time set for receipt of proposals. Contractor X submits all required copies of its proposal to the proper locations on time. Contractor Y submits a single paper copy of its proposal to only one location on time but does not bother to submit an electronic copy. Contractor Z submits no paper copies of its proposal, but does submit a timely electronic copy. The contracting officer (CO) wants to reject the proposals of Contractors Y and Z as late. Should she do so?*

The general rule governing the late submission of proposals is that late is late.<sup>2</sup> Normally, a CO can confidently reject proposals received after the exact time specified for the receipt.<sup>3</sup> Although the General Accounting Office (GAO) has strictly followed this mandate,<sup>4</sup> a CO must not substitute form over substance in its application. Solicitations requiring multiple submission methods make evaluations of proposals more efficient and advanced technology makes multiple submission methods possible. Use of multiple submission methods, however, can obscure limitations on a CO's discretion to reject submissions as late.<sup>5</sup> The GAO recently revisited limitations on applying the late rule in *Tishman Construction Corp.*<sup>6</sup>

In *Tishman*, the GAO applied form-over-substance limitations on the late rule, to the modern electronic era. The solicitation required offerors to submit both paper and electronic versions of their proposals. In the solicitation's submission instructions, it specifically stated that the paper copy would be the "official copy for recording timely receipt of proposals."<sup>7</sup> The protester submitted a timely electronic version of its proposal, but submitted its paper version seventy-three minutes late. As a result, the CO rejected the protester's proposal as late.<sup>8</sup>

---

1. The author is currently assigned as a trial attorney at the U.S. Army Contract Appeals Division.

2. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 15.208(b) (July 2003) [hereinafter FAR]. The FAR provides as follows:

(1) Any proposal, modification, or revision, that is received at the designated Government office after the exact time specified for receipt of proposals is "late" and will not be considered unless it is received before award is made, the contracting officer determines that accepting the late proposal would not unduly delay the acquisition; and—

(i) 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

(ii) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of proposals and was under the Government's control prior to the time set for receipt of proposals; or

(iii) It was the only proposal received.

(2) However, a late modification of an otherwise successful proposal, that makes its terms more favorable to the Government, will be considered at any time it is received and may be accepted.

*Id.*

3. *Id.*

4. See, e.g., Logistics Mgmt. Inst., Comp. Gen. B-276143, May 15, 1997, 97-1 CPD ¶ 186 (seven minutes late); Med-Nat'l, Inc., Comp. Gen. B-277430, Sept. 8, 1997, 97-2 CPD ¶ 67; Koba Assocs., Inc., Comp. Gen. B-265854, Nov. 8, 1995, 95-2 CPD ¶ 212 (three minutes late); Hallcrest Sys., Inc., Comp. Gen. B-215328, Sept. 24, 1984, 84-2 CPD ¶ 334 (one minute late); Priest & Fine, Inc., Comp. Gen. B-213606, Mar. 27, 1984, 84-1 CPD ¶ 358 (two minutes late).

5. FAR, *supra* note 2, at 15.208(b).

6. Comp. Gen. B-292097, May 29, 2003, 03-1 CPD ¶ 94.

7. *Id.*

8. *Id.*

In addressing the CO's use of the late rule to enforce compliance with multiple submission methods, the GAO re-examined its decision in *Abt Associates, Inc.*<sup>9</sup> In *Abt*, the agency required multiple submission locations.<sup>10</sup> The agency required offerors to submit their proposals both to the agency's project office in Zaire and to its regional contracting office in the Ivory Coast.<sup>11</sup> Abt's proposal reached the regional contracting office in the Ivory Coast on time, but was five days late to the project office in Zaire.<sup>12</sup> Consequently, the CO rejected Abt's proposal as late.<sup>13</sup>

Arguing for rejection of Abt's proposal, the agency claimed that the continuity of the program being competed was at stake and that time was limited.<sup>14</sup> The agency required multiple delivery locations to properly coordinate the evaluation of proposals with the government of Zaire while conducting the procurement out of the agency's regional contracting office in the Ivory Coast.<sup>15</sup>

The GAO acknowledged that an agency may impose conditions on offerors that reflect the "actual and reasonable needs of the agency," but rejected the notion that the needs of the agency

could trump basic contract principles.<sup>16</sup> According to the GAO, timely submission of one complete proposal legally represented the submission of an offer that could be evaluated and accepted, resulting in a binding contract.<sup>17</sup> The principles of offer and acceptance did not depend on the agency's desire for multiple copies<sup>18</sup> or multiple submission locations. Thus, applying the late rule, in this instance, exalted form over substance.<sup>19</sup>

The GAO noted that this outcome would be different if an offeror could obtain an unfair advantage by a late submission to the second location, but found no such advantage in *Abt*.<sup>20</sup> Consequently, the GAO characterized Abt's failure to timely deliver copies to both locations as an "informality or minor irregularity"<sup>21</sup> that the CO should have waived.<sup>22</sup>

The GAO's *Abt* decision provided the blueprint for *Tishman*.<sup>23</sup> Requiring submission by two methods, electronic and paper, was analogous to requiring submission to two locations.<sup>24</sup> Even though the solicitation in *Tishman* specifically gave notice that the official copy for timeliness purposes was the paper copy, timely submission of the electronic copy still provided an offer that could be accepted.<sup>25</sup> As such, the

---

9. Comp. Gen. B-226063, May 14, 1987, 87-1 CPD ¶ 513.

10. *Id.*

11. *Id.* A complete submission actually included a technical proposal along with a business proposal. Offerors were required to submit three copies of their technical proposal and one copy of their business proposal to the agency's project office in Kinshasa, Zaire, and one copy of their technical proposal, along with two copies of their business proposal, to the agency's contracting office in Abidjan, Ivory Coast by 3:00 p.m. local time on 31 December 1986. *Id.* at 1-2.

12. *Id.* at 2. The contractor blamed this mishap on misrouting by the courier service. As a result, the requisite submission did not reach the project office in Kinshasa, Zaire until 5 January 1987. *Id.*

13. *Id.*

14. *Id.* at 3.

15. *Id.*

16. *Id.*

17. *Id.* at 4-5.

18. The GAO has consistently held that submitting less than the required number of proposal copies is a minor irregularity that agencies should waive. *See, e.g.,* RGII Techs., Inc., Comp. Gen. B-278352.2, B-278352.3, Apr. 14, 1998, 98-1 CPD ¶ 130 (submitting required copies but omitting original); Limbach Co., 51 Comp. Gen. 329 (1971).

19. *See* Abt Assocs., Inc., Comp. Gen. B-226063, May 14, 1987, 87-1 CPD ¶ 513.

20. *Id.* The GAO held the following:

[There was] no possibility that Abt, by virtue of the late delivery of its proposal to the second location, either could take advantage of changed circumstances or of an improper disclosure of information concerning other offers during the interim, since the contents of its proposal already had been disclosed at the first location.

*Id.* at 6.

21. A CO has the discretion to waive informalities and minor irregularities in proposals. FAR, *supra* note 2, at 52.215-1(f)(3); *see also id.* at 14.405 (defining a minor informality or irregularity as one "that is merely a matter of form and not of substance").

22. *Abt Assocs., Inc.*, 87-1 CPD ¶ 513, at 6-7.

23. Tishman Constr. Corp., Comp. Gen. B-292097, May 29, 2003, 03-1 CPD ¶ 94.

agency's attempt to designate the paper copy as the official copy was meaningless for timeliness purposes.<sup>26</sup>

As in *Abt*, the GAO found no possibility that unfair advantage could result from consideration of Tishman's proposal.<sup>27</sup> Tishman's failure to submit its paper copy on time was a minor informality given that it submitted a complete copy of its proposal by the other required method of submission.<sup>28</sup> Thus, as in *Abt*, the CO should have waived this minor informality. In its opinion, the GAO acknowledged that a CO retains discretion to waive minor irregularities in proposals and indicated that failure to grant a waiver under the circumstances of this case was an abuse of that discretion.<sup>29</sup>

The GAO's decision in *Tishman* is clear and probably could have been foretold given its previous decision in *Abt*.<sup>30</sup> The larger picture, however, is important for practitioners. Agencies may instruct offerors to submit multiple copies of their pro-

posals through multiple methods and to multiple locations to assist their evaluation and logistical needs. For purposes of the late rule, however, only one timely copy submitted to one authorized location by one authorized method is necessary.<sup>31</sup> If a CO receives one timely copy at an authorized location by authorized means, he should not reject it as late unless the particular circumstances indicate that the offeror in question would receive an unfair advantage.<sup>32</sup>

In the initial hypothetical, the CO should not reject the proposals of contractors *Y* and *Z* as late. They each submitted at least one timely copy of their proposals by one authorized method and to one authorized location. Additionally, there is no indication that contractors *Y* and *Z* have gained or could gain an unfair advantage.<sup>33</sup> Consequently, as the *Tishman* opinion reminds us, the CO should consider their proposals along with the proposal of Contractor *X*.

---

24. *Id.* at 3, 8.

25. *Id.*

26. *Id.*

27. The GAO stated that the late rule alleviates confusion, ensures equal treatment of offerors, and prevents one offeror from obtaining a competitive advantage as a result of being permitted to submit a proposal later than the deadline set for all competitors. *Id.* at 7 (citing *Inland Serv. Corp.*, Comp. Gen. B-252947.4, Nov. 4, 1993, 93-2 CPD ¶ 266). The policy against confusion and unequal treatment, however, appears significant only as it relates to whether an offeror has received an unfair advantage. The GAO summarily noted that the unequal treatment of Tishman was not material.

28. *Id.* at 8-9.

29. *See id.* at 8-9.

30. *See Tishman Constr. Corp.*, 03-1 CPD ¶ 94; *Abt Assocs., Inc.*, Comp. Gen. B-226063, May 14, 1987, 87-1 CPD ¶ 513, at 6-7. Indeed, the GAO emphasized that it had notified the agency at an outcome prediction alternative dispute resolution conference that Tishman's protest was likely to be sustained for the reasons explained in its opinion. The agency declined to take corrective action. *See Tishman Constr. Corp.*, B-292097, May 29, 2003, 03-1 CPD ¶ 94.

31. *See, e.g.*, *RGII Techs., Inc.*, B-278352.2, B-278352.3, Apr. 14, 1998, 98-1 CPD ¶ 130 (submitting required copies but omitting original).

32. *See, e.g., id.*

33. An unfair advantage could occur where an offeror that is required to submit both electronic and hard copies of its proposal, submits its electronic copy on time but submits its hard copy late after taking additional time to improve its proposal. The CO could reject the hard copy submission as late because the additional time could be construed as an unfair advantage. The FAR, however, does allow the late modification of an otherwise successful proposal where the terms become more favorable to the government. FAR, *supra* note 2, at 15.208(b)(2); *see also id.* at 14.304(b)(2). If the modifications are not more favorable to the government, the agency should reject them as late because the additional time to make those modifications amounts to an unfair advantage over those who did not get the additional time. An unfair advantage could also result where late modifications make a technically unacceptable proposal acceptable. Consequently, the contracting officer should not accept a late modification that attempts to make it technically acceptable.