

A RARE CASE OF THE COURT WAIVING A MINOR INFORMALITY IN A LATE OFFER

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As readers of this blog know well, the general rule in the submission of proposals in a negotiated procurement is found in Federal Acquisition Regulation (“FAR”) 15.208, which states that “[a]ny 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 [except for some very specific exceptions]. The rule is repeated in FAR 52.212-1, Instructions to Offerors—Commercial items, a clause which is required to be in all commercial item solicitations. Generally, late proposals are carefully scrutinized and routinely not considered. But recently, the Court of Federal Claims, relying on another provision in FAR 52.212-1, waived a lateness in *part* of a proposal as a “minor informality,” thereby requiring the agency to consider the offeror’s submission. *T Square Logistic Services Corp., v. United States*, No. 17-744C (Fed. Cl. Oct. 16, 2017).

Before discussing *T Square*, it is worth looking at the FAR language on “informalities” in the context of submission of offers and making of awards. The following are the parts of the FAR that use this term in connection with offers:

- (1) **FAR 14.405 Minor informalities or irregularities in bids.** (This clause applies to all acquisitions using sealed bidding)

A minor **informality** or irregularity is one that is merely a matter of form and not of substance. It also pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders. The defect or variation is immaterial when the effect on price, quantity, quality, or delivery is negligible when contrasted with the total cost or scope of the supplies or services being acquired. The contracting officer either shall give the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid or waive the deficiency, whichever is to the advantage of the Government.

Examples of minor **informalities** or irregularities include [sets forth items which specifically relate to sealed bidding, and generally are not an issue in negotiated procurement].

There is no comparable discussion of “minor informalities or irregularities” in Part 15, negotiated procurement. The following clauses specifically apply to negotiated procurement.

- (2) **52.212–1 Instructions to Offerors—Commercial Items.** (Must be included in all commercial item solicitations)

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(g) Contract award (not applicable to Invitation for Bids). The Government intends to evaluate offers and award a contract without discussions with offerors. Therefore, the offeror's initial offer should contain the offeror's best terms from a price and technical standpoint. However, the Government reserves the right to conduct discussions if later determined by the Contracting Officer to be necessary. The Government may reject any or all offers if such action is in the public interest; accept other than the lowest offer; and waive **informalities** and minor irregularities in offers received....

(3) 52.214–10 Contract Award—Sealed Bidding. (Must be included in all sealed bidding solicitations, except those for construction)

(a) The Government will evaluate bids in response to this solicitation without discussions and will award a contract to the responsible bidder whose bid, conforming to the solicitation, will be most advantageous to the Government considering only price and the price-related factors specified elsewhere in the solicitation.

(b) The Government may (1) reject any or all bids, (2) accept other than the lowest bid, and (3) waive **informalities** or minor irregularities in bids received.

(4) 52.214–19 Contract Award—Sealed Bidding—Construction. (Must be included in all sealed bidding solicitations for construction)

(a) The Government will evaluate bids in response to this solicitation without discussions and will award a contract to the responsible bidder whose bid, conforming to the solicitation, will be most advantageous to the Government, considering only price and the price-related factors specified elsewhere in the solicitation.

(b) The Government may reject any or all bids, and waive **informalities** or minor irregularities in bids received.

(5) 52.215–1 Instructions to Offerors—Competitive Acquisition. (Must be included in all solicitations for negotiated acquisitions).

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(f) Contract award. (1) The Government intends to award a contract or contracts resulting from this solicitation to the responsible offeror(s) whose proposal(s) represents the best value after evaluation in accordance with the factors and subfactors in the solicitation.

(2) The Government may reject any or all proposals if such action is in the Government's interest.

(3) The Government may waive **informalities** and minor irregularities in proposals received....

The facts of *T Square* were that the solicitation for base supply and vehicle operation and maintenance stated that offerors were to submit both paper copies of their proposal and an identical electronic copy on a compact disk, no later than a certain time, to a location at Sheppard Air Force Base, TX. T Square's offer was scheduled to be delivered by Federal Express on the due date by the required time. However, four hours before the proposals were due, Federal Express notified T Square that the delivery time had been delayed due to inclement weather. T Square contacted an employee located at Sheppard and advised her that "pending further direction from the Air Force, she might be require to print out paper copies" of the proposal for timely delivery to the office on the base. T Square also contacted the contracting officer and contract specialist by email, informed them of the anticipated FedEx delay, and attached a timely electronic copy of its proposal. The contract specialist replied and stated it was

"not a problem, we understand that Fedex deliveries are beyond your control. Your receipt from FedEx shows that you shipped your proposal prior to the due date/time so we will be able to accept the hard copies when they arrive, even after [the time due today]."

Relying on the contract specialist's assurances, T Square directed its employee at Sheppard not to print and deliver hard copies of the proposal.

The Air Force rejected T Square's proposal, noting that although an email containing an electronic copy had been received on time, the compact disk, which was required, had been received later than the due date and time. The rejection noted that government email correspondence had been sent stating that the email submission would be acceptable—but it had been further reviewed by the contracting officer and legal office, and “that response lacked the authorization to materially alter the proposal submission requirements in FAR 52.212-1.” The rejection noted the section stating that “late is late” and found no reason to consider T Square's proposal.

The Court reviewed the record and concluded that the Air Force had erred because it failed to consider whether to waive delivery of T Square's paper copies as an informality or minor irregularity. The Court noted that the contract specialist had indicated in his email that late delivery of paper copies and the compact disk would be waived as inconsequential—and based on this, T Square discontinued its effort to have a local employee hand-deliver them on time.

Most important, however, was the Court's analysis of “minor informalities.” The Court noted that there is no definition of “minor informality” in the FAR for negotiated procurements, and the Air Force had made clear to T Square (through the contract specialist's email) its view of what constituted a minor, and thus, waivable—informality. The Court stated that the “plain terms of the Contract specialist's written assurance indicated that the contracting office had decided that delivery of the written copies was a ‘minor informality.’” Further, the submission of an electronic attachment to an email could easily be waived as a minor informality, said the Court, relying on FAR 14.405, which defines a minor informality as merely a matter of form and not substance.

Finally, the Court noted that “plaintiff's email submission was complete, its paper copies and the compact disc had already been shipped, and plaintiff had no opportunity to make changes or improvements in its proposal [and] the award had not been made prior to delivery of T Square's proposal. The court concluded that the Air Force had erred in failing to adequately consider and document whether a waiver of the later delivery of plaintiff's paper copies was a mere informality or minor irregularity. The Court ordered the agency to reinstate T Square's proposal for consideration of award.

Takeaway: This is a rare case where either the Court or the Government Accountability Office has required an agency to consider a proposal *that was submitted late* in accordance with the requirements of a solicitation. It points out the need for agencies to carefully review all the facts, circumstances and regulations, and not merely reject as late a proposal that has some minor informality in its delivery. The whole purpose of the “late is late” rule is to ensure fairness in the procurement system. When something like the T Square facts arise, the agency needs to look at them through the lens of fairness, ensuring what the FAR says—a minor informality can be waived--provided such a waiver is *not* prejudicial to other offerors.

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