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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Environmental Protection Agency--Reconsideration

File: B-297077.3

Date: January 25, 2006

Kenneth A. Redden, Esq., Environmental Protection Agency, for the agency.
Paul E. Jordan, Esq., and Jerold D. Cohen, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Where, in establishing a blanket purchase agreement under the Federal Supply Schedule (FSS) program, an agency conducts a competition, including issuing to FSS contractors a solicitation with a statement of work and evaluation criteria, the agency is not free to disregard either the requirements stated in the solicitation or its evaluation criteria.

DECISION

The Environmental Protection Agency (EPA) asks that we reconsider our decision in Haworth, Inc., B-297077, B-297077.2, Nov. 23, 2005, 2005 CPD ¶ 215, in which we sustained Haworth's protest of the EPA's issuance of a blanket purchase agreement (BPA) to Herman Miller, Inc. (HMI) under a request for quotations (RFQ) for furniture, including design and installation, for the Potomac Yard Complex buildings in Crystal City, Virginia.

We deny the request for reconsideration.

The RFQ was issued to six vendors holding contracts under General Services Administration Federal Supply Service (FSS) schedule 71 I for office furniture. The RFQ contemplated that the EPA would obtain its furniture as a single "Project," consisting of design and installation of some 1,520 workstations and 180 private offices, along with conference rooms and miscellaneous furniture. The RFQ contemplated award of the BPA on a "best value" basis considering cost/price and four equally-weighted technical evaluation factors--product, environmental factors, past performance, and management approach. Non-price factors, combined, were considered significantly more important than cost/price.

After receipt of quotations from three vendors, including Haworth and HMI, the agency selected HMI as the vendor that had provided the strongest technical submission and second-lowest overall cost. Haworth, whose quotation was priced higher than HMI's, was ranked second technically. The EPA issued a BPA to HMI and subsequently issued a unilateral modification, appearing to state that the BPA was an indefinite-quantity contract. Haworth filed a protest with our Office challenging the technical evaluations, specifically asserting that HMI's quotation was technically unacceptable and that the evaluators improperly downgraded Haworth's quotation. In sustaining Haworth's protest, we found that the EPA had erroneously concluded that HMI's quotation met requirements for chair-stacking capacity and provision of Forest Stewardship Council-certified wood conference tables.¹ We also found that the agency had erroneously downgraded Haworth's quotation under the "environmental factors" evaluation factor. We concluded that the EPA appeared to have overstated its actual needs as evidenced by the fact that it either did not consider certain requirements to be significant to its overall needs, or that some items that deviated from the requirements were acceptable.

Our Bid Protest Regulations require that a party requesting reconsideration show that our prior decision contains either errors of fact or of law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.14(a) (2005).

In requesting reconsideration, EPA asserts that our decision contains an error of law regarding the standard of review of this procurement. In this regard, our decision stated the following (at 3):

Under the FSS program, agencies are not required to conduct a competition before selecting a vendor that represents the best value and meets the agency's needs at the lowest overall cost. Federal Acquisition Regulation (FAR) § 8.404(a); Computer Prods., Inc., B-284702, May 24, 2000, 2000 CPD ¶ 95 at 4. However, where, as here, an agency handles the selection of a vendor for an FSS order like a competition in a negotiated procurement, and a protest is filed challenging the outcome of the competition, we will review the agency's actions to ensure that the evaluation was reasonable and consistent with the terms of the solicitation. Id. at 4-5.

EPA asserts that our statement that no competition was required under the FSS program was in error, and that, because this procurement involved the purchase of

¹ Our decision did not address all the areas Haworth identified in which HMI's quotation allegedly did not comply with other specifications. Nonetheless, we expressed our expectation that the agency would review those issues in the course of implementing our recommendation.

services subject to FAR § 8.405-2, entitled “Ordering procedures for services requiring a statement of work,” the agency in fact was required to conduct a competition. The cited regulation sets out procedures to be used in the circumstances named in the provision, including a requirement that an RFQ with the statement of work be furnished to schedule contractors, and a requirement to evaluate all responses received, and to select the best value quotation, based on evaluation criteria provided to the schedule holders.

EPA further asserts that our finding that the agency’s evaluation of Haworth’s and HMI’s quotations was unreasonable reflects a failure on our part to appreciate what EPA terms “the relaxed competition requirements of the FSS Program” as compared to the competition requirements applicable to negotiated procurements conducted under FAR Part 15.

FAR § 8.405-2 requires, where an agency is ordering FSS services at a value exceeding the micro-purchase threshold and requiring a statement of work (or establishing a BPA for such services), that the agency follow certain competitive procedures in the acquisition, including issuing a solicitation with a statement of work and evaluation criteria, and then evaluating responses received using those evaluation criteria. Our decision stated the general rule regarding the lack of a requirement for competition under the FSS; to the extent that the agency’s contention in its request for reconsideration is that there are situations in which subpart 8.4 of the FAR requires agencies to issue solicitations and conduct competitions before an FSS order can be placed, its point is well taken.

That, however, does not warrant granting the request for reconsideration of the merits of our decision. The point of the above-quoted language of our decision, as well as the crux of the decision itself, is that whenever an agency induces vendors to compete based on stated requirements and specified ground rules, the agency is not free to disregard either those requirements or those ground rules—regardless of whether the agency initiated the competition voluntarily or was required to do so by a particular provision in FAR subpart 8.4. We view it as fundamental to any acquisition that competitors be treated fairly, Armour of Am., B-237690, Mar. 19, 1990, 90-1 CPD ¶ 304 at 3, and fairness in competitions for federal procurements is largely defined by an evaluation that is, as we indicated in our decision, reasonable and consistent with the terms of the solicitation. While we believe that the government owes this basic fairness in the conduct of a competition to the competitors, even where no specific provision in a particular regulation calls for it, we note that in FAR § 8.405-2, which the agency states it was following here, it is explicitly required: the “ordering activity shall evaluate all responses received using the evaluation criteria provided to the schedule contractors.” FAR § 8.405-2(d). Nothing in FAR § 8.405-2, nor any aspect of what the agency calls “the relaxed competition requirements of the FSS Program,” waives the requirement for fairness in the conduct of a federal procurement.

In this procurement, as discussed in our decision, the criteria called for an evaluation of products and environmental factors based on the information included in the technical submissions. RFQ §§ 4.1.1, 4.1.2. In turn, the RFQ's instructions for the technical submissions warned vendors that they had the burden of proof in demonstrating how their products best responded to the technical requirements and were required both to document environmental features and to "provide products that match the requirements." RFQ § 3.1.2. As our decision explains, the EPA's selection was inconsistent with these provisions.

The core of EPA's request for reconsideration is its argument that the quotations in this procurement were not required to comply precisely with the terms of the RFQ since, unlike an offer, a quotation is not subject to government acceptance; the agency maintains that any apparent minor omissions by the awardee therefore should not provide a basis for sustaining a protest.

We first note that while vendors were given the option of identifying the discrepancies between products offered and requirements noted, our decision (at 5) makes plain that the RFQ did not give vendors the option of supplying a noncompliant product. Notwithstanding the difference between offers and quotations (whether under FAR Subpart 8.4 or otherwise), a selection based on the competitive quotation of a noncompliant product is objectionable where other firms in the competition are prejudiced by the selection, that is, where the other firms might have been able to meet the agency's needs if afforded an opportunity to compete based on the relaxed requirements. Armour of Am., supra, at 4. Here, we found that Haworth was prejudiced by the relaxation of the statement of work requirements for HMI (and by the agency's conceded error concerning Haworth's evaluation under the environmental factors criterion). Where an agency determines that an item other than the one specified in the RFQ will meet its needs, it generally should amend the RFQ and reopen the competition. See Zarc Int'l, Inc., B-292708, Oct. 3, 2003, 2003 CPD ¶ 172 at 2. As we recommended in our decision (at 9), the EPA should "review its needs, revise the RFQ, if necessary, to reflect them, and solicit new quotations to ensure that all firms are afforded an equal opportunity to compete based upon the same set of requirements."

The request for reconsideration is denied.

Anthony H. Gamboa
General Counsel