

Shimamura



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Herman Miller Inc.

File: B-238690.2

Date: June 14, 1990

Else V. Friborg, for the protester.
Marsha Goodman, Esq., for Westinghouse Electric Corporation,
an interested party.
Harry G. Mason, Esq., Office of Chief Counsel, Internal
Revenue Service, for the agency.
Amy M. Shimamura, Esq., and Christine S. Melody, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Protest that contracting agency improperly continued negotiations with offerors under a request for quotations after the protester's initial protest was filed is denied, since General Accounting Office (GAO) Bid Protest Regulations do not require cessation of negotiations during the pendency of a protest; rather, the agency is only required to withhold contract award where notice of a protest is received from GAO prior to award, and to suspend contract performance where the agency receives GAO notice of a protest within 10 days of the contract award date.

2. Protest that contracting agency improperly failed to provide the protester with a copy of an amendment that removed a protested certification requirement from the solicitation is denied since the protester was no longer in the competitive range when the amendment was issued.

DECISION

Herman Miller Inc. protests the issuance by the Internal Revenue Service (IRS) of purchase order No. SE-NO-90-02431 to Westinghouse Furniture Systems for systems furniture and components for the IRS New Orleans District Headquarters Office, under General Services Administration (GSA) Federal Supply Schedule (FSS) contract No. GS-00F-002679. Herman

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Miller contends that the IRS improperly conducted the procurement; that the solicitation's restrictive specifications can only be met by Westinghouse; and that the quotations were improperly evaluated.

We deny the protest in part and dismiss it in part.

Request for quotations (RFQ) No. N0-90-002, was issued on December 8, 1989, to 22 contractors listed under the FSS covering furniture systems.^{1/} The RFQ required offerors to meet the FSS' general specifications and the IRS' supplemental specifications which were designed to meet the agency's particular needs. In this regard, the RFQ advised that the IRS had developed complete floor plans that took into consideration the physical constraints of the building (i.e., spacing of columns and other aspects of building design), safety and security requirements (GSA fire and safety regulations which require aisles that are 3 feet, 8 inches wide), and the functional relationships of various employees and activities. Additionally, the RFQ advised that due to these limitations, the actual physical dimensions of workstations should not vary from the specified dimensions by more than 2 inches per panel, as measured in any direction.

Four quotations were received from suppliers on the FSS. An evaluation revealed that three of the four offered workstations had a problem with "panel creep."^{2/} The government drafters of the specifications had included an acceptable allowance of 3 to 4 inches for "panel creep" in the floorplan drawings. Since Herman Miller's furniture had an apparent "panel creep" of nearly 12 inches, the protester was requested, by letter dated January 23, 1990, to verify its workstation sizes. Additionally, on February 14, the agency issued amendment No. 4 to the RFQ, which required the offerors to sign a Certificate of Technical Requirements designed to ensure that the offerors would provide workstations which would fit within the space available on the floorplan.

^{1/} FSS Group 71, part II, section E, FSC class 7110 for the period October 1, 1988, through September 30, 1991.

^{2/} "Panel creep" is the expansion of systems furniture beyond its stated dimensions because of the space needed for the necessary connectors between the furniture components.

Herman Miller protested the certification requirement to our Office on February 22. By letter dated March 9, the agency advised the protester that the certification requirement would be removed. On March 12, the IRS issued amendment No. 5, which removed the certification requirement and requested best and final offers (BAFO) by March 16. Herman Miller withdrew its protest on March 16.

Since Herman Miller was unable to resolve its "panel creep" problem, the agency determined that the protester's workstations did not meet the government's technical requirements. By letter dated March 12, Herman Miller was notified that its furniture was technically unacceptable and that its offer was no longer under consideration. Amendment No. 5, which requested BAFOs, was not mailed to the protester. After an evaluation of BAFOs in accordance with the FSS evaluation formula, the purchase order was issued to Westinghouse on March 19, based on its low total weighted price.

Upon learning of the award of the order to Westinghouse, Herman Miller filed this protest with our Office contending that the agency acted improperly by continuing negotiations with offerors after it filed its original February 22 protest with our Office and by failing to issue an amendment deleting the certification requirement. Herman Miller also alleges that the specifications are overly restrictive and favor one manufacturer, and that the quotations received were not evaluated properly.

With regard to Herman Miller's first contention, our Bid Protest Regulations do not require contracting agencies to suspend negotiations during the pendency of a protest. Agencies are required only to withhold contract award under a protested procurement when the agency receives notice of a protest from our Office prior to the award of a contract, 4 C.F.R. § 21.4(a) (1990), and to suspend contract performance when notice of a protest is received from our Office within 10 calendar days of the contract award date. 4 C.F.R. § 21.4(b). Thus, there is no basis for Herman Miller's contention that the IRS was required to suspend negotiations after its February 22 protest was filed with our Office. In any event, the IRS has advised us that no negotiations occurred during the pendency of the protest.

Herman Miller's next argument--that offerors were not notified that the certification requirement had been deleted--is without merit. Amendment No. 5, deleting the requirement and requesting BAFOs, was issued on March 12 to the three offerors remaining in the competitive range. With regard to Herman Miller, the record clearly indicates that

the firm had been eliminated from the competitive range prior to the March 12 amendment issuance date. The IRS therefore was not required to provide a copy of amendment No. 5 to Herman Miller since agencies are not required to request BAFOs from offerors which are no longer in the competitive range. See Federal Acquisition Regulation § 15.611(a).

Herman Miller also contends that the RFQ's specifications are restrictive and favor Westinghouse; and that the evaluation should not have been based on the offered products' compliance with the "design layout" specified by the agency.

Under our Regulations, protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals are required to be filed prior to the closing date. 4 C.F.R. § 21.2(a)(1). Here, the RFQ's supplemental specifications clearly indicated that there were physical and other constraints which required that the workstations offered be of specified dimensions and advised that allowance had been made for only 3 to 4 inches of "panel creep." The record also indicates that on December 20, amendment No. 1 to the RFQ provided Herman Miller and other offerors with floor plans, for informational purposes, which illustrated the functional relationships and architectural and structural limitations of the building. Herman Miller thus was on notice from the RFQ of the restrictions in the specifications on which the evaluation of offered products would be based and was required to file its protest prior to the January 12 deadline for quotations. Herman Miller's protest regarding the specifications and the evaluation method, filed on March 30, therefore is untimely.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel