

Case No. 120159

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-209035

DATE: December 20, 1982

MATTER OF: Tiernay Manufacturing Company .

DIGEST:

1. Solicitation's incorporation by reference of standard form 33A, which advises that award might be made on basis of initial proposals, is adequate notice to offerors that award might be made without discussions. Initial proposal which, in face of such advice, responds to requirement for firm-fixed prices with a reservation of right to negotiate prices may be disregarded and award made without discussions where there are sufficient remaining competitors to ensure that price is fair and reasonable.
2. Improper citation of procurement regulation in letter rejecting proposal is merely matter of form, not substance, where valid reasons for rejection are properly stated in rejection letter.

Tiernay Manufacturing Company (Tiernay) protests the award of a contract by the Department of the Air Force to Engineered Air Systems, Inc. (EASI), under request for proposals (RFP) No. F41608-81-R-3924. The contract is for air conditioning systems used in support of several aircraft. The Air Force awarded the contract on the basis of initial proposals. Tiernay contends that the Air Force improperly rejected Tiernay's purportedly lower cost proposal without conducting discussions. We deny the protest.

The Air Force initially issued this RFP in August 1981, to cover a 3-year requirement for diesel engine driven air conditioners. After several rounds of industry inquiry and comment and modifications to the RFP, the Air Force established a June 7, 1982, closing date for the receipt of proposals. The RFP incorporated the provisions of standard form 33A, as revised January 1978, and required offerors to submit firm-fixed prices for various order quantities. The RFP also contained an Economic Price Adjustment clause which

provided for an annual price review, based on certain indexes published by the Bureau of Labor Statistics, accompanied by price adjustment in appropriate circumstances; this clause also states that the initial price (and any adjusted prices) remain fixed for the ensuing contract year. The RFP contemplated that after a fixed initial quantity, the Air Force might, anytime during the 3-year contract, order up to 301 additional units in lots ranging anywhere from 10 units to the full 301 units. The Air Force evaluated EASI's initial proposal at \$15,068,268. The Air Force rejected Tiernay's initial proposal, which Tiernay contends was in the amount of \$14,726,156, or \$342,112 less than EASI's offer, because Tiernay accompanied its proposal with a cover letter in which Tiernay "reserved the right to negotiate any increased costs due to small quantity procurements."

Tiernay contends that the rejection of its offer and the award of the contract to EASI was improper without advice to offerors of the possibility that award might be made on the basis of initial proposals and questions whether the incorporation by reference of standard form 33A, which contains such advice, was adequate notice. Tiernay also asserts that the Air Force improperly conducted negotiations with EASI, but not with Tiernay, on the basis of a remark by the contracting officer to a Tiernay employee, supported by affidavit, that the contracting officer had traveled to EASI for the purpose of "establishing a bilateral contract." We find no merit in these contentions.

We have held that a contract may be awarded without discussions where there is adequate competition to ensure that the contract is awarded at a fair and reasonable price, provided that the solicitation advises offerors of the possibility that award might be made without discussion. Todd Logistics, Inc., B-203808, August 19, 1982, 82-2 CPD 157; Centurion Films, Inc., B-205570, March 25, 1982, 82-1 CPD 285; see, also, Defense Acquisition Regulation (DAR) § 3-805.1(a)(v) (1976 ed.). The solicitation incorporated by reference the provisions of standard form 33A which, as we noted above, advises offerors of the possibility that award might be made on the basis of initial proposals. See Bow Industries, B-196667, March 25, 1980, 80-1 CPD 219; standard form 33A (Rev. 1/78). We have held that the incorporation by reference of such provisions is sufficient

to put offerors on notice of their contents. See Rally Racks, Division of Rally Enterprises, Inc.--Reconsideration, B-200159.2, October 30, 1980, 80-2 CPD 330. Consequently, we find that offerors were on notice of the possibility that the contract might be awarded without discussions. Since there were seven offerors other than Tiernay, we find that there was sufficient competition to assure a fair and reasonable price. We therefore agree with the Air Force that this contract could be awarded on the basis of initial proposals.

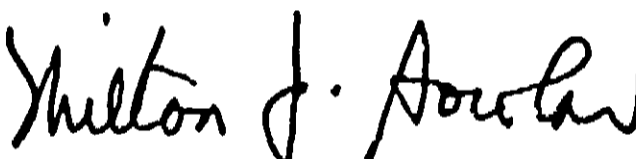
Furthermore, since Tiernay's exception to the specific requirement in the RFP for fixed prices rendered Tiernay's initial proposal both unacceptable and incapable of evaluation under the RFP, the Air Force could disregard Tiernay's proposal. In this respect, we cannot even agree with Tiernay that its proposal represented the lowest cost offer since the prices in Tiernay's proposal are indefinite.

Tiernay's reliance on the contracting officer's reference to a visit to EASI for the purpose of "establishing a bilateral contract" does not persuade us that discussions were conducted with EASI. The question of whether discussions have been conducted depends ultimately on whether an offeror has been provided an opportunity to revise or modify its proposal. C3, Inc.; M/A-Com Sigma Data, Inc., B-206881, B-206881.2, May 14, 1982, 82-1 CPD 431; 51 Comp. Gen. 479, 481 (1972). Amendment No. 3 to the RFP, which substantially modified the solicitation, both recognized the extent of the modifications and explicitly stated that the successful offeror would be expected to execute a bilateral contract--from which we infer that a "cleaned-up" version of the final solicitation, reflecting the successful offer, would be used for award. Absent evidence, and there is none in the record before us, that this process permitted EASI to vary the terms of its offer, we find that the contracting officer did not conduct discussions with EASI and that the award was based on EASI's initial proposal.

Finally, Tiernay contends that rejection of its proposal based upon DAR § 2-404.2(d)(i), as cited by the contracting officer in the rejection letter, was improper because that provision of DAR only applies to formally advertised procurements.

We agree with Tiernay that DAR § 2-404.2(d)(i), which states that a bid should be rejected if the bidder attempts to protect itself against future changes in conditions such as increased costs, only applies to formally advertised procurements. However, we do not find this citation renders the rejection invalid. Since Tiernay did not submit a firm-fixed price as required, it failed to comply with a material term of the RFP and its offer could not be evaluated. Therefore, where award was to be made on the basis of initial proposals, the rejection was proper and the improper citation was merely an error of form which does not alter the substantive reasons for the rejection, properly stated in the letter. See Universal Communications Systems, Inc.; Fisk Telephone Systems, Inc., B-198533, April 27, 1981, 81-1 CPD 321.

The protest is denied. Since we find no impropriety in the Air Force's action, there is no basis upon which we might allow Tiernay's claim for proposal preparation costs.

for 
Comptroller General
of the United States