DECISION

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

27026

FILE: B-213169 DATE: December 14, 1983

MATTER OF: Drexel Heritage Furnishings, Inc.

DIGEST:

1. Unlike unduly restrictive specifications, which violate the statutes and regulations requiring free and open competition in federal procurement, specifications that allegedly are not restrictive enough violate no law or regulation, and there is no legal basis for questioning their use.

2. When incumbent contractor's initial proposal is technically acceptable, but other offerors' proposals have deficiencies, agency is not required to hold discussions with incumbent, and its discussions with other offerors do not constitute unequal or unfair treatment.

3. When, during negotiations, offerors are advised of the changes in the government's requirements, offerors have actual notice of them regardless of inconsistency with or absence from a solicitation.

4. When protester is aware of changes in agency requirements well before they are formalized in a solicitation amendment, contracting officer's decision not to extend due date for best and finals is not arbitrary or capricious and does not unduly restrict competition, and GAO will deny protest that there was insufficient time to prepare an alternate proposal.

5. Under applicable regulations, the question of whether a prospective contractor qualifies as a manufacturer or regular dealer for Walsh-Healey Act purposes is for the contracting officer, with appeal to the Department of Labor or, in appropriate circumstances, the Small Business Administration, rather than to GAO.

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This is a protest by Drexel Heritage Furnishings, Inc. against the General Services Administration's award of a contract for "packaged" homes of furniture and household furnishings to be delivered to U.S. ports for shipment and use overseas, primarily by employees of the Department of State.

In addition to protesting here, Drexel sought relief in the United States Claims Court. The court denied Drexel's motion for a temporary restraining order, and on November 14, 1983, GSA awarded a contract to Ethan Allen, Inc. The court, however, retained jurisdiction and requested an advisory opinion from our Office. See Drexel Heritage Furnishings, Inc. v. United States, No. 661-83C (Cls. Ct. November 14, 1983). We find no merit to the protest.

Background:

GSA issued the solicitation in question, No. FNPS-S7-1491-N, on March 21, 1983, with an amended closing date of June 13, 1983; it planned to award an indefinite quantity, requirements contract for the year beginning October 1, 1983, with two 1-year options.

Until this time, the Department of State has made this type of purchase--which includes furniture and furnishings such as lamps, mirrors, carpeting, and bedspreads for complete homes of up to four bedrooms--under a delegation of procurement authority from GSA. Drexel has been awarded four contracts over the last 13 years; of these, only the last two appear to have been competitively awarded.[1]

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[1]During the pendency of Drexel's protest, the Department of State extended its contract, which expired on September 30, 1983, for 90 days. Ethan Allen subsequently filed a separate protest, alleging that since GSA had not authorized the extension, it was illegal. We will consider this protest in a subsequent decision under B-195309.3.

The Current Solicitation:

In the current solicitation, GSA advised offerors that for the sake of continuity, it would continue to purchase three styles previously selected by the Department of State: Italian Provincial/Transitional, 18th Century English, and Contemporary. For each of these, the solicitation named a corresponding Drexel line. Offerors could propose any or all three styles and could mix them within a single home, although not within a single room. In evaluating offers, the solicitation stated, GSA would award up to 10 percent of the total possible number of points for aesthetic appeal, i.e., compatibility of pieces, overall appearance, quality of construction and fabrics, and suitability of wood, as compared with 90 percent for price.

All offerors were required to provide furniture and furnishings from their regular commercial lines and to meet detailed specifications concerning construction, materials, and size of the items to be included in each packaged home. In addition, the solicitation stated that wood and upholstered furniture must be "comparable in overall quality" to the three named Drexel lines. In an attachment to the solicitation, GSA set forth Drexel's quality standards as a "guide . . . to the quality levels required" and asked offerors to identify and explain why deviations from them did not affect overall quality. The attachment also listed Drexel design characteristics; however, these were for "information purposes only," and offerors were not required to explain deviations from them.

Drexel's Protest:

In September 1983, Drexel protested to GSA and to our Office, alleging that contracting officials intended to waive solicitation requirements. First, Drexel alleged that GSA was negotiating for furniture and furnishings that were not "off the shelf" or sold in substantial quantities to the general public, and therefore were not from manufacturers' regular commercial lines. Drexel apparently was concerned that a line or items of furniture that one manufacturer intended to bring out in the future or to make especially for this procurement would be accepted. Second, Drexel alleged that GSA did not intend to enforce a

solicitation requirement that "drop in" springs for upholstered pieces, if offered, be comparable to Drexel's eight-way hand-tied springs. Drexel argued that "drop in" springs, by definition, are not comparable to hand-tied springs. Third, Drexel objected to GSA's proposed acceptance of cherry wood or veneer, which it argued is used only in 18th Century American/Colonial style furniture; according to Drexel, the 18th Century English style specified could only mean mahogany.

In response to this protest, on October 5, 1983, GSA issued amendment 6, indicating that it would accept modifications of regular commercial lines, which it defined in accord with Federal Procurement Regulations (FPR) § 1-3.807-1(b) (amend. 194, September 1978) as including all household-type furniture that is (1) regularly used for other than government purposes and (2) offered for sale in the course of normal business operations. As evidence of commerciality, the amendment required offerors to certify their dollar volume of business during the previous 12 months for each line offered; however, no minimum was stated.

In addition, while inspection originally was to have been first at a retail outlet, then of samples submitted by offerors, and finally, at the place of manufacture of the best evaluated offeror(s), amendment 6 stated that GSA would inspect by one or more of these methods, rather than all three. Further, in requesting sales catalogs and price lists, in the amendment GSA referred to 18th Century, rather than 18th Century English furniture.

In a supplemental protest, Drexel contended that by issuing amendment 6, GSA was attempting to ratify its earlier, improper waiver of specifications. Drexel alleged that by "secretly" negotiating with other offerors on the basis of "relaxed" specifications, GSA had denied it equal treatment and thus had violated applicable procurement regulations.

Finally, Drexel alleged that the short time between the issuance of amendment 6 and the October 21, 1983, due date for best and final offers made it virtually impossible for it or any other offeror to prepare a meaningful alternative proposal. Drexel argued that the changes contained

in the amendment were material, and therefore required either cancellation and resolicitation of all manufacturers who might wish to offer modifications of their regular commercial lines or, alternatively, a 30-day extension of the due date for best and finals, which GSA had refused to grant.

Throughout its protest, Drexel attempted to show that the Department of State, as the user agency, was committed to the 18th Century English style furniture it had been purchasing from Drexel and would not use non-matching cherry furniture, and that GSA was ignoring State's wishes.

Drexel made virtually the same allegations in its complaint to the Claims Court and, in an amended complaint, also argued that Ethan Allen did not qualify for award because it was not a manufacturer or regular dealer as required by the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 (1976).

GAO Analysis:

The essence of Drexel's protest, as amended, is its alleged unfair treatment by GSA in a series of actions culminating in the agency's belated issuance of amendment 6. Since presumably Drexel could have met the original specifications, the firm maintains that it was improper or inappropriate for the agency to relax them.

To the extent that Drexel is protesting that the amended specifications are not restrictive enough, this is a type of protest our Office generally dismisses. See, e.g., Joseph Pollak Corporation, B-209899, December 23, 1982, 82-2 CPD 573; Lion Recording Services, Inc., B-194724, May 14, 1979, 79-1 CPD 352. We do so because, unlike the use of unduly restrictive specifications, which violates the requirement for free and open competition in federal procurement set forth in 10 U.S.C. § 2304(g) (1982), 41 U.S.C. § 252(c) (1976), Defense Acquisition Regulation § 1-300.1 (1976 ed.), and FPR §§ 1-1.301-1 and 1-1.302-1(b), specifications that allegedly are not sufficiently restrictive violate no law or regulation, and their use is not subject to legal objection.

Here, GSA determined that the needs of user agencies could be met by less restrictive specifications than were used previously by the Department of State. (According to the solicitation, State will not be the exclusive buyer of furniture and furnishings under the contract. With GSA approval, orders may be placed by other agencies, including the International Communications Agency, the Peace Corps, the Departments of the Interior, Defense, and Agriculture, and the Agency for International Development.) This determination is GSA's to make, and its effect--permitting offerors to modify regular commercial lines, to use either "drop in" or hand-tied springs, and to use cherry for 18th Century style furniture--is the expansion of the competitive base for this procurement. This, of course, is consistent with the statutes and regulations requiring free and open competition.

The question is therefore whether GSA has treated Drexel unfairly, so that the award to Ethan Allen should be upset. We find that the actions complained of by Drexel were not unfair, but rather reflect the normal procedures for negotiated procurements. Drexel's allegations to the contrary appear to be based on (1) a too strict reading of the original solicitation and (2) unwarranted reliance upon statements by officials of the Department of State, who were not authorized to negotiate with Drexel or to respond to its questions. (The solicitation specifically stated that all inquiries should be directed to the contracting officer or to another individual at GSA's Furniture Commodity Center.)

The original solicitation, as noted above, appended Drexel's quality standards as guides and Drexel's design characteristics for information. Consequently, it is not clear why Drexel thinks only its own design approach was permitted by the specifications. Moreover, the original solicitation permitted the contracting officer to waive inspection at a commercial outlet or at the point of manufacture and to give tentative approval on the basis of drawings, photographs, or samples; pre-production samples were required for any items approved in this fashion. This strongly suggests that GSA would consider as from regular commercial lines items that were not yet in production.

As for lines or items of furniture made especially for this procurement, it appears that all offerors made certain changes in their regular commercial lines in order to meet GSA's specifications. Drexel, for example, combined the top of a desk that it had been supplying under its contract with the Department of State with the base of a desk from a new line that it was proposing in order to meet GSA's size requirements. The contracting officer, in an affidavit, states that she and Drexel representatives discussed this modification in September 1983--before the issuance of amendment 6.

While the original solicitation did state that furniture and furnishings must be from manufacturers' regular commercial lines, we believe that read as a whole, it permitted--and GSA and offerors demonstrated by their actions that they understood it to permit--minor modifications of regular commercial lines. Thus, in our view, amendment 6 merely clarified and formalized these solicitation provisions and did not relax any previously stated firm requirements.

Drexel, as noted above, also alleged that GSA intended to waive solicitation requirements for springs for upholstered pieces and mahogany wood. The original solicitation, however, specifically stated that "drop in" springs would be acceptable, so long as they were comparable in quality and comfort to Drexel's hand-tied springs. A protester's judgment that its own product is best does not clearly demonstrate that what another offeror has proposed does not meet specifications, particularly when there is more than one way that this can be accomplished, A. B. Dick Company, B-207194.2, November 29, 1982, 82-2 CPD 478, and Drexel's disagreement as to comparability does not show that the requirement was waived.

Further, the record shows that GSA advised Drexel as early as April 20, 1983, that cherry wood or veneer would be evaluated. The contracting officer avers that on that date she discussed the use of cherry for the 18th Century style with Drexel representatives, advising them that amendment 1 permitted the use of alternate woods. (This amendment, which had been issued April 18, 1983, following a pre-proposal conference, reiterated that the designs and

styles referenced in the solicitation were not intended to provide a detailed description of acceptable items, but were merely guidelines.) The contracting officer suggested that Drexel offer cherry if it believed its price for mahogany was not competitive. Thus, if there was any relaxation of specifications for mahogany, it was accomplished by amendment 1, issued nearly 2 months before the due date for initial proposals.

With regard to alleged "secret" discussions with other offerors, GSA reports that following submission of initial proposals it held discussions with other offerors but merely notified Drexel that its proposal was technically acceptable. In view of Drexel's acceptable proposal, GSA was not required to conduct discussions with Drexel at this stage. See Tracor Jitco, Inc., B-208476, January 31, 1983, 83-1 CPD 98. After samples had been evaluated, the record indicates, GSA did hold discussions with all offerors, including Drexel, pointing out deficiencies that it had not previously been aware of and giving them an opportunity to revise their proposals.

At this same time, Drexel acknowledges, it was talking to officials at the Department of State regarding the procurement. On August 24, 1983, Drexel wrote GSA that it was "confused" because these officials were stating, contrary to GSA's pronouncements, that cherry would not be acceptable. The contracting officer's September 7, 1983, response advised Drexel to direct any further questions to her, not to the Department of State. In this same letter, the contracting officer again offered Drexel an opportunity to propose cherry wood; Drexel declined to do so. Instead, it filed its protest, which led to the issuance of amendment 6.

We fail to see how this constitutes unfair or unequal treatment. The initial discussions with the other offerors were not "secret"; rather, they were the type of discussions envisioned by the regulations and were entirely consistent with competitive negotiation procedures. See FPR § 1-3.805-1; Tracor Jitco, Inc., supra. With respect to GSA's alleged willingness to agree to relaxed specifications during these negotiations, we think, as noted above, that Drexel simply reads the original specifications too strictly.

In addition, it is clear from the above chronology that Drexel actually knew how GSA was reading the specifications long before amendment 6 was issued. As we have often pointed out, when an offeror is informed of an agency's requirements during negotiation, it is on notice of them notwithstanding their absence from or inconsistency with what is in a solicitation. See Southland Associates, 62 Comp. Gen. 50 (1982), 8-22 CPD 451, and cases cited therein. Thus, even if the original solicitation did not permit the "relaxed" requirements of which Drexel complains, Drexel could not have been prejudiced by that fact in light of the information it possessed. Furthermore, any concern in this regard was eliminated by amendment 6.

Drexel's protest that it did not have sufficient time between the issuance of amendment 6 and the due date for best and final offers fails for the same reason--that it knew much earlier how GSA was reading the solicitation. Here, instead of preparing an alternative proposal, Drexel chose to rely on advice from officials of the Department of State until the amendment actually was issued. Such reliance was at Drexel's own risk, cf. Blue Ridge Security Guard Service, Inc., B-208605.2, November 22, 1982, 82-2 CPD 464 (dealing with protester's reliance on oral advice from authorized contracting officials) and, if anything, reveals that Drexel was attempting to gain a competitive advantage because of its contacts at the Department of State. Drexel advised GSA in a letter dated September 9, 1983, of its decision not to offer a less expensive line of 18th Century cherry furniture, thus making a business judgment for which the firm must accept responsibility.

In this regard, the regulations do not specify a definite time period to be allowed for preparation of proposals, and the date set for receipt of proposals is a matter of judgment for the contracting officer. We will not question that judgment unless the record shows that the date was arbitrarily or capriciously selected or that it unduly restricted competition. Similarly, the time to be permitted for preparation of best and final offers following amendment of a solicitation is within the discretion of the contracting officer. See Jets Services, Inc., B-207205, December 6, 1982, 82-2 CPD 504. Under the circumstances outlined above, we believe GSA's refusal to

extend the due date for best and finals was reasonable. Drexel's argument that the changes in requirements were so material as to require cancellation and resolicitation also fails, in view of our conclusion that amendment 6 merely formalized and clarified the original solicitation.

The remaining issue raised in Drexel's amended complaint to the Claims Court is whether Ethan Allen qualifies as a manufacturer or regular dealer under the Walsh-Healey Act. This question appears to be academic, since the contracting officer found Ethan Allen qualified and there is nothing in the record to indicate that Drexel has appealed the determination. In any event, under 41 C.F.R. § 50-201.101 (1983), Walsh-Healey Act qualifications are for review by the contracting officer, with appeal to Department of Labor and, in appropriate circumstances, the Small Business Administration, rather than our Office. See Jack Roach Cadillac, Inc., B-210043, June 27, 1983, 83-2 CPD 25.

The protest is denied.

for Comptroller General
of the United States