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## Decision

**Matter of:** Herman Miller, Inc.

**File:** B-407028

**Date:** October 19, 2012

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Robert J. Conlan, Esq., Mathew H. Solomson, Esq., and Kyle J. Fiet, Esq., Sidley Austin LLP, for the protester.

Col. Mark S. Teskey, Behn M. Kelly, Esq., and Michaelisa Tomasic-Lander, Esq., Department of the Air Force, and Kacie A. Haberly, Esq., General Services Administration, for the agencies.

Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. A solicitation with a two-tiered acquisition approach, under which manufacturers would receive contracts that include not-to-exceed prices for furniture systems and dealers would receive separate contracts for installation of the systems at prices not exceeding the manufacturers' prices, provided sufficient information to allow manufacturers to intelligently compete on an equal basis and does not place undue risk on the manufacturers.

2. GAO does not have jurisdiction to hear challenge to agency's selection of North American Industry Classification System (NAICS) code, nor jurisdiction to hear challenge that agency's two-tiered acquisition approach will preclude manufacturers' dealers from being considered small businesses under the Small Business Administration's regulations.

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### DECISION

Herman Miller, Inc., of Zeeland, Michigan, protests the terms of request for proposals (RFP) No. FA8057-12-R-0001, issued by the Department of the Air Force for systems and modular furniture. Herman Miller primarily challenges the solicitation's price evaluation scheme.

We deny the protest.

## BACKGROUND

The RFP, issued under the commercial acquisition procedures of Federal Acquisition Regulation (FAR) Part 12, provides for a two-tier acquisition process for acquiring systems and modular furniture for domestic Air Force installations. Under the first tier, the Air Force anticipates awarding four contracts with 5-year performance periods to furniture manufacturers on a lowest-price, technically acceptable basis. RFP at 22. The RFP provided five contract line items (CLIN) for annual program management reviews, and informed offerors that the contractors would receive \$1,000 for each CLIN.<sup>1</sup> RFP amend. 6, at 10; Contracting Officer's Statement at 44. Offerors were also required to provide not-to-exceed prices for furniture systems (and other related items) that the Air Force would later procure under separate contracts, under the second tier of the acquisition.

The second tier of the acquisition was set aside for small businesses, and identified North American Industry Classification System (NAICS) code 337215. Under this tier, small business dealers of the manufacturers that were awarded contracts under the first tier could compete for contracts for the installation of the systems and modular furniture.<sup>2</sup> To be considered for a second tier award, dealers must "honor the pricing, terms, and conditions established by the [respective] Tier I Manufacturer Contract." RFP at 77.

With respect to the evaluation of price under the first tier competition, the RFP provided a pricing matrix that identified systems and modular furniture for which offerors were to submit not-to-exceed prices. The RFP stated that an offeror's overall evaluated price would be the sum of its not-to-exceed furniture prices and the CLIN prices for the annual program management reviews. RFP amend. 6, at 17-20; RFP, attach. 10, Pricing Matrix.

Prior to the closing time for receipt of proposals, Herman Miller informed the Air Force that the firm was concerned that the agency's request for not-to-exceed prices from manufacturers in this two-tiered acquisition approach had implications with respect to the price reduction clauses contained in the manufacturers' General Services Administration (GSA) multiple award schedule contracts. See Protest at 19-22. The standard price reduction clause contained in GSA's multiple award contracts provides that, where a contractor offers price reductions to certain customers (basis of award customers), the contractor is required to offer the same price reductions to the government under that vendor's multiple award schedule

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<sup>1</sup> The RFP also included CLINs for data reporting that were not to be priced.

<sup>2</sup> The agency estimates that purchase and installation of furniture under the second tier contracts will be [DELETED] million annually. Supp. Legal Memorandum, Sept. 14, 2012, at 21 n.21.

contract for the same time period, as was provided to the basis of award customer. See General Services Acquisition Manual (GSAM) clause 552.238-75; see also GSA Legal Memorandum, Sept. 21, 2012, at 2. The Air Force responded that GSA was aware of the Air Force's two-tiered procurement scheme and had never indicated that the pricing scheme was "in any way inappropriate."<sup>3</sup> See Protest at 21.

Herman Miller protested to our Office prior to the closing time for receipt of proposals. The Air Force received a number of proposals in response to the RFP, including Herman Miller's.

## DISCUSSION

### Price Reduction Clause

Herman Miller raises a number of challenges to the terms of the solicitation. First, the protester complains that the solicitation does not adequately inform manufacturers of the possible impact that the two-tiered acquisition may have on the firms' multiple award schedule contract pricing under the pricing reduction clause. Herman Miller contends that it and other firms will be unable to reasonably calculate not-to-exceed pricing for the systems and modular furniture. Protest at 23. In this regard, Herman Miller argues that the ambiguity with respect to the GSA price reduction clause and the agency's representations regarding the non-applicability of the clause would mislead offerors into offering "artificially low" prices that would be prejudicial to the protester. See Comments, Aug. 31, 2012, at 6, 7.

As a general rule, a procuring agency must give sufficient detail in a solicitation to enable offerors to compete intelligently and on a relatively equal basis. Richen Mgmt., LLC, B-406750, B-406850, Jul. 31, 2012, 2012 CPD ¶ 215 at 4; AirTrak Travel et al., B-292101 et al., June 30, 2003, 2003 CPD ¶ 117 at 13. Specifications must be free from ambiguity and describe the minimum needs of the procuring activity accurately. However there is no legal requirement that a competition be based on specifications drafted in such detail as to eliminate completely any risk for the contractor or that the procuring agency remove all uncertainty from the mind of every prospective offeror. American Contract Servs., Inc., B-256196.2, B-256196.3, June 2, 1994, 94-1 CPD ¶ 342 at 2.

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<sup>3</sup> In response to other requests about the impact of this clause, the Air Force also indicated that the price reduction clause was not implicated because the contractor was selling to a government agency. Protest at 20. The price reductions clause is not triggered for sales to government agencies. See GSAM clause 552.238-75(d)(2).

Here, we find that the solicitation provides sufficiently detailed information to allow offerors to compete intelligently and on a relatively equal basis. In this regard, subsequent to Herman Miller's protest to our Office, GSA issued a memorandum stating that, solely for the purposes of this two-tiered procurement, GSA would "forbear" enforcement of the price reduction clause for vendors that request a contract modification from GSA.<sup>4</sup> See GSA Memorandum, Sept. 7, 2012. The Air Force provided this memorandum to all offerors, and states that it will request revised proposals. Supp. Legal Memorandum, Sept. 14, 2012, at 11-12. Although Herman Miller continues to assert that there is an unacceptable level of risk associated with the application of the price reduction clause here that will potentially affect its pricing, this does not show that the solicitation poses unreasonable risk. Rather, this concerns Herman Miller's business judgment as to whether, and at what price, to propose in response to this RFP, considering what effect, if any, it believes its pricing may have on its obligations under its GSA contract. See Adams Magnetic Prods., Inc., B-256041, May 3, 1994, 94-1 CPD ¶ 293 at 3 n.2.

#### Meaningful Consideration of Price

The protester also complains that the RFP fails to provide for meaningful consideration of price in the award of the first tier contracts, because the price evaluation is based upon not-to-exceed furniture prices where furniture is not being procured under the first tier contracts. In this regard, Herman Miller states that the RFP does not provide for meaningful consideration of offerors' prices for the annual program management reviews and data reporting that is being procured under these contracts.

Agencies must consider price or cost to the government in evaluating competitive proposals. 10 U.S.C. § 2305(a)(3)(ii) (2006). While it is up to the agency to decide upon some appropriate, reasonable method for proposal evaluation, an agency must use an evaluation method that provides a basis for a reasonable assessment of the cost of performance under the competing proposals. CW Gov't Travel, Inc.-Recon.; CW Gov't Travel, Inc., et al., B-295530.2 et al., July 25, 2005, 2005 CPD ¶ 139 at 4; Health Servs. Int'l, Inc.; Apex Env't'l, Inc., B-247433, B-247433.2, June 5, 1992, 92-1 CPD ¶ 493 at 3-4.

We find that the solicitation does provide for meaningful consideration of price. Contrary to Herman Miller's arguments, the first tier contracts will be for more than obtaining annual program management reviews and data reporting. Rather, these contracts also provide for promised not-to-exceed prices that will be relied upon by

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<sup>4</sup> Herman Miller questions whether GSA will actually agree to modifications of the vendors' GSA contracts to allow for forbearances of the price reductions clause. The record provides no basis to question GSA's statement that it will modify affected contracts, where asked to do so.

the manufacturer's dealers in the second tier competitions. Although Herman Miller contends that such an acquisition approach should not be permitted, it cites to no law or regulation violated by this approach. In this regard, the FAR expressly recognizes that "if a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive Order or other regulation, that the strategy, practice, policy or procedure is a permissible exercise of authority." FAR § 1.102(d).

### Small Business Issues

The protester also challenges the NAICS code identified for the procurement and contends that the relationship identified for manufacturers and dealers in the two-tiered acquisition will preclude dealers from being considered small businesses. Protest at 26. We, however, lack jurisdiction to hear challenges of selected NAICS codes, and to hear size-status challenges. 4 C.F.R. § 21.5(b)(1) (2012). With respect to the NAICS code selected by the Air Force, the Small Business Administration (SBA) is given exclusive authority to review challenges to an agency's choice of NAICS code. See FAR § 19.303(c); Expeditions Int'l Travel Agency, B 252510, June 28, 1993, 93-1 CPD ¶ 497 at 4. We also do not agree with Herman Miller that we must accept its protest challenging the NAICS code, because it lacks standing, as a large business, to file a NAICS code appeal at the SBA.

Further, we do not agree that we have jurisdiction to decide whether the Air Force's two-tiered acquisition implicates the affiliation rules of SBA's size status regulations. Although Herman Miller asserts that our Office has previously heard similar challenges, the decisions to which Herman Miller cites are inapposite. For example, Herman Miller cites our decision in Med-South, Inc., B-401214, May 20, 2009, 2009 CPD ¶ 112, for the proposition that we have jurisdiction to determine whether a procurement should be set aside for small businesses. Here, however, Herman Miller is not asserting that the second tier competition cannot be set aside

for small business competition, but is arguing that the approach may be considered an affiliation by SBA. For the same reason as stated earlier, this contention is more appropriately reviewed by the SBA, than by our Office.

We deny the protest.<sup>5</sup>

Lynn H. Gibson  
General Counsel

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<sup>5</sup> Herman Miller's initial protest also asserted that this procurement was "fundamentally at odds" with standard commercial practices. Protest at 13-18. Herman Miller states that it is not pursuing these arguments, and therefore withdrew this ground of protest in its comments. See Comments, Aug. 31, 2012, at 3 n.1.