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**Comptroller General  
of the United States**

Washington, D.C. 20548

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# Decision

**Matter of:** Touchstone Textiles, Inc.

**File:** B-272230.4

**Date:** September 5, 1996

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Mary C. Sorrell, Esq., for the protester.

Elizabeth R. Bagwell, Esq., Department of the Navy, for the agency.

Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Agency properly eliminated protester's initial offer from further consideration in negotiated competition for deck refurbishment services where protester's best and final offer (albeit submitted late) modified its initial offer and therefore operated as a revocation of the initial offer.

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## DECISION

Touchstone Textiles, Inc. protests the award of a contract to Bay Harbor Company, Inc. under request for proposals (RFP) No. N00604-96-R-0010, issued by the Department of the Navy for deck covering services at Pearl Harbor, Hawaii. Touchstone submitted an initial proposal for this procurement but failed to submit its best and final offer (BAFO) by the scheduled BAFO closing time. Although Touchstone concedes that the contracting officer properly rejected its late BAFO (as required by Federal Acquisition Regulation (FAR) § 15.412 (FAC 90-39), see Cyber Digital Inc., B-270107, Jan. 24, 1996, 96-1 CPD ¶ 20), Touchstone contends that it should have received contract award based upon its initial proposal—which was technically acceptable and lower-priced than the awardee's.<sup>1</sup>

We deny the protest.

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<sup>1</sup>The RFP (which was issued on December 12, 1995) contemplated the award of a fixed-price, indefinite quantity requirements contract to the lowest-priced, technically acceptable offeror.

As a general rule, once offerors submit BAFOs, award must be based on the BAFOs and not upon prior versions of the proposals.<sup>2</sup> See FAR § 15.611(d); Department of the Army--Recon., B-251527.3, Sept. 17, 1993, 93-2 CPD ¶ 178. Since an offeror's submission of a BAFO typically demonstrates an intent by that offeror to modify and/or replace an earlier offer, the submission of a BAFO generally operates to extinguish the agency's right to accept the earlier offer. Department of the Army--Recon., supra.

In its protest, Touchstone contends that although it submitted a BAFO, this submission did not operate to extinguish its earlier offer. Touchstone maintains that the untimeliness of its BAFO submission rendered the BAFO invalid for all purposes; Touchstone argues that because a contracting agency is not permitted to accept or consider a late BAFO, the Navy must proceed as though it never received any submission from Touchstone but its initial offer. Since its initial offer was technically acceptable, Touchstone contends that the Navy was required to make contract award to Touchstone based upon that offer, which was lower-priced than the awardee's BAFO. We disagree.

Given that Touchstone submitted a BAFO which modified its initial proposal terms, the agency properly eliminated Touchstone's initial offer from further consideration. While Touchstone correctly argues that the agency could not consider its BAFO for award as a result of its untimeliness, we do not think the agency was free to ignore the intent conveyed by the submission of a modified offer. Touchstone's BAFO set forth substantially different--and higher--pricing terms from its initial offer; although this submission was untimely and could not be considered a viable offer, it nonetheless demonstrated an intent by the protester to modify and replace its initial offer terms.<sup>3</sup> Our conclusion that the agency could not ignore the expressed intent in the untimely BAFO is consistent with FAR § 52.215-10(h), which provides that proposals may be withdrawn by written notice at any time before award. In our view, the changed terms in Touchstone's BAFO clearly operated as a revocation of

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<sup>2</sup>This rule is consistent with common law contracting principles, which establish that an offeree's power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention--such as a revised offer--not to enter into the proposed contract. See Restatement (Second) Contracts § 42 (1981).

<sup>3</sup>On April 17, the agency issued an amendment which changed one of the RFP's specifications by requiring a more expensive material covering; when the agency issued the BAFO request, it expected the offerors' prices to increase.

its initial offer. Accordingly, the agency properly decided not to consider the initial offer for award. Id.

The protest is denied.

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