



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

DOCUMENT FOR PUBLIC RELEASE

A protected decision was issued on the date below and was subject to a GAO Protective Order. This version has been redacted or approved by the parties involved for public release.

Matter of: Krueger International, Inc.

File: B-260953.4

Date: October 4, 1995

David T. Ralston, Jr., Esq., Leonard, Ralston, Stanton, Remington & Danks, for the protester.

Thomas L. McGovern III, Esq., and S. Gregg Kunzi, Esq., Hogan & Hartson, for Nightingale, Inc., an interested party.

Octavia Johnson, Esq., Department of Justice, for the agency.

David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency proposal to reopen discussions and request the submission of samples and technical information, but not to permit revision of cost proposals, is unobjectionable where discussions are necessary only to correct technical proposals, and corrections are unlikely to have a cost impact.

DECISION

Krueger International, Inc. protests the award of a contract to Nightingale, Inc. under request for proposals (RFP) No. IPI-C-2010-95, issued by the Department of Justice, Federal Prison Industries (known as UNICOR), for stacking chairs and occasional seating. Krueger contends that the awardee's proposal fails to comply with mandatory solicitation requirements and challenges the agency's proposed corrective action as inadequate.

We deny the protest.

The RFP contemplated the award of a 5-year requirements contract. The solicitation generally provided for award to be made "to the responsible offeror whose proposal represents the best value to the Government." The RFP listed two specific evaluation factors: (1) total cost, which was "slightly more important than" (2) technical quality. The technical quality factor included consideration of compliance with the "performance standards" in RFP section C ("Description/Specifications/Statement of Work"), as well as four specific subfactors: (1) the acceptability of the components offered; (2) whether any assembly,

component or data are protected by patent or proprietary rights; (3) the offeror's approach to vertical integration, that is, the process by which UNICOR would perform some of the manufacturing of the chairs at one or more of UNICOR's 75 manufacturing facilities using inmate labor; and (4) the equipment required to complete each type of chair.

With respect to vertical integration, the solicitation advised offerors that:

"[UNICOR] is interested in vertically integrating its chair assembly line to maximize [UNICOR] chair production capability and inmate employment while reducing overall costs. Offerors shall identify the level of vertical integration possible for each type of chair, and the effect upon [UNICOR] production capability, inmate employment, and overall production costs. Offerors should propose a schedule of backward vertical integration including a list of each logical progressive step.

"This schedule should take into account required training, equipment, etc. for each progressive step."

The RFP further stated that "[t]he contractor shall provide a list of required equipment including estimates of cost (installed), indicate delivery lead time for each piece of equipment, and whether the equipment is unique to the offeror's product line." The RFP provided that the total cost (evaluation factor) "includes the price of the proposed bases, and the cost of equipment, etc. necessary for [UNICOR] to begin production using the alternative bases." Although the references to "proposed bases" and "alternative bases" were unclear, having been, according to the agency, mistakenly taken from a prior procurement for chair bases, the agency advised potential offerors at the pre-proposal conference, the transcript of which was incorporated by amendment into the solicitation, that:

"[a]ward will be based on the combination of total cost and technical quality. . . . Total cost is the cost of the components themselves, of course[,] and any cost of equipment that will be needed to produce it if we don't have that already would be something that has to be identified in your proposal and will be evaluated."

Finally, the RFP required offerors to provide a "detailed listing of the components with all salient characteristics," and also stated that "[f]irms in the competitive range will be required to send production or prototype samples to a UNICOR location for evaluation and testing. . . . Firms submitting a prototype sample will be required to submit a production sample after award."

Six proposals were received by the closing time. Four—including Krueger's and Nightingale's—were included in the competitive range. UNICOR did not request the firms in the competitive range to submit samples. Instead, following discussions with offerors, the agency requested best and final offers (BAFO).

Based on its evaluation of BAFOs, UNICOR determined that Nightingale's proposal offered the best value to the government. Although Krueger's BAFO received a higher technical score (37 of 40 possible points) than Nightingale's (35 points), the agency determined that the difference in technical scores was "minimal," and made award on the basis that Nightingale's proposal offered a price (\$[DELETED]) approximately [DELETED] percent (\$[DELETED]) than Krueger's (\$[DELETED]).

In its original protest, Krueger argued that UNICOR had acted improperly in accepting a proposal which was not compliant with the solicitation requirements. Krueger noted that Nightingale had failed to comply with the solicitation requirement for a "detailed listing of the components with all salient characteristics." Nightingale had underlined some, but not all, of the specification requirements for the stacking chairs as set forth in section C of the solicitation and had stated that its proposed stacking chair "is completely compatible with the UNICOR (existing) chair"; it had not underlined any of the specification requirements or offered a similar guarantee of compatibility for the occasional seating. Krueger further noted that Nightingale had not complied with the requirement in section C that "offerors' manufacturing facilities should be ISO 9001 certified and all processes involved in the seating line's production should be completely documented." In addition, Krueger pointed out that Nightingale's proposed chair did not include the [DELETED] for the occasional seating; according to the protester, had it not included a [DELETED] in its proposal, its price would have been \$[DELETED]. Krueger also argued that UNICOR had acted improperly in not requesting samples from competitive range offerors and in not including in the evaluated total cost to the government the cost of any additional equipment necessary for UNICOR to begin production of the chairs as set forth in offerors' vertical integration proposals.

In response to Krueger's protest, UNICOR has proposed to reopen negotiations to request the submission of samples, a list of components, and other additional technical information concerning the acceptability of the proposed chairs and any ISO certification of the offeror's manufacturing facilities. However, since Nightingale's price had been exposed, UNICOR determined that reopening the price competition could result in an unacceptable auction; accordingly, the agency will not permit revisions to offerors' prices.

Krueger now argues that UNICOR's corrective action in response to its original protest is inadequate. According to the protester, UNICOR should permit offerors to revise their prices. In support of its position, Krueger argues that it based its

proposal on the belief that the solicitation required the chairs to include a [DELETED] and provided for the evaluated total cost to include the cost of equipment not already possessed by UNICOR which was necessary for production of the chair.

As a general rule, in response to discussions offerors may revise any aspect of their proposals they see fit—including portions which were not the subject of discussions. American Nucleonics Corp., B-193546, Mar. 22, 1979, 79-1 CPD ¶ 197. In appropriate circumstances, however, an agency may decide to limit the revisions offerors can make to their proposals after discussions. See, e.g., Metron Corp., B-227014, June 29, 1987, 87-1 CPD ¶ 642 (agency may request BAFOs on the basis of cost and price revisions alone where the agency has determined that the initial technical proposals do not contain significant uncertainties or deficiencies), aff'd on other grounds, Metron Corp.—Recon., B-227014.2, Sept. 25, 1987, 87-2 CPD ¶ 299. Thus, where the reopening of discussions is due, not to the addition of a new solicitation requirement or a change in an existing requirement, but to the need to correct an informational deficiency in a technical proposal, the correction of which is unlikely to have a cost impact, an agency may limit proposal revisions to revisions in technical proposals. See Pacific Architects and Engineers, Inc.—Recon., B-232500.4, Mar. 3, 1989, 89-1 CPD ¶ 231; see generally Eldyne, Inc., B-250158 et al., Jan. 14, 1993, 93-1 CPD ¶ 430, recon. denied, Dept. of the Navy—Recon., B-250158.4, May 28, 1993, 93-1 CPD ¶ 422; System Planning Corp., B-244697.4, June 15, 1992, 92-1 CPD ¶ 516; URS Int'l, Inc., and Fischer Eng'g & Maintenance Co., Inc.; Global-Knight, Inc., B-232500; B-232500.2, Jan. 10, 1989, 89-1 CPD ¶ 21. We find that the reopening of discussions here is necessary only to correct informational deficiencies in the technical proposals, the correction of which is unlikely to have a significant cost impact, and that therefore UNICOR was not required to permit revisions to offerors' prices.

We agree with UNICOR that the solicitation did not require offerors to furnish a [DELETED]; thus, the purpose of reopening discussions was not to add or change a solicitation requirement in a manner that would have a significant cost impact. [DELETED], and the agency repeatedly advised potential offerors at the pre-proposal conference—the transcript of which was incorporated by amendment into the solicitation—that there were no minimum mandatory specifications. For example, the agency stated that:

"The technical quality would among other things be the compliance with the statement of work. The minimum specifications in section C. It is an evaluation factor, but not the evaluation factor. It is not something that would automatically get you thrown out, but obviously, the less that somebody's products meet at least the minimum specifications

will have some weight upon the final evaluation of their product."

While the amendment incorporating the transcript of the pre-proposal conference noted that the minutes were "for informational purposes only," and were "provided as a clarification only and do not modify any solicitation requirements," the clear import of this language was that the pre-proposal conference was not intended to change the meaning of the solicitation. Thus, the transcript did not alter the solicitation requirements, but instead only clarified the agency's intention not to treat the section C specifications, or the attached drawings, as mandatory, minimum requirements. Since the solicitation did not require offerors to furnish a [DELETED], UNICOR did not improperly relax the specifications in this regard in making award to Nightingale on the basis of a proposal that did not offer a [DELETED].

The Federal Acquisition Regulation § 15.610(e)(2), generally prohibits the use of auction techniques, that is, indicating one offeror's price to another during negotiations, thereby promoting direct price bidding between offerors. See Youth Dev. Assocs., B-216801, Feb. 1, 1985, 85-1 CPD ¶ 126. Although reopening discussions after prices have been disclosed is not precluded and does not constitute an improper auction where it corrects a material, prejudicial impropriety in the procurement process or a violation of procurement laws, see The Faxon Co., 67 Comp. Gen. 39 (1987), 87-2 CPD ¶ 425, reopening competition after price disclosure is improper where it is not warranted by any material, prejudicial defect in procurement process or violation of procurement laws. See Hawaii Int'l Movers, Inc., B-248131, Aug. 3, 1992, 92-2 CPD ¶ 67, recon. denied, Gunn Van Lines; Dept. of the Navy--Recon., B-248131.2; B-248131.4, Nov. 10, 1992, 92-2 CPD ¶ 336. Here, in view of the fact that the awardee's price has been disclosed, permitting price revisions would create the risk of an auction. Since the record establishes that there was no actual impropriety with respect to the [DELETED], and given the risk of creating an auction, we agree with the agency that in these circumstances there would be no benefit to the procurement system that would justify reopening the price competition. See generally BDM Int'l, Inc., 71 Comp. Gen. 363 (1992), 92-1 CPD ¶ 377; Hawaii Int'l Movers, Inc., supra.

Nor do we find any basis for recommending cost discussions on account of UNICOR's decision not to include the cost of equipment in the evaluated total cost. Competitive prejudice is an essential element of a viable protest, and where no competitive prejudice is shown or is otherwise evident, our Office will not sustain a protest even if a deficiency in the procurement is evident. See Latins Am., Inc., 71 Comp. Gen. 436 (1992), 92-1 CPD ¶ 519; Anament Labs., Inc., B-241002, Jan. 14, 1991, 91-1 CPD ¶ 31. Here, it is clear from the record that Krueger was not prejudiced by UNICOR's failure to include in the evaluated total cost the cost of equipment associated with the proposed vertical integration approaches. UNICOR

reports that even when the cost of equipment is included in the evaluated total cost, Nightingale's offer [DELETED] after taking into consideration the proposed price reductions offered to account for the additional work to be performed by inmates; according to the agency, Nightingale's offer [DELETED] whether considering all levels of the proposed vertical integration, or only the elements common to both Krueger's and Nightingale's offers--[DELETED]. In these circumstances, where Krueger was not prejudiced by UNICOR's failure to include the cost of equipment associated with any selected vertical integration approach in the evaluated total cost, and given the risk of creating an auction, we agree with the agency that there would be no benefit to the procurement system that would justify reopening the price competition after offerors' competitive positions had been compromised by disclosure of the awardee's price. See generally, BDM Int'l, Inc., supra; Hawaii Int'l Movers, Inc., supra.

Krueger also argues that Nightingale is ineligible for award because it allegedly proposed Krueger components, thereby misrepresenting that it could obtain the component parts from Krueger. This argument is not persuasive. Although it appears that Nightingale's post-award prototype sample used some Krueger parts, nowhere did Nightingale's proposal state that it was offering Krueger components.¹ Rather, Nightingale merely stated that its proposed stacking chair "is completely compatible with the UNICOR (existing) chair," that is, with the current Krueger-supplied chair. While UNICOR read this language as indicating that the proposed chair "would be identical in all respects to the current stacking chair supplied by Krueger," the statement in no way represented that the parts would be identical to the Krueger components, much less that they would be produced by Krueger.

The protest is denied.

Comptroller General
of the United States

¹Nightingale has informed our Office that it has acquired tooling to manufacture the parts in question.