



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Global Industries, Inc.

File: B-270592.2; B-270592.3; B-270592.4; B-270592.5

Date: March 29, 1996

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C. Joseph Carroll, Esq., and Jonathan Cramer, Esq., Department of Justice, Federal Bureau of Prisons, for the agency.

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DIGEST

Agency failed to conduct meaningful discussions in a procurement for ergonomic chairs where it did not identify evaluated problems with the comfort of the protester's chairs which were of serious concern to the agency's evaluators but were considered to be correctable.

DECISION

Global Industries, Inc. protests the award of a contract to Nightingale, Inc. by Federal Prison Industries, Inc., doing business under the trade name UNICOR, under request for proposals (RFP) No. IPI-R-0315-95. Global protests, among other things, that the agency failed to conduct meaningful discussions.

We sustain the protest.

BACKGROUND

The RFP contemplated the award of a 5-year fixed-price requirements contract to provide two lines of office chairs, the "Economy Ergonomic" and the "Medium Range Ergonomic." Within each chair line, offerors were required to propose specified models, plus a variety of options, applicable to the different models being offered, such as soft wheel casters, seat angle adjustment, and adjustable lumbar support. The chairs were to be purchased from the awardee in the form of chair kits that would be assembled by inmates, and then marketed by UNICOR. The RFP

required that offerors submit written proposals and certified test reports showing compliance with various requirements. In addition, offerors were obliged to make a 90-minute in-person presentation to UNICOR setting forth their approaches to accomplishing the requirements of the statement of work. At the presentation, offerors were required to provide certain production samples for the agency to evaluate and test.

The RFP provided that award would be made to the responsible offeror whose proposal represented the best value to the government, taking into consideration price and technical quality, with the technical factor being more important than price. As amended, the RFP listed the following technical subfactors, in descending order of importance: (1) acceptability of components; (2) aesthetics, comfort level, and marketability; (3) manufacturing capability and history of production; (4) vertical integration; (5) product rights; and (6) ease of assembly.

The agency received five offers in response to the solicitation. Each offeror made an in-person presentation to UNICOR, which included a question and answer session and an examination of the sample chairs.

The technical evaluation panel (TEP) members then discussed the advantages and disadvantages of each proposal and assigned an overall numerical score to each. In evaluating proposals, the evaluators did not assign particular ratings (numerical or adjectival) for any of the six technical factors. Rather, after discussing the strengths and weaknesses of each proposal, the TEP agreed to an overall numerical score which was based on the following evaluation framework: excellent--91 to 100 points (a comprehensive and thorough proposal of exceptional merit with no or only minor weaknesses); very good--71 to 90 points (a proposal where strengths outweigh existing weaknesses, and any major weaknesses are correctable); good--51 to 70 points (a proposal where weaknesses equal strengths, and weaknesses are probably correctable); fair--31 to 50 points (a proposal where one or more weaknesses outweighs any strengths, and these weaknesses could probably be improved, minimized, or corrected); and poor--0 to 30 points (a proposal with one or more major weaknesses that are either difficult to correct or are not correctable). At the hearing conducted by our Office in connection with this protest, the TEP chair testified that the members of the TEP "were aware in our minds of each level of importance" of the individual subfactors, when calculating each proposal's total numerical score. In addition, the record evidences that the first technical subfactor, acceptability of components, was essentially evaluated on a "go/no go" basis, in that under this subfactor the TEP primarily examined proffered test reports to determine whether the offered chairs complied with the required testing standards.

Following evaluation, three proposals, including Nightingale's and Global's, were included in the competitive range. The initial technical scores and proposed costs of the competitive range proposals were as follows:

Offeror	Technical Score (100 points maximum)	Total Price
Nightingale	[deleted]	[deleted]
Offeror A	[deleted]	[deleted]
Global	[deleted]	[deleted]

Under the scoring system described above, Global's proposal was rated "very good" and described as "[a] proposal which demonstrates overall competence Any major weaknesses are correctable." Global's comparatively lower technical rating reflected the TEP's determination that Global's proposal had certain significant weaknesses under the aesthetics, comfort level and marketability subfactor. As indicated above, this subfactor was the most heavily weighted, relatively evaluated subfactor (i.e., subfactor not evaluated on a go/no go basis). Specifically, the TEP noted that the overall comfort of the Economy Ergonomic chairs was compromised by a "bottoming out" of the seat foam,¹ and, with regard to the Medium Range Ergonomic chairs, by pressure being placed on the outside of the legs--referred to as "pressure points." The TEP's initial consensus evaluation of Global included the following assessment:

"The weaknesses in aesthetics and comfort raises questions about the marketability of the products and were the primary reason that this proposal is roughly in the low-middle of the very good range."

Written discussions were subsequently conducted with each competitive range offeror. No questions were posed to Global regarding the agency's concerns under the aesthetics, comfort and marketability evaluation factor, particularly the "bottoming out" and "pressure point" concerns.

Best and final offers (BAFO) were subsequently requested and submitted. The final evaluated scores and proposed prices were as follows:

¹That is, a person sitting in the chair could feel the chair bottom through the foam pad on the chair seat.

Offeror	Technical Score	Evaluated Price
Nightingale	[deleted]	[deleted]
Offeror A	[deleted]	[deleted]
Global	[deleted]	[deleted]

In selecting Nightingale for award, the contracting officer repeated the TEP's earlier concerns regarding the comfort of Global's chairs, stating:

"Global's products were also generally attractive; however, the comfort of its product lines was mixed. The econo-line's seat cushions had a tendency to "bottom out" which impacts long-term comfort. The medium range chairs were fairly comfortable; however, the seat foam put pressure on the outside of the legs and would have a negative impact upon long-term comfort. Global's proposal included many strengths (i.e., manufacturing capability, vertical integration, product rights) and this is reflected in their overall technical rating. Additionally, Global submitted the lowest total price and is a very good value to the Government."

On November 14, 1995, the agency awarded the contract to Nightingale. This protest followed. Performance of Nightingale's contract has not been suspended based on the agency's determination that continued contract performance is in the best interest of the government.

DISCUSSION

Global protests that by virtue of UNICOR's failure to advise Global of the agency's concerns regarding the comfort factors associated with Global's chairs, UNICOR failed to conduct meaningful discussions.

In negotiated procurements, contracting officers generally are required to conduct discussions with all offerors whose proposals are within the competitive range. 41 U.S.C. § 253b(d)(2) (1994); Federal Acquisition Regulation (FAR) § 15.610. Although the discussions need not be all-encompassing, discussions must be meaningful; that is, the agency must lead offerors into the areas of their proposals which require amplification or revision. Jaycor, B-240029.2 et al., Oct. 31, 1990, 90-2 CPD ¶ 354. As reflected in FAR § 15.610, the Competition in Contracting Act of 1984 effectively requires agencies to point out weaknesses, deficiencies or excesses in proposals that need to be addressed in order for an offeror to have a reasonable chance of being selected for award. See FAR § 15.609(a); Price Waterhouse, B-222562, Aug. 18, 1986, 86-2 CPD ¶ 190. In short, discussions cannot be

meaningful unless they lead an offeror into those aspects of its proposal that must be addressed in order for it to have a reasonable chance of being selected for award. Eldyne, Inc., B-250158 et al., Jan. 14, 1993, 93-1 CPD ¶ 430, recon. denied Department of the Navy-Recon., 72 Comp. Gen. 221 (1993), 93-1 CPD ¶ 422.

The agency maintains that it was not required to discuss the weaknesses in Global's proposal relating to comfort because these weaknesses did not rise to the level of deficiencies rendering Global's proposal technically unacceptable. We disagree.

The record shows that "the primary reasons" the agency questioned, during its evaluation, whether Global's chairs could be successfully marketed were their tendency to "bottom out" and the problems related to "pressure points," which adversely impacted on the comfort of the chairs. At the hearing conducted in connection with this protest, the TEP chair testified that these weaknesses were "of major importance" and a "serious concern" to the agency evaluators, that the weaknesses would be "of major value and concern to the consumers," and that they would "affect marketability" of the chairs. Thus, regardless of the label the agency attaches to its concerns, the agency itself made it clear at the hearing that the problems had a serious impact on the evaluated comfort and marketability of the chairs. We think it is well-established that these are exactly the kind of "weaknesses" that under both the FAR and our decisions should be pointed out during discussions. See, e.g., Eldyne, Inc., supra.

The agency also argues that it was not required to discuss these because they were inherent in Global's design, and revision of that design would have required substantial time and effort. The record does not support the agency's argument. We first note that the chairs proposed by Global for this procurement incorporated various aspects of different existing chair lines; they were not "off-the-shelf" chairs. At the hearing both the TEP chair and the contracting officer agreed that the weaknesses in Global's proposal were considered "correctable." Indeed, the TEP chair testified that these problems would possibly be easily resolved to the agency's satisfaction by altering the density, shape, or width of the seat foam, and Global's representatives testified that Global could have effectively addressed the agency's comfort concerns by altering the density, shape or width of the foam used in the seat cushions, or by altering the height of the chair seat, and that such alterations could have been accomplished in a matter of days. On this record, we find without merit the agency's assertion that discussions regarding these matters were not required because the weaknesses were inherent in Global's product design.

Finally, the agency maintains that any weaknesses with regard to the evaluation factor aesthetics, comfort and marketability were inappropriate topics for discussions in that such matters generally reflected the inventiveness of each offeror in the development of its products, and raising such issues would involve the agency in "product development." The agency maintains that if such

weaknesses had been brought to Global's attention, the agency would have been required to discuss similar "product development" matters with other offerors, and that this would have constituted technical leveling.

We first note that while technical leveling is defined by FAR § 15.610(d) as helping an offeror bring its proposal up to the level of other proposals "through successive rounds of discussions," Global had only a single round of discussions during which the agency's serious concerns were not identified. We also fail to see how labeling the concern a "product development" matter is of any consequence with respect to the question of whether discussions were required. In any case, we note that notwithstanding the contracting officer's assertion that matters regarding aesthetics, comfort and marketability were not appropriate topics for discussion, the agency's discussion letter to Nightingale stated:

"Please consider the following list of weaknesses/clarifications that the evaluation panel has identified as requiring additional information.

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"Aesthetics, Comfort, Marketability

"1. The mechanisms using a 'bolt' type adjustment were wobbly when unscrewed. Combined with a short screw length, this make losing the bolts a concern."

While the agency now argues that this weakness was mistakenly categorized under the aesthetics, comfort and marketability subfactor, it appears to be similar in kind to the perceived weaknesses in Global's proposal under this factor; indeed, the agency has offered no plausible rationale which warrants redefining or re-categorizing this concern after the fact. Under these circumstances, the agency should have afforded Global comparable discussions regarding weaknesses in Global's proposal under the aesthetics, comfort and marketability subfactor.

We sustain the protest.²

²Global has raised various other issues in connection with this procurement, the primary one of which is an allegation that Nightingale's chairs do not meet the RFP requirements regarding adjustable lumbar support. We have considered this issue and conclude that Nightingale's chairs do, in fact, meet the solicitation requirements regarding adjustable lumbar support. We note that amendment No. 3 states that the chairs submitted with an offeror's proposal should "emulate" Human Factors Standard (HFS) 100, which states that "[c]urrent research does not clearly indicate

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RECOMMENDATION

Where, as here, an agency determines that it is in the best interest of the government to proceed with contract performance in the face of a protest in our Office, and we sustain the protest, we are required by the Competition in Contracting Act of 1984, 31 U.S.C. § 3554(b)(2), to make our recommendation for corrective action without regard to any cost or disruption from termination, recompeting or reawarding the contract. Accordingly, we recommend that the agency reopen the negotiations with all competitive range offerors, conduct meaningful discussions, and request the submissions of BAFOs.³ If a proposal other than Nightingale's is determined to offer the best value to the government, Nightingale's contract should be terminated and award made to that offeror. In addition, we recommend that Global be reimbursed for the reasonable costs of filing and pursuing this protest, including attorneys' fees. Bid Protest Regulations, section 21.8(d)(1), 60 Fed. Reg. 40,737, 40,743 (Aug. 10, 1995) (to be codified at 4 C.F.R. § 21.8(d)(1)). In accordance with section 21.8(f)(1), 60 Fed. Reg. supra (to be codified at 4 C.F.R. § 21.8 (f)(1)), Global's certified claim for such costs, including the time expended and costs incurred, must be submitted directly to the agency within 90 days after receipt of this decision.

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²(...continued)

the specific requirement for lumbar support." Global's representative acknowledges that HFS 100 fails to specify any minimum requirement for lumbar support and that this suggests that, if there is some curvature of the lumbar area of the chair back, then lumbar support, as indicated by HFS 100, has been provided. The chairs that Nightingale submitted with its proposal, as demonstrated by cutaways of the chair back examined at the hearing, show a curvature of approximately 3/8-inch when the chair is unoccupied, and when a person sits in the chair against the chair back pressure is exerted against the two "wings" of the chair, which are slightly closer to each other than the width of even a small person's back, thus causing forward movement of the lumbar support mechanism to meet the user's back. Under the circumstances, the lumbar support provided by Nightingale's chairs satisfied the RFP's requirements regarding adjustable lumbar support. We have also considered and rejected the various other allegations raised in Global's protest including, for example, that the RFP contained ambiguities and that Nightingale's proposal contained an incorrect price.

³Based on the hearing testimony of Global's representatives, it would appear that this action could be completed in a matter of a few days.