



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Lankford-Sysco Food Services, Inc.; Sysco Food Services of Arizona, Inc.

File: B-274781; B-275081

Date: January 6, 1997

Richard B. Oliver, Esq., and Laura O. Doyle, Esq., McKenna & Cuneo, for the protester.

Steve B. Hilkwitz, Esq., Defense Logistics Agency, for the agency.

Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Solicitations for acquisition of commercial food distribution services are neither ambiguous nor inconsistent with customary commercial practice where the protested terms of the solicitation considered as a whole have only one reasonable interpretation, which is not inconsistent with customary commercial practice.

DECISION

Lankford-Sysco Food Services, Inc. and Sysco Food Services of Arizona, Inc.¹ protest the terms of request for proposals (RFP) No. SPO300-96-R-4025 and SPO300-96-R-4016, respectively, issued by the Defense Logistics Agency, Defense Personnel Support Center (DPSC), for full service food distribution support for Navy ships at Norfolk Station, Virginia, and for military installations, hospitals and Job Corps centers in Arizona.

We deny the protests.

The terms of the RFPs, as relevant to these protests, are identical. The RFPs contemplate award of firm, fixed-price with economic price adjustment, indefinite quantity/indefinite-delivery contracts for a base year with 3 option years. The RFPs list the commercial food items to be supplied under the contracts and the estimated quantity of each item, and require offerors to provide the "delivered price," "distribution price," and "unit price" for each item. These terms are defined in the

¹The protesters are operating subsidiary companies of Sysco Corporation, a national food service distributor.

RFPs. The RFPs also include a price changes clause allowing for changes in the delivered price on a weekly basis, inasmuch as this component of the unit price may fluctuate as a result of "commercial market forces, such as supply and demand, and competition among suppliers." This clause further stated that:

"The offeror also warrants that its unit prices are equal to or lower than those offered its most favored customer for similar quantities under comparable terms and conditions while taking into account the requirements of the price adjustment schedule of this clause."

The RFPs also included the following price-related provision:

"III. REBATES/DISCOUNTS

(1) Rebates and discounts are to be returned to DPSC when they are directly attributable to sales resulting from orders exclusively submitted by DPSC or its customers. Additionally any rebates and discounts offered to any commercial customer or to other Governmental organizations shall be returned to the DPSC or its customers in the form of an up-front price reduction and/or lump sum reimbursement. Additional rebates over and above those cited above may be offered to the DPSC to enhance one's proposal but will not be mandated for return to the DPSC or its customers.

(2) The Prime Vendor shall be as aggressive as possible in pursuing all rebates and discounts for the customers supported under this contract. Notwithstanding the requirements included herein, the offeror warrants, at a minimum, that the DPSC and its customers will receive rebates and discounts equal to or better than the offeror's most favored commercial or other Governmental customer. The offeror will provide a description of those rebates and discounts meeting the requirements herein as part of their offer in accordance with the provisions outlined [in this solicitation]. The rebates and discounts proposal will be reviewed and if found acceptable, shall become part of the resulting contract(s). A rebate report shall be provided to the Contracting Officer on a quarterly basis as a minimum. . . ."

The RFPs require offerors to propose procurement/pricing plans explaining the offerors' purchasing methods and pricing methodology, including an explanation of the proposed discounts and rebates.²

The protesters allege that the Rebates/Discounts provision in the RFPs contains insufficient detail and is ambiguous and contrary to customary commercial practice. In particular, the protesters are concerned that this provision could be interpreted to include a firm's "earned income" generated by the firm's performance of merchandising services for its suppliers as a rebate or discount payable to the government. The protesters explain that while it is customary in the industry for distributors to pass discounts and rebates from suppliers on to the customer, it is not customary to pass earned income through to the customer nor practical to account for earned income related to specific customer accounts, and that to require such accounting would be unduly burdensome on the contractor and inconsistent with customary commercial practice. The protesters also allege that the solicitation language is otherwise ambiguous as to the meaning of a variety of RFP terms: discounts, rebates, and related terms (e.g., "directly attributable to sales" and "most favored customer").

A solicitation must contain sufficient information to enable offerors to compete intelligently and on a relatively equal basis. Pacific Consol. Indus., B-250136.5, Mar. 22, 1994, 94-1 CPD ¶ 206; Tucson Mobilephone, Inc., B-250389, Jan. 29, 1993, 93-1 CPD ¶ 79. There is no legal requirement that a solicitation be drafted so as to eliminate all performance uncertainties; the mere presence of risk does not render a solicitation improper. Pacific Consol. Indus., *supra*; J&J Maintenance, Inc., B-248915, Oct. 8, 1992, 92-2 CPD ¶ 232. Agencies may properly impose substantial risk upon the contractor, even where the risk in question is financial in nature. Tucson Mobilephone, Inc., *supra*. In procurements involving the acquisition of commercial items, such as here, Federal Acquisition Regulation § 12.301(a)(2) (FAC 90-32) requires that the contracts "shall, to the maximum extent practicable, include only those clauses . . . [d]etermined to be consistent with customary commercial practice."

Moreover, an allegation that a solicitation is ambiguous does not make it so. A solicitation term is only ambiguous if it is susceptible to more than one reasonable interpretation when read in the context of the solicitation as a whole. Canadian Commercial Corp./Ballard Battery Sys. Corp., B-255642, Mar. 18, 1994, 94-1 CPD ¶ 202. Where a dispute exists as to the actual meaning of the terms of a solicitation, we will resolve the matter by reading the solicitation as a whole and in

²The RFPs state a best value evaluation scheme. The procurement/pricing plan is a subfactor under both the technical and price factors.

a manner that gives effect to all of its provisions. Id.; Zeta Constr. Co., Inc., B-244672, Nov. 5, 1991, 91-2 CPD ¶ 428.

The agency states that it is aware of, and took into account, the customary commercial practice that discounts and rebates are considered distinct from compensation earned by distributors for performing actual services for suppliers and that such compensation generally is not passed on to customers in the form of discounts or rebates. The agency asserts that no provision in the RFP could reasonably be interpreted as requiring such "earned income" to be passed through to the government. We agree.

Here, the RFPs as a whole unambiguously require that a minimally acceptable proposal offer DPSC discounts and rebates which are "directly attributable to sales resulting from orders exclusively submitted by DPSC or its customers," which must result in "unit prices [that] are equal to or lower than those offered [to] its most favored customer for similar quantities under comparable terms and conditions." To accomplish this, an offeror, "at a minimum," must propose "rebates and discounts equal to or better than [those of] the offeror's most favored" customer. Since compensation earned for services performed results from a contractor's performance of those services for a particular supplier, not from orders placed by a customer, such compensation cannot be said to be "directly attributable to sales resulting from orders exclusively placed by DPSC or its customers." In other words, nothing in the RFPs requires a firm to alter its customary commercial practice by mandating the passing on of "earned income" to the government where the firm does not already do so or offer to do so.³

Nor does the RFP require reporting on compensation which is earned from services performed and which is uniformly retained by the contractor. The RFP only requires offerors to propose a "process for tracking and reporting rebates/discounts." Since compensation earned for services performed which is not

³The agency's survey of the industry found the term "earned income" to have many different meanings, including the compensation earned for performing services for a supplier--a finding which the protesters do not dispute. As noted by the agency, merely labeling something "earned income" does not make it other than a rebate or discount, and some distributors in fact pass earned income, including compensation earned, on to the customer. In our view, under the RFPs, if a contractor in fact passes on "earned income" to other customers--which the protesters assert is not their customary commercial practice--such payment could be considered a rebate or discount to a "most favored customer." In addition, since the RFPs allow offerors to voluntarily propose and commit to terms that are more advantageous to the government, a firm could commit to pass on "earned income" to the government.

passed on to any customer is neither a discount nor rebate under these RFPs, there is no requirement for tracking and reporting of such compensation.

While the protester alleges that the agency failed to conduct adequate market research to verify the consistency of discount/rebate clauses with customary commercial practice, as discussed above, the RFP has not been shown to be inconsistent with such practice. In any case, the record confirms that the agency did research the commercial practices of this industry and obtained input from the industry in drafting this provision.

As indicated, the protester contends that a variety of terms in the solicitation are not specifically defined and are ambiguous, in particular the terms "discount" and "rebate" because they are not specifically defined and thus could be interpreted to include "earned income" for services rendered. Our discussion above demonstrates that, considering the solicitation as a whole, this is not a reasonable interpretation. To the extent these terms are not specifically defined, the agency states that these terms are reasonably understood to be price reductions which differ only in terms of timing (*i.e.*, discounts are price reductions applied to current prices and rebates are price reductions applicable to prices which have been previously accounted for and thus require reimbursements) and need no specific definition. The protesters have not provided a contrary definition, and we are aware of no other reasonable interpretation of these terms.

In their remaining allegations of ambiguity, the protesters essentially dismantle the solicitation into isolated words and phrases, and offer various "possible" interpretations of these isolated component parts.⁴ We have reviewed all of these alternative interpretations and, giving effect to all of the relevant portions of the solicitation, we find none of these alternative interpretations to be reasonable.

For example, the protesters allege that the rebate and discounts provision phrase "directly attributable to sales resulting from orders exclusively submitted by DPSC" is ambiguous. We disagree and do not find the agency had any obligation to further clarify. The protesters hypothecate that some vendors could narrowly interpret "directly attributable" to mean this phrase is applicable only to rebates subject to a prior agreement between the agency and the supplier, while other vendors could broadly interpret the phrase as including rebates obtained by a contractor for recruiting a stated number of new customers for a supplier, of which DPSC was one. These interpretations either impose conditions not stated in the solicitation--*i.e.*, that discounts and rebates may only be established where there are prior agreements--or fail to consider the full meaning of the term in the context of other

⁴In some cases, Sysco agrees the agency's interpretation is the appropriate one, but argues that other vendors may be confused.

relevant terms and provisions of the solicitations--i.e., directly attributable to sales resulting from orders exclusively submitted by DPSC, as opposed to a rebate attributable to sales accounts in addition to the sales to DPSC, such as the second example advanced by the protesters. In sum, the protesters' various alternative interpretations of the terms of the solicitation are not reasonable because they do not give effect to all relevant terms of the solicitations. See Canadian Commercial Corp./Ballard Battery Sys., Corp., supra.

Finally, the protesters allege that, because the RFP provides that the terms of each offeror's discounts and rebates proposal will be incorporated into any resulting contract, offerors will not be competing on an equal basis. We disagree.

Here, the RFPs state that the "rebates and discounts proposal will be reviewed and if found acceptable, shall become part of the resulting" contract. The RFPs state what discounts and rebates are required to be minimally acceptable. Thus, proposals failing to satisfy these minimum requirements cannot be found technically acceptable under the RFP. The solicitation therefore provides adequate information for offerors to compete intelligently and on a relatively equal basis. The fact that offerors may individually propose terms more attractive than the minimum requirements which the agency may consider in making award is fully disclosed in the RFPs. In contracts such as those contemplated here, the price competition is largely dependent on variations in the proposed discounts and rebates, and the format of this solicitation is sufficiently flexible to allow fair competition on a relatively equal basis. See Pacific Consol. Indus., supra; Tucson Mobilephone, Inc., supra.

The protests are denied.

Comptroller General
of the United States