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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Red River Waste Solutions, LP

File: B-411760.2

Date: January 20, 2016

Johnathan M. Bailey, Esq., Bailey & Bailey, P.C., for the protester.

Major M. Aaron Lee, and Scott N. Flesch, Esq., Department of the Army, for the agency.

Glenn G. Wolcott, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the terms of a solicitation for commercial waste management services, issued pursuant to Federal Acquisition Regulation (FAR) Part 12, is sustained where the agency's market research fails to reasonably support the agency's determination that the solicitation's pricing terms are consistent with customary commercial practice, as required by the FAR.

2. Protest that estimated quantities in solicitation are not based on the best available information is denied where agency based its estimates on the most recent historical data, and also provided offerors with additional data covering the preceding 3 years.

DECISION

Red River Waste Solutions, LP (RRWS), of Dripping Springs, Texas, protests the terms of request for proposals (RFP) No. W91247-15-R-0026, issued by the Department of the Army, to provide solid waste management services at or near Fort Polk, Louisiana.¹ RRWS, the incumbent contractor for these requirements,

¹ The solicitation states that the required services "will be performed at North and South Fort Polk, Peason Ridge Cantonment Area and Military Maneuver Areas at the Joint Readiness Training Center (JRTC) and Fort Polk." Agency Report (AR), Tab 6, Performance Work Statement ¶ 1.6.4. The agency states that approximately 44,000 soldiers per year train at the Fort Polk JRTC prior to their deployments. AR, Tab 2, Contracting Officer's Statement, at 1.

protests that the solicitation, which seeks commercial services pursuant to Federal Acquisition Regulation (FAR) Part 12, contains terms that are inconsistent with customary commercial practice, and that the estimated quantities in the solicitation are not based on the best available information.

We sustain the protest in part and deny it in part.

BACKGROUND

On May 8, 2015, the agency issued this solicitation pursuant to FAR Part 12, posting it to the Federal Business Opportunities (FedBizOpps) website at that time. The solicitation requires the contractor to collect and dispose of solid waste in designated areas in and around Fort Polk, and provides that, except for government-furnished property, the contractor must provide all personnel, equipment, supplies, facilities, transportation, tools, materials, collection systems, supervision, and other items necessary to perform the required services. AR, Tab 6, PWS ¶ 1.1.

The solicitation contemplates award of a single, indefinite-delivery requirements contract for a base period² and four 1-year option periods. Offerors are required to submit fixed prices, on a per-ton basis, for several contract line item numbers (CLINS), for which the solicitation provided estimated quantities.³ This solicitation varies from the prior contract, held by RRWS, in that CLINs for contractor overhead costs have been removed. That is, although the prior contract included CLINs priced on a per-ton basis, the agency acknowledges that the prior contract also had overhead CLINs covering the contractor's variable costs. Here, the solicitation eliminates the overhead CLINs, requiring offerors to submit prices that reflect "all fixed and variable costs" on a per-ton basis, and "only permits the Contractor to invoice on tonnage collected." AR, Tab 2, Contracting Officer's Statement, at 2. The agency acknowledges that compensation under the current solicitation is "primarily based on tonnage." AR at 3.

² As amended, the solicitation provided for a 45-day phase-in period and a 10.5 month base performance period. AR, Tab 2, Contracting Officer's Statement, at 1.

³ Specifically, for each performance period, fixed prices on a per-ton basis are required for: collection/disposal of municipal solid waste; collection/sort/disposal of mixed field waste; and collection/delivery of various recycled materials. See AR, Tab 6, RFP at CLINs 0002, 0004, 0006. The solicitation also contains limited cost-reimbursement CLINS for tipping fees, verification of inspection/segregation, and conveyer system repairs. Id. at CLINS 0003, 0005, 0007, 0008.

Following publication of the solicitation, the agency conducted a site visit, issued various solicitation amendments, and responded to offerors' questions. As amended, the solicitation provided for a July 16 closing date.

On July 10, 2015, RRWS filed a protest with our Office challenging the terms of the solicitation. In that protest, RRWS asserted, among other things, that the solicitation's requirements for fixed prices on a per-ton basis were inconsistent with commercial practice, and that the solicitation's estimated quantities for the various CLINs were overstated. See RRWS Protest, July 10, 2015, at 4, 27. Thereafter, the agency advised our Office that it would take corrective action. On August 12, we dismissed RRWS's protest based on the agency's pending corrective action.

The agency subsequently issued several more solicitation amendments, provided additional information regarding historical quantities of refuse collected, responded to offeror questions, and extended the closing date to October 21. On October 13, RRWS filed this protest, again challenging various aspects of the solicitation. As discussed below, we sustain the protest in part and deny it in part.

DISCUSSION

RRWS protests that the solicitation's per-ton pricing provisions are inconsistent with customary commercial practice, and that the estimated quantities contained in the solicitation are not based on the best available information.

Customary Commercial Practice

RRWS first protests that the terms of the solicitation requiring price proposals to be submitted on a per-ton basis are inconsistent with customary commercial practice for refuse contracts. RRWS elaborates that where, as here, commercial contracts mandate regular trash collection schedules,⁴ such contracts are not priced on a per-ton basis since contractors' costs are driven by the number, frequency, and distance between stops on a collection schedule--not by the amount, or weight, of refuse collected during such stops. RRWS elaborates that the costs a contractor incurs are essentially the same whether the refuse containers are full, partially full, or empty.⁵ Protest at 33-41. Accordingly, RRWS maintains that customary

⁴ The solicitation requires the contractor to adhere to an established schedule, and specifically requires that containers be emptied at least once a week. AR, Tab 6, PWS ¶ 5.2.

⁵ By way of example, RRWS notes that one collection schedule with 100 stops could result in refuse collection totaling 10 tons, while a second collection schedule with 200 stops could also result in refuse collection totaling 10 tons. Pursuant to the pricing terms of this solicitation, the compensation for the contractor would be the
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commercial practice for refuse collection contracts is to price such contracts on a monthly or per-container basis--not on a per-ton basis. Id.

The Federal Acquisition Streamlining Act of 1994, 41 U.S.C. 3307 (2006), established a preference and specific requirements for acquiring commercial items that meet an agency's needs. The FAR requires that contracts for the acquisition of commercial items "shall, to the maximum extent practicable, include only those clauses . . . [d]etermined to be consistent with customary commercial practice." FAR § 12.301(a)(2). In establishing acquisitions for commercial items, FAR § 10.002(b) requires market research by the acquiring agency to address, among other things, customary practices regarding the provision of the commercial items. Northrop Grumman Tech. Servs., Inc., B-406523, June 22, 2012, 2012 CPD ¶ 197 at 14-15. Consistent with this approach, FAR § 12.302(c) bars the tailoring of solicitations for commercial items in a manner inconsistent with customary commercial practice unless a waiver is approved in accordance with agency procedures. Verizon Wireless, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 5-6; Smelkinson Sysco Food Services, B-281631, Mar. 15, 1999, 99-1 CPD ¶ 57 at 4-5. Such waiver must describe the customary commercial practice found in the marketplace, support the need to include a term or condition that is inconsistent with that practice, and include a determination that the use of the customary commercial practice is inconsistent with the needs of the government.

In response to RRWS's protest, the agency acknowledges that the services contemplated by this solicitation are commercial services, and that the solicitation is subject to the requirements of FAR Part 12. AR, Tab 4, Market Research Report, at 13. Nonetheless, the agency asserts that it performed market research supporting a determination that requiring per-ton fixed prices in refuse contracts is customary commercial practice. The agency's market research consisted of the following: (1) review of other Army refuse contracts; (2) request for feedback from industry in a Sources Sought Notice (SSN); and (3) contact with a sales representative for Thomas Trash Services, a company located in upstate New York. Id. at 7-12.

First, the agency states that it considered other Army refuse contracts at Fort Bragg in North Carolina, at Fort Drum in New York, and at Fort Stewart in Georgia, to determine whether those contracts contained prices based on tonnage. Id. at 12. The agency found that Fort Bragg "utilizes CLINs based on months"; that Fort Stewart operates its own landfill and, therefore, "do[es] not track cost by tonnage"; and that Fort Drum "utilizes a tonnage approach" for its post-wide refuse contracts. Id.

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same for both schedules, while the costs would be significantly different. Protest at 33-41.

Next, on January 5, 2015, the agency posted an SSN on the Federal Business Opportunities website, requesting responses to the following question:

Contract Content/Structure: The Government anticipates structuring the contract for pricing and payment according to the actual tonnage picked up. The potential CLIN structure is attached. Do you have any suggestions or comments on the anticipated structure as compared to customary commercial practices, the impacts of pricing this structure, or information necessary for Contractors to provide fair and reasonable pricing for this contract structure?

Id. at 8.

Although the agency report does not contain the actual responses to this question, the agency's summary of those responses states that 7 responses were received, and that "four (4) respondents suggested the CLIN structure be a monthly CLIN and three (3) respondents had no comments to the current tonnage-based contract structure." Id. at 11.

Finally, the agency states that it obtained "historical market research" that had been performed in September 2014 by personnel at Fort Drum, New York,⁶ by contacting a sales representative for Thomas Trash Services, a company located in upstate New York. Based on this contact, the agency stated:

[The named sales representative] explained that fixed and variable costs can be combined to establish a per ton price. [The sales representative] stated that this is the method of pricing used by Thomas Trash Services and it is a practical method of pricing for trash removal services. Based on [the sales representative's] expertise and knowledge of industry, it has been verified that pricing based on tonnage is an acceptable commercial practice.

Id. at 11-12.

Upon reviewing its market research, summarized above, the agency concluded that:

[I]t is in the Government's best interest to utilize the tonnage approach. The Government has determined it is a commercial practice During the solicitation phase, offerors will have the ability to establish pricing which would include all fixed and variable costs, on a per-ton basis. This

⁶ The agency states that personnel at Fort Drum "worked on this Solicitation before it was transferred to . . . [Fort Bragg]." AR at 4 n6.

restructure will give greater incentive for the Contractor to maintain lower costs.

Id. at 12.

Based on the record here, we conclude that the agency's market research fails to reasonably support the agency's conclusion that pricing for refuse contracts on a per-ton basis reflects customary commercial practice; further, no waiver was executed.

First, we agree with the protester's assertion that it was unreasonable for the agency to rely on other government refuse contracts as a basis for establishing customary commercial practice, since contracts with the federal government are not generally considered to be part of the commercial marketplace. In this regard, the FAR defines the term "Commercial item" as: "Any item, other than real property, that is of a type customarily used by the general public or by non-government entities for purposes other than government purposes" FAR § 2.101 (emphasis added). If government contracts were generally considered part of the commercial marketplace, everything the government procures could be considered a commercial item, and a significant portion of FAR Part 12 would be rendered superfluous. See Smelkinson Sysco Food Services, supra, at 5 (protest sustained despite agency's assertion that the challenged solicitation provisions appeared in other government contracts). In this regard, since the intent of FAR Part 12 is that both the government and its contractors will benefit by the government's acquisition of commercial goods and services using the same terms and conditions used in the commercial marketplace, such benefits fail to be realized when the government includes solicitation terms in commercial acquisitions that are contrary to that objective. In short, the agency's reliance here on other government refuse contracts does not provide a reasonable basis for its determination that the pricing provisions in this solicitation reflect customary commercial practice.

Next, we agree with the protester that the feedback received by the agency in response to the January 2015 SSN does not support the agency's determination that pricing on a per-ton basis reflects customary commercial practice in refuse contracts. As noted above, the agency's SSN referenced the solicitation's price-per-ton approach and asked the following question:

Do you have any suggestions or comments on the anticipated structure as compared to customary commercial practices, the impacts of pricing this structure, or information necessary for Contractors to provide fair and reasonable pricing for this contract structure?

AR, Tab 4, Market Research Report, at 8.

Of the seven responses received, the agency's market research report states that four suggested pricing should be "monthly," and the other three "had no comments" on this issue.⁷ Id. at 11. That is, the majority of respondents indicated that customary commercial practice reflected monthly-based prices--not prices based on tonnage collected--and none of the respondents identified any current commercial contracts priced on a per-ton basis.⁸ Further, the agency's reliance on three of the respondents who did not comment on this issue provides no basis for the agency to conclude that the solicitation's pricing terms constitute customary commercial practice. We have specifically held that the absence of objections to a solicitation provision does not satisfy an agency's obligation to establish support for an affirmative determination regarding customary commercial practice. See Smelkinson Sysco Food Services, supra., at 6.

Finally, we agree with the protester's contention that the market research previously performed by Fort Drum personnel through their contact with a sales representative for a trash company in upstate New York does not provide an adequate basis for concluding that this solicitation's price-per-ton approach reflects customary commercial practice. Here, the record does not contain, or even reference, any particular commercial refuse contract to which the New York trash company was a party. Further the record does not contain any documentation from the sales representative himself, nor does it even contain any documentation from the Fort Drum personnel who contacted the sales representative. Finally, although the agency refers to the "expertise and knowledge" of the sales representative, see AR, Tab 4, Market Research Report, at 12, nothing in the record in any way addresses the basis for, or extent of, such "expertise and knowledge."

On this record, we reject the agency's assertion that its market research provides a reasonable basis for determining that the price-per-ton provisions in this solicitation are consistent with customary commercial practice. Accordingly, the protest is sustained, based on the agency's failure to reasonably support that determination.

⁷ As noted above, the agency did not provide the actual responses provided by industry, providing instead only the agency's summary of those responses.

⁸ The fact that one responder stated that it "is capable of proposing on a tonnage basis" does support the conclusion that such pricing is customary commercial practice. AR, Tab 4, Market Research Report, at 10.

Estimated Quantities

Next, RRWS protests that the solicitation's estimated quantities for the fixed-price CLINs "are not based on the best available information," and maintains that the quantities are "substantially overestimated." Protest at 13-31. RRWS provides various charts and analyses, based on its own historical data dating back to 2009, asserting that there has been a downward trend in the quantity of refuse collected, and that this trend is not reflected in the solicitation's estimated quantities.⁹ Id. In addition to RRWS's assertion regarding a "downward trend," RRWS complains that the solicitation fails to reflect the impact of the Net Zero Waste program,¹⁰ which RRWS maintains will "further reduce the tonnage [of collected refuse]." Protest at 19.

The agency responds that it relied on the average historical data for the most recent 21 months of performance under the prior contract (from October 2013 to June 2015) to calculate the estimated quantities, maintaining that the data on which it relied constituted the best available information. AR, Tab 15, Department of Public Works Memorandum, at 1. The agency explains that refuse collection data prior to October 2013 was not used to calculate the estimates "in order to exclude the effects of the sequestration"¹¹ (which occurred from March 1, 2013 through September 30, 2013), and that information prior to sequestration was not considered to be the most current. Id. The agency notes that, even though its estimates were based on the most recent 21 months, it amended the solicitation to provide all potential offerors with historical data dating back to July 2012. See AR, Tab 14, RFP amend. 6, attach. 1.

With regard to the impact of the Net Zero Waste program, the agency states that Fort Polk was selected as a Net Zero Waste pilot installation in fiscal year 2010, and that "obvious opportunities to reduce the waste stream were quickly identified and implemented," leading to a reduction in the waste stream during fiscal years 2011 and 2012. AR, Tab 2, Contracting Officer's Statement, at 9. Since that time, there "has been very little further reduction in the waste stream." Id. Accordingly, the agency states that it "do[es] not anticipate that there will be any increase or decrease in total tonnage of the waste stream" during the life of the contract. Id.

⁹ The solicitation's estimated quantities are essentially the same for each performance period.

¹⁰ The Army's Net Zero Waste program reflects its intent "to reduce the volume of solid waste deposited in a landfill to the maximum extent possible," primarily through various recycling efforts. AR, Tab 6, RFP at CLIN 0006.

¹¹ Sequestration refers to the practice of applying mandatory cuts in the federal budget.

In any event, the agency notes that future reductions in the amount of solid waste due to the Net Zero Waste program should be offset by an increase in the items being collected under the solicitation's recycling CLIN. See AR, Tab 6, RFP at CLIN 0006.

As a general rule, a contracting agency must give sufficient detail in a solicitation to enable offerors to compete intelligently and on a relatively equal basis. Dellew Corp., B-407159, Nov. 16, 2012, 2012 CPD ¶ 341 at 3; Crown Contract Servs., B-288573, Oct. 31, 2001, 2001 CPD ¶ 179 at 2. Further, when an agency solicits offers for a requirements contract on the basis of estimated quantities, the agency must base its estimates on the best information available. While the estimates need not be absolutely correct, the estimated quantities must be reasonably accurate representations of anticipated needs. Inventory Accounting Serv., Inc., B-271483, July 23, 1996, 96-2 CPD ¶ 35 at 2-3.

Here, as discussed above, the record shows that the agency based its estimated quantities on the average historical data experienced over the most recent 21 months of prior performance, explaining that data preceding that period reflected atypical experience during sequestration, and that the historical data prior to sequestration was considered insufficiently current to be used in the estimates. Nonetheless, the agency provided additional historical data to all potential offerors, disclosing to them that the estimated quantities were based on the data for October 2013 through June 2015, as the government considered that data to reflect the best, most current information. AR, Tab 14, RFP amend. 6, at 203. Finally, the agency explains that it concluded that the Net Zero Waste program was unlikely to further reduce waste streams beyond the reductions that had already been experienced following implementation of the program in fiscal year 2010. On this record, we find no basis to question the reasonableness of the agency's estimated quantities, and RRWS's protest challenging that aspect of the solicitation is denied.

The protest is sustained in part and denied in part.¹²

¹² In its protest, RRWS raised various additional arguments including complaints that the type of containers required by the solicitation exceeded the agency's needs; that various solicitation terms, other than those discussed above, were ambiguous and/or improper; and that the agency failed to reasonably respond to all of RRWS's questions. In its report responding to the protest, the agency addressed all of RRWS's allegations and, thereafter, RRWS did not further address several of its initial allegations. Accordingly we view arguments that RRWS initially raised, but did not further address, to be abandoned. See, e.g., Advanced Techs. & Labs. Int'l, Inc., B-411658 et al., Sept. 21, 2105, 2015 CPD ¶ 301 at 4-5. In any event, we have considered all of RRWS's allegations and, other than the agency's failure to support its determination regarding customary commercial practice, as discussed above, we find no basis to sustain the protest.

RECOMMENDATION

We recommend that the agency either: (1) conduct adequately documented market research, reasonably addressing customary commercial practice with regard to per-ton pricing in commercial refuse contracts; (2) obtain a properly executed waiver of the FAR requirements; or (3) revise the solicitation to eliminate per-ton pricing. We also recommend that RRWS be reimbursed the costs of filing and pursuing its protests, including reasonable attorney's fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claims for costs, detailing the time expended and cost incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Susan A. Poling
General Counsel