



United States Government Accountability Office  
Washington, DC 20548

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## Decision

**Matter of:** Department of the Army--Reconsideration and Request for Modification of Recommendation

**File:** B-411760.3

**Date:** June 15, 2016

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Lt. Col. Jose A. Cora, Maj. Melvin Lee, and Scott N. Flesch, Esq., Department of the Army, for the agency.

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

Jonathan L. Kang, Esq., and Cherie J. Owen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Agency's request for reconsideration of a decision sustaining a protest that a solicitation for the procurement of commercial waste management services improperly included terms and conditions that were not consistent with customary commercial practice is denied where the agency's request does not demonstrate that the decision contained material errors of fact or law.

2. Agency's request that we modify our recommendation to reimburse the protester's costs of pursuing its successful protest is denied, as the request, in essence, addresses the amount to be reimbursed, rather than whether the protester should be reimbursed.

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### DECISION

The Department of the Army requests that we reconsider our decision in Red River Waste Solutions, LP, B-411760.2, Jan. 20, 2016, 2016 CPD ¶ 45, in which we sustained the protest filed by Red River Waste Solutions, LP (RRWS), of Dripping Springs, Texas, concerning the terms of request for proposals (RFP) No. W91247-15-R-0026, which was issued by the Army for solid waste management services at or near Fort Polk, Louisiana. The Army argues that our decision contained errors of law and fact that warrant reconsideration of our decision. The Army also requests that, in the event we do not reconsider the merits of our decision, we modify our recommendation that the agency reimburse RRWS's costs of filing and pursuing its protest to reflect that the protester did not prevail on all of the arguments raised.

We deny the request for reconsideration and modification of the recommendation.

## BACKGROUND

On May 8, 2015, the Army issued the solicitation pursuant to the commercial item provisions of Federal Acquisition Regulation (FAR) part 12. 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. RFP, Performance Work Statement, ¶ 1.1.

The solicitation contemplates award of a single, indefinite-delivery requirements contract with a base period of approximately 1 year, and four 1-year options. Offerors are required to submit fixed prices for the waste services, on a per-ton basis, under several contract line item numbers (CLINs), for which the solicitation provided estimated quantities.<sup>1</sup> The solicitation differed from the prior contract, for which RRWS is the incumbent, 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. Contracting Officer's Statement (B-411760.2), at 2. 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." Id. The agency acknowledges that compensation under the current solicitation is "primarily based on tonnage." Agency Memorandum of Law (B-411760.2) at 3.

On July 10, 2015, prior to the July 16 due date for proposals, RRWS filed a protest with our Office (B-411760) 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 (B-411760) 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.

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<sup>1</sup> 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. RFP at CLINs 0002, 0004, 0006. The solicitation also contains limited cost-reimbursement CLINs for tipping (landfill) fees, verification of inspection/segregation, and conveyer system repairs. Id. at CLINs 0003, 0005, 0007, 0008.

The Army 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 a second protest (B-411760.2), again arguing that the solicitation's per-ton pricing terms and conditions are inconsistent with customary commercial practice, and that the estimated quantities contained in the solicitation are not based on the best available information.

On January 20, 2016, our Office sustained the protest with regard to RRWS's challenge to the solicitation's per-ton pricing terms and conditions, but denied the protest with regard to the statement of estimated quantities. Red River Waste Solutions, LP, supra, at 7, 9. With regard to the per-ton pricing terms and conditions, we found that the Army's market research did not demonstrate that they were consistent with customary commercial practice, as required by FAR part 12. Id. at 3-7. As relevant to the Army's request for reconsideration, we concluded that the agency's reliance on other government contracts for waste disposal services was not consistent with the purposes of the commercial item procurement policies of FAR part 12, and thus did not justify the use of the per-ton pricing terms and conditions. Id. at 6.

On February 1, the Army filed a timely request for reconsideration of our decision and for modification of our recommendation.

## DISCUSSION

The Army requests that we reconsider our decision sustaining RRWS's protest. The agency raises two primary arguments: (1) the legal standard of review for terms and conditions consistent with customary commercial practice set forth in our decision was in error, and (2) our decision improperly concluded that an agency cannot rely on other government contracts to establish customary commercial practice.<sup>2</sup> The Army also requests, in the event we do not grant the request for reconsideration, that we modify our recommendation that RRWS be reimbursed its protest costs to reflect the fact that our decision did not sustain every issue raised by the protester. For the reasons discussed below we conclude that our decision did not err as a matter of fact or law, and that there is no basis to reconsider our

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<sup>2</sup> RRWS argues that the Army's request for reconsideration is untimely because it advances interpretations of FAR part 12 that were not raised in the agency's report responding to B-411760.2. Protester's Response to Request for Recon. (Feb. 12, 2016) at 1-2. We conclude that the request is timely because it was filed within 10 days of the issuance of our decision, and because the agency's request disputes the legal standard set forth by our Office in that decision. See Bid Protest Regulations, 4 C.F.R. § 21.14.

decision. Additionally, we find no basis to modify our recommendation that the Army reimburse RRWS's costs of filing and pursuing its protest, as the agency's request essentially addresses the amount to be reimbursed, rather than whether the protester should be reimbursed.

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must set out the factual and legal grounds upon which reversal or modification of the decision is deemed warranted, specifying any errors of law made or information not previously considered. Bid Protest Regulations, 4 C.F.R. § 21.14(a), (c). The repetition of arguments made during our consideration of the original protest and disagreement with our decision do not meet this standard. Id.; Veda, Inc.--Recon., B-278516.3, B-278516.4, July 8, 1998, 98-2 CPD ¶ 12 at 4.

#### Legal Standard of Review for Commercial Item Terms and Conditions

The Army first argues that our decision erred with regard to our statement of the legal standard applicable to an agency's requirement to procure commercial items and the prohibition on using terms and conditions that are inconsistent with customary commercial practice. Specifically, the agency argues that the standard set forth in our decision improperly limits an agency's discretion to include contract terms and conditions in a solicitation for commercial items. As discussed below, we conclude that the Army's argument is not supported by the laws and regulations pertaining to the acquisition of commercial items.

The Federal Acquisition Streamlining Act of 1994 established a preference for acquiring commercial items that meet an agency's needs. 10 U.S.C. § 2375-2379. Agencies are required to conduct market research to determine whether commercial items or nondevelopmental items are available to meet the agency's requirements, and to acquire those items when they are available. FAR § 12.101. When conducting market research, FAR § 10.002(b) requires agencies to address, among other things, customary practices regarding the commercial items. See also Northrop Grumman Tech. Servs., Inc., B-406523, June 22, 2012, 2012 CPD ¶ 197 at 14-15.

When issuing solicitations, agencies are directed "to the maximum extent practicable, [to] include only those clauses" that are required "to implement provisions of law or executive orders applicable to the acquisition of commercial items," or are "[d]etermined to be consistent with customary commercial practice." FAR § 12.301. The FAR identifies certain clauses necessary to implement laws that are consistent with customary commercial practice. FAR § 12.302(b). The FAR also provides however, that "because of the broad range of commercial items acquired by the Government, variations in commercial practices, and the relative volume of the Government's acquisitions in the specific market," agencies may "within the limitations of this subpart, and after conducting appropriate market research," tailor clauses. Id.

In granting the authority to tailor clauses, however, the FAR states that “[t]he contracting officer shall not tailor any clause or otherwise include any additional terms or conditions in a solicitation or contract for commercial items in a manner that is inconsistent with customary commercial practice for the item being acquired unless a waiver is approved in accordance with agency procedures.” FAR § 12.302(c); see also Verizon Wireless, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 5-6; Smelkinson Sysco Food Servs., B-281631, Mar. 15, 1999, 99-1 CPD ¶ 57 at 4-5. Such a 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. Aalco Forwarding Inc., et al., B-277241.8, B-277241.9, Oct. 21, 1997, 97-2 CPD ¶ 110 at 18; Crescent Helicopters, B-284706 et al., May 30, 2000, 2000 CPD ¶ 90 at 4-5.

The FAR provides the following definition of commercial items, quoted here in full as relevant to the Army’s arguments:

“Commercial item” means—

(1) Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and—

(i) Has been sold, leased, or licensed to the general public; or

(ii) Has been offered for sale, lease, or license to the general public;

(2) Any item that evolved from an item described in paragraph (1) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

(3) Any item that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, but for—

(i) Modifications of a type customarily available in the commercial marketplace; or

(ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. Minor modifications means modifications that do not significantly alter the nongovernmental function or essential physical

characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;

(4) Any combination of items meeting the requirements of paragraphs (1), (2), (3), or (5) of this definition that are of a type customarily combined and sold in combination to the general public;

(5) Installation services, maintenance services, repair services, training services, and other services if—

(i) Such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and

(ii) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government;

(6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. For purposes of these services—

(i) “Catalog price” means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and

(ii) “Market prices” means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

(7) Any item, combination of items, or service referred to in paragraphs (1) through (6) of this definition, notwithstanding the fact that the item, combination of items, or service is transferred between

or among separate divisions, subsidiaries, or affiliates of a contractor;  
or

(8) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.

FAR § 2.101.

The Army first argues that our decision sets forth an improperly truncated definition of commercial items that limits agencies' discretion in conducting commercial item procurements. Our decision defined commercial items as follows: "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)." Red River Waste Solutions, LP, supra, at 6. The agency contends that our decision improperly defines the scope of commercial items, as the quote above includes only part of the first of eight elements in the definition in FAR § 2.101. As most significant to this request for reconsideration, the agency notes that our decision did not reference portions of this definition which include items which would satisfy the definition of a commercial item but for: "(i) Modifications of a type customarily available in the commercial marketplace; or (ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements." Id. § 2.101(3).

Our decision was not intended to limit the definition of commercial items in the FAR. The brief and truncated citation to FAR § 2.101 was for the purpose of explaining the definition of commercial item to the extent necessary to address the substantive issues in the protest. As discussed in detail below, our decision primarily addressed the requirements in FAR part 12 that solicitations not include clauses or terms inconsistent with customary commercial practice. For this reason, we conclude that the limited citation to the definition of commercial items in FAR § 2.101 does not constitute an error of law that warrants reconsideration of our prior decision.

Next, the Army agency argues that our decision applied the incorrect legal standard for assessing whether a clause or term is consistent with customary commercial practice. The Army advocates, in essence, an interpretation of the FAR requirements concerning commercial item procurements that links the definition of commercial items with the prohibition on use of terms inconsistent with customary commercial practice. In this regard, the agency argues that there is an "interplay" between the broad definition of commercial items in FAR § 2.101, which includes modifications available in the commercial marketplace or minor modifications necessary to meet government requirements, and the guidance regarding tailoring of terms and conditions in FAR § 12.302(c). Thus, the agency argues that the

tailoring of commercial terms and conditions does not violate the prohibitions in FAR part 12 concerning customary commercial practice where the tailoring is necessary to meet the government needs, within the meaning of FAR § 2.101. Request for Recon. at 6, 17. Rather, under the agency’s “interplay” interpretation, a term or condition is not inconsistent with customary commercial practice unless it causes “supplies or service sought as commercial items [to be] changed into non-commercial items.” Id. at 6. As applied to our decision in Red River, the agency argues that even if the per-ton pricing is inconsistent with customary commercial practice, it should not be considered a prohibited term under FAR § 12.302(c) because it is a “minor modification allowed for commercial items since it does not ‘significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process.’” Id. at 17-18 (quoting FAR § 2.101(3)).

We do not agree with the Army’s “interplay” interpretation of FAR part 12. The requirement in the FAR for the acquisition of commercial items to meet the government’s needs is distinct from the prohibition on use of terms and conditions that are inconsistent with customary commercial practice. See FAR §§ 12.101, 12.301, 12.302. In this regard, FAR §§ 12.301(a) and 12.302(c) prohibit the use of terms and conditions that are inconsistent with customary commercial practice; these provisions do not state that terms and conditions are inconsistent with customary commercial practices only under circumstances where they cause the entire good or service being procured to lose its status as a commercial item.

Notwithstanding a lack of support for the “interplay” interpretation in the applicable statutes or the FAR, the Army argues that decisions by our Office support its argument. For example, the agency argues that our decision in Aalco Forwarding Inc., et al., supra, concluded that a disputed solicitation term was not inconsistent with customary commercial practice because it did not change the commercial nature of the services sought. We do not agree with the agency’s characterization of this decision.

In Aalco, the protesters challenged the terms of a solicitation for personal property shipping services for Department of Defense personnel, and argued that certain terms and conditions were inconsistent with customary commercial practice. Aalco Forwarding Inc., supra, at 13. The protesters argued that challenged terms and conditions changed the nature of the services to the degree that they were no longer commercial in nature, and that use of FAR part 12 procedures was therefore improper. Id. Our Office denied the protest, concluding that the terms and conditions did not transform the nature of the services to something other than a commercial service. Id. at 17. Although the protesters in Aalco chose to argue that the disputed terms and conditions caused the services to no longer be commercial in nature, it is not necessarily the case that every challenge to a term as being

inconsistent with commercial practice raises this argument in the same manner as the protesters in Aalco.<sup>3</sup> Instead, as here, a protester may argue that a term is inconsistent with commercial practice without arguing that the term so fundamentally changes the nature of the work as to render it non-commercial.

For example, other decisions by our Office have addressed arguments that solicitation terms and conditions were not consistent with customary commercial practice, where the protesters did not argue that the terms changed the nature of the solicited products or services to the degree that they were no longer commercial items. See, e.g., Northrop Grumman Tech. Servs., Inc., supra, at 14-17; Verizon Wireless, supra, at 6-14. Similarly, decisions by the U.S. Court of Federal Claims and U.S. Court of Appeals for the Federal Circuit have addressed the requirements of FAR part 12 by addressing solely whether disputed terms and conditions were consistent with customary commercial practice. For example, in CGI Federal Inc. v. United States, 779 F.3d 1346 (Fed. Cir. 2015), the U.S. Court of Appeals for the Federal Circuit held that a payment term was inconsistent with customary commercial practice, despite the fact that all parties agreed that the underlying services sought were commercial. In concluding that the payment term was inconsistent with customary commercial practice, the Federal Circuit did not apply the standard advocated by the Army here, e.g., that a term violates FAR §§ 12.301(a) or 12.302(c) only where the term changes the nature of the solicited services to the degree that they are no longer commercial items. CGI Fed. Inc., 779 F.3d at 1352-54. See also CW Gov. Travel, Inc. v. United States, 99 Fed. Cl. 666 (2011); U.S. Foodservice, Inc. v. United States, 100 Fed. Cl. 659 (2011).

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<sup>3</sup> Other decisions cited by the Army are distinguishable as well. For example, in NABCO, Inc., B-293027, B-293027.2, Jan. 15, 2004, 2004 CPD ¶ 14, our Office denied a protest where the agency reasonably concluded that products offered by the awardee were commercial items, as required by the solicitation, because the products were the same as those offered commercially, with the exception of a minor modification to meet the government's requirements that was itself commercially available. We did not conclude, as the agency contends, that a modification of a commercial item in a manner that does not change the commercial nature of the item is evidence that any associated terms and conditions in the solicitation are necessarily consistent with customary commercial practice. See Request for Recon. at 6; NABCO, Inc., supra, at 3-4. Moreover as relevant here, this protest challenged whether the entire product offered was a commercial item, rather than raising the issue of whether a term or condition of the solicitation was consistent with customary commercial practice. NABCO, Inc., supra, at 3-4.

In sum, we find no basis to conclude that our decision contained an error of law or fact with regard to the legal standards applicable to the procurement of commercial items, and find no basis to reconsider our decision on this basis.<sup>4</sup>

#### Reliance on Other Government Contracts for Market Research

Next, the Army contends that our decision improperly concluded that the agency could not rely on other government contracts to establish that a term or condition is a commercial practice.<sup>5</sup> The agency's argument again relies on its arguments concerning an "interplay" between the definition of a commercial item under FAR § 2.101 and the prohibition on using contract terms and conditions that are inconsistent with customary commercial practice under FAR part 12. The agency further argues that our decision improperly relied on support from our decision in Smelkinson. We find no merit to these arguments.

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<sup>4</sup> The Army also argues that, even if our decision applied the correct legal standard, we incorrectly found that per-ton pricing was a "term or condition" within the meaning of FAR part 12. Request for Recon. at 15-16; Army Comments on Request for Recon. (Feb. 19, 2016) at 4. As the agency notes, the FAR and Department of Defense FAR Supplement (DFARS) require agencies to include clauses for which there are no commercial analogues, such as restrictions on employing former government officials and requiring access to agency inspectors general. See DFARS § 212.301. The terms and conditions cited by the Army, however, are requirements that expressly apply to commercial procurements. Request for Recon. at 15 (citing, e.g., DFARS clauses 252.203-7000 (compensation of former DOD officials); 252.203-7003 (access by inspector general)). We therefore find no merit to the Army's argument that our decision sets a standard that requires agencies to seek waivers to include solicitation terms and conditions required by law or regulation.

<sup>5</sup> As discussed above, the Army's response to the protest argued that three sources of market research supported its conclusion that the per-ton pricing term was consistent with commercial practice: (1) other government contracts, (2) responses from vendors, and (3) information concerning a commercial contract in New York state. Red River Waste Solutions, LP, supra, at 4-5. Our decision concluded that none of these bases demonstrated that the disputed term was consistent with customary commercial practice, either with regard to requirements of the FAR or the adequacy of the record provided by the agency. Id. at 6-7. The Army's request for reconsideration concerns our arguments regarding the agency's reliance on other government contracts for market research, and does not meaningfully challenge our conclusions with regard to the other two sources of market research.

The Army argues that “[t]he FAR specifically authorizes an agency to review other government contracts as a means of conducting market research in reaching a commerciality determination.” Request for Recon. at 10 (citing FAR § 10.002(b)). In this regard, the Army notes that agencies are authorized to tailor the commercial items terms and conditions in FAR clause 52.212-4, after “conducting appropriate market research.” FAR § 12.302(a). The agency further notes that the techniques authorized for market research in FAR part 10 include: “Querying the Governmentwide database of contracts and other procurement instruments intended for use by multiple agencies available at <https://www.contractdirectory.gov/> contractdirectory/ and other Government and commercial databases that provide information relevant to agency acquisitions.” FAR § 10.002(b)(2)(iv) (emphasis added).

To the extent the agency argues that FAR § 10.002(b)(2)(iv) expressly permits agencies to cite other government contracts to demonstrate that a term or condition is consistent with customary commercial practice, we think the agency reads too much into this provision for two reasons. First, this FAR provision does not specifically state that agencies may rely upon other commercial item contracts to demonstrate customary commercial practice. Rather, the provision states that agencies may look to the [contractdirectory.gov](https://www.contractdirectory.gov/) database<sup>6</sup> for information about contracts available for use by multiple agencies. Similarly, the provision’s reference to “other Government and commercial databases” does not support the agency’s position that other government contracts may be cited as evidence of customary commercial practice.

Second, as the FAR recognizes, there are numerous reasons why the government’s unique requirements may be distinct from those found in the commercial marketplace. As discussed above, FAR § 12.301 states that “because of the broad range of commercial items acquired by the Government, variations in commercial practices, and the relative volume of the Government’s acquisitions in the specific market,” the agency may tailor commercial item contract terms and conditions, subject to the limitations in FAR § 12.302(c) regarding customary commercial practice.

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<sup>6</sup> The Interagency Contract Directory website at [www.contractdirectory.gov](http://www.contractdirectory.gov) (last visited May 27, 2016), states: “The Interagency Contract Directory (ICD) is a central repository of Indefinite Delivery Vehicles (IDV) awarded by the Federal agencies where the IDV is available for use at both the intra agency and interagency levels. IDVs include Government-Wide Acquisition Contracts (GWAC), Multi-Agency Contracts, Other Indefinite Delivery Contracts (IDC), Federal Supply Schedules (FSS), Basic Ordering Agreements (BOA), and Blanket Purchase Agreements (BPA).”

For this reason, we explained in our decision that the use of market research based on other government contracts was inconsistent with the purpose of the preference for commercial items: “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 Servs., supra, at 5 (protest sustained despite agency’s assertion that the challenged solicitation provisions appeared in other government contracts).” Red River Waste Solutions, LP, supra, at 6. In response to the Army’s request for reconsideration, we again conclude that if agencies are permitted to modify terms and conditions in a manner that is inconsistent with customary commercial practice, provided the modification does not change the commercial nature of the item, then agencies would be able to consistently enlarge the definition of customary commercial practice in a manner that is inconsistent with the intent of FAR part 12.

Next, the Army argues that our decision improperly cited Smelkinson (in the passage above) for the proposition that agencies may not rely upon contracts with the government to establish customary commercial practices. Request for Recon. at 13. The Army argues that our reliance on Smelkinson was in error because that decision did not involve a procuring agency’s assertion that the challenged terms and conditions appeared in other government contracts.

We agree with the Army’s characterization of the facts in Smelkinson to the extent the agency there argued that the disputed terms of the solicitation were customary in the commercial marketplace because they had been included in solicitations issued by the government, rather than in contracts awarded by the government. See Smelkinson Sysco Food Servs., supra, at 5. Our decision in Smelkinson, however, held that inclusion of a term or condition in government solicitations, and the absence of challenges to those terms by contractors, does not establish that the term is a customary commercial term. Id. Thus, we conclude that although our decision in Red River characterized Smelkinson as relying on the inclusion of a disputed term or condition in a contract, as opposed to a solicitation, this was not a material error, and does not provide a basis to reconsider our decision.<sup>7</sup>

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<sup>7</sup> The Army also cites our decision in Northrop, arguing that we held there that government contracts were evidence of commercial practice. In Northrop, the protester did not directly challenge the Air Force’s reliance on other government contracts for market research to establish that the disputed solicitation’s pricing approach was inconsistent with customary commercial practice. Northrop Grumman Tech. Servs., Inc., supra, at 15-17. Instead, the protester argued that the contracts cited by the agency were not relevant because the nature of the work in those contracts was different. Id. at 15. Thus, the issue raised in Red River and argued by the agency here in support of its request for reconsideration was not directly addressed in Northrop.

## Modification of Recommendation

Finally, the Army requests that we modify our recommendation that the agency reimburse RRWS's costs of pursuing its protest. The agency notes that our decision recommended that the protester "be reimbursed the costs of filing and pursuing its protests, including reasonable attorney fees." Request for Recon. at 19 (citing Red River Waste Solutions, LP, supra, at 10). The agency contends that the use of the plural term "protests" suggests that we sustained all of the protester's arguments, despite the fact that our decision sustained only the protester's argument concerning the per-ton pricing terms and conditions. The agency therefore requests that we modify our decision to recommend that the protester be reimbursed only the costs of pursuing the issue upon which we sustained the protest.

As a general rule, our Office concludes that a successful protester should be reimbursed its costs incurred with respect to all issues pursued, not merely those upon which it prevails. In our view, limiting recovery of protest costs in all cases to only those issues on which the protester prevailed would be inconsistent with the broad, remedial Congressional purpose behind the protest reimbursement provisions of the Competition in Contracting Act of 1984. AAR Aircraft Servs.--Costs, B-291670.6, May 12, 2003, 2003 CPD ¶ 100 at 9. Nevertheless, failing to limit the recovery of protest costs in all instances of partial or limited success by a protester may result in an unjustified windfall to the protester and cost to the government. Accordingly, in appropriate cases, we have limited the recommended reimbursement of protest costs where a part of the costs is allocable to a losing protest issue that is so clearly severable as to essentially constitute a separate protest. E.g., VSE Corp.; The Univ. of Hawaii--Costs, B-407164.11, B-407164.12, June 23, 2014, 2014 CPD ¶ 202 at 8; Honeywell Tech. Solutions, Inc.--Costs, B-296860.3, Dec. 27, 2005, 2005 CPD ¶ 226 at 3-4. In determining whether protest issues are so clearly severable as to constitute essentially separate protests, we consider, among other things, the extent to which the issues are interrelated or intertwined--i.e., the extent to which successful and unsuccessful arguments share a common core set of facts, are based on related legal theories, or are otherwise not readily severable. Basic Commerce & Indus., Inc.--Costs, B-401702.3, Feb. 22, 2010, 2010 CPD ¶ 258 at 4.

Here, we agree with the Army that our decision did not sustain all of the arguments raised in RRWS's protest. We do not conclude, however, that there is any basis to modify our recommendation, as it did not dictate a specific amount of costs for reimbursement to the protester. In this regard, RRWS notes that it had not submitted its request for costs as of the date the Army filed its request for reconsideration. Protester's Response to Request for Recon. (Feb. 12, 2016) at 9. At best, the agency's arguments here appear to anticipate a possible future dispute

concerning the amount to be reimbursed.<sup>8</sup> For these reasons, we conclude that the Army's request does not set forth a basis to modify our recommendation.

The request for reconsideration and for modification of our earlier-recommended remedy is denied.<sup>9</sup>

Susan A. Poling  
General Counsel

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<sup>8</sup> To the extent the protester and agency are unable to agree upon an appropriate amount for reimbursement, the protester may request that our Office resolve this matter. See 4 C.F.R. § 21.8(f)(2).

<sup>9</sup> The Army raises other collateral issues in connection with its request for reconsideration. Although we do not address all of the agency's arguments, we have reviewed each of them and find that none provides a basis to reconsider our decision. For example, the Army argues that RRWS's protest concerning the per-ton pricing terms and conditions is "really" a dispute concerning the shifting of risk. Request for Recon. at 18; Army Comments on Request for Recon. (Feb. 19, 2016) at 7. As discussed above, the incumbent contract included an overhead CLIN to address potential variances in the volume of refuse collected, whereas the challenged solicitation requires offerors to propose all fixed and variable costs on a per-ton basis. Red River Waste Solutions, LP, supra, at 2 (citing Contracting Officer's Statement (B-411760.2) at 2). The Army requests that we modify our decision to characterize the protest as challenging the agency's decision to shift the risk of variances in refuse collection volume from the government to the contractor, and to deny the protest on this basis. Request for Recon. at 18. Our decision did not address this matter, and instead addressed the issue challenged by the protester--whether the per-ton pricing term was consistent with commercial practice. The agency has not explained why an agency's discretion to shift risk to a contractor in a solicitation supersedes the agency's obligations under FAR part 12. For this reason, we find no basis to reconsider our decision.