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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: American College of Physicians Services, Inc.; COLA

File: B-294881; B-294881.2

Date: January 3, 2005

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David H. Turner, Esq., Department of the Navy, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contention that a solicitation unduly restricts competition by bundling the procurement of accreditation services and laboratory proficiency testing in a single contract is denied where the agency reasonably explains that procuring both services under the same contract is necessary to meet the agency's needs for maintaining its medical laboratories.

2. Contention that the agency violated the restriction, found at Federal Acquisition Regulation (FAR) § 12.302(c), against including terms and conditions in a commercial item procurement that are inconsistent with customary commercial practices by bundling the purchase of two commercial items into a single procurement is denied because the regulatory restriction, on its face, applies to terms and conditions used to procure commercial items, and cannot properly be read as a supplemental restriction against bundling, nor can it reasonably be read as a supplement to the definition of a commercial item found at FAR § 2.101.

DECISION

American College of Physicians Services, Inc. (ACPS) and COLA[1] protest the terms of request for proposals (RFP) No. N00140-04-R-0102, issued by the Department of the Navy to procure professional accreditation services and proficiency testing for

[1] The protester advises that COLA is not an acronym.

medical laboratories operated by the U.S. Navy Bureau of Medicine and Surgery.[2] Both protesters argue that the solicitation unduly restricts competition by bundling the purchase of accreditation services and laboratory proficiency testing in a single procurement. In addition, ACPS argues that it is also unduly restrictive to use one solicitation for all of the Navy's proficiency testing requirements. Both protesters also allege that purchasing accreditation and proficiency testing services jointly is not a commercial practice.

We deny the protests.

BACKGROUND

U.S. public heath regulations generally require certification of laboratories that perform testing on human specimens and report patient specific results for the diagnosis, prevention or treatment of disease, or impairment. 42 C.F.R. §§ 493.1, 493.3 (2004); see generally 42 C.F.R. Part 493. Federal laboratories, including those operated by the military services, are subject to these certification requirements, although the requirements may be modified by agency heads to address agency-unique circumstances. 42 C.F.R. § 493.3(c).

To implement the regulatory scheme for certification and accreditation of laboratories, the Department of Health and Human Services approves non-profit institutions, rather than for-profit contractors, to provide these services directly to the laboratories. 42 C.F.R. §§ 493.551(a), 493.553. The pleadings submitted by both the Navy and the protesters indicate that the community of institutions that perform these services is limited in size, and well-known to laboratories, and to each other. Within this heavily-regulated arena populated by non-profit institutions, the Navy is conducting a simplified acquisition for accreditation and proficiency testing services using the commercial item test program authorized by Federal Acquisition Regulation (FAR) Subpart 13.5, which permits the use of simplified procedures for the acquisition of commercial supplies and services in amounts up to $5 million.

With respect to the proficiency testing portion of this procurement, the Navy and the protesters agree that there is currently only one entity, the College of American Pathologists (CAP), that provides the full range of possible proficiency testing that could be required here. Thus, there is no dispute that any successful offer to perform these services would have to be submitted by CAP, or include CAP as a subcontractor.[3] CAP is also the Navy's incumbent contractor for these services, although it currently performs the services under separate contracts.

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[2] ACPS provides proficiency testing services for medical laboratories; COLA provides accreditation services.

[3] See Agency Report (AR) at 7, 14 n.12; ACPS Initial Protest at 2; COLA Initial Protest at 3.

In anticipation of this procurement, Navy contracting officials met with representatives of COLA and representatives of the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) in early 2004, to discuss the possibility of obtaining competition for the Navy's requirements for accreditation and proficiency testing. AR at 6. Although the Navy recognized that neither COLA nor JCAHO could provide all of the agency's requirements, it concluded that by partnering, these organizations might be able to submit viable proposals that would meet all of the agency's needs. Id. at 7.

On July 16, the Navy posted a presolicitation notice on the FedBizOpps website advising of its requirements, and of its intent to solicit these services as a commercial item using competition. On August 10, the Navy issued the instant solicitation seeking laboratory accreditation and proficiency testing services at various Navy laboratories in the continental United States and abroad. The Navy appended an attachment to the solicitation identifying by name 164 laboratories that might require the services covered by the RFP.

On August 20, COLA filed an agency-level protest with the Navy raising essentially the same issues raised here; on August 27, ACPS also protested to the agency. By letters dated September 23, the Navy denied both protests. Prior to the October 1 closing date, ACPS and COLA protested to our Office.

COLA'S PROTEST

ACPS and COLA raise several of the same issues, although there are differences in their pleadings. Since the issues raised by COLA share a legal foundation with additional issues raised by ACPS, we will address COLA's contention's first.

COLA argues that the Navy's bundled purchase of accreditation services and proficiency testing services in the same solicitation unduly restricts competition in violation of the Competition in Contracting Act of 1984 (CICA).[4] According to COLA, the Navy's answer to the agency-level protest failed to make the case for why these two services must be purchased jointly.

CICA generally requires that solicitations permit full and open competition and contain restrictive provisions and conditions only to the extent necessary to satisfy the needs of the agency. See 10 U.S.C. § 2305(a)(1) (2000). Since bundled, consolidated, or total-package procurements combine separate, multiple

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[4] Neither ACPS nor COLA argue that this solicitation violates the bundling restrictions found in the Small Business Act, as amended, see 15 U.S.C. § 631(j)(3) (2000); as a result, this decision does not consider whether these restrictions apply to this procurement.

requirements into one contract, they have the potential for restricting competition by excluding firms than can furnish only a portion of the requirement. Aalco Forwarding, Inc., et al., B-277241.12, B-277241.13, Dec. 29, 1997, 97-2 CPD ¶ 175 at 6. In interpreting CICA, we have looked to see whether an agency has a reasonable basis for its contention that bundling is necessary, and we have sustained protests where no reasonable basis was shown. National Customer Eng'g, B-251135, Mar. 11, 1993, 93-1 CPD ¶ 225 at 5.

In answer to COLA's challenge, the Navy argues that procuring these services separately would create an administrative burden for agency contracting personnel. AR at 16. The Navy also contends that using separate contracts would create logistical problems in its management of laboratories since using separate contracts requires the agency to act as a "go between" to coordinate the actions of the accreditation organizations and the proficiency testing organizations. Id. at 16-17. Finally, the Navy points out that by having a single contractor responsible for both functions, it is more likely to obtain the immediate review and monitoring of testing results needed to continue a laboratory's accredited status. Id. at 17. COLA offers no specific response to these arguments other than to contend that the Navy has yet to offer a rational basis for procuring these services jointly. COLA Comments at 3.

While the record here supports the protesters' contention that the joint purchase of these services with one contract will restrict competition, rather than enhance it, the question at issue is whether this approach is required to meet the agency's needs. EDP Enters., Inc., B-284533.6, May 19, 2003, 2003 CPD ¶ 93 at 5, 8. With respect to the Navy's first response--that it needs to procure these services jointly as a matter of administrative convenience--administrative convenience for agency contracting personnel is not a legal basis to justify bundling requirements, if the bundling of requirements restricts competition, as it appears here. Vantex Serv. Corp., B-290415, Aug. 8, 2002, 2002 CPD ¶ 131 at 4; National Customer Eng'g, supra at 6.

On the other two fronts, however, we think the Navy has offered a reasonable basis for procuring these services jointly, and neither COLA nor ACPS has offered any reason why the Navy's position is unreasonable. For example, unlike in EDP Enterprises (where GAO sustained the protest after finding that the agency had offered no reasonable basis for bundling food services with other logistical services required at Fort Riley, see 2003 CPD ¶ 93 at 6), there is no dispute here that there is a logical connection between the two services sought by this solicitation. The results of the proficiency testing services purchased under this solicitation are used to determine a laboratory's eligibility for accreditation. In addition, the Navy has concluded that using a single contractor to coordinate the two processes avoids logistical problems. For example, the Navy claims that using one contractor to coordinate these two processes may help avoid reporting delays the Navy has experienced in the past between the contractor who monitors the results of proficiency testing and the contractor who reflects those results in accreditation decisions. Navy Response to COLA's Comments at 4. In the absence of a showing

from COLA or ACPS that these rationales are unreasonable, we deny the challenge to the solicitation.

COLA next contends that the Navy has improperly included terms and conditions in a commercial item procurement that are inconsistent with customary commercial practices, in violation of FAR § 12.302(c).[5] In this regard, COLA argues that FAR § 12.302(c) blocks the joint purchase of accreditation and proficiency testing services because purchasing the two services with a single contract is not customary commercial practice. In addition, COLA argues that the Navy failed to obtain a waiver, or to conduct appropriate market research to support its decision to deviate from customary commercial practice by procuring these services jointly.

The Federal Acquisition Streamlining Act of 1994, 10 U.S.C. § 2377 (1994), established a preference, and specific requirements, for acquiring commercial items that meet the needs of an agency. In general terms, the Act, and the regulations that implement it, are intended to steer government agencies clear of the more traditional, and intrusive, government contracting practices that have evolved when agencies are buying products that have no counterpart in the commercial marketplace. ATA Defense Indus., Inc., B-282511.8, May 18, 2000, 2000 CPD ¶ 81 at 3; Aalco Forwarding, Inc., et al., B-277241.8, B-277241.9, Oct. 21, 1997, 97-2 CPD ¶ 110 at 9-10. FAR Part 12 implements this policy by allowing agencies to use solicitation terms--and to make other adjustments in the areas of acquisition planning, evaluation, and award--that more closely resemble the commercial marketplace when procuring commercial items. See also Crescent Helicopters, B-284706 et al., May 30, 2000, 2000 CPD ¶ 90 at 2-4; Smelkinson Sysco Food Servs., B-281631, Mar. 15, 1999, 99-1 CPD ¶ 57 at 4.

In accordance with the above-stated policy, 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." Specifically, the provision states:

> (c) *Tailoring inconsistent with customary commercial practice.* The 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. The request for waiver must describe the customary commercial practice found in the

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[5] In actuality, COLA alleged a violation of FAR § 13.303(c), which addresses blanket purchase agreements and has no application here. We presume COLA intended to argue a violation of FAR § 12.302(c), which bars the tailoring of provisions in a manner inconsistent with customary commercial practice.

> marketplace, support the need to include a term or condition that is inconsistent with that practice and include a determination that use of the customary commercial practice is inconsistent with the needs of the Government. A waiver may be requested for an individual or class of contracts for that specific item.

As a preliminary matter, we note that the scope of FAR subpart 12.3, within FAR Part 12, is to establish the provisions and clauses to be used when acquiring commercial items. FAR § 12.300. The first substantive provision within subpart 12.3 is titled, "Solicitation provisions and contract clauses for the acquisition of commercial items." Moreover, each of the three substantive subsections of subpart 12.3--i.e., §§ 12.301, 12.302, and 12.303--address the provisions and clauses to be included in solicitations (and the resulting contracts) for commercial items.

Viewing COLA's protest contention within the scope of FAR subpart 12.3, we note first that COLA does not identify any term or condition of the solicitation that is inconsistent with customary commercial practice. Instead, COLA's contention is that the joint purchase of these two services under one contract is not commercial--i.e., it is the bundled nature of the workload itself that COLA contends is the altered term or condition. Interestingly, both COLA and ACPS concede the commerciality of each service if purchased separately.[6]

In our view, COLA's challenge to the joint purchase of accreditation and proficiency testing services is appropriately heard as an assertion that the bundled workload is an undue restriction on competition, which has been answered above. Simply put, we do not read FAR § 12.302(c) to provide a basis separate from CICA for challenging bundled procurements. We also do not read FAR § 12.302(c) as an overlay on the definition of a commercial item or service found at FAR § 2.101. In our view, FAR § 12.302--and the entire scheme of FAR subpart 12.3--addresses how commercial items are procured, not whether the items or services themselves are commercial in nature.

To the extent that COLA argues that the Navy has failed to follow the procedures of FAR § 12.302(c) by not obtaining a waiver for allegedly tailoring provisions and clauses in a manner inconsistent with customary commercial practice, or failed to describe the customary commercial practice found in the marketplace to support

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[6] While our decision addresses the matters raised by the protesters, it should not be read to answer the question of whether accreditation services (or proficiency testing services) provided by non-profit entities (or by state boards, such as the Wisconsin State Laboratory of Hygiene Proficiency Testing Program, for example--identified by the protester as one of the proficiency testing providers eligible to participate in this procurement) are commercial services as defined at FAR § 2.101.

such a waiver, we do not think COLA has established that the requirements of this provision are applicable here.

In this regard, we disagree with COLA's contention that the situation here is similar to the situation we faced in Smelkinson Sysco Food Servs., B-281631, Mar. 15, 1999, 99-1 CPD ¶ 57. In Smelkinson, the protester challenged the inclusion of a clause requiring disclosure of internal profit data (specifically, data on profits associated with interorganizational transfers) in a solicitation issued under Part 12. We sustained the protest after concluding that the clause appeared inconsistent with customary commercial practice, that the agency had not conducted market research to support its decision to include the clause, and that the agency had not obtained the requisite waiver needed to include the additional requirements. Id. at 5-6. A clause requiring disclosure of internal profit data is a textbook example of a clause inconsistent with commercial practice, and, for that reason, we viewed the inclusion of such a clause without the requisite market research or waiver, as a violation of FAR § 12.302(c). In the present protest, by contrast, COLA is not protesting the inclusion of any such clause--or, indeed, of any clause, term, or condition in the solicitation at all.

In summary, we deny COLA's argument that the agency acted improperly by not following the procedures set forth in FAR § 12.302 when it decided to procure both accreditation and proficiency testing services in one solicitation because we are not convinced that these procedures are applicable here. Thus, there was no requirement for market research to support inclusion of an altered contract clause, and there was no requirement for a waiver from customary commercial practices.

ACPS' PROTEST

ACPS, for the most part, raises the same issues as COLA, which are addressed above. In a few instances, however, ACPS raises matters unique to its status as a provider of proficiency testing services--in contrast to COLA's status as a provider of accreditation services. These issues are addressed below.

In its initial protest, ACPS argued that the Navy is unduly restricting competition by using a single contract to procure all of its proficiency testing needs. In this regard, ACPS points out that CAP is the only provider of proficiency testing in certain more esoteric areas of healthcare.

The Navy's report answered ACPS's initial allegation regarding the bundling of all proficiency testing needs, as well as the allegation ACPS shared with COLA regarding the bundling of accreditation services and proficiency testing services. In its comments, however, ACPS offers no challenge to the Navy's stated rationale for not breaking out the more esoteric areas of proficiency testing. Instead, all of ACPS's comments regarding bundling are directed to the bundling of accreditation services and proficiency testing services. Accordingly, we conclude that ACPS abandoned its challenge to the bundling of all the Navy's proficiency testing needs

into one contract. See Wilson 5 Serv. Co., B-285343.2, B-285343.3, Oct. 10, 2000, 2000 CPD ¶ 157 at 3 n.3.

ACPS also argued in its initial protest that the Navy improperly states the proficiency testing portions of its requirements using an approach developed by CAP, which, in ACPS's view, makes it difficult for other offerors of proficiency testing services to know which specific tests are required. Although the Navy agreed that the solicitation stated the proficiency testing requirements in "testing modules that coordinate with CAP catalogs," AR at 25, the Navy ultimately supplemented its explanation of why this information was stated in this format in a final reply. In this document, the Navy stated that CAP pioneered proficiency testing to address the government's testing requirements, and that the components of CAP's testing modules are well-known throughout the industry, and are publicly posted on CAP's website for use by other entities. Since the Navy has offered an explanation for stating its requirements in this manner, and has shown that an explanation of the modules is publicly available, and since ACPS has offered no substantive response to the Navy's explanation, we have no basis to conclude that the solicitation is overly restrictive because of how the work is defined.

Finally, we note that ACPS raises several issues for the first time in its comments on the agency report. These issues include: (1) ACPS's assertion that the solicitation includes proficiency testing that should more properly be characterized as "continuing medical education of clinical pathologists rather than proficiency testing" as defined in 42 C.F.R. Part 493, ACPS Comments at 3; and (2) ACPS's challenge to the solicitation's request for "evidence of past performance on equivalent contracts of similar size, scope and value as this instant procurement," id. at 4-5. These issues raise challenges to the solicitation that were apparent on the face of the document, and had to be raised prior to the time set for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (2004). At this juncture--proposals were due October 1, 2004, and the comments here were filed November 17--these newly-raised issues are untimely, and are dismissed.

The protests are denied.

Anthony H. Gamboa
General Counsel