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## Decision

**Matter of:** Orlans PC

**File:** B-420905

**Date:** October 25, 2022

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### DIGEST

Protest challenging the terms of a solicitation for commercial services is sustained where the record does not show that the agency performed adequate market research to demonstrate that the terms were consistent with customary commercial practice, as required by the rules applicable to commercial item procurements set forth in the Federal Acquisition Regulation at part 12.

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### DECISION

Orlans PC, of Troy, Michigan, protests the terms of request for proposals (RFP) No. 12SAD122R0001, issued by the Department of Agriculture, Rural Development Administration, for nationwide default management services. The protester contends that certain pricing and payment terms are inconsistent with customary commercial practice and unduly restrictive of competition.

We sustain the protest.

### BACKGROUND

The agency issued the RFP pursuant to Federal Acquisition Regulation (FAR) part 12 on May 6, 2022, and subsequently amended it eight times. Contracting Officer's Statement (COS) at 1-2. The RFP seeks proposals to provide nationwide default management services for the Rural Development Single Family Direct Loan portfolio, including foreclosure services, real estate owned (REO) services, property preservation services, appraisal services, eviction services, and bankruptcy services. Agency Report

(AR), Tab 23, Attach. 11, Performance Work Statement (PWS) at 55-56.<sup>1</sup> The RFP anticipates award of two or more indefinite-delivery, indefinite-quantity contracts containing both fixed-price and time-and-materials line items, with award to be made on a best-value tradeoff basis. AR, Tab 22, RFP at 96, 123.

As relevant to this protest, the RFP contains fixed-price line items for property preservation and maintenance services. RFP at 3, 7. Under these line items, the selected contractors will be responsible for performing a variety of initial and recurring services to preserve and maintain properties (e.g., securing the property, lawn service, boarding or re-glazing windows, roof repairs, winterization, pest control), with payment to be made at a fixed, monthly price per property. *Id.*; PWS at 61, 64-65. Services under these line items will be invoiced on a monthly basis. RFP at 66 (detailing invoicing schedule for line items X004 and X013).

The RFP also contains a fixed-price line item for uncontested foreclosure services and a time-and-materials line item for contested foreclosure services. RFP at 2-3. Under those line items, the selected contractors will be entitled to payment of the fixed price for all foreclosure actions, with additional services to be billed on a time-and-materials basis when the foreclosure is contested. PWS at 59-61. Services under these line items will be invoiced only upon the government's receipt of an unencumbered title. RFP at 66 (detailing invoicing schedule for line items X001 and X002).

Prior to the deadline for the submission of proposals, Orleans filed this protest challenging the terms of the RFP.

## DISCUSSION

The protester alleges that the RFP's property preservation and maintenance service pricing terms and the foreclosure services invoicing terms are contrary to customary commercial practice. Specifically, the protester alleges that customary commercial practice is not to bill property preservation and maintenance as a flat monthly fee, as stated in the RFP, but rather according to a schedule of itemized fixed prices for each task performed. Protest at 7. With respect to foreclosure services, the protester alleges that customary commercial practice is to invoice upon completion of milestones, rather than only upon delivery of an unencumbered title as required by the RFP. *Id.* at 9-10. Additionally, the protester alleges that it is customary in the industry to provide for a monthly management fee for these services, which the RFP does not contemplate; rather, offerors are expected to account for any such fee in their proposed fixed prices. *Id.* at 11-12. Lastly, the protester alleges that the RFP's requirement to invoice foreclosure services upon the government's receipt of an unencumbered title is unduly

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<sup>1</sup> Citations to the record are to the numbered pages provided by the agency in its report, unless otherwise noted.

restrictive of competition, as it imposes carrying costs that many offerors cannot bear.<sup>2</sup> *Id.* at 13-14.

In procurements involving the acquisition of commercial items, FAR section 12.301(a) requires that contracts shall, to the maximum extent practicable, include only those clauses: (1) required to implement provisions of law or executive orders applicable to the acquisition of commercial items; or (2) determined to be consistent with customary commercial practice. In establishing acquisitions for commercial items, agencies must conduct market research to address, among other things, customary practices regarding the provision of the commercial items. FAR 10.002(b); *Northrop Grumman Technical Servs., Inc.*, B-406523, June 22, 2012, 2012 CPD ¶ 197 at 14-15. Consistent with this approach, FAR section 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.

To support its allegations that the challenged solicitation terms are inconsistent with customary commercial practice, the protester provides a sworn declaration from one of its employees. Protest, exh. A., Decl. of Orleans Sr. Exec. Counsel. Drawing on her 15 years of employment with the protester and citing the protester's 24 years of experience with mortgage default services, she notes the increasing complexity of the default process resulting from statutory and regulatory responses to the recession of the 1990s, subprime lending, the 2008 financial crisis, and COVID-19. *Id.* ¶ 4. Because of the resultant heightened risk, additional costs, and increased complexity associated with the default process, she avers that industry has transitioned from the use of flat fixed fees for property preservation and maintenance to the use of itemized fixed fees for the different services rendered. *Id.* ¶¶ 5, 9.

She further states that historically, industry invoiced foreclosure services on a monthly, prorated basis, but that as a result of the developments discussed above, it has moved to a milestone billing system developed by the Federal National Mortgage Association (Fannie Mae) and used by the Federal Housing Finance Agency. *Id.* ¶ 14. She avers that the protester has not encountered foreclosure services invoicing terms like those in the RFP, as customary commercial practice and the standard provisions of contracts between law firms and servicers contemplate invoicing for costs incurred and work performed through the completed milestone. *Id.* ¶ 17. She further states that Orleans is not aware of any invoicing standard other than milestone billing for those services. *Id.* ¶ 18.

Where final payment is withheld until delivery of an unencumbered title, she states that customary commercial practice is to provide for payment of a monthly servicing fee. *Id.*

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<sup>2</sup> The protester also initially challenged the RFP's pricing terms for appraisal and REO disposition, and further alleged that the RFP did not provide sufficient information in various aspects to permit offerors to compete intelligently and fairly. Protest at 6-8, 14-17. The protester subsequently withdrew those grounds of protest. Comments at 1 n.1.

¶ 19. Lastly, she states that timelines for mortgage default processes, and particularly foreclosures, have grown to years in many states, and that the RFP's terms for invoicing foreclosure services upon delivery of an unencumbered title therefore entail carrying costs for time periods that are not sustainable for mid-sized law firms like the protester and small businesses. *Id.* ¶¶ 6, 20-21.

With respect to the protester's allegations regarding customary commercial practice, the agency offers two principal arguments. First, the agency argues that the protester has not carried its burden to demonstrate customary commercial practices, and therefore that Orleans has not demonstrated how the RFP's terms are contrary to them. Memorandum of Law (MOL) at 7-12. Second, the agency responds that its market research demonstrated that there is no customary commercial practice with respect to the pricing of property preservation and maintenance services. *Id.* at 10. The agency further responds that its market research showed that payment of a servicing fee is unnecessary, and that industry is familiar with the practice of invoicing foreclosure services only upon delivery of an unencumbered title. *Id.* at 11-12.

We first address the agency's argument that the protester's allegations are legally and factually insufficient. Under our Bid Protest Regulations, a protest is required to include a detailed statement of the legal and factual grounds for the protest, and those grounds must be sufficient, if unrebutted, to establish the likelihood that the protester will prevail on its claim of improper agency action. See 4 C.F.R. § 21.1(c)(4), (f). Consistent with that general standard, in the specific context of a protest allegation that a proposed term of a commercial items contract is contrary to customary commercial practice, we have explained that a protester bears the initial burden of sufficiently alleging how the provision is contrary to customary commercial practice. See *JRS Staffing Servs.*, B-410098 *et al.*, Oct. 22, 2014, 2014 CPD ¶ 312 at 4 (citing 4 C.F.R. § 21.1(c)(4)); *Blue Origin Florida, LLC*, B-417839, Nov. 18, 2019, 2019 CPD ¶ 388 at 19.

In this regard, mere allegations that a term is inconsistent with customary commercial practice, without more, are insufficient. See, e.g., *Blue Origin, supra* at 19-20 (denying protest where protester asserted that terms were inconsistent with customary commercial practice without providing a factual basis for the assertion, such as by including examples of commercial contracts, protester's standard commercial terms and conditions, or declarations); *Sterisyn, Inc.*, B-418366 *et al.*, Apr. 1, 2020, 2020 CPD ¶ 114 at 6-7 (same); *JRS Staffing, supra* at 4-5 (same, where the protest included only perfunctory allegations without any support); *Verizon Wireless*, B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 5 n.2, 7-9 (sustaining in part challenges to tailored provisions where the protester identified provisions from the Federal Supply Schedule and other commercial agreements to establish its interpretation of customary commercial practice, while rejecting an unsupported allegation that a clause requiring the tracking of certain metrics was inconsistent with customary commercial practice). Where a protester has submitted legally and factually sufficient allegations, however, it is the agency's responsibility to respond to those allegations. *Verizon Wireless, supra* at 14 (sustaining legally and factually sufficient challenges to tailored provisions where the agency did not address those challenges).

Here, we disagree with the agency's argument that the protester has failed to provide legally and factually sufficient allegations that the RFP's terms are contrary to customary commercial practice. As detailed above, the protester specifically states how the solicitation deviates from customary commercial practice. The protester explains that customary commercial practice is not to bill property preservation and maintenance as a flat monthly fee, but rather according to a schedule of itemized fixed prices for each task performed. With respect to foreclosure services, the protester maintains that customary commercial practice is to invoice upon completion of milestones, rather than only upon delivery of an unencumbered title as required by the RFP. In addition, the protester explains that it is customary in the industry to provide for a monthly management fee for these services, instead of accounting for any such fee in proposed fixed prices, as contemplated by the RFP.

The protester has further supported its assertions about customary commercial practices with respect to pricing of property preservation and maintenance services, invoicing of foreclosure services, and foreclosure service fees with a sworn declaration. As detailed above, that declaration was based on substantial experience in the mortgage default service industry, and described industry-standard practices in these areas that differed from the pricing methodologies and invoicing processes set forth in the RFP. It further noted the milestone billing structure developed by Fannie Mae and indicated its widespread adoption and use in the industry as customary commercial practice.<sup>3</sup> In that way, the protest is unlike those we have found to be supported by nothing more than perfunctory assertions, without any evidentiary support identifying what the protester asserts are customary commercial practices. *Cf. Smelkinson Sysco Food Servs.*, B-281631, Mar. 15, 1999, 99-1 CPD ¶ 57 at 6 n.3 (noting that the protester's contentions regarding customary commercial practices were supported by a sworn statement by one of the protester's vice presidents based on his familiarity with the protester's own practice as well as the practices of other industry participants). We therefore agree with the protester that it has sufficiently and specifically alleged how the RFP is contrary to customary commercial practice.

We turn, then, to the agency's market research, which the agency contends demonstrates why the RFP does not violate customary commercial practice. MOL at 10, 11-12. With respect to the RFP's use of flat monthly fees for property preservation and maintenance services, the agency cites responses to a request for information (RFI) that the agency issued in December 2019 and updated in January 2020, seeking feedback on several aspects of the procurement, including the pricing structure.<sup>4</sup> MOL at 10; COS at 3; AR, Tab 4, Market Research Continuation Summary.

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<sup>3</sup> The protester provided further discussion of the details of milestone billing, supported by references to Fannie Mae's Servicing Guide, in its comments on the agency report. See Comments at 17-18.

<sup>4</sup> The agency also cites market research meetings with government agencies regarding pricing terms included in their contracts for similar services. COS at 4. As we discuss

Of the 17 responses the agency received, the agency found that seven recommended the use of a flat fee for property preservation services, while four recommended the use of itemized pricing.<sup>5</sup> COS at 3-4. The agency states that this mixed response demonstrates that there is no customary commercial practice with respect to the pricing methodology for such services. MOL at 10.

As the protester points out, though--and we agree--the RFI issued by the agency did not request information regarding customary commercial pricing practices. Rather, the RFI prompted potential offerors to answer open-ended questions regarding recommended pricing structures and how the agency should seek to price services. For example, one question asked, “[d]o you have any suggestions on pricing for each service . . . ? If so, provide recommended pricing structures?” AR, Tab 4, Market Research Continuation Summary at 5. Another asked, “[s]hould there be a flat fee for property preservation up to a certain amount?” *Id.* at 7. Notably, of the responses cited by the agency to support its finding that there is no customary commercial practice, none suggests that it is detailing customary commercial practice. See AR, Tab 3, Compiled Responses to RFI No. 3 at 7, 118, 135, 146, 148, 190, 234, 276, 294. While these responses provide recommendations as to the pricing structure, none indicates that the basis for its recommendation is consistency with customary commercial practice.

Thus, these questions cannot be fairly read to seek--and the responses cannot be fairly read to supply--information regarding standard industry practices with respect to the pricing methodology for these services. Accordingly, the market research does not demonstrate either what customary commercial practices are or that no customary commercial practices exist. We therefore conclude that the agency has not demonstrated with adequate market research or otherwise that the protested property preservation and maintenance service pricing terms are consistent with customary

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further below, however, an agency generally may not rely on other government contracts to establish customary commercial practice.

<sup>5</sup> The protester disagrees with the agency’s characterization of the responses, arguing that three of the seven responses cited by the agency actually support the use of itemized pricing, while three additional responses also support the use of itemized pricing. Comments at 4-7. For example, the agency concluded that one respondent supported the use of a monthly fee rather than itemized pricing because it stated, “[y]es, there should be a flat fee for initial services performed and a flat fee for monthly property management services mentioned above.” COS at 4 (citing AR, Tab 3, Compiled Responses to RFI No. 3 at 201). The respondent, however, also suggested the use of a monthly management fee with individual services to be paid at cost, or, if no monthly management fee was to be used, allowing contractors to submit invoices with an allowance for administrative costs. AR, Tab 3, Compiled Responses to RFI No. 3 at 199. The protester argues that, contrary to the agency’s analysis, 10 of the 17 responses supported the use of itemized pricing, with four supporting the use of flat fee pricing and three not providing a recommendation. Comments at 4-7.

commercial practice, or were properly included in the RFP. Accordingly, we sustain the protest on this basis. See *Smelkinson, supra* at 5-6 (protest sustained where agency performed inadequate market research to support its conclusion that the protested clause was consistent with customary commercial practice).

For similar reasons, we sustain the protest with respect to the RFP's use of fixed pricing for foreclosure services. In support of this requirement, the agency again cites industry responses to the December 2019 RFI. In this regard, the agency concluded that six companies stated that a servicing fee was unnecessary, eight either did not respond or provided an alternative, and three responded that a servicing fee should be required.<sup>6</sup> MOL at 11; COS at 5 (citing AR, Tab 3, Compiled Responses to RFI No. 3 at 124, 149, 165, 202, 243, 334). The RFI, however, did not request information regarding customary commercial practice with respect to the use of fixed pricing without providing for servicing fees. The agency prompted potential offerors only to "[p]rovide information on how the master servicer fees will be captured in each of the individual services, and not a separate management fee." AR, Tab 4, Market Research Continuation Summary at 5. Thus, the RFI sought information on how to avoid the use of a servicing fee, not customary commercial practices with respect to such fees.

To the extent the agency relied on RFI responses that such fees were "unnecessary," we have specifically stated 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. *Red River Waste Solutions, LP*, B-411760.2, Jan. 20, 2016, 2016 CPD ¶ 45 at 7. Moreover, of the responses cited by the agency, only one can be reasonably read as providing evidence of customary commercial practice. See Compiled Responses to RFI No. 3 at 165 (stating that the respondent "does not charge a separate management fee"). The remainder either provide information only as to how those respondents would avoid the use of such a fee in this procurement, see *id.* at 124, 149, 202, 243, or suggest that customary commercial practice is to use such a fee, see *id.* at 334 ("Fixed rate management fees are widely accepted best practices over vast territorial spaces and considered a best cost approach over cost plus models."). On this record, we find that the agency has not demonstrated with adequate market research either that the RFP's use of fixed pricing without a monthly servicing fee for foreclosure services is consistent with customary commercial practice, or that there is no customary commercial practice with respect to such servicing fees. We therefore sustain the protest on this basis as well.

Lastly, in support of the RFP's terms for invoicing foreclosure services upon the government's receipt of an unencumbered title, the agency asserts that it has been using such terms in its foreclosure service contracts for at least the past six years. MOL at 11-12. We have noted, however, that it is generally not reasonable for an agency to

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<sup>6</sup> As with the property preservation and management pricing structure, the protester disagrees with the agency's conclusions regarding responses on servicing fees. The protester argues that 10 of the 17 companies responding to the RFI expressed a preference for a servicing fee. Comments at 13-15.

rely on other government 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. *Red River Waste Solutions, supra* at 6 (“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 also Verizon Wireless, supra* at 11 (terms of contracts with state agencies insufficient to demonstrate customary commercial practice). The agency further cites a daylong market research meeting with one company that stated that it outsources foreclosure services and does not pay the attorneys providing those services until receipt of a cleared title. COS at 5. We can find no documentation in the contemporaneous record, however, of the meeting cited by the agency. The market research meeting therefore also does not provide an adequate basis for determining that the invoicing term is consistent with customary commercial practice. *See Red River Waste Solutions, supra* at 7 (incomplete record of meeting with industry participant insufficient to support finding of customary commercial practice). Accordingly, we also sustain this ground of protest.<sup>7</sup>

## RECOMMENDATION

For the reasons discussed above, we conclude that the record does not demonstrate that the protested terms are consistent with commercial practice or otherwise properly included in the RFP. We recommend that the agency amend the RFP to remove the

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<sup>7</sup> The protester also argues that the foreclosure service invoicing terms are unduly restrictive of competition and otherwise unreasonable. Because we conclude that the agency does not demonstrate that the disputed terms conform to customary commercial practice, and there was no waiver regarding those terms, we need not address these arguments. We note, however, that decisions by our office and the Court of Federal Claims stand for the proposition that agencies must, even in the event of a valid waiver, set forth a reasonable basis for the use of particular clauses or terms that deviate from customary commercial practice. *See U.S. Foodservice, Inc.; Labatt Food Servs., LP*, B-404786 *et al.*, May 13, 2011, 2011 CPD ¶ 102 at 3-4; *PWC Logistics Servs. Co.*, B-400660, Jan. 6, 2009, 2009 CPD ¶ 67 at 5-6; *U.S. Foodservice Inc. v. United States*, 100 Fed. Cl. 659, 681-83 (2011); *CW Gov’t Travel, Inc. v. United States*, 99 Fed. Cl. 666, 679-680 (2011).

The agency’s justification must be rational and withstand logical scrutiny, but a protester’s disagreement with the agency’s judgment concerning the agency’s needs and how to accommodate them does not show that the agency’s judgment is unreasonable. *JRS Staffing, supra* at 6-7. In this regard, the agency reports that its past use of itemized pricing for property preservation and milestone invoicing for foreclosure services has resulted in significant backlogs and delays in approving and paying invoices, and that the agency received multiple competitive proposals by the RFP’s closing deadline. *See Contract Servs., Inc.*, B-411153, May 22, 2015, 2015 CPD ¶ 161 at 5 n.4 (noting that receipt of multiple proposals further demonstrated that the challenged requirement was not unduly restrictive of competition).

challenged provisions, and request new proposals. In the alternative, if the agency continues to believe that the provisions are needed, the agency should either confirm through appropriately documented market research that the provisions are consistent with customary commercial practice or obtain a waiver pursuant to FAR section 12.302(c). We also recommend that Orleans be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' 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).

The protest is sustained.

Edda Emmanuelli Perez  
General Counsel