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

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Decision

Matter of: U.S. Foodservice, Inc.; Labatt Food Services, LP

File: B-404786; B-404786.2; B-404786.3; B-404786.4

Date: May 13, 2011

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John A. Burkholder, Esq., McKenna Long & Aldridge LLP, for Sysco New Mexico, LLC, an intervenor.

Judith Pullman Gever, Esq., and Elizabeth Amato-Radley, Esq., Defense Logistics Agency, for the agency.

Linda C. Glass, Esq., and Sharon L. Larkin, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of the terms of solicitation for food distribution services on grounds that the terms are inconsistent with commercial practice and are otherwise unreasonable is denied where the agency properly issued a waiver in accordance with Federal Acquisition Regulation § 12.302(c) for commercial item solicitation requirements that may be inconsistent with customary commercial practice, and the record shows that the terms are reasonably justified.

DECISION

U.S. Foodservice, Inc. (USF), of Rosemont, Illinois, and Labatt Food Services, LP, of San Antonio, Texas, protest the terms of request for proposals (RFP) No. SPM300-10-R-0047, issued by the Defense Logistics Agency (DLA) Troop Support, for subsistence prime vendor support for various customers in the Texas and New Mexico area. The protesters contend that various price terms are inconsistent with commercial practice and are otherwise unreasonable.

We deny the protest.

BACKGROUND

The RFP, issued on October 27, 2010, contemplated the award of an indefinite-delivery/indefinite-quantity, fixed-price contract with an economic price adjustment for a 2-month implementation period, followed by a 12-month performance period, and one 12-month option period. RFP at 32, 41, 149; RFP amend. 1, at 2. The prime vendor is responsible for furnishing food and beverage items required for garrison feeding, as well as some non-food items. RFP at 5. The procurement was conducted pursuant to the commercial item acquisition procedures of Part 12 of the Federal Acquisition Regulations (FAR). The RFP stated that award would be made to the lowest-priced, technically acceptable offer, considering the following technical evaluation factors: experience, past performance, quality control and quality assurance procedures, and food defense. RFP at 40, 135.

For the price evaluation, offerors were to provide a unit price, which consisted of the sum of an offerors' delivered price plus distribution price, for items in the RFP's market basket. RFP at 48; RFP amend. 3, at 11. The RFP further defined delivered price and distribution price as follows:

“Delivered Price” is the most recent manufacturer/grower/private label holder invoice price per unit charged to the Contractor, inclusive of standard freight, for that product delivered to the initial point of entry into the Contractor's distribution network (normally referred to as the landed or delivered price). . . . The Delivered Price shall have any and all Product Allowance subtractions made prior to presenting the Delivered Price to DLA TROOP SUPPORT.¹

* * * * *

“Distribution Price” means the firm fixed price portion of the Contract Unit Price, offered as a dollar amount per unit of issue, rounded up or down to the nearest cent. The Distribution Price is the only method for the Contractor to bill the Government for all costs of contract

¹ The RFP provided that only the delivered price component of the unit price would be subject to an economic price adjustment; the remaining components of the unit price remained fixed. RFP at 33. In addition, all rebates, allowances, or other similar economic incentives or benefits received by the contractor were required to be passed to the government, and the contractor was required to warrant, on a continuing basis, that its delivered price under the contract was equal to or lower than its delivered price to its commercial customer accounts. RFP amend. 5, at 2.

performance other than Delivered Price; for example, operational costs, overhead and profit. The Distribution Price shall remain constant for the entire contract period.

RFP at 33; RFP amend. 7, at 2. For evaluation purposes, the distribution price was weighted by multiplying the aggregate distribution prices for all market basket items by 20. RFP at 138. Each offeror's total evaluated price was calculated by adding this weighted aggregate distribution price to the aggregate delivered price to arrive at a weighted aggregate unit price. Id. at 138-39. This weighted aggregate unit price was used to determine the lowest-priced offer. Id. at 139.

On October 22, 2010, DLA Troop Support executed a class waiver to include provisions in the solicitation that are inconsistent with customary commercial practice. Agency Report (AR), Tab 11, Class Waiver. This waiver was signed by the contracting officer and approved by the Director of Subsistence Supplier Operations. Among other things, the waiver justified modifications to commercial practices involving economic price adjustments; rebates, discounts, and other price-related items; unilateral changes to the contract; and most favored customer warranties. Id.

On February 11, 2011 (prior to the due date for receipt of proposals), USF filed a protest with our Office challenging the terms of the solicitation, and it supplemented this protest on March 21. Labatt also filed a protest challenging the terms of the solicitation on March 15, and it supplemented its protest on March 21.²

DISCUSSION

The protesters contend that solicitation provisions are inconsistent with commercial practice, are unduly restrictive or onerous, and are ambiguous. The protesters' arguments generally revolve around the pricing scheme in the solicitation including, among other things, how the distribution and delivered prices are to be calculated.

The agency admits that several provisions are inconsistent with commercial practice, but asserts that it properly obtained a waiver to deviate from those practices. The agency also denies that the solicitation is unduly restrictive, onerous, or ambiguous.

The Federal Acquisition Streamlining Act of 1994 (FASA), 10 U.S.C. § 2377 (2000), established a preference and specific requirements for acquiring commercial items that meet the needs of an agency. FAR Part 12 implements this Act 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

² By April 8, the due date for receipt of proposals, Labatt and two other offerors submitted proposals. [DELETED]

commercial marketplace when procuring commercial items. See generally Aalco Forwarding, Inc., et al., B-277241.8, B-277241.9, Oct. 21, 1997, 97-2 CPD ¶ 110 at 9-10. 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. The request for 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. Id. We will review challenges to waivers under this provision for reasonableness. Aalco Forwarding, Inc., supra, at 11.

The waiver here identified several terms that are inconsistent with commercial practice, including (among others): (1) the inclusion of a tailored economic price adjustment provision, (2) modifications to rebate, discounts, and other price-related provisions,³ and (3) the inclusion of a unilateral changes clause. AR, Tab 11, Class Waiver and Addendum. The agency explained that these deviations were necessary to insure transparency in food pricing and to prevent fraud, especially given that there had been several fraud indictments involving subsistence contracts outside the continental United States. Contracting Officer's Supp. Statement at 1-2. In addition, the agency relied on a Department of Defense Inspector General report that found that DLA Troop Support did not provide sufficient oversight of costs of subsistence vendors in Afghanistan and recommended better contract administration of prime vendor costs. Id.

The waiver explained that commercial contracts often include economic price adjustment clauses to cope with inflation. However, the waiver justified the need for a more limited, tailored economic price adjustment clause on the basis that it "would not be practical or possible to adjust the prices of food service delivery suppliers in a changing marketplace via the use of a single index." AR, Tab 11, Class Waiver, at 2.

The waiver explained that customary commercial practice includes rebates, discounts, earned income allowances, freight allowances, and other provisions as economic incentives or benefits between manufacturers and distributors. However, the waiver justified changes to these provisions on the grounds that the agency wanted to avoid excessive pass through charges from multiple sources along the supply chain, promote transparency in pricing, and insert integrity into commercial pricing practice. Id. at 3; Class Waiver Addendum, at 2. The waiver further stated that various price provisions, including a most favored customer warranty, are

³ Among other things, the solicitation modified the way contractors were permitted to retain rebates, discounts, earned income, and freight allowances. The solicitation also changed the application of most favored customer warranties. AR, Tab 11, Class Waiver Addendum, at 1-2.

necessary to ensure that the delivered price charged to the government only includes the price of the product delivered to the initial entry point of the contractor's distribution network, and to ensure that the contractors' delivered price is equal to or lower than the price provided to commercial customers. Id., Class Waiver Addendum, at 2.

The waiver explained that customary commercial practice usually involves bilateral changes. However, the waiver justified the inclusion of a unilateral waiver provision because the government needs the right to make unilateral changes in delivery and shipment requirements in order to be able to supply food on a daily basis to its military customers, whose needs may change over the course of the contract. Id. at 1.

Based on this record, we find that the waiver satisfies the requirements of the FAR and supports the agency's decision to deviate from commercial practice. In this regard, we cannot find unreasonable the agency's decision--when faced with possible overcharges to the government--to adopt a series of pricing provisions intended to safeguard the government from excessive charges and to ensure pricing transparency and integrity. Indeed, we have previously held that an agency may use other than commercial clauses when necessary to protect the government's interest in avoiding fraud and otherwise ensure fair pricing. See PWC Logistics Servs. Co., B-400660, Jan. 6, 2009, 2009 CPD ¶ 67, at 6-7. Although the protesters claim that the waivers are unjustified because, among other things, the agency's arguments concerning fraud and transparency are unreasonable and could be addressed by other means,⁴ we find that the protesters' arguments amount to mere disagreement with the agency's rationale, which does not provide a basis to sustain the protest.

We are also unpersuaded by the protesters' arguments that the solicitation terms are unreasonable, too onerous or unfair to distributors, or are ambiguous. These arguments are variations of their protests that the solicitation deviates from commercial practice, which we have denied above. In any event, we have reviewed all of the protesters' alternative arguments and find them to be without merit.

For example, the protesters object to weighting the distribution price by a factor of 20 for price evaluation purposes, arguing that the multiplier of 20 is arbitrary and

⁴ The protesters also argue that the waiver is not supported by adequate market research. However, the record shows the agency was in continuous dialogue since 2008 with the foodservice industry concerning its proposed revised pricing methodology prior to issuance of the solicitation. The agency received and considered industry comments concerning how the RFP's pricing structure was inconsistent with the commercial practice and how the provisions would affect the competitiveness of foodservice vendors. AR, Tab 8, Letters from International Foodservice Distributors Association; Supp. AR, Declaration of Director of Subsistence Supplier Operations, at 1-3.

results in a distorted price evaluation. However, the agency explains that historically the aggregate distribution price was 10 percent of the aggregate delivered price,⁵ so the distribution price was multiplied by 10 to make the two components more equal. However, this number was then multiplied by 2 (resulting in a factor of 20) because the distribution price was not equal to the delivered price, but was more important in the evaluation. Giving greater weight to the fixed distribution price was intended to reduce the effect of any manipulation of delivered pricing. Contracting Officer's Statement at 32; AR, Tab 10, Memorandum for the Record, at 2-3. We find this explanation reasonable.

In another example, the protesters assert that the solicitation gives vendors who are private label holders an unfair competitive advantage, because the solicitation treats private label holders as manufacturers.⁶ However, we are unpersuaded that private label holders are given an unfair competitive advantage. Indeed, an agency is not required to equalize a competitive advantage that a firm may enjoy because of its own particular business circumstances, where that advantage does not result from a preference or unfair action by the government. JBG/Naylor Station I, LLC, B-402807.2, Aug. 16, 2010, 2010 CPD ¶ 194 at 4-5. As explained above, the agency's pricing methodology was based on the agency's needs for transparency in its subsistence program and not based on a preference for a distributor with a specific market strategy.

Finally, the protesters assert that various terms are unworkable⁷ or ambiguous.⁸ We have reviewed the solicitation terms and the protesters' objections and find that the RFP is sufficiently definitive and flexible to allow for a fair competition on a

⁵ As noted above, the distribution price remains fixed over the life of the contract, while the delivered price is subject to weekly changes. RFP at 33.

⁶ Amendment 7 to the RFP provides that the terms "supplier" and manufacturer/grower" mean "manufacturer/grower/private label holder." RFP amend. 7, at 4.

⁷ For example, USF contends that most favored customer clause is "unworkable" because it would require that DLA receive the best price for food services. USF's Comments at 25. USF also asserts that the RFP requirements to pass along earned income and freight allowances is "hopelessly ambiguous" because companies have different pricing practices. *Id.* at 27-28. The fact that USF does not want to provide the government with the lowest price, or that other companies have different pricing practices than USF, does not mean that the RFP is unworkable or ambiguous.

⁸ For example, Labatt raised numerous ambiguity issues with the agency, which the agency answered in an amendment to the RFP. Labatt's Protest at 55-69. Although Labatt asserts the agency's answers were inadequate, we find that the responses provided sufficient clarity for offerors to respond to the RFP.

relatively equal basis. It is clear from the record that the protesters understand what is required by the RFP, but they mainly object that the requirements are inconsistent with customary commercial practice and/or their own unique business models. To the extent the protesters desire more favorable terms, consistent with their business practices and without risk, there is no legal requirement that a solicitation be drafted so as to eliminate all performance uncertainties; the mere presence of risk does not render a solicitation improper. Pacific Consol., Indus., B-250136.5, Mar. 22, 1994, 94-1 CPD ¶ 206 at 6; see also CWTsatoTravel, B-404479.2, Apr. 22, 2011, 2011 CPD __. Agencies may properly impose substantial risk upon the contractor, even where the risk in question is financial in nature. Id.

The protests are denied.

Lynn H. Gibson
General Counsel