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Decision

Matter of: Sterisyn, Inc.

File: B-418366; B-418366.2; B-418288.2; B-418288.3

Date: April 1, 2020

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DIGEST

1. Protests of solicitation provision in commercial item solicitations requiring that the successful offeror enter into business agreements with non-governmental third party entities are denied where the protester does not demonstrate that such provisions are inconsistent with customary commercial practice.
 2. Protests alleging that the payment scheme established by commercial item solicitations will unreasonably result in the agency paying for the same services twice are denied where the protester's objections fail to provide a basis to question the agency's actions.
 3. Protests that a solicitation provision that the successful offeror enter into business agreements with non-governmental third party entities provides some offerors with an unfair competitive advantage are denied where the record does not show any unfair action or preferential treatment by the agency.
 4. Protests alleging that the solicitations are ambiguous are denied where the record shows that the terms of the solicitations provide sufficient information to allow offerors to intelligently prepare their proposals on a common basis.
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DECISION

Sterisyn, Inc., a small business of Moorpark, California, protests the terms of requests for proposals Nos. SPE2D2-19-R-0050 (RFP-0050) and SPE2D2-19-R-0051 (RFP-0051), issued by the Defense Logistics Agency (DLA) to establish requirements

contracts to sell pharmaceutical products to various prime pharmaceutical vendors (PPVs) that hold distribution contracts with DLA. Sterisyn primarily contends that the solicitations contain an unreasonable requirement that the successful offeror enter into business relationships with the PPVs. The protester also alleges that several terms of the solicitations are ambiguous.¹

We deny the protests.

BACKGROUND

The agency issued RFP-0050 and RFP-0051 pursuant to the procedures of Federal Acquisition Regulation (FAR) part 12 on September 3, 2019, and September 4, respectively. RFP-0050; RFP-0051. The solicitations contemplate the award of requirements contracts (referred to here as “national contracts”) for the sale of bottles of doxycycline hyclate and pramipexole dihydrochloride tablets of various dosages and quantities through the PPV program.² RFP-0050 at 2, 23; RFP-0051 at 2, 29.

Each of the RFPs provides for the award of a requirements contract with a base period of 1 year with four 1-year options. RFP-0050 at 2, 10-11; RFP-0051 at 2, 10-11. The estimated value of the contracts awarded under RFP-0050 and RFP-0051 is \$[DELETED] and \$[DELETED], respectively. Combined Contracting Officer’s Statement and Memorandum of Law (COS/MOL)-0050 at 5; COS/MOL-0051 at 5. The solicitations provide that all agency requirements for the specified pharmaceutical products will be purchased through the PPVs at the prices established by the national contracts at issue in these protests. RFP-0050 at 10-11; RFP-0050, amend. 0006 at 8; RFP-0051 at 10-11; RFP-0051, amend. 0006 at 4. The agency refers to the awardees

¹ The protest of the terms of RFP-0050 was docketed as B-418366; the protest of RFP-0051 was docketed as B-418288.2. The RFPs are substantively identical in all respects relevant to the protests, differing only as to the pharmaceutical products sought. Based on the commonality of protest grounds, our Office consolidated the protests after development of the cases. In addition, in anticipation of consolidation, the agency reports follow a common numbering scheme, and thus a citation to the agency report (AR) refers to the identical document at the identical tab number as provided in the other agency report. Citations to unique documents will include a reference to the specific protest.

² RFP-0050 is for the procurement of doxycycline hyclate. RFP-0050 at 2, 23. Doxycycline hyclate is an antibiotic in the tetracycline antibiotic class used in the treatment of a number of general infections as well as in the treatment of Lyme disease, chronic prostatitis, sinusitis, pelvic inflammatory disease, acne rosacea, and rickettsial infections. AR, RFP-0050, Tab 15, Business Case Analysis, at 1. In addition, doxycycline hyclate is used as a prophylactic against malaria. Id. RFP-0051 is for the procurement of pramipexole dihydrochloride. RFP-0051 at 2, 29. Pramipexole dihydrochloride is a dopamine agonist used in the treatment of Parkinson’s disease and restless leg syndrome. AR, RFP-0051, Tab 15, Business Case Analysis, at 1.

of the solicitations at issue here as national contractors. RFP-0050, amend. 0006 at 8; RFP-0051, amend. 0006 at 5.

The PPV Program

The purpose of the PPV program is to fulfill the pharmaceutical requirements of military and other government medical facilities worldwide. AR, Tab 7, PPV Business Case Analysis, at 1. Between 2012 and 2014, DLA awarded five PPV contracts for the benefit of various agencies. COS/MOL-0050 at 3; COS/MOL-0051 at 3. Under the PPV program, when an agency has a need for pharmaceuticals, the agencies place orders for the pharmaceuticals directly with the PPVs. The PPVs, in turn, obtain the pharmaceuticals from the national contractors and then provide the pharmaceutical products to these agencies, which include the Department of Defense, the Department of Veterans Affairs (VA), the Bureau of Indian Affairs, and the Bureau of Prisons. RFP-0050, amend. 0006 at 7; RFP-0051, amend. 0006 at 4. After delivery, the PPV submits an invoice to DLA, which is paid by DLA. Id. at 8; id. at 4; see also AR, Tab 7, PPV Business Case Analysis, at 1 (providing additional details of the PPV ordering process).

As relevant to these protests, the PPV contracts with DLA include fees for the worldwide distribution of the pharmaceutical products, where the fee is a percentage of the price of the pharmaceutical product as established by the national contract, i.e., the contract at issue here. COS/MOL-0050 at 3; COS/MOL-0051 at 4. Of note, all five PPV contracts were awarded with negative distribution fees, calculated as a discount from the national contract price for a particular pharmaceutical product.³ Id. at 3 n.1; id. at 4 n.1.

Market Research

In response to a prior protest involving a similar DLA procurement for pharmaceutical products, the agency conducted market research to inform its acquisition strategy. AR, Tab 10, Market Research Memorandum (Dec. 19, 2019). As relevant here, the market research found that it is standard commercial practice for pharmaceutical suppliers to enter into agreements with distributors in which suppliers are charged fees. Id. Additionally, the agency concluded that market research supports the practice that customers, not suppliers, designate which distributors will deliver the pharmaceuticals. Id. at 6.

³ For illustration, the agency provides the following example:

[I]f the National Contract price is \$100 and the PPV contract's distribution fee is - [i.e., negative] 10%, the Government will only pay \$90 [to the PPV], a 10% discount off the National Contract price.

Id. at 3 n.1; id. at 4 n.1.

Current Solicitations

Under these solicitations, award was to be made on a lowest-priced, technically acceptable basis, considering the factors of technical, past performance, and price. RFP-0050 at 40, 42-44; RFP-0051 at 47-50. In order to be found technically acceptable, a proposal must receive a rating of acceptable under the technical requirements and past performance factors. Id. at 42-44; id. at 48-50.

The solicitations' statements of work (SOWs) include the following provision:

The national contractor will establish business relationships with the PPVs to facilitate the sale of the items by the PPVs to the government at a unit price no higher than the established National Contract price, adjusted per the terms of the PPVs contract with the government.^[4] These agreements outline the terms and conditions by which the PPV is authorized to store, distribute, and/or sell a national contract holder's products. The terms and conditions expressed in these agreements shall be consistent with good, commercial (that is, acceptable industry-standard) business practices. The national contractor will notify the Contracting Officer within 10 days from receipt of award if an agreement has not been reached with any PPVs.

RFP-0050, amend. 0006 at 8; RFP-0051, amend. 0006 at 5.⁵

The RFPs also provided that “[t]he awardee consents to allow VA and DLA [PPVs] to distribute the listed products at the prices established in a contract resulting from this solicitation.” Id. at 8; id. at 4. While the RFPs did not require offerors to provide proof of their agreements with the PPVs as part of their proposals, the successful offeror would notify the contracting officer within ten days after award if an arrangement was not reached with any of the PPVs. Id.; id. at 5.

Offerors were instructed to submit pricing in terms of dollars as a unit of price per bottle, for the specified contract line item numbers (CLINs) for pharmaceutical products. RFP-0050 at 39-40; RFP-0051 at 46. The RFPs provide that the overall lowest aggregated price would be determined by multiplying the estimated quantity for each line item, including options, by the offered unit price and then adding the total of each line. Id.

Under the RFPs, payment would be made by the PPVs to the successful offeror when the agency placed orders. Id. at 1; id. at 1. Further, the agency would not be obligated

⁴ The protester did not challenge as ambiguous any provisions in these solicitations that purport to require the national contractor to ensure that the PPVs meet the terms of their independent agreements with DLA.

⁵ To aid this process, each RFP included the contact information of the PPVs. RFP-0050 at 74; RFP-0051 at 82.

to become involved in any financial disputes between the PPV as buyer and the national contractor as seller. Id. at 24; id. at 30.

Prior to the respective deadlines for the submission of proposals, Sterisyn filed protests challenging various aspects of the solicitations.

DISCUSSION

Sterisyn generally challenges the solicitation provisions that require the national contractor to enter into business relationships with the PPVs. The protester asserts that such a requirement is inconsistent with the commercial items provisions of the FAR because it does not limit the negotiating power of the PPVs or define the scope of those agreements.⁶ Protest-0050 at 4-5; protest-0051 at 5. Second, the protester alleges that the solicitation will cause DLA to pay twice--or be "double-bill[ed]"--for distribution of the pharmaceuticals sought. Id. at 5-7; id. at 6-7. Third, Sterisyn argues that allowing the PPVs to charge offerors different distribution fees is fundamentally unfair and will result in an unreasonable competition that favors some offerors over others. Id. at 5, 8-9; id. at 5, 8-9. Fourth, the protester contends that the provision regarding future business relationships with the PPVs is inconsistent with the solicitations' instructions to propose best prices and to ship the products at no cost to the government, resulting in ambiguities. Id. at 9-10; id. at 10-11.

Based upon these alleged flaws, Sterisyn asks our office to sustain the protests and require DLA to amend the solicitations to bar PPVs from charging distribution fees to offerors. Id. at 10; id. at 12. For the reasons discussed below, we find no basis to sustain the protests. In essence, the protester fails to establish that the agency's actions violate procurement law or regulation.⁷

Customary Commercial Practice

Sterisyn argues that the RFP provisions requiring that the national contractor enter into agreements with the PPVs are improper because the parties' resulting unequal negotiating posture is inconsistent with the FAR's requirement that commercial items contracts comply, to the extent possible, with customary commercial practice. Protest at 7-8; id. at 7-8. The protester also avers that because it cannot choose which distributor it wishes to use, and because the agency has not appropriately limited the

⁶ Of note, Sterisyn does not protest the PPV program itself, nor contend that it could both supply and distribute the pharmaceutical products the agency seeks. See Protester's Response to Request for Dismissal at 3 ("Contrary to DLA's arguments, Sterisyn does not challenge the administration of the entire PPV program.").

⁷ The protester presents other arguments that are in addition to, or variations of, those discussed in this decision. While we do not specifically address each of them, we have considered all of Sterisyn's allegations and find no basis to sustain the protest.

parameters of these agreements, the RFPs improperly force offerors to enter into business agreements that depart from those used commercially. Id. at 7; id. at 8.

In response, the agency contends that this provision is consistent with customary commercial practice. COS/MOL-0050 at 26-29; COS/MOL-0051 at 18, 21-25. As support, the agency explains that its market research confirmed that such practices exist in the commercial pharmaceutical marketplace. Id. at 27-28; id. at 21-23. Thus, the agency maintains that while Sterisyn might prefer to choose its own distributor, such a preference, alone, does not establish that this provision is inconsistent with customary commercial practice. Id. at 27; id. at 18.

The Federal Acquisition Streamlining Act of 1994 (FASA), established a preference for acquiring commercial items that meet an agency's needs. 10 U.S.C. § 2375-2379. This section of FASA is implemented by FAR part 12, and allows agencies to use solicitation terms (and other procedures) that more closely resemble the commercial marketplace when procuring commercial items. See FAR §§ 12.000; 12.201. To this end, FAR part 12 specifies the solicitation provisions and clauses to be used when acquiring commercial items.

As relevant here, 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) [r]equired to implement provisions of law or executive orders applicable to the acquisition of commercial items; or (2) [d]etermined to be consistent with customary commercial practice." Additionally, in establishing acquisitions for commercial items, FAR section 10.002(b) requires the acquiring agency to conduct market research to address, among other things, customary practices regarding the provision of the commercial items. Northrop Grumman Tech. Servs., Inc., B-406523, June 22, 2012, 2012 CPD ¶ 197 at 14-15. In the context of a procurement conducted under FAR part 12, our Office has explained that a protester asserting that a provision is contrary to customary commercial practice bears the initial burden of showing how the provision is contrary to customary commercial practice. JRS Staffing Servs., B-410098 et al., Oct. 22, 2014, 2014 CPD ¶ 312 at 4.

Although Sterisyn asserts that the national contractor's lack of choice for its distributor and unequal negotiating power are inconsistent with customary commercial practice, the protester provides no support for this claim. Protest-0050 at 7-8; Protest-0051 at 7-8. In contrast, the agency argues that its market research shows that "[a]ll of the suppliers responding to DLA's survey indicated that pharmaceutical customers designate which distributor will make deliveries to them."⁸ COS/MOL-0050 at 27; COS/MOL-0051 at 18 (citing AR, Tab 10, Market Research Memorandum, at 2). In particular, the agency found that all of the suppliers who returned surveys "agreed that

⁸ The agency sent market research surveys to 10 commercial pharmaceutical suppliers, receiving responses from three of them. AR, Tab 10, Market Research Memorandum, at 2.

customers designated their own Prime Vendor distributors, it was not the role of a supplier to designate the distributor.” AR, Tab 10, Market Research Memorandum, at 2.

The protester does not meaningfully challenge the agency’s conclusion that the solicitation’s national contractor/PPV structure represents customary commercial practice. Rather, Sterisyn argues that one survey response confirms that there are substantial differences between the commercial and federal marketplaces. See AR, Tab 11, Market Research Survey Responses, at 4. While one distributor did note two differences between the marketplaces, it is not apparent to our Office that these differences are relevant to this protest ground. Id. Additionally, the protester has not established how any of the differences bear on the question of whether the RFP provision that the national contractor enter into a business arrangement with the PPV is inconsistent with customary commercial practice. Consequently, we find no basis to disturb the agency’s determination. JRS Staffing Servs., supra at 4-6 (rejecting allegation that a solicitation provision was inconsistent with customary commercial practice where protester failed to support its allegations).

Moreover, our Office has rejected challenges to similar agency mandates to enter into agreements with third parties where the agency establishes the requirement is reasonably related to the needs of the agency. See CHE Consulting, Inc.; Digital Techs., Inc., B-284110 et al., Feb. 18, 2000, 2000 CPD ¶ 51 at 7-9 (finding unobjectionable a solicitation requirement that offerors obtain support agreements with original equipment manufacturers). In sum, the protester has failed to establish that the requirement that the national contractor enter into a business agreement with the PPVs is inconsistent with customary commercial practice or constitutes a violation of procurement law or regulation, or is otherwise impermissible. Accordingly, this protest ground is denied.

Double-Billing

Sterisyn also contends that in order to come to an agreement with the PPVs, offerors will have to agree to pay “‘value added’ fees” to the PPVs, which will be passed on to DLA in an offeror’s proposed price. Protest-0050 at 6; Protest-0051 at 7. According to the protester, this arrangement will result in the agency being charged twice for the same distribution services. Id. at 5-6; id. at 6-7. In response, the agency argues that Sterisyn has failed to demonstrate that the fees PPVs may charge offerors are in fact duplicative of the distribution fees the PPVs will charge DLA. COS/MOL-0050 at 15-18; COS/MOL-0051 at 19-22.

Our Office has consistently stated that the contracting agency has the primary responsibility for determining its needs and the best method of accommodating them, and that this principle applies to the contracting format used to purchase the items which the agency has determined necessary. ICARUS OPS, LLC, B-415287.2, May 3, 2018, 2018 CPD ¶ 168 at 3. Thus, it is the protester’s obligation to establish the solicitation violated applicable procurement laws or regulation. See Insero Corp., B-417791, B-417791.3, Nov. 4, 2019, 2019 CPD ¶ 370 at 7.

Based upon our review of the record, we find no basis to sustain Sterisyn's protest allegation that the payment scheme established by the RFPs will cause the agency to pay twice for the same distribution services. Here, the protester has not established that double-billing is likely to occur. As the agency points out, the successful offeror under the RFPs will be awarded a national contract to sell the pharmaceutical products in question to the PPVs at a specified price. RFP-0050, amend. 0006 at 8; RFP-0051, amend. 0006 at 4-5. In contrast, the PPVs are already under contract with DLA to distribute the pharmaceutical products worldwide at the prices established by the national contracts, adjusted for the PPVs distribution fees.

Under this scheme, the offerors are to submit proposed prices for the supply of the pharmaceutical products themselves, whereas the PPVs have already been awarded contracts for the distribution of the pharmaceutical products. Therefore, it is not readily apparent from the face of the RFPs that double-billing is probable where the successful offerors will be paid for selling pharmaceutical products to the PPVs.⁹ While some offerors may pass along fees charged by the PPVs to DLA by increasing their proposed prices, Sterisyn has failed to identify any procurement law or regulation that the agency has allegedly violated with the current RFP structure. For these reasons, we find no basis to sustain Sterisyn's contention that the RFPs will impermissibly result in double-billing, and deny this protest ground. See Inerso Corp., supra, at 7.

Unfair Competition

Next, Sterisyn claims that allowing the PPVs to charge offerors different fees makes the competition fundamentally unfair. Protest at 8-9. Citing the absence of any requirement in the RFPs that the PPVs charge a uniform fee to offerors, the protester contends that some offerors will be able to propose better prices than others, giving those offerors an unfair competitive advantage. Id. In response, the agency maintains that under the circumstances here, it is not required to equalize any competitive advantage that a firm

⁹ In its comments on the AR, Sterisyn raised--for the first time--a challenge to the propriety of the solicitations' provisions that payment will be made to the successful offeror by the PPV. Comments & Supp. Protest at 8. In response, the agency argues that this alleged defect was apparent from the face of the RFPs and is untimely raised in the protester's comments. Supp. MOL at 3. We agree with agency. Here, the RFPs clearly stated that payment would be made by the PPVs, not the agency. RFP-0050 at 1; RFP-0051 at 1. Thus, to the extent the protester believed that the agency was not permitted to establish a payment structure where the PPVs, instead of the agency, paid the successful offeror, such a defect was patent, i.e., an obvious, gross, or glaring error apparent from the face of the solicitation. Democracy Int'l, Inc., B-415243, B-415243.2, Dec. 13, 2017, 2018 CPD ¶ 293 at 7. A protest based on alleged improprieties in a solicitation that are apparent prior to closing time for receipt of proposals must be filed by that time. 4 C.F.R. § 21.2(a)(1). Since Sterisyn did not raise this protest ground until its comments, it is dismissed as untimely. Democracy Int'l, Inc., supra, at 8.

may enjoy by being able to negotiate more favorable terms with the PPVs. COS/MOL at 32.

An agency is not required to equalize a competitive advantage that a firm may enjoy, or a disadvantage it may experience, because of the firm's particular business circumstances, where that advantage or disadvantage does not result from an improper preference or unfair action by the government. Northrop Grumman Tech. Servs., Inc., *supra*, at 12.

Here, Sterisyn fails to demonstrate any improperly preferential or unfair action by the government. Rather, the protester only focuses on how the PPVs' actions may result in an unfair competition. *See, e.g.*, Protest at 8 ("This means that some offerors will be able to offer a better price, based on nothing but the whims of the PPVs."). So too here, we find no evidence to conclude that the agency's actions are objectionable. Northrop Grumman Tech. Servs., Inc., *supra*, at 12. Accordingly, we deny this protest ground.¹⁰

Alleged Ambiguities

Finally, Sterisyn argues that the RFPs suffer from ambiguities that render the solicitation inadequate, such that offerors lack information necessary to price their proposals. Protest-0050 at 9-10; Protest-0051 at 10-11. First, the protester argues that it is contradictory for the RFPs to ask offerors to present their best prices and also incorporate the PPVs' fees that, the protester alleges, are unknowable at the time of proposal submission. *Id.* at 10; *id.* at 10. Second, Sterisyn contends that FAR clause 52.247-34, F.o.b. Destination--which requires offerors to ship goods at no cost to the government--is in conflict with the requirement that the cost of shipping be included in its proposed pricing. *Id.* In response, the agency primarily argues that the protester has failed to read the terms of the RFPs in the proper context, and its protest contentions do not establish that the solicitations are ambiguous. COS/MOL-0050 at 35-42; COS/MOL-0051 at 27-32.

In assessing a protester's claim that a solicitation is inadequate, our Office will review the solicitation to determine whether it provides sufficient information for offerors to compete intelligently and on a relatively equal basis. Chenega Fed. Sys., LLC, B-414478, June 26, 2017, 2017 CPD ¶ 196 at 6. In making this determination, our Office has stated that there is no requirement that a solicitation be drafted in such detail as to completely eliminate all risk or remove every uncertainty from the mind of every prospective offeror. Phoenix Env't'l Design, Inc., B-411746, Oct. 14, 2015, 2015 CPD ¶ 319 at 3. Indeed, it is within the administrative discretion of an agency to offer for competition a proposed contract that imposes maximum risks on the contractor and

¹⁰ To the extent that the protester's allegations against the PPVs imply collusive bidding practices, such allegations would concern potential violations of antitrust laws, which are primarily matters for the contracting agency and the Department of Justice, and are outside our purview. Office Design Grp., B-415853.3 *et al.*, July 16, 2018, 2018 CPD ¶ 265 at 9 n.6.

minimum burdens on the agency. Fluor Fed. Sols., LLC, B-414223, Mar. 29, 2017, 2017 CPD ¶ 109 at 5. Risk is inherent in most types of contracts and firms must use their professional expertise and business judgment in anticipating a variety of influences affecting performance costs. Id. at 8.

Based on our review of the record, we find no basis to conclude that the agency has not provided sufficient information in the solicitation to permit offerors to compete intelligently and on a relatively equal basis.

First, we reject the protester's argument that an offeror will be unable to submit its best prices at the time of proposal submission. The RFPs specified the product and quantities offerors were to price. RFP-0050 at 39-40; RFP-0051 at 47. The RFPs also informed offerors that the national contractor must establish business relationships with the PPVs to sell the pharmaceutical products to the PPVs.¹¹ RFP-0050 at 25; RFP-0051 at 30. Contrary to the protester's contention, the fees the national contractor will be charged by the PPVs are not unknowable prior to proposal submission. Rather, potential offerors are able to enter into agreements with the PPVs before submitting their proposals.

Although an offeror may bear cost risk if it does not establish an agreement with a PPV prior to submitting a proposal, the RFPs' placement of that risk upon offerors does not render the solicitations defective. Rather, our Office has found that firms must use their professional expertise and business judgment in anticipating a variety of influences affecting performance costs. JRS Mgmt., B-402650.2, June 25, 2010, 2010 CPD ¶ 147 at 5. As a result, we fail to see any basis for the protester's contention that offerors will be unable to intelligently submit a proposal containing their best prices.

Second, we find Sterisyn's argument alleging an ambiguity arising from FAR clause 52.247-34, F.o.b. Destination and the solicitations to be unsupported by the RFPs. As defined by FAR section 2.101, F.o.b. (i.e., free on board) destination means that the seller delivers the goods on the seller's conveyance at destination, and that, unless the contract provides otherwise, the seller is responsible for shipping costs and risk of loss. See Independent Sys., Inc., B-413246, Sept. 15, 2016, 2016 CPD ¶ 260 at 2 n.2.

With the FAR definition in mind, we find no contradiction between the requirement in FAR clause 52.247-34, F.o.b. Destination, that the national contractor ship the pharmaceutical products at no cost to the government, and the requirement that offerors submit fixed prices. Therefore, since the RFPs clearly instructed offerors to incorporate any shipping costs into their price proposals, we find that the protester has failed to

¹¹ To the extent that the RFPs' provisions requiring the national contractor to sell the pharmaceutical products to the PPV "at the prices agreed to under this contract" may be inconsistent with the agency's understanding that the RFPs may require the national contractor to accept a lesser amount from the PPVs, the protester did not raise these apparent inconsistencies as protest grounds. RFP-0050 at 25; RFP-0051 at 31.

establish the existence of an ambiguity that would prevent it from competing intelligently. Consequently, we deny this protest ground.

The protests are denied.

Thomas H. Armstrong
General Counsel