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**Comptroller General
of the United States**

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

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Decision

Matter of: PWC Logistics Services Company

File: B-400660

Date: January 6, 2009

Michael R. Charness, Esq., Suzanne D. Reifmann, Esq., Bryan T. Bunting, Esq., and Jamie F. Tabb, Esq., Vinson & Elkins, for the protester.

Judith Gever, Esq., and Daniel K. Poling, Esq., Defense Logistics Agency, for the agency.

David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency properly issued waiver in accordance with Federal Acquisition Regulation § 12.302(c), for commercial item solicitation requirements that may be inconsistent with customary commercial practice, where agency reasonably found that requirements subject to waiver were legitimate agency needs.
 2. Solicitation is defective for failure to adequately identify bases for proposal evaluation, as required by Competition in Contracting Act of 1984, 10 U.S.C. 2305(a), where the solicitation divides requirement for food distribution into two geographic zones, with estimated value of one nearly five times that of the other, expresses intent to award each zone to different offeror, but fails to state factors that will be applied to determine which zone will be awarded to offeror whose proposal is found most advantageous for both zones.
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DECISION

PWC Logistics Services Company (PWC) of Kuwait protests the terms of request for proposals (RFP) No. SPM300-08-R-0061, issued by the Defense Logistics Agency, Defense Supply Center Philadelphia (DSCP), for food distribution for authorized customers in Kuwait, Iraq, and Jordan. PWC asserts that various terms of the solicitation impose undue risk on the contractor or are otherwise improper.

We sustain the protest with regard to one of the alleged deficiencies.

The solicitation contemplates award of two indefinite-quantity “commercial prime vendor contract[s],” with a 2-year base term and two 2-year option periods. The

contractors will act as prime vendors responsible for the supply and delivery of semi-perishable and perishable items to the military and other federally funded customers within Kuwait, Iraq, and Jordan. RFP at 47. The solicitation divides the requirement into two zones--Zone 1, comprised of Kuwait and the Northern, Central, and Southern portions of Iraq, and Zone 2, comprised of Jordan and the West-Central portion of Iraq (primarily, but not limited to, Anbar province)--with the stated intent to award each zone to a different contractor. The estimated total value of the requirements for Zone 1 is \$7.85 billion and for Zone 2 is \$1.58 billion, for an overall total of \$9.436 billion. RFP at 47-48, 70, 147. Award is to be made to the offerors whose proposals conforming to the solicitation are determined to be most advantageous to the government based on six technical evaluation factors (distribution system capability/quality assurance, experience/past performance, customer support/product availability, surge and sustainment, socioeconomic considerations, and Javits--Wagner--O'Day support), two price factors (aggregate distribution prices and aggregate prices), and a risk assessment.

PWC, the incumbent contractor, asserts that various terms of the solicitation are inconsistent with commercial practice, impose undue risk on the contractor, fail to adequately describe the basis for award, or are otherwise improper.

We have reviewed PWC's challenges and, with one exception discussed below, find that they furnish no basis upon which to sustain the protest. We discuss several of PWC's challenges below.

OTHER THAN COMMERCIAL TERMS

The RFP provides that the solicitation is for commercial items, specifically, a "commercial prime vendor contract," RFP at 1, 47, and includes a number of Federal Acquisition Regulation (FAR) commercial items clauses. See, e.g., FAR § 52.212-1, Instructions to Offerors--Commercial Items; FAR § 52.212-2, Evaluation--Commercial Items; FAR § 52.212-3, Offeror Representations and Certifications--Commercial Items; FAR § 52.212-4, Contract Terms and Conditions--Commercial Items; and FAR § 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders--Commercial Items.

PWC asserts that the solicitation nevertheless improperly includes a number of solicitation terms--primarily pricing terms--that are inconsistent with commercial practice. In this regard, the solicitation provides for award of a contract under which the contractor will be paid the unit price for each food item, with the unit price to be comprised of the product price plus a distribution price (normal or normal-plus-premium distribution price). RFP at 71, 179. The solicitation generally defines "product price" as follows:

The product price will be derived in one of two manners for this solicitation: 1) through the use of DSCP's Manufacturers Price

Agreements (MPAs); or 2) through the use of commercial pricing. When a DSCP MPA is available, the MPA price shall be used for the product price. When a DSCP MPA is not available, the Product Price shall be limited to the original manufacturer's or grower's price for [the] product. The Product Price shall be based on FOB Origin/Point of Manufacture. In addition, the Product Price shall exclude all costs that are required to be covered in the normal distribution price, including but not limited to, all transportation, broker and dealer costs and fees; and it shall exclude all costs that are required to be covered in the premium distribution price.

RFP at 71.

Under this provision, the prime vendor is required to purchase items under, if available, Manufacturers Price Agreements (MPA) negotiated by DSCP, which establish a product price for a fixed period of time; while the MPAs were not yet implemented when the solicitation was issued, the solicitation indicates that the agency anticipates that, ultimately, 75-80 percent of the contract catalog items will be covered by MPAs. RFP at 84. In addition, items are required to be priced on an FOB Origin/Point of Manufacture basis, that is, without the cost of shipping, with only three exceptions: (1) airfreight transportation charges may be included in the product price when it is necessary for fresh fruits and vegetables to be flown into the local markets of Kuwait, Jordan, or Turkey from a foreign country because the local supply is unavailable or insufficient to meet demand; (2) a CONUS (continental United States)-based manufacturer's price that is a national commercial price inclusive of transportation costs to a distribution point may be considered by the government to be the product price on a case-by-case basis, upon concurrence of the contracting officer; and (3) prices established by nonprofit agencies shall be used for items required to be purchased from those agencies. RFP at 71.

The RFP further provides that product pricing is acceptable only where the contractor "warrants, on a continuing basis throughout the period of performance, that its product price under this contract is equal to or lower than its product price to its most favored customer." RFP at 86. The solicitation also provided that "[a]ll [National Allowance Program Agreement] discounts, food show discounts, early payment discounts . . . , and other discounts, rebates, allowances or other similar economic incentives or benefits given to any other customer at any time during the period of performance shall be passed to the Government via a reduced catalog price." RFP at 86.¹ The sole exception to this discount passthrough requirement is for early payment discounts, but only where a number of requirements are satisfied,

¹ Under the National Allowance Program, a supplier or manufacturer enters into an agreement with DSCP to offer discounts to DSCP on products under DSCP Prime Vendor contracts. RFP at 93.

including: where an early payment discount is consistent with commercial practice and is routinely given by the suppliers to customers other than the prime vendor at the same discount rate and under the same conditions as provided to the prime vendor; the early payment discount is not established, requested, or negotiated for the purpose of avoiding giving DSCP a lower cost or a rebate or in exchange for a higher invoice price; the early payment discount is no more than two percent; and the contractor actually made the required payment within the time period required to receive the discount. Id.

In addition, the solicitation imposed a number of verification measures to ensure the integrity of the pricing, including provisions stating that: (1) “ALL offered product prices must be substantiated with a copy of the manufacturer or grower’s invoice or quote for each item in the Schedule of Items”; and (2) “[t]he government may require the contractor to submit invoices and other documentation from all subcontractor tiers or any supplier or person in the product price supply chain, to substantiate discounts, rebates, allowances or other similar economic incentives or benefits, and/or to substantiate that product prices under this contract are equal to or lower than product prices that are given to the contractor’s most favored customer.” RFP at 71, 87, 165.

Finally, while the product price component of the contract unit price is subject to prospective price redetermination, the normal and premium distribution prices are to remain fixed for the base period of the contract. RFP at 73, 85. However, the Defense Transportation System (DTS), which the prime vendors are required to use, is responsible for ocean transportation costs (the cost of shipping the product from the prime vendor’s CONUS facilities to its OCONUS (outside CONUS) facilities, also known as “Point to Point” delivery, and the DTS costs are excluded from the normal and premium distribution prices (except that the prime vendor will be responsible for any detention charges and arranging the return of empty containers to the government-designated ocean carrier). RFP at 62, 72-73.

PWC generally asserts that several of these RFP provisions are inconsistent with commercial practice, and therefore improper—(1) FOB Origin/Point of Manufacture pricing; (2) providing for DSCP to negotiate prices directly with food manufacturers under the mandatory MPA program; (3) the discount passthrough requirement; (4) the requirement that the prime vendor furnish invoices, quotes, and other documentation of manufacturers’ and growers’ prices; and (5) the requirement that the prime vendor use DTS for shipment overseas. PWC claims that these provisions, considered together, transform the requested services into something other than commercial food distribution services and thus are impermissible.²

² In its initial protest, PWC acknowledged that the solicitation’s requirement that DSCP receive most-favored-customer pricing “does not appear problematic” to the extent that it applies only to the pricing offered by the prime vendor itself, but

(continued...)

As noted by the protester, the FAR provides that “contracts for the acquisition of commercial items 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.” FAR § 12.301. However, the FAR provides that the contracting agency may waive the commerciality requirement as follows:

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 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.

FAR § 12.302(c).

(...continued)

asserted that it would be contrary to commercial practice if the requirement extended to the pricing offered by the prime vendor’s suppliers, that is, if it required the prime vendor to obtain its suppliers’ most-favored-customer pricing. Protest at 23-24. The most-favored-customer pricing language in the RFP clause states as follows: “For all items, including those covered by Manufacturer’s Pricing Agreements, the contractor warrants, on a continuing basis throughout the period of performance, that its product price under this contract is equal to or lower than its product price to its most favored customer.” RFP at 86. While this language does not on its face apply to the pricing of the prime vendor’s suppliers, but instead appears limited to the prime vendor’s pricing, PWC notes that, in response to a question concerning the coverage of the overall clause (XVII. REBATES/DISCOUNTS AND PRICE-RELATED PROVISIONS, Clause (a)), in which the most-favored-customer pricing requirement appears, a clause imposing a number of other pricing requirements (including restrictions regarding discounts and rebates), DSCP answered that “[a]ll requirements apply to the PV [prime vendor], and must be passed on to all sub-contractor relationships.” Amend. 003, Question & Answer 224. Although the agency has clarified in its report that its admittedly “somewhat inartful answer” was not intended to extend the most-favored-customer pricing requirement to the prime vendor’s suppliers, AR at 10, we agree with the protester that the agency, in implementing our recommended corrective action, should also amend the solicitation to clarify this point.

We will review challenges to waivers under this provision for reasonableness. Aalco Forwarding, Inc., et al., B-277241.8, B-277241.9, Oct. 21, 1997, 97-2 CPD ¶ 110 at 18; Crescent Helicopters, B-284706 et al., May 30, 2000, 2000 CPD ¶ 90 at 3. We find that PWC has provided no basis for questioning the the reasonableness of the waiver here.

The record includes both documentation of DSCP's market research into commercial practices and the waiver itself, signed by the supervisor (DSCP Integrated Supply Team (IST) Supervisor) of the contracting officer listed in the RFP. The waiver represents that the agency has determined that the use of other than commercial clauses was necessary to protect the government's interest in avoiding fraud and otherwise ensuring fair pricing. Class Waiver Addendum for the Inclusion of Provisions/Clauses in Prime Vendor Commercial Acquisitions Inconsistent with Customary Commercial Practices, Sept. 19, 2008; RFP at 1; Declaration of IST Supervisor; Agency Report (AR) at 4. In this regard, the waiver cites a number of problems that have arisen under DSCP's subsistence prime vendor contracts, under which the government is obligated to pay the actual cost of the food (plus a distribution price), including: the government has found that industry rebates, discounts, allowances or similar economic incentives are often hidden from the government in private agreements between manufacturers and distributors; there are no standard definitions of many pricing terms; and the price paid by the prime vendor may be layered with excessive fees imposed by numerous dealers/distributors/consolidators. Waiver Addendum; Declaration of IST Supervisor.

Further, it appears that the cited problems may have resulted in significant overcharges to the government. In this regard, the record shows that the U.S. Attorney's Office for the Northern District of Georgia has opened a civil fraud investigation into PWC's actions in connection with its incumbent prime vendor contracts to purchase food to support operations in Iraq, Kuwait, and Jordan, investigating whether PWC overcharged the government hundreds of millions of dollars. The record indicates that one focus of the investigation is PWC's retention of certain rebates and discounts from its suppliers (including possibly excessive claimed prompt payment discounts), while another focus is on whether PWC is using other companies, such as distributors and consolidators, to inflate the product prices charged to the government. Declaration of Assistant U.S. Attorney; Declaration of DSCP Deputy Director, Subsistence Supplier Operations. In addition, the record indicates that the investigation into whether the charges to the government for food were proper has been hampered by a failure by PWC to furnish requested invoices from manufacturers, growers and suppliers. Declaration of IST Supervisor. Against this background, the waiver addendum explains that such pricing provisions as FOB Origin/Point of Manufacturer pricing, requirements and restrictions regarding rebates and discounts, and documentation requirements are necessary to avoid

excessive passthrough charges at multiple points along the supply chain and to ensure pricing transparency and integrity. Waiver Addendum.³

In summary, the record indicates that DSCP, faced with possible overcharges to the government under PWC's current contract, has adopted a series of pricing provisions intended to safeguard the government from excessive charges and to ensure pricing transparency and integrity. In addition, DSCP is implementing the mandatory MPA program, under which DSCP negotiates prices directly with food manufacturers, and the use of which was likewise approved in the waiver addendum, in an attempt to maximize the leverage of DSCP's purchasing power and obtain fair and reasonable product pricing. RFP at 84; Waiver Addendum; AR at 18. PWC has not shown, nor does the record otherwise indicate, that the agency's objectives with these provisions could be accomplished by the use of commercial clauses. Under these circumstances, the waiver is unobjectionable.⁴

RISK ASSESSMENT

PWC objects to the solicitation's approach to assessing risk in evaluating proposals. In this regard, the RFP provides that "[t]he Government will make a risk assessment based on information contained in the proposal and other information, which has or may be derived from sources other than the proposal. Risk to the Government will be considered in the rating for any factors and/or sub-factors." RFP at 173. PWC asserts that this approach is improper because "the broad language of the RFP could allow DSCP to use extrinsic information that is inaccurate, misleading or biased when performing the contractor risk assessments," and that "[i]t would be improper for DSCP to rely on such information without giving the offeror concerned an opportunity to refute the information." PWC Comments, Nov. 13, 2008, at 15.

This argument is without merit. An agency's evaluation is not limited to the "four corners" of an offeror's proposal; the agency may rely upon other extrinsic

³ We note that we reviewed portions of the record concerning the agency's market research and the U.S. Attorney's investigation in camera, at the request of the agency and the U.S. Attorney's Office, in order to avoid interfering with the ongoing investigation of PWC.

⁴ It is not clear how the above rationale applies to the requirement for overseas shipment using DTS. However, PWC has offered no rebuttal to DSCP's explanation that this requirement, which has been in effect for prior DSCP prime vendor contracts, is mandatory for DSCP. Waiver Addendum; AR at 21; see Defense Transportation Regulation, Ch. 201, § B.2; Department of Defense Directive 4500.09E § 4. We thus have no basis to object to the requirement.

information of which it is aware. Park Tower Mgmt. Ltd., B-295589, B-295589.2, Mar. 22, 2005, 2005 CPD ¶ 77 at 6; see Bath Iron Works Corp., B-290470, B-290470.2, Aug. 19, 2002, 2002 CPD ¶ 133 at 23 (in evaluating proposals, contracting agencies may consider any evidence, even if that evidence is entirely outside the proposal, and, indeed, even if it contradicts statements in the proposal). Further, to the extent PWC anticipates that DSCP will act unreasonably in its consideration of extrinsic information, its protest is premature and not for consideration in this preaward protest. See ITT Elec. Sys., Radar Sys.-Gilfillian, B-299150 et al., Feb. 2, 2007, 2007 CPD ¶ 19 at 3.

UNDUE RISK

PWC asserts that a number of provisions in the RFP impose undue risk on the contractor. However, the mere presence of risk does not make a solicitation inappropriate or improper, as it is within the agency's discretion to structure a contract being competed in a way that imposes maximum risk on the selected contractor and minimum burdens on the agency. OMNIPLEX World Servs. Corp., B-295698, B-295698.2, Mar. 18, 2005, 2005 CPD ¶ 43 at 3; ABF Freight Sys., Inc., et al., B-291185, Nov. 8, 2002, 2002 CPD ¶ 201 at 6. We find that PWC has provided no basis for us to object to the solicitation's risk allocation.

For example, PWC objects to the solicitation requirements regarding sanitary approval of subsistence suppliers. In this regard, the solicitation provides as follows:

All establishments and distributors furnishing subsistence items under DSCP contracts are subject to sanitation approval and surveillance as deemed appropriate by the Military Medical Service or by other Federal agencies recognized by the Military Medical Service. The government does not intend to make any award for, nor accept, any subsistence products manufactured, processed, or stored in a facility which fails to maintain acceptable levels of food safety and food defense, is operating under such unsanitary conditions as may lead to product contamination or adulteration constituting a health hazard, or which has not been listed in an appropriate government directory as a sanitarily approved establishment when required. Accordingly, the supplier agrees that, except as indicated in paragraphs (2) and (3) below, products furnished as a result of this contract will originate only in establishments listed in the U.S. Army Veterinary Command (VETCOM) Circular 40-1, Worldwide Directory of Sanitarily Approved Food Establishments for Armed Forces Procurement. . . .

RFP at 107. PWC asserts that, since the VETCOM has not yet approved fresh fruit and vegetable (FF&V) growers in the local market (the only FF&V suppliers approved so far have been FF&V distributors), and has not yet published the standards it will use in determining whether to approve a grower, an offeror

preparing its proposal will have no idea whether its selected FF&V suppliers will be approved, or whether it instead will be required to enter into agreements with different FF&V suppliers. However, while this uncertainty may impose some risk on offerors, we think the agency's interest in ensuring acceptable levels of food safety and food defense provides a reasonable justification for shifting the risk to the contractor in this regard. See Computers Universal, Inc., B-296501, Aug. 18, 2005, 2005 CPD ¶ 161 at 3 (where solicitation requirements relate to health and safety concerns, agency has the discretion to set its minimum needs so as to achieve not just reasonable results but the highest possible reliability and effectiveness). PWC suggests that the risk could be mitigated if the contractor were entitled to an equitable adjustment in the event its selected FF&V suppliers ultimately were not approved. However, this amounts to no more than a suggestion that the agency accept the cost risk of selecting ultimately unapproved suppliers. Given our view that the agency's concern is a reasonable one and that shifting risk to the contractor is a reasonable means of addressing that concern, we find no basis for requiring the agency to accept that cost risk.

TWO AWARDS

PWC asserts that the solicitation does not adequately describe the basis for award. As noted above, the solicitation divided the requirement into two zones--Zone 1 with an estimated total value of \$7.85 billion and Zone 2 with an estimated value of \$1.58 billion--with the stated intent to award each zone to a different contractor. Specifically, the RFP provided as follows:

The Government intends to make two awards, one per zone. The intent is to have two different contractors, one for each of the separate zones. In order to ensure that two sources are available and to ensure the continuous availability of reliable sources of supplies, the Government reserves the right to exclude, under the authority of FAR 6.202, the awardee under one of these zones from being eligible for award under the other zone. However, [the] Government reserves the right to make one award for both zones, as necessary to support both zones if it is in the government's best interest.

RFP at 68.⁵ PWC asserts that the solicitation improperly fails to set forth the basis for determining which zone an offeror will be awarded in the event that its proposal is found to be most advantageous for both zones.

⁵ FAR § 6.202(a)(4) authorizes an agency to exclude a particular source from a contract action in order to establish or maintain an alternative source or sources for the supplies or services being acquired if the agency head determines that to do so would ensure the continuous availability of a reliable source of supplies or services.

The Competition in Contracting Act of 1984 (CICA) requires that solicitations “at a minimum” include “a statement of—(i) all significant factors and significant subfactors which the head of the agency reasonably expects to consider . . . ; [and] (ii) the relative importance assigned to each of those factors and subfactors” 10 U.S.C. § 2305(a)(2)(A) (2006).⁶ Here, the solicitation generally provides that the agency will “award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered”; lists the six technical and two price evaluation factors that will be considered in determining the “most advantageous” proposal; and lists the considerations—to “ensure that two sources are available and to ensure the continuous availability of reliable sources of supplies”—warranting excluding the offeror selected for award for one zone from award for the other zone. RFP at 68, 171. As noted by the protester, however, the solicitation is silent as to the basis for determining which zone an offeror will be awarded where its proposal is found to be most advantageous for both zones. We think this omission is especially significant here, since the estimated value of one zone is nearly five times greater than the value of the other. In our view, this failure to advise offerors of the factors the agency will apply is inconsistent with the requirement in CICA that agencies identify the bases upon which offerors’ proposals will be evaluated. Accordingly, we sustain the protest on this ground.

RECOMMENDATION

We recommend that the agency amend the solicitation to include a statement of the significant factors the agency will consider in determining which of two zones an offeror whose proposal was most advantageous for both would in fact be awarded where the agency determines not to award both zones to the same offeror. We further recommend that the protester be reimbursed its costs of filing and pursuing the protest with regard to this issue, including reasonable attorneys’ fees. 4 C.F.R. § 21.8(d)(1) (2008). The protester should submit its certified claim, detailing the

⁶ While CICA exempts solicitations in procurements for commercial items using special simplified procedures or a purchase for an amount not greater than the simplified acquisition threshold from the above requirements, 10 U.S.C. § 2305(a)(2), here the procurement had an estimated value of \$9.4 billion, significantly in excess of the thresholds for use of either the simplified procedures for the acquisition of commercial products set forth at FAR subpart 13.5 or the overall simplified acquisition procedures. FAR §§ 2.101, 13.003(c)(1), 13.500(a). In any case, as we indicated in Finlen Complex, Inc., B-288280, Oct. 10, 2001, 2001 CPD ¶ 167 at 10, basic fairness dictates disclosure of the evaluation factors including their relative weights where, as here, the agency requires offerors to prepare detailed written proposals addressing unique government requirements.

time expended and costs incurred in connection with this issue, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Gary L. Kepplinger
General Counsel