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Accountability \* Integrity \* Reliability

Comptroller General  
of the United States

United States General Accounting Office  
Washington, DC 20548

## Decision

**Matter of:** National General Supply, Inc.

**File:** B-292696

**Date:** November 3, 2003

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Robert G. Fryling, Esq., Blank Rome, for the protester.  
Aimee M. Nolan, Esq., for W. W. Grainger, Inc., an intervenor.  
Lawrence M. Anderson, Esq., Department of the Air Force, for the agency.  
Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO,  
participated in the preparation of the decision.

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### DIGEST

Protest that solicitation improperly fails to prohibit contractor from providing the agency with products from the contractor's own inventory or catalog is denied, since such a prohibition is not required by law or regulation, and any competitive advantage to an offeror results solely from its business structure, not from improper agency action.

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### DECISION

National General Supply, Inc. protests the terms of request for proposals (RFP) No. F04666-03-R-0026, issued by the Department of the Air Force for a contractor-operated civil engineering supply store (COCESS). National maintains that the solicitation improperly allows the contractor to provide supply items that it obtained from its own inventory or catalogs, which allegedly provides large businesses a pricing advantage not available to small businesses that do not maintain an inventory or catalogs.

We deny the protest.

The solicitation calls for the contractor to run a COCESS to provide the agency with building materials and tools for maintenance and improvement projects. In addition to the inventory held at the store, the contractor is required to provide items through an electronic catalog. Contract line item number (CLIN) 0001 calls for fixed prices for approximately 1,400 hardware items the agency will purchase on a regular basis. CLIN 0002 concerns hardware items used less often, such as special tools. These are non-priced items (NPI) for which the contractor will be paid on a cost

reimbursement basis. The RFP includes a “plug” number for these items that will be used to evaluate all proposals.<sup>1</sup> CLIN 0003 calls for a fixed monthly fee to operate the store. This fee covers the contractor’s costs of operation, including direct labor, overhead and profit. The solicitation provides for a “best value” award based on an evaluation of mission capability, past performance and price. The price evaluation is to be based on the sum of the CLINs for the base and 4 option years.

The solicitation, as issued, prohibited the contractor from transferring items between affiliates and subsidiaries in which the contractor has a financial interest. Statement of Work (SOW) § 1.4.8.1.2. In response to a question as to whether this prohibition would prohibit contractors from “purchasing from themselves” (*i.e.*, providing items from their own inventory), the Air Force responded that “[n]o, this paragraph does not prohibit a company such as Home Depot from selling a product off their shelf at a price that is available to the market.” Pre-Proposal Conference Question No. 13. Responding to another question, the Air Force stated that catalogs need not be published by an independent, third party (*i.e.*, sales may be made from the contractor’s own catalogs), provided the catalogs contain competitive published price lists available to the general public. Pre-Proposal Conference Question No. 18.

The gravamen of the protest concerns the prices that the contractor will be permitted to charge the government for goods provided under CLIN 0002 (those for which plug numbers are to be used in the calculation of offerors’ prices). National protests that the solicitation should prohibit the contractor from supplying products from its own inventory or catalogs and then charging the government the off-the-shelf purchase prices, since allowing that would provide large companies an unfair competitive advantage over small businesses such as National that do not maintain large inventories or catalogs. Specifically, the protester reasons, a large company contractor furnishing an item from its inventory or its own catalogs in effect would be purchasing the item from itself; since profit is included in the off-the-shelf purchase price, reimbursement of the cost for the item—*i.e.*, the purchase price—will include profit. This being the case, in preparing their proposals, large company offerors will be able to use the prospective profit on these items to subsidize—*i.e.*, reduce the prices for—the other line items in the procurement. (Because plug prices are to be used for these NPI supplies, rather than the actual amounts that the contractor will charge the government, in calculating competing offerors’ total prices for evaluation purposes, the protester apparently views the use of plug numbers as masking the actual differences in costs to be passed on to the government.) National maintains that this is unfair, and therefore improper, since small businesses such as itself that purchase from a supplier—so that their reimbursement will be limited to the amount they pay the supplier—will have no profit built into the prices at which they will be reimbursed by the agency.

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<sup>1</sup>The agency spends about \$134,833.33 per month on NPI’s and included this amount on CLIN 0002 for evaluation purposes.

This argument is without merit. First, the protester points to no statutory or regulatory prohibition—and we are aware of none—against contractors providing items from their own inventory or catalogs and charging the government the market price, even when the context is generally described as a cost reimbursement one. Further, we see no improper competitive advantage here. While an offeror may not be given a competitive advantage over other competitors by means of improper agency action, an agency is not required to construct a procurement to neutralize a competitive advantage that some potential offerors may have over others by virtue of their own particular circumstances. Electronic Design, Inc., B-279662.5, May 25, 1999, 99-1 CPD ¶103 at 6.<sup>2</sup> Such is the nature of the advantage complained of here. Any competitive advantage enjoyed by offerors intending to furnish items they purchase from their own inventory or catalogs is solely the result of the offerors' business structure, not improper government action. Accordingly, the solicitation does not operate to create an improper competitive advantage, and there is no requirement that the agency prohibit the contractor from furnishing products it purchases from its own inventory or catalogs.<sup>3</sup>

National also complains that, since a contractor supplying items from its own shelves will have profit built into the prices it pays, allowing such a contractor to be reimbursed at those prices will violate the cost reimbursement structure of CLIN 0002. This argument also is without merit. Regardless of whether allowing this arrangement is consistent with a strict cost reimbursement context, as discussed above, we see nothing improper in the challenged terms of the RFP. Moreover, the agency has unambiguously advised all offerors that such an arrangement is permissible here, so the solicitation cannot be reasonably challenged for lack of clarity in this respect.

The protest is denied.

Anthony H. Gamboa  
General Counsel

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<sup>2</sup>The Air Force specified that the contractor must provide items at prices available to the market in order to ensure against unreasonable price mark-ups.

<sup>3</sup> National argues that the solicitation is defective because it does not provide for the evaluation of the prices offerors will charge. As this issue concerns a solicitation impropriety and was not raised until National submitted its protest comments, after the closing date for receipt of proposals, it is untimely. See 4 C.F.R. § 21.1(a)(1) (2003).