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## Decision

**Matter of:** Labatt Food Service, LP

**File:** B-408790

**Date:** November 25, 2013

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Johnathan M. Bailey, Esq., Bailey & Bailey, PC, for the protester.  
Elizabeth Amato, Esq., Defense Logistics Agency, for the agency.  
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GAO, participated in the preparation of the decision.

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### DIGEST

Protest of solicitation's price evaluation scheme that assigns greater weight to an offeror's proposed distribution price is denied where agency conducted reasonable research to support the weighting factor in order to combat price manipulation of offerors' proposed distribution and delivery price components.

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### DECISION

Labatt Food Service, LP, of San Antonio, Texas, protests the terms of request for proposals (RFP) No. SPM300-13-R-0079, issued by the Defense Logistics Agency (DLA) for subsistence prime vendor (SPV) support for Department of Defense (DOD) and non-DOD customers in central Texas. The protester challenges the solicitation's price evaluation scheme.

We deny the protest.

### BACKGROUND

The RFP, which was issued on April 19, 2013, contemplates the award of an indefinite-delivery/indefinite-quantity, fixed-price contract, with an economic price adjustment, for a 2-month implementation and a 22-month performance period, with a 1-year, then a 2-year option. RFP (conformed) at 30-31, 43, 142.<sup>1</sup> The contractor is responsible for furnishing food, beverage, and related items for garrisons and others. *Id.* at 42, 44. The procurement is being conducted pursuant to the

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<sup>1</sup> The RFP was amended eight times; our citations are to the conformed RFP.

commercial item acquisition procedures of Part 12 of the Federal Acquisition Regulation. See id. at 8. The solicitation states that award will be made on a lowest-priced, technically-acceptable basis, considering the following evaluation factors: technical (experience, quality control and assurance procedures, and food defense), past performance, and price. Id. at 119, 122.

Offerors were to propose a contract unit price (for each item listed in the RFP's market basket and for each performance period), consisting of the sum of an offeror's delivered price and distribution price, less government rebates and discounts.<sup>2</sup> Id. at 111, 125; see attach. 1, Price Proposal Spreadsheet. The RFP defined the terms contract unit price, delivered price, and distribution price as follows:

Contract Unit Price means the total price per unit charged to DLA Troop Support for a product delivered to DLA Troop Support's customers.

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Delivered Price means the most recent manufacturer, grower or private label holder commercial price per unit to the Contractor, inclusive of all standard freight,<sup>3</sup> that is input in the Contractor's purchasing system as the starting basis for its pricing to customers prior to the application of any specific distribution fees, rebates, discounts, limited discounts, or other financial agreements with the Contractor's various customers. . . . Delivered price shall exclude all costs that are to be covered in the Distribution Price.

\* \* \* \* \*

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 aspects of contract performance other than Delivered Price . . . Delivered Price is distinct from and not to be included in the Distribution Price.

Id. at 54-56; see also 31-33.

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<sup>2</sup> The RFP requires that discounts and rebates be passed on to the government, except for those realized by the contractor as "earned income" for value-added services (such as marketing or volume incentives from manufacturers, growers, etc.) through the normal course of commercial business. See RFP at 52-53.

<sup>3</sup> Standard freight means the published list price or prevailing market rate for transportation of subsistence and food service operating supplies, i.e., the transportation charge for delivery from the manufacturer/grower/private label holder or redistributor to the SPV Contractor. See RFP at 31-32, 54.

Under the RFP's economic price adjustment clause, the delivered price component of the contract unit price could be adjusted weekly based on market fluctuations; the distribution price would remain fixed over the life of the contract. See id. at 33-35, 56.

The solicitation states that, for evaluation purposes, the distribution price would be weighted by multiplying the aggregate distribution prices for all basket items by 11.5. Id. at 120-21, 124. An offeror's total evaluated price would be calculated by adding the weighted aggregate distribution price to the aggregate delivered price, to arrive at a weighted aggregate unit price. Id. The lowest-priced offer would be determined based on the weighted aggregate unit price. Id.

Labatt protested the RFP's price evaluation scheme prior to the due date for submission of proposals, arguing that the 11.5 weighting factor is not based on relevant research, is arbitrary, and bears no rational relation to the actual cost to the government for the required items. See Protest at 11; Comments at 2, 16. According to the protester, the agency should only evaluate an offeror's total aggregate price, because evaluating delivered/distribution prices, which can vary dramatically among vendors, only invites offerors to manipulate those pricing components to achieve a lower aggregate unit price for evaluation and award purposes.

DLA responds that the weighting factor is based on recent analysis of average distribution prices from other SPV contracts, is specifically calculated to address price manipulation, and will result in a more meaningful price evaluation. Agency Report (AR) at 11-14. The agency points out that the RFP contains numerous other requirements, applicable before and after contract award, that will also stem price manipulation.

## DISCUSSION

Agencies must consider cost to the government in evaluating proposals, 10 U.S.C. § 2305(a)(3)(A)(ii) (2006), and while it is up to the agency to decide upon some appropriate and reasonable method for evaluating offerors' prices, an agency may not use an evaluation method that produces a misleading result. See Bristol-Myers Squibb Co., B-294944.2, Jan. 18, 2005, 2005 CPD ¶ 16 at 4; AirTrakTravel, et al., B-292101 et al., June 30, 2003, 2003 CPD ¶ 117 at 22. The method chosen must include some reasonable basis for evaluating or comparing the relative costs of proposals, so as to establish whether one offeror's proposal would be more or less costly than another's. Id.

The record here does not support Labatt's assertions that the RFP's weighted distribution price factor is arbitrary and not based on relevant data. Rather, the agency has provided documentation detailing its analysis of a sampling of basket items (approximately 70) from 29 SPV contracts. AR, Tab 1, Rationale for Business

Evaluation Weighting. According to DLA, the data reveal that an item's unit price is comprised, on average, of 92 percent delivered price and 8 percent distribution price, or an 11.5 ratio between the respective price components. In addition, the agency reviewed proposed aggregate prices from a recent regional procurement for a SPV contractor, which also showed--even under different pricing equations--the same 92/8 percentage and 11.5 ratio. See id. at 2-3. Thus, in DLA's calculation, multiplying or weighting aggregate distribution prices by a factor of 11.5 (again, based on the recent, typical ratio of distribution to delivered price) equalizes the two price components, leading to a more equitable price evaluation that minimizes the effect of price manipulation. Id. at 2, 11-13. We find, contrary to the protester's assertion, that DLA's rationale for the weighting factor is reasonably supported by agency research. See U.S. Foodservice, Inc.; Labatt Food Servs., LP, B-404786 et al., May 13, 2011, 2011 CPD ¶ 102 at 5-6

While Labatt disagrees with the extent of DLA's analysis,<sup>4</sup> the protester has not shown that the RFP's weighted price evaluation scheme is arbitrary or unsupported. See, e.g., id.; Short & Assocs., B-406799, B-406799.4, Aug. 31, 2012, 2012 CPD ¶ 251 (weighted price factor derived from historical data and protest denied where protester does not show that methodology was inaccurate or that more historical analysis required); RMS Info. Sys., Inc., B-280521.3, Oct. 21, 1998, 98-2 CPD ¶ 113 at 7 (protest denied where weighted price factor was intentionally structured, based on historical data, to discourage price unbalancing and manipulation); S. J. Thomas Co., Inc., B-283192, Oct. 20, 1999, 99-2 CPD ¶ 73 at 4-5 (comparing offerors' mark-up rates alone is meaningless without estimating expected cost ratios or some other mechanism for considering offerors' differing rate calculations, and uncertainty regarding rates and material costs does not mean that those elements play no role in evaluating relative cost to the government); see also U.S. Foodservice, Inc. v. United States, 100 Fed. Cl. 659, 680-81 (2011) (reducing fraud in food-service distribution contracts is sufficient rationale and DLA not obliged to produce additional research and analysis, or specific instances of past experience, to substantiate agency's goal).<sup>5</sup>

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<sup>4</sup> The protester urges DLA to consider nearly 2 decades of sales data (including 18 years of Labatt sales data) to determine a delivered/distribution price variance before and after contract award. See Protest at 11; Comments at 2-3.

<sup>5</sup> Both parties cite U.S. Foodservice, supra, at 684-85, to support their respective positions regarding the RFP's weighting factor. DLA contends that the court in that decision upheld DLA's use of a weighting factor; Labatt argues that the court directly challenged DLA's price weighting assumptions. AR at 16; Comments at 17. The court, however, explicitly stated that it was not ruling on the weighting factor, and its brief comments regarding the weighting factor are dicta. U.S. Foodservice, supra. Moreover, unlike the 11.5 weighting factor at issue in the instant protest, the solicitation in U.S. Foodservice employed a weighting factor of 20. (DLA states that  
(continued...)

Regardless, Labatt insists that the weighting factor invites price manipulation and that the solicitation's other pricing and reporting requirements offer little protection in that regard. The agency explains that the RFP includes numerous documentation, verification, monitoring, and audit provisions that are specifically intended to prevent price manipulation. AR at 14-16. For example, offerors, as well as the awarded contractor, must substantiate delivery prices with manufacturer or growers invoices, which DLA will verify if distribution prices appear too low.<sup>6</sup> RFP at 53, 117. An offeror/contractor must also provide printed computer "screen shots" showing delivered prices from the offeror/contractor's electronic purchasing system. Id. The agency may audit the contractor's computer purchasing system, to confirm that the delivered prices for market items sold to DLA's customers are identical to the delivered prices charged to other commercial customers, and request additional documentation regarding pricing agreements. Id. at 53. In this respect, the RFP also requires the contractor to warrant, on a continuing basis, that its delivered price for each item sold to DLA is equal to, or lower than, the delivered price offered to other commercial customers. Id. at 32, 54.

While Labatt questions the sufficiency of some<sup>7</sup> of these RFP provisions, we are persuaded by the agency that the solicitation's various requirements provide additional, and reasonable, protections against price manipulation. Indeed, the protester concedes that "adequate safeguards," including "periodic auditing," can control volatility and "creeping" delivered prices after contract award. Comments at 3.

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(...continued)

it has abandoned the pricing model at issue in the earlier case, and that the current 11.5 weighting is calculated differently and is based on different data. AR at 17.)

<sup>6</sup> The RFP also states that the agency will review, as part of its price evaluation, individual unit line items to determine whether those proposed prices are accurate, fair, and reasonable, and to ensure competitive pricing; any line items that are not found fair and reasonable may be subject to negotiation or require additional supporting documentation. RFP at 124. The RFP also provides economic price adjustment ceilings on the aggregate contract delivered price for each item over the life of the contract. See id. at 35.

<sup>7</sup> Labatt mainly alleges that the contractor can conceal--under the RFP's definition of "earned income"--price reductions that food vendors, manufacturers, growers, etc., typically negotiate among themselves, rather than pass those reductions on to the government. See, e.g., Comments at 6-8. DLA asserts, however, that the RFP's definition simply recognizes the food distribution industry's earned income practices, which the government will accept as long as it receives the same starting price as other commercial customers. See AR at 15; supra n.2. We find the agency's assertion reasonable.

Accordingly, we conclude that the solicitation's price evaluation methodology, which is based on the agency's recent, historical analysis and is specifically designed to minimize price manipulation, provides a reasonable and adequate basis to compare the relative costs to the government of offerors' proposals.<sup>8</sup>

The protest is denied.

Susan A. Poling  
General Counsel

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<sup>8</sup> In its comments on the agency report, Labatt argues that the weighting factor unfairly benefits private label holders and that delivered price should not include any earned income. Comments at 7-11. These arguments, raised for the first time in the protester's comments to the agency's report, are untimely as they should have been raised prior to the closing time for receipt of proposals and were not. 4 C.F.R. § 21.2(a)(1) (2013); National Customer Eng'g, B-251166, Feb. 9, 1993, 93-1 CPD ¶ 118 at 3; see also JAVIS Automation & Eng'g, Inc., B-290434, B-290434.2, Aug. 5, 2002, 2002 CPD ¶ 140 at 7 n.11 (piecemeal presentation of protest grounds, raised for the first time in comments, are untimely).