U.S. GOVERNMENT ACCOUNTABILITY OFFICE

441 G St. N.W.
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: SupplyCore, Inc.; Noble Supply & Logistics, LLC

File: B-419971.3; B-419971.4; B-419971.5; B-419971.6

Date: June 15, 2023

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Ashley L. Peskoe, Esq., and Andrew T. McGuire, Esq., Defense Logistics Agency, for the agency.
Uri R. Yoo, Esq., Alexa Stechschulte, and Alexander O. Levine, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests that the terms of solicitation are inconsistent with customary commercial practice and are otherwise unreasonable are denied where the agency properly issued a waiver in accordance with Federal Acquisition Regulation section 12.302(c), and the record shows that the terms are reasonably justified.

DECISION

SupplyCore, Inc., of Rockford, Illinois, and Noble Supply & Logistics, LLC, a small business of Boston, Massachusetts, protest the terms of request for proposals (RFP) No. SPE8E3-21-R-0001, issued by the Defense Logistics Agency (DLA) Troop Support, for prime vendor support to provide construction supplies, equipment, and incidental services for the continental United States, Alaska, and Hawaii. The protesters contend that specific price terms are inconsistent with customary commercial practice and that the agency's waiver of customary commercial practice was unreasonable.

We deny the protests.

BACKGROUND

The RFP, issued on April 26, 2021, contemplates award of 12 indefinite-delivery, indefinite-quantity, fixed-price contracts, with one award for each of two zones within each of the six geographic regions representing the continental United States, Alaska,

and Hawaii. Contracting Officer's Statement and Memorandum of Law (COS/MOL) at 2; Agency Report (AR), Tab 1, attach. 1, RFP at 23, 99. The contracts would be awarded for a 2-year base ordering period and up to four 2-year option periods. RFP at 9. Under DLA's maintenance repair and operations (MRO) tailored logistics support (TLS) program, each awardee would be responsible for supplying a wide range of commercial maintenance, repair, and operation supplies and incidental services to authorized DLA customers throughout the contractor's respective zone. COS/MOL at 2; RFP at 12, 19.

The procurement is being conducted pursuant to the commercial item acquisition procedures of part 12 of the Federal Acquisition Regulation (FAR). For each zone and region, award is to be made to the responsible offeror whose proposal conforming to the solicitation is determined to be most advantageous to the government based on price and non-price factors. The three non-price factors, listed in order of importance, are: (1) technical merit; (2) past performance; and (3) storefront support technical merit. RFP at 91-92. The RFP informed offerors that the non-price factors were significantly more important than price. *Id.* at 91.

As relevant here, the RFP requires, for each respective zone, the selected offeror to take on the role of a "prime vendor" responsible for supplying all products listed in the solicitation's price evaluation list, which "constitutes non-exhaustive, illustrative lists of the types of supplies that will potentially be ordered under the resultant contracts." RFP at 20. The RFP notes that all items are commercial or modified commercial products as defined in FAR section 2.101. *Id.*

For price evaluation, offerors were to provide a unit price, comprising the sum of the offeror's acquisition price and the applicable distribution fee price, for each item on the price evaluation list. *Id.* The initial RFP defined "acquisition price" as follows:

> The acquisition price is defined as the actual invoice price of the product and/or incidental service to the contractor. This is the price that the prime vendor pays its sub-contractor or supplier for the material or service ordered under a contract line item.

RFP at 31.

The solicitation as initially issued also required prime vendors to "be aggressive as possible in pursuing all discounts and rebates on items order[ed]" under the program and to "pass all discounts and rebates so obtained through to the Government in the form of an up-front reduction in the acquisition price of the items." *Id.* Any rebates or discounts received by the prime vendor from its suppliers were required to be reflected as corresponding discounts and reductions to the proposed acquisition price, and be fully disclosed and itemized in the documentation submitted to substantiate the acquisition price. *Id.* In addition to these requirements, the solicitation incorporated DLA Directive Procurement Note C08, which provided, in part, that "if the contractor is purchasing from subcontractors or other sources and receives a discount or rebates,

the contractor must immediately pass these savings to the Government in the contract price and invoice for payment." *Id.* at 135.

On January 5, 2023, the agency issued amendment 10 to the solicitation, revising the solicitation's pricing section to add to the definition of "acquisition price" and to limit affiliate mark-ups. Specifically, the amendment revised the above definition of acquisition price to read as follows:

> The acquisition price is defined as the actual invoice price of the product and/or incidental service that the prime vendor pays its sub-contractor or supplier for the material or incidental service ordered under a contract line item, less the value of any rebates, discounts (including prompt payment discounts), payments, fees, and/or remittances of any kind received by the prime vendor from its sub-contractor(s) or supplier(s) in connection with its fulfillment of that contract line item (whether received prior to or after issuance of the delivery order). The acquisition price shall not include the value of any markups, fees, charges, or other costs imposed upon the prime vendor by any affiliate(s) . . . of the prime vendor above and beyond what the affiliate entity pays its supply source.

AR, Tab 11, RFP amend. 10 at 2. The amendment also added a provision to the solicitation's pricing section requiring the prime vendor to pass through to the government the "values of any distribution, handling, or other fees, remittances, or payments of any kind received by the prime vendor" as "corresponding reductions to the acquisition prices of the pertinent line items and corresponding downward adjustments to the distribution fees." *Id.* The provision reiterated the requirement as follows:

> [T]he prime vendor . . . shall [not] collect any sort of discount, rebate, fee, payment, remittance, or other thing of value from its suppliers and/or subcontractors related to products or incidental services purchased to fulfill delivery order line items under this contract without immediately tendering the full value of those fees, payments, or other things of value to the Government, in the form of a reduction to the acquisition price of the line item and a corresponding downward adjustment to the distribution fee price for the line item (where applicable).

Id.

Prior to the closing date for the solicitation, SupplyCore filed a protest with our Office, alleging that amendment 10 included terms that were inconsistent with customary commercial practice and not supported by market research. COS/MOL at 7; *see SupplyCore, Inc.*, B-419971.2, Feb. 3, 2023 (unpublished decision) at 1. In response to the protest, DLA advised our Office that it would take corrective action by rescinding solicitation amendment 10, and our Office dismissed the protest as academic. *See SupplyCore, Inc.*, *supra*; AR, Tab 12, RFP amend. 11 at 2 (rescinding amendment 10 "pending further review and analysis").

The agency subsequently obtained a waiver pursuant to FAR section 12.302(c) for terms that were included in amendment 10, and issued amendment 12 to reinstate those terms. COS/MOL at 7; AR, Tab 12, RFP amend. 12; *see generally,* AR, Tab 15, Waiver. Prior to the next due date for submission of proposals, SupplyCore and Noble filed protests with our Office challenging the terms of solicitation amendment 12.

DISCUSSION

SupplyCore and Noble both argue that the solicitation provisions, as revised through amendment 12, are not consistent with customary commercial practice and that the agency lacks the rational basis to justify a waiver of such customary commercial practices under FAR section 12.302(c). SupplyCore Protest at 5-8; Noble Protest at 11-13. Specifically, both protesters object to the amendment's inclusion of "prompt payment discounts" as part of the discounts and rebates that must be passed through to the government under the solicitation's pricing scheme. *Id.* SupplyCore also objects to the RFP's prohibition on affiliate mark-ups. SupplyCore Protest at 5-8. In addition, the protesters contend that the agency failed to conduct required market research to support the departure from customary commercial practice.[1] SupplyCore Supp. Protest at 2-3; Noble Supp. Protest at 2-7.

The agency concedes that the terms of amendment 12 are inconsistent with customary commercial practice, but argues that the agency properly obtained a waiver for, and sufficiently justified its need for, these non-customary provisions. COS/MOL, SupplyCore at 14-19; Noble at 18-22. The agency also contends that market research is not required where the agency properly obtains a waiver for a provision that is inconsistent with customary commercial practice. COS/MOL, SupplyCore at 19-20; Noble at 22-24. As discussed below, we agree with the agency.

Timeliness

As a preliminary matter, the agency argues that challenges to the requirement to pass through prompt payment discounts should be dismissed as untimely. The agency contends that the actual requirement in the initial solicitation--to pass through to the government *all* discounts and rebates via reductions in acquisition prices--was not materially changed by amendment 12. COS/MOL, SupplyCore at 21-23; Noble at 24-27. The agency therefore asserts that the time for filing a protest of this requirement was prior to the time set for the receipt of initial proposals, not after the issuance of amendment 12. *Id.* The agency maintains that amendment 12 only added prompt payment discounts as one specific example of discounts that must be passed through, and therefore did not materially change the requirement as initially posted. *Id.*

[1] Although we do not specifically address every collateral argument the protester raises, we have carefully considered all of them and find that none provides a basis to sustain the protest.

Our Bid Protest Regulations require protests "based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time set for receipt of initial proposals [to] be filed prior to bid opening or the time set for receipt of initial proposals." 4 C.F.R. § 21.2(a)(1). Alleged improprieties that do not exist in the initial solicitation but are subsequently incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation. *Id.*

The protesters respond that the protests are timely because they are based upon improprieties that only became apparent after the issuance of amendment 12. SupplyCore Comments at 7-8; Noble Comments at 15-16. The protesters note that, prior to amendment 12, neither the solicitation's definition of "acquisition price" nor the provision requiring the pass-through of all discounts and rebates specifically included the disputed "prompt payment discounts." *Id.*; *see* RFP at 31. In this regard, the protesters contend that prompt payment discounts are distinct from "all discounts and rebates *on items order[ed]*," RFP at 31 (emphasis added), because prompt payment discounts constitute an incentive on the timing of payment. In this regard, the protesters assert that prompt payment discounts are customarily understood as separate and excluded from other discounts and rebates that may be passed through to the ultimate customer. The protesters therefore contend that they reasonably interpreted the initial solicitation requirement for passing through all discounts and rebates as not applying to prompt payment discounts.

Based on our review of the record, we agree with the protesters that the protests are timely. First, the solicitation as initially issued defined the term "acquisition price" simply as "the actual invoice price of the product and/or incidental service to the contractor." *See id.* As Noble argues, because a prompt payment discount would typically be applied after the prime vendor receives an invoice from the supplier or subcontractor, offerors could reasonably believe that the term acquisition price, defined as "the actual invoice price," did not include prompt payment discounts. *See* Noble Comments at 15-16. While the solicitation specified later in the same paragraph the requirement to pass through discounts and rebates through an upfront reduction in the acquisition price, as noted above, the definition of the term "acquisition price" was fixed to the actual invoice price and did not specifically incorporate prompt payment discounts until the issuance of amendment 12.

Although the agency disagrees with the protesters on whether prompt payment discounts are encompassed within the general meaning of the term "all discounts," as customarily understood in the commercial marketplace, we resolve doubts regarding timeliness in favor of the protester. *See Fort Mojave/Hummel, a Joint Venture*, B-296961, Oct. 18, 2005, 2005 CPD ¶ 181 at 6 n.7. Therefore, because the alleged solicitation impropriety--inclusion of prompt payment discounts among the discounts that must be passed through to the government--was not apparent until the issuance of amendment 12, we conclude that the protests are timely since they were filed before the proposal due date set out in amendment 12. *See* 4 C.F.R. § 21.2(a)(1) ("Alleged improprieties which do not exist in the initial solicitation but which are subsequently

incorporated into the solicitation must be protested not later than the next closing time for receipt of proposals following the incorporation.").

Waiver for Other than Customary Commercial Terms

The Federal Acquisition Streamlining Act of 1994, 10 U.S.C. § 2377, established a preference and specific requirements for acquiring commercial items that meet the needs of an agency. Part 12 of the FAR 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 commercial marketplace when procuring commercial items. *U.S. Foodservice, Inc.; Labatt Food Services, LP*, B-404786 *et al.*, May 13, 2011, 2011 CPD ¶ 102 at 3-4; *see 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 section 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 a 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*. Our Office reviews challenges to waivers under this provision for reasonableness. *PWC Logistics Services Company*, B-400660, Jan. 6, 2009, 2009 CPD ¶ 67 at 6; *see also, Orlans PC*, B-420905, Oct. 25, 2022, 2022 CPD ¶ 269 at 8 n.7 (finding that, in the event of a valid waiver, the agency must set forth a reasonable basis--a rational justification that can withstand logical scrutiny--for the use of particular clauses or terms that deviate from customary commercial practice).

Here, the record contains a waiver the agency obtained under FAR section 12.302(c) for the inclusion of provisions inconsistent with customary commercial practice. *See* AR, Tab 15, Waiver. In the waiver, the agency described the customary commercial practice where "[i]ndustry rebates, discounts, allowances or other similar economic incentives or benefits are often included in individual agreements between manufacturers and distributors," which may include "early payment discounts." AR, Tab 15, Waiver at 1. The waiver also acknowledged that a final invoice price typically "may include fees from any number of dealers, distributors, or consolidators, whether affiliated with the Prime Vendor." *Id.* Furthermore, the waiver noted that an offeror under the instant procurement asserted that discounts for prompt or early payments are "not customarily passed through to the ultimate customer," and that "any mark-up added by affiliates is not customarily excluded from the price to the ultimate customer in the commercial marketplace." *Id.*

The agency's waiver then explained that the other-than-customary solicitation provisions--requiring prompt payment discounts and affiliate mark-ups to be passed through--are necessary to ensure pricing transparency, protection against fraudulent

business practices, and the elimination of unnecessary costs under the MRO TLS program. *Id.* at 4. Specifically, the waiver described the unique structure of contracts under the program, where the selected "prime vendor" would take on the functions of a finder or a consolidator "that works with its industry contacts and commercial networks to source solutions advantageous to DLA's customers at the most competitive prices possible." *Id.* at 2. Because of this "position of trust," the waiver notes that the agency has historically structured the pricing scheme in MRO TLS contracts to ensure complete transparency of the acquisition price of the supplies and services provided, with the contractor being compensated only through a distribution fee that includes a profit component. *Id.* To this end, the waiver explained that the agency has a legitimate need to require the contractor to "aggressively seek rebates and discounts against the acquisition price of the items supplied and remit those rebates and discounts to DLA to reduce the overall cost to the Government and the taxpayer." *Id.* The waiver further explained its rationale for the requirements as follows:

> Absent such requirements, it is possible for a Prime Vendor to artificially increase the acquisition price of an item to the detriment of the Government and the taxpayer, while receiving discounts, rebates, and/or other remittances from its supply sources to augment its profits without the Government's knowledge. It is also possible for a Prime Vendor to utilize an affiliate to source supplies, while inflating the acquisition price charged for an item or service through [a] discretionary mark-up imposed by that affiliate, potentially at the direction of the Prime Vendor and/or its principals, to the detriment of the Government and the benefit of the Prime Vendor, the affiliate, and/or their principals.

Id. at 3.

In support of this rationale, the waiver enumerates DLA's past encounters with these problems. For example, in 2017, Public Warehousing Company, K.S.C., a prime vendor under DLA's subsistence provision program, pled guilty to inflating the price of a supplied product by including charges from a supplier that had already been billed to other entities. *Id.* In another example, in 2014, Supreme Foodservice, GMBH, a subsistence prime vendor, pled guilty to perpetrating a fraud against the government through a concealed affiliate mark-up of the acquisition price. *Id.* Finally, based on the above rationale, the waiver included a determination that the customary commercial practice of not including anticipated incentives and rebates, or including affiliate mark-ups, in the invoice price is inconsistent with the needs of the government and the structure and design of the MRO program. *Id.* at 4.

Based on this record, we find that the waiver satisfies the applicable regulatory requirements and reasonably supports the agency's decision to deviate from commercial practice. In this regard, we do not find unreasonable the agency's decision to include certain pricing provisions intended to ensure pricing transparency and to avoid possibly fraudulent business practices.

Our Office has previously concluded that an agency may use other than commercial clauses when necessary to protect the government's interest in avoiding fraud and ensuring fair pricing. *See PWC Logistics Servs. Co.*, *supra* at 6-7. Indeed, in *PWC Logistics Services Company*, which involved a DLA subsistence program contract with pricing requirements similar to the MRO program, we noted that the focus of an ongoing civil fraud investigation was "PWC's retention of certain rebates and discounts from its suppliers (including possibly excessive claimed prompt payment discounts)." *Id*. at 6. Under those circumstances, we found unobjectionable the agency's waiver of certain commercial pricing terms to adopt "a series of pricing provisions intended to safeguard the government from excessive charges and to ensure pricing transparency and integrity." *Id.* at 7.

The protesters here argue that the waiver is unjustified because the agency's concern with fraud and transparency is unreasonable insofar as it relates specifically to the provisions on prompt payment discounts and affiliate mark-ups. We find, however, that these arguments amount to disagreement with the agency's rationale, which, without more, does not provide a basis to sustain the protest. *See U.S. Foodservice, Inc.; Labatt Food Services, LP*, *supra* at 5. In this regard, we find unpersuasive the protesters' contentions that the solicitation's pass-through requirement unreasonably includes prompt payment discounts and affiliate mark-ups.

For example, the protesters argue at length about how a "prompt payment discount" differs from other discounts and rebates, and how prohibiting affiliate mark-ups deprives all parties of certain benefits of the bargain. SupplyCore Comments at 2-6; Noble Comments at 5-15. These arguments, however, amount to no more than variations on the argument that these requirements are inconsistent with customary commercial practice. They do not address or rebut the agency's argument that not passing through these discounts increases the risks to the government from fraud and lack of transparency. In other words, the protesters have not shown how the unique and incentivizing aspects of prompt payment discounts make them less susceptible to fraudulent business practices utilizing undisclosed discounts or rebates.[2] Likewise, SupplyCore has not demonstrated how the financial benefits to be gained by affiliate transactions could overcome the increased potential for fraud in affiliate transactions.

Finally, the protesters argue that the agency's waiver is improper because it is not supported by market research. SupplyCore Supp. Protest at 2-3; Noble Supp. Protest at 2-7. In this regard, Noble also argues that the requirement for the waiver to "describe the customary commercial practice found in the marketplace" requires the agency to conduct sufficient market research. Noble Supp. Protest at 3; Noble Comments at 3. We find no merit to the protesters' arguments in this regard.

Section 12.302(a) of the FAR requires a contracting officer to conduct appropriate market research before tailoring the commercial products and services provisions of the

[2] In this respect, the agency notes that [DELETED]. COS/MOL at 13, 24; AR, Noble, Tab 16, [DELETED] at 1.

FAR, where such tailoring is needed “to adapt to the market conditions for each acquisition” and to account for “variations in commercial practices.” Here, however, the agency concedes that the provisions it seeks to include in the solicitation are inconsistent with customary commercial practice and, for that reason, obtained a waiver under FAR section 12.302(c). As the parties all agree that the provisions in question are not consistent with customary commercial practice, it would be superfluous to require the agency to conduct further market research to demonstrate such inconsistency.

Indeed, in decisions where our Office sustained protests of solicitation provisions found to be inconsistent with customary commercial practice, we recommended that the agency *either* support the inclusion of the relevant provisions with sufficient market research showing they were consistent with customary commercial practice *or* obtain a waiver pursuant to FAR section 12.302(c). *See, e.g, Orlans PC, supra* at 8-9; *Verizon Wireless,* B-406854, B-406854.2, Sept. 17, 2012, 2012 CPD ¶ 260 at 14. Here, because the agency has properly obtained a waiver pursuant to FAR section 12.302(c) for solicitation provisions that are inconsistent with customary commercial practice, we do not find that the agency is required to conduct further market research on the corresponding customary commercial practice.

On this record, we find the agency’s waiver to be unobjectionable and reasonably based on legitimate agency needs.

The protests are denied.

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