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VIA OVERNIGHT DELIVERY AND ELECTRONIC MAIL

November 13th, 2008

David A. Ashen, Esq.
Deputy Assistant General Counsel
U.S. Government Accountability Office—PLCG
441 G Street, N.W.
Washington, D.C. 20548

Re: B-400660.1, Protest of PWC Logistics Services Company K.S.C.(c) Under
Defense Supply Center Philadelphia Solicitation No. SPM300-08-R-0061

Dear Mr. Ashen:

I am representing Bahrain Maritime and Mercantile International B.S.C. (d/b/a BMMI) in this Pre-Award Procurement Protest. These are the Comments of BMMI, 4 C.F.R. § 21.3(i), on the redacted Agency Report. BMMI received the redacted Agency Report on Thursday, November 6th, 2008 and these Comments are timely filed within 10 calendar days after BMMI's receipt of the redacted Agency Report.

THE CONTRACT PROPOSED BY THIS SOLICITATION IS A CONTRACT FOR DISTRIBUTION SERVICES, NOT A CONTRACT FOR FOOD ITEMS, FOOD PRODUCTS, OR FOOD.

This Pre-Award Procurement Protest by PWC Logistics Services Company K.S.C.(c) (PWC Logistics) challenges the pricing and discount provisions of Defense Supply Center Philadelphia Solicitation Number SPM300-08-R-0061 (the Solicitation) as inconsistent with "customary commercial practice" under Federal Acquisition Regulation 12.301(a)(2) and therefore unlawful because, per PWC Logistics, Defense Supply Center Philadelphia has conducted inadequate market research otherwise required for Defense Supply Center Philadelphia to tailor these pricing and discount provisions, Federal Acquisition Regulation 12.302(c).

The premise of PWC Logistics' challenge is that the Solicitation proposes a Contract for large-volume purchases of "food items," that these "food items" are customarily purchased through distributors (PWC Logistics Protest, at 14-15), that the Awardees of the Solicitation will be inventorying "food pro-

duct” (PWC Logistics Protest, at 21), and that the Awardees of the Solicitation will necessarily be delivering “food” from these inventories only after Government ordering (PWC Logistics Protest, at 22).

From this premise that the Solicitation proposes Contracts for large-volume purchases of food product, food items, or food, PWC Logistics complains about specific Solicitation requirements for Product Price based on manufacturer/grower pricing at origin/point of manufacture (Solicitation, § XIII.A.2., at 71), about Defense Supply Center Philadelphia retention of Early Payment discounts (Solicitation, § XVII.(b), at 86), and about the Solicitation requirement that the Awardees of the Solicitation pass through to Defense Supply Center Philadelphia any discounts, rebates, allowances, etc. given to any other customer of the Awardees (Solicitation, § XVII.(a), at 86).

It is these Solicitation requirements which PWC Logistics avers are inconsistent with “normal procurement and pricing operations” (PWC Logistics Protest, at 26) for commercial food products, food items, or food.

Before an Agency can be compelled to tailor specific Solicitation requirements it must first be established just which “commercial items” are the subject of a particular Acquisition. Federal Acquisition Regulation 2.101, 12.102(a); *American College of Physician Services, Inc.; COLA*, B-294881, B-294881.2, January 3rd, 2005, *2005 U.S. Comp. Gen. LEXIS 1, 14* (Federal Acquisition Regulation 12.302(c) “addresses how commercial items are procured, not whether the items or services themselves are commercial in nature.”).

Generally, “commercial items” include only “items” other than real property “of a type customarily used by the general public,” else “commercial items” must be “services” “of a type offered and sold competitively in substantial quantities in the commercial marketplace.” Federal Acquisition Regulation 2.101.

So is this Solicitation an Acquisition of commercial “items,” i.e., commercial food product, food items, or food, or instead is this Solicitation an Acquisition of commercial “services,” i.e., an Acquisition of commercial distribution services?

If this Solicitation were truly an Acquisition of “items,” “commercial items,” then BMMI would argue that Solicitation requirements for certain mandatory food items, food product, or food from designated sources (Solicitation, § XVIII.I, at 88 through 92) and Solicitation requirements for surge and sustainment (Solicitation, § XI., at 129 through 132) are such that this Acquisition is not inconsistent with “normal procurement and pricing operations” for large-volume purchases of food items, food product, or food because these Solicitation requirements for certain mandatory food items, food products, or food and these Solicitation requirements for surge and sustainment make this an Acquisition other than one for “normal procurement and pricing operations.”

In other words, these particular Solicitation requirements render this Solicitation other than a Solicitation for “commercial items.”

But BMMI need not go this far because it is otherwise quite clear that the Solicitation is an Acquisition of “services,” i.e., an Acquisition of commercial distribution services, and not an Acquisition of “items,” “commercial items,” i.e., commercial food product, food items, or food.

First, the Solicitation clearly explains that only a limited number of Stock Keeping Units (SKUs) are estimated to be required for distribution to Kuwait or to Iraq (at most, 829 SKUs have in the past been distributed from Kuwait to Iraq, 812 SKUs have been distributed from Jordan to Iraq, 773 SKUs have been distributed from Kuwait to Kuwait, and 115 SKUs have been distributed from Turkey to Iraq—Solicitation, Technical Evaluation Factor II, at 175). A commercial concern selling food product, food items, or food, either in the United States or internationally, would not be successful if it offered less than 1,000 commercial SKUs for sale to the general public. Thus prior performance of these Solicitation requirements suggests that commercial services, not commercial food product, food items, or food is in reality what is needed by Defense Supply Center Philadelphia.

Second, paragraph 4. of Solicitation Amendment 0013, effective October 31st, 2008, explicitly adds a requirement that Awardees provide workers’ compensation insurance or security as required by the Defense Base Act, 42 U.S.C. §§ 1651-1654. The Defense Base Act covers construction or services Contracts only, i.e., Contracts which are not “exclusively for materials or supplies.” Federal Acquisition Regulation 28.305(b); *AIU North America, Inc.*, B-283743.2, February 16th, 2000, 2000 U.S. Comp. Gen. LEXIS 34, *2.

PWC Logistics admits in its Pre-Award Procurement Protest that this Solicitation is an Acquisition of “services,” i.e., an Acquisition of commercial distribution services when it avers that the Contract “to be awarded under this solicitation is at its essence a service contract,” and that when drafting this Solicitation, Defense Supply Center Philadelphia “clearly envisioned the *distribution* of food items as the primary purpose of the contract” (PWC Logistics Protest, at 38) (Emphasis as in original).

Paragraph 4. of Solicitation Amendment 0013 is the death knell of PWC Logistics’ challenge to the pricing and discount provisions of the Solicitation as inconsistent with “customary commercial practice.” The Solicitation is now clearly (if ever there was cause to doubt) an Acquisition of “services,” i.e., an Acquisition of commercial distribution services, and not an Acquisition of commercial food product, food items, or food.

PWC Logistics has not shown just how the pricing and discount provisions of the Solicitation are inconsistent with customary commercial practice for distribution services, distribution services “of a type offered and sold competitively in substantial quantities in the commercial marketplace.” Lacking such a showing, there is no violation of the restriction set out at Federal Acquisition Regulation 12.302(c). *American College of Physician Services*, 2000 U.S. Comp. Gen. LEXIS 34, at *15.

The Defense Base Act requirement that Awardees provide workers’ compensation insurance or security was added to the Solicitation on Friday, October 31st. Under GAO procedures, PWC Logistics had 10 calendar days from this date, or until Monday, November 10th, to Protest the terms, or the effect of the terms, of Amendment 0013 issued by Defense Supply Center Philadelphia. 4 C.F.R. § 21.2(a)(2).

PWC Logistics has neither Protested this Defense Base Act requirement added with Amendment 0013 nor explained, as it must, just how this added Defense Base Act requirement for commercial distribution services now renders the pricing and discount provisions of the Solicitation inconsistent with customary commercial practice for distribution services. Consequently, PWC Logistics' challenge to the pricing and discount provisions of this Solicitation can now only be untimely.

Defense Supply Center Philadelphia has issued Amendment 0013 so as to take corrective action as a result of the PWC Logistics Pre-Award Procurement Protest. (Redacted Agency Report, at 26). This corrective action, taken by way of an Amendment to the Solicitation, confirms that this Solicitation is an Acquisition of commercial distribution services, not an Acquisition of commercial food product, food items, of food.

When an Agency takes corrective action by way of a Solicitation Amendment or Contract Modification, this corrective action, if it is a ground of Protest, must be Protested within 10 calendar days after the date of the Amendment or the Modification. If the corrective action is not so challenged, then the Protest is untimely. *Fisher-Cal Industries, Inc.*, B-285150.2, July 6th, 2000, *2000 U.S. Comp. Gen. LEXIS 103*, *4 n.2. Such is this Protest.

THIS SOLICITATION'S AUDIT AND PRICING DOCUMENTATION REQUIREMENTS ARE ENTIRELY PERMISSIBLE.

Defense Supply Center Philadelphia correctly points out in the redacted Agency Report that the audit rights and pricing documentation requirements of this Solicitation are allowed by Federal Acquisition Regulation 15.403-3(c)(1) permitting Agencies to require submission of pricing data other than certified cost or pricing data to determine price reasonableness. (Redacted Agency Report, at 25-26); *The Boeing Company*, B-311344 et al., June 18th, 2008, *2008 U.S. Comp. Gen. LEXIS 104*, *140. Indeed, your Office has already explicitly upheld a requirement for submission of such pricing data during performance of a Contract for food distribution services. *Smelkinson Sysco Food Services*, B-281631, March 15th, 1999, *1999 U.S. Comp. Gen. LEXIS 49*, *13 n.4.

Sincerely,

/s/ Cyrus E. Phillips IV

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