

November 13, 2008

By E-mail

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Re: B-400660, PWC Logistics Services Company K.S.C.(c)
Protester's Comments on Agency Report

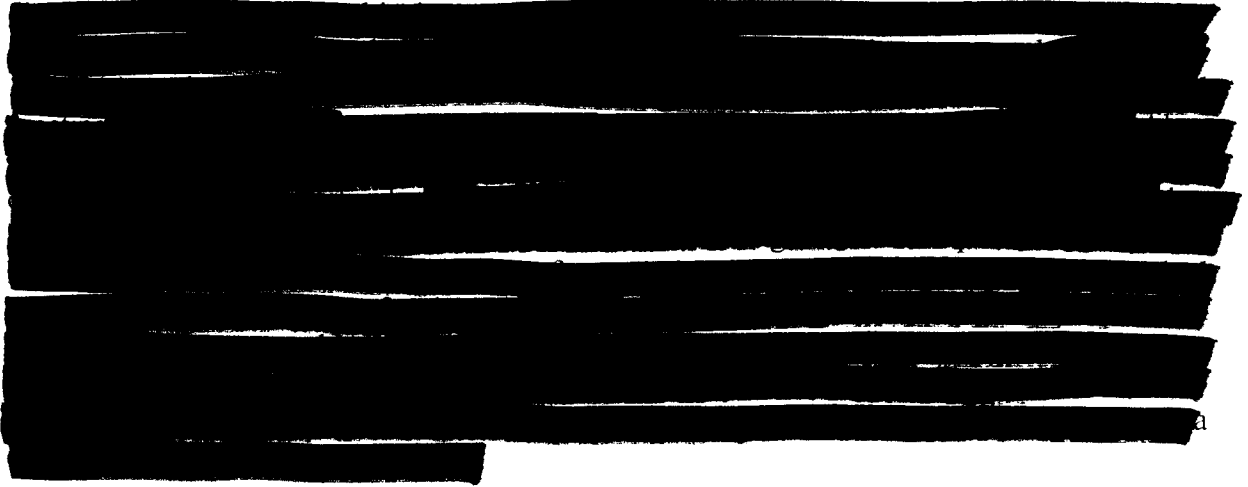
Dear Mr. Ashen:

Pursuant to 4 C.F.R. § 21.3(i), PWC Logistics Services Company K.S.C.(c) ("PWC") hereby files its comments on the Agency Report ("AR") of the Defense Supply Center Philadelphia ("DSCP"), which it received on November 3, 2008.

I. INTRODUCTION

DSCP's solicitation (hereinafter "RFP") remains flawed in many ways, and DSCP's efforts at defending its RFP are unpersuasive. Indeed, DSCP must have concluded that some of the flaws that PWC pointed out in the protest are indefensible, because DSCP chose not to address them. While DSCP did appropriately amend the RFP to add the mandatory Defense Base Act clause and remove the requirement for backhauling Government Furnished Material, it has disputed the legitimacy of the remainder of PWC's protest grounds, where it has addressed the grounds at all. As described below, DSCP's arguments are unavailing. The RFP includes terms and conditions that are inconsistent with customary commercial practice, and DSCP's attempt at complying with the waiver provisions in the Federal Acquisition Regulation ("FAR") falls far short. The RFP continues to suffer from undefined evaluation procedures in several key areas, and the RFP imposes unreasonable cost risk on offerors. Finally, DSCP has refused to remove from the RFP audit and document production requirements that are inappropriate and impermissible in a contract for commercial items.





II. DISCUSSION

A. The RFP Improperly Incorporates Non-Commercial Terms, and DSCP Abused its Discretion by Fundamentally Altering the Character of a Commercial Acquisition

In its protest, PWC demonstrated that the RFP deviated substantially from standard commercial terms and conditions, in violation of both the Federal Acquisition Streamlining Act ("FASA"), Pub. L. No. 103-335, 108 Stat. 3243 (1994) and FAR Subpart 12.3. In particular, PWC showed that the RFP's terms and conditions deviated from standard commercial practices with respect to its definition of "product price" and its restrictions on early payment discounts and other rebates.¹ Based on DSCP's response, these points appear to now be uncontroverted. In its Agency Report, DSCP made no real attempt to demonstrate that the terms PWC identified as being non-commercial, actually were commercial. Instead, DSCP only avers that to the extent it included non-commercial terms, it obtained the appropriate waiver to do so under FAR 12.302(c). *See* AR at 5-11.

¹ PWC also argued that the RFP's "most favored customer" provisions could be contrary to commercial practice to the extent they required PWC to obtain most favored customer pricing from each of its suppliers and subcontractors at each step in the supply chain. PWC further showed how DSCP's answer to a question on this point indicated that the RFP did require MFC pricing at each step in the supply chain. Protest at 23. In its response, DSCP avers that its original answer to this question was "inartful," and that it now interprets the most favored customer provision to apply only to the Prime Vendor. AR at 10-11. In light of this, DSCP is required to amend the solicitation to remove this ambiguity. *See M.E.E., Inc.*, B-265605.3, B-265605.4, 96-1 CPD ¶ 109 (Fed. 22, 1996).



DSCP's response is unavailing for two reasons. First, DSCP failed to follow the procedures required by the FAR to properly secure a waiver of the requirement that agencies use commercial terms and conditions exclusively to the maximum extent practicable. Second, even if DSCP properly implemented a waiver, it abused its discretion by altering the terms and conditions to such a degree that the services being acquired can no longer be fairly described as commercial food distribution services.


1. DSCP Failed to Properly Waive the Requirement that it not Deviate from Commercial Terms

FAR 12.302(c) requires more than a pro-forma "waiver" issued by some official within the agency before the agency may override Congress's mandate that agencies only use commercial terms to the maximum extent practicable. *See* FASA § 8002(b)(1), (3). The documents that DSCP produced as evidence of its waiver, and the process employed to secure the waiver, do not demonstrate DSCP's compliance with the requirements of either FAR 12.302(c) or the Defense Logistics Agency's ("DLA") regulations for waiving commercial terms. Accordingly, DSCP failed in its attempt to waive the requirements for commercial item acquisitions.

FAR 12.302(c) reads in full:

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.

(Emphases added.) This provision specifies the general rule that the contracting officer cannot deviate from the standard commercial terms. The FAR also requires that "contracts for the acquisition of commercial items shall, *to the maximum extent practicable*, include only those clauses . . . [d]etermined to be consistent with customary commercial practice." FAR 12.301(a) (emphasis added). This requirement implements Congress's mandate under FASA § 8002(b), where Congress directed the FAR Council to require agencies to use commercial terms "to the maximum extent practicable." *Id.*




FAR 12.302(c) provides that a contracting officer must make a formal, written request for a waiver that a higher official will subsequently approve. DLA's internal regulations implement the FAR mandate, by requiring that the contracting officer's waiver request be approved by an individual at least "one level above the contracting officer." Defense Logistics Agency Directives ("DLAD") § 12.203(c). It is logical to conclude that a waiver requested by one agency official must be approved by a different agency official, and not the same person wearing different hats.

In sum the FASA, FAR and DLAD require the following procedure for obtaining a waiver:

1. The contracting officer conducts market research to determine the commercial practice for acquiring the subject matter of the acquisition.
2. The contracting officer then determines whether one or more of the standard commercial terms is impracticable for achieving the agency's needs.
3. If the contracting officer so determines, he or she prepares a request that: (a) describes the customary commercial practice and (b) supports the need for a term or condition that is inconsistent with that practice, by (c) including the contracting officer's determination that the customary commercial practice is impracticable for the Government.
4. An official with actual oversight over the contracting officer then reviews the request, and, if he or she approves of the request, endorses the request either on the same document or in a separate document.

In its Agency Report, DSCP makes short shrift of these procedural requirements. *See* AR at 5-6, 8-9. In particular, DSCP avers that the contracting officer's request for the waiver and the waiver itself can be in the same document, but also that the waiver need *not* contain the information supporting the waiver. *See*, AR at 9; AR Tab 21 at 2, ¶ 8. This is a transparent attempt to avoid the requirements that the waiver request document the customary commercial practice, that the waiver justify the agency's need to deviate from that practice, and that the waiver be approved by an official who has actual supervisory authority over the official that requested it. The FAR requires a waiver request to describe the current commercial practice and contain information to "support the need" for the waiver. So even though the waiver itself need not contain this information, the information must still be documented *somewhere*. When DSCP avers that the contracting officer's request for the waiver and the waiver itself can be in the same document (but also that the waiver need *not*




contain the information to support the waiver), it is actually attempting to avoid the FAR's requirement that it provide some documentation of the current commercial practice as well as its justification for deviating from that practice.

Further, even if an agency may both request and approve a waiver in the same document, then unlike the waiver documents here, it must still provide evidence of a request that preceded the approval. As with the requirement that an official other than the requester approve that request, it is even more obvious that an action cannot be approved before it has been requested. By arguing that the request and the waiver can be in the same document, DSCP is urging GAO to overlook the evidence that the same official or officials who requested the waiver in the case also may have approved the waiver. *See* Section II.A.1(c), *infra*.

GAO should reject DSCP's lax interpretation of the waiver procedures. These procedures were enacted to ensure that agencies comply with Congress's mandate as implemented by the FAR, and to act as a check against unfettered efforts to deviate from commercial practices unless such practices are truly *impracticable*. Agencies must not be permitted to include any terms that they find advantageous into a commercial items contract by simply having one of their officials sign a document purporting to be a "waiver." *See Ocuto Blacktop & Paving Co.*, B-284165 (Mar. 1, 2000); *see also* Section II.A.1(b), *infra*. If agencies may waive commercial terms to any extent and by any means of their choosing, then the waiver exception obliterates both Congress's requirement that agencies follow commercial practices to the "*maximum extent practicable*," and the FAR Council's stricture that contracting officers *not* tailor any clause in a commercial item contract unless the contracting officer demonstrates to his superiors that the commercial practices are impracticable.

In this case, the supposed waiver documents do not reflect that DSCP followed any of these procedures. To date, there is no evidence that the contracting officer conducted any market research. There is no evidence that the contracting officer made a reasonable determination that the standard commercial terms are impracticable, and not just less desirable to DSCP. There is no contemporaneous evidence that the contracting officer prepared a proper request to deviate from commercial practice, and there is no dispositive evidence that an official with any real oversight over the contracting officer approved any waiver request that the contracting officer may have produced. Instead, DSCP created a set of self-serving documents and adopted a self serving waiver procedure that deviates from the FAR and Congressional mandates.



- (a) **DSCP has failed to produce any evidence that it conducted market research of the commercial food distribution industry.**

To date, DSCP has not produced any evidence that it actually conducted market research. Instead, DSCP has only averred that such market research exists, and complained that it is having difficulty “collecting and organizing” it. E-mail from J. Gever to D. Ashen, *et al.*, Subject: Protest of PWC Logistics Services Co – B400660, Nov. 7, 2008. [REDACTED]

[REDACTED] DSCP did not, however, have similar difficulties in compiling any other part of its Agency Report. Accordingly, if DSCP ever does eventually produce its market research to the protester, unless it is truly voluminous, questions will remain about when the research was actually performed.

[REDACTED]

[REDACTED]

Finally, DSCP’s statement that that it was too burdensome to “collect and organize,” its volumes of market research amounts to a tacit admission that any “research” currently

[REDACTED]

reflected in the AR is insufficient to meet the requirements of FAR 12.301 and FAR 10.002 (which provides general guidance regarding market research). In fact, DSCP's "Class Waiver Addendum," AR Tab 19, and Mr. Dlugokecki's Declaration, AR Tab 21, indicate that DSCP's "market research" was thin and insubstantial, consisting almost exclusively of informal communications with members of industry. GAO has indicated that such communications, while helpful, are insufficient to constitute reasonably adequate market research for an acquisition of this scope. See *Smelkinson Sysco Food Servs.*, B-281631, 99-1 CPD ¶ 57 (Mar. 15, 1999).

By comparison, GAO has found that commercial contracts are a highly probative form of market research. See *Aalco Forwarding, Inc., et al.*, B-277241, et seq., 97-2 CPD ¶ 110 (Oct. 21, 1997); *Crescent Helicopters*, B-284734, et al., 2000 CPD ¶ 90 (May 30, 2000). DSCP acknowledges that commercial food prime vendor contracts exist for entities such as cafeterias, restaurants and grocers. See AR Tab 19 at 1, ¶ 4. [REDACTED]

[REDACTED] As DSCP has not yet produced any such exemplar contracts, it probably simply has not obtained or utilized this type of highly probative market research. Thus, if any such contracts ultimately appear in the market research that DSCP has promised, GAO should disregard them, as they were most likely not obtained prior to the due date for DSCP's Agency Report.

In sum, DSCP's conduct to date makes it highly unlikely that it performed the FAR-required market research to any adequate degree.

(b) The contracting officer made no determination that using standard commercial terms was impracticable.

Where a statute requires agencies to take some action to the "maximum" or "greatest" extent practicable, the agency must either perform the action "or articulate a reasoned explanation of why it is impracticable to do so." *Ocuto Blacktop & Paving Co.*, B-284165 (Mar. 1, 2000). Agencies must "give reasonable consideration to the practicability of the statutory [mandate]." *Id.*

In this case, instead of conducting market research in order to give "reasonable consideration" to using commercial terms, DSCP decided *a priori* the terms and conditions that it wanted to include in the RFP. As the contracting officer failed to perform the market research necessary to determine what commercial terms were, it is impossible that the contracting officer could have made a determination that using commercial terms was not practicable. Thus, DSCP failed to give any consideration, much less reasonable

[REDACTED]

consideration, as to how it could use standard commercial terms to the maximum extent practicable.

While DSCP has proffered a reason for the terms it selected for use in the RFP, that reason does not derive from a determination that the use of commercial terms is impracticable. Instead, DSCP decided for other reasons that non-standard terms might be more favorable to it. In particular, DSCP apparently relied on the opinions of the contracting officer for the current Iraq SPV contract, Mr. Dlugokecki, [REDACTED] [REDACTED] to decide that it should design its own terms and conditions, regardless of what commercial practice entailed. *See* AR at 6; Tabs 2, 3, 21. [REDACTED] there is still no way for DSCP or GAO to determine whether there was some means by which DSCP could have used commercial pricing and discount terms.

Finally, DSCP's proposed interpretation of FAR 12.302(c)'s procedural requirements would eviscerate any meaning from FASA's and the FAR's requirement to use commercial terms to the maximum extent practicable. DSCP focuses only on the language in FAR 12.302(c) that refers to the agency's "needs." *See* AR at 8. From this, DSCP argues that because agencies have discretion to define their needs, they have equal discretion in waiving the requirement that they use commercial terms and conditions exclusively to the maximum extent practicable. *See id.* This interpretation would have the waiver exception in FAR 12.302(c) swallow the rule in both FAR 12.302(a) and FASA. GAO should reject DSCP's proffered interpretation; GAO should instead hold DSCP to the well-accepted standard that it must actually and reasonably consider using commercial terms rather than deciding to formulate its own terms prior to even discovering what the commercial practices entail.

- (c) **There is no contemporaneous evidence that the contracting officer prepared a request to deviate from commercial practices and there is no evidence that anyone with any independent oversight approved the request.**


Of the waiver documents DSCP provided, only one addresses the non-commercial terms identified in PWC's protest. That document is the "Class Waiver Addendum," AR Tab 19. This document neither constitutes a proper request for a waiver nor a proper approval of such a request. There is no contemporaneous evidence that the contracting officer for the RFP requested the Class Waiver Addendum. There is also no evidence that the Class Waiver Addendum was approved by an individual who was in fact in a supervisory position over the requester.

[REDACTED]

The Class Waiver Addendum is signed by a single person, Mr. Dlugokecki, who, by his own account, was *not* the contracting officer for the RFP at the time he signed the waiver. See AR Tab 21 at 1, ¶ 1. The only evidence that the contracting officer for the RFP, Ms. Ford, requested the Class Waiver Addendum is Mr. Dlugokecki's own Declaration, which he signed only after PWC filed the present protest. See *id.* at 3. GAO assigns little weight to such self-serving documents created in the heat of litigation. See *Global Analytic Info. Tech. Servs., Inc.*, B-298840.2, 2007 CPD ¶ 57 (Feb. 6, 2007). Furthermore, Mr. Dlugokecki only states that Ms. Ford "prepared" the Addendum, but does not specify that she did so as a "request" to Mr. Dlugokecki to approve the additional waivers. What makes this particularly troublesome is that Mr. Dlugokecki is also currently serving as the co-contracting officer with Ms. Ford under the current Prime Vendor contract. AR Tab 21 at 1, ¶ 1. He states that he is *simultaneously* serving in a position above Ms. Ford for the current RFP. *Id.*

The evidence in the AR strongly suggests that Mr. Dlugokecki both initiated and approved the waiver, while Ms. Ford may have acted as a scrivener. Mr. Dlugokecki, as one of the two co-contracting officers for the current Iraq Prime Vendor contract, was intimately aware of the reasons that DSCP had for altering the pricing terms for the current RFP for the follow on Iraq Prime Vendor contract. It appears therefore that Mr. Dlugokecki both requested the waiver, in his capacity as contracting officer on the current contract, and approved the waiver in his capacity as "one level above the contracting officer" for the RFP. Alternatively, if Ms. Ford in fact initiated the request, she most likely relied heavily on Mr. Dlugokecki, as her co-contracting officer on the current Iraq SPV contract, to aid in crafting the request. The most likely scenario is that Mr. Dlugokecki and Ms. Ford were working together to create the Class Waiver Addendum as they shared the contracting officer duties for the Iraq SPV contract. In sum; no matter which official originated the request for the waiver, whether it was Mr. Dlugokecki, Ms. Ford, or those two working jointly, no other official with any real supervisory authority over the requestor ever granted the request.

Indeed, Mr. Dlugokecki's statements strongly suggest that had he requested the waiver from one of his superiors, it would not have been granted. See AR Tab 21 at 2, ¶ 8. His superiors probably would have determined that the waiver was unnecessary, as their opinion was that the RFP's terms did not deviate from commercial practice. See *id.* In that event, this protest could have been decided solely on the content of the yet-to-be-disclosed market research. See *Smelkinson, supra*. As explained above, however, that market research probably was not performed any time prior to the filing of the Agency Report. In light of that fact coupled with the fact that Mr. Dlugokecki's statement was prepared in the heat of litigation, it appears that all of DSCP's recent activities are aimed at avoiding the result in



Smelkinson (where GAO found the market research to be inadequate), regardless of the merits PWC's protest.²

2. DSCP abused its discretion by altering the RFP's terms from standard commercial terms such that the services being acquired are no longer *commercial food distribution services*.

Even waivers that are properly granted under FAR 12.302(c) do not provide agencies with an unfettered license to deviate from commercial terms. *See Aalco Forwarding, Inc. et al., supra*. Specifically, an agency exceeds the scope of its discretion to tailor the terms of a commercial item contract where its deviations from commercial terms "are in themselves or in total of such a nature as to transform the type of services sought [in the solicitation] to something other than a commercial item." *Id.*; accord *ABF Freight Sys., Inc. v. United States*, 55 Fed. Cl. 392, 406 (2003).


When considering whether an agency has abused its discretion by fundamentally transforming commercial services into non-commercial type services, the GAO examines the terms of the solicitation to determine whether it requires the contractor to perform functions or provide concessions that are not reasonably similar to the functions or concessions that commercial service-providers perform or provide. *See Aalco, supra*; see also *Crescent Helicopters, supra*.

This analysis is in keeping with intent of FASA, which Congress passed after finding that agencies were requiring contractors to adhere to terms and conditions that were not required under commercial contracts. Specifically, the House Report for FASA stated:

Companies have found it difficult to sell commercial products to the Federal Government because of complex web of procurement requirements, e.g., requirement for cost data and other financial information, audit rights, government-unique terms and conditions, and unlimited Government rights to technical and propriety data. Such practices are uncommon, if not nonexistent, in the private sector.

H.R. Rep. No. 103-545(II), at 104 (1994).

² The issue of whether Mr. Dlugokecki both prepared the waiver request and subsequently approved his own request by "changing hats," is a valid factual area of inquiry and supports PWC's request for a hearing.



Accordingly, if government-peculiar requirements in a contract fundamentally alter the character of the contract, then it can no longer be characterized as a contract for the acquisition of commercial items. This is exactly what has happened in this case, where the Government has taken over the majority of the activities typically handled by a commercial food distribution vendor and imposed contract terms that are nonexistent in the commercial food distribution industry. For this reason, the terms of the solicitation cannot be sustained notwithstanding DSCP's attempt to acquire a waiver.


Commercial food distribution services have certain characteristics. A commercial food distributor buys product from manufacturers and wholesalers, providing a single source of food items for large-volume, institutional food buyers. Protest Ex. D, Ryan Decl. ¶ 4. Furthermore:

Distributors offer two main advantages to their customers. First, distributors buy and sell many types of food products, and buy and sell products from a large variety of manufacturers. *Thus, distributors provide a "one stop shop," eliminating the need for their customers to locate and purchase from several different manufacturers.*

Distributors typically add a fee to the product delivered price. This fee, often called a "distribution fee," cover the distributor's overhead, general and administrative expenses, and profit. *This fee may or may not be stated on a separate line on the distributor's invoice.* If a distributor provides consolidation, quality control or other services for the customer, the fee will also cover payment for these services.

Id. ¶¶ 17 – 18 (emphases added). To obtain "many types of food products," the distributor must navigate a food-supply market populated by commodity growers and producers, prepared food manufacturers, re-packagers, wholesalers, as well as private label companies and brokers, among other players. *See id.* ¶¶ 4-6. These companies typically sell food products to the distributor at prices that include delivery to the distributor's facility. *See id.* ¶¶ 10, 12-14. The amount ultimately paid by the distributor depends on a variety of discounts and allowances, some of which are passed on to the ultimate customer, and some of which (such as prompt payment discounts) are retained by the distributor. *See id.* ¶¶ 19-28.³

³ In its comments filed November 13, 2008, protest participant Bahrain Maritime and Mercantile International B.S.C. ("BMMI") argues that because the RFP essentially calls for food distribution services, PWC's arguments regarding pricing and discounts practices in the commercial food industry are somehow




Thus, commercial food distribution service contracts are characterized by the customer ordering certain food items at pre-negotiated prices that include certain value-added services and delivery to the customers' facility at a specific time. The distributor is required to select the source of the food and the means of transporting to the food to the customer's facility. *See id.*

Here, DSCP's customized terms, when considered together, are fundamentally different than the terms of a commercial food distribution contract described above. If DSCP requires the SPV to do all that it required in the RFP, the SPV will no longer be a commercial food distributor, but will instead provide a role not currently existing in the commercial food industry. Rather than having the SPV research and investigate the various suppliers, DSCP proposes to perform that function itself under its MPA program. Rather than allowing the SPV to find the most efficient and secure mode of transport to the Middle East, DSCP will dictate to the SPV how it will transport the food overseas. Rather than having the SPV purchase food from commercial suppliers at commercial delivered prices, DSCP will demand that supplier prices satisfy FOB origin requirements not typically found in the food distribution industry. Rather than having the SPV research and monitor supplier prices, DSCP will impose onerous audit and reporting requirements that do not exist in commercial food distribution contracts so that it can perform this work itself. In total, the RFP's customized terms no longer describe a commercial food distribution service. Instead, they describe the services of some kind of government-specific transportation manager that simply ensures that certain items are moved between two points designated by the Government (one of which is in a combat theater) via shipping channels designated by the Government. Such functions are far more similar to those performed by a military logistics cell, not a commercial Prime Vendor.

In total, DSCP's customized RFP terms no longer bear a reasonable resemblance to a commercial prime vendor contract. DSCP has therefore exceeded the scope of its discretion to tailor a commercial item contract under FAR 12.302(c). Furthermore, under FASA, DSCP must procure food distribution services by way of a commercial contract unless its market research showed commercial food distribution services were unavailable. *See FAR 12.101.* For these reasons, GAO should recommend that DSCP amend the RFP to use commercial terms to the maximum extent practicable.

irrelevant. BMMI's argument is not persuasive. The reality of the situation, as BMMI knows, is that the Subsistence Prime Vendor is required to purchase food items from domestic and international food suppliers of various types. While one of the Prime Vendor's principal tasks is to warehouse and deliver these products to military customers, the Prime Vendor's purchasing and procurement function immerses it in the domestic and international food industry. The Prime Vendor is called on to perform food distribution, and BMMI's effort to divorce the "food" from the "distribution" is unavailing.



B. The Solicitation's Evaluation Scheme is Flawed and Arbitrary

1. Allocation of Awards between Zones

DSCP avers that because it is obligated to use the determination and findings ("D&F") procedures of FAR Subpart 1.7, offerors can be assured that it will not act arbitrarily or capriciously in deciding how to allocate the awards between the RFP's two geographical zones. In reality, this is of no assurance, given the breadth of discretion that DSCP believes it has under FAR 6.202 to exclude offerors at the time of award. If FAR 6.202 allows, as DSCP contends, the exclusion of an offeror for one zone over the other at the time of award with no consideration for the large discrepancy in the estimated value of the zones, then the D&F procedural safeguards provide no additional assurance.

Moreover, DSCP may not use FAR 6.202 as it plans. As PWC explained in its protest, FAR 6.202 is meant to allow agencies the freedom to exclude an *existing* source from *participating* in a procurement, in order to establish an alternative source. Protest, at 27-28. It is not meant to allow for the exclusion of a firm at the time of award, after the firm has already submitted a bid and participated in the procurement process. The authority for FAR 6.202 derives from the Competition in Contracting Act ("CICA"), which generally requires that agencies obtain full and open competition through the use of competitive procedures when conducting a procurement. 10 U.S.C. § 2304(a)(1)(A). The right to exclude a source is set forth as a specific exemption to the "full and open competition" requirements. The statutory text reads as follows:

The head of an agency may provide for the *procurement* of property or services covered by this chapter using competitive procedures but excluding a particular source in order to establish or maintain an alternative source or sources of supply . . .

10 U.S.C. § 2304(b)(1) (emphasis added). As is clear from the statutory language, the provision allows for the exclusion of a source from a "procurement," which is defined as:

. . . all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout.



41 U.S.C. § 403(2).⁴ Thus, CICA provides authority for the agency to exclude a source from the entire competitive process, which for the offeror begins with the creation and submission of its proposal.⁵ The cases cited by PWC, in which agencies were permitted to exclude a source from the *bidding process*, are consistent with this interpretation. See *Am. Sci. & Eng'g, Inc. v. Kelly*, 69 F. Supp. 2d 227 (D. Mass. 1999); *Hawker Enternacell, Inc.*, B-283586, 99-2 CPD ¶ 96 (Nov. 23, 1999). Agencies are free to exclude a firm from competition due to the need to establish an alternative source, but the firm should be informed prior to submitting its proposal. Exclusion of an offeror at the time of award, after it has already participated in the entire procurement process, would be an unreasonable application of CICA and FAR 6.202.

Ultimately, the foremost concern regarding the allocation of awards is that in the event a single offeror is evaluated as the best offeror for both zones, DSCP will act arbitrarily and capriciously in deciding to award this offeror the much less valuable Zone 2, rather than Zone 1. The language of the RFP would appear to allow such a result, as DSCP has not informed offerors what it will use as its evaluation criteria in such a circumstance. DSCP could easily dispel any concern of this result by simply committing that in the event an offeror is in-line for award for both zones, it will give priority to awarding Zone 1 to that offeror. Under DSCP's interpretation of the applicable FAR provisions, nothing currently prevents DSCP from unreasonably deciding that the most competitive offeror should be awarded the less valuable zone. Since DSCP must again⁶ amend the RFP to correct deficiencies identified in this protest, it should further amend the RFP to commit to awarding Zone 1 first, before Zone 2.

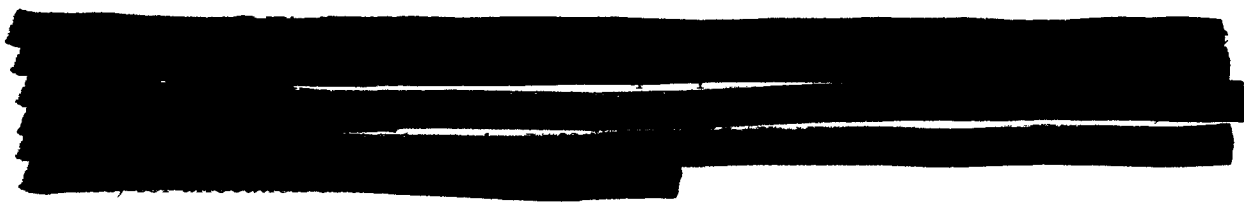
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⁴ In defining "procurement," CICA refers to the definition in the Office of Federal Procurement Policy Act at 41 U.S.C. § 403. See 10 U.S.C. § 2302(3).

⁵ DSCP emphasizes that the text of FAR 6.202 allows for the exclusion of a source from a "contract action." AR, at 12. The term "contract action" is not defined in the FAR. However, given that FAR 6.202 is meant to implement the CICA provision discussed above, it is likely that "contract action" here means the entire procurement process.

⁶ As stated above, DSCP must amend the RFP to remove the ambiguity as to whether the Prime Vendor must "flow down" the Most Favored Customer provisions to each of its subcontractors and suppliers. See *supra*, § II.A, n. 1.

[REDACTED]



2. Contractor Risk Assessments

DSCP disputes that its planned methodology for making contractor risk assessments is arbitrary and capricious. In its protest, PWC took issue with DSCP's stated intent to consider information "derived from sources other than the proposal" when assessing the risk involved in accepting a given offeror's proposal. Protest, at 28. PWC pointed out that the broad language in the RFP would allow DSCP to consider potentially inaccurate information provided by competitors or others with questionable motives. *Id.*

In its report, DSCP cites GAO case law stating that agencies, under certain circumstances, may consider extrinsic evidence when evaluating proposals. AR, at 13. Indeed, GAO has held that "[i]n evaluating proposals, a contracting agency may consider evidence obtained from sources outside the proposal so long as the extrinsic evidence is consistent with established procurement practice." See, e.g., *W. Med. Personnel, Inc.*, B-227991, 87-2 CPD ¶ 310 (Sep. 28, 1987); *Ferranti Int'l Def. Sys., Inc.*, B-237555, 90-1 CPD ¶ 239 (Feb. 27, 1990); *Appalachian Council, Inc.*, B-256179, 94-1 CPD ¶ 319 (May 20, 1994); *Bath Iron Works Corp.*, B-290470, B-290470.2, 2002 CPD ¶ 133 (Aug. 19, 2002). For example, evaluators may consider their own personal knowledge of an offeror's prior performance where the solicitation calls for evaluation of an offeror's experience. *W. Med., supra.* An agency may also consider information in agency records regarding prior performance, *Ferranti, Int'l, supra.*, or the information in the replies of references listed by the offeror. *Appalachian Council, supra.*

It should be emphasized, however, that the extrinsic evidence considered by the agency must be "consistent with established procurement practice." *W. Med., supra.* That is, an agency may not consider extrinsic evidence if doing so would be "unreasonable or inconsistent with the solicitation evaluation criteria." *Intermagetics Gen. Corp.—Recon.*, B-255741.4, 94-2 CPD ¶ 119 (Sep. 27, 1994). The concern expressed by PWC in its protest is that 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. It would be improper for DSCP to rely on such information without giving the offeror concerned an opportunity to refute the information. See *Univox California, Inc.*, B-210941, 83-2 CPD ¶



395 (Sep. 30, 1983) (finding unreasonable agency's reliance on extrinsic data when agency had not considered conflicting data supplied by offeror or consulted with offeror about the differences).

[REDACTED]

DSCP argues in its report that it would be impracticable to require agencies to list in advance every outside source of information it could consider in evaluating proposals. AR, at 14. At the very least, the RFP should be modified to limit the information to be considered by DSCP to that which is reliable and relevant to the RFP's evaluation criteria. *See Intermagnetics, supra*. DSCP should also be required to provide offerors an opportunity to explain or address any unfavorable extrinsic evidence received by the agency. *See Univox, supra*. These are reasonable limitations that would allow DSCP to consult extrinsic information without unfairly prejudicing the offerors.

3. Substitution of Product Prices with MPA Prices

Put plainly, DSCP's position with respect to Manufacturer Pricing Agreements ("MPAs") is that it is reasonable for DSCP to require offerors to first select a source of supply for a certain food item and to price the per-unit distribution price of delivering that item to dining facilities in Iraq; but also to require offerors to anticipate and assess the risk that upon DSCP's unilateral decision and with little notice, the offeror must switch to a supplier of DSCP's choosing. This precipitous action could potentially cause the offeror to breach its contract with its original supplier and perhaps drastically increase its distribution cost with no recourse against DSCP.

The specific evaluation issue raised by PWC is that DSCP does not plan to allow offerors to modify their distribution prices as a result of the MPA program's changes in the supply chain. This will result in DSCP evaluating distribution prices that are not realistic and that do not represent the true cost of performance. Protest, at 29. DSCP responds that distribution prices are allocated by category rather than by item. AR, at 15. This fact does not address the problem that offerors' transportation costs may drastically change due to the substitution of MPA items. DSCP acknowledges that "an offeror's actual distribution costs could change as MPA agreements are made." *Id.* However, it argues that the fluctuation in

[REDACTED]

transportation cost will not be disproportionately higher or lower for MPA items than for items purchased from Prime Vendor-selected suppliers. *Id.* It is unclear upon what reasoning DSCP bases this belief. If a Prime Vendor were to decide to change suppliers for a specific item, it would presumably select a supplier that would not drastically increase its costs. Manufacturers chosen by DSCP for the MPA program, however, could be located anywhere, causing offerors' transportation costs to increase or decrease drastically.⁷

As DSCP itself points out, the RFP requires price proposals to be "complete, realistic, and reasonable." RFP, Addendum to FAR 52.212-2, § 2(d), at 178. DSCP's refusal to allow changes to the distribution price in response to the substitution of MPA items will prevent offerors from presenting the most realistic distribution prices. Thus, DSCP's plans for evaluating distribution prices remain flawed.

4. Submission of Prices Not Meeting Product Price Definition

DSCP dismisses as "pure speculation" PWC's protest ground regarding the ambiguities surrounding the submission and evaluation of product prices that do not satisfy the RFP's definition of product price. AR, at 17. PWC pointed out in its protest that the RFP allows for submission of product prices meeting specified exceptions, and that DSCP's answers to offeror questions in Amendment 0006 apparently allow for submission of non-compliant product prices under certain circumstances. Protest, at 30-32. As discussed in the protest, the RFP provides little guidance regarding whether DSCP will ultimately accept such prices, or how DSCP will evaluate such prices when comparing them to prices that do satisfy the "product price" definition. *Id.*

DSCP has not addressed PWC's argument, which is that the uncertainties regarding the submission and evaluation of such prices will lead to differing interpretations of DSCP's requirements, preventing offerors from bidding on a common basis. Protest, at 30; *see United Int'l Investigative Servs., Inc.*, B-284871, 2000 CPD ¶ 111 (June 15, 2000) (a solicitation must be "sufficiently definite and free from ambiguity to permit competition on a common basis"). Instead, DSCP has focused on PWC's examples of potential results of this uncertainty, dismissing such examples as "unsupported speculation concerning future events." AR, at 16. To be clear, PWC's protest ground is not focused on whether DSCP or the offerors will or will not take certain actions in the future. Rather, PWC's focus is on the uncertainty faced by offerors in submitting their proposals. As such, the cases cited by

⁷ DSCP goes on to argue that offerors must factor the risk of fluctuations in transportation costs into their distribution price. The specific issue of risk caused by the MPA program is discussed in Section II.C.1, below.



DSCP are inapposite. *See Walmac, Inc.*, B-244741, 91-2 CPD ¶ 358 (Oct. 22, 1991) (protest denied where protester argued that agency would not evaluate its proposal in accordance with RFP criteria); *Bannum, Inc.*, B-298281.2, 2006 CPD ¶ 163 (Oct. 16, 2006) (finding that protester's argument regarding how a property owners' association will interpret a restrictive covenant is speculative and not a valid basis of protest).

In its protest, PWC first took issue with Product Price Exception 1, which allows for the inclusion of airfreight charges in the product price for certain FF&V purchases from outside the local market. Specifically, PWC argued that DSCP's instruction to include estimated airfreight charges in the quoted product price when using Exception 1 would lead to wildly divergent product price submissions. Protest, at 30. The RFP includes no guidance on what information offerors should use as the basis for such estimates, thus freeing offerors to invent estimates out of thin air. DSCP replies that the RFP requires price proposals to be "complete, realistic, and reasonable." AR, at 16. This fact does not address the core problem – namely, that the lack of guidance on this issue will prevent offerors from competing on a rational and common basis.

With regard to Product Price Exception 2, PWC pointed out that the RFP makes the offerors' use of the exception contingent on approval by the DSCP contracting officer, yet provides little guidance regarding how the approval decision will be made. Protest, at 31. In RFP Amendment 0003, DSCP merely stated that "[n]ational commercial prices will be verified with the manufacturer and accepted on a case by case basis." RFP, Amend. 0003, § II, A. to Q. 156(b). In its report, DSCP offers no defense for this lack of guidance, unhelpfully restating that "DSCP will accept such prices . . . subject to verification." AR, at 16.

[REDACTED] the problem is that the lack of guidance causes uncertainty regarding whether or not DSCP will accept offerors' prices submitted using Exception 2. DSCP could easily clarify this ambiguity by providing additional detail regarding the circumstances under which DSCP would refuse to accept a price submitted under Exception 2.

PWC also raised issues relating to DSCP's answers to offeror questions in RFP Amendment 0006, where DSCP left the door open for offerors to submit, under appropriate circumstances, product prices not satisfying the product price definition or the terms of the exceptions. Protest, at 31. PWC argued that DSCP had provided no guidance as to whether or under what criteria such prices would be accepted, leaving offerors to come to their own conclusions regarding whether DSCP would accept such submissions. *Id.* DSCP views this


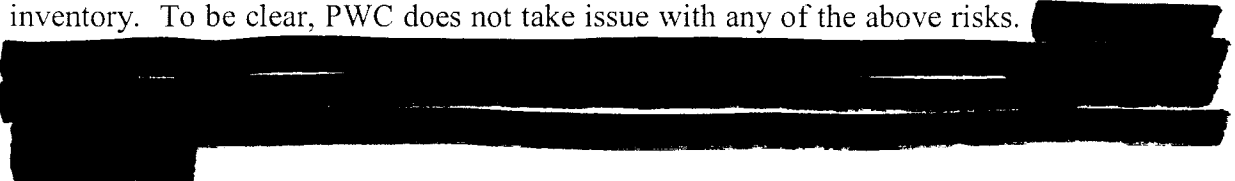
[REDACTED]

allegation as premature, arguing that it would decide how to handle such prices only if *all* offerors submitted prices not meeting the product price definition. AR, at 17. DSCP's response does not address the current problem – namely, that individual offerors have no idea whether their offers will be disqualified due to submission of noncompliant pricing. DSCP suggests that it would be unreasonable for it to remedy the ambiguity now, before it knows whether offerors will experience problems finding compliant pricing. However, several offerors already have informed DSCP of problems meeting the product price definition in certain circumstances. *See* RFP, Amend. 0006, § II, Qs. 30, 32, 64.

Finally, PWC argued that DSCP had failed to provide any indication of how it would evaluate prices submitted under Exceptions 1 and 2, as well as non-compliant pricing submitted pursuant to DSCP's answers to questions in Amendment 0006 cited above. That is, even if prices submitted pursuant to these provisions are accepted by DSCP, the offerors have received no guidance regarding whether such prices will be viewed as less favorable than prices fully satisfying the product price definition. Protest, at 31-32. The lack of information in the RFP leaves offerors in the position of guessing at how DSCP may evaluate such prices, thus preventing competition on a rational, common basis. DSCP did not address this element of PWC's protest in its report.

C. The RFP Imposes Unreasonable Risk Without the Right to an Equitable Adjustment

DSCP disputes that the RFP imposes unreasonable risk on offerors. In doing so, it acknowledges that the RFP involves significant risks due to the reality of operating in a war zone. AR, at 24. Indeed, the Prime Vendor selected for award on the contract will face threats to the lives of its employees working in Iraq, as well as the potential for catastrophic damage to trucks and other company property. Furthermore, the Prime Vendor faces the business risk that the dollar value of the contract may not approach the RFP's estimated value due to uncertainty surrounding the future presence of American troops in the Iraq theater. These risks are in addition to others inherent in the contract, such as the risk of damage to or spoilage of contractor-owned food products while in transit on a Government-selected ocean shipping line, and the risk of over-ordering and having to dispose of excess inventory. To be clear, PWC does not take issue with any of the above risks.



The specific risks discussed in PWC's protest are risks that DSCP has allocated to the Prime Vendor *in addition to* the enormous risks listed above. They involve future eventualities, contingencies and potential costs that offerors have no means to predict with any reasonable accuracy. Yet DSCP has required offerors to attempt to anticipate such costs and include them in their fixed distribution prices. The problems could be easily remedied if DSCP were to include in the RFP the right to request an equitable adjustment if certain events come to pass, but DSCP has refused to include such a right in the RFP.

In its report, DSCP points out that all solicitations include some amount of risk, and that it is within the agency's discretion to impose maximum risks upon the contractor and minimum burdens upon the agency. AR, at 17, 24. What is equally true, however, is that RFP pricing structures must meet a test of reasonableness, and agencies may impose risks on contractors only to the extent necessary to reasonably limit the burdens on the Government. *Four Star Maint. Corp.*, B-240413, 91-1 CPD ¶ 70 (Nov. 2, 1990). The risks discussed by PWC in its protest are unreasonable, and DSCP has failed to articulate any legitimate needs that justify placing these additional risks on the contractor.

1. Risks Caused by MPA Program

As discussed in the protest, DSCP plans to make MPA holders the mandatory sources for a large percentage of the products ordered by the military through the Prime Vendor. According to the RFP, DSCP plans to place 75 to 80 percent of the product price dollar value under MPA agreements. RFP, SOW, S/S&P, § XV, at 84. While DSCP will choose the manufacturers and reap the presumed benefits of favorable pricing, all the risks involved in purchasing from such manufacturers will be placed on the Prime Vendor. Yet unlike the typical scenario when the Government orders a change, the Prime Vendor has no recourse to an equitable adjustment.

First, in the event that an MPA holder for a given product is located farther from the offeror's CONUS distribution point than the manufacturer chosen by the offeror, the offeror will be forced to absorb those extra transportation costs.⁸ This is because the product price under the RFP definition does not include any transportation costs; all such costs are to be factored into the offeror's fixed distribution price. RFP, SOW, S/S&P, § XIII.A, at 71-72. DSCP responds to this problem by pointing out that "it is not unusual for a contractor to have changes in manufacturing sources." AR, at 19. While true, the difference is that when the

⁸ In the event that the Prime Vendor elects to purchase directly from the manufacturer instead of through a distributor, it may still be forced to pay increased transportation costs if the manufacturer is located more than 500 miles from the port. *See* RFP, SOW, S/S&P, § VI.A.7, at 61.



Prime Vendor chooses to change a source, it can weigh the costs and benefits of such a change to make an educated business decision. With the MPA program, on the other hand, the Prime Vendor has no control over the decision, as DSCP will be imposing the change on the Prime Vendor. There is no reasonable way to predict the potential costs, as DSCP has provided no information on the identities or locations of potential MPA holders.

DSCP also points out that CONUS transportation costs are only one of several costs that the offeror must factor into its distribution price. AR, at 19. While also a true statement, this fact does not make the additional risk imposed by the MPA program any less unreasonable. In fact, given the enormous amount of risk to be accepted by the Prime Vendor due to wartime contingencies and inventory forecasting, it is irrational for DSCP to force the Prime Vendor to take on the risk of additional inland freight costs due to Government-directed subcontracting.

Finally, DSCP acknowledges that at least some of the Prime Vendor's transportation costs may increase because of the MPA program, but points out that other transportation costs may actually decrease, and that the financial impact of such changes will even out over time due to the "law of averages." AR, at 20. It is unclear how DSCP arrived at this conclusion, as it would appear just as likely that the Prime Vendor's transportation costs would increase as it would that the costs would even out. In any case, the argument is a distraction. PWC has not alleged that the Prime Vendor's inland transportation costs are certain to increase. Rather, it has argued that there is a *risk* of such an outcome, and it is unreasonable to allocate that risk to the Prime Vendor when DSCP is the entity that has the knowledge about the program and the control over which manufacturers are chosen.

The second area of risk highlighted by PWC in its protest was the possibility that MPA holders may not perform as required. The Prime Vendor may have to absorb additional costs involved in fixing labeling or palletizing errors, finding replacement product if the product supplied is of low quality, or locating alternate sources if the MPA holder is unable to meet demand. When choosing its own suppliers, the Prime Vendor can vet companies and make its own determination regarding whether they are capable of performing as needed. When such a supplier fails to perform, it is reasonable that the Prime Vendor face the consequences of its own decision. With the MPA program, on the other hand, the Prime Vendor has no control over source selection, yet it is expected to pay for all costs involved in dealing with performance issues.⁹ Performance may actually be a bigger problem with MPA holders than with contractor-selected suppliers, since the Government will presumably be

⁹ DSCP stated in Amendment 0003 that "[t]he prime vendor is responsible for the performance of its subcontractors whether they are mandatory sources or not." RFP, Amend. 0003, § II, A. to sub-Q. 209, at 18.




selecting MPA holders based on one criterion only – price. DSCP did not discuss the potential for performance issues in its agency report.

The case cited by DSCP in the agency report is distinguishable. In *TN-KY Contractors*, the GAO found that an RFP did not impose excessive risk on the landscaping contractor when there was a possibility that large amounts of rain could increase the need for grass mowing without any increase in compensation for the contractor. B-291997.2, 2003 CPD ¶ 91 (May 5, 2003). The amount of rainfall in *TN-KY* is more akin to the possibility of death or property damage due to insurgent attacks – they are future events over which neither the contractor nor the Government have any control. However, in both circumstances the offeror can look to historical records for guidance. In such circumstances, it may be reasonable to allocate such risks to the contractor. The MPA program, however, is a new, Government-initiated program over which DSCP has total control. Since DSCP is mandating the use of specific manufacturers, it is unreasonable for it to allocate all the risks involved to the Prime Vendor. The uncertainties involved in the program make it extremely difficult for offerors to “use their professional expertise and business judgment” to anticipate additional costs. *TN-KY, supra*.

Compounding the unreasonableness of DSCP’s actions is the fact that it has failed to provide any mechanism for the Prime Vendor to request an equitable adjustment if, contrary to what DSCP hopes, the total changes caused by its MPA program do not “even out” in the long run. Agencies are generally required to provide equitable adjustments for unanticipated changes where the agency had the higher degree of knowledge regarding the risk of the change. *See Aerodex, Inc. v. United States*, 189 Ct. Cl. 344, 417 F.2d 1361 (Ct. Cl. 1969). Here, DSCP will have the higher degree of knowledge regarding when and whether it will select an MPA. For this reason, at the very least, DSCP should provide a mechanism by which the Prime Vendor can request and obtain an equitable adjustment in the event that DSCP’s directives to change suppliers do not work out as happily as DSCP intends.

2. Risk Caused by Defense Transportation System

DSCP next argues that the mandatory use of the Defense Transportation System (“DTS”) in the RFP does not impose unreasonable risks on the offerors. As discussed in PWC’s protest, the RFP requires the Prime Vendor to enter into an agreement with the over-ocean carrier selected by the U.S. Transportation Command for the newest Universal Services Contract, referred to as “USC06.” Protest, at 10-12. The agreement is to cover such issues as claims processing and dispute resolution between the Prime Vendor and the USC06 contractor. *Id.* Furthermore, the RFP makes the Prime Vendor liable to the USC06

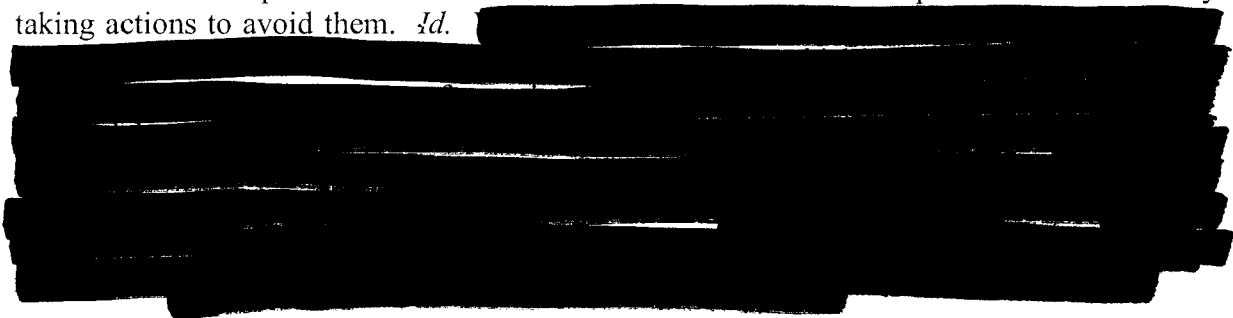


contractor for detained containers, port storage, and other related charges. *Id.* The USC06 contract will not be awarded prior to the new December 2 closing date for this RFP. *Id.* In its protest, PWC alleged that the RFP imposed unreasonable risks on offerors, as they have no way of anticipating the terms that may be negotiated with the eventual USC06 contractor or the costs for which they may be liable. Protest, at 33-34.


First, DSCP alleges that PWC has misinterpreted the RFP. DSCP points out that the cost of over-ocean transportation of Prime Vendor product is borne by the Government, and that therefore the identity of the USC06 contractor is irrelevant. Contrary to DSCP's assertion, PWC has not misinterpreted the RFP. PWC is fully aware that the Government is responsible for the operation of the DTS system, including payment of the USC06 contractor. PWC did not allege in its protest that the Prime Vendor would have to pay for over-ocean transportation costs.

Next, DSCP argues that offerors will be able to accurately predict the costs involved in paying for container detention because the USC06 solicitation lists the amounts for detention charges. AR, at 22. While it is true that the USC06 solicitation lists such amounts, there is no guarantee that those same amounts will be incorporated into the final USC06 contract. As this procurement has demonstrated, the terms and conditions of solicitations can change drastically between the first draft and contract award. Furthermore, the USC06 solicitation does not include amounts for port storage charges or other claims for which the Prime Vendor will be liable.

DSCP also points out that the Prime Vendor can control its exposure to such costs by taking actions to avoid them. *Id.*



In its protest, PWC also pointed out that since the USC06 contract is yet to be awarded, there is no way to anticipate what terms and conditions can be negotiated between the Prime Vendor and the USC06 contractor for claims processing, dispute resolution and other issues. DSCP does not address this concern in its report. Instead, DSCP merely states that such matters are better handled directly between the Prime Vendor and the USC contractor. AR, at 22. DSCP notes that on previous contracts, the Government handled



claims and paid the USC contractor when detention and other charges accrued. AR, at 21. Presumably, then, the Government has in its possession historical information regarding the types of claims filed by USC contractors, as well as the amounts and frequency of such claims. Had DSCP made such information available to offerors, the offerors may have been able to anticipate potential costs relating to such claims, and incorporate the costs into their distribution prices. The fact that DSCP has not made such information available to offerors is further evidence that the risk imposed by these provisions is unreasonable.

3. Risks Caused by the Lack of Information Regarding VETCOM Approval

Finally, DSCP disputes that the lack of information regarding whether and how local market fresh fruit and vegetable (“FF&V”) growers will be approved by the U.S. Veterinary Command (“VETCOM”) causes unreasonable risk to offerors. In fact, DSCP disputes the very factual premise of PWC’s allegation – namely, that DSCP has failed to supply sufficient information on this issue. DSCP points out that the RFP specifically requires the use of VETCOM-approved sources, and that PWC has access to VETCOM’s Approved Source Directory. AR, at 24.

DSCP has either misunderstood PWC’s allegation or chosen not to address it. PWC is fully aware of the RFP’s requirements and the contents of the VETCOM directory. The problem, as set forth in PWC’s protest, is that FF&V growers in the local market are not yet approved by VETCOM. [REDACTED] DSCP previously indicated in an answer to an offeror’s question that the appendix to a “soon to be released Military Handbook” will address the policies regarding veterinary requirements for FF&V growers. RFP, Amend. 0003, § II, A. to Q. 51. DSCP further indicated that the application of the appendix will depend on the theater veterinarian and the characteristics of individual products. *Id.* PWC argued in its protest that because of the uncertainty regarding these requirements, offerors have no idea whether they will be able to use their selected FF&V suppliers during performance of the Prime Vendor contract. Protest, at 34-35. The costs involved in having to locate and reach agreements with alternate FF&V suppliers cannot be reasonably anticipated.

Like the MPA program and the USC06 contract discussed above, it is unreasonable to impose on the offerors the risks caused by the lack of information regarding VETCOM approval of FF&V growers. In all three of the examples discussed above, DSCP has placed on the Prime Vendor cost risks that are tied to future decisions of the Government, whether DSCP itself or another agency. The root of the problem is that DSCP elected to move

[REDACTED]

forward with the RFP before all of the requirements and programs involved in the RFP had been defined. As discussed in PWC's protest, these issues could be easily remedied if DSCP were to allow for an equitable adjustment in the event that some of the potential eventualities discussed above come to pass during contract performance. *See Benco Contract Servs.*, B-233748, 89-1 CPD ¶ 205 (Feb. 24, 1989) (citing availability of equitable adjustments in denying protest that IFB requirements were uncertain). However, DSCP has refused, instead insisting that offerors anticipate and assume the risk of potential costs that are virtually impossible to predict. This risk allocation scheme "does not meet the test of reasonableness." *Four Star, supra*.

D. The RFP Includes Impermissible Terms

1. Audit Rights Clause

DSCP disputes PWC's contention that the RFP's audit rights clause is an impermissible clause for a commercial items contract. The clause reads as follows:

The Contracting Officer, or authorized representative, shall have the right to examine and audit all the Contractor's records (as defined at FAR 52.215-2(a)) relevant to the existence of discounts, rebates, allowances or other similar economic incentives or benefits, and most favored customer product prices.

RFP, SOW, S/S&P, § XVII(d), at 87.

In its protest, PWC asserted that DSCP lacked the authority to audit the contractor's records during the performance of a commercial items contract. Protest, at 36-37. In response, DSCP states: "PWC does not identify any law or regulation that the provision violates." Report, at 25. DSCP then argues that the audit rights clause is reasonable because it relates directly to the product price component of the unit price. DSCP also states that it has a need to ensure pricing transparency, and finally argues that the audit rights clause does not run afoul of the prohibition on requiring cost or pricing data on commercial items contracts.

DSCP's contention that the audit rights clause is permissible because it does not directly violate any statute or regulation is clearly erroneous. It is well-established that the powers of administrative agencies are limited by specific statutory authority granted by Congress. *See, e.g., Stark v. Wickard*, 321 U.S. 288, 309 (1944) ("When Congress passes an



Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted”). As such, DSCP must have some statutory basis for its claimed authority to perform post-award audits of contractor records on a commercial item contract.


DSCP has not cited, and could not cite, any statutory authority for the disputed clause. While military agencies previously had limited authority to audit certain records on commercial items contracts (*see* 10 U.S.C. § 2306a(d)(3) (1995)), Congress specifically repealed this authority in the Clinger-Cohen Act of 1996. Pub. L. No. 104-106, 110 Stat. 642, § 4201. The Conference Report accompanying the Act provided the following rationale for the action:

In recognition of the authority of the General Accounting Office to audit contractor records, the conferees have removed the specific audit authorities in the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) that relate to information supplied by commercial suppliers in lieu of certified cost and pricing data.

H.R. Rep. No. 104-450, at 966 (1996) (Conf. Rep.). The FAR clause implementing the audit authority was subsequently removed from the FAR. *See* FAR § 52.215-43, Audit-Commercial Items (Oct 1995); 62 Fed. Reg. 257 (Jan. 2, 1997) (describing purpose of notice to “[e]liminate[] the clause for postaward audit of information submitted to support the pricing of commercial item contracts”).

It is because of this lack of statutory authority that FAR 52.215-2, the general FAR audit clause for negotiated contracts, is inapplicable to commercial item contracts. *See* FAR 15.209(b)(1)(iii). As explained in the Conference Report cited above, Congress viewed the audit authority of the GAO as sufficient for oversight of pricing on commercial item contracts. The GAO’s authority is reflected in section (d) of FAR clause 52.212-5, which is incorporated into the RFP.

DSCP’s argument that the audit clause is reasonable because it directly relates to the product price is also erroneous. First, the reasonableness of the clause is irrelevant, given that DSCP has no authority to perform such audits. Second, the clause does not relate exclusively to the product price. The RFP defines the product price as the FOB manufacturer/grower price. RFP, SOW, S/S&P, § XIII.A.2, at 71. Thus, while the manufacturer or grower sets the product price, the Prime Vendor may be purchasing the product from a distributor, a private label vendor, or some other kind of supplier. Protest, at 14. That supplier may offer discounts independent of any discounts offered by the




manufacturer or grower off of the product price. Third, the clause is not reasonable, given that the RFP already calls for (1) the submission by the contractor, upon demand, of manufacturer invoices verifying the product price, (*see* RFP, SOW, S/S&P, § XVII(c), at 87), and (2) the submission by the contractor of monthly reports identifying all discounts, rebates and allowances or other economic benefits given to other customers and those being passed on to the Government (*see* RFP, SOW, Special Contract Requirements, § II.F(1), at 139). These requirements adequately address DSCP's stated need of ensuring price transparency.

Finally, DSCP's argument that the audit clause does not require the submission of cost or pricing data is inapposite. PWC has not argued that the clause requires the submission by the contractor of cost or pricing data. Rather, PWC merely pointed out in its protest that the contract audit provisions of the Truth in Negotiations Act are inapplicable to contracts for commercial items. Protest, at 36-37.

2. Pricing Documentation Clause

Finally, DSCP disputes that its claimed right to require the Prime Vendor to submit "invoices and other documentation from all subcontractor tiers or any supplier or person in the product price supply chain" is a demand for cost or pricing data in violation of the FAR. DSCP argues that because the RFP does not call for the information to be certified when submitted, it should be considered "other than cost or pricing data" rather than "cost or pricing data." AR, at 26. This argument is flawed.

The Truth in Negotiations Act ("TINA") defines "cost or pricing data" as "all facts that . . . a prudent buyer or seller would reasonably expect to affect price negotiations significantly." 10 U.S.C. § 2306a(h)(1). The FAR includes a similar definition at section 2.101, emphasizing that cost or pricing data consist of factual, verifiable information relating to the determination of the contractor's costs and the elements of the contract price. The FAR also includes the following statement, which forms the basis for DSCP's argument: "Cost or pricing data are data requiring certification in accordance with 15.406-2." FAR § 2.101. Contrary to DSCP's argument, this sentence does not make the certification requirement an indispensable element of what defines "cost or pricing data," or make certification the factor that differentiates "cost or pricing data" from "other than cost or pricing data." Rather, the sentence merely provides a cross-reference to FAR 15.406-2, highlighting the fact that when cost or pricing data are appropriately required, the contracting officer must also require the execution of a Certificate of Cost or Pricing Data. *See* FAR § 15.406-2(a). Indeed, the TINA statute does not even include the FAR's statement about certification in its definition of "cost or pricing data," and the certification requirement in



TINA appears in a separate provision from the requirement for submission of cost or pricing data. *See* 10 U.S.C. §§ 2306a(a)(1), (2).

Furthermore, under the FAR the Government is entitled to a price adjustment due to the contractor's submission of defective cost or pricing data, even if the contractor did not submit a certification. *See* FAR § 15.407-1(b)(3)(iv). If, as DSCP suggests, the lack of certification somehow converts cost or pricing data to "other than cost or pricing data," it is difficult to understand why such uncertified data would be described as "cost or pricing data" in the FAR.

The FAR does not define "other than cost or pricing data." However, the FAR does indicate that in the context of commercial items contracts, "other than cost or pricing data" may be used by agencies when performing price analyses. FAR § 15.403-3(c). The FAR defines "price analysis" as "the process of examining and evaluating a proposed price *without evaluating its separate cost elements* and proposed profit." FAR § 15.404-1(b)(1) (emphasis added). "Cost or pricing data," on the other hand, does include information regarding the elements of cost. For example, FAR 15.408 includes a table entitled "Table 15-2--Instructions for Submitting Cost/Price Proposals When Cost or Pricing Data Are Required." Section II of this table, titled "Cost Elements," requires offerors to include a breakdown of the costs of various materials and services to be provided. This is exactly the type of information that the disputed RFP clause requires the Prime Vendor to submit.

The clause requires submission of two types of information. The first is "invoices and other documentation from all subcontractor tiers." RFP, SOW, S/S&P, § XVII(d), at 87. As explained in PWC's protest, the Prime Vendor may not necessarily purchase products directly from the manufacturer or grower. Instead, it may purchase from a distributor, private label vendor, or some other type of supplier. Protest, at 14. This top-tier supplier may in turn purchase from another non-manufacturer supplier. Each of these suppliers makes up a "subcontractor tier." According to the RFP, the costs of any packaging, consolidation, quality control or labeling work performed by these non-manufacturer suppliers must be included in the Prime Vendor's distribution price, rather than the product price. RFP, SOW, S/S&P, § XIII.A, at 71-72. Thus, by requiring submission of "invoices and other documentation from all subcontractor tiers," DSCP is requiring submission of information about the costs making up the Prime Vendor's fixed distribution price. This information is cost or pricing data to which DSCP is not entitled on a commercial item contract.

The second type of information required by the clause is "invoices and other documentation from . . . any supplier or person in the product price supply chain." RFP,



SOW, S/S&P, § XVII(d), at 87. The RFP does not define the term “product price supply chain.” However, since the RFP separately requires submission of manufacturer invoices to verify the product price (*see* RFP, SOW, S/S&P, § XVII(c), at 87), documentation from the “product price supply chain” must refer to something other than manufacturer invoices. Presumably, the “product price supply chain” would consist of those companies that provide raw materials to the food manufacturer. Invoices from such companies are cost or pricing data, as they are evidence of the cost elements behind the manufacturer’s product price. A request for this type of data goes beyond even a reasonable request for cost or pricing data, as the Prime Vendor would have no access to invoices from the manufacturer’s suppliers.

DSCP claims that the clause is reasonable because “it directly relates to [the] product price component of the contract unit price.” AR, at 26. It states that the clause is necessary to ensure pricing transparency. As discussed above, a literal interpretation of the clause would require far more than documentation of the product price. It would require submission of invoices from every company that touches the food product or its ingredients, from raw material producers to the top-level distributor or wholesaler that sells the product to the Prime Vendor. Furthermore, the RFP’s requirements regarding submission of manufacturer invoices and monthly rebate reports adequately address DSCP’s concerns regarding price transparency. *See* Section II.D.1, *supra*. The pricing documentation requirement is unreasonable, highly intrusive, and inappropriate for a commercial items contract. By calling such information “other than cost or pricing data,” DSCP is merely attempting to side-step the FAR’s explicit prohibition of requesting cost or pricing data on commercial items contracts.



III. CONCLUSION

For the reasons stated above, PWC requests that GAO sustain its protest and recommend that (1) DSCP amend the RFP to correct the flaws discussed in the protest and above, and (2) DSCP solicit new proposals in response to the amended RFP. In addition, PWC requests that GAO recommend that PWC be reimbursed for its protest pursuit costs by DSCP.

Sincerely,



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