PRICING COMMERCIAL TRASH PICKUP: BY THE TON OR BY THE RUN?

The Army sought "solid waste management services" (trash pickup) at or near Fort Polk, LA. Army properly recognized that these services were commercial, and conducted a FAR Part 12, Commercial item (services) procurement. Unfortunately, the Army conducted the required market research improperly, and included contract terms that were inconsistent with customary commercial practice. *Red River Waste Solns, LP,* B-411760.2, Jan. 20, 2016. The protest turns on how this fixed-price contract would be priced: should it be based on price per ton of trash or by the number, frequency, and distance between stops on a collection run.

The current Ft. Polk trash contract based pricing on two separate contract line item numbers ("CLINs"), one for each ton of trash, plus a separate CLIN for the contractor's overhead to cover variable costs. The Army conveniently eliminated the overhead CLINs, requiring that all fixed and variable costs be included on a per-ton basis, and only permitting the contractor to invoice on a tonnage basis. Red River Waste Solutions protested the solicitation arguing that it contained terms that were inconsistent with customary commercial practice. Red River stated that it was commercial practice for trash collection contracts to be priced on a monthly or per-container basis, not a per-ton basis. Red River noted that one collection schedule with 100 stops could result in 10 tons of trash, while a second collection schedule with 200 stops could also result in a trash total of 10 tons. However, the cost of the two collection schedules would be quite different.

The Federal Acquisition Streamlining Act of 1994, 41 U.S.C. § 3307, ("FASA") established a specific preference for acquiring commercial items, when available to meet agency needs. Agencies are directed in Federal Acquisition Regulation (FAR) 12.101 to "conduct market research to determine whether commercial items…are available [and] acquire commercial items or nondevelopmental items when they are available to meet" agency needs. FAR 12.301(a)(2) requires that commercial item contracts "shall, to the maximum extent practicable, include only those clauses…[d]etermined to be consistent with customary commercial practice. FAR 12.302(c) bars the agency from tailoring solicitations for commercial items in a manner inconsistent with commercial practice unless a waiver is approved in accordance with agency procedures.

Knowing these requirements, the Army contended that it performed market research, as required. Here's what the Army did:

- Reviewed other Army refuse contracts
- Requested feedback from industry in a Sources Sought Notice and
- Contacted a sales representative for Thomas Trash Services, a company in Upstate New York.

The Army concluded that it was in the government's best interest to utilize the price per ton approach, and that this was a customary "commercial practice."

When GAO examined the market research it noted that:

- It was not reasonable for Army to rely on other *government* trash contracts to determine "commercial practice"
- It was not reasonable for the Army to conclude that the seven responses to the Sources Sought notice supported tonnage as a commercial practice. Four out of the seven responses indicated that customary commercial practice was *monthly* based prices, not prices based on tonnage. None of the seven respondents identified any current commercial contract priced on a per ton basis.
- The upstate New York Contract contained no support to conclude that the price per ton approach was a customary commercial practice.

The GAO sustained the protest and concluded that the market research did not provide a reasonable basis for determining that price per ton in the solicitation was consistent with customary commercial practice. GAO recommended that the Army conduct adequate market research to support price per ton, or revise the solicitation to eliminate per ton pricing.

This entire protest demonstrates how an agency action may undermine the purposes of both a federal statute and the FAR. One of the key purposes of FASA was to increase competition for federal contracts by encouraging the use of commercial items rather than agency specific items. (Do you remember the Army's 26 page military specification, no. MIL-C-44072C, for oatmeal cookies and chocolate brownies? The milspec certainly did not encourage a lot of bakery companies to compete for Army contracts).

Even when the policy is clear, agency officials are expected to exercise diligence and care in executing it—and Army officials did not do that in this case.