

INCONSISTENT WITH CUSTOMARY COMMERCIAL PRACTICES

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Both the U.S. Code and the Federal Acquisition Regulation (“FAR”) state a preference for commercial products and commercial services.

The U.S. Code states that: “[t]he head of each executive agency shall ensure that procurement officials in that executive agency, to the maximum extent practicable []acquire commercial services or commercial products or nondevelopmental items other than commercial products to meet the needs of the executive agency [.]” 41 U.S. Code § 3307(c)

The FAR states that [t]he head of the agency shall—

- (a) Conduct market research to determine whether commercial products, commercial services, or nondevelopmental items are available that could meet the agency’s requirements;
- (b) Acquire commercial products, commercial services, or nondevelopmental items when they are available to meet the needs of the agency[.] FAR 12.101.

FAR 12.301(a) also states that contracts for commercial products and services shall include only those clause “[d]etermined to be consistent with customary commercial practices.”

These policy prescriptions to the agencies are based on the assumption that acquiring commercial products and services are likely to result in more competition in procurement, potentially lower prices and higher quality items.

The Department of Agriculture (“USDA”) issued a Request for Proposals (“RFP”) for nationwide rural development direct loan default management services, as a commercial services procurement. Orlans PC protested that the RFP contained certain pricing and payment terms that were inconsistent with customary commercial practices and unduly restricted competition. *Orlans PC*, B-420905, Oct. 25, 2022.

Orlans alleged two things in its protest:

1. Customary commercial practice is that property preservation and maintenance services are not billed as flat monthly fees, as set forth in the RFP, but rather according to a schedule of itemized fixed prices for each task perform; and
2. For foreclosure services, the customary commerce practice is to invoice upon completion of milestones, rather than only upon delivery of an unencumbered title as required in the RFP

The protester provided a sworn declaration from one of its employees who had 15 years of employment with the protester, identifying the actual customary commercial practices. When USDA moved to dismiss the protest, alleging insufficient legal and factual grounds, GAO flatly

rejected the agency's argument, noting that Orleans specifically stated how the solicitation deviated from customary commercial practice.

The next question here was whether the agency had supported the RFP properly with market research. The agency relied on a Request for Information ("RFI") issued in December 2019 and updated in 2020. While the agency stated that a mixed response to this RFI indicated there was no customary commercial practice with respect to the pricing policy of paying flat monthly fees, GAO disagreed with that conclusion. GAO reviewed the RFI and noted that it prompted open-ended questions regarding how it should seek pricing services. GAO concluded that the responses to the RFI did not supply information regarding standard commercial practices and did not demonstrate what those practices were, or that there were no commercial practices used in the industry.

Similarly, on the question of commercial practices used with respect to fixed pricing for foreclosure services, the RFI never requested information on the use of fixed pricing without providing for servicing fees. Again, the agency merely asked offerors on how master servicing fees would be captured.

On the record before it, GAO concluded that USDA's market research had been inadequate with respect to both property preservation and foreclosure services. The market research did not demonstrate that the two protested items were consistent with commercial practice or otherwise properly included in the RFP. GAO sustained the protest and recommended that USDA should conduct properly documented market research to determine if the provisions reflected customary commercial practices or obtain a waiver pursuant to FAR 12.302(c) (waiver procedures for tailoring inconsistent with customary commercial practices).

Takeaway. Agencies must ensure that the terms in commercial contracts are consistent with customary commercial practices, and in order to do that, properly conduct market research to support those conclusions when preparing commercial RFPs.

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