Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Aalco Forwarding, Inc., et al.

File: B-277241.8; B-277241.9

Date: October 21, 1997

Alan F. Wohlstetter, Esq., and Stanley I. Goldman, Esq., Denning & Wohlstetter; James M. McHale, Esq., Seyfarth, Shaw, Fairweather & Geraldson; Thomas M. Auchincloss, Jr., Esq., Leo C. Franey, Esq., and Brian L. Troiano, Esq., Rea, Cross & Auchincloss; Richard L. DeWitt, Approved Forwarders Inc.; and Arthur R. Heath, A&P Shipping Corp., for the protesters.
G. Jerry Shaw, Esq., and Susan E. Shaw, Esq., Shaw, Bransford & O'Rourke, for HFS Mobility Services; Brad Effenberger for FAReaching Services; L. Clyde Groover, Jr., for Associates Relocation Management Co., Inc., intervenors.
Thomas J. Duffy, Esq., Maj. Jonathan C. Guden, and Ramon Morales, Esq., Department of the Army, for the agency.
Adam Vodraska, Esq., Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency properly determined, based on market research, that household goods moving services for military personnel could be acquired under Federal Acquisition Regulation part 12 commercial item procedures, notwithstanding the inclusion of government-unique requirements in the solicitation that are not present in commercial contracts for moving services.

2. Agency properly issued waiver in accordance with Federal Acquisition Regulation § 12.302(c) for commercial item solicitation requirements that may be inconsistent with customary commercial practice where agency followed its procedures and reasonably found that the requirements subject to the waiver were legitimate agency needs.

3. There is no basis to presume that relocation brokers who may be awarded contracts for household goods moving services for military personnel will violate the Anti-Kickback Act of 1986, 41 U.S.C. §§ 51-58, when subcontracting for moving services; violations must be determined under the particular facts and circumstances presented by each transaction and whether payments have been made to the broker by subcontractors for an improper purpose.

DECISION

Aalco Forwarding, Inc. and 118 other firms protest the terms of request for proposals (RFP) No. DAMT01-97-R-3001, issued by the Military Traffic Management Command (MTMC), Department of the Army, for all personnel, equipment, materials, supervision, and other items necessary to provide transportation and transportation-related services for 50 percent of the eligible Department of Defense (DOD) and U.S. Coast Guard sponsored personal property shipments from North Carolina, South Carolina, and Florida, to any or all of 13 destination regions in the continental United States (CONUS) and/or any or all of 5 destination regions in Europe.[1] The solicitation implements a pilot program to reengineer DOD's personal

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[1]The firms protesting this solicitation are: Aalco Forwarding, Inc.; AAAA Forwarding, Inc.; Air Van Lines International, Inc.; Allstates Worldwide Movers; Aloha Worldwide Forwarders, Inc.; Alumni International, Inc.; American Heritage International Forwarding, Inc.; American Mopac International, Inc.; American Shipping, Inc.; American Vanpac Carriers; American World Forwarders, Inc.; Apollo Forwarders, Inc.; Arnold International Movers, Inc.; Astron Forwarding Company; BINL Incorporated; Burnham Service Company, Inc.; Cavalier Forwarding, Inc.; Classic Forwarding, Inc.; Davidson Forwarding Company; Deseret Forwarding International, Inc.; Foremost Forwarders, Inc.; Gateways International, Inc.; Global Worldwide, Inc.; Great American Forwarders, Inc.; Hi-Line Forwarders, Inc.; International Services, Inc.; Island Forwarding, Inc.; Jet Forwarding, Inc.; Katy Van Lines, Inc.; Lincoln Moving & Storage; Miller Forwarding, Inc.; Northwest Consolidators; North American Van Lines; Ocean Air International, Inc.; Senate Forwarding, Inc.; Shoreline International, Inc.; Stevens Forwarders, Inc.; Von Der Ahe International, Inc.; Wold International, Inc.; Zenith Forwarders, Inc.; Acorn International Forwarding Company; AAA Systems, Inc.; A.C.E. International Forwarders; American Red Ball International, Inc.; Apex Forwarding Company, Inc.; Armstrong International, Inc.; Arpin International Group, Inc.; Art International Forwarding, Inc.; Atlas Van Lines International Corporation; Coast Transfer Company, Inc.; Crystal Forwarding, Inc.; CTC Forwarding Company, Inc.; Diamond Forwarding, Inc.; Dyer International, Inc.; Harbour Forwarding Company, Inc.; HC&D Forwarders International, Inc.; Jag International, Inc.; The Kenderes Group, Inc.; Pearl Forwarding, Inc.; Rainier Overseas, Inc.; Rivers Forwarding, Inc.; Ryans's World; Sequoia Forwarding Company, Inc.; A-1 Relocation, Inc. d/b/a A-1 Movers of America; A-1 Moving & Storage, Inc.; Able Forwarders, Inc.; A Columbia Forwarders; Aero Mayflower Transit, Inc.; Lile International Companies d/b/a American Movers; American Red Ball Transit Co.; Andrews Van Lines, Inc.; Apollo Express Van, Inc.; A. Arnold & Son Transfer & Storage Company, Inc.; Paul Arpin Van Lines, Inc.; Art and Paul Moving & Storage; Associated Forwarding, Inc.; Associated Storage and Van, Inc.; Atlas Van Lines, Inc.; Bekins Van Lines Co.; Burnham World Forwarders; Carrier Transport International, Inc.; Carlyle Van Lines,

(continued...)

property shipping and storage program. The protesters primarily contend that MTMC is improperly acquiring the transportation services under part 12 of the Federal Acquisition Regulation (FAR), Acquisition of Commercial Items, and that the RFP is defective because the inclusion of relocation brokers as offerors will violate the Anti-Kickback Act.

The protests are denied.

BACKGROUND

DOD's Personal Property Shipping and Storage Program

A member of the military services or a civilian employee of DOD who is ordered to make a permanent change of station or other approved move is entitled to ship and/or store, at government expense, an authorized amount of household goods and personal effects. As a result, DOD is the nation's largest personal property shipper. It expends more than one billion dollars on more than 650,000 household goods movements each year, accounting for approximately 15 percent of the moving industry's annual volume.[2] DOD's current personal property shipping and storage program is run centrally by the headquarters office of MTMC and administered locally by about 200 military and DOD shipping offices around the world. DOD relies almost exclusively on commercial movers, both directly with more than

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[1](...continued)
Inc.; Coastal Moving Company; Conrad Group, Inc.; Davidson Transfer & Storage Co., Inc.; Denoyer Brothers Moving & Storage Co.; Door To Door Moving & Storage Co.; Exhibit Transport, Inc.; Ferris Warehouse & Storage Co.; Fogarty Van Lines, Inc.; Global Van Lines, Inc.; Horne Storage Company, Inc.; Lift Forwarders, Inc.; Lynn Moving and Storage, Inc.; A.D. McMullen, Inc.; Mid-State Moving & Storage Inc.; Movers Unlimited, Inc.; Nilson Van & Storage; North American Van Lines; Northwest Consolidators, Inc.; Ogden Transfer & Storage; OK Transfer & Storage, Inc.; Pan American Van Lines, Inc.; Riverbend Moving & Storage; Royal Forwarding, Inc.; Sells Service, Inc.; South Hills Movers, Inc.; Stanley's Transfer Company; Starck Van Lines, Inc.; Star Trans International, Inc.; Stearns Forwarders, Inc.; Stearns Moving & Storage of Kokomo, Inc.; Stevens Van Lines, Inc.; United Van Lines; Von Der Ahe Van Lines, Inc.; Wainwright Transfer Co. of Fayetteville, Inc.; Weathers Bros. Transfer Co.-NC.; Approved Forwarders, Inc.; and A&P Shipping Corp.

[2]The General Services Administration, the second largest personal property shipper, manages about 20,000 moves a year. All other shippers individually order far fewer moves. MTMC asserts that it manages more moves than 100 large commercial shippers or 1,000 average-sized shippers and believes that one of its transportation offices may handle more shipments annually than several of the largest corporations combined.

1,100 moving van companies (carriers) and forwarders, and indirectly with thousands more agents and owner-operator truckers working for the carriers and forwarders.

The current program, under which the transportation and related services are acquired under government bills of lading, is exempt from the procurement laws and regulations, see FAR § 47.000(a)(2), and separately regulated. Under this program, MTMC solicits rates every 6 months based on a rate baseline from approved carriers or forwarders who have agreed to the terms and conditions of MTMC's tender of service. Carriers and forwarders have two chances to file rates before the beginning of each rate cycle--an initial rate filing and what is referred to as a "me-too" rate filing, in which a carrier or forwarder can lower its initially filed rate to that of any other carrier or forwarder. Each local military installation distributes its traffic using a traffic distribution roster from which carriers are selected by order of rate level and quality score (all shipments are scored after each move and carriers are given an overall performance score every 6 months).

In contrast to DOD's current personal property and shipping program, the commercial household goods transportation market, as relevant here, consists of two distinct sectors. The first commercial market sector is household goods transportation arranged and paid for by individual householders under terms and rates published in a tariff required by law to be published and available for public inspection. 49 U.S.C. § 13702 (Supp. I 1995). This tariff, the Professional Movers Nationwide Household Goods Commercial Relocation Tariff 400-L, issued by the Household Goods Carriers' Bureau Committee, specifies mileage rates for transportation between points in CONUS and separate charges for accessorial services as well as terms and conditions for the transportation and the other services provided, such as limitations on the carrier's liability. Several volumes of tariff exceptions are also published, which are typically special discounted rates and other variations of the provisions of the standard tariff applicable to the accounts of individual carriers.

The second sector is the national account market, which is for household goods transportation arranged and paid for by someone other than the householder, usually the householder's employer. Within the national account market, a large number of shippers maintain contracts with one or more carriers for their household moves. These contracts generally incorporate the commercial tariff by reference, but also provide binding long-term commitments, discounted tariff rates fixed for the term of the contract, full replacement liability for lost or damaged shipments, and other terms more favorable to the shipper than the standard tariff terms.

The Reengineering Effort

In 1994, the Deputy Commander-in-Chief, U.S. Transportation Command, tasked MTMC to reengineer the DOD personal property shipment and storage program, based on concerns about the quality of carrier performance, the high rates of loss of or damage to household goods being transported or stored, and the administrative burden of the program. According to MTMC, because of the "me-too" rate filing process and the resulting equal distribution of traffic under the current program, there is little incentive for movers to provide high quality service. MTMC also maintains that the amount and number of claims filed for loss of or damage to household goods being transported or stored exceeds the industry standard for commercial shipments. Further, the current program is administratively burdensome for MTMC; for example, a shipping office may have to contact many carriers on the distribution roster before finding a carrier willing to accept a shipment, and each move involves significant amounts of paperwork. MTMC states that it cannot continue to do business under the current program and that DOD must find a streamlined, efficient way to move its personnel while ensuring high quality moves. Thus, the principal goals of the reengineering effort are to improve the quality of personal property shipment and storage services provided to DOD and to simplify the administration of the program so as to be able to focus more of the resources of the shipping offices towards customer service and away from the administrative burdens associated with the current program.

According to MTMC, an initial review of trade publications indicated that various commercial shippers had faced similar service and claims problems, and had reengineered their relocation programs to improve the quality of service they received and to reduce the number and amount of claims, at a reasonable cost. MTMC decided to identify the services provided by the moving industry to commercial shippers and to incorporate the business processes commercial shippers were successfully using in order to obtain superior service, reduce administrative burdens, and adopt better business practices.

To determine commercial practices, the MTMC reengineering team and its contractors conducted an industry benchmarking survey of commercial shippers, examined commercial contracts, reviewed trade publications, and engaged in dialogue with industry, including visits to and correspondence with carriers, agents, forwarders, and relocation companies, some of which are participating in these protests. MTMC solicited comments from industry on various proposals to reengineer its current program during the acquisition planning stage for the pilot program, and conducted several industry forums on the reengineering effort to obtain further input from industry.

Congressional committees have expressed support for MTMC's reengineering effort and agreed that MTMC must pursue a higher level of service for the movement of household goods with greater reliance on commercial standards of service and

business practices. In particular, in 1995, the Committee on National Security of the House of Representatives, followed in 1996 by the conference committee on the National Defense Authorization Act for Fiscal Year 1996, directed DOD to undertake a pilot program to implement commercial business practices and standards of service for its movement of household goods.[3] MTMC proceeded to develop a proposed pilot program, which ultimately resulted in this solicitation to acquire personal property shipping and storage services through the procurement system.

Because of concerns that the reengineered program could adversely affect the moving industry, particularly small moving companies, the conference committee on the DOD Appropriations Act for 1996 directed DOD to report prior to the implementation of the pilot program on the incorporation of requirements that are not standard commercial business practices and the potential negative impact of the program on small businesses.[4] MTMC responded that most of the elements of the proposed pilot program are based upon commercial business "best practices," which it had verified through its industry benchmarking survey, and that it thought that the industry could provide the required services. The few government-unique elements of the pilot program, MTMC reported, serve compelling government needs and permit effective small business participation. Finding that MTMC's proposed pilot program did not satisfactorily address the concerns of small moving companies, the House Committee on National Security and the Senate Armed Services Committee directed DOD to convene a DOD/industry working group to develop a mutually agreeable program to pilot.[5]

The DOD/industry working group convened and came to a consensus on a number of issues in September 1996, including a set of program goals and various points of agreement, some of which were subsequently formalized in the MTMC Domestic Personal Property Rate Solicitation Exception Appendix to the commercial tariff dated January 16, 1997, applicable to this solicitation. However, the DOD/industry working group could not reach agreement on the approach to take for the pilot, and DOD and industry presented separate pilot program proposals. While DOD proposed to contract for the pilot program under the FAR, industry proposed to modify the existing non-FAR based program.

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[3]H.R. Rep. No. 104-131, at 164 (1995); H.R. Conf. Rep. No. 104-450, at 762 (1996).

[4]H.R. Conf. Rep. No. 104-261, at 58 (1995); H.R. Conf. Rep. No. 104-344, at 58 (1995).

[5]H.R. Rep. No. 104-563, at 268 (1996); S. Rep. No. 104-267, at 270 (1996). These House and Senate reports, which accompanied the National Defense Authorization Act for Fiscal Year 1997, also requested that our Office review and report on MTMC's pilot program, as well as any alternative approaches that industry provided. See Defense Transportation: Reengineering the DOD Personal Property Program (GAO/NSIAD-97-49, Nov. 1996).

The Solicitation

MTMC issued a draft solicitation for its proposed pilot program on December 12, 1996, and conducted a pre-solicitation conference on January 29, 1997. Following industry comments, MTMC issued the "final" solicitation on March 14, and conducted a pre-proposal conference on April 16. Amendment 0004, effective May 14, replaced the "final" solicitation in its entirety.

The solicitation was issued pursuant to the commercial item procedures of FAR part 12, and contemplates the award of firm, fixed-price, indefinite quantity/indefinite delivery contracts for a period of performance of a base year with 2 option years. The RFP's Schedule of Supplies/Services provided that the acquisition will have a minimum value of $5,021,000 and a maximum value of $75,000,000 for the entire pilot program during the base year.[6] The RFP allows the government to award a single task order contract or to award multiple task order contracts for the same or similar services to two or more sources; MTMC anticipates making multiple awards for each traffic channel (shipments from an origin state to a destination region).[7] Awards for some of the traffic channels are set aside for small business concerns.[8]

The solicitation requires offerors to list in their proposals the daily capacity (in pounds) that they are committing to this contract for the base year and each option year per traffic lane (shipments from an origin shipping office to a destination shipping office) for each traffic channel for which offers are submitted. Each offeror's committed daily capacity will be used by the agency to determine the number of contracts to be awarded for each traffic channel and to obligate the contractors to provide requested services up to their committed daily capacities. Although a minimum committed daily capacity is not specified, the RFP states that

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[6]As indicated above, the contracts to be awarded under the solicitation are for 50 percent of the eligible shipments in the test area; the orders under the existing program and under the pilot program will be randomly allocated on a per shipment basis. The RFP does not suggest that this allocation will be done on a tonnage basis, as contended by the protesters.

[7]There are 53 traffic channels in the pilot program, 38 domestic and 15 international.

[8]The Small Business Administration (SBA) protested to the agency head pursuant to FAR § 19.505 that the RFP did not set aside sufficient work for small business concerns and otherwise overly restricted the procurement with regard to small business concerns. After the agency denied the SBA's protest, the protesters protested to our Office that the set-aside decision was unreasonable and that the RFP overly restricted competition with regard to small business concerns. These protests will be the subject of a future decision.

committed daily capacities must be reasonable, based on the historical tonnage projections. An attachment to the RFP provides historical monthly/yearly tonnage data and numbers of shipments for each traffic lane; the information in the attachment covers 100 percent of the eligible traffic for fiscal years 1995 and 1996.[9]

For all domestic shipments, pricing is requested for the base year and each option year for a transportation line item and a storage-in-transit (SIT)[10] and SIT-related services line item based upon the Professional Movers Nationwide Household Goods Commercial Relocation Tariff, STB HGB 400-L in effect as of May 5, 1996, and the MTMC Domestic Personal Property Rate Solicitation Exception Appendix to the tariff dated January 16, 1997.[11] For international household goods and unaccompanied baggage shipments, single factor rates per net hundredweight are solicited for movements from origin to destination; unit prices are also requested for various specified accessorial services, such as reweigh and SIT, which are not included in the transportation single factor rate. There is no provision for rate adjustment during the extended contract period.

The RFP includes FAR § 52.212-2, Evaluation--Commercial Items, which provides that the government will award contracts to the responsible offerors whose offers represent the best overall value based on an integrated assessment of past performance/experience, subcontracting plan, and price. Past performance/experience is a more important evaluation factor than the subcontracting plan; combined, these two factors are significantly more important than price.

The RFP also incorporates FAR § 52.212-4, Contract Terms and Conditions-Commercial Items (Aug 1996), with authorized deviations and addenda. With regard

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[9]The protesters contend that they cannot reasonably calculate their committed daily capacities because the historical shipping/tonnage data included in the RFP may not be an accurate reflection of MTMC's actual requirements during the term of the contracts due to such occurrences as base closings. We find reasonable the agency's response that the historical information is the best available to the government and that MTMC checked beforehand with the military services for any adjustments needed to the data due to occurrences such as base closings, and was advised that no such occurrences were forecast for the term of the pilot program.

[10]SIT is the temporary storage of property in connection with the movement of personal property, such as when the shipment arrives at destination before the householder.

[11]Certain tariff provisions are specifically excluded from application under this solicitation. For example, the tariff's peak season (summer) transportation rates are inapplicable.

to compliance with laws unique to government contracts, the FAR clause states that the contractor agrees to comply with, among other statutes, the Anti-Kickback Act of 1986, 41 U.S.C. §§ 51-58 (1994). Included in the contract clauses in the addenda is FAR § 52.216-18, Ordering, which provides that personal property shipments shall be ordered through task orders; the orders will be placed on a rotational basis until the contract minimums for each awardee are reached and then issued based upon the contractor's proven value to the government.

The RFP includes a 21-page performance work statement detailing the performance obligations of the contractor. It requires the contractor to furnish facilities, personnel, equipment, materials, documentation, supervision, and other items necessary to perform the tasks called for in the performance work statement, and requires that all facilities, equipment, and materials be consistent with commercial practice to prevent deterioration and damage to personal property and to ensure timely arrival at destination. The contractor must establish a quality control program and meet certain performance requirements for on-time pick-up and delivery, frequency and amount of claims, and customer satisfaction. The agency periodically evaluates the contractor's conformance with the performance requirements based on the compiled results of a survey completed by each customer after every move.

The performance work statement also contains detailed provisions regarding the contractor's liability to the customer for loss or damage to household goods being transported or stored, as well as regarding the contractor's and customer's rights and responsibilities in resolving loss or damage claims filed by the customer. Customers generally have 90 calendar days from date of delivery to notify the contractor of lost or damaged items. Customers are to be encouraged to file any claim with the contractor first, within 9 months from the date of delivery, and the contractor is required to make a good faith effort to settle the claim. If agreement is not reached with the contractor, the customer may file a claim with the military claims service within 2 years for the unpaid or unresolved portion of the claim against the contractor under 31 U.S.C. § 3721(g) (1994). The military claims service will then adjudicate and pay the claim pursuant to applicable claims procedures and seek reimbursement from the contractor.

PROTEST AND ANALYSIS

Commercial Item

The protesters first contend that the solicitation was wrongfully issued as a commercial item acquisition under FAR part 12 and that the services being acquired under the solicitation cannot properly be considered a commercial item.

FAR part 12 prescribes policies and procedures unique to the acquisition of commercial items and implements the preference established by, and the specific

requirements in, the Federal Acquisition Streamlining Act of 1994 (FASA), 10 U.S.C. § 2377 (1994), for the acquisition of commercial items that meet the needs of an agency. FAR part 12 establishes acquisition policies more closely resembling those of the commercial marketplace, as well as other considerations necessary for proper acquisition planning, solicitation, evaluation, and award of contracts for commercial items. FAR part 12 specifies the solicitation provisions and clauses to be used when acquiring commercial items.

If this procurement can be conducted under FAR part 12, MTMC will be able to take advantage of the more streamlined acquisition procedures established by FAR part 12, as to which the provisions of the laws listed in FAR §§ 12.503 and 12.504 and Defense Federal Acquisition Regulation Supplement (DFARS) §§ 212.503 and 212.504 are inapplicable, eliminated, or modified. (For example, for commercial item acquisitions, an agency may not require a contractor's submission of certified cost or pricing data normally required under the Truth in Negotiations Act, 10 U.S.C. § 2306a(a)(B) (Supp. II 1996)). If the procurement cannot properly be conducted under FAR part 12, MTMC could conduct the acquisition under FAR part 15, Contracting by Negotiation; in that case, however, the procurement would be subject to the provisions of law inapplicable, eliminated, or modified under FAR part 12, and would have to be conducted without the benefit of FAR part 12's more streamlined procedures. Alternatively, the protesters would have MTMC continue with the current non-FAR based program or some variant thereof, such as the alternate pilot proposed by industry for the DOD/industry working group.

Relevant to determining the suitability of FAR part 12 to this procurement is FAR § 12.101(a), which requires agencies to conduct market research pursuant to FAR part 10 to determine whether commercial items are available that could meet the agency's requirements. According to FAR § 12.202(a), the market research as performed under FAR part 10 "is an essential element of building an effective strategy for the acquisition of commercial items and establishes the foundation for the agency description of need" pursuant to FAR part 11 (i.e., the performance work statement), the solicitation, and resulting contract.[12] The market research involves obtaining information specific to the item being acquired, and should address whether the government's needs can be met by items of a type customarily available in the commercial marketplace, items of a type customarily available in the commercial marketplace with modifications, or items used exclusively for governmental purposes; customary practices regarding customizing, modifying, or tailoring of items to meet customer needs; and the requirements of any laws or regulations unique to the item being acquired. FAR § 10.002(b)(1). If market research establishes that the government's needs can be met by a type of item (including services) customarily available in the commercial marketplace that would

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[12]Agencies are required to conduct the appropriate market research prior to developing new requirements documents for an acquisition. FAR § 10.001(a)(2)(i).

meet the definition of a commercial item at FAR § 2.101, the contracting officer is required to solicit and award any resulting contract using the policies and procedures in FAR part 12. FAR §§ 10.002 (d)(1), 12.102(a).

Consistent with FASA, FAR § 2.101(f), in relevant part, defines "commercial item" with respect to services as follows:

> Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions.

The protesters contend that the "movements of [the household goods of] military personnel are not like movements of [the household goods of] civilian personnel" and that "[t]here is no commercial item equivalent to moving [the household goods of] a military person from one station to another." The protesters allege that international shipments of household goods in particular cannot properly be considered a "commercial item" because such international shipments are not based on established catalog or market prices. Finally, the protesters argue that many of the solicitation's requirements are inconsistent with customary commercial practice and depart from standard commercial terms and conditions in the moving industry, such that the solicited services cannot possibly qualify as a commercial item acquisition under FAR part 12. Instead, the protesters maintain, MTMC has issued a solicitation for a custom-designed personal property transportation program with unique requirements that are tailored to meet MTMC's special needs and that are unavailable as solicited in the commercial marketplace.

Determining whether a product or service is a commercial item is largely within the discretion of the contracting agency, and such a determination will not be disturbed by our Office unless it is shown to be unreasonable. See Canberra Indus., Inc., B-271016, June 5, 1996, 96-1 CPD ¶ 269 at 5; Coherent, Inc., B-270998, May 7, 1996, 96-1 CPD ¶ 214 at 3 (protests of whether an awardee's product is a commercial item).

The record shows that MTMC reasonably concluded, based on its market research, including reviews of numerous commercial contracts, that the moving services it seeks in reengineering its current program qualify as a commercial item because they are the type of services offered and sold competitively by the moving industry in substantial quantities to commercial shippers, particularly in the national account contract market. In this regard, it is apparent that the services used for the movement of the household goods of military personnel, i.e., packing, loading, hauling, storage and other accessorial services, and delivery, are not services that are unique or provided only to the government, but are essentially the same moving services provided in the commercial market, in that movers use the same trucks, warehouses, ocean or air carriers, crews, packing materials, and other equipment to

perform both DOD's and the commercial market's household goods moving requirements. The protesters have not persuasively explained why the "type" of movement of household goods services performed for commercial contractors in substantial quantities is not essentially the same in this regard as the type of services being performed for the government.

Moreover, we find unpersuasive the protesters' contention that there is no established market price for international shipments. It is true that, unlike for domestic household goods shipments, there is no standard tariff for the entire origin-to-destination movement of international shipments. Instead, forwarders price international movements on an individual per-shipment basis by adding various separately priced components of the move for a lump-sum or "through" rate.[13] However, a copy of a commercial contract for overseas moves provided in the agency report shows that the overall price of a typical move is based on several component market rates, including origin services by the contractor (such as wrapping and packing) priced by weight, and transportation and destination services, which are not priced in the contract but are "invoiced [to the shipper] at prevailing rates." The conference report accompanying the National Defense Authorization Act for Fiscal Year 1996, which added "market prices" to the FASA definition of commercial item applicable to services, 41 U.S.C. 403(12)(F) (1994),[14] states that market prices are current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated from sources independent of the offeror. H.R. Conf. Rep. No. 104-450, at 967. Applying this definition, we find that the record evidences that the international shipment charges are based on established market prices for specific tasks; while prices may vary from shipment to shipment, there are apparently market rates established for the component services, which can then be compiled to formulate the "through" rate, which is effectively a market price. The protesters' contention that there are no established market rates for international moving services is also belied by the biennial "through" rates submitted to MTMC by participants in the current international program.

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[13]For example, in pricing an international shipment, individual quotations may be obtained by the forwarder from an agent located at the shipment's origin to cover the packing and pick-up of the shipment, from a motor carrier or railroad to move the shipment to port, from an ocean carrier, and from the agent at the destination (who delivers the shipment locally and unpacks it). The forwarder then adds other expenses (such as port charges, fees for container leasing, and customs clearance charges), and its overhead and profit to the quotations to develop an individual lump sum door-to-door or "through" rate for the particular shipment involved.

[14]41 U.S.C. 403(12)(F), as amended by the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 4204, 110 Stat. 186, 655 (1996).

Further, the protesters do not dispute that the type of moving services provided to commercial shippers are performed under standard commercial terms and conditions. In this regard, national account contracts typically incorporate by reference the provisions of the standard commercial tariff and contain terms and conditions regarding rate discounts, carrier liability, etc., that, while more favorable to the shipper than the commercial tariff, are considered standard in such commercial contracts.

Thus, the agency properly determined that the services constituted a commercial item, as defined by FAR § 2.101(f), that must be acquired pursuant to FAR part 12.

Nonetheless, the protesters argue that the solicited services must not be procured under FAR part 12, because many of the solicitation's requirements are not standard commercial terms and conditions and are inconsistent with customary commercial practice. The protesters have identified a variety of requirements that are assertedly not present in commercial practice and that, they claim, have changed the nature of the services being acquired here to something other than commercial services, so that use of FAR part 12 is impermissible.

For example, the protesters contend that the solicitation deviates from standard commercial practice by requiring in the Schedule for Supplies/Services that offerors "freeze" their rates for a period of at least 3 years, which is the possible term of the contracts (base year and 2 option years), without an opportunity for price adjustments.[15] The protesters assert that standard commercial practice is to use 1-year contracts; that the occasional 2-year contract provides for price adjustment due to unforeseen causes such as fuel price increases; and that a contract for more than 2 years is rare and customarily would have a price adjustment clause.

The protesters argue that the requirement that offerors commit to a constant committed daily capacity in pounds for each traffic lane for each year is a material deviation from commercial practice because commercial shippers do not require household goods carriers to provide the same level of service year round (i.e., to commit daily capacity for extended periods). The protesters explain that the demand for household goods moving services--both domestic and international--is highly seasonal, with over half of annual moves occurring during the peak summer moving season.

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[15]The protesters also note that the price is to be a percentage of an already outdated tariff, while customary industry practice is allegedly to allow prices to change as tariff changes are made. This allegation, however, is rebutted by the record, which includes various commercial contracts with rates based on the tariff as of a certain date without regard to later tariff amendments.

The protesters also assert that the loss and damage liability and claims handling procedures in the RFP are dramatically different from those in commercial practice and contracts: for example, a claims filing period of up to 2 years rather than the commercial standard of 9 months; loss and/or damage notification up to 90 days after delivery; offsets of claims settlements against future invoices; customer rather than carrier determination of when full replacement instead of repair of a damaged item is necessary; higher contractor liability limits than provided in commercial tariffs and contracts;[16] and the failure to exempt the contractor from liability for loss or damage resulting from certain forces beyond its control.[17]

Finally, the protesters maintain that a variety of other RFP requirements are assertedly inconsistent with customary commercial practice: for example, the submission of proposals electronically through MTMC's proposal entry software; the use of contractor identification cards; a 2-hour response time to customer telephone inquiries during non-business hours;[18] minimum performance requirements relating to on-time performance, claim frequency and average costs per claim; electronic data transmission of shipping and other information between the shipper and

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[16]The contractor is required by the performance work statement to provide full replacement protection of $3.50 times the net shipment weight but limited to a maximum of $63,000 per shipment, including disclosed high value items (contractor's liability for undisclosed high value items is $250 per pound per article). The protesters assert that these provisions greatly exceed those under customary commercial practice and contend that the performance work statement requirement that contractors make available additional liability coverage for customer purchase is inconsistent with customary practice.

[17]By incorporating the terms of the commercial tariff, commercial contracts generally exclude carriers of international shipments from liability for loss or damage to the transported goods from causes beyond their control, such as acts of God, an act or omission of the shipper, inherent vice of articles shipped, or hostile or warlike actions. As was made clear by question and answer #320 at the pre-proposal conference, the RFP and resulting contracts, including those for international shipments, also incorporate the terms of the commercial tariff in this regard, thus exempting carriers from liability for these causes.

[18]The protesters dispute the reasonableness of the performance work statement requirement for a 2-hour response time to customer telephone inquiries during non-business hours. Given the volume of DOD moves and the numerous time-zones, including international destinations, through which moves may take place, and given the agency's need for high quality, responsible service to be provided to the customer, we find no basis to find this requirement unreasonable.

contractor; the reduction of the minimum shipment weight from 1,000 to 500 pounds; different reweigh procedures[19]; different SIT procedures[20]; the exclusion of charges for certain services normally compensated under the commercial tariff, even under contract; and cargo insurance requirements.[21]

Notwithstanding the presence of the various requirements assertedly inconsistent with customary commercial practice, we think the solicited services still constitute a commercial item. In this regard, as noted, the FAR definition of commercial item speaks in terms of services of a "type" offered and sold in the commercial marketplace under standard commercial terms and conditions; it does not require

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[19]Under the performance work statement, the contractor must reweigh all shipments that exceed the customer's weight allowance, as well as those shipments requested by the customer or the ordering officer to be reweighed prior to delivery. The reweigh is the billing weight only if lower than the origin weight. The protesters contend that this is contrary to commercial practice where the reweigh is the billing weight regardless of whether it is higher or lower than the origin weight.

[20]The performance work statement reserves the right of the government to require, without notice, that contractors receive authorization prior to placing shipments into SIT, and requires that the complete shipment arrive prior to placement in SIT. The protesters assert that in commercial practice such prior authorization is not required and that partial shipments may go directly into storage without awaiting other parts of the shipment.

[21]FAR § 52.228-9, Cargo Insurance (Jan 1997) (Deviation), was included in the RFP. This clause, as modified, requires that the contractor, at its own expense, provide and maintain cargo liability insurance of $150,000 per aggregate losses or damages at any one place and time, and cargo liability insurance of at least $63,000 per shipment, to cover the total value of the property in the shipment. The protesters maintain that this clause is superfluous where, as here, freight is shipped under rates subject to released or declared valuations. However, the agency explains that the cargo insurance provision is needed to provide an added source of recovery of loss and damage claims. For example, if a contractor has four shipments in its warehouse at one time, each of which has a released value in excess of $50,000, and a fire destroys all four shipments, the contractor's total liability for that loss would be more than $200,000. While the solicitation makes the contractor liable for the entire loss, if the contractor became insolvent or bankrupt, or went out of business, the cargo insurance provision would allow recovery of at least $150,000 of the total loss from the insurance company. The agency report indicates that DOD has recovered millions of dollars through similar cargo insurance provisions and that the clause is therefore not superfluous. We find the agency's explanation reasonable.

that the services be identical to what offerors provide their commercial customers. See Morrison Constr. Servs., Inc., 70 Comp. Gen. 139, 141 (1990), 90-2 CPD ¶ 499 at 3; Sletager, Inc., B-237676, Mar. 15, 1990, 90-1 CPD ¶ 298 at 3 (former FAR definition of commercial product, which is similar in many respects to the current definition,[22] "focus[ed] on the commercial availability of the items or services being procured, not on the manner in which they are provided," and "should not be read so narrowly as to require that the exact services be provided in the exact manner in a commercial setting").

Further, contrary to the protesters' suggestion, there is no requirement that all specifications reflect commercial practice. Instead, agencies are only required "to the maximum extent practicable" to draft specifications to "enable and encourage" offerors to propose commercial items. FAR § 11.002(a)(2)(ii). Moreover, FAR part 12 recognizes that the agency has flexibility in incorporating terms and conditions, depending on the particular customary commercial practice and the agency's requirements.[23] In this regard, while FAR § 12.302(c) provides that the contracting officer may 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," it also provides for waivers of this requirement in accordance with agency procedures--indeed, on September 9, during the course of this protest, MTMC executed a waiver pursuant to FAR § 12.302(c) to allow the use of certain provisions in case they may be determined to be inconsistent with customary commercial practice.[24]

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[22]The FAR previously defined a commercial product as one sold or traded to the general public in the course of normal business operations at prices based on established catalog or market prices. FAR § 11.001 (FAC 84-5, Apr. 1, 1985).

[23]According to FAR § 12.213, it is common practice in the commercial marketplace for both the buyer and seller to propose terms and conditions written from their particular perspectives. It states that the terms and conditions prescribed in Part 12 seek to balance the interests of both the buyer and seller and are generally appropriate for use in a wide range of acquisitions. However, since market research may indicate other commercial practices that are appropriate for the acquisition of the particular item, FAR § 12.213 states that these practices should be considered for incorporation into the solicitation and contract if the contracting officer determines them appropriate in concluding a business arrangement satisfactory to both parties and not otherwise precluded by law or executive order.

[24]The RFP requirements that were the subject of the waiver included the claims and loss procedures, committed daily capacity, reweighs, separate weighing of professional items, the possible 3-year term of the contracts without opportunity for

(continued...)

In our opinion, none of the solicitation requirements asserted to be inconsistent with customary commercial practices are in themselves or in total of such a nature as to transform the type of services sought here to something other than a commercial item. Recognizing that the government has some unique requirements and that some provisions included in the RFP apparently have no commercial market counterpart, we find that there are sufficient common characteristics between commercial contracts for household goods moving services and the MTMC solicitation to warrant the acquisition of the solicited services as a commercial item. Many of the provisions alleged by the protesters to be inconsistent with customary industry practice are in fact similar to provisions in commercial household goods movement contracts. Specifically, the record establishes that both typical commercial contracts and the contracts to be awarded under the MTMC solicitation establish long-term binding shipper/mover relationships,[25] incorporate the standard commercial tariff (including discounts based on the tariff rates), establish higher contractor liability limitations for lost or damaged goods than provided in the standard tariff (including full replacement value liability coverage), lengthen SIT periods, and waive peak moving season charges, among other common features. Further, in our opinion, none of the solicitation requirements asserted to be inconsistent with customary commercial practice are individually or in total of such a nature as to transform the type of services sought here to something other than a commercial item.

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[24](...continued)
price adjustment, and the acquisition of both household goods and unaccompanied baggage movement services under the same solicitation. Although the accompanying determination stated that the waived requirements were, in the agency's view, consistent with customary commercial practice, the requirements were waived in case they may be determined to be inconsistent with customary commercial practice because, according to MTMC, they are essential agency requirements. As discussed below, we deny the protests challenging the propriety of this waiver and the reasonableness of the requirements subject to the waiver.

[25]MTMC, in conducting its industry benchmarking survey, discovered that most of the shippers had long-term contracts that ran from 12 to 36 months or more, and that most of the contracts did not allow any price adjustments for the duration; this finding is generally consistent with the commercial contracts reviewed by the agency and included in its report. While MTMC concedes that the firm prices and the term of the contracts to be awarded under the solicitation are "an extension of the direction of the commercial marketplace" and may be "more favorable" than what corporate shippers typically are able to negotiate, we agree with MTMC that there is "ample precedent," at least in the domestic commercial marketplace, for increasingly long contract terms at fixed rates.

The fact that the text of this RFP is far longer and more complicated than typical commercial contracts does not mean that the acquired services are other than commercial-type services. Given the unique but reasonable government requirements (which many of the carriers have had experience with previously under the current DOD program) and the very large volume of DOD moves as compared to commercial contracts for these services, the length and complexity of the RFP is understandable and does not render the services something other than a commercial item. In this regard, FAR § 12.302(a) recognizes that the relative volume of government acquisitions in a specific market may affect the tailoring of provisions and clauses for acquisition of commercial items.

In sum, we find reasonable MTMC's determination that the requested services constitute a commercial item and do not find that the incorporation into the RFP of the various specifications, terms, and conditions necessary to satisfy the government's needs changes the fundamental nature of this service type.

Waiver Regarding Deviation From Customary Commercial Practice

The protesters have challenged the validity of the September 9 waiver on both procedural and substantive grounds. Under FAR § 12.302(c), 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, and must be approved in accordance with agency procedures. While waivers such as this are subject to a test of reasonableness, see Lawlor Corp.--Recon., 70 Comp. Gen. 374, 377 n.1 (1991), 91-1 CPD ¶ 335 at 4 n.1, we think the protesters have failed to provide a valid basis here to challenge the waiver.

First, we see nothing procedurally defective in the granting of the waiver. Specifically, contrary to the protesters' contentions, there is no requirement that the request for waiver and the waiver itself be different documents. Nor is there any prohibition in the regulation against the granting of waivers following the issuance of the RFP, particularly where, as here, the RFP, as amended, will allow potential offerors to submit new or revised proposals. Further, contrary to the protesters' contention, FAR § 12.302(d) merely requires that any tailoring, as well as any other terms or conditions necessary for performance (rather than the waiver itself), be achieved through addenda to the solicitation and contract.[26] Finally, our review of the memorandum supporting the waiver shows that all the information required by

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[26]Here, the RFP contains addenda, which indicate that certain provisions and clauses were tailored and that other terms and conditions necessary for performance beyond those minimally required by FAR part 12 are included in the solicitation.

the regulation either was included in the waiver or was considered by the authorized official who granted the waiver.[27]

More fundamentally, however, the protesters claim that the waivers are unjustified because the waived requirements concerning claims and loss procedures, reweighs, shipment of professional books, committed daily capacity, and the possible 3-year duration of the contracts without opportunity for price adjustment are not legitimate agency needs and are overly restrictive, particularly with regard to small business moving companies.[28] Determination of the agency's minimum needs is properly the agency's responsibility; government procurement officials, who are familiar with the conditions under which services and supplies have been and will be used, are generally in the best position to make these determinations. Materials Management Group, Inc., B-261523, Sept. 18, 1995, 95-2 CPD ¶ 140 at 2-3. Our Office will not question an agency's determination of its minimum needs, and the resulting solicitation requirements, unless the record clearly shows that the determination was without a reasonable basis. Id. When a requirement is found to reasonably reflect an agency's minimum needs, the agency may include the requirement in a solicitation, even if it restricts the ability of small businesses to compete. See Mills Mfg. Corp., B-224005, Dec. 18, 1986, 86-2 CPD ¶ 679 at 5.

MTMC asserts, and the protesters do not persuasively rebut, that the government-unique requirements concerning claims and loss procedures, reweighing, and the separate weighing of professional items, are not only necessary in light of the government's responsibilities to service members and civilian employees under the existing claims filing statute and to preserve these individuals' weight allowances, but that these requirements have been applied to household good moves under the current program, in which the protesters participate, for many years. We also note

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[27]We see nothing improper with approval of the waiver by the official who did so here. Under FAR § 12.302(c), waivers are to be considered in accordance with agency procedures. DFARS § 212.302(c) provides that the head of the contracting activity (HCA) is the approval authority within DOD for waivers under FAR § 12.302(c). Army Federal Acquisition Regulation Supplement (AFARS) § 1.601 in turn authorizes the HCA to redelegate his or her contracting authority and to appoint a principal assistant responsible for contracting (PARC) who, among other things, is responsible for carrying out those delegable authorities of the HCA described in the FAR, DFARS, and AFARS. Here, the official who approved the waiver was the PARC, who, under these regulations, was authorized to do so.

[28]The protesters also challenge the reasonableness of the solicitation's bundling of unaccompanied baggage shipments with household goods shipments, arguing that this is overly restrictive for small business moving companies. We intend to address this issue in the future decision concerning the small business protest issues.

that despite the unique claims and loss procedures applicable to moves by service members and civilian employees, MTMC has attempted to craft claims procedures more closely resembling the commercial standard than its current program, for example, by encouraging the expedited direct settlement of claims between the customer and contractor.

With regard to the requirement that contractors specify committed daily capacities, while we can find no direct commercial precedent, we believe that the agency has reasonably established its need for this requirement. Specifically, the agency has persuasively stated that the committed daily capacities are needed to ensure contractor availability, especially during the peak moving season, in view of past problems under the current program. In this regard, MTMC concluded, based on its industry benchmarking survey and review of commercial contracts, that unlike the current program, where carriers reportedly occasionally refuse or even turn back shipments during the peak moving season, the carrier under a commercial contract is always available to move ordered shipments. Further, given the large size of the pilot program compared to commercial contracts, committed daily capacities are reasonably necessary under the evaluation scheme to determine how many contracts to award per traffic channel and to accommodate small business moving companies by slicing the volume of shipments into manageable pieces, the size of which offerors determine for themselves.

We also think that MTMC has shown that requiring prices to be fixed for up to 3 years is a minimum need of the government in order to meet the goals of the reengineering of the pilot program to increase service quality and reduce administrative burdens.[29] Unlike the current program, the solicitation at issue here establishes long-term commitments from the contractors with an emphasis on service quality rather than price; requiring contractors to propose long-term fixed prices transfers more of the administrative burden and the risks of doing business to the contractor.[30] Given that it is within the ambit of administrative discretion to offer to compete a proposed contract imposing substantial risks upon the selected contractor and reduced administrative burdens upon the agency, we cannot say that

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[29]The agency has broad discretion concerning the establishment of its minimum needs with respect to the number of years for which a contract is required. Kings Point Mfg. Co., Inc., B-220224, Dec. 17, 1985, 85-2 CPD ¶ 680 at 2.

[30]While the industry-proposed alternative pilot program may improve service quality, as asserted by the protesters, MTMC found it insufficient to satisfy the agency's needs because it neither establishes long-term commitments with each contractor nor reduces administrative burdens, since it essentially continues the current program's frequent "me-too" rate submissions and utilization of an administratively burdensome traffic distribution process.

the agency's determination that it needed long-term fixed rates was unreasonable. See B & P Refuse Disposal, Inc., B-253661, Sept. 16, 1993, 93-2 CPD ¶ 177 at 3; Argus Servs., Inc., B-234016.2, B-234017.2, Sept. 12, 1989, 89-2 CPD ¶ 227 at 3.[31]

Contrary to the protesters' contentions, we find that the contracting officer reasonably exercised her discretion in determining that there was insufficient evidence of significant fluctuations in labor or material costs, considering market and economic conditions, to warrant the need for economic price adjustment and that, since offerors can propose separate escalated prices for each option year, there was no need to provide for contract price adjustment in the event of changes in contractor's established prices.[32] FAR § 16.203-3; see Master Sec., Inc., supra,

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[31]It has been our view that offerors have the responsibility, in offering on a fixed-price contract, to project costs and to include in their proposed fixed prices a factor covering any projected costs increase; risk is inherent in most types of contracts and offerors are expected to allow for that risk in computing their offers. Master Sec., Inc., B-232263, Nov. 7, 1988, 88-2 CPD ¶ 449 at 3; Kings Point Mfg. Co., Inc., supra, at 4.

[32]The protesters allege--as an example of the potential for large unforeseen cost increases in international shipments--that certain ocean transportation rates recently doubled. As described above, such ocean rates are merely one of several component costs that go into determining the "through" rate for an international shipment. MTMC explains that such component cost increases are often offset or minimized by reductions in other component costs as well as competition and conditions in the marketplace. Further, MTMC has provided evidence that ocean carriers will enter into long-term (up to 3 years) contracts at lower rates, which suggests that contractors should be able to negotiate long-term agreements to lock in fixed rates for the duration of the contract, especially given the large volume of shipments offered under the MTMC contracts. Finally, MTMC states that under its own contracts with ocean carriers, the contracts' price adjustment provisions have seldom been activated, and that the "through" rates submitted under the current international program, after the referenced ocean carrier rate increases, actually decreased.

at 2. Indeed, based on MTMC's experience with a former currency fluctuation price adjustment program, which it characterizes as having been "unworkable" and "detrimental to the government," a MTMC economist asserts that any provisions for adjustments to the contract rates, including possible downward adjustments for cost decreases when other business costs might be increasing, would necessarily be arbitrary, unverifiable, anti-competitive, administratively burdensome, and harmful for small business.[33]

Finally, the protesters assert that the issuance of the waiver contravenes congressional direction to MTMC that the pilot program incorporate commercial practices and to report to the cognizant committees prior to implementation of the pilot program any program elements that are not standard commercial business practices. However, the language in the referenced congressional report does not require MTMC to utilize solely commercial practices without regard to the government's legitimate needs or preclude MTMC from using government-unique requirements where, as here, they are reasonably determined to be needed under a properly issued waiver pursuant to the commercial item procedures of FAR part 12. See H.R. Conf. Rep. No. 104-261 at 58.[34]

Alleged Uncertainty of Requirements

The protesters state that because many of the requirements in the RFP which affect the cost of doing business (especially the liability exposure and claims handling procedures) are not standard commercial practices, the preparation of a rational offer becomes a task full of uncertainties not faced when competing for business in the commercial market. As described above, the record evidences that many of the requirements, such as full replacement value liability exposure, are based on commercial practice and that other disputed requirements, such as certain claims procedures cited by the protesters, are based on similar requirements in the current DOD program, with which the protesters are familiar through their long-standing participation. In any event, there is no legal requirement that a solicitation be drafted so as to eliminate all performance uncertainties; the mere presence of risk

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[33]In Household Goods: Adjustment of DOD's Shipping Rates Based on Foreign Currency Fluctuation (GAO/NSIAD-88-154, June 1988), we concluded that reinstatement of the former currency fluctuation price adjustment program was unwarranted.

[34]We also note that the waiver at issue here was executed subsequent to MTMC's response to the congressional requests, which mentioned no continuing obligation by MTMC to update its responses. In any event, such language in congressional committee reports does not impose binding legal requirements on federal agencies. See LTV Aerospace Corp., 55 Comp. Gen. 308, 325-326 (1975), 75-2 CPD ¶ 203 at 21-22.

does not render a solicitation improper. Lankford-Sysco Food Servs., Inc.; Sysco Food Servs. of Arizona, Inc., B-274781, B-275081, Jan. 6, 1997, 97-1 CPD ¶ 11 at 3. To the extent that such uncertainties exist, we think they are reasonable here, given the protesters' experience in the commercial market and in DOD's current program.

Anti-Kickback Act

The protesters object that the RFP allows brokers (identified by the agency as relocation companies), such as the intervenors in this bid protest, to compete with carriers for award. Specifically, they argue that brokers typically receive commissions or rebates from tariff rates from carriers to which they award subcontracts to perform the actual moving services. The protesters argue that such payments violate the Anti-Kickback Act of 1986, which the RFP incorporates by reference. The Act prohibits the payment, offer, or solicitation of a kickback. 41 U.S.C. § 53. A "kickback" is defined as:

> money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to any prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract.

41 U.S.C. § 52(2) (emphasis added).

The protesters assert that, because brokers allegedly perform no substantial services to earn the payment of commission or rebates, these payments can be for no legitimate purpose and must represent improper kickbacks. Accordingly, the protesters contend that brokers should not be allowed to compete under the RFP.

We do not agree that the payment of commissions or rebates from tariff rates from carriers to brokers under a government contract must per se violate the Anti-Kickback Act. Both the express language of the statute and the Act's legislative history specify that the prohibition applies to payments or solicitations for payment that are made for an "improper" purpose (for example, payments made to a prime contractor to induce the award of a subcontract). See 41 U.S.C. § 52(2); H.R. Rep. No. 99-964, at 11-12 (1986). The record here does not establish that commissions or tariff rebates received by brokers can only be for an improper purpose such as to violate the Anti-Kickback Act. While the protesters argue that the brokers would not perform substantial services to justify the payment of a commission or tariff rebate, the brokers here, as prime contractors, will be responsible for the contract

services, for which they would be entitled to compensation.[35] Also, as asserted by the intervenors, brokers would perform contract work, inasmuch as they would be responsible for selecting carriers to perform transportation task orders and for contract administration, which would include, among other things, quality control, performance evaluation, and claims management.

In short, we have no basis to presume, as the protesters would have us do, that brokers will engage in conduct prohibited by the Act in the performance of a contract or contracts awarded under this RFP. Such a determination would necessarily have to be made under the particular facts and circumstances presented by each transaction and address whether payments had been made for an improper purpose. See Marketing Consultants Int'l Ltd., 55 Comp. Gen. 554, 558-560 (1975), 75-2 CPD ¶ 384 at 6-8.

Other Issues

The protesters maintain that the solicitation omitted FAR § 52.203-2, Certificate of Independent Price Determination, which is allegedly required by FAR § 3.103-1 for solicitations for firm, fixed-priced contracts. The protesters speculate that, because the solicitation encourages prospective offerors to enter into teaming arrangements, a number of offerors have submitted, or will submit, proposals on their own as well as joint proposals with other offerors or as subcontractors to other offerors, and thus have disclosed, or will disclose, prices to one another, which the protesters contend would violate the prohibitions of the Certificate of Independent Price Determination, had it properly been included in the solicitation. This contention is meritless. FAR § 12.301(d) provides that "notwithstanding prescriptions contained elsewhere in the FAR, when acquiring commercial items, contracting officers shall be required to use only those provisions and clauses prescribed in this part." The Certificate of Independent Price Determination is not listed as a required clause in FAR part 12.

The protesters finally contend that the clause providing a preference, pursuant to 46 U.S.C. app. § 1241(a) (1994), for privately owned U.S.-Flag Vessels, improperly

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[35]In PHH Homequity Corp., B-240145.3, B-241988, Feb. 1, 1991, 91-1 CPD ¶ 100 at 3-4, we found unobjectionable a solicitation for relocation services that prohibited relocation services contractors from receiving commissions from carriers to provide transportation services. In that case, because the relocation services contractors would otherwise be paid by the agency for its services, the agency was reasonably concerned that commissions from carriers to relocation services contractors could only be for improper purposes as prohibited by the Anti-Kickback Act. Here, the compensation that brokers receive for their services will be derived from the difference between the government's payment for the transportation services and the broker's payment to the carrier/subcontractor.

authorizes the contracting officer, instead of the Military Sealift Command, to waive the requirement that contractors use U.S.-flag vessels. MTMC explains in its agency report that this contention is incorrect because the contract clause requires the contractor to contact the contracting officer to use a foreign flag vessel and does not authorize the contracting officer to waive the requirement for contractor use of U.S.-flag vessels. Since MTMC has explained why the contention is incorrect and the protesters do not rebut MTMC's explanation, we deem this protest allegation abandoned. See Ares Corp., B-275321, B-275321.2, Feb. 7, 1997, 97-1 CPD ¶ 82 at 13 n.19.

The protests are denied.

Comptroller General
of the United States