RECONSIDERING TRASH PICKUP BY THE TON OR BY THE RUN

In a recent blog post, "Pricing Commercial Trash Pickup: By The Ton Or By The Run?**",** this blog discussed a protest where 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. The protest turned on how a fixed-price trash removal 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 commercial method asserted by the protester. The Government Accountability Office ("GAO") sustained the protest that the solicitation's terms were inconsistent with customary commercial practice. *Red River Waste Solns, LP,* B-411760.2, Jan. 20, 2016. The Army was concerned because GAO sustained the protest, and filed a Reconsideration and Request for Modification of Recommendation, which GAO denied. *Dept of the Army-Recon,* B-411760.3, June 15, 2016.

Army's request for reconsideration asserted that the GAO had used the wrong legal standard for reviewing terms and conditions consistent with customary commercial practices, and improperly concluded that the agency could not rely on other government contracts to establish customary commercial practice. GAO denied the request for reconsideration.

With respect to the legal standard, the Army recognized the prohibition on using terms and conditions in commercial contracts that are inconsistent with customary commercial practice but said that the GAO's interpretation improperly limited an agency's discretion to include contract terms and conditions. The GAO decision reiterated that commercial contracts are required to include only clauses that are consistent with customary commercial practices, and that agencies may "tailor" clauses only after conducting appropriate market surveys to determine what is "customary." The Army argued that tailoring of clauses was OK unless it caused commercial items to be changed into noncommercial items. GAO flatly rejected that approach, stating that the only issue is whether the terms and conditions are consistent with customary commercial practices. The standard is not whether any tailoring causes a change from commercial to noncommercial items.

With respect to the market surveys, the Army urged GAO to consider government contracts when performing market research—an idea that GAO rejected this time, as it had in the original protest, noting that if government contracts were considered part of the commercial marketplace, everything the government procured could be considered a commercial item and fundamentally, Federal Acquisition Regular Part 12 (Commercial Items) would be rendered superfluous.

In considering the reconsideration, the GAO held fast to interpreting the words of the FAR as written, and refused to stretch them to accommodate the Army's expansive definition of commercial items.

Readers should note that the GAO very rarely agrees to reconsider and reverse a prior decision.