

GAO APPROVES NEW BEST VALUE METHOD: HIGHEST TECHNICALLY RATED WITH FAIR AND REASONABLE PRICE; COURT OF FEDERAL CLAIMS AGREES

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The Government Accountability Office (“GAO”) recently deemed as permissible the use of the “highest technically rated offerors with a fair and reasonable price” evaluation scheme in order to achieve best value. *Sevatec, Inc. et al.*, B-413559.3 et al, Jan. 11, 2017. In a preceding case the Court of Federal Claims opined that a similar evaluation methodology, with no tradeoff of cost and technical factors, complied with FAR 15.101. *Octo Consulting Group, Inc. v. United States*, 117 Fed Cl. 334 (2014).

Sevatec concerned the Alliant 2 procurement by the General Services Administration (“GSA”), a multiple award, indefinite quantity set of contracts for information technology services. The RFP provided that GSA would select 60 awardees using a “highest technically rated with a fair and reasonable price” evaluation scheme. GSA would first rank all offerors from highest to lowest point scores, verify the scores, then identify the top 60 firms and analyze the pricing of those 60 proposals for fairness and reasonableness. The solicitation stated that any offer that lacked a fair and reasonable price would be eliminated, and there would be no tradeoff between the non-price factors and price.

The protester primarily protested the evaluation scheme, asserting that the scheme violated the Competition in Contracting Act, 41 U.S.C. § 3306(c)(1)(B), which states that “cost or price...must be considered in the evaluation of proposals.” The protester stated that a determination that a price is “fair and reasonable” does not constitute a meaningful consideration of price.

The GAO began by pointing to FAR 1.102(d) which states that agencies “may assume if a specific strategy, practice, policy or procedure is in the best interest of the government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, that the strategy, practice, policy or procedure is a permissible exercise of authority.” The GAO further noted that besides a tradeoff, FAR 15.101 envisions at least two other source selection processes: “lower price offeror” and a process that results in award to the “highest technically rated offeror.” GAO concluded that there was no basis in the FAR to object to a source selection process that contemplated award to the highest technically rated offerors without using a tradeoff process.

Next, the GAO addressed the need to consider price. GAO noted that in a tradeoff process, the agency cannot so minimize the impact of price as to make it a “nominal evaluation factor.” However, this solicitation involved no comparison of an offeror’s price relative to the benefits of its proposal. GAO concluded that here, the “relatively low importance of price in an evaluation scheme that does not contemplate tradeoffs” was unobjectionable. Further, because the selection process considered the price of every awardee and rejected those firms that lacked fair and reasonable pricing, GSA has satisfied the requirement to consider price to the government.

GAO's ruling in *Servatec* was consistent with the earlier Court of Federal Claims ruling in *Octo*. There the protester challenged the award of 43 contracts in the One Acquisition Solution for Integration Service-Small Business ("OASIS"). The solicitation appeared to be very similar to *Servatec*, and stated that "The best value basis for awards will be determined by the Highest Technically Rated Offerors with a Fair and Reasonable Price." [] "Once the top 40 and/or top 20 highest scored offerors have been evaluated and validated, the [GSA] will then check to verify that these offerors have proposed fair and reasonable pricing [or eliminate them]."

The protester alleged that GSA failed to consider price, but the Court disagreed and denied the protest. It noted that even if its price had not been considered, *Octo* had already been eliminated from the competition, and there was no requirement to consider its price. The government had properly not conducted a price evaluation of those offers that failed to meet the technical threshold set in the solicitation.

The court further noted that if the solicitation had called for a traditional tradeoff analysis, it "could have been arbitrary and capricious not to consider price" but under the circumstances the evaluation was reasonable.

TAKEAWAYS: Agencies are now permitted to use a non-tradeoff evaluation scheme based solely on technical merit and fair and reasonable pricing. Offerors may be eliminated from consideration *regardless* of price, if they are technically not in the highest "bracket" set forth in a solicitation.