

GAO RULES THAT HIGHEST TECHNICALLY RATED REASONABLY PRICED SELECTION METHOD IS NOT OK WITH GSA SCHEDULE BPA'S

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The Government Accountability Office (“GAO”) recently ruled that the General Services Administration’s (“GSA”) use of a highest-technically rated, reasonably priced source selection method when establishing single-award blanket purchase agreements (“BPA’s) with federal supply schedule (“FSS”) contract holders does not satisfy law and regulation. Specifically, such a source selection method does not “result in the lowest overall cost alternative to meet the needs of the federal government” as required by 41 U.S.C. § 152(3)(B) and Federal Acquisition Regulation (“FAR”) 8.404(d) and 8.405(a)(1)-(2). *Noble Supply and Logistics, Inc.* B-418141, Jan. 16, 2020. The GAO had previously approved the highest-technically rated, reasonably priced method for FAR Part 15 procurements, where, subsequent to the establishment of multiple indefinite-delivery, indefinite-quantity (“IDIQ”) contracts, the agency would hold subsequent competitions at the task-order level for awards. *See Sevatec, Inc. et al.*, B-413559.3 *et al.*, Jan. 11, 2017, and the discussion of the *Sevatec* case in this blog, “GAO Approve New Best Value Method: Highest Technically Rated with Fair and Reasonable Price; Court of Federal Claims Agrees” (May 3, 2017).

Noble Supply was a protest of a GSA solicitation for the establishment of BPAs under the FSS for hardware store supplies and ancillary services. The solicitation stated that award would be made on a best value basis but would not involve either a lowest-price technically acceptable or a best-value tradeoff source selection method. Rather the GSA would issue BPAs to each of the vendors that submitted the highest technically rated quotations with fair and reasonable prices. The protester alleged that the source selection method failed to meaningfully consider price in contravention of applicable procurement laws and regulations.

The Competition in Contracting Act requires (with exceptions) that agencies obtain full and open competition through the use of competitive procedures. The FSS program is a streamlined process that satisfies the “full and open” requirement when participation in the program is open to all responsible sources, and when FSS procedures “result in the lowest overall cost alternative to meet the needs of the Federal Government.” 41 USC § 152(3)(B). FAR Part 8 (which implements the FSS program) requires agencies to review FSS schedule and establish BPA’s that obtain the required supplies or services that represent best value and “result in the lowest overall cost alternative (considering price, special features, administrative costs, etc.) to meet the Government’s needs. FAR 8.404(d). Therefore, lowest cost to the government is imperative. GAO noted that any best value determination in the FSS program requires a weighing of value and benefits against cost.

Originally the solicitation established a price evaluation that compared vendor’s prices for 250 items for each BPA, but this was amended to remove the head to head price evaluation in favor of an evaluation that solely considered reasonableness of the prices. GAO noted that GSA would have already (prior to this procurement) evaluated the vendor’s schedule prices for fairness and reasonableness when it awarded the schedule contract.

The GAO held that use of the Highest Technical With Reasonable Fair and Reasonable price methodology did not provide for a comparison of the price of performance under competing quotations—but merely resulted in the use of the pre-determined price reasonableness finding when the vendors were awarded their schedule contracts. This type of evaluation did not satisfy the agency’s obligation to make a best-value source selection that, at a minimum, considers price and results in the lowest overall cost alternative to the government’s needs.

How is the evaluation method in this procurement different from the one in *Sevatec*, which was held to be acceptable? GAO noted that the two procurements were based on different facts. *Sevatec* used the procedures in FAR Part 15, and sought 60 multiple award IDIQ contracts under which the agency could hold subsequent competitions in task orders for a range of services. The agency evaluated prices at the IDIQ level *only to assess whether they were fair and reasonable, but was shifting price competition to the task order level for awards under the contracts*. Based on those facts, the evaluation was consistent with law and regulation. However in *Noble Supply*, the procurement is being conducted under the FSS ordering procedures in 41 USC § 152 and FAR part 8, both of which expressly require agencies to consider the lowest overall cost to the government when using FSS procedures. The FAR part 15 negotiated procedures used in *Sevatec* do not include a similar mandate to consider lowest overall cost, but rather, establish a broad continuum for assessing best value. Furthermore, in *Noble Supply*, the agency sought to establish single award BPAs, which would *not* have price competition at the task order level. In the instant procurement, there will never be head to head price competition, and this formed the basis of GAO’s sustaining the protest.

Takeaway. In an FSS single award BPA competition, actual price competition must be part of the source selection. However, in a Part 15 procurement, where there will be price competition at the task order level within IDIQ contract holders, the actual selection of the contract awardees may be made using the Highest Technically Rated With Fair and Reasonable Price Method.

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