The Department of the Navy
Office of the Chief Information Officer

Return

Blanket Purchase Agreement

Best Practices

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IT Investment Practices

Weighing Your Investments

Prepared by
The IT Investment Practices Integrated Product Teams

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FEB 14 2001

MEMORANDUM FOR DEPARTMENT OF THE NAVY ACQUISITION PERSONNEL

Subj: FEDERAL SUPPLY SCHEDULE BLANKET PURCHASE AGREEMENT (FSS BPA) GUIDANCE

Encl: (1) Guide to Best Practices for FSS BPAs

Recently, a team was chartered to examine practices being followed throughout the Department of the Navy (DON) in issuing FSS BPAs. The guidance in enclosure (1) is the result of this team's efforts. The DON Chief Information Officer and I jointly endorse this work, and believe it will assist both customers and contracting personnel in assuring our FSS BPAs provide best value solutions.

As with almost everything we do in this evolving world of acquisition, this area is subject to change and adjustment as events dictate, and we are interested in suggestions for improving this guidance. We plan to maintain it as a living document on our World Wide Web home pages, so documentation of your individual successes and best practices would be most appreciated.

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The Department of the Navy
Office of the Chief Information Officer

Blanket Purchase Agreements Best Practices

Prepared by
The Investment Practices Integrated Product Teams

0.0 Introduction

Federal Acquisition Regulation 8.404(b)(4) authorizes agencies to issue Blanket Purchase Agreements (BPAs) with Federal Supply Schedule (FSS) contractors. Agencies use the BPAs to improve upon price and/or delivery terms contained in the FSS. Although the Government has broad discretion when selecting which FSS contractor to use, the ordering officer must first conclude that the chosen contractor represents the best value for the supply or service being ordered. FSS BPAs can assist the ordering officer in making the best value determination if a best value analysis was conducted when the BPA was issued and if best value analyses are conducted during maintenance of the BPA. This Guide is therefore divided into three sections: (1) Issuing FSS BPAs; (2) Ordering Against an FSS BPA; and (3) FSS BPA Maintenance. Adherence to the guidance will ensure the FSS BPA process results in best value for the Department and that file documentation reflects that such is the case.

Acknowledgments

The *BPA Best Practices* guide was developed by the *BPA Best Practices Product Team*, which falls under the umbrella of the *IT Investment Practices Integrated Product Teams*. Under the leadership of **Mr. Rick Martinelli (NAVSUP HQ)**, the members of the *BPA Best Practices Product Team* are:

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The *BPA Best Practices Product Team* would especially like to thank **Mr. Pete Chase (ASN (RD&A))** and **Mr. Floyd Groce (DON CIO)** for serving as advisory consultants.

Enclosure 1

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Blanket Purchase Agreements Best Practices

1.0 Issuing Federal Supply Schedule Blanket Purchase Agreements (FSS BPA)

1.1 Requirements

The requirements necessitating a BPA should be defined. A summary of the requirements should include a description of the services and/or products, the applicable standards and architecture, an estimate of annual activity, the anticipated duration of the requirement, and the government price estimate.

As a part of this process, verify that a local BPA is the most appropriate vehicle (i.e., there will be multiple requirements with the vendor). A BPA is intended to gain a discount or other non-monetary advantage over the prices and/or terms in the GSA schedules for the agency.

NAPS 5208.404 prohibits establishing BPAs for information technology products or services with FSS contractors unless the activity's requirements cannot be met through the available DON/DoD BPAs or IDIQ contracts included on ITEC-Direct. Activities may access this on-line catalog at www.itec-direct.navy.mil.

Activities considering the development of a new information technology BPA should coordinate with the ITEC-Direct Project Manager (helpdesk@itec-direct.navy.mil) to ensure that duplicative efforts are avoided and to receive assistance/guidance related to the issue of compatibility with and registration on ITEC-Direct. Activities shall structure information technology BPAs to allow for DON-wide use and inclusion in ITEC-Direct, if practicable, and shall comply with DoD and DON information technology standards and architectures. DON CIO Information Technology Investment Policy message of 2 February 1999 requires all planned multi-claimant contracts, agreements or orders for IT hardware, software and services be coordinated through the DON Enterprise Licensing IPT. The establishment of BPAs with an ordering scope beyond DON should be carefully considered and rationale provided as part of the multi-claimant coordination. Additionally, requiring and ordering officials should become familiar with and comply with the Department of Defense Chief Information Officer Guidance and Policy Memorandum (G&PM) No. 12-8430 of July 26, 2000, "Acquiring Commercially Available Software."

Accordingly, FSS BPAs shall not contain supplies or services that are included, or planned for inclusion, under the Department of Defense Enterprise Software Initiative (DoD ESI). Information on the DoD ESI and copies of the DOD and DON implementing policies may be accessed at www.don-imit.navy.mil/esi.

1.2 Market Survey

Conduct and document a market survey of GSA FSS holders. For IT supplies and services, market research begins by determining whether the requirement is already available on either ITEC-Direct (www.itec-direct.navy.mil) or the DOD ESI (www.don-imit.navy.mil/esi).

Current GSA schedules for services and/or products that might meet the anticipated requirements should be reviewed and evaluated. Check the types of orders permitted under the schedules and duration of the schedules. Talk to GSA about any upcoming

schedule renegotiations. Compare definitions of labor categories included in each schedule against the definitions in the other schedules and against the personnel qualifications necessary to fulfill the requirement. If there are differences in experience and education, consider how to address this in the request for quotes (RFQ) and best value analysis. Check the GSA's web site for current ordering procedures. Consider the additional work required when exceeding the maximum order threshold in view of the anticipated order amounts.

A minimum of three FSS contractors identified by the market survey should be solicited. Under the market survey, the contractors to be solicited should be narrowed to those who appear to represent best value.

A Commerce Business Daily synopsis is not required under FAR 5.202(a)(6).

1.3 Best Value Approach

Develop a best value approach establishing the criteria for determining the best value offeror. GSA has issued mandatory procedures for issuing FSS BPAs for services. The GSA procedures discuss those situations when a single or multiple BPAs may be issued and also discusses the ordering procedures to be followed when issuing task orders for services. **Although the guidance contained herein will aid FSS BPA issuance for services, FSS BPAs for services should not be issued without consulting the mandatory GSA procedures at www.fss.gsa.gov/schedules/ordinssv.cfm. These procedures are also included in this document as attachment 1.**

A formal source selection plan is not required; however, a written approach can help maintain consistency in the solicitation and evaluation process as well as assure participants that all issues and evaluation criteria are being considered. The approach does not have to be unnecessarily complex but should include both the criteria to be considered and the method for the best value determination.

Evaluation criteria should include pertinent factors such as cost, past performance, personnel qualifications, corporate experience and resources, and management approach.

Consider requesting teaming arrangements that could allow for the inclusion of schedules for different services and/or supplies including, but not limited to, IT hardware; financial management; IT; professional engineering services; and management, organizational and business improvement services (MOBIS) to provide an overall support capability. Teaming arrangements can also be used to promote the participation of small/small disadvantaged business partners or subcontractors.

Possible evaluation methods include oral presentations, sample task or project plan preparation, and submission of documentation.

1.4 Request for Quotes (RFQ)

The RFQ should state that the Government intends to issue a BPA and whether a single BPA or multiple BPAs will be issued. The RFQ may establish the Government's ability, subject to limitations set forth in attachment 1, to issue either a single BPA or multiple BPAs against the RFQ.

The RFQ should include the terms and conditions for the BPA. For services, a performance-based statement of work should be employed that outlines, at a minimum, the work to be performed, location for performance, applicable standards, and acceptance

criteria. If applicable, include security requirements, potential organizational conflict of interest provisions, proprietary data issues and non-disclosure statements and/or requirements. The estimated quantities should be specified. Describe teaming agreements sought between different schedule holders if a range of products or services are included. Request a quantity discount from the FSS prices. Set forth the areas of consideration and relative order of importance for the best value evaluation. Describe the documentation or presentation required in response to the RFQ. Specify the types of orders anticipated, such as firm-fixed price or labor hour with ceiling price (verify that these pricing arrangements are allowed under the FSS schedules in question).

Adequate time should be allowed for preparation of responses. Consider holding question and answer sessions to identify any ambiguities in the requirements and clarify issues for offerors. This can assist in receiving responses tailored to the requirements. Information or changes should be relayed to all parties.

1.5 Evaluation of Quotes

Determine which vendor(s) quotation(s) gives the best value. The selection should be documented utilizing factors set forth in the RFQ. If there is no other difference between contractors, give preference to small businesses consistent with FAR 8.404 (b)(6).

Discussions are not required. However, discussions may be needed if significant questions which may affect the award decision arise during evaluation. While the competitive procedures at FAR 15.3 do not govern issuance of BPAs, all interested sources must be treated fairly and the evaluation must be consistent with the criteria set forth in the RFQ.

The best value analysis which is detailed and specific to well-defined requirements will lessen the requirements for an analysis under individual orders. Additionally, it should be determined at this point that the proposed BPA(s) offer the agency some type of advantage over the prices and/or terms and conditions in the contractor's FSS contract, such as lower price or better delivery terms. The best value analysis supporting BPA selection must be documented.

1.6 Debriefing of Vendors

Vendors not receiving BPAs should be notified promptly. If requested, a debrief should be provided. Although the debrief should include an explanation of why the vendor did not receive a BPA, release of information described at FAR 15.506(e) is prohibited.

1.7 Legal Review

Agency legal counsel should review the RFQ and evaluation decision.

1.8 Creating the FSS BPA

Standard Form (SF) 1449 will be used as the cover page for the BPA. Bilateral signatures will be obtained on the SF 1449.

Specify items, scope of the BPA, estimated value, duration, GSA schedule number(s), authorized ordering offices, invoicing or billing procedures, terms and conditions, applicable discount terms, agency specific clauses or provisions, and types of orders to be placed under the BPA. Specify if travel will be reimbursed in accordance with Federal or

Joint Travel Regulations. Include language on BPA review procedures, reporting requirements, and resubmission of the contractor's FSS if updated by GSA. If multiple BPAs are issued, include the procedures for determining which contractor will receive each order.

Review the FSS for each contractor to assure that all products and services included in the BPA are on the FSS. Do not include any language that conflicts with the specifications, terms, or conditions of the GSA schedules cited.

2.0 Ordering Against A FSS BPA

2.1 Ordering Officer's Responsibility

In accordance with FAR 8.404(a), it is the ordering officer's responsibility to determine if an FSS contractor represents best value and the lowest overall cost alternative (LOCA) prior to placing an order. It is noted that the FAR permits consideration of non-price evaluation factors (e.g., special features, past performance, administrative costs, etc...) as part of the LOCA analysis. Therefore, a sound best value tradeoff analysis, in which a higher price may represent the better value, also fulfills the requirement to perform a LOCA analysis. While previously performed analyses used to support establishing or maintaining a BPA (e.g., analyses performed under the ITEC-Direct program) may aid the ordering officer in making a best value determination, it is still the ordering officer's responsibility to make a best value determination before placing each order. For IT requirements included in ITEC-Direct BPAs, ordering officers are encouraged to seek support from ITEC-Direct in making the best value determination. Emails may be forwarded to helpdesk@itec-direct.navy.mil.

2.2 Acquiring Services Under FSS BPAs

GSA has issued supplemental procedures governing acquisition of services requiring a statement of work under FSS schedules. These procedures are mandatory. They are included in attachment 1 and may be viewed at www.fss.gsa.gov/schedules/ordinssv.cfm ***The GSA procedures place additional requirements on ordering officers when acquiring these types of services.*** **The guidance contained herein is most relevant to acquisition of supplies; ordering officers should not acquire services under FSS contracts or FSS BPAs without consulting the GSA guidance.**

2.3 Best Value Approach

The ordering officer has broad discretion in tailoring the best value analysis to the specific requirement being fulfilled. FAR 8.404(b)(2) sets forth examples of criteria the ordering officer may consider in the best value analysis. The following paragraphs discuss 1) orders at or below $2,500; 2) orders between $2,500 and the FSS maximum order threshold; and 3) orders in excess of the FSS' maximum order threshold.

Orders at or below $2,500: In accordance with FAR 8.404(b)(1), ordering officers can place orders with any FSS contractor. The ordering officer need not compare the selected vendor with other FSS or FSS BPA holders. The regulations at FAR 13.202(a)(3), while not applicable to FSS ordering, may still be used as general guidance concerning whether the ordering officer should verify price reasonableness. To the extent practical, repetitive orders under $2,500 should be distributed equitably among qualified FSS or FSS BPA holders. The Government-wide purchase card must be used as a method of procurement or payment for these acquisitions.

Orders between $2,500 and the FSS's maximum order threshold: Unless a legitimate situation exists to place an order with a single FSS or FSS BPA holder and the file is documented, the best value analysis must include a comparative assessment of multiple FSS or FSS BPA holders. The ordering officer will typically use one or more of the following techniques before placing the FSS BPA order:

- Comparative analysis of alternatives satisfying the Government's requirements on the GSA Advantage! on-line shopping service or Navy ITEC-Direct at www.itec-direct.navy.mil.
- Analysis of the catalogs/price lists of at least three FSS or FSS BPA holders.
- Soliciting competitive quotations under the price reduction procedures at FAR 8.404(b)(5). This method is encouraged when the ordering officer believes significant savings can be achieved. The process can typically be accomplished quickly as there is no requirement to publicize the RFQ. *If the RFQ permits competitors to choose their own configuration, as opposed to merely soliciting price reductions on items specified in the RFQ, the RFQ must notify competitors whether award will be made on a low price or tradeoff basis.* This allows competitors to tailor their quote to either a lower price/technical or higher priced/technical solution. Attachment 2, *GAO decision COMARK Federal Systems B-278343 (January 20, 1998)*, discusses this issue.
- The ordering officer may choose to use previously performed best value analyses conducted to support establishing or maintaining a FSS BPA. While such analyses do not guarantee the BPA contractor represents best value for the specific requirement, the ordering officer has the discretion to use these analyses when the situation warrants. For example, if the BPA was recently established or revalidated and the particular requirement being ordered was examined during the best value analysis supporting issuance of the BPA, the ordering officer may use this analysis to support the best value decision for the specific order. It is, however, the ordering officer's responsibility to determine why the previously performed best value analysis is applicable to the specific order. **The ordering officer should not rely on any previously performed best value analyses if such an analysis did not compare the BPA holder with other FSS contractors.**

Orders above the FSS's maximum order threshold: FAR 8.404(b)(3) sets forth additional responsibilities that an ordering officer must follow before placing an order over the FSS's maximum order threshold. These procedures include a requirement to seek price reductions from those FSS contractors appearing to provide the best value. Although BPAs normally include discounts off the FSS price, ordering officers are cautioned against concluding BPA discounts automatically satisfy the requirements of FAR 8.404(b)(3). Ordering officers should seek an additional discount unless the BPA discount contemplated a quantity of similar or greater volume than the order in question.

2.4 FSS BPA Orders When Only One FSS Contractor Can Satisfy a Requirement

Ordering officers are encouraged to invite the customer's participation in the selection process, as the customer may be ultimately responsible for the acquisition's success. However, since the analysis performed prior to issuance of a BPA does not eliminate the ordering officer's responsibility to perform a best value analysis for each order, customers do not have the ability to choose a vendor from among BPA holders. The customer's responsibilities are to identify the Government's needs, in performance oriented terms if possible, and to participate in the selection process.

When only one FSS product can satisfy a requirement, FAR 8.404(b)(7) requires the ordering officer to document why the contractor's particular brand name, product, or

feature is essential to satisfying the agency's needs. In these instances, the ordering officer will demonstrate that the order represents best value through this justification and a price analysis rather than using one of the methods discussed above in the Best Value Techniques section. When only one product can satisfy IT requirements included in ITEC-Direct BPAs, ordering officers are encouraged to seek support from ITEC-Direct in making the best value determination. Emails may be forwarded to helpdesk@itec-direct.navy.mil.

Such acquisitions are authorized without a FAR Part 6 Justification and Approval (J&A). Contracting activities, however, should ensure appropriate contracting and counsel oversight for high dollar FSS BPA orders.

2.5 Documentation

As in any acquisition, ordering officers are responsible for maintaining adequate documentation to support the FSS BPA order. For orders over $2,500, the ordering officer must at a minimum document the best value decision and, when required, that the process at FAR 8.404(b)(3) was followed. The regulation at FAR 13.202(b), although not applicable to FSS orders, may be used as guidance for documenting orders under $2,500. **Documentation must be completed prior to placing the order unless urgent conditions exist.**

2.6 Notification to ITEC-Direct

When an ordering officer determines a product or service included in an ITEC-Direct BPA does not represent best value, the ordering officer should notify the ITEC-Direct Program Manager after issuing the order for the non-ITEC-Direct item. ITEC-Direct will use the notice to improve the BPA. The notice should be sent to helpdesk@itec-direct.navy.mil and should include the best value analysis comparing the ITEC-Direct item to the selected product or service. All purchases of commercially-available software shall comply with guidance and policy published at www.don-imit.navy.mil/esi.

2.7 Incidental Items

Ordering officers cannot rely on the "incidentals" test to justify the purchase of non-FSS items in connection with a FSS BPA order. The "incidentals" test refers to the inclusion of non-contract items with priced contract items in delivery orders if they are incidental to the overall acquisition and the total price of these non-contract items is an insignificant percentage of the total value of the delivery order. *The Pyxis Corporation, GAO Decision B-282469, B-282469.2*, concluded that agencies can not include non-FSS items in delivery orders without complying with the regulations governing purchases of those non-FSS items. Accordingly, contracting officers and ordering officers must follow open market purchasing procedures for any non-FSS items. This issue is addressed in Attachment 3, *General Accounting Office Decision, Pyxis Corporation, B-282469.*

2.8 Reporting

FSS BPA orders have not been reported in a uniform manner. The following guidance is intended to ensure that DD 350 reporting accurately reflects that the FSS BPA order was acquired pursuant to FAR 8.4 rather than under a FAR Part 13 procedure. The DD 350 should be completed as follows:

- *Block B1A (Contract Number):* Enter the GSA FSS number
- *Block B1B (Origin of Contract):* Enter a C for "Other Non-DoD Agency"
- *Block B2 (Modification, order or other ID number):* Complete in accordance with DFARS 204.7004(d) as if the order was issued directly against a FSS
- *Block B13A (Contract/Order):* Enter a 6 for "Order/Call under Federal Schedule"

3.0 BPA Maintenance Best Practices

Proper post-award BPA maintenance and management is crucial to ensure the goals and objectives of the Competition in Contracting Act are met and that the best value for BPA customers is provided. Experience within the Department of the Navy (DON) has shown that there are several key elements that are critical to a successful BPA management process.

3.1 Personnel

In order to properly maintain a best value BPA, it is critical to have key management personnel dedicated to the effort. These key personnel include a Contracting Officer, a Program Manager (PM), and their supporting staffs. PM supporting staff should include Logisticians, Technical Analysts, Pricing Analysts, and Customer Service Representatives as appropriate for the scope and complexity of the BPA.

Supporting staff is essential to the successful management of BPAs. This staff should focus on communication and support to the end-users. Responsibilities should include ordering support, delivery order tracking, and warranty support. Support may or may not include a help desk, but should definitely maintain and advertise phone, fax, web, and email POC information.

3.2 Cyclic Best Value Analysis

Most successful BPA projects operate in a cyclic best value analysis mode. There are two major components required for operation in this mode. The first is to institute a standard technical refresh process and the second is to conduct regularly scheduled best value reviews.

3.2.1 Technical Refresh Process

It is important to institute a standard technical refresh process to ensure comprehensive standards-compliant and best value products in BPAs. A technical refresh is generally considered to be a quotation submission by the BPA holder to remove End-of-Life (EOL) technology and substitute new technology for old technology. It may also include the insertion of new technology within the scope of the BPA and includes updates to the pricing offered on the BPA products and/or services.

In general, BPAs should be refreshed on a frequent basis as determined by market conditions. For IT, no less than once per month is recommended because the IT commercial market is evolving product and services offerings on a very rapid basis and price structures change even more frequently.

A standard process for the submission, review and acceptance of the technical refresh is critical to maintain consistency with the BPA holders and ensure that all of the important aspects of a best value review are addressed.

A sample technical refresh process from the DON IT Umbrella Program is included in Figure 3.1. This process may be tailored as appropriate for each BPA but should be defined and documented in each case.

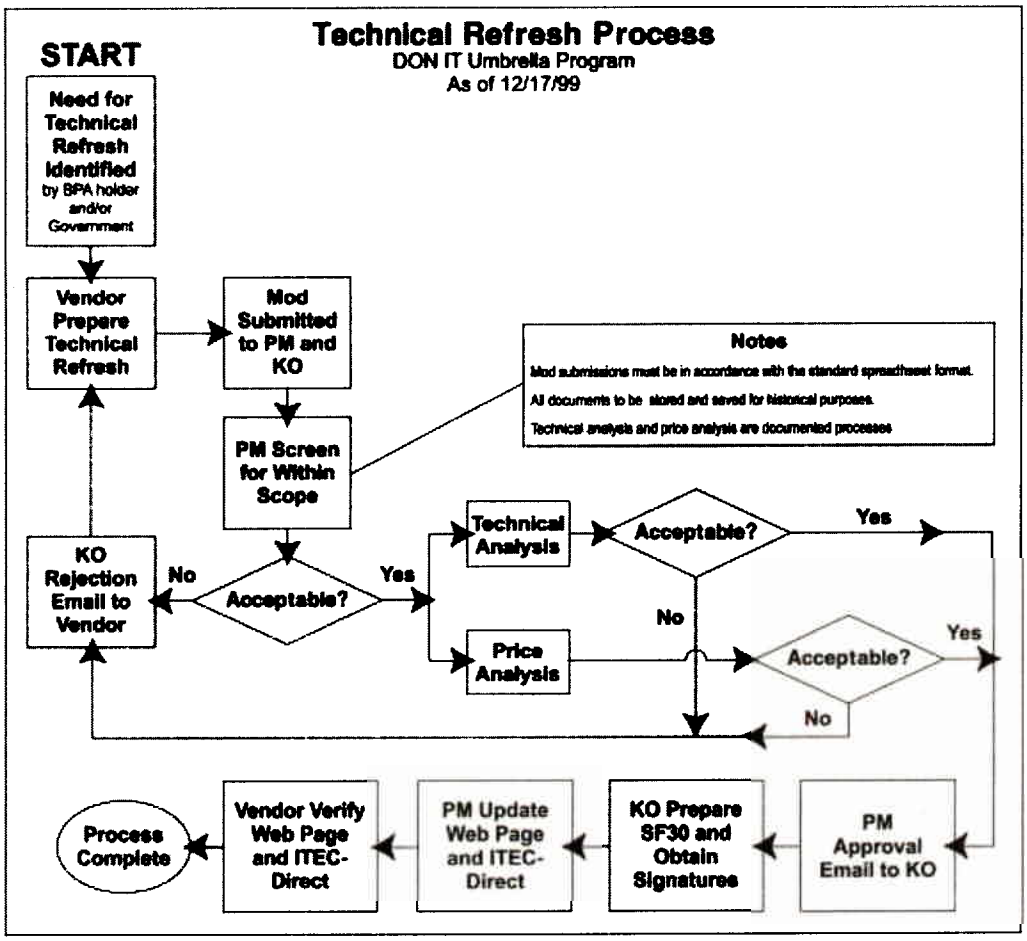

Figure 3.1

3.2.1.1 Technical Analysis

Technical analysts knowledgeable of the requirements should perform the technical analysis. The technical analysis process may vary by BPA, but should be defined and documented for each BPA. However, the following best practices are consistently found in successful BPA management analysis processes:

- *Check Product Deletions:* Question products that are deleted for reasons other than EOL. Are the logistics in place for products already fielded? Is there an appropriate substitution for the products being deleted? How much of this product has been ordered by customers and do they still have options for repairs, maintenance, and spares? Are there any outstanding orders for this product that have yet to be delivered? If so, can they still make delivery? If not, how does the BPA holder intend to compensate or satisfy the customer?
- *Check Product Substitutions:* Are the logistics in place for products already fielded? Is this an equivalent or better substitution? Is this substitution compatible with the previous product? Is there any capability in the old product that is not included in the substituted product? Is this product compliant with the commercial and DON standards (*IT Standards Guide* (ITSG), *IT Infrastructure Architecture* (ITIA)) imposed? Is there any new technology being introduced that

warrants further investigation or testing for standards compliance and interoperability? Is there a new or special software driver that must be provided, outside of the standard drivers provided by the Operating System?

- ❑ *Check Product Additions:* Is this product within scope of the BPA? Is this product compliant with the commercial and DON standards (e.g., ITSG, ITIA) imposed? Is interoperability an issue with this product? Is this product a high-risk new technology that should be tested for compliance to standards and interoperability? **Although vendors may claim standards compliance and interoperability, testing new technology products has often revealed problems in a DON environment that vendors were unaware of. For example, one vendor's implementation of a new standard may not be the same as another vendor's implementation.**

3.2.1.2 Price Analysis

Price analysts familiar with the product pricing structure, and who understand the technology offered under the BPA, should perform the price analysis. The price analysis process may vary by BPA but should be defined and documented for each BPA. During the price analysis, particular emphasis should be placed on items priced in excess of $2,500 and those items where large volume ordering is anticipated. However, the following best practices are found consistently in the process:

- ❑ Verify that the BPA Line Item Number (BLIN) is actually on the BPA holder's current FSS and that the schedule has not expired. This is also the time to double check that a copy of the most current GSA schedule is on file.
- ❑ Verify that the pricing on the BPA is lower than the GSA pricing and consistent with the discount previously submitted (or better) if applicable.
- ❑ Check at least two other vendor's FSS prices to verify that the BPA still represents best value when price is considered. This may be performed on same make/model, same salient characteristics, or in the case of services, same/similar labor categories. Note that fair market value adjustments may need to be made to pricing based upon bundle options. If the submitted BPA pricing does not represent best value, then the item should not be accepted. Verifying pricing for each BLIN is a time-consuming process, therefore, ensure that the BPA submission matches a high demand requirement.
- ❑ Verify that discounts submitted during the evaluation process, and that were part of the basis for BPA issuance, are continued or bettered in this submission. These discounts should be maintained or improved throughout the life of the BPA.
- ❑ Verify that the refresh matches a requirement and that best value still exists.

3.2.2 Best Value Reviews

3.2.2.1 Regularly Scheduled Program Management Review (PMR)

Regular face-to-face PMRs between Government officials maintaining the BPA and the BPA holder should be scheduled to review the best value of the BPA and insure progress is made on all outstanding issues. The goal of the PMR is to ensure that the BPA compares favorably with the rest of the FSS market. Particular emphasis is placed on evaluating performance metrics during the PMR. The results of the PMR should be documented. Recommended topics for the agenda include:

- *Cost Metrics:* Cost metrics should at least include discount structure and volume of sales. Note that discount and volume of sales data is often directly related to performance. Declining volume of sales can often be a result of inadequate product submissions, poor contractor performance, or poor value to the customer.
- *Schedule Metrics:* Schedule metrics should at least include delivery times for orders and frequency of technical refreshes. Any negative trends should be discussed and future preventative measures established and agreed to. An in-depth review of late deliveries should be accomplished and, if warranted, discussed with the contracting officer.
- *Performance Metrics:* Performance metrics should at least include the quality of product submissions and the BPA holder's performance on product deliveries, services, and warranty support. At least once annually, customer satisfaction surveys should be obtained and reviewed at the PMRs.
- *Changes to the BPA holder's organization or management should be discussed at the earliest opportunity, not just reserved for PMRs.* Transition plans and actions should be agreed to. High turnover rate of key contractor personnel should be strongly discouraged.

3.2.2.2 Monthly Reports

Monthly reports should be supplied to the Government by the BPA holder. The focus of these reports is to provide a constant review of performance metrics. At least a sales and exception report should be provided. However, the Government should always reserve the right, via a clause in the BPA, to increase reporting requirements up to and including a copy of all BPA orders if the Government deems it necessary.

The sales report provides data on all new BPA orders, including the customer name/address/phone, sales amount, and products ordered. This will allow tracking of performance, if necessary, and provide data input to customer feedback.

The exception report is used to identify all problem areas including, but not limited to, late deliveries, orders that cannot be fulfilled due to lack of product or EOL, and warranty support issues. The BPA holder should be required to identify the cause for each exception and the actions taken to remedy the exception.

3.3 GSA Schedule

In the proper management of BPAs, it is imperative that the Government maintain a file copy (electronic or paper) of the vendor's current GSA schedule. It should be included in the BPA Terms and Conditions that a copy of the FSS is provided to the Government at the time of submission and within seven days of any future modifications. An up-to-date copy of the FSS will allow verification of submitted items and prices as well as the scheduled expiration date.

3.4 BPA Cancellation

BPAs not providing best value should be canceled if the vendor cannot adequately resolve the issues within a reasonable amount of time (generally 60 to 90 days but the timeline may be tailored to the particular situation). Issues and status of problem areas are tracked during the status reviews. If they are not resolved within 30 days, the BPA holder should be given notice of the Government's intent to cancel the BPA within 30 to 60

days, and a special PMR should be held to discuss a plan of action. If the BPA holder has not resolved the issues discussed at the special PMR and 30 to 60 days have elapsed since intent-to-cancel notice was given, then the BPA should be canceled.

List of Acronyms and Glossary of Terms

BLIN	BPA Line Item Number
CBD	Commerce Business Daily
CICA	Competition in Contracting Act
DFARS	Defense Federal Acquisition Regulation Supplement
DoD	Department of Defense
DoD ESI	Department of Defense Enterprise Software Initiative
DON	Department of the Navy
EOL	End Of Life
Fair market value	A price based on reasonable costs under normal competitive conditions and not lowest possible cost
FAR	Federal Acquisition Regulation
FSS	Federal Supply Schedule
FSS BPA	Federal Supply Schedule Blanket Purchase Agreement
GAO	General Accounting Office
G&PM	Guidance and Policy Memorandum
GSA	General Services Administration
GSA Advantage	An electronic on-line shopping and ordering system which provides access to several thousand contractors and millions of services and products available from GSA Federal Supply Schedules
GSA Schedule	A listing of contracts awarded by GSA Federal Supply Service. GSA awards contracts to multiple companies supplying comparable services and products.
Incidentals	Items for which GSA has not negotiated or evaluated prices. Ordering officers must comply with the requirements for full and open competition by following all applicable acquisition regulations and determining price reasonableness.
IDIQ	Indefinite Delivery/Indefinite Quantity
IT	Information Technology
ITIA	Information Technology Infrastructure Architecture
ITSG	Information Technology Standards Guidance
ITEC-Direct	Information Technology Electronic Commerce Direct, the DON's on-line catalog for Standards compliant IT

IPT	Integrated Product Team
J&A	Justification and Approval
Key contractor personnel	Personnel employed by the BPA holder, such as a Program manager, considered by the ordering officer as essential for successful performance
KO	Contracting Officer
LOCA	Lowest Overall Cost Alternative
Local BPA	A BPA issued to satisfy requirements of a single site or customer
Make/model	When a specific brand name and product is required to meet the customer requirement
Maximum order threshold	The level, or trigger point, for seeking additional price reductions
MOBIS	Management, Organizational and Business Improvement Services
NAPS	Navy Acquisition Procedures Supplement
Ordering officers	Individual authorized in writing to place orders against IDIQ contracts or BPAs
PM	Program (or Project) Manager
PMR	Program Management Review
POC	Point of Contact
RFQ	Request for Quotation
Salient characteristics	Technical features defined in product specifications that are required to meet the needs of a customer
SOW	Statement of Work
Teaming agreements	When two or more Schedule contractors join together to provide a solution to meet customer needs

Attachment 1 • General Services Administration Ordering Procedures For Services (Requiring A Statement Of Work)

Context and Summary

Familiarity with the Federal Acquisition Regulation (FAR) 8.4 is essential when using FSS. In addition to the procedures of FAR 8.4, the General Services Administration (GSA) can and has issued additional guidance and ordering procedures for use of FSS. Specifically, the GSA has done this in establishing ordering procedures for services. This attachment provides the most current published procedures, such as issuing a Request for Quote (RFQ) with a Performance Based Statement of Work to three or more Schedule contractors. These procedures reiterate provisions contained in every FSS for IT Professional Services as well as the Management, Organizational and Business Improvement Services (MOBIS). As these procedures may change over time, contracting officers and ordering officers should refer to the GSA Federal Supply Service Web Site (www.fss.gsa.gov) for any updates.

Relationship to BPA Best Practices

The Ordering Procedures for Services prescribes specific procedures for establishing BPAs and issuing task orders for services under the FSS. Attachment 1 is relevant to the following sections:

- Paragraph 1.3, Best Value Approach
- Paragraph 1.4, Request for Quotes (RFQ)
- Paragraph 1.5, Evaluation of Quotes
- Paragraph 1.6, Debriefing of Vendors
- Paragraph 2.2, Acquiring Services Under FSS BPAs
- Paragraph 2.3, Best Value Approach

Updated 09/19/2000

General Services Administration Ordering Procedures For Services (Requiring A Statement Of Work)

FAR 8.402 contemplates that GSA may occasionally find it necessary to establish special ordering procedures for individual Federal Supply Schedules or for some Special Item Numbers (SINs) within a Schedule. GSA has established special ordering procedures for services that require a Statement of Work. These special ordering procedures take precedence over the procedures in FAR 8.404 (b)(2) through (b)(3).

GSA has determined that the prices for services contained in the contractor's price list applicable to this Schedule are fair and reasonable. However, the ordering office using this contract is responsible for considering the level of effort and mix of labor proposed to perform a specific task being ordered and for making a determination that the total firm-fixed price or ceiling price is fair and reasonable.

(a) When ordering services, ordering offices shall—

(1) Prepare a Request (Request for Quote or other communication tool):

(i) A statement of work (a performance-based statement of work is preferred) that outlines, at a minimum, the work to be performed, location of work, period of performance, deliverable schedule, applicable standards, acceptance criteria, and any special requirements (i.e., security clearances, travel, special knowledge, etc.) should be prepared.

(ii) The request should include the statement of work and request the contractors to submit either a firm-fixed price or a ceiling price to provide the services outlined in the statement of work. A firm-fixed price order shall be requested, unless the ordering office makes a determination that it is not possible at the time of placing the order to estimate accurately the extent or duration of the work or to anticipate cost with any reasonable degree of confidence. When such a determination is made, a labor hour or time-and-materials quote may be requested. The firm-fixed price shall be based on the prices in the schedule contract and shall consider the mix of labor categories and level of effort required to perform the services described in the statement of work. The firm-fixed price of the order should also include any travel costs or other direct charges related to performance of the services ordered, unless the order provides for reimbursement of travel costs at the rates provided in the Federal Travel or Joint Travel Regulations. A ceiling price must be established for labor-hour and time-and-materials orders.

(iii) The request may ask the contractors, if necessary or appropriate, to submit a project plan for performing the task, and information on the contractor's experience and/or past performance performing similar tasks.

(iv) The request shall notify the contractors what basis will be used for selecting the contractor to receive the order. The notice shall include the basis for determining whether the contractors are technically qualified and provide an explanation regarding the intended use of any experience

and/or past performance information in determining technical qualification of responses.

(2) Transmit the Request to Contractors:

(i) Based upon an initial evaluation of catalogs and price lists, the ordering office should identify the contractors that appear to offer the best value (considering the scope of services offered, pricing and other factors such as contractors' locations, as appropriate).

(ii) The request should be provided to three (3) contractors if the proposed order is estimated to exceed the micro-purchase threshold, but not exceed the maximum order threshold. For proposed orders exceeding the maximum order threshold, the request should be provided to additional contractors that offer services that will meet the agency's needs. Ordering offices should strive to minimize the contractors' costs associated with responding to requests for quotes for specific orders. Requests should be tailored to the minimum level necessary for adequate evaluation and selection for order placement. Oral presentations should be considered, when possible.

(3) Evaluate Responses and Select the Contractor to Receive the Order:

After responses have been evaluated against the factors identified in the request, the order should be placed with the schedule contractor that represents the best value. (See FAR 8.404)

(b) The establishment of Federal Supply Schedule Blanket Purchase Agreements (BPAs) for recurring services is permitted when the procedures outlined herein are followed. All BPAs for services must define the services that may be ordered under the BPA, along with delivery or performance time frames, billing procedures, etc. The potential volume of orders under BPAs, regardless of the size of individual orders, may offer the ordering office the opportunity to secure volume discounts. When establishing BPAs ordering offices shall—

(1) Inform contractors in the request (based on the agency's requirement) if a single BPA or multiple BPAs will be established, and indicate the basis that will be used for selecting the contractors to be awarded the BPAs.

(i) SINGLE BPA: Generally, a single BPA should be established when the ordering office can define the tasks to be ordered under the BPA and establish a firm-fixed price or ceiling price for individual tasks or services to be ordered. When this occurs, authorized users may place the order directly under the established BPA when the need for service arises. The schedule contractor that represents the best value should be awarded the BPA. (See FAR 8.404)

(ii) MULTIPLE BPAs: When the ordering office determines multiple BPAs are needed to meet its requirements, the ordering office should determine which contractors can meet any technical qualifications before establishing the BPAs. When multiple BPAs are established, the authorized users must follow the procedures in (a)(2)(ii) above and then place the order with the Schedule contractor that represents the best value.

(2) Review BPAs Periodically: Such reviews shall be conducted at least annually. The purpose of the review is to determine whether the BPA still represents the best value. (See FAR 8.404)

(c) The ordering office should give preference to small business concerns when two or more contractors can provide the services at the same firm-fixed price or ceiling price.

(d) When the ordering office's requirement involves both products as well as executive, administrative and/or professional, services, the ordering office should total the prices for the products and the firm-fixed price for the services and select the contractor that represents the best value. (See FAR 8.404)

(e) The ordering office, at a minimum, should document orders by identifying the contractor from which the services were purchased, the services purchased, and the amount paid. If other than a firm-fixed price order is placed, such documentation should include the basis for the determination to use a labor-hour or time-and-materials order. For agency requirements in excess of the micro-purchase threshold, the order file should document the evaluation of Schedule contractors' quotes that formed the basis for the selection of the contractor that received the order and the rationale for any trade-offs made in making the selection.

09/19/2000

Attachment 2 • General Accounting Office Decision B-278343

Context and Summary

The General Accounting Office protest decisions have affirmed the use of FSS and BPAs and the procedures of FAR 8.4. When agencies decide to issue a Request for Quote, the RFQ must provide guidance on the evaluation (or selection) criteria that will be used by the agency to choose from among the competing FSS or BPA holders. This GAO decision was issued in response to a protest filed by COMARK Federal Systems following a competition among BPA holders conducted by the Department of Health and Human Services. The RFQ did not specify whether selection would be on a best value basis or low price. This decision reaffirms the general rule that when conducting a competition, whether among open market vendors or FSS contractors, if the RFQ (or solicitation) does not include evaluation factors other than price then it is assumed that price is the only evaluation factor.

Relationship to BPA Best Practices

This GAO Decision provides criteria for identifying evaluation factors when issuing RFQs to FSS contractors and FSS BPA holders. Attachment 2 is relevant to the following paragraphs:

- Paragraph 1.3, Best Value Approach
- Paragraph 1.4, Request for Quotes (RFQ)
- Paragraph 1.5, Evaluation of Quotes
- Paragraph 1.6, Debriefing of Vendors
- Paragraph 1.7, Legal Review
- Paragraph 2.3, Best Value Approach

Comptroller General
of the United States

Washington, D.C. 20548

Decision

DOCUMENT FOR PUBLIC RELEASE

The decision issued on the date below was subject to a GAO Protective Order. This redacted version has been approved for public release.

Matter of: COMARK Federal Systems

File: B-278343; B-278343.2

Date: January 20, 1998

Joseph P. Hornyak, Esq., Sonnenschein Nath & Rosenthal, for the protester.
Keith L. Baker, Esq., and Jeffrey E. Weinstein, Esq., Eckert Seamans Cherin & Mellott, LLC, for Sytel, Inc., an intervenor.
Kenneth E. Patton, Esq., and Ada E. Bosque, Esq., Department of Health and Human Services, for the agency.
Andrew T. Pogany, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Under request for quotations which asked vendors to identify a configuration of computer systems and related hardware and services on Federal Supply Schedule, where agency intended to conduct a technical evaluation and cost/technical trade-off, agency improperly failed to advise vendors of the basis for selection.

DECISION

COMARK Federal Systems protests the issuance of a delivery order to Sytel, Inc. under request for quotations (RFQ) No. 0008, issued by the Health Care Financing Administration, Department of Health and Human Services, for computer desktop workstations. COMARK principally argues that the agency improperly failed to advise vendors of the agency's actual needs and evaluated quotations in a manner that was inconsistent with the solicitation.

We sustain the protest.

Background

In June 1997, the agency announced that it would issue multiple blanket purchase agreements (BPAs) covering a variety of computer hardware, software, associated equipment and services pursuant to the General Services Administration (GSA) Federal Supply Schedule (FSS). The agency tentatively identified six vendors to receive for review BPA "packages," which included, among other things, a sample personal computer specification, a document entitled "BPA Evaluation Requirements Criteria," and the agency's terms and conditions for future delivery orders to be issued under the BPA. The BPA package required the submission of a demonstration workstation to undergo a benchmark test and specified that the proposed unit have a hard drive capable of storing 1 gigabyte (GB) of data. In July, question and answer sessions were conducted and based on these sessions, as well as past performance evaluations, the agency selected four vendors, including COMARK and Sytel, to receive BPAs. On August 6, the agency

revised the BPA specifications to require a hard drive capable of storing a minimum of 2 GB of data. Benchmark demonstrations were performed by the agency from mid-August through mid-September. As relevant here, COMARK's "Plus Data" unit, which it proposed to meet the BPA specifications, successfully passed the benchmark demonstration, as did two models from Sytel and two from another vendor, BTG, Inc. These three firms signed and accepted the BPAs on September 4.

On September 18, the agency issued RFQ No. 0008 to the three firms via electronic mail. The RFQ called for a quantity of 1,950 desktop workstations and specifically stated that it was being issued "under [the agency's] BPA." The BPA, in turn, specified that it was issued "[p]ursuant to GSA Federal Supply Contract[s]." The RFQ contained numerous specifications, some of which were followed by the parenthetical designation "(minimum)." Among the latter, the RFQ included a requirement for a "2 GB Hard Disk (minimum)." The RFQ also required a 3-year on-site warranty for all items. The RFQ did not contain any evaluation criteria.

From September 23 through September 29, the agency received quotes, which were rated on a 1,000-point system with eight categories, including system design, features, performance, and price (which accounted for [deleted] percent of the total score). COMARK submitted two quotes; the chart below reflects its lower-priced quote. The evaluation results contained a pricing error that significantly reduced COMARK's rating; we show below the total scores and prices, as the agency has corrected them in its post-protest calculations. The total evaluated points includes both technical and price factors--that is, the scores reflect a combination of technical merit and price in a composite rating. The evaluation results, in relevant part, were as follows:

Vendor	Total Evaluated Score (Technical and Price)	Price
Sytel Dell	[deleted]	[deleted]
Sytel Opal	[deleted]	[deleted]
COMARK Plus Data	[deleted]	[deleted]
BTG Model A	[deleted]	[deleted]
BTG Model B	[deleted]	[deleted]

Based on the mistaken evaluation results (that is, results which, as noted above, assumed a significantly higher price and therefore a lower total evaluated score for COMARK), the agency's Project Officer made the following determination:

> Based on the quotations and the evaluation criteria, I recommend the purchase of the [Sytel] Dell system as a 'best value' decision. The Dell ranked highest on the [agency's] evaluation test in system design, system configuration and performance, as well as in overall scoring. It has a newer chipset [deleted] than the cheaper, and closest technically acceptable competitor, [deleted]. In addition, the [Sytel] Dell system has a [deleted] GB hard drive [versus] the 2 GB drive found on the less expensive machines.

Accordingly, the delivery order was issued to Sytel on September 30, 1997. This protest followed.

The protester argues that the RFQ was silent as to what evaluation criteria the agency would follow, and that the agency nevertheless improperly engaged in a "best value"

procurement instead of selecting the low, technically acceptable quote.[1] The agency responds that best value determinations are permitted under the FSS.

The RFQ specifically referred to the BPA, which, in turn, stated that it was issued pursuant to the GSA FSS. Accordingly, the provisions of Federal Acquisition Regulation (FAR) Subpart 8.4 apply. Those provisions anticipate agencies reviewing vendors' federal supply schedules--in effect, their catalogs--and then placing an order directly with the schedule contractor that can provide the supply (or service) that represents the best value and meets the agency's needs at the lowest overall cost. FAR § 8.404(b)(2) (June 1997).[2] When agencies review competing vendors' schedule offerings, they are permitted to make a best-value determination that takes into account "[s]pecial features of one item not provided by comparable items which are required in effective program performance." FAR § 8.404(b)(2)(ii)(A).[3] When agencies take this approach, there is no requirement that vendors receive any advance notice, regarding either the agency's needs or the selection criteria.

Agencies, however, may shift the responsibility for selecting items from schedule offerings to the vendors, by issuing solicitations (typically in the form of RFQs) that call on the vendors to select, from among the hundreds (or thousands) of possible configurations of the items on their schedules, a particular configuration on which to submit a quotation. It is certainly understandable that an agency would prefer for the vendors to construct these configurations; particularly in the area of information technology, the large number of possible combinations might make it difficult for agency personnel unfamiliar with the particular equipment or related technical issues to select one configuration by reviewing vendors' schedule offerings.[4]

Yet once an agency decides, by issuing an RFQ (a procedure not mentioned in FAR Subpart 8.4), to shift to the vendors the burden of selecting items on which to quote, the agency must provide some guidance about the selection criteria, in order to allow vendors

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[1] COMARK also alleges that it was orally advised by a contract specialist after the benchmark demonstrations that "price [would] now determine" the winner of this competition. The agency denies that such advice was given. In light of our resolution of the protest, we need not resolve this factual dispute or the other protest grounds raised by COMARK.

[2] The modification to this provision introduced by Federal Acquisition Circular (FAC) 97-01 deleted the reference in this paragraph to "lowest overall cost." This modification (which, in any event, was not yet in effect when the RFQ at issue in this protest was issued) would not change our analysis. We note, however, that the requirement that FSS purchases, in order to be exempt from the mandate for full and open competition, be made at the "lowest overall cost" has a statutory basis, and thus cannot be removed by a modification to the regulation. 41 U.S.C. § 259(b)(3)(B) (1994).

[3] FAC 97-01 slightly reworded the provision, but without changing its meaning in a way relevant here, and shifted its location to FAR § 8.404(b)(2)(i).

[4] The same may apply for furniture, another area where schedules are widely used. See, e.g., Design Contempo, Inc., B-270483, Mar. 12, 1996, 96-1 CPD ¶ 146.

to compete intelligently.[5] Haworth, Inc.; Knoll N. Am., Inc., 73 Comp. Gen. 283, 286 (1994), 94-2 CPD ¶ 98 at 5. Where the agency intends to use the vendors' responses as the basis of a detailed technical evaluation and cost/technical trade-off, the agency has elected to use an approach that is more like a competition in a negotiated procurement than a simple FSS buy, and the RFQ is therefore required to provide for a fair and equitable competition. See EMC Corp., B-277133, Sept. 4, 1997, 97-2 CPD ¶ 64 at 3; L.A. Sys., Inc., B-276349, June 9, 1997, 97-1 CPD ¶ 206 at 3-4. While an agency need not identify detailed evaluation criteria in an RFQ, even where it is asking vendors to select items from their schedules and where the agency intends to conduct a technical evaluation, it must indicate, at a minimum, the basis on which the selection is to be made, including whether the agency intends to select the low-cost technically acceptable quotation, or whether the agency is willing to consider paying a higher price for superior technical features (that is, whether it contemplates performing a cost/technical trade-off).

In the field of information technology, where schedule contractors typically have a wide spectrum of items--from cut-rate to cutting-edge--on their schedules, an FSS vendor needs guidance from the agency in order to rationally decide which products to select in responding to an RFQ. To use an example drawing on the facts of this protest, when the agency is asking a computer vendor to decide whether to submit a quotation for a hard drive with a 2 GB storage capacity for a lower price, or one with a [deleted] GB capacity at a higher price--where both possibilities are covered by the schedule contract--the vendor cannot intelligently make that choice without guidance about the basis on which the agency intends to make its selection.

In the multi-million dollar acquisition at issue in this protest, the agency intended to conduct a detailed technical evaluation and cost/technical trade-off, yet it asked vendors to submit quotations with less guidance than is required to be given in a solicitation for a far smaller purchase under the simplified acquisition procedures of Part 13 of the FAR. See FAR § 13.106-2(a)(1) ("Solicitations shall notify suppliers of the basis upon which award is to be made."). Specifically, the agency apparently viewed the specifications set out in the RFQ only as a statement of the minimum it was willing to purchase, and it was willing to pay a higher price for greater technical capabilities. It failed, however, to advise vendors of that critical fact.

The agency suggests that the protester's challenge to the RFQ's failure to set out evaluation criteria should be dismissed as untimely, pursuant to 4 C.F.R. § 21.2(a)(1) (1997). We believe that the defect in the RFQ only became apparent when the protester learned that the agency's needs were not for selection of the low-priced, technically acceptable quotation (as the protester reasonably expected, as explained below). Similarly, we reject the agency's contention that the RFQ made clear, through the use of the word "minimum" next to certain specifications, that a best-value determination might be the basis of the source selection here. In our view, the parentheticals in the list of specifications did not by themselves indicate the intended basis of selection, since they

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[5] Where an agency uses the RFQ simply to request price quotations for items identified by the agency (for example, where the agency is seeking a price reduction), the concern discussed here does not arise, since the agency is asking the vendors only to quote prices, not to choose the items on which to quote. See FAR § 8.404(b)(3) (FAC 97-01) (agency shall generally seek price reductions where the value of the purchase exceeds the maximum order threshold).

would have been consistent with either a lowest-price, technically acceptable approach or a best-value one.

The protester contends that, on one of the two technical factors on which the selection decision rested, the capacity of the hard drive, it could have quoted an item equal in capacity to that quoted by Sytel. The agency does not deny that the protester's FSS contract includes such an item.[6] The protester contends that the reason that it did not quote a configuration with greater capabilities was that it understood the RFQ to mean that the agency's needs were for the low-priced, technically acceptable configuration. Such a reading of a solicitation that does not otherwise explain the agency's evaluation criteria was reasonable.[7] See Vistron, Inc., B-277497, Oct. 17, 1997, 97-2 CPD ¶ 107 at 4 (where a solicitation does not contain evaluation factors other than price, general rule is that price is the sole evaluation criterion). We conclude that the RFQ did not accurately state the agency's requirements and that the protester was prejudiced by the agency's action in this regard.

Because the agency requested quotations from vendors without advising them that the agency did not require the low-priced, technically acceptable configuration, we sustain the protest. We recommend that the agency amend the RFQ to advise the firms holding BPAs of the agency's needs, including whether the agency is willing to conduct a cost/technical trade-off, if configurations are quoted that exceed the minimum specifications stated in the RFQ. If, upon reviewing quotations received in response to the amended RFQ, the agency selects other than Sytel, we recommend that the agency cancel that firm's purchase order and issue a purchase order to the vendor selected. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days after receipt of this decision.

The protest is sustained.

Comptroller General
of the United States

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[6] While the hard drive benchmark tested by the protester did not have a [deleted] GB capacity, there was apparently no requirement that vendors quote configurations that had been benchmark tested. Similarly, the protester contends that it could offer, apparently through its FSS contract, the chipset that the agency preferred.

[7] The agency argues that, since the protester did not submit the lowest technically acceptable quotation, it is not an interested party for purposes of pursuing this protest. (The protester contends that the only quote which was lower than its own was ineligible for selection.) Since the agency's needs were apparently not for the low-priced, technically acceptable solution and we are recommending that the agency amend the solicitation accordingly, we conclude that the protester is an interested party. See 4 C.F.R. § 21.0(a).

Attachment 3 • General Accounting Office Decision B-282469

Context and Summary

The use of FSS under the Multiple Award Schedules Program is compliant with the Competition in Contracting Act when orders are placed according to the procedures of the Federal Acquisition Regulation (FAR) Part 8.4. Because GSA has not negotiated or evaluated prices for those products and services not listed in Schedule contracts, this means that orders placed under FSS must contain only items which are available on a FSS contract. If a requirement contains items not available on a FSS, the contracting officer or ordering officer must follow all applicable acquisition regulations for open market purchases appropriate to the dollar threshold (i.e., under $2500 would follow micro purchase procedures). This GAO decision discusses the statutory and legal issues related to "incidentals" or open market items when combined with orders under FSS or FSS BPAs.

Relationship to BPA Best Practices

This GAO Decision established clear ground rules for inclusion of non-FSS (or open market) items in FSS BPAs and delivery orders. Attachment 3 is relevant to the following paragraphs of the Guide:

- Paragraph 1.8, Creating the FSS BPA
- Paragraph 2.7, Incidental Items
- Paragraph 3.2.1.2, Price Analysis
- Paragraph 3.3, GSA Schedule

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Pyxis Corporation

File: B-282469; B-282469.2

Date: July 15, 1999

Paul W. Cobb, Jr., Esq., and Leslie H. Lepow, Esq., Jenner & Block, for the protester.
Jeff Arbuckle for OmniCell Technologies, Inc., an intervenor.
Maj. David Newsome, Jr., Department of the Army, for the agency.
Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where an untimely issue raised by the protester provides an opportunity to clarify the caselaw concerning the ordering of non-Federal Supply Schedule (FSS) items in connection with an FSS buy, a matter which the General Accounting Office (GAO) views as of widespread interest to the procurement system, GAO will consider this issue pursuant to the significant issue exception to its timeliness rules.

2. An agency may no longer rely on the "incidentals" test to justify the purchase of non-FSS items in connection with an FSS buy; where an agency buys non-FSS items, it must follow applicable acquisition regulations.

3. Agency reasonably issued delivery orders to FSS vendor whose hospital medication and supply dispensing system offered features that satisfied the agency's needs, rather than to the protester, another FSS vendor, whose comparably priced system did not satisfy these needs.

DECISION

Pyxis Corporation protests the issuance of delivery order Nos. DADA10-99-F-0194, DADA10-99-F-0216, and DADA10-99-F-0217, to OmniCell Technologies, Inc. by the United States Army Medical Command, Department of the Army, for automated medication and supply dispensing equipment and software, known as a "point of use" (POU) system for, respectively, Womack Army Medical Center, Madigan Army Medical Center, and Walter Reed Army Medical Center. The delivery orders were issued under OmniCell's Federal Supply Schedule (FSS) contract No. V797P-3406K for medical equipment and supplies. Pyxis contends the agency improperly issued the orders to OmniCell.

We sustain the protest.

For each medical center, the agency required a POU system that would link and provide automated access to medication and supply information at the patient level, while interfacing with existing and future patient information systems and billing networks. Contracting Officer's (CO) Statement, May 10, 1999, at 1. The POU system would identify the specific supply and pharmacy costs involved with treating individual patients by case, diagnosis, and provider. As relevant here, by e-mail message dated December

14, 1998, from the agency to Pyxis, the agency described its urgent requirement for a POU system which "utilizes existing local area network infrastructure and is consistent with DOD [Department of Defense] standards for architecture (WIN NT) [Windows NT]." Protest, Apr. 8, 1999, Tab A; see also Agency Report, May 10, 1999, Tab I, Memorandum--Policy for Military Health Services System Operating Systems, Health Affairs Policy 96-058, Aug. 26, 1996 (Windows NT workstations and servers to be the standard). On December 14, the agency requested FSS and product information from Pyxis and OmniCell, the two firms which had FSS contracts for POU equipment. Pyxis and OmniCell subsequently submitted relevant product information which was reviewed by the agency between December 17, 1998 and January 8, 1999.

In reviewing the product information, the agency determined that OmniCell's system satisfied the agency's needs, while the comparably priced Pyxis system did not. CO Statement at 4. The most significant difference between the two systems was that OmniCell's system was Windows NT compliant at the time of the agency's review, while Pyxis, as stated in its product submission, "was in the process of implementing Windows NT servers." Supplemental Protest, May 20, 1999, at 12. (Pyxis also contemporaneously advised the agency by e-mail message dated December 18, 1998, that its architecture would be Windows NT compliant by the "MARCH/APRIL timeframe of 1999," Protest, Tab C, and by letter dated March 25, 1999, Pyxis announced that its Windows NT-compliant servers were now commercially available. Supplemental Agency Report, June 2, 1999, encl. 1.)

On March 15, the agency issued a delivery order for $293,990 to OmniCell for a POU system at Womack, and on March 26, the agency issued two delivery orders--one for $1,993,730 and one for $799,760 to OmniCell for POU systems at Madigan and Walter Reed, respectively. During the pendency of this protest, OmniCell delivered the three POU systems.

Ordering of Non-FSS Items Issue

Pyxis argues that the agency improperly ordered a number of non-FSS items under each delivery order from OmniCell. The record shows that the product and price list submitted by OmniCell in response to the agency's December 14 request for FSS and product information did not purport to be the firm's FSS product and price list. Rather, labeled "Confidential Internal Price List," this list included, in addition to many items that were on OmniCell's FSS, other, non-FSS items; moreover, even for the FSS items, some of the prices on the list varied from OmniCell's FSS prices. Agency Report, Tab M, OmniCell Product Submission, Confidential Internal Price List, at 38; Comments, May 26, 1999, at 6. The agency states that it "asked for the FSS, and that is what [it] thought it received [from OmniCell]." Supplemental Agency Report at 9. It therefore appears that the agency made no effort to ascertain whether OmniCell's submission was actually an FSS price list. The agency concedes it ordered several non-FSS items from OmniCell; it also appears that the agency paid higher prices for some of the FSS items than the prices actually on OmniCell's FSS.

Citing ViON Corp., B-275063.3, B-275069.2, Feb. 4, 1997, 97-1 CPD ¶ 53 at 3-4, however, the agency maintains that all of the non-FSS items ordered from OmniCell were incidental to the overall acquisition and the agency's need to have a complete POU system, and that the price of these items represented an insignificant percentage of the total value of each delivery order. Supplemental Agency Report at 9-10. For example, under the Womack delivery order, one non-FSS item valued at $15,000 was ordered (5 percent of the total purchase price); under the Madigan delivery order, three non-FSS

items valued at $51,420, $7,715, and $38,565 were ordered (4 percent of the total purchase price); and under the Walter Reed delivery order, two non-FSS items valued at $64,275 and $7,175 were ordered (6 percent of the total purchase price). Id. at 9.

Pyxis responds by stating that the agency's "incidentals" and "insignificant" arguments are untenable in light of the holding in ATA Defense Indus., Inc. v. United States, 38 Fed. Cl. 489 (1997). In ATA, the court pointed out that pursuant to 10 U.S.C. § 2304(a)(1)(A), unless an exception applies, an agency "shall obtain full and open competition through the use of competitive procedures," and held that "[t]here is no exception that even arguably covers 'incidentals.'" ATA, 38 Fed. Cl. at 503. The court continued by stating that "unless a product or service falls within an exception contained in Section 2304 or can be classified as de minimis, Section 2304 mandates that the product be purchased on a competitive basis using a competitive procedure as defined in [10 U.S.C. §2302]. There is no exception covering 'incidentals.'" Id.

Our review of the chronology of the protest leads us to conclude that Pyxis failed to assert the bid protest ground concerning the ordering of non-FSS items in a timely fashion. Under our Bid Protest Regulations, a protest based on other than alleged improprieties in a solicitation must be filed not later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1999). Here, Pyxis received the agency's administrative report on May 10, 1999. In this report, the agency included copies of the three delivery orders issued to OmniCell; each delivery order included the number and type of item ordered, and unit and extended prices for each item. Agency Report, Tabs D, G, and F. On May 20, Pyxis filed a supplemental protest in which it made several arguments, none of which involved the ordering of non-FSS items. On May 26, Pyxis filed comments on the agency report. (Our Office granted an extension to Pyxis for the filing of comments.) In these comments, for the first time, Pyxis raised the issue of the agency's ordering of non-FSS items. Comments at 5-7. Pyxis discloses in its comments that, not later than March 26, it had received a copy of OmniCell's FSS offerings at the time of the procurement through the Freedom of Information Act. Id. at 5-6. In its comments, Pyxis argued that "[i]t is clear from OmniCell's FSS that numerous items ordered by [the agency] were not on the FSS." Id. at 6.[8] We believe it is clear from this record that Pyxis knew of its basis for protest not later than May 10 when it received as part of the agency report copies of the three delivery orders and was able to compare information in these orders to information on OmniCell's FSS. Pyxis did not raise the non-FSS items issue within 10 days of receiving the agency report in its timely filed supplemental protest, but instead, raised this issue in its comments, 16 days after it knew of its basis for protest, thus rendering the issue untimely.

Nevertheless, we will consider this issue pursuant to the significant issue exception to our timeliness rules. 4 C.F.R. § 21.2(c). We do so in view of the conflict in this area of the law between the Court of Federal Claims' ATA decision and our prior decisions, the resolution of which is of importance to the procurement community. Moreover, the issue itself--the rules governing the ordering of non-FSS items in connection with an FSS buy--is one that we consider of widespread interest to the procurement system.

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[8] Pyxis went on to list items ordered, but not on OmniCell's FSS; it listed FSS items ordered, but priced higher than those available on OmniCell's FSS; and it calculated the percentage of the dollar value of each order which represented the prices of the non-FSS items. Id.

We are persuaded, in light of the analysis of the court in ATA, that there is no statutory authority for the "incidentals" test enunciated in ViON. We note that the General Services Administration (GSA), in its FSS Contractor Guide, states that "[f]or administrative convenience, non-contract items may be added to the Federal Supply Schedule BPA or the individual task order if the items are clearly labeled as such, applicable acquisition regulations have been followed, and price reasonableness has been determined for the items." The FSS Contractor Guide, Section B: Multiple Award Schedule Process, Incidental Items, pub.fss.gsa.gov/vendorguide/section-b.html. Thus, as GSA also recognizes, non-FSS items cannot be purchased from an FSS vendor unless applicable acquisition regulations have been followed.

We conclude that it was improper for the agency here to include non-FSS items in the delivery orders without ensuring that it had complied with the regulations governing purchases of those non-FSS items. In this case, for each delivery order, it is clear that the agency did not follow applicable acquisition regulations, as the non-FSS items ordered exceeded the $2,500 micro-purchase threshold. See Federal Acquisition Regulation (FAR) § 2.101. Accordingly, we sustain this ground of protest.

Other FSS Ordering Issue

Pyxis also argues that the purchases are flawed because, beyond advising vendors that the POU system had to be Windows NT compliant in accordance with Department of Defense policy, the agency failed to adequately state its requirements for the system. For example, Pyxis complains that the agency failed to disclose a requirement that both medications and supplies be stored in a single cabinet; that the POU system operate on one database, on one server; and that the system provide reports without requiring the user to manually consolidate results from multiple databases. Supplemental Protest at 5. Pyxis alleges these unstated requirements unduly restricted the competition and necessarily precluded the agency's consideration of the Pyxis POU system.

The protester does not dispute that, when an agency seeks to satisfy its needs through the use of the FSS, an agency is not required to seek further competition, synopsize the requirement, make a separate determination of fair and reasonable pricing, or consider small business set-asides. FAR § 8.404(a); Design Contempo, Inc., B-270483, Mar. 12, 1996, 96-1 CPD ¶ 146 at 2. When placing an order of more than $2,500 under the FSS, however, a procuring agency is required to reasonably ensure that a selection meets the agency's needs by considering reasonably available information about products offered under FSS contracts. See FAR §§ 8.404(a), (b)(2).

Here, the agency reviewed the product information of Pyxis and OmniCell, both of which had FSS contracts for medical equipment and supplies, Federal Supply Classification Group 65, Part II, Section D. Agency Report, Tab E. In selecting the supply or service that would meet an agency's needs, FAR § 8.404(b)(2)(i) provides that an ordering office may consider "[s]pecial features of the supply or service that are required in effective program performance and that are not provided by a comparable supply or service." Consistent with this provision, the agency concluded that the features of the OmniCell POU system, as opposed to those of the Pyxis system, would satisfy the agency's needs.[9]

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[9] No issue has been raised regarding the comparability of prices for the POU systems offered by Pyxis and OmniCell. To the extent Pyxis complains that the agency failed to seek price reductions from OmniCell, see FAR § 8.404(b)(3), the agency reports it sought, and received, price reductions from OmniCell. CO Statement at 4, 5.

In reviewing the product information submitted by both Pyxis and OmniCell, the agency noted that OmniCell's POU system was already Windows NT compliant in accordance with Department of Defense policy, as enunciated in 1996, while Pyxis was in the process of making its POU system Windows NT compliant, with Pyxis specifically advising the agency in its product submission and by e-mail message dated December 18, 1998, that this process would not be completed until March-April, 1999.10 Although Pyxis believes the agency should have waited until its POU system was Windows NT compliant before issuing the delivery orders, we point out that there was no requirement that the agency do so.

Further, in addition to the fact that the Pyxis POU system was not Windows NT compliant at the time of the agency's review of the product information and the issuance of the delivery orders, the agency identified additional features on the OmniCell POU system which satisfied its needs. For example, OmniCell's POU system stored medications and supplies in a single cabinet; OmniCell's system operated on one database, on one server;11 and OmniCell's system provided reports without requiring the user to manually consolidate results from multiple databases. Contrary to the protester's assertion, these features associated with the OmniCell POU system were not unstated requirements. Rather, in accordance with FAR § 8.404(b)(2)(i), the agency reasonably viewed these items as special features that materially differentiated OmniCell's POU system from the Pyxis system. Since a formal synopsis and solicitation process is not contemplated for ordering from the FSS, we have no basis to object to the agency's conclusion that the OmniCell POU system would satisfy its needs. See, e.g., National Office Sys., Inc., B-274785, Jan. 6, 1997, 97-1 CPD ¶ 12 at 4-5.

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[10] As noted above, by letter dated March 25, 1999, Pyxis advised the agency that its Windows NT-compliant POU system was now commercially available. However, the agency submitted information showing that Pyxis was still testing its Windows NT-compliant system in early April 1999. Supplemental Agency Report at 6.

[11] Pyxis complains that OmniCell's POU system does not operate using a single database, citing a page in OmniCell's "Policies and Procedures" portion of its product information that references, in the plural, "databases." Agency Report, Tab M, OmniCell Product Submission, Section 6: Policies and Procedures, at 13. The agency never had any doubt regarding whether OmniCell's system operated using a single database, and in the technical overview to OmniCell's product information, OmniCell states that its system "gathers data and archives it in a database. From this database, [a number of reports, as listed] can be generated." Agency Report, Tab M, OmniCell Product Submission, Section 1: Overview, at 11 (use of singular "database"). OmniCell also submitted during the pendency of this protest additional, publicly available product information, copyrighted from 1996 through 1998, which states in several places that OmniCell's POU system operates with a centralized data management area and uses a Windows NT operating system. See Letter from OmniCell to GAO (May 26, 1999) (summarizing publicly available product information). Pyxis ignores this information which supports the agency's position.

Recommendation

In light of the fact that OmniCell has delivered the POU systems, we recommend that Pyxis be reimbursed for its costs of preparing its product submission. As discussed in the decision, the issue we are sustaining was not timely raised by Pyxis, and we therefore are not recommending that the firm be reimbursed its costs of filing and pursuing its protest, including reasonable attorneys' fees. See 4 C.F.R. § 21.8(d)(1). As to the costs of preparing its product submission, Pyxis should submit its certified claim, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receipt of the decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Comptroller General
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