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Decision

Matter of: Noble Supply & Logistics, Inc.

File: B-418141

Date: January 16, 2020

Gary J. Campbell, Esq., G. Matthew Koehl, Esq., and Nathaniel J. Greeson, Esq., Womble Bond Dickinson-US, LLP, for the protester.
Nathan C. Guerrero, Esq., and Ginger Marshall, Esq., General Services Administration, for the agency.
Heather Self, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging agency's use of a highest-technically rated reasonably-priced source selection methodology when establishing single-award blanket purchase agreements (BPAs) with federal supply schedule (FSS) contract holders is sustained because the methodology does not satisfy the agency's statutory and regulatory obligation to establish BPAs with schedule contractors that can provide the supplies or services that represent the best value and result in the lowest overall cost alternative to meet the government's needs. When utilizing the FSS, an agency must use an evaluation methodology that provides a basis for a reasonable assessment of the price of performance under competing quotations, so as to establish whether one vendor's quotation would be more or less costly than another's. Here, there is no comparative assessment of prices, and any best-value determination will be made without a weighing of the value and benefits associated with a vendor's approach against its associated cost to the government.
 2. Protest challenging solicitation's required pricing structure is sustained because it is inconsistent with the terms of the underlying FSS contract.
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DECISION

Noble Sales Co., Inc., d/b/a Noble Supply & Logistics, Inc., a small business of Rockland, Massachusetts, protests the terms of request for quotations (RFQ) No. QSAB-RFQ-19001, issued by the General Services Administration (GSA) for the establishment of blanket purchase agreements (BPAs) under federal supply schedule (FSS) No. 51V for hardware store supplies and ancillary services. The protester argues

that the solicitation establishes an evaluation and source selection methodology that fails to consider price as required by law and regulation, and that the pricing requirements of the solicitation are inconsistent with the terms of the underlying FSS contract.

We sustain the protest.

BACKGROUND

On January 25, 2019, under the procedures of Federal Acquisition Regulation (FAR) subpart 8.4, the agency¹ issued the RFQ to vendors holding contracts under FSS No. 51V, Hardware Superstore. COS at 1 ¶ 5; AR, Tab 7, RFQ, at 1. The agency intends to establish four separate single-award BPAs, one each for the Departments of the Navy, Army, and Air Force, and the U.S. Marine Corps, with each BPA having a 1-year base period and four 1-year option periods. RFQ at 5, 20. The solicitation includes estimated total purchase volumes, inclusive of the base period and all option periods, of approximately: \$1.84 billion for the Navy; \$670 million for the Army; \$354 million for the Air Force; and \$481 million for the Marine Corps. Id. at 3-4.

Under GSA FSS No. 51V, Hardware Superstore, vendors offer a diverse line of products and related ancillary services normally found in, or offered by, a hardware store, home improvement center, or maintenance, repair, or operations provider. Supp. Memorandum of Law (MOL), attach. 1, GSA eLibrary Schedule Summary for FSS No. 51V, at 1. The established BPAs will include supplies and ancillary services that fall within three special item numbers (SINs) available under FSS No. 51V--SINs 105-001, 105-002, and 105-003. RFQ at 41. Vendors, or vendor teams, must hold FSS No. 51V contracts with all three SINs awarded at the time of quotation submission in order to be eligible for issuance of a BPA under the solicitation. Id.

Two of the SINs are for the provision of products: SIN 105-001--Hardware Store, Home Improvement Center, Industrial or General Supply Store, Industrial Maintenance Repair and Operations (MRO) Distributor-Store Front encompassing “[p]roducts within the scope of a hardware, general merchandise store, specialty supply store, or industrial supply store/distributor” to be provided through a “storefront”; and SIN 105-002--Hardware Store, Home Improvement Center, or MRO-Catalog encompassing the same

¹ The agency’s retail operations branch issued the solicitation as part of GSA’s 4th party logistics (4PL) program. Agency Report (AR), Tab 1, Contracting Officer’s Statement (COS) at 1 ¶ 2. Through the 4PL program GSA brings a vendor to a customer installation to provide retail store services and to make industrial products available for purchase by the customer agency. Id. at 1 ¶ 3. Under the 4PL program, GSA acts as an “integrator” performing the back-end contract administration work, such as monitoring order status and billing, paying commercial suppliers, and working with the customer agency to tailor inventory choices and availability online and at physical store locations. Id.

types of products as SIN 105-001 but offered through a catalog. AR, Tab 8, Solicitation for FSS No. 51V Contracts, at 1-4.

The third SIN is for the provision of ancillary services: SIN 105-003--Hardware Store, Home Improvement Center, or MRO-Services encompassing “[a]ll commercially available services typically performed in a Hardware Store” as “ancillary services for the products ordered through SIN 105-001 or 105-002” with service-only orders prohibited. AR, Tab 8, Solicitation for FSS No. 51V Contracts, at 4 (emphasis omitted). The ancillary services under SIN 105-003 include “commercially available, ancillary services typically performed in, and in the spirit and concept of, a hardware store and/or home improvement center.” RFQ at 6. The agency also “reserves the right to require any service that is commercially available and typically performed in a Hardware Store.” AR, Tab 5, RFQ amend. 2, attach. A, Questions and Answers (Q & A), at 2. The solicitation further explains the relationship between SIN 105-003 for ancillary services and the two SINs for products (105-001 and 105-002) as follows:

Any services performed are ancillary services for the products ordered through SIN 105-001 or 105-002 and related to the vendor’s management of their own inventory as is customary under a vendor-owned/ vendor-managed inventory arrangement. The 4PL Brick and Mortar stores, Tool Rooms/Issue Points, and satellite locations are Government Owned and Operated and shall not be confused with Contractor owned and/or operated. The vendor shall provide [an] ample amount of ancillary services necessary to ensure that all technical requirements for the 4PL locations are met.

RFQ at 6.

In terms of geographic scope, the solicitation calls for stocking industrial product inventory at up to 247 military installations--80 locations for the Navy, 76 for the Army, 67 for the Air Force, and 24 for the Marine Corps.² AR, Tab 5, RFQ amend. 2,

² The solicitation includes locations both in the continental United States (CONUS) and outside the continental United States (OCONUS), including some locations in foreign countries (e.g., Japan). AR, Tab 5, RFQ amend. 2, attach. 8, Industrial NextGen Locations. Of the 247 locations, 41 are OCONUS (22/80 for the Navy, 7/76 for the Army, 8/67 for the Air Force, and 4/24 for the Marine Corps), and 27 of those OCONUS installations are located in foreign countries (15/22 for the Navy, 4/7 for the Army, 5/8 for the Air Force, and 3/4 for the Marine Corps). Id.

The solicitation also includes both primary locations, which will be “immediately activated upon BPA establishment,” and optional locations, which will be evaluated but not activated immediately. RFQ at 5. The solicitation explains that the contracting officer may “provide express authorization to activate an optional location at a later date.” Id. The solicitation includes 28 primary locations (7/80 for the Navy, 1/76 for the

attach. 8, Industrial NextGen Locations. At 220 of the locations, the solicitation requires vendors to manage the stocked inventory under a vendor-owned/vendor-managed inventory (VMI) model. RFQ at 7. At 27 foreign locations, the solicitation provides for operation under a vendor-consignment inventory (VCI) model. Id. at 7-8.

Products supplied on a VMI basis are considered to be under the custody and control of the vendor until such time as the product is sold to and in the possession of the customer. RFQ at 7. Under this model, the government provides space for retail storefronts and associated warehouse space in which the vendor stocks and manages its inventory. Id. at 6-7. Conversely, products supplied on a VCI basis are owned by the vendor but “entrusted to GSA” and under the agency’s control and custody while in stock at the government-owned and operated storefront and warehouse locations. Id. at 8.

For VMI locations, the solicitation requires vendors to provide ancillary services such as “store lay-out and in-store promotions,” “coordination with GSA’s merchandising and marketing staff for product and service presentation, promotion, and communication efforts,” and outreach to Defense agency customers “at least quarterly to help anticipate future requirements, raise awareness of product trends, and to educate customers on available products/technology.” RFQ at 7-8. During the solicitation’s Q & A period, the agency explained that the solicited ancillary services include receiving inventory, stocking shelves, inventory management, and the provision of in-store customer service. AR, Tab 5, RFQ amend. 2, attach. A, Q & A, at 2-3. For VCI locations, however, the solicitation provides that foreign labor often is used “to provide basic store functions such as receipt, stocking, and merchandising of [inventory],” and requires that the vendor “liais[e] with the local Government representative for any in-store actions” when foreign labor is utilized. RFQ at 8.

The solicitation also requires vendors to provide in-store referral ordering and direct delivery services at almost every physical storefront location as well as at multiple locations without a physical storefront--both VMI and VCI. AR, Tab 5, RFQ amend. 2, attach. 8, Industrial NextGen Locations. These services require vendors to:

(1) conduct product research to assist in determining the best product to meet the customer’s needs; (2) provide an estimated product price; (3) provide an estimated delivery date; (4) coordinate customer pickup, as needed; and (5) manage the overall

Army, 3/67 for the Air Force, and 17/24 for the Marine Corps); the remaining 219 locations are optional. AR, Tab 5, RFQ amend. 2, attach. 8, Industrial NextGen Locations.

Further, the solicitation provides that the locations include a mix of different retail options, some of which require a daily vendor presence at the location and some of which do not. RFQ at 6-10; AR, Tab 5, RFQ amend. 2, attach. 8, Industrial NextGen Locations. The solicitation includes 125 locations that require a daily vendor presence (76/80 for the Navy, 15/76 for the Army, 11/67 for the Air Force, and 23/24 for the Marine Corps). AR, Tab 5, RFQ amend. 2, attach. 8, Industrial NextGen Locations.

referral order process and provide order status updates to the customer and GSA, as needed. RFQ at 9-10. Finally, the solicitation requires vendors, at every location, to make their catalogs available for customers to use to conduct their own product research. Id. at 10.

The solicitation instructs vendors to submit separate quotations for each military branch for which the vendors wish to compete. RFQ at 44-45. By submitting a quotation for a particular military branch, a vendor certifies that it “is capable of concurrently fulfilling BPA performance at all primary and optional locations” and certifies its “acceptance and capability to perform under” both VMI and VCI models. Id. at 42. For example, a vendor submitting a quotation for the Navy BPA certifies that it is capable of simultaneously providing supplies and attendant ancillary services at all 80 possible places of performance under the Navy BPA (58 CONUS and 22 OCONUS), including providing a daily presence at 76 of these locations.

Regarding pricing, the solicitation requires vendors to include their current FSS pricing for their entire catalog of SIN 105-001 and 105-002 products, any flat discounted rates from the catalogs, and four tiers of volume discounts. RFQ at 4, 45-46; AR, Tab 5, RFQ amend. 2, attach. B, Industrial Supplies Discounts; Tab 5, amend. 2, attach. C, Industrial Supplies Catalog. Upon establishment of the contemplated BPAs, any flat rate discount from the vendors’ FSS prices “will apply to all sales made under the BPA, for the life of the BPA, regardless of product, location, or cumulative sales volume.” RFQ at 4. The quoted tiered volume discounts “will apply when cumulative sales volume reach specified tiers.”³ Id.

The solicitation does not include instructions for pricing the required ancillary services to be provided under SIN 105-003. During the solicitation’s Q & A period, the agency instructed vendors to include the pricing for any ancillary services falling under SIN 105-003 within the prices provided for SIN 105-001 and 105-002. Specifically, the agency stated that “[t]he price of the services included under [SIN] 105-003 shall be included in the price of the products provided under SINs 105-001 and 105-002.” AR, Tab 5, RFQ amend. 2, attach. A, Q & A, at 2-3.

Among other things, the solicitation requires a vendor’s technical quotation to include descriptions of its distribution and transportation network; supply chain management system capabilities; end-to-end supply chain workflow; current and future warehouse or distribution center locations and capacity; product sourcing capabilities; capacity to onboard concurrently at up to 15 locations within the first 90 days of the BPA; shipping

³ The solicitation designates the four tiers of volume discounts beyond the initial flat rate discount as Tiers 2, 3, 4, and 5. AR, Tab 5, RFQ amend. 2, attach. B, Industrial Supplies Discounts. Tier 2 discounts will apply after cumulative BPA purchases reach \$5 million and until cumulative purchases reach \$30 million; Tier 3 discounts will apply while cumulative BPA purchases total between \$30 and \$50 million; Tier 4 discounts will apply while cumulative BPA purchases total between \$50 and \$100 million; and Tier 5 discounts will apply after cumulative BPA purchases reach \$100 million. Id.

terms; quality control plan; support approach for both VMI and VCI locations; comprehensiveness of product selection; and “[a] description of the vendor’s ancillary service capabilities as awarded under SIN 105-003[.]” RFQ at 49-50.

The solicitation sets forth five technical evaluation factors, three of which will be evaluated on a pass/fail or satisfactory/unsatisfactory basis. RFQ 54, 56. The receipt of a fail or unsatisfactory rating for any one of these three evaluation factors will render a quotation ineligible for award. Id. at 53. The two remaining technical evaluation factors--technical approach, and corporate experience and references--will be qualitatively assessed and adjectively rated with technical approach being considered more important than experience. Id. at 54-55. Technical approach will be evaluated to assess the degree to which a quotation meets the solicitation requirements and demonstrates a vendor’s capability to deliver performance at all solicited locations. Id. at 53-55. Corporate experience and references will be evaluated for relevancy. Id. at 55-56.

The solicitation establishes that the agency will evaluate price quotations “to ensure that offered pricing, to include offered flat rate and tiered volume discounts, is fair and reasonable.” RFQ at 56. The solicitation provides that award will be made on a best-value basis but will not involve either a lowest-priced technically acceptable or a best-value tradeoff source selection methodology. Id. at 53. Rather, the agency intends to issue BPAs for each of the four military branches to the vendor(s) submitting the highest technically rated quotations with fair and reasonable prices. Id.

The solicitation required quotations to be submitted by 12:00 p.m. Eastern on October 9. AR, Tab 6, RFQ amend. 3, Cover Letter, at 1. Prior to the time set for receipt of quotations, Noble filed its protest with our Office challenging the terms of the solicitation.

DISCUSSION

The protester argues that the solicitation’s evaluation and source selection methodology fails to meaningfully consider price in contravention of applicable procurement laws and regulations. The agency responds that its evaluation of vendors’ pricing solely for reasonableness is appropriate and consistent with our decisions regarding the use of a highest-technically rated reasonably-priced (HTRRP) selection methodology. We disagree with the agency. When, as here, an agency seeks to establish BPAs under the FSS, the use of an HTRRP source selection methodology fails to fulfill the agency’s obligation to consider the “lowest overall cost alternative” to the government as required by 41 U.S.C. § 152(3)(B) and FAR §§ 8.404(d) and 8.405-3(a)(1)-(2). Accordingly, we sustain the protest on this basis. The protester also argues that the solicitation’s required pricing structure is inconsistent with the underlying FSS contract, and the agency has failed to explain how the two are consistent other than to assert that it has used this pricing structure in the past. Based on the record before us, we find that the solicitation is inconsistent with the terms of the underlying FSS contract, and we sustain the protest on this basis as well.

Consideration of Price in the Source Selection Decision

Under the Competition in Contracting Act (CICA), when conducting procurements for property or services, agencies, within certain specified exceptions, must obtain full and open competition through the use of competitive procedures. 41 U.S.C. § 3301(a)(1). The FSS program provides agencies with a streamlined process for obtaining commonly used goods and services at prices associated with volume buying. See FAR § 8.401(a). Use of the program satisfies CICA's requirement for full and open competition when participation in the program has been open to all responsible sources, and orders and contracts under the FSS procedures "result in the lowest overall cost alternative to meet the needs of the Federal Government." 41 U.S.C. § 152(3)(B). The provisions of FAR part 8, implementing the use of the FSS program, require agencies to review vendors' FSS schedules and then place orders and establish BPAs, with schedule contractors that can provide required supplies or services representing the best value and "result[ing] in the lowest overall cost alternative (considering price, special features, administrative costs, etc.) to meet the Government's needs." FAR § 8.404(d).

Thus, it is evident from the statutory and regulatory framework that consideration of lowest cost to the government is an imperative when using the FSS. Consistent with this mandate, our Office has recognized that use of the FSS in lieu of conducting a full and open competition is premised on following the procedures of FAR subpart 8.4 to reach a determination regarding which FSS vendor meets the agency's needs at the lowest overall cost. Savantage Financial Servs., Inc., B-292046.1, B-292046.2, June 11, 2003, 2003 CPD ¶ 113 at 6. Additionally, we have recognized that "price is the one factor that, at a minimum, must always be considered when determining best value for purposes of establishing a BPA under the FSS." Cyberdata Technologies, Inc., B-406692, Aug. 8, 2012, 2012 CPD ¶ 230 at 4, citing FAR §§ 8.405-3(a)(1) ("[o]rdering activities shall establish the BPA with the schedule contractor(s) that can provide the supply or service that represents the best value.") and 8.405-3(a)(2) ("[i]n addition to price (see 8.404(d) and 8.405-4), when determining best value, the ordering activity may consider [various other enumerated factors]").

This is not to say that, when conducting an FSS procurement, agencies must use a lowest-price technically acceptable procurement model, and are precluded in all cases from selecting a more advantageous quotation at a higher price. To the contrary, the FAR contemplates the consideration of "the lowest overall cost alternative," and specifies that the government may consider features in addition to price when making its source selection decision. See FAR § 8.404(d). This assessment, however, requires at a minimum, a comparative consideration of price in conjunction with any additional features and benefits to the government.

Accordingly, our Office has found that, to meaningfully consider the lowest overall cost alternative, any best-value determination under the FSS program requires a weighing of the value and benefits associated with a vendor's approach against its associated cost

to the government. See Glotech, Inc., B-406761.1, B-406761.2, Aug. 21, 2012, 2012 CPD ¶ 248 at 7.⁴ An agency must use an evaluation method that provides a basis for a reasonable assessment of the price of performance under the competing quotations, so as to establish whether one vendor's quotation would be more or less costly than another's.⁵ See 6K Systems, Inc.--Protest and Costs, B-408124.3, B-408124.4, Dec. 9, 2013, 2014 CPD ¶ 347 at 10; AINS, Inc., B-405902.3, May 31, 2012, 2012 CPD ¶ 180 at 8.

Here, the record reflects that the solicitation originally established a price evaluation that contemplated conducting a head-to-head comparison of vendors' prices for a "market basket" of 250 specified items for each of the four contemplated BPAs. AR, Tab 3, Original RFQ, at 40-42 and at attachs. B.1, B.2, B.3, B.4, Industrial Supplies Market Baskets. The agency, however, amended the solicitation to remove the market basket approach, and settled on a price evaluation that solely considers the reasonableness of each product's unit price in each vendor's product catalog. See AR, Tab 5, RFQ amend. 2, attach. A, Q & A, at 23. The contracting officer explains that the agency will input each vendor's entire catalog price list into GSA's Price Point PLUS Portal (4P Tool), which is a GSA developed market research tool that provides multiple data points to assist GSA contracting staff in determining whether fair and reasonable pricing has been obtained. COS at 3 ¶ 15. The tool will review each of the items in a vendor's catalog to determine if the pricing for the item is within current market thresholds. Id. The tool will then create a report showing which items are within market thresholds and for which items additional information is needed to determine if the item falls within market thresholds. Id. The agency will review any items not found within market thresholds and either conduct additional market research or seek additional information from the vendor to justify the pricing. Id. at 3 ¶ 16.

The sole purpose of a price reasonableness review, however, is to determine whether prices are too high. Sterling Servs., Inc., B-291625, B-291626, Jan. 14, 2003, 2003 CPD ¶ 26 at 3. Such an evaluation, by its nature, does not provide a basis to assess whether one vendor's pricing will result in the "lowest overall cost alternative" as required under an FSS procurement. Without any comparative assessment of prices, any best-value determination will be made without a weighing of the value and benefits associated with a vendor's approach against its associated cost to the government.

⁴ In Glotech our Office did not address whether the procurement at issue in that protest was one for which the agency was required to develop a statement of work, because we concluded that "the requirements of FAR § 8.405-3(a) apply to all BPAs established under the FSS, regardless of the BPA type and regardless of the competition requirements that apply to each BPA type." Glotech, Inc., supra, at 9.

⁵ While it is up to the agency to decide on an appropriate and reasonable method for the evaluation of vendors' prices, an agency must consider cost or price to the government in making its source selection decision. Glotech, Inc., supra, at 7; Ball Aerospace & Techs. Corp., B-402148, Jan. 25, 2010, 2010 CPD ¶ 37 at 4.

Such an approach is not permitted in the context of an acquisition under the FSS program.

Additionally, we note that the prices the agency will evaluate for reasonableness are the vendors' schedule prices, as well as any discounts to those prices. GSA, however, already determined vendors' schedule prices to be fair and reasonable when it awarded the vendors' schedule contracts. See FAR § 8.404(d); AR, Tab 2, Acquisition Plan, at 7. Logic suggests that discounts to reasonable prices would also be reasonable--i.e., not too high. See Verizon Federal, Inc., B-293527, Mar. 26, 2004, 2004 CPD ¶ 186 at 6 ("In awarding the FSS contracts upon which the quotations were based, the [GSA] determined that the labor rates were fair and reasonable. FAR § 8.404(a)(1)(ii). In light of the fact that [the awardee] quoted labor rates that were approximately 25 percent lower than its FSS contract labor rates, we see no basis to conclude that [the awardee's] price was unreasonable."). The agency acknowledges in its acquisition planning documents that "[t]he prices under the resultant BPAs will have already been determined fair and reasonable by the vendor's GSA [FSS] 51V or 75 Contracting Officer." AR, Tab 2, Acquisition Plan, at 7.

It is clear that the agency's planned HTRRP evaluation methodology does not provide for a comparison of the price of performance under competing quotations; rather the agency's contemplated price evaluation will consist only of making an ostensibly pre-determined price reasonableness finding. Such an evaluation does not satisfy the agency's obligation to make a best-value source selection decision that, at a minimum, considers price and results in the lowest overall cost alternative to meet the government's needs. See 41 U.S.C. § 152(3)(B); FAR §§ 8.404(d), 8.405-3(a)(1), and 8.405-3(a)(2).

In support of its use of an HTRRP evaluation methodology, the agency cites to our decision in Sevatec, Inc.; et al., B-413559.3 et al., Jan. 11, 2017, 2017 CPD ¶ 3 for the proposition that our Office has found that agencies' may use the HTRRP source selection method when making a best-value selection decision. MOL at 4. In Sevatec we found that an agency's use of an HTRRP source selection method conformed with its obligation to consider price under CICA, 41 U.S.C. § 3306(c)(1)(B), and fell within the best-value selection continuum established by FAR part 15.⁶ Sevatec, Inc.; et al., supra, at 9. Our decision in Sevatec provided, however, that our conclusion was "[b]ased on the facts before us" in that particular protest and "[u]nder the circumstances" of that specific procurement. Id. at 7, 9. The facts and circumstances of the procurement at issue here are very different from those at issue in Sevatec, and we conclude that our analysis in Sevatec does not apply to this case.

⁶ In negotiated procurements, the FAR provides for a continuum whereby agencies can achieve best value "by using any one or a combination of source selection approaches." See FAR § 15.101. Part 8 of the FAR does not provide for a best-value continuum, using instead the definition of best value from FAR section 2.101 ("the expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement").

The procurement at issue in Sevatec was conducted using the best-value procedures of FAR part 15, and sought to establish approximately 60 multiple-award indefinite-delivery indefinite-quantity (IDIQ) contracts under which the agency could hold subsequent competitions for fixed-price, cost-reimbursement, time-and-materials, and labor-hour task orders for a broad range of information technology services. Sevatec, Inc.; et al., supra, at 2. The agency was to evaluate proposed prices at the multiple-award IDIQ level only to assess whether they were fair and reasonable. Id. at 4. As a result, the agency was shifting price competition to the task order level for awards under the IDIQ contracts. Based on these facts, we found nothing improper about the agency's price evaluation, which would consist of determining, for the first time, the fairness and reasonableness of multiple aspects of the highest-technically rated offerors' proposed rates. Id.

As explained above, the procurement here is being conducted using the FSS ordering procedures authorized by 41 U.S.C. § 152 and set forth under FAR part 8, both of which expressly require agencies to consider the lowest overall cost to the government when using the FSS procedures. This is in contrast to the use of FAR part 15 negotiated procurement procedures in Sevatec, which do not include a similar mandate to consider the lowest overall cost, and instead establish a broad continuum for assessing best value.

Moreover, the procurement here seeks to establish single-award BPAs, which will not have price competition or analysis at the order level. In Sevatec, the agency sought to establish a multiple-award IDIQ contract vehicle, under which task-order level pricing would be established through competition among 60 potential contract holders. Here, the only price assessment the agency will perform is for reasonableness of potential discounts from base prices that were found reasonable at the time the underlying FSS contracts were awarded. Unlike Sevatec, there will never be head-to-head price competition for the agency's actual order requirements in this case. Based on the fundamentally different statutory, regulatory, and factual posture of the cases, we reject the agency's argument regarding the applicability of Sevatec and sustain the protester's challenge.

Inconsistency Between the Solicitation and the Underlying FSS Contract

The protester also argues that this solicitation is defective because it requires vendors to include the price of ancillary services under SIN 105-003 in their prices for products provided under SINS 105-001 and 105-002, rather than pricing the ancillary services separately. Noble argues that this pricing methodology is inconsistent with the terms of the underlying FSS contract, which includes separate pricing for each of the three

SINs.⁷ Protest at 11-12; Comments at 14-15; Supp. Comments at 5. The agency argues that because the underlying FSS contract defines the services performed under SIN 105-003 as “ancillary services” provided “incidental to products offered under SINs 105-001 and 105-002,” the prices for the ancillary services are meant to be included in the price of the products provided. MOL at 9, citing AR, Tab 8, Solicitation for FSS No. 51V Contracts, at 4. The agency further contends that it “would be elevating form over function to seek pricing for services that GSA is not actually requesting.” In essence, the agency argues that pricing for ancillary services would only be necessary if the solicitation required provision of a contractor-operated hardware store.⁸ MOL at 9.

Where a dispute exists as to the meaning of a particular solicitation provision, or as here a particular underlying FSS contract provision, our Office will resolve the matter by reading the solicitation, or FSS contract, as a whole and in a manner that gives effect to all its provisions; to be reasonable, an interpretation must be consistent with such a reading. See SRA Int’l, Inc., B-409939, Sept. 2, 2014, 2014 CPD ¶ 264 at 4-5. Here, the only reasonable interpretation of the underlying FSS contract is that the ancillary services provided under SIN 105-003 are distinct from, and should be priced separately from, the products provided under SINs 105-001 and 105-002.

As an initial matter, we reject the agency’s argument that the solicitation need not seek pricing for ancillary services under SIN 105-003 because it is not requesting a contractor-operated hardware store. Although the stores here are government-owned and operated, the record reflects that the agency is nonetheless requiring firms to provide ancillary services outside the scope of SINs 105-001 and 105-002, which are for

⁷ The solicitation provides that it incorporates all terms and conditions “included in the awardee’s underlying [FSS No.] 51V contract,” that “[i]n the event of conflict between a delivery order or task order and the [FSS] contract, the [FSS] contract shall control,” and that a “vendor’s [FSS No.] 51V contract terms and conditions are in full force and effect for this BPA, unless otherwise specified.” RFQ at 3-4, 33.

⁸ The agency also argues that it has been requiring--and vendors, including the protester, have been providing--unpriced ancillary services under BPAs established against FSS No. 51V contracts for the last decade. MOL at 8; COS at 5 ¶ 25. While the protester acknowledges that it previously made the business decision to submit quotations for, and to accept orders under, BPAs where SIN 105-003 ancillary services were not priced separately, the protester provides that those past procurements were for BPAs to provide hardware store products and ancillary services at a single location where the type and amount of services could be reasonably estimated. Comments at 13-14. In contrast, the current solicitation requires the provision of an unknown quantity of ancillary services at an indefinite number of locations, both domestic and foreign. Id. These arguments related to past practices of the parties are irrelevant and are not addressed further, as our Office has repeatedly observed that each procurement stands alone. See e.g., ArmorWorks Enterprises LLC, B-405450, Oct. 28, 2011, 2011 CPD ¶ 242 at 3.

products. Specifically, the solicitation requires vendors to provide at each location “commercially available, ancillary services typically performed in, and in the spirit and concept of, a hardware store and/or home improvement center.” RFQ at 6. Further, during the solicitation’s Q & A period, the agency explained that the required ancillary services include receiving, stocking shelves, inventory management, and the provision of in-store customer service. AR, Tab 5, RFQ amend. 2, attach. A, Q & A, at 2. The agency acknowledges that SIN 105-003 encompasses “all activity from the moment of [product] delivery at the loading dock until the moment the cash register rings.” Supp. MOL at 3.

We also find unpersuasive the agency’s unsupported and conclusory argument that the FSS contract’s definition of the required services as “ancillary” indicates the services are meant to be unpriced or included within vendors’ prices under SINs 105-001 and 105-002. While these services may be ancillary to providing the products required under SINs 105-001 and 105-002, there is no evidence in the record to indicate that such services are within the scope of these SINs, or priced at the time these SINs were awarded. This is the very point of the agency’s inclusion of SIN 105-003--to capture the necessary services to support the solution sought by the agency that are otherwise outside the scope of the primary SINs for the products to be provided.

The FAR defines a SIN as “a group of generically similar (but not identical) supplies or services that are intended to serve the same general purpose or function.” FAR § 8.401. Thus, FSS No. 51V’s inclusion of these ancillary services as a separate SIN indicates that, despite being services provided incidental to the products provided under SIN’s 105-001 and 105-002, the services are distinct enough to not be considered “generically similar” to, or “intended to serve the same general purpose or function” as those products. See e.g., Bridges System Integration, LLC, B-411020, Apr. 23, 2015, 2015 CPD ¶ 144 at 5 (noting that each FSS contract is composed of SINs that are used to categorize or group similar products or services under the schedule).

Additionally, as contemplated by the solicitation, if an agency were to place only an order for a product under SIN 105-001 or 105-002 (the SINs for the hardware store, and the catalog store), it would not receive any ancillary services, as the performance of services is provided for under SIN 105-003 (the SIN for ancillary services). See Bluewater Mgmt. Group, LLC, B-414785, Sept. 18, 2017, 2017 CPD ¶ 290 at 5 n. 4 (“When used, an ancillary supplies and/or services SIN provides a means for the purchase of supplies and/or services that are not within the scope of any other SIN on a schedule. . . . When included, vendors include a list or description of the particular ancillary services offered and a means of establishing contract pricing.”). Moreover, GSA’s own published guidance about SINs for ancillary supplies and services specifies that they are for “known items that can be priced up-front and awarded at the Schedule contract level” and states that they “are not within the scope of any other SIN on the Schedule.” Summary of Support Item Types for GSA Schedules Program Orders, at 1, Nov. 28, 2018, <https://www.gsa.gov/cdnstatic/Summary%20of%20Schedule%20Support%20Items.pdf> (last visited Jan. 6, 2020) (emphasis in original). Thus, by establishing a separate SIN for ancillary services, it is readily apparent that the services

thereunder are not within the scope of SINs 105-001 or 105-002, and are to be separately priced at the time GSA awards a vendor's schedule contract.

The record also reflects that the most recent solicitation for FSS No. 51V⁹ enumerated separate estimated sales amounts and separate maximum ordering limits for each of the three SINs. AR, Tab 8, Solicitation for FSS No. 51V Contracts, at 1-4. Each of the three SINs has its own maximum ordering limit of \$750,000, and SIN 105-003 for ancillary services has an estimated sales amount of \$12,434,113. Id. at 4. The FSS No. 51V solicitation also required that offerors' price proposals "[p]rovide supporting documentation for EACH proposed product/service price," and include "a detailed price narrative containing sufficient information for each of the products/services offered to enable the contracting officer to determine that offered prices are fair and reasonable." Id. at viii. The FSS solicitation's inclusion of dollar values and pricing requirements for SIN 105-003 is further indication that the required ancillary services are to be priced separately from the products priced under SINs 105-001 and 105-002.¹⁰ In this regard,

⁹ Solicitations for FSS contracts typically do not have a closing date, but are open indefinitely (or "standing"), and are updated as required to include the most current contract clauses or to ensure that the solicitation incorporates changes to law and regulation that have occurred since the previous "refresh" was issued. See AR, Tab 8, Solicitation for FSS No. 51V Contracts, at 191; Applied Visual Tech., Inc., B-401804.3, Aug. 21, 2015, 2015 CPD ¶ 261 at 2 n. 1. The most recent refresh solicitation for FSS No. 51V is refresh number 31, dated June 13, 2019. AR, Tab 8, Solicitation for FSS No. 51V Contracts, at cover page.

¹⁰ In its initial report to our Office, the agency did not explain the pricing structure under FSS No. 51V. We therefore requested that the agency provide a supplemental report "to explain what the pricing structure of the underlying schedule contract is and how the pricing structure of the solicitation is consistent with the schedule contract." Notice of Request for Supplemental Briefing at 1. The agency's supplemental report failed to provide the requested explanation. Rather, the agency simply asserted that there are 33 vendors that hold FSS No. 51V contracts with all three required SINs--105-001, 105-002, and 105-003. Supp. MOL at 6; attach. 2, GSA eLibrary FSS No. 51V Vendor List. The agency represents that three of the 33 vendors' publicly available FSS contract term sheets do not include any information specific to pricing for SIN 105-003 ancillary services. Supp. MOL at 6; attachs. 3-5 FSS Contract Terms for Three FSS No. 51V Contract Holders. Based on the lack of information, the agency concludes, that these firms must have included the price of such ancillary services in the product pricing under their FSS contracts, and further asserts, without any support, that "most contractors follow a commercial practice of pricing for the services in this manner." Supp. MOL at 6.

The protester points out, however, that its own publicly available FSS contract term sheet similarly is silent as to how ancillary services under SIN 105-003 are priced, yet the protester has separate pricing for these ancillary services under its FSS No. 51V contract. Supp. Comments at 4; exh. 1, FSS Contract Terms for Noble FSS No. 51V

the agency concedes that “SINs on [FSS] contracts do require pricing for the products and services offered.” Supp. MOL at 5; see also FAR § 8.402(b) (“[E]ach [FSS] pricelist contains the pricing and the terms and conditions pertaining to each [SIN] that is on schedule.”).

Finally, we note that including the price of ancillary services under SIN 105-003 in the price of products under SINs 105-001 and 105-002 could result in agency customers paying for services they will not receive at the solicitation’s 27 locations utilizing a VCI model. As set forth above, customers at VMI locations will receive services such as vendor provided store lay-out, vendor receipt and stocking of inventory, and periodic vendor provided outreach. RFQ at 7-8. Customers at VCI locations, however, likely will not receive these vendor-provided services as the solicitation contemplates the use of foreign labor “to provide basic store functions such as receipt, stocking, and merchandising of” the vendor’s consigned inventory. Id.

Accordingly, the solicitation’s requirement for vendors to include the prices for ancillary services under SIN 105-003 in their prices for products under SINs 105-001 and 105-002 is inconsistent with the underlying FSS contract’s establishment of separate SINs for products and ancillary services. Moreover, the payment by some BPA customers for services they will not receive that results from this solicitation requirement is incongruous considering the agency’s above-discussed obligation to establish BPAs that achieve the best value and lowest overall cost alternative to meet the government’s needs.

RECOMMENDATION

We recommend that GSA amend the solicitation to provide for both an evaluation and source selection approach consistent with its obligations under statute and the FAR, and a pricing structure consistent with the terms of FSS No. 51V. The agency should then request revised quotations. We also recommend that GSA reimburse Noble’s costs of filing and pursuing this protest. 4 C.F.R. § 21.8(d)(1). Noble’s certified claim for costs, detailing the time expended and costs incurred, must be submitted to GSA within 60 days after this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel

Contract. The agency does not dispute that the protester’s FSS No. 51V contract includes separate pricing for ancillary services provided under SIN 105-003. In any event, whether these three firms may have included their SIN 105-003 pricing for ancillary services under their SIN pricing for products (SINs 105-001 and 105-002) is irrelevant to the question of whether such a pricing approach is valid.