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Decision

Matter of: NCS Technologies, Inc.

File: B-417956; B-417956.2

Date: December 13, 2019

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William T. Welch, Esq., and Johana A. Reed, Esq., McMahon, Welch and Learned, PLLC, for New Tech Solutions, Inc., the intervenor.

Dorothy M. Guy, Esq., Tal Kedem, Esq., and Alice Somers, Esq., Social Security Administration, and Jennifer L. Howard, Esq., General Services Administration, for the agencies.

April Y. Shields, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the establishment of a blanket purchase agreement (BPA) with a vendor holding two overlapping Federal Supply Schedule (FSS) contracts is sustained where the BPA was established under the vendor's first FSS contract that included an insufficient period of performance to cover the potential duration of the anticipated BPA, and where the BPA could not properly be established under either a combination of the vendor's two FSS contracts or the vendor's second FSS contract.

DECISION

NCS Technologies, Inc., of Gainesville, Virginia, protests the establishment of a blanket purchase agreement (BPA) with New Tech Solutions, Inc., of Fremont, California, under request for quotations (RFQ) No. 28321319Q0000008, which was issued by the Social Security Administration (SSA) for laptops, workstations, peripheral equipment, and installation services. The protester argues that the agency's establishment of a BPA with New Tech--which held two overlapping Federal Supply Schedule (FSS) contracts when it submitted its final revised quotation--was improper.

We sustain the protest.

BACKGROUND

By way of background, in October 2015 and as revised in February 2016, the General Services Administration (GSA) Federal Acquisition Service (FAS) established policies and procedures regarding the award of overlapping FSS contracts, which GSA terms “continuous” FSS contracts. FAS Policy and Procedure (PAP) 2016-04, Guidelines for the Award of Overlapping FSS Contracts (Continuous Contracts), Feb. 4, 2016; see also 41 U.S.C. § 152(3). Prior to the establishment of the policies and procedures on continuous FSS contracts, the award of a new FSS contract would result in the cancellation of the existing FSS contract upon award. GSA’s new policies and procedures now permit contractors to hold two continuous FSS contracts.

In developing these policies and procedures, GSA affirmed that, under applicable procurement law and regulation, “BPAs and orders cannot extend beyond the expiration date of the underlying FSS contract unless there are option periods remaining under the FSS contract that, if exercised, would cover the BPA’s/order’s period of performance.” FAS PAP 2016-04, Feb. 4, 2016, at 1, citing Federal Acquisition Regulation (FAR) § 8.405-3 and FAR § 52.216-18 (Ordering). GSA also recognized that “there are circumstances where a contractor needs the flexibility to retain its current FSS contract in order to continue performance under existing BPAs and orders, while simultaneously holding a new FSS contract in order to compete for new business opportunities.” FAS PAP 2016-04, Feb. 4, 2016, at 1.

Therefore, in accordance with GSA’s policies and procedures, a contractor may request a new FSS contract under the same schedule prior to the expiration of its existing FSS contract. The contractor may then hold two continuous FSS contracts by which, generally speaking, it may only use the first FSS contract for existing business and the second FSS contract for new business. In this regard, GSA advised procuring agencies and FSS contractors of the following: “Holding continuous contracts enables the FSS contractor to complete work under BPAs and orders awarded via the existing contract, while utilizing the new contract for new business opportunities. A contractor that wishes to hold continuous contracts must . . . [a]gree not to use the existing contract to compete for new business opportunities.” FAS PAP 2016-04, Feb. 4, 2016, at 2-3.

On March 11, 2019, SSA issued the RFQ as a small business set-aside under FAR subpart 8.4 to vendors holding contracts under GSA FSS No. 70, Information Technology. Agency Report (AR), Exh. 2, RFQ.¹ The RFQ contemplated the establishment of a single-award BPA for laptops, workstations, peripheral equipment, and installation services for the agency to use in administering its old-age, survivors, and disability insurance programs and supplemental security income program. RFQ at iii; Contracting Officer’s Statement and Memorandum of Law (COS/MOL), Oct. 9,

¹ The agency amended the RFQ nine times. All citations are to the conformed solicitation provided by the agency as Exhibit 2 of the agency report.

2019, at 2. Under the anticipated BPA, the agency would place fixed-price orders for an approximate total value of \$340 million. RFQ at vi.

The anticipated BPA would include a base year, four 1-year options, and an optional 6-month extension, for a total possible performance period of 66 months. RFQ at v. If all available options are exercised, the BPA's period of performance would extend through February 28, 2025.² AR, Exh. 6, Contract Specialist's Memorandum, Aug. 29, 2019, at 2.

The RFQ provided that the BPA would be entered into between SSA and the contractor pursuant to FAR § 8.405-3 and the contractor's applicable FSS contract.³ RFQ at iii. Of relevance here, section 8.405-3(d)(3) of the FAR provides the following: "Contractors may be awarded BPAs that extend beyond the current term of their GSA Schedule contract, so long as there are option periods in their GSA Schedule contract that, if exercised, will cover the BPA's period of performance." In this regard, the RFQ also provided the following: "In order to be eligible for award, the total period of performance under the vendor's GSA FSS contract . . . must be in full force and effect for at least 60 months beyond the award date of the BPA or capable of remaining in full force and effect for at least 60 months beyond the award date of the BPA via the exercise of available, unexercised options." RFQ at 61.

The RFQ provided for award to the lowest-priced, technically acceptable vendor based on a five-phase evaluation scheme.⁴ RFQ at 56-61. Of relevance here, during the first phase, the agency would evaluate quotations for technical acceptability, including whether the quotation was based on an FSS contract that fulfilled the period of

² The record contains various inconsistencies regarding the anticipated BPA's period of performance. See, e.g., RFQ at v, 55 (noting the total potential performance period of the BPA of 66 months), 61 (requiring the vendor's FSS contract to be in effect for at least 60 months beyond the date of award); see also, e.g., AR, Exh. 6, Contract Specialist's Memorandum, at 2 (noting the end date of the BPA's period of performance as February 28, 2025), 10 (noting the end date of the BPA's period of performance as March 13, 2025). These inconsistencies are irrelevant to the outcome of our decision.

³ The RFQ allowed for a quotation to include more than one FSS contract if it was submitted by a contractor team agreement. See RFQ at 54. New Tech did not propose a contractor team agreement, so this provision is inapplicable here.

⁴ The five evaluation phases were: technical; Section 508 conformance; price; hands-on testing; and supply chain risk assessment. RFQ at 56-61. By way of background, Section 508 of the Rehabilitation Act of 1973, as amended, generally requires that agencies' electronic and information technology be accessible to people with disabilities. See 29 U.S.C. § 794d.

performance requirement.⁵ Id. at 57. During the third phase, the agency would evaluate proposed prices to determine the vendor with the lowest overall price. Id. at 58. The RFQ noted that “[t]he technically acceptable vendor with the highest overall rating in Phase 2 and the overall lowest-priced quotation will advance to Phase 4.” Id.

On or before the April 25, 2019 closing date for initial quotations, the agency received quotations from four vendors, including NCS and New Tech. Because the agency found that all of the quotations were technically unacceptable, it engaged in two rounds of exchanges with the vendors and received final revised quotations on or before July 2. See AR, Exh. 6, Contract Specialist’s Memorandum, at 3-5. The agency then found that the final revised quotations submitted by NCS, New Tech, and a third vendor were technically acceptable, and that New Tech’s quotation was the lowest-priced at \$168,292,446. Id. at 7. The agency then evaluated only New Tech’s quotation under the fourth and fifth evaluation phases.⁶ Id. at 10; see also AR, Exh. 7, Final Technical Evaluation Results.

Of relevance here, with regard to the period of performance requirement, in its final revised quotation New Tech listed its FSS Contract as GS-35F-0791N, with a period of performance of July 22, 2003 to July 21, 2023. New Tech also asserted that it had applied for a second FSS contract that “is in process and will be awarded to New Tech prior to the award of the . . . BPA.” AR, Exh. 23, New Tech Final Quotation (Excerpt), July 2, 2019, at 2.⁷

Separately, the agency “learned via a survey of the GSA eLibrary” that New Tech had been awarded--one month prior to the closing date for final revised quotations--a second FSS contract, 47QTCA19D00CX, with an effective performance period starting on June 4, 2019 and, if all option periods are exercised, extending through June 3, 2039. COS/MOL at 6; see also AR, Exh. 6, Contract Specialist’s Memorandum, at 10. The agency concluded that New Tech’s quotation fulfilled the BPA’s period of performance requirement based on New Tech’s two FSS contracts; specifically, the contract specialist noted the following:

⁵ Specifically, the RFQ required the vendor to list its FSS contract number and provide a copy of its FSS contract and documentation verifying that its FSS contract covered the period of performance. RFQ at 54.

⁶ New Tech initially did not pass the hands-on testing phase. The agency “determined that New Tech could provide replacement products for the technically unacceptable items” and subsequently found the vendor to be technically acceptable under that evaluation phase. AR, Exh. 7, Final Technical Evaluation Results, Aug. 29, 2019, at 7.

⁷ At various times during the development of the protest, the agency submitted several excerpts from at least three versions of New Tech’s quotation, many of which were heavily redacted. Our decision cites to the most complete excerpt, which was submitted for the record on November 26.

New Tech meets the requirement for a FSS contract capable of remaining in full force and effect for at least 60 months beyond the award date of the BPA The period of performance of the BPA, including all options (if exercised), is currently anticipated to go through March 13, 2025. The ultimate period of performance end date associated with FSS contract GS-35F-0791N is July 21, 2023; however, New Tech has also proposed contract 47QTCA19D00CX, which has an ultimate period of performance end date of June 3, 2039.

On page two (2) of Volume III of its response, New Tech indicated that it had “submitted to GSA . . . the information required for a dual GSA contract.” The contract specialist later verified that this dual GSA contract was in fact contract 47QTCA19D00CX.

AR, Exh. 6, Contract Specialist’s Memorandum, at 10.

On August 30, 2019, the agency established the BPA under New Tech’s first FSS contract, GS-35F-0791N. AR, Exh. 1, BPA, Aug. 30, 2019, at 1. In the “supplies or services” section of the BPA, the agency described the BPA as “via General Services Administration (GSA) Federal Supply Schedule (FSS) contracts GS-35F-0791N and 47QTCA19D00CX.” Id. at 2. After receiving notice of award, NCS protested to our Office.

DISCUSSION

The protester primarily argues that the award was improper because the agency established the BPA under New Tech’s first FSS contract, GS-35F-0791N, which included an insufficient period of performance to cover the potential duration of the BPA. Therefore, the protester argues that New Tech failed to comply with the RFQ’s period of performance requirement and the award failed to comply with FAR § 8.405-3(d)(3). Protest at 3, 5. Pursuant to 4 C.F.R. § 21.3(j), our Office invited GSA to participate in the protest. In its brief submitted on November 22, GSA also asserts that “award in this case was improper.” GSA Comments, Nov. 22, 2019, at 4.

In its various filings, SSA asserts that it established the BPA under New Tech’s first and second FSS contracts, GS-35F-0791N and 47QTCA19D00CX. The agency argues that New Tech’s quotation met the RFQ’s period of performance requirement, and that the establishment of the BPA was proper, because New Tech’s second FSS contract included a sufficient period of performance to cover the potential duration of the BPA. COS/MOL at 12-15; Agency Response to GSA Comments, Nov. 26, 2019, at 5; see also AR, Exh. 6, Contract Specialist Memorandum, at 2, 10. In this regard, SSA argues that GSA policy and procedures on continuous FSS contracts permit it to establish a BPA under both of New Tech’s FSS contracts. COS/MOL at 15; Agency Response to GSA Comments at 2-4. In the alternative, SSA argues that it could have established the BPA under New Tech’s second FSS contract, such that its current award should be

excused as a “minor procurement deficiency[.]” Agency Response to GSA Comments at 4.

For the reasons discussed below, we sustain the protest.⁸

Our Office has recognized that an FSS BPA is not established with the contractor directly, but rather is established under the contractor’s FSS contract, such that the FSS BPA orders “ultimately are to be placed against the successful vendor’s FSS contract.” GBK P’ship, LLC-Constant Assocs., Inc., B-417039, Jan. 24, 2019, 2019 CPD ¶ 30 at 5, citing Panacea Consulting, Inc., B-299307.4, B-299308.4, July 27, 2007, 2007 CPD ¶ 141 at 1-2 n.1. Thus, as we have further recognized, when an agency intends to place an order under an FSS BPA, the vendor must have a valid FSS contract in place because that contract is the means by which the agency satisfies the competition requirements of the Competition in Contracting Act in connection with any orders issued under the BPA. Canon USA, Inc., B-311254.2, June 10, 2008, 2008 CPD ¶ 113 at 3-4. In this regard, FAR § 8.405-3(d)(3) requires a vendor’s FSS contract to have sufficient duration, including potential options, to coincide with the entire potential period of performance for the resulting BPA. See GBK P’ship, LLC-Constant Assocs., Inc., supra, at 4.

As noted above, the anticipated BPA would include a base year, four 1-year options, and an optional 6-month extension, for a total possible performance period of 66 months; if all available options are exercised, the BPA’s period of performance would extend through February 28, 2025. RFQ at v; AR, Exh. 6, Contract Specialist’s Memorandum, at 2.

⁸ As noted above, the RFQ provided for award based on a five-phase evaluation scheme. RFQ at 56-61. In its various protest submissions, NCS also challenged aspects of the agency’s evaluation in the third, fourth, and fifth evaluation stages--that is, allegations that the agency improperly evaluated New Tech’s quotation under the price, hands-on testing, and supply chain risk assessment evaluation phases, and that the agency should have referred various matters to the Small Business Administration. Because we find that New Tech’s failure to comply with the period of performance requirement--which was evaluated in the first evaluation phase--renders its quotation ineligible for award, NCS’s other challenges are effectively rendered moot. See VariQ Corp.; Octo Consulting Grp., Inc., B-417135 et al., Mar. 18, 2019, 2019 CPD ¶ 124 at 9, citing General Revenue Corp., et al., B-414220.2 et al., Mar. 27, 2017, 2017 CPD ¶ 106 at 11 (challenges to the source selection decision are rendered moot where GAO concludes that an agency improperly evaluated proposals and recommends that an agency conduct a new evaluation). Our Office will not consider a protest where the issue presented has no practical consequences with regard to an existing federal government procurement, and thus is of purely academic interest. We will not render to a protester what would be, in effect, an advisory decision. Ferris Optical, B-403012.2, B-403012.3, Oct. 21, 2010, 2010 CPD ¶ 265 at 2. Accordingly, NCS’s other challenges are dismissed.

The record shows that New Tech submitted its final revised quotation under its first FSS contract, GS-035F-0791N, which only extends through July 21, 2023. AR, Exh. 23, New Tech Final Quotation (Excerpt), at 1. One month prior to submitting its final revised quotation, New Tech was awarded its second FSS contract, 47QTCA19D00CX, which would extend through June 3, 2039. Yet, New Tech did not revise its final quotation to be based on its second FSS contract; instead, New Tech continued to assert in its final revised quotation that it had applied for a second FSS contract that “is in process and will be awarded to New Tech prior to the award of the . . . BPA.” *Id.* at 2. The agency later independently learned about the award of New Tech’s second FSS contract. COS/MOL at 6; see also AR, Exh. 6, Contract Specialist’s Memorandum, at 10.

The record also shows that the agency established the BPA under New Tech’s first FSS contract and, in the “supplies or services” section of the BPA, listed both of New Tech’s FSS contracts. AR, Exh. 1, BPA, at 1-2.

On this record, we conclude that the award was improper. First, we find that New Tech’s quotation was ineligible for award, and that SSA improperly established the BPA, because both the quotation and the BPA identified an FSS contract that did not include a sufficient period of performance to cover the potential duration of the BPA.

As a preliminary factual matter, the record clearly shows that SSA established the BPA under New Tech’s first FSS contract only, and does not support the agency’s assertion that it established the BPA under both of New Tech’s FSS contracts. AR, Exh. 1, BPA, at 1; see also Agency Response to GSA Comments at 2-3 (contracting officer’s claim that the agency planned to establish the BPA under New Tech’s first FSS contract “in part because that is the GSA FSS contract that expires first and in part because the [a]gency’s contract award system does not allow for the entry of two GSA FSS contract numbers”). In this regard, the agency’s listing of New Tech’s second FSS contract in the “supplies and services” section of the BPA is not dispositive and does not alter the fundamental basis upon which the BPA was established.

Moreover, we note that the record further shows that New Tech based its final revised quotation on its first FSS contract, and that New Tech’s first FSS contract did not have a sufficient period of performance to cover the entire potential performance period of the anticipated BPA. AR, Exh. 1, BPA, at 1; AR, Exh. 6, Contract Specialist’s Memorandum, at 2; see also COS/MOL at 13 (acknowledging that New Tech’s first FSS contract did not meet the period of performance requirement). Clearly stated technical requirements are considered material to the needs of the government, and a quotation that fails to conform to material solicitation requirements is technically unacceptable and cannot form the basis for award. Hanel Storage Sys., L.P., B-409030.2, Sept. 15, 2014, 2015 CPD ¶ 88 at 4.

In short, New Tech’s final revised quotation was based on an FSS contract that included an insufficient period of performance to cover the potential duration of the BPA, yet the

BPA was established under that FSS contract. On this record, we find that New Tech was ineligible for award and that the agency's establishment of the BPA with New Tech was improper. See FAR § 8.405-3(d)(3); GBK P'ship, LLC-Constant Assocs., Inc., supra, at 4 (finding that a vendor was ineligible for award where its FSS contract included an insufficient period of performance to cover the potential duration of the anticipated BPA); see also GSA Comments at 3 ("If a quote is submitted under an FSS contract for a BPA whose performance would extend beyond the expiration of the underlying FSS contract, the agency could properly reject that quote, and indeed could not make an award based on that quote.").

Second, even were we to accept the SSA's assertion that it established the BPA under New Tech's two FSS contracts, we find that such an award was improper and inconsistent with applicable procurement law and regulation. As noted above, section 8.405-3(d)(3) of the FAR provides that "[c]ontractors may be awarded BPAs that extend beyond the current term of their GSA Schedule contract, so long as there are option periods in their GSA Schedule contract that, if exercised, will cover the BPA's period of performance." We note that this language plainly allows for a BPA to be established under a singular contract--not multiple contracts--held by a contractor. We also note GSA's unequivocal assertion, in this regard, that "a vendor may not use two GSA FSS contracts to fulfill a period of performance requirement to compete for a BPA." GSA Comments at 3.

In its comments on this matter, GSA explains that it has "established policies and procedures under which overlapping FSS contracts can be awarded in certain circumstances." GSA Comments at 1. GSA explains that its policies and procedures permit, among other things, "the award and administration of overlapping contracts that will accommodate existing orders and BPAs while also allowing contractors to compete for new business opportunities." Id. at 2, citing FAS PAP 2016-04, Feb. 4, 2016.

Specifically, GSA explains that it has addressed the issue of a vendor's eligibility to compete for new BPAs as follows:

According to GSA's guidance, "Typically, the award of a new contract will result in the cancellation of the existing contract upon award. However, if the contractor has one or more active BPAs or orders under its existing contract (or has submitted quotes for either and is awaiting an award decision), it is eligible for award of a new contract that is allowed to overlap and run alongside the existing one. This is referred to as holding continuous contracts." [internal citations omitted] The reference to "or has submitted quotes for either and is awaiting an award decision" refers to quotes that have been submitted under the existing FSS contract for BPAs and orders that would comply with the existing FSS contract period of performance, and thus necessitate retaining the existing FSS contract after a new contract has been awarded. However, with respect to the existing FSS contract, "[a] contractor holding continuous contracts is prohibited from using its existing contract to compete for new BPAs and/or

new orders.” [internal citations omitted] All new BPAs and orders must be awarded against the new FSS contract.

GSA Comments at 2-3 (emphasis added), citing FAS PAP 2016-04, Feb. 4, 2016 and Frequently Asked Questions: Award of Overlapping FSS Contracts, Contract Continuity Initiative, <https://interact.gsa.gov/node/456026> (last visited Dec. 13, 2019) (“A contractor that wishes to hold continuous contracts must . . . [a]gree not to use the existing contract to compete for new business opportunities.”).

In other words, GSA has established policies and procedures by which a contractor may request a new FSS contract under the same schedule prior to the expiration of its existing FSS contract. The contractor may then hold two continuous FSS contracts but, generally speaking, it may only use the first FSS contract for existing business and the second FSS contract for new business. With regard to BPAs, a contractor that holds two continuous FSS contracts may only use its first FSS contract to complete work for existing BPAs that were established prior to the start date of the second FSS contract. After the contractor receives its second FSS contract, it may not use its first FSS contract to compete for the award of new BPAs; in this regard, all new BPAs must be established under the second FSS contract. See FAS PAP 2016-04, Feb. 4, 2016; see also GSA Comments.

In support of its position, SSA contends that it reviewed and interpreted GSA policy and procedures on continuous FSS contracts. COS/MOL at 15; Agency Response to GSA Comments at 2-4. Specifically, the contracting officer and contract specialist interpreted the following language to mean that SSA could establish the BPA under New Tech’s two FSS contracts: “Holding continuous contracts enables the FSS contractor to complete work under BPAs and orders awarded via the existing contract, while using the new contract for new business opportunities.” Agency Response to GSA Comments at 2, citing FAS PAP 2016-04, Feb. 4, 2016, at 2.

In our view, this language cited by SSA is consistent with GSA’s interpretation of its own policy and inconsistent with SSA’s interpretation. This language plainly contrasts a contractor’s ability to “complete work under BPAs and orders awarded via the existing contract” with its ability to “us[e] the new contract for new business opportunities,” id.; in no way does this language permit using both contracts simultaneously for one BPA award. Moreover, it is readily apparent that any BPA must still be awarded in accordance with FAR subpart 8.4. In this regard, as we discussed above, section 8.405-3(d)(3) of the FAR permits a BPA to be awarded under a contractor’s singular contract.

While SSA may disagree with GSA, it has not presented--nor do we find--any basis to question GSA’s interpretation of its own policies and procedures regarding continuous

FSS contracts.⁹ Therefore, even were we to accept the agency's unsupported assertion that it established the BPA under New Tech's two FSS contracts, we find that such an award was improper and inconsistent with applicable procurement law and regulation.

Third, SSA alternatively argues that it could have properly established the BPA under New Tech's second FSS contract, such that its BPA established under New Tech's first FSS contract should be excused as a "minor procurement deficiency[.]" Agency Response to GSA Comments at 4. We are unpersuaded by this attempt by the agency to cure the defects of its award.

As noted above, New Tech's final revised quotation was based on its first FSS contract, which included an insufficient period of performance to cover the potential duration of the BPA. AR, Exh. 23, New Tech Final Quotation (Excerpt), at 1. While New Tech asserted in its final revised quotation that it had applied for a second FSS contract that was "in process[.]" *id.* at 2, the record shows that, at that time, New Tech had already been awarded the second FSS contract but did not revise its quotation to be based on that second FSS contract. It is the vendor that bears the burden of submitting an adequately written quotation by including all information that was requested or necessary for its proposal to be evaluated. See Capitol Supply Inc., B-309999.3, Jan. 22, 2008, 2008 CPD ¶ 35 at 5. We also note that GSA has advised procuring agencies and FSS contractors that "[a] contractor that wishes to hold continuous contracts must . . . [a]gree not to use the existing contract to compete for new business opportunities." GSA Comments at 3, citing Frequently Asked Questions: Award of Overlapping FSS Contracts, Contract Continuity Initiative, <https://interact.gsa.gov/node/456026> (last visited Dec. 13, 2019); see also FAS PAP 2016-04, Feb. 4, 2016, at 2-3.

Because New Tech's quotation was not based on its second FSS contract, there is no basis for SSA to evaluate whether New Tech's second FSS contract would meet all of its requirements. See, e.g., GSA Comments at 3-4 ("In this situation, the existing FSS contract referenced in the initial quote could not be used to evaluate whether the revised quote meets the requirements of the BPA. The revised quote must be based entirely on the new FSS contract."). While SSA asserts that New Tech's second FSS contract contained all of the required equipment, Supp. MOL at 4, the record does not support this general assertion.¹⁰ The fact that SSA later independently learned about

⁹ GSA may wish to consider providing additional guidance to agencies seeking to establish BPAs with contractors that hold continuous FSS contracts. In this regard, SSA asserts that it relied on informal guidance from a GSA employee that the contract specialist interpreted as supporting the award, but which SSA now concedes "appears . . . inaccurate." Agency Response to GSA Comments at 4.

¹⁰ In this regard, we acknowledge the protester's allegation that New Tech's second FSS contract "failed to contain some of the required equipment identified under the RFQ." Protest at 3-4. Where an agency announces its intention to order from an

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New Tech's second FSS contract does not excuse New Tech's failure to revise its quotation accordingly and does not permit the agency to establish a BPA under a contract that the vendor did not include in its quotation and that was not the basis for the vendor's quotation.

In sum, we conclude that SSA's award was improper and inconsistent with applicable procurement law and regulation. First, the agency's establishment of a BPA under New Tech's first FSS contract was improper because that contract did not have sufficient duration to cover the entire period of performance of the resulting BPA. Second, the agency could not properly establish a BPA under New Tech's two continuous FSS contracts because such an award is contrary to applicable procurement law and regulation, including GSA's policies and procedures on continuous FSS contracts. Third, the agency could not properly establish a BPA under New Tech's second FSS contract because New Tech's final revised quotation was not based on that contract.

We also conclude that New Tech was ineligible for award because its final revised quotation was based on its first FSS contract--which did not meet the RFQ's period of performance requirements--and because it could have, but did not, revise its quotation to be based on its second FSS contract.

RECOMMENDATION

We recommend that the agency cancel this BPA. We also recommend that the agency evaluate the remaining quotations and make a new selection decision in accordance with the terms of the solicitation. Alternatively, we recommend that the agency reopen the competition, provide clarification regarding GSA policy and procedures, request and evaluate final revised quotations, and make a new selection decision in accordance with the terms of the solicitation.

(...continued)

existing FSS, all items quoted and ordered are required to be on the vendor's schedule contract as a precondition to its receiving the order. Savannah Cleaning Sys., Inc., B-415817, Mar. 27, 2018, 2018 CPD ¶ 119 at 4. We also note that the agency's filings suggest it was aware that New Tech's second FSS contract did not contain all of the required equipment. See, e.g., Supp. MOL at 4 ("New Tech's [second] FSS contract contained all required equipment. To the extent it did not, the [a]gency properly exercised its discretion under [the RFQ] to determine whether to eliminate the vendor from further consideration."). Under these circumstances, we also have no basis to conclude that a BPA established under New Tech's second FSS contract would be proper. See also GSA Comments at 4 ("if the revised quotation was submitted under the new FSS contract and the new FSS contract did not contain all of the items required by the solicitation, a procuring agency could not properly issue a BPA to that vendor under those circumstances").

Finally, we recommend that the protester be reimbursed the reasonable costs of filing and pursuing its protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1). The protester's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel