

ALERT

GAO Decision Provides Guidance on Use of Overlapping GSA Schedules Awarded Under GSA's 'Continuous Contracting' Policy

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WHAT: In *NCS Technologies, Inc.*, B-417956, the Government Accountability Office (GAO) sustained a protest challenging the establishment of a blanket purchase agreement (BPA) where a vendor held two “overlapping” Federal Supply Schedule (FSS or Schedule) contracts pursuant to the General Services Administration’s (GSA’s) “continuous contracting” rules. GAO held that the contractor was ineligible for award of the BPA because its quote only referenced its expiring FSS contract, which lacked a sufficient period of performance to cover the duration of the anticipated BPA, and the contractor did not reference its newly-awarded, overlapping FSS contract. GAO’s decision therefore makes clear that, under GSA’s continuous contracting rules, an expiring Schedule can only be used to complete *existing orders and BPAs*, while any *new orders and BPAs* must be placed under the newly-awarded, overlapping Schedule.

WHEN: December 13, 2019 (released publicly December 31, 2019).

WHAT DOES IT MEAN FOR INDUSTRY: Contractors with “overlapping” FSS contracts must be careful to ensure that expiring Schedules are only used to complete existing orders, and to ensure that quotes for new business opportunities are submitted through the new, overlapping FSS contract, which must include a sufficient period of performance to cover the anticipated duration of the new business.

As background, GSA contracting policy as well as GAO case law have long recognized that BPAs and orders placed against FSS contracts cannot extend beyond the expiration date of the underlying

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FSS contract unless there are sufficient option periods, if exercised, to cover the BPA's or order's period of performance. GSA policy also generally requires that the award of a new FSS contract will result in the cancellation of a Schedule holder's existing FSS contract. These policies created a dilemma for many Schedule contractors whose contracts were expiring: How to obtain a new Schedule with sufficient option years to generate new business, without losing the ability to continue performing existing orders or BPAs previously issued under the expiring Schedule?

In late 2015 and early 2016, the GSA established a new policy on "continuous contracting" that solved this problem by allowing overlapping or "continuous" FSS contracts. Under GSA's continuous contracting policy, Schedule contractors are permitted to hold two, overlapping FSS contracts for the same items: (i) the expiring FSS contract, which the contractor uses to complete work under any outstanding orders or BPAs issued prior to expiration; and (ii) a new, overlapping FSS contract, which the contractor uses to generate new business opportunities. Importantly, GSA policy requires that "[a] contractor that wishes to hold continuous contracts must . . . [a]gree not to use the existing contract to compete for new business opportunities."

In this small business set-aside procurement, the government established a BPA with a vendor whose final revised quote relied on its existing FSS contract, whose remaining period of performance was insufficient to cover the entire period of performance for the new BPA. Although the awardee's final revised quote stated that it had applied for a second or "overlapping" FSS contract which was to be awarded prior to establishment of the BPA - and, as the agency discovered independently, the vendor in fact received the second FSS contract one month prior to the closing date for final revised quotes - the final revised quote did not actually rely upon this second, overlapping FSS contract as the basis for the new BPA.

GAO sustained the protest, and held that the agency had improperly established the BPA on the basis that the vendor was ineligible for award. First, GAO found that awarding the BPA under the vendor's expiring FSS contract was improper because the expiring contract lacked a sufficient period of performance to cover the entire term of the new BPA. Second, although the awardee had identified both the expiring FSS contract and the new FSS contract in its quote, GAO held that the BPA could not be established under a combination of multiple FSS contracts. Instead, GAO held that under GSA's continuous contracting policy, contractors holding overlapping FSS contracts may only pursue new business opportunities under the new, overlapping FSS contract alone. Finally, even though the awardee had actually been awarded a new, overlapping FSS contract by the time the BPA was awarded, GAO held that the BPA could not be awarded against that new FSS contract because the vendor's quote was submitted against the expiring FSS contract and was not actually submitted under the new FSS contract.

This protest serves as a cautionary tale for Schedule contractors who hold overlapping FSS contracts, and provides a bright line test for pursuing new business opportunities through those contracts: Only use existing FSS contracts to complete existing orders and BPAs, and only use the new, overlapping Schedule to pursue new business opportunities.