

CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

A Lawyer's View of "Best Value" Buys

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A Lawyer's View of the "Best Value" Buy by Stacia D. Le Blanc

Getting the "Best Value" for the Government

Much has been discussed recently about how to conduct "best value" procurements. Articles have been written¹, Congressional investigations undertaken², and draft GSA guidance issued³, and yet, it remains to be a rather nebulous concept. This brief article will try to shed a little light on the subject in order to help you better understand how you can get the best value for the government without getting any protests.

What is a "best value" procurement?

"Best value" is not a new concept, it is based upon the FAR's prescription that "the government may select the source whose proposal offers the greatest value to the Government in terms of performance and other factors." FAR 15.605(c). There is no statutory or regulatory definition, but it generally refers to a source selection based upon a cost/benefit analysis. The award decision made by the Contracting Officer or Source Selection Authority, requires a subjective judgment as to whether the differences in prices among competing proposals are justified by other aspects *i.e.*, a cost/technical trade-off.⁴ It permits greater discretion by the agency in source selection versus the less subjective selection based upon the "lowest cost, technically acceptable" method of procurement.

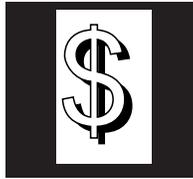
When can you use it?

Whenever you want. Most often, however, best value procurements are used when technical is more important than price. Purchases of products which can be easily compared, will likely be made upon the basis of the lowest evaluated price. It is when the specifications are more functional in nature, that the proposals will differ and a technical vs. cost tradeoff analysis will be necessary. The more important the contractor's experience, risk factors, and responsibility, the greater need to perform this analysis. Best value procurements are not only for highly complex technical items. This method can be used whenever the agency wants to devote the resources to perform a proper cost/benefit analysis

to support its source selection that offers the greatest value to the government.

How do I use it?

As in any other procurement, you must provide the evaluation factors and all other significant subfactors, including price, and their relative importance in Section M. FAR. 15.406-5(c) and 15.605(e). The offerors must be apprised of the evaluation scheme and the evaluators must base the selection on this scheme. The solicitation must set forth clearly that price and technical factors will be considered and weighed against each other. *DynCorp*, B-245289, B-245289.3, 1992 WL 194741 (July 30, 1992) (unpublished) and *Training and Mgmt. Resources, Inc.*, B-220965, 86-1 CPD ¶ 244.



The GSBICA, in *dicta*, was not impressed by a Section M which stated, "Award of the contract resulting from this solicitation will be made to the offeror whose proposal offers the greatest value to the Government in terms of technical capability and which proposal offers the greatest value to the Government." *DALFI, Inc.*, 87-3 BCA ¶ 20,018, at 101,356. The Board found that this left too much discretion to the Government and failed to state the degree to which technical capabilities are of particular concern or what factors may enter into any technical and cost trade off. *Id.* The relationship between technical and cost must be provided, *e.g.*, technical is "more important", "slightly more important", or "significantly more important" than cost. This will be the basis for award. The relative weights for the technical evaluation factors must also be provided, but numerical weights need not be disclosed. FAR 15.605(e). If there are minimum requirements for any of the evaluation factors, they must be disclosed. *Id.*

Rating the proposals can be accomplished in

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many ways. Point scoring is most common, but not required. The Department of Defense uses color coding for its ratings. Technical capabilities are evaluated separately from the assessment of probable cost to the Government. See *DALFI, Inc.*, 87-1 BCA ¶ 19,552 at 98,808. Points can be assigned to individual proposals against an absolute scale or upon a comparative analysis between the proposals. The numerical technical scores can be used in a formula that adds the weighted technical scores to weighted and normalized cost scores with award made to the highest scored proposals.^{5, 6} A percentage comparison, rather than an absolute dollar difference is acceptable. *System & Computer Technology Corp.*, 87-2 BCA ¶ 19,703. The numerical scores may be used by the source selection authority as a basis or guide for the cost/benefit analysis.

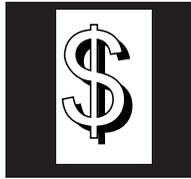
The GSBGA and the Comptroller General have made clear that the contract file must be documented articulating a reasoned explanation as to why one offeror's features are preferred at the price proposed over another proposal. *Network Solutions, Inc.*, and *PRC, Inc.*, v. *Air Force and EDS*, GSBGA 11498-P, 11532-P (April 30, 1992); *Grumman Data Systems Corp.*, GSBGA 11635-P, slip opin. (March 19, 1992); and *TRW, Inc.*, 89-1 CPD ¶ 584.

There is no established "formulaic requirement," and no "magic formulas" in making the cost/technical tradeoff analysis. *IBM and Lockheed Missiles & Space Co., Inc.*, GSBGA No. 11359-P-R, 92-1 BCA ¶ 24,438. Paramount to the agency's evaluation is the requirement that all offerors be treated fairly and equally. *DALFI, Inc.*, 87-1 BCA ¶ 19552 at 98,809. The agency must consistently evaluate and rate all proposals and its failure to review all proposals on the same basis renders a selection arbitrary, capricious, and unlawful. *DALFI, Inc.*, 87-1 BCA ¶ 19552, and *Honeywell Federal Systems, Inc.*, 89-1 BCA ¶ 21,444 at 108,044. "An agency might be able to justify an award at twenty times the price if the facts supported it and the solicitation allowed it." *IBM and Lockheed, supra*.

Judgments regarding the evaluation of proposals are subjective by nature, but they must be reasonable and must bear a rational relationship to the announced evaluation criteria upon

which competing offers are selected. *DynCorp.*, *supra* at 7; *Waddel Eng'g Corp.*, 80-2 CPD ¶ 269. It is the agency's responsibility to determine whether the technical differences, in fact, merit a price premium. *IBM and Lockheed, supra*. You need not quantify the technical differences by assigning dollar values or establishing some sort of a minimum cost ratio. *Id.* The Government must show why it will receive benefits commensurate with the price premium it will pay. *Id.* This basis for analysis also applies when choosing the lower priced proposal. *DALFI, Inc.*, 87-1 BCA ¶ 19552.

Hopefully, this brief discussion provides you with enough information so that you too can get the best value for the government without the headache of a protest. Remember, careful attention to Section M, by its drafters, the Contracting Officer, the Technical Evaluation Team, the Price Evaluation Team, and the Source Selection Official is critical to a successful procurement.



1. Joseph Petrillo, *Everyone Seems to Have a Way of Judging What Best Value Means*, (July 20, 1992), Government Computer News, at 76, and John Cibinic, *In Defense of Best Value Procurement*, Vol. 6, Number 8, The Nash & Cibinic Report ¶ 45 (August 1992).

2. Congress is concerned that best value procurements are destructive of full and open competition. See John Cibinic, *In Defense of Best Value Procurement*, Vol. 6, Number 8, The Nash & Cibinic Report ¶ 45 (August 1992). Legislation is being considered that will place a minimum weight on cost factors. See Joseph Petrillo, *Everyone Seems to Have a Way of Judging What Best Value Means*, (July 20, 1992), Government Computer News.

3. *Guidance for Source Selection of Federal Information Processing (FIP) Resources Using Greatest Value Approach*. Available from GSA IRM Reference Center, (KMAD), 18th and F Streets, N.W., Washington, D.C. 20405.

4. See GSA *Guidance, supra* at 5-3

5. Normalization compares the differences by assigning a perfect score for technical superiority, against which relative scores are assigned to the technically inferior offers, and a perfect score for lowest price, against which relative scores are assigned to the higher priced offers. See *Systems & Computer Technology Corp.*, 87-2 BCA ¶ 19,703.

6. The Editor is of the view that a "best buy" award decision should never be dictated by total point scores alone, and is, in fact, opposed to even scoring cost proposals. He has never seen a procurement where a buyer could rationally determine the relative worth of a "technical point" to a "cost point". Let's measure cost or price in dollars, not points!