



Section 876: Increasing Order Level Competition for Federal Supply Schedules

Presentation to GSA Listening Session

by

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November 9, 2020

(as of 11/9 /20)

Section 876 of FY19 NDAA (P.L. 115-232; 8/13/18) **“Increasing Competition at the Task Order Level”**

- Key Requirements
 - If:
 - Solicitation for services are to be acquired on an hourly basis; and
 - Agency intends to make a contract award to each qualifying offeror; and
 - Contract will feature individually competed task or delivery orders based on hourly rates
 - Then:
 - CO need not consider price as an evaluation factor for contract award, and, if not considered, then cost or price to the U.S. shall be considered in conjunction with the issuance of any task or delivery order under any contract resulting from the solicitation
- Term “qualifying offer” is also defined
- PSC supported (generally) congressional action

GSA's ANPR – Increasing Order Level Competition for Federal Supply Schedules

- Published 8/19/20 with focus on GSA FSS primarily; comments were due 9/18/20
- PSC did not submit written comments
- GSA issued 8/14/20 FAR Class Deviation CD-2020-04 [but not applicable to FSS]
- Aware that FAR Case 2018-014 is still in development (as of 11/2/20)
- FAC 2020-07 (7/2/20) amends the FAR effective 8/3/20 to implement Section 825 of FY17 NDAA by modifying the requirement to consider price or cost as an evaluation factor for the award of certain multiple award task-order contracts issued by DoD, NASA, and the Coast Guard.

PSC Key Takeaways

- 1.** The statute provides government-wide discretionary authority on non-priced multiple award IDIQs, including for the Schedules; although not mandatory, GSA should continue to take full and rapid advantage of the flexibility provided in Section 876 – including for the Schedules.
- 2.** The Schedules are being increasingly used for solutions – and less for products or even services, and contracting actions have to accommodate what federal buying activities need to acquire and how vendors are selling to them (and in the commercial marketplace).
- 3.** There are innumerable issues/topics/questions related to application of Section 876 to the Schedules, for which there are only a few clearly wrong answers.

Key ANPR topic: Implementing the Authority

- **GSA questions:**

1. Should GSA look at beginning with the entire FSS or just a portion (e.g. one or more category, subcategory, or SIN)?
2. If the latter, which portion?
3. Should GSA strip hourly rate pricing out of current Schedules contracts or permit a two-tier approach in which older schedules have established hourly rates and newer schedules do not?

- **PSC perspective:**

1. It makes more sense to apply Section 876 flexibility to the entire FSS. It is far more difficult to (a) segment by category, subcategory or SIN; (b) expect either government buyers or industry sellers to separate knowledge and offerings; and (c) differentiate between “newer” Schedules and “older” Schedules.
2. The world of priced Schedules, while also allowing ignoring Schedule-level pricing for individual task or delivery orders, can co-exist and both be successful. Prices do not need to be stripped but can be ignored.
3. Our interpretation of a “two-tiered” approach may differ from Q3.

➤ Key ANPR topic: Contract Type

GSA questions:

1. Does the language restrict use of the exception to labor-hour or time-and-material contracts?
2. Does the language support use of fixed-price contracts where services being offered can be converted into hourly rate calculations?
3. Does the language restrict the use of the exception to full and open competition set-forth in FAR 6.3?
4. Does the language limit the types of services that can be ordered to only those that are performed on an hourly-rate basis?

PSC perspective:

5. The statute appears limited to contracts for services to be acquired on an “hourly rate basis.” However, the term “hourly rate basis” is not otherwise defined or limited and GSA should take that flexibility to apply it to fixed-price contracts where services can be converted to hourly rate calculations.
6. The statute does not restrict the use of the exceptions in FAR 6.3.
7. The statute does limit the types of services, but GSA’s 8/14/20 FAR Class Deviation says that, for SPE consideration, “the predominant amount of the acquisition must be for services that will be acquired on an hourly rate basis.” (Emphasis added.) Embrace the expansion!

Key ANPR topic: Mixed-Use Contracts

- **GSA questions:**

1. Should GSA establish separate FSS contracts for priced and unpriced items?
2. Should GSA combine them into one contract in which some items are priced and other items are not priced?

- **PSC perspective:**

1. Have one contract. It is OK to have some items priced and others not. It's also OK to have all items priced at the Schedules level but allow for greater flexibility and even vendor deviation in pricing at the order level for selected orders, without implicating or violating the CSP or the PRC!!
2. Having separate FSS contracts would be contrary to GSA's multi-year effort (and PSC's support) for Schedules consolidation. GSA's move to a web-based catalog management system will also better support a single FSS contract approach.

Key ANPR topic: FAR Changes Necessary

GSA questions:

- Is the FAR (Section 8.404(d)) still sufficient in light of the statutory language?
 - FAR 8.404(d) is still sufficient and does not need to be modified to accommodate the implementation of Section 876 for FSS.
- Is it reasonable to read Section 876 as allowing for pricing for services on a Schedule not to be established at the FSS contract-level, but at the order-level? If so, what, if any, mechanism could be established at the FSS contract-level concerning pricing?
 - It is not only reasonable to read Section 876 as allowing for pricing for covered services on a Schedule to not be established at the FSS contract-level, but at the order-level, it is exactly the authority Section 876 provides!
- If pricing is not established at the FSS contract-level, is the FAR language still accurate or even necessary?
 - If pricing is not established at the FSS contract-level, the FAR language is still accurate; it is still necessary because Section 876 is discretionary, not mandatory and, even where applied, covers only a subset of all services.
- Are separate ordering procedures necessary for services not priced on an hourly basis, such as fixed unit rates?
 - No.
- If pricing for services is no longer evaluated as part of contract award, can a fair and reasonable determination still be made for other items?
 - Yes.
- How would the lack of determination of price reasonableness at the FSS contract-level still support FAR 12.209?
 - TBD

Key ANPR topic: FAR Changes Necessary (cont.)

- Is it possible for FSS contractors submitting offers involving services to submit price or cost information in response to a solicitation for award of a task or delivery order in order to support a fair and reasonable determination being made by the ordering activity?
 - The contracting officer must make the “fair and reasonable price determination” before making the task or delivery order award. While under very limited circumstances it would be appropriate for a contracting officer to request uncertified cost or price information, the nature of the Schedules pricing (even at the task or delivery order level where Section 876 allowed no pricing at the Schedules level) should make such request generally unnecessary.
- What if there ends up being no other competition on the agency order?
 - If there is no competition, this statute is not implicated as long as all qualified vendors have awards. Other statutes or rules (such as one-bid rules) may be implicated, however.
- For FAR 8.401, if pricing is no longer established at the FSS contract-level, would the language “at varying prices” still be accurate or even necessary? Are other changes to the FAR necessary?
 - TBD
- For FAR 12.207(c)(1), is the language still sufficient in light of the statutory language using “an hourly rate basis”? If not, any suggested language?
 - TBD

Key ANPR topic: GSAR Changes Necessary

- **GSA questions:**

1. What is the potential impact to the GSAR in relation to the FSS program as a result of implementation of this authority? Areas of particular impact interests are (a) price reductions; (b) transactional data reporting; (c) evaluation and use of options; (d) economic price adjustment; (e) price list; and (f) other.

- **PSC perspective:**

1. If Section 876 is fully and properly implemented, there will be impact on the GSAR but not at every level. Some existing GSAR items would be anachronistic to the Section 876 implementation, such as price reductions (because implementation should be treated as permissible “spot” pricing at identified task or delivery order level). Transactional data reporting is a challenge for all (and PSC remains skeptical) but it is not tied to when pricing is identified or what prices are bid.
2. Properly applied, Section 876 will not have an impact on source selection evaluations at the task order level because pricing will still have to be submitted by interested vendors with each task/delivery order response. We would expect option year pricing to be included in the initial task order solicitation for the work, but even unpriced options can work under Section 876 authority.
3. To the extent that prices are offered at the Schedule-level award, price lists would be maintained; if a solicitation takes advantage of Section 876 at the task order level, spot pricing rules and deviation from top-level Schedule pricing should apply. Price lists can be maintained for task order awards.

Key ANPR topic: Updated GSA Guidance

- **GSA questions:**

1. Potential impact to FSS solicitation and ordering requirements?
2. What changes should be made in FSS solicitations, instructions, ordering guidance, and training?
3. What type of pricing information for services should be requested as part of an offeror's response to an FSS solicitation, if any?
4. Should GSA still ask for pricing as part of the solicitation?

- **PSC perspective:**

- Since 876 is discretionary, GSA could still ask for pricing as part of the Schedule formation.

Key ANPR topic: Regulatory Impacts-Costs/Savings

- **GSA questions:**

1. How should GSA think about regulatory cost increase or decrease associated with moving to unpriced hourly rate Schedule contracts?
2. Confirm GSA's belief that this change will result in a net burden reduction?
3. The type of and number of employees used to develop and prepare cost or price information
4. The number of hours (in a range) that would be spent by each type of employee to develop and prepare the cost or price information?
5. The average hourly rate for each type of employee used to develop and prepare the cost or price information, or total average amount spent for each type of employee to develop and prepare the cost or price information for such a proposal?
6. The types of services organizations typically submit responses for and whether efforts/costs to provide cost or price information vary depending on different factors?
7. Any variations in efforts and costs?
8. Other areas of savings?

- **PSC Perspective:**

1. To the extent that pricing submissions are not asked for at the Schedules formation level, this will certainly reduce the time and cost to offerors in submitting and negotiating Schedules awards. Significant additional burden reductions will be achieved by eliminating the application of both the CSP and the PRC! However, the company's pricing regimes and data will still be necessary in order to respond to task or deliver order competitions.
2. We have requested information from our members on questions 3 through 7.

PSC Closing Comments

- 1.** Section 876 provides recognition of the continuing changes of the GSA and federal contracting markets.
- 2.** While applying Section 876 to the FSS is more complex than individual new IDIQs, 876 and FSS can be integrated successfully.
- 3.** GSA should take rapid and full advantage of the congressional authority.
- 4.** PSC and our members appreciate the current dialogue and are available for additional engagement and discussions.

> Questions?

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