



COMMENTARY  
NOVEMBER 2018

## GAO Says Strict Compliance with Buy American Act Exception Requirements Not Necessary

### IN SHORT

**The Situation:** The Government Accountability Office (GAO) recently held that a bid need not contain all of the information listed in the Federal Acquisition Regulation (FAR clause 52.225-9) to qualify for the "unreasonable cost" exception to the Buy American Act (BAA).

**The Result:** The decision requires agencies to analyze the contents of a bid, rather than mechanically rejecting it on a technicality.

**Looking Ahead:** A company can protest a rejected bid so long as the missing information would not allow the bidder to later alter its price or relative standing.

The GAO recently sustained a protest finding that it was unreasonable for the Department of Energy (DOE) to reject a bid simply because it failed to strictly comply with all of the requirements for an exception to the BAA. In [Addison Constr. Co.](#), B-416525 (Sept. 4, 2018), Addison Construction Company submitted a bid to construct a capacitor bank for DOE in Arizona. Addison's bid informed DOE that a portion of the construction materials used would be foreign, not domestic. Addison's bid requested an exception to the BAA pursuant to FAR clause 52.225-9, available when the cost of domestic construction material is "unreasonable" (i.e., it exceeds the cost of foreign material by more than six percent).

This holding is encouraging for companies and cost-conscious federal customers, as it requires agencies to analyze the contents of a bid, rather than mechanically rejecting it on a technicality.

Under FAR clause 52.225-9, a contractor seeking an exception to the BAA construction materials requirement on the basis of unreasonable cost must include the following with its bid: price, quantity, unit of measure, and a description of the foreign and domestic materials at issue, along with a detailed justification for the use of foreign construction materials, a "reasonable survey of the market," and a completed price comparison table in the format provided in FAR clause 52.225-9(d). In addition, the clause requires the contractor to provide the time of delivery or availability of the materials, the location of the construction project, specific supplier information (including the name, address, and telephone number for the supplier, and a copy of the supplier's response or a summary thereof), and "other applicable supporting information."

Addison's bid included much of this information, but failed to provide the name, address, telephone number, and contact information for the suppliers that had been surveyed, a copy of such suppliers' responses, or any other supporting information. As a result, DOE rejected the bid as nonresponsive. Addison protested the rejection to GAO.

GAO sustained the protest, finding that DOE's rejection of the bid was unreasonable. Rather than simply rejecting the bid, GAO found that the agency should have conducted its own investigation to determine the applicability of the requested BAA exception, since the missing

information was not the type of information that would enable a bidder to alter or amend the price or relative standing of its bid after submission.

This holding is encouraging for companies and cost-conscious federal customers, as it demonstrates a pragmatic approach to the BAA exception and requires agencies to analyze the contents of a bid, rather than mechanically rejecting it on a technicality. While bidders and offerors should always ensure they submit a complete bid or proposal, the Addison Constr. Co. decision provides companies with some measure of comfort that their bids may not be rejected solely because of a failure to include all of the information required by FAR clause 52.225-9, so long as the missing information would not allow the bidder to later alter its price or relative standing.

### THREE KEY TAKEAWAYS

1. While bidders and offerors should always ensure they submit a complete and well-written bid or proposal, agencies should not reject a bid solely because it fails to include all of the information required by FAR clause 52.225-9.
2. If an agency rejects a bid as nonresponsive under FAR clause 52.225-9, a company may be able to find relief through a GAO protest, so long as the missing information would not allow the bidder to alter its price or relative standing after bid submission.
3. If a bid fails to include all of the required information to demonstrate eligibility for the "unreasonable cost" exception to the BAA, an agency may be required to conduct its own investigation to determine the applicability of the exception.



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