THE FAR UNBALANCING ACT

The Government Accountability Office (GAO) has considered numerous protests alleging that an offeror's bid was "unbalanced." Only a small number of these protests have been sustained. In *Al-Tahouna Al-Ahliah Gen. Trading & Contracting Co, WLL, et al*, B-412769 *et al,* May 9, 2016, the GAO concurred in an agency finding that an offer was unbalanced, and that the agency had properly refused to make award to that offeror. The case shows how important it is, under the Federal Acquisition Regulation ("FAR") rewrite that was performed in 1997, for the agency to conduct a risk analysis when considering a potentially unbalanced offer.

Prior to 1997, when the FAR was rewritten, any offer that was "materially unbalanced" could be rejected by an agency. A materially unbalanced offer was one that was mathematically unbalanced (based on prices which were significantly less than cost for some contract line items and significantly overstated in relation to cost for others) **and**

- there was a reasonable doubt that the offer would result in the lowest overall cost to the Government, even though it was the lowest evaluated offer; or
- the offer was so grossly unbalanced that its acceptance would be tantamount to allowing an advance payment.

FAR 15.814(a) (pre 9/30/97). The complete FAR section is in the table below. In 1997, the section on unbalanced offers was renumbered and rewritten. The definitions of mathematical and material unbalanced offers were omitted, and the emphasis was placed on whether or not the lack of balance posed "an unacceptable risk to the Government." The FAR now states that "unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more contract line items is significantly over or understated as indicated by the application of cost or price analysis techniques." Contracting officers are required to evaluate separately priced items to determine if the prices are unbalanced, and if they are, to consider the risk to the government of those unbalanced prices. See the right column of the table below.

UNBALANCED OFFERS

FAR Prior to 9/30/1997	FAR After 9/30/1997 (62 Fed. Reg, 51224-01 (1997))
15.814 Unbalanced offers.	**15.404-1 Proposal analysis techniques**
(a) Offers shall also be analyzed to determine whether they are unbalanced with respect to prices or separately priced line items. This is particularly important when evaluating the relationship of the price for first article tests or test items to the price for the production units, and in evaluating the prices for options in relationship to the prices for the basic requirement. (b) An offer is mathematically unbalanced if it is based on prices which are significantly less than cost for some contract line items and significantly overstated in relation to cost for others. An offer is materially unbalanced if it is mathematically unbalanced, and if— (1) There is a reasonable doubt that the offer would result in the lowest overall cost to the Government, even though it is the lowest evaluated offer; or (2) The offer is so grossly unbalanced that its acceptance would be tantamount to allowing an advance payment. (c) Offers that are materially unbalanced may be rejected. (d) Depending on the nature of the acquisition, contracting officers	(g) **Unbalanced pricing.** (1) Unbalanced pricing may increase performance risk and could result in payment of unreasonably high prices. Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more contract line items is significantly over or understated as indicated by the application of cost or price analysis techniques. The greatest risks associated with unbalanced pricing occur when— (i) Startup work, mobilization, first articles, or first article testing are separate line items; (ii) Base quantities and option quantities are separate line items; or (iii) The evaluated price is the aggregate of estimated quantities to be ordered under separate line items of an indefinite-delivery contract. (2) All offers with separately priced line items or

shall use either price analysis or cost analysis techniques, or a combination of the two techniques, to determine if offers are materially unbalanced. The following are examples of techniques that can be used to determine if an offer is unbalanced. Although these examples specifically relate to first article testing, they may also be used for other procurements where unbalanced offers may be of concern. (1) Compare all offers to determine if the offerors have significantly higher prices for the first articles than for the production units. The comparison should consider whether the Government or the contractor will perform the first article test. (2) For an individual offer, compare the relationship of first article prices to prices for production items. The cost to the offeror for first articles may be estimated (i) By comparing the total price offered, including the first article to an alternate proposal by the same offeror which does not include first article testing (see 9.306(d)); or (ii) if cost data has been submitted, by reviewing certain elements of cost to determine, for instance, whether manufacturing and special tooling, and test equipment costs, are prorated among the first articles and the production units, or are only applied to the first articles. If cost data are not available, it may be necessary for contracting officers to estimate contractor cost.	subline items shall be analyzed to determine if the prices are unbalanced. If cost or price analysis techniques indicate that an offer is unbalanced, the contracting officer shall— (i) Consider the risks to the Government associated with the unbalanced pricing in determining the competitive range and in making the source selection decision; and (ii) Consider whether award of the contract will result in paying unreasonably high prices for contract performance. (3) An offer may be rejected if the contracting officer determines that the lack of balance poses an unacceptable risk to the Government

In *Al-Tahouna,* the Defense Logistics Agency ("DLA") sought bids for the purchase of metallic and non-metallic scrap metals in Qatar. A requirements contract would be awarded to the highest priced bid, based on a cumulative average of many line items. The solicitation contained terms and conditions applicable to DLA sales of personal property which stated that "the Government reserves the right to reject any or all bids, including bids under which a Bidder would take unfair advantage of the Government or other Bidders…when in the best interest of the Government." The GAO concurred with the DLA that an unbalanced bid would fit within these parameters, and could properly be rejected by the agency.

First, the GAO noted that although neither the Competition in Contracting Act of 1984 nor the FAR applies to sales of government property, the GAO refers to the FAR for guidance in reviewing protests involving sales. The GAO further noted that DLA concluded that two bids (including Al-Tahouna's) were unbalanced based on a comparison with the five highest bids and historical information. Both offerors bid significantly higher than the average bids of their five nearest competitors for plastics and rubber residue in line item 2, and significantly lower on the other five line items. GAO noted that the two protesters bid $11 and $10.55 per pound for item 2, compared with an average of $.70 per pound for the remaining top five bidders—amounting to more than 15 times higher. This was a significant overstatement, and was unbalanced per FAR 15.404-1(g)(1).

The DLA analyzed the risk in the bids, and concluded that there were two risks:

- risk that a contractor who receives award based on an unbalanced bid would terminate its contract (as permitted by the terms of the contract) with 60 days written notice. Because contractors must obtain a license for conducting business in Qatar and to use the equipment, the government would have to permit the contractors to continue to purchase the lower priced items until a replacement contractor was found.

- risk that the government would not receive the overall highest price from the protester's unbalanced bids if the percentages allocated to each line item varied by even 10 percent from the percentages that formed the basis of the evaluated price.

The GAO held that the DLA had reasonably considered the risks, and properly rejected the bids because they were unbalanced. DLA advised that it had a limited history of selling scrap in Qatar and had based its experience on scrap sales in Kuwait. If the DLA estimate was incorrect, the government was at risk of receiving significantly less money than was indicated by the evaluation of bid prices, thereby concurring the DLA's finding on the second risk above. Accordingly, GAO denied the protest, concurring in DLA's finding of unbalanced bids.