**Use of General Services Administration**
**Federal Supply Schedules**

During the last decade, there has been an explosion in Federal agency use of the General Services Administration (GSA) Federal Supply Schedules (FSS) Program. Almost all recent developments – be they regulatory, political or technological – have served to fuel that expansion. A significant constraint, however, was imposed by the General Accounting Office (GAO) in 1999. In the case of Pyxis Corporation, B-282469, July 15, 1999, 99-2 CPD ¶ 18, the GAO put a formal and complete end to the previously authorized practice of Federal agency ordering of non-FSS items through FSS contracts.

FSS contracts have become increasingly popular in recent years for a number of reasons: regulatory changes that allow agencies to place orders with unlimited dollar values and without any prior notice to industry; dwindling numbers of acquisition personnel seeking to find alternatives to lengthy and costly, full-blown procurements; and, the availability of an increasing variety of items on FSS contracts.

Notwithstanding this vast array of available products, agencies often cannot satisfy all their needs with FSS listings. For example, an agency buying a computer system from a FSS contractor may find that various cables, clamps and racks are not available through the FSS program. In the past, this was a minor nuisance, at worst, because GSA policy and GAO case law sanctioned the inclusion of non-FSS items in the FSS order. In essence, agencies were allowed to order non-FSS items through the FSS program as long as they were "incidental" to the overall acquisition, and their cost was "small compared to the total cost" of the delivery order. VION Corporation, B-275063.2, February 4, 1997, 97-1 CPD ¶ 53; Raymond Corporation, B-246410, March 2, 1992, 92-1 CPD ¶ 252. Although the GAO did not define what it meant by "small compared to the total cost", there were protest decisions in which the GAO sanctioned the inclusion of non-FSS items valued at up to 17% of the overall cost. More significantly, there were no protest decisions placing an upper limit on the allowable value of non-FSS items. Possibly emboldened by the GAO case law, GSA personnel normally advised agencies that they could safely include non-FSS items valued at up to 20-25% of the total cost.

A preliminary death knell was struck by the Court of Federal Claims (COFC) in the 1997 case of ATA Defense Industries, Inc. v United States, 38 Fed. Cl. 489 (1997). The Court found the GAO approach to be "fundamentally inconsistent with Congress' unambiguous statutory mandate in the [Competition in Contracting Act]". The Court indicated that non-FSS items must be acquired competitively, or pursuant to a Justification and Approval (J&A), unless de minimus in value.

However, since the GAO is not bound by the standards enunciated by the COFC, there remained some doubt as to whether the GAO would continue to follow, or overrule, its prior holdings. That question was answered unequivocally in the Pyxis Corporation case. In that case, the Army issued delivery orders to OmniCell Technologies for medical equipment and supplies.

Pyxis protested, alleging in part that some of the ordered products were not on OmniCell's FSS contract. Relying on GAO precedent, the Army argued that the non-FSS products (valued at roughly 5% of the total purchase price) were incidental to the overall acquisition, and that their price represented an insignificant percentage of the total value of each delivery order. Pyxis responded that the Army's "incidentals" and "insignificant" arguments were untenable in light of the ATA case.

In a stark reversal of its prior holdings, the GAO agreed with Pyxis and embraced the COFC's rationale in the ATA case. The GAO concluded that "it was improper for the agency . . . to include non-FSS items in the delivery orders without ensuring that it had complied with the regulations governing purchases of those non-FSS items."

In other words, the GAO now holds that an agency must "follow applicable acquisition regulations" when acquiring non-FSS items. For items valued at or below the micro-purchase threshold ($2500), the acquisition regulations do not require the use of competitive procedures. Therefore, non-FSS items valued at $2500 or less may be acquired from the FSS contractor in much the same manner as had been done before the ATA and Pyxis cases. (Acquisitions of $2500 or less can be viewed as analogous to the "de minimis" allowance enunciated by the COFC in ATA). However, if the non-FSS items are valued at greater than $2500, more formal procedures must be used. If not exceeding $100,000 in value, simplified acquisition methods may be used; otherwise, full and open competition must be utilized, or other than full and open competition justified.

After following applicable acquisition regulations, an agency may find that the selected source for the non-FSS items is a company other than the chosen FSS contractor. In that event, can the non-FSS items be acquired through a delivery order to the FSS contractor? On its website, GSA says that non-FSS items can be added to a FSS order "for administrative convenience". What GSA means, it appears, is that non-FSS items acquired from a source other than the chosen FSS contractor can be included on the FSS order if all three parties (the FSS contractor, the agency and the source) agree. Additional GSA guidance regarding these and other FSS-related matters can be found at its website: http://pub.fss.gsa.gov/sched.

In summary, it is now clear that the time-honored practice of routinely adding non-FSS items to a FSS order is dead. The importance to the GAO of ending this practice is reflected by the fact that it decided the Pyxis case notwithstanding the untimeliness of this protest ground. Although GAO rules allow it to hear an untimely protest if the protest involves "issues significant to the procurement system" (4 CFR § 21.2(c)), GAO practitioners indicate that it has been nearly a decade since such authority was previously exercised.

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