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SUMMARY OF KEY FEDERAL SUPPLY SCHEDULES CASES

December 10, 2002

I. PROTESTS:

A. No Incidental Items or Open Market Items:

ATA Defense Industries, Inc., 38 Fed. Cl. 489, June 27 1997 - U.S. Court of Federal Claims sustained protest on an Federal Supply Schedules (FSS) buy where 35% of products and services bought were not listed on the vendor's FSS contract. Court of Federal Claims held that there is no legally authorized acquisition of "incidental" exception to Competition in Contracting Act (CICA) under the Federal Acquisition Regulations (FAR) Subpart 8.4 FSS acquisitions. Therefore, acquiring "incidentals" also known as "open market" items must follow all applicable CICA procedures and Small Business Act (SBA) requirements.

Pyxis Corporation, B-282469, 99-2 CPD 18, (July 15, 1999) – General Accounting Office (GAO) overrules its prior GAO protest decisions that had allowed small amounts of incidentals under FSS buys. GAO now follows Court of Federal Claims' decision (ATA Defense Industries) and agency may no longer rely on the "incidentals" test to justify the purchase of non-FSS items in connection with an FSS buy; where an agency buys non-FSS items, it must follow other applicable CICA and SBA requirements.

SMS Systems Maintenance Services, Inc., B-284550.2, 2000 CPD 127, (August 4, 2000) - FSS quote for services, where some of which were not on vendor's FSS contract, then vendor could not be selected for award under the FAR 8.4 process. *Exception is items or service not exceeding micro-purchase threshold (\$2,500).*

T-L-C Systems, B-285687.2, 2000 CPD 166, (September 29, 2000) - FSS order was invalid where items that were part of integrated system were not on awardee's FSS contract. GAO held that proposed corrective action by agency of deleting the items from the awarded FSS order was deemed inadequate corrective action since basis for award was an integrated system.

B. Best Value FSS RFQ:

Comark Federal Systems, B-278343.2, 98-1 CPD 34, (January 20, 1998) – Once an agency decides, by issuing an RFQ, to shift to the vendors the burden of selecting items on which to quote, the agency must provide some guidance about the selection criteria, in order to allow vendors to compete intelligently. The GAO noted that where agency elects to use a best value evaluation process similar to Part 15 procurement and allows the quoter to submit his proposed solution to meet the agency's needs, the RFQ must at least provide for a fair and equitable competition by setting out minimal evaluation criteria and specs that accurately state the agency's requirements and the award record must be consistent with the evaluation criteria and reflect the conduct of tech/price tradeoff assessment. Must inform RFQ vendors whether the basis of evaluation and award is either tech acceptable- low cost or best value consistent with the evaluation factors and tech-price tradeoff.

Ellsworth Associates, Inc. v. U.S., 45 Fed. Cl. 388, Nov 22, 1999 – U.S. Court of Federal Claims held that use of scored interviews of vendors judged "minimally competent" did not transform a FAR Subpart 8.4 acquisition into a negotiated procurement. Distinguished Comark, supra, that an agency need not identify detailed evaluation criteria but only indicate at a minimum, the basis on which the selection is to be made. Noted that there was no requirement under Comark to import Part 15 procedures into an FSS procurement. However, an agency may choose to engage in a more comprehensive selection process than contemplated by 8.4, and protester may challenge decision on arbitrary and capricious grounds, but FAR 15 does not govern the process.

Computer Products, Inc., B-284702, 2000 CPD 95, (May 24, 2000) - GAO attempts to slightly distinguish the application of the Court of Federal Claims' Ellsworth decision to GAO protest. In this case, although best value criteria was in RFQ, the evaluators simply concluded that all quotes satisfied the requirement and were essentially equal and therefore no need to conduct qualitative technical/cost tradeoff assessment. GAO sustained the protest and held that when FSS RFQ sets out best value as basis for award, agency may not later then award on the conclusory evaluation finding that all the quotes are equal and therefore converting basis for award to the technically acceptable, lowest cost submission.

Cybertech Group, Inc., v. U.S., 48 Fed. Cl. 638, February 14, 2001 – Since Part 14 procedures are inapplicable to a FAR Subpart 8.4 FSS buy, was no prejudice to protester or requirement that the incumbent firm on contract be solicited. Therefore agency failing to advise that an FSS order competition was taking place, failure to provide protester with RFQ, and failure to obtain an offer from protester was denied. FAR Subpart 8.4 reference to GSA Special Ordering Procedures and the term "should" (1. Prepare RFQ; 2. Transit to contractors; 3. Evaluate responses considering the evaluation and award criteria) for certain FSS type contracts (e.g. those requiring SOW) was deemed by the court advisory and not mandatory.

Design Contempo, Inc., B-270483, 96-1 CPD 146, (March 12, 1996) – Where bulk of items at issue are contained in a non-mandatory schedule, the decision whether to

purchase an item from a vendor included on the schedule or to proceed with a new solicitation is a business judgment committed to the discretion of the Contracting Officer. Since requests for quotations for products on an FSS are merely intended to identify suitable products available on the FSS, evaluation of the products is not limited to consideration of the requirements mentioned in a RFQ. Since the agency found that the awardee's product offered features which it sought and which were not available on the protester's FSS, it properly issued a DO to awardee.

Vion Corporation, B-283804.2, 2000 CPD 22, (January 24, 2000) - Under an FSS purchase, the agency is not required to equalize the information gathering process among potential FSS vendors. Agency may obtain information from one vendor without seeking similar information from other vendors.

Avalon Integrated Services Corporation, B-290185, July 1, 2002- RFQ solicitation referred to the terms "competitive range" for those quoters who would then be allowed to provide oral presentation. However, GAO denied protest since FAR Part 15 procedures are inapplicable and notwithstanding the "competitive range" term in the RFQ, agency was not required for an FSS order to hold discussions.

Intelligent Decisions, Inc., B-274626. 97-1 CPD 19, (December 23, 1996) – Agency properly entered into BPA with vendor from FSS that offered best value after obtaining additional information from vendor. Seeking additional information is not prohibited in FSS buy because vendors are not submitting offers; the FSS defines what they will provide. Agency can seek additional information after the submission of quotes.

Digital Systems Group, Inc., B-286931, 2001 CPD 50, (March 7, 2001) – Far 8.4 acquisitions for fully integrated financial management services (base +9) required special ordering procedures because government requirement involves products as well as services. Procedures are at GSA website. Require agency to prepare SOW and notify vendors of basis to be used for selection. Requires best value selection evaluation and rationale for award. Where RFQ uses procedures equating to negotiated procurement, contentions of protester will be analyzed by the standards applied to negotiated procurement.

Labat-Anderson, Inc., B-287081, 2001 CPD 79, (April 16, 2001) – Where agency elects to use an approach that is like a competition in a negotiated procurement, agency's actions are reviewed to ensure that the evaluation was reasonable and consistent with the terms of the solicitation. Since RFQ expressly stated that source evaluation was to be conducted and selection made in accordance with the provisions set forth in FAR Part 15, the protester's contentions will be analyzed by standards applied to FAR Part 15 negotiated procurement. [As a result GAO really got into the weeds of the agency evaluation record but then denied the protest on the merits].

Labat-Anderson, Inc. v. U.S., 50 Fed. Cl. 99 (2001) - After GAO denied its protest, *Labat-Anderson* decided to pursue its protest with the U.S. Court of Federal Claims. The Court also denied their protest and also noted that the FSS RFQ solicitation incorporated by reference several FAR Part 15 provisions and therefore the court would review the protest under the requirements of a negotiated procurement. Also, the court

confirmed that they had jurisdiction to review the protest on an FSS acquisition and explained that (unlike task orders issued under FAR Part 16 IDIQ type contracts which are not subject to protest review) both the FSS BPA award and the individual FSS orders are subject to protest review by the GAO and U.S. Court of Federal Claims.

OSI Collection Services, Inc. B-286597.2, 2001 CPD 18, (January 17, 2001) – RFQ set up evaluation criteria similar to Part 15 procurement, so protest was analyzed by those standards. Record showed evaluation was consistent with criteria, reasonable, and supported. But mechanical comparison of past performance evaluation for incumbent contractors was unreasonable. However, failure of offeror to submit all information in its proposal on past performance was fatal.

OMIPLEX World Services Corporation, B-291105, (November 6, 2002) - Request for Proposal stated that price would undergo price reasonableness and “*price realism*” analysis. (The term “price realism” is a term of art. It is not the same as the term “price reasonableness.” “Price realism” means that a low price will be reviewed or question as to whether or not the vendor understands the nature and or magnitude of the solicited requirements.) GAO sustained the protest since Contracting Officer did not know the difference between “price realism” and “price reasonableness.” and the Contracting Officer only determined price reasonableness. Also, it appeared that the solicited “investigative” services were not within scope of the selected vendor’s nor team’s existing FSS contracts.

C: Simplified Procedures in Ordering FSS Contract Items:

National Office Systems, Inc., B-274785, 97-1 CPD 12, (January 6, 1997) – When placing an FSS order, an agency satisfies FAR Subpart 8.4 requirement to ensure best value at lowest cost by simply reviewing GSA’s MAS automated information system. Agency need not seek further competition by soliciting quotes. Formal or written RFQ solicitation is not contemplated or required by FSS program.

L. A. Systems, Inc., B-276349, 97-1 CPD 206, (June 9, 1997) – An RFQ solicitation does not seek offers that are subject to acceptance by the government, it solicits info from which the agency can determine what equipment meets its needs at the best available price. The info is used to enable the government to place a DO with an FSS contractor pursuant to FSS rules. An agency may place order for items that deviate from the stated requirements when deviating items comply with FSS contract and represent best value at lowest cost.

CPAD Technologies, Inc., B-278582.2, 98-1 CPD 55, (February 19, 1998) – When placing orders under FSS contracts, agency need not order lower-priced items which do not meet the agency’s needs. Rather, the agency must reasonably ensure that the items purchased meet the agency’s needs at the lowest overall cost. Statement by the agency that the awardee’s system’s lighter weight, smaller size and effectiveness of operation best met its needs at lowest overall cost was sufficient.

Boehringer Mannheim Corporation, B-279238, 98-1 CPD 141, (May 21, 1998) – BPA executed pursuant to FAR 8.4 was not legally objectionable notwithstanding that it included in the BPA a conditional discount for other products under another BPA. Protester characterized awardee's offer as "price bundling." GAO said no problem.

United Communications System, Inc., B-279383, 98-1 CPD 148, (June 2, 1998) – Untimely protest on issuance of an order using FAR Subpart 8.4 procedures. GAO indicated that once a contract is part of FSS contracts, orders do not have to be synopsisized.

Sales Resources Consultants, Inc., B-284943, 2000 CPD 102, (June 9, 2000) - Unsolicited proposal was not accepted and then offeror protested when the agency used FSS process to obtain software from an FSS vendor under the FSS contract. GAO held no requirement for agency to consider non-FSS vendor's offer.

REEP, Inc., B-290665, September 17, 2002- Agency has an obligation to adequately search and consider reasonably available information on the various FSS contracts for similar services. Agency was not justified in a sole source FSS order where other FSS group had similar language training services that were available on their FSS contracts.

II. CONTRACT DISPUTES ACT CASE:

Prior to July 29, 2002, determining who was the authorized contracting authority to issue a Contracting Officer's final decision under the Contract Disputes Act on an FSS "order" was confusing. Board of Contract Appeals decisions have held that only the GSA Contracting Officer (and not the ordering agency's Contracting Officer) could issue a Contracting Officer's final decision. The GSBCA and other BCAs have dismissed for lack of jurisdiction the termination of orders for default and disputed claims, when a non-GSA ordering Contracting Officer issue a final decision relating to the FSS. Centennial Leasing v. GSA, GSBCA No. 12321, 93-3 BCA 26,200, June 16, 1993; Diamond Envelope Corporation v. GSA, GSBCA No. 10752, 91-3 BCA 24,138, June 14, 1991.

Effective July 29, 2002, the FAR was changed to allow an agency ordering office's Contracting Officer the authority to issue a Contracting Officer's final decisions under the Contract Disputes Act on disputes arising from performance of the "order" or refer the dispute to the schedule contracting officer. The ordering office's Contracting Officer is still required to notify the GSA schedule contracting officer promptly of any final decision.