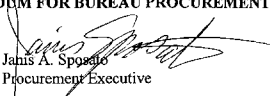




AUG 20 1999

Washington, D.C. 20530

MEMORANDUM FOR BUREAU PROCUREMENT CHIEFS

FROM: 
Janis A. Spaulo
Procurement Executive

SUBJECT: DOJ Procurement Guidance Document 99-9
Prohibition of the Purchase of non-FSS Incidental Items under FSS Procurements

It has been a commonly used practice for agencies to procure Federal Supply Schedule (FSS) items and "incidental" non-FSS items in a single FSS procurement. However, the Comptroller General has ruled that non-FSS items must be awarded according to competitive procedures even though the items may be "incidental" to a FSS procurement. The ruling follows a 1997 U.S. Court of Federal Claims decision holding that such a practice is "fundamentally inconsistent" with the Competition in Contracting Act. Since non-FSS items are not subject to the GSA "best value" evaluation, without competitive bidding, there is no assurance that they offer the best value to the Government.

So that you may have a complete understanding of the issues, attached is a copy of the pertinent Comptroller General Decision, Pyxis Corp., B-282469. It is notable that the Comp. Gen. decided to consider the protest, even though it was untimely, pursuant to the "significant issue" exception to its timeliness rules citing the conflict between the Comp. Gen.'s prior decisions and the Court of Federal Claims holding in ATA Defense Industries, Inc. v. U.S., 38 Fed. Cl. 489 (1997). The Comp. Gen. also decided to resolve the issue because the rules governing the ordering of non-FSS items in connection with a FSS buy are of "widespread" interest to the procurement system." In brief, Pyxis asserted that the "incidental" argument is untenable since CICA does not authorize a departure from full and open competition for the procurement of items "incidental" to an FSS order. The Comp. Gen. noted that GSA's Contractor Guide also recognizes that non-FSS items cannot be purchased from an FSS vendor unless applicable procurement regulations have been followed. Thus the Comp. Gen. sustained the protest since competitive procedures were not utilized to procure the non-FSS items.

It is important that our procurement practices conform to this ruling and that we adhere to CICA in procuring "open market" items for use in conjunction with FSS items. To that end I ask that you review your current procedures and provide the necessary training/instruction to your personnel to assure compliance with this guidance. Although this ruling may affect some of our processes as a result of greater scrutiny of these items, in effect it simply directs us to follow

existing procurement regulations. In practice, three choices are available to us in these circumstances: ask the vendor to add the items to an existing contract, ask GSA to do so, or buy the items separately.

Please add this information to your collection of DOJ Procurement Guidance Documents (a revised list is also attached). If you have any questions please call H.B. Myers at 202/616-3758

Attachment

cc: Director, Office of Small and Disadvantaged Business Utilization, JMD
Director, Office of General Counsel, JMD



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Pyxis Corporation

File: B-282469; B-282469.2

Date: July 15, 1999

Paul W. Cobb, Jr., Esq., and Leslie H. Lepow, Esq., Jenner & Block, for the protester. Jeff Arbuckle for OmniCell Technologies, Inc., an intervenor. Maj. David Newsome, Jr., Department of the Army, for the agency. Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where an untimely issue raised by the protester provides an opportunity to clarify the caselaw concerning the ordering of non-Federal Supply Schedule (FSS) items in connection with an FSS buy, a matter which the General Accounting Office (GAO) views as of widespread interest to the procurement system, GAO will consider this issue pursuant to the significant issue exception to its timeliness rules.
2. An 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 applicable acquisition regulations.
3. Agency reasonably issued delivery orders to FSS vendor whose hospital medication and supply dispensing system offered features that satisfied the agency's needs, rather than to the protester, another FSS vendor, whose comparably priced system did not satisfy these needs.

DECISION

Pyxis Corporation protests the issuance of delivery order Nos. DADA10-99-F-0194, DADA10-99-F-0216, and DADA10-99-F-0217, to OmniCell Technologies, Inc. by the United States Army Medical Command, Department of the Army, for automated medication and supply dispensing equipment and software, known as a "point of use" (POU) system for, respectively, Womack Army Medical Center, Madigan Army Medical Center, and Walter Reed Army Medical Center. The delivery orders were issued under OmniCell's Federal Supply Schedule (FSS) contract No. V797P-3406K for medical equipment and supplies. Pyxis contends the agency improperly issued the orders to OmniCell.

We sustain the protest.

For each medical center, the agency required a POU system that would link and provide automated access to medication and supply information at the patient level, while interfacing with existing and future patient information systems and billing networks. Contracting Officer's (CO) Statement, May 10, 1999, at 1. The POU system would identify the specific supply and pharmacy costs involved with treating individual patients by case, diagnosis, and provider. As relevant here, by e-mail message dated December 14, 1998, from the agency to Pyxis, the agency described its urgent requirement for a POU system which "utilizes existing local area network infrastructure and is consistent with DOD [Department of Defense] standards for architecture (WIN NT) [Windows NT]." Protest, Apr. 8, 1999, Tab A; see also Agency Report, May 10, 1999, Tab I, Memorandum-Policy for Military Health Services System Operating Systems, Health Affairs Policy 96-058, Aug. 26, 1996 (Windows NT workstations and servers to be the standard). On December 14, the agency requested FSS and product information from Pyxis and OmniCell, the two firms which had FSS contracts for POU equipment. Pyxis and OmniCell subsequently submitted relevant product information which was reviewed by the agency between December 17, 1998 and January 8, 1999.

In reviewing the product information, the agency determined that OmniCell's system satisfied the agency's needs, while the comparably priced Pyxis system did not. CO Statement at 4. The most significant difference between the two systems was that OmniCell's system was Windows NT compliant at the time of the agency's review, while Pyxis, as stated in its product submission, "was in the process of implementing Windows NT servers." Supplemental Protest, May 20, 1999, at 12. (Pyxis also contemporaneously advised the agency by e-mail message dated December 18, 1998, that its architecture would be Windows NT compliant by the "MARCH/APRIL timeframe of 1999," Protest, Tab C, and by letter dated March 25, 1999, Pyxis announced that its Windows NT-compliant servers were now commercially available. Supplemental Agency Report, June 2, 1999, encl. 1.)

On March 15, the agency issued a delivery order for \$293,990 to OmniCell for a POU system at Womack, and on March 26, the agency issued two delivery orders—one for \$1,993,730 and one for \$799,760 to OmniCell for POU systems at Madigan and Walter Reed, respectively. During the pendency of this protest, OmniCell delivered the three POU systems.

Ordering of Non-FSS Items Issue

Pyxis argues that the agency improperly ordered a number of non-FSS items under each delivery order from OmniCell. The record shows that the product and price list submitted by OmniCell in response to the agency's December 14 request for FSS and product information did not purport to be the firm's FSS product and price list. Rather, labeled "Confidential Internal Price List," this list included, in addition to

many items that were on OmniCell's FSS, other, non-FSS items; moreover, even for the FSS items, some of the prices on the list varied from OmniCell's FSS prices. Agency Report, Tab M, OmniCell Product Submission, Confidential Internal Price List, at 38; Comments, May 26, 1999, at 6. The agency states that it "asked for the FSS, and that is what [it] thought it received [from OmniCell]." Supplemental Agency Report at 9. It therefore appears that the agency made no effort to ascertain whether OmniCell's submission was actually an FSS price list. The agency concedes it ordered several non-FSS items from OmniCell; it also appears that the agency paid higher prices for some of the FSS items than the prices actually on OmniCell's FSS.

Citing VION Corp., B-275063.3, B-275069.2, Feb. 4, 1997, 97-1 CPD ¶ 53 at 3-4, however, the agency maintains that all of the non-FSS items ordered from OmniCell were incidental to the overall acquisition and the agency's need to have a complete POU system, and that the price of these items represented an insignificant percentage of the total value of each delivery order. Supplemental Agency Report at 9-10. For example, under the Womack delivery order, one non-FSS item valued at \$15,000 was ordered (5 percent of the total purchase price); under the Madigan delivery order, three non-FSS items valued at \$51,420, \$7,715, and \$38,565 were ordered (4 percent of the total purchase price); and under the Walter Reed delivery order, two non-FSS items valued at \$64,275 and \$7,175 were ordered (6 percent of the total purchase price). Id. at 9.

Pyxis responds by stating that the agency's "incidentals" and "insignificant" arguments are untenable in light of the holding in ATA Defense Indus., Inc. v. United States, 38 Fed. Cl. 489 (1997). In ATA, the court pointed out that pursuant to 10 U.S.C. § 2304(a)(1)(A), unless an exception applies, an agency "shall obtain full and open competition through the use of competitive procedures," and held that "[t]here is no exception that even arguably covers 'incidentals.'" ATA, 38 Fed. Cl. at 503. The court continued by stating that "unless a product or service falls within an exception contained in Section 2304 or can be classified as de minimis, Section 2304 mandates that the product be purchased on a competitive basis using a competitive procedure as defined in [10 U.S.C. §2302]. There is no exception covering 'incidentals.'" Id.

Our review of the chronology of the protest leads us to conclude that Pyxis failed to assert the bid protest ground concerning the ordering of non-FSS items in a timely fashion. Under our Bid Protest Regulations, a protest based on other than alleged improprieties in a solicitation must be filed not later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1999). Here, Pyxis received the agency's administrative report on May 10, 1999. In this report, the agency included copies of the three delivery orders issued to OmniCell; each delivery order included the number and type of item ordered, and unit and extended prices for each item. Agency Report, Tabs D, G, and F. On May 20, Pyxis filed a supplemental protest in which it made several arguments, none of which involved the ordering of non-FSS items. On May 26, Pyxis filed comments on the agency report. (Our Office granted an extension to Pyxis for

the filing of comments.) In these comments, for the first time, Pyxis raised the issue of the agency's ordering of non-FSS items. Comments at 5-7. Pyxis discloses in its comments that, not later than March 26, it had received a copy of OmniCell's FSS offerings at the time of the procurement through the Freedom of Information Act. Id. at 5-6. In its comments, Pyxis argued that "[i]t is clear from OmniCell's FSS that numerous items ordered by [the agency] were not on the FSS." Id. at 6.¹ We believe it is clear from this record that Pyxis knew of its basis for protest not later than May 10 when it received as part of the agency report copies of the three delivery orders and was able to compare information in these orders to information on OmniCell's FSS. Pyxis did not raise the non-FSS items issue within 10 days of receiving the agency report in its timely filed supplemental protest, but instead, raised this issue in its comments, 16 days after it knew of its basis for protest, thus rendering the issue untimely.

Nevertheless, we will consider this issue pursuant to the significant issue exception to our timeliness rules. 4 C.F.R. § 21.2(c). We do so in view of the conflict in this area of the law between the Court of Federal Claims' ATA decision and our prior decisions, the resolution of which is of importance to the procurement community. Moreover, the issue itself—the rules governing the ordering of non-FSS items in connection with an FSS buy—is one that we consider of widespread interest to the procurement system.

We are persuaded, in light of the analysis of the court in ATA, that there is no statutory authority for the "incidentals" test enunciated in VION. We note that the General Services Administration (GSA), in its FSS Contractor Guide, states that "[f]or administrative convenience, non-contract items may be added to the Federal Supply Schedule BPA or the individual task order if the items are clearly labeled as such, applicable acquisition regulations have been followed, and price reasonableness has been determined for the items." The FSS Contractor Guide, Section B: Multiple Award Schedule Process, Incidental Items, http://pub.fss.gsa.gov/vendorsguide/section_b.html. Thus, as GSA also recognizes, non-FSS items cannot be purchased from an FSS vendor unless applicable acquisition regulations have been followed.

We conclude that it was improper for the agency here 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 this case, for each delivery order, it is clear that the agency did not follow applicable acquisition regulations, as the non-FSS items ordered exceeded the \$2,500 micro-purchase threshold. See Federal Acquisition Regulation (FAR) § 2.101. Accordingly, we sustain this ground of protest.

¹Pyxis went on to list items ordered, but not on OmniCell's FSS; it listed FSS items ordered, but priced higher than those available on OmniCell's FSS; and it calculated the percentage of the dollar value of each order which represented the prices of the non-FSS items. Id.

Other FSS Ordering Issue

Pyxis also argues that the purchases are flawed because, beyond advising vendors that the POU system had to be Windows NT compliant in accordance with Department of Defense policy, the agency failed to adequately state its requirements for the system. For example, Pyxis complains that the agency failed to disclose a requirement that both medications and supplies be stored in a single cabinet; that the POU system operate on one database, on one server; and that the system provide reports without requiring the user to manually consolidate results from multiple databases. Supplemental Protest at 5. Pyxis alleges these unstated requirements unduly restricted the competition and necessarily precluded the agency's consideration of the Pyxis POU system.

The protester does not dispute that, when an agency seeks to satisfy its needs through the use of the FSS, an agency is not required to seek further competition, synopsise the requirement, make a separate determination of fair and reasonable pricing, or consider small business set-asides. FAR § 8.404(a); Design Contempo, Inc., B-270483, Mar. 12, 1996, 96-1 CPD ¶ 146 at 2. When placing an order of more than \$2,500 under the FSS, however, a procuring agency is required to reasonably ensure that a selection meets the agency's needs by considering reasonably available information about products offered under FSS contracts. See FAR §§ 8.404(a), (b)(2).

Here, the agency reviewed the product information of Pyxis and OmniCell, both of which had FSS contracts for medical equipment and supplies, Federal Supply Classification Group 65, Part II, Section D. Agency Report, Tab E. In selecting the supply or service that would meet an agency's needs, FAR § 8.404(b)(2)(i) provides that an ordering office may consider "[s]pecial features of the supply or service that are required in effective program performance and that are not provided by a comparable supply or service." Consistent with this provision, the agency concluded that the features of the OmniCell POU system, as opposed to those of the Pyxis system, would satisfy the agency's needs.²

In reviewing the product information submitted by both Pyxis and OmniCell, the agency noted that OmniCell's POU system was already Windows NT compliant in accordance with Department of Defense policy, as enunciated in 1996, while Pyxis was in the process of making its POU system Windows NT compliant, with Pyxis specifically advising the agency in its product submission and by e-mail message dated December 18, 1998, that this process would not be completed until March-April,

² No issue has been raised regarding the comparability of prices for the POU systems offered by Pyxis and OmniCell. To the extent Pyxis complains that the agency failed to seek price reductions from OmniCell, see FAR § 8.404(b)(3), the agency reports it sought, and received, price reductions from OmniCell. CO Statement at 4, 5.

1999.³ Although Pyxis believes the agency should have waited until its POU system was Windows NT compliant before issuing the delivery orders, we point out that there was no requirement that the agency do so.

Further, in addition to the fact that the Pyxis POU system was not Windows NT compliant at the time of the agency's review of the product information and the issuance of the delivery orders, the agency identified additional features on the OmniCell POU system which satisfied its needs. For example, OmniCell's POU system stored medications and supplies in a single cabinet; OmniCell's system operated on one database, on one server;⁴ and OmniCell's system provided reports without requiring the user to manually consolidate results from multiple databases. Contrary to the protester's assertion, these features associated with the OmniCell POU system were not unstated requirements. Rather, in accordance with FAR § 8.404(b)(2)(i), the agency reasonably viewed these items as special features that materially differentiated OmniCell's POU system from the Pyxis system. Since a formal synopsis and solicitation process is not contemplated for ordering from the FSS, we have no basis to object to the agency's conclusion that the OmniCell POU system would satisfy its needs. See, e.g., National Office Sys., Inc., B-274785, Jan. 6, 1997, 97-1 CPD ¶ 12 at 4-5.

³ As noted above, by letter dated March 25, 1999, Pyxis advised the agency that its Windows NT-compliant POU system was now commercially available. However, the agency submitted information showing that Pyxis was still testing its Windows NT-compliant system in early April 1999. Supplemental Agency Report at 6.

⁴ Pyxis complains that OmniCell's POU system does not operate using a single database, citing a page in OmniCell's "Policies and Procedures" portion of its product information that references, in the plural, "databases." Agency Report, Tab M, OmniCell Product Submission, Section 6: Policies and Procedures, at 13. The agency never had any doubt regarding whether OmniCell's system operated using a single database, and in the technical overview to OmniCell's product information, OmniCell states that its system "gathers data and archives it in a database. From this database, [a number of reports, as listed] can be generated." Agency Report, Tab M, OmniCell Product Submission, Section I: Overview, at 11 (use of singular "database"). OmniCell also submitted during the pendency of this protest additional, publicly available product information, copyrighted from 1996 through 1998, which states in several places that OmniCell's POU system operates with a centralized data management area and uses a Windows NT operating system. See Letter from OmniCell to GAO (May 26, 1999) (summarizing publicly available product information). Pyxis ignores this information which supports the agency's position.

Recommendation

In light of the fact that OmniCell has delivered the POU systems, we recommend that Pyxis be reimbursed for its costs of preparing its product submission. As discussed in the decision, the issue we are sustaining was not timely raised by Pyxis, and we therefore are not recommending that the firm be reimbursed its costs of filing and pursuing its protest, including reasonable attorneys' fees. See 4 C.F.R. § 21.8(d)(1). As to the costs of preparing its product submission, Pyxis should submit its certified claim, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receipt of the decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Comptroller General
of the United States