

Government Contracts Blog

Posted at 5:32 AM on May 12, 2010 by Sheppard Mullin

When Does A Free Item NOT Fall Below The Micro-Purchase Threshold?

By [Jonathan S. Aronie](#) & [Christopher Noon](#)

Over the years, contracting officers have exhibited a promiscuous tendency to include non-Schedule items in GSA Schedule purchases. The many GSA Schedule procurements seeking \$10,000 in Schedule items and \$50,000 in non-Schedule “incidental” items did not go unnoticed by the OIG. The primary concern being that those \$50,000 items should be properly competed – something that many agencies sought to avoid through their use of the Schedules program.

The practice also did not escape the notice of the Courts or the GAO. And in two quite notable cases – *ATA Defense Industries, Inc. v. U.S.*, 38 Fed. Cl. 489 (1997) and *Pyxis Corp.*, B-282469 *et al.*, July 15, 1999, 99-2 CPD ¶ 18 – the Court and the GAO respectively ruled that included non-Schedule items in a Schedule purchase was a no-no (a time-honored legal phrase). More technically, the Court and the GAO ruled that the non-Schedule portion of a GSA Schedule order had to meet the same competition requirements that would have applied had the purchase been made outside of the Schedule context. In other words, if the Government wanted to add non-Schedule items to its Schedule purchase, it had to hold a competition – unless the non-Schedule items were below the micro-purchase (since there are no competition requirements for such purchases).

Since the time of *ATA* and *Pyxis*, the GAO has been a vigilant guardian of this Schedule/non-Schedule rule, sustaining protests time and again wherever it finds an agency trying to procure non-Schedule products through a Schedule procurement. *See, e.g., T-L-C Sys.*, B-285687.2, Sept. 29, 2000, 2000 CPD ¶ 166, *Symplicity Corp.*, B-291902, Apr. 29, 2003, 2003 CPD ¶ 89, *Armed Forces Merchandise Outlet, Inc.*, B-294281, Oct. 12, 2004, 2004 CPD ¶ 218. In March of this year, we learned that the GAO’s vigilance continues apace.

On March 15, 2010, the GAO issued its decision in *Rapiscan Systems, Inc.*, B-401773.2, the latest in this long line of Schedule/non-Schedule cases. The case re-enforces the GAO’s view that the GSA Schedules program was not intended to shield the purchase of non-Schedule items from the FAR’s competition requirements. But *Rapiscan* went one step further than prior cases in that it provides significant insight into how the GAO views the micro-purchase threshold (currently set at \$3,000) – that is, the dollar value at which the Government’s competition rules fully kick in.

Rapiscan involved a GSA Schedule procurement conducted by the Department of State for the purchase of gamma ray vehicle and cargo inspection systems. The solicitation (a Request for Quotations, or “RFQ”) limited participation to GSA Schedule vendors. Following award, Rapiscan Systems, Inc. (which did not win, obviously) challenged the award decision before the GAO. Rapiscan contended that the DOS

improperly issued the purchase order to a contractor that did not offer *every* one of its items on its GSA Schedule. Specifically, Rapiscan argued that the awardee did not offer freight on its Schedule Contract.

In response to the protest, the Agency argued that the purchase of freight in this instance was permissible because it fell under the micro-purchase threshold. The facts at this point, however, get a bit complicated – and very relevant.

In its initial quotation, the awardee showed freight as an “open market” item, with a line item price of \$6,832 – a sum above the micro-purchase threshold, obviously. In its revised quotation, however, the awardee discounted the freight charge by 100% – to \$0. Accordingly, the Agency contended that the purchase of freight was permissible through a GSA Schedule procurement.

The awardee, however, also had stated in its revised quotation that the price for freight was “included in the unit price of” the primary Schedule item being purchased – a quite common turn of phrase among Government contractors. This language, however, coupled with the fact that the awardee had a price for freight in its initial proposal that was above \$3,000, clearly concerned the GAO. Indeed, it led the GAO to conclude that the awardee’s \$0 price for freight was “illusory.” In GAO’s view, it was no more than the “shifting of the initially quoted price” between line items. Having found the “real” price of freight to exceed the micro-purchase threshold, it was not a far leap to sustain the protest. According to the GAO, the “micro-purchase exception is a narrow one and was not intended as a means for vendors to provide non-FSS items as micro-purchase items”

Interestingly, there is much in the decision to suggest that the GAO would have come down differently had the awardee not stated that it “included the price” of freight elsewhere in its proposal. Finding evidence of a greater-than-\$3,000 price for the non-Schedule item, however, the GAO was boxed in by its prior case law.

The GAO’s *Rapiscan* decision obviously supports the long-standing general rule that non-Schedule products may not be procured through GSA Schedule procedures. But it also demonstrates how the GAO will read between the lines (or line items, in this case) when assessing the price of a non-Schedule item.

The lesson here? We offer two. First, when offering a non-Schedule item in a Schedule procurement, keep it “micro.” Second, to paraphrase an ancient Buddhist proverb, “whatever words we utter, should be chosen with care.”

Authored by:

[Jonathan S. Aronie](#)
(202) 218-0039
jaronie@sheppardmullin.com

and

[Christopher Noon](#)
(202) 469-4918
cnoon@sheppardmullin.com