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**Comptroller General  
of the United States**

**United States Government Accountability Office  
Washington, DC 20548**

# Decision

**Matter of:** Science Applications International Corporation

**File:** B-401773

**Date:** November 10, 2009

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James J. McCullough, Esq., and Steven A. Alerding, Esq., Fried Frank Harris Shriver & Jacobson, LLP, for the protester.

Daniel R. Forman, Esq., and Jonathan M. Baker, Esq., Crowell & Moring, for Rapiscan, Inc., an intervenor.

Dennis J. Gallagher, Esq., Department of State, for the agency.

Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Where solicitation limited competition to vendors holding Federal Supply Schedule contract for required items, issuance of purchase order with items not included on successful vendor's FSS contract was improper.

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## DECISION

Science Applications International Corporation (SAIC), of San Diego, California, protests the Department of State's issuance of a purchase order to Rapiscan, Inc. under request for quotations (RFQ) No. S-WHARC-09-Q-0030, issued to vendors holding General Service Administration (GSA) Federal Supply Schedule (FSS) contracts for gamma ray vehicle and cargo inspection systems. SAIC asserts that Rapiscan should not have received the order because certain of the required items were not included under its FSS contract.

We sustain the protest.

The RFQ was open to manufacturers under GSA FSS 84, category 426-4K, Metal and Bomb Detection Equipment, and required vendors to include their FSS contract number in their quotations. RFQ § D; Agency Report (AR) at 3. The RFQ included eight line items to be priced by vendors. The agency issued the order to Rapiscan based on its lowest-priced, technically acceptable quotation. SAIC asserts that the

order improperly was issued to Rapiscan because two of the items quoted were not on Rapiscan's FSS contract at the time the order was issued.

The agency concedes that two items were not included under Rapiscan's FSS contract at the time the order was issued, but principally argues that, since there was no requirement in the RFQ that all items be on the FSS at the time quotations were submitted or at the time the order was issued, this would not be a proper basis for rejecting Rapiscan's quotation. The agency asserts that the order was properly issued because the items were added to Rapiscan's FSS contract before the required delivery date.

FSS procedures provide agencies a simplified process for obtaining commonly used commercial supplies and services, Federal Acquisition Regulation (FAR) § 8.401(a), and, although streamlined, satisfy the requirement for full and open competition. 41 U.S.C. § 259(b)(3) (2006); FAR § 6.102(d) (3). However, non-FSS products and services may not be purchased using FSS procedures; their purchase requires compliance with otherwise applicable procurement laws and regulations, including those requiring the use of full competitive procedures. Symplicity Corp., B-291902, Apr. 29, 2003, 2003 CPD ¶ 89 at 4.<sup>1</sup> Where an agency announces its intention to order from an existing FSS, all items quoted and ordered are required to be on the vendor's schedule contract as a precondition to its receiving the order. Tarheel Specialties, Inc., B-298197, B-298197.2, July 17, 2006, 2006 CPD ¶ 140 at 4; CourtSmart Digital Systems, Inc., B-292995.2, B-292995.3, Feb. 13, 2004, 2004 CPD ¶ 79 at 5; see ATA Def. Indus. v. United States, 38 Fed. Cl. 489 (1997).<sup>2</sup>

Since the solicitation here limited the competition to vendors holding a specified FSS contract, the agency was limited to issuing the purchase order to a vendor whose FSS contract included all of the required items. Tarheel Specialties, Inc., *supra*; CourtSmart Digital Systems, Inc., *supra*. Since it is undisputed that Rapiscan's FSS contract did not include all required items at the time the order was issued, the order could not properly be issued to Rapiscan. We reject the agency's position that it was proper to issue an order to Rapiscan because the ordered items will be added to its FSS contract prior to the delivery date. This position ignores our decisions, as well as the Court of Federal Claims's decision in ATA, and, since there is no way to

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<sup>1</sup>We note that in, in response to our request for its views regarding this same issue in Symplicity Corp., *supra*, the General Services Administration, the agency responsible for administering the FSS program, expressed a view consistent with our holding there--when an agency conducts a procurement under the FSS program, all items ordered must be on the vendor's FSS contract at the time the order is issued.

<sup>2</sup>The sole exception to this requirement is for items that do not exceed the micro-purchase threshold of \$3,000. See CourtSmart Digital Systems, Inc., *supra*, at 5. The items in issue here exceed the threshold amount.

determine with certainty whether a vendor's FSS contract will include the ordered items in the future, clearly would undermine, if accepted, the requirement that non-FSS items be purchased using normal full and open competition procedures.<sup>3</sup>

The agency asserts, alternatively, that the order actually was issued to Rapiscan on the basis of full and open competition--and that the non-FSS item rule therefore does not apply--since all participants in the mobile intrusive gamma inspection unit marketplace hold FSS contracts, and all were permitted to submit quotations. We disagree because the agency's argument is based on a flawed premise. Pursuant to the FAR, full and open competition is achieved only where all responsible sources are permitted to compete. FAR § 2.101. While the agency asserts that all potential vendors of the required items were permitted to compete because all hold FSS contracts, there is no evidence in the record--and we question whether sufficient evidence could be presented--showing that there are no vendors of the items that do not hold FSS contracts. Rather, under the circumstances here, the only way to ensure that all responsible sources are permitted to compete would be to conduct a competition without FSS restrictions. Moreover, the agency's argument ignores the possibility that some FSS vendors chose not to submit a quotation because, like Rapiscan, they did not have all of the required items on their FSS contracts. Notably, in this regard, the agency reports that only 4 of the 46 FSS vendors notified of the solicitation requested a copy of it.

Based on the foregoing, we sustain the protest. We recommend that the agency cancel Rapiscan's purchase order. Because there is a dispute in the protest record as to whether SAIC's FSS contract includes all required items, we also recommend that the agency determine whether SAIC had all items on its FSS contract at the time the order was issued. If the agency determines that this is the case, and that SAIC's quotation is otherwise technically acceptable and lowest-priced, the agency should issue a purchase order to SAIC. Otherwise, the agency should issue the purchase order to the vendor in line for award under the terms of the RFQ, and in accordance with this decision. We also recommend that SAIC be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1) (2009). SAIC should submit its certified claim for costs, detailing the time expended and cost incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

Lynn H. Gibson  
Acting General Counsel

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<sup>3</sup> The agency also argues that it should be sufficient that the ordered items are of the type included on, and within the scope of, the vendor's FSS contract. However, similarity is not sufficient. Rather, again, the agency properly may issue an order only for items that are included on the vendor's FSS contract at the time the order is issued. See, Tarheel Specialties, Inc., supra; Symplicity Corp., supra.