



United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Desktop Alert, Inc.

File: B-408196

Date: July 22, 2013

Howard Ryan, Desktop Alert, Inc., for the protester.
Clayton S. Marsh, Esq., Reliable Government Solutions, Inc., for the intervenor.
Michael E. Sainsbury, Esq., Department of Defense, Defense Contract Management Agency, for the agency.
Heather Weiner, Esq., and Jonathan L. Kang, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Solicitation for an emergency mass notification system, telephony and training that was limited on a brand name basis is overly restrictive where the agency fails to demonstrate a reasonable basis for the brand name restriction.

DECISION

Desktop Alert, Inc., of Chatham, New Jersey, protests the terms of request for quotations (RFQ) No. S5121A-13-Q-0013, issued by the Department of Defense (DOD), Defense Contract Management Agency (DCMA) under the Federal Supply Schedule (FSS) procedures of Federal Acquisition Regulation (FAR) subpart 8.4 for emergency mass notification software, products and services. The protester asserts that the solicitation, which limits the competition to brand name items, is unduly restrictive of competition.

We sustain the protest.

BACKGROUND

In 2009, DOD issued DOD Instruction 6055.17, DOD Installation Emergency Management Program (Jan. 13, 2009), which requires defense agencies to maintain a mass warning and notification capability to warn immediately all personnel if there is a dangerous incident or condition in the workplace. To meet this requirement, DCMA awarded a Small Business Administration 8(a) set-aside contract on April 11, 2009, to Reliable Government Solutions, Inc., of Silver Spring,

Maryland, to provide a product known as the AtHoc Mass Notification System. Among other things, this contract included requirements for: software; licenses; core system; software assurance; upgrades and technical support; 50 dedicated phone lines for transmitting alerts; system installation and set-up; and a back-up system. Contracting Officer's Statement at 2. This contract ended on April 12, 2013.

Initial Solicitation

On March 12, 2013, DCMA posted the RFQ for the instant procurement on the General Services Administration's (GSA) e-Buy website. The solicitation was limited under the FSS procedures of FAR § 8.405-6 on a brand name basis to AtHoc products and services, and restricted the competition to GSA FSS contract holders which are authorized AtHoc resellers. The solicitation sought AtHoc software, upgrades, security patches, software assurance, technical support, communication services, telephony¹ and training. RFQ at 64; Supp. Agency Report (AR) at 1. The RFQ anticipated the issuance of a fixed-price task order for a base year and four 1-year options. The estimated total value of the contract was projected to be \$563,000. AR, Tab E, Justification at 1.

As explained in detail below, a limited source procurement under the FSS, such as a brand name limitation, requires a justification that describes the reasons for limiting the competition. On March 7, prior to issuing the RFQ, the contracting officer signed a limited source justification for an AtHoc Mass Notification System pursuant to FAR § 8.405-6(b),² which applies to the use of brand name limitations in task orders that exceed the simplified acquisition threshold. The justification states that DCMA is seeking "an emergency notification management system . . . to notify DCMA end users on short notice via phone, pager, email, etc. of continuity of operations (COOP), natural disasters, circuit and enterprise application outages, and a myriad of other scenarios that may occur on a day-to-day basis." AR, Tab E, Justification at 1.

¹ The telephony includes communication services, such as the leasing of phone lines to enable phone calls, e-mails and SMS texts, and pre-paid communication transactions packs. RFQ at 64-65.

² The agency's limited source justification document cites to the prior version of this provision, FAR § 8.405-6(a)(2), which was applicable to "brand name justifications," and was in effect until May 16, 2011. That FAR provision is essentially identical to the current provision at FAR § 8.405-6(b) (2013).

The justification explains the reason for limiting the acquisition to the AtHoc brand name system, as follows:

AtHoc is already installed in the DCMA Infrastructure and is in use by all Contracting Regions across DCMA. By using existing assets, and trained Operator and Administration personnel, DCMA saves money and time. Most of the emergency management force has already been trained on the AtHoc System, and the cost to retrain personnel is substantially lower than other systems. . . . These conditions all point to cost, time, and human resource savings by using the existing AtHoc brand software.

Id.

With regard to market research, the justification provides the following assessment, which addressed DCMA's views of the merits of the AtHoc system:

Based upon the market research conducted, the purchase of the AtHoc brand name represents the best value solution as this product, a) exceeds the technical specifications required for this type of emergency warning system, b) reduces training, as this system is already widely utilized within all DCMA, c) the configuration of this system allows the Agency's Emergency Management Personnel to provide quick alerts and operability within the Agency, and d) provides a high level ease-of-use for the customers at a very competitive price.

Id.

The justification also cites AtHoc's favorable past performance--both in terms of product reliability and customer service--and states that "AtHoc is the only mass notification application on the [Defense Information Systems Agency (DISA)] Approved Product List (APL)." Id.

On March 20, in response to the e-Buy solicitation, DCMA received one quotation, from Reliable, an AtHoc reseller. Reliable advised in its quotation that at least four of the RFQ's contract line item numbers (CLINs) for training were listed as open market items in its quotation, because those items are not available on the FSS.

Re-issuance of Solicitation on FedBizOpps

On March 29, DCMA re-issued the RFQ on FedBizOpps, via amendment 0001 to the solicitation. The amendment states that DCMA re-issued the solicitation "due to the open market items (Items 0006, 0007, 0008, and 0009) and to satisfy regulations," and that "FAR clauses applicable to the open market items have been added." RFQ amend. 1 at 1. In this regard, an agency is not permitted to purchase

open market items that exceed the micro-purchase threshold using FAR subpart 8.4 FSS procedures, such as e-Buy.³ FAR § 8.402(f). The closing date for receipt of quotations was extended to April 4.

Agency Protest

On April 3, Desktop Alert submitted a pre-award protest to DCMA, arguing that the solicitation's limitation of sources to AtHoc brand name items is unduly restrictive of competition, and that the solicitation fails to describe the agency's minimum requirements. The protester also asserted that DCMA failed to consider mass notification systems offered by other vendors. In its protest, Desktop Alert notified DCMA that it provides mass notification solutions to DOD and other government and commercial customers. Desktop Alert further noted that its software is currently being used as the installation-wide mass notification system by the Army at Fort Lee, Virginia--where DCMA's headquarters are located. AR, Tab F, Agency Protest at 1.

On April 9, DCMA denied the protest, stating: "[W]e limited our solicitation for support to the AtHoc system [because] it's the system we currently use and it's the system we seek to continue to use." See AR, Tab G, Agency Protest Decision (Apr. 9, 2013), at 1. DCMA also stated that its market research indicated that AtHoc is one of the two authorized vendors of mass notifications systems on the DISA Approved Products List (APL). Id. As discussed below, Desktop Alert is the other DISA-authorized mass notification system vendor. AR, Tab J, DISA APL Integrated Tracking System (Apr. 18, 2013).

³ As a general matter, FSS procedures provide agencies a simplified process for obtaining commonly used commercial supplies and services, and, although streamlined, satisfy the requirement for full and open competition. See 41 U.S.C. § 152 (2006); FAR § 6.102(d)(3). However, non-FSS products and services--frequently termed "open market"--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. Thus, 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. Science Applications Int'l Corp., B-401773, Nov. 10, 2009, 2009 CPD ¶ 229 at 2 n.1. The sole exception to this requirement is for items that do not exceed the micro-purchase threshold of \$3,000, since such items properly may be purchased outside the normal competition requirements. See FAR § 2.101; Maybank Indus., LLC, B-403327, B-403327.2, Oct. 21, 2010, 2010 CPD ¶ 249 at 4.

GAO Protest

On April 11, Desktop Alert filed a pre-award protest with our Office arguing the same grounds as its agency level protest. On April 12, the head of the relevant DCMA contracting activity executed a justification and approval, pursuant to FAR § 33.104, authorizing award of the contract notwithstanding the stay triggered by the protest to our Office, on the basis that urgent and compelling circumstances did not permit awaiting a GAO decision before proceeding with contract award. That same day, DCMA awarded contract No. S5121A-13-F-0007 to Reliable in the amount of \$84,472.50, for the base year, with a total estimated contract value of \$540,260.52, inclusive of the base and all option years. Reliable was the only company that submitted a quotation in response to the RFQ.

DISCUSSION

Desktop Alert challenges the RFQ's limitation of sources on a brand name basis to AtHoc resellers. The protester argues that the solicitation fails to describe the salient characteristics of the agency's requirement.⁴ For this reason, the protester contends that the RFQ is unduly restrictive of competition and does not permit other potentially qualified vendors of similar software systems to compete. Desktop Alert also argues that DCMA's limited source justification was unreasonable because it failed to describe the agency's requirements, and did not consider other qualified software systems when justifying its determination to limit the solicitation on a brand name basis.

As discussed below, we find that DCMA failed to justify the use of the restrictive brand name requirements for this procurement. Specifically, we conclude that the agency's justification is deficient because DCMA failed to adequately define the supplies or services required to meet its needs, or any essential feature of the supplies or services that is unique to the AtHoc brand name. We also conclude that the justification is deficient because the agency failed to document adequately its market research of other vendors' similar products. For these reasons, we conclude that the solicitation was overly restrictive, and sustain the protest.

FAR Restrictions on Limiting Sources in FSS Orders

Orders placed under the FSS, while streamlined, are considered to satisfy the full and open competition requirements of FAR Part 6. 41 U.S.C. § 152(3) (2006 & Supp. V); FAR § 6.102(d)(3).

⁴ As discussed below, the protester also contends that it can provide a mass notification system for a lower price than the award to Reliable for the AtHoc system.

Moreover, orders or blanket purchase agreements established under the FSS are exempt from the specific requirements in FAR Part 6, including the requirements for justifying restrictions to full and open competition. FAR § 8.405-6. However, to limit sources in FSS orders--such as a brand name requirement--ordering activities are required to justify the restriction in accordance with the procedures set out in FAR § 8.405-6. Id. § 8.405-6(b)(2).

When an ordering activity restricts competition on a brand name basis, the contracting officer is required to document in the justification a description of the reason why the particular brand name, product or feature is essential to the government's requirements, and the market research that indicates that a similar product does not meet, or cannot be modified to meet, the agency's needs. Id. § 8.405-6(b). In this regard, the FAR states:

Brand name specifications shall not be used unless the particular brand name, product, or feature is essential to the Government's requirements, and market research indicates other companies' similar products, or products lacking the particular feature, do not meet, or cannot be modified to meet, the agency's needs.

Id. § 8.405-6(b)(1). In addition, for acquisitions exceeding the simplified acquisition threshold, as is the case here, such a justification must also include "a demonstration of the proposed contractor's unique qualifications to provide the required supply or service," id. § 8.405-6(c)(2)(iv), as well as a "description of the supplies or services required to meet the agency's needs." Id. § 8.405-6(c)(2)(iii).

We will review an agency's use of a limited source justification under FAR part 8.4 for reasonableness. See XTec, Inc., B-405505, Nov. 8, 2011, 2011 CPD ¶ 249 at 5; Systems Integration & Mgmt., Inc., B-402785.2, Aug. 10, 2010, 2010 CPD ¶ 207 at 2-3.

Desktop Alert is an Interested Party to Pursue this Challenge

As an initial matter, DCMA argues, in essence, that Desktop Alert is not an interested party to challenge the terms of the solicitation. In this regard, DCMA contends that the RFQ sought maintenance and upgrades for its existing AtHoc system, and did not seek a new mass notification system. AR at 1 ("DCMA did not want to procure a new system or switch to another system; it only wanted to maintain and upgrade the system currently in place."). The agency asserts that its decision to limit the competition to FSS vendors who are authorized resellers of AtHoc mass notification systems is reasonable because "[b]uying software upgrades and maintenance on a system the agency already owns is far more reasonable than scrapping a functioning system and purchasing a completely new system." Id. at 2. The agency therefore argues that because the protester requests

an opportunity to provide its own mass notification system rather than maintain the existing AtHoc system, it is not an interested party.

The record, however, does not show that the RFQ is merely seeking maintenance or upgrades to the same AtHoc software system that DCMA purchased in 2009. Supp. AR at 2. As the agency's response to the protest acknowledges, the RFQ seeks a newer version of the AtHoc system with expanded functionality. Id. For example, the newer version of the software "increas[es] the functionality" and "increas[es] the type of methods that may be used to send out warning messages, such as adding capability to provide alerts over Twitter® and using computer desktop alerts (a desktop alert is a message that shows up on a window on the employee's computer monitor, in addition to telephonic and email alerts)." Id. at 1-2. While the agency will receive "software patches and bug fixes to correct any errors discovered in the software after purchase," this maintenance appears to be for the newer version of the software purchased, not the 2009 version of the software. Id. Moreover, more than half of the total contract value consists of training and telephony, unrelated to the particular brand name system being purchased. Order No. S5121A-13-F-0007 at 3-42.

As discussed above, the FAR requires agencies to issue a written justification to limit an FSS competition to a particular brand name source. FAR § 8.405-6. While an agency might reasonably limit a competition to a brand name source where it is simply upgrading an existing system, the record here does not show that the agency has sufficiently justified the limitation for this procurement. For this reason, we will not conclude that the protester is not an interested party.⁵

Inadequate Description of the Agency's Needs

Next, based on our review of the record, we conclude that the agency does not adequately describe its requirements for a mass notification system, or why AtHoc is essential to the government's requirements. The solicitation, under "Description of Requirement," states that "DCMA plans to establish a Task Order against a GSA Federal Supply Schedule (FSS) contract for AtHoc Mass Notification Software Maintenance and Support." RFQ amend. 1 at 8. The limited source justification states that "DCMA requires an emergency notification management system . . . to notify DCMA end users on short notice via phone, pager, email, etc. of continuity of operations (COOP), natural disasters, circuit and enterprise application outages, and a myriad of other scenarios that may occur on day-to-day basis." AR, Tab E, Justification at 1. This general description, however, fails to identify unique features

⁵ We note that, at this juncture, the protester is asking only for an opportunity to compete; the question of which approach will provide the greatest value to the agency--including cost and technical merit--can be addressed by the competition.

of the AtHoc software system particular to the agency's needs. See FAR § 8.405-6(c)(2)(iii)-(iv).

DCMA also argues that its requirement is "to maintain the current AtHoc brand since a large percentage of its workforce was already trained and using this system on a regular basis." Supp. AR at 3. This rationale, however, is not supported by the record. Essentially, the agency raises a circular argument: only the AtHoc system meets the agency's needs, because the agency does not want to change from the AtHoc system it currently uses. Other than this general rationale, however, the record does not include a definition of DCMA's requirement or needs that supports the agency's assertion that the agency's needs can be met only by the AtHoc software system.

Instead, the record merely establishes that the agency is procuring a mass notification system in order to comply with DOD Instruction 6055.17. Neither the justification, nor the record submitted in response to this protest, however, state any rationale explaining why the AtHoc software system is the only system that can meet DCMA's requirement to comply with DOD Instruction 6055.17 or that DCMA considered other similar systems, but found them insufficient to comply with the DOD Instruction. In this regard, the agency has failed to comply with the requirements of FAR § 8.405-6.

The record also fails to support the agency's contention that limiting the acquisition to AtHoc software is reasonable because its staff has already been trained on the software.⁶ The protester argues that the solicitation's inclusion of multiple CLINs for training conflicts with the agency's statement that having personnel already trained on the AtHoc software is justification for limiting the competition. Protest at 2. In response, the agency concedes that although the agency currently has approximately 300 personnel who have been trained on the 2009 version of the AtHoc software, the "DCMA workforce is not static," and that training for new personnel will be required:

⁶ As support for the reasonableness of its justification limiting competition, the agency cites our decision in Kingdomware Techs., B-407757, Jan. 31, 2013, 2013 CPD ¶ 47. Rather than support the agency's position, however, this case highlights the deficiencies in DCMA's justification. In Kingdomware, the contracting officer prepared an 8-page justification, detailing the agency's specific requirements and the reason why no other similar software systems could provide all of the capabilities required by the agency. Id. at 2. As discussed herein, this level of analysis is missing from DCMA's justification here, because the agency did not state its specific requirements, and did not explain why other products could not meet the agency's stated requirements.

As new personnel join the agency and others depart there exists a requirement that these new employees receive training,” and that “the use of [the AtHoc software] is a perishable skill and employees who were trained on this system in previous years could benefit from refresher training provided by the vendor.

Supp. AR at 3.

The protester contends that the agency’s arguments do not support the brand name limitation. We agree. Four of the RFQ’s ten CLINs are dedicated to training. RFQ at 64-65. In fact, the training CLINs make up a substantial portion⁷ of the total contract value. Order No. S5121A-13-F-0007 at 3-42. Given the amount of training that the contract requires, in combination with the agency’s recognition that it will be required to re-train its staff even if it purchases the AtHoc software system, we find that the agency’s justification limiting the procurement on this basis is insufficient and unreasonable.

Another reason stated in the limited source justification for limiting the competition is that DCMA will save costs and time by upgrading its existing AtHoc system and relying on personnel already trained for that system. AR, Tab E, Justification at 1; see also AR at 3. FAR subpart 8.4, however, does not cite cost or time savings as a basis for restricting sources. See FAR § 8.405-6. Moreover, the agency has not provided any support for this rationale, either in the justification or its response to the protest. In contrast, the protester asserts that it can provide an upgrade to DCMA’s current installed software by replacing the software system with its current v5.x DISA approved software, and that based on its published FSS pricing, its Desktop Alert software system would cost the Government 20 percent less than the award price to the intervenor. Protest at 2; Protester’s Comments at 1. The protester argues that since the original award in 2009, mass notification systems have improved significantly, and generally, the cost has been decreasing. Protest at 2.

Finally, as the protester notes, only two of the RFQ’s ten CLINs are AtHoc brand name items or services. The other eight CLINs, which comprise more than half of the total contract value, consist of telephony and open market training.⁸ RFQ at 64;

⁷ Although we did not issue a protective order in this case, the agency provided our Office with documents containing the intervenor’s proprietary information. Due to the sensitive nature of this information, we are not disclosing the exact value of the training CLINs.

⁸ As discussed above, agencies may not place orders for open market items using FSS procedures. Where, as here, an agency solicits quotations from vendors for purchase from the FSS, the issuance of a purchase order to a vendor whose
(continued...)

Order No. S5121A-13-F-0007 at 3-42. There is nothing in the justification, or elsewhere in the record, that explains why DCMA limited the acquisition of these eight CLINS to AtHoc resellers.

Inadequate Market Research

Next, we conclude that the justification also fails to adequately comply with the market research requirement of FAR § 8.405-6, which requires documentation of the agency's finding that "other companies' similar products, or products lacking the particular feature, do not meet, or cannot be modified to meet, the agency's needs." FAR § 8.405-6(b)(1). Specifically, the justification fails to show whether DCMA conducted market research concerning other companies' products. Instead, the agency's justification merely states that, based upon market research, "the purchase of the AtHoc brand name represents the best value solution" as it exceeds the technical specifications, reduces training, allows the agency to provide quick alerts, and provides a high level ease-of-use at a very competitive price. AR, Tab E, Justification at 1. This analysis does not support the brand name restriction, because, for example, it does not discuss any "technical specifications" that the AtHoc software system exceeds.

Additionally, as noted above, the justification cites as support for the brand name limitation the agency's finding that only AtHoc was an approved source. The record, however, demonstrates that Desktop Alert was listed on DISA's Approved Product List as an authorized vendor of mass notification systems prior to the date that the contracting officer signed the justification.⁹ AR, Tab J, DISA APL Integrated Tracking System (Apr. 18, 2013). The protester asserts that its mass notification system "meets the requirements established in DOD Instruction 6055.17" and that the "Desktop Alert mass notification system and support is available on a GSA schedule." Protester's Comments at 1. The record also establishes that Desktop Alert is currently providing its mass notification system to other DOD agencies in accordance with the DOD Instruction, including to the Army installation at Fort Lee, Virginia, which is located in the same building where DCMA's headquarters are located, and that the contracting officer was aware of this fact prior to the closing

(...continued)

quotation includes non-FSS items priced above the micro-purchase threshold is improper. Symplicity Corp., *supra*, at 4-5; T-L-C Sys., B-285687.2, Sept. 29, 2000, 2000 CPD ¶ 166 at 4.

⁹ Desktop Alert was listed as a DISA-authorized vendor effective February 15, 2013 (AR, Tab J, DISA APL Integrated Tracking System); the Contracting Officer signed the Limited Source Justification on March 7, 2013 (AR, Tab E, Justification at 3).

date for receipt of quotations. AR, Tab F, Agency Protest at 1; Tab G, Agency Protest Decision at 1. On this record, we conclude that the agency did not conduct adequate market research to determine whether Desktop Alert's, or any other vendors', mass notification software systems could meet DCMA's requirement.

SUMMARY AND RECOMMENDATION

We find the agency's limited source justification fails to comply with requirements of FAR § 8.405-6, and is therefore unreasonable. DCMA did not adequately define its requirements or specify any special features of the AtHoc supplies and services that make this brand name essential to the agency's needs. DCMA also did not demonstrate with adequate market research or otherwise that it considered whether other companies' similar products, or products lacking a particular feature, do not meet, or cannot be modified to meet, the agency's needs.¹⁰ On this record, we sustain the protest.

Because DCMA failed to adequately justify its limitation of the procurement on a brand name basis, the award to Reliable was improper. However, because DCMA moved forward with contract award due to urgent and compelling circumstances, we do not recommend the termination of the contract with Reliable. See Resource Dimensions, LLC, B-404536, Feb. 24, 2011, 2011 CPD ¶ 50 at 8; Charles Snyder, B-235409, Sept. 1, 1989, 89-2 CPD ¶ 208 at 5. Instead, we recommend that the options under Reliable's contract not be exercised and that the agency assess and define its requirements for an emergency notification management system, and either properly justify its need to limit competition to a single brand name system, or recompetes its requirement beyond the base year. We further recommend that the agency reimburse the protester the costs of filing and pursuing its protest, including reasonable attorneys' fees. The protester's certified claim for costs, detailing the time expended and the costs incurred on this issue, must be submitted to the agency within 60 days of receiving this decision. Bid Protest Regulations, 4 C.F.R. § 21.8(f)(1) (2013).

The protest is sustained.

Susan A. Poling
General Counsel

¹⁰ We further conclude that Desktop Alert was prejudiced by the agency's actions because it contends that it could meet the agency's requirement for a mass notification system that satisfies the DOD requirements.