

BRAND NAME OR EQUAL PROCUREMENT REQUIRES JUSTIFICATION AND APPROVAL IN SIMPLIFIED ACQUISITIONS

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The FAR is very clear that if an agency seeks to use the “brand name [or equal]” method of procurement, this essentially is a sole-source procurement that requires that the contracting officer prepare a supporting justification that is approved. FAR 11.105(a)(1), 11.105(a)(2)(ii) and 13.501. The documentation supporting this type of procurement must be published with the solicitation (“[C]ontracting officers must [c]onduct sole source acquisitions ... (including brand name) under this subpart only if the need to do so is justified in writing and approved at the levels specified...and make publicly available justifications.” FAR 13.501(a)(1)(i).) FAR 13.501(a)(2) further emphasizes this by stating that “Justifications and approvals are required under this subpart for sole-source (including brand name) acquisitions.”

In *W&G Machine Corp, Inc.*, B-418698, August 4, 2020, the Government Accountability Office (“GAO”) re-emphasized this point when the Defense Logistics Agency canceled a solicitation where it had failed to prepare the required Justification. The Defense Logistics Agency (“DLA”) sought to buy rigid connecting links for helicopters, a commercial item with a National Stock Number, using the simplified acquisitions procedures in FAR subpart 13.5. The connecting links are a critical safety item that can only be procured from pre-qualified manufacturers. The Solicitation identified Sikorsky Aircraft Corp., and its part number, as the only prequalified manufacturer.

W&G challenged the terms of the solicitation, stating that DLA had failed to prepare a written Justification and Approval (“J&A”) in support of the sole source. Recognizing that it had failed to follow the FAR requirements for a “brand name” procurement, DLA canceled the solicitation. W&G subsequently protested DLA’s cancellation of the solicitation, arguing that offerors could submit “alternate offers” and the cancellation was a “mere pretext.”

The GAO rejected W&G’s arguments completely. The DLA had a reasonable basis to cancel its solicitation because DLA had violated the sections of the FAR cited above requiring a J&A for a brand name or equal procurement. The solicitation was for a sole source, and the J&A was required. Even where a solicitation seeks a brand name procurement, but permits “alternate products,” the J&A is required. Accordingly, GAO denied the protest, stressing the restrictive nature of the solicitation and DLA’s need to prepare the J&A in connection with the issuance of the solicitation.

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