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## Decision

**Matter of:** Westwind Computer Products, Inc.

**File:** B-420119

**Date:** December 8, 2021

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Scott Arnold, Esq., Robyn N. Burrows, Esq., and Samarth Barot, Esq., Blank Rome LLP, for the protester.

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### DIGEST

Protest challenging solicitation's limitation of sources on a brand-name basis as unduly restrictive of competition is sustained where the agency fails to state that other companies' similar products, or products lacking a particular feature, do not meet, or cannot be modified to meet, the agency's needs. This justification is necessary to demonstrate a reasonable basis for the restriction as required by Federal Acquisition Regulation section 16.505(a)(4).

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### DECISION

Westwind Computer Products, Inc., a small business of Albuquerque, New Mexico, protests the terms of request for quotations (RFQ) No. 12314421Q0078, issued by the United States Department of Agriculture (USDA) in anticipation of a task order for enterprise business solutions licenses and software assurance to support the agency's enterprise business requirements. Westwind asserts that the agency's brand-name justification for limiting the competition to Microsoft enterprise software lacks a rational basis, and does not comply with one of the two applicable requirements identified in the Federal Acquisition Regulation (FAR) for conducting brand-name only procurements in a task order environment.

We sustain the protest.

### BACKGROUND

Using the provisions of FAR subpart 16.5, USDA issued the RFQ to holders of the National Aeronautics and Space Administration Solutions for Enterprise Wide

Procurement V governmentwide acquisition contract.<sup>1</sup> The solicitation, set aside for small businesses, contemplates the issuance of a single fixed-price task order for a 6-month base period with four 12-month options to the lowest-priced vendor that meets and provides prices for all of the requirements. Agency Report (AR), Tab 4, Instructions to Offerors at 1; Tab 5, Statement of Work (SOW) at 2.

The solicitation seeks quotations for enterprise business solutions licenses and software assurance to support the agency's enterprise business requirements; the RFQ specifies that vendors are to propose only Microsoft products. AR Tab 3, RFQ at 1. The licenses at issue here will be used to support numerous USDA enterprise business requirements, including: email, collaboration (data, voice, and video), conferencing, chat, cloud storage, local storage, word processing, spreadsheet capabilities, slide presentation, forms, website building, notes, security and compliance, eDiscovery, business intelligence, internet access, mobile platform support, records management, project management, enterprise resource management, workflows, application development, and database capability. AR, Tab 5, SOW at 1.

The solicitation provides that "USDA has standardized on Microsoft Office, email and cloud and has been using these tools for over 20 years." *Id.* It further requires that the "software provided must support the existing email system, business applications (word processing, spreadsheets, and slide presentations, etc.) and agency applications without the need for programming modifications." *Id.*

One day prior to issuing the new solicitation, on August 23, 2021, the agency issued a brand-name justification pursuant to FAR section 16.505(a)(4). See AR, Tab 6, Brand-Name Justification. The justification describes the solicitation requirement as enterprise licensing and software assurance to support mission operations and meeting Presidential Executive Order (EO) 14028, "Improve the Nation's Cybersecurity," dated May 12, 2021. *Id.* at 1. As set forth in greater detail below, the justification notes that, currently, "Microsoft products are essential to the government's need to provide software and security support necessary to meet operational, mission, Executive and Legislative requirements." *Id.*

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<sup>1</sup> This procurement was the subject of a prior protest. USDA first issued a solicitation for the new enterprise business solutions task order on March 5, 2021, with a brand-name justification limiting the competition to vendors offering Microsoft products. Westwind filed a GAO protest challenging the brand-name justification as unduly restrictive of competition, and USDA took corrective action by cancelling the solicitation. We dismissed that protest. See *Westwind Computer Prods., Inc.*, B-419684, Apr. 26, 2021 (unpublished decision).

The agency issued the undated solicitation on August 24, with a closing date of August 31. Contracting Officer's Statement at 1; see RFQ at 1. Westwind timely filed this protest with our Office prior to the August 31 deadline for receipt of quotations.<sup>2</sup>

## DISCUSSION

Westwind challenges the RFQ's limitation of sources on a brand-name basis to vendors providing only Microsoft Enterprise software as unduly restrictive of competition.<sup>3</sup> The protester argues that the agency's brand-name justification does not comply with the FAR requirement that brand-name justifications used in task order procurements must be supported by market research indicating that other companies' similar products, or products lacking a particular feature, do not meet, or cannot be modified to meet, the agency's needs.

As discussed below, we find that USDA failed to justify properly the use of the restrictive brand-name requirement for this procurement. Specifically, the USDA failed to provide or indicate that its market research showed that other companies' similar products cannot be modified to meet the agency's needs. For this reason, we conclude that the solicitation is overly restrictive and sustain the protest on this basis.

Agencies that issue orders under multiple-award indefinite-delivery, indefinite-quantity contracts must provide all contract holders a "fair opportunity to be considered" for the issuance of all orders in excess of \$3,500. 10 U.S.C. § 2304c(b); FAR 16.505(b)(1). In addition, all orders over the simplified acquisition threshold "shall be placed on a competitive basis," following the procedures set forth in FAR section 16.505(b)(1). FAR 16.505(b)(1)(iii)(A). The FAR requires a contracting officer to justify restricting consideration to an item peculiar to one manufacturer--in other words, a brand-name product. FAR 16.505(a)(4)(i). An agency "shall not" use a brand-name justification unless two conditions are met: (1) "the particular brand-name, product, or feature is essential to the Government's requirements"; and (2) "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.* A justification for a brand-name restriction must be in writing, set forth the basis for using the exception, and be approved by the appropriate agency official. *Id.*; FAR 16.505(b)(2)(ii).

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<sup>2</sup> The agency's estimate of the total value of this task order is approximately \$[DELETED]. AR, Tab 31, Independent Government Cost Estimate at 1. Because the value of the task order is over \$25 million, this procurement is within our jurisdiction to hear protests related to the issuance of orders under multiple-award indefinite-delivery, indefinite-quantity contracts established under the authority granted in Title 10 of the United States Code. 10 U.S.C. § 2304c(e)(1)(B).

<sup>3</sup> While we only address the issue on which we sustain the protest--the inadequacy of the brand-name justification--we have considered all of the allegations raised by Westwind and found the others to be without merit.

## Additional Detail from the Brand-Name Justification

USDA's brand-name justification developed for this procurement describes in detail the breadth of the agency's reliance on Microsoft systems. The agency notes that over "96% of USDA systems run Windows operating systems." *Id.* at 2. It also states that USDA currently operates on the Microsoft software platform and provides these application and support services to approximately 7,500 field offices while supporting roughly 122,531 users. *Id.* Additionally, the justification states that USDA's enterprise infrastructure supports significant public interest programs such as food safety, wildfire management, the Supplemental Nutrition Assistance Program and school lunch programs. *Id.* The justification explains that many of these programs "have their own information technology solutions integrate[d] with the current enterprise software to meet mission needs." *Id.* Moreover, the justification notes that USDA must continue to meet, without interruption, the requirements of the COVID-19 Presidential Declaration of Emergency; the Coronavirus Aid, Relief, and Economic Security Act (also known as the CARES Act); the American Rescue Plan; the Build Back Better Initiative; the Pandemic Assistance for Producers Initiative; and--in the midst of "the most catastrophic fire season ever"--wildland firefighting support operations, among others. *Id.* at 1.

The brand-name justification also notes that "[e]xisting licenses expire September 30, 2021." *Id.* Additionally, it states that the agency's "[m]arket research has determined that standard industry practices support a timeline for implementation and transition to other products that would require at least three years of effort in a normal operational environment before completely meeting the agency's needs." *Id.* at 1-2. The justification further states that considering the current operational environment of maximum telework and the additional usage and data it creates, the agency estimates that it would take at least four years to migrate all the data. *Id.* at 2. Because the migration would "all have to be done without risking impacts to current essential services to the public," the justification concludes that "at this time no other company's product can meet the agency's need to meet USDA's performance and risk requirements." *Id.*

As a separate rationale for the brand-name justification, the agency notes that, per Executive Order (EO) 14028, "Improve the Nation's Cybersecurity," "USDA is mandated to meet cybersecurity objectives of Zero-trust, secure cloud services, multi-factor authentication and encryption, data sensitivity and data classification," beginning in fiscal year 2022. *Id.* The justification states that Microsoft products would "enable USDA to timely meet these [cybersecurity] requirements." *Id.*

Finally, the justification states that "requirements have been evolving based on recent cybersecurity, health and safety concerns." *Id.* A planned implementation of a remote work policy will lead to additional requirement changes, the agency's justification notes. *Id.* The justification observes that "[m]oving forward with a change at this juncture as the Department moves to implement the post COVID work environment, while the pandemic may still be continuing, would cause significant operational difficulties for the Department to deliver on Congressional mandates and mission essential functions." *Id.* According to its justification, USDA anticipates a competition at some future date

without a brand-name limitation. *Id.* The agency explains that it expects “official decisions” on “the future of work for USDA staff and the resulting technology needs” in calendar year 2022. *Id.*

### The Justification Does Not Address One of the Requirements in the FAR

With regard to the first condition necessary to support a brand-name restriction--that the particular brand-name, product, or feature is essential to the Government's requirements--the justification provides that the Microsoft products are “essential to the government's need to provide software and security support necessary to meet operational, mission, Executive and Legislative requirements.” *Id.* Further, the justification, in order to “demonstrat[e] the unique qualifications of the proposed contractor,” describes the percentage of USDA systems that run Windows operating systems, and the number of USDA field offices and users to whom the Microsoft software platform provides application and support services. *Id.* at 2.

As for the second condition necessary for a brand-name restriction--*i.e.*, that 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--the justification makes no representations about the ability of similar products to meet agency needs. Instead, the justification concludes that, based on market research, standard industry practices support a timeline for implementation and transition of any non-Microsoft products of at least three years in a normal operational environment (and four years in the current operational environment of maximum telework).<sup>4</sup> *Id.* The justification concludes that because any transition/implementation “would all have to be done without risking impacts to current essential services to the public,” “at this time no other company's product can meet the agency's need to meet USDA's performance and risk requirements.” *Id.*

Westwind argues that the agency's reliance on this market research for its justification is unreasonable because, although the market research may indicate inconvenience or potential risk of transitioning to a new software platform, the research does not show or indicate that any other companies' software cannot meet, or be modified to meet, the agency's needs. We agree.

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<sup>4</sup> As part of its market research, the agency conducted two meetings with Google. See AR Tabs 16 & 17, Google Meeting Minutes. Besides those meetings with Google, the agency's market research specific to Google was included in the agency report at tabs 19-22. See Memorandum of Law (MOL) at 9 (citing tabs 19-22 as agency market research). Tab 19 is a document entitled “How to reduce your exposure to threats using Google Workspace.” Tabs 20 and 21 are one-page price sheets for training. See AR, Tabs 20 and 21. Tab 22 is a one-page schematic entitled “Transformation journey for Google Workspace.” The agency does not explain the relevance of this market research to its determination to pursue a brand-name-only restriction. See AR, Tab 6, Brand-Name Justification; see *also* MOL.

We conclude that the justification fails to comply with the market research requirement of FAR section 16.505(a)(4)(i), which, as noted above, precludes an agency from using a brand-name requirement unless the agency's market research finds that "other companies' similar products, or products lacking the particular feature [that 'is essential to the Government's requirements'], do not meet, or cannot be modified to meet, the agency's needs."

Here, nothing in the brand-name justification states that the product or services USDA requires are offered only by Microsoft or that other companies' similar products, or products lacking a particular feature, do not meet, or cannot be modified to meet, the agency's needs. See AR, Tab 6, Brand-Name Justification. In fact, the justification suggests otherwise. USDA states that, after "conduct[ing] a detailed technical assessment of the IT [information technology] landscape and market offerings by utilizing open vendor discussions, testing solutions, and other best practice techniques," the agency "will conduct a subsequent competition without [a] brand-name limitation." *Id.* at 2. In other words, USDA appears to recognize that other vendors can offer goods and services to meet the agency's needs. See *id.*

The agency argues that it reasonably determined that only Microsoft software would meet USDA's needs because it "reasonably assessed the burden and risk of transitioning to a new software solution," MOL at 4, and was concerned that the duration of effort required to transition to a new software solution would exceed the time remaining in the existing contract for the brand-name licenses. This discussion appears under the brand-name justification heading: "**B. USDA reasonably determined that only Microsoft products would meet USDA's needs.**" *Id.* Yet, the discussion does not address the FAR requirement that a justification specify the "particular feature" of Microsoft that distinguishes it from "other companies' similar products." See FAR 16.505(a)(4)(i). In essence, the agency contends that the "particular feature" of Microsoft is that it--and not a similar competing product--is already in use by USDA. See MOL at 4-7. Such a contention is unpersuasive, where the FAR requires that agencies demonstrate, through a comparison of "particular feature[s]," why only one product can meet the agency's needs. See FAR 16.505(a)(4)(i). Moreover, the market research provided by the agency in support of this rationale was not based on an assessment of Westwind's software--Google Workspace. See AR, Tab 30, Impacts to Cost and Schedule.

As an example, the record reflects that the market research discusses the impact of migrating to new server and end-user operating systems, finding that there "would be a significant workload to reimaging every server system across the USDA involving hundreds of IT personnel across the country." *Id.* at 2. The market research further concludes that the impact of the migration would require "significant retraining of the IT personnel and customer base to transition smoothly" and that "[a]n undertaking of this magnitude would be a multi-year and multi-million-dollar effort during which time there would likely be an impact to the IT workforce and customer satisfaction across the board." AR, Tab 30, Impacts to Cost and Schedule at 2.

In response, Westwind asserts that its product does not require a migration to other server and end-user operating systems. Comments, exh. 2, Consultant Decl. ¶ 42; Comments at 9 (noting that Google installs and maintains the servers used to provide the Google Workspace environment, and therefore there is no need to reimage every server system across the USDA involving hundreds of IT personnel across the country). Similarly, Westwind maintains that “because the Google Workspace environment is accessed via a web browser, it is operating system agnostic” and therefore “USDA could choose to remain on the Windows operating system or move to other operating systems as appropriate.” *Id.*

In sum, because USDA’s justification does not state that the product or services USDA requires are offered only by Microsoft or that other companies’ similar products, or products lacking a particular feature, do not meet, or cannot be modified to meet, the agency’s needs, the agency has not met the FAR section 16.505(a)(4)(i) requirements for justifying a brand-name restriction. We sustain the protest on this basis.

## RECOMMENDATION

We find the agency’s brand-name justification fails to comply with the requirements of FAR section 16.505(a)(4) and is therefore unreasonable. USDA failed to provide market research showing other companies’ similar products, or products lacking a particular feature, do not meet, or cannot be modified to meet the agency’s needs. We recommend that the agency either prepare a properly documented and supported justification, consistent with this decision and the FAR or, alternatively, obtain competition for the requirement without the brand-name restriction. We also recommend that the agency reimburse the protester’s reasonable costs of filing and pursuing the protest, including attorneys’ fees. 4 C.F.R. § 21.8(d)(1). The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after the receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Edda Emmanuelli Perez  
General Counsel