

The Office of Acquisition and Logistics

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Prioritizing Sources of Supplies and Services – FAR Change!

Effective January 30, 2014, the Federal Acquisition Regulation (FAR) Part 8, addressing priorities for use of Government supply sources has changed! The final rule can be found at <http://www.gpo.gov/fdsys/pkg/FR-2013-12-31/pdf/2013-31149.pdf>.

This final rule restructured this section and implemented revised category descriptions: “Mandatory Government Sources”, “Other Mandatory Sources” and “Other Sources”.

Below are the priorities sources of supplies and services as set out by the final rule.

Supplies

Mandatory Government Sources (8.002)

1. Inventories of the requiring agency
2. Excess from other agencies
3. Federal Prison Industries, Inc.
4. Supplies on the Procurement List (AbilityOne)
5. Wholesale supply sources (e.g. GSA, DLA, VA etc.)

Use of Other Sources (8.004)

6. Federal Supply Schedules, Governmentwide acquisition contracts, multi-agency contracts, Federal Strategic Sourcing Initiative (FSSI) agreements, or any other procurement instruments intended for use by multiple agencies (*not listed in order of priority*)
7. Open Market/Commercial Sources (including educational and non-profit institutions)

Services

Mandatory Government Sources (8.002)

1. Services on the Procurement List (Ability One)

Use of Other Sources (8.004)

2. Federal Supply Schedules, Governmentwide acquisition contracts, multi-agency contracts, Federal Strategic Sourcing Initiative (FSSI) agreements, Federal Prison Industries, Inc. or any other procurement instruments intended for use by multiple agencies (*not listed in any order of priority*)

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3. Open Market/Commercial Sources (including educational and non-profit institutions)

Use of Other Mandatory Sources (8.003)

Commodity Based Requirements

1. Public utility services
2. Printing and related supplies
3. Leased motor vehicles
4. Strategic and critical materials
5. Helium

After consideration of mandatory sources buyers should turn to pre-negotiated interagency instruments to fulfill their requirements. At NIH we prioritize the use of NITAAC (IT Equipment and Services) and NIHCATSII (Conference Services). A Governmentwide searchable database of contracts and other procurement instruments intended for use by multiple agencies is available via the Internet at <https://www.contractdirectory.gov/contractdirectory/>. All sources should be considered in priority order before any consideration of placing or writing a new open market order.

At present, the HHSAR is being rewritten which may result in further changes. In the meantime, if you have any questions about this change, you may submit your questions to the Simplified Acquisition Helpline at SimplifiedAcquisitionHelp@od.nih.gov.

What's in a (Brand) Name?

By Gladys Gines

This Advisory, explores the justification, approval, and publicizing requirements for brand name acquisitions.

Most people are biased toward certain brands—a preference for particular brand items they use in their daily lives, such as cleaning supplies that work just as expected, Apple computers rather than PCs (or vice versa), or a specific make of automobile. Companies work hard to build brand loyalty in their customer base. So it's understandable that people carry over those kinds of preferences to products used in the government. But while it may be a natural inclination—or at least one reasonably acquired in our individual lives—it isn't the best idea when acquiring supplies for the government.

Government acquisition policy long has held that market competition through an overtly impartial process is the best way to acquire supplies and services and to allocate resources among many competing needs. Competition puts pressure on firms to create and offer better value to customers. As a result, the government benefits because, when properly conducted, competition results in

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timely delivery of quality products and services at a reasonable cost and also helps to maintain the public's trust in the fairness and openness of the government's acquisition processes. So important is the concept of competition that Congress passed the Competition in Contracting Act of 1984 (CICA) to promote and provide for full and open competition in soliciting offers and awarding government contracts that exceed the simplified acquisition threshold (SAT; currently \$150,000).¹

Brand name acquisitions specify the items to be purchased by the specific brand name, which is a limitation on competition even if there are multiple sources that supply that brand name item. Such restriction should be the exception, not the rule. So does this mean the government can never limit its requirement to a brand name item? No. CICA allows for seven statutory exceptions to full and open competition, and brand name restriction falls under one of those exceptions. But the government must have a legitimate and rational need for the brand name item, and that need must be more than a mere preference. Furthermore, restriction of an acquisition to a specific brand name item must be properly justified, approved, and publicized.

Brand name requirements are discussed separately from other limits on competition in the Federal Acquisition Regulation (FAR), making adherence to justification and posting requirements somewhat confusing. For good measure, we also discuss the similarly named—but very different—“brand name or equal” acquisition. Let's start with a general discussion about what a brand name acquisition is and why it has been the focus of so much attention.

What is a brand name acquisition?

A brand name acquisition, formally termed as one in which only “items peculiar to one manufacturer” will meet the need, is an acquisition for a commercial product where the requirement is described by a specific brand name, make, model number, catalog designation, or other description (e.g., Dell computers) by which the product is regularly offered for sale to the public in the commercial marketplace, thereby precluding consideration of a product manufactured by another company. It may result in a sole source (the product is available only from the manufacturer) or the item may be sold by multiple vendors.

Does brand name include services as well as supplies?

Our interpretation of the FAR is that brand name descriptions apply only to supplies. However, supplies often come packaged with installation, maintenance, or repair services. In those cases, where the services in support of a brand name item cannot be separated from the item, the services should be included in the brand name description.

Why all the recent emphasis on brand name?

Brand name specifications always have been negatively viewed due to their competitive restrictions. Based on concerns about the increased use of brand name specifications in agency solicitations, particularly for information technology, the Office of Management and Budget (OMB) issued a memorandum in 2005 to reinforce the need for “vendor neutral” contract specifications. Citing several examples of agencies using brand name specifications, then-Office of Federal Procurement Policy (OFPP) administrator Daniel Safavian noted that their use “limited competition and diminished the likelihood the agency purchased the best value product. There is

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also a significant risk of severely limiting small business participation in these cases.”² OMB encouraged agencies to take steps to mitigate brand name usage and requested agencies post the brand name justification with the solicitation to provide for more transparency.

This memorandum was followed by three other memorandums on the subject of brand name acquisition:

- April 2006—mandated agencies post brand name justifications to the government-wide point of entry (Federal Business Opportunities [FedBizOpps]) with the solicitation or to e-Buy with the solicitation when using federal supply schedules (FSS).³ This requirement was implemented in the FAR on September 28, 2006, via an interim rule.⁴
- November 2007—reminded agencies to comply with the requirements of the interim rule and establish internal controls to monitor compliance.⁵
- December 2007—summarized the FAR requirements on brand name acquisition and again requested agencies establish internal controls.⁶

The posting requirements were finalized in the FAR in January 2012.⁷

JUSTIFICATION REQUIREMENTS

Do I need to prepare some kind of justification if I need a brand name item?

Yes. FAR 11.105(a)(1) is clear that, since a brand name acquisition is considered to be restrictive of competition, it is allowed only when the government adequately justifies that a “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.” Furthermore, a justification must be prepared not only for open market acquisitions, but also for orders placed and blanket purchase agreements (BPAs) established under the FSS program and for orders placed under indefinite-delivery, indefinite-quantity (IDIQ) contracts.

For BPAs established against FSS contracts and for IDIQ contracts, does the justification need to be prepared when the basic BPA or IDIQ contract is established or when an order is placed?

It depends. The FAR clearly establishes that the justification is to be prepared when the requirement for a brand name is determined. This dictates different points in time when justifications must be prepared, depending on the circumstances and whether the FSS BPA or IDIQ contract in question is multiple- or single award. As explained in the preamble to the January 2012 final rule:

The justification for use of a brand-name specification and posting of the justification should take place when the requirement for the brand name item is determined. This will result in different timing for multiple-award contracts from single-award contracts, e.g.,

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requirements contracts. By definition, a requirements contract is with a single source. Therefore, the requirement for the source's brand-name item is determined prior to award of the basic contract, and the justification for purchasing a brand-name item should be completed prior to award of the requirements contract. On the other hand, a multiple-award contract offers buyers products from a variety of sources, some of which may offer particular brand-name products. The existence of a brand-name item on a multiple-award contract does not imply that it is the only such item available for purchase. In this case, the requirement for a single manufacturer's brand-name item is determined at the time of the order, not at the time that the multiple-award contract is placed. Therefore, the justification for the brand-name item would be required when placing the order. For example, if an agency determined that it needed 50 Dell computers to be compatible with the agency's existing Dell capabilities, then it might place an order against a Federal Supply Schedule (FSS) contract for Dell brand-name computers. The agency placing the order would be responsible for justifying the brand-name purchase, because it is at the order level that it is determined that the requirement is for Dell computers, versus other brand-name computers that are also available on FSS contracts.⁸

The same concept applies to FSS BPAs. The brand name justification is required at the order level when a justification was not completed for the BPA or does not adequately cover the requirements in the order. That is, if the ordering vehicle requires that all orders issued will be for brand name products, then the ordering vehicle must be supported by the brand name justification. Conversely, if the brand name restriction applies to a single order within the scope of all orders to be placed under one or multiple ordering vehicles, then the order requires a justification that was not required upon issuance of the ordering vehicle(s).

If I determine that I need a brand name item, do I still have to justify it if there are multiple vendors that can provide it?

Yes. Even though there are multiple vendors that can provide the brand name item, it still is considered to be a limit on competition because you will not consider any other product. As stated in FAR 6.302-1(c)(1)(i):

- 1) An acquisition or portion of an acquisition that uses a brand-name description or other purchase description to specify a particular brand-name, product, or feature of a product, peculiar to one manufacturer—
 - i. Does not provide for full and open competition, regardless of the number of sources solicited.

Is there a specific format that must be used for the justification?

It depends on the dollar value of the acquisition and whether it is an open market acquisition, FSS order or BPA, or an order under an IDIQ contract. For acquisitions not exceeding the SAT, there is no specific format. For acquisitions exceeding the SAT, the FAR outlines the specific information that must be addressed, as identified below. ASI Government's Virtual Acquisition Office™ contains templates for various justifications.⁹

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Justification Formats for Brand Name Acquisitions Exceeding the SAT

- Open market, including commercial item acquisitions – FAR 6.303-2
- FSS Orders and BPAs – FAR 8.405-6(c)(2)
- IDIQ Orders – FAR 16.505(b)(2)(ii)(B)

What does a brand name justification need to address?

Basically, regardless of the dollar amount, the justification has to demonstrate a reasonable basis for the brand name restriction, i.e., why the particular brand, product, or feature is essential to the government's requirements. It must show that the agency conducted market research to determine if other qualified brands could meet the need and that the agency considered the results of that market research in justifying the determination to limit the acquisition to the brand name. Obviously, the involvement of technical personnel who have familiarity with the brand name and its characteristics is essential in determining whether other products are capable of meeting the government's needs.

A recent Government Accountability Office (GAO) decision highlights the importance of the justification.¹⁰ An agency issued a solicitation under the FSS program for emergency mass notification software and services, limiting the competition to the brand name software currently used by the agency. The agency's justification explained that the same brand name software (with the attendant technical support and training services) was required because the software already was installed in the agency's infrastructure and most of its personnel were trained on its use, thereby saving the agency "cost, time, and human resources." With regard to market research, the agency stated that the brand name software represented the best value because it exceeded the technical specifications for this type of emergency notification system; reduced training, since the system already was widely used within the agency; allowed for quick alerts and operability; and provided high ease of use for the customers at a very competitive price. The justification also cited the brand name software's favorable past performance.

A vendor submitted a pre-award protest to the agency, arguing that the solicitation's limitation to the brand name software was unduly restrictive of competition and that the solicitation failed to describe the agency's minimum requirements. The protestor contended the agency failed to consider systems offered by other vendors. The agency denied the protest, stating that it limited the requirement to the brand name software because it was the system it currently used and intended to continue to use, arguing that its market research showed there were only two mass notification systems on the agency's approved products list (the protestor offered the other system). The protestor then filed a protest with GAO.

GAO sustained the protest, finding that the agency did not adequately define what was required to meet its needs or any essential feature that was unique to the brand name software. GAO also stated that the agency's market research regarding other vendors' similar products was not adequately documented. The agency responded that its requirement was to maintain the current brand name software since a large percentage of its workforce already was trained on and using the system on a regular basis. GAO did not agree with that rationale, finding:

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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 indicated that a similar product does not meet, or cannot be modified to meet, the agency's needs. . . . Other than this general rationale [that the agency wants to maintain the current software because staff already are familiar with it], however, the record does not include a definition of [the agency's] requirement or needs that supports the agency's assertion that the agency's needs can be met only by the [brand name] software system. Instead, the record merely establishes that the agency is procuring a mass notification system in order to comply with [agency instruction]. Neither the justification, nor the record submitted in response to this protest, however, state any rationale explaining why the [brand name] software system is the only system that can meet [the agency's] requirement to comply with [agency instruction] or that [the agency] considered other similar systems, but found them insufficient to comply with the [agency instruction]. . . . Another reason stated in the limited sources justification for limiting the competition is that [the agency] will save costs and time by upgrading its existing [brand name] system and relying on personnel already trained for that system. FAR subpart 8.4, however, does not cite cost or time savings as a basis for restricting sources.

With respect to the agency's market research efforts, GAO also found that the justification did not demonstrate or document the agency's finding that other companies' similar products, or products lacking a particular essential feature, did not meet, or could not be modified to meet, the agency's needs, as required by FAR 8.405-6(b)(1):

. . . the agency's justification merely states that, based upon market research, "the purchase of the [software] 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. . . . This analysis does not support the brand name restriction, because, for example, it does not discuss any "technical specifications" that the [brand name] software system exceeds.

So be sure to adequately define your requirements and identify the unique features or capabilities that make the brand name item essential to your needs. Make sure your market research demonstrates that you have considered whether other companies' similar products, or products lacking a particular feature, cannot meet, or cannot be modified to meet, your needs. And, of course, document all of this in the justification. Finally, remember that just because the brand name item may save the agency time and money, that is not a sufficient basis, in and of itself, to limit competition to the brand name item.

In cases where support services are packaged with the brand name item, the brand name justification also must address those services. For support services that are required as follow-on support, for example, of information technology items originally purchased under a brand name justification, it may be necessary to justify a sole source acquisition on a basis such as is contemplated at FAR 6.302-1(b)(1)(i) or (b)(2) or at 8.405-6(a)(1)(i)(B).

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Does anyone other than the contracting officer have to approve the justification?

Yes, if the acquisition exceeds \$650,000 (unless agency procedures dictate otherwise). Approval levels are shown in Table 1 on page 5 and are the same whether the brand name acquisition is open market, an order or BPA issued under the FSS program, or an order issued under an IDIQ contract.

What about acquisitions where only part of the requirement is brand name?

In accordance with FAR 6.302-1(c)(1)(ii)(A), 8.405-6(b)(4), 13.106-1(b)(1)(ii), and 16.505(a)(4)(iii)(B), if only a portion of the acquisition is for a brand name item, the justification and approvals need cover only that portion. The justification should state that it is covering only the brand name part of the acquisition, and the approval level requirements will apply to only that portion of the overall requirement.

Table 1: Approval Requirements for Brand Name Justifications

Dollar Threshold	Approving Official
Over the micropurchase threshold but not exceeding \$650,000	Contracting Officer (unless higher approval required by agency procedures)
Between \$650,001 and \$12.5 million	Competition advocate or authority cited below
Between \$12,500.001 and \$62.5 million (\$85.5 million for DoD, NASA, and the Coast Guard)	Head of procuring activity (or the armed forces, a general or flag officer, or for civilians, a GS-15 or above)
Over \$62.5 (or \$85.5) million	Senior procurement executive (not delegable except by the under secretary of defense for acquisition, technology, and logistics)

SYNOPSIS AND POSTING REQUIREMENTS

What are the synopsis requirements when issuing a brand name acquisition?

As with all open market acquisitions exceeding \$25,000, brand name acquisitions must be appropriately synopsized in FedBizOpps unless one of the exceptions in FAR 5.202 applies. (We

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discuss the synopsis and posting requirements for orders and BPAs under the FSS program and orders under IDIQ contracts separately.)

Does the justification have to be posted for public view?

Yes. In accordance with FAR 5.102(a)(6) and 6.305(c), the justification document is posted on FedBizOpps along with the solicitation if the amount of the brand name acquisition exceeds \$25,000. Furthermore, if the amount will exceed the SAT, the justification also must be posted on the agency website (which may provide a link to the FedBizOpps posting).

Are synopsis and posting requirements the same if the brand name restriction results in a sole source?

Yes. Even though sole source justifications are required to be posted no later than 14 days after award, FAR 6.302- 1(c)(1)(ii)(C) and 6.305(c) both state that for acquisitions that require a specific brand name item, the justification is to be posted with the solicitation, i.e., pre-award. This is the case whether the brand name restriction results in the acquisition being limited to a sole source or there are multiple vendors that can provide the brand name item. Since brand name justifications are posted with the solicitation, it is not necessary to post the justification again after award is made.

If I do not have to synopsise my requirement based on one of the exceptions in FAR 5.202, do I still have to post my brand name justification on FedBizOpps?

No. While you still must develop a justification and it must be approved by the appropriate individual(s) based on the dollar amount, you do not have to post the justification on FedBizOpps. The FAR Council explicitly stated that “if a solicitation is not synopsized through the GPE [government-wide point of entry] based on one of the exceptions at FAR 5.202, the associated brand-name justification or documentation is not required to be published through the GPE.”¹¹

What about synopsizing and posting brand name requirements for FSS orders and BPAs?

Per FAR 8.404(a), orders and BPAs established under FSS contracts are not synopsized in FedBizOpps, unless the order or BPA is funded in whole or in part by the American Recovery and Reinvestment Act of 2009. However, if the amount of the order or BPA exceeds \$25,000, the contracting officer must post both the solicitation and justification on e-Buy unless: disclosure would compromise the national security (e.g., would result in disclosure of classified information) or create other security risks; the nature of the file (e.g., size, format) does not make it cost-effective or practicable for contracting officers to provide access through e-Buy; or the agency’s senior procurement executive makes a written determination that access through e-Buy is not in the government’s interest.¹²

If an agency uses a third-party system for posting notices or soliciting offers for orders under FSS, such as FedBid, the official posting is still e-Buy.¹³

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What about synopsising and posting requirements for orders under government-wide acquisition contracts and other multiple-award IDIQ contracts?

Per FAR 16.505(a)(1), orders under IDIQ contracts are not synopsised in FedBizOpps. However, if the amount of the order exceeds \$25,000, the contracting officer must post both the solicitation and the brand name justification on the agency website (if any) used to solicit offers from the multiple IDIQ contract awardees or provide the solicitation and justification to all IDIQ awardees, unless disclosure would compromise national security (e.g., would result in disclosure of classified information) or create other security risks.

What if there is proprietary information in the justification?

Contracting officers must take considerable care in dealing with proprietary information to ensure no such information remains in posted justifications. FAR 5.102(a)(6) requires contracting officers to screen all justifications for contractor proprietary information and remove such information before making the justification available to the public. Contracting officers must adhere to the exemptions on disclosure of information contained in the Freedom of Information Act (5 U.S.C. 552) and the prohibitions against disclosure in FAR 24.202 in determining the information that should be removed from the justification.

Tables 2, 3, and 4 show the brand name synopsising and posting requirements for open market acquisitions, FSS orders and BPAs, and IDIQ orders.

Have there been many recent GAO or Court of Federal Claims decisions regarding brand name?

Fortunately, no. In fact, within the past year, there have been only two GAO protests—one of which was discussed above and the other of which was denied, as GAO found the agency had reasonably established its need for the brand name item¹⁴—and one COFC case, sustained on the basis that the agency did not adequately justify its need for the brand name item.¹⁵ This suggests agencies are avoiding misuse of restrictive brand name descriptions, which is good news!

BRAND NAME OR EQUAL

What is the difference between brand name and brand name or equal?

A “brand name or equal” purchase description gives vendors the opportunity to offer a product other than that specifically referenced by the brand name if another product will meet the needs of the government in essentially the same manner as the brand name product.

Brand name or equal purchase descriptions must set forth those salient physical, functional, or other characteristics of the brand name product that are essential to meet the needs of the government.¹⁶ It should be noted that while the FAR allows for brand name or equal descriptions, the preferred manner to describe such requirements is by using a performance specification (FAR 11.104(a)).

What is a “salient characteristic”?

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The FAR does not define the term, but a salient characteristic generally is a significant, essential physical, functional, performance, or material element of a product or service—in other words, the distinguishing characteristics of the product. Some agencies have established a definition in their agency-specific regulations, including the Department of Veterans Affairs, which defines salient characteristics as “those particular characteristics that specifically describe the essential physical and functional features of the material or service required. They are features that are identified in the specifications as a mandatory requirement that a proposed ‘equal’ product or material must possess for the bid to be considered responsive.”¹⁷

Does brand name or equal include services as well?

No. As with a brand name acquisition, brand name or equal applies only to products. However, attendant services that come packaged with the brand name item may also be included when using a brand name or equal description.

Table 2: Brand Name Requirements for Open Market Acquisitions

Steps	FAR Citation
Prepare justification	13.106-1(b) – under SAT
Obtain appropriate approvals of justification for acquisitions over SAT	6.304
Prepare solicitation specifying brand name	
If the amount will exceed \$25,000, post on FedBizOpps: A notice of proposed contract action; The solicitation; and The justification document If the amount will exceed the SAT, also post the justification on the agency website (which may provide a link to the FedBizOpps posting)	5.207 5.102 5.102(a)(6) and 6.305(c)
If the amount exceeds \$25,000, post on FedBizOpps a postaward notice only if the acquisition – Is covered by the World Trade Organization Government Procurement Agreement or a Free Trade Agreement; or Is likely to result in the award of any subcontracts (Note: the dollar threshold is not a prohibition against publishing an award of a smaller amount when publicizing would be advantageous to industry or to the government)	5.301(a)(1)(i) 5.301(a)(1)(ii)

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Table 3: Brand Name Requirements for Orders and BPAs under FSS Contracts

Steps	FAR Citation
Prepare justification	8.405-6(b)(2)(i) – under SAT
Obtain appropriate approvals of justification for acquisitions over SAT	8.405-6(d)
Prepare solicitation specifying brand name	
If the amount will exceed \$25,000, post on e-Buy: The solicitation; and the justification document	8.405-6(b)(3)(i) 8.405-6(b)(3)(i)(A) or (B)
No postaward postings are required	

Table 4: Brand Name Requirements for Orders under IDIQ Contracts

Steps	FAR Citation
Prepare justification	16.505(b)(2)(ii)(A) – under SAT 16.505(b)(2)(ii)(B) – over SAT
Obtain appropriate approvals of justification for acquisitions over SAT	16.505(b)(2)(ii)(C)
Prepare solicitation specifying brand name	
If the amount will exceed \$25,000: Post the solicitation and justification on the agency website (if any) used to solicit offers; or Provide the solicitation and justification to all contract awardees	16.505(a)(4)(iii)(A)(1) 16.505(a)(4)(iii)(A)(2)
No postaward postings are required	

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Do I have to prepare and post a justification if I use a brand name or equal description?

No. Because vendors are not limited to providing only the brand name item, brand name or equal purchase descriptions are not considered to be restrictive of competition; therefore, there is no requirement to develop and post a justification (see FAR 6.302-1(c)(2)).

Is there any special language that must be used in the solicitation when using a brand name or equal description?

Yes. FAR clause 52.211-6, “Brand Name or Equal” (or a comparable agency-specific clause), must be included in the solicitation, per FAR 11.107(a) (see sidebar at right). This solicitation provision requires that the offeror indicate each product that is being offered as an “equal” product. For each equal product, the offeror must include a description reflecting the characteristics and level of quality that will satisfy the salient physical, functional, or performance characteristics of the equal product(s) specified in the solicitation. The offeror also must clearly identify the item by brand name (if any) and make/model number. Finally, the offeror must include descriptive literature, such as illustrations, drawings, or a clear reference to previously furnished descriptive data or information available to the contracting officer, and clearly describe any modifications it plans to make to a product to make it conform to the solicitation requirements.

Are there any particular issues or problems that arise when using a brand name or equal purchase description?

There are two common problem areas when using brand name or equal descriptions: (1) not adequately describing the essential salient features of the brand name item (or not describing them at all); and (2) not reasonably evaluating a product characterized as “equal.”

A 2012 GAO decision is illustrative of both these areas.¹⁸ GAO sustained the protest on the grounds that the brand name or equal solicitation lacked a description of the essential salient characteristics and that the equal product offered by the protestor was not shown to be significantly different from the brand name item.

The solicitation, for five electrosurgical units and associated equipment, listed 18 contract line item numbers (CLINs). Sixteen of the CLINs identified specific brand name items, but the solicitation did not identify or make any references to any salient characteristics of those items. The protestor offered a product it characterized as being equal to the brand name item, including product literature that highlighted various features of its product and a table comparing various features of its product with the brand name item. However, the agency rejected the protestor’s offer, claiming it did not provide an equal product, and awarded the contract to an offeror that provided the brand name item.

In sustaining the protest, GAO found the solicitation was in violation of FAR 11.104(b), which states that when using brand name or equal descriptions, agencies must include a general description of those salient physical, functional, or performance characteristics of the brand name item that an “equal” product must meet to be acceptable for award:

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This brand name or equal solicitation was defective because it did not identify salient characteristics, so that bidders offering equal products were left to guess at the desired essential qualities of the brand name item. . . . We have recognized that where, as here, an agency does not include a list of salient characteristics in a brand name or equal solicitation, the agency is precluded from rejecting a bid offering an equal product for noncompliance with some performance or design feature, unless the offered item is significantly different from the brand-name product.

The evaluation of equal items can be fairly technical, as it was in this case, with the agency indicating that the item offered by the protestor was not equal to the brand name item because of its use of constant voltage versus constant power as well as the location of a filter and the frequency with which that filter needed to be changed. However, GAO concluded the protestor showed that its product was not significantly different from the brand name item:

While our Office affords particular deference to the technical expertise of agency personnel where their technical judgments involve matters of human life and safety, . . . , the record before us does not withstand scrutiny. In short, in its written materials and in testimony presented at the hearing, the [agency] has not shown that [the protestor's] proposed electrosurgical unit was significantly different from the brand name unit.

Brand Name or Equal Salient Characteristics Example

We have a requirement to purchase bandages. Our baseline is the Band-Aid brand bandage. Salient characteristics are:

- Flexible, sterile adhesive bandages
- Safety center pads
- Individually wrapped
- Between 1-3/4 inches wide and 3 inches long

Using these salient characteristics would allow for offers of numerous bandages other than Band-Aid.

Source: Defense Acquisition University Primer Briefing “Brand Name or Equal” Purchase Descriptions

52.211-6: Brand Name or Equal (AUG 1999)

- a) If an item in this solicitation is identified as “brand name or equal,” the purchase description reflects the characteristics and level of quality that will satisfy the Government’s needs. The salient physical, functional, or performance characteristics that “equal” products must meet are specified in the solicitation.
- b) To be considered for award, offers of “equal” products, including “equal” products of the brand name manufacturer, must –
 - 1) Meet the salient physical, functional, or performance characteristic specified in this solicitation;

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- 2) Clearly identify the item by –
 - i. Brand name, if any; and
 - ii. Make or model number;
 - 3) Include the descriptive literature such as illustrations, drawings, or a clear reference to previously furnished descriptive data or information available to the Contracting Officer; and
 - 4) Clearly describe any modifications the offeror plans to make in a product to make it conform to the solicitation requirements. Mark any descriptive material to clearly show the modifications.
- c) The Contracting Officer will evaluate “equal” products on the basis of information furnished by the offeror or identified in the offer and reasonably available to the Contracting Officer. The Contracting Officer is not responsible for locating or obtaining any information not identified by the offeror.
- d) Unless the offeror clearly indicates in its offer that the product being offered is an “equal” product, the offeror shall provide the brand name product referenced in the solicitation.

Have there been recent GAO or COFC decisions regarding brand name or equal?

Yes, but not many. Table 5 below shows the GAO decisions issued within the past year where brand name or equal was one of the bases of the protest. There were no COFC cases.

Table 5: Recent GAO Decisions Related to the Use of Brand Name or Equal

Number/Date	Topic	Protestor’s Basis	Outcome	Conclusion
B-408342 August 22, 2013	Salient characteristic unduly restrictive of competition	Protestor alleged agency’s brand name or equal requirement unduly restricted competition.	Denied	Agency properly justified that the brand name or equal printer that used specific software was necessary to meet the agency’s need for rapid printing capability for agency worldwide distribution systems.

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<p>B-408136 June 10, 2013</p>	<p>Agency improperly evaluated “equal” product</p>	<p>Protestor alleged agency unreasonably concluded it did not propose an equivalent product to the brand-name item sought under the RFP and, as a result, improperly selected the awardee’s higher-priced proposal for award.</p>	<p>Denied</p>	<p>Protestor’s proposal did not show that its microscope met the salient characteristics under the terms of the solicitation. Protestor did not otherwise explain how its microscope was equal to the brand name microscope with respect to a salient feature of the brand name.</p>
<p>B-407223.2 December 13, 2012</p>	<p>Solicitation did not contain salient characteristics; agency improperly evaluated “equal” product</p>	<p>Protestor alleged the agency unreasonably rejected its lower-priced “equal” product.</p>	<p>Sustained</p>	<p>Solicitation did not contain or make reference to any salient characteristics of the brand name items. Consequently, the agency was precluded from rejecting an offer for noncompliance with an unidentified performance or design feature unless the offered product was significantly different from the brand name item.</p>
<p>B-407389 December 4, 2012</p>	<p>Cancellation of brand name or equal solicitation due to lack of salient characteristics</p>	<p>Protestor alleged agency’s cancellation of a brand name or equal RFQ was not reasonable because the RFQ provided the salient characteristics, which the protestor stated it satisfied.</p>	<p>Denied</p>	<p>The agency’s cancellation was reasonable since, contrary to the protestor’s arguments, the RFQ did not identify salient characteristics but included only a general description of the requirements that the software should satisfy.</p>

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Conclusion

Specifying a brand name requirement is considered to be a limit on competition, allowed only if an agency can affirmatively demonstrate that it has a legitimate need (not just a preference) for the brand name item. Because of the noncompetitive nature of brand name restricted acquisitions, the FAR imposes attendant justification, approval, and posting requirements. Recent changes requiring agencies to post the brand name justification emphasizes not only the desire for more transparency around brand name acquisitions, but a renewed focus on increasing competition. ♦

Endnotes

1. 41 U.S.C. 253.
2. [“Use of Brand Name Specifications,” memorandum, Office of Management and Budget, April 11, 2005;](#)
3. [“Publication of Brand Name Justifications,” memorandum, Office of Federal Procurement Policy, April 17, 2006;](#)
4. [“Implement OMB Policy on the Use of Brand Name Specifications,” interim rule, Federal Register 71, no. 188, September 28, 2006;](#)
5. [“Appropriate Use of Brand Name or Equal Purchase Descriptions,” memorandum, Office of Federal Procurement Policy, November 28, 2007;](#)
6. [“Reminder – Ensuring Competition When Acquiring Information Technology and Using Common Security Configurations,” memorandum, Office of Management and Budget, December 19, 2007;](#)
7. [“Brand-Name Specifications,” final rule, Federal Register 77, no. 1, January 3, 2012;](#)
8. [“Brand-Name Specifications,” final rule, Federal Register 77, no. 1, January 3, 2012;](#)
9. Available at <https://www.gotovao.com/index.cfm?action=search.keyword&id=10570000080012800004430>.
10. [Matter of: Desktop Alert, Inc. \(B-408196\), Government Accountability Office, July 22, 2013;](#)
11. [“Brand-Name Specifications,” final rule, Federal Register 77, no. 1, January 3, 2012;](#)
12. E-Buy is the General Services Administration’s electronic request for quotation (RFQ) system designed to allow government buyers to prepare and post an RFQ for specific products and services under the FSS program. FSS contractors may review the request and post a response.
13. [“Brand-Name Specifications,” final rule, Federal Register 77, no. 1, January 3, 2012;](#)
14. [Matter of: Kingdomware Technologies \(B-407757\), Government Accountability Office January 31, 2013;](#)
15. [McAfee v. United States, no. 13-198, July 17, 2013;](#)
16. FAR 11.104.
17. [Department of Veterans Affairs Acquisition Regulation 811.001;](#)
18. [Matter of: Veterans Healthcare Supply Solutions, Inc. \(B-407223.2\), Government Accountability Office, December 13, 2012;](#)

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GSA Webinars for Federal Strategic Sourcing Initiative (FSSI)

GSA is conducting several webinars on how to utilize the Federal Strategic Sourcing Initiative (FSSI) Office Supplies BPAs for the purchase of paper, toner and general office supplies. To register for a specific session, please click one of the links below:

February 19, 2014, 2 – 3 pm EST – <https://www4.gotomeeting.com/register/892207559>

March 19, 2014, 2 – 3 pm EST - <https://www4.gotomeeting.com/register/894992183>

April 16, 2014, 2 – 3 pm EST - <https://www4.gotomeeting.com/register/895057943>

The Federal Strategic Sourcing Initiative (FSSI) Office Supplies BPAs should be the primary source for your paper, toner and general office supplies purchases. Benefits of utilizing the FSSI Office Supplies BPAs include:

- Discounted Pricing (11-33% savings vs. GSA Federal Supply Schedule prices)
- 13 Small Business Vendors (15 Vendors Total)
- No Competition Required for Orders Under \$3,000
- Multiple Order Methods (GSA Advantage, Vendor Websites, DOD Email)
- Environmentally Friendly “Green” Products
- Ability One (Formerly JWOD) Products

You can access the [FSSI shopping portal](#) directly.

If you are not able to attend one of the above-mentioned webinars and would like to take a self-led webinar, please visit <https://interact.gsa.gov/webinar/fssi-office-supply-bpas-0>. You can earn .5 CLPs for attending these webinars.

For more information about the FSSI Office Supplies BPAs, please visit <http://www.gsa.gov/portal/content/141857> or <http://intranet.hhs.gov/abouthhs/administrative/ssc/fssi/index.html>. If you have any questions, please contact Kesa Russell, Strategic Sourcing Project Manager, at Kesa.Russell@hhs.gov or (202) 690-7326.

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Start earning CLPs NOW and Save Time on IT Acquisitions in 2014!

If your team has not taken advantage of a free NITAAC training session in the last 12 months, it's time for a refresher course so you can learn about the powerful IT acquisition tool that enables you to save both time and money: Government Wide Acquisition Contracts, more commonly known as GWACs.

[NITAAC](#) is one of only three federal Executive Agents authorized to administer GWACs and is housed within HHS at the National Institutes of Health.

Every federal civilian and DoD agency can use the NITAAC GWACs – [ECS III, CIO-SP3 and CIO-SP3 Small Business](#) – to acquire new and emerging technologies from companies that have already been vetted for their ability to provide mission critical IT products, services and solutions to the federal government.

Schedule free training NOW to learn more about the speed and cost saving benefits of using NITAAC GWACs. Participants will earn two Continuous Learning Points (CLPs) during a single session lasting no more than two hours. NITAAC's free training covers:

- How our GWACs are faster, easier and cost-competitive;
- The numerous benefits of using NITAAC GWACs for IT products, services and solutions;
- How to set-aside requirements for 8(a), HUBZone, WOSB, SDVOSB and Small Business;
- NITAAC's value-added services, including free comprehensive SOW/PWS/SOO assessments;
- A live demonstration of NITAAC's easy-to-use online competition/ordering systems.

We invite you to register for one of the upcoming training opportunities listed below.

WebEx Training Courses – Registration is free and it's easy to join a Webinar from the comfort of your own office. Please follow [this link to register](#) for one of the NITAAC monthly Webinars:

- Thursday, February 27th
- Tuesday, March 25th

Classroom – Registration is free and the locations are available either on the NIH Campus, or at satellite offices at 6001 Executive Blvd. in Rockville, MD. Please follow [this link to register](#):

- Tuesday, March 4th
- Thursday, April 3rd

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Or if you prefer to schedule a free training session at your facility with your entire IT procurement team (including CIO, program officers, contract specialists, and IT specialists) click on the NITAAC website at <http://nitaac.nih.gov/nitaac/free-training> or call the Customer Support Center at 1-888-773-6542.

Thank you! We look forward to seeing you and your IT procurement team soon.

Acquisition Training Schedule

Access [Acquisition Training Classes](#)

[CON 100 Shaping Small Business Arrangements](#)

[CON110 Mission Support Planning](#)

[CON 237 Simplified Acquisition Procedures](#)

[Advanced Simplified Acquisition](#)

[Basic Simplified Acquisition](#)

[Federal Appropriations Law](#)

[HHS Appropriations Law](#)

[Internal & External Requisitioner \(NBS\)](#)

[Price Reasonableness in Simplified Acquisitions](#)

[Professional Services](#)

[Purchase Card Training \(NBS\)](#)

[Negotiation Strategies for Simplified Acquisitions](#)

[NBS PCard Logs & Reconciliation \(Refresher\)](#)

[Simplified Acquisition & Delegated Procurement \(NBS\)](#)

[AT100 - Section 508 Electronic & IT Training - Phase II](#)

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[AT170 - Section 508 Training for Purchasing Agents: Purchases, VPATS & POTS](#)

[AT171 – Acquisition Process – Making Sure You Are in Compliance with Section 508](#)

[AT180 - Introduction to Making MS Office 2010 Documents 508 Compliant](#)

Green Purchasing Training

As a reminder, per HHS policy, all contracting officers, contract specialists, purchase cardholders, card approving officials, CORs and acquisition staff in job series 1102, 1105, and 1106 are required to take the Green Purchasing training every two calendar years. The training includes online training modules for your convenience.

Please visit the [Green Purchasing webpage](#) for further information including an application form and searchable database. Questions? Please send to: GreenPurchasing@mail.nih.gov.

NIH Blanket Purchase Agreement (BPA) Lists Available Online

Lists of all [NIH Blanket Purchase Agreements \(BPAs\)](#) can be found at the OAMP website.

This location contains Three BPA Lists:

1. Complete vendor alphabetical list;
2. Vendor list sorted by commodity; and
3. A listing of the preferred HHS Strategic Sourcing Vendors

If you have any questions or need further clarification, please contact the BPA helpline at 301-496-5212 or e-mail at BPAProgramBranch@od.nih.gov

We would like to thank all those who contributed to this issue and to future editions of the OALM Newsletter.

The OALM Newsletter will be published six (6) times in calendar year 2014. We encourage staff to submit articles that would be of interest to our readers. We will do our best to include such articles in future editions of the OALM Newsletter.

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