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## Brand Name or Equal: Without "Equal," It's Not Competitive

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# THE NASH & CIBINIC REPORT

government contract analysis and advice monthly from  
professors ralph c. nash and john cibinic

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**DATELINE OCTOBER 2020**

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## COMPETITION & AWARD

### ¶ 52 BRAND NAME OR EQUAL: Without "Equal," It's Not Competitive

*Steven L. Schooner*

Even in the complex and bureaucratic world of Government contracts, the logic of some rules appears inescapable. One such rule permits the Government



to describe its needs by specifying a “brand name” product, as long as the Government appends the words “or equal” to the brand name and articulates the product’s salient physical, functional, or performance characteristics that are essential to the Government’s needs.

The familiar, longstanding rule pre-dates the 1984 Competition in Contracting Act and the Federal Acquisition Regulation. See generally Federal Procurement Regulations § 1-1.307-4, -4(b) (1983), dating back to the “complete republication” of the FPR on July 24, 1964 (29 Fed. Reg. 10102), as amended January 8, 1971 (36 Fed. Reg. 287), and January 16, 1975 (40 Fed. Reg. 2810). See also Armed Services Procurement Regulation § 1206-2, -3 (28 Fed. Reg. 2272 (Mar. 8, 1963)). Then, as now, the rule furthered the fundamental policy of avoiding unnecessary limitations on competition:

Purchase descriptions used in competitive procurement shall not specify a product having features which are peculiar to the product of one manufacturer, producer, or distributor, and thereby preclude consideration of a product of another company, unless it has been determined in writing by the user that those particular features are essential to the Government’s requirements, and that similar products of other companies lacking those features would not meet the minimum requirements for the item.

FPR § 1-1.307(1)(b).

I learned the rule and its purpose in the course that initially introduced me to Government contracts. It stuck with me, not only due to its elegant simplicity, but because the instructor’s teaching example—the procurement of *IBM Selectric II* typewriters—resonated. Previously, as a GS-2 clerk/typist with the Army Corps of Engineers in Frankfurt, Germany (in the, gulp, 1970’s), I became enamored with the *IBM Selectric II*, which was vastly superior to the modestly-priced, consumer-grade electric typewriter that served me without particular distinction through college and law school (by which time, personal computers, PCs, began to appear on the scene).

### “Brand Name Or Equal” Need Not Restrict Competition

The teaching point emphasized the regulatory requirement to identify the *salient characteristics* of the name brand product. For most pre-FAR era typewriter consumers, the salient characteristic that mattered was *IBM Selectric II*’s “typeball” or “golf ball,” which outperformed the massive array of fragile (and often finicky) “type hammers,” one for each letter (upper and lower case) or number/character, found on most typewriters. While skilled typists appreciated that the typeball was less prone to jams (maddeningly caused by simultaneous key strikes), the typeball’s immense popularity derived from the fact that it could easily be changed, permitting a single typewriter to employ different fonts. (Yes, it’s true. A generation ago, our “manual word processors” limited users to a single font (and size) for the life of the machine.) The critical procurement lesson was that, if the Government customer wanted an industrial grade, high quality typewriter that offered alternative fonts, there was no need to limit competition to IBM. By adding the phrase “or equal” to the specification, and describing the salient characteristic (e.g., the ability to change the font), the Government customer could expect broader competition, because Olivetti (with its “Lexicon”) and Brother (with its “correct-o-ball”) offered similar capacity.

The larger policy concern, of course, was avoiding unduly restrictive specifications. For obvious reasons, “[s]pecifications written around a certain product are particularly susceptible to being found unduly restrictive.” Nonetheless, the Government Accountability Office historically has granted procuring agencies considerable discretion in determining their needs, and “[a]

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specification will not be held to be unduly restrictive if the agency can show that it has a *legitimate* need for the specified restrictive feature.” Cibinic, Jr., et al., *FORMATION OF GOVERNMENT CONTRACTS* 370–72 (4th ed. 2011) (emphasis added).

These simple, common rules changed little over time, and the FAR continues to recognize the efficiencies associated with using a “brand name or equal” specification.

#### 11.104 Use of brand name or equal purchase descriptions.

(a) While the use of performance specifications is preferred to encourage offerors to propose innovative solutions, the use of brand name or equal purchase descriptions may be advantageous under certain circumstances.

(b) Brand name or equal purchase descriptions must include, in addition to the brand name, a general description of those salient physical, functional, or performance characteristics of the brand name item that an “equal” item must meet to be acceptable for award. Use brand name or equal descriptions when the salient characteristics are firm requirements.

See also “*Brand Name or Equal*”: *The Contractor’s Rights*, 8 N&CR ¶ 39 (warning that “[t]he ‘brand name or equal’ policy is full of snares and delusions” and explaining that, during performance of a contract awarded based on a “brand name or equal” provision, “the Contracting Officer must approve an ‘equal’ product or pay the contractor the difference in price as an equitable adjustment under the ‘Changes’ clause.”).

### Minor Tweaks

Of course, since 1984, CICA’s “full and open competition” mandate required some evolution and added nuance. The CICA exemption for “only one responsible source,” FAR 6.302-1, 10 USCA § 2304(c)(1), or 41 USCA § 3304(a)(1), distinguishes between (1) the acquisition of a “brand name” product, which “does not provide for full and open competition,” and, thus, requires a justification and approval (J&A), pursuant to FAR 6.303 and 6.304, and (2) “brand name or equal descriptions,” which are deemed fully competitive. See, e.g., Jerome S. Gabig, *A Primer on Federal Information Systems Acquisition: First Part of a Two-Part Article*, 17 PUB. CONT. L.J. 31, 61 (1987) (“A brand-name specification which does not mention ‘or equal’ is synonymous with a specific make and model specification. Both are categorized as noncompetitive acquisitions. A [J&A] document must be completed.” (footnotes omitted)).

Alas, the FAR and Defense FAR Supplement drafters haven’t always made it easy to recognize the dramatic difference between “brand name” and “brand name or equal.” See *Postscript: A Case of Poor Draftsmanship*, 22 N&CR ¶ 10, *A Case of Poor Draftsmanship—We Hope*, 22 N&CR ¶ 5 (discussing the December 19, 2007 Office of Management and Budget Memorandum, *Reminder—Ensuring Competition When Acquiring Information Technology and Using Common Security Configurations*, available at [https://georgewbush-whitehouse.archives.gov/omb/procurement/memo/fdcc\\_competition.pdf](https://georgewbush-whitehouse.archives.gov/omb/procurement/memo/fdcc_competition.pdf), which clarifies, in part, the November 28, 2007 Office of Federal Procurement Policy Memorandum, *Appropriate Use of Brand Name or Equal Purchase Descriptions*, available at [https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/OMB/procurement/memo/2008\\_brand\\_name.pdf](https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/assets/OMB/procurement/memo/2008_brand_name.pdf), emphasizing that there are no restrictions on the use of *brand name or equal* purchase descriptions, where one can presume that the brand name is not the only brand that can meet agency needs). But see *Brand Name or Equal* (DFARS Case 2017-D040), 83 Fed. Reg. 54696 (Oct. 31, 2018) (“advis[ing] DOD COs] that, notwithstanding FAR 6.302-1(c)(2), a [J&A]...is required when using brand name or equal descriptions”). See also *Patents As Grounds for Sole-Source Procurement: An Unknown Rule?*, 28 NCRNL ¶ 44, for one of the more unique and strange examples of how an agency could run afoul of the J&A requirement at the GAO.

FAR 52.211-6 also contains a helpful provision for use in solicitations, “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.

\* \* \*

(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 in the offer.

(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.

## Comparison Shopping: Common, Commercial, Consumer Behavior

The underlying policy makes sense. Consumers routinely engage in basic brand name comparison shopping. Indeed, Internet shopping both permits and encourages consumers to compare specific items based upon the features, traits, aspects, or, well, salient characteristics that they seek. Thus, it's no surprise to see that, even as Congress has pushed the Government towards more commercial purchasing, these basic principles persevered. FAR 13.104(a)(2) clarifies that: "The [CO] must not [r]estrict solicitation to suppliers of well-known and widely distributed makes or brands." See also Linda S. Lebowitz, *Bid Protest Issues Arising in Commercial Item Acquisitions*, 27 PUB. CONT. L.J. 429, 432, 442–43, 450–54 (1998) ("GAO is receptive to the Government's acquisition of commercial items and has intervened only where agency actions have deviated from the statutory and regulatory framework to preclude fair and meaningful competitions."). For a less than elegant application, see *Postscript: Commercial Specifications*, 4 N&CR ¶ 22 (offering a suboptimal example of specifying salient characteristics).

FAR 13.106-1(b)(2) mandates that, for purchases *exceeding* the simplified acquisition threshold (SAT), the CO must follow the requirements in FAR 5.102(a)(6) with regard to posting the brand-name justification or documentation. For purchase *below* the SAT, FAR 13.106-3(b) nonetheless requires that purchasing offices "retain data supporting purchases...necessary for management review purposes....". See also FAR 13.106-1(b)(ii), FAR 13.501(a)(1), suggesting that limited justification, approval, and posting requirements for brand name justifications apply to acquisitions *below* the simplified acquisition threshold.

## A Binary Decision: "Brand Name" Versus "Brand Name Or Equal"

All of which leads to the GAO's recent decision in *Mythics, Inc.*, Comp. Gen. Dec. B-418785, 2020 CPD ¶ \_\_\_, 2020 WL 5425788 (Sept. 9, 2020). There's a lot going on in this protest arising out of a Library of Congress (LOC) procurement for cloud computing services. The decision reads as a surprisingly strong rebuke; it's difficult not to view the decision as a near-total rejection of the Library's acquisition strategy and process. For many REPORT readers, the most interesting aspect may be the GAO's rejection of the "online marketplace" approach for third-party software applications. There, while breaking some new ground, the GAO clarified that the Library could not simply outsource some of its procurement functions and, in so doing, bypass or jettison innumerable congressional mandates related to competition, compliance, responsibility, etc.

The GAO also rejected the LOC's single-award approach (or, in effect, refused to permit the Library to avoid the congressionally mandated multiple award preference), which, incidentally, seems to be most significant point of intersection with the DOD's JEDI cloud computing contract (which, of course, the GAO never fully vetted because (1) Oracle failed to demonstrate it was an interested party, and (2) Amazon (AWS) went straight to the U.S. Court of Federal Claims, instead). See, e.g., *Frictionless Acquisition: A New Initiative by the Office of Federal Procurement Policy*, 34 NCRNL ¶ 51 ("[F]riction is one of the causes of excessive procurement administrative lead time and partially explains why...the process of awarding the mission-critical Joint Enterprise Defense Infrastructure Cloud Program (JEDI) contract is, as of this writing, still underway more than two years after release of the Request for Proposals in July 2018."); *Postscript II: Enhanced Debriefings*, 34 NCRNL ¶ 26; *The JEDI Acquisition: Innovation Rejected*, 34 NCRNL ¶ 25; *Postscript: Enhanced Debriefings*, 34 NCRNL ¶ 21; *Enhanced Debriefings: A Toothless Mandate?*, 34 NCRNL ¶ 10; *Single Award IDIQ Contracts: A New Fad?*, 33 NCRNL ¶ 69; *Hiring A Member of the Source Selection Team: Not a Recommended Practice*, 33 NCRNL ¶ 54; *IDIQ Contracts for Support Services: What Are They Really?*, 32 NCRNL ¶ 50; *Indefinite-Delivery/Indefinite-Quantity Contracts: Time To Correlate Practice And Policy?*, 32 NCRNL ¶ 44.

The LOC also appears to have muddied the waters with its flexible, incremental approach to cleaning up its solicitation through corrective action. The GAO seems to signal that, when confronted with a preaward challenge regarding the solicitation's terms, an agency cannot assume that simply expressing its intent to revise the solicitation constitutes sufficient corrective action. Rather, agencies must demonstrate that their corrective action plans will actually resolve the pending protest issues.

## Brands Name Specifications Limit Competition

Returning to the present topic, one of the reasons that the GAO sustained the protest in *Mythics* was that the LOC played fast and loose with the exceptions that permit use of unduly restrictive specifications. Among other things, the protestors alleged that the LOC's solicitation:

impermissibly requires offerors to provide the 13 brand-name products peculiar to Amazon, Google and Microsoft without the agency having executed the required justification and approval for limiting competition to those products, and without alternatively specifying the salient characteristics of those products that are necessary to meet the agency's requirements so that alternative products may be offered.

Beginning from the simple premise that “the FAR mandates that agencies include restrictive provisions only to the extent necessary to satisfy actual requirements” and citing FAR 11.002(a)(1)(ii), the GAO explained:

Agencies generally are precluded from describing their requirements using a particular brand-name product or service (thereby precluding firms from offering the products or services of other concerns), and may only specify goods or services “peculiar to one manufacturer” where the agency's market research shows that other companies' products or services do not meet, or cannot be modified to meet, the agency's requirements. FAR 11.105(a). When agencies restrict competition to a particular brand-name product or service, the authority to contract without providing for competition must be supported by a justification and approval (J&A) describing the basis for the agency's conclusion that only the brand-name product—and no other supplies or services—will meet the agency's requirements. FAR 11.105(a), 6.302-1.

The GAO found that the LOC failed to publish the required J&A when it issued the solicitation and rejected the LOC's correction action because:

In effect, the agency is saying that it will no longer actually name the products it is soliciting, but will instead describe its current cloud computing environment and require that environment to be provided in response to the RFP. This also amounts to a prohibited solicitation of products on a brand-name basis without executing the necessary J&A. [Footnotes omitted.]

The GAO emphasized the distinction between “brand name” and “brand name or equal” specifications: “A brand-name-or-equal solicitation, by definition, permits firms to propose either the brand-name product being solicited, or some unspecified alternative that is equivalent to the brand name product being solicited.” The GAO continued: “[E]ven if the agency intend[ed] to solicit its requirements on a brand-name-or-equal basis, the RFP...lack[ed] a list of the salient characteristics that any alternative products would have to meet in order to be acceptable.” Specifically, the GAO concluded that the RFP failed to “enumerate the salient characteristics” that corresponded with the various brand name products called out in the solicitation. In other words, “the RFP [was] inadequate because it lack[ed] a statement of the salient characteristics peculiar to the brand-name products that would have to be met by an alternate product.”

### Specifying A “Brand Name,” Raising Eyebrows

On September 15, 2020, the week after the GAO's *Mythics* decision, the System for Award Management (SAM, or, still, “Beta Sam”) provided an awkward case study. The Department of Agriculture (USDA) published a combined synopsis/solicitation for (and, no, we're not making this up) 10 “Peloton Bike+” exercise bikes. See Notice ID 12665820Q0026 (published, September 15, 2020, offers due, September 18, 2020), [https://beta.sam.gov/opp/a8a8659303e946cb8c48bf78514fbb30/view?keywords=&sort=-modifiedDate&index=opp&is\\_active=true&page=67](https://beta.sam.gov/opp/a8a8659303e946cb8c48bf78514fbb30/view?keywords=&sort=-modifiedDate&index=opp&is_active=true&page=67). The solicitation explained:

Awardee will be selected based on Brand Name of Equal. Award of the contract resulting from this solicitation will be made to the vendor that has been found to be technically acceptable, based on Brand Name or Equal. To be technically acceptable, vendors must meet all requirements for the 10 Peloton Bike+ per specification on page 13[.]

Contrary to that language, the USDA made unequivocally clear that this was not a “brand name or equal” specification. Rather, the USDA's SAM notice description elaborated that the USDA wanted something quite specific: “Please note that these are the newest model of the Peloton exercise bikes,” although no similar clarification was included in the specification at solicitation page 13, which read, in its entirety:

**SPECIFICATIONS:**

Peloton Bike+ - Quantity of 10

These exercise bikes will be used in upcoming research studies.

The solicitation neither identified a Peloton bike's salient characteristics nor explained what unique salient characteristics the *new* model offers (for an additional \$600) that were lacking in the ubiquitous and popular original. The USDA did not post a J&A on SAM (but, since we're confident the price is below the simplified acquisition threshold, we'll assume the USDA's file contains an explanation “necessary for management review purposes” as required by FAR 13.106).

Other than the USDA's implicit "take my word for it," it's hard to understand why the USDA chose not to rely on a *brand name or equal* specification, with an identification of the bike's salient characteristics. See e.g., Gabig, *Primer, supra*, at 60 (1987), citing, *M/RAD Corp.*, Comp. Gen. B-199830, 81-1 CPD ¶ 138, 1981 WL 24390 ("[T]he purpose for listing the salient characteristics is to permit vendors to compete on an equal basis. Vendors should not be compelled to guess which features of the brand-name equipment are important to the procuring agency."). Adding to the confusion, the solicitation incorporated by reference FAR 52.211-6, "Brand Name or Equal (AUG 1999)," which, as noted above, unequivocally states: "The salient physical, functional, or performance characteristics that 'equal' products must meet *are specified in the solicitation.*" (Emphasis added.) Yet no such salient characteristics appear in the solicitation.

Still, as discussed above, agencies should not rely on a particular brand name product where market research shows that other products either meet, or could be modified to meet, the requirements. FAR 11.105(a). At the risk of understatement, we're skeptical of the USDA's market research. Go ahead, type "best exercise bikes" into your favorite search engine. Or trust us; there are a plenty of excellent options. Even if you search for "best exercise bike with screen" or "smart exercise bikes," you'll see innumerable Peloton competitors and alternative bikes, many of which are considered superior. Moreover, the plethora of reviews suggest innumerable salient characteristics that might have been deployed (such as construction, drive train, performance, power, adjustability, screen, sound, etc.), but, alas, were not. This should not have been difficult. During the coronavirus pandemic and quarantine, Peloton's stylish and chic bikes became one of the market's trendiest home exercise options. See generally Sharon Terlep & Micah Maidenbergl, *Peloton Rides a Coronavirus Surge in Home Workouts*, WALL STREET JOURNAL (May 6, 2020) ("Exercise-bike maker reports a 94% jump in subscriptions as pandemic shuts gyms.").

### And That's Not All

Equally perplexing is that the USDA's solicitation, for 10 bikes, says nothing about a monthly subscription. That's troubling, because Peloton's website explains that its "Bike packages require a [\$39/month] monthly Peloton All-Access Membership." Indeed, Peloton's web page seeks to entice consumers with its "live weekly classes," "on-demand library," "motivating instructors," and "diverse class types." Alas, none of these *services* are included in the price of the bike itself (which, again, is all that the USDA solicitation specified). Without the monthly subscription, the USDA is on track to purchase rather generic exercise bikes festooned with expensive, albeit useless, 24" HD screens.

To further stimulate head-scratching, the USDA posted the solicitation as total small business set-aside (see FAR Subpart 19.5) for firms with 1,000 employees or less. That's intriguing, since Peloton sells exclusively through its own retail and online stores and reported 3,200+ employees at the end of June 2020. As for potential small business resellers, Peloton specifies that: "The Peloton Bike or Bike+ must remain in the possession of the original purchaser...[and t]his Limited Warranty is not transferable." Peloton Bike and Bike+ Limited Home Use Warranty, <https://support.onepeloton.com/hc/en-us/articles/203020505-Peloton-Extended-Warranty>.

More broadly, 30 of the package's 32 pages exhibit an interesting collection of boilerplate, much seemingly out of place for a commercially off-the-shelf (COTS) transaction. The Standard Form 1449 cover sheet left block 27 blank, neither attaching nor incorporating by reference the commercial item solicitation provisions or contract clauses, FAR 52.212-1 through FAR 52.212-5. Conversely, the document incorporates by reference the FAR's "Drug-Free Workplace (MAY 2001)" clause, FAR 52.223-6 (which is not required for commercial items, FAR 12.503(a)(4), 23.501(b)), and, inexplicably includes, in full text, the USDA's "Key Personnel (FEB 1998)" clause, AGAR 452.237-74.

For icing on the cake, the USDA listed its solicitation under NAICS Code 334516—Analytical Laboratory Instrument Manufacturing. Sure, the USDA's terse specification indicated that: "These exercise bikes are to be used in upcoming research studies." Nonetheless, they're still "exercise bikes," as the USDA repeatedly emphasized, not "analytical laboratory instruments." By analogy, laboratories may consume mice in "research studies," but our sense is they're still "animals," under NAICS Code 0279—Animal Specialties, Not Classified Elsewhere. Nor is Peloton an art dealer, under NAICS Code 453920, despite the brilliant parody sequence described by Gloria Liu in *This Hilarious Twitter Thread Illuminates the Ugly Reality of Riding Indoors*, BICYCLING MAGAZINE (Jan. 29, 2019) (parodying the aspirational world of Peloton indoor bike ads, which display the bikes in the most attractive areas of over-the-top homes), <https://www.bicycling.com/culture/a26067688/peloton-twitter-parody/>.

For such a small, simple solicitation, it raised more than its fair number of issues.

### Back To Basics

Federal acquisition has become increasingly complex, and the Government's acquisition workforce is relentlessly bombarded by a dizzying array of flexible and innovative contracting vehicles, from consolidated multiple award indefinite-delivery/indefinite-quantity contracts to other transactions. And, over time, any number of pending initiatives could render many of these issues moot. For example, if Congress adopted the General Services Administration's proposal to raise the micro-purchase threshold to \$25,000, it would streamline, simplify, and speed transactions such as the USDA's exercise bike acquisition. Mark Lee, *The Recommended Micro-Purchase Threshold Increase—An Opportunity!*, GSA INTERACT (July 19, 2018) (focusing on reducing cost, gaining speed, and achieving efficiency; leveraging competition in an e-commerce world; and increasing transparency and the ability to make smarter buying decisions), <https://interact.gsa.gov/blog/recommended-micro-purchase-threshold-increase-opportunity>. See also *Market-Based Competition: A Coming Trend?*, 34 NCRNL ¶ 20 (“[I]t appears that there is growing interest in [permitting] the Government to obtain commercial products (and some services) using market based competition procedures.”).

For the time being, however, many of the most basic, foundational issues in federal procurement—particularly those intended to promote competition and transparency—remain largely unchanged. That being the case, it's disappointing to see simple rules be ignored. As our procurement officials increasingly run to keep up with the agency's demands, maybe they periodically need to be reminded how to walk. *SLS*