



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Adams Magnetic Products, Inc.

**File:** B-256041

**Date:** May 3, 1994

Bernard J. Adams for the protester,  
Steve Stepp, for National Audio Company, an interested  
party,  
Mike Colvin, Department of Health and Human Services, for  
the agency,  
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq.,  
Office of the General Counsel, GAO, participated in the  
preparation of the decision.

### DIGEST

1. Agency's issuance of a solicitation for audio cassette tapes is permitted, notwithstanding the existence of a mandatory Federal Supply Schedule (FSS) for the tapes, where the FSS cannot be used because the agency's tape requirements exceed the maximum order limitation of the FSS contracts.

2. The salient characteristics of the brand name product stated in the solicitation are sufficient to advise prospective offerors of the agency's requirements for products equal to the brand name where the salient characteristics identify the essential functional features of the stated brand name product; the agency is not required to state the salient characteristics solely in terms of performance standards.

### DECISION

Adams Magnetic Products, Inc. protests request for proposals (RFP) No. SSA-RFP-94-1558, issued by the Department of Health and Human Services (HHS), Social Security Administration (SSA), for audio cassette tapes for recording hearings conducted by the SSA Office of Hearings and Appeals.

We deny the protest.

HHS issued the RFP on August 9, 1993, soliciting proposals for brand name or equal audio cassette tapes. The RFP contemplated the award of a firm-fixed-price contract for

1 year, with 2 option years, to the offeror submitting the lowest-priced, technically acceptable proposal. The RFP stated that the contractor was obligated to deliver, within 150 days of contract award, 300,000 tapes for the base year, and, within 150 days of the effective date of each option, 350,000 tapes for each option year. The RFP also contained provisions requiring the contractor to deliver, upon receiving order(s) from the agency, up to 595,611 tapes for the base year; 599,163 tapes for the 1st option year; and 612,457 tapes for the second option year.

The RFP solicited proposals for brand name or equal cassette tapes and, as amended, listed two brand name tapes, a TDK Professional Master Series Instant Starting Acoustic Master AL-60, and an Adams Magnetic Products, Inc. D60 cassette with magnetic leader and mastering grade tape (BASF PE 649). Offerors proposing "equal" products were instructed that "the offered product shall have as a minimum, the salient characteristics listed in [the purchase description]."

The purchase description stated the way in which the tapes would be used and the equipment on which the tapes would generally be run. The purchase description also stated the mandatory salient characteristics of the tape, which included the following statement:

"Tape standards shall conform to International Electrotechnical Commission (IEC) standards for a normal bias, Type I domestic magnetic tape."

Two and one-half pages of specific and general salient characteristics were then listed addressing, among other things, the electroacoustic and physical properties of the tape, and other requirements pertaining to such matters as cassette torque, shell, box, labeling, packaging, and quality assurance.

Initial proposals were due on December 23. On December 17, Adams Magnetic protested the issuance of the RFP, alleging that the agency would incur lower total costs by purchasing tapes under existing General Service Administration Federal Supply Schedule (FSS) contracts, from which each SSA hearing office had been ordering its tapes. HHS, under this RFP, will centralize this SSA purchasing requirement, and expects to receive lower prices than available from FSS contracts because of the RFP's large guaranteed minimums. Adams Magnetic alleges that HHS will incur additional inventory, shipping, and handling costs, which will allegedly offset any savings from the lower price obtainable with the higher contract quantities under the RFP. Adams Magnetic alleges that HHS did not analyze the total costs of using FSS contracts versus using the RFP.

Where, as here, there is a mandatory FSS, an agency generally must order its requirements under that FSS if its minimum needs will be met by the products or services listed in the schedule. Professional Carpet Serv., B-221303, Apr. 23, 1986, 86-1 CPD ¶ 399. However, an order may not be placed under an FSS contract if the amount of the order would exceed the contract's maximum order limitation (MOL). Federal Acquisition Regulation (FAR) § 8.404-1(c); Quest Elecs., B-193541, Mar. 27, 1979, 79-1 CPD ¶ 205.

The RFP provides for award of a contract for a minimum quantity of 300,000 tapes to be delivered within 150 days of award. The MOL for the applicable FSS contracts is reportedly \$50,000; the value of the guaranteed minimum quantity here far exceeds that MOL.<sup>1</sup> Thus, HHS could not use the FSS contract to fill this requirement for tapes.<sup>2</sup> See id.

Adams Magnetic alleges that, in order to justify not using the FSS, HHS was required to perform a cost analysis before centralizing the ordering function of SSA's many hearing offices, which resulted in the requirement exceeding the MOL. However, we know of no law or regulation placing such

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<sup>1</sup>Using an FSS schedule price of \$0.80 per tape, which Adams Magnetic asserts is the price currently being paid by the SSA, the value of the guaranteed minimum order quantity is \$240,000.

<sup>2</sup>Adams Magnetic alleges that if the agency places an order for tapes in addition to the minimum guaranteed quantities in this contract, which is lower than the MOL in the FSS contract, and if Adams Magnetic offers a lower price in this contract than its current FSS contract price, the automatic price reduction clause assertedly included in the FSS contract will be activated and result in Adams Magnetic's current FSS contract price being reduced. Adams Magnetic argues that this possibility restricts its ability to offer a lower price than its current FSS contract price. HHS advises that Adams Magnetic's interpretation of the FSS contract is wrong, inasmuch as the asserted contract reduction clause would only apply if orders were within the MOL and orders under this RFP exceed the FSS contract MOL. Adams Magnetic has not provided the requisite FSS contracts so we have no basis to judge the validity of its observations. In any case, it was a matter within the purview of Adams Magnetic's business judgment as to whether and/or what price to propose in response to this RFP, considering what, if any, effect it believes its pricing may have on its obligations under its FSS contract. See National Customer Eng'g, B-254950, Jan. 27, 1994, 94-1 CPD ¶ 44.

a requirement on the agency. In fact, FAR § 8.404-1(c)(1) states in pertinent part:

"Ordering offices should not reduce or split their requirements simply to avoid an MOL. Rather, ordering offices should consolidate their requirements wherever possible to take advantage of lower prices normally obtainable through definite quantity contracts for quantities exceeding the MOL."

HHS consolidated SSA's requirements for tapes by centralizing the ordering function previously performed by each hearing office in order to take advantage of price discounts associated with larger contract quantities.<sup>3</sup> We are aware of nothing that prohibits HHS from so consolidating its requirements.

Alternatively, Adams Magnetic alleges that the salient characteristics stated in the RFP are defective because they do not provide a definitive statement of the agency's requirements in terms of specific performance standards, and thus the RFP does not contain sufficient information to allow offerors to compete intelligently and on an equal basis. Adams Magnetic has provided a detailed critique of many of the two and one-half pages of requirements, asserting that they are too nonspecific in many cases, and will either allow "equal" products that are not compliant with the designated brand names or will not be sufficient for offerors of "equal" products to know what will satisfy the requirements.

The Competition in Contracting Act of 1984, 41 U.S.C. § 253a(a) (1988), provides for a contracting agency to specify its needs and develop specifications and purchase descriptions in a manner designed to promote full and open competition with due regard for the goods or services to be acquired. See also FAR § 10.002(a). A solicitation must contain sufficient information to allow offerors to compete intelligently on an equal basis. A&C Bldg. and Indus. Maintenance Corp., B-230370, May 12, 1988, 88-1 CPD ¶ 451. Where the agency states its requirements in terms of "brand name or equal," the solicitation must also state the salient characteristics to identify for prospective offerors the essential features of the product which will meet the agency's functional requirements. General Hydraulics Corp., B-181537, Aug. 30, 1974, 74-2 CPD ¶ 133. There is no requirement that a competition be based on specifications

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<sup>3</sup>The agency received 12 proposals after this protest was filed. We understand that many of the prices offered represent significant savings over FSS contract prices.

drafted in such detail as to eliminate completely any risk or remove every uncertainty from the mind of every prospective offeror. RMS Indus., B-248678, Aug. 14, 1992, 92-2 CPD ¶ 109; A&C Bldg. and Indus. Maintenance Corp., supra.

Here, the RFP listed the acceptable brand name products and stated the salient characteristics in terms of minimum performance standards (e.g., electroacoustic and physical properties<sup>4</sup>) and otherwise as functional requirements in some cases by reference to published industry standards. Examples of the salient characteristics describing the agency's functional requirements include the following:

--"Cassette torque shall be low enough to prevent drag."

--"Tape-to-head pressure shall be uniform and neither excessive or light."

--"The recording tape or the magnetic leader shall not cause excessive head wear . . . ."

--"The cassette shell . . . shall be precision made to ensure proper alignment and tracking."

Notwithstanding Adams Magnetic's claims that many of these requirements (including those quoted above) are too vague,<sup>5</sup> we find that these functional characteristics adequately state what functional features of the product are important to satisfy the agency's requirements. In this regard, we note that the RFP referenced the acceptable brand names and applicable industry standards, and generally described the recording conditions under which the tapes would be used and identified the recording equipment generally used by the agency.

While Adams Magnetic expresses confusion as to how these characteristics may be interpreted, we note that salient characteristics usually are, by definition, descriptive of certain features of the brand name product which are required by the government to meet its functional needs. GAF Corp.; Minnesota Mining and Mfg. Co., 53 Comp. Gen. 586 (1974), 74-1 CPD ¶ 68. Generally, an offeror may determine whether substitute products are equals of the brand name

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<sup>4</sup>For example, the agency's requirements for electroacoustic properties were stated in terms of hertz (Hz) and kilohertz (kHz), or decibels (dB).

<sup>5</sup>For example, Adams Magnetic asks what is low enough to prevent drag and what is "excessive" head wear?

products by determining whether the substitute products function as well as the brand name in all essential respects identified by the stated salient characteristics. See Ocean Elec. Corp., NASA BCA No. 371-8, Oct. 18, 1973, 73-2 BCA (CCH) ¶ 10,335; see generally American Bristol Indus., Inc., B-249108.2, Oct. 22, 1992, 92-2 CPD ¶ 268; Indus. Storage Equip.--Pacific, B-228123, Dec. 4, 1987, 87-2 CPD ¶ 551, aff'd, B-228123.2, Apr. 1, 1988, 88-1 CPD ¶ 328.

Adams Magnetic essentially alleges that the agency must state all of its salient characteristics in terms of specific performance requirements in order to ensure that all offerors propose products of equal quality to the brand names. We disagree. There is no requirement that agencies only use performance specifications in a brand name or equal purchase description. See FAR §§ 10.002(b); 10.004(b)(3). By demanding such specificity in the statement of the agency's requirements, Adams Magnetic apparently expects the agency to remove every uncertainty from the mind of every prospective offeror. There simply is no requirement for such specificity in drafting specifications, including salient characteristics; nor is it improper that prospective offerors bear some risk in identifying acceptable products to propose. See RMS Indus., supra; A&C Bldg. and Indus. Maintenance Corp., supra; see generally Adventure Tech. Inc., B-253520, Sept. 29, 1993, 93-2 CPD ¶ 202. To the extent that Adams Magnetic or any other offeror may wish to propose an "equal" product, such an offeror bears the risk of whether the proposed substitute is an "equal" product under the RFP.

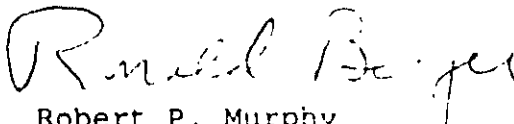
Since Adams Magnetic is the manufacturer of one of the brand name products, it should be in a good position to ascertain the specific performance standards of its products to determine what is equal.<sup>6</sup> Moreover, HHS received 12 timely proposals, and several late proposals, in response to this RFP, and no other offeror or prospective offeror complained of a lack of sufficient information in the RFP describing the agency's requirements--the one offeror who commented on the protest asserted that the RFP stated its requirements plainly and in great detail. In sum, Adams Magnetic has failed to show how the purchase description in the RFP

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<sup>6</sup>Adams Magnetic alleges that since the brand name specification for the Adams Magnetic tape cassette specifies a specific brand of BASF tape medium, the RFP restricts Adams Magnetic's ability to propose its product using substitute tape media. As this is a brand name or equal procurement, Adams Magnetic may alter its product in any way it chooses and submit it as a substitute "equal" to the brand names in accordance with the stated salient characteristics.

prevented the protester from submitting an intelligently prepared proposal or failed to ensure competition on an equal basis. A&C Bldg. and Indus. Maintenance Corp., supra.

The protest is denied.

  
 for Robert P. Murphy  
 Acting General Counsel