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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Harris IT Services Corporation

File: B-411699; B-411796

Date: October 2, 2015

Andrew E. Shipley, Esq., Lee P. Curtis, Esq., and Seth H. Locke, Esq., Perkins Coie LLP, for the protester.

Mark D. Colley, Esq., Dominique L. Casimir, Esq., Stuart W. Turner, Esq., and Nicole B. Neuman, Esq., Arnold & Porter LLP, for Motorola Solutions, Inc., an intervenor.

Jack R. Cordes Jr., Esq., and Megan E. Petersen, Esq., Department of Justice, Federal Bureau of Investigation, for the agency.

Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests challenging the agency's issuance of two solicitations, under a multiple-award, indefinite-delivery, indefinite-quantity (IDIQ) contract program for the issuance of a single delivery order under each solicitation are sustained where the record shows that the solicitations: (1) contemplate the issuance of what amounts to a single, second-tier IDIQ instrument, under which the agency will place subsequent delivery orders, without providing the multiple-award IDIQ contract holders a subsequent, fair opportunity to compete for those delivery orders; (2) contemplate the issuance of delivery orders that potentially exceed the scope of the underlying IDIQ contracts; and (3) include restrictive specifications that have not been justified.

DECISION

Harris IT Services Corporation protests the terms of request for proposal Nos. DJF-15-1200-R-0000068 (RFP 68) and DJF-15-1200-R-0000081 (RFP 81), issued by the Department of Justice, Federal Bureau of Investigation (FBI), to acquire land mobile radio (LMR) equipment through the issuance of a single delivery order under each RFP. Harris maintains that both of these RFPs improperly contemplate the issuance of a single, second-tier, indefinite-delivery, indefinite-quantity (IDIQ) instrument (labelled by the FBI as a delivery order), under which the agency will place subsequent delivery orders for this equipment without providing Harris a fair

opportunity to compete for those orders, in violation of the statute authorizing the use of multiple-award IDIQ contracts. Harris also argues that the RFPs contemplate the issuance of orders that potentially exceed the scope of the underlying multiple-award IDIQ contract program, and include unduly restrictive specifications.

We sustain the protests.

BACKGROUND

Both solicitations have been issued under the Department of Homeland Security's (DHS) tactical communications (TacCom) IDIQ multiple award contracts program and competition has been limited to concerns that previously have been awarded contracts under the DHS TacCom program. The underlying DHS TacCom multiple award IDIQ contract program solicitation (RFP No. HSSS-11-R-1001(RFP 1001)) contemplated the award of IDIQ contracts for a full array of communications equipment and services. RFP 1001 at 2. That solicitation was issued pursuant to part 12 of the Federal Acquisition Regulation (FAR) and contemplated the award of IDIQ contracts to provide commercial items. Id. The period of performance for the resulting TacCom contracts is from May, 26, 2012 to May 25, 2019 for the placement of orders, and contemplates that orders properly placed must be completed or fulfilled by May 25, 2021. Letter of Protest, exhs. 13, 14, TacCom Contract Modifications. The central purpose of the TacCom IDIQ program is described in RFP 1001 as follows:

The purpose of this contract is to support the Department of Homeland Security[']s (DHS and its Components) purchase [of] a full array of tactical communications (TacCom) commodity products, infrastructure and services. DHS seeks to establish a multi-vendor approach to implementing fully interoperable solutions to support mission critical, public safety communications.

RFP 1001 at 2. As to the question of interoperability, the TacCom contracts require the offered equipment to conform to what are referred to as the so-called "P25" interoperability standards; in effect, the equipment to be purchased using the TacCom program is required to employ open systems architecture so that each contractor's equipment will "interoperate" with equipment manufactured by other concerns. RFP 1001 at 132-33.¹

¹ The "P25" standards were developed by the Association of Public Safety Officials in partnership with industry manufacturers and prepared under the auspices of the American National Standards Institute-Accredited Telecommunications Industry Association. See e.g., Letter of Protest, June 26, 2015, at 6 n.3.

The current RFPs represent the FBI's second attempt to meet its requirements for the equipment being solicited. In July 2014, the FBI issued an RFP that contemplated the award of a sole-source contract for these requirements, and supported its solicitation with a justification and approval (J&A) document maintaining that only one source--Motorola--was capable of meeting its requirements. Letters of Protest, exh. 19, FBI J&A, June 6, 2014. After the agency issued that RFP, four concerns, including Harris, filed protests with our Office challenging the agency's proposed sole-source award to Motorola. In response to those protests, the FBI cancelled the solicitation and advised our Office that it was doing so because its J&A was inadequate to support its proposed sole-source acquisition. FBI Letter to GAO, August 22, 2014. Based on the FBI's proposed action, we dismissed those protests as academic. B-410464, et al., Aug. 25, 2014.

With the protested RFPs, the FBI again seeks to meet its current and future requirements for a full array of radio equipment. RFP 68 is for the acquisition of "subscriber base radio" LMR equipment and is valued at approximately \$200 million. RFP 81 is for the acquisition of infrastructure LMR equipment and is valued at approximately \$135 million.² Both RFPs contemplate the issuance of what the FBI characterizes as a single delivery order for a base year and four 1-year option periods. Each RFP specifies estimated quantities of various types of equipment for each year of performance, and provides that delivery of the purchased equipment may be made to any one of the FBI's 56 field offices, or to the FBI Academy in Quantico, Virginia. RFPs, Section B (Schedule of Supplies and Services); Section F (Delivery and Performance Requirements).³

PROTEST

Harris raises three challenges to the agency's proposed acquisitions. First, Harris alleges that the RFPs impermissibly contemplate the award of IDIQ delivery orders that effectively will eliminate future competition for the FBI's requirements. Second, Harris maintains that the RFPs improperly seek to award delivery orders that are beyond the scope of the underlying TacCom contracts. Third, Harris alleges that the RFPs improperly include restrictive specifications that call for Motorola brand products. We discuss each of Harris's allegations in detail below.

² Because the contemplated delivery orders are valued in excess of \$10 million, our Office has jurisdiction to consider these protests. 41 U.S.C. § 4106(f).

³ The Department of Justice is an authorized user of the TacCom contract program. Competition under RFP 68 is confined to firms that have been awarded TacCom contracts under technical category 1, subscriber base radio equipment, and competition under RFP 81 is confined to firms awarded TacCom contracts under technical category 2, infrastructure equipment.

Statutory and Regulatory Framework

The Federal Acquisition and Streamlining Act of 1994 (FASA) provided agencies with express authority to award task and delivery order type contracts.⁴ As is relevant here, 41 U.S.C. §§ 4101 to 4106 provide the framework for such contracts.⁵ Broadly speaking, the statutory and regulatory framework favors the award of multiple task or delivery order contracts for the same requirements, rather than the award of a single task or delivery order contract for an agency's requirements. 41 U.S.C. § 4103(d)(4); see also, One Source Mechanical Serv's, Inc.; Kane Construction, B-293692, B-293802, June 1, 2004, 2004 CPD ¶ 112 at 3-4. In this connection, the Senate Governmental Affairs Committee Report stated as follows:

Sec. 1004 would add a new section 2304a to Title 10, governing the use of task order contracts for advisory and assistance services and establishing a requirement that solicitations for such contracts shall ordinarily provide for multiple awards and for fair consideration of each awardee for task orders issued under the contracts where the contract period is to exceed 3 years and the contract is estimated to exceed \$10,000,000.⁶ Section 1054 would add a new section to the Federal Property Act to address task order contracts for advisory and assistance services for civilian agencies.

The Committee believes that indiscriminate use of task order contracts for broad categories of ill-defined services unnecessarily diminishes competition and results in the waste of taxpayer dollars. In many cases, this problem can effectively be addressed, without significantly burdening the procurement system, by awarding multiple task order

⁴ Although the statute uses the terms "delivery order contract" and "task order contract" the instruments being described also properly may be called IDIQ contracts, since the quantity, and time and place for delivery, are not specified at the time the contract is formed.

⁵ Largely identical provisions applicable to the Department of Defense are in 10 U.S.C. §§ 2304a-2304d.

⁶ The Senate report confines the discussion to task order contracts for the provision of advisory and assistance services. The House conference report prepared after the conference version of the bill was agreed to makes clear that the bill included task and delivery order contracts of all types, and not just those for providing advisory and assistance services. That report states: "In addition, the conference agreement would provide general authorization for the use of task and delivery order contracts to acquire goods and services other than advisory and assistance services." H.R. Rep. No. 103-712 at 178; 1994 U.S.C.C.A.N. at 2608.

contracts for the same or similar services and providing reasonable consideration to all such contractors in the award of such task orders under such contracts. The Committee intends that all federal agencies should move to the use of multiple task order contracts, in lieu of single task order contracts, wherever it is practical to do so.

S. Rep. No. 103-258 at 15; 1994 U.S.C.C.A.N. at 2576.

Consistent with this broad preference for multiple-award task or delivery order contracts, FASA prohibits the award of sole-source task or delivery order contracts using other than competitive procedures, unless the acquiring agency has complied with the requirements governing the conduct of sole-source acquisitions. 41 U.S.C. §§ 3304, 4103(c). FASA also prohibits the award of a task or delivery order contract to a single concern for an amount exceeding \$100 million unless the head of the acquiring executive agency has determined, among other things, that: (1) the individual task or delivery orders expected to be issued under the contract are so integrally related that only a single source can perform the work; (2) only one source is qualified or capable of performing the work at a reasonable price; or (3) because of exceptional circumstances, it is necessary in the public interest to award the contract to a single source. 41 U.S.C. § 4103(d)(3)(B). In addition to such express findings by the head of the executive agency, he or she also is required to notify Congress within 30 days of making such a determination. Id.

This broad preference for multiple-award task or delivery order contracts is mirrored in the FAR, which provides as follows:

Except for indefinite-quantity contracts for advisory and assistance services as provided in paragraph (c)(2) of this section, the contracting officer must, to the maximum extent practicable, give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources.

FAR § 16.504(c)(1)(i).

The statutory and regulatory framework also contemplates that, where an agency is issuing task or delivery orders using a multiple-award IDIQ contract program, it is not required to engage in full and open competition, and may instead confine its competition to firms that have been awarded an underlying multiple-award IDIQ contract. 41 U.S.C. § 4106; FAR § 16.505(b). However, those same provisions require agencies to give each contractor that has been awarded a contract a “fair

opportunity” to be considered for each task or delivery order in excess of \$3,500,⁷ and to provide for “enhanced competition” for orders in excess of \$5.5 million. Id.

Finally, the statutory and regulatory framework contemplates that each task or delivery order must specify all of the services to be performed or all the property to be delivered under the order. 41 U.S.C. § 4106(e); FAR § 16.505(a)(7).

Harris’s Challenge to the Delivery Orders

Harris first argues that the RFPs impermissibly call for the issuance of what amounts to IDIQ instruments to the successful contractor for a 5-year period. The protester maintains that the RFPs effectively remove the agency’s requirements from further competition for an extended period and amount to an impermissible “downselect” to a single vendor. Harris maintains that this is inconsistent with the terms of the underlying TacCom contracts, as well as applicable statutes and regulations which, the protester maintains, require the FBI to permit all of the eligible TacCom vendors to compete for every delivery order that the FBI may issue to meet its requirements.

The agency disputes Harris’s characterization of its anticipated approach, and argues that each RFP properly contemplates the award of a single delivery order. According to the FBI, FAR § 16.505(b)(1)(ii) affords its contracting officer broad discretion in determining the procedures used to place a particular delivery order. The agency maintains that, because its requirements vary at each of its 57 possible locations, the delivery orders to be awarded here contemplate “defining separate delivery specifications throughout the delivery order base period.” Legal Memorandum at 4. The FBI also notes that the solicitations specify estimated quantities for each type of equipment being purchased during the base period of the delivery orders, which the agency characterizes as “the maximum amount that could be required for delivery during the base period.” Id. The agency further states that the RFPs provide for meeting the FBI’s ongoing future requirements by including four option periods which also include estimated quantities that, again, the agency characterizes as the maximum amounts potentially to be delivered during the option periods.

The FBI explains that it elected to take this approach to meet its ongoing and future, geographically diverse, requirements in the most streamlined manner possible. According to the agency, its approach will allow it to avoid individually having to compete potentially dozens of delivery orders for varying quantities of equipment over a 5-year period. According to the agency, the latter approach--competing

⁷ The FAR uses a threshold figure of \$3,500, whereas the statute uses a threshold figure \$2,500. FAR § 16.505(b). The larger threshold specified in the FAR is one that has been adjusted for inflation. 41 U.S.C. § 1908(c); FAR § 1.109.

potentially dozens of separate delivery orders--“would place an enormous administrative burden on the FBI.” Legal Memorandum at 5. The agency states that its approach will result in substantial savings of both time and money over the contemplated 5-year period of the delivery orders.

As set forth below, we conclude that the FBI’s solicitations contemplate the award of what, in effect, would amount to single, multi-year, second-tier IDIQ instruments that are not permitted under the requirements discussed above.

We first address the FBI’s position that it properly is issuing single delivery orders under these RFPs that contemplate the subsequent issuance of “separate delivery specifications.” The terms “delivery order contract” and “task order contract” are defined by statute as follows:

(1) Delivery order contract.--The term “delivery order contract” means a contract for property that--

(A) does not procure or specify a firm quantity of property (other than a minimum or maximum quantity); and

(B) provides for the issuance of orders for the delivery of property during the period of the contract.

41 U.S.C § 4101(1).⁸

Although the RFPs here do not expressly contemplate the award of stand-alone IDIQ or delivery order contracts, they unequivocally are solicitations for undefined--or IDIQ-type--delivery order instruments, against which the FBI plans to place multiple, subsequent delivery orders over the next five years. See also, FAR § 16.501-2 (describing the central features of IDIQ type contracts). The solicitations include only estimated quantities of equipment, and therefore do not identify a specific quantity of property to be acquired. RFPs, Section B (Schedule of Supplies and Services). In addition, the RFPs both expressly provide for the separate, periodic, issuance of orders for the delivery of property during the period of the contract. Both RFPs include identical delivery clauses that state as follows:

⁸ The phrase “task order contract” is defined identically, except that it references contracts for services rather than property. 41 U.S.C. § 4101(2). See also 10 U.S.C. § 2304d.

Delivery Requirements:

Delivery locations shall include the FBI's 56 field office locations and FBI Academy, Quantico, VA. All delivery locations shall be designated in each delivery order issued. All deliveries shall be designated on individual delivery orders and shall be considered Free on-Board (F.O.B.) Destination.

Deliverables and Delivery Schedule:

The total period of performance will be five years with a one year base year and four one-year option periods of performance. Exercise of any option year period is at the discretion of the Government. The anticipated delivery of all components order[ed] is 90 days after receipt of order. The Contractor may request that it be permitted to make delivery within a longer period of time for extremely large orders, orders requiring engineering, and orders with diverse delivery locations. The decision to permit or negotiate a longer period of time for delivery rests exclusively with the Government.

RFP 81 at 11; RFP 68 at 11.

Both solicitations therefore clearly contemplate the award or issuance of an instrument that the agency terms a delivery order, but which, in essence, is a single-award, second-tier IDIQ instrument.

In light of our conclusion--that the FBI's RFPs, in fact, contemplate the award of single-award, second-tier IDIQ instruments--we next consider whether the FBI properly may issue such solicitations under the statutes and regulations governing competitive acquisitions conducted among the holders of previously-awarded multiple-award IDIQ contracts. As noted, the FBI takes the position that FAR § 16.505(b)(1)(ii) provides it considerable discretion to determine the procedures to be used to place a particular order, and that this discretion allows it to issue RFPs that contemplate issuance of second-tier IDIQ instruments.⁹ A review of that provision, however, does not support the agency's position.

FAR § 16.505(b) generally describes the agency's obligation to use order placement procedures that afford each multiple-award IDIQ contract holder a fair opportunity to compete for the agency's requirements. That provision begins by describing the agency's broad obligation as follows:

⁹ FAR part 16.505 implements the statutory requirements at 41 U.S.C. § 4104 requiring the issuance of regulations to provide guidance to agencies on the appropriate use of task and delivery order contracts.

The contracting officer must provide each awardee a fair opportunity to be considered for each order exceeding \$3,500 issued under multiple delivery-order contracts or multiple task-order contracts, except as provided for in paragraph (b)(2) of this section.

FAR § 16.505(b)(1)(i). This broad direction is self-explanatory and requires agencies to afford each multiple-award IDIQ contract holder a fair opportunity to be considered for each delivery order exceeding \$3,500.

FAR § 16.505(b) also describes the discretion that contracting officers have to tailor order placement procedures under multiple-award IDIQ contracts as follows:

The contracting officer may exercise broad discretion in developing appropriate order placement procedures. The contracting officer should keep submission requirements to a minimum. Contracting officers may use streamlined procedures, including oral presentations.

FAR § 16.505(b)(1)(ii). This same section goes on to note that, although the competition requirements of FAR part 6 and the policies outlined in FAR part 15.3 do not apply to the ordering process, *id.*, agencies must nonetheless develop order placement procedures that will provide each awardee a fair opportunity to be considered for each order above the \$3,500 order value threshold. FAR § 16.505(b)(1)(ii)(A).

Read as a whole, we agree that this provision of the FAR affords agencies broad discretion to tailor the ordering procedures to be used in awarding a given delivery or task order.¹⁰ For example, agencies may elect to keep submission requirements to a minimum and use streamlined procedures, including oral presentations. Alternatively, agencies may elect to use negotiated-type acquisition procedures similar to those described in FAR part 15.3. Or agencies may elect to use sealed bid procedures similar to those described in FAR part 14. However, there is nothing in FAR § 16.505(b) that provides agencies discretion to use a contract vehicle or instrument different from a “delivery order” as that term is defined under the FAR.¹¹

¹⁰ FAR § 16.505(b)(1)(v) describes considerations that contracting officers should weigh in developing procedures for issuing a task order. FAR § 16.505(b)(1)(iv) describes enhanced procedural requirements that must be used where an agency is contemplating award of a delivery order valued at more than \$5 million.

¹¹ These FAR provisions are consistent with the legislative history of FASA which describes the latitude afforded agencies in developing procedures for the issuance of task or delivery orders:

(continued...)

In this latter connection FAR § 16.505(a)(7) expressly describes the information that must be contained in every task or delivery order placed under an IDIQ contract as follows:

Orders placed under indefinite-delivery contracts must contain the following information:

(i) Date of order.

(ii) Contract number and order number.

(iii) For supplies and services, contract item number and description, quantity, and unit price or estimated cost or fee.

(iv) Delivery or performance schedule.

(v) Place of delivery or performance (including consignee).

(vi) Any packaging, packing, and shipping instructions.

(vii) Accounting and appropriation data.

(...continued)

The new provisions added to the procurement code by sections 1004 and 1054 of the bill are intended to give agencies broad discretion in establishing procedures for the evaluation and award of individual task orders under multiple award contracts. They do not establish any specific time frames or procedural requirements for the issuance of task orders, other than that there be a specific statement of work and that all contractors under multiple award contracts be afforded a reasonable opportunity to be considered in the award of each task order (with narrow exceptions). Accordingly, contracting officials will have wide latitude and will not be constrained by CICA [Competition in Contracting Act] requirements in defining the nature of the procedures that will be used in selecting the contractor to perform a particular task order. When contracting officials award task orders they will have broad discretion as to the circumstances and ways for considering factors such as past performance, quality of deliverables, cost control, as well as price or cost. In some cases, all that may be necessary is an oral discussion with each of the contractors, followed by the contracting officer's decision.

S. Rep. No. 103-258 at 16; 1994 U.S.C.C.A.N. at 2576.

(viii) Method of payment and payment office, if not specified in the contract (see 32.1110(e)).

Here, each of the agency's RFPs contemplates awarding a single, second-tier IDIQ instrument that lacks several of these enumerated requirements. First, the quantity to be acquired is not specified. While the RFPs include estimated quantities, they do not include specific quantities, as required by the FAR. In fact, although the agency describes the RFPs estimated quantities as "maximum" quantities, we see no provision in the RFPs that actually characterizes the quantities as maximum quantities. In effect, there is nothing under the express terms of the RFPs that would preclude the FBI from placing orders in excess of the estimated quantities specified. Moreover, because of the lack of specific quantities, the agency also is unable to determine the full cost or price of the solicited requirements. In this latter connection, FAR § 16.505(a)(2) requires individual orders to clearly describe all supplies to be delivered so the full cost or price of performance can be established when the order is placed.¹²

Second, the RFPs lack a delivery schedule. As noted, both RFPs expressly provide that the items are to be delivered, generally, within 90 days after receipt by the contractor of a particular order. RFP 81 at 11; RFP 68 at 11. Both RFPs also contemplate that different performance periods may be negotiated, depending upon the size and complexity of the agency's subsequently-placed delivery order. Id.

Finally, both RFPs fail to identify the place of delivery or performance, as required. As noted, both RFPs specify only that delivery locations will be identified in the individual delivery orders to be issued after award of the second-tier IDIQ instruments. RFP 81 at 11; RFP 68 at 11.

In addition to these considerations, we also point out that the FBI has described its use of option years under the RFPs as a means to address the agency's future, ongoing requirements. The option quantities suffer from the same deficiency as the second-tier IDIQ instruments suffer from, namely, that the agency's option requirements are not defined regarding quantity, place of delivery, or schedule, as required under the FAR.

In sum, while the agency has significant discretion to tailor the procedures that it will use in placing delivery orders, it does not have discretion to use instruments that do not satisfy the requirements of FAR § 16.505(a)(7). The FBI's contemplated award of a 5-year second-tier IDIQ instrument to a single contractor is inconsistent with the requirements of the applicable statutes and FAR provisions regarding what

¹² In addition, as noted, 41 U.S.C. § 4106(e) expressly requires that each delivery order include a statement of work that clearly specifies all tasks to be performed or all property to be delivered under the order.

constitutes a “delivery order.” Those requirements are, at a minimum, that the delivery order be defined as to quantity, place of delivery and schedule. In essence, the two orders contemplated under these RFPs will deprive all the other TacCom contractors of a fair opportunity to compete for each of the delivery orders that will be issued in the future, despite their aggregate value of approximately \$335 million.¹³ We therefore sustain this aspect of Harris’s protest.

Increase in the Scope of the Underlying Contracts

Harris also maintains that the RFPs impermissibly include a period of performance that exceeds the period of performance of the underlying TacCom contracts. In this connection the FBI’s RFPs contemplate the issuance of delivery orders until August 31, 2020 (whereas the TacCom contracts only allow for issuance of delivery orders until March 25, 2019), and contemplate fulfilling those delivery orders by August 31, 2021 (whereas the TacCom contracts contemplate fulfilling all delivery orders by May 25, 2021).

The FBI notes in connection with this allegation that both RFPs incorporate the terms of the underlying TacCom IDIQ contracts and provide that, in the event of a conflict, the terms of the underlying TacCom contracts control. According to the agency, to the extent its RFPs specify a period of performance longer than that contemplated under the TacCom contracts, the terms of the TacCom contracts supersede the terms of its RFPs.

We agree with Harris that the RFPs seek impermissibly to increase the scope of the underlying TacCom contracts. As noted, the agency does not deny that its contemplated delivery schedules vary from, and increase the period of performance beyond, the terms of the underlying TacCom contracts. Rather, the FBI merely asserts that the terms of the TacCom contracts will supersede the inconsistent terms of its solicitations. However, the fact remains that the RFPs expressly contemplate a period of performance longer than the period of performance included in the TacCom contracts.

In addition, and more fundamentally (as discussed above), neither RFP includes a maximum quantity, but, rather, specifies only an estimated quantity. As we conclude above, there essentially is no limit on the quantities the agency could order under the second-tier IDIQ instruments contemplated by the RFPs. It follows

¹³ Although not raised by the parties--and, accordingly, not resolved here--the FBI’s proposed approach of issuing what are, in essence, second-tier IDIQ instruments valued well in excess of \$100 million each to a single contractor raises additional concerns about whether the FBI seeks to circumvent the requirements of 41 U.S.C. § 4103(d)(3)(B) relating to the head of the executive agency making the necessary findings to justify such an award, and advising Congress of those findings.

that the agency could order quantities that exceed not only the estimated quantities specified in the RFPs, but also the maximum value of the underlying TacCom contracts.

In view of the foregoing, we conclude that the FBI's RFPs contemplate delivery orders that potentially are beyond the scope of the underlying TacCom contracts. We therefore sustain this aspect of Harris's protest.

Restrictive Specifications

As a final matter, Harris's protests also include specific objections to various elements of the RFPs' specifications. Harris maintains that these specifications are unduly restrictive and are designed to result in the award of the delivery orders to Motorola.

Because we recommend below that the agency cancel the RFPs and consider alternatives to how it intends to meet its requirements, we need not consider these allegations in great detail. Nonetheless, we discuss several obvious solicitation requirements that even the agency concedes call for Motorola-specific products.

RFP 68 requires that all radios provided be compatible with a standards based radio system called "SmartNet." RFP 68, Attach. C, Technical Specifications, § 1.1.8. In a similar vein, RFP 68 calls for providing radios that can be reprogrammed using "over-the-air-rekeying" when used with a "key variable loader." *Id.* § 1.1.31. Harris maintains that these requirements are proprietary to Motorola and that, for all intents and purposes, they limit competition under RFP 68 to products made by Motorola. Harris also maintains that specifying such requirements is inconsistent with the overarching requirement of the TacCom contracts to provide equipment that is interoperable and that meets the P25 open architecture standards.

The agency does not challenge Harris's fundamental assertion, but nonetheless maintains that these requirements are necessary in order for the radios that it acquires to meet the agency's needs for data security, and in order for them to be useable with state and local law enforcement entities that still use legacy radio systems that depend on the Motorola-proprietary standards specified. The agency suggests that Harris could still offer such radios by obtaining a license from Motorola for these proprietary technologies.

Where an agency seeks to issue a task or delivery order to acquire items peculiar to one manufacturer, it must execute a J&A in support of its specification for the task or delivery order, unless it has otherwise executed a J&A for other than full and open competition under 41 U.S.C. § 3304 and FAR § 6.302-1. FAR §§ 16.505(a)(4)(ii); 16.505(b)(2). Here, the agency concedes that it has specified Motorola-specific requirements. However, the record does not include the required

J&A, and the agency has offered no explanation regarding its failure to execute such a J&A.

As noted above, the agency previously attempted to meet its requirements on a sole-source basis, but concluded that the J&A prepared in connection with that acquisition was inadequate to support its attempted sole-source acquisition of Motorola products. Here, the agency again is attempting to acquire Motorola-specific products, but has not executed the required J&A, or even, for that matter, explained or demonstrated why it is not required to execute the J&A. Under the circumstances, we conclude that the RFPs include specifications for products that are specific to Motorola, and that the agency has failed to justify its inclusion of such requirements.¹⁴ We agree with Harris that the agency's attempt to acquire Motorola-specific equipment appears fundamentally inconsistent with the underlying interoperability objective of the TacCom IDIQ contract program.

In sum, for the reasons discussed above, we conclude that the agency's RFPs are inconsistent with the requirements of the FAR governing the issuance of delivery orders in the context of a competition conducted among holders of multiple-award IDIQ contracts. The agency's solicitations contemplate the award of second-tier IDIQ instruments that fail to include several of the required elements of a delivery order, as defined by the FAR. In addition, we find that the agency's RFPs seek to award delivery orders for requirements that may exceed the scope of the underlying TacCom contracts, and also include restrictive, Motorola-specific requirements that have not been justified by the agency, as required.

RECOMMENDATION

We recommend that the FBI cancel the solicitations it has issued and consider alternatives to meeting its requirements, either under the TacCom IDIQ contract program, or otherwise. We also recommend that the agency reimburse the protester the costs associated with filing and pursuing its protest, including

reasonable attorneys' fees. The protester should submit its certified claim for costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

¹⁴ With respect to the agency's contention that Harris simply could seek a license from Motorola, we point out that, in another case before our Office, Motorola expressly has represented that it will not license its proprietary technology to Harris because it is a direct competitor of Harris. Motorola Solutions, Inc., B-409148, B-409148.2, Jan. 28, 2014, 2014 CPD ¶ 59 at 6. In addition, we note that, in response to its RFPs, the agency received only one proposal that was submitted by Motorola.

The protests are sustained.

Susan A. Poling
General Counsel