



## Decision

**Matter of:** Mythics, Inc.; Oracle America, Inc.

**File:** B-418785; B-418785.2

**Date:** September 9, 2020

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David S. Black, Esq., Gregory R. Hallmark, Esq., and Amy Fuentes, Esq., Holland & Knight LLP, for Mythics, Inc.; and Craig A. Holman, Esq., and Nathaniel E. Castellano, Esq., Arnold & Porter Kaye Scholer, LLP, for Oracle America, Inc., protesters. Emily Vartanian, Esq., Library of Congress, for the agency. Scott H. Riback, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protests challenging the terms of a solicitation as unduly restrictive are sustained where the terms of the solicitation are inconsistent with various regulatory requirements applicable to the agency.

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### DECISION

Mythics, Inc., of Virginia Beach, Virginia, and Oracle America, Inc., of Reston, Virginia, protest the terms of request for proposals (RFP) No. 030ADV20Q0125, issued by the Library of Congress (LOC) to acquire cloud computing services. The protesters argue that the RFP is unduly restrictive of competition for a variety of reasons.

We sustain the protests.

### BACKGROUND

The RFP contemplates the award, on a best-value tradeoff basis, of a single, fixed-price, indefinite-delivery, indefinite-quantity (IDIQ) contract to provide the LOC cloud computing products and services for a 5-year period of performance. RFP at 4, 9, 40.<sup>1</sup>

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<sup>1</sup> After issuing the initial RFP, Agency Report (AR), exh. 1a, RFP, the agency issued a series of four amendments prior to Mythics and Oracle filing their protests. AR, exhs. 1j, 1l, 1n, 1o, RFP Amendments. All references to the RFP in this decision are to the consolidated version of the RFP issued as amendment No. 0004.

The RFP identifies the name-brand products of three cloud services providers, Amazon Web Services, Google Cloud Platform and Microsoft Azure, and requires offerors to provide pricing for an enumerated list of 13 products or services available from these three firms. RFP at 5-6, 39. See *also* AR, exh. 1p, Pricing Schedule.

In addition (and as amended) the RFP provides for the possibility of offering the cloud services of firms not specifically identified in the RFP, and referred to only generically as “other” services (including marketplace services, professional services, training services, and support services). RFP at 6, 39; see *also* AR, exh. 1p, Revised Price Schedule.

The RFP instructions expressly provide as follows: “The Library anticipates making a single award to the vendor who can provide all three cloud services. Vendors are encouraged to enter into teaming agreements if unable to provide all three cloud services.” RFP at 38. The RFP instructions also state that offerors are required to provide a technical narrative describing how they will meet the requirements of the solicitation’s statement of work, and explicitly encourage offerors to propose a solution that incorporates the “marketplaces” (discussed in detail below) of the three identified vendors. RFP at 38. The RFP does not include any specific instructions relating to proposing cloud services of “other” vendors.

The RFP includes three separate provisions that comprise the statement of work. First, the RFP document itself includes a section “C” which is captioned “Section C Statement of Work (SOW).” RFP at 5-8. This portion of the RFP includes an “overview/background” section that provides a list of the specific services being solicited from the named vendors (for example, section C.1.1 describes the Amazon services being solicited), as well as a list of “other” cloud service providers’ services being solicited, *id.* at 5-6; a statement of the scope of the contemplated services, *id.* at 6; a list of contractor requirements (for example, a requirement to provide a dedicated master payer account) *id.*; a description of the information necessary to place an order against the awarded contract, *id.*; a definitional list of “functional categories” of work being solicited (for example, the list includes a definition of infrastructure as a service (IaaS)), *id.* at 6-7; a list of contract performance and reporting requirements (for example, this includes reports detailing quality control of services and deliverables), *id.* at 8; a description of various requirements for all key personnel, *id.*; and, finally, certain generic information relating to the provision of government furnished property and reimbursement for travel, *id.*

Second, the RFP includes an attachment which is an Amazon-specific statement of work detailing “migration readiness and planning” consulting and advisory services to be performed--presumably directly by Amazon or an authorized Amazon reseller--once award has been made. AR, exh. 1b, Attachment A, Amazon-Specific SOW.

Third, the RFP includes an attachment which is a Google-specific statement of work describing services to be performed in connection with the establishment of a “Google cloud professional services project charter,” also described as a “cloud foundation

engagement”--once again, these are services that, presumably, will be provided by Google or an authorized Google reseller after contract award. AR, exh. 1c, Attachment B, Google-Specific SOW.<sup>2</sup>

In addition, the RFP includes a document that is an enumerated list of 68 required “minimum capabilities” that also identifies 15 additional “desirable features.” AR, exh. 1m, Attachment J4, Cloud Service Providers Base Minimum Requirements.

Finally, in addition to these RFP documents, the agency published three lists of offeror questions and answers relating to the agency’s requirements. AR, exhs. 1g, 1h, 1i, Offeror Questions and Answers. We discuss a number of these questions and answers below.

In sum, the materials described above comprise the solicitation as a whole.<sup>3</sup>

## DISCUSSION

The protesters raise a number of challenges to the terms of the RFP. We discuss these in detail below, but address two preliminary matters before considering the merits of the protests.

### The Agency’s Requests for Dismissal

The agency sought to have one or both of the protests dismissed for various reasons. On June 15, 2020, the agency submitted a request to dismiss the Oracle (but not the Mythics) protest, arguing that Oracle was not an interested party. The agency reasoned that, because it was soliciting cloud services through resellers (such as Mythics) as opposed to the actual cloud service providers (such as Oracle), that Oracle lacked the direct economic interest necessary to pursue its protest. By notice dated June 18, we declined to dismiss the Oracle protest, concluding that Oracle was an interested party with a direct economic interest in the outcome of the acquisition.

One day later, on June 19, the agency filed a request for dismissal of the protest based on its stated intent to take corrective action. The agency’s dismissal request provided as follows:

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<sup>2</sup> The RFP also included another attachment, which appears to be an order form to actually place the order for these initial tasks to be performed by Amazon and Google during the first year of contract performance, and which references as attachments the vendor-specific SOWs described above. AR, exh. 1d, Task Order Form.

<sup>3</sup> The RFP also included a Service Contract Act wage determination that is not pertinent to our consideration of the protest. AR, exh. 1f.

The Library of Congress will take corrective action in connection with the above captioned protests. Although the precise corrective action to be taken has not yet been determined, the Library will not award a contract from the current solicitation without further modification.

Agency Dismissal Request, June 19, 2020. In response to this request for dismissal, our Office sought clarification of the agency's intended corrective action. In response to our request, the agency submitted a letter that provided additional information about its proposed corrective action. We again declined to dismiss the protests, notwithstanding the agency's clarification.

The basis for our conclusion was that the proposed corrective action either was too vague to provide a basis for dismissal, or that the proposed corrective action failed to address one or more of the protest allegations. For example, in responding to a protest allegation that the agency impermissibly was soliciting proposals on a brand-name-only basis, the agency's clarification advised as follows:

The Library will either remove brand name requirements from the solicitation; post a brand name justification; or solicit on a "brand name or equal" basis indicating salient characteristics of the brand name item that an equal item must meet for award. The solicitation will include information regarding the Library's current IT [information technology] environment, such as what applications are in use in what brand name cloud environments.

Agency Dismissal Request, June 25, 2020, at 1. We concluded that the agency's request for dismissal failed to resolve this protest issue. In essence, the agency's proposed corrective action stated its intent to choose a course of action from among the only three possible courses of action available that would render the protests academic. This notice did not, however, advise our Office--or the protesters--which of the three possible courses of action the agency would actually take.<sup>4</sup>

Similarly, in responding to a protest allegation that the RFP impermissibly solicits marketplace services, the agency's clarification letter stated that the agency would

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<sup>4</sup> The agency's proposed corrective action in response to an allegation that the RFP impermissibly contemplates the award of just a single IDIQ contract was similarly ambiguous, providing only as follows:

The solicitation will clarify that award will be made on either a single or multiple award basis as determined by the Library at the time of award. Any necessary justifications for awarding on a single award basis will be documented in the contract file, if a single award is made.

Agency Dismissal Request, June 25, 2020, at 1. Again, the agency's representation stated that it intends to take one of only two courses of action available, without actually stating which course of action the agency intended to take.

continue to include the marketplace services as part of the overall requirement. Agency Dismissal Request, June 25, 2020, at 2. Because the agency's clarification letter represented that the agency would continue to include the challenged requirement, we found that this did not resolve this protest allegation.

After we declined to dismiss the protests based on the agency's clarification letter, the agency filed a report responding to the protests. In its report, in addition to providing substantive responses to the protest allegations, the agency again stated its intention to take corrective action in connection with certain protest issues, but did not provide sufficient detail or explanation about what, precisely, it intended to do, or when it intended to implement any proposed corrective action.

For example, in responding to an allegation that the RFP impermissibly solicits the agency's requirements on a brand-name basis, the agency takes the overall position that the RFP, as amended, now permits competition on a brand-name-or-equal basis (an issue discussed in detail below), but also states that the agency intends to issue an amendment that removes all references to brand names in connection with the agency's solicitation of the infrastructure as a service (IaaS) requirement. Agency Memorandum of Law at 2-3. However, in the same passage, the agency states that it will continue to solicit software as a service (SaaS) on a brand-name basis from Microsoft. *Id.*

In the final analysis, as in every protest, our Office must consider the propriety of the agency's actions based on a review of the record presented. In the context of a solicitation challenge, our Office necessarily must confine our review to the terms of the solicitation as actually--currently--issued. Vague, ambiguous, partial, or inadequate statements on the part of the agency to take corrective action at some indefinite point in the future--corrective action that may or may not render the protest academic--do not provide a basis for dismissal of the protests. *See Payne Construction*, B-291629, Feb. 4, 2003, 2003 CPD ¶ 46 at 3-4. Additionally, in the absence of an actual solicitation provision, there is no basis for our Office to consider the undefinitized corrective action measures sketched out in the agency's pleadings in reviewing the propriety of the solicitation as written. Under the circumstances, we will review the protest allegations in light of the record actually before us, without consideration of the assertions made by the agency to amend or modify the RFP at some time in the future.

#### Applicability of the Federal Acquisition Regulation

In addition to the considerations discussed above, we note that many of the protester's challenges are couched in terms of alleged violations of, or inconsistencies with, certain requirements of the Federal Acquisition Regulation (FAR). Because the Library of Congress is a legislative branch agency, we consider first the question of whether the FAR is applicable to the acquisition. The agency has not argued that it is not bound by the requirements of the FAR, and in fact, cites its own regulation stating that the agency follows the FAR as a matter of policy. Library of Congress Regulation 7-210--Procurement of Goods and Services, §3.A. Under the circumstances, we conclude that the requirements of the FAR govern this acquisition.

## Protests

Turning to the merits, the protesters principally argue that the solicitation as currently issued essentially amounts to a brand-name type solicitation that was issued without the required justification; that the agency is improperly soliciting online marketplace products or services that will be obtained without the benefit of competition; and that the agency improperly is using a single versus multiple award strategy. The protesters also raise several additional, related arguments. We discuss each of the protest allegations below.

### Brand-Name Solicitation

The protesters argue that the RFP 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. According to the protesters, this amounts to an impermissible brand-name-only solicitation, even though the agency added line items for "other" products in an amendment to the RFP.

We sustain this aspect of the protests. In describing an agency's needs, the FAR mandates that agencies include restrictive provisions only to the extent necessary to satisfy actual requirements. FAR 11.002(a)(1)(ii). To the maximum extent practicable, agencies are required to ensure that their needs are stated in terms of functions to be performed; the performance required; or the essential physical characteristics necessary to meet the agency's actual requirements. FAR 11.002(a)(2)(i).

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 FAR does provide agencies with authority to use brand-name-or-equal type purchase descriptions or specifications. In this connection, the FAR provides that the use of performance specifications is preferred over the use of brand name or equal specifications, because performance specifications encourage offerors to propose innovative solutions. FAR 11.104(a). Nonetheless, agencies may use brand-name-or-equal specifications provided that, in addition to specifying the brand-name product or

service, the agency also includes a general description of those salient physical, functional, or performance characteristics of the brand-name product that an “equal” product must meet to be acceptable for award. FAR 11.104(b).

The record includes a J&A in support of limiting competition to the name-brand products identified in the RFP that was executed in January 2020. AR, exh. 6d, Cloud Services J&A. However, the agency failed to publish the J&A when it issued the solicitation, as required by the FAR (the agency states that it inadvertently failed to publish it). See FAR 6.302-1(c)(1)(ii)(C), 5.102(a)(6). In any event, the agency now claims that its failure to publish the J&A was rendered “moot” when it issued amendments 2, 3 and 4 to the RFP which, it argues, converted the RFP into a brand-name-or-equal solicitation. We disagree.

A review of the RFP as currently issued leads our Office to conclude that, rather than issuing a brand-name-or-equal solicitation, the agency effectively has issued what we would characterize as a “brand-name-and-equal” solicitation. In particular, the RFP as currently issued continues to require any prospective offeror to propose the 13 enumerated brand-name products. RFP at 39; exh. 1p, Pricing Schedule.

As noted above, in responding to the protest, the agency stated that it intends to modify the RFP to remove all references to brand names in connection with its requirement for IaaS, but that it will continue to solicit its requirement for SaaS on a brand-name basis from Microsoft. The agency also states that, even after removing those references to the brand-name products, it intends to inform offerors of the agency’s existing cloud environment, and to communicate to offerors that the agency’s applications currently in an existing cloud environment must be maintained to support full operation until those applications can be migrated to an alternate cloud service provider.

Leaving aside the fact that the agency has not actually modified the RFP in the manner described in its response to the protests, even the proposed changes do not address in a meaningful way the issues related to identifying brand name products. First, although the agency represents that it will remove references to the brand name products in connection with the solicitation of its IaaS requirement, the agency nonetheless states that it will continue to solicit its SaaS requirements on a brand-name basis from Microsoft. Thus, in this area, the solicitation continues to seek a product on a brand-name-only basis without the agency having executed the necessary J&A.

Second, although the agency states that it will remove all references to the 13 enumerated brand-name products in connection with its IaaS requirements, it nonetheless states that it will describe--and continue to require offerors to provide--what amounts to the agency’s current IaaS cloud computing environment for some unspecified, indefinite period of time. 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.<sup>5</sup> This also amounts to a prohibited solicitation of products on a brand-name basis without executing the necessary J&A.<sup>6</sup>

In addition to the considerations outlined above, the agency's addition of the "other" products category to the RFP did not convert the solicitation from one seeking brand-name products, to one seeking either "brand-name" or "other" products. 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.

Here, the RFP continues to require offerors to propose all of the enumerated brand-name products being solicited, and also permits offers of unspecified "other" products in addition to, but not in lieu of, the brand-name products. The RFP instructions specifically provide that: "The Library anticipates making a *single award* to the vendor who can provide all three [Amazon, Google and Microsoft] cloud services. Vendors are encouraged to enter into teaming agreements if unable to provide all three cloud services." RFP at 38 (emphasis supplied). See also RFP at 4 ("The contract is a single award Indefinite Delivery-Indefinite Quantity and available for use by all Library service units and Legislative agencies."). As noted, this amounts to what we would characterize as a "brand-name-and-equal" solicitation, but does not address the improper limitation caused by brand-name-only procurements.

Second, merely adding contract line items for other products to the RFP fails to provide information about what particular characteristics those other products need to meet in order to be considered equivalent to the brand name products being solicited. The FAR requires agencies, when issuing brand-name-or-equal solicitations, to include a general description of those salient physical, functional, or performance characteristics of the brand-name product that an "equal" product must meet to be acceptable for award. FAR 11.104(b).

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<sup>5</sup> In a related argument, the protesters point out that the requirement for continued operation of the agency's current cloud computing environment is being acquired on a brand-name basis, and essentially without competition among competing cloud service providers. We agree. This is borne out by the two vendor-specific Amazon and Google statements of work included with the RFP. AR, exhs. 1b, 1c.

<sup>6</sup> In responding to the protest, the agency represented that, if necessary, it will document a justification for support of the existing cloud computing environment pending migration to another cloud computing environment. The agency also suggests that its June 25 notice of corrective action submitted during the protest left open the possibility of issuing a J&A to acquire particular brand name products. At this juncture, however, the record here includes no J&A that would permit the agency to solicit its requirements on a brand-name-only basis.

Here, the RFP does not include a list of the salient characteristics peculiar to the brand-name products that must be met by any proposed “equal” product in order to be considered acceptable. As noted, the RFP does include a list of the agency’s base minimum requirements for all cloud service providers. AR, exh. 1m, Cloud Service Providers Base Minimum Requirements. However, this document does not enumerate the salient characteristics peculiar to the brand name products being solicited. Instead, this is a list of the agency’s requirements that would have to be met by any cloud service provider, even those proposing brand-name products.<sup>7</sup>

The agency argues that this list of mandatory requirements is essentially equivalent to a list of salient characteristics. We disagree. The list itself provides:

The Library performed market research for . . . the current CONUS [continental United States] full service cloud platforms (AWS [Amazon Web Services], Azure [Microsoft], Google, IBM [International Business Machines], Oracle) in December 2019 to determine the minimum capabilities that would be required . . . to establish an Infrastructure as a Service Platform to host Library Applications. These requirements were developed by the OCIO [Office of the Chief Information Officer] Cloud Integrated Product Team, OCIO IT [information technology] Security and the OCIO Business Units.

The following requirements were determined to be the minimum requirements:

AR, exh. 1m, Cloud Service Providers Base Minimum Requirements, at 1. This overarching statement is followed by a list of 68 enumerated requirements, as well as a list of an additional 15 desirable features.

This is not a list of salient characteristics peculiar to the brand-name products being solicited but, instead, is a list of all the requirements that any prospective cloud service provider’s product would be required to meet in order to be responsive to the agency’s overall requirements. The list makes no reference to the particular brand-name products being solicited--or to specific characteristics peculiar to those brand-name products--that an equivalent product would need to meet in order to be considered acceptable. Based on the record before us, we conclude that, even if the agency intends to solicit its requirements on a brand-name-or-equal basis, the RFP also lacks a

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<sup>7</sup> The protesters point out that there is at least some evidence in the record to show that at least one of the named cloud service providers--Google--may not meet all of the requirements enumerated in this document. For example, among the requirements listed is one for a “relational DBaaS.” AR, exh. 1m, Cloud Service Providers Base Minimum Requirements, Requirement No. 5. The record here shows that Google does not entirely meet this requirement. See AR, exh. 6a, Cloud Requirements Matrix, IaaS Requirements Worksheet.

list of the salient characteristics that any alternative products would have to meet in order to be acceptable.

In summary, the RFP as written amounts to a “brand-name-and-equal” solicitation that requires prospective offerors to propose an enumerated list of brand-name products, and also contemplates that firms can offer “other” products in addition to the brand-name products; the agency has not executed a J&A that would permit it to solicit its requirements on a brand-name basis; and in any event, even if the agency intends to solicit its requirements on a brand-name-or-equal basis, the RFP is inadequate because it lacks a statement of the salient characteristics peculiar to the brand-name products that would have to be met by an alternate product. In light of these considerations, we sustain this aspect of the protests.<sup>8</sup>

### Solicitation of Online Marketplaces

The protesters argue that the RFP impermissibly requires offerors to provide what is known as an “online marketplace” for third-party software applications. These marketplaces are essentially like the applications stores available to obtain software for a smartphone. According to the protesters, these online marketplaces provide a mechanism for the agency to purchase pre-selected, third-party software products from the cloud service provider without competition of any sort for the software applications to be acquired.

The protesters also argue that the cloud service provider essentially is performing an inherently governmental function because the cloud service provider acts as a “gatekeeper” for what third-party software is available to be purchased, as well as what the terms and conditions of the sale may be. According to the protesters, these online marketplaces eliminate many of the basic responsibilities for agencies to acquire goods and services using full and open competition, including, for example, evaluating the products being offered, determining whether the prices offered are fair and reasonable, determining whether the firms providing the products are responsible, and determining whether the third-party vendors have improper conflicts of interest.

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<sup>8</sup> The protesters also correctly point out that the RFP is silent on the question of how the agency will comparatively evaluate proposals from vendors that include the brand-name products only, versus proposals from vendors offering the name-brand products, as well as cloud services from another, unnamed provider. There is nothing in the solicitation’s evaluation criteria that addresses this question or explains how the agency will perform an apples-to-apples comparison of offers that are fundamentally different in terms of what is being proposed. See RFP at 40. In this connection, offerors must be provided adequate information to compete intelligently and on a comparatively equal basis, and this includes the solicitation’s basis for award. See *Blue Origin of Florida, LLC*, B-417839, Nov. 18, 2019 2019 CPD ¶ 388. We therefore sustain this aspect of the protests.

The agency responds that these online marketplace services are an established, integral adjunct to the cloud services providers' overall product. The agency argues as well that the protesters are not prejudiced by this requirement because, according to the agency, they offer such an online marketplace.

We sustain this aspect of the protests. Our Office has not previously had occasion to address this question, but a similar issue arose recently in a protest considered by the U.S. Court of Federal Claims, *Electra-Med Corporation, et al., v. United States* 140 Fed. Cl. 94 (2018), *aff'd and remanded*, 791 Fed. Appx. 179 (Fed. Cir. 2019). In that case, the Department of Veterans Affairs (VA) awarded a series of prime vendor contracts to firms that were responsible for stocking (acquiring), storing and distributing medical supplies available on a master list to VA user locations.

The focus of the case revolved around the fact that these contracts, as modified, required the prime vendor contractors--private concerns rather than government agencies--to populate the master list with supplies that were selected by them, rather than with supplies that had been selected by the VA through, for example, the conduct of a competition to provide particular supplies. There, the court found that, by outsourcing the selection of suppliers entirely to the prime vendor contractors, the VA effectively avoided numerous legal and regulatory requirements pertaining to the federal government procuring goods or services.<sup>9</sup> *Electra-Med Corporation, et al., v. U.S. supra.* at 105.

The same concern identified by the Court in the *Electra-Med* case is present in this case. Here, the RFP contemplates that the cloud service providers will make these online marketplaces available to the agency. For example, the RFP provides, with respect to the Amazon online marketplace, as follows:

AWS Marketplace: The AWS enables the Library to connect to a marketplace and digital catalog of thousands of software listings from independent software vendors. This will enable the Library to easily find, test, buy and deploy software that runs on AWS.

RFP at 5. The RFP includes similar descriptions of the Microsoft and Google marketplaces. RFP at 5-6.

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<sup>9</sup> This is in contrast to, for example, the Federal Supply Schedule (FSS), where the General Services Administration runs competitions among firms to have their products included on the FSS. It is only through these competitions that a vendor may be included on the FSS. In effect, GSA--rather than a third-party, private concern--is the "gatekeeper" that decides which products and services are listed on the FSS.

Here, in contrast, the online marketplaces being solicited will include only products selected by the third-party cloud service providers without any input from--or as a result of competition conducted by--the agency.

These online marketplaces are populated entirely with software offerings selected by the cloud service providers. The selection process for these third-party software products is unknown and not subject to any of the bedrock requirements for competition applicable to federal agencies; the provenance of these third-party products also is entirely unknown and, by extension, the safety and security of these applications is unknown.

The agency will not hold a competition for the selection of these third-party software products, or participate in any way in the selection of the third-party software vendors or their products for inclusion in the online marketplaces. There is no way for the agency to know whether the third-party software products will be the best solution to the agency's technical requirements; whether the third-party software products will be obtained by the agency at fair and reasonable prices; whether the third-party software vendors are responsible concerns; or whether the third-party software vendors will comply with the many other legal requirements applicable to the acquisition of goods or services by the federal government.

The record in this case also does not include any documentation supporting the agency's decision to acquire these third-party software products using other than competitive procedures. In contrast, in the *Electra-Med* case for example, the VA had executed a J&A finding that the four vendors that had been awarded the master list contracts were the only concerns capable of meeting the agency's requirements. While that J&A ultimately was found inadequate by the Court, the agency nonetheless had executed a document that embodied the agency's rationale for using other than competitive procedures to meet its requirements. No such J&A exists here.<sup>10</sup> In light of these considerations, we sustain this aspect of the protests.

### Single Contract Award

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<sup>10</sup> In a case previously decided by our Office, the question of whether an online marketplace could be included in a solicitation for cloud computing services arose, but we did not address the issue directly. In *Oracle of America, Inc.*, B-416657, *et al.*, Nov. 14, 2018, 2018 CPD ¶ 391, the protester argued that a solicitation requirement for online marketplaces was unduly restrictive of competition because not all cloud service providers offered such a marketplace. We denied that aspect of the protest because there was direct evidence in the record that the protester, in responding to an agency request for information, actually had advised the agency that it had an online marketplace available; we therefore determined that the protester was not prejudiced by the requirement. *Id.* at 11-12. No such evidence exists here. In addition, the agency in the *Oracle* case had prepared a justification for its solicitation that included the agency's rationale for, among other things, the marketplace requirement. *Id.* Again, no such justification exists here.

Finally, the protesters argue that the RFP improperly contemplates the award of just a single IDIQ contract. According to the protesters, multiple IDIQ contract awards are the presumed preference under the FAR, and in every instance where an agency decides to award just a single IDIQ contract, the contracting officer is required to document the agency's decision as part of the agency's acquisition planning activities. FAR 16.504(c)(1)(ii)(C). The protesters also argue that, since the anticipated maximum value of the contract is \$150 million, the agency is required either to make multiple awards, or to have the head of the contracting agency execute a determination that award of only a single contract is appropriate. FAR 16.504(c)(1)(ii)(D).

The agency argues that the RFP allows for the possibility of multiple awards, and also that the agency intends to lower the maximum anticipated value of the contract below the \$112 million threshold by eliminating the possibility of other legislative branch agencies using the contract.

We sustain this aspect of the protests. Although the agency is correct that the FAR provision allowing for the possibility of making multiple awards--FAR 52.216-27--is referenced in the solicitation, RFP at 3, 38, the solicitation nonetheless expresses the agency's clear intent to make a single award, if at all possible. First, the RFP expressly provides in several places that the agency intends to make just a single award. RFP at 4, 38; see *also* AR, exh. 1h, Bidders Questions and Answers, Question 10. The agency further clarified its position in responding to a question concerning whether there was a possibility of making multiple awards by again stating its preference for a single award solution as follows:

Q: Is the requirement that resellers have or secure (through teaming agreements) the ability to resell all of the eligible cloud service providers a mandatory requirement, such that resellers not meeting the requirement would be disqualified from award? What if no reseller can meet the requirement?

A: Yes that is the requirement. *If there are no possible contractors that can meet that requirement we may consider a multiple vendor approach.*

AR, exh. 1h, Bidders' Questions and Answers, Question 19 (emphasis supplied).

Notwithstanding the agency's expressed preference for a single award strategy, the record does not include a determination by the contracting officer prepared during the agency's acquisition planning activities finding that the award of a single contract is appropriate, as required by the FAR. Thus, regardless of the anticipated dollar value of the contract, the agency has failed to comply with the requirements of the FAR regarding the use of its single award strategy.

In addition, the RFP expressly states that the maximum anticipated value of the contract to be awarded is \$150 million. RFP at 5. The agency states that it intends to amend the RFP to reduce the value of the contract below the \$112 million threshold, thereby

eliminating the need for a determination from the head of the contracting activity that a single award is appropriate. However, as noted, the agency has not amended the RFP.

In the final analysis, at a minimum, the record before our Office shows that the agency intends to make just a single award unless that is simply not possible based on the proposals received, but the agency has failed to execute the contracting officer's determination that a single award is appropriate as part of its acquisition planning activities. The RFP also currently states that the anticipated value of the resulting contract is estimated to be \$150 million. This amount exceeds the threshold amount necessary to require the head of the contracting agency to determine in writing that a single award is appropriate, although we see nothing in the regulation that would require that such a determination be made until the point in time when the agency is ready to award a contract.<sup>11</sup> We therefore sustain this aspect of the protests.<sup>12</sup>

## RECOMMENDATION

In light of the foregoing discussion, we sustain the protests. We recommend that the agency amend the solicitation in a manner that is consistent with the above discussion (as well as applicable FAR requirements) and provide offerors an opportunity to respond to the revised solicitation. In the alternative, should the agency prefer to use the RFP as issued, then we recommend that the agency execute the necessary documentation to support such a decision. We also recommend that the protesters be reimbursed the costs of filing and pursuing their respective protests, including reasonable attorneys' fees. The protesters should submit their certified claims for such

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<sup>11</sup> Section 16.504(c)(1)(ii)(D) of the FAR provides only that no task or delivery order may be awarded until such time as the written determination has been made. We read this requirement as a prohibition against the award of a contract, but it does not necessarily require that the head of the contracting agency execute the written determination at any point earlier in the acquisition cycle.

<sup>12</sup> As a final matter the protesters complain that certain of the bidders' questions and answers include inaccurate or misleading information about Oracle's capabilities. We need not discuss this aspect of the protests in detail. As part of our recommendation below that the agency amend the RFP in a manner consistent with this decision, we recommend as well that the agency review the bidders' questions and answers to ensure that they do not include inaccurate or misleading information about Oracle's capabilities.

costs, detailing the time spend and the costs incurred, directly to the agency within 60 days of receiving this decision.

The protest is sustained.

Thomas H. Armstrong  
General Counsel