DEPARTMENT OF THE NAVY
NAVAL FACILITIES ENGINEERING SYSTEMS COMMAND, MID-ATLANTIC
9324 VIRGINIA AVENUE
NORFOLK, VIRGINIA 23511-3095

J&A No. ML-23-09

JUSTIFICATION AND APPROVAL FOR USE OF OTHER THAN FULL AND OPEN COMPETITION

1. Contracting Activity.

The contracting activity is Naval Facilities Engineering Systems Command, Mid-Atlantic (NAVFAC ML).

2. Description of the Action Being Approved.

This Justification and Approval (J&A) authorizes the use of "brand name or equal" references in a construction solicitation where it is necessary to effectively communicate exterior color and finish selections in order to conform with the Base Architectural Exterior Appearance Plan. Specific band name finish and description are listed in Attachment 1 below and are specific to solicitation N40085-22-R-2504 and the resulting contract.

3. Description of Supplies/Services.

The intent of solicitation N40085-22-R-2504 for the P-228 Air Traffic Control Tower Facility is to replace the existing air traffic control tower and air operations facility at Marine Corps Air Station Cherry Point in Havelock, NC. The work includes constructing a new facility, converting existing buildings, and demolishing the excess footprint. The intent of this J&A is to approve the use of brand name or equal purchase descriptions in accordance with FAR 11.104, identifying paint colors and exterior finishes by brand names and proprietary descriptions from specific manufacturers. The solicitation is not intended to limit competition, and this justification does not seek approval to limit competition in this regard.

This acquisition will solicit proposals utilizing full and open competition, as authorized by the approved DD2579 on 14 December 2021. The estimated value of the work included in this construction solicitation is [redacted] and the estimated value of the brand name items that are the subject of this J&A is [redacted] The project will be funded by FY20 MILCON funds for construction. The work under this contract is required to be completed within 850 days after award.

In order to sufficiently define the scope of work to be performed by a construction contractor, a Basis of Design (BOD) is prepared to document the principles, assumptions, rationale, criteria, and considerations used for calculations and decisions required during design. When preparing a BOD for a construction project, it is not practicable to convey the required finishes to potential offerors using mere descriptions. For example, it is not feasible to adequately describe a particular shade of brick color that must be used in order to provide aesthetic compatibility with other buildings within a complex; however, the intended hue can be conveyed by referencing a particular manufacturer's proprietary color, and that color can then be replicated in any brand of

brick. Therefore, the use of brand name references is necessary to convey requirements, but is not intended to restrict competition. The identified brand name items or proprietary specifications are intended to solely relay the BOD for the exterior finishes. The specification for a certain exterior finish will include the manufacturer's name, product line, model number, etc. along with all salient characteristics necessary for "equal" products to meet contract performance requirements. While it is possible for many manufacturers to produce finishes that are functionally equivalent to these designated finishes, the finish descriptions themselves are nonetheless proprietary specifications unique to particular manufacturers. The contract performance requirements are not proprietary, and can be met by many established manufacturers. Manufacturer(s) and product line(s) are identified only to establish a color and aesthetic BOD.

4. Statutory Authority Permitting Other Than Full and Open Competition.

The National Defense Authorization Act for Fiscal Year 2017, 114 P.L. 328 (December 23, 2016) states under Section 888, "[t]he Secretary of Defense shall ensure that competition in Department of Defense contracts is not limited through the use of specifying brand names or brand-name or equivalent descriptions, or proprietary specifications or standards, in solicitations unless a justification for such specification is provided and approved in accordance with section 2304(f) of title 10, United States Code. Title 10, Section 2304 has been repealed, modified, and recodified at 10 U.S.C. § 3204 (effective January 1, 2022, amended by Pub. L. No. 117-81, 135 Stat. 154), and implemented by FAR 6.302-1(c), and DFARS 206.302-1(c)(2) and (S-70) (Only One Responsible Source and No Other Supplies or Services Will Satisfy Agency Requirements).

5. Rationale Justifying Use of Cited Statutory Authority.

As a preliminary matter, this justification is formatted in accordance with 10 U.S.C. § 3204, but the intent of the J&A and the solicitation is not to limit competition based on the use of brand names or equal purchase descriptions. This justification is merely meant to document compliance with section 888 of the 2017 NDAA. Section 888(a) of the FY17 NDAA requires that competition on Department of Defense (DoD) contracts not be limited through the use of brand name or equal descriptions or proprietary specifications or standards, in solicitations, unless a justification is approved in accordance with 10 U.S.C. 2304(f). In accordance with DFARS 206.302-1(c)(2), DFARS 211.104, and DFARS 213.501(a)(ii), use of Brand Name or Equal references requires a J&A for Other than Full and Open Competition.

To put things simply, paint colors and exterior finishes of a building can easily be color-matched by a variety of manufacturers and suppliers. It is common in the industry for colors and finishes to be identified by a particular brand or manufacturer and that brand's name or identifier for the product. The government has a legitimate need in this case for specific exterior paint colors and building finishes, but does not seek to limit the source of those materials to a specific brand or manufacturer.

Under current Unified Facilities Criteria (UFC), it is necessary for the government to include brand names or proprietary specifications for exterior finishes to have a complete design that can

be properly conveyed the published design guidelines to the construction contractor. UFC Requirements: (reference UFC 3-101-01, paragraph 3-1.2).

Most military installations and service design agencies have published design guidelines that contain criteria relative to achieving, maintaining, and emphasizing a positive exterior visual environment. Follow the design guidance contained in these documents.

For construction contracts, FAR 52.236-5, Materials and Workmanship, addresses any potential competition concerns associated with including a basis of design on the plans or in the specifications and has been well defined and well-understood by the construction contracting community for decades. The contract that follows this solicitation will include this clause. In part, this clause states: "References in the specifications to equipment, material, articles, or patented processes by trade name, make, or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition. The Contractor may, at its option, use any equipment, material, article, or process that, in the judgment of the Contracting Officer, is equal to that named in the specifications, unless otherwise specifically provided in this contract."

There is no alternative method to complete a 100% design suitable for those requirements that require a design-bid-build contract. Utilizing a basis of design is a critical component of designing complete and coordinated with the Installation Design Guide under the current UFC. It is impossible to fully design a system to meet requirements without assumptions of material specifications, especially given the numerous individual subcontractors supplying their respective items. The only potential alternative is to convert all solicitations into a design-build procurement without complete designs. This alternative does not meet the government's interests in providing complete designs for facilities where the government has determined a design-bid-build procurement is in the best interests of the government pursuant to FAR Part 36 "Construction and Architect-Engineer Contracts" and Engineer Regulations (ER)1180-1-9.

6. Description of Efforts Made to Solicit Offers from as Many Offerors as Practicable.

The government is not attempting to limit competition or the supply of these materials to one source. No efforts were made to identify multiple sources of paint or exterior finishes, because the solicitation will not limit the ultimate contractor to providing materials from only one or a limited number of brands or manufacturers. Regarding the project overall, a sources sought notice was published on 04 November 2021 for the project as a whole, and yielded two (2) responses. The sources sought notice closed on 18 November 2021. A Notice of Intent was published on Sam.gov on 23 August 2022 detailing the intent of the brand name or equal specifications and no responses was received. A pre-solicitation notice and solicitation will both be publicized on SAM.gov, in accordance with the requirements of FAR Part 5. The approved J&A will also be made publicly available as required by FAR 6.305.

7. Determination of Fair and Reasonable Cost.

The Contracting Officer will determine that the price for this acquisition is fair and reasonable in accordance with FAR Part 15 prior to contract award. Analysis will be performed by one or

more of the following techniques: (1) Comparison of proposed prices received in response to the RFP; (2) Comparison of proposed prices with the Independent Government Cost Estimate (IGCE); (3) Comparison of proposed prices with available historical information; and/or (4) Comparison of market survey results. The fair and reasonable determination will be made based on the total price of the project. These brand name or equal items are not individual line item prices in the solicitation.

8. Actions to Remove Barriers to Future Competition.

This solicitation does not limit competition. If it comes to NAVFAC ML's attention that the proposed language is having a limiting effect on competition or the selection of alternate sources of material within the scope of this justification, the contracting officer will seek counsel and make efforts to take remedial measures.

Attachment 1

MANUFACTURER	MODEL	FINISH	DESCRIPTION
YORK BUILDING PRODUCTS	EX01	Parchment	SPLIT-FACE CMU VENEER
LEE BRICK	EX02	206-F RED FLASH WIRECUT	BRICK VENEER- RUNNING BOND & BRICK VENEER- SOLDIER COURSE
GARLAND	RO01	R-MER SPAN STEEL PANEL"T" PROFILE/CADET GREY	PREFINISHED STANDING SEAM METAL ROOF
GARLAND	RO02, RO03, RO11, RO12	CUSTOM COLOR TO MATCH CADET GRAY	PREFINISHED METAL GUTTER, PREFINISHED METAL DOWNSPOUT, PREFINISHED METAL CANOPY, PREFINISHED METAL SCUPPER COLLECTOR BOX
KAWNEER	WN02	CLEAR ANODIZED FINISH	ALUMINUM WINDOW
KAWNEER	WN03	CLEAR ANODIZED FINISH	ALUMINUM STOREFRONT
LEE BRICK	EX02, EX03, EX04	206-F RED FLASH WIRECUT	BRICK VENEER- RUNNING BOND, BRICK VENEER- SOLDIER COURSE, BRICK VENEER- SOLDIER COURSE
GARLAND	RO02, RO03	CUSTOM COLOR TO MATCH CADET GRAY	PREFINISHED METAL GUTTER, PREFINISHED METAL DOWNSPOUT
TINDALL	EX04	BRICK STAMPED FINISH WITH INTEGRAL COLOR.*	COMPOSITE PRECASTE CONCRETE PANELS R-19 INSULATION
TINDALL	EX08	BRICK STAMPED FINISH WITH INTEGRAL COLOR.**	COMPOSITE ACCENT PRECAST CONCRETE PANELS R-19 INSULATION
CENTRIA	EX07	CUSTOM COLOR TO MATCH CADET GRAY	PREFINISHED FABRICATED WALL PANEL ASSEMBLY