



Decision

Matter of: Bluehorse Corporation

File: B-414578

Date: July 20, 2017

Akenaten Bluehorse, for the protester.
Brian A. Quint, Esq., Department of the Interior, for the agency.
Katherine I. Riback, Esq., and Amy B. Pereira, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's decision not to set aside procurement for Indian Small Business Economic Enterprises (ISBEs) is denied where agency's market research demonstrated that agency was not likely to receive quotations from at least two ISBEs.

DECISION

Bluehorse Corporation, of Reno, Nevada, an Indian Small Business Economic Enterprise (ISBEE), protests the terms of request for quotations (RFQ) No. A17PS00477, issued by the Department of the Interior, Bureau of Indian Affairs (BIA) for multi-shot capable electronic control devices.¹ Bluehorse contends that the agency should have set the solicitation aside for ISBEs and that the agency's requirement for Taser "or equal" electronic control devices is restrictive of competition.

We deny the protest.

BACKGROUND

On March 23, 2017, the agency issued a sources sought notice seeking qualified Indian Economic Enterprise (IEE) or ISBEE contractors to provide brand name or equal products meeting the minimum characteristics described therein. The notice sought brand name Taser model X2 electronic control devices or equal (as well as components

¹ According to the agency these devices are also referred to as conducted energy weapons or conducted energy devices. Memorandum of Law (MOL) at 1 n.1.

such as holsters and a high definition camera) that conform to a list of salient characteristics including, as relevant here:

Multi Shot: Must be able to fire two cartridges without having to change spent cartridge once fired. Weapon must be able to hold and effectively fire two cartridges with the pull of [the] trigger without changing cartridge.

Single shot ECD's will not be considered.

Agency Report (AR), Tab 5, Sources Sought Notice (Mar. 23, 2017), at 5 (emphasis in the original). The sources sought notice instructed potential vendors to respond to both the contracting officer (CO) and the contract specialist (CS) by March 28. Id.

Bluehorse submitted the only response to the sources sought notice, however its response did not provide the required information establishing that its equivalent product met the salient characteristics.² AR, Tab 8, Email from Bluehorse to CO and CS (Mar. 28, 2017); CO Statement (COS) at 3. Bluehorse's response prompted the CO and the CS to request a "detailed spec [specifications] sheet" on the product that Bluehorse states meets the agency's requirements by April 3. AR, Tab 8, Email from CO to Bluehorse (Mar. 31, 2017). The CO instructed Bluehorse to "comply with the instructions of the sources sought," which included responding to both the CO and the CS. Id. On April 3, Bluehorse responded via email to the CS, who was out of the office at that time, and provided technical specifications regarding two products, The Enforcer and The Raptor. AR, Tab 8a, Email from Bluehorse to CS (Apr. 3, 2017); COS at 3.

The CO, who had not received Bluehorse's April 3 email, verbally authorized a deviation from the Buy Indian requirement on April 11, on the basis of Bluehorse's initial response to the sources sought notice. The deviation was signed on April 13.³ AR, Tab 7, Buy Indian Deviation. This deviation was based on a determination that there was no reasonable expectation of receiving equivalent offers from two or more IEEs that would be competitive in terms of market price, quality, and delivery (or from at least from one IEE if the purchase fails to exceed the dollar threshold described in Federal Acquisition Regulation (FAR) § 13.003). Id.; COS at 3.

On April 11, the agency issued the RFQ, as a combined synopsis/solicitation, under commercial item acquisition and simplified acquisition procedures of FAR subparts 12.6

² Bluehorse's response to the sources sought notice included an editorial from Law and Order magazine about its products, which did not include detailed specifications that clearly outlined the capabilities of its products, and a copy of a previous protest that it filed with our Office. AR, Tab 8, Email from Bluehorse to CO and CS (Mar. 28, 2017).

³ This Buy Indian deviation (Department of Interior Acquisition Regulations § 1480.403) was issued in writing and signed on April 13 by the CO for this procurement, who is also one of the two chief COs for the BIA Central Office. COS at 2; AR, Tab 7, Buy Indian Deviation (Apr. 13, 2017).

and 13.5. AR, Tab 6, RFQ at 3. The RFQ which contemplated the award of a fixed-price contract, was issued as a small business set-aside. Id. at 5.

Relevant to this protest, the RFQ contained the same specifications that were in the sources sought notice; the specifications were under the heading “**Specifications/ Capabilities (Brand name or Equal)**.” Id. at 3, (emphasis in original). In addition, the solicitation incorporated a number of FAR provisions, including FAR provision 52.211-6 Brand Name or Equal. Id. at 5. The agency issued an amended solicitation on April 12 that reiterated that the RFQ sought Taser electronic control devices or equal. AR, Tab 6B, RFQ Amend. 1.

On April 12, Bluehorse filed a protest with our Office contesting the brand name limitation in the solicitation in which it stated that “[e]ven the ‘brand name or equal’ is insufficient since the essential characteristics are not set forth and there was a solicitation document set forth listing only Taser[’s].”⁴ Bluehorse Protest (Apr. 11, 2017), at 8. The protester later amended its protest to challenge the agency’s failure to set aside the procurement for ISBEs. Bluehorse Amended Protest (Apr. 12, 2017).

On April 19, the CO reviewed the additional information submitted by Bluehorse that, as explained above, had not been reviewed earlier, and determined that the vendor had not demonstrated that its proposed equivalent products met the salient characteristics listed in the solicitation. The CO amended the Buy Indian Deviation to reflect that he had reviewed Bluehorse’s additional information, and again concluded that a deviation was appropriate based on the determination that there was no reasonable expectation of receiving equivalent offers from two or more IEEs that would be competitive in terms of market price, quality, and delivery (or from at least from one IEE if the purchase fails to exceed the dollar threshold described in FAR § 13.003). AR, Tab 7a, Amended Buy Indian Deviation (Apr. 19, 2017).

DISCUSSION

In its protest Bluehorse contends that the solicitation should have been set aside for ISBEs. Bluehorse also contends that the solicitation, issued on a brand name or equal basis, lacked salient characteristics of the brand name item that the equal product must meet to be considered acceptable.⁵

⁴ Bluehorse submitted its protest on April 11 after 5:30 p.m. Accordingly, it was filed on the next federal business day, April 12, as provided in our Bid Protest Regulations, 4 C.F.R. § 21.0(d).

⁵ Bluehorse’s protest raises numerous allegations. While our decision here does not specifically discuss each and every argument and/or variations of the arguments, we have considered all of the protester’s assertions and find none furnish a basis for sustaining the protest.

The protester first argues that it is an ISBEE that supplies an electronic control device equivalent to Taser's model X2, that it has supplied equivalent devices to the agency in other procurements, and that the agency unreasonably failed to set aside this solicitation for ISBEEs pursuant to the Buy Indian Act. Bluehorse Amended Protest (Apr. 12, 2017), at 2.

The BIA is required to give preference to IEEs under procurement set-asides for requirements of products, services and covered construction when following the Buy Indian Act is feasible and authorized. 48 C.F.R. § 1480.401. We will disturb a BIA conclusion only where it is shown to be arbitrary, unreasonable, or in violation of law or regulation. See e.g. Colorado Constr. Co., B-290960, Sept. 6, 2002, 2002 CPD ¶ 162 at 3.

The agency maintains that it issued a sources sought notice for ISBEEs and IEEs prior to the issuance of the solicitation. The agency notes that the Bluehorse's first response to the sources sought notice did not include any information that would establish that its proposed equivalent products would meet the salient characteristics. COS at 3. The agency determined on the basis of this submission that Bluehorse was not capable of meeting or exceeding the requirement for providing an electronic control device with multi-shot capabilities. Therefore, the CO approved a deviation from the Buy Indian Act.

The agency also reviewed Bluehorse's second response to the sources sought notice that included technical specifications for two equivalent products, The Enforcer and The Raptor. The agency determined that The Enforcer was an electronic control device, but with a single shot application. AR, Tab 7A, Amended Buy Indian Deviation at 49. The agency concluded that The Raptor, although it had multi-shot capability, was an air carbine rifle and not a handheld electronic control device, as required by the solicitation.⁶ Id. The CO again decided that Bluehorse was not capable of producing an equivalent product and that, since there were no other responses to the sources sought notice, that there was no basis to set aside the instant procurement for ISBEEs. Id. at 3. The CO amended the deviation to reflect this determination. AR, Tab 7a, Amended Buy Indian Deviation (Apr. 19, 2017).

We have reviewed the protester's allegations and conclude that none provides a basis to question the reasonableness of the agency's determination not to issue to the solicitation as a set aside for ISBEEs or IEEs. See Rice Servs., Inc., B-411540, B-411540.2, Aug. 20, 2015, 2015 CPD ¶ 260 at 3. As stated above, Bluehorse's first response to the sources sought notice did not include any information that would establish that its proposed equivalent products would meet the salient characteristics. While Bluehorse's second submission did include more technical information, Bluehorse did not establish that it could produce an equivalent product, in this case an electronic

⁶ The agency states that the requirement that the electronic control device be a handheld weapon, and not a rifle, while not specifically spelled out, was clear because the agency also required holsters. COS at 10.

control device with multi-shot capability. In addition, we have no basis to reach a different conclusion because the protester claims that it has provided similar products to the same contracting activity in other procurements. As we have repeatedly observed, each procurement stands alone, and an action taken under a prior procurement is not necessarily relevant to the reasonableness of the action taken under the present procurement. JRS Mgmt., B-402650.2, June 25, 2010, 2010 CPD ¶ 147 at 4.

Next, Bluehorse alleges that the solicitation issued by the agency includes brand name or equal specifications and “lists some features, but does not say which items are essential.” Bluehorse Protest (Apr. 11, 2017), at 8.

Solicitations that include brand-name-or-equal specifications must include, in addition to the brand name, a “general description of those salient physical, functional, or performance characteristics of the brand name item that an ‘equal’ item must meet to be acceptable for award.” FAR § 11.104(b)

The agency maintains that the solicitation listed the salient characteristics of the product that it sought under the heading “Specifications/Capabilities (Brand name or Equal),” and that this information provided potential vendors a general description of the minimum characteristics of the products sought by the agency that an equal product would have to meet to be acceptable. MOL at 4. According to the agency, specifically labeling technical specifications as salient in a brand name or equal solicitation is not required. Webco Dental & Medical Supplies, Inc., B-410587, Jan. 8, 2015, 2015 CPD ¶ 32 at 2 (salient characteristics in solicitation listed under the heading ‘Technical Specifications’).

We find that the brand name or equal solicitation listed salient characteristics of the product it sought, albeit under the heading “Specifications/Capabilities (Brand name or Equal).” RFQ at 3. The solicitation listed 16 specifications, such as the requirement that all items be new and not refurbished. Id. Therefore, we conclude that the solicitation provided offerors with the specifications that their equivalent products had to meet. In the case of a brand name or equal solicitation, the particular features of a brand name item set forth in the solicitation are presumed to be material and essential to the government’s needs. See American Material Handling, Inc., B-410899, Mar. 12, 2015, 2015 CPD ¶ 106 at 4. Therefore, we find no basis upon which to sustain this protest ground.

The protest is denied.

Susan A. Poling
General Counsel