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**Comptroller General
of the United States**

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

Decision

Matter of: Bluehorse Corporation

File: B-413533

Date: October 28, 2016

Akenaten Bluehorse, for the protester.

Charles B. Wallace, Esq., and Sherry Kinland Kaswell, Esq., Department of the Interior, for the agency.

Paul N. Wengert, Esq., and Tania Calhoun, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency failed to properly publicize and solicit quotations for diesel fuel requirement valued between \$15,000 and \$25,000, and thereby failed to obtain maximum practicable competition, is sustained where the agency placed the solicitation in a binder in a closed building on Saturday, seeking quotations by Monday, and one of three sources solicited was a propane supplier that was thus unlikely to be able to submit a quotation for diesel fuel.

DECISION

Bluehorse Corporation (Bluehorse), of Reno, Nevada, a small business, protests the award of a contract to Recon Oil Co., Inc., of Window Rock, Arizona, by the Department of the Interior, Bureau of Indian Affairs (BIA), under solicitation No. A16PS01057 to supply diesel fuel to the Mariano Lake Community School, a Navajo District school operated by the Bureau of Indian Education, in Crownpoint, New Mexico. Bluehorse argues that the BIA improperly limited competition for the contract by failing to publicize the solicitation properly.

We sustain the protest.

The BIA issued the solicitation on Saturday, July 30, 2016, as a request for quotations (RFQ). The RFQ was prepared under the procedures for the streamlined acquisition of commercial items, as provided in Federal Acquisition Regulation (FAR) subpart 12.6. RFQ at 1; Dismissal Request at 1. The RFQ set

forth a contract “[p]erformance period of delivery [of] August 2, 2016 thru April 30, 2017,” and described the agency’s requirement as follows:

1-6000 gallon tank:

Diesel Fuel #2 = \$_____ per gallon X 9000 gallon = \$_____

RFQ at 1.¹

The RFQ stated that due to an “emergency requirement,”² the deadline for receipt of quotations would be Monday, August 1, at 2:00 p.m. local time, and that a contract would be awarded “to the lowest priced offeror, who[se] quote conforming to the requirements herein, will be most advantageous to the Government, and is fair and reasonable.” RFQ at 1. The RFQ also stated that it was set aside for Indian small business economic enterprises (ISBEE) pursuant to the Buy Indian Act and 48 C.F.R. § 1480.401.³

Since the contracting officer expected the value of the contract to be around \$20,000, she did not post the solicitation electronically.⁴ Instead at 11 a.m. on July 30, she sent the solicitation by separate emails to three firms that she had identified as eligible Indian Economic Enterprises. Agency Report (AR) at 2 & exh. B (copies of emails). She also placed a copy of the solicitation into a three-ring binder that is kept at a reception desk in the contracting office at the BIA Navajo Region Contracting Office in Gallup, New Mexico. AR at 2. Dismissal Request at 3.

¹ During this protest, the agency has described the requirement as being for 6,000 gallons of diesel fuel. Dismissal Request at 1; Contracting Officer’s Statement at 1.

² Although an agency may limit competition in circumstances of “unusual and compelling urgency” that would result in serious injury unless the competition was limited, the BIA has denied that unusual and compelling urgency was present despite the use of the term “emergency requirement.” FAR § 6.302-2; Agency Reply to Dismissal Request, at 2.

³ While we note for the record that the RFQ identified a size standard and North American Industry Classification System (NAICS) code that were apparently eliminated in 2012, our protest jurisdiction does not include challenges to the NAICS code selected by a contracting agency. 4 C.F.R. § 21.5(b).

⁴ In this regard, in order to meet the requirement to disseminate information on proposed contracting actions, FAR § 5.101(a)(2) provides that where the action is expected to exceed \$15,000, but not expected to exceed \$25,000, the contracting officer is directed to display in a public place, or by any appropriate electronic means, an unclassified notice of the solicitation or a copy of the solicitation, which must include certain information. The regulation also requires that the information be posted not later than the date the solicitation is issued, and must remain posted for at least 10 days or until after quotations have been opened, whichever is later.

By the deadline on Monday, August 1, the contracting officer received quotations from two of the firms that had received the RFQ by email, and awarded a contract to the lowest-priced vendor, Recon Oil, at a price of \$20,800. Contracting Officer's Statement at 2. Bluehorse learned of the contract award from an online contracting database on August 8, and filed this protest on August 9.⁵

ANALYSIS

Bluehorse argues that it is an eligible ISBEE contractor that has supplied fuel to agency locations under multiple contracts in the past year, but was unjustifiably denied the opportunity to compete for this requirement. Protest at 1. In particular, Bluehorse argues that the contracting officer failed to publicize the requirement properly, which effectively excluded Bluehorse from submitting a quotation. Protest at 1-2. As a result, Bluehorse argues, the BIA has violated the Competition in Contracting Act of 1984, as amended, in awarding the contract. Id. at 2.

The BIA contends that the contracting officer properly publicized the requirement as required by statute and regulation, and achieved competition consistent with the requirements applicable to a procurement valued between \$15,000 and \$25,000. Dismissal Request at 1; AR at 3. In particular, the BIA argues that the solicitation remained in the three-ring binder for over 10 days,⁶ and that the agency directly emailed the RFQ to three eligible sources. AR at 2-4.

Where an agency is using simplified acquisition procedures, it is not required to use full and open competition to conduct the procurement. See 41 U.S.C. §§ 3301(a), 3305. Instead, the agency is required to promote competition to the maximum extent practicable. 41 U.S.C. §§ 1901, 3305(d); FAR § 13.104. With respect to publication of a solicitation, except where the agency uses electronic posting,⁷ the agency is required to “post, for not less than 10 days, in a public place at the contracting office . . . a notice of solicitation.” 41 U.S.C. §§ 1708(a)(1), 1901(e)(1); 15 U.S.C. § 637(e)(1)(b). Beyond that, when using simplified acquisition procedures, an agency must conduct the procurement consistent with a concern for

⁵ Bluehorse submitted the protest on August 8 after 5:30 p.m. Accordingly, it was filed on the next federal business day, August 9, as provided in our Bid Protest Regulations, 4 C.F.R. § 21.0(d) (definition of “filed”).

⁶ FAR § 5.101(a)(2) requires the posting to continue “at least 10 days or until after quotations have been opened, whichever is later” and thus appears to anticipate that quotations may be opened sooner than 10 days after the initial posting.

⁷ The statute establishes several other exceptions that neither party contends apply here.

fair and equitable competition. Emergency Vehicle Installations Corp., B-408682, Nov. 27, 2013, 2013 CPD ¶ 273 at 4; Minotaur Eng'g, B-258367, Jan. 11, 1995, 95-1 CPD ¶ 137 at 2 (protest sustained where contracting officer solicited one source and failed to post notice of solicitation properly).

The FAR implements these requirements for a procurement expected to be valued between \$15,000 and \$25,000, as here, by directing the contracting officer to “display[] in a public place, or by any appropriate electronic means, an unclassified notice of the solicitation or a copy of the solicitation,” which must “be posted not later than the date the solicitation is issued, and must remain posted for at least 10 days or until after quotations have been opened, whichever is later.” FAR §§ 5.101(a)(2); 13.105(a), (b).

Beyond displaying the solicitation, the FAR also describes how the statutory requirement for maximum practicable competition can be met, as follows:

[M]aximum practicable competition ordinarily can be obtained by soliciting quotations or offers from sources within the local trade area. Unless the contract action requires synopsis pursuant to 5.101 and an exception under 5.202 is not applicable, consider solicitation of at least three sources to promote competition to the maximum extent practicable. Whenever practicable, request quotations or offers from two sources not included in the previous solicitation.

FAR § 13.104.

Bluehorse contends that the contracting officer failed to take reasonable steps to obtain competition because the RFQ was placed in a binder on a weekend when there was effectively no public access to the building, and specified a due date for quotations at 2 p.m. on Monday. Protester’s Comments at 2. The BIA argues that the placement of the solicitation in the binder was legally sufficient because the binder was available to anyone stopping at the contracting office reception desk, and the public could access the building by showing identification. AR at 2. In response to an inquiry from our Office, the BIA acknowledged that “the building is not open to the public on weekends but could be accessible by appointment.” Email from Counsel for BIA to GAO, Aug. 22, 2016, at 1.

Bluehorse also argues that the contracting officer failed to contact at least three sources because one of the firms she contacted was a propane supplier (as evident from its name) that could not reasonably have been expected to submit a quotation to deliver diesel fuel. Protest at 2. In response, the BIA acknowledges that the firm’s “history may not indicate diesel deliveries,” but the agency argues that the firm was a third potential source because “the vendor is clearly an ISBEE fuel

vendor in the vicinity of Gallup, New Mexico” and it “could easily seek to acquire the diesel from another source.” AR at 5.

The BIA’s actions here fell short of the minimum standards for obtaining maximum practicable competition when using simplified acquisition procedures with respect to both publication of the requirement and soliciting sources. We do not regard the Saturday placement of the solicitation in a binder, in an office that was effectively closed to the public on a weekend, for quotations that were due by 2 p.m. on Monday, as meeting the requirement for public posting. Further, the contracting officer’s decision to contact one source that was plainly unlikely to supply diesel fuel, leaving only two sources that could, does not meet the guideline of soliciting “at least three sources to promote competition to the maximum extent practicable.” FAR § 13.104; cf. Latvian Connection Gen. Trading & Constr., LLC, B-409442, Apr. 25, 2014, 2014 CPD ¶ 135 at 2 (stating that soliciting three sources meets the requirements for conducting a simplified acquisition). In both respects, the BIA’s actions fail to show appropriate concern for fair and equitable competition.

The BIA argues that regardless of any errors in publicizing or soliciting competition, Bluehorse was not competitively prejudiced by the agency’s actions because it is in Reno, Nevada, and thus could not have obtained the solicitation. Agency Reply to Dismissal Request at 1. We disagree. If the BIA had conducted the procurement with reasonable concern for obtaining competition, it could have elected either to publicize the requirement for a time and in a manner that would have allowed Bluehorse to respond, or might have contacted Bluehorse directly, particularly given its status as a past source of diesel fuel to the agency. We need not determine with certainty that Bluehorse would have been awarded the contract in order to conclude that the protester was prejudiced here. We resolve any doubts regarding prejudice in favor of the protester; a reasonable possibility of prejudice is sufficient. Celta Servs., Inc., B-411835, B-411835.2, Nov. 2, 2015, 2015 CPD ¶ 362 at 12.

We conclude that the BIA did not conduct the procurement consistent with a concern for fair and equitable competition, and thus did not achieve maximum practicable competition. Accordingly, we sustain the protest.

RECOMMENDATION

We recommend that the BIA cancel the RFQ, resolicit for its requirement consistent with the obligation to seek maximum practicable competition (including providing the solicitation to entities, like Bluehorse, that have requested it), and make award on the basis of the quotations or other responses received. We also recommend that the agency reimburse the protester’s reasonable costs associated with filing and pursuing its protest, including reasonable attorneys’ fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d). The protester’s certified claims for costs, detailing the time

expended and costs incurred, must be submitted to the agency within 60 days after the receipt of this decision. 4 C.F.R. § 21.8(f).

The protest is sustained.

Susan A. Poling
General Counsel