



Decision

Matter of: Bluehorse Corporation--Reconsideration

File: B-413929.2; B-413929.4

Date: May 16, 2017

Akenaten Bluehorse for the requester.
David G. Fagan, Esq., Department of Veterans Affairs, for the agency.
Louis A. Chiarella, Esq., and Peter H. Tran, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Requests for reconsideration of prior decisions are denied where the protester does not show that the prior decisions contained either errors of fact or law or information not previously considered that warrant reversal or modification of those decisions.

DECISION

Bluehorse Corporation, of Reno, Nevada, requests that we reconsider our decisions in Bluehorse Corp., B-413929, Oct. 26, 2016 (unpublished decision), and Bluehorse Corp., B-413929.3, Jan, 10, 2017 (unpublished decision), dismissing the company's challenges regarding the award of a contract to Railroad Cleaners, of Pittsburg, California, under request for quotations (RFQ) No. VA262-16-Q-1604, issued by the Department of Veterans Affairs (VA) for bulk laundry services for the VA Southern Nevada Healthcare System. Bluehorse argues that, for various reasons, the underlying dismissal decisions were in error.

We deny the requests for reconsideration.

BACKGROUND

The RFQ, issued on September 20, 2016, as a small business set-aside, contemplated the award of a single indefinite delivery, indefinite quantity contract, with a 5-year ordering period, under which fixed-priced task orders would be issued. RFQ at 1, 5, 16-26. The RFQ established two evaluation factors--technical and price--and stated that "[t]he Government will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government," based on technical acceptability and price. Id. at 52.

Bluehorse and Railroad Cleaners were among the vendors that timely submitted quotations in response to the RFQ by the October 4 closing date. The protester's proposed subcontractor, Superior Linen—who had also been proposed as a subcontractor by the eventual awardee, Railroad Cleaners—had entered into a teaming agreement with Railroad Cleaners that appeared to preclude Superior Linen from working with other vendors.¹ As a result, the agency had concerns regarding Bluehorse's ability to perform the contract.² The agency thereafter contacted both Superior Linen³ and Bluehorse regarding the parties' arrangement, and because the agency had concerns regarding Bluehorse's responsibility, ultimately referred Bluehorse to the Small Business Administration (SBA) for a certificate of competency (COC) determination.⁴ See Agency Dismissal Request, Oct. 17, 2016, Exh. E, VA Email to Bluehorse (“[A]s this exclusivity agreement is in place, unless you are able to show that the subcontractor you have proposed is willing to work with you on this requirement I will have to make a determination that you are not responsible....”).

On October 7, Bluehorse filed a protest with our Office alleging that the agency had improperly referred the matter of the firm's responsibility to the SBA for a COC determination. Our Office subsequently dismissed this protest on October 26, because we do not generally review COC referrals to the SBA.⁵ Bluehorse Corp., B-413929,

¹ In fact, Superior Linen subsequently informed Bluehorse that, as a result of an internal lack of communication, Superior Linen's general manager had entered into the laundry processing agreement with Railroad Cleaners “which included the exclusive amendment.” Protest, Oct. 7, 2016, at 1.

² When a solicitation evaluation scheme rates vendors' quotations, as here, on a non-comparative basis (e.g., pass/fail, or acceptable/unacceptable) under one or more responsibility type evaluation factors, a vendor's capability to perform the contract is a matter of responsibility rather than the quotation's technical acceptability. See 13 C.F.R. § 125.5(a)(2)(ii); 22nd Century Team, LLC--Costs, B-412742.4, Dec. 15, 2016, 2016 CPD ¶ 369 at 6; Coastal Envtl. Grp., Inc., B-407563 et al., Jan. 14, 2013, 2013 CPD ¶ 30 at 6.

³ The solicitation stated that the government reserved the right to contact a proposed subcontractor for any additional information necessary in making a responsibility determination. RFQ at 51.

⁴ Under the Small Business Act, 15 U.S.C. § 637(b)(7), contracting agencies may not find a small business to be nonresponsible without referring the matter to the SBA, which has final authority to determine the responsibility of small business concerns. See, e.g., Competitive Range Solutions, LLC, B-413104.10, Apr. 18, 2017, 2017 CPD ¶ ___ at 4; Joanell Labs., Inc.; Nu-Way Mfg. Co., Inc., B-242415.8 et al., Apr. 15, 1992, 92-1 CPD ¶ 369 at 6-7.

⁵ Our Bid Protest Regulations state that our Office does not review COC referrals to the SBA, or the issuance of, or refusal to issue, a COC, absent limited exceptions “which GAO will interpret narrowly out of deference to the role of the SBA in this area.”

(continued...)

Oct. 26, 2016 (unpublished decision). We also found the VA had concluded that Bluehorse was potentially nonresponsible based on the vendor's inability to perform the contract and, in light of the VA's resulting obligation to refer the matter to SBA, no basis to review a protest challenging such a referral:

In this regard, a conclusion by our Office that the VA improperly referred Bluehorse to the SBA for a COC determination would be, in effect, a finding by our Office that the protester was responsible; such a determination of responsibility for Bluehorse, a small business, is reserved by statute for the SBA. 15 U.S.C. § 637(b)(7).⁶

Id. at 2.

On October 19, in an email to the contracting agency, SBA stated that Bluehorse had been "advised yesterday via email that the [COC] case would be closed if no application was received by close of business yesterday, 10/18/2016." Agency Supplemental Request to Dismiss (B-413929.3), Exh. I. In addition, the SBA explained that because Bluehorse "failed to apply for a [COC] within the allotted timeframe" that "SBA is taking no further action and considers this case closed." Id., Exh. G. Consequently, the SBA noted that the VA could "proceed with the procurement." Id. The SBA also provided the VA with a copy of its letter to the protester that advised Bluehorse that SBA was unable to issue a COC on its behalf and the case was closed because Bluehorse failed to submit the COC application. Id., Exhs. H and I.

On December 7, the VA informed Bluehorse that it was an unsuccessful offeror, and thereafter awarded the contract to Railroad Cleaners on December 8.

On December 12, Bluehorse filed a second protest with our Office challenging the contract award to Railroad Cleaners. Here Bluehorse contended that: (1) the VA improperly referred it to the SBA for a COC; (2) the VA failed to provide sufficient information regarding Bluehorse's subcontractor (related to a bankruptcy filing) for the SBA to consider in its COC review, thereby acting in bad faith; and (3) the VA was required to also refer the awardee Railroad Cleaners to the SBA for a COC. Protest, Dec. 9, 2016, at 1-9.

(...continued)

4 C.F.R. § 21.5(b)(2). These exceptions are for protests that show possible bad faith on the part of government officials, or that "present allegations that the SBA failed to follow its own published regulations or failed to consider vital information bearing on the firm's responsibility due to the manner in which the information was presented to or withheld from the SBA by the procuring agency." Id.

⁶ Bluehorse thereafter filed a request for reconsideration of our dismissal decision here (which has been docketed as B-413929.2).

On January 10, 2017, our Office issued a decision dismissing Bluehorse's second protest. Bluehorse Corp., B-413929.3, Jan. 10, 2017 (unpublished decision). With regard to Bluehorse's contention that the VA had improperly referred it to the SBA for a COC, we found the protest failed to state legally sufficient grounds of protest.⁷ Id. at 2. With regard to the assertion that the VA failed to provide the SBA with information relating to a bankruptcy filed by Bluehorse's proposed subcontractor, we found the contracting officer's reason for referring Bluehorse to the SBA was not due to any concerns regarding the proposed subcontractor's bankruptcy (further, Bluehorse failed to explain why it did not itself provide this information to the SBA). Id. Thus, "[t]his protest allegation does not include any information that establishes the likelihood that the agency in this case violated applicable procurement laws or regulations and is therefore dismissed." Id. at 3. Lastly, in light of Bluehorse's failure to submit a COC application to the SBA (and the resulting non-issuance of a COC to Bluehorse), the protester was not an interested party to challenge whether the awardee should also have been referred to the SBA for a COC. Id. at 3-4.

On January 11, Bluehorse submitted a request for reconsideration of our January 10 decision (which has been docketed as B-413929.4). We consider both requests for reconsideration in this decision.

DISCUSSION

Bluehorse requests reconsideration of our decisions in both B-413929 and B-413929.3. The protester generally argues that the decisions were arbitrary, irrational, and failed to properly consider the facts as viewed by the protester.

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must set out the factual and legal grounds upon which reversal or modification of the decision is deemed warranted, specifying any errors of law or information not previously considered. 4 C.F.R. § 21.14(a), (c); Analytic Strategies LLC; Gemini Indus., Inc.--Recon., B-413758.4, B-413758.5, Mar. 9, 2017, 2017 CPD ¶ 87 at 5; Department of Veterans Affairs--Recon., B-409705.6, Dec. 5, 2016, 2016 CPD ¶ 342 at 4. The repetition of arguments made during our consideration of the original protest and disagreement with our decision do not meet this standard. Office Design Grp.--Recon., B-413166.7, Mar. 9, 2017, 2017 CPD ¶ 89 at 2; Veda, Inc.--Recon., B-278516.3, B-278516.4, July 8, 1998, 98-2 CPD ¶ 12 at 4.

We find that Bluehorse has failed to show that our previous decisions were based on errors of law or information not considered. Although we do not specifically address all of the protester's arguments, we have considered them all and find no basis on which to grant the requests for reconsideration.

⁷ We also noted that the protester had repeated here the challenges raised in its initial protest regarding the propriety of the VA's COC referral to the SBA. Id. at 2.

Reconsideration of B-413929

Bluehorse requests reconsideration of our decision in B-413929. The protester again argues that the contracting agency's decision to refer it to SBA for a COC determination was improper. Request for Reconsideration (B-413929.2), Oct. 27, 2016, at 1-8.

As a preliminary matter, the protester in essence repeats the arguments that it made previously--that the VA did not have a valid reason to have concerns regarding Bluehorse's responsibility (i.e., its ability to perform) notwithstanding the existence of a teaming agreement that appeared to preclude Bluehorse's laundry subcontractor from working with any vendors other than Railroad Cleaners. Compare id. at 4-7 with Protest, Oct. 7, 2016, at 1-3. Under our Bid Protest Regulations, to obtain reconsideration the requesting party must set out the factual and legal grounds upon which reversal or modification of the decision is deemed warranted, specifying any errors or law made or information not previously considered. 4 C.F.R. § 21.14(a). The repetition of arguments made during our consideration of the original protest and disagreement with our decision do not meet this standard. Veda, Inc.--Recon., supra.

Moreover, the record reflects the agency reasonably concluded that Bluehorse was potentially nonresponsible based on an inability to perform the contract, and properly referred the matter of Bluehorse's nonresponsibility to the SBA for resolution. We also find no merit in the protester's assertion that the referral to the SBA was done in bad faith. In this regard, government officials are presumed to act in good faith, and a protester's contention that procurement officials are motivated by bias or bad faith must be supported by convincing proof; our Office will not consider allegations based on mere inference, supposition or unsupported speculation. BAE Sys. Tech. Solutions & Servs., Inc., B-409914, B-409914.2, Sept. 16, 2014, 2014 CPD ¶ 322 at 11. There is nothing pernicious, as the protester alleges, about the contracting officer seeking additional information--including from the vendor itself--as part of making a responsibility determination. See Federal Acquisition Regulation (FAR) § 9.105-1; Mark Dunning Indus., Inc., B-405417.2, Nov. 19, 2013, 2013 CPD ¶ 267. Similarly, the contracting officer's decision (as part of her responsibility determination) to contact the proposed subcontractor Superior Linen about the terms of its teaming agreement with another vendor was both reasonable and expressly permitted by the solicitation. See RFQ at 51.

Lastly, Bluehorse also misunderstands our decision regarding our review of COC referrals to the SBA. As we previously held, determinations of responsibility are reserved for the SBA by statute. See 4 C.F.R. § 21.5(b)(2); 15 U.S.C. § 637(b)(7). A conclusion by our Office that the VA improperly referred Bluehorse to the SBA for a COC determination would be, in effect, a finding by our Office that the protester was responsible; such a determination of responsibility for Bluehorse, a small business, is reserved by statute for the SBA. 15 U.S.C. § 637(b)(7).

Reconsideration of B-413929.3

Bluehorse also requests reconsideration of our decision in B-414929.3, and again repeats the challenges raised in its underlying protest. As stated above, the mere repetition of arguments made during our consideration of the original protest and disagreement with our decision do not meet this standard for obtaining reconsideration. Veda, Inc.--Recon., *supra*.

For example, Bluehorse repeats again its initial protest regarding the propriety of the VA's COC referral to the SBA, which we have addressed above. Bluehorse also repeats its argument that the VA failed to provide the SBA with information relating to the bankruptcy filed by subcontractor Superior Linen, and thereby withheld vital information. The contracting officer, however, referred Bluehorse to the SBA because she did not believe its proposed subcontractor had in fact agreed to perform if Bluehorse were to be awarded the contract, and not due to concerns regarding the subcontractor's financial ability. As we previously held, this protest allegation does not include any information that establishes the likelihood that the agency in this case violated application procurement laws or regulations. Bluehorse Corp. (B-413929.3), *supra*, at 3.

Similarly, Bluehorse repeats its argument that the agency should have also referred the awardee to the SBA for a COC, based on the common subcontractor's (Superior Linen's) bankruptcy filing.⁸ However, as previously determined, Bluehorse is not an interested party to raise this issue. A protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or the failure to award a contract. 4 C.F.R. § 21.0(a)(1). A protester is not an interested party where it would not be in line for contract award were its protest to be sustained. RELM Wireless Corp., B-405358, Oct. 7, 2011, 2011 CPD ¶ 211 at 2. As noted above, the SBA did not issue a COC to Bluehorse for this procurement because Bluehorse failed to submit a COC application to the SBA following referral by the VA. As a result, Bluehorse lacks the direct economic interest required to maintain this aspect of its protest. Bluehorse Corp., B-413929.3, Jan. 10, 2017, at 4 (unpublished decision). For

⁸ While Bluehorse argues that this was "uneven discussions" under FAR § 15.306(d)(3), the referral to the SBA for a COC determination was instead a responsibility matter governed by FAR subpart 19.6. An agency's exchanges with an offeror regarding matters of responsibility also do not constitute discussions provided such dialogue does not seek, or result in, modifications to the vendor's quotation for purposes of technical acceptability. See McKissack+Delcan JV II, B-401973.2, B-401973.4, Jan. 13, 2010, 2010 CPD ¶ 28 at 6-8.

all the reasons discussed, we find that Bluehorse has failed to show that our previous decision were based on errors of law or information not considered.

The requests for reconsideration are denied.

Susan A. Poling
General Counsel