



Decision

Matter of: Bluehorse Corporation

File: B-414809

Date: August 18, 2017

Akenaten Bluehorse for the protester.
Brian A. Quint, Esq., Department of the Interior, for the agency.
Elizabeth Witwer, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's rejection of quotation as unacceptable is denied where the protester conditioned its quotation in a manner that fails to conform to the terms of the solicitation.

DECISION

Bluehorse Corporation, an Indian Small Business Economic Enterprise of Reno, Nevada, protests the rejection of its quotation by the Department of the Interior, Bureau of Indian Affairs, under request for quotations (RFQ) No. A17PS00709, issued by the agency to acquire clear diesel fuel delivery for a highway construction project near Polacca, Arizona. The protester asserts that the agency improperly rejected its quotation.

We deny the protest.

BACKGROUND

On May 27, 2017, the agency posted the combined synopsis/solicitation on the Federal Business Opportunities (FedBizOps) website using the commercial item procedures of Federal Acquisition Regulation (FAR) subparts 12.6 and 13.5. RFQ at 1; Memorandum of Law (MOL) at 1. The RFQ, which was set aside for Indian Small Business Economic Enterprises pursuant to the Buy Indian Act, 25 U.S.C. § 47, contemplated the issuance of a fixed-price order for the purchase and delivery of approximately 30,000 gallons of clear diesel fuel for a highway construction project near Polacca, Arizona. RFQ at 1; Agency Report (AR), Tab 3a, Acquisition Plan, at 2.

Of relevance to the protest, the solicitation's delivery and quantity terms provided:

All fuel delivery must be coordinated with the construction manager who will schedule delivery dates and quantities. Please note: that all fuel will not be delivered at one time but in stages as the project progresses.

RFQ at 2. The solicitation further provided that the agency intended to make a single award "at a fair and reasonable price to the lowest responsive and responsible [vendor] whose quote[,] conforming to the requirements herein[,] will be the most advantageous to the Government." RFQ at 3.

The RFQ was amended three times. Relevant here, the solicitation was amended for the third time on May 31 to provide responses to vendor questions. Among other things, the agency informed vendors that fuel deliveries would be made to "two five thousand gallon tanks" and that the agency "typically" orders 4,000 gallons of fuel per delivery. RFQ, Amend. 0003, at 1. The agency also explained that, because construction was in "full swing," the agency had been placing orders for fuel "approximately every three or four weeks." Id. The agency also reaffirmed that "[t]he maximum amount of fuel estimated is 30,000 gallons."¹ Id. at 2.

In response to the solicitation, the agency received three quotations, including one from Bluehorse. Contracting Officer's Statement (COS) at 3; AR, Tab 6, Bluehorse Quotation, at 1; MOL at 2. Bluehorse submitted the lowest-priced quotation. MOL at 2. In its quotation, Bluehorse indicated that it had the ability to supply 7,500 gallons of fuel per delivery. AR, Tab 6, Bluehorse Quotation, at 1 ("Offeror can fill one tank and half fill the other [tank] each Drop--7500 gallons.").

The contracting officer initially intended to make an award to Bluehorse and, on June 13, forwarded a purchase order to Bluehorse for signature. AR, Tab 7a, Documentation of Price Reasonableness, at 1; COS at 4; MOL at 2. As a result of subsequent communications with Bluehorse, however, the contracting officer concluded that Bluehorse's quotation failed to comply with the terms and conditions of the solicitation. COS at 5-6. Accordingly, the contracting officer rescinded the purchase order. COS at 6; AR, Tab 9d, Email Correspondence, June 13, 2017, at 14.² We summarize below the relevant portions of the correspondence between the contracting officer and Bluehorse.³ All communications occurred on June 13.

¹ The solicitation also included FAR clause 52.217-6, Option for Increased Quantity, which permits the government to increase the quantity of supplies under certain circumstances.

² Page citations to tabs 9a, 9b, 9c, and 9d of the agency report refer to the electronic page numbers.

³ Our review of the record indicates that, in a few instances, identical emails appear to have timestamps differing by exactly 1 hour. See e.g., AR, Tab 9b, Email from CO to
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The record reflects that, on June 13, the contracting officer forwarded the purchase order to Bluehorse for signature. AR, Tab 9a, Email Correspondence, at 17. The purchase order contained two provisions relevant to the protest. First, the purchase order erroneously listed the capacity of the agency's two tanks as 4,000 gallons.⁴ Initial Purchase Order at 3.⁵ Second, the purchase order provided that each delivery would be for 4,000 gallons of fuel. Id. at 1 ("4000 gallons each delivery . . . will be order[ed] approximately every three or four weeks[.]").

Upon receipt of the purchase order, Bluehorse requested that the agency clarify the capacity of its tanks. AR, Tab 9a, Email Correspondence, at 17. The contracting officer did not directly answer Bluehorse's question, stating instead that "[t]he terms and conditions of the contract and solicitation states 4,000 gallons per tank and delivery." AR, Tab 9b, Email Correspondence, at 6.

Bluehorse responded by attaching a screenshot of amendment 0003, in which the agency had informed vendors that it possessed two 5,000 gallon tanks. AR, Tab 9b, Email Correspondence, at 7, 9; RFQ, Amend. 0003, at 1. Bluehorse asked whether the information in amendment 0003 was correct. AR, Tab 9b, Email Correspondence, at 7.

Again, the contracting officer responded without answering Bluehorse's question. Instead, the contracting officer provided a screenshot in which the contracting officer highlighted the following language from amendment 0003:

2. How many deliveries are you going to require? How much fuel per delivery?

Government Response: We typically order 4000 gallons each delivery, right now construction is under full swing so we are ordering approximately every three or four weeks.

RFQ, Amend. 0003, at 1; AR, Tab 9c, Email Correspondence, at 1.

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Bluehorse, June 13, 2017, 12:13 p.m. and 1:13 p.m., at 6-7. We presume that these discrepancies result from differences in the sender and recipient's respective time zones. We have based our chronology upon the contracting officer's statement and the contemporaneous record. To the extent our chronology contains errors, we note that the exact chronology is not dispositive of the issues presented in this matter.

⁴ As noted above, the agency informed vendors through amendment 0003 that it possessed two 5,000 gallon tanks. RFQ, Amend. 0003, at 1.

⁵ This document was not included in the agency report, but was provided subsequently by the agency on June 28, 2017. Agency Email, July 28, 2017, 5:17 p.m.

In response, Bluehorse complained that the contracting officer was not answering its question and repeated the question: “Are the tanks 5,000 gallons (as listed on fbo.gov) or 4,000 gallons?” AR, Tab 9c, Email Correspondence, at 3. Shortly thereafter, Bluehorse sent a second email in which it stated, “[p]lease be aware that our offer was made on the ability to make a 7500 [gallon] drop (which also should be able to be done with two 5,000 gallon tanks).” Id. at 5.

The contracting officer responded by pointing out that the purchase order required the delivery of 4,000 gallons of fuel at a time. AR, Tab 9d, Email Correspondence, at 1. Bluehorse objected, contending that the solicitation did not expressly provide the amount to be delivered at a time. Id. at 4. In support of its contention, Bluehorse argued that “typically” does not mean “actual.” Id. Bluehorse cautioned the agency that “[i]f you don’t amend we will simply protest.” Id.

At some point during this exchange between the parties, the contracting officer sent Bluehorse a revised purchase order correcting the capacity of the agency’s tanks. AR, Tab 9c, Final Purchase Order, at 11. The revised purchase order also expressly stated that “[t]he government will order 4000 gallons for each delivery.” Id. at 11. In the email forwarding the revised purchase order, the contracting officer stated, “if you agree[,] then sign[;] if not[,] then I will assume you do not agree to the terms and conditions of this contract and the solicitation.” AR, Tab 9c, Email Correspondence, at 8.

After a number of subsequent exchanges between the parties, the contracting officer informed Bluehorse that “if you don’t agree to the terms and conditions of the solicitation and award[,] you are providing your own terms and conditions (determining the amount you want to deliver and not what the government is requesting)[.]” AR, Tab 9d, Email Correspondence, at 14. The contracting officer informed Bluehorse that the agency deemed the protester’s quotation “to be unacceptable.” Id.

Shortly thereafter, having failed to receive the signed purchase order from Bluehorse, the contracting officer sent a second email stating, “[m]y offer has been rescinded, thank you for your time.” Id. This protest followed on June 14.

DISCUSSION

Bluehorse contends that, in rejecting its quotation, the agency relied upon unstated criteria. Protest at 3. In this respect, Bluehorse argues that the revised purchase order provided to Bluehorse “inexplicably” limited deliveries to 4,000 gallons of fuel. Id. at 1; Comments at 1. Bluehorse argues that the RFQ did not mandate such a limitation. Protest at 3. Bluehorse also contends that the agency has improperly: (a) failed to amend the solicitation; (b) rejected its quotation as nonresponsive; and (c) rejected an alternate quotation. Id. at 1. Although we do not discuss all of Bluehorse’s challenges, we have fully considered them and conclude that none furnishes a basis upon which to sustain the protest.

A quotation that fails to conform to a solicitation's material terms and conditions is unacceptable and may not form the basis for an award. Technology and Telecomms. Consultants, Inc., B-413301, B-413301.2, Sept. 28, 2016, 2016 CPD ¶ 276 at 12. Material terms are those terms that affect the price, quantity, quality, or delivery of the goods or services being provided. Bluehorse, B-412494, B-412494.2, Feb. 26, 2016, 2016 CPD ¶ 64 at 2-3. Here, we conclude that, although Bluehorse's quotation, as submitted, conformed to the solicitation's material terms and conditions, the protester subsequently conditioned its quotation upon the ability to deliver a minimum of 7,500 gallons of fuel at a time. For this reason, we find the agency's decision to rescind the order to Bluehorse to be unobjectionable.

As explained above, the solicitation's delivery and quantity terms provided:

All fuel delivery must be coordinated with the construction manager who will schedule delivery dates and quantities. Please note: that all fuel will not be delivered at one time but in stages as the project progresses.

RFQ at 2. Additionally, the agency informed offerors through amendment 0003 that the agency "typically" orders 4,000 gallons of fuel per delivery. RFQ, Amend. 0003, at 1.

The parties dispute the meaning of this language. Where a dispute exists as to a solicitation's actual requirements, we begin by examining the plain language of the solicitation. Intelsat Gen. Corp., B-412097, B-412097.2, Dec. 23, 2015, 2016 CPD ¶ 30 at 8. If the solicitation language is unambiguous, our inquiry ceases. Desbuild Inc., B-413613.2, Jan. 13, 2017, 2017 CPD ¶ 23 at 5. We resolve questions of solicitation interpretation by reading the solicitation as a whole and in a manner that gives effect to all provisions; to be reasonable, and therefore valid, an interpretation must be consistent with such a reading. Id.

Here, the plain language of the solicitation states that the agency (specifically the construction manager) possesses the discretion to dictate the delivery dates and quantities. The only limitation imposed upon the agency's discretion is the prohibition against ordering the full quantity of fuel, i.e., 30,000 gallons, at one time.⁶ The solicitation does not contain--nor does the protester identify--a limitation on the minimum quantity of fuel that the agency could order. For this reason, the solicitation afforded the agency the discretion to issue an order providing for the delivery of 4,000 gallons of fuel at a time, as the agency did here.

Contrary to the contracting officer's repeated assertions, however, we do not construe the solicitation as requiring the agency to issue an order for the delivery of 4,000 gallons of fuel at a time. COS at 6 ("Ordering limit is 4,000 gallons per delivery as the government has requested in the solicitation amendment 003."); id. ("The Solicitation

⁶ Arguably, the capacity of the agency's tanks also limited the agency's discretion as a practical matter.

(amendment 003) stated[] the Government’s request for delivery was [] 4,000 gallons per delivery[].); AR, Tab 9b, Email Correspondence, at 6 (“The terms and conditions of the . . . solicitation states 4,000 gallons per tank and delivery.”); AR, Tab 9d, Email Correspondence, at 1 (The purchase order “places order at 4,000 gallons per order, per the solicitation.”).

In this respect, we agree with the protester that the word “typically” does not mean that the agency is required to order 4,000 gallons of fuel per delivery or even that it intends to order such quantities. See Protest at 3; Comments at 2 (The word typically “allude[s] to what has been done in past procurements” but “does not mean any and all circumstances” and “does not denote a mandatory obligation.”). Absent an express intent to impart a novel meaning, terms in a solicitation are to be given their ordinary and accustomed meaning, which is generally the dictionary definition. The online edition of the Oxford English Dictionary defines the word “typically” as meaning “in most cases” or “usually.” Oxford English Dictionary, <https://en.oxforddictionaries.com/definition/typically> (last visited August 14, 2017). Accordingly, the relevant language in amendment 0003 should be construed narrowly as informing vendors that the agency orders 4,000 gallons of fuel per delivery in most--but not all--cases.

In sum, we interpret the solicitation here as affording the agency the discretion to issue an order for the delivery of any amount of fuel less than the full 30,000 gallons, subject to the agency’s fuel storage capacity. This discretion obviously also affords the agency the right, but not the obligation, to issue an order for 4,000 gallons of fuel at a time. For this reason, contrary to the protester’s contentions, Protest at 1, we do not find the terms of the revised purchase order to be “inexplicabl[e].” Rather, we find the agency’s revised purchase order, which provides for deliveries in 4,000 gallon quantities, to be unobjectionable and consistent with the terms of the solicitation.⁷

Given our interpretation of the solicitation, as set forth above, we agree with the protester that its quotation, as initially submitted, conformed to the terms of the solicitation. Comments at 3. In this regard, the protester’s quotation stated that the protester would provide multiple deliveries of clear diesel fuel to two 5,000 gallon tanks near the construction project located in Polacca, Arizona. AR, Tab 6, Bluehorse Quotation, at 1. The protester’s quotation further represented that the protester “can fill one tank and half fill the other [tank] each Drop--7500 gallons.” Id. Contrary to the agency’s contentions, see COS at 6; MOL at 4, we do not view this latter representation as stating that the protester would make deliveries in 7,500 gallon quantities only. Rather, we view this representation as a statement of the vendor’s capabilities.⁸

⁷ Because we conclude that the agency possessed the discretion, under the terms of the solicitation, to place an order for 4,000 gallons of fuel at a time, we disagree with the protester that the agency was required to amend the solicitation to expressly state that the agency would order this quantity per delivery. See Protest at 3-4.

⁸ We recognize, however, that, had the agency wanted to order fuel in quantities greater than 7,500 gallons of fuel per delivery, this representation in the quotation may
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Although we find that Bluehorse's quotation, as submitted, conformed to the solicitation's material terms and conditions, the record supports the agency's conclusion the protester subsequently conditioned its quotation upon the ability to deliver a minimum of 7,500 gallons of fuel at a time. In this respect, during the communications between the agency and Bluehorse on June 13, the protester stated, in response to the contracting officer's assertion that the agency was permitted to order 4,000 gallons of fuel per delivery, "[p]lease be aware that our offer was made on the ability to make a 7500 [gallon] drop (which also should be able to be done with two 5,000 gallon tanks)." AR, Tab 9c, Email Correspondence, at 5. The protester also stated that it would protest the agency's actions if the agency refused to "amend" its requirements.⁹ AR, Tab 9d, Email Correspondence, at 4. Moreover, the protester did not sign the revised purchase order, as requested by the contracting officer. See AR, Tab 9c, Email Correspondence, at 8.

Accordingly, we find that the agency reasonably concluded that the protester conditioned its quotation on the ability to deliver a minimum of 7,500 gallons of fuel at a time.¹⁰ We also find that by conditioning its quotation in this manner, the protester's quotation failed to conform to a material term of the solicitation, i.e., the ability of the agency to order at any one time any amount of fuel less than the full 30,000 gallons. For this reason, the quotation submitted by Bluehorse may not form the basis for an

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have served as a basis to reject the vendor's quotation because it implies that the vendor can provide a maximum of 7,500 gallons of fuel per delivery.

⁹ It is unclear from the record whether Bluehorse meant for the agency to amend the solicitation or the purchase order. The protest seems to indicate that Bluehorse meant for the agency to amend the solicitation. See Protest at 1. As we discussed above, however, the agency was not required to amend the solicitation because the purchase order's delivery and quantity terms were consistent with the solicitation language.

¹⁰ In its protest, Bluehorse alleges that "we did not refuse to agree to dropping off the fuel required, as stated in the solicitation[.]" Protest at 1 n.1. The agency argues that this statement is contradicted by (a) Bluehorse's contemporaneous representation that its quotation was "made on the ability" to deliver the quantity of fuel it specified, i.e., 7,500 gallons; and (b) Bluehorse's refusal to sign the purchase order. MOL at 4 n.6. It is not entirely clear to us whether Bluehorse is contending in its protest that it agrees to provide fuel in 4,000 gallon quantities per delivery. In any event, regardless of Bluehorse's protest contentions, the contemporaneous record does not clearly indicate that the Bluehorse was willing to accept the terms of the purchase order. Rather, as we explained, it was reasonable for the agency to conclude that the protester had conditioned its quotation.

award, see Bluehorse, supra, at 2, and we find that the agency acted reasonably in rescinding the purchase order.

The protest is denied.

Susan A. Poling
General Counsel