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**Comptroller General
of the United States**

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

Decision

Matter of: Bluehorse

File: B-412494; B-412494.2

Date: February 26, 2016

Akenaten Bluehorse, for the protester.

Sherry Kinland Kaswell, Esq., Department of the Interior, for the agency.

Laura Eyester, Esq., Cherie J. Owen, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of agency's rejection of quotation as unacceptable is denied where the protester, the only vendor responding to the quotation, took exception to the terms of the solicitation and offered a price that was found to be unreasonable.
2. Protest that cancellation of the solicitation was a pretext for not awarding the contract to the protester is denied where the agency cancelled the solicitation because it did not receive an acceptable quotation and instead decided to purchase the heating fuel oil through the Defense Logistics Agency.

DECISION

Bluehorse, of Reno, Nevada, a small business, protests the Department of the Interior, Bureau of Indian Affairs' (BIA) actions with regard to request for quotations (RFQ) No. A16PS00018, for heating fuel oil for the BIA Rosebud Agency in Rosebud and Mission, South Dakota. Bluehorse asserts that the agency unreasonably rejected its quotation and cancelled the solicitation as a pretext to avoid making award to the protester.

We deny the protest.

BACKGROUND

On November 9, 2015, BIA posted the combined synopsis/solicitation on the Federal Business Opportunities (FedBizOps) and FedConnect websites using the commercial item procedures of Federal Acquisition Regulation (FAR) Part 12 and the simplified acquisition procedures of FAR subpart 13.5. RFQ at 1. The RFQ,

which was set-aside for Indian Small Business Economic Enterprises (ISBEE) pursuant to the Buy Indian Act, 25 U.S.C. § 47, contemplated the award of a fixed-price requirements contract with economic price adjustment for the purchase and delivery of approximately 35,000 gallons of heating fuel oil for the BIA Rosebud Agency in Rosebud and Mission, South Dakota. Id. Although the RFQ set forth estimated quantities and delivery dates for the various locations, it stated that the vendor would be providing delivery of the heating fuel oil “on an as needed basis” where the “Vendor will be contacted 24 hours in advance to deliver #2 Heating Fuel Oil in the amounts and at the locations specified.” RFQ, Statement of Work (SOW), at 1.

The RFQ required vendors to submit a quotation on all of the items/services listed and provide: (1) a completed Standard Form (SF) 1449; (2) a pricing schedule with the “most competitive and reasonable rate”; (3) an ISBEE representation; and (4) an acknowledgment of any amendments to the solicitation. RFQ at 1-2. The RFQ stated that the agency intended to make an award without discussions and therefore the initial offer should contain the best terms from a price and technical standpoint. Id. at 6.

The agency received only one quotation in response to the solicitation, which was from Bluehorse. Agency Report (AR) at 1. Although Bluehorse provided a completed SF 1449, pricing schedule, and an ISBEE representation, its quotation contained the following notation: “minimum order of 200 gallons” and “5 day advance notice required for deliveries.” AR, Tab 6, Bluehorse Quotation, at 1-3, 44.

The agency concluded that the quotation was unacceptable and on November 24, posted an amendment to the solicitation that removed the ISBEE set-aside requirements and inserted a provision that set aside the acquisition for small businesses. AR, Tabs 4a & 4b, Amendment to the Solicitation, at 1, 29. After Bluehorse filed a protest with this Office, BIA cancelled the solicitation. Bluehorse then filed a supplemental protest with our Office challenging the cancellation.

DISCUSSION

Bluehorse contends that the agency’s evaluation of its proposal was unreasonable and that the cancellation of the solicitation was improper. Protest at 1-2; Supp. Protest at 1-2. As set forth below, we find no basis to sustain the protest.

A quotation that takes exception to a solicitation’s material terms and conditions should be considered unacceptable and may not form the basis for an award. IBM U.S. Fed., a division of IBM Corp.; Presidio Networked Solutions, Inc., B-409806 et al., Aug. 15, 2014, 2014 CPD ¶ 241 at 10; CHE Consulting, Inc., B-406639, June 28, 2012, 2012 CPD ¶ 190 at 2-3. Material terms of a solicitation are those which affect the price, quantity, quality, or delivery of the goods or services being

provided. IBM U.S. Fed., a division of IBM Corp.; Presidio Networked Solutions, Inc., supra.

Here, the RFQ's delivery and quantity terms stated that the awardee would be required to provide delivery of the heating fuel oil "on an as needed basis" where the "Vendor will be contacted 24 hours in advance to deliver #2 Heating Fuel Oil in the amounts and at the locations specified" because the "[q]uantities depend on weather conditions and amounts needed." RFQ, SOW, at 1. The agency explained the basis for these delivery terms as follows:

Historically, solicitations for heating fuel for the Rosebud Agency have always required a 24 hour lead time. Past contract holders have always met this lead time. Due to unpredictable winters, cold spells can burn through heating fuel very quickly and the 24 hour lead time is a necessity to the BIA.

Contracting Officer's Supplemental Statement (COSS) at 1. Although the RFQ set forth estimated quantities for various locations and none of these were below 200 gallons, the RFQ did not set forth minimum quantities. RFQ, SOW at 1-3; AR at 3. Further, the RFQ stated that vendors that "reject the terms and conditions of the solicitation may be excluded from consideration." RFQ at 5.

Bluehorse's quotation stated that there must be a "minimum order of 200 gallons" and that "5 day advance notice required for deliveries." AR, Tab 6, Bluehorse Quotation, at 1-2. In conditioning its quotation on a minimum quantity order and 5 days notice, when the solicitation essentially provided for the contractor to respond to an order of any size within 24 hours, Bluehorse took exception to the quantity and delivery terms of the solicitation. Since Bluehorse's quotation took exception to material quantity and delivery requirements of the RFQ, the agency reasonably concluded that the offer was unacceptable.¹

The agency also rejected Bluehorse's quotation because its price was unreasonably high. With respect to price reasonableness, BIA's regulations explain that ISBEE set-asides of commercial item or simplified acquisitions "must conform to the

¹ Bluehorse instead argues that its market research showed that "24 hour delivery was [not] possible," and that because BIA failed to place minimum delivery quantities in the RFQ, the agency "cannot fault [Bluehorse] for including a minimum of 200 gallons per delivery." Comments at 2-3. Our Bid Protest Regulations specifically require that a protest based on alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals be filed before that time. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1). Since these allegations concern the terms of the solicitation, and were not filed before the due date for receipt of quotations, they are dismissed as untimely.

competition and price reasonableness documentation requirements of FAR 12.209 for commercial item acquisitions and FAR 13.106 for simplified acquisitions.” 48 C.F.R. § 1480.503(c). Under simplified acquisition procedures, the contracting officer determines price reasonableness, FAR § 13.106-3(a), and may make a reasonableness determination based on a comparison to an independent government cost estimate (IGCE). FAR § 13.106-3(a)(2)(vi).

Here, the contracting officer made a price reasonableness decision by comparing Bluehorse’s quoted price to the agency’s IGCE, which was prepared using market research that “was conducted by contacting a small local business to obtain the current pricing.” COSS at 1; AR, Tab 8, IGCE, at 1. Bluehorse’s price was higher than the IGCE and, as a result, the agency found that the quotation was unreasonably priced. A determination of price reasonableness is a matter of agency discretion, involving the exercise of business judgment, which our Office will not question unless it is shown to be unreasonable. Precise Mgmt., LLC, B-411708, Oct. 5, 2015, 2015 CPD ¶ 310 at 4; Selecta Corp., B-252182, May 26, 1993, 93-1 CPD ¶ 421 at 2. In its protest, Bluehorse admits that its pricing was “higher than larger firms near Rosebud, South Dakota”, Comments at 2, and when compared to the IGCE, which was based on market research that utilized pricing from a small business, Bluehorse’s quotation was still higher. Thus, we have no basis to question the agency’s business judgment that Bluehorse’s price was not reasonable.²

Finally, Bluehorse argues that the agency’s cancellation of the solicitation is a pretext to avoid awarding Bluehorse a contract. Supp. Protest at 1-2. Where a protester has alleged that an agency’s rationale for cancellation is pretextual, that is, the agency’s actual motivation is to avoid awarding a contract on a competitive basis or to avoid resolving a protest, we will closely examine the bases for the agency’s actions. Lasmer Indus., Inc., B-400866.2 et al., Mar. 30, 2009, 2009 CPD ¶ 77 at 4; Superlative Tech., Inc., B-310489, B-310489.2, Jan. 4, 2008, 2008 CPD ¶ 12 at 7. Notwithstanding such closer scrutiny, a contracting agency need only

² Bluehorse argues that pursuant to the Buy Indian Act and implementing regulations, BIA was nonetheless required to either award the contract to Bluehorse or enter into negotiations with the firm. We disagree. BIA’s regulations state that “[i]f the [contracting officer] proceeds with an ISBEE commercial item or simplified acquisition set-aside and receives an offer from only one responsible economic enterprise at a price that is not reasonable, the CO may negotiate with that enterprise to reach a reasonable price.” 48 C.F.R. § 1480.503(b) (emphasis added). Thus, contrary to Bluehorse’s assertions, the regulation does not state that the agency “shall” enter into such negotiations when the price quoted is not reasonable, but instead provides the agency with discretion to do so. See id. Thus, we find the protester’s contention that such negotiations were required fail to state a valid basis of protest.

establish a reasonable basis to support a decision to cancel an RFQ. See Lasmer Indus., Inc., supra. In this regard, so long as there is a reasonable basis for doing so, an agency may cancel a RFQ no matter when the information precipitating the cancellation first arises, even if it is not until quotations have been submitted and evaluated. National Conference Servs., Inc. & Direct Marketing Productions, Inc. d/b/a Technology Forums, Inc., B-311137, Apr. 25, 2008, 2008 CPD ¶ 80 at 3. A reasonable basis for cancellation exists and cancellation is appropriate when none of the proposals received were evaluated as technically acceptable. Precise Mgmt., LLC, supra, at 3.

Here, the agency has explained that it cancelled the solicitation because it did not receive an acceptable quotation under the ISBEE set-aside, as discussed above, and has decided to purchase the heating fuel oil through the Defense Logistics Agency (DLA) pursuant to FAR § 8.002(a)(1)(v). AR at 4; Contracting Officer's Statement at 2-3. That FAR section allows agencies to purchase heating fuel oil from DLA pursuant to 41 C.F.R. subpart 101-26.6. See also 41 C.F.R. § 101-26.602-3 (annual fuel requirements greater than 10,000 gallons to be submitted to Defense Fuel Supply Center); AR, Tab 9, DLA Letter dated Oct. 27, 2014 (DLA Energy is a source of petroleum supply for Federal installations and activities). Since Bluehorse has not demonstrated that the agency's rejection of its proposal was unreasonable, we find the agency has provided a reasonable basis for cancellation of the RFQ.

The protest is denied.

Susan A. Poling
General Counsel