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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Phoenix Environmental Design, Inc.

File: B-413373

Date: October 14, 2016

C. Chad Gill, Phoenix Environmental Design, Inc., for the protester.
Craig T. Donovan, Esq., Department of the Interior, for the agency.
Mary G. Curcio, Esq., and Laura Eyester, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Protest that solicitation for herbicides issued on a brand name only basis is unduly restrictive of competition is sustained where the justification the agency put forth for the restriction is not supported by the record.

DECISION

Phoenix Environmental Design, Inc., of Newman Lake, Washington, a service-disabled, veteran-owned small business (SDVOSB), protests the terms of request for quotations (RFQ) No. L16PS0081, issued by the Department of the Interior, Bureau of Land Management (BLM), for herbicides for the Price Field Office in Utah. Phoenix contends that the solicitation, which limits the competition to brand name items, is unduly restrictive of competition.

We sustain the protest.

On July 2, 2016, the agency posted the solicitation on FedConnect¹ as an SDVOSB set-aside, and also provided a copy to three SDVOSBs. Contracting Officer's Statement (COS) at 2. The solicitation sought the following herbicides, on a brand name only basis: 2,4-D Herbicide (Weedar 64-EPA (Environmental Protection

¹ FedConnect is a centralized web portal where vendors seeking to conduct business with the federal government can search for contract opportunities and submit solicitation responses directly through the FedConnect system. See <https://www.fedconnect.net/FedConnect/default.htm> (last visited on October 6, 2016).

Agency) Registration #71368-1); Plateau Herbicide EPA-Registration #241-365; Escort XP Herbicide-EPA Registration # 352-439; Hi-Light Blue Dye- Becker-Underwood; and Non-Ionic Surfactant- Activator 90- Loveland Products, Inc. (hereinafter referred to as Weedar, Plateau, Escort, Blue Dye, and Activator 90, respectively). RFQ at 2. The solicitation provided that a purchase order would be issued to the vendor that submitted the quotation for the requested herbicides that represented the best value to the government. Id. at 9. The agency estimated the value of the purchase order at approximately \$5,524. COS at 1. Since the items are commercial items, and the dollar value of the procurement is below \$150,000, the agency conducted the procurement using the commercial item procedures established under Federal Acquisition Regulation (FAR) part 12, and the simplified acquisition procedures established under FAR part 13. Id. at 2.

Phoenix protests that the brand name restriction is unduly restrictive of competition. In this regard, Phoenix notes that there is a list of commercial herbicides that are approved for use on BLM land, which contains multiple, equal items for each product the agency is procuring.²

The simplified acquisition procedures established under FAR part 13 are designed to promote efficiency and economy in contracting, and to avoid unnecessary burdens for agencies and contractors, where, as here, the value of the acquisition is less than \$150,000. See FAR § 13.002. When using simplified acquisition procedures, agencies are required to obtain competition to the maximum extent practicable and must not solicit quotations based on personal preference or restrict the solicitation to suppliers of well-known and widely distributed makes or brands. Id. § 13.104; see B&S Transport, Inc., B-407589, Dec. 27, 2012, 2012 CPD ¶ 354 at 2. In a simplified acquisition, an agency is permitted to limit a solicitation to a brand name item when the contracting officer determines that the circumstances of the contract action deem only one source is reasonably available. FAR §§ 11.105(a)(2)(ii), 13.106-1(b)(1). In such cases, we review the decision to limit the procurement to a brand name for reasonableness. See Critical Process Filtration, Inc., B-400746 et al., Jan. 22, 2009, 2009 CPD ¶ 25 at 3.

According to the agency, the brand name herbicides in the solicitation are necessary to satisfy the agency's needs because they "are currently approved for use" pursuant to the agency's pesticide use proposal (PUP). Agency Report (AR), Exh. 6, Brand Name Justification, July 8, 2016, at 1. With respect to the PUP, the agency explains that there must be an approved pesticide use proposal which lists

² In the alternative, Phoenix protests that the agency improperly set aside the solicitation for SDVOSBs because there are not two manufacturers of the brand name items being procured. Protest at 1; see FAR § 19.502-2. We do not reach this issue since we have concluded that the agency did not justify the brand-name restriction.

the pesticides that the agency will be using on a particular piece of land. COS Supplemental, Aug. 17, 2016, at 2-3. The agency reports that a PUP must be submitted every three years for approval. COS at 6; AR, Exh. 6, Brand Name Justification, July 8, 2016, at 1. According to the agency, it is justified in using brand name only herbicides in this case because if it desires to use other equal pesticides that are not on the PUP, it will be required to amend the PUP to include these pesticides, which will take up to six months. Id.

The agency's position, however, is not supported by the record. According to the 2012 PUP the agency provided to our Office, only two of the herbicides required by the solicitation (Plateau and Escort) were listed and their approval expired in November 2015. Pesticide Use Proposal 2012, at 1. A second PUP was prepared in June 2016, which includes the two herbicides on the 2012 expired PUP, plus the Weedar. Pesticide Use Proposal 2016, at 1. However, the June 2016 PUP has not yet been approved. Id. at 4. Thus, there is no current PUP that covers three of the herbicides that the agency is procuring under a brand name only specification.³

In response to a request for further information about the fact that several of the brand name pesticides are not actually listed on a current (unexpired) PUP, the agency stated that: "[I]t is not against BLM policy for a Field Office to purchase a chemical prior to the completion of a Pesticide Use Proposal." Agency e-mail, Sept. 22, 2016, at 1. Thus, the agency notes that the 2016 PUP, which includes the Plateau, Escort, and Weedar herbicides, and which was prepared to replace the expired PUP, is in the process of completion. Id. at 1-2. The agency concludes that since "the Field Office was in the process of preparing the necessary proposal [it] did not violate BLM policy by purchasing the products in question." Id. at 2. This position, however, directly contradicts its earlier justification that it was unable to include equal items in the solicitation because they were not currently on the PUP.⁴

³ There is a PUP that was signed in 2015, which includes the Blue Dye and the Activator 90. Pesticide Use Proposal 2015, at 1, 4.

⁴ Of note, the PUP for the Weedar was prepared by a field office employee and submitted for approval on June 16, 2016. Pesticide Use Proposal 2016, at 4. On July 8, only three weeks later, the contracting officer asked the field office whether equal items would be permitted for this solicitation. The field office told the contracting officer that it would take three to six months to amend the PUP to include the equal items, which would cause problematic delays in treating the weed infested areas for which the herbicides were being purchased. COS at 2. Since only three weeks passed between the time the PUP for Weedar was submitted for approval, and the contracting officer's inquiry regarding equal items, the field office had sufficient time to amend the PUP to include the equal items.

It seems that the agency's real explanation for the brand name only restriction is that there are over 350 formulated products associated with 18 herbicide active ingredients for consideration and:

[t]he pesticide use proposal identifies the proposed active ingredients and their associated formulations. . . . the selection of a particular formulation is at the discretion of the individual preparing the proposal and the addition of formulations outside the ones identified in the actual proposal, are not necessary, as they may not take into account the factors utilized by the proposal preparer in selecting the identified formulations.

Agency e-mail, Sept. 22, 2016, at 3. The agency also contends that the brand name is justified because the program office "would not use generics ([office] traded the generics [] received last year)."⁵ CO Supplemental at 5, quoting AR, Tab 7, Program Office E-mail, at 1. It appears from this that the agency is advocating that it has the discretion and control, with certain restrictions relating to environmental assessments, as to which herbicide ingredients and formulations are placed on the PUP, and therefore could choose not to place generic brands on the PUP. We do not disagree with the agency that it has some discretion to determine what products to include on the PUP. However, in exercising that discretion, the agency must have a reasonable basis to exclude equal products from the PUP. It cannot simply rely on the PUP to limit competition, where it has not provided a reasonable basis for excluding items from the PUP.

Accordingly, we find that the agency has failed to reasonably justify its determination to limit the competition to brand name items. See FAR § 13.106-1(b)(1). While there may be justifiable reasons for restricting this procurement to brand name only herbicides, the agency has not provided that justification here.

SUMMARY AND RECOMMENDATION

We find the agency's brand name justification fails to comply with the requirements of FAR part 13, and is therefore unreasonable. We recommend that BLM conduct further market research to determine whether, consistent with the FAR, a reasonable basis exists to limit the competition to satisfy the agency's needs. If no

⁵ While the agency has attempted to assert that the items it has sought to procure better meet its needs, it has not provided any documentation to support that position. In this regard, from the record it appears that the agency does not have any experience with many of the items on the BLM approved list. Agency Submission, Aug. 17, 2016, at 2-4. Thus, it would not know how well they work. As the protester has noted, there are multiple "equal items" on the BLM approved list which the agency here has not even considered.

such justification exists, the agency should cancel the procurement and resolicit its requirements on a brand name or equal basis. We also recommend that BLM reimburse Phoenix's costs of filing and pursuing the protest. 4 C.F.R. § 21.8(d)(1). Phoenix's certified claim for costs, detailing the time spent and the costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Susan A. Poling
General Counsel