



Decision

Matter of: Vetcorp, Inc.

File: B-402519

Date: May 14, 2010

Ralph C. Thomas III, Esq., Barton Baker Thomas & Tolle, LLP, for the protester. Deborah J. Shoemake, Esq., and Megan O. Jorns, Esq., U.S. Army Corps of Engineers; and Kenneth Dodds, Esq., and John W. Klein, Esq., Small Business Administration, for the agencies.

Peter D. Verchinski, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. In a commercial item acquisition under FAR subpart 12.6 where price was the only factor for award, and where all four offerors submitted the same price, the agency reasonably looked to the guidance at FAR § 14.408-6, Equal Low Bids, to determine the award priority among equally low-priced small business concerns.
 2. Protest that the agency should have provided the protester with an evaluation preference as a Historically Underutilized Business Zone (HUBZone) small business concern is denied, where the Small Business Act does not permit the application of this preference against small business concerns.
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DECISION

Vetcorp, Inc., of Frederick, Maryland, protests the award of a contract to NaturChem, Inc., of Lexington, South Carolina, under solicitation No. W91278-10-T-0017, issued by the U.S. Army Corps of Engineers for an aquatic herbicide.

We deny the protest.

BACKGROUND

The solicitation, issued as a combined synopsis/solicitation on the FedBizOpps website pursuant to the Federal Acquisition Regulation (FAR) subpart 12.6, sought unit prices for Aquathol K, an aquatic herbicide. The solicitation incorporated the following standard clauses: FAR clause 52.212-1, Instructions to Offeror--

Commercial Items; FAR clause 52.212-4, Contract Terms and Conditions-Commercial Items; FAR clause 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders--Commercial Items; FAR clause 52.214-31, Facsimile Bids; and Department of Defense FAR Supplement clause 252.225-7001, Buy American Act and Balance of Payment Program. The solicitation, however, did not specifically identify the basis upon which award would be made or provide evaluation factors.¹ The solicitation was amended once to specify the quantity sought.

Four vendors, including Vetcorp and NaturChem, provided unit pricing to the Corps. Vetcorp's quotation identified it as a Historically Underutilized Business Zone (HUBZone) small business concern. See Protest, exh. D, Vetcorp Quotation. Two of the remaining firms were small business concerns. All four vendors submitted an identical unit price for the herbicide. Agency Report (AR), Tab C.

Because the vendors had identical pricing, the contracting officer (CO) looked to the guidance set forth at FAR § 14.408-6, Equal Low Bids, to determine which vendor should receive award. CO's Statement at 1. FAR § 14.408-6 provides for the following priority in making an award where an agency receives equal low bids: small business concerns that are also labor surplus concerns, other small business concerns, and other business concerns. The regulation further provides that if, after application of this priority scheme two or more bidders remain equally eligible, award should be made by drawing lots.

The CO concluded that none of the small business vendors here were labor surplus concerns, and that the three small business concerns--Vetcorp, NaturChem, and a third vendor--were equally eligible for award. CO's Statement at 2. NaturChem's quotation was selected after the agency drew lots, which was witnessed by three people. Id. This protest followed.

DISCUSSION

Vetcorp objects to the agency's reliance on the guidance at FAR § 14.408-6 to determine which of the equally-priced quotes would receive award. Vetcorp contends that this regulation applies only to procurements conducted using sealed bids and that the solicitation here sought "proposals." See Protest at 3; Comments at 2. Vetcorp also contends that, as the only HUBZone small business in this competition, it should have received award. Specifically, Vetcorp argues that it is entitled to the evaluation preference set forth at FAR § 19.1307(a), which provides for a 10 percent price preference for HUBZone small businesses. Vetcorp contends

¹ For example, the agency did not incorporate FAR clause 52.212-2, Evaluation--Commercial Items.

that the HUBZone price preference must be used to break the tie, instead of drawing lots.

With respect to the contention that the agency could not look to the guidance in FAR part 14 because this procurement was not conducted using sealed bids, the Corps argues that this was a sealed bid procurement because the solicitation requested that “interested bidders . . . submit their pricing information.” Agency’s Response to Comments at 1-2.

As an initial matter, we disagree with the Corps that this procurement was conducted on the basis of sealed bidding. A fundamental element of sealed bidding is the submission of sealed bids that are publicly opened. See FAR § 14.101, Elements of Sealed Bidding. Here, the quotes received were not publicly opened.² Rather, as indicated on the face of the combined synopsis/solicitation, this procurement was conducted pursuant to the streamlined procedures of FAR subpart 12.6, which sets forth procedures for the acquisition of commercial items.

That said, we turn next to whether the Corps could appropriately look to the guidance in FAR part 14 to resolve this tie. We conclude that it could. In conducting commercial item procurements under FAR part 12, contracting officers have discretion to choose among the procedures prescribed in FAR part 13, simplified acquisition procedures; part 14, sealed bidding; or part 15, negotiation. See FAR §§ 12.102(b), 12.203. Here, the contracting officer looked to FAR § 14.408-6 to determine which of the equally low-priced quotes received from small businesses should receive award. Vetcorp has not identified any procurement law or regulation, or any solicitation provision that the Corps violated in using FAR part 14 to resolve this question.³ In fact, even in negotiated procurements conducted under FAR part 15, we have noted a contracting agency’s use of FAR part 14 procedures for determining the award priority among equally low-priced proposals. See, e.g., National Medical Staffing, Inc.; PRS Consultants, Inc., B-238694, B-238694.2, June 4, 1990, 90-1 CPD ¶ 530 at 2 (sustained on other grounds); Martin Tool & Die, Inc., B-230915.2, 232780, Aug. 11, 1988, 88-2 CPD ¶ 132 at 2 n.1.

We turn now to the question of whether the Corps was required to apply the HUBZone price preference. The Corps points out that FAR § 19.1307(b) specifically

² The Corps states that no vendor requested that it be allowed to attend the “opening” of the price quotations. The solicitation, however, did not inform vendors that there would be a public opening or that vendors could request to attend.

³ Apart from its argument that it should receive the award as a HUBZone concern, Vetcorp does not identify the method or procedure the agency should have used to determine which of the equally low-priced small business concerns should receive award.

provides that the HUBZone preference cannot be applied against “[o]therwise successful offers from small business concerns.”⁴ AR at 5. Vetcorp argues, however, that, because all of the small business concerns here submitted identical low prices, there is no “otherwise successful offer” from a small business concern, and therefore the HUBZone preference can be applied.

We agree with the Corps that applying a HUBZone preference for Vetcorp in this procurement, against the other small business concerns, is inconsistent with the Small Business Act. The Small Business Act, in pertinent part, provides:

in any case in which a contract is to be awarded on the basis of full and open competition, the price offered by a qualified HUBZone small business concern shall be deemed as being lower than the price offered by another offeror (other than another small business concern), if the price offered by the qualified HUBZone small business concern is not more than 10 percent higher than the price offered by the otherwise lowest, responsive, and responsible offeror.

15 U.S.C. § 657a(b)(3)(A) (2006).

Our Office also sought input from the Small Business Administration (SBA) on this issue. The SBA agrees that a HUBZone preference cannot be applied against the other small business concerns here.⁵ Specifically, SBA cites the provision of the Small Business Act quoted above, and its own regulations, for the principle that a HUBZone preference “cannot be applied to the offer of an [small business concern] under any circumstances.” SBA Letter to GAO, Apr. 16, 2010, at 2-3; see also 13 C.F.R. § 126.613(a)(1).

⁴ We also note that the solicitation did not provide for an evaluation preference for HUBZone small business concerns. For example, the solicitation did not include FAR clause 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns. We have held that an agency need not apply an evaluation preference for a HUBZone small business concern where the solicitation did not provide for such a preference. See Goel Servs., Inc., B-310822.2, May 23, 2008, 2008 CPD ¶ 99 at 2.

⁵ SBA also agrees with the Corps that it does not appear that Vetcorp would be entitled to a HUBZone preference in any event, because under SBA’s regulations Vetcorp must either manufacture the herbicide or qualify as a HUBZone manufacturer. SBA Letter to GAO, Apr. 16, 2010, at 4, citing, 13 C.F.R. §§ 125.6(c)(4), 126.601(e).

In sum, we see nothing unreasonable about the Corp's reliance on FAR part 14 to break this tie, and we think the agency's decision not to apply the HUBZone price preference was consistent with the requirements of the Small Business Act.

The protest is denied.

Lynn H. Gibson
Acting General Counsel