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Decision

Matter of: B&S Transport, Inc.

File: B-402695

Date: July 9, 2010

Alexander J. Brittin, Esq., Brittin Law Group, PLLC, and Mary Pat Buckenmeyer, Esq., and Jonathan D. Shaffer, Esq., Smith Pachter McWhorter PLC, for the protester.

Paul R. Hahn, Esq., Defense Logistics Agency, Defense Energy Support Center, for the agency.

Eric M. Ransom, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency misled the protester regarding the acceptability of a proposed retest of its offered item under a quality specification is denied where the solicitation was unambiguous as to the test required; any alleged oral advice to the contrary therefore is not binding on the government.

DECISION

B&S Transport, Inc. (BST) of North Canton, Ohio, protests the award of a contract to another firm by the Department of Defense (DOD), Defense Logistics Agency, Defense Energy Support Center (DESC), under request for proposals No. SP0600-09-R-0415 for bituminous coal.

We deny the protest.

BACKGROUND

The agency issued the solicitation on September 24, 2009, for the procurement of various quantities of bituminous coal to be delivered to DOD and federal civilian installations. The solicitation contained nine line items corresponding to delivery locations, and contemplated the award of one fixed-price requirements contract or fixed-price definite-quantity contract per line item.

Each line item contained coal specifications unique to that line item, and each line item was evaluated individually. For example, each line item identified minimum and maximum quality specifications related to heat output; ash, sulfur, moisture, mercury, and chlorine content; and coal size. Certain line items also contained specifications related to “Base/Acid Ratio and Fouling Factor,” and sodium oxide. RFP, SF-1449 Addendum, at 1.

This protest concerns the specifications for line item 0004. As relevant here, the specifications for line item 0004 included the following quality requirement related to ash content:

Ash (dry): 7.0 percent maximum, 5.0 percent minimum.

RFP at 12. Line item 0004 also included specifications related to mercury content, chlorine content, base/acid ratio, and fouling factor. RFP, SF-1449 Addendum, at 1.

The RFP required that “[b]efore submitting an offer, [an] offeror shall have the coal they are offering tested by the U.S. Army TARDEC Petroleum Laboratory . . . [m]ine samples must be paid for and received by the U.S. Army TARDEC Petroleum Laboratory by the date/time set for solicitation closing/offer due date.” Id. The RFP explained as follows:

The Government will determine, based upon published and special reports issued by the U.S. Army Petroleum Center Laboratory, if the coal offered from the ‘mine’ or ‘mines’ set forth in the offer meets all the requirements of the specifications shown on the Schedule. Those coal offers that do not meet the specifications and those coal offers for which there are no special or published reports will be rejected.

RFP at 52. With regard to mercury and chlorine content, the RFP stated, “[the] Army TARDEC Petroleum Laboratory does not perform mercury and chlorine testing at this time; therefore, all offerors must submit a commercial test report, with the initial offer, indicating the mercury and chlorine content for all mines/seams proposed.” RFP, SF-1449 Addendum, at 1. Additionally, with regard to line item 0004, “a commercial test report is required to be submitted, with the initial offer, indicating the Base/Acid Ratio and Fouling Factor for each mine/seam proposed.” Id.

BST submitted its proposal on November 2, 2009, and included a commercial laboratory test report demonstrating that its offered coal met the RFP’s specifications regarding mercury content, chlorine content, base/acid ratio, and fouling factor. Shortly thereafter, on December 9, the Army TARDEC Laboratory

completed its report on a sample of coal submitted by BST. That report showed that the coal sample's dry ash content was 4.82 percent, below line item 0004's minimum specification of 5.0 percent.

The agency entered into discussions with all offerors beginning on December 29. On January 5, 2010, the agency sent BST an email transmitting a letter raising issues for discussion. As relevant here, the letter stated: "[a]n Army TARDEC Tipple Report . . . for [BST's offered coal] lists an ash content of 4.82% which is below Wright Patterson [Air Force Base's] minimum ash requirement of 5%"; therefore, "[BST] is requested to have the [offered coal] re-tested or offer another mine for Line Item 0004." Agency Report, Tab 16, Correspondence, at 3.

On January 6, DESC contacted BST to discuss the issues raised in the letter. BST asserts that, during this call, it asked if it could complete the retest of its offered coal at a commercial laboratory and was told "yes." BST Comments, at 3. DESC and BST then had further discussions calls on January 15 and 19. BST asserts that during these calls, DESC affirmatively accepted a new commercial laboratory test report submitted by BST, showing that a sample of BST's offered coal contained an ash content of 6.16 percent. Discussions regarding line item 0004 then closed at 3:00 pm on January 19, with final revised proposals (FRP) due at 3:00 pm on January 20.

Three FRPs for line item 0004 were received by the closing time, including a proposal from BST. BST's FRP contained the new commercial laboratory report on ash content that it alleges was submitted to, and approved by, the agency during discussions. BST did not offer a new mine in its FRP, and did not seek an Army TARDEC laboratory retest of the ash content of its offered coal prior to the closing time for receipt of FRPs.

On January 28, DESC contacted the Army TARDEC laboratory and inquired as to whether BST had submitted a new coal sample or requested a retest for line item 0004. After learning that BST had not submitted a new sample or requested a retest, DESC rejected BST's proposal for line item 0004 due to noncompliance with the ash content specification in the RFP. DESC sent BST a post-award notice on March 29, informing BST that it was an unsuccessful offeror for line item 0004 because its offered coal did not meet the minimum ash requirement. BST then received a requested debriefing on April 1, and filed this protest on April 7. BST alleges that the agency improperly rejected its proposal due to failure of its offered coal to meet the minimum specifications for line item 0004, given that BST had submitted with its FRP a commercial laboratory report showing that the coal met the specifications.

DISCUSSION

The key issue here is whether the protester's use of a commercial laboratory to retest the ash content of its coal was acceptable under the RFP. The agency's position is that the RFP was clear: ash content was to be demonstrated through testing at the Army TARDEC laboratory. Since BST did not have a test from that laboratory showing that its coal met the ash content standard in the RFP, its offer was unacceptable. The protester's position is that the RFP was ambiguous regarding where a retest had to be performed and that during discussions the agency led BST to conclude that retesting in a commercial laboratory was acceptable. Since it had a commercial laboratory retest showing that its coal met the ash content requirements, BST argues, its offer was acceptable.

As discussed below, we conclude that the RFP unambiguously required that ash content be tested at the Army TARDEC laboratory. Accordingly, even if the agency had indicated to BST that use of a commercial laboratory was acceptable, that advice was contrary to the clear terms of the RFP and thus could not reasonably be relied on by BST.

The RFP required two types of tests. Generally, the RFP stated that “[b]efore submitting an offer, [an] offeror shall have the coal they are offering tested by the U.S. Army TARDEC Petroleum Laboratory.” RFP, SF-1449 Addendum, at 1. The RFP then stated, in the evaluation factors for award, that reports issued by the Army TARDEC laboratory would be used to determine whether the offered coal meets all requirements of the specifications. RFP at 52. The RFP also explained, however, that the Army TARDEC laboratory was not equipped to conduct tests for all specifications; thus, “offerors must submit a commercial test report, with the initial offer, indicating the mercury and chlorine content for all mines/seams proposed,” and “a commercial test report is required to be submitted . . . indicating the Base/Acid Ratio and Fouling Factor for each mine/seam proposed.” *Id.*

Read as a whole, we think that the unambiguous meaning of the RFP is that the Army TARDEC laboratory test reports would be utilized to determine compliance with all specifications stated in the solicitation, except for those specifically identified as beyond the testing capability of the Army TARDEC laboratory; for those specifications, commercial laboratory tests were required. Since ash content was not a specification that was identified as requiring a commercial test, we conclude that the RFP required that it be demonstrated on the basis of an Army TARDEC laboratory report.

BST asserts that the RFP was ambiguous because it failed to prescribe a procedure for the retest of a coal sample that initially failed to meet a minimum specification.

In our view, the fact that the RFP did not specifically address the issue of a retest does not render the RFP ambiguous. On the contrary, the RFP made clear that in order for a proposal to be acceptable, an offeror had to submit a test report from the Army TARDEC laboratory showing that its coal met the RFP ash content specification. There simply is no indication in the RFP that the requirement to demonstrate compliance through a report from the Army TARDEC laboratory would change depending on the stage at which the testing for ash content occurred. The RFP makes no distinction between initial testing and, for example, a retest after an initial failure, as was the case with the protester's offered coal; regardless of the stage at which the testing occurred, the RFP called for the offerors to demonstrate compliance through an Army TARDEC laboratory report.

Based on its assertion that the RFP was ambiguous regarding the procedure for retesting, BST argues that it was reasonable for it to presume that a commercial laboratory test would be acceptable in view of statements allegedly made by agency officials during discussions suggesting that its commercial laboratory report was acceptable. This argument is unpersuasive because BST's premise is flawed. Where, as here, an RFP provision is unambiguous, an offeror may not rely on oral advice from agency officials that is contrary to the clear terms of the RFP. Spacesaver Storage Sys., Inc., B-298881, Dec. 11, 2006, 2006 CPD ¶ 196 at 3. Thus, even assuming that the record supported the protester's contention that during discussions the agency led it to believe that use of a commercial laboratory was acceptable,¹ BST

¹ Although we need not address BST's assertions regarding the agency's statements during discussions given our conclusion that the RFP was clear, we have reviewed the record and conclude that it does not support BST's position that the agency misled it regarding the retest. The protester's allegations are based on non-contemporaneous affidavits that do not fully support its own allegations, and which are substantially contradicted by the contemporaneous record. For example, BST alleges that during the January 15 discussions call, DESC affirmatively accepted BST's ash test results from a commercial laboratory. Protest at 10. BST further alleges that the agency "affirmatively stated that the sheet from [the commercial laboratory], sent earlier that day, showing the re-testing was sufficient to meet the solicitation requirement for ash." Id. The record demonstrates, however, that the agency did not receive the BST submission containing the commercial laboratory results until 7 hours after the January 15 discussions call, and did not open the submission until January 19. Affidavit of the Contract Specialist at 5; BST Final Comments at 1.

As another example, with regard to the January 6 conversation between DESC and BST, BST's comments state that upon receiving the discussions letter, BST called DESC to inquire about the discrepancy between the Army TARDEC laboratory
(continued...)

could not reasonably rely on such advice as it would have been contrary to the clear terms of the RFP.

In a related argument, BST argues that because DESC had received BST's updated commercial laboratory test report prior to the close of discussions on January 19, DESC was obligated to advise BST that its commercial laboratory report was inadequate. BST asserts that by remaining silent regarding the ash content retesting issue, the agency failed to conduct meaningful discussions with BST.

We disagree. Although discussions must address deficiencies and significant weaknesses identified in proposals, the precise content of discussions is largely a matter of the contracting officer's judgment. American States Util. Servs., Inc., B-291307.3, June 30, 2004, 2004 CPD ¶ 150 at 6. Here, the agency specifically advised BST that the Army TARDEC laboratory report on its offered coal showed an ash content result below the minimum specifications for line item 0004, thus meeting its obligation to alert BST to the deficiency in this area of its proposal. DESC had no further obligation to review (or comment on) proposed proposal modifications submitted during the discussions period. It is the responsibility of the offeror to ensure that the areas of concern highlighted in discussions are adequately resolved in the offeror's final revised proposal. An agency is not obligated to "spoon-feed" an offeror, ITT Fed. Sys. Int'l Corp., B-285176.4, B-285176.5, Jan. 9, 2001, 2001 CPD ¶ 45

(...continued)

results, and an earlier commercial laboratory report showing a higher ash content. BST asserts in its comments that it asked the DESC contract specialist whether it should go back to Mineral Labs, a commercial laboratory, to have its offered coal retested for ash content, to which the contract specialist replied, "yes." Comments at 3. However, the affidavit on which this allegation is based contains a more general version of the conversation. The affidavit states:

I asked [the contracting specialist] if I should have the coal tested again at the Mineral Labs. [The contracting specialist] told me that I should have our coal retested for ash. That was all [the contracting specialist] said about the issue of ash content for CLIN 0004.

Affidavit of BST's President, May 17, 2010, at 2. Even in the context of the affidavit, we do not read the contracting specialist's statement that BST should have its coal retested for ash as an endorsement of the acceptability of a commercial laboratory test, but merely as a statement that the coal needed to be retested in order to meet the specifications in the RFP, as described in the discussions letter.

at 7, nor conduct successive rounds of discussions until all proposal defects have been corrected. OMV Med., Inc., B-281490, Feb. 16, 1999, 99-1 CPD ¶ 38 at 7.

In sum, we conclude that DESC properly evaluated the ash content of BST's offered coal based on the evaluation scheme set forth in the RFP, which required the ash content of coal to be determined on the basis of an Army TARDEC laboratory report. The Army TARDEC laboratory report on BST's offered coal showed that its ash content did not meet the minimum requirement for line item 0004, and, therefore, the agency acted properly in rejecting BST's proposal as technically unacceptable for that line item.²

The protest is denied.

Lynn H. Gibson
Acting General Counsel

² BST raises several additional arguments in its protest. For example, BST argues that DESC improperly evaluated its past performance and price. However, given our conclusion that the agency properly determined BST's proposal to be technically unacceptable, BST's proposal could not form the basis for an award, and BST's remaining arguments are therefore academic. We do not consider academic protests because to do so would serve no useful public policy purpose. Dyna-Air Eng'g Corp., B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132.