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DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-206398 DATE: June 28, 1982

MATTER OF: B&B Chemical Company, Inc.

DIGEST:

1. GAO denies the protest where the protester has not shown by clear and convincing evidence that the award was improper because the Government's use of the particular engine path cleaning compound procured is prohibited under California's local air quality standards.

2. Protest concerning legality of RFP provision regarding labor-surplus-area concerns filed after closing date for receipt of initial proposals is untimely.

B&B Chemical Company, Inc. (B&B), protests the award of a contract to Purex Corporation under request for proposals (RFP) No. DLA400-82-R-0745 issued by the Defense Logistics Agency (DLA) for engine gas path cleaning compound. B&B contends that DLA's award to Purex is improper because the Government's use of the Purex product in California is not permitted under local air quality standards. Purex contends that use of its product in California does not violate local air quality standards. DLA reports that it is not aware of a determination made by a cognizant court or enforcement agency finding that the use of the Purex product violates any local law or regulation. We deny the protest in part and dismiss it in part.

The RFP, as initially issued, called for a particular B&B product in two different size containers to be delivered to various destinations, including some destinations in California; however, Purex submitted a timely response offering its product. The contracting officer knew that the Government had been testing Purex's product to determine its acceptability, so he requested advice from the engineering support activity concerning the acceptability of

150 pounds per day for the facility. The letter also states that Government operators of the cleaning equipment using the selected cleaning compound must apply to South Coast for permits prior to actual usage; then, after a detailed evaluation of the equipment and its operation, South Coast would issue or deny a permit. From that letter, DLA concludes that B&B's contention based on Rule 442(f) is not germane.

DLA reports that it is not aware of any finding by any court or agency charged with enforcing California State or local pollution laws that the Purex product would violate any pollution regulation.

Purex explains that Los Angeles Rule 66 was replaced by South Coast Rule 442. Purex contacted Mr. Wilson of South Coast and, after considering the Purex product and its intended use, he advised Purex that the Purex product complied with South Coast Rule 442(a). At the bid protest conference, Purex stated that the Purex product is used in Los Angeles by two commercial airlines and that their use of the product has not been found violative of local pollution standards.

In reply, B&B argues that there is no indication that the May 24, 1982, South Coast letter was issued by the South Coast department vested with responsibility for interpreting South Coast's rules. B&B states that, by comparison, its information comes from the South Coast department charged with rule interpretation. Alternatively, B&B argues that if Rule 442(a) controls, then the Government would be able to clean no more than 3 engines per day (based on 39.6 pounds per day). B&B further argues that, under South Coast's new facility rule (limiting new uses to 150 pounds per day), the Purex product would limit the Government to four engine washes per day per facility. B&B also argues that DLA has not contested the illegality of the use of the Purex product in other areas of California, like the San Diego Air Pollution Control District, where the rules may be even more restrictive than South Coast's.

We are not persuaded that the record contains clear and convincing evidence demonstrating that the use of the Purex product in California violates local

the Purex product. His technical advisers reported that the Purex product was acceptable; therefore, the contracting officer amended the RFP to permit offers based on either the B&B product or the Purex product. Upon notice of the contracting officer's determination to consider the Purex product as acceptable, B&B protested here. While the protest was pending, DLA made award to Purex based on urgency.

B&B states that about one-third of the quantity being procured is to be delivered to California and that much of that amount would probably be used in California. B&B also states that the use of the Purex product in California would violate various local air quality regulations. In support, B&B refers to a report prepared by the Union Oil Company of California concluding that the sample tested would not meet Los Angeles Rule 66. B&B also refers to a letter dated April 27, 1982, from an official of the South Coast Air Quality Management District, Mr. Don Hopps, who stated that the intended use of the product described in the Union Oil report would violate his agency's Rule 442(f). B&B also states that Mr. Hopps' opinion was shared by his colleague, Mr. Ajay Wilson, and South Coast's laboratory. B&B argues that other local air quality management districts' rules are substantially similar to the South Coast District, so that use of the Purex product in other districts would also be prohibited. B&B notes that Federal law requires non-exempt Federal agencies, including the intended users of the Purex product, to comply with local air pollution requirements. B&B concludes that it was improper for DLA to accept Purex's proposal offering a product, which cannot be used for its intended purpose.

In response, DLA notes that B&B's contention is based on the applicability of South Coast's Rule 442(f), not Los Angeles Rule 66, as B&B initially alleged. In that regard, DLA refers to a letter dated May 24, 1982, from South Coast (which was prepared with some participation by Messrs. Hopps and Wilson) stating that Rule 442(f) is not applicable here, instead Rule 442(a) is applicable. The letter states that, under Rule 442(a), each individual spray station (at one site under one operator) would be limited, in the worst case, to 39.6 pounds per day and up to an increase of a maximum of

air pollution standards. Regarding use of the product in the South Coast District, South Coast representatives seem to have provided B&B, Purex, and DLA with inconsistent and nondefinitive advice. In fact, all parties rely, in part, on the apparently conflicting advice of South Coast's Mr. Wilson. According to the record, there is, at present, no definitive ruling by South Coast, or any court or administrative body in that jurisdiction prohibiting the use of the Purex product. Further, it appears that the contracting officer was aware of the contents of the South Coast letter dated May 24, 1982, prior to making the determination to award to Purex. Thus, it appears that DLA determined that the Government's needs could be satisfied in the South Coast District within the limitation of 150 pounds per day per facility. Moreover, the contracting officer was aware that South Coast expected the Government users to obtain a permit from South Coast prior to using the Purex product. Therefore, we have no basis to conclude that the Government's needs will not be satisfied by using the Purex product in the South Coast District.

Regarding use of the Purex product in California districts other than South Coast, the record contains only (1) B&B's opinion based on its analysis that use of the Purex product would violate local air quality standards in two other districts and (2) DLA's statement that it is unaware of any authoritative ruling supporting B&B's opinion. In our view, the record concerning these districts is far less persuasive than in the South Coast District where we found the evidence to be less than clear and convincing. Accordingly, with regard to these two districts, we have no basis to conclude that the Government's use of the Purex product violates applicable local air quality standards.

Finally, B&B's initial protest raised several other issues; all but one have been rendered academic or have been withdrawn by B&B. The remaining issue concerns the legality of the RFP's provision regarding labor-surplus-area concerns. That aspect of B&B's protest, filed on February 10, 1982, relates to an alleged impropriety in the RFP, which was apparent prior to the closing date for receipt of initial proposals on November 30, 1981. This aspect of B&B's protest is untimely under our Bid Protest Procedures

and will not be considered on the merits because it was not filed prior to the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(b)(1) (1981).

The protest is denied in part and dismissed in part.

Harry R. Van Cleve
for Comptroller General
of the United States