UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: April 25, 2007

CBCA 500

NACHTMANN ANALYTICAL LABORATORY, INC.,

Appellant,

v.

INTERNATIONAL BOUNDARY AND WATER COMMISSION,

Respondent.

Ahmed Modabber, Lab. Director of Nachtmann Analytical Laboratory, Inc., Davis, CA, appearing for Appellant.

Susan E. Daniel and Allen Thomas, Legal Office, United States Section, International Boundary and Water Commission, United States and Mexico, El Paso, TX, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **GOODMAN**.

DANIELS, Board Judge.

In this decision, we uphold the determination of a contracting officer of the International Boundary and Water Commission (IBWC) to terminate for cause a contract between that commission and Nachtmann Analytical Laboratory, Inc. (Nachtmann). We agree with the contracting officer that Nachtmann failed to meet one of the requirements specified in the contract as necessary for performance and that this failure constituted a ground for termination. We also find that the IBWC was properly troubled by the fact that Nachtmann misrepresented the way in which it would perform the contract.

Findings of Fact

On February 6, 2006, the IBWC solicited proposals for the conduct of water and sediment laboratory analyses for the purpose of monitoring water in the Rio Grande Basin. Appeal File, Exhibit 2 at 2, 65. Among the "laboratory requirements" of the solicitation was that "[t]he Contractor shall have National Environmental Laboratory Accreditation Conference (NELAC) certification by the time of contract award and acquire NELAC certification through the state of Texas when designated by the state." *Id.* at 66.

Nachtmann submitted an offer in response to the IBWC's solicitation. Appeal File, Exhibit 5.

On March 21, in response to a request from the IBWC, Nachtmann stated that it was "certified by US Environmental protection agency [sic], certification #CA00171 and State of Calif[ornia] certification #1419 for these analyses." Nachtmann also told IBWC, "All your proposed works will be performed in our lab. by our chemist and no part will be subcontracted." Appeal File, Exhibit 7.

On March 30, the IBWC awarded the contract to Nachtmann. Appeal File, Exhibits 16, 17. The contract contained the same "laboratory requirement" regarding NELAC certification as the one contained in the solicitation. *Id.*, Exhibit 17 at 55. The contract also contained a clause entitled "Termination for cause," which provided, "The Government may terminate this contract . . . for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance." *Id.* at 59.

The contracting officer who awarded the contract designated Wayne Belzer as her contracting officer's representative for this contract. Appeal File, Exhibits 14, 15, 19. Nachtmann provided to Mr. Belzer an environmental laboratory certification granted to it by the State of California Department of Health Services Environmental Laboratory Accreditation Program (ELAP). That department explained that it had certified Nachtmann as an environmental testing laboratory for various fields of testing, pursuant to a California law. *Id.*, Exhibits 23, 24.

Mr. Belzer conducted a site audit of Nachtmann's laboratory on May 9, 2006. Following the audit, Mr. Belzer wrote a memorandum to the contracting officer. In the memorandum, he said that during the audit, "several outstanding discrepancies were noted in the laboratory practices. These practices are not consistent with the contract requirements." He concluded, "Because of these discrepancies, the ability of the laboratory to properly perform required analyses is in question and the potential for contamination of

the samples is high." He asked that Nachtmann "be removed from the contract laboratory list." Appeal File, Exhibit 29.

By letter dated June 5, the contracting officer informed Nachtmann of the alleged discrepancies identified by Mr. Belzer and asked that the laboratory "provide evidence of correction . . . by no later than June 12." Appeal File, Exhibit 30. Nachtmann responded with a letter dated June 12, asserting that "[t]he discrepancies you have cited in your letter may be true, but they are very minor and trivial. These discrepancies have no negative influence in generating reliable and defensible analytical data." *Id.*, Exhibit 31.

On June 23, the parties engaged in a telephonic conference regarding the matters addressed in their June 5 and 12 correspondence. During the course of this conference, the contracting officer noted, Nachtmann's laboratory director "informed this agency that Nachtmann is not National Environmental Laboratory Accreditation Conference (NELAC) certified." Appeal File, Exhibit 34 at 1.

Following this conference, the contracting officer determined that it was in the best interest of the Government to terminate the contract "at no cost settlement agreement." She explained, "[T]his is a requirements contract where the contractor has not been issued a task order, therefore, no work has been performed or costs incurred which reasonably could have been avoided. Also the Government has not suffered any damages as a result of this termination." Appeal File, Exhibit 34. The contracting officer said that the decision to terminate was based on Nachtmann's failure to meet specifications mandated by the contract. First, the contractor "failed to provide evidence of compliance and/or corrective measures for the list of discrepancies provided by the Government" on June 5. Second, Nachtmann was not certified by NELAC. *Id.*

By letter dated July 6, the contracting officer asked Nachtmann to sign a contract modification terminating the contract at no cost to either party. Appeal File, Exhibit 35. Nachtmann declined to sign the modification. *Id.*, Exhibit 36.

By letter dated August 15, the contracting officer asked Nachtmann to reconsider its decision not to sign the modification. She also notified the contractor --

> that the Government considers failure by Nachtmann to hold NELAC certification a condition that prevents performance of the contract . . . . Therefore, unless, this condition is cured within 10 days after receipt of this notice, the Government may terminate for default under the terms and conditions of . . . this contract.

Appeal File, Exhibit 38 at 3. In this letter, the contracting officer also explained the importance of the requirement for NELAC certification:

> The . . . contract is for the State of Texas Clean Rivers Program, which is performed for and wholly funded by the State of Texas. As was clearly set forth in [the] contract, the State of Texas has adopted NELAC as the program with which all laboratories must comply. The State of Texas will not accept our testing results if the laboratory is not NELAC certified.

Id. at 2.

In response, Nachtmann maintained that its certification from the State of California "is just as good as State of Texas certification" and that Mr. Belzer had "indicated in effect" that the certifications were equivalent. Appeal File, Exhibit 40 at 2. Nachtmann also stated, "It was our intentions [sic], when we participated in this contract, that any analyses that we do not have the required certification, to subcontract to another certified lab." *Id.* Nachtmann reiterated its determination not to sign the proposed modification terminating the contract at no cost to either party. *Id.* at 3.

On September 18, 2006, the contracting officer terminated the contract under the contract's Termination for Cause clause. The termination was for failure of the laboratory to have, or even to intend to obtain, NELAC certification. Appeal File, Exhibit 41; *see also id.*, Exhibits 42, 43.

Discussion

When the Government contracts for the provision of goods or services, it is entitled to receive what it has contracted for. *R. B. Wright Construction Co. v. United States*, 919 F.2d 1569, 1573 (Fed. Cir. 1990); *Cascade Pacific International v. United States*, 773 F.2d 287, 291 (Fed. Cir. 1985). To permit a contractor to provide something different -- even if similar -- would have two unfortunate consequences. First, it would allow the contractor to change the contract's terms to suit its whim. Second, it would distort the competitive procurement process by allowing one firm to underbid its competitors by basing its proposal on less expensive factors and later alleging that what it offered what just as good as what the Government demanded. *Farwell Co. v. United States*, 148 F. Supp. 947, 949-50 (Ct. Cl. 1957); *see also Planning Research Corp. v. United States*, 971 F.2d 736 (Fed. Cir. 1992).

The IBWC maintains that Nachtmann failed in three ways to provide the Government what it contracted for under the contract at issue here. First, Nachtmann did not meet the requirement that it "have National Environmental Laboratory Accreditation Conference

(NELAC) certification by the time of contract award and acquire NELAC certification through the state of Texas when designated by the state." Second, Nachtmann misrepresented that it would perform all contract work itself. Third, the contractor's laboratory was plagued by many deficiencies in procedures and practices that jeopardized the integrity of test results.

Under the contract's Termination for Cause clause, the IBWC could terminate the contract for cause "if the Contractor fail[ed] to comply with any contract terms and conditions." Nachtmann's lack of NELAC certification was, as the contracting officer recognized, a failure to comply with a material contract term. The commission therefore had the "good grounds" and "solid evidence" necessary to support a termination for cause. *H & H Bentonite & Mud, Inc.*, GSBCA 10688, 91-3 BCA ¶ 24,334, at 121,576; *General Floorcraft, Inc.*, GSBCA 10493, 91-2 BCA ¶ 24,023, at 120,287 (citing *R. B. Wright Construction* and *J. D. Hedin Construction Co. v. United States*, 408 F.2d 424, 431 (Ct. Cl. 1969)); *UMM, Inc.*, ENG BCA 5330, 87-2 BCA ¶ 19,893, at 100,624 (upholding termination for default based on "manifestly deficient" insurance certification).

NELAC (now subsumed into the NELAC Institute) was a voluntary association of state and federal agencies whose purpose was to adopt and promote mutually acceptable performance standards for the operation of environmental laboratories. *See* http://www.nelac-institute.org; http://209.51.152/6 (last visited Apr. 23, 2007). The National Environmental Laboratory Accreditation Program (NELAP), which operated under NELAC, is responsible for the evaluation of accrediting authority programs. *Id.* The California Environmental Laboratory Program (ELAP) is an accrediting authority recognized by NELAP. *See* http://www.dhs.ca.gov/ps/ls/elap/html/nelapinfo.htm (last visited Apr. 23, 2007). NELAP and ELAP accreditation are administered separately, however. *Id.* There are significant differences between the two; NELAP standards are more stringent in terms of number, frequency, and detail of tests required to gain certification, and NELAP accreditation is recognized in all states whereas ELAP accreditation is recognized only in California. Respondent's Brief, Exhibit 2. Nachtmann is certified by the State of California, but not by NELAC. *Id.*, Exhibit 4 (list from http://www.dhs.ca.gov/ps/ls/ELAP/html/lablist.htm). Thus, the certification Nachtmann has is different from (and possibly inferior to) the certification it was required to have in order to perform this contract.[1] Further, by not

[1] Whatever Mr. Belzer may have said that Nachtmann construed to be an "indicat[ion] in effect" to the contrary of this conclusion is of no importance. Mr. Belzer's appointment as contracting officer's representative conveyed no authority to modify or waive contract requirements. Appeal File, Exhibit 15. Nor, of course, could his comments change (continued...)

having the proper certification, any tests Nachtmann might perform would not meet an important purpose of the testing -- being recognized by the State of Texas.

In its brief, the IBWC also expresses concern about Nachtmann's misrepresentation as to how it would perform. Before award, the contractor told the commission that "[a]ll your proposed works will be performed in our lab. by our chemist and no part will be subcontracted." After award, when the commission questioned Nachtmann's ability to conduct testing in the absence of a NELAC certification, the contractor responded, "It was our intentions [sic], when we participated in this contract, that any analyses that we do not have the required certification, to subcontract to another certified lab." Bait-and-switch tactics taint the bidding and evaluation process, so these misrepresentations are treated severely. *Planning Research Corp*., 971 F.2d at 740-41. Nachtmann's promising to do the work itself while intending to subcontract it may or may not have been a sufficient basis, standing alone, for terminating the contract for cause. It was surely an additional reason, however, for the contracting officer to doubt the contractor's trustworthiness.

The parties have not developed the record as to the IBWC's alternative ground for terminating the contract, the assertion that the contractor's laboratory was plagued by many deficiencies in procedures and practices that jeopardized the integrity of test results. We therefore do not decide whether the deficiencies, to whose existence Nachtmann admits, were sufficiently grave as to justify, by themselves, the termination decision. Even if they were not, however, the commission had other good cause for terminating the contract.

Decision

The appeal is **DENIED**.

_____
STEPHEN M. DANIELS
Board Judge

---

[1] (...continued)
the facts on which the conclusion is based.

We concur:

_____
ANTHONY S. BORWICK
Board Judge

_____
ALLAN H. GOODMAN
Board Judge