UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT GRANTED IN PART; APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT DENIED: January 10, 2024

CBCA 7704

CLEAN HARBORS ENVIRONMENTAL SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Anuj Vohra and Eric Kyle Herendeen of Crowell & Moring LLP, Washington, DC, counsel for Appellant.

Tami S. Hagberg, Eno-Obong J. Essien, and Anastasia M. Hautanen, Office of the General Counsel, Department of Health and Human Services, Washington, DC, counsel for Respondent.

Before Judges **LESTER**, **GOODMAN**, and **O'ROURKE**.

GOODMAN, Board Judge.

Appellant, Clean Harbors Environmental Services, Inc. (Clean Harbors or appellant), appeals the termination for cause of a purchase order with respondent, the Department of Health and Human Services. The parties have filed cross-motions for partial summary judgment on two issues. We grant respondent's motion and deny appellant's motion as to the first issue, and we do not resolve the second issue because the parties are in agreement as to its resolution.

Background

In March 2022, respondent, acting through the Indian Health Service, issued a request for quote (RFQ) entitled Combined Synopsis/Solicitation IHS1447316, seeking a contractor to provide waste disposal services at Claremore Indian Hospital (CIH or the hospital) for a period of performance from April 1, 2022, through March 31, 2023. Exhibit 1.[1]

The RFQ requested prices for three contract line item numbers (CLINs). CLIN 0001 required the provision of "standard service pharmacy waste program in accordance with the attached terms and conditions"; CLIN 0002 required the provision of "non-standard pharmacy waste disposal services as needed in accordance with attached terms and conditions for each year"; and CLIN 0003 required the contractor to provide "[a]dditional 18 gallon container[s] after the initial 8 containers." Exhibit 1 at 0008. In addition, the RFQ contained the following language relevant to the resolution of the parties' motions:

> Vendor Requirements: SEE ATTACHED Statement of Work (SOW)
>
> . . . .
>
> Evaluation: FAR [(Federal Acquisition Regulation)] 52.212-2 [(48 CFR 52.212-2 (2021))] Evaluation –
> (a) The Government will award a firm fixed price contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered. The following factors shall be used to evaluate offers:
>
> Lowest Price Technically Acceptable
> – Offers shall be a pharmacy waste disposal contractor.
> – Vendor shall pick up waste according to SOW.
>
> VENDORS SUBMITTING OR EQUAL ITEMS MUST SUMBMIT [sic] DESCRIPTITVE [sic] LITERATURE SHOWING HOW THEIR PRODUCT MEETS OR EXCEEDS THE REQUIREMENTS BEING SOLICITED – INCLUDES SERVICE CONTRACT.

Id. The solicitation also provided that the terms and conditions identified in the solicitation would be those upon which the contract would be based and that other terms and conditions would not be accepted:

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[1] Exhibits are in the appeal file.

> This solicitation will result in a firm fixed price purchase order pursuant to the terms and conditions below. Terms and conditions other than those stated will not be accepted. The above pricing is all inclusive.
>
> PROVISIONS: The following FAR provisions apply to this solicitation [a list of FAR provisions followed.]

Id. at 0009.

The RFQ also contained a five-page statement of work. Included in the statement of work was the following language relevant to the resolution of the parties' motions:

> 4. LEVEL OF EFFORT
>
> 4.1. The contractor shall pickup and dispose of pharmacy waste, hazardous waste, universal waste, radioactive waste and E-waste for the Claremore Indian Hospital (CIH) upon request.
>
> 4.2. The contractor shall provide a manifest and labeling for all waste picked up from CIH.

Id. at 0012.

> 10. DELIVERABLES/PERFORMANCE METRIX
>
> 10.1. The contractor shall pickup and dispose of pharmacy waste, hazardous waste, universal waste, radioactive waste and E-waste for the Claremore Indian Hospital (CIH) upon request. This will be reported with every scheduled pick up requested from CIH Safety Office.
>
> 10.2. The contractor shall provide a manifest and labeling for all waste picked up from CIH. A manifest will be sent with receiving after every scheduled pickup.

Id. at 0014.

On March 17, 2023, appellant submitted an initial quote in response to the RFQ. Exhibits 2-7. On March 31, 2023, appellant submitted a second quote and attached an unsigned copy of its standard environmental services agreement (ESA). Exhibits 11, 15. Appellant states that "the parties intended for Clean Harbors' waste profile requirement to be included in the Contract and acted accordingly." Appellant's Opposition to Respondent's

Motion for Partial Summary Judgment and Cross-Motion for Partial Summary Judgment at 22. However, appellant also states that "[t]he waste profile requirement was not part of CIH's RFQ or any other government-issued document; it exists only in Clean Harbors' ESA." *Id.* at 23-24.

An email dated March 31, 2023, from appellant's health care manager to the CIH contract specialist states, "I have . . . attached the ESA we discussed . . . ." Exhibit 16 at 0055.

On April 4, 2022, following additional exchanges between appellant's health care manager and the CIH contract specialist, appellant submitted a document entitled "Combined Synopsis Solicitation–Clean Harbors.docx" containing its final pricing. Exhibits 22, 23. This document was two pages, verbatim from the RFQ, with the pricing inserted for the period from April 1, 2022, through March 31, 2023, for the three CLINs as follows:

CLIN	DESCRIPTION	QTY	UNIT	UNIT PRICE	TOTAL
0001	04/01/2022 – 03/31/2023 – The contractor shall provide standard service pharmacy waste program in accordance with the attached terms and conditions.	12	EA	$793.00	$9516.00
0002	04/01/2022 – 03/31/2023 – The contractor shall provide non-standard pharmacy waste disposal services as needed in accordance with attached terms and conditions for each year. **Estimated 1 Annual T&D pickup for all universal waste streams**	12	EA	$175.00	$2100.00
0003	Additional 18 gallon container after the initial 8 containers	12	EA	$37.00	$444.00

Exhibit 23 at 0066. The ESA was neither referenced in nor otherwise attached to the April 4 submission.

On April 27, 2022, the contracting officer issued purchase order no. 75H71122P00420 (order), Standard Form 347, to appellant. Exhibit 30. Box 8 specified "PURCHASE REFERENCE YOUR 4/4/22 Quote IHS1447316." *Id.* at 0075. The second page of the order identifies the three CLINs; identifies the unit price and total dollar amount of each

CLIN, which matches the pricing contained in appellant's quote attached to the order; and states the performance period as June 1, 2022, through May 31, 2023. *Id*. at 0076. In addition, language was added to the purchase order's description of the supplies and/or services to be provided under each CLIN to indicate expressly that the work to be provided will be "according to the attached Statement of Work (SOW)" (CLIN 0001), "in accordance with attached Statement of Work (SOW)" (CLIN 0002), and "per attached Statement of Work" (CLIN 0003). *Id.*

The purchase order also contained a section identifying the documents that comprised the parties' contract:

> **SECTION D – CONTRACT DOCUMENTS, EXHIBITS AND ATTACHMENT**
>
> | Document No. | Title | Date | # of Pages |
> |---|---|---|---|
> | 1 | Statement of Work | | 5 |
> | 2 | Quote | | 2 |

Exhibit 30 at 0082. Both of those documents were attached to and were a part of the purchase order. The five-page statement of work attached to the order was identical to the statement of work in the RFQ. *Id*. at 0083-87. The two-page quote attached to the order was appellant's two-page April 4, 2022, "Combined Synopsis Solicitation–Clean Harbors.docx" document, which was also referenced in Box 8(a) of the Standard Form 347. *Compare* Exhibit 23 at 0066-67 *with* Exhibit 30 at 0088-89. Nowhere in the purchase order was the ESA referenced, nor was it attached to the purchase order.

From May through August 2022, representatives of appellant and CIH communicated by email attempting to arrange for appellant to fulfill its obligations under the order and pick up and dispose of pharmaceutical waste. During this period, appellant's representatives requested that CIH personnel complete waste profiles specifying the waste to be picked up. Appellant did not pick up any waste during this period. Complaint ¶¶ 38-72.

On August 18, 2022, respondent's contracting officer issued a cure notice, stating that appellant's failure to pick up pharmaceutical waste was "endangering the performance of the contract." Exhibit 80 at 0292. On October 27, 2022, respondent's contracting officer issued a show cause notice, stating that appellant had failed to cure the conditions identified in the previous cure notice. Exhibit 103.

On November 9, 2022, appellant sent to CIH quote 4090034 for pickup of waste "reflecting new pricing" and requested that the quote be signed and returned. Exhibits 110,

111. When CIH did not sign the quote, appellant retransmitted it on November 15, 2022. Exhibits 112, 113. CIH did not respond to the quote. Complaint ¶¶ 82-85.

On November 16, 2022, CIH sent to appellant a draft modification of the order terminating the contract for cause. Exhibits 114, 115. In response, appellant again sent CIH quote 40900034, requesting that it be signed and returned. Exhibit 116; Complaint ¶ 88.

On December 15, 2022, respondent's contracting officer issued modification P00001, terminating the order for cause. Exhibits 126, 127. Appellant appealed the termination to this Board.

Discussion

Respondent's motion for partial summary judgment seeks resolution of two legal issues: (1) whether appellant's ESA was incorporated into the order so that respondent was required to complete waste profiles before appellant was obligated to pick up the waste, and (2) whether there was a legal requirement for the hospital to sign appellant's new quote (quote 4090034) before appellant was obligated to provide the waste removal services. Respondent asserts that the ESA was not incorporated into the order and therefore there was no obligation to first complete the waste profiles, and the hospital had no duty to sign the new quote. Appellant's's cross-motion for partial summary judgment only seeks resolution of the first issue. Appellant asserts that the ESA was incorporated into the order and that respondent therefore was required to complete waste profiles prior to pickup of waste. As to the second issue, however, appellant maintains that it never claimed CIH was legally obligated to sign the new quote and that respondent is requesting resolution of an issue that appellant never asserted.

The ESA

Section D of the order listed the documents that were a part of the contract – the statement of work and appellant's April 4, 2022, quote. The two pages from the RFQ upon which appellant inserted its pricing and submitted as its quote on April 4, 2022, included the following statement from the RFQ:

> VENDORS SUBMITTING OR EQUAL ITEMS MUST SUMBMIT [sic] DESCRIPTITVE [sic] LITERATURE SHOWING HOW THEIR PRODUCT MEETS OR EXCEEDS THE REQUIREMENTS BEING SOLICITED – INCLUDES SERVICE CONTRACT.

Appellant maintains that this language incorporates its ESA and all of its terms into the order, even though the ESA was neither attached to the order nor specifically referenced by name

anywhere in the order. It argues that the term "service contract" in the quoted language must refer to its ESA, given that appellant submitted a copy of the ESA with its proposal and the word "include" means that the service contract, and therefore the ESA, was incorporated in the order.

Appellant's position lacks merit. The language of the order does not incorporate the ESA or any of its terms into the order. Appellant's quote, attached to the order, contained the following clear and unambiguous statement from the RFQ:

> This solicitation will result in a firm fixed price purchase order pursuant to the terms and conditions below. **Terms and conditions other than those stated will not be accepted.**

Exhibit 1 at 0009 (emphasis added). Thus, according to the plain language of the RFQ, the terms and conditions of the RFQ would not be varied.

The language concerning submission of descriptive literature relied upon by appellant was clearly not meant to incorporate terms and conditions of descriptive literature, including a vendor's service contract, but to request information to show how the vendor could meet the requirements of the RFQ. The direction to include a service contract is only a request to include a service contract in the descriptive literature. While directing "vendors" submitting "OR EQUAL ITEMS" to submit descriptive literature, the language does not say that such literature will be included or become part of the purchase order if the quote is accepted. The descriptive literature was to be submitted to show how an "or equal item" meets or exceeds the requirements being solicited. There is nothing in the correspondence before the order was issued to indicate that appellant was submitting an "or equal item" or otherwise deviating from the requirements of the RFQ.

Further, when the purchase order was issued, the language describing the supplies and/or services being purchased through each of the three CLINs expressly indicates that the purchased work will be provided "according to the attached Statement of Work (SOW)" (CLIN 0001), "in accordance with attached Statement of Work (SOW)" (CLIN 0002), and "per attached Statement of Work" (CLIN 0003), Exhibit 30 at 0076, not the ESA. The statement of work contained no language requiring the agency to complete waste profiles before the contractor had an obligation to begin disposing of the waste.[2] The order did not

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[2] As mentioned previously, appellant states that "[t]he waste profile requirement was not part of CIH's RFQ or any other government-issued document; it exists only in Clean Harbors' ESA." Appellant's Opposition to Respondent's Motion for Partial Summary Judgment and Cross-Motion for Partial Summary Judgment at 23-24.

refer to the ESA, did not attach it as a contract document, and did not in any way incorporate the ESA or any of its terms into the order.

The Court of Appeals for the Federal Circuit has made clear that the type of language used in the purchase order at issue here, including the absence of any language expressly and clearly incorporating an ESA into the purchase order, precludes us from doing so:

> To incorporate material by reference, "the incorporating contract must use language that is express and *clear*, so as to leave no ambiguity about the identity of the document being referenced, nor any reasonable doubt about the fact that the referenced document is being incorporated into the contract." *Northrop* [*Grumman Information Technology, Inc. v. United States*], 535 F.3d [1339,] 1344 [(Fed. Cir. 2008)]. Said differently, "the language used in a contract to incorporate extrinsic material by reference must explicitly, or at least precisely, identify the written material being incorporated and must clearly communicate that the purpose of the reference is to incorporate the referenced material into the contract (rather than merely to acknowledge that the referenced material is relevant to the contract, e.g., as background law or negotiating history)." *Id.* at 1345; *see also Callaway Golf Co. v. Acushnet Co.*, 576 F.3d 1331, 1346 (Fed. Cir. 2009) (A "mere *reference* to another [document] is not an *incorporation* of anything therein." (citation omitted)).

CSI Aviation, Inc. v. Department of Homeland Security, 31 F.4th 1349, 1355 (Fed. Cir. 2022). "[T]he incorporating document must not only refer to the incorporated document, it must bring the terms of the incorporated document into itself as if fully set out." *Sucesion J. Serralles, Inc. v. United States*, 46 Fed. Cl. 773, 785 (2000) (*quoted with approval in Northrop Grumman*, 535 F.3d at 1347). While appellant submitted a copy of its ESA with its second proposal, and there is an email from appellant's health care manager stating that the ESA was "discussed," there is no evidence as to how or if respondent reviewed the ESA in the evaluation process, and there is no language in the executed purchase order that clearly and expressly brings the ESA into the purchase order to create additional terms to the parties' agreement.

In fact, the sample ESA that appellant provided to respondent contains terms that respondent's contracting officer could not have accepted, and nothing in the record shows that the parties ever addressed or attempted to define how they would deal with conflicts between the ESA and the actual purchase order language and illegalities that the ESA would create if adopted. For example, the ESA provides that it "shall be governed and construed in accordance with the Laws of the Commonwealth of Massachusetts and [that] the parties agree to submit to the jurisdiction of the Commonwealth of Massachusetts for any disputes arising under this [ESA]." Exhibit 15 at 0052. Yet, as made clear in the commercial items

clause incorporated by reference into the purchase order, Exhibit 30 at 0077 (FAR 52.212-4 (Oct. 2018)), any disputes between the parties would be resolved in accordance with the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109 (2018), which requires the application of federal law and resolution, if necessary, by the boards of contract appeals or the U.S. Court of Federal Claims. In addition, the fifteen-day payment terms of the ESA, *see* Exhibit 15 (Article 5), directly conflict with the thirty-day period for payment expressly identified in the actual purchase order, Exhibit 30 at 0074. The ESA also purports to provide that, although the agreement would have an initial term of one year, it "shall continue in effect from year to year thereafter" unless a party terminates it "upon thirty (30) days prior written notice," Exhibit 15 (Article 1), a provision that not only is inconsistent with the actual express terms of the written purchase order but would violate general federal appropriations law that preclude such arrangements. *See Mach I AREP Carlyle Center LLC*, ASBCA 59821, 16-1 BCA ¶ 36,389, at 177,418 (discussing *Leiter v. United States*, 271 U.S. 204, 207 (1926)). The inclusion in the ESA of so many provisions that would have to be stricken for it to be enforceable against the United States and that would create direct conflicts with the actual express terms of the purchase order, without any evidence that the parties considered and dealt with those problems, further supports respondent's position that the ESA could not have been incorporated into the purchase order.

Our resolution of whether the ESA was incorporated into and became a part of the purchase order does not resolve the main issue in this appeal: whether the contracting officer's decision terminating the purchase order for cause should be upheld. The statement of work incorporated into the purchase order contains certain language about the necessity of the contractor providing "a manifest and labeling for all waste picked up from CIH," and the record is unclear regarding to the extent to which the parties claim that those provisions are relevant to the viability of the termination decision. These issues are not a part of the parties' cross-motions, and we do not address or resolve those issues here. In response to the parties' cross-motions, we find only that the ESA was not incorporated into and did not become a part of the purchase order.

The New Quote

Respondent's motion requests a determination whether there was a legal requirement for the hospital to sign appellant's quote 4090034 before appellant had an obligation to provide the pharmaceutical and related waste removal services required by the terms and conditions of the order.

Appellant maintains that respondent mischaracterizes its position relating to this quote. Appellant alleges that statements in its complaint were "not to suggest that CIH was 'legally required' to sign Quote No. 4090034 before waste disposal services could commence. . . . Accordingly, [respondent]'s argument here responds to a position Clean

Harbors has never taken . . . ." Appellant's Opposition to Respondent's Motion for Partial Summary Judgment and Cross-Motion for Partial Summary Judgment at 19.

This position seems inconsistent with appellant's email transmitting the new quote to the hospital "reflecting new pricing," even though the order was a firm-fixed-price purchase order and requesting that the new quote be signed and returned. Even so, as appellant now states that it is not its position that respondent was legally required to sign the new quote, there is no dispute as to this issue.

Decision

As we find that the ESA was not incorporated into the order, respondent's motion for partial summary judgment is **GRANTED**, and appellant's motion for partial summary judgment is **DENIED** as to this issue. As the parties agree that there was no legal requirement for the hospital to sign the new quote, that issue is moot.

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

We concur:

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge