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Decision

Matter of: MMI-Federal Marketing Service Corp.

File: B-297537

Date: February 8, 2006

Ron R. Hutchison, Esq., Doyle & Bachman LLP, for the protester.
Jennifer A. Kerkhoff, Esq., Troutman Sanders LLP, for Iguana, LLC, an intervenor.
Marit D. Bank, Esq., Defense Logistics Agency, for the agency.
Jonathan L. Kang, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where the agency unreasonably determined that awardee's quotation demonstrated compliance with the Berry Amendment's domestic production requirements, in light of countervailing pre-award information that the awardee would not comply.

DECISION

MMI-Federal Marketing Service Corp. protests the award of a contract to Iguana, LLC under request for quotations (RFQ) SPO406-05-Q-T784, issued by the Defense Logistics Agency, Defense Supply Center Richmond (DSCR) for pop-up bednets impregnated with an insecticide. The protester contends that the agency unreasonably relied upon information provided by the awardee indicating that it would comply with the RFQ's domestic production restrictions.

We sustain the protest.

BACKGROUND

The agency sought quotations for the supply of 25,000 bednets, which are mesh screen fabric covers that surround a user's sleeping area. The required bednets are manufactured from synthetic fabrics and coated synthetic fabrics that have been impregnated with permethrin, an insecticide. The RFQ stated that the bednet manufacturing process must comply with the requirements of 10 U.S.C. § 2533a, commonly referred to as the "Berry Amendment." RFQ at 2. The Berry Amendment generally restricts the Department of Defense's expenditure of funds for certain

articles and items, including synthetic fabric and coated synthetic fabric, to domestically produced products. See 10 U.S.C. § 2533a(b). The RFQ also included the “Preference for Certain Domestic Commodities” clause, Defense Federal Acquisition Regulation Supplement (DFARS) § 252.225-7012, which implements the Berry Amendment. RFP at 11. The RFQ listed two approved sources for the bednets, MMI and Iguana. Id. at 3. Award of a contract under the solicitation was reserved for small business vendors. Id. at 7. Award was to be made based on vendors’ prices and scores derived from the Automated Best Value System (ABVS), and vendors were advised that “[d]elivery is more important than price.” Id. at 18, 2.

Because the use of permethrin is regulated as a pesticide by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136a-y, the RFP required the bednets to carry a label listing valid Environmental Protection Agency (EPA) registration and establishment numbers. RFP at 2-3; see also 40 C.F.R. § 156.10 (EPA labeling requirements). An EPA registration number identifies the company that registered the pesticide product, and an establishment number identifies the location where the final product will be assembled. EPA FIFRA Label Review Manual 3d Ed., available at <http://www.epa.gov/oppfead1/labeling/lrm>. A supplemental distribution number must be identified on the product label, comprised of the registration number and a number identifying the distributor, if the distributor of the pesticide product is not the party to whom the pesticide product is registered. Id.

The agency received quotations from both Iguana and MMI. The agency delayed award of the contract to review information indicating that Iguana would not comply with the Berry Amendment requirements. Contracting Officer’s Statement at 2. In its quotation, Iguana provided a product label that identified EPA registration No. 81041-1-66306 and EPA establishment No. 81041-CHN-001. Agency Report (AR), Tab C, Iguana Quotation, at 27-28. The agency was aware, due to its exchanges with Iguana regarding another procurement for bednets, contract No. SP0406-05-D-4084, that establishment No. 81041-CHN-001 referred to Iguana’s subcontractor in China that would “treat the fabric using a patented process to apply the pesticide.” AR, Tab G, Exh. B, Letter from Iguana to Agency, Apr. 6, 2005, at 1.

Additionally, MMI filed a protest with the Small Business Administration (SBA) challenging the small business status of Iguana in connection with the award of contract No. SP0406-05-D-4084. SBA denied the protest, concluding that Iguana was a small business for purposes of the procurement. AR, Tab L, SBA Size Determination No. 3-2005-57, July 22, 2005, at 4-5. SBA’s decision noted, however, that Iguana’s manufacturing plan involved impregnation of the bednet fabric in China. Id. SBA’s determination quoted the following statement from Iguana regarding its intended manufacturing process:

Domestically produced rip-stop polyester fabric, which is the material used to make the bednets, will be procured in the United States. [Iguana] will also purchase (in the U.S.) Permethrin (pesticide), dye and waterproofing chemicals. These materials will then be shipped to

China where [Bickel Company of Seoul, Korea] will use the EXPEL™ process to impregnate the rip-stop polyester fabric with the pesticide, and will dye and waterproof the fabric. This is because [Bickel's] facility in China is the only facility in the world where the EXPEL™ process is performed. The treated fabric will then be shipped to the U.S., where it will be cut-and-sewn into the appropriate dimensions.

Id.

Based on the information indicating Iguana's plan to use bednet fabric that was impregnated in a facility in China, the agency issued a stop-work order to Iguana under the SP0406-05-D-4084 contract. Contracting Officer's Statement at 2. The agency subsequently issued a cure notice to Iguana for that contract, advising the firm that the agency interpreted the Berry Amendment to require impregnation of the bednet fabric to take place in a domestic facility, and thus did not consider Iguana's intended manufacturing plan of impregnating the bednet fabric in China to comply with the Berry Amendment. AR, Tab F, Cure Notice, at 1-2.

In correspondence with the agency, Iguana confirmed that it intended to impregnate the bednet fabric with permethrin in China. AR, Tab G, Letter from Iguana's Counsel to Agency, Sept. 20, 2005, at 4-7. Although Iguana argued that its intended manufacturing process complied with the Berry Amendment, Iguana agreed to comply with the agency's interpretation of the domestic production requirements.¹ Id. at 3. Iguana proposed a modified manufacturing plan for the SP0406-05-D-4084 contract that would involve impregnation of the bednet fabric with permethrin using Bickel's EXPEL process in a domestic facility. Id. at 7. Iguana advised the agency that, at that time, the only facility where the EXPEL permethrin impregnation process could take place was in China, and that Iguana "may need approximately 60 days to set-up a domestic production facility that is capable of performing the EXPEL™ impregnation process with the necessary EPA registration."² Id. at 8.

¹ Because Iguana agreed to comply with the agency's interpretation of the Berry Amendment, our decision addresses only whether the agency reasonably determined whether Iguana would supply bednets that complied with that interpretation; references to compliance with the Berry Amendment in this decision refer to compliance with the agency's interpretation. We need not, therefore, address the substance of the agency's interpretation of the Berry Amendment.

² During exchanges between Iguana and the agency concerning the cure notice issued for performance of contract No. SP0406-05-D-4084, Iguana indicated that the shift from impregnating the fabric with permethrin in China to impregnating the fabric in a domestic facility would cause a cost increase for which Iguana would seek an equitable adjustment. AR, Tab G, Letter from Iguana's Counsel to Agency, Sept. 20, 2005, at 9-10.

The agency then requested that both Iguana and MMI confirm that their quotations in response to the RFQ at issue in this protest would comply with the Berry Amendment. Contracting Officer's Statement at 3. Iguana replied that all items provided under the RFQ would comply with the Berry Amendment:

[Iguana] certifies all line items delivered on RFQ SP0406-06-Q-T784, if awarded to Iguana will be "B[e]rry Amendment" compliant as interpreted by DSCR. All materials will be domestically produced, treated, cut & sewn and assembled in the United States.

Impregnation will be performed in the United States at a registered EPA establishment [by] either [deleted], Burlington Mills Services or another qualified EPA establishment within the United States.

AR, Tab H, E-mail from Iguana to Agency, Sept. 23, 2005.

In response to the agency's request for additional information regarding Iguana's manufacturing process, Iguana provided a copy of its product label, indicating the EPA registration and establishment numbers for the bednet:

Please see the attached Iguana Bed Net Label. International Textile Group's number is 82689-VA-1; which is Burlington Industries. [Deleted] we will be receiving electronically on Tuesday 27 SEP and as soon as I get it back from our Graphics company I will forward theirs to you.

We have 2 labels one with International Textile Group and one with [deleted]. According to our EPA consultant with Technology Sciences Mr. Bob Stewart, Iguana does not need any additional submissions to the EPA to change the establishment number at any time.

AR, Tab H, E-mail from Iguana to Agency, Sept. 26, 2005. The label provided by Iguana included EPA registration No. 81041-1-66306, which denoted Bickel as the registrant of the EXPEL permethrin impregnation process and Iguana as the supplemental distributor, and establishment No. 82689-VA-1, which denoted Burlington as the final location where the bednets would be assembled. Contracting Officer's Statement at 4; Supplemental AR, Tab 1, Iguana Product Label.

The agency requested that Iguana clarify its previous e-mail: "Tech reply: Which establishment location will be supplying the product? That is the one we need." AR, Tab H, E-mail from Agency to Iguana, Sept. 27, 2005. In response, Iguana stated:

Our label reflects International Textile Groups (Burlington) located in Hurt Virginia; so therefore this will be our source for fabric impregnation. Should another establishment acquire the proper establishment registration and are capable of producing this product

we may decide to use them at that time. If they acquire this ability we then will submit a label with their EPA registration number.

AR, Tab H, E-mail from Iguana to Agency, Sept. 27, 2005.

The label submitted by Iguana on September 26 was approved by an agency technician on September 28. Contracting Officer's Statement at 4; AR, Tab J, Source Selection Decision (SSD), at 2. The agency determined that Iguana had submitted sufficient information to warrant lifting the stop-work order under SP0406-05-D-4084 contract: "The contractor has provided documentation indicating all of the material is now domestically produced and therefore fully complies with the Berry Amendment." AR, Tab J, SSD at 1. The agency also concluded that Iguana's quotation complied with the Berry Amendment. Id. The agency determined that the quotations were rated as follows:

	Iguana	MMI
ABVS Score	90.5	76.6
Price	\$1,999,250	[deleted]

Based on Iguana's lower price and higher ABVS score, the agency awarded the contract to Iguana on October 28. Id. at 2-3. MMI subsequently filed this protest.

DISCUSSION

MMI contends that the agency unreasonably relied upon information provided by Iguana certifying that it would comply with the Berry Amendment in the impregnation of the bednet fabrics with permethrin. As discussed in detail below, the agency requested that Iguana provide information to establish its quotation's compliance with the Berry Amendment, and the agency relied upon this information to determine that Iguana's quotation did comply. It is clear, however, based on our review of the record, that Iguana's submissions did not convey the information that the agency believed was required to establish compliance with the Berry Amendment.

In reviewing an agency's technical evaluation of vendor submissions under an RFQ, we will not reevaluate the quotations; we will only consider whether the agency's evaluation was reasonable and in accord with the evaluation criteria listed in the solicitation and applicable procurement statutes and regulations. American Recycling Sys., Inc., B-292500, Aug. 18, 2003, 2003 CPD ¶ 143 at 4. In determining the technical acceptability of a quotation, an agency may not accept at face value a promise to meet a material requirement, where there is significant countervailing evidence reasonably known to the agency that should create doubt whether the vendor will or can comply with that requirement. See Maritime Berthing, Inc., B-284123.3, Apr. 27, 2000, 2000 CPD ¶ 89 at 9. As relevant here, an agency should go beyond a firm's self-certification regarding domestic manufacturing requirements where the agency has reason to believe, prior to award, that a vendor will not

provide compliant products. See Leisure-Lift, Inc., B-291878.3, B-292448.2, Sept. 25, 2003, 2003 CPD ¶ 189 at 3-4.

The agency acknowledges that it had reason to question Iguana's representation in its initial quotation that it would comply with the Berry Amendment requirements, in light of the facts that gave rise to the stop-work order and cure notice under the SP0406-05-D-4084 contract. Contracting Officer's Statement at 2. The agency contends, however, that it did not rely solely on Iguana's certification that its quotation met the Berry Amendment requirements; rather, the agency requested and received information regarding Iguana's EPA product label and the identity of Iguana's proposed manufacturers. Contracting Officer's Statement at 5. The agency then confirmed that the facility identified by Iguana for permethrin impregnation was in the United States. Id. The agency further explains that during the performance of the SP0406-05-D-4084 contract, the agency had "granted Iguana a delivery extension to set up an arrangement with Bickel to perform the permethrin-impregnation of the bednets at an EPA-registered domestic facility." Agency Supplemental Response, Dec. 20, 2005, at 1. The agency states that it believed that "[s]ince Iguana had not misrepresented its manufacturing plans in the past, DSCR had no reason to question the veracity of Iguana's statements concerning a plan to comply with DSCR's clear direction that impregnation of the bednets must be performed domestically." Id. Thus, the agency argues, its approval of Iguana's product label and confirmation that manufacturers identified by Iguana were domestic was sufficient to determine that Iguana would comply with the Berry Amendment requirements.

For the reasons discussed below, we disagree with the agency's view that the information it received was sufficient to determine that Iguana's quotation demonstrated compliance with the Berry Amendment.

Here, to comply with the Berry Amendment, as interpreted by the agency, the vendor had to establish that the impregnation of the bednet fabric would be performed at a domestic facility. It is clear from the Contracting Officer's Statement and the record that the agency believed, prior to award, that the establishment number listed on Iguana's label indicated the facility at which the impregnation would take place:

The EPA label Iguana provided was from International Textile Group, which Iguana explained was Burlington Industries, with EPA registration number 81041-1-66306 and indicates the place where pesticide-related work will be performed, and appears after the number identifying the company. See Tab I. Iguana's EPA establishment identified a facility in Virginia. A DSCR technician approved the label Iguana provided on September 28, 2005. TAB J.

CO Statement at 4. Although the record does not disclose the method followed by the agency technician in approving Iguana's label, post-protest exchanges between agency counsel and the technician indicate that the approval process involved

checking the establishment and registration numbers in EPA databases to ensure that they were valid. Supplemental AR, Tab 2B, E-mail from Agency Counsel to Agency Technician, Nov. 29, 2005.

However, in response to questions posed by our Office, the agency acknowledged that information from a vendor's product label, particularly the EPA establishment number, would not be sufficient to verify whether that vendor would perform the permethrin impregnation at a domestic facility. The agency's technician explained that "[t]he EPA establishment number of Iguana's label does not reflect that the treatment facility will engage in any kind of pesticide usage" and, therefore, "the registration label that Iguana provided identifying [deleted] taken alone would not be sufficient to establish that permethrin treatment would occur at the establishment facility." Agency Technician's Responses to GAO Questions, Dec. 20, 2005, at 1. The technician further explained that any party seeking to perform impregnation of the bednet fabric for Iguana at a domestic facility would need a relationship with Bickel, as the registrant of the pesticide product. Id. The agency would thus need to "confirm that the EPA has approved the product label, and that a valid relationship exists between the original registrant (Bickel) and the supplemental registrant company [Iguana] to perform the process at the facility identified with the EPA establishment number." Id.

As relevant here, therefore, when a vendor identifies a facility for a particular manufacturing process, such as permethrin impregnation, the fact that the vendor lists an establishment number for the same facility on a product label does not mean that the facility is necessarily capable of performing that process or that the vendor has a valid relationship with a pesticide registrant that authorizes the facility to perform the process with the registrant's pesticide. See id.; see also, 40 C.F.R. § 167.20 (issuance of EPA establishment number is not made in connection with and does not indicate EPA's approval for any particular pesticide use or process).

As Iguana explained to SBA in July 2005 and to the agency in September 2005, Bickel was the registrant for the EXPEL permethrin impregnation process that would be used to produce Iguana's bednet fabric, and the only location where Bickel authorized that process to occur was in China. AR, Tab L, SBA Size Determination No. 3-2005-57, July 22, 2005, at 4-5; Tab G, Letter from Iguana's Counsel to Agency, Sept. 20, 2005, at 4-7. Accordingly, as discussed above, the agency would need to determine whether an agreement existed between Bickel and a domestic facility that authorized that facility to perform the impregnation of the bednet fabric using Bickel's EXPEL process. See Agency Technician's Responses to GAO Questions, Dec. 20, 2005, at 1.

With regard to the relationship between Bickel and a domestic manufacturer, Iguana now states, in response to questions posed by our Office, that Iguana will subcontract with [deleted], and not Burlington, to perform the permethrin impregnation. Iguana Response to GAO Questions, Dec. 22, 2005, at 2. Iguana provided documentation showing a contractual agreement between Bickel and

[deleted] to allow [deleted] to perform the permethrin impregnation using Bickel's EXPEL process. Id. at Exh. A. Iguana stated that [deleted] "has been issued an EPA establishment number ([deleted])" for the facility that it will perform the permethrin impregnation. Iguana Response to GAO Questions, Dec. 22, 2005, at 2. Iguana further stated that it "will subcontract with [deleted] to conduct the permethrin impregnation process." Id. at 3.

The Bickel-[deleted] documentation, however, was signed on November 29, 2005 -- more than two months after the agency determined that Iguana's proposed manufacturing process complied with the Berry Amendment, and a month after the contract was awarded. Iguana Response to GAO Questions, Dec. 22, 2005, Exh. A. The record is not clear when this information was provided to the agency, apart from Iguana's response to our Office. Additionally, as Iguana appears to concede, it had not, as of the end of December, subcontracted with [deleted] to perform the work. See Iguana Response to GAO Questions, Dec. 22, 2005, at 3. In any case, the agency could not have received the evidence of the agreement until after it was signed on November 29, and therefore could not, at the time of award, have made any determination regarding the relationship between Bickel, [deleted] and Iguana. In addition, Iguana provided in its December 22 response to our Office a new EPA product label, which lists Iguana's own facility as the establishment number, indicating that final assembly of the bednets will take place there. Iguana Response to GAO Questions, Dec. 22, 2005, exh. B. The revised manufacturing plan disclosed by the label is different from the plan disclosed by the product label approved by the agency, which indicated that Burlington's facility would be the place of final assembly.

During the agency's attempts to verify that both vendors would comply with the Berry Amendment requirements, Iguana stated that the impregnation would take place at the Burlington facility identified by the establishment number on its label: "Our label reflects International Textile Groups (Burlington) located in Hurt Virginia; so therefore this will be our source for fabric impregnation." AR, Tab H, E-mail from Iguana to Agency, Sept. 27, 2005. Although Iguana stated that it might use another facility if one became available, because the agency's finding of Iguana's compliance with the Berry Amendment was premised on performance by Burlington, we believe that the agency was required, at a minimum, to determine whether Burlington could have done the work. We conclude that there is no evidence in the record that Bickel had (or has) an agreement with Burlington that would have permitted permethrin impregnation at Burlington's facility.³ Because the agreement between Bickel and

³ Iguana provided the agency a Notice of Supplemental Distribution of a Registered Pesticide Product, which indicated that Bickel had authorized Iguana to distribute fabrics treated with Bickel's EXPEL permethrin, under EPA registration No. 81041-1. AR, Tab H, Notice of Supplemental Distribution of a Registered Pesticide Product, (continued...)

[deleted] occurred only after award, the agency could not have relied on that agreement. Furthermore, there is no evidence in the record that the agency has determined whether [deleted]'s new manufacturing arrangements with Bickel will allow Iguana to comply with the Berry Amendment requirements.

In sum, we believe that the agency's evaluation of Iguana's quotation was unreasonable. Because Iguana's quotation as originally submitted disclosed a manufacturing process in China that violated the Berry Amendment requirements, and because Iguana advised the agency that domestic facilities capable of performing the EXPEL impregnation processes were not then available, the agency was required to verify, prior to award, that Iguana's intended manufacturing process would comply with the Berry Amendment. The agency's pre-award determination regarding Iguana's compliance was flawed because the agency relied on inadequate information to satisfy its concerns. Although Iguana identified Burlington as the domestic facility where permethrin impregnation would occur, the establishment number relied upon by the agency to verify Iguana's self-certification of Berry Amendment compliance could not, as the agency acknowledges, have provided sufficient information needed to determine whether Burlington could perform the work. Instead, the agency confirms that, aside from verifying that the EPA establishment number for Burlington was valid, the agency did not determine whether Burlington, Bickel and Iguana had made the required arrangements to establish that Iguana's quotation complied with the Berry Amendment. Furthermore, there is still substantial doubt as to whether post-award changes to Iguana's manufacturing process bring Iguana's quotation into compliance with the Berry Amendment, and the record does not show that the agency has evaluated these post-award changes.

RECOMMENDATION

From the record, it is clear that the agency did not have a reasonable basis at the time of award to conclude that Iguana would perform the contract in accordance with the Berry Amendment. We recommend that the agency reassess, in light of the facts discussed above, the compliance of Iguana's quotation with the agency's interpretation of the Berry Amendment requirements.

We additionally recommend that the agency reimburse the protester the reasonable costs of pursuing its protest, including reasonable attorneys' fees. The protester's certified claim for costs, detailing the time expended and the costs incurred on this

(...continued)

Sept. 28, 2004. This notice, however, does not authorize Iguana or any other party to perform impregnation of fabrics with Bickel's EXPEL permethrin process.

issue, must be submitted to the agency within 60 days of receiving this decision.
4 C.F.R. § 21.8(f)(1) (2005).

The protest is sustained.

Anthony H. Gamboa
General Counsel