



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: December 19, 2012

CBCA 2782, 2832

LACEY NEWDAY CONSULTING, LLC,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Sidney Lacey, Director and Principal, Lacey Newday Consulting, LLC, Houston, TX, appearing for Appellant.

William D. Robinson and Oleta Thomas Vassilopoulos, Office of General Counsel, Federal Bureau of Prisons, Washington, DC, counsel for Respondent.

Before Board Judges **DRUMMOND**, **STEEL**, and **WALTERS**.

WALTERS, Board Judge.

The appeals are based on claims brought by appellant, Lacey Newday Consulting, LLC (Lacey Newday), for monies allegedly owed by respondent, the Department of Justice, Federal Bureau of Prisons (BOP), under a BOP contract for the furnishing of meat items for use at the United States Prison, Atwater, California (USP Atwater). A hearing was conducted on November 28, 2012, and the record in the appeals encompasses the hearing transcript, appeal file exhibits 1 through 26, plus an additional exhibit offered at the hearing, which the Board has accepted into evidence as appeal file, exhibit 27. Exhibit 27 consists of two documents provided by appellant via facsimile during the course of the hearing at Judge Walters' request, i.e., one page of purportedly contemporaneous notes for certain December

2011 telephone conversations prepared by Lacey Newday's independent contractor, Mr. Brian Gilbert, and a spread sheet also prepared by Mr. Gilbert listing unit prices Lacey Newday either bid or intended to bid in response to a host of customer requests for proposals (RFPs) and requests for quotations (RFQs) for various meat items, including the RFQ for the instant BOP contract. Also part of the record is a joint comprehensive statement of facts, which includes a number of stipulations. As explained below, based on the Board's review of the record, the appeals are denied.

Background

On December 6, 2011, BOP issued an RFQ for the supply of several varieties of meat items for USP Atwater, including, in particular, a request relating to furnishing 2355 lbs. of 80% lean (80/20) ground beef. Lacey Newday submitted to BOP a quotation on the ground beef on December 20, 2011, at a unit price of \$0.60/lb. Seven other unit price quotations for 80/20 ground beef were received, ranging from \$1.66/lb. to \$2.40/lb. On December 21, 2011, Lacey Newday's principal, Mr. Sidney Lacey, had two telephone conversations with the BOP contracting officer, Ms. Kathy Cole. The parties are in agreement that, on December 21, Ms. Cole inquired as to whether Lacey Newday's price for the ground beef was "good," and that Mr. Lacey on that date confirmed its quoted unit price for the ground beef. The parties also agree that Ms. Cole then inquired as to whether Lacey Newday would be capable of delivering 10,000 lbs. of ground beef instead of the 2355 lbs. called out in the RFQ, and that Mr. Lacey indicated that he would check to see whether Lacey Newday could furnish 10,000 lbs.

Mr. Lacey testified at the hearing that, after completing his second telephone call with Ms. Cole on December 21, he discovered that Lacey Newday's quotation of \$0.60/lb. had been mistaken and that its intended unit price quotation for 80/20 ground beef was to have been \$2.05/lb. The \$2.05/lb. is listed for 80/20 ground beef for USP Atwater on Mr. Gilbert's spread sheet (appeal file, exhibit 27). Mr. Gilbert, during his testimony, expressed his belief that the mistake came about by reason of Lacey Newday using for its quotation for 80/20 ground beef the \$0.60/lb. unit price listed on the spread sheet for chicken legs.

On December 22, 2011, Mr. Lacey and Ms. Cole had two more telephone conversations. During the second call, according to both Mr. Lacey and Mr. Gilbert (who testified that he listened in on that call while the phone was muted), Mr. Lacey notified Ms. Cole of both the mistake and of the intended quotation. Ms. Cole disputes this contention, maintaining that the first she learned of the alleged mistake and of the intended \$2.05/lb. figure was on January 20, 2012, when she received an emailed invoice from Lacey Newday seeking payment for the ground beef at that higher unit price per pound. Both Lacey and Gilbert also refer to four telephone calls between Mr. Lacey and Ms. Cole on December 29,

2011, and, more specifically, to the last two of those calls, during which they say Mr. Lacey again spoke to Ms. Cole of the mistake and intended quotation. Neither Lacey nor Gilbert allege that Ms. Cole ever agreed to the \$2.05/lb. price for the ground beef. Rather, in this regard, Mr. Gilbert testified that Ms. Cole was completely “non-responsive” to Mr. Lacey’s statements regarding appellant’s intended quotation.

Ms. Cole acknowledged having spoken with Mr. Lacey on both December 22 and December 29, but, at the hearing, she repeatedly denied having received any notice about the intended \$2.05/lb. unit price during any of the conversations on either date. Further, in light of her having received quotations from other suppliers as low as \$1.66/lb. for the ground beef, she stated, she never would have had Lacey Newday perform at the \$2.05/lb. price had she been presented with notification of bid mistake as alleged.

The parties are in agreement that, during the conversations on December 22, 2011, Mr. Lacey confirmed appellant’s ability to furnish 10,000 lbs. of ground beef and that Ms. Cole attempted to place an order orally for that quantity. It also appears that, in that connection, Mr. Lacey advised Ms. Cole that Lacey Newday would not accept that order, since it was based on payment via a Government purchase card (which would have entailed a significant fee for Lacey Newday). Lacey made clear at that time that payment based on a written purchase order would be needed.

The December 29, 2011, telephone calls between Ms. Cole and Mr. Lacey involved, in part, further discussion of the need for a written purchase order.¹ In that regard, Ms. Cole indicated that she would be able to issue a purchase order to Lacey Newday “after the holidays.” In fact, Ms. Cole did issue a written purchase order to Lacey Newday on January 11, 2012, for, among other items, 10,000 lbs. of 80/20 ground beef at a unit price of \$0.60/lb., for an item total of \$6000. On January 12, 2012, Mr. Lacey sent Ms. Cole an email message regarding the purchase order inquiring as to whether BOP would accept the substitution of a higher grade ground beef – 85/15, i.e., 85% lean – in lieu of the specified 80/20. Nothing is said in Mr. Lacey’s message about the quotation mistake or about any of the prior instances of alleged telephonic notification as to that mistake and of the intended

¹ During the hearing, Mr. Lacey, for the very first time alleged that, during the first of four telephone conversations on December 29, Ms. Cole threatened that, if Lacey Newday did not deliver the ground beef per its original quotation, i.e., for \$0.60/lb., this purported “failure to perform” would be posted on some sort of internet communications site frequented by BOP contracting officers, and Lacey Newday’s reputation as a contractor would suffer. Ms. Cole adamantly denied the allegation, disclaiming knowledge of any such internet site, and the Board does not find the allegation of such a threat credible.

unit price of \$2.05/lb. To the contrary, as seen below, the exchange of email messages between Mr. Lacey and Ms. Cole on that date is entirely consistent with Ms. Cole's assertions regarding her previous telephone conversations and of the lack of any such notification of mistake during those conversations. Indeed, it is clear that Mr. Lacey was again confirming appellant's \$0.60/lb. quotation for ground beef, and doing so enthusiastically – with the use of an exclamation point:

[From Sidney Lacey to Kathy Cole 1/12/2012 7:22 AM]

Kathy,

I know you said you guys take menu spec only, but will you take better than menu spec 85/15 ground beef instead of 80/20?

Thanks,

Sidney E. Lacey
Director/Principal
Lacey Newday Consulting, LLC

* * * *

[From Kathy Cole to Sidney Lacey 1/12/2012 9:29:38 AM]

For the same price of .60/lb?

* * * *

[From Sidney Lacey to Kathy Cole 1/12/2012 10:48 AM]

Same price \$.60!

Appeal File, exhibit 5.

Without any further written or oral notification as to the quotation mistake or as to the \$2.05/lb. price it intended to quote, Lacey Newday, in response to the purchase order,

proceeded to ship the 10,000 lbs. of ground beef to USP Atwater on January 13, 2012.² The parties are in agreement that delivery of the ground beef was completed on January 17, 2012. Appellant, in its complaint, had contended that, prior to delivery, on January 16, 2012, Mr. Lacey and Ms. Cole had yet a further telephone conversation during which Lacey reiterated the notification of mistake and of the intended quotation of \$2.05/lb. Nevertheless, both he and Mr. Gilbert (who had earlier provided the Board with an affidavit attesting to such a January 16 telephone call – appeal file, exhibit 25) during their testimony at the hearing corrected this allegation, stating that the notification was, in fact, given to Ms. Cole during a telephone conversation held on January 20, i.e., after delivery of the meat was completed and after Ms. Cole had received by email from Mr. Lacey an invoice for the ground beef showing the higher unit price of \$2.05/lb.

Because the Lacey Newday invoice differed markedly from the December 20, 2011, quotation (and from her January 11, 2012, purchase order) in terms of the ground beef unit price, Ms. Cole, by email message to Mr. Lacey on January 24, 2012, requested that the invoice be revised to reflect the original quotation of \$0.60/lb. for that item. His email response of the same date is utterly at odds with any notion that he had addressed repeatedly with Ms. Cole both appellant's bid mistake and its intended bid for the ground beef:

It's impossible to sell [o]r buy ground beef at .60 a lb. There must be a mix up.
Will check on it and get back to you.

Appeal File, exhibit 9. This January 24 message also cannot be reconciled with the above-described email message Mr. Lacey had sent to Ms. Cole about the ground beef unit price just twelve days earlier, when he proposed substituting an even better grade of ground beef (85/15) for the 80/20 specified:

Same price \$.60!

Appeal File, exhibit 5.³ Because Lacey Newday failed to revise the invoice per the contracting officer's request, she took an administrative deduction, on February 21, 2012,

² Actually, as the bill of lading indicates, Lacey Newday shipped a slightly greater quantity (10,126.70 lbs.) to the prison.

³ During the hearing, Mr. Lacey agreed that the notion in his January 24 message to Ms. Cole (that he would have to "check" on the possibility of a "mix up" and "get back to you") would make no sense were the Board to accept his allegations of prior notification to Ms. Cole of both the mistake and of appellant's intended bid. It would, however, support Ms. Cole's repeated denials regarding those allegations of prior notification.

against the invoice in the amount of \$14,621.81. This amount represents slightly less than the difference between the \$2.05/lb. and \$0.60/lb. unit prices multiplied by the actual quantity of ground beef delivered. Appellant claimed the amount of the deduction and submitted an appeal to the Board. That appeal was docketed as CBCA 2782. Thereafter, responding to the Board's concerns about potential jurisdictional problems with that appeal, Lacey Newday, by letter dated March 26, 2012, submitted a second claim for the \$14,621.81, specifically asking for a contracting officer's decision under the Contract Disputes Act (CDA). The contracting officer issued a final decision denying the claim, by letter dated May 15, 2012. Thereafter, Lacey Newday timely filed a second appeal, which the Board docketed as CBCA 2832 and consolidated with the earlier appeal for purposes of adjudication.

Discussion

The instant contract between BOP and Lacey Newday came about as a result of BOP's issuance of an RFQ. Under the Federal Acquisition Regulation (FAR), RFQs are treated differently than either invitations for bids (IFBs) or requests for proposals (RFPs), in that the submission of a quotation in response to an RFQ is not considered an offer that is subject to acceptance by means of a Government purchase order or award. In this regard, FAR 13.004 provides:

13.004 Legal effect of quotations.

(a) A quotation is not an offer and, consequently, cannot be accepted by the Government to form a binding contract. Therefore, issuance by the Government of an order in response to a supplier's quotation does not establish a contract. The order is an offer by the Government to the supplier to buy certain supplies or services upon specified terms and conditions. A contract is established when the supplier accepts the offer.

(b) When appropriate, the contracting officer may ask the supplier to indicate acceptance of an order by notification to the Government, preferably in writing, as defined at 2.101. **In other circumstances, the supplier may indicate acceptance by furnishing the supplies or services ordered or by proceeding with the work to the point where substantial performance has occurred.**

(c) * * *

The quotation submitted by Lacey Newday on December 20, 2011, per the FAR, was not an offer, but merely information furnished to the agency for its possible use. The contracting officer attempted to place an oral purchase order on December 22, 2011, based on the information she had obtained. That oral purchase order may well have constituted a Government offer, but that offer was rejected by Lacey Newday, because it was conditioned on payment being made by Government purchase card. The parties understood that issuance of a written purchase order would be required in order to satisfy Lacey Newday's payment concerns.

When the contracting officer ultimately transmitted a written purchase order on January 11, 2012, that was the Government's offer. Although, in accordance with the FAR, the contracting officer might have sought written acceptance of the offer from Lacey Newday, by its signature of the purchase order or by some separate writing, she did not do so. Instead, acceptance in this case was properly effected by delivery of the ordered meat items on January 17, 2012. The purchase order clearly called for delivery of 10,000 lbs. of ground beef at \$0.60/lb., and there is no evidence that Lacey Newday attempted to vary these terms of the purchase order between its issuance on January 11 and its completion of meat delivery on January 17. To the contrary, the email correspondence on January 12, 2012, can only be viewed as Lacey Newday's pre-delivery confirmation of the \$0.60/lb. unit price for ground beef. Notwithstanding Lacey Newday's allegation (in both the complaint and in Mr. Gilbert's affidavit) that there was a January 16 (pre-delivery) telephonic notification to the contracting officer, that the \$0.60/lb. unit price represented a bid mistake and that Lacey Newday had intended a unit price of \$2.05/lb., that allegation was expressly retracted at the hearing. Thus, when delivery was made on January 17, 2012, it signified Lacey Newday's clear and unequivocal acceptance of the offer to purchase 10,000 lbs. of ground beef at \$0.60/lb.

The Board need not address which party is the more credible in terms of appellant's assertions regarding prior notifications of bid error during the various telephone conversations on December 22 and 29, 2011. Those conversations all predated both the agency's offer and Lacey Newday's acceptance and thus would not be relevant to the parties' agreement on contract terms.

Decision

For the foregoing reasons, the appeals are DENIED.

RICHARD C. WALTERS
Board Judge

We concur:

JEROME M. DRUMMOND
Board Judge

CANDIDA S. STEEL
Board Judge