HOW NOT TO INCORPORATE BY REFERENCE IN A CONTRACT

A recent decision by the Civilian Board of Contract Appeals ("Board") demonstrates how careful and definitive a contractor must be (and, of course, an agency must be) in order to incorporate material by reference in a government contract. *Clean Harbors Environmental Services, Inc. v. Department of Health and Human Services,* CBCA 7704, Jan 10, 2024. The contractor never took the proper steps to incorporate its own important Environmental Services Agreement ("ESA") into a contract awarded by the Department of Health and Human Services/Claremore Indian Hospital ("CIH").

Clean Harbors responded to a solicitation for a quote for three contract line items (standard service pharmacy waste program, non-standard pharmacy waste disposal services, and additional 18 gallon containers) at CIH for a one year period of performance. The RFQ included a statement of work, and was based on "lowest priced technically acceptable" for best value, requiring the contractor to pick up waste according to a five page statement of work.

Initially, Clean Harbors submitted a quote in response to the RFQ on March 17, 2023, but then submitted a second quote on March 31, 2023. The second quote attached an unsigned copy of its standard ESA. Clean Harbors stated during the appeal that "the parties intended for Clean Harbors' waste profile requirement to be included in the contract and acted accordingly." However, the ESA was neither referenced in nor otherwise attached to a Combined synopsis with pricing that CIH sent to Clean Harbors. This document included the final pricing, and was the same as the final purchase order issued to CIH. The final purchase order identified only the statement of work and the contractor's quote as comprising the parties' contract.

From May through August 2022 CIH requested that Clean Harbor pick up and dispose of pharmaceutical waste. However, Clean Harbors requested that CIH complete waste profiles specifying the waste to be picked up (apparently as required by its ESA—but not specified in the contract). Clean Harbors did not pick up any waste during the four month period. CIH issued a cure notice, and then a termination of the contract for cause. The Board addressed whether the ESA was incorporated by reference in the order, so that CIH was required to complete waste profiles before Clean Harbors was obliged to pick up the waste.

Clean Harbors argued that language in the order and RFQ as follows incorporated its ESA. The language read "Vendors submitting or equal items must submit descriptive literature showing how their product meets or exceeds the requirements being solicited-includes service contract." The Board rejected this because the RFQ explicitly stated that "Terms and conditions other than those stated will not be accepted," and the ESA was never stated in the RFQ or contract. There was nothing in any descriptive literature that was to become part of the contract. And finally, the SOW did not contain language requiring CIH to complete waste profiles before the contractor began to dispose of the waste. The order did not refer to the ESA, did not attach it as a contract document, and did not in any way incorporate it or its terms in the order.

The Board noted that the Federal Circuit has clearly stated that "in order to incorporate material by reference, the contract must use express and clear language so as to leave no ambiguity about the documents being referenced nor any reasonable doubt about the fact that it is being incorporated into the contract." Clean Harbors never did this.

Furthermore, the Board noted that there were conflicts between the actual contract and Clean Harbor's ESA. The ESA stated the contract was to be governed and construed by the laws of Massachusetts, while the contract clearly stated that the Contract Disputes Act would govern. The ESA required payment in 15 days, while the contract said 30 days. The ESA provided that the contract would continue after the first year on a year to year basis, while the contract said it was for one year only (and automatic continuation would also violate general federal appropriations act principles). There was no evidence that the parties ever dealt with these problems.

The Board held that the ESA was not incorporated into the contract, and the termination for cause was valid.

Takeaway. This blog has previously discussed incorporation by reference. Be sure that if you choose to incorporate by reference you comply with the Federal Circuit's requirement that the contract use express and clear language so as to leave no ambiguity about the documents being referenced nor any reasonable doubt about the fact that it is being incorporated into the contract. Don't leave anything to chance, and ensure that the final contract document explicitly incorporates something like an ESA "by reference herein" and by attaching the document to the contract.