



STARESENCE, INC.

178 IBLA 346

Decided February 17, 2010



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

STARESENCE, INC.

IBLA 2009-298

Decided February 17, 2010

Appeal from a decision of the Las Vegas Field Office, Bureau of Land Management, denying a request for renewal of a mineral material sales contract. N-77716.

Affirmed.

1. Materials Act

To be eligible for a non-competitive renewal of a competitive mineral material sales contract under 43 C.F.R. § 3602.47(a), the purchaser must have paid the full contract price for the full quantity of materials it agreed to purchase under the initial contract.

APPEARANCES: Karen Budd-Falen, Esq., Cheyenne, Wyoming, for appellant; John Steiger, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEATH

Starensence, Inc., appeals from a decision of the Las Vegas (Nevada) Field Office (LVFO) of the Bureau of Land Management (BLM) dated July 8, 2009 (Decision), denying Starensence's request for renewal of mineral material sales contract N-77716. For the reasons explained below, we affirm.

Factual and Legal Background

A. *The Mineral Material Sales Contract and Corresponding Regulations*

On March 26, 2004, the LVFO issued a notice and invitation for sealed bids for the sale of decorative rock (in this case, pink limestone) from a parcel of public land in the NE $\frac{1}{4}$ NW $\frac{1}{4}$, sec. 5, T. 15 S., R. 67 E., Mt. Diablo Meridian, Clark County, Nevada. The sale, serialized as N-77716, was conducted under the authority of the

Materials Act of 1947, 30 U.S.C. §§ 601-604 (2006), and implementing regulations at 43 C.F.R. Part 3600.

The sale notice stated: “Material to be sold consists of 300,000 tons of decorative rock from a ten acre parcel in the Moapa area The material will be sold as one lot.” March 26, 2004, Sale Notice, Administrative Record (AR), Vol. 1.¹ The sale notice further specified that the minimum acceptable bid was \$1.00 per ton. *Id.* Staressence submitted the winning bid of \$5.06 per ton. Notice — High Bidder Declared, dated May 12, 2004, AR Vol. 1. Following submission of a mining and reclamation plan, BLM approved the sale and the reclamation plan in a decision dated July 2, 2004. AR Vol. 1.

Staressence and BLM then executed the “Contract for the Sale of Mineral Materials” No. N-77716 (Contract). AR Vol. 1. The date of the BLM authorized officer’s signature, August 10, 2004, became the effective date of the Contract under section 18. Section 6 of the Contract provides: “Your rights are subject to the regulations at 43 CFR Group 3600 and to any stipulations and the mining plan attached to this contract.” Contract at unpaginated (unp.) 1. A box was checked showing that stipulations were attached. The attached Stipulation no. 2 states in relevant part that “[p]urchaser will conform to all Federal . . . regulations.”

Section 1 of the Contract provides: “Under the terms and conditions of the contract, the United States sells to you and you buy the mineral materials listed in section 2 and contained in the following lands” Contract at unp. 1. Section 2 provides that “[t]he United States determines the total purchase price by multiplying the total quantity of each kind of material designated by the unit price given below, or as changed through reappraisal.” *Id.* It then shows the quantity as 300,000 tons of landscape rock, a unit price of \$5.06, and a total (principal) price of \$1,518,000. Added was a reclamation fee of 1 cent per ton, thus adding \$3,000 in reclamation fees for a total price of \$1,521,000 at \$5.07 per ton. *Id.* Section 2 then provides: “You are liable for the total purchase price, even if the quantity of materials you ultimately extract is less than the amount shown above. You may not mine more than the quantity of materials shown in the contract.” *Id.*

Section 3 of the Contract provides that Staressence “may not extract the materials until [it has] either paid in advance for them in full, or paid the first installment of \$15,000.00.” Contract at unp. 1. In the event Staressence elected to

¹ The record as submitted by BLM consists of two files labeled NVN-77716 Volume 1 and NVN-77716 Volume 2, with documents arranged primarily in reverse chronological order. The documents are not “Bates stamped” or continuously paginated. We therefore cite the record documents by date and file volume number.

pay in installments, subsections (b), (c), and (d) of that section then provide in relevant part:

(b) Once you start removing material, you must pay each subsequent installment payment monthly in an amount equal to the value of the materials removed in the previous month.^[2] . . . You must pay the total purchase price not later than 60 days before the contract expires.

(c) The United States will retain the first installment as security for your full and faithful performance and will apply it to the last installment required to make the total payment equal to the total price given in section 2. The total purchase price equals the sum of the total quantities removed, multiplied by their respective unit prices. . . .

(d) You receive title to the mineral materials only after you have paid for them and extracted them.

Id.

Section 11 of the Contract prescribes a 5-year term from the date of approval. A box was checked indicating that the Contract is a renewable competitive contract. Section 12 then provides that “BLM will renew your contract if you apply in writing no less than 90 days before your renewable competitive contract expires and you meet the conditions in the regulations at 43 CFR 3602.47.” Contract at unp. 2.

Title 43 C.F.R. § 3602.47 provides in pertinent part:

(a) *Applying for competitive contract renewal.* When you have paid the United States the *full contract price for the mineral materials you purchased* under a competitive contract, you may apply for renewal of the contract without further competitive bidding in order to purchase and extract *additional material* that may be available at the contract site. You must submit your request for renewal of the contract at least 90 days before it expires. You do not need to use a specific form.

(b) *BLM’s response to the application.* BLM will renew your contract if—

(1) You meet all the requirements of this section;

(2) Your contract is not limited under § 3602.49; and

² The regulations at 43 C.F.R. § 3602.21(a)(2)(iii)(A) contain the same requirement.

(3) BLM determines that you are able to fulfill the obligations of a new contract. [Emphasis added.]

B. Actual Production Levels, Requests for Contract Modifications, and Application for Renewal

Approximately 10 months into the contract term, sales of the material had averaged less than 236 tons per month. On June 29, 2005, Staressence sent a memorandum to BLM (received on July 11) discussing various changes in the market for decorative rock adverse to Staressence, and requesting a 2-year reduction in the contract price to \$1.00/ton. Memorandum dated June 29, 2005, AR Vol. 1, at unp. 1-4. BLM rejected this request. Letter from LVFO to Staressence dated July 13, 2005, AR Vol. 1. In the late summer and fall of 2005, and again in the fall of 2008, Staressence submitted several further requests to renegotiate and reduce the contract price, along with suggestions regarding other options.³ BLM rejected each of those requests for various reasons, discussion of which is not necessary to resolve this appeal.⁴

On May 28, 2009, Staressence sent another memorandum to the LVFO in which it requested renewal of the contract. Citing 43 C.F.R. § 3602.13(b) (“BLM may adjust the price at the beginning of any contract renewal period”), Staressence reiterated that it “would like to request a reappraisal based on current market conditions to reflect a more equitable price.” May 28, 2009, Memorandum, AR Vol. 2, at unp. 1.

C. The LVFO Decision and Staressence’s Appeal

The LVFO issued the Decision on July 8, 2009. AR Vol. 2. BLM stated that a review of the production history showed that 14,470.8 tons of rock had been removed through May 2009, for which Staressence had paid \$73,366.97. However,

³ See memoranda from Staressence to the LVFO dated Aug. 5, 2005, and Sept. 14, 2005, AR Vol. 1; memorandum from Staressence to the LVFO dated Sept. 25, 2008, AR Vol. 2. The correspondence in the record also refers to a memorandum or letter from Staressence to the LVFO dated Nov. 14, 2008, but it is not included in the record. The LVFO’s response dated Dec. 12, 2008, is in the record. AR Vol. 2.

⁴ See letters from the LVFO to Staressence dated Aug. 12, 2005, and Sept. 28, 2005, AR Vol. 1; letters from the LVFO to Staressence dated Oct. 3, 2008, Oct. 23, 2008, and Dec. 12, 2008, AR Vol. 2.

the total value of the Contract was \$1,518,000.⁵ Decision at 2. Citing both the contract renewal provisions of the regulations at 43 C.F.R. § 3602.47 and the provision in section 2 of the Contract that the purchaser is responsible for the full purchase price even if the quantity removed is less than the amount shown, BLM stated:

Staressence, Inc., does not meet the requirement of § 3602.47 in that you have requested a renewal before the full contract price for the mineral materials has been paid to the United States. The BLM has also determined that you are unable to fulfill the obligations of a new contract based on the failure to fulfill the obligations on your current contract in regards to paying the full purchase price of the material. Therefore, your request for renewal is denied.

Decision at 2. Staressence then appealed to this Board.

Analysis

Staressence acknowledges that the Contract makes Staressence “liable for the total purchase price, even if the quantity of materials [it] ultimately extract[s] is less than the amount shown above” [*i.e.*, 300,000 tons]. SOR at 4, *quoting* Contract section 2. But Staressence relies on section 3(c) of the Contract, part of the provisions pertaining to installment payments, which provides that “[t]he total purchase price equals the sum of the total quantities removed, multiplied by their respective unit prices.” *See* SOR at 3, 5. Thus, Staressence argues, it has paid the total purchase price, as defined in the Contract, of \$73,366.97.⁶ Staressence further maintains that because it fulfilled its obligations, BLM’s determination that Staressence would be unable to fulfill the obligations of a new contract was improper. *Id.* at 6-7. Finally Staressence argues that BLM’s refusal to reappraise and adjust the price of the rock during the term of the contract was arbitrary. SOR at 7-9.

BLM emphasizes that section 2 of the Contract provides that the United States “determines the total purchase price by multiplying the total quantity of each kind of material designated by the unit price given below,” and shows a “total price” of \$1,521,000. Answer at 2-3, *quoting* Contract section 2 (underscored emphasis BLM’s). BLM argues that the provision in section 3(c) of the Contract that the “total

⁵ Excluding the \$3,000 reclamation fee.

⁶ Staressence further argues that, particularly in light of this provision, the Contract is not a “lump sum contract.” *Id.* at 5. Staressence argues that the 300,000 ton contract quantity “is more correctly treated as the maximum amount of material allowed to be removed.” *Id.* at 6.

purchase price” is the sum of the total quantities removed, multiplied by the unit price, “pertains only to installments.” *Id.* Thus, “while the provision may exhibit poor draftsmanship,” it does not undercut the otherwise supposedly “unambiguous meaning” of sections 1 and 2. *Id.*⁷ For all of these reasons, BLM argues that the “total price” under section 2 of the Contract is the “full contract price for the mineral materials you purchased under a competitive contract” under 43 C.F.R. § 3602.47(a), which the purchaser must have paid to be eligible for non-competitive renewal. *Id.* at 3, 5.

[1] While the parties argue principally about the different definitions of the term “total purchase price” in the Contract, the question governing whether the Contract is eligible for non-competitive renewal under 43 C.F.R. § 3602.47(a) is whether Staressence as purchaser has “paid the United States the full contract price for the mineral materials [it] purchased” under the competitive contract within the meaning of that rule.⁸ The history of 43 C.F.R. § 3602.47(a) shows that the phrase “the full contract price for the mineral materials you purchased” is intended to refer to the full contract price for the mineral materials the purchaser *agreed* to purchase under a competitive contract. Section 3602.47 was a new provision in the September 2000 proposed rewrite of the mineral materials sales rule. Section 3602.47(a) in the proposed rule read as follows:

Applying for competitive contract renewal. When you have paid the United States the full contract price for the mineral materials you have purchased, you may apply for renewal of the contract in order to purchase and extract additional material that may be available at the contract site. You must submit your request for renewal of the contract at least 90 days before its expiration date. You do not need to use a specific form.

65 Fed. Reg. 55864, 55878 (Sept. 14, 2000). The preamble explained:

⁷ BLM also cites various examples of correspondence that it argues shows that Staressence was well aware that its contract was for the full 300,000 tons, not merely “up to” 300,000 tons. Answer at 3-5. Acknowledging that “[a]lthough the regulations are not crystal clear,” BLM maintains that they “consistently reflect an intent that competitive sales would be for a set amount of materials, not an ‘up to’ amount.” *Id.* at 5.

⁸ Prescribing two different meanings for the same term (“total purchase price”) in the same instrument is a drafting defect that BLM, in our view, would be well-advised to correct in future contract instruments. In addition, sections 2 and 3(d) create some ambiguity regarding how much material is actually purchased in the event a purchaser elects to use installment payments.

A prerequisite for renewal would be payment of *the full contract price of the initial contract*. BLM would allow you to renew your contract in order to extract additional materials, *not to complete the initial contract*.

65 Fed. Reg. at 55870 (emphasis added).

The final rule made changes to section 3602.47(a) in response to comments to clarify that the renewal provision applied only to competitive contracts and that the renewal itself would be non-competitive. 66 Fed. Reg. 58892, 58897, 58908 (Nov. 23, 2001). It made no changes relevant to payment of the full contract price of the initial contract and completing the initial contract. Indeed, addressing the requirement to request renewal at least 90 days before a contract expires, the preamble to the final rule also explained: “A purchaser who wants to renew a competitive contract must pay *the full contract value* before applying for renewal at least 90 days before the contract expires.” 66 Fed. Reg. at 58897 (emphasis added).

In summary, the regulatory history shows that the intent of section 3602.47(a) is that to be eligible for non-competitive renewal, the purchaser must have paid the full contract price for the materials it agreed to purchase under the initial contract and to have completed that contract. In this case, Staressence did neither. The Contract contemplated that Staressence would extract and pay for 300,000 tons of rock. In the end, it took and paid for less than 1/20 of the contract volume.

The Government did not realize the benefit from the Contract that it anticipated. The purchaser’s performance has fallen far short of the commitment that induced the Government to enter into the Contract in the first instance. It is apparent that the rule does not intend a non-competitive renewal of a competitive contract where the purchaser has not performed more than 95 percent of the initial contract.

It follows that the Contract is not eligible for non-competitive renewal under 43 C.F.R. § 3602.47(a), and that the Decision therefore must be affirmed. In view of this disposition, it is unnecessary to address Staressence’s arguments regarding reappraisal and contract price adjustment or issues involved in BLM’s determination that Staressence is not able to fulfill the obligations of a new contract.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

_____/s/
Geoffrey Heath
Administrative Judge

I concur:

_____/s/
Christina S. Kalavritinos
Administrative Judge