

**BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS**

In The Appeal of)
Mendocino General Contractors,)
Inc.)
) Docket No. MSBCA 2632
)
Under)
SHA Contract No. CL 4425189)

APPEARANCE FOR APPELLANT: Richard J. Hackerman, Esq.
Baltimore, Maryland

APPEARANCE FOR RESPONDENT: Scot D. Morrell
Assistant Attorney General
Baltimore, Maryland

APPEARANCE FOR INTERESTED PARTY: Steven A. Thomas, Esq.
(Klicos Painting Co., Inc.) Thomas & Libowitz, P.A.
Baltimore, Maryland

OPINION BY CHAIRMAN BURNS

Appellant appeals the denial of its bid protest by the Procurement Officer regarding a State Highway Administration Invitation for Bids contract for the cleaning and painting of two existing bridges on MD26 over the Liberty Reservoir in Carroll County, Maryland challenging painting and paint removal certification requirements within the contract.

FINDINGS OF FACT

1. Respondent Maryland State Highway Administration ("SHA") issued an Invitation for Bids for the cleaning

and painting of two existing bridges on MD Route 26 over the Liberty Reservoir in Carroll County, Maryland - SHA Contract No. CL 4425180, F.A.P.No.AC-BH-234-1(38)E ("contract") on or about May 8, 2008.

2. Among the potential bidders for this contract was Appellant Mendocino Contractors, Inc. ("Mendocino").
3. Prior to Bid Opening, a bid protest was filed by Mendocino on May 28, 2008 challenging contract provisions requiring certain certification requirements within the contract.
4. Specifically, Mendocino challenged the use by SHA of Society of Protective Coatings, formerly known as the Steel Structures Painting Council ("SSPC"), certifications on this project and, in general, on other projects requiring the cleaning and painting of structural steel.¹
5. The principle purpose of this IFB was to obtain the services of a contractor to clean and paint two bridges with exposed steel surfaces over the Liberty Reservoir in Carroll County, Maryland.
6. In addition to work involving surface preparation and painting, the work to be done also included the containment and collection of all surface preparation debris, as well as the disposal of the hazardous surface preparation debris.
7. The Contract specifically stated that it is the responsibility of the contractor to prevent "waste from entering into the environment by containing, storing, testing and disposing of all waste in

¹ The May 28, 2008 protest of Mendocino specifically protested two other SHA projects - PG 5485180 and FR 3825280. By way of a letter dated October 16, 2008, Mendocino formally rescinded its protest of those two projects.

conformance with Federal, State and local regulations." IFB Section 436.01.02 at p.75.

8. Among the IFB's Contract Provisions were two requirements associated with certification requirements established by the Society of Protective Coatings, formally known as the Steel Structures Painting Council (SSPC).
9. The SSPC is a non-profit professional society founded in 1950 and is designated as a 501 (c)(3) organization by the United States Internal Revenue Service.
10. The SSPC's constituency and members range across a number of entities and persons, including contractors, facility owner representatives, consultants, suppliers of materials and equipment, inspectors, and others who are involved in the coatings industry.
11. The SSPC was originally formed to deal with the coating and protection of steel. In 1997, the organization expanded its purview to include the coating of industrial concrete structures and other surfaces as well as steel.
12. The mission of the SSPC, according to the testimony of Michael Damiano, the Director of Product Development at the SSPC, "is to enhance good practice of protective coatings application." This includes developing standards and conducting training programs.
13. According to Mr. Damiano, the SSPC has two types of members. It has individual members and corporate members. There are approximately 8,000 individual members and 700 corporate members.
14. The SSPC also administers a nationally recognized independent contractor certification program which is

utilized by facility owners and others who hire industrial painting contractors.

15. The SSPC has published several hundred standards that have been used over the years.
16. Among these many standards, the SSPC programs includes the QP1 category ("QP1"), which evaluates contractors who perform surface preparation and industrial coating applications in the field, and the QP2 category ("QP2"), which evaluates the contractor's ability to perform industrial hazardous paint removal in field operations.
17. The contract herein involved both surface preparation and coating applications, as well as hazardous paint removal.
18. SHA incorporated both QP1 and QP2 certifications as minimum contracting requirements for the field painting operations in this contract.
19. Section 436.01.03 **Minimum Contracting Requirements for Field Painting** states:

The Contractor/subcontractor removing or applying paint shall be certified as specified in (a) below. When the paint being removed contains toxic metals, the Contractor/subcontractor removing the paint shall be certified as specified in (b) below. All certificates shall be effective prior to Award of Contract and shall remain in effect for the duration of the Contract. Refer to 436.03.01.

- (a) **SSPC-QP1.** Standard Procedure for Evaluating Qualifications of Painting Contractors: Field Application to Complex Structures.
- (b) **SSPC-QP2, Category A.** Standard Procedure for Evaluating Qualifications of Painting

Contractors to Remove Hazardous
Paint.

IFB at p.75. (Bold text in original).

20. During the 1980's and 1990's, concerns regarding the effects of lead-based paint on people and on the environment were raised and became a matter of grave concern.
21. As a result of these concerns, the use of the long-time standard lead-based bridge coating system was banned and new environmental controls during cleaning and painting were established and mandated.
22. As a result, the use of high performance non lead-based coating systems became necessary.
23. These paint systems required and require special expertise in the proper preparation and application of coatings to ensure the long-term success and safety of the coating systems.
24. Special expertise is required in the handling, storing and disposing of the hazardous waste products associated with such coating projects.
25. SHA has determined that it was and is necessary to ensure that contractors performing bridge coating work can properly prepare and apply these high-performance coating systems and are capable of successfully performing all required and necessary environmental controls and safeguards.
26. The determination listed in Finding of Fact Number 25 is not arbitrary, capricious, irrational or contrary to law or regulation.
27. SHA has determined that QP1 and QP2 certification requirements are specific, objective and definitive responsibility criteria which help ensure that

prospective contractors will have the special expertise necessary to perform the contract requirements herein.

28. The determination listed in Finding of Fact Number 27 is not arbitrary, capricious, irrational, an abuse of discretion or contrary to law or regulation.
29. SHA has determined that the QP1 and QP2 standards are particularly desirable because experience has shown that specialized expertise is needed for adequate performance on bridge painting and cleaning projects.
30. The determination listed in Finding of Fact Number 29 is not arbitrary, capricious, irrational, an abuse of discretion or contrary to law or regulation.
31. SHA has had specific experience where bridge painting contractors have caused serious and dangerous environmental damage performing bridge coating work. This experience included lead paint pollution in the City of Cumberland, Maryland and in the Potomac River.
32. According to the testimony of Mr. Earle "Jock" Freedman, the Director of the Office of Structures at SHA since 1973, the incident at Cumberland was "terrible", a "catastrophe", and "an absolute nightmare." Hearing Transcript, April 28, 2009, pp. 13-15.
33. According to the Procurement Officer's Final Decision in this protest, SHA has determined that "[T]he SSPC certification program has been successful in helping SHA ensure our painting work is completed to the high quality of standards required for the specialized high performance coating systems while also protecting the environment."

34. The determination listed in Finding of Fact Number 33 is not arbitrary, capricious, irrational, an abuse of discretion or contrary to law or regulation.
35. As a result of, and in response to, the environmental damage caused by incidents such as the one listed in Finding of Fact 31, SHA determined that it would be in the best interest of the State of Maryland to include a requirement for projects involving the painting of structural steel that potential contractors be certified in performing surface preparation, coating application and industrial hazardous paint removal.
36. This determination by SHA led to the inclusion of the SSPC QP1 and QP2 requirements in its bridge painting contracts.
37. SHA phased in the SSPC certification into its contracts in order to allow painting contractors sufficient time to become certified prior to the actual requirements going into effect.
38. All bridges advertised for work after January 1, 1998, which required total removal of lead paint required SSPC QP2 certification.
39. All bridges painted after July 1, 1998 required SSPC QP1 certification.
40. Twenty-six other states currently require some form of QP1 and/or QP2 certifications
41. The number of states and other facility owners requiring SSPC certifications, including various U. S. Government facility owners, is approximately 142 for QP1 and 90 for QP2.
42. By way of a Memorandum dated October 2, 2002, James D. Cooper, Director of Bridge Technology for the U. S. Department of Transportation, Federal Highway

Administration, encouraged state Departments of Transportation to adopt and implement the SSPC's Painting Contractor Certification Program (which includes both QP1 and QP2). Respondent's Exhibit 2.

43. It is worth quoting from Mr. Cooper's Memorandum at length:

The certification process for field painting contractors consists of two parts. The initial level of certification, QP1, required a contractor to demonstrate an acceptable level of competency in surface preparation and coating application. The assessment involves a review of the contractor's management systems, QA/QC plan, and an on-site audit of their field operations.

Through these performance evaluation criteria, a bridge owner can be assured that a certified contractor has the capability and successful performance record necessary to complete an industrial coating operation. Certification level QP2 focuses on the removal, handling, and disposal of coatings containing hazardous materials. This qualification assures the bridge owner the contractor has the capacity, skills, and knowledge to successfully accomplish a repainting job, especially one requiring the removal and disposal of lead containing paint. This certification helps the bridge owner manage the risk associated with lead paint removal jobs. The risk and liability of these jobs to the owner can be significant if not approached appropriately; however, with proper training, equipment, and experience, these jobs can be accomplished without incident in a quality manner. (Underlining added).

Respondent's Exhibit 2.

44. SHA states that since the inclusion of QP1 and QP2 requirements in its contracts SHA has not faced the type of environmental failure and damage that occurred

- prior to the inclusion of the QP1 and QP2 standards in contracts.
45. It is SHA's position that the imposition of the QP1 and QP2 requirements and the reduction in environmental problems related to such contracts are not unrelated.
 46. The determination listed in Finding of Fact Number 45 is not arbitrary, capricious, irrational, an abuse of discretion or contrary to law or regulation.
 47. There are approximately 213 SSPC QP1 and 313 SSPC QP2 certified contractors within the United States at this time.
 48. The inclusion of the SSPC QP1 and QP2 certification requirements in this and other SHA contracts has not and does not unreasonably restrict competition.
 49. The use of the SSPC QP1 and QP2 certifications in this and other SHA contracts is not an unlawful prequalification.
 50. The use of the SSPC QP1 and QP2 certification is not an unlawful or improper delegation of the authority vested in the Procurement Officer in this, or in any other, SHA contact.
 51. The SSPC QP1 and QP2 certification requirements do not in any way violate Maryland law or regulations.
 52. The policy of the Government of the United States of America does not discourage the use of these types of certification requirements.
 53. According to the testimony of Mr. Damiano and the **SSPC QP (Quality Program) Fee Schedule** (Appellant's Exhibit 3), the cost of obtaining QP1 certification is approximately \$5,000, with approximately \$700-\$1,500 rebated to an applicant due to the \$2,600 audit

- deposit usually being higher than the actual cost of the audit. Hearing Transcript, April 27, 2009, pp.199-201; Appellant's Exhibit 3.
54. According to the testimony of Mr. Damiano and the **SSPC QP (Quality Program) Fee Schedule** (Appellant's Exhibit 3), the cost of obtaining QP2 certification is approximately \$3,600-\$4,700. Hearing Transcript, April 27, 2009, pp.199-201; Appellant's Exhibit 3.
55. According to the **SSPC QP (Quality Program) Fee Schedule** (Appellant's Exhibit 3), the cost of obtaining QP1 and QP2 certification together is \$5,900-\$6,800. Appellant's Exhibit 3.
56. The cost of obtaining QP1 and/or QP2 certification is not prohibitive.
57. The use of the SSPC QP1 and QP2 certification requirements in this procurement were not arbitrary, capricious, irrational, an abuse of discretion, or in any manner contrary to law or regulation.
58. SHA has clearly established substantial prima facie support for its position that the use of the QP1 and QP2 responsibility criteria are reasonably related to its minimum needs.
59. Mendocino has not shown that the requirement of QP1 and QP2 certification in this contract is clearly unreasonable.
60. The Protest filed by Mendocino was denied by way of a letter from Mark J. Flack, the Procurement Officer, dated November 6, 2008.²

² Mendocino's Protest included Minority Business Enterprise ("MBE") protest issues which were ruled upon by the Procurement Officer. Pursuant to the clear language of COMAR 21.11.03.14 the Board is without jurisdiction to hear protests regarding MBE protests and, therefore, MBE issues were not considered or addressed in this decision.

61. The basis for the Procurement Officer's denial was that the requirement of QP1 and QP2 certification in this contract was proper and legal.
62. Mendocino timely appealed the Procurement Officer's decision to the Maryland State Board of Contract Appeals ("Board") by way of an Appeal received on November 14, 2008 and docketed (as MSBCA 2632) on November 17, 2008.
63. A hearing was held concerning Mendocino's Appeal on April 27 and 28, 2009.
64. Both parties submitted post-hearing briefs.

Decision

Appellant Mendocino's protest and appeal boil down to one issue: whether the SHA's imposition of a definitive responsibility criteria, in this case the SSPC QP1 and QP2 certification requirements, in a contract involving the cleaning and painting of two bridges over Liberty Reservoir in Carroll County, Maryland, is unreasonable, arbitrary, capricious, an abuse of discretion or violative of law or regulation. Since the answer to that question is clearly in the negative this appeal must be denied.

It is clear that SHA has experienced significant environmental problems in the past regarding the complex and difficult nature of the paint application and hazardous waste removal involving its steel structures - including bridges. According to the testimony of Mr. Earle "Jock" Freedman, the Director of the Office of Structures at SHA since 1973, an incident involving a contractor's poor performance on a cleaning and painting project involving the Cumberland Thruway viaduct (a structural steel bridge) which occurred in Cumberland, Maryland in approximately

1992 was "terrible", a "catastrophe", and "an absolute nightmare."

It is important to recount Mr. Freedman's testimony in detail:

What happened was they had a containment system there and as this gentleman talked to you about earlier, what you want is negative pressure. You want to make sure that everything stays inside what you've encapsulated. And it didn't work.

And they started to realize that it wasn't working and you could go out on the cars in the area and on the hoods of the car, you could see the lead.

You could actually see the dust there. And before it was all over, they were concerned and rightly so, that it was into people's homes.

So we actually actually had to go move people out of their homes in some instances, put them into motels. We then had to send people in to clean their homes, clean the drapes and the clean the rugs and do everything to try to assure them that they had a safe condition.

We even were concerned about women that were pregnant. We were worried about them. We had to send them to the doctors for evaluation. It was an absolute nightmare.

Hearing Transcript, April 28, 2009, pp. 14-15.

In reviewing Mr. Freedman's testimony as to what occurred in Cumberland, Maryland, it is no exaggeration to describe what happened in Cumberland as a result of this failure at the Cumberland Thruway viaduct as Mr. Freedman did indeed describe it at the Hearing conducted concerning this Appeal: a "catastrophe"; "terrible"; and, "an absolute nightmare."

Mr. Freedman also testified that the State "spent a fortune" resolving and repairing this environmental disaster. Hearing Transcript; April 28, 2009; p.15.

Mr. Freedman then noted that it was this disaster that would lead the State to utilize the SSPC QP1 and QP2 requirements in contracts involving the coating and removal of paint from steel structures such as bridges:

"And it was that that triggered us saying, hey, you know, we are not doing as good a job as we should do. So then we started to say, how can we do a better job? How do we move into an area so we can do better than we've done? [A]and we've got to do better. . ."

Hearing Transcript; April 28, 2009; p.p.16-17.

As part of this review of making these type of projects cleaner and safer, SHA "realized that this SSPC was out there" and it determined that it was in the public interest to adopt the SSPC QP1 and QP2 certification requirements to insure that bidders on such paint and coating jobs could be relied upon to have obtained a minimum standard of accreditation for the work to be done. Hearing Transcript; April 28, 2009; pp.15-20.

Mr. Freedman also testified that since the implementation of the SSPC requirement for QP1 and QP2 in SHA contracts the State has not experienced "anything that's really serious" with regard to another incident such as the Cumberland problem of 1992. See Hearing Transcript; April 28, 2009; p. 18.

Mendocino claims that the specific requirement set forth by SHA providing that the successful bidder for the contract to clean and paint the structural steel over the Liberty Reservoir in Carroll County, Maryland, must be

certified by the SSPC as both a QP1 and QP2 approved contractor is unreasonable, arbitrary, capricious and/or illegal. Mendocino opines that the answer to that question "Must be answered in the affirmative." In spite of a truly heroic attempt at bolstering that contention by Mendocino, the Board cannot agree with Mendocino's contention.

This appeal involves a discretionary determination by a State agency in incorporating contractual requirements concerning a bidder's responsibility as to its ability to perform bridge painting services. This Board has made clear in numerous decisions that under Maryland law, a procurement officer has broad discretion in determining whether a bidder is responsible, and such a determination will not be disturbed unless it is clearly unreasonable, arbitrary, an abuse of discretion or contrary to law or regulation. See, e.g., Customer Engineer Services, Inc., MSBCA 1332, 2 MSBCA ¶156 (1987); Custom Management Corporation and Ogden Food Service Corporation, MSBCA 1086/1090, 1 MSBCA ¶28 (1982). This Board has consistently held that it will not disturb a procurement officer's determination regarding responsibility unless the decision was arbitrary, capricious or clearly erroneous. See, e.g., Covington Machine & Welding Co., MSBCA 2051, 5 MSBCA ¶436 (1998); Environmental Controls, Inc., MSBCA 1356, 2 MSBCA ¶168 (1987).

"Deciding a prospective contractor's probable ability to perform a contract to be awarded involves a forecast which must of necessity be a matter of judgment. Such judgment should of course be based on fact and reached in good faith; however, it is only proper that it be left largely to the sound administrative discretion of the [procurement] contracting officers involved who should be

in the best position to assess responsibility, who must bear the major brunt of any difficulties experienced in obtaining required performance, and who must maintain day to day relations with the contractor on the [State's] Government's behalf. 39 Comp. Gen. 705, 711."

Charles Center Properties, MSBCA 1629, 3 MSBCA ¶297 (1992), at p. 9

Definitive responsibility criteria (specific and objective standards established by an agency for use in a procurement to measure a bidder's ability to perform the contract at issue) may be utilized in order to preclude marginal firms from bidding and/or to insure that the prospective contractor will have the special expertise necessary to perform the contract requirements. Such special standards are particularly desirable where, as is the case here, experience has demonstrated that unusual or specialized expertise is needed for adequate performance.

As noted extensively above in both the Statement of Facts and the Decision, SHA is aware of potential problems which its bridge painting contracts can present. Given the awareness of the complex nature of paint application and hazardous waste removal, as well as the serious environmental and health problems that resulted in past contract performance by contractors, SHA has decided it is necessary to require certain specifications to ensure that prospective contractors will have shown they have the expertise and technical skills necessary to perform the requirements of these contracts. SHA has, therefore, joined numerous other States and entities in incorporating the SSPC QP1 and QP2 certification requirements in its bridge painting contracts - including the contract at issue - as definitive responsibility criteria.

In dealing with a challenge to definitive responsibility criteria, the Board has said that:

"Nothing that this Board has stated in its past decisions would negate the validity of such responsibility criteria if shown to be reasonably required to meet [the state agency's] minimum needs. In this regard, if a specification is challenged, we are limited to a determination as to whether the specification unreasonably restricts competition, and we cannot substitute our judgment as to such requirements for that of the procuring agency. Initially, the burden is on the procuring agency to establish prima facie support for its position that [the] challenged definitive responsibility criteria is reasonably related to its minimum needs. If the agency meets this burden, the protestor on appeal must then show that the requirement is clearly unreasonable. In short, we necessarily must affirm the use of definitive responsibility criteria in a solicitation to measure a bidder's capacity to perform if rationally based."

(Citations omitted). The National Elevator Company, MSBCA 1276, 2 MSBCA ¶131 (1986), at p. 4.

In this appeal, SHA has clearly and amply illustrated why the criterion requiring bridge painters to meet the minimum certification requirement as to their ability to perform surface preparation and industrial coating applications in the field (as per QP1) and their ability to perform industrial hazardous paint removal in field operations (as per QP2) is entirely reasonable. The QP1 and QP2 standards give SHA assurance that the successful bidder has met certain minimum standards. These standards have

been established by a national organization whose mission, according to Mr. Michael Damiano, the Director of Product Development at the SSPC, "is to enhance good practice of protective coatings application."

In point of fact, such certification requirements are not merely fair and reasonable - they are eminently desirable. This finding is only bolstered by the fact that this contract will be performed on bridges which span the Liberty Reservoir, a vital water gathering facility for the City of Baltimore and for the State of Maryland. Having standards such as these are clearly reasonable when previous occurrences, including the incident in Cumberland noted previously, have shown that specialized expertise is necessary for adequate performance of such contracts.

This project will involve the painting of two bridges with structural steel. The project involves the removal of hazardous waste products resulting from that work. It is irrefutable that the QP1 and QP2 specifications associated with this project are reasonably related to SHA's needs in achieving the safe and successful implementation of this project over the Liberty Reservoir.

There is also no evidence that these criteria unduly or unreasonably restrict competition as Mendocino alleges. To some extent, all definitive responsibility criteria limit competition. In fact, any specific requirement in a solicitation may well serve to limit competition by adding requirements which a particular bidder may not be able to fulfill. That fact is irrelevant. The issue is whether or not a definitive responsibility criterion unreasonably restricts competition.

The evidence from this case is clear that SHA's inclusion of the QP1 and QP2 certifications in

solicitations has not unreasonably restricted competition. In fact, it has been SHA's experience that the competition for its bridge cleaning and painting projects has actually increased since the implementation of the QP1 and QP2 requirements. The contract at issue actually received ten bids, five from bidders inside Maryland and five from bidders outside of Maryland.

Not only has the inclusion of these specifications increased competition, but there is substantial evidence that it has also increased the quality of the bidders as well. Mr. Freedman testified that there are more bidders today than in the past because, in his opinion, there is a more level playing field for bidders to know that they are bidding against other contractors who have some minimum level of proven expertise. Hearing Transcript, April 28, 2009, pp.46-50.

By way of a Memorandum dated October 2, 2002, James D. Cooper, Director of Bridge Technology for the U. S. Department of Transportation, Federal Highway Administration, encouraged state Departments of Transportation to adopt and implement the SSPC's Painting Contractor Certification Program (which includes both QP1 and QP2). Numerous other States, agencies of the Federal Government, and private entities use QP1, QP2 or both requirements when bidding contracts for similar bridge work.

The use by the SHA of QP1 and QP2 certification requirements in this contract was, therefore, utterly reasonable. Appellant has not proven in any fashion that either of these requirements is "clearly unreasonable."

Nor is there any merit to Appellant's argument that the use of the SSPC certifications are somehow unlawful

prequalifications. The QP1 and QP2 certification requirements are found to be in no way improper or illegal "prequalifications", as Mendocino claims.

Mendocino also alleges that the SHA procurement officer in this solicitation has ceded his ultimate authority in making responsibility determination to a third party, the SSPC. We reject that contention. The facts indicate that the final authority and/or determination of responsibility come from SHA's procurement officer herein, not from the SSPC. The procurement officer herein did not improperly delegate his authority to any third party.

Mr. Freedman made very clear in his testimony that SHA makes the ultimate responsibility determination, not the SSPC. Hearing Transcript; April 28, 2009; p.40. Mr. Freedman also testified that although the QP1 and QP2 certifications and the SSPC office and field audits are beneficial in assisting SHA to make its responsibility determination, it is SHA that makes the ultimate determination. Hearing Transcript; April 28, 2009; pp.38-40. The SSPC certification, while not a guarantee, provides SHA with a useful minimum assurance that the potential contractors are able to perform the work required in this sort of contract up to a certain standard.

A certification requirement by a third party as a definitive responsibility criteria does not indicate that the procurement officer has ceded his authority. Such requirements in one form or another are often utilized by procurement officers, including various federal procurement officials, to insure fair treatment to all potential bidders and to insure that potential bidders, for whatever the contract at issue, are certified by a respected entity up to a certain minimum standard.

Appellant's argument would require the negation of such commonplace, rational, and legal certifications. We reject Appellant's argument and uphold the use of such third party certifications as were utilized herein.

Appellant next argues that "federal policy discourages certification requirements." The clear evidence says otherwise.

As noted, the Federal Highway Administration (FHWA) itself encourages the use of the QP1 and QP2 certification standards by state Departments of Transportation. Respondent's Exhibit 2. The FHWA has also, apparently, approved the contract at issue, including the requirement of QP1 and QP2 certification by bidders.

Several federal entities, including: the U.S. Army Corps of Engineers; the U.S. Bureau of Land Management; the U.S. Bureau of Reclamation; the U.S. Department of Commerce; and the Federal Lands Department all require QP1 and QP2 certification according to Mendocino's own Hearing Exhibit. See Appellant's Hearing Exhibit 4.

Quite simply, there is no evidence whatsoever that federal policy discourages these type of certification requirements.

Mendocino also cites the high cost of obtaining SSPC QP1 and QP2 certification as cost prohibitive and a ground for sustaining its appeal. Once again, the Board must reject Mendocino's argument.

According to testimony from Mr. Norman Ros, Jr. the owner and sole stockholder of Mendocino General Contractors, Inc., the cost of obtaining SSPC QP1 and QP2 certification would ultimately come to approximately \$36,000 to \$47,000. He argues such an amount is cost prohibitive.

Mr. Damiano of the SSPC disagreed with that cost estimate in his testimony. According to the testimony of Mr. Damiano and the **SSPC QP (Quality Program) Fee Schedule** (Appellant's Exhibit 3), the cost of obtaining QP1 certification is approximately \$5,000, with approximately \$700-\$1,500 rebated to an applicant due to the \$2,600 audit deposit usually being higher than the actual cost of the audit. Hearing Transcript, April 27, 2009, pp.199-201; See Appellant's Exhibit 3. According to the testimony of Mr. Damiano and the **SSPC QP (Quality Program) Fee Schedule** (Appellant's Exhibit 3), the cost of obtaining QP2 certification is approximately \$3,600-\$4,700. Hearing Transcript, April 27, 2009, pp.199-201; See Appellant's Exhibit 3. According to the **SSPC QP (Quality Program) Fee Schedule** (Appellant's Exhibit 3), the cost of obtaining QP1 and QP2 certification together is \$5,900-\$6,800. See Appellant's Exhibit 3.

Whatever the costs involved, clearly numerous entities within Maryland and around the United States are willing to bear them to receive QP1 and/or QP2 certification.

Mendocino's complaint concerning the cost of SSPC QP1 and QP2 certification is without merit and is denied.

Finally, Mendocino argues that SHA should mandate years of experience as a requirement under the solicitation. Mendocino argues that in virtually every case where a definite responsibility criterion was challenged but approved by the Board, the Board approved experience requirements, not outside qualifications.

We find no procurement law that supports Mendocino's position. Furthermore, it is not the role of Mendocino, or this Board, to substitute its judgment for the SHA's in determining whether to incorporate a definitive

responsibility requirement in its solicitations, and, if so incorporated, the exact nature of the requirement to be placed within a solicitation.

This ground is without merit and is denied.

In spite of substantial efforts, Mendocino has not come close to proving any sustainable appeal ground herein. SHA has met its burden in this appeal; Mendocino has not.

The appeal of Mendocino is, therefore, denied.

In The Appeal of
Mendocino General Contractors,
Inc.

)
)
)
)
)
)
)

Docket No. MSBCA 2632

Under
SHA Contract No. CL 4425189

ORDER

Wherefore it is Ordered this ^{13th} day of August,
2009 that the appeal of Mendocino General Contractors, Inc.
in the above-captioned matter is denied.

Dated:

13 August 2009 Michael W. Burns

Michael W. Burns
Chairman

I Concur:

Michael J. Collins

Michael J. Collins
Board Member

Dana Lee Dembrow

Dana Lee Dembrow
Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

(a) Generally. - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

(b) Petition by Other Party. - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

* * *

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 2632, appeal of Mendocino General Contactors, Inc. under SHA Contract No. CL 4425189.

Dated: *August 13, 2009*


Michael L. Carnahan
Deputy Clerk

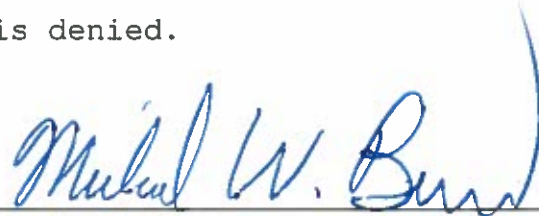
In The Appeal of)
Mendocino General Contractors,)
Inc.)
)
)
Under)
SHA Contract No. CL 4425189)

Docket No. MSBCA 2632

ORDER

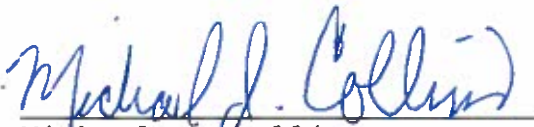
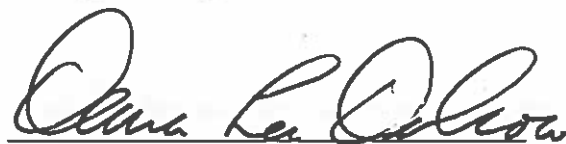
Wherefore it is Ordered this day of August,
2009 that the appeal of Mendocino General Contractors, Inc.
in the above-captioned matter is denied.

Dated:



Michael W. Burns
Chairman

I Concur:


Michael J. Collins
Board Member
Dana Lee Dembrow
Board Member