

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of INDEPENDENT TESTING	)	
AGENCY, INC.	)	
	)	Docket No. MSBCA 1833
Under DPS&CS Electrical Testing	)	
Annual Service Contract DCC-	)	
001-941-S01, DCC-002-941	)	
S01, DCC-003-941-S01	)	

November 4, 1994

Responsibility Criteria - Restricted Competition - Criteria requiring that the business have been in existence for five years is a matter of bidder responsibility and not responsiveness. In making a determination concerning whether a new corporation is responsible, the Procurement Officer should consider the experience of the principals of the new corporation.

Responsibility Criteria - Restricted Competition - A requirement in an IFB or RFP for certification of personnel of the successful bidder or offeror by specific entities (in this case private professional associations) involves a matter of responsibility and not responsiveness and such a definitive responsibility criteria is not per se unreasonably restrictive of competition.

APPEARANCE FOR APPELLANT:	None
APPEARANCE FOR RESPONDENT:	Alan D. Eason Asst. Attorney General Baltimore, MD

OPINION BY CHAIRMAN HARRISON

Appellant timely appeals the denial of its protest that Appellant met the definitive responsibility criteria of the specifications.

Findings of Fact

1. On January 1, 1994, the Division of Capital Construction of the Maryland Department of Public Safety and Correctional Services (DPS&CS) issued specifications for "electrical testing services for capital and maintenance projects for the eastern, central, and western regions of the state."
2. The Scope of Services was to:  
  
furnish all labor, materials, equipment, supervision, and insurance necessary to provide electrical testing including, but not limited

to, load surveys, power line disturbance studies, calibration and adjustment of relays, PCB sampling, ground resistance testing, transformer tap adjustments, and testing of high voltage apparatus such as cables, switchgear, and transformers.

Such services were to be performed at State facilities for which the capital construction or facility maintenance projects are managed by DPS&CS or St. Mary's College (central region).

3. Paragraph 2.1 of the specifications in part required that the selected vendor "shall have been regularly engaged in the testing of electrical power systems equipment, devices, and installations for a period of not less than five years." Additionally, the specifications provided:

- 2.3 The testing firm must have in their employ a minimum of two (2) two-man test teams who are employed full-time by the firm for testing services.

- 2.3.1 The members of the testing teams shall be currently certified by the International Electrical Testing Association (NETA) in Electrical Power Distribution System Testing, or certified as an Engineering Technician in Electrical Testing Engineering Technology by the National Institute for Certification in Engineering Technologies (NICET).

- 2.3.2. The names and certification numbers of the testing teams shall be identified on the Form of Proposal.

4. At bid opening on June 7, 1994 bids for the project were received from Met Electrical Testing; H&H testing, Inc.; Substation Test Company; and Appellant.
5. By letter dated June 9, 1994 to DPS&CS and received on June 13, 1994, H&H Testing, Inc. urged that Appellant, the apparent low bidder, did not meet the qualifications set out in paragraphs 2.1, 2.2, and 2.3 of the specifications. DPS&CS requested Appellant to provide further information on the qualifications of its personnel and the experience of the firm. By letter dated June 13, 1994, Appellant responded to the inquiry. This letter provides in relevant part as follows:

Enclosed please find our qualification submittals as per your request:

(1) Professional Engineer:  
Allen C. Howe, P.E.  
Prof. Eng. Reg. No. 11212

(2) Test Technicians:  
J. Michael Lawson  
IEEE Associate (M8116709)

Larry D. Long  
Master Electrical  
State of Maryland (License No. 3946)

David Ellis  
Associate Engineering Technologist  
NICET Cert. No. 000848

Jeffrey Donnelly  
Engineering Technician  
NICET Cert. No. 082446

(3) References:

Mr. Claude (Buzz) Wolfe  
R.T.K.L. Engineers  
Commerce Place  
1 South Street  
Baltimore, MD 21202  
(410) 528-8600

Mr. Charles Wellman  
Bell Atlantic  
1 East Pratt Street  
4N  
Baltimore, MD 21202  
(410) 393-4142

Mr. Dean Musser  
V.P. of Engineering Services  
Multi-Test Maintenance Corp.  
204 Gale Lane  
P.O. Box 390  
Kennett Square, PA 19348  
(215) 444-1100

Mr. Leonard Bathgate  
Kroeger Electric Company  
1007 Crain Highway S.E.  
Glen Burnie, MD 21061  
(410) 766-1416

(4) Business Experience:

J. Michael Lawson, President and Owner of the Independent Testing Agency, Inc. has been actively involved in the high voltage electrical testing field since July 1, 1975.

6. Following the receipt of Appellant's June 13, 1994 letter the DPS&CS Procurement Officer wrote to Appellant on June 15, 1994

stating that Appellant had not demonstrated that it possessed the requisite five years of firm experience, and also stating that an insufficient number of testing team members were certified as required by paragraph 2.3.1. The letter specifically provided as follows:

Dear Mr. Lawson:

We have received the qualifications material which was transmitted by facsimile to Mr. Robert N. Riley, P.E. of this office on this date. We regret to inform you that your bid is non-responsive in the following respects:

1. The specifications state (Paragraph 2.1) that "The testing firm shall have been regularly engaged in the testing of electrical power systems...for a period of not less than five years." One of your references has indicated that your firm was established not more than 18 months ago.

2. The specifications state (Paragraph 2.3) that "The testing firm must have in their employ a minimum of two (2) two-man test teams..." They further state (Paragraph 2.3.1) that "The members of the testing teams shall be currently certified by the International Electrical Testing Associates (NETA)...or certified as an Engineering Technician...by the National Institute for Certification in Engineering Technologies (NICET)." Only one of the four employees listed in your letter meets this requirement.

We appreciate your interest, and would like to have you as a bidder at a later date when you can meet the specifications.

7. By letter dated June 21, 1994, Appellant challenged the determination that its bid was non-responsive as follows:

We have received your letter dated June 15, 1994 pertaining to the referenced Contract indicating we are non-responsive for the following reasons:

1. Specifications (Paragraph 2.1)  
States that "The testing firm shall have been regularly engaged in electrical testing for a period of not less than five years". Although our firm was incorporated on December 1, 1993, all technicians listed on our qualification letter have over five years experience in high voltage maintenance and acceptance testing. As for

myself, as the owner and bidder on this project, I bring 19 years of experience with me.

On May 18, 1994, we were officially awarded a 3-year Electrical Testing Contract valued at \$22,800.00 by the State of Maryland, Department of General Services. This Contract, a copy of which is attached, was bid in a similar manner to yours and required a minimum of five (5) years professional experience also.

2. Specifications (Paragraph 2.3)  
Requires NETA or NICET certification. Our qualification letter identified the IEEE (Institute of Electrical and Electronics Engineers Inc.) and the State of Maryland "Master Electrical License" as certifications and standards which we abide by.

Both NETA and NICET are private professional groups located in the United States. They are neither a governing body or a licensing authority for electrical testing.

As a result, we would ask you to take another look at our firm based on our own individual merits, qualifications, and professional references.

8. The DPS&CS Procurement Officer responded to this letter by a letter dated June 24, 1994 in relevant part as follows:

I have received by facsimile your letter of June 21, 1994, concerning your qualifications to perform the work required by the subject testing contracts. Although your letter is not considered to be a formal protest, I want to respond to the issues you raised.

If you had any questions about the requirements of the specifications and your ability to meet them, they should have been resolved during the bidding process. There was a prebid conference for prospective bidders on May 24, 1994. Questions could also have been submitted at any time during the bidding process by mail, facsimile or telephone.

9. By letter dated June 24, 1994 Appellant's President filed a bid protest stating in relevant part:

I am in receipt of your letter dated June 24, 1994 . . . .

Please consider this letter our formal bid protest for Electrical Testing Contracts DCC-001-941-S01, DCC-200-941-S01, and DCC-300-941-S01.

Your letter indicated we did not meet Contract requirements as listed in the Specifications Section 2.0 (QUALIFICATIONS OF BIDDERS), paragraph 2.1 and 2.3.

I ask you to reference the "General Conditions", DPSCS, dated November 20, 1990 and revised April 25, 1994. Under Section 5 (MATERIALS), paragraph 5.04 addresses "APPROVED EQUALS". This term is implied throughout the specification in reference to all named manufacturers unless otherwise clearly stated.

As a result of this clause, we feel our Agency complies with Specification Section 2.1 regarding length of time in business. Our personnel have over five years experience in high voltage maintenance and acceptance testing, and bring with them the necessary experience and skills required for this type of Contract. When discussing our experience with your Mr. Riley last week, he informed me that he had spoken with several of our professional engineering references, and was told our reputation for quality service is impeccable.

As for Specification Section 2.3 regarding qualifications, our current professional affiliations "are equal to" the NETA and NICET groups mentioned in the specifications. Both NETA and NICET are private professional groups. They are neither a governing body or licensing authority for high voltage electrical testing.

10. By letter dated July 18, 1994, the DPS&CS Procurement Officer citing COMAR 21.10.02.03C denied the protest as being untimely on grounds it was based upon alleged infirmities in the solicitation which were apparent before bid opening. The decision specifically provides:

I have received your letter of June 24, 1994 formally protesting our award of the subject testing contracts.

As I stated in my letter of June 22<sup>1</sup>, if you had any questions about the requirements of the specifications and your ability to meet them, they should have been resolved

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<sup>1</sup>From the record it appears that the Procurement Officer is actually referring to his letter of June 24, mentioned in Finding of Fact No. 8 above.

during the bidding process. There was a prebid conference for prospective bidders on May 24, 1994. Questions could also have been submitted at any time during the bidding process by mail, facsimile or telephone.

COMAR 21.10.02.03 A states that "A protest based upon improprieties in a solicitation that are apparent before bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals." COMAR 21.10.02.03 C defines the term "filed" as meaning receipt by the Procurement Officer, and further states that "A protest received after the time limits prescribed in A or B may not be considered." Since the alleged improprieties upon which you base your protest are a part of the specifications (paragraphs 2.1 and 2.3.1), they were certainly apparent before bid opening. Since bids for these contracts were opened on June 7, 1994 your protest of June 24, 1994 must be considered to be untimely and of no effect.

11. This appeal followed. Neither party requested a hearing.

#### Decision

The Procurement Officer denied the protest on grounds that Appellant should have protested the experience and certification definitive responsibility requirements set forth in the invitation for bids prior to bid opening. He is correct that COMAR requires that a protest based upon alleged improprieties in a solicitation be filed prior to bid opening or the closing date for receipt of proposals. COMAR 21.10.02.03; Delaware Elevator, Inc., MSBCA 1741, 4 MSBCA ¶333 (1993). However, Appellant's protest was on grounds that it in fact met the experience and certification requirements. The Procurement Officer never specifically addressed this contention. We may infer that the Procurement Officer determined that Appellant did not and could not meet the specifications. The specifications requirements were plainly stated. We surmise that the procurement officer therefore concluded that the appellant was required to file a pre-bid protest that such specifications were restrictive in order to preserve Appellant's rights to challenge the specifications on such grounds. Nevertheless, focusing on the specific grounds of

protest, i.e. that Appellant, in fact, met the specifications as written in the invitation for bids, gives rise to some concern.

First as to the requirement that the successful firm" shall have been regularly engaged in the testing of electrical power systems equipment, devices, and installations for a period of not less than five years," we note that the Board has previously held that such a requirement involves bidder responsibility and the experience of corporate officials gained prior to the formation of a new corporation can be included when evaluating a corporation's overall experience level. See Acquatel Industries, Inc., MSBCA 1192, 1 MICPEL ¶82 (1984); The National Elevator Company, MSBCA 1266, 2 MICPEL ¶124 (1986); Environmental Controls, Inc., MSBCA 1356, 2 MICPEL ¶168 (1987); Calloway's Air Conditioning and Remodeling, MSBCA 1416, 3 MICPEL ¶202 (1989).

The DPS&CS Procurement Officer should have considered whether the experience of Appellant's President would meet the five year definitive responsibility criteria set forth in Specification 2.1. Based on the failure to consider the prior experience of corporate officials we would either affirm the appeal or remand with instruction that such consideration be undertaken but for the existence of an independent ground to support the finding that Appellant was not responsible. Specification 2.3 provided that the successful bidder must have in its employ two (2) two-man test teams each member of which was currently certified by NETA or NICET. Appellant did not meet this requirement since only one test-team person was certified as required.

Appellant argued in its protest that the Procurement Officer should consider the certifications that its testing personnel had received as "APPROVED EQUALS" under Paragraph 5.04 of the General Conditions. The Procurement Officer rejected the protest in this regard on timeliness grounds. While technically the Procurement Officer should have addressed the specific ground of protest, i.e. that the certifications possessed by Appellant's testing personnel were "equal" to the specifically required certifications by NETA and NICET, the record reflects that he did not consider such



certifications to be equivalent to NETA and NICET; nor was he required to. An agency may require certification of the personnel of the successful bidder or offeror by specific entities. See Substation Testing Co., MSBCA 1464, 3 MICPEL ¶225 (1989). Such a definitive responsibility criteria is not per se unreasonably restrictive of competition and Appellant failed to challenge the requirement prior to bid opening. Thus Appellant must meet the requirement at bid opening or at least prior to award to be considered a responsible bidder.

While the record clearly reflects that Appellant did not meet the requirement at bid opening (and apparently did not intend to meet the requirement prior to award) the Procurement Officer determined that such failure made Appellant's bid not responsive rather than that Appellant was not responsible. A matter of responsibility cannot be converted into a matter of responsiveness by the terms of the invitation for bid. See Cam Construction Company of Maryland, Inc., MSBCA 1393, 2 MICPEL ¶195 (1988). We therefore remand the matter to the Procurement Officer to determine whether Appellant is a non-responsible bidder due to the failure to meet the definitive responsibility requirements for certification and to also consider the experience of corporate officials relative to the definitive responsibility requirement for five years of regular engagement in the testing of electrical power systems equipment. So ORDERED this ~~4<sup>th</sup>~~ day of November, 1994.

Dated:

November 4, 1994



Robert B. Harrison III  
Chairman

I concur:



Candida S. Steel  
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.

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I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1833, appeal of Independent Testing Agency, Inc. under DPS&CS Annual Service Contract DCC-001-941-S01, DCC-002-941-S01, DCC-003-941-S01.

Dated: 11/4/94

  
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Mary F. Priscilla  
Recorder