

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of INDEPENDENT TESTING)
AGENCY, INC.)
) Docket No. MSBCA 1908
Under MAA Contract No. MAA-MC-)
96-003)
)

October 24, 1995

Responsibility - The experience of officials gained prior to the formation of a corporation or other business entity may be considered when evaluating responsibility of an offeror in the context of a request for proposals. The instant appeal, however, involved a criteria that specifically required that the business entity have five years of experience "not individual employees or combinations of employees, working on major types of electrical equipment." Based on the record compiled in the appeal the Board declined to find that the challenged requirement went beyond the minimum needs of the agency.

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: Mark A. Vulcan
Assistant Attorney General
Baltimore, MD

APPEARANCE FOR INTERESTED PARTY: Louis J. Kozlakowski, Jr., Esq.
(Harford Electrical Testing Blum, Yumkas, Mailman, Gutman &
Co., Inc.) Denick, P.A.
Baltimore, MD

MEMORANDUM OPINION

Appellant timely appeals the decision by the Maryland Aviation Administration (MAA) sustaining the protest of Harford Electrical Testing Co., Inc. (Harford) that Appellant failed to meet the requirements of TP-1.08 of the specifications for the above captioned contract which requires that "...the company or corporation must have five (5) years experience, not individual employees or combinations of employees, working on major types of electrical equipment." The contract was awarded through procurement by competitive sealed proposals.

Findings of Fact

1. Harford protested award of the above captioned contract to Appellant on June 28, 1995 on grounds (material to this appeal) that Appellant failed to meet the requirement of TP-1.08 of the specification requiring that "...the company or corporation must have five (5) years experience, not individual employees or combinations of employees, working on major types of electrical equipment."
2. On June 29, 1995 Appellant filed a letter of "counter-protest" opposing the Harford protest.
3. By letter dated July 20, 1995, MAA sustained the Harford protest and Appellant timely appealed to this Board on July 31, 1995.
4. The Agency Report was filed on September 11, 1995 and the Board scheduled a hearing on the merits.
5. Appellant requested postponement of the hearing and thereafter requested in comment on the Agency Report that the Board decide the appeal based on the written record.

Decision

The Board will deny the appeal. No protest of the requirement that offerors have five (5) years experience as a company or corporation and that prior experience of employees could not be considered was filed prior to the due date for receipt of initial proposals. Appellant's inferential protest of such requirement in its June 29, 1995 counter-protest filed after receipt of initial proposals is untimely. COMAR 21.10.02.03A. See National Elevator Company, MSBCA 1251, 2 MSBCA ¶115 (1985).

The Board has previously held in the context of procurement by competitive sealed bidding that requirements in an IFB that bidders demonstrate a certain level of experience represents a matter of responsibility rather than responsiveness and that a matter of responsibility cannot be converted into one of responsiveness by virtue of the language in the IFB. See e.g. National Elevator, MSBCA 1252, 2 MSBCA ¶114 (1985) at p.4; Cam Construction of Maryland, Inc., MSBCA 1393, 2 MSBCA ¶195 (1988) at pp. 9-10. We find that the same principle applies to procurement by competitive sealed proposals. We also reaffirm that experience of officials gained prior to the formation of a corporation or other business entity may be considered in determining whether a bidder or offeror meets experience criteria, at least where the responsibility requirement does not specifically preclude consideration of prior experience. We recognize that the challenged

criteria herein precludes consideration of an employee's former employment in meeting the experience requirement which could, in some instances, improperly restrict competition. However, on this record we cannot say that the challenged specification goes beyond the minimum needs of the agency. COMAR 21.04.01. See The National Elevator Company, MSBCA 1266, 2 MSBCA ¶124 (1986). The Board thus declines to find that the requirement on its face violates COMAR 21.04.01.

In any event, it makes no difference in this appeal whether the instant requirement is viewed as a definitive responsibility criteria or a matter of Appellant's inability to meet a mandatory requirement of the Request for Proposals causing its proposal to be not capable of being made acceptable. Nor does it make any difference that the Appellant may have in its employ persons who have experience elsewhere. The Appellant simply has not shown on this record that it has five (5) years experience as a company or corporation nor, if permitted, that it could meet such requirement through consideration of employment of its corporate or company employees elsewhere. See Aquatec Industries, Inc., MSBCA 1192, 1 MSBCA ¶82 (1984).

Accordingly, the appeal is denied.

Therefore, it is ORDERED this 24th day of October, 1995 that the appeal is denied.

Dated: October 24, 1995

Robert B. Harrison III
Chairman

Candida S. Steel
Board Member

Randolph B. Rosencrantz
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 Memorandum Opinion in MSBCA 1908, appeal of Independent Testing Agency, Inc. under MAA Contract No. MAA-MC-96-003.

Dated: October 24, 1995

Mary F. Priscilla
Recorder