

August 5, 1994

P.S. Protest No. 94-26

ELECTRO-TEST, INC.

Solicitation No. 266351-94-A-0714

DIGEST

Protest against award of contract for testing and maintenance of switchgear equipment is sustained where award was not made in accordance with the solicitation's stated requirement that the contractors' personnel be certified by either of two professional testing associations.

DECISION

Electro-Test, Inc., (ETI) timely protests the award of an electrical testing and maintenance contract to Industrial Electric Engineering & Testing Company (Industrial Electric), claiming that award was not made in accordance with the solicitation's requirements.

Solicitation 2266351-94-A was issued under simplified purchasing procedures on April 15, 1994, by the Purchasing Service Center in Minneapolis, MN, seeking offers for testing and preventive maintenance services for high voltage switchgear at a Kansas City, KS, postal facility. Offers were due April 28.

The solicitation stated that the Postal Service "intends to award a contract to the responsible offeror whose proposal conforming to the solicitation offers the best value to the Postal Service, considering price, price-related factors, and/or other evaluation factors specified elsewhere in this solicitation." Since there were no other factors specified in the solicitation, award was to be based on price.¹

¹ See, e.g., *Sircle Spring Company and Packaging Accessories Company*, P.S. Protest Nos. 91-86; 91-91, January 21, 1992; *Office Systems of Florida, Inc.*, P.S. Protest No. 91-70, December 6, 1991.

Attachment 1 to the solicitation stated that service was to be performed between May 1 and June 30, 1994.² Paragraph B, Scope of Performance, stated:

The contractor shall provide the service of factory-trained personnel for completion of all maintenance work described herein, or as becomes necessary in the execution of this contract[. All checks and tests will be performed [in] accordance with factory requirements, and Section 2, 3,³ 4, 5, 7 and 9 of Maintenance Testing Specifications for Electrical Power Distribution Equipment and Systems developed by International Electrical Testing Association (NETA-1989 or later edition), and at no less than the frequency recommended by the manufacturer. This information must be obtained by the contractor.

The proposals of the protester and the awardee were the only ones received. Award was made to Industrial Electric on May 5 after it was determined to have offered the lowest price. ETI's protest was received by the contracting officer on May 11.

ETI alleges that the awardee does not meet the requirements of Paragraph B, Scope of Performance, because under Section 3.4 of the NETA maintenance specifications, the contractor must provide a lead technical person who is currently certified by NETA or NICET. ETI alleges that Industrial Electric's lead technical person cannot be certified by NETA because Industrial Electric is not a "full member of NETA" and "therefore personnel employed by them do not qualify for certification." The protester asks that the awardee be disqualified.⁴

In response to the protest, the contracting officer confirms that Industrial Electric's lead person is not certified but states that it was not the "Postal Service's intent to require membership in NETA to be considered for award" because full membership "requires that 75% of a company's income come from testing. Requiring NETA membership would eliminate competition and generate protests." According to the contracting officer, Paragraph B focuses not on the "relationship between personnel and NETA, but between the type of maintenance work required and NETA standards." She states that the purpose is to have tests conducted and minimum performance standards set in accordance with recognized national standards. "The intent of the reference is to specify the quality of service desired by the Postal Service."

² This office has been notified that due to ETI's protest, performance did not begin on May 1 and has been suspended pending the issuance of this decision.

³ Section 3 of the InterNational Electrical Testing Association (NETA) Maintenance Testing Specifications, which lists qualifications of the testing agency, states at 3.4:

The lead, on site, technical person shall be currently certified by the [NETA] or National Institute for Certification in Engineering Technologies (NICET) in electrical power distribution system testing.

⁴ The record does not discuss the eligibility of Industrial Electric's lead technical person for NICET certification, but it is clear that that person is not so certified.

In response to the contracting officer's statement, ETI reemphasizes the language of Paragraph B and states:

Considering the insertion of this particular paragraph . . . , clearly the Postal Service wanted to insure that the lead on site technical person meets the letter of this paragraph. Industrial Electric Engineering & Testing Company personnel do not meet this requirement[.]

The protester also points out there are 69 NETA member offices with 256 certified test technicians, representing "significant and healthy competition in the electrical testing industry, while providing the US Postal Service with a service company that clearly meets the solicitation in every detail."

DISCUSSION

In effect, the protester is arguing that Section 3 of the NETA Maintenance Testing Specifications (footnote 3) was incorporated into the solicitation by the reference to those specifications in Paragraph B, Scope of Work. We agree, and, accordingly, sustain the protest.

The selection and weighting of evaluation criteria are duties falling within the contracting officer's discretion. *Service America Corporation*, P.S. Protest No. 91-56, October 30, 1991; *Frederick Manufacturing Company*, P.S. Protest No. 87-13, April 8, 1987. Once the criteria are selected, however, they must be applied as stated in the solicitation. *Id.*; see also PM 4.1.4 a.; 4.1.5 b.2.

Here, it is clear that neither the technical personnel nor the contracting officer intended for the solicitation to exclude firms whose personnel are not certified by NETA. Nevertheless, the language of the solicitation operates to exclude them. The proper course of action in this case would have been either to exclude Industrial Electric in accordance with the solicitation, or to issue a solicitation amendment that stated the Postal Service's true intentions. *Leslie-Locke, Inc.*, P.S. Protest No. 92-50, November 23, 1992; *POVECO, Inc.*, P.S. Protest No. 85-9, May 21, 1985; *PAE GmbH*, Comp. Gen. Dec B-212403.3 et al., July 24, 1984, 84-2 CPD 93. Awarding the contract to Industrial Electric despite the solicitation's language was improper.

Since performance has not begun, the error can be remedied. We direct the contracting officer to terminate Industrial Electric's contract for convenience and resolicit the requirement.⁵

⁵ Notwithstanding the contracting officer's suggestion to the contrary, it would not necessarily be unduly restrictive of competition to limit the lead personnel to NETA or NICET-certified individuals. See *Boiler, Pressure Vessels Inspection Agency, Inc.*, P.S. Protest No. 87-17, June 29, 1987 (requirement that boiler inspectors be certified by national group considered reasonable "[i]n view of the highly technical nature of the work of inspecting boilers"). Further, if a specification is otherwise reasonable, the fact that one or more potential offerors may be precluded from participating in the solicitation does not render its terms restrictive if they reflect the legitimate needs of the procuring activity. *Dataware Systems Lease, Inc.*,

The protest is sustained.

William J. Jones
Senior Counsel
Contract Protests and Policies

P.S. Protest No. 91-41, October 10, 1991.