



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Restec Contractors, Inc.

**File:** B-245862

**Date:** February 6, 1992

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Torrey M. Neill, Esq., Dann, Greenberg, Radder, for the protester,  
Ronnie Smith for Eastern Maintenance & Services, Inc., an interested party.  
John Petit, Esq., Department of the Air Force, for the agency.  
Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Requirement that offeror be certified by the state to perform asbestos work is a contract performance requirement, not a definitive responsibility criterion where, although a state regulation incorporated by reference into the solicitation required certification before bidding or before performance, when the solicitation is read reasonably and as a whole it only required possession of a certificate before performance began.

2. Agency had sufficient evidence to reasonably conclude that the proposed awardee satisfied a definitive responsibility criterion that the awardee have completed three similar asbestos projects within the last 3 years.

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### DECISION

Restec Contractors, Inc. protests the proposed award of a contract to Eastern Maintenance & Services, Inc. under invitation for bids (IFB) No. F45603-91-B8038, issued by the Air Force for asbestos removal and related services to be performed at a passenger terminal building located at McChord Air Force Base in the state of Washington. Restec maintains that Eastern's bid is nonresponsive and that the proposed awardee is nonresponsible because the firm has not submitted evidence that it is in compliance with a Washington state license requirement or that it has the experience required by the IFB.

We deny the protest.

The IFB was issued on August 13, 1991, and contemplated a contract for the project at McChord Air Force Base which involved: (1) the relocation of furniture and equipment from the air passenger terminal; (2) the removal, disposal or abatement of asbestos-containing materials from the terminal; and (3) the replacement of items initially removed and restoration of the terminal. Work was to commence within 5 days of receipt of a notice to proceed from the contracting officer, which was to be issued within 30 days of award.

Detailed contract performance requirements were set forth in the IFB specification. Paragraph 1.4 of specification section 02085 (which dealt with the asbestos work phase of the project) required several "submittals" which, in the IFB as originally issued, were required to be included "with the bid package;" however, the IFB specification was subsequently modified to delete the requirement that the submissions be included with the bid. The relevant provisions are as follows:

A. Subparagraph 1.4.9.1 required examples of three projects of similar complexity completed by the "abatement construction company" within the last 3 years.

B. Subparagraph 1.4.9.2 required the submission of resumes, medical records and other information, including state licenses on asbestos superintendents, foremen and laborers.

Further, paragraph 2 of section 01000 of the specification, entitled "APPLICABLE PUBLICATIONS," stated "federal, commercial and trade association publications as listed in the separate technical provisions, form a part of this specification to the extent applicable to the work being specified." In this regard, subparagraph 1.2 of the asbestos portion of the specification, also entitled "APPLICABLE PUBLICATIONS," stated that the "publications listed are incorporated into the specification." Chapter 296-65 of the Washington Administrative Code (WASH. ADMIN. CODE (1989)), entitled "Asbestos Removal and Encapsulation," was listed in the subparagraph. A portion of that Code chapter dealing with state "asbestos contractor certificates" provides that such a certificate shall be obtained "[b]efore submitting a bid or working on an asbestos abatement project." WASH. ADMIN. CODE, § 296-65-030(1). The IFB, however, did not require evidence of certification to be provided with the bids or before award and no bidder submitted such evidence.

The IFB also incorporated the standard clause set forth at Federal Acquisition Regulation (FAR) § 52.236-7, which states that the "contractor" is responsible for obtaining

any necessary licenses and permits and for complying with any federal, state, and municipal laws, codes, and regulations applicable to the performance of the work called for in the IFB.

Nine bids were opened on September 12. The three lowest bids were excluded from the competition; one was withdrawn as the result of a mistake in bid and two were rejected for failure to comply with IFB provisions relating to bid guarantees. Eastern was next in line with a price of \$878,485, and the protester followed with a price \$889,430.

To investigate Eastern's responsibility, the contracting officer verified 7 of 13 company references regarding recent asbestos projects which were submitted at the agency's request after bid opening. The references included projects where Eastern itself had performed asbestos removal work and where it had subcontracted the work. The responsibility review also stated that, since Eastern possessed asbestos certificates in other states, it would take about 30 to 45 days to obtain a Washington certification in the event the firm chose not to subcontract the work to an already certified firm.

On September 25, the contracting officer determined Eastern to be responsible principally because, in his view, the projects in which Eastern had either performed asbestos removal and abatement work itself or had subcontracted the work demonstrated that the firm had the ability to perform the McChord project. This protest followed the next day. No award has been made.

The principal basis of Restec's protest is that Eastern's failure to possess a prebid certification from the state of Washington as an approved asbestos contractor bars the firm from receiving the award under the IFB. This argument is based on the text of the state regulations, quoted above, which, in the protester's view, establish prebid certification as a material requirement of the IFB; thus, Restec argues that Eastern's bid must be rejected as nonresponsive. In the alternative, Restec argues that the state regulation establishes a definitive responsibility criterion which Eastern has not met.

We disagree with both of the protester's arguments. The language of the state regulation, which the Air Force incorporated into the solicitation, states that a firm must possess a state asbestos certificate "before submitting a bid or working on an asbestos abatement project." Read literally this provision may be read as requiring that a firm have the certificate before bid opening. Nevertheless, the solicitation contained no requirement that evidence of this certificate be submitted with the bids or, for that matter,

that evidence be submitted at any particular time and, in fact, none of the bidders, including the protester, submitted such evidence with its bid. Moreover, the second portion of the quoted language only required that the awardee possess the certificate by the time performance begins.<sup>1</sup> In our view, the most reasonable interpretation of this language is that the certificate is required before performance begins. We do not see how that interpretation of the solicitation would place Restec at a competitive disadvantage. This reading would ensure that the agency's needs would be fulfilled in that a certified firm would perform the work. Further, the protester does not argue that it would have bid differently had it understood that the certificate was needed by the time of performance as opposed to before bid opening.

With regard to whether the state requirement constitutes a definitive responsibility criterion as alleged by Restec, we have held that under circumstances such as are present in this case if a specific licensing requirement does not obligate a bidder to possess or show the ability to obtain a particular license before award, it is not a definitive responsibility criterion; rather, it is a contract performance requirement that does not affect a decision to award a contract. IBI Security Servs., Inc., B-240495.2, Feb. 28, 1991, 91-1 CPD ¶ 241. Whether Eastern is capable of meeting such a performance requirement is a matter of the firm's general responsibility. The agency found Eastern responsible and since the requirement is not a definitive responsibility criterion, we will not review the affirmative determination of responsibility absent a showing of possible bad faith or fraud. Standard Mfg. Co., Inc., B-236814, Jan. 4, 1990, 90-1 CPD ¶ 14. Restec does not allege bad faith or fraud.

Also, Restec argues that Eastern cannot meet the requirement in subparagraph 1.4.9.1 that it submit examples of three projects of similar complexity that it has performed as an asbestos abatement construction company within the last 3 years. This provision constitutes a definitive

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<sup>1</sup>The Air Force, upon advice of state officials received after bid opening, reports that certification requirements do not apply to asbestos contractors on projects performed wholly on federal property; the protester disputes this conclusion. Agencies may, however, through solicitation provisions require the possession of state licenses even though they are not legally required to accomplish the necessary work. 53 Comp. Gen. 51 (1973). Accordingly, since the agency adopted the provision by incorporating it into the solicitation, we expect that it will be enforced like any other performance requirement.

responsibility criterion as it sets forth objective standards to measure the firm's ability to perform. United Materials, Inc., B-243669, Aug. 16, 1991, 91-2 CPD ¶ 161. The Air Force requested and reviewed recent asbestos project references from Eastern as part of its preaward survey.

We have reviewed the evaluation and we find no basis for questioning the agency's conclusion that this experience requirement was satisfied. The seven references included projects within the last 3 years, and at least two of them involved projects valued in excess of \$1,000,000 each and one other indefinite quantity contract where \$200,000 worth of delivery orders have been issued. In view of this information, and the fact that the agency representatives had a positive assessment of Eastern's performance in circumstances where the firm either performed as a prime contractor or subcontracted the work, we think that there was sufficient evidence for the contracting officer to conclude that Eastern had exhibited a level of experience equivalent to that required in the solicitation; nothing more is needed to establish that this definitive responsibility criterion was satisfied. See Western Roofing Serv., B-232666.3, Apr. 11, 1989, 89-1 CPD ¶ 368.

Finally, Restec generally questions whether the agency has asked for and evaluated the data about employees required by subparagraph 1.4.9.2 of the specification. The record does not show that this information has been submitted or evaluated. Since according to the contracting officer, final approval for the selection of Eastern has yet to be made, we expect that the Air Force will comply with the provisions of the solicitation by requiring Eastern to submit evidence of compliance with all the requirements set forth in subparagraph 1.4.9.2 in order to complete the agency's preaward review of Eastern's responsibility. If the Air Force fails to do so before award, that issue will be ripe for our review.

The protest is denied.

  
for James F. Hinchman  
General Counsel