

**PAYMENT & INTEREST (MAY 2011)**

(a) Unless otherwise provided in this Solicitation, the State shall pay the Contractor, after the submission of proper invoices or vouchers, the prices stipulated in this contract for supplies delivered and accepted or services rendered and accepted, less any deductions provided in this contract. Unless otherwise specified herein, including the purchase order, payment shall not be made on partial deliveries accepted by the Government. (b) Unless otherwise provided herein, including the purchase order, payment will be made by check. (c) Notwithstanding any other provision, payment shall be made in accordance with S.C. Code Section 11-35-45, which provides the Contractor's exclusive means of recovering any type of interest from the Owner. Contractor waives imposition of an interest penalty unless the invoice submitted specifies that the late penalty is applicable. Except as set forth in this paragraph, the State shall not be liable for the payment of interest on any debt or claim arising out of or related to this contract for any reason. (d) Amounts due to the State shall bear interest at the rate of interest established by the South Carolina Comptroller General pursuant to Section 11-35-45 ("an amount not to exceed fifteen percent each year"), as amended. (e) Any other basis for interest, including but not limited to general (pre- and post-judgment) or specific interest statutes, including S.C. Code Ann. § 34-31-20, are expressly waived by both parties. If a court, despite this agreement and waiver, requires that interest be paid on any debt by either party other than as provided by items (c) and (d) above, the parties further agree that the applicable interest rate for any given calendar year shall be the lowest prime rate as listed in the first edition of the Wall Street Journal published for each year, applied as simple interest without compounding.

**INDEMNIFICATION - THIRD PARTY CLAIMS (NOV 2011)**

Notwithstanding any limitation in this agreement, and to the fullest extent permitted by law, Contractor shall defend and hold harmless Indemnitees for and against any and all suits or claims of any character (and all related damages, settlement payments, attorneys' fees, costs, expenses, losses or liabilities) by a third party which are attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property arising out of or in connection with the goods or services acquired hereunder or caused in whole or in part by any act or omission of contractor, its subcontractors, their employees, workmen, servants, agents, or anyone directly or indirectly employed by them or anyone for whose acts any of them may be liable, regardless of whether or not caused in part by an Indemnitee, and whether or not such claims are made by a third party or an Indemnitee; however, if an Indemnitee's negligent act or omission is subsequently determined to be the sole proximate cause of a suit or claim, the Indemnitee shall not be entitled to indemnification hereunder. Contractor shall be given timely written notice of any suit or claim. Contractor's obligations hereunder are in no way limited by any protection afforded under workers' compensation acts, disability benefits acts, or other employee benefit acts. This clause shall not negate, abridge, or reduce any other rights or obligations of indemnity which would otherwise exist. The obligations of this paragraph shall survive termination, cancelation, or expiration of the parties' agreement. This provision shall be construed fairly and reasonably, neither strongly for nor against either party, and without regard to any clause regarding insurance. As used in this clause, "Indemnitees" means the State of South Carolina, its instrumentalities, agencies, departments, boards, political subdivisions and all their respective officers, agents and employees.

**DISCLOSURE OF CONFLICTS OF INTEREST OR UNFAIR COMPETITIVE ADVANTAGE (MAY 2011)**

You warrant and represent that your offer identifies and explains any unfair competitive advantage you may have in competing for the proposed contract and any actual or potential conflicts of interest that may arise from your participation in this competition or your receipt of an award. The two underlying principles are (a) preventing the existence of conflicting roles that might bias a contractor's judgment, and (b) preventing an unfair competitive advantage. If you have an unfair competitive advantage or a conflict of interest, the state may withhold award. Before withholding award on these grounds, an offeror will be notified of the concerns and provided a reasonable opportunity to respond. Efforts to avoid or mitigate such concerns, including restrictions on future activities, may be considered.

**SUBMITTING REDACTED OFFERS (FEB 2007)**

You are required to mark the original copy of your offer to identify any information that is exempt from public disclosure. You must do so in accordance with the clause entitled "Submitting Confidential Information." In addition, you must also submit one complete copy of your offer from which you have removed any information that you marked as exempt, i.e., a redacted copy. The information redacted should mirror in ever detail the information marked as exempt from public disclosure. The redacted copy should (i) reflect the same pagination as the original, (ii) show the empty space from which information was redacted, and (iii) be submitted on magnetic media. (See clause entitled "Magnetic Media – Required Format.") Except for the redacted information, the CD must be identical to the original hard copy. Portable Document Format (.pdf) is preferred. [04-4030-1]

**ILLEGAL IMMIGRATION (NOV. 2008)**

(An overview is available at [www.procurement.sc.gov](http://www.procurement.sc.gov)) By signing your offer, you certify that you will comply with the applicable requirements of Title 8, Chapter 14 of the South Carolina Code of Laws and agree to provide to the State upon request any documentation required to establish either: (a) that Title 8, Chapter 14 is inapplicable to you and your subcontractors or sub-subcontractors; or (b) that you and your subcontractors or sub-subcontractors are in compliance with Title 8, Chapter 14. Pursuant to Section 8-14-60, "A person who knowingly makes or files any false, fictitious, or fraudulent document, statement, or report pursuant to this chapter is guilty of a felony, and, upon conviction, must be fined within the discretion of the court or imprisoned for not more than five years, or both." You agree to include in any contracts with your subcontractors language requiring your subcontractors to (a) comply with the applicable requirements of Title 8, Chapter 14, and (b) include in their contracts with the sub-subcontractors language requiring the sub-subcontractors to comply with the applicable requirements of Title 8, Chapter 14. [07-7B097-1]

**CERTIFICATE OF INDEPENDENT PRICE DETERMINATION (MAY 2008)**

GIVING FALSE, MISLEADING, OR INCOMPLETE INFORMATION ON THIS CERTIFICATION MAY RENDER YOU SUBJECT TO PROSECUTION UNDER SECTION 16-9-10 OF THE SOUTH CAROLINA CODE OF LAWS AND OTHER APPLICABLE LAWS.

(a) By submitting an offer, the offeror certifies that—

(1) The prices in this offer have been arrived at independently, without, for the purpose of restricting competition, any consultation, communication, or agreement with any other offeror or competitor relating to—

(i) Those prices;

(ii) The intention to submit an offer; or

(iii) The methods or factors used to calculate the prices offered.

(2) The prices in this offer have not been and will not be knowingly disclosed by the offeror, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed bid solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law; and

(3) No attempt has been made or will be made by the offeror to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

(b) Each signature on the offer is considered to be a certification by the signatory that the signatory—

(1) Is the person in the offeror's organization responsible for determining the prices being offered in this bid or proposal, and that the signatory has not participated and will not participate in any action contrary to paragraphs (a)(1) through (a)(3) of this certification; or

(2)(i) Has been authorized, in writing, to act as agent for the offeror's principals in certifying that those principals have not participated, and will not participate in any action contrary to paragraphs (a)(1) through (a)(3) of this certification [As used in this subdivision (b)(2)(i), the term "principals" means the person(s) in the offeror's organization responsible for determining the prices offered in this bid or proposal];

(ii) As an authorized agent, does certify that the principals referenced in subdivision (b)(2)(i) of this certification have not participated, and will not participate, in any action contrary to paragraphs (a)(1) through (a)(3) of this certification; and

(iii) As an agent, has not personally participated, and will not participate, in any action contrary to paragraphs (a)(1) through (a)(3) of this certification.

(c) If the offeror deletes or modifies paragraph (a)(2) of this certification, the offeror must furnish with its offer a signed statement setting forth in detail the circumstances of the disclosure. [02-2A032-1]

FOR IFBs & RFPs

### **CLARIFICATION (NOV 2007)**

Pursuant to Section 11-35-1520(8), the Procurement Officer may elect to communicate with you after opening for the purpose of clarifying either your offer or the requirements of the solicitation. Such communications may be conducted only with offerors who have submitted an offer which obviously conforms in all material aspects to the solicitation. Clarification of an offer must be documented in writing and included with the offer. Clarifications may not be used to revise an offer or the solicitation. [Section 11-35-1520(8); R.19-445.2080]

FOR RFPs Only:

### **DISCUSSIONS & NEGOTIATIONS (NOV 2007)**

Submit your best terms from a cost or price and from a technical standpoint. Your proposal may be evaluated and your offer accepted without any discussions, negotiations, or prior notice. Ordinarily, nonresponsive proposals will be rejected outright. Nevertheless, the State may elect to conduct discussions, including the possibility of limited proposal revisions, but only for those proposals reasonably susceptible of being selected for award. If improper revisions are submitted, the State may elect to consider only your unrevised initial proposal. [11-35-1530(6); R.19-445.2095(I)] The State may also elect to conduct negotiations, beginning with the highest ranked offeror, or seek best and final offers, as provided in Section 11-35-1530(8). If negotiations are conducted, the State may elect to disregard the negotiations and accept your original proposal.

### **AWARD NOTIFICATION (NOV 2007)**

Notice regarding any award or cancellation of award will be posted at the location specified on the Cover Page. If the contract resulting from this Solicitation has a total or potential value of fifty thousand dollars or more, such notice will be sent to all Offerors responding to the Solicitation. Should the contract resulting from this Solicitation have a total or potential value of one hundred thousand dollars or more, such notice will be sent to all Offerors responding to the Solicitation and any award will not be effective until the eleventh day after such notice is given. [02-2A010-1]

### **ETHICS CERTIFICATE (MAY 2008)**

By submitting an offer, the offeror certifies that the offeror has and will comply with, and has not, and will not, induce a person to violate Title 8, Chapter 13 of the South Carolina Code of Laws, as amended (ethics act). The following statutes require special attention: Section 8-13-

700, regarding use of official position for financial gain; Section 8-13-705, regarding gifts to influence action of public official; Section 8-13-720, regarding offering money for advice or assistance of public official; Sections 8-13-755 and 8-13-760, regarding restrictions on employment by former public official; Section 8-13-775, prohibiting public official with economic interests from acting on contracts; Section 8-13-790, regarding recovery of kickbacks; Section 8-13-1150, regarding statements to be filed by consultants; and Section 8-13-1342, regarding restrictions on contributions by contractor to candidate who participated in awarding of contract. The state may rescind any contract and recover all amounts expended as a result of any action taken in violation of this provision. If contractor participates, directly or indirectly, in the evaluation or award of public contracts, including without limitation, change orders or task orders regarding a public contract, contractor shall, if required by law to file such a statement, provide the statement required by Section 8-13-1150 to the procurement officer at the same time the law requires the statement to be filed. [02-2A075-2]

### **TAX CREDIT FOR SUBCONTRACTING WITH DISADVANTAGED SMALL BUSINESSES (JAN 2008)**

Pursuant to Section 12-6-3350, a taxpayer having a contract with this State who subcontracts with a socially and economically disadvantaged small business is eligible for an income tax credit equal to four percent of the payments to that subcontractor for work pursuant to the contract. The subcontractor must be certified as a socially and economically disadvantaged small business as defined in Section 11-35-5010 and regulations pursuant to it. The credit is limited to a maximum of fifty thousand dollars annually. A taxpayer is eligible to claim the credit for ten consecutive taxable years beginning with the taxable year in which the first payment is made to the subcontractor that qualifies for the credit. After the above ten consecutive taxable years, the taxpayer is no longer eligible for the credit. A taxpayer claiming the credit shall maintain evidence of work performed for the contract by the subcontractor. The credit may be claimed on Form TC-2, "Minority Business Credit." A copy of the subcontractor's certificate from the Governor's Office of Small and Minority Business (OSMBA) is to be attached to the contractor's income tax return. Questions regarding the tax credit and how to file are to be referred to: SC Department of Revenue, Research and Review, Phone: (803) 898-5786, Fax: (803) 898-5888. Questions regarding subcontractor certification are to be referred to: Governor's Office of Small and Minority Business Assistance, Phone: (803) 734-0657, Fax: (803) 734-2498. [02-2A135-1]

### **PROTESTS (JUNE 2006)**

Any prospective bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the solicitation of a contract shall protest within fifteen days of the date of issuance of the applicable solicitation document at issue. Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest within ten days of the date notification of award is posted in accordance with this code. A protest shall be in writing, shall set forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided, and must be received by the appropriate Chief Procurement Officer within the time provided. See clause entitled "Protest-CPO". [Section 11-35-4210] [02-2A085-1]

**PAGE TWO**

**(Return Page Two with Your Offer)**

<p><b>HOME OFFICE ADDRESS</b> (Address for offeror's home office / principal place of business)</p>          	<p><b>NOTICE ADDRESS</b> (Address to which all procurement and contract related notices should be sent.) (See "Notice" clause)</p>          <p>_____</p> <p style="text-align: center;">Area Code - Number - Extension                      Facsimile</p> <p>_____</p> <p>E-mail Address _____</p>
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<p><b>PAYMENT ADDRESS</b> (Address to which payments will be sent.) (See "Payment" clause)</p>          <p>____ Payment Address same as Home Office Address</p> <p>____ Payment Address same as Notice Address    <b>(check only one)</b></p>	<p><b>ORDER ADDRESS</b> (Address to which purchase orders will be sent) (See "Purchase Orders and "Contract Documents" clauses)</p>          <p>____ Order Address same as Home Office Address</p> <p>____ Order Address same as Notice Address    <b>(check only one)</b></p>
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<b>ACKNOWLEDGMENT OF AMENDMENTS</b>							
Offerors acknowledges receipt of amendments by indicating amendment number and its date of issue. (See "Amendments to Solicitation" Provision)							
Amendment No.	Amendment Issue Date	Amendment No.	Amendment Issue Date	Amendment No.	Amendment Issue Date	Amendment No.	Amendment Issue Date

<p><b>DISCOUNT FOR PROMPT PAYMENT</b> (See "Discount for Prompt Payment" clause)</p>	<p>10 Calendar Days (%)</p>	<p>20 Calendar Days (%)</p>	<p>30 Calendar Days (%)</p>	<p>____ Calendar Days (%)</p>
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**PREFERENCES - A NOTICE TO VENDORS (SEP. 2009):** On June 16, 2009, the South Carolina General Assembly rewrote the law governing preferences available to in-state vendors, vendors using in-state subcontractors, and vendors selling in-state or US end products. This law appears in Section 11-35-1524 of the South Carolina Code of Laws. A summary of the new preferences is available at [www.procurement.sc.gov/preferences](http://www.procurement.sc.gov/preferences). ***ALL THE PREFERENCES MUST BE CLAIMED AND ARE APPLIED BY LINE ITEM, REGARDLESS OF WHETHER AWARD IS MADE BY ITEM OR LOT. VENDORS ARE CAUTIONED TO CAREFULLY REVIEW THE STATUTE BEFORE CLAIMING ANY PREFERENCES. THE REQUIREMENTS TO QUALIFY HAVE CHANGED. IF YOU REQUEST A PREFERENCE, YOU ARE CERTIFYING THAT YOUR OFFER QUALIFIES FOR THE PREFERENCE YOU'VE CLAIMED. IMPROPERLY REQUESTING A PREFERENCE CAN HAVE SERIOUS CONSEQUENCES.*** [11-35-1524(E)(4)&(6)]

**PREFERENCES - ADDRESS AND PHONE OF IN-STATE OFFICE:** Please provide the address and phone number for your in-state office in the space provided below. An in-state office is necessary to claim either the Resident Vendor Preference (11-35-1524(C)(1)(i)&(ii)) or the Resident Contractor Preference (11-35-1524(C)(1)(iii)). Accordingly, you must provide this information to qualify for the preference. An in-state office is not required, but can be beneficial, if you are claiming the Resident Subcontractor Preference (11-35-1524(D)).

  
  
  
  
  
  
  
  
  
  

\_\_\_\_ In-State Office Address same as Home Office Address

\_\_\_\_ In-State Office Address same as Notice Address                      (check only one)

2012 Compendium Class Supplement  
STATE OF SOUTH CAROLINA  
MATERIALS MANAGEMENT OFFICE  
CAPITAL CENTER  
1201 MAIN STREET, SUITE 600  
COLUMBIA SC 29201

Intent to Award  
Posting Date: February 29, 2012

Solicitation:  
Description:  
Agency:



The State intends to award contract(s) noted below. Unless otherwise suspended or canceled, this document becomes the final Statement of Award effective 8:00 AM, March 01, 2012. Unless otherwise provided in the solicitation, the final statement of award serves as acceptance of your offer.

Contractor should not perform work on or incur any costs associated with the contract prior to the effective date of the contract. Contractor should not perform any work prior to the receipt of a purchase order from the using governmental unit. The State assumes no liability for any expenses incurred prior to the effective date of the contract and issuance of a purchase order.

AWARD - ONE RESPONSE RECEIVED: IN ACCORDANCE WITH SC PROCUREMENT CODE 11-35-1520 (10) AWARD, "WHEN ONLY ONE RESPONSE IS RECEIVED, THE NOTICE OF INTENT TO AWARD AND THE DELAY OF AWARD MAY BE WAIVED."

CERTIFICATES OF INSURANCE COVERAGE TO BE FURNISHED PRIOR TO COMMENCEMENT OF SERVICES UNDER CONTRACT.

Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest within ten days of the date notification of award is posted in accordance with this code. A protest shall be in writing, shall set forth the grounds of the protest and the relief requested with enough particularity to give notice of the issues to be decided, and must be received by the appropriate Chief Procurement Officer within the time provided. [Section 11-35- 4210]

PROTEST - CPO ADDRESS - MMO: Any protest must be addressed to the Chief Procurement Officer, Materials Management Office, and submitted in writing

- (a) by email to [protest-mmo@mmo.sc.gov](mailto:protest-mmo@mmo.sc.gov) ,
- (b) by facsimile at 803-737-0639 , or
- (c) by post or delivery to 1201 Main Street, Suite 600, Columbia, SC 29201.

Contract Number:  
Awarded To:



Total Potential Value:



Item	Description	Unit Price	Total
00010	500 Ton Centrifugal Water Chillers	\$ 273,156.00	\$ 546,312.00

Procurement Officer





State of South Carolina

RECORD OF NEGOTIATIONS

Solicitation Number

Procurement Officer

Phone

E-Mail Address

Address

[Redacted]  
[Redacted]  
[Redacted]@itmo.sc.gov  
1201 Main Street, Suite 601  
Columbia, SC 29201

CONTRACT DESCRIPTION: [Redacted]

USING GOVERNMENTAL UNIT: [Redacted]

OFFEROR'S NAME AND ADDRESS: [Redacted]  
[Redacted]

DESCRIPTION OF NEGOTIATED CHANGES: (attach additional pages if necessary)

- The document titled Record of Negotiation - Exhibit A / "Statement of Work" is attached hereto and incorporated by reference. Exhibit A and [Redacted] Proposal shall be read to be consistent and complimentary. Any conflict among these two documents shall be resolved by giving priority to Exhibit A.
- The document titled Record of Negotiation - Exhibit B / Negotiated Changes to Solicitation is attached hereto and incorporated by reference. (a) The following clauses of the Solicitation are deleted and replaced with the similarly titled clauses in Exhibit B:  
 DEFAULT (JAN 2006)  
 INDEMNIFICATION - THIRD PARTY CLAIMS FOR INJURY TO PERSONS OR PROPERTY  
 LIMITATION ON LIABILITY  
 TERMINATION FOR CONVENIENCE (JAN 2006)  
 COMPLIANCE WITH LAWS (JAN 2006)  
 CONTRACTOR'S LIABILITY INSURANCE (JAN 2006)  
 CONTRACTOR'S OBLIGATION -- GENERAL (JAN 2006)  
 PRICING DATA -- AUDIT -- INSPECTION (JAN 2006)  
 PRIVACY -- WEB SERVICES (JAN 2006)  
 OWNERSHIP OF DATA & MATERIALS (JAN 2006)  
 (b) The following clauses of the Solicitation are deleted:  
 ESTIMATED QUANTITY -- PURCHASES FROM OTHER SOURCES (JAN 2006)  
 ESTIMATED QUANTITY -- UNKNOWN (JAN 2006)  
 LICENSES AND PERMITS (JAN 2006)  
 (c) The following clause in Exhibit B is added to the Solicitation.  
 INTELLECTUAL PROPERTY PROTECTION
- Any conflict between Exhibit A and the Solicitation, as modified by Exhibit B shall be resolved by giving priority to the Solicitation, as modified by Exhibit B.
- The document titled Record of Negotiation - Exhibit C / Negotiation Changes to Business Proposal is attached hereto and incorporated by reference.
- Except as provided herein, all terms and conditions of the Offer and the Solicitation remain unchanged and remain in full force and effect.

OFFEROR'S CERTIFICATE OF CURRENT COST OR PRICING DATA: The Offeror certifies that, to the best of its knowledge and belief, the cost or pricing data (as defined by 48 C.F.R. 2.101) submitted, either actually or by specific identification in writing, by the Offeror to the Procurement Officer in support of the proposed contract are accurate, complete, and current as of the date this record of negotiations is signed. [Procurement Officer must initial here] *LS* if Certificate inapplicable to this Record of Negotiations] (See "Pricing Data - Audit - Inspection" provision.) (Reference § 11-35-1830 & R. 19-445.2120)

SIGNATURE OF PERSON AUTHORIZED TO SUBMIT BINDING OFFER TO ENTER A CONTRACT ON BEHALF OF OFFEROR:

By: [Redacted Signature] (authorized signature)

[Redacted Name] (printed name of person signing above)

Its: [Redacted Title] (title of person signing above)

Date: [Redacted Date]

SIGNATURE OF PERSON AUTHORIZED TO APPROVE NEGOTIATED MODIFICATIONS ON BEHALF OF USING GOVERNMENTAL ENTITY:

By: [Redacted Signature] (authorized signature)

[Redacted Name] (printed name of person signing above)

Its: Procurement Officer (title of person signing above)

Date: [Redacted Date]



# State of South Carolina

**Change Order #x**

**Contract Number** :  
 Procurement Officer :  
 Phone :  
 E-Mail Address :  
 Address :

DESCRIPTION:

USING GOVERNMENTAL UNIT:

CONTRACTOR'S NAME AND ADDRESS:

**TYPE OF CHANGE:**

- Change to Contract Scope of Work
- Change to Contract Pricing Pursuant to Existing Contract Clause.  
 Clause Name \_\_\_\_\_ . Clause No. \_\_\_\_\_
- Administrative Change to Contract (such as changes in paying office, name of Agency Contract Administrator, etc.)
- Other Change

**IMPORTANT NOTICE:**

- Change Order: Contractor is required to sign this document and return \_\_\_\_\_ copies to the procurement officer named above by the following date: \_\_\_\_\_.
- Contract Modification: Contractor is required to acknowledge receipt of this document in writing by the following date: \_\_\_\_\_. Contractor does not indicate agreement with change simply by acknowledging receipt.

DESCRIPTION OF CHANGE / MODIFICATION:

Except as provided herein, all terms and conditions of the Contract referenced above remain unchanged and in full force and effect.

CONTRACTOR'S CERTIFICATE OF CURRENT COST OR PRICING DATA: The Contractor certifies that, to the best of its knowledge and belief, the cost or pricing data (as defined by 48 C.F.R. 2.101) submitted, either actually or by specific identification in writing, by the Contractor to the Procurement Officer in support of this change order are accurate, complete, and current as of the date this change order is signed. [*Procurement Officer must initial here \_\_\_\_\_ if Certificate inapplicable to this Change Order*]  
 (See "Pricing Data – Audit – Inspection" provision.) (Reference § 11-35-1830 & R. 19-445.2120)

SIGNATURE OF PERSON AUTHORIZED TO EXECUTE THIS CHANGE ORDER & CERTIFICATE ON BEHALF OF CONTRACTOR:

By: \_\_\_\_\_  
 (authorized signature)

\_\_\_\_\_  
 (printed name of person signing above)

Its: \_\_\_\_\_  
 (title of person signing above)

Date: \_\_\_\_\_

SIGNATURE OF PERSON AUTHORIZED TO EXECUTE / ISSUE THIS CHANGE ORDER / CONTRACT MODIFICATION ON BEHALF OF USING GOVERNMENTAL ENTITY:

By: \_\_\_\_\_  
 (authorized signature)

\_\_\_\_\_  
 (printed name of person signing above)

Its: \_\_\_\_\_  
 (title of person signing above)

Date: \_\_\_\_\_

**Shipping Costs:** When the contract specifies "F.O.B. destination," the seller bears all costs to transport the goods to the specified destination. ("[W]hen the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this chapter (§ 36-2-503) . . .").

**Risk of Loss:** Risk of loss typically follows possession. In an FOB destination contract, risk of loss shifts to buyer upon delivery. S.C. Code § 36-2-319(1)(b). See also S.C. Code Ann. § 36-2-509(1)(b) & (3) (2003) (South Carolina Reporter's Comments) ("Subsection (1)(b) treats the risk of loss problem for 'destination contracts,' e.g., 'F.O.B., point of destination.' Again a result would be reached under this Commercial Code section similar to that under existing case law. The passage of title and thus risk of loss to buyer is delayed until the goods reach their destination. In accord, *Matheson v. Southern Ry. Co.*, 79 SC 155, 60 SE 437 (1908). See 2 Williston, Sales, Section 280 (rev ed 1948). This is the same point which this Code section prescribes for the passage of risk to the buyer." ).

**Title / Insurable Interest:** "[I]f the contract requires delivery at destination, title passes on tender there." S.C. Code § 36-2-401(2)(b) (2003). Tender of delivery is governed by 36-2-503. In other words, once the State takes physical possession, the state has title to the goods. See S.C. Code § 36-2-501 (2003) (South Carolina Reporter's Comments) ("It has been held in a number of cases that legal title is not necessary in order to constitute an insurable interest, an equitable interest being sufficient. E.g., *Scott v. Liverpool & London & Globe Ins. Co.*, 102 SC 115, 86 SE 484 (1915); *Dunning v. Firemen's Ins. Co.*, 194 SC 98, 8 SE2d 318 (1940). In *Mihous v. Globe & Rutgers Fire Ins. Co.*, 161 SC 96, 159 SE 506 (1931), it was held that a vendee of an executory contract of sale had an insurable interest in the property.")

Generally see S.C. Code Ann. § 36-2-401, -501, -503, -509(1)(b) & (3). The Law of Purchasing, Chapter 9, Risk of Loss and Shipping Terms (January 2000 Supp.)

B- 200,660, 81-1 CPD P 196

COMPTROLLER GENERAL  
MATTER OF: CONTRA COSTA ELECTRIC, INC.:  
MAR 16, 1981

DIGEST:

1. CONTRACT EXPERIENCE OF PROPOSED SUBCONTRACTOR MAY BE USED IN DETERMINING WHETHER BIDDER/PRIME CONTRACTOR MEETS SOLICITATION EXPERIENCE REQUIREMENT SINCE BIDDER WAS ALSO PRIME CONTRACTOR ON PREVIOUS SIMILAR CONTRACTS.

2. PROTESTER HAS NOT CARRIED BURDEN OF PROVING THAT AWARDEE'S BID WAS MATERIALLY UNBALANCED IN ORDER TO STAY WITHIN COST LIMITATION. PRICE PATTERN OF AWARDEE'S BID LEADS TO OPPOSITE CONCLUSION.

CONTRA COSTA ELECTRIC, INC., PROTESTS THE AWARD OF A CONTRACT TO JAY AND SAM CONSTRUCTION, INC., FOR THE REPAIR AND ALTERATION OF HEATING, VENTILATING AND AIR-CONDITIONING SYSTEMS AND FOR THE INSTALLATION OF ENERGY MONITORING AND CONTROL SYSTEMS IN VARIOUS BUILDINGS AT MCCLELLAN AIR FORCE BASE, CALIFORNIA. THE AWARD WAS MADE UNDER INVITATION FOR BIDS (IFB) NO. F04699-80-B0042, ISSUED BY THE AIR LOGISTICS CENTER, MCCLELLAN AIR FORCE BASE.

CONTRA COSTA, THE THIRD LOW BIDDER, CONTENDS THAT JAY AND SAM, THE LOW BIDDER, AND AMERICAN CONTRACTING ENGINEERS, THE SECOND LOW BIDDER, DO NOT MEET THE 2- YEAR SIMILAR EXPERIENCE REQUIREMENT CONTAINED IN THE IFB AND HAVE MATERIALLY UNBALANCED THEIR BIDS.

THE PROTEST IS DENIED.

CONTRACTOR EXPERIENCE REQUIREMENT

CONTRA COSTA ALLEGES THAT JAY AND SAM DOES NOT MEET THE FOLLOWING IFB PROVISION, ENTITLED 'QUALITY ASSURANCE, CONTRACTOR QUALIFICATION:'

'THE CONTRACTOR SHALL HAVE A 2 YEAR EXPERIENCE RECORD IN THE DESIGN AND INSTALLATION OF COMPUTERIZED BUILDING SYSTEMS SIMILAR IN PERFORMANCE TO THAT SPECIFIED HEREIN.'

THE DEPARTMENT OF THE AIR FORCE ADMITS THAT JAY AND SAM ALONE DOES NOT MEET THE REQUIREMENT, BUT ARGUES THAT IN CONJUNCTION WITH ITS PROPOSED SUBCONTRACTOR, JOHNSON CONTROLS, INC., JAY AND SAM DOES MEET THE REQUIREMENT. ACCORDING TO THE AIR FORCE, JAY AND SAM HAS BEEN THE PRIME CONTRACTOR WITH JOHNSON CONTROLS AS THE SUBCONTRACTOR ON PRIOR CONTRACTS MEETING THE TIME AND SIMILARITY REQUIREMENTS CONTAINED IN THE CLAUSE. THE AIR FORCE CONTENDS THAT IT IS PERMISSIBLE TO MEET THE EXPERIENCE REQUIREMENT IN THIS MANNER BECAUSE, EVEN THOUGH THE IFB USES THE TERM 'CONTRACTOR' THROUGHOUT THE SPECIFICATIONS, THERE IS NO PROHIBITION ON THE USE OF SUBCONTRACTORS. ALSO, DEFENSE ACQUISITION REGULATION SEC. 1-906(A) (DEFENSE ACQUISITION CIRCULAR NO. 76-22, FEBRUARY 22, 1980) PROVIDES THAT A SUBCONTRACTOR'S RESPONSIBILITY MAY BE CONSIDERED IN DETERMINING A PRIME CONTRACTOR'S RESPONSIBILITY. FINALLY, THE AIR FORCE ARGUES THAT OUR DECISION IN 39 COMP. GEN. 173 (1959) SPECIFICALLY PERMITS A PRIME CONTRACTOR TO MEET AN EXPERIENCE REQUIREMENT BY HAVING PREVIOUSLY PERFORMED THE NECESSARY WORK 'WITH ITS OWN ORGANIZATION OR BY USING THE SUBCONTRACTORS NOW PROPOSED.' ID. AT 176.

CONTRA COSTA POINTS OUT THAT IN 39 COMP. GEN. 173, SUPRA, THE SOLICITATION IN QUESTION

SPECIFICALLY PERMITTED SUBCONTRACTORS' EXPERIENCE TO BE CONSIDERED IN DETERMINING WHETHER THE BIDDER MET THE EXPERIENCE REQUIREMENT, WHILE HERE THE ENTIRE SOLICITATION AND THE EXPERIENCE CLAUSE MENTIONED ONLY THE CONTRACTOR. THEREFORE, THE PROTESTER ARGUES, THE SUBCONTRACTOR'S EXPERIENCE CANNOT BE CONSIDERED IN THIS CASE. CONTRA COSTA NOTES THAT AT THE BID PROTEST CONFERENCE HELD ON THIS CASE, THE AIR FORCE'S REPRESENTATIVE STATED THAT THE AIR FORCE INTENDED TO SEND A LETTER TO CONTRACTING PERSONNEL DIRECTING THAT FUTURE SOLICITATIONS NOT BE DRAFTED IN THIS MANNER. CONTRA COSTA ASSERTS THAT THIS CONSTITUTES AN ADMISSION THAT THE SOLICITATION CANNOT BE READ AS PERMITTING SUBCONTRACTORS' EXPERIENCE TO BE CONSIDERED.

GENERALLY, GAO WILL NOT REVIEW AFFIRMATIVE DETERMINATIONS OF BIDDERS' RESPONSIBILITY, WHICH INVOLVES SUCH MATTERS AS EXPERIENCE AND FINANCIAL CAPACITY. CENTRAL METAL PRODUCTS, 54 COMP. GEN. 66 (1974), 74-2 CPD 64. AN EXCEPTION TO THAT RULE IS WHEN THE SOLICITATION CONTAINS A 'DEFINITIVE RESPONSIBILITY CRITERION' WHICH ALLEGEDLY HAS NOT BEEN APPLIED. HAUGHTON ELEVATOR DIVISION, 55 COMP. GEN. 1051 (1976), 76-1 CPD 294. DEFINITIVE RESPONSIBILITY CRITERIA INVOLVE SPECIFIC AND OBJECTIVE FACTORS, SUCH AS SPECIFIC EXPERIENCE REQUIREMENTS. THE REQUIREMENT IN QUESTION HERE IS CLEARLY A DEFINITIVE RESPONSIBILITY CRITERION, APPROPRIATE FOR OUR REVIEW. NEITHER PARTY DISPUTES THIS. ALSO, THERE APPEARS TO BE NO DISPUTE THAT JAY AND SAM DO NOT MEET THE REQUIREMENT ALONE, BUT DO MEET THE REQUIREMENT IF THE EXPERIENCE OF JOHNSON CONTROLS, THE PROPOSED SUBCONTRACTOR, IS CONSIDERED.

THE NARROW ISSUE PRESENTED TO US IS WHETHER THE SOLICITATION PERMITS THE USE OF SUBCONTRACTORS AND, IF SO, WHETHER THE EXPERIENCE CLAUSE PERMITS THE USE OF SUBCONTRACTORS' EXPERIENCE IN DETERMINING THE BIDDER'S RESPONSIBILITY. THERE IS NO GENERAL PROHIBITION ON THE USE OF SUBCONTRACTORS TO PERFORM PORTIONS OF GOVERNMENT CONTRACTS. PRESENTATIONS SOUTH, INC., B-196099, MARCH 18, 1980, 80-1 CPD 209. IN THIS CASE, WE DO NOT THINK THAT THE USE OF THE WORD 'CONTRACTOR' THROUGHOUT THE SPECIFICATIONS CAN REASONABLY BE CONSTRUED AS PROHIBITING THE USE OF SUBCONTRACTORS, AND THERE IS NO SPECIFIC CLAUSE DOING SO. ALSO, THERE ARE NUMEROUS CLAUSES REFERRING TO SUBCONTRACTORS IN THE INSTRUCTIONS TO BIDDERS AND GENERAL PROVISIONS SECTIONS OF THE SOLICITATION. ADDITIONALLY, WE DO NOT THINK THAT A LETTER (IF ONE HAS IN FACT BEEN SENT) REQUESTING CONTRACTING ACTIVITIES TO SPECIFICALLY MENTION SUBCONTRACTORS IN FUTURE SOLICITATIONS IS NECESSARILY AN ADMISSION THAT THE SOLICITATION HERE DID NOT PERMIT SUBCONTRACTING OR THE CONSIDERATION OF SUBCONTRACTOR EXPERIENCE. RATHER, IT MAY WELL BE A GOOD-FAITH ATTEMPT TO RESPOND TO THE PROTEST BY MAKING THE REQUIREMENT MORE CLEAR.

OUR DECISION IN 39 COMP. GEN. 173, SUPRA, SANCTIONS THE USE OF PROPOSED SUBCONTRACTORS' EXPERIENCE IN DETERMINING A BIDDER/PRIME CONTRACTOR'S COMPLIANCE WITH AN EXPERIENCE CLAUSE, WHERE THE BIDDER WAS ALSO THE PRIME CONTRACTOR ON THE CONTRACTS WHICH ARE BEING RELIED ON TO MEET THE EXPERIENCE REQUIREMENT. WHILE, AS CONTRA COSTA POINTS OUT, THE CLAUSE IN THAT CASE SPECIFICALLY PROVIDED THAT SUBCONTRACTORS' EXPERIENCE COULD BE CONSIDERED, THE DECISION WAS NOT BASED ON THAT FACTOR.

IN INTERPRETING THE CLAUSE IN QUESTION, WE DISCUSSED THE EXPERIENCE CLAUSE FORMERLY USED BY THE AGENCY, WHICH:

'\*\*\* REFERRED ONLY TO THE BIDDER HIMSELF, AND NO MENTION WAS MADE OF THE USE, QUALIFICATIONS, OR EXPERIENCE OF SUBCONTRACTORS. \*\*\* PRESUMABLY THIS WAS BECAUSE FULL RESPONSIBILITY FOR SATISFACTORY PERFORMANCE WOULD BE PLACED UPON THE PRIME CONTRACTOR, AND BECAUSE SATISFACTORY PERFORMANCE OF PRIOR CONTRACTS, WHETHER ACCOMPLISHED SOLELY BY USE OF THE PRIME CONTRACTOR'S ORGANIZATION OR WITH THE AID OF SUBCONTRACTORS, WOULD BE INDICATIVE OF THE PRIME CONTRACTOR'S COMPETENCY AND RESPONSIBILITY.' ID. AT 176.

WE THEN STATED THAT THE CLAUSE IN QUESTION COULD NOT BE INTERPRETED AS A RELAXATION OF THE REQUIREMENTS OF THE FORMER CLAUSE. IN SUM, THE RULE IS THAT THE CONTRACT EXPERIENCE OF A PROPOSED SUBCONTRACTOR MAY BE USED IN DETERMINING WHETHER THE BIDDER MEETS AN EXPERIENCE REQUIREMENT IF THE BIDDER WAS THE PRIME CONTRACTOR ON THOSE PREVIOUS SIMILAR CONTRACTS, WHETHER OR NOT THE EXPERIENCE REQUIREMENT SPECIFICALLY MENTIONS SUBCONTRACTOR EXPERIENCE.

HERE, JAY AND SAM WAS THE PRIME CONTRACTOR AND JOHNSON CONTROLS THE SUBCONTRACTOR ON THE CONTRACTS RELIED UPON TO MEET THE EXPERIENCE REQUIREMENT. THEREFORE, JAY AND SAM APPEARS TO HAVE SATISFIED THE REQUIREMENT.

#### UNBALANCED BID

THE IFB REQUIRED SEPARATE LUMP-SUM BIDS FOR ITEMS 0001AA AND 0001AB. THE SOLICITATION ALSO CONTAINED A NOTICE THAT THE BID PRICE FOR ITEM 0001AB WAS STATUTORILY LIMITED TO \$100,000, AND THAT A BID WHICH WAS MATERIALLY UNBALANCED FOR THE PURPOSE OF BRINGING THE AFFECTED ITEM WITHIN THE LIMITATION 'MAY BE REJECTED.' JAY AND SAM BID \$99,611 FOR ITEM 0001AB AND \$133,603 FOR ITEM 0001AA. CONTRA COSTA BID \$98,607 FOR ITEM 0001AB AND \$224,835 FOR 0001AA.

CONTRA COSTA ALLEGES THAT JAY AND SAM MUST HAVE UNBALANCED ITS BID BY SHIFTING APPROXIMATELY \$45,000 IN INSTALLATION COSTS ON ITEM 0001AB TO ITEM 0001AA, IN CONTRAVENTION OF THE COST LIMITATION CLAUSE. IN SUPPORT OF THIS ALLEGATION, THE PROTESTER ASSERTS THAT THE EQUIPMENT TO BE PROVIDED BY JAY AND SAM UNDER ITEM 0001AB COSTS APPROXIMATELY \$85,000 AND THAT INSTALLATION AND MECHANICAL COSTS ARE APPROXIMATELY \$60,000. THEREFORE, CONTRA COSTA ARGUES, JAY AND SAM MUST HAVE SHIFTED THOSE EXCESS COSTS TO ITEM 0001AA. CONTRA COSTA HAS PROVIDED AN AFFIDAVIT SHOWING ITS OWN COST BREAKDOWN AND STATING THAT IT COULD MEET THE COST LIMITATION ONLY BY USING ANOTHER MANUFACTURER'S EQUIPMENT.

CONTRA COSTA HAS NOT CARRIED ITS BURDEN OF PROVING THAT JAY AND SAM SHIFTED COSTS FROM ITEM 0001AB TO 0001AA. THERE ARE POSSIBLE REASONS OTHER THAN SHIFTING COSTS TO EXPLAIN JAY AND SAM'S ABILITY TO STAY WITHIN THE COST LIMITATION, INCLUDING A WILLINGNESS TO TAKE A LOSS ON THAT ITEM WITHOUT MAKING IT UP ON THE OTHER ITEM. CERTAINLY, JAY AND SAM'S LOW PRICE FOR ITEM 0001AA, IN COMPARISON TO CONTRA COSTA'S HIGH PRICE, SUPPORTS THE CONCLUSION THAT COSTS WERE NOT SHIFTED.

SINCE WE HAVE CONCLUDED THAT JAY AND SAM, THE LOW BIDDER, MET THE EXPERIENCE REQUIREMENT AND DID NOT SUBMIT A MATERIALLY UNBALANCED BID, AWARD TO IT WAS PROPER.

THEREFORE, WE NEED NOT CONSIDER THE ALLEGATIONS WITH REGARD TO AMERICAN CONTRACTING ENGINEERS, THE SECOND LOW BIDDER.

B- 200,660, 81-1 CPD P 196

69 Comp. Gen. 359, B- 237,938, 90-1 CPD P 347

COMPTROLLER GENERAL

Matter of: Hardie-Tynes Manufacturing Company

April 2, 1990

L. Stephen Quatannens, Esq., Gardner, Carton & Douglas, for the protester.  
Douglas K. Olson, Esq., Kilcullen, Wilson and Kilcullen, for IMPSA-International, Inc., an interested party.  
Justin P. Patterson, Esq., Department of the Interior, for the agency.  
Mary G. Curcio, Esq., Peter A. Iannicelli, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where the identity of the bidder is clear from the bid as submitted and there is no indication that the bidder will not perform in accordance with the requirements of the solicitation, the bid is responsive.

2. Agency may properly consider manufacturing experience of parent corporation in finding that awardee subsidiary corporation met definitive responsibility criterion (5-year manufacturing experience requirement), where bid stated that product would be manufactured at parent corporation's facilities.

DECISION

Hardie-Tynes Manufacturing Company protests the award of a contract for flow gates under invitation for bids (IFB) No. 9-SI-30-07760/DS-7800, to IMPSA International, Inc. (IMPSA-International), by the Bureau of Reclamation, Department of the Interior. Hardie-Tynes alleges that IMPSA-International submitted a nonresponsive bid and is a nonresponsible bidder.

We deny the protest.

Issued on July 28, 1989, the IFB solicited bids to design, furnish and deliver flow gates for the Roosevelt Dam, Salt River Project, Arizona, and the Hoover Dam, Boulder Canyon Project, Arizona-Nevada. Section L-22 of the IFB provided:

"The bidder shall have experience in the manufacture of high-head slide gates and hydraulic hoists and in this respect shall have had equipment of similar complexity to that required by this solicitation/specifications in satisfactory operation for not less than 5 years."

At bid opening on September 28, the Bureau received six bids; IMPSA-International submitted the low bid of \$3,430,012, and Hardie-Tynes submitted the second-low bid of \$4,730,976. IMPSA-International, a Pennsylvania corporation with no manufacturing facility, stated in its bid that the gates would be manufactured in Argentina at the manufacturing facilities of its parent corporation, Industrias Metalurgicas Pescarmona S.A. (IMPSA-Argentina).

On October 5, Hardie-Tynes protested to the Bureau that IMPSA-International was ineligible for award because the firm did not meet the 5-year manufacturing experience requirement set out in section L-22 and was not a manufacturer for purposes of the Walsh-Healey Public Contracts Act. 41 U.S.C. ss 35-45 (1982 and Supp. V 1987). The Bureau initially agreed that IMPSA-International was ineligible for award because it was not a manufacturer under the Act. Subsequently, IMPSA-International submitted three corporate documents (a power of attorney and agency agreement, a special power of attorney, and a document entitled "unanimous written consent of sole shareholder in lieu of annual meeting") to show that IMPSA-International represented IMPSA-Argentina and was authorized to bind IMPSA-Argentina in contracts for projects in the United States. The Bureau then determined that, because the equipment would be manufactured in Argentina and shipped directly to the United States government installations, the Walsh-Healey Public Contracts Act was not applicable.

On November 27, the Bureau awarded the contract to IMPSA-International. Hardie-Tynes filed its protest with our Office on December 1.

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Hardie-Tynes first alleges that the bid submitted by IMPSA-International is nonresponsive because it does not contain an unequivocal commitment to perform the contract. Specifically, Hardie-Tynes argues that, because IMPSA-International relied on the manufacturing experience of IMPSA-Argentina, it could have chosen to avoid the contract by not disclosing its relationship with IMPSA-Argentina. Hardie-Tynes also argues that the bid is nonresponsive because it is ambiguous as to whether IMPSA-International or IMPSA-Argentina is the bidding party, and, therefore, it is not clear which firm is obligated to perform the contract.

The test for responsiveness is whether a bid as submitted represents an unequivocal commitment to provide the requested supplies or services at a firm, fixed-price. Unless something on the face of the bid either limits, reduces or modifies the obligation of the prospective contractor to perform in accordance with the terms of the solicitation, the bid is responsive. *Haz-Tad, Inc., et al.*, 68 Comp.Gen. 92 (1988), 88-2 CPD p 486. The determination as to whether a bid is responsive must be based solely on the bid documents as they appear at the time of bid opening. *Id.*

Here, the bid was submitted in the name of IMPSA-International and there was nothing on its face to indicate that IMPSA-International would not perform in accordance with the terms of the solicitation. Consequently, the bid as submitted was responsive. In examining the responsiveness of the bid, it would have been improper for the contracting officer to have relied on post-bid opening submissions concerning whether IMPSA-International met the solicitation requirement for manufacturing experience since, as explained below, that requirement relates to responsibility and has no bearing on the responsiveness of the bid. Insofar as Hardie-Tynes is arguing that the bid is ambiguous as to whether IMPSA-International or IMPSA-Argentina is the bidding party, it is clear from the bid itself that IMPSA-International was the bidder and that, even though the flow gates will be manufactured by IMPSA-Argentina, IMPSA-International is obligated to supply the flow gates to the government under the contract.

Furthermore, we find unpersuasive Hardie-Tynes' argument that IMPSA-International could have chosen not to disclose its corporate affiliation with IMPSA-Argentina in order to avoid being awarded the contract. IMPSA-International's bid clearly disclosed the only critical relationship between the two firms--that is, that IMPSA-Argentina would be doing the actual manufacturing for IMPSA-International, which had agreed to furnish the gates to the government. Theoretically, any bidder could attempt to be found nonresponsible by not cooperating with contracting officials who ask for relevant financial or corporate documents during the course of a responsibility determination. However, here, IMPSA-International cooperated fully by furnishing the corporate documents and, once found responsible and awarded the contract, was bound to perform the work.

Hardie-Tynes also protests that IMPSA-International, a Pennsylvania corporation with approximately 12 employees and no manufacturing facilities, is not a responsible bidder because it does not meet the manufacturing experience requirement of the IFB. Hardie-Tynes contends that while IMPSA-Argentina, the parent corporation, is a manufacturing company, IMPSA-International cannot rely on the experience of IMPSA-Argentina to meet the 5-year manufacturing experience requirement. To support this position Hardie-Tynes cites Federal Acquisition Regulation (FAR) s 9.104-3(d), which provides that affiliated concerns are normally considered separate entities in determining whether a contractor meets applicable standards for responsibility. Hardie-Tynes also argues that while the experience of a nonbidding entity can be used to determine the responsibility of a bidding party in appropriate circumstances, the bid must first establish that the nonbidding entity whose experience is being relied upon is committed to perform the contract.

Hardie-Tynes contends that the corporate documents submitted by IMPSA-International do not establish that IMPSA-Argentina made any commitment to manufacture flow gates for IMPSA-International when IMPSA-International acts in its own name; thus, Hardie-Tynes argues that the documents provide no basis for the Bureau to rely upon the experience of IMPSA-Argentina to find IMPSA-International responsible.

The Bureau agrees that IMPSA-International alone does not meet the experience requirement. The Bureau argues, however, that IMPSA-International properly may satisfy the 5-year experience requirement based on the manufacturing experience of its parent corporation, IMPSA-Argentina. According to the Bureau, it determined from the documents submitted by IMPSA-International--the unanimous written consent of sole shareholder in lieu of annual meeting, the special power of attorney, and the power of attorney and agency agreement--that IMPSA-Argentina was bound to manufacture the flow gates which IMPSA-International agreed to provide under the contract.

The Bureau further argues that the FAR does not prohibit using a parent corporation's experience to determine that a subsidiary corporation is responsible. In this connection, the Bureau cites FAR s 9.104-1, which provides in part that to

be responsible, a prospective contractor must have the necessary experience or the ability to obtain it, and the necessary production facilities or the ability to obtain them. The Bureau concludes that it properly found IMPSA-International responsible based on the experience of IMPSA-Argentina, because the corporate documents provided to the Bureau by IMPSA-International clearly showed that IMPSA-International had the ability to obtain both the required manufacturing experience and facilities from the parent corporation.

Our Office does not generally review affirmative responsibility determinations since a contracting agency's determination that a particular bidder or offeror is responsible is based in large measure on subjective judgments. *Tama Kensetsu Co., Ltd., and Nippon Hodo*, B-233118, Feb. 8, 1989, 89-1 CPD p 128. One exception to this rule is where a solicitation contains definitive responsibility criteria, which are specific and objective standards established by an agency to measure a bidder's or an offeror's ability to perform the contract. *Id.* A solicitation requirement that the prospective contractor have a specified number of years of experience in a particular area is a definitive responsibility criterion. *DJ Enters., Inc.*, B-233410, Jan. 23, 1989, 89-1 CPD p 59. Where an allegation is made that definitive responsibility criteria have not been satisfied, the scope of our review is limited to ascertaining whether sufficient evidence of compliance has been submitted from which the contracting officer reasonably could conclude that the criteria have been met. *Id.*

In the present case the parties agree that IMPSA-International does not meet the experience requirement on its own, nor is there any dispute that IMPSA-Argentina does meet the experience requirement. The issue for resolution thus is whether IMPSA-International properly may be found responsible by considering the manufacturing experience of IMPSA-Argentina.

The experience of a technically qualified subcontractor may be used to satisfy definitive responsibility criteria relating to experience for a prime contractor-bidder. *Tama Kensetsu Co., Ltd., and Nippon Hodo*, B-233118, *supra*; *Allen-Sherman-Hoff Co.*, B-231552, Aug. 4, 1988, 88-2 CPD p 116; *BBC Brown Boveri, Inc.*, B-227903, Sept. 28, 1987, 87-2 CPD p 309. We see little difference in this situation, where a subsidiary corporation is relying on its parent corporation to perform the work in question. See *Unison Transformer Servs., Inc.*, 68 Comp.Gen. 74 (1988), 88-2 CPD p 471 (in performing a technical evaluation under a negotiated procurement, the procuring agency may consider the experience of a parent company where the offeror's subsidiary company represents that the resources of the parent company will be available to it). Accordingly, as IMPSA-International represented in its bid that the manufacturing would be performed by IMPSA-Argentina at the facilities in Argentina, we believe the Bureau properly considered IMPSA-Argentina's experience in determining that IMPSA-International met the experience requirement.

In reaching this conclusion, we note that, contrary to Hardie-Tynes' position, evidence of a firm commitment from the subcontractor to the prime contractor is not a prerequisite to considering the subcontractor's experience in determining that the prime contractor is responsible. See *Allen-Sherman-Hoff Co.*, B-231552, *supra*; *Contra Costa Elec., Inc.--Reconsideration*, B-200660.2, May 19, 1981, 81-1 CPD p 381. Nevertheless, from IMPSA-International's bid and the corporate documents submitted to the Bureau, it is clear that IMPSA-Argentina was committed to IMPSA-International to manufacture the flow gates. The power of attorney and agency agreement, and the unanimous written consent of the sole shareholder in lieu of an annual meeting, give IMPSA-International the power to do all things necessary, and to execute all agreements and documents in the name of IMPSA-Argentina which IMPSA-International deems necessary or advisable, in order to submit bids for projects in the United States. In addition, the special power of attorney gives IMPSA-International's president the power to sign contracts of any kind on behalf of IMPSA-Argentina. Thus, IMPSA-International had the authority to commit IMPSA-Argentina to manufacture the flow gates, and, in fact, indicated its intention to do so by specifying in its bid that the flow gates would be manufactured by its parent.

Finally, we do not agree that FAR s 9.104-3(d) precludes a contracting agency from considering the experience of a parent corporation to find a subsidiary corporation responsible. While the provision does state that affiliated concerns are normally considered separate entities in determining whether the firm that is to perform meets the applicable standards of responsibility, it does not provide that a contracting agency may never rely on an affiliate to find a prospective contractor responsible. In our view, the provision would preclude using an affiliate's experience simply because it was an affiliate. However, where, as here, the bidder represents that the parent-affiliate will be performing the contract, we think the affiliate's experience properly may be considered. See FAR s 9.104-3(b), which recognizes that a contractor may be found responsible through its own resources or those of a subcontractor or by otherwise demonstrating that it has the ability to obtain the needed resources.

The protest is denied.

James F. Hinchman  
General Counsel

B- 224,267, 86-2 CPD P 457

COMPTROLLER GENERAL  
Matter of: Hettich GmbH and Co. KG  
October 24, 1986

DIGEST

1. Request for proposals provisions that high pressure steam boiler services be performed by certified employees that are merely a part of the general specifications concerning how and by whom the work is to be accomplished do not establish a precondition to award and therefore are contract performance requirements and not definitive responsibility criteria.
2. Where protest on its face is without legal merit, no useful purpose would be served by holding a bid protest conference.

DECISION

Hettich GmbH and Co. KG (Hettich) protests the award of a contract to PAE GmbH (PAE) under request for proposals (RFP) No. DAJA37-86-R-0675, issued by the U.S. Army Contracting Agency, Europe, for nonpersonal services consisting of the operation, maintenance and repair of high pressure steam boilers and similar systems at locations in West Germany.

We dismiss the protest.

The RFP, in Section L-8a, provided that award would be made to the responsible offeror whose offer conforming to the solicitation is the most advantageous to the government, cost or price, and other factors specified in the solicitation, considered. [FN1] However, while the RFP contained detailed specifications for performing the work, it did not contemplate the submission of technical proposals and did not specify any other evaluation factors. Thus, the basis for award was essentially price alone among firms found to be responsible.

Section H-9 of the RFP, entitled "Required Employee Qualifications," provided that "first-line boiler plant supervisors," responsible for the operation of high pressure systems, must be trained and certified by "Technische Ueberwachungsverein," a German quasi-governmental licensing organization. That clause also required that the successful contractor furnish evidence of compliance with this requirement to the contracting officer within 30 days after commencement of performance of the services. Further, Section C-6 of the RFP's Statement of Work, entitled "Applicable Regulations, Manuals, Specifications and Forms," incorporated into the solicitation several German specifications, forms, and publications, with which the successful contractor was required to abide by. One such specification is "TRD 601," which, in English, is entitled "General Instruction for the User of High Pressure Steam Heating Boilers." According to the protester, TRD 601 sets forth the training and testing requirements that must be satisfied for an individual employee to be certified as qualified to operate high pressure boilers. The protester further states that under TRD 601, certification and training is provided to personnel in the name of their employer and that without properly certified personnel, German authorities will not permit the operation of high pressure boilers. The protester is the incumbent contractor and has such certified employees on its staff.

Initial proposals were received by the Army on August 18, 1986 and award was made on September 24, 1986 with performance scheduled to begin on October 1, 1986. According to the protester, at a preperformance conference held on September 29, 1986, PAE informed the contracting officer's representative that while PAE knew that the solicitation required that certified personnel operate high pressure boilers as an essential element of contract performance, PAE had failed to obtain the necessary qualified personnel and would not be able to perform the contract unless PAE obtained the qualified personnel currently employed by the protester. In a telex dated September 29, the protester advised the contracting officer that its certified employees were employed under legally enforceable contracts and that the protester would not permit these employees to join PAE. The protester also states that on October 1, 1986, the first scheduled date of contract performance, PAE did not have qualified personnel on site and that therefore properly certified U.S. Army personnel were required to be present. Hettich contends that Sections H-9 and C-6 of the RFP established definitive criteria of responsibility and that by not having certified personnel available as of October 1, 1986, the performance commencement date, PAE "failed to satisfy such responsibility criteria and should not be permitted to retain the contract."

Hettich argues that definitive criteria are here involved because the training and certification requirements for employees do not involve subjective judgments but are "objective, concrete, and verifiable criteria." Hettich concludes

that PAE is nonresponsible and that therefore the contract awarded to PAE should be terminated and instead awarded to the protester as the low, responsible offeror.

Since Hettich is questioning PAE's responsibility, the issue is whether or not the provisions of solicitation Sections H-9 and C-6 constitute definitive criteria of responsibility. It has been our policy not to review affirmative determinations of responsibility absent a showing of possible fraud or bad faith on the part of contracting officials, Central Metal Products, Inc., 54 Comp.Gen. 66 (1974), 74-2 CPD p 64, or where definitive criteria in the solicitation have not been met. Yardney Electric Corp., 54 Comp.Gen. 509 (1974), 74-2 CPD p 376; Satellite Services, Inc., B-219679, Aug. 23, 1985, 85-2 CPD p 224.

Definitive responsibility criteria are specific and objective standards, established by an agency for a particular procurement, for use in measuring an offeror's ability to perform the contract; these special standards establish a precondition to award. Military Services, Inc. of Georgia, B-221384, April 30, 1986, 86-1 CPD p 423; Caelter Industries, Inc., B-203418, March 22, 1982, 82-1 CPD p 265. Definitive responsibility criteria limit the class of offerors to those meeting specified qualitative and quantitative qualifications that the agency determines are necessary for adequate contract performance. Vulcan Engineering Co., B-214595, Oct. 12, 1984, 84-2 CPD p 403. Thus, definitive responsibility criteria involve a bidder's eligibility for award and not its performance obligations under the contract. J.A. Jones Construction Co., B-219632, Dec. 9, 1985, 85-2 CPD p 637; Jack Roach Cadillac--Request for Reconsideration, B-200847.3, Aug. 28, 1981, 81-2 CPD p 183.

In a strikingly similar case, Johnson Controls, Inc., B-200466, Feb. 20, 1981, 81-1 CPD p 120, the solicitation required that service personnel employed by the successful contractor for the repair and maintenance of a highly complex energy management and control system "be certified by the manufacturer's representative to be qualified to maintain the completely installed ... system." We found that this provision did not constitute a definitive responsibility criterion. We stated that such provisions, which state how and by whom the work is to be accomplished, are performance requirements and are to be distinguished from requirements which are preconditions of award.

Here, the protester has not referred us to any RFP provision, and we have found none, which requires offerors to establish their specific qualifications in the area of boiler operations prior to award and as a prerequisite to award. Indeed, the protester's principal basis for protest rests upon post-award statements by the awardee that, without access to trained Hettich employees, it would be unable to secure the necessary certified personnel with which to perform the work in accordance with the terms of the contract. In our view, the cited RFP provisions are merely part of the general specifications concerning performance (how and by whom the work is to be accomplished) and do not establish a precondition to award. See Power Testing, Inc., B-197190, July 28, 1980, 80-2 CPD p 72.

In a supplemental submission filed by the protester, Hettich alleges that during a preproposal conference the contracting officer's representative orally informed offerors that no award would be made to any firm unable to comply with this "licensing requirement," and that this affected its bid pricing. Although the meaning of this statement is not altogether clear, we think the only reasonable interpretation of it is that the ability of the proposed awardee to obtain the necessary qualified employees with which to perform the contract would be considered before an affirmative responsibility determination would be made. Thus, the statement should have been taken as no more than an indication that the specifications would be enforced.

By submitting a proposal that took no exception to the terms of the RFP, PAE obligated itself to provide qualified boiler operators who meet the solicitation's requirements. Whether PAE could be expected to meet those obligations was for the contracting officer to determine in his overall determination as to PAE's responsibility. Moreover, whether PAE actually does perform under its contract with employees possessing the credentials and training required by the RFP is a matter of contract administration which we do not review. 4 C.F.R. s 21.3(f)(1) (1986).

Accordingly, we find that Hettich has not stated a valid basis of protest, and we dismiss the protest pursuant to our Bid Protest Regulations, 4 C.F.R. s 21.3(f), without requesting a report from the agency. In view of this dismissal, we also find that the conference Hettich has requested would serve no useful purpose. Cushman Electronics, Inc., B-207972, Aug. 5, 1982, 82-2 CPD p 110. Finally, since Hettich's protest is without legal merit, its request for reimbursement of the costs and fees of filing and pursuing its protest is disallowed. R.S. Data Systems, 65 Comp.Gen. 74 (1985), 85-2 CPD p 588.

The protest is dismissed.

Ronald Berger  
Deputy Associate General Counsel

FN1 For reasons that are not apparent, the RFP, in Section M-2, entitled "Award," also contained a second, duplicative clause with essentially similar evaluation factors for award.

B- 224,267, 86-2 CPD P 457

36 Comp. Gen. 673, B- 130,910

COMPTROLLER GENERAL  
TO THE NELLO L. TEER COMPANY  
MARCH 26, 1957

BIDDERS - QUALIFICATIONS - EXPERIENCE - RECENTLY ESTABLISHED  
CORPORATIONS AND JOINT VENTURERS

IN EVALUATION OF THE EXPERIENCE OF SEVERAL BIDDERS FOR A ROAD CONSTRUCTION CONTRACT, A RECENTLY FORMED JOINT VENTURE AND A RECENTLY ESTABLISHED CORPORATION MAY BE CONSIDERED AS MEETING THE EXPERIENCE QUALIFICATION ON THE BASIS OF PAST CONSTRUCTION EXPERIENCE OF ONE OF THE JOINT VENTURERS AND THE PREVIOUS CONSTRUCTION EXPERIENCE OF ONE OR MORE OF THE CORPORATION'S PRINCIPAL OFFICERS WHO OWN OR CONTROL MOST OF THE CORPORATE STOCK OR GUARANTEE THE CORPORATION'S FINANCIAL OBLIGATIONS.

REFERENCE IS MADE TO YOUR PROTEST AGAINST FAVORABLE CONSIDERATION OF EITHER OF THE TWO LOWEST BIDS RECEIVED UNDER AN INVITATION FOR BIDS ISSUED ON FEBRUARY 8, 1957, BY THE DEPARTMENT OF COMMERCE, BUREAU OF PUBLIC ROADS, FOR ROAD CONSTRUCTION WORK DESCRIBED AS NICARAGUA PROJECT 8-A, INTER-AMERICAN HIGHWAY FROM SEBACO TO CONDEGA, REPUBLIC OF NICARAGUA.

YOUR PROTEST IS BASED UPON THE PROVISION IN THE INVITATION THAT 'BIDS WILL BE CONSIDERED ONLY FROM UNITED STATES OR NICARAGUA FIRMS WITH A SATISFACTORY PERFORMANCE RECORD ON HIGHWAY CONSTRUCTION IN THE UNITED STATES OR NICARAGUA.' YOUR COMPANY WAS THE THIRD LOWEST BIDDER ON THE BASIS OF COMPLETION OF THE PROJECT BY JUNE 30, 1959. THE SECOND LOWEST BID WAS SUBMITTED BY A JOINT VENTURE CONSISTING OF A GUATEMALAN FIRM AND JAMES STEWART AND COMPANY, INC. THE LOWEST BID WAS SUBMITTED BY THOMPSON-ICORNWALL, INC.

THE BUREAU OF PUBLIC ROADS HAS REPORTED, WITH REFERENCE TO JAMES STEWART AND COMPANY, INC., THAT ONE OF THE JOINT VENTURERS HAS PERFORMED A LARGE VOLUME OF HIGHWAY WORK SINCE 1937. BY LETTER DATED MARCH 15, 1957, THAT COMPANY ADVISED THE BUREAU WITH RESPECT TO YOUR PROTEST THAT IT HAS PERFORMED ALL TYPES OF INDUSTRIAL CONSTRUCTION, INCLUDING FACTORIES, OFFICE BUILDINGS, BANKS, HARBOR DEVELOPMENTS, PUBLIC HIGHWAYS, AND MILITARY INSTALLATIONS AND BASES. LISTED IN THE LETTER AS PREVIOUS ROAD WORK PERFORMED BY THE CORPORATION ARE: WEST SIDE HIGHWAY, NEW YORK CITY, PARK AVENUE OVER NEW YORK CENTRAL TRACKS, NEW YORK CITY; BALTIMORE-WASHINGTON EXPRESS HIGHWAY; AND ROAD WORK IN CONJUNCTION WITH UNITED STATES NAVAL AIR STATION, TRINIDAD, B.W.I. THUS, IT IS APPARENT THAT THERE EXISTS NO SUBSTANTIAL BASIS FOR YOUR PROTEST AGAINST ANY AWARD TO THE SECOND LOWEST BIDDER.

DATA SUPPLIED BY THOMPSON-ICORNWALL, INC., SHOWS THAT ON APRIL 20, 1950, THE MACCO PAN-PACIFIC COMPANY WAS INCORPORATED IN THE STATE OF NEVADA, AND THAT THE NAME OF THIS CORPORATION WAS CHANGED ON \*\*674 AUGUST 12, 1954, TO THOMPSON-ICORNWALL, INC. IT HAS BEEN ALLEGED THAT THE ORIGIN OF THOMPSON-ICORNWALL, INC., STEMS DIRECTLY FROM THE PARTNERSHIP OF CHARLES AND GEORGE K. THOMPSON WHICH WAS FORMED IN 1916 FOR THE PURPOSE OF ENTERING INTO THE GENERAL CONTRACTING BUSINESS IN THE MID-WESTERN PART OF THE UNITED STATES. A BROCHURE ENTITLED 'CONTRACTS COMPLETED BY THOMPSON-ICORNWALL 1916 THROUGH 1954,' LISTS A NUMBER OF CONSTRUCTION PROJECTS, INCLUDING THE CONSTRUCTION OF HIGHWAYS AND BRIDGES IN THE UNITED STATES, THE CANAL ZONE, THE REPUBLIC OF PANAMA, PUERTO RICO, AND SOUTH AMERICA. THE BUREAU OF PUBLIC ROADS IS SHOWN AS A CONTRACTOR FOR SOME OF THE HIGHWAY WORK IN THE UNITED STATES.

IN A LETTER OF MARCH 19, 1957, YOU INDICATED THAT IT WAS YOUR UNDERSTANDING THAT THOMPSON-ICORNWALL, INC., HAS NEVER AS A CORPORATE ENTITY PERFORMED HIGHWAY CONSTRUCTION WORK IN THE UNITED STATES OR NICARAGUA. WE ARE ADVISED THAT SINCE MAY

1954 THE STOCK OF THOMPSON- CORNWALL, INC., IS JOINTLY AND EQUALLY OWNED BY R. C. THOMPSON AND F. E. CORNWALL, AND THAT ALL OF THE OBLIGATIONS OF THE CORPORATION ARE PRESENTLY GUARANTEED BY GEORGE K. THOMPSON AS WELL AS BY R. C. THOMPSON AND F. E. CORNWALL. GEORGE K. THOMPSON AND HIS SON, R. C. THOMPSON, APPEAR TO HAVE HAD A CONSIDERABLE AMOUNT OF EXPERIENCE IN THE CONSTRUCTION OF HIGHWAYS IN THE UNITED STATES, PARTICULARLY IN CONNECTION WITH CONTRACTS PERFORMED BY THE THOMPSON-IMARKHAM CO., WHICH PARTNERSHIP CONSTRUCTED HIGHWAYS, TUNNELS, AIRPORTS AND BUILDINGS IN THE UNITED STATES DURING THE YEARS 1936 TO 1943. BEFORE THAT TIME GEORGE K. THOMPSON WAS A PARTNER WITH HIS BROTHER, CHARLES THOMPSON, IN THE CONTRACTING BUSINESS AND OPERATED IN THE WESTERN STATES ON DRAINAGE AND BRIDGES, HIGHWAYS AND TUNNEL CONSTRUCTION. GEORGE K. THOMPSON IS NOW ONE OF THE VICE PRESIDENTS OF THOMPSON-ICORNWALL, INC., AND HIS SON, R. C. THOMPSON, IS THE PRESIDENT OF THE CORPORATION.

WE DO NOT BELIEVE IT WOULD BE IMPROPER IN EVALUATING THE EXPERIENCE OF A CORPORATION TO CONSIDER THE EXPERIENCE OF ONE OR MORE OF ITS PRINCIPAL OFFICERS WHO OWN OR CONTROL MOST OF THE CORPORATE STOCK OR GUARANTEE THE CORPORATION'S FINANCIAL OBLIGATIONS. NOR DOES IT APPEAR UNUSUAL FOR A CORPORATION TO CLAIM THAT IT HAS PERFORMED WORK WHICH HAS ACTUALLY BEEN PERFORMED BY INDIVIDUALS OR PREDECESSOR FIRMS BEFORE THE DATE ON WHICH THE CORPORATION WAS FORMED. IT IS INTERESTING TO NOTE IN THIS CONNECTION THAT JAMES STEWART AND COMPANY, INC., IN ITS LETTER OF MARCH 15, 1957, REFERS TO ITS INCORPORATION IN 1913 BUT FURTHER STATES THAT ' THIS ORGANIZATION HAS BEEN IN THE GENERAL CONTRACTING BUSINESS FOR OVER 110 YEARS AND HAS PERFORMED CONSTRUCTION WORK IN EVERY SECTOR OF THE UNITED STATES AS WELL AS IN SOUTH AMERICA, EUROPE AND ASIA.'

UNDER THESE CIRCUMSTANCES, WE DO NOT FEEL JUSTIFIED IN INTERPOSING ANY OBJECTION TO CONSIDERATION OF THE TWO LOWEST BIDS RECEIVED ON NICARAGUA PROJECT 8-A.