

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS
ON REFERRAL BY THE COMMISSIONER OF ADMINISTRATION**

TRASTAR, INCORPORATED)	
)	
vs.)	
)	
DEPARTMENT OF TRANSPORTATION)	
AND PUBLIC FACILITIES.)	OAH No. 09-0211-PRO
_____)	DOTPF ITB No. NRJ00000703F

DECISION

I. Introduction

This is a protest appeal. It concerns Invitation for Bid [ITB] No. NRJ00000703F, issued by the Department of Transportation and Public Facilities [DOTPF], Northern Region, to obtain light emitting diode (LED) pedestrian signal modules and crossing signs.

Eight bidders responded. The lowest bid on Lot 1, for the LED signal modules, was submitted by Trastar, Incorporated. The department deemed the bid non-responsive because the signal modules had not been tested as required by the ITB. Trastar filed a protest, which was denied. Trastar appeals.

Trastar has not shown that the testing requirement was unduly restrictive. Therefore, its protest is denied.

II. Facts

The Department of Transportation and Public Facilities issued Invitation to Bid NRJ00000703F on January 13, 2009. Lot 1 of the ITB solicited bids to supply 560 light emitting diode (LED) pedestrian countdown signal modules to DOTPF's Northern Region, with bids to be submitted no later than February 2, and the modules to be delivered no later than March 15.

The ITB specifications require that, except as otherwise noted, the signal modules must "conform to 'Pedestrian Traffic Control Signal Indications – Part 2: Light Emitting

Diode (LED) Pedestrian Traffic Signal Modules' [(PTSCI-04) issued by the] Institute of Transportation Engineers.”¹

In addition, the specifications including various testing requirements, including this one, specification no. 1(e)(4):

Design Qualification and Quality Assurance Testing by an Independent Lab. Have ETL/Intertek or other approved OSHA recognized “Nationally Recognized Testing Laboratory” do the following:

a. Perform an initial assessment of the manufacturer’s factory, engineering and manufacturing systems, and procedures to confirm compliance with ISO 9000.

b. Perform initial Design Qualification Testing as specified in Section 6.4 of the PTSCI-04.

c. Every 6 months, conduct a factory inspection and perform Quality Assurance Tests on two samples of each certified LED module in accordance with the following sections of PTSCI-04:

6.4.2 Conditioning

6.4.4.1-6.4.4.4 Luminous Intensity

6.4.4.6 Chromaticity

6.4.4.6 Power Factor

6.4.6.7 Total Harmonic Distortion^[2]

d. Provide a certification label on each certified LED traffic signal module verifying the manufacturer’s factory and modules passed the tests listed in a.-c. above.

Trastar reviewed the ITB and determined that its product, the Duralight JXM-400 model, would meet the performance and functional specifications of the ITB. However, although that product had in 2006 been tested and certified for compliance with the PTSCI-04 standards by an independent testing laboratory,³ and is widely used in major cities across the country,⁴ Trastar had not obtained certification for compliance with those standards from an OSHA-recognized laboratory.

¹ Pedestrian Traffic Control Signal Indications – Part 2: Light Emitting Diode (LED) Pedestrian Traffic Signal Modules, ITE Joint Industry and Traffic Engineering Council Committee (March 19, 2004), at 1 [hereinafter, PTCSI-04] [available online at <http://www.ite.org/standards/Led.asp>; accessed June 4, 2009). This document is referenced by the parties, and the electronic version is therefore incorporated into the record.

² The listed PTSCI-04 sections do not all bear the label attributed to them in the ITB. PTSCI-04 section 6.4.4.4 is labeled “Chromaticity”, while the ITB states that section 6.4.4.6 bears that label; PTSCI-04 sections 6.4.5.4 and 6.4.5.5 are labeled “Power Factor” and “Total Harmonic Distortion” respectively (the ITB attributes those labels to sections 6.4.4.6 and 6.4.6.7, which do not exist in PTSCI-04).

³ Test Report No. WUX-0608-5697-Safety-ITE-4 (EMC Compliance Management Group, September 13, 2006).

⁴ Email, B. Bagwell to J. Caskey (1/15/2008 @ 11:47 a.m.)

Bob Bagwell, Trastar’s sales manager, called the Jean Caskey, the procurement officer, to discuss the testing requirement in the ITB. He followed up with an email, noting that ITE has not issued specifications for countdown modules, and Intertek has certified only two manufacturers’ modules, Dialight and GE. He asked that the requirement for certification by a nationally recognized laboratory be removed.⁵

Ms. Caskey responded that the ITB specifications were taken from the department’s statewide highway construction standards, section 740-2.15, and could not be altered.⁶ Mr. Bagwell responded that the Trastar products fully comply with that specification, which does not require testing by a nationally recognized independent laboratory.⁷ Ms. Caskey checked with a department engineer, who responded:

Products need to comply with the Specifications in the Invitation to Bid. Unless referenced in the ITB, Section 740-2.15 of the 2004 Standard Specifications does not apply to this project (in addition, it is out-of-date). The requirement for independent testing is intended to give us an independent assurance of product quality. It should not be waived.^[8]

The terms of the ITB were not altered, although the date for delivery was changed from March 15 until 45 days “after receipt of [a purchase] order.”⁹

The department received seven timely bids. The three lowest, from lowest to highest, were from Trastar, EOI Excellence Opto (EOI), and Alaska Traffic Signal Supply, offering products manufactured by Trastar, EOI, and General Electric, respectively. The department found the Trastar bid non-responsive due to the lack of testing as required by the ITB.

The Occupational Safety and Health Administration (OSHA) operates the Nationally Recognized Testing Laboratories program. OSHA’s process for obtaining recognition involves review of the testing facilities and the applicant’s administrative and technical practices and documentation by qualified technical experts, with public

⁵ *Id.*

⁶ Email, J. Caskey to B. Bagwell (1/16/2009 @ 9:10 A.M.).

⁷ Email, B. Bagwell to J. Caskey (1/16/2009 @ 2:03 p.m.).

⁸ Email, K. Smith to J. Caskey (1/16/2009 @ 2:38 p.m.). The 2004 standards are the most current standards listed on the department’s website. It is unclear why it does not apply. That Section 740-2.15 is out-of-date presumably means that it does not reflect the PTSCI-04 standards, which were issued at a later date. *See* notes 21-22, *infra*.

⁹ ITB, Amendment No. 2 (February 2, 2009). The amendment also extended the closing time to February 5.

comment on the review findings.¹⁰ Laboratories obtaining national recognition are authorized to determine whether specific products meet applicable OSHA-accepted safety standards for use of those products in the workplace. Fifteen organizations operate Nationally Recognized Testing Laboratories. OSHA provides each with a scope of recognition. The scope of recognition identifies the specific products and standards for which recognition is provided to the laboratory.¹¹ Because OSHA's workplace safety regulations do not apply to pedestrian traffic signals, none of the fifteen nationally recognized laboratories has a scope of recognition for those products.¹²

The PTSCI-04 standards are specifications developed by the Joint Industry and Traffic Engineering Council Committee of the Institute of Transportation Engineers (ITE). At the time the standards were promulgated, the committee had ten members, none of them representing a state or local agency with highway construction responsibilities; members included an ITE staff liaison, a representative of the Federal Highway Administration, four independent consultants, and four industry representatives, including an employee of Dialight Corporation and an employee of Intertek Testing Services.¹³ The standards enunciate specifications for pedestrian traffic modules, but do not include the countdown function requested in the ITB. Draft specifications for the countdown function were issued by the committee on February 19, 2009; the Dialight and Intertek employees remained members of the committee at that time.¹⁴

PTSCI-04 Section 6.3 establishes standards for production quality assurance testing by manufacturers. All modules produced are to be tested by the manufacturer in accordance with the standards, and any modules not meeting the standards must be rejected.¹⁵ The effect of compliance with this standard is to provide assurance to end product purchasers that the particular items purchased will meet critical performance and

¹⁰ See generally, 29 C.F.R. §1910.07, Appendix A.

¹¹ 29 C.F.R. §1910.7(b)(1), (e) & Appendix A §I(A)(2)(b), §I(B)(7)(c)(1) (“Letter of recognition”).

¹² Trastar provided a copy of the OSHA webpage listing the recognized laboratories. Information on the scope of recognition for each laboratory may be obtained by following the links on that webpage.

¹³ PTSCI-04 at 1.

¹⁴ The proposed revisions to the standards are available at <http://www.ite.org/standards/Led.asp>. See note 1, *supra*.

¹⁵ PTSCI-04, §6.3 at 6.

functionality standards.¹⁶ PTSCI-04 Section 6.4 establishes standards for new module design. Much more extensive than production quality assurance testing, new module design testing must be provided at least once every five years (or when the module design changes) to a sample of six modules that are “representative of the manufacturer’s proposed normal production.”¹⁷ The purpose of the design qualification testing is to provide assurance that the manufacturer’s proposed product design will meet the full range of performance and functionality standards.¹⁸

Intertek Testing Services operates a nationally recognized testing laboratory. Intertek has established a program to test LED traffic signal modules for compliance with PTSCI-04 standards.¹⁹ Initially, it tested and certified two manufacturers’ products, GE Lumination and Dialight, but by June, 2009, Intertek had tested and certified a third manufacturer’s products: Excellence Opto, Inc.²⁰ No other nationally recognized testing laboratory is known to have established a program for testing LED pedestrian traffic signal modules for compliance with the PTSCI-04 standards.

In January, 2004, just before the PTSCI-04 standards were issued, the department issued statewide construction standards that require use of LED units that will fit into existing neon modules constructed to PTSCI standards, and adopted the PTSCI standards for the international “hand/walking person” symbol, color, chromaticity as set out in

¹⁶ The specific performance and functionality standards tested for are luminescence (§4.1.1), power (§5.6.1), current (§6.4.5.1), and visual appearance. PTSCI-04, §6.3.(1-4), at 6-7.

¹⁷ PTSCI-04 §6.4.1, 6.4.1.1, 6.4.1.2 at 7. *See generally, id.*, §6.4 at 7-11 and Attachment 2.

¹⁸ *See* PTSCI-04 §6.4.1.3.

¹⁹ The existence of this program is established by the undated list of certified products provided by Trastar that is in the record. Intertek, Directory of LED Traffic Signal Modules Certified Products [hereinafter, “Intertek Directory”]. The date the program was established is unknown, and nothing in the record establishes the specific standards applied. Intertek’s website includes an undated press release noting the development of the program. http://www.intertek-etlsemko.com/portal/page/cust_portal/ITK_PGR/ABOUT_INTERTEK_ETL_PG/OUR_NEWSROOM_PG/NEWS_RELEASES_2008_PG/Traffic_Signal_Program (accessed June 5, 2009). The site also includes a brief summary stating that the program “incorporates the provisions called out in Section 6.3 of the ITE Specifications [PTSCI-04].” http://www.intertek-etlsemko.com/portal/page/cust_portal/ITK_PGR/SELECT_YOUR_IND_PG/LIGHTING_PG/LIGHTING_SERVICES_PG/PERFORMANCE_PG/TRAFFIC_PG (accessed June 5, 2009). Both of these electronic documents have been disregarded for purposes of this decision.

²⁰ Intertek Directory. The administrative law judge takes official notice of Intertek’s updated directory, which bears the note “rev 6/09” [available online at http://www.intertek-etlsemko.com/portal/page/cust_portal/ITK_PGR/DOCUMENTS_PROD_PG/LED_Directory_Traffic_Signal_Modules_Certified_Products.pdf; accessed June 4, 2009]. A party may object to taking official notice of this electronic document in a proposal for action.

PTSCI §5.3 and figure C.²¹ The statewide construction standards did not specify any requirement for design quality assurance, but did require production testing consisting of 24-hour operation at a temperature of 140°F, and confirming rated intensity.²²

III. Discussion

A. Requirement for Compliance with PTSCI-04 Standards

Trastar's initial email objecting to the testing requirement raised suggested that the PTSCI-04 standards had been tailored to the interests of Dialight, GE and Intertek, rather than reflecting the needs of users. On that basis, Trastar asked that the requirement for certification be removed. In a subsequent email, Trastar pointed out that the department's statewide construction standards do not require compliance with the PTSCI-04 standards, and again asked that the requirement for certification be removed.²³

To the extent that Trastar's initial objection was to the use of the PTSCI-04 standards, rather than the statewide construction standards, the objection is moot: Trastar's product has been certified as meeting the PTSCI-04 standards by an independent testing laboratory, EMC Compliance Management Group.

B. Requirement for Certification by OSHA-Recognized Laboratory

In its protest, Trastar argued that the requirement for certification of compliance by a nationally recognized testing laboratory was unduly restrictive, because there are many other independent laboratories that provide certification for compliance with PTSCI-04.

The department denied the protest, pointing out that any independent laboratory could apply for certification by OSHA as a nationally recognized laboratory, and that any manufacturer may submit its modules to Intertek for testing. The department states that the specification called for use of a nationally recognized laboratory to ensure the quality of the laboratory, and it requires independent testing in order to ensure product quality.²⁴

²¹ Department of Transportation and Public Facilities, Standard Specifications for Highway Construction (January 9, 2004), §740-2.15, ¶3 [available online at http://www.dot.state.ak.us/stwddes/dcspcs/pop_hwyspecs_english.shtml (accessed June 4, 2009).

²² *Id.* See §740-2.14(1)(b)(5).

²³ See generally, *supra*, notes 8, 21-2.

²⁴ Protest Decision at 2; see Email, K. Smith to J Caskey (3/13/2009 @ 2:33 p.m.).

1. *The Procurement Was Not Sole Source or Brand Specific*

On appeal, Trastar argues that the procurement was in effect a sole source procurement.²⁵

A sole source procurement is one in which only one entity is solicited to provide the products or services sought. This solicitation was for the purchase of LED pedestrian traffic modules, not for the provision of the testing services. The ITB was not limited to a single supplier, and the department received timely bids from seven different bidders. This was not a sole source procurement and it would not have been one even if the solicitation had specified Intertek as the one and only laboratory whose certification would be accepted.

Trastar's appeal might also be characterized as arguing that the procurement was brand specific. A brand specific solicitation is one that specifies a particular product (without allowing the equivalent), or is unduly restrictive because it has that effect.²⁶ In this particular case, three manufacturers have obtained the required certification, and the solicitation is not restricted to a single product. Furthermore, as the department pointed out in its decision on the protest, any manufacturer can submit its products to Intertek for testing: the decision whether to submit a product for testing by Intertek is a business decision for each manufacturer. Accordingly, even if only one product had been certified by Intertek, this would not have been a brand specific procurement.

2. *The Specification Is Not Unduly Restrictive*

Specifications must “encourage competition in meeting the state’s needs, and may not be unduly restrictive.”²⁷

Specifications are unduly restrictive when they are not reasonably necessary to satisfy the agency’s actual needs. When a protestor asserts that specifications are unduly restrictive, the initial burden is on the agency to make a *prima facie* case that the specifications were reasonably necessary. If the agency meets that burden, the protestor must show that the agency was clearly mistaken.^[28]

²⁵ Protest Appeal.

²⁶ See 2 AAC 12.080(b), -.090, -.100.

²⁷ AS 36.30.060(c); AAM 81.470(1).

²⁸ Appeal of Scientific Fishery Systems, Inc., No. 98.09 at 7 (Department of Administration, July 26, 1999).

Trastar asserts that the requirement for certification by a nationally recognized testing laboratory is unduly restrictive, because any number of independent testing laboratories could provide the same certification, and there is no need to limit testing to OSHA-recognized laboratories. The department does not specifically state why it did not choose to accept certification from any other independent testing laboratory, stating only that use of a nationally recognized laboratory ensures the quality of the laboratory.²⁹

OSHA's program for national recognition only involves laboratories that provide testing for products used in the workplace that are subject to OSHA safety regulations. A laboratory that does not test products for compliance with OSHA regulations would have no reason to seek recognition under the program, and in fact could not obtain recognition. In particular, there is no laboratory that is recognized by OSHA for certification of pedestrian signal modules, which are not regulated by OSHA. Nonetheless, OSHA recognition provides reasonable assurance that a particular laboratory's management practices and adherence to technical standards in areas outside the scope of OSHA's national recognition will meet generally-accepted standards. Accordingly, the department has made a *prima facie* showing that a requirement for certification by an OSHA-recognized laboratory is reasonably necessary means of verifying laboratory quality.

To show that the requirement is unduly restrictive, Trastar was required to present evidence that restricting testing to OSHA laboratories was clearly mistaken. The specific laboratory that has certified Trastar's product as compliant with PTSCI-04 is accredited by the "National Voluntary Laboratory Accreditation Program for the specific scope of accreditation under Lab Code #20068-0." Trastar did not provide any evidence this accreditation is substantially equivalent, for purposes of certification of pedestrian signal modules, to recognition under the OSHA program. Nor has it provided any evidence that this accreditation should be deemed sufficient to meet the department's need for assurance that testing results are reliable, in light of the department's legitimate concerns regarding public safety. Because Trastar has not provided evidence of this nature, it has not established that the requirement for testing by an OSHA-recognized laboratory is

²⁹ Protest Decision at 2; *see* Email, K. Smith to J Caskey (3/13/2009 @ 2:33 p.m.).

unduly restrictive. Furthermore, even if it had made such a showing, Trastar did not show that it could not have timely obtained certification from Intertek.³⁰

IV. Conclusion

The protest appeal is denied.

DATED June 8, 2009.

Signed

Andrew M. Hemenway
Administrative Law Judge

Adoption

On behalf of the Commissioner of the Department of Administration, the undersigned adopts this decision as final under the authority of AS 44.64.060(e)(1). Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with AS 44.62.560 and Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 6th day of July, 2009.

By: Signed

Signature
Andrew M. Hemenway

Name
Administrative Law Judge

Title

[This document has been modified to conform to technical standards for publication.]

³⁰ The ITB did not require submission of test results prior to the date of closing. Compliant (*i.e.*, tested) products did not need to be provided until 45 days after a purchase order.