

Appendix 3 – Contract Comments and Proposed Changes

Subject: State of Indiana Request for Proposal 21-67284 for Laboratory Analytical Services for Environmental Samples Comment Memo

TestAmerica Laboratories, Inc. d/b/a Eurofins TestAmerica (“ETA”) Contracts Department has reviewed the State of Indiana’s Request for Proposal on behalf of The Indiana Department of Environmental Management for Laboratory Analytical Services for Environmental Samples, RFP Number 21-67284, and has the following comments and proposed changes:

Professional Services Contract**9. Changes in Work**

ETA prefers that changes to the scope of work or work schedule not be made unilaterally since such changes may be contingent upon technical feasibility and operational capacity. The following language is therefore proposed to replace the last sentence in its entirety:

Changes to the Scope of Services, including but not limited to increasing or decreasing the work, changing test and analysis specification, or acceleration in the performance of the work may be initiated by the State after sample delivery acceptance. Such a change will be documented in writing and may result in a change in cost and turnaround time commitment. Contractor’s acceptance of such changes is contingent upon technical feasibility and operational capacity.

10. Compliance with Laws

C. ETA does not accept set-off terms. It is therefore requested that the second and third sentence in this subsection be removed.

11. Condition of Payment

ETA prefers to have the contract recognize the parties’ obligation to work together in the event of an error requiring resampling and reanalysis. In addition, we don’t feel as if it is equitable for ETA to pay for the profit component of resampling costs, since the State will have the ultimate decision to conduct those activities and there is no other requirement of reasonableness in this decision. It is requested that the second sentence of this section be replaced in its entirety with the following language:

Any resampling, validation, or program management or any other costs of the State to be charged to the Contractor under the terms of this contract, shall not include profit or fee. Such reasonable costs will be negotiated by the State and the Contractor, prior to mobilization to the field for such work and shall be based on usability of the data. In no case shall the State unreasonably withhold the Contractor’s right to independently defend its data.

12. Confidentiality of State Information

ETA holds all client data as confidential to the client, however, in the event that data or other information is the subject of a subpoena or other legal process, ETA must be able to comply with legal requirements. The following language is therefore proposed as an additional paragraph:

Contractor shall not be prevented, however, from using or disclosing information: (i) which is or becomes published or otherwise publicly available through no breach of this Contract, (ii) which is already known to Contractor at the time of disclosure by the State as evidenced in writing, (iii) which Contractor later lawfully learns from some source other than directly or indirectly from the State, or (iv) which is required by legal process, provided that Contractor shall provide notice of such request to the State prior to any disclosure.

15. Default by State

ETA requests that the sixty (60) days after receipt of written notice opportunity to cure any alleged material breach before termination be lessened to thirty (30) days.

19. Employment Option

ETA requests that this section be removed in its entirety.

24. Indemnification

ETA believes that indemnification clauses should reflect a fair and equitable allocation of the risk involved in the work. ETA will not accept liability for a client's negligence. The following language is therefore requested to replace the last sentence:

Notwithstanding any other provisions herein to the contrary, the Contractor shall not be obligated to indemnify the State for liabilities to the extent caused by the State's negligent acts or omissions. The State agrees to indemnify the Contractor to the same extent the Contractor has indemnified the State above.

Additionally, ETA cannot accept the potential for unlimited damages in any project as we cannot incorporate the risk of such unforeseeable damages in our prices. The following language is therefore proposed as a new paragraph:

Notwithstanding anything to the contrary stated elsewhere in this Contract, Contractor's maximum liability under this Contract or any other attachments hereto whether based in contract, tort, warranty, negligence or otherwise shall not exceed amounts recoverable under the scope and limits of the insurance required under this Contract, up to a maximum of \$3,000,000. Where there is negligence of the State, the Contractor's duty of indemnification and defense shall be in proportion to its allocable share of such joint negligence or misconduct. In no event shall the Contractor be liable to the State for any special, indirect, or consequential damages occasioned by the services performed or by application or use of the reports prepared under this Contract.

28. Insurance

A.

1. ETA's Commercial General Liability policy is \$1,000,000 per occurrence and \$2,000,000 in the aggregate. It is requested that ETA's insurance limits apply.
2. ETA's Commercial Automobile Liability policy is \$1,000,000 combined single limit for bodily injury and property damage. It is requested that ETA's insurance limits apply.
4. Not applicable to ETA.
5. Not applicable to ETA.

B.

3. ETA cannot accept the potential for unlimited liability. It is therefore requested that this subsection be removed in its entirety.
4. It is ETA's standard practice to only provide notification of termination of a policy. It is therefore requested the words *or modified* be removed from this sentence.

36. Ownership of Documents and Materials

ETA requests that the last sentence be removed in its entirety as it does not offer licenses.

Additionally, ETA will not agree that its intellectual property, other than data generated in the course of its services, will belong to our clients. The following language is therefore requested as a new paragraph:

Data or information provided to Contractor or generated by services performed under this Contract shall only become the property of the State upon receipt in full by the Contractor of payment for the entire order. Ownership of any analytical method, QA/QC protocols, software programs or equipment developed by the Contractor for performance of work will be retained by the Contractor. The State shall not disclose such information to any third party.

37. Payments

A. ETA requests that payments be made thirty (30) days from receipt of a properly prepared invoice, as opposed to thirty-five (35) days. Moreover, ETA typically issues invoices concurrently with its analytical reports. The following language is therefore requested:

Invoices may be submitted to the State upon completion of any sample delivery group.

45. Termination for Convenience

ETA expects to be paid for all services properly performed. The following language is therefore proposed for addition to the third sentence:

The Contractor shall be compensated for services properly rendered ~~prior to~~ through the effective date of termination, and the Contractor shall complete at work in progress on the date of such termination and shall be paid in full for all such work even if completed after the date of such termination.

Additionally, ETA requests that the fourth sentence be modified as followed:

This material is intended only for the use of the individual(s) or entity to whom it is addressed and may contain information that is privileged and confidential. It is our policy that facsimiles are intended for and should be used for business purposes only. If you are not the intended recipient, or the employee or agent responsible for delivering this material to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this facsimile is strictly prohibited. If you have received this communication in error, please notify the sender. Thank you for your professional consideration and cooperation.

The State will not be liable for services performed after the effective date of termination unless such work was work in progress of the date of such termination.

49. Work Standards

ETA requests that the first sentence be replaced with the following language:

Contractor warrants that performance will be consistent with the standards of a competent professional in the field, conform to the requirements of the Work Order and be performed as implemented in the Contractor's Laboratory Quality Manuals and Standard Operating Procedures, as specified in the Scope of Work and shall comply with applicable laws.