

Protest of ) Date: February 25, 1992  
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JOHNSON CONTROLS, INC. )  
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Solicitation No. 3961-38-91-A-0147 ) P.S. Protest No. 91-72

### DECISION

Johnson Controls, Inc. ("Johnson Controls"), protests the rejection as technically unacceptable of its proposal under Solicitation No. 3961-38-91-A-0147 for the installation of a fire alarm system at the Main Post Office in Okmulgee, Oklahoma.

The solicitation was issued June 28, 1991, by the Procurement/ Contracting Office in Oklahoma City, OK; offers were due August 2. The solicitation provided for the installation of an alarm system which, according to section 1.02 D of the solicitation, was to be "listed" with Underwriters Laboratories under its standard 1076.<sup>1/</sup> According to section 1.02 G., the specification was written around a Pyrotronic system, but section 1.02 H. provided for other systems to be proposed which conformed to the standards of the specification. According to section 1.02 J. 6., upon operation the system was, inter alia, to "[a]ctivate the elevator return sequence, first floor or alternate floor." According to section 2.01 B, the system was to include a "panel annunciator" which "shall be an 80 character backlit and supertwist alphanumeric device, which shall provide a 32 character user definable message associated with each detection device or zone." According to provision M. 1., award was to be made "to the responsible offeror whose proposal conforming to the solicitation will be most advantageous to the Postal Service, cost or price and other factors specified elsewhere in the solicitation considered." No factors other than cost or price were specified elsewhere in the solicitation. Johnson Controls' offer was the lowest of five offers received in response to the solicitation. Johnson Controls did not offer a Pyrotronic system, but offered, instead, its own Johnson IFC-2020 system. Several discrepancies regarding the requirements of the solicitation were noted in Johnson Controls' proposal. Consequently, the contracting officer, through the architect/engineer for the project, Nunemaker/Huber, and its mechanical and electrical consultant, Warren W. Smith & Associates, requested Johnson Controls to furnish further information regarding its proposal.<sup>2/</sup> That

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<sup>1/</sup> The section stated:

The system, including all components shall be listed by Underwriters Laboratories, Inc. for use as a fire protective signaling system UL 864 and Security UL 1076. The security function of the system will not be used at this time but the equipment shall be 1076 listed for the future addition of security devices.

<sup>2/</sup> As relevant to this protest, the request asked Johnson with reference to section 1.02 D to "provide listing card for filing under category security 1076"; with reference to

information was submitted to the architect/engineer on August 29.<sup>3/</sup> Following further review, the program manager determined that Johnson Control's proposal was not an acceptable equal for that proposed.<sup>4/</sup>

On September 11, the contracting officer awarded a contract to Merit/Osborne at a price of \$67,110 and notified the unsuccessful offerors of the award by a letter which stated that award was made "on the basis of initial proposals received, without discussions."

By letter dated September 25, Johnson Controls protested its nonselection to this office. Johnson Controls argues that it should have received the award because of its

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section 1.02 J. G. to "[v]erify contractor has made provisions with elevator manufacturer to make necessary modifications to elevator for service code compliance"; and with reference to section 2.01 B, to "[v]erify LCD [liquid crystal display] is backlit."

<sup>3/</sup> With respect to the three queries set out above, Johnson Control's replies were as follows:

-- As specified, the Pyrotronic system requested could be listed for UL 1076, since the system lacked a tamper switch and a printer necessary to obtain that rating. "There currently is a project open with Underwriter's Laboratory to list the IFC-2020 for U.L. 1076. Although we have not received a definite date, we have a target date of early 1992 for receiving the listing."

-- "If the intent of the specification for the LCD display to be backlit is to be able to see it in the dark, then yes, Johnson Controls will verify that the display on the IFC-2020 will be seen in the dark."

-- "Item [1.02 J.] 6 as referenced says to 'activate the elevator return sequence'. In accordance with that statement, we will provide the outputs necessary to activate the sequence. Nowhere in the original specification is there any indication that the contractor is to make modifications to the elevator to bring it up to code.... Included is a quote on providing the requested modifications."

<sup>4/</sup> A memorandum dated September 3 to the contract file from the program managers states, in pertinent part:

1. The system proposed [by Johnson Controls] is not fully "listed" with Underwriters Laboratories (UL).
2. The annunciator panel on the system proposed is not backlit.
3. The original proposal by Johnson Controls does not include the required modifications to the existing elevator. Their contention is that it is not specified. My contention is that it is specified. Their proposal to add this is \$9000.00.

lower price, \$52,700.<sup>5/</sup> It also contends that, contrary to the statement that the contract was awarded on the basis of initial proposals without discussions, the inquiries posed to it by the A/E and its reply constituted discussions.

Johnson Controls alleges that it did not receive notification of the award until September 16. (Johnson Controls states that it did not receive the contracting officer's September 11 letter until September 23, 1991.) Thereafter, it made several attempts, to no avail, to reach the contracting officer. On September 19, Johnson Controls reached the contracting officer's representative, who forwarded to it a copy of the September 3 memorandum which explained why its proposal was rejected.

Johnson Controls disagrees with the September 3 memorandum. It argues that its proposal was in compliance with the specifications for the project; its system is fully listed for fire under UL 864, while UL 1076 is a standard applicable to security systems, rather than fire systems; the Pyrotronic system called for by the specification could not be fully UL 1076 listed in the configuration specified; and that although its proposal may not have been clear initially on whether the annunciator for the alarm system would be backlit, it would provide a backlit annunciator. It also argues that even with the additional costs for the modification of the elevator, its offer was more than eight percent lower than Merit/Osborne's offer. Johnson Controls contends that the apparently erroneous justification for the rejection of its proposal is the belief that the panel it proposed is not suitable for the intended fire alarm application. The protester states, among other things, that its panel is an industry standard product which is fully approved by Underwriters Laboratories, installed in numerous similar applications world-wide, and should not have been rejected.

In his report on the protest, the contracting officer states that Johnson Controls' contention that the Pyrotronic system could not be fully UL 1076 listed for fire security is in error, because Pyrotronic models are fully UL 1076 listed at the present time. The contracting officer states that the concern was that the Johnson Controls product was not UL 1076 listed, as required by the solicitation, and that Johnson Controls did not expect to obtain this listing until 1992.

The contracting officer asserts that Johnson Controls' failure to state that it was providing a backlit annunciator left him to conclude that one was not available, or the panel would be lit with emergency lighting of some other sort, which was unacceptable.

In response to Johnson Controls' comment regarding whether the solicitation required modification to the existing elevator, the contracting officer states that contact with the other offerors confirmed that all offerors knew that the cost for modification of the elevator should be included in their proposals. Finally, the contracting officer asserts that as a result of the identified deficiencies Johnson Controls' proposal was technically unacceptable and that his decision to reject Johnson Controls' proposal was not arbitrary or capricious.<sup>6/</sup>

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<sup>5/</sup> Johnson's total price including the elevator work, as revised by its August 29 response to the architect/engineer, was \$61,700.

<sup>6/</sup> The contracting officer included with his report a letter from Nunemaker/Huber describing the firm's review of Johnson Controls' proposal for the Postal Service, its

Noting that the contracting officer's statement did not address the issue whether discussions were held with Johnson Controls, as the protester has alleged, this office made further inquiry of the contracting officer. In a telephone conversation, the contracting officer responded to this allegation in the negative. He indicates that he communicated with Johnson Controls, through the architect/engineer, only to clarify certain aspects of Johnson Controls' proposal. The contracting officer also states that Merit-Osborne was similarly contacted by telephone for the purpose of clarifying certain aspects of its offer. The contracting officer reiterates that award of this contract was made on the basis of the initial proposals received, without discussions.

### Discussion

The contracting officer's rejection of Johnson Controls' proposal because it was not in conformance with the solicitation requirements is the equivalent of stating that Johnson Controls' proposal was technically unacceptable. See Bell & Howell Federal Government Sales, P.S. Protest No. 91-24, April 15, 1991; T&S Products, P.S. Protest No. 90-12, May 30, 1990.

In considering protests of determinations of technical unacceptability, "[t]his office will not substitute its judgment for that of the contracting officer or disturb his evaluation of an offer's technical acceptability unless it is shown to be arbitrary or in violation of procurement regulations." Lista International Corporation, P.S. Protest No. 90-47, September 11, 1990, quoting T&S Products, *supra*. Our review of the contracting officer's determination of technical acceptability examines the contracting officer's evaluation only to ensure it had a reasonable basis. TLT Construction Corp., Inc., P.S. Protest No. 89-75, January 18, 1990; Cohlmlia Airline. Inc., P.S. Protest No. 87-41, October 30, 1987; accord B&D Supply Company of Arizona. Inc., Comp. Gen. Dec. B-210023, 83-2 CPD ? 50, July 1, 1983.

Review of the documents in the protest file indicates that the contracting officer rejected Johnson Controls' proposal because it did not conform to the solicitation requirements. Although Johnson Controls argues to the contrary, its protest admits that the system it offered was not listed under the specified UL standard, and did not unequivocally offer to provide a backlit annunciator panel.

The contracting officer's determination that Johnson Controls' proposal was technically unacceptable was consistent with the terms of the solicitation, and was properly based upon the advice of technical personnel.

We next turn to Johnson Controls' contention that oral and written discussions were held with the contracting officer prior to award of the contract. The purpose of discussions is to obtain information essential for determining the acceptability of a

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furnishing Johnson Control a list of 13 items for it to "verify," and its review of the offeror's written response. Nunemaker/Huber said its role was to "assist the Postal Service in determining if the submitted Fire Alarm System was in compliance with the final plans and specifications."

proposal, or to provide an offeror an opportunity to revise its proposal. PM 4.1.5 a.3. Discussions are required whenever there is uncertainty as to the pricing or technical aspects of the most favorable initial proposal and that uncertainty cannot be resolved by clarification. PM 4.1.5 f.2. Contrary to the assertion of the contracting officer, the communications between his representatives and Johnson Controls did not concern the "minor irregularities, informalities, or apparent clerical mistakes in the proposal" that the clarification procedures were intended to eliminate. PM 4.1.5 a.2. Through his technical advisors, the contracting officer identified 13 items that required additional data and verification concerning the basic operation, safety, and testing of the offered alarm system. Couching the request for information as an instruction to "verify" does not alter the purpose of the inquiry, which was to obtain information to determine the proposal's acceptability; hence, the communications with Johnson Controls were "discussions." Accordingly, the contracting officer should have complied with the applicable procedures for award with discussion set forth in the PM.<sup>7/</sup>

However, his failure to do so here does not affect the correctness of rejection of Johnson Control's proposal. See Dawson Construction Co.. Inc., P.S. Protest No. 91-47, September 25, 1991. Johnson Control's proposal was determined to be unacceptable based, in part, on its written responses to the contracting officer's questions. Its protest does not suggest that it sought to, or intended to, submit anything other than what was contained in its original proposal and its August 29 letter. Thus, as to Johnson Controls, the outcome of the evaluation process would be unchanged, and the protester is not an interested party with respect to the issue of discussions. See Barber - Colman Company, P.S. Protest No. 90-34, December 5, 1990; accord Missoula Sheet Metal, P.S. Protest No. 91-38, August 29, 1991; TLT Construction Corp. Inc., supra; ISC Defense Systems Inc., Comp. Gen. Dec. B-236597.2, January 3, 1990, 90-1 CPD ? 8.

The protest is denied.

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Office of Contracts and Property Law

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<sup>7/</sup> Award with discussions contemplates the establishment of a competitive range of offerors whose proposals have a reasonable chance of receiving the award, the holding of discussions with the offerors within the competitive range, and provision to those offerors of the opportunity to submit best and final offers. PM 4.1.5 g.