

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-220374

DATE: November 8, 1985

MATTER OF: Westinghouse Electric Corporation

DIGEST:

Apparent low bid which took no exception to specifications is not nonresponsive because of a letter the bidder sent to the agency after bid opening indicating an inability to comply with the solicitation's Underwriters' Laboratories listing requirement because bid responsiveness is determined as of bid opening and thus letter was relevant only to the issue of bidder responsibility, not responsiveness.

Westinghouse Electric Corporation protests the proposed award of a contract for variable frequency controllers to Johnson Controls, the apparent low bidder under invitation for bids (IFB) No. 652-65-85, issued by the Veterans Administration Medical Center, Richmond, Virginia. Westinghouse is a supplier of controllers to the second lowest bidder, Maddox Supply Company, and is protesting on that firm's behalf. Westinghouse contends that the agency must reject the bid from Johnson Controls as nonresponsive.

We dismiss the protest under section 21.3(f) of our Bid Protest Regulations, 4 C.F.R. § 21.3(f) (1985), because it does not state a valid basis for protest.

Westinghouse contends that Johnson Controls' bid is nonresponsive because its controllers are not listed by Underwriters' Laboratories (U.L.) as required by the solicitation. Westinghouse says that even though Johnson Controls took no exception in its bid to the U.L. listing requirement, the company sent a letter to the agency stating that its controllers are not U.L. listed, but have been approved by another testing laboratory.

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A bid, to be responsive, must comply in all material respect to the terms of the solicitation. Provost's Small Engine Service, Inc., B-215704, Feb. 4, 1985, 85-1 CPD ¶ 130. Responsiveness is determined at bid opening on the basis of the bid submitted. Eclipse Systems, Inc., B-216002, Mar. 4, 1985, 85-1 CPD ¶ 267. In this case, bids were opened on September 27, 1985, and the letter from Johnson Controls dated October 4 was received several days later. Because the letter did not accompany the bid, the letter does not render the bid nonresponsive. By Westinghouse's own admission, the bid itself contained no exceptions to the specifications requirements, and therefore the bid must be viewed as responsive.

The letter, however, does raise the question of the ability of Johnson Controls to comply with the requirements of the IFB, and that is a question of bidder responsibility, see E.J. Murray Company, Inc., et al., B-212107, et al., Mar. 16, 1984, 84-1 CPD ¶ 316, which the contracting officer must resolve in the affirmative prior to award. Federal Acquisition Regulation, 48 C.F.R. § 9.103(b) (1984). This Office generally does not review an agency's affirmative determination of responsibility except in circumstances not present here.

We point out, however, that we have long viewed requirements for certification by particular testing firms such as U.L. as unduly restrictive of competition. See 33 Comp. Gen. 573 (1954); Arctic Marine, Inc., B-182321, May 14, 1975, 75-1 CPD ¶ 311. It may be proper in some cases for a solicitation to require a product that conforms to the standards of a particular testing firm, Gulf Coast Defense Contractors, Inc., B-212641, Feb. 28, 1984, 84-1 CPD ¶ 243, or to state that the certificate or label of that testing firm will be accepted as evidence that the offered product meets applicable standards. 33 Comp. Gen. at 576. However, the absence of such a token of approval should not automatically exclude a product that in fact conforms to such standards.

The protest is dismissed. By separate letter of today, we are informing the Administrator of Veterans Affairs of our concern regarding the U.L. listing requirement.


Ronald Berger
Deputy Associate
General Counsel