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## Decision

**Matter of:** Johnson Controls, Inc.

**File:** B-407337

**Date:** November 20, 2012

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David R. Johnson, Esq., Jenny J. Yang, Esq., and Elizabeth A. Krabill, Esq., Vinson & Elkins LLP, for the protester.

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Tania Calhoun, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

In procurement conducted under two-phase design-build selection procedures, protest of agency's decision to eliminate protester's phase 1 proposal from further competition is denied where the record shows that the agency reasonably found the proposal technically unacceptable.

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### DECISION

Johnson Controls, Inc., of Gaithersburg, Maryland, protests the exclusion of its proposal from phase two of a two-phase design-build competition under request for proposals (RFP) No. W912DY-11-R-0040, issued by the Department of the Army, Corps of Engineers, for the construction of projects supporting energy conservation and the development of alternative energy. Johnson Controls argues that the agency improperly evaluated its phase 1 proposal and unreasonably eliminated it from further competition.

We deny the protest.

### BACKGROUND

The solicitation, issued January 20, 2012, anticipated the award of multiple fixed-price, indefinite-delivery/indefinite-quantity task order contracts for the design/build construction of projects that support energy conservation and the development of alternative energy within and outside of the continental United States. RFP at 3. The total estimated contract capacity was \$600 million. This

capacity could be used over a 1-year base period and up to four 1-year option periods. The Army intends to award a target of eight contracts. Id.

The procurement was to be conducted under two-phase design-build selection procedures, in accordance with Federal Acquisition Regulation (FAR) Subpart 36.3 Two-Phase Design-Build Selection Procedures. In phase 1, offerors were to submit performance capability proposals demonstrating their capability to successfully execute the design-build or construction task orders under the contract. The Army was to evaluate these proposals in accordance with criteria described below, and to select a target of 12 proposals to compete in phase 2 of the process. The government reserved the right to select more or fewer than 12 proposals, or none at all, to move to phase 2. RFP Phase 1 Selection Procedures ¶ 1.2. The phase 2 process is not at issue here.

Phase 1 proposals were to be evaluated under three factors: (1) organizational and technical approach, the most important factor; (2) past performance, which was slightly less important; and (3) evidence of bondability, a go/no-go factor. Id. at ¶ 3.0. Our decision addresses only the most important factor.

The organizational and technical approach factor was comprised of seven elements that would not be separately rated: (1) organization; (2) offeror capabilities; (3) technical approach; (4) design-build approach; (5) planning and scheduling; (6) quality control; and (7) safety and risk management. Id. For each element, the solicitation included detailed submission requirements and evaluation criteria. In evaluating each proposal, the source selection evaluation board (SSEB) was to describe any strengths, weaknesses, deficiencies, or uncertainties, and to assign adjectival ratings of outstanding, good, acceptable, marginal or unacceptable. Id. at ¶ 8.3. The RFP defined a deficiency as “a material failure of a proposal to meet a government requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level.” Id. at ¶ 8.4.1. A proposal was to be rated unacceptable if it did “not meet requirements and contains one or more deficiencies;” such a proposal was “un-awardable.” Id. at ¶ 8.4.12.

Offerors were “cautioned to put forth their best efforts for the [p]hase [1] submission, and to furnish all information clearly to allow the [g]overnment to determine their performance capability.” Id. at ¶ 8.2.1. Offerors were further instructed that they should “not assume that they will have an opportunity to clarify or correct anything in their proposal after submitting it in response to [p]hase [1].” Id. The most highly-rated offerors were to be selected for phase 2. Id.

The Army received 45 proposals by the February 29 closing date, including one from Johnson Controls. The SSEB evaluated the firm’s proposal as unacceptable under the organizational and technical approach factor. The SSEB found that the proposal did not meet the solicitation’s requirements because of a deficiency under

the safety and risk element, and that it was, therefore, un-awardable. The deficiency was based on the protester's failure to provide Occupational Safety and Health Administration (OSHA) forms required by the solicitation that would enable the agency to evaluate the firm's history of work-related injury and incidence rates. The Army otherwise identified the firm's proposal as having four strengths (none of which were significant), eight weaknesses (none of which were significant), and one uncertainty. Agency Report (AR), Exh. 8, Consensus Proposal Evaluation Worksheet at 76. Johnson Controls' proposal was rated "satisfactory confidence" under the past performance factor, and "go" under the evidence of bondability factor. Id. at 211; AR, Exh. 9, Source Selection Authority Decision (SSAD) at 4.

In his decision document, the source selection authority (SSA) stated that he reviewed the proposals and concurred with the findings documented by the SSEB. He explained that his assessment found that the strengths and weaknesses identified by the SSEB, as well as its rationale for the proposals' ratings, were appropriate. Based on his review, the SSA determined that the 15 most highly rated offerors should be advanced to phase 2. AR, Exh. 9, SSAD at 12. Johnson Controls' proposal was not among these. In summarizing the weaknesses, significant weaknesses, and deficiencies of the 30 offerors not advanced to phase 2, the SSA noted the fact that the protester's proposal was rated unacceptable for the most important factor, and that the SSEB documented eight weaknesses and one deficiency. Id. at 10.

## DISCUSSION

Johnson Controls primarily argues that the Army irrationally assigned the deficiency to its proposal that led to its elimination from further competition.<sup>1</sup> The protester contends that the OSHA forms at issue were not required by the solicitation; that its proposal included information equivalent to that on the OSHA forms that demonstrated its superior safety record; and that the Army improperly failed to evaluate the information its proposal did provide.

The evaluation of an offeror's proposal is a matter largely within the agency's discretion. Frontline Healthcare Workers Safety Found., Ltd., B-402380, Mar. 22, 2010, 2010 CPD ¶ 91 at 5. In reviewing a protest that challenges an agency's evaluation of proposals, our Office will not reevaluate the proposals, but, rather, will examine the record to determine whether the agency's judgment was reasonable

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<sup>1</sup> It appears from the record that the deficiency, and the resulting rating of unacceptable, was the driving factor for the decision to exclude Johnson Controls' proposal from further competition. The protester challenges the reasonableness of three of these weaknesses, as well as its past performance rating. In view of our conclusion that the Army reasonably excluded its proposal from further competition on the basis of the identified deficiency, we need not reach these issues.

and consistent with the stated evaluation criteria and applicable statutes and regulations. Ocean Servs., LLC, B-406087, B-406087.2, Feb. 2, 2012, 2012 CPD ¶ 62 at 5. Our Office affords particular deference to the technical expertise of agency personnel regarding judgments that involve matters of human life and safety. See Rocamar Eng'g Servs., Inc., B-406514, June 20, 2012, 2012 CPD ¶ 187 at 5.

It is an offeror's responsibility to submit a well-written proposal, with adequately detailed information which clearly demonstrates compliance with the solicitation and allows a meaningful review by the procuring agency. Mike Kesler Enters., B-401633, Oct. 23, 2009, 2009 CPD ¶ 205 at 2-3. An offeror that does not affirmatively demonstrate the merits of its proposal risks rejection of its proposal. HDL Research Lab, Inc., B-294959, Dec. 21, 2004, 2005 CPD ¶ 8 at 5. Proposals with significant informational deficiencies may be excluded, whether the deficiencies are attributable to either omitted or merely inadequate information addressing fundamental factors. American Gov't Servs., Inc., B-292242, Aug. 1, 2003, 2003 CPD ¶ 163 at 4. A protester's disagreement with the agency's evaluation provides no basis to question the reasonableness of the evaluators' judgments. Mike Kesler Enters., *supra*.

Based on our review of the record, the Army reasonably assigned Johnson Controls' proposal a deficiency for its failure to submit the required OSHA Forms or the equivalent of their contents, reasonably determined that the proposal warranted an unacceptable rating on this basis, and reasonably excluded the firm's proposal from further competition.

Pursuant to the Occupational Safety and Health Act of 1970, the Secretary of Labor promulgates regulations that require covered employers to keep records of occupational deaths, injuries, and illnesses.<sup>2</sup> The records are used for several purposes. OSHA uses the statistics to help direct its programs and measure its performance; inspectors use the data to direct their efforts to workplace hazards; and employers and employees use the records to implement safety and health programs at individual workplaces. *Id.* As relevant here, analysis of the data is a "widely recognized method for discovering workplace safety and health problems and for tracking progress in solving those problems." *Id.*

Covered employers must use OSHA Form 300, "Log of Work-Related Injuries and Illnesses," to classify work-related injuries and illnesses and to note the extent and severity of each case. AR, Exh. 14, OSHA Forms for Recording Work-Related

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<sup>2</sup> "Detailed Frequently Asked Questions for OSHA's Injury and Illness Recordkeeping Rule," <http://www.osha.gov/recordkeeping/detailedfaq.html>. See also 29 C.F.R. Part 1904, "Recording and Reporting Occupational Injuries and Illnesses." The protester does not argue that it is exempt from these requirements.

Injuries and Illnesses, at 2; 29 C.F.R. § 1904.29(a). When an incident occurs, the employer is to use this form to record specific details about what happened and how it happened. Id. In this regard, the form requires such details as the employee's name and job title; the date of the injury or onset of illness; the location where the event occurred; a description of the injury or illness, parts of body affected, and object/substance that directly injured or made the person ill; a categorization of the result for each case (death, days away from work, or remained at work); the number of days the injured or ill worker was on the job, transferred, work-restricted, or away from work; and the type of incident (injury, skin disorder, respiratory condition, poisoning, or all other illnesses). OSHA Form 300. OSHA Form 300A, "Summary of Work-Related Injuries and Illnesses," shows the totals for the year in each category.<sup>3</sup> Employers are required to certify the accuracy of each OSHA Form 300A. Employers are required to keep a "Log"--an OSHA Form 300--for each establishment or site.

"Safety and Risk Management" was the seventh element under the organization and technical approach factor. The submission requirements were as follows:

Offeror shall provide construction team member history of work related injury and incidence rates per OSHA forms 300 and 300A. Offeror shall submit OSHA Forms 300 and OSHA Forms 300A for calendar years 2007, 2008, and 2009. Offeror shall also submit the total recordable case rates and the [Days Away Restricted or Transfer Rate (DART)] incidence rates for calendar years 2007, 2008, and 2009. . . .

RFP Phase 1 Instructions at ¶ 5.8.1.

The solicitation set forth the following evaluation criteria for the element:

The Government will evaluate the offeror's history of work related injury and incidence rates for calendar years 2007, 2008, and 2009 per OSHA forms 300 and 300A. The total recordable case rate for all calendar years must be less than or equal to 6.0 to receive an acceptable rating or higher. If the total recordable case rate for any single calendar year is greater than 6.0 the offeror may still receive an acceptable rating or higher, if the offeror submits an acceptable

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<sup>3</sup> The totals for the year in each category refer to the total number of cases (broken down by number of deaths, number of cases of days away from work, number of cases with job transfer or restriction, and number of other recordable cases); total number of days (broken down by number of days of job transfer or restriction and number of days away from work); and total number of injury and illness type (broken down by injuries, skin disorders, respiratory conditions, poisonings, and all other illnesses). OSHA Form 300A.

Safety/Risk Management Corrective Action Plan detailing how the rate is to be lowered. The total DART incidence rate for all calendar years must be less than or equal to 3.0 to receive an acceptable rating or higher. If the total DART incidence rate for any single calendar year is greater than 3.0 the offeror may still receive an acceptable rating or higher, if the offeror submits an acceptable Safety/Risk Management Corrective Action Plan detailing how the rate is to be lowered or has been lowered. If there has been a work related fatality for any single calendar year the offeror must also submit a Safety/Risk Management Corrective Action Plan detailing steps that have been or are being taken to minimize future fatalities to receive an acceptable rating or higher. . . .

Id. at ¶ 5.8.2.

The relevant section of Johnson’s proposal, entitled “Safety Record,” states:

The emphasis Johnson Controls places on safety has resulted in one of the industry’s best safety performance records, demonstrated by our low OSHA recordable incident rates, as shown in Figure 7-1. This record is even more significant considering Johnson Controls self-performs, on average, over 7,000,000 labor hours each year. These rates are supported by the OSHA Forms 300 and 300A provided at the end of this Element. Our most recent Experience Modification Rating has averaged 0.7 for the past 5 years. Our workers’ compensation experience is 30% better than that of comparable companies in our industry – and our Federal projects did not have a Day Away or a Day of Restricted Duty during the years requested.

Johnson Control Systems	Total Incidents	Total Days Away/Restricted	Total Hours	Total Recordable Incident Rate	DART
2007	41	14	7,055,292	1.16	0.40
2008	32	13	7,405,979	0.86	0.35
2009	13	5	6,615,243	0.39	0.15

Figure 7-1

AR, Exh. 7, Johnson Controls’ Proposal at ¶ 7.5

Johnson Controls’ proposal did not include the OSHA Forms 300 and 300A that it referenced. This omission is the source of the deficiency identified by the SSEB.

Johnson Controls argues that the OSHA forms were not required, citing a question-and-answer (Q/A) exchange in Amendment No. 0005. The protester further argues that, while it did not provide the OSHA forms, its proposal included equivalent information. Our review of the record shows that offerors were required

to submit the OSHA forms, or their equivalent, and that Johnson Controls did not meet this requirement.

The RFP put offerors on notice that the Army intended to evaluate each offeror's "history of work related injury and incidence rates for calendar years 2007, 2008, and 2009 per OSHA forms 300 and 300A." RFP Instructions for Phase 1 at ¶ 5.8.2. To permit the agency to conduct this evaluation, the RFP required offerors to provide construction team member "history of work related injury and incidence rates per OSHA Forms 300 and 300a." Id. at ¶ 5.8.1. More specifically, the RFP stated that offerors "shall submit OSHA forms 300 and 300A for calendar years 2007, 2008, and 2009," and "shall **also** submit the total recordable case rates and the DART incidence rates for calendar years 2007, 2008, and 2009." Id. (emphasis added).

Johnson Controls' proposal included a table of total incident numbers and rates. However, its failure to submit the required OSHA forms left the agency with no way to comply with the solicitation's requirement that it evaluate the firm's "history" of work related injury and incidence rates "per" those OSHA forms. This is because the firm's "history" of work related injury and incidence rates "per" the OSHA forms is not comprised merely of case numbers and rates. As described above, that history includes significant details about incidents over three years that would permit the Army to ascertain the nature, cause, and seriousness of those incidents in order to gain a complete picture of an employer's safety record. Thus, the protester's insistence that its proposal included information "equivalent" to the information on the OSHA forms, is without a basis.

Moreover, Johnson Controls' reliance on a Q/A exchange in Amendment No. 0005 is misplaced. It is true that the exchange established an exception whereby firms could avoid submitting the required OSHA forms. Johnson Controls, however fails to appreciate that an offeror relying on this exception was required to include equivalent information, and the record reflects that Johnson Controls did not include this information its proposal. Specifically, the relevant Q/A provided as follows:

- Q: Because OSHA Forms 300 and 300A pertain to individual sites, a large company may have thousands of forms encompassing the three years. In such a case, may we submit annual summaries of the data?
- A: This is acceptable unless a specific incident occurred. If something has occurred, please provide information on the incident and the corrective actions taken.

RFP Amend. No. 0005, Q/A Exchange No. 4416391.

Through this exchange, the agency established that a firm could provide annual summaries of data included in the relevant OSHA forms, in lieu of submitting the

OSHA forms themselves, unless a specific incident occurred. If a specific incident occurred, a firm was required to provide information on the incident and the corrective actions taken. Here, the table in Johnson Controls' proposal indicates that 86 incidents occurred over the applicable three-year period, but the firm's proposal did not, as required, "provide information on the incident[s] and the corrective actions taken." As a result, while a firm with no "specific incidents" was permitted to submit annual summaries of the data, Johnson Controls was not a firm with "no specific incidents."

The Army explains that the protester's failure to provide meaningful information about specific workplace incidents that occurred--found on the OSHA forms or otherwise--deprived the government of the ability to determine if there were safety-related matters of concern.<sup>4</sup> The omission of the details of the firm's history of work-related illnesses and injuries also left the agency without the type of verification of an offeror's incidence rates that those details--found on the OSHA forms or otherwise--can provide. Accordingly, we have no basis to question the agency's determination that the protester's omission of the required OSHA safety information, under a factor to be evaluated by the terms of the RFP pertaining to a matter of paramount concern, rendered Johnson Control's proposal unacceptable.<sup>5</sup>

Finally, Johnson Controls argues that the SSA failed to consider--and might not have been aware of--the strengths in its proposal and its past performance in eliminating it from further competition. The record does not support this argument.

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<sup>4</sup> The protester complains that the Army's explanation is not contemporaneous. However, GAO will not limit its review to contemporaneous evidence, but considers all the information provided, including a party's arguments and explanations. See Serco, Inc., B-406683, B-406683.2, Aug. 3, 2012, 2012 CPD ¶ 216 at 7. While we generally give little or no weight to reevaluations and judgments prepared in the heat of the adversarial process, Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15, post-protest explanations that provide a detailed rationale for contemporaneous conclusions, and simply fill in previously unrecorded details, will generally be considered in our review as long as those explanations are credible and consistent with the contemporaneous record. NWT, Inc.; PharmChem Labs., Inc., B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 16. The Army's explanation meets this standard.

<sup>5</sup> The protester's argument that the Army did not evaluate the information it did submit concerning its safety and risk management, which demonstrated a superior safety record, is unavailing. The Army rightly points out that the proposal's explanation of the firm's safety systems and approach to risk management sheds no light on its history of work-related illness and injury. The firm's incident rates alone, however commendable, did not afford the Army a sufficient basis to evaluate that history.



The SSA states that he “reviewed the proposals,” concurred with the SSEB’s findings, and found that the strengths and weaknesses identified by the SSEB, as well as its rationale for the ratings assigned the proposals, was appropriate. AR, Exh. 9, SSA at 12. Moreover, the protester has not shown how these features in its proposal could have countered its material failure to submit the information required by the agency to evaluate its proposal under one of the seven elements of the most important evaluation factor.<sup>6</sup>

We deny the protest.

Lynn H. Gibson  
General Counsel

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<sup>6</sup> The protester also contends that the contracting officer (CO) did not participate in the preparation of the decision document, and argues that this was contrary to the terms of the solicitation, which provided that the CO would select the most highly rated offerors for phase 2 of the selection process. See RFP at ¶ 8.2.3. The record reflects that the selection decision was made by the SSA, who was not the CO. This selection process was consistent with FAR § 15.303(a), which establishes that an individual other than the CO may be appointed to serve as the SSA. Thus, we have no basis to sustain the protester’s allegation in this regard.