

P. W. M. S.



Comptroller General  
of the United States  
Washington, D.C. 20548

# Decision

Matter of: Atherton Construction, Inc.

File: B-262115

Date: November 28, 1995

## DECISION

Atherton Construction, Inc. protests the award of a fixed-price contract to Johnson Controls World Services Inc. under invitation for bids (IFB) No. N44255-94-B-6096, issued by the Department of the Navy to remodel kitchens and bathrooms in existing family housing facilities at Naval Submarine Base Bangor in Silverdale, Washington. Atherton, the second low bidder, contends that Johnson Controls is ineligible for award because of an unfair competitive advantage arising from the agency's decision to cancel and resolicit its requirements after bid opening which allowed Johnson Controls to correct an alleged mistake in its initial bid.

We dismiss the protest.

The Navy initially solicited bids for the renovation work on February 13, 1995, when it issued IFB No. N44255-94-B-7463 (IFB-7463). That solicitation contemplated the award of a firm, fixed-price contract and included, among other things, detailed asbestos abatement specifications. Of the 16 bids received in response to IFB-7463 on March 27, Johnson Controls submitted the lowest bid at \$2,480,448; Atherton submitted the next low bid of \$3,248,765; the government estimate was \$3,965,087. In a letter dated March 29, the contracting officer notified Johnson Controls that it was the apparent low bidder and requested that Johnson Controls verify its bid. The contracting officer noted in her letter that Johnson Controls' bid was 37 percent lower than the government estimate and 24 percent lower than the second low bid. The letter advised that in the event Johnson Controls verified its bid as submitted, the firm may be required to participate in a pre-award meeting to discuss the scope of the services to be performed. In response, by letter of April 5, Johnson Controls confirmed its bid price.

Meanwhile, during a March 30 telephone conference with Johnson Controls which the contracting officer initiated and a follow-up meeting on March 31, the agency reports that it became apparent that Johnson Controls had a different interpretation of the asbestos abatement specifications than the agency. In this regard, the Navy states that it intended to specify that all materials removed from the 43 family housing buildings should be removed using full containment procedures, as if the

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materials contained asbestos. On the other hand, Johnson Controls interpreted the specifications as requiring the use of full containment removal procedures only for materials that actually contain asbestos. The contracting officer concluded that Johnson Controls' interpretation of the specifications was not unreasonable and determined that since there were two reasonable interpretation of the work to be performed, the asbestos abatement specifications were ambiguous. Under the circumstances, the contracting officer decided that there was a compelling reason to cancel IFB-7463; notice of the cancellation was sent to each bidder by letter dated April 17.

The solicitation at issue here, IFB-6096, was issued on June 6, and as amended, reduced the asbestos abatement work to requiring the use of full containment procedures only in two buildings. It also added or revised the scope of work required in other areas, such as, hazardous material testing, lighting fixtures, bathroom electrical wiring box locations, bathroom ceramic tiles and accessories, floor coverings and moldings, and painting services. The protester was furnished a copy of the revised solicitation on or about June 6. On July 6, nine bidders responded to the second solicitation, IFB-6096. Johnson Controls had again submitted the lowest bid of \$3,017,595 and Atherton the second low bid at \$3,049,786; the government estimate was \$3,786,610. On July 7, Atherton filed an agency-level protest essentially challenging the propriety of the cancellation and resolicitation on the grounds that the second solicitation permitted Johnson Controls to correct an alleged mistake in its first bid after the firm had learned the other bidders' prices as well as the government estimate. The contracting officer denied Atherton's agency-level protest on July 19, and award was made to Johnson Controls that same day. This protest followed.

Atherton protests that the award to Johnson Controls is improper because the awardee's bid reflects an upward correction of an alleged mistake in the firm's initial bid, submitted in response to IFB-7463, and that the agency knew of the alleged mistake when it decided to cancel IFB-7463 and resolicit its requirements. As support for its claim that the agency impermissibly allowed Johnson Controls to correct its initial bid, Atherton asserts that bids under the second solicitation (IFB-6096) should be priced less than the bids received under the canceled solicitation because the second solicitation contains a reduced scope of work; yet, of the nine bids received, only Johnson Controls had increased its bid price.

First, Atherton has no standing to claim an error in Johnson Controls's initial bid, submitted in response to the canceled solicitation (IFB-7463) since it is the responsibility of the contracting parties—the Navy and Johnson Controls—to assert rights and bring forth the necessary evidence to resolve mistake questions.

W.M. Schlosser Co. Inc., B-254968, Oct. 1, 1993, 93-2 CPD ¶ 201.<sup>1</sup> Moreover, even if Johnson Controls had submitted a bid which constituted a buy-in, there is no legal basis on which to object to the submission or acceptance of a responsive, below-cost bid. Mark Dunning Indus., Inc., B-258373, Dec. 7, 1994, 94-2 CPD ¶ 226.

Next, to the extent Atherton contends that cancellation of IFB-7463 and resolicitation of the requirements was an impermissible auction and improperly allowed Johnson Controls to correct its alleged mistaken bid, this protest ground is untimely. Our Bid Protest Regulations require that protests not based on alleged solicitation improprieties must be filed not later than 10 working days after the basis for protest is known or should have been known. 4 C.F.R. § 21.2(a)(2) (1995). Our Regulations also provide that a matter initially protested to an agency will be considered only if the initial protest to the agency was filed within the time limits for filing a protest with our Office. 4 C.F.R. § 21.2(a)(3); see, National Envtl. Servs. Co., Inc.-Recon., B-254377.2, May 20, 1994, 94-1 CPD ¶ 317. Atherton insists that its protest is not a challenge to the canceled solicitation; rather, its protest is that the resolicitation is an impermissible auction which improperly allows Johnson Controls to rectify its alleged pricing error. Since Atherton was aware of the new solicitation (and the fact that the solicitation did not exclude Johnson Controls from competing) on or about June 6 when it received the revised solicitation, its agency-level protest of July 7, filed more than 10 working days after it knew or should have known its basis for protest, is untimely. Thus, Atherton's subsequent protest to our Office is also untimely and will not be considered. Id.; see also, Community Asphalt Corp., B-249475; B-249475.2, Sept. 14, 1992, 92-2 CPD ¶ 178.

Accordingly, the protest is dismissed.

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<sup>1</sup>In any event, as the agency points out, and the record before us confirms, Johnson Controls had verified its first bid price and had specifically asserted that its bid did not contain a mistake.