

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )

BEFORE THE SOUTH CAROLINA  
PROCUREMENT REVIEW PANEL  
CASE NO. 1989-9

IN RE: )  
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PROTEST OF JOHNSON CONTROLS, INC. )  
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O R D E R

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This case came before the South Carolina Procurement Review Panel (the "Panel") for hearing on August 1, 1989, on the appeal by Johnson Controls, Inc. ("Johnson Controls") of a decision by the Chief Procurement Officer ("CPO") to reaward to Carrier Building Services ("Carrier") a contract for preventive maintenance and repair services on HVAC and energy management systems at the College of Charleston ("College").

Present at the hearing before the Panel were Johnson Controls, represented by Dan Brailsford, Esq.; Carrier Building Services, represented by Jack Duncan, Esq., and the Division of General Services, represented by Helen Zeigler, Esquire. Also present but not participating as a party was the College of Charleston.

#### FACTS

Prior to the hearing, the parties entered into an agreement entitled "Stipulated Facts", which sets forth some of the facts of this case as follows:

1. The Invitation for Bids was issued on April 14, 1989. There is a provision in the bid beyond the one year term for an option to extend the contract for three additional one year periods. (Exhibit 1, page 5).

2. Bids were opened on May 15, 1989, and the Protest was received on May 19, 1989. The intent to award has not been issued.

3. The tabulated bid prices per month, other than no bids, are as follows:

Johnson Controls, Inc.	\$ 7,583
Barber Coleman	9,717
Carrier Building Services	10,457
BSS	10,465
F. A. Bailey & Sons, Inc.	10,700
Wilson Electrical Service	19,485

The Johnson Controls, Inc. bid on a yearly basis is \$90,996.

4. The South Carolina Licensing Board for Contractors takes the following positions respecting the issues raised by this Protest:

a. Contracts for maintenance only do not require a State license regardless of the contract amount.

b. Contracts for mechanical repair service in excess of \$17,500 require a license from the South Carolina Licensing Board for Contractors with a classification covering the scope of work included in the repair contract.

c. The contract for preventative maintenance and repair service for the HVAC and energy management systems for the College of Charleston requires a license with an Air Conditioning Classification because a majority of the repair work involves air conditioning equipment.

d. Johnson Controls, Inc.'s Group #2 Air Conditioning license is limited to \$125,000; Johnson Controls, Inc. has not violated any licensing law in submitting its bid of \$90,996; the awarding of the contract as bid would not violate any licensing law.

e. In calculating the amount of repair work that can be performed under a Group #2 license, the value of any equipment being replaced is added to the charge for the services performed.

f. In performing the subject contract, Johnson Controls could replace equipment totalling \$34,004 in value under the current limitations of its Class #2 Air Conditioning license.

g. In the event it should reach the \$125,000 limitation on its Group #2 Air Conditioning license, Johnson Controls could not legally perform any additional air conditioning repair work for the College of Charleston on the subject contract.

5. Carrier Building Systems and Services has an Air Conditioning license with no monetary limitation.

6. There are currently 271 contractors holding an Unlimited Air Conditioning classification from the South Carolina Licensing Board for Contractors.

7. With respect to the goal of the procurement, the Invitation to Bid stated on page 6 as follows:

THE PURPOSE OF THIS SOLICITATION IS TO ESTABLISH A CONTRACT TO PROVIDE COMPLETE PREVENTIVE MAINTENANCE AND REPAIR SERVICES FOR ALL HEATING, VENTILATION AND AIR CONDITION (HVAC) EQUIPMENT/CONTROLS AND ENERGY MANAGEMENT SYSTEM (EMS) EQUIPMENT/CONTROLS AS DESCRIBED HEREIN. THE CONTRACTOR WILL PROVIDE ALL PARTS, SUPPLIES, REFRIGERANT GASES, CHEMICALS AND LABOR TO MAINTAIN DESCRIBED EQUIPMENT/CONTROLS IN AN OPERABLE CONDITION AT ALL TIMES. ALL HVAC AND EMS EQUIPMENT AND CONTROLS NOT SPECIFICALLY EXCLUDED ARE INCLUDED AND ARE THE RESPONSIBILITY OF THE CONTRACTOR.

8. The Invitation for Bid further provided as follows on page 8 with respect to the contractor's responsibility under the contract:

RESPOND AS DIRECTED DUE TO ACTS OF GOD, FAILURES BEYOND THE REASONABLE CONTROL OF THE COLLEGE OR CONTRACTOR; SUCH AS INTERRUPTIONS ON POWER NETWORK, AS SINGLE PHASING OR VOLTAGE SPIKES AND/OR VANDALISM. LABOR COST WILL BE BILLED PER BID SCHEDULE, PARTS TO BE BILLED AT CONTRACTOR'S COST. BILLING SUBMITTED UNDER THIS PARA MUST BE PROVIDED WITH IN ONE WEEK (7 DAYS) FROM DATE OF INCIDENT OR THE CONTRACTOR ASSUMES ALL RESPONSIBILITY FOR LABOR AND MATERIAL COSTS. WORK FORCE SIZING WILL BE AS DIRECTED BY THE CONTRACTOR ADMINISTRATOR.

In addition to the stipulated facts, the parties presented evidence through several witnesses. Based on this testimony the Panel further finds:

1. From Fiscal Year 1984/1985 to Fiscal Year 1988/1989, the average cost of emergency repairs to the College's HVAC and Energy Management System was \$2948.20 per year. (Plf.'s Ex. 2). "Emergency" repairs for purposes of the above figure are those repairs actually paid for or anticipated by the College which fell outside the contract price quoted by the contractor.

2. The College is authorized to purchase up to \$20,000 other goods and services and up to \$25,000 construction goods and services without the approval of State Procurement.

3. The age of the College's HVAC and Energy Management System equipment ranges from two to twenty years.

(Def.'s Ex. 1). The age of the equipment is not relevant to whether the equipment might be vandalized or subject to an act of God.

4. The statistical average replacement cost for the type of equipment in question is approximately 5% of the total value of the equipment per year. The 5% figure covers all equipment replaced and not just equipment replaced because of vandalism, act of God, abnormal usage, or events beyond the control of the College or contractor. The estimated value of the College's HVAC and Energy Management System equipment is \$2 Million.

5. The Invitation for Bids does not contain any specific minimum licensing requirements.

On May 19th, Beckham Sales & Service, the fourth low bidder, protested to the CPO claiming that the three bidders ahead of it were not properly licensed to perform the work. The CPO found that Barber Coleman, the second low bidder, is not a responsible bidder because it has no current license. The CPO further found that the cost of air conditioning work required under this contract could exceed \$125,000. Therefore, even though Johnson Control's bid is only \$90,996 per year, the CPO considered Johnson Controls a nonresponsible bidder because of its Grade #2 license limitation. The CPO ordered that an intent to award be issued to the third low bidder Carrier Building Services since it possesses an unlimited license.

### CONCLUSIONS OF LAW

At issue is the finding of the CPO that, "Since it cannot be said with any degree of certainty that [Johnson Controls] will not exceed the \$125,000 limitation of its license in performing this contract, its bid must be found non-responsible." (Record, p. 19).

Johnson Controls contends that the CPO improperly placed the burden of proof on it, instead of the protestant, to show that the contract amount would not exceed \$125,000. Johnson also argues that the "degree of certainty" standard enunciated by the CPO is too harsh because no contractor could ever show with certainty that no circumstances exist which might raise a contract above the threshold of a limited license. Johnson urges that such a standard potentially renders every bidder with a limited license nonresponsible on every construction or maintenance/repair contract because it is always possible that unforeseen conditions might require extra work for extra compensation. Finally, Johnson Controls contends that the CPO's decision violates the policies of the Procurement Code that encourage "broad-based competition" and "increased economy in state procurement activities." S. C. Code Ann. §11-35-20(f), (g) (1976).

General Services and Carrier argue that the mere possibility that unforeseen conditions might cause this contract to exceed \$125,000 is sufficient to disqualify

Johnson Controls under S. C. Code Ann. § 11-35-1810(1) (1976). That section provides:

(1) Determination of Responsibility. Responsibility of the bidder or offeror shall be ascertained for each contract let by the State based upon full disclosure to the procurement officer concerning capacity to meet the terms of the contracts and based upon past record of performance for similar contracts.

General Services and Carrier contend that, because Johnson Controls cannot legally perform work under the contract in excess of \$125,000, it does not have the "capacity to meet the terms of the contract."

Johnson Controls is correct that the burden of proof is not on it to prove with certainty that it is adequately licensed. Instead the burden of proof lies with the protestant, which must sustain its allegations by the weight or preponderance of the evidence. The Panel finds that the protestant has not met its burden in this case.

The weight of the evidence presented to the Panel indicates that, while it is within the realm of possibility that this contract will exceed \$125,000, it is more likely that it will not. Past historical data shows that the cost of the type of repairs in question has averaged a tenth of the amount required to push this contract over the limit of Johnson's license. Further the purchasing officer for the College testified that any major repairs caused by vandalism, act of God, abnormal usage, or events beyond the control of the College or contractor would probably be handled by emergency or other procurement outside the

contract. The College further testified that rebidding this contract would not cause a major disruption of its receipt of these services.

Balancing the need to maximize the purchasing value of State funds and foster effective broad-based competition against the probability that this contract will exceed Johnson's license limitations and the costs associated with that risk, the Panel finds that Johnson Controls is a responsible bidder and should be awarded the contract.

In its argument General Services raises policy considerations which it contends warrant finding against Johnson Controls. Those considerations are the need of State to rely on one vendor to perform this contract, which is a stated purpose of the contract, the indirect cost to the State of cancelling and rebidding this procurement if Johnson Controls' license is exceeded, and the potential direct cost to the State of having to procure these services through emergency or sole source procurements if the license is exceeded.

The Panel recognizes the validity of these concerns. However, State Procurement could have eliminated those concerns at the outset of this procurement by stating minimum licensing requirements in the Invitation for Bids. It chose not to do so. If these concerns are present in future procurements of this type, the State is free to include in the bid documents requirements that address these concerns. Of course, as with any specification, the

requirements must be not be unduly restrictive of competition. S. C. Code Ann. §11-35-2730 (1976) and Reg. 19-445.2040(B)(C).

For the reasons stated above, the June 23, 1989 decision of the Chief Procurement Officer is reversed and it is hereby ordered that the contract be awarded to Johnson Controls, Inc., as the lowest responsive and responsible bidder.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL

By:



Hugh K. Leatherman, Sr.

Columbia, South Carolina

August 7, 1989