

BLUTH



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Miklin Corporation
File: B-236746.2
Date: January 19, 1990

DIGEST

Where protester reasonably was found nonresponsible it was not prejudiced by the method chosen to evaluate bid prices and the award of a construction contract to the only other viable bidder.

DECISION

Miklin Corporation protests the award of a subcontract to Clark Construction Company under invitation for bids (IFB) No. 48915-HB, issued by Rockwell International Corporation, who at the relevant time was the prime contractor operating and managing the Rocky Flats Plant for the Department of Energy.

We deny the protest.

The solicitation, which was for the construction of a building, divided the work into a base bid item and three additive bid items. Bids were received only from Miklin and Clark. Miklin challenges the method by which Rockwell evaluated the additive items in determining that Clark was the low bidder for purposes of award. Rockwell not only has defended its evaluation methodology but argues that Miklin has not been prejudiced by the selection of Clark since Rockwell considers Miklin not to be a responsible prospective contractor and therefore ineligible for award no matter how the bid prices are evaluated.

Rockwell states that it considers Miklin to be nonresponsible based on Miklin's unsatisfactory performance under a prior contract. In making such a determination, a contracting officer is vested with a wide degree of discretion and of necessity, must rely upon his or her business judgment in exercising that discretion. Betakut USA Inc., B-234282, May 8, 1989, 89-1 CPD ¶ 432. Although the determination must be factually supported and made in good faith, the ultimate decision appropriately is left to the agency since

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it must bear the effects of any difficulties experienced in obtaining the required performance. For these reasons, we generally will not question a negative determination of responsibility unless the protester can demonstrate bad faith on the part of the agency, or a lack of any reasonable basis for the contracting officer's determination. R. J. Crowley, Inc., B-229559, Mar. 2, 1988, 88-1 CPD ¶ 220.

Miklin infers that the unsatisfactory report on the previous contract is fabricated, thus alleging bad faith or fraud. We will not attribute bad faith or fraudulent motives absent irrefutable proof that the officials involved had a specific malicious intent to harm the protester. Kinross Mfg. Corp., B-234465, June 15, 1989, 89-1 CPD ¶ 564. Since Miklin has not met this burden of proof the only remaining issue is whether the determination that Miklin was non-responsible lacked any reasonable basis.

Rockwell found Miklin nonresponsible principally because Miklin had unsatisfactorily performed an \$800,000 design-build contract for Rockwell the year before, as reflected in a "Builder's Performance Report" prepared by Rockwell employees. Based on that report, Rockwell advised Miklin of four major deficiencies it perceived in the performance of the prior contract which precluded a determination that Miklin was responsible: (1) it failed to have sufficient equipment of the required type; (2) its supervisor did not devote his full time to supervision; (3) it did not perform enough of the contract work with personnel on its own payroll, subcontracting all work except supervision; and (4) it did not adhere to certain safety, security and other requirements.

Miklin argues that the nonresponsibility determination is inconsistent with the fact that the project was completed in compliance with the contract plans and specifications and that during performance Rockwell had not retained any money, as was allowable under the contract, for poorly completed work or delays. In addition, Miklin has responded in detail to the inspector's comments made on the "Builder's Performance Report."

We have reviewed this record and are not persuaded that Rockwell had no reasonable basis to find Miklin's prior performance unsatisfactory, and Miklin therefore nonresponsible, even though the project was completed and the building accepted. For example, Rockwell was critical of Miklin for assigning only one employee of its own to the project, the superintendent, and for subcontracting the rest of the work. Since Miklin had the superintendent perform manual labor, which the inspector stated was a violation of the project's

labor agreement, and since the superintendent left the site to pick up materials from suppliers, he was not able to devote his full attention to the supervision of the subcontractors. Although Miklin contends that nothing in its contract specifically prohibited its superintendent from working on the project and that his trips to suppliers ensured construction materials were available when needed, we cannot say it was unreasonable of Rockwell to expect its prime contractor to have a full-time superintendent on site. Similarly, we do not think that Rockwell's criticism of Miklin's housekeeping practices is persuasively rebutted by Miklin's contention that while it could not keep the job site "sterile," its performance was consistent with "construction industry standards."

Since Rockwell's nonresponsibility determination appears to be reasonably based, leaving Clark as the sole viable bidder for the project, it is unnecessary for us to reach the question of whether Rockwell's bid evaluation methodology was proper.

The protest is denied.

for 
James F. Hinchman
General Counsel