DIGEST - L- Cont
Distinguished by B-186962, May 6, 1977

DECISION (CH)

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

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FILE: B-183235 DATE: November 6,1975

MATTER OF: Air Products and Chemicals, Inc.

DIGEST:

1. Prospective subcontractor's complaint against subcontract awarded under Federal grant is for consideration since prime contractor awarded subcontract in question for the grantee.

2. Purpose of "power cost" clauses in bidding documents for contract awarded under Federal grant is to enable grantee to ascertain as precisely as possible its total costs for proposed subcontract and to establish base for possible imposition of financial penalty in event power costs are exceeded.

3. Since power consumption figures are material only to determination of grantee's ultimate costs and because any deviation from prescribed figures actually affects only determination of whether given bid will be most financially advantageous to grantee, irregular power consumption figures in bid otherwise appearing most financially advantageous should not be regarded as making bid nonresponsive where bid, as adjusted for irregularities by engineering consultant, is still low.

BACKGROUND

On November 21, 1974, the cities of Littleton and Englewood, Colorado, opened bids for the construction of a wastewater treatment plant which was to be financed in significant part by Federal grant funds made available by the Environmental Protection Agency (EPA). The apparent low bidder for the general construction contract was the Centric Corporation (Centric).

Centric's bid contained three subcontractor bids from Air Products and Chemicals, Inc., Union Carbide Corporation, and FMC Corporation for the design, engineering and construction of the oxygen generation and dissolution supply subsystem for the plant.

Each of the prospective subcontractor bids set forth two separate prices in accordance with the bidding instructions. Those instructions required bidders to propose a "Lump Sum Bid" for the supplying of the subsystem and a 10-year "annual average /electrical/ power cost" expected to be incurred in operating the system. (Average power cost was to be determined for the supply subsystem through a complicated scheme containing assumptions about the cost of electrical energy over the period and the electrical efficiency (kilowatt (Kw) consumption) of the subsystem's components. The assumptions concerning electrical efficiency were stated in terms of "minimum Kw" consumption figures that bidders were to use in making power cost calculations.) Air Products and FMC submitted identical "Lump Sum" bids; however, FMC submitted a lower proposed power cost.

After bid opening the cities referred the submitted subcontractor bids to an engineering consulting firm for further evaluation. By letter dated December 5, 1974, the consulting firm advised the cities that it considered the FMC bid to be "irregular" because: (1) the company's power cost calculation failed to include kilowatt (Kw) consumption figures for two subsystem components (the expander lube oil pump and instrument control panel); and (2) the company's proposed Kw consumption (52.9) for oxygen compressor motors was below the minimum prescribed Kw consumption (83.9). Because of the finding that FMC's bid was irregular, the consulting firm recommended that the company's bid be rejected and that Air Products' low bid be accepted.

Once the engineer's recommendation became known, FMC filed a complaint with EPA and the cities in early December 1974. FMC alleged that it was the low, responsive and responsible bidder for the subsystem, that its subsystem met applicable specifications, that it provided written guarantees of power consumption, and that it was willing to furnish an appropriate performance bond.

In January 1975 the cities sustained FMC's complaint. In doing so the cities took into account additional engineering calculations which showed that if the "FMC electrical energy numbers were adjusted to comply with the intent of the specifications, they /FMC/ would still be the low bidder, based on their projected operating cost." The cities further concluded that the irregularities noted in FMC's bid were of "minor significance and /would/ not affect the ability

of [FMC's] equipment to properly function and perform according to the specification." Air Products then filed a timely petition for review of the cities' determinations with the Regional Administrator, Region VIII, EPA.

Air Products' petition insisted that the irregularities in FMC's bid were substantial and that "Federal law" would require rejection of FMC's bid. The "Federal law" involved, according to FMC, was section 1-2.404-2 ("Rejection of individual bids.") of the Federal Procurement Regulations (FPR) (41 C.F.R. § 1-1.000 et seq., (1975 ed.)) which provides that bids are to be rejected for failure to "conform to the essential requirements of the invitation for bids" and that a "condition goes to the substance of a bid where it affects price, quantity, quality or delivery of the items offered."

Air Products considered FMC's bid irregularities to be substantial because the irregularities involved proposed Kw consumption figures which were considered to be "technologically unfeasible." Further, Air Products insisted that after FMC's electric power figures were adjusted to meet stipulated Kw consumption rates, and an "oxygen utilization" factor (giving Air Products a $32,617 credit) was considered, Air Products' 10-year operating costs were $36,377 lower than FMC's costs. Air Products further insisted that its 10-year maintenance costs were more than $77,000 lower than FMC's costs.

EPA DETERMINATION

The EPA Regional Administrator decided that FPR did not apply to the questioned award. Assuming, for the sake of discussion, that the FPR did apply to the award, the Administrator further decided, in effect, that FPR would not require rejection of FMC's bid.

The Administrator's conclusion that FMC's bid was not required to be rejected was based on conclusions that: (1) FMC's bid irregularities were minor; (2) FMC's power consumption projections were not shown to be technologically unfeasible; (3) FMC would be subject to financial penalty if it did not meet its power consumption figures; (4) Air Products' argument that its power costs were lower than FMC's costs was unpersuasive; and (5) FMC's maintenance cost comparison could not be considered as this particular cost was not set forth as an evaluation factor in the bidding documents.

Because of this decision, award was thereafter made to Centric using FMC as the subcontractor for the subsystem in question.

ANALYSIS

A threshold question--whether Air Products' status as a prospective subcontractor for the subcontract award in question should preclude our review--is initially for consideration.

We have decided to hear complaints concerning awards of contracts under Federal grants where the awards were made by or for grantees. See Public Notice, Review of Complaints Concerning Contracts Under Federal Grants, 40 Fed. Reg. 42406, September 12, 1975. The record clearly shows that, although the subcontract award was nominally made by the prospective prime contractor, Centric, the cities actually determined that FMC should receive the subcontract award. Centric's award of the subcontract here is therefore considered to be "for" the grantee. Hence, FMC's status as a prospective subcontractor does not preclude our review of its complaint.

The arguments Air Products raises in its complaint before us are essentially those which the company made before the Administrator. Much of Air Products' complaint is devoted to the alleged applicability of the FPR to the purchase. The complaint further recites the irregularities in FMC's bid which allegedly render the bid nonresponsive.

We do not consider it necessary to give an opinion as to the applicability of the FPR to the purchase. All parties apparently agree that a bid cannot be accepted under either Colorado or Federal law if it contains irregularities which are other than minor. Our inquiry, then, is to determine whether the FMC bidding irregularities were substantive. Air Products considers the irregularities to be major because they do affect the calculation of FMC's power costs.

We consider the purpose of the bidding clauses regarding the computation of 10-year average electrical power costs for the proposed subsystems to be twofold: (1) to enable the grantee to ascertain as precisely as possible its total costs for the 10-year period involved; and (2) to establish a base for the possible imposition of a financial penalty in the event the power costs are exceeded. The "specifications" regarding Kw consumption relate only to these purposes and have nothing to do with the question as to the bidder's undertaking to meet the specifications for the subsystem actually to be delivered. In other words, if the delivered product does not meet the Kw consumption rates the grantee cannot legally default

the contractor (since the delivered item has been accepted and paid for) but only exact a financial penalty to the extent that resultant utility costs are higher than those initially proposed.

The Kw consumption figures are material, therefore, only to the determination of the grantee's ultimate costs after delivery and final payment under the contract. Moreover, any deviation from the prescribed figures actually affects only the determination of whether FMC's bid will be most financially advantageous to the grantee. Thus, we do not believe that FMC's power consumption irregularities should be regarded as making its bid nonresponsive under any system of competitive bidding unless the deviations preclude the making of that determination with a reasonable degree of certainty. Cf. W. A. Apple Manufacturing, Inc., B-183791, September 23, 1975; 48 Comp. Gen. 357 (1968).

There is a dispute as to whether FMC's bid is low when its Kw consumption figures are adjusted to meet the stipulated power consumption rates. The grantee's engineering consultant stipulated that FMC's bid would still be low in that event--although by an undisclosed amount. In this circumstance we think acceptance of the engineering consultant's computation as to FMC's adjusted power costs is appropriate. On this calculation (which appears to have eliminated any technological problems possibly arising out of the lower power consumption rates proposed by FMC) FMC's bid must be considered to have been reasonably established as most financially advantageous to the grantee.

We are aware of Air Products' claim that the financial penalty clause and performance bond requirements of the bidding documents will not adequately safeguard the grantee's interests should FMC overrun its projected utility costs. These objections would have been more appropriately raised prior to the submission of bids. In any event, we do not consider these objections as having a significant impact on the propriety of the questioned subcontract.

Although we cannot question the grantee's compliance with the competitive bidding requirement of the subject grant agreement, we are, by letter of today to the Administrator of EPA, recommending that: (1) Grantees or their engineering consultants should be required to state the exact dollar amount of adjusted

power cost estimates (unlike the case here) so as to enable proper bid comparison in future purchases where an operating cost factor is used and "irregular" power estimates are received; and (2) Grantees should be required to closely examine penalty cost/power cost "tradeoffs" so as to phrase adequate penalty provisions and security bond guarantees regarding power cost estimates.

R. F. Keller

Acting Comptroller General
of the United States