

DECISION

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

Ashen
28968

FILE: B-212304.4

DATE: July 31, 1984

MATTER OF: Koch Corporation--Reconsideration

DIGEST:

1. Prior decision is affirmed on reconsideration where the protester has not shown any error of fact or law which would warrant reversal or modification of it.
2. A nonresponsive bid may not be accepted even though it would result in monetary savings to the government, since acceptance would be contrary to the public interest in the maintenance of the competitive bidding system.

Koch Corporation requests reconsideration of E. S. Edwards & Sons, Inc.; Koch Corporation, B-212304; B-212304.3, June 18, 1984, 84-1 CPD ¶ 631. In that decision we denied in part and dismissed in part Koch's protest against the award of a contract to Hugh J. Baker & Co. under invitation for bids No. 583-28-83, issued by the Veterans Administration (VA) for window replacement at the VA Medical Center, Indianapolis, Indiana.

We affirm the decision, in which we held that the VA properly rejected Koch's bid as nonresponsive to a requirement, added by amendment to the solicitation, that bidders certify in their bids that the windows offered had been in satisfactory and efficient use at listed installations.

In its request for reconsideration, Koch argues that the very essence of its protest was that the windows it offered conformed to the specifications, as acknowledged by the VA. However, as we indicated in our prior decision, responsiveness must be determined from the bid as submitted. Since Koch did not include in its bid the mandatory certification, the bid was nonresponsive to a material requirement of the solicitation, and the VA therefore was required to reject it whether or not the windows offered in fact conformed to the specifications. Cf. Gulf & Western Healthcare, Inc., B-209684; B-210466, Aug. 25, 1983, 83-2 CPD ¶ 248 (assertion that product in fact complies with the

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specifications does not cure the failure of the bidder to submit with the bid the required descriptive literature establishing that the product complies).

Koch also argues that a contracting officer may waive deviations which are "insubstantial," asserting that the contracting officer here in fact waived the certification requirement by requesting additional information from Koch after bid opening instead of immediately declaring its bid nonresponsive. Koch in effect repeats this argument by stating that at the time of bid opening, compliance with the amendment imposing the certification requirement was waived by the VA.

As we said in the prior decision, the requirement directly concerned the quality of the windows offered, therefore it was material--i.e., substantial--and thus any waiver of the requirement and subsequent award to Koch would have been improper.

Nor are we convinced by Koch's renewed contention that the alleged inconsistencies in the government's post-bid opening actions estopped contracting officials from rejecting Koch's bid as nonresponsive. As the court indicated in United States v. Georgia-Pacific Company, 421 F.2d 92, 96 (9th Cir. 1970), a case cited by Koch, an equitable estoppel will be found only where, among other things, the party asserting the estoppel has relied to its detriment upon the conduct of the party to be estopped. As we previously indicated, Koch could hardly have relied on the VA's post-bid opening request for information in submitting a bid that did not include the required certification.

As for the cost savings to the government that Koch alleges would result if the government were estopped from rejecting its bid, we have repeatedly held that a nonresponsive bid may not be accepted even though it would result in monetary savings, since acceptance would be contrary to the public interest in maintaining the integrity of the competitive bidding system. See Railway Specialties Corporation, B-212535, Oct. 31, 1983, 83-2 CPD ¶ 519; Pioneer Industrial Products, B-209131, Mar. 22, 1983, 83-1 CPD ¶ 286.

We previously found Koch's alternative allegation that the amendment imposing the certification requirement was unduly restrictive to be untimely because this basis of

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protest concerned an alleged impropriety in a solicitation that was apparent before bid opening, and thus it should have been filed by that time. We also noted that there was no legal basis for allowing a protester to recover anticipated profits for the cost of pursuing its protest. Nothing Koch has said in its request for reconsideration convinces us otherwise.

Our Office will not reverse or modify a prior decision where, as here, the protester fails to provide new evidence or legal arguments which show that the decision was erroneous. Culp/Wesner/Culp--Reconsideration, B-212318.2, Mar. 26, 1984, 84-1 CPD ¶ 346; 4 C.F.R. § 21.9(a) (1984). Accordingly, our prior decision is affirmed.

Milton J. Auer
for Comptroller General
of the United States