



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Kos Kam-Pelasgus, Joint Venture

File: B-225841

Date: April 1, 1987

DIGEST

1. Agency has a compelling reason to cancel a solicitation after bid opening where it determines that sufficient funds are not available to make award.
2. Protester may not recover the costs of preparing its response to an invitation for bids that was properly canceled due to insufficient funds.

DECISION

V. [unclear]
[unclear]

Kos Kam-Pelasgus, Joint Venture, protests the cancellation of a solicitation for a centralized tray service at the Veterans Administration (VA) Medical Center, Brooklyn, New York. The agency initially issued an invitation for bids (IFB), No. 526-70-86, on July 28, 1986, and subsequently converted it to a request for proposals (RFP), No. 527-70-86. The agency canceled both solicitations on December 11, 1986. Kos Kam, however, seeks an award under the IFB.

We deny the protest in part and dismiss it in part.

The VA reports that although 20 potential bidders expressed interest in the procurement, it received only two bids--from Bedell Associates, Inc. and Kos Kam--on the September 16 opening date. Although Kos Kam was the apparent low bidder, the prices of both bidders exceeded the \$2 million funding limitation established for the project. The contracting officer asked each bidder to extend its bid acceptance period and sought a "cost limit increase" from agency headquarters. When the request was disapproved, the contracting officer converted the solicitation to an RFP in an attempt to negotiate prices with the original bidders that would be within the funding limitation.

Kos Kam protests that the VA lacked a compelling reason to cancel the IFB after bid opening and after it had requested Kos Kam to extend its offer. In addition, the firm argues

that the VA failed to follow proper procedures in canceling the IFB and failed to make required written determinations, for example, that its price was unreasonable, before converting to a negotiated procurement. Kos Kam also protests that the RFP did not clearly define the evaluation criteria and that cost should be the primary factor. The firm also argues that there was insufficient time for proposal preparation between issuance of the RFP on December 2 and the due date, December 17.

Cancellation of a solicitation after bids have been opened and prices have been exposed requires a cogent and compelling reason. Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.404-1(a)(1) (1986); Military Base Management, Inc., B-216309, Dec. 4, 1984, 84-2 CPD ¶ 619. However, an agency's determination that funds are not available is a sufficient reason to cancel a solicitation, even if the determination is not made until after bid opening. Tektronix, Inc., B-219981.4, June 12, 1986, 86-1 CPD ¶ 545. Since the protester does not dispute the VA's determination that there was not sufficient funding, we find that the VA properly canceled the original IFB. Cellular Product Service, Inc., B-222614, July, 3, 1986, 86-2 CPD ¶ 32, aff'd on reconsideration, Aug. 18, 1986, 86-2 CPD ¶ 196. The protester is not entitled to award under it, regardless of the reasonableness of its price.

As for the alleged procedural irregularities, the agency acknowledges that the contracting officer initially failed to cancel the IFB and to notify Kos Kam and the other bidder that had extended its bid acceptance period; he apparently believed that cancellation was not necessary when the IFB was being converted to an RFP. Instead, as noted above, the agency canceled both solicitations on the same date.

We do not find that this irregularity affects the propriety of the ultimate cancellation of the IFB. The FAR specifically permits cancellation after bid opening when all otherwise acceptable bids are at unreasonable prices, 48 C.F.R. § 14.404-2(c)(6), as well as completion of the acquisition through negotiation with each responsible bidder that submitted a bid, without issuance of a new solicitation. Id.; sections 14.404-2(e), 15.103. Contrary to Kos Kam's allegations, the record contains a written finding by the VA's Chief, Supply Service, dated December 2, the date of issuance of the RFP, that all bids received were excessive, as well as a determination to negotiate in accord with section 15.103. This basis of protest is therefore without merit.

Finally, regarding Kos Kam's protests concerning the evaluation criteria and the length of time allowed for submission of proposals under the RFP, since the VA canceled the second solicitation on December 11, i.e., before the due date for proposals, these grounds of protest are now academic.

Kos Kam seeks bid preparation and protest costs. Our Bid Protest Regulations provide for the recovery of such costs only where a protest is found to have merit. 4 C.F.R. § 21.6(d) (1986). The expenses the protester incurred in preparing its bid are typical costs of doing business and competing for government contracts. Kos Kam made these expenditures before being awarded a contract at its own risk. See Cellular Product Service, Inc., B-222614, supra. Because the IFB was properly canceled, there is no legal basis for recovery of either type of costs.

The protest is denied in part and dismissed in part.

for *Raymond E. Fox*
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General Counsel