

DECISION



17152
Boys
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

[Protest Against VA Rejection of Bid]

FILE: B-201599

DATE: March 2, 1981

MATTER OF: Klein Construction Company

DIGEST:

0622s

1. Bidder's agreement to extend bid acceptance period "as requested" coupled with reservation of right to request additional time or money, if certain events occurred, is not unqualified extension, since bidder sought to limit Government's rights to award contract as bidder's interests dictated. Thus, GAO does not object to agency's determination to exclude expired bid from further consideration.
2. Protester contends--for first time in comments on agency report--that contracting officer's staff member gave advance approval to protester's qualified extension of bid acceptance period. Contention is untimely under 4 C.F.R. § 20.2(b)(2) (1980), since protester knew of facts upon which contention is based in October 1980, more than 10 working days prior to time that contention was presented here.
3. Possibility that Government might realize monetary savings in particular procurement--if bidder's qualified extension of bid acceptance period is waived--is outweighed by importance of maintaining integrity of competitive bidding system.

Klein Construction Company (Klein) protests the rejection of its bid for project No. 578-098 submitted in response to an invitation for bids (IFB) issued by the Veterans Administration (VA)

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for a nursing home care building at the VA Medical Center, Hines, Illinois. Klein contends that the VA should not have rejected Klein's bid on the basis that Klein had improperly conditioned its agreement to extend the bid acceptance period.

We find no merit in Klein's protest.

Klein submitted the low bid of \$6,418,000 and Leo Michuda and Son Co. (Michuda) submitted the second low bid of \$7,365,000. The VA could not make award during the bid acceptance period (30 days after the September 17, 1980, bid opening) because delay was encountered in processing (1) Klein's claim that it made a \$520,000 clerical error in its bid requiring an upward adjustment of its bid price, and (2) a challenge by the third low bidder against Klein's small business size status. Bidders were requested to extend the bid acceptance period to December 1, 1980, and later to January 2, 1981. The second and third low bidders extended their bids but the VA reports that Klein did not receive the VA's first request to extend to December 1. Thus, Klein's bid expired on October 18, 1980. On October 21, 1980, the VA requested that Klein extend its bid acceptance period to January 2, 1981.

Klein's response to the VA's request for an extension to January 2, 1981, was contained in a mail-gram dated October 29, 1980, and stated as follows:

"In answer to your wire requesting an extension of our bid dated Sept 17 1980 for the above referenced project to January 2 1981 please be advised we will extend our bid proposal as requested. We reserve the right to request for frost breaking and granular backfill reimbursement costs, if incurred, as we may not schedule a winter start. As an alternate we may request lost time due to the later than planned start. We trust this meets with your approval."

About 2 weeks later, Klein wrote to the VA agreeing to waive the qualifications stated in its bid extension

mailgram on the condition that the VA favorably consider its mistake-in-bid claim. Klein explained that the qualifications in its bid extension were deemed necessary to partially equalize Klein's position with the competition because its low price placed it at a marked disadvantage when asked to unconditionally extend its bid. On December 8, 1980, the VA received notice that Klein consented to the extension to January 2, 1981, and withdrew the conditions contained in its prior communication.

The VA determined that the integrity of the competitive bidding system would be compromised if the qualified bid extensions tendered by Klein were accepted, notwithstanding Klein's later withdrawal of the conditions prior to award. The award was made to Michuda but notice to proceed is being withheld until this decision is rendered.

Klein contends that the VA erroneously interpreted the October 29 mailgram, and that the first sentence constitutes Klein's agreement to extend the bid acceptance period "as requested." Klein argues that the second and third sentences merely refer to Klein's right to request additional time or money without requiring that the VA grant Klein's request. Further, Klein argues that its subsequent correspondence does not affect the unqualified extension contained in the October 29 mailgram because the "responsiveness" of a bid extension should be judged on the basis of the extension language and not on subsequent correspondence or events.

In our view, Klein's October 29 mailgram was not an unqualified extension of its bid acceptance period. Instead, we believe that Klein sought to limit the rights of the Government to award a contract as Klein's particular interests dictated. Moreover, we believe that Klein's two subsequent communications are relevant to Klein's intent concerning the October 29 mailgram. These documents clearly convey Klein's intention by the October 29 mailgram to qualify the extension of its bid acceptance period. Thus, we conclude that the VA properly interpreted the meaning of Klein's October 29 mailgram as a qualified extension.

Therefore, Klein's bid acceptance period expired on October 18, 1980, and we do not believe that Klein's December 8 notice withdrawing prior conditions automatically revives its expired bid. In support of this conclusion, we refer to the similar situation in our decision B-158182, March 4, 1966. There, prior to expiration of the initial bid acceptance period, the agency requested the low bidder to extend its bid acceptance period. In response, the low bidder agreed to extend if it could raise its price. Before the agency advised the low bidder that its conditions could not be considered, the bid acceptance period expired. We held that the qualified extension could not be considered since that would be equivalent to permitting a new bid after bid opening and that, in the circumstances, the low bid was effectively withdrawn and no longer the low responsive bid. We concluded that award could properly be made to the initial second low bidder.

In further support of our conclusion in this case, we refer to our decision, Veterans Administration - request for advance decision, 57 Comp. Gen. 228 (1978), 78-1 CPD 59, aff'd sub nom, B-191019, February 27, 1978, 78-1 CPD 159. There, the VA could not make award during the initial bid acceptance period, in part because of delay incident to resolving a mistake in bid claim by the low bidder. The original low bid lapsed and a subsequent request for extension was specifically denied by the low bidder. Later, the low bidder reversed its position and agreed to extend its original bid acceptance period. We held that the low bidder apparently sought to limit the rights of the Government to award a contract as the low bidder's own particular interests dictated. We concluded that the low bidder's on-again, off-again behavior adversely affected the integrity of the competitive bidding system such that the interests of the Government would not be well served by awarding a contract to that bidder.

Under these standards, we do not believe that Klein is entitled to revive the expired bid because Michuda would be prejudiced (since it extended its bid acceptance period without condition) and the integrity

of the competitive bidding system would be compromised (see 50 Comp. Gen. 383 (1970)). Thus, we have no objection to the VA's determination to exclude Klein's expired bid from further consideration.

In its February 5, 1981, reply to the VA report, Klein argues that, prior to sending the October 29 mailgram, Klein's president read the text to a person on the VA contracting officer's staff, who told Klein that its response would be acceptable. We have not asked the VA to provide a report on this point because this basis of protest was not timely filed. Section 20.2(b)(2) of our Bid Protest Procedures requires that protests must be filed within 10 working days of when the basis of protest is first known. Here, Klein had all the information required to raise this aspect of its protest when the initial protest was filed on December 22, 1980. Thus, since Klein first raised this matter more than 10 working days after the basis of protest was known, it is untimely and will not be considered. Dataproducts New England, Inc.; Honeywell Inc.; Tracor Aerospace, B-199024, January 9, 1981, 81-1 CPD 16.

Klein argues that the VA should accept Klein's bid to take advantage of Klein's lower price. Our decisions indicate that the importance of maintaining the integrity of the competitive bidding system--by not accepting Klein's qualified extension--outweighs the possibility that the Government might realize a monetary savings in a particular procurement. See Chemical Technology, Inc., B-192893, December 27, 1978, 78-2 CPD 438. Thus, this argument is without merit.

Accordingly, Klein's protest is denied in part and dismissed in part.

Milton J. Fowler

For the Comptroller General
of the United States