

Ruppert

DECISION



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

FILE: B-221806 **DATE:** May 14, 1986
MATTER OF: Kos Kam, Inc.

DIGEST:

1. Bidder that conditions an extension of its bid acceptance period upon an increase in price renders itself ineligible for award after its bid expires, since it has attempted to change a material term of the bid.
2. Protest that contracting officer acted in bad faith in requesting extension of bid acceptance period is denied when the record shows that the request was for the purpose of completing inquiries as to the protester's responsibility and to allow sufficient time for the Small Business Administration to review and independently evaluate the firm's ability to perform the contract.
3. The General Accounting Office will not review a contracting officer's negative responsibility determination when the small business concern fails to submit to the Small Business Administration the information necessary for a certificate of competency proceeding.
4. Claim for reimbursement of costs of bid preparation and of pursuing a protest, including attorney's fees, is denied where the protest is without merit.

Kos Kam, Inc., protests the award of a contract to Genesis General Contracting, Inc., under invitation for bids (IFB) No. 604-12-86, issued October 7, 1985, by the Veterans Administration (VA) Medical Center, Lyons, New Jersey. The solicitation was for a general construction project involving the renovation of bathrooms and shower rooms in building No. 56 at that facility. The protester contends that the contracting officer improperly rejected its bid extension

035437

and determined that the firm was not responsible. Kos Kam requests that the VA terminate the contract and resolicit and that it be compensated for the costs of bid preparation and pursuing the protest, including attorney's fees.

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

The VA received five bids at opening on November 19. Kos Kam submitted the low bid in the amount of \$284,000; Genesis submitted the second-low bid, \$316,000, and the remaining bids ranged from \$414,000 to \$466,025.

The record indicates that the government's construction estimate was \$327,000. In view of this estimate and the range of bids, the contracting officer requested Kos Kam to verify its bid. In the process of checking Kos Kam's references, the agency also contacted the Department of Labor concerning possible violations by Kos Kam of that agency's regulations during the performance of other contracts. The VA states that it had additional questions concerning the protester's responsibility--primarily whether Kos Kam or one of its principals had been debarred.

On January 2, 1986, the contracting officer wrote Kos Kam, requesting that it extend its bid acceptance period for 60 days beyond the January 18 expiration date. The contracting officer was concerned that neither she nor the Small Business Administration (SBA) could complete a responsibility determination by that time. On January 7, concurrent with her own determination of nonresponsibility, the contracting officer directed a letter to the SBA, recommending the denial of a certificate of competency (COC).

Kos Kam responded to the contracting officer's request for an extension of its bid acceptance period with three letters. The first stated: "We regret that we cannot extend our bid price for 60 days, as requested." The second, which is at issue here, was dated January 10 and stated: "[W]e hereby extend our bid price, plus 10 percent (or an additional \$28,400) until February 15, 1986, in order to allow the SBA to issue its COC." A third, dated January 15, confirmed Kos Kam's extension of its bid acceptance period "in accordance with the terms of its letter of January 10."

The VA determined that after expiration of its bid, Kos Kam was ineligible for contract award by virtue of the qualification of the extension to its bid acceptance period. In rejecting Kos Kam's bid, the agency states that it relied upon the decisions of our Office regarding attempted changes in the material terms of a bid. Notwithstanding the protest, the VA awarded the contract to the second-low bidder on January 28.

Kos Kam does not dispute the fact that it qualified its bid, but rather contends that the contracting officer acted in bad faith in requesting an extension of bids. In its comments on the agency report, Kos Kam states that the contracting officer knew that proposed debarment proceedings had been terminated, failed to consider other information relevant to its responsibility, and knew that Kos Kam could not extend its bid, which was below the VA estimate, because Kos Kam could not afford to absorb increased costs if the award was delayed.

Where a bidder qualifies an extension to its bid acceptance period by conditioning it upon a change in a material term of its bid, that bidder is ineligible for award after the original bid expires. See Steenmeyer Corp., 61 Comp. Gen. 384 (1982), 82-1 CPD ¶ 445; U.S. Materials Co., B-216712, Apr. 26, 1985, 85-1 CPD ¶ 471; Klein Construction Co., B-201599, Mar. 2, 1981, 81-1 CPD ¶ 158. Under these cases (all cited by the VA), Kos Kam's extension of its bid acceptance period--conditioned upon an increase in price--amounted to a refusal to keep its bid available for acceptance by the government without adjustment. Therefore, the VA properly rejected Kos Kam's extended bid.

The record does not support Kos Kam's contention that the contracting officer's request for an extension was made in bad faith. Rather, it appears that the request was for Kos Kam's benefit: the contracting officer did not wish to let bids expire before completing inquiries as to Kos Kam's responsibility or to make a determination of nonresponsibility without evidence. In addition, the contracting officer wished to allow sufficient time for the SBA to review and independently evaluate Kos Kam's ability to perform the contract.

As for Kos Kam's contention that the VA's ultimate determination that it was nonresponsible was improper, on January 29, the day following the award, the SBA's New York regional office advised Kos Kam that its application for a COC had been evaluated as "unacceptable" and the file closed

because the firm had failed to forward the information needed to complete the application. Our Office will not review a contracting officer's negative responsibility determination when the small business concern fails to submit to the SBA the information needed for a COC proceeding. See Ion Exchange Products, Inc., B-218578 et al., July 15, 1985, 85-2 CPD ¶ 52.

The protest is denied in part and dismissed in part.

Since we find the protest without merit, we also deny the claim for reimbursement of the costs of bid preparation and of pursuing the protest. R.S. Data Systems, B-220961, Nov. 21, 1985, 65 Comp. Gen. ___, 85-2 CPD ¶ 588.

for Seymour Efron
Harry R. Van Cleve
General Counsel