



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: ABC Project Management, Inc.

File: B-274796.2

Date: February 14, 1997

Thomas J. Rossi, Esq., Canfield, Venusti, Madden & Rossi, LLP., for the protester.
Phillipa Anderson, Esq., Department of Veterans Affairs, for the agency.
Katherine I. Riback, Esq., and Paul Lieberman, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Agency properly rejected as nonresponsive a bid that failed to acknowledge an amendment containing a revised Davis-Bacon Act wage rate determination with an increased wage rate for sprinkler fitters; amendment was material as agency reasonably anticipates that the services of sprinkler fitters will be required in contract performance, and there is no evidence that the bidder was otherwise obligated to pay sprinkler fitters at a level at least as high as that set forth in the wage determination.

DECISION

ABC Project Management, Inc. protests the rejection of its bid as nonresponsive under Department of Veterans Affairs invitation for bids (IFB) No. 604-4-96. ABC's bid was rejected for failure to acknowledge amendment No. 0001, which contained a revised Davis-Bacon Act wage rate determination. ABC maintains that its failure to acknowledge the amendment should be waived as a minor informality.

We deny the protest.

The IFB, issued on July 5, 1996, called for replacement of certain steam and condensation lines. Amendment No. 0001, also issued on July 5, contained a modified wage rate determination under the Davis-Bacon Act, 40 U.S.C. § 276a (1994), which increased the wage rates for sprinkler fitters.

The agency received seven bids by the August 6 bid opening date. ABC was the apparent low bidder. The agency rejected ABC's bid as nonresponsive for failure to acknowledge amendment No. 0001. By letter dated September 5, ABC filed an

agency-level protest contesting the rejection of its bid as nonresponsive. After the agency-level protest was denied on September 16, ABC protested to our Office.¹

ABC argues that its failure to acknowledge amendment No. 0001 should be waived as a minor informality which did not affect the responsiveness of its bid. ABC states that the revised wage rate determination contained in the amendment had no monetary impact on the firm's bid because it intended to employ only pipe fitters (whose wages were not affected by the amendment). ABC asserts that the only work covered by this solicitation that could possibly be done by sprinkler fitters is the moving of sprinkler heads that interfere with the placement of the new steam pipes. ABC contends that pipe fitters are permitted to work with sprinkler pipes and that it is illogical to assume that a contractor would employ another trade, such as sprinkler fitters, to move sprinkler heads where there is a trade already on the job that can perform the work. Therefore, ABC contends that its failure to acknowledge the amendment should be waived and it should receive the award based on its low bid.

A bidder's failure to acknowledge a material amendment to an IFB renders the bid nonresponsive since, absent such an acknowledgment, the government's acceptance of the bid would not legally obligate the bidder to comply with the amendment. Head Inc., 68 Comp. Gen. 198 (1989), 89-1 CPD ¶ 82, recon. denied, B-233066.2, May 16, 1989, 89-1 CPD ¶ 461. On the other hand, a bidder's failure to acknowledge an amendment that is not material is waivable as a minor informality. Federal Acquisition Regulation (FAR) § 14.405; DeRalco, Inc., 68 Comp. Gen. 349 (1989), 89-1 CPD ¶ 327.

Where a reasonable possibility exists that a certain trade's services will be required in the performance of a contract, an amendment that revises a wage rate for that trade pursuant to the Davis-Bacon Act is material. Promethean Constr. Co., Inc., B-255222, Feb. 7, 1994, 94-1 CPD ¶ 78. This is true regardless of how minimal the revisions because the wage rates are mandated by the Act, and the bidder has no legal obligation to pay the minimum wage rates without acknowledgment of the amendment. Robinson & Co., B-265656, Dec. 1, 1995, 95-2 CPD ¶ 262. To give the bidder the opportunity to acknowledge an amendment revising wage rates after bid

¹In a letter dated October 28, the agency initially stated that it would treat ABC's failure to acknowledge the amendment as a minor informality. However, the agency subsequently determined that amendment No. 0001 was material; hence, it could not waive ABC's failure to acknowledge the amendment.

opening would allow the firm to decide to render itself ineligible for award by choosing not to cure the defect. See Phenix Mechanical Contractors, Inc., B-233061, Dec. 19, 1988, 88-2 CPD ¶ 603; RTC Constr., B-217362, Jan. 24, 1985, 85-1 CPD ¶ 95.²

Here, the contracting officer determined that there is a reasonable possibility that sprinkler fitters could be used to perform some of the work under this current project. While ABC claims that it intended to employ only pipe fitters instead of sprinkler fitters, nothing in ABC's bid shows the labor categories on which its bid was based and, in any case, ABC was not bound by the terms of the IFB to perform using any particular labor categories. Thus, ABC could perform the work using sprinkler fitters, and if it did so it would not be bound to pay the wages set forth in the amended IFB. Accordingly, ABC's bid clearly was nonresponsive. ABC may not take steps to obligate itself to pay the required wages at this juncture; post-bid-opening submissions or explanations cannot be used to make a nonresponsive bid responsive, even where the government could save money by permitting correction. Promethean Constr. Co., Inc., *supra*.

The protest is denied.

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²An exception to the general rule arises where the failure to acknowledge the amendment has no impact on the relative standing of bidders and the bidder is subject to a particular legal obligation to pay wages at least as high as those in the wage determination, such as where a collective bargaining agreement mandates such wage levels. ABC Paving Co., 66 Comp. Gen. 47 (1986), 86-2 CPD ¶ 436; Brutoco Eng'g & Constr., Inc., 62 Comp. Gen. 111 (1983), 83-1 CPD ¶ 9. However, ABC has not alleged that it was under any such specific legal obligation, and nothing in the record suggests such an obligation.