

**DECISION**

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

60063

FILE: B-184625

DATE: October 20, 1975

MATTER OF: Hinck Electrical Contractors, Inc.

97813

**DIGEST:**

1. Failure to acknowledge (prior to bid opening) amendment incorporating Davis-Bacon wage determination in IFB rendered bid nonresponsive, notwithstanding bidder's union labor agreement requiring it to pay electrician's wages identical to those in the wage determination since wage determination applied to all mechanics and laborers employed under contract and acceptance of bid as submitted at time of opening would not result in contract containing statement of minimum wage rates as required by provisions of Davis-Bacon Act. 40 U.S.C. § 276a.
2. Failure to acknowledge wage determination amendment may not be waived as a minor informality or irregularity (pursuant to provisions of ASPR § 2-405) under accepted procurement practices since amendment affects the price bid.

Hinck Electrical Contractors, Inc. (Hinck), protests the award of a contract to Tap Electrical Contracting Services, Inc. (TAP), under invitation for bids (IFB) No. N62472-74-B-0288 (as amended) issued by the Northern Division, Naval Facilities Engineering Command (NAVFAC), Philadelphia, Pennsylvania.

The solicitation, a small business set-aside, was for the provision of 220 volt electrical service in 31 apartment buildings at the Naval Support Activity, Mitchel Manor, East Meadow, Long Island, New York. The specifications called for the installation of 220 volt receptacles, necessary wiring, service entrance equipment and feeders, transformers and panelboards, together with associated removals, cutting, patching, and restoration for 493 apartment units in the buildings.

Eight bids were received at bid opening on June 17, 1975, and award was made to the third low bidder, Tap, on June 30, 1975. The low bidder, Hatzel & Buehler (H&B) was found to be a large

business and therefore ineligible for award under the set-aside. In addition the bids submitted by both H&B and Hinck (second low bidder) were rejected as being nonresponsive because they failed to acknowledge receipt of two amendments to the invitation. Amendment No. 1 incorporated into the IFB wage rates (Davis-Bacon Act, 40 U.S.C. § 276a (1970)), found in the Department of Labor Wage Decision No. NY-75-3038 dated 11 April 1975 (5 pages) and stated the minority manpower utilization goals ("6.0% to 8.0%") of the Nassau-Suffolk Plan. Amendment No. 2 made several minor changes to the technical specifications.

Hinck contends that the failure to acknowledge the amendments constituted a minor informality or irregularity in bid which it, pursuant to the provisions of Armed Services Procurement Regulation (ASPR) § 2-405 (1974 ed.), should have been allowed an opportunity to correct or that the contracting officer should have waived the requirement.

Hinck also asserts that NAVFAC had earlier determined that the failure to acknowledge Amendment No. 1 constituted a minor informality which should be waived by their decision to award the contract to H&B which they were forced to reverse only because H&B was found not to be a small business.

Amendment No. 1, Hinck maintains, simply attached the initial wage rate determination which all bidders knew would become a part of the IFB and therefore it "did not change or otherwise alter an existing wage determination and could not have had any effect on a bidder's contemplated labor cost or intended price." Therefore, Hinck takes the position that failure to acknowledge Amendment No. 1 had no effect on its bid since it was based on the identical prevailing wage rate for electricians as set forth in the wage determination. In this regard evidence was submitted which showed that under a union agreement with the International Brotherhood of Electrical Workers, it was concurrently obligated to pay the Davis-Bacon minimum wage for electricians. With respect to the acknowledgement of the Norfolk-Suffolk plan percentages and the changes in Amendment No. 2, Hinck asserts that this information only clarified what it had previously obligated itself to perform when the bid was submitted. This information, it is argued, did not affect the bid since it was said to have imposed no additional commitments upon any bidder.

It has been the established position of our Office that the failure of a bidder to acknowledge a wage determination amendment

may not be waived as a minor informality in bid under accepted procurement practices. Hinck's contention that it was required to pay electricians the Davis-Bacon wage rate is unpersuasive and provides no basis for an exception to this rule. Furthermore, this argument overlooks the fact that in addition to electricians, the IFB (section 1A.8) also required the contractor to pay the "mechanics and laborers employed in working directly upon the site of the work wage rates not less than those contained in the attached wage determination \* \* \*."

With respect to the basis of Hinck's protest, we stated in our decision, Hartwick Construction Corporation, B-182841, February 27, 1975, that:

"Protests regarding the effect of a bidder's failure to acknowledge an addendum have been the subject of several prior decisions of this Office. See B-176399, January 9, 1973; B-175936, June 20, 1972, and decisions cited therein. The established general rule applicable under those circumstances is that the failure of a bidder to acknowledge receipt (in a manner required by the solicitation) of an amendment which could affect the price, or quantity of the procurement renders the bid nonresponsive. 37 Comp. Gen 785 (1958). The rationale for this rule is that generally such a bidder would have an option to decide after bid opening whether to become eligible for award by furnishing extraneous evidence that a material addendum had been considered or to avoid award by remaining silent. See 41 Comp. Gen. 550 (1962) and decisions cited therein."

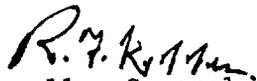
"The application of the general rule to a bidder's failure to acknowledge an addendum containing a wage determination has also been considered by this Office. See Matter of Lambert Construction Company, B-181794, August 29, 1974. In 51 Comp. Gen. 500 (1972) we reaffirmed the position taken in B-157832, November 9, 1965, wherein we stated:

"Since the wage rates payable under a contract directly affect the contract price, there can be no question that the IFB provision requiring the payment of minimum wages to be prescribed by the Secretary of Labor was a material requirement of the IFB as amended. As stated previously, the requirements of the Davis-Bacon Act were met when the amendment furnishing the

minimum wage schedule was issued, the purpose of the Act being to make definite and certain at the time of the contract award the contract price and the minimum wages to be paid thereunder. 17 Comp. Gen. 471, 473. In such circumstances, it is our view that a bidder who failed to indicate by acknowledgment of the amendment or otherwise that he had considered the wage schedule could not, without his consent, be required to pay wage rates which were prescribed therein but which were not specified in the original IFB, notwithstanding that he might already be paying the same or higher wage rates to his employees under agreements with labor unions or other arrangements. Accordingly, in our opinion, the deviation was material and not subject to waiver under the procurement regulation. B-138242, January 2, 1959. Furthermore, to afford you an opportunity after bid opening to become eligible for award by agreeing to abide by the wage schedule would be unfair to the other bidders whose bids conformed to the requirements of the amended IFB and would be contrary to the purpose of the public procurement statutes. B-149315, August 28, 1962; B-146354, November 27, 1961."

Concerning the effect of NAVFAC's alleged decision to award the contract to H&B, we do not feel that the correction of an erroneous decision before it is effectuated can in any way affect rejection of a bid on proper grounds or that such proposed actions could be used against the agency so as to require it to repeat its error by accepting Hinck's bid. Under these circumstances, Hinck's failure to acknowledge the Davis-Bacon wage determination in Amendment No. 1 was sufficient cause to render its bid nonresponsive. In view of our conclusion on the foregoing matter, it is unnecessary to discuss the effect of its failure to acknowledge the other information in the amendments.

The protest is therefore denied.

  
Deputy Comptroller General  
of the United States