

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

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FILE:

B-212551

DATE: November 18, 1983**MATTER OF:**

Davidson-Kelson, Inc.

DIGEST:

Failure to timely acknowledge an amendment to the solicitation which contains decreased wage rates does not render the low bidder's bid non-responsive. The low bidder would be obligated to pay the wage rates prescribed in the original wage determination and attached to its bid.

Davidson-Kelson, Inc. (DKI), protests the responsiveness of the low bid of C. E. Kramer Crane & Contracting (Kramer) under invitation for bids (IFB) No. R1-04-83-60 issued by the Department of Agriculture, Forest Service. The IFB was for the construction of roads on the Idaho Panhandle National Forests.

DKI contends that Kramer's bid was rendered nonresponsive because of Kramer's failure to acknowledge an amendment to the IFB.

For the reasons set forth below, we find the protest to be without merit.

Five bids were received in response to the IFB. Kramer submitted the low bid of \$274,718.24. However, Kramer failed to acknowledge amendment No. 1 to the IFB. DKI submitted the second low bid of \$280,446.59.

Amendment No. 1 to the IFB was the Department of Labor's new wage rates under the Davis-Bacon Act, 40 U.S.C. § 276(a) (1976), for laborers, power equipment operators and truck drivers and replaced the old wage rates in existence at the time the IFB was issued. DKI alleges that the amendment was a material one because the amendment provided in boldface letters that it had to be acknowledged in order for the bidder's bid to be considered. In DKI's view, every bidder would naturally assume that the amendment was a matter of particular importance to the Forest Service and, therefore, of particular importance to the responsiveness of a bidder's bid.

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The Forest Service states that the amendment concerned a wage rate determination which modified downward the wage rate in existence at the time the IFB was issued. The Forest Service takes the position that the contractor's performance was made less burdensome by the amendment. Therefore, the Forest Service argues that Kramer's failure to acknowledge the amendment can be waived as a minor informality.

In response, DKI asserts that the Forest Service's position that the new wage rates reduced the contractor's performance obligations is not totally correct. DKI points out that while the basic wage rates were reduced by the new wage rates, the fringe benefit rates were actually increased.

It is well settled that failure to acknowledge a material amendment in an advertised procurement renders a bid nonresponsive. Air Services Company, B-204532, September 22, 1981, 81-2 CPD 240. However, the failure of the low bidder to timely acknowledge an amendment that merely effects a decrease in price should not render the bid nonresponsive. Signal, Inc., B-201339, March 10, 1981, 81-1 CPD 189. This is because the bidder's failure to acknowledge an amendment containing a lessened requirement could only be prejudicial to the bidder's own competitive position and even possibly beneficial to the position of the other bidders. See 41 Comp. Gen. 550 (1962). Here, amendment No. 1 reduced the overall wage rates payable for laborers under the contract. Although DKI is correct that the fringe benefit rates actually rose, the basic wage rates were so significantly reduced that the hourly wage rates, based on the sum of the fringe benefits and basic wage rates, were reduced.

We recognize that the Davis-Bacon Act's principal purpose is to protect a contractor's employees from substandard earnings by fixing a floor under wages on government projects. United States v. Binghamton Construction Co., Inc., 347 U.S. 171 (1953). For that reason, we have held that the failure to acknowledge a wage rate determination is a material deviation that cannot be waived because the absence of such an acknowledgment would not legally obligate the bidder to pay the specified wages to its employees. Air Services Company, supra.

However, in those cases, there was no wage determination in the solicitation as issued or the new wage rate contained in the amendment was higher. Here, the new wage determination lowered the rates.

Standard form 19-A of this solicitation, paragraph 1(a), requires that laborers be paid not less than the wage rates contained in the wage determination "attached hereto and made a part hereof." The only wage determination attached to Kramer's bid was the original, higher determination. Therefore, if awarded the contract, Kramer would be bound to pay the rates in the original determination.

We deny DKI's protest.

for *Harvey R. Van Cleave*
Comptroller General
of the United States