Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Robinson & Company

File: B-265656

Date: December 1, 1995

Harold W. Robinson for the protester.
Amy M. Steed, Esq., and Cynthia S. Guill, Esq., Department of the Navy, for the agency.
Jacqueline Maeder, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency properly rejected as nonresponsive a bid that failed to acknowledge prior to bid opening an amendment increasing rates in the applicable Department of Labor wage determination, since the rates are mandated by the Davis-Bacon Act and there is no evidence that the bidder otherwise was legally required to pay its employees wages of at least those amounts.

DECISION

Robinson & Company protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. N44255-95-B-6068, issued by the Naval Facilities Engineering Command, Poulsbo, Washington, for repairs to certain antenna support towers. The Navy rejected Robinson's bid for failure to acknowledge amendment No. 0004 prior to bid opening; the protester maintains that the amendment did not materially affect its bid and argues that, in any event, its acknowledgment should be considered since it was received by the agency only 1 day late.

We deny the protest.

The IFB was issued on May 10, 1995. Amendment No. 0004, issued on June 29, contained a modified wage determination under the Davis-Bacon Act, 40 U.S.C. § 276(a) (1988), which affected the wage rates for two labor classes, power equipment operators and general laborers, whose use was anticipated on the project.

Bid opening was held on July 11. The apparent low bid of $22,700, submitted by USA Construction, was rejected as nonresponsive; Robinson's bid of $33,870 was second low.

Robinson failed to acknowledge amendment No. 0004 prior to bid opening; its acknowledgment of the amendment was received by the agency via regular mail on July 12. The Navy rejected Robinson's bid as nonresponsive because it regarded the amendment as material so that the failure to acknowledge it could not be waived as a minor informality.

Robinson contends that its failure to acknowledge the amendment should have been waived because the amendment had no impact on its bid price. Robinson further argues that because it signed and mailed the amendment on the day it was received (July 6), the amendment should be deemed timely received.

Generally, a bid that does not include an acknowledgment of a material amendment must be rejected, since acceptance of the bid would not obligate the bidder to comply with the amendment's terms. Weatherwax Elec., Inc., B-249609, Oct. 26, 1992, 92-2 CPD ¶ 281. An amendment that revises Davis-Bacon Act minimum wage rates is material, 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. See ABC Paving Co., 66 Comp. Gen. 47 (1986), 86-2 CPD ¶ 436; Bilt-Rite Contractors, Inc., B-259106.2, Apr. 25, 1995, 95-1 CPD ¶ 220; Weatherwax Elec., Inc., supra. To give the bidder the opportunity to acknowledge a wage rate amendment after bid opening would allow the firm to decide to render itself ineligible for award by choosing not to cure the defect. Id. Therefore, because Robinson was not obligated at bid opening to pay its employees at least the rates prescribed in the wage rate revision, the agency's determination that Robinson's bid was nonresponsive was proper.[1]

Regarding Robinson's argument that its acknowledgment should be deemed timely, the Federal Acquisition Regulation (FAR) permits consideration of a bid modification not received prior to bid opening only where it was sent by registered or certified mail at least 5 days before the bid opening date, was sent by U.S. Postal Service Express Mail Next Day Service not later than 5 p.m. 2 working days prior to the opening date, or was sent by regular mail, as here, and the delay in timely receipt was caused solely by government mishandling after receipt at the government installation. FAR §§ 52.214-7(a)(1), (2) and (3). Here, there is no

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[1]As an exception to the general rule, a bid which does not acknowledge new wage rates need not be rejected where the bidder already is obligated to pay wages not lower than those prescribed by the new rates, for example, where the bidder's employees are already covered by a collective bargaining agreement binding the firm to pay wages not lower than those in the new wage determination. Weatherwax Elec., Inc., supra. Here, the Navy asked Robinson if its employees were covered by a collective bargaining agreement and Robinson stated that its employees were not so covered.

allegation of mishandling by the Navy and the record does not suggest that the Navy mishandled the acknowledgment. Therefore, the exceptions permitting receipt after bid opening do not apply, and there was no basis for the Navy to consider the late acknowledgment.

The protest is denied.

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