

DECISION



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

60523

FILE: B-185198

DATE: February 24, 1976

98560

MATTER OF: Nautical Manufacturing Company

DIGEST:

1. Evidence concerning oral acknowledgment of material IFB amendment is inconclusive since contracting officer cannot recall alleged telephonic acknowledgment. Bid rejection is required in absence of adequate showing that amendment has been expressly or constructively acknowledged.
2. Requirement that bid reflect offer to pay wage rates incorporated in IFB amendment is not met in absence of express or constructive acknowledgment even though bidder may be paying higher wages under other Government contracts. Wage rate determinations are designed to protect bidder's employees whose rights may not be waived by Government.
3. Evidence submitted by bidder after bid opening to show awareness of new bid opening date included in unacknowledged IFB amendment may not be used to establish bidder's awareness and constructive acknowledgment of amendment. Integrity of bidding process requires use of independently verifiable evidence over which bidder does not have exclusive control as to whether or not to make it available after bid opening.
4. Acknowledgment of earlier IFB amendment which indefinitely suspended bid opening date and advised of Government's intention to issue another amendment to incorporate anticipated wage rate determination, is not, of itself, sufficient indication of such bidder's awareness of subsequently issued wage rate determination.

Nautical Manufacturing Company, Inc. (Nautical) protests the action of the Forest Service, United States Department of Agriculture, in rejecting its bid for failure to acknowledge Amendment No. 4 to IFB R2-76-4 for the construction of toilet structures at Shoshone National Forest, Park County, Wyoming.

The subject amendment incorporated the applicable wage rate determination by the Department of Labor and established a new bid opening date. Nautical's position is that its corporate vice president orally acknowledged Amendment No. 4 by telephone conversation with the contracting officer before bid opening. In addition, Nautical argues that the amendment was constructively acknowledged since the firm allegedly was aware, prior to bid opening, of the revised opening date in the subject amendment.

The solicitation was issued on July 17, 1975, and several amendments were issued thereafter. Amendment No. 3, issued September 2, 1975, extended the bid opening date indefinitely because of difficulties in obtaining a wage determination for Park County, Wyoming. The amendment noted that the wage determination would be published soon and would be forwarded by an amendment that would include a new bid opening time and date. On September 29, 1975, Amendment No. 4 was issued to incorporate the newly determined wage rates and to establish October 10, 1975, as the new opening date.

On October 3, 1975, Nautical's vice president called the contracting officer, and each agrees that they discussed the three other procurements recently awarded to Nautical by the Forest Service. Nautical maintains that it did not receive the subject solicitation amendment until after bid opening but that its content was discussed with the contracting officer during the above telephone conversation. The firm contends it was aware that the prevailing wage rates for the locality in the instant case were considerably lower than the rates provided in wage determinations in other contracts it was holding with the Government. Following the telephone conversation of October 3, protester contends it made a notation of the new bid opening date on the firm's desk calendar, which has been submitted for our review. In addition, the firm argues that it knew of the revised bid opening since it called shortly thereafter to obtain the results of the bidding. However, the contracting officer does not recollect discussing the instant procurement with Nautical and his memorandum of the October 3, 1975, conversation relates only to the discussion of the other three procurements. Moreover, the contracting officer recollects only one discussion with another bidder regarding Amendment No. 4, and, in that case, he required a confirming telegram acknowledging the bidder's receipt of the wage determination information.

Nautical's bid, which was submitted on August 13, 1975, and all other bids were opened as scheduled on October 10, 1975, and a protest was subsequently lodged with the agency. The contracting

officer has denied the protest on the basis that (1) Nautical was responsible for insuring that all amendments are received and acknowledged and (2) Nautical could not be bound under its bid to pay the minimum wage rates required by the Davis-Bacon Act, 40 U.S.C. § 276a (1970), since Nautical had not "seen and acknowledged the rates prior to bid opening." We agree with the contracting officer.

Amendments incorporating wage determinations pursuant to the Davis-Bacon Act are material. See 51 Comp. Gen. 500 (1972) and cases cited therein. The Government's acceptance of a bid which does not, in effect, offer to pay the applicable Davis-Bacon wages does not bind the contractor/employer to pay wages to which its employees are entitled under the Davis-Bacon Act. Thus, although a wage rate amendment may have only a trivial effect from the point of view of the Government or the bidder, the wage determination is designed to protect the bidder's employees, and their rights may not be waived by the Government. Prince Construction Co., B-184192, November 5, 1975, 75-2 CPD 279. Therefore, the fact that Nautical may be paying its employees higher wages than required for the applicable wage determination is irrelevant since that fact does not satisfy the requirement that it commit itself in its bid to do so.

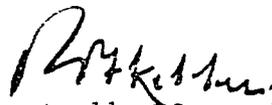
As pointed out by the protester, we have held that oral acknowledgement of a material amendment prior to bid opening is sufficient to permit acceptance of a bid which contains no other indication of acknowledgment. 33 Comp. Gen. 508 (1954). In addition, a bid may be construed as incorporating an amendment where the bidder has been advised of a forthcoming wage rate amendment and the bid submitted reflects, on its face, knowledge of an essential element included in the amendment, such as a new bid opening date. Square Deal Trucking Co., Inc., B-183529, August 19, 1975, 75-2 CPD 115.

The record in this case, however, is inconclusive as to whether the amendment was orally acknowledged. The contracting officer does not recall a telephone conversation with the protester concerning this amendment. We note that the contracting officer required another bidder to confirm in writing its oral acknowledgment of Amendment No. 4. While Nautical's desk calendar contains a notation of the new bid opening date, which the protester contends was entered thereon prior to bid opening, such evidence submitted after bid opening may not be considered. In order to maintain the integrity of the bidding process, evidence used to show awareness of or concurrence with a material solicitation amendment must, at the very least, be independently verifiable evidence

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over which the bidder does not have exclusive control as to whether or not to submit it. Finally, we do not agree with Nautical's argument that its acknowledgment of the prior amendment (No. 3) which indefinitely suspended the bid opening date and advised of the forthcoming wage rate determination, also tacitly effects acknowledgment of the subsequent amendment. It is clear that such action does not indicate an awareness of or concurrence with the wage determination issued at a later date.

Accordingly, the protest is denied.



Deputy Comptroller General
of the United States