

DECISION



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

FILE: B-200844

DATE: October 28, 1980

MATTER OF: Lexington Fire Protection Company, Inc.

DIGEST:

1. Procuring activity is not insurer of delivery of bidding documents to prospective bidders. Bidder bears risk of non-receipt of solicitation amendment unless failure to receive amendment is result of conscious and deliberate effort by contracting agency to exclude bidder from competition.
2. Failure to acknowledge wage rate determination amendment may not be waived as minor informality in bid.

Lexington Fire Protection Company, Inc. (Lexington) protests the Army Corps of Engineers' refusal to consider its bid under invitation for bids (IFB) No. DACA31-80-B-0111.

Lexington's bid was rejected because the firm failed to acknowledge two solicitation amendments, including a revised wage rate determination. Lexington argues that its bid should have been considered because: (1) it never received the amendments; and (2) it already pays its employees at least the prevailing wages.

With regard to the protester's first contention, we have stated that the procuring activity is not an insurer of delivery of bidding documents to the prospective bidders. The bidder bears the risk of non-receipt of solicitation amendments, 52 Comp. Gen. 281, 283 (1972); A. Brindis Company, Inc., B-187041, December 9, 1976, 76-2 CPD 477, unless the failure to receive the amendment is the result of a conscious and deliberate

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effort by the contracting agency to exclude the bidder from participating in the competition. 40 Comp. Gen. 126, 128 (1960); G&H Aircraft, B-189264, October 28, 1977, 77-2 CPD 329. Here, there is no allegation that Lexington failed to receive the amendments due to any deliberate effort by the agency to exclude the firm from competition.

The established rule as to the effect of a bidder's failure to acknowledge an amendment to an invitation for bids is that when the amendment affects, in other than a "trivial or negligible" manner, the price, quality, quantity, or delivery schedule of the procurement, the bidder's failure to acknowledge the amendment in compliance with the terms of the invitation or amendment cannot be waived. See Defense Acquisition Regulation § 2-405 (1976 ed.).

Where a bidder fails to acknowledge an amendment which modifies or adds a wage rate determination, the failure may not be waived as a minor informality, even though the bidder is paying the same or higher wages under labor agreements. This result is required because the Government's acceptance of a bid which does not contain an agreement to pay the appropriate wages does not bind the contractor/employer to the Government to pay wages to which its employees are entitled under the Davis-Bacon Act. Thus, the wage determination is designed to protect the bidder's employees and their rights may not be waived by the Government. See Prince Construction Company, B-184192, November 5, 1975, 75-2 CPD 279; Rothwell Brothers, Inc., B-190311, October 21, 1977, 77-2 CPD 316.

Accordingly, the failure to acknowledge the amendment revising the wage rate determination is a material deviation which is not subject to waiver.

The protest is summarily denied. See Inflated Products Company, Inc., B-190877, May 11, 1978, 78-1 CPD 362.


Acting Comptroller General
of the United States