

DECISION

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

FILE: B-217303 **DATE:** January 11, 1985

MATTER OF: United States Department of the
Interior--Request for Advance
Decision; Ball & Brosamer, Inc. and

DIGEST: Ball, Ball and Brosamer, Inc., A
Joint Venture; Grade-Way Construction

1. A bidder's failure to acknowledge a Davis-Bacon Act wage rate amendment may be treated as a minor informality in the bid, thus permitting correction after bid opening, if the effect on price is clearly de minimis, and the bidder affirmatively evinces its intent to be obligated to pay the revised rates by acknowledging the amendment as soon as possible thereafter, but always prior to award.
2. An amendment which imposes no different or additional legal obligations on the bidders from those imposed by the original invitation is not material, and thus failure to acknowledge receipt of such an amendment may be waived.

The United States Department of the Interior requests our advance decision on protests filed with the contracting officer by Ball & Brosamer, Inc. and Ball, Ball and Brosamer, Inc., A Joint Venture (Ball & Brosamer), and Grade-Way Construction (Grade-Way) under invitation for bids (IFB) No. 4-SI-20-04270/DC-7617, issued by the Bureau of Reclamation, Mid-Pacific Region. The procurement is for the construction of an earthfill dam and dike embankment. Ball & Brosamer and Grade-Way, respectively the apparent low and second low bidders, each protest that award of the contract to the other firm would be improper.

Specifically, the agency asks whether Ball & Brosamer's failure to acknowledge receipt of Amendments 5 and 6 to the solicitation requires rejection of the firm's bid as nonresponsive, or whether these failures properly may be waived as minor informalities.

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The solicitation was issued on August 28, 1984, and six amendments to the solicitation were subsequently issued. Bid opening took place on October 30, 1984. Ball & Brosamer was the apparent low bidder with an offered price of \$11,487,445, with Grade-Way second low at \$11,790,368.^{1/} However, the contracting officer noted irregularities in Ball & Brosamer's bid since the firm had failed to acknowledge receipt of Amendments 5 and 6, as required by both subsection B.2 of the IFB and the amendments themselves. Grade-Way contends that Ball & Brosamer's bid is accordingly nonresponsive and should be rejected, making Grade-Way the remaining low, responsive bidder and therefore in line for the contract award. The agency believes that Ball & Brosamer's failure to acknowledge the two amendments is, in each case, a minor informality which properly may be waived, because neither amendment has a material effect upon the procurement. We essentially agree with the agency's position in this matter, and conclude that Ball & Brosamer's bid may be accepted, conditioned upon the firm's post-bid opening acknowledgment of Amendment 5, which we understand has already occurred. The failure to acknowledge Amendment 6 may be waived.

Amendment 5

Amendment 5 incorporated a revised Department of Labor wage rate determination under the Davis-Bacon Act, 40 U.S.C. § 276a. (1982) (the Act). The 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). Because of that purpose, the traditional position of this Office has been that a bid which fails to acknowledge an amendment revising the wage rate for a labor category to be employed under the contract must be rejected. We have held that, without acknowledgment of such an amendment, a bidder legally cannot be required by the government to pay the wages prescribed in the amendment, and the bid is therefore

^{1/}The government's estimate for the project is \$14,801,320.

nonresponsive. See, e.g., Morris Plains Contracting, Inc., B-209352, Oct. 21, 1982, 82-2 CPD ¶ 360; X-Cel Constructors, Inc., B-206746, Apr. 5, 1982, 82-1 CPD ¶ 311. However, we have recognized that under some limited circumstances the failure to acknowledge a wage rate amendment can be cured after bid opening. Brutoco Engineering & Construction, Inc., Comp. Gen. 111 (1983), 83-1 CPD ¶ 9.

Brutoco was premised on the theory that where the failure to acknowledge the wage rate amendment could properly be categorized as a minor informality under the regulations, and where the interests of the employees that the Act was designed to protect were in fact protected by a union agreement to which the bidder was a party, the defect could be properly cured after bid opening. We so concluded because we believed that permitting the amendment to be acknowledged after bid opening in these circumstances would neither adversely affect the competitive bid system nor deny the affected employees the protection afforded by the Act. Even without a union agreement, however, we think it obvious that the interests of the affected employees will not suffer if the defect is cured after bid opening since the wage rate will be incorporated into the contract as a result. Hence, we see no reason to require the existence of a union agreement as a condition to permitting a bidder to cure the defect after bid opening if the conditions exist for invoking the rules for correcting the defect as a minor informality under the Federal Acquisition Regulation, § 14.405(d)(2), 48 Fed. Reg. 42,102, 42,180 (1983) (to be codified at 48 C.F.R. § 14.405(d)(2)). Brutoco Engineering & Construction, Inc., *supra*, is modified to this extent.

Here, the parties generally agree that the only applicable labor category affected by Amendment 5 was electricians, with the hourly fringe benefits for that category being increased \$1.00 by the revised wage rate determination. Ball & Brosamer contends that electrical work in the project is minor in terms of man-hours involved so that this increase will only total approximately \$500. The agency accepts this estimate, but Grade-Way asserts that the increase will be closer to \$1500. Even assuming that the increased electricians' benefits will total \$1500, we note that this represents only .013 percent of Ball & Brosamer's bid price, and .495 percent

of the difference between the bids. In our opinion, the total amount of increased electricians' benefits involved here is so minimal, given Ball & Brosamer's \$11.4 million bid price and the substantial difference between the two bids, that we fail to see how Grade-Way would be prejudiced if Ball & Brosamer now acknowledges Amendment 5.

Accordingly, we believe that a bidder's failure to acknowledge a wage rate amendment upon submission of its bid may be treated as a minor informality in the bid, thus permitting correction after bid opening, if the effect on price is clearly de minimis, as here and the bidder affirmatively evinces its intent to be obligated to pay the revised rates by acknowledging the amendment as soon as possible thereafter, but always prior to award.

Amendment 6

Amendment 6 incorporated numerous changes into the IFB, only two of which are seriously disputed by Grade-Way as to their materiality. Therefore, for purposes of our analysis, we will only address those two issues.

Amendment 6 modified subsection H.1 of the IFB by informing bidders that the rights-of-way for a particular quarry associated with the project, and for haul roads between the quarry and the damsite, would not be available for construction purposes until January 1, 1985. Subsection H.1, as previously amended, provided that the contractor was required to commence performance within 30 calendar days of receipt of the notice to proceed, which was anticipated to be December 12, 1984. Subsection H.1 further provided that the entire project was to be completed within 840 calendar days after award, with a particular access road from a local road to the dike to be completed no later than July 1, 1985.

Grade-Way urges that this modification to the solicitation was material since, if Ball & Brosamer had had knowledge of the fact that work could not commence until January 1, 1985, the firm's bid price could have increased. It is Grade-Way's position that Ball & Brosamer, anticipating that it could commence performance immediately upon receipt of the notice to proceed, had not factored costs for additional equipment and personnel into its bid

that would be necessary to assure timely completion of the project because of the delay in having access to the quarry and haul roads.

To the contrary, both the agency and Ball & Brosamer assert that this modification was immaterial because it was not conceivable that a contractor would begin to perform immediately after receipt of the notice to proceed. Ball & Brosamer urges that a certain period of time would be required to marshal its equipment and personnel, to obtain the necessary bonds, and to submit and receive approval of a safety program. Also, the firm states that adverse weather conditions would preclude working in the quarry or on the haul roads until the following spring. The firm also notes that there are 10 non-work days between December 12, 1984, and January 1, 1985. In any event, the firm contends that subsection H.1 only requires that work commence within 30 days of the notice to proceed. Therefore, the 20-day delay in having access to the quarry and haul roads does not affect the contractor's obligation to commence performance within that period.

We do not think that this 20-day delay as incorporated by Amendment 6 is material. An amendment which imposes no different or additional legal obligations on the bidders from those imposed by the original invitation is not material, and thus failure to acknowledge receipt of such an amendment may be waived. Emmett R. Woody, B-213201, Jan. 26, 1984, 84-1 CPD ¶ 123.

The delay occasioned by the amendment did not alter Ball & Brosamer's legal obligation to complete the entire project within 840 calendar days after award, and the access road to the dike by July 1, 1985. In this regard, subsection 1.3.1 a. of the IFB, provides, in part that:

". . . rights-of-way . . . will be provided by the government. . . . All work on the rights-of-way shall be performed by the contractor.

". . . the unavailability of transportation facilities or limitations thereon shall not become a basis for claims for damages or extension of time for completion of work.
. . ."

Thus, despite its failure to acknowledge Amendment 6, Ball & Brosamer, by signing and submitting its bid, legally obligated itself to perform the work at its offered price within the contract period set forth in subsection H.1, irrespective of the delay in the availability of the rights-of-way to the quarry. The firm cannot now disavow its bid by claiming that it had not intended to obligate itself to complete the work within the slightly shorter period of time for performance that may be occasioned by the unavailability of the quarry and haul roads until January 1, 1985. Since Ball & Brosamer's legal obligation remains the same, Amendment 6 in this respect cannot be said to be material. Emmett R. Woody, supra.

Prior to the issuance of Amendment 6, subsection 4.3.2 b. of the solicitation had read as follows:

"Materials-Zone 1 of the earthfill portions of the dam and dike embankment shall consist of a mixture of CL (inorganic clays), SC (clayey sands), SM (silty sands), and ML (inorganic silts and very fine sands), available from borrow pits in borrow area C, and from excavations required for the dam and appurtenant works."

Amendment 6 added the following last sentence to that subsection:

"Fat clay (CH) material will not be allowed within earthfill, zone 1, portions of the embankment."

Grade-Way urges that this constituted a material change because bidders were now on full notice that fat clay material could not be used at all in zone 1. This accordingly meant that more selective loading and stockpiling of materials would be required than was originally anticipated, so as to avoid any fat clay material being used inadvertently, thus increasing costs with respect to methods of operation and additional time necessary to perform the work. Grade-Way also points out that the same prohibition against the use of fat clay material had been added earlier by Amendment 3 to subsection 4.3.4 b., which governed the materials to be used in zone 1A. Thus,

Grade-Way contends that bidders without knowledge of the specific prohibition against its use in zone 1, as imposed by Amendment 6, would have construed the two subsections in context to infer that the use of fat clay material was permissible in zone 1, but not in zone 1A. We find no merit in the firm's argument.

It is clear that bidders were always obligated to use only a mixture of only four types of soils in zone 1, that is, inorganic clays, clayey sands, silty sands, and inorganic silts and very fine sands. Even though fat clay material was never specifically prohibited in zone 1 until the issuance of Amendment 6, we do not believe that bidders could reasonably interpret subsection 4.3.2 b. in its original form to mean that the use of fat clay material was in fact permissible. In our view, the additional language added by Amendment 6 was not material since, in essence, it merely reiterated the requirements of the IFB as originally set forth. Doyon Construction Co., Inc., B-212940, Feb. 14, 1984, 84-1 CPD ¶ 194. Therefore, the legal obligation of bidders to use only the four specified soils in zone 1 never changed. Emmett R. Woody, supra. We thus conclude that Amendment 6 was not material, and Ball & Brosamer's failure to acknowledge it may properly be waived.

Accordingly, it is our opinion that the Department of the Interior would be legally correct in accepting Ball & Brosamer's low bid and in awarding the firm the contract, if the firm is determined to be a responsible prospective contractor.

for Milton J. Fowler
Comptroller General
of the United States