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DECISION



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

FILE: B-219019

DATE: August 16, 1985

MATTER OF: Mike Vanebo

DIGEST:

Bid which failed to acknowledge amendment requiring upward wage rate revision was properly rejected as nonresponsive. Failure to acknowledge amendment could not be waived as a minor informality because the effect of the amendment on bid price cannot be said to be clearly de minimis.

Mike Vanebo protests the rejection of his bid as non-responsive under invitation for bids (IFB) No. R6-3-85-46s, issued by the Gifford Pinchot National Forest for precommercial thinning and slash disposal services in the Wind River Ranger District. The contracting officer rejected Vanebo's bid because Vanebo failed to acknowledge an amendment that revised a wage rate under the Service Contract Act. Vanebo argues that he did all that was required to acknowledge the amendment. The protester argues in the alternative, even if he had not, the amendment had a negligible effect on his price so his failure to acknowledge should be waived.

We deny the protest.

The IFB was amended twice. The first amendment replaced the original wage rate determination with a new determination including higher rates for laborers and the second amendment changed the work schedule and extended the bid opening date. The first amendment contained the following standard instruction:

"Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing Items 8 and 15, and returning copies of the amendment (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate

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letter or telegram which includes a reference to the solicitation and amendment numbers".

The agency inserted "0" in the blank which normally would be used to indicate that 1 or 2 copies of the amendment should be returned.

Vanebo's bid, which was low on one of the three items on the bid schedule, included a signed copy of the second amendment but did not include a copy of the first amendment. The bid did not otherwise indicate that Vanebo had received a copy of that amendment. Due to a clerical error, however, the bid abstract indicated that Vanebo had acknowledged both amendments. Later the contracting officer determined that Vanebo's bid was nonresponsive because the first amendment had not been acknowledged. A copy of the erroneous bid abstract indicating that Vanebo had acknowledged both amendments was inadvertently sent to Vanebo with notice that his bid had been rejected.

Vanebo does not argue that his bid included a copy of the amendment or that he ever indicated to the agency, in his bid or otherwise, that he received a copy of the amendment. Rather, Vanebo maintains that he literally complied with the amendment's instructions by signing the amendment and filling in his address without returning the original or a copy of the amendment or otherwise indicating to the agency that he had received the amendment. As proof that he properly acknowledged the amendment, Vanebo has submitted a copy of the bid abstract.

The agency says that the "0" was entered in the blank to indicate that bidders were not required to acknowledge the amendment by returning a signed copy of the amendment itself, but could use one of the other two listed methods.

While the agency's insertion of "0" in the instruction blank was confusing, we do not believe that Vanebo's reading of the instruction was reasonable. It was clear from the amendment that acknowledgment was required. The protester's interpretation of the instruction as permitting a method of acknowledgment which is not communicated in any way to the agency simply makes no sense. If the protester was confused by the ambiguity caused by the "0" in the

instruction, it should have brought the matter to the agency's attention prior to bid opening. Further, the fact that the contracting officer erroneously indicated on the bid abstract that the amendment was actually acknowledged has no bearing on whether the amendment was actually acknowledged by the bidder. We thus conclude that the protester did not acknowledge the amendment.

Vanebo further argues that even if we conclude that the amendment was not properly acknowledged, his failure to acknowledge the amendment should be waived because it had only a negligible effect on the bid price. The protester maintains that paying the wage rate increase of \$.55 per hour on this contract would only add \$492.80 to his total bid on this item of \$26,961.

Generally, 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. Morris Plains Contracting, Inc., B-209352, Oct. 21, 1982, 82-2 CPD ¶ 360. Without acknowledgment of such an amendment, the government legally cannot require the bidder to pay the wages incorporated by the amendment, and the bid therefore is nonresponsive. We have recognized, however, that the failure to acknowledge a wage rate amendment can be waived as a minor informality and cured after bid opening, but prior to award, if the effect on the bid price is clearly de minimis and the bidder affirmatively evidences its intent to be obligated to pay the revised rates by acknowledging the amendment as soon as possible after bid opening, but before award. United States Department of the Interior--Request for Advance Decision, et al., 64 Comp. Gen. 189 (1985), 85-1 CPD ¶ 34; Reliable Service Technology, B-217152, Feb. 25, 1985, 85-1 CPD ¶ 234.

This case does not fall within the limited circumstances for waiving minor informalities in wage rate situations. The amendment cannot be said to have a clearly de minimis effect. See United States Department of the Interior--Request for Advance Decision, et al., supra. Vanebo's estimate of a total price impact of only \$492.80 appears to be based on hiring only one employee. On the other hand, Vanebo also seems to argue that it will have no impact since he will do all the work himself and thus will pay no wages at all. The agency suggests that more than

one employee would be necessary under the contract and argues that the effect of the revised wage rate on Vanebo's bid price is significant.

Generally, whether the value of an unacknowledged amendment is trivial or negligible depends on the amendment's estimated impact on bid price and the relationship of that impact to the difference between the two low bids; both tests must be satisfied in order to permit waiver. Marino Construction Co., Inc., 61 Comp. Gen. 269 (1982), 82-1 CPD ¶ 167. Even if we accept Vanebo's estimate, it is not clear that the effect of the amendment is trivial. While the impact on Vanebo's price, amounting to approximately 1 percent of the \$26,961 bid is minimal, the more than 9 percent impact on the \$5,400 difference between the low bids is more significant. In any event, the matter is clouded by the agency's argument that the impact would be greater and Vanebo's statement that he will do all the work himself so the amendment will have no impact at all. Whatever Vanebo's current plans are regarding the performance of the contract, it is clear that Vanebo could legally hire employees or subcontract with another firm otherwise subject to the wage rates. Since Vanebo did not acknowledge the amendment containing the latest wage rate, it would not be obligated to pay at that rate. RTC Construction, B-217362, Jan. 24, 1985, 85-1 ¶ 95. In view of this and considering the uncertainty of the impact on the bid price we are unable to conclude that the value of the amendment was clearly de minimis. In this regard, we note that in the only prior case where we concluded that the impact of an unacknowledged wage rate amendment was de minimis the agency and protester agreed on the value of the impact. See United States Department of the Interior--Request for Advance Decision, et al., supra. Thus, Vanebo's failure to acknowledge the amendment is not a minor informality and may not be waived.

The protest is denied.

for 
Harry R. Van Cleave
General Counsel