



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Couse's Sanitation Service
File: B-223659
Date: September 15, 1986

DIGEST

1. Bid that failed to acknowledge amendment requiring upward wage rate revision properly was rejected as nonresponsive where the amendment's effect on price is not clearly de minimis.
2. Protest that contracting agency orally awarded a contract to the protester is without merit where agency did not transmit any written notice of award and informed the protester that contract documents would not be executed until later date.

DECISION

Couse's Sanitation Service protests the cancellation by the Forest Service of invitation for bids (IFB) No. R6-21-86-20 and the reissuance of this solicitation as request for quotations (RFQ) No. 21-86-16. Couse's asserts that it actually had been awarded a contract under the IFB.

We deny the protest.

The IFB, issued on May 29, 1986, requested bids to provide refuse collection services at the Curlew Civilian Conservation Center. The Forest Service issued amendment 1 on June 1 to incorporate a revised Department of Labor Service Contract Act Wage Determination. Couse's submitted the low bid, opened on June 30, and that same day the agency verbally notified Couse's that the firm would be receiving the award and that it should begin performance July 1. On July 1, however, the agency discovered that neither Couse's nor the other two bidders had acknowledged amendment 1. After verifying that the amendment had been mailed to potential bidders, the agency determined that all bids must be rejected as nonresponsive. On July 7, the agency notified Couse's that it would not receive the award and that the requirement would be resolicited.

Couse's first argues that the Forest Service orally awarded it the contract on June 30 and is now estopped to deny its existence. In this regard, Couse's states that on July 1 the agency told Couse's to acknowledge and submit the amendment for inclusion in its bid. Couse's states that it actually performed the collection services for 3 days prior to the July 7 cancellation. Couse's also complains that its bid should not have been rejected as nonresponsive. Couse's admits that it did not acknowledge the amendment but argues that it did not know it was necessary to acknowledge the amendment because the printing on the form was illegible. Couse's submits that in any event it took the revised wage rates into consideration in formulating its bid and that the amendment thus would have no effect on the firm's bid price.

The Forest Service, while conceding that on June 30 it told Couse's the firm would receive the award and to begin performance on July 1, denies that it ever actually awarded a contract to Couse's. In this regard, the agency states that it informed Couse's that the award documents would be executed on July 1, but never executed the documents once it discovered that all bidders had failed to acknowledge the wage rate determination amendment. The Forest Service asserts that it was proper to reject all bids as nonresponsive and cancel the solicitation based on such failure.

We agree with the Forest Service's decision to reject all bids. A bid that fails to acknowledge an amendment revising a wage rate determination for a labor category to be employed under the contract generally must be rejected. Absent an acknowledgment of the amendment, the bidder has not agreed to pay the revised wages, and the government cannot legally require the bidder to pay them. The bid therefore is non-responsive. Hispanic Maintenance Services, Inc., B-220957, Feb. 7, 1986, 86-1 C.P.D. ¶ 142. As a limited exception to this rule, the failure to acknowledge a wage rate amendment may be waived after bid opening where it is clear that the amendment would have only a de minimis effect on the bidder's proposed cost. See United States Department of the Interior--Request for Advance Decision, et al., 64 Comp. Gen. 189, 192 (1985), 85-1 C.P.D. ¶ 34 (waiver permitted where the amendment's effect on bid price was less than 0.013 percent). The present case does not fall within this narrow exception.

The IFB, as issued, included a wage determination covering two classes of employees, laborers at \$5.54 per hour and truck drivers at \$6.82 per hour. The revised wage determination replaced the broad laborer and truck driver classification with the more specific "refuse collector" and "truck driver" classifications at wages of \$6.38 and \$7.21 per hour, respectively. These wages represent increases of

approximately 15 percent and 6 percent in the rates in the original IFB. While neither the IFB nor the bids give estimated labor hours for these employees, given the labor intensive nature of a refuse collection contract there is no basis for assuming that these increases would have only a de minimis effect on price, and Couse's has not shown this to be the case.

It is irrelevant that Couse's or other bidders may have taken the amendment into consideration in calculating their bids or that they may have intended to pay the employees the new rates. A bidder's intent to be bound must be evident from the bidding documents themselves, so that post-bid opening submissions or explanations cannot be used to make a nonresponsive bid responsive. The reason is that to allow such correction would permit the bidder after bid opening to determine whether to accept or reject the contract award by choosing whether or not to acknowledge the amendment. Johnson Moving & Storage Co., B-221826, Mar. 19, 1986, 86-1 C.P.D. ¶ 273. Consequently, the Forest Service properly rejected all bids, including the protester's, as nonresponsive for failure to acknowledge the amendment.

The protester's argument that the Forest Service orally awarded it a contract on June 30 also is without merit. Acceptance of a prospective contractor's offer by the government must be clear and unconditional, and a contract does not come into existence when the purported acceptance is conditioned on future actions by the offeror or the procuring agency. TSCO, Inc., B-221306, Feb. 26, 1986, 86-1 C.P.D. ¶ 198. While it is clear that the Forest Service initially planned to make award to Couse's, it also is clear that the Forest Service never actually made the award. Indeed, by advising Couse's that the award documents would be executed on July 1, we think the agency essentially was indicating that award would not be made until that date.

Moreover, the Competition in Contracting Act of 1984, 41 U.S.C. § 253b(d)(4) (Supp. III 1985), and the Federal Acquisition Regulation, 48 C.F.R. § 14.407-1(c) (1985), as well as the IFB itself, provide that the contracting officer shall award a contract by transmitting written notice of award to the offeror. There was no such written notice here.

To the extent Couse's is claiming reimbursement for the small portion of the contract it has performed, this matter should be pursued with the agency.

The protest is denied.

for Ronald Berger
Harry R. Van Cleve
General Counsel