The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hewett-Kier Construction, Inc.

File: B-225412

Date: November 6, 1986

DIGEST

Failure to acknowledge a material amendment which adds a Davis-Bacon wage rate determination to a solicitation that was issued without the wage rate determination renders a bid nonresponsive since only a specific Davis-Bacon wage rate determination can legally bind a contractor under the Davis-Bacon Act to pay the rates specified in the solicitation.

DECISION

Hewett-Kier Construction, Inc. (HCI) protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. GS-04P-86-EX-C0078, issued by the General Services Administration (GSA) for construction work consisting of the renovation and modification of a government building in Key West, Florida. GSA rejected HCI's bid for failure to acknowledge with its bid an amendment that contained a wage determination under the Davis-Bacon Act, 40 U.S.C. § 276(a) (1982) (the Act). HCI advances several reasons why its failure to acknowledge the amendment was a minor informality which should be waived.

We dismiss the protest.

Briefly, the solicitation, as issued, did not contain a wage rate determination. The amendment which HCI failed to acknowledge included a wage rate determination for 10 classifications of workers.[1/] GSA received three bids. HCI's bid was $810,000, while the second and third low bids were $823,000 and $828,000, respectively.

1/ Because other classifications were not addressed by this amendment, HCI characterizes the amendment's wage determination as only a "partial wage rate schedule," apparently to support its position that the matter should be regarded as a minor informality.

First, HCI argues that its failure to acknowledge the wage determination amendment was a minor informality because the unamended solicitation already advised bidders that a wage rate determination would be furnished by a subsequent amendment and because the unamended solicitation also contained the following clause (General Services Administration Acquisition Regulation, 48 C.F.R. § 552.222-70 (1985)), which stated in part:

> "All laborers and mechanics employed or working upon the site of the work . . . will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account . . . the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the Contractor and such laborers and mechanics."

Despite the lack of any specific wage determination in the unamended solicitation, HCI argues that the above clause already obligated the firm to pay Davis-Bacon wages. We disagree.

We believe such a clause is not an acceptable substitute for acknowledging the wage rate amendment. The Act specifically requires that "the advertised specifications . . . shall contain a provision stating the minimum wages to be paid . . . which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing." 40 U.S.C. § 276a. In construing this statutory language, we have held that, as a general rule, the minimum wage rates so required cannot be incorporated in a contract in any way other than as stipulated in the statute, that is, by inclusion in the specifications upon which bids or proposals leading to the contract were invited. 42 Comp. Gen. 410 (1963); 40 Comp. Gen. 565 (1961). We have also held that a solicitation provision to the effect that contractors shall pay minimum wage rates as determined by the Secretary of Labor would not be an acceptable substitute for including the specific wage rate determination in the solicitation as required by the statute. 40 Comp. Gen. 48 (1960).

Because the clause quoted by HCI does not incorporate a specific wage rate determination into the solicitation, it does not legally bind HCI to pay the determined wage rate. See Vector Telecom, Inc., B-216008, Oct. 23, 1984, 84-2 CPD ¶ 452.

Second, HCI argues that its bid was responsive because it was based on wage rates higher than those required by the wage determination and that therefore the unacknowledged amendment would have had no effect on its price. HCI also notes that it immediately acknowledged the amendment after bid opening.

HCI's contention that its failure to acknowledge the amendment can be waived is not well taken. Generally, the responsiveness of a bid is determined as of the time of bid opening and involves whether the bid as submitted represents an unequivocal offer to provide the product or service as specified, so that acceptance of it would bind the contractor to meet the government's needs in all significant respects. Power Test, Inc., B-218123, Apr. 29, 1985, 85-1 CPD ¶ 484. Any bid that is materially deficient in that regard must be rejected; a defect in a bid is material if it affects price, quality, quantity or delivery. See Ashland Chemical Co., B-216954, May 16, 1985, 85-1 CPD ¶ 555. The failure to acknowledge an amendment that adds a wage rate determination is a material deviation that generally cannot be waived and, therefore, requires that the bid be rejected because, in the absence of such an acknowledgment, the bidder would not be legally obligated to pay the specified wages and provide the specified fringe benefits to its employees. See Action Porta Systems, B-220199.2, Nov. 8, 1985, 85-2 CPD ¶ 533.

We have recognized, however, that the failure to acknowledge a wage rate amendment may be corrected after bid opening under very limited circumstances. See U.S. Department of the Interior--Request for Advance Decision, et al., 64 Comp. Gen. 189 (1985), 85-1 CPD ¶ 34 (where the amendment revised a wage rate for one labor category and had a de minimis effect on price, amounting to only a 0.013 percent increase in the original bid price); Brutoco Engineering & Construction, Inc., 62 Comp. Gen. 111 (1983), 83-1 CPD ¶ 9 (where the effect on bid price was de minimis, only 0.8 percent, and the bidder was otherwise obligated under a collective bargaining agreement to pay wages exceeding the revised wage rate). But see Grade-Way Construction v. United States, 71 Cl. Ct. 263 (1985).

As stated above, the IFB as issued contained no wage rate determination at all while the amendment that HCI failed to acknowledge included a wage rate determination for 10 labor categories.[2/] Thus, acceptance of HCI's bid as submitted at

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2/ While the protester has not furnished the wage rate determination to our Office, the labor categories covered by the determination apparently included carpenters, structural steel workers, tile layers, bricklayers, and laborers.

bid opening would not have obligated the contractor to pay these employees the Davis-Bacon wages. That is, the firm legally could have paid these employees significantly lower wages than those required by the determination and no fringe benefits.3/ We therefore fail to see how the amendment, objectively viewed, was de minimis. Further, it is irrelevant that HCI may have intended to comply with the wages in the amendment despite the lack of acknowledgment, or that the firm acknowledged the amendment in a submission after bid opening. 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, even where the government could save money by permitting correction. Polan Industries, B-218720.2, May 30, 1985, 85-1 CPD ¶ 617. The reason is that to allow such correction would give the firm the option to accept or reject the contract after bids have been exposed by acknowledging or choosing not to, as the bidder's own business interests dictate. See Mobile Drilling Company, Inc., B-216989, Feb. 14, 1985, 85-1 CPD ¶ 199.

Since HCI has not stated a valid basis of protest, we dismiss the protest pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.3(f) (1986), without requesting a report from the agency. In view of this dismissal, we also find that the conference HCI has requested would serve no useful purpose. - Cushman Electronics, Inc., B-207972, Aug. 5, 1982, 82-2 CPD ¶ 110.

The protest is dismissed.

Marilyn Eaton

for Ronald Berger
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3/ HCI does not allege that it has a collective bargaining agreement with the employees.