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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Fast Electrical Contractors, Inc.
File: B-223823
Date: December 2, 1986

DIGEST

1. A bid found nonresponsive for failure to acknowledge the receipt of a material amendment prior to bid opening may not be made responsive by the acknowledgment of the amendment after bid opening.
2. Protest against the nonreceipt of a solicitation amendment is without merit where contracting agency indicates that protester was mailed the amendment and there is no showing that the failure to receive the amendment was caused by a conscious and deliberate effort to exclude the bidder from competing for the contract.
3. Failure to acknowledge an invitation for bids amendment which increased the wage rate for plasterers cannot be waived after bid opening even assuming that the increase in cost of contract performance is de minimus where the bidder's employees are not covered by a collective bargaining agreement which binds the bidder to pay wages not less than those prescribed by the Secretary of Labor.
4. Recovery of lost profits is not permitted under any circumstances. Recovery of bid preparation costs and the cost of pursuing a protest is denied where the protest has been found to be without legal merit.

DECISION

Fast Electrical Contractors, Inc. (Fast), protests the award of a contract to the Nelson Electric Company, Inc. (NECI) under General Services Administration (GSA) invitation for bids (IFB) No. GS-04P-86-EX-C0063 for the replacement of PCB-contaminated transformers and oil switches at the Estes Kefauver Federal Building in Nashville, Tennessee. Fast's low bid of \$225,000 was rejected as nonresponsive because Fast failed to acknowledge receipt of amendment No. 1, which contained a revised Davis-Bacon Act wage rate determination.

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The contract was awarded to NECI in the amount of \$228,334, and Fast contends that it should have received the award notwithstanding its failure to acknowledge the amendment.

We deny the protest.

Fast argues that its acknowledgment of the amendment after bid opening, but prior to award, was sufficient to correct this deficiency because it was the low bidder. Also, Fast contends that GSA was negligent in failing to provide it with a copy of the amendment. Fast notes that the amendment was available at the time the IFB was issued and that it should have been furnished a copy when it was sent the IFB.

In addition, Fast contends that the revised wage rate determination had no monetary effect on the cost of contract performance or, in the alternative, that the revised determination had a de minimus effect on the cost of performance. Consequently, Fast contends that the failure to acknowledge receipt of the amendment should be waived as a minor informality or irregularity. Fast notes that the only changed wage rate that has any application to this contract is that for plasterers and states that no plastering is required under the specifications unless required to repair damage occurring to the building, the piping, or the equipment during contract performance. Fast argues that no plastering should be required under the contract and disagrees with GSA's determination that the cost of performing the contract would increase. Fast contends that should any plastering be required it could be done at a total additional cost of only about \$7.12 and that any more extensive plastering would be highly unlikely.

A bidder's failure to acknowledge a material amendment by bid opening renders the bid nonresponsive and thus unacceptable since, absent such an acknowledgment, the government's acceptance of the bid would not legally obligate the bidder to meet the government's requirements as identified in the amendment. Power Service, Inc., B-218248, Mar. 28, 1985, 85-1 CPD ¶ 374. An amendment is material where it imposes a legal obligation (here, an increased wage rate for plasterers that the contractor would be obligated to pay) on the contractor that was not contained in the original IFB and the materiality of the amendment is not diminished by the fact that it may have little or no effect on the bid price or the work to be performed. Vertiflite Air Services, Inc., B-221668, Mar. 19, 1986, 86-1 CPD ¶ 272. Moreover, a bid that is nonresponsive may not be corrected after bid opening since this would give the nonresponsive bidder the competitive advantage of being able to accept or reject the contract after bids are exposed simply by deciding to make its bid responsive or to allow its bid to remain nonresponsive. Vertiflite Air Services, Inc., supra.

Further, it is well established that the risk of nonreceipt of a solicitation amendment rests with the bidder for a government contract. This rule stems from the fundamental principle that, from the government's point of view, the propriety of a particular procurement is determined on the basis of whether adequate competition and reasonable prices (both of which were present here) are obtained, not whether every possible prospective bidder is afforded an opportunity to bid. Thus, we decline as a general rule to consider a protest based on nonreceipt of an IFB amendment unless the contracting agency has made a conscious and deliberate effort to exclude a bidder from competing for the contract. Reliable Service Technology, B-217152, Feb. 25, 1985, 85-1 CPD ¶ 234. Here, GSA indicates that the amendment was issued to all prospective bidders and since Fast has not even alleged that there was a deliberate or conscious attempt to exclude the firm from competing, we see no basis to excuse Fast's failure to acknowledge the amendment or to permit the firm to cure this defect after bid opening.

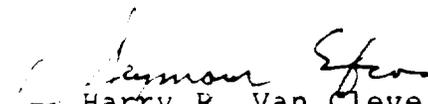
Concerning the impact of the increased wage rate on the cost of contract performance, GSA argues that the changed wage rate for plasterers increased the cost of performance by \$770 to \$1540, and that such an increase cannot be waived as a minor informality or irregularity. GSA's estimate is based on its determination that concrete walls would have to be replastered where the contractor has had to drill large holes to run new conduit and plastering would be required to repair sections of concrete walls where doors have been removed and relocated. Although Fast disagrees, Fast has not shown that GSA's determination that plasterers would be required under the contract is unreasonable.

Concerning the overall price impact, we have held that a bidder's failure to acknowledge prior to bid opening an amendment containing revised wage rates may be waived as a minor informality if the effect of the amendment on the cost of contract performance is clearly de minimus. United States Department of the Interior--Request for Reconsideration, et al., 64 Comp. Gen. 189 (1985), 85-1 CPD ¶ 34. However, subsequent to that decision, the Claims Court ruled in Grade-Way Construction v. United States, 7 Cl. Ct. 263 (1985) that the failure of a bidder to acknowledge receipt of an amendment containing a revised Davis-Bacon Act wage rate determination could not be waived, irrespective of the price impact of the amendment. The court held that to permit a bidder to waive the failure to acknowledge such an amendment would place that bidder in the position of being able to elect to accept the contract by acknowledging the amendment and

thereby making its bid responsive or to avoid the contract by refusing to acknowledge the amendment and this option alone was sufficient to render the bid nonresponsive. We have decided to follow the logic of this decision and in ABC Paving Company, B-224408, Oct. 16, 1986, 86-2 CPD _____, we overruled our decision in United States Department of the Interior-- Request for Advance Decision, supra, and held that a bidder's failure to acknowledge an amendment containing a revised wage rate must be rejected as nonresponsive where it impacts on a material requirement regardless of how negligible its impact might be. Here, the revised wage rate clearly impacts on the wage rate which would be required to be paid plasterers under the contract and there is no evidence that Fast's employees are covered by a collective bargaining agreement binding the bidder to pay wages not less than those prescribed by the Secretary of Labor (see Brutoco Engineering & Construction, Inc., 62 Comp. Gen. 111 (1983), 83-1 CPD ¶ 9. Consequently, even assuming that Fast is correct in its contention that the cost effect of amendment No. 1 is de minimus, Fast's bid must still be considered nonresponsive and must therefore be rejected.

Fast has also requested the award of the profits it would have made had the contract been awarded to it and the reimbursement of the costs it incurred in preparing and submitting its bid and in pursuing its protest with our Office. With respect to Fast's claim for loss profits, the general rule is that anticipated profits may not be recovered even in the presence of wrongful action. Fisherman's Boat Shop, Inc., B-223366, Oct. 3, 1986, 86-2 CPD ¶ _____. Concerning the request for the reimbursement of costs, since we have found the Fast protest to be without legal merit, its claim is denied. Hispanic Maintenance Services, Inc., B-220957, Feb. 7, 1986, 86-1 CPD ¶ 142.

Accordingly, the protest is denied.


Harry R. Van Cleve
General Counsel