



Comptroller General
of the United States

Washington, D.C. 20548

154170

Decision

Matter of: Bilt-Rite Contractors, Inc.

File: B-259106.2

Date: April 25, 1995

Henry J. Costa, Jr., Esq., Davis & Costa, for the protester, Arthur I. Leaderman, Esq., Smith, Pachter, McWhorter & D'Ambrosio, for General Engineering Corporation, an interested party.

John D. Brady, Esq., and Newton L. Klements, Esq., Department of the Army, for the agency.

Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where an agency erroneously canceled an invitation for bids (IFB) for construction services because the low bid was believed to be nonresponsive for its failure to acknowledge an amendment revising a Department of Labor wage determination and no other responsive bid was reasonably priced, but subsequently determined that the low bidder's failure to acknowledge the amendment should have been waived because the amendment was not material inasmuch as the low bidder was already legally obligated to pay the revised wage rates stated in the amendment, the agency properly reinstated the canceled IFB and made award to the low bidder.

DECISION

Bilt-Rite Contractors, Inc. protests an award to General Engineering Corporation (GEC) under invitation for bids (IFB) No. DACW17-94-B-0026 issued by the U.S. Army Corps of Engineers, Jacksonville District, for rehabilitation of family housing at the Louis E. Brown Villas, St. Croix, U.S. Virgin Islands.

We deny the protest.

On July 8, 1994, the Corps issued the IFB. The IFB incorporated Department of Labor (DOL) wage rate determinations,¹ dated "2/25/94," for various job classifications including:

<u>Job Classification</u>	<u>Hourly Wage Rate</u>
Laborers	\$4.33
Welders	\$7.03

On August 29, the Corps issued amendment No. 0005, which included a revised list of wage rate determinations, dated "6/24/94." The only wage rate changed by this amendment was the rate for laborers, which was increased to \$4.65.² The Corps mailed this amendment the same day to all bidders on the mailing list.

The Corps received the following three bids by bid opening on September 7:³

<u>Bidder</u>	<u>Price</u>
GEC	\$6,993,000
Francisco Levi & Son	\$7,987,000
Bilt-Rite	\$8,679,137

¹As stated in the IFB, the Davis-Bacon Act, 40 U.S.C. § 276a et seq. (1988), which generally mandates DOL minimum wage rates be paid under construction contracts performed in the United States, is not applicable to projects performed in the Virgin Islands. However, the IFB stated that:

"If a DOL wage determination is included in this contract, the [c]ontractor shall pay not less than the wages and fringe benefits specified in the wage determination."

²As discussed below, the agency first erroneously found that this amendment added the classification and wage rate for welders. However, the amendment merely restated the same classification and rate for welders as included in the initial IFB.

³One additional bid was received after bid opening and was rejected as late.

The bids submitted by GEC and Bilt-Rite did not acknowledge amendment No. 0005, and the bids submitted by Francisco and Bilt-Rite exceeded the government estimate by more than 25 percent. The Corps considered amendment No. 0005 to be material because it increased the wage rate for laborers and because the Corps determined, albeit incorrectly, that the amendment added the classification and wage rate for welders. The Corps thus determined that GEC's bid was nonresponsive for failing to acknowledge a material amendment; that Francisco's bid price was unreasonably high; and that Bilt-Rite's bid was both nonresponsive and unreasonably high. On September 23, the Corps rejected all bids and canceled the solicitation, planning to resolicit the requirement.

Both GEC and Bilt-Rite protested to the Corps prior to the IFB's cancellation. GEC alleged that amendment No. 0005 was not material and could be waived as a minor informality, and requested that award be made to GEC under the IFB as the apparent low bidder. Bilt-Rite alleged that amendment No. 0005 was improperly disseminated and requested cancellation of the IFB.

On October 12, the Corps denied both protests. The Corps determined that the change in wage rates for laborers was not material because bidders were otherwise legally

The revised government estimate for this project is \$6,014,600. The original government estimate was \$5,438,000. The Corps determined that the revision of the estimate was:

"necessary due to recent experience with other contracts and discussions with potential bidders that indicate that material costs have increased in the past quarter by approximately 10 percent for the Caribbean region."

To the extent Bilt-Rite challenges the agency's reliance on the revised government estimate to find GEC's low bid reasonably priced, such protest was untimely filed more than 10 days after the protester knew or should have known of this basis for protest. 4 C.F.R. § 21.2(a)(2) (1995). In this regard, the record shows that the Corps provided the revised government estimate to Bilt-Rite in its letter dated October 12, denying Bilt-Rite's first agency-level protest and Bilt-Rite did not mention this matter until its comments on the agency report on the present protest on December 16, some 2 months later. Thus, we will not consider Bilt-Rite's complaints about the revised estimate. See Swafford Indus., B-238055, Mar. 12, 1990, 90-1 CPD ¶ 268.

obligated to pay the same wage rate under the minimum wage required under the law of the Virgin Islands. However, the Corps determined that the inclusion in the amendment of the classification and wage rate for welders was material, and thus GEC's failure to acknowledge the amendment rendered its bid nonresponsive. In response to Bilt-Rite's protest, the Corps found that the amendment was properly distributed and that Bilt-Rite's failure to receive it was not a sufficient basis to cancel the solicitation, although the Corps advised that the IFB was properly canceled because all bids submitted were either nonresponsive or unreasonably priced.

By letter of October 24, GEC protested to our Office. During the course of this protest, the Corps realized that the wage rate determination in the IFB, as originally issued, included the classification and applicable wage rate for welders, and that amendment No. 0005 did not add or otherwise change this classification or wage rate. The Corps thus determined that amendment No. 0005 was not material, and that it should reinstate the canceled IFB, waive GEC's failure to acknowledge amendment No. 0005, and make award to GEC. Upon being advised of this corrective action, we dismissed GEC's protest. Bilt-Rite protested this proposed action to the agency. On December 6, the Corps denied the protest and reinstated the IFB, and, on December 8, made award to GEC. This protest followed.

A bidder's failure to acknowledge an amendment to an IFB generally renders its bid nonresponsive since, absent such acknowledgement, the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as stated in the amendment. USA Asbestos Removal Co., Inc., B-252349, May 24, 1993, 93-1 CPD ¶ 410. On the other hand, the failure to acknowledge an amendment that is not material is waivable as a minor informality. Federal Acquisition Regulation (FAR) § 14.405(d)(2); DeRalco, Inc., 68 Comp. Gen. 349 (1989), 89-1 CPD ¶ 327. An amendment that revises or adds minimum wage rates generally imposes a legal obligation on the bidder to pay wage rates which the government cannot require a bidder to pay without acknowledgement of the amendment. See ABC Paving Co., 66 Comp. Gen. 47 (1986), 86-2 CPD ¶ 435; USA Asbestos Removal Co., Inc., supra. However, where the bidder is otherwise legally obligated to pay the same or higher wage rates as required in the amendment, the failure to acknowledge the amendment may be waived as a minor informality. Id.; see Brutoco Eng'g & Const., Inc., 62 Comp. Gen. 111 (1983), 83-1 CPD ¶ 9.

We agree with the Corps that amendment No. 0005 was not material because it does not impose any wage rates which bidders were not otherwise legally obligated to pay under the initial IFB. Despite the initial confusion, the wage

determination, except for laborers, was unchanged from that included in the initial IFB. As for the hourly wage rate increase to \$4.65 for laborers, the legally required minimum wage for employees in the Virgin Islands is also \$4.65. See 24 V.I.C. § 4 (1993).⁵ Therefore, bidders were otherwise legally obligated to pay laborers a minimum wage equal to that required by amendment No. 0005. Since the amendment did not impose additional legal obligations, nor otherwise materially revise the IFB, the waiver of a bidder's failure to acknowledge amendment No. 0005 was required and GEC's bid was responsive. See ABC Paving Co., supra; USA Asbestos Removal Co., Inc., supra; Brutoco Eng'g & Const., Inc., supra.

Bilt-Rite nevertheless alleges that once the Corps canceled the IFB, the cancellation was irrevocable and bids submitted in response to that IFB cannot be revived. We disagree. An agency's reinstatement of a canceled IFB and revival of the bids received is proper where the justification for the cancellation no longer exists, the needs of the agency would be met by an award under the original solicitation, and no bidders are prejudiced. Sac & Fox Indus., Ltd., B-231873, Sept. 15, 1988, 88-2 CPD ¶ 250; KAL Maintenance, Inc., B-225429, Feb. 24, 1987, 87-1 CPD ¶ 207. Here, reinstatement of the IFB and award to GEC was proper because the reason for cancellation--that no reasonably priced bid was responsive--no longer exists because GEC's failure to acknowledge amendment No. 0005 should have been waived, and it should have received award under the canceled IFB since its bid price was considered to be reasonable; this satisfies the agency's requirements and does not prejudice the bidders. Id.

The protest is denied.

/s/ Michael R. Golden
for Robert P. Murphy
General Counsel

⁵Although the Fair Labor Standards Act of 1938, 29 U.S.C. § 206(a)(1) (Supp. I 1989), requires a federal minimum wage of \$4.25, this Act specifically permits states, territories and possessions of the United States to impose a higher minimum wage, as the Virgin Islands has done here. See 29 U.S.C. §§ 203, 218 (1988).