DECISION

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

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FILE: B-183299 DATE: May 28,1975

MATTER OF: Macrow Construction Co., Inc.

DIGEST:

1. Failure to acknowledge (prior to bid opening) amendment incorporating revised Davis-Bacon wage determination in IFB renders bid nonresponsive and subsequent award improper, notwithstanding bidder's statement that it pays wages at least equal to those in revised wage determination, since acceptance of bid as submitted at time of opening would not result in contract containing statement of appropriate minimum wage rates as required by provisions of Davis-Bacon Act, 40 U.S.C. § 276a.

2. Failure to acknowledge wage determination amendment may not be waived as minor informality or irregularity in bid under accepted procurement practices or regulations applicable to procurement of construction services issued by FAA, since amendment affected price and acceptance of low bid was prejudicial to other bidders.

3. Even though acceptance of low bid which failed to acknowledge amendment was improper, FAA has recognized procurement deficiency and given nature and state of procurement, termination for convenience would not be economically feasible at this time.

Macrow Construction Co., Inc. (Macrow), protests the award to Chateau Industries, Ltd. (Chateau), of a contract under invitation for bids (IFB) S055-5-48, issued on January 24, 1975, by the Department of Transportation, Federal Aviation Administration (FAA), for the remodeling of the communications center, regional office, East Point, Georgia.

Five bids were received for opening on February 14, 1975. The bid of Chateau was the lowest received. However, Chateau's bid failed to acknowledge amendment No. 1. Amendment No. 1, issued on February 4, 1975, deleted exhibit "A," Davis-Bacon wage rate Decision AR-4051, Clayton County, Georgia, which had

been incorporated in the IFB, and substituted therefor wage rate Decision AR-4029, Clayton County, Georgia. By letter of February 14, 1975, Chateau acknowledged that it "* * * was unaware that an Amendment No. 1 had been issued * * *" but that it "* * * estimated all labor for the aforementioned IFB to comply with the provisions of the Davis Bacon Act."

Notwithstanding Chateau's failure to acknowledge amendment No. 1, the contracting officer decided to make the award to Chateau based upon his Determination and Findings, dated February 20, 1975, wherein it is stated that Chateau's

> "* * * failure to acknowledge receipt of Amendment Number 1 is a minor informality in accordance with the provisions of FPR 1-2.405(d)(2) in that the price of their bid would not have been affected by receipt of Amendment Number 1 since the contractor already complies with the Davis-Bacon Act and pays the prevailing labor rate in the Metropolitan Atlanta area and based his bid price upon those rates * * *."

The contracting officer also determined that:

> "* * * this minor informality is therefore waived in accordance with FPR 1-2.405(d)(2) * * *."

Finally, the contracting officer further determined by a Determination and Findings dated February 27, 1975, to issue a Notice to Proceed to Chateau notwithstanding receipt of Macrow's protest against award. This determination was based upon the contracting officer's finding that "* * * an urgency to have this work completed as soon as possible still exists * * *."

It is this sequence of events that Macrow protests against. Macrow contends that Chateau's failure to acknowledge amendment No. 1 was not a minor informality, as it directly affects the price of Chateau's bid, and therefore should not have been waived.

By letter dated April 8, 1975, the Assistant Chief Counsel, Procurement Legal Division, FAA, has agreed, correctly we believe, with Macrow that the failure to acknowledge amendment No. 1 was

not a minor informality, thus rendering Chateau's bid nonresponsive. This conclusion was reached in view of our decision in Hartwick Construction Corporation, B-182841, February 27, 1975, wherein we stated that:

> "A statement of the Department of Labor's minimum wage rates applicable to the invitation was required under the provisions of the Davis-Bacon Act, 40 U.S.C. § 276a, which reads, in part, as follows:
>
> > '(a) the advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, or public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union, or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed, or in the District of Columbia if the work is to be performed there; * * *'" (Emphasis supplied.)

and then reaffirmed our position taken in B-157832, November 9, 1965, by stating that:

> "'Since the wage rates payable under a contract directly affect the contract price, there can be no question that the IFB provision requiring the payment of minimum wages to be prescribed by the Secretary of Labor was a material requirement of the IFB as amended. As stated previously, the requirements of the Davis-

> Bacon Act were met when the amendment furnishing the minimum wage schedule was issued, the purpose of the Act being to make definite and certain at the time of the contract award the contract price and the minimum wages to be paid thereunder. 17 Comp. Gen. 471, 473. In such circumstances, it is our view that a bidder who failed to indicate by acknowledgment of the amendment or otherwise that he had considered the wage schedule could not, without his consent, be required to pay wage rates which were prescribed therein but which were not specified in the original IFB, notwithstanding that he might already be paying the same or higher wage rates to his employees under agreements with labor unions or other arrangements. Accordingly, in our opinion, the deviation was material and not subject to waiver under the procurement regulation. B-138242, January 2, 1959. Furthermore, to afford you an opportunity after bid opening to become eligible for award by agreeing to abide by the wage schedule would be unfair to the other bidders whose bids conformed to the requirements of the amended IFB and would be contrary to the purpose of the public procurement statutes. B-149315, August 28, 1962; B-146354, November 27, 1961.'"

Accordingly, the only issue for resolution is what, if any, corrective action may be taken at this point in time.

Although Macrow has urged that the award to Chateau be terminated as having been improperly made, Chateau and FAA have stated that the contract has been substantially performed and that termination of the contract for the convenience of the Government would not be in the best interest of the Government. Given the nature of this procurement and its current state of performance, we must agree that it would not be economically feasible to recommend termination for the convenience of the Government at this time.

Deputy Comptroller General
of the United States