DECISION

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

50954

FILE: B-184169 DATE: July 30, 1975 97329

MATTER OF: Kuckenberg-Arenz

DIGEST:

1. Failure to acknowledge (prior to bid opening) amendment incorporating Davis-Bacon wage determination in IFB rendered bid nonresponsive notwithstanding bidder's contention that wages in its region are greater than those found in the amendment, 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 Davis-Bacon Act, 40 U.S.C. § 276a (1970).

2. Failure to acknowledge wage determination amendment may not be waived as minor informality in bid under accepted procurement practices since amendment affected price of bid.

Kuckenberg-Arenz (K-A) protests the award to the Roy D. Garren Corporation (Garren) of a contract under solicitation (IFB) No. R6-75-125, issued on May 5, 1975, by the Forest Service, United States Department of Agriculture, Portland, Oregon, for the construction of a new access road in the Mount Hood National Forest, Clackamas, Oregon.

Five bids were received for opening on June 3, 1975. The bid of K-A was the lowest received. However, K-A's bid failed to acknowledge amendment No. 1. Amendment No. 1 was issued May 19, 1975, and it contained Wage Determination Decision No. OR75-5055 with the statement that the wage decision was incorporated into the solicitation and any resultant contract. The amendment also stated that failure to acknowledge the amendment would result in rejection of the bid as nonresponsive.

The contracting officer by letter dated June 6, 1975, notified K-A that its bid had been rejected as nonresponsive for failure to acknowledge the Davis-Bacon Wage Determination amendment. K-A contends that even though it had failed to attach amendment No. 1 to its bid, or acknowledge it on standard form 21, by completing Standard Form 19-A (Labor Standards Provisions Applicable to Contracts in Excess of $2,000), it had agreed to comply with the

Davis-Bacon Act, 40 U.S.C. § 276a (1970), including amendment No. 1 which was in effect at the time the bid was submitted. K-A further contends that wages in its region are greater than those found in amendment No. 1 and, therefore, the failure to acknowledge amendment No. 1 has no effect on price, quantity, quality, or delivery and should be waived under Federal Procurement Regulations § 1-2.405(d)(2) (1964 ed.).

We agree with the contracting officer's decision that the failure to acknowledge amendment No. 1 was sufficient to render K-A's bid nonresponsive. Since the prevailing wage rate directly affects a bidder's price, the failure to acknowledge a wage determination amendment is not an error which can be waived. This conclusion is in keeping with 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:
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> > "'(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.)

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"Protests regarding the effect of a bidder's failure to acknowledge an addendum have been the subject of several prior decisions of this Office. See B-176399, January 9, 1973; B-175936, June 20, 1972, and decisions cited therein. The established general rule applicable under those circumstances is that the failure of a bidder to acknowledge receipt (in a manner required by the solicitation) of an amendment which could affect the price, or quantity of the procurement renders the bid nonresponsive. 37 Comp. Gen. 785 (1958). The rationale for this rule is that generally such a bidder would have an option to decide after bid opening whether to become eligible for award by furnishing extraneous evidence that a material addendum had been considered or to avoid award by remaining silent. See 41 Comp. Gen. 550 (1962) and decisions cited therein.

"The application of the general rule to a bidder's failure to acknowledge an addendum containing a wage determination has also been considered by this Office. See Matter of Lambert Construction Company, B-181794, August 29, 1974. In 51 Comp. Gen. 500 (1972) we reaffirmed the position taken in B-157832, November 9, 1965, wherein we stated:

"'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.'"

The position taken by counsel for K-A in his letter of June 10, 1975, that the bidder by virtue of agreeing to comply with standard form 19-A had agreed to comply with the wage determination in effect at the time of bid opening is without merit. Since the bidder did not acknowledge amendment No. 1, it was not bound by its terms. Therefore, at the time of bid opening, the Government could not have enforced all the terms and conditions of the solicitation. As we stated in B-171062, December 17, 1970:

> "* * * the controlling consideration in this and similar cases is that where a bidder fails to acknowledge an amendment of substance, his bid is nonresponsive because acceptance of the bid in the form it exists at the time of opening would not result in a contract containing a statement of the minimum wage rates to be paid as required by the Davis-Bacon Act, 40 U.S.C. 276a. See B-169581, May 8, 1970."

We have reviewed our decision at 52 Comp. Gen. 544 (1973) cited by counsel for K-A and find it is inapplicable. That case did not involve a wage determination amendment but merely an amendment which would have only a trivial or negligible effect on the total price of the bid. The amendment in the instant case contains a statutory requirement which by definition is neither trivial nor negligible and therefore cannot be waived. In Macrow Construction Co., Inc., B-183299, May 28,

1975, our Office held that failure to acknowledge a wage determination amendment may not be waived as a minor informality in the bid under accepted procurement practices. Therefore, we believe the case cited by counsel is distinguishable from the instant situation and is not for application.

For the foregoing reasons, the protest must be denied.

Deputy Comptroller General
of the United States