DECISION

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

ce0357

FILE: B-184228 DATE: January 2, 1976

MATTER OF: Porter Contracting Company

0993 ~~370~~ 265

DIGEST:

1. Failure to acknowledge material amendment to IFB which was received and acknowledged by all other bidders justifies rejection of bid even though bidder claims it was never received so long as there was no deliberate and conscious effort on part of agency to exclude bidder from competition.

2. Bid which failed to acknowledge IFB amendment increasing Davis-Bacon wage rate was properly rejected as nonresponsive, since failure to acknowledge amendment was material deviation. Fact that work to be performed by craft listed in amendment (bricklayer) was not specifically required under specifications is immaterial as agency determined that, in course of contract performance, craft could be employed. However, recommendation made that procedures be instituted to assure wage determination modifications are reviewed to ascertain applicability to contract prior to inclusion in amendment.

On May 8, 1975, the National Institutes of Health, Bethesda, Maryland (NIH), issued invitation for bids (IFB) No. NIH-75-B(91)-254 for the renovation of laboratory modules. Porter Contracting Company (Porter) has protested the rejection of its low bid for failing to acknowledge amendment No. 1 to the IFB.

Modification No. 2 to Wage Determination MD-75-3003 contained in the IFB was published in the Federal Register on May 9, 1975, and subsequently incorporated in amendment No. 1 dated May 21, 1975. This modification increased the wage rate for bricklayers.

Following the opening of bids on June 4, 1975, a protest was lodged with the contracting officer by the second low bidder, Crystal Construction Company (Crystal), contending that amendment No. 1 was material and that the failure of Porter to acknowledge it rendered Porter's bid nonresponsive.

Prior to ruling on the protest, the contracting officer inquired of the Construction Engineering Services Branch (CESB), NIH, as to whether a bricklayer would be required during the

PUBLISHED DECISION
55 Comp. Gen. .....

performance of the contract. The CESB advised the contracting officer that while the specifications did not specify any new construction involving masonry, "* * * the work will require some alteration of existing masonry partitions. Repairs could require the use of a bricklayer to assure structural integrity and compliance with contract requirements." Because of the above advice, the contracting officer determined that a bricklayer might be needed during performance and, therefore, the failure of Porter to acknowledge the amendment rendered the bid nonresponsive.

Following the rejection of Porter's bid, on June 12, 1975, the contracting officer awarded the contract to Crystal, the second low bidder.

Porter has protested the rejection of its bid on the grounds that it never received the amendment and that the amendment was not material.

Regarding the failure of Porter to receive the amendment, the contracting officer states that a systematic approach was used to mail the amendment to all bidders and that all other bidders received and acknowledged the amendment. Generally, if a bidder does not receive and acknowledge a material amendment to an IFB and such failure is not the result of a conscious and deliberate effort to exclude the bidder from participating in the competition, the bid must be rejected as nonresponsive. Mike Cooke Reforestation, B-183549, July 2, 1975, 75-2 CPD 8. Based on the record, we have no reason to believe the failure of Porter to receive the amendment was the result of a deliberate attempt on the part of NIH to exclude it from competition.

Addressing now the question of the materiality of the amendment, the wage rates contained in the IFB are required to be included in all construction contracts by the Davis-Bacon Act, 40 U.S.C. § 276a (1970). Therefore, the failure of a bid to contain the current wage rates, in effect at the time of bid opening, required rejection of that bid. I-K Electric Company, Inc., B-184332, July 17, 1975, 75-2 CPD 47.

Accordingly, the crucial question is whether bricklayers would be required in the performance of the instant contract and, therefore, entitled to protection under the Davis-Bacon Act.

Upon review of the specifications contained in the IFB, we agree with NIH that there is the possibility that a bricklayer may be required during the course of contract performance. Also, the protester has submitted no evidence to indicate to the contrary. Therefore, amendment No. 1 contained a material wage determination and the failure of Porter to acknowledge it rendered the bid nonresponsive.

Porter argues that this result allows the contracting agency to outline the manner and method of performance to be used by the contractor to insure compliance with the wage determination and that this broad discretion residing in the contracting officer will produce inconsistent and unfair results as to which wage determination should apply. Porter requests our Office to establish more definite guidelines in this area.

We believe it would be most difficult to establish definite guidelines in this area because each contracting officer's determination must be based on the particular specifications contained in an IFB on a case by case basis.

However, in the past, our Office has recognized that a determination such as was made in the instant case following bid opening is not as preferable as one made prior to the inclusion of a wage determination modification in an amendment. In connection with Prince Construction Company, B-184192, November 5, 1975, we made the following comments to the Acting Administrator, General Services Administration, in a seperate letter of the same date:

> Finally, today's decision, B-184192, is based on an after-the-fact determination that Amendment No. 1 [containing a wage rate modification] was inapplicable. We consider the necessity for employing hindsight regrettable where the matter could have been resolved by a similar determination prior to issuance. Consequently, our decision recommends that

Davis-Bacon wage rate determinations be surveyed prior to issuance to ascertain their applicability to the contract work involved.

"We expect that, by bringing the above-mentioned matters to your attention, we can prevent the recurrence of such difficulties in future procurements. We would appreciate being advised of actions taken pursuant to our recommendations."

While NIH reached the conclusion here that the wage modification was applicable, we believe it would have been better to consult with the CESB prior to the issuance of amendment No. 1 rather than following the bid opening and subsequent protest by Crystal.

Accordingly, while we find the rejection of Porter's bid to have been proper and the protest is denied, we are recommending, by letter of today to the Secretary of Health, Education, and Welfare, that consideration be given to instituting procedures to assure the review of the applicability of wage determination modifications to a specific procurement prior to the issuance of an amendment incorporating such modification.

Paul G. Dembling

Acting Comptroller General
of the United States