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DECISION

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

FILE: B-209098 DATE: January 4, 1983

MATTER OF: Brutoco Engineering & Construction, Inc.

DIGEST:

When union contract would require offeror to pay wages in excess of rates determined under Davis-Bacon Act, and acceptance of bid which failed to acknowledge amendment containing wage determination clearly has no prejudicial effect on competition, offeror may be permitted to cure defect by agreeing to amendment after bid opening.

Brutoco Engineering & Construction, Inc. protests award to anyone but itself under Invitation for Bids (IFB) N62474-82-B-0244 issued by the Naval Air Station, Alameda, California. The solicitation requested bids to repair concrete aprons at the Naval Air Station. The Navy rejected Brutoco's bid as nonresponsive because it failed to acknowledge amendment 1 containing a revised wage determination under the Davis-Bacon Act, 40 U.S.C. § 276(a) (1976) (the Act).

Brutoco recognizes that its bid was defective in failing to acknowledge the amendment, but Brutoco maintains that the defect should be waived. Brutoco points out that it bid $1,399,600, compared with $1,494,843 bid by the next low offeror. Brutoco asserts that it did not receive a copy of the amendment.

According to Brutoco, the only class of labor affected by the amendment is cement masons; the difference in the minimum wage rate for this labor classification in the original determination and in the amendment is $1.15 per hour; and the total

difference in cost for the entire contract is less than $800.00[1]. Brutoco asserts that it is obligated to pay a wage rate in excess of the minimum shown on the wage rate amendment because of its union agreement.

The issue as we view it is twofold--(1) whether Brutoco obtained any actual or theoretical competitive advantage as a result of its failure to acknowledge the amendment, thus adversely affecting the competitive bid system; and (2) whether there would be an adverse effect on the interests protected by the Act. We are of the opinion that under the circumstances of this case, neither the competitive bid system nor the Act will be subverted by an award to Brutoco.

We have, in limited circumstances, permitted a bidder to cure a defect in an otherwise responsive bid. For example, where an invitation requires a price on every item in a solicitation, a bid that does not contain a price for an item is generally considered to be nonresponsive and must be rejected. This is so because the bidder is not legally obligated to perform the work represented by the missing price. We have, nonetheless, permitted correction of such a bid where the bid not only indicates the possibility of the error, but also its exact nature and the price involved. This exception to the general rule is premised on the theory that where the consistency of the pricing pattern on the bid establishes the error and the price, to hold the bid nonresponsive would convert an obvious clerical error of omission to a matter of responsiveness. E.g., Selland Construction, Inc., B-201701.2, May 19, 1981, 81-1 CPD 383.

The procurement regulations also recognize, and we have permitted, the waiver of a bid's technical nonresponsiveness where it was shown that the deviation did not have any relative impact on bid prices because

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[1]About .8 percent of the $95,213 difference between Brutoco's bid and that of the second low bidder. There is no evidence on the record to rebut these assertions.

its effect was de minimus. See Roarda, Inc., B-192443, November 22, 1978, 78-2 CPD 359. In Roarda, we considered the possible impact of price to the Government of .1 percent of the low bidder's total price and 4 percent of the difference between the low and the second lowest bid to be so insignificant as to permit the waiver of the deviation as a minor informality.

When we view the facts of this case in relation to the factors discussed above, we conclude that, at least insofar as the effect on the competitive bid system is concerned, Brutoco's failure to acknowledge the amendment cannot reasonably be construed to affect the competition such that the competitive bid system will be adversely affected if the firm is permitted now to cure the defect by acknowledging the amendment.

However, we also recognize that the Act's principal purpose is to protect a contractor's employees from substandard earnings by fixing a floor under wages on Government projects. United States v. Binghamton Construction Co., Inc., 347 U.S. 171 (1953). For that reason, we have always held that the failure to acknowledge a wage rate determination is a material deviation that cannot be waived because the absence of such an acknowledgment would not legally obligate the bidder to pay the specified wages to its employees. Air Services Company, B-204532, September 22, 1981, 81-2 CPD 240.

Yet, there are circumstances as a practical matter where the rights of these employees are protected--not by any act of the Government--but through the contractual relationship of the employees' union and the employer/bidder. Thus, where it can be shown that the employees in question are in fact covered by a contract that legally binds the employer/bidder to pay wages not less than the Secretary of Labor's minimum wage rate determination, we think that the employees have been protected from the evils the Act was designed to foreclose. Because of its legal obligation under a union contract, we do not see how a bidder could refuse to acknowledge a wage rate determination after bid opening by claiming it did not intend to pay the wages set forth in it. Thus, the employer/bidder's ability to disavow its bid on the basis of the wage rate determination alone is so remote that it can be disregarded.

We also recognize that there are other administrative factors involved in the protection of the employees' right to adequate payment, such as the right of the Government to withhold payments to the contractor to the extent necessary to pay the employees the difference between the wages actually paid and those required by the determination. 40 U.S.C. § 276a.

For that reason, we believe the wage rate determination must be acknowledged prior to award, to afford the full panoply of protection contemplated by the Act.

We think, then, that under the circumstances of this case, the failure to acknowledge the amendment is immaterial and that Brutoco should be permitted to cure the technical deficiency in its bid by acknowledging the amendment.

The protest is sustained.

for Milton J. Socolar
Comptroller General
of the United States