

DECISION



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

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FILE: B-213228

DATE: March 5, 1984

MATTER OF: Protex Systems, Inc.

DIGEST:

1. An amendment is material, and thus rejection of a bid that fails to include written acknowledgment of it is proper, where the amendment revises a wage rate for carpenters, and there is a reasonable possibility under the provisions of the specifications that the services of carpenters will be needed.
2. The oral acknowledgment of a material amendment is not permissible.
3. Where the only evidence on an issue is the conflicting statements of the contracting agency and the protester, the protester has not met its burden of affirmatively proving its case.

Protex Systems, Inc. protests the rejection of its bid as nonresponsive under invitation for bids No. F05600-83-B0051 issued by the Department of the Air Force. The solicitation sought the furnishing and installation of smoke and heat detectors, and the replacement of a fire alarm panel. The contracting officer rejected Protex's bid because the firm failed to acknowledge with its bid an amendment that revised a wage rate under the Davis-Bacon Act, 40 U.S.C. § 276(a) (1976). Protex contends that the amendment was not material. The firm also asserts that, in any event, it acknowledged the amendment verbally. Finally, Protex argues that it relied on oral advice from a contracting official that it need not acknowledge the amendment.

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We deny the protest.

Where a reasonable possibility exists that a certain trade's services will be required in the performance of a contract, an amendment revising the wage rate for that trade is material. Porter Contracting Company, B-184228, January 2, 1976, 76-1 CPD 2. Thus, the failure to acknowledge such an amendment may not be waived, since without acknowledgment a bidder legally cannot be required by the government to pay the wages prescribed in the amendment. See, e.g., Morris Plains Contracting Inc., B-209352, October 21, 1982, 82-2 CPD 360; X-Cel Constructors, Inc., B-206796, April 5, 1982, 82-1 CPD 311. The waiver of the failure to acknowledge a wage-rate amendment is permissible only where a bidder is already obligated under a collective bargaining agreement to pay employees at the revised rate, the impact of the wage revision on the bidder's price is minimal, and waiver would not otherwise be prejudicial. Brutoco Engineering Construction, Inc., 62 Comp. Gen. 111 (1983), 83-1 CPD 9.

Protex asserts here that the amendment was immaterial because the services of carpenters, which was the trade covered by the revised wage rate, would not be used in the performance of the contract and thus the amendment did not affect Protex's bid price. The Air Force argues that the services of a carpenter might well be needed since the solicitation specifically required the contractor to repair damage caused by contract performance.

We agree with the Air Force. Here, the specifications stated the following:

"Damage to the building caused by the contractor's activity shall be repaired to match existing construction at the contractor's expense. Holes or voids left by the removal of fixtures, trim, ducts, plugs, vents, and similar items will be considered as damage and repaired as such to match existing adjacent work."

In our view, that provision clearly described circumstances under which carpentry services might become necessary. Protex has presented no evidence to support its

position that the need for those services would never arise during contract performance. We believe therefore that the amendment was material. Since Protex has not alleged any facts that would permit consideration of its bid under our Brutoco decision, supra, we conclude that Protex was required to acknowledge the amendment in order for its bid to be responsive.

Protex argues that it orally acknowledged the amendment during a pre-bid opening telephone conversation with a contracting official. The oral acknowledgment of a material amendment, however, is not permissible. MET Electrical Testing, Inc., 60 Comp. Gen. 321 (1981), 81-1 CPD 202. Therefore, rejection of Protex's bid for failure to acknowledge the amendment was proper.

Finally, Protex contends that it did not acknowledge the amendment in writing because a contracting official implied during the pre-bid opening telephone conversation with the firm that acknowledgment was not necessary. The Air Force disagrees. Where, as here, the only evidence on an issue is the conflicting statements of the parties, the protester has not met its burden of affirmatively proving its case. We find Protex's contention therefore to be without merit. See Holley Electric Construction Co., Inc., B-209384, January 31, 1983, 83-1 CPD 103.

The protest is denied.

Milton J. Fowler
for Comptroller General
of the United States