

**DECISION**

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

**FILE:** B-216008

**DATE:** October 23, 1984

**MATTER OF:** Vector Telecom, Inc.

**DIGEST:**

1. Only a specific Davis-Bacon wage rate determination included in a solicitation can legally bind a contractor under the Davis-Bacon Act to pay the rates specified in the solicitation.
2. A bidder can cure its failure to acknowledge the receipt of an amendment containing a wage determination only where no competitive advantage would accrue to the bidder and the bidder's employees are already covered by a collective bargaining agreement which requires the bidder to pay them at the wage rate included in the amendment.
3. Protest regarding insufficient notice of a solicitation's wage determination amendment is untimely when notice was received before bid opening, there was no effort to request an extension of the bid opening date and protest was filed after bid opening.

Vector Telecom, Inc. protests the rejection of its bid as nonresponsive under invitation for bids No. N62474-84-B-4508 issued by the Naval Facilities Engineering Command. The solicitation was for engineering, installation and maintenance of telephone equipment in selected northern California Navy facilities. The Navy rejected Vector's bid for failure to acknowledge with its bid an amendment that contained a wage determination under the Davis-Bacon Act, 40 U.S.C. § 276(a) (1982) (the Act). Vector argues that its failure to acknowledge the amendment was a minor informality and should be waived because

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its bid was based on wage rates higher than those required under the Act. The firm also argues that it was not given sufficient time to respond to the amendment because it received notice of the amendment 1-1/2 days before the bid opening.

We deny the protest in part and dismiss it in part.

Vector argues that its failure to acknowledge the wage determination amendment was a minor informality because it accepted a solicitation which included a clause stating:

"Minimum Wage Rates and Other Labor Standards

(a) The minimum wages required to be paid for work under this specification have been requested from the Department of Labor and will be issued by amendment upon receipt."

According to Vector, this clause incorporates by reference the wage rate determination, and a formal acknowledgment of the determination is therefore unnecessary.

We believe such a clause is not an acceptable substitute for acknowledging the wage rate amendment. The Act specifically requires that "the advertised specifications . . . shall contain a provision stating the minimum wages to be paid . . . which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing." 40 U.S.C. § 276a. In construing this statutory language, we have held that, as a general rule, the minimum wage rates so required cannot be incorporated in a contract in any way other than as stipulated in the statute, that is, by inclusion in the specifications upon which bids or proposals leading to the contract were invited. 42 Comp. Gen. 410 (1963); 40 Comp. Gen. 565 (1961). We have also held that a solicitation provision to the effect that contractors shall pay minimum wage rates as determined by the Secretary of Labor would not be an acceptable substitute for including the specific wage rate determination in the solicitation as required by the statute. 40 Comp. Gen. 48 (1960).

Because the clause quoted by Vector does not incorporate a specific wage rate determination into the solicitation, it does not legally bind Vector to pay the determined wage rate. Thus, Vector's failure to acknowledge the wage determination amendment was not a minor informality.

Vector's contention that its failure to acknowledge the amendment can be waived under the circumstances of this case is also not well taken. In some limited circumstances a bidder can cure its failure to acknowledge a wage determination amendment where no competitive advantage would accrue to the bidder (such as where the impact of the wage rates in the amendment on the bid price is minimal and there is significant difference between the bid in question and the next low bid) and the bidder's employees are already covered by a collective bargaining agreement which requires the bidder to pay them at the wage rate included in the amendment. Brutoco Engineering & Construction, Inc., 62 Comp. Gen. 111 (1983), 83-1 CPD ¶ 9. Our Brutoco decision recognized that where a bidder is legally obligated under a union contract to pay wages higher than the minimum wage rate determination, the bidder cannot refuse to acknowledge the determination after bid opening by claiming it did not intend to pay the wages set forth in it.

Vector has stated that it has no collective bargaining agreement. The fact that its bid was allegedly based on wage rates higher than those required by the wage determination does not legally obligate Vector to pay the wages required by the determination. Thus, the Navy acted correctly in rejecting Vector's bid as nonresponsive for failure to acknowledge the wage determination amendment.

Vector also objects to receiving notice of the wage determination amendment 1-1/2 days before the official bid opening, contending that it did not have sufficient time to analyze the amendment and properly respond to it. There is no evidence, however, that Vector asked for an extension of the bid opening date. Vector's objection concerns an impropriety in the solicitation. Our Bid Protest Procedures require that a protest alleging improprieties in

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an IFB must be filed prior to bid opening when the improprieties are apparent prior to bid opening. 4 C.F.R. § 21.1(b)(1) (1984). Because Vector's objection was raised after bid opening, it is untimely and we will not consider it on the merits. Echelon Service Co., 62 Comp. Gen. 542 (1983), 83-2 CPD ¶ 86.

The protest is denied in part and dismissed in part.

A handwritten signature in black ink, reading "Milton J. Aoulan". The signature is written in a cursive, flowing style.

Acting Comptroller General  
of the United States