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**DECISION**

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

**FILE:** B-220199.3 **DATE:** December 16, 1985

**MATTER OF:** Action Porta Systems, Inc.--Reconsideration

**DIGEST:**

A prior decision dismissing a protest is affirmed where the protester did not show the existence of the limited circumstances under which the protester's failure to acknowledge a solicitation amendment, incorporating minimum wage rates determinations under the Services Contract Act, may be corrected.

Action Porta Systems, Inc. request reconsideration of our decision in Action Porta Systems, Inc., B-220199.2, Nov. 8, 1985, 85-2 CPD ¶ ___, where we dismissed Action's protest against the Department of the Army's rejection of Action's bid as nonresponsive under invitation for bids (IFB) No. DABT35-85-B-0119 for the rental and maintenance of portable toilets. We find no error in our original decision.

The Army rejected Action's bid as nonresponsive because the firm failed to acknowledge an amendment to the IFB incorporating wage rate determinations under the Service Contract Act, 41 U.S.C. §§ 351-358 (1982). We dismissed the protest because we found that Action had not alleged the existence of the limited circumstances under which a protester may correct its failure to acknowledge a solicitation amendment incorporating minimum wage determinations.[1/] Action contends that our conclusion was incorrect, and asserts that its protest is within the

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[1/] The general rule is that failure to acknowledge a wage rate amendment, upwardly revising the wage rate for a labor category to be employed under the contract, renders a bid nonresponsive because without acknowledgment of such an amendment a bidder is not legally obligated to pay the wages prescribed in the amendment. TCA Reservations, Inc., B-218165, Aug. 13, 1985, 85-2 CPD ¶ 163.

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exception established by U.S. Department of the Interior--Request for Advance Decision, et al., 64 Comp. Gen. 189 (1985), 85-1 CPD ¶ 34.

In U.S. Department of the Interior the bidder did not acknowledge an IFB amendment incorporating a revised wage rate determination under the Davis-Bacon Act, 40 U.S.C. § 276a (1982). We noted that the amendment affected only one labor category (electricians) under the contract, with the hourly fringe benefits for that category being increased by $1.00, and that the amount of electrical work required for the project was minimal, amounting at most to 1500 man-hours of effort. We concluded that since the increased benefits the contractor would be required to pay represented only .013 percent of the difference between the low and second low bids, the agency could treat the low bidder's failure to acknowledge the wage rate amendment as a minor informality and permit bid correction after bid opening but prior to award.2/

Action argues that the facts in its case fulfill all the requirments of our decision in U.S. Department of the Interior because the amendment here had no effect on Action's price since Action's actual pay scale is within the guidelines of the amendment; the contracting officer originally was amenable to treating Action's failure to acknowledge the amendment as a minor informality (he later changed his mind), and Action did acknowledge the amendment after bid opening. We disagree and find that Action's reading of our decision is too broad.

Action ignores the fact that in U.S. Department of the Interior the wage rate amendment affected only one labor category employed under the contract, increased the required fringe benefit payments by only $1.00, and applied, at most, to 1500 man-hours of effort in an $11.4 million contract. Our decision that failure to acknowledge the wage rate amendment there could be treated as a minor informality thus was not predicated merely on the fact that the wage rate amendment had a de minimis effect on price, but also on the fact that the actual effect of the amendment on the low

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2/We have also permitted a bidder to correct its failure to acknowledge a wage rate determination amendment where the effect on bid price was de minimis and the bidder was otherwise obligated under a collective bargaining agreement to pay wages exceeding the revised wage rate. See Brutoco Engineering and Construction, Inc., 62 Comp. Gen. 111 (1983), 83-1 CPD ¶ 9. Action does not allege the existence of a collective bargaining agreement in this case, however.

bidder's material contractual obligation was minimal. Action has not alleged that the same circumstances exist here.

We note that it appears from the record that Action was not legally obligated under the terms of the IFB to pay any amount under the Service Contract Act. Instead, it appears that the wage rate amendment that Action failed to acknowledge incorporated Service Contract Act wage rates into the IFB for the first time (rather than simply upwardly revising rates already established in the IFB, as was the case in U.S. Department of the Interior). Further, Action's allegation that it already pays its employees more than the wage rates established by the amendment obviously does not establish that the firm was legally obligated to do so.

Accordingly, our prior decision dismissing Action's protest is affirmed.

for Seymour Efros
Harry R. Van Cleve
General Counsel