The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: ABC Paving Company

File: B-224408

Date: October 16, 1986

DIGEST

Failure to acknowledge IFB amendment increasing wage rates cannot be cured after bid opening by bidder whose employees are not covered by collective bargaining agreement binding firm to pay wages not less than those prescribed by Secretary of Labor. Decision in United States Department of the Interior--Request for Advance Decision, et al., 64 Comp. Gen. 189 (1985), 85-1 C.P.D. ¶ 34, which holds otherwise, is overruled.

DECISION

ABC Paving Company, the second lowest bidder, protests the Army's award of a contract to Souter Asphalt Paving, the lowest bidder, under invitation for bids (IFB) No. DACA27-86-B-0044 issued by the United States Army Engineer District (Army), Louisville, Kentucky, for repair of an armored vehicle test track. ABC contends that Souter's bid is nonresponsive because Souter failed to acknowledge a Davis-Bacon Act wage rate amendment that increased the cost of performance. ABC further contends that the defect in Souter's bid cannot be waived or cured as a minor informality under Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.405(d)(2) (1985), which permits consideration of a bid rendered nonresponsive by failure to acknowledge an amendment if the amendment has merely a negligible effect on price, quantity, quality, or delivery of the work.

We sustain the protest.

The IFB requires test track repairs including: (1) partial resurfacing of the track; (2) removal and reconstruction of an existing concrete and steel undulating course, (3) rehabilitation of the track shoulders, and (4) drainage improvements. The IFB was amended once to include a revised

Davis-Bacon Act wage rate determination increasing the wages payable to some classes of construction workers while decreasing the wages payable to others. The revised wage rate determination covers 16 classes of construction workers and applies to all airport, bridge, highway and sewer construction in the state of Michigan.

Souter submitted the low bid of $418,722, while ABC was second low, bidding $428,800. The Army noted Souter's failure to acknowledge the wage rate amendment at bid opening and immediately began evaluating the changes in the revised wage rate determination to ascertain their materiality for purposes of FAR, 48 C.F.R. § 14.405(d)(2). Since the amendment affected only wages and not construction specifications, the evaluation focused on the effect of the amendment on price. The evaluation assumed that the contractor would mark-up direct labor cost 20 percent for overhead, 10 percent for profit and 1.44 percent for bonds. It further assumed that the contractor's direct labor costs were: truck drivers - 30 percent; equipment operators - 30 percent; and laborers and other trades - 40 percent. These assumptions were then applied to the three labor classes (cement masons, truck drivers, and iron workers) affected by the revision. On this basis, the Army calculated the net effect of the revision as a cost increase of less than $1,000, or approximately 0.2 percent of Souter's low bid. The Army concluded that the amendment had only a negligible effect on price and that the government could consider Souter's bid.

The Army advised Souter of the effects of the amendment, and Souter acknowledged the amendment agreeing to abide by its terms at no change in bid price. The Army then awarded Souter the contract. In doing so, the Army relied on our decision in United States Department of the Interior--Request for Advance Decision, et al., 64 Comp. Gen. 189 (1985), 85-1 C.P.D. ¶ 34, which allows a bidder to cure, after bid opening, a defect occasioned by the failure to acknowledge an amendment incorporating a revised wage rate provided the conditions exist for invoking the rules for correcting the defect as a minor informality under FAR, 48 C.F.R. § 14.405(d)(2).

ABC argues that the Army's evaluation of the cost impact of the wage rate revision is in error principally because the Army omitted two classes of necessary workers (open cut construction laborers, and underground construction power equipment operators) from its calculations. In this respect, the record shows that in calculating the amendment's impact the Army assumed that the instant work requires only seven of

the 16 classes of workers covered by the revised wage rate determination. ABC, however, believes that nine classes apply.

The principal purpose of the Davis-Bacon Act, 40 U.S.C. § 276(a) (1982), is to protect a contractor's employees from substandard earnings by fixing a floor under wages on government projects. Until our decision in Brutoco Engineering & Construction, Inc., 62 Comp. Gen. 111 (1983), 83-1 C.P.D. ¶ 9, our Office's traditional position had been that in view of that purpose a bid that failed to acknowledge an amendment revising wage rates had to be rejected as nonresponsive; without such acknowledgment the bidder could not legally be required by the government to pay the revised wages. We held that the bidder could not be given the option, after bid opening, to accept the obligation the wage rate amendment would impose or to refuse it and avoid the contract. See, e.g., Morris Plains Contracting Inc., B-209352, Oct. 21, 1982, 82-2 C.P.D. ¶ 360.

In Brutoco, however, we recognized that as a practical matter the rights of the employees may well be protected--although not by any government action--through the contractual relationship of the employees' union and the employer/bidder. We noted that if the employees in fact are covered by a contract that legally binds the employer/bidder to pay wages not less than the Secretary of Labor's wage rate determination, the employees are protected from the evils the Davis-Bacon Act was designed to foreclose; in that case, we did not see how the bidder really could refuse to acknowledge the wage rate amendment after bid opening by claiming it did not intend to pay the wages set forth in it.

In the Department of the Interior decision on which the Army relied in the present case, we modified Brutoco to extend the bidder's ability to cure the failure to acknowledge a wage rate amendment. We stated that even without a union agreement the interests of the affected employees would not suffer if the defect were cured after opening but before award, since the wage rates thus would be incorporated into the contract. We held that so long as the conditions existed for invoking the minor-informality rules in FAR, 48 C.F.R. § 14.405(d)(2)--basically, the amendment's effect on price clearly had to be de minimis--the failure to acknowledge a wage rate amendment did not render the bidder ineligible for award, and could be cured. In the period since that decision, which we issued on January 11, 1985, we have analyzed the issue in terms of the impact of the wage rate increase on the low bidder's bid and the difference between

the low and second low bids. See, e.g., Mike Vanebo, 64 Comp. Gen. 780 (1985), 85-2 C.P.D. ¶ 184; Reliable Service Technology, B-217152, Feb. 25, 1985, 85-1 C.P.D. ¶ 234.

The same matter involved in the Department of the Interior decision was the subject of litigation in the Claims Court. In its January 15, 1985, decision in Grade-Way Construction v. United States, 7 Cl. Ct. 263 (1985), the court conceded that the possible impact in price of the amendment's revised wage rate clearly was de minimis. The court disagreed, however, that the failure to acknowledge the amendment could be cured after bid opening:

> "Failure to acknowledge the amendment containing the modified schedules and rates can be treated as a minor formality only if the government can waive the provision. While the bidder here would take advantage of an opportunity to cure its defect and acknowledge the amendment, this option alone cannot render the bid responsive, for to permit such action would place a bidder in the position of having an election to take or avoid the contract after bid opening . . . . The opportunity of a bidder to cure must be taken into consideration only when there is a corresponding right of the government to waive the provision if such curative action is not taken. Here, the payment of specified rates is mandated by the [Davis-Bacon Act] and the government is powerless to waive such requirements. Thus, if [the bidder] were to prevail here, a rule would be established whereby the sole control over whether the bid was rendered responsive or not would rest with the bidder--an unacceptable procedure impugning the integrity of the entire competitive bidding system."

The court held that since the government had no option to waive the wage rate increases the bid had to be rejected as nonresponsive regardless of how negligible its impact might be. On reflection, we think the Claims Court's view is the better one.

In the Department of the Interior decision, we noted the small amount of the amendment's impact--$1,500, or .013 percent--on the bid price of $11.4 million, and its .495 percent impact on the difference between the two bids, $302,923. However, we do not think that factor should be used to establish a precedent that would permit a post-bid opening cure of a defect that could not be waived. Although the impact of a wage rate revision might be minimal relative

to the bid price, it may well be significant to the employees the Davis-Bacon Act is designed to protect. Moreover, the fact that the amendment's purpose could be accomplished by a post-bid opening acknowledgement is not relevant, since the bidder simply cannot be awarded the contract without such acknowledgement--the wage rate protection for the employees is mandated by statute--and the bidder thus could decide to render itself ineligible for award by choosing not to cure the defect. (In contrast, in Brutoco we pointed out that, as a practical matter, the bidder was not really in a position to disavow the revised rates in view of the union agreement involved.) As the Claims Court points out, and as established in our decisions on bid responsiveness, giving the bidder such control over the bid's acceptability compromises the integrity of the competitive procurement system; where a bidder is in that situation, the bid is nonresponsive. See, e.g., Johnson Moving & Storage Co., B-221826, Mar. 19, 1986, 86-1 C.P.D. ¶ 273.

For the above reasons, we adopt the Claims Court's view as expressed in Grade-Way Construction v. United States, and we hereby overrule our decision on this issue in the Department of the Interior case. Accordingly, and since the protest record does not establish that Souter had the necessary union contract, we agree with ABC that Souter should not have been permitted to cure its failure to acknowledge the wage rate revision, and that the bid therefore should have been rejected as nonresponsive. In this respect, however, we recognize that the Army, in relying on our Department of the Interior decision, may not have ascertained whether Souter in fact was subject to a collective bargaining agreement that bound it to pay wage rates equal to or greater than the rates set out in the unacknowledged wage amendment. If such an agreement applied, permitting Souter to cure its failure to acknowledge the wage rate revision would have been proper.

The protest is sustained. The Army has postponed the issuance of a notice to proceed pending resolution of the protest. By separate letter, we are recommending to the Secretary of the Army that, in the absence of the required agreement, Souter's contract be terminated for the convenience of the government and that an award be made to ABC, if otherwise appropriate.

for Harry R. Van Cleve
Comptroller General
of the United States