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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Tri-Tech International, Inc.

File: B-246701

Date: March 23, 1992

Douglas L. Patin, Esq., Kilcullen, Wilson and Kilcullen, for the protester.
Vicki E. O'Keefe, Esq., and Paul M. Fisher, Esq., Department of the Navy, for the agency.
Aldo A. Benejam, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency properly rejected as nonresponsive a bid that failed to acknowledge an amendment that contained a modification to the applicable wage determination, which increased wage rates, where there is no evidence that the bidder was legally required to pay its employees wages not less than those prescribed by the Secretary of Labor.

DECISION

Tri-Tech International, Inc. protests the rejection of its low bid as nonresponsive under invitation for bids (IFB) No. N62477-87-B-0305, issued by the Department of the Navy for the construction of a combat arms training facility, including an outdoor shooting range, at Andrews Air Force Base, Maryland. Tri-Tech contends that the Navy improperly rejected its bid as nonresponsive for failure to acknowledge amendment No. 0001 to the IFB because the amendment did not materially affect its bid.

We deny the protest.

The IFB was issued unrestricted on August 16, 1991. Amendment No. 0001 to the IFB, issued August 27, included a modified wage rate determination under the Davis-Bacon Act, 40 U.S.C. § 276(a) (1988), that increased the wage rate for two labor categories, millwrights and material handlers. The agency received 12 bids by the September 26 extended bid opening date. Although Tri-Tech submitted the apparent low bid of $967,700, the firm did not acknowledge amendment

No. 0001 to the IFB in its bid. Consequently, on November 6, the contracting officer rejected Tri-Tech's bid as nonresponsive and awarded the contract to the second low bidder. Tri-Tech states that after bid opening, upon learning that it had failed to acknowledge the amendment, it notified the agency that it considered itself bound by amendment No. 0001.

Tri-Tech contends that its failure to acknowledge the amendment should have been waived as a minor informality because the amendment had no upward impact on its bid price. The protester argues that one of the labor categories (millwrights) affected by the amendment is inapplicable here because the project does not involve millwright work. As for material handlers, Tri-Tech contends that although the hourly wage rate for that category actually increased (from $11.04 to $11.44), the hourly fringe benefit rate for that category was so significantly reduced (from $3.05 to $2.30), that based on the sum of the hourly fringe benefit rate and the hourly wage rate, the amendment actually had a net effect of reducing (from $14.09 to $ $13.74) the total amount paid to material handlers.

Generally, a bid which does not include an acknowledgment of a material amendment must be rejected. Absent such acknowledgment, the bidder is not obligated to comply with the terms of the amendment, and its bid is thus nonresponsive. LaCorte ECM, Inc., B-231448.2, Aug. 31, 1988, 88-2 CPD ¶ 195. The amendment here is material because the prescribed wage rates are mandated by the Davis-Bacon Act, so that if an agency were to give the bidder an opportunity to acknowledge a wage rate amendment after bid opening, regardless of how de minimus, the bidder could decide to render itself ineligible for award by choosing not to cure the defect. Grade-Way Construction v. United States, 7 Ct. Cl. 263 (1985). The bid thus must be rejected as nonresponsive where the bidder is not already obligated to pay wages not less than those prescribed, for example, where the bidder's employees are already covered by a collective bargaining agreement binding the firm to pay wages not less than those prescribed by the Secretary of Labor and reflected in the new wage determination. ABC Paving Co., 66 Comp. Gen. 47 (1986), 86-2 CPD ¶ 436; LaCorte ECM, Inc., supra. Here, since there is nothing in the record showing that Tri-Tech's employees are covered by an appropriately binding collective bargaining agreement or that the firm is otherwise legally obligated to pay the prescribed rates, Tri-Tech's failure to acknowledge amendment No. 0001 cannot be waived as a minor informality, and its bid was properly rejected as nonresponsive.

Tri-Tech relies on our decision in Davidson-Kelson, Inc., B-212551, Nov. 18, 1983, 83-2 CPD ¶ 589, to argue that the agency improperly rejected its bid. In that case, we permitted the agency to accept a bid that did not acknowledge an amendment which reduced the hourly wage rate for certain labor categories and increased the fringe benefit rate. The net effect of the amendment was to reduce the total hourly wage rates. The protester argues that since the net effect of the amendment here, as in Davidson-Kelson, Inc., was to reduce the total hourly wage and fringe benefit rate for material handlers, and since Tri-Tech would be obligated under its bid to pay the higher total rate, its bid should not have been rejected.

Regulations that implement the labor standard provisions of the Davis-Bacon Act require that all construction laborers and mechanics, such as those involved in Davidson-Kelson, Inc. and in this case, "be paid . . . the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) . . . computed at rates not less than those contained in the wage determination" incorporated into the contract. (Emphasis supplied.) 29 C.F.R. § 5.5(a)(1)(i). Because fringe benefits can be paid by cash equivalents, an employer may pay wages in lieu of fringe benefits and thereby meet its Davis-Bacon Act obligations, but it may not substitute fringe benefits for wages due under the Act.

The net effect of the amendment in Davidson-Kelson, Inc. was to reduce the overall applicable hourly rates (wages plus fringe benefits). That result was the effect of reduced basic hourly wage rates and increased fringe benefit rates--the reverse of this case where the amendment increased the basic hourly wage rate for material handlers and decreased the fringe benefit rate. In Davidson-Kelson, Inc. the awardee was obligated to comply with Davis-Bacon Act requirements because it was obligated to pay the higher basic hourly wage rates prescribed in the original, unamended wage determination attached to its bid. The higher fringe benefits in the amended wage determination would be received by employees through cash equivalents (higher hourly wages), a permissible alternative. That result is consistent with the implementing regulations and consistent with our conclusion here that Tri-Tech's bid was properly rejected as nonresponsive.

By failing to acknowledge amendment No. 0001 with its bid, Tri-Tech would be legally obligated to pay its material handlers only the lower, substandard hourly wage rate prescribed in the original, unamended wage determination attached to its bid. See, e.g., Hewett-Kier Constr., Inc., B-225412, Nov. 6, 1986, 86-2 CPD ¶ 530 (only specific wage rate determination incorporated into IFB can legally bind contractor under the Davis-Bacon Act to pay the prevailing

wage rates specified in IFB). Although amendment No. 0001 to the IFB decreased the fringe benefit rate for material handlers, so as to lower the combined hourly wage and fringe benefit rate for that labor category, the Davis-Bacon Act does not permit hourly wages to be paid as higher fringe benefits. Therefore, by failing to acknowledge the amendment with its bid, Tri-Tech is not legally obligated to comply with the Davis-Bacon Act requirements. The agency properly rejected Tri-Tech's bid as nonresponsive.

The protest is denied.

Robert P. Murphy
for James F. Hinchman
General Counsel