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

Decision

Matter of: USA Asbestos Removal Co., Inc.

File: B-252349

Date: May 24, 1993

Samuel Stern for the protester.
Timothy P. Walsh, Esq., and Paul M. Fisher, Esq., Department of the Navy, for the agency.
Daniel I. Gordon, Esq., and Paul Lieberman, 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 establishing a rate for an additional labor category, since the amendment's inclusion of the additional rate renders the amendment material, and there is no evidence that the bidder was otherwise legally obligated to pay employees in that additional labor category at a level at least as high as the rate set out in the amendment.

DECISION

USA Asbestos Removal Co., Inc. protests the rejection of its bid under invitation for bids (IFB) No. N62472-92-B-2102, issued by the Department of the Navy. USA Asbestos's bid was found nonresponsive for failure to acknowledge three amendments, one of which set forth a wage rate for a labor category which previously had not been included in the IFB. USA Asbestos contends that its failure to acknowledge the amendments should be waived as a minor informality.

We deny the protest.

The Portsmouth Naval Shipyard issued the IFB on September 7, 1992, for asbestos removal and reinsulation services. The IFB included Federal Acquisition Regulation (FAR) § 52.222-6 relating to the Davis-Bacon Act, 40 U.S.C. § 276a et seq. (1988), and stated that the contractor would be required to pay employees working under the contract wages and fringe

benefits "computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part [hereof]." The wage determination included in the IFB covered a number of specific labor categories.

Amendment No. 0001, issued on October 6, 1992, advised bidders that bid opening was being postponed pending receipt of a wage determination for asbestos workers (not included in the initial IFB). After the agency obtained a new wage determination from the Department of Labor, including an additional labor category to cover asbestos workers, amendment No. 0002 was issued on November 5. That amendment deleted the wage determination included in the initial IFB and substituted the new one received from the Department of Labor. The amendment required bidders to acknowledge the amendment with their bid, and advised them that failure to do so might render their bids nonresponsive.[1]

By bid opening on November 20, 16 bids had been received, of which USA Asbestos's was the apparent low bid. The Navy sent the bidder a letter requesting verification of its bid and advising the company that the agency was considering finding the bid nonresponsive for failure to acknowledge the amendments. The company's written reply requested correction of one multiplication error but otherwise confirmed the accuracy of its bid, acknowledged the three amendments, and stated that the amendments would have "no impact on price, quantity or performance on the solicitation."

Meanwhile, the Navy confirmed internally that the labor category added by amendment No. 0002 was expected to be used in performance of the contract. On the basis of that confirmation, the contracting officer determined that amendment No. 0002 was material because it added a wage rate for a labor category expected to be used under the contract. Accordingly, the contracting officer concluded that USA Asbestos's failure to acknowledge that amendment rendered its bid nonresponsive.

The protester contends that its bid was responsive because the failure to acknowledge the amendments was a minor informality. USA Asbestos argues that the amendments could not affect the contract price or the company's compliance with the Davis-Bacon Act, because the company's pay scale exceeds the minimum rates required under the wage determination. The protester also argues that, since it was subject to the Davis-Bacon Act regardless of which wage

[1]Amendment No. 0003 is not relevant to the protest.

determination was included in the IFB, the failure to acknowledge the amendments did not reduce its legal obligations. Finally, the protester alleges that there is "still the possibility that [the added] labor category will not be used" and the Navy's determination, made after bid opening, that there was a reasonable possibility that the labor category would be used was an improper attempt to add a new contractual requirement to the IFB.

A bidder's failure to acknowledge a material amendment to an IFB renders the bid nonresponsive, since absent such an acknowledgment, the government's acceptance of the bid would not legally obligate the bidder to meet the government's needs as identified in the amendment. Head Inc., 68 Comp. Gen. 198 (1989), 89-1 CPD ¶ 82, aff'd, B-233066.2, May 16, 1989, 89-1 CPD ¶ 461. On the other hand, a bidder's failure to acknowledge an amendment that is not material is waivable as a minor informality. FAR § 14.405; DeRalco, Inc., 68 Comp. Gen. 349 (1989), 89-1 CPD ¶ 327.

An amendment that revises wage rates is material, regardless of how minimal the revisions, because wage rates are mandated by the Davis-Bacon Act; to give the bidder the opportunity to acknowledge an amendment revising wage rates after bid opening would allow the firm to decide to render itself ineligible for award by choosing not to cure the defect. Grade-Way Constr. v. United States, 7 Cl. Ct. 263 (1985). An amendment adding a labor category, establishing an additional minimum wage rate applicable to the contract, is material for the same reason.[2]

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[2]An exception to the general rule arises where the bidder is subject to a particular legal obligation to pay wages at least as high as those in the wage determination, such as where a collective bargaining agreement mandates such wage levels. ABC Paving Co., 66 Comp. Gen. 47 (1986), 86-2 CPD ¶ 436. USA Asbestos has not alleged that it was under any such specific legal obligation, and the fact that the company's pay scale may have indicated wage rates higher than the wage determination does not establish the necessary legal obligation. Moreover, the protester errs in contending that the Davis-Bacon Act imposes the obligation to pay conforming wages regardless of the failure of a contract to include those provisions. While the obligation is ultimately based on the statutory provisions, it comes into force only by virtue of contractual provisions; it is not directly imposed on the contractor by the statute. Emerald Maintenance, Inc., 70 Comp. Gen. 355 (1991), 91-1 CPD ¶ 320.

Amendment No. 0002 thus was material, since it added a labor category which the Navy expected to be used as part of contract performance.[3] Accordingly, USA Asbestos's failure to acknowledge amendment No. 0002 rendered its bid nonresponsive, and the agency properly rejected the bid.

The protest is denied.

for James F. Hinchman
General Counsel

[3]The fact that the Navy made a formal written determination to that effect only after bid opening is immaterial. Offerors were on notice by means of amendment No. 0001 (which the protester also did not acknowledge prior to bid opening) that the agency was seeking an additional wage determination to cover asbestos workers, thus indicating that the agency anticipated that the relevant labor category would be used during performance.