



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

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Decision

Matter of: Promethean Construction Co., Inc.
File: B-255222
Date: February 7, 1994

Stuart C. Nash, Esq., Kilcullen, Wilson and Kilcullen, for the protester.
Joel S. Rubenstein, Esq., Sadur, Pelland & Rubenstein, for Alfaro Corporation, an interested party.
Garrett L. Rensing, Esq., and Paul M. Fisher, Esq., Department of the Navy, for the agency.
Sylvia Schatz, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly rejected as nonresponsive a bid that failed to acknowledge an amendment containing a revised Davis-Bacon Act wage determination with an increased wage rate for plumbers; amendment was material, and thus had to be acknowledged for the bid to be responsive, since (1) agency reasonably anticipated that plumbers could be used in performance of the contract, and (2) bidder's employees were not covered by a collective bargaining agreement binding the firm to pay the minimum wage prescribed for plumbers under the wage determination.

DECISION

Promethean Construction Co., Inc. protests the rejection of its bid as nonresponsive, and the award of a contract to Alfaro Corporation, under Department of the Navy invitation for bids (IFB) No. N62477-90-B-0130, for laboratory conversion at the Uniformed Services University of the Health Sciences in Bethesda, Maryland. Promethean's bid was rejected for failure to acknowledge amendment No. 0002, which contained a revised Davis-Bacon Act wage rate determination. Promethean maintains that its failure to acknowledge the amendment should be waived.

We deny the protest.

The IFB was issued on August 3, 1993. The IFB called for interior remodeling of a laboratory, including installation of a new piping system for chilled water. Amendment No. 0002 to the IFB, issued on September 9, included a

modified wage rate determination under the Davis-Bacon Act, 40 U.S.C. § 276(a) (1988), which revised the wage rates for two labor categories, ironworkers and plumbers. The wage rate for plumbers was increased, but the amendment did not affect the wages of the steamfitters, the other labor category involved in the contract.

The agency received three bids by the extended September 20 bid opening date. Promethean submitted the apparent low bid of \$166,893, compared to Alfaro's next low bid of \$175,000. On the same day, Alfaro filed an agency-level protest, claiming that Promethean's bid, which did not acknowledge amendment No. 0002, should be rejected as nonresponsive. On September 28, the contract specialist contacted Promethean to determine if it had an existing collective bargaining agreement with any labor organization which would require it to pay a particular hourly wage, but was informed that the firm did not, since it is not a union company. The Navy determined that Promethean's failure to acknowledge the amendment rendered its bid nonresponsive due to the change in the wage rate, and made award to Alfaro as the next low bidder. This protest followed.

Promethean argues that its failure to acknowledge amendment No. 0002 should be waived as a minor informality which did not affect the responsiveness of its bid. Promethean reasons that since it intended to employ steamfitters (whose wages were not affected by the amendment), instead of plumbers, to perform the chilled water piping work on the project, the revised wage rate determination contained in the amendment had no upward monetary impact on the firm's bid price. Promethean concludes that it should receive the award based on its low bid.

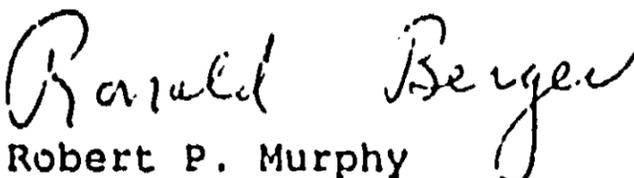
Where a reasonable possibility exists that a certain trade's services will be required in the performance of a contract, an amendment increasing a wage rate mandated by the Davis-Bacon Act for that trade is material. See Phoenix Mechanical Contractors, Inc., B-233061, Dec. 19, 1988, 88-2 CPD ¶ 603; RTC Constr., B-217362, Jan. 24, 1985, 85-1 CPD ¶ 95. A bid which does not acknowledge a material amendment cannot be waived or cured after bid opening. Rather, unless the bidder's employees are already covered by a collective bargaining agreement binding the firm to pay wages not less than those in the revised wage determination, see Irwin-Jurkewicz Corp., B-249037, Oct. 20, 1992, 92-2 CPD ¶ 257, such a bid must be rejected as nonresponsive, because absent an acknowledgement the bidder would not be legally obligated to pay the required wages. Tri-Tech Int'l, Inc., B-246701, Mar. 23, 1992, 92-1 CPD ¶ 304.

Promethean's bid clearly was nonresponsive. Promethean confirmed (as indicated above) that it is not covered by a collective bargaining agreement, and the contracting officer determined that there is a reasonable possibility that either plumbers or steamfitters could be used to perform the chilled water piping work on the project. This determination was based on the Dictionary of Occupational Titles, which indicates that either plumbers or steamfitters can be employed to assemble, install, or maintain water pipes. Nothing in the record contradicts the agency's determination in this regard; Promethean does not contest it.

Promethean's claim that it intended to employ steamfitters instead of plumbers to perform the piping work--and that the unacknowledged amendment thus had no upward economic impact on the firm's bid--does not make the bid responsive. Nothing in Promethean's bid shows the labor categories on which its bid was based and, in any case, Promethean was not bound by the terms of the IFB to perform using any particular labor categories. Thus, Promethean could perform the work using plumbers, and if it did so it would not be bound to pay the wages set forth in the amended IFB. Promethean may not take steps to obligate itself to pay the required wages at this juncture; post-bid-opening submissions or explanations cannot be used to make a nonresponsive bid responsive, even where the government could save money by permitting correction. Hewett-Kier Constr., Inc., B-225412, Nov. 6, 1986, 86-2 CPD ¶ 530.

As the record establishes that there was a reasonable possibility that plumbers, whose wages were increased by the amendment, would be used on the contract, the amendment increasing the wage rates for that trade is material. Since Promethean's bid did not preclude its employment of plumbers to perform the work, Promethean's failure to acknowledge this material amendment prior to bid opening requires rejection of its bid.

The protest is denied.

for 
 Robert P. Murphy
 Acting General Counsel