DECISION

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

61563

FILE: B-186239 DATE: September 29, 1976

MATTER OF: North Landing Line Construction Co. 97960

DIGEST:

1. Award to bidder failing to acknowledge presumptively applicable solicitation amendment increasing Davis-Bacon wage rate may be made only if agency demonstrates (a) that increased rate does not relate to work to be performed under contract and (b) that it either was not reasonable for bidders to consider increased rates in bid preparation or that reliance upon amended rates was not prejudicial to protesting bidder in circumstances.

2. Specifications which could be reasonably construed to permit work covered by inapplicable wage rate amendment misstated Government's minimum needs and had effect of placing bidders on unequal bidding basis. However, where impact of protester's reliance was not such as to affect its relative position as second low bidder, no corrective action is recommended.

BACKGROUND

North Landing Line Construction Co. (North Landing) protests award to Service Electric Corporation (Service) of a contract for refurbishment of interior panel board and high bay area lighting at the National Aeronautics and Space Administration (NASA), Langley Research Center. North Landing contends that Service's bid was nonresponsive by virtue of its failure to acknowledge Amendment No. 1 to invitation for bids No. 1-73-5992.

The unacknowledged amendment contained modified wage rates which increased the minimum wages payable to certain employees, including ironworkers, protected by the Davis-Bacon Act, 40 U.S.C. § 276a (1970). Service submitted the low bid of $13,672; North Landing was the second low bidder at $13,820. North Landing filed a protest with NASA concerning award to Service based on the company's failure to acknowledge the amendment and NASA

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denied the protest citing NASA Procurement Regulation 2.405 which permits the agency to waive minor informalities or irregularities in bids where there will be no prejudice to other bidders. The contracting officer held:

> "In view of the fact that * * * there is no requirement for ironworkers under the specifications and drawings on this project, failure to acknowledge the Amendment in this instance can be waived as a minor informality or irregularity in accordance with NASA Procurement Regulations and Comptroller General decisions."

DISCUSSION

NASA's contention that "there is no requirement for ironworkers under the specifications and drawings on this project," is disputed by the protester who contends that the specifications required bidders to consider the use of ironworkers for the purpose of moving a test aircraft situated in the high bay area to facilitate overhead work and for the movement of other machinery. In support of this position, North Landing refers to note 5 of specification drawing No. LD-751247 which states:

> "The contractor shall be responsible for moving any equipment to facilitate overhead work."

North Landing contends that relocation of the aircraft and other machinery falls within the scope of note 5. Other relevant requirements of the specifications state:

> "The site will be made available 'as is', and unless otherwise specified, the contractor shall be responsible for clearing the site, area for roads, utilities, and other off-site areas of all obstructions, both natural and artificial, which would interfere with the performance of the work under the contract.
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> "The contractor shall repair all damages caused by him to government premises.
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> "Existing equipment or facilities shall be properly protected by the contractor during his construction operations, and if damaged shall be promptly repaired."

It is the protester's position that, not only do these statements require the movement of obstructions but, in addition, they place the risk of damage to equipment squarely on the contractor. Based on its interpretation of the specifications and a visual inspection of the site, the protester contends that it contemplated moving the test aircraft and other equipment by employing the rigging skills of ironworkers in order to facilitate performance of the contract work and to limit its potential liability for damage to Government property.

In response, NASA argues that it should have been apparent to all bidders who viewed the work site that the aircraft was undergoing tests and could not be relocated. NASA maintains that "the work directly overhead the aircraft can be performed by use of a cherry picker or some other extendible scaffolding or conveyance." Furthermore, NASA states that it orally advised all bidders who attended a March 3 site visit that the airplane would not be permitted to be moved. However, North Landing did not attend the March 3 site visit. Moreover, the specifications state:

> "The Government also assumes no responsibility for any understanding or representations made by its officers or agents during or prior to the execution of the contract, unless (1) such

> understanding or representations are expressly stated in the contract and (2) the contract expressly provides that the responsibility therefor is assumed by the Government. Representations which are not expressly stated in the contract and for which liability is not expressly assumed by the Government in the contract shall be deemed only for the information of the contractor."

Thus, bidders would have relied on such oral advice at their own risk in computing their bids. Finally, NASA contends that there are no other pieces of equipment which could have reasonably necessitated the use of ironworkers.

NASA contends that this case falls squarely within the rule of Prince Construction Co., B-184192, November 5, 1975, 75-2 CPD 279, in which we held that, where the unrebutted evidence indicated that a Davis-Bacon wage amendment was inapplicable to the work required, there is no danger that employees will be deprived of protected rights and the contractor's failure to acknowledge the amendment may be waived as a minor informality. Our denial of the protest in Prince was accompanied by a recommendation that, in future procurements, the agency survey the amended wage rates to avoid the issuance of inapplicable amendments.

In a subsequent decision, Porter Contracting Company, B-184228, January 2, 1976, 76-1 CPD 2, we held that the contracting agency acted properly in rejecting a bid which failed to acknowledge a Davis-Bacon wage rate amendment even though the work to be performed by the craft affected by the amendment was not specifically required by the specifications. In Porter, we quoted from our letter to the contracting agency involved in Prince, where we stated:

> "Finally, today's decision, B-184192, is based on an after-the-fact determination that amendment No. 1 was inapplicable. We consider the necessity for employing hindsight regrettable where the matter could have been resolved by a similar determination prior to issuance. Consequently, our decision recommends that Davis-Bacon wage rate determinations be

surveyed prior to issuance to ascertain their applicability to the contract work involved."

Notwithstanding our Office's recommendations in Prince and Porter, supra, NASA issued the allegedly inapplicable amendment and yet made no effort to either cancel the amendment or to advise all bidders of its inapplicability during the period between its issuance (February 27) and bid opening (March 10).

CONCLUSION

Our decision and recommendations in Prince and Porter, supra, provide for the presumptive applicability of solicitation amendments containing increased Davis-Bacon wage rates. Agencies were advised to survey the amended rates in order to prevent the issuance of inapplicable amendments. Consequently, where an agency proposes to make award to a low bidder who fails to acknowledge a Davis-Bacon wage rate amendment, the agency must bear the burden of showing (a) that the amendment does not relate to the work to be performed and thereby does not affect the rights of workers protected by the Act and (b) that it either would have been unreasonable for bidders to have relied on the amended wage rates or that reliance on such rates was not prejudicial to the protesting bidder.

In the instant case, the rights of workers protected by the Act are not affected adversely by the wage amendment because NASA will not permit movement of the aircraft and the other obstacles are relatively lightweight pieces of equipment which sit on wheeled dollies or can be moved with ease without the use of rigging or hauling procedures.

However, since the specifications did not indicate that the aircraft could not be moved, bidders could well have assumed that ironworkers would be needed. In fact, the protester has advised our Office that its total bid included 120 hours for ironworkers. Since the amendment increased the wage rate by $.50 per hour, including fringe benefits, the effect of the amendment was limited to a maximum of $60. In view of the fact that the difference between the two bids amounted to $148, the practical effect of the wage rate change was not such as to injure the protester's competitive position relative to the low bidder. Consequently, the protester was not

adversely affected by the agency's decision to accept the bid of Service. However, we recommend that in future procurements, NASA more carefully review its specifications to insure that they are not susceptible to bids based on factors other than the Government's actual needs.

R. F. Keller

Acting Comptroller General
of the United States