DCCUMENT RESUME

02086 - [A1232219]

[Failure to Acknowledge Amendment to Bid Solicitation]. B-187858. April 28, 1977. 4 pp.

Decision re: Unitranco; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: General Government: Other General Government (806).
Organization Concerned: Federal Aviation Administration.
Authority: Davis-Bacon Act (40 U.S.C. 276a). 49 Comp. Gen. 289. 40 Comp. Gen. 48. 52 Comp. Gen. 544. F.P.R. 1-2.405(d)(2). B-182841 (1975). B-184192 (1975).

The protester objected to the award of a contract for construction work to any other firm. The protester's low bid was rejected because of failure to neither acknowledge nor return an amendment to the solicitation. The bid was nonresponsive since the amendment containing Davis-Bacon Act wage determination was per se material and failure to acknowledge it may not be waived as a minor informality, despite the minimal impact on price. (Author/SC)

B. Krasker
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DECISION

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

FILE: B-187858 DATE: April 28, 1977

MATTER OF: Unitranco

DIGEST:

Where bid for construction work contained notation "NONE" in space provided for acknowledgement of amendments, and where amendment containing revisions to applicable wage determination issued pursuant to Davis-Bacon Act, 40 U.S.C. § 276a (1970), was neither returned nor acknowledged, bid is non-responsive since amendment containing Davis-Bacon Act wage determination is per se material and failure to acknowledge it may not be waived as minor informality, notwithstanding minimal impact on price.

Unitranco has protested the award to any other firm under invitation for bids No. SW55-TQ-153 issued by the Federal Aviation Administration (FAA) for construction work at the Lafayette, Louisiana, Municipal Airport. The protest arose when the FAA advised Unitranco that its low bid of $84,375 could not be accepted because Unitranco had neither returned nor acknowledged amendment No. 1 to the IFB, which revised the minimum wages applicable to the project under the Davis-Bacon Act, 40 U.S.C. § 276a (1970). In addition, in the applicable space in the IFB for acknowledgement of amendments, Unitranco inserted in handwritten form the notation "NONE."

Unitranco maintains that the bid may nevertheless be accepted. It is Unitranco's position that the insertion of the notation "NONE" was merely a clerical mistake which did not affect the responsiveness of the bid. Unitranco states that its bid is responsive if the bid as submitted evidences sufficient commitment to the terms and conditions of the IFB to bind Unitranco to those terms in the event the bid is accepted. In this connection, Unitranco urges that its failure to acknowledge the amendment may be waived if the bid as a whole evidences that the bid was submitted on the basis of the amendment, regardless of whether the specified form in acknowledging the amendment was followed, citing 49 Comp. Gen. 289 (1969); 40 Comp. Gen. 48 (1960). In support of this argument, Unitranco notes that the applicable Davis-Bacon wage

determination was physically attached to the IFB when it was issued. Unitranco states that the logical inference from this fact is that it considered the contents of the amendment in the formulation of its bid. Further, Unitranco points out that the wage determination was published in the Federal Register before bid opening, thereby constituting notice to the world of its effect upon all projects subject to its provisions. In these circumstances, Unitranco argues that an award made to it would bind Unitranco to the provisions of the wage determination.

Alternatively, Unitranco contends that the failure to acknowledge the amendment can be waived as a minor informality pursuant to Federal Procurement Regulations (FPR) § 1-2.405(d)(2) (1964 ed.). Unitranco computes the difference in its bid price attributable to the revised wage determination at $455.11. This represents .527 percent of the overall bid and 3.5 percent of the difference between Unitranco's and the next low bid of the Johnston Electric & Construction Co. The rule in 52 Comp. Gen. 544 (1973) is that if the amount has a trivial or negligible effect in relation to the overall scope of work and the difference between the low bids it is de minimus. Moreover, Unitranco points out that in this case we are concerned with a modification of a wage determination, not the imposition of an entirely new wage rate.

With regard to its first argument, Unitranco maintains that the rule in 40 Comp. Gen., supra, controls the present case. Here, Standard Form (SF) 21, entitled "Bid Form Construction Contract," states:

> "In compliance with the above-dated invitation for bids, the undersigned hereby proposes to perform all work for furnishing all labor, equipment and materials * * * necessary for the accomplishment of the above named project in strict accordance with the General Provisions (Standard Form 23-A), Labor Standards Provisions Applicable to Contracts in excess of $2000 (Standard Form 19A) * * *."

The above-quoted language incorporating the same SF's as referred to in the cited case make the holding therein applicable to the present case, in Unitranco's opinion.

In our view, Unitranco's bid is nonresponsive. The insertion by Unitranco of the notation "NONE" in the space provided for acknowledgement of amendments in SF 21 included in the bid package operates as a specific disclaimer that Unitranco could raise in the event of award as to the applicability of the wage determination as revised by amendment No. 1. Since the test of responsiveness is whether upon acceptance of the bid as submitted a bidder would be bound by all of

the material provisions of the IFB, the fact that Unitranco would not be bound renders its bid nonresponsive. Hartwick Construction Corporation, B-182841, February 27, 1975, 75-1 CPD 118.

Furthermore, the two principal cases upon which Unitranco's case is premised do not support its position, since they are distinguishable. In 40 Comp. Gen., supra, the bidder failed to acknowledge an amendment to an IFB which incorporated the applicable wage determination issued pursuant to the Davis-Bacon Act. The amendment was physically attached to the IFB when issued due to the late receipt of the wage determination from the Department of Labor. The low bidder did not acknowledge receipt of the amendment in any form. In reading the provisions of the IFB as a whole, our Office concluded that the bid could be accepted. Specifically, paragraph 19 of the General Conditions provided that the wage determination referred to in clause 20 of SF 23A of the IFB was incorporated by reference and made a part of the contract. Also, clause 20 provided that the applicable wages paid by the contractor to laborers shall be computed at wage rates not less than the wage determination of the Secretary of Labor "* * * which is attached hereto and made a part hereof." Considering these provisions, and the fact that the amendment containing the wage determination was attached to the IFB, we concluded that the bidder would be bound to pay wages at the minimum rates in the wage determination. Therefore, the failure to acknowledge the amendment could be waived.

The solicitation in the cited case included the amendment in the bid package as the applicable wage determination. Therefore, the provisions in the solicitation in the cited case clearly had the effect of making the amendment and applicable wage rates therein a part of the bid specifications, binding upon signing and returning of the bid. However, the solicitation in the instant case included the then applicable wage determination as part of the specifications and the amendment revising the applicable wage rates was issued as a separate document. Therefore, while the provisions in the instant solicitation referred to by Unitranco would effectively bind the signer of the bid to the wage determination included as part of the specifications, they would not have the same effect with regard to a revision of that wage determination not referred to therein and issued as a separate document, with the requirement that it be acknowledged in a specific way and returned to the issuing office.

We also believe that 49 Comp. Gen. 289, supra, cited by Unitranco is distinguishable. In that case it was determined that the low bid was responsive even though it failed to include certain pages of the specifications included in the bid package as issued. However, the solicitation was issued on SF 33, which included a provision that all offers were subject to, inter alia, the specifications encompassed in

the omitted pages, and the bid was signed under the phrase "In compliance * * *" with those specifications. Therefore, it was concluded that the bidder was bound by the terms included in the omitted pages. Unlike that case, as noted above, there is no basis under the terms of the present solicitation to conclude that Universco would be bound in the absence of acknowledgement and return of the amendment.

Finally, we do not agree with the contention that failure to acknowledge the amendment may be waived as a minor informality as it would have only a trivial or negligible effect on price. We have held that the de minimus doctrine does not apply to this situation because the contract would not contain a commitment to pay the minimum wages required by the Davis-Bacon Act. Prince Construction Company, B-184192, November 5, 1975, 75-2 CPD 279.

Therefore, the protest is denied.

R. F. Keller

Deputy Comptroller General
of the United States