



Washington, D.C. 20548

Decision

Matter of: American Eagle Industries, Inc.

File: B-253481

Date: August 30, 1993

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parties.
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of the decision.

DIGEST

Bidder's failure to acknowledge an amendment updating the applicable wage rate decision does not render the bid nonresponsive where the modification did not change the wage rates or benefits to be paid but changed only descriptions of equipment under certain power equipment operator categories that would not be required for the work to be performed under the contract.

DECISION

American Eagle Industries, Inc. (AEI) protests the Navy's proposed award to Lugo Construction, Inc. under invitation for bids (IFB) No. N44255-93-B-4293, for the replacement of four dewatering valves at one of the drydocks at the Puget Sound Naval Shipyard in Bremerton, Washington. The protester contends that Lugo's bid was nonresponsive because Lugo failed to acknowledge amendment No. 0004 to the IFB. We deny the protest.

The IFB was issued on April 14, 1993, and contemplated the award of a firm, fixed-price construction contract for the removal of an existing valve system and its replacement by new valves. The solicitation included Federal Acquisition Regulation (FAR) § 52.222-6, which required bidders to comply with the Davis-Bacon Act, 40 U.S.C. §§ 276a et seq. (1988). This provision mandates that all laborers and mechanics employed on the project be paid not less than the appropriate wage rate and fringe benefits in the Secretary of Labor's wage determination for the classification of work

actually performed. Accordingly, the IFB incorporated the Secretary of Labor's general wage decision No. WA930002 with modifications #1-2, dated 2/26/93. When the IFB was issued, it included three Amendments (0001, 0002, and 0003). The last of these, No. 0003, updated the Wage Decision by adding its latest modification (#3, dated 3/26/93). On April 20, amendment 0004 was issued again to update the IFB with the most current version of the Department of Labor's general wage decision.

When bids were opened on May 14, the contracting officer determined that Lugo had submitted the apparent low bid, with AEI's bid apparently second low. In its bid, Lugo had acknowledged Amendments 0001, 0002, and 0003, but neglected to acknowledge amendment 0004. The contracting officer determined that this amendment had no effect on the wages in this contract or on the subsequent price, and concluded that it therefore was not a material amendment; accordingly, he determined that AEI's failure to acknowledge the amendment could be waived as a minor informality. This protest followed.

As AEI points out, 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; DeRalcó, Inc., 68 Comp. Gen. 349 (1989), 89-1 CPD ¶ 327. An amendment is material where it imposes legal obligations on a prospective bidder that were not contained in the original solicitation, Weatherwax Elec., Inc., B-249609, Oct. 26, 1992, 92-2 CPD ¶ 281, or if it would have more than a negligible impact on price, quantity, quality, or delivery, or the relative standing of the bidders. FAR § 14.405(d)(2); Star Brite Constr. Co., Inc., B-238428, Apr. 5, 1990, 90-1 CPD ¶ 373. Thus, the issue before us is whether amendment No. 0004 was material. In this connection, where a certain trade's services will not be required in the performance of a contract, an amendment increasing the wage rate for that trade or adding wage rates for that trade is not considered material. See Phenix Mechanical Contractors, Inc., B-233061, Dec. 19, 1988, 88-2 CPD ¶ 603.

Amendment No. 0004 contained a modification (#4) to the general wage decision (No. WA930002); the IFB already had incorporated this general wage decision with three modifications (#1-3) when the final amendment was issued. The modification does not change any wages or fringe

benefits from the wage decision previously incorporated into the IFB. It changes some descriptions of the equipment covered under the various power equipment operator categories.

The Navy argues in its protest report that the changes made by modification #4 would have no impact on the work to be performed under this solicitation because the changes do not affect the wages or benefits to be paid or the worker classifications applicable to this procurement. The supervisory civil engineer at the Puget Sound Shipyard provided a statement in which he describes the work to be performed under the contract and concludes that the changes in descriptions apply to equipment which reasonably cannot be used on this project.

Specifically, the engineer explains that the contractor is to remove and replace four valves, each weighing 4-6 tons, that are located in an existing concrete pumpwell adjacent to a drydock. The valves are located about 25 feet below ground level and are reached by lifting concrete lids that weigh about 4 tons. The entire job site is paved; the work will not require earthwork or excavation. Amendment No. 0004 replaced the previous language "Cranes over 200 tons with 250 feet of boom" applicable to category 1 AA power equipment with "Cranes 200 tons and over, or 250' of boom." The engineer explains that since the work to be performed here requires lifting 4-6 ton valves a distance of about 25 feet, a contractor would not use a crane of this size for this contract. The amendment also made changes to the description of piledrivers and back hoes which are not material here because, the engineer reports, the job does not require piles and back hoes will not be used since no excavation is contemplated. The other changes made by the amendment are similarly explained as immaterial to the work to be performed.

AEI has offered no specific rebuttal to the agency's position; instead, the protester responds to the agency report with two arguments. First, AEI insists simply that the language of the standard amendment form that was used (in Block 11 on SF 30) requires unequivocally that bidders acknowledge any amendment. To the contrary, the language of the form itself states that failure to properly acknowledge an amendment may result in rejection of the offer. The term "may" denotes the permissive, see, e.g., FAR § 2.101, and thus the IFB language provides no support for the protester's position. Furthermore, as stated above, the FAR specifically provides for waiver of a bidder's failure to acknowledge an amendment that is not material. See FAR § 14.405(d)(2). Second, AEI asserts that price could have been affected by the amendment. In view of the agency's persuasive explanation of why the modification does not

affect the work to be performed, we see no basis for the protester's position.

Accordingly, on this record we conclude that the Navy properly viewed amendment No. 0004 as not material and that Lugo's failure to acknowledge this amendment did not render its bid nonresponsive.

The protest is denied.

Ronald Berger

JF James F. Hinchman
General Counsel