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DECISION

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

50588

FILE: B-182841 DATE: **February 27, 1975**

MATTER OF: Hartwick Construction Corporation

DIGEST:

1. Failure to acknowledge (prior to bid opening) addendum incorporating Davis-Bacon wage determination in IFB rendered bid nonresponsive and subsequent award improper, notwithstanding bidder's union labor agreement requiring it to pay wage rates at least equal to those in the wage determination, since acceptance of bid as submitted at time of opening would not result in contract containing statement of minimum wage rates as required by provisions of Davis-Bacon Act, 40 U.S.C. § 276a. Maintenance of the integrity of competitive bidding system requires that contract be terminated for convenience of the Government.

2. Failure to acknowledge wage determination addendum may not be waived as minor informality or irregularity in bid under accepted procurement practices or regulations applicable to procurement of construction services issued by the Government of the District of Columbia, since addendum affected price and acceptance of low bid would have been prejudicial to other bidders.

Hartwick Construction Corporation (Hartwick) protests the award to Paul R. Jackson Construction Company, Inc., AND Swindell-Dressler Company, a Division of Pullman, Incorporated, A JOINT VENTURE (Jackson, Swindell-Dressler) of the FY-75 Second Asphalt Repair Contract under invitation for bids (IFB) No. 0516-AA-02-0-5-KA issued on October 30, 1974, by the Department of Highways and Traffic (DHT), for the Government of the District of Columbia.

Four bids were received on December 9, 1974, the amended date for opening. The Jackson, Swindell-Dressler bid of $1,349,370 was the lowest received. The bid was $125,737.50 or approximately 9 percent less than the Government estimate. However, the bid form which acknowledged Addendums No. 1, and No. 2, failed to acknowledge receipt of Addendum No. 3. Addendum No. 3 (addendum), issued on November 25, 1974, incorporated into the IFB the Department of Labor wage rate modification No. 5 to Decision

No. AR-2026 (Fed. Reg., Vol. 39, No. 227, dated November 22, 1974). This addendum replaced the IFB's previous wage schedule (AR-2026, Fed. Reg., Vol. 39, No. 165--Friday, August 23, 1974) with one substantially increasing the basic wage rate (by $0.35 per hour) for most of the specified highway construction labor categories.

The day after bid opening (by letter dated December 10, 1974), Jackson, Swindell-Dressler reaffirmed its bid price and agreed that addendum was part of the pending contract. The contracting officer was further advised that notwithstanding the prior lack of acknowledgment, it had been aware of, and calculated its low bid on the basis of, the addendum's wage rates. Jackson, Swindell-Dressler subsequently documented that as a signatory on April 1, 1974, to a local union paving agreement it was required to pay each employee on all paving projects within the District of Columbia wages equal to, if not more than those specified for such workers on the addendum. In addition, its bid estimate sheets were submitted for the purpose of showing that the low bid was formulated on the basis of wage rates at least as great as those in the addendum. Therefore, Jackson, Swindell-Dressler believed that its failure to acknowledge the addendum should be considered a clerical error and waived by the contracting officer.

DHT's administrative report (dated January 17, 1975) indicates that pursuant to the provisions of the Order of the Commissioner No. 69-615 (November 14, 1969), part IV, paragraph B, items 5 and 7, the protest was forwarded to the Contract Review Committee for its review and recommendation to the contracting officer. By letter dated January 6, 1975, the Committee recommended that the failure to acknowledge Addendum No. 3 may be treated as an inadvertent mistake and waived by the contracting officer. This recommendation was based on its finding that Jackson, Swindell-Dressler "was in fact bound to pay wage rates at least as high as those specified in Addendum No. 3, and that it computed its bid on that basis." In a Finding of Fact dated January 22, 1975, the contracting officer determined that it was in the best interest of the District of Columbia to award the contract to Jackson, Swindell-Dressler, notwithstanding the protest.

Hartwick contends that the failure to acknowledge the addendum prior to opening rendered the low bid nonresponsive. Since the prevailing wage rate directly affects a bidder's price, it argued that the failure to acknowledge a wage determination addendum is not an error which can be waived.

A statement of the Department of Labor's minimum wage rates applicable to the invitation was required under the provisions of the Davis-Bacon Act, 40 U.S.C. § 276a, which reads, in part, as follows:

> "(a) the advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, or public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union, or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed, or in the District of Columbia if the work is to be performed there; * * *" (Emphasis supplied.)

With respect to the consideration to be given addenda, Article 7 of the IFB's instructions to bidders states:

> "* * * Bidders must acknowledge receipt of all addenda on the Bid Form; failure to do so may result in rejection of bid. All addenda issued shall become part of the bid and contract documents."

The Materiel Management Manual for the Government of the District of Columbia effective July 1, 1974, sets forth mandatory policy and procedures for the procurement of goods and services. Section 2642.0 of the manual is the regulation applicable to procurement of construction services. On the matter of responsiveness of bids submitted, subsection 2642.2(U)(1)(c) states:

> "Bids should be filled out, executed, and submitted in accordance with the instructions which are contained in the Standard Contract Provisions for use with Specifications on District of Columbia Government Construction Projects. If a bidder uses his

> own bid form or a letter to submit a bid, the bid, may be considered only if (1) the bidder accepts all the terms and conditions of the invitations, and (2) award on the bid would result in a binding contract the terms and conditions of which do not vary from the terms and conditions of the invitation."

In 2642.2(Z)(6) the contracting officer is authorized to waive any minor informalities or irregularities in bids where it is to the advantage of the District which irregularities include:

> "c. failure of a bidder to acknowedge receipt of an amendment to an invitation for bids, but only if--
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> (1) the bid received clearly indicated that the bidder received the amendment, such as where the amendment added another item or the invitation for bid and the bidder submitted a bid thereon, or
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> (2) the amendment clearly would have no effect or merely a trivial or negligible effect on price, quality, quantity, delivery, or the relative standing of bidders, such as an amendment correcting a typographical mistake in the name of the District purchasing activity; * * *"

Protests regarding the effect of a bidder's failure to acknowledge an addendum have been the subject of several prior decisions of this Office. See B-176399, January 9, 1973; B-175936, June 20, 1972, and decisions cited therein. The established general rule applicable under those circumstances is that the failure of a bidder to acknowledge receipt (in a manner required by the solicitation) of an amendment which could affect the price, or quantity of the procurement renders the bid nonresponsive. 37 Comp. Gen. 785 (1958). The rationale for this rule is that generally such a bidder would have an option to decide after bid opening whether to become eligible for award by furnishing extraneous evidence that a material addendum had been considered or to avoid award by remaining silent. See 41 Comp. Gen. 550 (1962) and decisions cited therein.

The application of the general rule to a bidder's failure to acknowledge an addendum containing a wage determination has also been considered by this Office. See Matter of Lambert Construction Company, B-181794, August 29, 1974. In 51 Comp. Gen. 500 (1972) we reaffirmed the position taken in B-157832, November 9, 1965, wherein we stated:

> "Since the wage rates payable under a contract directly affect the contract price, there can be no question that the IFB provision requiring the payment of minimum wages to be prescribed by the Secretary of Labor was a material requirement of the IFB as amended. As stated previously, the requirements of the Davis-Bacon Act were met when the amendment furnishing the minimum wage schedule was issued, the purpose of the Act being to make definite and certain at the time of the contract award the contract price and the minimum wages to be paid thereunder. 17 Comp. Gen. 471, 473. In such circumstances, it is our view that a bidder who failed to indicate by acknowledgment of the amendment or otherwise that he had considered the wage schedule could not, without his consent, be required to pay wage rates which were prescribed therein but which were not specified in the original IFB, notwithstanding that he might already be paying the same or higher wage rates to his employees under agreements with labor unions or other arrangements. Accordingly, in our opinion, the deviation was material and not subject to waiver under the procurement regulation. B-138242, January 2, 1959. Furthermore, to afford you an opportunity after bid opening to become eligible for award by agreeing to abide by the wage schedule would be unfair to the other bidders whose bids conformed to the requirements of the amended IFB and would be contrary to the purpose of the public procurement statutes. B-149315, August 28, 1962; B-146354, November 27, 1961."

A similar conclusion must be reached under the facts of this case.

Accordingly, we must conclude that the Jackson, Swindell-Dressler bid was nonresponsive. The award of its contract was contrary to standard procurement practices and the procurement regulations (supra) of the Government of the District of Columbia. With respect to any savings that could be realized by an award to a

low nonresponsive bidder, we have stated that the strict maintenance of the integrity of the competitive bidding system is infinitely more in the public interest than obtaining a pecuniary advantage in a particular case by violation of the rules. B-157894, November 30, 1965. Therefore, we must recommend that the contract be terminated for the convenience of the Government and that the award be made to the lowest responsive and responsible bidder.

Since this decision contains a recommendation for corrective relief, a copy is being forwarded to each of the Committees referenced in § 232 of the Legislative Reorganization Act of 1970.

Deputy Comptroller General
of the United States