



**Comptroller General  
of the United States**

Washington, D.C. 20548

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# Decision

**Matter of:** Bug Control Unlimited, Inc.

**File:** B-277739

**Date:** October 16, 1997

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Robert M. Tata, Esq., Hunton & Williams, for the protester.  
George N. Brezna, Esq., Christopher M. Bellomy, Esq., and Patrick J. Coll, Esq.,  
Department of the Navy, for the agency.  
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General  
Counsel, GAO, participated in the preparation of the decision.

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## **DIGEST**

A bid is nonresponsive where it fails to acknowledge an amendment including a wage determination that established minimum wages for service employees pursuant to the Service Contract Act of 1965 and where the bidder is not otherwise bound to pay its employees wages at least at the level of those established by the wage determination.

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## **DECISION**

Bug Control Unlimited, Inc. protests the award of a contract under invitation for bids (IFB) No. N00187-96-B-9529, issued by the Department of the Navy, Navy Public Works Center, for annual pest control services at the Naval Amphibious Base Little Creek, Norfolk, Virginia. Bug Control alleges that the Navy improperly rejected Bug Control's low bid as nonresponsive.

We deny the protest.

The IFB, issued on February 5, 1997, contemplated the award of a combination firm, fixed-price and indefinite quantity contract. The IFB incorporated by reference the contract clause at Federal Acquisition Regulation (FAR) § 52.222-41, "Service Contract Act of 1965, as Amended," which states:

(c) *Compensation.* (1) Each service employee employed in the performance of this contract . . . shall be paid not less than the minimum monetary wages and shall be furnished fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor, . . . as specified in any wage determination attached to this contract.

The IFB at Section J, List of Documents, Exhibits, and Other Attachments, identified the following attachment number and title:

J-1-1 Wage Determination No. \_\_\_\_\_ (Rev \_) (Service Contract Act)

Attachment J-1-1 was a blank page with the heading "Wage Determination - Service Contract Act."

On February 14, the Navy received a letter from a prospective bidder inquiring about the wage determination. Upon reviewing the IFB, the Navy determined that the IFB did not contain any wage determination. On February 19, the Navy issued amendment No. 0001, which attached wage determination No. 94-2543 (Revision 12)<sup>1</sup> to the IFB. The Navy sent the amendment to all of the companies on the bidders' list, including Bug Control.<sup>2</sup>

At bid opening on March 7, the Navy received and opened nine bids. Bug Control's bid of \$120,539 was the low bid; however, it was the only bid that did not acknowledge amendment 0001. The agency determined that, since the amendment incorporated the wage determination into the IFB, the amendment was material. The agency thus rejected Bug Control's bid as nonresponsive for failing to acknowledge a material amendment.

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<sup>1</sup>The Department of Labor issued Revision 13 to this wage determination on February 3, 1997. This revision did not change the wage rate or fringe benefits for pest controller, the class of service employee applicable to this contract. The Navy states that it received this revision on March 27. To the extent Bug Control alleges that the procurement must be recompeted using the latest revised wage determination, the protest lacks merit. The applicable regulations anticipate such circumstances and prescribe either that the revision will not be effective, FAR § 22.1012-2(b), or that the revision will be incorporated into an already-awarded contract, FAR § 22.1012-4. Moreover, the inclusion of Revision 12 rather than Revision 13 is immaterial in this case since the wage determination rates applicable to this IFB did not change.

<sup>2</sup>Bug Control states that it has no record of receiving the amendment. A bidder bears the risk of not receiving IFB amendments unless it is shown that the contracting agency made a deliberate effort to exclude the company from competing. Fourth Corner Forestry, Inc., B-226438, Apr. 27, 1987, 87-1 CPD ¶ 439 at 2. The agency report evidences that the amendment was mailed to Bug Control at the same time it was mailed to the other bidders. Bug Control's comments did not take exception to this evidence. Thus, to the extent Bug Control protested the distribution of the amendment, it has abandoned that protest basis. See Akal Sec., Inc., B-261996, Nov. 16, 1995, 96-1 CPD ¶ 33 at 5 n.5.

In response to the Navy's letter notifying Bug Control of the rejection of its bid, Bug Control acknowledged the amendment and protested the rejection of its bid to the Navy. On July 31, the Navy denied the agency-level protest and awarded a contract to the third lowest bidder, Angel Systems, Inc., for \$229,647.<sup>3</sup> This protest followed.

Bug Control alleges that the amendment was not material because the IFB, as originally issued, had essentially incorporated by reference the current applicable wage determination. Bug Control alternatively claims that it was otherwise bound by its bid to pay wages in excess of the minimum wages stated in the wage determination. We disagree.

A bidder's failure to acknowledge an IFB amendment establishing or increasing minimum wage rates for a contract cannot be cured after bid opening, except where a collective bargaining agreement binds the bidder to pay wages not less than those prescribed by the Secretary of Labor. Western Helicopters, Inc., B-243445, Apr. 3, 1991, 91-1 CPD ¶ 345 at 1; Air Photo Surveys, Inc., B-228024, Nov. 3, 1987, 87-2 CPD ¶ 437 at 1-2. This is so because the wage rates prescribed by the Secretary of Labor are mandated by statute to be included in the contract, and if an agency were to give the bidder the opportunity to acknowledge after bid opening an amendment specifying such wage rates, the bidder could decide to render itself ineligible for award by choosing not to cure the defect. Western Helicopters, Inc., *supra*, at 1; Air Photo Surveys, Inc., *supra*, at 2. Since such post-bid opening control by a bidder over the acceptability of its bid compromises the integrity of the competitive procurement system, the bid must be rejected as nonresponsive unless the bidder is already obligated to pay wages not less than those prescribed. Western Helicopters, Inc., *supra*, at 1-2; Air Photo Surveys, Inc., *supra*, at 2.<sup>4</sup>

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<sup>3</sup>The Navy rejected the second lowest bidder as nonresponsive.

<sup>4</sup>Bug Control requests application of a legal standard briefly used by our Office beginning with our decision, United States Dep't of the Interior--Request for Advance Decision, et al., 64 Comp. Gen. 189 (1985), 85-1 CPD ¶ 34, which found that a bidder could cure, as a minor informality after bid opening, a defect occasioned by the bidder's failure to acknowledge an amendment incorporating a revised Davis-Bacon Act wage determination where the amendment's effect on bid price was de minimis. We overruled that decision and abandoned application of that standard the next year in ABC Paving Co., 66 Comp. Gen. 47, 49-50 (1986), 86-2 CPD ¶ 436 at 4-5, finding that even if such an amendment's effect on bid price was de minimis, the significant legal requirements for the benefit of covered employees imposed by the revised wage determination could not be waived; therefore, providing a bidder with the opportunity to acknowledge the amendment after bid opening would give the bidder post-bid opening control over the acceptability of its bid and thus compromise the integrity of the competitive procurement system.

It is irrelevant whether Bug Control may have known of and intended to comply with the wage determination where, as here, the bid documents do not evidence its intent to be so bound. Johnson Moving & Storage Co., B-221826, Mar. 19, 1986, 86-1 CPD ¶ 273 at 3. Prior to amendment 0001, the IFB did not contain the wage determination. Neither the Service Contract Act clause at FAR § 52.222-41, nor the uncompleted reference to a wage determination at section J of the IFB incorporated the applicable minimum service employee wages determined by the Secretary of Labor. Under the terms of the clause, the minimum wages determined by the Secretary of Labor are enforceable against the contractor only if the applicable wage determination is attached, FAR § 52.222-41(c)(1) (otherwise, pursuant to FAR § 52.222-41(e), the minimum wage is that set by the Fair Labor Standards Act of 1938).<sup>5</sup>

Thus, absent acknowledgment of amendment 0001, the bid documents only evidence Bug Control's obligation to pay its employees the federal minimum wage, which is less than the wage determination minimum rate of \$9.81 (the sum of \$8.25 per hour for wages and \$1.56 per hour for the cost of fringe benefits) for pest controller, the class of service employee applicable to this contract. See Johnson Moving & Storage Co., *supra*, at 3.

Also, contrary to the protester's assertion, the Service Contract Act's requirement for inclusion of the wage determination in the IFB does not incorporate the applicable wage determination into the IFB by operation of the "Christian doctrine." See G.I. Christian & Assocs. v. United States, 312 F.2d 418, 424-427 (Ct. Cl.), cert. denied, 375 U.S. 954 (1963). Operation of the Christian doctrine is limited to the incorporation of mandatory contract clauses into otherwise validly awarded government contracts; it does not extend to incorporating inadvertently omitted mandatory provisions into an IFB for purposes of interpreting the IFB or curing a defective bid. See American Imaging Servs., Inc.-Recon., B-250861.2, Jan. 5, 1993, 93-1 CPD ¶ 13 at 2; Parsons Precision Prods., Inc., B-249940, Dec. 22, 1992, 92-2 CPD ¶ 431 at 6. Since Bug Control seeks incorporation of the wage determination into the IFB to render its bid responsive, the Christian doctrine is not applicable. See Parsons Precision Prods., Inc., *supra*.

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<sup>5</sup>Although the Service Contract Act requires every contract to contain a provision specifying the minimum service employee wages as determined by the Secretary of Labor, 41 U.S.C. § 351(a)(1) (1994), the Act, absent insertion in the contract of a provision specifying such wage rates, does not put into force any specific wage rates other than the federal minimum wage set by the Fair Labor Standards Act. See 41 U.S.C. § 351(b)(1). The minimum wage under the Fair Labor Standards Act is \$5.15 per hour as of September 1, 1997. 29 U.S.C.A. § 206(a)(1) (West Supp. 1997).

Bug Control also alleges that its bid otherwise obligates it to pay wages in excess of the applicable minimum wage and benefits in the wage determination. This allegation is based on Bug Control's bid price for labor on contract line item number (CLIN) 0002AL of \$10 per hour, which is greater than the wage determination minimum rate of \$9.81 for pest controller.

This contention has no merit. Although the price bid for CLIN 0002AL is greater than the minimum wage rate, the bid price for CLIN 0002AL does not reflect the bidder's obligation to pay its employees' wages at any particular level. Rather, the CLIN price is the unit price for labor under the indefinite quantity portion of the contract which the Navy would pay the contractor. The IFB specifically states at section B.3 that the unit price bid for this CLIN would include all of the contractor's direct and indirect costs "associated with performing one standard hour of work." The CLIN price thus does not identify the specific wages which the bidder will be obligated to pay its employees under the contract; quite to the contrary, such a CLIN price for labor can be less than the applicable rates in an attached wage determination and the bid may still obligate the bidder to pay its employees the applicable minimum wage rates if the bidder has committed itself in its bid to do so. See Stanley Aviation, Inc., B-256650, July 14, 1994, 94-2 CPD ¶ 23 at 4-5 (proposed hourly rates below those specified in a wage determination do not take exception to the wage determination, but rather indicate a below-cost bid, which is acceptable as long as the bid does not take exception to the wage determination).<sup>6</sup>

Since Bug Control's bid did not acknowledge the applicable minimum wage rates specified in amendment 0001, nor obligate Bug Control to pay wages at least equal to those wage rates, and since a collective bargaining agreement does not otherwise create such an obligation, Bug Control's failure to acknowledge amendment 0001 is a material bid defect which may not be cured after bid opening. Therefore, Bug Control's bid is nonresponsive for failing to acknowledge the amendment. See Western Helicopters, Inc., *supra*; Air Photo Surveys, Inc., *supra*.

Bug Control finally contends that the additional cost to the government of making award to any bidder other than Bug Control is so significant that the agency is obligated to accept Bug Control's bid. This is not a basis for sustaining the protest. It is well established that the maintenance of the integrity of the competitive

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<sup>6</sup>Moreover, as indicated, CLIN 0002AL is only applicable to indefinite quantity work. Therefore, even if the CLIN price could be construed as evidence obligating the bidder to pay minimum wage rates in performing the indefinite quantity work to which it applies, it is not applicable to the fixed-price work which accounts for the majority of work to be performed under the contract.

bidding system is more in the government's best interest than any pecuniary advantage to be gained in a particular case by accepting a nonresponsive bid. Kurtz Constr. Co., B-245914, Oct. 29, 1991, 91-2 CPD ¶ 401 at 2.

The protest is denied.

Comptroller General  
of the United States