

**DECISION**



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

FILE: B-199880

DATE: June 2, 1981

MATTER OF: D. Moody & Co., Inc.

**DIGEST:**

1. Fact that protester's offer was for lesser quantity than that solicited is not determinative of protest because although RFP contained clause indicating that offers for partial quantities are not solicited it also contained clause indicating that partial offer would be accepted and in fact protester's offer was rejected because it was for surplus property.
2. Agency's policy that surplus property be more than \$3,000 or 5 percent, whichever is greater, less than price of newly manufactured property before agency will consider buying it imposes in this case undue restriction on competition, because agency has not shown there is a legitimate need to perform additional tests on surplus property, cost of which \$3,000/5 percent factor is intended to evaluate.

D. Moody & Co. Inc., protests the rejection by the Navy Aviation Supply Office (ASO) of its low offer to supply 18 of the 52 valves called for by request for proposals No. N00383-80-R-1582. Moody contends the Navy improperly rejected its offer pursuant to the agency's unpublished and improper policy of refusing to consider offers of surplus aircraft parts unless the price offered is lower than an offer for newly manufactured parts by a margin of \$3,000 or 5 percent, whichever is greater. We agree with Moody.

*Proposed as a result of Consideration*

*D-17105* 115389

The Navy states that only the Hydro-Aire Division of the Crane Company was solicited because it was the developer and only known producer of the valve and that the Navy lacked adequate technical data for a competitive procurement. Hydro-Aire offered to supply the 52 valves for a unit price of \$436 and was awarded the contract. Although Moody was not solicited, it submitted an offer for 18 of the 52 valves at a unit price of \$369, stating that the valves had been obtained from the Defense Property Disposal Service in 1975 and were "New Surplus Certified airworthy by a duly authorized FAA facility" and certifying that the parts "meet applicable specifications." After applying its \$3,000/5 percent test, the Navy rejected Moody's offer and informed the firm that the difference in price was not sufficient to warrant the cost of a technical review to determine if test criteria could be developed for the acceptance of surplus material.

Although ASO rejected Moody's offer solely on the basis that it failed to qualify for consideration under the \$3,000/5 percent test, ASO asserts that Moody's offer also could have been rejected because it was for only 18 of the 52 parts required. In support of this view ASO cites clause 320 of the solicitation which stated that award would be made for the total quantity of each item and that offers for partial quantities were not solicited. On the other hand, paragraph 10 of Standard Form 33-A also included in the solicitation stated that unless otherwise provided in the schedule, offers could be submitted for any quantities less than those specified. As clause 320 was not located in the schedule portion of the solicitation, it is not clear that ASO actually intended that offers for less than the total quantity be rejected, particularly since only one company was solicited. Accordingly, and since the agency did not reject Moody's offer for this reason, we do not view this issue as dispositive of the protest.

The primary issue is the propriety of the \$3,000/5 percent test under which the price of surplus property must be \$3,000 or 5 percent (whichever is greater) below the price of newly manufactured property before the agency will consider acquiring the surplus property. Moody asserts the test is unauthorized, unpublished and constitutes an improper prequalification for surplus dealers.

Although Moody had been previously informed by ASO of the existence of the test, the solicitation contained no notice of its possible application. The Navy contends the test, which is applied whenever ASO lacks adequate technical data for a competitive procurement, fairly reflects its estimate of the average extra cost it incurs whenever surplus property is considered for acquisition. These costs include those incurred in a search for, or the development of, documents adequate for acceptance criteria, preaward evaluation of the surplus property and testing at a Government site. The Navy states that such Government testing costs are not incurred when newly manufactured property is obtained since the new property is subjected to in-process and acceptance testing by the contractor prior to delivery although the Government may review and verify such testing. In addition, the agency states that there is an inherent risk in the acquisition of surplus property since the specialized criteria developed for its acceptance are not the same as those imposed by the manufacturer. In this regard, the Navy points out that surplus property cannot be subjected to in-process tests performed by the manufacturer and unless evidence that the surplus property successfully passed all in-process tests was available, surplus property would be accepted with less than the full range of tests applied to newly-manufactured material.

It is a fundamental principle of competitive procurement that offerors must be treated equally and be provided with a common basis for the submission of their proposals. Host International, Inc., B-187529, May 17, 1977, 77-1 CPD 346. We have, however, approved special agency procedures like the one in this case which may operate to limit competition to certain types of offers if the restrictive procedure serves a bona fide need of Government such as the need to maintain the high level of quality and reliability necessitated by the criticality of the product. Rotair Industries; D. Moody & Co., Inc., 58 Comp. Gen. 149 (1978), 78-2 CPD 410.

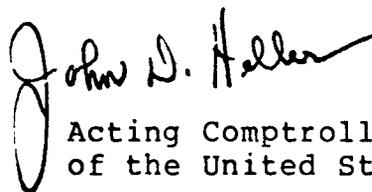
In D. Moody & Co., Inc., 56 Comp. Gen. 1005 (1977), 77-2 CPD 233, we recognized an agency has a legitimate concern as to where, when, why and how an item became surplus but that such concern, without more, is not sufficient to preclude procurement of parts from surplus dealers. We also concluded that once the historical data on a new, unused item

from the time it left the manufacturer's plant had been supplied, there was no distinction between the part furnished by the manufacture and the part furnished by a surplus dealer. We further found that since the surplus parts had once been accepted by the Government, these same parts had passed all the inspection procedures required of new parts prior to initial acceptance. In this instance the agency has not based its rejection of Moody's offer on the lack of such historical data and the agency has not indicated that the facts differ from those in D. Moody & Co., Inc., supra.

Here, in emphasizing its belief in the necessity for developing special tests and acceptance criteria adequate for the inspection of surplus property, the Navy apparently overlooks the fact that the subject items successfully passed through the acceptance procedure once. While it may be true that some items have been accepted under waivers or deviations from the specifications or were not included in the sample inspected where sampling techniques were used, the Navy has not shown that such waivers, deviations or techniques are incompatible with good inspection and acceptance procedures such as it uses in the purchase of newly manufactured equipment. Moreover, it has not shown that its experience with new, unused and undeteriorated surplus property warrants special treatment after the part number has been verified along with the facts pertaining to the Government's surplus sale of the item.

It is our view, therefore, that the agency has not shown that in this case there is a legitimate need to perform additional tests on the nondeteriorable surplus parts offered by Moody. Consequently, there was no reason to apply the \$3,000/5 percent test or any other evaluation penalty to offers of surplus property and if otherwise acceptable, Moody's offer should have been considered.

For the reasons stated above the protest is sustained. However, since all of the items have been delivered, no corrective action is feasible with respect to this procurement. We are recommending however, that the \$3,000/5 percent test not be utilized in the future under circumstances similar to those of this case.



Acting Comptroller General  
of the United States



115390

**DECISION**



1987  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548**

**FILE:** B-196671

**DATE:** June 2, 1981

**MATTER OF:** Leonard Brothers Trucking Co., Inc.

**DIGEST:**

1. While specific provision of tender is ambiguous standing alone, examination of entire tender removes ambiguity. Rule that ambiguities in tender should be resolved in favor of shipper is not for application.
2. Where purpose of tender revision is to clarify rather than change meaning of tender provision, shipper cannot point to revision as proving that tender had different meaning before being revised.
3. Order for stopping in transit service constitutes request for truckload service since such service is provided only on truckload shipment.

By letter of October 25, 1979, Leonard Brothers Trucking Company, Inc. (Leonard), requests review of the General Services Administration's (GSA) audit action on 22 shipments of Government property. At issue are shipments of various commodities, such as helicopter rotor wing blades, bomb racks, and radar antennae, that moved via Leonard between Eastern points on the one hand, and California and Arizona points on the other hand, during the period March 29 to June 27, 1974.

GSA asserted overcharges of \$10,636.91, computing the applicable charges at rates and minimum weights published in item 6210 of Leonard's Tender 30-B, ICC No. 50 without regard to the lineal foot rule in item 365 of the tender. Leonard protested, contending that all but one of the 22 shipments (most of which were under 10,000 pounds), were subject to item 365. Where the actual weight of a shipment is relatively light in relation to the lineal feet of loading space required, as in the case of these shipments, item 365 requires the

*Request for review of Leonard Brothers Trucking Co. Inc.*  
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application of rates to a constructive minimum weight of 750 pounds for each lineal foot of loading space. Application of item 365 results in higher charges.

In addition, Leonard contended that one shipment was tendered as a truckload shipment and was subject to the truckload minimum charge rule set forth in item 510 of its tender, which imposes a minimum weight of 24,000 pounds on a shipment that is tendered as a truckload, or occupies 32 lineal feet or more of trailer loading space. The overcharges were recovered by deduction.

Briefly, Leonard's Tender 30-B offers local and joint distance commodity rates and point to point commodity rates to all agencies of the Government pursuant to section 22 of the Interstate Commerce Act, made applicable to motor carriers by section 217(b), 49 U.S.C. 10721(b)(1) (Supp. III, 1979), and is composed of four sections. Section 4 sets forth rates applicable to the commodities described in section 1 of the tender. Both the carrier and GSA agree that the rates published in item 6210 of section 4 applied to the 22 shipments, but they disagree as to the applicable minimum weights. The dispute involves the application of a footnote under item 6210.

Item 6210 (original page 91), to the extent pertinent, reads as follows:

BETWEEN POINTS AND PLACES IN:	SEE NOTE 2	ARIZONA, CALIFORNIA							
		COLUMN A				COLUMN B			
		MINIMUM WEIGHTS IN 1000 POUNDS							
AND POINTS IN THE FOLLOWING STATES: (except as noted)		10	24	30	40	20	24	30	40
		RATES IN CENTS PER 100 POUNDS							
* *	*	*	*	*					
New York Groups 1, 2 & 3 North Carolina	820	620	600	590	720	620	530	499	
* *	*	*	*	*					

This chart is accompanied by two clarifying footnotes. Note 1 provides, in pertinent part, that: "Truckload Minimum provided in this Item are not subject to Item 365." Note 2 simply indicates that the single 10,000 pound chart in the tender item applies to both Columns A and B.

GSA argues that the phrase "truckload minimum" in note 1 refers to all of the weights shown under item 6210, including the 10,000-pound minimum weight. GSA notes that subsequent to the time these disputed shipments were made Leonard revised its tender expressly subjecting 10,000-pound minimum weight shipments to item 365. In view of this and the rule that ambiguities in a tender must be resolved in favor of the shipper (55 Comp. Gen. 958 (1976)), GSA believes that its interpretation of Leonard's tender should prevail: That the 10,000-pound minimum weight is a truckload minimum; that the lineal foot rule did not apply; and that the 10,000-pound rates were properly applied to 10,000 pounds or to the actual weight (where greater than 10,000 pounds), rather than to the higher constructive minimum weight.

However, we agree with Leonard's interpretation. As Leonard points out, before the rule concerning ambiguities in a tender may be applied to a specific provision it is necessary to look at the entire tender to determine if they can be resolved without recourse to the rule. National Van Lines, Inc. v. United States, 355 F.2d 326 (7th Cir. 1966).

Examination of Leonard's entire tender reveals that the term truckload minimum is defined in item 510. Specifically, item 510 provides that a 24,000-pound truckload minimum weight applies when a shipment is tendered as a truckload on the Government Bill of Lading (GBL) or the shipment occupies 32 feet or more of trailer loading space. We note this dimension because of a connection between 32 feet and the 750 pounds per lineal foot, minimum weight rule of item 365, in that the 750 pounds per foot rule produces 24,000 pounds of constructive weight when 32 feet of trailer space is used (32 x 750 pounds). We also note that in Section 1 of Leonard's tender 7,000- and 14,000-pound minimum weight shipments are classified as less than truckload minimums, and the lowest truckload minimum, leaving item 6210 aside, is 20,000 pounds. Although GSA argues that the minimums specified elsewhere

in Leonard's tender are not relevant to the application of item 6210 rates, since that item contains its own minimum weights, we are persuaded that they are relevant in classifying the minimums in item 6210. Indeed, as we stated in Yellow Freight System, Inc., B-197183, June 26, 1980, a 10,000-pound minimum weight is not generally or commercially understood to be a truckload minimum.

Nor does the fact that Leonard eventually revised item 6210, to state expressly that rates subject to the 10,000-pound minimum weight are subject to item 365, convince us that these shipments were not subject to item 365. Rather, we view the amendment as a clarification of existing intention and not as a change in the tender. See National Dairy Products Corp. v. Missouri-Kansas-Texas R.R. Co., 385 F.2d 173, 177 (5th Cir. 1967).

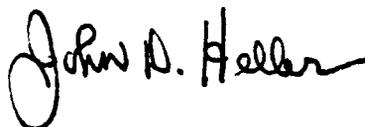
As previously indicated, on one shipment Leonard claims truckload minimum charges on the basis of item 510 of its tender.

On April 26, 1974, Leonard received a shipment of tractors, weighing 14,400 pounds, for transportation from Payne, Ohio, to Travis Air Force Base, California, under GBL F-7870862. The face of the GBL is noted as follows: "STOP OFF AT MATHER AFB, CALIFORNIA TO UNLOAD 2 TRACTORS." For this service Leonard billed and was paid \$1,497.97 on a truckload minimum weight of 24,000 pounds. Upon audit of the payment voucher GSA determined that the charges should be \$1,185.06 on the actual weight of 14,400 pounds, and assessed an overcharge of \$312.91. On the failure of Leonard to refund, the overcharge was recovered by deduction.

Leonard argues that the shipment was tendered as a truckload within the meaning of the truckload minimum charge rule of item 510, because the shipment was ordered stopped in transit for partial unloading, and item 600 of Leonard's Tender 30-B provides: "\* \* \* truckload shipments may be stopped in transit at a point or points enroute for the purpose of either partial loading or unloading \* \* \*." An order for a stop in transit for partial loading or unloading is a characteristic of truckload service. See Watkins Motor Lines, Inc., Ext-North and South Carolina, 103 MCC 227, 246 et seq. (1966). Therefore, since a stop-off in transit was authorized by the applicable tender only for truckload shipments and such an order is a characteristic of truckload

service the subject shipment was tendered as a truckload and is subject to the minimum truckload charge rule. Accordingly, Leonard is entitled to the truckload charges billed, if otherwise correct.

GSA should issue settlements consistent with this decision.

A handwritten signature in black ink, reading "John D. Heller". The signature is written in a cursive style with a large, looped initial "J".

Acting Comptroller General  
of the United States



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**DECISION**



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

FILE: B-200793, B-200793.2      DATE: June 2, 1981

MATTER OF: Nuclear Research Corporation;  
Ridgeway Electronics, Incorporated

**DIGEST:**

1. Where revised bid includes reduced item quantities set forth exclusively in amendment, even though revised item specification is not also included, bid serves as constructive acknowledgement of amendment; failure of bidder to acknowledge receipt of amendment in form prescribed in solicitation should be waived as minor informality as provided in Defense Acquisition Regulation § 2-405(iv)(A).
2. Bidder's failure to insert amended item specification in revised bid in place of original specification preprinted on bid form, constitutes neither express qualification of bid nor ambiguity as to specification upon which bid was based since constructive acknowledgement bound bidder to meet new specification and thus rendered old specification legal nullity.
3. GAO will not consider protester's complaint that agency should have issued stop work order instead of terminating protester's contract for convenience of Government while other party's protest was pending at GAO where agency correctly determined that other party was entitled to award and that award to protester was improper; protester was therefore not prejudiced by termination.

Ridgeway Electronics, Inc. (Ridgeway) protests the termination for convenience of its contract to supply quantities of radiac sets to Kelly Air Force Base, Texas, Department of the Air Force, and the proposed award of a contract for that requirement to Nuclear Research Corporation (NRC) under invitation for bids (IFB) No. F41608-80-B-0048.

*11/25/81*      *termination*  
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The solicitation was issued January 31, 1980 and contemplated award of a three-year multi-year requirements contract. It was amended on four occasions prior to bid opening which was held on May 23 as scheduled under Amendment 0004. Although NRC's bid was apparently low, the contracting officer rejected it as nonresponsive since NRC had failed to formally acknowledge Amendment 0002. This March 28 amendment was deemed material in that it changed the item specification and reduced certain quantities. Award was made to Ridgeway, the next low responsive, responsible bidder, on September 2.

On September 3, NRC filed a protest with the contracting officer arguing that rejection of its bid was improper since it had incorporated the reduced quantities in its bid, and thereby constructively acknowledged Amendment 0002. That protest was denied on September 29 on the ground that while NRC had revised the quantities in accordance with the amendment, its failure to also insert the amended item specification made it unclear to which specification the revised quantity prices applied. The contracting officer concluded that NRC's bid was therefore ambiguous and had to be rejected as nonresponsive.

By letter of October 8, NRC filed a similar protest in our Office (under B-200793) which included the additional contention that Ridgeway's bid should have been rejected as nonresponsive. Before we rendered a decision in the matter, the Air Force Logistics Command reversed the contracting officer's September 29 ruling and sustained NRC's protest on the basis that inclusion of the revised quantities in NRC's bid constituted a constructive acknowledgement of Amendment 0002 which bound NRC to perform in accordance with all changes under that amendment, including the changed item specification. By letter of December 5, it directed the procuring activity to terminate Ridgeway's contract for the convenience of the Government and to award NRC a contract for this requirement. Ridgeway filed this protest on December 16 in response to the termination action. The award to NRC has been postponed pending our decision.

Ridgeway takes the position, based on the manner in which NRC prepared its revised bid, that constructive acknowledgement has no application to the facts of this case. In this regard, NRC prepared its revised bid on four copied bid form pages since it had submitted the original bid form prior to amendment of the solicitation. Although NRC typed in the quantities as reduced by Amendment 0002 (as well as corresponding prices), it did not similarly type in the amended item specification, but instead submitted the revised bid with the original, unamended specification preprinted on all four pages as in the original solicitation. Ridgeway urges that this "flat refusal" to revise the preprinted specification constituted an express qualification of NRC's bid which therefore amounted to a counteroffer. Noting that counteroffers are nonresponsive and cannot be made responsive by means of constructive acknowledgement, Ridgeway concludes that NRC's bid should have been rejected.

Ridgeway argues in the alternative that even if NRC constructively acknowledged Amendment 0002, the bid is nevertheless ambiguous since it is unclear on its face whether NRC intended to be bound by the amended specification. It again concludes that NRC's bid should have been rejected as nonresponsive. Ridgeway requests as relief that its contract for this requirement be reinstated.

The Air Force reasserts its opinion that NRC's inclusion of the amended quantities in its revised bid clearly indicated it had received Amendment 0002 and thus operated as a constructive acknowledgement which bound NRC to perform in accordance with all changes in the amendment. Since this acknowledgement operated to incorporate all of Amendment 0002 in NRC's bid, NRC was not required to physically change the amended items in its bid and its failure to change the original item specification as preprinted in its bid form was thus not an express qualification of its bid. In a similar vein, the Air Force maintains that NRC's bid was not ambiguous as to the controlling specification since NRC's constructive acknowledgement of Amendment 0002 bound it to perform in accordance with the amended specification. We agree with the Air Force, and for the reasons stated below the protest is denied.

The general rule is that a bidder's failure to acknowledge receipt of a material amendment renders its bid non-responsive. Che Il Commercial Company, B-195017, October 15, 1979, 79-2 CPD 254; Scott-Griffin, Incorporated, B-193053, February 9, 1979, 79-1 CPD 93. This rule follows from the fact that if a bidder does not acknowledge a material amendment prior to bid opening, his offer is for something other than the performance requested by the solicitation as amended. 42 Comp. Gen. 490 (1963). However, the failure to formally acknowledge receipt of an amendment to an IFB should be waived as a minor irregularity if "the bid received clearly indicates that the bidder received the amendment." See Defense Acquisition Regulation (DAR) § 2-405(iv)(A) (1976 ed.).

We have held that inclusion in a bid of one of the essential items appearing only in an amendment is a clear indication that the amendment was received and that the bidder intends to be bound by the amended terms. The bid is considered responsive under these circumstances and the bidder's failure to formally acknowledge the amendment may properly be waived. Dependable Janitorial Service and Supply Company, B-188812, July 13, 1977, 77-2 CPD 20. It must be emphasized that this exception, which has come to be known as "constructive acknowledgement," operates to waive only the bidder's failure to acknowledge receipt of the amendment in the particular form prescribed, not compliance with the amended terms. Once found, constructive acknowledgement operates in the same manner as a formal acknowledgement: the bidder is bound to perform all of the changes set forth in the amendment at the price stated in its bid. Che Il Commercial Company, supra.

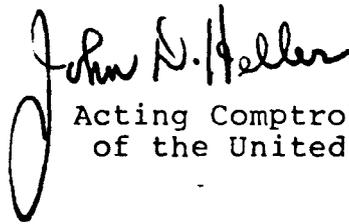
Applying these principles to the instant case, we find that NRC's bid did constructively acknowledge Amendment 0002. By preparing its revised bid using the reduced item quantities set forth exclusively in Amendment 0002, NRC clearly indicated it had received the amendment and that it was agreeing to be bound by its terms. NRC's acknowledgement of the amendment in this manner bound it to perform in accordance with its terms just as it would have been bound by an actual acknowledgement. It is thus inconsequential that NRC failed to physically incorporate the new item specification in its revised bid; it agreed to this term by constructively acknowledging the amendment.

We do not share the protester's view that NRC's failure to include the new specification in its bid constituted an express qualification of its bid. As noted above, and as observed by the Air Force, once a bidder has acknowledged an amendment, either actually or, as here, constructively, the terms as amended become part of the bid and it is not then necessary to also physically change the portion of the bid affected by the amendment. Although the superseded terms remain in the bid, they retain no legal significance. Logically, therefore, the superseded item specification remaining in NRC's bid cannot be construed as an express qualification of the bid since NRC, through its constructive acknowledgement of Amendment 0002, agreed to meet the amended specification.

These same considerations militate against Ridgeway's alternate contention that whether or not NRC acknowledged Amendment 0002, its bid was ambiguous as to the item specification being bid upon. A bid is ambiguous only when it is subject to two or more reasonable interpretations. Castle Construction Company, Inc., B-197466, July 7, 1980, 80-2 CPD 14. NRC's bid is subject to only a single reasonable interpretation. As discussed, NRC agreed to meet the new specification when it constructively acknowledged Amendment 0002. At the same time, the old specification was superseded and although it remained on NRC's revised bid form pages, it had no legal effect. Thus, NRC's bid was clearly based on the amended item specification and NRC was bound to perform in accordance with that specification. Ridgeway's protest is consequently without merit, and we conclude that the Air Force's decision sustaining NRC's protest and finding NRC entitled to the award was proper. See generally, Arrowhead Linen Service, B-194496, January 17, 1980, 80-1 CPD 54; Che Il Commercial Company, supra; Shelby-Skipwith, Inc., B-193676, May 11, 1979, 79-1 CPD 336; Artisan, Inc., B-186601, August 6, 1976, 76-2 CPD 132; Algernon Blair, Inc., B-182626, February 4, 1975, 75-1 CPD 76.

Ridgeway also complains that the Air Force acted improperly in terminating its contract before our Office had rendered a decision on NRC's September 3 protest. It contends that a stop work order should instead have been issued and that the premature termination violated applicable regulations. In view of our conclusion that the Air Force correctly determined NRC was entitled to the contract for this requirement, we cannot see how the protester was prejudiced by the termination of its contract. Accordingly, the merits of this contention are not for consideration in this decision. See Peter J. Giordano, B-192595, September 12, 1978, 78-2 CPD 195.

Ridgeway's protest is denied. NRC's protest under B-200793 is consequently dismissed as moot.



Acting Comptroller General  
of the United States