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**DECISION**



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

81-1 CPD 437



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 acknowledgment 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.

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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.

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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.

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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.

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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.

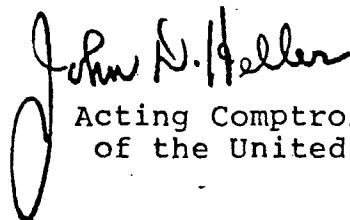
These same considerations militate against Ridgeway's alternate contention that whether or not NRC acknowledged Amendment 0002, its bid was ambiguous as to the item specification being bid upon. A bid is ambiguous only when it is subject to two or more reasonable interpretations. Castle Construction 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.

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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