

DECISION



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

30764

FILE: B-217024; B-217024.2 **DATE:** March 25, 1985

MATTER OF: Andrew Corporation;
Cablewave Systems, Inc.

DIGEST:

1. Protest against agency termination of contract is denied where award had been made on a bid offering an "equal" product radio transmission cable and the descriptive material did not demonstrate that the offered product possessed all the salient characteristics of the "brand name" product. A contracting officer may not waive compliance with the salient characteristics even though the product in fact satisfies the minimum needs of the government.
2. For a bid offering an "equal" product to be responsive to a "brand name or equal" solicitation, and thus eligible for award, the descriptive material submitted with the bid or readily available to the agency must be sufficient to permit the contracting officer to assess whether the equal product possesses each salient characteristic identified in the solicitation. If an equal bid includes a model number, information describing the model may be supplied after bid opening to show conformance with the salient characteristics, if that information was in existence prior to bid opening.
3. Acceptance of an offer by the government must be clear and unconditional and it must appear that both parties intended to make a binding agreement at the time of the purported acceptance. Notification by the contracting officer that he had sustained a protest against the improper award of a contract, that he had determined that the improperly awarded contract be terminated, and that the protester "should be receiving the award soon," cannot be considered notice of award since award is thereby represented as a future action.

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4. Protest fails to show that agency acted arbitrarily or capriciously in canceling a "brand name or equal" invitation for bids (IFB) where the agency determined that a less expensive product which did not possess all the salient characteristics of the "brand name" product nevertheless could satisfy the minimum needs of the agency. The required cogent and compelling reason to cancel an IFB after bid opening exists where the agency determines after bid opening that the IFB contains specifications which overstate the minimum needs of the government or that its needs can be satisfied by a less expensive alternative.
5. GAO will not consider the merits of an allegation that protester was entitled to a combined award for both Lots I and II, because of its low overall bid where agency properly canceled solicitation as it related to Lot II and protester was not in line for award for Lot I alone, because its bid for that lot was not low.
6. The failure to apprise an interested party of the pendency of a protest to the agency does not give rise to a substantive remedy but, at best, only provides the basis for the right to a procedural remedy, the rehearing of a protest. Protester, in essence, received this rehearing when GAO subsequently considered its protest.

Andrew Corporation (Andrew), and Cablewave Systems, Inc. (Cablewave), protest the actions of the Defense Industrial Supply Center (DISC) in regard to invitation for bids No. DLA500-84-B-0348, issued by DISC for the procurement of radio frequency cable. Andrew alleges that DISC improperly terminated for the convenience of the government the contract awarded to Andrew on its "equal" offer for Lot II of the "brand name or equal" solicitation. Cablewave, on the other hand, argues that DISC acted improperly in initially failing to award both Lots I and II to Cablewave and subsequently in refusing to award a contract for Lot II to Cablewave after DISC terminated Andrew's contract for that lot.

We deny both protests.

The solicitation included 18 items divided between two lots. Bidders were informed by clause D-81, "AWARD BY ENTIRE LOT/ITEM/SUB-ITEM," that:

"With respect to each lot/item/sub-item identified below, no award will be made for less than the full requirements shown in this solicitation for said lot/item:

Lot I, II

Item _____

Sub-Item _____

Any offer offering less than all of the solicitation requirements of any said lots/items/sub-items will be nonresponsive as to said lot/item/sub-item."

Under Lot I, DISC solicited offers for the supply of 259,000 feet of 3-inch radio frequency cable. Under Lot II, DISC solicited offers for the supply of 211,000 feet of 1-5/8-inch radio frequency cable, with the cable required to be:

"1-5/8 INCH INNER CONDUCTOR CORRUGATED COPPER DIELECTIC FOAM POLYETHYLENE, CORRUGATED COPPER OUTER CONDUCTOR, POLYETHYLENE JACKET, 50 OHMS OUTER DIAMETER 2.00 INCH, ELECTRICAL AND MECHANICAL CHARACTERISTICS AND TEST PER ANDREW CORP P/N FHJ7-50 OR EQUAL ANDREW CORP (84147) CHICAGO ILL
P/N FHJ7-50
CABLE WAVE SYSTEMS, INC. (16733)
NORTH HAVEN CT
P/N FCC158-50J
PRODELIN INC (94661)
HIGHSTOWN N.J.
P/N 31-1695"

Bidders proposing to furnish an "equal" product were warned that:

"The evaluation of bids and the determination as to equality of the product offered shall be the responsibility of the Government and will be based on information furnished by the bidder or identified in his bid, as well as other information reasonably available to the purchasing activity. CAUTION TO BIDDERS. The purchasing activity is not responsible for locating or securing any

information which is not identified in the bid and reasonably available to the purchasing activity. Accordingly, to insure that sufficient information is available, the bidder must furnish as a part of his bid all descriptive material (such as cuts, illustrations, drawings, or other information) necessary for the purchasing activity to (i) determine whether the product offered meets the salient characteristics requirements of the Invitation for Bids and (ii) establish exactly what the bidder proposes to furnish and what the Government would be binding itself to purchase by making an award. The information furnished may include specific references to information previously furnished or to information otherwise available to the purchasing activity."

In response to the solicitation, DISC received bids from Andrew and Cablewave. For Lot I, Andrew offered the brand-name cable specified for that lot at a bid price of \$4.89 per foot, while Cablewave offered a cable listed in the solicitation as an equal at a final, modified bid price of \$5.15 per foot. The contracting officer accordingly made award to Andrew for Lot I.

As for Lot II, Cablewave offered its FCC158-50J cable, listed in the solicitation as an "equal," at a final, modified bid price of \$3.56 per foot. Andrew, on the other hand, offered not only the "brand name" FHJ7-50 cable, at \$3.89 per foot, but also submitted an alternate bid in which it offered as an "equal" its LDF7-50 low-density type foam cable at \$2.89 per foot. Andrew submitted with its alternate bid a cover letter in which it claimed that its LDF7-50 cable met or exceeded all the specifications of the FHJ7-50 cable and a 1981 letter from the Naval Electronic Systems Command granting "qualification approval" to the LDF7-50 cable on the basis of test data furnished by Andrew indicating that the cable complied with certain military specifications. After bid opening, Andrew submitted copies of Andrew Bulletin No. 1139A, dated 12/82, describing the LDF7-50 cable and Andrew Bulletin No. 1111, dated 8/75, describing the FHJ7-50 cable.

DISC's Directorate of Technical Operations, in response to an inquiry from the contracting officer, determined that Andrew's LDF7-50 cable was "ACCEPTABLE . . . FOR THIS DIRECT DELIVERY BUY" and indicated that action was being taken to establish a new national stock number for the cable. The

contracting officer thereupon made award to Andrew on its alternate bid for Lot II.

Shortly thereafter, Cablewave protested to DISC, alleging that the award to Andrew for Lot II was improper because LDF7-50 cable was not an "equal" to the "brand name" FHJ7-50 cable. Cablewave later added that it had not offered its own low density foam cable only because the government had previously not considered low density foam cable to be the "equal" of the medium density foam cables specified under Lot II.

DISC subsequently determined that Andrew's LDF7-50 cable indeed failed to meet all the salient characteristics of the "brand name" FHJ7-50 cable as set forth in the solicitation and, accordingly, decided to terminate for the convenience of the government Andrew's contract for Lot II. DISC notified Cablewave of its decision by letter of October 16, indicating that "[y]ou should be receiving the award soon." However, upon further consideration, DISC concluded that since Andrew's less expensive LDF7-50 cable met its minimum needs, award of Lot II to Cablewave "may not be appropriate." DISC so notified Cablewave by letter of October 26. Both Andrew and Cablewave then filed protests with our Office.

Andrew contends that the termination of its contract as it relates to Lot II was arbitrary and capricious, arguing that its LDF7-50 cable is an "equal" to the "brand name" FHJ7-50 cable. Andrew emphasizes that DISC has determined that the less expensive LDF7-50 cable satisfies its minimum needs and points out the Defense Logistics Agency, of which DISC is a part, stipulated in 1980 that it had no reason to question Andrew's contention that LDF7-50 cable is equal or superior to FHJ7-50 cable.

As a general rule, our Office will not review an agency's decision to terminate a contract for the convenience of the government, since by law this is a matter of contract administration for consideration by a contract appeals board or by a court of competent jurisdiction. However, where the contracting agency's action is based upon a determination that the contract was improperly awarded, then our Office will review the validity of the procedures leading to award to the terminated contractor. See Amarillo Aircraft Sales & Services, Inc., B-214225, Sept. 10, 1984, 84-2 C.P.D. ¶ 269.

For a bid offering an "equal" product to be responsive to a "brand name or equal" solicitation, and thus eligible for award, the descriptive material submitted with the bid or readily available to the agency must be sufficient to permit the contracting officer to assess whether the equal product possesses each salient characteristic identified in the solicitation. See Ruud Lighting, Inc., B-215259, Aug. 17, 1984, 84-2 C.P.D. ¶ 189. If an equal bid includes a model number, information describing the model may be supplied after bid opening to show conformance with the salient characteristics, if that information was in existence before bid opening. See Scanray Corporation, B-215275, Sept. 17, 1984, 84-2 C.P.D. ¶ 299. However, the above information must demonstrate that the offered product possesses all the salient characteristics, and a contracting officer may not waive compliance with the salient characteristics even though the product in fact satisfies the minimum needs of the government. Id. at 5.

The adequacy of the descriptive material and the equality of the product it describes are technical evaluations for the judgment of the contracting agency. Accordingly, we have deferred to the agency's determination in the absence of evidence showing that determination to be arbitrary or capricious. See Calma Company, B-209260.2, June 28, 1983, 83-2 C.P.D. ¶ 31.

The specifications for Lot II provided that an "equal" product must meet the electrical and mechanical characteristics of FHJ7-50 cable. In the preexisting descriptive literature submitted by Andrews after opening, the mechanical characteristics of FHJ7-50 cable were said to include a flat plate crush strength of 300 pounds per inch and a hydrostatic crush strength of 750 pounds per square inch. However, the descriptive literature submitted by Andrew as to its LDF7-50 cable indicates that this cable possesses a flat plate crush strength of only 150 pounds per inch and gives no indication as to its hydrostatic crush strength. Since the available descriptive literature indicates that Andrew's LDF7-50 cable fails to meet one of the salient characteristics of the "brand name" cable and there is no indication as to whether LDF7-50 cable meets a second salient characteristic, see Sutron Corporation, B-205082, Jan. 29, 1982, 82-1 C.P.D. ¶ 69, we are unable to conclude that DISC's determination that LDF7-50 is not an "equal" under Lot II was unreasonable.

We note in this regard that while DISC now believes that the less expensive LDF7-50 cable will satisfy its minimum needs, the agency continues to maintain that the crush strength of the cable to be used is a significant, salient characteristic since the cable may, in some circumstances, be buried. In any case, as indicated above, contracting officials may not waive compliance with a salient characteristic in order to accept a product offered as an "equal" which in fact satisfies the minimum needs of the government. Accordingly, DISC properly found that Andrew's alternate bid was nonresponsive to the requirements for Lot II and that the award to Andrew for that lot was improper.

While Cablewave agrees with DISC that Andrew's alternate bid was nonresponsive, it questions DISC's subsequent decision to resolicit DISC's requirement for cable as set forth in Lot II. Cablewave argues that it has already received notice of award for that lot, citing the October 16 letter to Cablewave in which the contracting officer indicated that:

"I have determined that the Lot II portion of the contract with Andrew Corporation be terminated . . . and that said Lot be awarded to Cablewave Systems. You should be receiving the award soon."

The acceptance of an offer by the government must be clear and unconditional. It must appear that both parties intended to make a binding agreement at the time of the purported acceptance of the offer; a contract does not come into existence when the purported acceptance is conditioned on future actions by the offeror and the procuring agency. See Northpoint Investors, B-209816, May 17, 1983, 83-1 C.P.D. ¶ 523; Marino Construction Company, Inc., 61 Comp. Gen. 269 (1982), 82-1 C.P.D. ¶ 167. Given DISC's reference to future action, "[y]ou should be receiving the award soon," DISC's October 16 letter to Cablewave cannot be considered a notice of award or present acceptance of Cablewave's offer for Lot II. We note in this regard that Andrew's contract for Lot II apparently was not terminated until October 19, 3 days after the letter to Cablewave.

We see no reason to question the cancellation of the solicitation as it relates to Lot II. We have recognized that while a solicitation may be canceled after bid opening only when a cogent and compelling reason for the cancellation exists, the determination as to whether a sufficiently

compelling reason exists is primarily within the discretion of the administrative agency. This determination will not be disturbed absent proof that the decision was clearly arbitrary or capricious or not supported by substantial evidence. See Jarrett S. Blankenship Co., B-211582, Oct. 31, 1983, 83-2 C.P.D. ¶ 516; Chrysler Corporation, B-206943, Sept. 24, 1982, 82-2 C.P.D. ¶ 271. Moreover, we have also held that when it is determined that an IFB contains specifications which overstate the minimum needs of the government or the agency decides after bid opening that its needs can be satisfied by a less expensive alternative, there exists a compelling reason to cancel the solicitation. Jarrett S. Blankenship Co., B-211582, supra, 83-2 C.P.D. ¶ 516 at 2-3; Chrysler Corporation, B-206943, supra, 82-2 C.P.D. ¶ 271 at 3-4; Uffner Textile Corporation, B-204358, Feb. 8, 1982, 82-1 C.P.D. ¶ 106. Accordingly, we do not believe that Cablewave has demonstrated that DISC's decision to cancel because Andrew's less expensive LDF7-50 cable could satisfy the government's minimum needs was arbitrary or capricious.

We note that Cablewave points out that its final, modified bid prices for Lots I and II combined, when extended, totaled \$2,085,010, \$2,290 less than the \$2,087,300 total of bid prices in Andrew's responsive bid for Lots I and II. Cablewave interprets clause D-81 to require that award be made to the bidder offering the lowest overall bid price for both lots combined and contends therefore that the initial award should have been made to Cablewave for both lots.

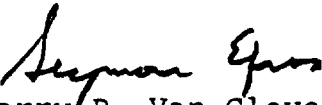
However, given our conclusion that Cablewave has not shown that DISC acted improperly in canceling the solicitation as it relates to Lot II, and since Andrew was clearly the low bidder for Lot I, then even if we were to accept Cablewave's interpretation of the solicitation, Cablewave would not have been in line for award for Lot I. Accordingly, we will not consider the merits of this allegation. See M. Pashelinsky & Sons, Inc., B-214973, Aug. 29, 1984, 84-2 C.P.D. ¶ 237.

Finally, Andrew observes that it was "not contacted about the merits of Cablewave's allegations" in the protest to DISC until after the contracting officer had sustained the protest. We note in this regard that the October 16 letter to Andrew informing that company of the contracting officer's determination that the award for Lot II was

improper indicated that the letter was to be both notice of the protest and notice of the disposition of the protest.

While we believe that DISC should have given Andrew an opportunity to comment prior to sustaining Cablewave's protest, see Electronic Associates, Inc., B-184412, Feb. 10, 1976, 76-1 C.P.D. ¶ 83; cf. Commonwealth Communications, Inc., B-209322.2, June 6, 1983, 83-1 C.P.D. ¶ 606, nevertheless, the failure to apprise an interested party of the pendency of a protest gives rise to no substantive remedy. At best, this failure provides only the basis for the right to a procedural remedy, the rehearing of a protest. See BDM Management Services Co., B-211036.2, Apr. 9, 1984, 84-1 C.P.D. ¶ 392. Essentially, that is what Andrew has received here. See Commonwealth Communications, Inc., B-209322.3, supra, 83-1 C.P.D. ¶ 606 at 5.

Accordingly, both protests are denied.

for 
Harry R. Van Cleve
General Counsel