

**DECISION**

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

FILE: B-185214

DATE: August 11, 1976

MATTER OF: LEK Corporation

61327  
98698**DIGEST:**

1. A solicitation for kits to be installed on trucks may be canceled where it is determined after the deadline for submission of proposals that it is in the Government's interest to have the kits installed by the vehicle manufacturer in the course of vehicle assembly.
2. GAO does not enforce the anti-trust laws and any questions in that regard should be referred to the Department of Justice.

The LEK Corporation (LEK) protests the cancellation of request for proposals (RFP) DAAB07-75-R-0287 which was issued by U. S. Army Electronics Command (ECOM) for a multi-year procurement of Communication Installation Rack and S-250 Shelter Tie-Down KITS (hereinafter collectively referred to as KITS) which were to be installed on commercial trucks purchased under another multi-year procurement from the Chrysler Motors Corporation (Chrysler).

The protested procurement is related to the procurement of Chrysler commercial trucks under a program called WHEELS. WHEELS is predicated on the concept that military design vehicles can be replaced at substantial savings by commercial trucks which, in essence, have met the test of the market place. However, it was also recognized that special KITS would have to be added to the commercial units to satisfy special minor requirements. It was contemplated such KITS would be separately purchased and installed.

With specific reference to the protested procurement, a multi-year contract for 1½ Ton Commercial Trucks (XM861 - now XM880) was awarded to Chrysler Corporation on February 28, 1975 as a result of a competitive solicitation. Although it was recognized that having the truck contractor supply and install the KITS in the course of truck manufacture would likely result in the best price to the Government, the KITS were not included in the truck procurement because of objections from some of the vehicle

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manufacturers to the possible disruption of their commercial production lines and because of Army concern that such installation would be inconsistent with the basic concept of buying the same item being purchased by the general public.

While the Army's Tank Automotive Command (TACOM) was responsible for procurement of the trucks, ECOM was assigned responsibility for development and procurement of the KITS. On May 22, 1975, ECOM issued the RFP for the KITS on an open competitive basis rather than as a small business set-aside after some concern was expressed that the vehicle producer not be excluded from the competition. The RFP was amended on June 14, 1975 to extend the closing date from June 23 to June 30, 1975. Chrysler's request for a further extension of the closing date until July 22, 1975 was denied on June 25, 1975, "due to the stringent requirements of the solicitation." LEK and Kellett Corporation (Kellett) both had submitted proposals by the June 30, 1975 closing date. Kellett's proposal was low. Chrysler did not submit a proposal within the prescribed deadline.

On August 8, 1975, Chrysler sent both offerors under the solicitation its own request for quotations for portions of the KITS procurement. The request sent to LEK contained the following description of the goods sought:

"POWER JUNCTION BOX ASSY.

(REF: IFB-DAAB07-75-R-0287)

(Mil Spec. MIL-K-4905 (EL). ) DWGS. FURNISHED

PREVIOUSLY THROUGH U.S. ARMY ELECTRONICS COMMAND

FT. MONMOUTH, N.J. 07703"

Kellett submitted a bid to Chrysler on August 20, 1975.

On August 22, 1975, Chrysler sent a document to the Commander of ECOM, the addressee, and a copy to TACOM, offering in response to the requirements of Solicitation No. DAAB07-75-R-0287, to

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furnish and install communications equipment, racks, shelter tie down, and allied equipment during truck production at a price of \$5,819,527.56, with a Government option to increase quantities up to 50 percent.

Accompanying the submission was a five page DD Form 633, Contract Pricing Proposal. On each of the five pages, immediately above the signature of an officer of Chrysler, appears the following statement:

"This proposal is submitted for use in connection with and in response to DAAB07-75-R-0287 \* \* \*."

By letter of September 10, 1975, the ECOM contracting officer, with the concurrence of his legal adviser, refused the proposal, pointing out that, contrary to the terms of the RFP for the KITS, it included installation and omitted a number of data items.

However, the TACOM project manager, by letter of September 19, 1975, to the Commander of ECOM, objected to the ECOM reaction to the Chrysler proposal noting that delivery of the KITS would have to be coordinated with truck delivery under the Chrysler contract to avoid "costly" depot storage pending KITS unavailability. He noted that acceptance of Chrysler's "unsolicited proposal" to install the KITS during vehicle production would obviate this problem. Meanwhile, he urged expeditious negotiations "up to the point of contract award" with LEK and Kellett.

On October 17, 1975, Chrysler executed a Standard Form 30, Modification of Contract, which TACOM had sent to it, modifying the commercial truck contract by adding KITS procurement and installation supplemental agreement at a price, not to exceed \$5,236,780.44, to be determined pursuant to the changes clause of the contract.

TACOM's contracting officer executed the contract modification on October 20, 1975. The same day TACOM directed ECOM to cancel the solicitation for the KITS.

The next day, October 21, 1975, LEK protested the cancellation by telegram to TACOM. By letter mailed October 23, 1975, LEK protested the cancellation to this Office.

The upshot of the LEK protest is that the Army's failure to follow applicable procedures and regulations in its acquisition of the KITS has been prejudicial to LEK and detrimental to the

integrity of the procurement process. LEK contends that consideration of Chrysler's document, which the Army refers to as an unsolicited proposal, well over a month after the closing date of the RFP, was in gross violation of the integrity of the procurement process. LEK argues that the document which Chrysler submitted was a late proposal and not an unsolicited proposal. LEK moreover challenges the authority of a contracting officer to negotiate the sole-source award of a procurement on the basis of an unsolicited proposal in a situation where the Government's requirements are, and have been, known and where the unsolicited proposal adds nothing which is either new or innovative to the procurement as originally conceived by the Army.

LEK further asserts that the Army never conducted discussions with either of the offerors under the solicitation at any time prior to its acceptance of the Chrysler offer. LEK also questions the practice of allowing Chrysler to write its own specifications and terms through the guise of an unsolicited proposal. In this context LEK asserts that the specifications and terms under which Chrysler offered to supply and install the KITS varied substantially from those of the RFP in the risk that they placed on the contractor. It is therefore unfair, LEK argues, to weigh the LEK and Kellett proposals against the late proposal of Chrysler for purposes of determining whether the two bona fide offerors and Chrysler were within some kind of competitive range for purposes of negotiations. LEK further questions the arithmetic by which the Army arrived at its estimate of the savings which would accrue to the Government were the Army to accept the Chrysler offer. LEK also alleges that TACOM leaked information to Chrysler during the course of the ECOM procurement and that the Product Manager at TACOM had from the initiation of the ECOM procurement attempted to steer the procurement into Chrysler's hands. Finally, LEK argues that the interactions between the Army and Chrysler, to the extent that Chrysler refused to install the KITS unless it was also given the contract for their manufacture, amounted to an illegal tying arrangement in violation of the Sherman Anti-Trust Act.

We agree that a proposal submitted in response to a solicitation after the effective deadline generally should not be considered for award. However, we note in this regard that even though Chrysler referred to the KITS solicitation in its offer, it clearly was not a proposal in response to the solicitation since it proposed

performance substantially different from what was called for: installation in the course of truck assembly (an offer which Chrysler, as the truck manufacturer, was in a unique position to make) and without certain data. While to the ECOM contracting officer it was a late proposal under a pending procurement, to the TACOM project manager it was a proposed modification to an existing contract which he had every right to consider.

We do not believe any useful purpose would be served by discussing whether the Chrysler submission should be characterized as a late proposal, an unsolicited proposal, or something else. The fact is that, at least so far as TACOM was concerned, it could certainly be regarded as a proposed change to an existing contract. We have found that it is proper to award a procurement by amendment to an existing contract where the additional work was not in contemplation at the time of the original award and is such an inseparable part of the original work that it could not reasonably be performed by other than the original contractor. B-164234, July 8, 1968. That rule fits the facts here since if the KITS are to be installed in the course of truck assembly, it can only be done by Chrysler, the truck manufacturer. In this connection, the Army has determined that the contract modification will result in substantial savings. Moreover, while the protester has alleged that TACOM leaked information from its proposal to Chrysler, the Army states that the protester's proposal "was appropriately marked and handled in accordance with regulations." We find no reason to question the Army's findings on these matters.

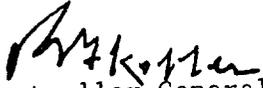
Once the truck contract was modified, the solicitation at issue reflected a procurement for which the Army no longer had a need. Accordingly, it was proper that it should be canceled. In reaching this conclusion we are not unmindful of the undesirable consequences of bringing a procurement to an advanced stage before cancelling it. Such an action is detrimental to those who accepted the solicitation at face value and took pains to respond to it. By letter of today, we are pointing out to the Secretary of the Army that where possible contract modifications of this type should be considered before the issuance of competitive solicitations.

The remaining issue is whether the interactions between Chrysler and the Army constituted an illegal tying arrangement in violation of the Sherman Anti-Trust Act. This Office is primarily concerned with determining whether agency practices are in accord

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with applicable procurement laws and regulations. It is not our function to enforce the anti-trust laws and any questions in that regard should be referred to the Department of Justice. Automated Datatron, Inc., B-184022, September 16, 1975, 75-2 CPD 153.

Accordingly, the protest is denied.

  
Deputy Comptroller General  
of the United States