

DECISION

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

FILE: B-205700.3

DATE: May 20, 1983

MATTER OF: International Logistics Group, Ltd.--
Reconsideration

DIGEST:

Where significant data and warranty requirements would have to be added to canceled IFB for brand name transmissions in order to permit consideration of alleged "equal" bid for award, addition may not be allowed since this would result in essentially new IFB under which no competition had been achieved. In any event, record does not show that alleged "equal" bid was, in fact, equal to brand name product; therefore, prior decision denying protest against Army's failure to award to alleged "equal" bidder under canceled IFB is affirmed.

International Logistics Group, Ltd. (ILG), requests reconsideration of our decision in International Logistics Group, Ltd., B-205700.2, March 9, 1983, 83-1 CPD 241. In that decision, we denied the protest of ILG against cancellation of invitation for bids (IFB) No. DAAE07-81-B-5547, issued by the United States Army Tank-Automotive Command for quantities of Chrysler Corporation "4x4" hydraulic transmissions (P/N4086336) and "4x2" hydraulic transmissions (P/N3898864). After bid opening, the Army found that the required Chrysler transmissions were no longer available from Chrysler even though ILG intended to supply "ILG assembled 'Chrysler' transmissions."

We affirm our decision.

From the record, it was clear that the Army canceled the IFB because: (1) there was no way of knowing whether the ILG transmissions would meet Army's needs without "documentary evidence" bearing on the alleged essential equality of ILG's and Chrysler's transmissions and without the Army's

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obtaining of a "one year warranty" on the ILG transmissions--apparently to ensure satisfactory experience in actual use, and (2) the IFB did not contain documentary or warranty provisions which would have allowed the Army to ensure the suitability of the ILG transmissions.

ILG now argues that our decision was erroneous for two reasons: (1) ILG asserts that we mistakenly noted that "ILG was not authorized by Chrysler to represent its ILG-assembled transmissions as the Chrysler transmissions sought under the IFB"; (2) The decision improperly concluded that ILG's transmissions, should they be considered an offer of "equal," rather than identical, transmissions, could not have been made the subject of an award under the IFB, as issued.

As to reason (1), above, ILG argues that, although we considered a statement of a Chrysler representative "in arriving at the conclusion that ILG was 'not authorized by Chrysler to represent its ILG-assembled transmissions as the Chrysler transmissions sought under the IFB,'" we should have also considered the sworn statement of a Mr. Zelkowski in which it is stated that the transmissions assembled by ILG to meet the requirements of the IFB "meet all Chrysler specifications for the Chrysler transmission Part Number 4086336."

Although Mr. Zelkowski's affidavit is present in our record, it is impossible to identify from the affidavit whether he was employed as a Chrysler "transmission technician" at the time ILG's bid was submitted. That affidavit, moreover, does not in any way establish that Mr. Zelkowski, even if he had been so employed, was properly authorized by Chrysler to permit other companies to represent "third-party-assembled" transmissions as the Chrysler transmissions required by the IFB. By contrast, the Chrysler representative's statement, noted in our decision--to the effect that ILG was not entitled to so represent its transmissions--was a statement from Chrysler's then-current "Manager, Pricing and Sales Analysis." In any event, absent a statement from a current, properly authorized Chrysler representative that ILG was entitled to so represent its transmissions, we affirm the observation in our decision that "ILG [did not seem to be] authorized to represent its ILG-assembled transmissions as the Chrysler transmissions sought."

As to reason (2), above, ILG argues that: (1) our decision in Dunlin Corporation, B-207964, January 4, 1983, 83-1 CPD 7, permits award under a canceled "brand name" IFB to an "equal" bidder even if the IFB references supplies which are no longer manufactured. Therefore, award should have been made to ILG--assuming the equality of its product--notwithstanding the unavailability of the Chrysler transmissions; (2) the Army has recently determined that ILG has submitted "documentary evidence" showing that ILG's transmissions "are the same as Chrysler's"; and (3) the Army has allegedly purchased "Chrysler parts * * * under Contract DAAE07-81-D-5037 [as] substitutes for the parts solicited under the canceled IFB"; this purchase allegedly demonstrates that the canceled IFB, as initially drafted, reasonably permitted the consideration of "equal" parts. We will address these arguments below.

As to argument (1), Dunlin Corporation involved a Navy purchase of window assemblies and a specified sealant. After bid opening, the Navy found that the specified sealant was no longer in production. Nevertheless, it awarded a contract under the solicitation to the low bidder who had bid \$18.10 per assembly. The award was made after the Navy had authorized the use of a substitute sealant costing \$0.07 less than the specified sealant. The award prompted a protest of the second low bidder (at \$24.80 per assembly), who possessed the only supply of the specified sealant. We denied the protest, given the minimal cost effect of the substitution under which we found no prejudice to the second low bidder. In contrast to Dunlin Corporation, an award to ILG would have required the addition of significant data and warranty requirements to the original IFB as a necessary first step in determining whether ILG's product was equal to Chrysler's. Adding significant requirements would result, essentially, in a new IFB under which no competition had been achieved, unlike the procurement in the Dunlin decision, which involved a full competition under an IFB containing an insignificant defect; moreover, it seems clear that Chrysler could have been interested in competing under an explicit "or equal" procurement for these transmissions. Thus, the holding in Dunlin does not permit an award to ILG.

As to argument (2), above, the Army has informed us, as follows:

"The documentary evidence required under ILG's Contract No. 5930 was not retained by the Government (administrative office) which accepted the transmissions. ILG has declined thus far to furnish copies of such documentation to the Procurement Contracting Officer. Consequently, this Command cannot verify that the part number composition of the ILG transmissions accepted under [this contract] is the same as Chrysler transmission No. 4086336.

"Apart from the question of component part number composition of the ILG transmission, however, the Army does not believe that its minimum needs will be protected in acquiring the reassembled transmissions proposed by ILG unless it is in a contractual position to require appropriate functional and durability testing of such transmissions before Government acceptance. The Army asserted such position in its initial Administrative Report on this protest, and its recent test experience with ILG transmissions accepted under Contract No. 5930 has again persuaded TACOM that appropriate testing of Chrysler proprietary transmissions which are reassembled by a party other than the manufacturer is an essential Government requirement for the proposed procurement."

Concerning the Army's experience under contract -5930, the Army alleges that eight ILG-supplied transmissions have recently failed. It is also the Army's position that it still needs suitable warranty protection from ILG. Consequently, we cannot question the Army's position that ILG's transmissions have not yet been shown to be the same as (or the virtual equal of) the Chrysler transmissions.

As to argument (3), we see no relevance to ILG's citation of Chrysler contract -5037--the alleged substitute procurement for the canceled IFB. The canceled IFB in this case specified a brand name only and cannot reasonably have been interpreted otherwise. In any event, the propriety of the Army's contract -5037 is pending in a separate protest before our Office.

Our decision has not been shown to be in error in fact or law; thus, we affirm it.

for *Harry D. Van Cleave*
Comptroller General
of the United States