

Glass



Comptroller General  
of the United States  
Washington, D.C. 20548

# Decision

Matter of: Elbit Computers, Ltd.  
File: B-239038  
Date: July 11, 1990

Jeffrey K. Kominers, Esq., Wilkinson, Barker, Knauer & Quinn, for the protester.  
Paul C. Fuener, Esq., Petit & Martin, for Systems Research Laboratories, Inc., an interested party.  
Gregory H. Petkoff, Esq., and Bradley S. Adams, Esq., Department of the Air Force, for the agency.  
Linda C. Glass, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

## DIGEST

Although the Competition in Contracting Act of 1984 mandates that agencies obtain "full and open competition" in their procurements through the use of competitive procedures, the proposed sole-source award of a contract under the authority of 10 U.S.C. § 2304(c)(1) (1988) is not objectionable where the agency reasonably determined that only one source could supply the desired item within the urgent time constraints of the procurement.

## DECISION

Elbit Computers, Ltd. protests the Department of the Air Force's proposed sole-source award to Systems Research Laboratories, Inc. (SRL) through modification of letter contract No. F09603-89-C-2662, for 12 Heads Up Displays (HUD) for use with Night Vision Goggles (NVG) on the B-52 aircraft. The HUDs interface with the NVGs by taking basic flight data and displaying it on a lens attached to the end of the helmet mounted NVG. This system provides mission oriented instrumentation while allowing pilots to maintain the ability to fly low and to look outside during night to avoid enemy radar and employ a variety of conventional weapons. Elbit challenges the Air Force's determination that only SRL can complete development and deliver the HUDs within its urgent time restraints.

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We deny the protest.

This procurement is the latest in a series of acquisitions designed to incorporate HUD technology in various aircrafts in the Air Force inventory. The initial contract was awarded to SRL in August 1986, for the development and production of kits to modify the H-53 helicopter into an MH-533 Pave Low III helicopter. The modification enhanced the helicopter's navigation and search and recovery systems and consisted of a variety of changes, including incorporation of an SRL HUD, which was part of the statement of work. Although this contract was negotiated pursuant to a justification and approval (J&A) using the statutory authority of 10 U.S.C. § 2304(c)(2) (1988), 20 potential sources were solicited with 3 offers received. The Air Force states that at that time it was unaware of Elbit's capabilities, and Elbit was not included in this acquisition. Under this contract, the government acquired non-recurring engineering design and development, technical data for training/maintenance, and baseline reprourement data.

In 1986, the Air Force recognized the need for a HUD system on the B-52 aircraft. SRL was requested under a support contract with the Air Force to evaluate the feasibility of the use of a HUD on the B-52. In 1987, the program was identified as an urgent mission flight safety requirement and the Air Force directed that the HUD be installed on B-52s within 1 year. The Air Force reports that because of funding constraints, the development of the B-52 HUD was delayed and as a result the Air Force was incapable of training and performing a vital B-52 mission requirement.

In early 1988, the Air Force and SRL jointly developed two prototype HUDs for use in the B-52 aircraft. The prototypes were installed in September 1988, and in October 1988, the Air Force modified an existing contract with Boeing Military Airplane Company to authorize SRL, as a subcontractor to Boeing, to manufacture 26 additional NVG/HUDs in the B-52 aircraft to demonstrate the system's capability and use. These 28 HUDs, including the two prototypes, were not built to military specification quality requirements.

On September 29, 1989, a letter contract was awarded to SRL to incorporate HUD technology in the C-130 and C-141 Special Operations Forces aircrafts. This effort was negotiated on a noncompetitive sole-source basis pursuant to 10 U.S.C. § 2304(c)(1) and involves a modification to the

HUD system contained on the H-53 helicopter for operation in fixed-wing aircrafts. This action was synopsized in the Commerce Business Daily (CBD) on August 3, 1989.

The Air Force now plans to fulfill its current requirement for 72 HUDs for the B-52 by a sole-source acquisition of 12 HUDs from SRL pursuant to 10 U.S.C. § 2304(c)(1). The 12 HUDs for the B-52 will be a modified version of the C-130/C-141 HUD. Specifically, these 12 HUDs will be a modification of the existing C-130/C-141 system software with no change to the existing system hardware under the current letter contract with SRL. The Air Force will also adapt the 28 SRL units developed under the Boeing contract to military specifications for permanent use on the B-52. The Air Force will compete the balance of 32 units upon delivery of reprocurment data.

Elbit identified itself to the procuring activity as a possible source of the B-52 HUD in November 1989. On February 1, 1990, Elbit sent an unsolicited price proposal to sell 250 units of Elbit's HUD system for installation in the B-52 aircraft. Elbit was advised by the Air Force that its proposal would be forwarded for evaluation, and it would be provided a determination of acceptability by April 15.

In the meantime, the requirement for the 12 HUDs was synopsized in the CBD on March 13, 1990. The CBD notice stated that a solicitation would be issued contemplating a sole-source award to SRL, but also provided that, within 45 days of publication of the notice, parties interested in the procurement could submit proposals which would be evaluated by the government for the purpose of determining whether a competitive procurement should be conducted. Elbit contacted the Air Force and requested a solicitation and specification so that it could submit a proposal. The Air Force advised Elbit that it would be furnished a copy of the solicitation but that the agency currently had no data to furnish unqualified sources and therefore would continue on a sole-source basis.

On May 9, the Air Force finalized the written J&A for use of other than competitive procedures, as required by the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(f). The J&A concluded that a sole-source award to SRL was justified under 10 U.S.C. § 2304(c)(1), which authorizes use of other than competitive procedures when the items needed are available from only one responsible source or a limited number of such sources and no other types of

product will satisfy the agency's needs. According to the J&A, SRL is the only company capable of providing the unique supplies and services within the Air Force's urgent time constraints imposed by mission requirements. The J&A also states that no other source possesses the knowledge, data and necessary experience with the systems and aircraft to satisfy mission support requirements.

Elbit disputes the agency's justification for a sole-source award to SRL for the 12 HUDs, maintaining that its HUD system currently being used in Israeli helicopters is at least as developed as SRL's for purpose of the B-52 aircraft.

While the overriding mandate of CICA is for "full and open competition" in government procurements obtained through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A), CICA does permit noncompetitive acquisitions in specified circumstances such as when the items needed are available from only one responsible source. 10 U.S.C. § 2304(c)(1). WSI Corp., B-220025, Dec. 4, 1985, 85-2 CPD ¶ 626. Where, the agency has substantially complied with the procedural requirements of CICA, 10 U.S.C. § 2304(f), calling for the written justification for and higher level approval of the contemplated sole-source action and publication of the required CBD notice, we will not object to the sole-source award unless it is shown that there is no reasonable basis for the award. WSI Corp., B-220025, supra; see also Dynamics Instruments, Inc., B-220092, et al., Nov. 25, 1985, 85-2 CPD ¶ 596. In sum, except in those noncompetitive situations that arise from a lack of advance planning, a sole-source award is justified where the agency reasonably concludes that only one known source can meet the government's needs within the required time. Turbo Mechanical, Inc., B-231807, Sept. 29, 1988, 88-2 CPD ¶ 299.

In justifying the contemplated sole-source award to SRL, the Air Force stresses the fact that this acquisition is merely another stage in the evolution of the SRL HUD from helicopter to C-130/C-141, to B-52. The Air Force states that the procurement involves continued development and production of highly specialized equipment and that award to any other source would result in unacceptable delays to an urgent mission requirement and the continuance of the problems of training and mission support fulfillment, which could result in the loss of life or aircraft. The agency also maintains that award to any other source would result in substantial

duplication of costs such as the nonrecurring engineering costs of the predecessor contract; the costs expended in the Boeing contract for wiring diagrams and the studies pertaining to hazard analysis, human engineering, safety of flight and flight worthiness; the costs of maintaining two distinct HUD systems in the inventory; and the costs of buying two different sets of competitive procurement data.<sup>1/</sup>

With regard to the substance of the Air Force justification, the primary reason for procuring the HUD from SRL was that the firm was the only responsible source capable of delivering the items within the required time frame. As the Air Force explains, there has been an urgent, critical, and immediate mission requirement for HUDs on B-52 aircraft to allow low level flight at night which has been identified as dangerous, hazardous, and life threatening to the flight crews. The record reflects nothing to contradict the Air Force's account of the urgency of its need for HUDs on B-52 aircraft and Elbit has not questioned this claim. While it is clear from the record that neither SRL nor Elbit currently has a HUD operating on a fixed-wing aircraft which meets military quality control specifications for permanent use, the agency, in our view, reasonably determined that SRL, by virtue of its work on its system under the Boeing contract for the B-52 and the current C-130/C-141 contract, is technically ahead of Elbit in the development of a HUD for fixed-wing aircraft. The record shows that SRL, as a result of its 4 years involvement in the development of the HUD specifically for the B-52, has a system that has already been through a Preliminary Design Review and Critical Design Review. In fact, the Air Force

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<sup>1/</sup> In this regard, the Air Force performed a life-cycle-cost (LCC) analysis to determine the cost associated with obtaining and maintaining a second HUD system in its inventory. Elbit, in its protest, objects to the use of the LCC to allegedly exclude competition and argues that it is based on faulty premises and speculation. The record establishes that the LCC was merely one tool used to determine the feasibility of satisfying the requirement through modification of an existing system versus bringing an entirely new system into the inventory. The record is clear that the Air Force's actual decision to procure the requirement on a sole-source basis was based on operational need, especially its critical time constraints.

states that SRL will deliver its C-130/C-141 trial installation kit and testing will be completed by February 1991. Production for the C-130/C-141 is scheduled to begin January 1991, and completed by October 1991. Further, SRL can develop, test, and deliver production units in support of the B-52 by November 1991.

The Air Force maintains that if this requirement were to be competed, a complete data package could not be approved before December 1991 with deliveries 14 months thereafter, or approximately second quarter fiscal year 1993. The Air Force states that this delay of more than 2 years is unacceptable for this mission critical item. In this regard, Elbit complains that the Air Force knew that it was a possible source for the B-52 HUD in the summer of 1989, and therefore it should have been taken into consideration prior to the Air Force making the determination to go sole-source. Contrary to Elbit's argument, the firm did not introduce itself to the appropriate procuring activity as a possible source for the B-52 until November 1989. This was significantly after the award to SRL for the C-130/C-141. To the extent Elbit complains that the proposed sole-source action stems from a lack of advance planning, the record does not support the assertion. The record shows that the Air Force identified the requirement as urgent in 1986 but, due to funding constraints, the concept could not be fully developed for fixed-wing aircraft. Since 1986, the Air Force has continuously worked on the funding and the development of a HUD for fixed-wing aircrafts.

Given the Air Force's urgent mission requirement and its need to require these items in the most expeditious manner, we see no basis to object to the proposed sole-source award to SRL under the authority of 10 U.S.C. § 2304(c)(1) as the only known available source capable of meeting the Air Force's current critical delivery requirements. Magnavox Elec. Sys. Co., B-230297, June 30, 1988, 88-1 CPD ¶ 618. Indeed, the record shows that the Air Force does not have sufficient time even to compete the requirement given its critical time constraints. Despite Elbit's vigorous assertion that its system is at an equivalent stage of development, the record shows that the hardware and software components of the Elbit's system would have to be modified significantly to fulfill the B-52 requirement and, unlike Elbit, SRL has already completed significant milestones in the development of its fixed-wing HUD. Since the Air Force only plans to purchase the initial quantity of 12 on a

sole-source basis and intends to purchase an additional 32 on a competitive basis using reprocurement data, we find the Air Force's proposed sole-source award to SRL reasonable.

In its comments to the agency report, submitted in response to this protest and the informal conference, Elbit argues that SRL, in October 1989, participated in a conference where Air Force officials discussed source selection information, specifically, whether to go sole-source or to compete this requirement as well as identified actual quantities to be procured. Elbit asserts that such communication violated 41 U.S.C.A. § 423(c) (West Supp. 1989) (prohibiting disclosure of certain procurement information)<sup>2/</sup> and Federal Acquisition Regulation (FAR) §§ 15.413-1 (FAC 84-53) and 6.303-1(a) (FAC 84-56).

The record shows that a meeting was held in October 1989 to discuss acquisition of the C-130/C-141 HUD system for use on the B-52. SRL attended this meeting but maintains that its participation in the meeting was limited to SRL's presentation of its overall concept. The record shows that SRL's presentation discussed the HUD system background, commonality for the B-52 and C-130/C-141 aircraft, advantages of their approach, additional requirements to modify the C-130/C-141 HUD to produce the B-52 HUD, cost, schedule considerations, and risk assessment. SRL was precluded from participating in any government discussions or in the decision-making process and was asked to leave the room after it had made its presentation.

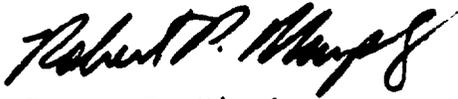
The basic purpose of the FAR provisions, cited by the protester is to ensure that: (1) all potential contractors are treated equally and one contractor is not furnished information that may give it an advantage and (2) a contracting officer not commence negotiations for a sole-source contract prior to making the necessary written determinations.

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<sup>2/</sup> Effective December 1, 1989, these provisions were suspended from December 1, 1989, to November 30, 1990. Section 507 of the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716 (1989). Accordingly, we will not discuss any alleged violations of the Act with respect to this procurement.

The record is clear that the purpose of the October meeting was to afford the Air Force procuring officials an opportunity to review all alternatives prior to making a final decision on how to best satisfy their requirement. There is no evidence in the record that any procurement sensitive information was discussed at the October meeting while SRL was present. It was not improper that Air Force personnel allowed SRL to make a presentation on the feasibility and proposed costs of modifying its C-130/C-141 contract for the B-52. We also find that SRL's participation in the October meeting for such a limited purpose did not violate the stated FAR provisions.

The protest is denied.



James F. Hinchman  
General Counsel