



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Electro Design Manufacturing, Inc.

File: B-280953

Date: December 11, 1998

Robert H. Koehler, Esq., and Christy G. Slade, Esq., Patton Boggs, for the protester. Maj. Cynthia Mabry, JAGC, Vera Meza, Esq., and Nancy L. Holzwanger, Esq., Department of the Army, for the agency. Glenn G. Wolcott, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Combination of system requirements in single acquisition is unobjectionable where procurement involves a foreign military sale and the foreign customer on whose behalf the procurement is being conducted has requested that all system components be acquired under a consolidated procurement.

DECISION

Electro Design Manufacturing, Inc. (EDM) protests the terms of request for proposals (RFP) No. DAAH01-98-R-0403, issued by the U.S Army Aviation & Missile Command in connection with a foreign military sales (FMS) acquisition of TOW 2 Launcher Systems and associated auxiliary equipment for Taiwan. EDM complains that the solicitation improperly combines the primary components of the TOW 2 Launcher System.

We deny the protest.

On July 31, 1998, the Army issued RFP No. DAAH01-98-R-0403 seeking proposals for specified quantities of the components which comprise the TOW 2 Launcher Systems which are to be provided to Taiwan under the FMS program. The Launcher Systems are comprised of two primary components: the launcher and the night vision sight equipment.¹

¹Other auxiliary equipment within the Launcher Systems includes a vehicle power conditioner modification kit, a post amplifier test set, a boresight collimator test set, and a battery charger.

On September 2, EDM filed this protest asserting that combining the two system components into a single acquisition improperly restricts competition,² and therefore violates the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2305(a)(1) (1994) and the Small Business Act, as amended, 15 U.S.C.A. §§ 631, 632, 644 (West Supp. 1998).³

This procurement is being conducted under the Arms Export Control Act, as amended, which authorizes the Department of Defense to enter into contracts for purposes of resale to foreign countries or international organizations. 22 U.S.C. §§ 2751-2799aa (1994). Although CICA generally requires agencies to obtain full and open competition in conducting acquisitions, that statute contains an express exemption for procurements in which the "written directions of a foreign government reimbursing the agency for the cost of the procurement of the property or services for such government, have the effect of requiring the use of procedures other than competitive procedures." 10 U.S.C. § 2304(c)(4).

In responding to EDM's protest, the agency defended the procurement on various bases, without making clear in its administrative report the specific expressed preference of the Taiwan authorities in this matter. Accordingly, on October 22, by Notice sent to counsel for all parties, this Office requested the Army to provide input from Taiwan authorities regarding the combination of the system components. By letter dated October 27, Taiwan authorities stated:

Please be advised that our Army prefers that the procurement be conducted as a consolidated package with a single manufacturer or group of manufacturers that can provide an entire system, rather than individual companies that can each provide a separate part of the procurement. The reasons for this preference are that we prefer to deal with a single manufacturer or group of manufacturers for purposes of time saving, accountability, quality control and overall coordination throughout the product life cycle.

²Solicitations which combine multiple requirements have the potential for restricting competition by excluding firms that can furnish only a portion of the combined requirements. See, e.g., National Customer Eng'g, B-251135, Mar. 11, 1993, 93-1 CPD ¶ 225 at 4-5.

³In addition to asserting that the two primary components should be separately acquired, EDM maintains that these separate acquisitions should be conducted as small business set-asides. Since we find the agency's combination of the components unobjectionable, this issue is not for consideration.

Congress has specifically authorized the use of other than full and open competitive procedures based on the written directions of an FMS customer, 10 U.S.C. § 2304(c)(4), and our Office has held that this statutory authority provides a valid basis for an agency to conduct a sole-source procurement following a written request from the FMS customer.⁴ Goddard Indus., Inc., B-275643, Mar. 11, 1997, 97-1 CPD ¶ 104 at 2; Pilkington Aerospace, Inc., B-260397, June 19, 1995, 95-2 CPD ¶ 122 at 2-3; Optic-Electronic Corp., B-235885, Oct. 6, 1989, 89-2 CPD ¶ 326 at 2-3. In responding to the agency report, EDM asserts that, "The request of [Taiwan] is not a proper justification in these circumstances because Taiwan did not officially direct a sole source." EDM Comments on Agency Report at 11. In short, EDM's comments assert that, although Taiwan could have properly directed a sole-source procurement, any other less restrictive request is improper. EDM's argument is without merit.

As pointed out above, CICA authorizes procuring agencies to accommodate written directions from FMS customers which "have the effect of requiring the use of procedures other than competitive procedures." 10 U.S.C. § 2304(c)(4). Here, the FMS customer has requested that the system components be acquired in a single procurement. Accordingly, while the combination of requirements may result in less than full and open competition, that request and result are explicitly permitted.⁵

The protest is denied.

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⁴The record shows that EDM has been the recipient of such sole-source contracts.

⁵On the basis of the FMS customer's request that the procurement be conducted as a single acquisition, we similarly conclude that the solicitation does not violate the provisions of the Small Business Act, as amended. That Act establishes certain limits on the consolidation of contract requirements "to the maximum extent practicable." 15 U.S.C.A. §§ 631(j), 644(e)(1). In our view, a situation such as that presented here, where the FMS customer requests that the contract requirements be combined, falls outside of the Act's limitations.