

DOCUMENT RESUME

02679 - [A1732754]

[Protest against Award of a Contract for Sale of Item under Foreign Military Sales Act]. B-187765. June 13, 1977. 3 pp.

Decision re: Aerosonic Corp.; by Paul G. Dumblyng, General Counsel.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law II.

Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).

Organization Concerned: Kearflex Engineering Co.; Department of the Air Force: San Antonio Air Logistics Center, TX.

Authority: Foreign Military Sales Act, sec. 22(b) (22 U.S.C. 2762 (Supp. V)). 55 Comp. Gen. 674. 55 Comp. Gen. 1479. B-177450 (1977).

The protester contended that only it was eligible to receive the contract award, since the original solicitation referred only to its part number. The contract, however, involved a foreign military sale, a purchase ultimately paid for from nonappropriated funds, and, therefore, the protest was not to be considered by GAO. (QM)

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DECISION



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

FILE: B-187765

DATE: June 13, 1977

MATTER OF: Aerosonic Corporation

DIGEST:

Since temporary use of Air Force appropriations pending reimbursement pursuant to Section 22(b) of Foreign Military Sales Act does not change essential nature of contract from that of one financed by particular foreign country or international organization involved, this Office declines to consider protest.

This decision concerns a protest by Aerosonic Corporation (Aerosonic) against award of a contract to Kearflex Engineering Company (Kearflex), the low bidder under invitation for bids (IFB) No. F41608-76-B-0641, issued by the Directorate of Procurement and Production, San Antonio Air Logistics Center, Kelly Air Force Base, Texas (Air Force). The subject IFB, a total small business set aside, sought unit price bids on 174 altimeters, pressurized compartment, type AAU-3A/A, in accordance with specified requirements contained in the solicitation.

Aerosonic contends that only it was eligible to receive award since the original solicitation schedule referred only to Aerosonic's part number. It is also argued that the Air Force acted improperly when it amended the subject solicitation. Specifically, Aerosonic states that it never received an Air Force TWX issued September 20, 1976, "TWX AMENDMENT No. 0001", which indicated that both the Kearflex and Aerosonic part numbers were to be included in the item description. Additionally, the protestor contends that although this message advised that a formal modification would follow, no formal modification was forthcoming prior to the bid opening on September 24, 1976. Aerosonic argues that the failure of the Air Force to issue a formal amendment requires that the contract to Kearflex be canceled.

Subsequent to receipt of the agency report we were advised by the Air Force that the transaction in the instant case represents a sale pursuant to Section 22(b) of the Foreign Military Sales Act, 22 U.S.C. 2762 (supp V, 1975). Section 22(b) authorizes the President,

if he determines it to be in the national interest, to issue letters of offer to a foreign country or international organization which provides for billing upon delivery of the defense article or rendering of the defense service and for payment within one hundred and twenty days after the date of billing. Additionally, Section 22(b) authorizes the use of appropriated funds available to the Department of Defense to meet the payments required by these contracts and provides for reimbursement of these funds upon receipt of payment from the foreign country. The Air Force has informed our Office that, in accordance with Section 22(b), appropriated funds that are used in connection with the instant procurement will be reimbursed from Foreign Military Sales Accounts of the respective countries upon delivery of the items.

This is the first occasion upon which we have considered our jurisdiction to decide a bid protest concerning a Section 22(b) foreign military sale. However, we recently considered a similar situation wherein United States Army funds were used temporarily to make payments under the contract because payments received from a foreign government which was party to a Section 22(a) "dependable undertaking" agreement were not received in time to cover all the payments due under the contract. In dismissing that protest, we observed that the incidental and temporary charging of Army appropriations pending reimbursement did not change the essential character of the transaction as one financed by the particular foreign country or international organization involved. Additionally, we noted that to decide otherwise would render our bid protest jurisdiction subject to changing circumstances during the course of contract administration. Consolidated Diesel Electric Company, B-177450, January 6, 1977, 77-1 CPD 7.

In Tele-Dynamics, Division of AMBAC Industries, 55 Comp. Gen. 674 (1976), 76-1 CPD 60, and subsequent cases, our Office has declined to render a decision in circumstances where the protest involved a question as to the proper recipient of an award of a Foreign Military Sale procurement. See, in this regard, Cincinnati Electronics Corporation, Inc. et al., 55 Comp. Gen. 1479 (1976), 76-2 CPD 286. These decisions are based upon the principle that this Office's jurisdiction depends upon the expenditure of appropriated funds and the procurements do not involve the expenditures of appropriated funds since the foreign country or international organization is required to make funds available in such amounts and at such times as may be required to meet the payments called for by the contract. Since, in the instant case, the use of appropriated funds serves merely as a temporary convenience for

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what is essentially a purchase ultimately paid for from nonappropriated funds, no useful purpose would be served in our consideration of the matter. In view thereof, we believe that our Office should decline to consider the protest.

Accordingly, the protest is dismissed.

Paul G. Dembling
Paul G. Dembling
General Counsel