Foreign Military Sales Sole Source Exception: The Current USASAC Practice

By

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"well, I shan't go, at any rate " said Alice: Besides, that's not a regular rule: you invented it just now." "It's the oldest rule in the book," said the King.

Lewis Carroll, *Alice's Adventures in Wonderland*

[The following article describes the legal authorities associated with sole source FMS procurements. Although the article provides an explanation of current U.S. Army Security Assistance Command procedures in processing FMS customer requests for such procurements, the Air Force and the Navy are bound by the same legal authorities, and employ procedures similar to those of the Army.]

A foreign military sales (FMS) purchaser may lawfully request that a defense article or defense service be obtained from a particular source. The Competition in Contracting Act of 1984, which generally requires that federal agencies obtain full and open competition, exempts procurements in which the "written directions of a foreign government reimbursing the agency for the cost of the procurement of the property or service for such government, have the effect of requiring the use of procedures other than competitive procedures."[1] The *Federal Acquisition Regulation* (*FAR*) reiterates this exemption, and provides for its use in circumstances such as "when a contemplated acquisition is to be reimbursed by a foreign country that requires that the product be obtained from a particular firm as specified in the official written direction such as a Letter of Offer and Acceptance."[2] Further, the *Defense Federal Acquisition Regulation Supplement* (*DFARS*) provides that:

> FMS customers may request that a defense article or defense service be obtained from a particular contractor. In such cases, *FAR* Section 6.302-4 provides authority to contract without full-and-open competition. The FMS customer may also request that a subcontract be placed with a particular firm. The contracting officer shall honor such requests from the FMS customer only if the Letter of Agreement or other written direction sufficiently fulfills the requirements of *FAR* [Subpart] 6.3.[3]

The purpose of this article is to describe the law, and to explain the current practice within United States Army Security Assistance Command (USASAC) in processing requests from FMS customers for a particular source.

[1] 10 U.S.C. Section 2304(c) (4).
[2] *FAR* Section 6. 302-4 (b) (1).
[3] DFARS Section 225.7304(a).

I FOREIGN PURCHASER REQUEST

A. Identification of the Foreign Purchaser

Under the Arms Export Control Act, foreign countries and international organizations are authorized to receive defense articles and/or defense services from the United States Government through FMS procedures.[4] There are now approximately 143 foreign countries and 4 international organizations eligible to purchase defense articles and/or defense services.[5] With respect to international organizations, there seems to be a gap in the legal authorization for sole source requests. While the law refers in one part of the provision to an "international organization," it specifically only mentions a "foreign government" when discussing the FMS sole source situation: "the written directions of a foreign government reimbursing the agency for the cost of the procurement of the property or services for such government . . . ."[6] The specific issue whether an international organization can legally request a sole source has never been addressed by applicable legal authorities. USASAC treats requests from an international organization in the same manner as those from foreign countries.

B. Reimbursing the Agency

Most FMS purchases are financed by funds from the foreign customer. But there are some purchases financed through appropriations from the United States Government or from third party donors. The statutory exception for FMS sole source specifically states that it applies to directions from a foreign government "reimbursing the agency . . . ."[7] Does an FMS sole source request lack a legal basis when the source of the funds is other than from the foreign customer? In considering an Egyptian FMS sole source procurement using nonrepayable credit funds (appropriated by the United States Congress for security assistance), the General Accounting Office (GAO) answered the question in the negative. It stated:

> The Department of Defense acts as an agent for a foreign government when it conducts procurements under the authority of the Arms Export Control Act, using the foreign government's funds that have been deposited in the FMS Trust Fund Account in the Treasury. Whether or not the funds were originally subject to repayment, once they are deposited in a foreign country's account to be used to meet the obligations of the FMS customer, FMS rules and procedures apply, including the authority of a foreign customer to designate a sole-source supplier as permitted by FAR Section 6.302-4. . . .[8]

It is submitted that the same reasoning would apply to grants under Foreign Military Financing (which replaced FMS credit funds), or even to funds derived from third party donors. Therefore, once funds, regardless of origin, are available for the FMS customer, that FMS customer may use the sole source procedures.

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[4] 22 U.S.C. Section 2761(a)

[5] See Table 600-1, *Security Assistance Management Manual (SAMM)* DoD 5105.38-M, Change No. 5, 2 November 1992.

[6] 10 U.S.C. Section 2304(c)(4).

[7] 10 U.S.C. Section 2304(c)(4).

[8] *Optic-Electronic Corp.*, B-235885, October 6, 1989, 89-2 CPD paragraph 326. See also, *International Logistics Group, Ltd.*, B-214766, September 18, 1984, CPD paragraph 314 [grant aid funds].

C. Written Directions

The essential statutory requirement is that the FMS sole source request be contained in "written directions" from the purchaser.[9] The law does not direct a specific form or format for these written directions. The procurement regulations refer to the Letter of Offer and Acceptance (LOA) [the LOA is the contractual instrument that contains the terms and conditions of the sale] as an example of the written direction from the purchaser, but it does not mandate this format.[10] Indeed, the GAO has opined that the foreign government need not provide anything other than the LOA to constitute its written directions.[11] But, the *SAMM* states that the request "should be contained in a letter of request for an LOA or an amendment to an existing LOA."[12] The normal practice of USASAC is to consider a letter requesting a sole source from the FMS customer that, upon approval, will then be incorporated either in the LOA, or in an amendment to an existing LOA.

D. Justification

Other than for the cryptic reference in the last sentence of *DFARS* Section 225.7304(a) that the written direction should sufficiently fulfill the requirements of *FAR* Subpart 6.3, there is no regulatory direction as to any other requirement for a sole source justification or the content thereof. Nor, is there any reported GAO decisions on this specific issue.

The SAMM guidance provides that the basis and justification for a sole source request must be "based upon the objective needs of the FMS purchaser as stated by the purchaser" and that the request not contain "patently arbitrary, capricious or discriminatory exclusion of other sources."[13] It should be noted in this context that the GAO considers the *SAMM* language to be merely guidance rather than with regulatory or legal effect.[14]

It is the policy of USASAC that the FMS request should state sufficient facts to justify the sole source. Examples of security assistance situations justifying a sole source are indicated in section 80102.B.1 of the *SAMM*. The *SAMM* states that sole source may be justified if (a) one of the suppliers can deliver faster and the situation is urgent, (b) the item is nonstandard, (c) the country has a history of procurement from the source and to change would have an adverse impact on the program, (d) the designated source has won the FMS customer's own selection competition, or (e) the FMS customer has an established history of procurement from a particular source which it needs to continue for standardization or logistical reasons. Similarly, facts that otherwise would justify noncompetitive procurements by the United States under any of the other remaining six exceptions under 10 U.S.C. Section 2304 (c) to full and open competition, may be

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[9] 10 U.S.C. Section 2304(c)(4).

[10] Compare *FAR* 6.302-4(b)(I) and *DFARS* 206.3024(c)(i), with *DFARS* 225.7304(a) ("the Letter of Agreement (sic) or other written direction. . . . ").

[11] See, *Kahn Industries Inc.*, 66 Comp. Gen. 360, 363 (1987) , 87- CPD paragraph 343.

[12] *SAMM*, paragraph 80102.B.

[13] *SAMM*, Section 80102.B.1.

[14] *Julie Research Laboratories Inc.*, B-210435.2, 85-1 CPD paragraph 196, February 14, 1985 ["The manual ... is an internal instructional manual for DoD personnel, and therefore sets forth executive branch policy that lacks the force and effect of law."]; *Julie research Laboratories Inc. Reconsideration* B-216312.2; B-218108.2 ; and B-218244.2, 85-1 CPD paragraph 672, June 12, 1985; *Kahn Industries, Inc.*, 66 COMP. Gen 360 (1987), 87-1 CPD paragraph 343; and *Group Technologies Corp.; Electrospace Systems, Inc.*, B-250699; B250699.3; B250699.6; B250699.7, February 17, 1993, 93-1 CPD paragraph 150 ["this DoD Manual provides internal guidance for DoD personnel and any failure to follow it does not provide a valid basis for protest."]

used by the FMS customer.[15] Indeed, the FMS customer may have greater latitude in the source selection process than the United States Government.[16] While there are no reported GAO opinions on this specific issue, the legal test appears to be whether a reasonable basis for the sole source has been stated in the written directions.[17]

E. USG Recommendation to FMS Customer as to Possible Sources

There is no legal bar to advising an FMS customer as to possible sources of supply or specifications that might satisfy the customer needs. "whether a United States agency initially recommends specific items or advises the foreign government as to what items might satisfy its needs is immaterial in the absence of evidence that the agency sought to have the foreign government request certain sources in bad faith or for the purpose of circumventing the requirement for competition."[18] Thus, it is permissible for the Army to assist an FMS customer in a sole source request, *provided* that the assistance is not for the purpose of avoiding competition in the procurement and the FMS customer exercises its own independent will as to the selection of a particular source. Note in this context, however, the DSAA policy of "strict neutrality between U.S. competitors."[19]

II USASAC CONSIDERATION OF THE SOLE SOURCE REQUEST

A. DoD Component Security Assistance Approval

Every FMS sole source request is subject to the initial approval of the DoD component security assistance director. This is the procedure set forth in section 80102.B of the *SAMM*. In the Army, the approval authority has been delegated by the Deputy Chief of Staff for Logistics, U.S. Army, to the Commander, U.S. Army Materiel Command, with further redelegation to only the Commander, U.S. Army Security Assistance Command.[20] USASAC exercises this authority for all Army managed items or services. Any denial of a FMS sole source must be coordinated in advance with DSAA Operations.[21]

B. Procedure

Every sole source request undergoes a preliminary screening in USASAC. After an initial review to determine whether the requested item or service is under Army cognizance and whether all the necessary information is included in the request, the USASAC Country Program Manager then sends the request to the International Logistics/Security Assistance Management Directorate at the applicable Major Subordinate Command (MSC) for comment on whether the request is reasonable under the circumstances. It serves, in accordance with section 80102.B.6, *SAMM*, as advance coordination with the contracting officer for the procurement. USASAC expects the MSC's comment to be a coordinated response reflecting information from acquisition, legal, and materiel management personnel on the specific request. This is the opportunity for the AMC buying commands to provide information on the request, such as the procurement history of the particular firm or the current status of a pending Army acquisition. Upon receipt of the MSC

[15]See *DFARS* Section 225.7304(a).
[16]GAO/NSIAD-93-184 Military Sales to Israel and Egypt, B-253149, at page 30.
[17]See, *Univox California, Inc., et al.*, B-2525449.2 *et al.*, December 9, 1987, 87-2 CPD paragraph 569, *aff'd on reconsideration*, B-2525449.5, et al., February 23, 1988, 88-1 CPD paragraph 183.
[18]*Kahn Industries, Inc.*, 66 COMP. Gen 360, 363 (1987), 87-1 CPD paragraph 343.
[19]Section 60202.B., *SAMM*.
[20]See paragraph 2-29, Army Regulation 12-8, 21 December 1990.
[21]Section 80102.B.2., *SAMM*.

comment, the sole source request is then staffed through the Office of Command Counsel and USASAC policy for a decision on the request by the Commanding General, USASAC. The security assistance approval is then communicated by message to the applicable MSC for necessary contractual action.

III. CONTRACTING OFFICER ACTION ON THE FMS SOLE SOURCE REQUEST

The ultimate responsibility for approval of the FMS sole source request rests with the Contracting Officer.[22] While the USASAC message assists in the acquisition approval of the FMS sole source procurement, the contracting activity has the separate and independent duty to review the circumstances of the request and to determine whether it is sufficient for a noncompetitive procurement.

Written justifications and approvals are not necessary in the FMS situation.[23] All that is required is a document prepared by the contracting activity describing the written directions that have the effect of requiring the use of noncompetitive procurement, and approval of that document by the competition advocate for the contracting activity.[24]

IV REVIEW BY THE GENERAL ACCOUNTING OFFICE

While once it was open to question whether FMS procurements were subject to GAO review, since 1978 it has been settled that GAO may review such procurements through its bid-protest procedures.[25] Almost all bid-protest involving Army FMS procurements are litigated by the Protest Litigation Group in the Office of Command Counsel, HQ, United States Army Materiel Command.

V. SUMMARY

While the procedures for approval of an FMS sole source may not be as time consuming as that encountered with the other exceptions to noncompetitive procurements, it has the same rigorous conditions. The FMS customer must make a request in writing that contains sufficient information to justify a sole source. That request will then be reviewed by and receive a security assistance approval from USASAC, and then furnished to the contracting activity for their action.

ABOUT THE AUTHOR

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[22]See *FAR* Sections 4.101(a) and 6.301(b).
[23]*FAR* Section 6.302-4 (c).
[24]10 U.S.C. Section 2304(f)(2)(E).
[25]*Procurements Involving Foreign Military Sales,* 58 Comp. Gen. 81 (1978), 78-2 CPD Paragraph 349.