DOCUMENT RESUME

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[Protest against Restrictive Procurement Procedures under Basic Ordering Agreement]. B-190392. December 13, 1978. 20 pp.

Decision re: Rotair Industries; D. Moody & Co., Inc.; by Robert F. Keller, Deputy Comptroller General.

Contact: Office of the General Counsel: Procurement Law I.
Organization Concerned: Department of the Navy: Navy Aviation Supply Office, Philadelphia, PA.
Authority: Small Business Act (15 U.S.C. 637(e)). 55 Comp. Gen. 1. 55 Comp. Gen. 11. 54 Comp. Gen. 1096. 56 Comp. Gen. 78. 54 Comp. Gen. 606. 54 Comp. Gen. 609. 50 Comp. Gen. 542. 50 Comp. Gen. 545. 36 Comp. Gen. 809. 36 Comp. Gen. 818. 53 Comp. Gen. 209. 53 Comp. Gen. 212. 52 Comp. Gen. 546. 52 Comp. Gen. 548. 50 Comp. Gen. 184. 50 Comp. Gen. 189. 52 Comp. Gen. 569. 52 Comp. Gen. 572. 57 Comp. Gen. 434. 57 Comp. Gen. 437. 56 Comp. Gen. 1005. 56 Comp. Gen. 1007. A.S.P.R. 1-1003. A.S.P.R. 1-313. A.S.P.R. 3-410.2. A.S.P.R. 1-705.4. A.S.P.R. 1-1002.4. A.S.P.R. 1-1001. Defense Acquisition Circular 76-15. Defense Procurement Circular 76-9. B-188541 (1977). B-176256 (1972). B-166435 (1969). B-189021 (1977).

Protests against procurement procedures used in awarding orders under a Basic Ordering Agreement (BOA) were based on contentions that procedures were unduly restrictive of competition. The procedures were unduly restrictive in the following respects: coding of spare parts to require sole-source procurement under an "approved source' system improperly precluded consideration of offers from previously unapproved sources which could otherwise qualify; disqualification of a firm on the basis that another may furnish items of superior quality was an invalid prequalification procedure; use of the BOA to exclude previously unapproved suppliers contravened regulations; and circumstances of the procurement did not relieve the agency of its obligation to publish procurement synopses in the Commerce Business Daily in the timeframe prescribed by regulations. (HTW)

8597

DECISION

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

FILE: B-190392; (See page 2 for additional references) DATE: December 13, 1978

MATTER OF:
Rotair Industries; D. Moody & Co., Inc.

DIGEST:

1. Coding of spare parts to require sole-source procurement under "approved source" system within contemplation of ASPR § 1-313 (1976 ed.) cannot be used to preclude consideration of offers from previously unapproved sources which could otherwise qualify.

2. Disqualification of firm from competition on basis that another may furnish superior quality is invalid prequalification procedure.

3. Procuring activity's use of basic ordering agreement (BOA) to exclude previously unapproved suppliers that may be capable of furnishing acceptable products and to effect sole-source procurements with BOA contractor contravenes ASPR § 3-410.2(c)(1) (1976 ed.) prohibition against using BOA in any manner to restrict competition.

4. Procuring activity is required, absent circumstances not applicable here, to publish spare parts procurement synopses in Commmerce Business Daily (CBD) in timeframe prescribed by ASPR § 1-1003.2 (1976 ed.); neither fact that items are deemed critical aircraft parts nor that agency now posts CBD synopses letters in bid room relieves agency of obligation to promptly synopsize proposed procurements.

Rotair Industries (Rotair) and D. Moody & Co., Inc. (Moody), have protested the procurement procedures used by the Department of the Navy (Navy), Navy Aviation Supply Office, Philadelphia, Pennsylvania, in awarding a series of orders (set forth below) to Sikorsky Aircraft, Division of United Technologies Corporation (Sikorsky), under Basic Ordering Agreement (BOA) No. N00383-77-A-7503.

The orders for procurement of H-3 and H-53 helicopter parts were issued pursuant to the Department of Defense (DOD) Joint Regulation on the High Dollar Spare Parts Breakout Program identified within the Navy as Navy Materiel Instruction (NAVMATINST) 4200.33A, March 1969.

The protesters cite as evidence of a continuing course of conduct by the Navy the following orders awarded to Sikorsky under the aforementioned BOA during the period of September 1977 through July 1978:

GAO Reference	Order No.	Commerce Business Daily Publication	Proposed Award Date	Award Date
B-190392	0438	8-24-77		9-12-77
B-191211	0784	1-13-78	1-19-78	1-27-78
B-191299	0872	2-10-78	2-17-78	5-3-78
B-191309	0516	11-2-77	11-7-77	11-7-77
	0537	11-3-77 12-5-77	11-11-77	11-11-77
B-191400	0901	2-28-78	3-1-78	3-1-78
B-191454	0904	3-8-78	3-13-78	5-3-78
B-191509	0930	3-20-78	3-22-78	5-3-78
	0932	3-20-78	3-22-78	5-3-78
	0938	3-20-78	3-22-78	5-3-78
	0941	3-20-78	3-20-78	3-20-78
	0943	3-20-78	-20-78	3-20-78
	0947	3-20-78	3-20-78	3-20-78
	0951	3-20-78	3-20-78	3-20-78
B-191510	0934	3-20-78	3-20-78	5-3-78
B-191585	0952	3-24-78	3-30-78	5-3-78
	0989	3-24-78	3-30-78	5-3-78
B-191605	0978	3-29-78	4-4-78	5-3-78
B-191641	0960	4-5-78	4-3-78	4-3-78
	0962	4-5-78	4-3-78	5-3-78
	1000	4-4-78	4-13-78	5-3-78

GAO Reference	Order No.	Commerce Business Daily Publication	Proposed Award Date	Award Date
B-191666	1008	4-7-78	4-13-78	Canceled
	1010	4-7-78	4-13-78	5-3-78
	1029	4-6-78	4-14-78	5-3-78
B-191733	1059		4-20-78	5-3-78
B-191845	1085	5-1-78	5-4-78	7-7-78
	1087	5-1-78	5-4-78	7-7-78
	1101	5-1-78	5-4-78	7-7-78

Rotair Protest

Rotair essentially contends that the procedures used by the Navy in procuring helicopter parts are unduly restrictive of competition. More specifically, counsel for Rotair states that despite the firm's experience in supplying parts for other Government agencies and private industry and repeated requests to the Navy, the firm has been denied an opportunity to qualify as an approved parts supplier. Counsel for the protester asserts that the Navy's lack of procedure for qualifying additional suppliers, continued use of restrictive procurement method coding on orders, and failure to promptly publicize orders in the Commerce Business Daily (CBD) prior to award as required by Armed Services Procurement Regulation (ASPR) (now Defense Acquisition Regulation) § 1-1003.2 (1976 ed.) result in virtually automatic procurement of orders under Sikorsky's BOA on a noncompetitive basis.

The Navy, however, contends that pursuant to ASPR § 1-313 (1976 ed.) a part for military equipment is to be bought from the original manufacturer of the equipment (i.e., Sikorsky) or its supplier unless or until a determination has been made that the part can be bought competitively. Section 1-313 provides for the procurement of parts as follows:

"(a) Any part, subassembly or component (hereinafter called 'part') for military equipment, to be used for replenishment of stock, repair, or replacement, must be procured so as to assure the requisite safe, dependable, and effective operation of the equipment. (Items procured as spare parts are governed by the 'DoD High Dollar Spare Parts Breakout Program' described in the DoD Joint Regulation AR 715-22, NAVMATINST P4200.33, AFR 57-6, MCO P4200.13, DSAM 4105.2.) Where it is feasible to do so without impairing this assurance, parts should be procured on a competitive basis, as in the kind of cases described in (b) below. However, where this assurance can be had only if the parts are procured from the original manufacturer of the equipment or his supplier, the procurement should be restricted accordingly, as in the kind of cases described in (c) below.

"(b) Parts that are fully identified and can be obtained from a number of known sources, and parts for which fully adequate manufacturing drawings and any other needed data are available with the right to use for procurement purposes (or can be made so available in keeping with the policies in Section IX, Part 2) are to be procured on a competitive basis. In general, such parts are of a standard design configuration.

They include individual items that are susceptible of separate procurement, such as resistors, transformers, generators, spark plugs, electron tubes, or other parts having commercial equivalents.

"(c) Parts not within the scope of (b) above generally should be procured (either directly or indirectly) only from sources that have satisfactorily manufactured or furnished such parts in the past, unless fully adequate data (including any necessary data developed at private expense), test results, and quality assurance procedures, are available with the right to use for procurement purposes (or can reasonably be made so available in keeping with the policies in Section IX Part 2) to assure the requisite reliability and interchangeability of the parts, and procurement on a competitive basis would be consistent with the assurance described in (a) above. In assessing this assurance, the nature and function of the equipment for which the part is needed should be considered Parts qualifying under this criteria are normally sole source or source controlled parts (see MILSTD 100) which exclusively provide the performance, installation and interchangeability characteristics required for specific critical applications. To illustrate, acceptable tolerances for a commercial television part may be far less stringent than those for a comparable military

> radar part, permitting competitive procurement of the former but not of the latter. The exacting performance requirements of specially designed military equipment may demand that parts be closely controlled and have proven capabilities of precise integration with the system in which they operate, to a degree that precludes the use of even apparently identical parts from new sources, since the functioning of the whole may depend on latent characteristics of each part which are not definitely known.
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> "(d) When an award is made to a source that has not previously produced the item, the cognizant Government inspection activity and the appropriate contract administration office should be notified by the procurement contracting office that the contractor will be producing the item for the first time." (Emphasis added.)

NAVMATINST 4200.33A establishes uniform procedures relating to procurement of spares and repair parts, requires screening of spare parts which account for a preponderance of procurement dollars in order to determine the optimum method for their procurement, and provides that parts be assigned a procurement method code (PMC) which indicates their procurement status. PMC1 denotes that the items are already competitive. PMC3 denotes that items are procured directly from the actual manufacturer or vendor, including a prime contractor which is the actual manufacturer. PMC5 indicates that parts continue to be purchased from a prime contractor which is not the actual manufacturer. PMC2 and 4 indicate

that parts have been determined for the first time to be suitable for competitive procurement and direct purchase, respectively. NAVMATINST 4200.33A, paragraph 1-201.12.

The Navy's regulation is implemented by Military Standard (Mil-Std)-789B, Procurement Method Coding of Replenishment Spare Parts, May 15, 1970, designed for incorporation in prime contracts for equipment, which provides a procedure for obtaining contractors' recommendations concerning methods of procuring selected spare parts. NAVMATINST 4200.33A, paragraph 5-203.1. In developing these codes, first preference is for open competitive procurement, then purchase from designated approved sources, and finally, noncompetitive procurement from a source other than the actual manufacturer. Mil-Std-789B, paragraph 4.1.1.

Rotair does not take exception to the DOD Breakout Program, but asserts that the Navy uses procurement method coding, CBD publication, and the Sikorsky BOA in such a manner as to discourage and restrict competition and to avoid its obligation to obtain maximum competition on parts procurements in violation of ASPR §§ 1-313, 1-1003, and 3-410.2(c) (1976 ed.).

Both procurement method coding and placing orders under a BOA are procedures which prequalify products and competitors and restrict competition for the Navy's parts procurements. The question, however, is whether the procedures or the manner in which they are applied are unduly restrictive of competition.

The general rule is that prequalification of offerors is an undue restriction on competition. D. Moody & Company, Inc., et al., 55 Comp. Gen. 1, 11 (1975), 75-2 CPD 1. We have, however, tentatively approved special agency procedures which limit competition to offerors which have previously entered into certain types of agreements with the procuring activity. See Department of Health, Education,

and Welfare's use of basic ordering type agreement procedure, 54 Comp. Gen. 1096 (1975), 75-1 CPD 392; Department of Agriculture's use of master agreements, 56 id. 78 (1976), 76-2 CPD 390 (hereinafter cited as Agriculture II).

The validity of any procedure which limits the extent of competition depends upon whether the restriction serves a bona fide need of the Government. Such restrictions include those essential to assure procurement of a satisfactory end product, Department of Agriculture's use of Master Agreement, 54 Comp. Gen. 606, 609 (1975), 75-1 CPD 40 (hereinafter cited as Agriculture I), or to determine the high level of quality and reliability assurance necessitated by the criticality of the product, 50 Comp. Gen. 542, 545 (1971); 36 id. 809, 818 (1957). Use of restrictive procedures will not be sanctioned merely because obtaining maximum competition is administratively burdensome; rather, a showing that the exigencies of the procurement in question are such that the Government's interests would be adversely affected by the delay necessary to obtain maximum competition is required. Agriculture I, supra, at 610. Basic characteristics of approved, albeit restrictive, procedures are that they function so that 1) no firm which is able to provide a satisfactory product is necessarily precluded from competing on procurements of that item, and 2) a firm may become eligible to compete at any time it demonstrates under applicable procedures that it is able to furnish an acceptable item which meets the Government's needs. Id. at 609. We have, therefore, found improper the use of restrictive procedures under which an offeror's disqualification would not be based on a finding that it could not provide a satisfactory product. Ibid. Moreover, even a prequalification system for which there may be valid reasons would be rendered invalid by a lack of regulation and procedures for its use. 53 Comp. Gen. 209, 212 (1973).

The Navy takes the position that procurement method coding is a reasonable exercise of procurement authority and a system of approved sources within the contemplation of ASPR § 1-313(c), citing our decisions in Mercer Products & Manufacturing Co., B-188541, July 25, 1977, 77-2 CPD 45, and 52 Comp. Gen. 546 (1973). The Navy's contracting officer further states that the time required to review and change a PMC makes such action impracticable for in-progress, replenishment-purchase transactions; that, until a PMC is changed, procurement in accordance with the assigned PMC is mandatory; and that, because the parts in question were so coded as to require procurement from Sikorsky, there was no need to issue solicitations and no improper prequalification of Sikorsky.

We believe that the Navy's reliance on the above-cited decisions is misplaced. In both decisions, we expressly stated that ASPR § 1-313(c) does not prohibit the submission and consideration of proposals from previously unapproved sources which could otherwise qualify under procedures established by the Joint DOD Regulation on the Spare Parts Breakout Program (here, NAVMATINST 4200.33A). See also Mercer Products & Manufacturing Co.--Reconsideration, B-188541, October 4, 1977, 77-2 CPD 260. Contrary to the Navy's interpretation, we held that the type of qualification procedure used by the procuring activity was consistent with the regulatory provision and that an offeror could properly be required to furnish data and samples for examination and testing as a prerequisite for award because award could be limited to approved sources. 52 Comp. Gen. 546, 548-49 (1973). In so doing, we noted that the use of a qualification procedure for determining approved sources was recognized as an appropriate way to qualify new sources. Ibid; B-176256, November 30, 1972.

We are unable to concur with the Navy's characterization of the nature of PMC's and their effect on procurement of parts so coded. We believe that ASPR § 1-313 does not constitute a mandate to effect sole-source awards regardless of the capability of producers which have not previously supplied the parts in question. Reliability assurance and interchangeability of parts may also be obtained through competitive negotiation procedures. B-166435, July 1, 1969. In our decision in 50 Comp. Gen. 184, 189 (1970), we indicated that to preclude competitive procurement of parts on the basis of the assignment of a certain PMC without regard to the willingness or ability of other sources to produce the parts would contravene the concept of "maximum practical competition." We concluded in that case that designating parts "engineering critical," a standard similar to that used in procurement method coding, had perpetuated an unjustified sole-source position, and recommended that the procuring activity institute a qualification test program to determine the acceptability of parts offered by alternate sources. Id. at 191.

The Navy is required by ASPR § 1-313(a) to procure parts so as to assure the requisite safe, dependable, and effective operation of equipment, and contends that the relevant issue is whether the protester can furnish parts, including necessary quality assurance services, required by the procuring activity. Lack of adverse reports about items furnished to others by Rotair, the Navy believes, does not provide adequate assurance that parts procured from Rotair will be satisfactory. The Navy says that, even though Rotair can furnish the data and quality assurance procedures used by Sikorsky in approving the parts, it must have Sikorsky assurance and inspection because Sikorsky may have information and may be doing something unknown to the Navy that contributes to the reliability of the parts.

However, the Navy does not know that Sikorsky is doing any more than Rotair is prepared to do. Even if Sikorsky, by virtue of its position, possesses knowledge superior to Rotair, the standard is not whether Rotair has the same qualifications as Sikorsky, but whether it is capable of furnishing parts that will provide for the safe, dependable and effective operation of the helicopters. The Navy has adduced no evidence to show that Rotair is incapable of providing the requisite assurances, has concluded only that Rotair may provide services somehow different from those furnished by Sikorsky, and has excluded Rotair from competition on a general finding of the protester's relative qualification. Rotair's disqualification as a potential supplier is not predicated on a finding that the firm could not provide satisfactory inspection and quality assurance services, but that Sikorsky may furnish services of a superior quality. Exclusion of prospective competitors on these bases constitutes an invalid prequalification procedure which is unduly restrictive of competition. Agriculture I, supra, at 609; Agriculture II, supra, at 80.

Evaluation of inspection and quality assurance procedures pertains to contractor responsibility, i.e., Rotair's ability to perform the work. Resolution of a contractor's responsibility by an unauthorized preselection method is contrary to full and free competition contemplated by applicable procurement law and regulations. Such a prequalification procedure, coupled with inadequate CBD synopsizing in furtherance of prequalification, results in an unwarranted restriction on competition in both formally advertised and negotiated procurements. 52 Comp. Gen. 569, 572 (1973).

Prequalification based on matters of responsibility is particularly objectionable as applied to small business concerns, including the protesters here, because a procuring activity is otherwise

required, upon finding a small business concern nonresponsible as to capacity, to so notify the Small Business Administration (SBA) in order to afford SBA an opportunity to issue a certificate of competency. ASPR § 1-705.4(c) (1976 ed.); ASPR § 1-705.4(c), Defense Acquisition Circular (DAC) No. 76-15, June 1, 1978.

Therefore, we conclude on the basis of the present record that the continued exclusion of Rotair from competition on the basis that Sikorsky may have information and may be doing something unknown to the Navy which contributes to the reliability of the parts is not justified.

Nature and Use of Basic Ordering Agreements

A BOA is a written instrument of understanding between a procuring activity and a contractor which shall apply to future procurements between the parties during the term of the BOA. It includes descriptions of the supplies to be furnished when ordered and the method for determining the prices the contractor will be paid. It states the terms and conditions of delivery or the method for their determination, lists the activities which are authorized to issue orders under the BOA, and specifies the circumstances under which an order becomes a binding contract. ASPR §§ 3-410.2(a)(1) and (2) (1976 ed.).

A BOA may be used to expedite procurement where specific items, quantities, and prices are not known when the BOA is executed and where procurement of parts under a BOA can be administratively and financially advantageous because the procedure reduces both the amount of inventory kept on hand and the administrative time required to place items in a production status. ASPR § 3-410.2(b). The content and use of such agreements are subject to a number of limitations. A BOA is not a contract; it cannot provide or imply that the Government agrees to place future orders or contracts with the BOA contractor. Most important, it cannot be used in any manner to restrict competition. ASPR §§ 3-410.2(a)(1) and (c)(1). The issuance of orders under a BOA is restricted as follows:

"(2) Supplies or services may be ordered under a basic ordering agreement only under the following circumstances:

"(i) If it is determined at the time the order is placed that it is impracticable to obtain competition by either formal advertising or negotiation for such supplies or services; or

"(ii) If after a competitive solicitation of quotations or proposals from the maximum number of qualified sources (see 3-101), other than a solicitation accomplished by use of Standard Form 33, it is determined that the successful responsive offeror holds a basic ordering agreement, the terms of which are either identical to those of the solicitation or different in a way that could have no impact on price, quality or delivery, and if it is determined further that issuance of an order against the basic ordering agreement rather than preparation of a separate contract would not be prejudicial to the other offerors.

In situations covered by (ii), the choice of firms to be solicited shall be made in accordance with normal procedures, without regard to which firms hold basic ordering

> agreements; firms not holding a basic ordering agreement shall not be precluded by the solicitation from proposing or quoting; and the existence of a basic ordering agreement shall not be a consideration in source selection." ASPR § 3-410.2(c). (Emphasis added.)

As mentioned above, the Navy contracting officer states that, because the parts were assigned a restrictive PMC which required procurement from Sikorsky, no solicitations were issued and the orders were subject to a BOA provision allowing negotiation of prices within a monetary limitation after the orders were issued. Because no solicitations were issued, ASPR § 3-410.2(c)(2)(ii), supra, is not applicable here. Consequently, placement of orders under the Sikorsky BOA was proper only if the determination required by ASPR § 3-410.2(c)(2)(i) was validly made at the time the orders were placed. The validity of that determination is, however, subject to the proscription that a BOA "shall [not] be used in any manner to restrict competition." ASPR § 3-410.2(c)(1).

We have recently held that conducting informal competition for an order to be issued under one of several BOA's without issuing an adequate written solicitation was a procedure at variance with fundamental principles of Federal negotiated procurement. Tymshare, Inc., 57 Comp. Gen. 434, 437 (1978), 78-1 CPD 322. The Navy contends that the Tymshare decision should be distinguished from the instant procurements because 1) the services being purchased were fully competitive and not required to be procured from a single source, 2) no formal solicitation was issued, and 3) informal negotiations were only conducted with

two BOA contractors. We find the Navy's distinctions to be without substantial differences from the facts obtaining in the Tymshare procurement. The Navy has conceded that no solicitation was issued or deemed necessary for the instant parts procurements. The orders were issued exclusively to Sikorsky under the firm's BOA, subject to price negotiation after their issuance. For these reasons, we believe that the BOA was used in a manner to restrict competition. Furthermore, in light of the Navy's disqualification of Rotair on a relative qualification basis, we are unable to conclude that a determination requisite to issuance of orders under the BOA was validly made at the time the orders in question were placed.

Finally, Rotair contends that the Navy's failure to timely synopsize its orders in the CBD precludes the protester from submitting offers for the Navy's consideration, unduly restricts competition for these requirements, and further demonstrates the Navy's preference for sole-source procurement from Sikorsky. Timely synopsis is required by ASPR § 1-1003.2 in order to allow potential bidders or offerors an opportunity to compete. Of the orders listed above, six were synopsized in the CBD on or after the proposed date of award, 20 were published from 1 to 9 days prior to the proposed award date, and 42.8 percent of the latter group were published less than 4 days before the proposed date of award.

The Navy defers issuance of BOA orders for which it mails synopses to the CBD until 15 days after the date the synopses are mailed. The Navy states that its synopsis procedure was developed in recognition of the exception provided in ASPR § 1-1003.1(c) (iv) (Defense Procurement Circular (DPC) No. 76-9, August 30, 1977), that ASPR § 1-1003.2 is not mandatory and that the procedure consumes

the maximum time compatible with its procurement needs and applicable procurement law and regulations.

We do not agree with the Navy's interpretation of the regulatory provisions upon which the agency's synopsizing procedure was developed. ASPR § 1-1003.1(a) requires, absent expressly enumerated circumstances not applicable here, that every proposed procurement which may result in an award exceeding $10,000 be timely synopsized. When feasible, synopses should be published no later than 10 days prior to placement of BOA orders. ASPR § 1-1003.2. (DPC No. 76-9, August 30, 1977). The Navy's synopsizing procedure ostensibly assumes that synopsis of replacement parts orders is never feasible within the 10-day timeframe. However, even the fact that replacement aircraft parts are deemed critical safety items does not relieve the procuring activity of its obligation to timely synopsize such procurements in accordance with the pertinent procurement regulations. Rotair Industries, B-189021, December 21, 1977, 77-2 CPD 487.

ASPR § 1-1003.1 states.

> "(c) The following need not be publicized in the Synopsis * * *
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> * * * * *
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> "(iv) procurement (whether advertised or negotiated) which is of such urgency that the Government would be seriously injured by the delay involved in permitting the date set for receipt of bids, proposals, or quotations to be more than 15 calendar days from the date of transmittal of the synopsis or the date of issuance of the solicitation, whichever is earlier."

That exception contemplates those occasions when the Government's requirements are so urgent as to necessitate unusually rapid receipt of pricing and technical submissions for expedited evaluation and award. Under the circumstances, the procuring activity is not required to synopsize the procurement. In other words, ASPR § 1-1003.1(c)(iv) is an exception from the synopsis requirement, not from the requirement concerning the time of publicizing synopses. Both the feasibility language and the exception cited are intended to establish exceptions to an otherwise required course of conduct, not to become a regular course of conduct or procurement system.

The Navy has advised our Office that "although not required by the Armed Services Procurement Regulation [the procuring activity] has begun posting copies of its letters to the Commerce Business Daily in the * * * Bid Room," and asserts that interested firms will thereby be able to review CBD synopses 15 days prior to the issuance of BOA orders. ASPR § 1-1002.4 provides for public display of solicitations as follows:

> "A copy of each solicitation for an unclassified procurement in excess of $2,500 which provides at least ten calendar days for submission of offers shall be displayed at the contracting office, and, if appropriate, at some additional public place from the date issued until seven days after bids or proposals have been opened." (Emphasis added.)

Notwithstanding the fact that posting notices is consistent with DOD's policy to increase competition by publicizing procurements, ASPR § 1-1001,

and may result in competition for the Navy's parts procurements, it does not relieve the Navy of its obligation to promptly synopsize proposed parts procurements in the CBD as well.

Rotair also takes exception to the Navy's use of "Number note" 46, rather than Note 33, in synopses of the BOA orders in question. See ASPR § 1-1003.9(b)(5) and (d). We agree with the protester that reference to a note which advises potential contractors that the synopsis is published solely for informational purposes and that solicitation documents are not available is inappropriate. ASPR § 1-1003.2 expressly provides that orders against BOA's are to be timely synopsized to afford concerns an opportunity to prepare bids or offers. We believe that the Navy's reference to Note 46 merely evidences further use of the BOA in a manner to restrict competition in violation of ASPR § 3-410.2(c)(1). We cannot, however, agree that Note 33 is applicable to these synopses because it pertains to procurements for which solicitations have been issued. Consequently, we believe that neither note is applicable to these synopses.

Moody Protest

Moody, a small business concern, also protests the Navy's CBD synopsizing procedure, contending that failure to allow 10 days' advance notice from the publication of synopses before orders are issued violates the Small Business Act, 15 U.S.C. § 637(e) (1976), and ASPR § 1-1003.2. Counsel for Moody asserts, and the Navy concedes, that Moody's position is different from Rotair's because Moody would be offering parts which were former Government surplus articles, i.e., parts previously furnished by an approved contractor. Nevertheless, the Navy states that surplus offers require time-consuming review which makes delay of

the entire procurement process unrealistic for the few surplus material offers that might be received and suggests that by reviewing CBD notices posted in the procuring activity's bid room or employing a bid service to do so, Moody and other surplus dealers would have ample time to submit offers or give notice of their intention to do so within a reasonable time. The Navy contracting officer states that if Moody indicates that it has a supply of the parts being procured and wants to submit an offer, order issuance will be further deferred, within reason.

While the Navy may legitimately be concerned about the circumstances in which a part became surplus, that concern alone is insufficient to preclude procurement of surplus parts from surplus dealers. D. Moody & Co., Inc., 56 Comp. Gen. 1005, 1007 (1977), 77-2 CPD 233. Procuring activities are not required in every instance to ascertain the existence of surplus dealers, assuming surplus parts are acceptable, before using a BOA. Timely publication of CBD synopses in accordance with ASPR § 1-1003.2 is, however, required and if an alternate source offers the same item being procured under the BOA, the Government is required to include the source if surplus parts are determined to be acceptable. Id. at 1008.

Attempts to substitute posting notices in the bid room for prompt CBD synopses are, for the reasons stated above, equally inappropriate and ineffective with regard to prospective surplus-dealer competitors. Similarly, the Navy's synopsizing procedure in conjunction with the agency's use of the Sikorsky BOA constitutes, under the circumstances of the procurements in question, an undue restriction on surplus parts competition for the Navy's parts procurements.

For the reasons stated above, we find that the Navy's disqualification of Rotair, CBD synopsis procedure, application of procurement method coding, and use of the Sikorsky BOA with regard to the instant aircraft parts procurements unduly restrictive of competition. Accordingly, the protests are sustained. Because the orders under the BOA have been substantially completed, no remedial action is appropriate. We recommend, however, that procedures for effectively qualifying alternate suppliers, including surplus dealers, be established and implemented, that synopsizing procedure be amended to provide notice requisite to allow and encourage competition for future parts procurements, and that basic ordering agreements be used in a manner consistent with the regulatory requirements.

Deputy Comptroller General
of the United States