

DOCUMENT FYSUME

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[Protest against Procurement Policies and Procedures]. B-187969.  
September 28, 1977. 5 pp.

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

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

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

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

Organization Concerned: Department of the Army: Army Aviation  
Systems Command; United Technologies Corp.: Sikorsky  
Aircraft Div.

Authority: 10 U.S.C. 2304(a)(10). A.S.P.R. 3-2102. A.S.P.R.  
2-410. A.S.P.R. 1-1003.2.

The protester objected to the procurement practices and policies used by the Army in placing a delivery order under a Basic Ordering Agreement. Basic Ordering Agreements cannot be used to exclude surplus spare parts once the procuring activity has been made aware of a potential source of supply. The publication of a synopsis in the Commerce Business Daily must precede ordering under Basic Ordering Agreements to allow potential bidders an opportunity to compete. (Author/SC)

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**DECISION**

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

**FILE: B-187968**

**DATE: September 28, 1977**

**MATTER OF: D. Moody & Co., Inc.**

**DIGEST:**

1. Basic Ordering Agreements (BOA) cannot be used to exclude surplus spare parts once procuring activity has been made aware of potential source of supply especially where surplus parts are acceptable from item manufacturer.
2. While Government may not have adequate data rights in parts to obtain competition from other manufacturers, assigned part number is sufficient to procure part from item manufacturer as well as surplus parts dealers.
3. Publication of synopsis in Commerce Business Daily must precede ordering under BOA so as to allow potential bidders an opportunity to compete. ASPR § 1-1003.2.

D. Moody & Co., Inc. (Moody), protests the procurement policies and procedures employed by the Department of the Army, United States Army Aviation Systems Command, in placing delivery order No. 3285 under Basic Ordering Agreement (BOA) No. DAAJ01-71-A-0303 with Sikorsky Aircraft, Division of United Technologies Corp. (Sikorsky).

The synopsis of the proposed procurement appeared in the Commerce Business Daily (CBD) on November 11, 1976. However, the award had been made on November 5, 1976. Moody contends it was wrongfully excluded from competition in two ways: (1) award before publication in the CBD precluded Moody from submitting a bid; and (2) sole-source procurement under the BOA avoided competition from surplus dealers. The parts Moody contends it would offer are new, unused, nondeteriorable surplus parts manufactured by Sikorsky and carrying the same part number as those ordered under the BOA.

The Army has questioned the timeliness of the protest with regard to the allegation that the sole-source procurement under the BOA was improper as a restriction on competition. The Army contends that Moody's original protest to it of November 11, 1976, complained only

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of the CBD synopsis procedure, while the protest of December 6, 1976, to this Office raised new issues. The interpretation the Army applies to Moody's protest is overly narrow. Since Moody protested to this Office within 10 working days from receipt of the Army's response (received November 23, 1976), we consider the protest to have been timely filed on both issues.

The essence of Moody's protest is that where surplus dealers can provide the requested part from the same item manufacturers, an order against a BOA violates Armed Services Procurement Regulation (ASPR) § 3-410.2(c) (1976 ed.). It reads:

"(c) Limitations.

"(1) Basic ordering agreements shall not in any manner provide for or imply any agreement on the part of the Government to place future orders or contracts with the contractor involved, nor shall they be used in any manner to restrict competition.

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

"(1) 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; \* \* \*" (Emphasis added.)

Here, the procuring agency determined that Sikorsky was the only manufacturing source of supply, since adequate data or specifications were not available to compete the items from other manufacturing sources. The negotiation authority for the sole-source procurement was 10 U.S.C. § 2304(a)(10) as implemented by ASPR § 3-210.2(xiii) (1976 ed.). The determinations and finding supporting the negotiation authority states that the spare parts can only be identified by manufacturer's part number since design data available is incomplete to permit advertised bidding. This, of course, excludes surplus dealers, similar to Moody, from being considered as a source of supply even though the part proffered was manufactured by Sikorsky and is new, unused, nondeteriorable surplus. The anomaly occurs when the agency elects to procure surplus property only from the item manufacturer (Sikorsky). We view the Army's justification of excluding surplus dealers, in this instance, by asserting that the fact that parts bear the same number does not mean the parts are exactly the same, as unmeritorious. The assignment of part numbers add to the

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Army is governed by Military Specification MIL-STD-100B dated October 5, 1975. The Army contends that under paragraph 402-14 of MIL-STD-100B it would be possible to change the manufacturing process of a part or material without necessitating the assignment of a new part number. Sections 402.14 and 402.15 thereof differentiate changes requiring a new part number from those which do not as follows:

"402.14 Changes requiring new identification. Items shall be assigned new design activity numbers different from the original identifying numbers under the following conditions:

"a. When an item(s) has been submitted, a new drawing number or part number as described in paragraph 402.10 shall be assigned when a part or assembly is changed in such manner that any of the following conditions occur:

"Condition 1. Performance or durability is affected to such an extent that superseded items must be discarded for reasons of safety or malfunctioning.

"Condition 2. Parts, subassemblies, or complete articles are changed to such an extent that the superseded and superseding items are not interchangeable.

"Condition 3. When superseded parts are limited to use in specific articles or models of articles and the superseding parts are not so limited to use.

"Condition 4. When an item has been altered or selected (see paragraphs 201.4.4 and 201.4.5).

"Condition 5. When interchangeable\* repairable\* assemblies contain a non-interchangeable part, the part number re-identification of the non-interchangeable part, of its next assembly and all the progressively high assemblies shall be changed up to and not including the assembly where interchangeability is re-established.

"b. When an item\* is changed in such a way that it necessitates a corresponding change to an operational, self-test or maintenance test computer program the part number identification of the item and its next assembly and all progressively higher assemblies shall be changed up to and including the assembly where computer-programs are affected.

"402.15 Changes not requiring new identification. When a part\* or assembly is changed in such a manner that conditions of paragraph 402.14 do not occur the part number shall not be changed. Under no condition shall the number be changed only because a new application is found for an existing part. When an item\* has been furnished to the Government the applicable part number shall not be changed unless conditions in paragraph 402.14 apply. However, when a design activity desires to create a tabulated listing or a standard because of a multiple application of an item the foregoing need not apply. The superseded drawing will identify the document which superseded it."

Any change which did not require a new part number would, by definition, be de minimus and not in and of itself require the purchase of the newer part. Here, the part has not been changed without being assigned a new part number. Based on the above it is clear that a part from an item manufacturer may be procured by the part number only--just as the Army did in placing the order under the BOA.

The Army's real concern appears to be over accepting surplus property without being capable of inspecting the parts so as to insure quality and conformance. The case at hand is somewhat unique. Here, Moody can offer a new, unused, nondeteriorable part from Sikorsky, identified by the same part number. While the Army has a legitimate concern relative to what, where, when, why and how an item became surplus, such concern without more is not sufficient to preclude procurement of surplus parts from surplus dealers. With regard to the effect which limited data rights bear on inspection, Sikorsky is required by the BOA to establish and maintain a quality control program to assure adequate quality throughout all stages of manufacture. Sikorsky is also required to maintain records of all inspection work. The Navy has the responsibility to assure that Sikorsky's quality control program meets the requirements. The Navy's inspection, in accordance with NAV AIR FIELD Administration MANUAL 4330.16, includes spot checking the product, auditing inspection records and visual checking of the manufacturing process. The Navy does not inspect an item after delivery

from Sikorsky, although a limited visual inspection is made by field maintenance personnel prior to installation. Accordingly, the only distinction between surplus parts from Moody's shelves, as opposed to Sikorsky's, is the necessity to update the historical data on the item since it left Sikorsky's plant. Once this data has been supplied there is no distinction. Here, the part Moody would offer was purchased from the Government as surplus. Therefore, the part has passed all the inspection procedures the Army alleges must be performed prior to acceptance of the item.

At the very heart of the controversy is the question whether the Government, after it has determined only one manufacturer can produce the part, then, must search surplus sources in order to satisfy 10 U.S.C. § 2304(g) and ASPR § 3-210.2. Based on the information the Army had at the time the order was placed, the determination that it was impracticable to obtain competition was reasonable. It would be overly burdensome on the procurement system to require the procurement activity to ascertain in every instance the existence of a surplus dealer (assuming surplus parts were acceptable) before using a BOA. Such a procedure would contravene the very purpose of a BOA. See ASPR § 3-410.2(b).

The problem encountered by Moody occurred when the synopsis of the order was published in the CBD after award. Timely synopsis is required by ASPR § 1-1003.2 (1976 ed.) so as to allow potential bidders an opportunity to compete. The publishing of a fait accompli does not allow alternate sources to bring their existence to the attention of the Government. This in effect was in contravention of ASPR § 3-410(c)(1) which prohibits using BOA's to restrict competition.

In the future the Army should timely publish the synopsis in the CBD in accordance with ASPR § 1-1003.2. If an alternate source offers the same item being procured under the BOA, free and open competition requires the Government to include the source, if surplus parts are determined to be acceptable. We can appreciate the legitimate concern of the Government in accepting surplus parts which have been outside the control of the manufacturer or the Government, which may have been abused or improperly stored. However, the procurement statutes and regulations generally contemplate obtaining maximum competition consistent with the Government's actual needs.

For the reasons stated above, we sustain the protest of Moody. However, since the orders under the BOA have been substantially completed, no remedial action is appropriate.

Acting   
Comptroller General  
of the United States