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Comptroller General  
of the United States  
Washington, D.C. 20548

## Decision

**Matter of:** Department of the Army--Statutory Authorization  
for Award of Sole-Source Contract

**File:** B-243857

**Date:** September 26, 1991

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### DIGEST

Agency may not cite 10 U.S.C. § 2304(c)(5) to permit the use of a noncompetitive procurement when the applicable statutes contain no express authorization or requirement to acquire aircraft from a particular source.

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### DECISION

The Deputy Assistant Secretary of the Army for Procurement asks whether the Army may award a contract for C-23 Sherpa aircraft to Short Brothers P.L.C. on a sole-source basis pursuant to the exception permitting other than full and open competition contained in 10 U.S.C. § 2304(c)(5). We conclude that the Army may not invoke the exception in this case.

The Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304, requires, with certain limited exceptions, full and open competition in government contracting. One of the exceptions to that requirement is contained in 10 U.S.C. § 2304(c)(5), which provides that the agency may use other than competitive procedures when "a statute expressly authorizes or requires that the procurement be made . . . from a specified source". See also Federal Acquisition Regulation (FAR) § 6.302-5(a)(2).

The Department of Defense Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-165, 103 Stat. 1112, 1124, provided, under the heading "National Guard and Reserve Equipment," a lump sum for the procurement of aircraft and other items of \$973,720,000 to remain available for obligation until September 30, 1992. The act contains no reference to the C-23 Sherpa aircraft manufactured by Short. In fiscal year 1991, Congress appropriated \$2,463,700,000 for National Guard and Reserve Equipment, to remain available until September 30, 1993. Department of Defense Appropriations Act for Fiscal Year 1991, Pub. L. No. 101-511, 104 Stat. 1856, 1867-68. Like the earlier act, this appropriations act contains no mention of Sherpa aircraft.

Although Congress was silent in the acts themselves, the conference committee reports do contain references to these particular aircraft. For 1990, the conference report recommended that \$42,000,000 be appropriated to purchase six C-23 aircraft. H. R. Rep. No. 345, 101st Cong., 1st Sess. 91-92 (1989). For 1991, the conference committee report recommended \$54,000,000 for 10 C-23s and an additional \$8,000,000 for a flight simulator. H. R. Rep. No. 938, 101st Cong., 2d Sess. 92, 94 (1990).

Unlike the appropriations acts, the National Defense Authorization Acts for Fiscal Years 1990-1991 and for 1991 do mention C-23 Sherpa aircraft. Pub. L. No. 101-189, 103 Stat. 1356; Pub. L. No. 101-510, 104 Stat. 1485. Both laws provide that "Funds appropriated for procurement of aircraft for the Army for fiscal year 1990 may not be obligated for the procurement of C-23 Sherpa aircraft unless the Secretary of the Army secures a commitment from the contractor that it will support equal employment opportunities. . . ." Pub. L. No. 101-510, sec. 833, 104 Stat. at 1613; Pub. L. No. 101-189, § 148, 103 Stat. at 1386. Like the conference reports mentioned above, neither law specifies a source of procurement. The only reference to Short was an indirect one, found in the acts' legislative history. One member of the House, when the House initially considered this provision, noted that the C-23 Sherpa aircraft had been built in Northern Ireland; he described the purpose of the provision as to ensure that the firm be fair in its hiring of members of the Catholic minority in that area. 135 Cong. Rec. H4432-3 (daily ed. July 27, 1989).

The Army believes that the appropriations acts, the authorization acts and the relevant committee language, when read together in the context of "mutual legislative and executive understandings," require it, or at least authorize it, to purchase 16 Sherpa aircraft on a sole-source basis. The Army has delayed purchasing the aircraft under both the 1990 and the 1991 appropriations pending our decision.

By its terms, section 2304(c)(5) applies where the acquisition from a specified source is expressly authorized or required by statute. We can find no express authorization or requirement here. The provision in the authorization acts, the sole statutory reference to C-23 aircraft, is a prohibition forbidding the Army from procuring C-23 aircraft unless a condition precedent is met. It would take an untenable leap of logic to convert such a prohibition into an authorization or requirement to acquire the C-23 aircraft from a particular source. Nor do we believe that the conference reports or the statement on the floor of the House provide a basis for reading into any of the statutes involved here the express authorization or requirement to procure from Short called for

in section 2304(c) (5). Accordingly, we find section 2304(c) (5) inapplicabable in this case.

The Army also suggests that it may use sole-source procedures in this case pursuant to 10 U.S.C. § 2304(c) (1), which suspends competitive procedures based on an agency's need for a product available from only one responsible source or a limited number of responsible sources. The Army believes that since the legislative history and the authorization act make reference to "C-23" aircraft, and only Short manufactures that particular aircraft, then the Army needs to purchase that aircraft from Short. Because we do not believe that the Army has been mandated to buy C-23 aircraft from Short, we do not believe such a mandate can be the basis of a sole source procurement under clause (1) of section 2304(c) any more than under clause (5). We express no view as to whether there is any other basis for concluding that Short is the only responsible source that can meet the Army's needs.

*for* *William F. Jordan*  
Comptroller General  
of the United States