

DOCUMENT RESUME

03010 - [A2093182]

[Protests concerning Procurement Policies and Procedures].
B-188541. July 25, 1977. 6 pp.

Decision re: Mercer Products & Manufacturing Co.; by Robert F. Keller, Deputy 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 Air Force: Air
Logistics Center, Oklahoma City, OK; Department of the Air
Force: San Antonio Air Logistics Center, TX; Rockwell
International Corp.

Authority: 10 U.S.C. 2304(a)(3). 52 Comp. Gen. 546. B-185647
(1976). B-182991 (1976). B-182903 (1976). B-177949(1)
(1973). B-184929 (1976). B-185333 (1976). A.S.P.R. 1-313,
1-313(c). A.S.P.R. 3-203.2.

Protest was made to the procurement policies and procedures used in awarding a sole-source contract for aircraft parts. Requiring supplier of aircraft parts to be on approved source list was reasonable. It was also reasonable that firm which wanted to use other firm's proprietary data be legally certified; refusal by firm to make such certification was basis for rejection. Small purchase negotiation rather than formal advertising is not considered by GAO for contracts less than \$10,000. Coding spare parts to determine degree of competition applicable to procurement was justifiable procurement action. Protest was denied. (Author/DJM)

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DECISION

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

FILE: B-188541

DATE: July 25, 1977

MATTER OF: Mercer Products & Manufacturing Co.

DIGEST:

1. Requirement that firm wishing to supply spare parts under ASPR § 1-313 procurement must acquire status of approved source in order to qualify for award is reasonable and proper.
2. Requirement for certification by firm that it has legal right to use data developed by third party which bears restrictive legend is reasonable, and refusal by firm to make such certification is proper basis for rejection of offer.
3. Decision to utilize small purchase negotiation procedures rather than formal advertising for contracts of less than \$10,000 is matter that is not reviewable by our Office.
4. Practice of coding spare parts as to degree of competition applicable to their procurement is reasonable exercise of procurement authority.

The Mercer Products & Manufacturing Co. (Mercer) protests the procurement policies and procedures employed by the San Antonio Air Logistics Center under solicitation No. FD2050-77-32114 and by the Oklahoma City Air Logistics Center under solicitation No. FD2030-77-25602. Both procurements were for T-39 aircraft parts, and both were issued solely to the Rockwell International Corp. (Rockwell) as the only approved source for the items.

Under the former solicitation Rockwell submitted no offer. It was discovered after issuance of the solicitation to Rockwell that Mercer, who did submit an unsolicited offer, should have been included as an approved source since it had once before satisfactorily supplied the Government the desired part. Since, the Mercer offer is low, award to Mercer is proposed.

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Under the latter solicitation Rockwell alone was solicited because the Government had only limited data rights in the item. Mercer did submit an unsolicited proposal (with the low price) under this solicitation with a reproduction of the design contractor's technical data (Rockwell is the successor to the design contractor.). Although a review of the data indicated that Mercer could be considered an acceptable source, the data contained a restrictive legend prohibiting its use outside of the Government, and Mercer refused to provide a certification of its legal right to use the data. In view of this refusal, award was made to Rockwell.

Mercer protests these procurements for basically three reasons. First, it is contended that our decisions in D. Moody & Co., Inc., B-185647, September 1, 1976, and May 11, 1977, 76-2 CPD 211, and 77-1 CPD 333, prohibit the Department of the Air Force from procuring spare parts by use of a system of "approved sources." Secondly, it is alleged that the use of the system of "approved sources" and the Air Force's interpretation of paragraph 1-313 of the Armed Services Procurement Regulation (ASPR) (1976 ed.)--Procurement of Parts--are contrary to the requirement that Government purchases be made under full and free competition. Finally, Mercer objects to the required certification that the technical data submitted was legally acquired and that the firm submitting it has full legal right to use it. Mercer objects because it feels the certification is in essence an indemnity clause, because an offeror does not always know what legal rights he has in the data, and because it is felt that our decision in Garrett Corporation, B-182991, B-182903, January 13, 1976, 76-1 CPD 20, negated the possibility of any activity inquiring into matters of this sort.

We must deny the protest on the following bases. First, our decisions D. Moody & Co., Inc., supra, dealt only with an offer by a surplus dealer-nonmanufacturer to provide newly manufactured and/or new and unused surplus items, the item-models for which had already been approved by the activity in response to a request from the item manufacturer or dealer. Hence the items offered were manufactured by the approved source. In the instant case, Mercer was not offering items manufactured by the original manufacturer (who had been qualified as an approved source). Rather, Mercer was offering items that would be manufactured by itself and that were ostensibly not approved.

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Secondly, as regards the use of the system of "approved sources," our Office has recognized the appropriateness of such a system as contemplated in ASPR § 1-313(c) (52 Comp. Gen. 546 (1973)), which provides, in pertinent part:

"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 * * * to assure the requisite reliability and interchangeability of the parts * * * 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."

While this provision does provide for the soliciting of only approved suppliers, it does not prohibit the submission of and consideration of proposals from unapproved sources who can otherwise qualify under procedures set forth in Air Force Regulation 57-6. B-177949(1), June 5, 1973; 52 Comp. Gen., supra; Olympic Fastening Systems, B-184929, October 18, 1976, 76-2 CPD 336. Further, such a system comes into effect only where the Government does not have enough data to draw up a specification which may serve as the basis for a competitive procurement.

Thirdly, our decision Garrett Corporation, supra, did not hold that the Government could not require a firm wishing to become an approved contractor to give reasonable assurances that it had a legal right to make use of data developed by a third company. As a matter of fact, we concluded that the Air Force

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acted reasonably in qualifying a firm on the basis of data furnished by that firm and in requesting from that firm, subsequent to award and a claim of misuse of proprietary data, assurance that the data was properly obtained.

Mercer also questions the authority for treating a procurement valued under a specific sum differently than any other procurement. Authorization for procurements of \$10,000 or less by negotiation rather than by formal advertising is provided for in 10 U.S.C. § 2304(a)(3) (1970). Paragraph 3-203.2 of ASPR requires the use of the simplified procedures set forth in ASPR § 3-600, et seq., for small purchases. Decisions not to use formal advertising for purchases which come within the ambit of 10 U.S.C. § 2304(a)(3) are not reviewed by our Office. Associated Builders and Contractors, Inc., B-185333, April 27, 1976, 76-1 CPD 283.

Finally, Mercer contends that the practice of coding spare parts for the purpose of determining the degree of competition, if any, applicable to their procurement is unnecessary and unduly restrictive of competition. It is Mercer's position that all spares should be open to competition for all sources. In this connection, Mercer cites the Defense Industrial Supply Center's (DISC) practice of procuring spares on an unrestricted basis as support for its position.

The Air Force offers the following explanation and justification for its coding practice:

"* * * A Procurement Method Code (PMC) is assigned to individual spare parts in accordance with the policy and procedures of the DOD High Dollar Spare Parts Breakout Program. The Joint Service and Defense Logistics Agency directive covering the program is identified within the Air Force as AFR 57-6. The PMC is assigned on the basis of technical and economic considerations through a screening effort which is separate from the procurement process. The definitions of the five PMCs and 23 suffix codes are reflected in the attached extract from the joint directive (Atch 1). Annually, replenishment spare parts that are not coded for open competition (i.e., other than 1G or 2G) are stratified based on the projected dollar value of the annual buy. Available resources are

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applied to the review of the highest dollar value items first. Detailed screening, aimed at improving the procurement status of the item, is conducted on those items representing at least 80% of all dollars expected to be spent on spare parts in the 12 month period. The items that do not meet the criteria for full screening are reviewed to identify known sources. The items in this latter category are identified with a 'L' suffix code and are the items addressed in Mercer's protest. All spare parts purchase requests forwarded to the procurement office identify the current PMC for each item. The PMC alerts the buyer as to the availability of manufacturing data for open competition or identifies the reason when procurement is contemplated from known sources. * * *

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"* * * Prior to 1971, awards were often made to new suppliers without consulting the responsible engineering activity. It was found that in some cases this resulted in the delivery of unusable parts that had been produced using obsolete or incomplete manufacturing data. The current coordination requirement provides reasonable precautions and has worked well. If a buyer or contracting officer does not agree with the engineering position regarding award of the contract to a new source, the AFLC implementation of AFR 57-6 provides an 'appeals' procedure where the issue is elevated to higher management levels for resolution. The air logistics center commander makes the decision if agreement cannot be reached at a lower level."

We find no basis to conclude that the coding practice is other than a reasonable exercise of procurement authority.

With regard to the DISC practice cited by Mercer to support its position, the Air Force points out that generally the DISC procurements are of common hardware-type items that do not involve manufacturing data that is proprietary to the original equipment manufacturer. With regard to a specific example cited by Mercer, the Air Force points out that while both it and DISC buy spare parts for the C-141 aircraft, the parts procured by DISC are not equal in terms of complexity or importance to the

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safe, reliable and effective operation of the aircraft as the parts procured by the Air Force.

Accordingly, the protest is denied.

W. H. K. 11/16
Deputy Comptroller General
of the United States