

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 2054860380
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FILE: B-183075

DATE: January 12, 1976

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

DIGEST:

1. Although grounds of protest regarding procuring agency's request that protester submit preaward samples are untimely under Interim Bid Protest Procedures and Standards [4 C.F.R. § 20 (1974)], in effect when protest was filed, since samples were submitted without objection and protest was not filed until approximately 5 months later, issues are considered since they are significant to procurement procedures.
2. Where request for quotations provided only for testing and inspection of product delivered under contract, failure to require preaward sample from manufacturer where such sample was required from surplus dealer creates dual standard which casts doubt on reasonableness of requirement, contrary to principles of free and open competition. However, since contract performance is completed no corrective action is available.
3. Although offeror-protester supplied surplus items from same lot to another agency, rejection of sample submitted in connection with current procurement was not without reasonable basis where, contrary to current procurement, protester was not required to refurbish deteriorative components under prior contract.

In April 1974, the San Antonio Air Logistics Center (SAALC), Department of the Air Force, issued a request for quotations (RFQ) for the procurement of 81 Pressure Control Valve Assemblies which control directional flow of fuel in F-86 aircraft. Quotations were submitted by two sources: Parker-Hannifin Corporation of Irvine, California, manufacturer of the item, and D. Moody & Co., Inc. (Moody), of Tulsa, Oklahoma, a surplus dealer, which submitted the low offer. Award was made to Parker-Hannifin. Moody has raised several grounds of protest which will be considered below.

In its initial offer dated April 25, 1974, Moody stated that the items were "new surplus currently cure dated and certified airworthy, obtained from AF Surplus approximately Nov. '69." Upon request, Moody submitted five samples which were evaluated for corrosion, deterioration, handling damage, and to ensure that the age of synthetic rubber components did not exceed 3 years. These rubber materials are referred to as "cure dated items." The samples were evaluated and rejected on October 17, 1974, because the cure dated items had deteriorated and their age could not be determined. Upon notification of rejection, Moody protested to the contracting officer by letter of October 22, 1974, stating:

"Our letter attached to our quotation on subject solicitation stated: 'Items quoted are new surplus currently cure dated . . .' (A) It should have read; 'Items quoted are new surplus. All rubber goods will be replaced with currently cure dated items and the units will be FAA certified Airworthy.' * * *

"Our intent was, and is, to replace the 'rubber goods' and 'swing gate rubber seals.'

"Because of the time factor and cost the soft goods in the samples we submitted were not replaced prior to shipment.

"I repeat, the old soft goods will be replaced by ones of current cure date * * *"

On November 6, Moody and the buyer communicated by telephone. The content of that conversation is in dispute. Although Moody insists that it was never informed that currently cure dated and refurbished samples would be required, the buyer notes in his Memo for the File of February 26, 1975, that he instructed Moody to refurbish the five samples for evaluation in that condition. The protest was withdrawn and five more samples were submitted and evaluated. The procuring activity determined to reject the samples on January 9, 1975, because of the absence of cure dates and the deteriorated condition of the rubber goods. Moody was notified of this second rejection by letter of January 15, 1975, whereupon it protested to our Office.

Moody contends that because the manufacturer of the item, Parker-Hannifin, was not required to submit samples prior to award, the requirement that Moody submit such samples constituted unfair discrimination.

At the outset it should be observed that this contention, as well as Moody's argument that the August 1974 request to submit samples was in violation of Armed Services Procurement Regulation (ASPR) § 2-202.4(b) (1974 ed.) and D. Moody & Co., Inc., B-180053, April 4, 1974, 74-1 CPD 171, is untimely under the Interim Bid Protest Procedures and Standards of our Office then in effect (4 C.F.R. § 20.2(a) (1974)), since the protest was not filed with our Office within 5 days from the events in question. However, we have determined to consider these issues as an exception to our timeliness rule under 4 C.F.R. § 20.2(b)(1974) since, for the reasons that follow, we feel that they are significant to procurement procedures.

The Air Force responds that an item purchased from the manufacturer is subject to stringent quality control, that surplus items are not necessarily made under the same strict controls, can be subject to deterioration or damage through age or storage conditions, and are susceptible to the possibility of fraud, and that the work done by the surplus dealer himself must be scrutinized. This response ignores the fact that the RFP subjected both Parker-Hannifin and Moody to identical sampling of end items in accordance with MIL-STD-105D and to an inspection system in accordance with MIL-I-45208. Thus, the RFP provided for an inspection system which the Air Force evidently believed would ensure the requisite quality of the valve assemblies.

SAALC has essentially created one standard for treating the proposals of manufacturers and another for treating those of surplus dealers. Such a dual standard is nowhere sanctioned by the applicable regulations. With regard to a similar unstated dual standard which was applied by DSA in a protested procurement which was the subject of our decision in B-162931, February 21, 1968, we stated:

"* * * the principal administrative objection to the award to White is that the Government does not have data from which it can ascertain that the surplus Hartman parts offered by White are of the same quality as the Hartman parts offered by Hartman and other offerors. It is suggested that the surplus parts may have deteriorated in storage, may have been subjected to rough handling, may be from rejected lots, etc. However, these same conditions could very well exist in respect to the parts offered by the name brand manufacturer or other offerors of its products, and the Government apparently does not seek assurances from these offerors against these contingencies and apparently it would have no means of ascertaining

any deficiencies, since admittedly it has no data which can be used for testing the parts.

"* * * Moreover, the RFP afforded sufficient protection and remedies to the Government respecting the furnishing and receipt of new and unused Government surplus property as would have afforded a basis for an award at a lower price to White."

See also, D. Moody & Co., Inc; Astronautics Corporation of America, 55 Comp. Gen. 1, 75-2 CPD 1.

As noted, the inspection and sampling requirement of the RFQ required tests for the purpose of ensuring that the Government received an acceptable product meeting its needs. Therefore, we question the validity of the requirement imposed upon Moody in light of the agency's failure to impose a like requirement on the manufacturer. Where agency personnel determine that such a pre-award sampling is required, it would seem to us consonant with the principles of free and open competition to require samples from each offeror.

Moody has advanced two grounds on which to protest the rejection of its samples. The first is that such rejection was without a reasonable basis because in June 1973 the Defense Construction Support Center (DCSC) had purchased 55 of the same valves as those offered under this procurement from the same lot. In response to this contention, the Air Force notes that the DCSC contract specifically provided that the items be unrefurbished, that possibly the cure dated items were not then out of date, and that the contracting officer under this procurement had no knowledge of the prior contract. In light of the purpose for the sampling--to determine Moody's ability to properly replace cure dated items--we cannot say that Moody's prior contract to provide unrefurbished goods renders the rejection of its samples here without a reasonable basis.

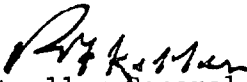
Moody further protests the rejection of its samples as nonconforming because it had offered by its letter of October 22, 1974, to replace all rubber goods with currently cure dated items. Moody contends that SAALC has misconstrued the October 22 letter, since nowhere therein did it offer to refurbish the samples, but offered to replace all rubber goods after award only, and that it had no notice that SAALC was requiring it to refurbish the samples. Moody contends that if it did in fact have to furnish refurbished samples prior to award, such a requirement constitutes an unfair and unreasonable burden.

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The buyer asserts, however, in his memo of February 26, 1975, that in the telephone conversation of November 6, 1974, he instructed Moody to refurbish the samples before resubmission and that Moody agreed.

The October 22 letter, as set forth above, does not refer either to samples or to post-award performance; it merely states that the soft goods will be replaced. It is difficult to construe the exchange between Moody and the buyer as requiring merely the resubmission of unrefurbished samples because there is little apparent need for the reevaluation of an unchanged item. There is, however, no probative evidence on this matter. Accordingly, the rejection of Moody's samples for failure to contain currently cure dated items was not unreasonable.

While we do not recommend disturbing the award to Parker-Hannifin in this case, since contract performance has been completed, we are bringing the noted deficiencies to the attention of the agency for corrective action.


Deputy Comptroller General
of the United States