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United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to: B-195164

Do not make available to public reading JUL 11 1979

The Honorable Tony P. Hall
House of Representatives

Dear Mr. Hall:

DLV 02107

This responds to your letter to our Office dated June 6, 1979, on behalf of Shiloh Industries (Shiloh) and Projects Unlimited, Inc. (Projects). You enclosed copies of correspondence in which the companies describe problems they have experienced in securing certain information from the Department of the Air Force, and express their concern about the impact of this on their ability to obtain Air Force contracts. You asked that we review the matter "to determine if correct contractual procedures can be utilized."

DETERMINATION of

The correspondence indicates that the companies are seeking unclassified technical data, such as engineering drawings, in which the Air Force has acquired unrestricted rights. Apparently Shiloh and Projects have in the past been able to obtain such data through requests under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1976). Due to a change in policy, the Air Force now refuses to release this type of data under FOIA, although it states it will provide such data to private parties in certain circumstances, e.g., where the data is necessary to prepare bids on Air Force contracts.

Shiloh and Projects believe they are entitled to continue receiving this kind of data under FOIA. Also, they are concerned that the new Air Force policy will make it difficult for small businesses to obtain in a timely manner the data necessary to bid on Air Force contracts.

The problem presented is basically an FOIA problem. At the outset, we must advise that our Office has no authority under FOIA to determine what information Government agencies must disclose. Therefore, we are unable under the law to take any action on the Air Force's refusal to disclose



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data to Shiloh and Projects. However, the following background information may be of some help.

Under FOIA, agencies subject to the act are required to make available to any person, upon request, "agency records" (with some exceptions, as set forth in 5 U.S.C. § 552(b)). Agency regulations provide procedures for making requests and for appealing within the agency in the event a request is denied. The Air Force regulations are in title 32, Code of Federal Regulations (C.F.R.), part 806 (1978). In addition, on complaint, the United States District Court where the complainant resides or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin an agency from withholding agency records and to order the production of any agency records improperly withheld. 5 U.S.C. § 552(a)(4)(B).

The FOIA does not define what is an "agency record." Whether a technical report or record is an agency record under FOIA has been the subject of some litigation. For example, in Soucia v. David, 448 F.2d 1067 (D.C. Cir., 1971) it was held that a scientific report prepared by a science advisor at the request of the President was an agency record. In SDC Development Corp. v. Mathews, 542 F.2d 1116 (9th. Cir., 1976) it was held that certain computer tapes of the National Library of Medicine were not agency records.

In addition, the FOIA regulations of several agencies, including the Air Force, contain a definition of agency records. The Air Force regulation provides in pertinent part (32 C.F.R. § 806.6(h)):

"For the purpose of this part, 'records' are defined as all books, papers, maps, photographs, or other documentary materials, regardless of physical form or characteristics, made or received by any agency of the United States Government under Federal law or in

connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations or other activities of the Government or because of the informational value of data in them (44 U.S.C. 3301). This definition should be used as a guide.

* * * * *

"(3) Formulae, designs, drawings, research data, computer programs, technical data packages, etc. are not considered 'records' within the Congressional intent of 5 U.S.C. 552. Because of development costs, utilization, or value, these items are considered property, not preserved for information value or as evidence of agency functions, but as exploitable resources to be utilized in the best interest of all the public."

We understand that in a pending case in the United States District Court for the District of Columbia, the Department of Defense, relying in part on this regulation, has argued that certain research reports and technical data submitted under Government contracts are not agency records (Siemens Corp. v. Department of Defense, Civil Action No. 78-0305). While we have no way of knowing how the court's decision will deal with this issue, it is possible that the outcome of this case will clarify the FOIA rights of parties such as Shiloh and Projects.

Finally, if Shiloh or Projects believes that the technical data included in a solicitation for bids on a particular Air Force contract is unsatisfactory, it could file a bid protest with our Office, as provided in our Bid Protest Procedures, 4 C.F.R. Part 20 (1978). However, if the bids received under a solicitation indicate that adequate competition has been generated and reasonable prices obtained,

the fact that a particular prospective bidder believes solicitation deficiencies precluded it from competing would not ordinarily be a sufficient justification for objecting to an award under the solicitation.

We trust that the foregoing information is responsive to your inquiry.

Sincerely yours,

MILTON SOCLAR

Milton J. Soclar
General Counsel