DECISION

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

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FILE: B-182991, B-182903 DATE: January 13, 1976

MATTER OF: Garrett Corporation

DIGEST:

1. Protester claims that certain part number drawings bearing its title block were obtained and used improperly by another firm in order to qualify as potential supplier to Government. Awards made to alleged wrongdoer for part numbers in question will not be disturbed where alleged wrongdoer denies that drawings were obtained improperly. Protester's unproven claim of wrongdoing by contractor is matter to be resolved privately and not by Government.

2. Government is not precluded from using drawings furnished with limited rights for internal purpose of verifying the currency of data packages submitted by another company seeking qualification as a potential source for like items.

3. Clarification of illegible quotation should have been obtained by contracting officer prior to award to another offeror since negotiation procedures are designed to permit written or oral clarification after receipt of offers. However, award will not be disturbed since it does not appear contracting officer acted in bad faith by interpreting delivery terms of illegible quotation in manner unfavorable to offeror's competitive position.

Garrett Corporation (Garrett) protests six awards made by the Department of the Air Force to Caprice Engineering Company (Caprice) for aircraft starter parts. It is alleged that award to Caprice will result in a violation of Garrett's proprietary rights in certain drawings.

Five of the awards in question were effected by orders placed under Basic Ordering Agreement F04606-74-A-0045 (Orders SD 16, SD 18, SD 20, SD 21 (Item 1) and SD 21 (Item 2)). Orders SD 16 and SD 18 were placed September 24, 1974, and November 19, 1974, respectively, and in this connection, Garrett claims misuse of its proprietary rights in shaft drawings 3500162-1 and 3500161-1 which it states were furnished by its division, AiResearch Manufacturing Company of Arizona

(AiResearch), to the Air Force under prior contracts. As to the Air Force's order SD 20 placed on November 25, 1974, Garrett claims abuse of its proprietary rights in internal gear hub drawing 359884 furnished under AiResearch's previous Air Force contract AF33-657-9887. The protester further claims that award for the two parts under order SD 21 made on December 9, 1974, similarly involved a misappropriation of its spur pinion gear drawing 360262 and its resilient mount liner drawings 363441 earlier furnished under AiResearch contracts AF33-657-13131 and AF33-657-9887. In addition, Garrett claims that order SD 01 awarded to Caprice under Basic Ordering Agreement FO 4606-75-A-0051 involved the improper use of its drive shaft drawing 356112-3 furnished to the Air Force under AiResearch contract AF046-077-7075.

Garrett contends that the six AiResearch drawings bore restrictive legends giving the Air Force only limited rights to the data contained therein. It further contends that these AiResearch drawings were furnished to the Air Force as part of Caprice proposal packages for qualification as a potential source for the six parts in question. Although it makes no assertion that the Air Force improperly furnished those drawings to Caprice and disclaims any knowledge of how Caprice acquired the drawings, Garrett claims that the awards to Caprice were nonetheless improper. Simply stated, Garrett's claim of impropriety is based on its belief that the circumstances surrounding submission of the Caprice data packages were sufficient to have put the Air Force on notice of Caprice's possible misuse of Garrett's proprietary rights in the drawings and given such notice that it was improper for the Air Force to have proceeded to make the awards to Caprice. Additionally, the protester questions the correctness of the Air Force's internal use of its drawings to qualify the data packages offered by Caprice for source qualification. Finally, Garrett states that the aircraft starter parts in issue are "critical" and questions what assurance the Air Force has that the parts to be furnished by Caprice will function properly.

The Air Force does not dispute Garrett's claim that the six drawings furnished it by AiResearch granted the Government only limited rights to their use. Nor does the Air Force question Garrett's assertion that the drawings submitted by Caprice were identical to and even possibly copies of AiResearch drawings. The Air Force has indicated that it recognized each to be an "AiResearch Manufacturing Company * * * design detail drawing * * * bearing a Caprice Engineering Company restrictive legend," since the drawings bore the title block of AiResearch.

Garrett states that since the time of initial awards to Caprice on AiResearch prime parts, AiResearch has had many contacts with "Various procurement service engineering and technical personnel" and that "many times over the past several years we have questioned their procurement practices that allowed awards to Caprice on such parts * * *." However, we find no indication in the record that Garrett had raised the issue of its title block appearing on the drawings furnished by Caprice at the time Caprice was qualified by the Air Force as a potential source or before the subject awards were made to Caprice. Rather it appears that at the time Caprice was qualified, the Air Force was aware that the Caprice drawings upon which the qualifications were based bore the title block of another firm along with a legend to the effect that the drawings were proprietary to Caprice.

The threshold question, therefore, is whether it was proper for the Air Force to qualify Caprice as a potential source on the basis of drawings bearing the title block of another firm. In a Departmental legal opinion on various issues involving data used in qualification, procurement officials were advised that the Air Force cannot stop "a potential for competitive procurement on the mere allegation of a prime contractor that they have not released specific drawings of specifications in question outside their company." That opinion concludes as follows:

> "* * * Although we would leave to the complaining party the primary obligation to protest its rights, it is not DOD policy (see AFR 57-6) to qualify sources to furnish parts 'for which the Government does not have and may not be in a position to acquire technical data necessary for proper qualification.' We do not wish to become a police force dedicated to the protection of a contractor's rights in data or the prevention of industrial espionage, however, we believe that, upon receipt of a specific complaint of improper use of data by a source seeking qualification to produce the item, it would be appropriate to advise the source seeking qualification that its right to use the data has been questioned and that further consideration of its qualification request will be deferred pending receipt of further information as to its rights to use the data. In this regard, we believe it would be appropriate to request that a company official provide an affidavit to the effect that to the best of his knowledge, information and belief, the questioned data was obtained by fair means and without breach of a contractual or confidential relationship with the owner."

After receipt of Garrett's protest and in accordance with the above legal opinion the Air Force secured the following statement from the President of Caprice:

> "In reference to your TWX messages to Caprice Engineering Company on Government contracts numbers 74-A-0045, SD16, SD18, SD 20 and SD 21 (two items) please be advised that Caprice Engineering Company did not in any way acquire the drawings necessary to manufacture these items through illegal means.
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> "In the future, if the Government prefers, Caprice Engineering Company would be very happy to furnish its own drawings for Qualification."

A statement similar in substance has been provided to the Air Force with respect to order SD 01 under contract FO 4606-75-A-0051. Garrett takes issue with the sufficiency of this statement and claims that, at the very least, the Air Force should have required Caprice to provide an explanation of the means by which it acquired the drawings.

At the outset, it is appropriate to point out that this Office is not in a position to adjudicate the rights of a protester against another private party, and until those rights are established in a proper forum we have no justification for disturbing an ongoing procurement program. B-156727, October 7, 1965. Thus, we have refused to interfere with the proposed award of a contract where the evidence is inconclusive as to whether data to be submitted thereunder will be furnished under circumstances violative of the protester's proprietary rights. 49 Comp. Gen. 471, 473 (1970). Also, in B-173192, August 23, 1971, we stated that we would take no position with respect to the possible violation of a protester's proprietary rights by a non-Government entity and would interpose no objection to the Air Force's action in qualifying the contractor charged with wrongdoing, where that Department had undertaken to obtain a reasonable explanation from the prospective contractor as to the manner in which it had obtained the contested data. In that case, the protester had specifically advised the Air Force that it had discharged one of its officers for improperly transmitting certain of its drawings. In turn, the selected contractor explained that "all the special processes required to produce an acceptable part are

specified in the Mil Spec [government specification] and, if followed, do not require trade secrets, special test equipment or proprietary information from anyone."

In the instant case, the Air Force reports that the protester's drawings were not released outside of the Government by the procuring activity and that the solicitations did not contain propriety information. Although the drawings supplied by Caprice to the Air Force for source qualification did contain the title block of the protester, this fact was protested after the awards to Caprice and the contractor categorically has denied to the Air Force that the protester's drawings were illegally obtained. In the circumstances the Air Force concluded that the protester's claim of propriety data was properly a matter to be resolved privately and therefore the awards to Caprice should not be disturbed because of the protester's claim. In our opinion the Air Force acted reasonably in qualifying Caprice on the basis of the data furnished by that firm and in requesting from the contractor, subsequent to the contract award and Garrett's protest, assurance that such data was fairly obtained. Moreover, we do not propose to disturb these awards merely on the basis of Garrett's unproven claim of wrongdoing by Caprice.

With respect to Garrett's contention that the Air Force improperly used its drawings to verify the currency of the data packages submitted by Caprice, the Air Force reports that Garrett's shaft drawings 3500162-1 and 3500161-1 were not in its possession when it qualified Caprice as a potential source for those parts. Inasmuch as Garrett does not dispute this statement, we presume that its allegation that the Government misused its drawings applies only to those four that are the subjects of orders SD 20, SD 21-1, SD 21-2 and SD 01, that is, Garrett drawings 359884, 360262, 363441 and 356112-3.

The Government's entitlement to use data provided it with limited rights is addressed at length in 49 Comp. Gen. 471, supra. There, the restrictive legend placed on the protester's proprietary data precluded its disclosure, reproduction or use for manufacturing by anyone other than itself without its permission. In accordance with the requirement of Armed Services Procurement Regulation (ASPR) § 9-203, the legend contained the further statement that the right to use information obtained from another source was not limited thereby. Finding that use of the data for comparison purposes was proper we stated:

> "Further, we note that the ASPR 9-203(b) Rights in Technical Data clause applicable to Hamilton Standard specification No. HS3676, in addition to precluding the use of data for

'procurement,' states that 'The limited rights provided for by this paragraph (b)(2) shall not impair the right of the Government to use similar or identical data acquired from other sources.' As indicated above, similar language is also contained in the legend printed on that specification. We can perceive of no way in which a determination could be made that data acquired from other sources is 'similar or identical' within the contemplation of the clause without comparing it with restricted data previously purchased by the Government. In our opinion, even reverse engineering would not necessarily reveal similarity or identicality without some comparison with the restricted data. Contrary to your assertion, therefore, we are of the opinion that the definition of the term 'procurement' set out in ASPR 1-201.13 does not prohibit the use of your restricted data for comparison purposes. For while that definition does include the 'selection and solicitation of sources' as being encompassed by the term 'procurement,' we think it should not be read to change the clear import of the ASPR 9-203(b) restricted data clause preserving the Government's right to use 'similar or identical' data acquired from other sources. Any other reading of that data clause would virtually foreclose any use by the Government of data acquired with limited rights, thereby effectively nullifying the Government's express interest in acquiring limited rights data for proper internal uses not involving unwarranted disclosure to others outside of the Government. Moreover, use of restricted data for evaluation of 'or equal' offers or first article acceptability could be said to be uses for 'procurement' and therefore such uses would be precluded, as could the customary use of such data in the course of contract administration.

"We think that the intent of the Government to acquire limited rights data for such internal uses, as well as other appropriate uses not involving disclosure, is clearly expressed by the rights in data clause when that clause is read in its entirety, particularly in view of reservation of the right to use 'similar or identical' data acquired from other sources. We therefore conclude that the term 'procurement' as used in the rights in data clause can only be interpreted to refer to procurement entailing disclosure of limited rights data. * * *"

That decision has been affirmed in B-172901, B-173039, B-173087, October 14, 1971 and in B-173196, B-174035, December 8, 1971. Inasmuch as ASPR § 9-203(b)(1974 ed.) contains substantially the same language considered in 49 Comp. Gen. 471, supra, we believe the Air Force's use

of the AiResearch drawings to confirm the currency of data packages submitted by Caprice was consistent with its limited rights in the drawings.

We believe the fact that four of the six parts in question have been successfully purchased from Caprice in the past is itself sufficient response to Garrett's concern that the Air Force has no assurance that Caprice can produce those four parts. With regard to the two parts that are the subject of orders SD 18 and SD 21-1, the record indicates that procurement personnel were expressly cautioned to take into account the necessity that the parts to be procured assure safe, dependable and efficient operation of the equipment. We have no reason to believe that the administrative determination of the ability of Caprice to furnish these parts was improperly made. Moreover, we note that the orders issued for those parts provide for first article testing.

In our opinion the above discussion adequately deals with Garrett's collateral contention that the Air Force improperly changed the nature of the procurements from sole source to competitive.

In providing its comments on the Air Force's protest report Garrett has raised an additional issue not heretofore presented pertaining to the solicitation procedures for order SD 16. Garrett states that it quoted delivery of 259 shafts per drawing 3500162-1 for March 1975 in accordance with the solicitation's requirement for delivery by that date but that award was made to Caprice on its quote for delivery of 3 pieces 90 days after receipt of order and 256 pieces 240 days after first article approval--which Garrett points out is at least 11 months after receipt of order.

Our review of the record indicates that Garrett submitted quotations for the shafts and for a quantity of sleeves in a TWX to the Air Force dated September 3, 1974. However, a portion of the TWX is not legible since printed characters are superimposed on what appears to be the delivery terms offered by Garrett for the shafts. In this connection, we have been informally advised by the contracting officer that Garrett's quotation was not viewed as offering delivery in March 1975, but, rather, the TWX was construed as offering delivery of the shafts within 17 months after receipt of order. Under this interpretation, the delivery terms offered by Caprice were more favorable than Garrett's and the award was made, in part, on the basis of the most favorable delivery terms offered.

Negotiation procedures are designed, in part, to permit a contracting agency to obtain clarification of an offer if such action is deemed necessary. In our opinion, Garrett's TWX was partially illegible and we believe the contracting officer should have obtained a clarification from the firm. Nevertheless, we are unable to conclude

that the contracting officer acted in bad faith since the TWX conceivably can be deciphered as offering delivery 17 months after receipt of order. However, we recommend that contracting officers refrain from making such speculative interpretations of illegible offers and utilize the flexibility of the negotiation process to obtain clarification whenever necessary.

Accordingly, the awards to Caprice should not be disturbed.

For the Comptroller General
of the United States