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*J. Cunningham
Proc I*

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

DECISION

FILE: B-186958

DATE: January 10, 1977

MATTER OF: York Industries, Inc.--request for reconsideration

DIGEST:

1. Proprietary data protester cites two instances which allegedly contradict procuring agency's official position that third party is holder of unlimited rights to drawings in question. Neither of cited instances, however, necessarily contradicts official position.
2. Assuming, for sake of discussion, that prior governmental conduct did show that drawings in question were considered to be proprietary by procuring agency in past, it is apparent that agency believes it has now acquired unlimited rights to drawings from third party. Although protester disagrees with position because protester's proprietary markings allegedly were on drawings sold to procuring agency, it is apparent position of agency that it was without knowledge of any markings when it acquired drawings.
3. Because of procuring agency's position that it has acquired unlimited rights to contested drawings, proprietary data protest is still considered to relate to dispute between two private parties as to which court action rather than protest to GAO is the appropriate method for protester to pursue if it wants to establish rights, if any, in contested drawings. Therefore, prior decision affirmed.

By letter dated December 3, 1976, York Industries, Inc. (York), has requested reconsideration of our decision in York Industries, Inc., B-186958, November 29, 1976, 76-2 CPD 453.

Our decision responded to a "proprietary data" protest filed by York against solicitation No. W00140-76-B-6740 issued by the Department of the Navy. It was York's position that the solicitation contained drawings of cylinders that were proprietary to the company.

The Navy replied that it had acquired rights to the drawings from Edo Corporation (Edo), which the Department considers to be the apparent holder of unlimited rights to the drawings and that it was, therefore, entirely justified in attaching the drawings to the IFB. It was the Navy's further position that the dispute presented by York's protest

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was essentially one between York and Edo as to which court action, rather than a protest to our Office, was the appropriate method for York to pursue if it wanted to establish its rights, if any, in the contested drawings.

We agreed with the Navy's position. We pointed out that we were not in a position to adjudicate the rights of private parties each of whom apparently claimed rights in contested data; moreover, we said that until those rights were established in a proper forum we would not be justified in disturbing an ongoing procurement or an award because of an allegation that data rights were being violated incident to a procurement. We therefore declined to consider York's protest.

York now takes issue with the Navy's position that it views Edo Corporation as the apparent holder of unlimited rights to the drawings in question. York says that this official position is contradicted by past conduct of "Government agencies" (presumably including the Navy). Specifically, York says that "Government agencies contacted York Industries to obtain information on the hydraulic cylinders involved" and that the "Government procured hydraulic cylinders of this type directly from York Industries."

Neither of the cited instances of prior governmental conduct necessarily contradicts the Navy's present position that it views Edo as the apparent holder of unlimited rights in the drawings. It is not uncommon that Government agencies ask information about a company's product or make a sole-source award to a company apart from whether the agencies consider the company's product (or related drawings) to be proprietary. For example, a sole-source award may be made because of reasons of urgency unrelated to any question about proprietary data.

Assuming, for the sake of discussion, however, that the prior governmental conduct does show that the drawings in question were considered to be proprietary by the Navy in the past, it is apparent that the Navy believes that it has now acquired unlimited rights to the drawings from Edo Corporation.

Although York disputes this present position by insisting that its proprietary markings were on the drawings that Edo furnished to the Navy, it is the apparent position of the Navy that it was without knowledge of any markings when it acquired the drawings.

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Because of the Navy's position, which we cannot contest on the basis of the present record, we are still of the opinion that York's protest essentially relates to a dispute between two private parties as to which court action, rather than a protest to our Office, is the appropriate remedy.

We affirm our prior decision.

R. F. K. L. M.
Deputy Comptroller General
of the United States