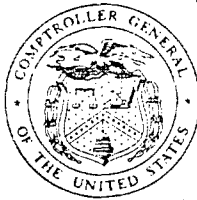


DECISION



13570 Golden Trans  
THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

FILE: B-196218

DATE: April 29, 1980

MATTER OF: Porta Power Pak, Inc.

DLG04497

DIGEST:

1. GAO will not recommend cancellation of solicitation where protester does not present clear and convincing evidence that procurement will violate protester's proprietary rights.
2. Technical data cannot be considered trade secret or proprietary where protester has not shown by clear and convincing evidence that design was marked proprietary or confidential or that it was disclosed to Government in confidence; that data involved significant time and expense in preparation; and that it contained material or concepts that could not be independently obtained from publicly available literature or common knowledge.

*Agreed*  
Porta Power Pak, Inc. (Porta Power) protests award of a contract for portable power distribution systems under invitation for bids (IFB) DLA400-79-B-3465 issued by the Defense General Supply Center (DGSC). The IFB was issued as a result of five military interdepartmental purchase requests (MIPR) from the Naval Construction Battalion Center (NCBC), Port Hueneme, California. The basis of the protest is that the IFB allegedly contains proprietary data belonging only to Porta Power.

Porta Power states that in 1971, after several meetings with NCBC it developed a mobile power distribution system at its own expense which precisely met the military's needs. It contends that it submitted its product to NCBC for evaluation purposes only with a legend stamped on the drawings and engineering data restricting their use and reserving Porta Power's proprietary rights. Porta Power alleges that NCBC subsequently traced the drawings

[Contract Award Protest]

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submitted for review without the restrictive legend and incorporated this documentation in the purchase descriptions in the solicitation.

It is also Porta Power's contention that although NCBC's review resulted in an attempt by the requiring activity to procure its system on a sole-source basis in 1973, a competitive solicitation was nonetheless issued with a specification in more general terms so as not to preclude competitive bids. Porta Power was not the low bidder for that procurement. Further, as we understand Porta Power's contentions, the military activities, being displeased with the products they were getting, prepared progressively more restrictive specifications over the years since 1973 by incorporating Porta Power's alleged proprietary features in an attempt to acquire only Porta Power's equipment, with the result that the present IFB specification duplicates Porta Power's proprietary data. It appears that Porta Power did not protest the use of any of its asserted proprietary data in the earlier solicitations. Thus, Porta Power alleges that the current specifications contain characteristics only Porta Power supplies; and that these specifications derived from drawings, part lists and data sheets for its units designed for military use were divulged to NCBC under a "cloak of secrecy" stamped with a restrictive legend.

In response, the agency asserts that substantially all of the information claimed by Porta Power as proprietary has been revealed to the public in prior solicitations, its commercial brochures, or is ascertainable from the item itself or from public knowledge.

X In appropriate circumstances our Office will recommend the cancellation of a solicitation which wrongfully discloses a protester's proprietary data or trade secrets so long as no award has been made. Data General Corporation, 55 Comp. Gen. 1040 (1976) 76-1 CPD 287; 52 Comp. Gen. 312 (1972); 49 Comp. Gen. 29 (1969); 43 Comp. Gen. 193 (1963); 42 Comp. Gen. 346 (1963); 41 Comp. Gen. 148 (1961). However, the protester must present clear and convincing evidence that the procurement will violate the protester's

proprietary rights. Chromalloy Division - Oklahoma of Chromalloy of American Corporation, 56 Comp. Gen. 537 (1977), 77-1 CPD 262; 52 Comp. Gen. 773 (1973); T. K. International Incorporated, B-177436, March 12, 1974, 74-1 CPD 126 (affirming 53 Comp. Gen. 161 (1973)).

To prevail on the claim that the materials given to NCBC are proprietary or constitute a trade secret, the protester must satisfy the following criteria. First, the protester's design must have been marked proprietary or confidential, or the claimant must show that the proposal was disclosed to the Government in confidence. Second, it must be shown that the proposal involved significant time and expense in preparation and that it contained material or concepts that could not be independently obtained from publicly available literature or common knowledge. See Chromalloy, supra; 49 Comp. Gen. 22 (1963); Andrulis Research Corp., B-190571, April 26, 1978, 78-1 CPD 321.

Applying these legal concepts to this case, we find ~~X~~ Porta Power's evidence unconvincing as to the requisite elements to a claim of proprietary data or trade secret. For example, with regard to Porta Power's efforts to maintain the confidentiality of its technical data the evidence as to whether the data given to NCBC was marked proprietary is at best, conflicting. Porta Power alleges that the NCBC was given a complete set of drawings, part lists and data sheet for each of its units designed for military use, all of which contained Porta Power's restrictive legend and that the NCBC has used them in this solicitation eradicating the restrictive legend prior to duplication of the material. In response NCBC states that the drawings did not contain a statement of proprietary rights, but rather referenced federal stock numbers and Navy assembly numbers. In addition, it states that the drawings do not contain any dimensions, part numbers, fabrication instructions/techniques, patent numbers or any other data that could be considered proprietary. NCBC provided one such drawing in its possession which did not contain a

restrictive legend. Porta Power also supplied drawings to us. Although those furnished by Porta Power include a restrictive legend, we have no evidence from these drawings or other documents that they were the ones Porta Power alleges were submitted to NCBC and used by them. On these facts, without more evidence, we do not believe that the protester's position has been established. Bogue Electric Manufacturing Company, B-194222, June 18, 1979, 79-1 CPD 431.

Furthermore, a comparison of the solicitation in question and the earlier ones issued for the equipment, indicates many of the specification provisions contained in the 1979 solicitation are also contained in one of the prior solicitations which are now a matter of public record. For example, the specifications which cover the description of the equipment, general design, and protective treatment were clearly derived from the earlier solicitations. Porta Power did not protest or raise any objection to the use of these materials in the earlier solicitations until this protest. In this regard we point out that the value of proprietary information lies in its possession uniquely by the owner; once such information becomes public knowledge, its value and status as proprietary information are lost. Agency Chemical, Inc., B-194440, December 17, 1979, 79-2 CPD 410.

Porta Power has submitted evidence which it suggests indicates the proprietary nature of the data in question. The first consists of an exchange of letters between NCBC and Porta Power, in which, first NCBC asked Porta Power whether attached drawings contain proprietary information and if it would be permissible to use such information in a specification. Porta Power then replied that the materials were proprietary. However, even this statement was qualified. Porta stated that a brief word description including length, width and height of the items, would not infringe on proprietary rights. To the extent that this material is included in the current solicitation in the item description and appendices, it cannot now be asserted as proprietary. We therefore view Porta Power's

assertion of proprietary rights in this correspondence, without more, to be a self serving statement. Certainly, the Government's question as to the existence of proprietary information does not itself create proprietary rights to materials which do not otherwise exist.

Porta Power has also submitted a document entitled "DOD Industrial Preparedness Program Production Planning Schedule" (Schedule) prepared for NCBC dated August 8, 1979, which references Porta Power's part numbers and states in the "remarks" section that, "Items . . . are considered proprietary designed units." as evidence that Porta Power intended to maintain the confidentiality of its product. However, we note that the NCBC purchase description dated April 30, 1979, which is incorporated in this solicitation predates both the May letters and the schedule. Therefore, when weighed against the evidence indicating that much of the information claimed as proprietary had already been used without objection prior to these later statements, we do not believe Porta Power has demonstrated with its evidence that its proposal is entitled to protection. In this connection, the agency points out that Porta Power has again provided substantive assistance on a new specification which incorporates many of the same requirements included in the protested solicitation and has not as yet objected to its intended use in a public solicitation. See Chromalloy, supra, at 541. In our view, Porta Power's failure to clearly establish its efforts to maintain the confidentiality of its information alone would justify denial of the protest. Andrulis, supra; Chromalloy, supra.

~~We have~~ <sup>GAO</sup> also examined all of the protester's various allegations regarding the uniqueness of its design. In this respect, we believe that Porta Power has neither provided evidence, beyond its own statements, that its efforts involved significant time and expense in preparation, see Andrulis, supra; Chromalloy, supra, at 548, nor, most importantly, shown that its technical data contained any material or concepts that could not be independently obtained from publicly available literature or common knowledge. If a concept is a matter of common knowledge, its mere reformulation

or expression cannot constitute a "secret" or be proprietary to the party restating it, unless the restatement represents a valuable contribution arising from the independent efforts of the claimant. See Andrulis, supra; Chromalloy, supra, at 547, 548.

For example Porta Power has marked portions of the solicitation it alleges are proprietary without explaining why it believes the material proprietary or providing evidence to support its position. Its other allegations are similar, i.e., they are self-serving statements which do not provide evidence that Porta Power's alleged design constitutes a valuable contribution arising from its independent efforts. Therefore, in our view, Porta Power has failed to demonstrate its alleged design is proprietary. Compare 49 Comp. Gen. 28 (1969).

Since <sup>GAD was</sup> ~~we are~~ unable to conclude that Porta Power's technical data contains protectible proprietary or trade secret information we need not determine whether NCBC in fact used portions of that data in its solicitation.

The protest <sup>was</sup> is denied.



For The Comptroller General  
of the United States