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DECISION

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

FILE: B-197436 **DATE:** May 19, 1980

MATTER OF: ARO, Inc. DLG02381

DIGEST:

1. Protest against disclosure of confidential data in RFP filed prior to closing date for receipt of proposals is timely as protest against solicitation impropriety under 4 C.F.R. § 20.2(b)(1) (1980).

2. Protest that disclosure of contractor's negotiated cost and manpower estimates to perform current contract in RFP for next contract period violated exemption 4 of Freedom of Information Act and Trade Secrets Act and placed contractor at competitive disadvantage in procurement is denied. In view of need for judicial determination of conduct violative of Trade Secrets Act, extraordinary remedy of cancellation of ongoing competitive procurement and directing agency to, in effect, award sole-source contract is not appropriate.

ARO, Inc. (ARO), has protested the alleged unauthorized disclosure of privileged and confidential manpower and cost data by the Arnold Engineering Development Center (AEDC), Arnold Air Force Station, Tennessee. DLG02382

ARO is the incumbent contractor for the operation and maintenance of the aerodynamic and propulsion test facilities at AEDC. Under its contract, ARO is required to submit reports of its estimates of the manpower and costs required to perform the contract.

AEDC, on November 16, 1979, issued draft request for proposals (RFP) No. F40600-80-R-0001 in preparation for conducting a competitive procurement for the operation of the AEDC facilities for fiscal years 1981-1985. Included in the RFP as attachment 3 to section "M " was

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a reproduction of ARO's estimate, dated October 11, 1979, for fiscal year 1980 of manpower and costs to perform the contract. On December 13 and 14, 1979, 21 companies attended an industry briefing conducted by AEDC.

On February 22, 1980, AEDC issued a competitive RFP bearing the above-noted number and setting the closing date for receipt of initial proposals as May 27, 1980.

ARO contends that the release of this privileged and confidential commercial and financial data has placed ARO at a competitive disadvantage because it permits competitors to determine the manner in which ARO allocates its resources in performance of the contract. ARO argues that the release of this data violates the Freedom of Information Act (FOIA) (5 U.S.C. § 522 (1976)) and the Trade Secrets Act (18 U.S.C. § 1905 (1976)). As a remedy, ARO requests that our Office recommend withdrawal of the RFP and exercise of the option in ARO's contract for a year in the expectation that the data will be stale in a year and a new RFP would permit viable, realistic competition.

Initially, AEDC argues that ARO's protest was untimely filed under our Bid Protest Procedures (4 C.F.R. part 20 (1980)). AEDC states that ARO had 10 working days to file its protest from November 16, 1979, the issuance date of the draft RFP and the date on which the basis of the protest was known or should have been known (4 C.F.R. § 20.2(b)(2) (1980)).

ARO responds that it was protesting an impropriety contained in the solicitation and, therefore, a timely protest could be filed until the closing date for receipt of proposals, May 27, 1980 (4 C.F.R. § 20.2(b)(1) (1980)).

We find the protest to be timely filed. Our Office has held that the disclosure of proprietary or confidential information in a solicitation constitutes an impropriety in a solicitation for the purposes of our timeliness requirements and a filing prior to the closing date for receipt of proposals is timely.

Applied Control Technology, B-190719, September 11, 1978, 78-2 CPD 183; and Francis & Jackson, Associates, 57 Comp. Gen. 244 (1978), 78-1 CPD 79.

As stated above, ARO contends that the release of attachment M-3 violates exemption 4 of the FOIA which protects "trade secrets and commercial or financial information obtained from a person and privileged or confidential" from disclosure. Further, ARO argues that the actions of AEDC have violated the mandate of the Trade Secrets Act that no Government office or employee should disclose:

> "* * * information which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm partnership, corporation or association * * *."

The data contained in attachment M-3 lists the tasks and subtasks set forth in the Statement of Work in ARO's contract and gives the negotiated estimate for labor, material and costs for each task and subtask. It also shows the estimated allocation of General and Administrative (G&A) expense to the contract.

The Air Force's position is that attachment M-3 is a carbon copy of Supplemental Agreement P00099 to ARO's present contract and that when this data was incorporated in ARO's contract, it entered the public domain and its subsequent use in the RFP was not improper.

Further, the Air Force points to our Office's decision regarding a protest of the 1977 award to ARO (Burns & Roe Tennessee, Inc., B-189462, July 21, 1978, 78-2 CPD 57; affirmed August 3, 1979, 79-2 CPD 77) to show the release of the data is not harmful to ARO. In the 1977 procurement, the same type of data was contained in the RFP and we stated that the manning estimates contained in the RFP were "in the grossest sense" and could only be viewed as a starting point for anyone not familiar with the operation of AEDC.

While we do not view the statement in the prior decision as dispositive here, since it was dicta in the case, release of the data not having been in issue, we believe it reasonably could have led the Air Force to release the data in connection with this procurement.

The Air Force, as noted above, maintains that its release of the ARO data was not prohibited by any law and was done pursuant to an entirely proper objective--assuring the widest possible competition for the AEDC operation and maintenance contract. We believe that this Air Force position has substantial merit.

Moreover, the relief sought from us by ARO is relief which this Office should not provide. Initially, we point out that the basic objective of the FOIA is disclosure, not withholding of information. Chrysler Corporation v. Brown, 441 U.S. 281 (1979). The courts permit a "reverse FOIA" action only when it can be shown that the information falls within one of the FOIA exemptions and is also "not in accordance with law" as stated in 5 U.S.C. § 706(2)(A). The type of action is based on the Administrative Procedure Act (5 U.S.C. § 702). See Chrysler, supra, and Burroughs Corporation v. Brown, Civil Action No. 78-520-A (E.D. Va., January 3, 1980).

ARO places great reliance on the recent decision in Burroughs, supra, in support of its position that the release was improper. Burroughs held that data of a similar nature to the ARO data released by the Air Force, submitted by a contractor pursuant to its contractual obligations in connection with its equal employment opportunity undertakings should not be released under exemption 4 of FOIA and the Trade Secrets Act. Burroughs thus was an action to prevent release of the data. In fact, all of the cases cited by ARO are actions brought to prevent the release of data. None involves situations where the data has already been made public, and we could only conjecture what relief a court might grant when presented by these facts or what corrective action might be ordered.

The remedy requested by ARO is extraordinary in that it would terminate an ongoing competitive procurement undertaken pursuant to statutory mandate (10 U.S.C. § 2304(g) (1976)) and direct the Air Force in effect to

make a sole-source award to ARO. We do not find this an appropriate remedy for our Office to provide.

Moreover, based on Chrysler, supra, to reach the result requested by ARO would require a determination that the action of specific officials of the Air Force violated the Trade Secrets Act. Any such finding of violation of a criminal statute ought to be made by a court of competent jurisdiction, not by our Office.

Accordingly, the protest is denied.

Milton J. Socolar

Acting Comptroller General
of the United States