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Weis Kopf

**DECISION**



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

FILE: B-197944

DATE: July 7, 1981

MATTER OF: Control Data Corporation

**DIGEST:**

1. Protester's job accounting day file, obtained by the Government under previous contract and released as part of benchmark test package to vendors competing for new contract, cannot be considered trade secret or proprietary to protester where protester has not shown by clear and convincing evidence either that information was proprietary and appropriately identified or that it was disclosed to Government in confidence.
2. Protest of alternative method of evaluation which was not used to evaluate protester's or awardee's proposals is academic.

Control Data Corporation (CDC) protests the Department of Transportation's (DOT) action under Request for Proposals (RFP) No. DOT-OST-79-086 by which the agency released to all competitors information which allegedly constituted highly confidential and proprietary CDC business and commercial data. For the following reasons we find this protest to be without merit.

The RFP sought offers for remote computing services, conversion, and related support services associated with operating the Federal Aviation Administration computer Airfield Simulation Model. An important portion of the RFP's evaluation/award process was the running of various benchmark problems to ascertain whether a proposal met all technical criteria and to determine the overall expected costs of each proposal.

Prior to benchmark testing, DOT made available to all potential vendors a calibration run of an Airfield

*[Protest Alleging That Agency Released Proprietary Data]*

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Simulation Model prepared by CDC, the incumbent contractor, which included a complete cycle of the model for one day at the Los Angeles International Airport. This was done to allow vendors an opportunity to evaluate whether their application of the data would produce the appropriate results during benchmark testing.

CDC notes that the calibration run materials released by DOT included a job accounting day file. According to CDC the job accounting day file gives a step-by-step listing of the chronology of events occurring during the computer's execution of the model, time consumed in the various functions of the model, computer resources required, etc. CDC asserts that the totality of this information allowed competitors to evaluate the efficiency of CDC's computer with respect to all of the applications required. CDC claims that with this information and a copy of CDC's fixed price General Services Administration (GSA) Teleprocessing Services Program Multiple Award Schedule contract, its competitors could compute CDC's price for this procurement with a high degree of accuracy.

While the protest was still pending before this Office, DOT made an award to the offeror with the lowest estimated cost and highest evaluated score, Boeing Computer Services, Inc.

In appropriate circumstances our Office may recommend the cancellation of a solicitation when a protester's proprietary data or trade secrets have been wrongfully disclosed so long as no award has been made. Porta Power Pak, Inc., B-196218, April 29, 1980, 80-1 CPD 305. However, the protester must present clear and convincing evidence that the procurement will violate the protester's proprietary rights. Chromalloy Division-Oklahoma of Chromalloy American Corporation, 56 Comp. Gen. 537 (1977), 77-1 CPD 262.

Such evidence (beyond a mere statement) must indicate that the data is proprietary, see Chromalloy, etc., supra, and that the party claiming proprietary rights took some measure to protect itself from unauthorized disclosure. Data General Corporation, 55 Comp. Gen. 1040 (1976), 76-1 CPD 287. We think this protest must fail on both counts.

For example, the protester has not furnished any evidence which would establish the accuracy of its statements regarding the confidentiality of the job accounting day file and the asserted use a competitor could make of it in a competitive environment. CDC has not submitted a copy of the day file, it has not submitted any pertinent portions of the GSA contract and it has not described by any example whatsoever how the complained of result would follow from DOT's disclosure. We are, therefore, unable to reach any conclusion with respect to the proprietary nature of the job accounting day file.

But even if the proprietary nature of the data were adequately established, the protest still must fail. To prevail on its claim that the job accounting file provided to DOT under the existing contract is proprietary to CDC, CDC must show that the data in issue was marked proprietary or confidential or that it was disclosed to the Government in confidence, i.e., that the company took the necessary measures to protect itself. See 43 Comp. Gen. 193 (1963). While CDC argues that DOT knew or should have known of the proprietary nature of this information and points out that it easily could have been removed from the calibration run material, DOT stresses that the job accounting file was not in any way marked as proprietary (the computer was not programmed to print a restrictive legend on the print-out) and that it is not incumbent upon the Government to classify contractor information for the protection of selected data.

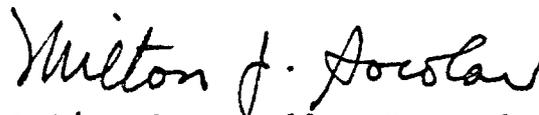
We agree. We find no basis to assume that the Government should have known the data was confidential. The mere fact that the data could have been segregated (it was printed on a separate page at the end of the computer run) does not establish that it should have been segregated, considered proprietary and held in confidence. On these facts, we find CDC's evidence unconvincing.

Moreover, in response to another ground of protest previously withdrawn, DOT revised the benchmark programs so that according to DOT they dealt with completely different data, and several modifications were made to the

model software. CDC does not refute DOT's contention that these changes "could very well have changed the relationship of the resource utilization factors, thereby preventing a simple analysis and linear extrapolation of results." We note that these changes are tantamount to one of the remedies requested by CDC, i.e., that the benchmark tests be reconfigured so they bear no linear relationship to the disclosed calibration run.

The protester also objects to an alternative method of benchmark evaluation listed in the RFP. However, since this method was not employed to evaluate the protester's or the awardee's proposals, the reasonableness of the method is academic. Therefore, we will not consider the matter. American Marine Decking Systems, Inc., B-197987, September 22, 1980, 80-2 CPD 217.

The protest is denied in part and dismissed in part.



Acting Comptroller General  
of the United States