

DECISION

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

42701d
29894

FILE: B-215028

DATE: November 30, 1984

MATTER OF: Davey Compressor Company

DIGEST:

1. The protester has the burden of proof when misconduct on the part of government officials is alleged and GAO will not rely on inferences alone to find such misconduct.
2. GAO will not resolve disputes between private parties involving alleged misuse of proprietary data.

Davey Compressor Company (Davey) protests the award of a contract to Murdock Enterprises, Inc. (Murdock) under oral Request for Quotations (later designated RFQ No. FD2060-84-60538) issued by the Department of the Air Force. The RFQ was for kits to convert MC1A air compressors, originally manufactured by Davey, from gasoline engine driven to diesel engine driven. Davey alleges that the Air Force must have improperly supplied Davey proprietary data to Murdock to enable Murdock to qualify as a producer of the kits and, therefore, Murdock should be barred from supplying the kits to the government. We deny the protest.

On June 22, 1983, after having spent some \$50,000 over a period of a year to develop conversion kits for the MC1A, Davey was suspended from doing business with the government. Faced with a requirement for kits to convert about 900 MC1A compressors, the Air Force supplied Murdock with samples of Davey's kit to help Murdock develop a kit to fulfill the Air Force requirement. Although the kit is made up of approximately 300 components, many are available off-the-shelf and there is some dispute as to the complexity of the remainder.

In January 1984, finding Davey no longer suspended, the Air Force issued a request for proposals (RFP)

030683

soliciting the Davey kit for the then current requirement, 787 kits. In addition, the RFP invited other potential sources to compete. Murdock submitted a proposal pursuant to the RFP accompanied by supporting data and samples of its kit with the same part number as Davey and was approved as a qualified source on April 17, 1984.

Meanwhile, the Air Force requirement for kits was reduced from 787 to 305. Award for any quantity other than 787 could not be made against either proposal. Since the 305-kit requirement was then too urgent to allow time for the formal submission of revised proposals, the RFP was canceled. Further, an attempt to sole-source the requirement to Davey under an expired Basic Ordering Agreement failed. Therefore, on May 7, 1984, oral quotations were solicited from Davey and Murdock. Murdock's quote was well below Davey's quote, and the agency intends to award to Murdock.

Davey contends that the data describing the kit is proprietary, that Murdock must have used that data and that it must have been disclosed by the Air Force. In support of this contention, Davey points out the following circumstances from which it should be inferred that the data was improperly disclosed. It would have been imprudent for any company to duplicate Davey's investment since there are only about 900 MC1A's to be converted. While it took Davey, the manufacturer of the MC1A, a year to develop the kit, it apparently took Murdock only a few months, and Murdock used the same part number for the kit as Davey. Therefore, Davey infers that Murdock could profit from developing a kit for this small market in a short time because it had Davey's data in hand.

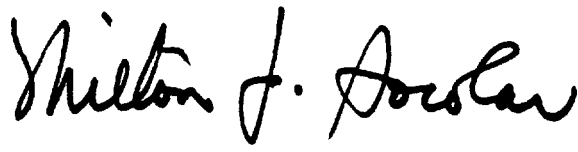
Murdock states that it used "reverse engineering" techniques to develop its kit which is comprised substantially of off-the-shelf components and that it did not possess Davey data. The Air Force claims that it purchased unlimited rights in the kit data under previous contracts with Davey. Further, the Air Force states that, in any event, it did not disclose Davey data to Murdock.

Davey cites cases where we have recommended sole source awards to the owners of proprietary data where the

data was used to describe the government's requirement in a solicitation. 43 Comp. Gen. 193 (1963); 49 Comp. Gen. 28 (1969). These cases are distinguishable. Here, there is a dispute as to whether the data is proprietary and whether the government disclosed any data to Murdock since clearly, there was no disclosure in any solicitation. In the absence of improper government disclosure, the issue of whether Murdock used Davey proprietary data in the process of developing its kit involves a dispute between private parties which cannot be adjudicated by our Office. See White Machine Co., B-206481, July 28, 1982, 82-2 CPD ¶ 89 (where the protest was dismissed even though the protester's proprietary data was inadvertently disclosed to a competitor by the agency).

When improper conduct on the part of government officials is alleged, the protester has the burden of proof. Arctic Corner, Inc., B-209765, Apr. 15, 1983, 83-1 CPD ¶ 414. Here, Davey has offered essentially only a bare assertion on the issue of whether the Air Force disclosed Davey data to Murdock. Accordingly, Davey has not met its burden on this issue. Therefore, we need not reach the issue of whether the data was proprietary.

The protest is denied.

for 
Comptroller General
of the United States