

Carter-PL



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: EDN Corporation

File: B-225746.2

Date: July 10, 1987

DIGEST

1. Request for proposals which states requirements in basic terms and does not reveal previously undisclosed details of incumbent's career planning program does not infringe incumbent's proprietary rights.
2. Contention that Competition in Contracting Act mandates sole-source procurement, based on alleged proprietary rights, is without merit where agency can describe requirements without revealing proprietary information.

DECISION

EDN Corporation protests the issuance of request for proposals (RFP) No. MDA903-87-R-0068 by the Defense Supply Service, Washington, D.C. (DSSW). We deny the protest in part and we dismiss it in part.

Background

DSSW issued this RFP on March 12, 1987, to acquire a career counseling program for use by the Army National Guard (ARNG) as a recruiting tool. In general terms, the RFP contemplates that the contractor will develop the concept, materials, publications and training necessary to provide career guidance and counseling to high school seniors, under the auspices of ARNG recruiters, and provide scheduling and support services to the ARNG in conjunction with the program. The program is to be used in all states and territories. The RFP stipulates that all products developed or produced under the contract will become the property of the government. The RFP describes the program in broad terms, such as:

"The Army National Guard Career Symposium is designed to provide career guidance and counseling to high school junior and senior students in all states, territories and the District of Columbia."

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"A course will be designed to train Guard field recruiters as symposium instructors.

"The course will include the various options available to high school students in terms of their future.

"The ARNG shall act as sponsor of a career symposium which utilizes ARNG field recruiters as classroom instructors.

"The Contractor shall develop a concept plan which will include what the contractor is going to do and how he is going to do it. Projected sequence of events in accomplishing tasks will be discussed along with how training materials and audio visual aids will be developed and used.

"The Contractor shall develop Teacher/Outline Notebooks."

Protest

EDN contends that the RFP discloses ideas, concepts and data used in the "Career Planning Workshop" (CPW) that EDN allegedly developed in 1974 for the Pennsylvania ARNG from existing EDN commercial materials and for which EDN has been awarded successive noncompetitive contracts since 1974. EDN contends that the RFP violates EDN's proprietary rights, the Competition in Contracting Act of 1984 (CICA), and the terms of EDN's current contract. EDN asks that we require withdrawal of the RFP and reissuance with none of EDN's concepts, data or ideas, or, in the alternative, require that DSSW award the contract to EDN or exercise the available option under EDN's current contract.

DSSW contests EDN's proprietary claims and argues that EDN's protest should be dismissed. DSSW does not contest either the prior existence of EDN's commercial products and materials or EDN's copyright and trademark of the materials used in CPW.

Discussion--Disclosure

EDN argues that the concept of using a career counseling program as a recruiting tool is unique, innovative and proprietary; that the use of ARNG recruiters in the classroom, and/or EDN's particular underlying approach to such use, is proprietary; that the use of an ARNG-wide contract, covering all states and territories, was EDN's idea and is proprietary; that EDN's use of teacher and instructor guides

in conjunction with classroom materials is proprietary; that EDN's written materials are copyrighted and trademarked and CPW is therefore proprietary; and that the myriad underlying details and concepts of CPW are proprietary. EDN points to successive ARNG sole-source justifications as amounting to admissions that the ARNG considered the CPW program to be proprietary.

In protests of this nature the burden is on the protester to demonstrate by clear and convincing evidence that its proprietary rights have been violated. Zodiac of North America, Inc., B-220012, Nov. 25, 1985, 85-2 C.P.D. ¶ 595. To prevail on a claim of violation of proprietary rights, the protester must show that (1) its material was marked proprietary or confidential or that it was disclosed to the government in confidence, and (2) the material involved significant time and expense in preparation and contained material or concepts that could not be independently obtained from publicly available literature or common knowledge. Porta Power Pak, Inc., B-196218, Apr. 29, 1980, 80-1 C.P.D. ¶ 305. Commercial products, for instance, are not considered proprietary, NEFF Instrument Corp., B-216236, Dec. 11, 1984, 84-2 C.P.D. ¶ 649, and neither are ideas or concepts which are obvious, and not innovative or unique. Chromalloy Division - Oklahoma of Chromalloy American Corporation, 56 Comp. Gen. 537 (1977), 77-1 C.P.D. ¶ 262. Moreover, the mere reformulation of a concept which is common knowledge cannot be proprietary unless the restatement represents a valuable contribution arising from the independent efforts of the claimant. Andrulis Research Corp., B-190571, Apr. 26, 1978, 78-1 C.P.D. ¶ 321. Also, the value of proprietary information lies in its unique possession by the owner; once such information becomes public knowledge, its value and status as proprietary information is lost. Porta Power Pak, Inc., B-196218, supra.

We find that the evidence is, at best, conflicting regarding EDN's claim of proprietary rights. Initially, we note that EDN markets a commercial--and therefore nonproprietary--version of CPW as well as the ARNG version, which differs from the commercial version primarily in the addition of a few pages to the student materials and added services and materials provided to the ARNG, such as instructor training. Although EDN now claims that it independently developed all aspects of the ARNG version of CPW, the record contains a May 9, 1977, letter from EDN which states that EDN and the National Guard invested substantial time and effort in developing and customizing CPW. In our view, this letter is evidence of the origins of the ARNG version of CPW as credible as EDN's present recollection of 10-year old events, and it suggests that the adaptation of EDN's

commercial version of CPW to the needs of the ARNG may not have been the result of EDN's independent efforts.

Moreover, EDN (1) has sought exemption from submission of cost or pricing data on the basis that CPW was a commercial product, and (2) as discussed below, suggests, as part of this protest, that CPW is a commercial product which DSSW is required to acquire under CICA in lieu of developing a new product. EDN's assertions that CPW is proprietary, and the firm's claims that CPW is a commercial product, are inconsistent.

Also, the ARNG sole-source justifications appear to us as not establishing that the program is proprietary to EDN, as argued by EDN. In each instance, the justification covering EDN's 1980, 1981, 1982 and 1983 contracts is based on the fact that EDN has the only program that can meet the ARNG's schedule. In other words, the justifications are based on urgency and not on the premise that the program is proprietary to EDN.

Furthermore, even if we accept EDN's proposition that some of the details of CPW might have been proprietary, we find that the details on which EDN relies are either already public knowledge or are not disclosed by the RFP. For instance, we find no merit in EDN's contentions that the use of its counseling program as a recruiting tool and the use of ARNG recruiters in the classroom as instructors is proprietary. These concepts obviously are revealed every time an ARNG recruiter conducts a CPW session--which they have been doing for 13 years. Since these concepts are already disclosed, they are no longer proprietary. Porta Power Pak, Inc., B-196218, supra. Moreover, since the language in the RFP, cited above, merely describes a requirement for a counseling session to be conducted by an ARNG recruiter and does not require the application of any particular concept to use of the recruiters, we find no disclosure of EDN's underlying approach in that regard.

This same rationale applies to the requirement for teacher outlines and notebooks. EDN provides these materials to its commercial customers when they purchase a minimum number of CPW publications; moreover, teacher outlines and notebooks are commonly provided in conjunction with educational materials. In our view, these are not the sort of unique or innovative ideas that can form the basis of proprietary information, and the language of the RFP, cited above, simply does not reveal the specific contents of EDN's materials or the degree of their integration, which EDN also asserts is proprietary.

In sum, we are not persuaded that CPW is proprietary beyond the copyrights and trademarks held by EDN, and we find that even if we accept, for the sake of argument, the proposition that some of the details of CPW on which EDN relies might have been proprietary, these details are either not disclosed by the RFP or are already public knowledge. Although the requirements in this RFP may parallel similar products and services provided by EDN, they are described in the most basic terms, representing little more than the common sense and commonly known associated requirements needed to accommodate the needs of the government, and are not described in sufficient detail to reveal any previously undisclosed detail of CPW in which EDN might hold a justifiable proprietary interest. In short, we do not find that the RFP violates EDN's proprietary rights in CPW.

Moreover, since we find no offending disclosure, we consider EDN's allegation that the RFP violates the terms of its contract, premised on an implicit contractual understanding of confidentiality, to be moot, and we will not consider that question.

Discussion--CICA

EDN's assertion that the RFP violates CICA is based on the argument that because CPW is unique and because EDN's rights in CPW preclude its use in development of specifications for a competitive procurement, this situation presents a compelling example of "unique supplies or services available from only one source or only one supplier with unique capabilities." (See FAR, 48 C.F.R. § 6.302-1(b)(1) (1986)). EDN contends that in these circumstances, CICA mandates that DSSW acquire EDN's program through a noncompetitive procurement.

We disagree. The applicable section of CICA, 10 U.S.C. § 2304(c)(1) (Supp. III 1985), provides that an agency may use noncompetitive procedures only when "the property or services needed by the agency are available from only one responsible source and no other type of property or service will satisfy the needs of the agency." As we noted above, DSSW described its requirements in a way that does not violate EDN's rights and which should result in the acquisition of a similar, but not identical, program that will meet the government's needs. The RFP has produced multiple inquiries from vendors. In our view, this is evidence that other vendors can meet the needs of the agency and DSSW may not, therefore, acquire EDN's program on a sole-source basis under CICA.

EDN also asserts that the RFP violates the directive in CICA that procurement policies and procedures should "promote the

use of commercial products whenever practicable," 10 U.S.C. § 2301(b)(6), because the RFP allegedly seeks the development of a new program to replace CPW. Initially, we note that this argument evidently is premised on CPW being a commercial program, in which case it is not proprietary. NEFF Instrument Corp., B-216236, supra. Secondly, EDN did not raise this question until April 21, 3 weeks after EDN filed its initial protest, and EDN has offered no plausible reason for the delay. Because our Bid Protest Regulations do not contemplate piecemeal filing of protest, protesters delay raising issues such as this at their own peril. We will not consider this question. Military Base Management, Inc., B-224128, Nov. 26, 1986, 86-2 C.P.D. ¶ 616.

Discussion--Transfer of Rights to Program

Finally, EDN contends that the requirement for the contractor to convey all rights in materials produced under the contract unfairly precluded its participation in the procurement because "much of EDN's other commercial business depends on these same concepts." EDN has not, however, provided any evidence which demonstrates the nature of the harm that might befall its commercial business from such a transfer and we have difficulty finding any, particularly where it involves what EDN describes as:

"the similar national programs EDN has developed and implements in the areas of prenatal and postnatal care, young childhood care, career education, vocational education, education for the handicapped, test taking skills, and premarital financial guidance."

Certainly, EDN's transfer of rights to the government would not keep EDN from continuing its commercial business, including CPW, or preclude EDN from developing additional programs using the same concepts. In short, we are not persuaded that EDN was precluded from this competition by this requirement.

The protest is denied in part and dismissed in part.

Harry R. Van Cleve
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General Counsel