The Comptroller General
of the United States

Washington, D.C. 20548

# Decision

Matter of: Vinnell Corporation

File: B-230919

Date: June 30, 1988

## DIGEST

The General Accounting Office will not recommend a noncompetitive award to the incumbent contractor, who protests that an agency disclosed its proprietary information in a solicitation, where the information does not describe the product or service being procured, but only reflects the protester's purported staffing for its contract work.

## DECISION

Vinnell Corporation protests the disclosure of its alleged proprietary data by the Department of Agriculture (USDA) in Modification No. 01 to request for proposals (RFP) No. RFP-00-88-R-31 to operate and maintain various USDA buildings in Washington, D.C.

We deny the protest.

Vinnell is the incumbent contractor for much of the services covered by this RFP. In November 1987, Vinnell was requested by USDA to complete a Standard Form (SF) 98A. The SF 98A completed by Vinnell identified 16 classes of service employees purportedly employed on its USDA contract as well as the number of employees in each class. A SF 98A is an attachment to the SF 98, "Notice of Intention to Make a Service Contract and Response to Notice." The SF 98 and SF 98A are to be completed by procuring agencies and submitted to the Department of Labor (DOL) to obtain wage determinations for inclusion in solicitations and contracts for services. The wage determinations issued by the DOL prescribe the minimum wages and fringe benefits to be paid service employees on contracts covered by the Service Contract Act, 41 U.S.C. § 351 et seq. (1982).

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On February 19, 1988, this RFP was issued. No wage determination was included in the RFP. Modification No. 01, issued on March 10, included a copy of the SF 98A that had been completed by Vinnell. Vinnell immediately complained of this release to USDA, and then protested to our Office on April 4. Proposals were received on April 6.

Vinnell protests that the SF 98A discloses Vinnell's staffing of the current contract, which it considers highly confidential proprietary information. Vinnell asserts that this information reveals to all offerors the unique approach and mix of skills that Vinnell uses to perform the present, substantially similar, services contract, such that Vinnell's competitors could determine Vinnell's contract price. Vinnell claims this disclosure violates applicable regulations and unfairly prejudices Vinnell's competitive position. As a remedy, Vinnell requests that the RFP be canceled and its present contract be extended another 2 years.

The contracting officer claims that he was unaware that Vinnell had prepared the SF 98A, but that the release of this information was not prejudicial. In this regard, he claims that the information was not marked proprietary nor was it disclosed in confidence, and that the information was otherwise obtainable by competitors through other sources, such as union halls. The contracting officer further claims that the staffing data did not reflect RFP work or even current contract staffing, and that the RFP work is significantly different from Vinnell's contract work.

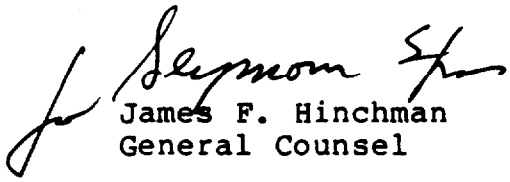
In appropriate circumstances, where it has been clearly established the government's use of a protester's proprietary data or trade secrets in a solicitation to describe the required product or service violated the protester's proprietary rights, we may recommend that the contracting agency either make a sole-source award to the protester or cancel the solicitation. 49 Comp. Gen. 28 (1969); Aeronautical Instrument and Radio Co., B-224431.3, Aug. 7, 1986, 86-2 CPD ¶ 170; Zodiac of North America Inc., B-220012, Nov. 25, 1985, 85-2 CPD ¶ 595. This is so because if acquisition of the data is necessary to describe the product or service being procured, it may be that a noncompetitive award could be justified under the Competition in Contracting Act, 41 U.S.C. § 253(c) (Supp. IV 1986). See EDN Corp., B-225746.2, July 10, 1987, 87-2 CPD ¶ 31. Such remedies, however, are not appropriate where the data in question does not describe the product or service required by the solicitation, but only reflects the data owner's particular approach to the contract work.

In this case, the SF 98A was not part of the RFP specifications, which detailed what operations and maintenance tasks were required to be performed. Instead, the SF 98A only reflected what staffing Vinnell said it would use on the previous contract. The SF 98A was released in the solicitation amendment for informational purposes only to apprise offerors of the government's labor estimate. Consequently, the release of the SF 98A provides no basis for our Office to sustain the protest, even assuming, without deciding, that the SF 98A contained confidential information.

In any case, as the contracting officer points out, there are substantial variations when the staffing in Vinnell's requests for equitable adjustment during the contract term and Vinnell's proposal on this RFP are compared to the staffing information furnished by Vinnell on the SF 98A. Therefore, it appears that Vinnell has overstated the value of the SF 98A information to the other offerors and the possible prejudice suffered by itself. See Management Services Inc., 55 Comp. Gen. 715, 731 (1976), 76-1 CPD ¶ 74 (no remedy will be given for improper disclosure of a protester's confidential information if the disclosure does not competitively prejudice the protester).

Finally, Vinnell argues that the release of this data constituted technical leveling which is prohibited by Federal Acquisition Regulation (FAR) 15.610(d)(1). However, this regulation is inapposite, since the technical leveling it prohibits refers to successive rounds of discussions during which a weak proposal is brought up to the level of other proposals through the pointing out of weaknesses resulting from the offeror's lack of diligence or competence. Moreover, we do not agree that the release of the data in the RFP could be viewed as tantamount to a more general concept leveling--as discussed above, there are differences between the information on the SF 98A and what Vinnell actually has done and is proposing to do.

Accordingly, the protest is denied.



James F. Hinchman
General Counsel