



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Del Mar Avionics
File: B-231124
Date: August 25, 1988

DIGEST

1. Protest against disclosure of proprietary data is untimely where filed more than 10 working days after the protester knew of the disclosure.
2. The appropriate remedy for a firm that contends that the government has infringed its proprietary rights is an action against the government for damages or administrative settlement of its claim.

DECISION

Del Mar Avionics protests request for proposals (RFP) No. N00123-88-R-0312, issued by the Naval Supply Systems Command to acquire remote strafe scoring systems. Del Mar contends that the RFP violates its proprietary rights in acoustic strafe scoring technology. We dismiss the protest.

The Navy issued this RFP in February of 1988, to acquire a data linked remote strafe scoring system for the Navy Fleet Analysis Center located in Corona, California. These systems employ sensors, called "transducers," placed in the target area with related circuitry, to detect aircraft-fired projectiles within the target zone and a communications system (the "data link") to send the information to a remote unit which displays the number of "hits" to an observer; the systems may be adjusted to accommodate different types of projectiles and sizes of targets. The RFP includes detailed specifications for the up-range and down-range units, including schematic diagrams and component lists for the circuitry that accompanies the transducer and display; the requirements for the data link are described in functional terms. The RFP refers readers to an Air Force technical manual, Technical Order (T.O) No. 43E7-7-0-1, dated September 25, 1972, for more in-depth details of the system. The RFP requires that all components of the system

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be interchangeable and compatible with the Eon SSS-101 Remote Strafe Scoring System manufactured by Eon Instrumentation, Inc.

Del Mar states that it was the originator of acoustic strafe scoring technology, developed at private expense, and first sold its system, known as the DA-3/H, to the Air Force in 1972, with accompanying technical information. Del Mar's technical information is contained in Air Force T.O. No. 43E7-7-9-1, dated December 15, 1972, which is subject to a limited data rights provision restricting the government's right to disclose the data except for emergency repairs and in certain other limited circumstances. Del Mar states that the Air Force has procured systems from Del Mar since 1972 for itself, the Army, Navy and others, and has never questioned Del Mar's proprietary rights in the technology.

Del Mar contends that the Eon SSS-101 referenced in the current solicitation is an outgrowth of an improper disclosure by the Navy of Del Mar's data in a 1985 Navy procurement for modification of a DA-3/H system to support a more sophisticated communications link between the down-range and up-range units. Del Mar contends that Eon used data gained through this procurement to reverse engineer Del Mar's entire DA-3/H system. In support of this assertion, Del Mar points to a 1986 noncompetitive procurement by the Navy of a complete remote strafe scoring system from Eon, announced in the Commerce Business Daily (CBD) on January 8, 1987, which Del Mar suggests establishes that Eon reverse engineered Del Mar's acoustic technology. Del Mar, a participant in the 1985 competition, states that it did not object to the disclosure of its data in that procurement because the information would be essential to any contractor to develop the necessary interfaces between the components of the system and Del Mar assumed the Navy would provide the data subject to appropriate restrictions.

Del Mar contends that the current RFP is an effort by the Navy to further erode Del Mar's proprietary rights. Del Mar does not assert proprietary rights to the data link, but does contend that the acoustic technology employed in the transducer and related circuitry, the display units, and the collected data upon which adjustments to the system are based, are proprietary to Del Mar and are disclosed by the current RFP. Del Mar also objects to the Navy's failure to disclose the modifications to its DA-3/H employed in the Eon SSS-101, without which, Del Mar contends, it is not possible to satisfy the requirement for component interchangeability and compatibility.

The Navy states that Del Mar did not submit an offer before the April 22 closing date of the solicitation and is not,

therefore, an interested party within the meaning of our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1988). The Navy also challenges Del Mar's claim of a proprietary interest in acoustic strafe scoring technology and argues that, in any event, the RFP does not require any particular design. The Navy asserts that the system being acquired is different from the DA-3/H because it does not require the hard-wired communication link employed in the DA-3/H. The Navy also states that it did not acquire the data rights to the Eon SSS-101. The Navy characterizes Del Mar's objections as a refusal to acknowledge that competitors may have reverse engineered Del Mar's system.

The Navy's view notwithstanding, a protester need not actually submit an offer to have its protest against a solicitation considered by our Office, where the protester has a direct economic interest that would be impinged by the alleged defect in the solicitation. See, e.g., M. C. & D. Capital Corp., B-225830, July 10, 1987, 87-2 CPD ¶ 32. It is clear that Del Mar has an economic interest in protecting its proprietary data and in arguing that it unfairly has been excluded from the competition by the Navy's failure to provide sufficient information with which to prepare an offer. Del Mar is an interested party for both of these questions.

The record contains several Air Force memoranda and communications with Del Mar, some as recent as March 1988, which support Del Mar's contention that the Air Force currently considers Del Mar's data to be proprietary. A copy of Air Force T.O. No. 43E7-7-9-1 provided by Del Mar contains a limited data rights provision. We also have informally contacted Air Force personnel who have confirmed that the Air Force views the DA-3/H data as proprietary to Del Mar. The Navy has offered no evidence to support its contention that the data in its possession, which Del Mar asserts the Navy obtained from the Air Force, was not proprietary. In these circumstances, it appears that the DA-3/H data was proprietary to Del Mar when it came into the Navy's possession.

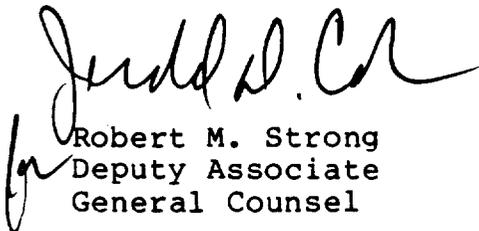
We have held that in the interest of preserving the integrity of the government as a purchaser, and of avoiding possible legal liability, the government should recognize an individual's proprietary rights and not use or disclose proprietary information for procurement purposes unless it has acquired the rights to do so. 52 Comp. Gen. 312 (1972). However, we have also recognized that the value of such information lies in its continued confidentiality, EDN Corp., B-225746.2, July 10, 1987, 66 Comp. Gen. ____, 87-2 CPD ¶ 31, and that the burden is upon the owner of the information to prevent its unauthorized disclosure. 46 Comp. Gen. 885 (1967). We think Del Mar should have known

that its data was going to be disclosed in conjunction with the Navy's 1985 procurement, and any assumptions Del Mar may have made about possible Navy restrictions on the use of the data in conjunction with that procurement should have been dispelled no later than January 1987, when Del Mar learned of the sole-source award to Eon. Moreover, Del Mar should have known, on the basis of the latter acquisition, that Eon may have used the data to reverse engineer the DA-3/H.

Our Bid Protest Regulations require that protests be filed within 10 working days of when the protester knew or should have known of the basis for its protest. 4 C.F.R. § 21.(a)(1). Because Del Mar did not protest the disclosure within 10 days of notice of the sole-source award to Eon in January 1987, Del Mar's objections to the past disclosure to Eon, as well as related allegations that the Navy engaged in technical transfusion and leveling, are untimely and will not be considered.

With respect to the current procurement, as noted above, the Navy states that it did not acquire a data package on the SSS-101, and we cannot recommend that the Navy disclose such data to Del Mar to allow it to compete in the present acquisition. Also, it would do no good to recommend deletion of Del Mar's data from the RFP, since it appears already to be in the possession of Eon, which Del Mar cites as the only other known competitor. The appropriate remedy for a firm that contends that the government has infringed its proprietary rights is an action against the government for damages or administrative settlement of its claim. See Garrett Pneumatic Systems Division, B-207213, et al., May 6, 1982, 82-1 CPD ¶ 435. Also, to the extent Del Mar objects to Eon's use of its data, this is a matter between private parties not appropriate for consideration under our bid protest function. Aeronautical Instrument and Radio Co., B-224431.3, Aug. 7, 1986, 86-2 CPD ¶ 170.

The protest is dismissed.


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