T. Williams

Comptroller General
of the United States

Washington, D.C. 20548

140160

Decision

Matter of: Ingersoll-Rand Company

File: B-236391

Date: December 5, 1989

DIGEST

Protest that agency violated protester's proprietary rights in technical data is denied since protester does not present clear and convincing evidence that the solicitation's technical drawing, developed through reverse engineering by the agency, was otherwise derived from proprietary technical data and drawings.

DECISION

Ingersoll-Rand Company (I-R) protests request for proposals (RFP) No. DLA700-89-R-2262, issued by the Defense Construction Supply Center (DCSC) to acquire casing assembly covers for use on auxiliary seawater (ASW) pumps for the Trident submarine. The solicitation's item description requested that the casing assembly covers be manufactured in accordance with DCSC drawing CS-4320-SV-0772 dated December 13, 1988, and that first article testing was required. I-R alleges that DCSC improperly disclosed its proprietary data through the issuance of the RFP because the agency used I-R's drawing 11725-F-18 for the casing assembly covers, previously furnished to the government with only limited rights, to develop the DCSC drawing issued with the solicitation.

We deny the protest.

DCSC issued the RFP to establish another source for production of the casing assembly covers designated by National Stock Number (NSN) 4320-01-192-3433. I-R had designed and built the ASW pump and component parts for the Trident submarine under a previous contract. That contract required I-R to furnish technical documentation and drawings for the component parts on a limited rights basis to the government; thus, I-R's limited rights drawing 11725-F-18 for casing assembly covers is in the government's possession. DCSC entered into sole-source contracts with

I-R for the production of this item--with the last contract price paid to I-R for this item as $9,042 each--because the government never acquired the technical data necessary for production by another contractor. DCSC's value engineering program office (VEPO) determined that the item could be purchased at a lower cost if a production data package was developed to permit full and open competition. Accordingly, the VEPO states that it developed the subject DCSC drawing through reverse engineering.

The RFP, which includes this drawing, was issued on July 6, 1989. I-R filed its protest with our Office on August 1, prior to the August 7 closing date. Award has been withheld pending the issuance of our decision.

I-R protests that the DCSC VEPO copied I-R's limited rights drawing 11725-F-18 to create its own version of the casing assembly cover drawing, and did not "reverse engineer" this part as is claimed. In this regard, I-R notes that every base dimension and every manufacturing tolerance in DCSC's drawing is identical to those in the I-R drawing.

We have recognized the right of a firm to protect its proprietary data from improper exposure in a solicitation in the context of a bid protest. See Diversified Technologies; Almon A. Johnson, Inc., B-236035, Nov. 6, 1989, 89-2 CPD ¶ ___; Zodiac of North America, Inc., B-220012, Nov. 25, 1985, 85-2 CPD ¶ 595. While we recently declined jurisdiction in Ingersoll-Rand Co., B-237497, Oct. 26, 1989, 89-2 CPD ¶ ___, that decision will no longer be followed.

When a protester alleges improper disclosure of proprietary data, 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, supra. 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. Litton Applied Technology, B-227090; Sept. 3, 1987, 87-2 CPD ¶ 219 at 4.

There is no dispute that I-R drawing 11725-F-18 was furnished to the government with only limited rights granted the government. Thus, the issue before us is whether the information contained in this proprietary drawing could be obtained independently from publicly available data.

DCSC denies that it used I-R's proprietary data in developing its drawing, CS-4320-SV-0772, and has provided a detailed description of its approach to reverse engineering the technical data package for this item. The agency reports that the VEPO ordered two casing assembly covers from stock which were dismantled and the manufacturing tolerances analyzed. In addition, the VEPO used both an unlimited rights drawing (I-R drawing 11230-F-18) for a sectional assembly--a similar item in the ASW pump and an unlimited rights drawing of an earlier version of the casing assembly cover, I-R drawing 11237-F-18, as part of the reverse engineering process. Moreover, a mating component from the ASW pump, the suction guide cone, was sent to an independent laboratory for analysis of the macroscopic structure of the base metal and overlays since the metallurgical structure of the casing assembly cover could be inferred from the mating component. The data gathered from these sources were used by VEPO to develop the DCSC drawing.

I-R responds that I-R drawings 11230-F-18 and 11237-F-18, which were used by VEPO to reverse engineer the casing assembly covers, were furnished to the government on a limited--not unlimited--rights basis, and that DCSC knew that these drawings were proprietary to I-R. I-R also contends that DCSC improperly obtained information from other government activities that had access to the limited rights I-R drawing for the casing assembly cover to develop its drawing. I-R contends these activities must have identified where I-R's upgrade of the casing assembly cover varied from the earlier drawings not marked as proprietary. I-R points to DCSC's decision to forego material analysis on the casing assembly cover and to rely instead on the material analysis of the suction guide cone as an indication that DCSC must have received information from other government activities that the materials used in the cladding process for the suction guide cone were identical to the materials used for its mating component--the casing assembly cover.

When improper conduct on the part of government officials is alleged, the protester has the burden of proof and our Office will not rely on inferences or suppositions alone to find such misconduct. See Devres, Inc., B-228909, Dec. 30, 1987, 87-2 CPD ¶ 644 at 6. In our opinion, I-R has not provided any credible evidence in support of its allegation that unnamed government officials, known to have I-R's latest version of drawing 11725-F-18, disclosed proprietary information to DCSC. Moreover, other than explaining in great detail the provisioning process established and maintained by the Defense Logistics Services Center for

technical data furnished to the government, the protester has presented no evidence that the two drawings 11230-F-16 and 11237-F-18 used, in part, to reverse engineer the covers were in fact furnished to the government on a restricted basis. Indeed, our review of the record simply gives no indication that DCSC used other than proper reverse engineering techniques to develop its drawing package included in the RFP. While I-R argues that the "exactness" of details in the DCSC drawing is not consistent with data developed using reverse engineering, we are not persuaded that this necessarily shows the agency did not use reverse engineering methodology, considering that the agency had access to two unrestricted drawings. See Litton Applied Technology, B-227090; B-227156, supra. Accordingly, I-R has not shown that DCSC violated I-R's proprietary rights in this RFP.

Finally, I-R contends that the DCSC drawing contains certain errors which the firm attributes to improper translation by DCSC of the I-R drawing format to the DCSC drawing format. Consequently, I-R alleges that (1) any parts manufactured in accordance with the DCSC drawing will result in equipment malfunction or failure when installed on the ASW pump and (2) any parts manufactured in accordance with the requirements of the original equipment manufacturer would be rejected by DCSC as nonconforming. As support for these allegations, I-R has furnished for our in camera review a detailed analysis of the cause and effect of errors in the DCSC drawing.

From our review of this analysis, we are not persuaded that either of these two results is likely to occur since any parts manufactured under a resultant contract is subject to first article testing. Under these circumstances, any changes or errors in the specifications discovered during the test can be corrected by the agency. See Federal Acquisition Regulation § 9.303.

The protest is denied.

for James F. Hinchman
General Counsel