B. Coles

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Sentel Corporation

File: B-244991

Date: December 6, 1991

David R. Smith, Esq., Reed, Smith, Shaw & McClay, for the protester.
Maryann L. Grodin, Esq., and William T. Mohn, Esq., Department of the Navy, for the agency.
Barbara C. Coles, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

A sole-source award is not an appropriate remedy to erase a competitive advantage allegedly given other offerors by an agency's disclosure of proprietary information where: (1) the agency only inadvertently disclosed the data and did not use it to define its requirements, and (2) a sole-source award would require the agency to procure services it had already found to be technically unacceptable.

DECISION

Sentel Corporation protests the award of a contract to any offeror other than itself under request for proposals (RFP) No. N00600-91-R-2297, issued by the Department of the Navy for electromagnetic spectrum management technical services. Sentel contends that the RFP contained some of the firm's proprietary information that Sentel submitted to the Navy as part of a technical presentation conducted prior to the issuance of the solicitation in connection with a possible award of a contract for this requirement under Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988). Sentel argues that since the Navy improperly attached the firm's proprietary information to the solicitation, the Navy should award the contract on a sole-source basis to Sentel.

We deny the protest.

On April 22, the Navy published a synopsis in the Commerce Business Daily (CBD) of an anticipated procurement for electromagnetic spectrum management support services. In response to a request by Sentel, the Small Business Administration (SBA) requested, by letter dated April 29, that the Navy set aside the procurement under Section 8(a) and make award to Sentel. In order to prepare its

capability briefing and technical presentation in connection with the possible Section 8(a) award, Sentel received the following portions of the RFP: section C, the Statement of Work, and section L, Instructions to Offerors.

On June 3, Sentel's representatives delivered a detailed written proposal to the Navy. In addition, they orally briefed the Navy in connection with the firm's experience and proposed management and technical approach which the firm summarized on overhead projection transparencies and which were shown on the conference room wall. Photocopies of these transparencies, comprising 51 pages, were also provided. On June 12, the Navy sent the SBA a letter stating that the requirement would not be offered to Sentel under the 8(a) program because Sentel's demonstrated knowledge, ability, and methodology in various areas did not meet the requirements in the RFP's Statement of Work. In short, the Navy had found Sentel's proposal technically unacceptable.[1]

The Navy subsequently issued the RFP on July 15. Upon its receipt of the RFP on July 16, a representative of Sentel telephoned the contract specialist to notify her that the Navy had attached Sentel's propriety information to the RFP. The contract specialist reviewed the RFP and discovered that photocopies of the overhead transparencies that Sentel used in its June 13 oral presentation were attached inadvertently to the RFP as a result of a clerical error in the Customer Service Center. The Navy then sent letters--on July 19--to all the vendors who had received the solicitation requesting that they "[p]lease return the documents prepared by Sentel Corp. immediately."

Sentel contends that the Navy's improper and unauthorized distribution of Sentel's proprietary data to the firm's competitors has caused the firm to suffer irreparable harm. Specifically, Sentel asserts that the disclosure will detrimentally impact its ability to compete for similar contracts and that the Navy should therefore make a sole-source award to Sentel.

---

[1]In its comments on the agency report, Sentel for the first time challenges the technical evaluation of its proposal under the previously proposed 8(a) set-aside. We will not review the matter. The decision to place or not to place a procurement under the 8(a) program is not subject to review by our Office absent a showing of possible fraud or bad faith on the part of government officials or that regulations may have been violated. See 4 C.F.R. § 21.3(m)(4) (1991), as amended by 56 Fed. Reg. 3759 (1991). No such showing has been made.

In appropriate circumstances, where the government has used or misused data or trade secrets in a solicitation in violation of a firm's proprietary rights, we may recommend that the contracting agency either make a sole-source award to the firm or, if possible, cancel the solicitation and resolicit without using the proprietary data. 49 Comp. Gen. 28 (1969); NEFF Instrument Corp., B-216236, Dec. 11, 1984, 84-2 CPD ¶ 649. We have done this in cases in which the data was necessary to describe the product or service being procured, so that a noncompetitive award would ordinarily be justified. For example, in 49 Comp. Gen. 28, supra, we found that the agency had misappropriated the protester's proprietary data by using it to develop its specifications; we recommended that the agency either make a sole-source award to the protester, or, if possible, resolicit without using the protester's data. Our recommendation was necessary to prevent the agency from continuing to violate the protester's proprietary rights by improperly using its data to acquire the item from another source. That is, if the agency required a product which was proprietary to the protester, then the protester was entitled to a sole-source award for that product. See White Mach. Co., B-206481, July 28, 1982, 82-2 CPD ¶ 89.

In this case, even assuming the information contained in the transparencies was proprietary,[2] we do not think it is appropriate to grant the relief requested--a sole-source award to the protester. The agency did not use the protester's data to define its needs but inadvertently disclosed it due to a clerical error. Thus, the usual purpose of a recommended sole-source award--to prevent the agency from using the protester's proprietary data to define and purchase its needs--would not be served by a sole-source award under the circumstances here. See EDN Corp., B-225746.2, July 10, 1987, 87-2 CPD ¶ 31; Vinnell Corp., B-230919, June 30, 1988, 88-2 CPD ¶ 4. Moreover, since the protester's offer had been found to be technical unacceptable prior to the disclosure, such an award would place the agency in the position of having to accept services that would not meet its needs. We also find no other extraordinary circumstances which would warrant the extreme remedy of a sole-source award.

---

[2]Our review of the transparencies indicates that the vast majority of the information was extremely general in nature and would not provide a competitor any advantage. For example, for short-term technical studies, the transparency stated that the firm would "review and analyze Navy requirements, and develop recommended technical courses of action for unplanned issues and problems that arise . . . ."

Since we have found a sole-source award to Sentel to be inappropriate, we deny the protest. If Sentel believes it has been damaged as a result of the agency's inadvertent release of its data, it may seek relief in the United States Claims Court on the basis that an implied-in-fact contract existed which obligated the government to maintain confidentiality of proprietary data contained in Sentel's technical proposal. See, e.g., Research, Analysis & Dev., Inc. v. United States, 8 Cl. Ct. 54 (1985).

The protest is denied.

Robert P. Murphy
for James F. Hinchman
General Counsel