

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

50933

FILE: B-179243

DATE: July 22, 1975

MATTER OF: Remcor, Inc.

97350

DIGEST:

Claim for damages arising from Navy use of proprietary data is of doubtful validity in view of unresolved factual disputes relating to the use of data and to the quantum of damages, if liability could be established.

Remcor, Inc. (Remcor), has presented a claim for \$75,000 against the Department of the Navy (Navy) for its unauthorized use, in connection with invitation for bids (IFB) No. N62269-73-B-0653, of data proprietary to Remcor which had been improperly obtained by the Navy.

By contract dated August 30, 1967, Brooks and Perkins Incorporated (B&P) agreed to furnish to the Naval Air Development Center (NADC) the following two items:

- Item 1 - Services and material necessary to perform a Value Engineering Study on the CTU-1/A Aerial Delivery Container.
- Item 2 - Aerial Delivery Container CTU-1/A, as per Section 2.0 and Brooks & Perkins Proposal of 8 Aug 1967.

The August 30, 1967, contract contained the following provisions relating to the furnishing of drawings:

"d. The selection (in conjunction with the Government) of optimal alternatives to be detailed on production drawings.

"e. The preparation of production drawings incorporating the design changes selected in (d).

"2. Fabricate containers in accordance with the drawings on NAVAIRSYSCOM drawing list DL67A74A1. A cost estimate for this phase without the value-engineered changes is required. This work shall not be undertaken until item B-1 has been completed by the contractor and accepted by the Government. The Government shall have the right to require the incorporation of any or all of the value-engineered changes developed in item 1 at the price quoted in item 1C.

"C. Quality

"1. Drawings made under this contract may be of commercial quality. They shall be such that all information required for the manufacture of the items covered shall be contained on the drawings, including any processing instructions. Dimensions controlling interchangeability shall be clearly identified. All materials and standard parts must be identified by Government specifications and standard drawings. One set of reproducible originals and one set of prints shall be delivered for all drawings made under this contract."

In addition, the B&P contract contained the Rights in Technical Data Clause (Feb 1965) which stated as follows:

"(g) Acquisition of Data from Subcontractors.

(1) Whenever any technical data is to be obtained from a subcontractor under this contract, the Contractor shall use this same clause in the subcontract, without alteration, and no other clause shall be used to enlarge or diminish the Government's or the Contractor's rights in that subcontractor data which is required for the Government.

(2) Technical data required to be delivered by a subcontractor shall normally be delivered to the next higher-tier Contractor. However, when there is a requirement in the prime contract, or in the deferred order, for data which may be supplied with limited rights pursuant to (b)(2) above, a subcontractor may fulfill

such requirement by submitting such data directly to the Government rather than through the prime Contractor.

(3) The Contractor and higher-tier subcontractors will not use their power to award subcontracts as economic leverage to acquire rights in data from their subcontractors for themselves."

The B&P contract was amended by Modification 2001, effective August 26, 1969, to provide, among other things, that "One set of commercial type drawings with all manufacturing details shall be supplied by the contractor."

B&P furnished the Value Engineering Study (item 1) and was paid the contract price of \$14,000 for that item. However, because B&P was having difficulty furnishing the Aerial Delivery Containers under item 2, it placed a subcontract with Remcor. Remcor, by letter dated September 22, 1969, and sent to both NADC and B&P, seemingly obligated itself as follows:

"Subject: Brooks & Perkins Purchase Order No. 22363

GUARANTEE

As partial consideration for the subcontract on Item 2 of NADC Contract N62269-68-C-0164 to Remcor Incorporated, we fully guarantee to the Government that the four (4) units and accompanying drawing will be in accordance with the contract specifications contained in Modification #1.

REMCOR, INCORPORATED"

By letter dated October 24, 1969, Remcor formally accepted the B&P purchase order "* * * subject only to the Terms and Conditions of sale enumerated below and on the attached sheets." Remcor's October 24 letter, attached to and made a part of the purchase order, provided in pertinent part:

"We herewith invoke the following clause regarding use of Remcor drawings:

"Use of Seller's Designs and other Data: Buyer agrees that it will keep confidential and will not divulge to anyone without Seller's written approval the features, nature or character of any tools, equipment, gauges, patterns, designs, drawings, specifications, engineering data or other technical or proprietary information furnished by Seller, and that it will use the same only in connection with the performance of items covered by this order and not otherwise."

In addition, Remcor's letter indicated that it intended to furnish the drawings and containers directly to NADC and not to B&P, thereby assuring that only the Navy would be made privy to Remcor's allegedly proprietary drawings and the design embodied therein.

Other than the above-quoted provision, the purchase order contained no provision concerning the rights in data of the Government, B&P or Remcor. In fact, the terms of the purchase order appear to have been designed to specifically exclude the possibility that a clause such as the "Rights in Technical Data" clause would be applicable to the purchase order. Further, Remcor's standard "Terms and Conditions of Sale," included as part of the purchase order, provided in pertinent part:

"GOVERNMENT PRIME CONTRACTS -- Any Purchase Order pursuant to the accompanying quotation or proposal which is awarded pursuant to Buyer's prime Government contract shall be deemed subject to those prime contractual terms and conditions which are expressly specified by Buyer. It is the intent of Seller to comply fully with such terms and conditions, where applicable, in its performance of any contract or purchase order resulting from this quotation or proposal, unless otherwise specified elsewhere in this quotation or proposal. [Emphasis added.]"

Since the "Buyer" (B&P) specified no prime contractual terms and conditions pertaining to rights and data, Remcor asserts that it was not obligated to furnish B&P (or, through B&P, the Government) with any rights to the data developed and to be delivered. Remcor's October 24, 1969, letter and "Terms and Conditions of Sale," attached to Remcor's acceptance of the purchase order, were accepted in full by B&P.

Thereafter, some drawings were delivered to the Navy. The drawings contained the following restrictive legend:

"This print, and the information and know-how thereon, is the confidential property of REMCOR INC. and may not be used or reproduced without the written permission of REMCOR INC. Permitted reproductions in whole or in part, including borrower's shop drawings, shall bear or refer to this notice. Return of this print must be made to REMCOR INC. upon request."

According to Remcor, the Navy raised no objection to this restrictive legend or formally notified Remcor that it deemed this restrictive legend to be inappropriate. Thus, argues counsel for Remcor, the Navy by its silence, has indicated concurrence with Remcor's position that the drawings and all information set forth thereon were proprietary to Remcor and were received by the Navy in confidence. Later drawings and revisions of drawings were delivered to the Navy with the same restrictive legend and without objection from Navy procurement officials.

On June 11, 1973, NADC issued the IFB in question. When Remcor examined the drawings attached to the solicitation, it claims that "* * * it discovered that they were based upon (and to a large extent copied) the drawings Remcor had submitted to NADC over three years earlier. In addition, Remcor discovered that the proprietary manufacturing processes and the like orally conveyed in confidence * * * to NADC in May 1970 also appeared in the solicitation's drawings." Thereupon, Remcor protested the use of its proprietary data to our Office.


Although Remcor had protested to our Office in June of 1973, bids in response to the IFB were publicly opened on August 6, 1973. Three bids were received, one being nonresponsive. The two responsive bidders were Remcor, who bid a unit price of \$2,827 for the containers and Pioneer Parachute Company, Inc., who bid a unit price of \$6,982.17. Based upon the expiration date of Remcor's bid and the large disparity in price, the Navy determined that it would be advantageous to the Government to make an award to Remcor and not allow the Remcor bid to expire. Award was made to Remcor on October 5, 1973. Remcor, thereafter, filed its present claim for damages resulting from the misuse of its proprietary data.

Navy has taken the position that Remcor was bound under the terms of the prime contract and the October 24, 1969, "Guarantee" letter to furnish the contested data. Moreover, while the Navy admits to having received Remcor's drawings containing the restrictive legend, the Navy claims that Remcor has never clearly identified which data on the drawings was proprietary to Remcor; that the data marked as proprietary was actually 1967 Navy data; and that in the few instances where the 1973 IFB drawings contained a physical shape or dimension which was on the Remcor 1969 drawings, the physical shape or dimensions were apparent from visual inspection of the containers delivered to NADC and cannot be considered as proprietary or a trade secret.

From the record before our Office, it can be seen that the question of liability, and any damages resulting therefrom, is clearly in dispute. Remcor has alleged that basically all knowledge about the manufacturing process for the containers in question was improperly obtained by the Navy from Remcor. The Navy, on the other hand, argues that Remcor has taken all the data from 1967 Navy drawings and reproduced them in 1969 as being proprietary and that certain design aspects labeled as proprietary are readily apparent from visual inspection. Therefore, argues the Navy, any damages to Remcor would be nominal.

The state of the record is such that the factual bases and the quantum of money damages of the claim may not be resolved without resort to sworn testimony under rules of judicial procedures.

In view of this circumstance, there is for application our well-settled rule to disallow a claim of doubtful validity and leave the claimant to pursue whatever remedy may be available in the courts. Accordingly, we are unable to authorize payment of the claim. See James J. Longwill v. United States, 17 Ct. Cl. 288 (1881); John H. Charles v. United States, 19 Ct. Cl. 316 (1884).


Deputy Comptroller General
of the United States