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DECISION

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

FILE: B-187051 DATE: October 6, 1977

MATTER OF: Chromalloy Division-Oklahoma of Chromalloy American Corporation-Reconsideration

DIGEST:

1. Where there is a mix of private and Government funds in developing weld repair process, development of process cannot be said to have been developed at private expense so as to gain protection of ASPR § 9-202.2(c).

2. ASPR § 9-202.2(c) directs contracting officers to protect data regardless of whether it is proprietary or trade secret on the basis of development at private expenses. However, release of information not proprietary or trade secret does not give rise to cause of action.

Chromalloy Division-Oklahoma of the Chromalloy American Corporation (CDO) has requested reconsideration of our decision of April 15, 1977 (B-187051, 77-1 CPD 262), which determined that the weld repair method for the shrouds on TF-30 jet engine blades (contained in an unsolicited proposal from CDO) was not entitled to trade secret protection. Further, we held that CDO had not sustained its burden of proving by clear and convincing evidence that the Government wrongfully disclosed its alleged proprietary data as to justify cancellation of a request for proposals (RFP) issued by the Air Force.

While counsel for CDO continues to maintain that the weld repair procedure is fully entitled to protection as a trade secret under applicable common law principles, counsel has not proffered any additional facts nor cited any authority to support this position. Therefore, we will not reconsider this aspect of our prior decision. 4 C.F.R. § 20.9(a) (1977).

Counsel for CDO contends that Armed Services Procurement Regulation (ASPR) § 9-202.2(c) (1976 ed.) precluded the Air Force from disclosing the repair procedure outside the Government even if the procedure was not a trade secret.

The cited regulation reads:

> "Limited Rights Technical Data. Except as provided in (b) above, technical data pertaining to items, components or processes developed at private expense will be acquired with limited rights, provided that the data is identified as limited rights data in accordance with paragraph (b)(2) of the clause in 7-104.9(a)." (Emphasis added.)

In our previous decision, we cited the Department of Defense Policy on processes developed under contracts containing the ASPR "Rights in Technical Data" clause (ASPR § 7-104.9(a)), as follows:

> "Where there is a mix of private and government funds, the developed item cannot be said to have been developed at private expense. * * *"

We found that it was the Air Force's prerogative to determine that the weld repair process contained in the unsolicited proposal was incomplete and unacceptable without adding Government-funded steps of preheating prior to welding and stress relief after welding. Since there is a mix of private and Government funds in developing the process, the process cannot be said to have been developed at private expense. It follows then that ASPR § 9-202.2(c), which requires the process be developed at private expense, is inapplicable to the case at hand.

Even assuming, for the sake of argument, that the unsolicited proposal contained a process developed at private expense, we view ASPR § 9-202.2(c) as an instruction to the contracting officer on how to handle data until it is determined to be proprietary or a trade secret so as to avoid such controversy. Here, we have already determined that the process contained in CDO's unsolicited proposal was not a trade secret. Since the process was determined unacceptable without the additional Government-funded heating steps, we could not conclude that CDO had proprietary rights in the TF-30 blade repair process incorporated in the subsequent solicitation. Accordingly, disclosure of a process not found to be a trade secret or proprietary would not be actionable under ASPR § 9-202.2(c) which is a statement of policy on the rights to be acquired in technical data. Further, we have been cited no authority, nor have we found any, where relief has been granted for appropriation of data which has been determined not to be proprietary or a trade secret.

With regard to the request of CDO's counsel that we confirm that our findings are not binding on the Armed Services Board of Contract Appeals, we believe that this determination is for the Board.

For the reasons stated above we affirm our decision of April 15, 1977.

Deputy Comptroller General
of the United States