



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

B-177436

SEP 10 1973

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Sellers, Conner and Cuneo
Attorneys and Counselors
1625 K Street, NW
Washington, D.C. 20006

Attention: Gilbert A. Cuneo, Esquire

Gentlemen:

By letter dated March 28, 1973, and prior correspondence written on behalf of T. K. International, Incorporated (T.K.), you protest the issuance of Request for Proposals (RFP) F34601-73-R-2561, at Tinker Air Force Base, Oklahoma, on the grounds that the agency's description of its requirements violates T.K.'s proprietary rights in data it submitted to the Air Force.

For the reasons stated below, we have not concluded that the process described in the solicitation violates T.K.'s proprietary rights and therefore we find no reason to disturb the Air Force procurement.

The subject RFP, issued on October 27, 1972, solicited offers for performance of a repair process requiring the removal and replacement of the rear flange of the J-57 engine combustion chamber outer rear case. The statement of work contained in the solicitation incorporates seven essential steps in the repair process which you contend are revealed in violation of T.K.'s proprietary rights. They are as follows:

1. Material: All replacement material shall be in accordance with AMS 5653 or AMS 5648.
2. Remove aft flange by machining.
3. Manufacture replacement flange of specified material.
4. Weld on new flange by electron beam process.
5. Machine flange to specified tolerances.
6. Perform radiographic inspection of weld joint.
7. Inspect item for conformity with required dimensions.

[Protest of Air Force RFP]

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You state that all prior contracts for this repair work have been awarded to T.K. on a sole-source basis incorporating Air Force Work Specification EAMLP 68-313, November 8, 1968, as modified. You have noted that this Air Force specification was issued after the agency received (in August 1968), evaluated, and discussed Automatic Welding Company's (Automatic) proposal for rear flange replacement and that it fully incorporates the allegedly proprietary process developed by Automatic. (Automatic was a corporate predecessor to T.K.).

You contend that the T.K. process defines the only economically feasible repair procedure for the J-57 case and therefore constitutes a protectible trade secret. (citing Imperial Chemical Industries Ltd. v. National Distillers and Chemical Corp., 342 F. 2d 737 (1965)). In this connection, you note that Armed Services Procurement Regulation (ASPR) 4-106.1(e) provides for protection against the disclosure of trade secrets submitted in an unsolicited proposal. Further, you assert that prior to the issuance of the instant solicitation the Air Force recognized the confidential nature of the relationship with T.K. in connection with this repair process: (1) by stamping a work specification with a proprietary legend; (2) by attempting to negotiate the purchase of the T.K. process; and (3) by recalling pursuant to your protest letter of September 27, 1971, similar specifications issued under a solicitation in an effort to qualify additional repair procedures and sources. It is your conclusion that these events confirm that a confidential relationship between the parties was established when Automatic made its initial submission and was formally recognized and affirmed by proper contractual action prior to the formulation or issuance of any Air Force solicitation. In this connection you cite our decision B-154079, October 14, 1964, wherein we recognized that an express disclosure agreement was not a prerequisite to the existence of a confidential relationship between the Government and a contractor.

The Air Force believes that T.K. has no protectible proprietary interest in the subject repair process for two basic reasons. First, the agency contends that the broad idea or concept of rear flange replacement and the essential steps in the replacement process were conceived and developed by Air Force personnel prior to Automatic's initial disclosure of its process to the agency. Second, in the Air Force's view such disclosures as were made to that agency were unrestricted disclosures and therefore cannot form the basis for a claim of protectible proprietary interest.

With respect to the Air Force's contention that it had independently developed the essentials of the J-57 repair process, it is reported that in April 1966 a deficiency report was prepared which described the defective condition of the outer rear case flange and recommended that "consideration be given to procurement and replacement of the aft section of the case." According to the Air Force this indicates that agency personnel had developed the basic form of the process (removal of the old flange and its replacement) nearly two years before the initial Automatic submissions.

Furthermore, the agency cites an evaluation report dated September 12, 1966, which indicates that the replacement flange would have to be welded in place and then machined. This report also refers to "special fixtures" and "extensive machinery" which the Air Force alleges refers to the process of milling the repaired area to the required tolerances.

In addition, the Air Force points to a Value Engineering Change Proposal (VECP) submitted by North American Aviation in February 1967, which describes a similar repair process and refers to an additional element of the disputed process, that is, the material from which the replacement flange is to be fabricated. While this VECP used tungsten gas welding as opposed to the electron beam welding, it was rejected by the Air Force because it did not restore the case to a "like new" condition and it was not considered economically feasible.

Another document cited by the Air Force in an agency memo dated July 9, 1968. This document refers to a repair process involving the electron beam welding of a replacement flange and indicates the necessity for a dimensional inspection to certain sketches. This, the Air Force believes, illustrates the fact that the agency independently conceived of the idea of using this type of welding in the process. Moreover, the Air Force points out that an Automatic letter dated August 23, 1963, evidences that the company learned of the necessity for complete replacement of the aft end of the case from Air Force personnel on July 17, 1963. We are also referred to a document dated September 11, 1963, in response to the above-cited July 9 memo which indicates that a prototype repair was accomplished on two sample cases using replacement flanges obtained from cases with defects in other areas. The replacements were welded to serviceable case bodies using the electron beam process. (This report notes,

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however, that the resulting outside diameter was too small and had to be resized.) In addition, the inspection results given in a laboratory report dated August 29, 1958, indicate that the weld area was inspected by using ultrasonic and X-rays (radiographic inspection).

Our attention is also directed to a series of correspondence beginning with an Air Force letter dated May 29, 1958, to Pratt & Whitney wherein the concept of fabricating a new replacement flange is discussed.

Based on the above-cited evidence and the Air Force's view that the radiographic inspection process as well as many of the other steps involve procedures which by 1958 were general shop practices, it is that agency's opinion that the T.K. process is not unique and not subject to protection as a trade secret. Also, the Air Force states that the original Automatic process was ineligible for proprietary protection because the process lacked certain required procedures, such as reforming and resizing, and heat treating, without which the repair cannot be successfully accomplished.

You disagree with the Air Force's conclusion in this matter since you believe that none of the various documents cited by the Air Force evidences the existence of a successful repair process. In this regard you note that although some of the elements of T.K.'s process may have been known, a workable repair process was not developed until the issuance of Air Force work specification, GS-313, dated November 8, 1958. It is your position that this specification was not developed independently by the Air Force, but it was developed from Automatic's unsolicited proposal which was submitted more than two months before the Air Force specification was issued.

You support this position by noting the similarity between the Air Force specification and the Automatic process. You argue that even if the Air Force was cognizant of all the elements of the repair process the fact that it had not developed a workable repair process prior to that agency's receipt of the Automatic unsolicited proposal refutes the Air Force position. In support of this position you cite Forest Laboratories, Inc. v. Formulation, Inc., 899 F. Supp. 202 (D.D. Minn. 1975) and other cases which hold that a protectible trade secret may consist of a combination of common commercially available elements as long as that combination produces a result not before achieved. Accordingly, it is your conclusion that the similarity

between the T.K. and Air Force processes along with the fact that the agency had not, prior to November 1969, developed a feasible repair method results in the presumption that the Air Force did, in fact, adopt and use T.K.'s proprietary process.

Although the record appears to substantiate your position that the Air Force had not accomplished the repair in a completely satisfactory manner prior to the submission of the Automatic proposal it is also evident that the essential elements of the process had by that time been developed by the Air Force. We are in agreement with the principle that a trade secret need not consist of unique elements as long as the combination of elements is unique. However, in this case, since all of the steps appear to have been previously and independently developed by the Air Force and since the operation sequence appears to have been in large part determined by normal shop practice (i.e. the old flange must be removed before a replacement can be installed; dimensions are best brought into tolerance after welding) we are unable to conclude that the subject repair process may be considered to be proprietary to T.K. Even assuming that the nature of the process is such as to merit protection as a trade secret, it is elemental that a person is not precluded from using such a process if he comes by it honestly, such as, by independent development. See statement, Forts, ¶ 757. In our view the fact that T.K. may have been the first to successfully implement the process does not necessarily prove that it first developed the process. Successful implementation may result from the employment of skilled personnel to perform the steps rather than from the intellectual development of the steps themselves. Also, we do not agree with your contention that the similarity of the Automatic repair process to that contained in the later Air Force work specification establishes that the agency adopted the Automatic process, since the record shows that the Air Force also was actively engaged in developing a repair process when Automatic submitted its process.

Although the Air Force work statement dated February 18, 1970, covering the repair of the J57 combustion chamber outer rear case, which you have submitted is stamped "PROPRIETARY", we do not believe this establishes Air Force recognition of T.K.'s proprietary rights to the repair process. In this connection, the Air Force reports that the initial Automatic repair process was submitted to the Air Force without a proprietary legend or any written indication that the material should be treated as proprietary. In such instances,

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ASPR 4-106.1(a)(4) provides that unsolicited proposals which are submitted without restrictive legend are to be marked by the agency and its contents not disclosed or used for any purpose other than the proposal's evaluation. It must be pointed out, however, that the ASPR notice specifies that it should not be construed as to impose any liability upon the Government for disclosure of the proposal, and that it does not limit the Government's right to use information contained in the proposal if it is obtainable from another source without restriction. Based on the record, we cannot conclude that the subject repair process was not independently developed by the Air Force.

Concerning the sole-source contracts awarded to T.K. for J-57 repairs we are informed that four sole-source awards were justified because of urgency in three cases and because of a possible interruption of an adequate flow of equipment in the other case. It is by no means certain that these awards were prompted by an Air Force recognition of T.K.'s alleged proprietary rights.

Likewise, it appears that although the Air Force withdrew certain information as a result of T.K.'s protest letter of September 9, 1971, the agency specifically advised that its review of the matter indicated that the data contained in its own independently developed general work and qualification specification did not infringe upon T.K.'s proprietary data. It is apparent, therefore, that the Air Force did not intend to create the impression that it would recognize the alleged proprietary nature of the T.K. process. Similarly we do not consider the discussions held on December 19, 1970, concerning the possible purchase by the Air Force of the T.K. process to be persuasive because the record indicates that the subject was raised only once by an Air Force buyer and no actual offer was made.

Accordingly, we do not believe that the evidence you have submitted affords an adequate basis for this Office to disturb a competitive procurement. See B-176764, May 14, 1973; 52 Comp. Gen. _____. Therefore, your protest must be denied.

Sincerely yours,

Paul G. Deubling

For the Comptroller General
of the United States

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