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

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B-174866

December 4, 1972

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AIR MAIL

Lockheed Propulsion Company
P. O. Box 111
Redlands, California 92373

Attention: A. E. Wehde, Esq.
Division Counsel

Gentlemen:

This is in reply to your letter of December 24, 1971, and subsequent correspondence, protesting the release to the Thiokol Corporation of the end formulas for the liner, insulation and adhesive materials used in the Short Range Attack Missile (SRAM) rocket motor which, you contend, include certain precursor formulas proprietary to Lockheed.

The prime Air Force contract for the design, development, test and evaluation (DDT&E) of the SRAM system program is with the Boeing Company and the record shows that on November 7, 1966, Boeing placed a purchase order with Lockheed for the DDT&E of the SRAM propulsion subsystem. On November 15, 1971, the Air Force entered into a supplemental agreement to the SRAM production contract with Boeing for the purpose of developing a second source subcontractor for the SRAM propulsion subsystem. The Thiokol Chemical Corporation was selected as the second source subcontractor, and has been provided with the end formulas for the SRAM liner, insulation and adhesive. Thiokol has commenced performance of its contract. You ask that it be ordered that use of the end formulas on present and future procurements is prohibited pending an equitable settlement with your company.

Essentially, you have raised two main issues which, we believe, are decisive of your protest. First, you contend that the disputed data for the end formulas was not specified for delivery under the Boeing and Lockheed contracts and, in accordance

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with the contract data provisions, the Government had no right to have this data furnished to it. Second, it is your position that even if the data on the end formulas had been specified for delivery, the precursor formulas are the basic formulas used in the manufacture of the liner, insulation and adhesive, and were developed entirely at Lockheed's expense prior to the SRAM propulsion subcontract. You contend that in any event, pursuant to the contracts' Rights in Technical Data clause, the Government is entitled to unlimited rights in only the Government-funded modifications which were made to the precursor formulas during the performance of the SRAM subcontract.

We have held that in the interest of preserving the integrity of the Government as a purchaser, and of avoiding possible legal liability, the Government should recognize an individual's proprietary rights to information and should not disclose or use such information for procurement purposes unless it acquires the right to do so. 42 Comp. Gen. 346, 354 (1963). In the present case the Government permitted the release of the formulas to Thiokol as well as the formulation of contractual obligations with that company. While this matter was not brought to our attention until after the end formulas were released and Thiokol had been awarded a contract, we note that you sought to supress the use of those formulas by raising the matter directly with the Air Force and Boeing after learning of their positions.

The Rights in Technical Data clause incorporated in both the prime contract and the SRAM motor subcontract defines technical data, in part, as that "which are specified to be delivered pursuant to this contract." It is your position that the data delivery requirements in the contracts were not sufficiently specific to require delivery of the contested end formulas. On the other hand, the Air Force contends that the data involved in the end formulas was sufficiently specified in the contracts and, in any event, that the Government's rights in material furnished pursuant to an inadequate identification of that and other necessary material are not affected by the inadequacy of the data description documents, since the sole criteria for determining the extent of data rights is the "private expense" policy of the Department of Defense (DOD) which is reflected in the following provisions of paragraph (b)

of the Rights in Technical Data clause:

"(b) Government Rights

(1) The Government shall have unlimited rights in:

(i) technical data resulting directly from performance of experimental, developmental or research work which was specified as an element of performance in this or any other Government contract or subcontract.

(ii) technical data necessary to enable manufacture of end-items, components and modifications, or to enable the performance of processes, when the end-items, components, modifications or processes have been, or are being, developed under this or any other Government contract or subcontract in which experimental, developmental or research work is, or was specified as an element of contract performance, except technical data pertaining to items, components or processes developed at private expense."

The Air Force reports that in development contracts for large systems such as SRAM, piece-by-piece calls for data have not been viewed as necessary for compliance with the "specified to be delivered" provision of the data clause. The data requested to be furnished under a DOD contract is identified on DOD Form 1423, entitled "Contractor Data Requirement List," which sets forth various categories or items of data. The SRAM data items called for on DD Form 1423, that are pertinent to this protest, include the requirements to furnish data of contractor's "Materials and Process Specifications" (item A046) and of contractor's "Materials and Processes R&D [research and development] report" (item A151). The prime contract further provides (on AFLC/AFSC Form 9) that the data to be submitted should include specifications, standards, reports and other engineering documentation resulting directly from the performance of research work under the contracts and

subcontracts thereunder. Also, the Lockheed subcontract provides that "a complete data package should be prepared (or compiled from existing data) consisting of drawings, specifications, standards, reports, lists and other engineering documentation which resulted directly from the performance of experimental, developmental or research work under the contract."

While data requirements are broadly stated in the SRAM prime contract and subcontract, such broad statements of data requirements are reported to be customary in defense contracting. It is believed, particularly because of your experience with similar language in performing a series of Government contracts for exploratory development of pulse type motors antedating the SRAM, that you were not misled as to what was intended to be encompassed by such terms as "materials and process specifications" and "materials and process research and development." Moreover, the record does not show any instance in which you questioned the sufficiency of the data call at, or before, the time you furnished data pertaining to the end formulas for the liner, adhesive and insulation. Accordingly, we agree with the Air Force that the data provisions of the contracts were sufficient to require delivery of the end formulas, and therefore we see no need to consider further whether an inadequate call for the data would have affected the Government's rights to the end formulas.

You argue at considerable length that the end formulas for SRAM liner, adhesive and insulation are basically the precursor formulas developed at your own expense and, under paragraph (b)(1)(ii) of the Rights in Technical Data clause, quoted above, the Government is entitled, at most, to unlimited rights only in the Government-funded modifications to those precursor formulas, which you believe are "finite and easily discernable." You state that the end formulas were consistently marked with a proprietary legend. Moreover, you feel it can be established that the precursor formulas were developed at your expense through a review of your accounting records and the statements submitted by the individual employees who actually created the precursor formulas.

While the correspondence submitted by your firm and the Air Force presents several complex arguments in support of the disparate positions taken, we are of the view that the principal question for

consideration here is whether the precursor formulas constitute data on the SRAM liner, adhesive and insulation, or components thereof, to which the Government would be entitled to only limited rights under the exception in paragraph (b)(1)(ii) of the data clause.

In reviewing the above-quoted data clause provisions, we believe it is significant, as both your firm and the Air Force have suggested, to consider the official interpretation given those provisions by responsible DOD officials at the time this clause was established. The DOD position has been stated to be 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. The rights will not be allocated on an investment percentage basis. The government will get 100 percent unlimited rights, except for individual components which were developed completely at private expense. Thus, if a firm has partially developed an item, it must decide whether it wants to sell all the rights to the government in return for government funds for completion or whether it wants to complete the item at its own expense and protect its proprietary data. On the other hand, if the government finances merely an improvement to a privately developed item, the government would get unlimited rights in the improvement or modification but only limited rights in the basic item." Hinricks, Proprietary Data and Trade Secrets under Department of Defense Contracts, 36 Mil L.R. 61, 76.

Thus, we are of the view that for the Government to obtain only limited rights in the end formulas, or the precursor formulas which may have been developed entirely at private expense, the precursor formulas must be recognizable as the basic end formulas for the SRAM liner, adhesive and insulation materials or as components of the end formulas.

On the basis of the analyses and opinions of its technical advisors the Air Force has taken the position that the precursor

formulas are not recognizable as the basic end formulas or as components of the end formulas. Specifically, it is reported that there are significant differences in the composition of the end formulas and the precursor formulas in that certain ingredients present in the precursor formulas are not present in the end formulas, and ingredients present in the end formulas are not present in the earlier formulas. Furthermore, the weight percentages of the common ingredients vary as between the end formulas and the earlier formulas. The existence of a number of common ingredients in the end and earlier formulas is felt to be of no consequence since other commercially available compounds all have certain basic ingredients in common which persons knowledgeable in the field can readily combine with other materials to achieve desired end products. The Air Force also argues that the efforts expended by your firm in developing the end formulas for the SRAM insulation, liner and adhesive materials were massive, as documented in your claim for equitable adjustment of that contract price. These efforts, the Air Force contends, justify the conclusion that wholly new and independent end formulas were developed under the SRAM contract and that the end formulas were not just routine extensions of the earlier formulas. (In this connection, we note that portions of your claim for equitable adjustment submitted here with the Air Force report, a copy of which has been made available to you, indicate research and exploratory development efforts by your firm of considerable magnitude in arriving at satisfactory end formulas for SRAM insulation, liner and adhesive materials.)

From our review of the record, we believe there is substantial support for the Air Force position that the precursor formulas should not be regarded as comprising the basic end formulas for the SRAM insulation, liner and adhesive materials or components thereof. Since the significance of any commonality in the formulas is a matter involving technical expertise and consideration, and since we cannot hold that the determinations of the Air Force technicians in such respect were arbitrarily or capriciously made, we do not believe that an adequate showing has been made for this Office to reject the agency views in this matter.

Since we are not persuaded that the precursor formulas should be recognized either as constituting the basic end formulas for the SRAM insulation, liner and adhesive materials, or components thereof, the question of whether the precursor formulas were privately developed is considered to be academic.

In view of the foregoing we cannot accept your contention that the Air Force has released technical data to which it had acquired only limited rights, and your protest is therefore denied.

Very truly yours,

R.F.KELLER

[Deputy Comptroller General
of the United States