12535 PR-E

DECISION

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

[Protest of Coast Guard's Proposed Procedure for Procurement of Transmitting Sets]

FILE: B-194986 DATE: January 15, 1980

MATTER OF: Megapulse, Inc. DLG03617

DIGEST:

AG C00164

1. Coast Guard's right to use and disclose certain data--delivered to it under four contracts with protester--in connection with proposed competitive procurement must be determined in first instance under provisions of prior contracts which indicate that (1) data first produced under contracts was Government's, (2) unrestricted data delivered under contracts could be used and disclosed by Government, and (3) only properly labeled data developed at private expense could be delivered with limited rights.

2. To determine whether properly labeled data was developed at private expense, permitting delivery with limited rights in accordance with contractual provisions, GAO will apply this test: when data is not severable and Government funds significant portion of development, Government is entitled to unlimited rights in whole data; and when data is severable, Government is entitled to only limited rights in discrete components developed solely at private expense. Here, GAO concludes that protester has not met burden of showing that agency's technical opinion and judgment--that no severable basic technology was developed at private expense--is not reasonably based.

3. Protester contends that it delivered proprietary data to agency based on Government's special confidential relationship with protester and oral assurances by cognizant Government officials that such data would be protected. Agency reports

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no awareness of assurances aside from contractual provisions. GAO must deny this basis of protest since (1) protester has provided no direct evidence that cognizant Government personnel ever made any assurances, and (2) contracts tend to show that agency intended to use and disclose delivered data in competitive procurements.

4. Government is not estopped to deny existence of implied contract where protester cannot establish that Government knew all facts. Here record shows that agency took no position on what data was subject to restrictive use and disclosure and Government personnel did not examine data to ascertain appropriateness of protection prior to this recent controversy.

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Megapulse, Inc., protests the Coast Guard's proposed procedure for the procurement of AN/FPN-64(V) Loran-C transmitting sets. In particular, the Coast Guard's plan to release certain data as part of the equipment specification. Megapulse contends that the data is proprietary to it and may not be released without requiring that those receiving the data enter into license agreements with Megapulse prior to receiving the data. The Coast Guard contends that provisions of prior contracts between Megapulse and the Government, and events, which took place during their performance, indicate that the Coast Guard has the unlimited right to use the data and that Megapulse is obligated to prove that the data is entitled to "limited-rights" protection under applicable contract clauses, but has made no attempt to do so.

Megapulse has also filed a complaint in the United States District Court for the District of Columbia in this matter. The court has approved an agreement between the parties that the data will not be released until our Office decides the protest or until January 15, 1980, whichever is earlier. In the circumstances, we consider it appropriate under 4 C.F.R. § 2.10 (1979) to render a decision.

I. BACKGROUND

The protested procurement is planned to be a competitive, multi-year procurement of approximately 20 Loran-C transmitters. The Coast Guard views it as the logical last step in a development process to prove the feasibility of producing a higher-power, solid-state Loran transmitter, and to provide the Coast Guard with a specification, drawings, and other data from which such transmitters could be manufactured. A series of contracts between the Coast Guard and Megapulse extending from 1970 to the present are involved.

A. The 1970 Contract

The first of these contracts (No. DOT-CG-10736-A, signed in August 1970) was a cost-plus-fixed-fee (CPFF) contract and required that Megapulse "construct and test a demonstration model Loran-C Transmitter Unit, demonstrating the feasibility of using the Megapulse 'Sequential Inverter' technique for generating and transmitting Loran-C pulses." The contract required Megapulse to deliver a final report covering test results, a study recommending automatic control methods for a transmitter, and an analysis of modifications to the demonstration model necessary to meet the Loran-C specifications.

The contract provided that the technical data, basic or derived, which was to be submitted in the report was based on several listed patents and patent applications; the final sentence of the applicable contract provision stated:

> "While the U.S. Coast Guard will be granted rights to data relating to the demonstration model transmitter to be constructed under the proposed contract, the use of the same will be subject to the above patent rights under which no license is hereby granted at this time other than freely to use the demonstration model transmitter."

Another clause, entitled "RIGHTS IN TECHNICAL DATA-SPECIFIC ACQUISITION (1964 May)," gave the Government the right to "* * * duplicate, use and disclose in any manner and for any purpose whatsoever, and have others do so, all or any part of the technical data delivered by the Contractor to the Government under this contract."

B. The January 1971 Contract

The second contract (No. DOT-CG-12535-A, signed in January 1971) was also a CPFF contract and required Megapulse to "conduct further design and development of specific areas uncovered in the demonstration

Loran-C model transmitter delivered under [the 1970 contract]." There were seven specific items required to be accomplished, ending with the delivery of a final report covering the results of all work under the contract. This contract also contained an article entitled "PREDETERMINATION OF UNLIMITED RIGHTS IN TECHNICAL DATA SHALL BE ACQUIRED IN UNLIMITED RIGHTS" [sic] and referred to "[a]ll data, basic or derived which is submitted in the report."

C. The April 1971 Contract

The third contract was a CPFF letter contract (dated April 15, 1971, No. DOT-CG-10258-A) and was superseded by a definitized contract in September 1971. The basic contract requirement was the delivery of an engineering model solid-state Loran-C transmitter complete with software and engineering drawings. This contract contained two provisions related to data rights: (1) Article VI, entitled "PREDETERMINATION OF UNLIMITED RIGHTS IN TECHNICAL DATA," stated that:

> "Predetermination of Unlimited Rights in Technical Data shall be acquired in unlimited rights [sic]:
>
> > "All data, basic or derived, procedures, computer programs, which is required to be delivered under contract, including but not limited to engineering drawings, manuals, reports, and other software."

and (2) the same Rights in Technical Data-Specific Acquisition (1964 May) clause as was contained in the 1970 contract, which gave the Government the right to duplicate, use or disclose any of the technical data delivered under the contract. Modification No. 5 to this contract detailed what was to be included in the engineering drawings and sketches.

> "Engineering drawings and sketches shall provide the necessary design, engineering and manufacturing information

> to enable the procurement of an item that duplicates the physical and performance characteristics of the original. These drawings and sketches shall not provide manufacturing process information unless this information is essential to accomplish the manufacture of an identical item by other than the original source."

These three contracts seem to constitute one phase of the Megapulse and Coast Guard relationship. After this, further efforts on the engineering model transmitter (EMT) appear to have been suspended because, in Megapulse's view, the Coast Guard believed that the unit was too complex to be effectively operated and maintained during its projected life cycle by the Coast Guard personnel available for site duty.

D. The January 1975 Contract

The fourth contract was also a CPFF letter contract (No. DOT-CG-51415-A entered into on January 22, 1975), later modified, and then definitized on December 5, 1975. The contract called for the delivery of two items--a Preproduction Prototype Solid-State Loran-C Transmitter and a set of engineering drawings--to get at least one useable Loran-C transmitter and a set of drawings which could be used for a competitive procurement of additional units.

This contract was based on Megapulse's proposed transmitter configuration different from the EMT and based on the Megapulse commercial equipment configuration, termed ACCUFIX® (the R is not used hereafter). Within this new configuartion were some of the original proprietary technologies such as the Megatron pulse generator. The ACCUFIX configuration utilized half of the equipment of the EMT version to obtain the same radiated power, did not use a computer as a controller, was much less expensive, and could be maintained by low-skill site personnel. This contract contained a clause entitled "RIGHTS IN DATA," specifically drafted for that procurement. The clause defined the term "Subject Data" as "recorded information in any form,

whether or not copyrighted, that is delivered or specified to be delivered under this contract." The clause described the rights of the Government and of the contractor by first dividing the "Subject Data" into two broad categories--(1) that first produced in the performance of this contract, and (2) that not first produced under this contract. The Government acquired title to the Subject Data in the first category. Subject Data not first produced under the contract remained the property of the contractor but, with one exception, the Government acquired a license to use the data and to authorize others to do so--"unlimited" rights. The exception permitted Subject Data to be delivered with only "limited rights" if the data pertained to "items, components, or processes developed at private expense, provided that each piece of data to which limited rights are being asserted is identified (e.g. by circling, or underlining, or a note) and marked with [a legend which is set out in the clause]." The clause also provides that:

> "No legend shall be marked on, nor shall any limitations on rights of use be asserted as to, any data which the Contractor or subcontractor has previously delivered to the Government without restriction. The limited rights provided for by this paragraph shall not impair the rights of the Government to use similar or identical data acquired from other sources."

Finally, the clause obligated the contractor to negotiate and issue royalty-free licenses to others designated by the Government. The licenses are required to cover the use of the "limited rights" data for the production, sale and use of Loran-C transmitters, auxiliary equipment and spare and replacement parts.

Megapulse made numerous submissions of data as required by the contract, including the November 1977 submission of the required engineering drawings, approximately 20 percent of which contained a legend reading "Limited Rights Data." No independent review

of Megapulse's claims of limited rights data was attempted at that time. Megapulse and the Coast Guard negotiated a license agreement to be issued by Megapulse directly to prospective offerors; the Coast Guard was not to be a party to the license. The Coast Guard, by letter dated July 27, 1978, accepted the final terms of the negotiated license but made the following statement to Megapulse:

> "The Coast Guard acknowledges that Megapulse claims that the data listed in the license * * * is being made available only with 'limited rights' * * *. This acknowledgement, however, does not limit the Government's right to use or disclose data (i) that does not meet those definitions, * * * [or] (iii) that is already available to the Government on an unrestriced basis or is the property of the Government * * *."

II. THE PROBLEM

In August 1978, the Coast Guard announced the competitive procurement of Loran-C transmitters and notified those interested that they would be required to execute licenses with Megapulse before receiving the data package. Only one prospective competitor executed the required license. Several others indicated that they found the license unduly restrictive and they would not participate in the procurement under those conditions. They questioned whether the listed data was legitimately entitled to limited rights protection. Therefore, the Coast Guard decided to perform its own evaluation of the limited rights claims since the result could drastically affect the amount of competition.

Accordingly, the contracting officer informed Megapulse that the Coast Guard was reviewing the listed data to determine its actual proprietary status and requested specific justification on each item listed. Megapulse objected to the review and advised the Coast Guard that the Coast Guard had the burden to demonstrate which of the items was not entitled to the limited rights.

The Coast Guard tried and failed to negotiate changes in the license to satisfy Megapulse and prospective competitors, thus continuing the need to resolve the limited rights claims. An informal, preliminary study was made by Coast Guard technical staff and it was their opinion that it was unlikely that significant portions of the "items, components, and processess" involved could be said to have been developed entirely at Megapulse's expense but Megapulse should be allowed to present information to prove its claim. Therefore, Megapulse was offered another opportunity to mark the specific portions of data as required by the Rights in Data clause. In reply, Megapulse marked the data by stamping the entire legend set out in the Rights in Data clause, thus indicating that Megapulse was claiming every bit of information on every item of data on about 10 percent of 4,000 drawings.

For the third time, the Coast Guard wrote to Megapulse emphasizing that identification (by circling, by underlining, or by a note) of the precise portions of protested data on the listed documents was necessary. Megapulse was asked to provide at least three properly marked samples. In response, Megapulse placed a line on the drawings encircling virtually all the data on the drawings. The Coast Guard technical staff reviewed the samples beginning with the first drawing listed, the Tailbiter Schematic. The basis for Megapulse's limited rights claim was:

> "This circuit was first designed, constructed and embodied in Megapulse ACCUFIX equipment, all on Megapulse's own funds, and details thereof have been acknowledged as proprietary Limited Rights Data by Megapulse's ACCUFIX commercial customers with agreement to hold same confidential."

The Coast Guard, therefore, compared the disputed circuit with the ACCUFIX tailbiter circuit and concluded that there were few similarities between the two circuits. Thus, in the Coast Guard's view, a great deal of design work had been accomplished to get from

the ACCUFIX tailbiter to the form of the circuit shown in the delivered drawing and most or all of that work must have been accomplished under the January 1975 contract. In addition, the Coast Guard notes that the ACCUFIX tailbiter schematic had been submitted to the Coast Guard in 1976 without any restricted data marking. A less time-consuming review was performed on each of the other sample drawings and the Coast Guard found that none of the drawings met all the criteria of the Rights in Data clause either because the devices depicted had been at least partially or wholly designed under the January 1975 contract or because the data had previously been submitted without restriction.

Additional submissions of marked data showed that in approximately three-fourths of the submissions Megapulse had merely taken the documents and circled all of the information in them and in the other submissions excluded only data of a trivial nature. This strengthened the Coast Guard's earlier opinion that it was unlikely that Megapulse's claims of limited rights data were legitimate. Accordingly, the Coast Guard decided to proceed with the procurement without requiring licenses of the prospective competitors.

III. Summary of Megapulse's Position

Megapulse requests that the Coast Guard honor its contractual commitments and assurances to protect the limited rights data and other propreitary data.

Megapulse also requests that the Coast Guard base its proposed solicitation on the restrictions agreed upon in the contracts between the Coast Guard and Megapulse and in the negotiated limited data rights license. This would permit the procurement to proceed expeditiously and yet protect Megapulse's proprietary designs, manufacturing formulations, processes, and other limited rights and proprietary data--all developed at Megapulse's sole expense prior to the entry into contracts with the Government for transmitter sets and associated equipment.

Specifically, Megapulse first asserts that our Office need not determine whether the data is proprietary because:

(1) Megapulse warrants its proprietary data. All that it warrants as such was developed with its own funds. None of the contracts between the Coast Guard and Megapulse was in any way for the development of basic technology - and indeed none was developed under the contracts.

(2) The Coast Guard recognized all of Megapulse's proprietary data throughout its long relationship. Megapulse does not state that by so doing the Coast Guard joins Megapulse in this warranty.

(3) Throughout this entire period no competitor contested Megapulse's position with regard to its proprietary data; and

(4) If any competitor believes that the data is not proprietary, then it need not honor the license agreement.

Secondly, Megapulse states that it would not have entered into any negotiations or contracts for any work to be done for the Government if the Coast Guard had indicated in any way during the past 8 years that it would not honor its commitments. Thirdly, for the past 8 years, the Coast Guard acted with the understanding that the data was proprietary and limited as evidenced by the many extensive negotiations with senior contract, technical, and legal personnel of the Coast Guard regarding this issue; by the unique and special contract terms that resulted from these negotiations; by the actions of the contracting officer in requesting Megapulse's permission to distribute such data; and by the Coast Guard's continued protection of the disputed data. Equity in these circumstances would demand that the Coast Guard be estopped from reversing its longstanding assurances and commitments.

Finally, Megapulse does not seek to prevent the procurement of items by fair competition with other companies and Megapulse does not seek a sole-source position from the Government on the basis of its

proprietary data. Megapulse makes its data readily available to the Government for its own use to procure from other sources; however, Megapulse does desire to protect its proprietary information from use by competitors in the commercial market. Megapulse sees no reason why the Coast Guard now after 8 years of contractual relations which recognized these mutual understandings on the use of such data is changing its position to the benefit of Megapulse's competitors.

IV. SUMMARY OF THE COAST GUARD'S POSITION

The Coast Guard plans to use only data delivered under earlier contracts. The use of such data is governed by the data clauses in those contracts. Only the Rights in Data clause in the January 1975 contract provides for anything less than the unlimited right to use data delivered under the contracts. That clause provides limited rights treatment only for data meeting certain specific criteria. Unless an item of data meets those criteria, its use by the Government may not be restricted. Therefore, in order to restrict the use of any data it must be demonstrated that the data meet the limited rights criteria of the clause.

It is the Coast Guard's position that Megapulse bears the burden of demonstrating that the data which it claims is subject to limited rights actually meet the criteria of the clause. Before the Coast Guard imposes on prospective offerors the requirement to obtain data licenses, it should be reasonably sure that the data to be licensed is legitimately limited rights data. If Megapulse had been able to demonstrate the contractual basis for its limited rights claims, the Coast Guard would certainly have proceeded with the procurement as originally planned by requiring licenses even at the expense of reduced competition. Absent such a demonstration by Megapulse, however, the Coast Guard does not believe that needlessly restricting competition is in the best interests of the Government.

Specifically, the Coast Guard first contends that since 1970 many significant technical changes occurred as the system progressed through Coast Guard-funded development contracts. As presently configured, the

differences between the current FPN-64 system and the 1970 demonstration model, and between the FPN-64 and the ACCUFIX system, far outweigh the similarities. It is clear from the funding history of this program that the changes and improvements made in the course of developing the solid-state Loran-C transmitter were funded largely or entirely through the Coast Guard contracts. For example, the basic technologies for such major items as the tailbiter, the PATCO (Pulse Amplitude Timing Control), and the voltage regulators were not developed until after 1970 and were apparently not even envisioned by Megapulse in 1970. Further, the half cycle generator (HCG) has undergone numerous significant technical changes from the model demonstrated in 1970 to the model used in the FPN-64 transmitter. Moreover, even if Megapulse can prove that ACCUFIX was developed at its own expense, the dispute is not resolved, since the Government acquired unlimited rights in much of the ACCUFIX data as well.

The Coast Guard argues that, citing 49 Comp. Gen. 124 (1969), for a contractor to retain limited rights there must not have been any Government funds used in the development of the data:

> "* * * Where there is a mixture of private and Government funds, the developed data cannot be said to have been developed at private expense. The rights will not be allocated on an investment percentage basis and the Government will get unlimited rights to such data. * * *"

The Coast Guard also cites our decision at 52 Comp. Gen. 312 (1972) for the same proposition. Thus, in order to sustain its limited rights claims, the Coast Guard believes that Megapulse must be able to demonstrate that no Government funds have gone into the data in question; in view of the development efforts, the funding history of this program and the lack of any meaningful response to identify proprietary data, the Coast Guard concludes that the data was not developed completely at Megapulse's expense.

Secondly, the Coast Guard argues that it acquired (1) unlimited rights in the data contained in the final report submitted under the 1970 contract; (2) unlimited rights in all data, basic or derived, which was submitted under Task V of the January 1971 contract; (3) unlimited rights under the April 1971 contract to all data, basic or derived, which was required to be delivered including engineering drawings, manuals, reports and other software; and (4) under the 1975 contract, title to data first produced under the contract and unlimited rights in all other data delivered under the contract, except data pertaining to items developed at private expense. The Coast Guard concludes that it has acquired a substantial interest in the data and is attempting to exercise its rights. The Coast Guard has agreed to protect data which is legitimately proprietary but such data does not exist here.

V. GAO's ANALYSIS

A. What Did the Coast Guard Buy Under the Four Contracts?

The first contract (the 1970 contract) for a total amount of about $81,000 was, in our view, essentially for the construction and testing of a demonstration model transmitter based on Megapulse's then existing technology. However, in Megapulse's final report, it was required to recommend modifications to the model to meet power output, spectrum, and automatic control of pulse timing (envelope shape and phase modulation) specifications. The final report was to include the test results and the results of a study concerning automatic control of the transmitter. The Coast Guard clearly bought (1) unlimited rights in the basic and derived data contained in the final report, and (2) Megapulse's ideas for transmitter modifications to meet specifications in three areas. The record does not reflect the allocation of contract price between any of the subitems so it is difficult to estimate the relative price of Megapulse's ideas as compared to its construction and testing efforts. It is also difficult to estimate the precise value of those ideas in the overall development of the transmitter but obviously

the ideas were of some value. The Coast Guard also acquired the right to use the demonstration model transmitter.

The second contract (the January 1971 contract) for a total amount of about $24,000 was, in our view, essentially for further design and development of specific areas identified from the results of the first contract, specifically to study the output circuit configuration including the megatron units' output turns ratios, harmonic filtering and antenna coupling of the transmitter and to determine the optimum mechanical and electrical design of a high power megatron unit. Again, Megapulse was required to deliver a final report concerning the above items and the basic and derived data of the report was purchased by the Government with unlimited rights.

The third contract (the April 1971 contract) for a total amount of about $1,734,000 was, in our view, essentially for an engineering model transmitter (previously referred to as EMT) and complete, detailed engineering drawings with design and manufacturing information to enable the procurement without additional design effort or recourse to the original design activity. Clearly, the purpose of this sole-source contract was to enable the Coast Guard to conduct competitive follow-on procurements by procuring adequate data from Megapulse. The contract provided that all data delivered under the contract (including engineering drawings, software, reports, and manuals) come to the Government with unlimited rights.

The patent license agreement option contained in this contract--permitting the Government to obtain nontransferable licenses to one patent and two invention disclosures--was, in Megapulse's view, its protection against disclosure of its basic megatron technology outside the Government. The licensing aspect, as Megapulse views it, and the clear purpose of the procurement are mutually exclusive in our view. It appears that a competitive procurement would be impossible without disclosure of all the data delivered under the contract and, if Megapulse

believed that it could control disclosure of some essential data through the licensing aspect, that was not the Coast Guard's apparent understanding.

We view the interrelation of the licensing aspect and the overall purpose of the contract as the Coast Guard does, namely: the licensing agreement pertained specifically to patent rights and other provisions of the contract pertained to data rights acquired under the contract. If there were areas of overlap between the use of data delivered under the contract and the use of information subject to patents in the licensing clause, we would interpret the latent conflict in favor of the clear, specific, and express intent of the contract which would require delivery of complete data essential for a competitive procurement with unlimited rights. If there are areas of overlap, a court may conclude that Megapulse constructively licensed the disputed areas for the Coast Guard's intended use. Further, Megapulse has not made a convincing showing that, through the licensing provision, it secured the Coast Guard's sober agreement to procure unlimited rights in all but a small portion of the essential data necessary for a competitive procurement, thereby rendering useless the entire procurement.

The instant situation is unlike the one in our decision at 46 Comp. Gen. 679 (B-158964, March 2, 1967) relied on by Megapulse. There contract provisions also conflicted regarding unrestricted data rights and restricted patent rights and there were areas of overlap in the data. We considered the intent of the parties when the contract was executed and concluded that the Government did not acquire data rights without completion of Phase IV of the contract, which the Government expressly terminated due to dissatisfaction with the contractor's performance. Here we believe that the contract was intended to provide the Coast Guard with the necessary data upon completion and final delivery.

The fourth sole-source contract (the January 1975 contract) for a total amount of about $4,100,000 was, in our view, for a preproduction prototype transmitter

and engineering drawings to form the basis for a follow-on fully competitive procurement. Under the Rights in Data clause, data first produced under the contract became the sole property of the Government. At a minimum, we believe that the data associated with the requirement that Megapulse design a two-fan HCG (half cycle generator) would be data first produced under the contract. All other "subject data" delivered under the contract came to the Government with limited rights; however, data previously delivered to the Government with unlimited rights could not now be classified as limited rights data. In part, the clause stated:

> "Except for 'Subject Data' delivered with limited rights as set out below, the Contractor * * * agrees to grant * * * to the Government * * * [a] license * * * (i) to * * * use * * * all 'Subject Data' not first produced in the performance of this Contract * * * but which is incorporated in the work furnished under this Contract * * * and (ii) to authorize others to do so. * * *"

The clause also stated that subject data pertaining to items, components, or processes developed at private expense must be identified (1) by circling, underlining, or a note, and (2) by a specified legend. Accordingly, all data delivered under the contract but improperly identified as contractually required came to the Government without restrictions on use and disclsoure.

Thus, only properly labeled data which was developed at private expense was within the clause's definition of limited rights data. We note that, in the Coast Guard's broad discretion concerning contract administration, it has elected to treat certain initially improperly labeled data as properly labeled data. The limited rights data may not be disclosed outside the Government without Megapulse's permission as evidenced by Megapulse's execution of a data licensing agreement with any recipient.

To summarize thus far, pursuant to the fourth contract, (1) data first produced was the Government's,

(2) data delivered under the contract but not restricted could be used and disclosed by the Government, (3) data delivered without restriction under the three prior contracts could not be limited now, and (4) only properly labeled data developed at private expense could be delivered with limited rights. We note that the term "delivered" has particular meaning here; delivered data under a contract is accompanied by specified transmittal forms to distinguish data disclosed informally or for information purposes only. Here the Coast Guard would disclose only delivered data since such data would be an adequate basis for a competitive procurement if certain delivered data was not developed at private expense.

We further note that in 41 Comp. Gen. 148 (1961) we held that even though the Government wanted a model and adequate data to conduct a competitive follow-on procurement, data delivered with restrictions permitted under the initial contract may not be used in the follow-on procurement. Accordingly, we must examine whether there was any properly labeled data developed at private expense.

B. Were There Any Items, Components, or Processes Developed at Private Expense and Delivered Under the Fourth Contract?

At the outset, we must determine what standard applies--the "mixture of funds" test advanced by the Coast Guard or the "severability" test advanced by Megapulse. In our decision at 49 Comp. Gen. 124, supra, relied on by the Coast Guard, we considered the situation in which an Air Force contractor initially could not make certain emulation programs work on its hardware, so the contractor, the hardware vendor and the Air Force jointly developed compatible emulation programs; however, subsequently, the Air Force lost confidence in the contractor and demanded all the contractor's software (programs and documentation). The contractor delivered the data with express restrictions prohibiting disclosure outside the Government. With the delivered data, the Air Force was capable of transferring the system to another contractor's hardware and the Air Force issued a solicitation for that purpose. The solicitation stated that

competitors would get the data necessary to participate in a benchmark test. The contractor protested claiming that its proprietary data would be released in connection with the benchmark and contended that at least some material part of the data was developed at its sole expense. The Air Force contended that it paid for the computer time used in the software development. We stated that where there is a mixture of private and Government funds, development is not at private expense and the Government gets unlimited rights to all the data. Further, in interpreting that contract's Rights in Data clause, we concluded that all data was first produced under the contract and became the Government's sole property.

The second decision, relied on by the Coast Guard, at 52 Comp. Gen. 312, supra, concerned the Air Force's release of certain formulas obtained from its primary subcontractor to a second-source subcontractor. The primary subcontractor protested contending that the disputed formulas were its proprietary data developed entirely at private expense and, alternately, that the Rights in Data clause entitled the Government only to Government-funded modifications to the formulas during contract performance. We first concluded that the data requirements of the subcontract, while broadly stated, were adequate to give the Government the right to the formulas. Secondly, we concluded that the Government would obtain only limited rights in end formulas developed entirely at private expense if the precursor formulas were recognizable as the basic end formulas or as components of the end formulas. Air Force technical personnel reported that neither test was passed because (1) there were significant differences between the end and precursor formulas and (2) the subcontractor expended massive efforts, as reflected in the subcontract price adjustment request, indicating that wholly new and independent end formulas were developed not just routine extensions of basic formulas. In sum, we found that an adequate showing had not been made to reject the agency's views.

Megapulse believes that those cases are distinguishable from the instant case since there the developed data was admittedly obtained through a

mixture of private and Government-furnished funds but here the basic data was not developed with Government funds; instead, the Government funds were for packaging, assembling, testing, and documenting equipment and did not in any way affect the basic fundamental technologies earlier developed by Megapulse.

Megapulse's view of this matter would be supportable if it were similar to the situation in Pioneer Parachute Co., Inc., B-190798, B-191007, June 13, 1978, 78-1 CPD 431, where the protester argued that the Air Force had unlimited data rights, permitting a competitive procurement, because Air Force personnel were involved with development of the data. The Air Force reported that its involvement was essentially monitoring and assessing performance and at no time had it assumed responsibility for development or redevelopment and design requirements of the contractor, although the Air Force financed system stability and reliability design efforts. We concluded that, while the contracts had developmental aspects, the Air Force merely funded modifications and improvements to an already developed system.

After reviewing these prior cases, it appears that the proper test to be applied here is: when the data is not severable and the Government funds a significant portion of the development, the Government is entitled to unlimited rights in the whole data; and when the data is severable, the Government is entitled to only limited rights in discrete components developed solely at private expense. With this rule in mind, we now examine Megapulse's contention that its severable basic technology is involved in the fourth contract.

First, Megapulse states that the basic technologies were all developed by the president of Megapulse, with its own money before there were any contracts with the Coast Guard or with any other agency of the Government and only the basic Megapulse processes, circuits, test procedures, and critical assembly procedures already in existence prior to such contracts are sought to be protected. In addition, Megapulse contends that its ACCUFIX transmitter contains new and novel circuits developed at its expense. Megapulse states that the

preproduction pilot transmitter delivered under the fourth contract was based largely on the design of the EMT and on Megapulse's ACCUFIX and constituted mechanical redesign of existing circuitry.

As in the case at 52 Comp. Gen. 312, technical personnel of the agency involved have reported that their examination of the best candidates for limited rights protection, in particular the ACCUFIX tailbiter circuit and the tailbiter circuit delivered under the fourth contract, contained few similarities and a great deal of design work was necessary to get from the former to the latter. The Coast Guard provided technical documentation and analysis to support its opinion and Megapulse responded with technical documentation and analysis to support its opposite view.

In specific support of the Coast Guard technical opinion, it refers to:

a. At least three engineering change orders relating to the tailbiter proposed by Megapulse and accepted by the Coast Guard during work on that contract.

b. The cost proposal submitted by Megapulse for the 51415-A (the January 1975) contract containing a specific task (No. 141-42X) for work on this item.

c. Monthly Progress Reports for December 1975 and January 1976 report on design progress.

Megapulse responds that this is a glaring example of misstating the actual facts; the tailbiter was first designed and constructed under the company-funded ACCUFIX program and, during the period from June 1974 to November 1974, the ACCUFIX tailbiter was redesigned for use in the high-power preproduction pilot transmitter--all on Megapulse's own funds. In November 1974, before the fourth contract award, component

values and semiconductors had been selected for the tailbiter and two tailbiters had been constructed and tested.

In direct conflict, the Coast Guard replies that the design of the tailbiter eventually used in the FPN-64 transmitter was not developed entirely at Megapulse's expense; indeed, unless Megapulse can demonstrate the source of the funds which went into the development of the ACCUFIX systems, it is unclear to what extent private funds were used at all. Contrary to Megapulse's view, the Coast Guard reports that the development of the FPN-64 tailbiter was not complete at the time of the proposal for the fourth contract, but continued as evidenced by Megapulse's monthly progress reports under that contract showing that significant design/development efforts were taking place at the Coast Guard expense. Thus concludes the Coast Guard, Megapulse's statements--that all of the components for the tailbiter had been selected by September 1974 and that the high-power tailbiter was developed completely at private expense--are obviously in error.

The Coast Guard also concludes that Megapulse was unwilling or unable to engage in a meaningful effort to identify any severable portion of the data which might qualify for legitimate limited rights legends.

As stated in 52 Comp. Gen. 312, in matters involving technical expertise and consideration, to prevail, a protester bears the very heavy burden of showing by clear and convincing evidence that the agency's technical opinion and judgment is not reasonably based. See, e.g., Andrulis Research Corp., B-190571, April 26, 1978, 78-1 CPD 321; 52 Comp. Gen. 773 (1973); 46 Comp. Gen. 885, 889 (1967). Here we do not believe that Megapulse has met its burden with respect to the tailbiter. Further, based on the record before us, Megapulse has not provided any basis for our Office to conclude that the Coast Guard's position on the other "best candidates" for limited rights protection is in error. We must conclude, therefore, that no severable basic technology developed at private expense was delivered

to the Coast Guard. Accordingly, we have no objection on this basis to the Coast Guard's use of delivered data in the proposed procurement.

C. Was Megapulse Given Any "Assurances" Aside From the Four Contracts that the Coast Guard Would Restrict Disclosure of the Delivered Data?

Megapulse states that it is simply asking the Coast Guard to deal with it fairly and reasonably based on the "assurances" given to Megapulse over the past 8 years. In particular, Megapulse relies on our decision at 43 Comp. Gen. 193 (1963) which concerned a situation essentially the same as the instant one, in Megapulse's view. There, the protester demanded cancellation of a solicitation disclosing its proprietary data which it argued was acquired by the Government during performance of prior contracts upon repeated assurances of a responsible procurement official that the plans would be held confidential and used for identification and cataloging purposes only. First, we concluded that all the pertinent facts and circumstances surrounding the prior circumstances should be considered to determine the rights and obligations of the parties under the three prior contracts. The first contract expressly stated that the Government did not require disclosure of proprietary data, but, after award, the Government project manager demanded repair parts drawings over the contractor's protest since the drawings contained proprietary data. The project manager gave assurances that the data would be used for the two purposes listed above and that it would not be disclosed to competitive manufacturers or used for procurement purposes; the drawings were later given to the Government based on those assurances. Responsible agency personnel advised the contractor that the project manager had the authority to speak for the Government in this matter. Two more contracts followed during which additional proprietary data came into the hands of the Government.

→ further study indicated We found that: (1) the contractor was not obligated to furnish proprietary data but did so because of Government assurances of protection; (2) the drawings were accepted with the knowledge that they were furnished

because of the Government's special confidential relationship with the contractor; and (3) the Government, therefore, could not properly use the data in the proposed procurement. Our decision was essentially based on the contractor's extensive documentation to establish the existence and scope of the assurances, the sworn affidavit of the project manager supporting the contractor's position, and express contractual provisions reflecting the Government's intent not to procure proprietary data.

Megapulse also refers to other decisions of our Office and the courts which recognize the Government's general duty to deal fairly with its contractors.

Megapulse has presented extensive argument to establish the existence and scope of "assurances" it received from the Coast Guard to protect its proprietary data. Examples follow.

> --From the outset when Commander Roland witnessed the demonstration of the laboratory model of a transmitter which incorporated two megatron units in June and July of 1970, the president of Megapulse, Dr. Johannessen, made it clear that work would be done for the Coast Guard only on the condition that the basic concepts, ideas, and technology conceived and developed by him and Megapulse would be protected. These assurances were given from the outset as evidenced by the special sentence of the first contract. Had it not been for these assurances, later reduced to writing (in the form of the Patent License Agreement Option), Megapulse would not have entered into any discussions with the Coast Guard.
>
> --It was agreed between Megapulse and the Coast Guard that any new data developed would belong to the Government and that the Government and Megapulse would negotiate the terms of a data license for the use of the background data so that other companies could

respond to the procurement. The Coast Guard knew what had been developed and agreed to the conditions imposed throughout the discussions, negotiations, and contracting.

--The traditional "patent indemnity clause" was not used in any of the contracts, deliberately, since Megapulse wished to avoid any lawsuits. It wanted its rights spelled out at the outset - clearly understood by all. The patent licensing agreement was developed by the Coast Guard to satisfy the concerns of both parties.

--Each important phase of the contractual relationship was preceded by a demonstration by Megapulse of the appropriate proprietary technology in working form developed at Megapulse's expense and documented by patents, patent disclosures, and/or patent applications. Also, each significant contractual phase was preceded by clear, unequivocal notification by Megapulse of what technologies are considered proprietary, of Megapulse's insistence on recognition of the same, and the granting of such recognition is evidenced by the inclusion of very special and unique clauses.

--The contracting officer and the Project Engineer themselves thought that everything was limited since the contracting officer requested permission to distribute the final reports on both the first two contracts even though the contract gave unlimited rights to this second contract report. Megapulse gave its permission with restrictions indicating that Megapulse was in accord with the proper dissemination of information and simply wished to restrict other use.

--In all of the communications and discussions with the Coast Guard regarding the proposed new transmitter configuration

(known both as the ACCUFIX-mode or Quad-mode configuration) Megapulse repeatedly made very clear its position regarding the proprietary nature of this new undertaking. This position is summarized in the Megapulse letter of November 20, 1973, to Captain Manning, then Chief of Electrical/Electronic Engineering, within whose responsibility the transmitter program rested.

--Megapulse's proposal resulting in the fourth contract explained the intent of the proposed patent licensing amendment: "The reason that this agreement is being made is that * * * [Megapulse] has developed, independent of the referenced and any other Government contract, a new method of generating high-powered Loran pulses. This method is not based upon nor derived from the patents, applications for patents or disclosures of inventions described as licensed patents and listed in the patent license agreement option."

--When the third contract was amended to allow for the proposed ACCUFIX tests and demonstrations, it was not done with the usual contract modification but was accomplished by a clearly designated "Supplement Agreement" - "Contract performance, terms, and conditions shall be in accordance with Megapulse proposal," which in turn designated the effort restricted and proprietary and not to be disclosed even to other Government agencies.

--During the negotiations preceding the fourth contract, Megapulse continued to insist that its proprietary position be protected in future contracts at least as well as it had been under the terms of the amended patent licensing agreement and the Coast Guard legal staff assumed the responsibility of drafting appropriate contract clauses. Because of the close

working relationship between the Coast Guard and Megapulse, many drawings were submitted (but not formally delivered) to the Coast Guard for inspection and information purposes only--but not to be given to competing companies. The Coast Guard was fully aware of this situation and, during the data license negotiations, the contracting officer agreed to have Megapulse review the completed reprocurement data package to make sure that all limited data was marked properly.

The Coast Guard reports that it is unaware of any assurances aside from those contained in the contracts.

After thoroughly considering the arguments and supporting documents supplied by Megapulse, we must conclude that the instant matter differs materially from the one at 43 Comp. Gen. 193, in that (1) Megapulse has not produced any direct evidence from cognizant Coast Guard personnel that the Coast Guard ever made assurances outside the contracts involved, and (2) from our analysis of the contracts involved, the Coast Guard intended to purchase at least unlimited rights in required Megapulse data. Megapulse notes that the Coast Guard sent representatives to the GAO conference who had no personal involvement or firsthand experience with this matter until the last few months; therefore, they cannot personally be expected to know what actually happended at various critical phases of the relationship over the past 9 or 10 years. Unlike a court or board of contract appeals, we are constrained to base our decision on the written record, which we believe does not contain the clear and convincing evidence necessary for our Office to conclude that assurances were given. Accordingly, we have no basis to conclude that there were Coast Guard assurances which would compel protection of the delivered data.

D. Is the Coast Guard Estopped to Deny its Agreement to Protect Megapulse's Data from Unrestricted Disclosure?

In summary, Megapulse states that what the contracting officer is saying in his overall statement is that in spite of not rejecting Megapulse's many assertions to limited data rights from the outset, in spite of entering into complex data rights negotiations, in spite of carefully asking Megapulse's permission to release data, and in spite of giving assurances to Megapulse that the data involved with the program would be protected, he is now free to disregard all of this 8-year history and conclude that Megapulse has no background data subject to limited data rights restrictions. In Megapulse's view, this totally ignores the evidence, in the form of equipment demonstrations and detailed documentation, which predates the subject contracts; such an unwarranted action would freely give to Megapulse's competitors the proprietary data which it sought so strenuously to protect from the very beginning and throughout its relationship with the Coast Guard. Megapulse believes that the Coast Guard had the obligation of assessing the information available in the form of demonstrations, patent disclosures, and proposals, and if any doubts existed as to Megapulse's contentions, it was incumbent on the Coast Guard to request justification of the contentions and, if the doubt persisted, to insist on the provision of data with totally unlimited rights.

Megapulse concludes that to deny protection of its proprietary data--which constitutes the basis of its existence--is to deny its survival.

In response, the Coast Guard reports that, until the first attempt at competitive procurement, it had not taken steps to confirm Megapulse's limited rights claims. When the extent of the data restrictions severely limited the amount of available competition, the Coast Guard first decided that it could no longer go along with Megapulse's unsupported claims and that proof of those claims was necessary.

The Coast Guard also reports that, while negotiating the license, the desire to get on with the competitive procurement and the appearance of adequate competition led to the decision not to make a complete evaluation of Megapulse's claims. However, to avoid misunderstanding, the contracting officer wrote to Megapulse stating that the acceptance of the data license did not limit the Government's right to use or disclose data previously obtained without restriction. Thus, the Coast Guard contends that it put Megapulse on notice that it was willing to go along with Megapulse's claim for the purposes of the license, but that the rights of the Coast Guard to use or disclose the data would be unaffected by the terms of the license and governed only by the terms of the contracts.

To prevail on the theory that the Government is estopped to deny the existence of an agreement (implied contract) to protect the data which Megapulse claims is subject to protection, at a minimum, Megapulse must show these elements:

1. the Government knew all the facts;

2. the Government intended that its conduct be acted on or the Government acted so that Megapulse had a right to believe that the Government intended that its conduct be acted on;

3. Megapulse was ignorant of the true facts; and

4. Megapulse relied on the Government's conduct to its injury.

See Emeco Industries, Inc. v. United States, 202 Ct. Cl. 1006 (1973); United States v. Georgia-Pacific Company, 421 F.2d 92 (9th Cir. 1970). Cf. T.C. Daeuble - Reconsideration, B-186889, March 3, 1977, 77-1 CPD 157.

We have already decided that there is no basis in the record to conclude that Megapulse received assurances from Coast Guard personnel that its basic technology-related data would be protected. Again, we note that Megapulse states that cognizant Coast Guard

personnel, named by Megapulse, have not been directly involved in contributing to the record before us. Further, the Coast Guard report shows that it never took a position on what data was subject to protection, if any. From the record before us, we may not conclude that the Government knew all the facts. Thus, there is no need to consider the other ~~three elements~~ remaining elements. Accordingly, this aspect of the protest is also denied.

VI. CONCLUSION

Megapulse's protest is denied. By letter of today, we are forwarding our views to the court for its consideration.

Milton J. Socolar

For the Comptroller General
of the United States