

**DECISION**

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

**FILE:** B-220012

**DATE:** November 25, 1985

**MATTER OF:** Zodiac of North America, Inc.

**DIGEST:**

GAO will not recommend award to the protester rather than the low responsive bidder where the protester does not present clear and convincing evidence that the solicitation's specifications and drawings package is derived from proprietary technical data and drawings.

Zodiac of North America, Inc. (Zodiac), protests award of a contract to any bidder but itself under invitation for bids (IFB) No. N00024-85-B-2292 issued by the Department of the Navy for the procurement of Combat Rubber Raiding Craft (Small). Zodiac contends that award to any other bidder under the solicitation would be improper since the solicitation's specifications and accompanying drawings were derived without its authorization from proprietary technical data and drawings which it had furnished the Naval Sea Systems Command. We deny the protest.

The IFB, issued by the Naval Sea Systems Command (Navy) on June 28, 1985, provided in pertinent part that the craft shall be in accordance with the requirements of specification NAVSEA T9008-A-G-SBS-010, June 14, 1985--"Specifications for Construction of a Combat Rubber Raiding Craft (Small), Outboard Motor Powered"--including the attached drawings Nos. 5103945 and 5103946. Notwithstanding the protest, the Navy has proceeded with award to the low bidder, RFD-Patten, on the basis of a written determination by the head of the procuring activity that urgent and compelling circumstances affecting the interests of the United States would not permit waiting for a decision. See 31 U.S.C. § 3553(d)(2) (West Supp. 1985).

Zodiac, in a protest filed the day before bid opening, argues that award under the solicitation to any bidder other than itself would be improper since the solicitation's specifications and related drawings are based upon proprietary technical data which Zodiac had developed at its own time and expense. Specifically, Zodiac asserts that the solicitation's specifications were derived from "privileged and protected" technical data, bearing restricted rights

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legends, which it furnished to the Navy. Zodiac states that the drawings accompanying the solicitation's specifications duplicate specific technical design details of Zodiac's model K-40 inflatable rubber craft which are wholly proprietary to Zodiac and which were protected against unauthorized disclosure by restrictive rights legends imposed on each of the drawings. Zodiac has provided photographs of the Zodiac K-40 which it asserts highlight the craft's proprietary features. Of the five bids received, Zodiac's was second low.

In response to the protester's allegations, the agency states that the solicitation's specifications and attached drawings were in no way developed on the basis of proprietary data or drawings furnished by Zodiac, but were independently developed for the Navy by NKF Engineering Corp. (NKF) under an April 1984 contract for the development of a new specifications and drawings package for future procurements of Combat Rubber Raiding Craft. The Navy advises that Zodiac did provide it with one drawing of its K-40 craft but that such drawing was not furnished pursuant to any contractual requirement, did not bear either a restricted rights legend or any other proprietary marking, and there was no written or oral agreement regarding its use. Moreover, the Navy advises, although there was no agreement with the protester limiting the Navy's right to use or distribute the drawing of the Zodiac K-40 craft, the Navy did not provide the drawing to either NKF or to any other contractor. The Navy stresses that the development of the Combat Rubber Raiding Craft performance specifications and drawings package was accomplished independently by NKF using Navy-owned boats and Navy military specifications and drawings.

According to the agency, in August 1984, NKF furnished it with the preliminary specifications and drawings for the craft and that this material was released to industry for comments. In September 1984, the Navy contracted with two firms for the production of prototype craft based on the preliminary specifications package. The Navy advises that on January 29, 1985, it modified an existing April 1983 contract with Zodiac for a quantity of Zodiac K-40 and K-50 model inflatable boats to include the construction of three prototype boats using the preliminary craft specifications and drawings which had been developed by NKF. These prototype boats, the Zodiac X-40, were delivered to the Navy in February 1985. The Navy notes that no technical data or drawings relating to the K-40 or K-50 boats were ever

delivered to the Navy by Zodiac pursuant to either the contract for delivery of such boats or under any other contract.

On May 7, 1985, Zodiac's April 1983 contract with the Navy was again modified to provide that Zodiac would provide the Navy with technical data and drawings for the three prototype (Zodiac X-40) boats. The drawings provided by Zodiac of the prototype boat did not bear a restrictive rights legend or any other marking that would indicate that the material was to be restricted as proprietary. A brochure on the Zodiac X-40 prototype boats, which contained technical data sheets on the boats, was stamped on each page with a restricted rights legend. However, the Navy states, neither the drawings nor the brochure was ever provided to NKF or used by Navy personnel during the preparation of the specifications and drawings for the Combat Rubber Raiding Craft. The Navy points out that a comparison between the data and drawings delivered by Zodiac for the prototype boats and the specifications and drawings used in the solicitation under protest demonstrates significant dissimilarities between Zodiac's data and the Navy's design for the craft.

In appropriate circumstances, where it has been clearly established that the government's use of proprietary data or trade secrets in a solicitation violates a firm's proprietary rights, we may recommend that the contracting agency either make a sole-source award to the protester or, if possible, cancel the solicitation and resolicit without using the protester's data. NEFF Instrument Corp., B-216236, Dec. 11, 1984, 84-2 C.P.D. ¶ 649. However, the protester must prove by clear and convincing evidence that its proprietary rights have been violated. Wayne H. Coloney Co., Inc., B-211789, Aug. 23, 1983, 83-2 C.P.D. ¶ 242. In other words, the protester has the burden of affirmatively proving its case. John Baker Janitorial Services, Inc., B-201287, Apr. 1, 1981, 81-1 C.P.D. ¶ 249. The protester must show that its material was marked proprietary or confidential or must show that the proposal was disclosed to the government in confidence. Also, the protester must show that the material involved significant time and expense in preparation and that it contained material or concepts that could not be independently obtained from publicly available literature or common knowledge. Id. and Porta Power Pak, Inc., B-196218, Apr. 29, 1980, 80-1 C.P.D. ¶ 305.

Zodiac has not provided sufficient evidence to establish the proprietary nature of the drawings which it

had furnished the agency. Our review of the record shows, contrary to Zodiac's allegations, that the drawing of the Zodiac K-40 boat, which the Navy states it received from Zodiac, does not contain a restricted rights legend or any other printed statement which would indicate that such drawing was regarded as proprietary or confidential in nature. Likewise, our review of the drawings of the Zodiac X-40 prototype boat furnished the Navy by Zodiac shows that such drawings do not bear a restricted rights legend or any other indication that such drawings were considered by Zodiac as proprietary. The Navy has informally advised us that the drawings which were furnished with its report on the protest are the original drawings provided by Zodiac and are not reproduced copies. Zodiac has not refuted the Navy's statement that none of the drawings furnished by Zodiac bear a notation that such material is restricted as proprietary. Furthermore, Zodiac has not rebutted the agency's position that except for the one drawing of its model K-40 rubber inflatable boat, Zodiac has not provided the Navy with any other technical data or drawings regarding the Zodiac model K-40 or K-50 boats.

While the brochure furnished by Zodiac on its model X-40 prototype boat bears restrictive rights legends, Zodiac has not stated why such material was properly proprietary in nature. Furthermore, as set forth above, the Navy advises that it did not provide the technical data on the Zodiac X-40 boat prototype to either NKF or any other Navy contractor and Zodiac has not specifically alleged that the Navy released the information contained in the model X-40 brochure. Indeed, Zodiac's protest, in which it names only its model K-40 boat, appears to relate solely to the Navy's alleged improper use of proprietary technical data and drawings pertaining to the K-40 model. In any case, Zodiac has not specified in what respect the Navy's specifications and drawings package for the craft has improperly incorporated Zodiac proprietary data and has not rebutted the Navy's statement that there are substantial differences between Zodiac's technical data and the specifications and drawings package developed by NKF.

On the basis of the record before us, we conclude that Zodiac has not met its burden of demonstrating by clear and convincing evidence that the specifications and drawings of the solicitation were derived from technical data which is proprietary to Zodiac. Accordingly, the protest is denied.

*for Seymour Gove*  
 Harry R. Van Cleve  
 General Counsel