The Comptroller General
of the United States

Washington, D.C. 20548

136119

Decision

Matter of: Ingersoll-Rand Company--Reconsideration

File: B-230101.2

Date: June 16, 1988

DIGEST

1. Protest alleging a solicitation defect was correctly dismissed by the General Accounting Office (GAO), where the protest was filed in the GAO more than 10 working days after the initial adverse contracting agency action (receipt of initial proposals in spite of the protest without amending the solicitation to change the allegedly defective requirement) on the firm's agency-level protest.

2. Protest alleging that the agency improperly requested unlimited rights to engineering data for a commercial item developed exclusively at private expense is timely, where the protest was filed within 10 working days after the protester was notified by the agency that only unlimited data rights would be considered acceptable.

3. The Air Force properly solicited engineering drawings and data for all components of an air compressor unit rather than for the end item alone, where: (1) there is nothing in the statute governing acquisition rights in technical data to prohibit a request for drawings/data on individual components; (2) the implementing regulations issued by the Secretary of Defense specifically authorize acquisition of unlimited rights to form, fit, and function data on individual components of the end item; (3) the Air Force reports that the data may be necessary for maintaining and operating the compressors in the future; and (4) the solicitation specifically recognizes the offerors' rights to protect their proprietary technical data for commercial items developed at private expense.

DECISION

Ingersoll-Rand Company requests reconsideration of our January 28, 1988, dismissal of its protest under request for

proposals (RFP) No. F09603-87-R-6943, issued by the Department of the Air Force to purchase 259 portable (MC7) air compressors, with an option to purchase from 1 to 340 additional items, and related manuals, manufacturing data and engineering drawings. We dismissed the protest as untimely because Ingersoll-Rand filed it in our Office more than 10 working days after the Air Force's initial adverse action on the protest Ingersoll-Rand filed with that agency. Ingersoll-Rand argues that it did, in fact, file its protest with our Office within 10 working days after the Air Force's first adverse action on its agency-level protest or within 10 days after it became aware that it had a basis for protest.

We affirm our dismissal to the extent it concerned Ingersoll-Rand's allegation of an impropriety in the solicitation. We have determined, however, that the other issue raised, which involves the acceptability of Ingersoll-Rand's proposal, in fact was timely, but we deny the protest on that issue on the merits.

BACKGROUND

On November 3, 1987, Ingersoll-Rand protested to the Air Force that the RFP unduly restricted competition. Specifically, Ingersoll-Rand objected to solicitation line item number 0003AF, which required offerors to provide engineering drawings in level 3 format and associated lists. Under Department of Defense standards incorporated into the RFP, drawings are categorized as level 1, 2, or 3. The level relates to the maturity of the item or program. For example, level 1 drawings represent an experimental product, while level 3 drawings are prepared only after all first article testing has been completed and the product has been proven. Level 3 drawings can be used by any competent manufacturer to produce an identical or interchangeable item. Level 3 format is a particular drawing format prescribed by the Department of Defense. According to Ingersoll-Rand, it and other manufacturers using the most current technology would have to spend considerable time and effort to convert their commercial drawings to level 3 format. Ingersoll-Rand also complains that such firms are at a further disadvantage because they will have to charge the Air Force significantly higher prices than competitors using antiquated technology to account for the risk that their drawings improperly might be disclosed to firms that do not possess the most current technology.

Notwithstanding Ingersoll-Rand's protest, the Air Force continued with the procurement and received initial proposals, including an offer from Ingersoll-Rand, by the November 13 closing date. By letter of December 15, the Air

Force formally denied Ingersoll-Rand's protest. The Air Force further explained that it was attempting to buy unlimited rights to the required manufacturing drawings/data so that it could prepare a standardized data package that would increase operational and repair capabilities, reduce the need for cataloging and storage or spare parts, and enable the agency to obtain increased competition in future procurements.

On January 11, 1988, the Air Force wrote to Ingersoll-Rand concerning the proposal the firm had submitted. Among other things, the Air Force stated that although the proposal otherwise was generally technically acceptable, the proposal was not acceptable in the area of reprocurement data because Ingersoll-Rand had not offered unlimited rights to the manufacturing drawings/data as required by the RFP. The Air Force offered Ingersoll-Rand an opportunity to revise its proposal and to cure this deficiency by January 29.

Ingersoll-Rand filed its protest in our Office on January 27, raising two separate issues: (1) the Air Force improperly is soliciting manufacturing data in level 3 format, creating an unnecessary burden on offerors and unduly restricting competition to the disadvantage of firms offering the most current technology; and (2) the Air Force is buying a commercial item developed exclusively at private (rather than government) expense, but considers unacceptable Ingersoll-Rand's proposal because Ingersoll-Rand refuses to sell unlimited rights in its technical data. We dismissed the protest on January 28 because Ingersoll-Rand had not filed it in our Office within 10 working days after the Air Force's receipt of proposals in the face of the agency-level protest.

Timeliness

Ingersoll-Rand contends that we erred in dismissing the protest filed in our Office, because the Air Force's first adverse action on Ingersoll-Rand's agency-level protest was the Air Force's January 11 letter stating that Ingersoll-Rand's proposal was unacceptable concerning manufacturing data. Basically, Ingersoll-Rand argues that, prior to its receipt of the January 11 letter, it believed the Air Force was still considering accepting data in other than level 3 format, and that the Air Force also was still considering accepting limited rights to the data/drawings, rather than the unlimited rights required by the RFP.

The protest to our Office concerning the level 3 format issue properly was dismissed as untimely. This alleged impropriety was apparent from the solicitation, and Ingersoll-Rand timely raised it with the Air Force prior to

the closing date for receipt of initial proposals. However, our Bid Protest Regulations require that if a protest is filed initially with the contracting agency, a subsequent protest to this Office must be filed within 10 working days after the protester has "actual or constructive knowledge of initial adverse agency action." 4 C.F.R. § 21.2(a)(3) (1988). The contracting agency's receipt of proposals in the face of the protest without modifying the solicitation to delete or at least change the level 3 format requirement to which Ingersoll-Rand objected constituted the initial adverse agency action on the protest. Shaw Aero Development, Inc., B-221980, Apr. 11, 1986, 86-1 CPD ¶ 357. Thus, Ingersoll-Rand was required to file its protest in our Office within 10 working days after the November 13 closing date. Futhermore, by letter of December 15, the Air Force unequivocally denied Ingersoll-Rand's protest. Yet, Ingersoll-Rand did not file its protest in our Office until January 27--well over 10 working days after either Air Force action. Accordingly, we correctly dismissed the protest as untimely.

The second issue presented by Ingersoll-Rand is whether the Air Force's procurement of rights in technical data is in compliance with 10 U.S.C. § 2320, as amended by the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 953, 100 Stat. 3949 (1986), and pertinent regulations. The RFP required offerors to provide their engineering data to the Air Force (line item number 0003AF), to provide rights to that engineering data (line item number 0003AK), and to state separate prices for both line items. According to Ingersoll-Rand, prior to receipt of the Air Force's letter of January 11, 1988, it assumed that the Air Force would accept limited rights to the engineering data; the Air Force's letter was the first time Ingersoll-Rand learned that the Air Force actually would consider unacceptable a proposal that did not offer unlimited rights.

From our review of the record, it does appears that, as of December 15, the Air Force was undecided whether unlimited data rights were a mandatory requirement. It was not until January 11, 1988, that the Air Force first articulated its opinion that Ingersoll-Rand's offer of "in place access"1/

1/Ingersoll-Rand initially offered to give the Air Force only limited rights to its commercial drawings for use as necessary for emergency repairs or overhaul. Ingersoll-Rand stipulated that it would keep the drawings in its possession at no cost to the government.

to drawings was unacceptable, and that unlimited rights2/ or government purpose rights3/ were the only acceptable data rights that would allow competitive acquisition of spare parts and MC7 compressors in the future. As Ingersoll-Rand filed its protest in our Office within 10 days of receiving the Air Force letter, we consider this issue to be timely under section 21.2(a)(2) of our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2), and we will consider the issue on its merits.

Protester's Argument on Rights to Technical Data

The protester argues that the Air Force is attempting to force it and other manufacturers of portable air compressors to provide detailed manufacturing data to be used for reprocurement of the compressor and related spare parts in contravention of 10 U.S.C. § 2320(a)(2)(F), which generally provides, with certain exceptions, that a contractor may not be required to sell or otherwise relinquish to the United States any rights in technical data as a condition for the award of a contract. Ingersoll-Rand asserts that the MC7 compressors it is offering to the Air Force are commercial products as required by the RFP and that the design has been perfected by Ingersoll-Rand over many years, exclusively at its own expense. Therefore, Ingersoll-Rand argues, according to the above-cited statute and implementing regulations the Air Force may not require Ingersoll-Rand to sell this data.

Air Force Response

The Air Force contends that, even though the solicitation provided that the compressor offered should be a regular commercial product, it is unlikely that any commercial compressor marketed as off-the-shelf equipment will meet all of the requirements specified in the purchase description. The Air Force reports that its intent is to maximize the use of commercial components, while minimizing the development

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2/Unlimited rights means the right to use, duplicate, release, or disclose technical data in any manner and for any purpose whatsoever, and to permit other parties to do so. See Department of Defense Supplement to the Federal Acquisition Regulation (DFARS) § 27.471 (DAC 86-3).

3/Government purpose rights are the rights to use, duplicate, or disclose technical data in any manner, for government purposes only, and to permit other parties to do so for government purposes only. See DFARS § 27.471.

of military-unique components. The Air Force asserts that what it is really buying is a commercial-type product, i.e., a commercial product that will be modified to meet certain "government-peculiar" physical requirements. In this connection, the Air Force points out that the MC7 compressor will be the only compressor specifically designed for "flight line use" and, therefore, it must be modified to meet particular electro-magnetic interference suppression, air transportability, and painting requirements. The Air Force states that this procurement therefore is designed to obtain (in addition to the compressors themselves) engineering data and drawings as follows: (1) detailed design drawings4/ on only those items, components and processes that are developed at government expense; and (2) form, fit and function data5/ for all components of the compressor.

According to the Air Force, the average useful life of these compressors is 12 to 15 years, but many will remain in the Air Force inventory and be used for much longer. The Air Force believes that the engineering drawings will be needed to procure compressors and spare parts in the event the original manufacturers or vendors either stop producing the items or their components or change the configuration or design. The Air Force reports that over the long, useful life of these compressors, it is likely there will be frequent changes in the operational and mission requirements that may necessitate modifications to the compressors; the drawings will facilitate such changes. Other reasons given by the Air Force for purchasing this engineering data include: (1) maintaining the compressor units; (2) standardizing the data package based upon only one compressor design in order to limit the number of spare parts that have to be catalogued and retained in inventory; and (3) creating a common data package to increase

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4/Detailed design drawings define all the features of the part or assembly, configurations, dimensions, tolerances, materials, processes, surface finishes, protective coatings, manufacturing symbols (i.e., welding). This type of drawing enables a capable party to manufacture an identical part or assembly (as opposed to a functionally interchangeable or substitute part). See DFARS § 27.471.

5/Form, fit, and function data is data which depicts the configuration and mating dimensions, function, and performance and qualification requirements. This data is often less detailed engineering data. See DFARS § 27.471.

competition/reduce costs in future procurements of spare parts and compressor units.

ANALYSIS

Section 953 of the National Defense Authorization Act for Fiscal Year 1987, the statute governing acquisition of rights in technical data, requires the Secretary of Defense to prescribe regulations to define the "legitimate interest of the United States and of a contractor" in technical data. 10 U.S.C.A. § 2320(a)(1) (West Supp. 1988). The DFARS are to assure the government unlimited rights to use or disclose technical data where the item or process has been developed by a contractor exclusively with federal funds. 10 U.S.C.A. § 2320(a)(2)(A). For items developed exclusively at the contractor's own expense, the statute provides:

> "(B) Except as provided in subparagraphs (C) and (D). . . the contractor or subcontractor may restrict the right of the United States to release or disclose technical data pertaining to the item or process to persons outside the Government, or permit the use of the technical data by such persons. [10 U.S.C.A. § 2320(a)(2)(B).]
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> . . . . .
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> "(F) A contractor or subcontractor (or a prospective contractor or subcontractor) may not be required, as a condition of being responsive to a solicitation or as a condition for the award of a contract, to sell or otherwise relinquish to the United States any rights in technical data except--"
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> "(i) rights in technical data described in subparagraph (C). . . ." 10 U.S.C.A. § 2320(a)(2)(F).

Among other things, subparagraph (C) of the statute, 10 U.S.C.A. § 2320(a)(2)(C), specifically exempts from the contractor-protection coverage of subparagraphs (B) and (F) any technical data that relates to "form, fit, or function" or which is necessary for "operation maintenance, installation, or training (other than detailed manufacturing or process data)."

The RFP specifically incorporated by reference DFARS § 52.227-7013, entitled "Rights in Technical Data and Computer Software," which implements the statute and sets

forth the rights in technical data accruing to the Air Force and the contractor under the proposed contract. Essentially, the clause provides that the Air Force will acquire only limited rights in technical data pertaining to items, components or processes developed exclusively at private expense, and unlimited rights in technical data pertaining to items, components on processes developed at government expense. DFARS § 52.227-7013 (DAC 86-3). In addition, the Air Force will acquire unlimited rights in technical data, regardless of who paid to develop the data, where the data is comprised of:

> "(ii) form, fit, or function data pertaining to items, components, or processes prepared or required to be delivered under this or any other Government contract or subcontract;
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> "(iii) manuals or instructional materials (other than detailed manufacturing or process data) prepared or required to be delivered under this contract or any subcontract hereunder necessary for installation, operation, maintenance, or training purposes. . . ."

The record shows that while the Air Force did state in its January 11, 1988, letter that it considered unacceptable an offer of anything less than unlimited or government rights in data, the Air Force apparently continued to negotiate with Ingersoll-Rand over this matter even after the protest was filed in our Office. On February 25, 1988, the Air Force issued a clarification which stated that "The Air Force is seeking no rights in technical data beyond those set forth in DFARS § 27.472-5." This DFARS section basically summarizes the various legal rights set forth in the statute and regulations discussed above. Thus, the solicitation incorporates DFARS § 52.227-7013 (enunciating the parties' rights with regard to technical data), and the Air Force recognizes the protester's right to offer only limited rights to technical data developed exclusively by the protester with its own money.

We find no violation of the above laws or regulations in this procurement. The statute specifically allows the agency to acquire rights in technical data that relate to form, fit, and function, or where the data is necessary for operation and maintenance of the item being purchased by the agency. The Air Force has specifically requested only form, fit and function data for those components of the compressor that are commercial in nature and that have been developed by Ingersoll-Rand at its own expense. Moreover, the Air Force has stated that it wants the engineering drawings for

maintenance and operation of the compressors, especially in view of the fact that the compressors have a long useful life and the operational and mission requirements may necessitate changes to the compressors.

The Air Force also has recognized offerors' rights to protect their proprietary data in the RFP itself and in discussions with Ingersoll-Rand. To this end, the Air Force has suggested to Ingersoll-Rand that it use restrictive legends to protect its technical data where appropriate. The Air Force has further suggested that the protester can protect its interests by diminishing the detail in drawings that it claims are commercial or proprietary in nature, so as to provide only form, fit and function drawings rather than detailed engineering data that could be used by another firm to manufacture the compressor or component.

In sum, the record contains no evidence that the Air Force is acting illegally. To the extent that the MC7 air compressors require features that are unique to the Air Force's needs, the Air Force will acquire a legitimate interest in the technical data developed under the contract paid for by the government. This interest will include the unlimited rights to use the technical data pertaining to the item or process, as well as the right to release the technical data outside the government. See 10 U.S.C.A. § 2320(a)(2)(A). To the extent that the MC7 air compressors represent commercial products developed exclusively at private expense--and we note that the record shows Ingersoll-Rand's compressors basically to be commercial items developed by Ingersoll-Rand using its own funds--the rights to engineering drawings/data are delineated by the above-quoted law and the regulations issued by the Secretary of Defense. See 10 U.S.C.A. § 2320(a)(2).

The protester next contends that the statute allows the Air Force to request form, fit and function data with regard to the end item only--the compressor unit itself--rather than the individual components that make up the end item. We do not agree. There is nothing in the statute or its legislative history that restricts the purchase of form, fit and function data to the end item as the protester contends. Furthermore, the regulations promulgated pursuant to the statute, as set about above, specifically state that the government may acquire unlimited rights in form, fit, and function data pertaining to components, as well as end items, to be delivered. DFARS § 52.227-7013(b)(3).

The protest, to the extent we now find it was timely filed, is denied.

for Seymour Efros
James F. Hinchman
General Counsel