



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Del Mar Avionics--Request for Reconsideration
File: B-231124.2
Date: February 9, 1989

DIGEST

1. Request that General Accounting Office reconsider dismissal of protest against disclosure of data as untimely is denied where, even if protest is timely, protest would not be for consideration under bid protest function, but rather as a claim or action against the government for damages for administrative or judicial resolution.
2. If protester viewed certain documentation in the possession of the agency as essential to its ability to compete, the firm should have pursued release of the documentation under the Freedom of Information Act at the outset of the procurement.

DECISION

Del Mar Avionics requests that we reconsider our decision in Del Mar Avionics, B-231124, Aug. 25, 1988, 67 Comp. Gen. ____, 88-2 CPD ¶ 180, in which we dismissed as untimely the firm's protest that request for proposals (RFP) No. N00123-88-R-0312, issued by the Naval Supply Systems Command to acquire a data-linked remote strafe scoring system, violated Del Mar's proprietary rights. We deny the request for reconsideration.

Remote strafe scoring systems employ acoustic sensors placed in the target area to detect aircraft-fired projectiles within the target zone, and a communications system to send the information to a remote unit which displays the number of "hits" to an observer. Del Mar, which states it developed this technology at private expense, first sold its system, known as the DA-3/H, to the Air Force in 1972, with accompanying technical information.

In 1985, the Navy awarded a contract to Eon Instrumentation, Inc., to modify a Navy-owned DA-3/H to accommodate a data link between the up-range and down-range units, in lieu of the cables used in the DA-3/H. Del Mar was a competitor for this contract. Subsequently, Del Mar observed a notice in

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the Commerce Business Daily for January 8, 1987, that the Navy had awarded a contract to Eon for a remote strafe scoring system.

In February of 1988, the Navy issued the RFP that is the subject of Del Mar's protest. The RFP contains detailed specifications, including schematic diagrams and component lists, for the acoustic technology and parts of the strafe scoring system that Del Mar claims are proprietary. The requirements for the data link, to which Del Mar makes no proprietary claim, were described in functional terms. The RFP requires that all components of the system be interchangeable and compatible with the Eon SSS-101 Remote Strafe Scoring System.

Del Mar argued in its initial protest that the Eon SSS-101 referenced in the RFP was an outgrowth of an improper disclosure by the Navy of Del Mar's proprietary data in the 1985 Navy contract with Eon. Del Mar also objected to the Navy's failure to disclose the details of the modifications to the DA-3/H employed in the Eon SSS-101, without which, Del Mar contended, it was not possible to satisfy the requirement for component interchangeability and compatibility with the Eon SSS-101.

On the basis of Del Mar's unanswered assertion that the Navy obtained its data on Del Mar's DA-3/H from the Air Force, which considers the data to be proprietary, and the lack of any evidence offered by the Navy that the data was not proprietary, we stated that the DA-3/H data appeared to have been proprietary to Del Mar when it came into the Navy's possession. However, we also found that Del Mar, a participant in the Navy's 1985 procurement, should have known then that its data was going to be disclosed in that procurement. We further held that when Del Mar learned in January of 1987 of the award to Eon, Del Mar should have known that: (1) any assumptions it may have made in 1985 about possible Navy restrictions on the use of the data were wrong, and (2) Eon may have used the data to reverse engineer the DA-3/H. Also, since the Navy reported that it had not acquired unlimited rights to the Eon SSS-101 data, we concluded that we could not recommend that the Navy disclose this data for purposes of the current procurement.

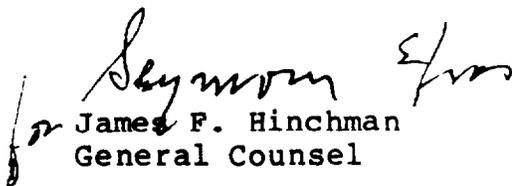
In requesting reconsideration, Del Mar asserts that we erred in finding its protest untimely. Del Mar states that it did not object to the disclosure of its data to Eon in the 1985 acquisition because it presumed that the Navy would honor Del Mar's proprietary rights in the 1985 data link acquisition and, thus, furnish Del Mar's data to Eon subject to appropriate restrictions. Del Mar also explains that it thought that the award to Eon announced in 1987 was premised

on the acquisition of only a data link for a DA-3/H, and that the Navy would provide Del Mar's system as government-furnished equipment. Del Mar states that it was not until March of 1988, when the firm toured a Navy facility in conjunction with the present acquisition, that Del Mar recognized that Eon was producing the entire system, including those parts that Del Mar considers proprietary.

Even if we were to agree with Del Mar that its protest was timely, it would not be for consideration by our Office under our bid protest function. The current solicitation disclosed no more than was already disclosed in the 1985 acquisition. In short, the disclosure in the current RFP about which Del Mar complains is simply a repetition of an earlier disclosure to which Del Mar did not object. In this respect, we have suggested that a company might waive objections to the disclosure of its proprietary data by failing to protest the data's inclusion in an earlier solicitation. Litton Applied Technology, B-227090 et al., Sept. 3, 1987, 87-2 CPD ¶ 219. As we stated in our prior decision, the appropriate remedy for a firm that contends that the government has infringed its proprietary rights is administrative settlement of its claim or a judicial action against the government for damages. Garrett Pneumatic Systems Division, B-207213 et al., May 6, 1982, 82-1 CPD ¶ 435.

Del Mar also disputes the Navy's assertion that the agency did not acquire data to the Eon SSS-101, and contests our failure to recommend that the Navy release this data in conjunction with the current procurement. The Navy states that it did not obtain a technical data package adequate to support a competition in terms of ensuring compatibility and interchangeability. In any event, if Del Mar viewed the documentation as essential, the firm should have pursued its release under the Freedom of Information Act, 5 U.S.C. § 552 (1982), at the outset of the procurement.

The request for reconsideration is denied.


for James F. Hinchman
General Counsel