

MS. Cooper



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Elpaz Instruments, Inc.

File: B-242328

Date: December 21, 1990

James J. Shipman for the protester.
Sabina K. Cooper, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

1. The alleged infringement of one private party's proprietary data by another is a matter between those private parties, not appropriate for consideration under the bid protest function of the General Accounting Office.
2. The General Accounting Office will not consider challenges to affirmative determinations of responsibility where there is no showing of fraud or bad faith on the part of the agency nor that definitive responsibility criteria in the solicitation were not met.

DECISION

Elpaz Instruments, Inc. protests the award of a contract to A.Y.A. Technology under request for proposals (RFP) No. F33659-90-R-0005, issued by the Department of the Air Force, Newark Air Force Base, Ohio, for electronic instruments known as phase shifters. Elpaz argues that A.Y.A. has improperly infringed proprietary technology, processes, and trade secrets belonging to Elpaz, and challenges the Air Force's affirmative determination of A.Y.A.'s responsibility.

We dismiss the protest.


Elpaz informed our Office in its protest that the firm has filed for bankruptcy and is in the process of reorganization. Elpaz also alleges that the key personnel for A.Y.A., all of whom are former employees of Elpaz, as well as creditors in the bankruptcy, had signed an employment agreement with Elpaz which protected the firm from the employees' use of confidential, proprietary or trade secret information belonging to Elpaz.

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With respect to Elpaz's first allegation that A.Y.A. has infringed its proprietary technology, processes and trade secrets, where a private party such as Elpaz, objects to another party, such as A.Y.A.'s, alleged use of its proprietary data in a proposal, it is a matter between those private parties, not appropriate for consideration under our bid protest function. SETAC, Inc., 62 Comp. Gen. 577 (1983), 83-2 CPD ¶ 121. The courts, rather than our Office, are the appropriate forum to determine the parties' rights regarding allegedly proprietary data. Id.

Secondly, Elpaz contests the Air Force's affirmative determination of A.Y.A.'s responsibility, stating that the requirements for the preaward surveys conducted by the agency on Elpaz and A.Y.A. were vastly different, and implying that A.Y.A.'s preaward survey demonstrates that the firm is incapable of performing the contract. Our Office does not consider challenges to affirmative determinations of responsibility unless there is a showing of fraud or bad faith on the part of the agency or that definitive responsibility criteria in the solicitation were not met. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(5) (1990); Crux Computer Corp., B-234143, May 3, 1989, 89-1 CPD ¶ 422. Elpaz does not contend that the solicitation contained definitive responsibility criteria, nor is there any allegation or indication of fraud or bad faith by the Air Force.

Accordingly, the protest is dismissed.


for Christine S. Melody
Assistant General Counsel