



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Kitco, Inc.
File: B-241133
Date: January 25, 1991

Paul J. Seidman, Esq., Seidman & Associates, P.C., for the protester.
Robert L. Mercadante, Esq., Defense Logistics Agency, for the agency.
Christina Sklarew, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where protester alleges procuring agency has violated its proprietary rights in a technical drawing which it developed through reverse engineering but does not provide sufficient factual record to determine whether the drawing is protectable, and does not provide adequate information regarding the value of materials that were provided by the government at no charge for the reverse engineering effort, protester has not shown that the drawing is entitled to protection as a trade secret and the government's release of the drawing therefore is not legally objectionable.

DECISION

Kitco, Inc. protests the Defense Logistics Agency's (DLA) allegedly unauthorized use of one of Kitco's own drawings in request for proposals (RFP) No. DLA500-90-B-0052, which was issued by the Defense Industrial Supply Center (DISC) for a quantity of plate seals or gaskets. Kitco alleges that the solicitation violated Kitco's proprietary rights because it incorporated the protester's drawing and revealed it to others. We deny the protest.

The plate seal at issue, which is used on the constant speed drive of certain aircraft engines, was originally developed and manufactured by Sunstrand Corporation. DISC initially purchased the seal noncompetitively from Sunstrand, since the firm held proprietary rights to the part. When Sunstrand was suspended from government contracting, DISC lent a used seal to Kitco to enable the firm to reverse engineer the part. The reverse engineering effort was not formalized by any contract

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between Kitco and the agency. In February 1987, Kitco prepared a technical drawing of the seal, which was a compilation of data derived from reverse engineering. Kitco submitted the drawing to DISC and requested source approval of its plate seal as an alternate for the Sunstrand part. The drawing included a "limited rights legend," asserting Kitco's proprietary rights.

Kitco's plate seal subsequently was tested and approved as an acceptable alternate for the Sunstrand part. The agency issued a solicitation listing Kitco's part number, and Kitco received the award of contract No. DLA500-99-C-0469 in February 1988. The next solicitation listed both Sunstrand and Kitco part numbers, and Kitco also was awarded that contract in May 1988.

The next acquisition of the part was initiated with the issuance of a request for proposals (RFP) in October 1988 that referenced the Sunstrand and Kitco part numbers; this RFP was canceled and an IFB was issued in July 1989, which referenced a Naval Air Rework Facility (NARF) drawing No. 535231. The drawing itself was not included in the solicitation package, in accordance with newly adopted procedures; instead, potential bidders in need of the drawing were advised to request a copy of the drawing from the agency. Kitco states that it requested a copy of the drawing, but for reasons that remain unclear, did not receive one. Kitco submitted its bid on the basis of its own drawing, and received the award (the third contract it had received since its approval as an alternate source).

The IFB at issue here was issued in December 1989. This solicitation also referenced the NARF drawing but did not include the drawing in the bidding package. Kitco again requested a copy of the drawing and again encountered difficulty in obtaining it. Kitco again submitted a bid based on its own drawing. The protester states that it discovered through conversations with another firm seeking to supply the part as a subcontractor that the agency's drawing was, in fact, a copy of Kitco's own drawing.

Kitco filed a protest with the contracting officer by telefax of February 13 and 14, prior to bid opening on February 15. Bids were opened as scheduled. The agency received four bids, including Kitco's, which was the second highest. Upon investigating the alleged disclosure of Kitco's drawing, DISC determined that the drawing at issue had been created by a NARF engineer. Kitco's agency-level protest was denied, and this protest followed. The matter was reexamined when DLA began preparing its report in response to this protest. During that investigation, it was determined that the drawing

labeled "NARF Drawing No. 535231" was, in fact, a mechanical reproduction of Kitco's drawing.

Kitco argues that the agency's use of Kitco's drawing violated the firm's proprietary rights and conferred a competitive advantage on other bidders who had not incurred the expense involved in creating the drawing. Kitco contends that since the use of its drawing is undisputed, it is entitled to relief, whether in the form of a directed award or cancellation of the solicitation.

DLA argues that the drawing is not entitled to trade secret protection in any case, since the information contained in the drawing is readily obtainable through reverse engineering and, in fact, was reverse engineered by Kitco using a government furnished seal.

Generally, to prevail on a claim of violation of proprietary rights, the protester must show that: (1) its material was marked proprietary or confidential or that it was disclosed to the government in confidence; and (2) the material involved significant time and expense in preparation and contained material or concepts that could not be independently obtained from publicly available literature or common knowledge. Litton Applied Technology, B-227090; B-227156, Sept. 3, 1987, 87-2 CPD ¶ 219; Zodiac of North Am. Inc., B-220012, Nov. 25, 1985, 85-2 CPD ¶ 595.

Here, there is no dispute that the drawing was marked as proprietary to Kitco. We are not persuaded, however, that Kitco's drawing is entitled to protection.

First, the substantive specifications and technical data reflected on the drawing were not initially developed by the protester, but resulted from reverse engineering. It is also undisputed on the record that the data could be readily obtained by others by reverse engineering. While reverse engineering data has been recognized not to warrant protection as a trade secret because it is independently obtainable, see SI Handling Sys., Inc. v. Haisley, 753 F.2d 1244 (3rd Cir. 1985), we are not prepared to say that data obtained through reverse engineering may never be a protectable trade secret.

A comprehensive definition of a trade secret is provided by the Committee on Torts of the American Law Institute, set out in Section 757, Comment b, of Restatement, Torts (1939). The Restatement provides that no exact definition of a trade secret is possible, but sets forth the following factors to be considered in determining whether a person's data qualifies as a trade secret: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees outside of his business; (3) the extent of

measures taken to guard the secrecy of the information; (4) the value of the information to the person and his competitors; (5) the amount of effort or money expended by the person in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. These factors are generally consistent with our standards stated above, requiring, as relevant here, that preparation of the material involved significant time and expense.

The protester has unique knowledge about how much time or money was expended in the reverse engineering effort. However, Kitco has not submitted any evidence on the question of how much time or expense it actually incurred in preparing its drawing, either in the form of engineers' time logs or affidavits, statements of cost for materials used in the effort, or any other quantitative information. Kitco has not even offered an approximate dollar figure for its costs. Instead, the protester relies on generalized statements such as "hundreds of hours of engineering efforts were required."

In connection with this issue, the agency has submitted estimates from private firms indicating that a technical drawing of the seal could be produced for a few thousand dollars. Although Kitco contends that the types of drawings described in these estimates could not be used for manufacturing purposes because they do not include manufacturing tolerances, the protester has given no indication what further expense this additional information represents. While the protester insists in this general way that the development of data relating to tolerances requires a much more intense effort, we find no specific support for this in the record. Indeed, the source approval request documents that Kitco submitted to the agency in 1987, in which the firm describes its reverse engineering process, reveals only that "tolerances were applied to the basic dimensions as per industry standard for the given feature or manufacturing method. OEM [original equipment manufacturer] drawings of similar parts were also reviewed to aid in comparing tolerances for similar features and determining the appropriate industry standard."

In our view, it was the protester's responsibility to disclose the extent of its efforts and the expense these efforts represented. While Kitco's drawing may very well involve a trade secret, we are unable to find a violation of a protectable proprietary interest without a more extensive factual record.

Second, the agency argues that Kitco was able to reverse engineer the drawing because the government provided Kitco with a government-owned seal at no charge; the government's

making the seal available contributed to the development of the drawing. Generally, where there is a mix of private and government contribution to an item, the developed item cannot be said to have been developed at private expense, and the government will get unlimited rights to the data, whether or not a contract is formally in place for the item. See Chromalloy Division-Oklahoma of Chromalloy American Corp., 56 Comp. Gen. 537 (1977), 77-1 CPD ¶ 262; 49 Comp. Gen. 124 (1969). Here, the protester has failed to provide the facts to rebut the agency's contention that by providing the seal it obtained rights in the resulting data. Kitco does not reveal to us whether it could have obtained the seal (or even the constant speed drive itself) commercially or from any source other than the government, nor does the protester provide any other indication of the seal's value in this context. Thus, the record supports DLA's view that it has a right to use the data.

Under these circumstances, we think the protester has not shown that its drawing was entitled to protection; we therefore deny its protest.



James F. Hinchman
General Counsel