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

B-176146

JAN 22 1973

Crosby Valve & Gage Company
43 Kendrick Street
Wrentham, Massachusetts 02093

Attention: Mr. T. H. Teplow
Executive Vice President

Gentlemen:

Reference is made to your letter of June 1, 1972, and subsequent correspondence protesting the award of a contract to any firm other than Crosby Valve & Gage Company (Crosby) under request for proposals (RFP) No. N00140-72-R-1198, issued by the Naval Regional Procurement Office, United States Naval Base, Philadelphia, Pennsylvania.

The RFP was issued on January 28, 1972, on an unrestricted competitive basis and covered 1,592 safety valve clamps and 1,592 clamp screws to be manufactured in accordance with BUSHIPS drawing H3250326, revision "G."

Apparently, as a result of excessive leakage which had developed in safety valves supplied by Crosby, discussions had previously taken place between Crosby and the Navy at which time the Navy informed Crosby of a discrepancy between the fit of old "gags" and the valve--the cause of the leakage. Crosby then advised the Navy of a new "gag" design it had conceived and developed. The Navy disapproved the old "gag" and told Crosby that only the new "gag" would be acceptable in the future.

To assure that the old "gag" would no longer be purchased, Crosby was requested to prepare a master drawing for dissemination to cognizant supply activities. Crosby suggested that the new "gag" be added to Crosby drawing A-36566--BUSHIPS drawing H3250326--rather than having a new drawing prepared. The Navy agreed, and Crosby added information to the drawing which showed the application of the new "gag" and simply indicated the obsolescence of certain existing "gags." This information was approved by the Navy by letter dated June 29, 1971, which covered revision "G" of drawing H3250326. However, this information proved insufficient to show interchangeability between the old and new "gags." Further information was therefore provided to satisfy the Navy's need for proper procurement of the new "gags."

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This latter information pertaining to interchangeability was in addition to that added to the drawing in revision "G" and was approved in final version by the Navy by letter dated February 14, 1972, as revision "H" of drawing H3250326. This information had been furnished by Crosby by letter dated November 5, 1971, apparently on the assumption that it would facilitate the procurement of the new design test clamp even before final approval of the drawing. In addition, all of the information covered by both revisions "G" and "H" was furnished by Crosby to the Navy without charge, on an informal basis, and apparently at the request of the Navy.

By telegram of March 24, 1972, and letter dated March 28, 1972, Crosby submitted a protest to the contracting officer alleging that drawing H3250326, revision "G," contained technical data which was the property of Crosby which the Government had no right to use for competitive procurement. By letter dated May 19, 1972, the contracting officer advised Crosby of the conclusion reached by the Naval Ship Systems Command (N380) legal counsel that the Government was not precluded from using drawing H3250326, revision "G," for competitive procurement. Crosby then submitted a protest to our Office by letter dated June 1, 1972.

Crosby contends that the information it supplied to the Navy on November 5, 1971, which subsequently was covered by revision "H," is proprietary to it; that the Government had no right to use this data for competitive procurements; and that an award of the contract to another bidder would be legally in error. This contention is based upon the claims that this information was necessary for the adequate procurement of the items and that Crosby's initial assertion of proprietary rights to this data--its protests to the Navy dated March 24 and 28, 1972--were within the 6-month period for calling out restrictive rights to the data.

You state that the ethics of the situation are questionable and not in the best interests of preserving good relationships between the Navy and its suppliers. In your letter of November 2, 1972, you also state Crosby's desire to assert its rights to information covered under revision "H" and its request that a restrictive legend be made part of drawing H3250326 applicable to revision "H" with regard to all future procurements.

On October 4, 1972, the Department of the Navy forwarded its report in response to your protest to our Office. On the basis of the opinion of N380 legal counsel, the contracting officer stated his intention to

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proceed with the procurement on a competitive basis. In a supplemental statement the contracting officer admits that the difference between revision "G" and revision "H" is that revision "H" includes information regarding the function and use of the item--the new "gag"--and the specific existing items with which the newly designed item is interchangeable. However, he also states that information concerning application of the item and its interchangeability with other items was available within the Navy and that compilation of this information did not involve any unique or secret concept in the sole possession of Crosby.

Paragraph 9-202.3 of the Armed Services Procurement Regulation (ASPR) sets out the procedures to be used in connection with the acquisition of rights in technical data. ASPR 9-202.3(d) provides as follows:

"(d) Unmarked or Improperly Marked Technical Data.

"(1) The Government shall have the right to require the contractor to furnish clear and convincing evidence of the propriety of any restrictive markings used by the contractor on data furnished to the Government under contract.

"(2) Technical data received without a restrictive legend shall be deemed to have been furnished with unlimited rights. However, within six months after delivery of such data the contractor may request permission to place restrictive markings on such data at his own expense and the Government may so permit if the contractor:

"(i) demonstrates that the omission of the restrictive marking was inadvertent,

"(ii) establishes pursuant to (d)(1) above that the use of the markings is authorized, and

"(iii) relieves the Government of any liability with respect to such data (see 9-202.3(a))."

This provision is predicated upon the existence of a contract between the Government and the supplier of data. In the instant case there is no formal agreement regarding the information supplied by Crosby to the Government. However, in 44 Comp. Gen. 451, 456 (1965), we stated as follows:

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"When the right of the Government to use contractor-furnished drawings and technical data for competitive procurement purposes has been challenged, we have recognized and applied the well-established rule that, independent of the law applicable to patents and copyrights, the owner of proprietary information or trade secrets is entitled to appropriate relief against the use or disclosure thereof in violation of a confidential or contractual relationship, and that a nondisclosure agreement or contract may be implied from the particular circumstances involved."

The factors involved fail to afford an adequate basis for holding that there is an implied obligation restricting the Government from using the data supplied to it by Crosby on November 5, 1971, for competitive procurement purposes. Crosby supplied the information informally and without cost to the Government. No restrictive markings accompanied the data when it was supplied, nor were there any discussions between Crosby and the Navy regarding proprietary rights before or at the time when the Navy received the data. Crosby was never advised that this information was being held by the Navy in confidence. Crosby originally revised drawing H3250326 and knew that this information was to be used by the Navy for procurement purposes. In addition, Crosby apparently supplied the information in order to facilitate the procurement of the new design test clamp without waiting for the final approved drawing.

Further, the Navy has advised that the data furnished by your firm has been divulged to potential suppliers. Therefore, the imposition of a restrictive legend on the data at this time would not be appropriate. 50 Comp. Gen. 271, 277 (1970).

Based upon a finding that the data was properly used by the Navy in the subject solicitation due to the lack of an agreement restricting such use, the protest of Crosby is denied.

Very truly yours,

Paul G. Oembling

For the Comptroller General
of the United States