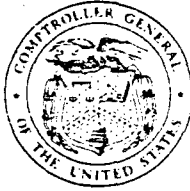


DECISION

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

60811

FILE: B-185897

DATE: April 28, 1976

MATTER OF: Data General Corporation

99011

DIGEST:

1. General Accounting Office has provided some protection against unauthorized disclosure of proprietary data in solicitation which includes data without owner's consent. If protest against solicitation disclosing data is lodged after award, policy has been not to hear protest.
2. Because of policy not to hear post-award proprietary data protests and since relief being sought by post-award protester is injunctive in nature--relief not available through GAO--aspect of protest will not be considered.
3. Since question whether protester's data is proprietary will not be considered, capability of prime contractor to successfully complete contract without data will not be questioned.
4. Protester's post-award assertion that solicitation was defective for failing to include as evaluation factor cost of possible damages arising from release of alleged proprietary data is untimely filed under Bid Protest Procedures.

On February 12, 1976, a protest was received from Data General Corporation against the January 30, 1976, award of prime contract No. 6-35124 for computer equipment and related services to Aeronutronic Ford Corporation (AFC) by the Department of Commerce. The contract was awarded under solicitation No. 5-35243.

B-185897

Data General, an unsuccessful competitor for certain work under the prime contract, insists that item 26 of the contract ("CONVERSION SOFTWARE, to convert 100,000 NOVA 840 Instructions") requires AFC, or its subcontractor, Keronix, Inc., to have the NOVA 840 Instructions. The protester argues that it has previously furnished the Instructions to the Department "under specific license agreements" incident to National Oceanic and Atmospheric Administration Purchase Order No. 5-19402, General Services Administration contract No. G5-00C-00430, and Department of Commerce contract No. 3-35323. Because the Instructions were furnished under license agreements, Data General insists that the Instructions are its proprietary data; further, Data General says that it has not given license rights to AFC or Keronix to use the Instructions. The company therefore requests that we "bar the Department from giving AFC or Keronix access to Data General's proprietary data, the NOVA 840 Instructions."

Our Office has provided some protection against the unauthorized disclosure of proprietary data in a solicitation which includes the data without the owner's consent. In several prior decisions, we have directed the cancellation of solicitations which improperly disclosed proprietary data. 49 Comp. Gen. 28, 32 (1969); 43 Comp. Gen. 193, 203 (1963); 41 Comp. Gen. 148, 160 (1961). Data rights have been protected in order not to give any semblance of approval to improper disclosures of data and so as not to expose the Government to liability for damages resulting from the disclosures. See 52 Comp. Gen. 312, 313 (1972); 42 Comp. Gen. 346, 354 (1963).

If a protest is lodged with our Office after the award of a contract under a solicitation which allegedly discloses proprietary data, it has been our policy, however, not to hear the protest. Cf. B-167803, December 12, 1969. We have taken this view because the courts have held that a party must take reasonable action to prevent unauthorized use of its proprietary data. See, for example, Ferroline Corporation v. General Aniline and Film Corporation, 207 F.2d 912 (7th Cir. 1953); Globe Ticket Company v. International Ticket Company, 104 A. 92 (1918). Because of this view, and recognizing that proprietary data cases often

B-185897

involve disputed facts--including technical issues of the greatest complexity--we have never directed the cancellation, or recommended the termination, of a contract which has been the subject of a proprietary data protest. See 49 Comp. Gen 124, 128 (1969).

The post-award protest filed by Data General here, of course, does not involve a solicitation which contained the concern's alleged proprietary data. Further, the relief being sought by the protester--that we order the Department to refrain from releasing the data in question--is injunctive in nature and not within our authority to grant. The courts, of course, have the general power to issue injunctive relief. Notwithstanding the courts' general authority to fashion injunctive relief, the U.S. Court of Appeals has held that injunctive relief, enjoining the United States from distributing reports containing a company's alleged proprietary data, is improper. International Engineering Co. v. Richardson, 512 F.2d 573 (D.C. Cir., 1975), cert. denied, January 12, 1976.

Although in footnote eleven of the Court of Appeal's decision, cited by the protester, the court states that our Office has the "power to cancel * * * procurements made to competitors who wrongfully have acquired [proprietary data]," we interpret the court's statement as a reference to our Office's role in sometimes directing the cancellation of solicitations which have improperly disclosed proprietary data and not as an indication that we have or will entertain post-award protests of the type lodged by Data General here.

Consequently, we will not further consider this aspect of Data General's protest.

Arguing in the alternative, Data General also asserts that if the Department does not intend to give the Instructions to AFC, AFC should not now be considered a responsible contractor. The company acknowledges that we generally do not review affirmative responsibility determinations made by contracting

B-185897

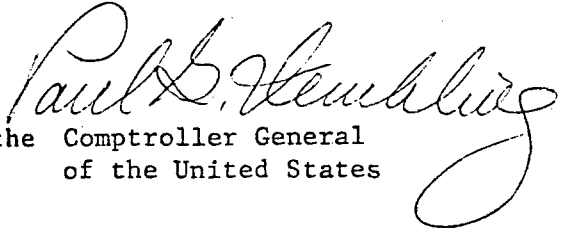
officers save for a showing of fraud or where the solicitation contains definitive responsibility criteria which allegedly have not been met. See, for example, Randall Manufacturing Company, Inc., B-185363, January 26, 1976, 76-1 CPD 44. The company argues, however, that we should review AFC's responsibility here since it "go[es] to the right to use proprietary data."

This ground of protest is predicated on the assumption that the the Department would not release data considered to be proprietary. The argument obviously involves the question whether the Instructions are, in fact, proprietary--a question we will not consider. Because of this position, we cannot question AFC's capability to perform the contract.

Finally, Data General argues that the Department failed to consider, for proposal evaluation purposes, the cost of breach of contract damages arising out of the release of Data General's alleged proprietary data.

Since Data General is asserting that the solicitation was defective for failing to specifically include the cost of these possible damages as an evaluation factor, the company's post-award protest is untimely filed under our Bid Protest Procedures (40 Fed. Reg. 17979 (1975)).

Protest denied.


For the Comptroller General
of the United States