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DECISION

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

FILE: B-189361 DATE: March 31,1978

MATTER OF: Harvey W. Neeley

DIGEST:

1. Protester alleging that agency has acquired unlimited rights in technical data and that, therefore, manufacturer should not constitute sole source of supply for spare parts has the burden of showing that agency's position as to the ownership of the technical data is unreasonable.

2. Protester's showing that agency at one time believed it had unlimited rights in technical data is not sufficient to carry protester's burden of demonstrating unreasonableness of agency's present position that royalty payments made to manufacturer did not have the effect of agency's purchasing unlimited rights in technical data. However, agency may wish to consider whether data rights should be purchased so that future procurements can be opened to competition.

Harvey W. Neeley (Neeley) has protested against the Air Force's proposed sole source award under solicitation No. F34601-77-R-1102 for spare parts for the TF-41 jet engine. Neeley contends that the Government owns unlimited rights in the technical data necessary to construct certain noncritical spare parts and that, therefore, there is no justification for the Air Force's restriction of the purchase of the spare parts to the engine's manufacturer.

The protest arises out of a contract entered into between the Air Force and General Motors, Detroit Diesel Allison Division (Allison) in 1966 whereby Allison would supply the Air Force with a specified quantity of TF-41 engines and spare parts. The TF-41 jet engine is produced by Allison under a licensing agreement with Rolls-Royce (1971) Limited (RR) dated November 4, 1966, which has been amended and extended to November 4, 1981. Much of the controversy surrounding the protest is directly related to the Allison-RR agreement.

Allison and RR agreed basically that RR would furnish Allison the necessary proprietary and technical information and assistance in order for Allison to submit a proposal to the Air Force for incorporating RR's RB.168, 168-61, and/or 168-62 by-pass type turbo-jet engine for the Air Force's A-7A aircraft. In the event Allison was awarded development and production contracts for the engine, RR agreed to support Allison by supplying necessary services, parts, and information as would be required for Allison to perform.

Article 5 of the agreement specified how Allison and RR would deal with technical information each had that was not a matter of public knowledge. It states in pertinent part as follows:

> "(A) ALLISON and RR agree that the drawings, specifications and other documents containing technical information furnished to either party by the other for the Programme, to the extent that they are not matters of public knowledge, will not be furnished to others except as may be reasonably required by sub-contractors, suppliers, customers, licensees and others connected with work on the Engine.
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> (D) No rights are granted by either party for the use of any technical information supplied by the other except in accordance with the provisions of this Agreement.
>
> (E) (1) RR grants to ALLISON the right to furnish to the United States Government data properly required by the United States Government pursuant to the Armed Services Procurement Regulation relating to data, but in each instance such furnishing by ALLISON of data shall be subject to all limitations on use permitted by the Armed Services Procurement Regulation, and as applicable, data so furnished shall be marked with a legend pursuant to ASPR 9-203 restricting the use thereof without the permission of RR.

(2) It is agreed that the United States Government shall have the right to use, for Governmental purposes, any information which ALLISON shall have acquired from RR under the terms of this Agreement relating to the manufacture of the Engine, and which is supplied by ALLISON to the United States Government under the terms of the Government's contracts for such Engine subject to the provisions, including those of ASPR 9-203 as applicable, of such Government Contracts relating to limitations as to right of use and limitations as to the data required to be furnished. No rights under patents are hereby granted by implication, estoppel or otherwise.

(3) The provisions of this Paragraph (E) shall survive, the expiration or any termination of this Agreement.

* * * * *

The Armed Services Procurement Regulation (ASPR) then in effect was the 1963 edition, Revision 19 dated October 1, 1966. ASPR § 9-203(b) (1963) contained the Basic Data clause which was included by reference in Allison's contract with the Air Force. That clause sets out seven specific instances where the Government acquires unlimited rights in the technical data to be supplied under the contract. It also stipulates two specific instances where the Government obtains only limited rights to the technical data supplied, provided that such data is marked with a legend indicating that the contractor is giving only limited rights in the data. The clause we are most concerned with here is the one which restricts the technical data purchased to limited use because the information was developed at private expense. That clause states in pertinent part as follows:

"(b) Government Rights

* * * * *

(2) The Government shall have limited

rights in

* * * * *

(ii) technical data pertaining to items, components, or processes developed at private expense * * *."

The protester's basic argument regarding the rights in technical data is that the Air Force has, in fact, purchased substantially all technical data which RR developed at private expense. To understand this argument it is necessary to review correspondence between the Small Business Administration (SBA), and the Air Force wherein this issue was first raised.

In a letter dated November 20, 1969 the SBA's representative at Tinker Air Force Base, Oklahoma pointed out to the Air Force that in her opinion the Air Force had purchased unlimited rights in data to some 700 drawings of the TF-41 engine but which bore RR's restrictive legend as provided in the Technical Data clause of Allison's contract. On December 12, 1969 the recipient of SBA's November 20, 1977 letter requested the contracting officer for the TF-41 engine to review the referenced drawings and determine whether they were purchased with unlimited rights even if developed at private expense. The contracting officer wrote to Allison on February 27, 1970 and March 20, 1970 noting that every one of the 700 drawings supplied by Allison bore RR's restrictive legend and that several things had led the contracting officer to believe all of the 700 drawings should not bear a proprietary legend.

As of July 15, 1970 Allison had made no substantive reply to the contracting officer's request, so the contracting officer sent the following letter to Allison stating in pertinent part as follows:

"2. It is acknowledged that past and future payments to Rolls Royce under the license agreement are in part for the amortization of the original development cost of the engine. This means that Government contributions were directly made for the development of the engine. Therefore it can no longer be maintained that the engine was developed at private expense. Accordingly, pursuant to ASPR 9-202.3, it is requested

> that the Contractor show by clear and convincing evidence why all the restrictive legends appearing on all the TF-41 engine drawings should not be removed. Failure to respond within 60 days will cause removal of all legends by Government personnel."

Allison responded almost immediately by letter of July 28, 1976 in which it disagreed with the contracting officer that payments it made to RR under the licensing agreement--and which were reimbursed under its contract--had anything to do with RR's rights in technical data.

On November 17, 1970 the small business representative at Tinker Air Force Base wrote to SBA headquarters and stated that she believed the Air Force had paid Allison--which in turn reimbursed RR--$7 million in "original development costs." On June 15, 1977, the SBA, referring to and relying on the contracting officer's July 15, 1970 letter to Allison withdrew its concurrence in the sole source procurement of the parts listed in solicitation F34601-77-R-01102 until the rights in technical data issue is settled.

No one has argued and we have seen no evidence that the information contained in the 700 drawings bearing RR's restrictive legend was not initially developed at RR's expense. The only question raised is whether the United States has directly or indirectly purchased the rights withheld by RR pursuant to section (b)(2)(ii) of the Rights in Technical Data clause of the Air Force's contract with Allison.

Since the contracting officer's July 15, 1970 letter is pivotal as to both Navy's and the SBA's view that even the Air Force conceded that it owned the data marked proprietary, our analysis will begin there. We note that Allison has never conceded, nor has the Air Force shown, that payments to RR under the licensing agreement were intended to compensate RR for engine development costs. In fact, the license agreement referred to only two instances wherein Allison was to pay RR: (1) If RR was the subcontractor under a development or production contract and (2) royalties on engines sold. Section 5 of the agreement specifically stated that information that was not then public knowledge was

not to be so unless RR concurred. While it may be the case that RR is using monies received under its subcontracts and royalty payments to off-set privately incurred developmental costs, there is no evidence in the record before us that RR has given up any additional rights in the technical data contained in the 700 proprietary drawings RR has furnished to Allison and, ultimately, to the United States.

The present case is very similar to Applied Devices Corporation, B-187902, May 24, 1977, 77-1 CPD 362. Neeley is contending that the Air Force should be asserting rights in RR's data for the purpose of using the data in a competitive procurement. As in Applied Devices, the sole source procurement is premised on the finding that only RR possesses the necessary procurement data. We stated that the protester's burden was to show that the Air Force's position regarding the rights to the third parties' data was without a reasonable basis. In view of the circumstances set out above, we do not believe that Neeley has met its burden.

The protest is denied. We note, however, that the Air Force states in its report that no attempt has been made to acquire sufficient rights in data to allow for competition for the parts to be purchased under this solicitation. In this connection the Air Force may wish to consider whether these rights in data should be purchased, so that future procurements can be opened to competition.

R. F. Keller

Deputy Comptroller General
of the United States