143971

SKlarew

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

Decision

Matter of: Kitco, Inc.--Reconsideration

File: B-241133.2

Date: May 21, 1991

Paul J. Seidman, Esq., Seidman & Associates, P.C., for the protester.
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

Request for reconsideration of prior decision denying protest alleging agency violation of contractor's proprietary rights in technical drawing is denied where protester repeats arguments previously made, disagrees with our conclusions, and attempts to supplement record with information it should have submitted during the course of the initial protest.

DECISION

Kitco, Inc. requests reconsideration of our decision in Kitco, Inc., B-241133, Jan. 25, 1991, 70 Comp. Gen. ____, 91-1 CPD ¶ 73, in which we denied Kitco's protest that the Defense Logistics Agency had violated Kitco's proprietary rights by its unauthorized use of one of Kitco's technical drawings in request for proposals (RFP) No. DLA500-90-B-0052.

We deny the request for reconsideration.

The solicitation was for a quantity of plate seals for use on the constant speed drive of certain aircraft engines. Kitco did not develop the plate seal itself, but had reverse engineered the item from government-furnished seals and had submitted its technical drawing to the Defense Industrial Supply Center (DISC) with a proprietary legend when it applied for source approval as an alternate to the original equipment manufacturer. Kitco's plate seal was approved as an acceptable alternate for the original part. Following its approval as an alternate source, Kitco received three contracts to supply various quantities of the plate seal. Kitco's protest involved the next solicitation that was issued for the part, the RFP referenced above. This solicitation

included Kitco's technical drawing, incorrectly identifying it as a Naval Air Rework Facility (NARF) drawing.

Kitco argued that the agency's use of Kitco's drawing violated the firm's proprietary rights, and sought either a directed award or the cancellation of the solicitation. We found that although the drawing might involve a trade secret, Kitco had not provided a sufficient factual record to allow us to determine whether the drawing was protectable. We also found that because the government had provided Kitco with government-owned seals at no charge to use in its reverse engineering effort, the government had contributed to the development of the drawing; we stated that where there is a mix of private and government contributions to an item (mixed funding), the developed item cannot be said to have been developed at private expense, and the government received unlimited rights to the data. See Chromalloy Div.--Oklahoma of Chromalloy Am. Corp., 56 Comp. Gen. 537 (1977), 77-1 CPD ¶ 262; 49 Comp. Gen. 124 (1969). We stated that although the agency had argued that it had obtained rights in the data by providing the seals, the protester failed to provide any facts to rebut the agency's assertions.

Seeking reconsideration of that decision, Kitco argues that it met the appropriate standard of proof to show that its drawing deserved trade secret protection; that the mixed funding rule has been superseded by statute; and that the monetary value of the seals was minimal in any case.

Our Bid Protest Regulations provide that a party requesting reconsideration must show that our prior decision contains either errors of fact or law or must present information not previously considered by this Office that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a) (1991). Information not previously considered means information that was not available when the initial protest was filed. S/A Baltimore-I Limited Partnership--Recon., B-241050.3, Jan. 14, 1991, 91-1 CPD ¶ 33. Failure to make all arguments or submit all information available during the course of the initial protest undermines the goals of our bid protest forum--to produce fair and equitable decisions based on consideration of both parties' arguments on a fully developed record--and cannot justify reconsideration of our prior decision. Id. The mere repetition of arguments made during our consideration of the original protest or disagreement with our decision also fails to meet this standard. Action Bldg. Sys., Inc.--Recon., B-237067.2, Jan. 30, 1990, 90-1 CPD ¶ 130.

In our original decision, we examined the question of whether Kitco's drawing was entitled to protection as a trade secret, applying factors established in Section 757, Comment b, of the Restatement, Torts (1939). On the issue of how much time and

expense was involved in the reverse engineering effort, we concluded that Kitco had not provided sufficient information to enable us to resolve the matter.

Kitco argues that it provided sufficient facts and met the requisite standard of proof, citing Section 21.1(e) of our Regulations, which provides that "No formal briefs or other technical forms of pleading or motion are required." In our view, the protester mischaracterizes our decision. We did not require any further formalities from the protester, but further information. As we pointed out in our decision, Kitco had unique knowledge about how much time or money was expended in the reverse engineering effort, yet its protest submissions did not include even an approximate dollar figure for its costs. Kitco sought to support a claim of some legal complexity with generalizations and conclusory statements rather than precise information. Neither Kitco's attempts to supplement the factual record at this point nor its disagreement with the conclusions we reached based on the original record warrants reversal of our initial decision.

Kitco also argues that the value of the seals that the government provided to the firm (representing mixed funding of the development of the drawing) was minimal.1/ In our decision, we pointed out that Kitco had failed to provide any facts to rebut the agency's contention that by providing the seals it obtained rights in the resulting data. Kitco did not reveal to us whether it could have obtained the seals commercially or from any source other than the government (since the unavailability of the part from any other source would make the government's contribution to the effort significant), nor did the protester provide any other indication of the seals' value in this context. On reconsideration, Kitco argues only that the seals were used parts, whose value should be measured as scrap metal. Kitco has never addressed the matter of the government's

---

1/ Regarding the mixed funding, Kitco argues that 10 U.S.C. § 2320(a)(2)(E) (1988) requires that rights in technical data be negotiated where an item is developed partially with federal funds and partially at private expense and that our prior decision was therefore erroneous in relying on our superseded prior case law to find unlimited rights for the government in its drawing. The statute contemplates negotiation of rights in technical data developed with mixed funding between the government and the contractor early in an acquisition, with the results incorporated into the contract before delivery of the data. See Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 227.472-3(c) (DAC 88-2). Here, this procedure was never invoked, and the rights to Kitco's drawing were not negotiated.

contribution in terms of the availability of the part, and we consequently find no error of law or fact in our decision in this connection. Moreover, any further information the protester might have in this regard should properly have been submitted in its protest conference comments, since the agency raised the issue at the bid protest conference held in our Office and the information was available to Kitco at that time.

The request for reconsideration is denied.

for James F. Hinchman
General Counsel