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

B-177115

May 14, 1973

The Goodyear Tire and Rubber Company
Wheel and Brake Operations
Aviation Products Division
Akron, Ohio 44316

Attention: Mr. E. A. Davis, Jr.

Gentlemen:

Reference is made to your telegram dated September 26, 1972, and subsequent letters, protesting the issuance of request for proposals No. F42600-72-R-6565, by the Ogden Air Materiel Area, Hill Air Force Base, Utah, to parties other than Goodyear, for a stated quantity of stationary brake discs to be used as spare parts, and the resulting award of a contract to Nasco Engineering, Incorporated.

Prior to the issuance of the subject RFP, the stationary brake discs, P/N 9533565, were procured from Goodyear on a sole-source basis. However, in April 1972 the cognizant technical personnel determined that any subsequent procurement of the brake discs should be done on a competitive basis. Consequently, Purchase Request No. FD2020-73-42603 was coded 2C, designating the suitability of the procurement for competition for the first time, in accordance with Air Force Regulation (AFR) 57-6. Nine firms were designated as the "ONLY KNOWN QUALIFIED SOURCES" and of the nine sources solicited, only Goodyear and Nasco responded. Since Nasco was the low proposer, but had not previously produced the brake disc, a pre-award survey was conducted by the Defense Contract Administration Services Office (DCASR) in Los Angeles. At the conclusion of the survey, a complete award to Nasco was recommended. After your protest was filed with our Office, the contracting officer, on January 5, 1973, in accordance with ASPR 2-407.8(b)(3), determined that it was necessary to award the contract for the procurement of the brake disc. The contract was awarded to Nasco on January 12, 1973.

[Protest Against Air Force Contract Award]

DIGEST DECISION
52 Comp. Gen. _____

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In your letter dated October 5, 1972, you challenge the legality of the Air Force's utilization of your drawings for competitive procurement or reverse engineering. You state that the drawings and other data are proprietary and the right to their use had not been acquired by the Government even though the proprietary legends had been crossed out by unknown persons.

The drawings in question were reportedly delivered by Goodyear to the Government under contracts AF33(657)-8177 and AF33(657)-9716. Each contract included a Data Clause, the pertinent portions of which follow:

> (a) The term "Subject Data" as used herein includes * * * drawings or other graphical representations * * * (whether or not copyrighted) which are specified to be delivered under this contract * * *.
>
> (f) * * * the Government may duplicate, use, and disclose in any manner and for any purpose whatsoever, and have others so do, all Subject Data delivered under this contract. [Underscoring supplied.]
>
> (h) Notwithstanding any provision of this contract concerning inspection and acceptance, the Government shall have the right at any time to modify, remove, obliterate or ignore any marking not authorized by the terms of this contract on any piece of Subject Data furnished under this contract. [Underscoring supplied.]

Furthermore, in Part IV (b) in each of the said contracts it was agreed that:

> The rights obtained by the Government in Subject Data are set forth in the Data Clause incorporated in this contract [above], and nothing elsewhere in this contract or in any documents incorporated by reference in this contract shall be construed as in any way altering such rights.

Consequently, we are of the opinion that the Government acquired unlimited rights to the drawings in question and, irrespective of which party crossed-out the proprietary legends on the drawings, none of Goodyear's proprietary rights in the data were violated by including the drawings with the subject RFP. In this connection, it should be noted that the Air Force states that the legends were crossed-out when the drawings were received from you.

In your letter of January 25, 1973, you state, in reference to material and processing specifications for discs and friction elements, that:

> The subject disc cannot be manufactured without such data, however, and the Government did not receive it from Goodyear. Therefore, this data, if available for reprocurement, has to be the result of Reverse Engineering on the part of the Air Force. The data could be obtained in no other way.

Therefore, you contend that by engaging in reverse engineering, the Air Force has unlawfully gained possession of, and wrongfully used, your proprietary data.

Protection of one's rights in proprietary or technical data is recognized throughout the area of Government contracts law. See B-156727, October 7, 1965. However, the law clearly recognizes that, by the process of reverse engineering, one may lawfully gain possession of a product fabricated through the use of proprietary data and, thus, through inspection, experimentation and analysis, create a duplicate. The product then loses its proprietary character. B-166071, September 18, 1969. Since Goodyear did not explicitly restrict the use of the brake discs sold to the Government under contracts AF33(657)-8177 and AF33(657)-9716, the Government acquired title to the items and the right to use them however it wished. B-166071, supra. Furthermore, the Data Clauses included in those contracts stated in part that:

> (i) * * * For the purpose of this clause, "proprietary data" means data providing information concerning the details of a contractor's secrets of manufacture, such

> as may be contained in but not limited to his manufacturing methods or processes, treatment and chemical composition of materials, plant layout and tooling, to the extent that such information is not disclosed by inspection or analysis of the product itself and to the extent that the contractor has protected such information from unrestricted use by others. [Underscoring supplied.]

Since restrictions on the use of the brake discs procured under the aforementioned contracts were not stipulated in the contracts, it seems clear that the Air Force procured and received the discs delivered under those contracts free of any restriction on their use and was able to engage in reverse engineering without incurring any liability to Goodyear. However, it should be noted that it is not clear from the record to what extent, if any, reverse engineering was accomplished.

In a letter of October 16, 1972, your patent counsel lists the patents (which cover the brake structure) that Goodyear owns in certain foreign countries. He states that the Government has no license under these patents since the brake was developed solely with Goodyear funds and urges us to consider the possible patent problems which may arise from the procurement of this type of brake disc from unlicensed sources and from its ultimate use in any of the countries where the device is patented.

In this regard, we are of the opinion that the contracting officer should not have to take into consideration the possible patent problems involving foreign patents when making an award. Whether or not such problems will occur after award, and what liabilities, if any, will be incurred, are matters so speculative and complex that it would be unreasonable to impose such a burden on the contracting officer.

Your contention that the RFP should have been cancelled or placed as a sole-source procurement because it violated the Memorandum of Agreement between Wright-Patterson Air Force Base and Hill Air Force Base is apparently without merit. It appears from the record that the cognizant engineering activity under the Agreement assumed responsibility for technical acceptability of the parts being procured under the subject RFP.

You also question the procurement facility's determination that the other eight companies were, in fact, qualified sources. It is reported that the companies in question were considered qualified because they had previously furnished satisfactory aircraft wheel/brake components of equivalent complexity and functional criticality. Furthermore, it is reported that components tested by OOAMA in accordance with material and process requirements developed by OOAMA/MME met all test requirements of the applicable Air Force drawing and military specification. Therefore, it is the Air Force's position that parts manufactured by qualified sources in accordance with the manufacturing data furnished in the RFP will meet all requirements. The establishment of procedures to determine the qualifications of a source to manufacture a part in accordance with required specifications is discretionary and within the ambit of the expertise of the cognizant technical activity. Thus, the activity assigned responsibility over a given part, in this case the Ogden Air Material Area, "may determine those criteria necessary to insure the safety, dependability and interchangability [sic] of the part on an ad hoc-basis." B-172901, B-173039, B-173087, October 14, 1971. While it is true that the testing procedures to which Goodyear was initially subjected were more stringent than those to which subsequent contractors will be subjected, this inequality is attributable to the fact that the Goodyear tests were necessary to prove the design, composition and functional characteristics of the newly designed component, while any subsequent sources will be required to demonstrate only that their parts will meet the specifications and functional characteristics of the accepted component previously proven through more rigorous qualification testing. Ogden Air Material Area was charged with the responsibility of determining the amount of testing necessary, if any, to assure specification compliance. Since our Office is not equipped to consider the technical sufficiency of such determinations, and since such determinations are matters primarily of administrative discretion, we will not substitute our opinion for that of the technical activity assigned the duty to oversee component acceptability. B-172901, B-173039, B-173087, supra.

In your letter of October 5, 1972, you contend that changing from a sole-source procurement method to a competitive method for procuring brake discs will cause a

degradation of the industry. You state:

> All of these programs require engineering talent and we maintain this talent by selling spare parts. It seems eminently unfair to start a program one way and then switch to a new method of procuring parts that could eliminate the entire wheel and brake industry from proposing on new aircraft.

In your letter dated December 19, 1972, you state that:

> * * * we feel that the Government must maintain an industry base for future development of wheels and brakes for the next generation of military aircraft. This can only be done by buying spare parts from the original designer and manufacturer.

You contend that it would be in the Government's best interest to continue procuring the brake discs on a sole-source basis from Goodyear.

We are of the opinion that competition will not eliminate the entire industry from proposing on brake discs for new aircraft. To the contrary, we believe it may encourage new firms to enter the market, thereby enhancing rather than degrading the industry. For the same reason, we fail to see how elimination of the entire wheel and brake industry, other than Goodyear, from competing on spare parts will "maintain an industry base for future development of wheels and brakes."

We have consistently held that absent sufficient documented reasons, competition in all aspects of procurement is the desired goal and that continued vigilance should be exercised in an effort to maximize competition. 50 Comp. Gen. 184 (1970). Further, 10 U.S.C. 2304(g), as implemented by ASPR 3-102(c), requires competition to the maximum extent practicable. AFR 57-6, section 1-300 is to the same effect. Also, see ASPR 1-313(a), with respect to the competitive procurement of parts. We feel that in many instances the assurance of reliability and interchangeability of spare parts may be obtained through competitive procurement procedures as well as from sole-source buys from the current manufacturer of the item. Therefore, when the

Air Force became aware of other qualified sources, it was incumbent upon it to solicit those firms to attain maximum competition, B-172901, B-173039, B-173087, supra; B-166435, July 1, 1969.

Finally, in your letter of January 25, 1973, you cite our decision, B-175661, September 19, 1972, 52 Comp. Gen. 142, for the proposition that an offer to supply a product to be produced at a plant other than the one at which the previously qualified item was produced is an offer to supply an unqualified product and is nonresponsive in a material aspect. The cited case is not applicable to the situation here because the procurement concerned there was restricted to bidders listed on a Qualified Products List (QPL) and involved the affect of a bidder having QPL status failing to accomplish transfer of QPL production facility designation from the approved facility to another facility prior to bid opening as provided for in the solicitation and regulations. Although the procurement here involved was restricted to certain qualified sources, it did not involve a QPL item.

In view of the foregoing, your protest is denied.

Sincerely yours,

PAUL G. DEMBLING

For the Comptroller General
of the United States