



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

B-176764

May 14, 1973

30878

McGown, Godfrey, Decker, McMackin,
Shipman & McClane
Eighteenth Floor
Commerce Building
Fort Worth, Texas 76102

DLG06228

Attention: John W. McMackin, Esquire

Gentlemen:

We refer to your letter dated August 8, 1972, and subsequent correspondence, on behalf of Howell Instruments, Incorporated (Howell), protesting against the Department of the Navy's use for procurement purposes of data which you contend is proprietary to Howell.

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On June 22, 1972, request for technical proposals (RFTP) NO0156-72-RFTP-0496 was issued by Naval Air Engineering Center, Philadelphia, Pennsylvania. The solicitation called for technical proposals for furnishing 60 engine trim test sets in accordance with the requirements of purchase description 35 (PD-35), dated June 12, 1972. These sets are used to determine whether an engine is performing efficiently and to determine what adjustments to the engine are required. The requirements included indicators to read revolutions per minute (RPM), temperature and pressure, and circuitry for correcting RPM and temperature to a standard day condition (59°F.) and for computing engine pressure ratio.

As background, it is reported that the general requirements for the test unit were not at a meeting held on February 3, 1971, between technical personnel from Howell, Navy and Pratt & Whitney Aircraft (P.W.). The record indicates that it was concluded at this meeting that a test set was to be furnished by Howell, under a subcontract with P.W., to be delivered to the Navy pursuant to P.W.'s prime contract (No. N00019-70-C-0208) with the Navy for TF30-P-412 engines and support equipment for the F-14A aircraft. At this time Howell provided the Navy with three drawings which depicted the configuration of the control panel, external dimensions of the test set, and the circuitry connecting the test set to the engine. Each of these drawings was marked with a Howell legend which indicated that it represented a proprietary device.

[Unauthorized Use of Proprietary Data]

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After 15 of these test sets (H236) had been furnished to the Navy by HW pursuant to its purchase order No. 807153 to Howell, dated April 28, 1971, the Navy concluded that any additional procurement of these devices should be on a competitive basis.

In early May 1972, Howell was informed of the Navy's intent to solicit competitive proposals. Howell expressed its concern to the Navy that the specification to be released in the solicitation might contain data which Howell considered proprietary and requested an opportunity to review the Navy purchase description before its release. This request was denied by the Navy on the basis that a prior release of the purchase description to Howell could give it an unfair competitive advantage over other prospective offerors. The Navy then issued solicitation N00156-72-RFTP-0496 on June 22, 1972, which incorporated the three restricted Howell drawings previously provided to the Navy.

On August 8, 1972, you protested to this Office against RFTP-0496. Meanwhile, the Navy had cancelled RFTP-0496 and on August 1, 1972, issued a new solicitation (RFTP-N00156-73-RFTP-0104), which included a revised purchase description (PD-35A) eliminating the three Howell drawings. Howell states that it received this solicitation soon after August 8, 1972. With regard to the cancellation of RFTP-0496, Navy concluded that its use of the Howell drawings was contrary to the policy established in Armed Services Procurement Regulation (ASPR) 4-106.1(e) because they bore a restrictive legend and were not furnished to the Navy pursuant to the terms of any contract which gave it any rights to the drawings. However, the Navy also concluded that while use of the Howell drawings themselves was restricted by the legend on the drawings, the information depicted in the drawings was not proprietary to Howell.

In this connection, the Navy reports that the drawings depict only information which is readily disclosed by physical inspection of the item itself, such as the external dimensions, the layout of the control panel, and the connecting cables, and not detailed information as to the component's manufacture or assembly. The Navy takes the position that such requirements are not proprietary because they are based upon information which had been previously published or furnished to the Navy without restriction by Howell, Pratt & Whitney, and other manufacturers; that some of the components are commercially available; and that each of the requirements in PD-35A was established on the basis of the performance of the engines to be tested as indicated by engine trim charts prepared by the engine manufacturer, the equipment in the fleet which will be used in operations, and the need for standardization of equipment specifications (government and commercial). Finally, the Navy has furnished the following statement as to why it considers the information included in PD-35A as not being proprietary to Howell:

* * * * *

2. The specification as now worded merely describes the purpose of the equipment and the functions desired to be performed by it. The specification includes no information detailing how the component parts are to be manufactured or assembled in combination with each other; nor does the specification contain detailed descriptions of the circuitry involved. The information contained in the specification -- performance parameters, physical characteristics, quality assurance tests, etc. -- consists of functional statements describing the desired diagnostic capability of the test set in order that the performance capabilities of various engines can be accommodated and determined.

3. Accordingly, since details of specific designs or features are not disclosed in the specification PD 35A, it is considered to be a performance-type specification and therefore not containing technical information that can be properly considered to be proprietary to a single firm.

By letter dated August 23, 1972, you reasserted your protest, this time objecting to the new solicitation. It is your position that the information depicted on the Howell drawings, improperly included in the cancelled solicitation and purchase description (PD-35), has been converted to a narrative form and included in the new solicitation and PD-35A. Accordingly, you conclude that PD-35A incorporates the same proprietary information included in PD-35 and, therefore, the current solicitation must likewise be cancelled. You assert that the specifications included in both PD-35 and PD-35A are design specifications detailing types of circuits to be used, dimensional outlines of boxes, weights, switch functions, panel layouts, types of connectors, cable details, and test specifications, which you contend are almost an exact copy of the H236 trim test set and, therefore, violative of Howell's proprietary rights. To substantiate these charges, you have furnished a detailed comparative analysis of what you consider the most "apparent and flagrant" similarities between the solicitation specifications and the Howell H236 specifications. You point out that while PD-35A omitted the most obvious appropriations of H236 design specifications, it continues to contain proprietary data.

You state that Howell already has been injured by the Navy's actions and has an immediate course of action for damages against the Government. However, your contention that the pending procurement is the proper remedy. In this regard, you refer

to a number of our decisions to support your argument that the instant solicitation should be canceled.

In addition, the record contains a letter dated November 27, 1972, from the Division Assistant Counsel, United Aircraft Corporation, Pratt & Whitney Aircraft Division, which expresses that firm's opinion that PW was unable to provide the Navy unlimited rights to the requirements for the test set since a substantial part of the specification was proprietary to Howell. The Navy has taken exception to PW's position, stating the view that its prime contract with PW obligates that firm to provide the Navy with unlimited rights in certain drawings and that the drawings which PW has thus far provided do not fulfill that firm's contractual requirements.

The Navy points out that it possesses "Handbook, Operation, Service and Overall Instruction" (FIA24365), dated April 1, 1972, which contains all of the disputed requirements included in PD-35A. This handbook, which contains a Howell proprietary legend, was furnished PW by Howell pursuant to purchase order No. 8C7153, and in turn delivered to the Navy by PW in accordance with the prime contract. The record indicates that the prime contract between the Navy and PW contains the clause entitled "Rights in Technical Data (Feb 1965)" set forth in paragraph 9-203(b) of the Armed Services Procurement Regulation (ASPR). The clause provides, in part, as follows:

* * * * *

(b) Government Rights

(1) The Government shall have unlimited rights in:

* * * * *

(v) manuals or instructional materials prepared for installation, operation, maintenance or training purposes.

Section (g) of the clause entitled "Acquisition of Data from Subcontractors", provides that whenever any technical data is to be obtained from a subcontractor, the contractor shall use the same clause in the subcontract, without alteration.

Paragraph 9 of the "Terms and Conditions of Purchase", included in the PW purchase order for the H236 test sets and manuals provides, in part, as follows:

* * * There are hereby incorporated by reference and made a part hereof the following Armed Services

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Procurement Regulation clauses as in effect at the date hereof: * * * ASPR 9-203.1 "Basic Data Clause" * * *.

Although the undated form included in the purchase order references the "Basic Data Clause", you have agreed that Howell's subcontract is governed by the "Rights in Technical Data" clause of 1965, referred to above.

It is the Navy's position that as a result of the express provisions concerning rights in technical data contained in both the prime contract and the purchase order, it contracted for and obtained unlimited rights in the subject manual notwithstanding any legend which Howell affixed thereto.

You argue that the subject data clause only entitles the Navy to unlimited rights in the manual for the purposes of installation, operation, maintenance or training. You assert that any use of the manual for procurement purposes is contrary to the intent of the rights in data clause and in the instant case, where the manual carries a restrictive legend, amounts to "confiscation".

In this regard, we note that paragraph (a)(3) of the subject data clause provides that "unlimited rights" means rights to "use, duplicate or disclose technical data, in whole or in part, in any manner and for any purpose whatsoever." (Underscoring supplied.) It is clear, therefore, that "unlimited rights" in the subject manual would include the right to use the material contained therein for procurement purposes.

We recognize that the owner of proprietary data may protect itself against the unauthorized use of such data, but the owner of the data may also contract to obligate itself to deliver such information for unrestricted use as a part of the contract consideration--then such unrestricted use is not unauthorized. See generally, B-167365, November 14, 1969 and B-156959, December 6, 1965.

As you have pointed out, this Office has held that the Government should not disclose or use proprietary data for procurement purposes without the consent of the owner of such data. 43 Comp. Gen. 193 (1963). In this case, however, the Navy contends that the procurement in question does not include data of a proprietary nature and that, in any event, the disputed requirements are contained in a manual which was furnished to the Navy with unlimited rights. It has offered forceful arguments in support of its position. Although you have strongly disputed the Navy's position, we are not persuaded that Howell's proprietary rights are being violated by the Navy. In the absence of clear and convincing evidence that

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Howell's proprietary rights are being violated, we do not believe that our Office would be justified in disturbing a competitive procurement.

Accordingly, your protest must be denied.

Sincerely yours,

PAUL G. DEMBLING

For the Comptroller General
of the United States