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DECISION

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

FILE: B-201287

DATE: April 1, 1981

DL606335

MATTER OF: John Baker Janitorial Services, Inc.

DIGEST: [Protest Against Contract Award]

Protester has burden of affirmatively proving its case. Burden has not been met where only evidence is conflicting statements of parties as to whether Government's use of data in solicitation was violative of protester's proprietary rights.

John Baker Janitorial Services, Inc. (Baker) protests the award of a contract for custodial services under invitation for bids (IFB) No. DABT39-80-B-0155 issued by the Army Field Artillery Center, Fort Sill, Oklahoma. The basis of the protest is that the IFB allegedly contains proprietary data belonging only to Baker and that disclosure of this proprietary data seriously prejudices Baker's competitive position.

Baker, the incumbent contractor, was required under its previous contract to submit, on a quarterly basis, a listing of the number of hours of janitorial support services performed. This listing was required to be documented on a Government-supplied form ("UCA Form No. 21") which was not restrictively marked as confidential or proprietary by Baker when submitting the form to the Government. The Army states that the quarterly report "consisted of data routinely collected during performance on the previous contract." The current IFB contained a copy of one of these quarterly reports as a sample of the type of report the successful bidder would be required to submit during contract performance. According to the Army, the IFB's sample report "did not contain any information that would identify it as having been furnished either by [Baker] or as specific to a particular contract or quarterly period."

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In some cases we have considered claims of misuse of proprietary data. We have done so "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." Data General Corporation, 55 Comp. Gen. 1040 (1976), 76-1 CPD 287. Thus, where it was clear that the Government's use of data in a solicitation was violative of a contractor's proprietary rights, we directed cancellation of the solicitation. 49 Comp. Gen. 28 (1969); 43 Comp. Gen. 193 (1963). However, the protester must present clear and convincing evidence that the procurement will violate its proprietary rights. Chromalloy Division-Oklahoma of Chromalloy American Corporation, 56 Comp. Gen. 537 (1977), 77-1 CPD 262; 52 Comp. Gen. 773 (1973); T. K. International, Incorporated, B-177436, March 12, 1974, 74-1 CPD 126. Stated somewhat differently, the protester has the burden of affirmatively proving its case. Reliable Maintenance Service, Inc.--Request for Reconsideration, B-185103, May 24, 1976, 76-1 CPD 337.

To prevail on the claim that the material given to the Army is proprietary, the protester must satisfy the following criteria. First, the protester's material must have been marked proprietary or confidential, or the protester must show that the material was disclosed to the Government in confidence. Second, it must be shown that the material involved significant time and expense in preparation and that it contained material or concepts that could not be independently obtained from publicly available literature or common knowledge. See Chromalloy, supra; 49 Comp. Gen. 22 (1963); Andrulis Research Corp., B-190571, April 26, 1978, 78-1 CPD 321.

Except for the unsubstantiated general allegations of the protester, the record is completely devoid of any evidence supporting its assertions. As noted, there is no marking on the form submitted by Baker to indicate that any material contained therein is proprietary or confidential. Neither has Baker alleged that the contents of the form were disclosed to Army officials in confidence. These facts alone would be sufficient to deny protection to the form. See Andrulis Research Corp., supra. Under

the circumstances, it is our view that the protester has not met its burden of proof and therefore we accept the Army's characterization of this data as non-proprietary in nature and of the type routinely generated during contract performance.

Accordingly, since there has been no showing of Government misuse of proprietary data, the protest is denied.

A handwritten signature in cursive script, reading "Milton J. Fowler".

Acting Comptroller General
of the United States