

GAO's Treatment of Inadvertent Disclosures¹

A. Some Basic Principles

- Agency may choose to cancel a procurement if it reasonably determines that an inadvertent disclosure harmed the integrity of the procurement process. The Agency has broad discretion in making this determination.
- If the Agency elects not to cancel the procurement, GAO will sustain a protest due to improper disclosure only where a protester demonstrates that the recipient received an unfair advantage, or that it was otherwise *competitively prejudiced*.
- A protest will not be sustained where the competitive harm is deemed speculative. For example, GAO will likely conclude that the disclosure of unit prices does not result in competitive harm unless the protester demonstrates that the disclosure enables its competitors to determine its individual cost elements and/or future prices.
- GAO will consider the inadvertence of the disclosure and how the parties proceeded upon discovery of the disclosure in assessing the impact on the integrity of the procurement.
- GAO regards a sole-source award as an extraordinary remedy. Available remedies include requiring competitors to make comparable disclosures, or cancelling a solicitation that contains a contractor's proprietary information and reissuing the solicitation without the proprietary material.

B. What's Proprietary?

An agency's disclosure of a contractor's proprietary information to unauthorized persons during the conduct of a federal procurement is improper under the Procurement Integrity Act. 41 U.S.C. § 423(d) (1988 and Supp. II 1990). The FAR prohibits disclosure of an offeror's internal business data by the Government. FAR § 5.401.

GAO considers information to be proprietary when it is so marked, "or otherwise submitted in confidence to the government." *Rothe Dev., Inc.*, B-279839, Jul. 27, 1998, 98-2 CPD ¶ 31. In addition, it must have "involved significant time and expense in preparation and contained material or concepts that could not be independently obtained from publicly available literature or common knowledge." *Id.*² Thus, information that is derived from "reverse engineering," or "matters which are fully disclosed by [a] marketed product cannot be protected as a trade secret." *Id.* In *Rothe Dev.* the number of personnel performing a services contract monitored by the government was deemed not proprietary. Comparable historic information concerning incumbent performance (number of items supplied, hours worked, employee seniority categories, etc.), available from contractor invoices tendered without restrictive legends

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² GAO recognizes these as separate "prongs" of inquiry which must each be satisfied. *The Source* B-266362, Feb. 7, 1996, 96-1 CPD ¶ 48. Note that the absence of proprietary markings may be compelling evidence that disclosed materials do not qualify for such treatment. *Id.*

was not considered proprietary or competitively prejudicial upon disclosure. *Urserly Companies, Inc.*, B-258247, Dec. 29, 1994, 94-2 CPD ¶ 264.³ Likewise, materials based on “publicly available information” or general concepts common in the relevant field will not be considered proprietary, notwithstanding contrary claims. *The November Group, Inc.*, B-292483, Sept. 20, 2003, 2003 CPD ¶ 165.

C. Standards for Protest Relief

GAO does not automatically sustain a protest where there has been an improper disclosure of proprietary information. Nor will GAO presume that a contractor is entitled to relief where it challenges an agency’s improper disclosure of its proprietary business information during the course of a procurement. GAO requires a showing of competitive harm as a result of the disclosure:

Where an agency inadvertently discloses an offeror's proprietary information, the agency may choose to cancel the procurement if it reasonably determines that the disclosure harmed the integrity of the procurement process. Where an agency chooses not to cancel the procurement after such a disclosure, we will sustain a protest based on the improper disclosure only where the protester demonstrates that the recipient of the information received an unfair advantage, or that it was otherwise competitively prejudiced by the disclosure.

Kemron Envt’l Serv., Inc., B- 299880, 2007 CPD ¶ 176 (citing *Info., Inc.*, B-41441.4 *et al.*, Dec. 27, 1991, 91-2 CPD ¶ 583; *Norfolk Shipbuilding & Drydock Corp.*, B-247053.5, Jun. 11, 1992, 92-1 CPD ¶ 509); *see also Rothe Dev., Inc.*, *supra*; *Urserly Cos. Inc.*, *supra*.

In *Kemron Envt’l*, the agency incorrectly emailed Kemron’s discussion letter to a competitor. GAO analyzed the nature of the final proposal submissions and was able to confirm, from the nature of the proposal changes made relative to the information disclosed, that there had been no competitive impact. GAO rejected assertions that the disclosed information was sufficient to permit derived insight about pricing without a persuasive explanation of how that might be accomplished. The lack of competitive harm, the inadvertent nature of the disclosure, and the appropriate party response upon discovery (the recipient immediately alerted the agency, returned the email and destroyed all copies) sufficiently protected the “procurement system” from harm.

Where the agency is able to determine, based on a review of the proposals and

³ *See Vinnell Corporation*, B-230919, Jun. 30, 1988, 88-2 CPD ¶ 4 (disclosure of incumbent contractor’s current staffing profile, even if confidential, did not create competitive prejudice due to differences with proposed staffing and other data regarding current staffing).

surrounding circumstances, that there has been no prejudicial competitive impact, GAO will not require further remediation. See *Gentex Corporation*, B-291793, Mar. 25, 2003, 2003 CPD ¶ 66 (agency determined from proposal review that no changes had been made based on information disclosed between initial and final proposal revisions); *Northrop Grumman Technical Services*, B-291506, Jan. 14, 2003, 2003 CPD ¶ 25 (inadvertent release unobjectionable where agency review confirmed that offerors did not change proposals in any manner that reflected the disclosed information).

Even where the inadvertent disclosure was made prior to the procurement's commencement, the focus of analysis remains on the competitive impact. In *Computer Sciences Corp.*, B-231165, August 29, 1988, 88 CPD ¶ 188, the protester's proprietary costs information had been disclosed to an incumbent services contractor that was competing for a new contract. The GAO found reasonable the agency's decision not to exclude that offeror, based upon findings that the disclosure was inadvertent, and employee affidavits confirmed that the information was not available to or used by personnel preparing the competitive proposal. The GAO also took account of the fact that excluding that offeror would have had a significantly adverse impact on the degree of competition in the still pending procurement.⁴

GAO requires that a protester demonstrate that its proprietary rights have been violated, and competitive harm inflicted, by clear and convincing evidence. *The November Group, supra*; *Zodiac of North America, supra*. Consequently, GAO will not sustain a protest where the competitive harm to the protester is speculative. *Rothe Dev., Inc., supra*; *J.L. Assocs., Inc.*, B-239790, Oct. 1, 1990, 90-2 CPD ¶ 261. Instead, GAO requires affirmative evidence to establish the harm flowing from improper disclosure of proprietary information:

[A] firm may protect its proprietary data from improper exposure in a solicitation where its material was marked proprietary or confidential, or was disclosed to the government in confidence, and where it involved significant time and expense in preparation and contained material or concepts that could not be independently obtained from publicly available information or common knowledge. To prevail on such a claim, the protester must prove by clear and convincing evidence that its proprietary rights have been violated.

The November Group, Inc., supra (citing *The Source*, B-266632, Feb. 7, 1996, 96-1 CPD ¶ 48)). See also *Zodiac of North America, Inc.*, B-220012, Nov. 25, 1985, 85-2 CPD ¶ 595 (accord).

⁴ Nor will GAO grant relief where the inadvertent disclosure was in connection with a prior and different procurement, even if it might have yielded a competitive advantage in connection with the challenged procurement. See *Youth Development Associates*, B-216801, Feb. 1, 1985, 85-1 CPD ¶ 126; *White Machine Company*, B-206481, Jul. 28, 1982, 82-2 CPD ¶ 89.

Under this standard, protesters before GAO have struggled to establish competitive prejudice regarding release of unit prices, where the prejudice is in any way speculative.⁵

This is consistent with recent federal court litigation on this topic, despite several significant decisions protecting release of unit prices. Since the D.C. Circuit's decision in *McDonnell Douglas v. U.S. Air Force*, 375 F.3d 1182 (D.C. Cir. 2004), the federal courts have been more aggressive in protecting contractors' unit prices under FOIA. The D.C. Circuit reaffirmed this direction earlier this year, in *Canadian Commercial Corp. v. Department of Air Force*, 514 F.3d 37 (D.C. Cir. 2008). However, these cases protected only such information as was competitively harmful in itself, without need for derivations or external comparisons.

Both *McDonnell Douglas* and *Canadian Commercial* protected unexercised option year prices from release, on the basis that such prices were the actual proposed prices for those options, and competitors could use such prices to present lower bids to the Agency, in an attempt to convince the agency not to exercise the options. However, in both cases, the court upheld the Agency's release prices for "over and above" unit prices covering unanticipated work.. In *McDonnell Douglas*, the D.C. Circuit held that because the over-and-above rates did not disclose the indirect components of the rates (*i.e.* retirement, vacation, etc.), the actual wage proposed could not be determined with any precision. The plaintiff submitted published accounts of comparable salaries in the areas of the contract, but the appeals court found the proposed analysis to be too speculative. *McDonnell Douglas*, at 1193. While not an issue before the D.C. Circuit, the District Court decision underlying the *Canadian Commercial Corp.* appeal drew a similar conclusion, based on *McDonnell Douglas*, regarding the plaintiff's argument that prices could be derived through various "arithmetic calculations" in comparison to published information, *Canadian Commercial Corp. v. Department of Air Force*, 442 F.Supp.2d 15, n.10 (D.D.C. 2006).

The GAO case law has been consistent with this result, even prior to the D.C. Circuit's recent activity. For example, in *J.L. Associates, Inc.*, B-23970, Oct. 1, 1990, 90-2 CPD ¶ 261, GAO declined to find prejudice "where the disclosure of the prices would not *directly* reveal confidential proprietary information, such as a company's overhead, profit rates, or multiplier, such that the possibility of competitive harm would be considered too speculative." *Id.* (emphasis added). In denying the protest, GAO alluded to the level of proof required to sustain a protest under these circumstances:

[The protester] does not contend that its unit prices necessarily disclose its overhead rates or profit margins; rather, the firm asserts this disclosure allows a competitor to view, in detail, [its] pricing

⁵ The paucity of sustained protests involving these kinds of disclosures may indicate a reluctance by GAO to conclude that an agency's disclosure violates the Trade Secrets Act. See, *e.g.*, *Aro, Inc.*, B-197436, May 19, 1980, 80-1 CPD ¶ 344 (denying protest claiming entitlement to sole-source award as a consequence of improper disclosure of proprietary information and stating that to the extent that sustaining the protest involves finding that the agency violated the Trade Secrets Act, "such finding of violation of a criminal statute ought to be made by a court of competent jurisdiction, not by [GAO].").

strategy and decision-making process as to services to be performed, which will give competitors an unfair advantage.

Id. In a subsequent protest, GAO continued to examine whether particularly sensitive cost components were disclosed, rather than ending the inquiry simply upon a finding that an improper disclosure had occurred. For example, in a case where only lump-sum proposed costs were disclosed, GAO found that the protester suffered no harm:

Only [the protester's] lump-sum proposed costs for each availability were exposed. These costs are comprised of many elements, including labor and material costs for the standardized work items that make up the notional work package, labor rates, escalation factors, overhead rates, and other costs. None of these components of [the protester's] proposed costs were disclosed. Moreover, the contract will be awarded based on evaluated costs and [the protester's] evaluated costs were not exposed. Thus, [the protester's] competitors do not know to what extent [the protester's] proposed costs as evaluated, were adjusted. Given these factors, we fail to see how [the protester's] competitors could use [its] lump-sum proposed costs for the availabilities to structure their proposals to gain an advantage over [the protester].

Moon Eng'g Co., Inc., B-251698.7, Dec. 14, 1993, 93-2 CPD ¶ 315. GAO thus appears to require a protester, in establishing prejudice, to show that the challenged disclosure enables its competitors to reasonably predict its future prices.

While there has been some movement toward greater protection of unit prices in the federal courts, protesters at GAO must still demonstrate direct, non-speculative competitive harm arising from a release of data to establish prejudice. This has been, in practice, a very high burden.

D. Available Remedies

Even where the protester successfully establishes competitive prejudice as a result of an agency's improper disclosure of proprietary information, GAO will not direct a sole-source award to the protester. GAO recognizes the broad discretion of an agency in determining the appropriate corrective action required in such instances. *See, e.g., Ocean Serv., LLC*, B-292511.2, Nov. 6, 2003, 2003 CPD ¶ 206 ("Contracting officials in negotiated procurements have broad discretion to take corrective action where the agency determines that the action is necessary to ensure fair and impartial competition, and our Office will not object to the corrective action taken so long as it is appropriate to remedy the impropriety."). In this regard, GAO has even held that an agency may properly decline to release the prices of all competitors in a re-opened competition simply because it disclosed the awardee's prices during a debriefing following the initial award. *See, e.g., Symvionics, Inc.*, B-293824.2, Oct. 8, 2004, 2004 CPD ¶ 204.

GAO regards a sole-source award to a protester as an extraordinary remedy. *Aro, Inc.*, B-197436, May 19, 1980, 80-1 CPD ¶ 344. GAO has counseled that such relief is appropriate *only* where the procurement required a product that was proprietary to the protester and the agency misappropriated the protester's proprietary data by using it to develop its specifications. *White Mach. Co.*, B-206481, Jul. 28, 1982, 82-2 CPD ¶ 89 (denying protester's request for sole-source award following agency's disclosure in RFP of the protester's negotiated cost and manpower estimates to perform the current contract). See *Sentel Corporation*, B-244991, Dec. 6, 1991, 9102 CPD ¶ 519 (sole-source award inappropriate where inadvertently disclosed proprietary information--part of a pre-solicitation presentation to the agency--was not used to define requirements and would require agency to procure services considered technically unacceptable).

The extraordinary sole-source remedy, while recognized in other cases, appears to have been recommended only in *To the Secretary of the Air Force*, B-165542, July 11, 1969, 1969 CPD ¶ 47. In that case, a solicitation's specifications for an electric lift truck matched the designs in an unsolicited proposal that included restrictive legends, and the contracting officer could not identify other sources for the specifications. The protester demonstrated that it had developed the design with its own investment of time and money, including various studies and scale model construction. The GAO determined that the government could not divulge and exploit the contractor's proprietary information to conduct a competitive procurement. GAO recommended that the agency either negotiate a sole-source contract with the protester, or issue a new solicitation with specifications that were not based on the protester's proprietary data. Without such compelling circumstances, however, the sole-source remedy is definitely disfavored. See *NEFF Instrument Corporation*, B-216236, Dec. 11, 1984, 84-2 CPD ¶ 649 (demand for sole-source remedy rejected where protester did not show by clear and convincing evidence that IFB contained proprietary data provided in confidence or marked as such, and equipment to be provided by protester to agency and furnished to awardee as GFE is commercial item). The sole-source remedy is thus limited to situations where an agency uses proprietary data to define and purchase its needs. *Sentel Corporation, supra*. The GAO will justify such a noncompetitive award where acquisition of the proprietary data is necessary to describe the product or service being procured. *Vinnell Corporation*, B-230919, June 30, 1988, 88-2 CPD ¶ 4.

GAO has sanctioned the use of any of several remedies, as deemed appropriate by the agency in the exercise of its discretion. In some instances, GAO has found that the prejudice was remedied by an agency's cancellation of a solicitation containing proprietary information and reissuance without inclusion of the protester's data. See *Janico Bldg. Serv.*, B-290783, Jul. 1, 2002, 2002 CPD ¶ 119. Preservation of true competition, in GAO's view, appears to outweigh the adverse impact on competing contractors from price disclosures. Thus, in *Information Ventures, Inc.*, B-241441, Dec. 27, 1991, 91-2 CPD ¶ 583, GAO upheld an agency decision to terminate a contract award and recompete because an offeror's price was disclosed in a preaward notice, before final proposed prices were submitted. The awardee's objection that it would then be impacted, because its final price was disclosed in the debriefing, was rejected in favor of "the need to preserve the integrity of the competitive system, and to promote competition on an equal basis."

In other instances, GAO concurred with the agency that the appropriate remedy consisted of requiring other offerors to disclose similar information contained in their final proposals. *See, e.g., Honeywell Info. Sys., Inc.*, B-186313, Apr. 13, 1977, 77-1 CPD ¶ 256 (holding that disclosure of protester's unit prices and proposed system configuration resulted in competitive harm that was remediable by comparable disclosure of similar information from competitor's proposal).

The remedy of excluding an offeror from the competition because of its improper receipt of proprietary or source selection information has been reserved for instances where the offeror's access to the information was tainted by impropriety. *See Computer Technology Associates, Inc.*, B-288622, 2001 CPD ¶ 187 (contractor employee wrongfully acquired information regarding competing proposals); *Compliance Corporation-Reconsideration*, B-239252.3, 90-2 CPD ¶ 435 (1990) (contracting officer may act to preserve competitive integrity in the face of industrial espionage). Where the competitively valuable information has been obtained by legitimate means, however, offeror disqualification is not appropriate, even if other means are necessary to preserve competition. *KPMG Peat Marwick*, B-251902, Nov. 8, 1993, 93-2 CPD ¶ 272 (GAO recommended that competitor not be disqualified based on information obtained via FOIA, but that other means to protect competition be employed instead).

Because of GAO's focus on protecting the procurement process and promoting competition, it is not a tribunal necessarily suited to effect complete relief for other impacts of inadvertent disclosures of proprietary information. Where the protest allegation amounts to a claim that a competitor may be using the protester's proprietary data, the GAO has recognized this as a dispute among private parties not within GAO's protest jurisdiction. *Aeronautical Instrument and Radio Co.*, B-224431, Aug. 7, 1986, 86-2 CPD ¶ 170. Likewise, where the agency disclosed information obtained from the protester's subcontractor, which the protester alleged had been improperly obtained by the subcontractor, GAO directed the protester to pursue any claims against the subcontractor elsewhere. *Wayne H. Coloney Company, Inc.* B-211789, Aug. 23, 1983, 83-2 CPD ¶ 242. In addition, GAO has noted that where a contractor believes it has been damaged due to an agency's improper disclosure, relief may be available based on the theory that an implied-in-fact contract existed obligating the government to maintain confidentiality of proprietary data in a proposal. *Sentel Corporation, supra* (citing *Research, Analysis & Dev. Inc. v. United States*, 8 Cl.Ct. 54 (1985)).