

We note that the request for proposals was issued on October 14, 1966, and that proposals thereunder were to be submitted by November 18, 1966, or about 6 months after Custom had submitted its unsolicited proposal to Edgewood Arsenal. Custom had ample opportunity to study the request for proposals before it responded thereto but it took no exception in its proposal or otherwise with respect to the alleged inclusion of its "proprietary" information. There is no indication of any protest by Custom until it appeared that it was an unsuccessful offeror. The courts have taken the position that a party to maintain his proprietary rights in information must take reasonable action to prevent or suppress its unauthorized use. See, for example, *Ferroline Corp. v. General Aniline & Film Corp.*, 207 F. 2d 912, 914; *Globe Ticket Co. v. International Ticket Co.*, 104 A. 2d 92. Here, Custom made no attempt subsequent to issuance of the request for proposals to protest against the allegedly improper disclosure until it became aware of the fact that it was not being considered for award. In this posture of the matter, coupled with the administrative denial of disclosure, we must conclude that no substantial basis exists for questioning the actions of the procurement agency in this regard. See B-149295, September 6, 1962; B-153144, June 4, 1964; B-154038, August 4, 1964; B-154818, November 16, 1964.

Pursuant to the negotiation authority in 10 U.S.C. 2304(a)(11), paragraph 3-211 of ASPR authorizes negotiation of contracts for property or services that the Secretary of the Department determines to be for experimental, developmental or research work, or for making or furnishing property for experiment, test, development or research. This authority to negotiate such contracts is applicable in the following circumstances listed in ASPR 3-211.2:

"(i) Contracts relating to theoretical analysis, exploratory studies and experiment in any field of science or technology;

"(ii) Developmental contracts calling for the practical application of investigative findings and theories of a scientific or technical nature;

"(iii) Contracts for such quantities and kinds of equipment, supplies, parts, accessories, or patent rights thereto, and drawings or designs thereof, as are necessary for experiment, development, research, or test; or

"(iv) Contracts for services, tests, and reports necessary or incidental to experimental, developmental, or research work."

It seems clear from the documented record that the technical nature of this procurement was such that two-step formal advertising under ASPR 2-501 *et seq.* was neither feasible nor practicable. Since "development" was involved, the exact nature and extent of the proposed work and the precise method of accomplishing the same could not be established in advance. Moreover, the work contemplated was subject to improvisation and change based on the offeror's approach prior to the establishment of firm contract requirements. It will be noted from a reading of the two-step formal advertising procedures that the "development" work involved here was not amenable to those procedures. *Cf.* ASPR 4-104. The procurement was, however, on a competitive basis to the maximum practical extent. As indicated above, proposals were requested from 16 sources and 9 firms responded. All offers which were determined to be technically acceptable were evaluated under the established criteria on a common basis. Aside from this the determination to negotiate this contract under 10 U.S.C. 2304(a)(11) is final as a matter of law under 10 U.S.C. 2310(b). While the request for proposals and the contract called for the furnishing of 20 weapons and 2,000 rounds of ammunition for test purposes, the procurement was primarily for research and development under the regulations referred to above.

You contend that negotiations should have been conducted with Custom in accordance with ASPR 3-805.1(a) which provides, with certain stated exceptions, that after receipt of initial proposals, written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price and other factor considered. However, ASPR 3-805.1(d) provides with reference to the negotiation of research and development contracts that:

"(d) The procedures set forth in (a) * * * above may not be applicable in appropriate cases when special services (such as architect-engineer services) or when cost-reimbursement type contracting is anticipated. Moreover award of such contract and R&D contracts may be properly influenced by the proposal which promises the greatest value to the Government in terms of possible performance, technical quality, ultimate producibility, growth potential and other factors rather than the proposals offering the lowest price or probable cost and fixed fee."