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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Digital Healthcare, Inc.

File: B-296489

Date: August 24, 2005

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Phillipa L. Anderson, Esq., Dennis Foley, Esq., and Philip Kauffman, Esq., Department of Veterans Affairs, for the agency.
Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Allegation that agency misappropriated information contained in protester's unsolicited proposal and developed specifications based on that information is denied where protester has not met its burden of showing proprietary nature of information allegedly misappropriated.

DECISION

Digital Healthcare, Inc. protests the issuance of request for proposals (RFP) No. 500-20-05, by the Department of Veterans Affairs (VA) for the acquisition of insurance identification services. Digital complains that the agency improperly used proprietary information contained in its unsolicited proposal in the current solicitation.

We deny the protest.

In June 2003, Digital submitted an unsolicited contract proposal to each of the federally funded health plan providers, including the Veterans Health Administration (VHA) indicating that it was the sole licensee of various intellectual properties governing the automation of the coordination of benefits (COB) among health plans, and other related procedures in the healthcare finance area. Unsolicited Proposal at 2. Digital stated that it was therefore uniquely situated to address VHA's need to identify and bill other sources of insurance coverage for VHA patients. Digital stated that its proposal differed from other approaches to the problem in that other vendors propose to "poll" a small number of local payers and that the proposal to poll only a

handful of local payers will yield an improvement, but not a very good result relative to the automated polling of all payers. Digital identified a number of advantages to its automated COB process. Digital stated that no other system combined these functions. Digital further stated that its e-commerce process as described in its unsolicited proposal was proprietary to Digital by virtue of its patents, non-competition agreements, and other intellectual property.

In November 2003, the VA responded to Digital and stated that its unsolicited proposal was not considered unique in nature. Agency Report (AR) Tab 3, Letter to Protester. Specifically, the agency concluded that the proposal itself indicated that these services are available from other companies albeit not to the scope Digital proposed. AR, Tab 3, Determination and Findings of Unsolicited Proposal. The agency also stated that the Digital proposal only contained "slight" details; there was no identification of purported patented application and according to letters from Digital's technical support, intellectual applications belong to third party holders. Id., encl., Determination of Unsolicited Proposals.

After receipt of a request for the acquisition of insurance identification services, the VA contracting officer conducted a market survey to determine whether potential service disabled veteran owned, small business firms with either General Service Administration or VA Federal Supply Schedule contracts were available to supply the requirement as a commercial item. Contracting Officer's Statement at 1. The contracting officer received several responses from potential sources for the required services. On April 12, 2005, request for quotations No. 500-14-05 was issued to all vendors who responded to the market survey. However, all responses to that solicitation were rejected on the basis that they did not meet the minimum requirements. The agency subsequently cancelled that solicitation and revised the requirement.

On April 29, 2005, the current RFP was issued for the award of a fixed-price, indefinite-quantity/indefinite-delivery services contract for a base year with two 1-year option periods. The services described by the solicitation were as follows:

The overall scope of services is the establishment of an off-site insurance identification unit. Its purpose shall be to identify insurance for veterans without insurance or unknown insurance. Contractors should not contact insurance carriers directly and all identification efforts should be electronic to avoid damage to VA/carrier relationships which may occur due to sudden increased telephonic inquiry. No direct patient contact is to occur.

RFP Sec. II, ¶ 2.

The RFP further provided that the contractor would receive an electronic file on a routine basis (to be identified) and a listing of veterans with future clinical appointments that have no insurance identified. Other than detailing and

emphasizing the necessity for contractors to protect sensitive data, the RFP did not identify or proscribe any particular methodology for the electronic identification of insurance carriers. Rather, it simply provided that the contractor would provide by the designated date of the month, all insurance identified for patient appointments for the previous month. RFP Sec. II, ¶ 4.

Several proposals, including one from the protester, were received by the amended closing date of May 23, 2005. Included in Digital's proposal was a copy of its protest filed with our Office on May 20.

Digital contends that the agency has made improper use of its proprietary material contained in its unsolicited proposal. Specifically, the protester maintains that the RFP copies from its unsolicited proposal the essential process of the electronic identification of all known insurance sources covering VA beneficiaries. Digital argues that the electronic polling of databases to identify insurance coverage is an element of its proprietary process.

In protests of this nature the burden is on the protester to demonstrate by clear and convincing evidence that its proprietary rights have been violated. EDN Corp., B-225746.2, July 10, 1987, 87-2 CPD ¶ 31 at 3. To prevail on a claim of violation of proprietary rights, the protester must show that (1) its material was marked proprietary or confidential or that it was disclosed to the government in confidence, and (2) the material 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. Porta Power Pak, Inc., B-196218, Apr. 29, 1980, 80-1 CPD ¶ 305 at 4. Commercial products, for instance, are not considered proprietary, NEFF Instrument Corp., B-216236, Dec. 11, 1984, 84-2 CPD ¶ 649 and neither are ideas or concepts which are obvious, and not innovative or unique. Chromalloy Div.—Oklahoma of Chromalloy Amer. Corp., B-187051, Apr. 15, 1977, 77-1 CPD ¶ 262. Moreover, the mere reformulation of a concept which is common knowledge cannot be proprietary unless the restatement represents a valuable contribution arising from the independent efforts of the claimant. Andrulis Research Corp., B-190571, Apr. 26 1978, 78-1 CPD ¶ 321 at 4. Finally, the value of proprietary information lies in its unique possession by the owner; once such information becomes public knowledge, its value and status as proprietary information is lost. Porta Power Pak, Inc., *supra*.

Digital maintains that the key requirement of the RFP is the same key functional solution proposed by it in its unsolicited proposal, that being the electronic identification of all known insurance sources covering VA beneficiaries. Digital argues that the electronic polling of databases to identify insurance coverage is one element of its proprietary process. Digital maintains that the e-commerce process described in its unsolicited proposal is a trade secret because it qualifies as a method of doing business, has actual and potential value, and would be very valuable to Digital's competitors. Digital states that it has filed one or more patent applications on the methods that it has developed to conduct an e-commerce business that

collects the relevant information necessary to identify primary and secondary coverage, and thereafter to bill and collect from those sources.

Based on our review of the record, we find unconvincing Digital's claim that the agency improperly used proprietary information contained in the protester unsolicited proposal. As stated above, the protester must demonstrate that the information was marked proprietary and was provided to the government in confidence. As explained above, once proprietary information becomes public knowledge, it is no longer considered proprietary. A significant amount of the information in Digital's unsolicited proposal about its capabilities and approach to automation of the coordination of benefits among health plans, and related procedures is available to the public on Digital's website. Specifically, while it claims that the electronic polling of databases to identify insurance coverage is somehow proprietary to Digital, its website includes a discussion of its ability to "obtain the latest eligibility data from 4,000 other payors" with its "automated COB process." Also on the website is a quote from the Office of Management and Budget (OMB) at a hearing before the Senate Finance Committee in 1995 that OMB envisions: "an on-line, up front query system in which the primary and secondary payors will be determined at or before the time that care is provided ..."
<http://www.dhinc.biz/docs/Digital_Healthcare_Brochure.pdf. at 6. Thus, based on Digital's website, it appears that the concept touted by Digital as proprietary is public knowledge.¹

In its submissions, the only information identified as proprietary by the protester is the solicitation requirement for the electronic identification of insurance coverage. The contracting officer states that she had no prior knowledge of Digital's unsolicited proposal when she issued the solicitation. Contracting Officer's Statement at 2. She further reports that in 1999/2000, the VA worked with another firm to provide identification and verification of patient insurance coverage and this relationship led to the development of a web based insurance verification/identification process. Id. at 3. The requirement in this RFP is described in basic terms. The RFP simply required the electronic identification of insurance coverage, it did not proscribe any particular methodology, it only stated the type of information it wanted delivered on a monthly basis. In short, we do not find that the RFP violates the protester's proprietary rights, since we do not believe the protester

¹ Digital was afforded the opportunity to comment on the fact that its website contains a significant amount of the information included in its unsolicited proposal. Digital was specifically requested to, given the content of its website, identify what, if any, proprietary information existed. In its response, Digital failed to identify any specific proprietary information. Instead Digital asserted without support that "while the information contained in the website bears some similarity to that contained in the UCP [unsolicited proposal], and in the solicitation under protest, the overlap is not substantial." Protester Comments, Aug. 10, 2005, at 2.

has demonstrated that it has a proprietary right in the concept of electronic identification of insurance coverage as envisioned by the solicitation and as generally detailed in its unsolicited proposal.

The protest is denied.

Anthony H. Gamboa
General Counsel