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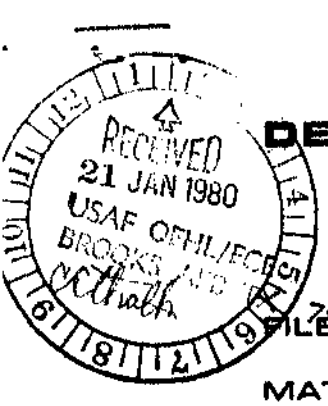

DECISION

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

FILE: 78235 B-194440 DATE: December 17, 1979

MATTER OF: Agent Chemical, Inc.

DIGEST:

1. Claim for disclosure of proprietary information in testimony by Air Force personnel is denied because same information was already disclosed in greater detail with knowledge and assent of claimant.

2. Claim for use of proprietary data by Air Force in efforts to obtain permit for destruction of herbicide orange at sea is denied because it was failure of either Air Force or claimant to accomplish acceptable destruction of dioxin residues that would result from reprocessing of herbicide that was subject of testimony. General and abbreviated references to data already disclosed in same forum in effort to obtain approval for herbicide reprocessing was not use of proprietary information.

3. Claim for payment for production of information for use and benefit of Air Force is denied where information was produced for benefit of claimant in effort to satisfy prebid condition on sale of surplus herbicide orange.

4. Decision to terminate negotiations and stop proposed sale of surplus herbicide orange is neither arbitrary nor capricious where neither prospective purchaser nor Air Force is able to satisfy presale condition for environmentally acceptable disposition of contaminated filters. Risk that sale might be halted remains with prospective purchaser even though Air Force offers to assume control of filters.

Agent Chemical, Inc. (Agent), claims reimbursement for expenses incurred in the construction and test of a pilot plant for the decontamination of herbicide orange (HO) erected to satisfy a prebid condition on a sale of

surplus Department of Defense (DOD) stocks of HO. The sale was aborted and the HO was destroyed at sea. Agent asserts entitlement to payment on the basis that proprietary information developed through its pilot plant project was disclosed and/or used by the Air Force to obtain from the Environmental Protection Agency (EPA) the ocean dumping permit required for destruction of the HO. For the reasons that follow, we find no legal basis upon which Agent's claim may be paid.

Background

HO, a combination of two phenoxy herbicides, was first formulated in 1962 for military use as a defoliant. By 1969, however, undesirable side effects attributable to the use of HO were noted, eventually traced to the presence in the HO of certain extremely toxic contaminants called dioxins or TCDD. As a result of these discoveries, in April 1970 the DOD directed the Air Force to dispose of all DOD stocks of HO.

After investigating disposal methods, in November 1974 the Air Force published an Environmental Impact Statement (EIS) proposing the destruction of the HO through high-temperature incineration at sea. The EPA, however, suspended hearings on the Air Force's application for an ocean dumping permit after testimony which indicated that reprocessing technology might exist which would enable the decontamination of the HO and its conversion to a safe and saleable herbicide. Unsuccessful contacts with HO manufacturers concerning the prospect of reprocessing led to the request for quotations (RFQ) which underlies this claim.

The RFQ advised potential purchasers of the proposed sale of DOD's stock of HO and stated that the sale would be limited to a party having the ability to reduce it to a safe and registerable herbicide. Before purchasers could bid on the HO, they were required to explain and document their proposed reprocessing method, comply with all applicable Federal, State and local laws pertaining to the processing or use of the herbicide, submit a description of the residues and their disposal, and, most importantly for our purposes here, process a test batch through a pilot plant.

Agent proposed to use a two-part process for decontamination of the HO and destruction of the TCDD. Decontamination would be accomplished by adsorbing the dioxin onto charcoal in a filtration process developed by Dr. David L. Stalling and other scientists of the United States Fish and Wildlife Service to reduce the level of dioxin contaminants to acceptable levels; Final destruction of the adsorbed dioxin was to be accomplished by incineration of the contaminated charcoal filter cylinders. At this time, charcoal filtration of dioxins had only been demonstrated on a laboratory scale. Dr. Stalling and his associates had performed preliminary research under an inter-agency agreement with the Air Force which indicated that pyrolysis was a promising method of disposal of the contaminated charcoal residues.

Agent encountered severe difficulties with its pilot plant. The initial and four subsequent tests of Agent's incinerator system conducted over the period from November 2, 1975, through March 1-2, 1976, all resulted in failures, as did the initial test of the filtration system in late January 1976.

In February 1976 Agent advised the Air Force that Dr. Stalling had identified the flow rate as the culprit in the filtration test failure and requested 45 additional days to correct and demonstrate its plant. Before considering Agent's request, the Air Force required Agent to respond to an extensive statement of deficiencies and problems which the Air Force had noted in Agent's efforts. Technical analysis of Agent's response reflected continued dissatisfaction with Agent's performance and plan and culminated in a recommendation that HO reprocessing be dropped. A second submission from Agent led to approval of Agent's requested extension in a letter bearing the caveat: "As in the past, [Agent] will bear all risk and expense of this effort."

Agent successfully demonstrated its filtration process in June 1976, but was still unable to incinerate the dioxin-contaminated filters. In July 1976 Agent filed a report with the Air Force on its filtration process which contained the information upon which this claim is based. After efforts at disposal of the

filters in a landfill were unsuccessful, the Air Force proposed that if Agent could not arrange for burial of the filters in an approved landfill, "we should direct our mutual efforts toward negotiating a sales agreement providing for Government control of the containers."

At about the same time, the Air Force published an amended EIS proposing to decontaminate the HO using Agent's process and store the contaminated charcoal cylinders until technology could be developed to permit their disposal. This proposal drew substantial negative reaction. Several of those commenting pointed out that the filtration approach did not resolve the problem of TCDD disposal, but merely converted it to another form. Subsequent investigation by the Air Force of avenues of destruction of the contaminated charcoal cylinders produced the following comment in an internal memorandum dated March 7, 1977:

> "Achieving total destruction of the more densely dioxin-contaminated charcoal is technically much more difficult than destroying the lesser concentration of dioxin contained in liquid herbicide orange. The theoretical technology may exist, but no existing incinerator is capable of demonstrating it. The technology will have to be applied; an incinerator designed; military construction funding obtained; and the incinerator actually constructed. As in the case of storage, only a DOD site outside the jurisdiction of any state possesses the slightest chance of being acceptable. The cost and timing of such an endeavor is unknown and depends on a series of unprovable assumptions, such as how long it will take to prove the technology, design the incinerator, complete an environmental statement process, and have the incinerator successfully compete in the military construction funding process."

The Air Force concluded that "disposal of the dioxin-laden charcoal and their containers in the

foreseeable future is not feasible and that herbicide reprocessing should not be regarded as a viable alternative to ocean incineration." This conclusion was apparently induced in part by the continuing deterioration of the herbicide containers.

The Air Force subsequently withdrew its amended EIS and reinstated its original proposal to destroy the HO by high-temperature incineration at sea. The HO was destroyed by this method during the latter part of 1977.

Agent seeks reimbursement for the research and development expenses it incurred in applying the filtration process and in its unsuccessful efforts to incinerate or otherwise dispose of the resulting contaminated filters. Agent bases its claim on the theory that the Air Force, without Agent's permission, used proprietary data developed by Agent to document its earlier unsuccessful request for an EPA permit to incinerate the HO at sea and that such use required either the prior approval of Agent or compensation.

We believe that Agent's claim is a composite of three separate claims: First, a claim resulting from the alleged disclosure of proprietary information; second, a claim for the use of proprietary information; and third, a claim for proposal preparation costs. We discuss each of these claims below. For the purposes of our discussion, we assume without deciding both that the information on which the claim is based is actually proprietary and that Agent's expenses for its pilot plant would be an appropriate measure of recovery.

Disclosure of Proprietary Data

Agent's theory that the Government disclosed proprietary data developed by Agent is based on testimony by Dr. Billy Welch, USAF, during hearings in the spring of 1977 on the Air Force's request for the final granting of an ocean dumping permit. We have reviewed this claim carefully, including examination of that portion of the transcript of Dr. Welch's testimony to which it is believed Agent refers, and do not believe that any information was revealed by Dr. Welch

for which Agent would be entitled to payment. During the course of his testimony, Dr. Welch discussed Agent's efforts at HO decontamination in general terms, including a general description of Agent's process and such remarks as: "As many as 1,000 of these canisters, each approximately ten feet long and 30 inches in diameter and each containing more than one-half ton of charcoal, could be generated by a reprocessing action involving the entire stock of orange herbicide." All of this information, including specific figures for charcoal weight per column, dimensions of the filter columns, and details of the process, was published in greater detail in the Air Force's amended EIS filed on October 12, 1976, with Agent's knowledge and without protest.

The value of proprietary information lies in its possession uniquely by the owner; once such information becomes public knowledge, its value and status as proprietary information are lost. As stated by the Seventh Circuit Court of Appeals, "Of course, as the term demands, the knowledge cannot be placed in the public domain and still be retained as a 'secret.' * * * That which has become public property cannot be recalled to privacy." Smith v. Dravo Corp., 203 F.2d 369, 373 (7th Cir. 1953). A trade secret is no longer protectable when it becomes public knowledge or general knowledge in the trade or business. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 475 (1974); Ferroline Corp. v. General Aniline & Film Corp., 207 F.2d 912, 921 (7th Cir. 1953); Chromalloy Division - Oklahoma of Chromalloy American Corporation, B-187051, April 15, 1977, 77-1 CPD 262.

We think the publication of Agent's data in the Air Force's October 1976 EIS amendment placed this information in the public domain. Furthermore, we believe that this disclosure was accomplished with Agent's approval which we infer from Agent's knowledge and lack of protest of the inclusion of its data in the amendment and our belief that it was the understanding of the parties at the time of submission of Agent's July 1976 report that at least some of the details of Agent's process would have to be disclosed in order to win EPA approval of HO reprocessing. In these circumstances, we do not think that Dr. Welch's subsequent testimony constitutes a disclosure of proprietary information.

Use of Proprietary Data

Agent claims reimbursement for "its reasonable research and development expenses for the production of proprietary and confidential data used by the Air Force in documenting its request for a permit from the [EPA] to incinerate Herbicide Orange at sea." For the reasons stated below, we do not think Agent is entitled to compensation for the use of this information.

We are unable to ascertain from the wording of Agent's claim whether it is Agent's intent to claim compensation for the use of information proprietary to Agent or whether Agent seeks reimbursement for the expense of preparation of information for the benefit of the Air Force. In either event, we find no basis upon which Agent's claim may be paid.

In the first case, we do not think that Dr. Welch's testimony constituted a "use of proprietary and confidential data" in support of the Air Force's renewed request for an ocean dumping permit. It was not Agent's process but rather the fact of Agent's failure to achieve destruction of the dioxin residues which was the focus of Dr. Welch's testimony. However much Agent may have desired to keep this confidential, we do not regard it as proprietary and neither do we regard as proprietary Dr. Welch's general and abbreviated references to materials already disclosed in the same forum to demonstrate the consequences of the inability to dispose of the TCDD-contaminated charcoal filters.

In the second case, we think Agent is trying after the fact to recast the terms of the RFQ under which it proceeded and its subsequent dealings with the Air Force to incorporate or imply an agreement to compensate Agent for the product of its research regardless of the outcome. We find nothing in the record to support Agent's interpretation.

Agent's pilot plant efforts were in response to a clear and unequivocal requirement in the RFQ that prospective purchasers document and demonstrate their process for HO decontamination as a prerequisite to bidding. The RFQ specifically and prominently provided that "No payment will be made for the information

solicited" and Agent was advised both at the inception and later that its pilot plant would be at its own risk and expense. We note in this latter regard that both the letter commenting on Agent's proposed operational plan in support of its February 1976 request for a 45-day extension of the time within which to demonstrate its decontamination process and the letter of May 27, 1976, actually granting Agent's request, specifically point out that the Government would incur no liability or obligation to Agent for its efforts. In this same exchange of correspondence Agent also was advised that the Air Force was considering alternate disposal methods. And, while negotiations may have been conducted with Agent concerning the purchase of rights to Agent's data, no agreement was ever completed.

In these circumstances, we believe that Agent's efforts were for its own benefit rather than that of the Air Force and we find no basis, implied or otherwise, upon which Agent might now be compensated for the production of this information.

Proposal Preparation Costs

Lastly, Agent's claim may be construed as a claim for proposal preparation costs. The basis of liability for bid or proposal preparation costs is the breach by the Government of its obligation to fairly and honestly consider all bids. Heyer Products Company, Inc. v. United States, 135 Ct. Cl. 63 (1956); Keco Industries, Inc. v. United States, 192 Ct. Cl. 773, 428 F.2d 1233 (1970); T&H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345. The ultimate standard is whether the procurement agency's actions were arbitrary and capricious towards the offeror-claimant. T&H Company, supra; System Development Corporation, B-191195, August 31, 1978, 78-2 CPD 159. We do not think this is the case here.

Agent voluntarily accepted the burden and substantial risk of successfully demonstrating both HO reprocessing and the environmentally acceptable disposal of the dioxin residues, each of which was a prerequisite to the sale of the HO. We do not believe that the Air Force's offer to assume control of the contaminated filters after Agent was unsuccessful in arranging their disposition relieved Agent of the risk that the sale

would not take place if Air Force efforts at container disposal were also unsuccessful. We think it abundantly clear that neither Agent nor the Air Force was able to satisfy the requirement for acceptable disposal of the residues. Consequently, we find nothing arbitrary or capricious in the Air Force's decision to reject reprocessing as an option for HO disposal and terminate negotiations with Agent.

We find no legal basis upon which Agent's claim may be certified for payment and, therefore, the claim is denied.

Comptroller General
of the United States