Audit Report

OFFICE OF THE INSPECTOR GENERAL

SECOND SOURCE PROCEDURES FOR THE AN/SQQ-89 COMBAT SYSTEM

Report Number 91-088

June 6, 1991

This is a Sanatized Version of For Official Use Only Report Number 91-088.

Department of Defense

The following acronyms are used in this report.

ASW .....Anti-Submarine Warfare
DCIS ..... Defense Criminal Investigative Service
DFARS .....Defense Federal Acquisition Regulation Supplement
GE.....General Electric Company
NAVSEA .....Naval Sea Systems Command
RFP .....Request For Proposal
SECNAVINST .....Secretary of the Navy Instruction
WEC.....Westinghouse Electric Corporation

TABLE OF CONTENTS

	Page
TRANSMITTAL MEMORANDUM	1
EXECUTIVE SUMMARY	i
PART I - INTRODUCTION	
Background	1
Objectives	1
Scope	2
Internal Controls	3
Prior Audits and Other Reviews	3
Other Matters of Interest	3
PART II - FINDINGS AND RECOMMENDATIONS	
A. Release of Contractor Data	5
B. Processing Disclosure Statements and Identifying Source Selection Participants	9
PART III - ADDITIONAL INFORMATION	
APPENDIX A - Summary of Potential Benefits Resulting from Audit	15
APPENDIX B - Activities Visited or Contacted	17
APPENDIX C - Report Distribution	19
APPENDIX D - Audit Team Members	21
PART IV - MANAGEMENT COMMENTS	
Assistant Secretary of the Navy	25

This audit report was prepared by the Contract Management Directorate, Office of the Assistant Inspector General for Auditing, DoD. Copies of the audit report can be obtained from "the Information Officer, Audit Planning and Technical Support Directorate, (703) 694-6302."

PART I - INTRODUCTION

Background

The AN/SQQ-89 Anti-Submarine Warefare (ASW) Combat System is procured by the Naval Sea Systems Command (NAVSEA). This 114 system program, provides long-range detection, classification, and tracking capabilities for combat surface ships. The estimated cost of the program is $5.26 billion. The program combines NAVSEA's purchase and integration of several components, which, prior to 1988, were purchased individually.

In 1987, Westinghouse Electric Corporation (WEC) was awarded contract N00024-87-C-6024 to become the second source for the AN/SQQ-89. Under this contract and a companion contract awarded to General Electric Corporation (GE), GE transferred AN/SQQ-89 technology to WEC. Each contract also required the companies to develop a concept design for the next generation of ASW systems (AN/SQQ-89I).

In 1988, GE was awarded a sole source contract to manage production and integration of AN/SQQ-89 components. As such, the Navy considers GE to be the program's prime source. WEC purchased AN/SQQ-89 technology from GE on this contract.

WEC and GE competed head-to-head for the FY 1990 production requirements. Prior to issuing the Request for Proposal (RFP), NAVSEA issued a draft RFP to the prospective contractors in September 1989. NAVSEA encourages its staff to issue draft RFP's, which are used to obtain feedback from prospective offerors. This feedback is used to prepare the final RFP. Included in the draft RFP was a copy of a DD Form 1921, "Cost Data Summary Report," which GE was required to submit to NAVSEA as part of its 1988 contract. In February 1990, WEC was awarded the FY 1990 production contract.

Objectives

This audit was performed at the request of Representative John Conyers, Jr., Chairman of the House Committee on Government Operations. The Chairman requested that we perform an audit of the procedures used by the Navy in soliciting a second source for the production of the AN/SQQ-89 ASW Combat System. The request was based on information that GE's cost and pricing data may have been disclosed to WEC, and that WEC may not have been qualified to produce the combat system.

The overall objectives of this audit were to determine whether Navy procedures for soliciting a second source to produce the AN/SQQ-89 ASW Combat System complied with established criteria and whether adequate internal controls were in place and being followed. After we determined that NAVSEA released GE's business sensitive information to WEC, the audit objectives were expanded to determine whether better controls could have prevented release of the data and whether NAVSEA properly evaluated and investigated the data release.

Scope

Locations and contracts reviewed. The audit was performed primarily at NAVSEA's mine warfare contracting branch and the AN/SQQ-89 program office. We also visited GE to obtain its view on how the release of data harmed its competitive position. See Appendix B for activities visited or contacted.

We reviewed the second sourcing contract, awarded on February 25, 1987, and the FY 1990 production contract, awarded on June 14, 1990, as well as the adequacy of, and compliance with, regulations. For the second source selection contract N00024-87-C-6024, awarded to WEC for $6,000,000, we evaluated the source selection organization and procedures. For the FY 1990 production contract N00024-90-C-6013, awarded to WEC for $177,602,908, we evaluated the NAVSEA contracting office's security over source selection and contractor data, WEC's technical qualifications, and NAVSEA's actions after it released the GE data.

Use of technical staff. Office of Inspector General technical staff assisted in this review. Specifically, engineers in the Inspector General, DoD, Technical Assessment Division evaluated NAVSEA's assessment that WEC was qualified to produce the AN/SQQ-89. Procurement analysts evaluated our audit guide to ensure that procurement regulations were properly interpreted. Further, DoD Office of General Counsel (Fiscal and Inspector General) advised us that release of a contractor's contract budget information would violate 18 U.S.C. 1905 (Trade Secrets Act) even if the employees did not intend to release the information.

Auditing standards. This program audit was performed between May and November 1990 in accordance with auditing standards issued by the Comptroller General of the United States as implemented by the Inspector General, DoD. Accordingly, the audit included such tests of internal controls as were considered necessary. We did not rely on any computerized data to perform the audit.

Internal Controls

We evaluated internal controls related to NAVSEA's source selection procedures for major system procurements and for controlling source selection and contractor sensitive data. Specifically, we reviewed:

o NAVSEA procedures for ensuring that source selection and contractor data are not released to unauthorized persons,

o NAVSEA procedures for ensuring that persons involved in the source selection process have no financial or other interests in the source selection decision,

o NAVSEA policy on selecting source selection evaluators and advisors,

o NAVSEA policy and procedures for evaluating and investigating instances involving unauthorized release of source selection and contractor data, and

o Federal policy and procedures for evaluating and investigating unauthorized release of source selection and contractor data.

The assessment included an evaluation of control techniques identified in NAVSEA policies and procedures and interviews with NAVSEA staff.

The audit identified internal control weaknesses as defined by Public Law 97-255, Office of Management and Budget Circular A-123, and DoD Directive 5010.38. The controls at NAVSEA were not sufficient to ensure that all staff participating in the contract source had no financial conflicts, which could affect their evaluation. However, NAVSEA has revised the Source Selection Guide to correct these weaknesses.

Prior Audits and Other Reviews

There havve been no other audits or reviews of the release of business sensitive data on the acquisition of the AN/SQQ-89 Combat System.

Other Matters of Interest

The improper release of GE data occurred on September 7, 1989. On January 12, 1990, the Deputy Commander for Contracts, NAVSEA, terminated the warrant and demoted the contracting officer responsible for the contents of the draft RFP that contained GE's contract data. The termination and demotion were partially attributable to the release of other sensitive financial data. The Assistant Secretary of the Navy for Research, Development and

Acquisition, in comments to the draft report, stated that the Navy considered the release of the GE data to be the more significant of the two incidents.

PART II - FINDINGS AND RECOMMENDATIONS

A. RELEASE OF CONTRACTOR DATA

NAVSEA released GE business sensitive data to WEC during a price-only contract competition to produce the AN/SQQ-89 ASW Combat System. Also, NAVSEA did not adequately document the impact that the release had on the procurement. The data release occurred because training was inadequate on policies regarding sensitive data. The impact was not adequately documented because the Defense Federal Acquisition Regulation Supplement (DFARS) did not provide guidance on determining and documenting the impact of disclosed business sensitive data. Such releases expose the Government to possible lawsuits and may increase the difficulty of obtaining needed information from contractors. In addition, NAVSEA could not determine if there were adequate competitive prices.

DISCUSSION OF DETAILS

Background

In his request, Representative Conyers expressed concern that the AN/SQQ-89 prime source's cost or pricing data may have been released to the second source. Because of this concern, we analyzed the release of data during the draft RFP for contract N00024-90-C-6013, the FY 1990 production contract. We also conducted a review of the actions by NAVSEA after the release of the data.

According to Federal Acquisition Regulation subpart 15.801, cost or pricing data "means all facts as of the time of price agreement that prudent buyers and sellers would reasonably expect to affect price negotiations significantly." Information that is not used to support price negotiations is not cost or pricing data.

Contractors also submit other business sensitive information to DoD, the release of which may harm their operations. NAVSEA Instruction 4295.1B, "Control of Contractor Cost Data," defines business sensitive information as data submitted by a contractor that may cause substantial competitive harm if released or that may impair the Government's ability to obtain necessary information in the future. Examples of business sensitive data include: backup data to contract prices, vendor quotes, business objectives and prospects, and contractor cost/schedule control system reports.

Release of business sensitive data is subject to the Trade Secrets Act, United States Code, title 18, section 1905. This Act prohibits Government employees from disclosing trade secrets, processes, operations, styles of work, or apparatus, or from identifying confidential statistical data, income and profits of contractors unless disclosure is otherwise authorized by law. Violation of the Act may subject responsible employees to a fine up to $1,000 and/or imprisonment up to 1 year.

In addition, when contractor business sensitive data are released to a competing firm, Defense Federal Acquisition Regulation (DFARS) Part 203.104, "Procurement Integrity," places special requirements on Government agencies. Specifically, it requires the contracting officer to determine if the information released had any impact on the pending procurement. The contracting officer should document the determination and forward it to the individual designated by the agency for review.

Data release. As part of a draft Request For Proposal (RFP) for the FY 1990 AN/SQQ-89 production contract, the NAVSEA contracting office sent GE's 1988 production contract budget to WEC. GE had provided these data to NAVSEA in a DD Form 1921, "Cost Data Summary Report," which contained the GE name, the contract number, and the contract budget. NAVSEA contracting officials stated that this form was included in the draft RFP to provide WEC an example of how to report cost details. NAVSEA officials stated that NAVSEA did not intend to provide GE's actual DD Form 1921 to WEC even though GE did not mark the form as proprietary.

The DD Form 1921 contained GE's cost allocation to the weapon system subassemblies, recurring and nonrecurring costs, general and administrative expenses, and profit. According to DoD and NAVSEA officials, data on the DD Form 1921 are business sensitive and should not be released to the public, whether or not the contractor marked the form as proprietary.

The contractor business sensitive data included in the draft RFP, subjected NAVSEA to a possible lawsuit and may increase the difficulty of obtaining needed information from contractors in the future. According to DoD Directive 7000.11, "Contractor Cost Data Reporting," DoD uses the data on the form to prepare acquisition program cost estimates, support cost-effectiveness studies, prepare budgets, and negotiate contracts. Therefore, the DD Form 1921 is important to DoD operations.

Impact assessment. After the DD Form 1921 was improperly released, NAVSEA did not document how the release affected the procurement. Instead, the program office summarized the events and provided NAVSEA's legal office with possible defenses in case of litigation from GE. In addition, NAVSEA's documentation shows that the contracting office asked GE to explain how the data

release affected its competitive position. After reviewing GE's assessment, NAVSEA determined the data release did not impact the procurement and mailed the RFP to both contractors. However, NAVSEA's impact assessment was not supported or documented.

The impact assessment was inadequate because DFAR Part 203.104,"Procurement Integrity," provided no guidance on how to determine or document the impact on the procurement. Although it states that the assessment must be documented, it does not discuss how to determine if there is an impact or the types of information that should be included in the documentation.

As a result of the inadequate assessment, NAVSEA did not have assurance that adequate pricing competition existed on the FY 1990 AN/SQQ-89 production contract. GE officials stated that WEC could have used the information on the DD Form 1921 to determine the manufacturing complexity of each AN/SQQ-89 subassembly. According to these officials, although GE had previously transferred AN/SQQ-89 technology to WEC, the technology transfer did not include information on manufacturing complexity.

In addition, unless the DFARS is clarified, confusion for Government officials may continue on how to determine if there is an impact or the types of information to include in the documentation.

RECOMMENDATIONS FOR CORRECTIVE ACTION

A.1. We recommend that the Commander, Naval Sea Systems Command provide training to Naval Sea Systems Command staff on the sensitivity of data on the DD Form 1921, "Cost Summary Data Report."

A.2. We recommend that the Director of Defense Procurement direct the Defense Acquisition Regulatory Council to revise the Defense Federal Acquisition Regulation Supplement, Part 203.104 "Procurement Integrity" to provide guidance on determining and documenting the impact of improperly disclosed cost and pricing data on procurements.

MANAGEMENT COMMENTS

The Assistant Secretary of the Navy for Research, Development and Acquisition partially concurred with Recommendation A.1. NAVSEA distributed a "lessons learned" memo to all NAVSEA contracting officers stressing the importance of protecting sensitive contractor information. The Assistant Secretary did not agree that Recommendation A.2., requesting additional guidance in the DFARS was needed. The Assistant Secretary disagreed that the information released by NAVSEA was business sensitive, and that NAVSEA did not adequately document the impact that the release

had on the procurement. The Assistant Secretary did not concur that the release occurred because training was inadequate on policies regarding sensitive data. The Assistant Secretary also did not agree that NAVSEA did not make an adequate determination on whether there was adequate price competition. The Navy believes that the data released were not proprietary since the contractor had not marked it as such.

A draft of this report was issued on February 25, 1991, for comments. The Under Secretary of Defense for Acquisition did not submit comments on Recommendation A.2. Therefore, for the final report, we redirected Recommendation A.2. to the Director of Defense Procurement.

AUDIT RESPONSE TO MANAGEMENT COMMENTS

The actions taken by the Navy on Recommendation A.1. are responsive to the intent of the recommendation. Accordingly, additional comments are not required on this recommendation.

According to DoD and NAVSEA officials, data on the DD Form 1921 should not be released to the public, despite the contractor's failure to mark the form as proprietary. In our opinion, if this information were not sensitive, then NAVSEA would not have terminated the contracting officer's warrant.

We agree that NAVSEA performed some form of an assessment on the release of data. However, this assessment was not dated or addressed to any staff for comments or input for a concurrence or nonconcurrence of impact determination. Further, without documentation, the Navy can only speculate what NAVSEA determined, which does not lend itself to a proper determination of price competition.

We continue to believe that additional DFARS guidance would help contracting officers avoid mistakes and omissions when determining and documenting the impact of improperly disclosed information.

B. PROCESSING DISCLOSURE STATEMENTS AND IDENTIFYING SOURCE SELECTION PARTICIPANTS

NAVSEA files for contract N00024-87-C-6024 contained improperly completed financial disclosure and nondisclosure of information statements and did not identify all source selection staff. These conditions existed because NAVSEA procedures were not clearly stated. As a result, persons with conflicts of interest may have participated in the source selection without the knowledge of NAVSEA officials. However, NAVSEA has revised the Source Selection Guide to provide guidance and clearly state procedures.

DISCUSSION OF DETAILS

Background

Since the 1988 Pentagon procurement scandal, known as "Ill Wind," much concern was expressed on Government contracting ethics. For example, several changes have been made to the Federal Acquisition Regulation to require better disclosure of potential conflicts of interest and to otherwise improve the accountability of persons involved in the selection of Government contractors. Because of this concern, our audit evaluated NAVSEA procedures for identifying contract source selection staff and for obtaining and processing financial disclosure and nondisclosure of information statements from the staff. Although this audit was limited to the source selection procedures for contract N00024-87-C-6024, discussions with NAVSEA officials and a review of written procedures indicate that the procedures used for this contract were similar to procedures used on other NAVSEA competitive negotiated contracts.

Navy requirements for obtaining and processing financial disclosure and nondisclosure of information statements from source selection staff are provided in Secretary of the Navy Instruction (SECNAVINST) 4200.33, "Selection of Contractual Sources for Department of the Navy Defense Systems." This instruction applies to competitive negotiated acquisitions for developing and/or producing Acquisition Category I, IIS, and IIC programs. It states that Source Selection Plans shall contain procedures for obtaining financial disclosure statements according to SECNAVINST 5370.2, "Standards of Conduct and Government Ethics," along with nondisclosure of information statements, from all source selection staff.

The Navy uses two financial disclosure forms for its personnel to complete. Senior Executive Service personnel and Flagship officers complete the "Executive Branch Public Financial Disclosure Report" (Standard Form 278). Other Government personnel and contractor staff, who provide advice, complete the "Confidential Statement of Affiliations and Financial Interests" (DD Form 1555).

SECNAVINST 5370.2, prescribes ethical standards and conduct rules for Navy personnel. The individual's supervisor and agency ethics officer review the statements or financial disclosure forms. These reviews ensure that each item has been completed, and that interests, positions or affiliations do not indicate that individuals have interests that could impair their judgment. Supervisor and agency ethics officer evaluations are documented by their signatures on the forms.

When the Source Selection Plan for contract N00024-87-C-6024 was prepared in August 1986, there was no specific requirement for documenting the identity of all source selection staff. The NAVSEA Source Selection Guide did require that the Source Selection Plan identify the Source Selection Authority, members of the Source Selection Advisory Council and Source Selection Evaluation Board, and the contractors assisting with the source selection. However, the Guide did not require identification of individual contractor employees assisting with source selection.

Despite the lack of specific requirements for identifying all source selection staff, General Accounting Office's "Standards for Internal Controls in the Federal Government" provide overall requirements. The Standards, which apply to all executive agencies, state that internal control systems, transactions, and other events are to be clearly documented and that events should be executed only by persons acting within the scope of their authority. These requirements indicate that not only should the identity of all source selection staff be documented, but also each person's responsibilities and access to information should be clearly documented.

Processing disclosure statements. The file for contract N00024-87-C-6024 contained improperly completed nondisclosure of information and financial disclosure statements. Specifically, no financial disclosure statements were properly processed, and at least 33 of the 88 statements were not in the file.

Missing Statements

	Missing	Total
Nondisclosure of information statements	15	44
Financial disclosure statements	18	44
Total	33	88

Because the Source Selection Plan did not identify contractor staff assisting in the source selection process, the total number of required statements was unknown.

In addition to the missing statements, none of the 26 financial disclosure statements in the contract file was signed by the NAVSEA ethics officer. Further, 6 financial disclosure statements were completely blank, while 12 others were not signed by supervisors. For example, one financial disclosure statement

was submitted by a consultant who provided advice on the source selection. The consultant stated that he owned stock in GE, which was a prime source for the AN/SQQ-89. Although there is no restriction on using consultants with potential conflicts to assist in the contractor selection process, source selection officials should be aware that the advice may not be objective.

NAVSEA did not properly obtain and process the statements principally because its Source Selection Guide and the Source Selection Plan did not provide clear instructions. Specifically, neither the Source Selection Guide nor the Source Selection Plan provided clear instructions for receiving, processing, and reviewing the statements.

Without having properly completed and reviewed financial disclosure statements, NAVSEA had no assurance that the source selection staff had no interests in the contract selection. The statements in the file for N00024-87-C-6024 clearly demonstrate this, since a review of the financial disclosure statements would have identified the blank statements. Also, a review would have identified the consultant who had a financial interest in GE.

Identity of source selection participants. The contract file did not associate 18 persons with the source selection process and may not have identified all contractor employees that assisted. Of the 31 financial disclosure and/or nondisclosure statements in the file, 18 were for individuals who were not members of either the Source Selection Advisory Council or the Source Selection Evaluation Board. There was no indication in the file of why all persons submitted the financial disclosure and nondisclosure of information statements or why they needed access to source selection and contractor business information.

Source selection staff was not adequately identified principally because the NAVSEA Source Selection Guide did not require that contractor staff be identified. In addition, the guide did not require that NAVSEA staff document the need for using consultants or identify the work that the consultants performed.

Since the contract file did not adequately document source selection staff and their responsibilities, there was no assurance that all contractor staff assisting in the source selection process completed financial disclosure and nondisclosure of information statements. Therefore, contractor staff may have had interests that conflicted with a fair evaluation of the contract proposals and may not have been aware of restrictions on releasing source selection and contractor business sensitive information.

MANAGEMENT ACTIONS

NAVSEA has taken several steps to better identify all source selection staff and control the use of contractor staff to assist in the selection process. In March 1989, NAVSEA changed Part 2.3 of its Source Selection Guide to require that the program manager prepare a list of all source selection staff including advisors and independent evaluators. The change also requires that Source Selection Plans justify the use of contractor personnel to provide technical advice and states that contractor personnel cannot evaluate offeror's cost and pricing proposals.

RECOMMENDATIONS FOR CORRECTIVE ACTIONS

The actions already taken by NAVSEA have corrected the internal control deficiencies identified in this finding; therefore, the recommendations to this finding have been deleted.

PART III - ADDITIONAL INFORMATION

APPENDIX A - Summary of Potential Benefits Resulting from Audit

APPENDIX B - Activities Visited or Contacted

APPENDIX C - Final Report Distribution

APPENDIX D - Audit Team Members

APPENDIX A - SUMMARY OF POTENTIAL BENEFITS RESULTING FROM AUDIT

Recommendation Reference	Description of Benefit	Amount and Type of Benefit
A.1	Compliance. Training on the sensitivity of data on DD Form 1921 will ensure better control of contractor data.	Nonmonetary
A.2	Compliance. Guidance on determining documenting impact of disclosed Cost and Pricing on procurements will determine if competition exists.	Nonmonetary

APPENDIX C - FINAL REPORT DISTRIBUTION

Office of the Secretary of Defense
Under Secretary of Defense for Acquisition
Assistant Secretary of Defense (Production and Logistics)
Comptroller, Department of Defense
Director of Defense Procurement
Director, Defense Acquisition Regulatory Council

Department of the Navy
Secretary of the Navy
Comptroller, Department of the Navy
Assistant Secretary of the Navy (Financial Management)
Auditor General, Naval Audit Service
Headquarters, Naval Sea Systems Command

Other Defense Activities
Director, Defense Contract Audit Agency
Director, Defense Logistics Agency

Non-DoD
Office of Management and Budget
U.S. General Accounting Office, NSIAD Technical Information Center
Congressional Committees:
- House Ranking Minority Member, Committee on Appropriations
- Senate Subcommittee on Defense, Committee on Appropriations
- Senate Committee on Armed Services
- Senate Committee on Governmental Affairs
- Senate Ranking Minority Member, Committee on Armed Services
- House Committee on Appropriations
- House Subcommittee on Defense, Committee on Appropriations
- House Committee on Armed Services
- House Committee on Government Operations
- House Subcommittee on Legislation and National Security, Committee on Government Operations
- Representative John Conyers, Chairman, House Committee on Government Operations

APPENDIX D - AUDIT TEAM MEMBERS

David K. Steensma, Director, Contract Management Directorate
James J. McHale, Program Director
Macie J. Hicks, Project Manager
Donney Bibb, Team Leader
Henry Hoffman, Team Leader
Jerry Bailey, Auditor
Allen Jackson, Auditor
Kevin Richardson, Auditor
Milton Kaufman, Cost Price Analyst
William Fox, Industrial Specialist
Mable Randolph, Editor
Robin Young, Administrative Support

PART IV - MANAGEMENT COMMENTS

Assistant Secretary of the Navy

Management Comments from the Department of the Navy

THE ASSISTANT SECRETARY OF THE NAVY
(Research, Development and Acquisition)
WASHINGTON, D.C. 20350-1000

MAY 07 1991

MEMORANDUM FOR THE DEPARTMENT OF DEFENSE ASSISTANT INSPECTOR GENERAL FOR AUDITING

Subj: DRAFT REPORT ON SECOND SOURCE PROCEDURES FOR THE AN/SQQ-89 COMBAT SYSTEM (PROJECT NO. 0CD-5011)

Ref: (a) DODIG memo of 25 Feb 1991

Encl: (1) DON response to Draft Audit Report

I am responding to the draft audit report forwarded by reference (a), concerning Navy procedures for soliciting a second source to produce the AN/SQQ-89 Anti-Submarine Warfare Combat System.

The Department of the Navy response is provided at enclosure (1). We partially concur with the draft report findings and recommendations and are providing additional Navy comments for clarification.

Gerald A. Cann

Copy to:
NAVINSGEN
NAVCOMPT (NCB-53)

Final Report
Page No.

Department of the Navy Response

to

DODIG Draft Report of February 25, 1991
on
Second Source Procedures for the AN/SQQ-89 Combat System
(Project No. OCD-5011)

Deleted

Part I, page 1, third paragraph, third sentence. "As a subcontractor to GE, WEC continued to receive AN/SQQ-89 technology on this contract."

DON Comment: Do not concur. Westinghouse Electric Corporation (WEC) was not a subcontractor to GE. WEC purchased information directly from GE.

2
Revised

Part I, page 4, second paragraph, last sentence. "Further, DOD Office of General Counsel (Fiscal and Inspector General) advised us on whether the release of GE's data violated any laws or regulations."

DON Comment: To avoid any misunderstanding, the report should set forth the opinion of the DOD Office of General Counsel as to whether the release violated any law or regulation.

3

Part I, page 7, first paragraph, second and third sentences. "On January 12, 1990, the Deputy Commander for Contracts, NAVSEA, terminated the warrant for the Contracting Officer responsible for the contents of the draft RFP that contained GE's contract data. However, the termination was the result of the release of other sensitive financial data."

DON Comment: Partially concur. The last statement is misleading. After the first incident involving the release of contractor data, the Contracting Officer was admonished, and advised that there could be no repeat of this type incident. When the second incident occurred shortly thereafter, immediate action was taken to relieve the Contracting Officer of his duties. The release of the GE data was considered the more significant of these two incidents, and was the most important factor leading to the termination of the Contracting Officer's warrant and his demotion from GM-14 to GM-13.

5

Part II, page 11, first paragraph, first sentence. "NAVSEA released GE business sensitive data to WEC during a price-only contract competition to produce the AN/SQQ-89 ASW Combat System."

DON Comment: Do not concur. The DODIG has chosen to classify this information as "GE's business sensitive data," although GE did not do so. The data released by the Contracting Officer was not marked "business sensitive," "proprietary," nor did it bear any other restrictive markings prohibiting its release outside

Final Report
Page No.

the Government. NAVSEA recommends that the DODIG refer to this information as the "released data" rather than "GE's business sensitive data" wherever it appears in the report.

5

Part II, page 11, first paragraph, second sentence. "Also, NAVSEA did not adequately document the impact that the release had on the procurement."

DON Comment: Do not concur. An investigation began immediately after NAVSEA was notified by GE that data had been released, and the results were documented in an impact assessment. The impact assessment included an analysis by Work Breakdown Structure element of the data released to WEC. This analysis supported the conclusion that the information released to WEC did not adversely impact GE's competitive position in this procurement.

5
Revised

Part II, page 11, first paragraph, third sentence. "The data release occurred because training was inadequate on policies regarding sensitive data."

DON Comment: Do not concur. We strongly object to the DODIG's conclusion on this point. The two incidents addressed in this response represent the only known unauthorized releases of contractor data by NAVSEA contracting personnel in the past ten years. It is the conclusion of both NAVSEA and GE (as stated in GE letter N-226 of 9 Oct 1989) that an honest mistake was made in releasing the data. The Contracting Officer simply did not check every page of the several hundred page draft RFP before releasing it, and as a result, the GE data was inadvertently included. NAVSEA considers the release of data to be the failure of an individual to properly execute his duties, not the failure of the system to properly instruct employees on the sensitivity of contractor data.

5

Part II, page 11, first paragraph, last sentence. "In addition, NAVSEA cannot determine if there was adequate price competition."

DON Comment: Do not concur. Based on the impact assessment completed before the final RFP was released and the results of the price competition, NAVSEA can and did determine that adequate price competition existed on this procurement. A determination of adequate price competition was included in the business clearance memorandum, in accordance with prescribed regulatory procedure.

5

Part II, page 11, last paragraph. "In his request, Representative Conyers expressed concern that the AN/SQQ-89 prime source's cost or pricing data may have been released to the second source. According to FAR subpart 15.801, cost or pricing data "means all facts as of the time of price agreement that prudent buyers and sellers would reasonably expect to affect price negotiations significantly." Information that is not used to support price negotiations is not cost or pricing data."

Final Report
Page No.

thoroughly the draft RFP before it was released; that led to the disclosure of the GE data.

Part II, page 14, last paragraph. "After the DD Form 1921 was improperly released, NAVSEA did not document how the release affected the procurement. Instead, the program office summarized the events and provided NAVSEA's legal office with possible defenses in case of litigation from GE. In addition, NAVSEA's documentation shows that the contracting office asked GE to explain how the data release affected its competitive position. After reviewing GE's assessment, NAVSEA determined the data release did not impact the procurement and mailed the RFP to both contractors. However, NAVSEA's impact assessment was not supported or documented." 6

DON Comment: Do not concur. NAVSEA did perform an assessment and did document how the release affected the procurement. This assessment included an analysis of each Work Breakdown Structure element identified in the released report. The DODIG statement that the impact assessment was not supported or documented appears to conflict with statements made elsewhere in the report in which the DODIG recognizes that there was an investigation but charges that it was inadequately documented.

Part II, page 15, paragraph two, second sentence. "GE officials stated that WEC could have used the information on the DD Form 1921 to determine the manufacturing complexity of each AN/SQQ-89 subassembly. According to these officials, although GE had previously transferred AN/SQQ-89 technology to WEC, the technology transfer did not include information on manufacturing complexity." 7

DON Comment: Partially concur. While this may be an accurate restatement of the GE officials' contention, NAVSEA believes that a review by a competent manufacturer of the drawings and data transferred to WEC during the technology transfer stage would certainly reveal the manufacturing complexity of the AN/SQQ-89 subassemblies.

Part II, page 15, last paragraph. "In addition, unless the FAR is clarified, Government officials may continue to be confused about how to determine if there is an impact or the types of information that should be included in the documentation." 7 Revised

DON Comment: Do not concur. There is no confusion on the relevant factors to be assessed in determining whether the release of data impacts a procurement. This is an area requiring judgment, and the relevant factors will vary with each situation. The NAVSEA Source Selection Guide provides guidance on procedures to be followed when information is disclosed during the conduct of a competitive procurement. In addition, NAVSEA 02 has issued guidance on procedures to be followed when there is an unauthorized disclosure of proprietary or source selection information (NAVSEA memo Ser 02B/717 of 14 Nov 90 applies.)

Final Report
Page No.

5

Revised

Finding A: Release of Contractor Data

NAVSEA released GE business sensitive data to WEC during a price-only contract competition to produce the AN/SQQ-89 ASW Combat System. Also, NAVSEA did not adequately document the impact that the release had on the procurement. The data release occurred because training was inadequate on policies regarding sensitive data. The impact was not adequately documented because the Federal Acquisition Regulation (FAR) did not provide guidance on determining and documenting the impact of disclosed business sensitive data. Such releases expose the Government to possible lawsuits and may increase the difficulty of obtaining needed information from contractors. In addition, NAVSEA cannot determine if there was adequate price competition.

7

Recommendation A-1.

We recommend that the Commander, Naval Sea Systems Command provide training to Naval Sea Systems Command staff on the sensitivity of data on the DD Form 1921, "Cost Summary Data Report."

DON Position:

Partially concur. The release of the sensitive data was due to a combination of two factors: (1) The data were not marked as proprietary by GE, which would have highlighted it as such to recipients of the data; and (2) The Contracting Officer did not adequately review the draft RFP before it was released to industry. Had such a review been performed, the inclusion of the sensitive data would have been detected. NAVSEA considered this to be a serious breach of the Contracting Officer's responsibilities. As a result of this and a subsequent incident involving the release of sensitive data, the Contracting Officer's warrant was withdrawn, he was relieved of all signature authority, and he was demoted from GM-14 to GM-13.

As a result of this incident, a "lessons learned" memo has been distributed to all NAVSEA 02 contracting officers stressing the importance of protecting sensitive contractor information and reminding them of their responsibility for thoroughly reviewing all documents presented to them for signature.

As further evidence of NAVSEA's aggressive action in these matters, COMNAVSEA immediately recognized the importance of providing training to NAVSEA employees on the requirements of the Procurement Integrity Act prior to its affectivity on 16 July 1989. A special working group including members from SEA 02 (Contracts) and SEA 00L (Counsel) was formed to develop comprehensive training for the Command since the prohibitions against the unauthorized disclosure of proprietary or source selection information applies to all personnel. Necessary regulatory interpretations, training documents, and agency procedures were established. Individual training packages,

Final Report
Page No.

forwarded by a personal memorandum from COMNAVSEA stressing the importance of the subject, were provided to approximately 1,500 key Headquarters personnel. Subsequent written updates containing clarifications and answers to key questions were provided to appropriate personnel.

Recommendation A-2.

We recommend that the Under Secretary of Defense for Acquisition direct the Defense Acquisition Regulatory Council to revise the Defense Federal Acquisition Regulation Supplement Part 203.104 Procurement Integrity to provide guidance on determining and documenting the impact of improperly disclosed cost and pricing data on procurements.

7
Revised

DON Position:

Do not concur. The relevant factors involved in assessing the impact of the release of data on a procurement will vary with each situation. As such, this type of analysis requires judgment and does not lend itself to the cookbook approach advocated by the DODIG. Further, with respect to the incident under review, it is noted that the released information should not be termed "cost or pricing information."

Finding B: Processing Disclosure Statements and Identifying Source Selection Participants

9
Revised

NAVSEA files for contract N00024-87-C-6024 contained improperly completed financial disclosure and nondisclosure of information statements, and did not identify all source selection staff. These conditions existed because NAVSEA procedures were not clearly stated. As a result, persons with conflicts of interest may have participated in the source selection without the knowledge of NAVSEA officials.

Recommendation B-1.

We recommend that Commander, Naval Sea Systems Command, change the Source Selection Guide to require that each Source Selection Plan specify procedures for receiving and processing and reviewing nondisclosure of information and financial disclosure statements. These procedures should make sure that the statements have been properly completed, signed by each participant's supervisor, approved by the agency ethics officer, and obtained prior to releasing source selection information and contract proposals to source selection staff.

Deleted

DON Position:

Partially concur. This recommendation has already been implemented, with the exception of the review of the statements by the agency ethics officer. Current NAVSEA procedure provides

Final Report
Page No.

that the program attorney review and approve these statements on individual procurements; this procedure in adequate. The program attorney is the attorney most familiar with the procurement and is the individual who serves as legal advisor to the source selection organization. The ethics officer remains responsible for reviewing the annual statements required of individuals in key positions. The remainder of the recommendation is considered to have been implemented in the revised NAVSEA Source Selection Guide dated 31 March 1989.

Recommendation B-2.

We recommend that Commander, Naval Sea Systems Command, change the Source Selection Guide to require that the contract file document why all persons who have submitted financial disclosure and nondisclosure of information statements need access to source selection and contractor business information.

DON Position:

Deleted

Do not concur. The revised NAVSEA Source Selection Guide provides guidance on the need to obtain these statements from all members of the source selection organization, including Government personnel, contractor advisors (if used), and independent evaluators (such as the OSD CAIG). The Procurement Integrity Act also requires that the contract file include listings of individuals and classes of individuals who participated in the procurement. The recommendation to further justify the need for these individuals to have access to source selection and contractor business information would create an onerous administrative burden which would add no value to the safeguards already established through compliance with provisions of the Procurement Integrity Act.