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Federal Contracts Report™

Freedom of Information Act

BNA INSIGHTS: Protecting Government Contractors' Proprietary Information in Response to FOIA Requests

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Most government contractors are familiar with the nearly 50-year-old Freedom of Information Act (FOIA), but many nonetheless find themselves surprised and, often reflexively, dismayed, when they are on the receiving end of a FOIA request.

The request usually arrives in a contracting officer or contract specialist e-mail stating that the agency intends to release their contracts and proposals to an often anonymous requester. ''But it's a competitor. How can they give my information to my competitor?'' is usually the first reaction. But it's true: The same law that the press and public interest groups use to mine government files to expose mismanagement, corruption or to shine light on agency operations gives private companies an opportunity to seek potentially useful information.

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Welcome to Planet FOIA. It's a potentially scary place to be when, for example, a competitor asks for a copy of your latest successful proposal to an agency customer.

There are, however, some steps that contractors can take to limit the release of their sensitive, proprietary information — particularly their most important or sensitive information. But the deadlines can be quick and unforgiving, so the best advice is to be proactive, prepared and responsive.

Be Proactive: Mark Any Submissions With the Appropriate Protective Legend.

The most important step any company can take to protect the confidentiality of any information that it submits to an agency is to mark it appropriately. The Federal Acquisition Regulation (FAR) takes the hard work out of this step and prescribes a specific protective legend for offerors to use:

> This proposal includes data that shall not be disclosed outside the government and shall not be duplicated, used, or disclosed — in whole or in part — for any purpose other than to evaluate this proposal.

FAR 52.215-1(e). You'd be surprised how often this legend is omitted from key documents containing valuable proprietary data.

 ISSN 0014-9063

This legend does not guarantee that an agency will ultimately agree that the documents that bear its mark are necessarily protected from disclosure under FOIA. But it does at least signal to the agency that it needs to consult with the contractor before simply releasing the document. Without this legend, an agency might not even realize that the document it is about to produce is proprietary to another party. If a company does not include a protective legend, it also makes it much harder for the company to later convince the agency that it values the information and has itself taken the appropriate steps to maintain the document's confidentiality.

Be Prepared: Decide What Is Important to Your Business and Understand the Scope of the Primary Exemptions .

In response to an agency's notice that it intends to release a contractor's documents, the contractor should prepare a reasonably detailed response based on one or more of the exemptions to FOIA. Two primary exemptions in the Freedom of Information Act are most useful to contractors.

The first, and simplest, of these exemptions protects information that is ''specifically exempted from disclosure by [another] statute.'' 5 U.S.C. 552(b)(3). The specific statutes that contractors cite to most frequently are 10 U.S.C. § 2305(g) (DOD agencies) and 41 U.S.C. § 4702 (civilian agencies). *See, e.g.*, *Hornbostel v. United States Dep't of the Interior*, 305 F. Supp.2d 21, 29-30 (D.D.C 2003). Both of these statutes prohibit agencies from disclosing a proposal — including a technical proposal, a management proposal or a cost proposal — submitted to an agency in response to a solicitation for a competitive proposal.

This exemption, however, does not cover all aspects of a winning proposal. If any portion of a proposal is ''set forth or incorporated by reference in a contract'' with the Government, then this exemption will not apply to that portion of the proposal. This does not mean that contractors are out of luck when it comes to protecting winning proposals or portions of proposals that are incorporated into a contract; it just means that they have to find protection under another exemption.

The second most useful exemption covers two types of confidential or privileged information: (1) ''trade secrets'' and (2) ''commercial or financial information.'' 5 U.S.C. § 552(b)(4). In interpreting ''trade secrets'' — a term that FOIA does not define — courts have generally adopted a narrow definition focused on information relating to business methods or processes.

To qualify as a ''trade secret'' under this narrow definition, the information must be ''a secret, commercially valuable plan, formula, process or device that is used for the making, preparing, compounding or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.'' *Public Citizen Health Research Grp. v. Food & Drug Administration*, 704 F.2d 1280, 1289 (D.C. Cir. 1983).

For example, under this exception, an agency or court might conclude that the manufacturing process for a particular item constitutes a trade secret but that the same end item's physical and performance characteristics are not. *See, e.g.*, *Center for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 151 (D.C. Cir. 2001).

Courts have generally interpreted the ''commercial or financial information'' component of the exemption broadly. For cases dealing with ''commercial or financial information,'' the deciding factor tends to be whether the information is ''confidential.''

In determining whether information is ''confidential,'' courts have used several different tests. The most common test looks at whether disclosure of the information would have one of two recognized effects: (1) ''to impair the Government's ability to obtain the necessary information in the future'' or (2) ''to cause substantial harm to the competitive position of the person from whom the information was obtained.'' *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Dir. 1974).

Contractors have often been successful in invoking these justifications to protect information in their technical proposals. *See, e.g.*, *Orion Research Inc. v. EPA*, 615 F.2d 551, 554 (1st Cir. 1980); *Audio Technical Servs. Ltd. v. Dep't of Army*, 487 F. Supp. 779, 782 (D.D.C. 1979). When it comes to protecting pricing information in a successful proposal or contract, contractors are more successful when they seek to protect more detailed information.

In general, the total price or cost of a contract is considered public information. Even unit or line-item prices are often considered public information, although there are some cases where a contractor has offered a strong enough justification to persuade a court that certain line-item prices or option-year prices are protected. *See, e.g.*, *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182 (D.C. Cir. 2004).

Contractors have been most successful when they seek to protect the detailed pricing information that is used to prepare a price proposal, because that is the type of information that is most likely to cause a substantial competitive harm.

If the information does not meet the *National Parks* definition of ''confidential,'' it might still be protected if the information was submitted ''voluntarily'' and ''is of a kind that would customarily not be released to the public by the person from whom it was obtained.'' *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992).

This is an easier test to satisfy than the *National Parks* test because courts have recognized that the government has a strong interest in securing information from voluntary sources on a confidential basis, and failing to protect that information would jeopardize the government's ability to secure similar information in the future. *Id.* But the courts have varied how they apply this test.

In general, the courts that follow the *Critical Mass* test look not at whether a contractor was required to participate in a competition for a government contract but at whether, once the contractor decided to participate, it was required to submit a particular piece of information.

For example, if a solicitation requires offerors to submit an operating plan as part of the proposal submission, then the plan will likely be considered an involuntary submission. *See Frazee v. U.S. Forest Serv.*, 97 F.3d 367, 372 (9th Cir. 1996). But if a solicitation merely provides an offeror with the option to submit a particular piece of information, then that information will likely be considered a voluntary submission. *See Cortez III Serv. Corp. v. Nat'l Aeronautics & Space Admin.*, 921 F. Supp. 8, 12 (D.D.C. 1996).

   ISSN 0014-9063

Be Responsive: Work Promptly With the Agency to Negotiate Appropriate Protection.

When a contractor receives notice from an agency that it intends to release proposal information or contract documents, it is important for the contractor to act quickly and respond fully. This should begin with immediate notification to company legal counsel to assess the potential impact of disclosure, seek additional response time if necessary, determine what exemptions may be available and prepare the most effective presentation possible in the time permitted.

Although DOD's regulations suggest ''30 calendar days'' as an example of ''reasonable time'' for a contractor to respond, contractors often do not have that much time. Sometimes agencies will attempt to pressure contractors into responding in less than five calendar days. Nonetheless, a contractor's responsiveness is critical for at least two reasons.

First, if the contractor fails to respond, then the agency may find that the contractor waived any objection to the release of the documents. If the agency then releases the documents, the contractor is often out of luck — the documents have already been released. And once an agency releases a particular document to one party, the contractor will have waived any protection over those documents for any future FOIA requests.

Second, because FOIA litigation can be costly, most parties ultimately find that they need to negotiate an acceptable set of redactions with the agency that protects the most important information.

Sound information management practices, supported by aggressive, fact-based and timely responses to risky FOIA requests, are the best means of protecting valuable company assets from unwarranted disclosure.