

U.S. ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF GENERAL COUNSEL
GENERAL AND INFORMATION LAW DIVISION

CLASS DETERMINATION 1-95

CONFIDENTIALITY OF CERTAIN BUSINESS INFORMATION SUBMITTED
BY CONTRACTORS AND PROSPECTIVE CONTRACTORS

U.S. Environmental Protection Agency regulations issued under the authority of the Freedom of Information Act ("FOIA" or "the Act"), 5 U.S.C. § 552, prescribe procedures for determining whether business information submitted to the Agency and claimed as confidential by third parties should be released to the public when disclosure is requested under the Act. See 40 C.F.R. part 2, subpart B. Section 2.207 of the regulations provides that a determination that information is or is not entitled to confidential treatment for reasons of business confidentiality may be made on a class basis if one or more characteristics common to all items of such information necessarily will result in identical treatment under the regulations for each such item of information. In accordance with the regulation, the Associate General Counsel for General and Information Law, as the General Counsel's designee, herein makes the requisite determination that certain items of information submitted to the Agency by contractors and prospective contractors will be treated identically and should be the subject of class treatment.

On May 3, 1978, the Agency issued Class Determination 2-78, concerning the confidentiality of business information contained in contract proposals submitted to the Agency. The class determination was refined and reissued in 1979 (Class Determination 2-79) and again in 1994 (Class Determination 2-94) to reflect changes in applicable law and to incorporate the teaching of experience in how the disclosure of business information may affect the competitive position of a business.

Every year, EPA receives numerous requests under the FOIA for release of information submitted to the Agency by its contractors and prospective contractors. The information is contained in the numerous documents generated in the selection of Agency contractors and in the administration of contracts awarded by the Agency. Such documents include contract proposals, awarded contracts and contract modifications, invoices, accounting and financial reports, and an array of other documents that trace the contracting process. In almost all cases, the businesses that submit these documents to the Agency claim at least portions of the information contained in them as confidential business information.

In accordance with 40 C.F.R. § 2.207, I find that:

1. The Agency possesses many documents submitted by contractors and prospective contractors containing information claimed to be entitled to confidential treatment for reasons of business confidentiality. The Agency routinely requires the submission of such documents by its contractors and prospective contractors and will continue to require such documents in the future.

2. Certain categories of information contained in documents submitted to the Agency by its contractors and prospective contractors share common characteristics that necessarily will result in identical treatment with respect to claims of business confidentiality. It is therefore appropriate to treat such information on a class basis for purposes of determining whether the information is entitled to confidential treatment.

3. A class determination that such information is or is not entitled to confidential treatment would streamline the Agency's response to requests for information under the Act and would further the purposes of the Act by assuring the American public timely access to requested information, consistent with the rights of affected businesses to be protected from improper disclosure of confidential information.

Information Submitted by Agency Contractors and Prospective Contractors

Contract proposals are usually required to be submitted to the Agency in two parts: a technical proposal and a business proposal. The technical proposal commonly sets forth the offeror's understanding of the requirements of the procurement, the way in which the offeror would do the work required, the resources that the offeror would devote to the work, and information concerning the offeror's experience and expertise in the field. The business or cost proposal specifies the price for which the offeror is willing to do the work under a fixed price contract or the estimated cost and fee for doing the work under a cost reimbursement contract. It commonly includes information about the offeror's financial status, the anticipated costs of performing the contract work, a proposed fee, information regarding the past performance of other contracts, and other general financial information about the offeror. Such information is commonly also contained in revisions to the offeror's proposal, in negotiation documents, and various other documents generated prior to selection of a contractor and award of the contract. The information generated in the pre-award procurement process may also be incorporated into the contract awarded by the Agency.

After a contract is awarded, during its performance, a contractor is commonly required to submit many documents reporting the status of the contract. These documents may describe the progress of contract work, the costs incurred, the use of resources and personnel, the degree of success in achieving contract objectives, and strategies for future accomplishments. This information is contained in such documents as work plans, progress reports, contractor self-evaluations, and various other documents. In addition, information submitted to the Agency by the contractor may be incorporated into Agency generated documents such as audit reports, performance evaluations, work plan approvals, and other documents.

This class determination applies to information required to be submitted to the Agency by its contractors and prospective contractors. Because it applies to information, its scope is not limited to any particular document or documents described in this class determination. It also applies to information that is incorporated into Agency-generated documents.

This class determination sets forth certain classes of information that will and will not be released pursuant to FOIA requests. It is premised on a class-wide determination that the information is or is not releasable under Exemption 4 to the FOIA. Exemption 4 of FOIA exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). In order for information to meet the requirements of Exemption 4, the Agency must find that the information either is a trade secret, or is 1) obtained from a person, 2) commercial or financial information, and 3) privileged or confidential.

The definition of trade secret under FOIA is limited to "a secret, commercially valuable plan, formula, process or device that is used for the making, preparing, compounding, or processing of trade commodities," where there is a "direct relationship" between the trade secret and the productive process. Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1288 (D.C. Cir. 1983). Because the information subject to this class determination is not used to make, prepare, compound, or process a trade commodity, such information does not constitute a trade secret.

The term "person" has been construed broadly to encompass a wide range of entities, including corporations, state governments, and foreign governments. See, e.g., Stone v. Export-Import Bank, 552 F.2d 132 (5th Cir. 1977). Agency contractors and prospective contractors are thus "persons" within the meaning of FOIA Exemption 4. Information developed by the Agency is not obtained from a person and is not entitled to confidential treatment.

Certain information contained in contract proposals, contracts, and related documents is clearly commercial or financial information. Contract proposals are written as commercial documents designed to sell the offeror's services to the Agency. Contracts and related documents are incidents of a commercial transaction and may disclose information pertaining to the administration or cost of a Government contract. Such documents may contain detailed information about the financial structure, personnel, and management of the contractors or prospective contractors.

Since the information submitted to the Agency by contractors and prospective contractors is commercial information obtained from a person, the remaining question is

whether the information is privileged or confidential. No recognized privilege is applicable to the commercial information submitted by contractors and prospective contractors, thus the sole remaining inquiry is whether the information is properly characterized as confidential.

The Federal courts have enunciated the relevant criteria by which the Agency is to determine whether commercial information that is not voluntarily submitted to the Government¹ is to be characterized as confidential within the meaning of Exemption 4 of the FOIA. In the landmark case National Parks & Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974), the court determined that such information is entitled to confidentiality under Exemption 4 if disclosure of the information could cause substantial harm to the competitive position of the person from whom the information was obtained. This is the central question the Agency must ask each time it receives a request for disclosure of information that has been claimed as confidential by an Agency contractor or prospective contractor submitter.

Experience over the years has demonstrated that contractors and prospective contractors are able routinely to demonstrate that the disclosure of certain types of information could cause substantial harm to the competitive position of the submitter. Prior to its first class determination, the Agency routinely denied requestors access to such information, but only after an individual determination that the information was entitled to confidential treatment. This repetitive analysis of confidentiality claims yielded consistent findings and demonstrated no value added to the process of implementing the Act. Accordingly, the Agency's first class determination concerning prospective contractor's business information, Class Determination 2-78, articulated on a class basis the analysis that had theretofore been repeatedly reiterated in individual confidentiality determinations. Experience since the issuance of Class Determination 2-78 has demonstrated that contractors and prospective contractors continue to claim certain information as confidential. Reanalysis of such claims reinforces the Agency's view that there is substantial value to handling certain confidentiality determinations on a class basis.

Class Determination 2-78 and its successors applied only to information submitted to the Government prior to the award of a contract. This limitation reflected the Agency's cautious approach to treating information on a class basis. It has, however, led to the anomalous result that precisely the same types of information may be treated differently within the Agency's FOIA processes. By way of example, the Agency has since 1978 protected from disclosure on a class

1. The submission of the information subject to this class determination is required by the Government. Federal procurement statutes, regulations, and contract terms compel the submission of this information by all who choose to seek or to enter into contracts with the Government. Chemical Waste Management, Inc. v. O'Leary, No. 94-2230 (D.D.C. Feb. 28, 1995). Because this information is not voluntarily submitted, the greater protection afforded by Critical Mass Energy Project v. Nuclear Regulatory Commission, 975 F.2d 871 (D.C. Cir. 1992) (en banc) for such submissions is not applicable.

basis the indirect cost rates of its contractors where that indirect cost rate was included in the contractor's pre-contract proposal. Nonetheless, where the same contractor's indirect cost rate was adjusted during performance of the contract, the adjusted rate did not fall within the scope of the class determination and the Agency was forced to issue a repetitive individual determination of confidentiality. This created a substantial impediment to the Agency's desire to respond in a timely manner to requests for the release of information. Finding no reason to maintain the artificial distinction between information that is submitted prior to award and that submitted after award of a Government contract, the Agency today deletes the previous limitation of its prior class determination.

Information Entitled to Confidential Treatment

I have determined that the following types of information are entitled to confidential treatment where the information is not otherwise publicly available and disclosure of the information is not otherwise required by statute or regulation:

1. Information that would disclose the submitter's proposed approach to performing contract work.
2. Information that would disclose the submitter's plan to manage the contract, including plans to subcontract for performance of contract work.
3. Information concerning the submitter's relevant experience and expertise, except for general information regarding the submitter's Government-sponsored contracts or grants that is public information.
4. Information concerning the identities or qualifications of specific employees, consultants, subcontractors, and subcontractor's employees that the submitter proposes to use in performing the contract work. Information that would disclose the identities of key employees, subcontractors and consultants utilized in performing contract work. Information that would associate the identities of specific employees with the amounts, nature, and costs of work performed by them.
5. Information concerning the submitter's proprietary processes, devices, software, organization of reports, and analyses, etc.
6. Information concerning the submitter's financial structure.
7. Information concerning the submitter's accounting methods.
8. Information that would disclose a submitter's labor rates, salaries, overhead costs, general & administrative costs, or fee or profit.. [Unit prices are not included in this category.]

Substantial competitive harm

Disclosure of information contained in categories 1 through 8 above would be likely to cause substantial harm to the competitive position of the submitter. The kinds of competitive harm that would be likely to result are as follows:

- Release of information concerning how the submitter would undertake the specific work required might allow a competitor to improve its performance by taking advantage of the skills, experience, and techniques developed by the submitter. If the competitor could improve its skills, experience, and techniques, it would be in a position to compete more effectively with the submitter in future procurement actions. Also, a competitor could discover weaknesses in an submitter's work and take advantage of them in subsequent competitions. This would put the submitter at a competitive disadvantage in a future procurement action because the submitter would not necessarily have access to the same information about the competitor.
- Release of information concerning the submitter's management structure and techniques supplements the information in the technical approach by showing a competitor how the submitter would organize for performance, allocate resources, assign personnel, and control costs and time. This might enable the competitor to improve or change its own management techniques to the detriment of the submitter.
- Information concerning the submitter's experience with non-government contracts would show a competitor the market in which the submitter competes. Disclosure might cause a competitor to move into those same markets and take business away from the submitter.
- Release of information concerning the submitter's personnel might allow a competitor to raid the submitter's personnel and hire away key employees. This could enhance the competitor's position and might hurt the submitter's position, especially where the quality of technical or management personnel is important in performing the work. The identities of key personnel are well recognized as having commercial value to competitors, *see, e.g., Audio Technical Services v. Army*, 487 F.Supp. 779 (D.D.C. 1979), and the identities of employees in general are entitled to confidentiality where they are found in such a context as to make the employees attractive and vulnerable to raiding by competitors. *See, e.g., Burroughs v. Brown*, 501 F.Supp. 375, 381 (E.D. Va. 1980).
- Release of information concerning the submitter's processes, devices, proprietary software, proprietary organization of reports and analyses, accounting methods, etc. might give a competitor access to information developed by the submitter at some expense and allow the competitor to use the information without the same expenditure of time and resources in its development. This might allow a competitor to propose a lower contract price in a subsequent competition, because the competitor would not have to include the development costs for such items in determining the price for its work while the

submitter might still be recovering its development costs. All of these factors would enable a competitor to compete more effectively with the offer in future government and private procurement actions.

- Information concerning the submitter's financial structure, specific costs, and fees could be used by a potential competitor to anticipate the submitter's costs and fees in future procurement actions and allow the competitor to underbid the submitter. Since price or cost is an important factor in deciding who will be awarded a contract, the ability of a competitor to underbid the submitter could mean loss of future contracts. Unit prices are not susceptible to generalizations concerning confidentiality because it must be determined on an individual basis whether they provide information applicable to future procurements.

Information Not Entitled to Confidential Treatment

Competitive harm resulting from release of the information is contingent on the information not already having been made public. The following information is publicly available, and is therefore not entitled to confidential treatment:

- A. Information concerning the identity and scope of work of other government contracts or grants performed by the submitter. This information is available to the public through the Commerce Business Daily and from specific government agencies.
- B. Information of a general nature about the submitter that the submitter routinely publishes or discloses to the public as part of its regular business activities.
- C. Information reproduced from documents that are already public, such as the request for proposals, other EPA documents, or published materials.

The following information, although not necessarily publicly available, is not entitled to confidential treatment after contract award² because it does not satisfy the criteria for confidentiality discussed in National Parks. Nonetheless, this information will not be disclosed if it could be used to ascertain information that is entitled to confidential treatment, including information in categories 1 through 8, above.

- D. The aggregate cost (total of all costs and fees) of the contract to the government. The aggregate cost of contract options to the government. Totals of labor effort expended, invoiced, or paid at any point during contract performance for work performed under the contract or for any discrete segment of such contract work. Totals of costs incurred,

2. Prior to contract award, the disclosure of certain of this information is prohibited by statute and regulation. See, e.g., 41 U.S.C. § 423; 48 C.F.R. § 3.104-1(a).

invoiced, or paid at any point during contract performance for work performed under the contract or for any discrete segment of such contract work. The aggregate of labor hours worked by all subcontractors and consultants and the aggregate of all costs incurred by them at any point during contract performance or for any discrete segment of such contract work.

- E. Information that is developed by the Government, regardless of whether the information is subsequently contained in a document submitted to the Government by a contractor or prospective contractor.
- F. Information concerning the identity of the submitter and the aggregate cost of the submitter's proposal.

Each of the total costs contained in Category D above is an amalgam of fluctuating variables that can not realistically be dis-aggregated by a competitor so as to reveal meaningful competitive data. Disclosure of the total amounts, therefore, is not likely to cause substantial competitive harm to the submitter. Category E simply reflects the fact that contractors and prospective contractor's have no individual claim to confidentiality in Government generated information. Category F treats an unsuccessful offeror the same as the contract awardee; neither will suffer competitive harm from disclosure of the firm's public identity or the aggregate cost proposed for the government contract.

Implementation

To implement this class determination, the office responding to a request for Agency records containing information submitted to the Agency by its contractor or prospective contractors must first review Agency records. If the office determines that information contained in these records has been claimed as confidential, the office must deny the request with respect to those categories of information described in 1 through 8 above, based upon this class determination. If information described in categories A through F above, has been claimed as confidential, the office must 1) provide the submitter with a copy of this class determination, 2) inform the submitter that the confidentiality claim is denied pursuant to this class determination, and 3) provide notice to the submitter that it has ten working days in which to seek judicial intervention prior to release of the information (unless such notice had previously been provided), pursuant to procedures at 40 C.F.R. § 2.204(d)(2) and § 2.205(f). Information not covered by categories 1 through 8 or A through F above will require

substantiation of the claim by the submitter and a separate final confidentiality determination by the appropriate EPA legal office.

/s/

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General and Information Law

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Date