

FOIA - THE FREEDOM OF INFORMATION ACT**WHAT CAN YOU ASK FOR? WHAT DO YOU HAVE TO PROVIDE?**

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August 2016

It has become routine for Federal contractors to provide Freedom of Information Act (FOIA) requests to the government in the hope of receiving valuable business or proposal information about your company and their other potential competitors. These FOIA letters may ask for pricing information in one of your proposals, or request general information about your services, methods, or products. Concerned contractors are asking questions, including:

- How can you protect your company information?
- What can you find out about your competition?
- What can your competition find out about you?
- What kind of information is really privileged?
- Can you accidentally release your information and waive your rights?
- Will the Government release your proposal information to the public?
- Can you fight the release of your private company documents?

SOLE PROPOSERS HAVE A NEW PROBLEM: The FAR now includes information on FOIA at FAR Part 24, and DOD has established policies regarding provision of financial information and to determine and protect sensitive information. However, if your company is the sole proposer on a contract, the government has the right to receive and review all your company information, down to unit prices, profits, and wages. This information may become part of the contract, which is information that could be subject to a FOIA request by your competition. This puts all your competitive advantages at risk of publication by the Government. How can your company protect its commercial information and avoid competitive harm?

How do you protect your company interests? The answer is identifying and protecting your company from release of sensitive information that can cause substantial competitive harm. It is critical that your company immediately state in writing that a disclosure of such confidential information would jeopardize your company's commercial interests, and explain how it will cause substantial and immediate competitive harm. The U.S. Department of Justice Guide to FOIA is at <http://www.justice.gov/oip/foia-guide.html>.

When an agency notifies the contractor, it typically includes the notice letter, a copy of the FOIA request from the enquiring contractor, and instructions to the contractor that it must specifically justify nondisclosure of the information. FOIA Exemption 4 is supposed to protect the contractor against disclosure of confidential and/or proprietary information, including anything that would give an unfair, competitive advantage to a requestor. This should include



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protection against disclosure of any matter that is a trade secret or that constitutes commercial or financial information that is privileged or confidential.

FAR Subpart 24.2- Freedom of Information Act

24.201 Authority.

The Freedom of Information Act (5 U.S.C. 552, as amended) provides that information is to be made available to the public either by . . . (c) Upon request, providing a copy of a reasonably described record.

24.202 Prohibitions.

(a) A proposal in the possession or control of the Government, submitted in response to a competitive solicitation, shall not be made available to any person under the Freedom of Information Act. This prohibition does not apply to a proposal, or any part of a proposal, that is set forth or incorporated by reference in a contract between the Government and the contractor that submitted the proposal. (See 10 U.S.C. 2305(g) and 41 U.S.C. 253b(m).)

(b) No agency shall disclose any information obtained pursuant to 15.403-3(b) that is exempt from disclosure under the Freedom of Information Act. (See 10 U.S.C. 2306a(d)(2)(C) and 41 U.S.C. 254b(d)(2)(C).)

The Department of Defense emphasizes this:

10 U.S.C. §2305 Armed Forces

(g) Prohibition on Release of Contractor Proposals.—(1) Except as provided in paragraph (2), a proposal in the possession or control of an agency named in section 2303 of this title may not be made available to any person under section 552 of title 5.

(2) Paragraph (1) does not apply to any proposal that is set forth or incorporated by reference in a contract entered into between the Department and the contractor that submitted the proposal.

(3) In this subsection, the term “proposal” means any proposal, including a technical, management, or cost proposal, submitted by a contractor in response to the requirements of a solicitation for a competitive proposal.

It is critical for your company to institute protective measures for potentially sensitive information submitted to the government.

- First, all information that your company does not want released should be clearly marked as proprietary on any documents you submit to the government.
- Second, whenever the agency gives your company notice of an outside FOIA request for company submitted information, immediately notify the agency in writing of your objection. It will be necessary to provide specific explanations to the agency demonstrating how release of this information will cause damage to your company’s competitive advantages and identifying this information is not in the public domain.
- Non-response to a government FOIA notification may be deemed an agreement to release the requested information to the third party.



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Your company did not provide this information to the government with the understanding or agreement it would be made public. In order to respond fully to an RFP, your company was required to disclose some of its most valuable intellectual property, including trade secrets and confidential information. Providing this information to a government agency requires careful consideration, and as noted above, you should identify such information. Unfortunately, this information may be intentionally or inadvertently disclosed by a government agency to a third party, or may be disclosed under applicable Federal freedom of information laws.

Addressing the sole proposer issue, don't just provide written copies of all your company's confidential information. Agree to a meeting with the agency and show their people whatever they need to see. Allow the Government reasonable time to sit and review any documents requested and agreed to. But try to avoid providing sensitive documents or copies to the Government that could make their way into the hands of your competitors.

Once again, you must always be on guard to monitor and to protect your company information. We strongly suggest you seek competent legal assistance if you receive a notice of a FOIA request from the government. Feel free to contact Jim Krause at (904) 353-5533 or jimkrause@krauselaw.net.



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