

This class determination remains applicable insofar as it does not conflict with *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356 (2019). The Agency is in the process of evaluating whether any changes need to be made to its regulations and guidance to conform with this recent U.S. Supreme Court decision and will update class determinations, as appropriate.

US EPA ARCHIVE DOCUMENT

CLASS DETERMINATION 2-78

CONFIDENTIALITY OF BUSINESS INFORMATION SUBMITTED IN TECHNICAL AND COST PROPOSALS

Each year the Environmental Protection Agency (EPA) receives thousands of proposals from businesses offering to perform EPA contracts. Some are responding to EPA requests for proposals; some are unsolicited. Usually several proposals are received for each request.

EPA has been receiving ever-increasing numbers of requests under the Freedom of Information Act for copies of these proposals. Often the requests are from unsuccessful offerors seeking copies of proposals submitted by successful offerors. In the majority of such cases the business that originally submitted the proposal has claimed that its proposal contains trade secrets and proprietary information that should be kept confidential.

I have found that:

1. EPA possesses many proposals from offerors seeking to perform EPA contracts and will continue to acquire such proposals in the future.
2. Although the subject matter may vary, the information contained in the proposals is of the same character. Therefore, it is proper to treat all of the proposals in the same class for the purposes of this determination.
3. A class determination would serve a useful purpose in that it would simplify the task of organizing and writing final confidentiality determinations for proposals or proposal information without eliminating case by case review of the confidentiality claims.

This determination covers all proposals now in EPA's possession and those that EPA will acquire in the future. It applies only to disclosure of proposals following award of a contract.

Proposals are usually submitted in two parts: the technical proposal and the business proposal. The technical proposal sets out 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 proposal specifies the price for which the offeror is willing to do the work in a fixed price contract or the estimated cost and fixed fee for doing the work in a cost reimbursement contract. It includes information about the offeror's financial record, past performance on other contracts, cost information, fee information, and other general financial information about the offeror.

Many offerors have claimed that their proposals are entitled to confidential treatment in their entirety. For a proposal to be entitled to confidential treatment in its entirety, each part of the proposal must be entitled to confidential treatment standing on its own or in conjunction with other parts of the proposal. A proposal is not entitled to confidential treatment on the theory that it reflects a unique style or format of proposal preparation or presentation. Proposal information is only entitled to confidential treatment based on its substance.

EPA may withhold information from disclosure under the Freedom of Information Act if the information falls within one of the exemp-

tions of the Act. One of these exemptions is for "trade secrets and commercial or financial information obtained from a person and privileged or confidential" (5 U.S.C. 552(b)(4)). The information contained in contract proposals is clearly commercial or financial information. The proposals are written as commercial documents designed to sell the offeror's services to EPA. They contain detailed information about the financial structure, personnel, and management of the offeror. The real issue is whether proposal information is exempt from disclosure as "trade secrets" or is otherwise "confidential" within the meaning of 5 U.S.C. 552(b)(4).

Before EPA may conclude that proposal information is exempt from disclosure as a trade secret or confidential data, the Agency must find that the information is in fact maintained in confidence by the business and is not publicly available. If EPA finds that the information is not maintained in confidence by the business or that it is publicly available, the information is not entitled to confidential treatment and must be disclosed under the Freedom of Information Act. The following are examples of information of this type which must be disclosed:

1. Information concerning the identity and scope of work of other Government contracts or grants performed by the offeror. This information is available to the public through the Commerce Business Daily and from the specific Government agencies.
2. Information of a general nature about the offeror that the offeror routinely publishes or discloses to the public as part of its regular business activities.

3. Information reproduced from documents that are already public such as the request for proposals, other EPA documents, or published materials.

Information in a proposal that has been kept confidential and has not been made public in any way may be entitled to confidential treatment under 5 U.S.C. 552(b)(4) if it meets one of the tests set out in National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974). Under Morton commercial or financial information may only be withheld from disclosure if disclosure by EPA would be likely: (1) to impair the ability of the Government to obtain necessary information in the future or (2) to cause substantial harm to the competitive position of the person who submitted it to the Government.

I have determined that the following types of information that appear in proposals, if claimed as confidential, are entitled to confidential treatment under the Morton tests:

1. Information concerning the technical approach to be taken in performing the work.
2. Information concerning the offeror's understanding of the work required.
3. Information concerning the offeror's management of the work.
4. Information concerning the offeror's relevant experience and expertise, except for general discussions of the offeror's Government sponsored contracts or grants which is public information (see above).
5. Information concerning the offeror's facilities and equipment.
6. Information concerning the offeror's employees and matching of personnel to the work required.

7. Information concerning processes, devices, computer programs, reports, analyses, etc.
8. Information concerning the offeror's financial structure.
9. Information concerning the offeror's price, cost, or fee.
10. Information concerning the offeror's accounting methods or specific labor rates, salaries, overhead, and other items of cost.
11. The same types of information as that listed in items 1 through 10 in relation to any proposed subcontractor.

With respect to the first Morton, test, I have determined that release of the above types of information, if claimed as confidential, would be likely to impair EPA's ability to obtain necessary procurement information in the future. EPA uses contracts to perform an important part of its mission and has a responsibility to perform its work creatively, with a high degree of quality, and at the lowest cost to the taxpayer. When EPA makes a decision to enter into a contract, EPA seeks to obtain a contractor capable of doing the best job for the best price. EPA solicits proposals from as many potential offerors as possible. Proposals are voluntarily submitted; EPA cannot demand them. EPA depends upon getting detailed proposals so that its personnel may fairly and completely evaluate the relative value of each proposal. If prospective offerors were to submit less detailed or less candid proposals or were to choose not to submit proposals, EPA would have less information on which to base its contracting decisions and fewer offerors from which to choose. It would also tend to reduce innovation. This might impair EPA's ability to get the best work for the best price.

With respect to the second Morton test, if the offeror claims any of the above types of information as confidential, asserts that release of the information would cause substantial harm to its competitive position, and provides justification for this assertion, I have determined that release of the information would cause substantial harm to the offeror's competitive position. The kinds of competitive harm that would be likely to result are as follows:

1. Release of information concerning how the offeror 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 offeror. If the competitor could improve its skills, experience, and techniques, it would be in a position to compete more effectively with the offeror in future procurement actions. Also, a competitor could discover weaknesses in an offeror's work and take advantage of them in subsequent procurement. This would put the offeror at a competitive disadvantage in a future procurement action because the offeror would not necessarily have access to the same information about the competitor.

2. The information concerning the offeror's understanding of the work involved relates to the offeror's skill and experience. Release of this information would have the same result as release of data concerning skills and experience.

3. Release of information concerning the offeror's management techniques and personnel supplements the information in the technical approach by showing a competitor how the offeror would 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 offeror.

4. Release of information concerning the offeror's employees might allow a competitor to raid the offeror's personnel and hire away key employees. This could enhance the competitor's position and might hurt the offeror's position, especially where the quality of technical or management personnel is important in performing the work.

5. Information concerning the offeror's experience and non-Government contracts would show a competitor the markets in which the offeror competes. Disclosure might cause a competitor to move into those same markets and take business away from the offeror.

6. Release of information concerning the offeror's facilities and equipment might help a competitor to improve its own facilities and equipment. This could place the competitor in a better position to bid on subsequent contracts for similar work and take business from the offeror.

7. Release of information concerning processes, devices, computer programs, reports, analyses, etc. might give a competitor access to information developed by the offeror 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 procurement because the competitor would not have to factor in development costs in pricing its work while the offeror might still

be recovering its development costs. All of these factors would enable a competitor to compete more effectively with the offeror in future Government and private procurement actions. If the offeror lost future contract work, it would constitute substantial harm.

8. Disclosure of information concerning the offeror's financial structure, cost structure, specific costs, and internal accounting would give potential competitors detailed information about the offeror's finances. This information could be used by the competitor to anticipate the offeror's costs in future procurement actions and allow the competitor to underbid the offeror. Since price is an important factor in deciding who will be awarded a contract, the ability of a competitor to underbid the offeror could mean loss of future contracts. The loss of future contracts would constitute substantial competitive harm.

If EPA determines that release of information would be likely to impair EPA's ability to acquire necessary procurement information in the future or would be likely to result in substantial competitive harm to the affected business, the information is exempt from disclosure under the Freedom of Information Act by virtue of 5 U.S.C. 552(b)(4). EPA policy requires that information that is exempt under 5 U.S.C. (b)(4) must be maintained in confidence, subject to any modification that might arise under 40 CFR 2.205(h) or any other requirement in 40 CFR Part 2.



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5/3/78

Date