

Seal the deals

Contractors need to know how to keep data confidential



BY LARRY CAUDLE

A contractor's estimating techniques, means and methods, and pricing data are what give a company its edge and ability to win work. It also is highly confidential information that a contractor does not want publicly shared because it can result in the loss of a significant competitive advantage. As competition for contracts becomes

even tighter in an uncertain economy, disclosure of that information can lead to the loss of new work.

While you go to great lengths to keep this information confidential, what happens when a government agency comes into possession of such information? Can a competitor get access to your proprietary information? The answer is yes, the government can sometimes disclose your confidential information to a competitor, but there are things you can do to prevent it.

Seek an exemption

Most local governments, states and political subdivisions (such as transit authorities and sewer commissions) follow the lead of the federal government in allowing the public to review government records pursuant to a Freedom of Information Act (FOIA) request. Once a request is made, the FOIA mandates the disclosure of records in the government's possession unless the records are exempt from disclosure by one of nine exemptions.

One of those exemptions, known at the federal level as "Exemption 4," protects from public disclosure information that is submitted to the government containing confidential commercial information such as trade secrets or financial data. Once the government is aware that confidential information is the subject of a FOIA request, it has an obligation to notify the person or entity that provided the document of the request. Notification gives the creator time to object to its release.

Unless you identify confidential information in advance, it becomes the decision of a government bureaucrat to

determine whether the information you so highly prize is actually confidential. Keep in mind, the government is usually not liable for the release of confidential information in response to a FOIA request if the documents were not previously identified as confidential.

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Therefore, to safeguard your livelihood, you must take action. First, you should mark any documents you believe contain sensitive, confidential or proprietary information with a "CONFIDENTIAL" stamp. You should similarly

identify, in a letter or otherwise, that the information being submitted is considered confidential.

Second, if a government agency or authority notifies you of its intent to disclose your confidential information, failure to object in a timely manner may waive your right to contest its release. If they still indicate they will release the documents over your objections, you should bring a lawsuit to prevent disclosure and seek to enjoin the government from releasing the documents.

They can always ask

The lesson to be learned is that any time you make a submission to a government entity (shop drawings, change order pricing, request for equitable adjustment) you need to be cognizant of the fact that someone else has the right to ask to see those documents in the future.

If you believe your competitors would benefit from reviewing any of that information, you need to consider taking steps to protect that valuable information and notify the government that you believe those documents should not be disclosed.

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