



## CONSTRUCTION LAW ALERT

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### Protecting Confidential Information and Trade Secrets When Bidding on Government Contracts

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With a slowing economy, many participants in the construction industry are turning to projects in the public sector, such as infrastructure and housing. Doing business with the government, however, raises a number of issues.

One significant issue concerns the protection of rights in confidential business information and trade secrets, such as technical descriptions, data and drawings, information about business operations, finances, customer and supplier lists, and intellectual property. Protecting this information in the government procurement area is subject to a myriad of procedural requirements. Failure to comply with these requirements can result in public access to this information and loss of confidentiality.

If a contractor fails to follow the terms or requirements of the procuring governmental entity, the government may be required to disclose the information to the public in response to a public records request, the government could use the trade secrets with other vendors, or an unsuccessful bidder on a government

contract, perhaps a competing business, could obtain this valuable information.

#### Conflict Between the Public Records Law and Trade Secret Protection

The tension between public access to government documents and need to protect confidential information and trade secrets often arises in the area of government procurement. Vendors are frequently required to provide proprietary and confidential business information when responding to government requests for proposals. Under the Florida Public Records Law, any records made or received by any public agency in the course of its official business are available for inspection, unless specifically exempted by the Legislature. Thus, confidential and trade secret information of vendors is subject to disclosure under the Public Records Law.

How does a vendor wishing to take advantage of government procurement opportunities protect against unnecessary disclosure of its confidential business information and trade secrets?

#### Statutory Trade Secret Protection

A Florida law restricts public access to trade secret information. Under this law, a "trade secret" is defined as the whole or any portion or phase of any formula, pattern, device, combination of devices, or compilation of information which is for use, or is used, in the operation of a business and which provides the business an advantage, or an opportunity to obtain an advantage, over those who do not know or use it. A "trade secret" includes any scientific, technical, or commercial information, including any design, process, procedure, list of suppliers, list of customers, business code, or improvement.

In enacting this law, the Florida Legislature found that it is a public necessity that a trade secret held by an agency be made exempt from public meetings requirements and confidential and exempt from public records requirements. The Legislature stated that without an exemption, the trade secret becomes a public record when received by the agency and must be divulged upon request. Divulgence of a trade

secret under public records or public meetings laws destroys the value of that property to the proprietor could give business competitors an unfair advantage, and weaken the position of the proprietor of the trade secret in the marketplace. In addition, without protecting information concerning a trade secret during meetings at which the information is discussed, competitors and other persons may attend those meetings and discover the trade secret.

To invoke the protection of this law when responding to a request for proposal, invitation to bid, or invitation to negotiate, it is essential to carefully read and comply with the terms and conditions or instructions, particularly those which address confidential or trade secret information. It is common for requests for proposals or invitations to require a proposer submitting trade secret information, to segregate that information and clearly label each pertinent page "trade secret." Failure to follow the specific instructions can result in public access to this information.

In one Florida case, a bidder had a conversation with a state employee and advised that the proposal included confidential

information. The court held that this did not constitute reasonable efforts to maintain the information's secrecy and was not enough to prevent the confidential information from being made available to persons who made public records requests. The court stated that the trade secret owner needed to label the trade secret as such, or otherwise specify in writing upon delivery to the state agency that the information was confidential, exempt under the public records law, and not to be disclosed.

In another Florida case, the court held that a company failed to protect its alleged trade secrets and its documents were not protected from disclosure under the Public Records Act. The company supplied documents to a governmental agency, failed to mark them "confidential", and then continued to supply them without even asserting a post-delivery claim of confidentiality until some thirty days later.

It should also be noted that labeling information "confidential" or "trade secret" does not mean that the information is automatically protected. The information must fall within the definition of

scope of "confidential" or "trade secret" information.

## Public Records Exemption for Sealed Bids and Proposals

In addition to the trade secret statute discussed above, there is an exemption to the Florida's Public Records Law for sealed bids and proposals. Sealed bids and proposals submitted to agencies are exempt from disclosure as public records, until the agency provides a notice of a decision or intended decision or within 10 days after bid or proposal opening, whichever is earlier. This exemption, however, only provides temporary protection of information in sealed bids, not long-term protection from public disclosure.

## Conclusion

Contracting with the government can provide valuable opportunities for your business. If you bid on a government contract and are submitting confidential business information or trade secrets it is important that you understand how to protect this information. If trade secret information must be included in submitting a bid to a governmental agency, great care must be given in identifying and properly designating the portions of the submitted materials which constitute the trade secrets. ■

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