CLASS DETERMINATION 2-79

CONFIDENTIALITY OF BUSINESS INFORMATION SUBMITTED IN CONTRACT PROPOSALS AND RELATED DOCUMENTS

On May 3, 1978, I issued Class Determination 2-78 concerning the confidentiality of business information in proposals submitted to the Environmental Protection Agency (EPA) by persons competing for EPA contracts. Since that time, I have made nearly 100 confidentiality determinations applying that Class Determination.

EPA has been receiving ever-increasing numbers of requests under the Freedom of Information Act (FOIA) for copies of contract proposals, proposal modifications, best and final offers, and related documents submitted by offerors seeking to obtain contracts from EPA. Well over 90% of these FOIA requests come from competing offerors who are seeking information concerning their competitors. In almost all cases the business that originally submitted the proposal or related document claims that all or part of the submission consists of trade secrets or confidential commercial or financial information that should be kept confidential.

I have found that:

1. EPA possesses many proposals and related documents from offerors seeking to perform EPA contracts and will continue to acquire such documents in the future.

2. Although the subject matter may vary, the information contained in the proposals and related documents is of the same character. Therefore, it is proper to treat all of the proposals and related documents in the same class for the purpose of this determination.

3. A class determination would serve a useful purpose in that it would simplify the responses of EPA to FOIA requests for proposals and related documents and reduce the burden of making individual determinations.

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. In addition, in the course of a procurement action the offeror may submit a revised proposal, answers to specific written questions, a best and final offer, and negotiating documents. All of these documents contain information similar to that in the proposal.

This Class Determination applies to the information in proposals, revised proposals, best and final offers, negotiating documents, and documents of a similar character submitted by an offeror prior to award of a contract. This Class Determination also applies to information submitted by offerors which is incorporated into documents written by EPA personnel.

EPA may withhold information from disclosure under the FOIA if the information falls within one of the exemptions 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 and the related documents set forth above is clearly commercial or financial information. The documents 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 the information is exempt from disclosure as "trade secrets" or is otherwise "confidential" within the meaning of 5 U.S.C. 552(b)(4).

The threshold decision which EPA must make before it may conclude that the information is exempt from disclosure as a trade secret or confidential data is that the information is in fact maintained in confidence by the business and, therefore, is not publicly available from a source other than the document in question. If EPA finds that the information is publicly available elsewhere, the information is not entitled to confidential treatment and must be disclosed under FOIA. 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.

Once EPA has determined that information in a proposal has been kept confidential and has not been made public elsewhere, the information 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 these proposal documents, if claimed as confidential and maintained in confidence, 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 listed in items 1 through 10 with respect 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 lowest 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 the Agency 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. Less detailed proposals or fewer proposals would also tend to reduce innovation. This might impair EPA's ability to get the best work for the lowest price.

Since promulgation of its confidentiality regulations in September 1976, EPA has written to several hundred offerors concerning the confidentiality of their proposals and related documents. These offerors represent a broad cross-section of the offerors submitting proposals to EPA. Over 90 percent of these offerors have indicated that if EPA disclosed information in their proposals which they have claimed as confidential, they would be very reluctant to submit detailed technical and financial information to EPA in the future or they would seriously reconsider submitting proposals to EPA at all. There is clear evidence that disclosure of proposals and related documents over the objections of the offerors would result in those offerors submitting less detailed and less informative proposals or ceasing to submit proposals.

The same finding was made by the United States District Court for the District of Massachusetts in a recent decision concerning a request under FOIA for a copy of a proposal submitted to EPA. In Orion Research Incorporated v. Environmental Protection Agency, Civil Action No. 75-5071-F, June 15, 1979, the Court found that the proposal was exempt from disclosure under 5 U.S.C. 552(b)(4) because "[i]f EPA were ordered to disclose this plan or others like it, its 'ability to obtain necessary information in the future' would be impaired."

Furthermore, the Office of Federal Procurement Policy has stated in its Policy Letter 78-3 that:

> commercial and financial information submitted in connection with a procurement frequently is submitted more or less voluntarily and public disclosure against the wishes of the submitter may result in less complete information in future procurements.

On the basis of EPA's experience, the Orion case, and Policy Letter 78-3, I have determined that when the offeror has claimed such information confidential and the information is not already available to the public from sources other than the document in question, disclosure would be likely to impair EPA's ability to obtain necessary procurement information in the future. Accordingly,

I have determined that such information is exempt from mandatory disclosure under 5 U.S.C. 552(b)(4) because the information meets the first test of Morton.

With respect to the second Morton test, I have also determined that release of the information listed above in items 1 through 11, if claimed as confidential, would be likely to 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 procurements. 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 structure and techniques supplements the information in the technical approach by showing a competitor how the offeror 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 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 market 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 it 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 include the development costs for such items in determining the price for 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, the loss 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.

As indicated above, since promulgation of its confidentiality regulations in September 1976, EPA has written to several hundred offerors concerning the confidentiality of their proposals and related documents. These offerors represent a broad cross-section of the offerors submitting proposals to EPA. Almost all of these offerors have indicated that disclosure of information from their proposals and related documents which they have claimed as confidential would cause substantial harm to their competitive positions. I have found in almost all cases that the disclosure of this information, with the exception of clearly public infor-

mation, would be likely to cause substantial harm to the competitive position of the offeror.

The Office of Federal Procurement Policy has also stated in its Policy Letter 78-3 that:

> the context in which such commercial and financial information is submitted--that of the highly competitive area of Government procurement and free market enterprise--makes it more likely that release of the information would in many instances cause substantial competitive harm.

On the basis of the above discussion, I have determined that when the offeror has claimed proposal information confidential and the information is not already available to the public from sources other than the document in question, disclosure would be likely to cause substantial harm to the offeror's competitive position. Accordingly, I have determined that such information is exempt from mandatory disclosure under 5 U.S.C. 552(b)(4) because the information meets the second test of Morton.

EPA policy requires that information which is exempt from mandatory disclosure under 5 U.S.C. 552(b)(4) must be maintained in confidence by the Agency subject to any modification that might arise under 40 CFR 2.205(h) or any other requirement in 40 CFR Part 2. Accordingly, such information will not be disclosed.

To implement this Class Determination, the appropriate procurement office in EPA must, upon receipt of a request for proposals or related documents, review the requested documents. If the office determines that the documents have been claimed confidential and that the information in the documents is not publicly available from sources other than the documents in question, the office must deny the request in whole or in part, as appropriate, in reliance upon this Class Determination.

David O. Bickart

11/15/79

David O. Bickart — Date