Department of Energy

Bonneville Power Administration
P.O. Box 3621
Portland, Oregon 97208-3621

FREEDOM OF INFORMATION ACT PROGRAM

December 5, 2016

In reply refer to: FOIA #BPA-2016-00539-F

Joshua M. Deitz
Rogers Joseph O'Donnell
Robert Dollar Building
311 California Street, 10th Floor
San Francisco CA 94104

Dear Mr. Deitz:

This is the Bonneville Power Administration's (BPA) determination in response to your May 24, 2016 letter. Inter-Con Security Systems, Inc. (Inter-Con) objected to the release of some of its information in response to this Freedom of Information Act (FOIA) request.

The Request

Allied Barton Security Services submitted a request for "...the current contract for security guard services, including all changes/addendum, wages/bill rates, bid tabulations/evaluation documentation, and copies of proposals submitted during the previous solicitation." [Exhibit 1]

Background and Inter-Con's Objections

BPA's Services Acquisition Team identified and gathered 744 pages of responsive records. In accord with the FOIA and Executive Order 12,600 and Department of Energy (DOE) regulations at 10 C.F.R. 1004.11, BPA sent these agency records to Inter-Con on April 25, 2016, requesting that Inter-Con detail any objections to release under 5 U.S.C. § 552(b)(4) (Exemption 4), which protects business trade secrets or other confidential commercial or financial information. Inter-Con responded on May 24, 2016. [Exhibits 2 and 3]

Inter-Con objected to the release under Exemption 4 of:

> "1. Total contract, renewal, and hourly prices for the base contract and extensions because they provide an indication of how Inter-Con would increase its pricing over the course of the years contemplated by exercise of the option; and

2. Line item ceiling prices for labor categories, including for different levels and types of security personnel, standard services, additional services, and other direct costs because they directly indicate how Inter-Con Prices its services and equipment."

Inter-Con also requested Exemption 6 redactions of employee contact information and signatures. [Exhibit 3, pg. 3][1]

BPA's Analysis and Findings

The FOIA favors the disclosure of agency information.[2] As such, the burden is on Inter-Con to show that the requested redactions are exempt from disclosure.

1. **Exemption 3**
   As an initial matter, the request included: 1) all contractor proposals submitted to BPA during the contract solicitation process: and 2) BPA evaluation and source selection information.

   BPA did not ask Inter-Con for comment on these records, as they are protected by two Exemption 3 statutes, respectively: 41 U.S.C. § 253b(m)(1) (currently at 41 U.S.C. § 4702) and 41 U.S.C. § 2102 (amending 41 U.S.C. § 423(a)(1)) (Procurement Integrity Act). These withheld records are exclusive of the 744 pages of records between BPA and Inter-Con gathered by the Services Acquisition Team.

2. **Exemption 6**
   BPA agrees with Inter-Con's proposed redactions of contact information and signatures pursuant to 5 U.S.C. § 552(b)(6) (Exemption 6).

   Exemption 6 of the FOIA protects information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." The application of Exemption 6 requires balancing the public's interest in acquiring the information against the individual's privacy interests. NARA v. Favish, 541 U.S. 157 (2004). If a significant privacy interest is found to exist, but there is no FOIA public interest in disclosure, the information should be protected. Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989). BPA can find no public interest in the information. Accordingly, BPA has redacted the Inter-Con requests on PDF pages 1, 4, 10, 16, and 22.

   [I redacted this as it is more appropriate as an explanation to the requester, not the submitter]

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[1] Inter-Con attached a 24 page PDF to its letter, showing its requested redactions. This was very helpful. BPA will refer to the appropriate pages of the PDF in its discussion.

[2] The FOIA, 5 U.S.C. § 552, as Amended By Public Law No. 110-175, 121 Stat. 2524, and Public Law No. 111-83, § 564, 123 Stat. 2142, 2184, and the FOIA Improvement Act of 2016.

3. Exemption 4

Information may be exempt from disclosure under Exemption 4 if it is "commercial" in nature, is "obtained [by BPA] from a person [Inter-Con]," and is "privileged or confidential." Here, there is no question that the requested redactions are commercial information, and that BPA obtained them from Inter-Con.

Consequently, BPA must determine whether that information is "confidential." To do so, the initial question is whether Inter-Con submitted the information to BPA voluntarily or involuntarily.[3] If voluntarily submitted, it is withheld under Exemption 4 without further analysis if Inter-Con would not customarily make the information available to the public. If the information was submitted involuntarily, on the other hand, it is confidential only if its release would likely cause Inter-Con substantial competitive harm.[4] Showing actual competitive harm is not necessary, but Inter-Con must demonstrate that there is a "likelihood" of substantial competitive injury.

In its response, Inter-Con did not argue that it had provided the information voluntarily to BPA, but made arguments how disclosure would likely cause it substantial competitive harm. (Exhibit 3, page 4) By definition this means it provided the information involuntarily to BPA. In addition, BPA required this information as a prerequisite for participating in the contract solicitation process.

Therefore, BPA finds that the requested redactions consist of commercial information submitted involuntarily to BPA. BPA must now determine if Inter-Con has met its burden of showing a likelihood of substantial competitive harm if the proposed redactions are released.

a. Total Contract, Renewal, and Hourly Prices

BPA finds that Inter-Con's proposed redactions for the numbers in the "Unit Price" and the "Extended Price" columns of the Master Contract, and of the contract modifications, are warranted. (Inter-Con had no objections to the release of the columns for Unit and Quantity.) The competition for security services, as evidenced by this contract solicitation, is fierce. To release the dollar amounts in the two redacted columns—especially as they are paired with detailed line items--would allow a competitor to determine the pricing strategy and mark-up for each of those items. This concern is also true for the option year column pricing by Inter-Con, allowing competitors to have an inside view on Inter-Con's escalation of the line

[3] Critical Mass Energy Project v NRC, 975 F2d 871, 879 (DC Cir 1992).

[4] See National Parks & Conservation Ass'n v. Morton, 498 F2d 765, 770 (DC Cir 1974). If Inter-Con involuntarily provided the commercial information to BPA, the analysis here is under the "competitive harm prong" of National Parks. The "impairment prong" of National Parks is not applicable because there is no factual basis for BPA to claim that the release of any involuntarily submitted information will impair BPA's ability to receive similar contract pricing information in the future.

item pricing, thereby making those prices easy to undercut. Therefore, these columns will be redacted by BPA.[5]

The same reasoning does not apply, however, to the requests to redact the master contract (and the contract modifications) total prices. Unlike the redactions discussed above for unit and line item prices, the master contract price—by definition an addition of all of the individual prices—does not show any pricing strategy, mark-up, or overhead by Inter-Con.[6] Those total prices will be released.

The final, and most difficult question, is the redaction request for option years total contract amounts. Since the unit and extended price columns for option years will be redacted, the total option year contract price is not as commercially sensitive. Nonetheless, BPA realizes that to release the option year overall contract price has a high likelihood of putting Inter-Con at a competitive disadvantage if BPA were to open the option years to competitive bidding. While the question is a close one, BPA finds that those option year contract totals will be redacted.[7]

Determination

For the forgoing reasons, it is BPA's determination that Inter-Con has met its burden for most, but not all, of its requested redactions. A copy of the redactions on the 24-page PDF, as applied by BPA, is enclosed for reference.

Pursuant to Executive Order 12,600 and 10 C.F.R. 1004, in ten calendar days from the date of Inter-Con's receipt of this letter, BPA will release the responsive records, redacted as shown.

Sincerely,

C. M. Frost
Freedom of Information/Privacy Act Officer

Enclosures

[5] See PDF pages 2,3,6,7,8,9,12,13,14,15,18,19,`20,21,23, and 24.
[6] See PDF pages 5,7,11, and 13.
[7] See PDF pages 9,15,17, and 21.