

Construction Law Update

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Your Proposal May Be Accessible to Your Competitors: Safeguard Trade Secrets in Government Procurement

Businesses submitting bids, responses to requests for qualifications, and proposals to state and local agencies must remember that generally their submissions are subject to disclosure under the Public Records Act (PRA). The PRA has limited exceptions. Many contractors and professionals have learned this lesson the hard way and only *after* their submissions are produced in response to a public records request — usually from a competitor.

The most recent example involves a law firm that responded to a request for qualifications from the Washington State Attorney General's Office. The firm's predecessor firm previously made a proposal in 2004. The prior proposal was disclosed by the Attorney General's Office in response to a PRA request in 2005. Subsequently, a 2009 proposal that the firm made to a Florida agency was published in a national legal trade publication that was available on the Internet.

In 2010, the firm responded to another request for qualifications from the Washington Attorney General. The attorney general was building a roster of qualified law firms to represent the state investment board in securities litigation and to provide related services for portfolio monitoring. An Atlanta lawyer practicing in the same field made a PRA request to the Attorney General's Office for similar requests for proposals. The law firm brought suit in October 2011 to stop the disclosure of what it claimed were its confidential and trade secret information contained in the proposals. *Robbins, Geller, Rudman & Dowd, LLP v. State* No. 44520-4-II, 2014 WL 839895, -- P.3d --- (Wash. Ct. App. Mar. 4, 2012). The trial court granted a preliminary injunction.

The Washington State Court of Appeals overturned the trial court's decision. While a trade secret can be exempt from disclosure under the PRA, the firm had failed to establish that the information in its proposal met the definition of a trade secret. The firm did not prove that it had taken steps to keep the information secret. This was particularly true for the firm's references and client list — some of which was available on websites. The Court of Appeals ruled that there was insufficient evidence of attempts to keep that information secret.

Importantly, the court held that a private party like the law firm could invoke the conditional financial, commercial and proprietary information exemption under the PRA — RCW 42.56.270(1).¹ But the court ruled that the firm failed to establish the requirement that the disclosure would result in "public loss," rendering the exemption unavailable to them. The court rejected the argument that fewer law firms would seek the opportunity to represent the state agencies if its rates, malpractice insurance and other conditions for service were disclosed to the public, and it was contradicted by the fact that some two-dozen firms submitted proposals for the work.

¹ *Resident Action Council v. Seattle Housing Auth.*, 177 Wn.2d 417, 435, 300 P.3d 376 (2013) (discussing conditional exemptions and identifying RCW 42.56.270(1) as a conditional exemption).

A public agency may separately invoke exemptions preventing or delaying the disclosure of records used in evaluating the award or negotiation of public contract, such as its review of a bid.² But those kinds of records were not the focus in the *Robbins Geller* suit.

The moral of the story is that unless meaningful measures are taken from the start to keep information that meets the statutory definition of a trade secret out of the hands of others, the information will not qualify for trade secret protection. Meaningful measures include adopting policies and implementing those policies. These measures may include nondisclosure agreements, marking documents, social media standards, exit interviews, monitoring efforts, etc.

So ask this question before including anything in your response to a request for proposal (RFP). Would you want your competitors to read any part of it?

Lane Powell's Construction, and Intellectual Property and Technology teams represent clients in responding to and preparing RFP's, and in disputes involving trade secrets and the Public Records Act.

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² See, e.g., *Morrison-Knudsen Co. v. Dep't. of the Army*, 595 F. Supp. 352 (D. D.C. 1984) (granting government summary judgment dismissal of Freedom of Information Act suit and permitting the temporary withholding of documents whose release would place an agency in a competitive disadvantage or would endanger the procurement process), *aff'd*, 762 F.2d 138 (D.C. Cir. 1985) (unpublished decision table); *Servias v. Port of Bellingham*, 127 Wn.2d 820, 830, 904 P.2d 1124 (1995) (concluding cash flow analysis prepared for port's use in negotiations with prospective joint venture partners fell within research exemption, because it would result in private gain and public loss and would unduly burden the port).