

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR



Mayor's Office of Legal Counsel

October 12, 2017

VIA ELECTRONIC MAIL

Maryll Kersting

RE: FOIA Appeal 2017-167

Dear Ms. Kersting:

This letter responds to the administrative appeal you submitted to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-537 ("DC FOIA"). In your appeal, you challenge the response you received from the Department of General Services ("DGS") to a request you submitted under the DC FOIA.

Background

On August 17, 2017, you submitted a request to DGS, on behalf of your client, for records relating to "RFP DCAM-17-NC-0007." On September 8, 2017, DGS granted your request in part, providing you with an award memorandum and other documents. Portions of the documents were redacted pursuant to D.C. Official Code § 2-534(a)(1) ("Exemption 1") and D.C. Official Code § 2-534(a)(4) ("Exemption 4").

You appealed DGS's response by letter dated September 22, 2017. Your appeal requests that DGS be ordered to release an unredacted copy of the award memorandum. The award memorandum is an internal DGS document that was prepared by a contract specialist and sent to the chief contracting officer stating a choice for which bidder shall be awarded a contract. Primarily, you challenge the redactions made in the released award memorandum. Your appeal argues that unlike the pricing, which you concede was properly redacted, the scoring in the award memorandum is not commercial information as contemplated by Exemption 1¹ and that the award memorandum is not "pre-decisional" such that it is not properly covered by Exemption 4.

This Office notified DGS of your appeal, and DGS responded² by reaffirming its position that redactions were properly invoked pursuant to Exemptions 1 and 4. DGS also indicated that the documents are now subject to a protective order issued on October 10, 2017 by the Contract Appeals Board ("CAB").

¹ Because we find adequate grounds for withholding under Exemption 4, this decision will not address the applicability of Exemption 1.

² DGS's response is attached.

Discussion

It is the public policy of the District of Columbia that “all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.” D.C. Official Code § 2-531. In aid of that policy, DC FOIA creates the right “to inspect . . . and . . . copy any public record of a public body . . .” D.C. Official Code § 2-532(a). The right created under the DC FOIA to inspect public records is subject to various exemptions that may form the basis for denial of a request. *See* D.C. Official Code § 2-534. Under the DC FOIA, an agency is required to disclose materials only if they were “retained by a public body.” D.C. Official Code § 2-502(18).

The DC FOIA was modeled on the corresponding federal Freedom of Information Act, *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987). Accordingly, decisions construing the federal statute are instructive and may be examined to construe the local law. *Washington Post Co. v. Minority Bus. Opportunity Comm’n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

Exemption 4

Exemption 4 vests public bodies with discretion to withhold “inter-agency or intra-agency memorandums and letters which would not be available by law to a party other than an agency in litigation with the agency[.]” This exemption has been construed to “exempt those documents, and only those documents, normally privileged in the civil discovery context.” *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). Privileges in the civil discovery context include the deliberative process privilege. *McKinley v. Bd. of Governors of the Fed. Reserve Sys.*, 647 F.3d 331, 339 (D.C. Cir. 2011).

Here, DGS has invoked Exemption 4 and has asserted arguments related to the deliberative process with respect to redacted portions of the award memorandum. Similarly, your appeal makes arguments concerning the deliberative process – that the award memorandum amounts to a final decision, therefore portions of it cannot be withheld as “predecisional” under the deliberative process standard. It is not clear that your proffered deliberative process argument about the “pre-decisional” nature of the award memorandum is a correct statement of law within the context of a government contract subject to a bid protest. *See Shermco Indus., Inc. v. Sec’y of Air Force*, 613 F.2d 1314, 1317 (5th Cir. 1980) (“We feel that the District Court misunderstood the bid protest procedure when it characterized the award as a final decision. The October 14th notice to Shermco was of a proposed award to Tayko; it was not a final decision. The District Court’s statement that there was no need for secrecy because the award would be made either to Tayko or to Shermco is contrary to GAO protest procedure. It is amply clear from the record and from oral argument that there is a possibility that if the protest were to succeed either before the GAO, the SBA or some other forum, the bidding could be reopened.”). The contract that is the subject of your FOIA request is currently under a bid protest, which, if successful, could result in a different contract award, which suggests that the award memorandum is still predecisional.

However, this Office need not reach the merits of whether the deliberative process privilege protects the redacted portions of the award memorandum. Instead, this Office finds that the

challenged portions of the redactions³ are more closely protected by a different Exemption 4 privilege, contemplated by the drafters of the original federal Freedom of Information Act (“federal FOIA”) and articulated by the Supreme Court in *Fed. Open Mkt. Comm. of Fed. Res. Sys. v. Merrill*:

Congress amended the provision that ultimately became Exemption 5⁴ to provide for nondisclosure of materials that “would not be available by law to a party . . . in litigation with the agency.” The House Report, echoing the Report on the original Senate bill, S. Rep. No. 1219, 88th Cong., 2d Sess., 6-7, 13-14 (1964), explained that one purpose of the revised Exemption 5 was to protect internal agency deliberations and thereby ensure “full and frank exchange of opinions” within an agency. H. R. Rep. No. 1497, *supra* n. 15, at 10. It then added, significantly:

“Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated *before it completes the process of awarding a contract* or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy” (emphasis added). *Ibid.*

In light of the complaints registered by the agencies about premature disclosure of information relating to Government contracts, we think it is reasonable to infer that the House Report, in referring to “information . . . generated [in] the process of awarding a contract,” specifically contemplated a limited privilege for confidential commercial information pertaining to such contracts.

. . . . The theory behind a privilege for confidential commercial information generated in the process of awarding a contract, however, is not that the flow of advice may be hampered, but that the Government will be placed at a competitive disadvantage or that the consummation of the contract may be endangered. Consequently, the rationale for protecting such information expires as soon as the contract is awarded or the offer withdrawn.

443 U.S. 340, 357-60 (1979). *See also NRDC, Inc. v. United States Dep't of Interior*, 36 F. Supp. 3d 384, 413 (S.D.N.Y. 2014) (“The Court therefore holds that the confidential commercial information privilege under Exemption 5 does not, as a matter of law, automatically and always terminate once a contract is awarded. Instead, the Court holds that, in rare cases, the Government's legitimate commercial interests may require the protection of information even after a contract has been awarded.”)

³ Your appeal “concedes that the offeror’s pricing information may be subject to Exemption 1.” What remains at issue in this appeal are the redactions of the award memorandum that are not of pricing.

⁴ Exemption 5 of the federal FOIA is the equivalent of Exemption 4 of the DC FOIA.

Having reviewed the redacted material *in camera*, we conclude that the challenged redacted portions of the award memorandum are commercial in nature and were “generated in the process of awarding a contract.” The redacted information pertains to DGS’s evaluation of bids submitted by your client and your client’s competitors.

The release of the withheld information at this time could interfere with the integrity of the still ongoing contracting process and could place the government “at a competitive disadvantage.” As a result, the type of information that was withheld by DGS appears to fall squarely within the Exemption 4 privilege, protecting from disclosure confidential commercial information generated in a government contracting process, which the Supreme Court articulated in *Fed. Open Mkt. Comm. of Fed. Res. Sys. v. Merrill*, 443 U.S. 340, 357-60 (1979).

Furthermore, the award memorandum is currently subject to a protective order issued by the CAB.⁵ This further bolsters DGS’s position that the withheld documents are exempt under Exemption 4, as the documents appear to be of the type that are “normally privileged in the civil discovery context.” See *Agility Pub. Warehousing Co. K.S.C. v. NSA*, 113 F. Supp. 3d 313, 335 (D.D.C. 2015)(“the proper test for determining whether an agency improperly withholds records [subject to a court order] is whether the [order], like an injunction, prohibits the agency from disclosing the records.”). We therefore find that the redactions DGS made to the award memorandum at issue were proper under Exemption 4.

Conclusion

Based on the foregoing, we affirm DGS’s decision, and your appeal is hereby dismissed. This constitutes the final decision of this Office.

If you are dissatisfied with this decision, you may commence a civil action against the District of Columbia government in the Superior Court of the District of Columbia in accordance with DC FOIA.

Respectfully,

Mayor’s Office of Legal Counsel

cc: Victoria Black Johnson, FOIA Officer, DGS (via email)

⁵ See attached order.