

FOIA Appeal: Contractor's Technical Proposal

Legal Opinion: GMP-0065

Index: 7.340, 7.522

Subject: FOIA Appeal: Contractor's Technical Proposal

March 26, 1992

Ms. Jeanne Marie Klein  
Digital Technologies, Inc.  
11417 Sunset Hills Road  
Suite 106  
Reston, Virginia 22090

Dear Ms. Klein:

This is in response to your Freedom of Information Act (FOIA) appeal dated July 8, 1991. You appeal the partial denial dated June 21, 1991 by Gail L. Lively, former Director, Executive Secretariat, withholding confidential commercial and financial information under Exemption 4. You request review of the Department's determination to withhold the Transition Plan developed by Martin Marietta for revising the Department's personnel/payroll computer system to the new HIIPS computer system. This information was submitted as part of Martin Marietta's technical proposal in response to HUD contract HC-14703.

I have determined to affirm the initial decision withholding this information under Exemption 4.

Exemption 4 of FOIA, 5 U.S.C. 552(b)(4), exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential. Information may be withheld under Exemption 4 if disclosure of the information is likely to have either of the following effects: "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained." National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

Release of information contained in Martin Marietta's technical proposal would permit competitors to gain "valuable insight into the operational strengths and weaknesses of the supplier of the information." National Parks and Conservation Association v. Kleppe, 547 F.2d 673, 684 (D.C. Cir. 1976). Courts have recognized the competitive harm to a submitter by release of the above described information. See, e.g., BDM Corp. v. SBA, 2 GDS 81,189 (D.D.C. 1981) (protecting technical and commercial data and information on performance, cost, and equipment); Joint Board of Control v. Bureau of Indian Affairs,

Civil No. 87-217, slip op. at 8 (D. Mont. Sept. 9, 1988);  
Landfair v. Department of the Army, 645 F. Supp. 325, 329 (D.D.C.  
1986) (protecting technical proposals which are submitted, or  
could be used, in conjunction with offers on government

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contracts). Martin Marietta's technical proposal could be  
replicated by the company and submitted in response to other  
future proposals. Therefore, I have determined that the  
Transition Plan is confidential commercial and financial  
information, withholdable under FOIA's Exemption 4.

I have also determined, pursuant to HUD's regulations at  
24 C.F.R. 15.21, that the public interest in protecting  
confidential commercial and financial information militates  
against release of the withheld information.

You are advised that you have the right to judicial review  
of this determination under 5 U.S.C. 552(a)(4).

Very sincerely yours,

C.H. Albright, Jr.  
Principal Deputy General Counsel

cc: Yvette Magruder