

USE FOIA TO YOUR ADVANTAGE

THE FREEDOM OF INFORMATION ACT

INTRODUCTION

The Freedom of Information Act (“FOIA”) is an effective tool for government contractors in researching government programs and activities, as well as learning about competitors. FOIA requests can also be useful in gaining more information and insight pertaining to claims and disputes.

FREEDOM OF INFORMATION ACT

Under FOIA (5 U.S.C. § 552), requests for records held by the federal government may be made by “any person,” which includes foreign citizens, corporations and governments.

A FOIA request must “reasonably describe” the records sought – the more detailed the description, the better. See 5 U.S.C. § 552(a)(3). Sometimes a date range also provides a good method for narrowing a search for documents. The request should mention that a reply is expected within the statutory time frame, which is 20 days.

The initial reply from the agency will most likely not be the requested documents, but a “determination” of whether it will comply with the FOIA request. An agency decision to not comply with a FOIA request, or to only partly comply, can be appealed through an administrative process under 5 U.S.C. § 552(a)(6)(A)(i). Finally, the request should state that the requester will pay reasonable reproduction and search costs. It is recommended that you state a dollar limit you are willing to pay, and request that the agency contact you if the estimated fees to perform the records search and copying will exceed the stated amount. Requesters must be aware that they may be charged for search time even if no documents are found or released, and an agency may request payment in advance where the estimated cost exceeds \$250.

Responses to FOIA requests take time. While not the norm, some requests have been reported to take years to complete. You should not wait until a few weeks before a proposal is due or discovery is due to file a FOIA request to obtain documents you believe would be helpful to your proposal preparation or litigation/arbitration. Instead, consider FOIA to be an ongoing part of your long-term marketing, information-gathering, and dispute resolution processes.

FOIA contains nine exceptions. If data falls under the exceptions, it will not be released. See 5 U.S.C. § 552(b)(1)-(9). For example:

- Exemption 1 - National security information
- Exemption 2 - Internal agency rules and procedures
- Exemption 4 - “Trade secrets and commercial or financial information obtained from a person and privileged or confidential”
- Exemption 6 - Personal privacy information, such as medical files

- Exemption 7 - Law enforcement records, etc. Exemption 4 is the focal point concerning a contractor's proposal or similar records containing business confidential information.

If the Government agency denies all or part of a FOIA request that falls under one of these exceptions, it is required to provide its reason, along with the exception, for denying the request. Again, such denials are appealable.

USES OF FOIA

FOIA is an important research method that can be utilized for many purposes during the **entire contracting process**. For example, if a company is considering competing for a particular procurement in the future, it can request copies of the current contract and modifications to it, correspondence between the agency and the incumbent contractor, and the incumbent contractor's proposal. The documents the agency releases may be heavily redacted, but can still provide valuable information on the program and the current contractor. In addition, some agencies are more lenient (or less careful) than others when it comes to redacting documents released under FOIA.

Another use of FOIA requests is to gather information relating to claims or disputes, or to assess a claim's strength or weakness. For example, sometimes a contractor may find it difficult to prove that the Government changed a provision of the contract, or that it was wrongfully terminated. Through FOIA, the contractor can request documents that may help support its allegations.

Another example of FOIA's usefulness is in assessing a claim's strengths and weaknesses. This may be applied to a claim by the contractor, or in assessing a Contracting Officer's Final Decision. In these situations, the more information relied upon in making tactical decisions typically leads to a more predictable result.

LEARNING ABOUT FOIA

The Federal Government recently released its new website, <http://open.foia.gov> in an effort to modernize FOIA. The new site allows users to search government agencies to determine which agency is likely to have the information being requested. According to sources, the website will soon allow a user to submit its FOIA request to any of the participating agencies. For now, locating an agency's FOIA office through the Internet is usually easy, and many agencies now allow FOIA requests to be sent by email.

While contractors should use FOIA to obtain as much information as possible about your competition or a Government agency, you must attempt to ensure that the agency does not provide your confidential business data to third parties who submit FOIA requests. First and foremost, always use the proper restrictive legends, such as those set forth at FAR 52.215-1(e), on your proposal documents. Failure to use a restrictive legend could result in your proposal being released to a competitor.

Also, make sure the cover page and following pages are properly marked, or you may encounter problems concerning the release of pages without a legend. For example, in *Xerxe Group Inc. v. United States*, 278 F.3d 1357 (Fed. Cir. 2002), a company alleged it had been damaged to the tune of \$72 million after the government released proprietary data contained in an unsolicited proposal submitted by the company. The court, which did not award damages because only the first page had been marked with the proprietary legend, noted that contractors are required under FAR to mark each page containing proprietary data.

In addition, a legend should be used if you are submitting proprietary business information to the agency that is not contained in a proposal, such as data provided for an audit or pursuant to contract performance. Adapt the legend at FAR 52.215-1 to the particular situation, and, once again, use a legend on the cover page and subsequent pages.

CONCLUSION

FOIA requests can be an effective, cost efficient tool in obtaining important information. Accordingly, FOIA requests should be utilized as often as is necessary to ensure that company decisions are based on as much good information as possible. Typically, the more information the better – and the more predictable your results will be.

In the end, you will be glad you made the call; by the way, it's a FREE CALL.

EXCELL CONSULTING: “HERE TODAY FOR YOUR TOMORROW.”

Author's note: The information contained in this article is for general informational purposes only. This information does not constitute legal advice, is not intended to constitute legal advice, nor should it be relied upon as legal advice for your specific factual pattern or situation. – Taylor Benson, Asst General Counsel