

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of Inteum Company)
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Filing Date: July 15, 2022)
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_____)

Case No.: FIA-22-0023

Issued: July 27, 2022

Decision and Order

On July 15, 2022, Inteum Company (Appellant) appealed a final determination letter (Determination Letter) from July 15, 2022, issued by the Department of Energy’s (DOE) Office of Public Information (OPI). The letter responded to Request No. HQ-2022-00512-F, a request filed by the Appellant under the Freedom of Information Act (FOIA), 5 U.S.C. § 522, as implemented by the DOE in 10 C.F.R. Part 1004. The Determination Letter was accompanied by four pages of responsive records redacted pursuant to FOIA Exemption 3. The Appellant challenges the decision to withhold information pursuant to Exemption 3. In this Decision, we deny the appeal.

I. Background

On February 5, 2022, Appellant submitted the FOIA request to the DOE. The request was as follows:

In relation to Solicitation ID 89303020QGC000003, there were 4 bids received. The winning bidder was Wellspring Worldwide. I would like to request technical and commercial bid copies from all four parties.

FOIA Request from Amy Shim at 1 (Feb. 25, 2022).

DOE issued an interim response letter on February 25, 2022. Email from Rosa Vazquez to Amy Shim (February 25, 2022). The letter informed the Appellant that the company had been categorized as a “commercial” requestor and that DOE would contact the Appellant if the processing fees for the request exceeded the cost the Appellant had indicated that it was willing to pay. *Id.*

Throughout March 2022, Appellant was in email contact with the FOIA analyst regarding the status of the request. Email from Amy Shim to Rosa Vazquez (March 28, 2022). On March 29, 2022, the FOIA analyst informed the Appellant that the request had generated approximately 402 pages of potentially responsive records and the fee to process that request would be about \$800, which was greater than the amount that the Appellant had indicated it would be willing to pay.

Email from Rosa Vazquez to Amy Shim (March 29, 2022). The FOIA analyst asked the Appellant if it would be willing to pay the larger fee and offered to discuss the matter over the phone. *Id.* Appellant replied later that same day, asking if it would be possible to amend the request to seek only the names of the parties that bid, rather than copies of their full bids, because it had not known getting the full bids would be so expensive. Email from Amy Shim to Rosa Vazquez (March 29, 2022). The FOIA analyst, in response, informed the Appellant that DOE's ability to produce responsive records may be limited by the Procurement Integrity Act and asked if the Appellant wished to withdraw the request. Email from Rosa Vazquez to Amy Shim at 1 (May 19, 2022).

The Appellant and FOIA analyst continued to discuss the request via email, and eventually the Appellant said "I will submit a new request. . . ." Email from Amy Shim to Rosa Vazquez at 1 (May 19, 2022). Responding to this email, the FOIA analyst asked if the Appellant's stated intention to submit a new request meant that it was withdrawing the current request. Email from Rosa Vazquez to Amy Shim at 2 (May 19, 2022). The Appellant clarified that it believed it had said it wanted to amend the request already and it had no intention to withdraw the request. Email from Amy Shim to Rosa Vazquez at 2 (May 19, 2022). After apologizing for the oversight, the FOIA analyst agreed that the request had already been amended down to the names of the four bidders. Email from Rosa Vazquez to Amy Shim at 2 (May 19, 2022). The Appellant and FOIA analyst continued to be in communication regarding the status of the request. Email from Rosa Vazquez to Amy Shim (July 7, 2022).

On July 15, 2022, DOE issued a final response to the FOIA request. Determination Letter from Alexander C. Morris to Amy Shim at 1. The letter explained that the request had been assigned to DOE's Office of Headquarters Procurement Services (MA-64) to conduct a search for responsive records. *Id.* Four pages of responsive documents were found, but DOE determined that certain information in the documents needed to be withheld pursuant to FOIA Exemption 3. *Id.* In explaining the rationale behind the Exemption 3 redactions, DOE stated that the "Procurement Integrity Act (PIA), 41 U.S.C. § 4702, prohibits disclosing contractor proposals that are in the possession or control of an executive agency and that have not been set forth or incorporated by reference into contracts." *Id.* at 2.

Appellant timely appealed the Determination Letter on July 15, 2022. Appeal Letter Email from Amy Shim to OHA Filings at 1. The Appellant argues that DOE misapplied the PIA, citing language in 41 U.S.C. § 2102,¹ which states "[e]xcept as provided by law, a person described in paragraph (3) shall not knowingly disclose contractor bid or proposal information or source selection information before the award of a Federal agency procurement contract to which the information relates." The Appellant contends that, because this FOIA request was made *after* the award of the procurement contract, this section of the PIA cannot be used to exempt DOE from disclosing the information. Appeal at 1.

¹ In the appeal, the Appellant references this statute as 41 U.S.C. § 423(a)(1). Appeal at 1. In 2011, that portion of the PIA was amended and is now codified at 41 U.S.C. § 2102. *See* 41 U.S.C. § 2102. As such, we refer to that statutory language using its most up-to-date codification.

II. Analysis

FOIA Exemption 3 allows agencies to withhold information which a statute unequivocally and specifically exempts from disclosure. 5 U.S.C. § 552(b)(3). The information must be specifically identified by the statute as exempt from disclosure. *Id.* Furthermore, the statute must exempt the information in a nondiscretionary manner, delineate specific criteria for determining whether the information must be exempt from disclosure, or refer to particular types of information to be withheld. *Id.* We first determine whether the statute at issue creates an exemption from disclosure within the meaning of Exemption 3, and if so, we then determine whether the requested records fall within the law's protection. *CIA v. Sims*, 471 U.S. 159, 167 (1985).

A number of federal courts have held that 41 U.S.C. § 4702 is a statute that falls within the meaning of Exemption 3. *See, e.g. Hornbostel v. U.S. Dep't of the Interior*, 305 F. Supp. 2d 21, 30 (D.D.C. 2003); *Margolin v. NASA*, No. 09-CV-00421, 2011 WL 1303221, at *6 (D. Nev. Mar. 31, 2011); *Sinkfield v. HUD*, No. 10-885, 2012 U.S. Dist. LEXIS 35233, at *13-15 (S.D. Ohio Mar. 15, 2012). Therefore, we find that DOE properly cited to this statute as a basis for withholding information under Exemption 3.

We must next look at whether records that the Appellant requested are protected by the statute. 41 U.S.C. § 4702 reads as follows:

(a) Definition.—

In this section, the term “proposal” means a proposal, including a technical, management, or cost proposal, submitted by a contractor in response to the requirements of a solicitation for a competitive proposal.

(b) Prohibition.—

A proposal in the possession or control of an executive agency may not be made available to any person under section 552 of title 5.

(c) Nonapplication.—

Subsection (b) does not apply to a proposal that is set forth or incorporated by reference in a contract entered into between the agency and the contractor that submitted the proposal.

The Appellant seeks information about the unsuccessful bids in a specific project. Appeal at 2. A bid “submitted by a contractor” is a proposal. *Hodes v. U.S. Dep't of Treasury*, 967 F. Supp. 2d 369, 375 (D.D.C. 2013). Therefore, no part of a contractor’s submissions on a bid that is not incorporated into a contract between an agency and contractor can be released pursuant to a FOIA request. The released documents were redacted to avoid releasing information from bids that was not incorporated into a contract between DOE and a contractor. Accordingly, we find that the released documents were properly redacted pursuant to Exemption 3.

Appellant argues that it should be able to obtain the documents because 41 U.S.C. § 2102 only protects procurement information *before* the award of a contract. Appeal at 1. We need not address the merits of that argument. The Determination Letter makes clear that the Exemption 3 redactions were made pursuant to 41 U.S.C. § 4702, not 41 U.S.C. § 2102.

III. Order

It is hereby ordered that the Appeal filed on July 15, 2022, by Inteum Company, FIA-22-0023, is denied.

This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 522(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

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