



U.S. Department
of Transportation
**Federal Aviation
Administration**

Office of Adjudication
Office of Dispute Resolution for Acquisition
AGC-70, Wilber Wright Bldg., STE 2W100
800 Independence Avenue SW
Washington, DC 20591

Via Email

February 5, 2020

Todd R. Steggerda, Esq.
McGuire Woods
2001 K Street, NW, 400
Washington, DC 20006

Alexander Athans, Esq.
Federal Aviation Administration
800 Independence Ave, SW
Washington, DC 20591

John R. Praire, Esq.
Wiley Rein
1776 K Street, NW
Washington, DC 20006

**Re: Protest of Versar Security Solutions
Solicitation No. DTFA01-17-R-00049
ODRA Docket 19-ODRA-00865**

Dear Counsel:

M.C. Dean, Inc. (“M.C. Dean”) challenges redactions proposed by the Product Team and Versar Security Solutions (“Versar”) to a settlement agreement, dated December 20, 2019.¹ The objection is before the Office of Dispute Resolution for Acquisition (“ODRA”) pursuant to paragraph 13 of the Protective Order, dated September 11, 2019. Specifically, the Product Team and Versar seek to redact portions of the settlement terms and the entirety of Exhibit A.² *Product Team Brief in Support of its Proposed Redactions* (“*Product Team Brief*”) at 5 and Attachment A; *Versar Brief in Support of Requested Redactions* (“*Versar Brief*”) at 2.

For the reasons discussed herein, M.C. Dean’s challenge to the proposed redactions is granted. The ODRA further finds the positions taken by counsel for the Product Team and Versar unsupported.

¹ Versar also objects to proposed redactions from M.C. Dean to its Response to the Product Team and Versar Briefs. *Versar’s Objections and Proposed Redactions to M.C. Dean’s Response to Product Team and Versar Briefs* at 1. The objections concern the same information at issue in the challenge to the proposed redactions to the settlement agreement. This decision by the ODRA applies to both inasmuch as the letter contains identical information in the settlement agreement.

² Proposed redactions to the settlement agreement were revised and resubmitted by the Product Team at the direction of the ODRA pursuant to representations made by counsel that portions were due to be publicly posted on FAA Contract Opportunities website. *Status Conference memorandum*, dated January 13, 2020.

I. Standard of Review

The proponent of the redaction order has the burden of persuasion establishing the need to protect the information at issue. 5 U.S.C.S. § 556(d); *see also Protest of Adsystech, Inc.*, 09-ODRA-00508 ("ODRA proceedings . . . place the burden of proof on the proponent of an order[.]") and *Protest of Leader Communications, Inc.*, 17-ODRA-00794 (Decision on Challenges to Redactions, August 1, 2017).

II. Discussion

A. The Product Team May Not File a Demurrer to Define Protected Information

Counsel for the Product Team boldly asserts that: "[t]he FAA is not in the practice of determining what information a contractor may or may not consider confidential, proprietary, or would otherwise competitively disadvantage them were it to be known to competitors." *Product Team Brief* at 2 (emphasis added). On the contrary,

An employee [of the FAA], who does not know whether information is proprietary or source selection information, or who does not know whether he or she may disclose or receive such information, has an affirmative obligation to verify with the contracting officer or the Procurement Legal Division whether the information is proprietary or source selection sensitive.

Human Resources Policy Manual (HRPM), Volume 4: Employee Relations, Standards of Conduct § 9.c. (internal citations omitted) (emphasis added). Counsel may not cede the Product Team's role in determining what itself considers confidential or source selection sensitive to Versar, especially when otherwise directed by the ODRA. *Status Conference Memorandum*, dated January 13, 2020 at 2 ("Judge Maravilla directed the Product Team . . . resubmit a proposed redacted version along with a brief in support of those portions the Product Team continues to assert as protected.").

B. The FAA Contract Opportunities Website Does Not Establish the Standard for Disclosure

Counsel for the Product Team argues that the standard to determine what constitutes confidential and proprietary information under a Protective Order is governed by what is generally made public on the FAA Contract Opportunities ("FAACO") website. *Product Team Brief* at 1-3. Specifically, "the FAA does not customarily release this level of detail in its FAACO posting announcing a single-source contract." *Product Team Brief* at 4.³ Counsel's reliance on FAACO is misplaced. That provision of the Acquisition Management System ("AMS") merely concerns

³ Counsel for the Product Team has repeatedly represented to the ODRA that the single source award at issue "will be released to the public on the FAA's contracting opportunities website." *FAA's Response to Intervener's Opposition to Requested Protection of Settlement Agreement* at 2 (emphasis added); *see also Status Conference Memorandum*, dated January 13, 2020. The ODRA is unaware if this notice has been publicly posted pursuant to the Product Team's representations. In the least, the Product Team has not provided the ODRA with such information.

the requirements for the posting of public announcements of procurement actions on FAACO and the internet. AMS 3.2.1.3.11.1 (Revised 1/2017). It does not establish the standard for disclosure; it is a method of communication. Indeed, one of fundamental principles of the AMS is to “[p]romote open communication and access to information throughout the procurement process.” AMS 3.1.3 (Revised 7/2013). To that end, “[f]reedom of information is applicable to all FAA procurements.” AMS 3.7.1 (Revised 10/2018).

The Freedom of Information Act (“FOIA”) and its exemptions, 5 U.S.C. § 552(b)(1)-(9) and AMS 3.7.2 (Revised 10/2018) (“The FAA will comply with [FOIA].”), along with the Procurement Integrity Act (“PIA”), 41 U.S.C. § 423 and AMS Guidance T3.1.8(A)(2) (Revised 7/2006), are intertwined with the requirements of the Protective Order. The purpose of the ODRA Protective Order is to “limit[] disclosure of certain material and information . . . in order to protect proprietary and competition-sensitive information so that no party obtaining access to protected material under [the] Order will gain a competitive advantage.” *Protective Order*, dated September 11, 2019; *see also* 14 C.F.R. 17.9(a) (2012). The AMS makes clear that “[u]nless the request for information is exempt from disclosure under [FOIA] . . . the information must be released.” AMS Guidance T3.1.6 (A)(4)(a) (Revised 1/2017) (emphasis added).

Accordingly, the ODRA’s analysis focuses on the application of FOIA, PIA, and their related AMS provisions, not FAACO.

C. The Parties Have Not Demonstrated that the Information in the Settlement Agreement is Proprietary or Competition Sensitive

The information proposed for redaction is the FAA’s own contract information none of which meets the definitions of under PIA. AMS 3.1.8 (Revised 1/2019) (“FAA is subject, with modifications as described in the AMS Guidance with FAA-specific language, to [PIA]”); *see also* AMS Guidance T3.1.8. Indeed, with respect to Exhibit A of the settlement agreement, the Product Team concedes that the locations for performance “are not a part of a proposal from Versar.” *Product Team Brief* at 4 (emphasis in original).

As to pricing, nothing in the agreement states a unit price, indirect cost rates, profit, or even a final total price on a task order. The agreement only shows a minimum and maximum range for task orders. Competitive harm has not, therefore, been demonstrated. *See Racal-Milgo Gov. Systems v. Small Business Administration*, 559 F. Supp. 4 (D.D.C. 1981) (“Prices paid by the Government in an ordinary contract . . . are not matters subject to withholding under exemption 4.”). Moreover, it is universally accepted practice, including the FAA, to post total award value on www.usaspending.gov.

Versar does assert that “[i]f Exhibit A and the redaction portions of Section 2 were released, it could result in competitive harm to Versar.” *Versar Brief* at 4. Versar states that the potential harm would be a “loss of Versar’s employees to competitors.” *Id.* This is not only speculative, but Versar offers no evidence in the record to substantiate its claim. *Protest of Leader Communications, Inc.*, 14-ODRA-00705 (Mere argument of counsel is not evidence.);

D. The Terms of the ADR Agreement Do Not Support an Intent for a Confidential Settlement Agreement

Versar asserts that the terms of the settlement agreement describe a “confidential financial arrangement between Versar and the FAA.” *Versar Response to Opposition to Requested Protection of Settlement Agreement* at 2. Versar further states that “[t]he intent of the parties was for the Settlement Agreement to be protected.” *Versar Brief* at 4. In support of this position, the Product Team also states that “Settlement Agreements reached pursuant to the ODRA’s Alternative Dispute Resolution (ADR) process are not typically made public.” *FAA’s Response to Intervener’s Opposition to Requested Protection of Settlement Agreement* at 1.

This intent of the parties for a confidential settlement agreement is contravened by the very terms of the ADR agreement itself. The agreement provides, “[n]either this agreement nor any resulting settlement agreement will be confidential.” *ADR Agreement*, dated September 17, 2019, section 7.11; *see also* section 7.2 (“Neither this agreement nor any resulting settlement agreement is a dispute resolution communication.”). It is also the policy of the United States Department of Transportation that “[u]nless required by law, settlement agreements are not confidential and are subject to public disclosure.” *Memorandum for Secretarial Officers and Heads of Operating Administrations*, dated February 15, 2019 at 11.

III. Conclusion

The ODRA finds that counsel for the Product Team and Versar have not met their burden that the information contained in the settlement agreement is protected or source selection sensitive. Accordingly, counsel are directed to file an unredacted copy of the filings at issue with the ODRA by the close of business, Friday, February 7, 2020. The filings may be released to interested parties.

Sincerely,



C. Scott Maravilla
Dispute Resolution Officer and Administrative Judge
Office of Dispute Resolution
for Acquisition, AGC-70