

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

In the Matter of California-Arizona-Nevada)
District Organization Contract)
Compliance) Case Nos. FIA-12-0060
)
)
Filing Date: October 4, 2012)
_____)

Issued: November 1, 2012

Decision and Order

On October 4, 2012, California-Arizona-Nevada District Organization Contract Compliance (CANDO) filed an appeal from a final determination issued by the Loan Guarantee Program Office (LGPO) of the Department of Energy (DOE). In that determination, LGPO responded to a request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004 (Request No. HQ-2011-01750-F). LGPO released substantial amounts of information responsive to the request, but withheld responsive information under FOIA Exemption 4. This Appeal, if granted, would require LGPO to release to CANDO some of the information it withheld previously.

I. BACKGROUND

CANDO filed a request for information with LGPO seeking copies of ten specified documents related to loan guarantee contracts for the Agua Caliente Solar Energy Project (Project).¹ On November 8, 2011, LGPO issued a determination letter releasing copies of the documents regarding the Project. However, LGPO withheld portions of the responsive documents under Exemption 4. On February 2, 2012, CANDO appealed LGPO's November 8 determination letter contending that LGPO had improperly applied Exemption 4 to withhold the names and other identifying information concerning contractors and sub-contractors listed in those documents. Following an initial OHA Decision denying CANDO's Appeal and a subsequent, successful Motion for Reconsideration filed by CANDO, LGPO issued another determination letter on September 5, 2012 (Determination Letter).² The Determination Letter stated that the names of the contractors and subcontractors contained in the Project's loan guarantee contract had been withheld pursuant to Exemption 4 of the FOIA. The Determination Letter stated that the firm names were involuntarily submitted to the LGPO and that the loan guarantee applicant, First

¹ The original FOIA Request submitted by CANDO also asked for similar documents regarding the Gila Bend Solar Energy Project.

² The somewhat involved procedural history of this appeal is described in *California-Arizona-Nevada District Organization Contract Compliance*, Case No. FIA-12-0020 (April 27, 2012).

Solar, normally keeps such information in confidence. LGPO went on to state:

Specifically, the following information is not customarily made available to the public: identification of First Solar's project partners, vendors and contractors and the process used for selecting them, preapproval and post selection requirements, procedures for determining performance capabilities and granting permissions to work on the project at various levels, standards for project completion, including certification requirements, subcontractor facility inspection or training requirements. Consequently, official release of this information would enable First Solar's competition to derive anticipated project contributions, insight into First Solar's selection processes and consideration in a marketplace where the same partners, vendors and contractors are selected, and would provide insight into project costs/schedule to their competitors causing First Solar substantial, competitive harm

Determination Letter at 2.

In its October 4 Appeal, CANDO argues that the names and identifying information of the contractors referenced in the documents were improperly withheld.³ CANDO argues that the Determination does not allege sufficient competitive harm to withhold the names of the contractors and subcontractors pursuant to Exemption 4, especially since work has now begun on the Project.

II. ANALYSIS

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d. 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). It is well settled that the agency's burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). "An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption." *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). Only Exemption 4 is at issue in the present case.

Exemption 4 exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). In order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person," and "privileged or confidential." *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines the material is a trade secret for the purposes of the FOIA, its analysis is complete and the material may be withheld under Exemption 4. *Public Citizen Health Research Group v. Food & Drug*

³ CANDO does not challenge LGPO's withholding regarding the other information redacted in the documents at issue in this appeal.

Admin., 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983) (*Public Citizen*). If the material does not constitute a trade secret, the agency must then determine whether the information is “privileged or confidential.”

In order to determine whether the information is "confidential," the agency must first decide whether the information was either voluntarily or involuntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993) (*Critical Mass*). If the information was involuntarily submitted, the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.

In the present case, both parties agree that the withheld information has been involuntarily submitted. See CANDO October 4, 2012 Appeal at 4 n.2 (stating that providing the names of contractors under the loan guarantee program is required); Determination Letter at 2 (names of contractors were involuntarily submitted to DOE as part of loan guarantee program). Because the application process for the Project required that the information be submitted, it is questionable that release of the information would impair DOE's ability to obtain similar information in the future. See *Sierra Club*, Case No. FIA-11-0010 (December 29, 2011).⁴ Consequently, the question, under *National Parks*, turns to whether release of the contractor and subcontractor information would likely result in substantial competitive harm to First Solar, the loan applicant.

Our review of the unredacted pages indicates that three firm names were withheld from the pages provided to CANDO. These firm names are contained in a section that lists the firms from which First Solar intended to select the Project's Engineering, Procurement and Construction (EPC) contractor.⁵ In past cases, OHA has recognized the competitive harm that could result from the release of subcontractor names. *Larson Associates, Inc.*, Case No. VFA-0155 (June 18, 1996); *Consultec, Inc.*, 24 DOE ¶ 80,140 (1994) (*Consultec*). Release of the names of subcontractors, or in this case, firms to be the Project's EPC contractor, could provide a competitive edge to contractors soliciting future business by providing them instant access to firms capable of functioning as an EPC contractor without expending the time and energy that First Solar expended in determining the firms' qualifications. *Consultec*, 24 DOE at 80,604. Further, competitors could use this information to lure away key employees from these firms to gain expertise. *Id.* For the reasons stated above, we find that LGPO properly applied Exemption 4 to the names of the candidate EPC firms contained in the documents at issue in this case. Consequently, we find that CANDO's Appeal should be denied.

⁴ Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

⁵ In the present case, it is apparent that the EPC contractor essentially functions as a subcontractor to First Solar. None of the firms whose names were withheld were selected to be the EPC contractor for the Project. First Solar ultimately elected to be the EPC contractor for the Project. E-mail from Janelle Jordan, LGPO, to Richard Cronin, Attorney-Examiner, OHA (October 24, 2012).

It Is Therefore Ordered That:

(1) The Appeal filed by California-Arizona-Nevada District Organization Contract Compliance on October 4, 2012, Case No. FIA-12-0060, is hereby denied.

(2) 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. § 552(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.

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