

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

In the Matter of California-Arizona-Nevada)
District Organization Contract)
Compliance) Case No. FIA-12-0020
)
)
Filing Date: February 2, 2012)
_____)

Issued: April 27, 2012

Motion for Reconsideration

This Decision concerns a Request for Reconsideration filed with the Department of Energy’s (DOE) Office of Hearings and Appeals (OHA) by California-Arizona-Nevada District Organization Contract Compliance (CANDO). In this Request, CANDO requests that OHA modify a Decision and Order that we issued in response to one of two appeals CANDO 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. *See California-Arizona-Nevada District Organization Contract Compliance*, Case Nos. FIA-12-0004 and FIA-12-0005 (2012) (CANDO).¹

I. BACKGROUND

CANDO filed requests for information with the Loan Guarantee Program Office (LGPO) seeking copies of documents responsive to ten specified topics related to loan guarantee contracts for the Agua Caliente and Gila Bend Solar Energy Projects. On October 31, and November 8, 2011, LGPO issued determination letters releasing copies of the documents CANDO requested regarding the Agua Caliente and Gila Bend projects, respectively. In both instances, however, LGPO withheld portions of the responsive documents under Exemption 4 of the FOIA.² On February 2, 2012, CANDO filed appeals 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.³

¹ OHA FOIA decisions issued after November 19, 1996, may be accessed at <http://www.oha.doe.gov/foia1.asp>.

² Exemption 4 permits an agency to withhold from mandatory disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4).

³ CANDO did not challenge LGPO’s application of Exemption 4 to withhold other information from the responsive documents.

On March 23, 2012, OHA issued a Decision and Order in which it addressed LGPO's determinations regarding both sets of documents that CANDO had requested. Regarding the Agua Caliente documents (Case No. FIA-12-0005), OHA determined, based on representations it received from LGPO, that "no names or other information that identified contractors or sub-contractors was withheld." *CANDO* at 4. Relying on those representations, OHA concluded that CANDO's contention on appeal did not apply to any of the information withheld from the Agua Caliente documents, and it denied CANDO's appeal with respect to those documents.

In its Request for Reconsideration, CANDO asserts that the material LGPO identified and provided as responsive to the fifth enumerated topic of its request for Agua Caliente documents bore deleted information that, in the context of the surrounding, unredacted portions of the information CANDO received, "appears to refer to contractors." Request for Reconsideration at 1.

II. ANALYSIS

The DOE FOIA regulations do not explicitly provide for reconsideration of a final Decision and Order. *See* 10 C.F.R. § 1004.8. However, in prior cases, we have used our discretion to consider Motions for Reconsideration where circumstances warrant. *See, e.g., Tarek Farag*, Case No. TFA-0385 (2010). We have deemed CANDO's current Request a Motion for Reconsideration. In reviewing Motions for Reconsideration, we look to OHA's procedural regulations regarding modification or rescission of its orders. *See* 10 C.F.R. Part 1003, Subpart E; *see also Terry M. Apodaca*, Case No. TFA-0237 (2007). Those regulations provide that an application for modification or rescission of an order shall be processed only when the application "demonstrates that it is based on significantly changed circumstances." 10 C.F.R. § 1003.55(b)(1).

Significantly changed circumstances includes "the discovery of material facts that were not known or could not have been known" at the time of the original proceeding; "the discovery of a law, rule, regulation ... that was in effect" at the time of the original proceeding "and which, if such had been made known to the OHA, would have been relevant to the proceeding and would have substantially altered the outcome;" or "a substantial change in the facts or circumstances upon which an outstanding and continuing order of the OHA affecting the applicant was issued, which change has occurred during the interval between the issuance of such order and the date of the application [for modification or rescission] and was caused by forces or circumstances beyond the control of the applicant." 10 C.F.R § 1003.55(b)(2).

Applying these standards to the case at hand, we find that CANDO has presented evidence in its Motion warranting modification or rescission of our prior decision in *CANDO*. After receiving CANDO's Motion, we obtained and reviewed an unredacted version of the Agua Caliente material LGPO provided to CANDO's fifth topic of its request: "A copy of the Technical Information Section C – Part II 2. Engineering and Construction Plans, a copy of the list of engineering design contractors and the construction contractors selected to perform the construction of the project . . ." Among the information withheld from the redacted version of the responsive material are the names of three finalists. According to the document, one of these three companies had not yet, but was to be, selected to serve as the Engineering and Construction

Plans (EPC) contractor for the project. Immediately following the first deletion of these companies' names, the text of the application states: "These EPC [Engineering and Construction Plans] companies are extremely qualified and experienced to serve as the EPC Contractor for the Project." Agua Caliente Application at 13.

As stated above, although LGPO withheld a significant amount of information from the responsive documents under Exemption 4, CANDO limited its appeal to LGPO's application of Exemption 4 specifically to "names of the contractors and subcontractors, and identifying information." We spoke with LGPO after we received this Motion for Reconsideration. LGPO informed us that the names deleted from the material responsive to the fifth topic of CANDO's request were not the names of selected contractors, but rather a list of companies from which the contractor was to be selected at a later date, and therefore not responsive to CANDO's request. Memoranda of Telephone Conversation between Janelle Jordan, LGPO, and William Schwartz, OHA (April 13, 2012); E-mail from Janelle Jordan to William Schwartz (April 16, 2012).

We reject LGPO's position. Because CANDO specifically requested the entire section of the application entitled "Agua Caliente/II/C/2/Engineering and Construction Plans," no portion of that section can be considered not responsive to the request. Moreover, because the names of potential contractors contained in that section are responsive to CANDO's request, LGPO must either release those names or adequately justify applying Exemption 4, or any other basis for withholding, to those names.⁴ In our previous Decision, we stated that adequate justification for applying Exemption 4 to any information requires, as an initial step, a description of the withheld information that is sufficient to permit the requester to understand what information has been redacted from a document. *CANDO* at 3. LGPO failed to describe the information it withheld from CANDO to include the names and identifying information of contractors and subcontractors, both selected (in the Gila Bend documents) and potential (in the Agua Caliente documents). On remand, it must describe the information withheld from the Agua Caliente documents in a more detailed manner, and, for the reasons set forth in *CANDO*, explain to the requester how the disclosure of any potential as well as selected contractors or subcontractors contained in the Agua Caliente documents is likely to cause competitive harm to the applicant.

III. CONCLUSION

CANDO has presented material facts that were not known at the time of the appeal proceeding. It has therefore demonstrated "significantly changed circumstances" warranting modification of our decision in *CANDO*, Case No. FIA-12-0005 (2012). Consequently, the Motion for Reconsideration should be granted.

Accordingly, we are remanding to LGPO CANDO's appeal concerning its request for information about the Agua Caliente Solar Energy Project (Case No. FIA-12-0005). LGPO should, on remand, review its withholding of any names or identifying information regarding potential or selected contractors or subcontractors throughout the material it identified as responsive to that request, and either release that information or issue a new determination in

⁴ We note that LGPO indicated on the redacted material it provided to CANDO that the names of the potential contractors were withheld pursuant to Exemption 4.

which it properly describes the information it is withholding and provides a sufficient explanation for withholding the information.

It Is Therefore Ordered That:

(1) The Motion for Reconsideration filed by California-Arizona-Nevada District Organization Contract Compliance (CANDO) on April 10, 2012, OHA Case No. FIA-12-0020, is granted.

(2) The Appeal filed by California-Arizona-Nevada District Organization Contract Compliance in Case No. FIA-12-0005 is hereby remanded to the Loan Guarantee Program Office for further processing in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 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.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 27, 2012