

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

In the Matter of Don Joiner)
) Case No.: FIA-14-0016
Filing Date: March 4, 2014)
_____)

Issued: March 13, 2014

Decision and Order

On March 4, 2014, Don Joiner (“Appellant”) filed an Appeal from a determination issued to him by the Idaho Operations Office (“IOO”) of the United States Department of Energy (“DOE”) (FOIA Request Number FOIA-14-00530-F/OM-PA-14-006). In its determination, IOO responded to the Appellant’s request for information filed under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. IOO determined that the Appellant sought records that were not in its possession as they were the property of its contractor, Battelle Energy Alliance, LLC (“BEA”). This Appeal, if granted, would require IOO to release the requested records.

I. BACKGROUND

In his FOIA Request, the Appellant requested “copies of responses to [BEA’s] Request for Proposal No. 00132933 Managed Technical Support Services, including the value of the winning bid.” *See* Determination Letter from Clayton Ogilvie, FOIA Officer, to Appellant (Feb. 3, 2014). In its Determination Letter, IOO stated that it conducted a search and could not locate any responsive records and that the requested documents are not agency records pursuant to the contract between BEA and DOE, DE-AC07-05ID14517, Clause I.15 (DEAR § 970.5204-3 “Access To And Ownership of Records”). *See id.* IOO further stated that DOE has not received copies of the requested documents and therefore, has no ability to use or dispose of them.

In his Appeal, the Appellant argues that the value of the winning bid should be made available under the FOIA.¹ *See* Appeal. The Appellant claims that the Contract Data Requirements List (CDRL) associated with the DOE’s contract with BEA provides that “information regarding the award amount, name, address and business size of the vendor will be reported to the DOE.” *Id.* Hence, the Appellant contends that the value of the winning award must have been submitted to DOE, thereby making it an agency record.

¹ The Appellant concedes that “copies of responses to [BEA’s] Request for Proposal No. 00132933 Managed Technical Support Services” are not available for release.

II. ANALYSIS

The FOIA applies to agency records. *See* 5 U.S.C. § 552(f)(2)(A) (“‘record’ and any other term used in this section in reference to information includes – (A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format”). The FOIA does not specifically set forth the attributes that a record must have in order to qualify as an agency record that is subject to the FOIA requirements. The United States Supreme Court addressed this issue in *Dep’t of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989). In that decision, the Court stated that documents are “agency records” for FOIA purposes if they (1) were created or obtained by an agency, and (2) are under agency control at the time of the FOIA request. *Id.* The federal courts have identified four relevant factors to consider in determining whether a document was under an agency’s control at the time of a request:

- (1) The intent of the document’s creator to retain or relinquish control over the document;
- (2) The ability of the agency to use and dispose of the record as it sees fit;
- (3) The extent to which agency personnel have read or relied upon the record; and
- (4) The degree to which the record was integrated into the agency’s record system or files.

See, e.g., Burka v. Dep’t of Health and Human Services, 87 F.3d 508, 515 (D.C.Cir. 1996); *see also Donald A. Verrill*, Case No. TFA-0364 (2010).²

IOO provided an analysis on this four-factor test to the Appellant in its Determination Letter. In applying the first factor, IOO stated that “BEA created the documents, and has indicated no intent to relinquish control of the records to DOE.” *See* Determination Letter. In regards to the second factor, IOO stated that “[t]he documents are not submitted to DOE under any contractual or other requirement; DOE has not received copies of the documents, and as such, has no ability to use or dispose of them as it sees fit.” *Id.* Accordingly, the winning bid amount has not been relied upon by the DOE and has not been integrated into DOE’s record systems or files, as required by the third and fourth factors. Hence, we conclude that the requested information is not an “agency record.”

However, a finding that certain documents are not “agency records” does not end our inquiry. DOE’s FOIA regulations state:

When a contract with DOE provides that any records acquired or generated by the contractor in its performance of the contract shall be the property of the Government, DOE will make available to the public such records that are in the

² Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at <http://www.energy.gov/oha>.

possession of the Government or the contractor, unless the records are exempt from public disclosure under 5 U.S.C. § 552(b)(2).

10 C.F.R. § 1004.3(e).

In this regard, IOO cited to its contract with BEA, specifically, clause (b)(3) of Department of Energy Acquisition Regulation (“DEAR”) 970.5204-3,³ to support its argument that the requested documents are contractor-owned. *See* Determination Letter; Email from Clayton Ogilvie, FOIA Officer, IOO, to Shiwali Patel, Attorney Advisor, OHA (Mar. 4, 2014). Clause (b)(3) identifies contractor-owned records as including “Records relating to any procurement action by the Contractor, except for records that under 48 CFR 970.5232-3, Accounts, Records, and Inspection, are described as the property of the Government.” IOO explained that the winning bid amount is also not subject to release under 48 CFR 970.5232-3 as that clause specifically allows for the “inspection of accounts and records [by the Comptroller General or the General Accounting Office] for the purpose of supporting costs incurred under the terms of the contract;” however, “[i]t does not include procurement sensitive information,” such as the winning proposal amount under a subcontract. *See* Email from Suzette Olson, Contracting Officer, IOO, to Clayton Ogilvie, FOIA Officer, IOO (Mar. 10, 2014). Thus, the subcontractor’s winning bid is a contractor-owned record pursuant to clause (b)(3) of the DEAR 970.5204-3, and therefore, is not subject to release.

Finally, the Appellant attached a document to his Appeal entitled, “Small Business Subcontracting Plan, Part III, Section J, Attachment J” (“Plan”), arguing that it requires BEA to report to DOE “information regarding the award amount, name, address and business size of the vendor.” *See* Appeal. Yet, the clauses cited by the Appellant in the Plan do not indicate as such, providing instead that BEA will maintain certain records on subcontractor awards of more than \$100,000 and records on the subcontractor’s name, address and business size.

Thus, based on the above, we conclude that the requested winning bid amount is a contractor-owned record and is not in the possession of DOE. *See In the Matter of Snake River Alliance*, OHA Case No. TFA-0468 (2011); *In the Matter of Donald A. Verrill*, OHA Case No. TFA-0364 (2010). Therefore, we will deny the Appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Action Appeal filed by Don Joiner on March 4, 2014, OHA Case Number FIA-14-0016, 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 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.

³ “Except as provided in paragraph (b) of this clause, all records acquired or generated by the contractor in its performance of this contract shall be the property of the Government and shall be delivered to the Government or otherwise disposed of by the contractor either as the contracting officer may from time to time direct during the progress of the work or, in any event, as the contracting officer shall direct upon completion or termination of the contract.”

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