

Contractors Bear the Burden of Protecting Their Proprietary Information

Summary: The Government Accountability Office ("GAO") reminds contractors, once again, that contractors bear responsibility for the protection of their proprietary data. In *Digital Healthcare, Inc.*, B-296489, August 24, 2005, the GAO denied a protestor's claim that the agency had misappropriated information contained in an unsolicited proposal because the protestor could not establish the proprietary nature of the disputed data.

Background and Analysis: *Digital* involved a claim by a protestor that had submitted an unsolicited contract proposal to the Veterans Health Administration ("VA") and other federally funded health providers for the identification and billing of additional sources of insurance coverage for VA patients. As part of its proposal, the protestor informed the VA that its process "was proprietary by virtue of its patents, non-competition agreements, and other intellectual property."

- The VA responded to the contractor and informed it that: (1) the VA did not consider the unsolicited proposal to be unique; (2) the proposal indicated that the proposed services were available from other companies; and (3) the proposal only contained slight details concerning the proprietary nature of the protestor's "e-commerce process."
- Subsequently, the VA issued an RFP for "a fixed-price, indefinite-quantity/indefinite-delivery services contract for a base year with two 1-year option periods." The scope of the procurement included the establishment of an off-site unit that would "identify insurance for veterans without insurance or unknowing insurance." The RFP did not set forth a particular methodology for the electronic identification of potential insurance carriers.
- In its protest, the contractor claimed that the VA had improperly utilized the proprietary information contained in its proposal by copying "the essential process of the electronic identification of all known insurance sources covering VA beneficiaries." The protestor claimed that the process described in its unsolicited proposal qualified as a "business method" that would be very valuable to its competitors.
- The GAO denied the protest, noting that the value of proprietary information arises from the owner's unique possession of the information. The information cannot be publicly available. Moreover, to be considered "proprietary," the information must be innovative or unique. Consequently, a protestor will not prevail on a claim that its proprietary rights have been violated unless it shows "that (1) its material was marked proprietary or confidential or that it was disclosed to the government in confidence, and (2) the material involved significant time and expense in preparation and contained material or concepts that could not be independently obtained from publicly available literature or common knowledge."
- In *Digital*, the protestor was unable to prove that its information was truly proprietary because significant amounts of the information contained in the unsolicited proposal also appeared on the protestor's website. The GAO found that the data was publicly available such that it did not constitute proprietary information.

Practitioner Tips: To ensure that this vital business information is protected, companies should:

- Clearly label sensitive commercial and business information as "proprietary information."
- Establish internal procedures and controls to maintain the confidentiality of proprietary data.
- Conduct periodic reviews of websites and advertising data to determine whether they contain proprietary material.

For further information please contact:

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