United States Department of Energy Office of Hearings and Appeals

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In the Matter of Torres Consulting & Law Group, LLC

Filing Date: September 25, 2012

Case No.:

FIA-12-0056

Issued: October 19, 2012

Decision and Order

On September 25, 2012, Torres Consulting & Law Group, LLC, (Appellant) filed an Appeal from determinations issued to it on August 9, 2012, August 14, 2012 and August 21, 2012, by the Golden Field Office (Golden) of the Department of Energy (DOE) (Request Nos. GO-12-298, GO-12-299, and GO-12-300). In those determinations, Golden released documents responsive to the requests the Appellant 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. Golden withheld portions of the released documents under Exemptions 4 and 6 of the FOIA. This Appeal, if granted, would release the employee wage rates and total hours worked, both daily and weekly, from the documents at issue.

I. Background

On July 31, 2012, the Appellant filed three requests with Golden for certified payroll records pertaining to "MTech Mechanical," "Weifield Group," and "Diamond Fire Protection." Request E-mail dated July 31, 2012, from Ashley Walkup, Appellant, to Michele Altieri, Golden. On August 9, 2012, Golden released the Weifield Group payroll records, but withheld information under Exemptions 4 and 6 of the FOIA. Determination Letter dated August 9, 2012, from Golden to Ashley Walkup, Appellant. On August 14, 2012, Golden released the MTech Mechanical payroll records, but withheld information under Exemptions 4 and 6 of the FOIA. Determination under Exemptions 4 and 6 of the FOIA. Determination Letter dated August 9, 2012, from Golden to Ashley Walkup, Appellant. On August 14, 2012, Golden released the Diamond Fire Protection payroll records, but again withheld information under Exemptions 4 and 6 of the FOIA. Determination Letter dated August 21, 2012, Golden released the Diamond Fire Protection payroll records, but again withheld information under Exemptions 4 and 6 of the FOIA. Determination Letter dated August 21, 2012, Golden released the Diamond Fire Protection payroll records, but again withheld information under Exemptions 4 and 6 of the FOIA. Determination Letter dated August 21, 2012, from Golden to Ashley Walkup, Appellant.

On September 17, 2012, the Appellant filed an Appeal with the Office of Hearings and Appeals (OHA) challenging only the information withheld under Exemption 4, *i.e.*, the withholding of the employee wage rate and total hours worked both daily and weekly. Appeal Letter dated September 17, 2012, from Jim Barton, Appellant, to Director, OHA, DOE. The Appellant

argues that release of this information will not allow a competitor to gain a "substantial competitive advantage in pricing future bids, even on exactly similar projects." *Id.* at 3.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. \$ 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. \$ 1004.10(b)(1)-(9). We must construe the FOIA exemptions narrowly to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from disclosure. *See* 5 U.S.C. \$ 552(a)(4)(B). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. \$ 1004.1. Exemption 4 is at issue in this Appeal.

Exemption 4 shields 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); 10 C.F.R. § 1004.10(b)(4). Accordingly, 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." *Nat'l Parks & Conservation Ass'n v. Morton,* 498 F.2d 765 (D.C. Cir. 1974) (*National Parks*). If the agency determines that 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. FDA,* 704 F.2d 1280, 1286, 1288 (D.C. Cir. 1983). If the material does not constitute a "trade secret," a different analysis applies. The agency must determine whether the information in question is "commercial or financial," "obtained from a person" and "privileged or confidential."

The Appellant is not challenging whether the information withheld, employee wage rate and total hours worked both daily and weekly, is either commercial or financial or obtained from a person. Appeal Letter at 2. We therefore must determine whether the information is privileged or confidential. For the reasons set forth below, we find that the information is confidential and therefore exempt from release under Exemption 4.

In this case, the contractors were required to submit the documents in question as part of their contracts with Golden. Accordingly, we find that the withheld information was "involuntarily submitted." Under *National Parks*, involuntarily-submitted withheld information is confidential if its release would be likely to either (a) impair the government's ability to obtain such information in the future, or (b) cause substantial harm to the competitive position of submitter. *National Parks*, 498 F.2d at 770. In applying Exemption 4 to the documents at issue, Golden determined that release of the information would likely cause the contractors substantial competitive harm.

The Appellant states that the wage rate data from the certified payroll documents would not cause substantial competitive harm because all contractors are aware of the requirement to pay

the prevailing wage rate and benefits as it is stipulated and incorporated into the project contract. Appeal Letter at 2. In addition, disclosure of the hours worked on a project's jobsite should not be protected under Exemption 4 because this information is readily observable on most projects and is the primary way to establish if a contractor complies with apprenticeship guidelines mandated by federal law. *Id.* Finally, the number of hours worked, daily and weekly, for a given employee demonstrates that the worker is being paid for every hour worked and that the contractor is not simply using a required base wage rate to back into Davis-Bacon Act compliance. *Id.* In sum, the Appellant argues that the wage rate, fringe benefits, and apprenticeship guidelines cannot be considered confidential and the release of the information would not cause a competitive disadvantage to the submitter.

Golden determined that release of the commercial and financial information contained in the documents would likely cause the contractors substantial competitive harm. We believe that release of the information would give the contractors competitors an undue advantage when submitting proposals in the future. In addition, release of the financial information would give the contractors' competitors an undue advantage in bidding on future contracts. Therefore, we find that Golden properly applied Exemption 4 to the withheld information in the released documents and properly withheld the total hours worked and total pay received.

III. Conclusion

After considering the Appellant's arguments, we are convinced that Golden properly withheld the redacted information from the documents under Exemption 4. Accordingly, the Appeal should be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Torres Consulting & Law Group, LLC, Case No. FIA-12-0056, 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.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services National Archives and Records Administration 8601 Adelphi Road-OGIS College Park, MD 20740 Web: ogis.archives.gov E-mail: ogis@nara.gov Telephone: 202-741-5770 Fax: 202-741-5759 Toll-free: 1-877-684-6448

Poli A. Marmolejos Director Office of Hearings and Appeals

Date: October 19, 2012