

**IDENTIFYING AND MANAGING
CONFIDENTIAL INFORMATION IN
PROCUREMENT**

The purpose of this guide is to assist the State of Montana (the State) in identifying and managing confidential information throughout the solicitation process. Contracts Officers and Agencies should be aware that bidders and offerors from the private sector may seek to protect their information as confidential. Where this occurs, the State is, by law, required to make an assessment of the information and determine whether the information can be protected as confidential. In order to augment the process of determining confidentiality, the State Procurement Bureau (SPB) has defined the actions and responsibilities regarding review of the submitted materials for solicitations issued through the SPB in the following manner:

- The Contracts Officer and the SPB will be responsible for the review and determination of materials claimed to be confidential that are related to:
 - The Solicitation Process
 - Staffing Issues (i.e. project team identification, titles, resumes, etc.)
 - Contract Language
- The Agency will be responsible for the review and determination of materials claimed to be confidential that are related to the scope of service and/or the solicitation specifications. ***The responsibility of providing the SPB with the decision of confidentiality will fall solely on the authorized signatory listed on the submitted Requisition Form.***

A recommended “timely” timeframe should be *no greater than 10 working days*, with exceptions being granted for exigent circumstances. The Contracts Officer should make clear to the Agency their role in determining what constitutes a “trade secret” prior to opening the responses.

The following guide outlines the steps that a Contracts Officer and/or Issuing Agency should follow when s/he must determine whether confidential information exists and how to handle it when it does.

I. DETERMINING CONFIDENTIALITY

a) What is Confidential Information?

- MCA 18-4-304(4): “After the proposals have been opened at the time and place designated in the request for proposals and reviewed by the procurement officer for release, proposal documents may be inspected by the public, subject to the limitations of:
 - a) the Uniform Trade Secrets Act, Title 30, chapter 14, part 4;
 - b) matters involving individual safety as determined by the department; and
 - c) other constitutional protections.”
- MCA 18-4-303(3) provides for the same protections for confidential information provided in a competitive sealed bid.

b) What constitutes a “trade secret”?

- ***Uniform Trade Secrets Act***

MCA 30-14-4(4): "Trade secret" means information or computer software, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- a) derives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use; and
- b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

- When determining if information constitutes a "trade secret", Contract Officers and Agencies should ask themselves the following questions¹:
 - How extensively is the information known to employees, the public, or competitors? The most important characteristic of a trade secret is, by definition, its secrecy. The more extensively circulated the information is, the less likely it will be considered a protected trade secret.
 - To what extent did the bidder/offeror take security measures to preserve the secrecy of the information? To ensure security of its information, the bidder/offeror would have expended time and money. Businesses incur these costs because they believe that the information provides them with a competitive advantage.
 - What is the value of the information and to what effort did the company expend to create the information? The more time, effort and money expended in developing the information, the more likely it is a protected trade secret.
 - How easily can the information be duplicated? The more easily information can be obtained or replicated, the less likely it is a protected trade secret.

c) Department Determined Confidentiality (case-by-case determination):

- Individual Safety:
 - E.g. personal information – defined as any government-issued personal identification number or financial account information, per 2-6-501(4), MCA – reported within the solicitation.
- Constitutional Protection:
 - E.g. the Right of (Individual) Privacy as guaranteed by the Montana Constitution, Article II, Section 10.

II. MANAGING CONFIDENTIAL INFORMATION

a) Evaluating Solicitations with Confidentiality Requests

- i) When confidentiality issues arise, bidders/offerors must complete the Affidavit of Trade Secret form (found at: <http://gsd.mt.gov/ProcurementServices/rfpprocess.mcpX>), including the writing

¹ See <http://www.finemanlawfirm.com/fineman/index.cfm/publications/publication-details/?dynapsifuse=showdetails&pkid=209&tableid=2>

requirement specifying what information they are seeking to be labeled as “confidential” and the validity of their request.

- ii) Upon receipt of an affidavit, the Contract Officer and/or the Issuing Agency must determine whether the information should be deemed confidential or not (see above.)

b) Post-Award Confidentiality

i) Confidentiality Provisions in Contracts

Where the parties to a contract agree that info is confidential, the contract should include a confidentiality clause setting out how the parties will deal with the confidential information.

- *E.g.: A Party must not, without prior written consent of the other Party, disclose any Confidential Information of the other Party to a third party. The Parties may agree in writing after the date of this Contract that certain additional information is to constitute Confidential Information for the purposes of this Contract.*

Confidential Information means information that is 1) by its nature confidential; and 2) is included in Clause X of this Contract.

Agencies and Contracts Officers should consult their respective legal counsel for further clarification on contract confidentiality language.