



Contractors – Protect Your Confidential Information from Wrongful Disclosure

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Introduction

Unit pricing and other confidential information contained within your bid documents may be recognized as a trade secret under Ohio's Uniform Trade Secret Act and similar federal laws. What does that mean? In simple terms, it means that even on a public project subject to applicable public records laws, contractors can prevent disclosure of their trade secrets to the world, including their competitors.

In today's world, it is all too common that public records requests are made by competitors to uncover the confidential information of their competitors. Often, these requests are even encouraged by public owners or their consultants to drive down costs. The construction industry is no exception. That is especially the case with bid information submitted on publicly owned or funded projects. With competition on the rise, bid contestants are aggressively pursuing every opportunity they have to gain an advantage. Although unfair and potentially unlawful, trade secrets are often wrongfully disclosed. However, with some advanced planning, contractors can seek to prevent this sort of abuse by asserting and enforcing their trade secret rights. Even in a public setting, the wrongful disclosure of trade secrets could entitle a contractor to injunctive relief to prevent disclosure, damages – including extraordinary damages in the form of punitive damages, and attorney's fees.

Trade Secret Law

Ohio's Uniform Trade Secrets Act defines a trade secret as information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

- (1) It 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.
 - (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
- R.C. 1333.61(D).

The unauthorized disclosure or acquisition of trade secrets is prohibited under Ohio law. Records in the possession of a government agency are generally subject to disclosure under Ohio's Public Records Act, but trade secrets are exempt. This exemption can be a valuable tool for contractors because it can preclude proprietary information customarily contained in bid documents, such as

unit pricing, from being publicly disclosed. To protect these assets, it is essential that contractors are proactive. For example, a contractor should consider the following: (1) Where appropriate, add the trade secret protections noted below, and (2) Confirm in a pre-bid meeting, and in writing, that the public agency will not release trade secrets contained in bid information in the event of a public records request.

Protecting Your Trade Secrets

The following are steps you can consider before disclosing proprietary information that will assist in enforcing your trade secrets in the event of a threatened or actual disclosure:

1. Identify your proprietary information and treat it accordingly. Establish a process for managing and maintaining sensitive information, including limiting access to that information both inside the company and to the outside world. Not every employee necessarily needs to know every piece of information.
2. Educate your employees on confidentiality. When hiring, have employees sign a non-disclosure agreement. Similarly, when an employee departs the company, have him/her reaffirm their obligations concerning confidentiality.
3. Include an express and conspicuous notice in any information provided to a public agency that it is confidential and contains trade secrets.
4. Identify the specific section(s) of the document that contain(s) trade secrets (not every word or sentence in a bid document is a trade secret) and make it clear to anyone reading the document that those portions are protected trade secrets.
5. Require a non-disclosure agreement with the public agency, when possible.

Conclusion

It is essential to move quickly if you learn that a document containing your trade secrets is the subject of a public records request. Public agencies are often under pressure to turn around record requests promptly. For them, disclosure is the path of least resistance. The words that will stop them dead in their tracks are "Trade Secret". Agencies understand that the wrongful disclosure of trade secrets can have serious consequences.

The key: Be proactive and do not underestimate the value of your confidential information or your ability to protect it. If managed properly, the law is on your side.

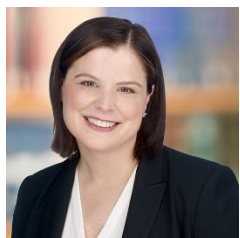


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