

BEFORE THE MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of _____ *

Under _____ * Docket No. MSBCA _____

IFB/RFP/Contract No. _____ *

* * * * *

**AGREEMENT AND ORDER PROTECTING
CONFIDENTIALITY OF DOCUMENTS AND INFORMATION**

[for use in protest appeals]

Upon the parties’ agreement to the terms and conditions set forth herein, it is hereby ORDERED by the Maryland State Board of Contract Appeals (“MSBCA”), that any document or portion thereof designated as “Confidential Information” by any of the parties hereto (the “Producing Parties”) shall be used, shown, or disclosed by the party obtaining discovery thereof (the “Discovering Parties”) only as follows:

1. That in connection with this protest appeal [Procuring Agency] (“Respondent”) shall make available to counsel for Appellant and to counsel for the Interested Party, upon their stipulation and agreement to the terms set forth herein, certain categories of documents that may contain confidential, sensitive, proprietary, and/or trade secret information (“Confidential Information”).
2. The parties will be responsible for designating those materials in their possession/control as Confidential Information before production by Respondent. To that end, counsel for Appellant and the Interested Party must designate for Respondent any materials in their technical and financial proposals that they believe deserve the protections for Confidential Information provided in this Order before production. Similarly, Respondent shall designate as Confidential Information the materials in its possession/control before production.

3. Confidential Information shall be made available only to “Qualified Persons,” as defined by Paragraph 5 of this Order, who shall have read this Order and who shall agree to be bound by its terms. No other persons shall have access to Confidential Information without: (a) written approval of all parties or (b) an Order of the MSBCA. In addition, no other person shall be informed of such Confidential Information by any person having access to it, except as is otherwise provided by this Order. Confidential Information shall not be disclosed to or discussed with any employee or other representative of Appellant or the Interested Party except as provided in this Order.

4. Counsel of record for the party obtaining Confidential Information pursuant to this Order (“Obtaining Party”) shall maintain a list of the names and addresses of all persons to whom Confidential Information is disclosed and shall make that list available to counsel for the Designating Party or the MSBCA upon request from counsel or the MSBCA.

5. “Qualified Persons” as used herein means:

A. members of the MSBCA and its staff;

B. counsel of record for each party who have signed this Confidentiality Order and Agreement;

C. counsel of record, attorneys, paraprofessionals, stenographic and clerical employees (none of whom shall be current or former officers or agents of Appellant or the Interested Party), and of the Office of the Attorney General assisting and working with such counsel in representing the parties to this appeal, provided that no Confidential Information shall be provided to, discussed with, or disclosed to any consultants, experts, independent contractors, and other personnel hired or retained specifically by those organizations in connection with this appeal (“Third Parties”),

unless such Third Parties have been identified to and approved by counsel for the other parties in this appeal.

- D. Technical consultants or experts designated by any party must be identified by name, address, and employer, and must be approved by counsel for the other parties before being permitted to view any Confidential Information. No technical consultants or experts may be officers, employees, or agents of Appellant or the Interested Party (except where an individual is an agent of Appellant or the Interested Party solely for the purpose of their consultation or testimony on this matter). For purposes of Paragraph 5.C. and this Paragraph 5.D., “approved” shall mean that no written objection has been made pursuant to Paragraph 7.

Before receiving or reviewing any Confidential Information, all Qualified Persons shall review this Order and shall agree to be bound by it by providing the written certification required by Paragraph 7 of this Order.

6. Notwithstanding any other provision of this Order, nothing herein shall preclude any party from providing access to or discussion of the Confidential Information with those individuals who had possession, custody, control of, or access to the Confidential Information before the commencement of this appeal, specifically as follows:

- A. All of the documents and information described in Paragraph 1 may be discussed with (including during testimony at hearing(s) in this appeal, if applicable) the procurement officer, members of the evaluation committee, procurement staff who participated in the procurement, and those employees of the State of Maryland who are responsible for assisting in this litigation or participating in the award or administration of the subject contract;

- B. The technical and financial proposals of Appellant may be discussed with (including during testimony at hearing(s) in this appeal and depositions, if applicable) employees and representatives of Appellant; and
- C. The technical and financial proposals of the Interested Party may be discussed with (including during testimony at hearing(s) in this appeal and depositions, if applicable) employees and representatives of the Interested Party.

7. All persons to whom Confidential Information is to be disclosed, except those described in Paragraph 6, shall execute a Certification in the form attached hereto as Exhibit A, stating that they have read this Order and agree to be bound by its terms and conditions. An executed original of that Certification shall be filed with the MSBCA and copies provided to all counsel of record before such persons are given access to Confidential Information.

- A. A party shall have two (2) working days of State government from counsel's receipt of a Certification in accordance with this Order to provide notice to counsel for the other parties, in writing, via regular first-class mail or electronic mail, of any objection to the disclosure of Confidential Information. The notice of objection shall state the objection and grounds therefor, and make a particular and specific demonstration of facts, as distinguished from general, conclusory statements that:

(1) some injustice, prejudice, or consequential harm will result if confidential information is disclosed; and (2) the execution of a Certification is not sufficient to protect Confidential Information from wrongful disclosure.

- B. If the objection is not withdrawn or the parties cannot resolve the objection within five (5) working days of State government from receipt of the notice of objection,

then the party seeking disclosure of Confidential Information shall file a motion to compel. The motion shall attach as an exhibit thereto a copy of the notice of objection.

C. The party seeking to protect the documents and information described in Paragraph 1 shall have the burden of demonstrating why such documents and information should be protected from disclosure.

D. In the event a written objection is made, Confidential Information shall not be disclosed to such person(s) subject to the objection unless and until the objection is withdrawn by the objecting party, resolved by the parties, or until the MSBCA issues an order requiring said disclosure.

8. Confidential Information shall be used by the Obtaining Party solely for the above-captioned appeal and shall not be disclosed or used for any other purpose or proceeding whatsoever. Notwithstanding the foregoing, Confidential Information obtained pursuant to this Order may be used in a protest filed with Respondent and in any resulting appeals related to the procurement giving rise to this appeal. The production of Confidential Information pursuant to this Order and Agreement shall not waive any privilege that may attach to such Confidential Information. It is agreed that any use of Confidential Information for any purpose other than this appeal or a protest or appeal thereof related to the procurement giving rise to this appeal shall, without limitation, constitute an abuse of process actionable at law or in equity. Any violation of this Order shall give rise to a right to injunctive relief in state or federal court, as appropriate. In addition, if this procurement is reopened because of these proceedings either under the present or a new solicitation and Confidential Information appears or is used, in whole or in part, in preparation of or in any subsequent proposal submitted by any party upon such reopening or in any negotiations relating thereto, that party shall be disqualified from the award of the subject contract. Notwithstanding the foregoing, nothing in this Order is intended to restrict the parties' use of their own Confidential

Information for any purpose.

9. Only Qualified Persons may be present for testimony or argument presented at the hearing of this matter when Confidential Information is discussed. All other persons shall be excluded from the hearing room and prohibited access to any transcripts, notes, or recordings of the hearing.

10. Nothing contained in this Order shall prejudice or restrict the respective rights of the parties to bring this Order to the attention of the tribunal in any subsequent litigation that may arise between the parties.

11. All documents containing Confidential Information that are filed with the MSBCA shall be filed in sealed envelopes or other appropriately sealed containers, which shall be labeled with the title of this action, the words “CONFIDENTIAL INFORMATION,” and a statement substantially in the following form:

This envelope is sealed pursuant to the Order of the Maryland State Board of Contract Appeals and contains information designated confidential in this case and is not to be opened nor its contents displayed or revealed except by Order of the Maryland State Board of Contract Appeals or pursuant to stipulation of all parties to this action.

The envelope or container shall not be opened without further order of the MSBCA except by Qualified Persons who shall return the document to the MSBCA’s Clerk in a sealed envelope or container. The MSBCA’s Clerk is directed to maintain such Confidential Information in a separate portion of the MSBCA’s files not available to the public.

12. Paper documents or other materials that are designated as Confidential Information shall be stamped “Confidential” on each page containing any Confidential Information, except in the case of multi-page documents bound together by staple or other binding, the word “Confidential” shall be stamped on the first page of the document for the entire document to be

designated as Confidential Information, and/or by designating in writing by Bates stamping those documents that are “Confidential.” Electronically disclosed documents or material may be designated as Confidential Information by stamping “Confidential” on the medium storing the electronic documents or material, or by designating as “Confidential” individual documents contained on the medium storing the electronic documents or material. This Order shall apply to other materials designated as Confidential Information by a party and produced to another party. Such information shall include, but is not limited to, unredacted copies of the protests and appeals filed by Appellant.

13. When any party sends or receives documents in connection with this appeal that are not designated as Confidential Information, including proposed redacted versions or documents containing Confidential Information, the parties agree to refrain from releasing the documents to anyone who is not a Qualified Person until the end of the second working day following receipt of the documents by all parties. Inadvertent failure to designate any materials produced as Confidential Information shall not constitute a waiver of such claim and may be corrected by prompt supplemental written notice designating such material as Confidential Information pursuant to this Paragraph. The party or parties receiving such supplemental written notice shall thereafter treat materials so designated as Confidential Information, and such materials shall be fully subject to this Agreement as if they had been initially so marked. An individual who is not a Qualified Person and receives materials designated as Confidential Information shall sign Exhibit A.

14. If any party produces any document that is protected as attorney work product or as an attorney-client communication, or if the State produces any document that is protected by a deliberative process privilege or by an executive privilege, the producing party may, within five

(5) days after the producing party actually discovers that such inadvertent production occurred, amend its response and notify the receiving party in writing that such document was inadvertently produced and should have been withheld as privileged. Once such notice is provided, the party receiving notice must promptly return the specified document and all copies thereof. By complying with this obligation, the receiving party does not waive any right it has to challenge the assertion of privilege and request an order denying such privilege.

15. Within thirty (30) days after the conclusion of this appeal, including any subsequent appeals, all documents designated or treated as Confidential Information, and all copies, notes, or memoranda (and all copies thereof) referring or relating to such Confidential Information, shall be returned to the Office of the Attorney General or, in the alternative, counsel for the Obtaining Party shall certify to all counsel that all Confidential Information, including notes or memoranda referring or relating to such Confidential Information, has been destroyed. The provisions of this Paragraph shall not apply to Respondent, the Office of the Attorney General, or the MSBCA.

16. Nothing in this Agreement precludes any party from objecting to the use or introduction of any documents or potential witnesses referred to herein in any pleading or hearing related to this or any subsequent matter.

17. The terms of this Order shall survive any final disposition of this appeal.

STIPULATED AS TO FORM AND CONTENT:

COUNSEL FOR APPELLANT:

[address]

COUNSEL FOR RESPONDENT:

[address]

[printed name]

[printed name]

COUNSEL FOR INTERESTED PARTY:

[address]

[printed name]

ORDER

It is this _____ day of _____, so ORDERED.

Exhibit A

CONFIDENTIALITY AGREEMENT AND AFFIDAVIT

_____ affirms and states as follows:

1. I am _____ and am employed as a _____ by _____.

2. I understand that it may be necessary for me to review confidential documents, or to be provided with information derived from confidential documents (collectively herein “Confidential Information”), as defined in the Agreement and Order Protecting Confidentiality of Information dated _____ (the “Protective Order”), which was entered by the Maryland State Board of Contract Appeals on the _____ day of _____, 20____, in _____.

3. I have received and read a copy of the Protective Order, and I fully understand its provisions. I understand and agree to be bound by the terms of the Protective Order and to be personally responsible for preserving the confidentiality of documents and information in accordance with the Protective Order.

4. I will not disseminate any Confidential Information to any person at any time, except in accordance with the strict terms and conditions of the Protective Order.

5. I will not use any Confidential Information at any time for any person or entity for any purposes other than as provided by the Protective Order.

6. I agree to be bound by the terms of the Protective Order as any other member of the Bar of the Court of Appeals of Maryland would be if participating in these proceedings as counsel.

7. The only persons with whom I shall have contact in connection with discussions about Confidential Information are the counsel of record in the proceeding that is the subject of the Protective Order and other Qualified Persons as defined in the Protective Order.

8. I agree to notify immediately the counsel who have signed the Agreement and Order and the Maryland State Board of Contract Appeals if I learn that the terms of the Protective Order or this Affidavit have been violated.

9. I hereby declare under the penalty of perjury that the matters set forth herein are true and correct.

Print name: _____

Date: _____