

Response to Questions on the RFI

Question:

Will NASA protect the confidentiality of submissions to the RFI?

Answer:

NASA will not publicly disclose proprietary information obtained as a result of the RFI. To the full extent that it is protected by law and regulations, information properly identified by a respondent as Proprietary or Confidential will be kept confidential.

So yes, if information is properly marked as proprietary, NASA will protect it as such.

Of course if the data is publicly available; or it has been made available by the owners to others without obligation concerning its confidentiality; or it is already available to the Government without obligation concerning its confidentiality; or it is required to be disclosed pursuant to Federal statute, law, regulation, or valid court order – then it isn't proprietary information.

As far as the provisions of the Freedom of Information Act (FOIA) are concerned, for example, if someone submitted a FOIA for “all responses to NASA’s RFI,” NASA would handle it in accordance with established FOIA procedures and review possible responsive records for any applicable FOIA exemptions. Exemption 4 of the FOIA covers, “trade secrets and commercial or financial information obtained from a person and privileged or confidential” (also known as proprietary information). The presumption would be that if the information submitted to NASA was properly marked as proprietary, the Agency would withhold it under Exemption 4.

In addition, federal government employees are subject to the Trade Secrets Act (18 USC 1905) which prohibits disclosure of information that “concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association.”

Below are relevant sections of the Federal Acquisition Regulation (FAR):

3.104 - 4 - Disclosure, protection, and marking of contractor bid or proposal information and source selection information.

(a) Except as specifically provided for in this subsection, no person or other entity may disclose contractor bid or proposal information or source selection information to any person other than a person authorized, in accordance with applicable agency regulations

or procedures, by the agency head or the contracting officer to receive such information.

(b) Contractor bid or proposal information and source selection information must be protected from unauthorized disclosure in accordance with 14.401, 15.207, applicable law, and agency regulations.

(d) Except as provided in paragraph (d)(3) of this subsection, the contracting officer must notify the contractor in writing if the contracting officer believes that proprietary information, contractor bid or proposal information, or information marked in accordance with 52.215-1(e) has been inappropriately marked. The contractor that has affixed the marking must be given an opportunity to justify the marking.

3.104-1 Definitions

Contractor bid or proposal information means any of the following information submitted to a Federal agency as part of or in connection with a bid or proposal to enter into a Federal agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

(1) Cost or pricing data (as defined by 10 U.S.C. 2306 <<http://vlex.com/vid/19222341>> <<http://vlex.com/vid/19222341>> a(h)) with respect to procurements subject to that section, and section 304A(h) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254 <<http://vlex.com/vid/19243088>> <<http://vlex.com/vid/19243088>> b(h)), with respect to procurements subject to that section.

(2) Indirect costs and direct labor rates.

(3) Proprietary information about manufacturing processes, operations, or techniques marked by the contractor in accordance with applicable law or regulation.

(4) Information marked by the contractor as contractor bid or proposal information in accordance with applicable law or regulation.

(5) Information marked in accordance with 52.215-1(e).

It is important to clarify that although the language above references “contractor bid or proposal information,” and the subject matter here is a response to a Request for Information (RFI) (as opposed to bids or proposals submitted in response to a solicitation), the Agency’s position is that the same protections against unauthorized disclosure would apply. In summary, as long as the party submitting the information appropriately marks the information it believes to be protected as proprietary, then that information cannot be disclosed outside the Government for any purpose other than to

evaluate the information. If properly marked, it also would most likely be protected from FOIA release under Exemption 4. All submitters should, of course, consult with their legal counsel for further guidance (details) as how to best protect their proprietary information that they plan to submit, as NASA cannot specifically advise entities in this regard.

I hope this answers your question. I will also post the answer on the IPP web site at <http://www.nasa.gov/offices/ipp/home/index.html>, under the RFI itself.

Please let me know if you have additional questions.

Sincerely,

Diana P. Hoyt