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May 18, 2022

Teresa Deaton
Strategic Sourcing Analyst
Indiana Department of Administration
Procurement Division
402 West Washington Street, Room W468
Indianapolis, Indiana 46204
tdeaton@idoa.in.gov

Re: Confidential Information Designation
Request for Proposal: 22-70230
IEDSS System Maintenance and Operations

Dear Ms. Deaton:

In accordance with Sections 1.15 and 2.2.5 (Confidential Information) of the above-referenced Request for Proposal issued by the State of Indiana Department of Administration on behalf of the FSSA Division of Family Resources (the "State"), this letter serves to identify the information contained in Deloitte Consulting LLP's Best and Final Offer ("Deloitte BAFO") which it claims to be confidential and exempt from public disclosure pursuant to the Indiana Access to Public Records Act ("APRA"). Deloitte Consulting LLP ("Deloitte Consulting") requests the State maintain the confidentiality of the specific items identified herein, as required under applicable Indiana law.

Deloitte Consulting provides professional consulting services to government entities and companies around the world. This services market is a dynamic market with many participants vying for a limited universe of clients. In this regard, Deloitte Consulting objects to the release of certain information included in the Deloitte BAFO on the basis, among other things, that it will cause competitive harm to Deloitte Consulting if it is released by the State.

The Indiana Access to Public Records Act provides the following mandatory exemptions from public disclosure:

- (a) The following public records are excepted from section 3 [IC 5-14-3- 3] of this chapter and may not be disclosed by a public agency, unless access to the records is specifically required by a state or federal statute or is ordered by a court under the rules of discovery:

* * *

- (4) Records containing trade secrets.
- (5) Confidential financial information obtained, upon request, from a person. However, this does not include information that is filed with or received by a public agency pursuant to state statute.

Ind. Code Ann. §5-14-3-4(a).

The definition of “trade secret” contained in the Indiana Uniform Trade Secrets Act applies for purposes of the Access to Public Records Act. See Ind. Code Ann. §5-14-3-2(t). That definition is as follows:

“Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (1) 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
- (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Ind. Code Ann. §24-2-3-2.

“Thus, a protectable trade secret has four characteristics: (1) information, (2) which derives independent economic value, (3) is not generally known, or readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and (4) the subject of efforts reasonable under the circumstances to maintain its secrecy.” *Hydraulic Exch. & Repair, Inc. v. KM Specialty Pumps, Inc.*, 690 N.E.2d 782, 785-86 (Ind. Ct. App. 1998). Indiana Courts have held that “the threshold factors [to be considered] are the extent to which the information is known by others and the ease by which the information could be duplicated by legitimate means.” *Franke v. Honeywell, Inc.*, 516 N.E.2d 1090, 1093 (Ind. App. 1987). Importantly, Indiana Courts have found trade secrets to include “customer lists, pricing, labor rates, overhead costs, suppliers, designs, blueprints, and specific needs of customers.” *Infinity Prods. v. Quandt*, 810 N.E.2d 1028, 1032 (Ind. 2004).

As set forth below, the Protected Information is exempt from disclosure under the APRA which permits an agency to withhold trade secrets and confidential financial information if disclosure would cause substantial harm to the competitive position of a company. The Protected Information falls within the meaning of said exemption and is therefore exempt from disclosure for two independent reasons.

First, the Protected Information is *not* the kind of information that Deloitte Consulting customarily discloses to the public and was provided voluntarily to the State with the reasonable expectation that such information would not be released. *Second*, disclosure of the Protected Information would cause substantial harm to Deloitte Consulting’s competitive position by permitting its competitors to leverage Deloitte Consulting’s innovative business strategies, methodologies and approaches, all of which have significant commercial value and represent the investment of substantial time, effort and money.

I. Identity and Qualifications of Personnel and Subcontractors.

The Deloitte BAFO includes confidential information and protected trade secrets concerning the identity and qualifications of individual Deloitte Consulting personnel and its proposed subcontractors, the compilation of which Deloitte Consulting deems trade secret. See *1 MILGRIM ON TRADE SECRETS §1.09[8][g]* (2020) (“...[b]usiness information which can be protected under a trade secret theory...[includes]...[i]nformation concerning...effectiveness and good sales performance of key sales and other personnel...”). Deloitte Consulting holds the identity of its personnel and proposed subcontractors in the strictest confidence.

Disclosure of this Protected Information would injure Deloitte Consulting's competitive position by providing competitors with insight into the manner in which Deloitte Consulting assembles individuals with particular types of education, experience and talents into project teams. In addition, disclosure of such information would allow Deloitte Consulting's competitors with visibility into how we may position subcontracts for the potential engagement. Deloitte Consulting's competitors could use this Protected Information to free ride on its years of experience by assembling project teams virtually identical to those of Deloitte Consulting in terms of composition and qualifications. Providing competitors with the identification of our firm's resources not only would result in placing Deloitte Consulting in a less competitive position in the future but could also compromise our ability to perform in the present, should those resources be pirated by competitors.

Because Deloitte Consulting considers its staffing strategy and proposed team to be trade secrets, Deloitte Consulting does not customarily release its staffing arrangements to third parties. Further, in order to protect the confidentiality of certain information, not all team members are provided access to all sections of Deloitte Consulting's proposals. To the extent Deloitte Consulting must disclose information to its subcontractors and/or teaming partners, prior to doing so, Deloitte Consulting ensures that all subcontracts and/or teaming agreements to which Deloitte Consulting is a party contain restrictions on the release of information between Deloitte Consulting and its subcontractors and/or team members.

Accordingly, Protected Information regarding the identity and qualifications of Deloitte Consulting personnel and the composition of Deloitte Consulting's project teams, including its proposed subcontractors, is exempt from disclosure under the APRA. *See Prof'l Review Org. of Fla., Inc. v. Dep't of Health and Human Servs.*, 607 F. Supp. 423, 425 (D.D.C. 1985) (information regarding contractor's organizational structure and staffing was exempt from disclosure under the FOIA); *Audio Technical Services LTD. v. Department of the Army*, 487 F. Supp. 779, 782 (D.D.C. 1979) (same for "biographical data on key . . . employees").

Based upon this Section, the provisions contained in the Deloitte BAFO listed on Attachment A to this letter and as set forth in the attached redactions should be withheld from disclosure by the State.

II. Pricing.

The Cost Proposal contained in the Deloitte BAFO reflects Deloitte Consulting's costs to "manufacture" its product. Deloitte Consulting does not sell goods; Deloitte Consulting's product is the knowledge of its employees and their knowledge services. This information is not specific to the Deloitte BAFO; this information goes to the heart of Deloitte Consulting's business of providing services. This "compilation of information" regarding the rates Deloitte Consulting charges for the knowledge of its employees is used in every Deloitte Consulting proposal, which includes proposals for jobs at private entities as well as government agencies.

This information—especially coupled with information available in the Deloitte BAFO and proposal regarding how Deloitte Consulting staffs projects like the State project—constitutes the direct "formula" for Deloitte Consulting's approach to staffing many different projects. This is not merely information as to what overall price Deloitte Consulting would charge for the State's project, or what levels of staff it would utilize. This information would reveal Deloitte Consulting's measured, focused approach for providing exceptional client services while maximizing revenue for Deloitte Consulting. This information would be extremely valuable to a competitor and should be withheld as trade secret

information and is clearly protected from disclosure as a trade secret. *See Ackerman v. Kimball Int'l*, 634 N.E.2d 778 (Ind. App. 1994) (customer lists and pricing information constitute trade secrets); *Orbitz v. Ind. Dep't of State Revenue*, 997 N.E.2d 98, LEXIS 25, 2013 WL 5630987 (Ind. Tax 2013) (if competitors have access to pricing information, they could possibly gain a competitive advantage by negotiating better rates with clients; and as such pricing is protected from public disclosure pursuant as a trade secret under the APRA).

While the public may have an interest in the aggregate price of a bid proposed to a government agency, there is no similar public interest in the hourly billing rates for particular employees or estimated project or FTE hours. The aggregate price may reflect the costs to the government, but the hourly rates are actually costs incurred by Deloitte Consulting in "manufacturing" its services and include staff time, travel costs, overhead, and other costs. The release of even one element of a cost structure has been found to result in substantial competitive harm, because release of such "separate pieces of this financial puzzle would enable competitors, who may somehow have gathered other pieces, to complete the picture." *Braintree Electric Light State v. DOE*, 494 F. Supp. 287, 290 (D.D.C 1980); *see also Sterling Drug, Inc. v. Federal Trade Commission*, 450 F.2d 698, 708-709 (D.C. Cir. 1971); *Timken Co. v. Customs Service*, 531 F. Supp. 194 (D.D.C. 1981); *Timken Co. v. Customs Service*, 491 F. Supp. 557 (D.D.C. 1980).

Deloitte Consulting's costs and pricing information is very valuable to the company, and it would be very valuable to its competitors. The costs and pricing information in the Deloitte BAFO reveals a roadmap for successful staffing on projects. If a competitor was given access to the details of Deloitte Consulting's costs and pricing used to calculate the bid submitted in the Deloitte BAFO, the competitor could "reverse engineer" Deloitte Consulting's time and work estimates for each piece of the overall service package that Deloitte Consulting has offered the State. By combining the employee hourly rate data with the information about the duration of each step of the whole project and the price for each step, an informed competitive company could calculate estimates of the type and duration of staffing used for each step of the project. These estimates would reveal the formula that Deloitte Consulting employs when designing its consultation projects. This is not information that is limited to a single proposal; it is information that is ubiquitous throughout Deloitte Consulting's operations. The Supreme Court of Indiana found in *Amoco Prod. Co. v. Laird*, 622 N.E.2d 912 at *918, LEXIS 152, 30 U.S.P.Q.2D (BNA) 1515 at *1519, 62 U.S.L.W. 2294, 128 Oil & Gas Rep. 484 (Ind. 1993) that "... information which can be duplicated only by an expensive and time-consuming method of reverse engineering, for instance, could be secret."

Deloitte Consulting has invested considerable sums of money and amounts of time to develop its pricing and staffing expertise. Without access to the types of information about costs and pricing, Deloitte Consulting's competitors would not be able to acquire or duplicate the expertise that Deloitte Consulting has built. Deloitte Consulting's pricing methodology is not known outside of the company except to those who are party to its agreements. The agreements are available and known inside the company on a need-to-know basis. Hard copies are maintained in restricted access files. Electronic copies are likewise restricted. Hence, this Protected Information amounts to trade secret information. *See Infinity Prods. v. Quandt, supra*.

Based upon this Section, the provisions contained in the Deloitte BAFO listed on Attachment A to this letter and as set forth in the attached redactions should be withheld from disclosure by the State.


III. Conclusion.

For the reasons stated above, Deloitte Consulting respectfully requests that the State protect from disclosure the categories of information discussed herein and as further identified on the enclosed Attachment A and the attached redactions, including its personnel, subcontractors and its pricing. Release of Deloitte Consulting's Protected Information would impair Deloitte Consulting's competitive position, undermine the integrity of the procurement process and may discourage Deloitte Consulting and other qualified firms from submitting proposals in the future.

Thank you for your consideration of this matter. In the event that the State disagrees with the information that Deloitte Consulting has identified as confidential and exempt from public disclosure, please contact me in advance of the release of any such Deloitte Consulting related information so that we can discuss the matter.

Sincerely,

DELOITTE CONSULTING LLP

By: 
Seth Mandel, Principal

Enclosures:

- 1) Attachment A
- 2) Redacted Deloitte BAFO Response

ATTACHMENT A
Confidential Information Designation

Deloitte Consulting LLP requests the following provisions of the Deloitte BAFO be withheld from disclosure by the State pursuant to §§5-14-3-4(a)(4), 5-14-3-4(a)(5), and 5-14-3-2(t) of the Indiana Access to Public Records Act (APRA) and Burns Ind. Code Ann. §24-2-3-2. We have organized our list in accordance with the two (2) key elements as outlined in our letter dated May 19, 2022.

I. Identity and Qualifications of Personnel and Subcontractors

Section # / Page #	Description of Confidential/Trade Secret Material
Attachment A MBE/WBE Certifications Pages 1-21	Description of Deloitte's proposed subcontractors, including names, contact information, signatures, qualifications, and percentage of subcontract. This section also contains the name, contact information, and signature of Deloitte personnel.

II. Pricing

Section # / Page #	Description of Confidential/Trade Secret Material
Attachment A MWBE Form Pages 2-4	Details of BAFO proposal pricing as it relates to our scope of work including subcontractors
Attachment D Cost Proposal Pages 2-10	Details regarding our professional fees, including hourly rates and estimated hours that Deloitte deems trade secret.