

**TITLE: CIB 96-25 - Freedom of Information: New Statute on Disclosure of Contractors' Proposals**

October 15, 1996

MEMORANDUM FOR ALL CONTRACTING OFFICERS AND NEGOTIATORS

TO: Distribution List FAC

FROM: M/OP, Marcus L. Stevenson, Procurement Executive

SUBJECT: Freedom of Information: New Statute on Disclosure of Contractors' Proposals

**CONTRACT INFORMATION BULLETIN 96-25**

Prior to September 23, 1996, contract proposals were subject to disclosure under the Freedom of Information Act (FOIA) except to the extent that a FOIA exemption was applicable to specific parts of the proposals. This meant that the contracting office and the FOIA staff did line-by-line reviews to determine which portions were releasable and which were not releasable.

Section 821(b) of the National Defense Authorization Act for FY 1997 (Public Law No. 104-201), however, now prohibits the release of contractor proposals in the possession or under the control of a Federal executive agency unless the proposal has been set forth or incorporated by reference into a contract. This prohibition applies only to proposals submitted in response to a solicitation for competitive proposals.

In order to eliminate the need for contracting staff and FOIA staff to review proposals and determine which parts are or are not releasable, I strongly suggest that you do not incorporate proposals by reference into contracts. If some portion of the proposal needs to be made a part of the contract, that portion, and that portion only, should be expressly stated in the contract. Any portion of the proposal which is included in the contract will, of course, be subject to review by FOIA staff to determine whether it's releasable to a requestor, but the remainder of the proposal (which might include information the offeror would not want to release) should be protected from release under the terms of Section 821(b).

When it is necessary to incorporate part of a proposal by reference, it would be useful to reviewers later if the contract file clearly indicates what portions of the proposal have been so incorporated.

This prohibition on release of proposals applies only to proposals received as part of a competitive negotiated procurement. We construe that it would apply to limited competitions, including competitive 8(a) procurement. While not absolutely clear, it would appear not to apply to competitions for task orders unless a solicitation were issued requesting proposals. Also, the prohibition only applies to procurement and not to assistance instruments.