

ARMED SERVICES BOARD OF CONTRACT APPEALS
MODEL PROTECTIVE ORDER
September 26, 2016, Rev. May 4, 2020

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
ABC, Inc.) ASBCA No. 00011

ABC, Inc. (“ABC” or “appellant”) and the United States Government, acting through the XYZ Agency (“XYZ” or “government”) (collectively, the “parties”), agree to the terms of this Protective Order (“Protective Order”), which limits disclosure of certain documents and information produced or otherwise submitted in the above-captioned appeal¹ pending with the Armed Services Board of Contract Appeals (“Board”). Nothing in this Protective Order shall be construed as relieving the parties hereto of any legal obligation that would otherwise apply.

1. Definitions.

a. When used in this Protective Order, the word “documents” means all written, electronic, recorded, or graphic material, including, but not limited to, responses to requests for production of documents or things, documents or things produced, interrogatory answers, requests for admission and responses thereto, briefs, memoranda, affidavits, exhibits, deposition transcripts and any portion of any papers filed with the Board that quote from or summarize any of the foregoing.

b. “Protected Information” means information disclosed in discovery or other proceedings in this appeal that a party believes would be exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b)(1)-(9), to include business proprietary information, personally identifiable information, and source selection sensitive information, any of which would cause harm or a violation of privacy if it were to be publicly disclosed, which has been marked in accordance with Paragraph 2.

c. Material shall be deemed Protected Information when so designated in the manner described in Paragraph 2. After disclosure of any Protected Information, all copies made of that material, and all notes made therefrom and all references made thereto, of any kind whatsoever, shall also constitute Protected Information.

¹ References to “appeal” or “this appeal” herein shall be read in the plural in the case of multiple appeals.

2. Marking.

a. At the time of producing documents, the producing party shall designate documents containing Protected Information by marking all pages of such documents with a legend reading “Contains Protected Information – Subject to ASBCA Protective Order.” The specific Protected Information within the document shall be expressly marked as “Protected Information.” When an entire document contains Protected Information such that specifically marking the Protected Information would be impossible or impracticable, the entire document may be marked as protected by including, with the above legend, the phrase, “Entire Document”.

b. For any Protected Information that a party produces in electronic form, the producing party shall designate the electronic material as Protected Information in accordance with Paragraph 2.a. In addition, the legend set forth in Paragraph 2.a. shall be placed on the disc or e-mail transmitting the electronic material.

c. If a producing party determines that a previously produced document containing Protected Information was not marked as such, that party shall give notice in writing that the document is to be treated as containing Protected Information, and thereafter shall supply the receiving party with a copy of the designated document marked as Protected Information in accordance with Paragraph 2.a. After such notice, the unmarked document shall (at the option of the receiving party) be treated in accordance with this Protective Order, destroyed, or returned to the producing party.

3. Limits of Use.

a. All documents (or portions thereof) and other information produced in this appeal pursuant to this Protective Order shall be used by the receiving party only in preparing for and conducting this appeal and not for any other purpose whatsoever.

b. Nothing contained in this Protective Order shall prevent or in any way limit or impair the right of counsel for the United States to disclose to any agency of the United States any document or information regarding any potential violation of law or regulation or, subject to procedures that maintain the confidentiality of Protected Information consistent with this Protective Order, prevent or limit in any way the use of such documents and information by an agency of the United States in any investigation or proceeding regarding any potential violation of law or regulation.

c. Nothing in this Protective Order shall prevent appellant from providing Protected Information to a government agency in response to that agency’s lawful request.

4. Access to Protected Information.

a. Except as otherwise ordered by the Board, each party that receives Protected Information may allow the following persons to review such information: (1) the Board and appellate courts if a decision in this appeal is appealed, as well as personnel or contractors employed by these tribunals; (2) United States Government attorneys, employees, and contractors assigned to this appeal; (3) appellant and its employees and contractors assisting counsel in this appeal; (4) appellant's counsel and counsel's employees and contractors assigned to this appeal; (5) deposition officers and court reporters; and (6) persons retained by counsel for the purposes of providing support in this appeal, including experts, consultants, and support contractors to whom it is necessary that such Protected Information be shown for purposes of assisting in this appeal, provided that persons retained by counsel shall not retain such documents following the conclusion of their work related to this appeal.

b. Should either party wish to disclose Protected Information that is subject to this Protective Order to any persons other than those described in paragraph 4.a. of this Protective Order, counsel for that party will first inform opposing counsel in writing. If opposing counsel consents to disclosure of Protected Information to such additional person(s) in writing, counsel for the requesting party shall require the person to whom Protected Information shall be shown to read this Protective Order and execute a copy of the agreement set forth in Exhibit A, that states that he or she shall comply with all provisions of this Protective Order. *See* Exhibit A. Counsel will retain copies of the executed agreements until such time as this appeal is concluded, including appeal(s) to the United States Court of Appeals for the Federal Circuit, if any. A copy of the executed agreement shall be provided to counsel for the other party. If opposing counsel does not consent to the disclosure, then the requesting party may, on motion, seek a ruling from the Board.

c. In the event that the government anticipates the need to produce proprietary information of a third party or procurement or source-selection sensitive information that would otherwise be exempt from production under the Freedom of Information Act, it shall notify appellant's counsel, in writing, that such a production is expected. Once such notification is given, access to such information on behalf of appellant shall be limited to outside counsel and counsel's employees and support personnel and persons retained by outside counsel for the purposes of providing support in this appeal. If appellant wishes other persons to have access to such material, the procedures in paragraph 4.b. shall be followed. All persons given access to Protected Information under this subparagraph c., other than outside counsel, shall execute the agreement set forth in Exhibit A, copies of which shall be retained by counsel and provided to counsel for the other party.

d. Each person receiving Protected Information shall maintain such Protected Information in his or her possession in a manner sufficient to protect such material against unauthorized disclosure.

5. Filing Protected Information.

Documents filed with the Board pursuant to this Protective Order shall be marked as required by paragraph 2 and filed, like any other document, in accordance with the Board's Document Filing Guidance, dated April 7, 2020, and any revisions thereto.

6. Depositions and Hearings.

a. With regard to any depositions that may be taken or hearings that are transcribed, either party may, on the record of such deposition or hearing or within five working days after receipt of the transcript or such other time as agreed to by the parties, designate any portion or portions of the deposition or hearing transcript as containing Protected Information. Prior to the expiration of the time described in the preceding sentence, neither party may disclose such transcript or portion thereof to anyone who did not participate in the deposition or hearing, other than those persons described in, and subject to the terms of, paragraph 4.a. or permitted access pursuant to the terms of paragraph 4.b.

b. All such deposition or hearing transcripts, any copies thereof, and the portions of such transcripts designated as Protected Information, may be disclosed only as provided in this Protective Order.

7. Objections to Designation of Protected Information.

Either party may object to the designation of documents or other discovery material as Protected Information. The party objecting to the designation shall first make a good-faith effort to resolve such a dispute with opposing counsel. If the dispute cannot be resolved by the parties, the party objecting to the designation shall file with the Board and serve the opposing party with a notice of objection to such designation. Such notice of objection shall be filed promptly and within 30 days of receipt of the document(s) in question. In such event, the party designating the information as protected shall file, within two weeks after receipt of the notice of objection, a response to the notice showing good cause to designate information as protected. Such designated Protected Information shall be protected in accordance with this Protective Order until resolution of the objection, and thereafter shall be treated in accordance with the Board's disposition of the dispute.

8. The Board's Practice with Protected Information.

a. This Protective Order does not impose any obligations or requirements on the Board.

b. The parties are advised that, while not readily available to the public, appeal records maintained at the Board are accessible under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and its implementing executive branch and Department of Defense regulations. Documents in the Board's possession and subject to this Protective Order remain releasable to the public unless determined to be exempt from release under one of the FOIA exemptions. A document that is subject to this Protective Order will not, however, be released until the parties have been afforded an opportunity to assert the applicability of a FOIA exemption to the release of the document. Similarly, when the Board issues orders or decisions that would, in the usual course of business, be published, but which the Board believes may contain Protected Information, the parties will be given an opportunity to propose redactions prior to such publication.

9. Disposal of Protected Information by the Parties Following the Conclusion of Litigation.

Within 90 days of the conclusion of this appeal (whether by settlement or by a judgment that has become non-appealable), documents containing Protected Information shall be destroyed by the receiving party or returned to the originating party, except as specified herein. As to those materials that contain Protected Information but that constitute counsel's work product, counsel shall maintain such records in a manner consistent with the terms of this Protective Order. Counsel for appellant may also retain one copy of all pleadings in this appeal, so long as they are maintained in a manner consistent with the terms of this Protective Order. Counsel for the government may retain documents containing Protected Information sufficient to comply with applicable statutes, regulations and other internal records-keeping requirements, so long as those documents retained are maintained in a manner consistent with the terms of this Protective Order.

Dated:

IT IS SO ORDERED:

JUDGE NAME
Administrative Judge
Armed Services Board
of Contract Appeals

EXHIBIT A

**ASBCA No. 00011
APPEAL OF ABC, Inc.
UNDER CONTRACT No. W000X7-15-C-0001
PROTECTIVE ORDER AGREEMENT**

DECLARATION OF _____

1. My name is _____.
2. My business address is _____.
3. My present employer is _____.
4. My present occupation or job description is _____.
5. I have received a copy of the Protective Order entered by the Armed Services Board of Contract Appeals in connection with the above-captioned appeal(s).
6. I have carefully read and understand the provisions of the Protective Order.
7. I certify that I am eligible to have access to the Protected Information under paragraph 4 of the Protective Order.
8. I will hold all Protected Information and any duplicates, notes, abstracts or summaries thereof in confidence, will not disclose such information to anyone not specifically entitled to access under the Protective Order, and will use the information solely for purposes of this appeal, as provided by the Protective Order.
9. At the conclusion of this appeal/these appeals, I will return all documents containing Protected Information and any duplicates, notes, abstracts, or summaries thereof, whether prepared by me or anyone else, to counsel for the party by whom I am employed or retained.

(signature)

Dated: