

and recordkeeping requirements, and Toxic chemicals.

Dated: December 8, 1995.

William H. Sanders III,
Director, Office of Pollution Prevention and
Toxics.

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48 CFR Parts 1535 and 1552

[FRL-5332-3]

Acquisition Regulation; Confidential Business Information

AGENCY: Environmental Protection Agency.

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to revise its acquisition regulation by revising both the prescription for use of solicitation provisions and contract clauses regarding collection, use, access, treatment, and disclosure of confidential business information (CBI), and adding solicitation provisions and contract clauses on CBI.

DATES: Written comments should be submitted to the contact listed below not later than February 13, 1996.

ADDRESSES: Comments and data may also be submitted electronically by sending electronic mail (e-mail) to: Senzel.Louise@epamail.epa.gov. Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted on disks in WordPerfect in 5.1 format or ASCII file format. No Confidential Business Information (CBI) should be submitted through e-mail. Electronic comments on this proposed rule may be filed online at many Federal Depository Libraries.

FOR FURTHER INFORMATION CONTACT: Louise Senzel, Environmental Protection Agency, Office of Acquisition Management (3802F), 401 M Street, SW, Washington, D.C. 20460. Telephone: (202) 260-6204.

SUPPLEMENTARY INFORMATION:

A. Executive Order 12866

The proposed rule is not a significant regulatory action for the purposes of Executive Order 12866; therefore, no review is required by the Office of Information and Regulatory Affairs.

B. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because this proposed rule does not contain information collection requirements that require the approval

of OMB under the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.)

C. Regulatory Flexibility Act

The EPA certifies that this proposed rule does not exert a significant economic impact on a substantial number of small entities. The requirements to contractors under the proposed rule impose no reporting, record-keeping, or any compliance costs.

D. Unfunded Mandates

This proposed rule will not impose unfunded mandates on state or local entities, or others.

The provisions of this regulation are issued under 5 U.S.C. 301; 40 U.S.C. 486(c).

List of Subjects in 48 CFR Parts 1535 and 1552

Government procurement.

Therefore, Chapter 15 of title 48, Code of Federal Regulations is proposed to be amended as set forth below:

1. The authority citation for parts 1535 and 1552 continue to read as follows:

Authority: Sec. 205(c), 63 stat. 390, as amended, 40 U.S.C. 486(c).

2. Section 1535.007 is revised to read as follows:

1535.007 Solicitations.

(a) Contracting Officers shall insert the following provisions in all solicitations when the Contracting Officer has determined that EPA may furnish the contractor with confidential business information which EPA has obtained from third parties under the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. 136 et seq.).

(1) 1552.235-72 Control and Security of Federal Insecticide, Fungicide, and Rodenticide Act Confidential Business Information; and

(2) 1552.235-73 Access to Federal Insecticide, Fungicide, and Rodenticide Act Confidential Business Information.

(b) Contracting Officers shall insert the following provisions in all solicitations when the Contracting Officer has determined that EPA may furnish the contractor with confidential business information which EPA has obtained from third parties under the Toxic Substances Control Act (15 U.S.C. 2601 et seq.)

(1) 1552.235-74 Control and Security of Toxic Substances Control Act Confidential Business Information; and

(2) 1552.235-75 Access to Toxic Substances Control Act Confidential Business Information.

3. Subsection 1535.007-70 is amended by revising paragraphs (b) and

(c) and adding paragraph (d) through (f) to read as follows:

1535.007-70 Contract clauses.

(a) * * *

(b) The Contracting Officer shall insert the clause at 1552.235-71, Treatment of Confidential Business Information, in solicitations and contracts when the Contracting Officer has determined that in the performance of the contract, EPA may furnish confidential business information to the contractor obtained from third parties under the Clean Air Act (42 U.S.C. 7401 et seq.), the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.), the Resource Conservation and Recovery Act (42 U.S.C. 301 et seq.), the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. 136 et seq.), the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 et seq.), and provision 1552.235-70, Release of Contractor Confidential Business Information. EPA regulations on confidentiality of business information in 40 CFR part 2, subpart B, require that the contractor agree to the clause entitled "Treatment of Confidential Business Information" before any confidential business information may be furnished to the contractor.

(c) The Contracting Officer shall insert the clause at 1552.235-76, Treatment of Confidential Business Information, in solicitations and contracts when the Contracting Officer has determined that in the performance of the contract, EPA may furnish the contractor with confidential business information obtained from third parties under the Toxic Substances Control Act (15 U.S.C. 2601 et seq.). EPA regulations on confidentiality of business information in 40 CFR part 2, subpart B, require that the contractor agree to the clause entitled "Treatment of Confidential Business Information" before any confidential business information may be furnished to the contractor.

(d) The Contracting Officer shall insert the clause at 1552.235-77 Data Security for Federal Insecticide, Fungicide, Rodenticide Act Confidential Business Information, when the contract involves access to confidential business information related to the Federal Insecticide, Fungicide, Rodenticide Act and the Treatment of Confidential Business Information clause (1552.235-71) and the Screening Business Information for Claims of Confidentiality clause (1552.235-70) are included.

(e) The Contracting Officer shall insert the clause at 1552.235-78 Data Security for Toxic Substances Control Act Confidential Business Information, when the contract involves access to confidential business information related to the Toxic Substances Control Act and the Treatment of Confidential Business Information clause (1552.235-76) and Screening Business Information for Claims of Confidentiality clause (1552.235-70) are included.

(f) Contracting Officers shall insert the clause 1552.235-79 Release of Contractor Confidential Business Information in all solicitations and contracts in order to authorize the Agency to release confidential business information under certain circumstances.

4. Subpart 1552.2, is amended by revising section 1552.235-72, and adding sections 1552.235-73 through 1552.235-79 to read as follows:

1552.235-72 Control and Security of Federal Insecticide, Fungicide, Rodenticide Act Confidential Business Information (XXX 1995).

As prescribed in 1535.007(a), insert the following provision:

Control and Security of Federal Insecticide, Fungicide, Rodenticide Act Confidential Business Information (XXX 1995)

The offeror certifies that—

—The Contractor and its employees have read and are familiar with the requirements for the control and security of Federal Insecticide, Fungicide, Rodenticide Act confidential business information contained in the manual entitled "Federal Insecticide, Fungicide, Rodenticide Act Information Security Manual". (See also 1552.235-77 elsewhere in this solicitation.)

(End of Provision)

1552.235-73 Access to Federal Insecticide, Fungicide, Rodenticide Act Confidential Business Information (XXX 1995).

As prescribed in 1535.007(a), insert the following provision:

Access to Federal Insecticide, Fungicide, Rodenticide Act Confidential Business Information (XXX 1995)

In order to perform duties under the contract, the Contractor will need to be authorized for access to Federal Insecticide, Fungicide, Rodenticide Act (FIFRA) confidential business information (CBI). The Contractor and all of its employees handling CBI while working under the contract will be required to follow the procedures contained in the security manual entitled "FIFRA Information Security Manual". These procedures include applying for FIFRA CBI access authorization for each individual working under the contract who will have access to FIFRA CBI, execution of confidentiality agreements, and designation by the Contractor of an individual to serve as

a Document Control Officer. The Contractor will be required to abide by those clauses contained in EPAAR 1552.235-70, 1552.235-71, and 1552.235-77 that are appropriate to the activities set forth in the contract.

Until EPA has approved the Contractor's security plan, the Contractor may not be authorized for FIFRA CBI access away from EPA facilities.

(End of Provision)

1552.235-74 Control and Security of Toxic Substances Control Act Confidential Business Information (XXX 1995).

As prescribed in 1535.007(b), insert the following provision:

Control and Security of Toxic Substances Control Act Confidential Business Information (XXX 1995)

The offeror certifies that—

—The Contractor and its employees have read and are familiar with the requirements for the control and security of Toxic Substances Control Act confidential business information contained in the manual entitled "Toxic Substances Control Act Confidential Business Information Security Manual". (See also 1552.235-78 elsewhere in this solicitation.)

(End of Provision)

1552.235-75 Access to Toxic Substances Control Act Confidential Business Information (XXX 1995).

As prescribed in 1535.007(b), insert the following provision:

Access to Toxic Substances Control Act Confidential Business Information (XXX 1995)

In order to perform duties under the contract, the Contractor will need to be authorized for access to Toxic Substances Control Act (TSCA) confidential business information (CBI). The Contractor and all of its employees handling CBI while working under the contract will be required to follow the procedures contained in the security manual entitled "TSCA Confidential Business Information Security Manual". These procedures include applying for TSCA CBI access authorization for each individual working under the contract who will have access to TSCA CBI, execution of confidentiality agreements, and designation by the Contractor of an individual to serve as a Document Control Officer. The Contractor will be required to abide by those clauses contained in EPAAR 1552.235-70, 1552.235-71, and 1552.235-78 that are appropriate to the activities set forth in the contract.

Until EPA has inspected and approved the Contractor's facilities, the Contractor may not be authorized for TSCA CBI access away from EPA facilities.

(End of Provision)

1552.235-76 Treatment of Confidential Business Information (XXX 1995).

As prescribed in 1535.007-70(c), insert the following clause:

Treatment of Confidential Business Information (XXX 1995)

(a) The Project Officer (PO) or his/her designee, after a written determination by the appropriate program office, may disclose confidential business information (CBI) to the Contractor necessary to carry out the work required under this contract. The Contractor agrees to use the CBI only under the following conditions:

(1) The Contractor and Contractor's employees shall (i) use the CBI only for the purposes of carrying out the work required by the contract; (ii) not disclose the information to anyone other than properly cleared EPA employees without the prior written approval of the Assistant General Counsel for Information Law or his/her designee; and (iii) return the CBI to the PO or his/her designee, whenever the information is no longer required by the Contractor for performance of the work required by the contract, or upon completion of the contract.

(2) The Contractor shall obtain a written agreement to honor the above limitations from each of the Contractor's employees who will have access to the information before the employee is allowed access.

(3) The Contractor agrees that these contract conditions concerning the use and disclosure of CBI are included for the benefit of, and shall be enforceable by, both EPA and any affected businesses having a proprietary interest in the information.

(4) The Contractor shall not use any CBI supplied by EPA or obtained during performance hereunder to compete with any business to which the CBI relates.

(b) The Contractor agrees to obtain the written consent of the CO, after a written determination by the appropriate program office, prior to entering into any subcontract that will involve the disclosure of CBI by the Contractor to the subcontractor. The Contractor agrees to include this clause, including this paragraph (b), in all subcontracts awarded pursuant to this contract that require the furnishing of CBI to the subcontractor.

(End of Clause)

1552.235-77 Data Security for Federal Insecticide, Fungicide, Rodenticide Act Confidential Business Information (XXX 1995).

As prescribed in 1535.007-70(d), insert the following clause:

Data Security for Federal Insecticide, Fungicide, Rodenticide Act Confidential Business Information (XXX 1995)

The Contractor shall handle Federal Insecticide, Fungicide, Rodenticide Act (FIFRA) confidential business information (CBI) in accordance with the contract clause entitled "Treatment of Confidential Business Information" and "Screening Business Information for Claims of Confidentiality," the provisions set forth below, and the Contractor's approved detailed security plan.

(a) The Project Officer (PO) or his/her designee, after a written determination by the appropriate program office, may disclose FIFRA CBI to the contractor necessary to carry out the work required under this contract. The Contractor shall protect all FIFRA CBI to which it has access (including

CBI used in its computer operations) in accordance with the following requirements:

(1) The Contractor and Contractor's employees shall follow the security procedures set forth in the FIFRA Information Security Manual. The manual may be obtained from the Project Officer (PO) or the Chief, Information Services Branch (ISB), Program Management and Support Division, Office of Pesticide Programs (OPP) (H7502C), U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460.

(2) The Contractor and Contractor's employees shall follow the security procedures set forth in the Contractor's security plan(s) approved by EPA.

(3) Prior to receipt of FIFRA CBI by the Contractor, the Contractor shall submit a certification statement to the Chief of the ISB, with a copy to the Contracting Officer (CO), certifying that all employees who will be cleared for access to FIFRA CBI have been briefed on the handling, control and security requirements set forth in the FIFRA Information Security Manual.

(4) The Contractor Document Control Officer (DCO) shall obtain a signed copy of the FIFRA "Contractor Employee Confidentiality Agreement" from each of the Contractor's employees who will have access to the information before the employee is allowed access.

(b) The Contractor agrees that these requirements concerning protection of FIFRA CBI are included for the benefit of, and shall be enforceable by, both EPA and any affected business having a proprietary interest in the information.

(c) The Contractor understands that CBI obtained by EPA under FIFRA may not be disclosed except as authorized by the Act, and that any unauthorized disclosure by the Contractor or the Contractor's employees may subject the Contractor and the Contractor's employees to the criminal penalties specified in FIFRA (7 U.S.C. 136h(f)). For purposes of this contract, the only disclosures that EPA authorizes the Contractor to make are those set forth in the clause entitled "Treatment of Confidential Business Information."

(d) The Contractor agrees to include the provisions of this clause, including this paragraph (d), in all subcontracts awarded pursuant to this contract that require the furnishing of CBI to the subcontractor.

(e) At the request of EPA or at the end of the contract, the Contractor shall return to the EPA PO or his/her designee all documents, logs, and magnetic media which contain FIFRA CBI. In addition, each Contractor employee who has received FIFRA CBI clearance will sign a "Confidentiality Agreement for Contractor Employees Upon Relinquishing FIFRA CBI Access Authority". The Contractor DCO will also forward those agreements to the EPA PO or his/her designee, with a copy to the CO, at the end of the contract.

(f) If, subsequent to the date of this contract, the Government changes the security requirements, the CO shall equitably adjust affected provisions of this contract, in accordance with the "Changes" clause when:

(1) The Contractor submits a timely written request for an equitable adjustment; and

(2) The facts warrant an equitable adjustment.

(End of Clause)

1552.235-78 Data Security for Toxic Substances Control Act Confidential Business Information (XXX 1995).

As prescribed in 1535.007-70(e), insert the following clause:

Data Security for Toxic Substances Control Act Confidential Business Information (XXX 1995)

The Contractor shall handle Toxic Substances Control Act (TSCA) confidential business information (CBI) in accordance with the contract clause entitled "Treatment of Confidential Business Information" and "Screening Business Information for Claims of Confidentiality."

(a) The Project Officer (PO) or his/her designee, after a written determination by the appropriate program office, may disclose TSCA CBI to the contractor necessary to carry out the work required under this contract. The Contractor shall protect all TSCA CBI to which it has access (including CBI used in its computer operations) in accordance with the following requirements:

(1) The Contractor and Contractor's employees shall follow the security procedures set forth in the TSCA CBI Security Manual. The manual may be obtained from the Director, Information Management Division (IMD), Office of Pollution Prevention and Toxics (OPPT), U.S. Environmental Protection Agency (EPA), 401 M Street, SW, Washington, DC 20460. Prior to receipt of TSCA CBI by the Contractor, the Contractor shall submit a certification statement to the Director of the EPA OPPT/ Office of Program Management and Evaluation, with a copy to the Contracting Officer (CO), certifying that all employees who will be cleared for access to TSCA CBI have been briefed on the handling, control, and security requirements set forth in the TSCA CBI Security Manual.

(2) The Contractor shall permit access to and inspection of the Contractor's facilities in use under this contract by representatives of EPA's Assistant Administrator for Administration and Resources Management, and the TSCA Security Staff in the OPPT, or by the EPA Project Officer.

(3) The Contractor Document Control Officer (DCO) shall obtain a signed copy of EPA Form 7740-6, "TSCA CBI Access Request, Agreement, and Approval" from each of the Contractor's employees who will have access to the information before the employee is allowed access. In addition, the Contractor shall obtain from each employee who will be cleared for TSCA CBI access all information required by EPA or the U.S. Office of Personnel Management for EPA to conduct a Minimum Background Investigation.

(b) The Contractor agrees that these requirements concerning protection of TSCA CBI are included for the benefit of, and shall be enforceable by, both EPA and any affected business having a proprietary interest in the information.

(c) The Contractor understands that CBI obtained by EPA under TSCA may not be

disclosed except as authorized by the Act, and that any unauthorized disclosure by the Contractor or the Contractor's employees may subject the Contractor and the Contractor's employees to the criminal penalties specified in TSCA (15 U.S.C. 2613(d)). For purposes of this contract, the only disclosures that EPA authorizes the Contractor to make are those set forth in the clause entitled "Treatment of Confidential Business Information."

(d) The Contractor agrees to include the provisions of this clause, including this paragraph (d), in all subcontracts awarded pursuant to this contract that require the furnishing of CBI to the subcontractor.

(e) At the request of EPA or at the end of the contract, the Contractor shall return to the EPA PO or his/her designee, all documents, logs, and magnetic media which contain TSCA CBI. In addition, each Contractor employee who has received TSCA CBI clearance will sign EPA Form 7740-18, "Confidentiality Agreement for Contractor Employees Upon Relinquishing TSCA CBI Access Authority". The Contractor DCO will also forward those agreements to the EPA OPPT/IMD, with a copy to the CO, at the end of the contract.

(f) If, subsequent to the date of this contract, the Government changes the security requirements, the CO shall equitably adjust affected provisions of this contract, in accordance with the "Changes" clause when:

(1) The Contractor submits a timely written request for an equitable adjustment; and

(2) The facts warrant an equitable adjustment.

(End of Clause)

1552.235-79 Release of contractor confidential business information (XXX 1995).

As prescribed in 1535.007-70(f), insert the following clause:

Release of Contractor Confidential Business Information (XXX 1995)

(a) The Environmental Protection Agency (EPA) may find it necessary to release information submitted by the Contractor either in response to this solicitation or pursuant to the provisions of this contract, to individuals not employed by EPA. Business information that is ordinarily entitled to confidential treatment under existing Agency regulations (40 CFR part 2) may be included in the information released to these individuals. Accordingly, by submission of this proposal or signature on this contract or other contracts, the Contractor hereby consents to a limited release of its confidential business information (CBI).

(b) Possible circumstances where the Agency may release the Contractor's CBI include, but are not limited to the following:

(1) To other Agency contractors tasked with assisting the Agency in the recovery of Federal funds expended pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9607, as amended, (CERCLA or Superfund);

(2) To the U.S. Department of Justice (DOJ) and contractors employed by DOJ for use in advising the Agency and representing the Agency in procedures for the recovery of Superfund expenditures;

(3) To parties liable, or potentially liable, for costs under CERCLA Sec. 107 (42 U.S.C. 9607), et al, and their insurers (Potentially Responsible Parties) for purposes of facilitating settlement or litigation of claims against such parties;

(4) To other Agency contractors who, for purposes of performing the work required under the respective contracts, require access to information the Agency obtained under the Clean Air Act (42 U.S.C. 7401 *et seq.*); the Federal Water Pollution Control Act (33 U.S.C. 1251 *et seq.*); the Safe Drinking Water Act (42 U.S.C. 300f *et seq.*); the Federal Insecticide, Fungicide and Rodenticide Act (7 U.S.C. 136 *et seq.*); the Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*); the Toxic Substances Control Act (15 U.S.C. 2601 *et seq.*); or the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 *et seq.*);

(5) To other Agency contractors tasked with assisting the Agency in handling and processing information and documents in the administration of Agency contracts, such as providing both preaward and post award audit support and specialized technical support to the Agency's technical evaluation panels;

(6) To employees of grantees working at EPA under the Senior Environmental Enrollee (SEE) Program;

(7) To Speaker of the House, President of the Senate, or Chairman of a Committee or Subcommittee;

(8) To entities such as the General Accounting Office, boards of contract appeals, and the Courts in the resolution of solicitation or contract protests and disputes;

(9) To Agency contractor employees engaged in information systems analysis, development, operation, and maintenance, including performing data processing and management functions for the Agency; and

(10) Pursuant to a court order or Court-supervised agreement.

(c) The Agency recognizes an obligation to protect the contractor from competitive harm that may result from the release of such information to a competitor. (See also the clauses in this document entitled "Screening Business Information for Claims of Confidentiality" and "Treatment of Confidential Business Information.") Except where otherwise provided by law, the Agency will permit the release of CBI under subparagraphs (1), (3), (5), or (9) only pursuant to a confidentiality agreement.

(d) With respect to contractors, 1552.235-71 will be used as the confidentiality agreement. With respect to Potentially Responsible Parties, such confidentiality agreements may permit further disclosure to other entities where necessary to further settlement or litigation of claims under CERCLA. Such entities include, but are not limited to accounting firms and technical experts able to analyze the information, provided that they also agree to be bound by an appropriate confidentiality agreement.

(e) This clause does not authorize the Agency to release the contractor's CBI to the public pursuant to a request filed under the Freedom of Information Act.

(f) The Contractor agrees to include this clause, including this paragraph (f), in all subcontracts at all levels awarded pursuant to this contract that require the furnishing of confidential business information by the subcontractor.

(End of Clause)

Dated: October 30, 1995.

Betty L. Bailey,

Director, Office of Acquisition Management.

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