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JUDGMENT CALL



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TOP SECRETS

PROTECTING TRADE SECRETS IS ESSENTIAL WHEN CONTRACTING WITH THE GOVERNMENT. HERE'S A SHORT GUIDE

Recent technology advances have made commercial products and services alluring to government agencies. Similarly, companies that once catered only to government agencies see commercial opportunities.

Selling in both markets, however, might put you in a difficult bind. Government agencies may require broad, even unlimited, access to your confidential trade secrets. But once you give away such unlimited rights, you may lose the ability to protect that information from would-be commercial competitors.

A secret told, after all, is no secret at all.

The bad news first: In some cases, government regulations require contractors to grant “unlimited rights” in computer software, source code and other information. If the agency discloses that information to your competitor, or publishes it as part of a data package in a request for bids on a subsequent contract, you may have no legal recourse—at least not in the defense procurement arena.

But don't give up just yet. If an invention can be patented, do it. Similarly, many forms of technical and computer data can be copyrighted; if so, be sure to mark all deliverable data and software with a copyright notice. If neither patent nor copyright is an option, you still may be able to protect your secrets. To do so, you should consider both government contracts regulations and state trade secret laws.

Federal regulations may provide some protection under the rubric of “organizational conflicts of interest.” Under these regulations, a company that gained access to a contractor's secrets in connection with one project may be prohibited from using that information against the contractor in future procurements. Also, a contractor should work with the agency to protect its secrets. For example, while the agency may require unfettered access to your trade secrets, the agency may permit you to require employees of other companies to sign nondisclosure agreements.

State trade secret laws also may provide some protection. To qualify, information must be actually secret—i.e., not known to the public—and the owner must take reasonable steps under the circumstances to protect the secrecy. The key is to take steps to protect the secrecy of your information early and often. The following actions may help keep competitors at bay:

- Raise the issue of protecting trade secrets with the government

agency before performing any work. Any agreed-upon protections should be in place before potential trade secrets are shared.

- Make sure that any outside contractors who may have access to the trade secrets have signed NDAs before accessing your secrets. The drafting of these agreements merits careful attention—they should be sufficiently broad in scope, specify use restrictions and require that information be returned when no longer needed.

Once you grant unlimited rights, you may lose the ability to protect vital information from would-be rivals. A secret told is no secret at all.

- Documents containing trade secrets should be labeled “confidential” or “trade secret.” Electronic information should be password-protected and labeled with applicable legends. These actions need to be done consistently. If some information is labeled or password-protected and some is not, it may be hard to maintain trade secret protection.

- Restrict trade secret access to individuals who have signed an NDA and only on a need-to-know basis. This may not be possible for employees of the agency, but you should try to get the agency's approval to do this for employees of another contractor.

The government agency may pressure your company to forgo such protections, either because the agency thinks it has exclusive rights to the information or because it perceives that the protections will be difficult to manage. But if you make clear up front that the protections are designed to guard the information from commercial competitors, not from the agency, and you ensure that the procedures will not slow work on the project, the agency is more likely to permit the restrictions.

Ultimately, your company must decide whether the potential cost of selling to the government (i.e., risk of losing trade secret protection against competitors) outweighs the benefits of such sales.

If you plan ahead and are diligent in your efforts, you may be able to reduce these risks. ■



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