THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Merrimack Superior Court
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NOTICE OF DECISION

Attorney General's Office
Attn: Mary Ann Dempsey

Case Name: **Law Warehouses, Inc. v New Hampshire State Liquor Commission**
Case Number: **217-2012-CV-00817**

Enclosed please find a copy of the court's order of January 08, 2013 relative to:

Order

January 08, 2013

William S. McGraw
Clerk of Court

(629)

C: New Hampshire State Liquor Commission; Suzan M. Lehmann, ESQ; Nicholas Kimberley Holmes, ESQ

The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

Law Warehouses, Inc.

v.

New Hampshire State Liquor Commission

NO. 2012-CV-00817

ORDER

Law Warehouses Inc. ("Law") has brought a Petition pursuant to the Right to Know Law, RSA 91-A, to compel the Respondent, the New Hampshire State Liquor Commission ("Commission") to produce an unredacted copy of a contract between it and Exel Inc. ("Exel"). For the reasons stated in this Order, the Petition is DENIED.

I

Law and Exel were competing bidders on a request for proposal issued by the Commission regarding a long-term contract for the provision of warehouse services. Law had contracted with the State for many years to provide such services. On March 28, 2012, The Commission issued RFP 2012-14 which sought bids for a new 20 year contract for liquor warehousing services pursuant to the competitive bidding process. Both Law and Exel as well as several other vendors submitted bids. Ultimately, Law was unsuccessful, and the contract was awarded to Exel. On November 20, 2012 the Commission entered into a contract with Exel for warehouse services.

The Commission listed as a nonpublic item on its agenda for November 14, 2012 on November 13, 2012, "one item for nonpublic session regarding long-term warehouse

contract." Petitioner submitted a Right to Know request, which was denied on the grounds, *inter alia*, that the information was protected under RSA 21-I: 13-a II. The contract was made public on November 20, 2012 and the next day Law renewed its Right to Know request, arguing that the contract was made public on November 13, 2012 and seeking a copy of the contract and certain scoring information used by the Commission in its determination regarding award of the contract. The Commission responded to Law with a rolling production of documents. In addition, since the contract had been awarded, the Commission posted proposals of a number of bidders, including Exel. Dissatisfied with the Commission's production, Law brought the instant action on December 6, 2012. Exel's Motion to Intervene was granted on December 12, 2012. A hearing was held on December 18, 2012.

By the time of the hearing, the parties had substantially narrowed their dispute. The Commission had produced a complete copy of the contract between the Commission and Exel, but had redacted certain information which it claimed was confidential. At the hearing on December 18, Law conceded that information submitted by the vendors to the Commission could contain confidential information but asserted that any confidentiality was waived once a contract was awarded.

II

RSA 91-A, the Right to Know Law, provides in its preamble that "[t]he purpose of this chapter is to ensure to the greatest extent possible public access to actions, discussions, and records of all public bodies, and their accountability to the people". RSA 91-A: 1. Under the Right to Know Law, every person has the right to inspect "Governmental Records". Professional Firefighters of New Hampshire v. New

Hampshire Local Government Center, 163 N.H. 613, 614 (2012). "Governmental Records" are broadly defined in the statute. Under RSA 91-A: 1-a III:

> "Governmental Records" means any information created, accepted, or obtained by, or on behalf of, any public body, or a quorum or a majority thereof, or any public agency in furtherance of its official function. Without limiting the foregoing, the term "governmental records" includes any written communication or other information, whether in paper, electronic, or other physical form, received by a quorum or a majority of a public body in furtherance of its official function, whether at a meeting or outside a meeting of the body. The term "governmental records" shall also include the term "public records."

The New Hampshire Supreme Court has held that the Right to Know Law must be construed to further the statutory objective of increasing public access to governmental proceedings. Professional Firefighters of New Hampshire v. Health Trust, 151 New Hampshire, 501, 504 (2004).

The Commission concedes that the contract with Exel is a "Governmental Record." However, the Commission asserts that it is entitled to redact information which Exel claims is confidential. RSA 91-A: 5 IV exempts records containing "confidential, commercial, or financial information" from disclosure.

The burden of proving whether information is confidential rests with the party seeking to avoid disclosure. Hampton Police Association v. Town of Hampton, 162 N.H. 7, 14 (2011). The Commission points out that its regulations relating to disclosure of proposals specifically recognizes that financial information submitted by vendors may be confidential. Section 1.14 of its regulations provides in relevant part:

> NHSLC obligation. The NHSLC shall maintain the confidentiality of each proposal until a contract award is made... Following an award the NHSLC will disclose all Proposals in accordance with applicable law and regulations including, but not limited to, New Hampshire RSA c. 91-A... A Vendor who determines that it must divulge any confidential, commercial or financial or other information not subject to public disclosure... must submit in its Proposal a signed written statement describing in detail the nature of the Vendor

Confidential Information.

Exel points out in its memo that when Law submitted its proposal to the Commission, it submitted a "Statement of Position on Vendor Confidentiality", expressly asserting that some of the information provided by it in response to the Commission's RFP was exempt from public disclosure under RSA: 91-A, the Right to Know Law. Law submitted a document it called "Statement on Vendor Confidentiality with its bid, stating that "as required under the RFP... we are submitting this written statement to describe the nature of the confidential information contained in the proposal in the grounds for our position that the information is exempt from public disclosure under applicable laws and regulations, including but not limited to, The Right to Know Law, N.H. RSA 91-A.". It specifically noted that:

> Embodied in the proposal are significant and highly confidential financial and proprietary information, including without limitation and regardless of format, our audited financial statements, information related to the system design for our automated order fulfillment system... and information relating to our operations, customers, suppliers, business plans, finances, revenues, trade secrets, know-how, technology and intellectual property...

Law Warehouses Statement on Vendor Confidentiality, p.2

However, at the hearing on December 18, 2012, Law argued that while a vendor may assert confidentiality while bidding on an RFP, the right to confidentiality ceases, once a contract is awarded with respect to all parts of the contract as a matter of law. The Court disagrees.

III

Law's position was implicitly rejected by the New Hampshire Supreme Court in Professional Firefighters of New Hampshire v. HealthTrust, 151 N.H. 501 (2004). In that case, the trial court held that HealthTrust was a public entity subject to the Right to

Know Law and ordered that a contract it had entered into with Anthem Blue Cross and Blue Shield must be disclosed in its entirety. HealthTrust argued that the Anthem Blue Cross and Blue Shield contract was exempt from disclosure under RSA 91-A: 5 IV because portions of the contract contained confidential commercial or financial information. The Court held that the trial court erred in ordering release without either conducting an *in camera* review of the materials or requiring production of a Vaughn Index[1] to determine which portions of the withheld materials fall within the statutory exemption. Implicit in the Court's decision is a recognition that a contract may be a "Government Record" and yet contain confidential information.

The New Hampshire Supreme Court generally relies on federal decisions interpreting FOIA in construing the Right to Know Law. Lamy v. N.H. P.U.C. 152 N.H. 106, 108 (20905) ("Because exceptions under the Right to Know Law are similar to those under the Federal Freedom of Information Act (FOIA) we often look to federal decisions construing FOIA for guidance"); Murray v. New Hampshire State Police, 154 N.H. 579, 584 (29006); 38 Endicott Street v. State Fire Marshall, 163 N.H. 656, 660-667 (2012). Federal courts considering requests under the Federal Freedom of Information Act, 5 U.S.C. section 552 ("FOIA") have explicitly held that confidential financial information in public contracts may be withheld. See, e.g., McDonnell Douglas Corporation v. National Aeronautics and Space Administration, 180 F.23d 303, 304-305 (D.C. Cir. 1999); GE Micro Corporation v. Defense Logistics Agency, 33 F.3d 1109, 1112-1113 (9th Cir. 1994); National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974). Under federal law, an agency is not required to disclose confidential

[1] Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. den. 415 U.S. 977 (1974).

commercial or financial information" obtained from a person. 5 U.S.C. sec. 552 (b). Federal courts generally hold that "information is confidential if its disclosure is likely either (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained". Island Film, S.A. v. Department of the Treasury, 869 F.Supp. 123, 134 (D.D.C. 2012).

The New Hampshire Supreme Court also relies on decisions of other state courts interpreting similar state statutes. Montenegro v. City of Dover, 162 N.H. 641, 645 (2011) ("...in interpreting and applying our own Right to Know Law, we look to the decisions of other jurisdictions, since other similar acts, because they are *in pari materia*, are interpretively helpful, especially in understanding the necessary accommodation of the competing interests involved".); ATV Watch v. N.H. Dep't of Trans. 161 N.H. 746, 753-758 (2011).Other state courts with similar statutes have rejected the argument that information contained in a public contract cannot be withheld as confidential business information. See, e.g.International Brotherhood of Electrical Workers v. Denver Metropolitan Major League Baseball Stadium District, 880 P.2d 160, 165 (Colo. App. 1994) Caldwell & Gregory v. University of Southern Mississippi, 716 So.2d 1120, 1123 (Miss. App. 1998). ("The fact that in the course of seeking a business arrangement with a public agency, the business is willing to share... confidential information with the agency itself (from whom it can reasonably expect no competition) in the hope of securing a business relation with the public body does not mean, necessarily, that the information ought to fall into the hands of the general public.").

Courts recognizing the confidential nature of business information contained in a public contract recognize that disclosure of a business is confidential financial information could result in providing competitors of a party awarded a contract an unfair competitive advantage. Alex Abou Hussein v. Mabus, 2010 U.S. Dist. LEXIS 115032 (D.S.C. June 17, 2010) *34; Caldwell & Gregory, Inc. v. University of Southern Mississippi, 716 So.2d at 1122-1123.. If the government is required to release a bidder's confidential and proprietary information if the bidder is awarded a contract, the release could have a chilling effect on the willingness of potential bidders to submit proposals to a government entity or to submit proposals with the level of detail which would help the government agency make a better decision. This commonsense fact was recognized by Law itself, which insisted on the confidentiality of its proprietary business information in its bid. Here the Commission states in its memo that if it "is required to release a third party's confidential and proprietary information, the release could cause substantial competitive harm to the third party, and could have a chilling effect on the willingness of potential bidders to submit proposals to a government entity". Commission's Memorandum of Law Addressing Whether Contracts Are Subject to RSA 91-A: 5 IV, page 5.

Law has produced no authority for the proposition that when a bidder is awarded a contract, its otherwise confidential information becomes public as a matter of law. Its position cannot be accepted.

It is doubtless true that an agency which asserts the confidentiality of government records must provide a basis upon which that assertion can be reviewed, which would ordinarily require *in camera* review a Vaughn Index. Professional Firefighters of New

Hampshire v. HealthTrust, 151 N.H. at 506. At oral argument, Law's counsel introduced a copy of the contract which had been produced to it and which appeared to contain only minimal redactions of certain information within a document, such as the names of Exel's customers or quantitative information about its financing costs.

A Vaughn Index must include " a general description of each document withheld and a justification for its disclosure". Id. A Vaughn index would not necessarily be required if a document is produced with only a few words excised, and the context is sufficient to establish the basis for the withholding of information. In such a circumstance, Law would be able to challenge the claim of confidentiality. But that issue is not currently before the Court, since Law's claim is that the entire document must be produced as a matter of law, and it does not assert that in *camera* review or a Vaughn index is necessary to understand the Commission's position. Moreover, at the hearing on December 18, counsel for the Commission and Exel advised the Court that they were still attempting to narrow the information that they claimed was confidential. It follows that under the present circumstances of this case, Law is not entitled to relief, and its Petition must be DENIED.

SO ORDERED.

1/8/13
DATE

Richard B. McNamara
Richard B. McNamara,
Presiding Justice

RBM/