PROTECT
YOUR
INVESTMENT
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One of the benefits of a "proposal center of excellence" is that it centralizes much of your company’s procurement “memory” in one place. Done right, it will prevent the need for reinventing technical approaches and pricing strategies from one proposal to the next. Ironically, those very benefits lead to serious legal challenges. While some of your employees may remain with you for their entire careers, you must assume in today’s highly mobile society that most of them will not. Thus, a proposal center of excellence exposes a vast amount of sensitive business information to employees who may be out the door next week.

What can a company do to protect itself?
The first, and most obvious, step is to have employees sign non-disclosure agreements (NDAs). At a minimum, an NDA will prohibit an employee from disclosing specific company information outside of the company, or even inside the company, except on a need-to-know basis. Of course, the NDA must have teeth, i.e., it should entitle the company to all rights and remedies available under law. And, it should entitle the company to obtain an injunction in any court to put an immediate stop to any improper disclosure.

What information should the NDA protect? It is not practical to prohibit an employee from disclosing every bit of information that he or she learns in the course of his or her employment. Rather, your goal should be to protect confidential information. The types of information that are considered confidential will vary from one company to the next. However, the information is such that would provide a competitive advantage to a person or entity outside of the company.

In order to qualify as “confidential information,” the information must be . . . in a word, confidential. The holder of trade secret or other confidential information can lose its proprietary rights in protected information if the information is disclosed without protecting the confidentiality of the disclosure. In other words, protected information is no longer protected when it becomes general or public knowledge. For instance, when the information has been disclosed in a trade journal or left behind on a seat in the Metro, it is not likely to be treated as confidential. It doesn’t matter whether the disclosure was intentional or not; once the information is in the public domain, it arguably has lost its confidential status. See, e.g., Digital Healthcare, Inc., B- 296489, 2005 CPD ¶ 166 (information available on contractor’s website is not confidential).

Furthermore, even before the information has become public, it may be difficult to argue that it is confidential if you do not take commercially reasonable steps to protect its confidentiality. For starters, the information should be marked “confidential.” Information on a server can be protected by requiring users who log-on or who call-up certain information to accept a confidentiality statement before gaining access. If every employee in the company can log-on to the server that houses your proposal “memory” and can print, copy and email those materials at will, you may be hard-pressed to argue that the material was confidential. It is important, therefore, to control your employees’ access to information that is confidential. It goes without saying that you also should control the access of your subcontractors and teaming partners to information in your proposal center of excellence. See, e.g.,
Accent Service Co., B-299888, 2007 CPD ¶ 169 (information was no longer confidential after it was disclosed to visitors to the contractor’s office).

Another strategy is to have your employees sign non-compete agreements which limit their ability to become, or work for, competitors after they leave your company. Again, a non-compete agreement should provide for both legal and injunctive remedies.

A word of caution about non-compete agreements. While laws vary from state-to-state, some courts may consider non-competes to be against public policy. Thus, in order to be enforceable, a non-compete agreement should be written as narrowly as possible (in scope and duration) to protect the employer’s legitimate business interests without hamstringing the employee from earning a living in his or her chosen profession in the future.

Finally, an aside relating to non-disclosure and non-compete agreements. It is in an employer’s interest to be sure that its new hires are not bringing confidential information from their former employers to their new jobs. Employers can, and do, sue their competitors when former employees take confidential information to the competitors, and damages can easily be in the millions of dollars. The former employer may even seek an injunction to keep the new employer from participating in a procurement because the new employer has been tainted by purloined confidential information. Whether you win or lose, such litigation is expensive, and it distracts contractors from doing what they want to be doing—winning contracts and making money.

So, good luck with that new proposal center of excellence. Just be sure that you are taking the right legal steps to protect your expensive investment.