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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Torres Consulting and Law Group, LLC,

10 Plaintiff,

11 v.

12 Department of Energy,

13 Defendant.
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No. CV-13-00858-PHX-NVW

ORDER

15 Before the Court is Defendant's Motion for Summary Judgment (Doc. 16),
16 Plaintiff's Cross-Motion for Summary Judgment and Response (Doc. 18), Defendant's
17 Response and Reply (Doc. 20), and Plaintiff's Reply (Doc. 22). For the following
18 reasons, Defendant's Motion for Summary Judgment will be granted and Plaintiff's
19 Motion will be denied.

20 **I. LEGAL STANDARD FOR SUMMARY JUDGMENT**

21 Summary judgment is appropriate when the moving party carries its burden of
22 demonstrating that there is no genuine dispute as to any material fact and that it is entitled
23 to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S.
24 317, 322 (1986). A material fact is one that might affect the outcome of the suit under
25 the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual
26 issue is genuine if "the evidence is such that a reasonable jury could return a verdict for
27 the nonmoving party." *Id.*

28 Once the moving party has carried its burden under Rule 56, the party opposing

1 summary judgment must “set forth specific facts showing that there is a genuine issue for
2 trial.” *Anderson*, 477 U.S. at 256. The fact are “viewed in the light most favorable to the
3 nonmoving party only if there is a genuine dispute as to those facts.” *Scott v. Harris*, 550
4 U.S. 372, 380 (2007). “Where the record taken as a whole could not lead a rational trier
5 of fact to find for the nonmoving party, there is no genuine issue for trial.” *Matsushita*
6 *Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

7 **II. FACTS**

8 On July 31, 2012, Plaintiff Torres Consulting and Law Group submitted a
9 Freedom of Information Act (“FOIA”) request to Defendant Department of Energy
10 (“DOE”) regarding its Energy Systems Integration Facility (“ESIF”) construction project
11 located in Golden, Colorado. Torres sought certified payrolls from MTech Mechanical
12 Technologies Group and Diamond Fire Protection, two subcontractors of J.E. Dunn, the
13 DOE’s prime contractor on the ESIF. (Doc. 17 ¶¶ 5-7). Specifically, Torres sought rate
14 of pay, worker classification, fringe benefits, hours worked, names of contractors and
15 subcontractors, and project identifiers. (Doc. 12). Torres sought the information to
16 assess compliance with the Davis-Bacon Act, a federal law which requires contractors
17 and subcontractors on federally funded projects to pay their laborers no less than the
18 prevailing local wage.

19 On August 14, 2012, the DOE produced MTech’s certified payrolls but redacted
20 the individual employees’ names, social security numbers, hours worked, net and gross
21 wages, payroll deductions, and other withholdings. (Doc. 15 ¶¶ 23-25). A week later,
22 the DOE produced Diamond Fire Protection’s certified payrolls for the requested dates,
23 again redacting the same information. The DOE justified the redactions by raising two
24 FOIA exemptions: (1) Exemption 4, 5 U.S.C. § 552(b)(4), which protects “trade secrets
25 and commercial or financial information obtained from a person and privileged or
26 confidential” from disclosure to the public; and (2) Exemption 6, 5 U.S.C. § 552(b)(6),
27 which protects information about individuals in “personnel and medical files and similar
28 files” when the disclosure of such information “would constitute a clearly unwarranted

1 invasion of personal privacy.” (Doc. 16).

2 In September 2012, Torres filed an appeal with the DOE’s Office of Hearings and
3 Appeals, challenging the redactions made under FOIA Exemption 4 for both disclosures.
4 (Doc. 17 ¶ 35). It did not challenge any redactions made pursuant to Exemption 6. (Doc.
5 17 ¶ 39). Torres sought disclosure of each employee’s wages, including hourly rate, total
6 pay, fringe benefits, and hours worked but agreed with the redaction of personal
7 identifying information. (Doc. 17 ¶ 42). The Office of Hearings and Appeals denied the
8 appeal, finding that the requested information was properly redacted. In response, Torres
9 filed this suit for declaratory and injunctive relief. (Doc. 12). The DOE then moved for
10 summary judgment (Doc. 16), and Torres cross-moved for summary judgment. (Doc.
11 18).

12 **III. LEGAL ANALYSIS**

13 Review of an agency’s response to a FOIA request is conducted *de novo*. 5 U.S.C.
14 § 552(a)(4)(B). The Freedom of Information Act requires federal agencies to disclose
15 documents upon request, unless those documents are exempted from disclosure by
16 statute. *Willamette Indus., Inc. v. U.S.*, 689 F.2d 865, 867 (9th Cir. 1982). The decision
17 to disclose information turns on the nature of the information requested and not on the
18 identity of the requesting party. *U.S. Dep’t of Justice v. Reporters Comm. For Freedom*
19 *of Press*, 489 U.S. 749, 771-72 (1989). The FOIA contains nine, narrowly construed,
20 exemptions that permit the government to withhold requested information. *G.C. Micro*
21 *Corp. v. Def. Logistics Agency*, 33 F.3d 1109, 1112 (9th Cir. 1994).

22 **A. FOIA Exemption 6**

23 Exemption 6 protects information about individuals in “personnel and medical
24 files and similar files” when the disclosure of such information “would constitute a
25 clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). Because Torres
26 did not challenge any redactions the DOE made under Exemption 6 in its administrative
27 appeal, it has not exhausted its administrative remedies for redactions made under
28 Exemption 6. Exhaustion of administrative remedies is a jurisdictional prerequisite to

1 brining a FOIA claim in district court. *United States v. Steele*, 799 F.2d 461, 465-66 (9th
2 Cir. 1986). Accordingly, there is no jurisdiction to adjudicate redactions made pursuant
3 to Exemption 6 in this action.

4 The DOE argues Torres' challenges to the redactions it made under Exemption 4
5 are irrelevant because the DOE justified every redaction Torres challenges under both
6 Exemption 4 and Exemption 6. (Doc. 16, Pg. 10). The DOE suggests that redactions
7 challenged under Exemption 4 still stand under Exemption 6. The index of redactions
8 submitted by the DOE, however, does not support this assertion. Page 3-51, for example,
9 explains redactions made on M-Tech's Certified Payroll. (Doc. 17, Exb. A). For
10 redactions made under Exemption 4, it lists "[c]onfidential labor costs and commercial
11 information contained within the certified payrolls pertaining to overtime, standard time,
12 dates and hours worked, (allocation of weekly hours worked and total hours), and gross
13 earnings, relating to employees of the subcontractor, MTEch." (Doc. 17, Exb. A). For
14 redactions made under Exemption 6, it lists "[n]ames and individual identifying numbers
15 of workers employed by MTEch . . . and specific personal information related to
16 overtime, standard time, dates and hours worked, gross earnings, withholding tax,
17 Medicare payments, and net earnings." (Doc. 17, Exb. A). While Exemption 4 is used to
18 justify redacting the confidential labor costs and commercial information, Exemption 6 is
19 only used to justify redacting names and personal identifying information associated with
20 such data. Furthermore, on the actual payroll sheets submitted, "Exemption 6" is
21 stamped near where the name of the employee would be shown, and "Exemption 4" is
22 stamped where the total hours worked would be shown. (Doc. 17, Exb. A).
23 Accordingly, the index supports Torres' assertion that at least some of the information
24 sought was redacted only under Exemption 4. Because Torres properly exhausted its
25 administrative remedies in challenging redactions under Exemption 4, those claims are
26 properly presented.

27 **B. FOIA Exemption 4**

28 Exemption 4 prevents the disclosure of trade secrets, which are defined as "(1)

1 commercial and financial information, (2) obtained from a person or by the government,
2 (3) that is privileged or confidential.” *GC Micro Corp.*, 33 F.3d at 1112 (citing 5 U.S.C.
3 § 552(b)(4)). The government bears burden of proving that the information withheld
4 under Exemption 4 is protected from disclosure. *Frazee v. U.S. Forest Serv.*, 97 F.3d
5 367, 371 (9th Cir. 1006). Torres concedes that the first two criteria for trade secrets are
6 met, and the parties only dispute whether the information withheld under the FOIA was
7 “privileged or confidential.” (Doc. 18, Pg. 4).

8 The Ninth Circuit employs a two prong test to determine whether information is
9 privileged or confidential. Under that test, information is considered confidential if it is
10 likely “(1) to impair the Government's ability to obtain necessary information in the
11 future; or (2) to cause substantial harm to the competitive position of the person from
12 whom the information was obtained.” *G.C. Micro Corp.*, 33 F.3d at 1112 (internal
13 citations and quotations omitted). Here, the first prong is inapplicable because the
14 subcontractors associated with this case are required to submit their payroll information,
15 meaning the outcome of this case has no bearing on the government’s ability obtain
16 similar information in the future. (Doc. 16, Pg. 8).

17 To prove substantial competitive harm under the second prong, the government
18 must “show that there is (1) actual competition in the relevant market and (2) a likelihood
19 of substantial competitive injury if the information were released.” *Lion Raisins v. U.S.*
20 *Dep’t. of Agric.*, 354 F.3d 1072, 1079 (9th Cir. 2004). A common sense approach is
21 applied when determining whether there is actual competition in the relevant market.
22 *Watkins v. U.S. Bureau of Customs and Border Protection*, 643 F.3d 1189, 1195 (9th Cir.
23 2011) (internal citation and quotations omitted). Although neither party provided much
24 data on this issue, the competitive nature of federal contracts is well-established. *See* 10
25 U.S.C. § 2304(a)(1) (requiring federal agencies “conducting a procurement for property
26 or services . . . [to] obtain full and open competition through the use of competitive
27 procedures”). Accordingly, to defend its redactions on the ESIF project, the government
28 must show that releasing the requested information is likely to cause substantial

1 competitive injury to MTEch and Diamond Fire Protection.

2 Substantial competitive harm occurs when disclosure would allow competitors to
3 estimate and undercut a contractor's bid. *G.C. Micro Corp.*, 33 F.3d at 1115. Whether
4 disclosure would allow a competitor to undercut a bid requires a case-specific inquiry
5 into the nature of the industry involved and the significance of the information being
6 disclosed. The government's burden can be satisfied by producing "government
7 affidavits so long as the affiants are knowledgeable about the information sought and the
8 affidavits are detailed enough to allow the court to make an independent assessment of
9 the government's claim." *Lion Raisins*, 354 F.3d at 1079. Although it is unnecessary to
10 engage in a "sophisticated economic analysis of the likely effects of disclosure,
11 conclusory and generalized allegations of substantial competitive harm are unacceptable
12 and cannot support an agency's decision to without requested documents." *Watkins*, 643
13 F.3d 1189 at 1195.

14 A likelihood of substantial competitive harm is often found when the disclosed
15 information would give a competitor conclusive insight into how it could modify its
16 business to undercut another's. In *Watkins v. U.S. Bureau of Customs and Border*
17 *Protection*, for example, the Ninth Circuit found a likelihood of substantial competitive
18 harm when disclosure of a Customs and Border Protection Notice of Seizure would
19 reveal importers' entire distribution and supply chains, and agency affidavits showed the
20 industry players "zealously guarded" such information. 643 F.3d at 1196. A likelihood
21 of substantial competitive harm was also found when a raisin producer sought disclosure
22 of its competitors' Line Check Sheets from the United States Department of Agriculture
23 ("USDA"). *Lion Raisins*, 354 P.3d at 1080. In *Lion Raisins*, the plaintiff claimed
24 disclosing information allowing it to calculate the volume and types of raisins produced
25 by its competitors would not give it a significant competitive advantage because many
26 variables go into raisin production. *Id.* at 1081. The USDA, however, produced
27 affidavits from various industry leaders attesting that the raisin market is highly
28 competitive and if Lion Raisins knew the volume and types of raisins produced by its

1 competitors, it could undercut prices on the same varieties. *Id.* at 1080-82.

2 Substantial competitive harm is less likely to be found when the information
3 redacted provides insight into only one of several variables a competitor needs to gain an
4 advantage. In *G.C. Micro v. Defense Logistics Agency*, for example, the plaintiff
5 submitted a FOIA request for certain documents pertaining to the amount of money spent
6 on Small Disadvantaged Business subcontracts under Department of Defense contracts
7 with Loral Aerospace, McDonnell Douglas Corporation, and Northrop Corporation. 33
8 F.3d at 1111. In response, the government withheld a requested document which
9 estimated the total dollars spent on subcontractors per contract, actual dollars spent on
10 Small Disadvantaged Business subcontracts, and the actual percentage of Small
11 Disadvantage Business subcontracts on each contract. *Id.* The government argued the
12 documents would provide competitors with a roadmap for those contractors
13 “subcontracting plans and strategies,” but the plaintiffs prevailed by showing that because
14 the documents did not show how many subcontracts each company had, the subject
15 matter of the subcontracts, or who the subcontracts were awarded to, the document left
16 too many unknown variables in play for competitors to gain an advantage from them. *Id.*
17 at 1112-15.

18 In the present case, the DOE submitted affidavits from the heads of the
19 subcontractors MTech and Diamond Fire and the primary contractor, J.E. Dunn. The
20 affidavits state that disclosing the hours worked by individual employees, net and gross
21 wages, payroll deductions, and other withholdings would be a competitive disadvantage
22 because the hourly labor rate for the ESIF project is set by the government, meaning the
23 subcontractors’ labor production costs could be calculated by multiplying the
24 government’s labor rate by the hours worked. (Doc. 17, Exbs. D-F). They attest that
25 labor production rates are treated as confidential information in the construction industry
26 and that disclosing them would allow to competitors to underbid the contractors when
27 competing for work because labor production rates are a significant element of a
28 contractor’s price. (DSOF ¶¶ 51-52; Doc. 17, Exbs. D-F). It is undisputed that

1 information permitting a competitor to accurately estimate a bid price is likely to cause
2 competitive harm.

3 The essence of this dispute is whether the labor production rate is just one of the
4 many variables that make up a bid, or if the labor production rate is such a significant
5 piece of a bid that release of the data would essentially reveal the bid price, causing
6 substantial competitive harm. Torres does not dispute that labor production rates could
7 be calculated from the information sought but asserts that knowledge of the labor
8 production rate is not enough to allow one contractor to undercut another's bid because
9 other crucial variables, such as costs of materials, overhead, administrative costs, profit
10 margins, and multipliers make up a bid. (Doc. 18, Exbs. B-C).

11 In support of its position, Torres submitted affidavits from two owner/operators
12 of companies who claim they have years of experience with government contracts and
13 frequently bid on prevailing wage projects. (Doc. 18, Exbs. B-C). The affidavits present
14 broad, conclusory statements without supporting facts. They fail to specifically
15 contradict the central role labor production rates play in bid estimates and are not
16 sufficient to create a triable issue of fact. *See generally Far Out Prods., Inc. v. Oskar*,
17 247 F.3d 986, 997 (9th Cir. 2001) (noting that “[a] party opposing summary judgment
18 may not simply question the credibility of the movant to foreclose summary judgment.
19 Instead, the non-moving party must go beyond the pleadings and by its own evidence ‘set
20 forth specific facts showing that there is a genuine issue for trial.’ Fed. R. Civ. P. 56(e)”).
21 That the DOE has released substantial information to Torres that is useful in evaluating
22 whether Davis-Bacon was complied with is also significant.

23 The DOE has met its burden on this Motion for Summary Judgment by
24 establishing that a likelihood of competitive harm is beyond dispute. Its affidavits
25 establish conclusively that competitive harm would result if its subcontractors' labor
26 production rates were disclosed. While the exact extent of that competitive harm is
27 debatable, the precise amount need not be determined in this action. Additionally,
28 disclosing the requested wage and hour information could hurt the DOE by impacting the

1 type and amount of bids received in the future and harm the contractors' employees by
2 altering the wages offered on future contracts.

3 **IV. CONCLUSION**

4 The Department of Energy's Motion for Summary Judgment (Doc. 16) will be
5 granted, and Torres' Consulting Group's Cross-Motion for Summary Judgment (Doc. 18)
6 will be denied.

7 IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment
8 (Doc. 16) is granted, and Plaintiff's Cross-Motion for Summary Judgment (Doc. 18) is
9 denied.

10 IT IS FURTHER ORDERED that the Clerk enter judgment in favor of Defendant
11 and against Plaintiff and that Plaintiff take nothing. The Clerk shall terminate this case.

12 DATED this 27th day of November, 2013.

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16 Neil V. Wake
17 United States District Judge
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