Rinkers, Inc. v. State of Vt., Communications Bd., No. 798-11-08 Wncv (Toor, J., June 2, 2009)

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STATE OF VERMONT
WASHINGTON COUNTY

RINKERS, INC. Plaintiff v. STATE OF VERMONT, COMMUNICATIONS BOARD Defendant	SUPERIOR COURT Docket No. 798-11-08 Wncv

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This case is brought under the Public Records Act by a disappointed bidder on a State "request for proposals" ("RFP"). The bidder, Rinkers, seeks disclosure of records related to the RFP process. The State objects, arguing that the records are exempt from public access pursuant to the "trade secrets" and "contract negotiation" provisions in the Public Records Act, 1 V.S.A. §§ 317(c)(9) and (c)(15). Although it failed to prepare a privilege log, the State has submitted the contested documents for in camera review by the court. Both parties have filed motions for summary judgment.

Undisputed Facts

The RFP in question was for a "voice radio interoperability solution," which the court gathers to be a multi-million dollar, improved radio system for the police, fire departments, and emergency responders in Vermont. The Vermont Communication

Board ("VCOMM") is the entity responsible for issuing the RFP. In response to the RFP, three companies submitted proposals: Rinkers, Motorola, and E.F. Johnson. VCOMM decided to award the contract to Motorola, and began negotiations with regard to the contract. However, questions arose regarding transmissions near the Canadian border, and the need for approvals from Industry Canada. As a result, VCOMM did not finalize the Motorola contract and instead plans to issue a new RFP soliciting proposals that will include the Canadian requirements.

The RFP stated that "[u]nder no circumstances can the entire Proposal or price information be marked confidential." Complaint, ¶ 9. Nonetheless, all three bidders – including Rinkers – marked their entire proposals "proprietary and confidential."

The original record request in this case asked for "all VCOMM's files on this matter, including the contract file established in the RFP, bids, technical proposals, cost proposals, notes, correspondence, drafts, score sheets, weighting information, weighted score sheets, site evaluations, memoranda, documents reviewed by or produced by the Evaluation Team and other materials, written or electronic." The request, however, expressly stated that it was not initially seeking disclosure of any records marked proprietary or confidential. April 11, 2008 Letter. At oral argument on the motions, counsel for Rinkers reaffirmed that, although the entire bids are marked "confidential," Rinkers is not at this time seeking their disclosure. Rinkers does, however, seek all other responsive documents.[1]

Discussion

[1] VCOMM did produce some materials in response to the request from Rinkers.

The Vermont Public Records Act generally requires disclosure, upon request, of state government records unless they come within an exception listed in the statute. 1 V.S.A. § 317. The two exceptions relied upon by VCOMM here are as follows:

> ▪ trade secrets, including, but not limited to, any formulae, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern, and which gives its user or owner an opportunity to obtain a business advantage over competitors who do not know it or use it;
>
> ▪ records relating specifically to negotiation of contracts including but not limited to collective bargaining agreements with public employees[.]

Id., §§ 317(c) (9) and (c)(15).

Trade Secrets

With regard to trade secrets, VCOMM argues that the bids submitted by other bidders (Motorola and E.F. Johnson) are covered by this exception because they are marked proprietary and confidential. However, the court need not reach this issue now because Rinkers has stated that it does not currently seek those materials. Although a review of the in camera materials suggests that some of the communications from Motorola might be within the trade secrets exemption, VCOMM does not argue that any records other than the bids themselves are protected by the trade secret exemption. Should Rinkers choose to pursue this issue, the court will require that Motorola and E.F. Johnson be made parties so they can be heard on the issue.

Contract Negotiations

VCOMM asserts that the only other documents it has besides the proposals themselves are score sheets and emails. As it turns out, this is not accurate. The in camera

submission also contains letters and draft contract provisions.[2] VCOMM claims that all the documents are exempt from disclosure because they relate to contract negotiations. Rinkers argues that because the contract negotiations with Motorola have ended and a new RFP is expected, the exemption is inapplicable.

Neither side cites any controlling case law. There are no Vermont appellate cases interpreting the "contract negotiations" exemption. While Rinkers cites Springfield Terminal Railway Co. v. Agency of Transportation, 174 Vt. 341 (2002), the only exemption actually addressed on appeal in that case was the trade secrets exemption.

The exemption for contract negotiations does not exist in the federal Freedom of Information Act, 5 U.S.C. § 552, and does not appear to be standard in other states' public records statutes. However, other jurisdictions have addressed issues relating to contract negotiations in the context of their trade secret exemptions, some of which are broader than Vermont's. *See, e.g.*, Id., § 552 (b)(4) ("exempting "trade secrets *and commercial or financial information* obtained from a person and privileged or confidential")(emphasis added).

In addressing these issues, some courts have found that business information provided as part of contract negotiations is exempt from disclosure because such back-and-forth in a business setting is generally considered to be private information. *See, e.g.*, Providence Journal Company v. Convention Center Authority, 774 A. 2d 40, 45-50 (R.I. 2001). The rationale behind this is, in part, that information should not be made public if

[2] The court finds this unexplained, apparent inaccuracy in the sworn affidavit submitted by VCOMM to be highly disturbing. It underlines the court's point at oral argument that a "Vaughn Index" or privilege log is crucial in these cases, so that every document is carefully reviewed by counsel and identified both in the index/log and in the affidavit submitted after counsel's full review of all of the documents. If in a future case counsel fails to submit such a log, the court may immediately order disclosure of the documents on the ground that the State has failed to meet its burden.

it is likely "(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." Id., *quoting* National Parks and Conservation Association v. Morton, 498 F. 2d 765, 770 (D.C. Cir. 1974).

In the Providence Journal case, the documents requested related to "negotiations that led to the booking of" a banquet and golf tournament – two events that had already occurred at the time of the public records request. Thus, as in this case, the contract negotiations were clearly over rather than ongoing. Nonetheless, the court held that because the information "was developed during the negotiation process and is of the sort that would not customarily be disclosed to the public" by the parties to such negotiations, it did not need to be disclosed. Providence Journal, 774 A. 2d at 47-48.

Courts have also considered the harm to bidding parties if details of their bids are disclosed to competitors. For example, where a contract listed "option prices" and vendor pricing, the contracting party (McDonnell Douglas) objected to the Air Force's proposed disclosure of those portions of the contract to a competitor (Lockheed). McDonnell Douglas argued that "disclosure of the option prices in the contract likely will cause it substantial competitive harm because, in the event the Air Force does decide to rebid the contract, its competitors will be able to use that information to underbid it." McDonnell Douglas Corp. v. United States Department of the Air Force, 375 F. 3d 1182, 1188 (D.C. Cir. 2004). The court concluded that the pricing information was protected from disclosure.

It is unclear why Vermont created a separate "contract negotiation" exemption when other statutes address such issues under the "commercial or financial information"

prong of trade secret exemptions. Nor does the statute provide any explanation regarding the goals of the separate "contract negotiation" exception. However, the court finds the rationales of the above cases to be helpful to its analysis here. Certainly the legislature must have in part been concerned about protecting Vermont's ability to obtain contracts, which includes making the process one in which commercial entities are willing to participate. As noted by other courts, disclosure of the details of contract negotiations could well undercut the State's ability to obtain contracts, and to obtain them at the best prices. *See*, Michaelis, Montanari & Johnson v. Superior Court, 136 P.3d 194, 199 (Cal. 2006) (finding that "advance disclosure" of competing proposals for an airport project "could adversely affect the city's ability to maximize its financial return"). *See also*, Springfield Terminal Railway Co. v. Agency of Transportation, 174 Vt. at 347-49 (under trade secret exemption, financial information that would give competitors an advantage in state RFP process did not need to be disclosed).

The fact that the contract to which these negotiations related was ultimately not signed does not change these concerns. In fact, the expectation that a new RFP will soon issue, seeking proposals for a revised version of the same project, strengthens the need to protect the confidentiality of earlier proposals and discussions with regard to the aborted contract.

Nor does the court find that the phrase "*relating specifically to* the negotiation of contracts" changes its analysis. 1 V.S.A. § 317(c) (15) (emphasis added). While this does suggest that the documents must clearly be part of contract negotiations, it offers little guidance on where contract negotiations begin and end, or where one draws a line between that and some broader category of documents. Suffice it say that the court here

concludes that all communications between VCOMM and bidding parties between the time the RFP was issued and the time the contract negotiations were terminated, as well as all internal VCOMM communications with regard to that process, are ones that relate specifically to the negotiation of a contract for the communications system for the State. The same rationale -- protecting the State's ability to obtain the best contracts for its citizens -- applies to all such communications regardless of whether they actually lead to a contract or not.

Order

Rinkers' motion for summary judgment is denied. The State's motion for summary judgment is granted. Based upon the court's discussion with counsel at oral argument, the court will delay entry of judgment for thirty days to allow Rinkers to determine whether it wishes to seek disclosure of the documents that were expressly marked "proprietary and confidential." If so, Rinkers must within that period amend the complaint to name the other bidding parties so that they will have a chance to be heard on the issue.[3]

VCOMM is directed to submit to the court within ten days an affidavit either of counsel or of J. Paul Duquette or both, explaining why the latter's March 3 affidavit appears to be inaccurate with regard to the scope of the documents in VCOMM's possession, including an explanation of what steps counsel took to assure that the court currently has all responsive documents and how and by whom the search for all such documents was made.

Dated at Montpelier this 29th day of May, 2009.

[3] Given that the court's ruling above would exempt all documents including the proposals themselves from disclosure under the "contract negotiation" exemption, addressing the other exemption appears unnecessary. However, the court will leave that to counsel for Rinkers to consider.

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Helen M. Toor
Superior Court Judge