

	COMPLIANCE FAQ
Title: Confidentiality and Trade Secrets	Revision Date: 06-24
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This Frequently Asked Questions (FAQ) document is provided as a resource to provide clarification on confidential information. While the FAQ includes examples of legally compliant, procedurally efficient, and fiscally prudent processes, these are not the only such processes allowable under the Arizona Procurement Code (A.A.C. R2-7-103 et seq.). Depending on the circumstances surrounding a given procurement, deviation from this FAQ may be necessary or preferable. In the event of a discrepancy between an answer listed in this FAQ and applicable statute and rule, statute and rule shall prevail. Consider seeking legal advice for specific questions.

PURPOSE

The State Procurement Office (SPO) published SPO Form 204 - Confidentiality and Trade Secrets (Form 204) to aid compliance with certification requirements under A.A.C. R2-7-103. These forms have led to questions from state governmental units and procurement professionals throughout the State. As a courtesy, this document will provide general answers to common questions. *This document is for informational purposes only and does not supplant or replace SPO Form 204 as the official standard form. This document may be revised at any time.* Please contact SPO Compliance at SPOCompliance@azdoa.gov, if you have additional questions that are not addressed by this document or seek legal advice for specific questions.

QUESTIONS AND ANSWERS

Question: What documents or information contained within documents may be considered confidential in an offer?

Answer: Confidential information may include but is not limited to, personal identifiable information (e.g. SSN, EIN, TIN, address, personal phone number), HIPAA, security control measures, or trade secrets and proprietary information, defined in the Arizona Procurement Code as well as A.R.S. § 44-401 as follows:

- Is a formula, pattern, compilation, program, device, method, technique or process;
- Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; AND
- Is the subject of efforts *[by myself or my organization]* that are reasonable under the circumstances to maintain its secrecy.

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Question: What is considered a Trade Secret?

Answer: Trade Secret is defined in A.A.C R2-1-101(51) "Trade secret" means information, including a formula, pattern, device, compilation, program, method, technique, or process, that is the subject of reasonable efforts to maintain its secrecy and that derives independent economic value, actual or potential, as a result of not being generally known to and not being readily ascertainable by legal means.

Question: What if information isn't marked as confidential in an offer?

Answer: All information that does not meet the definition of trade secret as defined by A.A.C. R2-7-101(52), or is designated as confidential by other State or Federal laws or policies, will become public in accordance with A.A.C. R2-7-C317. The State reserves the right to make its own determination of Proposer's trade secret materials through a written determination in accordance with A.A.C. R2-7-103.

Question: How should an offeror submit information to be marked as Confidential?

Answer: If a person wants to assert that a person's offer, specification, or protest contains a trade secret or other proprietary information, or is held confidential under other applicable State or Federal laws or policies, a person shall include with the submission a statement supporting this assertion. A person shall clearly designate the information, using the term "confidential". Contract terms and conditions, pricing, and information generally available to the public are not considered confidential information under this Section.

Question: Is pricing considered confidential in an offer, quote, purchase, etc.?

Answer: No. Pricing is never considered confidential.

Question: How is information designated as confidential by the offeror handled while the Confidential Request is being processed?

Answer: Until a final determination is made, an agency chief procurement officer shall not disclose information designated as confidential except to those individuals deemed by an agency chief procurement officer to have a legitimate state interest.

Question: Can the State deny a Confidentiality Request from an offeror?

Answer: Yes, an agency chief procurement officer shall make one of the following written determinations:

1. The designated information is confidential and the agency chief procurement officer shall not disclose the information except to those individuals deemed by the agency chief procurement officer to have a legitimate state interest;
2. The designated information is not confidential; or

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3. Additional information is required before a final confidentiality determination can be made.

Question: What if the State denies a Confidentiality Request?

Answer: The State reserves the right to make its own determination of Proposer's confidential information through a written determination in accordance with A.A.C. R2-7-103. If an agency chief procurement officer determines that information submitted is not confidential, a person who made the submission shall be notified in writing. The notice shall include a time period for requesting a review of the determination by the state procurement administrator. Any information that is not deemed confidential will be made publicly available in accordance with A.A.C. R2-7-C317.

Question: Who has access to Confidential Information?

Answer: The entire offer, including confidential, trade secret and proprietary information may be shared with an evaluation committee and technical advisors during the evaluation process. Further, pursuant to A.R.S. § 35-214, the State reserves the right to audit the books and records of contractors or subcontractors under any contract or subcontract to the extent the books and records relate to the performance of a contract or subcontract.

Question: Will Confidential Information ever be released?

Answer: An agency chief procurement officer may release information designated as confidential if:

1. A request for review is not received by the state procurement administrator within the time period specified in the notice; or
2. The state procurement administrator, after review, makes a written determination that the designated information is not confidential.
3. Pursuant to A.R.S. § 35-214, The State reserves the right to audit the books and records of a contractor or subcontractor under any contract or subcontract to the extent the books and records relate to the performance of a contract or subcontract.

Question: What does A.A.C. R2-7-103 state?

Answer: The rule reads as follows:

R2-7-103. Confidential Information

- A. If a person wants to assert that a person's offer, specification, or protest contains a trade secret or other proprietary information, a person shall include with the submission a statement supporting this assertion. A person shall clearly designate any trade secret and other proprietary information, using the term "confidential". Contract terms and conditions, pricing, and information generally available to the public are not considered confidential information under this Section.

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- B. Until a final determination is made under subsection (C), an agency chief procurement officer shall not disclose information designated as confidential under subsection (A) except to those individuals deemed by an agency chief procurement officer to have a legitimate state interest.
- C. Upon receipt of a submission, an agency chief procurement officer shall make one of the following written determinations:
 - 1. The designated information is confidential and the agency chief procurement officer shall not disclose the information except to those individuals deemed by the agency chief procurement officer to have a legitimate state interest;
 - 2. The designated information is not confidential; or
 - 3. Additional information is required before a final confidentiality determination can be made.
- D. If an agency chief procurement officer determines that information submitted is not confidential, a person who made the submission shall be notified in writing. The notice shall include a time period for requesting a review of the determination by the state procurement administrator.
- E. An agency chief procurement officer may release information designated as confidential under subsection (A) if:
 - 1. A request for review is not received by the state procurement administrator within the time period specified in the notice; or
 - 2. The state procurement administrator, after review, makes a written determination that the designated information is not confidential.