



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

PROTECTIVE ORDER: <date>

CBCA <docket number>

<NAME OF APPELLANT>,

Appellant,

v.

<NAME OF RESPONDENT>,

Respondent.

<counsel name> of <firm>, <city>, <state>, counsel for Appellant.

<counsel name>, <office>, <agency>, <state>, <city>, counsel for Respondent.

<NAME OF JUDGE>, Board Judge.

PROTECTIVE ORDER

The Board hereby enters the following protective order through which a party may limit the distribution of confidential and/or proprietary documents, information, or tangible items produced in this appeal:

1. The term “protected material” as used in this protective order shall mean documents, information, or other tangible items that (a) constitute or contain confidential research, confidential financial information and commercially sensitive information, proprietary commercial information, and/or trade secrets, the disclosure of which might, with

reasonable probability, adversely affect a party's or non-party's competitive business position and/or affect a party's or non-party's legally protected rights and (b) are designated protected material by the procedures set forth in this order. No party shall designate any material as protected material absent a good faith basis for believing that such information falls within such a category. To the extent a party objects to the designation of material as protected, the parties, if they are unable to resolve the matter themselves after consultation, shall seek the Board's determination as to whether the designation is appropriate.

2. A party may designate any document, information, or other tangible item as protected by marking the following words on the face and every subsequent page of the original or photocopy of the document, information, or other tangible item, or by delivering at the time of disclosure, production, or filing to the party to whom disclosure is made written notices that the tangible item is protected material.

**PROTECTED MATERIAL
TO BE DISCLOSED ONLY IN ACCORDANCE WITH BOARD ORDER
IN CBCA <doctet number>**

To the extent that the party generating or providing any document, information, or tangible item wishes to designate it as protected, it shall do so when it is passed to another party of record or to the Board. If the party receiving any document, information, or tangible item wishes to add a protective designation to the material received, it shall do so within three working days of receipt by informing all parties (and the Board, if the material was submitted to the Board) that it is to be protected.

3. The party claiming protection is to identify each portion of the material for which it is claiming protection. This may be done either by highlighting or otherwise marking the material for which protection is sought, or by providing a separate redacted version of the material, with all protected portions deleted, with respect to material not protected. However, any party entering any protected material into the record or submitting protected material to another party in response to a proper discovery request is to submit a redacted version along with the original version.

4. If the Board receives no opposition to material marked as protected or claimed to be protected, it will be deemed protected subject to this protective order unless otherwise ordered by the Board.

5. Should a party oppose any requested protection, it must notify, in writing, both the Board and the party seeking the protection, stating the objection and bases for objection, within five business days following receipt of the material marked or identified as protected

or subsequent notification of intent to protect. The party seeking the protection must respond, in writing, to the Board and the opposing party, stating its position and bases therefore, within two business days following the one on which it received the opposition. The Board will then rule on the motion in due course, but, in the interim, the material shall be deemed protected subject to this protective order. The Board will consider any late-identified objection only for good cause shown.

6. Any material containing protected information submitted to either the Board or a party in paper or hard copy form is to be identified on the outside of the sealed parcel containing the protected information with a legend stating: **“PROTECTED MATERIAL ENCLOSED.”** Protected material so marked is to be sent to the Board and counsel of record, as appropriate. The Board shall treat all protected material as *in camera* submissions.

7. Unless received by a party independently from this action, any exhibits identified as protected material under this protective order may be used by the receiving party in connection with this action and any appeals resulting from this action, and specifically not for any other litigation, business, or other purposes unless approved in writing by the parties to this order. For purposes of this order, this action includes all discovery and depositions. Authorization for use or disclosure of protected material or information contained therein, outside this action, must be sought from the Board with notice to all parties.

8. Except to the extent that a party or individual has received independently from this action one or more of the exhibits marked under this protective order as protected material, the following persons are the only ones who shall be permitted to review protected material covered by this protective order, and the documents so identified shall not be given, shown, or described to any other persons:

- a. Counsel for appellant, paralegal or clerical staff of counsel for appellant, and appellant’s employees; and
- b. Employees of the respondent agency, including counsel for the agency; and
- c. The Board, its employees, and designated court reporters.

Pursuant to this order, the persons identified in paragraphs 8.a, 8.b, and 8.c above are presumptively admitted under this order to receive and review protected material as defined herein. To the extent that a party wishes to preclude any categories of individuals identified in or any specific individual encompassed within paragraphs 8.a, 8.b, or 8.c from accessing any particular protected material, it shall provide notice to the Board and the opposing party

prior to production of the protected material or as soon as it becomes aware that a particular individual should not have access to particular protected material.

9. To the extent that either party wishes to add additional persons to the protective order, such persons may be added with the mutual written consent of all parties. To the extent that a party objects to a particular person being granted access under this protective order, the party seeking to admit the individual may file a motion with the Board, accompanied by a completed copy of the form that is attached as Attachment A to this order, seeking that individual's admission.

10. No protected material may be disclosed to a consultant or expert witness unless the individual has signed a non-disclosure agreement with the retaining attorney. This non-disclosure agreement shall, at a minimum, require the individual to abide by the terms of this protective order and prohibit both the use, except in connection with this appeal, and the disclosure, of any information or knowledge received subject to this protective order. Protected material may not be disclosed to such an individual unless the individual has been designated in writing to all parties' counsel and to the Board, and either no objection has timely been made to the individual's access to the material or objection has timely been made but overruled by the Board.

11. Nothing in this protective order shall be construed to prohibit the disclosure by any federal agency party of materials covered by the protective order to other appropriate persons within the federal government, for those persons' official use. This order is subject to the exception that appeal records maintained at the Board are accessible to the public under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012), and its implementing executive branch regulations. Any document in the Board's possession and subject to this order remains releasable to the public unless determined exempt from release under one of the FOIA exemptions. Should a FOIA request be made, the party generating a record being sought that is subject to this order will be afforded an opportunity to assert the applicability of an exemption. Nothing in this order, however, shall render inapplicable any statutory or regulatory limitations on such disclosure that may otherwise exist. *See, e.g.*, 18 U.S.C. § 1905, 31 U.S.C. § 716(e)(1).

12. The inadvertent or unintentional failure of a supplying party to designate documents or information as protected material in accordance with the provisions of this protective order shall not be deemed a waiver or estoppel, in whole or in part, of the supplying party's claim of confidentiality. However, the party supplying the documents or information must give reasonable notification to the other party to this action, and to the other persons to whom such material was revealed, when it learns of such inadvertent or unintentional failure to designate.

13. Within thirty calendar days after the conclusion of this appeal, all documents in a party's possession that contain protected material, including transcripts of proceedings, and all copies thereof shall be (1) returned to counsel for the party or witness who produced them, or (2) with the prior written agreement of the party that generated the protected material, destroyed and certified as destroyed to counsel for the party or witness who produced them. For purposes of this paragraph, the conclusion of the appeal may be by settlement or, alternatively, by a judgment that is no longer appealable. If any party wishes to retain protected material for any legitimate purpose, such party shall first attempt to obtain the opposing party's agreement to a longer retention period. If the parties cannot agree in a timely manner, the party that wishes to retain protected material shall file a motion with the Board within thirty calendar days after conclusion of the appeal requesting permission.

14. The Board will retain in the official case file one copy of protected material in accordance with its records retention policy. Any protected material will only be released after consultation with the parties.

15. This order does not prevent any party from asserting any legally cognizable privilege to withhold any document or information.

16. This protective order and the agreement embodied herein shall survive the termination of this action and continue in full force and effect after the termination of this action whether by dismissal, final judgment, or settlement.

17. Any allegations of abuse or violation of this order shall be considered by the Board either for purposes of determining whether it should enter sanctions under Rule 33(c) or other rules, or for purposes of determining whether or not the matter should be referred for appropriate possible disciplinary proceedings, or both.

<NAME OF JUDGE>

Board Judge