

Office of the Secretary of Defense

§ 286h.3

Defense Intelligence Agency
Defense Security Service
Defense Logistics Agency
National Imagery and Mapping Agency
Defense Special Weapons Agency
National Security Agency
Office of the Inspector General, Department
of Defense
Defense Finance and Accounting Service
National Reconnaissance Office

PART 286h—RELEASE OF ACQUISITION-RELATED INFORMATION

Sec.

- 286h.1 Purpose.
- 286h.2 Applicability and scope.
- 286h.3 Policy.
- 286h.4 Responsibilities.

AUTHORITY: Pub. L. 101-189.

SOURCE: 55 FR 28614, July 12, 1990, unless otherwise noted.

§ 286h.1 Purpose.

This part sets forth Department of Defense (DoD) policy for the release of acquisition-related information.

§ 286h.2 Applicability and scope.

(a) This part applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Chairman, Joint Chiefs of Staff and Joint Staff (CJCS), the Unified and Specified Commands, and the Defense Agencies (hereafter referred to collectively as "DoD Components").

(b) This part is issued pursuant to section 822 of Public Law 101-189, which requires the Department of Defense to prescribe a single uniform regulation for dissemination of, and access to, acquisition information.

§ 286h.3 Policy.

(a) *General.* It is the Department of Defense's policy to make the maximum amount of acquisition-related information available to the public, and to respond promptly to specific requests from the public for such information, except for the information identified in paragraph (b) of this section, for which release is restricted.

(b) *Information for which release is restricted.* The information identified below may be released only as set forth herein.

(1) *Release subject to statutory restrictions.* This information may be released

only in accordance with the applicable statutory requirements. Once the statutory requirements have been satisfied, the information may be released unless it falls within one of the categories described in the following paragraphs, in which case the policies governing release of information within those categories shall be followed.

(2) *Classified information.* (i) Any information or material, regardless of its physical form or characteristics, that is owned by, produced by or for, or under the control of the United States Government, and which, for national security purposes, must be protected against unauthorized disclosure and is so designated or marked with the appropriate classification.

(ii) Release, access, and dissemination of classified information shall be made through existing security channels in accordance with DoD 5220.22-R;¹ DoD 5220.22-M;² and DoD 5200.1-R,³ which are implementing publications for safeguarding classified information release, access, and dissemination to United States and foreign concerns.

(3) *Contractor bid or proposal information.* (i) This is information prepared by or on behalf of an offeror and submitted to the Government as a part of or in support of the offeror's bid or proposal to enter into a contract with the Government, the disclosure of which would place the offeror at a competitive disadvantage or jeopardize the integrity or the successful completion of the procurement. Contractor bid or proposal information includes cost or pricing data, profit data, overhead and direct labor rates, and manufacturing processes and techniques. Contractor bid or proposal information does not include information that is available to the public.

(ii)(A) *Sealed bids.* (1) Prior to bid opening, no release or disclosure of contractor bid information shall be made to anyone other than those who are involved in the evaluation of the

¹Copies may be obtained, at cost, from the National Technical Information Services, 5285 Port Royal Road, Springfield, VA 22161.

²Copies may be obtained, at cost, from the Government Printing Office, ATTN: Superintendent of Documents, Washington, DC 20402.

³See footnote 1 to § 286h.3(b)(2)(ii).

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bids or to other individuals authorized by the Head of the DoD Component, or his or her designee.

(2) After contract award, contractor bid information may be released or disclosed by those authorized by the Head of the DoD Component, or his or her designee, to make such release or disclosure, if the information to be released or disclosed is not subject to a restrictive legend authorized by Federal Acquisition Regulation (FAR) 52.215-12 or release is not otherwise restricted by law.

(3) *Negotiated procurements.* Prior to contract award, no release or disclosure of contractor proposal information shall be made to anyone other than those who are involved in the evaluation of the proposals or the source selection or to other individuals authorized by the Head of the DoD Component, or his or her designee. DoD Components shall adopt procedures in accordance with FAR 15.413 to protect against release or disclosure of contractor proposal information. After contract award, contractor proposal information may be released or disclosed by those authorized by the Head of the DoD Component, or his or her designee, to make such release or disclosure, if the information to be released or disclosed is not subject to a restrictive legend authorized by FAR 15.509 or FAR 52.215-12 or release is not otherwise restricted by law.

(4) *Source selection information.* (i) This is information prepared or developed for use by the Government in connection with the selection of a bid or proposal for the award of a contract. Only the following information, including copies or extracts thereof, is source selection information:

(A) Bid prices submitted in response to a Government solicitation for sealed bids or lists of such bid prices (applicable prior to bid opening only);

(B) Proposed costs or prices submitted in response to a Government solicitation prior to award of the contract, a list of proposed costs or prices;

(C) Source selection plans;

(D) Technical evaluation plans;

(E) Technical evaluations of competing proposals;

(F) Cost or price evaluations of competing proposals;

(G) Competitive range determinations;

(H) Rankings of competitors;

(I) The reports and evaluations or source selection boards, advisory councils, or the source selection authority (SSA); and

(J) Any other information which:

(1) If disclosed, would give an offeror a competitive advantage or jeopardize the integrity or successful completion of the procurement; and

(2) Is marked with the legend "Source Selection Information."

(ii) *Release of or access to source selection information (SSI)—(A) Access to SSI.* The SSA (including the contracting officer when the contracting officer is the SSA) shall restrict access to source selection information to only those Government employees directly involved in the source selection process or to those individuals who have been authorized by the Head of the DoD Component, or his or her designee, to have access to such information. If the contracting officer or the SSA have not been appointed, the Head of the DoD Component, or his or her designee, shall assure access to such information is properly restricted. Employees supervising or managing employees directly involved in the source selection process are not themselves by virtue of their positions directly involved in the source selection process.

(B) *Release of SSI—(1) Prior to contract award.* Source selection information shall not be released prior to contract award unless the Head of the DoD Component, or his or her designee, determines that release is in the public interest and would not jeopardize the integrity or successful completion of the procurement. The information to be released shall only be released by the contracting officer. The contracting officer shall make release in a manner that does not provide any potential offeror with a competitive advantage.

(2) *After contract award.* The need to protect source selection information generally ends with contract award. The contracting officer may release, or authorize the release of, any source selection information related to that contract award except: Source selection information specifically developed or prepared for use with more than one

solicitation when there is a continuing need to protect that information; unless otherwise permitted by law, source selection information containing contractor data or extracts thereof which are protected by law; information which would reveal the relative merits or technical standing of the competitors or the evaluation scoring; and any pre-decisional or other information not subject to release under the Freedom of Information Act. Debriefings to unsuccessful offerors shall be conducted in accordance with FAR 15.1003 and Defense Federal Acquisition Regulation Supplement (DFARS) 215.1003(a).

(5) *Planning, programming, and budgetary information.* (i) Planning, Programming, and Budgeting System (PPBS) documents and supporting data bases are not to be disclosed outside the Department of Defense (DoD) and other governmental agencies directly involved in the defense planning and resource allocation process (e.g., the Office of Management and Budget). PPBS papers and associated data set forth the details of proposed programs and plans. Access to this material by those not directly involved in the PPBS process undermines the confidentiality necessary for the Secretary and Deputy Secretary to obtain candid advice on the content of the defense program. Also, access to PPBS information by private firms seeking contracts with the Department may pose ethical, even criminal, problems for those involved and reduce effective competition in the contract awards process.

(ii)(A) Requests for exceptions to this limitation may be granted on a case-by-case basis to meet compelling needs, after coordination with the Office of General Counsel, by the Head of the OSD office responsible for the PPBS phase to which the document or data base pertains; the Under Secretary of Defense (Policy) for the planning phase; the Assistant Secretary of Defense (Program Analysis and Evaluation) for programming; and the Comptroller, DoD for budgeting. A list of the current major documents and data bases for each PPBS phase is in paragraph (B)(5)(11)(C) of this section; all other PPBS materials are also controlled under this policy.

(B) Disclosure of PPBS information to Congress and the General Accounting Office (GAO) is covered by statute and other procedures.

(C) Major PPBS Documents and Data Bases by Phase.

Planning Phase

(1) Defense Planning Guidance.

Programming Phase

(2) Fiscal Guidance (when separate from Defense Planning Guidance);

(3) Program Objective Memoranda (POM);

(4) POM Defense Program (formerly FYDP) documents (POM Defense Program, Procurement Annex, RDT&E Annex);

(5) Program Review Proposals;

(6) Issue Papers (aka, Major Issue Papers, Tier II Issue Papers, Cover Briefs);

(7) Proposed Military Department Program Reductions (or Program Offsets);

(8) Tentative Issue Decision Memoranda;

(9) Program Decision Memoranda;

Budgeting Phase

(10) Defense Program (formerly FYDP) documents for September and President's Budget Estimate submissions including Defense Program Procurement, RDT&E and Construction Annexes;

(11) Classified P-1, R-1 and C-1;

(12) Program Budget Decisions/Defense Management Review Decisions;

(13) Reports Generated by the Automated Budget Review System (BRS);

(14) DD Form 1414 Base for Programming;

(15) DD Form 1416 Report of Programs;

(16) Contract Award Reports;

(17) Congressional Data Sheets.

(iii) Contractor requests for information contained in the National Military Strategy Document (including annexes) and the Chairman's Program Assessment Document (including annexes and comments) shall be forwarded to the CJCS who shall determine on a case-by-case basis what information, if any, is releasable to the contractor.

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(6) *Documents that disclose the Government's negotiating position.* Documents that would disclose the government's negotiating position (such as pre-negotiation business clearances and positions and government cost estimates) or would adversely impact the government negotiating strategy shall not be released.

(7) *Drafts and working papers.* Drafts and working papers that would otherwise be releasable under paragraph 286h.3(a) shall not be released where their release would inhibit the development of agency positions, jeopardize the free exchange of information that is part of the deliberative process, or compromise the decision-making process.

(c) *Freedom of Information Act.* Where a request for information, the release of which is restricted under paragraph 286h.3(b) is made under the Freedom of Information Act, the request shall be forwarded to the appropriate official for disposition in accordance with DoD 5400.7-R.⁴ Requests for contractor bid or proposal information pursuant to the Freedom of Information Act shall be subject to subparagraph 5-207 a. of DoD 5400.7-R, which requires notice to a non-United States Government source of a record.

§ 286h.4 Responsibilities.

(a) The Under Secretary of Defense (Acquisition) shall be responsible for establishing uniform policies and procedures for the release of acquisition-related information.

(b) The Under Secretary of Defense (Policy), Assistant Secretary of Defense (Program Analysis and Evaluation) and Comptroller, DoD are responsible for adjudicating requests for access to Planning, Programming and Budgeting information pertaining to their respective phases of the PPB system.

(c) The Head of each DoD Component shall assure that procedures for the release of acquisition-related information are consistent with the policy contained in this Directive and shall not impose any additional restrictions on release of such information. These procedures shall specifically identify the

⁴See footnote 1 to § 286h.3(b)(2)(ii).

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individuals authorized to release and transmit acquisition-related information.

PART 287—DEFENSE INFORMATION SYSTEMS AGENCY FREEDOM OF INFORMATION ACT PROGRAM

Sec.

- 287.1 Purpose.
- 287.2 Applicability.
- 287.3 Authority.
- 287.4 Duties of the FOIA Officer.
- 287.5 Responsibilities.
- 287.6 Duties of the DITCO and the DTIC FOIA Officers.
- 287.7 Fees.
- 287.8 Appeal rights.
- 287.9 Reports.
- 287.10 Questions.
- 287.11 "For Official Use Only" Records.

AUTHORITY: 5 U.S.C. 552.

SOURCE: 64 FR 67166, Dec. 1, 1999, unless otherwise noted.

§ 287.1 Purpose.

This part assigns responsibilities for the Freedom of Information Act (FOIA) Program for DISA.

§ 287.2 Applicability.

This part applies to DISA and the Office of the Manager, National Communications System (OMNCS).

§ 287.3 Authority.

This part is published in accordance with (IAW) the authority contained in 32 CFR part 286. It supplements 32 CFR part 286 to accommodate specific requirements of the DISA FOIA Program. However, 32 CFR part 286 takes precedence and shall be used for all issues not covered by this part.

§ 287.4 Duties of the FOIA officer.

The DISA FOIA Officer, located at DISA Headquarters, 701 S. Courthouse Road, Arlington, Virginia, is vested with the authority, within DISA, to release documentation for all requests of Agency records received by DISA directorates and field activities. The DISA FOIA Officer will:

- (a) Make the materials described in 32 CFR 286.7 available for public inspection and reproduction. (A current index of this material will be maintained in accordance with 32 CFR 286.8).