SIDLEY

SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
+1 202 736 8000
+1 202 736 8711 FAX

AMERICA • ASIA PACIFIC • EUROPE

+1 202 736 8446
KFIET@SIDLEY.COM

March 17, 2023

By Email

Meggan LaPorte
Chief Procurement Officer
AHCCCS Procurement Office
100 N. 7th Avenue, Suite 400
Phoenix, AZ 85007
Email: Procurement@azahcccs.gov

Re: KPMG Comments Regarding The Confidentiality of Its Proposal in Response to AHCCCS RFQ No. YH23-0021 for AHCCCS Systems Integrator Services

Dear Ms. LaPorte:

We are counsel to KPMG LLP ("KPMG") and have been asked to provide you with comments in support of KPMG's redactions to its March 17, 2023 proposal (the "Proposal") in response to Arizona Health Care Cost Containment System ("AHCCCS") Request for Quotation No. YH23-0021 (the "RFQ") for Systems Integrator Services.

As discussed in more detail below, certain portions of KPMG's Proposal are exempt from public disclosure under the Arizona Public Records Law ("PRL"), A.R.S. § 39-101 *et seq.*, because they constitute (1) KPMG trade secrets as defined in A.R.S. § 44-401, or (2) "other [KPMG] proprietary data." Under A.R.S. § 34-603(H)(4), where an offeror for a professional services contract designates information in its proposal as a "trade secret" or "proprietary data" and "the agent concurs," the information will "remain confidential" notwithstanding the PRL.[1] The exempt information in KPMG's Proposal falls into the following two categories:

[1] The information that it has marked for redaction is also exempt from public disclosure under the common law exemption for records, the inspection of which "might lead to substantial and irreparable private or public harm," *Carlson v. Pima County*, 141 Ariz. 487, 491, 687 P.2d 1242, 1246 (Ariz. 1984), and because disclosure of this information would be "detrimental to the best interests of the state," *Mathews v. Pyle*, 75 Ariz. 76, 81, 251 P.2d 893, 897 (1952). Because A.R.S. § 34-603(H) provides a sufficient statutory basis for withholding the identified information from public release, we have not discussed these common law exemptions in this letter, but we would be happy to do so at your request.

Sidley Austin (DC) LLP is a Delaware limited liability partnership doing business as Sidley Austin LLP and practicing in affiliation with other Sidley Austin partnerships.

1. KPMG's confidential engagement methodology, including a detailed description of KPMG's proprietary approach to performing systems integration engagements (Proposal pp. 9-11, 13-17, 20-22, 24).

2. Confidential information regarding KPMG's systems integration engagement team, including the names, contact information, and resumes of the individual team members (Proposal pp. 2, 3, 7, 13, 22-26, 28-34).

Legal Standards

Under the PRL, "public records" are generally required to be made available for public inspection upon request. *See* A.R.S. § 39-121 ("Public records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours."). This right of public access to state records is, however, not absolute, and state agencies may deny access to public records on the basis of legitimate government considerations of privacy and when withholding is in the "best interests of the state." *See, e.g., Scottsdale Unified Sch. Dist. No. 48 v. KPNX Broad. Co.*, 191 Ariz. 297, 300, ¶ 9, 955 P.2d 534, 537 (1998). In addition, over 300 Arizona statutes other than the PRL address the confidentiality of public records and either allow the withholding of, or require the withholding of, certain categories of records in the event of a PRL request. *See* Arizona Attorney General, Arizona Agency Handbook, ch. 6, p. 4 (Rev. 2018 ed.) (discussing statutory exemptions to mandatory public disclosure under the PRL).

As relevant here, Title 34, Section 603 of the Arizona Revised Statutes authorizes the state agencies to withhold from public release any portion of a proposal that an offeror submits to a state agency to provide professional services "[t]o the extent that the offeror designates and the agent concurs, trade secrets and other proprietary data contained in [the] proposal." A.R.S. § 34-603(H)(4). This exemption applies even after the source selection process has been completed and the contract has been awarded. *See id*.

Title 34 of the Arizona Revised Statutes does not define the term "trade secrets," and we are not aware of any case law in which the courts have defined the term for purposes of Title 34, Section 603. In this letter, we have assumed that the definition of "trade secret" in A.R.S. § 44-401, which codifies Arizona's enactment of the Uniform Trade Secrets Act, is applicable, since the Arizona Legislature has used this definition in comparable statutes that exempt trade secrets from public release under the PRL in other contexts.[2]

[2] In other sections of the Arizona Revised Statutes that provide similar exemptions for trade secrets held by specific state agencies (*e.g.*, the Arizona Commerce Authority), the Legislature specifically relied on the definition of trade secret in the Uniform Trade Secrets Act, *e.g.*, A.R.S. § 41-1504(L), and there is no apparent reason why a different definition of the term would apply to Section 603.

A.R.S. Section 44-401 defines the term "trade secret" to include "information, including a formula, pattern, compilation, program, device, method, technique, or process, that both: (a) 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] (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

Of these two factors, the "most important" is demonstrating that the owner has taken such precautions as are reasonable under the circumstances to preserve the secrecy of the information. *Enterprise Leasing Co. of Phoenix v. Ehmke*, 197 Ariz. 144, 150, ¶ 22, 3 P.3d 1064, 1071 (Ariz. Ct. App. 1999). To meet this requirement, "[t]he secrecy need not . . . be absolute." *Id*. ¶ 23. Rather, "when evaluating the level of secrecy required, the owner need only be able to show that it made reasonable efforts to maintain the secrecy of the information such as to ensure that it would be difficult for others to discover the information without using improper means." *Id*. "Reasonable efforts do not require extreme and unduly expensive procedures to be taken to prevent trade secrets against industrial espionage, and the owner of a trade secret does not relinquish its secret by disclosure to employees on a necessary basis or by limited publication [to outside parties] for a restricted purpose." *Id*.

To satisfy the requirement that a trade secret have "economic value," the owner of the information need only provide "circumstantial evidence" of the resources invested in producing the information, the precautions taken to protect its secrecy, or the willingness of others to pay for the information. *Joshua David Mellberg LLC v. Will*, 96 F.Supp. 953, 973-74 (D. Ariz. 2015) (analyzing the Arizona Uniform Trade Secrets Act). Value "can be inferred" where the owner can show that the information confers upon it an economic advantage over others in the industry. *Ehmke*, 197 Ariz. at 150, ¶ 22, 3 P.3d at 1070.

Court's applying Arizona's enactment of the Uniform Trade Secrets Act have occasionally looked to the six-factored test set forth in the Restatement of Torts for "additional guidance" in determining whether information is a trade secret. Factors that are considered as part of this test include:

> (1) the extent to which the information is known outside of [the] business; (2) the extent to which it is known by employees and others involved in [the] business; (3) the extent of measures taken by [the business] to guard the secrecy of the information; (4) the value of the information to [the business] and to [its] competitors; (5) the amount of effort or money expended by him in developing the information; [and] (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

FireClean LLC v. Touhy, No. CV-16-00604, 2018 WL 1811712, at *6 (D. Ariz. Apr. 17, 2018) (quoting the Restatement (First) of Torts § 757 cmt. B (1939)); *Ehmke*, 197 Ariz. at 148, ¶ 12, 3 P.3d at 1068 (recognizing the applicability of the Restatement of Torts to the interpretation of Arizona's enactment of the Uniform Trade Secrets Act in the absence of controlling authority).

The term "other proprietary data" is not defined in Title 34, and we are not aware of any case law that has interpreted this term. In comparable public records statutes, this type of language is typically given its "'ordinary, contemporary, common meaning.'" *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2362 (2019) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

Analysis

As discussed below, KPMG's Proposal includes confidential information regarding (1) KPMG's proprietary engagement methodology for systems integration work, (2) the names, contact information, resumes, and biographical data for the members of KPMG's engagement team, each of which are exempt from public disclosure under Section 34-603(H)(4) because they are (1) trade secret and/or "other [KPMG] proprietary data."

1. KPMG's Proprietary Methodology for Systems Integration Engagements

KPMG's Proposal contain highly confidential trade secret information regarding KPMG's methodology and approach for performing systems integration engagements, which is exempt from public disclosure under Section 34-603(H)(4). This information can be found in KPMG's Proposal on pages 9-11, 13-17, 20-22, and 24, which contain a detailed, step-by-step description of KPMG's methodology for performing these engagements, the proprietary tools and approaches that KPMG utilizes in these types of engagements, including the ways in which KPMG has implemented this methodology in providing services to other clients and how KPMG has tailored this approach to serve AHCCCS. As discussed below, KPMG's proprietary engagement methodology and approach for systems integration services satisfies both prongs of the Uniform Trade Secrets Act definition of "trade secret" and meets all six trade secret factors set out in the Restatement.

a. The extent to which the information is known outside of the business. The information that is marked for redaction on these pages regarding KPMG's proprietary methodology for performing systems integration engagements is not widely known outside of the firm. None of this information is available to the general public, and KPMG makes every effort to limit the distribution of this information to individuals outside of the firm when not required by business necessity. For example, due to the sensitivity and value of this information, KPMG does not include any of this information on its website or include it in marketing materials. Moreover, when KPMG includes this information in a proposal for a public sector client, KPMG works with

legal counsel and the public sector client to restrict disclosure of the information to the fullest extent possible under the state's open records laws.

b. The extent to which the information is known by employees and others involved in the business. In addition, the information on these pages regarding KPMG's proprietary methodology for performing systems integration engagements is not widely known within KPMG. The information is shared internally on a need-to-know basis, and the only KPMG personnel who would have access to this information are those who actively work on these types of engagements, as well as a small number of additional personnel who work in supervisory and administrative roles that support these individuals (*e.g.*, secretaries, contract administrators, IT support, legal counsel). All of these individuals are required, under the terms of their employment agreements with KPMG and (in the case of legal counsel) by the ethical standards of their profession, to maintain the secrecy of this information.

c. The extent of measures taken to guard the secrecy of the information. As discussed above, KPMG shares this information regarding its proprietary methodologies outside of the firm only under limited circumstances, and when it does so, it works to protect the information under the state's open records laws. Moreover, the information is only shared with KPMG personnel on a need-to-know basis, and all personnel are required to maintain the confidentiality of the information pursuant to the terms of their employment agreements. Moreover, KPMG has invested significantly in IT security and security training for its personnel in order to prevent the potential misappropriation of this information (as well as other confidential information about the firm and its clients) by hackers and others.

d. The value of the information to the owner of the trade secret and his competitors. The non-public information about KPMG's engagement methodology, which is marked for redaction, is highly valuable KPMG intellectual property and a key differentiator that enables KPMG to compete effectively against rival firms for systems integration work. KPMG is one of the nation's leading firms in providing these services. KPMG's success in this area is, in large part, due to the proprietary engagement tools and methodologies that KPMG utilizes in performing these specialized services. If this information were released to a competitor, the competitor could leverage KPMG's proprietary methodology in developing its own proposals and performing engagements in a way that would give the rival firm an unfair competitive advantage.

If this information were released to a competitor of KPMG, it would cause significant and irreparable competitive harm to KPMG. This harm is due to the vigorous competition in the professional services industry for systems integration engagements. KPMG routinely competes against numerous professional services firms in response to solicitations for this work, and to win business, KPMG must distinguish itself based on the quality, efficiency, and cost effectiveness of its services. The quality, efficiency, and cost with which KPMG performs systems integration work largely depend on the tools, resources, and strategies that KPMG uses in these engagements.

If KPMG's competitors had access to these materials, it would significantly reduce the competitive advantage that KPMG has over other firms in this area, thus causing immediate and irreparable harm to KPMG, and giving KPMG's rivals a correspondingly unfair and unearned advantage.

e. The amount of money or effort expended in developing the information. KPMG has devoted significant resources into the development of the methodology that is reflected in the material that is marked for redaction. This includes both an investment of financial resources, as well as a significant number of labor hours by KPMG's principals and employees to develop and refine the methodology and tools. The methodology is also based on KPMG's cumulative experience performing systems integration work for other public sector clients, which KPMG has used to refine its methodology and ensure that KPMG is providing the best value possible for its clients.

f. The ease or difficulty with which the information could be properly acquired or replicated by others. It would be difficult, if not impossible, for other firms to acquire or replicate this information (assuming, of course, that the competitor did not obtain the information at no cost through a PRL request). KPMG does not widely share this information with individuals inside or outside of the firm, and KPMG has taken significant steps to preserve the confidentiality of this information. Moreover, it is unlikely that a rival firm could produce this information on its own. As noted above, KPMG is a national leader in performing systems integration engagements. Although some aspects of these materials are consistent with and effectuate the relevant professional standards for this type of work, the specific manner in which KPMG performs these engagements also reflects KPMG's extensive experience and unique approach to this work, and the competitive differentiators that are described on these pages represent years of KPMG's combined experience and in this area. Accordingly, the only way by which a rival firm could realistically acquire this information is through a PRL request or misappropriation.

In addition to being a trade secret, the information about KPMG's proprietary tools, methodology, and approach for systems integration engagements in its Proposal is also exempt from public disclosure because it is "other proprietary data," as that term is used in Section 603(H)(4), for the same reasons that are stated above.

2. Proprietary and Competitively Sensitive Information Regarding the Composition of KPMG's Engagement Team

KPMG's Proposal includes detailed information regarding the identities of KPMG's systems integration team for this AHCCCS engagement, including names, contact information, photographs, resumes, and biographical information, which is exempt from public disclosure under Section 34-603(H)(4) because it is a KPMG trade secret and "other [KPMG] proprietary data." This information includes the material that has been marked for redaction on pages 2, 3, 7, 13, 22-26, and 28-34 of KPMG's Proposal.

As discussed below, KPMG's proprietary information regarding the composition of its systems integration engagement team satisfies both prongs of the Uniform Trade Secrets Act definition of "trade secret" and meet all six trade secret factors set out in the Restatement.

a. The extent to which the information is known outside of the business. The information that is contained in KPMG's Proposal regarding the identities of KPMG's systems integration engagement team is not widely known outside of the firm. KPMG specifically limits the release of this information outside of the proposal context to minimize the poaching of its employees by rival professional services firms. KPMG does not publicly release this information. There is no information about the identities of KPMG's systems integration engagement team on KPMG's website, and KPMG does not include this information in any marketing materials. Indeed, the only time KPMG would release information regarding the composition of its engagement team for this type of work is when required to do so in response to a solicitation. And when this information is included in response to a public sector solicitation, KPMG works to protect this information to the fullest extent allowable under the state's open records laws.[3]

b. The extent to which the information is known by employees and others involved in the business. In addition, the information regarding the identities of KPMG's systems integration engagement team is not widely known within KPMG. This information is provided to KPMG personnel on a need-to-know basis only. The only individuals within KPMG who would have access to this information are individuals who work directly in the systems integration area and potentially a small number of administrative and professional staff (*e.g.*, secretaries, contract administrators, legal counsel). KPMG does not maintain an internally accessible database of engagement team members for each project, and there is no easy way by which an employee working in a different practice area could obtain this information regarding how KPMG staffs its systems integration projects. Moreover, KPMG employees who might obtain access to this information are prohibited from sharing it outside of the firm under the terms of their employment agreements with KPMG.

c. The extent of measures taken to guard the secrecy of the information. As discussed above, KPMG shares this information outside of the firm only under limited circumstances, and when it does so, it works to protect the information under the state's open records laws. The information is not widely known within KPMG, and all personnel are required to maintain the confidentiality of the information regarding the identities of the systems integration engagement team pursuant to the terms of their employment agreements with KPMG. Moreover, KPMG has invested significantly in IT security and security training for its personnel in order to prevent the

[3] While it is true that KPMG's individual employees are free to share the fact that they work at KPMG, and many of KPMG's employees maintain LinkedIn accounts, KPMG employees typically cannot share the names of the specific clients with whom they work without receiving prior authorization from both the client and the firm. And there is no plausible way that a competitor of KPMG could recreate the composition of KPMG's engagement team for this engagement or similar systems integration engagements based on information that is available in the public domain.

potential misappropriation of this information (as well as other confidential information about the firm and its clients) by hackers and others.

d. The value of the information to the owner of the trade secret and his competitors. The release of information about the identities of KPMG's engagement team would cause immediate competitive harm to KPMG by providing an ideal tool for competitors to poach KPMG's employees. As a professional services firm, KPMG's most valuable asset is the professionals who make up the firm. Accordingly, KPMG devotes significant time and resources to the recruiting, hiring, training, and retention of its partners, principals, and employees and to train them regarding how to perform systems integration engagements. As noted above, KPMG's website does not include employee bios or a comprehensive director of employees, partners, and principals. This is due, in part, to KPMG's desire to limit poaching by rival firms. If specific information about the names, contact information, and resumes of KPMG's engagement team were publicly available, a rival firm could use this information to engage in targeted recruitment of these individuals. This would cause immediate and significant harm to KPMG (and a corresponding gain to the rival firm) by causing the loss of skilled professionals who are integral to KPMG's success in this area, and by allowing the competitor firm to unfairly leverage the significant resources that KPMG has devoted to the training and development of these individuals.[4]

e. The amount of money or effort expended in developing the information. As discussed above, KPMG's devotes significant financial resources and time each year to recruit and retain its employees. In addition, KPMG invests significant resources each year in training and professional development for its employees.[5] This investment in recruiting and training is a result of KPMG's belief that KPMG's most valuable asset, and the key to its success, is its people. The public release of the resume and staffing information that KPMG has redacted would immediately erode the value of KPMG's investment in these areas by enabling the targeted recruitment of KPMG's employees in the systems integration field.

f. The ease or difficulty with which the information could be properly acquired or replicated by others. It would be difficult, if not impossible, for other firms to acquire or replicate

---

[4] Although we are not aware of any case law in Arizona regarding the protection of employee resumes under Section 603, courts in other states routinely allow for the protection of this information under comparable provisions of their state open records laws. *See, e.g.*, Tex. Att'y Gen. OR2014-04656 (2014) (holding that resumes submitted by a contractor to the Teacher Retirement System of Texas as part of a proposal were exempt from public disclosure under the Texas public records statute); *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St. 3d 396, 402 (Ohio 2000) (holding that a list of physicians employed by a hospital and their revenue generation was a trade secret and exempt from public disclosure, in part, because it would assist rival healthcare providers in poaching these employees).

[5] To cite one significant example, in 2020, KPMG opened a $450,000 million campus, with almost 800,000 square feet of meeting, classroom, and event space in Lake Nona, Florida, specifically for the training and professional development of KPMG's employees. *See* https://info.kpmg.us/kpmg-lakehouse/lakehouse.html and https://www.lakenona.com/thing-place/kpmg-lakehouse/

KPMG's engagement team information. As noted above, KPMG is a national leader in the systems integration space, and KPMG closely protects the identities of its employees on any given engagement. It would be difficult, if not impossible, for a rival firm to develop or acquire similar staffing information without acquiring it through a PRA request.

In addition to being a trade secret, KPMG's confidential staffing information in its Proposal is also exempt from public disclosure because it is "other proprietary data," as that term is used in Section 603(H)(4), for the same reasons that are stated above.

Conclusion

For the reasons discussed above, the material that KPMG has redacted in its Proposal is exempt from public disclosure under the PRL, and KPMG respectfully asks that AHCCCS not release this information to the public. If AHCCCS decides that any of the redacted information should be released, we ask that you please notify us in writing sufficiently in advance of any release so as to allow KPMG to consider appropriate next steps.

Thank you for your time and consideration.

Sincerely,

/s/ Kyle Fiet
Kyle J. Fiet
Counsel to KPMG LLP

Enclosure