

# TUTORIAL #34

## How do I protect the proprietary information in my grant application?

### BEFORE SUBMITTING YOUR DOE APPLICATION WITH PROPRIETARY INFORMATION

Before submitting your application to the Department of Energy (DOE) through GRANTS.gov, take the time to assure that you have properly marked all proprietary information in your proposal. Most companies start this process when they begin drafting the project narrative by entering the recommended proprietary statement clause at the bottom of the Cover page, as well as the additional recommended statements on subsequent pages that contain proprietary information.

The types of information that are considered proprietary usually include technical information that the company considers a trade secret, as well as commercial and financial information that one would not typically share with others. As you will submit your DOE application in a number of discrete sections through grants.gov – make note of which sections contain proprietary information. Typically, these include the project narrative, the commercialization plan, and the financials. However, it is possible that you may have proprietary information in other sections of your application as well. Once

you have identified the sections of the application that contain proprietary information, then place the appropriate markings at the bottom of relevant pages.

So what constitutes appropriate marking? According to the DOE Funding Opportunity Announcement (FOA), on the cover page of the project narrative you must place the following notice. It is recommended that you cut and paste this notice exactly. “Pages [insert page numbers] of this document may contain trade secrets or commercial or financial information that is privileged or confidential and is exempt from public disclosure. Such information shall be used or disclosed only for evaluation purposes or in accordance with a financial assistance or loan agreement between the submitter and the Government. The Government may use or disclose any information that is not appropriately marked or otherwise restricted, regardless of source.” Please note that this last sentence clearly indicates that anything that is NOT marked as proprietary could be disclosed – so be sure to think carefully about what is proprietary. On subsequent pages that contain



proprietary information add the following statement, again cutting and pasting precisely: “May contain trade secrets or commercial or financial information that is privileged or confidential and exempt from public disclosure.” Please refer to the DOE SBIR/STTR web site. Under “Applicant Resources”, click on “Protecting your Trade Secrets, Commercial, and Financial Information”. That link will bring up four examples of how to properly denote and mark proprietary information in your application.

### **Guidance of FOA**

The guidance in the FOA clarifies that one must NOT include this statement on pages that do NOT contain proprietary information. On those pages that DO contain proprietary information, each line or paragraph containing trade secrets or commercial or financial information that is privileged, must be marked with one of the following: brackets, highlighted text, underlined text or vertical line. Again, please refer to the DOE web site for examples for properly identifying proprietary information. Once you have chosen how to mark your proprietary information, you must also include on the cover page a Proprietary Data Legend denoting your chosen method, whether brackets, highlights, or underlined text. It is recommended that you cut and paste this statement exactly. “Proprietary Data Legend: Lines, paragraphs, tables, charts, and other graphics containing trade secrets, commercial, and/or financial information are marked with (insert your method here).” Failure to follow these guidelines may result in DOE’s inability to treat such information as proprietary and may delay the grant process.

An obvious question to ask is “Beyond DOE SBIR/STTR program managers and staff, who will see the proprietary information during the evaluation process?” For the vast majority of applications, DOE uses qualified non-Federal personnel as reviewers when conducting the merit review evaluation. However, these individuals must sign conflict of interest agreements prior to reviewing an application. By submitting an application, the applicant is providing consent to the use of non- Federal reviewers and administrators.

Another question that may cross your mind is “What happens to information in an applicant’s proposal if they are unsuccessful in winning an award?” The application that you submit remains the property of the applicant. However, the DOE must retain one electronic copy for three years for each unsuccessful application.

Another reason to ensure your proprietary data is properly marked is that any application submitted to a federal agency is subject to existing statutory and regulatory requirements such as the Freedom of Information Act (FOIA). All information clearly marked by the applicant in accordance with the guidance provided in the Funding Opportunity Announcement, will be treated in confidence to the extent permitted by law.

The Department of Energy wants to protect your proprietary information. However, in order to do that you must first consider and clearly indicate which information is proprietary using the procedures identified in the FOA and discussed here.

*Revised July 2020*