Construction is a competitive industry; even the most successful contractor finds itself in the position as the unsuccessful bidder from time to time. On private sector construction, bidders many times have good relationships with the owner and are able to call the owner up for feedback on their bid. Unsuccessful bidders on public sector construction may not have the same relationship, and in those instances unsuccessful bidders many times seek additional information through state open records requests or federal Freedom of Information Act ("FOIA") requests. Often unsuccessful bidders hope to use the information obtained through open records and FOIA requests as the basis of a bid protest. Unsuccessful bidders are caution to seek legal advice immediately, because bid protest rights can lapse while waiting on the government agency to respond to open records and FOIA requests. The United States Government Accountability Office has long held that bid protestors who are aware of the basis of a protest cannot wait and see before it files a protest.¹

We are often approached by clients who wish to file FOIA requests for a number of reasons. “The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”² When contemplating a FOIA request, it is important to identify the documents you wish to see and determine early if the documents fall under one of the nine exemptions to disclosure – before expending the energy requesting the documents. The following documents categories are exempted from disclosure under FOIA:

1. Classified Information (Confidential, Secret and Top Secret);
2. Records “related solely to the internal personnel rules and practices of any agency”;
3. Information that has been “specifically exempted from disclosure by statute”;
4. Trade secrets, commercial or financial information obtained from a person and is privileged or confidential;
5. “Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency”;
6. Information in personnel and medical files and similar files when disclosure would be an invasion of personal privacy;
7. Certain law enforcement information;
8. Matters contained in or related to examination, operating or condition reports prepared by or for regulators/supervisors of financial institutions;
9. Geological information and data concerning wells.³

In the past, agencies have used Exemption 2 to withhold a wide variety of documents. The Supreme Court decision Milner v. Department of the Navy, 131 S.Ct. 1259 (2011) substantially

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¹ See Orbital Scis. Corp., 2008 WL 5790105 (Comp. Gen. Dec. 15, 2008)(“a protestor who is already reasonable aware of a protest basis may not wait until it obtains additional information before filing a protest”).
narrowed Exemption 2 to only encompass records related to employee relations and human resources.

The most common exemptions seen in construction related FOIA requests preventing disclosure of documents are Exemptions 4 and 5. A recent case out of the 4th Circuit Court of Appeals confirms the validity of those exemptions. In *American Management Services, LLC v. Department of the Army*, No. 12-1274, 2012 WL 93154 (4th Cir. Jan. 9, 2013), the Army’s refusal to release documents requested via a FOIA request because they fell with Exemption 4 “trade secrets and commercial or financial information obtained from a person and privileged or confidential” or Exemption 5 “interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency” was upheld. Interestingly, the FOIA request arose out of two projects that were privatization of military housing at Fort Benning, Georgia and Fort Belvoir, Virginia.4 The projects included complicated corporate structures and included the development, ownership, operation, management, and maintenance of military housing. Clark Realty Capital, LLC (“Clark”) was the majority owner of the projects and American Management Services d/b/a Pinnacle (“Pinnacle”) was the minority owner.5 The Army maintained minority ownership of the Fort Benning project, essentially creating a public-private partnership.6 At some point during the project, Clark and its outside counsel approached the Army with a binder of information alleging fraudulent conduct on the part of Pinnacle in order to request the Army’s approval (as its partner) with its proposed course of action.7 The Army approved Clark’s proposed course of action and a lawsuit in the Superior Court of Muscogee County, Georgia ensued between Clark and Pinnacle, which is still ongoing.

Within the Georgia litigation, Pinnacle requested the binder of information through discovery requests, Clark objected asserting that the binder was privileged. Pinnacle did not file a motion to compel; instead it filed a FOIA request to the Army requesting among other things the binder, thus attempting to use FOIA as a work around when it faced a roadblock in discovery.8 The Army released limited responsive document and withheld the remaining under FOIA Exemptions 4 and 5. Pinnacle argued that the documents were not privileged or confidential and thus Exemption 4 did not apply. The district court found that the documents included timelines and tables created by Clark’s outside counsel and notes and reports detailing the alleged wrongdoings and that Clark “would prefer not to disclose such documents to the public. Disclosure...would likely have a chilling effect on the company’s decision to initiate litigation in the first place or, alternatively, to provide a government agency with the same quality and quantity of information that it might otherwise receive.”9 More importantly, for private participants in public-private partnerships, the Fourth Circuit Court of Appeals also found that Exemption 5 applied to documents prepared by Clark and shared with the government, even

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4 *Id.* at *1.
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.* at *2.*
9 *Id.* at *4.*
though Clark is not a government agency. When the common interest doctrine applies, “a document prepared outside the Government may nevertheless qualify as an ‘interagency’ memorandum under Exemption 5.” The public-private partnership (Clark as the managing partner and the Army with a minority interest) and the shared common interest in the Georgia litigation were sufficient to prove a common interest, even though the common interest had not been reduced to writing. Thus, the 4th Circuit Court of Appeals upheld the Army’s decision, protecting Clark’s communications with the Army regarding the ongoing litigation from disclosure under FOIA.

Bottom Line: FOIA and open records requests are useful tools, when utilized properly. FOIA does not extend any bid protest rights and does not replace discovery in litigation. Participants in public-private partnerships should keep abreast of developments in open records and FOIA law and should identify when the common interest doctrine may apply to protect information shared with the government.

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10 Id. at *6.
11 Id. at *6 (quoting Dep’t of Interior v. Klamath Water Users Protective Ass’n, 532 U.S. 1, 9 (2001)).
12 Id. at *7.