

## Recent Developments: Protection of Line Item Pricing Under FOIA Exemption 4

The decades-old battle over the release of contract line item pricing and other unit prices has heated up once again.

On September 8, 2005, the Department of Justice Office of Information and Privacy ("DOJ"), which establishes government-wide policy regarding FOIA issues, issued its long-awaited updated guidance to Executive Branch agencies on the release of pricing information in government contracts. This guidance (at <http://www.usdoj.gov/oip/foiapost/2005foiapost17.htm>) follows two overwhelming defeats for the government on this issue in the D.C. Circuit. The most recent case, *McDonnell Douglas Corp. v. Dep't of the Air Force*, 375 F.3d 1182 (D.C. Cir. 2004), reaffirmed that Court's core holding in *McDonnell Douglas Corp. v. NASA*, 180 F.3d 303 (D.C. Cir. 1999), that a contractor would likely suffer substantial competitive harm simply because its competitors could use its line item pricing to underbid the contractor in future competitions.

In the 2004 decision, the court had forcefully rejected the Air Force's argument that contract prices are never competitively useful because price is only one of many factors considered in best value contract awards. In both cases, the court found that the agency did not have an adequate basis in the administrative record to reject the common sense proposition that disclosure of pricing to a competitor is likely to assist that competitor and harm the submitter in future competitions for similar products or services. The most recent *McDonnell Douglas* decision is particularly significant because it upheld the withholding of option year prices, one of the most frequently contested types of contract pricing information under FOIA Exemption 4.

Notwithstanding the clear holdings in these two decisions, DOJ's September 8 guidance is a frontal assault on the D.C. Circuit's position. The guidance document rejects the core, common sense premise of these cases, reasserts DOJ's long-held view that unit prices should routinely be released, and attempts to provide agency FOIA officials with a roadmap for making an administrative record in support of disclosure that will better withstand judicial review.

DOJ does, however, reaffirm that agencies must give submitters notice of FOIA requests for contract pricing information and an opportunity to submit comments on the proposed release. Companies that want to protect their pricing information (or any other information contained in successful proposals for government contracts) must take care to make a comprehensive administrative submission containing all

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arguments in support of withholding and presenting all facts on which the contractor relies in support of its competitive harm position. The basic legal test has not changed. A contractor must show that release of particular information would be likely to cause the company substantial competitive harm. If so, the information is exempt from disclosure under FOIA Exemption 4, 5 U.S.C. § 554(b)(2), and is protected from discretionary disclosure by the Trade Secrets Act, 18 U.S.C. § 1905.

A second aspect of the new DOJ guidance document is equally troubling. DOJ continues to maintain that the relevant Federal Acquisition Regulation provisions (FAR 15.503(b)(1)(iv) and 15.506(d)(2)) **require** disclosure of unit prices in post-award notice to and debriefing of unsuccessful offerors. But that position contradicts both the plain language of the FAR provisions themselves and the D.C. district court's decision in *MCI Worldcom, Inc. v. GSA*, 163 F. Supp.2d 28 (D.D.C. 2001), which holds that these FAR provisions require disclosure of unit prices only if not otherwise protected under FOIA Exemption 4. DOJ contends that the *MCI* case did not really resolve the issue because the pricing at issue there was not true unit pricing, as that term is used in the FAR.

The FAR Part 15 issue is, however, squarely presented in a new reverse-FOIA action recently filed in the same district court. See *Honeywell Tech. Solutions, Inc. v. Dep't of the Air Force*, No. 05-cv-01772-RWR (D.D.C. filed Sep. 6, 2005). With regard to unit pricing, based on FAR 15.506(d)(2), the Air Force decided to release Honeywell's price information, labor rate information, and line item prices. In its complaint, Honeywell challenges the Air Force release decision and its interpretation of the controlling FAR provisions.

These developments are a clear indication that DOJ and federal procuring agencies continue to be hostile to the protection of contract pricing information. As a result of the new DOJ guidance, we expect that even those procuring agencies that have agreed to withhold pricing information in recent years in the wake of the *McDonnell Douglas* cases will again refuse to accept contractors' reliance on the D.C. Circuit case law. Contractors who want to protect pricing information must be prepared not only to establish their positions at the administrative level in detailed submissions, but also to seek judicial review of unfavorable release decisions.

For more information, please contact a member of our Freedom of Information Act practice group: David Kasanow at (202) 496-7194, Tom Papson at (202) 496-7639, or Joanne Zimolzak at (202) 496-7375.

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