GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
OFFICE OF THE GENERAL COUNSEL TO THE MAYOR

Freedom of Information Act Appeal: 2011-16

March 10, 2011

William L. Callahan, Esq.

Dear Mr. Callahan:

This letter responds to your administrative appeal to the Mayor under the District of Columbia Freedom of Information Act, D.C. Official Code § 2-531(a)(2001) (the "DC FOIA"), dated February 22, 2011 (the "Appeal"). You ("Appellant") assert that the District Department of Transportation ("DDOT") improperly withheld records in response to your request for information under DC FOIA dated January 6, 2011 (the "FOIA Request").

Background

Appellant's FOIA Request sought from DDOT records related to its procurement for tree removal services from 2009 to the date of the FOIA Request. In response, by letter dated January 31, 2011, DDOT provided the records to Appellant, but redacted certain portions of the records, citing the "trade secrets privilege. D.C. Official Code § 2-531(a)(1)."

On Appeal, Appellant challenges the redaction of the pricing information as follows:

1. DDOT did not articulate a clear rationale for its redaction other than citing the section of the District of Columbia Official Code, that is, it did not distinguish between trade secrets and confidential commercial or financial information.

2. Disclosure of pricing information cannot result in a substantial harm to the competitive position of the contractor as the contract has been awarded. No commercial or financial information regarding the contractor is sought.

In its response, dated March 3, 2011, DDOT reaffirmed its prior position. It stated that it properly invoked the trade secrets exemption under D.C. Official Code § 2-531(a)(1) and that, under applicable law set forth regarding the exemption, it redacted (1) company-specific pricings per unit; and (2) aggregate amounts that presented a likelihood of calculating company-specific (A) item pricing; (B) pricing for services; (C) pre-negotiation bid amounts; and (D) total bid amounts. DDOT also explained the reasoning for its determination that disclosure of the redacted information would result in competitive harm. In addition, DDOT provided a privilege log

indicating the page number, subject matter, and privilege asserted for each documents. Finally, it attached copies of redacted and corresponding unredacted pages of the documents produced.

Discussion

It is the public policy of the District of Columbia (the "District") government that "all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." D.C. Official Code § 2-537(a). In aid of that policy, the DC FOIA creates the right "to inspect … and … copy any public record of a public body . . ." *Id*. at § 2-532(a). Moreover, in his first full day in office, the District's Mayor Vincent Gray announced his Administration's intent to ensure that the DC FOIA be "construed with the view toward 'expansion of public access and the minimization of costs and time delays to persons requesting information.'" Mayor's Memorandum 2011-01, Transparency and Open Government Policy. Yet that right is subject to various exemptions, which may form the basis for a denial of a request. *Id*. at § 2-534.

The DC FOIA was modeled on the corresponding federal Freedom of Information Act, *Barry v. Washington Post Co.*, 529 A.2d 319, 321 (D.C. 1987), and decisions construing the federal statute are instructive and may be examined to construe the local law. *Washington Post Co. v. Minority Bus. Opportunity Comm'n*, 560 A.2d 517, 521, n.5 (D.C. 1989).

D.C. Official Code § 2-534(a)(1) exempts from disclosure "trade secrets and commercial or financial information obtained from outside the government, to the extent that disclosure would result in substantial harm to the competitive position of the person from whom the information was obtained." This has been "interpreted to require both a showing of actual competition and a likelihood of substantial competitive injury." *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987). See *Washington Post Co. v. Minority Business Opportunity Com.*, 560 A.2d 517, 522 (D.C. 1989), citing *CNA Financial Corp. v. Donovan.* In construing the second part of this test, "actual harm does not need to be demonstrated; evidence supporting the existence of potential competitive injury or economic harm is enough for the exemption to apply." *Essex Electro Eng'rs, Inc. v. United States Secy. of the Army*, 686 F. Supp. 2d 91, 94 (D.D.C. 2010). See also *McDonnell Douglas Corp. v. United States Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (The exemption "does not require the party . . . to prove disclosure certainly would cause it substantial competitive harm, but only that disclosure would "likely" do so. [citations omitted]").

The first contention of Appellant is that DDOT did not distinguish between trade secrets and confidential commercial or financial information. The case law has generally treated unit pricing in contracts as commercial or financial information and the analysis of DDOT in its response is consistent with that treatment. For the purposes of this decision, as *in Airline Pilots Ass'n, Int'l v. USPS*, 2004 U.S. Dist. LEXIS 26067 (D.D.C. 2004), it will not be necessary to consider whether or not the unit pricing information constitutes a trade secret; it will be considered as commercial or financial information.

The second and main contention of Appellant is that the disclosure of unit pricing information cannot result in a substantial harm to the competitive position of the contractor as the contract

has been awarded. However, this is clearly not the law. The award of the contract does not affect the availability of the exemption.

"Constituent or line-item pricing information in a Government contract falls within [the exemption] . . . if its disclosure would . . . "cause substantial harm to the position of the person from whom the information was obtained. [citation omitted]." *Canadian Commer. Corp. v. Dep't of Air Force*, 514 F.3d 37, 40 (D.C. Cir. 2008). While an early case, *Racal-Milgo Gov't Systems, Inc. v. Small Bus. Admin.*, 559 F. Supp. 4 (D.D.C. 1981), and some cases which follow its reasoning, have held that the disclosure of unit pricing is not likely to cause substantial competitive harm, most cases have found that such disclosure would result in competitive harm. *See, e.g., Boeing Co. v. United States Dep't of the Air Force, 616 F. Supp. 2d 40, 45 (D.D.C. 2009)* ("Release of requested information is likely to cause substantial competitive harm if disclosure would allow a company's competitors to "accurately calculate" its "future bids and its pricing structure" so that they could "estimate and undercut its bids. [citations omitted]."; *Canadian Commer. Corp. v. Dep't of Air Force*, 514 F.3d 37 (D.C. Cir. 2008); *GE v. Dep't of the Air Force*, 648 F. Supp. 2d 95 (D.D.C. 2009)(finding that disclosure of line-item pricing results in likelihood of harm for actual competition over future contracts and negotiations by company's customers); *McDonnell Douglas Corp. v. United States Dep't of the Air Force*, 375 F.3d 1182, 1189 (D.C. Cir. 2004)(substantial competitive harm because disclosure would significantly increase the probability competitors would underbid contractor in the event the government rebids the contract).

Nevertheless, there is no *per se* rule with respect to nondisclosure of unit pricing information and the actual circumstances of each case must be addressed. *McDonnell Douglas Corp. v. United States Dep't of the Air Force*, 375 F.3d 1182 (D.C. Cir. 2004); *Boeing Co. v. United States Dep't of the Air Force, 616 F. Supp. 2d 40, 45 (D.D.C. 2009).*

DDOT states that it considered the tests applicable to the exemption under D.C. Official Code § 2-534(a)(1). First, it states that it determined that the contractor faced actual competition from the Appellant. Second, the disclosure of pricing and bidding information, specific line-item and service pricing, and bid amounts . . . would permit Appellant to calculate to a degree of accuracy pricing structure and future bids and later underbid and undercut the competition."

The availability of an exemption from disclosure is not evaluated based on the identity of the requester or the use for which the information is intended. *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 162 (2004). Notwithstanding its focus on the Appellant, we agree with the conclusion of DDOT as to component bidding and pricing. First, there is actual competition in the market. The documents submitted indicated that there were at least 30 companies which could provide the services contemplated by the contract. Of these companies, there were 9 companies which submitted bids for the contract. This demonstrates that there is substantial competition in the market for the services contemplated by the contract. Second, the pricing and bidding information in the documents is the kind of information which could enable a potential bidder on future contracts of the type awarded here to determine the amount of bids which could be submitted for such contracts to undercut the competition. Furthermore, in this regard, there does not appear to be any reason to question the judgment of the agency which has the presumptive expertise in the value of this information in the industry. While, as stated, the

identity of the requester and the use contemplated for this information is not considered in determining the availability of the exemption, the fact that the Appellant is specifically seeking this pricing information through the Appeal does buttress the conclusion that this is valuable commercial or financial information.

However, because the response of DDOT was unusually detailed and complete, including copies of redacted and corresponding unredacted pages of the documents produced, we have had an opportunity to review all of the redactions made. In certain instances, the redactions were not limited to pricing and bidding information and were not necessary based on the exemption. These instances are as follows:

1. On page 1, the portion of the disclosure relating to the total increase in the contract ceiling, without reference to the number of items which this covers, should be unredacted. This information relates to the total contract price and, as it was a modification of a contract after award, would not allow competitors to gain any information about pricing or bidding.

2. On page 3, the portion of the disclosure relating to the total increase in the contract ceiling should be unredacted. This information relates to the total contract price and, as it was a modification of a contract after award, would not allow competitors to gain any information about pricing or bidding.

3. On page 4, the disclosure relating to the total increase in the contract ceiling and the total should be unredacted. This information relates to the total contract price and, as it was a modification of a contract after award, would not allow competitors to gain any information about pricing or bidding.

4. On page 108, the evaluation of the bidder in the third paragraph should be unredacted as it does not relate to pricing or bidding information.

5. On page 113 and 114, in the Determinations and Findings, the redactions relate to the funding for the contract and do not appear to relate the pricing or bidding information. Therefore, they should be unredacted.

Accordingly, DDOT should provide the unredacted disclosures as set forth in paragraphs (1) through (5) above. If DDOT believes that we have misconstrued the nature of these redactions and the likelihood of substantial harm of their disclosure, it may request a reconsideration of this decision prior to the date set forth below for production in accordance with this decision. The fact that we are finding that such disclosures should be made should not be read as a rebuke of the agency. Based on the response of DDOT, we are satisfied that it made a good-faith effort to comply with DC FOIA and its underlying policy; indeed, it was the unusually compete and detailed response which allowed for the relief provided to Appellant.

Conclusion

Therefore, the decision of is UPHELD in part and REVERSED and REMANDED in part. DDOT is ordered to provide pages 1, 3, 4, 108, 113, and 114 without the redactions noted on page 4 of this decision within ten (10) days after the date of this decision.

This constitutes the final decision of this office. If you are dissatisfied with this decision, you are free under DC FOIA to commence a civil action against the District of Columbia government in the District of Columbia Superior Court.

Sincerely,

Donald S. Kaufman
Deputy General Counsel

cc: Nicholas Simopoulous, Esq.