

## *McDonnell Douglas* Extended – Release of Unit Prices Still Improper

**Background:** Release of unit prices or similar pricing information in awarded government contracts continues to be an extremely contentious issue. A recent decision by the U.S. District Court for the District of Columbia has blocked the U.S. Air Force from releasing line-item pricing pursuant to a Freedom of Information Act (“FOIA”) (5 U.S.C. § 552) request. The pricing for both base and option years that had been provided to the Air Force by Canadian Commercial Corporation (“CCC”) and its subcontractor Orenda Aerospace Corporation (“Orenda”) in competing for and receiving award of a jet engine repair and maintenance contract. *Canadian Commercial Corp., et al. v. Air Force*, No. 04-1189 (HDB) (D.D.C. Aug. 3, 2006). This case reinforces and extends the rationale for withholding such information set forth in the U.S. Court of Appeals for the District of Columbia’s opinion in *McDonnell Douglas v. Air Force*, 375 F.3d 1182 (D.C. Cir. 2004).<sup>1</sup>

**Summary and Analysis:** *Canadian Commercial Corp.*, like *McDonnell Douglas*, involved a “Reverse FOIA” suit in which CCC and Orenda challenged the Air Force’s decision to release to a competitor a variety of pricing information which they had submitted with their proposal for a contract to provide J85 turbojet engine repair and maintenance services and which had been incorporated by reference into the contract. Orenda objected to the Air Force’s release pursuant to an FOIA request for a variety of pricing information, including option year line-item pricing, base year line-item pricing, and fixed hourly labor rates for over and above work. Orenda objected to the release on the basis that the information was exempt from disclosure under FOIA Exemption 4 (5 U.S.C. § 552(b)(4)) which authorizes the withholding of confidential, commercial or financial information and on the basis that release of the information would violate the Trade Secrets Act (18 U.S.C. § 1805). The Air Force vigorously defended its decision to release the pricing information providing extensive and detailed arguments to justify its decision.

In reaching its decision that the Air Force’s decision to release line-item pricing (i.e., unit prices) was arbitrary and capricious, the Court followed the approach articulated in the 2004 *McDonnell Douglas* decision and held that:

- Because the Federal Government is required by law to consider price when it decides which competitor should be awarded a contract, pricing information is deemed a requirement of government solicitations, and, hence, involuntarily submitted. As such, the burden is on the submitter to show that disclosure is likely either to impair the government’s future interest in competition or cause the submitter to suffer substantial competitive harm.
- The Air Force’s decision that release of the pricing information at issue was unlikely to cause future impairment to the Government was conclusory, unsupported by any evidence, and not worthy of deference by the Court.
- The Air Force’s argument that “price is one of many factors” used in selecting which competitor should be awarded a contract is contrary to D.C. Circuit case law and does not reflect that price is the only “objective factor” and the only one that must be considered by law.
- Orenda demonstrated that the release of its line-item pricing information would likely cause it substantial harm as its competitors could then submit unsolicited proposals undercutting Orenda’s

<sup>1</sup> The D.C. Circuit’s decision in this case was the subject of an earlier Venable *Government Contracts Update* which may be viewed at [http://www.venable.com/publications.cfm?action=view&section=newsletters&publication\\_id=1163](http://www.venable.com/publications.cfm?action=view&section=newsletters&publication_id=1163).

prices. Despite Air Force objections that it could not accept such unsolicited proposals, the Court concluded that such lower cost proposals could induce the Air Force to re-compete the requirement rather than exercise the options under CCC/Orenda's contract as "options may not be exercised unless they are determined to be "the most advantageous method of fulfilling the government's need" and price must be considered in this determination.

- The scope of the Trade Secrets Act is at least co-extensive with Exemption 4 and the terms of the Trade Secrets Act affirmatively preclude the Government from disclosing information that is protected by Exemption 4.
- Federal Acquisition Regulation ("FAR") language authorizing the disclosure of unit pricing does not allow for the disclosure of information exempt from release under FOIA.

This decision is very important for contractors as it follows and extends the rationale in the *McDonnell Douglas* decision, which was itself a general departure from prior FOIA decisions that had allowed the release of pricing information. Since the District of Columbia federal courts are generally considered to author the leading FOIA decisions, the *McDonnell Douglas* and *Canadian Commercial Corp.* cases are particularly important. For a further discussion of the *McDonnell Douglas* decision, see our *Procurement Lawyer* article on this subject: *Release of Unit Prices after McDonnell Douglas Corp. v. NASA*, 35 Procurement Law. 9 (Winter 2000).

**Practitioner Tips:** It is difficult to predict how the government will apply the FOIA in any given situation. As evidenced by the Air Force actions in *Canadian Commercial Corp.*, some of the defense agencies have been aggressive in attempting to release pricing information in an attempt to establish a bright line test for release of this type of information. In order to protect sensitive information and to maximize the likelihood that such information will not be released to competitors in response to FOIA requests, government contractors should consider:

- Limiting the amount of sensitive commercial or financial information submitted to that necessary to satisfy the requirements of the solicitation.
- Clearly and conspicuously marking all sensitive commercial or financial information contained in a proposal that, if released, would harm your company's ability to compete for similar work.
- Notifying the government in proposals or otherwise that you expect to be notified and to have an opportunity to object prior to the release of any sensitive information to any FOIA requester.
- Upon receiving notice that the government is considering releasing your sensitive information, promptly engage the appropriate business personnel and legal counsel in order to develop all credible objections to the government's release. You will probably be unable to raise in court any arguments that you did not first raise with the government agency.

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