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DISCLOSURE OF CONTRACT PRICES A MIXED MESSAGE

Two recent federal court cases show that the law is still unsettled on whether the government can release procurement contract prices to a company's competitors. In the first case, the D.C. District Court concluded that the decision of the Department of the Air Force to release Boeing's contract option prices and other pricing information, pursuant to a Freedom of Information Act (FOIA) request from its competitor, Lockheed Martin, was proper. In the second case, the Court of Federal Claims found that the Department of the Army had a duty not to release contract option and other prices pursuant to a FOIA request by a competitor during a recompetition.

I. McDonnell Douglas v. U.S. Air Force (D.C. District Court)

In *McDonnell Douglas Corporation v. United States Department of the Air Force, et al.*, Civil Action No. 00-1693 (RWR), August 27, 2002, the D.C. District Court reviewed an Air Force decision to release option prices and other pricing information on a McDonnell contract for KC-10 aircraft supplies and services, pursuant to a FOIA request from Lockheed Martin Corporation. McDonnell Douglas Corporation (a wholly-owned subsidiary of The Boeing Company) brought a reverse FOIA action contending that the Air Force decision that the prices were not protected from disclosure under FOIA Exemption 4[1] was in violation of the Administrative Procedures Act[2] and the Trade Secrets Act.[3] Boeing challenged the Air Force's conclusion that disclosing the contract prices would neither harm the government nor Boeing in the future.

The court dismissed Boeing's claim that disclosure violates the Trade Secrets Act, relying on *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), to conclude that the Trade Secrets Act does not afford a

[1] Exemption 4 states that FOIA's disclosure requirements do not apply to matters that are trade secrets and commercial or financial information obtained from a person and privileged or confidential. 5 U.S.C. § 552(b)(4).

[2] The Administrative Procedures Act provides that a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action is entitled to judicial review thereof. 5 U.S.C. § 702. The Act also requires a reviewing court to hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706 (2)(A).

[3] The Trade Secrets Act is a criminal statute that precludes government employees from disclosing, to the extent not authorized by law, trade secrets and certain business and financial information. 18 U.S.C. § 1905.

private right of action to enjoin disclosure in violation of the statute. The court then applied the two-part test in *National Parks and Conservation Assoc. v. Morton*, 498 F.2d 765 (D.C. Cir 1974), to determine whether the prices were "confidential" commercial or financial information and exempt from disclosure.[4] The court found that the contract prices were not confidential because the Air Force presented reasoned accounts of why disclosure would neither impair its future ability to obtain pricing information nor likely cause substantial harm to Boeing. The court distinguished *McDonnell Douglas Corp. v. NASA*, 180 F.3d 303 (D.C. Cir. 1999), a case in which the contract prices were determined to be confidential and exempt from disclosure, because in that case McDonnell had shown that it was likely to suffer substantial competitive harm and the government's claims of lack of harm were conclusory.[5] The court found in the *Air Force* case that the Air Force's accounts of the effects of disclosure were at least as compelling as Boeing's, and the Air Force's decision to disclose was neither arbitrary nor capricious.

II. Flammann v. U.S. (Court of Federal Claims)

In *R & H Flammann GmbH v. U.S.*, No. 02-800C, September 23, 2002, the Court of Federal Claims enjoined the Department of the Army from proceeding with a procurement after it had disclosed prices in the incumbent Flammann's contract to a competitor under the FOIA. Flammann sought the injunction after the government failed to exercise an option on its contract and solicited bids for a new procurement. Flammann claimed that the prices were confidential commercial information, pursuant to Exemption 4 of FOIA and the Trade Secrets Act, and that it was harmed and prejudiced by the government's unlawful action in releasing the prices, notwithstanding that the prices had been made publicly available at a bid opening for the award of Flammann's contract.

The court found that since the prices were publicly disclosed, they would not fall under the *National Parks* "confidential" standard nor would they fit within Exemption 4 of FOIA, and implied that they would not be covered by the Trade Secrets Act. Yet, the court found that under the peculiar factual circumstances of the case, and to ensure impartial, fair and equitable treatment, the government's contracting officer "had a duty to preclude any and all access to plaintiff's pricing information under its control, particularly that of the future unperformed option years." The court therefore enjoined the Army from proceeding with the competition.

The court found *McDonnell Douglas v. NASA* inapposite, because that case turned on both a finding of nonpublic disclosure and a showing of potential competitive harm. Instead, because of the public bid opening, the court found that the prices were generally subject to release under FOIA. Nevertheless, the court found that there was an appearance of impropriety to release the prices to only one competitor, in the face of an imminent resolicitation of a substantially similar contract, and therefore the Army's contracting officer was duty bound not to release the prices to ensure that the contractors received impartial, fair, and equitable treatment.[6]

III. Some Observations

Contractors who have relied on *McDonnell v. NASA* to prevent release of contract prices may find that the D.C. District will not as readily conclude that

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[4] In *National Parks*, the court set out a two-part test to determine what constitutes "confidential" commercial or financial information within the meaning of FOIA Exemption 4: disclosure of the information would be likely (1) to impair the Government's ability to obtain necessary information in the future, or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained. *See National Parks*, 498 F.2d at 771.

[5] In *McDonnell v. NASA*, the Circuit Court of Appeals not only found that contractor had shown that it was likely to suffer substantial competitive harm, it also determined that the agency's decision to release was not in accordance with law because disclosure would either be contrary to the Trade Secrets Act or arbitrary and capricious for illogically applying the competitive harm test. *See McDonnell*, 180 F.3d at 307.

[6] Contracting officers are responsible, *inter alia*, to "ensure that contractors receive impartial, fair, and equitable treatment." 48 C.F.R. § 1.602-2.

release will likely cause substantial harm to the competitive position of the contractor. The court in *McDonnell v. Air Force* indicates that contractors seeking to protect their prices will not only have to demonstrate likely substantial competitive harm, but will also have a substantial burden of persuading the court that the agency's conclusions are arbitrary and capricious or cannot be supported. Contractors may find a sympathetic ear in the Court of Federal Claims, particularly in a pre-award bid protest setting, but it is unclear how likely the ruling in *Flammann* will be extended. In any event, it is critical that a good administrative record demonstrating competitive harm be created before a challenge is mounted in the courts.

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