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FEATURE COMMENT: Trends In Congress For Greater Transparency In Government Funding May Be At Odds With Courts' Protection Of Contractor Information

On September 26, Congress passed into law the Federal Funding Accountability and Transparency Act of 2006, 120 Stat. 1186, requiring the disclosure of the amount of federal funding for contracts, grants and subawards, as well as "other relevant information" as determined by the Office of Management and Budget. Related legislation pending in Congress, such as the Openness Promotes Effectiveness in Our National Government Act of 2005 (OPEN Act) and the Clean Contracting Act, further evidence Congress' current focus on transparency, accountability and accessibility in Government contracting. However, absent from the congressional debate thus far is any discussion of the need to protect contractors' confidential and proprietary information. Moreover, the Act and other contemplated congressional activity noted above come at a time when courts in the D.C. Circuit increasingly are recognizing the competitive harm that can result from the disclosure of information found in Government funding vehicles such as contracts and grants.

This FEATURE COMMENT first will provide an overview of the Act's provisions relevant to the disclosure of contractor information. It then will discuss the U.S. District Court for the District of Columbia's recent decision in *Canadian Commercial Corp. v. Dep't of the Air Force*, the latest case protecting contractor pricing information from disclosure under the Freedom of Information Act Exemption 4. As reflected in these two discussions, Congress and the courts appear to be headed in different directions when it comes to balancing the desire to allow citizens to see how their tax dollars are being spent against contractors' need to protect their business and competition-sensitive information from public disclosure.

The Federal Funding Accountability and Transparency Act—The Act requires OMB to publish information relating to all federal awards valued over $25,000 on "a single searchable website, accessible by the public at no cost to access." § 2(a), (b). The Act defines "Federal award" as including "grants, subgrants, ... contracts, subcontracts, purchase orders, task orders, and delivery orders," and, for every covered award, requires the disclosure of:

(1) the name of the entity receiving the award;
(2) the amount of the award;
(3) other information, including transaction type, funding agency, the North American Industry Classification System code or Catalog of Federal Domestic Assistance number (if applicable), program source, and an award title descriptive of the purpose of each funding action;
(4) the location of the entity receiving the award and the primary location of performance under the award, including the city, state, congressional district and country;
(5) a unique identifier of the award recipient and its parent entity, should it have one; and
(6) any other relevant information specified by OMB.

§ 2(b)(1). Section 3 states that "[n]othing in this Act shall require the disclosure of classified information."

This information must be published on the Web site "not later than 30 days after the award of any Federal award requiring posting." § 2(c)(4). The Act further authorizes OMB to enlist awarding agencies to participate in the "development, establishment, operation, and support" of the Web site, § 2(b)(3), but explicitly states that the site may not merely hyperlink to existing Government Web sites, § 2(c)(2). The site must be operational no later than Jan. 1, 2008. § 2(b)(1).

With respect to subcontracts and subawards, the Act provides for a pilot program to be implemented by July 1, 2007. § 2(d). The pilot program will test subcontract and subgrant information collection, and determine how to implement a subaward reporting program that includes "a reporting system under which the entity issuing a subgrant or subcontract is responsible for fulfilling the subaward reporting requirement." Information regarding subawards "will be disclosed in the same manner as data regarding other Federal awards, as required by this Act." § 2(d)(2)(A)(i). Subaward information is not required on the Web site until Jan. 1, 2009. § 2(d)(2)(A).

To be sure, total Government contract prices are routinely made public. *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1193 (D.C. Cir. 2004) (*McDonnell Douglas II*). The Act's provision requiring disclosure of "bottom-line" prices is, therefore, unremarkable. However, other provisions may have repercussions for contractors. For example, the Act's subaward pilot program may allow competitors to gain insight into the contractor's teaming partners, amounts paid to those companies, areas where the contractor may lack in-house capability and valued small-business partners. Likewise, the Act gives OMB broad discretion to disclose contractor and subcontractor information that it deems relevant. How OMB will construe that discretion is uncertain, particularly in light of the Act's legislative history, which explains, "The purpose of this legislation is to provide the public with a broad and highly detailed view of Federal funding." S. Rep. No. 109-329 at 6 (2006). For example, OMB may view detailed pricing information as relevant.

These issues may be magnified by the absence of a provision in the Act protecting confidential and proprietary information—only classified information is mentioned—and any procedure for objecting to disclosure of information a contractor considers proprietary or confidential. In contrast, under FOIA, a contractor may object to the proposed disclosure of information it considers confidential or proprietary and, if necessary, institute a reverse-FOIA action to challenge Government disclosure.

Congress' focus on transparency and the lack of a specific provision protecting confidential and proprietary information contrasts with what appears to be an opposite trend in recent reverse-FOIA litigation in the D.C. Circuit.

Canadian Commercial Corp. v. Department of the Air Force—Seven weeks before the Act's passage, the D.C. District Court issued another decision protecting contractor pricing information from disclosure under FOIA Exemption 4. In *Canadian Commercial Corp. v. Dep't of the Air Force*, 442 F.Supp.2d 15 (D.D.C. 2006), the court held that the contractor's option year line-item pricing and base year line-item pricing fall within FOIA Exemption 4 and, thus, cannot be released pursuant to the Trade Secrets Act (TSA). Id. at 40.

Canadian Commercial is the latest in a line of cases that begins with *McDonnell Douglas Corp. v. NASA*, 180 F.3d 303 (D.C. Cir. 1999), in which the court prevented NASA's disclosure of the contractor's line-item pricing information because "whatever may be the desirable policy course, appellant has every right to insist that its line item prices be withheld as confidential." Id. at 307. In *McDonnell Douglas II*, the court expanded on its previous decision and held that option year prices and vendor pricing contract line items also are exempt from disclosure under FOIA Exemption 4. 375 F.3d at 1188–91. Moreover, the court rejected a per se suggestion from the Air Force that all contractor pricing information should be disclosed, emphasizing that "pinpoint precision is not required to inflict substantial competitive harm." Id. at 1192–93.

During litigation, the *Canadian Commercial* parties requested that the court stay the case until the D.C. Circuit determined whether it would rehear *McDonnell Douglas II* en banc. Id. at 22. The Air Force represented to the district court that it might alter its decision to disclose the contractor's information in *Canadian Commercial*, depending on the *McDonnell Douglas II* decision. Although the D.C. Circuit declined to rehear *McDonnell Douglas II* en banc, the Air Force issued a letter reaffirming its decision to disclose the pricing information.

The *Canadian Commercial* court criticized the Air Force for "largely ignoring" the D.C. Circuit's opinion in *McDonnell Douglas II*. Id. at 32, 39. For example, the court rejected the Government's argument that TSA's plain language and legislative history do not apply to the disclosure of contract prices, id. at 22–23, applying the D.C. Circuit's rule that "the scope of the Trade Secrets Act is at least co-extensive with that of Exemption 4," and that "if information is covered by Exemption 4, it *must* be withheld because the TSA prohibits disclosure." Id. at 39 (emphasis in original).

Recognizing the "competing policies of maintaining an informed citizenry and fostering government accountability ... and protecting legitimate privacy and security interests of entities," id. at 33, the court concluded that the TSA prohibited disclosure of the contractor's pricing information in this case.

The *Canadian Commercial* court also considered three arguments raised, but not considered, by the D.C. Circuit in *McDonnell Douglas II*, regarding the disclosure of contractor pricing information. Id. at 38.

First, the court rejected the Government argument that, because the Air Force usually exercised contract options, the contractor was unlikely to suffer competitive harm. Id. The court found no evidence that the Air Force traditionally exercised options and suggested that, regardless, what mattered was whether "the Air Force *could* do so with respect to *this* contract." Id. at 35, 38 (emphasis in original).

Second, the court considered the contractor's argument that competitors could use its pricing information in submitting an unsolicited proposal to convince the Air Force not to exercise the option and re-bid the contract work. Id. at 38. The Government maintained that, under the Federal Acquisition Regulation, it cannot consider such unsolicited proposals. The court agreed, but concluded that this does not mean the contractor is unlikely to suffer competitive harm. Specifically, the court found that receipt of an unsolicited proposal can "alert the Air Force to the possibility of cost savings, which could influence it to test the market." The court noted that, under such circumstances, the FAR prefers re-bidding, to the extent it gave the Government reason to believe that not exercising the option (and, thus, being able to take advantage of the cost savings) would be in the best interest of the Government.

Finally, the court rejected the Government's argument that any proposed prices from a competing contractor would have to offset the transaction costs of re-bidding the contract work. The court found that the FAR does not require the Government to consider transaction costs; it only states that an agency "should" consider such costs in deciding whether to exercise an option.

The *Canadian Commercial* decision represents continued recognition by courts in the D.C. Circuit that disclosure of confidential information, even pricing-related information, does not necessarily have to be a "cost of doing business" with the Federal Government.

Conclusions—The Act is new, and it is uncertain how it will be implemented and what types of data the Government intends to make publicly available. However, the advocacy groups that promoted the Act view it as only the first step toward greater transparency. In testimony before the Senate Subcommittee on Federal Financial Management, Government Information and International Security, the executive director of OMB Watch stated:

> [W]e want to emphasize that [the Act] should be perceived as a first step in a much larger effort to enhance transparency in federal spending. The quality of the data must be significantly improved and more information must be put in the public domain in order to hold our government accountable.

What You Don't Know Can Hurt You: S. 2590 and the Federal Funding Accountability and Transparency Act, Testimony of Gary D. Bass, Ph.D. (July 18, 2006), available at *www.ombwatch.org/pdfs/S2590_testimony_OMBW.pdf*.

Congress currently is considering another bill to provide even greater insight into federal contracts. The Clean Contracting Act contains language that would require the disclosure of "any stated unit price of items or services to be procured under the contract." At present, the Act does not contain an exception for confidential or proprietary information. Moreover, the OPEN Act, which imposes stricter deadlines for agencies to respond to FOIA requests, has as its stated purpose the promotion of "accessibility, accountability, and openness in Government by strengthening [FOIA]."

Although there are benefits to transparency and accountability in Government funding, there are equally valid reasons to protect contractors' confidential and proprietary business information. Since the D.C. Circuit's initial *McDonnell Douglas* decision, courts have become increasingly sensitive to contractors' concerns. Recent legislative activity suggests that Congress may be moving in a different direction. As it focuses on greater transparency and accountability, Congress should not lose sight of existing statutes such as FOIA Exemption 4 and the TSA, which aim to protect proprietary and confidential business information.

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