



United States
General Accounting Office
Washington, D.C. 20548

Comptroller General
of the United States

B231156

April 28, 1988

The Honorable Jack Brooks
Chairman, Committee on Government
Operations
House of Representatives

Dear Mr. Chairman:

By letter of April 22, 1988, you requested our opinion on the extent to which and under what circumstances pricing information submitted to the General Services Administration in the FTS 2000 procurement can be protected under the Freedom of Information Act (FOIA), 5 U.S.C. § 552.

Your question arises because of concerns expressed by a potential offeror for the procurement, which will replace the existing Federal intercity switched voice telecommunications program and provide additional telecommunications capabilities to the Federal government. Those concerns may have been heightened by a recent amendment to the FTS 2000 solicitation. The amendment (paragraph H.15, Amendment No. 8: January 28, 1988) provides as follows:

"H.15 Protection of Pricing Information

The government will take the necessary and usual steps to maintain the confidentiality of any pricing information submitted by the offeror prior to award of this contract. The government will also attempt to maintain the confidentiality of pricing information submitted by the contractor after award of this contract. However, the offeror/contractor is advised that pricing information may be determined to be releasable upon request under the Freedom of Information Act, 5 U.S.C. § 552, and other applicable statutes and regulations."

In your letter, you quote a later statement by GSA on the subject:

"In light of the 10-year nature of this procurement, it is GSA's position that disclosure of the pricing supplied by all of the offerors is likely to cause substantial competitive harm to the offerors, both pre-award and post-award (Pursuant to the fourth FOIA exemption, 5 U.S.C. § 552(b)(4)). In accordance with established agency policy, upon receipt of a request GSA will notify the submitter of the information requested and will ask the submitter to provide comments thereon. See GSA Order ADM 1035.11A, October 27, 1983."

The fourth FOIA exemption, 5 U.S.C. § 552(b)(4), currently exempts from release, "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Clearly the pricing information that will be submitted during the FTS 2000 procurement is financial information submitted by a person within the meaning of the statute. The standard to be applied in determining whether the information is confidential was explained in National Parks and Conservation Assoc. v. Morton, 498 F.2d 765 (D.C. Cir. 1974). There the court stated:

"To summarize, commercial or financial matter is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (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." (Footnote omitted.) 498 F.2d at 770.

In general, the courts have held that government contract prices must be released both in the aggregate and by unit or other breakdown. For example, in AT&T Information Systems v. GSA, 627 F. Supp. 1395 (D.D.C. 1986), rev'd, 810 F.2d 1233 (D.C. Cir. 1987), the District Court stated that, "[t]here is a strong public interest in release of component and aggregate prices in Government contract awards," and quoted from Racal-Milgo Government Systems, Inc. v. SBA, 559 F. Supp. 4 (D.D.C. 1981), to the effect that release of prices charged is part of the cost of doing business with

the Government.^{1/} But see Sperry Univac Div. v. Baldrige, 3 GDS ¶ 83,265 at 84, 052 (E.D. Va. 1982) (protecting unit prices based on finding that they revealed submitter's pricing and discount strategy and would prejudice the submitter in contract renewal competitions).

A determination that there would be substantial competitive harm to vendors in the FTS 2000 procurement is a factual determination, which will require persuasive and concrete evidence. In National Parks and Conservation Assoc. v. Kleppe, 547 F.2d 673 (D.C. Cir. 1976), the court stated that:

"Conclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden of nondisclosure under the FOIA, since such allegations necessarily elude the beneficial scrutiny of adversary proceedings, prevent adequate appellate review and generally frustrate the fair assertion of rights under the Act." 547 F.2d at 680.

The court also stated that it is unnecessary to produce all the evidence normally associated with elaborate antitrust proceedings. Thus, the ability of the vendors to demonstrate factually the potential for substantial competitive harm is crucial in determining whether the pricing information will be released.

Obviously, before award of the FTS 2000 contracts the release of offered prices would harm the vendors' competitive positions and such information can be protected under the FOIA. The quotation from GSA included in your letter indicates that GSA plans to seek protection of the pricing information both before and after award. Given the unique structure of this procurement, we believe that there is an unusually strong case that GSA and the successful vendors will be able to do so.

^{1/} The District Court's decision in AT&T Information Systems was appealed, and the Court of Appeals reversed and remanded the case to GSA for a more comprehensive determination on the existence of competitive harm. The Court of Appeals specifically stated that it was expressing no view on the merits of the case. In neither the District Court's nor the Court of Appeals' opinion is there any real discussion of what must be demonstrated to support a finding of substantial competitive harm.

GSA will award two contracts--one for 40 percent of the work and one for 60 percent--for a 10-year period. Offerors' aggregated 10-year costs (discounted) will represent about one-third of the evaluation. (Prices are provided in a detailed and complex breakdown with respect to various services, and the prices may vary depending upon factors such as volume, location, time-of-day, etc.) After 4 years and 7 years GSA must request price redetermination proposals from the two contractors and will reallocate the work at those times based upon the new price proposals and the quality of past service. Except for economic price adjustments, the prices originally bid for years 4 through 10 represent a ceiling for the new proposals. Thus, prices for later years of the contracts are not really what the government will pay for telecommunications services--they are ceilings at or below which the vendors may price their services. Knowing the relative difference in these ceilings might well provide a significant competitive advantage. For example, if the ceilings differ greatly, neither firm might be motivated to reduce its price; the higher-priced firm would risk too great a reduction in profit if unsuccessful in obtaining a greater percentage of the services, and the lower-priced firm would have less reason to drop its price to preserve its share.

The likelihood of protecting the price ceilings will increase if GSA and the firm whose information is sought can show that the detailed pricing so reflects the firm's corporate strategy and plans for providing and pricing future services that competing firms would gain a substantial competitive advantage in other markets. In the end, since a substantial competitive harm determination requires a detailed factual analysis, and we do not now have the benefit of the analyses and arguments that might be mustered by GSA and the potential vendors, we cannot say that the contract pricing information definitely can be protected. We do believe, however, that because of the unique nature of this procurement, there is an unusually strong case that substantial competitive harm would result from the release of contract pricing information and that such information can be protected.

Sincerely yours,



for Comptroller General
of the United States