



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

April 10, 2009

CBCA 1509

HOUCK LIMITED,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Chad A. Readler and Grant W. Garber of Jones Day, Columbus, OH, counsel for Appellant.

Brian Reed and Larry Stunkel, Chicago Office of Regional Counsel, Department of Veterans Affairs, Hines, IL; and Phil Kauffman and Phillipa L. Anderson, Office of General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

DANIELS, Board Judge (Chairman).

ORDER

The appellant, Houck Limited (Houck), holds an indefinite quantity contract with the respondent, the Department of Veterans Affairs (VA), for the provision of vocational rehabilitation and employment services to service-connected disabled veterans. The contract contains numerous contract line items (CLINs) and sub-contract line items (sub-CLINs), each for a specific kind of service. Each CLIN and sub-CLIN contains a unit price; under the contract, whenever VA orders one of those units, it pays Houck the specified price. CLINs and sub-CLINs are included for a base year and each of four option years.

On March 24, 2009, Houck filed a Motion for Confidential Treatment of Case Management Task Orders and Price Schedules. On March 26, Houck supplemented this motion with a List of Appeal File Documents to be Marked in Accordance with the Protective Order. Houck has since withdrawn from its appeal file all documents addressed in the portion of the motion involving case management task orders. Thus, the remaining question before the Board is whether to grant confidential treatment to price schedules by permitting them to remain where Houck has placed them, under the protective order issued by us in this case. The documents at issue include the CLIN and sub-CLIN prices in Houck's contract; the CLIN and sub-CLIN prices in the contract of a company with a parallel contract to Houck's, but for a different region, C. J. Turner; and the "Base Cost per Case Assumptions" pertaining to Houck's contract.

VA opposes Houck's motion. The agency maintains that the Federal Acquisition Regulation (FAR) requires the disclosure of unit prices in awarded contracts. It cites in support of its position numerous decisions of district courts and courts of appeals in which agency determinations to disclose contract pricing information under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), were permitted. Houck contends that because VA has acknowledged its intention to re-solicit in the near future for offers to perform the same services, and will likely terminate Houck's contract and all parallel contracts, disclosure of the price schedules in Houck's contract would be highly prejudicial to Houck. It would, according to the appellant, alert other potential offerors to the prices they would have to offer in order to underbid Houck. The appellant cites in support of its position decisions of the General Services Board of Contract Appeals (GSBCA) regarding disclosure of unit prices in the context of protests of contract awards. Houck considers most of the FOIA decisions cited by VA to be irrelevant, but urges us to follow two of them, *Chemical Waste Management, Inc. v. O'Leary*, Civ. A. No. 94-2230, 1995 WL 115894 (D.D.C. Feb. 28, 1995), and *McDonnell Douglas Corp. v. United States Department of the Air Force*, 375 F.3d 1182 (D.C. Cir. 2004).

Each side's position has some merit. The FAR provides that soon after contract award, a contracting officer shall provide to unsuccessful offerors notification which "shall include . . . [t]he items, quantities, and any stated unit prices of each award." Even where "the number of items or other factors makes listing any stated unit prices impracticable at that time," "the items, quantities, and any stated unit prices of each award shall be made publicly available, upon request." 48 CFR 15.503(b)(1)(iv) (2007). In light of this directive, it is clear that the unit prices contained in Houck's contract for the base year -- the only year for which a contract has been awarded -- are public information. *R & W Flammann GmbH v. United States*, 339 F.3d 1320 (Fed. Cir. 2003). They must therefore be removed from the protective order.

On the other hand, as the GSBCA decisions make clear, in the context of protests, while contract awards are in dispute and the potential exists for continued competition in the contested procurements, unit prices should remain confidential because their disclosure could be prejudicial to an offeror's opportunities to succeed in the competition. *TRI-COR Industries, Inc.*, GSBCA 10886-P, 91-1 BCA ¶ 23,462 (1990); *Federal Sources, Inc.*, GSBCA 9082-P, 87-3 BCA ¶ 20,200. Similarly, in the case of options, the Government has not yet decided whether to continue the contract, see *International Telephone & Telegraph, ITT Defense Communications Division v. United States*, 453 F.2d 1283, 1291 (Ct. Cl. 1972), so the potential exists for competition for the requirements covered by the option periods. Disclosure of unit prices could be prejudicial to the contractor's opportunities to succeed in the competition. For this reason, disclosure of those prices has been precluded in the context of FOIA litigation. *Canadian Commercial Corp. v. Department of the Air Force*, 514 F.3d 37, 42 (D.C. Cir. 2008) (in applying the test set out in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974), court determined that disclosure would have been "likely . . . to cause substantial harm to the competitive position of the person from whom the information was obtained"); *McDonnell Douglas*, 375 F.3d 1182, 1189 (same); *Chemical Waste* (same).¹ The Board does not have jurisdiction to hear FOIA cases, see 5 U.S.C. § 552(a)(4)(B)-(G) (2006), and those cases involve somewhat different issues from this one -- disclosure of requested information, not shielding of information in case files from public access -- but we find the cited FOIA decisions to be instructive. Additionally, we note that the case before us involves base year pricing only; the option year pricing does not appear to have any impact on this dispute, so restricting it from public view will not affect access to our proceedings. Accordingly, we allow the option year CLIN and sub-CLIN prices in Houck's contract, and in C. J. Turner's parallel contract, to remain under our protective order.

We permit the "Base Cost per Case Assumptions" pertaining to Houck's contract to remain under the protective order as well. Houck appears to be correct in asserting that this document shows how the contractor derived its unit prices, so disclosing the document would

¹ In *Flammann*, the Court held proper the agency's determination to disclose the contractor's option year prices even though the options were not exercised and a competition was to be conducted to fill the agency's requirements in the option years. That case had a significant difference from ours and the cited FOIA cases, however. *Flammann* involved a sealed bid procurement, and the prices were already in the public domain because they had been disclosed during bid opening. Here and elsewhere, the contracts were awarded through negotiated procurements, and the FAR does not require disclosure of prices for unawarded option years in those procurements.

be likely to cause substantial harm to Houck's competitive position, especially in the competition to provide in the future services which are included in the current contract.

Houck placed under the protective order its Statement in Support of Confidential Protection of Price Schedules and "Base Cost per Case Assumptions" Page. The reason given for this placement is that the Statement contains certain information provided by counsel for VA which may be confidential. Agency counsel has informed us that the information in question has been made public. Consequently, the Statement is not appropriately placed under the protective order and must be removed from it.

STEPHEN M. DANIELS
Board Judge