

BEFORE THE
POSTAL RATE COMMISSION
WASHINGTON, D.C. 20268-0001

RECEIVED

MAR 10 4 47 PM '00

POSTAL RATE COMMISSION
OFFICE OF THE SECRETARY

POSTAL RATE AND FEE CHANGES, 2000

Docket No. R2000-1

OPPOSITION OF UNITED STATES POSTAL SERVICE TO UPS MOTION TO
COMPEL PRODUCTION OF INFORMATION AND DOCUMENTS REQUESTED IN
INTERROGATORIES UPS/USPS-T34-1(a)-(c) AND 3(e) TO WITNESS ROBINSON
(March 10, 2000)

On February 8, 2000, the United Parcel Service (UPS) filed interrogatory UPS/USPS-T34-1 to Postal Service witness Robinson. Subpart (a) of this interrogatory requests a current copy of the contract between Emery Worldwide Airlines (Emery) and the Postal Service pursuant to which Emery provides mail processing, surface transportation, and air transportation for Priority Mail. Subpart (b) requests any other documents defining the relationship between the Postal Service and Emery regarding Priority Mail services. Subpart (c) requests the contract used in developing the proposed Priority Mail rates, if different from that requested in (a). The Postal Service objected to provision of the requested information on February 18, 2000.

On February 14, 2000 UPS filed interrogatory UPS/USPS-T34-3(e), again relating to the contract between Emery and the Postal Service pursuant to which Emery provides mail processing, surface transportation, and air transportation for Priority Mail. Specifically, subpart (e) requests, for the contract as currently in effect, the rates or rates which the Postal Service will pay Emery in the test year. The Postal Service filed an objection to this interrogatory on February 25, 2000.

On March 3, 2000, UPS moved to compel production of the information requested in these interrogatories, arguing that the information is highly relevant to the

determination of proper rates for Priority Mail, and that none of it need be subjected to protective conditions. The Postal Service hereby opposes the motion to compel.

UPS acknowledges that a similar dispute regarding disclosure of contract information pertaining to Emery's operation of the PMPC network was ruled upon in Docket No. R97-1. UPS Motion at 2-3. This prior ruling, Presiding Officer's Ruling No. R97-1/62, recognized the commercially sensitive nature of the PMPC contract, and ordered the disclosure only of a very limited amount of contract information, the majority of it under strict protective conditions. Faced with a UPS request for general and specific contract pricing and other information, the Presiding Officer ruled that the balance of potential competitive harm versus the relevance of the information sought justified provision of the information under protective conditions. Ruling No. R97-1/62 at 8, 11-13.

In now arguing that the requested PMPC contract information must be fully disclosed without the application of any protective conditions at all, UPS apparently asserts that Presiding Officer's Ruling No. R97-1/62 was wrongly decided and should be reversed. Unfortunately, UPS has not provided any basis for setting aside that ruling.

UPS presents no new information which would counter the consistent position of the Postal Service and Emery Worldwide, confirmed by the Presiding Officer in Docket No. R97-1, that the contract information sought is commercially sensitive, and is not the type of information that any rational business entity would willingly place in the hands of its competitors. The Postal Service argued in that docket that to reveal the pricing information redacted from the contract could impair future negotiations for third-party processing of Priority Mail should the Postal Service wish to procure additional such services in the future. The Postal Service also argued that because of the importance of the unique and financially significant cooperative business venture undertaken with

Emery, the Postal Service has no option but to defend commercial information deemed sensitive by its business partner. That Emery views its contract pricing and other information as commercially sensitive is beyond serious dispute, as evidenced by comments filed in Docket No. R97-1 and in this case. *See, e.g., Emery's Informal Expression of Views on Conditions for Access to Protected Material*, (February 28, 2000.)

The degree to which pricing and other information contained in the PMPC contract is considered confidential and commercially sensitive by Emery and the Postal Service is revealed not only by the extent to which both have sought to prevent its disclosure in Commission proceedings, but also by the fact that the contract itself contains provisions limiting disclosure (See Docket No. R97-1, USPS-LR-H-235, Section G.8, page 30 of 62), and by the fact that access to the contract has been limited within the Postal Service, and then only after execution of non-disclosure agreements.^{1/}

UPS has produced nothing that should cause the Commission to doubt the consistent position of the Postal Service and its contractor that information of this nature would not be publicly disclosed by a rational business. UPS certainly has not cited any instances in which it has published similar contracts for the world to see.

Given the unrebutted contentions of the Postal Service and Emery that disclosure could harm commercial interests of both, there is no reason for the Presiding Officer to reverse the Commission's established practice of protecting from disclosure the commercially sensitive business information of the Postal Service and others.

Unable to show a lack of commercial sensitivity attendant to the Emery contract information it seeks, nor a compelling reason to overturn Commission precedent, UPS

¹ The fact that the information is sought by UPS, a competitor of both the Postal Service and Emery, is also some indication of its commercial value.

instead constructs a straw man argument based on the Freedom of Information Act. UPS first assumes that its request is in the nature of a FOIA request, which it patently is not, and that the Postal Service's objection rests on exemptions to the FOIA. Citing a number of cases interpreting 5 U.S.C. §552, UPS argues that the requested contract information must be publicly provided, without any protective conditions whatsoever. UPS Motion at 3-5.

The UPS argument founders in many important respects. First, the Postal Service relies principally on Commission precedent and practice, not principles applicable to FOIA disputes, in arguing that commercially sensitive materials must be protected from disclosure in Commission proceedings. Second, even if FOIA law were controlling, the cases cited by UPS, which apply 5 U.S.C. §552 to agencies having no commercial function, are not on point. In recognition of the Postal Service's unique status as both a government agency and a business enterprise, the Congress created exemptions in Title 39 that go beyond the exemptions contained in 5 U.S.C. §552. Specifically, 39 U.S.C. §410(c)(2) provides that application of 5 U.S.C. §552 to the Postal Service shall not require the disclosure of "information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed." Contrary to the assertion of UPS, (UPS Motion at 3-4) this language cannot be redundant of FOIA exemption 4, for the simple reason that Congress would have seen no need to include it in 39 U.S.C. §410(c) if it were.^{2/} The cases cited by UPS, which apply the lesser exemptions found in 5 U.S.C. §552 to other federal agencies having no function

² For further confirmation of this view, attached to this pleading is a fairly recent unpublished decision of the United States District Court for the District of Columbia, which clearly demonstrates the point that "Section 410(c)(2) trumps FOIA disclosure requirements." *Weres Corporation v. United States Postal Service*, No. 95-1984, slip op. at 3. (D.D.C., September 23, 1996).

in the commercial marketplace, have no bearing on the PMPC contract dispute.

Finally, a leading case on disclosure of government contract materials clearly holds that commercially sensitive line item pricing information such as that withheld from the Emery PMPC contract should not be disclosed, and that such disclosure by a government agency would constitute a violation of the Trade Secrets Act. *McDonnell Douglas Corp. v. National Aeronautics and Space Administration*, 80 F.3d 303, 306-307 (D.D. Cir. 1999).

UPS's reliance on 39 U.S.C. §5005(b)(3), which requires certain types of transportation contracts to be made available for inspection, is also misplaced. Although the Presiding Officer, in Ruling No. R97-1/62, in connection with an argument that the Trade Secrets Act may preclude disclosure of PMPC contract pricing information, did observe that 39 U.S.C. § 5005(b)(3) "apparently imposes an unqualified duty upon the Postal Service to make available for public inspection all contracts for the transportation of mail," (Ruling No. R97-1/62 at 6), the Postal Service respectfully submits that it is unlikely that the Congress intended this section to apply to contracts such as the PMPC contract. In enacting this section, the Congress was focused on pure mail transportation routes for highway contractors, such as "star routes," not the complex amalgam of mail processing, distribution and transportation found in the PMPC agreement. *See Myers & Myers, Inc. v. United State Postal Service*, 527 F.2d 1252, 1257 (2nd Cir. 1975)("... legislative history of § 5005(a)(4), (b)(2) indicates that the statute was enacted to give star route contractors a measure of security") In any event, as UPS acknowledges, the Presiding Officer was aware of the existence of this statutory provision in deciding the most recent PMPC contract disclosure dispute. Despite the "apparent" applicability of this section, the Presiding Officer nevertheless ruled that protective conditions would apply to much of the information to be produced.

In a final effort to overturn Ruling R97-1/62, UPS contends that recent disclosures of unrelated contractual materials by the Postal Service and various pronouncements made by Emery regarding its contractual relationship with the Postal Service constitute a waiver of any claim of confidentiality regarding the materials it now seeks. The fact that the Postal Service has chosen in some unrelated contexts to provide contractual materials says nothing about the confidentiality and commercial sensitivity of the pricing and other information in the PMPC contract sought to be protected in this instance. The Postal Service and Emery have both carefully protected from disclosure any such information. The statements made by Emery, moreover, do not reveal any of the detailed pricing information contained in the PMPC contract which Emery and the Postal Service now seek to protect.

Furthermore, the fact that some aspects of the contract relationship have been made public does not mean that the information withheld should be disclosed. UPS might as well argue that because some of the non-price terms of the PMPC contract have been disclosed in the redacted LR-H-235, the portions deliberately withheld must also be disclosed. This, of course, would make a mockery of any such attempt to protect confidential information through redaction, a well-accepted procedure in Commission proceedings. Parties possessing commercially sensitive business documents must be allowed some discretion in choosing to disclose non-sensitive aspects of those documents while protecting those portions that are considered sensitive.

Consistent with prior precedent, the Presiding Officer should again acknowledge the commercial sensitivity of the contract information sought by UPS, and, weighing the potential commercial harm versus the relevance of the material to the issues at hand, determine whether the material must be disclosed. In making this evaluation, the Presiding Officer should bear in mind that the PMPC network still is somewhat experi-

mental, and may or may not continue into the future. For this reason, the role of PMPC contract in determining the ongoing costs and rates of the Postal Service should not be overemphasized. See Direct Testimony of Maura Robinson, USPS-T-34, at 12-15.

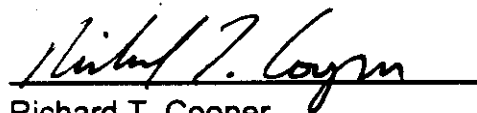
In the event that disclosure of some or all of the contractual materials sought by UPS is deemed warranted, the Postal Service strongly urges the Commission to condition any such disclosure upon the application of protective conditions at least as strict as those governing the limited disclosures ordered in Docket No. R97-1.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

Daniel J. Foucheaux, Jr.
Chief Counsel, Ratemaking

A handwritten signature in cursive script, appearing to read "Richard T. Cooper", is written over a solid horizontal line.

Richard T. Cooper

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-2993; Fax -5402
March 10, 2000

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| |
|--|
| <p>WERES CORPORATION, Plaintiff, v. UNITED STATES POSTAL SERVICE, Defendant.</p> |
|--|

Civil Action No. 95-1984 (NHJ)

FILED

SEP 23 1996

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORANDUM ORDER

Plaintiff Weres Corporation brings this action under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1994). Plaintiff seeks to compel the United States Postal Service ("USPS") to produce certain pricing information received by the USPS in response to a contract solicitation. The USPS contends that it may withhold the requested information from public disclosure pursuant to FOIA Exemption 3, 5 U.S.C. § 552(b)(3) (1994). Presently before the Court are the cross-motions of the parties for summary judgment. Upon consideration of the motions, the Court will deny the motion of plaintiff and grant summary judgment for defendant.

The following material facts are undisputed: The USPS does not procure goods and services by soliciting sealed bids which are opened in public. Instead, it employs a contract negotiation system which may involve negotiations with offerors after bid proposals are reviewed by the USPS. The solicitation at issue in this case, Solicitation No. 475630-95-1309, requested proposals for portable conveyors. The USPS made two separate awards based primarily on the lowest price received from responsible offerors.

(N)

17

Plaintiff Weres Corporation, which did not participate in the USPS solicitation, requested a "complete abstract" of proposed bids. In response to plaintiff's requests for bid abstracts, the USPS identified the successful offerors, released the names of the other offerors, and released the unit and total prices of the awarded contracts. The USPS, however, withheld pricing information submitted by unsuccessful offerors. Although USPS regulations permit the disclosure of prices submitted by unsuccessful offerors, the agency customarily does not disclose this information to the public. At issue is whether FOIA Exemption (3)(B), 5 U.S.C. § 552(b)(3)(B) (1994), protects from disclosure unit and total prices submitted by unsuccessful offerors in a USPS contract solicitation.

Subsection (B) of FOIA Exemption 3 exempts from mandatory disclosure matters specifically exempted from disclosure by statute, provided that such statute "establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3)(B) (1994). A statute thus falls within the FOIA disclosure exemption if it satisfies either of two disjunctive requirements: the statute provides criteria "in which discretion may be exercised in favor of withholding information that would otherwise be subject to disclosure" (hereafter "Subsection B-1"); or the statute "refers to particular matters to be withheld" (hereafter "Subsection B-2"). Association of Retired R.R. Workers, Inc. v. United States R.R. Retirement Bd., 830 F.2d 331, 333-34 (D.C. Cir. 1987).

The USPS contends that Section 410(c)(2) of the Postal Reorganization Act (the "Postal Act"), Pub. L. No. 91-375, § 114, (codified as amended at 39 U.S.C. § 410 (c)(2) (1994)),

qualifies under Subsection B as a FOIA exemption 3 withholding statute.¹ The Court agrees.

Section 410 of the Postal Act provides that:

- (a) Except as otherwise provided by subsection (b) of this section, and except as otherwise provided in this title. . .
- (b) The following provisions shall apply to the Postal Service:
 - (1) section 552 (public information), section 552a (records about individuals), section 552b (open meetings)
- (c) Subsection (b)(1) of this section shall not require the disclosure of --
 - (2) information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed.

39 U.S.C. §§ 410(a)-(c)(2) (1994). Because the statute, on its face, plainly exempts the matters described in Section 410(c)(2) from FOIA disclosure, the congressional purpose in enacting the statute is clear from the words of the statute itself. *See Reporters Comm. for Freedom of the Press v. United States Dep't of Justice*, 816 F.2d 730, 735 (D.C. Cir.), *modified on other grounds*, 831 F.2d 1124 (D.C. Cir. 1987), *rev'd on other grounds*, 489 U.S. 749 (1989). In short, the statute unambiguously provides that Section 410(c)(2) trumps FOIA disclosure requirements. Moreover, Section 410(c)(2) falls within the scope of FOIA Exemption 3 Subsection B-2's provision for nondisclosure of "particular types of matters to be withheld." *See e.g., Mudger Rose Guthrie Alexander & Ferdon v. ITC*, 846 F.2d 1527, 1530-31 (D.C. Cir. 1988) (finding that Tariff Act prohibition against disclosure of "proprietary matters" that "can be associated with" or

¹ This is an issue of first impression in this Circuit. In the only published opinion on the issue, the Federal District Court in the Northern District of Texas held that 39 U.S.C. § 410(c)(2) qualifies as a withholding statute under FOIA Exemption 3(B). *See National Western Life Ins. Co. v. United States*, 512 F. Supp. 454, 459 (N.D. Tex. 1980).

"otherwise used to identify" operations of particular firms satisfies conditions of Subsection B-2).

Although plaintiff argues that the phrase "good business practice" is not defined in the statute and thus disqualifies Section 410(c)(2) as a "particular matter to be withheld," plaintiff's argument is unavailing. Congress enacted the Postal Act to free the USPS from, among other things:

serious handicaps that are now imposed on the postal service by certain legislative, budgetary, financial, and personnel policies that are outmoded, unnecessary, and inconsistent with modern management and business practices.

H.R. REP. NO. 91-1104, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S.C.C.A.N. 3649, 3650. A legislative definition of "good business practices" would have injected Congress squarely into the arena of business decision-making at USPS -- the very type of situation that Congress sought to eliminate by passage of the Postal Reorganization Act. *See e.g., id.* at 3653 (congressional involvement in technical details "unjustly hampered" efforts to run USPS like a business). That Congress chose not to define "good business practices" is clear from its finding that congressional meddling in business operations was inconsistent with modern management practices. *See id.* at 3650-53.

The Court finds no authority to support plaintiff's contention that Congress may not choose to exempt matters from disclosure under Subsection B-2 unless it provides a narrow definition of the information to be withheld. Indeed, the designation of information to be withheld under Section 410 -- "information of a commercial nature . . . which under good business practice would not be publicly disclosed" -- leaves no more room for agency discretion

than other statutes to which the Court of Appeals for this Circuit has applied Subsection B-2.

See, e.g., Mudge Rose Guthrie Alexander & Ferdon v. ITC, 846 at 1529-31.

Having established that 39 U.S.C. § 410(c)(2) qualifies as a withholding statute, the Court must consider whether the USPS has shown that the requested information falls within the statute's scope. *See Goland v. CIA*, 607 F.2d 339, 350 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927 (1980). It is undisputed that the information sought by plaintiff is commercial information. Hence, the sole remaining question is whether the release of unit and total prices submitted by unsuccessful offerors in a USPS solicitation qualifies as information which, "under good business practice, would not be publicly disclosed." *See* 39 U.S.C. § 410(c)(2) (1994).

The USPS argues that were it to release unsuccessful bid prices to the public, such a disclosure could increase the agency's procurement costs. The USPS bases its argument on the following hypotheticals:

[I]f the successful offeror learns that its price is well below the next lowest proposal, it may increase its price for future proposals. Similarly, if the next-lowest proposal is the only one that is close in price to the successful proposal, and the successful offeror goes out of business or for some other reason does not submit future proposals, then the next-lowest offeror may increase its price for future proposals.

Declaration of B.E. Burchell at 3; *see also* Declaration of Jim Nails at 2.

Although plaintiff argues that potential bidders would not object to release of their unsuccessful bid proposals, plaintiff does not dispute the USPS's contention that the release of this information to the public may increase the agency's procurement costs. In sum, the agency has set forth an undisputed, non-conclusory, and logical "good business practice" rationale for its decision to withhold unsuccessful bid prices from public disclosure. *Cf. Mudge Rose Guthrie*

Alexander & Ferdon v. ITC, 846 F.2d at 1531-32 (suggesting ITC could provide hypotheticals to explain proprietary nature of withheld data). The Court finds that the requested information falls within the nondisclosure provisions of 39 U.S.C. § 410(c)(2).

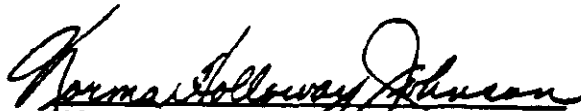
Accordingly, it is this 21st day of September 1996,

ORDERED that the motion of defendant for summary judgment be, and hereby is, granted; it is further

ORDERED that summary judgment be, and hereby is, entered in favor of defendant; it is further

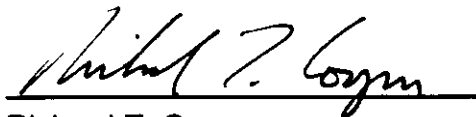
ORDERED that the motion of plaintiff for summary judgment be, and hereby is, denied; and it is further

ORDERED that any pending motions in this case be, and hereby are, denied as moot.


NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all participants of record in this proceeding in accordance with section 12 of the Rules of Practice.

A handwritten signature in black ink, appearing to read "Richard T. Cooper", is written over a solid horizontal line.

Richard T. Cooper

475 L'Enfant Plaza West, S.W.
Washington, D.C. 20260-1137
(202) 268-2993; Fax -5402
March 10, 2000