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August 5, 2003

General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW
Room 4035
Washington, DC 20405

Attn: Laurie Duarte

**Re: Notice 2003-N01;
Posting Awarded Contracts on the Worldwide Web;
68 Fed. Reg. 33950, June 6, 2003**

Dear Ms. Duarte:

On behalf of the Section of Public Contract Law ("Section") of the American Bar Association ("Association"), I am submitting comments on the above-referenced matter.¹ The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section's governing Council and substantive committees contain members representing these three segments to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

¹ The Honorable Mary Ellen Coster Williams, Chair of the ABA Section of Public Contract Law, has recused herself on this matter, did not participate in the Section's consideration of these comments, and abstained from voting to approve and send this letter. Similarly, Council Member Daniel I. Gordon recused himself on this matter and did not participate in either the preparation or approval of these comments.

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The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the Association and, therefore, should not be construed as representing the policy of the American Bar Association.

Although the Section generally supports the idea of optimizing the availability of procurement-related information using channels such as the Internet, the Section believes that the program proposed by the General Services Administration ("GSA"), which would make awarded contracts available via the Internet (the "Pilot Program"), is not an appropriate method for providing access to procurement information.

The Pilot Program, if implemented, would create a host of challenges and issues, legal and otherwise, to government procurement managers and contractors alike. In addition to discussing these issues more fully below, the Section also offers a suggested alternative to provide the public with an appropriate set of procurement information that would satisfy the goals of the original proposal while protecting the sensitive business information of contract awardees.

A. Legal Issues

Publishing all awarded contracts on the Internet poses several legal problems that the Notice and Request for Comment regarding the Pilot Program too quickly dismisses. The Notice states that "any proprietary information contained in a contract covered by the pilot would be redacted before posting." Aside from the administrative burden that the effort to redact contractor-sensitive information would require, the fact that the contracts do contain contractor-sensitive information causes the need to identify which information is sensitive and which is not. As discussed below, the law in this area is uncertain at best.

Consistent with the goals of the Pilot Program, courts have found that general policy considerations strongly favor the disclosure of awarded contracts to permit the public "to evaluate the wisdom and efficiency of Federal programs and expenditures." *Racal-Milgo Government Systems, Inc. v. SBA*, 559 F. Supp. 4, 6 (D.D.C. 1981). Nevertheless, an agency is certainly not precluded from withholding portions of an awarded contract where warranted under Exemption 4 of the Freedom of Information Act ("FOIA"), 5 U.S.C. §§ 552 *et seq.* Exemption 4

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applies to "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4) (2002).

Exemption 4 protects the interests of both the Government and submitters of information, encourages submitters to voluntarily furnish useful commercial or financial information to the Government, and provides the Government with an assurance that such information will be reliable. This FOIA exemption also affords protection to those submitters who are required to furnish sensitive and proprietary commercial or financial information to the Government by safeguarding that information from the competitive disadvantages that could result from disclosure. *See* Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001), *reprinted in FOIA Post* (posted 10/15/01) (recognizing fundamental societal value of "protecting sensitive business information").

Some of the most sensitive contractor information contained in awarded contracts relates to pricing. Although courts have historically leaned towards allowing government disclosure of contract unit and other pricing data under FOIA, the United States District Court for the District of Columbia recently rejected the Government's argument that compliance with FOIA required agencies to disclose out-year prices in multi-year contracts. In *MCI Worldcom, Inc. v. United States* and *Sprint Communications Co. v. United States*, the court agreed with plaintiffs that prices offered to government customers in future years could be protected from FOIA disclosure as trade secrets. 163 F.Supp.2d 28, 37 (D.D.C. 2001).

In the *MCI Worldcom* case, GSA had awarded eight-year contracts (including option years) for long-distance telecommunications services to Sprint and MCI Worldcom in December 1998 and January 1999, respectively, under the FTS2001 program. The contracts provided that only then-current-year unit prices would be made public over the course of the contracts. Nevertheless, GSA later informed its contractors that it was changing its policy and that, in response to FOIA requests, it would make public all prices under the subject contracts. Sprint and MCI Worldcom brought reverse-FOIA actions against GSA. The court found that GSA's decision to release the out-year prices was contrary to the Trade Secrets Act and to the Federal Acquisition Regulation ("FAR") and violated GSA's own FOIA regulations. The court also determined that GSA departed from its own precedent not to release future year prices without a reasoned explanation.

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The court's decision, which relied upon the 1999 decision of the U.S. Court of Appeals for the District of Columbia Circuit in *McDonnell Douglas Corp. v. NASA*, 180 F.3d 303 (D.C. Cir. 1999), has generated a great deal of discussion in the federal procurement community. In fact, proposed modifications to the FAR's competitive debriefing rules issued earlier this year acknowledge that, as a result of the decision in *MCI Worldcom*, "the treatment of unit prices under exemption no. 4 of [FOIA] is in a state of flux which may cause a revision to FAR 15.503(b)(1)(iv) to clarify the release of unit prices." See Federal Acquisition Regulation; Debriefing—Competitive Acquisition, 68 Fed. Reg. 5778-01 (2003) (to be codified at 48 C.F.R. pt. 52) (proposed February 4, 2003). Moreover, the logic of the *MCI Worldcom* decision applies with equal force to the protection of pricing information in multiple-award contracts, where the competition for the task and delivery orders under those contracts will occur over the term of the contract based on the original, awarded pricing.

In summary, what is and is not considered "proprietary information contained in a contract" is clearly open to interpretation, and simply offering to redact this type of information prior to publishing awarded contracts on the Internet ignores the quagmire of sorting out the proprietary from the non-proprietary information. Therefore, the Section believes that the legal and administrative burden that the redaction process will create will cost the taxpayer far more than it would for an agency to respond to individual FOIA requests.

B. Potential Costs and Production Burden

In addition to the legal issues raised above and the costs associated with the administration and resolution of those issues, publishing awarded contracts on the Internet creates an entirely new burden on both the Government and its contractors. The redaction process, however it ultimately is handled, or by whom, is time consuming and costly. Even if there are no disagreements between an agency and its contractor regarding the nature of the information that might be disclosed, it still takes time to go through a contract line-by-line to identify potentially sensitive contractor information or to ensure that none exists. It is simply unreasonable to require contractors, some of which hold many hundreds of contracts with government agencies, to undergo the redaction process for every single contract when many, if not most, of those contracts likely will be of no interest to the public.

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On the other hand, if a member of the public expresses interest in a particular contract through FOIA, responding to those requests, although also time consuming and costly, occurs only occasionally, and not for every single contract awarded by an agency and won by a contractor. Indeed, the Section understands that the number of FOIA requests received throughout the Government for contract materials is relatively small compared to the number of contracts actually awarded. As stated earlier, the FOIA process, although it arguably does not allow the “transparency” desired by public interest groups, serves to protect the interests of both the Government and its contractors, and hence the interests of the taxpayer as well.

C. Alternative Public Disclosures

As the Notice and Request for Comments acknowledges, the Government has undertaken several important steps to increase the transparency of the procurement process, including the FedBizOpps Internet site, the interagency contract directory, and the Federal Procurement Data System—Next Generation. These resources have and will enable the Government, its contractors, and the public to obtain access to a broad array of procurement and acquisition information without subjecting agencies and contractors to the time-consuming expense and effort needed to review each and every contract and engage in a potentially disputed redaction process. Indeed, the Section believes that the Pilot Program will bog down the acquisition process rather than improve it.

As an alternative to the Pilot Program, the Section recommends offering a more standardized set of procurement information for each contract awarded. This information would include items that are or should be indisputably publicly available, such as the solicitation, the Independent Government Estimate (“IGE”), and the identity of the contract awardee. This set of information would offer the public sufficient non-sensitive information to understand the procurement intentions and goals of the agency, including the magnitude of what it planned on spending on each contract, as well as provide interested parties with information regarding potential subcontracting opportunities. Such a standardized process would also avoid the enormous costs and administrative burden that publishing every contract awarded on the Internet would place on both the Government and its contractors.

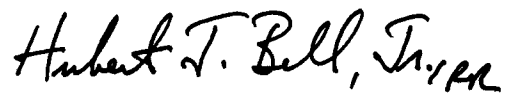
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The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

A handwritten signature in black ink that reads "Hubert J. Bell, Jr." with a stylized flourish at the end.

Hubert J. Bell, Jr.

Chair-Elect, Section of Public Contract Law

cc: Mary Ellen Coster Williams
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