

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of )
DONALD J. CARNEY )
On Request for Inspection of Records ) FOIA Control No. 2011-427
OMNIPLEX WORLD SERVICES )
CORPORATION )
On Request for Confidential Treatment )

MEMORANDUM OPINION AND ORDER

Adopted: February 1, 2012

Released: February 2, 2012

By the Commission:

1. We have before us an Application for Review filed by OMNIPLEX World Services Corporation (OMNIPLEX) seeking review of a decision of the Office of the Managing Director (OMD) in the Disclosure Decision under review, OMD partially granted Donald J. Carney's Freedom of Information Act (FOIA) request for copies of price and technical quotations (the "quotations") that OMNIPLEX submitted to the Commission in a GSA Multiple Award Schedule order competition for FCC guard services. OMD decided that the OMNIPLEX quotations would be released to Mr. Carney after redaction of confidential commercial information under FOIA Exemption 4. In the AFR, OMNIPLEX opposes release of the quotations, contending that a FOIA exemption statute, 41 U.S.C. § 4702 (formerly 41 U.S.C. § 253b(m)), applies. Mr. Carney opposes the AFR, both with respect to OMNIPLEX's suggestion that an exemption statute applies and, alternatively, with respect to OMNIPLEX's claimed right to review the redactions the Commission would make under FOIA Exemption 4.

1 Letter from William A. Turk, OMNIPLEX, to Office of the General Counsel (Sept. 7, 2011) (the AFR).

2 Letter from Chief of Staff, OMD, to Donald J. Carney, Perkins Coie (Aug. 18, 2011) (Disclosure Decision).

3 Letter from Donald J. Carney, Perkins Coie, to Deputy Managing Director (Ginsburg), OMD (June 10, 2011) (Request).

4 Uniformed Protective Support Services ("UPF"), Sol. No. SOL10000004, Amend. 8 (Dec. 10, 2010) (request for quotations, as amended); Order No. PUR1100051, GSA Multiple Award Sched. Contract No. GS-07F-0256L (Feb. 3, 2011) (order as placed with OMNIPLEX).

5 5 U.S.C. § 552(b)(4).

6 Letter from Donald J. Carney, Perkins Coie, to Office of the General Counsel (Sept. 13, 2011) (Opposition); see also Letter from William A. Turk, OMNIPLEX, to Office of the General Counsel (Sept. 20, 2011) (Reply); Letter from Nereyda Dunn, OMD, to Lisa McLeod, OMNIPLEX (June 14, 2011) (soliciting response or non-response to Request); Letter from William A. Turk, OMNIPLEX, to Nereyda Dunn, OMD (June 23, 2011) (requesting extensive redactions); Letter from Donald J. Carney, Perkins Coie, to Nereyda Dunn, OMD (June 30, 2011) (opposing redaction requests). In the volley of correspondence that preceded the Disclosure Decision, OMNIPLEX had been afforded an opportunity to suggest redactions to its quotations for commercial confidential information. In the

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2. As used in this Memorandum Opinion and Order, “the order” or “order for guard services” means the FCC’s GSA Multiple Award Schedule order for guard services made on February 4, 2011. The order was placed after considering the “business and technical quotations” of several GSA schedule contract holders in response to the FCC’s request for quotations (RFQ).<sup>7</sup> OMNIPLEX was the prevailing competitor.

3. As discussed below, OMNIPLEX’s application is granted because the quotations, to the extent not set forth or incorporated by reference in a contract with the Commission, must be withheld under 5 U.S.C. § 552(b)(3) (records specifically exempted from disclosure by statute) and 41 U.S.C. § 4702, which precludes the release of contract proposals that are not set forth or incorporated by reference in a contract entered into between the agency and the successful vendor that submitted the proposal. We find that, apart from extracts of quotation information set forth in the text of the order for guard services (and previously found to be exempt from release under FOIA Exemption 4 as confidential commercial information), the quotations were not set forth or incorporated by reference in a contract and are therefore not subject to release.

## I. BACKGROUND

4. The instant FOIA request grew out of an earlier FOIA request made by Mr. Carney for “[t]he entire . . . [c]ontract awarded by the FCC under Solicitation SOL10000004 . . . to Omniplex . . . , including any proposal set forth or incorporated by reference in the contract issued by the FCC to Omniplex.”<sup>8</sup> On June 6, 2011, OMD found that certain passages from the FCC’s order for guard services that had been drawn from the quotations submitted by OMNIPLEX, such as line item prices and lists of the key personnel, were covered by the initial FOIA request but were exempt from disclosure under FOIA Exemption 4.<sup>9</sup> OMD also concluded that the OMNIPLEX business and technical quotations submitted on December 15, 2010 otherwise “were not incorporated into the contract,” and therefore fell outside of the initial FOIA request by its own terms.<sup>10</sup> OMD thus disclosed the redacted order for guard services and its attachments to Mr. Carney, but it did not provide him with the quotations.

5. After receiving OMD’s *June 2011 Decision*, Mr. Carney wrote to OMD setting forth his view that the “[q]uotes in response to FCC Solicitation SOLI0000004 are responsive to FOIA request 2011-289.” Mr. Carney argued that the quotations were incorporated into the order because OMNIPLEX’s quotation prices were reproduced in the contract, and, therefore the quotes were effectively incorporated

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*Disclosure Decision*, OMD identified the categories of information that it regarded as commercial confidential. In the *AFR*, OMNIPLEX first asserted that FOIA Exemption 3 applied (through 41 U.S.C. § 4702), and for that reason, stated that it did not address the specific quotation redactions that OMD sent with the decision. OMNIPLEX further stated that in “the event that the results of this appeal allow for the release of any of OMNIPLEX’s proposals, OMNIPLEX reserves the right to separately address the specific redactions that have been proposed.”

<sup>7</sup> Each vendor’s quotations contained substantial narratives explaining its relevant experience; past performance; key personnel; proposed technical approach and staffing plan; and any assumptions, conditions, and exceptions respecting the terms, conditions, and requirements of the RFQ; as well as firm fixed prices and rates for hourly services.

<sup>8</sup> Electronic FOIA Request of Donald J. Carney, Perkins Coie, to FCC, FOIA@fcc.gov (Apr. 6, 2011) (docketed as FOIA No. 2011-289) (*First Request*).

<sup>9</sup> Letter from Deputy Managing Director (Ginsburg), OMD, to Donald J. Carney, Perkins Coie (June 6, 2011) (*June 2011 Decision*).

<sup>10</sup> *Id.*

by reference into the contract. He requested that his letter be treated as a FOIA request “for Omniplex's Technical and Business Quotes in response to FCC Solicitation SOL10000004.”<sup>11</sup>

6. OMD treated Mr. Carney’s letter of June 10, 2011 as a new FOIA request for the quotations. On June 14, 2011, OMD afforded OMNIPLEX an opportunity to respond to the new request, including an opportunity to explain why any portions of these records are confidential commercial information. After considering OMNIPLEX’s FOIA Exemption 4 assertions (submitted on June 23, 2011), and Mr. Carney’s counterarguments to those assertions (submitted on June 30, 2011), OMD concluded in the *Disclosure Decision* of August 18, 2011 that the business and technical quotations would be disclosed subject to redaction of FOIA Exemption 4 material. Specifically, OMD determined to redact from the quotations descriptions of: the software, techniques, and training that Omniplex has developed to meet the contract requirements; personnel assigned to the implementation of the order, including experience; Omniplex’s projected costs and rates; information about Omniplex’s performance under other contracts; and information about Omniplex’s subcontractors. It also notified Mr. Carney that it was sending the redacted documents to OMNIPLEX for review and that it would provide Mr. Carney the final redacted documents if and when no appeal had been filed or in the case of appeal, once the appeals process is resolved.

7. In the *AFR*, OMNIPLEX first asserted that FOIA Exemption 3 applied (through 41 U.S.C. § 4702), and for that reason, stated that it did not address the specific quotation redactions that OMD sent with the decision. OMNIPLEX further stated that in “the event that the results of this appeal allow for the release of any of OMNIPLEX’s proposals, OMNIPLEX reserves the right to separately address the specific redactions that have been proposed.” In addition to his general objection to applying FOIA Exemption 3 to the quotations, Mr. Carney objected to affording OMNIPLEX an opportunity for comment on those redactions if the FOIA Exemption 3 argument fails. OMNIPLEX had already been asked to state what it regarded as qualifying for FOIA Exemption 4.

## II. DISCUSSION

8. Generally, FOIA Exemption 3 exempts from mandatory disclosure matters that are “specifically exempted from disclosure by statute,” 5 U.S.C. § 552(b)(3), and 41 U.S.C. § 4702 is a FOIA Exemption 3 statute.<sup>12</sup> The central matter before us is whether 41 U.S.C. § 4702 applies to OMNIPLEX’s technical and business quotations and thus precludes their release under FOIA. Under subsection 4702(b), a “proposal in the possession or control of an executive agency may not be made available to any person under section 552 of title 5.”<sup>13</sup> However, the restriction does not apply to “a proposal that is

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<sup>11</sup> Letter from Donald J. Carney, Perkins Coie, to Deputy Managing Director (Ginsburg), OMD (June 10, 2011) (regarding decision on FOIA No. 2011-289). In this letter, Mr. Carney did not object to the Exemption 4 redactions made to the text of the order that was released to him; he objected only to OMD’s conclusion that the quotations were not within the scope of his initial request.

<sup>12</sup> See U.S. Department of Justice, Office of Information Policy, *Statutes Found to Qualify under Exemption 3 of the FOIA* (Aug. 2011), available at, <http://www.justice.gov/oip/exemption3.pdf> (last visited January 9, 2012). The document lists as an Exemption 3 statute 41 U.S.C. § 253b(m), recently recodified as 41 U.S.C. § 4702. Pub. L. No. 111-350, §§ 3, 7, 124 Stat. 3677, 3794, 3855 (2011); see also *Hornbostel v. U.S. Dep’t of the Interior*, 305 F. Supp. 2d 21, 30 (D.D.C. 2003) (finding proposals to be properly withheld from disclosure pursuant to Exemption 3, because statute “specifically prohibits the disclosure of ‘a proposal in the possession or control of an agency’” and quoting 41 U.S.C. § 253b(m)), *summary affirmance granted*, No. 03-5257, 2004 WL 1900562 (D.C. Cir. Aug. 25, 2004).

<sup>13</sup> In the statute, “the term ‘proposal’ means a proposal, including a technical, management, or cost proposal, submitted by a contractor in response to the requirements of a solicitation for a competitive proposal.” 41 U.S.C. § 4702(a).

set forth or incorporated by reference in a contract entered into between the agency and the contractor that submitted the proposal.”<sup>14</sup>

9. We are not aware of any judicial precedent addressing what constitutes incorporation by reference for purposes of 41 U.S.C. § 4702 (or its predecessor, former 41 U.S.C. § 253b(m)). The Federal Circuit, however, has interpreted “incorporation by reference” in other contexts. The court has stated for general federal contracting purposes it treats the expression as it does in patent cases, and in both contexts “[t]o incorporate material by reference, the host document must identify with detailed particularity what specific material it incorporates and clearly indicate where that material is found in the various documents [identified].”<sup>15</sup> The court concludes, “the incorporating contract must use language that is express and clear, so as to leave no ambiguity about the identity of the document being referenced, nor any reasonable doubt about the fact that the referenced document is being incorporated into the contract.”<sup>16</sup>

10. The contract at issue here was placed using an Optional Form 347.<sup>17</sup> The Optional Form 347 on which the current order was placed, together with its attachments, was an integrated contract that stands by itself. The form’s list of supplies and services simply reads: “[p]rovide uniformed protective

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<sup>14</sup> 41 U.S.C. § 4702(c). The statute was primarily crafted by the House of Representatives as section 821b(m) of the National Defense Authorization Act of 1997 to reduce “administrative burden on federal agencies receiving requests for release of contractor proposals even though most if not all of the information is exempt under the FOIA process.” H.R. Rep. 104-563, p. 327 (1996). The conference agreement incorporated a Senate “amendment clarifying the status of those portions of contractor proposals included in a government contract.” H.R. Conf. Rep. No. 104-724, p. 771 (1996). The clarification excepted from the nondisclosure rule a “proposal that is set forth or incorporated by reference in a contract entered into between the agency and the contractor that submitted the proposal.” 41 U.S.C. § 4702(c). See also U.S. Department of Justice, Office of Information and Privacy, New Statute Protects Contractor Proposals, FOIA Update Vol. XVIII, No. 1 (1997), available as [http://www.justice.gov/oip/foia\\_updates/Vol\\_XVIII\\_1/page2.htm](http://www.justice.gov/oip/foia_updates/Vol_XVIII_1/page2.htm).

<sup>15</sup> *Northrop Grumman Information Technology, Inc. v. U.S.*, 535 F.3d 1339, 1343-47 (Fed. Cir. 2008), quoting *Cook Biotech*, 460 F.3d at 1376, and *Advanced Display Systems*, 212 F.3d at 1282. The Boards of Contract Appeals, such as in *Corning Const. Corp. v. Department of the Treasury*, GSBICA No. 16127-TD, 2003 WL 22456725 (G.S.B.C.A.) (Oct. 29, 2003), have characterized “incorporation by reference” for general contracting purposes in a similar fashion:

Incorporation by reference is a common practice in government contracting, routinely recognized as an effective way to include a term, condition, or standard in the contract without further spelling it out in the document signed by the parties. See *Klinger Constructors, Inc.*, ASBCA 41006, 91-3 BCA ¶ 24,218, at 121,126; *Wright-Dick-Boeing*, ENGBICA 3576, 77-1 BCA ¶ 12,437, at 60,205. The term “incorporation by reference” generally requires a reference in one document to the terms of another. Further, the incorporating document must not only refer to the incorporated document, but also bring the terms of the incorporated document into itself as if fully set out. *Sucesion J. Serralles, Inc. v. United States*, 46 Fed. Cl. 773, 785-86 (2000); *Firth Construction Co., Inc. v. United States*, 36 Fed. Cl. 268, 275 (1996).

<sup>16</sup> *Northrop Grumman*, 535 F.3d at 1344.

<sup>17</sup> See 48 C.F.R. § 53.302-347 (form reproduced). The Optional Form 347 on which the current order was placed can be an integrated contract that stands by itself once signed by the contractor, performed upon, or made operative by the terms of a master contracting vehicle, such as a GSA Schedule Contract. Alternatively, and often in service contracts, the order can include terms found in attached documents or documents incorporated by reference. In GSA schedule contracting, as was conducted here, the request for quotation (RFQ) is typically a letter RFQ to vendors with quotation instructions and evaluation criteria. The RFQ often includes, and in this case did include, a statement of work to be performed. Once a vendor is selected, an order is typically placed by sending an order form (here, the Optional Form 347, with its continuation sheet, Optional Form 348) to the successful vendor. The form may append the statement of work, sometimes with blanks filled in or negotiated items altered. Sometimes, some or all of the RFQ attachments and/or the successful vendor’s quotation are appended to the form.

Services in accordance with the statement of work and the attached schedule of services.” It does not incorporate by reference OMNIPLEX’s business or technical quotation.

11. Attachment 7 to the request for quotation was a detailed schedule of services containing blanks that competing vendors filled in with unit and total prices and rates. Attachment 7 was not included as an attachment to the order, however. Instead its content was partially reproduced as a continuation sheet to the Optional Form 347, providing more detailed pricing than the base form, with figures drawn from OMNIPLEX’s quotation. Key personnel information drawn from the technical portion of the vendor’s quotation was also reproduced in the order. These pricing figures, associated explanatory notes, and list of key personnel are the only parts of OMNIPLEX’s business or technical quotation contained in the order for guard services. This inclusion was done by setting forth language from the quotation in the order, not through incorporation by reference.

12. Mr. Carney argues that incorporation of the business and technical quotations occurred by implication because certain information was drawn from that quotation to complete pricing or key personnel blanks. He also argues that because the FCC’s contracting office considered the technical quotation in deciding to place the order with OMNIPLEX, the entire quotation was incorporated. But the exception in 41 U.S.C. § 4702(b) is narrower than Mr. Carney suggests; it allows disclosure (absent some other grounds for withholding) not of any proposal that is drawn upon or considered by an agency, but only of “a proposal that is set forth or incorporated by reference in a contract entered into between the agency and the contractor that submitted the proposal.” If Mr. Carney’s arguments were to be accepted, they would eviscerate section 4702’s limited exception for incorporated proposals by expanding it to include essentially all proposals of awardees. Finally, Mr. Carney’s position is at odds with the general rule that incorporation by reference should be clear.<sup>18</sup>

13. Mr. Carney also asserts that OMD suggested by its actions, and the contractor at one point stated outright,<sup>19</sup> that OMNIPLEX’s final quotations were incorporated into the order. Significantly Mr. Carney does not assert that these statements preclude the Commission from concluding in this AFR proceeding that FOIA Exemption 3 applies here. For that reason alone, we need not consider this argument. If we did consider the argument, we would find separate and independent grounds for rejecting it. Contrary to Mr. Carney’s argument, although OMD previously relied on FOIA Exemption 4, it found in its *June 2011 Decision* that “Omniplex’s Technical and Business Quotes that were contained in its initial proposal in response to the RFQ . . . were not incorporated into the contract itself.”<sup>20</sup> Further, as Mr. Carney implicitly recognizes, OMNIPLEX’s position could not bind the Commission, and we conclude that it would be inappropriate to release documents that are barred from release 41 U.S.C. § 4702(b).

14. Accordingly, we find that OMNIPLEX’s quotations are exempt from disclosure under 5 U.S.C. § 552(b)(3) and 41 U.S.C. § 4702, except to the extent that they were set forth in the order for guard services.<sup>21</sup> Such parts of the quotations as were included in the text of the order for guard services were previously found by OMD to be exempt from disclosure under FOIA Exemption 4 and that decision has become final and not subject to further review. Given these conclusions, Mr. Carney’s objections

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<sup>18</sup> See *supra* note 15 (and associated text).

<sup>19</sup> *Opposition* at 2; see Letter from William A. Turk, OMNIPLEX, to Nereyda Dunn, OMD (Aug. 22, 2011) (where Omniplex states that it did “not believe that any proposal prior to the final one submitted on December 15, 2010 was incorporated into the contract.”).

<sup>20</sup> See *June 2011 Decision* (emphasis added).

<sup>21</sup> Even if section § 4702 were somehow found not to apply in these circumstances, the Commission would, in that event, be responsible for reaching a final determination as to FOIA Exemption 4 coverage of the quotations. See, e.g., *Raher v. FBI*, 759 F.Supp.2d 1148, 1162-1163 (D.Or. 2010).

about affording OMNIPLEX further opportunity for comment on proposed redactions to its quotations need not be addressed.<sup>22</sup>

### III. ORDERING CLAUSE

15. Accordingly, IT IS ORDERED that the Application for Review filed September 7, 2011 by OMNIPLEX IS GRANTED. Mr. Carney may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).<sup>23</sup>

16. The officials responsible for this action are the following: Chairman Genachowski and Commissioners McDowell and Clyburn.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>22</sup> *Opposition at 2; see supra ¶ 7.*

<sup>23</sup> We note that as part of the Open Government Act of 2007, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect Mr. Carney's right to pursue litigation. Mr. Carney may contact OGIS in any of the following ways:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road - Room 2510  
College Park, MD 20740-6001  
E-mail: [ogis@nara.gov](mailto:ogis@nara.gov)  
Telephone: 301-837-1996  
Facsimile: 301-837-0348  
Toll-free: 877-684-6448.