

EMAIL MESSAGE – SENT February 10, 2003

From: George Geczy

To: Stephen Bauld, Manager of Purchasing, City of Hamilton  
Rick Male, Director of Finance, City of Hamilton  
Marvin Caplan, Councillor, City of Hamilton

Thank you all again for taking the time to meet with me on Thursday.

I look forward to participating further when revisions to the 'Purchasing Policies' are drafted for discussion by Council, which as I recall is expected sometime this spring. Obviously I have a strong interest from the Government Openness/Transparency perspective, and I would hope this viewpoint can be reconciled with some of the concerns you voiced about a fully transparent process.

And though I've only had a cursory chance to do some searches regarding the topics we discussed, some of the first things I ran in to are quite interesting so I hope you don't mind if I take a moment to pass them along.

1) Unit Pricing - Federal Government policy. The Canadian Government has made it policy that unit prices are always released for Standing Offers, and optionally released for single contracts. In the PWGSC Supply Manual Section 7F.705 (see footnote 1), it states "To ensure a consistent approach to the public release of information, PWGSC has agreed to release the unit prices contained in goods and services standing offers on a routine basis." Moreover, it includes the following section in its contract with winning bidders:

"the Offeror agrees to the disclosure of its unit prices by Canada, and further agrees that it shall have no right of claim against Canada, the Minister, the Identified User, their employees, agents or servants, or any of them, in relation to such disclosure."

2) Unit Pricing Release - Studies and Precedents. It turns out that there have been considerable examinations of the possible effects of the release of unit pricing in public bids. The United States "Freedom of Information Act", which predates the Canadian and Provincial acts by a number of years (but includes very similar wording), has resulted in a number of publications by the US Department of Justice Office of Information and Privacy. The policy of the OIP is to allow release of unit pricing in most cases, and most significantly some key cases were taken to court by the vendors to prevent such releases. The release of unit pricing was upheld by the court decisions, and in one particular precedent-setting case a very thorough debate on the issue of release versus harms was held. Called the "J.H. Lawrence Precedent" (footnote 2), the decision summary in part says "District Judge Shirley B. Jones examined a unit price breakdown that contained more than two thousand line items to ascertain whether disclosure would reveal the profit

or overhead costs of the submitter. After receiving extensive testimony concerning the various formulas that might be used to compute the contractor's markup, profit and overhead costs, Judge Jones concluded that because so many variables and uncertainties were involved, disclosure of the unit prices would not permit competitors to calculate confidential proprietary information. Her conclusion that those unit prices must be disclosed under the FOIA seems an entirely rational one, at least under the circumstances presented in that case."

Another case quoted by the OIP makes the following statement, which I think very wisely sums up my position as well: (footnote 3) "District Judge June L. Green emphasized the public interest in favor of disclosure, stating that adequate information about government contracts was necessary in order for the public to evaluate the 'wisdom and efficiency' of federal programs and that disclosure of only the aggregate prices was insufficient to allow evaluation of the contract. The public release of prices charged the government was, she found, 'a cost of doing business with the government.'"

I also discovered a number of US jurisdictions that release and publish bid results with unit pricing on the internet (though in my first cursory searches I have not found a Canadian example of this). As well, in searching through the MFIPPA Orders and Guidelines, I found a number of examples where unit pricing was determined to qualify for release under the Act. I will continue compiling this information into a reference document that can be used as a basis of reviewing the new Purchasing Policy terms when the draft becomes available (if you would like to see it earlier, please drop me a note).

Again, thank you for taking the time on Thursday, and I look forward to discussions on this topic in the future.

-- George.

- George Geczy, Partner, dg technical consulting
- Co-Chair, Hamilton Chamber Science & Technology Committee
- Library Trustee, Hamilton Public Library Board
- Email: [george@dgtechnical.com](mailto:george@dgtechnical.com) Phone/Fax 905.304.9383

Footnote (1): "Public Works and Government Services Canada, Supply Operations Service, Supply Manual, Section 7F.705, Updated Mar 31 1997, internet link [www.pwgsc.gc.ca/sos/corporate/sm/text/ch07f-01-e.html](http://www.pwgsc.gc.ca/sos/corporate/sm/text/ch07f-01-e.html)

Footnote (2): United States Department of Justice, Office of Information and Privacy; FOIA Update on Exemption 4; case J. H. Lawrence Co. v. Smith, Nos. 81-2993, 82-0361 (D. Md. Nov. 10, 1982)

Footnote (3): United States Department of Justice, Office of Information and Privacy; FOIA Update on Exemption 4; case Racal-Milgo Government Systems, Inc. v. SBA, 559 F. Supp. at 6 ruling by District Judge June L. Green