FOIA-2009-000325
5/8/2009

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May 5, 2009

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FREEDOM OF INFORMATION REQUEST

VIA E-MAIL AND U.S. MAIL

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COMMERCIAL SEARCH REVIEW & REPRODUCTION

Freedom of Information Act Officer
U.S. Department of Energy
1000 Independence Ave., SW
Washington, DC 20585

Re: Freedom of Information Act Request

Dear Freedom of Information Act Officer:

Please consider this letter to be a formal request for the following records pursuant to the Freedom of Information Act and 10 C.F.R. §§ 1004.1 - .12:

Emcbc

- A copy of all documents relating to the determination by Contracting Officer, Mr. Mark A Million, on June 28, 2004 that a payment bond was not necessary in connection with the prime contract (Contract # DEAC0502OR 22717 – Award Date 8/29/2002) between the U.S. Department of Energy ("DOE") and Uranium Disposition Services, Inc. ("UDS") regarding the DUF6 Conversion project ("Project").

Emcbc

- A copy of the June 28, 2004 letter authored by Contracting Officer, Mr. Mark A. Million, which is referenced in the quoted language on page two of the attached Decision and Order of the Department of Energy dated January 5, 2009 (Case No. TFA-0285).

Emcbc

- A copy of all documents relating to any proposal made by UDS to the DOE for UDS to provide "alternative financial protection" in lieu of having to provide performance and payment bonds in connection with the prime contract (Contract # DEAC0502OR 22717 – Award Date 8/29/2002) between the DOE and UDS regarding the Project. Such "alternative financial protection" is referenced in the quoted language on page two of the attached Decision and Order of the Department of Energy dated January 5, 2009 (Case No. TFA-0285).

FOIA-2009-000325

Sheila

Emc bc • A copy of all documents relating to the DOE's consideration and/or acceptance of any proposal by UDS to the DOE for UDS to provide "alternative financial protection" in lieu of having to provide performance and payment bonds in connection with the prime contract (Contract # DEAC0502OR 22717 – Award Date 8/29/2002) between the DOE and UDS regarding the Project. Such "alternative financial protection" is referenced in the quoted language on page two of the attached Decision and Order of the Department of Energy dated January 5, 2009 (Case No. TFA-0285).

Emc bc • A copy of all documents relating to the "alternative financial protection," "subcontractor bonding," and/or "performance guarantees of UDS' three member companies" referenced in the quoted language on page two of the attached Decision and Order of the Department of Energy dated January 5, 2009 (Case No. TFA-0285).

Emc bc • A copy of all contracts wherein UDS agreed to provide "alternative financial protection" in lieu of performance and payment bonds in connection with the prime contract (Contract # DEAC0502OR 22717 – Award Date 8/29/2002) between the DOE and UDS regarding the Project.

Emc bc/OHA • A copy of the January 7, 2009 electronic mail message from Brady Jones III, Procurement Attorney, Environmental Management, to Steven L. Fine, OHA Staff Attorney relating to the attached Decision and Order of the Department of Energy dated January 5, 2009 (Case No. TFA-0285).

OHA • A copy of all documents reviewed or relied upon by the DOE to issue the attached Decision and Order of the Department of Energy dated January 5, 2009 (Case No. TFA-0285).

Please contact me if you have any questions. We will pay all fees assessed up to $250.00. If the fees to process this request will exceed $250.00, please contact me.

Very truly yours,

LEONARD, STREET AND DEINARD

Brian W. Thomson

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Department of Energy
Washington, DC 20585

JAN 15 2009

DECISION AND ORDER OF THE DEPARTMENT OF ENERGY

Appeal

Petitioner:	Morsey Constructors
Filing Date:	January 5, 2009
Case Number:	TFA-0285

This Decision concerns Morsey Constructors' (Morsey) Appeal from a determination that the Department of Energy's (DOE) Environmental Management Consolidated Business Center (EM) issued to it on November 18, 2008. In that determination, EM responded to Morsey's request for information filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as the DOE implemented in 10 C.F.R. Part 1004. This Appeal, if granted, would require the EM to perform an additional search and either release newly discovered documents or issue a new determination justifying their withholding.

I. Background

On September 5, 2008, Morsey filed a FOIA request with the EM seeking three specific documents pertaining to a contract between the DOE and Uranium Disposition Services (UDS) regarding the DUF6 Conversion Project (the Project). On November 19, 2008, EM issued a Determination Letter in which it released one of the requested documents in its entirety and provided the internet address of another of the requested documents. EM indicated that it had performed a search for the third requested document, "a copy of a payment bond between the DOE and UDS regarding the Project," and that this search had not located any responsive documents. Determination Letter at 1. On January 5, 2009, Morsey filed the present Appeal with OHA contending that EM's search for this responsive document was inadequate.

II. Analysis

In responding to a FOIA request for information, the courts have established that an agency must "conduct[] a search reasonably calculated to uncover all relevant documents. . . ." *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990) (citations omitted). "[T]he standard of

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reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Dep't of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, (Case No. VFA-0098) (1995) (remanding where there was "a reasonable possibility" that responsive documents existed at an unsearched location).[1]

In support of its assertion that EM's search for responsive documents was inadequate Morsey claims that EM should have located a payment bond for the project because UDP was obligated to post one with EM. In support of this assertion, Morsey cites the Federal Acquisition Regulations, the United States Code, and the language of the contract between DOE and UDS. Appeal at 1-2.

We contacted Brady Jones, a procurement attorney with EM, to evaluate the adequacy of EM's search. Jones stated:

> I contacted the Contracting Officer, Ms. Pamela Thompson, and she advised that there is no payment bond in the contract file because the Contracting Officer, Mr. Mark A. Million, determined on June 28, 2004, that a payment bond was not necessary. Attached is a copy of the June 28, 2004 letter. Prior to this letter, UDS proposed and the Contracting Officer accepted an alternative financial protection to requiring UDS to post performance and payment bonds. The alternative approach included subcontractor bonding and the performance guarantees of UDS's three member companies.

January 7, 2009, Electronic Mail Message from Brady Jones III, Procurement Attorney, Environmental Management, to Steven L. Fine, OHA Staff Attorney. Based upon our communications with Mr. Jones and our own examination of the June 28, 2004, letter, we find that EM conducted a reasonable search for responsive documents and has provided a compelling explanation of why that search did not locate any responsive documents. Accordingly, we conclude that the EM's search for responsive documents was reasonably calculated to uncover the information described in Morsey's request, and was therefore adequate. Therefore, we will deny Morsey's Appeal.

It Is Therefore Ordered That:

(1) The Appeal filed by Morsey Constructors on January 5, 2009, OHA Case No. TFA-0285, is denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district

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[1] Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at http://www.oha.doe.gov . The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at http://www.oha.doe.gov/search.htm .

in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: JAN 15 2009

UNITED STATES DEPARTMENT OF ENERGY
1000 INDEPENDENCE AVE., SW
WASHINGTON, DC 20585

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