ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 21, 2011

Mr. Hyattye O. Simmons
General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2011-17133

Dear Mr. Simmons:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 436980 (DART ORR 8499).

Dallas Area Rapid Transit ("DART") received a request for the "green line" and "orange line" schedule unit prices. Although you indicate DART takes no position with respect to the public availability of the submitted pricing information, you state its release may implicate the proprietary interests of Archer Western Contractors, Ltd. ("Archer") and Kiewit, Stacy and Witbeck, Reyes, and Parsons a Joint Venture ("KSWRP"). Accordingly, you state, and provide documentation showing, DART notified these companies of the request and of each company's right to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have received comments from Archer. We have considered the submitted arguments and reviewed the submitted information.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from KSWRP explaining why its submitted information should not be released. Therefore, we have no basis to conclude KSWRP has protected proprietary interests in its information. *See*

id. § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Consequently, DART may not withhold any of KSWRP's submitted information on the basis of any proprietary interests KSWRP may have in the information. As no exceptions to disclosure have been claimed for KSWRP's information, DART must release KSWRP's submitted information.

Archer claims its submitted pricing information is excepted from disclosure under section 552.101 of the Government Code in conjunction with the federal Freedom of Information Act ("FOIA"), chapter 552 of the United States Code. In Attorney General Opinion MW-95 (1979), this office determined FOIA does not apply to records held by a Texas agency or its political subdivisions. Furthermore, this office has stated in numerous opinions information in the possession of a governmental body of the State of Texas is not confidential or excepted from disclosure merely because the same information is or would be confidential under one of FOIA's exceptions. *See* Open Records Decision Nos. 496 at 4 (1988), 124 at 1 (1976). Therefore, none of Archer's bid proposal may be withheld under FOIA.

Archer also asserts its pricing information is excepted from disclosure pursuant to section 552.104 of the Government Code, which excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. Section 552.104, however, is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of governmental body in competitive situation, and not interests of private parties submitting information to government), 522 (1989) (discretionary exceptions in general). As DART does not seek to withhold any information pursuant to this exception, we find section 552.104 is not applicable to Archer's information. *See* ORD 592 (governmental body may waive section 552.104).

Finally, Archer claims its pricing information is excepted from disclosure under section 552.110(b) of the Government Code, which protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; ORD 661 at 5-6.

Archer asserts its submitted pricing information constitutes commercial and financial information that, if released, would cause the company substantial competitive harm. Upon

review, however, we find Archer has made only general conclusory assertions that release of this information would cause it substantial competitive injury, and has provided no specific factual or evidentiary showing to support such assertions. *See generally* Open Records Decision Nos. 661, 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts is too speculative), 319 at 3 (1982) (information relating to organization and personnel, professional references, market studies, qualifications, and pricing are not ordinarily excepted from disclosure under statutory predecessor to section 552.110). Furthermore, we note Archer was the winning bidder for the project to which its information pertains and the pricing information of a winning bidder is generally not excepted under section 552.110(b). This office considers the prices charged in government contract awards to be a matter of strong public interest. *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors); *see generally* Dep't of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Consequently, DART may not withhold Archer's submitted pricing information under section 552.110(b) of the Government Code. As Archer has not claimed any other exceptions to disclosure for its pricing information, DART must release Archer's submitted information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 436980

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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