



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 1, 2013

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2013-03498

Dear Ms. Alexander:

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# 480188.

The Texas Department of Transportation (the "department") received a request for the annual audit reports for Ballenger Construction Company ("Ballenger") for the years 2010, 2011, and 2012, including the amount Ballenger was allowed to bid on department jobs for each of those years, and any information from the audits indicating Ballenger's financial trouble. You claim the information at issue is excepted from disclosure under sections 552.104 and 552.110 of the Government Code. You also state the requested documents may implicate the proprietary interests of a third party. Accordingly, you notified Ballenger of the request and of its right to submit arguments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permitted governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under certain circumstances). We have received comments from an attorney on behalf of Ballenger. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.104 of the Government Code excepts from required public disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991) (discussing statutory predecessor). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except information from disclosure after bidding is completed and the contract has been awarded. *See* Open Records Decision No. 541 (1990). However, in Open Records Decision No. 541, this office stated that the predecessor to section 552.104 may protect information after bidding is complete if the governmental body demonstrates that public disclosure of the information will allow competitors to undercut future bids, and the governmental body solicits bids for the same or similar goods or services on a recurring basis. *See id.* at 5 (recognizing limited situation in which statutory predecessor to section 552.104 continued to protect information submitted by successful bidder when disclosure would allow competitors to accurately estimate and undercut future bids); *see also* Open Records Decision No. 309 (1982) (suggesting that such principle will apply when governmental body solicits bids for same or similar goods or services on recurring basis).

In this instance, you inform us that “[t]o maximize efficiency and save time and money, [the department] has instituted a ‘prequalification’ procedure that requires contractors to submit certain financial information in advance of any bid.” *See* 43 T.A.C. § 9.12(b)(1) (listing requirements for prequalification). You assert that the release of Exhibit B would adversely affect the department’s ability to compete for contractors with entities that do not have to release private financial information and would, in effect, reduce competition on competitive bids. Based on your representations, we find you have demonstrated that public release of Exhibit B would cause specific harm to the department’s interests in particular competitive bidding situations. Therefore, the department may withhold Exhibit B from disclosure under section 552.104 of the Government Code.²

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,

²As our ruling is dispositive, we need not address the remaining arguments against disclosure.

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,



Britni Fabian
Assistant Attorney General
Open Records Division

BF/dls

Ref: ID# 480188

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Ballenger Construction Company
c/o Mr. Allen M. DeBard
Langley & Banack, Inc.
745 East Mulberry, Suite 900
San Antonio, Texas 78212
(w/o enclosures)