



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 21, 2016

Ms. Jennifer Burnett
Attorney & Public Information Coordinator
Office of General Counsel
The University of Texas System
201 West Seventh Street, Suite 600
Austin, Texas 78701

OR2016-16453

Dear Ms. Burnett:

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# 619604 (UT GC# 169422).

The University of Texas System (the "system") received a request for information pertaining to a specified project, including (1) responses to the request for qualifications ("RFQ"); (2) responses to the request for proposals ("RFP"); (3) the construction manager-at-risk contract; and (4) all change orders and amendments to the contract. Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of Lee Lewis Construction, Inc. ("Lee"), Hill & Wilkinson General Contractors ("H&W"), Hunt Construction Group, Inc. ("Hunt"), Austin Commercial ("AC"), Linbeck Group, LLC ("Linbeck"), Turner Construction ("Turner"), Whiting-Turner Contracting Co. ("W-T"), HCBeck, Ltd. ("Beck"), Clark Construction Group, LLC ("Clark"), J.T. Vaughn Construction, LLC ("Vaughn"), and McCarthy Building Companies, Inc. ("McCarthy"). Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of their rights 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) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from H&W and Beck. We have reviewed the submitted information and the submitted arguments.

Initially, we note 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 Lee, Hunt, AC, Linbeck, Turner, W-T, Clark, Vaughn, or McCarthy explaining why the submitted information should not be released. Therefore, we have no basis to conclude these third parties have a protected proprietary interest in the submitted 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. Accordingly, the system may not withhold the submitted information on the basis of any proprietary interests Lee, Hunt, AC, Linbeck, Turner, W-T, Clark, Vaughn, or McCarthy may have in the information.

We note H&W and Beck raise section 552.104 of the Government Code for their respective information. Section 552.104(a) excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov't Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The “test under section 552.104 is whether knowing another bidder’s [or competitor’s information] would be an advantage, not whether it would be a decisive advantage.” *Id.* at 841. H&W states it has competitors. Additionally, H&W argues disclosure of its information would put at a competitive disadvantage against the other companies it routinely competes against in the marketplace. After review of the information at issue and consideration of the arguments, we find H&W has established the release of its information at issue would give advantage to a competitor or bidder. Thus, we conclude the system may withhold H&W’s information at issue, which we have marked, under section 552.104(a) of the Government Code.¹

Beck also states it has competitors. Additionally, Beck argues the loss of its differentiation by release of the information at issue would give its competitors an advantage. For many years, this office concluded the terms of a contract and especially the pricing of a winning bidder are public and generally not excepted from disclosure. Gov't Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); Open Records Decision Nos. 541 at 8 (1990) (public has interest in knowing terms of contract with state agency), 514 (1988) (public has interest in knowing prices charged by government contractors), 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). However, now, pursuant to *Boeing*, section 552.104 is not limited to only ongoing competitive situations, and a third party need only show release of its competitively

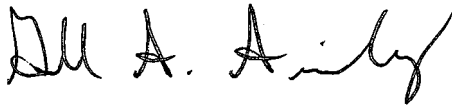
¹As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

sensitive information would give an advantage to a competitor even after a contract is executed. *Boeing*, 466 S.W.3d at 831, 839. After review of the information at issue and consideration of the arguments, we find Beck has established the release of its information at issue would give advantage to a competitor or bidder. Thus, we conclude the system may also withhold Beck's information at issue, which we have marked, under section 552.104(a) of the Government Code.² The remaining information must be released.

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/dls

Ref: ID# 619604

Enc. Submitted documents

c: Requestor
(w/o enclosures)

11 Third Parties
(w/o enclosures)

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