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ATTORNEY GENERAL OF TEXAS

May 22, 2020

Ms. Jennifer Burnett
Senior Attorney & Public Information Coordinator
Office of General Counsel
The University of Texas System
210 West 7th Street
Austin, Texas 78701-2901

OR2020-14448

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# 830001 (OGC# 195803).

The University of Texas Southwestern Medical Center (the "university") received a request for information regarding the awarded firm, scoring criteria, and proposed pricing pertaining to a specified request for proposals.¹ The university states it will release some information to the requestor. The university claims some of the submitted information is excepted from disclosure under section 552.104 of the Government Code. Additionally, the university states release of the submitted information may implicate the proprietary interests of the following third parties: Archer Western Construction, LLC, d/b/a Walsh Construction Company ("Archer"); Batson-Cook Construction; SpawGlass Contractors, Inc.; and Structure Tone Southwest, LLC.² Accordingly, the university states, and provides documentation showing, it notified these interested third parties of the request for information and of their right to submit arguments to this office. *See Gov't Code* § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to

¹ The university states, and provides documentation demonstrating, it sought and received clarification of the information requested. *See Gov't Code* § 552.222(b) (governmental body may communicate with requestor for purposes of clarifying or narrowing request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification or narrowing of unclear or overbroad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

² The university informs us J.T. Vaughn Construction, LLC does not object to release of their information.

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 Archer. We have considered the submitted arguments and reviewed the submitted information.

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) of the Government Code 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 only received comments from Archer explaining why its information at issue should not be released. Thus, we have no basis to conclude the remaining 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, 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. Therefore, the university may not withhold the submitted information on the basis of any proprietary interest the remaining third parties may have in the information.

Next, although Archer asserts its information is not responsive to the instant request, we note this information consists of pricing information pertaining to the specified request for proposals and was submitted by the university as responsive. Upon review, we find the information at issue is responsive to the request for information. Therefore, we will consider the submitted arguments against disclosure of the information at issue.

Section 552.1101 of the Government Code provides, in relevant part:

(a) . . . [I]nformation submitted to a governmental body by a vendor, contractor, potential vendor, or potential contractor in response to a request for a bid, proposal, or qualification is excepted from the requirements of Section 552.021 if the vendor, contractor, potential vendor, or potential contractor that the information relates to demonstrates based on specific factual evidence that disclosure of the information would:

(1) reveal an individual approach to:

- (A) work;
- (B) organizational structure;
- (C) staffing;
- (D) internal operations;
- (E) processes; or

(F) discounts, pricing methodology, pricing per kilowatt hour, cost data, or other pricing information that will be used in future solicitation or bid documents; and

(2) give advantage to a competitor.

Gov't Code § 552.1101(a). Archer asserts disclosure of its information would reveal an individual approach to pricing and give advantage to a competitor. Upon review, we find Archer has demonstrated the applicability of section 552.1101(a) to some of the information at issue. Accordingly, the university must withhold the information we marked under section 552.1101 of the Government Code.³ However, we find Archer has failed to provide the specific factual evidence necessary to withhold any of the remaining information at issue under section 552.1101(a), and the university may not withhold it on that basis.

Archer raises section 552.104 of the Government Code for its remaining information. Section 552.104 excepts from disclosure information “if a governmental body demonstrates that release of the information would harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future.” *Id.* § 552.104(a) (emphasis added). In *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015), the Texas Supreme Court held section 552.104 does not preclude third parties from raising section 552.104 as an exception to disclosure. *See Boeing*, 466 S.W.3d at 842. However, the Eighty-sixth Legislature has amended section 552.104 since the issuance of *Boeing*. *See Act of May 25, 2019, 86th Leg., R.S., S.B. 943, § 3.* Section 552.104 now expressly limits the protections of section 552.104 to governmental bodies. Gov't Code 552.104(a). Therefore, we do not address Archer's arguments under section 552.104.

The university also raises section 552.104 of the Government Code. 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.” *Boeing*, 466 S.W.3d at 841. After review of the information at issue and consideration of the arguments, we find the university has failed to demonstrate the applicability of section 552.104 to the remaining information at issue. Thus, we conclude the university may not withhold any of the remaining information under section 552.104(a).

Section 552.110(b) of the Government Code states “information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret.” *See Gov't Code § 552.110(b).* Section 552.110(a) defines a trade secret as all forms and types of information if:

(1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and

³ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

(2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

Id. § 552.110(a). Archer argues its remaining information consists of trade secrets subject to section 552.110(b). Upon review, however, we find Archer has failed to provide specific factual evidence demonstrating any portion of the remaining information at issue is a trade secret. Therefore, the university may not withhold any of the remaining information at issue under section 552.110(b) of the Government Code.

Archer asserts its tax account number is excepted from public disclosure under section 552.136 of the Government Code. Section 552.136 provides, “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” *Id.* § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Upon review, however, we find Archer has not demonstrated the information at issue consists of a credit card, debit card, or charge card number, or is an access device number used to obtain money, goods, services, or any item of value, or used to initiate the transfer of funds. *See id.* §§ 552.136(a), .301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). Therefore, we find Archer has failed to demonstrate the applicability of section 552.136 of the Government Code to the information at issue, and the university may not withhold it on this ground.

In summary, the university must withhold the information we marked under section 552.1101 of the Government Code. The university must release the remaining 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

James M. Graham
Assistant Attorney General
Open Records Division

JMG/gw

Ref: ID# 830001

Enc. Submitted documents

c: Requestor
(w/o enclosures)

c: Third Parties
(w/o enclosures)