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ATTORNEY GENERAL OF TEXAS

April 20, 2022

Ms. Patricia M. Borschow
Assistant General Counsel
El Paso Water Utilities - Public Service Board
P.O. Box 511
El Paso, Texas 79961-0511

OR2022-11536

Dear Ms. Borschow:

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# 944085 (Ref. No. EPW #01.28).

The El Paso Water Utilities – Public Service Board (the "board") received a request for information related to a specified request for proposals. You claim the submitted information is excepted from disclosure under section 552.104 of the Government Code. Additionally, you state release of the information at issue may implicate the proprietary interests of MGC Contractors, Inc. ("MGC") and Sundt Construction, Inc.¹ Accordingly, you state, and provide documentation demonstrating, the board notified these interested third parties of the request for information and of their 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) (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 MGC. 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) 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

¹ Although the board raises sections 552.110 and 552.1101 of the Government Code, we note these sections protect the interests of third parties, not the interests of governmental bodies themselves. Thus, we do not address the board's arguments under section 552.110 and section 552.1101 of the Government Code.

received comments from the remaining third party explaining why the information at issue should not be released. Thus, we have no basis to conclude the remaining third party has a protected proprietary interest in the information at issue. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating the applicability of the exception). Therefore, the board may not withhold any portion of the submitted information on the basis of any proprietary interest the remaining third party may have in it.

MGC and the board raise section 552.104 of the Government Code. Section 552.104 excepts from disclosure information “if a *governmental body* demonstrates that release 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). 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 Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015). 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 the arguments of MGC under section 552.104 of the Government Code. Further, after review of the information at issue and consideration of the arguments, we find the board has failed to establish the applicability of section 552.104 to the information at issue. Thus, we conclude the board may not withhold the submitted information under section 552.104(a) of the Government Code.

MGC argues some of its information is excepted from disclosure under section 552.128 of the Government Code. Section 552.128 is applicable to “[i]nformation submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program[.]” *Id.* § 552.128. Section 552.128(c) provides:

[i]nformation submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list, including information that may also have been submitted in connection with an application for certification as a historically underutilized or disadvantaged business, is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

Id. § 552.128(c). In this instance, MGC submitted its information at issue to the board in connection with a specific proposed contractual relationship with the board. We therefore conclude the board may not withhold any portion of MGC’s information under section 552.128 of the Government Code.

MGC raises section 552.110 of the Government Code for some of their information at issue.² Section 552.110(b) states, “[e]xcept as provided by [s]ection 552.0222, information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret.” *See Id.* § 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

(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). Section 552.110(c) of the Government Code states:

Except as provided by Section 552.0222, commercial 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 is [excepted from required disclosure].

Id. § 552.110(c). Additionally, we note section 552.0222(b) lists certain types of information to which section 552.110 does not apply. *See id.* § 552.0222(b). Upon review, we find MGC have demonstrated portions of the information at issue constitute commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the board must withhold the information we have marked under section 552.110(c) of the Government Code. However, we find some of the remaining information at issue is subject to section 552.0222(b) and may not be withheld on the basis of section 552.110 of the Government Code. Additionally, we find MGC has failed to provide specific factual evidence demonstrating any portion of the rest of the remaining information at issue is a trade secret or constitutes commercial or financial information, the release of which would result in substantial competitive harm. Therefore, the board may not withhold any portion of the remaining information at issue under section 552.110 of the Government Code.

In summary, the board must withhold the information we marked under section 552.110(c) of the Government Code. The board 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.

² Although MGC raises former subsections 552.110(a) and 552.110(b) of the Government Code in its brief, we understand MGC to raise current subsections 552.110(b) and 552.110(c) based on the substance of its arguments.

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,

Sarah E. Reese
Attorney
Open Records Division

SER/be

Ref: ID# 944085

Enc. Submitted documents

c: Requestor
(w/o enclosures)