



The Attorney General of Texas

December 27, 1979

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Open Records Decision No. 232

Re: Whether construction contract bids are excepted from public disclosure after contract is awarded.

Dear Mr. Pleitz:

You request our decision pursuant to section 7 of article 6252-17a, V.T.C.S., the Texas Open Records Act.

The Texas Municipal Power Agency solicited bids for a general construction contract to build the Gibbons Creek Steam Electric Station. Four companies submitted bids. Following an evaluation of the bids, the contract was awarded to the low bidder. Two of the bidders, including the successful bidder, have requested to inspect the other bids and materials submitted with them. A third bidder stated that it had no objection to disclosure, but the fourth bidder, H. B. Zachry Company, contends that information submitted with its bid should not be disclosed. The agency has also received a request for the bid evaluation report prepared by its consulting engineer. This report contains some of the same information contended to be excepted by Zachry. The agency states that it takes no position on whether or not the bids are or are not excepted from required public disclosure, but states that it believes certain portions of the bid of the bidder who objects to disclosure may be excepted under sections 3(a)(4) or 3(a)(10) of the Open Records Act. The agency invited the bidder who objects to disclosure to submit its argument to this office, which it did.

The construction project around which this controversy centers is estimated in the bid evaluation to cost over \$50 million dollars. A bid does not consist of a simple dollar figure, but includes a considerable volume of information prepared by the bidder. There is no dispute that the summary figures are public. These include totals for (1) field overhead; (2) fixed fee; (3) total target man hours; (4) composite wage rate; and (5) list of milestone dates.

Zachry contends that the bid information submitted by it is excepted from disclosure under sections 3(a)(4), 3(a)(10), or both. These exceptions protect from required public disclosure:

(4) information which, if released, would give advantage to competitors or bidders;

....

(10) trade secrets and commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision.

Zachry places particular emphasis on the circumstances under which the information supporting its bid was submitted, and contends that it was induced to disclose the information under a promise of confidentiality by the consulting engineer for the agency. A letter from the engineer to the bidders said:

Attached hereto is the Bid Tabulation for the above referenced project, which lists the items which will be publicly read from your bid on July 16, 1979.

Also attached is the Bid Evaluation Checklist. The information listed thereon will not be publicly read, but will be reviewed in detail during the bid evaluation; therefore, it is imperative that this information be included in your proposal.

An agency may not make information confidential by the promulgation of a rule. To imply such authority would be to allow the agency to circumvent the purpose of the Open Records Act. Industrial Foundation of the South v. Texas Industrial Accident Board, 540 S.W.2d 668, 677 (Tex. 1976). An agency may not bring information within section 3(a)(4) or 3(a)(00) merely by a promise that it will not be disclosed, where there is no statutory authority to make such a promise. We do not believe that the letter from the consulting engineer makes an absolute promise of confidentiality, and even if it did, we do not believe that authority exists for such a promise in this instance.

With reference to the section 3(a)(10) exception, there is no statutory provision or judicial decision holding that information of the type requested is privileged or confidential. The inquiry then is whether the information is a trade secret. Texas has adopted the definition of "trade secret" contained in the Restatement of Torts, §757(b) 1939. Hyde Corporation v. Huffines, 314 S.W.2d 763, 776 (Tex. 1958). See Open Records Decision Nos. 184 (1978); 175 (1977); 89 (1975); 50 (1974). That definition provides:

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

In addition, the Penal Code, in making theft of a trade secret a third degree felony, defines it as:

the whole or any part of any scientific or technical information, design, process, procedure, formula, or improvement that has value and that the owner has taken measures to prevent from becoming available to persons other than those selected by the owner to have access for limited purposes.

Penal Code § 31.05(a)(4).

The Restatement lists six factors to be considered in determining whether particular information is a trade secret:

(1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts § 757, comment b (1939).

We have found no judicial decision which has held the type of information at issue here to be a trade secret. To the contrary, it has been held that an analysis technique used in a particular business which would be developed by an experienced person in the business was not entitled to protection as a trade secret. Hallmark Personnel of Texas, Inc., v. Franks, 562 S.W.2d 933, 936 (Tex. Civ. App. — Houston [1st Dist.] 1978, no writ). Matters of general knowledge in an industry cannot be appropriated by one as a trade secret. Wissman v. Boucher, 240 S.W.2d 278 (Tex. 1951). Methods of manufacture or design and details of construction which are matters of general scientific knowledge in the industry do not constitute "trade secrets." Midland-Ross Corp. v. Sunbeam Equipment Corp., 316 F. Supp. 171, 178 (W.D. Pa. 1970), aff'd, 435 F.2d 159 (3rd Cir. 1970).

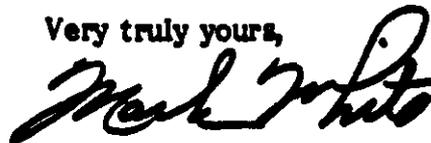
While Zachry states that the information here is regarded as highly private and secret and is known only to a very limited number of company engineers and officers there is no showing of any measures taken to guard the secrecy of the information, nor to what extent the information is different from that generally known in the industry, nor the difficulty of duplicating this type of information. We do not believe that there has been a sufficient showing that the information submitted with a bid would disclose "trade secrets." The agency to whom the information was submitted is not convinced that the information is a trade secret, for it takes no position in the matter, and none of the other bidders regard the information submitted by them as a trade secret. It is our decision that the information is not excepted from required public disclosure under section 3(a)(10).

The issue is then whether the information is excepted under section 3(a)(4) as "information the disclosure of which would give advantage to competitors or bidders." This office has construed this exception narrowly, requiring a showing of a specific actual

or potential harm in a particular competitive situation. See Open Records Decision Nos. 222 (1979); 203, 184 (1978); 170 (1977); 124 (1976); 95, 75 (1975); 48, 46, 45 (1974). The information at issue here relates to a particular project on which the bidding has been completed. There can be no harm to any of the parties to this particular competitive situation. A federal court confronted with a claim of confidentiality under a similar provision in the Federal Freedom of Information Act held that once the agency selects a bidder to perform the service or supply the goods, the cost proposals, including the low offeror's proposals, abstracts of proposals and bid evaluation, are releasable under the Federal Act. The court pointed out that even if new bids were solicited on the same project, the passage of time would be such that new and different cost proposals would inevitably be submitted. Shermco Industries v. Secretary of the United States Air Force, 452 F. Supp. 306, 324 (N.D. Tex. 1978). Here, the potential for harm from disclosure of the information is speculative and general. It is not related to a specific bidding situation, but only to the general competition among contractors on projects of this type. Based on the detail involved in the lengthy specifications and requirements for this particular massive project, we cannot assume that there is a sufficient similarity in the construction of steam electric stations that disclosure of these particular bids would give advantage to Zachry's competitors in unspecified bidding situations which might occur in the future. It is our decision that the information requested is not excepted from required public disclosure by section 3(a)(4).

In summary, we do not believe that the information requested has been shown to be excepted from required public disclosure under either of sections 3(a)(4) or 3(a)(10), and therefore it is public and should be disclosed.

Very truly yours,



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Mr. Dan Pleitz - Page Five

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