



Office of the Attorney General
State of Texas

April 30, 1992

DAN MORALES
ATTORNEY GENERAL

Ms. Susan Kerr
School Attorney's Office
Arlington Independent School District
1203 West Pioneer Parkway
Arlington, Texas 76013-6246

OR92-181

Dear Ms. Kerr:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the act), article 6252-17a, V.T.C.S. Your request was assigned ID# 14706.

You have received a request for "pricing information" for your bid #92-114, dealing with energy efficiency improvements. The requestor expressly limits its request to "non-technical data from the bid forms." You claim that section 3(a)(4) of the act exempts the requested information from disclosure to the requestor. Pursuant to section 7(c) of the act, Johnson Controls Inc., the bidder whose pricing information the requestor seeks, also has submitted a brief explaining why the requested information should be exempted from disclosure.

Section 3(a)(4) of the act exempts from required public disclosure "information which, if released, would give advantage to competitors or bidders." Section 3(a)(4) applies primarily to competition for governmental contracts, and specifically protects the sealed bid process. Open Records Decision No. 541 (1990) at 4. Significantly, section 3(a)(4) protects only the interests of governmental bodies, not the interests of private parties submitting information to the government. Open Records Decision No. 592 (1991) at 8. The section's purpose is to prevent one competitor or bidder from gaining an unfair advantage over others. Open Records Decision No. 541 at 4.

Section 3(a)(4) does not protect requested information from disclosure unless the governmental body or interested third party shows some actual or specific competitive harm in a particular competitive situation. *Id.* A general allegation or remote possibility that an unknown competitor will gain an unfair advantage will not

suffice. *Id.* (citing Open Records Decision No. 514 (1988) at 2). Section 3(a)(4) ordinarily does not protect bids from disclosure once bidding is over, and the governmental body has awarded a contract. See Open Records Decision No. 541 at 5 (citing Open Records Decision Nos. 514; 319, 306 (1982)).

We understand that the Arlington Independent School District (the AISD) requested bid proposals for improving the energy efficiency of its component schools. Only Johnson Controls International submitted a bid. In situations in which only one person is seeking a contract, no competitors exist for purposes of section 3(a)(4). See Open Records Decision No. 331 (1982) at 2. Furthermore, you state that AISD has awarded the contract to Johnson Controls International. Thus, section 3(a)(4) does not permit you to withhold the information from the requestor.

Although the attorney general ordinarily will not raise an exception that might apply but that the governmental body has failed to claim, we will raise exceptions under the act that protect information deemed confidential under the act because the release of confidential information could impair the rights of third parties. See Open Records Decision Nos. 455 (1987) at 3; 325 (1982) at 1. We therefore will raise section 3(a)(10) of the act on your behalf, which excepts from public disclosure

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

Section 3(a)(10) comprises two separate categories of information: (1) trade secrets, and (2) commercial or financial information. Open Records Decision No. 552 (1990) at 2. The legislature designed the whole of section 3(a)(10) to preserve only those third party interests that statutes or judicial decisions protect. Open Records Decision No. 541 (1990) at 6. Information regarding pricing is generally not excepted from public disclosure as a trade secret (*see* Open Records Decision Nos. 319, 309 (1982) at 3, 3 (respectively); 184 (1978) at 2; *see also* Open Records Decision No. 592 (1991) at 2-4).

The requested pricing information also is not excepted from disclosure as commercial or financial information made confidential by statute, for section 21.9012(i) of the Education Code permits governmental bodies to keep the proposals secret only during contract negotiations. After the governmental body has published the notice of intent to award the contract, the proposals are public

information, with the exception of trade secrets and proprietary information clearly identified in the proposals. As we are informed that AISD has awarded the contract, we assume that AISD has published its notice of intent to award the contract. Based upon this assumption, section 21.9012 of the Education Code no longer permits AISD to keep the pricing information in the proposal secret. The fact that Johnson Controls International clearly has marked the information "proprietary" does not make it so. See Open Records Decision No. 575 (1990) at 3. To be nondisclosable under the act, the information must be truly confidential under the act, and we have concluded that it is not. Accordingly, you must release the requested information to the requestor.¹

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR92-181.

Yours very truly,



Kym Oltrogge
Assistant Attorney General
Opinion Committee

KO/lmm

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¹Furthermore, a governmental body cannot close information by simply contracting or agreeing with a third party that information the third party submits will be confidential. Open Records Decision No. 514 (1988) at 1 (citing Attorney General Opinion JM-672 (1987); Open Records Decision No. 232 (1979)).