



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 4, 2011

Ms. Shirley Thomas
Senior Assistant General Counsel
Dallas Area Rapid Transit
P.O. Box 660163
Dallas, Texas 75266-0163

OR2011-03108

Dear Ms. Thomas:

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# 410850 (ORR 7888).

Dallas Area Rapid Transit ("DART") received a request for all information regarding DART's plans, actions, and procurement solicitations pertaining to Positive Train Control ("PTC") Consultant Services and any FCC-licensed radio spectrum for use by DART, regardless of whether it involves PTC. You claim the submitted bid proposal and contract negotiation information is excepted from disclosure under sections 552.104, 552.105, 552.107, and 552.131 of the Government Code, and privileged under rule 503 of the Texas Rules of Evidence. You also state release of the submitted information may implicate the proprietary interests of LTK Engineering Services ("LTK"), Maritime Communications/Land Mobile LLC ("MCLM"), and Stantec Consulting Services Inc. ("Stantec"). Thus, pursuant to section 552.305 of the Government Code, you notified these companies of the request and of their rights to submit arguments to this office as to why the information at issue should not be released. 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 to disclosure in certain circumstances). We have received comments from LTK and Stantec. We have considered

the submitted arguments and reviewed the submitted information, a portion of which is a representative sample.¹

Initially, you state, and provide documentation showing, DART sought clarification from the requestor of a portion of the request for information. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information, rather than for specific records, governmental body may advise requestor of types of information available so request may be properly narrowed). You state DART has not received clarification of the portion of the request at issue. Thus, for the portion of the requested information for which you have not received clarification, we find DART is not required to release information in response to that portion of the request. However, if the requestor clarifies that portion of the request for information, DART must seek a ruling from this office before withholding any responsive information from the requestor. *See City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010).

Next, you seek to withhold, among other things, the bid solicitation documents submitted in Attachment C. This information, however, was provided to all vendors who wished to submit bid proposals for the project at issue. The Act does not permit selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). Although you seek to withhold the submitted bid solicitation documents under sections 552.104 and 552.131(b) of the Government Code, these sections are discretionary exceptions to disclosure that protect a governmental body's interests and may be waived. *See* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions), 592 at 8 (1991) (statutory predecessor to section 552.104 subject to waiver). As such, sections 552.104 and 552.131(b) neither expressly prohibit the release of information to the public nor make information confidential under law. Therefore, because DART previously voluntarily released the submitted bid solicitation documents in Attachment C to members of the public, it may not now withhold this information from the requestor under section 552.104 or section 552.131(b) of the Government Code. As you have not claimed any other exceptions to disclosure for this information, it must be released.

You claim the remaining submitted information is excepted from disclosure under section 552.104 of the Government Code. This section protects from required public

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and, therefore, does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

disclosure "information which, if released, would give advantage to competitors or bidders." Gov't Code § 552.104. The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* ORD 592. Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* ORD 463. Generally, section 552.104 does not except bids from disclosure after bidding is completed and the contract has been awarded. *See* Open Records Decision No. 541 (1990).

You seek to withhold the remaining information in Attachment C, which consists of LTK's and Stantec's bid proposals regarding providing PTC consulting services to DART. You indicate the bidding process for the project at issue is not complete and state a contract has not been awarded. You assert release of the bid proposal information at this stage in the bidding process would give each bidder an unfair advantage and indicate the release would harm DART's ability to negotiate a final agreement. Based on your representations and our review, we conclude DART has demonstrated release of the bid proposals in Attachment C could harm DART's interests with respect to the project at issue. Therefore, DART may withhold the remaining information in Attachment C under section 552.104 of the Government Code.²

You also seek to withhold the information in Attachments D and E under section 552.104. You explain this information consists of communications between DART and MCLM pertaining to ongoing contract negotiations regarding MCLM selling radio frequency to DART for use in the project at issue. You state release of the negotiation information would give an unfair advantage to MCLM's competitors, who could use the information to disrupt the negotiations and harm DART's ability to negotiate a final agreement. Based on your representations and our review, we conclude DART has demonstrated release of the contract negotiation communications in Attachments D and E could harm DART's interests with respect to the project at issue. Therefore, DART may withhold Attachments D and E under section 552.104 of the Government Code.³

In summary, DART may withhold the bid proposals in Attachment C and all of the information in Attachments D and E under section 552.104 of the Government Code. The remaining bid solicitation information in Attachment C 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.

²As our ruling for this information is dispositive, we need not address DART's remaining argument or LTK's arguments against disclosure for this information.

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

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.oag.state.tx.us/open/index_orl.php, 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 must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 410850

Enc. Submitted documents

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