



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 5, 2014

Ms. Halfreda Anderson Nelson
Senior Assistant General Counsel
Dallas Area Rapid Transit
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Dallas, Texas 75266-0163

OR2014-15695

Dear Ms. Nelson:

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# 535716 (ORR# 10881).

Dallas Area Rapid Transit ("DART") received a request for the winning and competitors' proposals submitted in response to two specified solicitations. You claim some of the submitted information is excepted from disclosure under section 552.104 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of AmeTrade, Inc. ("AmeTrade"); Transtechnik Corporation USA ("Transtechnik"); and Toyo Denki USA, Inc. ("Toyo"). Accordingly, you state, and provide documentation showing, you notified Ametrade, Transtechnik, and Toyo of the request for information and of the right of each 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 AmeTrade and Transtechnik. We have reviewed the submitted information and the submitted arguments.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect a governmental body's interests in competitive

bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 (1991). Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). This office has long held that section 552.104 does not except information relating to competitive bidding situations once a contract has been executed. *See, e.g.*, Open Records Decision Nos. 541, 514 (1988), 306 (1982), 184 (1978), 75 (1975).

You state some of the information at issue was submitted in connection with DART's solicitation for Light Rail Vehicle IGBT Propulsion Retrofit, solicitation number P-2007526. You further state the contract arising from that process has not yet been awarded. You claim release of the information at issue would undermine the procurement process because it would allow future bidders an unfair advantage. Based on your representations and our review, we conclude you have demonstrated the applicability of section 552.104 to the information related to solicitation number P-2007526. Accordingly, DART may withhold that information under section 552.104 of the Government Code until such time as a contract has been executed.¹ *See* Open Records Decision No. 170 at 2 (1977) (release of bids while negotiation of proposed contract is in progress would necessarily result in an advantage to certain bidders at expense of others and could be detrimental to public interest in contract under negotiation).

We now turn to Transtechnik's arguments against release of its information. Transtechnik argues against the release of information that was not submitted by DART. This ruling does not address information that was not submitted by DART and is limited to the information DART has submitted for our review. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

Next, Transtechnik raises section 552.104 of the Government Code for the remaining information, which pertains to DART's solicitation for Auxiliary Power Supply for Light Rail Vehicles, solicitation number P-2007598. We note section 552.104 protects the interests of governmental bodies, not third parties. *See* ORD 592 at 8 (purpose of section 552.104 is to protect governmental body's interest in competitive bidding situation). DART does not argue section 552.104 is applicable to the remaining information. Accordingly, we will not consider Transtechnik's claim under this section, and DART may not withhold the information at issue under section 552.104 of the Government Code. *See id.* (section 552.104 may be waived by governmental body).

¹As our ruling is dispositive for this information, we need not address AmeTrade's argument against its disclosure.

Next, Transtechnik states some of its information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See Gov't Code* § 552.110(a)-(b). Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts, which holds a trade secret to be:

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. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors.² RESTATEMENT OF TORTS § 757 cmt. b. This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See Open Records Decision No. 552 at 5* (1990). However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information

²The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] 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 cmt. b; *see also Open Records Decision Nos. 319 at 2* (1982), *306 at 2*, *255 at 2* (1980).

meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial 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[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *Id.*; *see also* Open Records Decision No. 661 at 5 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm).

Transtechnik asserts its pricing information constitutes a trade secret under section 552.110(a) of the Government Code. We note pricing information pertaining to a particular contract is generally not a trade secret because it is “simply information as to single or ephemeral events in the conduct of the business,” rather than “a process or device for continuous use in the operation of the business.” RESTATEMENT OF TORTS § 757 cmt. b; *see also Huffines*, 314 S.W.2d at 776; Open Records Decision Nos. 255, 232 (1979), 217 (1978). Upon review, we find Transtechnik has failed to establish a *prima facie* case that its pricing information meets the definition of a trade secret. We further find Transtechnik has not demonstrated the necessary factors to establish a trade secret claim for its pricing information. *See* ORD 402. Therefore, DART may not withhold Transtechnik’s pricing information under section 552.110(a).

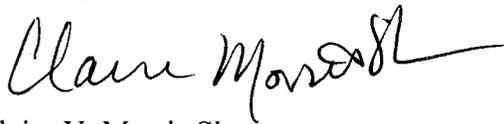
Transtechnik further argues its pricing information consists of commercial information the release of which would cause substantial competitive harm under section 552.110(b) of the Government Code. However, we note the contract at issue was awarded to Transtechnik. This office considers the prices charged in government contract awards to be a matter of strong public interest; thus, the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* ORD 514 (public has interest in knowing prices charged by government contractors). *See generally* Dep’t of Justice Guide to the Freedom of Information Act 344-345 (2009) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Further, the terms of a contract with a governmental body are generally not excepted from public disclosure. *See* Gov’t Code § 552.022(a)(3) (contract involving receipt or expenditure of public funds expressly made public); ORD 541 at 8 (public has interest in knowing terms of contract with state agency). Accordingly, DART may not withhold Transtechnik’s pricing information under section 552.110(b).

In summary, DART may withhold the information related to solicitation number P-2007526 under section 552.104 of the Government Code until such time as a contract has been executed. DART must release the information related to solicitation number P-2007598.

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 http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



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Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 535716

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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