

Legal Opinion: GMP-0123

Index: 7.340, 7.360, 7.523

Subject: FOIA Appeal: Winning Offeror's Pricing Proposal

October 26, 1992

Mr. Ken Barrington
Benchmark Realty, Inc.
211 Commerce Drive
Brandon, Mississippi 39042

Dear Mr. Barrington:

This is in response to your Freedom of Information Act (FOIA) appeal of August 13, 1992 requesting our review of the denial from the Jackson Office. The request was for copies of Standard Form #33, Cost and Pricing Section, Technical and Management Section, and any subsequent correspondence regarding the winning bid of Mr. Rick Saucier on the Real Estate Asset Manager (REAM) solicitation for the East Central Mississippi territory, (RFP No. 065-92-646).

In the Department's letter dated July 14, 1992, Sandra S. Freeman, Manager, Jackson Office, released Section A, Standard Form #33 but withheld the winning offeror's pricing and technical proposals under Exemption 4 of the FOIA. The documents at issue contain a detailed description of cost elements concerning the bidder's business. This information includes estimated costs and pricing. It also includes a financial statement and the bidder's operating statement. Part 1 of the bid includes a resume of key personnel showing their background and experience.

I have determined to affirm the initial denial of this information under Exemptions 4 and 6 of the FOIA.

Exemption 4 of the FOIA, 5 U.S.C. Section 552(b)(4), exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The courts have held that information may be withheld under Exemption 4 if disclosure is likely to have either of the following effects: (1) impair the Government's ability to obtain necessary information in the future or (2) cause substantial harm to the competitive position of the entity from whom the information was received. *National Parks and Conservation Association v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

The information contained in the Contract Pricing Proposals is detailed labor and cost information concerning each respective bidder. "[C]ost and labor data . . . are commercial information which if released would cause substantial harm to [a bidder's] competitive position." See, *BDM Corp. v. Small Business Administration*, Civ. No. 80-1180 (D.D.C. May 20, 1981) 2 GDS 81,189, at 81,495. See also, *Fidell v. United States Coast*

Guard, Civ. No. 80-2291 (D.D.C. March 3, 1981) 2 GDS 81,144. Accordingly, we have determined that this information is confidential commercial and financial information which should be withheld under Exemption 4. National Parks and Conservation Association v. Department of Housing and Urban Development, 519 F.2d 935 (D.C. Cir. 1975).

Additionally, the Trade Secrets Act, 18 U.S.C. Section 1905, makes it a criminal offense for any employee of the United States, or one of its agencies, to release trade secrets and certain other forms of confidential commercial or financial information except when disclosure is authorized by law. The statute classifies as confidential commercial or financial information, the "amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation or association." Thus, HUD is prohibited from exercising any discretion with respect to release of the information contained in the Contract Pricing Proposals.

Exemption 6 of the FOIA, 5 U.S.C. Section 552(b)(6), protects information in medical and personnel files and information in "similar files." The Supreme Court in United States Department of State v. Washington Post, 456 U.S. 595, 602 (1982) gave "similar files" a broad rather than a narrow meaning. The Court held that Exemption 6 covers detailed Government records and files which can lead to the identity of an individual. The resume of key personnel, with prior and current experience and additional information, contains the kind of personal information that would fall within Exemption 6, and there is no public interest in disclosure for release of the information.

Accordingly, I have decided to affirm the initial denial pursuant to Exemption 4 and Exemption 6 of the FOIA, 5 U.S.C. Section 552(b)(4), (b)(6), and the Trade Secrets Act, 18 U.S.C. Section 1905. I have also determined, under 24 C.F.R. Section 15.21, that the public interest in protecting information implicating personal privacy militates against release of the withheld information.

You have a right to a judicial review of this determination under 5 U.S.C. Section 552(a)(4).

Very sincerely yours,

George L. Weidenfeller
Deputy General Counsel (Operations)

cc: Yvette Magruder

Ray Buday