

Legal Opinion: GMP-0121

Index: 7.220, 7.340, 7.350, 7.524

Subject: FOIA Appeal: Acquisition Plan and Source Selection Plan

September 23, 1992

John Powell Walker, President
Sunbelt Properties, Inc.
3535 N.W. 58th Street, Suite 950
Oklahoma City, Oklahoma 73112-4802

Dear Mr. Walker:

This is in response to your Freedom of Information Act (FOIA) appeal dated June 18, 1992, of a denial of information by HUD's Oklahoma City Office. You appeal the June 16, 1992 partial denial of information pertaining to Request for Proposal No. 39-91-117 withheld under Exemptions 4 and 5 of the FOIA.

The documents requested in your initial request of May 29, 1992, consist of the following:

- 1.The written acquisition plan and its contents;
- 2.The Source Selection Plan;
- 3.The Contracting Officer's determination making this solicitation an RFP;
- 4.A list of all persons or entities and their addresses to whom the solicitation was sent;
- 5.Copies of all proposals and revisions submitted, including best and final offers;
- 6.A copy of the signed Technical Evaluation Panel Report;
- 7.A list of firms with their addresses who were selected to be in the competitive range; and
- 8.The document designating the individual who shall be responsible for custody of the proposals throughout the evaluation process.

The Oklahoma City Office denied items 1-3 and 5-8 listed above and provided you with a copy of item 4. Items 1-3 and 6-8 were denied under Exemption (b)(5) of the FOIA and item 5 was denied under Exemption (b)(4).

I have determined to affirm, in part, and reverse, in part, the initial denial of your request.

I am reversing the withholding of Item 7 (a list of firms with their addresses who were selected to be in the competitive

range). The release of this information would have no impact on Government operations after award of the contract has been made. The Oklahoma City Office will be instructed to furnish you with this information.

I am affirming the denial of Items 1, 2, 3, and 6 under Exemption (b)(5) of the FOIA, 5 U.S.C. Section 552(b)(5).

Item 1 (acquisition plan and its contents), Item 2 (source selection plan) and Item 3 (Contracting Officer's determination making this solicitation an RFP) are all part of the acquisition plan and consist of inter-agency deliberations and recommendations as to what type of procurement is to be used. The source selection procedures are also part of the acquisition plan which includes the discussions and determinations of the timing for submission and evaluation of proposals, and the relationship of evaluation factors to the attainment of acquisition objectives.

Item 6, (Technical Evaluation Panel Report), containing the names of the Source Evaluation Board (SEB), is also protected from release under Exemption 5 to preserve free and candid internal agency deliberations.

Exemption 5 of the FOIA exempts from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The purpose of this exemption is to preserve free and candid internal agency deliberations leading to executive branch decision-making. In keeping with this policy, the Supreme Court has construed Exemption 5 as encompassing the advice, opinions and recommendations of staff members in the agency decision-making process. *NLRB v. Sears, Roebuck and Co.*, 421 U.S. 132 (1975).

The Department has no record responsive to Item 8, (document designating the individual responsible for custody of the proposals throughout the evaluation process). No formal document is created during the Department's contract selection process designating an individual responsible for the custody of the proposals. This is the responsibility of the Contracting Officer.

I am also affirming the denial of Item 5 under Exemption (b)(4) of the FOIA.

Item 5, (copies of all proposals and revisions submitted, including best and final offers), is comprised of financial information and the offerors' proprietary information which, if released, could cause substantial competitive harm to the

offerors. Disclosure of this information could reveal insight for estimating and undercutting the proposers' future bids. See *Braintree Electric Light Department v. Department of Energy*, 494 F. Supp. 287, 290 (D.D.C. 1980); *Timken Company v. United States Customs Service, et al.*, 491 F. Supp. 557, 559 (D.D.C. 1980).

Exemption 4 exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The courts have interpreted Exemption 4 as protecting confidential commercial or financial information the disclosure of which is likely to: (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).

In answer to your request for a fee waiver, commercial use requesters are not entitled to two hours of free search time or 100 free pages of reproduction of documents. See 24 C.F.R. Section 15.15.

Pursuant to HUD's regulations at 24 C.F.R. Section 15.21, I have determined that the public interest in protecting confidential commercial and financial information and predecisional agency deliberations militates against release of the withheld information.

Please be advised that you have the right to 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
William Daley, 6G