

Legal Opinion: GMP-0137

Index: 7.340, 7.523
Subject: FOIA Appeal: Offerors' Proposals

January 14, 1993

Mr. Brian Van Holm, CPM
Management Solutions
8601 Dunwoody Place, Suite 714
Atlanta, Georgia 30350

Dear Mr. Van Holm:

This is in further response to your Freedom of Information Act ("FOIA") appeal dated June 8, 1992 and our letter to you dated August 5, 1992. You appeal the May 29, 1992 denial of your FOIA request by Joseph B. Lynch, Manager, Buffalo Office, which withheld the five successful proposals for real estate asset management contracts under Exemption 4, 5 U.S.C. Section 552(b)(4), and 15 copies of the Technical Evaluation Panel's ("TEP's") scoring documents for Management Solutions and 3 copies of each of the TEP's scoring documents for the five successful offerors' proposals, under Exemption 5, 5 U.S.C. Section 552(b)(5).

My August 5, 1992 letter to you affirmed the denial of the withheld documents under Exemption 5. With respect to the denial of the five proposals submitted by the successful bidders under Exemption 4, I advised that I was requesting the New York Regional Office to notify the bidders and afford them the opportunity to present their opinions on the confidential nature of their proposals. After receipt of their submissions, I advised that the Department would render a determination upon your appeal for the five successful proposals.

Three of the five successful offerors have objected to the release of the confidential and financial information contained in their proposals. Based upon their objections and our review of the information, I have determined to affirm, in part, and reverse, in part, the initial denial of the five successful proposals by the Buffalo Office.

The documentation submitted by Re/Max Advantage Real Estate and Cayuga Real Estate will be supplied to you in its entirety, as both of these companies informed HUD that they had no objections to the release of the requested information. For the reasons explained below, I have decided to withhold Part I and the cost and pricing data found in Part II of the three remaining proposals, as this information is confidential or financial information properly withheld pursuant to Exemption 4.

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 order to show the likelihood of substantial competitive harm it is not necessary to show actual competitive harm; actual competition and the likelihood of substantial injury is all that is necessary." *Professional Review Organization of Florida, Inc., v. U.S. Dept. of Health and Human Services*, 607 F. Supp. 423, 426 (D.D.C. 1985); citing, *Gulf and Western Industries, Inc. v. U.S.*, 615 F.2d 527, 530 (D.C. Cir. 1979).

The information contained in the successful offerors' proposals, which we are withholding under Exemption 4, includes financial statements, expenses, assets and liabilities, taxpayer identification numbers, profit and loss statements, tax returns, and the business practices, procedures, techniques and strategies to be used to carry out the contract. This is confidential financial and commercial information, the release of which could permit competitors to gain "valuable insight into the operational strengths and weaknesses of the supplier of the information" and could cause substantial harm to the companies' competitive positions in future projects. *National Parks and Conservation Association v. Kleppe*, 547 F.2d 673, 684 (D.C. Cir. 1976).

The Courts have recognized the competitive harm to a submitter by the release of the above described information. See, *Braintree Electric Light Department v. Department of Energy*, 494 F. Supp. 287, 290 (D.D.C. 1980) withholding financial information including selling price, inventory balance, profit margins, purchasing activity and cost of goods sold; *Timken Company v. U.S. Customs Service, et al.*, 491 F. Supp. 557, 559 (D.D.C. 1980) protecting financial and commercial information on pricing and marketing.

In addition to the foregoing material, certain of the offerors' proposals contain information regarding the prior and current experience and qualifications of its employees. I have determined that this type of information which is identifiable to individuals and/or groups of employees is not releasable pursuant to Exemptions 4. This information, if released, could be used by competitors to identify employees, determine technical, administrative or marketing skills experience of competitors, and locate employees for employee raiding purposes. See, *Burroughs Corp. v. Brown*, 501 F. Supp. 375, 381 (E.D. Va 1980).

Since the withheld documents contain confidential commercial and financial information, discretionary release is further prohibited by the Trade Secrets Act. The Trade Secrets Act makes

it a criminal offense for an officer or employee of the government to disclose to "any extent not authorized by law any information . . . [which] concerns or relates to trade secrets,

processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of income, profits, losses, or expenditures or any person, firm, partnership corporation or association" 18 U.S.C. Section 1905. Accordingly, HUD is prohibited from releasing the financial or commercial confidential information of the type contained in the bid proposals, unless authorized to do so by law.

You have the right to judicial review of this determination under 5 U.S.C. Section 552(a)(4). Judicial review of my action on this appeal is available to you in the United States District Court for the judicial district in which you reside or have your principal place of business, or in the District of Columbia, or in the judicial district where the records you seek are located.

I am directing the Buffalo Office to release the information from the five proposals as determined by this decision. Should you have any further questions concerning the release of this information by the Buffalo Office, you may contact James Brylinski, Chief Counsel, at (716) 846-5783.

Very sincerely yours,

George L. Weidenfeller
Principal Deputy General Counsel

cc: Yvette Magruder
James Brylinski, Area Counsel, Buffalo Office, 2.2G
John P. Dellera, Regional Counsel, 2G