

Treatment of Confidential Information within Proposals:
A look at the larger cities in Texas, Travis County and the State

1) City of Houston

In City of Houston RFPs, confidentiality may be addressed in one of two sections, General Information or Submission of Proposal. This information is not included in every RFP. In the General Information of some RFPs, the Texas Public Information Act section outlines the rules per state law.

4.0 Texas Public Information Act

Proposals will be subject to the Texas Public Information Act (the Act), located in Texas Government Code Chapter 552 and may be disclosed to the public upon request. Subject to the Act, Proposers may protect trade secret and confidential information from public release. If the Proposer asserts that information provided in the proposal is trade secrets or other confidential information, it must clearly mark such information in boldface type and include the words “confidential” or “trade secret” at the top of the page in at least fourteen (14) point font.

Furthermore, the Proposer must identify trade secret or confidential information and provide an explanation of why the information is exempt from public disclosure under the Act in the other section of the Technical Proposal.

The Finance Department will process any request from a member of the public in accordance with the procedures outlined in the Act. Proposers should consult the Texas Attorney General’s website for information concerning the Act’s application to proposals and potential exceptions to disclosure.

In the Submission of Proposal section, under 2.4.1 Chapter 8 Financial Resources, it states that they will make best efforts to maintain confidentiality, and will comply with the Texas Public Information Act.

The City will make best efforts, but make no representation that it will be able to maintain total confidentiality of Proposer’s financial information. At all times, the City will comply with the provisions of the Texas Public Information Act as required by State law. The Public Information Handbook is freely available on the Internet at https://www.texasattorneygeneral.gov/files/og/publicinfo_hb.pdf.

2) City of Dallas

The City of Dallas makes repeated references to confidentiality in their RFPs. In the Opening of Proposals section, they inform offerors that it is their responsibility to clearly mark and identify confidential information. There is also a dedicated Confidentiality section (sometimes 2) that

describes the state statute, and gives offerors guidance on how to mark their proposals confidential. If a request is made for confidential information, the City of Dallas provides the information requested to the Attorney General's office for determination.

OPENING OF PROPOSALS

Proposals will be opened by the City at 2:00 p.m. the day following the due date so as to avoid disclosure of contents to competing proposers. Proposer names will be publicly read. It is the responsibility of the proposer to clearly mark and identify all portions of the proposal, which, in the proposer's opinion, contain trade secrets, confidential information and other proprietary information. All proposals are subject to the Texas Open Records Act process.

CONFIDENTIALITY

Respondents are advised that materials contained in proposals are subject to open records after the contract award, and may be viewed and copied by any member of the public, including news outlets and competitors. The Attorney General may make the final determination as to whether documents are releasable.

Under Method of Selection

Documentation

Each Proposer shall indicate the type of documentation provided with the System. Include a sample of each of the documents. Mark each document "RFCSP Confidential," and number each set of documents.

Under Evaluation Method of Selection

Confidentiality

In accordance with Chapter 252, Texas Local Government Code, Vernon's Texas Civil Statutes, proposals shall be opened so as to avoid disclosure of contents to competing Proposers and kept secret during the process of negotiation. Proposals will not be publicly read. Any material that is to be considered confidential in nature should be clearly marked as such and shall be treated as confidential to the extent allowable in the Open Records Act. Trade secrets, confidential information or other proprietary information should be marked "RFCSP CONFIDENTIAL" on EACH PAGE that the Proposer considers confidential. If a request is made for information marked "Confidential," "Trade Secret," or "Proprietary", the City will provide the requested information to the State Attorney General's office for a final determination on its release. The Proposer will be contacted directly by the Attorney General's office as to their findings.

Some RFPs only contain the first two sections.

3) City of Fort Worth

The City of Fort Worth may include an explicit section on Proprietary Information or will address the state statute in the Opening of Proposals section.

3.0 PROPRIETARY INFORMATION

- 3.1 If a Proposer does not desire proprietary information in the Proposal to be disclosed, it is required to identify all proprietary information in the Proposal. This identification will be done by individually marking each page with the words "Proprietary Information" on which such proprietary information is found. If the Proposer fails to identify proprietary information, it agrees that by submission of its Proposal that those sections shall be deemed non-proprietary and made available upon public request.
- 3.2 Proposers are advised that the City, to the extent permitted by law, will protect the confidentiality of their Proposals. Proposer shall consider the implications of the Texas Public Information Act, particularly after the RFP process has ceased and the Contract has been awarded. While there are provisions in the Texas Public Information Act to protect proprietary information, where the Proposer can meet certain evidentiary standards, please be advised that a determination on whether those standards have been met will not be decided by the City of Fort Worth, but by the Office of the Attorney General of the State of Texas. In the event a request for public information is made, the City will notify the Proposer, who may then request an opinion from the Attorney General pursuant to 552.305, Texas Government Code. The City will not make a request of the Attorney General.

1.6 OPENING OF PROPOSAL

The Document entitled "Proposal Summary" in each Proposal Package submitted will be opened and read aloud at 2:00 p.m. on Thursday, June 8, 2017, in the Fort Worth City Council Chambers. The Proposal Packages shall be handled so as to avoid the disclosure of the remainder of their contents to competing offerors and so as to keep such contents secret during negotiations. All Proposal Packages will be open for public inspection after the contract is awarded.

However, information in the Proposal Packages subject to the trade secrets exception of the Public Information Act under §552.110 of the Texas Government Code or the confidential information exception under §552.101 of the Texas Government Code will not be open to public inspection. It is the responsibility of the Provider to clearly mark as such any information they deem trade secret or confidential.

4) City of El Paso

In El Paso's solicitations, a Public Disclosure of Bid or Proposal Information section is included under General Information or Notices to Proposers. It provides info on the state statute, and instruction to clearly mark information in the proposal as confidential.

PART 1 GENERAL INFORMATION

1.1 Public Disclosure of Bid Information

Offerors are cautioned that once a bid is opened, all information contained therein will be available to the PUBLIC unless the information is excepted from the requirements of Government Code Section 552.021 pertaining to Open Records. The exception that allows the City to protect information that, if released, would give advantage to a competitor or bidder does not apply after the bidding is complete and the contract has been awarded. Trade secrets, commercial or financial background data and privileged or confidential information may be excepted from public inspection. If any information contained in your offer qualifies for an exception because it falls into one of the categories above it should be clearly marked "CONFIDENTIAL" and the basis of your claim of confidentiality should be stated. Data so

identified will be maintained as a protected record. Offerors who claim that information contained in a bid should be protected from public disclosure after the award of the contract may be asked to support such claim if the City receives an Open Records request for the information and requests a determination by the Attorney General. [Rev. 04-03-98]

PART 2 - NOTICES TO PROPOSERS

2.1 Public Disclosure Proposal Information

Proposers are cautioned that once a bid is opened, all information contained therein will be available to the PUBLIC unless the information is excepted from the requirements of Government Code Section 552.021 pertaining to Open Records.

The exception that allows the City to protect information that, if released, would give advantage to a competitor or bidder does not apply after the bidding is complete and the contract has been awarded. Trade secrets, commercial or financial background data and privileged or confidential information may be excepted from public inspection. If any information contained in your offer qualifies for an exception because it falls into one of the categories above it identified will be maintained as a protected record. Proposers who claim that information contained in a bid should be protected from public disclosure after the award of the contract may be asked to support such claim if the City receives an Open Records request for the information and requests a determination by the Attorney General. [Rev. 04-03-98]

5) City of San Antonio

City of San Antonio solicitations include a Confidential or Proprietary Information section that instructs proposers to clearly identify confidential information, but informs them that the City of San Antonio may be compelled to disclose information by state statute. Some RFPs offer additional information on working with the Attorney General.

Confidential or Proprietary Information. All proposals become the property of City upon receipt and will not be returned. Any information deemed to be confidential by Respondent should be clearly noted; however, City cannot guarantee that it will not be compelled to disclose all or part of any public record under the Texas Public Information Act, since information deemed to be confidential by Respondent may not be considered confidential under Texas law, or pursuant to a Court order.

Confidential or Proprietary Information. All proposals become the property of the City upon receipt and will not be returned. Any information deemed to be confidential by Respondent should be clearly noted; however, City cannot guarantee that it will not be compelled to disclose all or part of any public record under the Texas Public Information Act, since information deemed to be confidential by Respondent may not be considered confidential under Texas law, or pursuant to a Court order. Respondent acknowledge that exemptions to Public Information Act requests may require a brief to be submitted to the Texas Attorney General explaining why the claimed exceptions apply to the information in issue. The City shall not be obligated to submit the brief supporting those claimed exceptions. Respondent shall be solely responsible for submitting the brief and the documents in issue to the Texas Attorney General.

6) Travis County

Travis County's Purchasing & Assets Policies and Procedures (Title 3, Chapter 32) outlines the county's confidentiality practice in sections 32.027 and 32.028. According to their language, all vendor proposal information is confidential until award. If any vendor's confidentiality is compromised, all proposals may be rejected. RFPs include a Proposal Disclosure section that ensures proposers that their proposal will be kept confidential until award and is subject to state statute at that time.

32.027 Confidential Information

Employees shall keep the proprietary information of vendors confidential. Employees shall keep vendor proposal information obtained from a solicitation confidential until after contract award.

3.0 PROPOSAL DISCLOSURE:

Proposals will be opened so as to avoid disclosure of the contents to competing Proposers. Proposals will be kept secret during the process of negotiation. However, all proposals will be open for public inspection after award. If identified by the Proposer, County will make reasonable efforts to protect information that qualifies as trade secrets and/or confidential information under the Texas Public Information Act.

7) State of Texas

Solicitations issued by State of Texas agencies include a statement or section on confidentiality. Each agency has different language. Solicitations from the Texas Department of Transportation (TXDOT), Office of the Governor (OOG), and State Comptroller are reviewed here. TXDOT and OOG have general sections that inform the proposers of the state statute and promise to honor confidentiality requests to the extent allowed by law.

RECEIPT OF PROPOSALS AND BID OPENINGS

DISCLOSURE OF RESPONSE: Information submitted in an accepted response will not be returned to the respondent. The Public Information Act (PIA), Government Code Chapter 552, allows the public to have access to information in the possession of a governmental body through an open records request. Therefore, the respondent shall clearly identify in the response any confidential or proprietary information. Proprietary information identified by the respondent in the response, will be kept confidential by TxDOT to the extent permitted by state law. TxDOT merely raises the exception on behalf of the vendor. TxDOT takes no legal position on disclosure. TxDOT will use best efforts to give the respondent or the awarded vendor an opportunity to present to the Office of the Attorney General its arguments for non-disclosure of its identified confidential or proprietary information.

Texas Public Information Act/Confidentiality

Contractor agrees the State, OOG, and this Contract are subject to the Texas Public Information Act, Chapter 552, Government Code (the "PIA"). Contractor agrees all information created or exchanged in connection with this Contract is subject to the PIA. Contractor will cooperate with OOG in the production of documents or information responsive to a request for information. Information provided by Contractor in connection with this Contract that Contractor considers proprietary, financial, or trade secret

information (collectively “Confidential Information”) shall be designated as such when it is provided to OOG. Contractor will notify OOG within twenty-four (24) hours of receipt of any third party requests for information that was provided to the Contractor by the OOG or the State.

Contractor agrees that information not otherwise excepted from disclosure under the PIA, will be available in a format that is accessible by the public at no additional charge to OOG or the State.

The Comptrollers’ Office requires proposers to provide an explicit explanation of why their information is confidential. If the explanation is deemed insufficient, the information will not be considered confidential.

From Comptroller, 219F

3.9 Confidential Information; Nondisclosure; Open Records

Following the award of a Contract, responses to this RFP are subject to release as public information unless the response or specific parts of the response can be shown to be exempt from the Texas Public Information Act. All Respondents are advised to consult with their legal counsel regarding disclosure issues and take the appropriate precautions to safeguard trade secrets or any other proprietary information. Comptroller assumes no obligation or responsibility relating to the disclosure or nondisclosure of information submitted by Respondents.

If a Respondent believes that any portion of a proposal is confidential, then Respondent must so specify. Respondent must stamp in bold red letters the term “CONFIDENTIAL” on that specific part or page of the proposal which Respondent believes to be confidential. Respondent must submit in writing specific detailed reasons, including any relevant legal authority, stating why Respondent believes the material to be confidential. Vague and general claims as to confidentiality will not be accepted. Comptroller will be the sole judge as to whether a claim is general and/or vague in nature. All proposals and parts of proposals which are not marked as confidential will be automatically considered public information after the contract is awarded. A response resulting in an award may be considered public information even though parts are marked confidential.

In the event Comptroller receives a request for portions of a proposal marked as “CONFIDENTIAL” as specified above, Comptroller shall forward such request to the office of the Texas Attorney General for an opinion on whether such information may be withheld from disclosure under the Texas Public Information Act. Comptroller will notify Respondent whose proposal is the subject of the request when the information is forwarded to the office of the Attorney General. Comptroller assumes no obligation for asserting legal arguments on behalf of Respondent. Respondents are advised that Comptroller is obligated to comply with the decision of the Attorney General, including any such decision calling for the release of information marked “CONFIDENTIAL” by a Respondent.

Copyrighted proposals are unacceptable and are subject to disqualification as non-responsive.

Under the State of Texas’ procurement manual, Section 2.26, it states that confidential or proprietary declarations should be included in the bid tabulations.

From Section 2.26

At a minimum, the following should be included on the tabulation:

- NIGP Class/Item
- Confidential or Proprietary declarations by respondent
- Vendor (Payee) Identification Number
- Respondent name
- HUB Status
- Price Sheet Line Item Descriptions
- Price
- Delivery Days ARO
- Warranty