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April 3, 2012

Jacob Zahniser
Ball Janik LLP
101 SW Main Street, Suite 1100
Portland, OR 97204

Jana Toran
General Counsel
TriMet
4012 SE 17th Avenue
Portland, OR 97202

Re: Petition of Jacob Zahniser received March 23, 2012 to disclose certain records of TriMet

Dear Mr. Zahniser and Ms. Toran:

BACKGROUND

On this public records petition, ORS 192.410 et. Seq., petitioner Jacob Zahniser requests the District Attorney to order TriMet to make available for inspection the following documents:

1. **All emails, memorandums, phone messages, letters, charts, and other documents of any kind that in any way relate to scoring, evaluations, and/or comparisons of best and final offers ("BAFO's") for Request Proposal for Contract No. RH120160BW (the "RFP").**
2. **All documents in any way related to TriMet's decision that the RFP response submitted by Siemens, USA best meets TriMet's needs, and provides TriMet with the best value.**
3. **All documents in any way related to TriMet's decision that all light rail vehicles (LRV's") provided pursuant to the RFP must communicate with Siemens S70 LRV's previously provided to TriMet and/or any other LRV's provided to TriMet by any other vendor.**
4. **All BAFO's and related documents submitted to TriMet pursuant to the RFP.**

5. **All emails, letters, phone messages, memorandums, and other documents of any kind that relate in any way to communications between anyone at TriMet and any entity that submitted a BAFO in response to the RFP, as well as any internal TriMet documents relating to such documents.**
6. **All other documents of any kind that in any way relate to TriMet's decision to award the RFP to Siemens.**

On February 29, 2012, James Bradshaw of Ball Janik made a written request to inspect the documents. Lance Erz, Deputy General Counsel at TriMet, denied the request and asserted three exemptions: Trade Secrets under ORS 192.501(2), Internal Advisory Communications under ORS 192.502(1), and Confidential Submissions under ORS 192.502(4). Mr. Erz submitted a second letter to Mr. Bradshaw on March 20, 2012 and included a document entitled the "Determination of Responsibility/Contract Award Summary for the Light Rail Vehicle contract, with attachments." He added the attorney/client privilege as an exemption although TriMet apparently has abandoned this assertion.

Petitioner included with his petition a March 20, 2012 letter from TriMet to the Ball Janik law firm rejecting the Protest of Award of their client, Stadler Bussnang AG. This five-page letter responded to a March 5, 2012 protest letter and a follow up March 15, 2012 meeting with a Jim Fronk. One of the bases of the protest was TriMet's refusal to allow Stadler's counsel to review public records related to the RFP.

TriMet responded to the petition in an eight-page letter dated March 29, 2012. General Counsel Jana Toran included the March 5, 2012 letter of protest by Ball Janik attorney Mark Rosencrantz. Submitted under seal were excerpts, as exemplar material, from the Stadler BAFO, SEC notes, and emails to and from Stadler. Ms. Toran recited the confidentiality provision of the RFP and invoked the exemptions first listed by Mr. Erz. Ms. Toran noted the existence of "approximately 1500 pages of emails relating to scheduling of meetings and answering questions of proposers which are not related to the evaluations process, but are responsive to Stadler's broad request."

DISCUSSION

I. Trade Secrets

ORS 192.501(2) conditionally exempts:

> Trade secrets. "Trade Secrets," as used in this section, may include, but are not limited to, any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within an organization and which is used in a business it

> conducts, having actual or potential commercial value, and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it[.]

The Attorney General's Public Records and Meetings Manual, 2011, p. 35, recommends that "[p]ublic bodies that anticipate receiving some trade secret information in response to a request for proposal or other bidding request should specify in their solicitation documents that any trade secret information must be specifically identified. However, the Public Records Law does not require a trade secret to be specifically labeled as such in order to receive protection as a trade secret."

The confidentiality provision in the RFP stated: "To insure appropriate post-award confidentiality, Proposers must clearly identify trade secret information and should specifically cite statutory or regulatory authority for exemption from public disclosure." A review of excerpts from the Stadler proposal demonstrates the necessary presence of trade secret information in the RFP or BAFO submissions. No public interest has been demonstrated by petitioner requiring disclosure of such trade secrets.

Any identified trade secrets in the SEC notes or the emails are exempt from disclosure as well.

II. Confidential Submissions

ORS 192.502(4) exempts:

> Information submitted to a public body in confidence and not otherwise required by law to be submitted, where such information should reasonably be considered confidential, the public body has obliged itself in good faith not to disclose the information, and when the public interest would suffer by the disclosure.

As stated in the Attorney General's Public Records and Meetings Manual, 2011, p. 72, there are "no less than five conditions that must be met" for the exemption to apply:

1. The informant must have submitted the information on the condition that the information would be kept confidential.

2. The informant must not have been required by law to provide the information.

3. The information itself must be of a nature that reasonably should be kept confidential.

4. The public body must show that it has obligated itself in *good faith* not to disclose the information.

5. Disclosure of the information must cause harm to the public interest.

The confidentiality provision in the RFP clearly contemplates the application of this exemption to the "Proposals, Proposal supplements, and communications made in the course of procurement negotiations." It was specified that the public interest would not suffer, at least in the judgment of TriMet, "as a result of disclosure after Contract award" subject to redaction of certain items such as trade secrets and confidential cost information. The first four conditions have been satisfied.

Significantly, there is also a provision in the RFP confidentiality clause that "[i]f information from a Proposal or a Proposal supplement is disclosed improperly prior to Contract award and TriMet determines that the disclosure puts the Proposer whose information was disclosed at a disadvantage relative to other Proposers, TriMet may cancel the solicitation and reissue the Request for Proposals." TriMet argues that "[r]evealing the detailed price evaluations and other competitive business information submitted by the proposers would discourage qualified proposers from seeking to submit proposals out of concern that the disclosure of such information will cause them to lose the competitive positions that they worked so hard to obtain."

Petitioner has made no argument that the public interest would somehow be served by disclosure of the winning bid prior to the awarding of the contract. The confidentiality provision was clearly an important precondition for the submission of the proposals to TriMet. It is our understanding that disclosure of the documents protected by the confidentiality provision will potentially be disclosed as early as the next TriMet Board meeting on April 11th, 2012. We conclude that the public interest would be harmed by the premature disclosure of the procurement documents.

Any identified confidential communications in the SEC notes or the emails are exempt from disclosure as well until the contract is awarded.

III. Internal Advisory Communications

ORS 192.502(1) exempts:

> Communications within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to any final agency determination of policy or action. This exemption shall not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between

officials and employees of public bodies clearly outweighs the public interest in disclosure.

TriMet provided several documents from the SEC that can be described as scoring and evaluation materials including some handwritten notes. According to Ms. Toran, TriMet provided Stadler with the "BAFO scoring without the detailed pricing." The detailed proposer pricing "was not provided as the information revealed would be trade secrets or confidential submissions."

TriMet identified the remainder of the SEC documents as "records reflecting the review of the SEC members as they were evaluating the BAFOs as part of the preliminary recommendation." Ms. Toran argues that these records "reflect the frank communications of the SEC" and are exempt as internal advisory communications. They are clearly preliminary to the final determination by the TriMet Board.

Petitioner has made no public interest arguments to outweigh the position of TriMet. Consequently, TriMet has met its burden by default. It should be understood, however, that upon the awarding of the contract and disclosure of many of the confidential communications, a public airing and analysis of the bid process may reveal a public interest argument (assuming TriMet continues to withhold these evaluations from the media or interested citizen groups). That is not the case here.

ORDER

Accordingly, it is ordered that TriMet promptly disclose the email records sought in the above petition, subject to the redaction of trade secrets or confidential submissions. Disclosure of the documents ordered is subject to payment of TriMet's fee, if any, not exceeding the actual cost in making the information available, consistent with ORS 192.440.

Very truly yours,

Mike Schrunk

MICHAEL D. SCHRUNK
District Attorney
Multnomah County

NOTICE TO PUBLIC AGENCY

Pursuant to ORS 192.450(2), 192.460 and 192.490(3) your agency may become liable to pay petitioner's attorney fees in any court action arising from this public records petition (regardless whether petitioner prevails on the merits of disclosure in court) if you do not comply with this order and also fail to issue within 7 days formal notice of your intent to initiate court action to contest this order, or fail to file such a court action within 7 additional days thereafter.