TEXAS DISPOSAL SYSTEMS

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FEDERAL JUDGE RULES TEXAS DISPOSAL SYSTEMS NEVER VIOLATED CITY'S ANTI-LOBBYING ORDINANCE, THAT THE CITY IMPROPERLY SUBJECTED TEXAS DISPOSAL TO THE ORDINANCE, AND ORDERS THAT THE CITY REMOVE THE DISQUALIFICATION IMPOSED PURSUANT TO THE ORDINANCE FROM ALL TEXAS DISPOSAL'S RECORDS KEPT BY THE CITY

Austin, Texas, March 21, 2014 – A federal judge ruled yesterday that the City of Austin acted improperly when it found that Texas Disposal Systems (TDS) violated the City's Anti-Lobbying Ordinance and entered judgment that the violation be removed from TDS' record.

The Honorable Judge Lee Yeakel, of the United States District Court, Western District of Texas, granted TDS' Motion for Summary Judgment on its claim that it did not violate the Anti-Lobbying Ordinance, in the case of TEXAS DISPOSAL SYSTEMS, INC., AND TEXAS DISPOSAL SYSTEMS LANDFILL, INC., V. CITY OF AUSTIN, TEXAS, AND BYRON JOHNSON, IN HIS OFFICIAL CAPACITY.

In his 17 page ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT ruling, Judge Yeakel stated, "the City improperly subjected Texas Disposal to the Ordinance and … the disqualification assessed against Texas Disposal is unsupported by the plain meaning of the Ordinance's terms." Judge Yeakel further stated, "Texas Disposal is entitled to judgment declaring that it did not violate the Ordinance and is entitled to have the City's disqualification removed from its record." The Court's FINAL JUDGMENT pronounced, "THE COURT DECLARES that neither the December 8, 2009 email sent by Texas Disposal's Bob Gregory to Defendant City of Austin nor Texas Disposal's February 9, 2010 proposal to the City seeking to amend its existing 2000 City contract violate the City's Anti-Lobbying and Procurement Ordinance." And, "Further the court DECLARES that the City improperly assessed the disqualification against Texas Disposal and HEREBY ORDERS that the City remove from all Texas Disposal's records before the City the disqualification imposed pursuant to the Ordinance."

In light of the Court's ruling that TDS did not violate the Anti-Lobbying Ordinance, TDS' constitutional arguments regarding the City's application of the ordinance in violation of the First Amendment were not addressed by the Court. To avoid the potential of a technical objection by the City, TDS also brought a claim against the City's Purchasing Officer, in his official capacity; the Court found that the Purchasing Officer's disqualification of TDS, although improper, was an exercise of his discretion, entitling him to summary judgment.

The lawsuit stems from the City's January 21, 2010 disqualification of TDS, for alleged violations of the City's Anti-Lobbying Ordinance, from the Request for Proposals (RFP) process intended to identify a company to build and operate a Materials Recovery Facility (MRF) to process the City's residential single stream recyclables, and for other services related to solid waste and recycling.
Concurrently with the RFP process, City staff pursued an extension of a separate contract: the then-active single stream recyclables processing contract with Greenstar of North America, which could have negated the justification for the RFP, as proposed. Proposals to extend the Greenstar contract for three to five years were posted for action before the Solid Waste Advisory Committee (SWAC) and the Austin City Council, after the RFP had been issued, which included an Anti-Lobbying Ordinance restriction. Yesterday's ruling makes it clear City staff can no longer stifle public discourse on specific agenda items before City Council just because it was of the same general subject matter of another pending contract with the City.

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TDS sent an email communication to SWAC members and City staff expressing concern with the staff-proposed Greenstar contract extension. Six weeks later, a Buyer with the City's Purchasing Office notified TDS that the City had determined that TDS' communication to SWAC and staff regarding the separate issue of the Greenstar contract extension constituted a prohibited representation under the Anti-Lobbying Ordinance provision of RFP #RDR0005 for Recycling Services, and disqualified TDS from that solicitation. At the time, firms could be barred from doing business with the City for a period of three years if they were issued more than one disqualification under the City's Anti-Lobbying Ordinance within a three-year period.

TDS has maintained since it sent the subject communication that its email communication was not a violation of the City's Anti-Lobbying Ordinance, and that, even if it was, the City staff disqualified TDS before TDS was even qualified to be disqualified, because neither TDS nor Greenstar had responded to the RFP and the proposed Greenstar contract revision option was not related to the RFP. TDS did not respond to the staff's RFP, but rather, submitted an unsolicited proposal to amend an existing thirty-year waste and recycling contract TDS holds with the City, which allowed the negotiation of a contract amendment to build and operate a MRF for the City. Staff incorrectly considered that unsolicited TDS proposal to be a response to their RFP and refused to allow the City Council to consider it as an alternative option to the RFP responses received.

City staff submitted their own formal response to their own RFP, along with a signed Anti-Lobbying Ordinance compliance certification, which prohibited staff members from communicating with other staff members and City Council members about the staff's RFP response. Staff members favorably scored their own RFP response, which included statements to justify the merits of cutting out service providers such as TDS so the City could effectively dominate the recycling processing market in Austin. The Austin City Council eventually threw out the RFP process and awarded a short-term two-year recyclables processing contract to TDS, after learning that the City's staff had become a competitor for their own long term RFP. Yesterday's ruling confirms the City Council acted appropriately in throwing out the RFP process after it became apparent that City staff had disqualified TDS while the staff itself was competing for the contract.

After exhausting its appeal rights through City staff as prescribed by the ordinance and having City staff reject TDS' contract negotiation request to drop the disqualification from TDS' record, TDS was left with no option other than to file suit in state district court to challenge City staff's interpretation of the ordinance and to seek removal of the City staff's disqualification of TDS. City attorneys then removed the suit to federal district court, where it was resolved today by Summary Judgment following a period of discovery and briefing.

TDS CEO, Bob Gregory, said of the ruling, "While we are pleased with the result, it's unfortunate that TDS was forced to spend so much time and money to overturn the self-serving actions of City staff. To this day, City staff and attorneys have failed to provide a legal basis for their disqualification of TDS. It shouldn't have taken a Federal Judge to make the determination that TDS did not violate the City's Anti-Lobbying Ordinance. TDS has no problem with the original intent of the City's Anti-Lobbying Ordinance; however, we do have a serious problem with the interpretation by the City Manager's office and its manipulation of the ordinance in an attempt to silence critics while City staff pursues a competitive agenda that is not in the best interests of the citizens of Austin."

Gregory also stated, "It was City staff's position at the time that the City would have been immediately barred from doing any further business with TDS for a period of three years, had TDS received another disqualification within three years. Currently, the City hauls 100% of its residential garbage and

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approximately 40% of its residential recyclables to the TDS landfill and recycling facilities. The City Manager's interpretation of the ordinance would have prevented TDS from speaking on any other topic concerning solid waste, recycling or composting except in the extremely limited extent that comments can be given during posted public meetings while a single proposal was winding its way through a multi-month consideration process.

"While a debarment of a contractor has not yet occurred under the City's Anti-Lobbying Ordinance, I believe the City staff was prepared to eliminate TDS as a service provider in order to eliminate TDS and the Gregory family as a formidable competitor to their agenda. TDS chose not to be silenced while City staff attempted to hoodwink the City Council into entering into an unwise contract extension with Greenstar. City staff almost certainly would have ended the City's reliance upon TDS and its facilities by debarring TDS had TDS not challenged City staff. This is what I believe City staff has wanted in order to help them convince City Council members to allow City staff to build and operate the City's own facilities to manage waste, compostables and recyclables.

"I believe that City staff desire to replace an open competitive commercial waste collection, recycling and composting market within the City's jurisdiction with a public utility monopoly, similar to Austin Energy, to serve as a major profit center for the City, as staff implements its interpretation of the City's Zero Waste Master Plan. The City staff's asserting itself as a competitor for the award of an RFP was not contemplated when the Anti-Lobbying Ordinance was initially approved by City Council. I believe that Anti-Lobbying Ordinance restrictions should not apply to solicitations for which City staff is actively competing for the business and which the City staff seeks to convert to an unregulated monopoly."

TDS is hopeful that the Austin City Council will amend the Anti-Lobbying Ordinance to place the City Council as the final arbiter in the appeal process to overturn a staff disqualification decision, instead of the City Purchasing Officer being the final arbiter before a contractor has to challenge staff's disqualification decision in state or federal district court. TDS also recommends that the City Council not allow Anti-Lobbying Ordinance restrictions to apply to any bid or RFP for which City staff is a competitor, since it is not possible for the City staff to be unbiased and to refrain from speaking to Council members, their aides, or themselves about the City staff's own (and other's) proposal when staff has an interest in eliminating a competitor.

For more information please visit www.texasdisposal.com/cityofaustin, or contact Bob Gregory at bgregory@texasdisposal.com, Gary Newton at gnewton@texasdisposal.com, or Jim Hemphill at jhemphill@gdhm.com or call (512) 421-1300.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS DISPOSAL SYSTEMS, INC. AND TEXAS DISPOSAL SYSTEMS LANDFILL, INC., PLAINTIFFS,	§	
V.	§	CAUSE NO. A-11-CV-1070-LY
CITY OF AUSTIN, TEXAS, AND BYRON JOHNSON, IN HIS OFFICIAL CAPACITY, DEFENDANTS.	§	

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Before the court in the above-styled cause are the parties' cross-motions for summary judgment, responses, replies, and exhibits.[1] On August 16, 2013, the court held a hearing on the motions at which all parties were represented by counsel. Having considered the motions, responses, replies, the parties' summary-judgment proof, exhibits and stipulations, the case file, and applicable law, the court renders the following order.

Plaintiffs Texas Disposal Systems, Inc. and Texas Disposal Systmens Landfill, Inc. (collectively "Texas Disposal") commenced this action against the City of Austin ("City") in the 345th Judicial District Court of Travis County, Texas. The City removed the proceeding to this court. Texas Disposal filed an amended complaint, which, *inter alia*, added claims against Byron

[1] Plaintiff Texas Disposal Systems, Inc. and Texas Disposal Systems Landfill, Inc.'s Motion for Summary Judgment filed May 10, 2013; Defendants City of Austin and Byron Johnson's response filed May 31, 2013; Texas Disposal's reply filed June 14, 2013 (Clerk's Document Nos. 34, 49, and 52) and the City and Johnson's Motion for Summary Judgment filed May 10, 2013, Texas Disposal's response filed May 31, 2013, the City and Johnson's reply filed June 14, 2013 (Clerk's Document Nos. 35, 48, and 51), and the parties' Corrected Joint Summary Judgment Exhibits and Stipulations filed May 10, 2013 (Clerk's Document No. 32).

Johnson, in his official capacity as Purchasing Officer for the City. The City and Johnson filed answers and, following a conference with the court, all parties moved for summary judgment.

Texas Disposal is in the business of hauling waste and recyclable materials as well as providing facilities for composting, recycling, and landfilling of discarded materials and waste. Texas Disposal operates within the City and throughout central Texas. Texas Disposal complains about the City's actions related to the City's single-stream recycling program. Specifically, Texas Disposal complains of the City's assessment of a disqualification against Texas Disposal for violating anti-lobbying provisions of the City's Code. *See* Austin, Tex. City Code ch. 2-7-101-110 (2007) (Ordinance No. 20071206-045, "An Ordinance Adding a New Article 6 to Chapter 2-7 of the City Code Relating to Anti-Lobbying and Procurement") ("Ordinance"). Texas Disposal seeks a judgment declaring that it did not violate the Ordinance, that the City improperly assessed the disqualification against Texas Disposal, and ordering that the City withdraw the disqualification. Additionally, Texas Disposal alleges that, in the event the court finds and concludes that Texas Disposal violated the Ordinance and the City properly imposed the disqualification, the court declare the Ordinance unconstitutional as applied. Texas Disposal argues that the assessment of the disqualification violated Texas Disposal's free-speech and due-process rights guaranteed by the United States Constitution, because the City's application of the Ordinance is an unconstitutional content-based restriction on speech that is not narrowly tailored to serve a compelling governmental interest, infringes on Texas Disposal's rights to petition the government, and deprives Texas Disposal of due process for lack of notice. *See* 42 U.S.C. § 1983. Finally, Texas Disposal alleges that Johnson's final administrative decision to assess the disqualification against Texas Disposal was an *ultra vires* act unsupported by any legal authority.

Jurisdiction and venue

Any state-court action over which federal courts would have original jurisdiction may be removed from state to federal court. *See* 28 U.S.C. § 1441(a). Federal courts have original jurisdiction over "all civil actions arising under the Constitution, laws or treaties of the United States." *See id.* at § 1331. Federal courts also have supplemental jurisdiction over "all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." *Id.* at § 1367(a). State and federal claims form part of the same case or controversy when they "derive from a common nucleus of operative fact." *City of Chicago v. International Coll. of Surgeons*, 522 U.S. 156, 165 (1997).

This court has jurisdiction over this action because Texas Disposal raises federal constitutional claims. Further, Texas Disposal's state-law claims are so related to the alleged federal claims that all claims derive from the same controversy, and the court will exercise supplemental jurisdiction over Texas Disposal's state-law claims. *See eg., Davis v. Department of Health & Hosp.*, 195 Fed. Appx. 203, 205 (5th Cir. 2006). Venue is proper in the Austin Division of the Western District of Texas, because a substantial part of the events or omissions related to Texas Disposal's claims arose within this district. *See* 28 U.S.C. § 1391(a), (b).

Ordinance

The Ordinance bans speech that is a "representation" by a class of persons who are "respondents" to the City's formal requests for contract proposals during a defined time period. The Ordinance also includes specific exceptions. The following portions of the Ordinance are relevant:

> REPRESENTATION means a communication related to a response to a council member, official, employee, or agent of the City which:
>
> (a) provides information about the response;
> (b) advances the interests of the respondent;
> (c) discredits the response of any other respondent;
> (d) encourages the City to withdraw the solicitation;
> (e) encourages the City to reject all of the responses;
> (f) conveys a complaint about a particular solicitation.

See City Code Section 2-7-101(5).

> RESPONDENT means a person responding to a City solicitation including a bidder, a quoter, responder, or a proposer.

Id. at Section 2-7-101(4). The definition expressly includes owners, officers, and employees of respondents, as well as other representatives of a respondent.

The Ordinance's substantive speech restriction provides:

> (A) During a no-contact period, a respondent shall make a representation only through the authorized contact person.
>
> (B) If during the no-contact period, a respondent makes a representation to a member of the City Council, a member of a City board, or any other official, employee, or agent of the City, other than to the authorized contact person for the solicitation, the respondent's response is disqualified from further consideration except as permitted in this article. This prohibition also applies to a vendor that makes a representation and then becomes a respondent.

Id. at Section 2-7-103(A) & (B).

Further, the Ordinance includes a "debarment" provision, by which anyone who is disqualified more than once in a three-year period is barred "from the sale of goods or services to the City for a period not to exceed three years provided the respondent is given written notice and a hearing in advance of the debarment." *Id.* at Section 2-7-109(A).

Pursuant to the Ordinance, the City's Financial Services Department and Public Works Department promulgated Rule No. R2008-PO-1, which provides a procedure to protest a disqualification. When a party challenges the assessment of a disqualification, the City Purchasing Officer may designate an independent hearing examiner to conduct a hearing and make a written recommendation regarding the disqualification. The Purchasing Officer then determines whether to accept or reject the recommendation. The Purchasing Officer's decision is a final disposition regarding a disqualification. At all times relevant to this action, Johnson was the City's Purchasing Officer.

Factual background

In 2000, after a competitive bidding process, Texas Disposal and the City entered into a 30-year contract under which Texas Disposal accepts the City's residential solid waste at Texas Disposal's landfill near Creedmoor, Texas. In 2008, the City began a single-stream recycling program, by which the City's residents may deposit all of their recyclables into a single large bin, which is collected from the street curb by City employees. After pickup, crews separate or process the recyclables at a "material recovery facility," which the trade abbreviates as "MRF." The City planned to build its own MRF. As an interim solution, the City entered into a no-bid contract with Greenstar, a company that separated and processed the City's single-stream recyclables at Greenstar's MRFs located in San Antonio and Garland, Texas. The Greenstar contract was to expire September 30, 2010.

In summer 2009, Texas Disposal's Chairman and CEO, Bob Gregory, met with Assistant City Manager Robert Goode. Gregory told Goode that Texas Disposal planned to build an MRF and have it operational by October 1, 2010. Gregory suggested that the City and Texas Disposal amend

their contract to allow Texas Disposal to process the City's single-stream recyclables upon the expiration of the Greenstar contract. Goode responded to Gregory that the City preferred to award an MRF contract through a formal competitive request-for-proposal process and encouraged Texas Disposal to respond to that request when announced by the City.

In fall 2009, the City considered amending and extending the Greenstar interim contract, because the City wanted to clarify some of the existing contract terms, improve pricing and flexibility in the contract, and provide a bridge between the Greenstar contract and the yet to be executed long-term recycling-service contract.

On November 16, 2009, the City issued the request for proposal for the building of an MRF ("Recycling Request"). This triggered the Ordinance's no-contact period, to continue until a contract was executed or the City closed the request. Meanwhile, the City continued negotiating with Greenstar for an extension of the existing interim contract. The Ordinance did not apply to the Greenstar short-term contract, because there had not been a formal request-for-proposal competitive bidding process associated with the Greenstar contract.

On November 30, 2009, Texas Disposal submitted questions to the authorized contact person about the Recycling Request. On December 4, Texas Disposal and Greenstar representatives attended a pre-bid conference held by the City.

Meanwhile, the Greenstar contract-amendment proposal was made a stand-alone agenda item for the City's Solid Waste Advisory Commission's ("Commission") meeting set for December 9, 2009. The Commission is an Austin City Council appointed volunteer-citizen commission that makes recommendations to the city council on solid-waste issues. On December 8, 2009, Gregory

sent an email and attachments to Commission members and other City officials, urging the Commission to recommend that the city council not extend the Greenstar contract:

> **Note: This narrative is intended only to convey my thoughts related to the extension of the Greenstar contract now pending before Austin's Solid Waste Advisory Commission (12/09/09 Agenda Item #4.a.) and not intended to relate to the pending Recycling Services RFP. That RFP process has an Anti-Lobby provision and represents a different issue, which is not the subject of this discussion.**
>
> Dear [Commission] Members,
>
> I urge you to encourage the Austin City Council to reject all three of the Greenstar single stream contract amendments. I believe that it is not in the City's best interests to guarantee Greenstar that they will receive all the City's single stream recyclables for the remainder of the contract term. The City may find that it has lower cost options when its RFP responses are received on February 9, 2010. I also believe that Greenstar has sufficient flexibility in this contract to simply lower its purchase price fo the City's commodities enough to negate any benefit the City would receive from the contract amendment. Please see the attached document which describe and support my concerns.
>
> Please let me know if you have any questions concerning my position or the attached documents.
>
> Sincerely,
> Bob Gregory
> [phone numbers][2]

The last section, entitled "Explanation of Contractual Agreements for Commodity Purchase Pricing," closes with the following:

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[2] For convenience, the court refers to the December 8 email with attachments as "the Gregory email." The attachments to the Gregory email included a document titled, "Reasons why the City of Austin should not amend its contract with Greenstar to commit 100% of its single stream recyclables for an extended term, in return for a small reduction in Greenstar's processing charge" with supporting charts and graphs. These attachments are not relevant to the disposition of the summary-judgment motions.

> Considering the above contractual requirements and the following data, it appears that Greenstar does not always adhere to its contractual agreements with regard to determining its purchase price for commodities. Furthermore, given Greenstar's apparent flexibility in determining what it pays Austin for recyclable commodities, any savings to the City of Austin on processing costs offered as part of an amended contract could easily be recouped or offset by Greenstar through manipulation of commodity pricing.

At the time of the email, Texas Disposal had not submitted a response to the Recycling Request. On December 9 the Commission voted to extend the Greenstar interim contract.

On December 15, an attorney for Greenstar wrote to Roy Rivers, the City's contact person for the Recycling Request, claiming that Texas Disposal, by sending the Gregory email had violated the Ordinance. On January 21, 2010, Rivers assessed anti-lobbying disqualifications against Texas Disposal and Greenstar.[3]

Protest hearings were held on February 5. The hearing officer found that when the Gregory email was sent, Texas Disposal had not responded to the Recycling Request and, therefore, the email was not in violation of the Ordinance. The hearing officer noted that the Recycling Request remained open until February 9, and inquired whether the parties desired to continue the matter until February 10. Texas Disposal represented that it would not be responding to the Recycling Request. The City then urged there was no need to suspend the hearing, and the hearing officer ruled the "matter closed, [and] the disqualification moot. I do not intend to issue an opinion other than what is on the record, on the digital record."[4]

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[3] The letter stated that the Gregory email "both advances the interest of the [Texas Disposal] and . . . discredits the response of [Greenstar]."

[4] Regarding Greenstar's disqualification, the hearing officer recommended that Greenstar's protest of its disqualification be upheld, and it was; Greenstar's disqualification was reversed.

On February 9, about an hour past the deadline for responding to the Recycling Request, Texas Disposal distributed an unsolicited proposal to amend Texas Disposal's existing contract to add single-stream recycling services "in lieu of a formal response to the [Recycling Request.]" The City compared Texas Disposal's February 9 proposal to the Recycling Request and determined that, although the proposal did not contain all the elements required for a formal response to the Recycling Request, the proposal sought a contract for the same scope of services as those described in the Recycling Request. The City Attorney determined that Texas Disposal's February 9 proposal was in effect a response to the Recycling Request.

On February 23, the City Attorney informed the City Manager that the disqualification issued to Texas Disposal should remain in place in light of Texas Disposal's February 9 proposal. Texas Disposal sought clarification of the City's position, positing that the hearing examiner had ruled that there was no disqualification. On May 12, 2010, the City notified Texas Disposal that it had been disqualified for alleged violations of the Ordinance. A second protest hearing was held on May 26, and on June 2, the hearing officer recommended that Texas Disposal's disqualification be upheld. Johnson accepted the recommendation and upheld the disqualification on June 4, 2010. Texas Disposal sought reconsideration, but was informed by the City Attorney that no further review of Johnson's decision was available.

The Austin City Council rejected all formally submitted proposals to the Recycling Request. At a meeting on June 24, 2010, the council voted to instruct the City staff to negotiate long-term recycling services with Balcones, another company interested in providing recycling services for the City, and Texas Disposal, and for the staff to negotiate with Texas Disposal and Greenstar regarding a short-term recycling contract. Because the council had rejected all proposals submitted through

the formal Recycling Request, Texas Disposal was now eligible to be chosen by the City for services that *had been* within the scope of the Recycling Request. During the new round of negotiations, Texas Disposal presented a proposal that included the City's removal of Texas Disposal's disqualification for violating the Ordinance. The City rejected that proposal and Texas Disposal filed this action.

Arguments

By its summary-judgment motion, Texas Disposal contends that as a matter of law the City interpreted and applied the Ordinance incorrectly, that Texas Disposal did not violate the Ordinance, that the City erred in disqualifying Texas Disposal, and that the disqualification should be removed from Texas Disposal's record. Specifically, Texas Disposal contends that neither the Gregory email nor its February 9 proposal was a response to the Recycling Request, and that Johnson's assessment of the disqualification was an *ultra vires* act unsupported by any legal authority. Alternatively, Texas Disposal argues that the Ordinance, as applied, unconstitutionally infringes on Texas Disposal's free-speech rights, in violation of the First Amendment. *See* 28 U.S.C. § 1983.

The City and Johnson move for summary judgment, contending that Texas Disposal lacks standing to assert its claims because lacking is the existence of any imminent harm or any chilling effect on Texas Disposal's free-speech rights. If Texas Disposal has standing, the City and Johnson contend that they are entitled to summary judgment because the assessment of the disqualification was proper under the Ordinance and there was no violation of Texas Disposal's First Amendment rights. Finally, the City and Johnson argue that Texas Disposal cannot show that Johnson acted outside his legal authority or that he failed to perform a ministerial act, and therefore, the *ultra vires* claim should be denied.

Summary-judgment review

Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–25 (1986); *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). If the moving party carries its burden of showing that there is no genuine dispute as to any material fact, the burden shifts to the nonmovant to introduce specific facts or produce evidence that shows the existence of a genuine dispute regarding a material fact that prevents the grant of summary judgment in the movant's favor. FED. R. CIV. P. 56(e); *see also Celotex*, 477 U.S. at 322–23. A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

On cross motions for summary judgment, the court reviews each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party, determining for each side, whether judgment may be rendered in accordance with the Rule 56 standard. *Amerisure Ins. Co. v. Navigators Ins. Co.*, 611 F.3d 299, 304 (5th Cir. 2010) (internal citation and quotation omitted); *Shaw Constr. v. ICF Kaiser Engrs., Inc.*, 395 F.3d 533 fn. 8 & 9 (5th Cir. 2004).

Texas Disposal's standing

The City argues that Texas Disposal lacks standing to bring this action because Texas Disposal has yet to sustain any harm under the Ordinance. The City argues that any harm that might befall Texas Disposal has yet to occur and would only occur if and when the City barred Texas

Disposal from seeking to do business with the City. It is, therefore, only Texas Disposal's future actions that could result in additional disqualifications within a three-year period that would then result in Texas Disposal being disallowed from seeking to do business with the City through the formal request-for-proposal process.[5]

Texas Disposal responds that it has sustained harm under the Ordinance, because the City took an adverse action against Texas Disposal–wrongly assessed the disqualification–based on the City's improper interpretation of the Ordinance. Thus contends Texas Disposal, it has suffered harm because the disqualification counts as a mark against it for purposes of seeking to do business with the City in the future.

Justiciability determinations, such as standing or ripeness are threshold questions that courts address before reaching the merits of claims. *See Warth v. Seldin*, 422 U.S. 490, 498 (1975). The essence of standing is "whether a litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Id.* Although the question of standing is one of degree and not a precise test, for a plaintiff to have standing to bring an action, the plaintiff must show (1) that the plaintiff sustained an injury in fact that is concrete and particularized, and is actual or imminent, not hypothetical; (2) that there is a causal connection between the injury and the conduct complained of; and (3) it must be likely that the injury will be redressed by a favorable decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). A plaintiff can meet the standing requirements when suit is brought as a declaratory-judgment action by establishing "actual present harm or a

[5] Pursuant to the Ordinance, an entity may not seek to do business with the City through the formal request-for-proposal process if the following occurs: (1) a disqualification is assessed more than two times in a sixty month period and (2) a there must have been provided a hearing process that includes a written notice to the respondent. City Code § 2-7-109(A).

significant possibility of future harm." *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 542 (5th Cir. 2008).

Texas Disposal alleges that the City took adverse action against it by wrongfully assessing the disqualification against Texas Disposal, which remains in place. It is this disqualification–for which Texas Disposal has exhausted its City-provided administrative remedies–that is the subject of this action. Here there exists a present controversy: whether Texas Disposal violated the Ordinance, and if so, whether application of the Ordinance to Texas Disposal's speech violates the Constitution. The court finds and concludes that Texas Disposal has sustained actual present harm and that currently there exists a ripe dispute among the parties. Texas Disposal has standing to bring its claims.

Interpretation of Ordinance

Texas Disposal's claim that the City improperly determined that Texas Disposal violated the Ordinance and assessed the disqualification is a pendent, nonfederal state-law claim over which this court exercises supplemental jurisdiction. *See* 28 U.S.C. § 1367(a). As to these claims the court relies on and applies Texas law. *See Erie R.R. v. Thompkins*, 304 U.S. 64, 78 (1938); *Transcontinental Gas Pipe Line Corp. v. Transportation Ins. Co.*, 953 F.2d 985, 988 (5th Cir. 1992).

Municipal ordinances are interpreted in the same manner as statutes. *Board of Adjustment of San Antonio v. Wende*, 92 S.W.3d 424, 430 (Tex. 2002). Courts construe ordinances, like statutes, as a matter of law. *City of San Antonio v. Headwaters Coalition, Inc.*, 381 S.W.3d 543, 551 (Tex. App.–San Antonio 2012, pet. denied) (citing *Arredondo v. City of Dallas*, 79 S.W.3d 657, 667 (Tex. App.–Dallas 2002, pet. denied)). In construing the Ordinance, the court considers the plain meaning of the words used in the Ordinance and endeavors to give each part of the Ordinance meaning. *Id.*

(citing *Wende*, 92 S.W.3d at 430; *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983)). If the language of the ordinance is unambiguous, a court interprets the ordinance using that plain language, unless such an interpretation leads to absurd results. *Id.* (citing *Texas Dep't of Protective & Reg. Servs. v. Mega Child Care, Inc.*, 144 S.W.3d 170, 177 (Tex. 2004)).

The Ordinance is unambiguous. Under the Ordinance, during the no-contact period, the only regulated speech are representations *made by* a "respondent." To be a prohibited representation, a communication must be "related to a response." Further, a "response" is defined as "a response to a solicitation," including "a request for proposal response." Thus, by its terms, the Ordinance applies *only* to the speech of those responding to City solicitations. The Ordinance may apply to speech made during a no-contact period before a business becomes a respondent, but only if the business actually does become a respondent to a City solicitation. Thus, a respondent is severely restricted in its ability to communicate with a City official, employee, or agent about a solicitation, while the solicitation is pending.

Texas Disposal was not originally a respondent to the City's solicitation for the Recycling Request. Gregory's email addresses the pre-existing Greenstar agreement, and explicitly does not respond to the City's Recycling Request. Texas Disposal specifically and intentionally never joined the respondents to the City's Recycling Request. Also, it is undisputed that although Texas Disposal's February 9 proposal may address issues similar to those in the Recycling Request, it is not a response to that request, as the period for responding had closed.

By interpreting the Ordinance's plain language, the court concludes that as a matter of law neither the Gregory email nor the February 9 proposal violates the Ordinance, because neither is a prohibited "representation" and because Texas Disposal was not a respondent to the City's Recycling

Request. The court also concludes that with regard to the Recycling Request, the City improperly subjected Texas Disposal to the Ordinance and that the disqualification assessed against Texas Disposal is unsupported by the plain meaning of the Ordinance's terms.

The court finally concludes that Texas Disposal is entitled to judgment declaring that it did not violate the Ordinance and is entitled to have the City's disqualification removed from its record.

Ultra vires *claim against Johnson*

Texas Disposal alleges that "[t]he final City administrative decision by Mr. Johnson to disqualify [Texas Disposal]–which necessarily included a finding that [Texas Disposal] had responded to the Recycling [Request]–was *ultra vires* and unsupported by legal authority because [Texas Disposal] was not a 'respondent' under the plain language of the [] Ordinance."

An *ultra vires* claim against a governmental employee in his official capacity is a claim seeking a court to require a governmental official to comply with statutory or constitutional provisions. *City of El Paso v. Heinrich*, 284 S.W.3d 366, 372 (Tex. 2009).

Johnson argues that his decision to assess the disqualification against Texas Disposal required him to exercise his discretion and judgment as a City employee and was reasonably based on a review of all of the information available to him, including the advice of the City's legal department. Johnson argues that lacking is any proof that his assessment of the disqualification against Texas Disposal was outside his legal authority as the City's purchasing officer. Johnson argues summary judgment should be granted in his favor with regard to Texas Disposal's *ultra vires* claim alleged against him.

In response, Texas Disposal contends, "Some Texas authority suggests that a party alleging misapplication of the law by a governmental entity must sue the public official charged with

applying the law."[6] Texas Disposal represents that it "does not bring any claims against Johnson that are not also brought against the City. The claims against both Defendants are the same: declaratory judgment claims that Texas Disposal did not violate the Ordinance."

The court finds lacking any summary-judgment proof that Johnson's decision whether or not to assess a disqualification is anything other than a decision and action that was within Johnson's city-employment duties. To the extent Texas Disposal has raised a separate *ultra vires* claim against Johnson, summary judgment is granted in favor of the City.

Remaining constitutional claims

As the court has resolved the parties' disputes by interpreting and applying the Ordinance's plain language, the court need not and will not address Texas Disposal's constitutional claims. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 457 (1985) (courts are "never to anticipate a question of constitutional law in advance of the necessity of deciding it" and ought not to pass on questions of constitutionality unless such adjudication is unavoidable). The court dismisses without prejudice Texas Disposal's remaining constitutional claims.

Conclusion

Texas Disposal has standing to proceed with the claims alleged in this action. Further, Texas Disposal's motion for summary judgment will be granted in part and to the extent that Texas Disposal is entitled to summary judgment on its request for declaratory relief that pursuant to the Ordinance, the City improperly disqualified Texas Disposal and Texas Disposal is entitled to

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[6] Texas Disposal cites *Heinrich* as authority for its *ultra vires* claim against Johnson. 284 S.W.3d 366, 372 (Tex. 2009).

removal of the disqualification. With regard to Texas Disposal's constitutional claims, as the court does not address those claims, the court will dismiss the constitutional claims without prejudice.

The City and Johnson's motion for summary judgment will be granted in part and to the extent that Johnson did not act *ultra vires*. Texas Disposal will take nothing on its claim alleged against Johnson.

IT IS THEREFORE ORDERED that Texas Disposal's Motion for Summary Judgment filed May 10, 2013 (Clerk's Document No. 34) is **GRANTED IN PART** and to the extent that the court grants Texas Disposal judgment declaring that the Gregory email and Texas Disposal's February 9 proposal to amend its 2000 City contract do not violate the Ordinance.

IT IS FURTHER ORDERED that all of Texas Disposal's constitutional challenges to the Ordinance are **DISMISSED WITHOUT PREJUDICE.** In all other respects Texas Disposal's motion for summary judgment is **DENIED**.

IT IS FURTHER ORDERED that the City and Johnson's Motion for Summary Judgment filed May 10, 2013 (Clerk's Document No. 35) is **GRANTED IN PART** and to the extent that Texas Disposal shall take nothing by its *ultra vires* claim. In all other respects the motion is **DENIED**.

SIGNED this 20th day of March, 2014.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS DISPOSAL SYSTEMS, INC. AND TEXAS DISPOSAL SYSTEMS LANDFILL, INC., PLAINTIFFS,	§	
V.	§	CAUSE NO. A-11-CV-1070-LY
CITY OF AUSTIN, TEXAS, AND BYRON JOHNSON, IN HIS OFFICIAL CAPACITY, DEFENDANTS.	§	

FINAL JUDGMENT

Before the court is the above styled and numbered cause. On this date by separate order the court addressed the parties' cross-motions for summary judgment. The court found and concluded that Plaintiffs Texas Disposal Systems, Inc. and Texas Disposal Systems Landfill, Inc. (collectively "Texas Disposal") are entitled to declaratory-judgment relief. The court dismissed without prejudice all of Texas Disposal's constitutional claims. Finally, the court found and concluded that Defendant City of Austin was entitled to summary judgment on Texas Disposal's *ultra vires* claim alleged against Defendant Byron Johnson. As there are no disputes remaining among the parties for resolution, the court renders this final judgment pursuant to Federal Rule of Civil Procedure 58.

THE COURT DECLARES that neither the December 8, 2009 email sent by Texas Disposal's Bob Gregory to Defendant City of Austin nor Texas Disposal's February 9, 2010 proposal to the City seeking to amend its existing 2000 City contract violate the City's Anti-Lobbying and Procurement Ordinance. *See* Austin, Tex. City Code ch. 2-7-101-110 (2007) (Ordinance No. 20071206-045, "An Ordinance Adding a New Article 6 to Chapter 2-7 of the City Code Relating to Anti-Lobbying and Procurement") ("Ordinance").

Further the court **DECLARES** that the City improperly assessed the disqualification against Texas Disposal and **HEREBY ORDERS** that the City remove from all Texas Disposal's records before the City the disqualification imposed pursuant to the Ordinance.

IT IS FURTHER ORDERED that Texas Disposal **TAKE NOTHING** on the *ultra vires* claim alleged against Defendant Byron Johnson in his official capacity.

Any claim for attorney's fees incurred in this action will be determined post judgment and pursuant to Rule CV-7(j), of the Local Rules of the United States District Court for the Western District of Texas.

IT IS FURTHER ORDERED that Texas Disposal recover its costs of court.

IT IS FURTHER ORDERED that any other relief requested by any party hereto not specifically granted herein is **DENIED**.

IT IS FINALLY ORDERED that this action is hereby **CLOSED**.

SIGNED this 20th day of March, 2014.

LEE YEAKEL
UNITED STATES DISTRICT JUDGE