

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS DISPOSAL SYSTEMS, INC.,	§	
and TEXAS DISPOSAL SYSTEMS	§	
LANDFILL, INC.	§	
Plaintiffs	§	
V.	§	CASE NO. A-11-CV-1070-LY
	§	
CITY OF AUSTIN, TEXAS	§	
Defendant	§	

ORIGINAL ANSWER OF BYRON JOHNSON

TO THE HONORABLE JUDGE LEE YEAKEL:

Defendant, Byron Johnson, in his official capacity as City of Austin Purchasing Officer, files his Original Answer in response to “Plaintiffs’ First Amended Complaint (Original Complaint after Removal)” (hereinafter referred to as “First Amended Complaint”, and respectfully shows:

I. ANSWER

PARTIES, VENUE AND JURISDICTION

Johnson denies the factual allegations, if any, in the introductory paragraph of the First Amended Complaint. The following numbered paragraphs are responsive to the same numbered paragraphs in the First Amended Complaint.

1. Johnson does not have sufficient knowledge to admit or deny the factual allegations in paragraph 1.
2. The City of Austin admitted this paragraph. Johnson concurs with the City.
3. Defendant Byron Johnson, Purchasing Officer, executed a waiver of service of

summons, which was returned to Plaintiffs. Johnson admits the first sentence of paragraph 3 and acknowledges the stipulation set forth in the second sentence of paragraph 3.

4. Parties are not required to admit or deny conclusions of law. Johnson admits the first sentence and admits the City removed this lawsuit to federal court. Johnson denies that by its removal, the City or Johnson have waived any claim of sovereign or governmental immunity. Johnson was not a party at the time of the removal, and has insufficient knowledge to admit or deny the remainder of this paragraph.

5. Johnson need not admit or deny conclusions of law, including conclusions of law related to jurisdiction. Johnson does not contest venue. Johnson concurs with the City's position that that the acts of City employees complained of by Plaintiffs occurred in Travis County. Johnson does do not have sufficient information to admit or deny whether all acts complained of by Plaintiffs occurred in Travis County.

SUMMARY OF FACTS

6. Johnson admits the first sentence. Johnson does not have sufficient information to admit or deny the remainder of the allegations in paragraph 6.

7. Johnson admits the first sentence. Johnson admits that the referenced contract was not the subject of competitive bidding. Johnson does not have sufficient information at this time to admit or deny the remainder of the factual allegations in paragraph 7.

8. Johnson denies the accuracy of the term "in the same time period" in the first sentence. Johnson admits that the deadline for the "Recycling RFP" was extended to February 9, 2010. Johnson admits the last sentence of paragraph 8.

9. Johnson admits the first sentence, but denies the e-mail communication was distributed only to those persons listed in the sentence. Johnson denies the second sentence, but

admits the referenced exhibit was attached to the petition filed in state court. Johnson does not have sufficient information to admit or deny Plaintiffs' allegations in regard to the timing of issues on SWAC's agenda. In regard to the fourth/last sentence, Johnson admits Plaintiffs have correctly described the subject-matter of the referenced communication and the general description of the note at the beginning of the e-mail. For further answer, Johnson states that the document attached as Exhibit "A" to Plaintiffs' Original Petition filed in state court speaks for itself. Johnson denies the remainder of the factual allegations in paragraph 9.

10. Johnson admits the first sentence of paragraph 10. In regard to the second, third and fifth sentences, Johnson has no knowledge of what Mr. Gregory knew in regard to RFP submissions at the time of the referenced communication, and does not have sufficient information to admit or deny what Texas Disposal has learned to date. Johnson admits that no RFP responses had been submitted to the City by December 8, 2009. Johnson denies the fourth sentence. Johnson admits that Greenstar and others responded to the RFP. Johnson does not have sufficient knowledge to admit or deny the remaining factual allegations, if any, in paragraph 10.

11. Johnson is not required to admit or deny legal conclusions. Johnson generally admits the factual allegations of the first sentence, but denies that the term "during the RFP process" accurately describes the applicable time period as the term is vague and ambiguous. Johnson relies on the specific terms of the Recycling RFP, which constitutes the best evidence of its terms. Johnson admits that the ordinance attached as Exhibit "B" to Plaintiff's state court petition was in effect at the time of the events made the basis of Plaintiffs' claims. However, the anti-lobbying ordinance was amended on or about December 1, 2011. Thus, the ordinance referenced by Plaintiffs has been superseded and/or amended. Johnson admits the third sentence,

which is enclosed in parentheses. Johnson need not admit or deny Plaintiffs' characterization or description of the referenced ordinance, which speaks for itself.

12. Johnson need not admit or deny whether Plaintiffs accurately copied provisions of the Ordinance. The referenced Ordinance is attached as Exhibit "B" to Plaintiffs' Original Petition in state court and speaks for itself.

13. Johnson admits the first sentence. Johnson admits the second sentence to the extent "includes" is not intended to be all-inclusive. Johnson states further that the referenced definition in the ordinance speaks for itself.

14. Johnson need not admit or deny conclusions of law and, therefore need not admit or deny the description in the first sentence before "in Section 2-7-103." Johnson need not admit or deny whether Plaintiffs accurately copied provisions of the Ordinance. The referenced Ordinance is attached as Exhibit "B" to Plaintiffs' Original Petition in state court and speaks for itself.

15. Johnson need not admit or deny conclusions of law. Johnson denies Plaintiffs have properly interpreted the ordinance in its statements in paragraph 15. For further answer, in regard to the first sentence, Johnson states that the referenced ordinance speaks for itself. In regard to the second sentence in parentheses, Johnson refers Plaintiffs to section 2-7-103(E)(6) of the ordinance, which speaks for itself.

16. Johnson need not admit or deny conclusions of law, nor Plaintiffs' characterizations of the referenced ordinance. Johnson relies on the specific terms of the ordinance, which speaks for itself.

17. Johnson need not admit or deny Plaintiffs' characterizations of the referenced ordinance. Johnson relies on the specific terms of section 2-7-109(A), which refers to a "respondent".

18. Johnson need not admit or deny Plaintiffs' characterizations of the referenced ordinance. Johnson admits that the referenced rule relates to the administration and enforcement of the referenced ordinance. Johnson relies specifically on sections 2-7-107 and 2-7-109 of the referenced ordinance. Johnson denies the third sentence, but admits same is attached to the state court petition. Johnson generally admits the fourth, fifth and sixth sentences, but relies on the specific terms of Rule No. R2008-PO-1 as the rule speaks for itself. Johnson admits the last sentence of paragraph 18.

19. Johnson denies that there was a finding of "no violation" as stated in the caption preceding paragraph 19. Johnson admits the first sentence of paragraph 19 with the exception of the word, "allegedly." Johnson denies the second sentence but admits the exhibit was attached to the state court petition. Johnson does not have sufficient knowledge to admit or deny what Gregory or TDS knew or learned in regard to its allegations in paragraph 19. Johnson admits that there were collaborative discussions related to the decision set forth in Rivers' January 21, 2010 letter. Johnson asserts the attorney-client privilege in regard to any specific legal advice provide to the Purchasing Office in regard to the January 21, 2010 letter. Johnson denies Plaintiff's allegation that the letter was drafted by members of the Law Department and Ethics Office, and asserts that any legal advice rendered is irrelevant to Plaintiffs' claims and constitutes a privileged communication. Johnson admits that the referenced letter includes the statements set forth in the fourth sentence. Johnson further admits on January 21, 2010, TDS had not yet submitted a response to the Recycling RFP.

20. Johnson admits that Texas Disposal timely filed a protest and that a hearing was held on or about February 5, 2010, before an independent hearing examiner. Johnson admits that Texas Disposal appeared at the hearing and submitted a letter brief, along with other materials, to the hearing examiner. Johnson asserts that any briefing by Texas Disposal speaks for itself. Johnson denies that Texas Disposal argued three main points at the February hearing. The hearing was determined to be moot after Texas Disposal represented that it would not submit a response to the Recycling RFP. Johnson denies the remainder of the factual allegations in paragraph 20.

21. Johnson admits that the hearing officer determined the disqualification to be moot based on Texas Disposal's representation that it did not intend to respond to the Recycling RFP. The City generally agreed that Texas Disposal's position rendered the issue moot at that time. However, Texas Disposal later submitted a proposal that was substantively a response to the Recycling RFP. Johnson does not have sufficient information to admit or deny the remaining factual allegations in paragraph 21.

22. Johnson admits Greenstar was also disqualified by City staff for its response to Mr. Gregory's communication, but denies the remainder of the first sentence. Johnson need not admit or deny Texas Disposal's speculation about potential future events as same are not facts. Johnson admits that the Hearing Officer recommended that Greenstar's protest of the disqualification be upheld, and that he followed the recommendation of the Hearing Officer. Johnson denies the remaining factual allegations in this paragraph.

23. Johnson need not admit or deny conclusions of law. Johnson denies the statements in the caption preceding paragraph 23. Johnson denies the first sentence. Johnson admits that immediately following the deadline for proposals, Texas Disposal asserted that it was

submitting an alternative to the Recycling RFP, which it described as a proposed amendment to Texas Disposal's long-term contract with the City. Johnson does not have sufficient information to admit or deny the third sentence of paragraph 23, or any factual allegations related to the terms of the "existing long-term contract" between Texas Disposal and the City. Johnson admits that Texas Disposal claimed that its proposed contract amendment was not intended as a response to the Recycling RFP; however, such statement is contrary to the substance of the proposal. Johnson denies that the "alleged alternative to the Recycling RFP" was not submitted with the intent of obtaining a contract that was the subject of the "Recycling RFP". Johnson has no knowledge of Texas Disposal's reasoning or motives, but admits the other factual allegations in the fifth sentence. Johnson admits that Texas Disposal's proposal did not include all the items to be included in the RFP. Johnson denies the remainder of the factual allegations in paragraph 23.

24. Johnson admits the first sentence and denies the second sentence. In regard to the third sentence, Johnson denies errors and Plaintiffs characterization of the degree of error. Otherwise, Johnson admits that the third sentence includes a partial quote from the February 23rd memorandum. Johnson denies the remainder of paragraph 24.

25. Johnson admits that Texas Disposal's proposal was made immediately after the deadline for the RFP and that Texas Disposal purported that the proposal was not a response to the Recycling RFP. Johnson denies the remaining factual allegations in paragraph 25 and denies Plaintiffs' characterization of the Smith Memorandum. Johnson is not required to admit conclusions of law.

26. Johnson denies that Plaintiffs have accurately characterized or interpreted the Smith Memorandum. Johnson admits that Plaintiff s have accurately quoted a portion of the

Memorandum. Aside from any factual allegations admitted in prior paragraphs of this Original Answer, Johnson denies the remaining factual allegations in the second and third sentences.

27. Johnson admits that Assistant City Manager Robert Goode authored a memorandum to the Mayor and other city council members, which is dated February 24, 2010. Johnson denies the remainder of the first sentence, except to acknowledge the existence of the Smith Memorandum. Johnson denies that the assertions set forth in the second sentence were erroneous.

28. Johnson does not have sufficient information to admit or deny the factual allegations in paragraph 28.

29. Johnson admits that Texas Disposal's submission of its purported "alternative to the Recycling RFP" required another hearing for consideration of whether Texas Disposal was disqualified because the notice of disqualification was no longer a moot issue. Johnson denies the remaining factual allegations in paragraph 29.

30. Johnson admits the first sentence. Johnson denies that the first hearing examiner "found no violation" and denies the implication, if any, of any impropriety in the use of two different hearing examiners/officers. Otherwise, Johnson admits the remainder of the second sentence.

31. Johnson need not admit or deny conclusions of law. Johnson admits that at the hearing the City argued that Texas Disposal was a respondent to the recycling RFP, but denies the remainder of the first sentence. Johnson does not have sufficient information to admit or deny the specific factual allegations in the second sentence, but generally admits that the City argued that Texas Disposal did not comply with the Recycling RFP requirements and was not playing by the same set of rules as the other vendors. Johnson denies the third and fourth

sentences. Johnson denies that Texas Disposal did not respond to the “Recycling RFP”. Johnson admits the RFP process is designed to place applicants on equal footing in regard to the RFP process. Johnson denies the remainder of the factual allegations in the fifth sentence. Johnson denies the factual allegations in the sixth and seventh sentences and need not respond to Texas Disposal’s legal conclusions. Johnson denies the eighth/last sentence of paragraph 31.

32. Johnson denies the caption preceding paragraph 32. Johnson need not admit or deny legal conclusions or the accuracy or inaccuracy of Texas Disposal’s interpretation of the hearing examiner’s decision (or statements in the decision). The decision is in writing and speaks for itself. Johnson admits the first sentence. Johnson admits the second sentence in regard to the Original Petition filed in state court, but denies the decision is attached to Plaintiffs’ federal court pleadings. Johnson denies that the ordinance addresses the Purchasing Officer’s authority. Johnson denies that the hearing examiner’s decision functions “only as” a recommendation to the Purchasing Officer. Johnson admits that the rules governing challenges to disqualifications under the Ordinance make the Purchasing Officer’s decision the final decision. Johnson denies the remainder of the allegations in the third sentence. Johnson denies that the Hearing Examiner’s decision included several errors and denies the remaining factual allegations set forth in the six bullet points, which are part of the fourth/last sentence of paragraph 24. Johnson need not admit or deny Plaintiff’s characterizations or opinions related to the decision, but denies that same are accurate.

33. Johnson admits that on June 4, 2010, he, as the City’s Purchasing Officer, accepted and concurred with the recommendation of the Hearing Officer and denied the protest of Texas Disposal. Johnson denies the remainder of the first sentence. Johnson denies the second sentence, but admits the statement is true in respect to Exhibit “F” attached to Plaintiffs’

Original Petition filed in state court. Johnson does not have sufficient knowledge to admit or deny the remaining factual allegations in paragraph 33.

34. Johnson need not admit or deny legal conclusions. In regard to the caption preceding paragraph 34, Johnson denies Texas Disposal's characterization of his testimony in a separate lawsuit as "the City's overly broad interpretation of the Anti-Lobbying Ordinance". Further, Johnson cannot admit or deny Texas' Disposal's motives for responding or not responding to other RFPs. Johnson admits he was deposed in a lawsuit between one of the Plaintiffs in this suit and Waste Management of Texas, Inc. Johnson does not have sufficient information to admit or deny the motives of Texas Disposal's alleged competitor or other factual allegations in the first sentence of paragraph 34. Johnson denies the second sentence. Johnson denies that the third and fourth sentences accurately set forth the definitions of "representations" and "response" in the Ordinance. Johnson denies the allegations in the fifth sentence accurately reflect his deposition testimony. Johnson denies the allegations in the sixth sentence. Johnson admits that he concluded Mr. Gregory's communication advanced the interests of Texas Disposal, but denies the remainder of the allegations in the seventh sentence. Johnson denies the factual allegations, if any, in the eighth/last sentence that follow the phrase, "discredited Greenstar's response". Johnson denies that the City is required to ignore facts that occur later in time than the date of one or more communications at issue. Johnson admits that Greenstar had not submitted an RFP response at the time of Mr. Gregory's December 8th communication. Despite the issue of timing, both Greenstar and one or more of the Plaintiffs submitted a response to the RFP.

35. Johnson denies the first sentence. Johnson denies that Plaintiffs have accurately and/or completely described his deposition testimony in regard to the subject matter addressed in

paragraph 35. Johnson admits that Plaintiff's accurately quoted one of the questions in the deposition, but Plaintiffs did not include the complete response or his complete responses on the subject matter addressed in this paragraph.

36. Johnson denies that there was any improper disqualification of Texas Disposal. Johnson denies the factual allegations in paragraph 36 between the phrases, "In light of" and "Texas Disposal has chosen not to respond". Johnson cannot (and is not required to) admit or deny Texas Disposal's motives, thought processes or reasoning behind its decision making.

37. Johnson does not have sufficient information to admit or deny the factual allegations in paragraph 37, and thus, denies Plaintiffs' allegations at this point in time. Further, Johnson has no knowledge of Texas Disposal's motives, reasoning or predictions of future events.

38. Johnson does not have sufficient knowledge to admit or deny the first or second sentences. Johnson does not have sufficient knowledge to admit or deny Texas Disposal's motives, predictions or reasoning, and therefore, need not admit or deny the second or third sentences. Johnson admits the City requires certification of non-suspension or debarment in circumstances involving eligibility for receipt of federal funds, but does not have sufficient information to admit or deny whether this policy or practice applies to amendment or modification of all short-term or long-term contracts. Johnson also denies that the certification requirement was recently adopted by the City.

39. Johnson does not have sufficient information to admit or deny the first sentence. Johnson denies any overly broad interpretation of the referenced ordinance by City staff. Johnson denies Plaintiffs' allegations that the City's interpretations chill the speech of Texas Disposal or others on important public issues. Johnson denies that the referenced ordinance has

the potential of chilling nearly all speech to City officials or employees on solid waste issues. Johnson need not admit or deny Texas Disposal's motives, reasoning or predictions of future events. Johnson denies the remaining factual allegations, if any, in paragraph 39.

40. Johnson denies the first sentence. Johnson need not admit or deny the language of the referenced ordinance, as the ordinance language speaks for itself. Johnson need not admit or deny Texas Disposal's motives, reasoning or predictions of future events. Johnson denies the the third/last sentence.

CAUSES OF ACTION

Count One

41. Johnson need not respond as there are no specific factual allegations.

42. Johnson need not admit or deny Texas Disposal's request for relief or legal conclusions, but denies Texas Disposal is entitled to the relief requested. More specifically, Johnson denies that Gregory's December 8, 2009 communication did not violate the referenced ordinance.

43. Johnson denies paragraph 43.

44. Johnson need not admit or deny Texas Disposal's request for relief or legal conclusions, but denies Texas Disposal is entitled to the relief requested. Johnson denies that TDS/Texas Disposal would have an absolute right to a declaratory judgment under Texas law.

Count Two

45. Johnson need not respond as there are no specific factual allegations.

46. Johnson need not admit or deny Texas Disposal's request for relief or legal conclusions, but denies Texas Disposal is entitled to the relief requested. More specifically,

Johnson denies that Texas Disposal's "proposal to amend the existing contract with the City was not a response to the Recycling RFP" as alleged.

47. Johnson denies paragraph 47.

48. Johnson need not admit or deny Texas Disposal's request for relief or legal conclusions, but denies Texas Disposal is entitled to the relief requested. Johnson denies that TDS/Texas Disposal would have an absolute right to a declaratory judgment under Texas law.

Count Three

49. Johnson need not respond as there are no specific factual allegations.

50. Johnson need not admit or deny Texas Disposal's request for relief or legal conclusions, but denies Texas Disposal is entitled to the relief requested. More specifically, Johnson denies that Texas Disposal is entitled to either of the proposed declarations set forth in the last sentence of paragraph 50.

51. Johnson need not admit or deny legal conclusions, but Johnson denies the allegations in paragraph 51.

52. Johnson denies.

53. Johnson need not admit or deny Texas Disposal's request for relief or legal conclusions, but denies Texas Disposal is entitled to the relief requested. Johnson denies that TDS/Texas Disposal would have an absolute right to a declaratory judgment under Texas law.

54. Johnson agrees that TDS/Texas Disposal is required to notify the Texas Attorney General with notice of this suit, but does not have sufficient information to admit or deny the factual allegations in paragraph 54.

Count Four

55. Johnson need not respond as there are no specific factual allegations.

56. Johnson need not admit or deny conclusions of law. Johnson denies that the referenced ordinance (which has been superseded and/or amended) is unconstitutional as applied to Defendants and further denies that the current anti-lobbying ordinance is unconstitutional as applied to Defendants. Johnson further denies any violation of TDS/Texas Disposal's free speech or due process rights.

57. Johnson denies TDS/Texas Disposal is entitled to attorney fees and further denies that it is entitled to any of the relief sought in its prayer.

II. AFFIRMATIVE DEFENSES

Pleading further, Johnson asserts the following affirmative defenses:

58. The City is a home-rule municipality. Accordingly, the City, and Johnson, in his official capacity, are entitled to sovereign or governmental immunity from suit and from liability with respect to Plaintiffs' claims against them.

59. Johnson asserts that Plaintiffs have failed to mitigate any alleged damages by failing to respond to City of Austin RFP's pursuant to the applicable RFP instructions and applicable ordinances and rules that apply to solicitations for business with the City of Austin.

60. Johnson asserts the affirmative defense of estoppel. In particular, Plaintiffs have claimed that they were not a "respondent" to the relevant City RFP. However, through their intentional actions, Plaintiffs have behaved as a "respondent."

61. Johnson asserts the affirmative defense of waiver. In particular, Plaintiffs claim they were not a "respondent" to the relevant City RFP. However, through their intentional actions, Plaintiffs have behaved as a "respondent" and relinquished the right to claim that they were not a "respondent."

III. RELIEF REQUESTED

62. Defendant Johnson requests that all relief requested by Plaintiffs be denied, and that Johnson recover his costs and reasonable attorneys fees and any additional relief to which HE is entitled under law or in equity. In the event the Court determines that Texas Disposal is entitled to any relief requested, Johnson requests attorney fees and/or an offset of attorney fees related to any frivolous, unsuccessful and/or unreasonable arguments or conduct by Plaintiffs in pursuing their claims.

RESPECTFULLY SUBMITTED,

KAREN M. KENNARD, CITY ATTORNEY

/s/ Lynn E. Carter

LYNN E. CARTER
Assistant City Attorney
State Bar No. 03925990
P.O. Box 1546
Austin, Texas 78767-1546
(512) 974-2171
(512) 974-1311 [FAX]
lynn.carter@austintexas.gov

ATTORNEYS FOR DEFENDANTS,
CITY OF AUSTIN AND BYRON JOHNSON

