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, and BYRON JOHNSON, in his official capacity, Defendants.	§	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE LEE YEAKEL, JUDGE OF SAID COURT:

Come now Plaintiffs Texas Disposal Systems, Inc. and Texas Disposal Systems Landfill, Inc. (collectively "Texas Disposal" or "Plaintiffs") and file their Response to the Motion for Summary Judgment of Defendants City of Austin, Texas and Byron Johnson, in his official capacity (collectively, "City") (Doc. 35, "City MSJ"), and would show as follows:

INTRODUCTION AND SUMMARY

The parties agree that this case presents no genuine issue of material fact and is appropriate for decision on summary judgment. However, the City's summary judgment motion ignores Texas Disposal's primary claim and misapprehends its constitutional arguments.

Texas Disposal's first two pleaded causes of action are for declaratory judgment that it did not violate the City's anti-lobbying ordinance (the "Ordinance") and that it was not a "respondent" for purposes of the Ordinance. Doc. 7 (First Amended Complaint) at 18-19. The City disqualified Texas Disposal, claiming TDS was a "potential respondent"; the Ordinance

does not allow "potential respondents" to be disqualified unless they become *actual* respondents. The City has not specifically moved for summary judgment on those claims; Texas Disposal has. Summary judgment for TDS on these claims renders the remainder of the case moot.

The City's summary judgment motion argues that the Ordinance is not facially unconstitutional, either as overly broad or as a content-based speech restriction. City MSJ at 13-15. But Texas Disposal has not raised a facial challenge to the Ordinance's constitutionality. Rather, the constitutional challenge is an as-applied challenge – a claim that the Ordinance is unconstitutional if it is interpreted to prohibit the speech of Texas Disposal here at issue, Doc. 7 at 19-21 – and should be reached only if TDS' declaratory judgment claims are rejected. If this as-applied challenge is reached, the application of the Ordinance to Texas Disposal's speech is unconstitutional because it is a content- and viewpoint-based speech restriction, and because it restricts more speech than necessary to meet any legitimate governmental interest.

The City maintains that Texas Disposal's procedural due process rights were not violated. The due process here at issue is whether the Ordinance gives the constitutionally required notice as to what speech it prohibits, not whether Texas Disposal received adequate procedural due process to protest its wrongful disqualification.

The City argues that this case is not ripe for decision because Texas Disposal allegedly complains about future contingent acts that could result in debarment. This is incorrect. Texas Disposal challenges actual adverse action taken against it by the City, pursuant to the City staff's interpretation of the Ordinance: a disqualification that counts against TDS for purposes of debarment from doing business with the City by prohibiting new contracts with TDS (and perhaps cancelling all current contracts with TDS).

The City moves for summary judgment on the claims against Byron Johnson. Texas Disposal named Johnson as a defendant, in his official capacity as the City's Purchasing Officer only, because some recent Texas precedent indicates that a city official is a proper (and perhaps necessary) defendant when a party challenges a city's act as unlawful. Johnson's ultimate decision to disqualify Texas Disposal was made without legal authority, because Texas Disposal did not violate the Ordinance.

ARGUMENT AND AUTHORITIES

I. The City's Summary Judgment Motion Does Not Address Texas Disposal's Claim that it Did Not Violate the Terms of the Anti-Lobbying Ordinance.

The City's motion argues that (1) Texas Disposal's claims are not ripe, City MSJ at 11-12; (2) no First Amendment violation has been established, *id.* at 13-15; (3) Texas Disposal's right to procedural due process was not violated, *id.* at 15-16; and (4) that Texas Disposal does not have a viable *ultra vires* claim against Byron Johnson, *id.* at 16-17. The City makes no substantive argument with regard to Texas Disposal's primary claim: that it did not violate the Ordinance because its speech was not a prohibited "representation" and because it was not a "respondent" under the Ordinance.

The City's motion is entirely moot if this Court determines that Texas Disposal did not violate the Ordinance, as properly interpreted. *See* TDS MSJ (Doc. 34) at 20-21. As Texas Disposal has argued, such would be the preferable and correct disposition of this case. *See id.*

II. The City Took Actual Adverse Action Against Texas Disposal; Thus, this Case is Ripe for Decision.

Texas Disposal is not complaining that the City might, in the future, take adverse action against it. The City has (wrongfully) assessed TDS with a violation of the Ordinance, which remains in place. City MSJ at 7. It is this actual action by the City – the disqualification, for

which Texas Disposal has exhausted its City-provided administrative protest remedies – that is the subject of this lawsuit. Texas Disposal now has a wrongful disqualification on its record (not to mention the negative impact of the wrongful disqualification – which was highly publicized – has already had on Texas Disposal's reputation).

It is unclear when the City believes a suit over alleged Ordinance violations would be ripe. The City hints that there is no ripe controversy until an actual debarment has been assessed. City MSJ at 11, 13. But Texas Disposal is not challenging a potential future debarment; it is challenging the actual past assessment of a disqualification. The City makes no coherent argument as to why TDS should be required to wait until it is debarred to seek judicial relief as to this actual disqualification.

This case is wholly unlike the ripeness cases relied upon by the City. In each of those cases, the dispute was held unripe because there would be a controversy only if some future contingent event occurred. *Hometown Co-Operative Apartments v. City of Hometown*, 515 F.Supp. 502 (N.D. Ill. 1981) (controversy was not ripe because it would only exist if the defendant City chose to act in violation of the Fourth Amendment in the future); *New Orleans Public Service, Inc. v. Council of the City of New Orleans*, 833 F.2d 583 (5th Cir. 1987) (controversy was not ripe because it would only exist if the defendant City chose to act in violation of a federal regulatory order in the future).[1] In contrast, here there is a present controversy: whether Texas Disposal violated the Ordinance, and whether application of the Ordinance to Texas Disposal's speech violates the Constitution. No future events are necessary for a dispute to exist.

[1] In another case cited by the City, *Valley v. Rapides Parish School Board*, 145 F.3d 329 (5th Cir. 1998), the panel's initial finding of lack of ripeness was vacated upon a grant of *en banc* rehearing, 169 F.3d 216 (1999), and the case was ultimately remanded to the district court for further proceedings, 173 F.3d 944 (5th Cir. 1999).

Similarly, Texas Disposal plainly meets the Article III standing requirements as set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Texas Disposal has suffered an actual injury – the assessment of disqualification – which is not conjectural or hypothetical; the injury is directly traceable to the City's conduct; and a favorable decision in this case will redress the injury by removing the disqualification from Texas Disposal's record. (It is not entirely clear why the City discusses standing, City MSJ at 12, which is a different issue than ripeness; in any event, TDS easily meets the standing requirement, and the actual controversy is ripe for decision.)

The City assessed a disqualification and upheld that disqualification through an administrative proceeding, and thus the matter is ripe for decision. The City's contrary argument is simply without any merit.

III. Texas Disposal Does Not Argue that the Anti-Lobbying Ordinance is Facially Unconstitutional; its Alternative Argument is an As-Applied Challenge Due to the City's Overly Broad and Vague Interpretation of the Ordinance in This Case.

A. The City's extensive argument about Texas Disposal's ability to speak at public meetings is irrelevant.

The City spends a great deal of its motion showing that Texas Disposal has taken advantage of opportunities to speak at public meetings, which is allowable under the Ordinance even during no-contact periods. *See, e.g.*, City MSJ at 7-10.[2] Apparently this is intended as support for the City's argument that the Ordinance leaves open sufficient alternative channels of communication to satisfy First Amendment scrutiny. However, the City's examples are not relevant to Texas Disposal's actual argument: that in the particular instance here at issue – Bob

[2] Texas Disposal does not agree with all the City's characterizations regarding instances in which TDS has made comments at public meetings regarding pending RFPs, but will not lengthen this Response by taking issue with any of these particular erroneous characterizations, as they are ultimately not germane to the issues currently before the Court in the parties' summary judgment motions.

Gregory's December 8, 2009 email – TDS did not in fact violate the Ordinance, and if the Ordinance is interpreted to prohibit the email, the Ordinance is unconstitutional *as applied to that specific communication*. The specific communication did not address the City's request for proposal (RFP) to which the Ordinance applied.

Nor does Texas Disposal maintain that it is "being silenced by being forced to speak in a public forum." City MSJ at 14. Texas Disposal has stated many times that it does not contest the validity of the Ordinance as written and properly applied, which the City seems to acknowledge. City MSJ at 15. When Texas Disposal is in fact a respondent to an RFP or other City solicitation, and when it makes communications about that RFP, it does not object to limiting its speech pursuant to the Ordinance's terms. At issue here is the application of the Ordinance to Texas Disposal when it was not an RFP respondent, and to speech of TDS that was not related to an RFP and that did not discredit any respondent's RFP response.

Thus, the City's arguments that the Ordinance is not unconstitutional because it is facially content-neutral, City MSJ at 13-14, and facially not overbroad, *id.* at 15, simply bear no relevance to the claims TDS brings.

B. The Ordinance, if applied to restrict Texas Disposal's speech here at issue, is unconstitutionally content- and viewpoint-based and overly broad.

Texas Disposal submits that this case is best decided on non-constitutional grounds: that TDS did not violate the terms of the Ordinance. *See* TDS MSJ (Doc. 34) at 14-18 (arguing that there was no violation of the Ordinance); *id.* at 20-21 (arguing that decision on non-constitutional grounds is preferred when possible). *See also Asgeirsson v. Abbott*, 696 F.3d 454, 466 n.13 (5th Cir. 2012), *cert. denied*, 133 S.Ct. 1634 (2013) (advocating that statutes should be construed narrowly when possible, and recognizing that "speech burdened by broader interpretations can be

protected by as-applied challenges" under the First Amendment, such as the one brought here by TDS). If the Court accepts that Bob Gregory's December 8, 2009 email and attachments did in fact violate the Ordinance, then the Ordinance is unconstitutional as applied to that communication. (Texas Disposal argued this point affirmatively in its summary judgment motion at pages 20-24; here, TDS will focus on responding to the points raised in the City's motion.)

1. This case is fundamentally different than *Asgeirsson v. Abbott*. The City heavily relies on the Fifth Circuit's recent decision that the restrictions on private governmental deliberation in the Texas Open Meetings Act do not violate the First Amendment. *Asgeirsson v. Abbott*, *supra*. Without a doubt, *Asgeirsson* was correctly decided. But a law (such as TOMA) requiring a quorum of a public body to deliberate public issues in public meetings, not in private, is fundamentally different from a law (such as the Ordinance) prohibiting citizens from having certain communications with elected or appointed government officials. *Asgeirsson* recognized that there is no fundamental constitutional right for the government to secretly conduct public business. In contrast, there is an established right for citizens to petition their government; the right is enshrined in the First Amendment. *See, e.g.*, *McDonald v. Smith*, 472 U.S. 479 (1985).

The City attempts to draw parallels between TOMA and the Ordinance by arguing that both are intended to promote transparency in government. *See, e.g.*, City MSJ at 14. But the Ordinance does not allow only "transparent" statements made in public meetings; it also allows communications that are not "transparent." Respondents are allowed to communicate as much as they wish directly with the "authorized contact person" during the no-contact period. The contact person is not required to make those communications public, and is only required to pass them on to others in certain defined circumstances. Ordinance § 2-7-104(A)-(C) (JEX 1). These are

communications the City would call "private," *i.e.*, those that occur outside open public meetings. The Ordinance (unlike TOMA) does not require that all speech be made in public meetings, or not at all.

2. If applied to Texas Disposal's speech, the Ordinance is an unconstitutional content- and viewpoint-based speech restriction. The City argues that the Ordinance is not aimed at suppressing speech, but rather is intended to prevent the alleged "secondary effects" of citizens communicating directly with public officials: lack of transparency, encouragement of fraud and corruption, and mistrust in government. City MSJ at 14.

Here, Texas Disposal has been sanctioned for communicating with appointed City representatives about a proposal to amend and extend an existing contract that was not the subject of an RFP. Further, the party who had that existing contract with the City – Greenstar – was allowed to communicate *in favor of* the proposed extension to City representatives other than the authorized contact person, whereas TDS was sanctioned for communicating *against* the proposed extension. This application of the Ordinance cannot withstand constitutional scrutiny.[3]

The City's interpretation of the Ordinance prohibits speech that would not cause harm from the alleged "secondary effects" of lobbying. Texas Disposal's speech simply did not involve promoting its RFP response (there never was such a response to promote) or discrediting Greenstar's RFP response (none even existed at the time of the communication). It was speech on a separately existing contract that was a matter of public concern, as acknowledged by the City. *See* TDS MSJ at 2. And, as discussed above, the Ordinance allows certain

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[3] Further, as discussed at length in Texas Disposal's summary judgment motion, the City's Public Works Department submitted a response to the MRF RFP (unlike TDS) and executed an anti-lobbying affidavit, but City staff working on the RFP response were allowed to communicate with City representatives other than the RFP's designated contact person – communications that would constitute violations of the Ordinance. TDS MSJ at 9-10.

communications outside public meetings; allowing such communications does nothing to prevent the alleged secondary effects.

Rather, the Ordinance – if applied to Texas Disposal's speech – simply shields City representatives from receiving speech that the City has decided those representatives should not be required to hear. This is a speech restriction based on the message of the speech; such restrictions are content-based and unconstitutional if they do not meet strict scrutiny. *See, e.g.*, *Boos v. Berry*, 485 U.S. 312 (1988). The City does not argue that the Ordinance as applied satisfies strict scrutiny.

Additionally, because the Ordinance (under the City's interpretation, as applied here) allows speech in favor of the amendment of an existing contract by the incumbent contractor, but disallows speech by a third party advocating against such an amendment, the speech restriction is viewpoint-based and presumptively unconstitutional. *See, e.g.*, *Morgan v. Swanson*, 659 F.3d 359, 402 (5th Cir. 2011); TDS MSJ at 22-23.

3. If applied to Texas Disposal's speech, the Ordinance is unconstitutionally overbroad. A statute or ordinance is unconstitutionally overbroad if it "reaches a substantial amount of constitutionally protected conduct." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982). If a restriction bans speech that will not bring about the alleged "secondary effects" that a government seeks to prevent through the restriction, that restriction may be overly broad and unconstitutional when "judged in relation to the statute's plainly legitimate sweep." *Asgeirsson*, 696 F.3d at 465.

Here, the City's interpretation and application of the Ordinance would restrict all speech critical of any potential RFP respondent – even if the speech is from a non-respondent, and the subject of the criticism is a pre-existing contract whose proposed extension is a matter of

legitimate public interest and concern. The speech restriction, as interpreted by City staff, would appear even to reach speech on issues of general public policy by an RFP respondent, if the policy touched on some of the same issues as the pending RFP. Prohibiting such speech does not prevent the alleged secondary effects cited by the City. Its interpretation of the Ordinance sweeps too broadly and violates the First Amendment.

4. If applied to Texas Disposal's speech, the Ordinance violates due process. The City argues that it provided Texas Disposal with procedural due process by providing opportunity to protest its disqualification. City MSJ at 16. Texas Disposal does not argue otherwise, and never has.

Rather, the due process issue in this case is that the Ordinance fails to provide the constitutionally required "fair notice" of what speech it does and does not prohibit, if the City's interpretation of the Ordinance and its application to TDS are accepted. *See, e.g.*, S*ervice Employees Int'l Union v. City of Houston*, 595 F.3d 588, 596-97 (5th Cir. 2010); TDS MSJ at 20-21. The Ordinance's terms apply only to RFP respondents, and to speech related to an RFP response that either advances the interests of a respondent or discredits the response of another respondent. Gregory's email was crafted to comply with those terms. But if the City's interpretation is accepted, the Ordinance applies to communications *in addition to* those specified in the Ordinance – for example, Texas Disposal's speech that was critical of the proposed extension of the pre-existing Greenstar contract, which was its own separate agenda item at both the SWAC and the City Council. This is the nature of Texas Disposal's due process claim, not any alleged insufficiency of procedural due process.[4]

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[4] The City's assertion that Texas Disposal was "rewarded for [its] violation" of the Ordinance because it ultimately entered into a contract to process some of the City's single-stream recyclables, City MSJ at 16, is both unsourced and wrong. TDS was *penalized* for engaging in speech that did not violate the Ordinance.

IV. Mr. Johnson's Decision to Uphold the Disqualification of Texas Disposal Was Without Legal Authority, Because Texas Disposal Did Not Violate the Ordinance.

Texas Disposal has included City Purchasing Officer Byron Johnson as a defendant in this lawsuit, in his official capacity only. Some Texas authority suggests that a party alleging misapplication of the law by a governmental entity must sue the public official charged with applying that law. *See, e.g.*, *City of El Paso v. Heinrich*, 284 S.W.3d 366 (Tex. 2009). Texas Disposal 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; and declaratory judgment and Section 1983 claims that the application of the Ordinance to Texas Disposal's speech would violate the First Amendment.

The City refers to its arguments on the First Amendment issues in the section of its motion dealing with the claims against Johnson. City MSJ at 16. It does not, however, argue that Gregory's communication met all the requirements of the Ordinance to properly be considered a prohibited "representation" under the Ordinance. Rather, the City merely argues that Johnson had the "discretion" to accept the recommendation of City-hired hearing officer Stephen Webb that Texas Disposal violated the Ordinance, and the conclusion of the Law Department that Texas Disposal was a "respondent" to the MRF RFP. *Id.*

Texas Disposal alleges that the law was incorrectly applied – that there was no violation of the Ordinance, and that Johnson's conclusion otherwise was contrary to legal authority (*i.e.* the Ordinance). *See, e.g.*, *City of El Paso v. Heinrich*, 284 S.W.3d at 372. A public official charged with administering the law does not have discretion to incorrectly administer or apply that law. *Id.* at 374 ("the basis for the *ultra vires* rule is that a government official is not following the law"). The City makes no argument otherwise. To the extent necessary, Texas

Disposal incorporates the argument and authorities at pages 14-20 of its summary judgment motion, demonstrating that it did not violate the terms of the Ordinance, as properly interpreted and applied.

CONCLUSION AND PRAYER

Plaintiffs pray that this Court deny Defendants' Motion for Summary Judgment, and grant Plaintiffs all further relief to which they may show themselves entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was served *via* CM/ECF and *via* email on the 31st day of May, 2013, to counsel of record for Defendants:

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