From:	Bob Gregory
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Cc:	"mwhellan@gdhm.com"; "djbutts@sbcglobal.net"; "Mark Nathan"; Gary Newton; Ryan Hobbs; Adam Gregory
Bcc:	Bob Gregory; Maggie Nienow
Subject:	Ethics Review Commission Agenda Item 3b – CRITICAL review of proposed revisions to Austin's Anti-Lobbying Ordinance
Date:	Friday, October 6, 2017 9:33:00 PM
Attachments:	J Hemphill Memo on ALO and First Amendment-.pdf 9-28-17 TDS Recommended Revisions to Proposed ALO.pdf 10-6-17 TDS PROPOSED CHANGES TO STAFF REVISED ALO.pdf 10-6-17 Staff ALO vs WG Recommendations.pdf

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Chair Einhorn, Vice Chair Harding and members of the Ethics Review Commission:

Thank you very much for your service on the Ethics Review Commission (ERC). As you may know, the Austin City Council voted on 9/28/17 to request that City staff-proposed revisions to the City of Austin's Anti-Lobbying Ordinance (ALO) be reviewed by the ERC before further review by Council. The ALO review appears as Item 3b on your 10/11/17 meeting agenda.

The recommendation to revise the ALO originated with a City Council committee – the Waste Management Policy Working Group – created by Council on 3/23/17, to review the City's waste, recycling and organics policies and contracting practices after all staff-proposed waste contracts presented to City Council in 2016 were rejected. Revising the ALO was one of eight other Working Group recommendations to advance the City's "Zero Waste" goals developed after a series of meetings with waste services providers and community stakeholders. (Please note that, per Council, the Zero Waste Advisory Commission will also review the proposed ALO revisions, as well as the other Working Group recommendations, also on 10/11/17.)

Texas Disposal Systems (TDS), the City of Austin's most relied-upon waste services provider over the past 20 years and a Working Group stakeholder, has actively participated in the recent Council and Working Group dialogue related to City waste policies and contracting. In doing so, we have consistently advocated for, among other things, revising the broad, vague and severely punitive ALO, including adding citizen and Council oversight to ensure fairness and transparency.

Unfortunately, City staff's proposed revision to the ALO fails to satisfy TDS' driving concern that the ordinance's ambiguous, open-ended language – as well as the still-missing proposed administrative rules requested by the Working Group – will continue to allow City staff a range of interpretation that includes infringement on free speech rights granted by the U.S. Constitution and the ability to inappropriately disqualify contractors, or to deem as acceptable violations committed by preferred contractors.

To be clear, TDS' position in favor of revising the ALO stems first and foremost from the unique conflict inherent in City staff's dual role as waste services industry regulator and industry competitor – a conflict specifically acknowledged in City staff's 2/15/17 "Policy Considerations" memorandum to City Council, which notes that the City's current practice of providing waste services to special events "competes with private haulers." (City staff regularly utilizes contracted "toll haulers" to provide a

full range of waste-related services – including trash, recycling, composting, and portable toilets – to Austin special events, often for free, in direct competition with non-contracted private waste services providers, including TDS, and in direct conflict with city code prohibiting commercial competition.)

In addition, in 2010, City staff pursued a plan to compete directly with City-licensed private waste providers for the provision of recycling processing services, spending over $100,000 to secretly prepare and submit an internal bid in response to a City of Austin solicitation for development of a Materials Recovery Facility (MRF), while at the same time **utilizing the ALO to attempt to disqualify TDS from responding to the same solicitation** – a disqualification that was later rebuked as "improper" and "unsupported" by U.S. District Court Judge Lee Yeakel and ordered reversed. (Demonstrating the absurd range of interpretations allowed by the current ordinance and capitalized on by City staff in pursuit of competitive objectives in the waste management marketplace, Howard Lazarus, then Director of Public Works, in submitting the City's internal bid to the City, signed the required ALO certification indicating that City staff had not communicated with and would not communicate with City staff or City officials during the RFP response review, scoring, and presentation to boards and commissions and to City Council; something not possible to accomplish. Staff even scored their own RFP response as third, behind those of Republic Waste and Waste Management, Inc.)

Even now, given the broad authority that Austin and municipalities across the state and country have to regulate and control the provision and pricing of many waste services (note, for example, the City of Los Angeles' controversial ongoing takeover of much of L.A.'s commercial waste services), the prospect of competitive conflict between City staff and licensed local waste services providers like TDS is and will remain ongoing, raising concerns about the potential for staff abuse of the ALO, which is essentially a 'gag order' against all competitors – again, other than City staff – under the penalty of debarment, with no independent oversight or ability to appeal.

Indeed, TDS has grown increasingly alarmed since the 2008 arrival in Austin of Assistant City Manager Robert Goode to witness City staff's misuse of the "no-contact" provisions in the current ALO to effectively silence criticism, quash questions and withhold information from Council about waste contracts and policies. As per the document TDS presented to the Waste Management Policy Working Group this summer, over a span of nearly 8 years beginning in Nov. 2009, there have been only two brief periods – totaling just 56 days – where there were no ALO "no-contact" restrictions in place for solid waste, recycling or organics management solicitations. In other words, if TDS had responded to every waste-related solicitation over the past 8 years, we would have been prohibited from speaking with City officials about most waste-related issues for nearly the full length of that time – not only a plainly overbroad infringement on free speech, but also an absurdly impractical restriction given TDS' numerous City waste contracts and TDS services capable of responding to all of these solicitations.

Overall, TDS' years of experience with City staff's oversight-free interpretation and enforcement of the ALO has led us to the inescapable conclusion that the ordinance's vague and broad provisions and penalties have been abused – especially as it relates to solid waste, recycling and organics management solicitations – to achieve staff's competitive objectives and punish those

who raise concerns with the City Council or other concerned stakeholders.

For these and other reasons – including the existential risk to our business associated with a possible staff-imposed ALO debarment and resulting termination of our City contracts, among them a 30-year contract for waste disposal and yard trimmings processing, and a 20-year contract for recyclables processing and marketing – **TDS determined in 2015 that we could no longer respond to City waste solicitations under the current ALO as interpreted and administered by City staff.**

Because TDS is unique among private local waste services providers in terms of offering a full range of processing and disposal services and state-permitted facilities needed to help the City and Austin community achieve "Zero Waste" goals, TDS' difficult decision to forgo responding to City solicitations understandably created concern among City officials and community stakeholders, which in turn helped result in the creation of the Waste Management Policy Working Group.

Accordingly, as noted, TDS actively participated in the Working Group process, advancing a range of policy proposals across each of the committee's review areas, including the following proposal regarding revision of the ALO:

The City should exempt waste contracts from the ALO. Alternatively, the ALO should be revised to go into effect no sooner than 14 days after each solicitation is issued and end no later than 14 days before each proposed contract is posted for consideration by either a City board or commission or the City Council; to eliminate debarment; to apply only to communications specific to solicitation responses; and to allow appeal to both the Ethics Review Commission and the City Council as well as state or federal district court. If debarment is not eliminated, it should be made to apply only to future solicitations and contracts.

While the final Working Group recommendation ultimately indicated support for many of these proposed revisions, City staff's resulting proposed revised ALO unfortunately not only failed to include key reforms but also left in place – and in some places inserted anew – overly broad and ambiguous ordinance language that TDS believes will continue to empower staff to interpret the ALO with the same level of motivated subjectivity as before, and still with no independent oversight.

TDS is also troubled by the extent to which the "Comparison Matrix" developed by City staff as an analytical tool does not accurately reflect the substance of the proposed revised ALO but in fact offers mostly favorable examples of how staff could interpret the proposed language. Once again, City staff has demonstrated a disposition to interpret the ALO in whatever way advances staff's interests.

Further, it is clear that City staff's proposed revised ALO ordinance also raises a range of serious First Amendment concerns. As you know, any restriction on the First Amendment's free speech clause must be narrowly drawn to avoid limiting speech beyond what is necessary to achieve the intent of the restriction. Restrictions must also include "fair notice" (i.e. clear and precise terms defining the restricted speech) and provide adequate alternative forms of communication.

Given the unfortunate failure of City staff's proposed ALO draft to track the recommendations of the

Working Group and consider First Amendment concerns, **TDS views the 10/11/17 ERC and ZWAC review and vote on recommendations to Council as a CRITICAL step** in ensuring that the ALO is finally reformed in a way that will not only allow TDS to resume responding to City solicitations but also establish a consistent, fair and transparent contracting process for all City vendors that can withstand possible legal challenges based on free speech restrictions.

Accordingly, we have attached and linked several important documents for your review, including a legal analysis of City staff's proposed revised ALO vis-à-vis First Amendment issues; a TDS redlined revision to staff's proposed revised ALO reflecting both our First Amendment concerns and our policy recommendations, including comments (in blue) explaining each proposed ordinance change; a bullet point synopsis of each proposed ordinance change; and a notation of key differences between the Working Group recommendations and staff's resulting proposal.

Please note that TDS' primary position has been and remains that the unique conflict inherent in City staff's dual role as waste services industry regulator and industry competitor merits the full ongoing exemption of all waste services contracts from the requirements of the ALO (Council voted on 4/6/17 to temporarily waive the ALO for all waste solicitations, which remains in effect until further Council action). Note also that Council has previously voted to permanently exempt other groups of bidders from the ALO – exemptions staff proposes to maintain in the proposed revised ordinance. As an alternative to a full ongoing exemption, TDS will continue to advocate for changes as reflected in the attached documents, including proposed changes specific to solid waste, recycling and organics management.

Finally, while the attached documents reflect numerous areas of concern, there are at least three unresolved issues of particular importance:

- **Oversight – Under both the current ALO and the revised proposed ALO, City staff would continue to serve as judge, jury, prosecutor and appeals court for each alleged violation. As per the recommendation of the Waste Management Policy Working Group, TDS urges ERC to recommend that all staff-determined ALO disqualifications be subject to an appeal process including a protest hearing before the Ethics Review Commission and a final appeal and hearing before the City Council. This is essential for ensuring due process.**

- **Administrative Rules – While the Waste Management Policy Working Group specifically recommended that all administrative rules associated with the ALO be approved by the City Council before taking effect, City staff's proposed revised ALO instead assigned rule-making authority to staff rather than Council. TDS urges ERC to recommend honoring the Working Group recommendation and re-establishing that Council should approve the ALO's administrative rules. TDS further urges the ERC to recommend that all proposed administrative rules for the ALO be considered by the ERC for a recommendation of approval, rejection or revision to the City Council. (If proposed ALO revisions are specific to solid waste, recycling and organics management solicitations, proposed administrative rules should also be considered by ZWAC for a recommendation to the City Council.)**

- **Recusals – City staff's proposed revised ALO introduces compulsory recusals of City officials**

who receive "a representation" – a concept never discussed by the Waste Management Policy Working Group. This addition to the ALO not only establishes an overbroad restriction but is also in conflict with existing ethics rules charging City officials, rather than staff, with determining when recusal is required. TDS urges ERC to recommend elimination of this recusals provision.

Once again, TDS believes that the ERC and ZWAC recommendations are CRITICAL to strengthening and sustaining the ALO – i.e. leaving no room for subjectivity or abuse moving forward – and as such we urge you to please take the time necessary to fully and carefully review and deliberate City staff's proposed ordinance rather than being rushed unnecessarily to develop final recommendations. **Importantly, this is the first proposed revision to the ALO since Judge Yeakel's 2014 ruling that City staff's interpretation of the ordinance was erroneous.** There is no rush to act, and, without revision, a violation of First Amendment challenge risk exists, considering a likely continuation of staff's insistence on controlling the information made available to boards, commissions and the Council related to waste services solicitations over the past nine years.

Thank you once again for your service on the ERC, and please do not hesitate to contact me or Michael Whellan directly with questions or concerns.

Sincerely,
Bob Gregory
President & CEO
Texas Disposal Systems
512-619-9127

TDS Recommended Revisions Redlined and Comments in Blue

RECOMMENDED REVISIONS, 9-28-2017

ARTICLE 6. – ANTI-LOBBYING AND PROCUREMENT.

§ 2-7-101 – FINDINGS; PURPOSE; APPLICABILITY.

(A) The council finds that persons who enter a competitive process for a city contract voluntarily agree to abide by the terms of the competitive process, including the provisions of this article.

(B) The council finds that it is in the City's interest:

(1) to provide the most fair, equitable, and competitive process possible for selection among potential vendors in order to acquire the best and most competitive goods and services; and

(2) to further compliance with State law procurement requirements.

(C) The council intends that:

(1) each response is considered on the same basis as all others; and

(2) respondents have equal access to information regarding a solicitation, and the same opportunity to present information regarding the solicitation for consideration by the City.

(D) This article applies to all solicitations except:

(1) City social service funding;

(2) City cultural arts funding;

(3) federal, state or City block grant funding;

(4) the sale or rental of real property;

(5) interlocal contracts or agreements; and

(6) solicitations specifically exempted from this article by council.

(E) Absent an affirmative determination by council, the purchasing officer has the discretion to apply this article to any other competitive process.

(F) Section 1-1-99 does not apply to this article.

Source: Ord. 20071206-045; Ord. 2011111052.

§ 2-7-102 – DEFINITIONS.

In this article, for all purposes whenever used:

TDS Comment:
This revision makes it clear that defined terms will be used for interpretation of the Ordinance.

(1) AGENT means a person authorized by a respondent to act for or in place of respondent in order to make a representation, including but not limited to:

(a) a person acting at the explicit request of respondent in exchange for any type of consideration;

~~(b) a person acting with the knowledge and consent of a respondent;~~

~~(c) a person acting with any arrangement, coordination, or direction between the person and the respondent;~~

~~(d)~~ (b) a current full-time or part-time employee, owner, director, officer, member, or manager of a respondent;

~~(e)~~ (c) a person related within the first degree of consanguinity or affinity to a current full-time or part-time employee, owner, director, officer, member, or manager of a respondent; and

~~(f)~~(d) a person related within the first degree of consanguinity or affinity to the respondent, if a respondent is an individual person.

TDS Comment:
This revision narrows the overly broad definition of Agent, which would require staff to determine the nature of relationships and communication among entities without any objective means of doing so. Please see Jim Hemphill's 9/27/2017 Memo on constitutional requirements of speech restrictions as they pertain to staff's proposed ALO revisions (Hemphill Memo).

(2) AUTHORIZED CONTACT PERSON means a City employee designated in a City solicitation as the point of contact for all purposes for that solicitation.

(3) CITY EMPLOYEE is defined in Section 2-7-2 (*Definitions*).

(4) CITY OFFICIAL is defined in Section 2-7-2 (*Definitions*).

(5) ~~NO CONTACT~~ RESTRICTED COMMUNICATION PERIOD means the period of time beginning at the final effective date and time a R~~r~~esponse to a solicitation is due, ~~as may be extended in the purchasing officer's discretion,~~ and continuing through the earliest of the following:

(a) the date of the initial execution of the ~~last~~ contract resulting from the solicitation is signed (~~,~~ if multiple contracts are executed pursuant to a solicitation, then the date of initial execution of the last contract to be signed);

(b) ~~6~~30 days following council authorization of the last contract resulting from the solicitation; ~~or~~

(c) cancellation of the solicitation by the City~~;~~.

(d) 14 days prior to the date a contract or RCA related to solid waste, recycling or organics is considered for action by the City Council, or

~~(c)~~(e) 14 days prior to the date a contract or RCA is considered for recommendation by the Zero Waste Advisory Commission.

TDS Comment:
As there is not an actual "No Contact Period" envisioned by the ordinance; for the sake of accuracy this term should be changed to "Restricted Contact Period", as there are a variety of communications that are both permitted and prohibited. Further edits are intended to 1) utilize language that is not subject to variable interpretations, for the sake of creating a clear expectation of the effect of the proposed limits on speech, which is required when limiting speech; 2) more reasonably limits the time respondents will be bound by the ALO in the event that staff choose not to take any action pursuant to a solicitation; and, 3) creates an earlier termination of the Restricted Contact Period specifically for solicitations for solid waste, recycling and organics management related services. This market segment specific provision is necessary due to the staff's unique dual role as both regulator of, and competitor within this market segment, staff's history of ambitious pursuit of greater control over and revenue

from this market segment, and staff's demonstrated propensity to embed significant policy implications concerning this market segment within the solicitation process. The ability of respondents to speak freely with policy makers prior to finalization of contracts will serve more as deterrent to staff's problematic attempts to create "policy by RFP", rather than an opportunity for respondents to advocate for their solicitation specific interests.

(6) PURCHASING OFFICER means the City employee authorized to carry out the purchasing and procurement functions and authority of the City and, when applicable, the director of a City department to whom the purchasing officer has delegated procurement authority for that department.

(7) RESPONSE means ~~a response to a solicitation.~~ only the contents of ~~the~~ a sealed proposal submitted by ~~an offeror~~ a bidder replying to a solicitation ~~to provide the goods or services solicited by the City~~.

TDS Comment:
This revision simply defines "Response" in the manner that staff's "Comparison Matrix" states that it will be interpreted. However, staff has maintained a problematic circular definition of Response that can be subject to wildly variable interpretations.

(8) RESPONDENT means a person who ~~makes~~submits a ~~r~~Response to a City solicitation, even if that person subsequently withdraws its ~~r~~Response ~~or has been disqualified by the City~~, and includes:

~~(a) a contractor for a respondent;~~

~~(b)~~(a) a subsidiary or parent of a respondent; and

~~(c) a joint enterprise, joint venture, or partnership with an interest in a response and in which a respondent is a member or is otherwise involved, including any partner in such joint enterprise, joint venture, or partnership; and~~

~~(d)~~(b) a subcontactor to a respondent in connection with that respondent's response.

TDS Comment:
These revisions remove unnecessary portions and limit the requirements to things that can be objectively determined by staff. Revisions also eliminate the potential for broad interpretations that would allow the staff to enforce against speech that is not constitutionally eligible for government restriction.

(9) REPRESENTATION means a communication~~, whether or not initiated by a respondent or agent,~~ that is:

(a) related to a response;

(b) made by a respondent or agent; and

(c) made directly to a council member, City employee, City representative, or independent contractor hired by the City with respect to the solicitation.

~~(c)~~(d) Communications not made directly to persons included in (c) above, including without limitation communications to the media, citizen groups, or business or advocacy organizations, are not representations under this article.

TDS Comment:
This revision clarifies the limit of speech that is constitutionally allowed to be restricted. Please see the Hemphill Memo for the detailed basis for this revision.

(10) SOLICITATION means an opportunity to compete to conduct business with the City that requires council approval under City Charter Article VII Section 15 (Purchase Procedure), and includes, without limitation:

(a) an invitation for bids;

(b) a request for proposals;

(c) a request for qualifications;

(d) a notice of funding availability; and

(e) any other competitive solicitation process for which the purchasing officer, in the purchasing officer's sole discretion, affirmatively determines this article should apply in accordance with Section 2-7-101(E).

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-103 – PROHIBITED REPRESENTATIONS.

Subject to the exclusions in Section 2-7-104, during a no-contact period, a respondent and an agent shall not make a representation that~~: is intended to or reasonably likely to:~~

(1) provides substantive information about the response to which it relates;

~~(2) advance the interests of the respondent with respect to the solicitation to which it relates;~~

~~(3)~~(2) ~~discredit the response of any other respondent to the solicitation to which it relates;~~

~~(4)~~ [NOTE – an alternative to strikeout may be something like "Permitted representations under Section 2-7-104(2) will not be considered to be representations prohibited under Section 2-7-104(2) or (3)." This resolves any potential interpretive conflict between those provisions.]

~~(5)~~(3) encourages the City to reject all of the responses to the solicitation to which it relates;

~~(6)~~(4) conveys a complaint about the solicitation to which it relates; or

~~(7)~~(5) directly ~~or indirectly~~ asks~~, influences, or persuades~~ any City official, City employee, or body to favor or oppose, recommend or not recommend, vote for or against, consider or not consider, or take action or refrain from taking action on any vote, decision, or agenda item regarding the solicitation to which it relates.

Source: Ord. 20071206-045; Ord. 20111110-052.

TDS Comment:
This revision removes criteria that cannot be objectively determined by the staff, and appropriately tailors the ordinance to the constitutional limits on restriction of speech. Please see the Hemphill Memo for the detailed basis for this revision.

§ 2-7-104 – PERMITTED REPRESENTATIONS AND OTHER COMMUNICATIONS.

The following representations and other communications are permitted under this article at any time:

(1) any representation or communication between a respondent or agent and any authorized contact person;

(2) any communication between a respondent or agent and any person to the extent the communication relates ~~solely~~ to an existing contract between ~~a respondent~~any person or entity

and the City, even when the scope, products, or services of the current contract are the same or similar to those contained in an active solicitation;

TDS Comment:
This revision removes a content based restriction on speech that is presumptively unconstitutional. Please see the Hemphill Memo for further detail.

(3) any representation or communication between a respondent or an agent and a City employee to the extent the representation or communication relates solely to a non-substantive, procedural matter related to a response or solicitation;

(4) any representation or communication required by or made during the course of a formal protest hearing related to a solicitation;

(5) any representation or communication between a respondent or an agent and the City's Small & Minority Business Resources Department, to the extent the communication relates solely to compliance with Chapters 2-9A through 2-9D (*Minority-Owned and Women-Owned Business Enterprise Procurement Program*) of the City Code;

(6) any representation or communication between an attorney representing a respondent and an attorney authorized to represent the City, to the extent the communication is permitted by the Texas Disciplinary Rules of Professional Conduct;

(7) any representation or communication made by a respondent or an agent to the applicable governing body during the course of a meeting properly noticed and held under Texas Government Code Chapter 551 (*Open Meetings Act*);

(8) any representation or communication between a respondent or an agent and a City employee whose official responsibility encompasses the setting of minimum insurance requirements for the solicitation to which the communication relates, to the extent the communication relates solely to the insurance requirements established by the City in the solicitation; and

(9) ~~any communication occurring when~~ making a contribution or expenditure as defined in Chapter 2-2 (*Campaign Finance*).

TDS Comment:
Contrary to statement of staff, this is not simply a concept carried forward from the previous version of the ordinance, staff's language would actually lift all ALO restrictions, under the condition that otherwise prohibited statements would be accompanied by a monetary donation to a campaign, while existing (and TDS proposed) language simply make clear that a campaign donation is not a restricted communication. Staff's language could not be more counter to the stated intent of the ordinance.

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-105 – MODIFICATION OF PROHIBITION.

The purchasing officer may waive, modify, or reduce the prohibited representation requirements in Section 2-7-103 in order to allow respondents to make representations to persons identified in Section 2-7-102(10)(c) other than the authorized contact person when the purchasing officer determines, in writing, that the solicitation must be conducted in an expedited manner, including but not limited to a solicitation conducted for reasons of health or safety under the shortest schedule possible with no extensions. The purchasing officer must promptly transmit any such written waiver, modification, or reduction to all respondents.

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-106 – ENFORCEMENT.

~~(A) This article is not subject to enforcement by the Ethics Review Commission established in Section 2-7-26.~~

~~(B) The purchasing officer may consider mitigating factors or circumstances beyond the control of a respondent, including but not limited to any action taken by a respondent in reliance on information provided by a person identified in Section 2-7-102(10)(c), when determining whether a respondent has violated Section 2-7-103.~~

~~(C)~~(A) The purchasing officer has the authority to enforce this article through Council approved rules ~~promulgated in accordance with Section 1-2-1~~, which at a minimum shall include a notice~~,~~ ~~and protest~~ hearing and appeal process for respondents disqualified pursuant to Section 2-7-107, including:

(1) written notice of the penalty imposed pursuant to Section 2-7-107;

(2) written notice of the right to ~~protest the penalty imposed~~ a hearing before, and determination by, the Ethics Review Commission; and

(3) written notice of the right to ~~request a an impartial hearing process~~ a final appeal before the City Council.

Source: Ord. 20071206-045; Ord. 20111110-052.

TDS Comment:
The TDS proposed revisions to the Enforcement section are intended to accomplish 1) Removal of the arbitrary exclusion of the Ethics Review Commission from any oversight role in the Ordinance; 2) Removal of the problematic language providing the purchasing officer the authority to determine when/if violations should be ignored for whatever reason staff sees fit; 3) Establish that administrative rules must be approved by Council as recommended by the Council Waste Management Policy Working Group; 4) allow for a protest hearing before, and decision by the Ethics Review Commission as recommended by the Council Waste Management Policy Working Group; and, 5) allow for a final appeal before City Council. Without these changes to the enforcement section of the ALO, the staff would have absolute authority to establish rules, interpret and enforce the ordinance without any oversight of any kind from elected officials or their appointees. Given staff's dismal record of fairly interpreting and enforcing the ALO, these changes are imperative.

§ 2-7-107 – PENALTY.

(A) If the purchasing officer finds that a respondent has violated Section 2-7-103, the respondent is disqualified from participating in the solicitation to which the representation related.

(B) The purchasing officer shall promptly provide written notice of disqualification to a disqualified respondent.

(C) If a respondent is disqualified from participating in a solicitation as a result of violating Section 2-7-103 and the solicitation is cancelled for any reason, that respondent is disqualified from submitting a response to any reissue of the same or similar solicitation for the same ~~or similar~~ project. For the purposes of this section, the purchasing officer may determine whether any particular solicitation constitutes a "same or similar solicitation for the same ~~or similar~~ project".

(D) If a contract resulting from a solicitation that is the subject of a prohibited representation is awarded to a respondent who has violated Section 2-7-103 with respect to that solicitation, that contract is voidable by the City Council.

Source: Ord. 20071206-045; Ord. 20111110-052.

TDS Comment:
TDS proposed revisions to the "Penalty" section are necessary eliminate opportunities for interpretations that go beyond the intent of the ALO, and to create a clear expectation of the results of a violation. Without the revisions to the "same or similar project" language, the staff effectively maintains the ability to permanently debar a vendor, as they would have the ability to determine that any solicitation within a particular market segment is a "similar project" to a solicitation that was the subject of a disqualification. Also, without the inclusion of the term "Council" at the end of 2-7-107(D), the staff would have the authority to unilaterally subvert the will of the Council, based simply on a retroactive allegation of prohibited communication, without substantiation. If there is a need to void a contract due to violations of the ALO, then the Council should make that decision.

~~§ 2-7-108 – RECUSAL.~~

~~(A) During a no-contact period, a person identified in Section 2-7-102(10)(c) shall not contact a respondent regarding a response or solicit a representation from a respondent.~~

~~(B) A person identified in Section 2-7-102(10)(c) that receives a representation during the no-contact period for a solicitation, or otherwise becomes aware of a violation of Section 2-7-103, shall notify the authorized contact person in writing as soon as practicable.~~

~~(C) If a person identified in Section 2-7-102(10)(c) violates either Subsection (A) or Subsection (B), that person shall be recused from further participation in the solicitation to which the violation relates.~~

TDS Comment:
Staff's newly proposed "Recusal" section amounts to an unprecedented transfer of authority from the Council to staff and should be rejected outright. Under this provision, along with others proposed by staff, staff would be empowered to impose compulsory recusal on any Council Member or B&C Member by simply claiming they spoke to a respondent, or failed to report contact between a respondent and any other City employee or official, whether or not the subject of that communication was prohibited, and regardless of whether or not staff determines that a violation of the ALO has taken place. This would give the staff the ability to remove individual votes they may deem unfriendly to their stated or unstated agendas, without any requirement to carry out the remaining supposed requirements of the ordinance. Council Members and their appointees on B&C's should have the sole authority to determine whether they ought to be recused from taking action based on existing code of ethics requirements, and not be subject to the staff unilateral declaration of recusal, without any requirement to substantiate their basis for doing so.

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MEMORANDUM

FROM: Jim Hemphill

DATE: September 28, 2017

RE: First Amendment implications of the proposed revisions to Austin Anti-Lobbying Ordinance

This memo will outline some of the First Amendment concerns regarding Austin's Anti-Lobbying Ordinance ("ALO"), in the context of the proposed revision to the ALO. It is not intended to be a comprehensive analysis of all possible interpretations and applications of the ALO, but rather a high-level view of some of the more obvious issues. Therefore, there might be circumstances unaddressed in this memo in which interpretation or application of the ALO raises additional First Amendment problems.

First Amendment principles and doctrines.

The bedrock purpose of the First Amendment's free speech clause (as well as its analog in the Texas Constitution, Article I Section 8) is to prevent government restriction of speech. Because the ALO prohibits certain types of speech for those seeking City contracts, it implicates First Amendment considerations.

Like most constitutional guarantees, the First Amendment is not absolute. Some government restriction of speech is allowable under certain circumstances. Determining whether a government speech restriction is allowable under the First Amendment involves examination of, *inter alia*, the type of speech at issue and the scope of the restriction.

The most suspect government speech restrictions are those that infringe on **political speech** (including the right to petition the government) and those that are **content-based**. The right to petition the government is a fundamental constitutional right. *See, e.g.*, *McDonald v. Smith*, 472 U.S. 479 (1985). Speech discussing government policy and decisions is the essence of protected political speech. *See, e.g.*, *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999). Communication with executive officials regarding a particular project is core political speech entitled to the highest level of constitutional protection, and infringements upon that speech will be strictly

scrutinized. *See, e.g.*, *Meyer v. Grant*, 486 U.S. 414 (1988). Political speech is fully protected under the First Amendment, even if the speaker is an entity ultimately motivated by commercial gain, such as a corporation. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

Content-based speech restrictions are those that prohibit speech based on the substance of the message being communicated. When a government restriction allows communication of some types of messages, but restricts others that are made to the same audience or through the same channel but differ only in their content, the restriction is content-based. *See, e.g.*, *Boos v. Barry*, 485 U.S. 312, 318-19 (1988) (ordinance that allowed some picket signs but not others, based on the message conveyed, was a content-based speech restriction). Content-based speech regulations are presumptively invalid. *See, e.g.*, *Citizens United*, *supra*; *Davenport v. Washington Educ. Ass'n*, 127 S.Ct. 2371 (2007); *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). Such regulations are constitutional only if they pass the "strict scrutiny" test – the government must show the existence of a **compelling interest** and that the regulation is **narrowly tailored** to advance that interest. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976).

Some government speech restrictions are **content neutral** and are subject to a less-strict test of constitutionality. Such restrictions do not depend upon the substance of the speech at issue. Content-neutral restrictions (sometimes referred to as "time, place and manner" restrictions) must be narrowly drawn to serve a significant governmental interest, and leave open alternative channels of communication. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

At the very least, the ALO is a content-neutral speech restriction. An argument may be made that the ALO is in fact a content-based restriction on political speech, and thus subject to "strict scrutiny" – which makes a speech restriction more likely to be found unconstitutional. In fact, content-based restrictions are "presumptively unconstitutional." *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015).

Speech about a proposal for a municipal contract is not simply commercial speech motivated by a desire for financial gain. Such contracts almost always involve the expenditure of public funds or use of other public resources. The wisdom of entering into any particular municipal contract is inherently a political issue. And, as the *Citizens United* case confirmed, political speech is entitled to a high degree of constitutional protection, even if the speaker is ultimately motivated, in whole or in part, by potential financial gain.

Analysis of both content-based and content-neutral speech involve examination of the governmental interest that the restriction allegedly promotes, and whether the restriction "fits" that interest – that is, whether the restriction is tailored to promote that governmental interest and does not restrict speech more broadly than necessary to

promote that interest. Thus, a First Amendment analysis of the ALO must examine the governmental interest it furthers, and whether it is tailored to promote that interest without restricting more speech than necessary for such promotion. The ALO must also leave open sufficient alternative avenues of communicating the speech that it restricts.

A speech restriction must also be framed in clear and precise terms. "Regulation of speech must be through laws whose prohibitions are clear. … [T]he statute must provide 'fair notice' so that its prohibitions may be avoided by those who wish to do so." *Service Employees Int'l Union v. City of Houston*, 595 F.3d 588, 596-97 (5th Cir. 2010) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 110-12 (1972)). *See also Webb v. Lake Mills Community School Dist.*, 344 F.Supp. 791 (D.C. Iowa 1972) (citing cases for the principle that "no person shall be punished for conduct unless such conduct has been proscribed in clear and precise terms. This is especially true when the conduct involves First Amendment rights …." (citations omitted)).

Potential First Amendment issues with the ALO.

1. Scope of the speech restriction.

The proposed revised ALO restricts entities who have responded to a City request for proposal or invitation to bid from making "representations," as defined in the ALO, under certain circumstances. The proposed definition of "representation," found in Section 2-7-102(9), is:

> REPRESENTATION means a communication, whether or not initiated by a respondent or agent, that is:
>
> (a) related to a response;
>
> (b) made by a respondent or agent; and
>
> (c) made to a council member, City employee, City representative, or independent contractor hired by the City with respect to the solicitation.

This definition in turn incorporates other terms defined in the ALO, including "response," "respondent," and "agent." While there are issues (both legally and policy-based) with other aspects of this definition, for present purposes this memo will address potential First Amendment concerns.

The ALO does not specify whether a representation is only "made ***to***" a council member or City employee/representative/contractor if that representation is made **directly** to such a person (such as a face-to-face conversation or directed email communication), or if it encompasses a statement made to an identifiable group that **includes** such a person, or if it even more broadly includes a statement made to the general public (such as through the media, an advertisement, or a website) that may be **seen or heard** by such a person.

This ambiguity raises at least two fundamental First Amendment issues. First, this provision of the ALO does not provide the constitutionally required "fair notice" regarding what speech it purports to restrict. Interpretation of this provision as a ban only on direct statements to the class of persons defined in 2-7-102(9)(c) may substantially mitigate the vagueness concern, though allowing City personnel such latitude in interpretation may itself raise issues regarding the appropriate scope of discretion in determining whether a violation has occurred.

The second issue is one of both narrow tailoring and of providing adequate alternate forms of communication. It may be argued that a prohibition on direct statements to the defined class of persons serves the interests the ALO purports to further (providing a "fair, equitable, and competitive process" to choose vendors, and to further compliance with State procurement laws, ALO § 2-7-101(B)).[1] But restricting speech directed at groups that *might* include such persons, or worse yet restricting speech aimed at the general public, would sweep far more broadly than necessary to further the asserted governmental interests, and would shut down almost all channels of communicating the potential vendors' messages (such as a statement that awarding the contract to a potential vendor would be in the public's best interest).

The ALO would be less vulnerable to First Amendment challenge if Section 2-7-102(9) were revised per the following redline:

> REPRESENTATION means a communication, whether or not initiated by a respondent or agent, that is:
>
> (a) related to a response;
>
> (b) made by a respondent or agent; and
>
> (c) made directly to a council member, City employee, City representative, or independent contractor hired by the City with respect to the solicitation.
>
> (d) Communications not made directly to persons included in (c) above, including without limitation communications to the media, citizen groups, or business or advocacy organizations, are not representations under this article.

These changes clarify that the prohibition is on direct communications only, and that the ALO does not purport to restrict speech directed at audiences other than the individuals defined in 2-7-102(9)(c).

2. Consistency of defined terms to avoid non-uniform interpretation and application.

[1] This memo assumes, without specifically addressing the issue, that the governmental interests that the ALO purports to further are at the least "significant" interests. It is conceivable that the ALO may be vulnerable to challenge on the ground that those interests are not sufficient to meet the applicable test for constitutionality.

Section 2-7-102 sets forth definitions of certain terms for purposes of the ALO. To avoid lack of clarity that may raise First Amendment and/or due process concerns, it should be made clear that the definitions apply to **every** use of the defined term in the ALO. In the past, there have been City employees who have applied the definition of a term when used in one context in the ALO, but when the same term is used in another context, have claimed that the term should be given its common meaning, instead of the defined meaning. It is therefore recommended that the introductory phrase of this section be edited as follows:

> § 2-7-102 – DEFINITIONS.
> In this article, for all purposes whenever used:

3. Vagueness in definition of "agent."

The defined term "agent" in 2-7-102(1) includes "a person acting at the request of respondent," "a person acting with the knowledge and consent of a respondent," and "a person acting with any arrangement, coordination, or direction between the person and the respondent."

These provisions are vague – possibly unconstitutionally so, under both First Amendment and due process analyses – and are subject to interpretation in a manner that would be unconstitutionally overbroad.

For example, suppose a bidder speaks with a member of the public regarding the solicitation, informs that person of the perceived benefits of awarding the contract to the bidder, and tells the person that if they agree, they should let their council member know their opinion. If the member of the public subsequently expresses his or her opinion to a council member, is he or she "acting at the request of respondent" and thus the communication constitutes an ALO violation on the part of the bidder?

Or suppose that the bidder again informs the person of the perceived benefits of awarding the contract to the bidder, and the person replies, "I'm convinced, and I'm going to tell my council member how I feel if that's OK with you." Is the person "acting with the knowledge and consent of a respondent" if he or she follows through by telling the council member his or her opinion? Is the bidder required to say "no, it's not OK if you express your opinion to your council member?"

As vague as "request" and "knowledge and consent" are, the provision regarding "a person acting with any arrangement, coordination, or direction between the person and the respondent" is even more vague and potentially overbroad. What is "coordination"? What is "**any** arrangement"? If meant to prohibit payment to a person to express an opinion, that may pass First Amendment muster; if it reaches the hypothetical situations

set forth above, the prohibitions would very likely be considered to be not narrowly tailored and to be unconstitutionally vague.

To address this lack of clarity and potential overbreadth, 2-7-102(1)(a) could be amended as follows:

> (1) AGENT means a person authorized by a respondent to act for or in place of respondent in order to make a representation, including but not limited to:
>
> (a) a person acting at the explicit request of respondent in exchange for any type of consideration;

This amendment of subsection (a) would encompass all situations that could rationally be reached by the proposed subsections (b) and (c), which thus should be deleted entirely.

4. Circular definition of "response."

The proposed revised ALO's definition of "response" in 2-7-102(7) uses the word "response" to define the word "response," resulting in another lack of clarity. In the bidding situation, what does a "response to a solicitation" mean? If used in the common, undefined sense, a "response to a solicitation" can mean **any** statement or communication made that relates to a solicitation, even if that statement or communication is not a "response" in the sense the definition appears aimed at – a submission by a bidder in an attempt to secure the contract that is the subject of a solicitation. A broader interpretation would result in the ALO not being narrowly tailored to serve the purported governmental interest, and in being unconstitutionally vague. To this end, the definition should be clarified:

> (7) RESPONSE means ~~a response to a solicitation~~ only the contents of a sealed proposal submitted by a bidder replying to a solicitation.

5. Clarification of permitted statements regarding existing contracts.

The proposed amended ALO clarifies that statements regarding existing contracts are generally not prohibited "representations," even if the existing contract covers the same general subject matter as the pending solicitation. This is a welcome clarification; application of the ALO to bar speech regarding an existing contract would have serious First Amendment overbreadth issues.

However, the proposed language of 2-7-104(2) regarding permitted communications is limited to statements about existing contracts between a "respondent" as defined in the ALO – a bidder – and the City. As written, it does not allow a "respondent" to make

statements about existing contracts between the City and *other* contractors having existing contracts. This is clearly a content-based speech restriction and thus is presumptively unconstitutional. A suggested revision:

> (2) any communication between a respondent or agent and any person to the extent the communication relates ~~solely~~ to an existing contract between ~~a respondent~~ any person or entity and the City, even when the scope, products, or services of the current contract are the same or similar to those contained in an active solicitation;

6. Possible conflict between prohibited and permitted "representations."

Section 2-7-103 outlines "representations" (as defined in the ALO) that are prohibited, and Section 2-7-104 sets forth representations and other communications that are permitted. While 2-7-104 states that the listed representations and communications "are permitted under this article at any time," there is possible tension between its list of permitted communications and the list of prohibited "representations" under 2-7-103.

Of particular concern are the provisions in 2-7-103 that purport to prohibit statements that "advance the interests of the respondent" or "discredit the response of any other respondent." Based on past interpretations and applications, there is the possibility that a statement covered by 2-7-104(2) (discussed above, regarding statements related to existing contracts) could be interpreted as falling within 2-7-103's prohibitions (despite the statement that communications falling under 2-7-104 are permissible "at any time."

To remove potential conflict and to clarify that 2-7-104's "safe harbor" trumps any contrary interpretation of 2-7-103, it is suggested that the following be added to 2-7-103 (or 2-7-104):

> Permitted communications under Section 2-7-104(2) will not be considered to be representations prohibited under Section 2-7-104(2) or (3).

7. Prohibiting speech based on the listener's reaction rather than the speech itself.

As set forth above, a speech restriction must be sufficiently clear to give notice to the speaker as to whether the restriction applies to the speaker's speech. However, certain provisions of the proposed revised ALO appear to ban speech based on the listener's reaction to the speech, rather than the speech itself. Section 2-7-103(6) prohibits a "representation" if it:

> directly or indirectly asks, **influences**, or **persuades** any City official, City employee, or body to favor or oppose, recommend or not recommend, vote for or against, consider

> or not consider, or take action or refrain from taking action on any vote, decision, or agenda item regarding the solicitation to which it relates.

[Emphases added.] While a speaker can control whether his or her speech "asks" for certain action, it is the *listener*, not the speaker, who determines whether the speech "influences" or "persuades" him or her to take (or not take) certain action. The words "influences or persuades" should be stricken from this provision.

Conclusion.

Any government restriction on speech should be closely scrutinized from both a legal and policy perspective, and (assuming the restriction passes constitutional muster) must be clearly written and applied narrowly and in accordance with its specific language. Unfortunately, there is a history of overly broad and erroneous interpretation and application of the City's ALO (for one example, see *Texas Disposal Systems, Inc. v. City of Austin*, Cause No. A-11-CV-1070-LY, in which the U.S. District Court for the Western District of Texas reversed the City's interpretation and application of the then-current ALO that resulted in a wrongful disqualification). While the need for *any* ALO remains questionable, particularly for certain types of proposed contracts, the City should endeavor to make the ALO (if one is to exist) narrow, predictable, and aimed squarely at furthering its actual purpose.

TEXAS DISPOSAL SYSTEMS 23 URGENT PROPOSED CHANGES TO CITY STAFF'S REVISED ANTI-LOBBYING ORDINANCE
October 9, 2017

To avoid infringing on First Amendment free speech rights, ensure administrative objectivity, avoid confusion, and deliver consistency and transparency, TDS proposes the following revisions to the staff's Anti-Lobbying Ordinance (ALO):

NO CONTACT PERIOD

1. To acknowledge that specific communications are permitted, change the name "NO CONTACT PERIOD" to "RESTRICTED CONTACT PERIOD".

2. In recognition of City staff's dual role as waste industry competitor *and* regulator, for all solid waste, recycling and organics management solicitations, initiate the "RESTRICTED CONTACT PERIOD" at the final effective date and time sealed proposal solicitation responses are due and lift the "RESTRICTED CONTACT PERIOD" a minimum of 14 days prior to the date a contract or RCA is considered by the City Council and/or Zero Waste Advisory Commission or any other board or commission.

3. For solicitations unrelated to solid waste, recycling and organics management, clarify that the "RESTRICTED CONTACT PERIOD" begins at the final effective date and time sealed proposal solicitation responses are due, and ends at either initial execution of the resulting contracts or 30 days after Council authorization, whichever is earliest.

PERMITTED REPRESENTATIONS

1. Ensure that the definitions of "PERMITTED REPRESENTATION" and "PROHIBITED REPRESENTATION" are mutually exclusive.

2. Ensure that the definition of "REPRESENTATION" directly excludes communications to the media, community groups and business and advocacy groups.

3. Ensure that the definition of "REPRESENTATION" is specific to direct communications with identified parties, rather than encompassing all communications to all parties.

4. Ensure that the definition of "PROHIBITED REPRESENTATION" is based on the content of the communication itself rather than on the listener's reaction by removing words like "influences" or "persuades."

5. Eliminate all definitions of "PROHIBITED REPRESENTATION" that require subjective analysis, including "advances the interest of the respondent" and "discredits the response of any other respondent."

6. Ensure that the definition of "PERMITTED REPRESENTATION" includes communication related to any existing contract not only between the respondent and the City but also between any person or entity and the City.

7. Clarify that while making a campaign contribution to a City Council member does not constitute a "PROHIBITED REPRESENTATION" in and of itself, any communication associated with making the campaign contribution continues to be subject to ALO restrictions.

DEFINITIONS

1. Clarify that all definitions apply consistently across the ordinance.

2. Narrow the definition of "AGENT" to mean only a person acting at the explicit request of a solicitation respondent in exchange for consideration.

3. Narrow the definition of "RESPONSE" to mean only the contents of a sealed proposal submitted by a bidder in response to a solicitation.

4. Narrow the definition of "RESPONDENT" to a person or entity who submits a "RESPONSE" excluding persons or entities who have withdrawn a "RESPONSE" or been disqualified by the City.

5. ENFORCEMENT / "MITIGATING FACTORS"

6. Establish that the ALO is subject to enforcement by the Ethics Review Commission.

7. Eliminate the proposed authority of the purchasing officer to "consider mitigating factors" in determining violations.

8. As per the original recommendation of the Waste Management Policy Working Group, establish that all administrative rules associated with the ALO must be approved by the City Council before taking effect.

9. As per the original recommendation of the Waste Management Policy Working Group, establish that all staff-determined ALO disqualifications are subject to an appeal process including a protest hearing before the Ethics Review Commission.

10. Establish that all staff-determined ALO disqualifications are subject to a final appeals process including a protest hearing before the City Council.

PENALTY

1. Clarify that a respondent who is disqualified under the ALO may not respond to a subsequent solicitation for the same – rather than a "similar" – project.

2. Clarify that any contract awarded to a respondent later determined to have violated the ALO with respect to the original solicitation can be voided by the City Council, rather than by City staff.
3. RECUSALS

4. Eliminate compulsory recusals of City officials who receive "a representation." This staff-proposed addition to the ALO not only establishes an overbroad restriction but is also in conflict with existing ethics rules charging City officials, rather than staff, with determining when recusal is required.

ADMINISTRATION

1. Clarify that if the purchasing officer makes any modifications to prohibitions for any solicitation, each solicitation respondent must be promptly notified.

Texas Disposal Systems Comparison of Staff Proposed ALO Revisions vs. Council Working Group Recommendations

October 6, 2017

Working Group Recommendation	Staff Proposal
• Apply the ALO ordinance only to the solicitation. Vendors may communicate on all other matters without violating the ALO.	• Staff proposed language can be interpreted to include the restriction applying to communication far beyond the specific solicitation.
• Apply the ALO from the time a RFP is released through Council's vote on executing the contract. Should an RFP be pulled down, the ordinance does not apply during the timeframe the RFP is pulled down.	• ALO applies from the time any undefined response to a solicitation is due, until various points after the Council votes to approve a contract.
• Narrow the definition of representations to target lobbying. For instance, if staff tells a vendor that the ALO does not apply and a communication is allowable – then the vendor cannot be later be disqualified as violating the ordinance by the communication.	• Purchasing officer is given broad authority to determine whether or not a violation should be assessed. Staff also has given themselves the authority to unilaterally impose recusal on any City employee, CM, or B&C member.
• Add communications regarding existing contracts to "Permitted Communications".	• Only existing contracts between a communicating respondent and the City are exempt.
• Develop a body of Rules in a companion document to the ALO that defines enforcement, appeal, complaint, and debarment procedures. Rules should: a. Clarify current definition of "Representation" and what triggers debarment. b. Clarify procedures for determining violations, judgement, and penalty enforcement, and incorporate a third party reviewer such as the Ethics Review Commission to determine violations, judgement, and penalty enforcement. c. Clarify process for submitting and facilitating complaints. d. City purchasing and legal should develop this companion document for approval by Council and prepare any language updates to the ALO that might be required to allow for adopted rules in the companion document.	• Staff has not proposed rules for the ALO a. Not addressed by staff. b. Staff explicitly states that there will be no third party review, oversight or appeal of any kind. c. Staff has completely removed the process for receiving and communicating complaints re: the solicitation to Council. d. Staff explicitly states that Rules will not be presented to or approved by Council.
• Existing ALO should remain suspended until Council approves proposed revisions.	• Not addressed by staff.
• Purchasing Office should receive and compile further stakeholder input for Council and will work with adopted input as determined by Council.	• Purchasing office solicited no such additional stakeholder input prior to taking the ALO revisions to Council seeking approval on 9/28/17.