From:	Bob Gregory
To:	"steve.adler@austintexas.gov"; "kathie.tovo@austintexas.gov"; "ora.houston@austintexas.gov"; "delia.garza@austintexas.gov"; "sabino.renteria@austintexas.gov"; "greg.casar@austintexas.gov"; "ann.kitchen@austintexas.gov"; "jimmy.flannigan@austintexas.gov"; "leslie.pool@austintexas.gov"; "ellen.troxclair@austintexas.gov"; "alison.alter@austintexas.gov"; "Jim.Wick@austintexas.gov"; "Amy.Everhart@austintexas.gov"; "amy.smith@austintexas.gov"; "shannon.halley@austintexas.gov"; "david.chincanchan@austintexas.gov"; "ken.craig@austintexas.gov"; "Marti.bier@austintexas.gov"; "michael.searle@austintexas.gov"; "kurt.cadena-mitchell@austintexas.gov"; "cj.hutchins@austintexas.gov"; "geno.rodriguez@austintexas.gov"; "katherine.nicely@austintexas.gov"; "neesha.dave@austintexas.gov"; "donna.tiemann@austintexas.gov"; "john.lawler@austintexas.gov"; "Lesley.varghese@austintexas.gov"; "Louisa.Brinsmade@austintexas.gov"; "Jackie.Goodman@austintexas.gov"; "ceci.gratias@austintexas.gov"; "Shelby.Alexander@austintexas.gov"; "Joi.Harden@austintexas.gov"; "Ashley.richardson@austintexas.gov"; "alba.sereno@austintexas.gov"
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Bcc:	Bob Gregory
Subject:	Agenda Item 44, TDS Response and Comments
Date:	Thursday, September 28, 2017 10:35:00 AM
Attachments:	J Hemphill Memo on ALO and First Amendment.pdf 9-28-17 TDS Recommended Revisions to Proposed ALO.pdf

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Dear Mayor Adler & Council Members:

As noted in our 9-26-17 email, TDS is requesting that the Austin City Council please postpone consideration of Item #44, a City management-proposed revision to the Anti-Lobbying Ordinance (ALO), until such time as the Waste Management Policy Working Group process unanimously established by the Council in Ordinance 20170323-055 has been completed.

As a reminder, Council's unanimous vote and dais discussion on 3-23-17 clearly established the expectation that the recommendations of the Waste Management Policy Working Group would be presented to the Zero Waste Advisory Commission (ZWAC) and other appropriate boards and commissions prior to Council consideration.

As noted, TDS is also alarmed by Item #44's seeming disregard for the subsequent process recommendations of the Working Group itself, which both urged additional input from community stakeholders regarding proposed revisions to the ALO – which has not happened – and proposed that administrative rules for the revised ALO be presented to and approved by Council along with the draft ordinance – which also has not happened.

While executive City staff from Austin Water have urged immediate Council consideration of proposed revisions to the ALO without regard to the Working Group process in order to facilitate the release of a pending solicitation for biosolids management, there is in fact no urgency. The current vendor's contract extends until April 2018 – seven more months – leaving ample time to allow an appropriate public process to continue; alternatively, Austin Water could simply choose to issue the biosolids management solicitation without the ALO in effect (there are only two likely respondents to the solicitation, both of whom are well known to Council and management). It would NOT be necessary to extend the current vendor's contract to accommodate postponement until the Working Group process is complete. Please also know, if Council desires to do so, the City and TDS can easily amend the existing long term Waste Disposal and Yard Trimmings Processing Contract to have TDS do 100% of the City's biosolids composting. TDS can mobilize and fully take over the City's

biosolids composting program with as little as two weeks' notice.

Nonetheless, as it appears based on Council's consent agenda vote this morning that you in fact intend to proceed with taking up Item #44 today, I am reluctantly bypassing (but copying) ZWAC and other board/commission members and writing to present TDS' analysis, concerns and recommendations with regard to the proposed revised ALO ordinance directly to the Council.

Overall, the proposed ALO revisions as drafted by City management fall far short of resolving the concerns that led TDS to discontinue responding to City waste solicitations in 2015, and would not change TDS' position on responding to future solicitations.

To be clear, as we have shared with you many times before, TDS' central concerns have been and remain centered around City management's subjective interpretation of broad, vague language in the ALO and resulting misuse of the ordinance to achieve strategic, competitive objectives in the waste marketplace. This includes an illegal ALO disqualification of TDS in 2009 that was later overturned by a federal judge, as well as last year's effort – ultimately rejected by Council – to allow Synagro to circumvent the ALO by holding private meetings with City officials during a solicitation process.

TDS has also been deeply unsettled by City management's misuse of the broad no-contact provisions in the current ALO to effectively silence criticism of City waste solicitations and proposed City waste contracts on an ongoing basis. As per the document we presented during the Waste Management Working Group process, 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.

During the Working Group process, TDS has advanced the following proposed policy position with regard to 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 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.

Unfortunately, City management's proposed revised ordinance not only fails to accomplish most of these reasonable goals but also leaves in place ambiguous ordinance language that will continue to empower staff to intepret the ALO with the same level of motivated subjectivity as before, and no independent oversight.

Further, it is clear that City management's proposed revised ALO ordinance also raises a range of 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.

Accordingly, we have attached TWO important documents for your immediate review – a legal analysis of City management’s proposed revised ALO ordinance vis-à-vis First Amendment concerns; and TDS’ redline revision to City management's proposed revised ALO, which reflects both our First Amendments concerns AND our policy recommendations.

Finally, please note that we are troubled by the extent to which the "Comparison Matrix" provided to Council by City management as an analytical tool does not accurately reflect the substance of the proposed ordinance but in fact offers mostly favorable examples of how staff could interpret the language. Once again, City staff has clearly demonstrated a disposition to interpret the ALO inconsistently and in ways detrimental to those who raise concerns about City management's efforts to advance their competitive interests in the waste management marketplace.

In sum, TDS believes that City management's demonstrated history of subjective interpretation and misuse of the ALO, particularly as it relates to waste, recycling and organics management, warrants the full exemption of waste contracts from the ALO. Alternatively, revisions to the ALO should leave no room for subjectivity or abuse moving forward but instead be based on unambiguous language and independent oversight, as well as narrow, defensible restrictions on constitutionally protected speech. TDS calls on Council to please act accordingly should you in fact proceed today with considering City management’s proposed revised ALO rather than honoring the original Working Group process.

Thank you for your attention to this important issue. Please do not hesitate to contact me directly with questions or concerns.

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

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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.

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.