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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.