Bob Gregory

Subject: FW: TCE Review of Suggested Changes from TDS, Nikelle Meade and ZWAC

From: Whellan, Michael [mailto:MWhellan@gdhm.com]
Sent: Friday, October 27, 2017 6:55 PM
To: Bob Gregory <bgregory@texasdisposal.com>; Adam Gregory <agregory@texasdisposal.com>; Ryan Hobbs <rhobbs@texasdisposal.com>; Gary Newton <gnewton@texasdisposal.com>; Mark Nathan <mark@citylightsgroup.com>; David Butts <djbutts@sbcglobal.net>; Hemphill, Jim <JHemphill@gdhm.com>
Cc: Whellan, Michael <MWhellan@gdhm.com>
Subject: FW: TCE Review of Suggested Changes from TDS, Nikelle Meade and ZWAC

Fyi.
MJW.

From: Andrew Dobbs [mailto:dobbs@texasenvironment.org]
Sent: Friday, October 27, 2017 5:32 PM
To: Meade, Nikelle; 'Einhorn, Peter - BC'; 'Ohueri, J Michael - BC'; 'Kahle, Mary - BC'; 'Holmes, Fredda - BC'; 'Danburg, Debra - BC'
Cc: 'Tom, Cynthia'; 'Smith, Amy'; 'Scarboro, James'; 'Weema, Chris'; 'Palmer, Sue'; 'GErwin@spartnerships.com'; 'bcorbett@spartnerships.com'; Whellan, Michael; 'Gay Erwin (GErwin@spartnerships.com)'; 'Beth Corbett (bcorbett@spartnerships.com)'; 'jackie.goodman@austintexas.gov'; 'alba.sereno@austintexas.gov'; 'ken.craig@austintexas.gov'
Subject: TCE Review of Suggested Changes from TDS, Nikelle Meade and ZWAC

October 27, 2017

Commissioners:

As promised, here is my analysis of where the positions of the various parties are with reference to the ZWAC recommendations laid out on October 11. In this analysis I am suggesting some possible compromises that may bring us closer to a resolution to this important and challenging issue. These do not, of course, reflect the input of parties that have not yet weighed in, but should help clarify where things stand prior to their engagement.

Areas of Consensus or Near Consensus

Specific mention in the ordinance of a right to appeal all disqualifications and other penalties or determinations to the ERC and ultimately Council.

There is consensus that some sort of appeal to an authority outside of the Purchasing Department is advisable. Ms. Meade has objected to allowing an appeal to Council, and you all indicated a wariness to make ERC the body to consider the appeals. TCE does support allowing an appeal to Council, but more fundamentally we believe that some sort of appeal to a non-staff body is the key point here. We are okay with some other appointed body serving this role as opposed to the ERC, but we oppose any process that will keep the power to review in the hands of staff only.

Clarification that only Council may void a contract for violation for the ALO.

This is an area of flat consensus between the parties that have presented their positions to date.

Replace disqualification for "similar" projects with a disqualification for the SAME project.

This is an area of near consensus, with the concept apparently acceptable to all even if the mechanisms for doing so in the code being disputed. Ms. Meade proposed language to the effect of "same project or a project with a substantially similar scope of work." While some of these terms are open to interpretation an independent appeals process should minimize the risk of abuse.

Areas Not Addressed or of Ambiguous Status

A guarantee that rulemaking will have an element of ongoing public participation, with rules ultimately brought back to the Ethics Review Commission (ERC) and Council for final review and approval.

This is not addressed in either Mr. Whellan's or Ms. Meade's documents. That said, no sides have to date objected to the idea that administrative rules should be subject to public approval, and we urge you to include this recommendation so that we avoid confusion and unnecessary conflicts in the future.

Definition of the term "response."

TDS' proposed changes to the definition proposed by staff were substantially agreed to by Ms. Meade with the insistence that the phrase "provide the goods or services solicited by the City" be kept in place. We hope that this will be acceptable to all parties, and with other protections introduced so far this suggestion from ZWAC may not be as significant as it would be under the present ALO, where this ambiguity has been abused in the past.

Assurance that the ordinance will not consider public communications to be in any way a violation.

This is a topic that has been addressed and agreed to in some ways, disagreed to in others, and unaddressed in yet others. All sides agree that statements to the media should be exempted from the ALO. As for protections that explicitly protect communications at public commission or Council meetings, this is still absent from the proposed document and nobody has expressed any objections to this so far. Finally, Ms. Meade objected to the inclusion of "business groups or advocacy groups" in permitted communications.

Assurance that independent advocacy from non-respondents will not be used to disqualify respondents.

All sides agree that organizations without any relationships to respondents are free to advocate. Ms. Meade both wants disclosure for any entities that receive contributions from respondents and opposes any explicit carve outs for this sort of behavior. We support an explicit guarantee of the right of non-profit groups to advocate on contracts. Although non-profit groups by federal law do not have to reveal their funding sources, a limited disclosure of relationships could be workable.

Clarification of subjective terms such as "influences," "persuades," "advance the interests," or "discredit." At minimum we recommend that you direct staff to provide objective standards for these terms as part of their rulemaking.

This has not been specifically addressed by the sides weighing in thus far. Ms. Meade did object to striking the term "indirectly" in sections using some of these terms, but expressed no problems with eliminating "influences" and "persuades." She appears to have no objection to striking "advance the interests" and "discredit," though she may also be suggesting that these could be the call of the appellate body for the ordinance. We recommend striking these subjective terms for the sake of strict clarity in the ordinance.

Areas of Remaining Disagreement

Eliminate or delineate the power of purchasing officers to determine "mitigating factors" in violations.

Ms. Meade says that they object to striking this provision, but then goes on to say that ERC (or, presumably, any entity appealed to) should have the ability to consider these factors. It strikes us as inappropriate for staff to unilaterally determine that a violation should NOT be considered because of undefined "mitigating factors," since this non-decision cannot be appealed as far as we can tell. It may make sense to empower ERC to consider such factors, but even this may be problematic. WIth the revisions at hand the ordinance is essentially unambiguous, and those that violate its simple standards should not be subjectively granted passes to disregard City rules.

Striking all sections which empower staff to require recusal of elected or appointed City officials.

This is an area of substantial and significant disagreement. It seems appropriate to us to include somewhere in the ordinance an explicit prohibition on staff and other officials from contacting respondents (to supplement the existing prohibition on communications in the other direction--respondents contacting staff or Council), as well as some mechanism for recording such incidents if they do occur. What is totally inappropriate is any power given to City staff to direct elected officials or their appointments to compel recusal. It is likewise not appropriate for appointed officials to be able to compel elected officials in this way.

Some sort of authorization to publicly recommend recusal may be appropriate with elected and appointed officials able to determine whether they will comply with or reject this recommendation. But an imbalance between the powers of staff and Council is what brought us to this point; we need to prevent a new path for the same mistake.

<u>Previously Addressed Areas Now Contested</u>

Debarment as a Penalty

Staff's present draft revisions to the ordinance and their policy proposals earlier in the Council Working Group process had eliminated debarment as a possible penalty. There are a number of cities that rely only upon disqualification only as a penalty and do not provide for debarment. We see no reason to go back on this topic.

Beginning and Ending Points for the Restricted/No Contact Period

Staff's draft of the ALO revisions began the Restricted Contact Period after the close of the solicitation and ends it with either the cancellation of the process, the successful execution of the contract or sixty days after Council authorization to negotiate with the selected vendor. We believe that this starting point is the most appropriate, as it allows for advocacy in the instance that a proposed contract reflects bad policy or staff departure from policy. If the process begins when the solicitation opens it forces potential vendors to either go along with bad policy or to surrender their rights to bid. These are the very companies we want bidding the most, and the policy design being proposed now makes that the most likely.

As for the ending point, we see a great deal of benefit in allowing some advocacy in the period between the vendor being chosen and before it is finally decided upon by Council. Again, if the chosen contract departs from policy or reflects a bad expression of existing policy the people most likely to spot this may be firms involved in that industry and their voices could be of great benefit for the public interest.

As for the concept of a "Notice of Solicitation" before the solicitation is issued, this is better than status quo for sure, but there have been numerous concrete instances of solicitations changing between their initial design and their final issuance. Mr. Scarboro himself acknowledged the "iterative" nature of this process, so this notice seems insufficient to accomplish the goals suggested above.

<u>Recommended Recommendation</u>

If you wanted to make a recommendation to Council that reflects the areas of consensus or non-objection to this point you could say something to the effect of:

“The Ethics Review Commission recommends that the Austin City Council adopt proposed changes to the Anti-Lobbying Ordinance (ALO) with the following amendments:

- A guarantee that rulemaking will have an element of ongoing public participation, with rules ultimately brought back to the Ethics Review Commission (ERC) and Council for final review and approval.
- A guaranteed appeals process for all penalized violations to a board appointed by the Council.
- Clarification that only Council may void a contract for violation for the ALO.
- Clarification that disqualification only applies to solicitations for the same project or a project with a substantially similar scope of work.”

If you wanted to include our suggested recommendations for the areas of ambiguity, you could add:

- Amendment of the definition of “Response” to read “only the contents of a sealed proposal or bid submitted by an offeror replying to a solicitation to provide the goods or services solicited by the City.”
- Exemption for communications made in public meetings or to the media.
- Exemption for independent advocacy from non-respondents from being used to disqualify respondents.
- Elimination of subjective terms such as “influences,” “persuades,” “advance the interests,” or “discredit.”

Our suggestions for the areas that have not been agreed to yet or that remain areas of contention would be:

- Eliminate or delineate the power of purchasing officers to determine “mitigating factors” in violations.
- Striking all sections which empower staff to require recusal of elected or appointed City officials.
- Ending the Restricted Contact Period at some point before Council has voted to authorize the contract under consideration.

We do not at this time recommend any other specific recommendations.

Thank you again for your service on this important commission and your work so far. We look forward to the outcome of this difficult process, and are happy to answer any questions you may have on this or other topics.

Sincerely Yours,

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