



## City of Austin

Purchasing Office

P.O. Box 1088, Austin, TX 78767

The following are the comments which have been received in response to proposed revisions to the Anti-Lobbying Ordinance as of:

October 31, 2017

Date	Respondent	Response
9/27/2017	Andrew Dobbs, Texas Campaign for the Environment	Comments
9/27/2017	Donna Gosh, Organics By Gosh	Comments; Attachment (4 pages)
9/28/2017	Bob Gregory, Texas Disposal Systems	Comments; 2 Attachments (8 pages and 7 pages)
10/3/2017	Steven Shannon, Waste Connections, Inc.	2 Attachments (3 pages and 9 pages)
10/4/2017	Aletta Sung, Asian Contractor Association	Comments
10/10/2017	Bruce Letbetter, EST Group, LLC	Comments
10/11/2017	Zero Waste Advisory Commission	Attachment (2 pages)
10/19/2017	Bob Batlan, Capital IDEA	Comments/Questions with responses
10/19/2017	Michael Whellan, Graves Dougherty Hearon & Moody	Comments; Attachment (7 pages)
10/20/2017	Amy Casto, American Council of Engineering Companies of Central Texas	Comments/Questions with response
10/23/2017	Mary Scott Nabers, Strategic Partnerships, Inc.	Comments
10/27/2017	Andrew Dobbs, Texas Campaign for the Environment	Comments
10/30/2017	Bob Gregory, Texas Disposal Systems	Comments
10/30/2017	Stephen P. Webb, Webb & Webb	Attachment withdrawn

## **Andrew Dobbs, Texas Campaign for the Environment; 9/27/2017**

**From:** Andrew Dobbs [<mailto:dobbs@texasenvironment.org>]

**Sent:** Wednesday, September 27, 2017 12:20 PM

**To:** Adler, Steve <[Steve.Adler@austintexas.gov](mailto:Steve.Adler@austintexas.gov)>; Tovo, Kathie <[Kathie.Tovo@austintexas.gov](mailto:Kathie.Tovo@austintexas.gov)>; Houston, Ora <[Ora.Houston@austintexas.gov](mailto:Ora.Houston@austintexas.gov)>; Garza, Delia <[Delia.Garza@austintexas.gov](mailto:Delia.Garza@austintexas.gov)>; Renteria, Sabino <[Sabino.Renteria@austintexas.gov](mailto:Sabino.Renteria@austintexas.gov)>; Casar, Gregorio <[Gregorio.Casar@austintexas.gov](mailto:Gregorio.Casar@austintexas.gov)>; Kitchen, Ann <[Ann.Kitchen@austintexas.gov](mailto:Ann.Kitchen@austintexas.gov)>; Flannigan, Jimmy <[Jimmy.Flannigan@austintexas.gov](mailto:Jimmy.Flannigan@austintexas.gov)>; Pool, Leslie <[Leslie.Pool@austintexas.gov](mailto:Leslie.Pool@austintexas.gov)>; Troxclair, Ellen <[Ellen.Troxclair@austintexas.gov](mailto:Ellen.Troxclair@austintexas.gov)>; Alter, Alison <[Alison.Alter@austintexas.gov](mailto:Alison.Alter@austintexas.gov)>; Everhart, Amy <[Amy.Everhart@austintexas.gov](mailto:Amy.Everhart@austintexas.gov)>; Richardson, Ashley <[Ashley.Richardson@austintexas.gov](mailto:Ashley.Richardson@austintexas.gov)>; Rodriguez, Genoveva <[Geno.Rodriguez@austintexas.gov](mailto:Geno.Rodriguez@austintexas.gov)>; Goodman, Jackie <[Jackie.Goodman@austintexas.gov](mailto:Jackie.Goodman@austintexas.gov)>; Chincanchan, David <[David.Chincanchan@austintexas.gov](mailto:David.Chincanchan@austintexas.gov)>; Alexander, Shelby <[Shelby.Alexander@austintexas.gov](mailto:Shelby.Alexander@austintexas.gov)>; Craig, Ken <[Ken.Craig@austintexas.gov](mailto:Ken.Craig@austintexas.gov)>; Bier, Marti <[Marti.Bier@austintexas.gov](mailto:Marti.Bier@austintexas.gov)>; Smith, Amy <[Amy.Smith@austintexas.gov](mailto:Amy.Smith@austintexas.gov)>; Searle, Michael <[Michael.Searle@austintexas.gov](mailto:Michael.Searle@austintexas.gov)>; Cadena-Mitchell, Kurt <[Kurt.Cadena-Mitchell@austintexas.gov](mailto:Kurt.Cadena-Mitchell@austintexas.gov)>; Hart, Elaine <[Elaine.Hart@austintexas.gov](mailto:Elaine.Hart@austintexas.gov)>; Goode, Robert <[robert.goode@austintexas.gov](mailto:robert.goode@austintexas.gov)>; Angoori, Sam <[Sam.Angoori@austintexas.gov](mailto:Sam.Angoori@austintexas.gov)>; Scarboro, James <[James.Scarboro@austintexas.gov](mailto:James.Scarboro@austintexas.gov)>

**Subject:** TCE Position on ALO Changes

September 27, 2017

Mayor and Council:

I am writing today to express Texas Campaign for the Environment's position on proposed changes to the City's Anti-Lobbying Ordinance (ALO). We are very happy to see progress being made on this important topic, and to see suggestions very much in line with concerns that we have raised in the past. We have a few remaining concerns that we wanted to communicate, but in general we are grateful to staff and Council's efforts to move forward on this topic.

In particular we approve of suggestions to significantly shorten to no-contact period, to eliminate debarment as a penalty for ALO violations, to clarify precisely which sorts of communications are prohibited or allowed, to introduce mitigating factors into consideration of violations, and to extend new responsibilities to staff with regard to recusals. Had these provisions been in place to now we would likely have avoided many of the frustrating controversies that have arisen in the last couple of years.

### **Ending the No Contact Period Earlier**

All that said, we see a couple of substantial outstanding issues. First is that while we are glad to see the no-contact period shortened, we believe it should be shorter still at the end of the period. Its proposed starting point--at the closing of the solicitation, when all bids are due--makes sense to us, as it gives potential bidders the opportunity to raise questions about scope of work or other solicitation problems without forfeiting their ability to bid on the solicitation in question.

But ending the period only after the contract is authorized, cancelled, or 60 days after Council approval means that parties interested in the contract cannot raise problems with a proposed deal prior to that deal's authorization. With recent proposed contracts between the City and notorious polluters, this risk is not hypothetical. We believe that an end point prior to Council's final vote--perhaps when the contract is initially posted for Council action or for commission review--would make more sense.

#### Rulemaking Must Be Subject to Your Review

Furthermore, for all of the positive steps these amendments make, in the end it will ultimately be the upcoming rulemaking process around this topic that will decide whether the ordinance works or not. We look forward to engaging in this rulemaking effort, but we urge you to insist upon approving any rules put forward.

The primary concern that has inspired this entire process is the fear that under the present ALO City staff has had powers that some potential bidders feared would be abused with little recourse for defense against these harms. This current revision process represents a proper use of Council's power to reduce these threats and prevent these abuses, but confidence in this project will be severely undermined if in the most important element--the rulemaking process--this balance between Council and staff is abandoned. We ask that you please direct staff to bring any proposed rules back before you for final amendment and approval.

#### Let Commissions Review Proposed Amendments

To a similar end, we also ask you to please delay your formal consideration of the amendments at hand until all relevant commissions have had a chance to review them. Obviously much of this discussion has arisen as a result of dispute over solid waste contracts, so a review by the Zero Waste Advisory Commission would make sense, but the Ethics Review Commission and others may wish to consider them as well. If these reviews can be undertaken prior to October 19, then we have no problem taking this question up then. If it will take longer, it is better to get it right than to get it done hastily.

As for any urgency suggested because of the biosolids contract, Austin Water has until April 2018 to sign a new contract--a relatively short time, but long enough to get this process right first. Furthermore, you would have the power to suspend the ALO for this particular contract if necessary. We are encouraged by the very positive suggested scope of work put forward for this contract, and we hope that if this is put forward intact (with one or two possible improvements) it will settle our most substantial concerns with that proposal. Regardless, we believe that the City can effectively solve both of these problems simultaneously.

We again wish to thank staff from the Purchasing Department, as well as leadership on Council and from other City staff in developing these suggested revisions, and we believe that we are very close to a solution here to a once intractable problem. This solution will allow for you to find contractors that can serve Austin's needs while effectively stewarding our resources, operating with integrity, and protecting the environment.

Thank you again for your attention to this, and please do not hesitate to reach out with any questions on this or any other topics.

Sincerely Yours,

Andrew Dobbs

Central Texas Program Director

Legislative Director

Texas Campaign for the Environment

(512) 326-5655

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**Donna Gosh, Organics By Gosh; 9/27/2017**

**From:** Donna Gosh [<mailto:djshavercpa@gmail.com>]

**Sent:** Wednesday, September 27, 2017 3:23 PM

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**Subject:** Anti-Lobby Ordinance

Good morning Mayor and Councilmembers.

Phil and I appreciate the opportunity to review the Anti-Lobby Ordinance draft. We do not feel the ordinance draft fully reflects the waste working group feedback. Is there a way that the results of the waste working group may be more fully incorporated?

Attached are the thoughts we communicated to you in May after the completion of the waste working group meetings.

Please do not hesitate to contact Phil or me with any questions.

Thank you.

**Donna J. Shaver Gosh, CPA, CFO**



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## WORKING GROUP INSIGHTS AND SUGGESTIONS

The waste management working group has discussed the need for an anti-lobbying ordinance and protection of confidentiality, and the importance of competition.

Power exists when we all work together and utilize the many experts and vast experience in Austin's waste and recycling community. Diversity, collaboration and competition are healthy and provide an opportunity for multiple businesses to participate and offer pricing and service options to the City. In this spirit of competition, do we want to draw more businesses to the City of Austin and increase the diversity and collaboration of businesses? And do we want to promote small businesses and entrepreneurs in Austin's zero waste movement?

If so, it is important to have commitment to create an environment in which:

1. Politics is secondary to obtaining and communicating information and enforcing policy, verifying information and trusting city staff;
  2. Mutual respect exists in collaborating toward zero waste;
  3. New businesses and entrepreneurs can enter the market and thrive;
  4. City Council, city staff, and advisory boards work well together modeling trust and collaboration;
  5. A competitive solicitation is respected through the process and enforcement of not allowing non-solicitors to derail the process; and
  6. Confidentiality is respected in pre-meetings and advisory meetings with enforceable confidentiality agreements signed by all parties.
- A. The Anti-Lobby Ordinance is a good and necessary policy. As stated at recent city council meetings and ZWAC meetings, the ordinance exists to minimize corruption. This is key to a healthy environment to promote local business competition and to prevent monopoly and corruption. A level playing field needs to be fostered with guidelines to protect businesses who respond to solicitations from those who choose not to respond or abide by the ordinance guidelines.

Ideas on tweaking the Anti-Lobby Ordinance so that boundaries and limitations are clear, strong, and enforced. The Anti-Lobby Ordinance should:

1. Specify in the ordinance that it applies to all waste and recycling service solicitations;
2. Define "Representation" to include
  - a. contact initiated by respondent or its representative, city official, city employee, or city representative;
  - b. advance the interest of the respondent
  - c. discredit the response of any other respondent
  - d. encourage the city to withdraw the solicitation or reject all of the responses;
  - e. directly or indirectly ask, influence or persuade any City official, City employee, or body in any manner regarding the solicitation or other respondents;
3. Define the "no contact period" to be effective from the date a solicitation is released until contract(s) awarded and executed or when solicitation is withdrawn;
4. Be applicable to all respondents during the entire "no contact period".



## WORKING GROUP INSIGHTS AND SUGGESTIONS

5. If a vendor's solicitation is not recommended, the ordinance should still apply to them until a contract is awarded and executed to prevent derailment of the process and discrediting of other responses and respondents;
6. Clarify that if a vendor makes a representation during the "no contact period" then they cannot later participate in the solicitation and be a respondent;
7. Support transparency thus include that all representations other than procedural questions should be limited to publicly posted meetings held under the Texas Government Code, Chapter 551 (Open Meetings Act);
8. Incorporate a violation inquiry channel and panel for reporting complaints and violations. This would create an objective avenue to file complaints or make inquiries as to the ordinance and policy conflicts. Perhaps the existing ethics commission could be utilized to receive email of complaints or questions, investigating if they are valid and communicating conclusion to involved parties and if violation exist, recommending action. It seems fair to have 1-2 warnings before issuing a violation; so, clarify how violations will be tallied. The ethics commission should have the ability to enforce actions on complaints and violations.
9. Multiple violations would result in disbarment from solicitation process if vendor has more than 2 violations that occur during a 5-year period. Violations are a serious matter and harmful to healthy collaboration and competition to reach zero waste.

Prior to releasing a solicitation, it would be helpful for the city receive input from advisory commissions on scoring matrix and items that would be important to clarify in the solicitation. This would reduce anti-lobby violations if the solicitation was very clear on details of service parameters and scoring.

If clear policy is in place for a solicitation process, then only those who participate in following the process should be considered for awarding the contract. It is important for the city to have clear policy that applies to all with accountability and power to enforce. Clear solicitation process and anti-lobbying boundaries enforced without exceptions.

An anti-lobbying ordinance is critical to foster an environment for entrepreneurs and new businesses to enter as stated at the April 6 city council meeting by SCORE representative. A start-up business does not have the time, energy, or capital to spend on lobbying and legal advice. Therefore, a level playing field where companies can thrive and grow and participate in solicitations without lobbying or defending frivolous accusations and incomplete information.

- B. ZWAC participation to review scope of work in solicitations and offer input before they are distributed to vendors is a good idea, but there needs to be an enforceable confidentiality to not share information on solicitations with vendors or obtain vendor input on solicitations.
- C. From our experience, a pre-solicitation meeting is held allowing all vendors to participate and ask questions about the scope of work. This has been helpful and a good practice to continue.



## WORKING GROUP INSIGHTS AND SUGGESTIONS

- D. Construct a scoring matrix for solicitations that is based on historical perspective as well as current solicitation parameters.
1. Collaboration with others in industry
  2. Ethics
  3. Integrity
  4. Reputation with peers and employees
  5. Previous Contract Compliance
  6. Commitment to Zero Waste Goals
  7. Local Business (need to be clear on definition)
  8. Generous with others, sacrifice to greater good
  9. Solution Based / Problem Solver not creator
  10. Conflict Resolution with city staff, peers, competition (i.e. limit legal action)
  11. Communication – clear and transparent
- E. Proper handling of confidential information in solicitations and contracts is critical to healthy competition. A solution would be to choose carefully what is required in solicitations, request only information that is absolutely necessary and relevant. Allow vendors the option to redact anything proprietary (financial, trade secret, etc.) before a solicitation is provided outside of the purchasing office. The public should not be allowed to view submitted solicitations and/or unexecuted contracts. A Public Information Act exists to provide govern the release of information. It is not conducive to healthy competition when confidential financial or proprietary information is released and allowed to be viewed by public or competitors.
- F. Existing contract utilization for new solicitation items should be avoided except in emergency situations. Issuance of a new solicitation would be healthy for competition and obtaining best value / service. Contracts are based on a scope of work in the solicitation and if a blanket clause in an existing contract is utilized, then it would not be fair to those who were not able to participate in original solicitation based on its scope of work. A new solicitation would allow others to respond that may not have responded to the solicitation for the existing contract because they did qualify for the original scope of work. Competition is important and having one business simply add things to an existing contract via a "blanket clause" would create a monopoly. For example, if a business is capable of providing multiple service, they could simply put a "blanket clause" in every contract to argue its use for every future solicitation. Whereas, a business that provides limited service may not have been able to bid on the existing contract because they did not provide the service in its scope of work, but may provide the service for the scope of work being added. Healthy competition is the goal.
- G. Directing product to or away from certain landfills in future solicitations should be based on whether the landfill is compliant with federal and state requirements. All of the facts need to be considered on landfills – what type of liner, is methane captured to produce energy, is all testing current.

In addition, we need another landfill available. As was discussed in the first working group session, the objective is to avoid monopoly and encourage competition. Multiple landfills will promote





## WORKING GROUP INSIGHTS AND SUGGESTIONS

competition and pricing; as well as provide alternatives and contingency plans in the event of an emergency.

- H. A preferred policy for biosolids management requires obtaining all the information from city staff and waste water as they are the experts. They have worked with current contractor for about 9 years and have all of the backup data and lab analysis. A diversity for use of compost is important. Please get all of the facts and focus on the complete truth.

Let's focus on the vision of zero waste set before us, working together, trusting each other, sacrificing for the good of the community. And foremost, let's abide by policy and stop the politics so we can make sound decisions for future generations, "By Gosh"!

**Bob Gregory, Texas Disposal Systems; 9/28/2017**

**From:** Bob Gregory [<mailto:bgregory@texasdisposal.com>]

**Sent:** Thursday, September 28, 2017 10:36 AM

**To:** Adler, Steve <[Steve.Adler@austintexas.gov](mailto:Steve.Adler@austintexas.gov)>; Tovo, Kathie <[Kathie.Tovo@austintexas.gov](mailto:Kathie.Tovo@austintexas.gov)>; Houston, Ora <[Ora.Houston@austintexas.gov](mailto:Ora.Houston@austintexas.gov)>; Garza, Delia <[Delia.Garza@austintexas.gov](mailto:Delia.Garza@austintexas.gov)>; Renteria, Sabino <[Sabino.Renteria@austintexas.gov](mailto:Sabino.Renteria@austintexas.gov)>; Casar, Gregorio <[Gregorio.Casar@austintexas.gov](mailto:Gregorio.Casar@austintexas.gov)>; Kitchen, Ann <[Ann.Kitchen@austintexas.gov](mailto:Ann.Kitchen@austintexas.gov)>; Flannigan, Jimmy <[Jimmy.Flannigan@austintexas.gov](mailto:Jimmy.Flannigan@austintexas.gov)>; Pool, Leslie <[Leslie.Pool@austintexas.gov](mailto:Leslie.Pool@austintexas.gov)>; Troxclair, Ellen <[Ellen.Troxclair@austintexas.gov](mailto:Ellen.Troxclair@austintexas.gov)>; Alter, Alison <[Alison.Alter@austintexas.gov](mailto:Alison.Alter@austintexas.gov)>; Wick, Jim <[Jim.Wick@austintexas.gov](mailto:Jim.Wick@austintexas.gov)>; Everhart, Amy <[Amy.Everhart@austintexas.gov](mailto:Amy.Everhart@austintexas.gov)>; Smith, Amy <[Amy.Smith@austintexas.gov](mailto:Amy.Smith@austintexas.gov)>; Halley, Shannon <[Shannon.Halley@austintexas.gov](mailto:Shannon.Halley@austintexas.gov)>; Chincanchan, David <[David.Chincanchan@austintexas.gov](mailto:David.Chincanchan@austintexas.gov)>; Craig, Ken <[Ken.Craig@austintexas.gov](mailto:Ken.Craig@austintexas.gov)>; Bier, Marti <[Marti.Bier@austintexas.gov](mailto:Marti.Bier@austintexas.gov)>; Searle, Michael <[Michael.Searle@austintexas.gov](mailto:Michael.Searle@austintexas.gov)>; Cadena-Mitchell, Kurt <[Kurt.Cadena-Mitchell@austintexas.gov](mailto:Kurt.Cadena-Mitchell@austintexas.gov)>; Hutchins, Christopher <[CJ.Hutchins@austintexas.gov](mailto:CJ.Hutchins@austintexas.gov)>; Rodriguez, Genoveva <[Geno.Rodriguez@austintexas.gov](mailto:Geno.Rodriguez@austintexas.gov)>; Nicely, Katherine <[Katherine.Nicely@austintexas.gov](mailto:Katherine.Nicely@austintexas.gov)>; Dave, Neesha <[Neesha.Dave@austintexas.gov](mailto:Neesha.Dave@austintexas.gov)>; Tiemann, Donna <[Donna.Tiemann@austintexas.gov](mailto:Donna.Tiemann@austintexas.gov)>; Lawler, John <[John.Lawler@austintexas.gov](mailto:John.Lawler@austintexas.gov)>; Varghese, Lesley <[Lesley.Varghese@austintexas.gov](mailto:Lesley.Varghese@austintexas.gov)>; Brinsmade, Louisa <[Louisa.Brinsmade@austintexas.gov](mailto:Louisa.Brinsmade@austintexas.gov)>; Goodman, Jackie <[Jackie.Goodman@austintexas.gov](mailto:Jackie.Goodman@austintexas.gov)>; Gratias, Ceci <[Ceci.Gratias@austintexas.gov](mailto:Ceci.Gratias@austintexas.gov)>; Alexander, Shelby <[Shelby.Alexander@austintexas.gov](mailto:Shelby.Alexander@austintexas.gov)>; Harden, Joi <[Joi.Harden@austintexas.gov](mailto:Joi.Harden@austintexas.gov)>; Richardson, Ashley <[Ashley.Richardson@austintexas.gov](mailto:Ashley.Richardson@austintexas.gov)>; Sereno, Alba <[Alba.Sereno@austintexas.gov](mailto:Alba.Sereno@austintexas.gov)>

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**Subject:** Agenda Item 44, TDS Response and Comments

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 interpret 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



## MEMORANDUM

FROM: Jim Hemphill

DATE: September 28, 2017

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

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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)).<sup>1</sup> 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.**

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<sup>1</sup> 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 Response 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) ~~630~~ 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

~~(e)~~(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 subcontractor 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.
  - ~~(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) convey~~ 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.

Steven Shannon, Waste Connections, Inc.; 10/3/2017

Attachment to follow:



WASTE CONNECTIONS, INC.  
*Connect with the Future*

October 3, 2017

Austin City Hall  
P.O. Box 1088  
Austin, Texas 78767

Honorable Mayor Steve Adler:

Progressive Waste Solutions of TX, Inc. d/b/a WC of Texas respectfully conveys this letter for your consideration.

WC of Texas has had a productive presence in Austin for more than two decades, employing hundreds of local citizens and serving thousands of local customers. We have also been an active participant and observer of the Solid Waste Policy Focus Group; recently convened to address issues pertaining to the solicitation of solid waste and recycling Bids and Requests for Proposals.

Those issues include concern that many solicitations of solid waste services have been interrupted during the solicitation process, causing the contract awards to be withdrawn or delayed, much to the detriment of the City and the vendors that have submitted bids or proposals in good faith.

As we have testified to City Council, due to this interference, we have chosen not to submit responses to recent bids or RFPs and, until we can be assured of a fair opportunity to serve the City and its constituents.

To address this issue, The City convened the Solid Waste Policy Focus Group, seating four City Council Members and numerous industry representatives and other stakeholders. While several issues were clarified, it is most noteworthy that the conclusions of the SWPFG did not identify any mishandling, or the attempted creation of City Policy, by City Staff through the Bid/RFP process; effectively refuting allegations to the contrary.

The recommendations of the SWPFG include the following pertinent conclusions:

- The Anti-Lobbying Ordinance should be in effect from the time a Bid or RFP is issued through the time that City Council votes to execute the contract.
- Clarify what constitutes disbarment and penalties for violating the ALO.
- That the Ethics Review Commission potentially serve as a third-party reviewer to determine violations, judgment and penalty enforcement.
- That except in the case of an emergency, the City should continue to competitively solicit waste management contracts.

The crux of the matter is the application of the ALO as a clear and enforceable mechanism to prevent subversion of good faith responses to Bids/RFPs. This issue was not fully vetted by the SWPFG and is under further review. The City Purchasing Department has submitted draft revisions to the ALO to City Council and for public review.





WASTE CONNECTIONS, INC.  
*Connect with the Future*

The draft finds [Article 6. 2-7-101 (B)] that: "The Council finds that it is in the City's interest 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". We support this approach.

We suggest that if the City desires to negotiate with a chosen vendor, or under the auspices of an existing agreement that provides such negotiations, then feel free to do so. However, if the City decides to issue a Bid or RFP then such side-bar negotiations should end or be suspended and not considered until such time as the City Council has voted to execute, or not execute, a contract obtained through the Bid/RFP solicitation.

The draft revisions to the ALO by the Purchasing Department include several streamlined processes but we are very concerned and object to the following potential changes:

- The No Contact Period is to begin at the point in time when Bids/Proposals are due to be submitted. This is directly contrary to the recommendation of the SWPFG that the No Contact Period begin when the solicitation is issued. It is also contrary to the existing ALO. The Purchasing Department asserts that if the No Contact Period is concurrent with the issuance of the solicitation it is difficult for them to track if an agent of a potential bidder/responder is in violation of the No Contact clause. We suggest that the Purchasing Department publish a list of all active solicitations so that City Officials and Staff can be aware of potential conflicts and record the contact in a City database.
- The draft eliminates the current penalty for repeat violations of the ALO; which specifies that a respondent that has violated the ALO more than two times in a five year period be disbarred from bidding for three years. Without this penalty, and the enforcement thereof, there is nothing to stop continued interference and disruption of the Bid/RFP process. The draft asserts that, since there is no record of disbarment, the penalty serves as deterrent only. A deterrent is certainly better than an open invitation to subvert the solicitation process and merely because disbarment has not occurred in the past doesn't mean it might not in the future.

We are very interested in continuing to work with the City and, under fair and good faith circumstances, are eager to respond to Bids and RFPs.

I have attached the pertinent documents for your reference; upon some of which I have made notations.

If anyone has any questions or comments regarding this letter please contact me on my email at [steve.shannon@progressivewaste.com](mailto:steve.shannon@progressivewaste.com) or my cell phone at 830-225-0735.

Respectfully,

Steven R. Shannon  
WC of Texas  
Austin, Texas

Copy to:



WASTE CONNECTIONS, INC.  
*Connect with the Future*

Council Member Ora Houston  
Council Member Delia Garza  
Council Member Sabino Renteria  
Council Member Gregorio Casar  
Council Member Ann Kitchen  
Council Member Jimmy Flannigan  
Council Member Leslie Pool  
Council Member Ellen Troxclair  
Interim City Manager Elaine Hart  
Assistant City Manager Robert Goode  
City Attorney Ann Morgan  
Interim Capital Contracting Officer Rolando Fernandez  
Interim Chief Financial Officer Greg Canally  
Interim Resource Recovery Department Director Sam Angoori  
Purchasing Department Director James Scarboro  
Zero Waste Advisory Commission Chair Gerard Acuna  
Zero Waste Advisory Commission Staff Michael Sullivan  
Ethics Review Commission Chair Peter Einhorn  
Ethics Review Commission Secretary Robert Stratmann  
Ethics Review Commission Staff Sue Palmer



## RECOMMENDED REVISIONS, 9-28-2017

(MARK-UP)

### ARTICLE 6. ~~—~~ ANTI-LOBBYING AND PROCUREMENT.

#### § 2-7-1012 ~~—~~ 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 Chapter/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/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) A solicitation includes, without limitation, an invitation for bids, a request for proposals, a request for quotations, a request for qualifications, and a notice of funding availability.

(E) Unless this Article is invoked by Council, †This article does not apply to an opportunity to compete for City social service funding; City cultural arts funding; federal, state and City block grant funding; and the sale or rental of real property, 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.

(EF) 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.—A representation excludes communication between a City of Austin attorney and a respondent's attorney.

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

#### § 2-7-1021 ~~—~~ D—DEFINITIONS.

In this article:

- (1) AGENT means a person authorized by a respondent to act for or in place of respondent, ~~including a person acting at the request of respondent, a person acting with the knowledge and consent of a respondent, or a person acting with any arrangement, coordination, or direction between the person and the respondent.~~ in order to make a representation, including but not limited to:
  - (a) a person acting at the request of respondent;
  - (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) a current full-time or part-time employee, owner, director, officer, member, or manager of a respondent;
  - (e) 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) a person related within the first degree of consanguinity or affinity to the respondent, if a respondent is an individual person.
- (2) AUTHORIZED CONTACT PERSON ~~means a City employee designated in a City solicitation as the point of contact for all purposes for that solicitation.~~ means the person identified in a City solicitation as the contact regarding the solicitation, or the authorized contact person's designee during the course of the no-contact period.
- (3) CITY EMPLOYEE is defined in Section 2-7-2 (Definitions). ~~in this article means a person employed by the City.~~
- (4) CITY OFFICIAL is defined in Section 2-7-2 (-Definitions-).
- (5) ~~DIRECTOR means the director of a department to which the purchasing officer has delegated authority for enforcing this Chapter.~~
- (56) NO-CONTACT PERIOD means the period of time beginning at the date and time a response 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 the last contract resulting from the solicitation is signed;
  - (b) 60 days following council authorization of the last contract resulting from the solicitation; or
  - (c) cancellation of the solicitation by the City.
- (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. ~~means the period of time from the date of issuance of the solicitation until a contract is executed. If the City withdraws the solicitation or rejects all responses with the stated intention to reissue the same or similar solicitation for the same or similar project, the no-contact period continues during the time period between the withdrawal and reissue.~~
- (7) RESPONSE means a response to a solicitation.

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

(a) a contractor for a respondent;

(b) a subsidiary or parent of a respondent;

(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) a subcontractor to a respondent in connection with that respondent's response.

~~means a person responding to a City solicitation including a bidder, a quoter, responder, or a proposer. The term "respondent" also includes:~~

~~(a) an owner, board member, officer, employee, contractor, subsidiary, joint enterprise, partnership, agent, lobbyist, or other representative of a respondent;~~

~~(b) a person or representative of a person that is involved in a joint venture with the respondent, or a subcontractor in connection with the respondent's response; and~~

~~(c) a respondent who has withdrawn a response or who has had a response rejected or disqualified by the City.~~

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

~~means a communication related to a response to a council member, official, employee, or City representative that is intended to or that is reasonably likely to:~~

~~(a) provide information about the response;~~

~~(b) advance the interests of the respondent;~~

~~(c) discredit the response of any other respondent;~~

~~(d) encourage the City to withdraw the solicitation;~~

~~(e) encourage the City to reject all of the responses;~~

~~(f) convey a complaint about a particular solicitation; or~~

~~(g) directly or indirectly ask, influence, or persuade 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.~~

(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). ~~means an opportunity to compete to conduct business with the City that requires City Council approval under City Charter Article VII Section 15 (Purchase Procedure).~~

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

~~§ 2-7-102 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 Chapter.~~
- ~~(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) A solicitation includes, without limitation, an invitation for bids, a request for proposals, a request for quotations, a request for qualifications, and a notice of funding availability.~~
- ~~(E) Unless this Article is invoked by Council, this article does not apply to an opportunity to compete for City social service funding; City cultural arts funding; federal, state and City block grant funding; and the sale or rental of real property.~~
- ~~(F) A representation excludes communication between a City of Austin attorney and a respondent's attorney.~~

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

~~§ 2-7-103 -- PROHIBITED REPRESENTATIONS RESTRICTION ON CONTACTS.~~

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) provide 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) discredit the response of any other respondent to the solicitation to which it relates;
- (4) encourage the City to reject all of the responses to the solicitation to which it relates;
- (5) convey a complaint about the solicitation to which it relates; or

- (6) directly or indirectly ask, influence, or persuade 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.~~(A) During a no-contact period, a respondent shall make a representation only through the authorized contact person.~~
- ~~(B) During the no-contact period, a respondent may not make a representation to a City official or to a City employee other than to the authorized contact person. This prohibition also applies to a vendor that makes a representation and then becomes a respondent.~~
- ~~(C) The prohibition of a representation during the no-contact period applies to a representation initiated by a respondent, and to a representation made in response to a communication initiated by a City official or a City employee other than the authorized contact person.~~
- ~~(D) If the City withdraws a solicitation or rejects all responses with a stated intention to reissue the same or similar solicitation for the same or similar project, the no-contact period shall expire after the ninetieth day after the date the solicitation is withdrawn or all responses are rejected if the solicitation has not been reissued during the ninety-day period.~~
- ~~(E) For a single vendor award, the no-contact period shall expire when the first of the following occurs: contract is executed or solicitation is cancelled.~~
- ~~(F) For a multiple vendor award, the no-contact period shall expire when the last of the following occurs: all contracts are executed, negotiations have been fully terminated, or the ninetieth day after the solicitation is cancelled.~~
- ~~(G) The purchasing officer or the director may allow respondents to make representations to city employees or city representatives in addition to the authorized contact person for a solicitation that the purchasing officer or the director finds must be conducted in an expedited manner; an expedited solicitation is one conducted for reasons of health or safety under the shortest schedule possible with no extensions. The purchasing officer's or director's finding and additional city employees or city representatives who may be contacted must be included in the solicitation documents.~~
- ~~(H) Representations to an independent contractor hired by the City to conduct or assist with a solicitation will be treated as representations to a City employee.~~
- ~~(I) A current employee, director, officer, or member of a respondent, or a person related within the first degree of consanguinity or affinity to a current employee, director, officer or member of a respondent, is presumed to be an agent of the respondent for purposes of making a representation. This presumption is rebuttable by a preponderance of the evidence as determined by the purchasing officer or director.~~
- ~~(J) A respondent's representative is a person or entity acting on a respondent's behalf with the respondent's request and consent. For example, a respondent may email their membership list and ask members to contact council members on the respondent's behalf. The members are then acting per respondent's request and with their consent, and the members have become respondent representatives.~~

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

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 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;
- (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).

~~(A) If City seeks additional information from respondent, the respondent shall submit the representation in writing only to the authorized contact person. The authorized contact person shall distribute the written representation in accordance with the terms of the particular solicitation. This subsection does not permit a respondent to amend or add information to a response after the response deadline.~~

~~(B) If respondent wishes to send a complaint to the City, the respondent shall submit the complaint in writing only to the authorized contact person. The authorized contact person shall distribute a complaint regarding the process to members of the City council or members of the City board, to the director of the department that issued the solicitation, and to all respondents of the particular solicitation. However, the director or purchasing officer shall not permit distribution of any complaint that promotes or disparages the qualifications of a respondent, or that amends or adds information to a response. A determination of what constitutes promoting or disparaging the qualifications of a respondent or constitutes amending or adding information is at the director's or purchasing officer's sole discretion. Bid protests are not subject to this subsection. Documents related to a bid protest may not be forwarded to council under this subsection.~~

~~(C) If a respondent makes a written inquiry regarding a solicitation, the authorized contact person shall provide a written answer to the inquiry and distribute the inquiry and answer to all respondents of the particular solicitation.~~

- ~~(D) If a respondent is unable to obtain a response from the authorized contact person, the respondent may contact the director or purchasing officer as appropriate.~~
- ~~(E) A respondent may ask a purely procedural question, for example a question regarding the time or location of an event, or where information may be obtained, of a City employee other than the authorized contact person. This section does not permit a respondent to make suggestions or complaints about the contract process that constitute a representation to a City employee other than the authorized contact person. Notwithstanding this subsection, a respondent may not ask a procedural question of a councilmember, a councilmember's aide, or of a City board member except in a meeting held under the Texas Government Code, Chapter 551 (Open Meetings Act).~~
- ~~(F) This Article allows representations:~~
- ~~(1) made at a meeting convened by the authorized contact person, including meetings to evaluate responses or negotiate a contract;~~
  - ~~(2) required by Financial Services Department protest procedures for vendors;~~
  - ~~(3) made at a Financial Services Department protest hearing;~~
  - ~~(4) provided to the Small & Minority Business Resources Department in order to obtain compliance with Chapter 29A D (the Minority Owned and Women Owned Business Enterprise Procurement Program);~~
  - ~~(5) made to the City Risk Management coordinator about insurance requirements for a solicitation;~~
  - ~~(6) made in public at a meeting held under Texas Government Code, Chapter 551 (Open Meetings Act); or~~
  - ~~(7) made from a respondent's attorney to an attorney in the Law Department in compliance with Texas Disciplinary Rules of Professional Conduct.~~
- ~~(G) Nothing in this article prohibits communication regarding the solicitation between or among City officials or City employees acting in their official capacity.~~
- ~~(H) A contribution or expenditure as defined in Chapter 2-2 (Campaign Finance) is not a representation.~~

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

#### § 2-7-105 — NOTICEMODIFICATION 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. (A) An employee preparing a solicitation shall include a notice in the solicitation that advises respondents of the requirements of this article, including a notice that if any City official or City employee, other than the authorized contact person, approaches a respondent for response or solicitation information during the no-contact period, the respondent is at jeopardy if he or she makes any representation in response.

~~(B) The authorized contact person for that solicitation shall notify council members in writing that the no-contact period for that solicitation is in effect.~~

~~(C) When a solicitation is issued that will be reviewed by a City board, the authorized contact person for that solicitation shall notify in writing each member of the board that the no-contact period for that solicitation is in effect.~~

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

§ 2-7-106 -- DISCLOSURE OF PROHIBITED REPRESENTATION 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) The purchasing officer has the authority to enforce this article through rules promulgated in accordance with Section 1-2-1, which at a minimum shall include a notice and protest 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; and
  - (3) written notice of the right to request a an impartial hearing process.
- ~~(A) If a City official or City employee receives a representation during the no-contact period for a solicitation, the official or employee shall notify in writing the authorized contact person for that solicitation as soon as practicable.~~
- ~~(B) During the no-contact period, a City official or City employee, except for the authorized contact person, shall not solicit a representation from a respondent.~~

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

§ 2-7-107 -- ENFORCEMENT 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. (A) A respondent that makes a prohibited representation violates this article. If the authorized contact person for a solicitation is informed, or receives information, that a respondent has made a prohibited representation during the no-contact period, the authorized contact person shall document the representation and notify the director or purchasing officer immediately.
- ~~(B) If the director or purchasing officer finds that a respondent has violated this article, the respondent is disqualified.~~
- ~~(C) If a respondent is disqualified for a solicitation and the solicitation is withdrawn or if all responses are rejected, the respondent is disqualified for a reissue of the same or similar solicitation for the~~



~~same or similar project. Section 2-7-103(D) does not limit the duration of the disqualification. The director or purchasing officer may determine what constitutes a "same or similar" project for purposes of this subsection.~~

~~(D) The Financial Services Department and a department to which the purchasing officer has delegated purchasing authority shall adopt rules to administer and enforce this article. The rules must include the provision of written notice of disqualification to the respondent and a process to protest a disqualification.~~

~~(E) This article is not subject to enforcement by the Ethics Review Commission.~~

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

§ 2-7-108 -- CONTRACT VOIDABLE 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.

~~If a contract is awarded to a respondent who has violated this article, the contract is voidable by the City.~~

~~Source: Ord. 20071206-045.~~

~~§ 2-7-109 -- DEBARMENT.~~

~~(A) If a respondent has been disqualified under this article more than two times in a sixty-month period, the purchasing officer shall debar a respondent from the sale of goods or services to the City for a period not to exceed three years, provided the respondent is given written notice and a hearing in advance of the debarment.~~

~~(B) The Financial Services Department and any department to which the purchasing officer has delegated authority for enforcing this article shall adopt rules to administer and enforce this section. The rules must include a hearing process with written notice to the respondent.~~

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

~~§ 2-7-110 -- NO CRIMINAL PENALTY.~~

~~Section 1-1-99 does not apply to this article.~~

~~Source: Ord. 20071206-045.~~

~~§ 2-7-111 -- DIRECTOR DISCRETION.~~

~~A director has the discretion to apply this Article to any other competitive process not covered by this Article.~~

~~Source: Ord. 20111110-052.~~

*This should be retained. Repeat Aho  
obstructors <sup>may</sup> continue to violate the Aho  
disrupting the bid/RFP processes.*



**Aletta Sung, Asian Contractor Association; 10/4/2017**

**From:** Asian Contractor Association [mailto:asiancontractor@gmail.com]

**Sent:** Wednesday, October 04, 2017 11:21 AM

**To:** Willett, Shawn <Shawn.Willett@austintexas.gov>

**Subject:** My feedback - Re: Feedback for Proposed Changes to the Anti-Lobbying Ordinance

Hi Shawn,

Thank you for answering my questions. Here is my written feedback.

1. There should be a clause to address consequences to those city personnel who fail to report any violations during the No-Contact period.
2. Keep the debarment ordinance in the anti-lobbying law.
3. Expand "a person identified in Section 2-7-102(10)c," in 2-7-108-RECUSAL to all city employees.

Thank you!

Best Regards,

Aletta Sung

Executive Director

Asian Contractor Association

4201 Ed Bluestein Blvd, Ste 2105

Austin, TX 78721

Tel: 512-926-5400

Cell: 512-300-7644

[asiancontractor@gmail.com](mailto:asiancontractor@gmail.com)

[www.acta-austin.com](http://www.acta-austin.com)

**Bruce Letbetter, EST Group, LLC; 10/10/2017**

**From:** Bruce Letbetter [mailto:bletbetter@est-grp.com]

**Sent:** Tuesday, October 10, 2017 7:58 PM

**To:** Willett, Shawn <Shawn.Willett@austintexas.gov>

**Subject:** Fwd: Your input on City of Austin Anti-Lobbying Ordinance - Please read.

Hi Shawn,

I hope you are doing well. I'm told you are the one to respond to with feedback on the draft ordinance.

Looks perfectly fine to me. Short, clear and concise.

Thanks,

-Bruce

**Bruce Letbetter**

Regional Sales Manager

Austin | Central and South Texas

[www.est-grp.com](http://www.est-grp.com)

Mobile: 512-635-1475

**Zero Waste Advisory Commission; 10/11/2017**

**Attachment to follow:**



## **ZERO WASTE ADVISORY COMMISSION RECOMMENDATION 20171011-003b**

Date: October 11, 2017

Subject: **Recommendation from ZWAC Regarding City Code Chapter 2-7, Article 6 relating to anti-lobbying and procurement.**

Motioned By: Commissioner Blaine

Seconded By: Commissioner Bones

### **Recommendation**

At the October 11, 2017 meeting of the Zero Waste Advisory Commission, the Commission made the following recommendation regarding the Anti-Lobbying Ordinance (ALO).

### **Description of Recommendation to Council**

The Zero Waste Advisory Commission registers a serious concern that the recommendations of the Waste Management Policy Working Group are not well reflected in the drafted changes to the Anti-Lobbying Ordinance (ALO) and recommends adoption of the changes to the ALO detailed below:

- 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.
- Specific mention in the ordinance of a right to appeal all disqualifications and other penalties or determinations to the ERC and ultimately Council.
- Clarification that only Council may void a contract for violation for the ALO.
- Striking all sections which empower staff to require recusal of elected or appointed City officials.
- Assurance that the ordinance will not consider public communications to be in any way a violation.
- Assurance that independent advocacy from non-respondents will not be used to disqualify respondents.
- Definition of the term “response.”
- Clarification of subjective terms such as “influences,” “persuades,” “advances the interests,” or “discredits.” At minimum we recommend that you direct staff to provide objective standards for these terms as part of their rulemaking.
- Eliminate or delineate the power of purchasing officers to determine “mitigating factors” in violations.
- Replace disqualification for “similar” projects with a disqualification for the SAME project.”
- Continue to keep the Anti-lobby Ordinance in a suspended state until such time that both the final ALO and subsequent governing Rules are drafted and adopted by Council.

**Vote: 8-0-0-2**

For: Commissioners Acuna, Blaine, Bones, de Orive, Hoffman, Masino, Rojo, White,

Against: 0 Abstain: 0 Absent: Joyce, Gattuso

Attest:



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Michael Sullivan, ZWAC staff liaison

**Bob Batlan, Capital IDEA; 10/19/2017**

Alba / All,

Thank you for bringing this discussion to our attention.

We will add your questions to the running list of feedback we've received regarding the proposed revisions to the City's Anti-Lobbying Ordinance located at:

[https://www.ci.austin.tx.us/financeonline/vendor\\_connection/index.cfm](https://www.ci.austin.tx.us/financeonline/vendor_connection/index.cfm)

Some general clarifications.

- The recommendations to change the City's Anti-Lobbying Ordinance resulted from a request made by the Waste Management Working Group. Staff has proposed changes to the ordinance (Ch. 2-7, Article 6). Council voted on 9/28 to refer the changes to the Ethics Review Commission (ERC). At the 10/19 meeting, Council postponed the vote on the revised ordinance to give the ERC more time to complete their review. Currently the revised ordinance is schedule to return to Council on 11/9.
- The proposed changes to the Anti-Lobbying Ordinance would apply to the majority of City solicitations.
- As currently drafted, the proposed changes do not intend to further limit communications. To the contrary, the proposed changes seek to clarify the ordinance (making it easier to interpret and comply with) and to shorten the period of time that the ordinance applies.

As to the more specific question regarding communications that may occur while a solicitation is underway. First and foremost – When in doubt, ask the Authorized Contact Person (person named on the solicitation). Generally speaking however, if the communications do not pertain to a solicitation and to an actual or prospective response to a solicitation, that kind of communication is not subject to the Anti-Lobbying Ordinance. To be sure however, actual and prospective respondents should ask the Authorized Contact Person.

Again, thanks for sharing your conversation with the Purchasing Office. Feel free to send us any further comments on the proposed changes to the ordinance as we proceed.

-James

**JAMES SCARBORO, CPPO, CPCM, CPSM**

*Purchasing Officer*



City of Austin | Purchasing Office

124 W 8<sup>th</sup> St, # 310 Austin, TX 78701

Tel 512-974-2050 | Fax 512-974-2238

Email [james.scarboro@austintexas.gov](mailto:james.scarboro@austintexas.gov)

**From:** Sereno, Alba

**Sent:** Friday, October 20, 2017 3:19 PM

**To:** Bob Batlan <[bobbatlan1@gmail.com](mailto:bobbatlan1@gmail.com)>

**Cc:** Kathleen Davis <[kdavis@austininterfaith.org](mailto:kdavis@austininterfaith.org)>; Steven Jackobs <[sjackobs@capitalidea.org](mailto:sjackobs@capitalidea.org)>; Scarborough, James <[James.Scarboro@austintexas.gov](mailto:James.Scarboro@austintexas.gov)>

**Subject:** RE: Anti-Lobby

Dear Bob,

Very good questions, we have heard from many stakeholders in one industry during the process to consider changes to the ALO but not many nonprofits so I want to make sure that you both have access to submit this question to the City's Purchasing Officer so that he can answer your question about the potential change but also so that he may hear your perspective. I am CC'ing him here.

In short, it is my understanding that the no contact would apply only during the time the RFP is on the street. So contact with Mayor and Council and city staff outside of the designated contact from purchasing would not be allowed during the period set out in the ALO. The length of that period of no contact is what is being considered for change right now, but not the entire lifting of the no contact rule altogether. The work with the Mayor's office would be ok outside of the no contact period if you were bidding on the RFP. That is, speaking to city staff regarding an existing contract, including to Mayor and Council would not be prohibited, it is only the contact regarding the RFP "on the street". This is one thing in the current ALO that is being clarified with the potential changes.

James has far more mastery over the subject so he may respond with more detail/a better explanation.

(Kurt I am moving you to Bcc).

Kindly,

**Alba Donajhi Sereno**

Policy Advisor

Austin City Council Member Alison Alter, District 10

**From:** Bob Batlan [<mailto:bobbatlan1@gmail.com>]

**Sent:** Thursday, October 19, 2017 4:38 PM

**To:** Sereno, Alba <[Alba.Sereno@austintexas.gov](mailto:Alba.Sereno@austintexas.gov)>

**Cc:** Cadena-Mitchell, Kurt <[Kurt.Cadena-Mitchell@austintexas.gov](mailto:Kurt.Cadena-Mitchell@austintexas.gov)>; Kathleen Davis <[kdavis@austininterfaith.org](mailto:kdavis@austininterfaith.org)>; Steven Jackobs <[sjackobs@capitalidea.org](mailto:sjackobs@capitalidea.org)>

**Subject:** Re: Anti-Lobby

Alba, Kurt,

Thanks so much for the prompt response. I am still concerned. The last time Capital IDEA responded to an RFP, Capital IDEA staff, board members, and Austin Interfaith were given direction by city legal not to discuss any aspect of Capital IDEA with anyone other than a single purchasing point of contact or in official, open council meetings. It got to the point that we couldn't ask city legal to explain the rules.

The RFP process impacted numerous non-profits and led to constitutional issues. At some point the rules were adjusted.



A specific example -- we participate with the Mayor on phone calls asking technology companies to offer paid internships to Capital IDEA students. Can these occur during the RFP period?

Thanks.

Bob Batlan

On Oct 19, 2017, at 2:38 PM, Sereno, Alba <[Alba.Sereno@austintexas.gov](mailto:Alba.Sereno@austintexas.gov)> wrote:

Dear Bob, I do not think that would be the case. This is about the normal no contact rules that are put in place when a solicitation is on the street. You all already follow these and make contact only with the specific staff when the RFP is on the street. I can speak more and answer specific questions if you need.

Alba

Alba Sereno

Policy Advisor

Office of CM Alter, D10

City Council Austin, TX

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**From:** Cadena-Mitchell, Kurt

**Sent:** Thursday, October 19, 2017 2:26:15 PM

**To:** Bob Batlan gmail; Sereno, Alba

**Cc:** Kathleen Davis; Steven Jackobs

**Subject:** RE: Anti-Lobby

I have copied Alba because she has been staffing that issue. I do believe that the issue today was strictly limited to a biosolids contract, and I'm not sure about the potential impact of the later decisions being discussed regarding the ALO.

Alba will be the one to fill in some gaps, but I am confident that had the vote taken place today it would have been limited to a specific contract and would not have impacted other issue areas.

**From:** Bob Batlan gmail [<mailto:bobbatlan1@gmail.com>]

**Sent:** Thursday, October 19, 2017 2:24 PM

**To:** Cadena-Mitchell, Kurt <[Kurt.Cadena-Mitchell@austintexas.gov](mailto:Kurt.Cadena-Mitchell@austintexas.gov)>

**Cc:** Kathleen Davis <[Kdavis@austininterfaith.org](mailto:Kdavis@austininterfaith.org)>; Steven Jackobs <[SJackobs@capitalidea.org](mailto:SJackobs@capitalidea.org)>

**Subject:** Anti-Lobby

I could use some advice.

I was relieved that the Anti-Lobby issue was postponed. I haven't been paying enough attention to the discussion. I think I got fooled that it was simply a waste disposal issue.

The press reports make me wonder if Capital IDEA will be impacted during the upcoming Workforce RFP. We interact with Economic Development regularly relative to the existing contract. We are participating in their efforts to modify incentive rules. We have meetings with the Mayor, Council

Members and staff relative to our efforts to grow, recruit students, recruit employers to offer internships, invest, and push ACC to add capacity etc. I wonder if there may be risk working with the Workforce Board. Will any/all of this be shut down if the new rules pass?

Thanks for your incite.

Bob

Bob Batlan

[bobbatlan1@gmail.com](mailto:bobbatlan1@gmail.com)

**Michael Whellan, Graves Dougherty Hearon & Moody; 10/19/2017**

**From:** "Whellan, Michael" <[MWhellan@gdhm.com](mailto:MWhellan@gdhm.com)>

**To:** "Serenio, Alba" <[Alba.Serenio@austintexas.gov](mailto:Alba.Serenio@austintexas.gov)>

**Cc:** "Alter, Alison" <[Alison.Alter@austintexas.gov](mailto:Alison.Alter@austintexas.gov)>, "Whellan, Michael" <[MWhellan@gdhm.com](mailto:MWhellan@gdhm.com)>, "Meade, Nikelle" <[Nikelle.Meade@huschblackwell.com](mailto:Nikelle.Meade@huschblackwell.com)>, "Pool, Leslie" <[Leslie.Pool@austintexas.gov](mailto:Leslie.Pool@austintexas.gov)>, "Smith, Amy" <[Amy.Smith@austintexas.gov](mailto:Amy.Smith@austintexas.gov)>

**Subject: Revisions to ALO - possible areas of agreement and continuing discussions - Agenda Item #18**

Thanks for talking.

Attached is the Staff's version of the Procedures for Respondent Conduct a/k/a Anti-Lobbying Ordinance with TDS' redline and blue comments explaining each of the changes.

Yesterday, Amy Smith facilitated a discussion with Nikelle Meade and me to review these suggested revisions. Our discussions are still subject to our respective clients' consideration AND ALL stakeholder's feedback - - I think the hope was that the two folks with the most interest might be able to help move this along.

I have marked in handwriting areas of broad agreement or open items – AGAIN, this is NOT a final position or final agreement or approval – only a good first start. Nikelle is still reviewing and will have further language to offer for everyone's consideration.

If this is postponed until after ERC consideration on 11/1, there might be more areas of consensus and agreement after ALL stakeholders have a chance to weigh-in - I would urge that you do not force vendors into a choice between bidding or continuing to participate in the Working Group Process - -

I appreciate Council Member Pool and Amy Smith pulling us together – as an opposing litigator once told me – cases do not get resolved if the parties are not talking.

All good things.

MJW.

**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:

Agreed

**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;

<

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~~(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 Response 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) ~~60~~ 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

(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

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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.~~

ok  
w/new  
word

**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 Response to a City solicitation, even if that person subsequently withdraws its Response ~~or has been disqualified by the City~~, and includes:

Agreed

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

Agreed

~~(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~~

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

Agreed w/ change

**TDS Comment:**

Contractor or

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:

Agreed

(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.

Agreed

(e)(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.

Agreed

**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.

Agreed  
Agreed  
Agreed  
Agreed

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

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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*).

Agreed

**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.

Agreed

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.

Agreed

Agreed

Agreed

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.

Agreed

Agreed

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.~~

Agreed  
To be  
Disposed

**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.



**Amy Casto, American Council of Engineering Companies of Central Texas; 10/20/2017**

**From:** Fernandez, Rolando  
**Sent:** Friday, October 27, 2017 8:07 AM  
**To:** Amy Casto <amy@acectx.org>  
**Cc:** Willett, Shawn <Shawn.Willett@austintexas.gov>  
**Subject:** RE: no contact period - ordinance revisions

Hi Amy –

Sorry for the delay in responding. You are correct that the current draft notes a change in the start of the NO CONTACT period from solicitation issuance to solicitation due date. You and ACEC raise good concerns and ones that we considered with this proposed change. Aside from not knowing who would be responding to a solicitation and determining who is under the purview of the ordinance, there is another reason for the change. This ordinance rules over all solicitation conducted by the City –not just Engineer/Architect Professional Services led by Capital Contracting Office. As such, this change is in response to concerns that the current ordinance makes it difficult for vendors that “may” respond to a solicitation to communicate concerns related to policy matters within the solicitation as opposed to one vendor is better than the other.

Also, regardless if a prime or a sub, they both fall under the definition of respondent as noted in the existing ordinance and the current revised draft. As such, once the No Contact period, starts both a prime and a sub must comply with ordinance.

We are still in the review period and will share this concern with those currently reviewing the draft.

Thank you Amy.

Rolando

**From:** Amy Casto [<mailto:amy@acectx.org>]  
**Sent:** Friday, October 20, 2017 9:21 AM  
**To:** Fernandez, Rolando <[Rolando.Fernandez@austintexas.gov](mailto:Rolando.Fernandez@austintexas.gov)>  
**Subject:** no contact period - ordinance revisions

Rolando-

In the COA proposed language about the no lobbying period for contract procurement, a question has popped up among membership. The start date of the no contact period is changing to the due date for the response – as opposed to the date the RFQ is issued. The reason given was so that staff would know who is subject to the ordinance. The practical effect of this is that a respondent could lobby for itself right up to the due date for responses. Additionally, a firm that will be on a selected respondent’s team could lobby for that respondent throughout the entirety of the period because that firm does not actually submit a response on its own behalf.

Do you have any thoughts on that?

Thanks!

Amy

**Mary Scott Nabers, Strategic Partnerships, Inc.; 10/23/2017**

**From:** Anne Marie [<mailto:AWillsey@spartnerships.com>] **On Behalf Of** Mary Scott Nabers

**Sent:** Monday, October 23, 2017 11:33 AM

**To:** Scarboro, James <[James.Scarboro@austintexas.gov](mailto:James.Scarboro@austintexas.gov)>

**Subject:** Letter of Concern for you!

October 23, 2017

Dear Mr. Scarboro,

For more than 20 years, Strategic Partnerships, Inc. (SPI) has represented companies across a broad spectrum of industries that do business with the city of Austin. The SPI Team provides them guidance and we help them understand the processes and procedures of government procurement. We also work diligently to make sure they never cross any ethical boundaries when responding to solicitation documents and competing for contracts.

It is on behalf of all our clients that I am writing to you now, as we believe the proposed changes to Austin's Anti-Lobbying Ordinance (ALO) pose an incredibly serious threat to the credibility of the City's ethics and the ability of businesses to continue effectively and appropriately in Austin, Texas.

More specifically, I would like to call your attention to two parts of the proposed ALO changes currently under consideration by the Ethics Review Commission:

- **No Contact Period** - The proposed changes to this provision would, if adopted, open the door for corruption and unethical behavior. This change would encourage influence peddling and it is impossible for me to believe that you, as elected officials, want this result. To allow lobbying efforts to continue after a solicitation is published and to allow lobbying efforts to continue for 60 days following a vote by the Council before the final contract is signed is unprecedented in state and local government. We can find no reason whatsoever that the current "no contact" restrictions should be changed – and certainly not for only one area of the City's procurement process.
- **Debarment** – Again, the proposed changes eliminating debarment would fly in the face of every principle of good government. The fact that this debarment provision has never been implemented is evidence of its necessity and purpose. I am unaware of any state or local procurement policy that does not contain a debarment policy. Why would the city of Austin limit the ability to preclude bad actors from participation in the solicitation process?

I and others have already met with many council members and staff about the recommendations of the Waste Management Policy Working Group that met over the summer. I, and the entire SPI Team, would like to reiterate our concerns about the City setting any precedent to treat individual industries and sectors differently from others. Policies that address lobbying and procurement processes are the critical components when businesses decide to participate in public sector solicitations. Singling out

individual contracts for special treatment is unheard of in the public sector and this would send a negative message to the business community, citizens, and the media and to taxpayers.

Austin's leadership has worked hard to create an environment that encourages diversity and a competitive environment for businesses across all industries. I urge you to ensure that we continue to be a city where vendors can be proud to do business because they are able to compete in an open, transparent and fair marketplace that is not subject to unethical tactics of any competitors.

Thank you for your service to our great city and for your judicious consideration of the concerns I've listed. As always, I am available to discuss this and any other issue at any time. I look forward to productive conversations as we all work to make Austin a great place to do business and the most admired city in the U.S.

Sincerely,

A handwritten signature in cursive script, appearing to read "Mary".

Mary Scott Nabers

President/CEO

## **Andrew Dobbs, Texas Campaign for the Environment; 10/27/2017**

**From:** Andrew Dobbs [<mailto:dobbs@texasenvironment.org>]

**Sent:** Friday, October 27, 2017 5:32 PM

**To:** Meade, Nikelle <[Nikelle.Meade@huschblackwell.com](mailto:Nikelle.Meade@huschblackwell.com)>; Einhorn, Peter - BC <[bc-Peter.Einhorn@austintexas.gov](mailto:bc-Peter.Einhorn@austintexas.gov)>; Ohueri, J Michael - BC <[bc-Jmichael.Ohueri@austintexas.gov](mailto:bc-Jmichael.Ohueri@austintexas.gov)>; Kahle, Mary - BC <[BC-Mary.Kahle@austintexas.gov](mailto:BC-Mary.Kahle@austintexas.gov)>; Holmes, Fredda - BC <[BC-Fredda.Holmes@austintexas.gov](mailto:BC-Fredda.Holmes@austintexas.gov)>; Danburg, Debra - BC <[BC-Debra.Danburg@austintexas.gov](mailto:BC-Debra.Danburg@austintexas.gov)>

**Cc:** Tom, Cynthia <[cynthia.tom@austintexas.gov](mailto:cynthia.tom@austintexas.gov)>; Smith, Amy <[Amy.Smith@austintexas.gov](mailto:Amy.Smith@austintexas.gov)>; Scarboro, James <[James.Scarboro@austintexas.gov](mailto:James.Scarboro@austintexas.gov)>; Weema, Chris <[Chris.Weema@austintexas.gov](mailto:Chris.Weema@austintexas.gov)>; Palmer, Sue <[Sue.Palmer@austintexas.gov](mailto:Sue.Palmer@austintexas.gov)>; 'GERwin@spartnerships.com' <[GERwin@spartnerships.com](mailto:GERwin@spartnerships.com)>; 'bcorbett@spartnerships.com' <[bcorbett@spartnerships.com](mailto:bcorbett@spartnerships.com)>; 'Whellan, Michael' <[MWhellan@gdhm.com](mailto:MWhellan@gdhm.com)>; 'Gay Erwin ([GERwin@spartnerships.com](mailto:GERwin@spartnerships.com))' <[GERwin@spartnerships.com](mailto:GERwin@spartnerships.com)>; 'Beth Corbett ([bcorbett@spartnerships.com](mailto:bcorbett@spartnerships.com))' <[bcorbett@spartnerships.com](mailto:bcorbett@spartnerships.com)>; Goodman, Jackie <[Jackie.Goodman@austintexas.gov](mailto:Jackie.Goodman@austintexas.gov)>; Sereno, Alba <[Alba.Sereno@austintexas.gov](mailto:Alba.Sereno@austintexas.gov)>; Craig, Ken <[Ken.Craig@austintexas.gov](mailto: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.

#### Previously Addressed Areas Now Contested

##### **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. Scarborough himself acknowledged the "iterative" nature of this process, so this notice seems insufficient to accomplish the goals suggested above.

### Recommended Recommendation

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,

Andrew Dobbs

Central Texas Program Director

Legislative Director

Texas Campaign for the Environment

(512) 326-5655

[www.texasenvironment.org](http://www.texasenvironment.org) [www.facebook.com/texasenvironment](https://www.facebook.com/texasenvironment)

## **Bob Gregory, Texas Disposal Systems; 10/30/2017**

**From:** Bob Gregory [<mailto:bgregory@texasdisposal.com>]

**Sent:** Monday, October 30, 2017 11:38 AM

**To:** [nikelle.meade@huschblackwell.com](mailto:nikelle.meade@huschblackwell.com); Einhorn, Peter - BC <[bc-Peter.Einhorn@austintexas.gov](mailto:bc-Peter.Einhorn@austintexas.gov)>; Ohueri, J Michael - BC <[bc-Jmichael.Ohueri@austintexas.gov](mailto:bc-Jmichael.Ohueri@austintexas.gov)>; Holmes, Fredda - BC <[BC-Fredda.Holmes@austintexas.gov](mailto:BC-Fredda.Holmes@austintexas.gov)>; Kahle, Mary - BC <[BC-Mary.Kahle@austintexas.gov](mailto:BC-Mary.Kahle@austintexas.gov)>; Danburg, Debra - BC <[BC-Debra.Danburg@austintexas.gov](mailto:BC-Debra.Danburg@austintexas.gov)>; Tom, Cynthia <[cynthia.tom@austintexas.gov](mailto:cynthia.tom@austintexas.gov)>; Smith, Amy <[Amy.Smith@austintexas.gov](mailto:Amy.Smith@austintexas.gov)>; Scarboro, James <[James.Scarboro@austintexas.gov](mailto:James.Scarboro@austintexas.gov)>; [GErwin@spartnerships.com](mailto:GErwin@spartnerships.com); [bcorbett@spartnerships.com](mailto:bcorbett@spartnerships.com); Goodman, Jackie <[Jackie.Goodman@austintexas.gov](mailto:Jackie.Goodman@austintexas.gov)>; Sereno, Alba <[Alba.Sereno@austintexas.gov](mailto:Alba.Sereno@austintexas.gov)>; Craig, Ken <[Ken.Craig@austintexas.gov](mailto:Ken.Craig@austintexas.gov)>; [dobbs@texasenvironment.org](mailto:dobbs@texasenvironment.org)

**Cc:** Stratmann, Robert - BC <[bc-Robert.Stratmann@austintexas.gov](mailto:bc-Robert.Stratmann@austintexas.gov)>; Harding, Meagan - BC <[bc-Meagan.Harding@austintexas.gov](mailto:bc-Meagan.Harding@austintexas.gov)>; McCormick, Donna Beth - BC <[bc-DonnaBeth.McCormick@austintexas.gov](mailto:bc-DonnaBeth.McCormick@austintexas.gov)>; Soberon, Luis - BC <[BC-Luis.Soberon@austintexas.gov](mailto:BC-Luis.Soberon@austintexas.gov)>; Speight, Dennis - BC <[bc-Dennis.Speight@austintexas.gov](mailto:bc-Dennis.Speight@austintexas.gov)>; Thompson, Brian - BC <[bc-Brian.Thompson@austintexas.gov](mailto:bc-Brian.Thompson@austintexas.gov)>; [mwhellan@gdhm.com](mailto:mwhellan@gdhm.com); [djbutts@sbcglobal.net](mailto:djbutts@sbcglobal.net); Mark Nathan <[mark@citylightsgroup.com](mailto:mark@citylightsgroup.com)>; Gary Newton <[gnewton@texasdisposal.com](mailto:gnewton@texasdisposal.com)>; Ryan Hobbs <[rhobbs@texasdisposal.com](mailto:rhobbs@texasdisposal.com)>; Adam Gregory <[agregory@texasdisposal.com](mailto:agregory@texasdisposal.com)>

**Subject:** TDS Response to Andrew Dobbs' 10-27-17 Email

Ethics Review Commission Commissioners and stakeholders:

Given the unique role of Texas Campaign for the Environment (TCE) as the only non-industry stakeholder currently engaged in the ERC review of proposed revisions to the Anti-Lobbying Ordinance (ALO), I'm writing in response to [Mr. Dobbs' 10/27/17 email](#) forwarded to me by Michael Whellan, linked and also attached, to briefly detail where Texas Disposal Systems (TDS) agrees and mildly differs with TCE's stated positions. I am sending this response to everyone on Mr. Dobbs' email for which I have an address. TDS values TCE's long history of advocacy on behalf of the environment and a transparent public process and would propose that the ERC consider utilizing TCE's stated positions on key ALO issues as the basis for an analysis matrix indicating where industry stakeholders may agree or disagree.

In addition, TDS would also request ERC's specific attention to the unanimous [10-11-17 recommendations of the Zero Waste Advisory Commission](#) (ZWAC) (also attached) with regard to ALO revisions. Also, please note that the Council recognized a need to review waste services policy issues, including concerns related to the current ALO, and that the initial proposal to revise the ALO originated with a recommendation from the Waste Management Policy Working Group. Not only did the City Council vote on [9-28-17](#) to request that the ERC review the proposed ALO revisions, but in voting on 3-23-17 (see [transcript](#) and [resolution](#)) to create the Waste Management Policy Working Group also specifically requested that each of the Working Group [recommendations](#) be reviewed by ZWAC prior to presentation to Council. Accordingly TDS would urge that ZWAC's stated positions on ALO revisions also be reflected in any matrix employed by the ERC to analyze the positions of industry stakeholders and develop final recommendations. Please note that the 10/27/17 TCE positions from Mr. Dobbs are consistent with the [10/11/17 recommendations](#) made by ZWAC and the ZWAC recommendations of [7/12/17](#) and [8/9/17](#).

## KEY ALO ISSUES

**APPEAL: TDS *agrees* with TCE's position in favor of a right to appeal "all ALO disqualifications and other penalties or determinations" to a non-staff body and to the City Council.**

While TDS does not object to TCE's proposal to create a Council-appointed board to hear ALO appeals if the ERC prefers to not be that entity, TDS continues to support allowing ALO appeals to both the ERC and the City Council. ZWAC's recommendation ([second bullet point in the ZWAC 10/11/17 recommendations](#)) also supports appeal to both the ERC and City Council.

**VOIDING CONTRACTS: TDS *agrees* with TCE's position establishing that only Council may void a contract for violation of the ALO.**

ZWAC's recommendation (third bullet point) also supports TCE's position.

**SIMILAR PROJECTS: TDS *agrees* with TCE's position in favor of replacing disqualification for "similar" projects with a disqualification for the "same" project.**

ZWAC's recommendation (tenth bullet point) also supports TCE's position of replacing "similar" with "same".

**RULEMAKING: TDS *agrees* with TCE's position in favor of public participation in the ALO administrative rulemaking process, including final review and approval of administrative rules by the ERC and City Council.**

ZWAC's recommendation (first bullet point) also supports TCE's position.

**DEFINE RESPONSE: TDS *agrees* with TCE's position in favor of defining the term "response" as "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."**

ZWAC's recommendation (seventh bullet point) also supports TCE's position, but without offering a specific proposed definition.

**PUBLIC COMMUNICATION: TDS *agrees* with TCE's position in favor of assurance that the ALO will not consider public communications to be in any way a violation.**

ZWAC's recommendation (fifth bullet point) also supports TCE's position.

**INDEPENDENT ADVOCACY: TDS *agrees* with TCE's position in favor of assurance that independent advocacy from non-respondents will not be used to disqualify respondents. TDS believes First Amendment case law effectively prohibits what Synagro's attorney advocates.**

ZWAC's recommendation (sixth bullet point) also supports TCE's position.

**SUBJECTIVE TERMS: TDS *agrees* with TCE's position in favor of striking the subjective terms "influences," "persuades," "advances the interests," and "discredits." TCE's position appears to be more specific than ZWAC's position, which recommends Council give direction to staff to provide objective standards for these terms.**

TDS supports TCE's position in favor of striking these subjective terms for the sake of strict clarity in the Ordinance. TDS' strong preference is for the *elimination* of all subjective terms from the ALO. ZWAC's recommendation (eighth bullet point) supports TCE's position, but with some flexibility for Council to direct staff to provide objective standards for these terms as part of their rulemaking.

**MITIGATING FACTORS: TDS *agrees* with TCE's position in favor of eliminating or delineating the power of purchasing officers to determine "mitigating factors" in violations.**

While TDS supports TCE's comments and position, TDS' strong preference is for the complete *elimination* of the staff proposed authority of purchasing officers to consider "mitigating factors" in determining ALO violations. Staff requested Council to remove the ALO restriction from the 2016 Biosolids Management solicitation so they would not have to determine whether Synagro had violated the ALO restrictions applied to that withdrawn solicitation. ZWAC's recommendation (ninth bullet point) supports TCE's position.

**RECUSALS: TDS *agrees* with TCE's position in favor of striking all sections that empower staff to require recusal of elected or appointed City officials.**

ZWAC's recommendation (fourth bullet point) also supports TCE's position.

**DEBARMENT AS A PENALTY: TDS *agrees* with the TCE position and understanding that debarment should be and will be eliminated as a possible penalty.**

ZWAC recommendation (third bullet point) apparently deals with this by recommending that "only Council may void a contract for violation for the ALO."

**RESTRICTED CONTACT PERIOD: While TDS proposes that there should be no ALO restrictions applied to waste services solicitations, TDS *agrees* with TCE's position in favor of beginning the restricted contact period after the close of the solicitation (after the sealed proposals, bids or RFP responses are submitted) and lifting the restricted contact period at some point between the time staff chooses a respondent to recommend and before it is finally decided upon by Council. However, TDS also recommends ALO restrictions be lifted before consideration of proposed contracts by Boards and Commissions and with sufficient time to review and respond to the posted proposed contract.**

As noted, TDS agrees with TCE's position in favor of beginning the restricted contact period when solicitations are due; TDS also very strongly endorses TCE's suggestion of "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" and likewise TCE's indication that "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." While TDS is not aware that TCE has proposed a specific timeframe for lifting the restricted ALO contact period prior to consideration of proposed contracts, TDS again strongly urges the ERC to support lifting the restricted contact period no later than 14 days before each proposed contract is posted for consideration by EITHER a citizen board or commission or the City Council. However, if the ERC ultimately chooses NOT to recommend lifting the restricted period before consideration of proposed contracts, TDS would then *strongly* urge the ERC to specifically recommend that City staff present all negotiated contract documents to boards and commissions and the City Council prior to requesting a recommendation for contract approval – a recommendation that has been adopted unanimously, [twice by ZWAC](#) (also

attached). To *neither* lift the restricted contact period prior to consideration of proposed contracts *or* to require staff presentation of all negotiated contract documents prior to requesting a recommendation would constitute a wholesale abandonment of the appropriate oversight role of public stakeholders and City officials vis-à-vis the City's contracting process.

Finally, TDS would call ERC's attention to ZWAC's important recommendation to Council to "Continue to keep the Anti-Lobbying Ordinance in a suspended state until such time that both the final ALO and subsequent governing Rules are drafted and adopted by Council." See ZWAC's recommendation (eleventh bullet point). Please recall that the [City Council voted on 4-6-17 to temporarily waive the application of the ALO to all City waste solicitations](#) (see attached [Ordinance No. 20170406-023 and its Exhibit A](#)) in order to allow stakeholders and City officials to "openly exchange information on Solid Waste policy issues" and "until Council has given staff direction on the policies applicable to such matters." As at least one Council member appears to be contemplating reapplication of an amended version of the current ALO to a pending waste solicitation, TDS would urge the ERC to please consider adopting the same recommendation as ZWAC in order to clearly establish the importance of allowing the ongoing policy review process – both with regard to the ALO and the other waste-related policy issues still pending before ZWAC, other Boards and Commissions and the City Council – to continue without impediment.

Thank you for your ongoing efforts and please do not hesitate to contact me directly with any questions or concerns. For your reference, here is a [link to our 10-6-17 email](#) to ERC commissioners detailing TDS' full position on ALO revisions.

Sincerely,

Bob Gregory

President & CEO

Texas Disposal Systems

512-619-9127

Stephen Webb, Webb & Webb; 10/30/2017



## City of Austin

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### Purchasing Office

P.O. Box 1088, Austin, TX 78767

## MEMORANDUM

**TO: ALO Revision Comment File**

**FROM: Shawn Willett, Deputy Procurement Officer**

**DATE: November 22, 2017**

**SUBJECT: Withdrawal of Comments**

The comments submitted by Stephen P. Webb of Webb & Webb on 10/30/2017 have been pulled at the request of Mr. Webb.