

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

TEXAS DISPOSAL SYSTEMS, INC.,	§	
and TEXAS DISPOSAL SYSTEMS	§	
LANDFILL, INC.	§	
Plaintiffs	§	
V.	§	CASE NO. A-11-CV-1070-LY
	§	
CITY OF AUSTIN, TEXAS	§	
Defendant	§	

**CITY OF AUSTIN’S FIRST AMENDED ANSWER**

TO THE HONORABLE JUDGE LEE YEAKEL:

Defendant, City of Austin (“the City”), files its First Amended Original Answer in response to “Plaintiffs’ First Amended Complaint (Original Complaint after Removal)” (hereinafter referred to as “First Amended Complaint”, and respectfully shows:

**I. ANSWER**

**PARTIES, VENUE AND JURISDICTION**

Defendant denies the factual allegations, if any, in the introductory paragraph of the First Amended Complaint. The following numbered paragraphs are responsive to the same numbered paragraphs in the First Amended Complaint.

1. Defendant does not have sufficient knowledge to admit or deny the factual allegations in paragraph 1.
2. Admits.
3. Mr. Byron Johnson, Purchasing Officer, has been executed a waiver of service of summons, which has been returned to Plaintiffs. Defendant admits the first sentence of paragraph 3 and need not admit or deny the remainder of paragraph 3.

4. Parties are not required to admit or deny conclusions of law. The City admits removing this lawsuit to federal court. The City denies that by its removal it has waived any claim of sovereign or governmental immunity. The City admits that its removal was based in whole, or in part, on federal-question jurisdiction.

5. The City need not admit or deny conclusions of law, including conclusions of law related to jurisdiction. The City does not contest venue. The City admits that the acts of City employees complained of by Plaintiffs occurred in Travis County. The City does not have sufficient knowledge to admit or deny the remaining factual allegations in paragraph 5.

#### **SUMMARY OF FACTS**

6. The City admits that TDSL currently has a long-term contract with the City but does not have sufficient information at this time to admit or deny the remaining specific factual allegations in the first sentence. In regard to the second sentence, the City admits there are contract provisions allowing for amendment of the contract. The City need not admit or deny whether Plaintiffs' statements properly reflect the effect or terms of the contract. The contract speaks for itself.

7. The City admits the first sentence. The City admits that the referenced contract was not the subject of competitive bidding. The City does not have sufficient information at this time to admit or deny the remainder of the factual allegations in paragraph 7.

8. The City denies the accuracy of the term "in the same time period" in the first sentence. The City admits that the deadline for the "Recycling RFP" was extended to February 9, 2010. The City admits the last sentence of paragraph 8.

9. The City admits the first sentence, but denies that the e-mail was distributed only to those persons listed in the sentence. The City denies the second sentence, but admits the

referenced exhibit was attached to the petition filed in state court. The City does not, at this time, have sufficient information to admit or deny Plaintiffs' allegations in regard to the timing of issues on SWAC's agenda. In regard to the fourth/last sentence, the City admits that Plaintiffs have correctly described the subject-matter of the referenced communication and the general description of the note at the beginning of the e-mail. For further answer, the City states that the document attached as Exhibit "A" to Plaintiffs' Original Petition filed in state court speaks for itself. Defendant denies the remainder of the factual allegations in paragraph 9.

10. The City admits the first sentence of paragraph 10. In regard to the second, third and fifth sentences, the City has no knowledge of what Mr. Gregory knew in regard to RFP submissions at the time of the referenced communication, and does not have sufficient information to admit or deny what Texas Disposal has learned to date. The City does not have sufficient knowledge at this time to admit or deny the third sentence. The City denies the fourth sentence. The City admits that Greenstar and others responded to the RFP. The City does not know have sufficient knowledge to admit or deny the remaining factual allegations, if any, in paragraph 10.

11. The City is not required to admit or deny legal conclusions. The City generally admits the first sentence, but states that the Recycling RFP is the best evidence of what is stated. The City denies the second sentence, but admits the referenced exhibit was attached to the state court petition. The City admits the third sentence, which is enclosed in parentheses. The City need not admit or deny Plaintiffs' description of the referenced ordinance, which speaks for itself. The City states further that the ordinance in effect at the time of Texas Disposal's disqualification has been superseded and/or amended.

12. The City need not admit or deny whether Plaintiffs accurately copied provisions of the Ordinance. The referenced Ordinance is attached as Exhibit “B” to Plaintiffs’ Original Petition in state court and speaks for itself.

13. The City admits the first sentence. The City admits the second sentence to the extent “includes” is not intended to be all-inclusive. The City states further that the referenced definition in the ordinance speaks for itself.

14. The City need not admit conclusions of law and, therefore need not admit or deny the description in the first sentence before “in Section 2-7-103.” The City need not admit or deny whether Plaintiffs accurately copied provisions of the Ordinance. The referenced Ordinance is attached as Exhibit “B” to Plaintiffs’ Original Petition in state court and speaks for itself.

15. The City need not admit or deny conclusions of law. The City denies that Texas Disposal has properly interpreted the ordinance in its statements in paragraph 15. For further answer, in regard to the first sentence, the City states that the referenced ordinance speaks for itself. In regard to the second sentence in parentheses, the City refers Plaintiffs to section 2-7-103(E)(6) of the ordinance, which speaks for itself.

16. The City need not admit or deny conclusions of law. The City need not admit or deny Plaintiffs’ characterizations of the referenced ordinance. The City refers Plaintiffs to the ordinance, which speaks for itself.

17. The City need not admit or deny Plaintiffs’ characterizations of the referenced ordinance. The City refers Plaintiffs to the section 2-7-109(A), which refers to a “respondent”.

18. The City need not admit or deny Plaintiffs’ characterizations of the referenced ordinance. The City admits that the referenced rule relates to the administration and enforcement

of the referenced ordinance. The City refers Plaintiffs to sections 2-7-107 and 2-7-109 of the referenced ordinance. The City denies the third sentence, but admits same is attached to the state court petition. The City generally admits the fourth, fifth and sixth sentences, but the City refers Plaintiffs to the specific terms of Rule No. R2008-PO-1 as the rule speaks for itself. The City admits the last sentence of paragraph 18.

19. The City denies that there was a finding of “no violation” as stated in the caption preceding paragraph 19. The City admits the first sentence of paragraph 19. The City denies the second sentence but admits the exhibit was attached to the state court petition.

20. The City admits that Texas Disposal timely filed a protest and admits that a hearing was held on or about February 5, 2010, before an independent hearing examiner. The City admits that Texas Disposal appeared at the hearing. The City asserts that any briefing by Texas Disposal speaks for itself. At this time, the City does not have sufficient information to admit or deny the remainder of the factual allegations in paragraph 20.

21. The City admits that the hearing officer determined the disqualification to be moot. The City denies that the City or the hearing officer agreed that the referenced ordinance was not applicable and that Texas Disposal was not in violation. At this time, the City does not have sufficient information to admit or deny the remaining factual allegations in paragraph 21.

22. The City need not admit or deny Texas Disposal’s predictions of potential future events. The City admits Greenstar was also disqualified by city staff. At this time, the city does not have sufficient information to admit or deny the remaining factual allegations in paragraph 22.

23. The City need not admit or deny conclusions of law. The City denies the statements in the caption preceding paragraph 23. The City denies the first sentence of

paragraph 23. The City admits that Texas Disposal's interpretation of certain facts is set forth in the second, third and fourth sentences of paragraph 23. The City denies that the "alleged alternative to the Recycling RFP" was not submitted with the intent of obtaining a contract that was the subject of the "Recycling RFP". The City need not admit or deny the fourth or eighth sentences, which interpret a provision of a contract and, therefore, constitute conclusions of law. The City has no knowledge of Texas Disposal's reasoning or motives, but admits the other factual allegations in the fifth sentence. The City admits that Texas Disposal's proposal did not include all the items to be included in response to the RFP, but denies that such factors are determinative of whether a person or entity is a respondent under the referenced ordinance. At this time, the City does not have sufficient information to admit or deny the remaining factual allegations in paragraph 23.

24. The City asserts the attorney-client privilege in regard to any communications between former city attorney, David Smith, and the City Manager, an assistant city manager, and/or members of the City Council. Unless and until the City has a full and fair opportunity to determine whether Texas Disposal has obtained a copy of any specific attorney-client communications (with or without an intended waiver by the City), the City cannot admit or deny the factual allegations related to the referenced privileged (or potentially privileged) communication. Therefore, the City denies the factual allegations in paragraph 24.

25. The City refers Plaintiffs to the preceding paragraph and states that it cannot admit or deny factual allegations related to the referenced privileged (or potentially privileged) communication. In the alternative, the City denies the factual allegations in paragraph 25. The City is not required to admit or deny conclusions of law.

26. The City refers Plaintiffs to paragraph 24 above and states that it cannot admit or deny factual allegations related to the referenced privileged (or potentially privileged) communication. The City denies that “the result of the February 5 hearing was a conclusion that there was no violation.” In the alternative, the City denies the remaining factual allegations in paragraph 26. The City is not required to admit or deny conclusions of law.

27. The City admits that Assistant City Manager Robert Goode authored a memorandum to the Mayor and other city council members, which is dated February 24, 2010. The remainder of the first sentence is denied, except to acknowledge the existence of a Smith memorandum and to assert the attorney-client privilege in regard to the Smith memorandum. The City denies the assertions set forth in the second sentence were erroneous.

28. At this time, the City does not have sufficient information to admit or deny the factual allegations in paragraph 28.

29. The City admits that Texas Disposal’s submission of its “alternative to the Recycling RFP” required another hearing for consideration of whether Texas Disposal was disqualified because the notice of disqualification was no longer a moot issue. The City denies the remaining factual allegations in paragraph 29.

30. The City admits the first sentence. The City denies that the first hearing examiner “found no violation” and denies the implication, if any, of any impropriety in the use of two different hearing officers. Otherwise, the City admits the remainder of the second sentence.

31. The City need not admit or deny conclusions of law. The City does not have sufficient information, at this time, to admit or deny the specific factual allegations in the first sentence, but generally admits that the City argued that Texas Disposal’s “alternative [submission] to the RFP” was in substantive effect a response to the RFP. The City does not

have sufficient information, at this time, to admit or deny the specific factual allegations in the second sentence, but admits that the second sentence generally reflects the City's argument. The City denies the third and fourth sentences. The City denies that Texas Disposal did not respond to the "Recycling RFP". The City admits the RFP process is designed to place applicants on equal footing in regard to the RFP process. The City denies the remainder of the factual allegations in the fifth sentence. The City denies the factual allegations in the sixth and seventh sentences and need not respond to Texas Disposal's legal conclusions. The City denies the eighth/last sentence of paragraph 31.

32. The City need not admit or deny legal conclusions or the accuracy or inaccuracy of Texas Disposal's interpretation of the hearing examiner's decision (or statements in the decision). The City need not admit or deny the specific content of the hearing officer's decision, as the decision is in writing and speaks for itself. The City denies the second hearing officer erroneously found a violation as alleged in the caption preceding paragraph 32. The City admits that the Purchasing Officer adopted and concurred with the recommendation of the hearing officer. The City denies that it has an obligation to reverse the Purchasing Officer's decision. The City admits the first sentence of paragraph 32. The City denies the second sentence, but admits the statement is true in respect to Exhibit "E" attached to Plaintiffs' Original Petition filed in state court. In regard to the third sentence (which is contained in parentheses) the City need not admit or deny legal conclusions. The City admits that under Rule No. R2008-PO-1 (adopted 4/10/2008) established under the ordinance that was in effect at the time of Texas Disposal's protest, "[t]he Purchasing Officer's decision on a hearing or a written hearing decision is final". The city denies the remainder of the factual allegations in the third sentence and need not respond to the legal conclusions. The City denies that the hearing examiner's decision includes



several errors and specifically denies the alleged errors set forth in the first sentence of each of the bullet points<sup>1</sup> following the colon (“:”) after the beginning of the fourth sentence. The City further denies the last sentence of the first bullet point. In regard to the last sentence of the second bullet point, the City responds that the phrase following “[Decision at 12-13]” is nonsensical, as it suggests the extent of a party’s briefing affects the correctness of the party’s argument. Further, the City denies that Texas Disposal’s disqualification was substantively erroneous. As further answer in regard to the third bullet point of the fourth sentence of paragraph 32, the City need not admit or deny Plaintiffs’ allegations in regard to the hearing officer’s underlying reasoning. The City denies the last sentence and/or the phrase following “[Decision at 12-13]” of the fourth bullet point. The City denies the factual allegations in the fifth bullet point of the fourth sentence and refers Plaintiffs to paragraphs 8-10 of the decision. The City denies Texas Disposal’s characterization(s) and conclusion(s) in the sixth bullet point. The City denies any factual allegations in paragraph 32 that are not specifically addressed above.

33. The City admits that on June 4, 2010, the City’s Purchasing Officer accepted and concurred with the recommendation of the Hearing Officer and denied the protest of Texas Disposal. The City denies the remainder of the first sentence. The City denies the second sentence, but admits the statement is true in respect to Exhibit “F” attached to Plaintiffs’ Original Petition filed in state court. The City admits the factual allegations, if any, in the third and fourth sentences. The City need not admit or deny legal conclusions, and therefore, need not admit or deny the fifth sentence.

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<sup>1</sup> In regard to the first sentence of the third bullet point, Texas Disposal appears to complain that the language quoted from the hearing examiner’s decision is both an error and a correct statement. In either event, the City need not admit or deny Texas Disposal’s interpretation of statements in the hearing examiner’s decision.

34. The City need not admit or deny legal conclusions. In regard to the caption preceding paragraph 34, the City denies Texas Disposal's characterization of the Purchasing Officer's testimony in a separate lawsuit as "the City's overly broad interpretation of the Anti-Lobbying Ordinance", and the City cannot admit or deny Texas' Disposal's motives for responding or not responding to other RFPs. The City does not have sufficient information to admit or deny the motives of Texas Disposal's alleged competitor in an unrelated lawsuit, but otherwise, admits the factual allegations in the first sentence of paragraph 34. The City admits Mr. Johnson testified by deposition but denies the remainder of the second sentence. The City need not admit or deny Texas Disposal's interpretations of specific language in the referenced ordinance in the third and fourth sentences, as the ordinance language speaks for itself. The City denies the fifth and sixth sentences of paragraph 34. The City does not have sufficient information, at this time, to admit or deny the alleged length of the RFP process that Plaintiffs alleges "often" occurs in the sixth sentence. The City denies the factual allegations, if any, in the seventh sentence that follow the phrase, "advanced the interests of Texas Disposal". The City denies the factual allegations, if any, in the eighth/last sentence that follow the phrase, "discredited Greenstar's response".

35. The City denies the first sentence. At this time, the City does not have sufficient information to admit or deny the remainder of the factual allegations in paragraph 35. The City admits, however, that interpretation of the ordinance depends on the specific factual circumstances at issue in regard to each alleged violation of the anti-lobbying ordinance.

36. The City denies the factual allegations in the first sentence of paragraph 36 between the phrases, "In light of" and "Texas Disposal has chosen not to respond". The City cannot (and is not required to) admit or deny Texas Disposal's motives, thought processes or the

reasoning behind its decision making. The City denies that it improperly disqualified Texas Disposal.

37. The City again denies that it improperly disqualified Texas Disposal. The City does not have sufficient information to admit or deny the factual allegations in first, second and fourth sentences. The City need not admit or deny Texas Disposal's motives, reasoning or predictions of future events. Aside from Texas Disposal's allegations related to its motives, reasoning and prediction of future events, the City denies the factual allegations, if any, in the third, fifth, sixth and seventh sentences of paragraph 37.

38. The City does not have sufficient knowledge to admit or deny the first sentence. The City need not admit or deny Texas Disposal's motives or reasoning, and therefore, need not admit or deny the second sentence. The City need not admit or deny Texas Disposal's motives, reasoning or "what if" predictions, but denies the factual allegations related to the City's actions in the third sentence. The City does not have sufficient knowledge to admit or deny Texas Disposals' description of an alleged new policy as described in the fourth/last sentence of paragraph 38.

39. The City asserts that the phrase, "regularly discussed" is too vague and broad to provide sufficient information for the City to admit or deny. Otherwise, the City admits the first sentence. The City denies any overly broad interpretation of the referenced ordinance. The City denies Plaintiffs' allegations that the City's interpretations chill the speech of Texas Disposal or others on important public issues. The City denies that the referenced ordinance has the potential of chilling nearly all speech to City officials or employees on solid waste. The City need not admit or deny Texas Disposal's motives, reasoning or predictions of future events.

40. The City denies the first sentence. The City need not admit or deny the language of the referenced ordinance, as the ordinance language speaks for itself. The City need not admit or deny Texas Disposal's motives, reasoning or predictions of future events. The City denies the factual allegations related to the City's conduct in the third/last sentence. More specifically, the City asserts that Texas Disposal's conduct, not the City's conduct, caused Texas Disposal's disqualification.

## **CAUSES OF ACTION**

### **Count One**

41. The City need not respond as there are no specific factual allegations.

42. The City need not admit or deny Texas Disposal's request for relief or legal conclusions, but denies Texas Disposal is entitled to the relief requested. More specifically, the City denies that Gregory's December 8, 2009 communication did not violate the referenced ordinance.

43. The City denies paragraph 43.

44. The City need not admit or deny Texas Disposal's request for relief or legal conclusions, but denies Texas Disposal is entitled to the relief requested. The City denies that TDS/Texas Disposal would have an absolute right to a declaratory judgment under Texas law.

### **Count Two**

45. The City need not respond as there are no specific factual allegations.

46. The City need not admit or deny Texas Disposal's request for relief or legal conclusions, but denies Texas Disposal is entitled to the relief requested. More specifically, the City denies that Texas Disposal's "proposal to amend the existing contract with the City was not a response to the Recycling RFP" as alleged.

47. The City denies paragraph 47.

48. The City need not admit or deny Texas Disposal's request for relief or legal conclusions, but denies Texas Disposal is entitled to the relief requested. The City denies that TDS/Texas Disposal would have an absolute right to a declaratory judgment under Texas law.

### **Count Three**

49. The City need not respond as there are no specific factual allegations.

50. The City need not admit or deny Texas Disposal's request for relief or legal conclusions, but denies Texas Disposal is entitled to the relief requested. More specifically, the City denies that Texas Disposal is entitled to either of the proposed declarations set forth in the last sentence of paragraph 50.

51. The City need not admit or deny legal conclusions, but the City denies the allegations in paragraph 51.

52. The City denies.

53. The City need not admit or deny Texas Disposal's request for relief or legal conclusions, but denies Texas Disposal is entitled to the relief requested. The City denies that TDS/Texas Disposal would have an absolute right to a declaratory judgment under Texas law.

54. The City agrees that TDS/Texas Disposal is required to notify the Texas Attorney General with notice of this suit, but does not have sufficient information to admit or deny the factual allegations in paragraph 54.

### **Count Four**

55. The City need not respond as there are no specific factual allegations.

56. The City need not admit or deny conclusions of law. The City denies that the referenced ordinance (which has been superseded) is unconstitutional as applied to Defendants

and further denies that the current anti-lobbying ordinance is unconstitutional as applied to Defendants. The City further denies any violation of TDS/Texas Disposal's free speech or due process rights.

57. The City denies TDS/Texas Disposal is entitled to attorney fees and further denies that it is entitled to any of the relief sought in its prayer.

## **II. AFFIRMATIVE DEFENSES**

Pleading further, the City asserts the following affirmative defenses:

58. The City is a home-rule municipality. Accordingly, the City is entitled to sovereign or governmental immunity from suit and from liability with respect to Plaintiffs' claims against it.

59. The City asserts that Plaintiffs have failed to mitigate any alleged damages by failing to respond to City RFP's as described in paragraphs 33-39 of Plaintiffs' Original Petition.

60. The City asserts the affirmative defense of estoppel. In particular, Plaintiffs have claimed that they were not a "respondent" to the relevant City RFP. However, through their intentional actions, Plaintiffs have behaved as a "respondent."

61. The City asserts the affirmative defense of waiver. In particular, Plaintiffs have claimed that they were not a "respondent" to the relevant City RFP. However, through their intentional actions, Plaintiffs have behaved as a "respondent" and relinquished the right to claim that they were not a "respondent."

62. Premises considered, Defendant City of Austin prays that all relief requested by Plaintiffs be denied, and that the City recover its costs and reasonable attorneys fees and any additional relief to which it is entitled under law or in equity. In the event the Court determines that Texas Disposal is entitled to any relief requested, the City requests attorney fees and/or an

