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, and BYRON JOHNSON, in his official capacity, Defendants.	§	

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE LEE YEAKEL, UNITED STATES DISTRICT COURT JUDGE:

Defendants, City of Austin (the "City"), and Byron Johnson, in his official capacity ("Johnson") file their Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56.

I. SUMMARY OF ARGUMENT

Defendants are entitled to summary judgment because: (1) Plaintiffs' claims are not ripe for review as Plaintiffs are not threatened by imminent harm; nor is there a chilling of Plaintiffs' free speech rights. (2) The City has a substantial and rational interest in providing a fair, equitable, and competitive process for selection among potential vendors competing for provision of goods and services with the City; maintaining the integrity of the procurement process; and avoiding the appearance of corruption or undue influence. (3) The Anti-Lobbying Ordinance restrictions are content-neutral and provide full access to the public forum/open meetings of the City Council and the Solid Waste Advisory Commission. (4) Plaintiffs were not denied due process of law because they received a fair hearing and have not property interest at

issue. (5) Plaintiffs cannot show Byron Johnson acted without legal authority or that he failed to perform a ministerial act; thus, their ultra vires claim is without basis.

II. FACTUAL & PROCEDURAL HISTORY

A. Anti-Lobbying Ordinance

The Anti-Lobbying Ordinance restricts communications between the City and actual or potential respondents to a bid for city goods or services. Austin City Code §2-7-101, *et. seq.* JEX 1 and 25. On November 16, 2009, the City issued Request for Proposal No. RDR0005 ("the Recycling RFP") that sought a public-private partnership for building a local material recovery facility for long-term recycling services. Ex. 1 RFA 5. The Recycling RFP included an anti-lobbying provision that required compliance with the ordinance by respondents, which states in part that during the No-Contact Period, Offerors or potential Offerors are prohibited from making a representation to anyone other than the person designated in the RFP as the contact for questions and comments regarding the RFP. Ex. 1 RFA 7; JEX 27 (COA 00955).

B. Single-Stream Recycling History

On June 5, 2008, council approved a proposal (agenda item 41) to contract with Vista Fibers (now named Greenstar) for single-stream recycling services. Ex. 11 at 9-10. The City's single-stream recycling program was launched for single-family residential services in October of 2008. Ex. 4, 67:10-12. The City expected to make $3 million over a two-year period, but instead the City suffered a $2 million dollar loss over a two-year period. Ex. 12 (COA agenda item 41.) However, starting in approximately October of 2008, the market for recycled materials experienced a tremendous downturn. Ex. 5, 71:23-72:1.

Plaintiffs testified that a November 18, 2009 In-Fact Daily article reflected the general knowledge and circumstances at the time as follows: the City of Austin was seeking bids for a private proposal or a public-private partnership proposal to build a material recovery facility (MRF) for Austin's recycling needs. Ex. 4, 10-11. The date a facility might open was uncertain, so City Council would have to make an educated guess on how long it might take to build a facility. *Id.* That uncertainty might make council's decision on contracting with Greenstar more difficult. *Id.*

In late summer and fall of 2009, the City was also seeking to extend its two-year contract with Greenstar to clarify contract terms, improve pricing, improve flexibility in the contract, and provide a bridge between the Greenstar contract and the long-term recycling services' contract that would result from the Recycling RFP. JEX 20 at 1-2; Ex. 8 36-40. Bridging the two contracts was important because the City did not expect to have a local MRF operational until about one-year after the Recycling Service contract was awarded. Ex. 9 23-27. Austin citizens responded positively to the recycling program and the City's highest priority was to avoid interruption of single-stream recycling. Ex. 8:19-20, 39-40.

C. Key Facts Relevant to TDS' Disqualification

On November 30, 2009, TDS submitted questions to the authorized contact person about the MRF/recycling services RFP. Ex. 4; CR Dep. Ex. 1, item 2. On December 4, 2009, TDS representatives and Greenstar representatives (as well as others) attended the pre-bid conference held by the City. Ex. 6 11:12-12:24. Despite TDS knowledge that Greenstar was a potential competitor for the Recycling RFP, on December 8, 2009, TDS sent an e-mail to Solid Waste Advisory Commission (SWAC) members and some city staff in which Bob Gregory was critical of Greenstar's pricing and questioned whether Greenstar abides by its contractual agreements.

JEX 3. Additionally, Gregory recommended in the e-mail that SWAC members wait until they receive responses to the RFP before making a decision on the Greenstar contract extension. JEX 3. In addition to numerous charts and pricing comparisons, Gregory's e-mail included the following, "Considering the above contractual requirements and the following data, it appears that Greenstar does not always adhere to its contractual agreements with regard to determining its purchase price for commodities."

TDS fully intended to submit a response to the RFP at the time Gregory sent the e-mail. Ex. 1 RFA 8-9; JEX 20 at 17:1-4. On January 21, 2010, the City sent TDS a notice of disqualification under the Anti-Lobbying Ordinance. JEX 4. On February 5, 2010, TDS represented at the protest hearing on its disqualification that it would not submit a response to the RFP and the hearing was concluded because the disqualification was considered to be a moot issue based on TDS' representation. PEX 10 at 40-41.

On February 9, 2010, approximately an hour after the RFP response deadline, TDS submitted a proposed amendment to its existing waste disposal and yard trimmings contract "in lieu of a formal response to the SSMRF RFP" PEX 11. Solid Waste Services Director, Bob Gedert, compared TDS' February 9th proposal to the Recycling RFP and determined that although the proposal did not contain all the elements required for a response to the RFP, the proposal sought a contract for the same scope of services as those described in the RFP. Ex. 9 at 87. The City Attorney, David Smith, determined that TDS' proposal constituted a response to the RFP. JEX 14. Mr. Smith further stated that when the City chooses to competitively bid a contract, the City must meet the legal requirements of "competitive bidding", which include all bidders bidding on the same terms and conditions, which requires that the process be fair and the

all bidders be treated on the same plane of equality, which includes adherence to the Anti-Lobbying Ordinance. *Id.*

D. Council Findings related to the Anti-Lobbying Ordinance

Section 2-7-102 of the ordinance sets forth the following Findings and Purpose:

> (A) …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 the 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.

John Steiner, an assistant city attorney, who drafted the ordinance, described the city's prior anti-lobbying restrictions as unenforced and ignored by the vast majority of respondents, which placed those who complied at a competitive disadvantage to those who directly lobbied city officials for city contracts. Ex. 10, Dep. Ex. 1.

Plaintiffs' corporate representative, Bob Gregory, and his counsel have repeatedly emphasized that they do not object to the language or text of the Anti-Lobbying Ordinance. Ex. 4, 114:8-22; 64:19-65:6; JEX 20, 17:1-8. Yet, Plaintiffs complain that City staff interprets the ordinance too broadly. *Id.* Plaintiffs are allegedly frustrated by feeling limited to the time limits provided during an open meeting and by the desire to provide written information to *public* officials prior to council and commission meetings. Ex. 4, CR Dep. at 64:25-65:6.

The City has consistently taken the position the Anti-Lobbying Ordinance contemplates that parties with existing contractual agreements with the City are expected to continue to communicate with the City to provide services under those contracts and Plaintiffs have failed to

identify other respondents who share their opinion. Ex. 2, RFA 24. Moreover, the ordinance provides a safe harbor for any communications made during an open meeting § 2-7-104(F)(6); allows from communications between a respondent's attorney and an attorney of the City §2-67-104(F)(7); and provides several avenues for communications with the authorized contact person. §§2-7-104(B)(C)(D)(E)(F) and (G); JEX 25.

E. Plaintiffs' Public Meeting Experience

Although Plaintiffs complain that the City's open meetings do not provide them sufficient time to speak, Plaintiffs admit that they could have had up to five people sign up in opposition to an item on a council meeting agenda and that item would be pulled for discussion. Ex. 4 83:17-24. Plaintiffs admit that they could have taken advantage of the opportunity to speak about the Greenstar contract extension at the Solid Waste Advisory Commission (SWAC) meeting on December 9, 2009, and at the City Council meeting on December 17, 2009. Ex. 4 84:16-22:9. TDS also admits that it participates in public meetings and in communications with city officials because of its commercial/business interests. Ex. 7 at 41-43.

At the SWAC meeting on February 10, 2010, Plaintiffs' representatives Hobbs and Gregory spoke extensively about the recommendation for council action on the Greenstar contract extension (item 5(b)). Ex. 16 at 2-3. Mr. Gregory also provided written materials to the commissioners. Following discussion, SWAC voted to postpone the item and to hold a special called meeting in the event the item were scheduled for council meeting prior to the next SWAC meeting. *Id.* at 3.

Plaintiffs also did not testify at City Council meetings on June 10, 2010 or June 24, 2010 (the dates key decisions were made in regard to the Recycling RFP). Ex. 2, RFA No. 22 and 23. However, Plaintiffs provided a packet of information and met with council members prior to the

June 10, 2010 meeting (see table below). During the June 10, 2010 meeting, council voted to reject all responses to the MRF/Recycling Services RFP. Ex. 4, 110:4-11. At its meeting on June 24, 2010, Council voted in favor of instructing staff to negotiate long-term MRF/Recycling Services with TDS and Balcones and instructed staff to negotiate with TDS and Greenstar in regard to a short-term recycling contract. Because council rejected all bids, TDS was eligible to be chosen for the services included in the scope of the Recycling RFP. However, council did withdraw the anti-lobbying provision from the RFP, which meant TDS retained its disqualification.

During the 2011 contract negotiations related to TDS' long-term contract with the City for recycling services, TDS proposed a contract provision that would have removed TDS' 2010 disqualification for violation of the Anti-Lobbying Ordinance. Plaintiffs discussed TDS' proposal with council members and believed staff discussed it with council members. Ex. 4 170:19-174. The City rejected Plaintiffs' contract-term proposal to remove the disqualification. *Id.* at 171:17-23; 174:6-10.

Plaintiffs have demonstrated over the past several months that they are fully capable of complying with the Anti-Lobbying Ordinance and concurrently exercising their First Amendment rights during the City's open meetings. Ex. 4, CR Dep. Ex. 13; Ex. 5at 60-62. The transcript prepared by TDS from a SWAC meeting on October 10, 2012 shows that ZWAC Commissioners and ARR Director, Bob Gedert, were cooperative in referring TDS' items of concern to ZWAC for discussion so that the commission could make recommendations to council, and Commissioner Cofer noted Gedert's willingness to agree to TDS' proposal that the City's purchase of heavy-duty equipment only be approved on the condition that it would not be used to provide commercial collection and recycling services (currently provided by the private

industry). Ex. 3, CR Dep. Ex. 13 at 1, 14-15. Hobbs of TDS passed out materials to commissioners and he spoke for nine minutes after combining his time with other TDS representatives. *Id.* at 5-7

In January of 2013, the Zero Waste Advisory Commission changed its procedures to allow ten speakers during citizen communication (five at the beginning of the meeting and five at the end) instead of its traditional four speakers (at the beginning of the meeting). Ex. 25 (item 3(a). In March and April of 2013, TDS' representatives were granted extensive time to speak during three public meetings following TDS' disqualification for submission of an incomplete response to an Austin Energy industrial waste bid, , in which TDS omitted required pricing information. JEX-29-30 (item 26), 32-33; Ex. 5 at 60-62; CR Dep. Ex. 29. The bid was subject to the Anti-Lobbying Ordinance and Plaintiffs requested during open meetings before council and ZWAC that the bid be reissued. Ex. 5 at 65:20-21. Allied Waste objected that it would be unfair to issue a new bid because Allied's pricing was exposed and, thus, it was at a competitive disadvantage. JEX. 32 at 7-8; JEX 33 at 9. Council members and city staff discussed concerns that reissuing the bid would negatively affect the fairness and integrity of the City's bidding process. JEX 29 at 9, 26-27; JEX 33 at 10. Following extended public discussion and Plaintiffs' submission of a substantial amount of written information during the open meetings, City Council awarded the bid to the only bidder that provided a complete response, Allied Waste, but limited the terms of Allied's contract to a period of two years. JEX 34 (31-3 at 240); JEX 33 at 19; Ex. 5 at 66:4-13.

Although TDS did not prevail in its mission to convince council to reissue the Austin Energy bid, TDS well-demonstrated its experience in holding the floor at public meetings. TDS' lobbyist and attorney, Michael Whellan, combined time to speak for up to six minutes during a

March 7, 2013 council meeting. JEX-29 at 1-3. After extensive discussion, council voted to send the issue to the Zero Waste Advisory Commission for consideration. TDS. *Id.* at 33.

On April 10, 2013, TDS' representatives had the opportunity to speak extensively at the ZWAC meeting and to provide substantial materials to commissioners in regard to the AE bid item. JEX 31at 10-28, 65-72 (Doc 31-3 at -128 of 263); JEX 32 (Doc. 31-3 at 129 of 263). Mr. Whellan and Mr. Gregory spoke at the meeting. JEX 32 at 137-. Mr. Gregory and Allied's representative were permitted to speak long past their combined six minutes. *Id.* at 19:15-26:12; 65:14-73:2.

Following is a sample of some additional meetings in which Plaintiffs' representatives spoke at public meetings of the City.

Date	Plaintiffs Spoke at City Public Meetings	Exhibit
2/10/10	Ryan Hobbs' presentation at a SWAC meeting related to the proposed extension of the Greenstar contract	Ex. 4 96:19-98:5
10/1/10	TDS represented Hobbs spoke and passed at materials at a SWAC meeting re TDS Contract for Single Stream Recycling	Ex. 4 111:8-13; 186-189; CR Ex. 13
4/2011	TDS spoke at a SWAC meeting in regard to the percentage of volume of recyclables to be awarded to TDS and Balcones	Ex. 4 159-160
12/4/09	Pre-bid conference meeting; expressed concerns about Anti-Lobbying Ordinance restrictions	Ex. 4, 123-124
2/8/12	Adam Gregory spoke at SWAC meeting on item 4(a)	Ex. 21
5/9/12	Adam Gregory spoke at SWAC meeting during citizen communication (item 1)	Ex. 22
6/13/12	Adam Gregory spoke at SWAC meeting on item 3	Ex. 23
7/11/12	Adam Gregory spoke at SWAC meeting during citizen communication (item 1)	Ex. 24
10/10/12	Ryan Hobbs of TDS spoke at ZWAC meeting	Ex. 186-189; CR Dep. Ex. 13
11/1/2012	Plaintiffs communication to council regarding its opposition to the City's purchase of equipment that TDS felt threatened a city takeover of commercial collection of solid waste and recyclables	Ex. 4, CR Dep. Ex. 15
2/13/13	Adam Gregory spoke during citizen communication to raise	Ex. 26

	concerns that increasing speakers from 4 to 10 might not allow time for citizens to ask questions and comment during staff briefings	

The following table provides samples of some of Plaintiffs' representatives' private meetings with city officials, mostly council members or their aides. Ex. 4 107:3-21.

Date	**Non-public communications with members of Council or SWAC/ZWAC**	Exhibit
June 2009	Gregory and Armbrust met with Robert Goode (twice) and Marc Ott (once)	Ex. 28
July-Aug 2009	TDS has six meetings with the Mayor or other council members and one meeting with Robert Goode	Ex. 28
Sept-Nov	TDS has eight meetings with the Mayor or other council members; TDS has one meeting with Robert Goode	Ex. 28
2010	2010 Council Meeting Dates	Ex. 4 Dep. Ex. 10
2/24/10	Plaintiffs' Package for Council Members: Martinez, Riley, Morrison, and Spelman (numerous pages related to the history of the Greenstar short-term recycling contract; comparisons to Dallas and San Antonio's long-term recycling contracts; and photos and description of TDS' equipment for part of the MRF it was building.	Ex. 4 98:13-103:3
Feb 2010	TDS has 2 meetings with SWAC members and five meetings with council members	Ex. 28
Feb 2010	TDS message to council concerning TDS' February 9, 2010 proposal	Ex. 4 104:3-105:16
March 2010	TDS has 4 meetings with Mayor and other council members and one meeting with Robert Goode	Ex. 28
3/25/10	"Just Say No" packet re Greenstar contract extension	Ex. 4 82-83, 90-91, 105:18-21
4/6/10	Package to Council Members: Riley, Shade, and Morrison, which included Hemphill's response to City Attorney, David Smith's memo of 2/2Ex. 40, Hemphill's 2/5/10 letter to the independent hearing examiner, and a cost comparison for processing of recyclables between Greenstar and TDS	Ex. 4 106:24-107:11
April 2010	TDS has 3 meetings with council members	Ex. 28
6/8/10	Package related to the June 10, 2010 council meeting (agenda item no. 23). Plaintiffs testified they may, or may not, have provided this packet to council.	Ex. 4 109:18-111:7
June 2010	TDS has 8 meetings with council members and 1 meeting with Robert Goode	Ex. 28
4/7/11	Communication to Council Members re concern about	Ex. 4 114-117;

	potential violation of Anti-Lobbying Ordinance on the downtown refuse collection contract while negotiating the Recycling Services contract.	CR Dep. Ex. 8; Ex. 8, A. Gregory Dep. Ex. 5 and 18

II. ARGUMENT AND AUTHORITIES

A. Standard of Review

Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. PROC. 56(c); *Cates v. Dillard Dep't Stores, Inc.*, 624 F.3d 695, 696 (5th Cir. 2010). Once the moving party establishes its burden, the nonmovant must producing competent summary judgment proof establishing a genuine issue of material fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The nonmovant may not satisfy its burden by resting on its pleadings alone. *Id.* Moreover, neither "conclusory allegations" nor "unsubstantiated assertions" will defeat a properly supported motion for summary judgment. *Wallace v. Tex. Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir. 1996).

B. Plaintiffs' Claims are not Ripe for Review

Plaintiffs' claims are not ripe for review because Plaintiffs are not at risk of debarment from city contracts. Debarment requires the following to occur (1) a disqualification more than two times in a sixty month period and (2) a hearing process involving written notice to a respondent. City Code § 2-7-109(A); JEX 25. Thus, Plaintiffs are subject to a three-strike' rule that nonetheless does not strike them out of City contracts until they have an opportunity for a hearing. Moreover, with each disqualification, a respondent or potential respondent is entitled to notice and a hearing. JEX 2. Thus, before being subjected to debarment, a respondent charged with three disqualifications would be entitled to four hearings. Thus, Plaintiffs cannot show that they are subject to imminent harm, a required showing to establish that their claim is ripe for review.

"The standing doctrine defines and limits the role of the judiciary and is a threshold inquiry to adjudication." *McClure v. Ashcroft,* 335 F.3d at 408. A court should dismiss a case for lack of ripeness when the case is abstract or hypothetical. *New Orleans Public Service, Inc. v. Council of the City of New Orleans,* 833 F.2d 583, 586 (5th Cir. 1988). Speculation about the possibility of future unconstitutional acts of officials under a statute is insufficient to create a ripe case or controversy. *Hometown Co-operative Apartments v. City of Hometown,* 515 F.Supp. 502, 505 (N.D. Ill. 1981). A federal court must find that Article III standing requirements are met before proceeding. These requirements include (1) "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) causation, meaning that the injury is "fairly traceable to the challenged action of the defendant"; and (3) redressability, meaning that "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Valley v. Rapides Parish School Board,* 145 F.3d 329, 332 (5th Cir.1998), *citing Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992). The element of standing that deals directly with ripeness is the requirement of "imminence," and in a declaratory action, the threatened injury must be "sufficiently 'imminent' to establish standing." *Id*. A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' *See Texas v. United States,* 523 U.S. 296, 300 (1998).

The Fifth Circuit recently upheld the Texas Open Meetings Act (TOMA) in a lawsuit challenging the statute on First Amendment grounds. *Asgeirsson v. Abbott,* 696 F.3d 454, 458 (5th Cir. 2012), *cert denied*, 133 S.Ct. 1634, 81 U.S.L.W. 3371 (Mar. 25, 2013). In its rationale, the court emphasized that TOMA makes government more transparent by providing the public with access to government decision making:

> Here, government is not made less transparent because of the message of private speech about public policy: Transparency is furthered by allowing the public to have access to government decision making…. The private speech itself makes the government less transparent regardless of its message. The statute is therefore content-neutral.

Id. at 561-62. Because Plaintiffs cannot establish that they are entitled to "private speech' with government officials who are part of the decision-making process involving contracts for which Plaintiffs are competing under the Anti-Lobbying Ordinance and because Plaintiffs are entitled to one more disqualification before Plaintiffs would be subjected to the possibility of debarment related to a third disqualification, Plaintiffs' claims are conjectural, speculative and not ripe for review.

C. Plaintiffs Cannot Establish Violation of the First Amendment Rights

1. Content-Neutral Speech

The Fifth Circuit's opinion in *Asgeirsson* provides a road-map of reasoning that is more than sufficient in itself to provide the basis for dismissal of Plaintiffs' First Amendment' claims. The Fifth Circuit rejected the argument that TOMA was a content-based restriction on speech as a result of its application only to speech regarding public policy over which governmental bodies have supervision and control. 696 F.3d at 459. "A statute that appears content-based on its face may still be deemed content-neutral if it is justified without regard to the content of the speech. *Id.; see Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 47-48 (1986). The Fifth Circuit explained further that "[i]n *Playtime Theatres,* the Court upheld a zoning ordinance that was facially content–based because it applied only to theaters showing sexually-explicit material." *Id.* at 460. The Court determined the regulation was not aimed at suppressing the erotic message but rather the "secondary effects" of crime and lower property values. *Id.*, *citing Playtime Theatres,* 475 U.S. at 48. The same is true for the Anti-Lobbying Ordinance, which is not aimed

at the content of the speech but at the secondary effects of an unfair process that fosters the appearance, if not the actual harm, of corruption and undue influence that would result from vendors being allowed to directly lobby for contracts for city goods and services. More importantly, the Fifth Circuit emphasized that the Open Meetings Act "is applicable only to private forums and is designed to *encourage* public discussion." *Asgeirsson,* 696 F.3d at 461. Contrary to recognizing the violation of any First Amendment rights, the court denoted the Act's purpose of controlling the secondary effects of closed meetings that prevent transparency, encourage fraud and corruption, and foster mistrust in government. *Id.* These secondary effects are equally applicable to the City's competitive bidding process under the Anti-Lobbying Ordinance. Moreover, the steering of communications through an authorized contact person help ensure additional secondary effects including providing a level playing field to competitors who benefit from the same opportunities to ask questions and learn from the questions of other competitors, the same information provided to others, and the same level of access to decision makers. Likewise, as recognized by the explicit terms of the ordinance, the City benefits when the most qualified bidder obtains the contract because it acquires the best and most competitive goods and services. City Code § 2-7-102 (B).

The Fifth Circuit also rejected the argument that the Open Meetings Act punishes private speech, which is similar to TDS' argument that they are being silenced by being forced to speak in a public forum. *Id.* at 463. The court reasoned that in order to enforce disclosure requirements in the public forum of certain speech, it must have the ability to punish nondisclosure of the same speech in the private forums. *Id.*

2. Overbreadth

The Fifth Circuit also rejected the TOMA plaintiffs' overbreadth argument because they could not show that TOMA reaches a substantial amount of protected speech when judged in relation to the statute's plainly legitimate sweep. *Id., citing Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973). The court's overbreadth analysis of TOMA is equally applicable to the Anti-Lobbying Ordinance because just as government officials have no constitutional right to discuss public policy among a quorum of their governing body in private, vendors lobbying for government goods and services contracts have no right to lobby their governing body outside the rules of the competitive bidding process. *Id.* at 464. TOMA's plainly legitimate sweep in fostering government transparency, trust in government, reducing corruption, and participation by all elected officials is equally applicable to the Anti-Lobbying Ordinance. *Id.* at 465-66. Yet, the Anti-Lobbying Ordinance has additional subject matters to include in its plainly legitimate sweep: transparency, fairness, and integrity of the bidding process. Thus, Plaintiffs' overbreadth claims are equally without basis in law. Furthermore, like the plaintiffs in *Asgeirrson,* TDS not only fails to point to language in the ordinance that is vague on its face, TDS has repeatedly denied that it has any complaint about the text of the ordinance.

The anti-lobbying ordinance at issue in this lawsuit does not prohibit or limit communications during public meetings before the city council and city boards and commissions.

D. DUE PROCESS

Plaintiffs have failed to establish entitlement to procedural due process under the Constitution. *Bd. Of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972). Vendors who compete for a bid are similar to job applicants who are not hired, which is insufficient to establish a cognizable property interest. *Sartaine v. Pennington,* 410 F.Supp.2d 584, 590 (E.D.

Ky.2006). Plaintiffs were not denied due process of law because Plaintiffs can establish no loss of property interest. To the contrary, despite the intents and purposes of the Anti-Lobbying Ordinance, Plaintiffs were actually rewarded for their violation because as a result of council's rejection of all bids under the Recycling RFP, TDS was back on the playing field and actually received both the short-term recycling contract and 40 percent of the long-term recycling contracts after they were disqualified from the Recycling RFP.

Plaintiffs' also had numerous opportunities to explain their actions and to protest the disqualification decision. The May 26, 2010 hearing transcript and Plaintiffs' numerous communications with attorneys in the City's Law Department establish that Plaintiff received sufficient due process. JEX 7-8, 14-22.

E. ULTRA VIRES

Under Texas law, ultra vires suits against government employees in their official capacity "must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority." *City of El Paso v. Heinrich,* 284 S.W.3d 366, 372 (Tex. 2009). Defendants incorporate herein the preceding arguments related to Plaitniffs' First Amendment claims. Plaintiffs presumably allege that Byron Johnson acted without legal authority when he followed the advice of City Attorney David Smith and the recommendation of the Independent Hearing Examiner Webb, and upheld TDS' disqualification. Ex. 27 at 57-60; 81-85; JEX 10, 12-14, and 20-22. Mr. Johnson's decision clearly required the exercise of discretion and judgment and was reasonably based on review of all the information available to him, including the advice of the City's Law Department. Plaintiffs' cannot show that Johnson was without legal authority in applying the ordinance to application of the terms of

the ordinance to Gregory's conduct and do not allege that Johnson's actions were ministerial in nature.

PRAYER

For the foregoing reasons, Defendants, City of Austin and Byron Johnson, respectfully request that the Court dismiss all of Plaintiffs' claims with prejudice. Defendants further request any additional relief to which they may be justly entitled.

RESPECTFULLY SUBMITTED,

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CITY OF AUSTIN

CERTIFICATE OF SERVICE

I certify that on the 10th day of May, 2013, I served by electronic mail, by agreement of counsel, a copy of the foregoing to:

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/s/ Lynn E. Carter
LYNN E. CARTER

Exhibits to the

Defendants' Motion for Summary Judgment

Exhibit 1	Plaintiffs' Responses to the Defendants' First Request for Admissions
Exhibit 2	Plaintiffs' Responses to Defendants' Second Request for Admissions
Exhibit 3	TDS' Response to Interrogatories
Exhibit 4	Plaintiffs' Corporate Representative Deposition Excerpts and Exhibits (Vol. 1, 3/1/12)
Exhibit 5	Plaintiffs' Corporate Representative Deposition Excerpts and Exhibits (Vol. 2, 4/12/12)
Exhibit 6	Bobby Gregory Deposition Excerpts and Exhibits (2/27/12)
Exhibit 7	Adam Gregory Deposition Excerpts and Exhibits
Exhibit 8	Robert Goode Deposition Excerpts and Exhibits
Exhibit 9	Bob Gedert Deposition Excerpts and Exhibits
Exhibit 10	John Steiner Deposition Excerpts and Exhibits
Exhibit 11	June 5, 2008 Austin City Council Agenda
Exhibit 12	June 5, 2008 Austin City Council backup documents for item 41
Exhibit 13	December 17, 2009 Council backup materials for item 82
Exhibit 14	December 17, 2009 Council meeting minutes for item 82
Exhibit 15	January 13, 2010 SWAC meeting minutes (item 5(c))
Exhibit 16	February 10, 2010 SWAC meeting minutes (item 5(b))
Exhibit 17	February 23, 2010 SWAC agenda and cancellation notice
Exhibit 18	March 10, 2010 SWAC meeting minutes
Exhibit 19	April 14, 2010 SWAC meeting minutes
Exhibit 20	January 11, 2012 SWAC meeting minutes (numerous speakers on item 4(a))

Exhibit 21 February 8, 2012 SWAC meeting minutes

Exhibit 22 May 9, 2012 SWAC meeting minutes

Exhibit 23 June 13, 2012 SWAC meeting minutes

Exhibit 24 July 11, 2012 SWAC meeting minutes (item 1)

Exhibit 25 January 9, 2013 SWAC meeting minutes (item 3(a))

Exhibit 26 February 13, 2013 SWAC meeting minutes (item 1)

Exhibit 27 Byron Johnson Deposition Excerpts and Exhibits

Exhibit 28 TDS Response to City's Third Request for Production

Defendants' MSJ
Exhibit No. 1

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, and BYRON JOHNSON, in his official capacity, Defendants.	§	

PLAINTIFFS' OBJECTIONS AND RESPONSES TO CITY OF AUSTIN'S FIRST REQUEST FOR ADMISSIONS

To: Defendant City of Austin, by and through its counsel of record, Lynn Carter, Assistant City Attorney, P.O. Box 1546, Austin, Texas 78767-1546.

Pursuant to Rule 36 Federal Rules of Civil Procedure, Plaintiffs Texas Disposal Systems, Inc. and Texas Disposal Systems Landfill, Inc. ("Plaintiffs" or "Texas Disposal") hereby serve their Objections and Responses to Defendant City of Austin's First Request for Admissions.

Respectfully submitted,

/s/ James A. Hemphill
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was served *via* email by agreement, on the 19th day of April, 2013, to counsel of record for Defendant, City of Austin:

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/s/ James A. Hemphill

GENERAL STATEMENTS AND OBJECTIONS

The following statements and objections are made with respect to all discovery. All answers are made subject to these general statements and objections, which will not be repeated under each answer. Where a partial response can be made in response to a request that is otherwise objectionable, a partial response will be made without waiving the objection.

1. Plaintiffs' responses are made without waiver of, and with preservation of:

(a) all questions as to competency, relevance, materiality, privilege, and admissibility of each response, and the subject matter thereof as evidence for any purpose in any further proceedings in this matter, including the trial of this matter, and in any other lawsuit or proceeding;

(b) the right to object to the use of any response, or the subject matter thereof, in any further proceedings in this matter, including the trial of this matter, and in any other lawsuit or proceedings; and

(c) the right at any time to revise, correct, add to, supplement, or clarify any of the responses contained herein.

2. Plaintiffs object to any definition or instruction requiring actions differing from those required by the Federal Rules of Civil Procedure.

4. Plaintiffs object to all discovery requests that can be construed as seeking the discovery of attorney-client communications, attorney work product or materials prepared in the anticipation of litigation or trial, or any other privileged material.

5. Plaintiffs do not concede the relevance of any answer being produced and expressly reserves the right to object on relevance or any other grounds, to the introduction into evidence of any answer given or document produced.

6. Plaintiffs object to all discovery requests to the extent that they request materials or information equally or more available to Defendant.

PLAINTIFFS' OBJECTIONS AND RESPONSES TO CITY OF AUSTIN'S
FIRST REQUEST FOR ADMISSIONS

REQUEST FOR ADMISSION NO. 1:
Plaintiffs do not dispute the "Findings of Fact" in the "Decision of the Independent Hearing Officer," dated June 2, 2010 and attached as Exhibit "E" to Plaintiffs Original Petition in this Lawsuit.

RESPONSE: While there are some findings that Plaintiffs do not dispute, there are other findings that Plaintiffs do dispute, and still others for which Plaintiffs lack sufficient knowledge or information to admit or deny; therefore, denied.

REQUEST FOR ADMISSION NO. 2:
The City of Austin's Solid Waste Services Department implemented Single-Stream Recycling in October of 2008.

RESPONSE: Plaintiffs lack sufficient knowledge or information at this time to admit or deny, but do not dispute this specific assertion for purposes of this lawsuit.

REQUEST FOR ADMISSION NO. 3:
The City of Austin's short-term single-stream recycling contract with Mid-America Recycling, LLC d/b/a/ Greenstar ("Greenstar contract") for the transportation, processing, and sale of single-stream recycling material expired on September 30, 2010, and no extension options were available under the Greenstar contract after September of 2011.

RESPONSE: Admit that the contract included the stated expiration date, and that the contract included at least two six-month extension options. Plaintiffs lack sufficient knowledge at this time as to whether the referenced contract could have allowed for continuation of services past September of 2011.

REQUEST FOR ADMISSION NO. 4:
Because unanticipated negative market factors associated with a sudden downturn in the national economy, the City engaged Greenstar in contract negotiations to amend Option 3 of its contract with Greenstar so that the City could continue to provide Single Stream Recycling Services to Austin residents until a Single Stream Material Recovery Facility ("SSMRF") was constructed locally.

RESPONSE: Plaintiffs lack sufficient knowledge or information to admit or deny the assertion regarding the City's motivation for engaging Greenstar in the referenced contract negotiations. Plaintiffs admit that during the referenced time period, there was an economic downturn, particularly in the prices of recyclable materials, and that the City engaged Greenstar in the referenced contract negotiations.

REQUEST FOR ADMISSION NO. 5:
On November 16, 2009, the City of Austin issued Request for Proposal No. RDR0005 ("the Recycling RFP" referenced in Plaintiffs' First Amended Complaint in this Lawsuit) that pertains

to recycling services.

RESPONSE: Admitted.

REQUEST FOR ADMISSION NO. 6:
The Recycling RFP expressly excluded collection services from the scope of work to be provided under the Recycling RFP.

RESPONSE: Admit that the Recycling RFP excluded collections services from the scope of work to be provided under the Recycling RFP.

REQUEST FOR ADMISSION NO. 7:
Item II of the Supplemental Purchasing Provisions to the Recycling RFP provides in part:

II. NON-COLLUSION, NON-CONFLICT OF INTEREST, AND ANTI-LOBBYING

A. The Austin City Council adopted Ordinance No. 20071206-045 on December 6, 2007, adding a new Article 6 to Chapter 2-7 of the City code relating to Anti-Lobbying and Procurement. The policy defined in this Code applied to RFP's for goods and/or services exceeding $5,000. During the No-Contact Period, Offerors or potential Offerors are prohibited from making a representation to anyone other than the person designed in the RFP as the contact for questions and comments regarding the RFP.

B. If doing the No-Contract Period an Offeror makes a representation to anyone other than the Authorized Contract Person for the RFP, the Offeror's Offer is disqualified from further consideration except as permitted in the Ordinance.

RESPONSE: Admitted.

REQUEST FOR ADMISSION NO. 8:
Prior to Gregory's December 8, 2009 (9:04 p.m.) e-mail (attached as Exhibit "A" to Plaintiffs' Original Petition) Plaintiffs intended to respond to the Recycling RFP.

RESPONSE: To the extent that this request implies that Plaintiffs no longer intended to respond to the Recycling RFP at any time after the referenced e-mail was sent, denied; otherwise, admitted.

REQUEST FOR ADMISSION NO. 9:
Prior to January 21, 2010, TDS issued a press release stating its intention to respond to the Recycling RFP.

RESPONSE: Plaintiffs admit that they had publicly stated, before January 21, 2010, that they intended to respond to the Recycling RFP.

REQUEST FOR ADMISSION NO. 10:
Attached to Gregory's December 8, 2009 e-mail was a multi-page analysis that compared Greenstar's valuation to market pricing for the following: newspaper; cardboard; mix paper; steel cans; aluminum cans; HDPE (High Density Polyethylene), natural: HDPE, color, and PETE

(Polyethylene Terephthalate).

RESPONSE: Admit that the referenced e-mail included such an analysis with regard to the existing short-term recycling contract between the City and Greenstar.

REQUEST FOR ADMISSION NO. 11:
Gregory's December 8, 2009 e-mail included the following criticism of Greenstar: "Considering the above contractual requirements and the following data, it appears that Greenstar does not always adhere to its contractual agreements with regard to determining its purchase price for commodities."

RESPONSE: Deny that the quoted phrase was a general "criticism of Greenstar." Admit that the quoted phrase was part of the e-mail's analysis with regard to the existing short-term recycling contract between the City and Greenstar.

REQUEST FOR ADMISSION NO. 12:
During the February 5, 2010 Bid Protest Hearing, Texas Disposal System, Inc. (TDS) asserted, and the City Staff agreed, that TDS' decision not to respond to the Recycling RFP rendered the January 21, 2010 disqualification moot and the subject matter of the hearing moot, as well.

RESPONSE: Admit that the City Staff and the Hearings Officer agreed that the matter was moot, and that the Hearings Officer stated that "there has been no violation of the ordinance."

REQUEST FOR ADMISSION NO. 13:
On February 9, 2010, at approximately 12:37 p.m., TDS/Plaintiffs submitted a packet of information that TDS/Plaintiffs declared was "*In lieu of a formal response to the SSMRF RFP...*" and that was styled:

"Texas Disposal Systems Proposed Amendment to Existing Waste Disposal and Yard Trimmings Proceeding Contract Executed May 12, 2000."

RESPONSE: Admit that Plaintiffs submitted the referenced packet of information on the date and approximate time referenced. Admit that the cover letter included the quoted language, but deny that the language was italicized or otherwise emphasized. Admit that the packet of information included the quoted title.

REQUEST FOR ADMISSION NO. 14:
At Page 24 of 33 of its February 9, 2010 proposed amendment to its existing contract, Plaintiffs/TDS acknowledged that its waste disposal contract with the City had not required it to market the commodities collected by the City.

RESPONSE: Deny. Admit that the referenced page of the referenced document includes the following language: "While TDS has not yet marketed all of the commodities collected by the City, we have marketed and sold organic products, newsprint, cardboard, mixed paper and numerous types of scrap metal for many years and have fulfilled contracts with large customers, including HEB, Samsung, TXDOT and large landscaping firms in central Texas."

REQUEST FOR ADMISSION NO. 15:
In the February 9, 2010 proposed amended, Plaintiffs/TDS asserted its experience marketing the commodities of newsprint, cardboard mixed paper and numerous types of scrap metal" for its private customers, and cited the experience of its principals in marketing scrap metals.

RESPONSE: Admit that the referenced proposal to amend Plaintiffs' existing contract included in substance the referenced subject; Plaintiffs cannot admit or deny as to any actual quotations because the request is not clear where the quotation is purported to begin.

REQUEST FOR ADMISSION NO. 16:
In the February 9, 2010 proposed amendment, Plaintiffs/TDS specifically asserted its intention to construct a "Materials Recovery Facility" or "MRF" locally as a short-term and long-term solution to "the City's single stream recyclables processing needs."

RESPONSE: Admit that the referenced proposal to amend Plaintiffs' existing contract included the following language, at page 2 of 33:

"TDS is proposing both a short term and a long term solution to the City's single stream recyclables processing needs. … TDS has purchased the processing equipment capable of processing the City's recyclables, as well as those from other central Texas customers, and is currently assembling a multi-function MRF, which has the ability to process both residential and commercial volumes over twice the City's current reported volume of recyclables."

REQUEST FOR ADMISSION NO. 17:
Plaintiffs/TDS' February 9, 2010 proposed contract amendment included the following cited information: the company's regulatory compliance record; the cost effective benefit to the City (particularly relative to Greenstar's existing contract); its marketing plan; its long term revenue sharing proposal with City; its existing contracts and agreements; details of its proposed MRF; and its experience and qualifications.

RESPONSE: Admit that the referenced proposal to amend Plaintiffs' existing contract included the following language:

"The TDS facilities are fully regulated and authorized to manage waste and recyclables through the TCEQ Air, Waste and Water programs. The TDS permit (TCEQ#2123) is authorized for the recycling, composting and landfilling activities discussed within this proposal. The facilities are inspected regularly by TCEQ and have an exemplary record of compliance and performance. The facility's personnel have extensive experience in environmental compliance, and will meet regulatory requirements. They will also obtain or make changes to current permits, as required, to accommodate the proposed facilities and any new activities, and will ensure compliance with all changes in applicable regulations." [at pages 28-29]

Admit that the referenced proposal to amend Plaintiffs' existing contract included a short-term MRF processing proposal, at pages 14-15, and that the short-term proposal included

the following language at page 14: "This short term MRF processing proposal is presented as an alternative to the pending Greenstar contract material guarantee and term extension as proposed in February 11, 2010 Austin City Council Agenda Item # 15."

Deny that the referenced proposal to amend Plaintiffs' existing contract included any comparison of the proposed long-term processing proposal with the long-term proposal of Greenstar or any other entity.

Admit that the referenced proposal to amend Plaintiffs' existing contract included a subsection titled "Marketing Plan" at pages 13-14, as part of the proposal's section titled "Operational Plan for the Material Recovery Facility."

Admit that the referenced proposal to amend Plaintiffs' existing contract included a section titled "Long Term Cost and Revenue Sharing Proposal" at pages 16-18.

Admit that the referenced proposal to amend Plaintiffs' existing contract included a section titled "Existing Recycling Services Agreement Opportunity for the City – A Role Reversal" at page 16.

Deny that the referenced proposal to amend Plaintiffs' existing contract included general information about Plaintiffs' "existing contracts and agreements" other than their existing contract with the City.

Admit that the referenced proposal to amend Plaintiffs' existing contract included a section titled "Description of Single Stream Materials Recovery Facility (MRF) Services" at pages 7-9, and a section titled "Operational Plan for the Material Recover Facility" at pages 9-14.

Admit that the referenced proposal to amend Plaintiffs' existing contract included a section titled "Experience and Qualifications" at pages 24-29.

REQUEST FOR ADMISSION NO. 18:
Plaintiffs/TDS' February 9, 2010 proposed contract amendment proposed a change in its services to be offered to the City that were more similar to those being performed by Greenstar under Greenstar's short-term recycling contract and the services sought in the Recycling RFP than to Plaintiffs/TDS' existing contract with the City.

RESPONSE: Plaintiffs object that the undefined term "more similar" is inherently vague and subjective, and that therefore the request as worded cannot be admitted or denied. Admit that the referenced proposal to amend Plaintiffs' existing contract included proposals to expand the services provided by Plaintiffs under the existing contract. Deny that the proposed expanded services were dissimilar to those specifically mentioned in the existing contract.

REQUEST FOR ADMISSION NO. 19:
Plaintiffs/TDS intended its February 9, 2010 proposed contract amendment as an alternative to the City's Recycling RFP.

RESPONSE: Admit that Plaintiffs intended the referenced proposed contract amendment as a proposal that the City could choose to consider for the provision of recycling services if it chose not to award a long-term recycling contract through the Recycling RFP.

Deny that the only services included in the referenced proposed contract amendment were those specified in the Recycling RFP.

REQUEST FOR ADMISSION NO. 20:
Plaintiffs/TDS made the proposed contract amendment on February 9, 2010 instead of submitting a response to the Recycling RFP because Plaintiffs/TDS had been determined by the City to have violated the Anti-Lobbying Ordinance.

RESPONSE: Deny that Plaintiffs "had been determined by the City to have violated the Anti-Lobbying Ordinance" at the time they made the contract amendment proposal. Rather, City Staff had agreed that the original notice of disqualification was moot, and the Hearings Officer selected by the City specifically stated that "there has been no violation of the ordinance."

Admit that Plaintiffs submitted the referenced proposed contract amendment in part because of their concern that City Staff would continue to misinterpret and misapply the Anti-Lobbying Ordinance and would continue to erroneously argue that, if Plaintiffs submitted an RFP response, then Mr. Gregory's December 8, 2009 e-mail was a prohibited "representation" under that Ordinance.

Defendants' MSJ
Exhibit No. 2

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, and BYRON JOHNSON, in his official capacity, Defendants.	§	

PLAINTIFFS' OBJECTIONS AND RESPONSES TO CITY OF AUSTIN'S SECOND REQUEST FOR ADMISSIONS

To: Defendant City of Austin, by and through its counsel of record, Lynn Carter, Assistant City Attorney, P.O. Box 1546, Austin, Texas 78767-1546.

Pursuant to Rule 36 Federal Rules of Civil Procedure, Plaintiffs Texas Disposal Systems, Inc. and Texas Disposal Systems Landfill, Inc. ("Plaintiffs" or "Texas Disposal") hereby serve their Objections and Responses to Defendant City of Austin's Second Request for Admissions.

Respectfully submitted,

/s/ James A. Hemphill
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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was served *via* email by agreement, on the 8th day of May, 2013, to counsel of record for Defendant, City of Austin:

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lynn.carter@austintexas.gov

/s/ James A. Hemphill

GENERAL STATEMENTS AND OBJECTIONS

The following statements and objections are made with respect to all discovery. All answers are made subject to these general statements and objections, which will not be repeated under each answer. Where a partial response can be made in response to a request that is otherwise objectionable, a partial response will be made without waiving the objection.

1. Plaintiffs' responses are made without waiver of, and with preservation of:

(a) all questions as to competency, relevance, materiality, privilege, and admissibility of each response, and the subject matter thereof as evidence for any purpose in any further proceedings in this matter, including the trial of this matter, and in any other lawsuit or proceeding;

(b) the right to object to the use of any response, or the subject matter thereof, in any further proceedings in this matter, including the trial of this matter, and in any other lawsuit or proceedings; and

(c) the right at any time to revise, correct, add to, supplement, or clarify any of the responses contained herein.

2. Plaintiffs object to any definition or instruction requiring actions differing from those required by the Federal Rules of Civil Procedure.

4. Plaintiffs object to all discovery requests that can be construed as seeking the discovery of attorney-client communications, attorney work product or materials prepared in the anticipation of litigation or trial, or any other privileged material.

5. Plaintiffs do not concede the relevance of any answer being produced and expressly reserves the right to object on relevance or any other grounds, to the introduction into evidence of any answer given or document produced.

6. Plaintiffs object to all discovery requests to the extent that they request materials or information equally or more available to Defendant.

PLAINTIFFS' OBJECTIONS AND RESPONSES TO CITY OF AUSTIN'S
SECOND REQUEST FOR ADMISSIONS

REQUEST FOR ADMISSION NO. 21:
Plaintiffs did not testify at the City Council meeting on December 17, 2009.

RESPONSE: Admitted.

REQUEST FOR ADMISSION NO. 22:
Plaintiffs did not testify at the City Council meeting on June 10, 2010.

RESPONSE: Admitted.

REQUEST FOR ADMISSION NO. 23:
Plaintiffs did not testify at the City Council meeting on June 24, 2010.

RESPONSE: Admitted.

REQUEST FOR ADMISSION NO. 24:
Assistant City Attorney, Robin Sanders, stated the following (or similar words having the same effect) during the May 26, 2010 protest hearing on TDS's disqualification:

> [T]he anti-lobbying ordinance contemplates that if you have an existing contractual arrangement with the City, in order to have necessary communications to fulfill that, that's not a violation of anti-lobbying. That happens all the time where we have an existing vendor who needs to continue to be a vendor … where the City of Austin had an existing relationship ….

RESPONSE: Admit that the quoted statement was made in words or substance.

REQUEST FOR ADMISSION NO. 25:
Plaintiffs are not aware of any vendor with an existing contract with the City that has been disqualified under the anti-lobbying ordinance for any statement made by the vendor during typical communications related to the vendor's existing contract with the City.

RESPONSE: Admit that Plaintiffs are not aware of any such instance.

REQUEST FOR ADMISSION NO. 26:
Plaintiffs are not aware of any vendor with an existing contract with the City that has been disqualified under the anti-lobbying ordinance for any statement made by the vendor during communications related to the vendor's existing contract with the City.

RESPONSE: Admit that Plaintiffs are not aware of any such instance; however, Plaintiffs' communications with the City related to an existing contract were wrongly considered by the City to be a "response" to an RFP and led to the purported disqualification of Plaintiffs.

REQUEST FOR ADMISSION NO. 27:
Plaintiffs are not aware of any potential vendor that has been disqualified under the anti-lobbying ordinance for any statements made by the potential vendor during contract negotiations related to a potential contract for goods or services with the City.

RESPONSE: Admit that Plaintiffs are not aware of any such instance; however, Plaintiffs' communications with the City related to an existing contract were wrongly considered by the City to be a "response" to an RFP and led to the purported disqualification of Plaintiffs.

REQUEST FOR ADMISSION NO. 28:
Plaintiffs are not aware of any vendor with an existing contract with the City that has been disqualified under the anti-lobbying ordinance for any statements made by the vendor during contract negotiations related to a potential contract for goods or services with the City.

RESPONSE: Admit that Plaintiffs are not aware of any such instance; however, Plaintiffs' communications with the City related to a potential amendment of an existing contract were wrongly considered by the City to be a "response" to an RFP and led to the purported disqualification of Plaintiffs.

Defendants' MSJ
Exhibit No. 3

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, and BYRON JOHNSON, in his official capacity, Defendants.	§	

PLAINTIFFS' OBJECTIONS AND RESPONSES TO CITY OF AUSTIN'S FIRST SET OF INTERROGATORIES

To: Defendant City of Austin, by and through its counsel of record, Lynn Carter, Assistant City Attorney, P.O. Box 1546, Austin, Texas 78767-1546.

Pursuant to Rule 33, Federal Rules of Civil Procedure, Plaintiffs Texas Disposal Systems, Inc. and Texas Disposal Systems Landfill, Inc. ("Plaintiffs" or "Texas Disposal") hereby serve their Objections and Responses to Defendant City of Austin's First Set of Interrogatories.

Respectfully submitted,

/s/ James A. Hemphill
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was served *via* email by agreement, on the 22nd day of February, 2013, to counsel of record for Defendant City of Austin:

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/s/ James A. Hemphill
James A. Hemphill

GENERAL STATEMENTS AND OBJECTIONS

The following statements and objections are made with respect to all discovery. All answers are made subject to these general statements and objections, which will not be repeated under each answer. Where a partial response can be made in response to a request that is otherwise objectionable, a partial response will be made without waiving the objection.

1. The word usage and sentence structure contained herein may include that of the attorneys who helped to prepare these responses and does not purport to be the exact language of the executing person.

2. Plaintiffs' responses are made without waiver of, and with preservation of:

(a) all questions as to competency, relevance, materiality, privilege, and admissibility of each response, and the subject matter thereof as evidence for any purpose in any further proceedings in this matter, including the trial of this matter, and in any other lawsuit or proceeding;

(b) the right to object to the use of any response, or the subject matter thereof, in any further proceedings in this matter, including the trial of this matter, and in any other lawsuit or proceedings; and

(c) the right at any time to revise, correct, add to, supplement, or clarify any of the responses contained herein.

3. Plaintiffs object to any definition or instruction requiring actions differing from those required by the Federal Rules of Civil Procedure.

4. Plaintiffs object to all discovery requests that can be construed as seeking the discovery of attorney-client communications, attorney work product or materials prepared in the anticipation of litigation or trial, or any other privileged material.

5. Plaintiffs do not concede the relevance of any answer being produced and expressly reserves the right to object on relevance or any other grounds, to the introduction into evidence of any answer given or document produced.

6. Plaintiffs object to all discovery requests to the extent that they request materials or information equally or more available to Defendants.

PLAINTIFFS' OBJECTIONS AND RESPONSES TO DEFENDANTS' FIRST SET OF INTERROGATORIES

INTERROGATORY NO. 1:
Identify all persons assisting with answering these interrogatories and the number(s) of each interrogatory that the person assisted in answering.

ANSWER: Counsel assisted with all responses. All responses were reviewed by Bob Gregory and Gary Newton. Bob Gregory and Adam Gregory provided factual information in response to the interrogatories that requested such information. Plaintiffs do not waive the attorney-client privilege or work-product protection with regard to any matter.

INTERROGATORY NO. 2:
Identify all City of Austin request for proposals (RFPs) (by date, RFP identification code, authorized contact person, and subject matter) that Plaintiffs chose not to respond to since February 9, 2009 and identify all employees or representatives of Plaintiffs or the City who have knowledge of Plaintiffs' decision to not respond to the identified RFP.

ANSWER: Plaintiffs object to this interrogatory's request to identify all employees who "have knowledge" of any such decision as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Subject to the foregoing general and specific objections and without waiving same, following are the RFPs to which Plaintiffs did not respond due to concerns about the City's overly broad interpretation of the Anti-Lobbying Ordinance:

- Downtown Refuse Collection RFP SDC0162
- Food Service Industry Recycling Pilot Project RFP SDC0165
- Mattress Recycling RFP SDC0182

Bob Gregory, Adam Gregory, and Ryan Hobbs participated in the decisions not to respond to the above-listed RFPs. Texas Disposal has produced, or is producing, documents evidencing its determinations not to bid on these RFPs.

Plaintiffs chose not to respond to these RFPs because under City staff's incorrect and overly broad interpretation of the Anti-Lobbying Ordinance, Plaintiffs reasonably believe that any communications relating generally to solid waste or recycling issues, and communications regarding existing contracts between Plaintiffs and the City, would be interpreted as violations of the Anti-Lobbying Ordinance, subjecting Plaintiffs to potential disqualification and debarment from doing business with the City:

INTERROGATORY NO. 3:
Aside from any written or electronic communications previously produced by either party in this lawsuit, identify all Communications between Plaintiffs and the City of Austin that relate to Plaintiffs' expressing to the City its inability to exercise its First Amendment rights or alleged

unconstitutional restrictions on its First Amendment rights.

ANSWER: Plaintiffs object to this interrogatory insofar as it mischaracterizes Plaintiffs' claims in this lawsuit.

Plaintiffs do not contend that they have been unable to exercise their First Amendment rights. Rather, they contend that the City's overly broad reading of the Anti-Lobbying Ordinance has made them choose between responding to RFPs and unduly restricting their First Amendment rights, or not responding to RFPs and continuing to exercise their First Amendment rights. Plaintiffs have chosen the latter, and thus have continued to exercise their First Amendment rights. Plaintiffs also contend that the City has attempted to use its overly broad interpretation of the Anti-Lobbying Ordinance to restrict Plaintiffs' speech, and to dissuade members of the City Council, ZWAC, and perhaps others from communicating with Plaintiffs and/or considering written proposals and materials submitted by Plaintiffs.

To the extent that the Anti-Lobbying Ordinance's terms, properly interpreted, applied to Plaintiffs' speech that resulted in the disqualification here at issue – a proposition that Plaintiffs contest – Plaintiffs contend that the Ordinance as applied violates their constitutional free speech and due process rights.

Plaintiffs further object to this interrogatory's request to identify all oral communications regarding the subject of this lawsuit over a period of several years as unduly burdensome. Plaintiffs have produced, or are producing, all relevant written communications in their possession.

As the City is aware, representatives of Plaintiffs also set forth Plaintiffs' position at the two administrative hearings regarding the disqualification here at issue. Representatives of Plaintiffs also attended a meeting with the City Attorney and some staff members before filing this lawsuit at which the disqualification was discussed, which discussions are reflected in documents produced by Plaintiffs and/or Defendants. Plaintiffs' representatives at this meeting were Gary Newton, David Armbrust, and Jim Hemphill. Plaintiffs do not waive the attorney-client privilege or work-product protection with regard to any matter.

Plaintiffs may also have had other oral communications with City representatives for which records do not exist. Plaintiffs will supplement this response if and when necessary.

INTERROGATORY NO. 4:

Aside from any written or electronic communications previously produced by either party in this lawsuit, describe specifically how Plaintiffs' First Amendment rights have been restricted. Include in your description, the time periods, subject matters and circumstances that resulted in an infringement on Plaintiffs' First Amendment rights. (In this request, the City is not interested in the factual events between the dates of December 9, 2009 and June 10, 2010 addressed in Plaintiffs' First Amended Complaint. The City seeks specifics as to how and when Plaintiffs have refrained from exercising their First Amendment rights because of the Anti-Lobbying

Ordinance since June 10, 2010.)

ANSWER: Plaintiffs object to this interrogatory insofar as it mischaracterizes Plaintiffs' claims in this lawsuit.

Plaintiffs do not contend that they have been unable to exercise their First Amendment rights. Rather, they contend that the City's overly broad reading of the Anti-Lobbying Ordinance has made them choose between responding to RFPs and unduly restricting their First Amendment rights, or not responding to RFPs and continuing to exercise their First Amendment rights. Plaintiffs have chosen the latter, and thus have continued to exercise their First Amendment rights. Plaintiffs also contend that the City has attempted to use its overly broad interpretation of the Anti-Lobbying Ordinance to restrict Plaintiffs' speech, and to dissuade members of the City Council, ZWAC, and perhaps others from communicating with Plaintiffs and/or considering written proposals and materials submitted by Plaintiffs.

To the extent that the Anti-Lobbying Ordinance's terms, properly interpreted, applied to Plaintiffs' speech that resulted in the disqualification here at issue – a proposition that Plaintiffs contest – Plaintiffs contend that the Ordinance as applied violates their constitutional free speech and due process rights.

INTERROGATORY NO. 5:

Aside from written or electronic communications produced by either party previously in this lawsuit, identify all Communications related to the Request for Proposal at issue in TDS' disqualification effective June 10, 2010, or the contract for recycling services, which was executed between Plaintiffs and the City (date of contract signatures is August and September of 2010). The time period relevant to this request is June 1, 2009 to June 30, 2010.

ANSWER: Plaintiffs object to this interrogatory's request to identify all oral communications regarding the subject of this lawsuit over a period of several years as unduly burdensome.

Plaintiffs have produced, or are producing, all relevant written communications in their possession.

As the City is aware, representatives of Plaintiffs also set forth Plaintiffs' position at the two administrative hearings regarding the disqualification here at issue. Representatives of Plaintiffs also attended a meeting with the City Attorney and some staff members before filing this lawsuit at which the disqualification was discussed, which discussions are reflected in documents previously produced by Plaintiffs and/or Defendants. Plaintiffs also may have had other oral communications with City representatives for which records do not exist.

Plaintiffs had numerous negotiation sessions with City representatives prior to executing a short-term recycling contract in August 2010. Plaintiffs' primary representatives in these negotiations were Bob Gregory, Adam Gregory, Ryan Hobbs, Rebecca Hilt, Gary Newton, and David Armbrust.

Plaintiffs will supplement this response if and when necessary.

INTERROGATORY NO. 6:

Since, December 1, 2009, identify by general subject matter, dates and type of meeting, all presentations (verbal or written) made or submitted by Plaintiffs at (or prior to) open meetings of the City, including but not limited to City Council or SWAC meetings.

ANSWER: Plaintiffs object to this interrogatory as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

This interrogatory appears to be premised on a misunderstanding of Plaintiffs' contentions in this lawsuit. Plaintiffs do not contend that they have been unable to exercise their First Amendment rights. Rather, they contend that the City's overly broad reading of the Anti-Lobbying Ordinance has made them choose between responding to RFPs and unduly restricting their First Amendment rights, or not responding to RFPs and continuing to exercise their First Amendment rights. Plaintiffs have chosen the latter, and thus have continued to exercise their First Amendment rights, including at open meetings. Plaintiffs also contend that the City has attempted to use its overly broad interpretation of the Anti-Lobbying Ordinance to restrict Plaintiffs' speech, and to dissuade members of the City Council, ZWAC, and perhaps others from communicating with Plaintiffs and/or considering written proposals and materials submitted by Plaintiffs.

Plaintiffs further object that this interrogatory calls for detailed identification of oral communications over the course of several years for which written records may not exist, and which may not be relevant to the claims in this lawsuit, and thus is overly broad and unduly burdensome. Plaintiffs have produced, or are producing, written materials evidencing such presentations as are relevant to the claims in this lawsuit.

Plaintiffs' representatives attended numerous meetings with City staff, the Zero Waste Advisory Commission, and City Council to discuss solid waste and recycling issues. Written documents have been produced that memorialize these meetings in the responses to the Request for Production. Plaintiffs' primary representatives in these meetings were Bob Gregory, Adam Gregory, Ryan Hobbs, Rebecca Hilt, Dennis Hobbs, Gary Newton, and David Armbrust.

Plaintiffs will supplement this response if and when necessary.

INTERROGATORY NO. 7:

Since June 1, 2009, identify all Communications between TDS and the media related to recycling, composting and/or waste disposal relevant to the City of Austin and identify the person(s) responsible for coordinating Communications with the media for Plaintiffs in regard to issues relevant to the City of Austin.

ANSWER: Plaintiffs object to this interrogatory as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

This interrogatory appears to be premised on a misunderstanding of Plaintiffs' contentions in this lawsuit. Plaintiffs do not contend that they have been unable to

exercise their First Amendment rights. Rather, they contend that the City's overly broad reading of the Anti-Lobbying Ordinance has made them choose between responding to RFPs and unduly restricting their First Amendment rights, or not responding to RFPs and continuing to exercise their First Amendment rights. Plaintiffs have chosen the latter, and thus have continued to exercise their First Amendment rights, including communications with media. Plaintiffs also contend that the City has attempted to use its overly broad interpretation of the Anti-Lobbying Ordinance to restrict Plaintiffs' speech, and to dissuade members of the City Council, ZWAC, and perhaps others from communicating with Plaintiffs and/or considering written proposals and materials submitted by Plaintiffs.

Plaintiffs further object that this interrogatory calls for detailed identification of oral communications over the course of several years for which written records may not exist, and which may not be relevant to the claims in this lawsuit, and thus is overly broad and unduly burdensome.

Plaintiffs have had communications with the media that are reflected in documents that have been produced, or are being produced, on issues relevant to the claims in this lawsuit.

Plaintiffs also may have had other oral communications with the media for which records do not exist.

Plaintiffs will supplement this response if and when necessary.

INTERROGATORY NO. 8:

Identify all Communications related to TDS' request for (or submission of) a contractual provision in the recycling services contract (executed between August and September of 2010) that would effectively remove (or dissolve) any prior disqualifications of Plaintiffs under the Anti-Lobbying Ordinance.

ANSWER: Plaintiffs object to this interrogatory as overly broad and unduly burdensome. This interrogatory calls for detailed identification of oral communications that may have taken place more than two years ago and for which written records may not exist.

Plaintiffs' representatives had numerous internal discussions before submitting proposed written contractual provisions that would effectively remove the disqualification and has provided documents in the responses to the Request for Production. The primary participants in these discussions were Bob Gregory, Adam Gregory, Ryan Hobbs, and Gary Newton. Plaintiffs do not waive the attorney-client privilege or work-product protection with regard to any matter.

Plaintiffs have produced, or are producing, written materials evidencing such communications.

Plaintiffs also may have had other oral communications for which records do not exist.

Plaintiffs will supplement this response if and when necessary.

INTERROGATORY NO. 9:

Since, January 1, 2006, identify the amount of money donated each year by each Plaintiff and each of their officers, owners, principals and key representatives (including but not limited to Bob Gregory, Adam Gregory, Paul Gregory, Jim Gregory, Dennis Hobbs, Ryan Hobbs, Wade Wheatley, Tom Mistler, Gary Newton, Steve Wright, Rick Fraumann, or any immediate family members of the owners, principals or key representatives including the persons named above) to each City of Austin mayoral or city council candidate. Additionally, if Plaintiffs, or any of their officers, owners, principals or key representatives provided "bundled" donations to any City of Austin mayoral or city council candidate during this time period, please describe the bundled donations by date, amount, candidate and who provided the "bundled" donations.

ANSWER: Plaintiffs object that this interrogatory seeks information that is not reasonably calculated to lead to the discovery of admissible evidence, is propounded for the purposes of harassment, and to the extent that it seeks public information equally available to the requestor.

INTERROGATORY NO. 10:

Since, January 1, 2006, identify the amount of money donated each year by each of Plaintiffs' attorneys of record in this cause, as well as David Armbrust and the law firms, Armbrust & Brown, PLLC, and Graves Dougherty Hearon & Moody, P.C., to each City of Austin mayoral or city council candidate. Additionally, if the attorneys and/or law firms described in the preceding sentence provided "bundled" donations to any City of Austin mayoral or city council candidate during this time period, please describe the bundled donations by date, amount, candidate and who provided the "bundled" donations.

ANSWER: Plaintiffs object that this interrogatory seeks information that is not reasonably calculated to lead to the discovery of admissible evidence, is propounded for the purposes of harassment, and to the extent that it seeks public information equally available to the requestor.

VERIFICATION

I hereby verify that I am an authorized representative of Texas Disposal Systems, Inc. and Texas Disposal Systems Landfill, Inc.; that I am duly qualified and authorized in all respects to make this verification; that I have read the above and foregoing objections and responses to interrogatories; and that every statement of fact contained in the answers is within my personal knowledge or has been obtained from persons with personal knowledge, and is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Signature 2/22/13 date