

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. §

**MOTION FOR SUMMARY JUDGMENT
OF PLAINTIFFS TEXAS DISPOSAL SYSTEMS, INC.
and TEXAS DISPOSAL SYSTEMS LANDFILL, INC.**

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PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE LEE YEAKEL, JUDGE OF SAID COURT:

The City of Austin wrongly held that a communication by Texas Disposal violated the City's anti-lobbying ordinance. The ordinance applies to respondents to City solicitations, and limits respondents' ability to make communications that are "related to a response" to a solicitation. The City admits that the ordinance is a restriction on speech.

The communication did not relate to any solicitation response. Rather, it was a criticism of the City staff's proposal to extend an existing contract – a matter of public concern. Further, because Texas Disposal was not a respondent to the separate solicitation at issue – either at the time of the communication or any time after – the ordinance did not apply at all to its speech.

Plaintiffs Texas Disposal Systems Landfill, Inc. and Texas Disposal Systems, Inc. (collectively "Texas Disposal" or "TDS") move for summary judgment pursuant to Federal Rule of Civil Procedure 56, on their declaratory judgment cause of action, and ask that this Court render judgment that Texas Disposal did not violate the anti-lobbying ordinance. Additionally or in the alternative, Texas Disposal moves for summary judgment that the City's application of the ordinance unconstitutionally infringes on Texas Disposal's free speech rights, in violation of the First Amendment and 28 U.S.C. § 1983.

FACTS¹

This dispute grows out of the City's single-stream recycling program. Austin residents can deposit all their recyclables – glass, metal, paper, plastic, etc. – in a single large bin. The recyclables must be separated and processed after pickup by City crews. The facility where the

¹ No separate summary of facts is being filed per Local Rule 7(b). Plaintiffs rely on the exhibits, stipulations, deposition excerpts, and other materials attached hereto and in the parties' previously filed Joint Exhibits and Stipulations.

separation takes place is called a “material recovery facility,” usually abbreviated as MRF and pronounced “murf.” Access to a MRF is essential for a single-stream recycling program.

1. The Greenstar single-stream recycling contract.

City staff in 2008 negotiated and entered into a no-bid contract with a company called Greenstar to process single-stream recyclables.² Greenstar’s MRFs were in San Antonio and Garland. The contract was intended as a short-term solution until a more permanent arrangement was made.³ The Greenstar contract was portrayed as a money-maker for the City. PX8 at 68.

The Greenstar deal was criticized for the long haul of recyclables out of the Austin area. Further, the City lost money on the contract; the losses were significant as markets declined. The contract became a significant issue of public concern. PX2 at 89.

2. The solicitation for single-stream recycling services.

Texas Disposal has a long-term contract with the City of Austin to accept residential solid waste at its landfill southeast of Austin, near Creedmoor, in Austin’s extraterritorial jurisdiction. This contract was finalized in 2000 after a fierce competitive RFP bidding process. While the contract did not require the construction of a MRF, it anticipated that TDS and the City might enter into contract amendments to address additional recycling issues, including construction of a MRF. The 2000 contract provides:

It is the intent of TDS and the City to negotiate upon mutual consent and agreement ... to locate, design, build, operate, and jointly access ... a recyclables materials processing and recovery facility, to reduce the overall collection, processing and disposal costs for City solid waste, yard waste, and recyclables

JEX36 at 25 (Doc. 32-2 at 13).⁴ Texas Disposal’s Chairman and CEO, Bob Gregory, met with

² The City maintains that competitive bidding is not required for contracts involving solid waste and recycling because contracts affecting public health and safety are exempt from bidding requirements.

³ The City had planned to build its own MRF as a long-term solution. *See* PX2 at 19-21.

⁴ The parties have filed 36 joint exhibits, which will be cited as “JEX” followed by the exhibit number. Citations to

Assistant City Manager Robert Goode in the summer of 2009 to discuss single-stream recycling. Gregory told Goode that TDS planned to build a MRF and have it operational by October 1, 2010. Gregory suggested that the City and Texas Disposal amend the 2000 contract to allow TDS to accept the City's single-stream recyclables for processing after the expiration of the Greenstar contract (which was set to end September 30, 2010, with the possibility of two additional six-month extensions upon mutual consent).

Goode responded that the City would prefer to award a MRF contract through a competitive request for proposal (RFP) process and encouraged Texas Disposal to respond to the anticipated RFP. Gregory indicated that TDS would respond, and stated that the City Council would still have the choice of entering into a TDS contract amendment separate from the RFP process. PX2 at 50-52; PX7 at 18-19, 23-25. The RFP was issued on November 16, 2009. The due date for responses was eventually extended to February 9, 2010.

3. Texas Disposal's criticism of the proposed Greenstar contract extension.

While the City was drafting the MRF RFP, staff was also considering proposed amendments to the existing Greenstar contract and negotiating those amendments with Greenstar. Staff testified that the purposes of the proposed amendment were (1) to renegotiate the contract's terms to give the City a more favorable financial deal, which would involve extension of the term, and (2) to ensure that the City had a vendor that would continue taking single-stream recyclables until a new MRF was constructed by the prevailing RFP bidder. Several options were proposed, including an extension of up to three to five years. PX2 at 36-38. Texas Disposal had previously voiced its concerns about the proposed extension; the City's Robert Goode acknowledged that there were "absolutely valid concerns" regarding the proposal.

the joint exhibits will also include this Court's document and page number when appropriate.

PX2 at 53-54. The Greenstar contract amendment proposal was a stand-alone agenda item for the City's Solid Waste Advisory Commission's (SWAC) meeting of December 9, 2009.⁵

On December 8, 2009, Texas Disposal's Bob Gregory sent an email and attachments to SWAC members, urging them to recommend that the Austin City Council not agree to any of the proposed Greenstar contract extensions. (The email with attachments – the source of the disqualification at issue in this lawsuit – was also sent to Assistant City Manager Robert Goode and acting Solid Waste Services Director Tammie Williamson; it is Exhibit 3 to the parties' joint exhibits, Doc. 27-1 at 12-32.) Gregory's email stated that it addressed the Greenstar contract extension agenda item, and not the pending MRF RFP. It pointed out that "[t]he City may find it has lower cost options [than extending the Greenstar contract] when its RFP responses are received on February 9, 2010" without stating or speculating as to the specific content of any potential RFP responses.

Attached to the email were materials outlining Texas Disposal's objections to the Greenstar proposal. A memo pointed out that the proposal would obligate the City to send 100 percent of its recyclables to Greenstar, whereas the existing contract did not have this commitment. The memo also stated that the proposal gave Greenstar flexibility in the prices it paid to the City, such that it could agree to cut processing fees but also cut the amount it paid for recyclables, potentially negating any benefit to the City.

Gregory's email also included a detailed analysis of Greenstar's contracts with the cities of Austin, Dallas, and San Antonio. The data appears to show that Greenstar at times was not paying the prices to cities for recyclable material that it agreed to pay in contracts. Gregory

⁵ SWAC is a City Council-appointed volunteer citizens' commission that makes recommendations on solid waste issues to the City Council. It is now known as the Zero Waste Advisory Commission, or ZWAC.

pointed to this as another reason that Austin should not extend its contract with Greenstar, and advocated that the City audit the Greenstar contract. He summarized by noting that “[c]onsidering 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.” JEX3 (Doc. 27-1 at 15).

4. The City’s anti-lobbying ordinance.

Article 6 of Chapter 2-7 of the Austin City Code is titled “Anti-Lobbying and Procurement.” The City’s anti-lobbying ordinance – Article 6 of Chapter 2-7 of the Austin City Code, referred to in this Motion as the Ordinance – restricts the speech of those who respond to City solicitations. Specifically, such respondents are severely restricted in their ability to communicate with City officials, employees, or agents about the solicitation while that solicitation is pending. The Ordinance, as applicable to this case, is Joint Exhibit 1.⁶

The Ordinance applies to communications about an RFP, made by a respondent, during the “no-contact period” – from the date of the RFP’s issuance through the date a contract is executed (or the RFP is withdrawn). Such communications may be made only to a City employee designated as the “authorized contact person” for that RFP. §§ 2-7-101(1); 2-7-103. The authorized contact person has limited duties once a respondent to an RFP sends him a communication: (1) general communications are to be distributed “in accordance with the terms of the particular solicitation” (the MRF RFP did not include any terms regarding distribution of general communications); (2) complaints about the solicitation “to a member of the City Council or a member of a City board” are to be distributed to the intended recipient, the director of the City department that issued the RFP, and to all RFP respondents; and (3) written inquiries

⁶ Since the events here at issue, the Ordinance has been amended. JEX 25.

regarding RFPs are to be answered by the contact person and the answer distributed to all RFP respondents. § 2-7-104(A)-(C). RFP respondents also may make communications “in public at a meeting held under the Texas Open Meetings Act.” § 2-7-103(E)(6).

Particularly important here are the Ordinance’s definitions of “response” and “representation.” A “response” under the Ordinance is “*a response to a solicitation*” (such as an RFP). § 2-7-101(3) (emphasis added). The Ordinance defines “representation” as follows:

REPRESENTATION means *a communication related to a response* to a council member, official, employee, or agent of the City which: ...

- (b) advances the interest of the respondent;
- (c) discredits the response of any other respondent;

§ 2-7-101(5) (emphasis added). The core provision of the Ordinance, § 2-7-103(A), states:

During a no-contact period, a *respondent* shall make a *representation* only through the authorized contact person.

(Emphasis added.) The Ordinance regulates only “representations” made by a “respondent.”

5. **Greenstar’s allegation of an anti-lobbying violation by Texas Disposal.**

A week after Bob Gregory’s email to SWAC members, a lawyer for Greenstar wrote to the authorized contact person for the MRF RFP, with a copy to the City Attorney, complaining that the email violated the Ordinance. JEX4 (Doc. 27-1 at 33-35). Although no RFP responses had been submitted at the time of Gregory’s email, Greenstar characterized the email as a “transparent attempt to discredit Greenstar’s proposal in the RFP process.” *Id.* at 1 (Doc. 27-1 at 33).

At the same time that Greenstar’s lawyer was contending that Texas Disposal could not talk to the City about Greenstar’s existing contract, Greenstar itself was talking to the City about its existing contract – the parties, throughout the no-contact period for the MRF RFP, were in

negotiations to amend and extend the contract. PX2 at 23-33, 81.

6. The City issues anti-lobbying disqualifications to TDS and Greenstar.

Under the Ordinance, the authorized contact person makes the initial determination as to violations. The contact person “shall document his findings in a report and disqualify the respondent” from eligibility in the RFP process. § 2-7-107(A). The contact person issued disqualifications to both Greenstar and TDS on January 21, 2010. JEX5, JEX6 (Doc. 27-2 at 1-3, Doc. 28-1 at 1-3). The City’s Law Department actually exercised the final authority to approve the disqualifications. PX1 at 30-32 & ex. 7 thereto.

The notice of violation to Texas Disposal alleged that Gregory’s December 8, 2009 email “is critical of Greenstar’s pricing for recyclable commodities and casts doubt on Greenstar’s ability to honor its contractual obligations on recyclable service agreements.” The notice contends that the email violated the Ordinance because:

The correspondence is a communication related to a response to a member of a City board and employees of the City that both advances the interest of the respondent TDS, and that discredits the response of another respondent (Greenstar). [JEX5 (Doc. 27-2 at 1).]

7. The City reverses the Greenstar disqualification.

The City provides an internal protest process for Ordinance violations: an informal hearing before a City-selected hearing officer. The hearing officer recommends that the disqualification be upheld or reversed. The City’s Purchasing Officer is the final arbiter of whether there has been a violation. JEX2 at 4 (Doc. 27-1 at 11). Byron Johnson, the Purchasing Officer, testified that he has never disagreed with the recommendation of a hearing officer. PX1 at 134.

The City selected lawyer Monte Akers as the hearing officer for the protests of both

Greenstar and Texas Disposal. Akers issued a detailed recommendation that Greenstar's disqualification be reversed. He found that although Greenstar's letter criticized Texas Disposal and mentioned the RFP, it was not a prohibited "representation" because it did not relate to an RFP response. JEX12 at 3 (Doc. 31-1 at 3).⁷

8. The first Texas Disposal disqualification hearing.

Texas Disposal argued that Gregory's communication was not a "representation" because it was not related to a response, it did not advance Texas Disposal's interests, and it did not discredit an RFP response of Greenstar (no RFP responses even existed at the time). Texas Disposal also maintained that application of the Ordinance to Gregory's email would be an unconstitutional content-based speech restriction.

Additionally, Texas Disposal announced at the hearing that under the circumstances it had made the decision not to submit a formal response to the MRF RFP. The City and the hearing officer agreed that if TDS did not respond to the RFP on or before February 9, 2010 at 10:00 a.m. – the RFP response due date and time, which was four days after the hearing – it could not violate the Ordinance, which applies only to respondents. JEX10 at 25, 39 (Doc. 30-1 at 25, 39). Hearing officer Monte Akers thus stated, "[I]t would be my intention to rule that it is moot, that the disqualification is moot, that there has been no violation of the ordinance for purposes of debarment." *Id.* at 39 (Doc. 30-1 at 39).

9. Texas Disposal's contract amendment proposal.

True to its word, Texas Disposal did not submit an RFP response by the deadline on February 9, 2010. After the response deadline, TDS provided to various City officials an

⁷ Akers also found that sending a copy of the letter to the City Attorney was authorized by the Texas Disciplinary Rules of Professional Conduct, even though it violated the terms of the Ordinance. JEX12 at 4 (Doc. 31-1 at 4).

unsolicited proposal to amend its existing 2000 contract to incorporate single-stream MRF services – just as it had proposed to Robert Goode a few months earlier, before issuance of the RFP. JEX 11 (Doc. 30-1 at 42-78). The unsolicited TDS contract amendment proposal was not submitted in the form or fashion required by the RFP process. The cover letter to the proposal specifically stated that it was made “[i]n lieu of a formal response to the RFP” and that “[t]oday’s proposal is not a submittal under the current RFP process.” JEX11 at 1 (Doc. 30-1 at 42). The contract amendment proposal was intended to give the City an alternative if it decided not to award the MRF contract to any of the RFP respondents. PX8 at 95-96.

10. The City’s own RFP response.

Though the City’s plans to build its own MRF allegedly had been dropped by the time of the MRF RFP, the City’s Public Works Department actually submitted a response to the RFP. City representatives claim that it was intended only as a “baseline” against which to judge other responses. PX2 at 91-92. But the Public Works response itself states that it could function as an alternative to proposals from private RFP respondents, and that the City could “cut out the middle man” and realize larger revenues by building its own MRF. PX3 at 62, 67-68, 72 & ex. 10 thereto.

Internal communication shows that City staff intended to draft the RFP in a manner that would make it “easy” for the City to respond, without mentioning that the response would simply be a “baseline.” PX1 at 16-18 & ex. 3 thereto. The Public Works Director even signed an anti-lobbying affidavit in connection with the MRF RFP, PX3 at 76 & ex. 11 thereto. However, City employees who worked on the RFP response were free to talk to other City employees about the RFP – something that private RFP respondents were not allowed to do. PX5 at 66-67. The Public Works Department had a budget of \$100,000 to respond to the RFP; the Public Works

Director testified that this budget was probably exceeded. PX3 at 128, 131.

Even after the RFP responses were submitted, Assistant City Manager Robert Goode declined to rule out the option of a City-built MRF, PX4 at 68-69 & ex. 9 thereto. The City established a team to evaluate and score the RFP responses in order to come up with recommendations to City Council; at least some members of the team evaluated and scored the City's RFP response. PX2 at 195-96.

Thus, there is evidence that the City was actually a competitor to TDS and other potential vendors of single-stream recycling services. The City responding to its own RFP, and promising not to lobby itself, apparently happened only with the MRF RFP. PX3 at 126-27.

11. The City's reinstatement of the Texas Disposal disqualification.

City staff, including the Law Department, reviewed Texas Disposal's contract amendment proposal and determined that it was, in fact, a "response" to the MRF RFP because it addressed some of the same topics as the RFP. City Attorney David Smith issued a memo setting forth this conclusion, but without any elaboration on the legal basis for his opinion; Assistant City Manager Robert Goode echoed the conclusion in his own memo to the City Council that attached Smith's memo. JEX14 (Doc. 31-1 at 7-10).

Texas Disposal sought clarification of the City's position. JEX 15 (Doc. 31-1 at 11-15). After more than two and a half months, an assistant city attorney responded and alleged that "the Purchasing Officer's finding that TDS had violated the anti-lobbying ordinance" remained in place. JEX16 at 1 (Doc. 31-1 at 16). (The Purchasing Officer has confirmed that this assertion was false; he had not found a violation of the Ordinance as of the date of the letter. PX1 at 90-91.) The only rationale provided was that the TDS contract amendment proposal addressed some of the same topics as the MRF RFP, a concept that was never in dispute.

Texas Disposal requested that its protest hearing be reconvened.

12. The second Texas Disposal protest hearing and its aftermath.

The City scheduled a second hearing for Texas Disposal, but with a different hearing officer than Monte Akers, who heard the first protest. The Law Department decided not to use Akers, who had reversed the City's disqualification of Greenstar. PX1 at 95-96. The City selected Stephen Webb to act as hearing officer.

Texas Disposal continued to argue its two primary points: (1) that TDS was not an RFP "respondent," and thus the Ordinance was inapplicable; and (2) Gregory's email was not a prohibited "representation," because it was not "related to a response" to the MRF RFP. JEX18 (Doc. 31-1 at 45-51, TDS supplemental briefing); JEX20 (Doc. 31-1 at 70-133, hearing transcript).

The City argued that the aspect of Gregory's email pointing out apparent inconsistencies between the prices set in Greenstar's municipal contracts and the prices it actually paid was "a very core issue" because a responder's "community values" were to be considered in evaluating RFP responses. JEX20 at 37-38 (Doc. 31-1 at 106-07). The City further argued that Texas Disposal's proposal was actually an RFP response because TDS was not obligated to provide MRF services under the existing contract, and so any proposed expansion of services was inherently an RFP "response" – even though Texas Disposal disclaimed any intent to respond to the RFP, did not comply with the time or content requirements of the RFP, and surrendered any right to be considered on an equal footing with actual RFP respondents.

Stephen Webb recommended that the disqualification be upheld. JEX21 (Doc. 31-1 at 134-148). He asserted that "any general or extensive criticism of Greenstar, the existing contractor, would have to be evaluated as a possible proscribed communication against

Greenstar, an anticipated *responder*” to the MRF RFP, and that “TDS’ global condemnation of Greenstar’s supposed tendency to disregard contract terms would be relevant in evaluating Greenstar, the responder.” JEX21 at 12 (Doc. 31-1 at 146) (emphasis in original). Thus, he concluded that the email was a prohibited “representation.”

Webb also acknowledged that Texas Disposal’s contract amendment proposal was “fatally non-compliant” with the terms of the MRF RFP, but opined that the proposal should be considered as a “response” anyway, because “TDS had no contract to market, sell, or share the profits in processed recyclables.” JEX21 at 13 (Doc. 31-1 at 147). The opinion was apparently based on the uncontested fact that the proposal sought to expand the services TDS provides to the City.

Purchasing Officer Byron Johnson accepted Webb’s recommendation. JEX22 (Doc. 31-2 at 1). Johnson testified that he did not determine that TDS’ contract amendment proposal was a “response” to the MRF RFP; rather, he said, that determination was made by the Law Department. PX1 at 79-86. He testified that he agreed with the substance of Webb’s determination that Gregory’s email was “related to a response” to the MRF RFP because the email criticized the proposal to amend Greenstar’s existing short-term single-stream recycling contract, and said that he believed any criticism of the existing Greenstar contract inherently was related to the MRF RFP, PX1 at 109 – even though Greenstar was allowed to advocate and negotiate the extension of that contract during the no-contact period without being assessed a violation of the Ordinance.

Receiving two disqualifications within three years results in “debarment” – a prohibition from “the sale of goods or services to the City for a period not to exceed three years.” § 2-7-

109(A).⁸ If interpreted to terminate existing contracts, a debarment would prevent TDS from continuing to accept 100 percent of the City's residential solid waste at its landfill, as well as ending the now-existing recycling contract between the City and TDS (which opened its MRF on October 1, 2010). Such a debarment would be financially devastating to TDS.

Texas Disposal sought reconsideration from the Purchasing Officer through the City Attorney, JEX23 (Doc. 31-2 at 2-8), who rejected the request. JEX24 (Doc. 31-2 at 9). With no further avenues within the City for Texas Disposal to pursue its protest, this lawsuit followed.

13. Timeline summary of key events.

In light of the foregoing, some of the key dates relevant to this case are the following:

Summer 2009	Bob Gregory and Robert Goode discuss MRFs and potential RFP. Gregory points out that existing contract between City and Texas Disposal anticipates potential amendment to add MRF.
Nov. 16, 2009	MRF RFP issued and no-contact period begins; City continues negotiating with Greenstar for extension of existing contract and does not place extension proposal on SWAC or Council agenda until after MRF RFP no-contact period begins.
Dec. 8, 2009	Bob Gregory sends email arguing against proposed extension of existing Greenstar contract to SWAC members and others; consideration of extension was on SWAC agenda as its own separate item for 12/9/2009 meeting.
Dec. 9, 2009	SWAC meeting; Commission voted on whether to recommend City Council agree to the Greenstar extension.
Dec. 15, 2009	Greenstar lawyer writes to contact person and City Attorney, claiming Texas Disposal violated the anti-lobbying ordinance.
Jan. 21, 2010	City assesses anti-lobbying disqualifications against Texas Disposal and Greenstar (six weeks after Gregory's email to SWAC members).

⁸ The amended Ordinance debars vendors who have more than two Ordinance violations in a five-year period.

Feb. 5, 2010	First protest hearings for TDS and Greenstar. In TDS hearing, hearing officer Monte Akers and City representatives agree that if TDS does not submit a MRF RFP response, then there is no anti-lobbying violation.
Feb. 9, 2010, 10:00 a.m.	MRF RFP responses due. Texas Disposal does not submit a response, but the City Public Works Department and Greenstar do.
Feb. 9, 2010, approx. 11:07 a.m.	Texas Disposal distributes its unsolicited proposal to amend its existing contract to add single-stream recycling services.
Feb. 16, 2010	Hearing officer Monte Akers recommends that Greenstar's disqualification be reversed; Purchasing Officer Byron Johnson accepts the recommendation on 2/18/2010.
Feb. 23, 2010	City Attorney David Smith, in memo to City Manager Marc Ott, asserts that Texas Disposal remains disqualified.
Feb. 26, 2010	Texas Disposal seeks clarification on City's position re: disqualification and whether TDS can still protest any alleged disqualification.
May 12, 2010	After more than two and a half months, City again asserts that Texas Disposal has been disqualified for alleged anti-lobbying violations.
May 18, 2010	Texas Disposal requests that protest hearing be reconvened.
May 26, 2010	Second Texas Disposal protest hearing held, with different hearing officer than presided over Greenstar and first TDS hearings.
June 2, 2010	Hearing officer Stephen Webb recommends that Texas Disposal's disqualification be upheld.
June 4, 2010	Purchasing Officer Byron Johnson accepts Webb's recommendation.
June 7, 2010	Texas Disposal seeks reconsideration from Purchasing Officer, through correspondence to City Attorney.
June 8, 2010	City Attorney states that no further review of Purchasing Officer's decision is available.

ARGUMENT AND AUTHORITIES

I. Texas Disposal Did Not Violate the Terms of the Anti-Lobbying Ordinance.

Municipal ordinances are interpreted in the same manner as statutes. *Board of Adjustment of San Antonio v. Wende*, 92 S.W.3d 424, 430 (Tex. 2002). If the language of an

ordinance is unambiguous, a court interprets the ordinance using its plain language. *City of San Antonio v. Headwaters Coalition, Inc.*, 381 S.W.3d 543, 551 (Tex. App. – San Antonio 2012, pet. denied, mtn. rhrg. filed) (citing *Texas Dept. of Protective & Regulator Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 177 (Tex. 2004)). The interpretation of an ordinance is a question of law. *City of San Antonio v. Headwaters Coalition, Inc.*, 381 S.W.3d at 551.

Under the undisputed facts of this case, the Ordinance is unambiguous, and Gregory's email did not violate its plain language.

A. The December 8, 2009 email was not a “representation.”

To be a prohibited “representation,” a communication must:

- Be “related to a response” to the RFP. § 2-7-101(5). “Response” is defined as “a response to a solicitation,” including “a request for proposal response.” § 2-7-101(3).
- Be made by a “respondent,” which is a person who has made a “response,” as defined above. §§ 2-7-101(4), 2-7-103.
- Include content meeting one of the six categories of § 2-7-101(5)(a)-(f); in the present case, the City alleges that Gregory's email met the following two:
 - it must “advance[] the interests of the respondent,” § 2-7-101(5)(b), or
 - it must “discredit[] the response of any other respondent,” § 2-7-101(5)(c).

The communication was not “related to a response.” Gregory's email addressed a contract that pre-existed, and was separate from, the RFP process – the Greenstar contract that was to be discussed as its own separate agenda item at upcoming meetings of SWAC and the City Council. Even though Purchasing Officer Byron Johnson agreed that the existing Greenstar contract was a separate matter from the MRF RFP responses, PX1 at 78-79 & ex. 21 thereto, he interprets the Ordinance far beyond its actual words, considering any communication that criticizes, in any way, a party that is expected to submit a future RFP response to be “related to a response.” The Ordinance is not that broad. For a violation to occur, a communication must be

“related to a *response*,” not simply to an *expected respondent*.

The communication was not made by a “respondent.” As discussed below, Texas Disposal was not a “respondent,” so an essential element of a violation was not present.

The communication did not “advance[] the interests” of a “respondent.” TDS was not a “respondent.” Further, Gregory’s email did not advance Texas Disposal’s interests at all. It was limited to a recommendation that the City not adopt any of the proposed amendments to the pre-existing Greenstar contract.

The communication did not “discredit[] the response of any other respondent.” Gregory’s email said nothing about any RFP response, whether of Greenstar or any other entity (no RFP responses even existed when the email was sent). The hearing officer’s decision gives an unjustifiably broad interpretation of the Ordinance by contending that “any general or extensive criticism of Greenstar” is a potential violation because Greenstar is an anticipated responder. JEX21 at 12 (Doc. 31-1 at 146). The notion that the Ordinance prohibits “general criticism” of any “anticipated responder” is not supported by the Ordinance’s language. The Ordinance does not state, “Any general criticism of any potential respondent is prohibited.” To violate the Ordinance, a communication must be “related to a response,” and (in the instant case) must either “advance[] the interests” of a respondent, or “discredit[] the response of any other respondent.” These required elements are not present in Gregory’s email.

B. Texas Disposal was not a “respondent.”

The City’s Law Department determined that Texas Disposal was a “respondent” to the MRF RFP because TDS proposed to amend TDS’ existing contract, even though the unsolicited proposal was expressly submitted “in lieu of” – *instead of* – an RFP response. PX1 at 79-86. Such a conclusion cannot be supported by the law, or by the language of either the Ordinance or

Texas Disposal's proposal.

An RFP respondent is vested with certain legal rights. While the City is not required to accept any of the RFP responses, it is obligated to ensure that all the respondents are treated equitably. *See, e.g., Texas Highway Commission v. Texas Ass'n of Steel Importers, Inc.*, 327 S.W.2d 525 (Tex. 1963) (all bidders have a right to be on the same "plane of equality"). Thus, a major advantage of responding to an RFP is that each respondent is guaranteed that the City will, at the very least, consider each response on an equal footing with all other responses.

Texas Disposal knowingly and voluntarily waived any right to be on the same "plane of equality" when it chose not to respond to the MRF RFP. Rather, TDS proposed an alternative to the entire RFP process, suggesting a method by which the City could achieve the same general objective of contracting for single-stream recycling services without accepting any of the RFP responses. The City, as a matter of policy, could have decided to discard Texas Disposal's proposal without even looking at its content; the City could not legally do this if the proposal had been an RFP response. The City has argued that Texas Disposal was "attempting to shoulder their way onto the same playing field [as the RFP respondents] without playing by the same set of rules," JEX20 at 41-42 (Doc. 31-1 at 110-11), but TDS was doing no such thing. Texas Disposal specifically and intentionally opted out of the "playing field" of RFP respondents. Texas Disposal was not entitled to be treated under the same rules as the RFP respondents, and never claimed to be.

Hearing officer Stephen Webb also misapprehended Texas Disposal's position. Webb stated that the City "is not *obligated* to accept a proposal for consideration for services for which the City has determined that the RFP process is most appropriate." JEX21 at 13 (Doc. 31-1 at 147) (emphasis added). Texas Disposal has never argued that the City was *obligated* to consider

its proposal alongside, and under the same terms and rules as, the RFP responses. It is fundamentally inequitable and illogical to recognize that Texas Disposal is not entitled to the advantages due a “respondent” while at the same time finding that it *is* a respondent. Texas Disposal agrees that it was not entitled to those advantages – precisely because it was *not* a respondent.

The City and the hearing officer also concluded that the Texas Disposal proposal was a “response” because the services that were proposed are not services that previously were provided to the City by TDS. This position makes no sense. Texas Disposal did not seek an award of a MRF contract as part of the RFP process. It removed itself from that process. Texas Disposal’s alternative proposal to enter into an agreement with the City through the anticipated amendment of an existing contract simply was not an RFP response.

II. The City Applied the Anti-Lobbying Ordinance Inconsistently.

Purchasing Officer Byron Johnson and Assistant City Manager Robert Goode agreed that the Ordinance should be applied consistently. PX1 at 69; PX2 at 129-30. This is a requirement of constitutional dimension: “the First Amendment does not permit the Government to differentiate between similarly situated speakers in regulating speech.” *NAACP Legal Def. & Educ. Fund, Inc. v. Devine*, 727 F.2d 1247, 1266 (D.C. Cir. 1984), *rev’d on other grounds*, 473 U.S. 788 (1985). “[G]overnment regulation may not favor one speaker over another.” *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995).

The City allowed Greenstar to advocate for the extension of its pre-existing contract, and to criticize Texas Disposal, during the no-contact period for the MRF RFP. However, it sanctioned Texas Disposal for the same type of conduct: criticizing the proposed extension of the Greenstar contract and advocating for the amendment of its own pre-existing contract. The

inconsistency is clear: When Texas Disposal argued that the application of the Ordinance should be consistent with the earlier application to Greenstar by hearing officer Monte Akers, Stephen Webb – the hearing officer at TDS’ second protest hearing – responded, “Well, let’s say that Mr. Akers’ determination doesn’t control me because I don’t think it does.” JEX20 at 52 (Doc. 31-1 at 121). This, despite the Purchasing Officer’s unqualified acceptance of Akers’ recommendation regarding Greenstar. JEX13 (Doc. 31-1 at 6).⁹ The Purchasing Officer made no effort to ensure that Webb’s recommendation regarding Texas Disposal was consistent with Akers’ recommendation regarding Greenstar. PX1 at 105.

In contending that Gregory’s email violated the Ordinance, Greenstar’s lawyer sharply criticized TDS. JEX4 (Doc. 27-1 at 33-35). City staff contended that the Greenstar letter was an anti-lobbying violation, and Greenstar protested. Hearing officer Monte Akers correctly noted that while Greenstar’s letter criticized Texas Disposal, “it is not about the response of TDS or any other respondent” and did not discredit any *response* of Texas Disposal – and, thus, was not a violation of the Ordinance. JEX12 at 3 (Doc. 31-1 at 3).

In contrast, hearing officer Stephen Webb asserted that TDS’ alleged “general criticism” of Greenstar had to be treated as a “possible proscribed communication” against “an anticipated *responder*” to the MRF RFP. JEX21 at 12 (Doc. 31-1 at 146) (emphasis in original).

Further, Greenstar was allowed to communicate with City representatives other than the authorized contact person, during the no-contact period, and advocate for the amendment and extension of its pre-existing short-term contract. PX2 at 177-78. However, when Texas Disposal proposed an amendment to *its* pre-existing contract – while specifically disclaiming that

⁹ In deposition, the Purchasing Officer contended that he only accepted the portion of hearing officer Akers’ decision regarding Greenstar that related to the propriety of copying the City Attorney, in addition to the designated contact person, on correspondence. PX1 at 64-69. The memo to City Council announcing the acceptance of Akers’

its proposal was an RFP response – the City chose to treat the proposal as a response, and then reinstated its purported disqualification. The City has never proffered a rational justification. It claims that the Texas Disposal proposal was different because it anticipated an expansion of services, *see, e.g.*, JEX20 at 40-41 (Doc. 31-1 at 109-10), but that does not logically make the proposal an RFP response, or distinguish it from Greenstar’s advocacy for amending and extending its own contract in any aspect that relates to the actual language of the Ordinance.

The City’s ultimate finding that Greenstar did not violate the Ordinance was correct under the Ordinance’s language and the First Amendment. The Ordinance should be applied consistently to Texas Disposal’s speech, resulting in a finding of no violation.

III. The City’s Interpretation and Application of the Anti-Lobbying Ordinance Is an Unconstitutional Restriction on Speech.

A. The Court should avoid the constitutional question by interpreting the Ordinance’s plain language to find no violation.

The First Amendment and due process establish that no person may be sanctioned by the government for its speech unless that speech has been prohibited in clear and precise terms. “Regulation of speech must be through laws whose prohibitions are clear. ... [T]he statute must provide ‘fair notice’ so that its prohibitions may be avoided by those who wish to do so.” *Service Employees Int’l Union v. City of Houston*, 595 F.3d 588, 596-97 (5th Cir. 2010) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 110-12 (1972)). *See also Webb v. Lake Mills Community School Dist.*, 344 F.Supp. 791 (D.C. Iowa 1972) (citing cases for the principle that “no person shall be punished for conduct unless such conduct has been proscribed in clear and precise terms. This is especially true when the conduct involves First Amendment rights” (citations omitted)). The City admits that the Ordinance is a restriction on speech. PX6 at 32. However, at

recommendation has no such qualification.

the second protest hearing, the City took the position that “this is not the forum for that. We don’t think that the First Amendment issues are part of this hearing process.” JEX20 at 42 (Doc. 31-1 at 111).

Gregory’s email was tailored to comply with the Ordinance. The communication even included an acknowledgement of the Ordinance; it was drafted assuming that the Ordinance’s language provided the constitutionally required “fair notice.” But the City has sanctioned Texas Disposal based on an interpretation of the Ordinance that extends beyond its actual words.

The Ordinance’s language is not ambiguous as applied to the facts here. However, if the Ordinance is considered ambiguous, “ambiguous statutory language should be construed to avoid serious constitutional doubts.” *United States v. Stevens*, 559 U.S. 460, 130 S.Ct. 1577, 1592-93 (2010) (brackets omitted). A court may impose a limiting construction on a statute or ordinance if it is susceptible to such a construction. *Id.* A court is bound to consider whether a construction of an ordinance is fairly possible that would avoid constitutional questions. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914, 996 (2000).

It is a “time-honored canon of constitutional adjudication” that courts “ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable.” *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 438 n.1 (1985); *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944). Constitutional questions thus should be avoided when there are non-constitutional grounds for decision in a case. Here, that canon can be followed by simply interpreting the Ordinance’s plain language and concluding that Gregory’s email did not violate the Ordinance, both because it was not a prohibited “representation” and because Texas Disposal was not a “respondent” to the MRF RFP, and thus was not subject to the Ordinance.

B. The Ordinance violates the First Amendment if applied to TDS's speech.

Gregory's email was a communication entitled to full protection under the First Amendment. The right to petition the government is a fundamental constitutional right. *See, e.g., McDonald v. Smith*, 472 U.S. 479 (1985). Speech discussing government policy and decisions is the essence of protected political speech. *See, e.g., Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999). Communication with executive officials regarding a particular project is core political speech entitled to the highest level of constitutional protection, and infringements upon that speech will be strictly scrutinized. *See, e.g., Meyer v. Grant*, 486 U.S. 414 (1988). Political speech is fully protected under the First Amendment, even if the speaker is an entity ultimately motivated by commercial gain, such as a corporation. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

As applied by the City here, the Ordinance is a content-based restriction on speech. "Respondents" are forbidden from communicating outside public meetings with elected and other City officials regarding any pending responses to City solicitations. Thus, the Ordinance restricts some speech more than other speech, and determines which speech to restrict based on the content of that speech. Under the City's interpretation, the Ordinance would restrict all speech related in subject matter to any pending RFP, as well as all speech critical of any "respondent," even if the criticism is not aimed at that respondent's "response." This is an even more sweeping content-based restriction.

Further, it appears that the City considered Greenstar's speech in favor of amending its existing contract during the no-contact period to be allowable, but considered Texas Disposal's speech against amending the Greenstar contract to be prohibited. This is not only a content-based speech restriction, but a restriction based on the *viewpoint* being expressed by the speaker.

When a speech restriction is triggered by reference to the perspective being voiced and not just the general subject matter, the restriction is viewpoint-based. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 831 (1995).

Content-based speech regulations are presumptively invalid. *See, e.g., Citizens United, supra; Davenport v. Washington Educ. Ass’n*, 127 S.Ct. 2371 (2007); *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). Such regulations are constitutional only if they pass the “strict scrutiny” test – the government must show the existence of a compelling interest and that the regulation is narrowly tailored to advance that interest. *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976). “Viewpoint discrimination is an egregious form of content discrimination. Viewpoint-based restrictions receive even more critical judicial treatment” than content-based restrictions. *Mesa v. White*, 197 F.3d 1041, 1047 (10th Cir. 1999). When a speech prohibition is based on viewpoint rather than general content, “the violation of the First Amendment is all the more blatant.” *Morgan v. Swanson*, 659 F.3d 359, 402 (5th Cir. 2011) (quoting *Rosenberger*, 515 U.S. at 829)).

The Ordinance, as interpreted and applied by the City, is not narrowly tailored to serve a compelling interest. The Ordinance itself recites that its purposes are to “provide the most fair, equitable, and competitive process possible” to choose vendors, and to “further compliance with State law procurement requirements.” § 2-7-102(A). While these are important state interests, a *ban* on speaking to elected officials (except for brief comments at public meetings) is not narrowly tailored to serve those interests. Many alternative methods, not involving speech bans, are available to maintain fair and competitive procurement processes.

The City has argued that Texas Disposal “is absolutely entitled to express themselves relative to the issues, but they are not entitled to do both that and be responders to an RFP.” JEX20 at 57 (Doc. 31-1 at 126). If the City maintains that responding to a City RFP is a

voluntary waiver of First Amendment rights, any such waiver must be narrowly construed, and the government must show that the waiver – including its extent – was done knowingly, intelligently, and with sufficient awareness of relevant circumstances and likely consequences. *See, e.g., Legal Aid Society v. City of New York*, 114 F.Supp.2d 204, 226 (S.D.N.Y. 2000) (citing cases). Given the Ordinance’s language, a respondent is not aware the City believes the Ordinance is waiver not only of the right to speak about the RFP, but also about any topic related to the RFP or any potential RFP respondent.

The City’s overly broad interpretation, untethered to the Ordinance’s actual language, has had a significant deleterious effect on Texas Disposal, and on the City’s ability to solicit effective competitive bids. Bob Gregory testified that Texas Disposal declined to bid on at least three City solicitations due to fear of being assessed another violation of the Ordinance. PX8 at 113-14. Texas Disposal not only has ongoing waste and recycling contracts with the City that require communications with City employees other than the authorized contact person; TDS also is an active participant in ongoing dialog regarding public policy on waste and recycling issues. The City’s interpretation of the Ordinance has created uncertainty as to Texas Disposal’s ability to exercise its First Amendment right to discuss policy with City policymakers during the no-contact period for RFPs to which it has responded. City staff has stated that the Ordinance does not apply to communications regarding ongoing contracts, JEX20 at 40 (Doc. 31-1 at 109), but the Ordinance had no such specific exception, and the staff’s broad interpretation of what constitutes a prohibited “representation” has chilled Texas Disposal’s speech.

CONCLUSION AND PRAYER

Given the threat of debarment, coupled with the City's overly broad interpretation of the Ordinance, Texas Disposal has brought this lawsuit to remove the unjustified disqualification from its record, and to achieve greater clarity as to the conduct prohibited by the Ordinance.

Plaintiffs pray that this Court enter judgment in their favor declaring that they did not violate the Ordinance, and/or that the Ordinance as applied violates Plaintiffs' First Amendment rights in violation of 28 U.S.C. § 1983, and grant Plaintiffs all further relief to which they may show themselves entitled.

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* CM/ECG and *via* email on the 10th day of May, 2013, to counsel of record for Defendants:

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS DISPOSAL SYSTEMS,
INC. and TEXAS DISPOSAL
SYSTEMS LANDFILL, INC.,
Plaintiffs,

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VS.

CASE NO. A-11-CV-1070-LY

CITY OF AUSTIN, TEXAS, and
BYRON JOHNSON, in his
official capacity,
Defendants.

ORAL DEPOSITION OF
BYRON JOHNSON
APRIL 19, 2013
VOLUME 1

ORAL DEPOSITION OF BYRON JOHNSON, produced
as a witness at the instance of the Plaintiffs and duly
sworn, was taken in the above-styled and numbered cause
on the 19th day of April, 2013, from 9:45 a.m. to
3:59 p.m., before KIMBERLY G. KEEPER, Certified
Shorthand Reporter in and for the State of Texas,
reported by machine shorthand, at Austin City Hall, 301
West 2nd Street, Austin, Texas 78701 pursuant to the
Federal Rules of Civil Procedure and that the deposition
shall be read and signed under penalties of perjury.

TDS vs. City of Austin
Summary Judgment
Plaintiffs' Exhibit
PX-01



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ALSO PRESENT:

Mr. Gary Newton
Mr. Adam Gregory

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Letter 6/8/10 to Hemphill From Kennard



1 BYRON JOHNSON,
2 having been first duly sworn, testified as follows:

3 EXAMINATION

4 QUESTIONS BY MR. HEMPHILL:

5 Q. Good morning, Mr. Johnson.

6 A. Good morning, sir.

7 Q. I know that -- that you've given at least one
8 deposition before, so I know you're somewhat familiar
9 with the process, but I just wanted to give you a couple
10 of reminders.

11 Because the court reporter is taking down
12 everything we say, it's important that you try to wait
13 until I'm done with my question until you answer and
14 I'll do my very best to wait until you are done with
15 your answer before I ask another question. All right?

16 A. Okay.

17 Q. And it's also important, again because the
18 court reporter is taking this down, that questions be
19 answered, if they're yes or no questions, with a yes or
20 no rather than a nod or shake of the head or uh-huh or
21 huh-uh. All right?

22 A. Okay.

23 Q. And if for any reason you need a break during
24 the deposition, let me know and we'll be glad to
25 accommodate you. All right?

1 that report directly to me in the chain of command.

2 They report to a manager or a deputy.

3 Q. So they would report indirectly to you through
4 the chain of command.

5 A. Yes, sir.

6 Q. Fair enough.

7 (Deposition Exhibit No. 3 marked)

8 Q. (By Mr. Hemphill) Exhibit 3 to your deposition
9 is an e-mail chain from October of 2009 regarding the
10 MRF RFP, and the first e-mail that I have a question
11 about is -- I guess since we have double-sided pages,
12 here it's the third page. It's an e-mail from
13 Mr. Rivers to you --

14 A. I'm sorry, I don't have anything from October
15 the 9th.

16 Q. I'm sorry, October 28th, 2009.

17 A. Okay.

18 Q. And some of it's from October 27th as well.

19 A. Okay.

20 Q. There is an e-mail on the third page from Roy
21 Rivers to you October 27th, 2009 at the bottom of the
22 third page. Are you with me on that?

23 A. Okay.

24 Q. And Mr. Rivers says, "Any suggestions on
25 language to exclude governmental agencies and what would

1 be required in place of the bonds?" Do you see that?

2 MS. CARTER: (Indicating). You're on
3 Page 4 of 5?

4 Q. (By Mr. Hemphill) That's what it says, yes.

5 A. Okay, okay. I was looking at 3 of 5. Okay, 4
6 of 5.

7 Q. Uh-huh.

8 A. Okay. Yes, I do.

9 Q. And then above that you see your response to
10 Mr. Rivers where you say, "A little confused on this.
11 Is the intent of the committee to discourage (or
12 exclude) government agencies from responding? Or from
13 participating in the contract?" Do you see that?

14 A. I do.

15 Q. Do you recall anything about the discussion
16 between you and Mr. Rivers regarding any potential
17 discouragement or exclusion of government agencies from
18 responding?

19 A. No, I sure don't.

20 Q. Okay. And then if you look at what says Page 3
21 of 5 at the top, there is an e-mail from
22 Mr. Smythe-Macaulay to Mr. Rivers and others to which
23 you are copied on. Mr. Smythe-Macaulay was the -- I
24 believe his title was project manager of the
25 single-stream MRF RFP process; is that correct?

1 A. The official title, I'm not aware of what his
2 official title was.

3 Q. He was kind of heading up the effort; is that
4 fair to say?

5 A. Yes, sir.

6 Q. Okay. And Mr. Smythe-Macaulay says, "We don't
7 want to exclude Governmental agencies; we want to make
8 it easy for them to respond. Remember the City of
9 Austin is responding to this RFP." Do you see that?

10 A. I do.

11 Q. Now, tell me what discussions around this time
12 frame before the MRF RFP was issued you remember, if
13 any, about the -- the concept of the City responding to
14 the RFP.

15 A. I really wasn't party to many of the
16 discussions.

17 Q. Do you remember being a party to any of them?

18 A. Prior to that, yes.

19 Q. Okay. What -- what do you remember?

20 A. Originally you would have to go back to the
21 sponsor of this was the current Solid Waste director at
22 that time, which was Willie Rhodes.

23 Q. Uh-huh.

24 A. And Willie Rhodes at that time requested that
25 he wanted to have a solicitation done to do a

1 (Indicating).

2 A. The re line?

3 Q. Or the -- yes, or the subject line. It's --
4 it's -- actually it's the subject line.

5 A. Okay.

6 Q. It says Subject.

7 A. Yes, it would appear to be the same.

8 Q. Okay. Thank you.

9 (Deposition Exhibit No. 7 marked)

10 Q. (By Mr. Hemphill) Exhibit 7 to your deposition
11 is an e-mail exchange among several persons that
12 includes an exchange between you and Mr. Goode on
13 January 21st, 2010. Do you see that?

14 A. Yes, sir.

15 Q. And in an e-mail from you to Mr. Goode dated
16 11/26, on that date you are asking Mr. Goode, "Do we
17 want to send both of the Disqualifications out the same
18 day, or go ahead and send one out that is approved?" Do
19 you see that?

20 A. I do, but the date is a January 21st.

21 Q. If I didn't say January 21st, let the record
22 reflect that it is indeed January 21st. Thank you.

23 And then Mr. Goode responds, "Get the 1st
24 one out ASAP. Followed up quickly with the next one."
25 Correct?

1 A. Yes, sir.

2 Q. Do you recall communicating with Mr. Goode
3 about how or when to send out the TDS notice of
4 disqualification?

5 A. I don't recall this.

6 Q. Do you recall or know why you would be
7 communicating with Mr. Goode on this topic?

8 A. I don't recall, it's been too long.

9 Q. And my understanding is that you had no --
10 well, strike that.

11 My understanding is that you had -- that
12 Mr. Goode was not in the -- in the chain of command that
13 you were in; is that correct?

14 A. That's correct.

15 Q. Now, you refer in this e-mail to -- to one that
16 is approved. Do you see that?

17 A. Yes.

18 Q. Okay. What do you recall about the process by
19 which the TDS disqualification was approved?

20 A. TD -- TDS's in particular in that regard?

21 Q. Yes, that's my first question.

22 A. There would have been, as I said earlier,
23 the -- Robert Goode had submitted it to the Law
24 Department directly --

25 Q. Uh-huh.

1 A. -- instead of to the procurement office and it
2 was under review by the Law Department. So the Law
3 Department was reviewing the issue with Mr. Goode before
4 it would be coming to us.

5 Q. Okay. And so who -- who is -- is it safe to
6 say that to your recollection it was the Law Department
7 that was doing the approval that's referred to in
8 Exhibit 7?

9 A. Yes, sir.

10 Q. Okay. And did you have any discussions
11 regarding that approval with anyone who wasn't a lawyer
12 or that did not involve the seeking or repetition of
13 legal advice?

14 A. Yes.

15 Q. Okay. Who do you recall having such
16 discussions with?

17 A. I would have advised Roy Rivers that he needed
18 to check with the Law Department, and if one of the two
19 disqualifications, the letter was final, that he was to
20 go ahead and continue with his process.

21 Q. Any other such discussions with anyone else
22 that you recall?

23 A. None that I can remember.

24 Q. Now, the -- the -- Mr. Rivers' letter, which is
25 dated the same day as we saw Exhibit 7, which is

1 MR. HEMPHILL: Yes.

2 MS. CARTER: -- the above listed.

3 MR. HEMPHILL: Right, right. And it's
4 that paragraph and the following paragraph. And
5 frankly, to be fair, since this is referring to
6 Greenstar's communication --

7 MS. CARTER: Uh-huh.

8 MR. HEMPHILL: -- I'll give you a copy of
9 that as well. We'll mark that as exhibit -- exhibit --
10 (Deposition [Exhibit No. 17](#) marked)

11 MR. HEMPHILL: -- [Exhibit 17](#).

12 MS. CARTER: Let's go take a break.

13 MR. HEMPHILL: You want to take a break,
14 and I'm going to give you a chance to look at that also
15 and see if there's anything in there that you think is
16 off limits.

17 MS. CARTER: Okay.

18 THE COURT REPORTER: We're off.

19 (Break from 11:38 a.m. to 12:04 p.m.)

20 THE COURT REPORTER: It's 12:04.

21 Q. (By Mr. Hemphill) Mr. Johnson, before we took
22 our break we were looking at a couple of paragraphs on
23 [Exhibit 15](#) to your deposition, and in particular they
24 were the two paragraphs in -- right around the middle of
25 the page, one starting "An examination of the

1 communication" and one starting "In my opinion". Are
2 you with me on those?

3 A. Yes, sir.

4 Q. Okay. And my question -- if you can answer it
5 generally that's fine, and if you can't we'll go through
6 it phrase by phrase, but in general are the -- is the
7 analysis set forth in those two paragraphs by Mr. Akers
8 something that was considered and accepted by you in
9 your role as purchasing officer and ultimate
10 determinater of whether there had been an anti-lobbying
11 violation?

12 MS. CARTER: And I'm going to object on
13 the basis of calls for legal conclusion and invades the
14 deliberative process privilege. To the extent you can
15 testify as to the general basis of your decision in
16 reference to this or just your own recollection, then
17 you can do that. But we're not going to go point by
18 point. You can answer if you understand my
19 instructions.

20 Q. (By Mr. Hemphill) Okay. Well, in light of
21 that instruction, let me ask it a different way then.
22 Okay? So strike the question that's on the table and
23 I've got a new question for you.

24 The first sentence of the paragraph on
25 Page 3 of Exhibit 15 that starts, "An examination of the

1 communication of December 15th, 2009," says, "leads
2 quickly to a conclusion that factors 4 through 6" --
3 referred to above -- "are not present - there is no
4 discussion of withdrawal of the solicitation, rejection
5 of responses, or a complaint about a solicitation."

6 Is that consistent with your rationale for
7 your ultimate recommendation that Greenstar's protest be
8 allowed?

9 A. No.

10 Q. It is not.

11 A. Correct.

12 Q. Okay. Is it inconsistent with your
13 recommendation?

14 A. Yes.

15 Q. Okay. How so?

16 THE WITNESS: The general question you
17 ask?

18 MS. CARTER: Yeah, you can answer it.

19 A. In general, my response here, Exhibit 16 --

20 Q. (By Mr. Hemphill) Uh-huh.

21 A. -- where we found that it was not going to be
22 disqualified, if you would look at Exhibit 15 --

23 Q. Uh-huh.

24 A. -- and you would look at Page 2 --

25 Q. Uh-huh.

1 A. -- and you would look at the bottom paragraph.

2 Q. Uh-huh.

3 A. That paragraph there was the basis of the
4 determination that I had in regards to it, and that
5 was -- and based upon review with the Law Department and
6 providing legal assistance was that that factual
7 information there and, as provided, the determination
8 was consistent with the --

9 THE WITNESS: Correct term is American Bar
10 Association? Is that the correct -- ABA, is it American
11 Bar Association?

12 A. The rules for -- that lawyers conduct
13 themselves, and in fact that was the basis of the
14 determination that I made, and henceforth, we put that
15 as one of the items that should we look at revising the
16 ordinance we would provide clarity. And again, when we
17 revised the ordinance, we provided clarity for that.

18 Q. (By Mr. Hemphill) Okay. Fair enough. Now,
19 let me see if I can accurately summarize this situation
20 with Greenstar then as I understand your testimony. One
21 of Mr. Akers' conclusions set forth in Exhibit 15 is
22 that Greenstar had not made a prohibited communications
23 by sending a copy of its letter to the city attorney
24 because it was required by lawyer rules in general to
25 send such a copy to the city attorney; is that fair to

1 say?

2 A. Yes, sir.

3 Q. And is it fair to say that that was your basis
4 as the decision-maker, the purchasing officer, to
5 recommend that the protest be upheld?

6 A. Yes, sir.

7 Q. Now, Mr. Akers also in Exhibit 15 included his
8 analysis of whether or not the Greenstar letter was a
9 prohibited communication or prohibited representation
10 under the anti-lobbying ordinance separate and apart
11 from the issue of whether sending it to the city
12 attorney was improper, correct?

13 A. Yes.

14 Q. Okay.

15 A. He provided (inaudible).

16 THE COURT REPORTER: I'm sorry, he
17 provided --

18 THE WITNESS: Additional information.

19 Q. (By Mr. Hemphill) And is it your testimony
20 that once you decided that sending it to the city
21 attorney wasn't a violation, you then didn't consider
22 the issue that Mr. -- the additional information that
23 Mr. Akers put in his opinion regarding whether or not it
24 was a prohibited communication?

25 A. That's correct.

1 Q. Okay. So it played that analysis, of whether
2 or not it was a prohibited communication, separate and
3 apart from communication with your attorney, played not
4 part in your decision on the Greenstar protest; is that
5 fair to say?

6 A. That is correct.

7 Q. Okay. Would you agree that the anti-lobbying
8 ordinance should be applied consistently by the City?

9 A. Yes.

10 Q. And are there any documents or other writings
11 in which you have made clear that your acceptance of the
12 recommendation of the hearing officer, Mr. Akers in the
13 Greenstar matter, was solely on the basis of his
14 analysis regarding whether the contact with the City
15 attorney was proper or not?

16 MS. CARTER: And I'll instruct you not to
17 answer in regard to any attorney-client communications
18 that are in writing.

19 Q. (By Mr. Hemphill) And let me make a friendly
20 amendment to my question in light of that objection,
21 because I didn't even think of that.

22 Did you make any communications that were
23 not to lawyers that would be generally available to the
24 public or that would be open records in which you stated
25 that your acceptance of Mr. Akers' recommendation with

1 Q. Did you, as purchasing officer, do any analysis
2 independently of the legal department as to whether it
3 was appropriate for Greenstar to negotiate its
4 single-stream contract while the no contact was in
5 effect for the long-term contract?

6 A. No.

7 (Deposition Exhibit No. 21 marked)

8 Q. (By Mr. Hemphill) Exhibit 21 to your
9 deposition is an article from In Fact Daily dated
10 February 19th, 2010, headline "Greenstar OK'd to compete
11 for MRF proposal". Do you see that?

12 A. Yes, sir.

13 Q. And the first part of the article in general
14 addresses your acceptance of Mr. Akers' recommendation
15 that the protest be accepted, correct?

16 A. Yes. Affirmed.

17 Q. Okay. Now, the next to the last paragraph
18 begins by saying, "The company still faces a Council
19 hearing on a proposed extension of its contract, set for
20 next Thursday." Do you see that?

21 A. Yes, sir.

22 Q. Okay. And is that consistent with your general
23 understanding, that the Greenstar -- there was a council
24 item about something regarding the Greenstar
25 single-stream contract?

1 A. I'm not sure of the dates --

2 Q. Okay.

3 A. -- but --

4 Q. Fair enough. And then in the last paragraph,
5 the first sentence says, "Greenstar's response to the
6 MRF request for proposal is a separate matter." Do you
7 see that?

8 A. Yes, sir.

9 Q. Do you have any reason to disagree with that?

10 A. No, sir.

11 (Deposition Exhibit No. 22 marked)

12 Q. (By Mr. Hemphill) Exhibit 22 to your
13 deposition is, the first two pages, an e-mail to
14 mayor -- excuse me, a memorandum to Mayor and Council
15 from Mr. Goode dated February 24th, 2010 and the second
16 two pages an attachment to that memorandum is another
17 memorandum from David Smith to Mr. Ott dated
18 February 23rd, 2010. Can you confirm that?

19 A. These would appear to be copies of those. I
20 can't tell for the completeness or not.

21 Q. Sure.

22 A. They're not numbered.

23 Q. And if you see on the first page of Exhibit 22,
24 in the second paragraph Mr. Goode references "David's
25 response". He says, "I have attached David's response".

1 Do you see that?

2 A. Yes, sir.

3 Q. And attached to Exhibit 22 is a memorandum from
4 Mr. Smith, correct?

5 A. David Smith's response to the city manager is
6 attached to the memo from Robert Goode, yes, sir.

7 Q. In your role as the ultimate arbiter of whether
8 or not TDS violated the anti-lobbying ordinance, did you
9 rely on the analyses set forth in Exhibit 22 with regard
10 to the ques -- with regard to that question?

11 MS. CARTER: Objection, vague and
12 ambiguous. You can answer.

13 A. I don't quite understand the question.

14 Q. (By Mr. Hemphill) Sure, I'll ask a different
15 question. Confined to Mr. Smith's memorandum that's the
16 third and fourth pages of Exhibit 22 --

17 A. Okay.

18 Q. -- did you understand Mr. Smith to express an
19 opinion in this memorandum as to whether or not TDS's
20 contract amendment proposal should be considered as a
21 response to the -- the long-term MRF RFP for purposes of
22 the anti-lobbying ordinance?

23 A. Yes, sir, it would appear to be the legal
24 opinion from the city attorney's office.

25 Q. And can you point me to language in this

1 memorandum that you believe reaches the conclusion that
2 TDS's contract amendment proposal was a response to the
3 RFP for purposes of the anti-lobbying ordinance.

4 MS. CARTER: Object, the document speaks
5 for itself.

6 A. I'm not an attorney, I'm not sure that I can
7 speak to the legal issues of it, but in general I think
8 the memorandum is whole and complete as is.

9 Q. (By Mr. Hemphill) Okay. I want to make sure
10 that the record is clear on this. You relied on
11 Mr. Smith's memo, in part at least, for your conclusion
12 that TDS violated the anti-lobbying ordinance, correct?

13 A. No, you asked whether this -- you asked a
14 different question.

15 Q. I did.

16 A. You asked whether I looked at this to determine
17 if they were responding to the RFP.

18 Q. Correct.

19 A. Now are you asking a different question?

20 Q. Let me ask yet a different question then. Did
21 you rely on Mr. Smith's memo that's part of Exhibit 22
22 for a conclusion that TDS was a respondent to the RFP
23 for purposes of the anti-lobbying ordinance?

24 A. Yes, sir.

25 Q. Okay. In the third paragraph of Mr. Smith's

1 memorandum, near the end there is a sentence that says,
2 "Despite TDS's denial, a careful reading shows that a
3 majority of that proposal is in fact a response to the
4 RFP." Do you see where it says that?

5 A. Yes, sir.

6 Q. Is that language that you considered to be a
7 conclusion by Mr. Smith that TDS's contract amendment
8 proposal was a response to the RFP for purposes of the
9 anti-lobbying ordinance?

10 A. I think that's a question that I already
11 answered, that it is the complete memo that's the
12 response.

13 Q. I'm not asking about the complete memo, I'm
14 asking about that sentence.

15 A. The answer is I don't think it's just that
16 sentence, no.

17 Q. Other than that sentence that I just asked you
18 about and the item under No. 1 of Legal Conclusions and
19 Council's Options on Mr. Smith's memo, is there anything
20 else in this memo that you understand is Mr. Smith's
21 conclusion that TDS was prohibited -- was -- was a
22 respondent to the long-term MRF RFP for purposes of the
23 anti-lobbying ordinance?

24 MS. CARTER: I'm going to object; this is
25 harassing, that the document speaks for itself, and it's

1 ridiculous to ask this witness to go through and analyze
2 every word of a memo that speaks for itself.

3 Q. (By Mr. Hemphill) And this memo does not speak
4 for itself. It never once says anywhere in it that TDS
5 should be considered a respondent for purposes of the
6 anti-lobbying ordinance specifically, does it?

7 MS. CARTER: Well, and I object that
8 you're arguing with the witness. He's already testified
9 to that general subject matter and I -- you can make
10 that argument all day long you want to the Court, but
11 arguing with the witness about what's in the memo seems
12 to me to be a pointless waste of time. And I realize I
13 can't argue about relevance, but I will make this an
14 issue for attorneys' fees request for either side.

15 Q. (By Mr. Hemphill) Does Mr. Smith's memorandum
16 once cite the definition of respondent contained in the
17 anti-lobbying ordinance?

18 MS. CARTER: Same objection.

19 MR. HEMPHILL: We'll take that to the
20 judge.

21 MS. CARTER: You can go down this path if
22 you want, Mr. Hemphill. I did not -- not instruct him
23 not to answer, I just made my point, and if you want to
24 continue down this path, you may.

25 Q. (By Mr. Hemphill) Can you answer my question?

1 A. Would you rephrase it for me just a little bit?

2 Q. Sure. Does Mr. Smith's February 23rd, 2010
3 memo ever once quote or cite the definition of
4 respondent that's in the anti-lobbying ordinance?

5 MS. CARTER: Same objection.

6 A. It does not use the word respondent, which is
7 in the ordinance. It does reference the definition
8 where it talks about a person responding to a City
9 solicitation, which includes a bidder, quoter,
10 respondent or proposer and it does reference that part
11 of that definition in the memo.

12 Q. (By Mr. Hemphill) Where in the memo?

13 A. In several places it -- it does.

14 Q. And by reference, let me just -- before I send
15 you looking through the memo, you said it references.
16 And what do you mean by "references", if it refers to
17 the same general principles or it actually quotes the --
18 quotes the definition?

19 A. It says in the third paragraph the majority of
20 the proposal is in fact a response to the RFP. So in
21 the definition it talks about a person responding to a
22 solicitation. There is the first reference of that
23 particular part of the definition. In the legal
24 conclusion, under No. 1 --

25 Q. Uh-huh.

1 A. -- second line, end of the second line, start
2 of the third line it says "are in fact a response to
3 that RFP."

4 Q. Uh-huh.

5 A. Would appear to be at least that piece of that
6 there.

7 Q. Okay. So is there anything that you relied
8 upon for -- for your conclus -- your ultimate conclusion
9 that TDS's response to -- TDS's contract amendment
10 proposal is a response to the RFP other than Mr. Smith's
11 legal memorandum?

12 A. Yes.

13 Q. What? And don't tell me what lawyers told you,
14 but other than what's in Mr. Smith's memorandum.

15 A. At what point in time?

16 Q. At the point in time when you made the ultimate
17 decision to uphold Mr. Webb's recommendation.

18 A. The answer is all information that I had at
19 that time --

20 Q. Okay.

21 A. -- I would have reviewed.

22 Q. Okay. And I'm just now talking about the
23 determination that TDS was a -- was a respondent.

24 First of all, I'm making an assumption.
25 Let me ask you this question: Did you make that

1 determination as part of your decision to accept
2 Mr. Webb's recommendation regarding TDS?

3 A. The answer is no.

4 Q. Okay. Who did make that determination that
5 TDS --

6 A. On advice by the legal department, it had
7 already been determined.

8 Q. Fair enough. That's what I was trying to get
9 at.

10 (Deposition Exhibit No. 23 marked)

11 Q. (By Mr. Hemphill) Exhibit 23 to your
12 deposition is an In Fact Daily article dated
13 February 26, 2010. Do you see that?

14 A. Yes, sir.

15 Q. Now, your name appears maybe six, seven lines
16 down where it says: Purchasing Officer Byron Johnson
17 told In Fact Daily that the City still considers --
18 considers Texas Disposal System (TDS) to be in violation
19 of the city's anti-lobbying ordinance. Do you see that?

20 A. Yes, sir.

21 Q. Now, first of all, were you accurate -- was
22 your position accurately reflected in this article?

23 A. I'm not sure of the context of which the
24 question would have come up, but the answer is in
25 general it would appear to be a fair assessment.

1 February of 2010 to tell In Fact Daily what the City's
2 position was.

3 A. Well, I don't know that I told the City that.
4 They might have got that from any other kind of
5 discussion. I don't know where they would have
6 necessarily gotten that information. They did attend
7 the hearings.

8 Q. And -- and I'm just -- well, it's not
9 important.

10 (Deposition Exhibit No. 24 marked)

11 Q. (By Mr. Hemphill) Exhibit 24 is a letter from
12 the Law Department signed by Cary Grace on May 12th,
13 2010. Are you familiar with this letter?

14 A. In general.

15 Q. Okay. You will see that in the paragraph --
16 the first paragraph under the word First on the first
17 page --

18 A. Okay.

19 Q. -- Ms. Grace says about four lines down, "It is
20 the City's position that the appeal hearing was merely
21 stopped, and leaves in tact the Purchasing Officer's
22 finding that TDS had violated the anti-lobbying
23 ordinance by sending the e-mail dated December 8th, 2009
24 with attached documentation." Do you see that?

25 A. Yes, sir.

1 Q. First question: Is that consistent with your
2 understanding of the result of the first appeal hearing
3 in the TDS case?

4 A. No.

5 Q. How is it not consistent?

6 A. I -- I had not been requested to make a finding
7 at that point.

8 Q. So you would agree that you had not -- at this
9 point had not made a finding that TDS had violated the
10 anti-lobbying ordinance, correct?

11 A. Yes, sir.

12 Q. Okay. Now, I don't mean to limit this -- limit
13 my question to the following sentence but I'm going to
14 point the following sentence out to you in particular,
15 and I'm talking about a sentence on the back of -- of
16 Exhibit 24 under the word Second, and it's a sentence
17 that begins three lines down in that first paragraph.
18 And it says, "Portions of that proposed amendment are
19 for new services not covered by the existing contract,
20 and in fact are services that are outlined in the
21 General Scope of Services for RFP Number RDR0005. Those
22 portions of the proposed amendment are in fact a
23 response to that RFP." Do you see that?

24 A. Yes, sir.

25 Q. Okay. Did you consider that sentence or this

1 Q. And was anything he told you on the phone
2 inconsistent with that?

3 A. No, sir.

4 Q. Okay. I see on the front of Exhibit 25 there
5 is an e-mail indicating that you're asking Ms. Castro to
6 send to people in the Law Department for advice,
7 correct?

8 A. Yes, sir.

9 Q. Okay. What role, if any, did you play in the
10 decision to not have Mr. Akers be the hearing officer
11 for the second TDS protest hearing?

12 A. I took the information from the law office and
13 then passed it on to Carolyn Castro and then we went
14 forward at that time.

15 Q. Okay. And I guess who was the -- let me ask
16 this: When you say "we went forward at that time," what
17 did you do then, going forward?

18 A. We decided to select a -- a separate hearings
19 officer.

20 Q. And when you say "we", was that you and
21 Ms. Castro made that decision?

22 A. That was the City of Austin based upon the
23 advice from the legal department.

24 Q. And I don't want to know what the advice from
25 the legal department was, I just want to know if there

1 was anyone involved in making that decision that wasn't
2 a lawyer.

3 A. No.

4 Q. So is it fair to summarize by saying that after
5 Mr. Akers sent the e-mail, you had it forwarded to the
6 legal department, the legal department gave input, and
7 based on that input the decision was made to have
8 someone other than Mr. Akers be the hearing officer; is
9 that fair?

10 A. Based upon the advice from the Law Department.

11 Q. Right.

12 A. Correct.

13 Q. Okay.

14 (Deposition Exhibit No. 26 marked)

15 Q. (By Mr. Hemphill) Exhibit 26 to your
16 deposition is the Decision of the Independent Hearing
17 Officer, Mr. Webb, with regard to the TDS
18 disqualification protest, correct?

19 A. Yes, it would appear to be.

20 (Deposition Exhibit No. 27 marked)

21 Q. (By Mr. Hemphill) And exhibit --

22 MR. HEMPHILL: I'm sorry, I wrote on your
23 copy of the exhibit.

24 Q. (By Mr. Hemphill) Johnson Exhibit 27 is a
25 memorandum from you to the mayor and council members

1 response?

2 A. Correct.

3 Q. I'm going to attempt to -- to give you my
4 understanding of your previous testimony, but I'm not
5 trying to mischaracterize it, I'm trying to clarify and
6 make sure I understand. So please listen closely and
7 let me know if I'm mischaracterizing anything, because I
8 absolutely do not intend to.

9 My understanding of your previous
10 testimony was that the determination that TDS's contract
11 amendment proposal should be considered as a response to
12 the long-term recycling RFP was made on advice of
13 counsel and not independently by you. Is that fair? If
14 it's not, please tell me.

15 A. That's correct.

16 Q. Okay. As part of your decision to -- I'm
17 sorry, I'm looking for the right word. As part of your
18 decision to accept the recommendation of Mr. Webb, did
19 you do any comparison between Mr. Webb's
20 recommendation -- the content of Mr. Webb's
21 recommendation and the content of Mr. Akers'
22 recommendation regarding Greenstar?

23 A. No.

24 Q. Had Mr. Gregory in his December 8th, 2009
25 e-mail to SWAC, Mr. Goode, Mr. -- Ms. Williamson and

1 Q. And I'm -- and I'm -- I appreciate that, and
2 I'm trying to ask it so I'm not asking for speculation.
3 I'm asking whether you know any facts that lead you to
4 believe that he had a copy of the Greenstar RFP
5 response.

6 A. There is a question I can answer is I have no
7 information that he had any facts that were in regards
8 to any -- anything in regards to a Greenstar proposal --

9 Q. Fair enough.

10 A. -- response.

11 Q. Is it your position as purchasing officer that
12 the subject matter of the existing Greenstar contract
13 that was in existence in December of 2009 was so
14 intertwined with the subject matter of the pending RFP
15 that criticizing Greenstar with regard to the existing
16 contract amounted to criticism of Greenstar's RFP
17 response that had not yet been filed?

18 A. Yes.

19 Q. Okay. Is it your understanding as the
20 purchasing officer that Greenstar was free to say
21 anything it wished to the City during the negotiation of
22 its short-term contract about its short-term contract
23 without violating the anti-lobbying ordinance?

24 A. I think that calls for a legal opinion that
25 I really could not give a legal opinion in regards to

1 Q. Okay. And you will see on the third page of
2 the exhibit that there are -- there is scoring for the
3 City of Austin?

4 A. Yes, sir.

5 Q. Okay. And so would you have expected
6 Mr. Rivers and/or Ms. Mendez to have had copies of the
7 City's materials it submitted in connection with the
8 long-term single-stream MRF RFP?

9 A. I don't know that I can answer that.

10 Q. All right. Do you know if you have ever not
11 accepted the recommendation of a hearings officer with
12 regard to a protest to a notice of violation of the
13 anti-lobbying ordinance?

14 A. If I understand the question, have I ever not
15 accepted a recommendation from the hear -- independent
16 hearings officer in regards to how they saw an
17 anti-lobbying violation.

18 Q. Precisely.

19 A. The answer is yes, I know the answer to that
20 question.

21 Q. And what is the answer to that question?

22 A. I -- I know of none that I have not concurred
23 with their response in an anti-lobbying violation.

24 MR. HEMPHILL: That's all we have. Thank
25 you for your time. We pass the witness.

Attached is a draft of 0400 that includes Carol's updates I am currently working on. Did we decide to remove the contract term and living wage & benefit from this document? Please forward any updates for this document to me and I will post a final on Sharepoint.

Thanks,

Roy Rivers
Buyer II
City of Austin
Purchasing Office
124 W. 8th St., STE 308
Austin, TX 78701
Phone: 512-974-2596
Fax: 512-974-2388

From: Vance, Carol
Sent: Wednesday, October 28, 2009 2:35 PM
To: Rivers, Roy; Smythe-Macaulay, David; Parrish, Jules
Subject: RE: MRF Letters of credit, govt agencies

I have already made the change in the 0400 and sent it to Roy. The alternative (if there is one) for governmental agencies for the bond would be included in the same item in the 0400.

From: Rivers, Roy
Sent: Wednesday, October 28, 2009 2:30 PM
To: Smythe-Macaulay, David; Parrish, Jules
Cc: Vance, Carol
Subject: RE: MRF Letters of credit, govt agencies

I agree.

Roy Rivers
Buyer II
City of Austin
Purchasing Office
124 W. 8th St., STE 308
Austin, TX 78701
Phone: 512-974-2596
Fax: 512-974-2388

From: Smythe-Macaulay, David
Sent: Wednesday, October 28, 2009 2:24 PM
To: Parrish, Jules; Rivers, Roy
Cc: Vance, Carol
Subject: RE: MRF Letters of credit, govt agencies

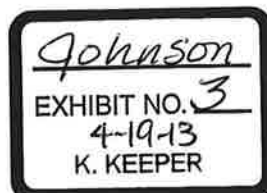
I believe it goes in the 0400 section with other bond and insurance requirements.

Thanks!

David Smythe-Macaulay

Please consider the environment before printing this email.

10/28/2009



TDS v. COA
A-11-CV-1-70-LY
COA 00490

From: Parrish, Jules
Sent: Wednesday, October 28, 2009 2:19 PM
To: Smythe-Macaulay, David; Rivers, Roy
Cc: Vance, Carol
Subject: RE: MRF Letters of credit, govt agencies

Hi Folks,

Please let me know what section this language is going in so I can direct other information to that area.

Thanks,
Jules

From: Smythe-Macaulay, David
Sent: Wed 10/28/2009 2:11 PM
To: Rivers, Roy; Parrish, Jules
Cc: Vance, Carol; Johnson, Byron
Subject: RE: MRF

Roy,

We don't want to exclude Governmental agencies; we want to make it easy for them to respond. Remember the City of Austin is responding to this RFP.

I agree with Byron for a letter of credit, cashiers check or certified check (I will find out which one is easier for the City from Jeff).

Carol, please let us know your recommendation for a performance bond.

Thanks!

David Smythe-Macaulay

Please consider the environment before printing this email.

From: Rivers, Roy
Sent: Wednesday, October 28, 2009 1:16 PM
To: Smythe-Macaulay, David; Parrish, Jules
Subject: FW: MRF

FYI,

Roy Rivers
Buyer II
City of Austin
Purchasing Office
124 W. 8th St., STE 308
Austin, TX 78701
Phone: 512-974-2596
Fax: 512-974-2388

From: Johnson, Byron

10/28/2009

Sent: Wednesday, October 28, 2009 11:10 AM
To: Rivers, Roy
Cc: Vance, Carol; Walsh, Mark
Subject: RE: MRF

A little confused on this. Is the intent of the committee to discourage (or exclude) government agencies from responding? Or from participating in the contract?

If it is to limit them in responding to the RFP, I think there is enough language in the RFP that would preclude an agency from responding or at the very least disinterest them. I do not think we address that issue in the RFP.

If the intent is to limit agencies from participating in the contract, once awarded, then we would leave that to discussions down the road once we are through this.

As to an alternative to a bid bond, there would be irrevocable letter of credit, cashiers check or certified check.

Alternatives to performance bonds? That would probably be best answered by Carol and/or attorney.

Byron

Byron E. Johnson, C.P.M.
Purchasing Officer FASD
City of Austin Texas
512 974 2050
email Byron.Johnson@CLAUSTIN.TX.us



please consider the environment before printing this e-mail or attachments

From: Rivers, Roy
Sent: Tuesday, October 27, 2009 4:34 PM
To: Johnson, Byron
Cc: Vance, Carol
Subject: FW: MRF

Any suggestions on language to exclude governmental agencies and what would be required in place of the bonds?

Roy Rivers
Buyer II
City of Austin
Purchasing Office
124 W. 8th St., STE 308
Austin, TX 78701
Phone: 512-974-2596
Fax: 512-974-2388

From: Vance, Carol
Sent: Tuesday, October 27, 2009 1:14 PM
To: Parrish, Jules; Smythe-Macaulay, David; Rivers, Roy
Cc: Cornwell, Clark
Subject: MRF

10/28/2009

TDS v. COA
A-11-CV-1-70-LY
COA 00492

We also need to discuss the appropriate options for Bonds for governmental agencies.

I think this would go in the bonds individual bond sections.

Roy, is it necessary for us to do this in an RFP?

Carol Vance

Sr. Risk Analyst

City of Austin, TX

phone: 512/974-3264

fax: 512/974-3411

10/28/2009

From: ~~Goode, Robert~~
To: ~~Johnson, Byron~~
Subject: Re: No Contact Disqualification - Treat as Confidential Material - re RFP 1500 RDR0005-reply (Confidential)-reply
Date: Thursday, January 21, 2010 11:39:09 AM

Get the 1st one out ASAP. Followed up quickly with the next one.

From: Johnson, Byron
To: Goode, Robert
Sent: Thu Jan 21 11:26:52 2010
Subject: FW: No Contact Disqualification - Treat as Confidential Material - re RFP 1500 RDR0005-reply (Confidential)-reply

Do we want to send both of the Disqualifications out the same day, or go ahead and send one out that is approved?
Byron

Byron E. Johnson, C.P.M.
Purchasing Officer FASD
City of Austin Texas
512 974 2050
email Byron.Johnson@CILAUSTIN.TX.us



please consider the environment before printing this e-mail or attachments

From: Kurtz, Tamara
Sent: Thursday, January 21, 2010 9:43 AM
To: Johnson, Byron
Cc: Walsh, Mark; Rivers, Roy; Fudge, Rick
Subject: RE: No Contact Disqualification - Treat as Confidential Material - re RFP 1500 RDR0005-reply (Confidential)-reply

From: Johnson, Byron
Sent: Thursday, January 21, 2010 6:32 AM
To: Kurtz, Tamara



TDS v. COA
A-11-CV-1070-LY
COA 001438

InFact Daily

February 19, 2010

Greenstar OK'd to compete for MRF proposal

The City of Austin will allow **Greenstar (Mid-America Recycling)** to bid on the chance to build a new Materials Recovery Facility (MRF).

Purchasing Officer Byron Johnson signaled the end of the appeals process with a letter addressed to the Mayor and City Council Members on Thursday morning, accepting a recommendation from hearings officer **Monte Akers**.

Akers had ruled that Greenstar should not be held in violation of the city's anti-lobbying ordinance for contacting **City Attorney David Smith** to notify him of their complaint against competitor **Texas Disposal Systems**.

Greenstar was previously disqualified from bidding on a planned MRF because of an allegation that it had violated Austin's anti-lobbying ordinance.

"After a review of all of the pertinent information I have accepted the recommendation of the Independent Hearing Officer and granted (Greenstar's) protest," Johnson wrote.

The company still faces a Council hearing on a proposed extension of its contract, set for next Thursday. That extension has been complicated by a proposal from Greenstar competitor Texas Disposal Systems (TDS). TDS has asked the Council to reconsider the Greenstar extension in light of TDS' promise to, among other things, handle Austin's recycling at no charge.

Greenstar's response to the MRF request for proposal is a separate matter. It can now be considered along with at least six other bids submitted to the city. TDS did not submit a bid but appealed directly to the City Council to enlarge a contract it already has with the city.



TDS0003412

BYRON JOHNSON - April 19, 2013

1 UNITED STATES DISTRICT COURT
 2 WESTERN DISTRICT OF TEXAS
 3 AUSTIN DIVISION

4 TEXAS DISPOSAL SYSTEMS,
 5 INC. and TEXAS DISPOSAL
 6 SYSTEMS LANDFILL, INC.,
 7 Plaintiffs,

8 VS.

9 CITY OF AUSTIN, TEXAS, and
 10 BYRON JOHNSON, in his
 11 official capacity,
 12 Defendants.

CASE NO. A-11-CV-1070-LY

13 *****
 14 REPORTER'S CERTIFICATION
 15 ORAL DEPOSITION OF
 16 BYRON JOHNSON
 17 APRIL 19, 2013
 18 VOLUME 1
 19 *****

20 I, KIMBERLY G. KEEPER, Certified Shorthand
 21 Reporter in and for the State of Texas, hereby certify
 22 to the following:

23 That the witness, BYRON JOHNSON, was duly
 24 sworn by the officer and that the transcript of the oral
 25 deposition is a true record of the testimony given by
 the witness;

I further certify that pursuant to FRCP
 Rule 30(f)(1) that the signature of the deponent:

XXX was requested by the deponent or a
 party before the completion of the deposition and is to
 be returned within 30 days from date of receipt of the

BYRON JOHNSON - April 19, 2013

1 transcript. If returned, the attached Changes and
2 Signature Page contains any changes and the reasons
3 therefor;

4 _____ was not requested by the deponent
5 or a party before the completion of the deposition.

6 I further certify that I am neither
7 counsel for, related to, nor employed by any of the
8 parties or attorneys to the action in which this
9 proceeding was taken. Further, I am not a relative or
10 employee of any attorney or record in this cause, nor am
11 I financially or otherwise interested in the outcome of
12 the action.

13
14 Subscribed and sworn to on this the 29th
15 day of April, 2013.

16
17 *Kimberly G. Keeper*

18 KIMBERLY G. KEEPER, TEXAS CSR No. 2162
19 Expiration Date: 12/31/13
20 Firm Registration No. 556
21 7800 North Mopac, Suite 120
22 Austin, Texas 78759
23 512-732-1805
24
25

EXHIBITS TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

<u>PX#</u>	<u>Exhibit</u>
PX1	Byron Johnson deposition excerpts (4/19/13) and exhibits 3, 7, & 21 thereto
PX2	Robert Goode deposition excerpts (4/17/13)
PX3	Howard Lazarus deposition excerpts (4/9/13) and exhibits 10 & 11 thereto
PX4	Bob Gedert deposition excerpts (4/29/13) and exhibit 9 thereto
PX5	Tammie Williamson deposition excerpts (4/10/13)
PX6	John Steiner deposition excerpts (4/18/13)
PX7	Bobby Gregory (individual) deposition excerpts (2/27/13)
PX8	Bobby Gregory (TDS corporate representative, vol. 1) deposition excerpts (3/1/13)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS DISPOSAL SYSTEMS,
INC. and TEXAS DISPOSAL
SYSTEMS LANDFILL, INC.,
Plaintiffs,

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*
*

VS.

CASE NO. A-11-CV-1070-LY

CITY OF AUSTIN, TEXAS, and
BYRON JOHNSON, in his
official capacity,
Defendants.

ORAL AND VIDEOTAPED DEPOSITION OF
ROBERT GOODE
APRIL 17, 2013
VOLUME 1

ORAL AND VIDEOTAPED DEPOSITION OF ROBERT
GOODE, produced as a witness at the instance of the
Plaintiffs and duly sworn, was taken in the above-styled
and numbered cause on the 17th day of April, 2013, from
9:38 a.m. to 5:05 p.m., before KIMBERLY G. KEEPER,
Certified Shorthand Reporter in and for the State of
Texas, reported by machine shorthand, at Austin City
Hall, 301 West 2nd Street, Austin, Texas 78701 pursuant
to the Federal Rules of Civil Procedure and that the
deposition shall be read and signed under penalties of
perjury.

TDS vs. City of Austin
Summary Judgment

Plaintiffs' Exhibit
PX-02



APPEARANCES

FOR THE PLAINTIFFS:

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ALSO PRESENT:

Mr. Bob Gregory
Mr. Adam Gregory
Mr. Gary Newton
Mr. Mark Wolfington, Videographer

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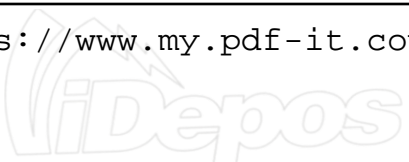
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1 THE VIDEOGRAPHER: Today is April the
2 17th, 2013. The time is 9:38. We are on the record.

3 ROBERT GOODE,
4 having been first duly sworn, testified as follows:

5 EXAMINATION

6 QUESTIONS BY MR. HEMPHILL:

7 Q. Could you tell us your name, please.

8 A. Robert Goode.

9 Q. And, Mr. Goode, my name is Jim Hemphill and I'm
10 a lawyer for Texas Disposal Systems and Texas Disposal
11 Systems Landfill, and you understand we're here to take
12 your -- excuse me -- deposition today in my clients'
13 case against the City of Austin and Byron Johnson in his
14 official capacity only as purchasing officer, correct?

15 A. I do.

16 Q. Have you had your deposition taken before, sir?

17 A. I have.

18 Q. Multiple times?

19 A. Yes.

20 Q. You probably are familiar with the drill, but
21 we'll do the -- the typical refreshing your recollection
22 about some of the ground rules here. The court reporter
23 is taking down everything we say, so it's important that
24 we try not to talk at the same time. I will do my best
25 to wait until you're finished with your answer if you do

1 over where private haulers take waste?

2 A. I don't -- I don't recall any of that
3 discussion.

4 Q. Do you recall ever -- TDS ever raising that
5 possibility during those discussions?

6 A. I don't recall that.

7 Q. Do you recall any discussions during the -- the
8 deliberations over the franchise ordinance about whether
9 or not the City could realize additional revenue by
10 taking for the City any of the business -- the waste
11 business that's currently in the hands of private
12 operators in Austin?

13 A. That was never discussed.

14 Q. Do you believe that TDS did anything improper
15 with regard to its opposition to the 2008 haulers
16 ordinance proposal?

17 A. Absolutely not.

18 Q. Now, the City also at one point in 2008 or 2009
19 had a study commissioned about building its own MRF; is
20 that correct?

21 A. Yes.

22 Q. And it's fair to characterize that as the City
23 explored building a MRF, got some consultants' input,
24 and then there was resistance to the idea of the City
25 building its own MRF and the City dropped that idea; is

1 that a fair summary?

2 A. Let me add, I think, something to that. When I
3 came in '08, that study was underway and there was
4 beginning some opposition, but the first thing I said --
5 well, not the first thing, that wasn't the first thing I
6 said when I entered the -- entered the job market -- was
7 that I didn't see that there was a master plan or any
8 direction from the Council for us to do that. So I was
9 very concerned that we were entering this major
10 operation without any real direction that I could see
11 from our policymakers, the city council.

12 So I don't even -- I don't recall if it
13 was during the re -- the -- during that decision-making
14 process that -- that there was a resistance that began
15 to be known in the community or it was -- or it was
16 after that, but it was my intention at that point is to
17 stop that process and say, I'm not -- we're not moving
18 forward with that operation without going to council and
19 seeing a full-blown master plan of what our operation
20 should look like in the next five, 10, 15, 20 years. So
21 that's how -- that's how that process -- I engaged in it
22 when I entered -- when I began my work here and why that
23 stopped.

24 Q. And so tell me your recollection about how
25 the -- how that whole project was terminated. Was

1 that -- was that your call or --

2 A. Yes, sir.

3 Q. Okay. And was that project terminated when
4 Mr. Rhodes was the solid waste director?

5 A. Yes, sir.

6 Q. And did you -- and you had supervisory
7 authority over him, correct?

8 A. Yes, sir.

9 Q. And you directed for that effort to stop?

10 A. Yeah, what we ended up doing with that is
11 going -- using some of R.W. Beck's work and saying isn't
12 there -- shouldn't we explore all our options rather
13 than the City building the MRF and operating it? So
14 that's what I directed Willie to do is we -- we need to
15 have an effort to look at what's the best path forward.
16 In light of the fact that we weren't going to have a
17 master plan done for quite some time, we still needed to
18 move forward, but -- but what were the options. So
19 that's where the -- the single option of the City
20 building a MRF was stopped and the evaluation process of
21 what -- what's out there and what can we do
22 public-private partnership started at that point.

23 (Deposition Exhibit No. 1 marked)

24 Q. (By Mr. Hemphill) I'm handing you what's
25 marked as Exhibit 1 to your deposition, and you had

1 your understanding is?

2 A. Well, I think in part of their analysis, what
3 they were asked to do was what's the best avenue to
4 explore on options, what -- what -- what could we
5 determine that's available for the City to engage in,
6 whether it be a private-public partnership or a
7 privately owned MRF. And I think in their analysis
8 there, they were evaluating the wasteshed on what would
9 be available in this area and whether or not a private
10 operator would be able to operate within this region.
11 So I think they were looking at more than just City of
12 Austin, they were probably looking at, well, what could
13 a private operator in partnership with the City, what's
14 their value proposition.

15 Q. Was -- was it your understanding that any part
16 of what R.W. Beck was doing was -- was trying to
17 determine whether or not the City of Austin could in any
18 way exercise any type of control or influence over what
19 those other cities did with their recycling stream?

20 A. No.

21 (Deposition Exhibit No. 2 marked)

22 Q. (By Mr. Hemphill) I'm handing you what the
23 court reporter has marked as Exhibit 2 to your
24 deposition. And this is an e-mail chain from July 12th
25 and July 13th of 2009 and the top e-mail is from Tammie

1 Williamson to you. Do you see that?

2 A. Yes, sir.

3 Q. And at that time Ms. Williamson was in the
4 Solid Waste department, correct?

5 A. Yes.

6 Q. And as her signature indicates on Exhibit 2 she
7 was acting directory at that point, correct?

8 A. Yes.

9 Q. At that point Mr. Rhodes had gone to another
10 position, correct?

11 A. Right.

12 Q. The bottom e-mail from Mr. Canally to you talks
13 about solid waste service has a planned 800,000 dollar
14 capital appropriation - financed with debt - for work on
15 the existing recycling facility. They also have the
16 7.7 million for design, etc on the MRF. Do you see
17 that?

18 A. Yes.

19 Q. And what's your recollection about that --
20 those -- the 7.7 million for design, etc on the MRF.
21 What was -- what was going on there?

22 A. That was still the leftover from the idea that
23 the City would build their own MRF.

24 Q. And at that point that was still a possibility,
25 correct? In July of '09.

1 A. Slim, but a possibility. I -- I gave my
2 direction early on that I didn't think that was the
3 right way for the City to go, I thought a private-public
4 partnership or a privately owned was the best option,
5 but I didn't want to eliminate any option as an
6 assistant city manager. My direction is always, "You
7 bring me data and options."

8 Q. And when you -- and you've talked a bit about
9 public-private partnership for a MRF, so let's make sure
10 that I'm understanding that. Is that a -- a situation
11 in which -- well, why don't you describe it in your own
12 words instead of me trying to characterize it.

13 A. Well, what the idea there -- the ideas could be
14 limitless, and that's what we wanted to do is to provide
15 anybody the opportunity to propose something. It could
16 be that a private vendor would build a MRF on our
17 property, it could be that we would be a partner in a
18 private operator to build a MRF 50-50 on their property
19 or property that they -- that they would purchase in
20 that effort. It could be any of the above. I mean, it
21 was really -- the idea of a private-public partnership
22 at that point was wide open. We just wanted to see what
23 the options were out there and wanted to keep it as
24 flexible as possible for the creativity of the private
25 sector.

1 Q. And would it be fair to characterize an
2 arrangement by which a private company builds and
3 operates its own MRF and then contracts to take the
4 City's single-stream recycling, would that be, as you
5 define it, a purely private arrangement?

6 A. I think -- yes, I think that would be -- we
7 looked at the options, there was a public-private,
8 there's private options, there was City-owned MRF.
9 Those are the -- the universe, I suppose, of the
10 categories you would define them. So I would define
11 that as a private option, yes.

12 Q. All right. And I think -- and tell me if I'm
13 misunderstanding your testimony. I think what you --
14 what you testified to is that your personal preference
15 at the -- at the time that we're discussing, which is
16 summer/fall of '09, was either for a public-private
17 partnership or a private solution as opposed to a purely
18 City owned and operated MRF; is that correct?

19 A. That's correct.

20 Q. Can you explain why that you had that thought?

21 A. At that -- at that point, remember I'm fairly
22 new to the City, my evaluation of the operation that we
23 had at that point was I'm not sure we could have handled
24 that. I mean, as the -- as the evaluation of that -- of
25 the publicly -- of the publicly-owned MRF was blowing up

1 and the costs were accelerating, and I just didn't feel
2 like that was the best. Many times cities are not the
3 best innovators, and I didn't think that a public sector
4 built and operated MRF was -- at that point was going to
5 be the -- the best alternative for us as a City to
6 pursue. Again, leaving it open because I didn't want to
7 shut the door, but my preference was clearly known --
8 was clearly communicated that I didn't think that was
9 going to be the right way.

10 That's why the process stopped. If it
11 would have been -- if I would have said, "Boy, that's a
12 great idea," we wouldn't have stopped the -- that design
13 effort, we would have continued that through. So it was
14 obviously clear that wasn't the idea that I thought was
15 the best, that would flow to the top at the end.

16 (Deposition Exhibit No. 3 marked)

17 Q. (By Mr. Hemphill) And I'm showing you what the
18 court reporter has marked as Exhibit 3 to your
19 deposition, and this is an excerpt from a proposed
20 budget for fiscal year '09 and 2010 dated August 19th,
21 2009. Do you see where I'm referring to that?

22 A. Yes.

23 Q. And that again refers to the \$7.7 million that
24 you characterized as left over from the -- the previous
25 public MRF study?

1 A. Right.

2 Q. And is that -- was that funding that was
3 approved by council?

4 A. As a part of the budget process, council would
5 always approve all -- all the department's budget, yeah.

6 Q. Okay. And so I guess my question is you -- I
7 think that you said that one of your concerns about
8 the -- the City -- the proposal for a City built and
9 owned MRF was that you did not have council support for
10 that but the council did approve some budget money for
11 the study of that? How -- tell me how that worked.

12 A. Well, there is two ways that council gives
13 support; one is the budget process that's -- that -- you
14 know, they fly high during that process at the
15 general -- they can always dig down, but in many cases I
16 wouldn't say that council has full knowledge of what all
17 the inner workings and the -- and the grand schemes in
18 the budget process and I think it's our job as City
19 staff to bring anything like this -- this was a huge
20 proposal. This should have been a very big master plan
21 kind of discussion with council that in my knowledge
22 never occurred. And so therefore, I wouldn't say that
23 council gave direction, "You go build your own MRF." I
24 don't think they ever gave that direction.

25 Q. Fair enough. Now, is it fair to say that --

1 well, let me say this: Do you understand that the
2 disqualification of TDS for the alleged violation of the
3 anti-lobbying act was in connection with an e-mail that
4 Mr. Gregory sent that addressed, at least in part, an
5 existing single-stream MRF contract with green --
6 between the City and Greenstar?

7 A. Yes.

8 Q. Okay. Did you play any part in the initial
9 execution of that single-stream contract with Greenstar?

10 A. Huh. I don't recall what time that was. If it
11 was, it was very early in my tenure. I think it was
12 that when I came on board that they were -- that the --
13 the single-stream had -- was launching, and of course we
14 had to have some place to take the material, so I --
15 yeah, I do think that -- that that was done early in my
16 tenure, so probably was done after I was here. So yes,
17 I guess for --

18 Q. So you -- so you -- if it was done during your
19 tenure you would have --

20 A. Absolutely.

21 Q. -- had at least some supervisory authority over
22 it.

23 A. Yes.

24 Q. And is it fair to say that Mr. -- that was
25 under the direction of Mr. Rhodes?

1 A. Yes, sir.

2 Q. Okay.

3 (Deposition Exhibit No. 4 marked)

4 THE WITNESS: While we're paused for just
5 a minute --

6 MR. HEMPHILL: Sure.

7 THE WITNESS: -- could somebody get me a
8 glass of water?

9 MR. HEMPHILL: Absolutely.

10 MS. CARTER: I'm sorry.

11 (Discussion off the written record)

12 Q. (By Mr. Hemphill) Now, is it fair to say that
13 at some point there was some discussion about whether or
14 not the existing Greenstar single-stream recycling
15 contract was a good deal for the City?

16 A. Yes.

17 Q. I'm handing you what's marked as Exhibit 4 to
18 your deposition, and this is an e-mail chain from
19 June 4th of '09 that includes you and Ms. Williamson,
20 among others, correct?

21 A. Yes.

22 Q. And the subject is Greenstar Meeting.

23 A. Yes.

24 Q. In June of '09, was the City discussing the
25 potential renegotiation and/or extension of the

1 Greenstar contract? I'm just trying to figure out when
2 that process started.

3 A. It looks like -- I don't recall the exact date
4 it did happen. We obviously did try to renegotiate the
5 Greenstar contract, so I don't -- I don't recall an
6 exact date, but yes, it did happen.

7 Q. Can you -- by looking at the contents of
8 Exhibit 4, can you tell whether or not that was the -- I
9 see this is about Greenstar and meeting, but whether or
10 not the particular subject would have been potential
11 renegotiation and/or extension?

12 A. No, I can't tell. I think so, but I can't
13 tell.

14 Q. Okay. Now, it is fair to say that at some
15 point the City did start negot -- engaging in
16 negotiations with Greenstar for potential renegotiation
17 and/or extension of its short-term contract.

18 A. Yes.

19 (Deposition Exhibit No. 5 marked)

20 Q. (By Mr. Hemphill) I have marked what I have
21 had marked as Exhibit 5 to your deposition an e-mail
22 chain between you and Carole Keeton Strayhorn in October
23 of 2009. Do you see that?

24 A. Yes.

25 Q. And this e-mail appears to indicate that by

1 October -- early October of 2009 you were communicating
2 with Greenstar about potential -- excuse me --
3 renegotiation of the contract; is that fair to say?

4 A. Yes.

5 Q. Now, at the -- at the time that the negotiation
6 with Greenstar was ongoing in -- in October of 2009, was
7 the City at the same time planning to issue an RFP for a
8 long-term single-stream recycling contract?

9 A. Well, I don't remember the dates exactly, but
10 that was around that same time, yeah.

11 (Deposition Exhibit No. 6 marked)

12 Q. (By Mr. Hemphill) Exhibit 6 to your deposition
13 is an e-mail chain in November of 2009 between you and
14 then Council Member Shade. Do you see that?

15 A. Yes.

16 Q. And the bottom e-mail, which is the first in
17 time, Ms. Shade is -- is asking whether the RFP for MRF
18 is still planning to be issued November 9th and she says
19 she'd like to take Carole Strayhorn up on an offer to
20 tour Greenstar but she doesn't want to wait too long
21 given the fact Greenstar would likely be responding to
22 the RFP. Do you see that?

23 A. I see that.

24 Q. Now, certainly it's safe to say, based on the
25 content of this e-mail, by early November of 2009 there

1 was a -- there had been a decision to issue an RFP for
2 long-term single-stream recycling; is that fair?

3 A. Yes.

4 Q. Okay. And that -- that RFP was going to be
5 issued around the same time frame that the City was
6 talking to Greenstar about potential contract
7 renegotiation, correct?

8 A. Same time frame.

9 Q. And do you recall Council Member Shade or
10 anyone else in this time frame, early November of 2009,
11 expressing concern about speaking with Greenstar about
12 the short-term contract after the RFP for the long-term
13 contract had been issued?

14 A. I'm not sure I understand the question. Could
15 you repeat that?

16 Q. Sure. In the -- well, let me rephrase it. In
17 the bottom e-mail on Exhibit 6 --

18 A. Uh-huh.

19 Q. -- that Council Member Shade is sending to you,
20 she says, in effect, if I wait too long to visit
21 Greenstar, it "may be too late given the fact that
22 Greenstar would likely be responding to RFP." Do you
23 see that?

24 A. Yes.

25 Q. And do you understand that to be a concern over

1 A. Yes.

2 Q. Now, what do you recall about your meetings
3 with Ms. Strayhorn, if anything, regarding the potential
4 renegotiation of the Greenstar contract.

5 A. Well, that's a broad question, what do I
6 recall.

7 Q. Were your -- were your meetings regarding
8 potential renegotiation primarily with Ms. Strayhorn or
9 with someone else or do you recall?

10 A. No, she was engaged, I think, in a lobbyist
11 format, so I think I probably had I would guess two
12 meetings with Greenstar folks and then Ms. Strayhorn got
13 engaged at some point just for a lobby -- so I probably
14 had one meeting with her, maybe two, but it was other --
15 it was probably with the other group, too.

16 Q. And is it fair to say that Ms. Strayhorn's
17 general pitch to you was that the City was better off
18 renegotiating and extending Green -- Greenstar's
19 contract than they would be not doing so?

20 A. Say that again?

21 Q. Sure. Was Ms. Strayhorn's general pitch to you
22 that it was a good idea for the City to renegotiate and
23 extend Greenstar's short-term contract?

24 A. Yes. May I add something though? We -- we
25 approached Greenstar to renegotiate because that --

1 we -- we were -- it was pointed out quite frankly in the
2 media and other events that this wasn't a very good
3 contract with Greenstar, so we approached them with some
4 ideas about is there some way we can clarify a few
5 things because there was some ambiguities in the
6 contract; and so we would like to clarify some things
7 and we also didn't think that the price was very good at
8 that point and would they be willing to look at a --
9 look at a price reduction.

10 At that point I think they came back and
11 said yes, but only if we would extend a certain period.
12 I think their initial concept was three to five years,
13 and my initial response was there is no way we're doing
14 that; we're not going to extend any -- any long period
15 of time. All we were doing was a bridge contract to get
16 to the point where we would be able to operate a
17 public-private or a private MRF in the -- in the -- in
18 the -- in the region.

19 So I think she was probably, as Greenstar
20 would be, the longer the contract would have been, the
21 better for them, but we were unwilling to go even
22 consider some of the lengths that they initially
23 proposed. That wasn't the intent of us opening the --
24 the door of re -- of the renegotiation was for better
25 pricing, more clarity in the contract and -- and to be

1 able to have some flexibility to extend it until we had
2 a local MRF.

3 Q. Okay. And when you -- I think you used the
4 phrase a bridge contract or something --

5 A. Uh-huh.

6 Q. -- along that line? Is that fair?

7 A. Yes, sir.

8 Q. And what you're talking about there is ensuring
9 that the City had a reliable method or a reliable place
10 to send its single-stream recyclables until a contract
11 could be awarded with regard to a long-term
12 single-stream recycling contract; is that fair to say?

13 A. Yes, sir.

14 Q. Okay. And one of the -- is it fair to say that
15 one of the options that the City had at that point was
16 to take advantage of existing extensions of the existing
17 Greenstar contract without renegotiating, although that
18 would have made the -- the price terms the same? Is
19 that fair to say?

20 A. Yes.

21 Q. Did the City staff consider whether or not an
22 extension of the existing Greenstar contract under the
23 exten -- the contract's existing extension provisions
24 was favorable or not over an -- a renegotiation that
25 would change the rates but also might make the contract

1 discussion -- and I'm sorry, strike that.

2 Was it just one meeting that you recall?

3 A. I don't recall how many times we met.

4 Q. Fair enough. Might have been more than one --

5 A. Could have been.

6 Q. Okay. So tell me what you recall about your
7 discussions with Mr. Gregory in the time frame of before
8 the single-stream MRF RFP was issued about the idea of a
9 single-stream long-term MRF project.

10 A. All right. Mr. Gregory was proposing that our
11 existing contract, our 30-year contract with TDS, could
12 be modified and just add that operation to the existing
13 contract some way.

14 Q. And did you voice any reaction to that proposal
15 at that time?

16 A. Yeah, I thought that -- and I think I
17 communicated this to -- to Mr. Gregory at that time. I
18 thought that the best value for the citizens of Austin
19 would always be a competitive process where you have
20 several vendors understanding that -- that -- that
21 they're competing against each other and also open up
22 the creativity of the private sector on solutions that
23 we may not have even thought of. So I thought it would
24 be best for the citizens, again for our customers, to --
25 to go through a competitive process and I encouraged

1 them to participate in that.

2 Q. Do you recall having any opinion on --
3 regardless of its wisdom, on whether it was consistent
4 with the existing 30-year contract for the City and TDS
5 to have entered an amendment to that contract to add
6 long-term single-stream MRF issues?

7 A. Well, I don't recall if I asked the Law
8 Department for that analysis or not. I just don't
9 remember.

10 Q. Do you remember having any personal opinion as
11 to whether that would have been appropriate, rather --
12 whether or not it was good policy, whether it would have
13 been allowable.

14 A. Yeah. I don't remember on that exact. That --
15 that would have been, I think, a scope of services that
16 wasn't initially intended in that 30-year contract, so
17 it may have been a stretch; but we may have been able to
18 do it. I just don't recall the legal analysis if we --
19 if we looked at that or not.

20 Q. And do you --

21 A. So it was -- it was really -- let me --

22 Q. Sure.

23 A. -- just complete. If I looked at it, I don't
24 remember concluding one way or the other from the legal
25 office if it -- if it was viable or not. But we didn't

1 do a lot of work there because of the process. I always
2 thought it was a better -- better process to compete.

3 Q. And do you have any understanding today as --
4 as to whether or not the existing 30-year contract would
5 allow an amendment to encompass such services?

6 A. I don't know.

7 Q. Now, what reaction do you have Mr. Gregory
8 having to your discussions in this meeting or meetings
9 regarding your preference to go through the competitive
10 bidding process?

11 A. Well, I think it was a very friendly meeting.
12 I think he thought that we had that option in the
13 contract and should pursue and it could pursue it. He
14 was encouraging us to head down that path, but it -- I
15 don't think there was an animosity whatsoever, I thought
16 it was a very good meeting on let's talk about options
17 and we were both expressing our opinions at which way we
18 thought it was best for the community to pursue, so I
19 thought it ended very well.

20 Q. And I believe you said that you encouraged
21 Mr. Gregory to -- to bid on that RFP?

22 A. Absolutely.

23 Q. And what do you recall his response was, if
24 any?

25 A. I'm sure he was going to bid.

1 Q. Okay. Do you recall any discussion at that
2 meeting or any other meetings in that time frame with
3 Mr. Gregory or any TDS representative about the existing
4 short-term Greenstar contract?

5 A. I don't remember if we had any conversations on
6 that or not. I don't remember.

7 Q. Do you recall whether or not TDS was one of the
8 parties or entities that took the position that the
9 existing Greenstar contract was not a good deal for the
10 City?

11 A. Sure, yes.

12 Q. Fair to say that your perception was that TDS
13 was fairly vocal on that issue?

14 A. Yes.

15 Q. Did you believe that TDS did anything
16 improper -- and I'm talking about the time frame before
17 the issuance of the long-term recycling RFP. Okay? Up
18 to that point do you believe that TDS did anything
19 improper with regard to expressing its opinions about
20 the Greenstar contract?

21 A. No. There were -- there were -- there were a
22 lot of concerns that were raised during that period that
23 I think were absolutely valid concerns. Now, I do -- I
24 do think there was some confusion on -- remember this
25 was a short-term contract. The best value we could

1 get -- and we've seen this from our negotiations for --
2 for the situation we have now with our two vendors; the
3 longer the term you have, the better contract you're
4 going to get.

5 And there was some unfair comparisons I
6 believe with -- at that time with, well, look what some
7 other city got. Well, that's a 10 or 15-year contract.
8 It's like comparing a 30-year mortgage with a five-year
9 mortgage; it's just not -- it's just not the same. So
10 there were a lot of other concerns I think they were
11 absolutely valid on, on some of the ambiguities in the
12 contract so I think that was absolutely the right thing
13 for them to have done.

14 Q. And my question was whether you -- whether you
15 believed TDS did anything improper, and I think what
16 you -- what you indicated was you might have disagreed
17 with some of their criticisms, but is it fair to say
18 that up to the point the issuance of the long-term RFP,
19 you don't think that TDS did anything that was either
20 violative of any city ordinance or unethical with regard
21 to its criticism of the Greenstar contract; is that fair
22 to say?

23 A. I don't believe so.

24 Q. It is fair to say? I'm sorry, that --

25 A. That's fair to say.

1 A. Are you talking about the third paragraph or --

2 Q. Fourth paragraph.

3 A. It would be the fourth -- "We need to wait and
4 see what comes" -- that paragraph?

5 Q. Yes.

6 A. Yeah. Yes.

7 Q. And so is it fair to say that at this time,
8 again we're in January of 2010, the City is still
9 involved in negotiations with Greenstar about the
10 potential renegotiation and extension of its contract?

11 A. No, I believe that was still going on at the
12 time.

13 Q. It was still going on.

14 A. I believe.

15 Q. Yes.

16 A. I don't recall the time frames.

17 Q. And what, if any, involvement did you have in
18 those negotiations?

19 A. I met with Greenstar probably twice, maybe
20 three times, to express the need for the renegotiation,
21 that the desire for renegotiation. So I laid out -- I
22 didn't negotiate prices, I didn't -- I laid out the --
23 the idea of the renegotiation, that we thought that
24 there was some contract ambiguities that should be
25 cleaned up, that there was a lot of negative thoughts

1 the -- the potential extension of the Greenstar
2 contract, that the potential extension of the Greenstar
3 contract and its potential interaction with the
4 single-stream MRF RFP was a legitimate issue of public
5 concern and debate?

6 A. Certainly.

7 Q. Now, going back to the period when the City
8 decided to issue the long-term single-stream MRF RFP, my
9 understanding is that there was a team put together I
10 guess to consider what should go into the MRF RFP; is
11 that correct?

12 A. Yes.

13 Q. And I'm showing you what was marked as
14 Exhibit 1 to Mr. Lazarus's deposition which is a -- I
15 believe is a listing of that team. Could you confirm
16 that that's the case?

17 A. I don't recall everybody that was on the team,
18 but that looks like that was a list of them, yeah.

19 Q. And you recall being one of the sponsors on
20 that team.

21 A. Yes.

22 Q. And what was your understanding of what
23 "sponsor" denoted?

24 A. That it was a sponsor of the project so that
25 that's the sponsoring department, for example, or the

1 A. Yes.

2 Q. Do you recall, around this time, a meeting in
3 the bullpen where it was discussed whether the City
4 would respond to the MRF RFP?

5 A. Yes.

6 Q. What do you recall about that meeting with
7 regard to that particular topic?

8 A. Right. When -- when we were meeting,
9 developing the RFP, at some point we discussed
10 whether -- how would we compare these MRFs not only
11 against each other, which an RFP does against the
12 criteria, but against just a baseline. How would we
13 know if all the MRF proposals for example, were
14 extremely expensive? Compared to each other they were
15 very close, but extremely expensive in some way or
16 the -- the community benefits or all the criteria we put
17 together.

18 And so at some point we discussed wouldn't
19 it be helpful to have a baseline of a internal MRF so we
20 could just compare all those private proposals,
21 private-public partnerships to some baseline to see
22 how -- how valuable they were to the City.

23 Q. And do you recall who -- who initiated that
24 idea?

25 A. I think it was probably me.

1 Q. And what -- do you recall any dissenting views
2 as to that concept?

3 A. No, everybody thought that would be a great
4 baseline concept that we could have that -- that data to
5 compare these to.

6 Q. Was there any discussion as to whether a City
7 response also could function as an alternative to the --
8 any private or public-private partnership proposals if
9 none of them were found acceptable?

10 A. That was never the intent.

11 Q. Was it discussed in that --

12 A. I don't --

13 Q. -- meeting in the bullpen?

14 A. I don't recall. If it was, I would have made
15 that clear that it wasn't the intent, but I don't recall
16 if it was discussed.

17 Q. Was it discussed as to whether any of the work
18 that R.W. Beck had done in the previous couple of years
19 could function as a baseline, an adequate baseline?

20 A. I think the idea after we launched, Mr. Lazarus
21 to put together this baseline that they could use any
22 data that they wanted to and that -- and that was data
23 that could be available to them. But I don't recall if
24 there was -- it certainly wasn't -- wouldn't be a
25 stand-alone option to consider because their data was --

1 sure I was involved with some communications there.

2 Q. Did you have any discussions with Mr. Johnson
3 that involved talking about any potential differences or
4 similarities between Greenstar's communication that
5 resulted in the disqualification and TDS's communication
6 that resulted in a disqualification?

7 MS. CARTER: I'll object. To the extent
8 that you discussed legal advice received from the Law
9 Department with Mr. Johnson, I'll instruct you not to
10 disclose that.

11 Q. (By Mr. Hemphill) Did you have any such
12 discussions with Mr. Johnson that didn't involve --

13 A. No. It was based on his advice from counsel
14 and my advice from counsel, so it would have been
15 exchanged in that way.

16 I also was obviously informed about the
17 process, about how this was going to be processed
18 through, because I'm -- I don't do those all the time,
19 so I needed to be aware of what the -- what the process
20 was on how this -- how the City processes these
21 complaints, or alleged violations.

22 Q. It would be fair to say that as a matter of
23 policy -- not as a matter of law but as a matter of
24 policy you would agree that the anti-lobbying ordinance
25 should have been applied equally to Greenstar and TDS,

1 correct?

2 A. We apply our policies equally in every case.

3 Q. And so that -- that's a yes, you would --

4 A. Sure --

5 Q. -- have expected them --

6 A. -- yes.

7 Q. -- to be applied equally to both parties,

8 correct?

9 A. Yes.

10 Q. And is it fair to say that as a matter of
11 policy you would expect and desire the outcomes of the
12 disqualification process to be -- for both TDS and
13 Greenstar to be consistent?

14 A. Well --

15 Q. I don't mean the same, I mean the application
16 of the anti-lobbying ordinance to be consistent.

17 A. Application, yes.

18 Q. In other words, the same standards used for one
19 as for the other.

20 A. Yes.

21 Q. Now, I'm going back to Exhibit 18, which is the
22 packet from Mr. Rivers --

23 A. Uh-huh.

24 Q. -- to Mr. Gregory. Do you recall whether or
25 not you had any input as to the drafting of the cover

1 long time ago. I remember there were three options. I
2 just don't recall the differences between those three
3 and what we ended up recommending. But again, I think
4 the March -- the March time frame is -- I think that was
5 what we recommended.

6 Q. Okay. But during the negotiations between the
7 City and Greenstar, Greenstar would have logically
8 brought up points such as those in Exhibit 31 that it
9 has strong compliance -- contract compliance history, it
10 had a transparent relationship, that there were
11 increasing positive benefits to the City if that
12 contract extension for the short-term contract were
13 entered into, correct?

14 A. Well, if this was from a presentation, I think
15 the point that we were probably trying to make is with a
16 change in this contract -- remember, as we discussed
17 very early today, there was some contract ambiguities
18 and some things that we thought we could -- we would be
19 better served as a city to clarify those. Some of those
20 are probably some of these points we were making. So
21 not necessarily the existing contract but the extension
22 would have solved some of these things.

23 Q. Fair enough, and is it fair to say that -- that
24 it stands to reason that Greenstar during the
25 negotiations was also making those points, that in

1 essence they -- they were trying to argue that they were
2 a good vendor to continue providing these services to
3 the City for the short-term?

4 A. Sure.

5 Q. And promoting themselves as a -- as a -- as a
6 good vendor and a positive business relationship with
7 the City.

8 A. Yeah, but that wasn't -- again, that was -- I
9 think this -- as you alluded to, if it was in my
10 presentation, that would have been me making these
11 points.

12 Q. Sure, I understand. Apart from Exhibit 31
13 though, those were the kind of things that Greenstar was
14 saying in the negotiations; is that fair enough?

15 A. Well, again, I wasn't in the negotiations, all
16 I was in was the -- the first part of those meetings to
17 say I need the new prices, and hopefully they are a lot
18 better than ones we have now, we have to clear up some
19 of these contract ambiguities, you guys go back to work
20 and figure out what you can do for us.

21 (Deposition Exhibit No. 32 marked)

22 Q. (By Mr. Hemphill) Exhibit 32 to your
23 deposition is an In Fact Daily article dated March 16th,
24 2010, and it looks like Mr. Gedert sent a copy of that
25 to you and Mr. Lazarus, correct?

1 Q. (By Mr. Hemphill) Exhibit 39 to your
2 deposition is an e-mail from Ms. Williamson to you dated
3 July 13th, 2009. And it -- excuse me for a minute. I'm
4 sorry. Okay.

5 I'm sorry, in the second paragraph of
6 Exhibit 39 Ms. Williamson makes a reference to "It
7 appears there is NO minimum tonnage unless the COA
8 chooses the 'hedging' option or unless we build the MRF
9 BEFORE the two year contract period ends." Do you see
10 that?

11 A. Uh-huh.

12 Q. I'm sorry, yes?

13 A. Yes.

14 Q. And do you recall whether you took "unless we
15 build the MRF" as a -- as a statement of interest on
16 Ms. Williamson's part as of this date for the City
17 building its own MRF?

18 A. I don't believe so.

19 Q. Earlier we had talked about a candidate for a
20 position at the City of Austin with the first name of
21 Ellen. Was that Ellen Smyth from El Paso?

22 A. Yeah, from El Paso. I don't recall her last
23 name. I'll take your word for it.

24 Q. Fair enough. Now, with regard to the City
25 baseline RFP response, did you become aware at some

1 point that some of the -- at least some, if not all of
2 the evaluators of the RFP responses assigned scores to
3 the City's response?

4 A. I think that's their process, yes.

5 Q. Okay. Do you -- was it consistent with your
6 understanding that the -- the City response would be
7 scored?

8 A. No.

9 Q. Okay. So when -- when you discovered that
10 it -- that the City response had been scored at least by
11 some -- some folks, did you do anything about that or
12 say anything to anyone about that?

13 A. I don't recall.

14 Q. Do you know if there was anything that would
15 have prohibited the city council from saying, you know,
16 we look this idea of the City building its own MRF, we
17 want to pursue that?

18 A. Say it again.

19 Q. Sure. Was there anything that would have
20 prevented the City -- the city council from looking at
21 the City's MRF response and saying, "We like this
22 proposal, we want to pursue the City building a MRF"?

23 A. Boy, I don't believe so. City council couldn't
24 give us policy and direction on whatever they want to
25 do, so --

ROBERT GOODE - April 17, 2013

1 UNITED STATES DISTRICT COURT
 2 WESTERN DISTRICT OF TEXAS
 3 AUSTIN DIVISION

4 TEXAS DISPOSAL SYSTEMS, *
 5 INC. and TEXAS DISPOSAL *
 6 SYSTEMS LANDFILL, INC., *
 7 Plaintiffs, *

8 VS. *

CASE NO. A-11-CV-1070-LY

9 CITY OF AUSTIN, TEXAS, and *
 10 BYRON JOHNSON, in his *
 11 official capacity, *
 12 Defendants. *

13 *****

14 REPORTER'S CERTIFICATION
 15 ORAL AND VIDEOTAPED DEPOSITION OF
 16 ROBERT GOODE
 17 APRIL 17, 2013
 18 VOLUME 1

19 *****

20 I, KIMBERLY G. KEEPER, Certified Shorthand
 21 Reporter in and for the State of Texas, hereby certify
 22 to the following:

23 That the witness, ROBERT GOODE, was duly
 24 sworn by the officer and that the transcript of the oral
 25 deposition is a true record of the testimony given by
 the witness;

I further certify that pursuant to FRCP
 Rule 30(f)(1) that the signature of the deponent:

_____ was requested by the deponent or a
 party before the completion of the deposition and is to
 be returned within 30 days from date of receipt of the

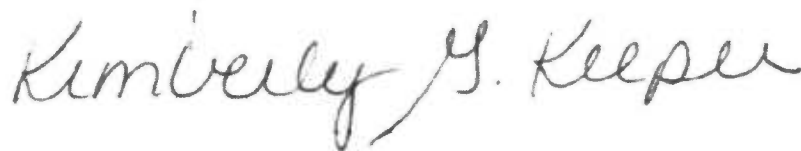
ROBERT GOODE - April 17, 2013

1 transcript. If returned, the attached Changes and
2 Signature Page contains any changes and the reasons
3 therefor;

4 _____ was not requested by the deponent
5 or a party before the completion of the deposition.

6 I further certify that I am neither
7 counsel for, related to, nor employed by any of the
8 parties or attorneys to the action in which this
9 proceeding was taken. Further, I am not a relative or
10 employee of any attorney or record in this cause, nor am
11 I financially or otherwise interested in the outcome of
12 the action.

13
14 Subscribed and sworn to on this the 29th
15 day of April, 2013.

16
17 
18

19 KIMBERLY G. KEEPER, TEXAS CSR No. 2162
Expiration Date: 12/31/13
20 Firm Registration No. 556
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21 512-732-1805

HOWARD LAZARUS - April 09, 2013

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS DISPOSAL SYSTEMS,
INC. and TEXAS DISPOSAL
SYSTEMS LANDFILL, INC.,
Plaintiffs,

VS.

CITY OF AUSTIN, TEXAS, and
BYRON JOHNSON, in his
official capacity,
Defendants.

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CASE NO. A-11-CV-1070-LY

ORAL DEPOSITION OF
HOWARD LAZARUS
APRIL 9, 2013
VOLUME 1

ORAL DEPOSITION OF HOWARD LAZARUS,
produced as a witness at the instance of the Plaintiffs
and duly sworn, was taken in the above-styled and
numbered cause on the 9th day of April, 2013, from
10:38 a.m. to 2:32 p.m., before KIMBERLY G. KEEPER,
Certified Shorthand Reporter in and for the State of
Texas, reported by machine shorthand, at Austin City
Hall, 301 West 2nd Street, Austin, Texas 78701 pursuant
to the Federal Rules of Civil Procedure and that the
deposition shall be read and signed under penalties of
perjury.

HOWARD LAZARUS - April 09, 2013

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ALSO PRESENT:

Mr. Bob Gregory
Mr. Adam Gregory

HOWARD LAZARUS - April 09, 2013

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HOWARD LAZARUS - April 09, 2013

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1 (Per agreement of counsel, the reading of
2 the federal introduction was waived)

3 HOWARD LAZARUS,
4 having been first duly sworn, testified as follows:

5 EXAMINATION

6 QUESTIONS BY MR. HEMPHILL:

7 Q. Could you state your name for the record,
8 please, sir.

9 A. My name is Howard Lazarus.

10 Q. And what is your current title with the City of
11 Austin?

12 A. I'm the director of the Public Works
13 Department.

14 Q. And you understand we're here to take your
15 deposition in a lawsuit between Texas Disposal Systems
16 and Texas Disposal Systems Landfill against the City of
17 Austin and Byron Johnson in his official capacity as
18 purchasing officer, correct?

19 A. Yes.

20 Q. Have you given a deposition before?

21 A. Yes.

22 Q. About how many times?

23 A. Once.

24 Q. How long ago was that?

25 A. It was more than 10 years.

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1 and also might have been involved in the evaluation of
2 the RFP.

3 A. Typically the project manager is involved in
4 that -- or has some role in the evaluation. They may or
5 not be someone who scores it, but they have some role.

6 Q. Was Public Works, anyone from Public Works to
7 your knowledge involved in negotiations with Greenstar
8 regarding the potential extension of the short-term
9 contract?

10 A. Not that I recall.

11 Q. You were not involved with that.

12 A. I was not.

13 (Deposition Exhibit No. 10 marked)

14 Q. (By Mr. Hemphill) I have marked as Exhibit 10
15 to your deposition excerpts from what I believe is
16 the -- the baseline document that you were talking
17 about --

18 A. Correct.

19 Q. -- that does not purport to be the entire
20 document. I want to make that clear for the record,
21 that it's a very lengthy document; isn't that correct?

22 A. It's a large volume.

23 Q. Yes. And so I have -- I have a -- I have some
24 excerpts that I just want to ask you about.

25 The first page -- well, the first two

HOWARD LAZARUS - April 09, 2013

1 of the things this chart indicates is if the City
2 determined to build the MRF internally that the project
3 owner would be Solid Waste Services, not Public Works?

4 A. Correct. I think it's -- remember, it's
5 important to note that one of the require -- one of the
6 evaluation criteria in the RFP was the key personnel and
7 their relevant background. So anyone who develops a
8 baseline document or proposal is going to put in
9 individuals in that organization that would earn you
10 the -- the best score, so we put people in our proposal
11 on our project team who would be viewed at as being --
12 would be the best in their field so that we could have a
13 comparison as to background qualifications.

14 Q. Now, on the first page of Exhibit 10, in your
15 letter at the end of the first paragraph it says, "Our
16 proposal is submitted with the intention of meeting the
17 following objectives," and the first bullet point
18 says -- no. I'm sorry, right here, (indicating).

19 A. Okay, right.

20 Q. The first bullet point as you discuss says
21 providing a baseline --

22 A. Uh-huh.

23 Q. -- for the evaluation of the other submissions,
24 correct?

25 A. Correct.

HOWARD LAZARUS - April 09, 2013

1 Q. And then the second bullet points says,
2 "Provide an acceptable public alternative in the event
3 private sector offers did not meet the goals of the
4 procurement," correct?

5 A. Correct.

6 Q. Now, when Mr. Goode back in the fall of 2009
7 directed you to have Public Works provide a baseline
8 document, did he -- did he say also that it should
9 function as an acceptable public alternative in the
10 event private sector offers didn't meet the goals of the
11 procurement?

12 A. I don't -- I don't believe that he did, but I
13 couldn't say that with a hundred percent certainty, but
14 I don't think so.

15 Q. And at what point did -- did the -- the
16 response submitted by Public Works was it determined
17 that it would also provide an acceptable public
18 alternative in the event the private sector offers
19 didn't meet the goals?

20 A. We added that in as we developed the proposal
21 as a goal, because for one thing, it provided a certain
22 sense of realism to what we were doing, so we put our
23 best foot forward. And the second is you just never
24 know what's going to come out of a procurement process.
25 And I think as you've already established, there was a

HOWARD LAZARUS - April 09, 2013

1 A. I do.

2 Q. And is this -- is this your language or was
3 this a collaborative effort or is this someone else's
4 language --

5 A. This is --

6 Q. -- or do you know?

7 A. This is our language.

8 Q. And by "our" you mean Public Works or the team?

9 A. It's the team that put this document together.

10 Q. Okay. And what is meant by "allow the City to
11 take control over the flow of recyclables"?

12 A. I think you have to read it in context of the
13 whole paragraph --

14 Q. Okay.

15 A. -- and the intent of that paragraph is that by
16 having the City involved directly, because it's a
17 non-profit entity, it could maximize a greater -- a
18 greater return.

19 Q. And that's -- that's also the reference to "the
20 City can't eliminate the 'middle man'". That's the same
21 point to, where it says that at the bottom of that page;
22 is that correct?

23 A. Correct. And again -- correct.

24 Q. And when -- again, at the bottom of
25 Roman III-31 there is the phrase "regional solution" in

HOWARD LAZARUS - April 09, 2013

1 Q. (By Mr. Hemphill) I'm handing you what's
2 marked as Exhibit 11 to your deposition. And this is a
3 two-page document front and back. And can you confirm
4 that it is indeed your signature on the -- on the
5 reverse?

6 A. It is.

7 Q. And this is a document that's titled City of
8 Austin Non-Collusion, Non-Conflict of Interest, and
9 Anti-Lobbying Affidavit that you executed on behalf of
10 the City of Austin Public Works Department; is that
11 correct?

12 A. Correct.

13 Q. And am I correct in understanding that
14 execution of this affidavit was a requirement for
15 responses to the single-stream MRF RFP?

16 A. Correct.

17 Q. And would this have been submitted at the --
18 simultaneously with the -- the baseline proposal
19 document?

20 A. Correct.

21 Q. Now, at some point obviously before this was
22 submitted you became aware of the anti-lobbying
23 ordinance, correct?

24 A. Correct.

25 Q. And at what point during the process of putting

HOWARD LAZARUS - April 09, 2013

1 point, do you want to just break now and go over there?

2 MS. CARTER: Sure.

3 MR. HEMPHILL: And if want to go and look
4 for those two other documents.

5 MS. CARTER: Okay.

6 MR. HEMPHILL: We can go off the record.

7 (Break taken from 1:51 p.m. to 2:00 p.m.)

8 Q. (By Mr. Hemphill) Mr. Lazarus, before we went
9 off the record, we were talking about some of the
10 experiences that you had with TDS through the
11 negotiation process and some of the opinions that you
12 had formed with TDS. I want to make sure I'm clear on
13 this. Those -- were those opinions that you -- that you
14 formed after the negotiating process or were those
15 opinions that you had beforehand and that you had
16 conveyed to city officials before the council rejected
17 the RFP responses?

18 A. I had never met anyone from TDS before that
19 point, so I had no basis to form an opinion. I think --
20 so those are opinions formed during the contact we had
21 during negotiations.

22 Q. Has Public Works -- other than in this
23 situation, under -- under your tenure has Public Works
24 done a similar baseline RFP response document since
25 you've been at the City of Austin other than this --

HOWARD LAZARUS - April 09, 2013

1 this situation?

2 A. This is the only time.

3 Q. Is this the only time that you had executed a
4 no-contact/anti-lobbying affidavit?

5 A. This is the only time.

6 Q. Has Public Works provided information to be
7 used as baseline or comparative information in other RFP
8 situations?

9 A. I think it's reasonable to expect that we
10 provided cost comparisons and reviews of technical
11 abilities. I mean, that's -- that's what we do as a
12 business.

13 Q. Sure. And do you have any knowledge as to why
14 in this particular circumstance your Public Works input
15 took the form of the RFP response baseline document as
16 opposed to provision of information to be used as a
17 baseline outside of that type of formal response?

18 A. I believe it's because the City was doing
19 something that was different from its normal course of
20 business and that in the conversation that we mentioned
21 before with Mr. Goode, we wanted to ensure that we had a
22 sound basis for comparison of offers that we were going
23 to receive. This was done under a -- some compelling
24 time constraints so that it was important that we had a
25 good, strong basis for comparison.

HOWARD LAZARUS - April 09, 2013

1 Remember also this is a -- this is an RFP
2 process. Most of the vast majority of what we do is
3 fixed price, and on fixed price bids, we provide, either
4 through the architect or in-house, a -- an in-house
5 estimate; but on a proposal where you're evaluating on a
6 best value basis, you just don't do it based on price.

7 Q. Did you have any particular budget for the
8 baseline RFP response?

9 A. We had a \$100,000 budget.

10 Q. Was -- and I'm sorry, I might have asked --
11 asked you this previously but I didn't write it down,
12 who were the -- was the person or people who brought
13 solid waste and/or recycling expertise to the team that
14 put together the baseline response document?

15 A. There were some individuals who we had
16 mentioned before from Solid Waste Services who were a
17 part of that team.

18 Q. And did that include Mr. Maldonado?

19 A. It did.

20 Q. And what expertise in particular did he bring
21 to the -- to the process of putting this document
22 together?

23 A. He provided the expertise on the operational
24 aspects of the -- of the propose -- of the document and
25 he also provided input on the types of equipment.

HOWARD LAZARUS - April 09, 2013

1 A. I don't know what you're reading from, so --

2 Q. The -- the baseline proposal.

3 A. If that's what's in there. I don't -- I don't
4 have -- I don't the advantage of seeing what you're
5 looking at.

6 Q. I'm sorry, I don't have a copy -- another copy
7 of that page. Is that consistent with your recollection
8 or you would just defer to the document?

9 A. I'll defer to the document.

10 Q. Fair enough. On your -- on the team's hundred
11 thousand-dollar budget, did that -- did you come in
12 under, at or over?

13 A. It was pretty close.

14 Q. How close?

15 A. I don't remember.

16 Q. Do you recall if it was over or under?

17 A. It was probably over.

18 (Deposition Exhibit No. 26 marked)

19 Q. (By Mr. Hemphill) Exhibit 26 is a March 3rd,
20 2011 memo from Mr. Gregory to you, copy the negotiation
21 team for the long-term contract negotiations. That's
22 dated March 3rd, 2011, and I have only one small thing
23 to ask you about this. You see on the first page it
24 talks about Article II, Most Favored Nation?

25 A. Yes.



February 5, 2010

Purchasing Officer
City of Austin
Attn: Roy Rivers
Municipal Building
124 W 8th Street
Room 310
Austin, TX 78701

Dear Mr. Rivers:

The Public Works Department (PWD) is pleased to submit its proposal to provide Recycling Services to the City under Requisition No. 09091400778. Our proposal is submitted with the intention of meeting the following objectives:

- Provide a baseline against which private sector offers could be evaluated.
- Provide an acceptable public alternative in the event private sector offers did not meet the goals of the procurement.

PWD's proposal substantially complies with the requirements established in the Request for Proposals, and is complete with the following exceptions:

- Attachment A – Pricing Schedule Instructions: The PWD provides an internal City option for design, construction, financing, and operation and therefore all proceeds accrue to the City.
- Attachment B – Transportation Cost Form: Under PWD's proposal, the City will continue to provide collection and transportation to the new Material Recovery Facility.



City of Austin Requisition No. 09091400778



2/4/2010

TDS v. COA
A-11-CV-1070-LY
COA 002095



- Attachment D – Safety Program Information: PWD and Solid Waste Services (SWS) operate under the City's safety program with City oversight of their operations. The City's Risk Manager already maintains the applicable requested information.
- Reference Sheet: PWD is a public entity and does not have external references.
- Bonding is not required as PWD is a City entity.

The Statement of Non-Collusion, Non-Conflict of Interest, and Anti-Lobbying is provided at Tab 7 per the RFP instructions. All other requested forms are provided following this cover letter.

During the preparation of this proposal, PWD organizationally separated those individuals working on the offer from the City's proposal team. PWD had access only to the same information provided to the private sector providers.

Please do not hesitate to contact me directly if you have any questions, or if you need additional information.

Howard S. Lazarus, PE
Director, Public Works Department
City of Austin





EXECUTIVE SUMMARY

Background

The City of Austin (the "City") has determined it has the need to replace its existing dual-stream material recovery facility (MRF) with a single-stream MRF. The current facility, which was operational from 1998 through September 2008, is now primarily a transfer station for the movement of recyclable materials from the City's collection equipment to contracted transport vehicles that haul the materials to a facility in San Antonio. Due to the short timeframe before the existing contract is due for renewal/extension, SWS is pursuing a "fast track" approach to bringing a new MRF on-line. A Request for Proposal (RFP) was released on November 9th, 2009 to the private sector. The RFP is performance based, and is open to a variety of technologies and business structures.

Purpose and Intent

The Public Works Department (PWD) of the City of Austin (the "City") has developed and is submitting a proposal to design and construct a single-stream MRF. Upon completion, the City's Solid Waste Services Department (SWS) will operate and maintain the facility, with the option of outsourcing or privatizing the MRF at a later date. PWD has been requested to submit the proposal to accomplish the following two purposes:

- 1) Provide a baseline against which submittals from private sector entities can be evaluated.





- 2) Provide an approach to the project that could be used in the event that a satisfactory private sector offer is not received.

PWD's proposal is compliant with all applicable requirements of the Request for Proposal (RFP), and was prepared separately from the procurement effort. Personnel working on the proposal were organizationally separated from the procurement team, and PWD had no preferential access to personnel or information.

Project Management Approach

PWD's approach to the project implements an internal "design-build" arrangement in which PWD staff serve as the design-builder. Our intent is to break the project down into small, discrete packages that will be competitively bid as each is completed rather than wait to bid a complete facility design. While this approach imposes some degree of construction risk upon the City, it is the only path possible that will enable the schedule constraints to be met. The City's risk is mitigated through the expertise of PWD and SWS personnel. Schedule risk is further addressed through the experience PWD personnel have in permitting and compliance issues.

Technical Approach

PWD is proposing to construct the new MRF on the FM812 Landfill site. This property is City-owned, negating any purchasing costs and construction of the MRF is consistent with the current land use. The site offers reasonable access and is centrally located to serve the region. Development of the site will require upgrades of roadways and utilities systems.





Financial Approach

Under the PWD approach, the MRF project will be financed using City funds. Revenue bonds will be issued to cover the \$45.7 million initial cost, which will be secured against the fees assessed to recycling customers. Revenue from the sale of recyclable materials will be used to offset these fees, to pay for MRF operations, and to potentially provide a transfer to the City's General Fund. Revenues are projected to increase in the future due to population growth and the marketing of the facility to other users while debt service and operating costs remain relatively flat (adjusted only for inflation). Under this scenario, the City removes the "middle-man" in the process, however it also absorbs the risk of recycling demand and pricing inherent in the marketplace. If SWS seeks to privatize the facility in the future, the balance of the remaining bond debt required for the initial project cost could be paid off from receipts of the sale.

Achievement of City Goals

PWD's proposal supports the achievement of the City's goals of Carbon Neutrality by 2020 and Zero Waste by 2040. The presence of a local MRF eliminates the need to transport materials out of the region. The FM812 campus, combined with composting facilities at the City's Hornsby Bend Center, provide for the integration of other waste streams (landscaping debris, food scraps, and construction/demolition materials) into the recycling flow in the future.





PART I - BUSINESS ORGANIZATION

Business Name: Public Works Department
Point of Contact: Howard S. Lazarus, PE, Director
Parent Organization: City of Austin
Address: 505 Barton Springs Road, Suite 1300
Austin, TX 78746
Telephone: 512.974.7190
Fax: 512.974.7084
E-Mail: howard.lazarus@ci.austin.tx.us
Type of Organization: Municipal Government Corporation
State of Incorporation: Texas





staff was responsible for the sorting of all recyclables collected by City crews as well as recyclables from several private haulers. Dual-Stream MRF processed approximately 28,000 tons of City-owned material when it began operating in 1999. At its close at the end of September 2008 the Dual-Stream MRF was processing approximately 40,000 tons per year of City-owned and private hauler volume.

SWS staff was also responsible for managing the marketing and shipping of all commodities processed. SWS staff developed fee schedules used for billing and revenue sharing with private haulers. SWS also implemented internal record keeping and reporting procedures, used in conjunction with the fee schedules and dedicated solid waste management software, in the day to day operation of the MRF. These systems are still being used today for the management and accounting procedures at the Recycling Center and can be adapted to be used at the proposed Single-Stream Material Recovery Facility.

The proposed management and maintenance staff for the City-owned and operated single-stream MRF has ninety (90) years of combined operational supervision, management and marketing experience. SWS is confident that, given the opportunity, its designated internal staff has the ability, capability and experience to properly manage a single-stream MRF.

Development and Growth of Local Markets

The development of a MRF in the Austin area will allow the City to take control over the flow of recyclables and will provide a “regional solution” for these materials. By operating its own facility, the City can eliminate the “middle man”





that otherwise would be sharing profits from the sale of commodities when processing is contracted out. The reduction in cost and increase in revenue will allow the City to be more responsive to the addition of new sources and materials to the recyclable stream. The means and methods to be used in marketing recyclable materials are provided in **Section 3.2.5** above.

Waste Reduction, Reuse, and Recycling Strategies at the MRF

The City of Austin has made sustainability, a City-wide mandate for all public development projects. Achieving a “Silver” rating for the campus is a primary goal for the MRF project under the US Green Building Council’s LEED program. The program evaluates six areas of sustainability (water efficiency, energy and atmosphere, materials and resources, indoor environmental quality, and innovation and design process) that address the strategies of waste reduction, reuse, and recycling.

Experience with Composting Facilities

The City of Austin is a recognized leader in composting operations, and this experience will be extended to the MRF project. PWD has worked extensively with the Austin Water Utility (AWU) to design and construct improvements to the Hornsby Bend Biosolids Management Plant. Jim Vickery, the proposed Lead Inspector, is currently responsible for improvements to the composting facilities at Hornsby Bend, and will bring this experience to the MRF project. Other PWD personnel involved in the project will also be available to assist on design and





construction of the MRF. Through AWU, SWS will be able to access expertise on the operation of industrial scale composting facilities.

Future Plant Expansion to Incorporate Non-Traditional Materials

The FM812 landfill site has sufficient size and topography to accommodate expansion for the incorporation of non-traditional materials, including but not limited to landscaping debris, food scraps, and construction and demolition debris, as discussed below.

Landscaping Debris

SWS currently collects yard trimmings and large brush and delivers them to the Hornsby Bend facility, where they are integrated into the composting process. This plan contemplates continuing this process.

Food Scraps

While the US lags behind other countries in the collection of food wastes, those communities that offer this service generally rely on source separation. For example, Alameda County, CA collects food wastes with yard trimmings in a separate container from other recyclable materials. Should the City of Austin look to incorporate separation and collection of food wastes in the future, we anticipate a similar system would be put in place and the composting of these materials would be conducted at an expanded Hornsby Bend facility or another site. Processing of food wastes would require construction of additional facilities on site, with extensive attention being paid to vector and odor control.





Demolition/Construction Debris

The handling of construction and demolition debris would require source separation of concrete, brick, steel, lumber, and other materials. The FM812 site has sufficient space to handle some quantities of these materials, as discussed below:

Concrete: The City currently allows the use of crushed concrete as road base, and could accept deliveries of concrete debris (with the reinforcing steel removed). Facilities would be required to crush, and stockpile this material for sale, with special attention to dust control.

Lumber: Wood debris could be accepted and added to the composting flow once the material is reduced to a sufficient size. Industrial scale wood chipping equipment would be required, and facilities would have to be designed to address dust and noise concerns.

Brick: The market for recycling of brick includes separation of materials for reuse as a building material without further processing, processing of brick materials to make new bricks, and the use of brick chips for landscaping purposes. PWD anticipates that if the MRF were expanded to accept brick, operations would involve separation based upon buyer requirements.

3.3.2 Transportation/Equipment

Transportation of Materials

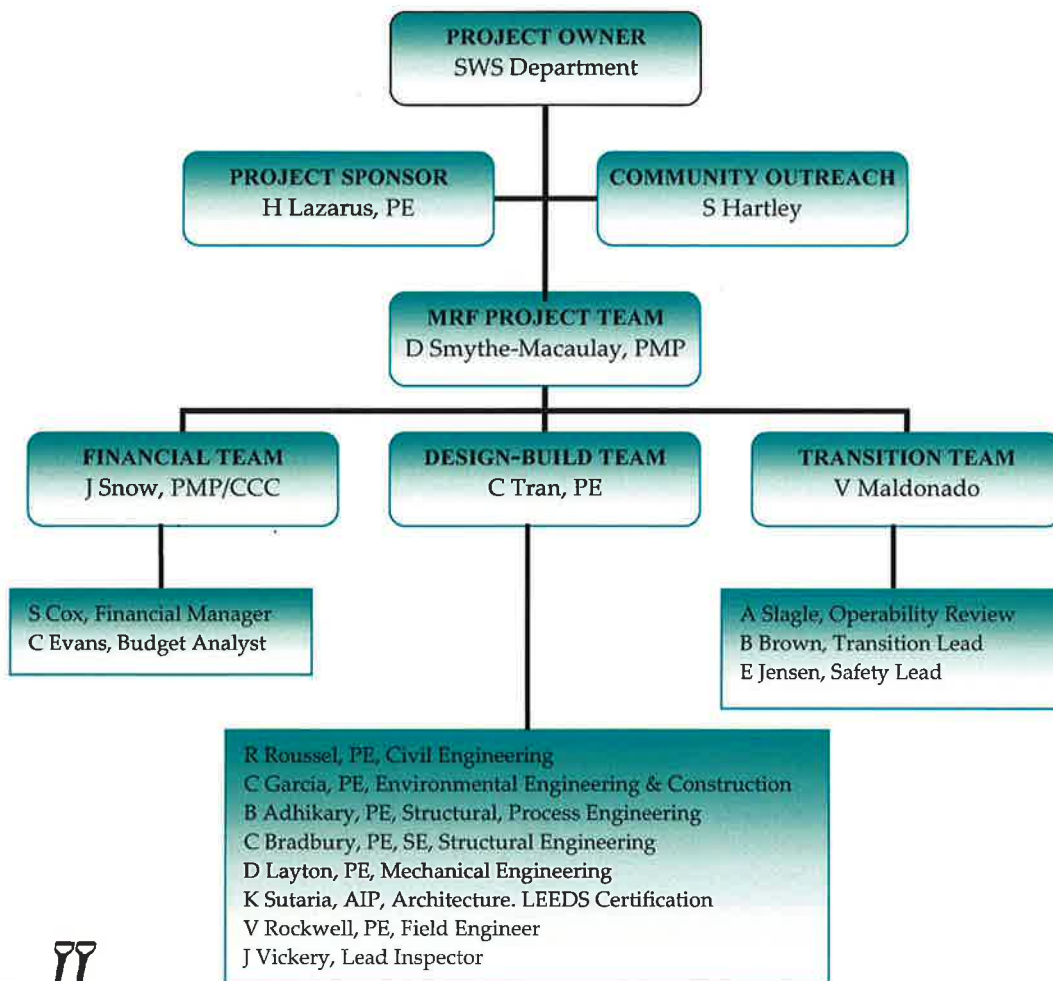
The selection of the FM812 site provides a centrally located option that can help reduce transportation costs and impacts. However, improvements to the access routes and entrance road will be required to reduce congestion and enhance





The project team includes a Financial Team, a Design-Build Team, and a Transition/Operability Team each reporting to the Project Manager. SWS personnel will be integrated into the team to provide operational review and transition input. Resumes and qualifications for key personnel are provided in Part VI of the proposal.

FIGURE 4.1 – MRF PROJECT ORGANIZATION





The roles, responsibilities, and reporting relationships for each team component are further detailed in Figure 4.2 below:

Figure 4.2 – Roles, Responsibilities, and Reporting Relationships		
Role	Responsibilities	Reporting Relationship
Project Owner	Provide project scope, requirements, and funding	Reports to Assistant City Manager
Project Sponsor	Ensure proper resources are provided and monitor progress. Provide interagency coordination as required.	Reports to Assistant City Manager and maintains relationship with Project Owner.
Community Outreach	Coordinates and provides outreach, marketing, and public information support.	Reports to Project Sponsor and collaborates with the Project Manager and Project Owner's outreach staff.
Project Manager	Responsible for overall progress and completion of project. Coordinates cost, schedule, quality, and transition.	Reports to Project Owner.
Financial Team	Provides cost-schedule reporting and procurement support.	Reports to Project Manager
Design-Build Team	Responsible for design, construction management, procurement of services, inspection, safety, and contract compliance.	Reports to Project Manager
Transition/Operability Team	Reviews plans for operability. Plans, staffs, resources, and oversees transition to new MRF.	Reports to Project Manager



CITY OF AUSTIN
NON-COLLUSION,
NON-CONFLICT OF INTEREST, AND ANTI-LOBBYING AFFIDAVIT
SOLICITATION NO. RDR0005

FOR
Recycling Services

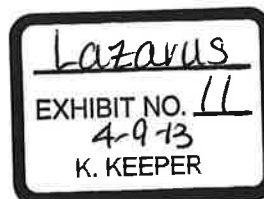
State of Texas

County of Travis

The undersigned "Affiant" is a duly authorized representative of the Offeror for the purpose of making this Affidavit, and, after being first duly sworn, has deposed and stated and hereby deposes and states, to the best of his or her personal knowledge and belief as follows:

The term "Offeror", as used herein, includes the individual or business entity submitting the Offer and for the purpose of this Affidavit includes the directors, officers, partners, managers, members, principals, owners, agents, representatives, employees, other parties in interest of the Offeror, and anyone or any entity acting for or on behalf of the Offeror, including a subcontractor in connection with this Offer.

1. **Anti-Collusion Statement.** The Offeror has not in any way directly or indirectly:
 - a. colluded, conspired, or agreed with any other person, firm, corporation, Offeror or potential Offeror to the amount of this Offer or the terms or conditions of this Offer.
 - b. paid or agreed to pay any other person, firm, corporation Offeror or potential Offeror any money or anything of value in return for assistance in procuring or attempting to procure a contract or in return for establishing the prices in the attached Offer or the Offer of any other Offeror.
2. **Preparation of Solicitation and Contract Documents.** The Offeror has not received any compensation or a promise of compensation for participating in the preparation or development of the underlying Solicitation or Contract documents. In addition, the Offeror has not otherwise participated in the preparation or development of the underlying Solicitation or Contract documents, except to the extent of any comments or questions and responses in the solicitation process, which are available to all Offerors, so as to have an unfair advantage over other Offerors, provided that the Offeror may have provided relevant product or process information to a consultant in the normal course of its business.
3. **Participation in Decision Making Process.** The Offeror has not participated in the evaluation of Offers or other decision making process for this Solicitation, and, if Offeror is awarded a Contract hereunder, no individual, agent, representative, consultant, subcontractor, or subconsultant associated with Offeror, who may have been involved in the evaluation or other decision making process for this Solicitation, will have any direct or indirect financial interest in the Contract, provided that the Offeror may have provided relevant product or process information to a consultant in the normal course of its business.
4. **Present Knowledge.** Offeror is not presently aware of any potential or actual conflicts of interest regarding this Solicitation, which either enabled Offeror to obtain an advantage over other Offerors or would prevent Offeror from advancing the best interests of the City in the course of the performance of the Contract.
5. **City Code.** As provided in Sections 2-7-61 through 2-7-65 of the City Code, no individual with a substantial interest in Offeror is a City official or employee or is related to any City official or employee within the first or second degree of consanguinity or affinity.
6. **Chapter 176 Conflict of Interest Disclosure.** In accordance with Chapter 176 of the Texas Local Government Code, the Offeror:
 - a. does not have an employment or other business relationship with any local government officer of the City or a family member of that officer that results in the officer or family member receiving taxable income;



**CITY OF AUSTIN
NON-COLLUSION,
NON-CONFLICT OF INTEREST, AND ANTI-LOBBYING AFFIDAVIT**

- b. has not given a local government officer of the City one or more gifts, other than gifts of food, lodging, transportation, or entertainment accepted as a guest, that have an aggregate value of more than \$250 in the twelve month period preceding the date the officer becomes aware of the execution of the Contract or that OWNER is considering doing business with the Offeror.
- c. as required by Chapter 176 of the Texas Local Government Code, Offeror must file a Conflict of Interest Questionnaire with the Office of the City Clerk no later than 5:00 P.M. on the seventh (7th) business day after the commencement of contract discussions or negotiations with the City or the submission of an Offer, or other writing related to a potential Contract with the City. The questionnaire is available on line at the following website for the City Clerk:
<http://www.ci.austin.tx.us/cityclerk/coi.htm>

There are statutory penalties for failure to comply with Chapter 176.

If the Offeror cannot affirmatively swear and subscribe to the forgoing statements, the Offeror shall provide a detailed written explanation in the space provided below or, as necessary, on separate pages to be annexed hereto.

7. **Anti-Lobbying Ordinance.** As set forth in the Solicitation Instructions, Section 0200, paragraph 7N, between the date that the Solicitation was issued and the date of full execution of the Contract, Offeror has not made and will not make a representation to a member of the City Council, a member of a City Board, or any other official, employee or agent of the City, other than the Authorized Contact Person for the Solicitation, except as permitted by the Ordinance.

OFFEROR'S EXPLANATION:

Contractor's Name: CITY OF AUSTIN, PUBLIC WORKS DEPARTMENT

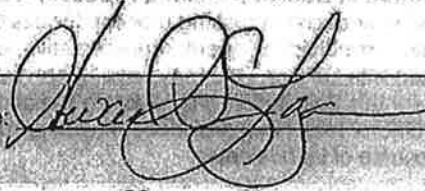
Printed
Name:

HOWARD S LAZARUS

Title

DIRECTOR

Signature of Officer or Authorized Representative:



Subscribed and sworn to before me this ____ day of ____, 20__

D. Mindieta
Notary Public

My Commission Expires

5/10/2010



HOWARD LAZARUS - April 09, 2013

1 UNITED STATES DISTRICT COURT
 2 WESTERN DISTRICT OF TEXAS
 3 AUSTIN DIVISION

4 TEXAS DISPOSAL SYSTEMS,
 5 INC. and TEXAS DISPOSAL
 6 SYSTEMS LANDFILL, INC.,
 7 Plaintiffs,

8 VS.

9 CITY OF AUSTIN, TEXAS, and
 10 BYRON JOHNSON, in his
 11 official capacity,
 12 Defendants.

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CASE NO. A-11-CV-1070-LY

13 *****
 14 REPORTER'S CERTIFICATION
 15 ORAL DEPOSITION OF
 16 HOWARD LAZARUS
 17 APRIL 9, 2013
 18 VOLUME 1
 19 *****

20 I, KIMBERLY G. KEEPER, Certified Shorthand
 21 Reporter in and for the State of Texas, hereby certify
 22 to the following:

23 That the witness, HOWARD LAZARUS, was duly
 24 sworn by the officer and that the transcript of the oral
 25 deposition is a true record of the testimony given by
 the witness;

I further certify that pursuant to FRCP
 Rule 30(f)(1) that the signature of the deponent:

XXX was requested by the deponent or a
 party before the completion of the deposition and is to
 be returned within 30 days from date of receipt of the

BOB GEDERT - April 30, 2013

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS DISPOSAL SYSTEMS,
INC. and TEXAS DISPOSAL
SYSTEMS LANDFILL, INC.,
Plaintiffs,

*
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*
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VS.

*
*

CASE NO. A-11-CV-1070-LY

CITY OF AUSTIN, TEXAS, and
BYRON JOHNSON, in his
official capacity,
Defendants.

*
*
*
*

ORAL AND VIDEOTAPED DEPOSITION OF

BOB GEDERT

APRIL 30, 2013

VOLUME 1

ORAL AND VIDEOTAPED DEPOSITION OF BOB
GEDERT, produced as a witness at the instance of the
Plaintiffs and duly sworn, was taken in the above-styled
and numbered cause on the 30th day of April, 2013, from
9:47 a.m. to 5:25 p.m., before KIMBERLY G. KEEPER,
Certified Shorthand Reporter in and for the State of
Texas, reported by machine shorthand, at Austin City
Hall, 301 West 2nd Street, Austin, Texas 78701 pursuant
to the Federal Rules of Civil Procedure and that the
deposition shall be read and signed under penalties of
perjury.

CRC for KEEPER COURT REPORTING
(512) 732-1805

TDS vs. City of Austin
Summary Judgment
Plaintiffs' Exhibit
PX-04

BOB GEDERT - April 30, 2013

APPEARANCES

FOR THE PLAINTIFFS:

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GRAVE DOUGHERTY HEARON & MOODY, P.C.
401 Congress Avenue, Suite 2200
Austin, Texas 78701
512-480-5762/512-536-9907 (fax)
jhemphill@gdhm.com

FOR THE DEFENDANTS:

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ASSISTANT CITY ATTORNEY
301 West 2nd Street
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lynn.carter@austintexas.gov

ALSO PRESENT:

Mr. Bob Gregory
Mr. Adam Gregory
Mr. Gary Newton
Mr. Mark Wolfington, Videographer

BOB GEDERT - April 30, 2013

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BOB GEDERT - April 30, 2013

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BOB GEDERT - April 30, 2013

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BOB GEDERT - April 30, 2013

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BOB GEDERT - April 30, 2013

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BOB GEDERT - April 30, 2013

1 THE VIDEOGRAPHER: Today is April
2 the 30th, 2013. The time is 9:47. We're on the record.

3 BOB GEDERT,
4 having been first duly sworn, testified as follows:

5 EXAMINATION

6 QUESTIONS BY MR. HEMPHILL:

7 Q. Could you state your name, please.

8 A. Bob Gedert, G-e-d-e-r-t.

9 Q. Mr. Gedert, my name is Jim Hemphill and I'm a
10 lawyer for Texas Disposal Systems and Texas Disposal
11 Systems Landfill, and you understand we're here to take
12 your deposition in a lawsuit between my clients and the
13 City of Austin, correct?

14 A. Yes.

15 Q. And have you had your deposition taken before?

16 A. I have in different settings. Not in this
17 particular setting, but in Ohio I had a -- a deposition
18 as well as in California.

19 Q. Okay. And how long has it been?

20 A. Oh, probably four or five years.

21 Q. All right. Well, you probably know some of the
22 drill, but just to refresh your recollection, and
23 frankly also to refresh mine, obviously the court
24 reporter is taking down everything that we say, so it's
25 important that you try to wait until I'm done with a

BOB GEDERT - April 30, 2013

1 A. Well, from my -- from my understanding of the
2 responses from the bid, the -- the Public Works bid was
3 a baseline and not a response.

4 Q. And that -- again, that -- it's -- I want to
5 make sure I understand this. It's fair to say that that
6 understanding came from discussions you had had with --
7 with folks involved in the RFP process?

8 A. Yes. And in -- and in all likelihood -- I
9 cannot recall exactly the timeline during this first two
10 weeks on the job, but in all likelihood that -- that
11 Wednesday morning is when we had that -- that team
12 meeting.

13 Q. And by that -- that would be the day after the
14 -- the --

15 A. The bids.

16 Q. -- responses were --

17 A. That's right. Yeah.

18 (Deposition Exhibit No. 9 marked)

19 Q. (By Mr. Hemphill) Exhibit 9 to your deposition
20 is a followup set of e-mails from Exhibit 8 to your
21 deposition, again communication with Mr. Coleman of
22 Council Member Shade's office. The e-mail said -- there
23 is an e-mail in the middle that says it's from
24 Mr. Goode. Is that an e-mail that you also were
25 involved in drafting?

BOB GEDERT - April 30, 2013

1 A. No, I'm not familiar with this e-mail
2 communication at all.

3 Q. Okay.

4 A. Yeah.

5 Q. And so --

6 MS. CARTER: Okay, Gary Newton is here.

7 MR. HEMPHILL: Oh.

8 THE WITNESS: Another visitor.

9 Q. (By Mr. Hemphill) So in Exhibit 9, in the
10 middle where -- where Mr. Goode says in response to "can
11 we tell parties that the City does not intend to build
12 it's own MRF," he says, "No, I don't think we can say
13 that yet because we've not had time to evaluate." And
14 he says that if -- if all of the responses are really
15 bad, we still may -- we still need maybe for us to build
16 our own MRF. Do you see that?

17 A. I do see that.

18 Q. And then he says, "I seriously doubt that, but
19 I don't think we can eliminate any option at this
20 stage."

21 A. Yeah, I was not familiar with this
22 communication or -- or that direction.

23 Q. Was that consistent with your understanding at
24 the time?

25 A. My understanding at the time was that the

From: ~~Coleman, Glen~~
To: ~~Goode, Robert~~
Subject: RE: Greenstar contract renegotiation
Date: Wednesday, February 10, 2010 1:36:24 PM

Thanks!

g

- glen coleman

Policy Aide, Council Member Randi Shade
Austin City Council Place Three
512 974-1374

From: Goode, Robert
Sent: Wednesday, February 10, 2010 11:46 AM
To: Coleman, Glen
Subject: RE: Greenstar contract renegotiation

No, I don't think we can say that yet because we've not had time to evaluate these options. What if we evaluate the options and all of them proposed deals that were real bad from the City's perspective? We still need may be forced to build our own MRF. I seriously doubt that, but I don't think we can eliminate any option at this stage.

From: Coleman, Glen
Sent: Wednesday, February 10, 2010 10:29 AM
To: Goode, Robert
Subject: RE: Greenstar contract renegotiation

Thanks.

May we now safely tell inquiring parties that the City does not intend to build its own MURF?

- glen

- glen coleman

Policy Aide, Council Member Randi Shade
Austin City Council Place Three
512 974-1374



TDS v. COA
A-11-CV-1070-LY
COA 001732

BOB GEDERT - April 30, 2013

UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF TEXAS
 AUSTIN DIVISION

TEXAS DISPOSAL SYSTEMS,
 INC. and TEXAS DISPOSAL
 SYSTEMS LANDFILL, INC.,
 Plaintiffs,

VS.

CITY OF AUSTIN, TEXAS, and
 BYRON JOHNSON, in his
 official capacity,
 Defendants.

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CASE NO. A-11-CV-1070-LY

REPORTER'S CERTIFICATION
 ORAL AND VIDEOTAPED DEPOSITION OF
 BOB GEDERT
 APRIL 30, 2013
 VOLUME 1

I, KIMBERLY G. KEEPER, Certified Shorthand
 Reporter in and for the State of Texas, hereby certify
 to the following:

That the witness, BOB GEDERT, was duly
 sworn by the officer and that the transcript of the oral
 deposition is a true record of the testimony given by
 the witness;

I further certify that pursuant to FRCP
 Rule 30(f)(1) that the signature of the deponent:

XXX was requested by the deponent or a
 party before the completion of the deposition and is to
 be returned within 30 days from date of receipt of the

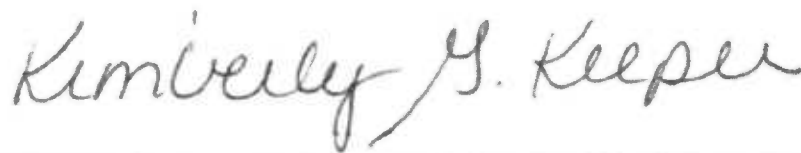
BOB GEDERT - April 30, 2013

1 transcript. If returned, the attached Changes and
2 Signature Page contains any changes and the reasons
3 therefor;

4 _____ was not requested by the deponent
5 or a party before the completion of the deposition.

6 I further certify that I am neither
7 counsel for, related to, nor employed by any of the
8 parties or attorneys to the action in which this
9 proceeding was taken. Further, I am not a relative or
10 employee of any attorney or record in this cause, nor am
11 I financially or otherwise interested in the outcome of
12 the action.

13
14 Subscribed and sworn to on this the 6th
15 day of May, 2013.

16
17 
18

19 KIMBERLY G. KEEPER, TEXAS CSR No. 2162
20 Expiration Date: 12/31/13
21 Firm Registration No. 556
22 7800 North Mopac, Suite 120
23 Austin, Texas 78759
24 512-732-1805
25

HOWARD LAZARUS - April 09, 2013

1 transcript. If returned, the attached Changes and
2 Signature Page contains any changes and the reasons
3 therefor;

4 _____ was not requested by the deponent
5 or a party before the completion of the deposition.

6 I further certify that I am neither
7 counsel for, related to, nor employed by any of the
8 parties or attorneys to the action in which this
9 proceeding was taken. Further, I am not a relative or
10 employee of any attorney or record in this cause, nor am
11 I financially or otherwise interested in the outcome of
12 the action.

13
14 Subscribed and sworn to on this the 24th
15 day of April, 2013.

16
17 *Kimberly G. Keeper*
18

19 KIMBERLY G. KEEPER, TEXAS CSR No. 2162
20 Expiration Date: 12/31/13
21 Firm Registration No. 556
22 7800 North Mopac, Suite 120
23 Austin, Texas 78759
24 512-732-1805
25

TAMMIE WILLIAMSON - April 10, 2013

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS DISPOSAL SYSTEMS,
INC. and TEXAS DISPOSAL
SYSTEMS LANDFILL, INC.,
Plaintiffs,

*
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*
*

VS.

CASE NO. A-11-CV-1070-LY

*
*

CITY OF AUSTIN, TEXAS, and
BYRON JOHNSON, in his
official capacity,
Defendants.

*
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*
*

ORAL DEPOSITION OF
TAMMIE WILLIAMSON
APRIL 10, 2013
VOLUME 1

ORAL DEPOSITION OF TAMMIE WILLIAMSON,
produced as a witness at the instance of the Plaintiffs
and duly sworn, was taken in the above-styled and
numbered cause on the 10th day of April, 2013, from
9:35 a.m. to 12:34 p.m., before KIMBERLY G. KEEPER,
Certified Shorthand Reporter in and for the State of
Texas, reported by machine shorthand, at Austin City
Hall, 301 West 2nd Street, Austin, Texas 78701 pursuant
to the Federal Rules of Civil Procedure and that the
deposition shall be read and signed under penalties of
perjury.

TAMMIE WILLIAMSON - April 10, 2013

APPEARANCES

FOR THE PLAINTIFFS:

MR. JAMES A. HEMPHILL
GRAVE DOUGHERTY HEARON & MOODY, P.C.
401 Congress Avenue, Suite 2200
Austin, Texas 78701
512-480-5762/512-536-9907 (fax)
jhemphill@gdhm.com

FOR THE DEFENDANTS:

MS. LYNN E. CARTER
ASSISTANT CITY ATTORNEY
301 West 2nd Street
P.O. Box 1546
Austin, Texas 78767
512-974-2171/512-974-1311 (fax)
lynn.carter@austintexas.gov

ALSO PRESENT:

Mr. Gary Newton
Mr. Adam Gregory

TAMMIE WILLIAMSON - April 10, 2013

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TAMMIE WILLIAMSON - April 10, 2013

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TAMMIE WILLIAMSON - April 10, 2013

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TAMMIE WILLIAMSON - April 10, 2013**EXHIBITS (cont'd)**

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TAMMIE WILLIAMSON - April 10, 2013

1 (Per agreement of counsel, reading of the
2 federal introduction was waived)

3 TAMMIE WILLIAMSON,
4 having been first duly sworn, testified as follows:

5 EXAMINATION

6 QUESTIONS BY MR. HEMPHILL:

7 Q. Could you state your name for the record,
8 please, ma'am.

9 A. Tammy Williamson.

10 Q. Ms. Williamson, my name's Jim Hemphill and I'm
11 the lawyer for Texas Disposal Systems and Texas Disposal
12 Systems Landfill, and you understand we are here to take
13 your testimony under oath in a lawsuit between TDS and
14 the City of Austin, correct?

15 A. Yes.

16 Q. And have you had your deposition taken before,
17 ma'am?

18 A. Yes.

19 Q. How many times?

20 A. Maybe five.

21 Q. Maybe five? When was the last -- most recent
22 one?

23 A. About a year ago.

24 Q. Okay. So you might be generally familiar with
25 the format of a deposition, but I'm going to go ahead

TAMMIE WILLIAMSON - April 10, 2013

1 that helped Howard put the response together from Solid
2 Waste Services who was also an evaluator of the RFP
3 proposals or responses?

4 A. I take that back, I don't think Sam was -- I
5 think Sam was an evaluator. I don't believe Sam was on
6 the -- the team putting it together, so I think it may
7 have been Vidal, it may have been Richard and a couple
8 others, but I think Sam was an evaluator like I was on
9 the team. So I don't think there was -- there were
10 people that did both evaluate and put it together.

11 Q. Okay.

12 A. So I think there was two separate and distinct
13 teams.

14 Q. Do you recall anyone who was involved in
15 putting the RFP response together coming to you and
16 asking for any input to be used in putting it into the
17 RFP response by Public Works?

18 A. What -- I'm sorry, I don't understand your
19 question.

20 Q. Sure. Did -- I think you said Mr. Maldonado
21 was on the team that was helping putt the Public Works
22 response to an RFP together --

23 A. Right.

24 Q. -- correct? Did Mr. Maldonado or anyone else
25 from Solid Waste, do you recall them ever coming to you

TAMMIE WILLIAMSON - April 10, 2013

1 and talking to you about what should or shouldn't be in
2 the Public Works proposal?

3 A. I think Vidal did come to me and ask a couple
4 of questions, I believe, and I think -- I can't remember
5 what the questions were exactly, and I may have referred
6 him to go back to Howard or someone else or Jules or
7 someone else and say, okay, that's not -- you know,
8 that's not something I felt comfortable with or I didn't
9 know enough about that particular issue. He needed to
10 go back and talk to Jules and the other team members
11 about that.

12 Q. Okay.

13 A. I think Vidal did ask a question or two.

14 Q. And was it -- and if Mr. Maldonado or any other
15 member of the Public Works team, Mr. Lazarus's team, had
16 particular questions about Solid Waste Services issues,
17 were they free to ask other members of the Solid Waste
18 Services staff about them?

19 A. Yeah, they could have.

20 Q. Now, when you -- well --

21 (Deposition Exhibit No. 24 marked)

22 Q. (By Mr. Hemphill) Exhibit 24 to your
23 deposition is an e-mail chain, and one of -- one of
24 which is a -- has an attachment that is called a
25 purchasing recycling services final evaluation matrix,

TAMMIE WILLIAMSON - April 10, 2013

1 UNITED STATES DISTRICT COURT
 2 WESTERN DISTRICT OF TEXAS
 3 AUSTIN DIVISION

3 TEXAS DISPOSAL SYSTEMS, *
 4 INC. and TEXAS DISPOSAL *
 5 SYSTEMS LANDFILL, INC., *
 6 Plaintiffs, *

7 VS. *

CASE NO. A-11-CV-1070-LY

8 CITY OF AUSTIN, TEXAS, and *
 9 BYRON JOHNSON, in his *
 10 official capacity, *
 11 Defendants. *

12 REPORTER'S CERTIFICATION
 13 ORAL DEPOSITION OF
 14 TAMMIE WILLIAMSON
 15 APRIL 10, 2013
 16 VOLUME 1

17 I, KIMBERLY G. KEEPER, Certified Shorthand
 18 Reporter in and for the State of Texas, hereby certify
 19 to the following:

20 That the witness, TAMMIE WILLIAMSON, was
 21 duly sworn by the officer and that the transcript of the
 22 oral deposition is a true record of the testimony given
 23 by the witness;

24 I further certify that pursuant to FRCP
 25 Rule 30(f)(1) that the signature of the deponent:

XXX was requested by the deponent or a
 party before the completion of the deposition and is to
 be returned within 30 days from date of receipt of the

TAMMIE WILLIAMSON - April 10, 2013

1 transcript. If returned, the attached Changes and
2 Signature Page contains any changes and the reasons
3 therefor;

4 _____ was not requested by the deponent
5 or a party before the completion of the deposition.

6 I further certify that I am neither
7 counsel for, related to, nor employed by any of the
8 parties or attorneys to the action in which this
9 proceeding was taken. Further, I am not a relative or
10 employee of any attorney or record in this cause, nor am
11 I financially or otherwise interested in the outcome of
12 the action.

13
14 Subscribed and sworn to on this the 24th
15 day of April, 2013.

16
17 *Kimberly G. Keeper*
18

19 KIMBERLY G. KEEPER, TEXAS CSR No. 2162
20 Expiration Date: 12/31/13
21 Firm Registration No. 556
22 7800 North Mopac, Suite 120
23 Austin, Texas 78759
24 512-732-1805
25

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS DISPOSAL SYSTEMS,
INC. and TEXAS DISPOSAL
SYSTEMS LANDFILL, INC.,
Plaintiffs,

VS.

CITY OF AUSTIN, TEXAS, and
BYRON JOHNSON, in his
official capacity,
Defendants.

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*
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*
*
*
*

CASE NO. A-11-CV-1070-LY

ORAL DEPOSITION OF
JOHN STEINER
APRIL 18, 2013
VOLUME 1

ORAL DEPOSITION OF JOHN STEINER, produced
as a witness at the instance of the Plaintiffs and duly
sworn, was taken in the above-styled and numbered cause
on the 18th day of April, 2013, from 1:12 p.m. to
2:35 p.m., before KIMBERLY G. KEEPER, Certified
Shorthand Reporter in and for the State of Texas,
reported by machine shorthand, at Austin City Hall,
301 West 2nd Street, Austin, Texas 78701 pursuant to the
Federal Rules of Civil Procedure and that the deposition
shall be read and signed under penalties of perjury.

TDS vs. City of Austin
Summary Judgment

Plaintiffs' Exhibit
PX-06



APPEARANCES

FOR THE PLAINTIFFS:

MR. JAMES A. HEMPHILL
GRAVE DOUGHERTY HEARON & MOODY, P.C.
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Austin, Texas 78701
512-480-5762/512-536-9907 (fax)
jhemphill@gdhm.com

FOR THE DEFENDANTS:

MS. LYNN E. CARTER
MS. BEVERLY WEST
ASSISTANT CITY ATTORNEYS
301 West 2nd Street
P.O. Box 1546
Austin, Texas 78767
512-974-2171/512-974-1311 (fax)
lynn.carter@austintexas.gov

ALSO PRESENT:

Mr. Gary Newton

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1 (Per agreement of counsel, reading of the
2 federal introduction was waived)

3 JOHN STEINER,
4 having been first duly sworn, testified as follows:

5 EXAMINATION

6 QUESTIONS BY MR. HEMPHILL:

7 Q. Mr. Steiner, you are a licensed attorney,
8 correct?

9 A. That's right.

10 Q. How long have you been licensed?

11 A. Since '82.

12 Q. And you've maintained your practice as active
13 since then? Or your license as active, I should say.

14 A. Yes.

15 Q. How long have you been with the City?

16 A. Since '95.

17 Q. And your -- what is your title today?

18 A. Assistant city attorney.

19 Q. And at one point you were -- and make sure I
20 get the title -- title right, and you correct me if I'm
21 wrong -- the City's integrity officer?

22 A. That's right.

23 Q. And approximately what time span did you serve
24 in that capacity?

25 A. It started about the time we moved to City

1 sure, sure.

2 (Discussion off the record)

3 MS. CARTER: I think that's a basic enough
4 question I don't mind Mr. Steiner answering that.

5 MR. HEMPHILL: Thank you.

6 MS. CARTER: But by that I don't intend to
7 waive any attorney-client privilege or deliberative
8 process privilege objection that we've made. I think
9 it's just such a basic level, I will allow him to
10 respond.

11 MR. HEMPHILL: Agreed you are not making
12 any such waiver.

13 A. Well, I think the attorney-to-attorney contacts
14 are allowed, so -- and I think that also public meeting
15 is a -- is a safe harbor we call it, Open Meeting Act is
16 a safe harbor, and I believe the 2011 amendments have a
17 provision in it for procedural questions as well.

18 Q. (By Mr. Hemphill) Fair enough. Another one of
19 these questions. Would you agree that the anti-lobbying
20 ordinance places restrictions on the speech of
21 respondents?

22 A. Yes.

23 Q. Have you or anyone else to your knowledge
24 associated with the City made any public statements --
25 and I'm not talking about pleadings in this lawsuit, I

JOHN STEINER - April 18, 2013

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS DISPOSAL SYSTEMS,
INC. and TEXAS DISPOSAL
SYSTEMS LANDFILL, INC.,
Plaintiffs,

VS.

CITY OF AUSTIN, TEXAS, and
BYRON JOHNSON, in his
official capacity,
Defendants.

CASE NO. A-11-CV-1070-LY

REPORTER'S CERTIFICATION
ORAL DEPOSITION OF
JOHN STEINER
APRIL 18, 2013
VOLUME 1

I, KIMBERLY G. KEEPER, Certified Shorthand
Reporter in and for the State of Texas, hereby certify
to the following:

That the witness, JOHN STEINER, was duly
sworn by the officer and that the transcript of the oral
deposition is a true record of the testimony given by
the witness;

I further certify that pursuant to FRCP
Rule 30(f)(1) that the signature of the deponent:

XXX was requested by the deponent or a
party before the completion of the deposition and is to
be returned within 30 days from date of receipt of the

**CRC for KEEPER COURT REPORTING
(512) 732-1805**

d6f5f780-288e-45cc-843f-9961cda605fe

JOHN STEINER - April 18, 2013

1 transcript. If returned, the attached Changes and
2 Signature Page contains any changes and the reasons
3 therefor;

4 _____ was not requested by the deponent
5 or a party before the completion of the deposition.

6 I further certify that I am neither
7 counsel for, related to, nor employed by any of the
8 parties or attorneys to the action in which this
9 proceeding was taken. Further, I am not a relative or
10 employee of any attorney or record in this cause, nor am
11 I financially or otherwise interested in the outcome of
12 the action.

13
14 Subscribed and sworn to on this the 24th
15 day of April, 2013.

16
17 *Kimberly G. Keeper*

18 KIMBERLY G. KEEPER, TEXAS CSR No. 2162
19 Expiration Date: 12/31/13
20 Firm Registration No. 556
21 7800 North Mopac, Suite 120
22 Austin, Texas 78759
23 512-732-1805
24
25

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS DISPOSAL SYSTEMS, INC., °
and TEXAS DISPOSAL SYSTEMS °
LANDFILL, INC., °
Plaintiffs, °

v. °

CITY OF AUSTIN, TEXAS, and °
BYRON JOHNSON, in his °
Official Capacity, °
Defendants. °

CIVIL ACTION NO.

A-11-CV-1070-LY

* * * * *

THE ORAL DEPOSITION OF

BOBBY EDWARD GREGORY

February 27, 2013

* * * * *

ORAL DEPOSITION OF BOBBY EDWARD GREGORY

produced as a witness at the instance of the Defendants
and duly sworn, was taken in the above styled and
numbered cause on the 27th day of February, 2013, from
9:06 a.m. to 12:02 p.m., before Sandra S. Givens, CSR,
in and for the State of Texas, reported by machine
shorthand method, at Graves Dougherty Hearon & Moody,
PC, 401 Congress Avenue, Suite 2200, Austin, Texas
78701, pursuant to the Federal Rules of Civil
Procedure.

TDS vs. City of Austin
Summary Judgment
Plaintiffs' Exhibit

PX-07

1 A P P E A R A N C E S

2

3 FOR THE PLAINTIFF:

4 James A. Hemphill
5 Graves Dougherty Hearon & Moody, PC
6 401 Congress Avenue
Suite 2200
7 Austin, Texas 78701
512.480.5762

8 FOR THE DEFENDANT:

9 Lynn E. Carter
Assistant City Attorney
10 City of Austin
301 W. 2nd Street
11 4th floor
Austin, Texas 78701
12 512.974.2171

13 ALSO PRESENT:

14 Gary Newton
15 General Counsel
Texas Disposal Systems
16 512.421.1305

17 Adam Gregory
Texas Disposal Systems
18 512.421.7693

19

20

21

22

23

24

25

1 I N D E X

2

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E X H I B I T S

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12 NO. DESCRIPTION PAGE

13

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Set of Interrogatories

15 2 Comparison of Annual Net Revenue 45

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1 BOBBY EDWARD GREGORY,
2 having been first duly sworn, testified as follows:

3 EXAMINATION

4 BY MS. CARTER:

5 Q Mr. Gregory, have you had your deposition
6 taken before?

7 A Yes.

8 Q Okay. I'm going to remind you of just a
9 couple of quick ground rules. If you'll wait till I
10 finish a question -- and I'm sorry, I tend to kind of
11 pause -- before you answer, then that will give us a
12 clear record. Fair enough?

13 A I'll do my best.

14 Q And if you will answer -- you're doing
15 great -- with a yes or a no rather than an uh-huh or a
16 huh-uh, that will also give us a clear record. Fair
17 enough?

18 A Yes, ma'am.

19 Q And if there's any question that I ask you
20 that you do not understand or blanked out, you need me
21 to rephrase it, please let me know that, because
22 otherwise, I will assume that every answer that you've
23 given you've understood the questions. Fair enough?

24 A Fair enough.

25 Q Okay. I am going to kind of hit the high

1 to give you a price on a 20 million dollar MRF and say,
2 Okay, we'll tell you later whether we want it in 2010,
3 2011, or 2012. They'll say, Well, the deal's off. Our
4 pricing is off, because it's all based on manufacturing
5 and short-term delivery or a specific time to make it
6 and deliver it and get their money.

7 So while they were two separate issues,
8 and I was comfortable and still am comfortable that I
9 had the basis to address the issue and not violate an
10 anti-ordinance, it was very bizarre why the Greenstar
11 deal came out immediately after the RFP came out, and
12 it appeared to me that it was an effort to basically
13 scuttle any opportunity to do the RFP. But
14 nevertheless, they were two separate issues.

15 Q What do you mean an effort to scuttle the
16 RFP?

17 A The intent of the RFP, as I understood it
18 then and as I firmly believe it today, was to give an
19 opportunity for all vendors to answer the City's needs
20 for recycling services. It wasn't just the MRF. The
21 City staff themselves proposed other things other than
22 a MRF. TDS was well prepared to, under its RFP
23 response had it sent one...

24 We'd already met with Robert Goode
25 telling him all the things we wanted to do in a

1 contract amendment, and he said, "No. Don't do the
2 contract amendment now. Let's do the RFP." And I
3 said, "Well, I can do it through an RFP," and so he got
4 me to hold off on the contract amendment proposal so he
5 could do the RFP.

6 And I was fine with that. I had full
7 intentions to do it, and I told him at the time -- and
8 he asked me, "How soon can you have your MRF up and
9 running?" And I assured him, and he asked me several
10 times, and I assured him that we would have it up and
11 running by October 1st, 2010, which was at that time
12 less than a year. Because as I recall, this meeting
13 was in late October. Could have been right at the
14 first of November, I'm not sure, because those -- we'd
15 have to go back and check my calendar, but it
16 definitely was before the RFP came out.

17 Q Prior to December 9th of 2009 tell me all the
18 meetings that you recall being prevented from sharing
19 your opinion or making a presentation to SWAC or City
20 Council.

21 A Well, I can -- I'll do my best to come up
22 with them, but I certainly need some help from
23 documents to remind me when meetings happened, because
24 there have been many meetings. SWAC or SWAC [SWOK],
25 however you say it, S-W-A-K --

1 him on that. We dealt with him or watched him on the
2 Austin Energy wood-waste-burning plant in August of
3 2008, which was a very, very odd thing to us, because
4 it dealt with a plant that could bury the waste.

5 We talked with Austin Energy about waste
6 that was high BTU going into a plant. There was a lot
7 of interest in that. At the same time, Austin, mainly
8 Robert Goode, began pushing the franchise effort to
9 take over all control of haulers in Austin
10 jurisdiction. That's when the 3,000 petitions came in.

11 The Greenstar contract went on. We
12 started giving comment on that. That was very, very
13 frustrating, it seemed, to the staff, because I don't
14 think they really cared about the price issues. They
15 wanted to build their own MRF; that became more and
16 more evident to me.

17 And so we were working and meeting with
18 Robert Goode and the city manager as we could during
19 that time, and that's why I remember this late October
20 2009 or early November, I forget exactly, meeting that
21 we had with Robert Goode where we presented our
22 proposal to amend our existing contract to him
23 verbally, told him what we would like to do.

24 He said, "Well, we certainly can do
25 that, because the contract allows it, although it would

1 be better if we did something like an RFP where
2 everyone had a chance to give, to give their proposals,
3 not only on recycling, but -- a MRF, but on other types
4 of recycling and other types of transportations,
5 service centers, all kind of things. And then if the
6 Council didn't want to do that, or along the way they
7 could say, Well, no, they want to do the amendment of
8 existing contract, and no one could come and say they
9 were left out of the process."

10 I said, "Robert, you're right. That
11 makes, that makes good sense, because we're not, we're
12 not trying to cut people out. We're trying to give you
13 an avenue to implement large numbers of operations and
14 the facilities for the implementation of a large number
15 of zero-waste activities." A lot of things regarding
16 zero waste require facilities, and lots of those
17 facilities have to be permitted through the TCEQ, dealt
18 with on the county citing ordinance, because all the
19 good intentions in the world just can't get there
20 unless you've got a facility to do these things on and
21 that facility has the proper regulations, et cetera.

22 So we were offering to do it through
23 the contract amendment format or through an RFP. So
24 I -- it's the only good meeting I've ever had with
25 Robert Goode, and it was clear to me that he wanted to

1 pin down whether I was going to have a MRF ready -- and
2 I assured him several times that I would -- up in
3 operation by October 1st, 2010, that I would respond to
4 an RFP if one was issued, and I said, "Sure.
5 Absolutely."

6 And he asked me to hold off on the
7 permit -- I'm sorry, the contract amendment proposal so
8 that they could do the RFP, and I said, "That's fine."
9 I said, "It's there anyway, and it's a separate thing
10 from the RFP. So if at any point in time you want to
11 do that for any one of these things" -- and one of them
12 includes pulverizing glass, as a matter of fact -- "any
13 one of those we can do," and he acknowledged that.

14 So we left that meeting thinking, Well,
15 good. There's actually an opportunity through a
16 combination of an RFP and a potentially combination of
17 an amended existing contract to really get some of
18 these facilities going and get the process going on
19 expanding the efforts to actually meet zero waste.

20 Q Let me ask -- interrupt just a second.

21 A Sure.

22 Q When was this meeting with Robert Goode that
23 you --

24 A I'll have to do better -- I'll have to find
25 out.

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF TEXAS
3 AUSTIN DIVISION

4 TEXAS DISPOSAL SYSTEMS, INC., °
5 and TEXAS DISPOSAL SYSTEMS °
6 LANDFILL, INC., °
7 Plaintiffs, °

° CIVIL ACTION NO.

8 v. °

° A-11-CV-1070-LY

9 CITY OF AUSTIN, TEXAS, and °
10 BYRON JOHNSON, in his °
11 Official Capacity, °
12 Defendants. °

13 REPORTER'S CERTIFICATION OF THE
14 ORAL DEPOSITION OF BOBBY EDWARD GREGORY

15 February 27, 2013

16 I, Sandra S. Givens, Certified Shorthand Reporter
17 in and for the State of Texas, hereby certify to the
18 following:

19 That the witness, BOBBY EDWARD GREGORY, was duly
20 sworn by the officer and that the transcript of the
21 oral deposition is a true record of the testimony given
22 by the witness;

23 That the original deposition transcript was
24 submitted to: James A. Hemphill, attorney for
25 Mr. Gregory.

26 That a copy of this certificate was served on all
27 parties and/or the witness shown herein on March 11,
28 2013.

29 I further certify that pursuant to FRCP Rule

1 30(f)(1) that the signature of the deponent:

2 X was requested by the deponent or a party
3 before the completion of the deposition and that the
4 signature is to be before any notary public and
5 returned within 30 days from the date of receipt of the
6 transcript. If returned, the attached Changes and
7 Signature Page contains any changes and the reasons
8 therefor:

9 was waived by the deponent or a party before
10 the completion of the deposition.

11 That \$556.00 is the deposition officer's charges
12 to the Defendants for preparing the original deposition
13 transcript and any copies of exhibits;

14 That the amount of time used by each party at the
15 deposition is as follows:

16 Lynn E. Carter - 2 hours, 40 minutes
17 James A. Hemphill - 0 minutes

18 That pursuant to information given to the
19 deposition officer at the time said testimony was
20 taken, the following includes counsel for all parties
21 of record:

22 James A. Hemphill - Attorney for Plaintiff
23 Lynn E. Carter - Attorney for Defendants

24 I further certify that I am neither counsel for,
25 related to, nor employed by any of the parties or

1 attorneys in the action in which this proceeding was
2 taken, and further, that I am not financially or
3 otherwise interested in the outcome of the action.

4 Certified to by me this 11th day of March, 2013.

5

6

GIVENS COURT REPORTING
9532 Morgan Creek Drive
Austin, Texas 78717
(512) 301-7088

7

8

9



A handwritten signature in cursive script, appearing to read "Sandra S. Givens".

10

11

SANDRA S. GIVENS, CSR
Certification No. 5000
Certificate Expires 12/31/13

12

sg-1280

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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.)

ORAL DEPOSITION OF
BOBBY EDWARD GREGORY,
CORPORATE REPRESENTATIVE
MARCH 1, 2013

ORAL DEPOSITION OF BOBBY EDWARD GREGORY, CORPORATE REPRESENTATIVE OF TDS DISPOSAL SYSTEMS, INC. AND TDS LANDFILL, INC., produced as a witness at the instance of the Defendants, and duly sworn, was taken in the above-styled and numbered cause on March 1, 2013, from 9:19 a.m. to 4:58 p.m., before Linda M. Hutchins, CSR in and for the State of Texas, reported by machine shorthand, at the law offices of Graves Dougherty Hearon & Moody, 401 Congress Avenue, Suite 2200, Austin, Texas, pursuant to the Federal Rules of Civil Procedure.

TDS vs. City of Austin
Summary Judgment
Plaintiffs' Exhibit
PX-08

GIVENS COURT REPORTING
9532 Morgan Creek Drive, Austin, Texas 78701 (512) 301-7088

A P P E A R A N C E S

FOR THE PLAINTIFFS:

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E-mail: jhemphill@gdhm.com
- and -
Mr. Gary Newton, General Counsel
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FOR THE DEFENDANTS:

Ms. Lynn E. Carter, Assistant City Attorney
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Austin, Texas 78767-1546
512-974-2171
512-974-1311 (Fax)
E-mail: lynn.carter@austintexas.gov

ALSO PRESENT:

J. Adam Gregory

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25	regarding outstanding long term recycling		

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1 (Exhibit 1 was marked.)

2 BOBBY EDWARD GREGORY,
3 having been first duly sworn, was examined and testified
4 as follows:

5 EXAMINATION

6 BY MS. CARTER:

7 Q. Mr. Gregory, we took your personal deposition
8 on Wednesday. The same rules apply. Are you fine
9 with -- I know we stepped on each other a little bit, so
10 we'll both try to do a better job of waiting until the
11 other finishes talking before we start talking. Okay?

12 A. Yes, ma'am.

13 Q. And I guess the one that's the most important
14 to me is if there's any question that I ask you that you
15 don't understand or need repeated, if you'll please ask
16 me to do that. Otherwise, I'll assume anything you've
17 answered, you've understood; is that fair enough?

18 A. I'll do my best.

19 Q. All right. So Exhibit 1 to your deposition is
20 the corporate representative deposition notice; and have
21 you seen that prior to today?

22 A. Yes, ma'am, I have.

23 Q. Okay. All right. I'm going to go through
24 these not in order and not necessarily going to touch
25 one and get off of it, because some stuff I have more in

1 representation was made by Willie and by Robert Goode
2 that this would be all revenue coming in, and there
3 would be no expenses.

4 And you may recall in my deposition the
5 day before yesterday, I reminded you that TDS hauled all
6 of its recyclables to the City's dual-stream MRF at that
7 time, and we were making money from the City, even
8 though we were paying a lot of expenses; and how it was
9 explained to us that this was going to be -- the
10 Greenstar deal would be far, far better than what the
11 City's processing would be, which is why we supported
12 the Greenstar contract. It was based on a
13 representation that it was going to be far more
14 profitable to the City and to TDS.

15 And they wouldn't let us see a contract,
16 because they just didn't want to show a contract. And
17 we didn't see the contract until the first part of
18 October. And that's when we realized that it was
19 completely wrong, that it was going to be a major
20 lose -- loser for us. And that's when we started
21 talking to SWAC members, because the representation had
22 been one thing, that it was going to be highly
23 profitable, and it turned out to be -- they just left
24 out the expense part. It was a complete
25 misrepresentation of the, of the facts.

1 contract amendment proposal.

2 Q. Okay. And allow me to skip around a little
3 bit here.

4 A. Sure.

5 Q. Was what was the reason for the timing that
6 the proposed amendment to TDS's contract would be
7 approximately the same time that the RFP responses were
8 due?

9 A. Well, we wanted it to be approximately the
10 same time, but after, so that it clearly was not in
11 response to the RFP. With an RFP, you have a deadline
12 to submit. You can submit it a week early, if you want
13 to, and you're still responsive.

14 We were not going to respond to the RFP.
15 By then we've made that decision. So we turned it in,
16 as I recall, about a half hour after, in a manner that
17 was clearly not compliant with the submittal of an RFP
18 response.

19 Now, to further answer your question, we
20 did it so that our contract amendment options were
21 available to Council and staff roughly the same time,
22 but after the deadline to turn them in.

23 Q. So what TDS hoped for by submitting the
24 proposed amendment to the contract is that the other
25 bids would be rejected or that TDS would be selected as

1 the preferred alternative to the bid submitted in
2 response to the RFP?

3 A. Absolutely not. We had no reason, nor did I
4 ever say, "Reject the other RFP." There was -- I don't
5 mean "the other." "Reject the RFP responses. It was an
6 alternative to the RFP response. And we talked about,
7 day before yesterday, why we chose not to also submit an
8 RFP response.

9 But, no, it was not with the intention
10 that Council or the staff would reject RFP responses. I
11 still believed then that it was good, that everyone had
12 their proposal out on the table, and they saw -- or
13 Council, at least, saw the options that would be
14 available to them from anyone and everyone who wanted to
15 give a proposal.

16 Q. All right. Before you flip past that one, I'm
17 going to look at it and see if I can describe it in the
18 record or I may just mark it as an exhibit.

19 So this is Wednesday, February 10th of
20 2010, from Ryan Hobbs; its addressed to the SWAC
21 members, there's a three-page -- three pages from Ryan
22 Hobbs, and then it has some attachments which are 24
23 pages. Right?

24 A. Yes, ma'am. Well, it starts at page 5 --

25 Q. This is not all the pages. So it's got 5 of

1 speak on an item under staff briefing; whereas, in, in
2 the past, like December of '09, the action item was
3 under staff briefing.

4 Q. And it's my understanding that the City
5 Clerk's Office made that change; do you know what time
6 period that change was made?

7 A. I think it's fairly recent. Just the last few
8 months, actually, is my understanding.

9 Q. Okay. I'm going to hand you a copy of a
10 responses to interrogatories, and there's not -- I'm
11 just going to direct you to page 5, under Interrogatory
12 No. 2; do you recall this came up on Wednesday's --

13 A. Are you done with this book?

14 Q. Yes, I am through with that book.

15 A. Yes, I do recall us talking about this item.

16 Q. Okay. And I'm looking on here, it looks like
17 Item No. 9 would be on the deposition notice, is going
18 to have information.

19 A. Yes. And this is a -- not necessarily a
20 correction, but a clarification from what I spoke of in
21 the first deposition. You asked me about three items
22 that we had decided to not place a bid on for concern
23 related to anti-lobby provisions, and I told you I
24 thought that there were four.

25 Q. Right.

1 A. I did check that, and I believe it is three,
2 and there was a fourth one that we were not going to bid
3 on, but at the last minute decided to bid on. So that
4 was the basis of my confusion.

5 Q. Okay. Do you recall which one that was?

6 A. It was the SDC0174, which was dated March
7 19th, 2012, "Residential Refuse Dumpster Collection."

8 Q. And do you recall what changed TDS's decision
9 about, first, we think we better not respond to this
10 RFP, and then you made the decision, no, let's go ahead?
11 I'm interested as it relates to the Anti-Lobbying
12 Ordinance provision.

13 A. We were concerned with the Anti-Lobby
14 Ordinance. But as I recall--and I'm pulling this out so
15 I've got some documents to show you--we were the
16 incumbent, I believe, and -- yes, we were the incumbent,
17 and we had it, and we were willing to take the risk on
18 it.

19 Again, our concern was not so much the
20 Anti-Lobby Ordinance, per se, as it was the
21 interpretation by staff of the ordinance. So we did
22 choose at the last minute to bid that one.

23 Q. Okay. When you say you were the incumbent,
24 you already had the contract, and this was just -- it
25 had been put up for bid again?

1 UNITED STATES DISTRICT COURT
 2 WESTERN DISTRICT OF TEXAS
 3 AUSTIN DIVISION
 4 TEXAS DISPOSAL SYSTEMS,)
 INC., and TEXAS DISPOSAL)
 5 SYSTEMS LANDFILL, INC.)
)
 6 v.) CASE NO. A-11-CV-1070-LY
)
 7 CITY OF AUSTIN, TEXAS, and)
 BYRON JOHNSON, in his)
 8 official capacity)

9 REPORTER'S CERTIFICATION
 ORAL DEPOSITION OF BOBBY EDWARD GREGORY,
 CORPORATE REPRESENTATIVE
 MARCH 1, 2013

10
 11 I, LINDA M. HUTCHINS, Certified Shorthand Reporter
 12 in and for the State of Texas, hereby certify to the
 13 following:

14 That the witness, BOBBY EDWARD GREGORY, was duly
 15 sworn by the officer and that the transcript of the oral
 16 deposition is a true record of the testimony given by
 17 the witness;

18 That the deposition transcript was submitted to
 19 Bobby Edward Gregory, c/o his attorney, James A.
 20 Hemphill;

21 That a copy of this certificate was served on all
 22 parties and/or the witness shown herein on
 23 March 12, 2013;

24 I further certify that pursuant to FRCP Rule
 25 30(f)(1) the signature of the deponent:

1 XXX was requested by the deponent or a party before
2 the completion of the deposition and that the signature
3 is to be before any notary public and returned within 30
4 days from the date of receipt of the transcript. If
5 returned, the attached Changes and Signature Page
6 contains any changes and the reasons thereof:

7 _____ was waived by the deponent or a party before
8 the completion of the deposition;

9 That \$ 953.25 is the deposition officer's
10 charges to the Paying Party City of Austin for
11 preparing the original deposition transcript and any
12 copies of exhibits;

13 That the amount of time used by each party at the
14 deposition is as follows:

15 Mr. Hemphill - 0 Hour(s), 0 Minute(s)

Mr. Newton - 0 Hour(s), 0 Minute(s)

16 Ms. Carter - 6 Hour(s), 5 Minute(s)

17 That pursuant to information given to the
18 deposition officer at the time said testimony was taken,
19 the following includes counsel for all parties of record

20 JAMES HEMPHILL, Attorney for Plaintiffs

GARY NEWTON, Attorney for Plaintiffs

21 LYNN E. CARTER, Attorney for Defendants

22 I further certify that I am neither counsel for,
23 related to, nor employed by any of the parties or
24 attorneys in the action in which this proceeding was
25 taken, and further, that I am not financially or

1 otherwise interested in the outcome of the action.

2 Certified to by me this 12th day of March, 2013.

3

4

5

6


Linda M. Hutchins, Texas CSR No. 8219



7

Expiration Date: 12/31/13

GIVENS COURT REPORTING

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