UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TEXAS DISPOSAL SYSTEMS, INC., and TEXAS DISPOSAL SYSTEMS LANDFILL, INC., Plaintiffs,	§	
v.	§	Case No. A-11-CV-1070-LY
CITY OF AUSTIN, TEXAS, and BYRON JOHNSON, in his official capacity, Defendants.	§	

DEFENDANTS' RESPONSE TO MOTION FOR SUMMARY JUDGMENT OF PLAINTIFFS, TEXAS DISPOSAL SYSTEMS, INC. AND TEXAS DISPOSAL SYSTEMS LANDFILL, INC.

TO THE HONORABLE LEE YEAKEL:

Defendants, City of Austin (the "City"), and Byron Johnson, in his official capacity ("Johnson") file their Response to Plaintiffs' Motion for Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, as follows:

I. SUMMARY OF ARGUMENT

Plaintiffs' Motion for Summary Judgment should be denied on the following grounds: (1) Plaintiffs cannot establish jurisdictional standing or ripeness necessary to seek relief from this court; (2) Plaintiffs incorrectly rely on heightened scrutiny analysis of their First Amendment claims because the Anti-Lobbying Ordinance is not a content-based restriction or a viewpoint restriction on speech; (3) Plaintiffs fail to provide competent summary judgment proof in support of their claims; and (4) Plaintiffs fail to explain (or attempt to explain) why the numerous opportunities to speak at the City's open meetings are insufficient for Plaintiffs to exercise their First Amendment rights. (*See* Doc 35 at 6-11 of 28.)

II. OBJECTIONS TO PLAINTIFFS' SUMMARY JUDGMENT PROOF

The City objects to the conclusory factual allegations in Plaintiffs' motion and to Plaintiffs' factual assertions that are unsupported by citation to the record. Much of Plaintiffs' section entitled "Facts" lacks citation to the record and much of the factual commentary in Plaintiffs' motion is conclusory in nature. Pl. MSJ (Doc 34 2-14/28) Conclusory allegations are not competent summary judgment evidence, and thus are insufficient support or defeat a motion for summary judgment. *Eason v. Thaler,* 73 F.3d 1322, 1325 (5th Cir.1996). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *Forsyth v. Barr,* 19 F.3d 1527, 1533 (5th Cir.), *cert. denied*, 513 U.S. 871 (1994).

A. No Competent Evidence of Chilled Speech

Defendants object to evidence on pages 113-114 of PX8 because it is conclusory and insufficient to establish that Plaintiffs' speech was chilled. Plaintiffs have not attempted to prove that the Anti-Lobbying Ordinance applied to any of the three solicitations—nor have they attempted to prove the time periods covered by an alleged no-contact periods. (Doc. 34 at 25 of 28) Mr. Gregory merely states that Plaintiffs chose not to bid on three solicitations due to concerns about the Anti-Lobbying Ordinance. *Id.* Plaintiffs offer no description of the time periods for the no-contact periods; no description of the type of speech, occasion of speech, subject matter of speech or otherwise, attempt to explain their decisions—nor do they attempt to address what avenues of speech were available to them during public meetings during any alleged no-contact period. Plaintiffs conclusively allege that their speech was chilled by uncertainty about their ability to exercise their First Amendment rights. Plaintiffs conclusively allege that their speech was chilled and rely on the first nine lines of page 4 of 28 of the motion

lack any citation to the record. (Doc. 34) Plaintiffs have not attempted to show that the Food Service Pilot Project RFP was in an amount that would require council approval, or that it was subject to the Anti-Lobbying Ordinance. "A contract or an amendment to a contract, involving an expenditure of more than forty-three thousand dollars annually must be expressly approved by the council." Austin City Charter Article VII, § 15. [1] Contracts below that amount are approved by the City Manager. Thus, there is no competent summary judgment evidence that Plaintiffs' speech was chilled.

B. No Evidence related to Johnson or Plaintiffs' Due Process Claims

The City further objects that Plaintiffs have failed to offer any argument or evidence related to Plaintiffs' claims against Byron Johnson in his official capacity and that Plaintiffs have offered only minimal mention of any argument or basis related to their claims of violation of their due process rights. (*See* Doc. 34 at 20, which includes only a mere mentions of "due process".) Such allegations and arguments are conclusory and insufficient to support a motion for summary judgment.

III. LIST OF DEFENDANTS' RESPONSE EXHIBITS

The following documents are attached as exhibits to this motion and relied on in support of Defendants' Response to the Plaintiffs' motion for summary judgment. Additionally, Defendants rely on the Joint Exhibits on file with the Court and the exhibits attached to Defendants' motion for summary judgment (cited as "Def. MSJ Ex. ____"). The following exhibits are Defendants' Response Exhibits 1 through 13 (cited as "DRsp Ex. ____"):

DRsp Ex. 1 City Clerk's Declaration regarding Open Meetings

DRsp Ex. 2 Zero Waste Advisory Commission (ZWAC) Meeting Minutes (1/9/13)

[1] http://www.amlegal.com/nxt/gateway.dll/Texas/austin/thecodeofthecityofaustintexas?f=templates$fn=default.htm$3.0$vid=amlegal:austin_tx$anc

DRsp Ex. 3 ZWAC Meeting Back-up Document (1/9/13)
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DRsp Ex. 7 City Council Meeting Minutes (6/24/10)
DRsp Ex. 8 Gregory e-mail to Council (3/22/10)
DRsp Ex. 9 Armbrust e-mails to Mayor and Council Member Cole (8/3/10)
DRsp Ex. 10 Goode Deposition Excerpts and Exhibits
DRsp Ex. 11 Gedert Deposition Excerpts and Exhibits
DRsp Ex. 12 Johnson Deposition Excerpt
DRsp Ex. 13 Benson Declaration and attachments

IV. STATEMENT OF FACTS

Defendants chiefly rely on the Statement of Facts in Defendants' Motion for Summary Judgment. (Doc 35 at 2-11 of 18) While Defendants pointed to examples of Plaintiffs' exercise of their First Amendment rights in their motion for summary judgment (Doc 35 at 6-11 of 18), the following provides further evidence of Plaintiffs' exercise of their First Amendment rights.

A. Plaintiffs' Opportunities to Speak during Public Meetings of the City of Austin

As shown by Exhibits 1-4 attached to this motion, Plaintiffs have numerous opportunities to speak at public meetings of the City Council and the Zero Waste Advisory Commission. DRsp Ex. 1-4. A single speaker may combine time with other speakers to speak for a maximum of 15 minutes at a council meeting. DRsp Ex. 1. Although council may, and often does allow additional time for speakers on action items such as occurred on April 11, 2013[2] when Mr. Gregory and Mr. Whellan spoke over 25 minutes in regard to item no. 19, the Austin Energy industrial waste solicitation. JEX-33 (Doc 33-1 at 223-228 of 263);

[2] Mr. Whellan and Mr. Kuhn also spoke at the March 7, 2013 council meeting on this same subject matter and Mr. Gregory spoke at the ZWAC meeting on April 10, 2013. JEX-33 (Doc 31-3 at 137-154 of 263; 193-200 of 263) Mr. Gregory also submitted a substantial packet of materials to ZWAC and Council during the April 10 and 11, 2013 meetings. JEX-31.

http://austintx.swagit.com/play/04112013-502 (The video shows that Mr. Whellan and Mr. Gregory spoke and responded to questions for over 22 minutes on behalf of TDS. *Id.* (Mr. Kuhn of Allied Waste, the other responder to the solicitation, spoke for about 9 minutes.) JEX-33 (Doc 31-3at 9-10;) Citizens may sign up to speak on any number of agenda items—other than staff briefings during council and ZWAC public meetings. DRsp. Ex. 1-5. Up to ten citizens may sign up to speak for three minutes on any matter during citizen communication at each council meeting and each ZWAC meeting. DRsp Ex. 1, Citizen Participation at Council Meetings; City Code §2-5-28; DRsp Ex. 2 (item 3(a)); Ex. 3 (p. 2 of 4); Ex. 4 (item 3(c)). Citizens may ask questions during staff briefings and citizens may comment about any matter, including staff briefings at the beginning or end of each ZWAC meeting during citizen communication. DRsp. Ex. 9; DRsp. Ex. 8 at TDS 18210.

B. No-Contact Periods for Plaintiffs' Responsive Bids Overlapped the No-Contact Periods Avoided by Plaintiffs

As best demonstrated by the graph, which is the first attachment to Mike Benson's declaration (DRsp Ex. 13), Plaintiffs claim to have avoided bidding during two no-contact periods that were actually encompassed within no-contact periods on solicitations to which Plaintiffs chose to respond. The no-contact period for the Downtown Collection and Hauling solicitation is shorter, and encompassed within, the dates of the no-contact period for the Roll-Off Container Disposal solicitation, to which TDS responded. DRsp Ex. 13 at ¶¶ 6 and 7 and attached graph. Likewise, the no-contact period for the mattress recycling solicitation is shorter, and encompassed within, the dates of the no-contact period for the Austin Energy industrial waste solicitation, to which TDS responded. *Id.* at ¶¶ 9 and 10 and attached graph.

Additionally, Plaintiffs are not aware of any vendor with an existing contract with the City that has been disqualified under the anti-lobbying ordinance for any statements made by the

vendor during contract negotiations—nor in regard to standard communications related to existing contracts. (Doc 35-3 at 7 of 7; RFA No. 24-28. Further, Plaintiffs do not seek any prospective relief in their pleadings. Plaintiffs only seek relief in regard to the past disqualification under the Anti-Lobbying Ordinance. (Doc. 18-21).

C. GreenStar Extension and Disqualification

1. Proposed Extension of Greenstar Contract

Defendants dispute the following statement by Plaintiffs that "[s]everal options were proposed [by Greenstar], including an extension of up to three to five years. PX2 at 36-38." *Id.* A review of the actual testimony shows that "three options" were proposed and that Assistant City Manager, Robert Goode immediately rejected any long-term extension: "I think their PX2 at 37. Moreover, there was no urgent need for Mr. Gregory to send an e-mail to SWAC Commissioners. Mr. Gregory could have appeared to speak at the SWAC meeting during citizen communication. Mr. Gregory could have signed up to speak and handed out his materials to council during the City Council meeting on December 17, and numerous city council meetings and ZWAC meetings between December 17, 2009, and June 24, 2010, when council directed staff to negotiate with TDS and Greenstar in regard to a short-term contract. (Doc 46-2 at 25-26; Doc 46-11 at 6-9 of 9; Doc 46-13; Doc 46-14; Doc 46-16 (item 4(a); Doc 46-17 (item 1)). Plaintiffs did not attempt to speak at council meetings on December 17, 2009, June 10, 2010 or June 24, 2010. Mr. Gregory could have also sent his e-mail to the authorized contact person.

2. Decision related to Greenstar Protest of Disqualification

Plaintiffs' fail to establish that there is no issue of genuine fact in regard to differences between the Greenstar's attorney's letter and Gregory's letter. Greenstar's attorney's letter was sent only to the authorized contact person and the City attorney, and it complained that

Gregory's letter constituted a violation of the Anti-Lobbying Ordinance and explained why. JEX-4. It was not sent to SWAC or council members. *Id.* There is simply no valid comparison between the content of the Greenstar letter and the content of Gregory's e-mail to SWAC members. Further, Plaintiffs have failed to offer any evidence other than conclusory allegations and vague implications that Greenstar may have said something during contract negotiations that was self-promotional in nature. Plaintiffs have failed to offer competent summary judgment evidence of any person who actually recalled the content of communications after the no-contact period began (November 16, 2009).

David Smith, Robert Goode, Bob Gedert, hearing officer, Stephen Webb, and Byron Johnson, each independently provide evidence of a genuine issue of material fact in regard to whether Gregory's e-mail violated the Anti-Lobbying Ordinance. JEX-14, JEX-20, JEX-21, JEX-22, DRsp Ex. 10 at 121-22 and Dep Ex. 27; DRsp Ex. 11, Dep. Ex. 12 and 14; DRsp Ex. 12 at 109. The City's notice of disqualification and Greenstar's letter also provide evidence of a genuine issue of material fact on this issue. JEX-4, JEX-6. Additionally, although Gregory made several attempts to convince city council members to lift the Anti-Lobbying Ordinance requirements in regard to the recycling RFP and to remove TDS' disqualification, Gregory's requests were unsuccessful, which suggests council agreed with the determinations that TDS violated the Anti-Lobbying Ordinance.

D. Plaintiffs' Caused Change in Hearing Officer by Exparte Communications

TDS' complaint about Monte Akers being replaced as hearings officer in regard to the second protest hearing is surprising because Monte Akers reported exparte communications by TDS' General Counsel, Gary Newton, in April or early May of 2010, during which communication Mr. Akers reported that Mr. Newton asked him for advice about how to appeal a

decision by the City of Austin related to a disqualification from participating in an RFP. DRsp Ex. 10; Goode Dep Ex. 24 at 899-900.

V. ARGUMENTS AND AUTHORITIES

A. Standard of Review

Courts view the evidence in the light most favorable to the nonmoving party. *Am. Int'l Specialty Lines Ins. Co. v. Rentech Steel LLC,* 620 F.3d 558, 561–62 (5th Cir.2010). To prevail, Plaintiffs must establish that there is no there is no genuine issue of material fact on each element of their claims, and that they are entitled to prevail as a matter of law. *Gilbane Bldg. Co. v. Admiral Ins. Co.* 664 F.3d 589, 593 (5th Cir. 2011); *Cedyco Corp. v. PetroQuest Energy, LLC,* 497 F.3d 485, 488 (5th Cir.2007); FED.R.CIV.P. 56(a).

B. Standing

1. Overbreadth

The Supreme Court long ago determined that the overbreadth doctrine does not apply to commercial speech. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 496-497 (1982) (citing *Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 565 n.8 (1980)). The Fifth Circuit recently reiterated that holding. *See McKinley v. Abbott,* 643 F.3d 403, 407 (5th Cir. 2011, *citing Village of Hoffman Estates,* 455 U.S. at 496-97)("Challenges to statutes regulating commercial speech do not enjoy the expanded standing inquiry employed in normal First Amendment overbreadth cases 'because the overbreadth doctrine does not apply to commercial speech.'") Accordingly, for a plaintiff to succeed on a facial challenge to an ordinance or statute, the plaintiff must establish that no set of circumstances exists under which the ordinance or statute is valid, or that the statute lacks any "plainly legitimate sweep." *McKinley,* 643 F.3d at 408, citing *U.S. v. Stevens,* 559 U.S. 460, 130 S.Ct. 1577, 1587 (other citations omitted).

Plaintiffs' speech is purely commercial in nature. Adam Gregory admitted during his deposition that the reason TDS and its representatives including himself, Bob Gregory, and Ryan Hobbs, participate publicly at SWAC and Austin City Council meetings is because of TDS' commercial interests. Def. MSJ Ex. 7 at 41:10-43:22. Adam Gregory could cite no matters on which TDS was concerned about violating the Anti-Lobbying Ordinance that did not involve TDS' commercial interests. *Id.* at 43:11-22.

Overbreadth standing is not applicable under the commercial speech doctrine because commercial speech is not as easily deterred by overbroad regulations. *Central Hudson,* 447 U.S. at 566, n. 8.

> Bolstered by the demands of the marketplace, commercial speech is 'more hardy, less likely to be chilled, and not in need of surrogate litigators.' The assumed profit motive is thought to be sufficiently compelling to enable such speech to withstand the chilling effect of an overbroad statute.

Houston Balloons & Promotions, LLC v. City of Houston, 589 F. Supp. 2d 834, 848 (S.D. Tex. 2008) (citations omitted). Thus, Plaintiffs have no standing to bring a claim based on the overbreadth doctrine.

2. Standing Generally[3]

Standing "is a jurisdictional question which must be resolved as a preliminary matter." *Xerox v. Genmoora Corp.*, 888 F.2d 345, 350 (5th Cir. 1989). The "essence" of standing is "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To have standing, a plaintiff must demonstrate: (1) an injury-in-fact; (2) that is traceable to the defendant's actions; and (3) that will be redressed by a favorable decision. *Delta Commercial Fisheries Ass'n v. Gulf of Mexico*

[3] Defendants refer the court to their motion for summary judgment at 11-13. (Doc 35)

Mgmt. Council, 364 F.3d 269, 272 (5th Cir. 2004). To show injury-in-fact, a plaintiff must demonstrate an injury that is "'concrete,' 'distinct and palpable,' and 'actual or imminent.'" *Id.* (citation omitted). To establish a causal connection between the injury and the conduct complained of, the injury must be "fairly trace[able] to the challenged action of the defendant and not . . . the[e] result [of] the independent action of some third party not before the court." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Finally, the injury must be "likely" as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id.* "Failure to establish any of these three elements deprives the federal court of jurisdiction . . . ." *Rivera v. Wyeth-Ayerst Labs*, 283 F.3d 315, 319 (5th Cir. 2002).

The mere existence of a statute or ordinance "that may or may not ever be applied to plaintiffs, is not sufficient to create a case or controversy within the meaning of Article III." *Scott v. Pasadena Unified School Dist.,* 306 F.3d 646, 656 (9th Cir. 2002). A generalized threat of prosecution does not satisfy the case or controversy requirement. *Id.* Likewise, "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Pittman v. Cole,* 267 F.3d 1269, 1284 (11th Cir. 2001) (citing *Laird v. Tatum,* 408 U.S. 1, 13-14 (1972)). To establish standing, a plaintiff who alleges his speech has been chilled, must show: (1) he was threatened with prosecution, (2) prosecution is likely, or (3) there is a credible threat of prosecution. *Pittman*, 267 F.3d at 1283-84. Plaintiffs are not subject to prosecution because there are no criminal penalties for violations of the Anti-Lobbying Ordinance. JEX-25 §2-7-110. Additionally, Plaintiffs have wholly failed to provide any competent evidence of a chilling of their First Amendment rights. *See* pp. 2-3 herein. Further, Plaintiffs are not subject to loss of any property interest because they have one strike in regard to an ordinance that requires three strikes (each of which includes the right to a protest

hearing) before Plaintiffs are at risk of loss of a contract—subject to the outcome of a separate hearing. (Doc. 35 at 11)

C. Genuine Issue of Material Fact Exists in regard to TDS' Disqualification

Plaintiffs have failed to establish that no genuine issue of material fact exists on the issues of (1) whether TDS' proposal was a response to the Recycling Services RFP; (2) whether Gregory's December 8th e-mail related to a response to the RFP; (3) whether the e-mail provided information about a response to the RFP; (4) whether the e-mail advanced the interests of TDS as a respondent; or (5) whether the e-mail discredited the response of any other respondent. See pp. herein; (Doc 35 at 3-6 and 13-15 of 18)

D. First Amendment Analysis

1. Time, Place & Manner

Defendants rely principally on their First Amendment legal arguments set forth in their motion for summary judgment. (Doc. 35 at 13-16) Even assuming for the sake of argument that *Asgeirsson v. Abbott*[4] is not directly on point in regard to Plaintiffs' First Amendment claims, the City is entitled to establish appropriate time, place and manner regulations in regard to restrictions of speech for the purpose of avoiding the appearance of corruption. Even in a public forum, which is not at issue in this case, the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information. *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Thus, at best, Plaintiffs are entitled to an intermediate level of

[4] 696 F.3d 454, 458 (5th Cir. 2012), cert. denied, 133 S.Ct. 1634, 81 U.S.L.W. 3371 (Mar. 25, 2013).

scrutiny. Plaintiffs have not establish; however, and cannot establish that the ordinance's time, place and manner restrictions are not reasonable because Plaintiffs have demonstrated that the time provided to them to speak on issues related to solicitations at council and ZWAC meetings are reasonable. *See* pages 4-5 herein.

The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized. *Federal Election Com'n v. National Right to Work Committee,* 459 U.S. 197, 209-210; 103 S.Ct. 552 (1982). Federal courts will not second guess a legislative body's determination "as to the need for prophylactic measures where corruption is the evil feared." *Id.* at 209-210. Just as the *National Right to Work Committee* case addressed pay-to-play/"political debt" issues involving the integrity of the election process, the Anti-Lobbying Ordinance addresses pay-to-play issues involving the integrity of the procurement process. JEX 1 and JEX 25, §§ 2-7-102; Def. MSJ Ex. 10, JS Ex. 1(Doc 46-8 at 7-8). The danger of eroding of public confidence in the electoral process is indistinguishable from the danger of eroding public confidence in the procurement process through the appearance of corruption. *See Nat'l Right to Work Com,* 459 U.S. at 208; Def. MSJ (Doc 35 at14.

Because the vote of City Council is required for all contracts exceeding $43,000 annually, opportunities for corruption, and the appearance of corruption, are obviously present in the election and procurement processes. City Charter Article VII, § 15. Under the current ordinance, as a condition of participating in the competitive process for providing goods and services to the City, persons who participate in the competitive process must agree to abide by the terms of the competitive process—including compliance with the Anti-Lobbying Ordinance. JEX 25, § 2-7-102(A). The Anti-Lobbying Ordinance provides no exception for those with

existing contracts with the City or those interested in seeking a proposal outside the rules set forth in the ordinance. TDS attempted to participate outside the fair, equitable, and competitive process and asked Council to ignore the intentions set forth in the ordinance: equal opportunity to present information regarding a solicitation; equal access to information; and a fair, equitable and competitive process. JEX 1 and JEX 25, §§ 2-7-102.

TDS does not possess a constitutional right to bid on city solicitations under its own terms. The City is entitled to set reasonable restrictions on the time, place, and manner of Plaintiffs' private speech, its lobbying of council members on matters relevant to a solicitation to protect the integrity of the bidding process.

Moreover, the principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. *Community for Creative Non-Violence*, supra, 468 U.S. 288, 295 (1984). The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. See Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47-48, 106 S.Ct. 925, 929-930, 89 L.Ed.2d 29 (1986). Government regulation of expressive activity is content neutral so long as it is " justified without reference to the content of the regulated speech." Community for Creative Non-Violence, supra, 468 U.S., at 293, 104 S.Ct., at 3069 (emphasis added); Heffron, supra, 452 U.S., at 648, 101 S.Ct., at 2564 (quoting *792 Virginia Pharmacy Bd., supra, 425 U.S., at 771, 96 S.Ct., at 1830); see Boos v. Barry, 485 U.S. 312, 320-321, 108 S.Ct. 1157, 1163-1164, 99 L.Ed.2d 333 (1988) (opinion of O'CONNOR, J.).

The test for time, place, and manner restriction even in regard to a public forum, which is not at issue in this case, is that the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information." *Ward,* 491 U.S. at 791, *citing Clark v. Community for Creative Non-Violence,* 468 U.S. at 293. The City's justification for its restrictions on speech is to avoid the appearance of corruption and to provide a fair playing field for all responders or potential responders to a solicitation. This justification, just like the justification for controlling noise in *Ward* is content neutral. Additionally, because the City provides ample avenues for speech through public meetings, as well as communications through the authorized contact person during a no-contact period, the terms of the Anti-Lobbying ordinance are narrowly tailored to serve a significant governmental interest. Intermediate scrutiny does not require a least restrictive means or a less intrusive means test. *Ward,* 491 U.S. at 798-800.

3. No Total Ban

Plaintiffs incorrectly argue that the Anti-Lobbying Ordinance constitutes a total ban on speech. As addressed by *Asgeiersson,* encouraging public speech necessarily punishes private speech, and encouraging transparency while discouraging corruption serves the public interest by encouraging public discussion. (Doc 35 at 13-14).

E. Statutory Construction

"The fundamental rule of statutory construction requires that courts give effect to every word in a statute." *United States v. Monjaras–Castaneda,* 190 F.3d 326 (5th Cir.1999), *cert. denied,* 528 U.S. 1194 (2000). Plaintiffs ask this Court to ignore two provisions of the ordinance: (1) "[t]his prohibition also applies to a vendor that makes a representation and then

becomes a respondent," and (2) the no-contact period "means the period of time from the date of issuance of the solicitation." JEX -1 (City Code §§ 2-7-101(2) and 2-7-103(B)); JEX-25 (§§ 2-7-101(6) and 2-7-103(B)). For these provisions to have effect, there must be a way that a response can be discredited or commented on prior to the deadline for the bid response. The no-contact period begins when the bid is issued and thus, it necessarily applies prior to and after the deadline for submission of responses.

F. Fair Notice

A statute must be construed to avoid constitutional questions if such a construction is fairly possible. *Boos v. Barry*, 485 U.S. 312, 333 (1988). The statute must provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). The Anti-Lobbying Ordinance provides fair notice. If it did not, Plaintiffs would be able to cite to numerous other respondents who have been unable to comply with the terms of the ordinance during the pendency of standard communications or negotiations related to existing or pending contracts. Plaintiffs have simply attempted to read the ordinance in a manner that provided TDS a loophole around the provisions of the ordinance, but that loophole does not exist in the ordinance's terms.

CONCLUSION & PRAYER

For the foregoing reasons, the City of Austin and Byron Johnson, in his official capacity as Purchasing Officer, respectfully request that this Court deny Plaintiffs' Motion for Summary Judgment, and that the Court dismiss Plaintiffs' case for lack of subject-matter jurisdiction, or for the additional reasons set forth in Defendants' Motion for Summary Judgment. Defendants further request any and all other relief to which the Court may find him entitled.

RESPECTFULLY SUBMITTED,

KAREN KENNARD, CITY ATTORNEY
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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties, or their attorneys of record, in compliance with the Federal Rules of Civil Procedure, this 31st of May, 2013.

Via E-File Service
James Hemphill
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ATTORNEYS FOR PLAINTIFFS

/s/ Lynn E. Carter
LYNN E. CARTER

Exhibits to the

Defendants' Response to Plaintiffs'

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Defendants rely on the Joint Exhibits on file with the Court, the exhibits attached to Defendants' motion for summary judgment (cited as "Def. MSJ Ex. ____") and the following exhibits, Defendants' Response Exhibits 1-13 (cited as "DRsp Ex. ____"):

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