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' REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE LEE YEAKEL:

Defendants, City of Austin and Byron Johnson, in his official capacity, file this Reply Brief to Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment.

I. SUMMARY OF ARGUMENT

Defendants seek dismissal of Plaintiffs' claims against Defendants in their entirety because Plaintiffs' lack standing in regard to their federal law claims; Plaintiffs' federal and state law claims are not ripe for review; and because Plaintiffs' First Amendment and due process rights were not violated. Additionally, Plaintiffs cannot show that an *ultra vires* claim is appropriate under the facts and legal issues presented. In the alternative, Defendants request that the Court dismiss Plaintiffs' claims under federal law and remand Plaintiffs' pendent state law claims to state court.

II. ARGUMENT & AUTHORITIES

A. Standard of Review related to Summary Judgment

To establish a basis for summary judgment, a defendant need only prove the absence of an essential element of the plaintiff's claim. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). If the absence of a material fact is asserted by the movant, the burden shifts to the nonmovant to present "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Conclusory allegations are not competent summary judgment evidence and are insufficient to defeat a summary judgment motion. *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996). Likewise, unsubstantiated assertions, improbable inferences, and uncorroborated speculation are not competent summary judgment evidence. *See Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994), *cert. denied*, 513 U.S. 871 (1994).

B. Standard of Review related to Subject-Matter Jurisdiction

Determinations of standing and ripeness are threshold questions that must be addressed before addressing the merits of a claim. *Roark & Hardee v. City of Austin*, 522 F.3d 533, 541 (5th Cir. 2008). "Subject-matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt." *Ashcroft v. Iqbal*, 556 U.S. 662, 671 (2009). "[T]he plaintiff constantly bears the burden of proof that jurisdiction does in fact exist." *In re FEMA Trailer Formaldehyde Products Liab. Litig.*, 646 F.3d 185, 189 (5th Cir. 2011); *see Vantage Trailers, Inc. v. Beall Corp.*, CIV.A. H-06-3008, 2008 WL 304747 (S.D. Tex. Jan. 31, 2008) *aff'd*, 567 F.3d 745 (5th Cir. 2009)("A plaintiff responding to a factual attack on the court's jurisdiction generally bears the burden of proving by a preponderance of the evidence that the court has subject matter jurisdiction.")

In regard to issues of justiciability, federal courts cannot consider the merits of a case unless a live case or controversy is presented "as required by Art. III of the Constitution and the Federal Declaratory Judgment Act, 28 U.S.C. § 2201." *Mississippi State Democratic Party v. Barbour*, 529 F.3d 538, 544 (5th Cir. 2008), *citing Steffel v. Thompson*, 415 U.S. 452, 458 (1974). "Justiciability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention." *Barbour*, 529 F.3d at 544, *quoting Renne v. Geary*, 501 U.S. 312, 320, 111 S.Ct. 2331, 2338, 115 L.Ed.2d 288 (1991)(other citations omitted). "The 'essence' of standing is 'whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.' *Barbour*, 529 F.3d at 544, *quoting Warth v. Seldin*, 422 U.S. 490, 498 (1975).

To establish standing, plaintiffs must show (1) they have suffered an "injury in fact"[1] that is (a) concrete and particularized and (b) actual or imminent--not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendants; and (3) a favorable decision is likely, as opposed to merely speculatively, to redress the injury. *Friends of the Earth,*

[1] Unique standing considerations arise in the pure First Amendment Speech context so as to avoid the chilling of First Amendment rights. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 380 (1977). However, the potential chilling effects of overbroad statutes has been rejected as a basis for special standing in commercial speech cases, since it is unlikely that such speech is particularly susceptible to being crushed by overbroad regulation. *Id.* at 381; *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 561 (1980). "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). Commercial speech is defined as "expression related solely to the economic interests of the speaker and its audience." *Id., citing Central Hudson,* 447 U.S. at 561 (other citations omitted). It is speech that "does no more than propose a commercial transaction." *Houston Balloons*, 589 F.Supp. at 847, *citing Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 385 (1973).

Inc. v. Laidlaw Environmental Services, 528 U.S. 167, 181 (2000)(citations omitted). Likewise, the Texas Declaratory Judgment Act requires "a justiciable controversy as to the rights and status of parties actually before the court for adjudication, and the declaration sought must actually resolve the controversy." *Texas Dep't of Public Safety v. Salazar*, 304 S.W.3d 896, 906, Tex.App.–Austin 2009, no pet.), *citing Brooks v. Northglen Ass'n*, 141 S.W.3d 158, 163–64 (Tex.2004). To establish standing under the Texas DJA, a party must show "a particularized, legally protected interest that is actually or imminently affected by the alleged harm." *Tex. Dept' of Public Safety v. Salazar*, 304 S.W.3d at 906.

Ripeness overlaps with and bears close affinity to the elements of standing—especially the requirement that an injury be actual and imminent rather than hypothetical or conjectural. *Barbour*, 529 F.3d at 544-45. Ripeness, more particularly, addresses the question of timing. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985). The purpose of the ripeness requirement is to prevent premature adjudication by federal courts, so as to avoid entanglement in abstract disagreements. *Id.*

Standing and ripeness can both turn on whether the plaintiffs' alleged injury is actual or imminent rather than conjectural or hypothetical. *Barbour*, 529 F.3d at 545. In the case at bar, the question of whether plaintiffs' alleged injury is actual or imminent is the primary issue to be decided. In determining whether plaintiffs have suffered an imminent injury, the Court must consider whether Plaintiffs have presented evidence of any actual injury related to their disqualification, the likelihood that two or more additional disqualifications will occur in the future and the likelihood that debarment will result from two or more potential disqualifications of plaintiffs. *See Adult Video Assoc. v. U.S. Dept. of Justice*, 71 F.3d 563, 568 (6th Cir.1995)("[T]he mere fact that anti-obscenity laws may work a chill on the distribution of

constitutionally protected materials does not in itself confer standing upon a potentially aggrieved party.") Plaintiffs argue that its disqualification counts toward a debarment. However, the disqualification counts toward a debarment only in the event Plaintiffs receive three disqualifications in a sixty-month period, and only after the opportunity for a total of four hearings. JEX-25 at §2-7-109. Thus, Plaintiffs risk of debarment is wholly speculative and conjectural.

Additional ripeness considerations include determining "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580 (1985). Plaintiffs are not subject to any criminal penalty under the ordinance. JEX-1 (Doc 27-1 at 1) and JEX-25 (Doc 31-2 at 10) at §2-7-110. Moreover, Plaintiffs cannot argue that they suffer hardship by the ordinance's restrictions that encourage public speech and provide for an equal flow of information to/from all respondents to a solicitation. JEX-1 and JEX-25 at 2-7-102.

Economic regulations such as those affecting commercial speech are subject to a less strict vagueness test in part because a business is expected to consult relevant legislation in advance of action and because the business may have the ability to clarify the meaning of a regulation by its own inquiry or by resort to an administrative process. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Plaintiffs had numerous opportunities to complain about the process; inquire about potential application of the ordinance; and make other representations in public meetings and through communications with the authorized contact person. JEX-1 at §§2-7-103(E); 2-7-104; Doc 35 at 5-10; Doc 49 at 4-5. Plaintiffs could have complained about any matter, including any of the matters addressed in Gregory's December 8, 2009 e-mail, at numerous public meetings between December 9, 2009 and June 10,

2010, the date that council rejected all responses to the Recycling RFP. Doc. 49 at 6. Additionally, Plaintiffs could have communicated complaints, concerns, or requests for clarification to the authorized contact person. JEX-1 at §§2-7-103(A); 2-7-104. Moreover, because the amended ordinance allows respondents/potential respondents' attorneys to communicate with attorneys representing the City, the ordinance has ratified the inquiry made by Greenstar, which was directed to the authorized contact person and City Attorney, and which was ultimately determined to not constitute a violation of the ordinance. (JEX-25 §2-7-102(F))

C. Plaintiffs Present No Cognizable Injury to their First Amendment Rights

Plaintiffs have alleged violation of their First Amendment rights under the U.S. Constitution pursuant to 42 U.S.C. §1983. However, as described in Defendants' Motion for Summary Judgment, Plaintiffs' First Amendment claim must fail because, like the Texas Open Meetings Act upheld in *Asgeirsson*, the Anti-Lobbying Ordinance is a content-neutral regulation of private speech supported by substantial government interests that was correctly applied to Plaintiffs. Plaintiffs possess no First Amendment constitutional right to unlimited private communication with city officials regarding a competitive procurement. Doc 35 at 12-15; Doc 49 at 11-14. Plaintiffs' First Amendment rights are fully protected by the provision of the ordinance that allows communications made in public meetings. JEX-1, § 2-7-103(E)(6); JEX-25, § 2-7-104(F)(6).

D. Plaintiffs Fail to Establish a Concrete Injury In-Fact

Plaintiffs' assert the following injuries without providing competent summary judgment support: (1) that the disqualification was an injury in and of itself; (2) that the disqualification resulted in an injury to Plaintiffs' reputation, and (3) that they are injured by the chilling of their free speech rights. Doc 34 at 25 of 28 ("Bob Gregory testified that Texas Disposal [TDS] declined to bid on at least three City solicitations due to fear of being assessed another

violation….The City's interpretation of the Ordinance has created uncertainty as to [TDS'] 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…, and the staff's broad interpretation of what constitutes a prohibited "representation" has chilled [TDS'] speech"; Doc 48 at 4 ("[TDS] now has a wrongful disqualification on its record (not to mention the negative impact of the wrongful disqualification—which was highly publicized—has already had [sic] on Texas Disposal's reputation.")) Plaintiffs point to no evidence of damage to their reputation or any highly publicized negative impact, and Plaintiffs provide only conclusory evidence of the decision to not bid on three RFPs, which conclusory statement is countered by contrary, competent summary judgment evidence presented by Defendants. Doc 35 at 3-6 and 13-15 of 18; Doc 49 at 2-3, 5-6.

Likewise, Plaintiffs provide no competent summary judgment evidence of any chilling of their speech related to contract communications or negotiations. To the contrary, Plaintiffs have made the following admissions that show there is no issue of material fact as to whether the ordinance as-applied results in a chilling of Plaintiffs' First Amendment rights. Plaintiffs are not aware of any vendor with an existing contract with the City or any disqualified vendor that has been disqualified for any statements made by a vendor or potential vendor during contract negotiations with the City. Doc 35-3 at 7 of 7, RFA 27-28. Plaintiffs are also not aware of any vendor with an existing contract with the City that has been disqualified for any statement made by the vendor during communications related to the vendor's existing contract with the City. *Id.*, p. 6 of 7, RFA 25-26; *see also* RFA 24. "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum,* 408 U.S. 1, 13-14, (1972).

Not only did TDS suffer no harm, TDS arguably benefitted from its non-compliance with the ordinance and its direct lobbying of council members and city officials after the disqualification notice was issued (and while other responders were complying with the ordinance's no-contact restrictions). Doc 35 at 10-11. It is undisputed that TDS was awarded both short-term and long-term recycling contracts by the City after the City rejected all bids under the Recycling RFP. Doc. 46-5, p. 93-95 of depo; Doc. 46-6, p. 49 of depo; Doc. 46-2, pp. 60 and 111 of depo. Because TDS obtained contracts for the city services that were targeted within the scope of the Recycling RFP, TDS suffered no concrete harm. Thus, it is no surprise that TDS has alleged no loss of property interest or that Plaintiffs did not respond to Defendants' summary judgment argument that Plaintiffs possess no property interest at issue in this lawsuit. Doc 35 at 15-16. TDS will have no property interest at issue unless and until Plaintiffs are subject to debarment, which necessarily requires the development of additional facts.

Because Plaintiffs fail to provide competent summary judgment evidence of any imminent or present harm, Plaintiffs wholly fail to establish an actual or imminent concrete injury. At most, the evidence shows that the "disqualification" decision has resulted in nothing more than a first warning that may or may not apply to a future debarment—and will apply, if and only if—Plaintiffs are disqualified twice more and—if and only if a debarment decision is made following notice and an opportunity for a hearing on a potential debarment. JEX-25 at §2-7-109. Accordingly, Plaintiffs have failed to establish Article III standing or that their claims are ripe for review.

E. No Unconstitutional Vagueness as Applied to Plaintiffs

Plaintiffs respond to the City's Motion for Summary Judgment by principally arguing: Plaintiffs did not violate the ordinance and, thus, Plaintiffs are entitled to a determination as to

whether they violated the ordinance prior to a ruling on their First Amendment claims. Doc. 48 at 2-3. Plaintiffs' argument ignores the requirement that federal courts first and foremost address issues of subject-matter jurisdiction prior to addressing the merits of Plaintiffs' substantive claims. *See* p. 2 herein.

Pursuant to 42 U.S.C. § 1983, Plaintiffs allege violation of their substantive due process rights as a result of the City's allegedly overly broad application of the Anti-Lobbying Ordinance to Plaintiffs. Doc. 7 ¶ 56. Plaintiffs seek a declaration from the Court that Texas Disposal System's proposed amendment to its existing contract was not a response to the Recycling Services RFP and that it did not make a prohibited representation because TDS was not a respondent. Doc 48 at 1-3. Plaintiffs alternatively seek a declaration that the ordinance is vague as applied to the December 8th communication for failure to prohibit conduct such as Mr. Gregory's in sufficiently clear terms. *Id*. at 5, 9-10.

Plaintiffs flatly deny any facial challenge to the terms of the ordinance, and Plaintiffs do not allege that any specific terms in the ordinance are vague—or that any provisions of the ordinance are void for vagueness. Doc. 48 at 2, 5-6. Plaintiffs do not allege that the terms of the ordinance fail to provide a person of ordinary intelligence fair notice of what conduct is prohibited or that indefinite wording of the ordinance will lead to unfettered discretion by city officials. Plaintiffs simply allege that the ordinance was incorrectly applied to them.

Plaintiffs appear to chiefly argue that they have a right to "opt out" of the ordinance's terms if they so choose. Plaintiffs assert, "When [TDS] is in fact a respondent to an RFP or other City solicitation, and when it makes communications about the RFP, it does not object to limiting its speech pursuant to the Ordinance's terms." Doc. 48 at 6. Yet, this interpretation flies in the face of the principal legislative intent of the ordinance: to provide a fair playing field for

all respondents to the RFP and to ensure that all competitors for a solicitation are treated equally and have an equal opportunity to present and receive information about the solicitation.

Gregory's e-mail was plainly a violation of the ordinance because TDS later submitted a response to the RFP, thereby becoming a "respondent" within the scope of the ordinance. TDS may not avoid the application of the ordinance simply by placing a disclaimer ("proposal is not a submittal under the current RFP process") on a communication responsive to the RFP or presenting a response in the form of an amendment to an existing contract with the city that is wholly outside the scope of that contract. JEX-3; JEX-36. Interpreting the ordinance to permit such an avoidance technique would permit any RFP respondent to easily evade enforcement and render the regulation ineffective.

The ordinance also states that even a communication made prior to the person becoming a respondent would fall within its sweep, stating "This prohibition also applies to a vendor that makes a representation and then becomes a respondent." JEX-1 § 2-7-103(B). Thus, when Gregory communicated during the no-contact period with City officials to advance TDS' interests with respect to its planned response to the RFP, and subsequently responded to the RFP, TDS' actions clearly fell within the ordinance's scope and the City's disqualification of TDS was not unconstitutional. TDS' private lobbying during the no-contact period is precisely the kind of action that creates a perception of unfairness and lack of transparency, and as such TDS's disqualification served to protect the City's significant interest in preserving the integrity of its RFP process, a clear indication that the ordinance's application in this case was not "overbroad."

1. Void for Vagueness Analysis

When reviewing an ordinance for vagueness, the particular context of the ordinance provides fair notice of its scope. *Boos v. Barry*, 485 U.S. at 332. A statute provides fair notice to

citizens and adequate guidelines for law enforcement if it "communicates its reach in words of common understanding." *Boos*, 485 U.S. 312, 322 (1988); *Farmer v. State*, 540 S.W.2d 721, 722 (Tex. Crim. App. 1976) (statute is not unconstitutionally vague if it conveys a sufficient warning about the proscribed conduct when measured by common understanding and practices). A statutory provision, however, need not be mathematically precise: it need only give fair warning in light of common understanding and practices. *Grayned v. City of Rockford*, 408 U.S. 104, 110, (1972).

2. Statutory Construction

"Statutory interpretation is a question of law." *Howeth Investments, Inc. v. City of Hedwig Village,* 259 S.W.3d 877, 904 (Tex.App.–Houston [1 Dist.] 2008, no pet.) "Municipal ordinances are interpreted by the same rules of construction that apply to statutes." *Id., quoting SWZ, Inc. v. Bd. of Adjustment of City of Fort Worth*, 985 S.W.2d 268, 270 (Tex.App.-Fort Worth 1999, pet. denied). "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); *see Tex. Lottery Com'n v. FSB DeQueen*, 325 S.W.3d at 635. (Courts "presume the Legislature selected language in a statute with care and that every word or phrase was used with a purpose in mind.")

> Courts must take statutes as they find them. More than that, they should be willing to take them as they find them. They should search out carefully the intendment of a statute, giving full effect to all of its terms. But they must find its intent in its language and not elsewhere.... They are not responsible for omissions in legislation. They are responsible for a true and fair interpretation of the written law. It must be an interpretation which expresses only the will of the makers of the law, not forced nor strained, but simply such as the words of the law in their plain sense fairly sanction and will clearly sustain.

Kazman v. Frontier Oil Corp., No. 14–12–00320–CV, —– S.W.3d ——–, 2013 WL 1244376, at *8 (Tex.App.-Houston [14th Dist.] Mar. 28, 2013, no pet. h.), *citing RepublicBank Dallas, N.A.*

v. Interkal, Inc., 691 S.W.2d 605, 607 (Tex.1985)(*quoting Simmons v. Arnim*, 110 Tex. 309, 220 S.W. 66, 70 (1920)); *see Bolton v. Sparks*, 362 S.W.2d 946, 951 (Tex.1962)("primary duty" of courts when interpreting municipal ordinances is to "carry out the intentions of the municipal legislative body.") Courts "rely on the plain meaning of the text [of an enactment] as expressing legislative intent unless a different meaning is supplied by legislative definition or is apparent from the context, or the plain meaning leads to absurd results." *Tex. Lottery Com'n v. FSB DeQueen*, 325 S.W.3d at 635. Courts "do not confine their review to isolated statutory words, phrases, or clauses, but…instead examine the entire act." *Howeth*, 259 S.W.3d at 905. Additionally, words are construed "according to their common usage, unless they have acquired a technical or particular meaning." *Id.*

Gregory's Dec. 8th communication was essentially determined by the City to have violated the ordinance in two respects: by advancing the interests of a respondent, TDS, and by discrediting the response of Greenstar. Doc. 1-1 at 8-9 of 21. Gregory's e-mail communication and attachments focused in large part on criticizing Greenstar's pricing and lack of specificity in the contract terms related to pricing. Doc. JEX-5 at 9-29 of 35. In addition to the implication that Greenstar manipulated market pricing to its advantage, Gregory's most vociferous criticism of Greenstar, was that "it appears that Greenstar does not always adhere to its contractual agreements with regard to determining its purchase price for commodities." JEX-5 at 1 and 12 of 35. The City's notice of disqualification described TDS' criticism as "[casting] doubt on Greenstar's ability to honor its contractual obligation on recyclable service agreements". *Id.*

Plaintiffs ask this Court to ignore the statutory rules of construction and focus on isolated provisions of the ordinance. By their proposed interpretation of the ordinance, Plaintiffs ask this Court to ignore two key provisions: (1) "[t]his prohibition also applies to a vendor that

makes a representation and then becomes a respondent," and (2) the definition of "no-contact period", which begins on "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)).

Attempting to rely on isolated terms in the ordinance, Plaintiffs ask the Court to ignore the start date of the no-contact period, which began on November 16, 2009. Doc. 1-3 at 8. If the ordinance were interpreted in the manner sought by Plaintiffs, any potential respondent could criticize any contracts or actions of a potential vendor for approximately the first two months of the no-contact period because there would not likely be an actual "response" to the RFP until the RFP deadline (February 9, 2010). Furthermore, because of the standard confidentiality of the bidding process, a competitor could always claim that it was not being critical of a response that had never been revealed to it. Thus, it was highly reasonable for the City to determine that any response that would be submitted by Greenstar would be discredited by Gregory's criticism of Greenstar's not adhering to its contractual agreements.

Moreover, Plaintiffs' proposed interpretation of the Ordinance is contrary to the plain and ordinary meaning of the Ordinance and would require that this Court interpret the ordinance in a manner that ignores numerous provisions of the ordinance including—chiefly, the ordinance's findings and purpose (§2-7-102); JEX-1; JEX-25; Doc 35 at 5. Plaintiffs admit that the Recycling RFP included the following:

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

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

Doc. 35-2 at 7 of 11, RFA no. 7. Plaintiffs admit that the Recycling RFP was issued on November 16, 2009 (Doc 35-2 at 6-7 of 11, RFA no. 5). Plaintiffs admit they intended to respond to the Recycling RFP. (Doc 35-2 at 7 of 11, RFA no. 8-9) Thus, Gregory's December 8, 2009 e-mail was sent during the Ordinance's no-contact period. *See* §2-7-101(2) (JEX-1); §2-7-101(6) (JEX-25).

The following provisions of the Ordinance, which were in effect at the time of TDS' disqualification, show that the City's interpretation is the only reasonable interpretation based on a review of the entire ordinance, including the legislators' expressed intent.

> **§2-7-102 FINDINGS; PURPOSE**
>
> (A) The Council finds that it is in the City's interest:
>
> (1) to provide the most fair, equitable, and competitive process possible for selection among potential vendors in order to acquire the best and most competitive goods and services; and
>
> (2) to further compliance with State law procurement requirements.
>
> (B) The Council intends that:
>
> (1) each response is considered on the same basis as all others; and
>
> (2) respondents have equal access to information regarding a solicitation, and the same opportunity to present information regarding the solicitation for consideration by the City.

The ordinance's findings and purpose establish that council intended all responses to be considered on the same basis and for all respondents to have equal access to information

regarding a solicitation.[2] The ordinary meaning based on the plain language of the ordinance is to treat all competitors to the solicitation the same and to provide equal access to receive and present information. There is no opt-out or exception language in the ordinance that provides respondents the option of submitting an alternative proposal in lieu of a response to a solicitation. Allowing Plaintiffs' self-crafted opt-out/exception thwarts the express purposes of the ordinance. Plaintiffs' interpretation is also contrary to the rules of statutory construction that presume words in the ordinance are chosen with care and that every word or phrase was used with a purpose in mind. *See Tex. Lottery Com'n v. FSB DeQueen*, 325 S.W.3d at 635.

As shown below, Plaintiffs' proposed interpretation of the ordinance also conflicts with the ordinance's definitions, which include the no-contact period that begins on the date a solicitation is issued, as well as broadly encompassing definitions of "representation" and "respondent," the latter of which includes a person who withdraws a response or has a had a response rejected or disqualified. JEX-1 at §2-7-101(4). Most importantly, the restriction on contacts provision applies to "a vendor that makes a representation and then becomes a respondent." JEX-1 at §2-7-103(B).

[2] The amended ordinance provides an additional finding, which by its plain language makes clear that participants in the competitive process for city contracts voluntarily agree to abide by the Anti-Lobbying Ordinance, among other ethical requirements of the City Code. JEX-25 at §2-7-102 (A). This amended provision further supports Defendants' standing and ripeness arguments because although statutory rules of construction do not allow plaintiffs to add terms at their whim to the ordinance, this new provision provides no doubt that compliance with the ordinance is not optional.

§2-7-101 DEFINITIONS

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(2) NO-CONTACT PERIOD means the period of time from the date of issuance of the solicitation until a contract is executed….

(3) RESPONSE means a response to a solicitation and includes a bid, a quote, a request for proposal response or a statement of qualifications

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

(a) an owner, officer, employee, contractor, lobbyist,…or other representative of a respondent;….

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

(5) REPRESENTATION means a communication related to a response to a council member, official, employee, or agent of the City which:

(a) provides information about the response;

(b) advances the interests of the respondent;

(c) discredits the response of any other respondent;

(d) encourages the City to withdraw the solicitation;

(e) encourages the City to reject all of the responses; or

(f) conveys a complaint about a particular solicitation.

(6) SOLICITATION includes an invitation for bids, a request for proposals, a request for quotations, and a request for qualifications.

***

§2-7-103 RESTRICTION ON CONTACTS

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

(B) If during the no-contact period, a respondent makes 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 to the authorized contact person for the

> solicitation, the respondent's response is disqualified from further consideration except as permitted in this article. This prohibition also applies to a vendor that makes a representation and then becomes a respondent.

The above-described provisions of the ordinance clearly show that it was the intent of City Council to prevent—not encourage loopholes—so that all who compete for services subject to a solicitation are treated the same. The ordinance contains no opt-outs, but it provides safe harbors of communicating during public meetings and to the authorized contact person. Notably, there is nothing in the ordinance that suggests a representation is not allowed to have more than one purpose. Section 2-7-101(5) does not provide an exception for private communications on matters that are identified as agenda matters for public meetings. Gregory's e-mail advanced the interests of TDS by discrediting Greenstar, one of its competitors and by encouraging council to reject the Greenstar amendments in order to consider responses to the RFP. Bob Gregory took a known risk when he sent the private communication to SWAC members, and his self-created disclaimer is not an exception allowed by any terms of the ordinance.

The City also reasonably determined that TDS' February 9, 2010 proposal which sought to provide a local MRF facility, as well as short-term and long-term recycling services were within the scope of the Recycling RFP. Doc 35 at 4-5. The City retains the authority to determine which solicitations will be subject to the competitive bidding process, including the Anti-Lobbying Ordinance. Any vendor who attempts to evade the terms of the ordinance runs the risk of a disqualification.

The ordinance cannot be held unconstitutionally vague as applied to Plaintiffs under the undisputed facts relevant to Gregory's December 8th communication because the City's disqualification was reasonable under the plain language of the ordinance and the ordinance provided fair notice to TDS that his actions would in all likelihood result in a disqualification.

See Howeth, 259 S.w.3d at 907-08. (Courts will generally defer to the interpretation of the agency charged with enforcing an ordinance when that interpretation is reasonable.) No more than a reasonable degree of certainty is required—even for laws that carry criminal penalties. *Id.* at 907. Moreover, Gregory ignored the numerous options available to him for communication, which included communicating during public meetings—an option which Plaintiffs have demonstrated an exception depth of experience. Doc 46-1 at 111-12 of the depo.; Doc. 49 at 4-6; Doc. 35 at 6-10.

Accordingly, Plaintiffs' proposed interpretation would lead to an absurd result that is contrary to the plain meaning of the ordinance. Courts are "responsible for a true and fair interpretation of a law as it is written." *Tex. Lottery Comm'n,*325 S.W.3d at 638. Plaintiffs' proposed interpretation cannot be squared with the expressed intent or a true and fair interpretation of the ordinance. Thus, Plaintiffs' request for declaratory relief must fail as a matter of law.

G. No Valid Ultra Vires Claim

Plaintiffs assert that they are entitled to assert *ultra vires* claims against Byron Johnson because he incorrectly interpreted the ordinance. (Doc. 48 at 11) However, the Texas Supreme Court rejected this same argument in *Texas Lottery Commission v. First State Bank of DeQueen,* 325 S.W.3d 628, 633-35 (Tex. 2010). In *FSB DeQueen,* the court held questions of statutory interpretation are properly brought against a governmental entity under the Texas Declaratory Judgment Act. 325 S.W.3d at 633-35. In contrast, the court stated that an *ultra vires* suit is one requiring a state official to comply with statutory or constitutional provision. 325 S.W.3d at 633; *see Texas Comm'n of Licensing & Regulation v. Model Search Am., Inc.*, 953 S.W.2d 289, 292 (Tex.App.-Austin 1997, no writ)(plaintiffs' DJA claim that agency had authority to interpret

statute but had interpreted provision incorrectly was insufficient to invoke *ultra-vires* exception because the fact that the agency might interpret a provision incorrectly does not destroy its legal authority to make that determination). In *FSB DeQueen*, the Lottery Commission refused to recognize the validity of an Arkansas judgment assigning lottery payments to FSB DeQueen, which sought declaratory relief that the Arkansas judgment was effective and that a provision of the Texas UCC rendered portions of the Lottery Act ineffective. *Id.* at 632-33.

Similarly, in the present case, Plaintiffs are not asking the court to order Mr. Johnson to comply with the ordinance, Plaintiffs request a declaration that the disqualification be removed based on a determination that the ordinance was incorrectly interpreted. Mr. Johnson's upholding the hearing officer's decision in regard to TDS' protest interpretation of the ordinance was squarely within the scope of his legal authority. Doc 27-1, JEX-2 at 9-11 of 57. Plaintiffs' argument that the decision was incorrect simply fails to present an *ultra vires* claim. Therefore, Plaintiffs' claims against Mr. Johnson, which are limited to *ultra vires* claims against Johnson in his official capacity, must be dismissed, as Plaintiffs failed to establish subject-matter jurisdiction in regard to Mr. Johnson, or alternatively, because Plaintiffs failed to show Mr. Johnson acted without legal authority or that he failed to perform a ministerial act.

III. CONCLUSION

For the reasons set forth above, and based on the pleadings, joint exhibits, admissions of Plaintiffs, the competent summary judgment evidence, and the arguments and authorities including in Defendants' motion for summary judgment and response to Plaintiffs' motion for summary judgment, as well as the exhibits attached thereto (or referenced therein) Defendants request that the Court dismiss Plaintiffs' claims in their entirety. Alternatively, Defendants request that the Court dismiss Plaintiffs' federal claims and remand the state law pendent claims

to state court for determination. Defendants further request any and all other relief to which this Court finds them entitled.

RESPECTFULLY SUBMITTED,

KAREN KENNARD, CITY ATTORNEY
MEGHAN L. RILEY, CHIEF, LITIGATION

/s/ Lynn E. Carter
LYNN E. CARTER
Assistant City Attorney
State Bar No. 03925990
Post Office Box 1546
Austin, Texas 78767-1546
(512) 974-2171
(512) 974-1311 [FAX]
ATTORNEYS FOR DEFENDANT
CITY OF AUSTIN

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 14th day of June, 2013.

Via E-File Service
James Hemphill
Graves, Dougherty, Hearon & Moody, P.C.
401 Congress Avenue, Suite 2200
Austin, Texas 78701
ATTORNEYS FOR PLAINTIFFS

/s/ Lynn E. Carter
LYNN E. CARTER