

**Item 3b. Proposed amendments to Article 6 (Anti-lobbying and Procurement) of City Code Chapter 2-7 (Ethics and Financial Disclosure), including a staff briefing and a possible recommendation to Council.**

**Peter Einhorn:** Let's go ahead and get started. We have a couple people who are probably gonna show up when traffic allows them to. We'll call the meeting of the Ethics Review Commission to order. It is October 11, 2017. It is 6:08 p.m. here in City Hall Room 1027. Cindy, would you call the roll please?

**Cindy Tom:** J. Michael Ohueri?

**J. Michael Ohueri:** Present.

**Cindy Tom:** Peter Einhorn?

**Peter Einhorn:** Present.

**Cindy Tom:** Donna Beth McCormick?

**Donna Beth McCormick:** Present.

**Cindy Tom:** Luis Soberon?

**Luis Soberon:** Present.

**Cindy Tom:** Debra Danburg... is not present. Fredda Holmes?

**Fredda Holmes:** Present.

**Cindy Tom:** Brian Thompson?

**Brian Thompson:** Present.

**Cindy Tom:** Ben Stratmann... not present at this time but expected later. Meagan Harding?

**Meagan Harding:** Present.

**Cindy Tom:** Mary Kahle?

**Mary Kahle:** Present.

**Cindy Tom:** And Dennis Speight.

**Dennis Speight:** Here.

**Cindy Tom:** We have a quorum.

**Peter Einhorn:** Great. All right, the first thing I'm gonna ask if there's anybody here to speak on Item 3... is anyone here to speak on 3a, yes... is anybody here to speak on Item 3a, which is the Ochoa-Bessard initial determination? Okay. Then I will... we're gonna table that one and we're gonna move to Item 3b on the agenda just cause that's probably what everybody... most people are here for. Item 3b under New Business is 'Discussion and possible action regarding the following proposed amendments to Article 6, Anti-Lobbying and Procurement of City Code, Chapter 2-7 Ethics and Financial Disclosure, including a staff briefing on a possible recommendation to Council.' It is my understanding that the Council met last week and discussed this Item and then asked for the Ethics Review Commission to take a look at this and make a recommendation to them. I think we have some City staff here. If City staff would come to the table first...get a presentation from them and then we'll bring in the other stakeholders. Go ahead.

**Brian Thompson:** Mr. Chairman, Councilmember Pool is here also...

**Peter Einhorn:** Yeah let's bring Councilmember Pool up to the... actually...

**Brian Thompson:** I just think that she was helpful, that maybe she could...

**Peter Einhorn:** Yeah, I know.

**Brian Thompson:** ...speak for a few minutes and then...

**Peter Einhorn:** Please, yes, sorry about that.

**Brian Thompson:** ...feel a little bit better about this.

**Leslie Pool:** Chair, how are you?

**Peter Einhorn:** Good to see you. Good evening.

**Donna Beth McCormick:** Do you need to time it?

**Leslie Pool:** Please, let's keep it short. All right. I appreciate you all looking at these changes to the Ordinance. A little bit of brief background on the Waste Management Policy Working Group that was... I chaired that and Councilmembers Garza, Kitchen, and Alter, and you may have had an opportunity to look at all the work papers that are on our website. We do have a page with audio from each of our stakeholder meetings. They were amply attended. I can't remember how many people were around that table but it was a full house with all the stakeholders and we went through the various different policy issues and had pretty good conversations and debate and presentations by staff. The four councilmembers put together with our staff a set of recommendations on the Anti-Lobbying Ordinance and that's the piece that you are looking at here today. When staff presented their proposed revisions I noticed two main differences between what we recommended and what the staff had drafted up in their recommendations, so I just want to lay those out to you and then I would ask for you all to look at those and give me your considered opinions on how you think we should proceed. So that's what I'm hoping to get from this Commission. First is the no-contact period. Our thinking was to apply the Anti-Lobbying Ordinance at the time the RFP is released through the time Council considers-votes on executing the contract. Staff is here and they can also speak to that. I can understand why staff recommended starting the no-contact period at the time the response is due. It gives staff a better handle on which vendors are subject to the Ordinance and so I will allow Mr. Scarborough, who is our Purchasing Officer, and our Law staff, can speak to that and can give you their opinions on that. The second difference is the debarment issue. The Working Group had asked for clarification on enforcement, appeals, and compliance. Staff recommended removing the debarment section altogether based on the fact that the City has never debarred any vendor. This tells me that having a debarment clause serves as a deterrent so maybe we need to think about how to keep some form of deterrent in the Ordinance rather than simply removing it entirely. Staff can speak to that as well. Again, thanks so much for reviewing these revisions. It's out of... maybe out of your wheelhouse but I really, really appreciate you digging into it and I really respect the work that you all do and look forward to seeing your recommendations. Thank you Chair.

**Brian Thompson:** May I ask you a question, Councilmember Pool?

**Leslie Pool:** Yes.

**Brian Thompson:** One of the concerns that I've heard just in talking with some folks on the Commission is generally the way we've handled these... especially when you have recommendations where every word matters and you kinda have to run through it with a fine-toothed comb. In the past we have used our working groups to look at those types of issues. It's not a type of review process that this arrangement is conducive to...

**Leslie Pool:** Right.

**Brian Thompson:** ...'cause we have a limited amount of time each month, we only meet on a monthly basis. My understanding through talking with you and your chief of staff and just kinda keeping up with it is that you kinda want to move on this a little bit quicker than our more deliberative process would require, including potentially

having Council vote on this next week, is my understanding. Can you just explain what the timetable is right now and why, if there is a concern about getting it voted on in the next week or two, why there is that concern?

**Leslie Pool:** Yeah, thanks. Thanks, Brian, for that question.

**Brian Thompson:** Sure.

**Leslie Pool:** There is interest on Council to continue moving this forward and to come to some closure, that is rubbing up against my natural inclination to allow time to pass in order for the appropriate levels of review to happen. And so, I would like you all to take the amount of time that you need in order to do the work that you see in front of you appropriately, and so I would ask you how much time you think you would need for it, and I can take that back to the Council and let them know that we may need... you may need the additional time and then we will just postpone it. That's absolutely possible. We did talk about how to go forward. There is one contract that's pending that we, on the biosolids, that we would like Austin Water Utility to move forward with, and at the last Council meeting where we postponed this, Councilmember Alter offered up an amendment to the postponement which would allow the Anti-Lobbying Ordinance piece to be attached to the biosolids contract so that that would have that protection. I am a bit concerned that we have gone a number of months without the Anti-Lobbying in place, although it is only on these contracts and we have only issued two contracts in that timeframe, because of that. But we are coming up against a time where there are probably a half a dozen or more... is Mr. Scarboro here? Yeah, and he can talk about that and tell you about the additional contracts that will be pending and will start running out very soon, and the way for those program initiatives, and I don't want to disturb those... so that's kinda the rub. But I think we can work with the timeframe that you may need for a work group to do the due diligence on the language and make sure we get it right.

**Brian Thompson:** Okay. Can you say again what Councilmember Alter proposed on the existing, or the closest contract that's coming up... the biosolids?

**Leslie Pool:** It was a little bit loose, but essentially we would reinstate and have it as an element of the contract issuance that Anti-Lobbying was reinstated.

**Brian Thompson:** So it'd be within the contract versus following existing ordinance or any new ordinance?

**Leslie Pool:** Just for that one contract. Just for that one contract, and that was also something that I would like to defer to our Law department and our Purchasing office to talk about how that would look in reality, but the concept was that we would reinstate the clause at some level for that one biosolids contract. And just remember the only... the only area where the ALO has been suspended is in Austin Resource Recovery and specifically for the time that was needed so that all the stakeholders would feel free to come to the table and talk to us openly because there were some concerns about communications with the City and whether that would unnecessarily penalize them for future dealings. So we agreed on Council to suspend it for the time being while we do this work.

**Peter Einhorn:** Further questions? All right, thank you very much.

**Leslie Pool:** And I'll stay... yes, Donna Beth.

**Donna Beth McCormick:** Only Austin Resource Recovery contract, that's the only one in all the City contracts that...

**Leslie Pool:** Well of the ones that come under the Anti-Lobbying Ordinance, and it's not all of them. There are some social services contracts and some other contracts that don't come under ALO, but it was suspended only for the array of contracts that come out of our Austin Resource Recovery department.

**Donna Beth McCormick:** Why not other contracts?

**Leslie Pool:** Because this is where we were having the pain points. This is where the disagreements arose.

**Peter Einhorn:** Was your question why certain contracts don't fall under the ALO, or why the ALO has only been suspended as to the waste...

**Leslie Pool:** Only... Austin Resource Recovery is the only thing, and why don't other contracts with the City fall under this?

**Peter Einhorn:** Okay, so both questions really.

**Leslie Pool:** So our Law staff can talk about previous Council actions that they have exempted different kinds of contracts from the ALO and then I think the... Mr. Whellan might want to talk about why his client had issues with the ALO. And we were attempting to address his specific concerns and they were only with the Austin Resource Recovery.

**Donna Beth McCormick:** I have some questions for him, too.

**Leslie Pool:** Yeah. Okay. And I'll be here and will listen with interest to the rest of the commentary.

**Peter Einhorn:** Fantastic. Thank you, councilmember. Appreciate it. All right, Purchasing.

**James Scarboro:** Good evening, Chair. Commissioners. My name is James Scarboro, I'm the Purchasing Officer for the City of Austin. It's my pleasure to be here this evening and to answer any questions that you have regarding staff recommendations for the revisions to the City of Austin Anti-Lobbying Ordinance. With me I have Chris Weema from the Law department, who's been working with me on these revisions. I also have with me some other City staff tonight. We have Rolando Fernandez, the Capital Contracting Officer, he can also answering questions as the Anti-Lobbying Ordinance applies to his operations, as they may apply differently from Purchasing Office. And I also have Deputy Procurement Officer Shawn Willett, and also my procurement consiculary and advisor, Mark Walsh, who also may also be able to answer historical questions associated with Anti-Lobbying, the origins of the Ordinance and past changes to the Ordinance. So with that, I will apologize up front, I just learned that we had a role in presenting this evening a couple of days ago, so, and I haven't had the pleasure of speaking with you previously, so I'm not familiar with the format and the approach that you're expecting but I'm glad to answer any questions, and to allow the questions to direct the content of the presentation. But I thought most logically that we would start with a high-level overview of the areas of change that we are recommending for Council consideration. Before I do that I wanted to just underscore, or kind of reiterate staff's position in this regard. We were asked to recommend the changes to the Anti-Lobbying Ordinance. We don't necessarily take a policy position, in fact, we try to enact the policy objectives of Council, and to the extent that we heard the direction from Council, both in the recommendation and then the discourse that occurred at the Working Group meetings, we tried to reflect that to the best of our ability in our recommendations. But we also are responsible for making recommendations based on our professional experience and trying to make the most objective determination of what the City needs operationally. Some of the recommendations that we made were based on our operational needs and what is actually impactful to how the Anti-Lobbying Ordinance is applied. But beyond that there are elements of the Anti-Lobbying Ordinance that are also policy-significant, but I'm not here to exercise my policy nor are the staff here to do so but rather we try to make our recommendations as objective as possible and when Council provides us with policy direction then we certainly endeavor to implement that. So, we realize there may be areas of the recommendation that may need to be crafted further. We saw in the Work Group document, Council indicated in that document that further discussions would occur and that feedback would be received and so we took that to heart that this would be a first shot and we intend to work with the councilmembers and the Work Group and any other interested parties to bring forward an Ordinance that City Council can ultimately get behind and meets their policy objectives and needs of the City. So with that, I'm glad to dive into the major areas of change associated with the recommendations, but before so are there are any questions that you have or any approach that you would like us to take or anything you'd like us to address before we get into the meat of the changes?

**Peter Einhorn:** Commissioner Thompson.

**Brian Thompson:** I think most of us on the Commission have heard from various folks this week about specific changes, specific wording. I don't think where we might have heard as much about is kind of the big picture. The 30,000 foot view. And what I mean by that is, what is the Anti-Lobbying Ordinance? Maybe start there. And then, why is the area of solid waste kind of where we're zeroing in on tonight, what's the story behind that? My understanding is that this Anti-Lobbying Ordinance, which by the way I kind of think is a bit of a misnomer, I know

Mr. Whellan agrees with me. When we hear 'lobbying', we just went through a big revision of the Lobbying Ordinance in the City, and so when we hear 'anti' we think the other side of the coin of that, and this is actually not anything like that at all. And so that's why I kind of think maybe we just need a little bit of a big picture view and maybe then can we get into the specifics of the recommendations.

**Donna Beth McCormick:** And to follow up on his timeline, is relevant, as to the RFP, the Anti-Lobbying, when everything kicks in... that's really what I want to know, which is pretty much what he said.

**James Scarboro:** Sure. So big picture, would a historical perspective help or you just want to know kind of how the Anti-Lobbying Ordinance works...

**Donna Beth McCormick:** How it works.

**James Scarboro:** How it works. Okay. So, basically the way that the Anti-Lobbying Ordinance currently is applied is it creates a framework in which communications, when a solicitation is issued, those communications are directed towards an office or a representative of the City, and not just to any City staff or officials or what have you. Kind of the preamble to the Ordinance is to create the most level playing field and give the bidders a chance at equal communication. So, with that, the communications are to be directed to the authorized contact person. That's a phrase of ours established under the Ordinance. Basically, any of the communications that occur from when the solicitation is issued through the end of the no-contact period, another phrase of ours, should be directed to the authorized contact person. That way we are assured that we can manage that communication flow equitably for all prospective participants and the actual participants in the competitive process. An important concept in the Anti-Lobbying Ordinance is the No-Contact Period. That's just the name of the period of time, it's not... it doesn't have any actual meaning regarding contact or no contact. It's just the period of time where the Ordinance applies. Right now it begins when the solicitation is published. Published onto the City's website, we subsequently do other notices, both active notices and newspaper notices, but basically it starts when the solicitation is published. The Anti-Lobbying, or no-contact period, then continues through the end of the process and right now that's defined as when the resulting contracts are signed. Now, the resulting contracts can be signed immediately following Council authorization of contracts. They can be signed within a number of days if further negotiations or definitization of the contract documents are required, or the no-contact period can be extended for a period of time if there is a need to resolicit and a need to continue the no-contact period to allow for issuance of a new solicitation is necessary. So, authorized contact person and no-contact period. So beyond that, entities or persons or companies that are subject to the Anti-Lobbying Ordinance are referred to as 'respondents.' And 'respondents' refers to both of those companies that submit responses to the solicitation and to companies who will eventually submit responses to the solicitation. Because the Anti-Lobbying Ordinance applies at the time of the solicitation's issuance, it also applies to companies who have not yet submitted an offer. So, 'respondents' means those that actually have and potentially will respond to the solicitation. Beyond respondents' responses, the Ordinance calls out prohibited responses, excuse me, prohibited representations. A representation is a specific type of communication where a respondent says something that is related to their response to a City staff or official or what have you, other than the authorized contact person. So, a prohibited representation would be a communication that was about their response that was aimed to somebody other than the authorized contact person. Now, in the current version of the Anti-Lobbying Ordinance there are lots of nuances to that communication. What is... is it influential, is it trying to advocate for a certain action or what have you. Some of that was driving some of the concern that you heard about the Ordinance and we tried to clarify that in the revised version of the Ordinance. We tried to streamline the description of prohibited representations. Tried to streamline and clarify the examples of the permitted representations and the permitted communications. So those are the kind of phrases of ours that are used in the Ordinance and how they're applied now, and we forwarded those in the recommended revisions to the Ordinance. So, we're still using 'respondent' we're still using 'no-contact period', we're still using 'permitted representations' and 'prohibited representation'. So, the phrases of our terminology are staying the same. But we are recommending some basic changes to certain of these elements that are both based on the recommendations that were made to the Work Group but also based on our practical experience with the Anti-Lobbying Ordinance. And then we stand ready to act on Council's direction and further direction from the Work Group to make adjustments. But essentially the timing associated with our recommendation back on September 15<sup>th</sup>, and it ultimately went to Council on the 9/28 agenda, was to

accommodate the need from Austin Water to proceed with a solicitation to address their biosolids. And this is a byproduct of treating water that accumulates over time. It's not something that they can stop accumulating. And so they have an increasingly urgent need to address this requirement and the contract that is running towards the last few months of its term, and based on their urgency we went ahead and brought forward the Item so that we could initiate the discussion and hopefully move the ball call down the field with regard to bringing Council ultimately some changes that meet their policy objectives. Is that overview enough or... yes sir?

**J. Michael Ohueri:** I just have a follow-up question on that. So typically, what type of contacts are made between a vendor and I guess, the City... someone that works for the City, a City representative that isn't the... I guess, the agent?

**James Scarboro:** So, typically a vendor... a prospective contractor of the City and an actual contractor of the City. Communications between companies that wish to do business with the City in itself is not limited or precluded to the extent that they're communicating about their response, about a solicitation, while the no-contact period is in play or is in effect, that's when you start getting into the prohibited communications or the prohibited representations in the current Ordinance. But it's necessary for companies to communicate with the City about the day to day activity of their contracts, and that's not precluded in the current Ordinance. It wasn't as clear as it needed to be in the current Ordinance so it was clarified in the rules that were promulgated under the Ordinance. But that's allowable, and that's encouraged and that's necessary. But when those communications are associated with a given solicitation and a response to that solicitation, that's when communications, in terms of the Ordinance, start to take on the characteristics of lobbying, and advocating in the interest of the company and that vendor process. Because the authorized contact person, which is the procurement representative, when they're outside of that communication, they're not able to officiate the communication so that all of the participants in the process have the benefit of that exchange. And so that's the kind of preclusion in the Ordinance, is that those communications necessarily about the solicitation associated with the response, they need to be directed to the Purchasing office and they need to be directed to the person that is overseeing that solicitation. Yes. Is that...?

**Donna Beth McCormick:** Are you done?

**J. Michael Ohueri:** I have one more follow-up. So, I guess, from the vendor standpoint, I understand where some of their concerns might be, so let's say that it's something like... I can't think of a good example right now, but say the City, for whatever reason, passes out umbrellas on a regular basis. It puts out a request for these contracts annually January 1<sup>st</sup>. So Company A is currently providing umbrellas. It gets to November; Company A is having a conversation... the request hasn't been made yet, it's made middle of December... excuse me, I'm just making this up, so I know it's somewhat confusing. So in November, Company A is talking about the umbrellas, and then they mention, "Oh yeah, I think next year we might have a great reduction in price beginning in February," but at that point a Request for Solicitation from the City hasn't been made. That wouldn't be in violation of the Anti-Lobbying. But if in the middle of December, this person mentions, "Oh yeah, I think we're gonna have a great sale, whatever, maybe reduction in price, in February", that would be a violation of the Anti-Lobbying Ordinance. Is that... am I understanding that clearly?

**James Scarboro:** Yeah, I try to be careful about making kind of spot determinations without actually looking at the details of the circumstance, because I really try to give the perspective and actual respondents as much depth of detail as possible. But it sounds about right. There's no solicitation on the street. The Anti-Lobbying Ordinance has not been triggered because the no-contact period has not been triggered. So a communication at that point would not be characterized as a representation. Once the solicitation was on the street and it appeared that that communication was associated with an actual or prospective response to the new solicitation, that may be characterized as a representation, if that communication was not made to authorized contact person. So, if it was made to another City staff or to an official, then that may be characterized as a violation of the Anti-Lobbying Ordinance. So, again, I really have to look at the details and it depends on the day that the communication occurred, was the solicitation on the street, I mean there's a lot of specific that would determine whether a violation had occurred but it sounds generally like, yes, that would be a violation if the solicitation was on the streets.

**Donna Beth McCormick:** Okay, you have guidelines. Like: 'we start on this date, this is the person responsible, you don't talk to anybody but this person. When this person has a question they will contact you or you contact them,' and that's it? Then, I think there's just, it doesn't have to be as difficult as you're making it sound. If you have guidelines that these are the rules, and you follow the rules, and that's it. So, it seems like there's just way too much weeds here. That if this happens and if that happens, no... we do the RFP, we have a contact. That's the only person that you talk to. And then you have to have some responsibility between the two people. And then you have a cutoff date. Everybody needs to reply to the RFP by the deadline date. I used to deal with the federal government, so that's why I'm kinda... you have a deadline date and then that's it. Anything after that is not considered, and we're not going, 'oh well they're a friend or this or whatever.' No, we're not doing that. So, whoever your contact is, that's it. I just can't see that this is just a little bit too much "iffy" stuff. So, you have the guidelines and these are the dates and this is it, and these are the rules you follow, and you don't follow the rules, then you're out. So...

**James Scarboro:** I hear you.

**Donna Beth McCormick:** Too much bureaucracy.

**James Scarboro:** What I've conveyed so far is my interpretation and understanding of how the ordinance is written. Well, this is my fourth government and this is an ordinance that applies in the City of Austin and it's my read and it's our historical application of the ordinance and I understand, and I hear you.

**Donna Beth McCormick:** Have little bullet points, and this is the way it is, and don't deviate. I'm not a lawyer, but that's... you know, as you can tell.

**James Scarboro:** I understand.

**Donna Beth McCormick:** But you don't need wiggle room in things like this.

**James Scarboro:** Well I hope that one of the takeaways from our recommended revisions was a substantial streamlined clarification. If nothing else, there are a lot fewer words in the Ordinance now. But that aside, hopefully it's a clearer read, it's easier to understand and to apply, particularly to the participants in the process, but also to staff and to the elected officials. Because we have an obligation to observe the no-contact period, and the easier it is to observe, to your point, the easier it to observe and more clear it is to observe the provisions of the Ordinance, the less that the Ordinance becomes this thing that we have to wrestle with and more of an intuitive and common sense...

**Donna Beth McCormick:** Don't let those wiggle words in there... that 'oh well it could be interpreted this way or that way'. Say '1, 2, 3, this is it.'

**James Scarboro:** I appreciate it.

**J. Michael Ohueri:** I guess one more thing I just wanted to ask about and clarify is the Draft 27106, I believe, speaks about the enforcement and it also speaks about the written notice or the right to request an impartial hearing process. But I have two questions. First question is, is it made clear how that impartial hearing process would be conducted? Who handles that?

**Chris Weema:** If I may? Good evening, Chris Weema, Assistant City Attorney. There are existing rules promulgated in the last time the Anti-Lobbying Ordinance was revised in 2011. There were companion rules that were promulgated to implement the requirements, revisions to the Ordinance. There are existing rules that set out... that fully flesh out the procedure. There are also existing rules generally applicable to most City solicitations regarding probation, suspension, and debarment. And so both of those do provide... they do flesh out the framework with... what is included here are the procedural safeguards to that process you would be required to have. But any rules that are promulgated once this Ordinance is, in whatever form, is passed by Council there would be updated rules that would be promulgated that would put the Ordinance into full effect.

**J. Michael Ohueri:** Is that's something that's handled by City employees? What public input is there in that process?

**Chris Weema:** There is a 30-day, a required 30 day comment period. Rules are promulgated. There'd be a Notice of Draft Rules. Notice of Rulemaking is posted by the City Clerk. There is then a 30-day comment before those rules can be implemented... so there's a public comment period, and for the historical context, the prior revisions in 2011, there was a delay in implementation of the Ordinance. The Ordinance was passed by Council but there was a delay in implementation of the Ordinance to allow for that rule comment period. And so those, they can work together. The rules are promulgated by staff. The rules are technical in nature and they give full effect to the Council's directives and ordinances.

**J. Michael Ohueri:** My follow up is, and it seems like it may advance my question, there's also a mention of making contracts voidable if it was found out that there had been a contact. Is there a timeline on when that impermissible contact has to be found, I mean, it is a year into the contract, is the contract 30 days...?

**Chris Weema:** There is none in the statute and that's a current... voidability is in the current Anti-Lobbying Ordinance, the current implementation of the Anti-Lobbying Ordinance. It would be within the terms of the contract. If the contract was a 12-month contract it would be within the term of the contract.

**Meagan Harding:** In the no-contact period, can you shed light on why it begins when the solicitation is due as opposed to beginning when the solicitation is publicized? From the point in which the solicitation opens to when it's due? Because I would think that if the concern is undue influence or anything like that, then once it is publicized, if people are able to talk freely or speak freely to anyone until it's due then don't you still have the same issue?

**James Scarboro:** I appreciate the question. That's probably the biggest component of staff recommendation that is dissimilar than the Work Group. And I'll say up front, we can continue with implementing the no-contact period at the time the solicitation issues. That's what we're used to. That's the current iteration. But if you ask us for our recommendation in that regard, and I said 'well, let's have the no-contact period start when the solicitation issues,' I would have a hard time providing you with practical examples of how that works effectively, or more effectively. And here's some of the practical reasons that we look for when the recommendations start when the offers are due. When we issue the solicitation, we don't know who the offerers are. The offerers let us know, the respondents to the solicitation, they let us know who they are by submitting their response. And we don't usually know who they are until the day that we open the responses, til the day that the advertisement period is over and we open up the responses. So currently, this means that communications that occur while the solicitation is on the street but before the offers are in, are subject to the no-contact period and the Anti-Lobbying Ordinance. But we don't really have a way to enforce that while it's on the street because we don't know who the offerors are. So when we receive the offer, when we receive the responses, then we know who is now subject to the Ordinance and then if we're now going to now enforce it, we have to now enforce it in areas. So there's... if we don't know who the respondents are there's no way for us to really prevent a violation, or to report a violation until after, weeks later, when the offers are submitted. If we're going to... if there are normal exchanges between City staff and elected officials, they won't know... offerors, contractors, and staff, offerors, contractors and officials, we won't necessarily know who to watch our communications with, who to, you know, to make sure that we don't get into communications that are associated with a given solicitation. We don't know if they're respondents yet. We don't know if they're going to offer. So it makes it difficult for staff, practically speaking, to enforce Anti-Lobbying because we don't know who to enforce it on. We find out weeks later and then if there have been phone calls received, if we find out about it. If there were emails sent, if we find out about it. So it... we very, very infrequently find out about violations, I can't recall any, in fact. But of the violations that we learn of, most of them are associated with known parties, with known respondents. Once we know who the respondents are then we can enforce the Ordinance because the parties are known at that point. But when you don't know who the parties are it makes it difficult, practically speaking, to enforce the Ordinance. Now...

**Brian Thompson:** But you don't actually even propose that, because you know once it's submitted who they are.

**James Scarboro:** Once the responses are in, yes....

**Brian Thompson:** You know then, you can enforce it starting then versus at the end of the solicitation period, the timeframe in between the two... correct? I mean, you could do it that way. So if you get your submissions before the due date, right? The time period starts there versus what the due date is.

**James Scarboro:** That is if, let's say, the responses are due on Friday and we receive a response on Monday, then conceivably yes, we would know who the respondents were. That puts us in a kind of an operational circumstance because we would then have to publicize the list of respondents and while the solicitation is still on the street the knowledge of who had submitted offers may have an effect on competition.

**Brian Thompson:** I would also guess that everybody would wait til the due date.

**James Scarboro:** Right, and we don't know what's in that response, it may be a no-bid. It may be an incomplete offer. Once a respondent submits their proposal bid, they can withdraw it. And so they can submit something and withdraw it and resubmit it...

**Donna Beth McCormick:** But you have their name.

**James Scarboro:** We do.

**Donna Beth McCormick:** Okay. You've got a list with their names on it.

**James Scarboro:** But if they withdrew it...

**Donna Beth McCormick:** Well, that's later.

**Meagan Harding:** Do you find some value in even if you had to enforce it, in the areas, there being a deterrent there, for future bidders or vendors once enforcement starts to happen? Cause I think right now what you're saying is there's no way to enforce it but obviously you want to deter certain behavior and influence, and the way sometimes that happens is through there being some kind of punitive measure, even if it's after the fact.

**James Scarboro:** I understand. We don't disregard that at all. We think that the likely Anti-Lobbying Ordinance does act as a deterrent while the solicitation is on the street. That's a bit of a policy issue and we were trying to keep our recommendations more operationally oriented, but we do recognize that and if that is the rationale for starting the no-contact period at the time that the solicitation issues, we're glad to continue to enforce it that way.

**Peter Einhorn:** Commissioner Thompson.

**Brian Thompson:** While we're on this issue of the start date for the no-contact period, a longer period versus a shorter period, and this is a question for Legal, can you touch on the First Amendment implications of that? And I'm using this specific example, but I mean just generally, I would think that the shorter the no-contact period the better your chances are of getting through a First Amendment challenge. Is that a fair statement?

**Chris Weema:** You know what, that's not a... that's certainly a question I would have to look into.

**Brian Thompson:** Well, why don't we just talk about the First Amendment implications of it generally? My understanding is that, you know, any time you prohibit a lobbyist or a member of the public, a lobbyist is a member of the public but, from speaking to their elected officials, or in this case agents of their elected officials, that could implicate the First Amendment, and God knows that although we miss Councilmember Zimmerman dearly, because we used to get educated on the First Amendment pretty much every week from he and his lawyer down here, but that's my general understanding of how it would begin. So, I guess my question is do you agree with having a period that started on the due date of the solicitation versus when the RFP is published might have a better chance of surviving a First Amendment challenge? And if you're not prepared to answer that question that's fine.

**Chris Weema:** I'd rather not speak on that...

**Brian Thompson:** Mr. Whellan might be able to speak on that and educate us a bit. Okay.

**James Scarboro:** There was also a recommended change to the end of the no-contact period, if you wanted to address that, I'm glad to. So currently the no-contact period ends at the signing of the contract. Typically, the signing of the contract will happen either immediately or several days, weeks after Council authorization and one of the things that we heard from the Work Group, and one of the things that frankly we've heard from departments that we send out the no-contact list to and they see all the solicitations that are on it. It's difficult for them to kind of know when a given process ends. They have to just wait until a solicitation drops off the list. Even though Council may have authorized the resulting contact weeks ago, they have to wait until that solicitation drops off the list so they know the no-contact period has ended for that solicitation. So what staff got out of that was that there's a desire for finality to the no-contact period so that all persons are sure that it has ended, and that's what we took from the recommendation from the Work Group, that ending at the time of Council authorization would absolutely give finality to the no-contact period. Now that... our recommendations suggest that that is impossible. For certain types of procurement activity in the City we're ready to go at the time of Council authorization, and that's predominantly in our side of the house, in Purchasing and Non-Construction Services. But my colleague Rolando from the Capital Contracts Office can certainly address operational variations there, but they do a substantial amount of their negotiation after contract, after Council authorization, and to have that negotiation occur while the Anti-Lobbying... while the no-contact period was not in effect, they perceive it as being procedurally, very problematic.

**Dennis Speight:** We're referring to change orders and things like that?

**James Scarboro:** No, we're talking about forming, actually signing a contract. So, they're finalizing negotiations, they're definitizing terms, they're discussing pricing details, so they're actually finalizing the details of the contract within Council authorization and that would be subject to simultaneous communication with all parties if the Anti-Lobbying Ordinance were not in place at that time. So, after discussion with our colleagues and I'll certainly defer to Rolando for details, but after our discussion with our colleagues at the Capital Contract Office and other offices that negotiate after Council authorization, we came back with a recommendation that there at least be a period of time after Council authorization to allow staff the chance to wrap up negotiations, but not an open-ended time period like there is now. Or not as much of an open-ended time period as there is now, but a finite time period. That's why we recommended the 60 days. So, under no case would no-contact period go beyond that 60 days. But it would end earlier if we signed a contract early. And to that extent...

**Donna Beth McCormick:** Okay. Is there extensive negotiation after the contract is approved? So...

**Rolando Fernandez:** Thank you, James. Commissioners, if I may?

**Donna Beth McCormick:** Yeah.

**Rolando Fernandez:** Rolando Fernandez. Absolutely. I want to just begin by talking a little about the services that we provide in our office. So we do construction, and we do small construction all the way to very large construction. If you've visited the airport recently, you can see the airport, the brand-new garage, the terminal apron expansion, those are multimillion dollar contracts. Hundred million dollars, twenty million dollars. And so those contracts are what we call alternate delivery. Construction manager at risk, design and build, those require a lot of negotiations for us with the sponsor department, the owner, Aviation, or Austin Water Utility, or Austin Energy, and the contractor and their consulting team; their sub consultants. So, we look at negotiating the scope of work, and sometimes we might think we have an idea about what that scope of work looks like but then we hire these professionals that are top notch engineers, architects, and they come back and they propose ideas to make things better for us. And so there's a lot of discussion, a lot of negotiation on that end. We also, for Professional Services, negotiate the raw rates for each individual that they have on their team. So, we're talking about the hourly rates that we're going to be billed, that they'll be billing the City. We also look at the profit. So that takes a lot of negotiation, a lot of give and take, and so there is quite a bit of time, depending on the size of the project, depending on the number of contracts, the workload that we have, and also the workload that the firm has. If they're pursuing other jobs, have multiple contracts on board, it may take a little longer for them to sit down and negotiate. Sometimes, we try to prioritize these things but these things happen and it just takes a little longer and so the idea of 60 days would hopefully incentivize other folks to also come in and try to get these contracts done, but at the same time, recognizing the scope of work that we're negotiating and the amount of

effort that goes into that, it's not a matter of Council awards on Thursday and try to have an executed contract by Friday of the next week. It's just really impossible for us to do that.

**Donna Beth McCormick:** And my next question is about... money. Do you have a range of money that would be approved or is it going to be way over the original RFP? Two million to eight million? But anyway, if there's something like that or is there kind of a...

**Rolando Fernandez:** So, it depends on the contract delivery method. If we're talking about a Professional Services contract, where we're soliciting an architect, for example, we will put on the solicitation a budget amount, an estimated cost that we derive, and that's what's gonna go to Council. But this methodology state statute doesn't really allow us to start negotiation until Council awards. So that's one where we have an idea of our budget but we're always trying to get the most for our buck, right, so that's where the negotiation starts, after the Council award. For other contracts, you know, we get the bid amount, the proposed amount for that project, and we negotiate. There's different cases that are done after Council has awarded it. So, and there may be some efficiencies gained through the negotiation where we thought we were going this way and they come back and say but if we do it this way, you're gonna save some dollars and you're gonna save some time, right, and so all that happens.

**Donna Beth McCormick:** So there's guidelines.

**Rolando Fernandez:** Yes ma'am.

**Donna Beth McCormick:** Not free for all.

**Rolando Fernandez:** Not free for all, no ma'am.

**Donna Beth McCormick:** Okay.

**James Scarboro:** These are not just operational differences between Construction and Non-Construction procurement. These are legal differences between consecutive negotiations where you negotiate one, the highest rated offer, and if that doesn't work out, then you go to number 2. If that doesn't work out then you go to number 3. Whereas in Non-Construction Procurement, you can do competitive negotiations, where you can negotiate with everybody simultaneously and take the best offer. So, because our processes... we may say RFP, but when I say RFP I mean a different RFP, oftentimes than what our colleagues over at Capital Construction mean. So, with those differences that's why we came back with a recommendation, that we still have a finite date, but that we allow for a period of time so that those parts of the City that need additional time after the Council authorization have it, but ultimately the finite date is known. So if you can calculate from the date of authorization, 60 days, it's going... the no-contact period will end before or by that 60<sup>th</sup> day with the recommendation we also forgo the ability to extend the no-contact period through an interim period of time to get us to a re-solicitation. So that was utilized occasionally but it wasn't necessary enough for us to hold onto it for operational reasons so we went ahead and struck that from the recommended revisions to the Anti-Lobbying Ordinance. Any more questions on the no-contact period, when it starts, when it ends, or any additional clarification we can provide in that regard?

**Peter Einhorn:** There may be questions that will come up as we go through this conversation, but maybe if y'all will give us the seats, we'll bring some folks up that signed up. I have 3 people who have signed up to speak. Is there anyone else that are not signed up who would like to speak on this? All right. Nikelle Meade? We'll start with you and we'll give folks three minutes and then, then obviously, there will be question and answer before the Commission. Dennis, do you want to be our time keeper? Whenever you're ready.

**Nikelle Meade:** I will not take three minutes. Nikelle Meade. I'm an attorney here in town and I work with lots and lots of clients on the local, state and federal level who are seeking these type of contracts. I really just wanted to offer a bit of testimony and commentary about what's before you all today, which in principle, we support, we, meaning the staff's recommended proposal. We do think it could stand some tweaks, but we think generally it's fine, but frankly we think the existing ordinance is fine and I think you will realize that there's not a widespread upset among those who are seeking these contracts about the City's existing Anti-Lobbying provisions. This is par for the course. Every, almost every procurement that we encounter, all over the country, has something very

similar to what Austin has. It's about transparency. It's about everybody having the same information. It's about streamlining these processes and making them, the awards of these contracts based on the merit of the folks who are submitting proposals and not on politics. It's kind of funny that the one vendor who we know is really upset by these has three lobbyists in this room tonight, so. And I'm a lobbyist and I think these regulations are totally acceptable and we cannot continue to have a situation where we don't have any rules with regards to these contracts. One of my clients is one of the victims of the Council's action to remove anti-lobbying which the Council was in a position that it was forced to do. We totally understood that, but we are one of the victims these waste management contracts that are currently without any lobbying restrictions and we just hope something is adopted and put in place because that is not a good climate in which to do business. It ends up costing the City more money. It ends up really messing up the competitive environment and frankly, it causes many companies to not even want to participate in contracts in Austin because of the environment. So, just a few of the tweaks; I sent you all an email, it was fairly late in the day so I'm not sure you had a chance to look at it but as I said, we generally support the staff recommendation. We agree whole-heartedly with Councilmember Pool's comments that she made tonight, that the no-contact period is too short. We think it should start when the solicitation is on the streets. I think there are a lot of reasons for it to start at that time but it really goes back to making sure everybody has the same information. You know I heard Mr. Scarboro explain that the reason they are offering, or the staff is proposing, to shorten that time period, and I would make note that the staff's recommendation is inconsistent with the Council Working Group has recommended. The Council Working Group has recommended, I think Councilmember Pool reiterated that that period start when the RFP is published. But he mentioned that the reason for that is ...

**Peter Einhorn:** Time.

**Nikelle Meade:** ... they have difficulty knowing that ... no, no, that's fine. That didn't feel like three minutes. I'm used to doing like entire speeches in three minutes.

**Peter Einhorn:** You can go ahead and finish your thought.

**Nikelle Meade:** Just really quickly, I think there are some other things that can be done but we think that that time period is too short, and my last comment is just that, you know, we think that anybody who is asking for that piece of work should really be subject to these regulations, and so we hope that this body, as you all go forward looking at this in your working groups, really can brainstorm about some ways to close the loopholes that we have in the ordinance today that lets somebody not officially submit a proposal but be lobbying like crazy to get the work. Thank you very much. And I'll stick around in case anybody has questions.

**Peter Einhorn:** Appreciate it. All right, our next person signed up is Michael Whellan.

**Michael Whellan:** I think Gary Newton is donating his time...

**Peter Einhorn:** So we'll give you six minutes.

**Michael Whellan:** Thanks. Commissioners, Michael Whellan on behalf of Texas Disposal Systems. I know you received an email from Bob Gregory on Saturday that outlines the core issues and some of the background so I just want to provide some quick highlights and then I want to respond to your direct question to the purchasing officer or their lawyer about the rules, which I'll do that in a minute. So, four highlights, I would kind of focus on from that email would be why is the Anti-Lobbying Ordinance, or as I like to call it 'guidelines for', I hope I get this right, 'guidelines for respondents' conduct in connection to a solicitation' being heard now in the context of the waste policy review. Second, why is it necessary to change this ordinance? Third, what are the core principles remedied as City staff's draft? And then finally, what are the specific revisions and what is the rationale for each?

First, you know, for about ten years the ALO had been narrowly interpreted and a shift occurred about ten years ago and a broader interpretation began, so much so that TDS was disqualified before it was even a respondent to an RFP. And it took a federal judge to reverse that disqualification and the reason that was so important is because if you're disqualified twice you are then debarred. Texas Disposal has a 30-year contract and it could not put at risk it's a 30-year contract, which is why we got that clarified in reversed, that action reversed by a federal judge. As a result of the new found interpretation, and I would call it really an oversight-free interpretation and

enforcement of the Anti-Lobbying Ordinance, and this goes to Commissioner Ohueri's question. You asked specifically, what is the checks and balances, if you will, on the system now, and the rules explicitly say that the purchasing officer may appoint an independent hearing examiner to conduct a hearing and to provide a written recommendation. There is no requirement that any third party look at it, it's at purely the discretion of the purchasing officer, and further that you don't even have to take that recommendation. It again completely resides with the person who disqualified you initially whether to appoint somebody, and then whether to even take that recommendation. So as a result of that, and what I've given to you in your backup, the last item which is in orange, is a chart which shows precisely what the purchasing officer explained to you. There you'll see that some of these contracts, the very first ones here, back recently in 2017, have been open up to 300 days. 206, 336 days on the very first one on the first page, 344 days on the second one, 365 days on the third. So in a seven point five year period, there have only been fifty-six days when there have been no contract open, for a waste management, for waste services, if you wanted to apply, in which you would not have been able to talk or communicate with a Council member and be at risk, be at risk of the purchasing officer claiming that you are contacting them inappropriately. So, as a result of that, we had to make a choice, we chose to stop bidding, two years ago because, we were putting at risk a thirty year contract and a lot of business. And that led us to identifying and begin seeing that the solicitations that were coming through were not necessarily in sync with the Zero Waste policy of the City Council. And so, we did begin exercising our free speech right because we were not responding and making it apparent to people, for example with biosolids, which is my friend Nikelle Meade's client, that they were just for the most part, spraying that stuff down in Corpus Christi or that they wanted to just cook it for four weeks, and then spread it throughout Travis County, rather than really creating something like Dillo Dirt. And we thought that needed to be said, so that the environmental community and the Council members would know.

So, what we decided is during the Working Group policy recommendation process, the question was raised, "Why isn't TDS bidding?" and we brought to their attention the fact that there's too much exposure, in connection with debarment and disqualification with no checks and balances that we had to, that we could not do it until the anti-lobbying ordinance was revised. So, if you want to ensure that solicitations match Council policy, we do agree with the purchasing officer's recommendation that it start on the date that they're due, so that if people think that the solicitation does not match policy, somebody can at least throw a flag on the field and say "hey, folks, this doesn't quite match what policy has said." Also, the purchasing officer did point out, you don't know who the respondents are going to be, and we agree with that as well. I would say that when you look at the core principles and what needs to be remedied, it boils down to three things. I think if the draft has, and you, the red tab at the very top has our redlined revisions with the basis, and I'll go over those if we have time in a moment. But the core principles are checks and balances, which we think it's important. Ironically, in 2011 the rules, the effective date as was pointed out was not until December of 2011 and the rules themselves, in 2011 came to this body before the effective date of the Anti-Lobbying Ordinance. I find it ironic that it's not included to be done under this circumstance. And then the other two things, that I think can be done with our recommendation and still keep the core principles outlined here is eliminate subjective terms in favor of objectivity. Get rid of the wiggle room that's in here, there's a lot of it and I'll be happy to show you where it is, because it's everywhere. And then second, where possible, eliminate discretion. When you eliminate discretion, you create a better system for everybody to operate under. Again, eliminate wiggle room. Have it outlined when you can speak, who you can speak to and not have it be any person under certain circumstances if it's intended, I think that's where you get in trouble. So, with that, I thank you, I've also included, if I can, the memo that's more specific in terms of the law, and the first amendment rights that's the blue, and then the yellow is a two-page summary of the changes that we're recommending. And then, a one-page summary of the working group recommendations versus what staff proposed. Thank you very much.

**Peter Einhorn:** All right, questions?

**Donna Beth McCormick:** So, you're saying that TDS doesn't have any kind of contracts with the City now?

**Michael Whellan:** We do. We have a thirty year contract with the City that we are unwilling to put at risk through debarment.

**Donna Beth McCormick:** So, you don't want to bid on anything else? Is that what you're saying?

**Michael Whellan:** No, we would like to bid on something else if there is the elimination of wiggle room and clear direction in an anti-lobbying ordinance, then we're prepared to bid again. And the changes that I've recommended here would achieve that goal, and we would be prepared, if these changes were made to start bidding again. And when you bid, there's more competition, and you get better prices and better service. So, we would be prepared to bid again, with these changes to the Anti-Lobbying Ordinance.

**Peter Einhorn:** Mr. Whellan, how is the anti-lobbying ordinance in Austin different from other jurisdictions?

**Michael Whellan:** Great question. So, we did a bit of an analysis on that, and an example would be debarment, which the only other city we found in Texas that I think did it, was El Paso, and they require it to go to City Council. Here, it can be done unilaterally under the current ordinance by the purchasing officer with no appeal rights to anybody. And that's the risk we were unwilling to take. That type of discretion without bullet-points, eliminating wiggle room and being clear in a draft. So, that would be one example. There are other examples, I'll give you another example, Sacramento, because, we did a search to get a more... some progressive cities now are ending the no-contact period, if you will, at the time that it's agendized. San Antonio or there's a, and they're requiring a contracts to actually be posted. That's another interesting feature. So that everybody gets to see the contract ahead of time and knows exactly was happening. And you would think that a city like Austin would embrace that type of transparency and open government. And we hope that someday we will. We also acknowledge that, this is where we are. My goal in making these changes was to be minimal, to eliminate the wiggle room, to infuse this with more objectivity so that we could minimize the changes and proceed with starting the bid again as Commissioner McCormick has suggested.

**Ben Stratmann:** Would there be issues if Texas had posted the contracts subject to the recent Boeing decision?

**Michael Whellan:** I mean maybe, I don't, I think, if there's confidential information, it would need to be redacted and then you would just have an issue that you could take up with the Attorney General, which everybody has the right to do. And people do often. I mean a lot of vendors do that and that's just what happened. It's a good question.

**Luis Soberon:** I have a question. In terms of voidability, is that something that's normal throughout certain jurisdictions?

**Michael Whellan:** I'm not sure. I do believe voidability is a power that can exist. I just think it's a matter of not voiding any contract, but just voiding the one upon which you have violated the anti-lobbying ordinance. So long as there's some checks and balances, I don't think that's an unfair thing to be included in here with checks and balances. And I think that is a severe penalty, if you're talking about a hundred million dollar contract, as you heard, I think that's a very severe penalty that does kind of get you to sit up straight and be sure that you're following the procedures that have been outlined. And I don't think you need debarment, I think debarment is one step too far. Which is why very few cities do it.

**Donna Beth McCormick:** Are we going to talk about debarment?

**Man:** [inaudible]

**Donna Beth McCormick:** I would like to talk about debarment.

**Michael Whellan:** Sure.

**Donna Beth McCormick:** Personally, I think debarment needs to stay, because you need to have some kind of guidelines, some kind of penalty for people who do not abide by rules. And I think that even though it hasn't been used in lots of years, and that's, the, what people say, "oh well, we haven't used it in years, we need to get rid of it." It is a, kind of a security factor, I think, for who knows who you might get in who does not follow the rules. And you need to have some way to get rid of them. And that's my two-cent.

**Michael Whellan:** And I think one reason why the City staff has not included it, and is taken out is because it's not best practice anymore. But like Commissioner Ohueri said, voiding the contract is what is really here at stake rather than debarring somebody from showing up to bid.

**Donna Beth McCormick:** But, you never know what might happen, so we need, I just think that that's one more little guideline that we need to have.

**Michael Whellan:** Well, regardless, in the current form, the current ALO, complete... I'm pulling that out, that's what I was looking for... completely lacks any sort of checks and balance in that regard.

**Donna Beth McCormick:** Well, that can be added. You know it's a...

**Michael Whellan:** I would encourage going with a more progressive best practice, which is not having it but, I hear what you're saying, and...

**Donna Beth McCormick:** You just never know what kind of people are out there.

**Peter Einhorn:** Does the debarment carry with it a time period or is it...

**Ben Stratmann:** That's what I was going to ask.

**Michael Whellan:** It does. The current debarment, the current...

**Peter Einhorn:** Mr. Stratmann, do you want to come up here?

**Ben Stratmann:** Yes, I would love to get a technical definition of what the City...

**Michael Whellan:** The current debarment, the current debarment says that if you're disqualified under this article more than two times, in a sixty month period, 'the purchasing officer shall debar respondent from sale of goods or services to the City for a period not to exceed three years, provided respondent has given written notice in a hearing in advance of the debarment.' Again, remember that hearing is the purchasing officer gets to select who's going to do that. And then a recommendation is made that the purchasing officer can accept or reject. So, that's the debarment. Two times disqualified at the unilateral determination of a purchasing officer in a sixty month period and then up to a three year debarment from any sort of vending. That's what it says.

**Ben Stratmann:** Sure.

**James Scarboro:** Thanks for your questions and I appreciate your sentiment. I'm a career public procurement person so, debarment I take very seriously. You're separating a company from the opportunity to do business with its government, and that's not something we take lightly at all. So, under the current Anti-Lobbying Ordinance, a company would have to have violated the ordinance more than two times. I believe we meant two times. But, it says more than two times.

**Michael Whellan:** It does, that's right.

**James Scarboro:** So with that, the purchasing officer shall debar. That's pretty mutually exclusive. You either do or you don't. And we take, we would use a hearing officer. Now I don't, disregard the need for more clarity with regard to protest and the use of hearing officer, but I would hesitate to add policy and procedural clarity to procurement protests and the use of hearing officers and appeals or second level reviews to a single ordinance. Because then we end up having a protest process for anti-lobbying violations and a protest process for violation of a \_\_\_\_\_ ordinance, and protest process... and they all start to use different terminology and have different periods of time. It would make more sense if we had a single protest and appeals body of code and rules and procedure. And then in a given area of operations like anti-lobbying refer to the general of policy or code for those regulations. But we don't have that yet. So, we have what's in the ordinance now, and it does prescribe a debarment for multiple violations over a five year period. But that debarment, and it's been our read of the code and our interpretation as we consulted with Law, that debarment is prospective. It applies to any contract that was received by the company, if they received it as a result of their violating anti-lobbying, that contract would be voided and they would lose the opportunity to compete for the City's work going forward. But, it would not apply to their existing contracts. That is our interpretation and understanding of how debarment would be applied. Certainly, we would appreciate clarifying that further as well. But that is our interpretation after consulting with the folks that have been in my office for years and consulting with the Law department.

**Donna Beth McCormick:** I just think that, it's just a little security for the City, because you don't know what's coming down the pike or who's coming down the pike and what they might use.

**James Scarboro:** I would characterize the debarment, as an action associated with a company or with a vendor because it only would trigger after multiple solicitation level actions, so what's contemplated in the recommendation now would be a solicitation level action. So, the consequences would only be associated with that solicitation. The company would be disqualified from further participation in that solicitation. What we would be talking about would be a compounding of consequences so it wouldn't be results of, or consequences associated with a single solicitation, it would be multiple solicitations. So as the ordinance is written now it would be more than two. It's just, it's not something that has occurred, operationally in our past, and we have spent an inordinate amount of time discussing debarment and how it applies, and when it applies, and the work that we were doing to defend this action that we have never use, it just ultimately didn't make sense to carry forward in the recommendation, objectively speaking. But we understand there is a deterrent quality and we don't disregard that and we are glad to retain debarment as an element of the Anti-Lobbying Ordinance if that is the desire of Council. Our recommendation came strictly from an objective, observable, here's what we need, here's what makes sense. But if there's a policy, a desire beyond that we embrace that and we're glad to support that in the revised ordinance.

**Donna Beth McCormick:** It puts a little teeth in the...

**James Scarboro:** Yes ma'am.

**J. Michael Ohueri:** Well then answer this question. So, although, no one's ever been debarred, how often has someone had a violation? Or how often does one time violation occur?

**James Scarboro:** Anti-lobbying violations probably occur, and I'll have to get specific numbers, because I really can't, given this conversation, I need to have specific numbers and I apologize for that. We'll have that very shortly. Probably on the order of, maybe, one to three a year. And one or two of our recommended changes were associated with recent experience with disqualifications that the Ordinance didn't give us any wiggle room with regard to interpretation. One of them actually went to a hearing officer and I was told, there's only one way to interpret the Ordinance, and that's the way it had to be applied. And essentially the violation was initiated by, well, the violation of the ordinance was initiated by an exchange with an official, but the official actually initiated the exchange. They contacted the company, and the company responded back to that contact and violated the Ordinance. And so we couldn't undo that violation and ultimately, it took Council action so that we could dispense with having to disqualify that firm under the Ordinance. But we didn't have any ability to consider mitigating factors. We had no ability to consider that the violation was initiated by City staff or official. So that was what behind one of the recommended changes here. If violation was not initiated by the respondent but it was actually initiated by a City staff or official that we could consider that mitigating factor and not find a violation. But to balance the equation, we needed some level of responsibility on behalf of City staff or official, so allowing them to recuse themselves from further participation in the authorization or in the furthering of the item before Council or in the contract. So, again those are based on practical experiences that we've had with the Anti-Lobbying Ordinance in the last couple of years.

**Peter Einhorn:** Commissioner Soberon?

**Luis Soberon:** Yes, sir. So, I'll be kind of straight forward, I'm very sympathetic at the outset to procedures for appeal and review by someone who was sort of removed from the process, and with all due respect, is the purchasing office acquit more so than a deliberative body, to consider quote unquote mitigating factors? Because I think, like you know, it's our job to weigh context and circumstances in all these cases. But I honestly don't know much about the purchasing office so, maybe there are deliberative processes within your office...

**James Scarboro:** Sure. So, at a basic level, we hear protests throughout the year. Dozens of them. And whether a company has violated the procedures set forth in the solicitation or whether they were determined to be non-responsive initially in the incomplete offer, or they were later found to be non-responsive because their proposal or bid was not compliant with the specifications, that's something that we normally, that's a determination that we regularly make. In this case, determining the violation, typically, if it's a matter of fact, then we would go

ahead and make the determination. However, if there's a matter of interpretation or legal interpretation, then we bring in a hearing officer. I'm not suggesting that that area could not be further clarified, but because we took the debarment out of the recommendation, all of the accompanying procedural clarifications are not in the recommendation as well. Whether or not the Ethics Review Committee plays a role in a hearing, whether it be a debarment action or an individual violation, that didn't occur necessarily to us when we made the recommendation because in consulting with Law, and looking at the code under which this organization is established it didn't appear to be in the scope of your activities so it wouldn't be just us changing our ordinance, it would be us changing our ordinance and your ordinance to have that happen. If that's the desire of the Council, then we don't have an issue in that regard, but I believe that there are some legal concerns that may make that level of review more challenging and I would defer to my colleagues from Law department in that regard.

**Peter Einhorn:** Commissioner Stratmann.

**Ben Stratmann:** I'm not asking for specific details on the instance, but did I hear you say just a minute ago that a business was cited for violating one of these non-contact orders as a result of responding to outreach initiated by a City official?

**James Scarboro:** Yes sir.

**Ben Stratmann:** By what mechanism are we advising City officials, be they elected or appointed or hired staff, of these no-contact orders? I would probably be very unhappy if I were in the shoes of that business had that occurred.

**James Scarboro:** Yes. The way that the ordinance is written now, and again, this has been in place for years.

**Ben Stratmann:** Sure.

**James Scarboro:** The way the ordinance is written now the responsibility is entirely on the respondent. They control their actions, and they can determine whether or not to initiate a representation or to respond to a question from somebody other than the authorized contact person. We empathize very strongly with the company, but ultimately, the way the ordinance is written, this went to, I took, I sent this to a hearing officer.

**Ben Stratmann:** Sure.

**James Scarboro:** I went to the hearing officer and I said if there's another way to interpret this ordinance, I am all eyes and ears. And he responded back directly and in writing that there was no ambiguity with regard to the interpretation of the ordinance in this regard. It was the offeror's responsibility not to have responded to the question that they received from the official.

**Ben Stratmann:** Seems like...

**Peter Einhorn:** ... the respondent to be non-responsive to a city official. So, if somebody reaches out to them, could they respond to the official and say I can't, I don't want to be non-responsive but, I can't. Would that be allowed?

**Ben Stratmann:** I'm sure that would be within their jurisdiction to all that kind of response, I think that ironically, is the type of thing that would be exactly what you would pay a lobbyist to know and advise you to do. Which is delightfully ironic, but anyway. And that's not directed at you. You're doing your job to the letter of the law. That's incredible. So, thanks for the information.

**James Scarboro:** Hopefully, and the recommended revisions to the ordinance would address that...

**Ben Stratmann:** Outstanding.

**James Scarboro:** ...and allow us an outlet so that we could take into consideration mitigating factors like that without having to stop the process, without having to move heaven and earth like we did to find a resolution for this particular circumstance. But, that was the interpretation of the ordinance as it was written.

**Ben Stratmann:** Sure. Totally understand and appreciate that.

**James Scarboro:** But, I understand your perspective, I really do.

**Ben Stratmann:** Yeah, the mitigating circumstances seem like a big aspect of that because the idea that, I don't know, that again, I don't want to know what the contract was, but the idea that the tax payers maybe went with a lesser quality or a more expensive, comparatively contract for city services of some kind because of y'all not being able to bend that a little bit, makes my stomach hurt a little bit. But again that's, you're doing exactly what you're supposed to.

**Peter Einhorn:** Commissioner Thompson?

**Brian Thompson:** Mr. Whellan, I know you have concerns here, other concerns about different provisions in the ordinance than the debarment provision, but it sounds to me like the main thrust of your client's argument, his reason to not participate in the RFP process right now, is that there is a risk of debarment and therefore a risk of losing the thirty year contract that he has with the City. If the debarment provision was not in the ordinance, would he participate in future RFPs?

**Michael Whellan:** If the changes we're recommending were adopted. So, if this Commission ultimately decided and, by the way, you have time. I know that Purchasing just sent an email out to everybody who is a vendor that says that you have until October 30<sup>th</sup> to give responses. So, I don't think this is set to go to Council next week because they're still seeking feedback on this through October 30<sup>th</sup>. At least that's the email that vendors received. So...

**Brian Thompson:** But, my question is the debarment provision, if the decision of this group, the Working Group look at it or whatever, if the final decision was, well Council's decision, I mean, is what matters, was remove the debarment provision because what I've heard from you is that that is the main thrust of the argument. At the risk of losing the thirty year contract with a debarment, if that came out, but everything else was left either the same or we adopted all of the staff's recommendations or some split the baby approach. What would your client do?

**Michael Whellan:** I think if there was some additional changes, and I'll pause and say that is, we've been told by some staff members, much to my surprise, that if we are responding on one of these and we talk to anybody about waste or recycling without, that it would be a violation of the Anti-Lobbying Ordinance because it would advance our interest. If we say we're really good recyclers, even though we've bid on a biosolids contract, because...

**Brian Thompson:** Is there some clarity as to the fact...

**Michael Whellan:** Getting rid of some of the wiggle room, like a prohibitive representation is quote "advancing the interest of the respondent" with respect to the solicitation to which it relates. It's too vague and mushy and it doesn't have the precision that I think would be needed. So, I think yes, if this was cleaned up and the debarment wasn't there, we would enjoy participating again. I think you would see prices, to Commissioner Stratmann's point, come down considerably, as a result of our bidding.

**Meagan Harding:** I have a question for Miss Meade. Mr. Whellan has some First Amendment concerns as it relates to political speech and the regulating content of speech, and I just wanted to know if you share those concerns, if you think that's a significant risk, Miss Meade, obviously thinking about if the Ordinance could withstand a challenge.

**Nikelle Meade:** No, we do not have those concerns, love Michael, but we looked at the legal analysis of that as well, I apologize I didn't bring those cases with me, but it sounds like you all are going to be looking at this for a while so we'll send you our legal memo, but in short, what we found is that where there's a compelling public interest in limiting that speech, or restricting that speech, cities are perfectly within their rights to do so. And we also found cases where trying to solicit better prices for cities, trying to avoid undue influence, trying to avoid corruption, are all examples of those compelling type of interest, so no, we don't agree. I've not seen Michael's memo; I'll be finding him and knocking on his door tomorrow for a copy, but, and I'll send ours to you all, but we did look at that.

**Brian Thompson:** I had asked a question earlier and now I've got two highly respected attorneys here on the dais with me. Can we all agree, regardless of the specifics, the shorter a no-contact period, the better an ordinance has in the courtroom against the First Amendment? Can we all agree on that?

**Nikelle Meade:** I frankly don't think it matters, and I'll tell you why, because I think the person or the party who would be making such a claim, is going to make it if they don't get the contract; and they're going to make it regardless of whether they were barred from speaking on the day the proposal was due, or they were barred from speaking 30 days before the proposal was due. So I actually think from a practical standpoint, when everybody actually, if it really came down to somebody making the claim, it wouldn't matter. And I'm not seeing anything in the law about it saying that shortening it, the way we're proposing to shorten it, really helps us.

**Michael Whellan:** Remarkably, I agree with Nikelle that the length doesn't matter as much, and I disagree then on the rationale. The core cases always talk about, as Ms. Meade just mentioned, is the reason for having the restriction tailored to promote the particular governmental interest and, the conjunction is and, does it restricts speech more broadly than necessary? So I think you heard some practical reasons why having the period begin at the time of the solicitation is due as the appropriate time because you don't know who the respondents are, so you really are 1. doing yourself a disfavor, and, it was your question, isn't a list published regularly saying who's on the... and the answer is they do, in fact it's weird, they put the biosolids on recently even though it doesn't apply, but they do list the contracts once they're out but they don't know who the vendor is. And I think that's been the challenge, is you don't know who the vendor is even though a solicitation has hit the street and the bids aren't quite due yet. So it just has to be examined. Is it, has the restriction been tailored appropriately?

**Nikelle Meade:** One thought that I had listening to Commissioner's comments and Michael's comments, is looking at it again, this might be something that this body might be perfect to look at, working with Purchasing, is it a possibility to have mandatory pre-proposal conferences where, and this happens on several contracts, where if you are going to submit a bid, you are required to attend the pre-proposal conference, and then only restrict those parties who attended the pre-proposal conference from then lobbying after that point. So, that might be a way, and I do understand Mr. Scarborough's concerns about how do you know who you can and cannot talk to, and that might be a way of figuring out who those parties are. And it's not unheard of to require people to attend a conference in order to be able to submit a bid.

**Michael Whellan:** I guess the only challenge there is, often times, and we've got a great example of the waste contract, waste in particular is the one area of the City where the City of Austin, Austin Resource Recovery, is a direct competitor to private competition. Right? We don't have a competitor to aviation or electric or water. This is a direct competitor because they are into the commercial business a little bit, as well as the residential business, so there is a little bit of a difference here, and I think having third party expertise outside of the City informs Council members for a very short period of time, sometimes 14 days, 30 days, whatever, if there is a solicitation that has been promoted that does not match Council policy. You all might remember the Goodwill and Salvation Army contract that was unilaterally bid without any sort of oversight, and as a result there was a lot of screeching that occurred, even though a contract had been signed it was too late basically, because there was no third party thought given to what is going to be the impact of that solicitation. Does it match the Council policy?

**Nikelle Meade:** I don't want to, like every time Michaels says something I have to say something, but I will say that I do think that's been solved. I do think that's a problem, but I think with Councilmember Pool's leadership, I don't know if she's still here, the Council made very clear that before Austin Resource Recovery and Austin Water Utility in particular, issue these RFPs that they actually have a policy discussion with the relevant Boards and Commissions to talk about what's going to be in those RFPs, and that's a public a hearing process before two separate commissions, where the environmental groups, or Michael and I, or whomever, has a great opportunity, and to me that's the right time to have that opportunity. So you're not specifically saying 'I want this changed because I can't meet this requirement', you're talking about the policies and what we're trying to achieve, that would have circumvented the Goodwill situation. But I think with Councilmember Pool's leadership that is in place and that problem has been resolved.

**Michael Whellan:** Well it's not in place 'cause it's not even in an ordinance. As soon as it's in an ordinance then we know it's in place.

**Nikelle Meade:** Yeah, and we wouldn't have objection to that.

**Michael Whellan:** And I think, to your point, you can see in the redline I gave you, there is a little bit of a carve out because this is a unique area in that, and this is on page, in the redline, page 2, where we have the restricted communication period. You can see a new D and E, which takes into account, at least on the ending of the period, for solid waste, recycling and organics, and maybe to your point, Miss Meade, to have a similar provision on the front end for waste, recycling and organics, would be appropriate, and that way... because it is the one area where there is direct competition by the vendor.

**Nikelle Meade:** I haven't seen that. I'm sure there's something that I disagree with in there.

**Michael Whellan:** Well of course, of course there is.

**Nikelle Meade:** Generally that's the right approach. And I actually understood that Council gave that instruction, and that that's going to happen, (inaudible) but I agree, it doesn't hurt to have it in there.

**Michael Whellan:** In an ordinance. So I think a working group, I mean, I think you can see, we would be able to identify some core values, and we might have some disagreements, of course, naturally, and I think we would be able to have quite a bit of consensus on a considerable portion of this, if that could be done in the next, you know, 30 days.

**Ben Stratmann:** I imagine we could lock you two in a room and probably solve this.

**Nikelle Meade:** We keep saying that but then margaritas always get involved and we make no progress.

**Ben Stratmann:** Hence the lock on the door

**Peter Einhorn:** Any other questions?

**Luis Soberon:** While we're still on, I'm assuming the subject of free speech.

**Michael Whellan:** Yes, I like free speech.

**Luis Soberon:** So, I just want to kind of identify where you think there's ambiguity in the proposed ordinance because, so I mean, just haven't had the time to thoroughly read, but like this first, let's see, I'm looking at the legal memo on page 3, under the scope of, it looks like the complaint is that the proposed ALO doesn't specify that a representation made 'directly'... so elaborate that, I don't know, it think that the preposition 'to' is fairly definitive, like if I walk down the street 'to' the store just because the pharmacy is a block away doesn't mean I walked to the pharmacy.

**Michael Whellan:** Right. So, I think if you keep going down you'll see the example there is if there is a statement made to an identifiable group that happened to include a Council member, which has been, that was a violation that happened to Texas Rowing. They sent out a blast email to their members and they didn't realize that a Council member was a member of Texas Rowing Club and all of a sudden they were disqualified as a result of sending out a blast email. So that would be an example. Or if there was a statement made to the general public and it was heard by a Council member, that could be interpreted made 'to', rather than 'directly to' the Council member, so, you know, what we've done is we've tried to be narrow in identifying where the wiggle room is, and if you look at the Anti-Lobbying, the redline that I provided, you can quickly see cuz they just kind of pop out at you, where there's some language that is overly broad, or very vague. You know, I gave you one example under paragraph, Prohibited Representations, where it says, this is 2-7-103, where if you advance the interest of the Respondent, or if you discredit the response of any other respondent to the solicitation, I think if you just are very clear about if you're trying to directly ask any City official for a favor, or recommend, or not recommend, or vote for or against, I mean that's why we kept 5., and we just made it clear, if you directly do this, it's a violation, you know. And so I think the core intent of the Anti-Lobbying Ordinance will remain. I think you can see 2-7-104, I'm glad they added that, you've created a safe Harbor so that everybody knows what you can do, and I thought that was well done so that we have some guidance on what you can do and what you can't do. You can see we have very few changes there. The one change we do have is another example. Kind of funny, one of the safe harbors there is 'any communication occurring when making a contribution,' and I can think of somebody handing

somebody a check and having in there a communication that says 'please support this solicitation, the bid,' and we're now free to claim that that communication was made while doing a bid, and I know that's exactly not what was intended by this which is why I would eliminate that and just say 'you can make a contribution, you just can't have any communication related to a bid in connection with that contribution' which is what it says now, so...

**Nikelle Meade:** We just, I haven't seen this exact draft, but I think I've seen it many times before in other venues, but, I just think, we just think, almost in line with what Commissioner McCormick is saying, their proposal just makes it way too complicated. I mean, we know as lawyers that you cannot address every circumstance and every possibility in a legal document. You have to draft it where it makes some sense, and you have to draft it where it's logical, and the intent is clear, and you've got to go with it. And I think we're hearing from the Purchasing office that, you know, only when there really was a violation are people being nabbed by these issues, and you know, I think there have been some problems, clearly, The Rowing Club for example, but we can deal with those. I don't think we have to have all these really specific to one entity tailored set of changes to be able to have our ordinance...

**Michael Whellan:** We concur. The tailoring that I'm talking about addresses your question. I've really identified strictly where I think we can clean it up to eliminate the vagueness that exists so that we don't have to go federal court every time there's a disqualification. When you have a process like this where disqualifications come to the Ethics Review Commission, just like we changed in the last two years the process for sworn complaints being filed, and I thought that was, that was hard work, and we had a working group and it came up I thought with a good result.

[Comment]

**Michael Whellan:** But you know we had a good result and I think it's paid dividends by being thorough and having checks and balances in place. It's just a core principal that I think we all value. And this body is the right body. It can take into account mitigating circumstances, and I think having a little bit of checks and balances doesn't hurt the process, it makes everybody behave better.

**Donna Beth McCormick:** Bullet points.

**Michael Whellan:** We concur. That's why there's a good safe harbor here.

**Megan Harding:** I'd like to make a motion, I would like to make a motion that we send this to the 2-7 Working Group and have them... is it 2-7? Or do we need... yeah, 2-7 Working Group and have them come back to us with their thoughts and recommendations.

\_\_\_\_ Who's on that committee?

\_\_\_\_ Yeah, would you remind me...

**Peter Einhorn:** The Ethics and Financial Disclosure Working Group is myself, Commissioner Ohueri, Commissioner Danburg, Commissioner Holmes, and then we have one vacant position because that was our former Vice Chair, who's no longer on the Commission... so, and I know that

**Michael Whellan:** Would you repeat that? It's Commissioner Einhorn...

**Peter Einhorn:** Ohueri, Danburg, Holmes, and currently vacant. We do have an agenda item later where we can add people to it because we have new members who have not...

**Fredda Holmes:** Mary wants to be on it.

**Peter Einhorn:** Okay, let's wait until we get to that Agenda item, and then we'll add you, we'd be happy to add you. Anyone who wants to do work, we're always willing to give them the work. That, and when you miss meetings. We also make you do work when you miss meetings. Okay, so that's a motion. Do we have a second?

**Ben Stratmann:** Second.

**Peter Einhorn:** Okay we have a motion by Chair Harding, a second by Commissioner Stratmann to take this issue and send it to the 2-7 Ethics and Financial Disclosure Working Group.

**Dennis Speight:** As far as discussion, is there any timeline for that? Knowing the timelines that...

**Peter Einhorn:** Well presumably we want to be able to report back by our next meeting.

**Dennis Speight:** My question is is what is the agenda for our next meeting?

**Peter Einhorn:** Our next meeting is two preliminary hearings and an evidentiary hearing in the former police monitor.

**Dennis Speight:** Awesome.

**Peter Einhorn:** So there's nothing on the agenda.

**Donna Beth McCormick:** Remember we used to be sleepy little commission.

**Peter Einhorn:** No, we don't remember that Donna Beth. There were only three people on that Commission.

**J. Michael Ohueri:** Is there any reason why we couldn't push one of those back?

**Peter Einhorn:** I think we already pushed it back from the September meeting because our outside counsel had...

[Discussion]

**Peter Einhorn:** I just think we have to give our former police monitor some resolution.

**Brian Thompson:** I'll put it out there, I think that this, just like with the lobbying ordinance, has enough public interest, and is important enough to consider having a special meeting just on this issue in November. Although, again, November is...

**Donna Beth McCormick:** Either before or after the November

**Peter Einhorn:** Well why don't we ask staff to see if they can find us a meeting space and a quorum of the Commission, for a special called meeting in late October/early November. That means the Work Group will have to probably try to meet in the next week and bring in the various stakeholders.

**Cindy Tom:** Your November meeting is November 8<sup>th</sup>. Would you want to have it...

**Brian Thomson:** I think that October would be preferable.

**Peter Einhorn:** The ideal would be to try to get some resolution before our November 8<sup>th</sup> meeting.

**J. Michael Ohueri:** So could we have it, I mean, November 1<sup>st</sup> is the Wednesday before the 8<sup>th</sup>. Would that work

**Peter Einhorn:** Well, we have to find a meeting room, in addition to getting a quorum, meeting rooms are in demand.

**Brian Thompson:** Is this for the full Commission, or is the for the Work Group?

**Peter Einhorn:** Well the Working Group would presumably meet in advance of a specially called meeting.

**Brian Thompson:** Okay.

**Cindy Tom:** If a majority of the Commissioners, a quorum, would be happy with the November 1<sup>st</sup> as the date, we could definitely look and see if we can find an appropriate room for that date, but we can find rooms for other dates if we can't find...

**Meagan Harding:** What date is it?

**Cindy Tom:** November 1<sup>st</sup>. It would the week, one week before the regular meeting.

**Peter Einhorn:** We'd want a sizable room too.

**Cindy Tom:** We can see what we can find,,,

**Peter Einhorn:** Anyone else?

**Brian Thompson:** What's the date again?

[Discussion]

**Peter Einhorn:** November 1<sup>st</sup> is what we're tentatively looking at pending being able to find a meeting room. So that's the motion...

**Ben Stratmann:** I have a friendly amendment to... is it a friendly amendment?

**Meagan Harding:** Yes.

**Peter Einhorn:** To get the report back at a, have the Working Group report back...

**Ben Stratmann:** ...How about at the next meeting of the Ethics Commission, whether it's special called or the regular meeting on the 8<sup>th</sup>.

**Meagan Harding:** Yes.

**Peter Einhorn:** All right. That's friendly to the second as well?

**Ben Stratmann:** Yes.

**Peter Einhorn:** Any other discussion on this motion? All those in favor.

**All:** Aye.

**Peter Einhorn:** Opposed? [no response] Abstaining? [no response] Thank you all.