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Mayor Adler and Council Members:

TDS understands that Agenda Item 42 on your November 9th Council meeting agenda (consideration of a staff proposed revised Anti-Lobbying Ordinance) is being postponed **for at least six months**, and that you will only take up Item 50 (consideration of re-applying the current ALO to the biosolids solicitation with perhaps two modifications) at this week's meeting.

Accordingly I'm writing in advance of tomorrow's work session discussion to briefly share TDS' **core concerns** with regard to Item 50 only. This item has been sponsored by Council Member Alter and would reverse [Council's 12/15/16 suspension of the ALO with regard to the biosolids management solicitation](#).

**City staff's six-month postponement of Item 42 is itself the best evidence of the scope of stakeholder concerns about the current ALO, plainly arguing against the reapplication of the ordinance to waste solicitations as Item 50 proposes.**

On Thursday, we will ask you to **please vote NO on Item 50** and instead **please vote to leave the ALO suspended for the biosolids solicitation and all waste services solicitations**, as [Council voted separately to do on 4/6/17](#), until Council has finally taken action on a revised ALO and administrative rules, as has been recommended to you by both the Solid Waste Policy Working Group (PWG) and Zero Waste Advisory Commission (ZWAC):

- **PWG: "The existing ALO should remain suspended until Council approves proposed revisions."**
- **ZWAC: "Continue to keep the ALO in a suspended state until such time that both the final ALO and subsequent governing rules are drafted and adopted by Council."**

To be clear, TDS cannot submit to the restrictions and potential staff interpretations of the

**current ALO.** We are encouraged that the solicitation for biosolids processing finally seems to have been restructured to close significant loopholes and deficiencies previously opposed by TDS (which we believe could have led to significant environmental problems and legal issues for the City), and we are hopeful that we may be able to submit a competitive response to the City's RFP.

However, for the reasons explained below, if the Council were to choose on Thursday to apply the current ALO or a slightly modified version to the biosolids solicitation, TDS would be forced to make any proposal to provide biosolids composting services to the City outside of the staff's procurement process pursuant to our 30-year Waste Disposal & Yard Trimmings Processing Contract.

TDS' **core concerns** follow:

### **1. FREE SPEECH**

TDS believes that the slightly revised current ALO (Item50) – as well as the current staff-proposed revised ALO attached to the postponed Item 42 – allows City staff to restrict speech far beyond what is allowed under the law to accomplish their procurement process goals and to **disqualify and debar solicitation respondents for exercising free speech rights legally protected under the Texas Constitution and U.S. Constitution's First Amendment.**

TDS believes that any version of the ALO must allow waste services providers who respond to City solicitations – and all other City vendors who respond to City solicitations, if the Council so chooses – to:

**1. Communicate about any facility, product, service, program, permit application, proposal or contract, including any solicitation or solicitation response, to any audience at any time without restriction, excluding identified City officials and employees;**

**2. Express any view about any political or policy issue, including any City contracting or operations issue, to any audience at any time without restriction, excluding identified City officials and employees; and**

**3. Communicate about any facility, product, service, program or permit application and express any view on any political or policy issue to any City official or City employee at any time without restriction, excluding only direct, solicitation-specific advocacy during the procurement process as defined by the ALO, assuming the ALO is Constitutionally compliant.**

If any ALO does not allow a vendor who responds to a City solicitation to exercise the free speech rights as defined above, it should not be adopted by the City Council. **Indeed, we urge you to please ask City staff DIRECTLY at Tuesday's work session whether the current ALO does or does not allow respondents to exercise these rights.**

[CLICK HERE to read an important legal memo from attorney Jim Hemphill detailing First Amendment concerns in the staff-proposed revised ALO](#) which are also each relevant to the current ALO.  
[CLICK HERE to read a specific list of free speech activities any ALO should allow.](#)

**To be clear, TDS believes that the current ALO, if it is now reapplied to waste services solicitations, is ripe for a legal challenge to determine whether it is Constitutional or goes beyond the restrictions on speech allowed by state and federal law during the government procurement process.**

## **2. WORKING GROUP PROCESS**

Please recall again that City Council has voted twice to suspend the ALO for waste services solicitations – [first just for the biosolids management solicitation](#), and later for all waste services solicitations [in order to allow waste industry stakeholders to participate in the Council-created PWG process and subsequent discussion before boards/commissions and Council](#) about the ALO itself, its accompanying administrative rules, the original controversial procurement and waste policy issues that stalled every staff-proposed City waste contract in 2016, and ultimately [the PWG recommendations](#).

However at this point **seven of the eight PWG recommendations have not yet been considered by Council or Boards/Commissions** (as specifically directed in Council’s 3/23/17 [discussion](#) and adopted [resolution](#)), meaning that to reverse Council’s suspension of the current ALO with regard to the biosolids management solicitation would be to **disallow certain waste industry stakeholders from participating in the forthcoming policy discussions.**

We are aware of language in Council Member Alter’s proposed ordinance suggesting that Council’s 12/15/16 suspension of the ALO for the biosolids solicitation can be reversed and the current ALO re-applied in a way that protects the ability of waste industry stakeholders to participate in the ongoing process, but **we not aware of any actual proposed revisions to the language of the current ALO itself** that would in fact resolve the communication restrictions that Council originally acted to waive.

## **3. EMBEDDED POLICY**

As we have long observed to be City staff’s practice, **staff has embedded the biosolids solicitation to which Item 50 speaks with a staff-preferred waste services policy**, which in fact reflects a different position than a PWG policy recommendation now pending before ZWAC (scheduled for consideration on 11/8/17) for a recommendation to Council.

Specifically, the revised biosolids management solicitation includes a Scoring Matrix that has removed all potential scoring related to “Local Business Presence.” **This is contrary to the PWG recommendation** to revise the “Local Business Presence” scoring matrices for waste services solicitations to resolve the scoring disadvantage for waste services providers with offices located just outside the City limits, as is appropriate and preferable for waste processing and disposal facilities.

- **PWG: “Within waste management matrices, revise the definition of “local” to more accurately represent local business presence. The current point allowance favors businesses with offices within the city limits regardless of the type, nature, or history of their presence in the local**

**community. At the same time it penalizes businesses with headquarters just outside the city limits but with substantial business presence in the Austin area.”**

Thus if Council votes to re-apply the current ALO the biosolids solicitation – even if Item 50 could somehow erase the current ALO’s broader restrictions on speech unrelated to the solicitation based on revised ordinance language not yet seen – industry stakeholders would still be disallowed from communicating with City officials about this pending policy issue, as it is embedded into the solicitation itself.

#### **4. LEVEL PLAYING FIELD**

TDS’ position against Item 50 is additionally based on the serious concern **that to re-apply the current ALO to the biosolids management solicitation would in effect twice absolve a prospective vendor**, Synagro, of an [alleged violation of the current ALO](#) that occurred in 2016 in conjunction with the previous iteration of this same solicitation.

Indeed, the fact that [Council acted on 12/15/16 to retroactively suspend the current ALO for the previous biosolids solicitation](#) clearly reveals Council’s view at the time that Synagro was at risk of being disqualified from that solicitation and thus also disqualified from responding to the current revised solicitation. To simply now re-adopt the exact same ALO rules which we believe Synagro violated in 2016 would plainly be to accommodate the current vendor to a deeply troubling extent.

#### **5. TRANSPARENCY AND FAIRNESS**

Finally, TDS’ core concerns about both the current and both of the staff-proposed revised ALO drafts relate to transparency and fairness – that the ALO should allow City policymakers and community stakeholders to ensure that the City’s waste services solicitations and contracts are compliant with established City policies, and should protect solicitation respondents from disqualification or debarment based on City staff’s subjective interpretation of vaguely-worded ordinance provisions without the ability to appeal.

As we have shared before, TDS’ transparency and fairness concerns about the ALO originate with **the conflict inherent in the local waste services industry being regulated by an acknowledged competitor**, and with our experience of being illegally disqualified (i.e. [later overturned by a federal judge](#)) under the ALO in conjunction with a then-secret effort in 2010 by City staff – led by Austin Assistant City Manager **Robert Goode** and former Austin Public Works Director **Howard Lazarus** – to compete in the local marketplace for processing recyclables.

Please understand that municipalities like Austin have broad legal authority to control and compete in the waste services marketplace, up to and including imposing exclusive franchise agreements with preferred vendors and even complete transformation of all private waste services into a public utility. Just last week, the [City of Reno, NV threatened fines and jail time for local businesses not utilizing the City’s exclusive waste services franchise contractor, Waste Management, Inc.](#) (WMI). WMI is also the [exclusive franchise contractor for the City of Ann Arbor, MI](#), where City Manager Howard Lazarus [terminated an existing contract with another company for processing recyclables in](#)

[order to award the business to WMI](#). The City of Los Angeles has also recently [imposed franchised contractors on all local businesses to disastrous effect](#).

[CLICK HERE to read a 9-year chronology of City staff's efforts to control and compete in Austin's waste services marketplace, including unprofessional, unethical, and even illegal actions intended to harm TDS specifically and favor City staff's preferred waste contractors.](#)

[CLICK HERE](#) to see a copy of the full City staff RFP response presented by **Howard Lazarus** in February 2010 for the City's recycling services RFP No. RDR0005, including Mr. Lazarus' signature on the ALO certification page certifying that he and his City staff would not contact other City staff during a time period he oversaw ARR and other departments covering for Robert Goode who temporarily oversaw Austin Energy, and explicitly detailing City staff's plan to "cut out the middle man" and "control the flow of recyclables."

Based on our broad concerns about free speech, and our industry-specific concerns about transparency and fairness, TDS has long advocated for a **full exemption from the ALO for all waste services solicitations and contracts**, just as [social services; cultural arts; federal, state and City block grant; and real estate solicitations and contracts are each exempt from the ALO](#).

**Alternatively, we now urge the City Council to ONLY adopt any ALO – whether for the biosolids solicitation, or any other waste services solicitation – that:**

- 1. Prohibits only direct, solicitation-specific advocacy, and specifically allows speech protected by the Texas and U.S. Constitution, beyond which a procurement process restriction on speech is allowed.**
- 2. Allows appeal of any disqualification to both the Ethics Review Commission (or another Council-designed body) and the City Council.**
- 3. Allows a single offense to result in only one disqualification.**
- 4. Stays the solicitation process during disqualification appeals.**
- 5. Does not allow staff to compel recusals by City officials.**
- 6. Does not allow staff to consider "mitigating factors" in determining disqualifications and instead utilizes "mitigating factors" on appeal.**
- 7. Eliminates debarment; alternatively, debarment should be made to apply only to future solicitations and should be appealable to both the Ethics Review Commission (or another Council-designed body) and the City Council.**
- 8. Requires Council to approve the ordinance's administrative rules.**
- 9. Begins the restricted contact period no sooner than 14 days after each solicitation is issued and to continue to apply no later than 14 days before each proposed contract is posted for consideration by either a City board or commission or the City Council.**

To be clear, because **City staff is both regulator and acknowledged competitor**, TDS believes staff must not be considered a neutral or objective arbiter of policy or conduit of information about City waste services solicitations and contracts.

Indeed, even as City staff has shown that it can interpret the current ALO to limit or allow a wide

range of restricted or allowed contacts and representations to fit their agenda, they have at the same time **often chosen to ignore what state and county statute allows or requires of solid waste processing and disposal facilities and service providers**. Their tendency to make up the rules as they go – and the significant long-term cost of such gamesmanship to Austin ratepayers – is the reason waste solicitation respondents and community stakeholders must be able to point out where City staff is or may be violating City policy and environmental regulations before contracts are awarded.

This is why TDS **additionally** urges the Council to please only adopt any ALO that requires staff to share core elements of draft solicitations (including the Scope of Work and the Scoring Criteria) with appropriate boards/commissions prior to issuance, and to post full negotiated contract documents with sufficient time for review by boards/commissions and City Council prior to a requested vote to recommend or authorize, as has twice been recommended to Council by ZWAC.

[CLICK HERE for ZWAC's resolution requesting review of core elements of draft waste solicitations prior to issuance of the solicitation and posting of full negotiated contracts prior to a requested vote to recommend](#) (adopted unanimously on 7/12/17 and 8/9/17).

Finally, for your information, following please find a list of critical links to additional information reflecting the positions of boards/commissions and various stakeholders on ALO revisions, which in many cases endorse the core concerns about the current ALO that we have expressed above, and **argue strongly against its re-application to the biosolids solicitation on Thursday.**

**Once again, TDS believes City staff's planned delay of six months in bringing a proposed revised ALO to Council for consideration is itself the very best evidence of the scope of serious concerns with the current ALO and the risk of voting to re-apply it to waste solicitations.**

[CLICK HERE for PWG's recommended changes to the current ALO.](#)

[CLICK HERE for key differences between PWG's ALO recommendations and the "resulting" staff ALO recommendations.](#)

[CLICK HERE for ZWAC's recommended changes to the staff proposed revised ALO.](#)

[CLICK HERE for TCE's recommended changes to the staff proposed revised ALO.](#)

[CLICK HERE for TDS' positions on TCE's recommended changes to the staff proposed revised ALO.](#)

[CLICK HERE for TDS' 25 recommended changes to the staff proposed revised ALO.](#)

[CLICK HERE for 18 recommended changes as a whole to the staff proposed revised ALO agreed to by TDS, SYNAGRO, and TCE.](#)

[CLICK HERE for TDS' redlined version of the staff proposed revised ALO.](#)

Thank you again for your important efforts and for your consideration of these requests. As always, please do not hesitate to contact me directly with any questions or concerns you may have. **Please do not reinstate the ALO to apply to the Biosolids Management solicitation, so TDS can respond to it directly.**

Sincerely,  
Bob Gregory

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