MEMORANDUM

Date: December 14, 2016
To: To Whom It May Concern
From: Gary Newton, General Counsel, Texas Disposal Systems

Re: Austin City Council December 15, 2016 Agenda Items 46, 52 and 53

Introduction

During the review of the above referenced agenda items by the various City of Austin (City) Commissions, City staff made several misrepresentations about solid waste and contract issues. This memorandum is a brief explanation by Texas Disposal Systems (TDS) of why the City staff's statements are wrong and misleading. These misrepresentations relate to the following issues:

- TDS Master Contract and Composting;
- Waste and Recycling Flow Control;
- Competitive Bid Requirements; and
- Confidentiality of Information in Proposed Contracts.

The only reason I can provide you with this information to correct City staff misrepresentations is because TDS did not respond to various RFP's related to these agenda items due to concerns involving the City staff's arbitrary application of the Anti-Lobby Ordinance. TDS also had concerns the RFP's in this instance are fatally flawed in numerous ways as TDS pointed out in written communication to City staff, various City Commissions, and Council members. If TDS had responded to the RFP's and subjected itself to the restrictions of City staff's interpretation of Anti-Lobby Ordinance, TDS could not address the following misrepresentations with anyone in the City other than the designated contact person. The arbitrary application of the Anti-Lobby Ordinance by City staff is used as a tool to silence all voices other than those of City staff. Please feel free to contact me if you have any questions on any of these issues.

TDS Master Contract and Composting

I understand in the November 9, 2016 Zero Waste Advisory Commission (ZWAC) meeting during a discussion of Item 3.d. regarding Organics Processing, a Commissioner requested a legal opinion from an unbiased party about whether the TDS Master Contract allows the City to add food waste composting services without going through a bid process or a request for proposal process.

Although I cannot give you an independent third party opinion since I represent TDS, I can provide you a copy of the section out of the TDS Master Contract in effect with the City of Austin, entitled Waste Disposal and Yard Trimmings Processing Contract, dated May 12, 2000 for you to form your own opinion (Tab 1). The relevant sentence in the attached Section 32.A. needs no legal expertise to understand when it says, "In addition to the above, TDS and City reserve the option to amend this Contract upon mutual consent to (i) allow TDS and/or its affiliated companies to operate a glass pulverizing facility; and (ii) allow TDS to provide composting services." If anyone were to state composting was not offered by the TDS Master Contract, that would be a deliberate misrepresentation of the plain language you can read in the TDS Master Contract.

Furthermore, if any City vehicle showed up tomorrow at TDS' gatehouse with a load identified as food waste it would be accepted. TDS would divert the food waste to the composting operation and charge the City the rate for waste disposal already in place pursuant to the TDS Master Contract. No change to the contract is really necessary except to memorialize in detail each parties responsibilities regarding food waste composting.

I also understand City staff also misrepresented the TDS Master Contract could not be used because it does not mention food waste. Well it does not have to because TDS' facility is authorized to compost food waste and has been doing so for almost 20 years. In fact, TDS reported to Texas Commission on Environmental Quality it composted approximately 16,000 tons of food waste in the last fiscal year, which is way more than any other local facility.

Waste and Recycling Flow Control

In the November 9, 2016 ZWAC meeting some very confusing and misleading statements were made by Bob Gedert about waste and recycling flow control. The statements were made during the discussion on Item 3.e City Facilities Dumpster Collection Services – Contract to provide dumpster collection services for City of Austin facilities to include non-hazardous class 2 waste collections. I believe Mr. Gedert was trying to reference a U.S. Supreme Court's decision that prohibits cities from enacting flow control ordinances that confer a benefit on a privately owned facility as a justification for not specifying a landfill to be used in a collection and disposal contract with a private company. Mr. Gedert said, "I would note that when we bid contracts out we do not designate a landfill and therefore we do not practice flow control. The U.S. Supreme Court has ruled that we cannot prohibit waste from entering a private landfill and we cannot promote a private landfill by government edict. There is restrictions on the government on controlling waste streams, and we do not control waste streams. "

Mr. Gedert's statement was in response to a question about whether Austin Energy waste was being transported by Republic Waste to its landfill in San Antonio. His statement above was a misapplication of the phrase "flow control" that gave the impression the City could not tell its contractor where to dispose or not to dispose waste. This is absolutely untrue. The City has broad authority under Texas Health & Safety Code Chapter 363 to enter into solid waste management contracts on terms considered appropriate to the City. The City can designate which landfill it wants its contractor to use and if the contractor does not agree the City does not have to do business with the company. For example, the City can contract with Republic Waste and insist Republic Waste use the TDS Landfill rather than the Waste Management Austin Community Landfill as long as Republic Waste agrees to that condition as a term of the contract. If Republic Waste refuses to agree to use a specific landfill the City does not have to enter into a contract with Republic.

The type of flow control prohibited by U.S. Supreme Court is an entirely different fact situation. The Supreme Court has ruled a city cannot pass an ordinance directing third parties to use a specific privately owned waste processing or disposal facility (See Carborne V. Clarkstown, 511 U.S. 383 (1994). Mr. Gedert is wrong to suggest a Supreme Court ban on "flow control" ordinances that confer a benefit on a private facility prohibits the City from designating a specific waste processing or disposal facility in a contract between the City and a private company. Contrary to what Mr. Gedert stated to you on November 9, 2016, the City can say to its contractor that provides waste services "this is a dirty landfill, none of our waste shall go there."

Competitive Bid Requirements

A couple of City staff emphatically stated at the November 9, 2016 ZWAC meeting State law requires the City to competitively bid the organics and City facilities proposed contracts for processing, hauling and disposal services. This statement is totally incorrect. It has been the law in Texas since at least 1936 that cities do not have to competitively bid proposals like waste and recycling services that are for the preservation of public health or safety. The City can directly negotiate with all willing providers of these services to obtain the best deal for the citizens without being limited by time consuming RFP or IFB processes or by burdensome anti-lobby restrictions. The City can also negotiate with TDS and amend its existing Waste Disposal and Yard Trimming Processing contract dated May 12, 2000 to add these, without going through a competitive bidding process.

I have attached an excerpt from a recent case (Tab 2) that explains this in a concise manner so you do not have to just take my word on this issue. Republic Waste is certainly aware of this because one of its companies was the defendant in the attached case that successfully argued state competitive bidding requirements do not apply to contracts for collection and disposal of solid waste.

Confidentiality of Information in Proposed Contracts

This section is response to an incorrect statement made by a City of Austin Purchasing Office staff person during the discussion of agenda Item 8, at the November 14, 2016 Electric Utility Commission (EUC) meeting. The relevant portion of the statement was "…. around disclosure of proposals, of contents, anything like that, that is per Texas Local Government Code Chapter 252 and that states that any of the proposals that we receive are confidential until the award so we would not be able to disclose the pertinent details of a proposal or any of those details. That's actually from State law." The statement reflects a City staff strategy for obtaining the EUC's approval of a contract without telling the EUC any details about the contract.

The strategy and statement are an incorrect characterization of State law. What the Texas Local Government Code actually says (Tab 3) in Section 252.049(b) "…..proposals shall be opened in a manner that avoids disclosure of the contents to competing offerors and keeps the proposals secret during negotiations." The language in this section is very straight forward and simple. Note the key words "…..that avoids disclosure…. "and "secret during negotiations." All proposals must be kept confidential until the negotiations are complete unless disclosed by the respondent, not until the contract is finally awarded and executed. The Purchasing Office staff was either badly misinformed or deliberately misleading in responding to questions. In the case of Item 8 on the November 14, 2016 EUC agenda, we understand that the negotiations were complete. The EUC was being asked to recommend Council approval of the negotiated Republic Services contract without disclosing actual terms of the negotiated contract to the EUC. The statute's language does not say the Republic Services proposal and the draft negotiated contract are to be kept secret until the award and execution of the contract, but instead allows a full public disclosure of the proposed contract and a full discussion of all related facts after negotiations are complete. If City staff does not allow the Republic Services proposal and draft contract to be reviewed by the EUC, and important questions and concerns discussed and responded to before the EUC is to recommend the execution of a final contract, that is a decision arrived at by City staff, it is not required by State law. Confidential treatment of RFP or IFB responses and the details regarding negotiated contracts is only required by State law until the contract is negotiated, not until after award of a contract.

The EUC had every legal right to inspect the draft negotiated contract and the Republic Services proposal that formed the basis of the draft negotiated contract before making a recommendation that the Council execute the contract. In my opinion, it would be a dereliction of duty for the EUC to vote to recommend the approval of a draft contract the EUC did not review. City staff could have requested the EUC to approve a recommendation to simply negotiate but not execute the contract. City staff should then come back to EUC with the negotiated contract for review prior to the EUC vote to recommend the execution of the contract. Only when the EUC has no real concerns involving the intricacies of the RFP or IFB responses and the particulars of the negotiated contract should the EUC recommend Council approval of a contract.

Perhaps the Purchasing Office misread the last sentence in Section 252.049(b) that says, "All proposals are open for public inspection after the contract is awarded…" Note it does not say all proposals must be kept secret until the one recommended contract is awarded, as the Purchasing Office would have everyone believe. This sentence is a mandate on City staff to allow anyone that is interested to review all proposals after the contract is awarded. This language is meant to prevent a situation where City staff represents a contract is entered into with the best proposer, but then tries to keep the other proposals secret to avoid comparison.