

**TDS Recommended Revisions Redlined
and Comments in Blue**

RECOMMENDED REVISIONS, 9-28-2017

ARTICLE 6. – ANTI-LOBBYING AND PROCUREMENT.

§ 2-7-101 – FINDINGS; PURPOSE; APPLICABILITY.

- (A) The council finds that persons who enter a competitive process for a city contract voluntarily agree to abide by the terms of the competitive process, including the provisions of this article.
- (B) The council finds that it is in the City's interest:
- (1) to provide the most fair, equitable, and competitive process possible for selection among potential vendors in order to acquire the best and most competitive goods and services; and
 - (2) to further compliance with State law procurement requirements.
- (C) The council intends that:
- (1) each response is considered on the same basis as all others; and
 - (2) respondents have equal access to information regarding a solicitation, and the same opportunity to present information regarding the solicitation for consideration by the City.
- (D) This article applies to all solicitations except:
- (1) City social service funding;
 - (2) City cultural arts funding;
 - (3) federal, state or City block grant funding;
 - (4) the sale or rental of real property;
 - (5) interlocal contracts or agreements; and
 - (6) solicitations specifically exempted from this article by council.
- (E) Absent an affirmative determination by council, the purchasing officer has the discretion to apply this article to any other competitive process.
- (F) Section 1-1-99 does not apply to this article.

Source: Ord. 20071206-045; Ord. 2011111052.

§ 2-7-102 – DEFINITIONS.

In this article, for all purposes whenever used:

TDS Comment:

This revision makes it clear that defined terms will be used for interpretation of the Ordinance.

- (1) AGENT means a person authorized by a respondent to act for or in place of respondent in order to make a representation, including but not limited to:
 - (a) a person acting at the explicit request of respondent in exchange for any type of consideration;

~~(b)~~ a person acting with the knowledge and consent of a respondent;

~~(c)~~ a person acting with any arrangement, coordination, or direction between the person and the respondent;

~~(d)~~ (b) a current full-time or part-time employee, owner, director, officer, member, or manager of a respondent;

~~(e)~~ (c) a person related within the first degree of consanguinity or affinity to a current full-time or part-time employee, owner, director, officer, member, or manager of a respondent; and

~~(f)~~(d) a person related within the first degree of consanguinity or affinity to the respondent, if a respondent is an individual person.

TDS Comment:

This revision narrows the overly broad definition of Agent, which would require staff to determine the nature of relationships and communication among entities without any objective means of doing so. Please see Jim Hemphill's 9/27/2017 Memo on constitutional requirements of speech restrictions as they pertain to staff's proposed ALO revisions (Hemphill Memo).

(2) AUTHORIZED CONTACT PERSON means a City employee designated in a City solicitation as the point of contact for all purposes for that solicitation.

(3) CITY EMPLOYEE is defined in Section 2-7-2 (*Definitions*).

(4) CITY OFFICIAL is defined in Section 2-7-2 (*Definitions*).

(5) ~~NO CONTACT RESTRICTED COMMUNICATION~~ PERIOD means the period of time beginning at the final effective date and time a Response to a solicitation is due, ~~as may be extended in the purchasing officer's discretion,~~ and continuing through the earliest of the following:

(a) the date of the initial execution of the last contract resulting from the solicitation is signed (if multiple contracts are executed pursuant to a solicitation, then the date of initial execution of the last contract to be signed);

(b) ~~630~~ days following council authorization of the last contract resulting from the solicitation; ~~or~~

(c) cancellation of the solicitation by the City;

(d) 14 days prior to the date a contract or RCA related to solid waste, recycling or organics is considered for action by the City Council, or

~~(e)~~(e) 14 days prior to the date a contract or RCA is considered for recommendation by the Zero Waste Advisory Commission.

TDS Comment:

As there is not an actual "No Contact Period" envisioned by the ordinance; for the sake of accuracy this term should be changed to "Restricted Contact Period", as there are a variety of communications that are both permitted and prohibited. Further edits are intended to 1) utilize language that is not subject to variable interpretations, for the sake of creating a clear expectation of the effect of the proposed limits on speech, which is required when limiting speech; 2) more reasonably limits the time respondents will be bound by the ALO in the event that staff choose not to take any action pursuant to a solicitation; and, 3) creates an earlier termination of the Restricted Contact Period specifically for solicitations for solid waste, recycling and organics management related services. This market segment specific provision is necessary due to the staff's unique dual role as both regulator of, and competitor within this market segment, staff's history of ambitious pursuit of greater control over and revenue

from this market segment, and staff's demonstrated propensity to embed significant policy implications concerning this market segment within the solicitation process. The ability of respondents to speak freely with policy makers prior to finalization of contracts will serve more as deterrent to staff's problematic attempts to create "policy by RFP", rather than an opportunity for respondents to advocate for their solicitation specific interests.

- (6) PURCHASING OFFICER means the City employee authorized to carry out the purchasing and procurement functions and authority of the City and, when applicable, the director of a City department to whom the purchasing officer has delegated procurement authority for that department.
- (7) RESPONSE means ~~a response to a solicitation, only the contents of the a sealed proposal submitted by an offeror a bidder replying to a solicitation to provide the goods or services solicited by the City.~~

TDS Comment:

This revision simply defines "Response" in the manner that staff's "Comparison Matrix" states that it will be interpreted. However, staff has maintained a problematic circular definition of Response that can be subject to wildly variable interpretations.

- (8) RESPONDENT means a person who ~~makes~~submits a ~~R~~Response to a City solicitation, even if that person subsequently withdraws its ~~R~~Response ~~or has been disqualified by the City~~, and includes:
- ~~(a) a contractor for a respondent;~~
 - ~~(b)~~(a) a subsidiary or parent of a respondent; and
 - ~~(c) a joint enterprise, joint venture, or partnership with an interest in a response and in which a respondent is a member or is otherwise involved, including any partner in such joint enterprise, joint venture, or partnership; and~~
 - ~~(d)~~(b) a subcontractor to a respondent in connection with that respondent's response.

TDS Comment:

These revisions remove unnecessary portions and limit the requirements to things that can be objectively determined by staff. Revisions also eliminate the potential for broad interpretations that would allow the staff to enforce against speech that is not constitutionally eligible for government restriction.

- (9) REPRESENTATION means a communication, ~~whether or not initiated by a respondent or agent~~, that is:
- (a) related to a response;
 - (b) made by a respondent or agent; and
 - (c) made directly to a council member, City employee, City representative, or independent contractor hired by the City with respect to the solicitation.
 - ~~(d)~~ Communications not made directly to persons included in (c) above, including without limitation communications to the media, citizen groups, or business or advocacy organizations, are not representations under this article.

TDS Comment:

This revision clarifies the limit of speech that is constitutionally allowed to be restricted. Please see the Hemphill Memo for the detailed basis for this revision.

(10) SOLICITATION means an opportunity to compete to conduct business with the City that requires council approval under City Charter Article VII Section 15 (Purchase Procedure), and includes, without limitation:

- (a) an invitation for bids;
- (b) a request for proposals;
- (c) a request for qualifications;
- (d) a notice of funding availability; and
- (e) any other competitive solicitation process for which the purchasing officer, in the purchasing officer's sole discretion, affirmatively determines this article should apply in accordance with Section 2-7-101(E).

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-103 – PROHIBITED REPRESENTATIONS.

Subject to the exclusions in Section 2-7-104, during a no-contact period, a respondent and an agent shall not make a representation that ~~is intended to or reasonably likely to:~~

- (1) provides substantive information about the response to which it relates;
~~(2) advance the interests of the respondent with respect to the solicitation to which it relates;~~
- ~~(3)(2) discredit the response of any other respondent to the solicitation to which it relates;~~
- ~~(4) — [NOTE – an alternative to strikeout may be something like “Permitted representations under Section 2-7-104(2) will not be considered to be representations prohibited under Section 2-7-104(2) or (3).” This resolves any potential interpretive conflict between those provisions.]~~
- ~~(5)(3) encourages~~ the City to reject all of the responses to the solicitation to which it relates;
- ~~(6)(4) convey~~ a complaint about the solicitation to which it relates; or
- ~~(7)(5) directly or indirectly asks, influences, or persuades~~ any City official, City employee, or body to favor or oppose, recommend or not recommend, vote for or against, consider or not consider, or take action or refrain from taking action on any vote, decision, or agenda item regarding the solicitation to which it relates.

Source: Ord. 20071206-045; Ord. 20111110-052.

TDS Comment:

This revision removes criteria that cannot be objectively determined by the staff, and appropriately tailors the ordinance to the constitutional limits on restriction of speech. Please see the Hemphill Memo for the detailed basis for this revision.

§ 2-7-104 – PERMITTED REPRESENTATIONS AND OTHER COMMUNICATIONS.

The following representations and other communications are permitted under this article at any time:

- (1) any representation or communication between a respondent or agent and any authorized contact person;
- (2) any communication between a respondent or agent and any person to the extent the communication relates ~~solely~~ to an existing contract between ~~a respondent~~ any person or entity

and the City, even when the scope, products, or services of the current contract are the same or similar to those contained in an active solicitation;

TDS Comment:

This revision removes a content based restriction on speech that is presumptively unconstitutional. Please see the Hemphill Memo for further detail.

- (3) any representation or communication between a respondent or an agent and a City employee to the extent the representation or communication relates solely to a non-substantive, procedural matter related to a response or solicitation;
- (4) any representation or communication required by or made during the course of a formal protest hearing related to a solicitation;
- (5) any representation or communication between a respondent or an agent and the City's Small & Minority Business Resources Department, to the extent the communication relates solely to compliance with Chapters 2-9A through 2-9D (*Minority-Owned and Women-Owned Business Enterprise Procurement Program*) of the City Code;
- (6) any representation or communication between an attorney representing a respondent and an attorney authorized to represent the City, to the extent the communication is permitted by the Texas Disciplinary Rules of Professional Conduct;
- (7) any representation or communication made by a respondent or an agent to the applicable governing body during the course of a meeting properly noticed and held under Texas Government Code Chapter 551 (*Open Meetings Act*);
- (8) any representation or communication between a respondent or an agent and a City employee whose official responsibility encompasses the setting of minimum insurance requirements for the solicitation to which the communication relates, to the extent the communication relates solely to the insurance requirements established by the City in the solicitation; and
- (9) ~~any communication occurring when~~ making a contribution or expenditure as defined in Chapter 2-2 (*Campaign Finance*).

TDS Comment:

Contrary to statement of staff, this is not simply a concept carried forward from the previous version of the ordinance, staff's language would actually lift all ALO restrictions, under the condition that otherwise prohibited statements would be accompanied by a monetary donation to a campaign, while existing (and TDS proposed) language simply make clear that a campaign donation is not a restricted communication. Staff's language could not be more counter to the stated intent of the ordinance.

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-105 – MODIFICATION OF PROHIBITION.

The purchasing officer may waive, modify, or reduce the prohibited representation requirements in Section 2-7-103 in order to allow respondents to make representations to persons identified in Section 2-7-102(10)(c) other than the authorized contact person when the purchasing officer determines, in writing, that the solicitation must be conducted in an expedited manner, including but not limited to a solicitation conducted for reasons of health or safety under the shortest schedule possible with no extensions. The purchasing officer must promptly transmit any such written waiver, modification, or reduction to all respondents.

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-106 – ENFORCEMENT.

- ~~(A) This article is not subject to enforcement by the Ethics Review Commission established in Section 2-7-26.~~
- ~~(B) The purchasing officer may consider mitigating factors or circumstances beyond the control of a respondent, including but not limited to any action taken by a respondent in reliance on information provided by a person identified in Section 2-7-102(10)(c), when determining whether a respondent has violated Section 2-7-103.~~
- ~~(C)~~(A) The purchasing officer has the authority to enforce this article through Council approved rules ~~promulgated in accordance with Section 1-2-1~~, which at a minimum shall include a notice, ~~and protest hearing and appeal~~ process for respondents disqualified pursuant to Section 2-7-107, including:
- (1) written notice of the penalty imposed pursuant to Section 2-7-107;
 - (2) written notice of the right to ~~protest the penalty imposed a hearing before, and determination by, the Ethics Review Commission~~; and
 - (3) written notice of the right to ~~request a an impartial hearing process a final appeal before the City Council~~.

Source: Ord. 20071206-045; Ord. 20111110-052.

TDS Comment:

The TDS proposed revisions to the Enforcement section are intended to accomplish 1) Removal of the arbitrary exclusion of the Ethics Review Commission from any oversight role in the Ordinance; 2) Removal of the problematic language providing the purchasing officer the authority to determine when/if violations should be ignored for whatever reason staff sees fit; 3) Establish that administrative rules must be approved by Council as recommended by the Council Waste Management Policy Working Group; 4) allow for a protest hearing before, and decision by the Ethics Review Commission as recommended by the Council Waste Management Policy Working Group; and, 5) allow for a final appeal before City Council. Without these changes to the enforcement section of the ALO, the staff would have absolute authority to establish rules, interpret and enforce the ordinance without any oversight of any kind from elected officials or their appointees. Given staff's dismal record of fairly interpreting and enforcing the ALO, these changes are imperative.

§ 2-7-107 – PENALTY.

- (A) If the purchasing officer finds that a respondent has violated Section 2-7-103, the respondent is disqualified from participating in the solicitation to which the representation related.
- (B) The purchasing officer shall promptly provide written notice of disqualification to a disqualified respondent.
- (C) If a respondent is disqualified from participating in a solicitation as a result of violating Section 2-7-103 and the solicitation is cancelled for any reason, that respondent is disqualified from submitting a response to any reissue of the same or similar solicitation for the same ~~or similar~~ project. For the purposes of this section, the purchasing officer may determine whether any particular solicitation constitutes a "same or similar solicitation for the same ~~or similar~~ project".
- (D) If a contract resulting from a solicitation that is the subject of a prohibited representation is awarded to a respondent who has violated Section 2-7-103 with respect to that solicitation, that contract is voidable by the City Council.

Source: Ord. 20071206-045; Ord. 20111110-052.

TDS Comment:

TDS proposed revisions to the “Penalty” section are necessary eliminate opportunities for interpretations that go beyond the intent of the ALO, and to create a clear expectation of the results of a violation. Without the revisions to the “same or similar project” language, the staff effectively maintains the ability to permanently debar a vendor, as they would have the ability to determine that any solicitation within a particular market segment is a “similar project” to a solicitation that was the subject of a disqualification. Also, without the inclusion of the term “Council” at the end of 2-7-107(D), the staff would have the authority to unilaterally subvert the will of the Council, based simply on a retroactive allegation of prohibited communication, without substantiation. If there is a need to void a contract due to violations of the ALO, then the Council should make that decision.

~~§ 2-7-108 — RECUSAL.~~

- ~~(A) — During a no-contact period, a person identified in Section 2-7-102(10)(c) shall not contact a respondent regarding a response or solicit a representation from a respondent.~~
- ~~(B) — A person identified in Section 2-7-102(10)(c) that receives a representation during the no-contact period for a solicitation, or otherwise becomes aware of a violation of Section 2-7-103, shall notify the authorized contact person in writing as soon as practicable.~~
- ~~(C) — If a person identified in Section 2-7-102(10)(c) violates either Subsection (A) or Subsection (B), that person shall be recused from further participation in the solicitation to which the violation relates.~~

TDS Comment:

Staff’s newly proposed “Recusal” section amounts to an unprecedented transfer of authority from the Council to staff and should be rejected outright. Under this provision, along with others proposed by staff, staff would be empowered to impose compulsory recusal on any Council Member or B&C Member by simply claiming they spoke to a respondent, or failed to report contact between a respondent and any other City employee or official, whether or not the subject of that communication was prohibited, and regardless of whether or not staff determines that a violation of the ALO has taken place. This would give the staff the ability to remove individual votes they may deem unfriendly to their stated or unstated agendas, without any requirement to carry out the remaining supposed requirements of the ordinance. Council Members and their appointees on B&C’s should have the sole authority to determine whether they ought to be recused from taking action based on existing code of ethics requirements, and not be subject to the staff unilateral declaration of recusal, without any requirement to substantiate their basis for doing so.