

Subject: Item 56 – Please do Not adopt staff’s proposed “revised” ALO

Date: Friday, June 8, 2018 at 5:49:33 PM Central Daylight Time

From: Bob Gregory

To: steve.adler@austintexas.gov, kathie.tovo@austintexas.gov, ora.houston@austintexas.gov, delia.garza@austintexas.gov, sabino.renteria@austintexas.gov, greg.casar@austintexas.gov, ann.kitchen@austintexas.gov, jimmy.flannigan@austintexas.gov, leslie.pool@austintexas.gov, ellen.troxclair@austintexas.gov, alison.alter@austintexas.gov, Jim.Wick@austintexas.gov, Amy.Everhart@austintexas.gov, amy.smith@austintexas.gov, shannon.halley@austintexas.gov, david.chincanchan@austintexas.gov, ken.craig@austintexas.gov, Marti.bier@austintexas.gov, kurt.cadena-mitchell@austintexas.gov, cj.hutchins@austintexas.gov, geno.rodriguez@austintexas.gov, katherine.nicely@austintexas.gov, neesha.dave@austintexas.gov, donna.tiemann@austintexas.gov, john.lawler@austintexas.gov, Lesley.varghese@austintexas.gov, Louisa.Brinsmade@austintexas.gov, Jackie.Goodman@austintexas.gov, ceci.gratias@austintexas.gov, Shelby.Alexander@austintexas.gov, Joi.Harden@austintexas.gov, Ashley.richardson@austintexas.gov, alba.sereno@austintexas.gov, brian.thornton@austintexas.gov, bc-gerard.acuna@austintexas.gov, Bc-cathy.gattuso@austintexas.gov, bc-joshua.blaine@austintexas.gov, bc-kendra.bones@austintexas.gov, bc-heather-nicole.hoffman@austintexas.gov, bc-amanda.masino@austintexas.gov, bc-ricardo.rojo@austintexas.gov, bc-kaiba.white@austintexas.gov, bc-b.christopher@austintexas.gov, bc-Melissa.Rothrock@austintexas.gov, BC-philip.howry@austintexas.gov, bc-Peter.Einhorn@austintexas.gov, bc-Robert.Stratmann@austintexas.gov, bc-Meagan.Harding@austintexas.gov, BC-Debra.Danburg@austintexas.gov, BC-Mary.Kahle@austintexas.gov, bc-DonnaBeth.McCormick@austintexas.gov, bc-Jmichael.Ohueri@austintexas.gov, BC-Luis.Soberon@austintexas.gov, bc-Dennis.Speight@austintexas.gov, bc-Brian.Thompson@austintexas.gov, bc-kenneth.gober@austintexas.gov

CC: Gary Newton, mwhellan@gdhm.com, djbutts@sbcglobal.net, Mark Nathan, JHemphill@gdhm.com, Adam Gregory, Ryan Hobbs

Mayor Adler and Council Members:

Thank you for your efforts to reform the Anti-Lobbying Ordinance (ALO). I am writing on behalf of Texas Disposal Systems, including some of its affiliated companies (TDS), to share our serious concerns about staff’s proposed “revised” ALO as presented in Item 56 on your June 14th agenda.

Incredibly, staff’s “revised” ALO fails to address ANY of the major problems or incorporate ANY of the proposed solutions that we and others have shared with the City. Indeed, staff’s proposal completely ignores EVERY substantive recommendation for reforming the ALO made by the City Council’s Waste Management Policy Working Group, the Zero Waste Advisory Commission, the Ethics Review Commission, Texas Campaign for the Environment, and TDS. As staff itself acknowledges in the memo accompanying Item 56, despite taking nearly a year to develop this proposal, “the recommended changes to the ALO are very modest and consistent [sic] mostly of consolidation and clarifications.”

In other words, staff incorporated NO significant input from the City Council’s Waste Management Policy Working Group or other key stakeholders. As a result, staff’s proposed “revised” ALO is completely inadequate because it continues to:

- Contain broad, ambiguous language and restrictions that call the ordinance’s constitutionality into

question;

- Include no provision for appeal of staff decisions to anyone other than staff, protecting their role as prosecutor, judge and jury in each case;
- Give staff discretion to enforce or not enforce certain penalties, including debarment, allowing them to pardon or punish favored or disfavored vendors;
- Allow staff to silence solicitation respondents and exert total control over the flow of information to policymakers and the public, with the exception of the few minutes vendors may speak prior to a vote by policymakers; and
- Allow staff to impose any administrative rule or policy interpretation without Council approval.

Obviously, TDS is deeply disappointed in this proposal. If staff's "revised" ALO were adopted as proposed, to protect our constitutional free speech rights, and to be able to defend our interests in the numerous areas in which we are involved in the City's business, TDS would have no choice but to continue NOT responding directly to City solicitations subject to the ordinance. Accordingly, we write to urge you NOT to adopt staff's proposal but to instead please take one or both of the following two steps:

1. Vote to exempt all waste-related services solicitations from the ALO.

As we have noted repeatedly, the City is in a uniquely conflicted position regarding the local waste, recycling and composting services industry. In addition to being a regulator and a customer, the City is also an industry competitor. As you know, the City maintains a monopoly on single-family residential waste and curbside recycling collection within the city. The City also controls waste services to captive business customers in the Central Business District. Further, there is the strong possibility that the City will expand its monopoly to services currently subject to free-market competition, such as collection of waste, compostable and recyclable materials from most private businesses in the city.

Given the City's conflicted position as well as staff's documented history of misusing the ALO as a competitive tool to its own advantage and to the disadvantage of private businesses (e.g. staff submitting and scoring their own internal response to a City solicitation, which included a signed and notarized ALO certification form but which was not subject to the same ALO restrictions as other competing responses, while at the same time using the ALO to improperly disqualify TDS' response, as determined by a federal judge) TDS urges a full exemption from the ALO for all waste, recycling and composting services solicitations – just as social services, cultural arts, block grants, and real estate solicitations are ALO-exempt.

2. Vote to adopt the [attached redlined version](#) of staff's proposed ALO; direct staff to bring the associated administrative rules to Council for approval BEFORE the revised ALO goes into effect; and reinstate the ALO moratorium for all waste-related solicitations during the interim.

The [attached redlined version](#) of staff's proposal addresses key concerns identified by the City Council's Waste Management Policy Working Group, TDS and other stakeholders, and ensures that a revised ordinance would be constitutional, fair and promote transparency. Specifically, the attached document:

- Eliminates broad, ambiguous language and restrictions to ensure the ALO is constitutional;
- Includes a provision for appeal of staff decisions beyond staff;
- Eliminates staff discretion to enforce or not enforce penalties;
- Eliminates vendor debarment as a penalty; and
- Allows solicitation respondents to communicate with City officials about the solicitation for some period at the beginning and end of each solicitation process to accommodate policy dialogue and promote transparent contracting practices.

In addition, TDS urges the City Council to insist on approving the administrative rules for the revised ALO before the ordinance goes into effect. During the time administrative rules are being developed for Council approval, TDS believes the Council should also reinstate the ALO moratorium for all waste-related solicitations; indeed we believe the rationale for a moratorium, and a full exemption, is more compelling now than it was in 2017, given staff's demonstrated indifference to the input of stakeholders, including Council members.

In summary, the attached TDS-proposed redlined version of staff's "revised" ALO accomplishes the following SIX critical reforms:

- 1. Ensures the protection of constitutional free speech rights.**
- 3. Includes a third-party appeals process.**
- 4. Eliminates staff enforcement discretion.**
- 5. Eliminates debarment as a penalty.**
- 6. Allows unrestricted communication at the beginning and end of each solicitation process (TDS recommends beginning each restricted contact period no sooner than 14 days after each solicitation is issued and discontinuing it no later than 14 days before each proposed contract is posted for consideration by a City board or commission and by the City Council).**

SUMMARY OF CRITICAL ALO RECOMMENDATIONS FROM KEY STAKEHOLDERS

Following please find a summary of critical ALO reform recommendations made by the City Council's Waste Management Policy Working Group and other key stakeholders over the past year, exactly NONE of which have been incorporated into staff's proposed "revised" ALO as presented in Item 56.

City Council Waste Management Policy Working Group:

- Engage a third-party reviewer of staff disqualifications such as the Ethics Review Commission;
- Develop rules in a companion regulatory document for Council approval; and
- Narrow the definition of "representation" to target lobbying.

See: [Full City Council Waste Management Policy Working Group Recommendations](#)

Zero Waste Advisory Commission:

- Allow appeal of disqualifications to the Ethics Review Commission and City Council;
- Bring administrative rules to the Ethics Review Commission and Council for approval;
- Assure that public communications and advocacy from non-respondents do not constitute violations; and
- Eliminate "mitigating factors" in staff determination of violations.

See: [Full Zero Waste Advisory Commission Recommendations](#)

Ethics Review Commission:

- Establish third-party appellate process;
- Begin restricted contact period 4 days after a solicitation is issued to give respondents time to address policy concerns; and
- Eliminate staff consideration of "mitigating factors" in determining violations.

See: [Full Ethics Review Commission Recommendations](#)

Texas Campaign for the Environment:

- Establish right to appeal disqualifications or other penalties to Ethics Review; Commission or another

City body and to City Council;

- Bring administrative rules to Ethics Review Commission and Council for approval;
- Begin restricted contact period upon solicitation response due date until sometime prior to Council consideration; and
- Ensure public communication and independent advocacy do not constitute violations
- Eliminate staff consideration of “mitigating factors” in determining violations and other subjective terminology.

See: [Full Texas Campaign for the Environment Recommendations](#)

Texas Disposal Systems:

TDS has advocated for the following ALO reforms over the past year:

- Restrict only direct, solicitation-specific advocacy by respondents and agents; allow all other speech;
- Allow appeal of staff decisions to the Ethics Review Commission or another Council-designated body, and to the City Council;
- Begin each restricted contact period no sooner than 14 days after each solicitation is issued and discontinue it no later than 14 days before each proposed contract is posted for consideration by a City board or commission and by the City Council, to allow POLICY discussion;
- Do not allow staff to consider subjective “mitigating factors” in determining disqualifications;
- Eliminate debarment; alternatively, apply debarment only to future solicitations, and make debarment appealable to the Ethics Review Commission or another City Council-designated body, and to the City Council; and
- Require City Council approval of the ALO’s administrative rules.

See: [TDS’ feedback on staff’s ALO “Version 2” \(substantially identical to “Version 3”\)](#)

For your reference, we have posted documents and correspondence related to ALO reform on our website at <http://www.texasdisposal.com/ALOREFORM>.

Thank you for your consideration. As always, please do not hesitate to contact me, or another TDS representative, directly with questions or concerns.

Sincerely,

Bob Gregory

President & Principal Owner

[Texas Disposal Systems](#)

512-619-9127 (m)