



# City of Austin

## Purchasing Office

P.O. Box 1088, Austin, TX 78767

### **City of Austin Anti-Lobbying Ordinance Proposed Changes**

#### **Feedback Form**

The City of Austin is currently working on a revision to its Anti-Lobbying Ordinance (ALO) to complete an update in the 1<sup>st</sup> quarter of 2018 and needs your review and comments. The ALO governs the communication between respondents and City employees or City officials during the solicitation process to restrict lobbying and help ensure a level playing field for all participants. The City has published the latest revision to the ALO ("V2") online as well as a companion document ("Rule Elements") containing the elements that staff intends to include in any subsequent rules, which is available at:

[https://www.ci.austin.tx.us/financeonline/vendor\\_connection/index.cfm](https://www.ci.austin.tx.us/financeonline/vendor_connection/index.cfm)

This form has been designed to allow for you to make targeted comment on each section of the draft ordinance in an ordered manner. All comments received will be shared with the City of Austin's Audit and Finance Committee as part of their review of the proposed ordinance. Please contact Shawn Willett at [shawn.willett@austintexas.gov](mailto:shawn.willett@austintexas.gov) or by phone at (512) 974-2021 with any questions.

**Completed By:** Adam Gregory, Texas Disposal Systems

**(Name and Company if applicable)**

#### **Specific Feedback is requested on the following sections:**

##### **Definition of Agent:**

TDS believes that the current revised ordinance's definition of "agent" remains over-broad. For example, what if a bidder shared the perceived benefits of his/her solicitation response with a member of the public and asked that person to share their own opinion of the solicitation response with a City official? Is the member of the public then "authorized by a respondent to act for or in place of a respondent in order to communicate on behalf of the respondent" and thus the communication would constitute a violation of the ALO by the bidder? Or, what if a bidder were to share the perceived benefits of his/her solicitation response with a member of the public and the member of the public proposed to the bidder to share their opinion with a City official without being requested by the bidder to do so? Would the bidder then be obligated to direct the member of the public NOT to share their opinion with a City official in order to avoid creating an "agent" whose communication would constitute a violation of the ALO by the bidder? In order to avoid this lack of clarity, TDS has already proposed and continues to propose that the revised ordinance should define "agent" specifically as a person "acting in exchange for compensation or any type of consideration."

##### **Definition of No-Lobbying Period:**

TDS strongly opposes the current revised ordinance's reversion back to the existing "no-lobbying" period, which starts when a solicitation is issued and ends either when the last contract from the solicitation is signed, 60 days following council authorization of the last contract resulting from the solicitation, or upon cancellation of the solicitation. In the previous version of the revised ordinance, staff proposed to change the start of the "no-lobbying" period to the time solicitations are due in order to "allow staff to know which respondents are subject to the ordinance" and to "make the no-contact list more meaningful to staff, Council and the public." Reverting back to the existing "no-lobbying" period thus ignores staff's own argument in favor of "certainty" with regard to applicability. More importantly, the current revised draft also ignores the recommendation of the Ethics Review Commission (ERC), which recommended starting the "no-lobbying" period four business days after a solicitation is issued in order to "give respondents time to

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address policy concerns." TDS' position has been and remains that the ALO should be revised to go into effect no sooner than 14 days after a solicitation is issued and be lifted no later than 14 days before each proposed contract is posted for consideration by either a City board or commission or the City Council in order to allow City policymakers to receive information about solicitation responses from sources other than only City staff.

### Definition of Respondent:

TDS believes the current revised ordinance's definition of "respondent" remains over-broad as it continues to derive from an over-broad definition of "response," which itself is defined as "a response to a solicitation." In common language, "a response to a solicitation" could mean ANY statement or communication made relating to that solicitation, rather than only the definition the ordinance appears to intend (a formal submission by a bidder in an attempt to secure a contract that is the subject of the solicitation). In order to avoid this lack of clarity, TDS has already proposed and continues to propose that the definition of "response" - and thus the derivative definition of "respondent" - should be amended in the revised ordinance to "the contents of a sealed proposal submitted by a bidder in response to a solicitation."

### Definition of Solicitation:

TDS has no comment on the definition of "solicitation."

### Restriction on Lobbying Section:

TDS opposes the over-broad language in the "restriction on lobbying" section of the current revised ordinance. Specifically, part 1(a) now contemplates a prohibition on "substantive information about any respondent or response with respect to the solicitation to which the communication relates." What is, and what is not, "substantive information?" Would this language allow for communication of "substantive information" about a respondent during the "no-lobbying" period if the information were NOT "with respect to the solicitation?" Does the prohibition in part 1(b) against encouraging "the City" to "reject all of responses to the solicitation to which the communication relates" mean it would be allowable to encourage a City official to reject only ONE solicitation, as opposed to all of them? TDS thus proposes that sections 1 (a), 1(b) and 1(c) be eliminated from the revised ordinance in favor of retaining only a revised version of part 1(d), which appropriately contemplates a prohibition on ADVOCACY as opposed to a prohibition on INFORMATION. TDS proposes only that part 1(d) be revised to retain "directly" before "ask" (the previous draft modified ask with "directly OR indirectly").

### Permitted Communications Section:

TDS believes the entire "permitted communications" section should be eliminated as ANY communication that is not specifically prohibited by the "restriction on lobbying" section should be presumed by the ordinance to be allowed. If the "permitted communications" section is retained, TDS believes it should be re-drafted in such a way as to ensure that any respondent to any solicitation CANNOT be found in violation of the ALO for exercising free speech rights legally protected under the Texas Constitution and the First Amendment to the U.S. Constitution. Specifically, TDS believes that the ALO must allow all respondents to all solicitations 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 only City officials and employees as identified by the ALO; 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

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only direct, solicitation-specific ADVOCACY during the procurement process, as defined by the ALO.

### Notice Section:

TDS has no comment on the "notice" section.

### Disclosure of Violation; Recusal Section:

TDS strongly opposes the current revised ordinance's contemplated COMPELLED "self-recusal" of City officials and City employees who are determined, presumably by the Purchasing Officer, to have violated the ordinance's "no-lobbying" provisions. This provision also ignores the unanimous recommendation of the Zero Waste Advisory Committee (ZWAC) to "strike all sections which empower staff to require recusal of elected or appointed City officials." TDS believes that City officials, including elected and appointed officials, must retain the ability to determine for themselves whether they should be recused from decision-making.

### Enforcement Section:

TDS strongly opposes the "enforcement" section of the current revised ordinance. Most importantly, this section completely ignores the recommendations of everybody that has considered ALO revisions - the City Council's Waste Management Policy Working Group (PWG), the Ethics Review Commission (ERC), and the Zero Waste Advisory Commission (ZWAC) - to establish third-party oversight of the ordinance's enforcement process and create appeal rights beyond City staff. Specifically, the PWG proposed to "incorporate an option to engage a third-party reviewer such as the Ethics Review Commission to determine violations, judgment, and penalty enforcement." ZWAC recommended "a right to appeal all disqualifications and other penalties or determinations to the ERC and ultimately Council." The ERC further contemplated designating the Municipal Court as an appellate body for ALO violations. The current revised ordinance INSTEAD continues to give City staff the power of judge, jury and executioner in each case, up to and including vendor debarment. This section also ignores the recommendations of both ERC and ZWAC to eliminate the Purchasing Officer's authority to waive violations, with the ERC specifically recommending that such authority be assigned exclusively to "the appellate body." Finally, this section contemplates staff enforcement of the ALO via "rules promulgated in accordance with Section 1-2-1" but these rules have not yet been developed, despite the specific recommendation of the Council's PWG that the rules receive "approval from Council" prior to implementation of the revised ALO, and the recommendation from ZWAC that the rules "ultimately be brought back to the Ethics Review Commission (ERC) and Council for final review and final approval." Indeed, staff has as yet publicly offered only a broad outline of what the ALO rules may eventually contain, while at the same time informing Council via memo that they intend to "promulgate rules in support of the revised ALO that include elements SUBSTANTIALLY SIMILAR to the requirements in this section." TDS believes it is CRITICAL to the success of the City's revised ALO for the ordinance's administrative rules to be considered by boards/ commissions and the City Council CONCURRENTLY with the revised proposed ordinance itself.

### Disqualification; Contract Voidable Section:

TDS opposes much of the language in the "disqualification" section of the current revised ordinance. Most importantly, TDS opposes the reversion from the previous draft of the ordinance to again include debarment as a penalty. TDS believes debarment is unnecessarily punitive, as disqualification is a sufficient deterrent to violating the ALO. Further, TDS is only aware of one other city in Texas, El Paso, whose anti-lobbying provisions contemplate debarment, which requires approval from the City Council. If debarment is nonetheless retained in the revised ordinance, TDS urges that the ordinance specify that debarment applies only to future solicitations and contracts. This section also ignores the recommendation of the Zero Waste

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Advisory Commission (ZWAC) that ALO-disqualified respondents be prohibited from responding only to the "the same" solicitation as opposed to "the same or similar" solicitation in the future; and ignores the ZWAC recommendation that ONLY the City Council be authorized to void a contract for a violation of the ALO. Finally, TDS has previously recommended, but staff has not incorporated, a provision establishing that a single ALO offense should result in only one disqualification; and a process for staying the solicitation process temporarily during disqualification appeals.

### **Any other feedback you would like to provide:**

TDS believes that the current revised ordinance as drafted continues to function more as an Anti-Information Ordinance than an Anti-Lobbying Ordinance. Unfortunately, the current revised draft largely fails to address the ambiguities that have led to ongoing controversy and conflict, particularly as it relates to waste contracting. TDS' direct experience suggests that the current ALO is likely unconstitutional; unquestionably, the current ALO has been misapplied by City staff in the area of waste contracting, including being used to illegally disqualify TDS (as determined by a federal judge). To be very clear, TDS' position has been and continues to be that all waste contracting should simply be exempted from the requirements of the ALO based on the conflict of interest inherent in City-licensed waste contractors being regulated by an acknowledged competitor - just as other contracting areas are exempt from the ALO. However City staff has recommended to Council that any changes to the ALO that may derive from the ongoing waste management-focused policy discussion should apply to everyone. TDS appreciates the ongoing efforts of City policymakers to develop a fair and enforceable ALO, as well as effective new waste management policies, and will continue to engage in the process moving forward.