



September 26, 2018

Mr. Matthew Duree
City of Austin Purchasing Office
124 West 8th Street, Room 308
Austin, Texas 78701

RE: TLM Protest of IFB CDL2003REBID2

Mr. Duree:

Texas Landfill Management, LLC (TLM) – a sister company to Texas Disposal Systems, Inc. and Texas Disposal Systems Landfill, Inc. – protests IFB CDL2003REBID2. TLM is requesting the Purchasing Office reject Synagro’s response to this bid and instead recommend to City Council that it accepts TLM’s bid.

To call IFB CDL2003REBID2 compromised would be a compliment. Over the course of nearly 30 months since the first version of this solicitation was issued, TLM has observed a clear, ongoing pattern of conduct by City of Austin staff suggesting an effort to manipulate and usurp authority from the Austin City Council and rig the solicitation review process to advantage the incumbent vendor, Maryland-based Synagro. Never in more than 40 years of doing business in Austin and across Texas have TLM’s executives ever witnessed a plainer appearance of impropriety; for the Austin City Council to now adopt staff’s recommendation would, TLM believes, represent a spectacular failure of governance.

TLM protests IFB CDL2003REBID2 on the following grounds:

1. CITY STAFF APPEARS TO HAVE WITHHELD EVIDENCE FROM THE CITY COUNCIL OF ANTI-LOBBYING VIOLATIONS BY SYNAGRO.

In December 2016, City of Austin staff appears to have misled the Austin City Council into voting to support a retroactive waiver of the Anti-Lobbying Ordinance (ALO) to cure ALO violations by Synagro that were initiated by staff during the first version of this solicitation while apparently WITHHOLDING DOCUMENTS from the City Council containing evidence of OTHER anti-lobbying violations that were initiated by Synagro, NOT by staff. Based on the evidence in their possession at the time – which was revealed via a public information request only AFTER the December 2016 City Council vote – TLM believes City staff should have disqualified Synagro from this solicitation process. Instead, staff not only appears to have

ignored evidence of ALO violations initiated by Synagro in October 2016 but also to have possibly hidden the evidence from City policymakers. TLM believes the City Council should now be presented with the presumably suppressed evidence and consider whether to act to rescind or amend the December 2016 retroactive blanket ALO waiver for this solicitation. With the waiver rescinded or amended by the Council, TLM believes staff should subsequently find that Synagro violated the ALO in October 2016 and is thus ineligible to respond to IFB CDL2003REBID2.

2. CITY STAFF IMPROPERLY RELEASED TLM'S CONFIDENTIAL BID PRICE TO SYNAGRO.

3. SYNAGRO APPEARS TO HAVE SUBMITTED FALSELY CERTIFIED BID DOCUMENTS TO CITY STAFF.

4. CITY STAFF APPEARS TO HAVE KNOWINGLY ACCEPTED FALSE BID DOCUMENTS FROM SYNAGRO.

In June 2018, City of Austin staff may have violated City policy and the Texas Public Information Act by [improperly releasing](#) the full contents of TLM's confidential low-bid response to the second version of this solicitation to Synagro's lobbyist. As a result, the second version (RFP CDL2003REBID) was cancelled and the third version (IFB CDL2003REBID2) was issued more than two months later. However, the [scope of work and required pricing](#) for the second version and the current, third version are entirely IDENTICAL; as such, staff's release to Synagro's lobbyist of TLM's previous low-bid response for identical services irreconcilably advantaged Synagro, who in fact subsequently lowered their bid price in the third solicitation to beat TLM's improperly revealed previous low bid by approximately 4% (1% outside of the margin that would have allowed the City Council, under state law, to instead select a local vendor like TLM to receive the contract). Further, Synagro's response to the third solicitation included Section 0801 V2 of the City's standard bid documents ("[Non-collusion, non-conflict or interest, and anti-lobbying certification](#)") apparently falsely certifying that Synagro "is not currently aware of any potential or actual conflicts ... which enabled Offerer to obtain an advantage over other Offerers." Knowing that Synagro was improperly in possession of TLM's confidential bid for the identical scope of work contained in the cancelled second solicitation, staff nonetheless accepted Synagro's Section 0801 V2 certification. To cure the improper release of TLM's bid price for the previous identical solicitation, as well as Synagro's false certification of Section 0801 V2 for the third solicitation and staff's knowing acceptance of apparently false documents, TLM believes City staff must now recommend to the City Council to contract with TLM to perform the scope of work based on TLM's low-bid price response to RFP CDL2003REBID.

5. TLM IS THE "LOWEST RESPONSIBLE OFFERER" TO IFB CDL2003REBID2 BASED ON "TOTAL COST CONCEPT."

TLM's response to IFB CDL2003REBID2 included an offer to provide "optional additional services" in the form of on-site waste grinding (necessary to generate bulking agent required to produce the biosolids compost that is the solicitation's objective); it additionally included an "[alternative offer for consideration](#)" containing a bundled price of \$16.99 per ton for both composting and grinding. TLM's calculations indicate that this proposal represents an estimated cost savings to ratepayers of approximately [\\$1M](#) per year. Synagro's proposal includes no such additional offer. TLM's response to IFB CDL2003REBID2 thus meets the City's definition of "[Lowest Responsible Offer](#)" as it results in "the lowest cost to the City in a total cost concept." TLM requests that City staff identify TLM as the "[Lowest Responsible Offerer](#)" for IFB CDL2003REBID2.

Additional details on each complaint follow:

1. CITY STAFF APPEARS TO HAVE WITHHELD EVIDENCE FROM THE CITY COUNCIL OF ANTI-LOBBYING VIOLATIONS BY SYNAGRO.

As indicated above, IFB CDL2003REBID2 is the City staff's third version of Austin Water's solicitation for "beneficial reuse of biosolids." In December 2016, the City Council voted to support a staff recommendation to retroactively waive the requirements of the ALO for the first version of this solicitation in order to cure at least two known ALO violations by Synagro that were believed to be the result of a staff-directed solicitation evaluation process.

As the [Recommendation for Council Action](#) for [Ordinance 20161215-052](#) stated: "Passage of this item would have the effect of holding harmless any offerors that have participated in the City solicitations described in the proposed ordinance who may have unintentionally communicated with City employees or officials. Passage of this item would also prevent such offerors from being disqualified from submitting responses and be eligible for contract awards for these materials or from participating in any future solicitations for these materials."

Based on the [transcript](#) of the City Council discussion, it is indeed plain that Council approval of staff's proposed Ordinance retroactively waiving the ALO for the first version of this solicitation was based on information provided by City staff, AND Synagro, that staff itself was solely responsible for Synagro's ALO violations.

As Mayor Steve Adler noted during the discussion: "I would waive [the ALO] going back because I think [the City] precipitated any problem that might exist." Andrew Bosinger of Synagro similarly noted before the City Council: "What we're talking about ... is whether a meeting was adequately posted or not ... we, Synagro, as the recommended bidder on this, [were] acting at the City's instruction."

However, subsequent to Council's approval of the ordinance retroactively waiving the ALO for the first version of this solicitation, it was indicated via a public information request that Synagro

had at least TWICE violated the ALO in October 2016 INDEPENDANT of the staff-directed RFP evaluation process, and that City staff appears to have deliberately withheld evidence of these violations from the City Council before asking the Council to adopt a blanket retroactive ALO waiver.

As documented in the attached and linked internal City emails:

- On Monday, [October 17, 2016](#), in an email titled “Potential violation of Anti-Lobbying Ordinance,” Monica McClure – a Corporate Contract Administrator in the Financial Services Department and not the authorized contact for the solicitation – documents a phone conversation with Andrew Bosinger of Synagro in which Bosinger recounts multiple instances of direct contact between Synagro’s registered lobbyist, Nikelle Meade, and City officials while the ALO was in effect. While simply the content of the phone call between Bosinger and McClure violated the ALO, the communications described by Bosinger during the call indicate multiple additional violations. McClure’s email (again, titled “Potential violation of Anti-Lobbying Ordinance”) describing the exchange was sent directly to the Purchasing Office’s authorized contact person for the solicitation, Danielle Lord, but neither Lord or Purchasing Officer James Scarboro appear to have undertaken any investigation and failed to inform the City Council of the potential violations.
- On Thursday, [October 6, 2016](#), Andrew Bosinger of Synagro forwarded an email to Monica McClure – again, not the authorized contact person for the solicitation – with an attached memorandum from Synagro’s registered lobbyist, Nikelle Meade, containing content appearing to violate the ALO’s communication restrictions, including conveying “a complaint about the solicitation to which the communication relates.” While the content of the lobbyist’s memorandum was originally directed to authorized contact Danielle Lord, Bosinger’s email forward of the memorandum to McClure resulted in what I believe is an indisputable ALO violation. This email was also forwarded to both Danielle Lord and James Scarboro by Monica McClure, but once again it appears no action was taken and staff failed to inform the City Council of the evidence of the potential violation.

In summary, it is impossible to avoid the appearance that City staff chose in December 2016 to mislead Mayor Adler and the City Council by failing to appropriately inform them of known possible ALO violations by Synagro UNRELATED to staff’s compromised RFP evaluation process, which was instead presented to Council as the SOLE RATIONALE for requesting Council support for a retroactive ALO waiver.

As staff is aware, after the City Council voted in December 2016 to adopt the retroactive ALO waiver for the first version of the solicitation and direct staff to issue the second version, the Council subsequently (in April 2017) voted to temporarily waive the ALO for ALL waste-related solicitations, to accommodate a comprehensive policy review process by the City Council’s Waste Management Policy Working Group. As the second version of the biosolids solicitation (RFP CDL 2003REBID) was not issued until October 2017, the Council’s temporary ALO waiver was then in effect and thus the ALO did not apply to the second solicitation; accordingly TLM did not at that time submit a complaint regarding Synagro’s 2016 ALO violations.

However, after the second solicitation was cancelled as the result of City staff's release of TLM's confidential RFP response to Synagro's lobbyist, staff issued the current IFB CDL2003REBID2 with the Council's revised and re-instated ALO in full effect. This ALO complaint thus became valid again upon Synagro's response to IFB CDL2003REBID2.

Note the previous 2016 version of the ALO disallow respondents who have violated the ALO from responding to "the same or similar solicitation" if the original solicitation is cancelled. TLM maintains that City staff's failure to inform the City Council in December 2016 of known ALO violations by Synagro in October 2016 and to instead request support for a retroactive blanket waiver based on withheld information improperly cured ALO violations by Synagro that were neither "unintentional" nor the result of "acting at the City's instruction." As a result, TLM believes that Synagro is now improperly eligible to respond to IFB CDL2003REBID2.

To cure the deception perpetrated on the City Council by City staff and Synagro, TLM believes City staff must now present the presumed suppressed evidence of Synagro's ALO violations to Mayor Adler and the City Council so they may consider whether to act to rescind or amend the December 2016 retroactive blanket ALO waiver for this solicitation (Ordinance 20161215-052). With the ALO waiver rescinded or amended by the City Council, I think City staff should subsequently find that Synagro violated the ALO in October 2016 and is thus ineligible to respond to the current version of the solicitation, and retract their September 12, 2017 recommendation for award to Synagro.

2. CITY STAFF IMPROPERLY RELEASED TLM'S CONFIDENTIAL BID PRICE TO SYNAGRO.

3. SYNAGRO APPEARS TO HAVE SUBMITTED FALSELY CERTIFIED BID DOCUMENTS TO CITY STAFF.

4. CITY STAFF APPEARS TO HAVE KNOWINGLY ACCEPTED FALSE BID DOCUMENTS FROM SYNAGRO.

As noted, RFP CDL2003REBID was [cancelled](#) in June 2018 during a BAFO process when it was discovered that staff may have violated City policy as well as the Texas Public Information Act and released the contents of TLM's full RFP response, including TLM's confidential bid price, to the registered lobbyist of the staff-recommended incumbent vendor, Synagro. (Note that the BAFO process, which included only Synagro and TLM, had been initiated in May 2018 after staff rejected the [recommendation](#) of a protest hearing officer who determined that staff had improperly scored TLM's response to RFP CDL2003REBID – e.g. staff had overlooked sections of TLM's response, and mischaracterized strengths as deficiencies – and proposed that TLM's response be re-scored by new evaluators.)

As the scope of work and required pricing for IFB CDL2003REBID2 is IDENTICAL to the scope of work and required pricing of RFP CDL2003REBID, staff's release to Synagro's lobbyist of TLM's RFP CDL2003REBID response irreconcilably advantaged Synagro. Indeed

when Synagro responded to IFB CDL2003REBID2, they lowered their RFP CDL2003REBID bid price (from \$16.25 per ton to \$13.93 per ton) to beat TLM's improperly revealed RFP CDL2003REBID low bid (\$14.53 per ton) by approximately 4% (1% outside of the margin that would have allowed the City Council, under state law, to instead select a local vendor like TLM to receive the contract).

Further, Synagro's response to IFB CDL2003REBID2 included Section 0801 V2 of the City's standard bid documents which may have falsely certified that Synagro "is not currently aware of any potential or actual conflicts ... which enabled Offerer to obtain an advantage over other Offerers." With TLM's confidential bid for the IDENTICAL scope of work in RFP CDL2003REBID in hand, Synagro in fact had a demonstrable advantage over TLM.

Indeed, in direct contrast to Synagro's IFB CDL2003REBID2 Section 0801 V2 certification, Synagro's own lobbyist, Nikelle Meade, testified to the nature of Synagro's competitive advantage in responding to IFB CDL2003REBID2 in a August 14, 2018 [memorandum](#) to the Texas Attorney General, requesting that the content of Synagro's response to RFP CDL2003REBID be protected from release by the City of Austin (even after the City had released TLM's response directly to Synagro's lobbyist) by writing:

"The City recently canceled [RFP CDL2003REBID] and has reissued the solicitation for **the very same biosolids contract** through an Invitation for Bids (and "IFB") process, which, like an RFP, is a competitive solicitation process governed by City procurement rules. In addition, we expect that the Requestor, via TDS or TLM, will submit a bid in response to the pending IFB. As a consequence, [Synagro's RFP CDL2003REBID response documents] are comprised of information that, if released, **would give advantage to a competitor or bidder** ... The disclosure of the requested information could allow TDS, TLM or other competitors of Synagro to gain insight into Synagro's proprietary solutions and business information. **It would also allow competitors to undercut Synagro in terms of bid price.**"

(After TLM executives learned that TLM's confidential bid in response to RFP CDL2003REBID had been released to Synagro's registered lobbyist via a public information request, TLM submitted a similar request for Synagro's response to RFP CDL2003REBID; this time City staff refused the information release and referred the inquiry to the Texas Attorney General.)

In [rejecting](#) TLM's previous protest of IFB CDL2003REBID2 based on staff's release to Synagro's lobbyist of TLM's RFP CDL2003REBID response and Synagro's resulting competitive advantage, City of Austin Purchasing Officer James Scarboro indicated a view – consistent with City staff's pattern of behavior – that IFB CDL2003REBID2 is "inherently different" from RFP CDL2003REBID because of the distinct solicitation formats. However with even Synagro characterizing IFB CDL2003REBID2 as a "solicitation for the very same biosolids contract," TLM believes the burden should be on City staff to explain to policymakers how the SUBSTANCE rather than the FORMAT of the two solicitations differ. (Note that while the City Council was notified on June 12, 2018 that RFP CDL2003REBID had been cancelled "due to an

unintentional release of records,” TLM is not aware that staff has EVER informed the Council that the specific rationale for cancelling the RFP was the release of TLM’s proposal to Synagro.)

As there is in fact NO distinction in substance, to cure the improper release of TLM’s bid price for the previous solicitation, and Synagro’s apparently false certification of Section 0801V2 for the third solicitation, TLM believes City staff must now recommend to the City Council to contract with TLM for IFB CDL2003REBID2 based on TLM’s RFP CDL2003REBID price.

5. TLM IS THE “LOWEST RESPONSIBLE OFFERER” TO IFB CDL2003REBID2 BASED ON “TOTAL COST CONCEPT.”

As noted, TLM’s response to IFB CDL2003REBID2 included an offer to provide “optional additional services” in the form of on-site waste grinding (necessary to generate bulking agent required to produce the biosolids compost that is the solicitation’s objective); it additionally included an “alternative offer for consideration” containing a bundled price of \$16.99 per ton for both composting and grinding. TLM’s calculations indicate that this proposal represents an estimated cost savings to ratepayers of approximately \$1M per year. Synagro’s proposal includes no such additional offer. TLM’s response to IFB CDL2003REBID2 thus meets the City’s definition of “Lowest Responsible Offer” as it results in “the lowest cost to the City in a total cost concept.” TLM requests that City staff identify TLM as the “Lowest Responsible Offerer” for IFB CDL2003REBID2 and recommend City Council execute a contract with TLM for the reasons described above.

Thank you in advance for your consideration of this protest and the issues detailed. Please do not hesitate to contact me with questions or concerns.

Sincerely,



Adam Gregory
Texas Landfill Management, LLC