RULE NO.: R2011-COA-1

NOTICE OF AMENDED RULE ADOPTION EFFECTIVE DATE: December 7, 2011

By: Byron Johnson
Purchasing Officer, Purchasing Office, Financial and Administrative Services

Rosie Truelove
Director, Contract Management Department

The Purchasing Office and the Contract Management Department have adopted an amended version of a proposed rule. Notice of the proposed rule was posted on October 24, 2011. Public comment on the proposed rule was solicited in the October 24, 2011 notice. The adoption of a rule may be appealed to the City Manager in accordance with Section 1-2-10 of the City Code as explained below. This notice is issued under Chapter 1-2 of the City Code.

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AUSTIN CITY CLERK
RECEIVED

EFFECTIVE DATE OF ADOPTED RULE

The rule adopted by this notice is effective on December 7, 2011.

TEXT OF PROPOSED AMENDED RULE

A copy of the complete text of the adopted rule is available for public inspection and copying at the following locations. Copies may be purchased at the locations at a cost of ten cents per page:

City of Austin Purchasing Office located at 124 W. 8th Street, 3rd Floor, Austin, Texas 78701

Contract Management Department, located at 105 W. Riverside Drive, Suite 210, Austin, Texas 78704

Office of the City Clerk, City Hall, located at 301 West 2nd Street, Austin, Texas.

BRIEF EXPLANATION OF PROPOSED AMENDED RULE

The proposed amended rules adopt procedures required to administer and enforce City Code Chapter 2-7, Article 6 Anti-lobbying and Procurement, as amended effective December 7, 2011.

The proposed rules set forth the City's procedures to provide notice of disqualification or possible debarment and provide respondents with an opportunity to protest the disqualification or possible debarment at a hearing.

Staff has integrated a new Rule 9 and 10 to address comments received from the public (see below), and integrated a new Rule 11 per staff revisions to administer and enforce the city code. The new Rule 11 states that staff will determine whether new entities are reconstituted disqualified respondents.

SUMMARY OF COMMENTS

The City received comments during the public comment period. Below is a summary of comments received and City staff responses to those comments.

1) **Commenter:** City of Austin Ethics Review Commission

Comment: Clarify who has the power to void a contract awarded to a respondent who has violated this article, as noted in Section 2-7-108 of the Ordinance.

Staff Response: Staff recommends that the Purchasing Officer, and by delegation, the Director of the Contract Management Department, be authorized to void these contracts. Staff is adding a new item 9 to the rules:

9. CONTRACT VOIDABLE

The director or purchasing officer may void a contract awarded as a result of a solicitation in which the respondent violated the article. The director or purchasing officer shall take into account the needs of the municipality, including the time required to resolicit the requirement and the availability of suitable alternate products before voiding the contract. Voiding a contract under the terms of this section is not subject to an appeal.

2) **Commenter:** Ryan Hobbs, Texas Disposal Systems

Comment: Suggested amending Rule 3 to read:

If a respondent is disqualified, the authorized contact person shall provide written notice to the respondent that includes a statement that the respondent is disqualified; the identifying number of the solicitation from which the respondent is disqualified; a statement that the disqualification does or does not trigger debarment; <u>a description of the response which makes the respondent subject to the anti-lobby ordinance;</u> a description of the prohibited representation that is the reason for the disqualification <u>and an explanation of how the prohibited representation relates to the solicitation</u>.

Staff Response: No change to Rule 3; notice and cause are sufficiently provided to respondent by existing language.

3) **Commenter:** Ryan Hobbs, Texas Disposal Systems

Comment: Suggested amending Rule 3 to read:

If a respondent is disqualified, the authorized contact person shall provide written notice to the respondent that includes a statement that the respondent is disqualified; the identifying number of the solicitation from which the respondent is disqualified; a statement that the disqualification does or does not trigger debarment; <u>a description of the response which makes the respondent subject to anti-lobby ordinance;</u> a description of the prohibited representation that is the reason for the disqualification <u>and an explanation of how the prohibited representation relates to the solicitation</u>; a description of the protest process; the city official that will decide the protest; and a copy of this rule. <u>It is not a violation of the anti-lobby ordinance for a person with an existing contract or business relationship with the city to discuss issues related to that contract or relationship with a city employee or official, even if there is a pending solicitation regarding the same or similar subject matter which the person is or may become a respondent.</u>

Suggested amending Rule 5.B to read:

C. Debarment Protest Hearing. This section applies to hearing procedures for a respondent protesting a disqualification that results in debarment. Any disqualification that was made before the effective date of these amendments will not count toward debarment after the third anniversary of that disqualification.

Staff Response: First two proposed changes in Rule 3, no change; notice and cause are sufficiently provided to respondent by existing language. The third proposed change to Rule 3 ("It is not a violation...), has been restated as a new Rule 10. The proposed relettering to Rule 5.B. has been integrated (changed to 5.C.), and the proposed additional language has not been integrated.

AUTHORITY FOR ADOPTION OF RULE

The authority and procedure for the adoption of a rule to assist in the implementation, administration, or enforcement of a provision of City code is established in Chapter 1-2 of the City Code.

APPEAL OF ADOPTED RULE TO CITY MANAGER

A person may appeal the adoption of a rule to the City Manager. **AN APPEAL MUST BE FILED WITH THE CITY CLERK NOT LATER THAN THE 30TH DAY AFTER THE DATE THIS NOTICE OF RULE ADOPTION IS POSTED. THE POSTING DATE IS NOTED AT THE TOP OF THIS NOTICE.** If the 30th day is a Saturday, Sunday, or official city holiday, an appeal may be filed on the next day which Is not a Saturday, Sunday, or official city holiday.

An adopted rule may be appealed by filing a written statement with the City Clerk. A person who appeals a rule must (1) provide the person's name, mailing address, and telephone number; (2) identify the rule being appealed; and (3) include a statement of specific reasons why the rule should be modified or withdrawn.

Notice that an appeal was filed will be posted by the City Clerk. A copy of the appeal will be provided to the City Council. An adopted rule will not be enforced pending the City Manager's decision. The City Manager may affirm, modify, or withdraw an adopted rule. If the City Manager does not act on an appeal on or before the 60th day after the date the notice of rule adoption is posted, the rule is withdrawn. Notice of the City Manager's decision on an appeal will be posted by the City Clerk and provided to the City Council.

On or before the 16th day after the City Clerk posts notice of the City Manager's decision, the City Manager may reconsider the decision on an appeal. Not later than the 31st day after giving written notice of an intent to reconsider, the City Manager shall make a decision.

CERTIFICATION BY CITY ATTORNEY

By signing this Notice of Rule Adoption the City Attorney certifies that the City Attorney has reviewed the rule and fins that adoption of the rule is a valid exercise of the Director's administrative authority.

REVIEW AND APPROVED

Byron E. Johnson, C.P.M.,
Purchasing Officer, Purchasing Office

Date: 12/01/2011

Rosie Truelove, Director
Contract Management Department

Date: 12/1/2011

Karen Kennard
City Attorney
Law Department

Date: 12/5/2011

Enforcement of the Anti-Lobbying Ordinance
by Delegated Procurement Authorities
Effective December 1, 2011

This rule is adopted under the authority of City Code Chapter 2-7, Article 6 and the delegated authority of the Purchasing Officer.

1. DEFINITIONS

Words in this rule have the meanings they have in Article 6 of Chapter 2-7 of the City Code.

2. OVERVIEW: DISQUALIFICATION AND PROTEST

A. Financial and Administrative Services Department. The purchasing officer enforces disqualifications for solicitations originating in the Financial and Administrative Services Department (FASD) and enforces debarments for solicitations originating in all city departments. The purchasing officer may delegate initial disqualification determinations for FASD solicitations to a Deputy Purchasing Officer or Corporate Purchasing Manager. All disqualification protests are heard by the purchasing officer and are final. All disqualification protests that trigger debarment are heard by the purchasing officer and are final.

B. Contract Management. The purchasing officer has delegated to the director of Contract Management (CM) the ability to enforce disqualifications for solicitations originating in Contract Management, including disqualifications that may result in debarment. The director of Contract Management may delegate initial disqualification determinations for CM solicitations to an Assistant Director or Division Manager. All disqualification protests are heard by the director and are final; however, if the disqualification triggers debarment, the protest must be heard by the purchasing officer.

3. NOTICE OF A DISQUALIFICATION

If a respondent is disqualified, the authorized contact person shall provide written notice to the respondent that includes a statement that the respondent is disqualified; the identifying number of the solicitation from which the

respondent is disqualified; a statement that the disqualification does or does not trigger debarment; a description of the prohibited representation that is the reason for the disqualification; a description of the protest process; the city official that will decide the protest; and a copy of this rule.

4. PROTEST

A. Opportunity to Protest Disqualification. This section applies to procedures for a respondent to protest a disqualification that does not trigger debarment.

(1) A respondent shall file a written protest. The protest must be actually received by the city official that will decide the protest no later than the fourth business day after the date that the respondent receives notice of the disqualification. If the respondent does not file a timely protest, the respondent waives the right to protest the disqualification.

(2) A respondent's protest must be concise and presented logically and factually. The protest must include:

a. The respondent's name, address, telephone, and fax number, and email address;
b. The identifying number of the solicitation; and
c. A detailed statement of the factual grounds for the protest, including copies of any relevant documents.

(3) If a disqualified respondent fails to comply with this rule, the director or purchasing officer may dismiss the respondent's protest.

B. Opportunity to Protest Debarment. This section applies to procedures for a respondent to protest a disqualification that results in debarment.

(1) A respondent shall file a written protest. The protest must be actually received by the purchasing officer no later than the fourth business day after the date that the respondent receives notice of the disqualification and debarment. If the respondent does not file a timely protest, the respondent waives the right to protest the disqualification and debarment.

(2) A respondent's protest must be concise and presented logically and factually. The protest must include:

a. The respondent's name, address, telephone, and fax number, and email address;
b. The identifying number of the solicitation; and
c. A detailed statement of the factual grounds for the protest, including copies of any relevant documents.

(3) If a disqualified respondent fails to comply with this rule, the purchasing officer may dismiss the respondent's protest.

5. PROTEST HEARING

A. Hearing Authority. Either a director or purchasing officer may conduct the hearing for a protest of a disqualification that does not trigger debarment. Only the purchasing officer may conduct the hearing for a protest of a disqualification that triggers debarment.

B. Disqualification Protest Hearing. This section applies to hearing procedures for a respondent protesting a disqualification that does not result in debarment.

(1) When the director or purchasing officer receives a timely written protest, the director or purchasing officer shall determine whether the grounds for the protest are sufficient.

(2) If the director or purchasing officer decides that the grounds are sufficient, the director or purchasing officer shall schedule a hearing. If practicable the director or purchasing officer should schedule the hearing within five (5) business days.

(3) If the director or purchasing officer determines that the grounds of a protest are insufficient, the director shall notify the respondent of that decision in writing.

(4) A protest hearing is informal and open to the public.

(5) The purpose of the hearing is to give a disqualified respondent a chance to present the respondent's case; it is not an adversarial proceeding.

(6) The following individuals from the City may attend the hearing:

a. Representatives from the department that requested the solicitation or services;
b. Law Department staff;
c. Contract Management staff;
d. FASD staff; and
e. Other appropriate City staff as determined by the director or purchasing officer.

(7) The respondent may bring to the hearing a representative or anyone else that will present information to support the factual grounds for the respondent's protest.

(8) The director or purchasing officer may appoint an independent hearing examiner to conduct the hearing and to provide a written recommendation.

(9) If the director or purchasing officer appoints an independent hearing examiner to conduct the hearing:

a. The independent hearing examiner shall provide a written hearing recommendation within five business days after the date of the hearing; and
b. The director or purchasing officer shall determine on the basis of the written hearing recommendation whether to maintain or deny the disqualification no later than the 15th business day after the date of the hearing.

(10) If the director or purchasing officer conducts the hearing, they shall:

a. Make a decision no later than the 15th business day after the date of the hearing; and

b. Shall send a written notice of the director's or purchasing officer's decision to the respondent within five business days after the date of the decision.

(11) When a protest is filed, the city usually will not make an award until a decision on the protest is made. However, the city will not delay an award if the director or purchasing officer determines that:

a. The City urgently requires the goods, supplies, or services to be purchased; or
b. Failure to make an award promptly will unduly delay delivery or performance.

(12) In the instances described under (11), the director or purchasing officer shall notify the respondent and make every reasonable effort to resolve the protest before the award.

C. Debarment Protest Hearing. This section applies to hearing procedures for a respondent protesting a disqualification that results in debarment.

(1) When the purchasing officer receives a timely written protest, the purchasing officer shall determine whether the grounds for the protest are sufficient.

(2) If the purchasing officer decides that the grounds are sufficient, the purchasing officer shall schedule a hearing. If practicable the purchasing officer should schedule the hearing within five (5) business days.

(3) If the purchasing officer determines that the grounds of a protest are insufficient, the purchasing officer shall notify the respondent of that decision in writing.

(4) A protest hearing is informal and open to the public.

(5) The purpose of the hearing is to give a disqualified respondent a chance to present the respondent's case; it is not an adversarial proceeding.

(6) The following individuals from the City may attend the hearing:

a. Representatives from the department that requested the solicitation or services;
b. Law Department staff;
c. Contract Management staff;
d. FASD staff; and
e. Other appropriate City staff as determined by the purchasing officer.

(7) The respondent may bring to the hearing a representative or anyone else that will present information to support the factual grounds for the respondent's protest.

(8) The purchasing officer may appoint an independent hearing examiner to conduct the hearing and to provide a written recommendation.

(9) If the purchasing officer appoints an independent hearing examiner to conduct the hearing:

a. The independent hearing examiner shall provide a written hearing recommendation within five business days after the date of the hearing; and
b. The purchasing officer shall determine on the basis of the written hearing recommendation whether to maintain or deny the decision no later than the 15th business day after the date of the hearing.

(10) If the purchasing officer conducts the hearing, the purchasing officer shall:

a. Make a decision no later than the 15th business day after the date of the hearing; and
b. Shall send a written notice of the purchasing officer's decision to the respondent within five business days after the date of the decision.

(11) When a protest is filed, the city usually will not make an award until a decision on the protest is made. However, the city will not delay an award if the purchasing officer determines that:

a. The city urgently requires the goods, supplies, or services to be purchased; or
b. Failure to make an award promptly will unduly delay delivery or performance.

(12) In the instances described under (11), the purchasing officer shall notify the respondent and make every reasonable effort to resolve the protest before the award.

6. DESIGNATION OF AUTHORIZED CONTACT PERSON

A. The department issuing the solicitation shall designate the authorized contact person(s) for the solicitation and provide appropriate contact information in the solicitation package at the time the solicitation is issued to the public.

B. Unless changed in writing, the authorized contact person(s) shall serve as such from the time the solicitation is issued, including any resolicitations, until a contract is issued based on the solicitation, or the solicitation is cancelled.

C. If the authorized contact person(s) needs to be changed, written information shall be provided by means of a solicitation addenda. An absence of the authorized contact person(s) for less than one work week may be considered an administrative issue and need not be published in an addenda.

D. The authorized contact person(s) may transfer responsibility in writing to a new designated Authorized Contact Person for the purposes of contract pre-positioning or negotiation.

E. FASD shall provide training for employees designated as authorized contact persons and for employees who serve as liaisons to Boards and Commissions covering the "No Contact Violation Process" and the "Complaint and Communications Process".

F. FASD shall provide training for Mayor, Council, Board and Commission members, and other interested parties covering the "No Contact Violation Process" and the "Complaint and Communications Process".

7. NOTICE OF NO CONTACT INFORMATION

A. Mayor, Council, City Manager and Directors. Distribution of the No Contact Solicitation Lists shall be made weekly by the Public Information Office to the Executive Distribution List.

B. Boards and Commissions. A department director whose department provides staff support to a board or commission with oversight of purchasing matters will distribute notice of the No Contact Solicitation Lists to the board and commission members through the board and commission liaisons.

C. Vendors. The current No Contact Solicitation Lists shall be available on the city's website.

8. NOTIFICATION BY STAFF OR RESPONDENT OF A VIOLATION

A. The person contacted must provide the authorized contact person with a written notification of a no-contact violation, using the City standard form, an email, or memo.

B. A written notification must include the key elements of the contact – who was contacted, who contacted them, when the contact was made, and what the contact included. The authorized contact person(s) shall complete the official report form and attach the written notification as appropriate.

C. Notification must be provided immediately to the authorized contact person.

9. CONTRACT VOIDABLE

The director or purchasing officer may void a contract awarded as a result of a solicitation in which the respondent violated the article. The director or purchasing officer shall take into account the needs of the municipality, including the time required to resolicit the requirement and the availability

of suitable alternate products before voiding the contract. Voiding a contract under the terms of this section is not subject to an appeal.

10. EXISTING CONTRACTS

It is not a violation of Article 6 of Chapter 2-7 of the City Code for a person with an existing contract or business relationship with the city to discuss issues related to that contract or relationship with a city employee or official. Article 6 of Chapter 2-7 of the City Code allows communications with staff regarding existing contracts or relationships; a representation is not an appropriate, relevant, or necessary topic for communications regarding existing contracts or relationships.

11. NEW ENTITIES

If it reasonably appears that a disqualified respondent has reconstituted itself for purposes of circumventing Article 6 of Chapter 2-7, that creates a rebuttable presumption that the new entity is the same respondent and therefore disqualified.