

NOTICE OF RULE ADOPTION

ADOPTION DATE: February 28, 2019

By: James Scarboro
Purchasing Officer

The Purchasing Office has adopted the proposed rule to implement Ord. No. 20180614-056, Anti-Lobbying and Procurement, codified at Chapter 2-7, Article 6 of the Austin City Code. Notice of the proposed rule and request for public comment was published on January 7, 2019. 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.

TEXT OF THE ADOPTED RULE

A copy of the complete adopted rule is attached hereto. This document along with the complete adopted rules are also available online at the City's financial services website, Austin Finance Online, at: <https://www.austintexas.gov/financeonline/finance/>. Hardcopies of the adopted rules may be purchased at either of the following City of Austin Locations.

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

Office of the City Clerk, located at 301 W. 2nd Street, Austin Texas, 78701

EFFECTIVE DATE OF THE ADOPTED RULE

The rule adopted by this notice is effective on February 28, 2019.

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:** James A. Hemphill of Graves Dougherty, Hearon and Moody, on behalf of Texas Disposal Systems; Texas Disposal Systems Landfill, Inc, Texas Landfill Management, LLC and related companies (Hemphill for TDS)

Comment: Section 3(1)- definition of "Agent" - broadens the Ordinance's definition to make a member of the public a respondent's "Agent" if the member of the public seeks information regarding a solicitation, receives information from the respondent, and is told that s/he has the constitutional right to voice her/his concerns to the City. This can convert an exercise of the right to petition the government into a violation of the ALO.

Staff Response: Staff disagrees with this comment. Section 3(1) does not make members of the public into "Agents" of respondents. No change to the rule is made based on this comment.

2) **Commenter:** Hemphill for TDS

Comment: Section 3(6)(a)(ii) - definition of "Respondent" - broadens the Ordinance by purporting to include within the definition a person or entity submitting a proposal that is "determined nonresponsive." How can something "non-responsive" make one a "Respondent?" Gives Staff far too much latitude to deem a statement, proposal, etc. to be a "non-responsive response" and thus subject the proposer to the ALO - even if the proposer has consciously chosen not to respond to a solicitation (and thus is not entitled to be treated on the same "plane of equality" as other responders, as Texas law requires).

Staff Response: Staff disagrees with the commenter's interpretation. A "Respondent" is a person or entity that submits a response. "Responsive" and "Nonresponsive" are evaluative determinations used to describe whether a response (a bid or proposal) complies with the solicitation requirements. A response is determined to be "Responsive" when it complies with all solicitation instructions and requirements, and "Nonresponsive" when it does not. The proposed rule merely clarifies that a "Respondent" to a solicitation continues to be a "Respondent" under that solicitation, even if their response to the solicitation is determined to be "Nonresponsive".

3) **Commenter:** Hemphill for TDS

Comment: Section 4(A) - defining a direct communication - broadens the Ordinance by stating that a City official or employee is an "intended recipient" of a communication if that persons "name or title is in the messages subject or text body." So just mentioning a City official or employee in an email makes that person an "intended recipient"? That makes no sense and is extraordinarily overly broad. The new proposed rules eliminate the presumption that a person is an "intended recipient" if the person is simply mentioned in the email.

Staff Response: Staff agrees that the rule does not presume a person is an intended recipient if that person is only mentioned in the email. No change to the rule based on this comment.

4) **Commenter:** Hemphill for TDS

Comment: Section 4(B) - when a communication is "substantive" - would appear to encompass any communication dealing with any subject matter related to a solicitation, even if the party making the communication is communicating about something other than the solicitation (for example, an existing contract between the party and the City).

Staff Response: Staff disagrees with the commenter's interpretation. Section 2-7-104(1)(a) of the City Code prohibits a respondent or its agent from communicating substantive information about any respondent or response with respect to the solicitation to which the communication relates. Rules Section 4(B) merely clarifies what "substantive" means within the context of the ordinance's prohibition.

5) **Commenter:** Hemphill for TDS

Comment: Section 5(2) - regarding permitted communications with the "presence" of the authorized contact person - allows the contact person to be "present" if s/he is included "in

writing" – gives extraordinary latitude to the contact person to allow communications that otherwise would be ALO violations and may be difficult for a competing bidder to learn about.

Staff Response: The communications identified in the comment are necessary from time to time in order to facilitate certain exchanges during competitive solicitations, e.g. clarifications, discussions and negotiations. These exchanges may occur, both in-person or in-writing. Although these exchanges are typically only between the authorized contact person and the respondent, when the material is highly technical or detailed, the authorized contact person may choose to direct the respondent to communicate directly with the City's subject matter experts, as long as the communication is initiated by and done in the presence of the authorized contact person.

6) **Commenter:** Hemphill for TDS

Comment: Section 5(4)(b)- seems to say that a communication about an existing contract is OK as long as the communication "does not occur with the solicitation related to the response is subject to this Article." This appears to establish that an existing contract holder can't communicate about an existing contract while there's a solicitation pending. That's directly contrary to the ordinance itself, which specifically allows such communications. This provision is now in section 5(4) (there are no longer subsections (a) or (b)) and some of the problematic language was deleted. There is still a concern that providing a "safe harbor" only for communications "solely related to an existing contract" may leave room for a claim that the ALO was violated by a communication about an existing contract that covered the same or similar subject matter as a pending solicitation.

Staff Response: Staff disagrees with this comment. As written, the rule permits a current contractor to communicate with City officials or City employees about their contract.

7) **Commenter:** Hemphill for TDS

Comment: Section 5(7) - narrows the Ordinance by providing that the "public meeting" exception only applies "after being recognized by the chair and made in the presence of all members of the governing body in attendance at that time." The plain language of the ALO itself allows any communication during the course of a public meeting. The language requiring the presence of all members of the governing body has been deleted, but the rest of the concerning language remains, and is narrower than the ALO itself.

Staff Response: Staff disagrees with this comment. The rule language clarifies how communication in a governmental meeting occurs. This is consistent with Sec. 2-7-105, City Code.

AUTHORITY FOR ADOPTION OF RULE

AUTHORITY FOR ADOPTION OF RULE

The authority and procedure for adoption of these rules is set forth in Chapter 1-2 and in Section 2-7-109 of the Austin City Code. Sec. 2-7-109(C) further authorized the Purchasing Officer to promulgate rules necessary to enforce this Article.

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 ON THE FIRST PAGE 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 THE CITY ATTORNEY

By signing this notice, the City Attorney certifies that the proposed rules have been reviewed by the City Attorney and are within the authority of the Purchasing Officer to adopt.

REVIEWED AND APPROVED:



James Scarboro
Purchasing Officer

2/25/2019
Date



Anne L. Morgan
City Attorney

2/25/19
Date

ANTI-LOBBYING AND PROCUREMENT RULES

SECTION 1 – RULES; ANTI-LOBBYING AND PROCUREMENT.

Pursuant to Austin City Code, Sec. 1-2-1 and Sec. 2-7-109(C), the following rules are promulgated to further implement Ch. 2-7, Article 6, Anti-Lobbying and Procurement.

SECTION 2 – APPLICABILITY AND EXEMPTIONS.

- (A) This Article is applicable to all solicitation processes as defined under Sec. 2-7-103(9), except those processes and/or contracts subject to Sec. 2-7-102(A), as further clarified here.
- (1) The exemption for City social services funding referenced in Sec. 2-7-102(A)(1) applies to professional service contracts and/or grants, that were competitively solicited but are otherwise exempt from applicable procurement statutes. A primary characteristic of a social service contract is that the contractors are providing direct services to City residents and clients, not the City. Human service contracts that include this characteristic are also considered to be social services.
 - (2) The exemption for City cultural arts funding referenced in Sec. 2-7-102(A)(2) applies to contracts and/or grants for artwork under the Art in Public Places program as well as related professional service contracts for community-based arts development services, that were competitively solicited but that are otherwise exempt from applicable procurement statutes.
 - (3) The exemption for federal, state or City block grant funding referenced in Sec. 2-7-102(A)(3) applies to contracts and/or grants in support of affordable housing, anti-poverty programs, and infrastructure development funded by Community Development Block Grants (CDBG) and related funding sources.
 - (4) The exemption for the sale or rental of real property referenced in Sec. 2-7-102(A)(4) applies to contracts for the sale, purchase, lease or rental of real property that are competitively solicited but that are otherwise exempt from applicable procurement statutes. Contracts for the sale, purchase, lease or rental of real property also includes the release of public easements on private property and applications from third parties to use portions of public right-of-way.
 - (5) The exemption for interlocal contracts or agreements referenced in Sec. 2-7-102(A)(5) applies to a limited category of interlocal contracts or agreements that are competitively solicited in accordance with applicable procurement statutes.
- (B) The purchasing officer may apply this Article to some solicitations that may otherwise be exempt from this Article as referenced in Sec. 2-7-106(1), including but not limited to solicitations:
- (1) for concessions and/or revenue-generating contracts;
 - (2) conducted by the City, for the sale of surplus City-property; or
 - (3) conducted in accordance with applicable procurement statutes, that were awarded administratively because the resulting contracts did not require Council authorization in accordance with City Charter Article VII Section 15 (Purchase Procedure).

SECTION 3 – DEFINITIONS AND EXAMPLES.

The terms in this rule have the meanings they have in Sec. 2-7-103, as clarified and/or supplemented as follows:

- (1) **AGENT.**
 - (a) A person is authorized as referenced in Sec. 2-7-103(1) when there is evidence:
 - (i) the respondent provided the person with the content of the prohibited communication;
 - (ii) the person making the prohibited communication did so at the request of the respondent.
 - (b) A person has first degree of consanguinity or affinity as referenced in Sec. 2-7-103(1), with the person's:
 - (i) children;
 - (ii) parents;
 - (iii) spouse;
 - (iv) parents-in-law;
 - (v) daughters- and sons-in-law;
 - (vi) step-parents; and/or
 - (vii) step-children.
- (2) **APPLICABLE PROCUREMENT STATUTES.** Applicable procurement statutes include but are not limited:
 - (a) Texas Local Government Code, Ch. 252 (Purchasing and Contracting Authority of Municipalities);
 - (b) Texas Local Government Code, Ch. 271 (Purchasing and Contracting Authority of Municipalities, Counties, and Certain Other Local Governments);
 - (c) Texas Government Code, Ch. 2269 (Contracting and Delivery Procedures for Construction Projects);
 - (d) Texas Government Code, Ch. 2254 (Professional and Consulting Services); and
 - (e) Texas Government Code, Ch. 791 (Interlocal Cooperation Contracts).
- (3) **ARTICLE.** Austin City Code, Ch. 2-7, Article 6; the Article under which these rules are promulgated.
- (4) **AUTHORIZED CONTACT PERSON.** Authorized contact persons referenced in Sec. 2-7-103(2) will be those persons identified in the solicitation document.
- (5) **PURCHASING OFFICER.** The purchasing officer as referenced in Sec. 2-7-103(6) may further delegate in writing some or all of the purchasing officer's duties and responsibilities of the Article and these rules.
- (6) **RESPONDENT.** A person or entity remains a respondent in Sec. 2-7-103(8) through the completion of the no-lobbying period even if:
 - (a) the respondent's response is:
 - (i) rejected; or
 - (ii) determined non-responsive; or
 - (iii) not recommended for contract award; or
 - (iv) withdrawn after the solicitation's due date and time; or
 - (b) the respondent is determined to be non-responsible.

SECTION 4 – RESTRICTION ON LOBBYING.

- (A) A communication is made directly to a City official or City employee, as referenced in Sec. 2-7-104(1), when there is evidence that a City official or City employee was the, or one of the, intended recipients of the communication. Examples of evidence of intention include:
- (1) an email, text message or similar electronic communication, when the City official or employee's:
 - (a) City email address, mobile number or other social media user name is included among the electronic communication's recipients; or
 - (b) non-City email address, mobile number or other social media user name is included among the electronic communication's recipients and the City official or City employee later confirms the non-City email address, mobile number or other social media user name belongs to them;
 - (2) a written correspondence, letter or facsimile when:
 - (a) the City official or City employee's name or title appears anywhere in the correspondence as being one of the correspondent's recipients; or
 - (b) there is evidence the correspondence, letter or facsimile was sent or delivered to the City official or City employee; or
 - (3) a documented account of a verbal communication, when the respondent or their agent knew or should have reasonably known they were communicating with a City official or City employee, and the City official or City employee later confirms they received the verbal communication.
- (B) A communication is substantive as referenced in Sec. 2-7-104(1)(a) when the communication increases a City official or City employee's knowledge of:
- (1) a respondent's experience, personnel or capacity that are relevant to the solicitation's requirements; or
 - (2) the contents of a response that are relevant to the solicitation's requirements.

SECTION 5 – PERMITTED COMMUNICATIONS.

Respondents or their agents do not violate Sec. 2-7-104 when communicating:

- (1) with an authorized contact person as referenced in Sec. 2-7-105(1), for any reason;
- (2) with other designated City employees at the request and in the presence of an authorized contact person as referenced in Sec. 2-7-105(1). The request and presence of the authorized contact person may be in-person, by telephone or in writing. Examples of such communications include:
 - (a) clarifying the solicitation, e.g., pre-offer conference or site visit;
 - (b) clarifying the respondent's response;
 - (c) participating in an interview or discussions concerning the respondent's response; or
 - (d) negotiating a recommended or authorized contract; or
- (3) complaints as referenced in Ch. 2-7-105(1), subject to the following limitations:
 - (a) complaints shall be submitted to the authorized contact person(s);
 - (b) complaints shall be received during the no-lobbying period;
 - (c) complaints shall be limited to the solicitation document or process;

- (d) complaints shall identify the specific City official(s) and/or City employee(s) the complaint is to be conveyed to;
 - (e) complaints shall not be confidential; and
 - (f) complaints shall not be considered a protest and shall not be subject to applicable protest regulations or procedure.
- (4) solely related to an existing contract as referenced in Sec. 2-7-105(2). Any communication that would otherwise violate Sec. 2-7-104, that is included within a communication related to an existing contract, is not a permitted communication under this section.
- (5) non-substantive or procedural questions in Sec. 2-7-105(3) pertain to the following solicitation contents:
- (a) identification information including solicitation number, title, participating department(s);
 - (b) dates, times, and/or locations pertaining to the solicitation process; and/or
 - (c) names and contact information of any authorized contact persons.
- (6) during a protest hearing in Sec. 2-7-105(4) to communicate:
- (a) with designated City employees regarding the preparations for, directions to and participation in a protest hearing; and
 - (b) at the request of and in the presence of the assigned independent hearing officer. The presence of the independent hearing officer may be in-person or in writing.
- (7) to the applicable governing body during the course of a properly noticed public meeting as referenced in Sec. 2-7-105(7) so long as the communication is made as a part of the meeting, where the respondent or their agent is recognized by the chair as having the floor to speak.

SECTION 6 – MODIFICATION OF RESTRICTION, URGENCY.

- (A) The purchasing officer may modify the application of this Article as authorized in Sec. 2-7-106(1) when the purchasing officer determines in writing that there is insufficient time to seek normal competition as normally required under applicable procurement statutes to:
- (1) respond to public calamity that requires the immediate appropriation of money to relieve the necessity of the municipality's residents or to preserve the property of the municipality;
 - (2) preserve or protect the public health or safety of the municipality's residents; or
 - (3) respond to unforeseen damage to public machinery, equipment, or other property.
- (B) The written determination shall include:
- (1) which permissible reason necessitates the modification;
 - (2) a list of those element(s) of Sec. 2-7-104 and related rules that are impracticable to perform;
 - (3) alternative element(s), if any, that will be used in place of the impracticable elements; and
 - (4) the reason why each alternative step is preferable given the circumstances.
- (C) The modifications will be identified in the applicable solicitation.

SECTION 7 – RESERVED.

Reserved.

SECTION 8 – DISCLOSURE OF VIOLATIONS.

- (A) An authorized contact person is also considered a City employee in Sec. 2-7-108 for purposes of disclosing a violation.
- (B) City officials and City employees shall report violations in Sec. 2-7-108 as soon as is practicable after learning of the violation.

SECTION 9 – ENFORCEMENT AND NOTICE OF DISQUALIFICATION.

- (A) A respondent may appeal their disqualification under the Article to the Ethics Review Commission, in accordance with rules established by the Ethics Review Commission.
- (B) The purchasing officer shall waive violations in Ch. 2-7-109(B) resulting from communications initiated by a City official or City employee where the reply by the respondent is directly to that City official or City employee and only answers the questions asked or provides the information requested. For example:
 - (1) City official or City employee initiates a single communication with a respondent or their agent, asking a question. The respondent or agent makes a single reply to the City official or City employee, solely answering the question. This violation is waived.
 - (2) City official or City employee initiates multiple communications with a respondent or their agent, asking a question and then follow-up questions. The respondent or agent makes a single reply to each of the communications initiated by the City official or employee, answering each question in turn. These violations are waived.
 - (3) City official or City employee initiates a single communication with a respondent or their agent, asking a question. The respondent or agent replies to the communication with an answer to the question and marketing material about the respondent and a statement of how the respondent could best meet the City's needs, if it were awarded the contract. This violation is not waived, as it goes beyond replying to the question asked.
- (C) The purchasing officer shall not waive additional violations, beyond the single violation resulting from a single communication initiated by a City official or employee. For example.
 - (1) A City official or City employee initiates a single communication with a respondent or their agent. The respondent or agent makes multiple replies to the single communication, providing information in excess of that needed to reply to the City official or City employee. The violations that consisted solely of replying to the communication from the City official or City employee is waived. The violations that go beyond what was needed to reply to the City official or City employee shall not be waived.
 - (2) City official or City employee initiates a single communication with a respondent or their agent. The respondent or agent makes a single reply to multiple City officials or employees. The violation associated with the reply to the initiating City

official or City employee is waived. The violations of contacting City officials and City employees who did not initiate the communication shall not be waived.

- (D) Communications initiated by City officials or City employees that are prohibited by the Article shall be documented in the solicitation file and retained in accordance with the City's Record Control Schedule.
- (E) As an alternative to appealing a disqualification to the Ethics Review Commission in Sec. 2-7-109(A), disqualified respondents may protest their disqualification to the purchasing officer according to Sec. 2-7-109(C), utilizing the protest procedure set forth in the solicitation.
- (F) When notifying respondents of a violation in Sec. 2-7-109(C), the authorized contact person shall issue a written notice of disqualification as soon as is practicable after determining the violation. Notices of disqualification shall at a minimum include:
 - (1) a statement that the respondent is disqualified;
 - (2) the identifying number and title of the solicitation from which the respondent is disqualified from further participation;
 - (3) a description of the prohibited communication that is the reason for the disqualification;
 - (4) a statement that the disqualification does or does not trigger debarment;
 - (5) a statement of the disqualified respondent's protest options including the right to request a hearing by an independent hearing officer; and
 - (6) a copy of this Article and of these rules.

SECTION 10 – DISQUALIFICATION; RESOLICITATION, CONTRACT VOIDABLE AND DEBARMENT.

- (A) The purchasing officer may, at his or her sole discretion, request information from any City official, City employee, respondents, or actual or apparent agent of the respondent, when determining a violation of the Article.
- (B) A new solicitation or project is the same or similar to a previously cancelled solicitation or project in Sec. 2-7-110(C) when it:
 - (1) is for the same customer department(s);
 - (2) has the same solicitation and project title;
 - (3) uses the same product and/or service commodity codes; and
 - (4) is published within 180 days of the prior solicitation's cancellation.
- (C) If it reasonably appears that a disqualified respondent has reconstituted itself for purposes of circumventing Sec. 2-7-110(C), there is a rebuttable presumption that the new entity is the same respondent and therefore is also disqualified.
- (D) If a respondent is disqualified, due to violation Sec. 2-7-104, three or more times within a five year period, that respondent may be debarred from participating in any new City contracts for up to three years