

RECOMMENDED REVISIONS, 9-28-2017

(MARK-UP)

ARTICLE 6. ~~—~~ ANTI-LOBBYING AND PROCUREMENT.

§ 2-7-101~~2~~ — FINDINGS; PURPOSE; APPLICABILITY.

(A) —The Council finds that persons who enter a competitive process for a city contract voluntarily agree to abide by the terms of the competitive process, including the provisions of this Chapter~~article.~~

(B) —The Council finds that it is in the City's interest:

- (1) to provide the most fair, equitable, and competitive process possible for selection among potential vendors in order to acquire the best and most competitive goods and services; and
- (2) to further compliance with State law procurement requirements.

(C) The Council~~Council~~ intends that:

- (1) each response is considered on the same basis as all others; and
- (2) respondents have equal access to information regarding a solicitation, and the same opportunity to present information regarding the solicitation for consideration by the City.

(D) A solicitation includes, without limitation, an invitation for bids, a request for proposals, a request for quotations, a request for qualifications, and a notice of funding availability.

(E) ~~Unless this Article is invoked by Council, t~~This article does not apply to an opportunity to compete for City social service funding; City cultural arts funding; federal, state and City block grant funding; and the sale or rental of real property.applies to all solicitations except:

- (1) City social service funding;
- (2) City cultural arts funding;
- (3) federal, state or City block grant funding;
- (4) the sale or rental of real property;
- (5) interlocal contracts or agreements; and
- (6) solicitations specifically exempted from this article by council.

(EF) Absent an affirmative determination by council, the purchasing officer has the discretion to apply this article to any other competitive process.

(F) Section 1-1-99 does not apply to this article.~~—A representation excludes communication between a City of Austin attorney and a respondent's attorney.~~

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-102~~1~~ – D—DEFINITIONS.

In this article:

- (1) AGENT means a person authorized by a respondent to act for or in place of respondent; ~~including a person acting at the request of respondent, a person acting with the knowledge and consent of a respondent, or a person acting with any arrangement, coordination, or direction between the person and the respondent, in order to make a representation, including but not limited to:~~
 - ~~(a) a person acting at the request of respondent;~~
 - ~~(b) a person acting with the knowledge and consent of a respondent;~~
 - ~~(c) a person acting with any arrangement, coordination, or direction between the person and the respondent;~~
 - ~~(d) a current full-time or part-time employee, owner, director, officer, member, or manager of a respondent;~~
 - ~~(e) a person related within the first degree of consanguinity or affinity to a current full-time or part-time employee, owner, director, officer, member, or manager of a respondent; and~~
 - ~~(f) a person related within the first degree of consanguinity or affinity to the respondent, if a respondent is an individual person.~~
- (2) AUTHORIZED CONTACT PERSON ~~means a City employee designated in a City solicitation as the point of contact for all purposes for that solicitation. means the person identified in a City solicitation as the contact regarding the solicitation, or the authorized contact person's designee during the course of the no-contact period.~~
- (3) CITY EMPLOYEE ~~is defined in Section 2-7-2 (Definitions). in this article means a person employed by the City.~~
- (4) CITY OFFICIAL is defined in Section 2-7-2 (-Definitions-).
- ~~(5) DIRECTOR means the director of a department to which the purchasing officer has delegated authority for enforcing this Chapter.~~
- ~~(56)~~ NO-CONTACT PERIOD ~~means the period of time beginning at the date and time a response to a solicitation is due, as may be extended in the purchasing officer's discretion, and continuing through the earliest of the following:~~
 - ~~(a) the date the last contract resulting from the solicitation is signed;~~
 - ~~(b) 60 days following council authorization of the last contract resulting from the solicitation; or~~
 - ~~(c) cancellation of the solicitation by the City.~~
- ~~(6)~~ PURCHASING OFFICER ~~means the City employee authorized to carry out the purchasing and procurement functions and authority of the City and, when applicable, the director of a City department to whom the purchasing officer has delegated procurement authority for that department. means the period of time from the date of issuance of the solicitation until a contract is executed. If the City withdraws the solicitation or rejects all responses with the stated intention to reissue the same or similar solicitation for the same or similar project, the no-contact period continues during the time period between the withdrawal and reissue.~~
- (7) RESPONSE means a response to a solicitation.

- (8) **RESPONDENT** means a person who makes a response to a City solicitation, even if that person subsequently withdraws its response or has been disqualified by the City, and includes:
- (a) a contractor for a respondent;
 - (b) a subsidiary or parent of a respondent;
 - (c) a joint enterprise, joint venture, or partnership with an interest in a response and in which a respondent is a member or is otherwise involved, including any partner in such joint enterprise, joint venture, or partnership; and
 - (d) a subcontractor to a respondent in connection with that respondent's response.

~~means a person responding to a City solicitation including a bidder, a quoter, responder, or a proposer. The term "respondent" also includes:~~

- ~~(a) an owner, board member, officer, employee, contractor, subsidiary, joint enterprise, partnership, agent, lobbyist, or other representative of a respondent;~~
- ~~(b) a person or representative of a person that is involved in a joint venture with the respondent, or a subcontractor in connection with the respondent's response; and~~
- ~~(c) a respondent who has withdrawn a response or who has had a response rejected or disqualified by the City.~~

- (9) **REPRESENTATION** means a communication, whether or not initiated by a respondent or agent, that is:

- (a) related to a response;
- (b) made by a respondent or agent; and
- (c) made to a council member, City employee, City representative, or independent contractor hired by the City with respect to the solicitation.

~~means a communication related to a response to a council member, official, employee, or City representative that is intended to or that is reasonably likely to:~~

- ~~(a) provide information about the response;~~
- ~~(b) advance the interests of the respondent;~~
- ~~(c) discredit the response of any other respondent;~~
- ~~(d) encourage the City to withdraw the solicitation;~~
- ~~(e) encourage the City to reject all of the responses;~~
- ~~(f) convey a complaint about a particular solicitation; or~~
- ~~(g) directly or indirectly ask, influence, or persuade any City official, City employee, or body to favor or oppose, recommend or not recommend, vote for or against, consider or not consider, or take action or refrain from taking action on any vote, decision, or agenda item regarding the solicitation.~~

- (10) **SOLICITATION** means an opportunity to compete to conduct business with the City that requires council approval under City Charter Article VII Section 15 (Purchase Procedure), and includes, without limitation:

- (a) an invitation for bids;

- (b) a request for proposals;
- (c) a request for qualifications;
- (d) a notice of funding availability; and
- (e) any other competitive solicitation process for which the purchasing officer, in the purchasing officer's sole discretion, affirmatively determines this article should apply in accordance with Section 2-7-101(E).~~means an opportunity to compete to conduct business with the City that requires City Council approval under City Charter Article VII Section 15 (Purchase Procedure).~~

Source: Ord. 20071206-045; Ord. 20111110-052.

~~§ 2-7-102 FINDINGS; PURPOSE; APPLICABILITY.~~

- ~~(A) The Council finds that persons who enter a competitive process for a city contract voluntarily agree to abide by the terms of the competitive process, including the provisions of this Chapter.~~
- ~~(B) The Council finds that it is in the City's interest:

 - ~~(1) to provide the most fair, equitable, and competitive process possible for selection among potential vendors in order to acquire the best and most competitive goods and services; and~~
 - ~~(2) to further compliance with State law procurement requirements.~~~~
- ~~(C) The Council intends that:

 - ~~(1) each response is considered on the same basis as all others; and~~
 - ~~(2) respondents have equal access to information regarding a solicitation, and the same opportunity to present information regarding the solicitation for consideration by the City.~~~~
- ~~(D) A solicitation includes, without limitation, an invitation for bids, a request for proposals, a request for quotations, a request for qualifications, and a notice of funding availability.~~
- ~~(E) Unless this Article is invoked by Council, this article does not apply to an opportunity to compete for City social service funding; City cultural arts funding; federal, state and City block grant funding; and the sale or rental of real property.~~
- ~~(F) A representation excludes communication between a City of Austin attorney and a respondent's attorney.~~

~~Source: Ord. 20071206-045; Ord. 20111110-052.~~

§ 2-7-103 — PROHIBITED REPRESENTATIONS RESTRICTION ON CONTACTS.

Subject to the exclusions in Section 2-7-104, during a no-contact period, a respondent and an agent shall not make a representation that is intended to or reasonably likely to:

- (1) provide substantive information about the response to which it relates;
- (2) advance the interests of the respondent with respect to the solicitation to which it relates;
- (3) discredit the response of any other respondent to the solicitation to which it relates;
- (4) encourage the City to reject all of the responses to the solicitation to which it relates;
- (5) convey a complaint about the solicitation to which it relates; or

- ~~(6) directly or indirectly ask, influence, or persuade any City official, City employee, or body to favor or oppose, recommend or not recommend, vote for or against, consider or not consider, or take action or refrain from taking action on any vote, decision, or agenda item regarding the solicitation to which it relates. (A) During a no-contact period, a respondent shall make a representation only through the authorized contact person.~~
- ~~(B) During the no-contact period, a respondent may not make a representation to a City official or to a City employee other than to the authorized contact person. This prohibition also applies to a vendor that makes a representation and then becomes a respondent.~~
- ~~(C) The prohibition of a representation during the no-contact period applies to a representation initiated by a respondent, and to a representation made in response to a communication initiated by a City official or a City employee other than the authorized contact person.~~
- ~~(D) If the City withdraws a solicitation or rejects all responses with a stated intention to reissue the same or similar solicitation for the same or similar project, the no-contact period shall expire after the ninetieth day after the date the solicitation is withdrawn or all responses are rejected if the solicitation has not been reissued during the ninety-day period.~~
- ~~(E) For a single vendor award, the no-contact period shall expire when the first of the following occurs: contract is executed or solicitation is cancelled.~~
- ~~(F) For a multiple vendor award, the no-contact period shall expire when the last of the following occurs: all contracts are executed, negotiations have been fully terminated, or the ninetieth day after the solicitation is cancelled.~~
- ~~(G) The purchasing officer or the director may allow respondents to make representations to city employees or city representatives in addition to the authorized contact person for a solicitation that the purchasing officer or the director finds must be conducted in an expedited manner; an expedited solicitation is one conducted for reasons of health or safety under the shortest schedule possible with no extensions. The purchasing officer's or director's finding and additional city employees or city representatives who may be contacted must be included in the solicitation documents.~~
- ~~(H) Representations to an independent contractor hired by the City to conduct or assist with a solicitation will be treated as representations to a City employee.~~
- ~~(I) A current employee, director, officer, or member of a respondent, or a person related within the first degree of consanguinity or affinity to a current employee, director, officer or member of a respondent, is presumed to be an agent of the respondent for purposes of making a representation. This presumption is rebuttable by a preponderance of the evidence as determined by the purchasing officer or director.~~
- ~~(J) A respondent's representative is a person or entity acting on a respondent's behalf with the respondent's request and consent. For example, a respondent may email their membership list and ask members to contact council members on the respondent's behalf. The members are then acting per respondent's request and with their consent, and the members have become respondent representatives.~~

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-104 ~~—~~ PERMITTED REPRESENTATIONS AND OTHER COMMUNICATIONS.

The following representations and other communications are permitted under this article at any time:

- (1) any representation or communication between a respondent or agent and any authorized contact person;
- (2) any communication between a respondent or agent and any person to the extent the communication relates solely to an existing contract between a respondent and the City, even when the scope, products, or services of the current contract are the same or similar to those contained in an active solicitation;
- (3) any representation or communication between a respondent or an agent and a City employee to the extent the representation or communication relates solely to a non-substantive, procedural matter related to a response or solicitation;
- (4) any representation or communication required by or made during the course of a formal protest hearing related to a solicitation;
- (5) any representation or communication between a respondent or an agent and the City's Small & Minority Business Resources Department, to the extent the communication relates solely to compliance with Chapters 2-9A through 2-9D (*Minority-Owned and Women-Owned Business Enterprise Procurement Program*) of the City Code;
- (6) any representation or communication between an attorney representing a respondent and an attorney authorized to represent the City, to the extent the communication is permitted by the Texas Disciplinary Rules of Professional Conduct;
- (7) any representation or communication made by a respondent or an agent to the applicable governing body during the course of a meeting properly noticed and held under Texas Government Code Chapter 551 (*Open Meetings Act*);
- (8) any representation or communication between a respondent or an agent and a City employee whose official responsibility encompasses the setting of minimum insurance requirements for the solicitation to which the communication relates, to the extent the communication relates solely to the insurance requirements established by the City in the solicitation; and
- (9) any communication occurring when making a contribution or expenditure as defined in Chapter 2-2 (*Campaign Finance*).

~~(A) If City seeks additional information from respondent, the respondent shall submit the representation in writing only to the authorized contact person. The authorized contact person shall distribute the written representation in accordance with the terms of the particular solicitation. This subsection does not permit a respondent to amend or add information to a response after the response deadline.~~

~~(B) If respondent wishes to send a complaint to the City, the respondent shall submit the complaint in writing only to the authorized contact person. The authorized contact person shall distribute a complaint regarding the process to members of the City council or members of the City board, to the director of the department that issued the solicitation, and to all respondents of the particular solicitation. However, the director or purchasing officer shall not permit distribution of any complaint that promotes or disparages the qualifications of a respondent, or that amends or adds information to a response. A determination of what constitutes promoting or disparaging the qualifications of a respondent or constitutes amending or adding information is at the director's or purchasing officer's sole discretion. Bid protests are not subject to this subsection. Documents related to a bid protest may not be forwarded to council under this subsection.~~

~~(C) If a respondent makes a written inquiry regarding a solicitation, the authorized contact person shall provide a written answer to the inquiry and distribute the inquiry and answer to all respondents of the particular solicitation.~~

- ~~(D) If a respondent is unable to obtain a response from the authorized contact person, the respondent may contact the director or purchasing officer as appropriate.~~
- ~~(E) A respondent may ask a purely procedural question, for example a question regarding the time or location of an event, or where information may be obtained, of a City employee other than the authorized contact person. This section does not permit a respondent to make suggestions or complaints about the contract process that constitute a representation to a City employee other than the authorized contact person. Notwithstanding this subsection, a respondent may not ask a procedural question of a councilmember, a councilmember's aide, or of a City board member except in a meeting held under the Texas Government Code, Chapter 551 (Open Meetings Act).~~
- ~~(F) This Article allows representations:~~
- ~~(1) made at a meeting convened by the authorized contact person, including meetings to evaluate responses or negotiate a contract;~~
 - ~~(2) required by Financial Services Department protest procedures for vendors;~~
 - ~~(3) made at a Financial Services Department protest hearing;~~
 - ~~(4) provided to the Small & Minority Business Resources Department in order to obtain compliance with Chapter 2 9A D (the Minority Owned and Women Owned Business Enterprise Procurement Program);~~
 - ~~(5) made to the City Risk Management coordinator about insurance requirements for a solicitation;~~
 - ~~(6) made in public at a meeting held under Texas Government Code, Chapter 551 (Open Meetings Act); or~~
 - ~~(7) made from a respondent's attorney to an attorney in the Law Department in compliance with Texas Disciplinary Rules of Professional Conduct.~~
- ~~(G) Nothing in this article prohibits communication regarding the solicitation between or among City officials or City employees acting in their official capacity.~~
- ~~(H) A contribution or expenditure as defined in Chapter 2 2 (Campaign Finance) is not a representation.~~

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-105 — NOTICEMODIFICATION OF PROHIBITION.

The purchasing officer may waive, modify, or reduce the prohibited representation requirements in Section 2-7-103 in order to allow respondents to make representations to persons identified in Section 2-7-102(10)(c) other than the authorized contact person when the purchasing officer determines, in writing, that the solicitation must be conducted in an expedited manner, including but not limited to a solicitation conducted for reasons of health or safety under the shortest schedule possible with no extensions. (A) An employee preparing a solicitation shall include a notice in the solicitation that advises respondents of the requirements of this article, including a notice that if any City official or City employee, other than the authorized contact person, approaches a respondent for response or solicitation information during the no-contact period, the respondent is at jeopardy if he or she makes any representation in response.

(B) The authorized contact person for that solicitation shall notify council members in writing that the no-contact period for that solicitation is in effect.

(C) When a solicitation is issued that will be reviewed by a City board, the authorized contact person for that solicitation shall notify in writing each member of the board that the no-contact period for that solicitation is in effect.

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-106 — DISCLOSURE OF PROHIBITED REPRESENTATION ENFORCEMENT.

- (A) This article is not subject to enforcement by the Ethics Review Commission established in Section 2-7-26.
- (B) The purchasing officer may consider mitigating factors or circumstances beyond the control of a respondent, including but not limited to any action taken by a respondent in reliance on information provided by a person identified in Section 2-7-102(10)(c), when determining whether a respondent has violated Section 2-7-103.
- (C) The purchasing officer has the authority to enforce this article through rules promulgated in accordance with Section 1-2-1, which at a minimum shall include a notice and protest process for respondents disqualified pursuant to Section 2-7-107, including:
 - (1) written notice of the penalty imposed pursuant to Section 2-7-107;
 - (2) written notice of the right to protest the penalty imposed; and
 - (3) written notice of the right to request a an impartial hearing process.
- ~~(A) If a City official or City employee receives a representation during the no contact period for a solicitation, the official or employee shall notify in writing the authorized contact person for that solicitation as soon as practicable.~~
- ~~(B) During the no contact period, a City official or City employee, except for the authorized contact person, shall not solicit a representation from a respondent.~~

Source: Ord. 20071206-045; Ord. 20111110-052.

§ 2-7-107 — ENFORCEMENT PENALTY.

- (A) If the purchasing officer finds that a respondent has violated Section 2-7-103, the respondent is disqualified from participating in the solicitation to which the representation related.
- (B) The purchasing officer shall promptly provide written notice of disqualification to a disqualified respondent.
- (C) If a respondent is disqualified from participating in a solicitation as a result of violating Section 2-7-103 and the solicitation is cancelled for any reason, that respondent is disqualified from submitting a response to any reissue of the same or similar solicitation for the same or similar project. For the purposes of this section, the purchasing officer may determine whether any particular solicitation constitutes a “same or similar solicitation for the same or similar project”.
- (D) If a contract resulting from a solicitation that is the subject of a prohibited representation is awarded to a respondent who has violated Section 2-7-103 with respect to that solicitation, that contract is voidable by the City. (A) — A respondent that makes a prohibited representation violates this article. If the authorized contact person for a solicitation is informed, or receives information, that a respondent has made a prohibited representation during the no-contact period, the authorized contact person shall document the representation and notify the director or purchasing officer immediately.
- ~~(B) If the director or purchasing officer finds that a respondent has violated this article, the respondent is disqualified.~~
- ~~(C) If a respondent is disqualified for a solicitation and the solicitation is withdrawn or if all responses are rejected, the respondent is disqualified for a reissue of the same or similar solicitation for the~~

~~same or similar project. Section 2-7-103(D) does not limit the duration of the disqualification. The director or purchasing officer may determine what constitutes a "same or similar" project for purposes of this subsection.~~

~~(D) The Financial Services Department and a department to which the purchasing officer has delegated purchasing authority shall adopt rules to administer and enforce this article. The rules must include the provision of written notice of disqualification to the respondent and a process to protest a disqualification.~~

~~(E) This article is not subject to enforcement by the Ethics Review Commission.~~

~~Source: Ord. 20071206-045; Ord. 20111110-052.~~

~~§ 2-7-108 — CONTRACT VOIDABLE/RECUSAL.~~

~~(A) During a no-contact period, a person identified in Section 2-7-102(10)(c) shall not contact a respondent regarding a response or solicit a representation from a respondent.~~

~~(B) A person identified in Section 2-7-102(10)(c) that receives a representation during the no-contact period for a solicitation, or otherwise becomes aware of a violation of Section 2-7-103, shall notify the authorized contact person in writing as soon as practicable.~~

~~(C) If a person identified in Section 2-7-102(10)(c) violates either Subsection (A) or Subsection (B), that person shall be recused from further participation in the solicitation to which the violation relates.~~

~~If a contract is awarded to a respondent who has violated this article, the contract is voidable by the City.~~

~~Source: Ord. 20071206-045.~~

~~§ 2-7-109 — DEBARMENT.~~

~~(A) If a respondent has been disqualified under this article more than two times in a sixty-month period, the purchasing officer shall debar a respondent from the sale of goods or services to the City for a period not to exceed three years, provided the respondent is given written notice and a hearing in advance of the debarment.~~

~~(B) The Financial Services Department and any department to which the purchasing officer has delegated authority for enforcing this article shall adopt rules to administer and enforce this section. The rules must include a hearing process with written notice to the respondent.~~

~~Source: Ord. 20071206-045; Ord. 20111110-052.~~

~~§ 2-7-110 — NO CRIMINAL PENALTY.~~

~~Section 1-1-99 does not apply to this article.~~

~~Source: Ord. 20071206-045.~~

~~§ 2-7-111 — DIRECTOR DISCRETION.~~

~~A director has the discretion to apply this Article to any other competitive process not covered by this Article.~~

~~Source: Ord. 20111110-052.~~