




## MEMORANDUM

**TO:** Mayor and Council

**FROM:** James Scarboro, Purchasing Officer 

**DATE:** June 1, 2018

**SUBJECT:** Recommended Revisions to Ch. 2, Article 6, Anti-Lobbying and Procurement

Staff will be including an item on the June 14, 2018 Council agenda, bringing back an updated recommendation to revise the City's Anti-Lobbying Ordinance (ALO), Ch. 2, Article 6, Anti-Lobbying and Procurement. This latest item is a follow up to a prior item that went before Council at their November 9, 2017 Council Meeting. Staff withdrew the prior item in order to more fully consider the feedback received from the Ethics Review Commission, from the waste management stakeholders, and to allow more time for the City's entire vendor community to weigh in on the proposed changes to the ordinance. Staff also conveyed its intention to further vet the ALO with the Audit and Finance Committee and to incorporate their feedback into any subsequent revisions whenever possible.

Since then staff have developed and presented two subsequent revised versions of the ALO to the Audit and Finance Committee on three separate instances. At their April 25, 2018 meeting, the Committee reviewed the most recent version of the ALO ("ALO Version 3"). Because the Committee sought additional information concerning the recommended changes, the Committee did not vote to approve the recommended changes, rather they voted to send the revised ordinance on to Council, and for staff to include the additional information along with the recommended ordinance. ALO Version 3, all the additional information requested by the Audit and Finance Committee are attached to this memo and include.

- Ch. 2, Article 6, Anti-Lobbying and Procurement (Version 3)
- Ch. 2, Article 6, Anti-Lobbying and Procurement – Markup (Original-to-Revised Version 3)
- Anti-Lobbying Ordinance Comparison Matrix (Original to Revised Version 3)
- Anti-Lobbying Ordinance Recommendations and Responses (Work Group and Commissions)
- Anti-Lobbying Ordinance – Rule Elements

### Efforts-to-Date

- April 6, 2017 – Council lifted the ALO for waste management solicitations, established the Waste Management Policy Work Group; and asked the Work Group to make recommendations concerning the ALO.
- July 21, 2017 – Waste Management Policy Work Group recommended the ALO be revised, including some recommended revisions to the ALO.
- September 28, 2017 – Staff presented a revised version of the ALO to Council (Version 1); Council referred the revised ALO to the Ethics Review Commission (ERC).

## **Purchasing Office**

### **Recommended Revisions to Ch. 2, Article 6, Anti-Lobbying and Procurement**

**June 1, 2018**

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- November 1, 2017 – ERC recommended further revisions be made to the ALO; Staff requested time to gather more vendor input and to revise the ALO further.
- December 11, 2017 – Staff provided an overview of the initial revisions of the ALO (ALO Version 1) to the Audit and Finance Committee; staff also described the feedback received on ALO Version 1 and that Staff would be seeking further public feedback in the development of a subsequent version of the ALO to bring back to the Audit and Finance Committee.
- January 2018 – Staff published a further revision of the ALO (ALO Version 2) and associated documents; notices were sent to thousands of vendors requesting comments; Additional outreach made to target vendor segments and associations.
- March 5, 2018 – Staff returned to Audit and Finance Committee to review ALO Version 2.
- March 2018 – Staff met with Committee Members and/or their staff to receive their feedback on ALO Version 2; staff made final revisions to the ALO (ALO Version 3) based on prior public comments and subsequent feedback from Committee Members.
- April 25, 2018 – Staff reviewed ALO Version 3 with the Audit and Finance Committee; the Committee asked for additional information regarding the recommended revisions but voted to send ALO Version 3 onto Council for further consideration and possible action.

### **Recommended Changes**

Aside from a vocal constituency in or associated with the waste management sector, for the most part the vendor community appeared to want to keep the ALO largely as is. Based on the preponderance of feedback received and on staff analyses, the recommended changes to the ALO are very modest and consistent mostly of consolidations and clarifications. The latest ALO Version 3 includes the following very general changes. A more detailed ALO Comparison Matrix is also attached.

- The recommended ALO starts with a section for FINDINGS; PURPOSE and a section on APPLICABILITY. These sections are taken from section two of the current ALO. They were split in-two and moved to the beginning of the ordinance for formatting purposes. No changes to the contents of these sections are included.
- The DEFINITION section is now the third section of the ordinance. Nearly all the definitions were clarified and/or revised, with the definitions of AGENT, NO-LOBBYING (previously NO-CONTACT) PERIOD, and RESPONDENT generating the most feedback.
- The fourth section, RESTRICTION ON LOBBYING (renamed to echo the ordinance's title), pertains to the ALO's restriction on certain communications during a solicitation process, substantially similar to the current ordinance's section three. The improved clarity of the revised restrictions should result in greater consistency in interpretation and application of this section.
- The fifth section, PERMITTED COMMUNICATIONS, establishes specific communications that do not violate the ordinance, substantially similar to the current ALO's section four. The revised section includes all the prior permitted communications, including communications pertaining to existing contracts and non-substantive procedural matters.
- The sixth, seventh and eighth sections, MODIFICATION OF RESTRICTION, NOTICE and DISCLOSURE OF VIOLATION, are consolidated and clarified versions on same contents in the current ALO.

- The ninth section, ENFORCEMENT, is largely similar to the same section in the current ALO except for the addition of a provision allowing certain violations that were initiated by City officials or employees to be waived. Like the current version, the revised section continues to require a protest process and associated notices.
- The last section, DISQUALIFICATION; CONTRACT VOIDABLE, is largely consistent with the same provisions in the ALO, with some consolidations and further clarifications. Based on substantial feedback, the debarment provision in the current ALO is continued in this section.

### **Public Comments**

At the April 25, 2018 meeting, the Committee requested more information on the public comments received concerning the proposed revisions to the ALO. All totaled, staff received over 30 comments from organizations and individuals representing a variety of different industries. In general, the feedback was positive and very concise concerning the proposed changes to the ALO. Constructive feedback was received from a smaller number of respondents, the majority of which were from or associated with the waste management sector and were extensive in detail. All constructive recommendations were considered and several of these elements were incorporated into the latest version of the revised ALO. All comments received were published to the City's financial services website at: <https://www.austintexas.gov/financeonline/finance>.

### **Availability of Administrative Rules**

Another area of the constructive feedback that staff was unable to include in its recommendation was the development of and inclusion of administrative rules to go along with the recommended revisions to the ALO. As presented on a number of occasions previously, administrative rules are developed by the City staff in order to promulgate and provide procedural clarification in order to ensure compliance with ordinances enacted by Council. Aside from being inconsistent with City policy, bringing administrative rules to Council alongside the ordinance under which these rules are intended to further, effectively codifies the rules and expanding the ordinance to include extensive procedural contents. In an effort to address this desire, at the March 5, 2018 Audit and Finance Committee meeting, staff presented a proposed outline of possible future administrative rules, showing how each element of the to-be developed administrative rules will follow the ordinance section-by-section. This approach will add the desired procedural clarity to each element of the ALO so that both the ordinance and the rules may be read together as a single document. Staff received no subsequent feedback on the proposed "Rule Elements".

### **Campaign Contributions**

At the April 25, 2018 meeting, there was a question from the Committee regarding a specific provision of the ordinance concerning Campaign Contributions. This provision, clarifying that campaign contributions do not violate the Anti-Lobbying Ordinance, as is carried forward from the current ALO and is not substantively changed.

- Current ALO: 2-7-104(H) A contribution or expenditure as defined in Chapter 2-2 (Campaign Finance) is not a representation.
- ALO Version 3: 2-7-105 The following communications are permitted under this article at any time:  
(9) any contribution or expenditure as defined in Chapter 2-2 (Campaign Finance).

Historically the intent of this provision was to ensure that campaign contributions, by themselves, were not interpreted as constituting a Representation, and therefore possibly violate the limits on such communications

under the ALO. Staff received no public feedback on this element of the ALO and only carried it forward into the revised Version 3 to maintain Council's original intent for this provision. Staff has no position on this matter would not be impacted if Council chooses to remove this element of the ALO.

### **Solicitations with High Public Interest**

On a number of occasions throughout the ALO review, staff were asked if there was a different solicitation process that could be used to ensure greater public visibility and feedback when conducting solicitations that had high public interest. Although there is no separate process for high-interest solicitations, there are steps that can be added or clarified in the City's existing processes that may better facilitate higher levels of public and/or industry interest in City solicitations. Some examples of approaches include:

- **Standard Specifications.** When evaluating compliance with specifications takes a considerable amount of time; the specifications may revise or create new policy; or there is strong industry or public sentiment on the specifications, e.g., whether to allow certain landfills to be used or not, it may be advantageous to develop and establish such specifications outside separate from any solicitation process. Standard specifications allow City departments the time and flexibility to develop their requirements without the constraints of a legally competitive process. Any issues or concerns with the specifications may be considered and addressed at the time the specifications are established. Standard specifications may be established and maintained over a period of time and applied to multiple solicitations.
- **Competitive Sealed Bidding.** The Competitive Sealed Bidding process, as described in the Invitation for Bids (IFB) solicitation document, is the most objective solicitation process available. The IFB establishes the specifications and minimum qualifications to meet the City needs. Responses to IFBs are "bids" (priced offers). The lowest priced bid is identified and evaluated for compliance with the solicitation's specifications. If this bid is responsive to these specifications, the competition is over and no further evaluations are conducted. Evaluations are much faster and objective. Because no deviations from the specifications are permitted, no unique or custom methods may be proposed. As solicitation specifications are known at the time the solicitation is published, it is not possible for new or unknown City policies result from this process unintentionally. Confidentiality is also much less of an issue in IFBs. Bid prices are all available at the time they are opened. And although bidders may still indicate portions of their bid as trade secrets or confidential, because the solicitation prescribes the work to be performed, there is very little if any bid contents that bidders may feel the need to keep confidential.
- **Pre-Solicitation Feedback.** In solicitations with high industry and/or public interest, before the solicitation publishes, notices regarding the solicitation may be issued in order to encourage and better facilitate feedback concerning the solicitation's contents, including any pre-solicitation meetings and/or the use of a Request for Information (RFI). These exchanges may also include a draft copy of the solicitation's specifications and/or scope of work. Staff may also indicate desirable qualifications standards and seek feedback on these standards. And while the entire solicitation document, evaluation criteria and criteria weighting are usually not included in these exchanges, staff can request general feedback in these areas and take public comments into consideration when developing the resulting solicitation.
- **Solicitation Complaint Process.** For a number of years, the ALO has authorized respondents to communicate complaints concerning any aspect of a solicitation, and directs City staff to forward any such complaints to Council Members, board members, certain department directors and all other respondents to a solicitation so long as the complaint did not disparage any other respondent. Although the period time complaints will be received is not stated, effectively it corresponds with the

No-Lobbying Period (No-Contact Period) beginning when the solicitation first published and ending when the resulting contract is signed. ALO Version 3 seeks to preserve this process going forward, in the ordinance and in the accompanying administrative rules. Greater use of the current complaint may alleviate some of the stated concerns for not participating in City solicitations in order to preserve the ability to communicate various concerns about solicitations – including any policy concerns that may be associated with a solicitation. Going forward, staff is examining the use of technology to better facilitate these communications, without compromising the competitiveness of and participation in City solicitations.

### **Third-Party participation in Administrative Procedures**

One more common aspect of the constructive feedback received concerned the inclusion of the Ethics Review Commission (ERC) and/or some other board or commission to play a role in either the determination of violations or the hearing of protests of disqualifications under the ALO. Although there were a number of suggestions received for this approach, at this time staff does not recommend using the ERC or another body in this capacity. As there may be legal implications associated with using boards and commissions in this capacity, the Law Department may be able to provide further advisement to Council in this regard. Operationally, instead of defining protest procedures unique to ALO violations, staff recommends formalizing the City's protest, appeals, suspension and debarment processes through the establishment of a more globally applicable set of procurement ordinances in City code. In establishing a Procurement Code to handle administrative remedies the City would be able to process all manner of violations and procurement findings using consistent standards of review and process. Having a body of code for these purposes would also provide the City a single regulatory location into which all City procurement policy may be observed.

### **Reestablishment of the Current ALO**

At their November 9, 2017 meeting, Council passed Resolution no. 20171109-050, continuing the suspension of Ch. 2, Article 7, Anti-Lobbying and Procurement, for solicitations for waste management services for an additional 180-days (six-months). This 180-day period expired on May 21, 2018. As of the date of this memo, there is only one (1) solicitation underway for waste management services, solicitation no. RFP 2200 CDL2003REBID, Beneficial Reuse of Biosolids. At this time, there is only one solicitation underway related to waste management services, for Recycling of Alkyds and Solvents. Per Council's resolution, this solicitation did not reference the Anti-Lobbying Ordinance. Aside from this one solicitation, there are no new waste management-related solicitations in development at this time. Unless operationally necessary in order to preserve and/or maintain City services, it is staff's intention not to issue any new solicitations for waste management services until we have further policy guidance from Council regarding the Anti-Lobbying Ordinance.

### **Further Discussions**

Between now and the date this item will return to Council, staff will be contacting each of your offices to provide you and/or your staff the opportunity to review any elements of the revised ordinance, to ask any questions you may have in this regard. Staff appreciates the opportunity to provide input on the contents of the Anti-Lobbying Ordinance and look forward to its implementation following any further desired edits as desired by Council.

If you or your staff have any questions feel free to contact me.

**Purchasing Office**

**Recommended Revisions to Ch. 2, Article 6, Anti-Lobbying and Procurement**

**June 1, 2018**

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**cc: Spencer Cronk, City Manager  
Elaine Hart, Chief Financial Officer  
Robert Goode, Assistant City Manager  
Greg Canally, Interim Chief Financial Officer  
Rolando Fernandez, Capitol Contracting Officer  
Shawn Willett, Deputy Procurement Officer  
Chris Weema, Assistant City Attorney**

**Attachments:**

**Ch. 2, Article 6, Anti-Lobbying and Procurement (Version 3)  
Ch. 2, Article 6, Anti-Lobbying and Procurement – Markup (Original-to-Version 3)  
Anti-Lobbying Ordinance Comparison Matrix (Original-to-Version 3)  
Anti-Lobbying Ordinance Recommendations and Responses (Work Group and  
Commissions)  
Anti-Lobbying Ordinance – Proposed Rule Elements**

**RECOMMENDED REVISIONS, 4-25-2018**  
**VERSION 3 (V3)**

**ARTICLE 6. – ANTI-LOBBYING AND PROCUREMENT.**

**§ 2-7-101 – FINDINGS; PURPOSE.**

- (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 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 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.

**§ 2-7-102 – APPLICABILITY.**

- (A) This article 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.
- (B) Absent an affirmative determination by the council, the purchasing officer has the discretion to apply this article to any other competitive process.
- (C) Section 1-1-99 does not apply to this article.

**§ 2-7-103 – DEFINITIONS.**

In this article:

- (1) AGENT means a person authorized by a respondent to act for or in place of respondent in order to communicate on behalf of that respondent. Each of the following is presumed to be agent:
  - (a) a current full-time or part-time employee, owner, director, officer, member, or manager of a respondent;

- (b) 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;
  - (c) a person related within the first degree of consanguinity or affinity to the respondent, if a respondent is an individual person; and
  - (d) a lobbyist, attorney, or other legal representative of the respondent that has been retained by the respondent with respect to the subject matter of either the solicitation or the respondent's response to the solicitation.
- (2) AUTHORIZED CONTACT PERSON means a City employee designated in a City solicitation as the point of contact for all purposes for that solicitation.
- (3) CITY EMPLOYEE is defined in Section 2-7-2 (*Definitions*), and further includes an independent contractor hired by the City with respect to the solicitation.
- (4) CITY OFFICIAL is defined in Section 2-7-2 (*Definitions*).
- (5) NO-LOBBYING PERIOD means the period of time beginning at the date and time a solicitation is published 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.
- (7) RESPONSE means a written offer or submission in reply to a solicitation.
- (8) RESPONDENT means a person or entity who has timely submitted or subsequently timely submits a response to a City solicitation, even if that person subsequently withdraws its response or has been disqualified by the City for any reason. Respondent includes:
  - (a) a subsidiary or parent of a respondent;
  - (b) 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
  - (c) a subcontractor to a respondent in connection with that respondent's response.
- (9) 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 2-7-102(B).



§ 2-7-104 – RESTRICTION ON LOBBYING.

Subject to the exclusions in Section 2-7-105, during a no-lobbying period,

- (1) a respondent or an agent shall not communicate directly with a City official or a City employee, or both in order to:
  - (a) provide substantive information about any respondent or response with respect to the solicitation to which the communication relates;
  - (b) encourage the City to reject one or more of the responses to the solicitation to which the communication relates;
  - (c) convey a complaint about the solicitation to which the communication relates; or
  - (d) ask any City official or City employee 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 the communication relates.
- (2) a City official shall not contact or communicate with a respondent regarding a response or the solicitation to which the no-lobbying period applies;
- (3) a City employee, other than the authorized contact person, shall not contact or communicate with a respondent regarding a response or the solicitation to which the no-lobbying period applies.

§ 2-7-105 – PERMITTED COMMUNICATIONS.

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

- (1) any communication between a respondent or agent and any authorized contact person, including, without limitation and in accordance with regulation, any complaint concerning the solicitation;
- (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 communication between a respondent or an agent and a City employee to the extent the communication relates solely to a non-substantive, procedural matter related to a response or solicitation;
- (4) any communication required by or made during the course of a formal protest hearing related to a solicitation;
- (5) any communication between a respondent or an agent and the City's Small & Minority Business Resources Department, that solely relates to compliance with Chapters 2-9A through 2-9D (*Minority-Owned and Women-Owned Business Enterprise Procurement Program*) of the City Code;
- (6) any 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 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 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 contribution or expenditure as defined in Chapter 2-2 (*Campaign Finance*).

#### § 2-7-106 – MODIFICATION OF RESTRICTION.

The purchasing officer may waive, modify, or reduce the requirements in Section 2-7-104 in order to allow respondents to communicate with a City employee or a City official 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. Any such modification authorized by the purchasing officer shall be stated in the solicitation.

#### § 2-7-107 – NOTICE.

- (A) Each solicitation shall include a notice advising respondents and prospective respondents:
  - (1) of the requirements of this article;
  - (2) that any communication initiated by a City employee or City official, other than the authorized contact person, during the no-lobbying period regarding a response or the solicitation may result in a violation of Section 2-7-104(1) if the respondent subsequently lobbies that City employee or City official.
- (B) The purchasing officer, or a City employee designated by the purchasing officer, shall provide weekly written notice, accessible to all City employees and City officials, of each solicitation for which the no-lobbying period is in effect.

#### § 2-7-108 – DISCLOSURE OF VIOLATION.

A City official or a City employee other than the authorized contact person that becomes aware of a violation of Section 2-7-104 shall notify the authorized contact person in writing as soon as practicable.

#### § 2-7-109 – 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 waive a violation of Section 2-7-104(1) if the violation was solely the result of communications initiated by a City official or a City employee other than the authorized contact person.
- (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 2-7-110, including:
  - (1) written notice of the disqualification imposed pursuant to Section 2-7-110;

- (2) written notice of the right to protest the disqualification imposed; and
- (3) written notice of the right to request an impartial hearing process.

§ 2-7-110 – DISQUALIFICATION; CONTRACT VOIDABLE.

- (A) If the purchasing officer finds that a respondent has violated Section 2-7-104(1), the respondent is disqualified from participating in the solicitation to which the violation 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 2-7-104(1) 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 respondent violates Section 104(1) and is awarded a contract resulting from the solicitation to which the violation relates, the City may void that contract.
- (E) Respondents that violate Section 2-7-104(1) three or more times during a five year period may be subject to debarment from participating in any new contracts with the City for a period of up to three years.

ARTICLE 6. - ANTI-LOBBYING AND PROCUREMENT.

§ 2-7-10~~31~~ - DEFINITIONS.

In this article:

- (1) ~~(1)~~ — **AGENT** means a person authorized by a respondent to act for or in place of respondent in order to communicate on behalf of that 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. Each of the following is presumed to be agent:
- (a) a current full-time or part-time employee, owner, director, officer, member, or manager of a respondent;
  - (b) 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;
  - (c) a person related within the first degree of consanguinity or affinity to the respondent, if a respondent is an individual person; and
  - (d) a lobbyist, attorney, or other legal representative of the respondent that has been retained by the respondent with respect to the subject matter of either the solicitation or the respondent's response to the solicitation.
- (2) **AUTHORIZED CONTACT PERSON** means a City employee designated in a City solicitation as the point of contact for all purposes for that solicitation 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), and further includes an independent contractor hired by the City with respect to the solicitation 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.~~
- (5) **NO-LOBBYINGCONTACT PERIOD** means the period of time beginning at the date and time a solicitation is published and continuing through the earliest of the following: 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:
- (a) the date the last contract resulting from for 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.
- (7) **RESPONSE** means a written offer or submission in reply-response to a solicitation.
- (8) **RESPONDENT** means a person or entity who has timely submitted or subsequently timely submits a response to a City solicitation, even if that person subsequently withdraws its response

~~or has been disqualified by the City for any reason, responding to a City solicitation including a bidder, a quoter, responder, or a proposer. The term "respondent" also includes~~Respondent~~includes:~~

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

~~(9)~~ REPRESENTATION 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.~~

~~(9+0)~~ SOLICITATION 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 ), and includes, without limitation:~~

- (a) ~~an invitation for bids;~~
- (b) ~~a request for proposal;~~
- (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 2-7-102(B).~~

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**§ 2-7-1012 - 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 ~~article~~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.~~

#### § 2-7-102 – APPLICABILITY

(A) This article 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 the article by council

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

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(C) Section 1-1-99 does not apply to this article.

#### § 2-7-1043 - RESTRICTION ON LOBBYING CONTACTS.

Subject to the exclusions in Section 2-7-105, during a no lobbying period,

(1) a respondent or an agent shall not communicate directly with a City official or a City employee, or both in order to:

- (a) provide substantive information about any respondent or response with respect to the solicitation to which the communication relates;
- (b) encourages the City to reject one or more of the responses to the solicitation to which the communication relates;
- (c) convey a complaint about the solicitation to which the communication relates; or
- (d) ask any City official or City employee 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 the communication relates.

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(2) a City official shall not contact or communicate with a respondent regarding a response or the solicitation to which the no-lobbying period applies;



(3) a City employee, other than the authorized contact person, shall not contact or communicate with a respondent regarding a response or the solicitation to which the no-lobbying period applies.

- ~~(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.~~

#### **§ 2-7-1054 - PERMITTED COMMUNICATIONS REPRESENTATIONS.**

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

- (1) any communication between a respondent or agent and any authorized contact person, including, without limitation and in accordance with regulation, any complaint concerning the solicitation;

- (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 communication between a respondent or an agent and a City employee to the extent the communication relates solely to a non-substantive, procedural matter related to a response or solicitation;
- (4) any communication required by or made during the course of a formal protest hearing related to a solicitation;
- (5) any communication between a respondent or an agent and the City's Small & Minority Business Resources Department, that solely relates to compliance with Chapters 2-9A through 2-9D (Minority-Owned and Women-Owned Business Enterprise Procurement Program) of the City Code;
- (6) any 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 communication made by a respondent or an agent to the applicable governing body during the course of a meeting properly noticed and held under the Texas Government Code Chapter 551 (Open Meetings Act);
- (8) any 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 contribution or expenditure as defined in Chapter 2-2 (Campaign Finance).

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- (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.~~

#### § 2-7-106 – MODIFICATION OF RESTRICTION.

The purchasing officer may waive, modify, or reduce the requirements in Section 2-7-104 in order to allow respondents to communicate with a City employee or a City official 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. Any such modification authorized by the purchasing officer shall be stated in the solicitation.

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#### § 2-7-107<sup>5</sup> - NOTICE.

(A) Each solicitation shall include a notice advising respondents and prospective respondents. 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:

- (1) of the requirements of this article;
- (2) that any communication initiated by a City employee or City official, other than the authorized contact person, during the no-lobbying period regarding a response or the solicitation may result in a violation of section 2-7-104(1) if the respondent subsequently lobbies that City employee or City official.

(B) The purchasing officer, or a City employee designated by the purchasing officer, shall provide weekly written notice, accessible to all City employees and City officials, of each solicitation for which

~~the no-lobbying period is in effect, 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.~~

#### **§ 2-7-1086 - DISCLOSURE OF VIOLATION PROHIBITED REPRESENTATION.**

~~A City official or a City employee other than the authorized contact person that becomes aware of a violation of section 2-7-104 shall notify the authorized contact person in writing as soon as practicable.~~

- ~~(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.~~

#### **§ 2-7-1097 - 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 waive a violation of Section 2—7-104(1) if the violation is solely the result of a communication initiated by a City official or a City employee other than the authorized contact person.~~

~~(C) The purchasing officer has the authority to enforce this article through the 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 2-7-110, including:~~

- ~~(1) written notice of the disqualification imposed pursuant to Section 2-7-11;~~
- ~~(2) written notice of the right to protest the disqualification imposed; and~~
- ~~(3) written notice of the right to request an impartial hearing process.~~

~~(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.~~

**§ 2-7-11098 — DISQUALIFICATION; CONTRACT VOIDABLE.**

(A) If the purchasing officer finds that a respondent has violated Section 2-7-104(1), the respondent is disqualified from participating in the solicitation to which the violation 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 2-7-104(1) 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 respondent violates Section 104(1) and is awarded a contract resulting from the solicitation to which the violation relates, the City may void that contract.

(E) Respondents that violate Section 2-7-104(1) three or more times during a five year period may be subject to debarment from participating in any new contracts with the City for a period of up to three years.

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

**§ 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.~~

**§ 2-7-110 — NO CRIMINAL PENALTY.**

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

**§ 2-7-111 — DIRECTOR DISCRETION.**

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



## ALO Comparison Matrix – Current Version vs. Recommended Version (Version 3)

Ch. 2-7, Article 6 – Anti-Lobbying and Procurement

The following is an analysis and discussion of the major provisions of the City’s Anti-Lobbying Ordinance (ALO) that are recommended to be revised in the proposed ALO Version 3.

Element / Section	Current Version	Recommended Version (Version 3)	Discussion
<b>Definition of “Agent”</b>	<p>AGENT means a person authorized by a respondent to act for or in place of respondent, including:</p> <ul style="list-style-type: none"> <li>• a person acting at the request of respondent;</li> <li>• a person acting with the knowledge and consent of a respondent; or</li> <li>• a person acting with any arrangement, coordination, or direction between the person and the respondent.</li> </ul>	<p>AGENT means any person authorized by a respondent to act for or in place of respondent to communicate on behalf of that respondent, including:</p> <ul style="list-style-type: none"> <li>• any employee, owner, director, officer, member, manager of a respondent, or if the respondent is an individual person; or</li> <li>• any of close family relatives of the above; or</li> <li>• a lobbyist, attorney, or other legal representative of the respondent that has been retained by the respondent with respect to the subject matter of either the solicitation or the respondent’s response to the solicitation.</li> </ul>	<ul style="list-style-type: none"> <li>• Consolidated and clarified the definition of “agent” by making it more specific</li> <li>• Increased specificity is intended to address concerns that the definition was too broad previously</li> </ul>
<b>Definition of “No Lobbying Period”</b>	<p>NO CONTACT PERIOD means: Start: Date solicitation is issued End: Date contract is signed, OR Date solicitation is cancelled</p> <ul style="list-style-type: none"> <li>• Extendable: Yes. If solicitation is cancelled with the stated intention to reissue, the no-contact period continues after cancellation for up to 90 days</li> <li>• Note: If Council authorizes the contract, the No Contact Period continues until the contract is signed. If this takes several months, the No Contact Period can continue without limitation.</li> </ul>	<p>NO LOBBYING PERIOD means: Start: Date solicitation is issued End: Date the contract is signed; OR Date solicitation is cancelled; OR No later than 60-days following Council authorization</p> <ul style="list-style-type: none"> <li>• Extendable: No</li> </ul>	<ul style="list-style-type: none"> <li>• Ensures a certain end date of the No Lobbying Period</li> <li>• Permits a reasonable amount of time to complete and sign the contract</li> <li>• Name changed to “No Lobbying Period”, to be consistent with the Ordinance title.</li> </ul>

<b>Definition of "Respondent"</b>	<p>RESPONDENT means a person responding to a City solicitation including:</p> <ul style="list-style-type: none"> <li>• a bidder, a quoter, responder, or a proposer;</li> <li>• an owner, board member, officer, employee, contractor, subsidiary, joint enterprise, partnership, agent, lobbyist, or other representative of a respondent;</li> <li>• a person or representative of a person that is involved in a joint venture with the respondent; or</li> <li>• a subcontractor in connection with the respondent's response; and</li> <li>• a respondent who has withdrawn a response or who has had a response rejected or disqualified by the City.</li> </ul>	<p>RESPONDENT means a person or entity who has timely submitted or subsequently timely submits a response to a City solicitation, including:</p> <ul style="list-style-type: none"> <li>• any person subsequently withdraws its response or has been disqualified by the City for any reason;</li> <li>• a subsidiary or parent of a respondent;</li> <li>• 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</li> <li>• a subcontractor to a respondent in connection with that respondent's response.</li> </ul>	<ul style="list-style-type: none"> <li>• Made the definition of "respondent" more specific</li> <li>• Increased specificity is intended to address concerns that the definition was too broad previously</li> </ul>
<b>Prohibited Communications</b>	<p>Prohibits communications between respondents or their agents and City officials or employees that:</p> <ul style="list-style-type: none"> <li>• provide substantive information about a response</li> <li>• advance the interests of the respondent with respect to the solicitation</li> <li>• discredit the response of any other respondent to the solicitation</li> <li>• encourage the City to reject all of the responses to the solicitation to which it relates;</li> <li>• convey a complaint about the solicitation</li> <li>• asks, influences, or persuades the solicitation process</li> <li>• Permits representations only through the authorized contact person</li> <li>• Prohibits representations to City officials or to City employees</li> <li>• Representations made before a Response is submitted are also prohibited</li> </ul>	<p>Prohibits communications between respondents or their agents and City officials or employees that:</p> <ul style="list-style-type: none"> <li>• provide substantive information about a respondent or a response to a solicitation</li> <li>• encourages the City to reject one or more responses to a solicitation</li> <li>• conveys a complaint about a solicitation</li> <li>• asks a City official or employee to take or not take an action regarding a solicitation</li> </ul>	<ul style="list-style-type: none"> <li>• Clarifies the scope of prohibited communications</li> <li>• Makes determining violations less subjective and therefore more consistent</li> </ul>

<b>Prohibited Communications (cont.)</b>	<ul style="list-style-type: none"> <li>• Prohibition also applies to representations initiated by City officials or City employees</li> <li>• If the solicitation is cancelled with the intention of re-soliciting, the No-Contact Period continues for 90-days after cancellation</li> <li>• In the event of multiple awards, the No-Contact Period continues until the last contract is signed</li> <li>• Provision for allowing representations under emergency circumstances</li> <li>• Prohibits representations made to a contractor hired by the City to assist with a solicitation</li> <li>• Representations made by agents of a respondent are prohibited</li> <li>• Clarifies definition of respondent's agent</li> </ul>		
<b>Permitted Communications</b>	<p>Allow communications ("Representations"):</p> <ul style="list-style-type: none"> <li>• made to the authorized contact person.</li> <li>• describing what the authorized contact person does with the respondent's communications</li> <li>• disallowing a respondent from changing their offer through a communication with the authorized contact person</li> <li>• permitting complaints submitted through the authorized contact person</li> <li>• limiting the Purchasing Officer from distributing complaints that are derogatory to other offerors</li> <li>• excluding protests from the complaint distribution process</li> <li>• allowing a respondent to contact the Purchasing Officer of the authorized contact person does not respond</li> <li>• ask procedural questions to other City employees</li> </ul>	<p>Provides specific examples of allowable communications between a respondent or their agent, and City officials and employees, including any communications:</p> <ul style="list-style-type: none"> <li>• made to the authorized contact person</li> <li>• solely pertaining to an existing contract between the respondent and the City</li> <li>• regarding a non-substantive aspect of a solicitation</li> <li>• made at a protest hearing</li> <li>• with the Small, Minority Business Resource Department concerning the City's MWBE program</li> <li>• between a respondent's attorney and the City's attorney</li> <li>• made during a noticed public meeting</li> <li>• with City risk management staff regarding insurance requirements in a solicitation</li> <li>• when making a campaign contribution</li> </ul>	<ul style="list-style-type: none"> <li>• Consolidates and clarifies allowable communications</li> </ul>

	<ul style="list-style-type: none"> <li>• prohibiting procedural questions to City officials or their staff</li> <li>• made at a public meeting</li> <li>• made during negotiations</li> <li>• made during protest hearings</li> <li>• made to the Small &amp; Minority Business Resources Department regarding subcontract goals</li> <li>• made to the City Risk Management coordinator about insurance requirements</li> <li>• made from the respondent's attorney to the City's Law Department</li> <li>• allows City employees and officials to discuss the solicitation</li> <li>• establishes that campaign contributions are not representations</li> </ul>		
<b>Waiving violations</b>	The ordinance includes no provisions allowing the Purchasing Officer to waive violations that are initiated by City officials or employees	Authorizes the Purchasing Officer to waive violations if the lobbying violation that are initiated by a City official or employee	Adds authority to waive violations initiated by City officials or employees
<b>Debarment</b>	<ul style="list-style-type: none"> <li>• Directs staff to debar (preclude from the award of any new contracts) any respondent found to have committed 3 or more violations within a rolling five-year period</li> <li>• Debarment shall not exceed 3 years</li> </ul>	<ul style="list-style-type: none"> <li>• Authorizes staff to debar (preclude from the award of any new contracts) any respondent found to have committed 3 or more violations within a rolling five-year period</li> <li>• Debarment shall not exceed 3 years</li> </ul>	Based on significant feedback, no substantial changes are recommended



# ALO Recommendations and Responses

Ch. 2-7, Article 6 – Anti-Lobbying and Procurement

Waste Management Policy Working Group	
Recommendation	Response
<ul style="list-style-type: none"> <li>• Apply the anti-lobbying ordinance only to the solicitation. Vendors may communicate on all other matters without violating the ALO.</li> </ul>	<ul style="list-style-type: none"> <li>• The proposed ALO V3 only applies to communication with respect to a solicitation, and it specifically permits communication regarding an existing contract and for non-substantive procedural matters.</li> </ul>
<ul style="list-style-type: none"> <li>• Apply the ALO from the time a Request for Proposals (RFP) is released through Council’s vote on executing the contract. Should an RFP be pulled down, then the ordinance does not apply during the timeframe the RFP is pulled down.</li> </ul>	<ul style="list-style-type: none"> <li>• The proposed ALO V3 applies the ALO from the time a solicitation is published and continuing through <u>the earliest of the following</u>:               <ol style="list-style-type: none"> <li>1. Day the last contract relating to the solicitation is signed;</li> <li>2. 60-days following Council authorization;</li> <li>3. Cancellation of the solicitation.</li> </ol> </li> </ul>
<ul style="list-style-type: none"> <li>• Narrow the definition of “Representations” to target lobbying. For instance, if staff tells a vendor that the ALO does not apply and a communication is allowable - then the vendor cannot later be disqualified as violating the ordinance by the communication.</li> </ul>	<ul style="list-style-type: none"> <li>• The proposed ALO V3 more clearly defines those types of communications that are subject to the ordinance.</li> <li>• ALO V3 would also allow the Purchasing Officer to waive a violation if that violation is the result of a communication initiated by a City official or City employee.</li> </ul>
<ul style="list-style-type: none"> <li>• Add communications regarding existing contracts to “Permitted Communications.”</li> </ul>	<ul style="list-style-type: none"> <li>• The proposed ALO V3 includes as a permitted communication provision that states,                 “...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.”             </li> </ul>
<ul style="list-style-type: none"> <li>• Develop a body of rules in a companion regulatory document to the ALO that defines enforcement, appeal, complaint and debarment procedures. The companion document should:               <ol style="list-style-type: none"> <li>1. Clarify the current definition of “Representation” and what triggers debarment</li> </ol> </li> </ul>	<ul style="list-style-type: none"> <li>• Staff from the Purchasing, Capital Contracting and Law Departments are currently in the planning stages regarding the development of a body of regulations for a City Procurement Code which would include specific procedures for a protest and appeals process. Staff contemplates including</li> </ul>

<ul style="list-style-type: none"> <li>2. Clarify procedures for determining violations, judgment, and penalty enforcement and incorporate an option to engage a third-party reviewer such as the Ethics Review Commission to determine violations, judgment, and penalty enforcement.</li> <li>3. Clarify the process for submitting and facilitating complaints.</li> <li>4. City Purchasing and City Legal should develop this companion document for approval by Council and prepare any language updates to the ALO that might be required to allow for adopted rules in the companion document.</li> </ul>	<p>further regulations concerning suspension, and debarment, which would be standardized and apply to all procurement processes.</p>
<ul style="list-style-type: none"> <li>• The existing ALO should remain suspended until Council approves proposed revisions. Staff from Law and Purchasing are working on draft language to address issues identified in discussions with stakeholders. Estimated date for Council approval is the end of September.</li> </ul>	<ul style="list-style-type: none"> <li>• Per Council Resolution 20171109-050, the ALO was suspended from application to contracts for waste management services through May 21, 2018. Unless operationally necessary, staff does not intend to issue new solicitations for waste management services until Council has provided further policy direction regarding the ALO.</li> </ul>
<ul style="list-style-type: none"> <li>• Revisions to the ALO may require continued participation from stakeholders. The Purchasing Office should receive and compile further stakeholder input for Council and will work with adopted input as determined by Council.</li> </ul>	<ul style="list-style-type: none"> <li>• The Purchasing Office sent notices and a request for feedback regarding the proposed changes to the ALO to thousands of vendors in January 2018, including all vendors of the City; the Purchasing Office also conducted specific outreach to targeted vendor segments including chambers and minority &amp; trade associations. Purchasing presented recommendations and shared input received from the vendor community to the Audit and Finance Committee on three occasions requesting input and feedback (1/24/18, 3/5/18 and 4/25/18).</li> </ul>
<b>Zero Waste Advisory Committee</b>	
<b>Recommendation</b>	<b>Response</b>
<ul style="list-style-type: none"> <li>• A guarantee that rulemaking will have an element of ongoing public participation, with rules ultimately brought back to the Ethics Review Commission (ERC) and Council for final review and approval.</li> </ul>	<ul style="list-style-type: none"> <li>• After Council approves a new ordinance, Staff intends to work through the process set forth regarding rules promulgation including public posting and comments.</li> </ul>
<ul style="list-style-type: none"> <li>• Specific mention in the ordinance of a right to appeal all disqualifications and other penalties or determinations to the ERC and ultimately to Council.</li> </ul>	<ul style="list-style-type: none"> <li>• Staff does not recommend including a third-party body such as the Ethics Review Committee (ERC) or some other body to participate in protest or appeal processes. Staff believes that a more fully developed procurement</li> </ul>

	code addressing protests and appeals would be a more effective approach to resolving administrative complaints.
<ul style="list-style-type: none"> <li>• Striking all sections which empower staff to require recusal of elected or appointed City officials.</li> </ul>	<ul style="list-style-type: none"> <li>• The proposed ALO V3 does not include any provisions concerning the recusal of City officials or employees.</li> </ul>
<ul style="list-style-type: none"> <li>• Assurance that the ordinance will not consider public communications be in any way a violation.</li> </ul>	<ul style="list-style-type: none"> <li>• The proposed ALO V3 only applies to communication with respect to a solicitation, and it specifically permits communication regarding an existing contract and for non-substantive procedural matters.</li> </ul>
<ul style="list-style-type: none"> <li>• Assurance that independent advocacy from non-respondents will not be used to disqualify respondents.</li> </ul>	<ul style="list-style-type: none"> <li>• Only violations of the specific restrictions identified in the ordinance will lead to a disqualification.</li> </ul>
<ul style="list-style-type: none"> <li>• Definition of the term “response”.</li> </ul>	<ul style="list-style-type: none"> <li>• The proposed ALO V3 contains the following definition:  “RESPONSE means a written offer or submission in reply to a solicitation.”</li> </ul>
<ul style="list-style-type: none"> <li>• Clarification of subjective terms such as “influences”, “persuades,” “advances the interests,” or “discredits.” At minimum we recommend that you direct staff to provide objective standards for these terms as part of their rulemaking.</li> </ul>	<ul style="list-style-type: none"> <li>• Staff intends to further describe and include specific examples of each in the rules promulgated after the ordinance is approved.</li> </ul>
<ul style="list-style-type: none"> <li>• Eliminate or delineate the power of Purchasing Officer to determine “mitigating factors” in violations.</li> </ul>	<ul style="list-style-type: none"> <li>• The only mitigating factor which can be considered in the proposed ALO V3 is for a violation which is solely the result of a communication initiated by a City official or employee other than the authorized contact person.</li> </ul>
<ul style="list-style-type: none"> <li>• Replace disqualification for “similar” projects with a disqualification for the SAME project”.</li> </ul>	<ul style="list-style-type: none"> <li>• Staff cannot recommend this change. The “Similar” distinction is necessary so as to include any subsequent reissuance of the ‘same’ solicitation, that happens to include minor administrative, procedural or clarifying changes. Should staff be limited to “Same” solicitations only, it could be argued that absolutely no changes, no matter how minor, may be included in the subsequent solicitation.</li> <li>• This provision is carried-forward from the current ALO. To-date, staff recalls no issues with this provision.</li> </ul>

<ul style="list-style-type: none"> <li>• Continue to keep the Anti-lobby Ordinance in a suspended state until such time that both the final ALO and subsequent governing Rules are drafted and adopted by Council.</li> </ul>	<ul style="list-style-type: none"> <li>• Per Council Resolution 20171109-050, the ALO was suspended from application to contracts for waste management services through May 21, 2018.</li> </ul>
Ethics Review Commission	
Recommendation	Response
<ul style="list-style-type: none"> <li>• A guarantee that rulemaking will have an element of ongoing public participation, with rules ultimately brought back to the Ethics Review Commission (ERC) and Council for final review and approval.</li> </ul>	<ul style="list-style-type: none"> <li>• After Council approves a new ordinance, Staff intends to work through the process set forth regarding rules promulgation including public posting and comments.</li> </ul>
<ul style="list-style-type: none"> <li>• Restrict communication period to begin four (4) business days after the day a solicitation is issued for the purpose of discouraging undue influence and giving respondents time to address policy concerns.</li> </ul>	<ul style="list-style-type: none"> <li>• The proposed ALO V3 applies the ALO from the time a solicitation is published. The solicitation process is often an iterative process. After the solicitation is published it is common for the solicitation to be changed from time to time via addenda in order to clarify, revise and improve the solicitations contents. Given the natural iterations the solicitation may undergo, the recommended 4-day delay in starting the No-Lobbying Period may not be substantively meaningful.</li> <li>• Also, the ALO currently includes a complaint process that lasts throughout the No-Lobbying Period (well more than 4-days). This process allows prospective and actual respondents to submit complaints to the authorized contact person that are then forwarded to Council Members and to applicable City staff.</li> <li>• The ALO further stipulates that all communications occurring at publicly posted meeting are also permitted.</li> </ul>
<ul style="list-style-type: none"> <li>• Restrict communications period to end 60 days following Council authorization or when the contract is executed, whichever is sooner.</li> </ul>	<ul style="list-style-type: none"> <li>• The proposed ALO V3 applies the ALO from the time a solicitation is published and continuing through <u>the earliest of the following</u>:               <ol style="list-style-type: none"> <li>1. Day the last contract relating to the solicitation is signed;</li> <li>2. 60-days following Council authorization;</li> <li>3. Cancellation of the solicitation.</li> </ol> </li> </ul>
<ul style="list-style-type: none"> <li>• Accept working recommendation on enforcement, debarment and reporting obligation (adding Municipal Court to the option of third party due process).</li> </ul>	<ul style="list-style-type: none"> <li>• Staff cannot recommend an appeal process to a board or commission; staff recommends developing a body of regulations which will include a process for a protest and an appeal.</li> </ul>

<ul style="list-style-type: none"> <li>• Recommendation that Council work with staff and stakeholders on exploring implementation of Model Procurement Rules of the American Bar Association or other best practices models.</li> </ul>	<ul style="list-style-type: none"> <li>• Staff from the Purchasing, Capital Contracting and Law Departments are currently in the planning stages regarding the development of a body of regulations for a City Procurement Code which would include specific procedures for a protest and appeals process.</li> </ul>
<ul style="list-style-type: none"> <li>• Eliminate the proposed authority of the Purchasing Officer to consider “mitigating factors” in determining violations and instead authorize the appellate body to consider “mitigating factors” upon appeal.</li> </ul>	<ul style="list-style-type: none"> <li>• ALO V3 includes no reference to “mitigating factors” and only adds the ability for the Purchasing Officer to waive violations that were initiated by City officials or employees.</li> <li>• Staff cannot recommend an appeal process to a board or commission; staff recommends developing a body of regulations which will include a process for a protest and an appeal.</li> </ul>



## MEMORANDUM

**TO:** Mayor and Council  
**FROM:** James Scarboro, Purchasing Officer  
**DATE:** January 5, 2018  
**SUBJECT:** Possible Rule Elements – to further enable  
Ch. 2-7, Article 6, Anti-Lobbying and Procurement

Following Council authorization of any changes to Austin City Code, Ch. 2-7, Article 6, Anti-Lobbying and Procurement (“Anti-Lobbying Ordinance” or “ALO”), staff intend to promulgate administrative rules to implement the ALO, in accordance with City Code Chapter 1-2-1. As any changes to the ALO are speculative prior to Council authorization, staff cannot propose the actual language of the contemplated rules at this time. To aid consideration of the most recent draft of the revised ALO (“Version 2” or “V2”), should this version remain substantially unchanged, staff contemplate including the following elements in any administrative rules.

### Possible Rule Elements – ALO

**R2-7-101 Findings; Purpose.**

- Reserved.

**R2-7-102 Applicability**

- Exempt solicitations – Clarification and examples.

**R2-7-103 Definitions.**

- AGENT – Clarification and examples. E.g., Persons authorized by the Respondent.
- RESPONDENT – Clarification and examples. E.g., Disqualified vs. Nonresponsive, Newly formed entities, etc.
- SOLICITATION – Clarification and examples. E.g., Invitation for bids, Request for proposals, etc.

**R2-7-104 Restriction on Lobbying.**

- Restricted Lobbying – Examples.

**R2-7-105 Permitted Communications.**

- Communications with the Authorized Contact Person – Clarification and examples.
- Complaint Process – Describe process.
- Communications regarding an Existing Contracts – Clarification and examples.
- Procedural questions associated with a Solicitation – Clarification. E.g., City officials and City employees.

**R2-7-106 Modification of Restriction.**

- Modification description in Solicitations – Clarification and examples.

**R2-7-107 Notices.**

- Solicitations within the No-Lobbying Period – Form of notice, frequency, process and posting location.

**R2-7-108 Disclosure of Restricted Lobbying and Recusal.**

- Notification by Staff or Respondent of a Violation
- Staff process for recusal or removal from participation in solicitation process.

**(NOTE: June 1, 2018. Recusal was subsequently eliminated from ALO Version 3.)**

**R2-7-109 Enforcement.**

- Enforcement authority and delegation – Clarification.
- Determining a Disqualification – Standards of review and inquiry, and examples.

**R2-7-110 Disqualification; Contract Voidable.**

- Disqualification – Notices and process description.
- Debarment – Notices and process description.
- Protests – Notices and process description, including independent hearing.
- Contract Voidable – Notices and process description.