

NOTICE OF PROPOSED RULE

**POSTING DATE:
October 15, 2018**

By: James Scarboro
Purchasing Officer

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The City of Austin Purchasing Office proposes the rule set out below, to implement the Anti-Lobbying and Procurement Ordinance, Ord. No. 20180614-056, codified at Chapter 2-7, Article 6 of the City Code. This notice solicits comments from the public. This notice of proposed rule is issued under the authority of Chapter 1-2 of the City Code.

EFFECTIVE DATE OF PROPOSED RULE

The rules proposed in this notice may not become effective before the effective date established by a separate notice of rule adoption. A notice of rule adoption may not be posted before November 16, 2018 (the 32nd day after the date of this notice) or after December 24, 2018 (the 70th day after the date of this notice).

If a proposed rule is not adopted on or before December 24, 2018, it is automatically withdrawn and cannot be adopted without first posting a new notice of a proposed rule.

REQUEST FOR COMMENTS ON PROPOSED RULES

The City requests comments from the public with respect to the Proposed Rules included in this Notice. **Comments must be submitted in writing (by US Mail or by Email) to the Contact Person (below) no later than the thirty-first day after the POSTING DATE (above) of this NOTICE.**

Contact Person

Shawn Willett, Deputy Procurement Officer

US Mail

City of Austin, Purchasing Office
PO Box 1088
Austin, Texas 78767-1088

Email

Shawn.Willett@austintexas.gov

Questions regarding this process may be sent to the Contact Person at the Email address (above).

TEXT OF PROPOSED RULES

The text of the proposed rules is attached.

BRIEF EXPLANATION OF THE RULES

The rules adopt and implement the policies related to prohibiting lobbying during City of Austin procurement processes, as established in Chapter 2-7, Article 6 of the City Code. These new rules adopt regulations on implementation and enforcement by the City of Austin Purchasing Office and describe consequences for violating the City's Ordinance on Anti-Lobbying and Procurement.


AUTHORITY FOR ADOPTION OF PROPOSED RULES

The authority and procedure for adoption of these rules is set forth in Chapter 1-2 and in Section 2-7-109 of the Austin City Code.

CERTIFICATION BY CITY ATTORNEY

By signing this Notice of Proposed Rule, the City Attorney certifies that City Attorney has reviewed the proposed rules and finds that adoption of these rules is a valid exercise of administrative authority.

REVIEWED AND APPROVED:



James Scarboro
Purchasing Officer

Date: 10/11/2018



Anne L. Morgan
City Attorney

Date: 10/12/18

ANTI-LOBBYING AND PROCUREMENT RULES

SECTION 1 – RULES; ANTI-LOBBYING AND PROCUREMENT.

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

SECTION 2 – APPLICABILITY AND EXEMPTIONS.

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

authorization in accordance with City Charter Article VII Section 15 (Purchase Procedure).

SECTION 3 – DEFINITIONS AND EXAMPLES.

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

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

- (iv) withdrawn after the solicitation's due date and time; or
- (b) the respondent is determined to be non-responsible.

SECTION 4 – RESTRICTION ON LOBBYING.

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

SECTION 5 – PERMITTED COMMUNICATIONS.

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

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

- (c) complaints shall be limited to the solicitation document or process;
 - (d) complaints shall identify the specific City official(s) and/or City employee(s) the complaint is to be conveyed to;
 - (e) complaints shall not be confidential; and
 - (f) complaints shall not be considered a protest and shall not be subject to applicable protest regulations or procedure.
- (4) any communication solely related to an existing contract as referenced in Sec. 2-7-105(2), is permitted so long as the communication:
- (a) is not about the solicitation in any way; and
 - (b) does not occur when the solicitation related to the response is subject to this Article.
- (5) non-substantive or procedural questions in Sec. 2-7-105(3) pertain to the following solicitation contents:
- (a) identification information including solicitation number, title, participating department(s);
 - (b) dates, times, and/or locations pertaining to the solicitation process; and/or
 - (c) names and contact information of any authorized contact persons.
- (6) during a protest hearing in Sec. 2-7-105(4) to communicate:
- (a) with designated City employees regarding the preparations for, directions to and participation in a protest hearing; and
 - (b) at the request of and in the presence of the assigned independent hearing officer. The presence of the independent hearing officer may be in-person or in writing.
- (7) during a publicly called meeting in Sec. 2-7-105(7) so long as:
- (a) there is a quorum of the governing body in attendance; and
 - (b) the communications are made after being recognized by the chair and made in the presence of all members of the governing body in attendance at that time.

SECTION 6 – MODIFICATION OF RESTRICTION, URGENCY.

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

- (3) alternative element(s), if any, that will be used in place of the impracticable elements; and
 - (4) the reason why each alternative step is preferable given the circumstances.
- (C) The modifications will be identified in the applicable solicitation.

SECTION 7 – RESERVED.

Reserved.

SECTION 8 – DISCLOSURE OF VIOLATIONS.

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

SECTION 9 – ENFORCEMENT AND NOTICE OF DISQUALIFICATION.

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

The violations that go beyond what was needed to reply to the City official or City employee shall not be waived.

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

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

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