



TO: Mayor and City Council

FROM: Anne L. Morgan,
Division Chief, Litigation Division
Acting Division Chief, Municipal Operation

DATE: May 13, 2011

SUBJECT: Social Service Contracts and Anti-lobbying Ordinance

I write to address questions that have come up concerning the interplay between the City's recent Request for Proposals (RFP) for social service contracts and the City's anti-lobbying ordinance. As you know, the City's anti-lobbying ordinance has been in place since December 2007, and it applies to city solicitations. It applies to the current solicitation for social services contracts.

The *authorized contact person* in the Purchasing Office, for this RFP is Wilbur Jones. He has consistently advised respondents to this RFP that the anti-lobbying ordinance applies. If a *respondent* has questions regarding this matter, Wilbur Jones is the person to contact.

I have attached a copy of the anti-lobbying ordinance, and a copy of the Purchasing Office's Rules for enforcing the ordinance. Please feel free to share those documents, and this memo, with any member of the public.

The *no-contact period* for this solicitation began the date of the issuance of this RFP (October 11, 2010), and will continue until one of the following conditions exists: a) all contracts are executed; b) the City withdraws the solicitation and reissues the same or similar solicitation, which then results in the execution of contract(s); or c) the sixtieth day after the date that the solicitation is withdrawn without subsequent reissue; or d) the day that all responses are rejected and the solicitation is officially cancelled.

Specific questions

Who is a Respondent?

A *respondent* is the person or entity that submits a bid or proposal to a City solicitation. A *respondent* also includes: (a) "an owner, officer, employee, contractor, lobbyist, subsidiary, joint enterprise, partnership, or other representative of a respondent and

(b) a person or representative of a person that is involved in a joint venture with the respondent, or a subcontractor in connection with the respondent's response...

What is prohibited?

Respondents cannot make a *representation* to a member of City Council, a member of a city board, or any other official, employee, or agent for the City. The only *representation* allowed is to the *authorized contact person*.

What is a representation?

A communication, related to a response to a solicitation, which

- (a) provides information about the response;
- (b) advances the interests of the respondent
- (c) discredits the response of any other respondent
- (d) encourages the City to withdraw the solicitation;
- (e) encourages the City to reject all of the responses; or
- (f) conveys a complaint about a particular solicitation.

If a *respondent* wants to do any of the things listed above, the respondent should contact the *authorized contact person*. The authorized contact person will follow the procedures set out in the ordinance. (Section 2-7-104).

The exceptions to the restriction on representations is set out in Section 2-7-103 (E) of the Ordinance. Section 2-7-103 (E) (6) specifically allows a *respondent* to make a presentation in a public meeting held under the Texas Open Meetings Act.

Summary

The purpose of the ordinance is to make sure that the playing field is level and that all respondents have the same opportunity to present information.

Respondent includes a representative of a respondent.

It doesn't matter who initiates a prohibited contact.

Respondents have the opportunity talk to the full council at council meetings.

Neither the City nor the communities that need the social services will be well served if a solicitation is decided on the basis of *disqualification* rather than the merits of the proposals. As such, everyone should be mindful the requirements of the anti-lobbying ordinance because the penalty for a violation is disqualification.

ORDINANCE NO. 20071206-045

AN ORDINANCE ADDING A NEW ARTICLE 6 TO CHAPTER 2-7 OF THE CITY CODE RELATING TO ANTI-LOBBYING AND PROCUREMENT.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. Chapter 2-7 is amended to add a new article 6 to read:

ARTICLE 6. ANTI-LOBBYING AND PROCUREMENT.

§ 2-7-101 DEFINITIONS.

In this article:

- (1) **AUTHORIZED CONTACT PERSON** means the person designated in a City solicitation as the contact for questions and comments regarding the solicitation.
- (2) **NO-CONTACT PERIOD** means the period of time from the date of issuance of the solicitation until a contract is executed. If the City withdraws the solicitation or rejects all responses with the stated intention to reissue the same or similar solicitation for the same or similar project, the no-contact period continues during the time period between the withdrawal and reissue.
- (3) **RESPONSE** means a response to a solicitation and includes a bid, a quote, a request for proposal response or a statement of qualifications.
- (4) **RESPONDENT** means a person responding to a City solicitation including a bidder, a quoter, responder, or a proposer. The term "respondent" also includes:
 - (a) an owner, officer, employee, contractor, lobbyist, subsidiary, joint enterprise, partnership, or other representative of a respondent;
 - (b) a person or representative of a person that is involved in a joint venture with the respondent, or a subcontractor in connection with the respondent's response; and
 - (c) a respondent who has withdrawn a response or who has had a response rejected or disqualified by the City.
- (5) **REPRESENTATION** means a communication related to a response to a council member, official, employee, or agent of the City which:

- (a) provides information about the response;
- (b) advances the interests of the respondent;
- (c) discredits the response of any other respondent;
- (d) encourages the City to withdraw the solicitation;
- (e) encourages the City to reject all of the responses; or
- (f) conveys a complaint about a particular solicitation.

(6) SOLICITATION includes an invitation for bids, a request for proposals, a request for quotations, and a request for qualifications.

§2-7-102 FINDINGS; PURPOSE.

(A) 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.

(B) 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.

§2-7-103 RESTRICTION ON CONTACTS.

(A) During a no-contact period, a respondent shall make a representation only through the authorized contact person.

(B) If during the no-contact period, a respondent makes a representation to a member of the City Council, a member of a City board, or any other official, employee, or agent of the City, other than to the authorized contact person for the solicitation, the respondent's response is disqualified from further consideration except as permitted in this article. 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 member of the City Council, member of a City board, or any other official, employee, or agent of the City 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 sixtieth day after the date the solicitation is withdrawn or all responses are rejected if the solicitation has not been reissued during the sixty day period.
- (E) This section does not apply to a representation:
 - (1) made at a meeting convened by the authorized contact person to evaluate responses;
 - (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 2-9 (Minority-Owned and Female Owned Business Enterprise Procurement Program);
 - (5) made to the City Risk Management coordinator about insurance requirements for a solicitation; and
 - (6) made in public at a meeting held under the Texas Open Meetings Act.

§2-7-104 PERMITTED REPRESENTATIONS.

- (A) If a respondent seeks to make a representation to a City official, employee, or agent during the no-contact period, 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 a respondent seeks to make a complaint about a particular solicitation to a member of the City Council or a member of a City board, the respondent should include the complaint in his written representation to the authorized contact person. The authorized contact person shall

distribute the complaint 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.

- (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 of the Public Works Department or Purchasing Officer as appropriate.

§2-7-105 NOTICE.

- (A) An employee preparing a solicitation shall include a notice in the solicitation that advises respondents of the requirements of this article, including a notice that if any official, employee or agent of the City, other than the authorized contact person, approaches a respondent for response or solicitation information during the no-contact period, the respondent is at jeopardy if he or she makes any representation in response.
- (B) When a solicitation is issued that requires Council action, the authorized contact person for that solicitation shall notify in writing each City Council member 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.

§2-7-106 DISCLOSURE OF PROHIBITED REPRESENTATION.

- (A) If a City official or employee receives a representation during the no-contact period for a solicitation, the City official or employee shall notify in writing the authorized contact person for that solicitation as soon as practicable. Notification to the authorized contact person must be made using a form prescribed by the City and include any supporting documentation.
- (B) During the no-contact period, a City employee, except for the authorized contact person, shall not solicit a representation from a respondent.

§2-7-107 ENFORCEMENT.

- (A) If the authorized contact person for a solicitation finds that a respondent has made a prohibited representation during the no-contact period, the authorized contact person shall document his findings in a report and disqualify the respondent.
- (B) The Financial Services Department and Public Works Department 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.

§ 2-7-108 CONTRACT VOIDABLE.

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 violates this article more than once in a three year 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 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.

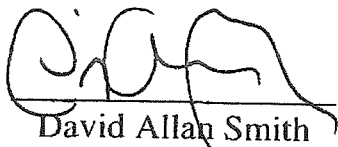
Section 1-1-99 does not apply to this article.

PART 2. This ordinance takes effect on December 17, 2007.

PASSED AND APPROVED

_____, December 6, 2007

APPROVED:



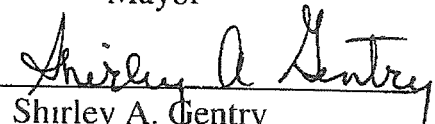
David Allan Smith
City Attorney

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Will Wynn
Mayor

ATTEST:



Shirley A. Gentry
City Clerk

**Enforcement of the Anti-Lobbying Ordinance
by the Purchasing Office**

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

1. DEFINITIONS

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

**2. NOTICE OF A DISQUALIFICATION OR POSSIBLE
DEBARMENT**

a. If an authorized contact person disqualifies a respondent under Article 6 of Chapter 2-7 of the City Code, the authorized contact person shall provide written notice to the respondent that includes:

- i. a statement that the respondent is disqualified and the identifying number of the solicitation from which the respondent is disqualified;
- ii. a description of the prohibited representation that is the reason for the disqualification;
- iii. a description of the respondent's opportunity to protest;
and
- iv. a copy of this rule.

b. Before a respondent is debarred under Article 6 of Chapter 2-7 of the City Code, the Purchasing Officer shall provide written notice and an opportunity for a hearing to the respondent. The notice to the respondent shall include:

- i. a statement that the respondent is disqualified and the identifying number of the solicitation from which the respondent is disqualified;
- ii. a description of the facts that are the reason for debarment;
- iii. a description of the respondent's opportunity to protest;
and
- iv. a copy of this rule.

3. OPPORTUNITY TO PROTEST

This section applies to notice procedures for a respondent to protest disqualification or possible debarment.

- a. The Purchasing Officer has the authority to settle or resolve a protest of a disqualification or possible debarment under Article 6 of Chapter 2-7 of the City Code. The Purchasing Officer's decision is final.
- b. If a disqualified respondent fails to comply with this rule, the Purchasing Officer shall dismiss the respondent's protest.
- c. A respondent shall file a written notice of the respondent's protest with the Purchasing Officer. The notice must be actually received by the Purchasing Officer no later than the fourth business day after the date that the respondent receives notice of the disqualification or possible debarment. If the respondent does not file a timely notice of the protest, the respondent waives the right to protest the disqualification or debarment.
- d. A notice of a respondent's protest must be concise and presented logically and factually. The notice must include:
 - i. the respondent's name, address, telephone, and fax number;
 - ii. the identifying number of the solicitation number; and
 - iii. a detailed statement of the factual grounds for the protest, including copies of any relevant documents.

4. HEARING

This section applies to hearing procedures for a respondent to protest disqualification or possible debarment.

- a. When the Purchasing Officer receives a timely written protest, the Purchasing Officer shall determine whether the grounds for the protest are sufficient.
- b. If the Purchasing Officer decides that the grounds are sufficient, the Purchasing Office will schedule a protest hearing. If practicable the Purchasing Officer should schedule the hearing within five (5) business days.

- c. If the Purchasing Officer determines that the grounds of a protest are insufficient, the Purchasing Officer shall notify the respondent of that decision in writing.
- d. A protest hearing is informal and is not subject to the Open Meetings Act.
- e. The purpose of the hearing is to give a disqualified respondent a chance to present the respondent's case; it is not an adversarial proceeding.
- f. The following individuals from the City may attend the hearing:
 - i. representatives from the department that requested the solicitation or purchase;
 - ii. the Law Department;
 - iii. the Purchasing Office; and
 - iv. other appropriate City staff as determined by the Purchasing Officer.
- g. The respondent may bring to the hearing a representative or anyone else that will present information to support the factual grounds for the respondent's protest.
- h. The Purchasing Officer may appoint an independent hearing examiner to conduct the hearing and to provide a written decision on the protest.
- i. If the Purchasing Officer appoints an independent hearing examiner to conduct the hearing,
 - i. the independent hearing examiner shall provide a written hearing decision to the Purchasing Officer and respondent no later than five business days after the date of the hearing;
 - ii. the Purchasing Officer shall determine on the basis of the written hearing decision whether to maintain or deny the decision no later than the 15th business day after the date of the hearing; and

- iii. the Purchasing Officer shall send a written notice of his decision to the respondent no later than five business days after the date of the decision.
- j. If the Purchasing Officer conducts the hearing, the Purchasing Officer shall:
 - i. make a decision no later than the 15th business day after the date of the hearing; and
 - ii. shall send a written notice of the Purchasing Officer's decision to the respondent no later than five business days after the date of the decision.
- k. The Purchasing Officer's decision on a hearing or a written hearing decision is final.
- l. When a protest is filed, the City usually will not make an award until a decision on the protest is made. However, the City will not delay an award if the City Manager or the Purchasing Officer determines that:
 - i. the City urgently requires the goods, supplies, or services to be purchased; or
 - ii. failure to make an award promptly will unduly delay delivery or performance.
- m. In the instances described under item l, the Purchasing Officer shall notify the respondent and make every reasonable effort to resolve the protest before the award.