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Title 3 REVENUE AND FINANCE							
Chapter 3.36 PURCHASING							

3.36.175 Regulated Communications with the Mayor and City Council During Competitive Procurement Process.

- A. Definitions. The following definitions shall apply for the purposes of this section:
1. "Bidder" shall mean a person or entity responding to a competitive procurement process, including a Bid Invitation.
 2. "Bid Invitation" shall mean a notice, in writing to potential responders, to submit bids to the City, when any award is to be made to the lowest responsive and responsible Bidder, subject to the City's right to reject any and all bids.
 3. "Communication" means contact in any form, directly or indirectly, by or between a Bidder or Proposer, on the one hand, and a Council Member or the Mayor, on the other hand, during the pendency of a competitive procurement, if that contact, directly or indirectly, is related in any way to that competitive procurement, regardless of whether the Bidder or Proposer, at the time of the communication, had yet to put forward, present, or sponsor a request, proposal, bid, or quote for consideration of a contract, if the Bidder or Proposer eventually does so.
 4. "Competitive bidding" shall mean the offering procedure involving sealed bids to the City for materials, supplies, equipment or any public work or improvement, as described in Chapter 3.36 of this Code.
 5. "Competitive procurement" shall mean and include the processes for competitive bidding, Request for Expression of Interest, Request for Proposals, and Request for Qualifications.
 6. "Competitive procurement remains pending" shall mean until the competitive procurement is completed upon either the award of a contract, official notice from the City of cancellation of the competitive procurement or a determination by the Council not to award a contract; provided, that that determination is final and Council does not direct the re-initiation of the competitive procurement at the time it determines not to make an award of the contract.
 7. "Continue" shall mean to persist in, remain in, carry on, recommence or resume a communication.
 8. "Disclosure" shall mean the writing, or oral statement entered in Council proceedings, containing the information required by Subsection D of this Section necessary to disclose a regulated communication.
 9. "Elected official" shall mean the Mayor and each Council Member.
 10. "Initiate" shall mean to cause a communication to begin to send, transmit, or convey information.
 11. "Initiation of competitive procurement" shall mean the issuance, publication or announcement by the City of a Request for Expression of Interest, Request for Proposals, Request for Qualifications, or Bid Invitation.
 12. "Proposer" shall mean a person, other than personnel from a City division or department, who puts forward, presents, or sponsors an expression of interest, statement of qualification, request, proposal, bid, or quote for consideration of a contract, including a bidder. For purposes of this Section, a Proposer is also any agent or representative, or officer of a Proposer, and any person

holding an ownership, beneficial, equitable or security interest in a Proposer. However, a commercial lending institution is not a Proposer if it merely holds a security interest as a result of a loan or loans, which are made in the lender's regular course of business on terms available to members of the public without regard to official status.

13. "Record" shall mean the oral and written information conveyed to the Mayor and Council through writings and statements made available to the public, or an attorney-client privileged communication, in connection with a competitive procurement, and upon which the Council

could rely in considering whether to award a contract. "Record" shall include oral communication during a regular or special meeting of the Council.

14. "Regulated communication" shall mean any communication prohibited under Subsection C of this Section.

15. "Request for Expression of Interest (RFEI)" means a solicitation to prospective proposers on a procurement opportunity. An RFEI may be issued in advance of an RFP to assist in the development of a more definitive set of terms and conditions, scope of work or service and the selection of qualified proposers. An RFEI does not contain all of the information a prospective proposer needs to provide a full bid or proposal response, and should not be construed as an RFP or notice inviting bids. The RFEI enables potential proposers to determine whether they have a serious interest in preparing a proposal or bid in response.

The RFEI may be used simultaneously with a RFQ when the proposed procurement is well-defined and the City has clear expectations for the procurement.

16. "Request for Proposal (RFP)" shall mean an invitation for providers of services or work to solicit the right to supply services or work to the City, when any award is to be made to a Proposer providing the best value in meeting the interest of the City and the objectives of the project, based on criteria, such as benefit to the City, qualifications, experience, and demonstrated ability, subject to the City's right to reject any and all proposals.

17. "Request for Qualification (RFQ)" shall mean a City request for the submission of a statement of qualifications from interested potential Proposers, as a prerequisite to a bid or proposal for the right to supply materials, supplies, equipment, services or work.

18. "Subject Proposer or Bidder" as used in this Section, shall mean the Proposer who is the subject of a disclosure and consideration of potential sanctions.

19. "Writing" shall mean a writing as defined in California Evidence Code Section 250.

B. **Applicability.** This Section applies to competitive procurement, which may result in the award of a contract by the Council, including competitive bidding, Request for Proposals, Request for Expression of Interest, and Request for Qualifications. It applies whether the procurement process is classified as legislative or otherwise. The requirements of this Section apply upon the initiation of competitive procurement and while the competitive procurement remains pending. Any communication (even if unintended or inadvertent) covered by this Section must be disclosed, as provided by this Section or any other applicable local, state or federal law or regulation.

C. **Regulation of Communications during Competitive Procurement—Notice of Regulated Communication Rule.**

1. No Proposer or Bidder shall initiate, engage in, or continue any communication to or with any elected official, and no elected official shall initiate, engage in, or continue any communication to or with any Bidder or Proposer, concerning or touching upon any matter which is the subject of a competitive procurement within the scope of this Section except as permitted in this Section.

2. Only communications meeting the following requirements are allowed under this Section: a communication that is:

- a. Made on the record in a regular or special meeting of the Council; or
- b. Between or among elected officials outside of a regular or special Council meeting; provided, that none of the communicants is an agent or representative of a Proposer or Bidder, or acting in concert with or at the behest of a Proposer or Bidder; and provided, further, that the communication is not prohibited under the Ralph M. Brown Act (California Government Code Section 54950 et seq.); or
- c. Part of the record presented to the Council as a result of being communicated to City staff involved in, and in the ordinary course of, the competitive procurement; or
- d. An identical writing that is delivered simultaneously and by identical means to all elected officials, the City's Purchasing Agent, and the City Manager, at their respective official City offices; provided, that hand deliveries to the City's Purchasing Agency must be made by someone other than a Proposer or Bidder.

3. The regulated communication rule established by this Section and a reference thereto shall be set forth in each Bid Invitation, RFEI, RFP and RFQ, or in the respective specifications or other documents referred to therein.

D. Disclosure of Regulated Communications.

1. Any elected official and any Proposer or Bidder who has initiated, engaged in, continued in, or received, any regulated communication shall disclose that regulated communication, as provided in this Section.

2. A regulated communication shall be disclosed at the earliest feasible time, but in any event, it shall be disclosed no later than 24 hours or the next business day following such communication, whichever is earlier.

3. Disclosures shall be in writing, unless the regulated communication occurs on the date the Council is to consider award of the contract, in which case it may be orally disclosed on the record during the Council proceedings concerning the subject procurement. Written disclosures shall be directed to the City's Purchasing Agent, and a copy filed with the City Clerk.

4. The disclosure shall contain all the information necessary to fully and fairly convey the substance of the communication. At minimum, disclosures shall include the following information:

- a. Person making the disclosure;
- b. Date, time and place of the regulated communication;
- c. Identity of each person who initiated, engaged in, continued or received the regulated communication;
- d. Copies of all written-regulated communications;
- e. Summary of all oral-regulated communications;
- f. Identity of all persons present during the regulated communication; and
- g. Identification of subject competitive procurement and subject Proposer.

5. The City Clerk shall promptly distribute to all Council Members and the Mayor every disclosure filed pursuant to this Section.

E. Sanctions.

1. In accordance with the applicable procedures for the respective competitive procurement as referenced or set forth in the specifications of the respective Bid Invitation, RFEI, RFP or RFQ, a Proposer or Bidder violating this Section may be sanctioned as follows:

- a. Disqualification from the competitive procurement;
- b. A finding of non-responsibility under the procurement; and
- c. Setting aside by Council of any award of contract prior to its execution by both parties.

2. Those sanctions may be imposed in addition to any remedies provided by any other law or regulation.

F. Evaluation, Criteria, and Appeals. EVALUATION OF DISCLOSED COMMUNICATIONS—CRITERIA FOR IMPOSITION OF SANCTIONS—APPEALS.

1. The City's Purchasing Agent shall ensure the information, which is the subject of a disclosure, is reviewed, evaluated, and processed in accordance with applicable laws and regulations, this Section, and the specifications, criteria and requirements of the applicable competitive procurement.

2. The City's Purchasing Agent shall report the disclosure in the record of the competitive procurement, summarize the results of the evaluation of the disclosure, and make a recommendation on whether or not to impose sanctions concerning the regulated communication.

3. Before sanctions may be imposed, it shall first be established the subject Proposer or Bidder did initiate, engage in, or continue a regulated communication, and, if so, whether any of the following extenuating circumstances exist:

- a. The regulated communication was inadvertent and did not affect the integrity or outcome of the procurement process;
- b. The regulated communication was initiated by the Mayor or a Council Member, the subject Proposer or Bidder advised the Mayor or Council Member of the regulated communication rule, and the subject Proposer or Bidder did not continue or engage in the regulated communication;
- c. The regulated communication was made under bona fide mistake of fact or law, other than a mistake or ignorance of the provisions of this Section, and the regulated communication was not material to the procurement. A regulated communication may be deemed material if it relates to any provision of a Bid Invitation, RFEI, RFP, RFQ, or specifications or other documents referenced therein, including documents responsive to a Bid Invitation, RFEI, RFP or RFQ, unless the regulated communication is so obviously insignificant and unimportant that it could be objectively found that no reasonable person would have been influenced by it, or attached any importance to it.

4. In the absence of extenuating circumstances, the subject Proposer may be sanctioned under this Section if doing so is deemed consistent with the objectives of this Section and in the best interest of the City.

5. The subject Proposer or Bidder may appeal the determination of the City's Purchasing Agent if that determination forms a basis of his or her recommendation for imposition of a sanction in accordance with the appeal procedures specifically applicable to the subject Bid Invitation, RFEI, RFP, or RFQ. In the absence of such a specifically applicable appeal procedure, the subject Proposer or Bidder may protest the determination of the Purchasing Agency, in accordance with Section 3.36.170 of this Code.

6. If a disclosure is made subsequent to the posting of the Council agenda, which includes notice of the consideration of the subject contract, then the Council shall refer the matter back to the Purchasing Agent for his or her evaluation, and report and recommendations, in accordance with this Section. (Ord. 1603(14) § 1)

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