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MEMORANDUM

TO: Honorable Council Members

CC: Jason R. Gabriel, General Counsel

FROM: Lawsikia J. Hodges, Deputy General Counsel, Government Operations
Margaret M. ("Peggy") Sidman, Deputy Legislative Affairs/Managing Deputy 

RE: **JEA Invitation to Negotiate #129-19 for Strategic Alternatives -
Cone of Silence Guidelines**

DATE: August 27, 2019

I. Purpose

The purpose of this memorandum is to provide you with recommended Cone of Silence Guidelines regarding the JEA Invitation to Negotiate #129-19 for Strategic Alternatives” issued on August 2, 2019 (the “JEA ITN Solicitation”). While several procurement practices and prohibitions described below tend to overlap with ethics and sunshine law requirements, any ethics or sunshine law concerns that you may have related to the JEA ITN Solicitation should be independently reviewed by our office.

II. Background

Several of you have inquired about the JEA ITN Solicitation and the extent to which the Ex Parte Communications Policy applies to City Council, individual council members, and immediate staff communications (collectively, the “Council”). In government procurement, the ex parte communications prohibition is commonly referred to as the “cone of silence.” The essential purpose of the cone of silence is to ensure fair, transparent, ethical and open competition in the procurement process and to secure the best values for the government at the lowest possible expense.¹ The cone of silence for the JEA ITN Solicitation began on August 2, 2019² and will remain in effect until the JEA Board makes a contract award³ (the “Cone of

¹ *Wester v. Belote*, 138 So. 721 (Fla. 1931).

² The JEA Solicitation is available at jea.com/strategicalternatives.

³ Any JEA Board contract award under this solicitation is subject to Council approval and subsequent voter referendum. Section 21.04, JEA Charter.

Silence Period”). The Cone of Silence Period will also apply to any bid protests and remain in effect until the JEA Board resolves such protests (i.e., grant or deny).

As shown on **Attachment 1** (JEA ITN Solicitation Approval Process), the Council⁴ is a clear *potential* decision-maker in the JEA ITN Solicitation procurement process. As such, it is important that the Council understands how certain communications regarding the JEA ITN Solicitation *may* directly or indirectly impact the fair, transparent, ethical and open procurement process. The JEA Board desires to meaningfully explore strategic alternatives for JEA’s future in this procurement process and, together with Vendors and Respondents,⁵ will invest significant amounts of time and resources. The Guidelines below are intended to assist you in determining whether your desired actions and communications regarding JEA during the Cone of Silence Period are appropriate. Our office recommends that all Council actions and communications regarding JEA during the Cone of Silence Period consider the guidance and associated procurement risks described herein.

III. Cone of Silence Guidelines (“Guidelines”)

The Guidelines below address the following topics: 1) Communications to Certain Parties; 2) Publicly Noticed Meetings; 3) Legislation; 4) FY2019-2020 Budget Approval Process; and 5) Associated Procurement Risks. The Guidelines are based on the relevant laws and provisions contained on **Attachment 2** and the Council (and Mayor) should adhere to the Guidelines during the Cone of Silence Period. Except for laws governing ethics, the Guidelines will no longer apply at such time that the Cone of Silence Period is no longer in effect⁶ (i.e., JEA Board contract award).

The Guidelines are intended to serve as a practical guide during the Cone of Silence Period only. Whether a specific communication or action by the Council is permitted or prohibited by law and best government procurement practices will vary depending on the type and content of the communication in question. When in doubt, and prior to making your desired action or communication regarding this matter, please do not hesitate to seek further advice from our office.

A. Communications to Certain Parties

1) Vendors and Respondents to the JEA ITN Solicitation

Communications of any kind between the Council and Vendors/Respondents regarding the JEA ITN Solicitation, including communications regarding process participation or interest in responding, are strictly prohibited.⁷

⁴ The Mayor is also a *clear* potential decision-maker in the JEA ITN Solicitation procurement process. Thus, the Guidelines also apply to the Mayor, including his immediate Mayoral staff.

⁵ “Vendors” and “Respondents” are defined in the JEA ITN Solicitation on Pg. 83-84.

⁶ The Cone of Silence Period will no longer apply when the JEA Board makes a contract award and all bid protests, if any, have been resolved. Any contract award shall be subject to Council approval and subsequent voter referendum.

⁷ As potential decision-makers to the JEA ITN Solicitation, the Council and Mayor will have the power to approve or reject the JEA Board’s contract award during the procurement process. The JEA Board’s *Ex Parte*

Communications between the Council and Vendors/Respondents regarding any matters unrelated to the JEA ITN Solicitation are permissible. However, Council should consider appearances of impropriety when engaging in any permissible communications with Vendors/Respondents.

2) Constituents and Other Members of the Public

Communications between Council and constituents and other members of the public (collectively, the “Public”) regarding possible Vendors/Respondents and the merits of the JEA ITN Solicitation terms are strictly prohibited.

Communications between the Council and the Public regarding JEA, JEA strategic alternatives, or JEA’s future *in general* are permissible so long as such discussions do not lead to discussions regarding the merits of JEA ITN Solicitation terms.

3) Social Media and News Interviews; Other Public Statements

Communications by the Council on social media, in news interviews or other public venues and forums regarding the merits of the JEA ITN Solicitation terms are strictly prohibited.

Communications by the Council on social media, in news interviews or other public venues and forums regarding JEA, JEA strategic alternatives or JEA’s future *in general* are permissible so long as such discussions do not lead to discussions regarding the merits of JEA ITN Solicitation terms.

B. Publicly Noticed Meetings

Town hall meetings and other publicly noticed meetings held by Council regarding the merits of the JEA ITN Solicitation terms are strictly prohibited.

Town hall meetings and other publicly noticed meetings held by Council regarding JEA, JEA strategic alternatives or JEA’s future *in general* are permissible so long as such discussions do not lead to discussions regarding the merits of the JEA ITN Solicitation terms.

C. Legislation

Legislation filed by Council regarding the JEA ITN Solicitation is strictly prohibited.

Legislation filed by Council regarding JEA, JEA strategic alternatives and JEA’s future *in general* is permissible so long as Council and Council committee discussions do not lead to discussions regarding the merits of the JEA ITN Solicitation terms.

Communications Policy prohibits communications between a bidder and JEA, its members, employees, agents, and *representatives*. Given the Council’s authority in the JEA Charter to approve or reject the JEA Board’s contract award, the Council in this limited procurement instance is acting as a representative and principal decision-maker of the JEA.

Ordinance 2019-566 regarding proposed changes to JEA employees' pension benefits is scheduled to be reviewed in Council committees the week of September 2, 2019. Any discussion on this bill regarding the merits of the JEA ITN Solicitation terms is strictly prohibited. However, any discussion regarding JEA employees' pension benefits or JEA strategic alternatives and JEA's future *in general* is permissible.

D. FY2019-2020 Budget Approval Process

Any discussion by Council during the FY2019-2020 budget ordinance approval process regarding the merits of the JEA ITN Solicitation terms is strictly prohibited.

Any discussion by Council during the FY2019-2020 budget ordinance approval process regarding JEA, JEA strategic alternatives or JEA's future *in general* is permissible so long as Council and Council committee discussions do not lead to discussions regarding the merits of the JEA ITN Solicitation terms.

E. Associated Procurement Risks

Associated procurement risks for the JEA Board, Vendors, Respondents, and the Council by engaging in prohibited communications during the Cone of Silence Period include, but are not limited to the:

- *Potential* for Vendors and Respondents to be disqualified from participating in the procurement process (which leads to less competition);
- *Potential* ethics complaints and other actions to be filed against public employees and public officers;
- *Potential* for Vendors and Respondents to be misinformed during the procurement process;
- *Potential* of frustrating the pending procurement process and re-soliciting bids;
- *Potential* for the time and resources invested by the JEA, Vendors/Respondents and the City to be expended needlessly; and
- Inability of the JEA Board to pursue its decision to *explore* strategic alternatives for JEA's future.

IV. Conclusion

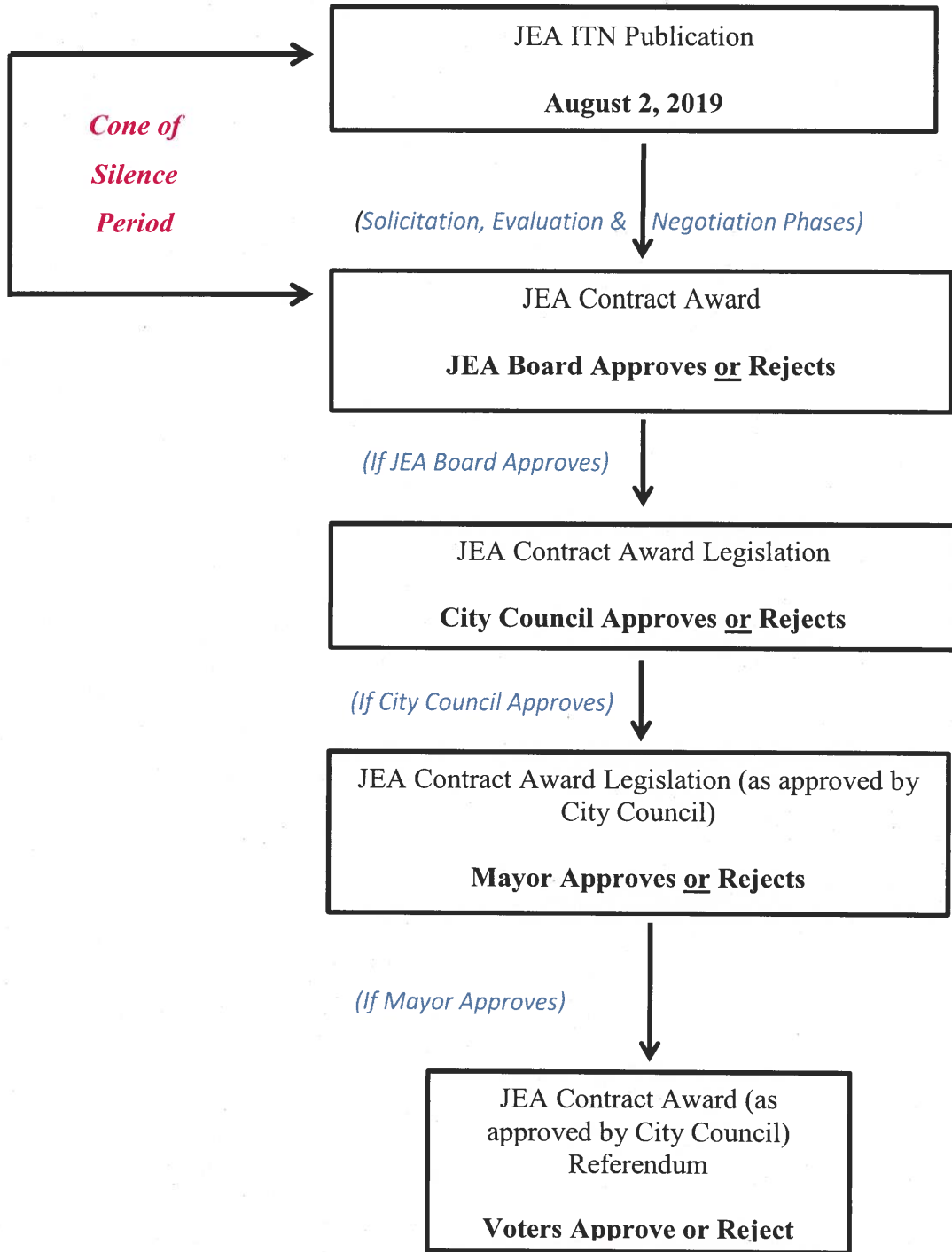
I trust that this memorandum provides the guidance you seek. As always, please do not hesitate to contact me with any questions or concerns whatsoever.

List of Attachments:

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|--------------|----------------------------------|
| Attachment 1 | ITN Procurement Approval Process |
| Attachment 2 | Relevant Laws and Provisions |

JEA ITN Solicitation Approval Process for City Agencies and Officials Only*

Attachment 1



* The City Approval Process shown above only includes City agencies and officials and does not include other required agency approvals.

Attachment 2

Relevant Laws and Provisions

I. Government Procurement Principles – Open/Fair Competition Concepts

Public policy favors competitive procurement whenever possible, even in the absence of controlling statutes and/or laws. *1966 Op. Att’y Gen. Fla. 066-9* (Feb. 7, 1966)

The purpose of public bidding is to protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in its various forms; to secure the best values for the [public body] at the lowest possible expense, and to afford an equal advantage to all desiring to do business with the [public body], by affording an opportunity for an exact comparison of bids. *Wester v. Belote*, 138 So. 721 (Fla. 1931).

Competitive procurement affords the public protection by preventing favoritism toward contractors by public officials. *City of Daytona Beach v. News Journal Corp.*, 156 So. 887 (Fla. 1934)

Public bidding seeks to ensure fair competition by providing equal terms/criteria for award of contracts. *City of Opa-Locka v. Trs. of Plumbing Indus. Promotion Fund*, 193 So.2d 29 (Fla. 3d DCA 1966)

II. JEA ITN #129-19 Provisions Regarding Communications

Ex Parte Communication is defined in the ITN as “inappropriate communication concerning the ITN between a firm submitting a Reply and a JEA representative during the time which this ITN is being advertised [through] the time of award. For more information on Ex Parte Communications, see JEA Procurement Code, Article 1-110.” *ITN, Pg. 81*

“Parties interested in making an offer related to JEA’s review of potential alternatives are required to participate in this ITN process, which will be integral to the report and recommendations that will be provided to the [JEA] Board of Directors and the Jacksonville City Council.” *Section 1.3 (Additional Information) of the ITN, Pg. 22*

“All communications regarding this ITN process should be directed to the Designated Procurement Representatives identified in Section 2.11, who will distribute communications to or solicit necessary information from JEA personnel, the Advisors, or subject matter experts as deemed appropriate.” *Section 1.4 (Advisors) of the ITN, Pg. 22*

“By signing the Reply, the Respondent certifies ... that its Reply is made without outside control, collusion, fraud, or other illegal or unethical actions. The Respondent shall comply with all JEA and City of Jacksonville ordinances, policies, and procedures regarding business ethics. *Section 2.12 (Ethics) of the ITN, Pg. 23*

III. JEA Procurement Code Provisions Regarding Ex Parte Communications

Section 1-110 of the Procurement Code provides, in relevant part, as follows:

(1) *Policy.* Ex Parte Communication denies any Company submitting a bid or proposal fair, open and impartial consideration. Adherence to procedures that ensure fairness is essential to the maintenance of public confidence in the value and soundness of the important process of public Procurement. Therefore, any Ex Parte Communication between a Company (or its employees, agents or representatives) and JEA (its members, Employees, agents, or representatives, other than the Chief Procurement Officer or Designee or JEA’s legal counsel) is strictly prohibited.

(2) *Periods.* Ex Parte Communication is prohibited during the following periods:

(a) from the advertisement of a Solicitation through the award of a Contract; and

(b) from the initiation of a protest of an Award or Contract through resolution of such protest.

IV. Florida Statutes – Procurement and Ethics Laws

Section 838.22(1) – Bid Tampering

(1) It is unlawful for a public servant or a public contractor who has contracted with a governmental entity to assist in a competitive procurement to knowingly and intentionally influence or attempt to influence the competitive solicitation undertaken by any governmental entity for the procurement of commodities or services, by:

(a) Disclosing, except as authorized by law, material information concerning a vendor’s response, any evaluation results, or other aspects of the competitive solicitation when such information is not publicly disclosed.

(5) Any person who violates this section commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Section 112.313(6) – Misuse of Public Position

No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege,

benefit, or exemption for himself, herself, or others. This section shall not be construed to conflict with s. 104.31.

Section 112.313(8) – Disclosure or Use of Certain Information

A current or former public officer, employee of an agency, or local government attorney may not disclose or use information not available to members of the general public and gained by reason of his or her official position, except for information relating exclusively to governmental practices, for his or her personal gain or benefit or for the personal gain or benefit of any other person or business entity.

V. Jacksonville Ordinance Code

Section 602.401 - Misuse of position, information, resources etc.

(a) Misuse of position, title, or authority. It is a violation of this Chapter for an officer, or employee of the City or an independent agency to intentionally use his or her official position, title or any authority associated with his or her public office to coerce, induce or attempt to coerce or induce another person, or otherwise act in a manner inconsistent with official duties, to obtain a special privilege or exemption, financial or otherwise, for himself, herself or others, or to secure confidential information for any purpose other than official responsibilities.

(b) Misuse of confidential information. It is a violation of this Chapter for an officer, or employee of the City or an independent agency to intentionally or knowingly disclose or use any confidential information gained by reason of said person's position for any purpose other than official responsibilities.