

OFFICE OF GENERAL COUNSEL  
CITY OF JACKSONVILLE  
117 WEST DUVAL STREET  
SUITE 480  
JACKSONVILLE, FL 32202  
PHONE: (904) 255-5050



## MEMORANDUM

**TO:** Honorable Council Members

**FROM:** Jason R. Gabriel, General Counsel

**RE:** Ex Parte (a/k/a Cone of Silence) Guidelines; JEA Invitation to Negotiate

**DATE:** September 24, 2019

### I. Purpose & Background

The purpose of this memorandum is to provide you with simple guidelines on Ex Parte (a/k/a Cone of Silence) communication requirements with respect to the procurement process related to the JEA's exploration of potential recapitalization, namely, JEA Invitation to Negotiate #127-19 for Strategic Alternatives issued on August 2, 2019 (the "ITN"). This memo summarizes and supplements previously issued guidance on this topic pursuant to a memorandum issued by this office dated August 27, 2019.

In government procurement, the ex parte communications restriction is commonly referred to as the "cone of silence." The essential purpose of the cone of silence rules 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.<sup>1</sup> The cone of silence for the ITN began on August 2, 2019<sup>2</sup> and will remain in effect until JEA (through its Board) makes a contract award<sup>3</sup> (the "Cone of Silence Period"). The Cone of Silence Period will also apply to any bid protests and remain in effect until JEA resolves such protests (i.e., grant or deny). As discussed, the Council<sup>4</sup> is a clear *potential* decision-maker in the ITN procurement process. This is a function of the City Charter. In particular, Section 21.04(p), Charter sets forth the following:

Nothing in this article shall authorize or be construed to authorize JEA to transfer any function or operation which comprises more than ten percent of the total of the utilities system by sale, lease or otherwise to any other utility, public or

<sup>1</sup> *Wester v. Belote*, 138 So. 721 (Fla. 1931).

<sup>2</sup> The JEA Solicitation is available at [jea.com/strategicalternatives](http://jea.com/strategicalternatives).

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

<sup>4</sup> 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.



private without approval of the council; provided, however, that no approval by the council shall become effective without subsequent referendum approval of the terms and conditions of the sale.

As such, the Council has ultimate legislative authority to decide whether such a transfer or sale is sent to the voters to decide. Accordingly, it is important that the Council understand how various types of communication regarding the ITN *may* directly or indirectly impact the fair, transparent, ethical and open procurement process. In order for the JEA Board to meaningfully explore strategic alternatives for JEA's future in this procurement process and, together with Vendors and Respondents,<sup>5</sup> it will invest significant amounts of time and resources. The guidelines below are intended to assist you in discerning appropriate actions and communications regarding JEA during the Cone of Silence Period.

## II. Ex Parte (Cone of Silence) Guidelines

The guidelines are based on applicable laws<sup>6</sup> and are relevant until such time that the Cone of Silence Period ends. The Cone of Silence Period ends and no longer applies when the JEA Board makes a contract award and all bid protests, if any, have been resolved. Of course, any contract award is subject to Council approval and subsequent voter referendum.

This summary is 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. There are two essential ITN-related communication restrictions<sup>7</sup> during the Cone of Silence Period: (1) communications with vendors or respondents to the ITN, and (2) communications regarding the merits of the ITN terms. These restrictions are explained below:

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<sup>5</sup> "Vendors" and "Respondents" are defined in the JEA ITN Solicitation on Pg. 83-84.

<sup>6</sup> 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). Also see *Florida Statutes, Section 838.22(1) – Bid Tampering, Section 112.313(6) – Misuse of Public Position, Section 112.313(8) – Disclosure or Use of Certain Information. City of Jacksonville, Ordinance Code, Section 602.401 – Misuse of position, information, resources etc.*

<sup>7</sup> These restrictions are analogous to state-level cone of silence requirements contained within Section 287.057(23), Florida Statutes. That law intended to prohibit contact between vendors and employees of the State related to on-going procurement processes. Such provisions are intended to serve two purposes: first, to ensure that no vendor is placed at an informational disadvantage while the procurement is ongoing and, second, to prohibit vendors from making contact during the pendency of a procurement "in an attempt to influence the decision makers." *Cubic Transp. Sys., Inc. v. Dep't of Transp.*, 2014 Fla. Div. Adm. Hear. LEXIS 468 at \*\*70-71, Case No. 14-2322BID (Fla. Div. of Adm. Hear. Sept. 4, 2014). As these analogous provisions illustrate, the prohibition is intended not only to prevent inappropriate contact with employees of the procuring agency itself, but likewise with any person that could have influence or appear to have influence, in either the executive or legislative branch, who a bidder may contact in an attempt to improperly influence the procurement process. Similarly here, JEA's prohibition on ex parte communications extends not only to JEA itself but also to representatives or agents of JEA, including the Council (Jacksonville's "legislative branch") and the mayor (Jacksonville's "executive branch").

### (1) Communications with Vendors/Respondents

Communications of any kind between the Council and Vendors/Respondents regarding the ITN, including communications regarding process participation or interest in responding, are strictly prohibited.<sup>8</sup> 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) Communications on the merits of the ITN terms

Communications between Council and members of the public, 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 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 ITN. This would also apply to legislation filed by Council. 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 ITN. The same applies during the budget process.

Procurement risks associated with engaging in prohibited communications during the Cone of Silence Period are covered in the previously referenced August 27, 2019 memorandum. Those risks include the potential for Vendors and Respondents to be disqualified from participating in the procurement process which in turn could reduce competition, perpetuate misinformation during the process, and counteract time, money and resources expended by JEA, Vendors/Respondents and others, in undertaking JEA's decision to explore strategic alternatives for JEA's future.

## **III. Conclusion**

As described above, there are essentially two (2) main ITN-related communication restrictions during the Cone of Silence Period: (1) communications with vendors or respondents to the ITN, and (2) communications regarding the merits of the ITN terms. All other policy-related discussion points with respect to the JEA are permissible. As always, please do not hesitate to contact me with any questions or concerns whatsoever.

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<sup>8</sup> 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 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.