

## MEMORANDUM

CLIENT-MATTER NUMBER  
123214-0101

**TO:** Lynne C. Rhode

**FROM:** Robert H. Hosay  
Benjamin J. Grossman

**DATE:** August 21, 2019

**RE:** Prohibitions on *Ex Parte Communications* and Limitations on Communications to Ensure Fair and Open Procurement Process

---

You have asked us to advise regarding the applicability of the prohibition on *Ex Parte Communications*, which is in place during the conduct of Invitation to Negotiate (“ITN”) #127-19, entitled “Strategic Alternatives,” to members of the City of Jacksonville City Council (the “Council”). As you know, prohibitions on *ex parte* communications are standard in government procurements, are required in all JEA procurements pursuant to JEA’s Procurement Code, and are similarly imposed by Florida law in state-level procurements and called for under the governing rules of most government jurisdictions. With respect to the question that you have posed to us, in short, we conclude that there is a strong basis to read the prohibition on *ex parte* communications as applying to members of the Council, and that the City of Jacksonville and the Council would best serve the public purposes underlying the prohibition on *ex parte* communications by abiding by the communication limits contained within JEA’s purchasing policies.

### Analysis:

On Friday, August 2, 2019, JEA released ITN #127-19, entitled “Strategic Alternatives.” The release of the ITN caused a prohibition on *ex parte* communications between potential bidders and JEA and its representatives (commonly referred to as a “cone of silence”) to take effect. This prohibition is described in more detail in section 1-110 of the JEA Procurement Code. As the Procurement Code states, “adherence to procedures that ensure fairness is essential to the maintenance of public confidence in the value and soundness of the important process,” and *ex parte* communications have the potential to deny fair, open, and impartial consideration to companies that may submit a response to the ITN. To ensure that this procurement is conducted in a fair, open, and impartial manner, communications between potential bidders (including their employees, agents, or representatives) and JEA (or its members, employees, agents, or representatives) are strictly prohibited between the time of the ITN’s release and the award of a contract resulting from the ITN. As explained below, because the Council is potentially a decision

maker with respect to the ITN process and, by the express terms of section 21.04 of the City Charter, may be asked to approve a potential transaction resulting from this ITN process, this prohibition on *ex parte* communications extends to members of the Council.

“*Ex Parte Communication*” is defined by the JEA Procurement Code as meaning “any oral or written communication relative to a Solicitation, evaluation, Award or Contract controversy that occurs outside of an advertised public meeting pursuant to Section 286.011, F.S.” The JEA Procurement Code, in turn, sets forth a prohibition on *Ex Parte Communication*, subject to a few narrow exceptions, at Section 1-110. This provision 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.

While there are certain limited exceptions to the prohibition on *ex parte* communications, each of these exceptions relate to formal activities conducted by JEA as part of the procurement or protest process (such as pre-bid meetings, site visits, negotiation sessions, meetings of the Awards Committee, or formal communications as part of the protest process), communications between a current-JEA contractor and JEA staff relating to work currently in process and unrelated to the procurement, or questions directed to the designated procurement point of contact identified in the solicitation documents.

As a practical matter, this prohibition on *ex parte* communications means that, from the time of the ITN’s release to the point at which an award is made, no conversations or communications relating to the ITN should occur between potential bidders and JEA employees, agents, or representatives other than communications between potential bidders and the Designated Procurement Representatives identified in the ITN (John McCarthy and Jenny McCollum) or communications at meetings formally scheduled by JEA as part of the procurement process. “The award of a Contract” is made, triggering the end of the prohibition on *ex parte* communications that accompanies the advertisement of the ITN, at the point that the JEA Board has considered the recommendation of the Negotiation Team and voted to make a contract award under the ITN. It is important to note, however, that under section 1-110(2)(b) of the Procurement

Code, the filing of a protest to the procurement process would result in the prohibition on *ex parte* communications going back into effect until the conclusion of the protest process.

This provision is analogous to the state-level cone of silence contained within section 287.057(23), Florida Statutes. The current state-level cone of silence requires each solicitation issued by an agency subject to chapter 287 to include the following statement:

Respondents to this solicitation or persons acting on their behalf may not contact, between the release of the solicitation and the end of the 72-hour period following the agency posting the notice of intended award, excluding Saturdays, Sundays, and state holidays, any employee or officer of the executive or legislative branch concerning any aspect of this solicitation, except in writing to the procurement officer or as provided in the solicitation documents. Violation of this provision may be grounds for rejecting a response.

§ 287.057(23), Fla. Stat. This provision was adopted into law by the Florida Legislature in 2006 as section 1 of Chapter 2006-224, Laws of Florida, and was intended to formalize the prohibition on contact between vendors and any employee of the State relating to an on-going procurement. *Senate Staff Analysis and Economic Impact Statement*, CS/CS/SB 2518 (Fla. S. Ways and Means Comm. Apr. 4, 2006) at pp. 7-8. Prior to adoption of this provision, state agencies were required to include in each procurement a form developed by the Department of Management Services that provided, in part, that “Respondents shall not contact any other employee of the Buyer or the State for information with respect to this solicitation.” *Id.* These 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 make clear, 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”).

As the policy portion of Section 1-110 of the Procurement Code recognizes, the prohibition on *ex parte* communications is necessary because “adherence to procedures that ensure fairness is essential to the maintenance of public confidence in the value and soundness of the important process,” and *ex parte* communications have the potential to deny fair, open, and impartial consideration to companies that may submit a response to the ITN. The Florida Supreme Court long ago held that the purpose of public bidding laws 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, 723-24 (Fla. 1931). These objectives have been interpreted to mean that the acts prohibited during a public procurement as contrary to competition “include those which: (a) create the appearance of and opportunity for favoritism; (b) erode public confidence that contracts are awarded equitably and economically; (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or (d) are unethical, dishonest, illegal, or fraudulent.” *CTS America v. Dep’t of Highway Safety and Motor Vehicles*, 2011 Fla. Div. Adm. Hear. LEXIS 264 at \*\*61-62, Case No. 11-3372BID (Fla. Div. of Adm. Hear. Oct. 19, 2011). That a prohibited contact may not actually have the effect of corrupting the process or providing an informational advantage is not relevant to the prohibition: the simple potential of prohibited contact to have such an effect, or the appearance of impropriety that may result from prohibited contact, are themselves to be avoided. See, e.g., *Roam Secure, Inc. v. Div. of Emergency Mgmt.*, 2008 Fla. Div. Adm. Hear. LEXIS 218 at \*\*23-24, Case No. 07-5454BID (Fla. Div. of Adm. Hear. Apr. 23, 2008) (“Roam argues that its communications to DEM during the no-contact period were harmless since DEM chose NTI’s proposal over Roam’s proposal. Notably, the success or lack thereof of a prohibited communication is not what makes it unlawful. Mr. Tiene chose to both call and email Mr. Hagan with unsolicited information during the no-contact period. Roam, thus, should have been disqualified from participation in the RFP process.”).

Because of these important purposes, competitive bidding laws such as JEA’s prohibition on *ex parte* communications must always receive a construction that ensures these objectives are met and that the laws are not circumvented. *Wester*, 138 So. at 724. As the Florida Supreme Court again explained:

Insofar as they thus serve the object of protecting the public against collusive contracts and prevent favoritism toward contractors by public officials, and tend to secure fair competition upon equal terms to all bidders, they remove temptation on the part of public officers to seek private gain at the taxpayers’ expense, are of highly remedial character, and should receive a construction always, which will fully effectuate and advance their true intent and purpose and which will avoid the likelihood of same being circumvented, evaded or defeated.

*Id.*

Consistent with the public policy articulated by the Florida Supreme Court in the *Wester* decision, the prohibition on *ex parte* communications contained within JEA’s Procurement Code should be given a broad construction that effectuates its purpose of preventing both anticompetitive conduct and attempts to influence the process, or the appearance of or opportunity for such actions. Thus, to the degree that there is any question as to whether the provision applies to members of the Council, this question should be resolved in favor of finding that the provisions apply to ensure

that the purposes of the prohibition are served and impropriety, or the appearance thereof, are avoided such that public confidence in the procurement process is not eroded.

Under this analysis, it appears clear in this context that members of the Council should be considered representatives or agents of JEA who are subject to the prohibition on *ex parte* communications contained in Section 1-110 of the Procurement Code. One Florida appellate court has analyzed the meaning of the word “representative” as follows:

Black’s Law Dictionary 1302 (6th ed. 1990), defines “representative” as “[a] person or thing that represents, or stands for, a number or class of persons or things, or is equivalent to, another person or thing.” Black’s Law Dictionary recognizes that when one represents another in a special capacity as an agent, the term “representative” may be interchangeable with the term “agent.” However . . . the terms “agent” and “representative” are not synonymous.

*Breed Techs. v. AlliedSignal, Inc.*, 861 So. 2d 1227, 1232 (Fla. 2d DCA 2003) (analyzing meaning of terms “representative” and “agent” for purposes of venue statutes). Given that the Council will be asked to play a role in and approve any transaction that may result from the ITN, *see* § 21.04(p), *Charter of the City of Jacksonville, Florida*, has approval authority over the JEA budget, *see id.* at § 21.07(b), and expressly has legislative authority over JEA as provided in section 21.11 of the City Charter, it would be difficult to argue that the Council does not “represent” or “stand for” JEA, at least in some respects, with respect to the ITN. Further, to the degree that a Councilmember attempted to exert influence over the JEA solicitation process, or held him or herself out as having the ability to influence the process, such actions would certainly appear to confirm that such Councilmember is a “representative” of JEA with respect to the process. Moreover, particularly in light of the well-established public policy in favor of fair and open procurements, as well as the clear purpose of the prohibition on *ex parte* communications to prohibit attempts to influence the procurement process and eliminate potential unfair advantages, it appears clear that, as a matter of policy, the Council and its members should ensure that their actions are consistent with this policy and purpose. As a result, Council members are prohibited from communicating with any potential bidders or their employees, agents, or representatives.

While it is understandable that members of the Council may be interested in – or wish to have a say regarding – this procurement process, as the City Charter provides, the appropriate time for them to do so is when any proposed transaction requiring Council approval is brought before the Council. As it is possible that this procurement never results in a transaction that would come before the Council, any attempt to become involved prior to that time would be premature. Taking meetings with any interested parties, or any direct or indirect communications, would be clearly prohibited under the terms of the JEA Procurement Code. Similarly, constituent communications (even if conducted on an individual basis or in a public meeting) relating to the ITN would be problematic under the prohibition given that the “cone of silence” prevents communications with both potential bidders and their employees, representatives, or agents. Because Council members are not the Designated Procurement Representatives under the ITN and such communications are not part of the formal ITN process, and such communications thus would not constitute



communications coming within one of the enumerated limited exceptions to the prohibition. Moreover, while the Council can certainly consider legislation relating to JEA during the pendency of the procurement, any legislation that would interfere in the process or address any individual participants would likely be problematic. This is, however, not intended to be an exhaustive list of actions that may be included within the prohibition on *ex parte* communications, and any fact based inquiries that the Council may have should be brought to the attention of the Office of General Counsel so that appropriate guidance can be provided.

In addition to the provisions of the JEA Procurement Code, Florida law also contains provisions that are relevant to this analysis. Specifically, section 838.22, Florida Statutes, the bid tampering statute, makes it unlawful for any public servant to knowingly and intentionally attempt to influence a competitive government procurement. This statute provides in relevant part that:

**It is unlawful for a public servant . . . 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.**

§ 838.22(1), Fla. Stat. (emphasis added). It is important to note that this prohibition, by its express terms, does not only prohibit a public servant from attempting to influence a competitive procurement by the entity for which he or she works, but instead prohibits attempts to influence solicitations “undertaken by *any governmental entity*.” *Id.* (emphasis added). Thus, even if one were to assume for the sake of argument that members of the Council were not encompassed within the terms of the prohibition on *ex parte* communications contained within the JEA Procurement Code, section 838.22, Florida Statutes, would still serve to limit their ability to disclose non-public information relating to the procurement. The bid tampering statute is a criminal statute and imposes substantial penalties, providing that a violation of its terms constitutes a felony of the second degree. § 838.22(5), Fla. Stat.

### **Conclusion:**

In short, the prohibition on *ex parte* communications or “cone of silence” applies to the Council because the City and Council are or may appear to be “members, [e]mployees, agents, or representatives” of JEA. While the cone of silence does not prevent or preclude the Council from conducting the City of Jacksonville’s business in its ordinary course, it does prohibit communications between members of the Council and potential bidders or their employees, agents, and representatives. In addition, Council members should be aware of the provisions of section 838.22 and ensure that they do not take actions that could be interpreted as an attempt to influence the competitive solicitation undertaken by JEA through the disclosure of non-public information relating to the solicitation.



FOLEY & LARDNER LLP

The Strategic Alternatives ITN is an important, time-consuming, and costly procurement that is currently being undertaken by JEA and is subject to a prohibition on *ex parte* communications. It would be prudent to take every reasonable precaution in order to mitigate any risk to the process. Thus, if there are Council duties or work that could potentially implicate JEA or the Strategic Alternatives ITN, we would recommend that the Council mitigate risk where it is possible to do so by deferring the activity until the expiration of the prohibition on *ex parte* communications and seeking advice from counsel.

\*\*\*

Notwithstanding the analysis set forth above, it should be expressly noted that our analysis does not constitute a guaranty or a defense to a contrary decision which may later be rendered by appropriate authorities, which have broad discretion to interpret and apply the applicable laws, or by a court construing the same laws. This analysis is limited to the laws of Florida in effect on this date, and we have not analyzed the laws of any other jurisdiction. This analysis is intended to apply only to those facts and circumstances that exist and have been brought to our attention as of the date of this memorandum, and we assume no obligation or responsibility to update or supplement this analysis to reflect any facts or circumstances that may come to our attention after that date or any changes in laws that may occur or have occurred this date, or to inform you of any change in circumstances occurring after the date of this memorandum that would alter this analysis.

This analysis is being provided solely for your benefit and is limited to the matters expressly described or adopted by reference in this memorandum, and no conclusions may be inferred or implied beyond the matters expressly stated in this memorandum. This analysis may not be used or relied upon for any other purpose or by any other party without our prior written consent.