

## Late Backup

### **COMMENTS SUBMITTED TO AUSTIN CITY COUNCIL ON ITEM #20: BENEFICIAL REUSE OF BIOSOLIDS**

Mayor Adler and City Council, thank you for your consideration on this item.

I'm Bob Gregory with Texas Landfill Management, TLM, which is a sister company of Texas Disposal Systems, TDS.

TLM is the largest composter in the region, and has many years experience with biosolids composting.

As you know, this solicitation process has been going on for 2 ½ years. A lot has happened during that time.

I have to start with the backup memo that staff distributed to you on this item.

#### **SEE: 10-29-18 CITY STAFF AGENDA ITEM BACKUP MEMORANDUM**

This memo is misleading in a number of ways.

Just like every time this has come before you, staff is telling you once again that this is an emergency.

They are telling you that if you don't act today to authorize execution of a contract that no one has seen that awful things are going to happen.

Anyone who's been around Austin for a while remembers that former Council Member Daryl Slusher once put out list of "top ten ways to spot a City Hall boondoggle."

One of those rules was that it might be a boondoggle if it's said to be an "emergency."

Another rule was that it might be a boondoggle if "the contracts were

available only hours before they were to be approved, or even after the meeting started."

So it's obviously even more qualified to be a boondoggle when the contracts aren't even available at all.

That's exactly the situation here today.

Staff is telling you that there is an emergency, and that you must authorize them now to execute a decade-long, multi-million dollar contract to fix it.

What they aren't telling you is what's actually in that contract.

What I want to tell you is that the limited backup that is available tells me that this contract has the potential to result in enormous unnecessary expense, and hugely negative environmental impacts if emergency conditions allow offsite land application or landfilling of biosolids sludge.

Based on what I see, authorizing the negotiation and execution of a contract today leaves the door wide open to wasting many, many millions of dollars, and ultimately undermining the Dillo Dirt program.

So I want to talk to you today about the PRODUCT and the PROCESS.

The PRODUCT is the solicitation and the proposed contract. The PROCESS is the way in which staff has managed this solicitation.

Starting with the product – there are some basic things that are important to understand before you proceed in any direction.

The first thing to know is what your options really are for managing biosolids.

You have three choices when it comes to biosolids. The first two are disposal. You can either landfill it, or you can do offsite land application, which is spraying sludge it on rural pastureland.

The third option is to recycle your biosolids by composting them. That's exactly what Dillo Dirt is – biosolids compost.

This does not include the bogus composting procedure practiced by Synagro in California, consisting of just heat treating the sludge and declaring it stabilized and mature compost so it can be land applied without a state biosolids sludge land application permit.

Responsibly composting Austin's biosolids into Dillo Dirt, and marketing it locally, is the best option both environmentally and economically.

To illustrate the economics, look at the bids submitted by Synagro.

Their price for composting is \$13.93 per ton, but their price for offsite land application is \$52.72 per ton – 4 times as much:

### SYNAGRO'S PER TON PRICING

	CURRENT	NEW	DIFF.
COMPOST	\$26.45	\$13.93	-55.76%
LAND APP.	\$34.80	\$52.72	+27.25%
LANDFILL	\$39.14	\$59.72	+28.15%

Now let's understand how a stable, mature, marketable biosolids compost is actually made. This is critical.

You make real biosolids compost – Dillo Dirt – by mixing and composting biosolids sludge together with bulking agent.

Bulking agent is any kind of clean, organic, biodegradable waste - grass, leaves, brush, mulch, soiled paper, untreated unpainted wood, and on so on.

A standard "recipe" for biosolids compost in this region is a minimum of **4 parts bulking agent to 1 part biosolids** - a "4-to-1" recipe.

If you don't have a recipe of at least 4 parts bulking agent to 1 part biosolids sludge, you are going to have odor and pest problems on site.

So, all of this leads to one very important question about the contract that you are being asked to authorize without seeing:

**Will the contract allow staff and the vendor, Synagro, to decide to dispose of biosolids rather than properly compost them simply because Synagro is not able to supply enough bulking agent to compost everything based on a 4-to-1 recipe?**

It's a simple but critical question.

Because if deciding to dispose rather than compost is only a matter of whether Synagro has supplied enough bulking agent to compost all of your biosolids based on a 4-to-1 recipe, then the cost of this contract could easily soar far beyond anyone's expectations.

It's important to realize that the City will not be in a position to supply any meaningful amount of bulking agent to Synagro to compost 100% of the biosolids.

In fact, the City's current main source of bulking agent - the organic waste collected curbside by ARR - will all have to be diverted from Hornsby Bend by 2020 because it will have food waste mixed in, as the green carts are deployed citywide.

Food waste can't be processed at Hornsby Bend because the FAA doesn't allow it near airports, because of the birds.

That means within the next 24 months, I expect that the City will only be able to supply a small fraction of the bulking agent needed to compost all City biosolids based on a 4-to-1 recipe.

Given all that, you would think staff would show you a proposed contract that contains one simple provision – a requirement that Synagro supply enough bulking agent to make Dillo Dirt from all of Austin's biosolids, based on a minimum 4-to-1 recipe.

The corollary provision would be that no disposal would be allowed by any so-called "emergency" created simply by Synagro being unable to supply sufficient bulking agent for 100% composting.

Will this contract include that simple provision?

I hope you will ask that question directly and get a clear answer, because as far as I can tell, the answer is definitely not.

In the backup I see no mention of any guarantee to supply enough bulking agent to compost all biosolids, and no mention of any guarantee to actually compost all biosolids into Dillo Dirt.

What I do see is a likely provision for loosely defined "emergencies" – basically an easy out for Synagro to transition from composting to disposal, at ANY time, at nearly 4 times the cost.

In fact, if you look at the budget allocation on this item, it seems clear that staff is already planning for Synagro not to compost all biosolids.

**SEE: RECOMMENDATION FOR COUNCIL ACTION**

The solicitation asked for bids to process 110,000 wet tons of biosolids sludge per year. Over 10 years, that's 1.1 million tons.

At Synagro's price of \$13.93 per ton, that's \$15.3 million, but staff is asking for \$19.3 million.

What's the other \$4 million for? CPI adjustments couldn't account for all of that. Even a projected increase in the volume of biosolids couldn't account for it.

So what is it for? I'm worried that I know the answer.

You need to know that Synagro's core business across the country is not composting – it's land application. Disposal. That's primarily what they do.

SEE: SYNAGRO – LAND APPLICATION

As far as I can tell, this contract may allow Synagro to stop making Dillo Dirt and start offsite land application simply by running out of bulking agent, or by creating an odor problem by having and using too little of it.

So, instead of a \$19 million contract, the City's cost might eventually be \$29 million, or \$39 million, or \$49 million – or even \$57.9 million if Synagro offsite land applied all of the City's biosolids.

Remember, Synagro is currently managing Austin's biosolids. In reviewing the available records for 2018, they show that Synagro land applied almost **58%** of your biosolids through August.

If they continued to dispose of **58%** of biosolids for the duration of this new contract, it would cost the City approximately **\$40 million** instead of the budgeted \$19 million.

Please look again at Synagro's pricing and note that while their price for composting has gone down 55% from their current contract, their price for both disposal options has gone up by more than 27%.

The bottom line going into a new contract is that without a guarantee that Synagro will independently supply enough bulking agent to make Dillo Dirt from all of your biosolids sludge based on a 4-to-1 recipe – and a guarantee to do exactly that – you simply have no what the final cost of this contract might be.

And in the absence of those guarantees, it is indefensible to suggest that Synagro is the low-price bidder. You don't know.

I also have to point out that without these guarantees, you're creating a situation that allows and even encourages staff to exercise flow control over organic waste – such as construction and demolition waste and commercial recyclables – in order to deliver enough bulking agent to Synagro to compost all the City's biosolids.

Municipal flow control over waste streams – where staff dictates to which processing or disposal facilities waste must go – is a death sentence for competition. It cannot be allowed if you want the free market and competitive options to continue to work in Austin.

This contract, if it has no guarantees built in, would essentially set up a choice – either implement flow control, or pay Synagro more and more money for offsite land application. That's very troubling.

The last PRODUCT issue is grinding.

To be used in composting, bulking agent has to be ground up. For all City-controlled organic waste, that grinding is done on-site at Hornsby Bend by Austin Resource Recovery (ARR).

ARR doesn't charge AWU for grinding, but it costs ARR a lot of money. Based on the City's figures, in FY17, ARR spent \$36.22 per ton on grinding. They ground 35,000 tons, spending around \$1.26 million. It's been even more than that in previous years.

Before ARR took it over, TLM used to provide grinding service to the City at Hornsby Bend under our 30-year contract with the City. And in both of the responses that TLM submitted, we proposed to again provide grinding on-site, at a cost of \$9.11 per ton – about 25% of what ARR now spends.

Last year that would have saved the City nearly \$1 million. Even with the reduction of City-controlled organic waste coming to Hornsby Bend based on the green cart rollout, TLM would honor its \$9.11 bid, while ARR's cost per ton would only increase as volume decreases.

That means there is still PLENTY of money to be saved – but ARR doesn't seem to want to save it. Why? Please ask this question of staff, because I can't get an answer:

**ESTIMATED COST SAVINGS FOR  
GREEN WASTE GRINDING SERVICES PROPOSED BY TLM**

<u>ARR Budget For Grinding <sup>1</sup></u>	<u>Annual Volumes <sup>2</sup></u>	<u>ARR's Calculated Unit Cost</u>	<u>TLM's Unit Cost to City</u>	<u>Annual Savings to City</u>
FY2017 \$1,268,024	35,000 tons	\$36.22 per ton	\$9.11 per ton	\$949,174
FY2016 \$1,367,015	35,000 tons	\$39.05 per ton	\$9.11 per ton	\$1,048,165

By the way, this is not a new issue, as staff suggested it is in their backup memo.

TLM proposed grinding in our RFP response nearly a YEAR ago, and we have been asking about it ever since.

To summarize, the three big PRODUCT questions are:

- 1. Will staff require the contractor to independently supply enough bulking agent to compost all of Austin's biosolids based on a 4-to-1 recipe?**
- 2. Will staff require the contractor to actually compost all of the City's biosolids, and disallow so-called "emergency" disposal based on the supply of bulking agent?**
- 3. Will staff include on-site grinding of City-controlled organic waste as part of the biosolids contract?**



Now let's talk about PROCESS. If there is reason enough to pause based on the PRODUCT, which I think there is, there's an excess of reason based on PROCESS.

There is no other way say it – this solicitation has been mismanaged and compromised from the beginning. This is a big part of the reason that ZWAC voted not to support staff's recommendation.

**WATCH: ZERO WASTE ADVISORY COMMISSION MEETING**

Over 2 ½ years, there have been three solicitations. Some of you may recall that the first solicitation was canceled by the City Council.

The big reason for that was staff's failed policy – the solicitation didn't actually require the contractor to make any stable, mature compost, effectively terminating the Dillo Dirt program.

Unbelievably, staff's backup memo on this item says that Synagro committed to compost 100% of your biosolids in response to that first solicitation. That is entirely untrue.

The other reason you cancelled that solicitation was that staff set up an evaluation process that violated the anti-lobbying ordinance.

Staff told you that it was their fault and suggested you waive the ALO retroactively – which you did – so Synagro could participate in the subsequent solicitation.

But what staff appears NOT to have told you back then was that there had been OTHER communications between Synagro and City officials during that period that had nothing to do with staff's evaluation. The following email suggests that Synagro should have been disqualified under the ALO back then – but they weren't:

From: McClure, Monica  
To: Lord, Danielle  
Subject: RFP CDL2003-Beneficial Reuse of Biosolids  
Date: Monday, October 17, 2016 8:23:26 PM

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RE: Potential violation of Anti-Lobbying Ordinance

Danielle:

At approximately 7:20 today, October 17, 2016, I returned a telephone call from Andrew Bosinger of Synagro. I had expected to get his voice mail as in his voice message left for me at 2:11 PM earlier on this date, he indicated he was boarding a plane. Andrew answered his phone and indicated his plane had landed in Austin and he would be attending Council's Work Session meeting tomorrow morning. In Andrew's voice message earlier, he had asked whether I had received a response from Austin Water concerning incorporation of a provision into the contract which had been suggested by the Texas Commission on the Environment. I had earlier that day spoken with Judy Musgrove but she said they would have to discuss and get back with me. This evening, I was returning Andrew's call, fully expecting to get his voice mail, to simply indicate I had no update from Austin Water, and suggest that he refrain from speaking directly to James Scarboro at the Work Session meeting tomorrow to lessen any further allegations of anti-lobbying.

Andrew went on to discuss with me "what he was hearing". He explained that his attorney, Nikelle Meade, was contacted by several Council members today who all indicated that TDS representatives were in their offices lobbying for delay of this item (on Council's Agenda presumably). The Council members asked Nikelle why the item should not be delayed. According to Andrew, Nikelle responded to the Council members and explained that the procurement had been sent to Committee which then formed the Work Group, and that these groups had all reviewed, vetted and approved the item and further delay was unnecessary. I specifically asked Andrew again how Council Members knew to contact Nikelle. Andrew responded and said that they all know that Nikelle represents Synagro. Andrew also mentioned Brandi Policy Aid (to the Mayor) and that she had also possibly contacted Nikelle with questions.

You may remember that TLM didn't respond to that first solicitation because of staff's previous problems with applying the ALO fairly.

But when the second solicitation came out, TLM was able to respond because Council had suspended the ALO.

The second solicitation was also very different from the first in terms of policy, and actually required preserving the Dillo Dirt program – another reason it's so disturbing now to see staff misrepresent Synagro's response to the first solicitation.

So TLM responded – and we were the low bidder. And yet, staff once again recommended Synagro.

So we protested, and we had our case heard by an independent examiner brought in by staff, Pamela Lancaster.

After the examiner reviewed everything, she concluded that portions of our proposal had been “completely overlooked”; that our proposal was evaluated in “piecemeal fashion”; and that our proposal’s strengths were actually scored by staff as weaknesses:

SEE: PAMELA LANCASTER REPORT AND RECOMMENDATION

Based on that, she recommended our proposal be re-scored by different staff evaluators. Clearly that would have been the right thing to do.

Instead, staff rejected her recommendation – the only instance we know of when that has happened – and then asked both Synagro and TLM to give the City ‘best and final’ offers.

And then, during that ‘best and final’ offer process, in response to an information request, staff released TLM’s entire RFP response directly to Synagro’s lobbyist.

This meant that Synagro had access to our confidential bid price and the rest of our proposal. Staff told you, and later us, that the release of our proposal was “inadvertent” – and because of it, they then cancelled the second solicitation.

So now comes the third solicitation, which was – and is – substantively identical to the second, with the exact same Scope of Work. Except staff changed the third solicitation from an RFP to an IFB, so that price – with and without grinding – became the only evaluation factor.

To be clear about what happened – staff gave Synagro our price, which was the low bid, then cancelled that RFP, then reissued it, with the same Scope of Work, but as an IFB, based only on price!

So guess what happened? Synagro lowered their price on the third solicitation to beat ours by 4%.

And that is exactly 1% less than a bid that would have allowed you, the Council, under state law, to choose a local vendor to receive the contract, instead of staff's recommendation, without having to throw out the IFB.

I just don't see how anyone could possibly believe it was a coincidence that Synagro had our price and then bid exactly 1% less than would have allowed you to choose us instead of them.

Synagro will tell you now that yes, they may have had our price – but they didn't look at it. I don't find that believable.

At the same time, staff wants you to believe now that the second and third solicitations were actually very different – but that's not true, either.

The IFB contained staff-generated plans previously proposed by respondents, but didn't change the party responsible for implementing those plans. And again, the Scope of Work was exactly the same.

Regardless of all that, to illustrate how unfair this all was, TLM filed our own information request – to get Synagro's response to the second solicitation. But this time, of course, City staff sent the request to the Attorney General for review, and then denied our request.

And so TLM protested again. We said: If you cancelled the second solicitation because you gave Synagro our price, how could it be OK to issue a third solicitation with the exact same Scope of Work?

This time staff didn't even give us a hearing, they just denied our protest. In fact, not only did they deny our protest, they also changed their story from it being an accident that they gave Synagro

our proposal to it being OK that they did, because our RFP response wasn't marked "confidential:"

SEE: CITY STAFF REJECTION OF TLM PROTEST

The problem with that, as Synagro's own lobbyist pointed out in her letter to the Attorney General asking that their proposal not be released to us, is that under the Texas Public Information Act, a proposal doesn't have to be marked confidential to be protected.

Staff will tell you that the City's bid instructions say that anything not marked "confidential" may be released, but we – and Synagro's lobbyist – believe that is not how state law works.

And Council, I do have to point out the richness of this letter from Synagro's lobbyist to the Attorney General, arguing that to release THEIR proposal to US would give us an unfair advantage, without ever mentioning that they already had our proposal sitting right there on their desk.

SEE: SYNAGRO LOBBYIST LETTER TO ATTORNEY GENERAL

You also need to know that TLM bid exactly the same price on the third solicitation as we did on the second – not only because it was exactly the same Scope of Work, but also because of how compromised the process had been. Synagro's lobbyist told ZWAC that we changed our price – but that's simply untrue.

WATCH: ZERO WASTE ADVISORY COMMISSION MEETING

There is one final PROCESS issue to raise. Through all three of these solicitations, staff has refused to include local business presence as an evaluation factor.

That's despite the recommendation of the City Council Waste Management Policy Working Group to do so – and in fact to revise that definition specifically for waste-related solicitations. That was a recommendation made by Council Members Kitchen, Pool, Garza and Alter.

SEE: CITY COUNCIL WASTE MANAGEMENT POLICY WORKING  
GROUP RECOMMENDATIONS

And yet on the very first waste-related solicitation to be issued after that Council recommendation, staff simply ignored you and removed local business presence points altogether. Why?

So Council, we've talked about the PRODUCT and we've talked about the PROCESS. The bottom line is that this item is riddled through with unknowns and irregularities.

You are being asked to authorize a contract no one has seen, at great financial and environmental risk.

If the contract indeed allows staff and Synagro to easily declare a "emergency" requiring offsite land application or landfill disposal based only on whether Synagro has supplied enough bulking agent to responsibly compost all biosolids – in other words, saying they are "responsible" for composting everything, but then giving them the easiest of outs – the City is definitely looking at a fiscal and environmental FAIL.

And, the integrity of this process was plainly, undeniably compromised.

City staff said in their agenda item backup memo this week that they "resolved" giving our RFP response to Synagro by issuing a new solicitation. Nothing was resolved by that. In fact it only helped Synagro more when staff changed the RFP to an IFB for the exact same scope of work.

So Council, here's what I am asking of you. The last point at which the integrity of this process was still salvageable was before staff gave our RFP response to Synagro. I am asking you to take this process back to that moment, when staff had asked Synagro and TLM to participate in a 'best and final' offer process.

What I propose is that you direct staff to cancel this third solicitation and once again initiate a 'best and final' offer process with only Synagro and TLM – but this time, with specific direction to provide offers based on the guarantees we've just discussed:

- **The City should REQUIRE the contractor to independently supply all bulking agent needed to responsibly compost all biosolids based on a 4-to-1 recipe.**
- **The City should REQUIRE the vendor to actually compost everything, and not allow for any "emergency" disposal based solely on the contractor's ability to supply bulking agent.**
- **The City should REQUIRE the vendor to grind all City-controlled bulking agent delivered to Hornsby Bend.**
- **And the City should honor the Working Group recommendation and REQUIRE local business presence as an evaluation factor in the 'best and final offer' solicitation.**

I believe that such a solicitation would be different enough from the previous solicitations to "de-compromise" this process – assuming that staff can manage it appropriately going forward.

I hope that you will not choose today to authorize negotiation or execution of a contract with Synagro. It is not the case that there is a crisis that must be addressed today. Staff has already extended Synagro's current contract several times, and could do so again very easily. But if it is your decision to move forward with Synagro today, at a minimum, I would ask that you please not authorize execution of a contract that no one has seen.

Instead, I would urge you to direct staff to bring you back a proposed contract – a contract that the public can see – that provides safeguards against the risks we're warning you about. We propose the following:

- Make the contract publicly available for a reasonable period of time to review and provide comments before there is a separate vote to execute.
- Ensure that the contract includes the City's right to give six months' notice to terminate the contract in whole or in part, without cause, any time an emergency condition requires the offsite land application or landfilling of more than two weeks' daily generation of biosolids sludge over a 30 day period.
- The City Council and appropriate Boards and Commissions will be notified within 10 calendar days of a determination of emergency conditions, and whether the emergency condition was created by the contractor, with updates every two weeks thereafter.
- Shorten the initial term of the contract to two years and require all succeeding one year contract extensions to be approved by Council.
- Ensure that a failure of the contractor to provide sufficient bulking agent for the composting of all the City's produced biosolids to a stable and mature compost product is grounds for contract termination.
- Ensure that the standard 30 day notice of contract termination without cause, which is in this IFB, is included in the negotiated contract.

Please, at a bare minimum, see the contract before you authorize it – and let the public see it – to be sure that you are getting exactly what you want, and that staff is not exposing Austin ratepayers to millions of dollars of additional unnecessary expense over the life of the contract.

Thank you for your time and attention to our concerns.



11/1/2018

Comparison of Synagro's Current Prices to their Latest Bid for Managing the City of Austin Biosolids Sludge				
Biosolids Management Activity	Synagro's Current Rates	Synagro's RFP CDL2003REBID Quoted Rate	Synagro's IFB CDL2003REBID2 Bid Rates	% Change from Current Rate
On-Site Composting	\$26.45/Cu. Yd. (\$26.45/Cu. Yd. = \$31.49/Wet Ton) <sup>1</sup>	\$16.25/Wet Ton	\$13.93/Wet Ton	55.76% decrease <sup>1</sup>
Off-Site Land Application	\$34.80/Cu. Yd. (\$34.80/Cu. Yd. = \$41.43/Wet Ton) <sup>1</sup>	Not Released by City	\$52.72/Wet Ton	27.25% increase <sup>1</sup>
Landfill Disposal	\$39.14/Cu. Yd. (\$39.14/Cu. Yd. = \$46.60/Wet Ton) <sup>1</sup>	Not Released by City	\$59.72/Wet Ton	28.15% increase <sup>1</sup>
<p>1. Synagro's current "Cubic Yard" prices have been calculated on a "Wet Ton" basis to illustrate how they compare to their proposed prices. Based upon the City's reported biosolids density of 1,685 pounds per cubic yard, or 0.84 tons per cubic yard, the calculation is as follows:</p> <p>On-Site Composting: \$26.45 per cubic yard X 1 cubic yard/0.84 tons = \$31.49 per wet ton</p> <p>Off-Site Land Application: \$34.80 per cubic yard X 1 cubic yard/0.84 tons = \$41.43 per wet ton</p> <p>Landfill Disposal: \$39.14 per cubic yard X 1 cubic yard/0.84 tons = \$46.60 per wet ton</p>				
<p>NOTE: Synagro's monthly invoices for January - May 2018 and July - August 2018, indicate that Synagro has land applied 58% of the City's biosolids and composted 42% of the biosolids. It is unknown to what standards or specifications the biosolids were composted. Assuming, going forward, 58% of the biosolids are land applied and the remainder composted, the total charges per year would be \$4,007,102 and would be \$40,071,020 over the life of the contract, which is \$20,771,020 more than staff is requesting for the contract.</p>				

Texas Landfill Management (TLM) Only Bid Prices for Managing the City of Austin's Biosolids Sludge		
(Note: TDS has guaranteed the City that none of the City's Biosolids sludge would be off-site land applied or landfilled)		
Biosolids Management Activity	TLM RFP CDL2003REBID Quoted Rate	TLM IFB CDL2003REBID2 Bid Rate
On-Site Composting	\$14.53/Wet Ton	\$14.53/Wet Ton



## MEMORANDUM

**TO:** Mayor and City Council Members

**FROM:** Greg Meszaros, Director, Austin Water  
James Scarboro, Purchasing Officer

**DATE:** October 29, 2018

**SUBJECT:** Item 20, Beneficial Reuse of Biosolids, Additional Background Information

The purpose of this memo is to provide additional background information on Item 20, which requests authorization to execute a contract with Synagro of Texas-CDR, Inc., to provide biosolid composting services for an initial term of five years, with five additional one-year optional extensions (10 year aggregate), for a total contract amount not to exceed \$19,300,000. This contract will provide for the treatment, marketing and distribution of all biosolids generated by the City's three (3) water treatment plants.

Over the last two and a half years, the Purchasing Office and Austin Water (AW) have developed and issued two Requests for Proposals (RFP's) and one Invitation for Bids (IFB) in an attempt to create a new contract for this service. The following is an overview of these prior solicitations, as well as a more detailed discussion on some of the issues associated with the latest solicitation and award recommendation.

### First Solicitation

The scope of the first solicitation included very few restrictions regarding the type and quantity of services that could be proposed by offerors. Offerors could propose a full or partial use of the Hornsby Bend concrete pads. If the successful offeror proposed using all of the pad space for biosolids processing, AW would cease production of Dillo Dirt, as there would be no pad space available for Dillo Dirt production by City staff.

The first solicitation, RFP 2200 CDL2003, published on April 4, 2016 and closed on May 19, 2016. Five proposals were received in response to this solicitation. The evaluation committee determined that the proposal submitted by Synagro of Texas-CDR, Inc. (Synagro) was the most advantageous based on the solicitation's evaluation criteria. Synagro's proposal included using all of the pad space for 100% composting of the biosolids.

Due to concern from parties outside the solicitation process over the possible loss of the Dillo Dirt program, as well as other aspects of the solicitation, Council directed AW to work with the Water and Wastewater Commission (WWWC) and the Zero Waste Advisory Commission (ZWAC) to develop public policies for the processing of biosolids prior to the contract being negotiated. After the commissions made their recommendations and policies were created, staff negotiated a contract that was consistent with these new policies.

The solicitation eventually had to be cancelled however due to anti-lobbying issues. Council instructed AW to issue a new solicitation.

### Second Solicitation

The scope of work for the second solicitation included the policy recommendations from the commissions. There was also a public comment period before the scope of work was finalized.

The second solicitation, RFP 2200 CDL2003REBID, published on October 9, 2017 and closed on November 16, 2017. Four proposals were received in response to this solicitation. The evaluation committee determined that the proposal submitted by Synagro was the most advantageous based on the solicitation's evaluation criteria.

Following the award recommendation, multiple protests were received. In resolving one of these protests, staff set aside the earlier award recommendation and proceeded to request best and final offers (BAFO) from the two offerors submitting the highest rated proposals. While the BAFO process was underway, the Purchasing Office received and responded to a public information request (PIR) concerning the earlier protests. After responding to the PIR, staff learned that the protest released included a copy of one of the proposals as an attachment. As this proposal was submitted by one of the offerors participating in the BAFO process, staff had no choice but to cancel this second solicitation as well.

### Third Solicitation

Due to the policy clarifications incorporated into the second solicitation and the continued specificity of the solicitation's scope and requirements, Purchasing and AW staff determined that the IFB process would be a better and less contentious competitive method for this third solicitation. Prior to issuing the solicitation, staff released a Request for Information (RFI), seeking feedback on the solicitation's scope and requirements. Four companies responded with comments that assisted in removing ambiguity from the scope. Examples of the major responsibilities that were changed from the second to the third solicitation are shown in the table below.

Solicitation Element	CDL2003REBID (RFP)	CDL2003REBID2 (IFB)
Fire Prevention and Control Plan	Contractor's responsibility	AW Generated
Spill Prevention and Response Plan	Contractor's responsibility	AW Generated
Compost Sampling Plan	No Requirement	AW Generated
Dust and Odor Control Plans	Contractor's responsibility	AW Generated
Soil Sampling	Contractor's responsibility	In a different contract
Inventory Controls	Utilizes monthly measurements, 20% increase requires report	Utilizes trend monitoring w/annual net zero requirement
Sampling Entity	Contractor Only	Contractor, City or 3 <sup>rd</sup> Party

The third solicitation, IFB 2200 CDL2003REBID2, published on August 13, 2018 and closed on September 4, 2018. Three bids were received in response to this solicitation. The bid submitted by Synagro was the lowest bid received.

Multiple protests were received in conjunction with this solicitation as well. Purchasing reviewed each of the protests but found no legal or factual errors upon which to overturn the solicitation results.

On October 12, 2018, AW presented the award recommendation to the WWWC and to the ZWAC for their concurrence. The WWWC passed the motion unanimously. ZWAC passed a motion to postpone the item until they could question the Purchasing Office regarding release of the documents during the second solicitation and obtain the cost of the yard waste grinding operation at Hornsby from Austin Resource Recovery (ARR) staff.

### **Proposal Release**

Concerns regarding the release of information in response to the PIR that occurred during the second solicitation were addressed during the applicable protest processes. Staff resolved this matter by cancelling the previous solicitation.

### **Grinding Services**

During the RFI process, prior to finalizing the third solicitation, a respondent raised the question of having the AW biosolids Contractor also take over the grinding of all the brush and curbside yard waste collection that comes to Hornsby. This is the "bulking agent" used with the biosolids to make the compost. When asked if ARR wanted the grinding included in the scope of work, ARR staff replied that it was not a decision they were able to quickly make due to the concern of privatizing an operation that has City personnel dedicated to it. This question was also addressed in subsequent protests.

### **Conclusion**

AW urges the Council to approve the contract as recommended. The current contract expires at the end of December 2018 and spending authorization will be exhausted by the end of October 2018. The biosolids, and more significantly the yard waste, has been building up since the composting stopped. Hornsby staff are managing the accumulation of unprocessed biosolids for now but are increasingly concerned with the odor of the biosolids reaching the nearby areas as well as the yard waste becoming a fire hazard.

Finally, during the recent water crisis, the water plants had to discharge much of the storm water solids they had collected into the sewer since the plants weren't designed to handle that much solid material. These solids will be going through the wastewater plants and will be arriving at Hornsby Bend where storage space is already in short supply. This contract is desperately needed and needs to be executed as soon as possible.

cc: Spencer Cronk, City Manager  
Elaine Hart, Deputy City Manager  
Greg Canally, Deputy Chief Financial Officer

## AGENDA



## Recommendation for Council Action

## AUSTIN CITY COUNCIL

Regular Meeting: November 1, 2018

Item Number: 020

## Purchasing Office

Authorize negotiation and execution of a multi-term contract with Synagro of Texas-CDR, Inc., to provide biosolid composting services, for up to ten years for a total contract amount not to exceed \$19,300,000. (Note: This solicitation was reviewed for subcontracting opportunities in accordance with City Code Chapter 2-9C, Minority Owned and Women Owned Business Enterprise Procurement Program. For the services required for this solicitation, there were no subcontracting opportunities; therefore, no subcontracting goals were established).

<b>Lead Department</b>	Purchasing Office.
<b>Fiscal Note</b>	Funding in the amount of \$1,404,608 is available in the Fiscal Year 2018-2019 Operating Budget of Austin Water. Funding for the remaining contract term is contingent upon available funding in future budgets.
<b>Purchasing Language</b>	The Purchasing Office issued Invitation for Bids (IFB) 2200 CDL2003REBID2 for these services. The solicitation issued on August 13, 2018 and it closed on September 4, 2018. Of the three offers received, the recommended contractor submitted the lowest responsive offer. A complete solicitation package, including a response list, is available for viewing on the City's Financial Services website, Austin Finance Online. Link: <a href="https://www.austintexas.gov/financeonline/account_services/solicitation/solicitation_details.cfm?sid=126894">Solicitation Documents &lt;https://www.austintexas.gov/financeonline/account_services/solicitation/solicitation_details.cfm?sid=126894&gt;</a> .
<b>Prior Council Action</b>	August 11, 2016 - Council postponed the item, item 25, on an 11-0 vote and directed staff to refer the item to the Water and Wastewater Commission and the Zero Waste Advisory

	<p>Commission for discussion and feedback prior to returning to Council for action.</p> <p>December 15, 2016 - Council approved an amendment, item 52, waiving the anti-lobbying ordinance regarding solicitations for the sale and removal of compost materials and management of biosolids reuse on a 10-0 vote, with Council Member Troxclair off the dais.</p> <p>December 15, 2016 - Council withdrew item 53, cancelling the solicitation and directed staff to reissue the Request for Proposals and send the solicitation documents to the Zero Waste Advisory Commission and the Water and Wastewater Commission, on a 10-0 vote with Council Member Troxclair off the dais.</p> <p>March 23, 2017 - Council approved Resolution No. 20170323-055, item 55, to form a council working group to examine waste management and biosolids policy issues and contracts on an 11-0 vote.</p> <p>April 6, 2017 - Council approved Ordinance 20170406-023, item 23, waiving the Anti-Lobbying Ordinance for solicitations for the collection, disposal and processing of municipal solid waste, recyclables, compostables, special waste collections for City facilities, and other solid waste matters related to these items, on a 7-1 vote, with Council Member Troxclair voting nay, Council Member Houston abstained and Council Members Alter and Casar off the dais.</p> <p>August 15, 2017 - Waste Management Working Group presented its recommendations to Council at Work Session; among the recommendations was to revise the Anti-Lobbying Ordinance.</p> <p>September 2017 through May 2018 - Staff worked with the Audit and Finance Committee to develop the revisions to the Anti-Lobbying Ordinance. Staff postponed the solicitation for Biosolids until after Council approved the revisions to the ordinance.</p> <p>June 14, 2018 - Council approved the revised Anti-Lobbying Ordinance, item 56, on an 8-1 vote, with Council Member Alter voting nay and Council Members Garza and Troxclair off the dais. Shortly thereafter, staff issued the solicitation for Biosolids, IFB 2200 CDL2003REBID2, with the revised ordinance referenced therein.</p>
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<b>For More Information</b>	<p>Inquiries should be directed to the City Manager's Agenda Office, at 512-974-2991 or <a href="mailto:AgendaOffice@austintexas.gov">AgendaOffice@austintexas.gov</a>  <a href="mailto:AgendaOffice@austintexas.gov">&lt;mailto:AgendaOffice@austintexas.gov&gt;</a></p> <p>NOTE: Respondents to this solicitation, and their representatives, shall continue to direct inquiries to the solicitation's Authorized Contact Person: Matthew Duree, at 512-974-6346 or <a href="mailto:Matthew.Duree@austinetexas.gov">Matthew.Duree@austinetexas.gov</a>  <a href="mailto:Matthew.Duree@austinetexas.gov">&lt;mailto:Matthew.Duree@austinetexas.gov&gt;</a>.</p>
<b>Council Committee, Boards and Commission Action</b>	<p>October 10, 2018 - Recommended unanimously by the Water and Wastewater Commission on a 6-0 vote, with Commissioner's Castleberry, Turrieta, Lee, Bell, and Schmitt absent.</p> <p>October 10, 2018 - Reviewed by the Zero Waste Advisory Commission; Commissioner White motions that the commission recommends to Council to hold off on moving forward with the contract until the commissioners can receive more information from Purchasing by having them attend the meeting to answer these questions to gain understanding. Commissioner Blaine seconds. Commissioner Gattuso offers a friendly amendment: wants information as to how the cost of grinding fits in to the contract. Vote: 8-0-2; Abstentions made by Commissioners Barona and Hoffman and with Commissioner Bones absent.</p>
<b>Client Department(s)</b>	Austin Water.

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**Additional Backup Information:**

The contract is for the composting of biosolids at the Hornsby Bend Biosolids Management Plant. The contract will be managed in accordance with strict federal, state, and local regulations; and in a safe and environmentally responsible manner. The contractor will beneficially reuse a minimum of 110,000 wet tons of biosolids annually.

The Environmental Protection Agency (EPA) and Texas Commission on Environmental Quality (TCEQ) establishes requirements for the treatment, use, reuse, and disposal of biosolids generated during the process of treating municipal wastewater. Biosolids are the solid components of sewage which have undergone treatment and meet federal and state standards for beneficial reuse. The reuse of biosolids

under this contract will follow standard management practices for composting and will seek to maintain or improve environmental quality and protect public health.

The current contract expires on December 31, 2018; however, the contract is low on authorized funding.

If the City is unable to secure a contract, there will not be sufficient City staff or resources to process all the biosolids material. If the biosolids are not processed, the Hornsby Bend Biosolids Management Plant may not be in compliance with EPA and TCEQ regulations, which could lead to fines and administrative penalties for stockpiling and storing of biosolids improperly or lead to health and public safety concerns.

**Contract Detail:**

<b>Contract Term</b>	<b>Length</b>	<b>Contract of Term Authorization</b>
Initial Term	5 yrs.	\$ 9,650,000
Optional Extension 1	1 yr.	\$ 1,930,000
Optional Extension 2	1 yr.	\$ 1,930,000
Optional Extension 3	1 yr.	\$ 1,930,000
Optional Extension 4	1 yr.	\$ 1,930,000
Optional Extension 5	1 yr.	\$ 1,930,000
<b>TOTAL</b>	<b>10 yrs.</b>	<b>\$19,300,000</b>

**Note:** Contract Authorization amounts are based on the City's estimated annual usage.



**CITY OF AUSTIN  
HORNSBY BEND BIOSOLIDS COMPOSTING**

**MAINTENANCE & OPERATIONS PLAN**

**A. General Project Description**

Synagro of Texas-CDR, Inc. (Synagro), a subsidiary of Synagro South, LLC, intends to operate the biosolids composting facility at the City of Austin's Hornsby Bend Biosolids Management Plant. The facility utilizes the standard aerated windrow method of biosolids composting and utilizes bulking agents (carbon sources) to mix with the biosolids such as yard debris and ground, clean wood wastes. These products are blended together and windrow composted to produce a soil conditioner or low grade fertilizer for agricultural, horticulture, silviculture and domestic uses. The finished compost is sold in bulk and may be sold in bags for beneficial use. Each bulking agent source is monitored for inorganic (non-compostable) materials. Additionally, all biosolids beneficially used at the composting facility are tested for both metal and agronomic constituents as described herein.

The finished compost products are tested to ensure quality and stability of the materials. During the composting process, monitoring of windrow temperature is conducted to ensure pathogen and vector attraction reduction in accordance with 40 CFR 503 regulations, TCEQ regulations and the applicable Hornsby Bend facility permits.

Process elements for the composting operation consist of initial mixing and formation of the windrows, turning of the compost piles during the active composting cycle, monitoring and logging temperature data for each windrow, and the monitoring and distribution of finished product.

Each bulking agent load is transported to the composting facility from the producer (e.g. green waste receiving and processing facility or grinding operation) using tractor/trailer rigs. The bulking agents are placed on the bulking agent storage area and blended with biosolids as needed, forming windrows. Recycled compost is also used as bulking agents. After the mixture is bulked to approximately 30 to 40 percent solids, the material is formed into windrows for composting. The composting process is a windrow process with mechanical mixing equipment for turning. The complete composting process is performed in approximately 3 to 4 weeks the finished compost is stored in a designated area on-site until sale or distribution. Quality control testing is performed to ensure the compost meets the pathogen reduction, vector attraction reduction, and metals requirements associated with the final use of the product in accordance with 40 CFR 503 regulations. Water is available at the site and is used for dust control and moisture conditioning of the compost as needed.

The composted product is marketed by Synagro's Product Sales staff and is transported from the site to customers using tractor/trailer rigs.

**B. Ownership and Responsible Parties**

Personnel associated with the composting site have extensive experience in bulking agent and biosolids handling, dewatering and composting operations, as well as regulatory requirements, marketing and distribution of composted products.

**From:** McClure, Monica  
**To:** Scarboro, James  
**Cc:** Lord, Danielle  
**Subject:** FW: Response to 9-27-16 Letter from TDS to Danielle Lord  
**Date:** Thursday, October 06, 2016 11:15:19 AM  
**Attachments:** Response to 9-27-16 Letter from TDS to Danielle Lord.pdf

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James:

Attached is Synagro's response letter to the TDS letter of 9/27/16. Are you or this Office the appropriate party to forward the letter to TDS?

Also, I'm sure Synagro is going to ask: What is the status of the City's formal response to the 9/27 letter?

Thank you.

Monica L. McClure  
Corporate Contract Administrator  
Financial Services Department  
Direct Contact (512) 974-1714

**From:** Andrew Bosinger [mailto:ABosinger@SYNAGRO.com]  
**Sent:** Thursday, October 06, 2016 10:43 AM  
**To:** McClure, Monica <Monica.McClure@austintexas.gov>  
**Subject:** FW: Response to 9-27-16 Letter from TDS to Danielle Lord

FYI

**From:** Pearson, Julia [mailto:Julia.Pearson@huschblackwell.com]  
**Sent:** Thursday, October 6, 2016 11:38 AM  
**To:** 'Danielle.Lord@austintexas.gov'  
**Cc:** Andrew Bosinger; Meade, Nikelle  
**Subject:** Response to 9-27-16 Letter from TDS to Danielle Lord

Ms. Lord –

Please see attached letter from Nikelle Meade.

- Julia Pearson

**Julia Pearson**  
**Legal Support Team Specialist**

**HUSCH BLACKWELL LLP**  
111 Congress Avenue, Suite 1400  
Austin, TX 78701-4093  
Direct: 512.370.3306  
Fax: 512.226.7208  
[Julia.Pearson@huschblackwell.com](mailto:Julia.Pearson@huschblackwell.com)

huschblackwell.com



Your Partner for a cleaner, greener world

**Andrew Bosinger**

**VP, Strategic Accounts & Partnerships**

6326 Wilson Road Ann Arbor, MI 48108

O: 1-443-489-9087 | M: 1-410-271-1020

[ABosinger@SYNAGRO.com](mailto:ABosinger@SYNAGRO.com) | [www.synagro.com](http://www.synagro.com)

[Facebook](#) | [Twitter](#) | [LinkedIn](#)

# HUSCH BLACKWELL

111 Congress Avenue, Suite 1400  
Austin, Texas 78701  
512.472.5456

Nikelle S. Meade  
512.479.1147 direct  
512.226.7373 fax  
[nikelle.meade@huschblackwell.com](mailto:nikelle.meade@huschblackwell.com)

October 6, 2016

**VIA EMAIL -- [Danielle.Lord@austintexas.gov](mailto:Danielle.Lord@austintexas.gov)**

Danielle Lord  
Purchasing Department  
City of Austin  
124 West 8<sup>th</sup> Street  
Austin, Texas 78701

Re: Response to 9/27/16 Letter from Texas Disposal Systems to Danielle Lord

Dear Ms. Lord:

The purpose of this letter is to provide clarification and correction for the record concerning statements made by Texas Disposal Systems, Inc. (hereinafter, "TDS") in its September 27<sup>th</sup> letter to you regarding the City's anti-lobbying regulations that apply to procurements. In that letter, TDS implies that Synagro requested suspension of the anti-lobbying regulations in connection with the biosolids management procurement because Synagro shares TDS's concerns about the regulations. We want to make it clear that the only reason Synagro requested that the anti-lobbying regulations be suspended in connection with this procurement was the continuous lobbying activity by TDS related to this procurement pursuant to what TDS believes is a loophole in the regulations.

Because TDS has been actively pursuing discussions with City staff, commissioners, and council members in which TDS has specifically asked for this work to be taken out of the City's procurement process and given directly to TDS (TDS is on the public record stating that it wants the contract awarded to it without there being a bidding/RFP process) and because we believe TDS has provided City staff, commissioners, council members, and the public with erroneous information about Synagro and the procurement, Synagro believed application of the anti-lobbying regulations to all of the parties seeking this work except TDS was unfair to all of the companies that properly submitted proposals in response to the RFP and was clearly contrary to the very intent of the regulations. In short, Synagro's earlier request to suspend the anti-lobbying rules for the biosolids management RFP was submitted for the sole hope of leveling the playing field and instilling fairness in such a way that Synagro could defend itself and its RFP response in a professional manner.

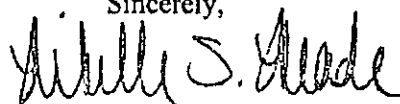
Synagro subsequently withdrew its request, as you know, determining that it was better to have the rules in place than to open the process up to a free-for-all of lobbying.

Danielle Lord  
October 6, 2016  
Page 2

Synagro supports the anti-lobbying regulations and will continue to do so. In fact, Synagro believes that the anti-lobbying ordinance should be made stronger to prohibit the type of lobbying activity TDS is engaged in with respect to this procurement.

Please do not hesitate to contact me if you have any questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Nikelle S. Meade".

Nikelle Meade

cc: Andrew Bosinger (via email -- [ABosinger@SYNAGRO.com](mailto:ABosinger@SYNAGRO.com))

**From:** McClure, Monica  
**To:** Lord, Danielle  
**Subject:** RFP CDL2003-Beneficial Reuse of Biosolids  
**Date:** Monday, October 17, 2016 8:23:26 PM

---

RE: Potential violation of Anti-Lobbying Ordinance

Danielle:

At approximately 7:20 today, October 17, 2016, I returned a telephone call from Andrew Bosinger of Synagro. I had expected to get his voice mail as in his voice message left for me at 2:11 PM earlier on this date, he indicated he was boarding a plane. Andrew answered his phone and indicated his plane had landed in Austin and he would be attending Council's Work Session meeting tomorrow morning. In Andrew's voice message earlier, he had asked whether I had received a response from Austin Water concerning incorporation of a provision into the contract which had been suggested by the Texas Commission on the Environment. I had earlier that day spoken with Judy Musgrove but she said they would have to discuss and get back with me. This evening, I was returning Andrew's call, fully expecting to get his voice mail, to simply indicate I had no update from Austin Water, and suggest that he refrain from speaking directly to James Scarboro at the Work Session meeting tomorrow to lessen any further allegations of anti-lobbying.

Andrew went on to discuss with me "what he was hearing". He explained that his attorney, Nikelle Meade, was contacted by several Council members today who all indicated that TDS representatives were in their offices lobbying for delay of this item (on Council's Agenda presumably). The Council members asked Nikell why the item should not be delayed. According to Andrew, Nikelle responded to the Council members and explained that the procurement had been sent to Committee which then formed the Work Group, and that these groups had all reviewed, vetted and approved the item, and further delay was unnecessary. I specifically asked Andrew again how Council Members knew to contact Nikell. Andrew responded and said that "they all know that Nikell represents Synagro". Andrew also mentioned Brandi, Policy Aid (to the Mayor?) and that she had also possibly contacted Nikell with questions.

Please let me know if you have any questions or need further clarification.

Thank you,

*Monica L. McClure*

Monica L. McClure  
Corporate Contract Administrator  
Financial Services Department  
City of Austin  
124 W. 8<sup>th</sup> St., Suite 310  
Austin, Texas 78701  
Phone: (512)974-1714

Fax: (512)974-2388

Email: [Monica.McClure@austintexas.gov](mailto:Monica.McClure@austintexas.gov)

Manager: Danielle Lord

Phone: (512) 974-2298

Email: [Danielle.Lord@austintexas.gov](mailto:Danielle.Lord@austintexas.gov)

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<http://www.ci.austin.tx.us/financeonline/finance/index.cfm>



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**From:** [Willett, Shawn](#)  
**To:** [Scarboro, James](#)  
**Subject:** Fwd: RFP CDL2003-Beneficial Reuse of Biosolids  
**Date:** Thursday, October 20, 2016 5:29:09 PM

---

Just FYI

Ms. Shawn M. Willett  
Deputy Purchasing Officer  
City of Austin, Purchasing Office

Begin forwarded message:

**From:** "McClure, Monica" <[Monica.McClure@austintexas.gov](mailto:Monica.McClure@austintexas.gov)>  
**Date:** October 20, 2016 at 4:27:51 PM CDT  
**To:** "Lord, Danielle" <[Danielle.Lord@austintexas.gov](mailto:Danielle.Lord@austintexas.gov)>, "Willett, Shawn" <[Shawn.Willett@austintexas.gov](mailto:Shawn.Willett@austintexas.gov)>  
**Subject:** RFP CDL2003-Beneficial Reuse of Biosolids

Danielle and Shawn:

Today, I received phone messages from Andrew Bosinger at Synagro and his attorney, Nikelle Meade. Andrew wanted information on Council's delay of this Agenda item and Nikell asked about whether any decisions have been made on the Anti-Lobbying allegations.

Please advise how you wish me to proceed.

Thank you,

*Monica L. McClure*

Monica L. McClure  
Corporate Contract Administrator  
Financial Services Department  
City of Austin  
124 W. 8<sup>th</sup> St., Suite 310  
Austin, Texas 78701  
Phone: (512)974-1714  
Fax: (512)974-2388  
Email: [Monica.McClure@austintexas.gov](mailto:Monica.McClure@austintexas.gov)

Manager: Danielle Lord  
Phone: (512) 974-2298  
Email: [Danielle.Lord@austintexas.gov](mailto:Danielle.Lord@austintexas.gov)



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PAMELA S. LANCASTER  
ATTORNEY AT LAW

February 23, 2018

City of Austin  
Purchasing Office  
124 W 8<sup>th</sup> Rm 310  
Austin TX 78701

Findings, Conclusions, and Recommendation  
Protest Hearing  
RFP CDL2003REBID as filed by Texas Landfill Management, LLC  
Beneficial Use of Biosolids

History and Summary of the Protest

Texas Landfill Management, LLC, ("TLM") timely submitted a response to a rebid RFP in November 2017, as did Synagro of Texas-CDR, Inc., Denali Water Solutions, LLC, and Walker Aero Environmental, LLC. The City of Austin ("COA") sought to establish a contract for the treatment and beneficial reuse of biosolids for the Austin Water Department. After evaluation of the responses by subject matter experts, the COA staff recommended awarding the contract to Synagro of Texas-CDR, Inc.

The COA shared the scoring process and results with TLM, which form the basis of the protest. TLM protests

1. unfounded deduction of points from its proposal in qualitative evaluation categories, specifically:
  - a. Business Capacity and Experience
  - b. Proposed Solution and Schedule, and
  - c. Marketing Plan,
2. improper distribution of points in quantitative pricing category, and
3. improper removal of Local Business Presence ("LBP") scoring criteria.

The COA responded that TLM, although deemed to be qualified, failed to answer or demonstrate all criteria requested in the RFP, and that criteria not made part of the rebid RFP were irrelevant to the scoring, recommendation to council, and the protest.

### Findings and Conclusions

1. The City reissued RFP CDL2003REBID for Beneficial Reuse of Biosolids on October 9, 2017. An Addendum was then issued on October 20, 2017 that extended the bid submittal deadline to November 16, 2017 at 2:00PM.
2. The City issued an Addendum on October 21, 2017 that removed the Local Business Presence ("LBP") evaluation factor from the solicitation.
3. The City issued an Addendum on November 9, 2017 that disclosed the following information about brush, green waste, and wood waste grinding services provided by City crews:  
Number of employees assigned to City grinding operation:  
5 full time employees  
Annual cost for City grinding operation during last five years:  
FY17 \$1,268,024  
FY16 \$1,367,015  
FY15 \$1,200,783  
FY14 \$ 981,378  
FY13 \$ 917,722
4. The November 9, 2017 Addendum also disclosed the following:
  - A. The City chose to issue solicitation CDL2003REBID as an RFP because "It is necessary for the City to review and score cost along with other considerations, such as a proposed solution/approach, experience, capacity, schedule, and various operational plans to ensure the City receives the best possible value, not just the lowest cost."
  - B. Local Business Presence evaluation factor was removed from the solicitation "as recommended by the working group and at the request of the Assistant City Manager."
5. On November 16, 2017, TLM submitted a timely response to RFP CDL2003REBID. The City also received RFP responses from: Synagro of Texas-CDR, Inc.; Denali Water Solutions, LLC; and Walker Aero Environmental, LLC.
6. Five business days later, on November 27, 2017, the City issued a notice to RFP respondents that the solicitation evaluation team had completed their process and had recommended award of the contract to Synagro of Texas- CDR, Inc. A proposal scoring matrix was included with the November 27, 2017 notice, indicating the evaluation team's point allocation for each proposal in five separate categories (Proposed Cost, Business Capacity & Experience, Proposed Solution & Schedule, Marketing Plan, and Service- Disabled Veteran Business Enterprise).
7. Pursuant to a provision in Section 0400 (Supplemental Purchasing Provisions) of the solicitation documents for RFP CDL2003REBID, representatives of TLM met with the Purchasing Office on November 30, 2017 at 9:30am for the purposes of a Debriefing Meeting. At the Debriefing Meeting, TLM was provided the evaluation team's determination of "Strengths" and "Weaknesses" for each evaluation factor of its proposal and was given the opportunity to ask questions. The specific

"Strengths" and "Weaknesses" of TLM's proposal as determined by the evaluation team were as follows:

A. Evaluation criteria: business capacity & experience

1. Score: 13 out of a possible 20
2. Strengths: Composting and bagging experience. Established retail outlets and brand recognition.
3. Weaknesses: Lack of recent large municipal biosolids projects. Lack of organizational structure and personnel to bring online multiple comparably sized operations simultaneously. Did not demonstrate adequate experience specific to biosolids composting.

B. Evaluation criteria: proposed solution & schedule

1. Score: 12 out of a possible 20
2. Strengths: Good odor and fire control plans. 24 hour fire watch if needed. Good mobilization schedule.
3. Weaknesses: Spill response plan not included. Detailed scientific information instead of site and operation plans; not site specific. Did not adequately demonstrate an understanding of the current site layout. Lack of details provided on material volumes onsite and/or produced.

C. Evaluation criteria: marketing plan

1. Score: 15 out of a possible 17
2. Strengths: Existing retail outlets. Existing marketing structure. Designated and developed marketing department.
3. Weaknesses: No information on marketing current products produced at municipal facilities. No details on supply and demand or lessons learned. No product descriptions given on specific City of Austin biosolids products, and how these products will be incorporated into the current product portfolio.

D. Evaluation criteria: proposed cost

Score: 40 out of a possible 40

8. Pursuant to a provision in Section 0200 (Solicitation Instructions) of the solicitation documents for RFP CDL2003REBID, on November 30, 2017 at 3:30pm, TLM filed a notice of intent to protest City staff's recommendation to award Synagro of Texas- CDR, Inc. the contract for Beneficial Reuse of Biosolids.
9. On December 11, 2017, TLM filed a timely protest for review and consideration by the Purchasing Office. TLM's protest was based on the following:
  - A. Unfounded deductions of points from TLM's proposal in qualitative evaluation categories,

- B. Improper distribution of points to other respondents in the quantitative pricing category, and
  - C. Irregular and unjustified removal of 'Local Business Presence' scoring category.
10. The Purchasing Officer, James Scarboro, subsequently notified TLM on December 20, 2017, that he found there to be sufficient grounds to refer TLM's protest to an independent hearing officer to conduct a protest hearing and to provide the Purchasing Officer with a recommendation concerning the protest.
  11. TLM received 100% of the available points in the category for Proposed Cost, thereby deeming TLM the lowest qualified bidder.
  12. The RFP states, on the cost proposal form, that Optional Additional Services or Products will not be used to evaluate "proposed cost".
  13. The contract services will be provided primarily on the COA site at Hornsby Bend.

#### DISCUSSION AND RECOMMENDATION

With regard to scoring on qualitative factors, TLM protested deductions taken against it as unfounded and without reference to its actual response.

**BUSINESS CAPACITY & EXPERIENCE** -TLM received 13/20 points, with perceived weakness in three areas:

**Lack of recent large municipal biosolids projects:**

The projects described by TLM were either new (San Antonio Water System-"SAWS"), smaller capacity (San Antonio River Authority-"Martinez" and City of Victoria, producing 12-14,000 tons annually, compared to Hornsby Bend production averaging 100,000 tons annually), or large, but not recent (SAWS Leon Creek, which ended in 2012).

From another angle, these projects qualify as potentially large, but not yet in operation (SAWS), and ongoing with capacity to become large, having been designed by TLM (Martinez and Victoria). SAWS Leon Creek, although large in the last year, expired 5 years prior and is not recent.

TLM's response showed weakness in this area.

**Lack of organizational structure and personnel to bring online multiple comparable sized operations simultaneously:**

The RFP requested information about numerous non-quantifiable measures describing the "big picture" of the responding company: mission, financial resources, organizational stability, dedicated resources, and knowledge.

TLM's response established a company longstanding not only in its existence but in the focus of its operations, with deep financial pockets, large equipment inventory, active presence in the professional community, and numerous highly expert employees. TLM showed past and current experience working with small and large municipalities

including the City of Austin, broad experience in its field (designing and operating facilities), and a dedication to continuing education in the field.

TLM did fail to list a specific project manager, although Mark Cummings was described as overseeing all aspects of TLM's composting operations and **would be responsible for staffing and acquiring equipment for the Hornsby Bend operation.** TLM named an additional four personnel, describing their qualifications and current responsibilities at TLM, including resumes. Duties for the Hornsby Bend project were described only for Jim Doersam.

The COA stated at the protest hearing that none of the professional organizations in which TLM listed membership were "related to biosolids, but were rather related to solid waste, not to biosolid/composting organizations". A quick Google search reveals that, of the four listed organizations, SWANA offers a certification in composting, and NWRA recently awarded the Emerald Coast Utilities Authority's Biosolids Composting Facility for excellence in organics recycling. TLM also belongs to the U.S. Composting Council, and the Texas Nursery and Landscape Association, which states that it attracts "green industry professionals".

The scoring for Business Capacity and Experience does not reveal which underlying factors caused a reduction in points, but in the absence of specific measures for the requested information, TLM's response on this factor showed only minor weakness in its failure to specifically name a project manager.

**TLM did not demonstrate adequate experience specific to biosolids composting:**

TLM demonstrated biosolid composting experience dating 2001-2012 in its contract with SAWS Leon Creek. TLM conducts biosolid composting operations for San Antonio River Authority (SARA) since 2015 with a 30 year contract, the City of Victoria for the last 11 years, and has a new contract with SAWS. Even if the new SAWS contract isn't considered as "experience", TLM has biosolid composting experience, without break, for at least 17 years. Without a measurable standard for "adequate experience", it's hard to imagine an industry or profession where 17 years experience would be considered inadequate.

The scoring for Business Capacity and Experience does not reveal which underlying factors caused a reduction in points, but in the absence of specific measures for the requested information, TLM's response on this factor showed no weakness.

**PROPOSED SOLUTIONS & SCHEDULE-** TLM received a score of 12/20 points, with perceived weakness in four areas:

**Spill response plan not included:**

TLM's response included reference to its maintenance of a spill prevention, control, and countermeasures plan, and a statement of general company policy. The Plan referred to oil pollution prevention measures, not to spills associated with loading, transporting, land application, incorporation or use of biosolids as requested by the scope of work. TLM argued that such a spill response was unnecessary as only mature, stable compost would be transported from the site; in its response, TLM states that material

which needed additional time to reach the required stability and maturity standards could be hauled to a different composting facility.

TLM failed to respond with the requested spill response plan.

**Detailed scientific information instead of site and operations plans. Not site specific:**

TLM's response in tab 3 (a) and (b) provide a very detailed description of how the compost would be produced and managed for odor and fire danger, the potential for transport to another site, and how the product will be marketed and sold. TLM guaranteed that it can market and provide beneficial reuse of the composted product. TLM described compost-amended products that it would create and sell through its Gardenville stores, retailers, and wholesalers.

The response in (a) and (b) overlap to some extent: (a) provides information requested by (b), and vice versa, as though the responses were merged and the paragraphs jumbled. It should be noted that the COA said TLM's response here was not "site specific", but its question at tab 3(a) asks for how the company plans to compost on the Hornsby site and/or any other site.

The two responses, read together, contain the requested information, with the exception that TLM's response does not provide an estimate of the maximum compost that would be onsite at any one time.

TLM's response on this factor showed minor weakness.

**Did not adequately demonstrate an understanding of the current site layout:**

TLM points out that it corrected an error in the solicitation regarding the number of basins available for use by the contractor, which demonstrates its understanding of the site. Jim Doersam, a TLM personnel to be assigned to the contract, has direct onsite management experience of the Hornsby composting project, and presumptively, knowledge of the current site layout. TLM referred to the Hornsby TCEQ permit when explaining that, in case of an emergency, Hornsby had 454 acres upon which TLM could apply Class B biosolids. TLM crews have worked at the Hornsby site for extended periods as recently as summer 2017, moving Dillo Dirt.

TLM's response showed no weakness.

**Lack of details provided on materials volumes onsite and/or produced:**

TLM's response estimated 25,000 cubic yards of Dillo Dirt to be sold annually, by inference showing that at least 25,000 cubic yards of compost could be present on the property over the course of a year.

TLM's response included an agreement to donate 3,000 cubic yards of finished and screened Dillo Dirt.

TLM's response showed that 19,000 wet tons of biosolids could be applied to the Hornsby site if required.

TLM's response showed that it was aware of, and prepared to handle, the biosolids stored onsite, approximately 3-5,000 dry tons.

As noted above, TLM did not provide an estimate of the maximum compost that would be onsite at any one time.

TLM's response showed minor weakness in this response.

**MARKETING PLAN:** TLM received a score of 15/17, with perceived weaknesses in three areas:

**No information on marketing current products produced at municipal facilities:**

TLM's response is replete with examples of marketing, examples of products, and record of selling current products with materials from municipalities, so it is not clear why this response was seen as a weakness. The relevant portion at Tab 4 reads as follows: *Tab 4-Marketing Plan: a. Provide information on programs where you have successfully produced and marketed biosolids compost products for other municipalities. Include products you have marketed or are currently marketing.*

If the emphasis (in the perceived weakness statement above) was on current products, the following products are mentioned: Elite Lawn, a biosolid compost product, and Eco Thrive, a compost produced from food scraps and other material, along with compost, mulch, and compost-amended soil products, sold bagged or in bulk through Gardenville, to retailers or wholesalers.

If the emphasis (in the perceived weakness statement above) was on marketing, TLM's response contained a lengthy, thorough description of its marketing tools, including identifying the marketing personnel, the Gardenville stores, the use of advertising on the internet, billboards, radio, print, direct mail, and on social media, presence at home and garden shows and landscaping trade shows, networking events with industry peers, and partnering with Keep Austin Beautiful and Habitat for Humanity. The marketing response showed an understanding of current and future markets, projected end users and uses of compost, and a description of the existing market along with potential market expansion into agriculture.

TLM claims that it has sold 100% of the compost products made at its TOP facility.

TLM's response showed no weakness.

**No details on supply and demand or lessons learned:**

TLM's response indicates that there are peak seasons for the products, often accompanied by a shortage of the product, describing a situation of high demand, low supply. TLM refers to a steadier demand from landscapers and construction contractors, suggests that agriculture may provide another source of demand, or even its own Exotic Game Ranch as an internal customer. TLM's response indicates that it understands that product supply would increase with the additional Hornsby Bend material, then explains how that material would be fit into its current product stream, and how it would develop new avenues for demand.

The COA indicated at the protest hearing that TLM did not provide a list of biosolid products produced at other operations, or any other products produced. Please see the comments in the immediately prior section, "No Information on Marketing Current Products...".

The COA also testified that TLM's marketing plan did not include how to incorporate the city's biosolids into the existing line. From TLM's response: *"Dillo Dirt will primarily be marketed for top dressing lawns, athletic fields, highway right-of-ways and for use on other ornamental landscaping projects. Other compost products produced at Hornsby Bend*



*will be incorporated into various compost-amended soil mixes such as landscape, turf, rose, container mixes, etc. Also, compost is blended in with double ground mulch and marketed as a "living mulch" product which is very popular during the dry summer months."*

The COA identified as a weakness that TLM failed to describe marketing plans that did not achieve the expected outcome and corrective action taken to resolve the issue. TLM's response did not contain an answer for this item; TLM stated that it has sold 100% of compost products made in its facility, and that it further guarantees that it can sell 100% of the Dillo Dirt that it would produce from Hornsby Bend.

TLM's response showed no weakness.

**IMPROPER DISTRIBUTION OF POINTS IN THE QUANTITATIVE  
"PRICING" CATEGORY: TLM received 40/40 points**

With regard to cost, TLM's response was the lowest, and received the maximum 40 points. TLM protests that its proposal to provide grinding services, shown as an optional additional service, at a significant cost savings from the current COA cost, was insufficiently valued for its financial benefit and in the overall evaluation; TLM argues that the savings from its grinding service should have resulted in the other respondents receiving fewer quantitative points. Neither the cost proposal form, nor other language in the package, explain the value or weight accorded an optional service, other than to state that it would not be considered in the cost evaluation. TLM's optional offer did show substantial savings for the grinding services, but without a prescribed value, there is no evidence to support TLM's claim on this point. Optional services were not included in the factors to be evaluated.

Failure to assign a value to the optional offered service did not result in improper distribution of points.

**REMOVAL OF "LOCAL BUSINESS PRESENCE" SCORING CRITERIA**

TLM protested the removal of the Local Business Presence criterion, and offered testimony about the history of the original RFP and the Council working group established to consider a new definition of Local Business Presence. COA staff testified that they couldn't wait for the new LBP definition to be recommended and adopted by Council, and determined the best course was to proceed without the definition. The COA argued that the playing field was leveled for this factor, whereas TLM pointed to the extra points it would have gained under the LBP definition being considered for adoption. It is uncontroverted that the RFP was issued without a LBP factor, and this Hearing Officer cannot consider matters outside the RFP language.

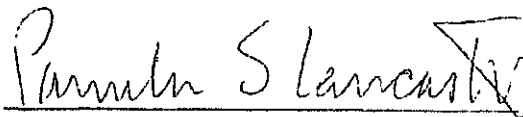
It was not improper for the LBP factor to be removed from the RFP.

TLM criticized the COA for completing the evaluation of the RFP responses in five business days, for failing to make a site visit, and for not requesting additional information from responders. An RFP response is meant to be complete as presented.

information from responders. An RFP response is meant to be complete as presented. The subject matter experts who reviewed the responses are likely very familiar with the Hornsby Bend site who felt no need to visit during the evaluation period. There was no evidence that the COA diverted from its usual pattern in evaluating the RFP responses.

TLM's final suggestion was that the evaluation panel lowered TLM's scores with intent to prevent award of the contract to TLM, in retaliation for TLM's active involvement in protesting the initial RFP. The scoring process for this RFP required all evaluators to agree on the score, making it unlikely that the entire panel worked in unison to achieve an unfair result. Beyond TLM's surmise that retaliation played a part in this final result, there was no statement, document, email, or even an overheard remark to suggest that COA acted, or had reason to act, other than impartially toward TLM's response. In fact, COA staff offered credible testimony to TLM's reputation as experts who could be consulted for difficult questions.

It is not unreasonable to believe, however, that portions of TLM's response were completely overlooked or read in piecemeal fashion without reference to the whole. Some material described as weak was strong in this Officer's estimation, but the subjective nature of this sort of review doesn't allow a mathematical reassessment of scores; neither is it in this Officer's authority to recalculate. In order to assure a full consideration of TLM's response, this Hearing Officer respectfully RECOMMENDS that the evaluator panel be reformed, ideally with all new members, to re-review and re-score TLM's response.

A handwritten signature in cursive script, reading "Pamela S Lancaster". The signature is written in dark ink and is positioned above the printed name.

PAMELA LANCASTER  
HEARING OFFICER

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August 14, 2018

**Via the Texas Attorney General Public Information Act Electronic Filing System**

The Honorable Ken Paxton  
Office of the Attorney General  
Open Records Division  
P.O. Box 12548  
Austin, TX 78711-2548

Re: City of Austin PIR # C003876

Request for Attorney General Decision under Tex. Gov't Code § 552.301 in response to an Open Records Request (the "*Request*") submitted to the City of Austin (the "*City*") by Mr. Ryan Hobbs (the "*Requestor*")

Attorney General Paxton:

Husch Blackwell represents Synagro of Texas-CDR, Inc. ("*Synagro*") in connection with the Request and respectfully requests notice of any action by the Texas Attorney General and of correspondence with the Requestor, or any other parties related to the Request, be provided to Synagro by mail or email to Husch Blackwell at the addresses provided above.

By this letter, and in accordance with the Texas Public Information Act (the "*Act*"), Synagro requests that the Attorney General issue a decision that the City of Austin to withhold the requested information (the "*Documents*") for the reasons stated herein.

On July 13, 2018, the Requestor filed the Request with the City. On July 31, 2018, Synagro received notice of the Request. Thus, today marks the tenth day from the date that Synagro received notice of the Request.

Disclosure of the information provided to you by the City in response to this Request are subject to exceptions from disclosure of information pursuant to numerous sections of the Texas Government Code, including, but not necessarily limited to, Sections 552.104, 552.110(a), and 552.110(b).

## BACKGROUND

The Request is for a proposal or bid submitted to the City in response to a competitive contract bidding and procurement process, specifically, a Request for Proposals (an "*RFP*")

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issued by the City for a biosolids contract valued at approximately \$200 million. The Requestor is a representative of Texas Disposal System ("**TDS**") and Texas Landfill Management ("**TLM**"), which submitted a proposal to the City in response to the RFP at issue here, and which is a competitor to Synagro.

The City recently canceled the RFP and has reissued the solicitation for the very same biosolids contract through an Invitation for Bids (an "**IFB**") process, which, like an RFP, is a competitive solicitation process governed by City procurement rules. In addition, we expect that the Requestor, via TDS or TLM, will submit a bid in response to the pending IFB. As a consequence, the Documents are comprised of information that, if released, would give advantage to a competitor or bidder.

Since the City still needs to procure a contractor for the biosolids contract, and due to the ongoing competitive process, the entire proposal should be excepted from disclosure pursuant to Texas Government Code Section 552.104 ("Information Relating to Competition or Bidding"), as well as pursuant to the Texas Supreme Court holding in *Boeing Co. v. Paxton*, 466 S.W. 3d 831 (Tex. 2015), in addition to other sections of the Local Government Code. However, should the Attorney General prefer a more targeted response, we have included a more detailed explanation regarding why the various portions of the proposal are covered by exceptions to disclosure under the Act.

#### **GROUND FOR WITHHOLDING AND EXEMPTIONS FROM DISCLOSURE**

##### **Generally**

It is an offense under the Act for any person to "distribute information considered confidential under the terms of [the Act]." Section 552.352.<sup>1</sup> And, it is a misdemeanor and official misconduct for any person to "knowingly ... disclose the confidential information to a person who is not authorized to receive the information." *Id.*

"There is no authority under the [Public Information A]ct for requiring a third party to substantiate any claims of confidentiality at the time it submits material to a government body." Open Records Decision 575 (1990). Confidentiality of information under the Act is not determined by whether or not the third party "submitting the information marks it as confidential." *Id.* (citing *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976)). Rather, the determination is based on whether "disclosure of the information submitted might result in an injury" to the third party or its interest. *Id.*

"The attorney general may not disclose to the requestor or the public any information submitted to the attorney general" for review. Section 552.3035. While the issue of whether certain types of information must be disclosed, may be withheld, or is excepted under the Public

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<sup>1</sup> "Section" references herein are to the Texas Government Code.

Information Act is a usually question of law,<sup>2</sup> such determinations as to a particular document or datum turn on application of facts to law.<sup>3</sup>

When applying facts, the Attorney General must base its decision “on a review of the information at issue and on any other information provided to the attorney general by the government body or third parties.” Office of the Attorney General of Texas, Public Information Handbook (2018) [hereinafter “*Handbook*”] at 43 (citing Open Records Decision 652 (1997)).

Comments of the public and third parties “must be received before the attorney general renders a decision under section 552.306.” *Handbook* at 49. Because a governmental body is not required to raise an exception to the release of a third party’s information, any failure by the governmental body to raise an exception to the information’s disclosure is not a waiver of any exception, nor is it acquiescence in the disclosure of the information. *Boeing*, 466 S.W.3d at 838.

If facts are insufficient for the Attorney General to make a determination, the Attorney General “shall give written notice of that fact to the governmental body and the requestor” in order to ensure the law is properly applied and that the rights of requestors, government bodies, and third parties are not prejudiced as a result from a misinterpretation or misapplication of fact to law.<sup>4</sup>

Third parties have standing to assert any exceptions to public disclosure where “no statutory language limits [such exception] to the government.” *See Boeing Co. v. Paxton*, 466 S.W.3d 831, 838, 839 (Tex. 2015); Section § 552.305.

If facts are disputed, then the Attorney General’s “office cannot resolve disputes of fact in the opinion process.” Open Records Decision 652 (1997). Where there is any uncertainty to relevant facts, then “the attorney general must accept a claim for exception as valid if the *prima facie* case for exception is made and no argument is presented that rebuts such claim for exception as a matter of law.” Open Records Decision 552 (1990). “To find otherwise could deprive a third party of a valid property right without an opportunity to be heard before a tribunal empowered to resolve the question of fact.” *Id.* (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 896 (1984)).

### **Responsiveness or Nonresponsiveness**

A government body has no obligation to disclose information not requested. *See* Section 552.221(a) (requiring disclosure only “on application” by the requestor). Information not responsive to or subject to a request is therefore excepted from any requirement of mandatory disclosure. While a “government body must make a good faith effort to relate a request to

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<sup>2</sup> *Heidenheimer v. Tex. Dept. of Transp.*, Case No. 03-02-00187-CV, 2003 WL 124248, at \*1 (Tex. App. Jan. 16, 2003).

<sup>3</sup> *See e.g.* Open Records Decision 609 (1992).

<sup>4</sup> *Handbook* at 48.

information that it holds,”<sup>5</sup> mere submission by the government body to the Attorney General does not in itself mean such submitted information is actually responsive to the request. *See* Informal Letter Ruling No. OR2017-03211 (Feb. 13, 2017) (determining information submitted by government entity was not responsive to the request).

#### **Section 552.110(a): Trade Secrets**

Section 552.110(a) excepts from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. Tex. Gov’t Code § 552.110(a). Under Texas judicial decisions, a trade secret is “any formula, pattern, device or compilation of information which is used in one’s business and presents an opportunity to obtain an advantage over competitors who do not know or use it.” *In re Bass*, 113 S.W.3d 735, 739 (Tex. 2003).

A trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, the design and operation of which in unique combination affords a competitive advantage, is a protected trade secret. *Metallurgical Industries, Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1202 (5th Cir. 1986), *rev’d on other grounds sub nom. Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699 (Tex. 2016). The Texas Supreme Court defines trade secret using Section 757 of the Restatement of Torts as:

[A]ny formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business. . . . A trade secret is a process or device for continuous use in the operation of the business . . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

Restatement of Torts § 757 cmt. b (1939); see also *Hyde Corp. v. Huffines*, 314 S.W.2d 776 (Tex. 1958).

In determining whether particular information is a trade secret, the Attorney General considers the Restatement’s definition of trade secret and the Restatement’s six trade secret factors, none of which are singularly necessary to find a trade secret:

1. the extent to which the information is known outside of [the company’s] business;
2. the extent to which it is known by employees and others involved in [the company’s] business];

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<sup>5</sup> Handbook at 17 (citing Open Records Decision 561 at 8 (1990)).

3. the extent of measures taken by [the company] to guard the secrecy of the information;
4. the value of the information to [the company] and to [its] competitors;
5. the amount of effort or money expended by [the company] in developing the information;  
[and]
6. the ease or difficulty with which the information could be properly acquired or duplicated by others.

Restatement of Torts § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

A party asserting the trade secret under Section 552.110 is not required to satisfy all six factors listed in the Restatement in order to prevail on its claim. *In re Bass*, 113 S.W.3d 735, 740 (Tex. 2003). Rather, the party seeking the exception need only show the information meets the definition of a trade secret when considered with some of the factors. Open Records Decision No. 402 (1983).

The Attorney must accept a claim that information is excepted as a trade secret if a *prima facie* case for the exception is made and no argument is submitted that rebuts the claim as a matter of law. *See* Open Records Decision No. 552 at 5 (1990).

When determining whether information is excepted under Section 552.110(a), the Attorney General must base its decision "on a review of the information at issue and on any other information provided to the attorney general by the government body or third parties." Handbook, p. 48 (citing Open Records Decision 652 (1997)). If facts are disputed, then the Attorney General's "office cannot resolve disputes of fact in the opinion process." Open Records Decision 652 (1997).

Where there is any uncertainty to relevant facts, then "the attorney general must accept a claim for exception as valid if the *prima facie* case for exception is made and no argument is presented that rebuts such claim for exception as a matter of law." Open Records Decision 552 (1990). "To find otherwise could deprive a third party of a valid property right without an opportunity to be heard before a tribunal empowered to resolve the question of fact." *Id.* (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 896 (1984)).

#### **Section 552.110(b): Competitive Harm**

Section 552.110(b) excepts from disclosure "commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained."

A party asserting this exception need only identify specific facts or evidence of a potential competitive injury which could result from release of the requested information. *See* Open Records Decision No. 661 at 5 6 (1999).

When determining whether information is excepted under Section 552.110(b), the Attorney General must base its decision "on a review of the information at issue and on any other information provided to the attorney general by the government body or third parties." Handbook, p. 48 (citing Open Records Decision 652 (1997)). If facts are disputed, then the Attorney General's "office cannot resolve disputes of fact in the opinion process." Open Records Decision 652 (1997).

Where there is any uncertainty to relevant facts, then "the attorney general must accept a claim for exception as valid if the prima facie case for exception is made and no argument is presented that rebuts such claim for exception as a matter of law." Open Records Decision 552 (1990). "To find otherwise could deprive a third party of a valid property right without an opportunity to be heard before a tribunal empowered to resolve the question of fact." *Id.* (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 896 (1984)).

#### **Section 552.104: Competition**

Section 552.104 excepts from disclosure information that, if released, would give advantage to a competitor or bidder. The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Boeing Co. v. Paxton*, 466 S.W.3d 831, 841 (Tex. 2015).

As "no statutory language limits" Section 552.104 "to the government," third parties have standing to assert them as exceptions to disclosure. *See Id.* at 838, 839; Tex. Gov't Code § 552.305. When determining whether information is excepted under Section 552.104, the Attorney General must base its decision "on a review of the information at issue and on any other information provided to the attorney general by the government body or third parties." Handbook, p. 48 (citing Open Records Decision 652 (1997)).

Where there is any uncertainty to relevant facts, then "the attorney general must accept a claim for exception as valid if the prima facie case for exception is made and no argument is presented that rebuts such claim for exception as a matter of law." Open Records Decision 552 (1990). "To find otherwise could deprive a third party of a valid property right without an opportunity to be heard before a tribunal empowered to resolve the question of fact." *Id.* (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 896 (1984)).

#### **The Applicable Exceptions to Disclosure**

Even if a document were responsive, it would fall within various exceptions to disclosure and should be withheld. In the sections below, you will find the applicable exceptions to disclosure. They include the following Sections: 552.104 (Information relating to competition or bidding); 552.110(a) (Trade secrets); and 552.110(b) (Commercial or financial information that would cause substantial competitive harm).



**I. Some of the Documents are Not Responsive to the Request.**

Some of the documents that the City provided to you are not responsive due to their content. The Request was very specific: "The Request was for "a digital copy of the response submitted to the City of Austin by Synagro in response to Request for Proposal CDL2003REBID." The documents that the City provided to you in response to the Request consisted of 342 pages of documents that the City marked as potentially responsive, even though Synagro's submitted proposal only consisted of 300 pages. It appears that the City included duplicate portions of certain parts of the proposal, but, at a minimum, Pages 339-342 were not part of the Synagro proposal, and should be withheld.

**II. Sections 552.104, 552.110(a), and 552.110(b) apply to protect Synagro's proprietary information.**

The Documents should be excepted from disclosure because they fall within the exceptions provided by Sections 552.104, 552.110(a), and 552.110(b).

By its terms, Section 552.104 exempts from disclosure information that, "if released, would give advantage to a competitor or bidder." Tex. Gov't Code § 552.104(a). Section 552.110(b) excepts from disclosure, "Commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Tex. Gov't Code § 552.110(b).

Synagro is a large, national company with many competitors. The Documents would, if released, give advantage to a competitor or bidder due to their proprietary nature and given their use in highly competitive procurement processes and business operations. Moreover, any commercial or financial information or other business information in the Proposal, including regarding Synagro's business capacity and experience, proposed solutions and schedule, marketing and other plans, proposed cost, and business exceptions, if released, would cause Synagro substantial harm since this information is based on the unique skills, knowledge, and experience of Synagro executives, financial analysts, engineers, and other critical employees.

The disclosure of the Documents would cause Synagro real harm not just in the pending competitive procurement process for the biosolids contract in Austin, but also in other cities in which Synagro conducts or plans to seek business throughout the United States, including in other cities in which Synagro and TDS or TLM compete for valuable business contracts. The disclosure of the requested information could allow TDS, TLM, or other competitors of Synagro to gain insight into Synagro's proprietary solutions and business information. It would also allow competitors to undercut Synagro in terms of bid price. All of these harms to Synagro could also harm the municipalities and other governmental bodies that contract for the types of services that Synagro provides.

In addition, the information in the Documents is not generally known outside of Synagro's business, is generally contained within the company on a need-to-know basis, and is

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vigorously protected by Synagro from disclosure to its competitors and the general public. Synagro protects this information because it gives it a competitive advantage, was acquired at great cost of time and funding, and could not be easily acquired or duplicated by its competitors, which is demonstrated by the fact of the Requestor having requested the Documents.

Accordingly, we respectfully request that your Office determine that the City may withhold the Documents pursuant to Section 552.104, 552.110(a), and 552.110(b).

#### **INFORMATION SUBJECT TO WITHHOLDING AND EXEMPTION**

Attached hereto as *Exhibit A* is a document-by-document explanation of how the foregoing grounds for withholding and/or excepting from mandatory or permissive disclosure are applied to the documents which the City has identified as being potentially responsive to the Request.

#### **CONCLUSION**

The City is not required to disclose any of the documents discussed in in the Proposal or in Exhibit A because they are not responsive to the Request and/or are excepted from disclosure by the Texas Government Code. Therefore, Synagro respectfully requests that the Attorney General issue a decision permitting or instructing the City to withhold the Documents.

Pursuant to Texas Gov't Code § 552.305(e), we are contemporaneously providing a copy of this letter the Requestor, with Exhibit A omitted, as it reveals the substance of the Documents.

Should you have any questions concerning the foregoing, please do not hesitate to contact us with the information provided above.

Sincerely,

A handwritten signature in black ink, appearing to read "Nikelle Meade". The signature is fluid and cursive, with the first name "Nikelle" and last name "Meade" clearly distinguishable.

Nikelle Meade

cc: The Requestor, Mr. Ryan Hobbs, via email: rhobbs@texasdisposal.com

## ESTIMATED COST SAVINGS FOR GREEN WASTE GRINDING SERVICES PROPOSED BY TLM

<b>ARR Budget For Grinding <sup>1</sup></b>	<b>Annual Volumes <sup>2</sup></b>	<b>ARR's Calculated Unit Cost</b>	<b>TLM's Unit Cost to City</b>	<b>Annual Savings to City</b>
2017 \$1,268,024	28,300 tons	\$44.81 per ton	\$9.11 per ton	\$1,010,211
2016 \$1,367,015	35,800 tons	\$38.18 per ton	\$9.11 per ton	\$1,040,877

1. ARR budget figures reported in RFP CDL2003REBID – Beneficial Reuse of Biosolids
2. Green waste volumes reported in IFB CDL2003REBID2 – Beneficial Reuse of Biosolids