

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

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

II. Ex Parte (Cone of Silence) Guidelines

The guidelines are based on applicable laws⁶ and are relevant until such time that the Cone of Silence Period ends. The Cone of Silence Period ends and no longer applies when the JEA Board makes a contract award and all bid protests, if any, have been resolved. Of course, any contract award is subject to Council approval and subsequent voter referendum.

This summary is intended to serve as a practical guide during the Cone of Silence Period only. Whether a specific communication or action by the Council is permitted or prohibited by law and best government procurement practices will vary depending on the type and content of the communication in question. When in doubt, and prior to making your desired action or communication regarding this matter, please do not hesitate to seek further advice from our Office. There are two essential ITN-related communication restrictions⁷ during the Cone of Silence Period: (1) communications with vendors or respondents to the ITN, and (2) communications regarding the merits of the ITN terms. These restrictions are explained below:

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

⁶ Public policy favors competitive procurement whenever possible, even in the absence of controlling statutes and/or laws. 1966 Op. Att'y Gen. Fla. 066-9 (Feb. 7, 1966). The purpose of public bidding is to protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in its various forms; to secure the best values for the [public body] at the lowest possible expense, and to afford an equal advantage to all desiring to do business with the [public body], by affording an opportunity for an exact comparison of bids. *Wester v. Belote*, 138 So. 721 (Fla. 1931). Competitive procurement affords the public protection by preventing favoritism toward contractors by public officials. *City of Daytona Beach v. News Journal Corp.*, 156 So. 887 (Fla. 1934). Public bidding seeks to ensure fair competition by providing equal terms/criteria for award of contracts. *City of Opa-Locka v. Trs. of Plumbing Indus. Promotion Fund*, 193 So.2d 29 (Fla. 3d DCA 1966). Also see *Florida Statutes*, Section 838.22(1) – Bid Tampering, Section 112.313(6) – Misuse of Public Position, Section 112.313(8) – Disclosure or Use of Certain Information. *City of Jacksonville, Ordinance Code, Section 602.401 – Misuse of position, information, resources etc.*

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