

**OFFICE OF GENERAL COUNSEL
CITY OF JACKSONVILLE
117 WEST DUVAL STREET
SUITE 480
JACKSONVILLE, FL 32202
PHONE: (904) 255-5100**



MEMORANDUM

TO: Honorable Council Member Brenda A. Priestly Jackson

CC: Jason R. Gabriel, General Counsel

FROM: Lawsikia J. Hodges, Deputy General Counsel, Government Operations
Lynne Rhode, JEA Chief Legal Officer
Stephen M. Durden, Chief Assistant

RE: **City Council’s Authority Regarding JEA and JEA Invitation to Negotiate #129-19 for Strategic Alternatives; Clarification regarding meaning of the phrase “merits of the ITN terms” as used in the Ex Parte Communications (a/k/a Cone of Silence) Guidelines Memoranda**

DATE: October 7, 2019

I. Background.

On August 2, 2019, JEA, an independent agency of the City of Jacksonville (“City”), issued JEA Invitation to Negotiate #129-19 for Strategic Alternatives pursuant to JEA’s Procurement Code (the “ITN”).¹ An “invitation to negotiate” is one of several competitive government procurement methods.² Pursuant to Article 21, Section 21.09 of the City Charter, JEA is not subject to the City’s Procurement Code (Chapter 126, *Ordinance Code*). Section 21.09 authorizes JEA to establish its own procurement code regarding contractual services.³ JEA’s Procurement Code was originally established in 1996, and JEA’s contractual services are governed by its procurement code.

¹ The ITN is available at jea.com/strategicalternatives.

² An “invitation to negotiate” is similar to another government procurement method referred to as a “request for proposal”. An ITN typically consists of minimum requirements, a description of services, evaluated responses, multiple negotiation sessions and a final contract award.

³ Section 21.09 provides as follows: “JEA shall not be subject to the provisions of Chapter 126, Ordinance Code of the City of Jacksonville, as the same may be amended from time to time, however, JEA in entering into any contracts relating to the construction, reconstruction, repair, operation or maintenance of the utilities system or the purchase of supplies, equipment, machinery and materials for the utilities system or the contracting or otherwise purchasing for any advisory, professional or any other services *may establish such rules, regulations or procedures as it may deem desirable or necessary in connection therewith.*”

JEA approved issuing the ITN, subject to mandatory minimum requirements, for public advertisement on July 23, 2019.⁴ City Council did not pre-approve the ITN, or any of its terms, prior to the ITN’s public advertisement on August 2, 2019. Additionally, JEA did not seek City Council’s approval of the ITN, or any of its terms, prior to the ITN public advertisement.

After the ITN was issued, and pursuant to several council member requests, the Office of General Counsel provided memoranda to City Council on September 24, 2019, and August 27, 2019 (the “ITN Memoranda”). The purpose of the ITN Memoranda was to provide City Council with practical guidelines related to ex parte communications (a/k/a Cone of Silence) and other communications during the Cone of Silence Period (as defined in the ITN Memoranda). These guidelines permitted City Council during the Cone of Silence Period to discuss JEA, JEA strategic alternatives, and JEA’s future so long as such discussions did not lead to discussions regarding the “merits of the ITN terms.”

In light of the above background, you have asked the following questions.

II. Questions Asked.

- A. What authority does the City Council have with respect to JEA and the ITN?
- B. What does the phrase “merits of the ITN terms” mean as used in the ITN Memoranda?

III. Short Answers.

- A. JEA is an independent agency of the City governed by Article 21 of the Charter. In accordance with Section 21.04, JEA is authorized to sell its assets; however, if JEA sells more than ten percent (10%) of its assets, such sale would require City Council approval and subsequent voter referendum.

In regards to the ITN, City Council has the ultimate authority to approve or reject any ITN contract award that includes a sale of more than ten percent (10%) of JEA’s assets. However, City Council has no authority under the Charter to *require* the JEA Board to perform or not perform an action regarding the ITN.

- B. The phrase “merits of the ITN terms” as used in the ITN Memoranda, refers to any discussions *during* the Cone of Silence Period regarding the worthiness, or pros and cons, of essential ITN terms (i.e., minimum requirements, scope of services description, and evaluation criteria). As noted in the ITN Memoranda, City Council (and the Mayor) is a *potential* decision-maker in the ITN contract award. As public officials, council members (and the Mayor) have the *potential* to influence the procurement competition and outcome. As such, procurement and ethics laws expressly limit various

⁴ See JEA Resolution 2019-07.

communications and actions by public officials and government employees during a government procurement process.⁵

The above being said, City Council may engage in discussions, meetings, or workshops to discuss JEA, JEA strategic alternatives, JEA's future, or the ITN procedures, timelines and components so long as such discussions, meetings, or workshops during the Cone of Silence Period (as defined in the ITN Memoranda) do not lead to discussions regarding the merits of essential ITN terms.

IV. Analysis.

A. The City's independent agencies, including the JEA, were established by acts of the Florida Legislature and are identified in Section 18.07 of the Charter. The City's independent agencies' exists as separate body politic and corporates, having a corporate existence distinct and separate from the City. Among other things, the City's independent agencies can sue and be sued, own property (personal and real) in its own name, and are generally authorized to operate its business and enter into contracts without City Council approval⁶.

Article 21 of the Charter creates JEA and defines its responsibilities, authority, and powers. JEA was created for the purpose of owning, operating, and managing utilities systems (i.e., electric, water, sewer, natural gas, etc.). The majority of JEA's express powers are set forth in Section 21.04, and JEA's implied powers are set forth in Section 21.05. Pursuant to Section 21.04, JEA may sell more than ten percent (10%) of its assets, subject to City Council approval and subsequent voter referendum. Additionally, pursuant to Section 21.09, JEA is authorized to establish its own procurement code, which JEA established in 1996.

Unlike with other independent agencies, City Council has a unique authority over JEA. Namely, City Council, via supermajority vote, has the authority in its sole discretion to modify all or a portion of JEA's powers. Thus, City Council could eliminate JEA and have its duties taken over by a newly created City department, if it desired to. Further, City Council could modify JEA's relationship with the rest of the Consolidated Government by increasing or decreasing JEA's required use of Central Services (e.g., require JEA to use the City's Procurement Division). However, City Council may not interfere with JEA's exercise of its powers and duties, so long as Article 21 grants JEA particular powers and duties. In other words, and oversimplified, the Charter grants to JEA, *inter alia*, the power to operate the City's electric utility; thus, JEA, and only JEA, may operate such utility. Similarly, City Council may not, consistent with the Charter, operate the City's electric utility, directly or indirectly.⁷ So long

⁵ See Section 112.313(6) and (8), *Florida Statutes*; Section 838.22(1), *Florida Statutes*; Chapter 602, Ordinance Code; JEA Procurement Code.

⁶ Pursuant to the Charter, City Council must approve each independent agency's budget. See Article 14 of the Charter. Each independent agency has authority and powers as provided in each independent agency's applicable City Charter provisions.

⁷ Finally, while the Council may modify or repeal any or all of Article 21 by supermajority vote, the Council may not use an amendment to Article 21 as a backdoor method of amending another provision of the Charter. For example, Section 3.01(e)(2) of the Charter requires further approval by referendum of the electors for certain specified categories of the Charter such as matters involving the Council Auditor. Consequently, the Council could not amend Article 21 in a manner that modified the Charter powers and duties of the Council Auditor without the referendum required by such section of the Charter.

as JEA remains in the Charter as an independent agency, City Council and JEA must function within their respective Charter spheres.

In regards to the ITN, City Council has the ultimate authority to approve or reject any ITN contract award that includes a sale of more than ten percent (10%) of JEA's assets. Because JEA issued the ITN pursuant to its procurement code, City Council has no authority to require JEA to perform or not perform an action regarding the ITN. Notwithstanding the foregoing, City Council may engage in discussions, meetings, or workshops to discuss JEA, JEA strategic alternatives, JEA's future or the ITN procedures, timelines and components so long as such discussions, meetings, or workshops *during* the Cone of Silence Period (as defined in the ITN Memoranda) do not lead to discussions regarding the merits of essential ITN terms (i.e., minimum requirements, scope of services description, and evaluation criteria).

B. As previously discussed in the ITN Memoranda, the purpose of public bidding is to ensure fair competition upon equal terms to all bidders.⁸ Florida procurement and ethics laws expressly limit various communications and actions by public officials and government employees during a government procurement process.⁹ In order to assist council members with their obligation as *potential* decision-makers in the ITN, this Office provided practical guidelines to City Council regarding communications between council members and other parties, including vendors/respondents, the public, and the media, during the Cone of Silence Period. Under the guidelines City Council was permitted to discuss JEA, JEA strategic alternatives, and JEA's future during the Cone of Silence Period so long as such discussions did not lead to discussions regarding the "merits of the ITN terms."

The phrase "merits of the ITN terms" as used in the ITN Memoranda refers to any discussions *during* the Cone of Silence Period regarding the worthiness or pros and cons of essential ITN terms (i.e., minimum requirements, scope of services description, and evaluation criteria). Additionally, the term "merits" as used in this context means "the substantive considerations to be taken into account" regarding the worthiness of essential ITN terms.¹⁰ In light of this guidance, council members are discouraged from debating the importance of one ITN minimum requirement versus another during the Cone of Silence Period. Such discussions by City Council or individual council members during the Cone of Silence Period regarding the merits of essential ITN terms *may* (directly or indirectly) improperly sway or influence the procurement competition and process that bidders are currently participating in.

As discussed in the ITN Memoranda, whether a specific communication or action is permitted or prohibited by law and best government procurement practices will vary depending on the type and content of the communication or action in question. Ultimately, each public official must exercise their professional judgment in engaging in various communications and

⁸ *Wester v. Belote*, 138 So. 721 (Fla. 1931).

⁹ See Section 112.313(6) and (8), *Florida Statutes*; Section 838.22(1), *Florida Statutes*; Chapter 602, Ordinance Code; JEA Procurement Code.

¹⁰ See Black Laws Dictionary.

actions regarding JEA ITN related matters. When in doubt, please do not hesitate to seek further advice from this Office.

V. Conclusion.

We trust that this memorandum provides the legal guidance that you seek. Should you have any questions or require additional information, please do not hesitate to contact us for further discussion.