

Portland City Auditor

Simone Rede



July 23, 2024

Tonkon Torp LLP

c/o Danny Newman and Paul Balmer

DELIVERED VIA EMAIL AND FIRST-CLASS MAIL

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Dear Mr. Newman and Mr. Balmer:

We are in receipt of your May 15, 2024, request for reconsideration asking the Auditor's Office to reconsider the Notice of Determination, Warning and Letter of Education that we issued to Urban Alchemy on May 1, 2024 (the "Initial Determination").

Because of recent Council actions that we believe could cause a protracted dispute about the interpretation of the lobbying code, which we do not believe to be in the public interest at this critical moment in the transition to a new form of government, we withdraw the finding of a violation of the lobbying code and the official warning we issued Urban Alchemy. However, in light of Urban Alchemy's apparent confusion about the lobbying code, we believe a letter of education remains warranted and continue to recommend that Urban Alchemy participate in trainings to ensure future compliance with the City of Portland's lobbying regulations. In addition, because of the public interest in this matter, we address below some of the false and misleading statements in your request for reconsideration.

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I. The Initial Determination is factually accurate and based on a holistic reading of Code, but in light of recent confusion about the definition of “lobbying,” we withdraw the finding of a violation.

Although we are withdrawing the finding of violation, we believe it is important to clarify, both to Urban Alchemy and to the interested public, that we stand behind all the factual statements in the Initial Determination. In particular, the evidence that we developed in the course of our investigation—which Urban Alchemy does not seriously dispute—shows that Urban Alchemy sought to influence the official action of City officials, including, but not limited to, the Mayor, Commissioners, and at-will staff of City elected officials. The evidence also shows that Urban Alchemy spent more than \$1,000 in Q4 2022 doing so.¹ In addition, the evidence shows that while the City and Urban Alchemy’s conversations started out with Urban Alchemy providing information to the City at the City’s request, as the months went by, Urban Alchemy became more and more invested in securing a partnership with the City and convincing the City that it would be the best choice for the ultimate contract. Indeed, Urban Alchemy admitted to the Auditor’s Office that it engaged in meetings and communications with City officials to “help the City identify the parameters of the RFP” that Urban Alchemy was ultimately awarded. (See Initial Determination at 10.)

The reason that we are withdrawing our determination relates to recent unfortunate confusion around whether Urban Alchemy’s actions, notwithstanding that they were an attempt to influence City officials to award it a multi-million dollar contract before the RFP was issued, are exempt from the definition of lobbying as “time spent submitting a bid, responding to related information requests, and negotiating terms on a competitively bid contract or intergovernmental agreement.” (City Code 2.12.020 (G)(4).) Urban Alchemy claims that we were wrong to conclude that this provision of Code means that the City must issue an RFP before a bid-related information exchange becomes exempt from lobbying. As Urban Alchemy’s argument goes, any “bid-related” information request “is excluded from lobbying, whether the response is before or after an RFP was formally announced.” (5/15/2024 Request for Reconsideration at 2-3 (emphasis added).)

Urban Alchemy’s argument is inconsistent with the Auditor’s Office’s longstanding interpretation of City Code and public contracting law, which is that the term “bid” refers

¹ We recognize that you have argued that the amount spent on the December 2022 trip should have been prorated. We dispute proration would be the correct way to determine cost spent lobbying. In addition, the math in your letter is wrong. 45% of the meeting time was spent with City officials. Thus, even using Urban Alchemy’s methodology, the amount spent lobbying would be \$1,777.46.

to a document created in the context of a competitive request for proposals (“RFP”), and that requests related to a bid necessarily must take place after the RFP is issued. The Auditor’s Office has long interpreted the term “bid” as it appears in Code Chapter 2.12 to be consistent with how it is defined in other sections of City Code, and reads the City Code holistically, so that terms used in various sections of Code are given the same meaning to the extent possible. As stated in City Code 5.33.010 A(8), a “bid” is a “response to an Invitation to Bid.” An “Invitation to Bid” is “[t]he written document that invites offers from prospective contractors pursuant to either ORS 279B.055 or 279C.335.” (City Code 5.33.010 A(18).) The invitation to bid for the alternative shelter contract (pursuant to ORS 279B.055 as a competitive sealed bid) was issued on December 20, 2022.

In other words, a holistic reading of the Code requires an interpretation that the “bid” here is Urban Alchemy’s response to the City’s formal December 20, 2022, request for proposals. Time spent submitting a “bid” would then refer to work on Urban Alchemy’s response to the December 20, 2022, request for proposals. Likewise, time spent “responding to related information requests” would be information requests “related to” the bid—i.e., the December 20, 2022, request for proposals. Not only is this consistent with other sections of City Code and state law, it aligns with the initial legislative intent to interpret Chapter 2.12 this way because it would lead to perverse results if City officials and a private contractor could hammer out the terms of a large contract and then agree to sanitize the process by going through the motions of a (preordained) RFP process to exempt a contracting party from reporting the lobbying contacts. The lobbying code was never intended to retroactively remove an activity from the definition of lobbying simply because an RFP is issued after the lobbying activity occurs.

Nonetheless, we do recognize that Chapter 2.12 does not define “bid” and that interpreting the carve-out to the definition of lobbying requires review of other sections of Code (and state law). In light of this, we have planned for some time (for reasons having nothing to do with Urban Alchemy) to update this section of Code, and proposed these edits in a recent Code update process. We recognize that when we brought proposed lobbying code updates before City Council in May, some interpreted this to be an attempt to fix a problem that Urban Alchemy identified. It was not—it was an attempt to reduce the burden on the regulated community from having to look at multiple sections of City Code to understand the carve-out.

Unfortunately, the ensuing discussions that have taken place in public and in private around this Code revision muddy the waters here. We do not think it is in the public’s interest to elevate this dispute to litigation, particularly given that the public now has the information about Urban Alchemy’s contacts with City officials to “identify the

parameters of the RFP.” The finding of violation and warning are thus hereby withdrawn.

II. Urban Alchemy’s request for reconsideration is rife with false statements and accusations.

We also take this opportunity to correct misstatements and mischaracterizations contained in the request for reconsideration. Particularly, Urban Alchemy is incorrect in accusing me and my staff of “bias” and “selective enforcement.” Neither I nor City Elections staff are “biased” against Urban Alchemy, and Urban Alchemy relies on a misunderstanding of how lobbyist reporting works to bolster its arguments of “bias.”

The City’s lobbying enforcement program is complaint-based; the majority of our enforcement actions are the result of third-party complaints to the Auditor’s Office. If the Auditor’s Office receives such a complaint, the Auditor’s Office investigates and makes an impartial determination of whether the code has been violated. (See ARA 15.03(D)(2) (“The Auditor’s Office will conduct an initial review of each complaint received.”). After completion of the investigation, the “Auditor’s Office will issue a written decision” (ARA 15.03(D)(5).) If the Auditor’s Office determines there has been a violation of the code, the Auditor is required to issue a civil penalty. (See City Code 2.12.120 (“A person who violates any provision of this Chapter ... shall be subject to a civil penalty”) (emphasis added).)

As you know, the Auditor’s Office received a complaint about Urban Alchemy. As you also know, the complaint expressly stated: “I think there might be some lobbying violations and RFP violations regarding Urban Alchemy’s [award] of the contract.” We investigated this complaint, consistent with our administrative rules. During the investigation, we spoke to three employees at Urban Alchemy. Those conversations were respectful and cordial. We also gave Urban Alchemy a chance to respond before we finalized the determination—and your office took that opportunity and issued a six-page letter with attachments, all of which we carefully considered. We elected to issue the most lenient penalty available (a written warning), and the Initial Determination made explicit note of mitigating factors, including Urban Alchemy’s full cooperation in the investigation.

To the extent your assessment of “bias” is based on your review of other Q4 2022 lobbying entity registrations (your footnote 1), it appears Tonkon Torp and Urban Alchemy misunderstand the nature of lobbying entity reporting in the City of Portland. 64 entities were registered as of December 31, 2022. Registration lasts for a calendar year. (See City Code 2.12.030.) Simply because an entity is registered does not mean it has to file a quarterly report. Instead, as explained in the Initial Determination, registration

and reporting are separate requirements.² Thus, taking the ACLU as an example: it registered for the calendar year of 2022 in Q1 and reported on lobbying contacts for that quarter; in Q2-Q4, it remained on the list (as it was already registered that year) but declared it had nothing to report. Without a complaint or some other indication that the ACLU exceeded the lobbying threshold in Q2-Q4, my office has nothing to investigate. The mere fact it is registered—which we encourage—and did not file a quarterly report of lobbying activity in all quarters of 2022 is not uncommon and in and of itself not remotely suspicious.³

Moreover, I wish to dispel the misstatement in your request for reconsideration that the real “transgression” according to the Auditor’s Office was that “Urban Alchemy won the City contract.” (5/15/2024 Request for Reconsideration at 3.) The Auditor’s Office has no opinion on the RFP process or the award of the contract, and we did not investigate that.⁴

The other rationales you gave to support your claim of bias also fail to support your assertion.

- **We disagree that the Initial Determination unnecessarily quoted from “inflammatory media reports” about Urban Alchemy.** The Request for Reconsideration contends that the Initial Determination cited media reports that had nothing to do with Portland, and that this is evidence of “bias” against Urban Alchemy. (5/15/2024 Request for Reconsideration at 3-4.) We disagree. The point of referring to the media reports was to strengthen the conclusion that Urban Alchemy’s interest, by the fall of 2022, was not simply helping the City (as Urban Alchemy claimed to investigators), but in positioning itself to win the contract, which we understand Tonkon Torp to have essentially conceded in its

² The Auditor’s Office also encourages registration even if it is not strictly required. (See ARA 15.01(c); see also City Code 2.12.030 B.) Among other reasons, this eliminates the potential for the entity to be the subject of a complaint it failed to register, and ensures it gets quarterly reminders to file reports of lobbying activity if the entity has passed the quarterly reporting threshold.

³ A for-profit example would be NW Natural. It was not registered in Q1 of 2022. It registered, and reported, in Q2. In Q3 and Q4 it remained registered, but indicated it had nothing to report. Again, without any indication that NW Natural failed to make a required report in Q4 (and we had and have none), there would be no reason to investigate it for not reporting in Q4 simply because it had registered earlier in the year.

⁴ As explained previously, we did not investigate conduct after the City issued a formal request for proposals because time spent submitting a bid, responding to related information requests, and negotiating contract terms for a competitively bid contract is not lobbying.

February 27, 2024, letter. If Urban Alchemy was only assisting the City, there would be no reason to encourage the City to keep quiet that it was coordinating with Urban Alchemy and no concern that it would be “harder” for “everyone” (including Urban Alchemy) for recent “bad press item[s] about [Urban Alchemy]” to emerge into discussions around Portland’s alternative shelter plans. (See Initial Determination at 4.)

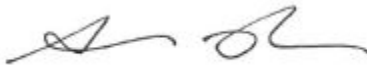
- **We disagree that Urban Alchemy’s “bid-related communications”—such as preparing with City officials a proposed budget that would be palatable to the City before the RFP was issued—are ubiquitous in public contract bidding.** Tonkon Torp further claims the Auditor’s Office is “biased” against Urban Alchemy because we pointed out Urban Alchemy’s contacts with City officials, such as working with the City to design a budget that would best position it to be awarded the contract before the RFP was issued. (5/15/2024 Request for Reconsideration at 3-4.) Tonkon Torp goes so far as to suggest that it is “ubiquitous” in public contracting that potential contracting parties devise lower proposed budgets, in coordination with government officials, outside of and prior to a formal RFP process commencing, and then submit that budget in a formal RFP where the prospective vender is instructed to limit its communications to procurement officials. (5/15/24 Request for Reconsideration at 4.) While we concur that it is not uncommon for a potential contractor to include in its bid a budget it intends to be palatable to City officials, working out the details of a proposed budget with City officials before the issuance of an RFP is not something we have seen in our other investigations. Moreover, pointing these communications out is not evidence of “bias,” but support for the conclusion that Urban Alchemy sought to influence the official action of City officials.
- **We disagree that the Auditor’s Office’s enforcement actions are rare or that the Office attempted to make an “example” of Urban Alchemy.** Finally, the Request for Reconsideration claims that the Auditor has undertaken “exceeding sparse enforcement actions over the last several years” and that, in this light, “the only conclusion is that the Auditor is arbitrarily making an example of Urban Alchemy, playing politics instead of following the law.” Both assertions are incorrect. We have undertaken a number of enforcement actions relating to investigations in recent years. Rather than reflecting any political motive, these investigations are mandatory when a complaint is received (see above), and they have resulted in findings for and against businesses, organizations, campaigns, and persons across a variety of industries and ideological backgrounds. For example, in recent years, we have found against Zenith Energy (lobbying), Portland Business Alliance (lobbying), Uber Technologies, Inc. (lobbying),

Commissioner Chloe Eudaly (political consultant reporting), Portland United PAC (campaign finance), Sarah Iannarone (campaign finance), Write in Teresa Raiford (campaign finance), Ted Wheeler and certain contributors to Friends of Ted Wheeler (campaign finance), Loretta Smith (campaign finance), Sam Adams (campaign finance), and Sam Works for Portland (campaign finance). On the other hand, we have found for ShotSpotter Inc. (lobbying), Dan Ryan for Portland (campaign finance) (in 2020, we found against Day Ryan), Schnitzer Property Management (campaign finance), Teresa Raiford (campaign finance), United for Portland (campaign finance), Jo Ann for Portland City Council (campaign finance), contributors to Friends of Sam Adams (campaign finance), United Food and Commercial Workers (campaign finance), Mingus Mapps (campaign finance), Keep Portland Safe (campaign finance), and Reed College (campaign finance).

III. Conclusion

In conclusion, while we withdraw our finding of violation for reasons discussed above, we also remind Urban Alchemy that attempts to influence legislative and administrative actions of City officials may require registration and reporting if these activities exceed the 8-hour or \$1,000 threshold during any calendar quarter. We continue to remain available and to provide resources to support Urban Alchemy with training, registration, and reporting, as we do for all members of the regulated community.

Sincerely,



Simone Rede
City Auditor