



City of Sacramento City Council

24

915 I Street, Sacramento, CA, 95814
www.CityofSacramento.org

Meeting Date: 10/11/2011

Report Type: Staff/Discussion

Title: Assignment of Amended Service Agreement for Municipal Solid Waste Transfer, Transport, Disposal, Processing and Recovered Materials Handling and Amended Agreement for Purchase of Recyclables, from BLT Enterprises of Sacramento, LLC to USA Waste of California, Inc. (Continued from 9-20-11)

Report ID: 2011-00802

Location: Citywide

Recommendation: Receive and File

Contact: Dave Brent, Engineering Manager, (916) 808-1420; Steve Harriman, Integrated Waste General Manager, 808-4949 - Department of Utilities

Presenter: Steve Harriman, Integrated Waste General Manager, (916) 808-4949, Department of Utilities

Department: Department Of Utilities

Division: Solid Waste Administrative Svc

Dept ID: 14001711

Attachments:

- 1- Description/Analysis
- 2 - Attachment 1-Letter to Alex Oseguera
- 3 - Attachment 2- Letter to John Shirey
- 4 - Attachment 3- Letter to Councilmember Cohn
- 5 - Attachment 4- Response Letter of September 30, 2011

City Attorney Review

Approved as to Form
Janeth D. San Pedro
9/9/2011 2:20:59 PM

Approvals/Acknowledgements

Department Director or Designee: Jamille Moens - 9/9/2011 10:37:08 AM

escription/Analysis

Issue: USA Waste of California, Inc. (“USA Waste”), a subsidiary of Waste Management Inc. (“WMI”), has offered to purchase the Sacramento Recycling and Transfer Station (“SRTS”) from BLT Enterprises, and BLT may assign the Amended Service Agreement and the Amended Recyclables Agreement with the consent of the City Council.

Policy Considerations: At the September 20, 2011 City Council meeting, Council continued the item and directed staff to request additional information and assurances from BLT and WMI. Pursuant to Council’s direction, the City Manager sent a letter dated September 27, 2011 to BLT and Waste Management (Attachment 1) on the following issues:

Financial Information: the Council requested USA Waste to provide financial information or analysis , including but not limited to pro forma, to demonstrate that it can earn a sufficient profit while meeting the Performance Obligations without seeking additional rate adjustments beyond those provided for in the amended agreements. The documents and information requested were previously requested by City staff but which USA Waste/WMI refused to provide.

In a letter dated September 30, 2011 (Attachment 2), USA Waste indicated that it would “walk the City Manager and/or individual Council members” through their financial information upon execution of a Confidentiality Agreement.

However, staff recommends that USA Waste also allow other appropriate City staff and the City’s consultant to review the financial information from USA Waste, pending execution of a Confidentiality Agreement.

In-Region Disposal: the Council expressed concern that one of the fundamental differences between BLT and USA Waste is landfill ownership. This difference may create an economic incentive for USA Waste to terminate its disposal agreement with the County of Sacramento, which it has the right to do under the Kiefer Landfill agreement with the County, and take steps to deliver waste to a WMI company-owned landfill.

In the September 30th letter, USA Waste indicated its willingness to amend the Amended Service Agreement to provide the City the right to consent to any proposed termination of the Kiefer Landfill agreement.

Prior Negotiations between USA Waste and BLT Enterprises: the Council asked if there had been previous discussions or negotiations between BLT and USA Waste regarding the purchase of STRS prior to the City’s contract approval date of November 16, 2010.

In a letter dated September 27, 2011 (Attachment 3) BLT confirmed that there were negotiations between BLT and USA Waste regarding the purchase of SRTS prior to November 16th , and that those negotiations were not disclosed to City staff. In a letter

dated September 27, 2011, the City Manager requested that BLT and USA Waste provide all documents they have related to BLT's negotiations of the amended agreements as well as the offer to purchase of SRTS and/or BLT's assets or business, including records that pre-date November 16th.

In the September 30th letter, USA Waste indicated that it has no documents regarding BLT's negotiation of the amended agreements with the City prior to November 16th and documents related to their discussion with BLT for the acquisition of BLT's assets are "proprietary, trade secret and/or attorney client privileged" and refused to provide the documents.

In a letter dated October 4, 2011 (Attachment 4), BLT did not indicate whether or not it would provide the requested documents.

Given the timing and sequence of the discussions between BLT and USA Waste for the purchase of BLT's assets while the City was negotiating with BLT on the amended agreements, staff is evaluating the City's options with regards to the response received from BLT and USA Waste on this issue.

Environmental Considerations: This report is not subject to California Environmental Quality Act (CEQA) review pursuant to Section 15378 of the CEQA Guidelines.

Sustainability: Not applicable.

Commission/Committee Action: Not Applicable

Rationale for Recommendation: Staff needs to seek further clarification from BLT and USA Waste on these issues, coordinate with USA Waste for the review of the financial information, and evaluate City's options with regards to the disclosure of negotiations between BLT and USA Waste regarding the acquisition of BLT's assets while City was negotiating with BLT on the amended agreements.

Financial Considerations: Not applicable.

Emerging Small Business Development (ESBD): Not Applicable

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OFFICE OF THE
CITY MANAGER

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September 27, 2011

Alex Oseguera, Area Vice President
11931 Foundation Place, Suite 200
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Shawn Gutterson, VP BLT Enterprises of Sacramento LLC
8491 Fruitridge Road
Sacramento, CA 95826

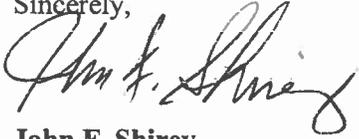
Dear Mr. Oseguera and Mr. Gutterson,

On September 20, 2011, the City Council directed staff to request from Waste Management and BLT Enterprises of Sacramento the following additional information and assurances necessary for the City Council to fully evaluate its decision regarding the assignment of the Amended Service Agreement and Amended Recyclables Agreement to Waste Management:

1. Documents that demonstrate Waste Management, Inc., including but not limited to USA Waste of California, Inc. and Waste Management Holdings, Inc. (collectively referred herein as "WMI"), will be able to operate profitably under the terms of the Amended Service Agreement without seeking adjustments to its compensation to recover the cost of purchasing BLT Enterprises' Sacramento transfer station and/or BLT Enterprises' assets or business, including but not limited to any and all internal memoranda, reports, analyses, correspondence, pro forma, financial projections, rate of return analysis, or other documents prepared by WMI, or any agent or consultant, relating to the determination, calculation, or method of determining the acquisition price. This includes, but is not limited to, the documents and information previously requested by City staff but which WMI refused to provide.
2. Written assurances from WMI that it is committed to not only AB 32 goals, but also that WMI is committed to in-region disposal of City Waste (as defined in the Amended Service Agreement) at Kiefer Landfill, and not a return to its own Lockwood Landfill or some other WMI-owned landfill outside the Sacramento region.
3. Documents (of any kind and in any form) that BLT Enterprises of Sacramento and WMI, and all of their respective officers, agents, employees, directors, attorneys, consultants, corporate affiliates, owners, and any other person related to them, have that mention or relate to BLT's negotiation of the Amended Service Agreement with the City of Sacramento and/or any offer to purchase BLT Enterprises' Sacramento transfer station and/or BLT Enterprises' assets or business. This request specifically includes, but is not limited to, any such records that pre-date November 16, 2010.

As you know, the City Council continued this item to October 11, 2011, meeting. We therefore request a prompt response to these requests so City staff and the City Council can fairly evaluate the information provided.

Sincerely,



John F. Shirey
City Manager

cc: Dave Brent, Interim Director of Utilities
Steve Harriman, Integrated Waste General Manager
Matthew Ruyak, Supervising Deputy City Attorney
Janeth San Pedro, Senior Deputy City Attorney

Rob Solomon, Chief Development and Legal Officer
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Palm Springs, CA 92262



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September 30, 2011

John F. Shirey
City Manager
915 I Street, Fourth Floor
Sacramento, CA 95814

Dear Mr. Shirey:

Thank you for your recent correspondence dated September 27, 2011 requesting additional information relating to our purchase agreement for BLT's Sacramento Recycling and Transfer Station. As stated in previous discussions with the City of Sacramento (City), Waste Management is committed to working with the City to provide environmental solutions that reduce the local impact on our environment, and provide for a long-term solution to the region's waste and recycling needs. It is our intent to provide you with the information you need for Waste Management to assume all obligations under the City's agreement with BLT, while protecting confidential business information.

Based upon the feedback we received from the City Council, and in response to your recent correspondence, below we have provided additional information. Please find detailed responses to the items of clarification requested:

Cost of Service: The City's Amended Service Agreement with BLT specifically sets forth how the Service Fee is calculated and adjusted. Section 18.01(b) specifically provides that the Service Fee is "all inclusive" of direct costs and indirect costs including, but not limited to, capital recovery. Thus, there is no "cost of service" or "return on investment" component to the Service Fee. Under the terms of the Amended Service Agreement, the profitability of the operations and the recovery of our purchase price are irrelevant to future compensation adjustments.

Nevertheless, provided that the City will enter into a Confidentiality Agreement substantially in the form entered into with BLT, we are prepared to walk the City Manager and/or individual City Council members, through our financial information and analysis demonstrating our ability to operate profitably under the amended agreements without seeking extraordinary adjustments to compensation.

Termination of Lockwood Agreement: While we do not believe the agreements allow the City to condition its consent on any changes to the agreements, we will agree to the early termination of the Lockwood Landfill agreement and redirection of City Waste to Kiefer landfill as soon as reasonably practicable following the closing of the acquisition of BLT's assets.



Termination of Kiefer Landfill Agreement: We will agree to allow the City the right to consent to any proposed termination of the Kiefer Landfill agreement with the County if this were requested in the future by USA.

Commitment to AB 32 Goals: We hereby confirm our commitment to meet AB 32 Goals. Waste Management was one of a very few large companies to support enactment of AB 32, and we have made significant investments to significantly reduce our carbon footprint. With our joint venture with Linde North America, we are now producing more than 10,000 gallons per day of ultra low-carbon LNG produced from landfill gas.

Negotiations with BLT: The final request from Councilmember Cohn related to the timing of discussions with BLT regarding the purchase of the Sacramento Recycling and Transfer Station. As the official representative of Waste Management in the Sacramento region, I can confirm the detailing of communications as set forth in item 2 of Mr. Gutterson's September 27, 2011 letter to Councilmember Cohn.

We have no documents regarding BLT's negotiation of the Amended Service Agreement with the City of Sacramento prior to November 16, 2010. **We had no input or involvement in BLT's negotiations with the City.** Our discussions at that time related solely to the acquisition of BLT's assets. The proprietary, trade secret and/or attorney client privileged material that you are seeking regarding our negotiations to purchase BLT's assets is not in any way relevant to the assignment and is the subject of a confidentiality agreement. Thus, we cannot provide such confidential information.

We have addressed all issues and concerns raised during the recent City Council meeting, and in your recent correspondence, and we look forward to moving forward with the assignment of the contract. Please let me know how the City wishes to proceed with respect to scheduling briefings on financial information. We look forward to our working together to achieve the environmental goals that will help support the City of Sacramento's environmental leadership.

Sincerely,

Alex Oseguera
Area Vice-President
Sacramento/Nevada Area

Cc: Shawn Gutterson, VP BLT Enterprises of Sacramento LLC



September 27, 2011

Hand Delivered

Councilmember Steve Cohn
City of Sacramento
915 I Street
Sacramento, California 95814

Re: BLT Enterprises of Sacramento, LLC
Proposed Assignment to USA Waste of California, Inc.

Dear Councilmember Cohn:

I would like to take this opportunity to thank you, the Mayor and the other members of the City Council for taking the time to evaluate our request for the City to consent to the assignment of the Amended Service Agreement and the Amended Recycling Agreement to USA Waste of California, Inc., a subsidiary of Waste Management. At the September 20, 2011 City Council hearing, you and the other members of the council indicated that there were three questions that needed further explanation before council could vote on the proposed assignments to Waste Management. The following is our brief response to these questions.

1. Can Waste Management Deliver City Waste Out-of-Region after 3 Years?

The City has total control where City waste is disposed.

At the council hearing, you expressed concern that after three years, Waste Management could terminate the Kiefer landfill agreement and choose to deliver the City's waste to an out-of-region landfill. This would, of course, fly in the face of the fundamental policy reason why the City entered into Amended Service Agreement – namely, to dispose of the City's waste in-region and thus help the City to be a leader in greenhouse gas emission. That's why the City retains total control over where the City's waste is disposed of, as specified in Section 12.03 of the Amended Service Agreement, which provides that ***"... the City shall have the sole discretion to direct Contractor to deliver City Waste to any Primary Disposal Facility or Facilities, Alternate Disposal Facilities or Waste-to-Energy Facilities."*** The City's control to direct where City waste is disposed of has never been disputed by BLT or Waste Management.

The issue raised at the meeting appears to stem from BLT's termination right under the Kiefer landfill agreement. While it is true that BLT can terminate the Kiefer landfill agreement, BLT cannot use this right to abrogate the City's control of the disposal of City's waste stream. Without a termination right, the City would have been stuck with a 20 year commitment to have its waste disposed of at the Kiefer landfill.



It is important to note that City staff itself supported giving BLT a termination right to preserve the City's flexibility to direct BLT to deliver the City's waste to other landfills, processing centers and waste-to-energy facilities. In fact, City staff, including the City Attorney's office, actively participated in the negotiations of the Kiefer landfill agreement and ultimately approved all of its terms. It is attached as an exhibit to the Amended Service Agreement. In addition, page 16 of the Staff Report to the City Council recommending approval of the Amended Service Agreement, specifically states that "[u]nder the proposed Amended Service Agreement with BLT... the City can direct to any disposal agreement..."

We find it hard to believe that staff may now argue that the City does not control where its waste is disposed of. But if this is still causing concern, Waste Management has confirmed that it would not terminate the Kiefer landfill agreement without the City's consent.

Finally, it is our understanding that in order to expedite the City's policy goals of in-region disposal, Waste Management is prepared to terminate the Lockwood landfill agreement early and immediately dispose of the City's waste at the Kiefer landfill. Not only will this help the City achieve in-region disposal more than a year before it is set to occur under the Amended Service Agreement, this will also permit the City to immediately increase to 40,000 tons per year the delivery of City waste to the County's transfer station located north of the American River. As noted in the November 2010 Staff Report, utilizing the County's north area transfer station is estimated to save the City upwards of \$500,000 per year as a result of reduced maintenance costs and fuel use.

2. Did Waste Management and BLT have Discussions Regarding a Purchase of the Transfer Station Prior to the City and BLT's Execution of the Amended Service Agreement?

Yes, but those discussions did not occur in parallel with our negotiations with the City and had no bearing on our negotiation of the Amended Service Agreement.

Waste Management has acquired numerous companies in the waste and recycling business over the years, and has approached BLT many times about acquiring certain BLT assets. It was in this general context of ascertaining interest that Waste Management asked BLT in early 2008 if it would consider selling the Facility. That inquiry culminated in an offer to buy the Facility in April 2008 which was summarily rejected.

In mid 2010, Waste Management again raised the subject of acquiring the Facility. This was more than two years after the City Council's direction to staff to negotiate with BLT to secure long term disposal of the City's waste to an in-region landfill. At that time, BLT and the City had been negotiating the Amended Service Agreement for more than two years. In early October 2010, Waste Management outlined a proposed transaction under which it might be willing to buy the Facility. For the next six months, Waste

Councilmember Steve Cohn
September 27, 2011

Management conducted due diligence regarding a potential acquisition. During this same time period, Waste Management and BLT continued discussing potential terms. It was not until April 2011 that Waste Management made an acceptable offer to buy the Facility, and May 2011 when Waste Management and BLT executed a definitive agreement.

The City approved the Amended Service Agreement and Amended Recycling Agreement in November 2010. While BLT had no legal or contractual duty to inform the City that it was in preliminary discussions with Waste Management, after more than two years of negotiating with the City, such discussions had no influence on the outcome of the Amended Service Agreement or the Amended Recycling Agreement. Certainly, in November of 2010, there was no agreement between BLT and Waste Management, and there was no guaranty that any transaction with Waste Management could ever be consummated.

3. City Asked to Review Copy of Waste Management's Financial Projections

We understand Waste Management is willing to make such a disclosure.

At the council hearing, the City Council requested a copy of Waste Management's financial projection for the Facility demonstrating that Waste Management would be able to operate profitably under the terms of the Amended Service Agreement without seeking adjustments to compensation that are not provided under the Amended Service Agreement to recover the cost of purchasing the Facility.

We understand that if the City provides Waste Management with appropriate assurances that Waste Management's non-public financial information will remain confidential, Waste Management will allow appropriate City personnel to review additional financial information.

We do want to point out, however, that if in the future Waste Management requests an increase in compensation that is not provided under the Amended Service Agreement, the City can simply say "no." There is no right under the Amended Service Agreement for BLT, Waste Management or any other operator of the Facility to seek an increase in compensation because it is not earning a reasonable rate of return on its investment.

Finally, we think it is important to keep in mind that the assignment of the Amended Service Agreement and Amended Recycling Agreement to Waste Management does not change the terms of these agreements, and certainly will not adversely affect the City's goals of in-region disposal and reduction in greenhouse gas emissions.

Councilmember Steve Cohn
September 27, 2011

Please let me know if you have any questions or need any additional information.

We look forward to the October 11th council hearing.

Very truly yours,



Shawn Guttersen

cc: Mayor Kevin Johnson
Angelique Ashby
Darrell Fong
Robert King Fong
Kevin McCarty
Bonnie Pannell
Jay Schenirer
Sandy Sheedy
(all via hand delivery)
Robert Solomon, Esq.
Michael Taitelman, Esq.
Daniel Rosenthal
(all via email)



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October 4, 2011

Mr. John F. Shirey
City Manager
City of Sacramento
915 I Street, Fourth Floor
Sacramento, CA 95814

Subject: Response to letter of September 30, 2011

Dear Mr. Shirey,

Thank you for your September 27, 2011 letter seeking the additional information requested by Councilmember Cohn at the September 20, 2011 City Council hearing.

We understand that per Alex Oseguera's September 30, 2011 letter to you, Waste Management has (i) agreed to make available for the City's review additional financial information demonstrating its ability to operate profitably under the Amended Service Agreement without seeking adjustments to compensation, (ii) confirmed its commitment to AB 32 goals and in-region disposal of City Waste at Kiefer landfill, (iii) agreed to terminate the Lockwood landfill agreement early and start delivering City Waste to Kiefer landfill, and (iv) confirmed that it will not terminate the Kiefer landfill agreement without the City's consent. This, coupled with the existing terms and provisions of the Amended Service Agreement, should resolve any legitimate City concerns about Waste Management's commitment to in-region disposal under the compensation structure of the Amended Service Agreement.

With respect to your request for documents, as set forth in my September 27th letter to Councilmember Cohn, Waste Management and BLT had discussions regarding Waste Management's potential acquisition of the Facility prior to November 16, 2010, but these discussions related solely to Waste Management's interests in acquiring the Facility and did not conclude for almost six months after the City Council approved the amended agreements. **Waste Management had no input or involvement with BLT's negotiations with the City, and we did not provide to or receive any documents from Waste Management regarding these negotiations prior to November 16, 2010.**

If you are available, I would like to schedule a time to meet with you and discuss any questions you may have regarding the terms of the amended agreements before the October 11th City Council hearing. Waste Management's competitors and the Sacramento Bee want you and the City Council to believe that the Amended Service Agreement is a bad deal for the City. They somehow argue that this agreement will leave City residents paying the highest rates for waste disposal in the region. While our request for the City's consent to the assignment of the amended agreements should not be a referendum on their terms, what is being said is just not true.



Before I address the inaccuracies about costs, it is important to not lose sight of the fundamental policy considerations that were the driving force behind the amended agreements: in-region disposal, fleet efficiencies by the City's use of the County's north area transfer station, significant carbon footprint reductions and local job preservation. All of these policy goals were achieved without increasing the City's costs, and none of these policy goals are impacted by the assignment of the amended agreements to Waste Management.

With respect to the financial impact, the amended agreements are not the driving force behind the City's solid waste costs. Pursuant to the City's proposed 2011/2012 budget and the November, 2010 staff report recommending approval, the Amended Service Agreement accounts for only 10% of the City's solid waste budget. Of this, more than 40% of the compensation paid to BLT is a direct pass-through of landfill costs (which the City primarily negotiated). The November, 2010 staff report recommending approval further estimates that the Amended Service Agreement will save the City's collection fleet upwards of \$500,000 per year because of the operational efficiencies the City would gain by delivering City waste directly to the County's north area transfer station. Finally, given the escalating cost of diesel fuel, the distance to dispose out-of region (more than 300 miles round trip) and the operational efficiencies, the November, 2010 staff report estimates that the City's costs will be less under the Amended Service Agreement than what they would have been had the City chose not to amend its agreements with BLT and dispose of its waste in-region.

Please let me know if you need any additional information.

Sincerely,



Shawn Gutterson
Vice President

cc: Honorable Mayor Kevin Johnson
City Council
City Attorney's Office
Alex Oseguera, Area Vice President, WM
(all via email)