Agenda Item No. 20

File Code No. 630.01

CITY OF SANTA BARBARA

COUNCIL AGENDA REPORT

AGENDA DATE: June 28, 2016

TO: Mayor and Councilmembers

FROM: Environmental Services Division, Finance Department

SUBJECT: Status Of The Resource Recovery Project At Tajiguas Landfill

RECOMMENDATION: That Council:

A. Receive a report on the status of the proposed Resource Recovery Project at Tajiguas Landfill; and

B. Direct staff to work with the Solid Waste Ad Hoc Committee to evaluate the project in greater detail.

EXECUTIVE SUMMARY:

In January of 2013, the County of Santa Barbara, the City of Goleta and the City of Santa Barbara executed a Term Sheet with Mustang Renewable Power Ventures, now MSB Investors, LLC (MSB), to design, build, own and operate a materials recovery facility and an anaerobic digestion facility at Tajiguas Landfill. After determining that private financing of the project would result in unacceptably high tipping fees, the City Council on July 28, 2015 directed staff to work with County staff on a new model, whereby the County would finance and own the facility and MSB would design, build, and operate it. The County and MSB reached tentative agreement on terms for a Waste Services Contract that incorporates Deal Points that were approved by the Board of Supervisors. The draft Waste Services Contract yields a tipping fee that is approximately 27 percent lower than those proposed by the vendor under the previous, privately-financed model. The Board of Supervisors will consider approval of the contract at its July 12, 2016 meeting.

The draft Waste Services Contract also establishes strict performance standards and guarantees and revenue sharing provisions that are beneficial to the County and the participating agencies, including the Cities of Santa Barbara and Goleta, and potentially the Cities of Solvang and Buellton (collectively referred to as the “Public Participants”). Based upon an analysis of the various risks (technological, performance, commodity volatility and market risk, etc.) that would be assumed by the Public Participants under the County-owned model and the mitigating factors associated with these risks, staff believes that assumption of these risks is prudent, given the lower tipping fees, enhanced diversion services and reduction in greenhouse gas emissions yielded by the project.

In addition to the Waste Services Contract between the County and MSB, the County would also need to execute a separate Materials Delivery and Processing Services Agreement (MDPSA) with each participating jurisdiction, including the City of Santa Barbara. The MDPSA would be used to secure the County's debt financing obligation through a guarantee of revenue and materials delivery from each jurisdiction for its proportional share of the facility costs based upon a pre-determined range of waste to be delivered.

Under the MDPSA, each jurisdiction's revenue guarantee is expressed through a tipping fee that is applied to a minimum tonnage commitment from each jurisdiction. The tipping fee would be incorporated into trash and recycling fees charged to City customers, similar to the current Tajiguas tipping fee. To protect City ratepayers, the County will obtain a variety of insurance coverage to mitigate against casualties or performance failures. Should the City and County reach agreement on this waste commitment, staff anticipates bringing the MDPSA to the Council in September of 2016.

Should the City agree to commit its waste to the project and execute a formal agreement with the County, the Council would be required to make findings on the Final Subsequent Environmental Impact Report for the project, which the Board of Supervisors will consider certifying at its July 12, 2016 meeting.

DISCUSSION:

Background

For several years, staff the County of Santa Barbara and the Cities of Santa Barbara, Goleta, Buellton, and Solvang (Public Participants), have worked together to explore the development of a Resource Recovery Project (RRP) at the Tajiguas Landfill. Following a formal procurement process which began in 2009, the Public Participants selected a project proposal, submitted by Mustang Renewable Power Ventures, now known as MSB Investors, LLC (MSB), comprised of the following components:

1. Materials Recovery Facility (MRF) – this facility would sort trash that is currently received at Tajiguas Landfill into three streams:

    - Recyclables – that would be separated, baled, and sold for reuse[1],
    - Organics – that would be recovered for processing in the Anaerobic Digestion Facility; and,

[1] The RRP would provide the Public Participants a local option for processing source-separated recyclables and source-separated organics, which are currently processed in Ventura and Santa Maria, respectively.

- Residual – non-recoverable materials left over from the MRF and Anaerobic Digestion Facility that would ultimately be landfilled.

2. Anaerobic Digestion Facility (ADF) – this facility would convert organics recovered from the MSW into compostable material and biogas.
   The compost would be marketed as a soil amendment or used for reclamation projects. The biogas would be combusted to generate electricity.

In January of 2013, the Public Participants jointly executed a Term Sheet, including an Exclusive Right to Negotiate with MSB to design, build, own, and operate the facility.

A detailed description of the history of the project, the procurement process, proposed technologies, and business terms to be negotiated were presented to the City Council on January 10, 2012. The Council Agenda Report is available at http://services.santabarbaraca.gov/CAP/MG101721/AS101725/AS101739/AS101745/AI105625/DO105746/DO_105746.pdf.

Business Negotiations with MSB Investors, LLC

In November 2014, MSB submitted a proposal to the Public Participants that included tipping fees well in excess of the $100 per ton threshold set forth in the Request for Proposal (RFP) and Term Sheet. The cost of private equity (internal rate of return on equity, etc.) and other terms associated with the proposed private financing played a significant role in the higher tipping fees. For these reasons, at its July 28, 2015 meeting, Council directed staff to work with County of Santa Barbara staff to study and evaluate a public financing model for the RRP. The Council Agenda Report is available at http://services.santabarbaraca.gov/CAP/MG124884/AS124888/AS124902/AS124908/AI129145/DO129146/DO_129146.pdf.

On August 31, 2015, the Public Participants sent a proposal to MSB to design, build, and operate the facility, which the County would both finance and own. In a letter dated November 30, 2015, MSB stated that it found the terms of the proposal acceptable in concept. Based upon this acceptance, the Public Participants and MSB conducted additional negotiations, which resulted in the creation of the attached set of Deal Points, which the County Board of Supervisors approved at its April 5, 2016 meeting. The Deal Points created a framework for the County-owned model and served as a guide for further negotiations with the vendor.

Since the adoption of the Deal Points, the Public Participants and MSB have nearly completed negotiations on the draft Waste Services Contract (WSC) between the County and MSB, which will be considered by the Board of Supervisors on July 12, 2016. The WSC contains the following key terms:

- **Project**: Construction of a MRF and ADF at Tajiguas Landfill and disposal of remaining waste.

- **Contract Term**: Twelve years (Two-year construction period and ten-year operation period) with County option to extend the contract by five one-year extensions.

- **MSB Responsibilities:** Design, build, and operate the MRF and ADF, including management of all contractors and subcontractors and obtaining and maintaining compliance with all land use entitlements and regulatory permits; and market recyclable materials, compostable material, and electricity produced from biogas.

- **County Responsibilities:** Finance the RRP, administer the WSC with MSB, operate the scale house, and dispose of residual waste.

- **Performance Guarantees**: the WSC requires MSB to guarantee the following performance standards:

    - Material Throughput: the RRP will be capable of processing material to its rated capacity at all times.
    - Diversion: The RRP will divert a minimum of 64.8 percent of waste by weight (based upon current waste composition assumptions and waste commitments by jurisdictions).
    - Electrical Output Guarantee: power output per ton of digested organic material.
    - Recyclable Sales Guarantee: sales of recyclable commodities will generate revenue consistent with market values throughout the industry.

- **Compensation**: MSB would be compensated in two distinct phases, during construction of the facility and during the ten-year operational period, as follows:

    A. Construction Phase:

        - Facility Design and Land Use Entitlements: $7.8 million ($4 million related to land use entitlements and $3.8 million related to facility design).
        - Development Fee: $3.09 million for construction and equipment vendor management.
        - Equipment and Construction Costs: $99.6 million.

    B. Operational Phase:

        - Per-Ton Tipping Fee: $5.60 per ton of material processed. The per-ton tipping fee will be adjusted each year by the Consumer Price Index (CPI) to reflect certain increases in the vendor’s cost to operate the facility.
        - Recyclable Commodity Revenues: Approximately 75 percent of the annual revenues needed to operate the RRP (approximately $12.5 million) is expected to be derived from the sale of recyclable commodities. While the

WSC requires the vendor to achieve commodity pricing that are consistent with the industry, the WSC stipulates that the County will keep the vendor whole for any shortfall below the conservative baseline revenue assumption of $9.4 million that was used in the pro-forma. In exchange for this revenue floor, the County would receive the majority of any revenues above the baseline, as discussed in the Revenue Sharing section below.

- **Revenue Sharing:** In the case that revenues generated by the sale of recyclable commodities, compost, and electricity production exceed pro-forma revenues, then the vendor would receive share of the revenues. The amount the vendor would receive will depend on the level of revenues above pro-forma, but in no case would it exceed 25%.

Risk Analysis

The risk profile under the publicly financed option differs from that contemplated by the 2009 RFP.

The RFP was open to a wide array of cutting-edge and potentially risky technologies (e.g. pyrolysis, plasma arc gasification, etc.) that were unproven on a heterogeneous waste stream and that had not been permitted widely in California or even the United States for this application. For these reasons, the RFP shifted all risk to the potential vendor throughout the contract term.

By 2015, the risk profile of the project had changed dramatically. For example, MRF and ADF technologies are more common and the science is better understood than other alternative waste-processing technologies. Moreover, years of negotiations with MSB made it clear that the tipping fee proposed by the vendor of $146 per ton was too high relative to the risk protection afforded by the vendor. In contrast, by publicly financing the project, assuming some additional risks, and identifying risk mitigation measures, the tipping fee fell by approximately 27 percent to approximately $106 per ton.

An analysis of the following risks and associated mitigating factors that result from the County-financed model led staff to conclude, along with HF&H, the County's consultant, that the Public Participants should pursue the publicly-financed option:

- Technological Risk: risk that the facilities completely fail to perform. Two types of technology are employed by the RRP:
  - Mixed waste MRF: mixed waste sorting technology has been in existence for many years and has improved substantially in the past decade. The number of

mixed-waste processing facilities increased from 33 to 60 between 2006 and 2012, 66 percent of which are located in California.[2]

- o Anaerobic Digester: Anaerobic digestion technology has long been used to digest sludge at wastewater treatment plants and to produce electric power (as is the case with the City's El Estero Wastewater Treatment Plant). Moreover, source-separated foodwaste and greenwaste has been anaerobically digested in Europe since the 1990s. In California alone, there are eleven anaerobic digesters that are currently processing waste, two more are under construction, and an additional seven are in various stages of permitting.[3]

- New Diversion Mandates: since the RFP was issued in 2009, several new State statutes, including Assembly Bill 341 and Assembly Bill 1826, were signed into law. Assembly Bill 341 mandates commercial recycling and sets a statewide diversion goal of 75 percent. AB 1826 requires diversion of organic material from the commercial sector. While the RRP represented a sound and progressive approach to waste management in 2009, it is now essential infrastructure if the Public Participants are to comply with these new State mandates. In addition, the diversion of materials from the landfill will extend the permitted capacity of Tajiguas Landfill and will reduce greenhouse gas emissions in accordance with Assembly Bill 32, the Global Warming Solutions Act of 2006.

- Commodity Value Risk: as stated above, approximately 75 percent ($9.4 million) of the $12.5 million annual revenue requirement to operate the facility is derived from the sale of recyclable materials, both source-separated and those recovered from the trash stream. Under the terms of the draft WSC, the County (and by extension, the ratepayers of the participating agencies) would maintain a floor of $9.4 million for recyclable materials. Should market prices fall, the Public Participants would be required to keep MSB whole for the losses below the revenue floor through either accumulated reserves or a rate adjustment.

  However, it is important to note that the Public Participants already assume the risk of market volatility with its source-separated recyclables that are processed by Gold Coast Recycling in Ventura. The City itself has experienced substantial swings in revenue in response to global economic conditions and tightening quality standards (e.g. China's Green Fence, etc.). In the context of the RRP, revenues from source-separated recyclables will constitute up to 40% of the total revenues derived from recyclables. The remaining 60% of the total revenues from recyclables are expected to be generated from the recyclables extracted from the trash container by the MRF. Therefore, the existing commodity value risk will be expanded since a larger portion

[2] "Cleaning Up Dirty MRFs" – Resource-Recycling Magazine. Retrieved from http://www.resource-recycling.com/images/Staff_MixMRFs0714rr.pdf.

[3] CalRecycle. Retrieved from http://www.calrecycle.ca.gov/Organics/Conversion/ADProjects.pdf.

of the project revenues will be relying on what has been a volatile revenue source, recyclables recovered from the trash container as opposed to source-separated recyclables.

While the ratepayers would assume the risk on baseline recyclable commodity revenues, staff has attenuated the remaining risk by using very conservative revenue assumptions and by establishing revenue sharing that substantially favors the Public Participants over the vendor, should revenues exceed baseline assumptions. To protect against extraordinary erosions in commodity values, or otherwise significant swings in those values, the Public Participants will establish, as part of the initial tipping fee, a rate stabilization fund to help weather periodic downturns and MSB will establish a line of credit to attenuate market volatility.

- Digestate Marketing Risk: to achieve a diversion rate of nearly 65 percent, the vendor must be able to successfully market the digested organic material (digestate) from the ADF. Staff was initially concerned about the quality of the digestate and what level of inert contaminants (i.e., small pieces of glass, plastic, and rock) might be entrained in the material that might inhibit its marketability.

  Several mitigating factors alleviate staff concerns. First, site visits to other composting operations in California have demonstrated that screening of the digestate (using the same equipment as that proposed for the RRP) effectively removes rocks, glass, and plastic from trash-derived organics. Based upon the resulting quality, these reference facilities have been able to develop markets for the resulting compost and have achieved similar diversion goals as those set forth in the WSC. Nursery Products, the subcontractor that would operate the ADF, has a decade of experience in successfully processing and marketing biosolid-derived compost from the City of Los Angeles.

  Even if market development proves difficult, the material represents less than ten percent of the total material delivered to the facility on an annual basis. Staff is confident that sufficient open space is available for land application to avoid landfilling. Finally, because the vendor would be required to pay an additional $50 per ton to dispose of residual waste beyond 35 percent, MSB would be highly motivated to optimize the MRF and to screen the resulting digestate from the ADF to avoid additional disposal costs.

- Performance Risk: the vendor/facility might be unable to meet the specifications set forth in the WSC, such as 65 percent diversion. If the facility were unable to perform, the County and vendor would have several avenues of recourse through construction and performance bonds, equipment warranties, and insurance coverage. Moreover, should the facility fail to perform, the WSC includes a protocol for the development of a compliance plan by the vendor and allocation of costs necessary to correct any deficiencies. Lastly, while the facility is out of compliance with the WSC, the contract provides for the assessment of substantial liquidated damages, as well as the additional disposal costs, which the vendor would likely also incur; all of these factors would motivate the vendor to cure any performance deficiencies.

Material Delivery and Processing Service Agreement

As stated above, should the project move forward, the County would execute a Waste Services Contract with MSB to design, build, and operate the RRP. Each participating city would in turn execute a separate Materials Delivery and Processing Services Agreement (MDPSA) with the County. The MDPSAs would underpin the County's debt financing obligation, compelling each participating City to guarantee a fixed revenue amount to the County each year. For this reason, the term of the MDPSA would be 20 years, equal to the term of the bond financing.

For ease of administration, this fixed annual payment is translated to a tipping fee that would apply to a "minimum tonnage commitment" to be specified by the City in the MDPSA.

For example, assume that the City's proportional share of the financing and operational costs (e.g. landfilling of residual, WSC administration, closure/post-closure maintenance obligations for Tajiguas Landfill, etc.) is $7.738 million annually (adjusted in future years by CPI). Further, assume that the City committed to a deliver a minimum of 73,000 tons of trash and commingled recyclables to the RRP during each year of the MDPSA term. The per-ton tipping fee charged to the City's waste would equal $106 per ton. Should the City fail to actually deliver the tonnage, it would be required to remit the unpaid shortfall to equal $7.738 million.

It is important to note that the City's financial obligation to the RRP would be satisfied exclusively through solid waste rates charged to City customers for waste collected by its franchised waste hauler (currently MarBorg). No General Fund monies would be used or placed at risk by executing the MDPSA with the County. Moreover, the County would obtain property and business interruption insurance coverage to cover losses should the facility be rendered unusable (e.g. due to a natural disaster) or if it fails to perform as intended through a design flaw, etc.

Negotiations between the City and County on the MDSA are scheduled to take place between June and August of 2016. Assuming these negotiations are successful, staff would bring the MDPSA to the City Council for consideration in September of 2016. Should the Council choose to execute an MDPSA with the County, the Council would also be required to make findings on the Final Subsequent Environmental Impact Report prepared by the County, which the Board of Supervisors will consider certifying at its July 12, 2016 meeting.

BUDGET/FINANCIAL INFORMATION:

Effective July 1, 2016, the tipping fee charged at Tajiguas Landfill is $87 per ton. The publicly-financed RRP would result in tipping fees of approximately $106, which is consistent with the $100 per ton ceiling established by the 2009 RFP, when adjusted for inflation. Alternative disposal options, including transportation of waste to other landfills, would result in similar tipping fees without the diversion benefits of the RRP.

SUSTAINABILITY IMPACT:

Construction of the Resource Recovery Project would significantly increase the City's waste diversion rate, directly supporting City efforts to comply with State diversion mandates set forth in Assembly Bill 939, Assembly Bill 341, and, most recently, Assembly Bill 1826. This increase in South Coast diversion would approximately double the number of years before Tajiguas Landfill reaches its permitted capacity, depending upon disposal rates and when the facility becomes operational. As such, the State's mandate to maintain at least 15 years of disposal capacity (Title 27, California Code of Regulations) would be satisfied.

In addition, the project would generate renewable energy (equivalent to the demand of approximately 1,000 homes) and would reduce greenhouse gas emissions (equivalent to removing approximately 22,000 vehicles) when compared to current landfill disposal in direct support of the City's efforts to comply with Assembly Bill 32.

ATTACHMENT: Deal Points

PREPARED BY: Matthew R. Fore, Environmental Services Manager

SUBMITTED BY: Robert Samario, Finance Director

APPROVED BY: City Administrator's Office

Memorandum of Deal Points
Version 4.3

These deal points reflect the basic terms of a proposed arrangement between the County of Santa Barbara and MSB Investors, LLC. These basic terms are intended to provide the framework for the subsequent negotiation of a definitive agreement between the County of Santa Barbara and MSB Investors, LLC. These deal points do not create a binding contractual obligation on either party.

Many essential terms and conditions have not yet been agreed upon, including, but not limited to agreements with other parties related to the construction, financing and operation of the Tajiguas Resource Recovery Project (TRRP). These other agreements may require changes to the proposed deal points and such changes may be significant and may result in the project not being viable.

Section 6 Compensation is based on current projections of the financial results of operations of: the Resource Recovery & Waste Management Division; capital and related financing costs of the TRRP, and the operations of the TRRP. These projections are based on assumptions regarding the future values of certain factors. The parties agree that the assumptions regarding capital costs of the TRRP and the financial results of operations of the TRRP have been made in good faith with an attempt to be reasonably conservative. However, these assumptions may change between the tentative agreement of the deal points and approval and execution of a definitive binding agreement by the County Board of Supervisors that may result from these deal points. Such changes may be significant and may result in the project not being viable.

1. The design, build, operate contract (Contract) will be between the County of Santa Barbara (County) and MSB Investors, LLC (Contractor) and shall comply with the terms of Government Code Section 5956 et seq. Mustang Renewable Power Ventures, LLC is the manager of Contractor.

2. This Contract is for the Tajiguas Resource Recovery Project (TRRP) which:
    a. Shall be owned by the County (and shall not be leased to the Contractor);
    b. Shall be located at the Tajiguas Landfill (Landfill);
    c. Shall include a material recovery facility (MRF), anaerobic digestion facility and composting facility (including the improvements, building and all fixed equipment);
    d. Shall receive and process mixed refuse and organic materials, source separated recyclables and source separated organic materials (Acceptable Materials) generated in the County;
    e. Shall divert from Landfill disposal a minimum of 60% of materials received by:
        i. Recovering recyclables;
        ii. Extracting methane through anaerobic digestion to generate electricity to power the TRRP and sell to the public utility; and,
        iii. Creating soil amendments and other products for land application; and,
    f. Shall dispose of the residue from processing at the Tajiguas Landfill.

3. The Contract term:
    a. Is effective upon execution of the Contract;
    b. Has approximately a twelve year initial term (as shall be determined based on development of a comprehensive project schedule to be agreed upon by the Parties and to be described in the Contract):
        i. Includes approximately a two (2) year construction period (culminating with TRRP acceptance) from the commencement date; and,
        ii. Has a ten (10) year operating period, commencing with acceptance of the TRRP by the County;
    c. Grants an exclusive option for the County to extend the Contract (in one year increments up to five years) on the same terms and conditions; additionally, the parties may agree on the extension of the Contract on mutually agreeable terms; and,
    d. Includes the County as Additional Insured on all insurance policies, beneficiaries on all performance bonds and pre-approved assignee in agreements (with construction contractor, equipment provider, primary subcontractors, permit agencies, licensing organizations and California Public Utilities Commission) and the right of County to approve in advance any changes to the Construction Contractors (Diani), Equipment Suppliers (Bekon and Van Dyk) and Primary Subcontractors (MarBorg and Nursery Products).

4. The contractor is responsible for:
    a. Obtaining (in cooperation with the County) and maintaining conformance with all permits and terms of approvals (including licenses or agreements for use of equipment and/or software) necessary for the development and operation of the TRRP.
    b. Designing the TRRP to meet agreed upon plans and specifications attached to the Contract and conditions related to all permits and approvals (including the mitigation measures required by the environmental impact report) in accordance with:
        i. Applicable law;
        ii. Good industry practice;
        iii. Good and accepted construction practice; and,
        iv. Applicable design and construction codes and standards.
    c. Obtaining County approval of notices to proceed with development, construction and operations, in accordance with procedures to be described in the Contract.
    d. Constructing and Equipping the TRRP at an agreed upon amount of $110,530,000 (as described in Attachment 1) or such lesser amount as the parties may agree, using the agreed upon Construction Company and Equipment Suppliers in accordance with an approved construction schedule and the agreed upon performance requirements to be described in the Contract (all such performance requirements shall include the ability to

manage increases in the volume of materials delivered to the TRRP), and assuming industry-standard risks of construction and the payment of liquidated damages for failure to perform, in accordance with:

   i. The agreed upon performance requirements to be described in the Contract;
   ii. Design and construction requirements (as described in 4b. above); and,
   iii. Construction codes and good and accepted construction practices, and
   iv. The bond financing documents.

e. Providing and maintaining all rolling stock, maintenance equipment, furnishings and office equipment (ownership of which shall be transferred to the County, at no cost, upon the end of their depreciable lives, except for such equipment which shall have remaining depreciable lives which the County has unilateral option (but is not obligated) to acquire at net book value or outstanding debt balance whichever is greater upon termination or expiration of the Contract) to meet agreed upon performance requirements to be described in the Contract.
f. Performing acceptance tests and obtaining acceptance of the TRRP by the County in accordance with agreed upon testing procedures (including schedule) agreed to by the Parties and to be described in the Contract and Contractor will assume industry standard risks of performance (including, but not limited to, the Contractor expending any sums required to achieve the acceptance of the TRRP without compensation from the County, and the payment by the Contractor to the County of liquidated damages for delay and failure to perform).
g. Receiving, processing and marketing Acceptable Materials, in accordance with agreed upon performance requirements to be described in the Contract (including but not limited to days and hours of operations, minimum throughput and recovery guarantees, marketing standards, maximum disposal guarantees, vehicle turnaround times, safety and security standards, environmental standards as well as maintenance of a humane work environment), using agreed upon primary subcontractors, and assuming industry standard risks of performance including the payment of liquidated damages for failure to perform.
h. Marketing available capacity at the TRRP to companies and agencies who are not already delivering Acceptable Material under a Material Delivery and Service Agreement with the County, subject to County approval.
i. Guaranteeing residue from processing does not exceed 40% of materials delivered to the TRRP (subject to periodic waste composition verification in accordance with procedures to be mutually agreed upon and to be described in the Contract)
j. Complying with additional guarantees (including but not limited to development, construction, equipment, throughput, electric output, environmental and vehicle turnaround, etc.) to be described in the Contract.

k. Delivering residue from the processing of materials to the County for transport to the Landfill in accordance with a disposal agreement with the County to be agreed to by the Parties.
l. Maintaining and repairing the TRRP in accordance with the agreed upon maintenance manual and practices to be described in the Contract and Contractor will assume industry standard risks of performance including the payment of liquidated damages for failure to perform.
m. Providing qualified, experienced and trained management, supervisorial, technical and line staff.
n. Providing the County timely access to observe and inspect operations and review records.
o. Making payments to be described in the Contract to the County (including a share of revenues from the sale of recyclable materials and products developed at the TRRP as described in 6.b.vi).
p. Keeping records (including those related to tonnages received and processed, billing, development, operations, marketing (including broker inspection reports), and financial transactions), providing County access to such records and providing monthly and annual reports (including adverse reports) as well as timely notices (e.g., 24 hour notice of non-compliance with performance guarantees), to be described in the Contract.
q. Paying all fines and penalties (including liquidated damages) related to non-compliance with permits, approvals and contract terms.
r. Indemnifying the County and providing insurance, indemnities, bonds and further assurances in accordance with County standards to be described in the Contract.

5. The County is responsible for:
    a. Financing the TRRP secured largely through Material Delivery and Service Agreements with the participating public agencies and the issuance of public financing ; however, the County shall have no obligation to use general obligation bonds or other non-enterprise funding.
    b. Performing as lead agency for the Environmental Impact Report.
    c. Completing, prior to the Contractor beginning construction, any necessary site remediation related to past County activities.
    d. Providing Contractor notices to proceed with construction, acceptance testing, and operations in accordance with the conditions to be described in the Contract.
    e. Receiving, inspecting, accepting, weighing, directing and charging customers for materials delivered to the Landfill in accordance with Material Delivery and Service Agreements between the participating agencies (including the County as franchisor of solid waste services in the unincorporated area of the County) and the County.

f. Making payments to Contractor calculated in accordance with this Contract, County-approved rates, and tonnage delivered to the TRRP.
g. Entering into an agreement with the Contractor for disposal of residue at the Landfill (such agreement may be incorporated into the Contract).
h. Assuming industry-standard risk related to the site (e.g., access and site remediation due to County operations).
i. Indemnifying the Contractor with regard to the TRRP site and providing insurance and bonds in accordance with terms to be described in the Contract.
j. Participating with Contractor in marketing available capacity at the TRRP to companies and agencies who are not already delivering Acceptable Material under a Material Delivery and Service Agreement with the County.

In addition the County may:

a. Observe and independently inspect the construction and equipping of the TRRP, without assuming any obligation to notify the Contractor of errors or assuming any liability with regard to the construction and equipping of the TRRP; and,
b. Observe and independently inspect the operation of the TRRP, without assuming any obligation to notify the Contractor of errors or assuming any liability with regard to the construction and equipping of the TRRP.

6. Compensation
   a. TRRP Pre-Construction, Development, and Construction and Equipping Compensation
      i. Compensation for TRRP Pre-Construction (Permits and Entitlements of $4,000,000 and Design and Engineering of $3,840,000) totaling $7,840,000 or such lesser amount as the parties may agree as of the Financial Close (the closing date of the public financing, which includes the TRRP) based on Contractor's actual expenses necessarily incurred as of the end of the month preceding Financial Close: but specifically excluding costs related to attorney fees related to the investment tax credit, but which specifically includes the payment of a return on its TRRP development costs. County shall pay Contractor (following receipt of the proceeds from the public financing , which includes the TRRP) in accordance with the bond financing documents. Contractor hereby acknowledges that such payment is the full and complete payment from the County for such TRRP Pre-Construction costs and relinquishes any and all claims against the County for such costs.
      ii. Development Fee totaling $3,090,000: County shall pay Contractor a Development Fee for construction and equipping management. Fifty percent (50%) shall be paid during the anticipated 16 month construction schedule and 50% (retention) shall be payable following acceptance test performance

compliance and receipt of any and all required permit issuance and approvals. Contractor hereby acknowledges that such payment is the full and complete payment from the County for such services and relinquishes any and all claims against the County for such services.

iii. Construction and Equipment Costs – $99,600,000 or such lesser amount as the parties may agree based on Contractor's actual expenses necessarily incurred: Contractor shall be compensated for constructing and equipping the TRRP (but not for purchase of rolling stock, costs related to attorney fees related to the investment tax credit, interest on the purchase of turbine engines, two years depreciation on the turbine engines, and storage of the turbine engines) in accordance with the bond financing documents (Total Cost less Pre-Construction and Development Fee). Contractor hereby acknowledges that such payment is the full and complete payment from the County for such costs and relinquishes any and all claims against the County for such costs.

iv. 50% of any per ton savings in annual debt service payment from reduced TRRP Pre-Construction, Development and Construction and Equipment Costs may be used to increase the per ton operating cost rate a corresponding amount.

b. TRRP Operation Compensation

i. Contractor's compensation for all costs of and profits for providing service shall be exclusively from: 1) A per ton rate described in ii below, which is calculated based on the Contractor receiving the revenues from the sale of recyclable materials up to a baseline described in v. below; 2) A share of revenues received from the sale of recyclable materials and products produced at the TRRP as well as energy sales above a baseline described in vi. below); and, 3) Per ton rates applied to tons received at the Landfill as spot market materials (in accordance with 4.h and 5.j and based on mutually agreeable terms including the sharing of any net benefits) and directed by the County to the TRRP;

ii. The Initial per ton rate to be paid Contractor by County shall be $5.60 per ton as identified in the Contractor's pro-forma financial results of operations;

iii. The initial per ton rate shall be adjusted annually in accordance with certain cost indices , as agreed to by the Parties and to be described in the Contract;

iv. County shall make payment to the Contractor monthly for materials delivered to TRRP;

v. County shall make payment (unless such lesser revenues results from Contractor's failure to perform in accordance with 4. Above) to the Contractor annually for Annual revenues received, less than projected, from: Recyclable material sales ($9,464,000 projected); and Energy sales to the public utility less than $1,281,750. County shall not make payment to the Contractor for the first

$427,250 in annual energy sales revenue less than the $1,709,000 projected or for compost sales revenues less than projected (a projected cost of $163,960).

vi. Contractor shall make payment to the County annually, as follows:

a. Additional revenue received greater than projected from the sale of recyclables ($9,464,000) will be shared with 75% being received by the County and 25% by Mustang and MarBorg up to the point that Mustang and MarBorg receive an additional $500,000 in income (i.e., total additional revenue of $2 million) and thereafter the County will receive 90% and Mustang and MarBorg will receive 10% of incremental additional revenues above $11,464,000.

b. Additional revenue received greater than projected from the sale of compost (a cost of $163,960) will be shared with 75% being received by the County and 25% by Mustang and Nursery Products up to the point that Mustang and Nursery Products receive an additional $250,000 in income (i.e., total additional revenue of $1 million) and thereafter the County will receive 90% and Mustang and Nursery Products will receive 10% of incremental additional revenues above revenue of $836,040.

c. Additional revenue received greater than projected from the sale of electricity ($1,709,000 as described in v. above) will be shared with 75% being received by the County and 25% by Mustang up to the point that Mustang receives an additional $500,000 in income (i.e., total additional revenue of $2 million) and thereafter the County will receive 90% and Mustang will receive 10% of incremental additional revenues above the $3,709,000.

vii. Contractor shall ensure that throughout the term of the Contract, the County receives “most-favored” rates, unless specifically waived by the County;

viii. Rates shall be adjusted for material changes directed by the County and for force majeure events and changes in law (including labor law), in accordance with procedures agreed to by the Parties and to be described in the Contract; and,

ix. Rates shall not be adjusted for increased costs of TRRP development, construction or operation; Contractor’s failure to perform; or changes in tonnage or composition of material delivered. Notwithstanding the foregoing, the $5.60/ton tip fee paid to the TRRP for not less than 143,038 tons per year (based on 75% of the 190,717 franchised tons assumed to be delivered) is to be paid irrespective of whether the delivered tonnage is less than 143,038. The parties agree that, in the condition where the Contractor is failing to achieve its diversion guarantee due to a change in waste composition, as determined in accordance with 4.i. above, County and Contractor shall meet and confer and consider a rate adjustment in order to insure that the TRRP does not operate at a deficit as a result of its conforming to its diversion requirement in light of the change in waste composition.

7. Breaches, Defaults and Remedies
    a. Contractor Events of Default and County Remedies:
        i. Contractor shall be in default for the breach of any obligation and failure to cure such breach without delay (if health, welfare of safety of the public) or for other matters within 30 days (unless the cure cannot be completed in 30 days and Contractor commences cure within 30 days and diligently proceeds to complete such cure). However, no opportunity for cure will exist for events of fraud, deceit or misrepresentation, false or misleading statements, insolvency or bankruptcy, failure to maintain security instruments, violations of regulation, failure to maintain and secure permits, abandonment of project, or repeated or chronic failure to meet performance guarantees; and,
        ii. County shall have remedies including termination, suspension, and all other remedies it has under the Contract, under the Security instruments, or at law (including specific performance, consequential and punitive damages, in accordance with a schedule to be agreed upon by the Parties).
    b. County Events of Default and Contractor Remedies:
        i. County shall be in default for the breach of any material obligation (including payment of Contractor) and failure to cure such breach within 30 days (unless the cure cannot be completed in 30 days and County commences cure within 30 days and diligently proceeds to complete such cure); and,
        ii. Contractor shall have such remedies as it has under the Contract and at law, including specific performance.
    c. County's right to perform and Contractor's obligation to take direction from County and make available employees and equipment if Contractor repeatedly fails to perform and does not cure events of default (including failure to provide uninterrupted operation of the TRRP); and,
    d. County may impose liquidated damages for Contractor's failure to meet specific performance standards to be described in the Contract.

8. Bonds and Insurance
    a. Contractor shall provide Contractor Security and Bond, Construction Performance Bond, and an Operations Bond in a form and amount acceptable to the County.
    b. Contractor shall provide Commercial General Liability, Automobile Liability, Workers Compensation, Professional Liability, Contractors Pollution Legal Liability and/or

Asbestos Legal Liability, and Property insurance in a form and amount acceptable to the County.

9. Other Key Agreements
    a. The County shall have the right, upon failure to reach agreement with Contractor on additional services, to contract with a third party to perform such services;
    b. No assignment of Contract by Contractor without prior consent of County, such consent being under the complete discretion of the County (and such request for assignment shall trigger County's right but not obligation to replace the Contractor for an amount specified in the Contract);
    c. Contractor to take direction from County upon termination or expiration of the Contract and transition of the TRRP operations to the next contractor to assure a smooth transition of operations and management, including specific actions to be described in the Contract; and,
    d. Contractor shall provide a system of financial guarantees related to its obligations under the Contract in a form acceptable to the legal counsel of the County.
    e. County shall provide 250 SCFM of landfill gas, with a methane content of approximately 50%, to operate the TRRP for which the Contractor shall pay the County $300,000/year. The County may (but is not obligated to) provide up to an additional 200 SCFM of landfill gas based on terms mutually agreeable to the Parties.