

The background features abstract green geometric shapes, including triangles and polygons, in various shades of green, creating a modern and professional look.

MSB Investors, LLC: *Response to Proposed Contract Termination*

December 12, 2023 Board of Supervisors Hearing

Why Are We Here?

- ▶ ***Breakdown in good faith implementation of the Contract***
 - ▶ Essential to delivering the best results for ratepayers, the public, and the environment
 - ▶ Hallmark of successful public-private partnerships
 - ▶ Legally required
- ▶ ***Failure to respond to global and economic realities through contractually established mechanisms***

Decline in Recycling Revenue: Globally

“‘We're fighting an uphill battle to make it cost competitive from day one.’ One problem ... is the U.S. outsourced so much of its recycling to Asia that the domestic industry languished.”

Joyce, C. (2019, August 20). U.S. recycling industry is struggling to figure out a future without China. NPR.
<https://www.npr.org/2019/08/20/750864036/u-s-recycling-industry-is-struggling-to-figure-out-a-future-without-china>

U.S. Recycling Industry Is Struggling To Figure Out A Future Without China

AUGUST 20, 2019 · 3:27 PM ET

HEARD ON ALL THINGS CONSIDERED

Haulers continue to see recycling revenue drops

Published: November 13, 2023

Updated: November 13, 2023

by [Jared Paben](#)

CORPORATE SOCIAL RESPONSIBILITY

America's Broken Recycling System

by Christian Blanco, Calvin Spanbauer, and Sara Stienecker

June 23rd, 2020

Report by Howard Husock

The Declining Case for Municipal Recycling

Decline in Recycling Revenue: ReSource Center

- ▶ \$15 million annual operating budget to be supported by **\$10 million** of annual recyclable revenues, as estimated by County consultant in 2016
- ▶ China policy (2017) and COVID (2020-2022),
→ recyclable revenues in the past three fiscal years: average **~\$4 million** annually

Response to Revenue Uncertainty = Not a “Fixed” Price Contract

- ▶ Parties recognized inability to predict recycling revenue with sufficient certainty
- ▶ Levers built into agreement to account for uncertainty
- ▶ Agreement required County to ***increase Tip Fee*** to offset the gap in the operating budget

Consequences of County Underfunding

- ▶ Refusal to increase Tip Fee → contrary to terms and requirements of the Contract
- ▶ Staff withheld over \$3 million of the agreed upon, budgeted operating funds in the past 6 months
- ▶ With a total of more than \$10 million of budgeted, unfunded operating costs paid for by MSB and its subcontractors over the past three years
 - ▶ Deferred maintenance → requires even greater investment by County and ratepayers

MSB's Performance

- ▶ A rational partner and developer
- ▶ Patient supporter of the County and advocate for the ReSource Center
- ▶ Over fourteen years as the design-build-operator
- ▶ Investment of over ***\$30 million***

Alleged Grounds for Termination

- ▶ Factually unsupported
- ▶ Result of the County's withholding of agreed upon, budgeted funding for the operation of the ReSource Center
- ▶ Focus on unilateral termination and fault of MSB → Failure of good faith implementation of the Contract

Alleged Ground for Termination: Acceptance Tests

- ▶ MSB has passed 11 of 12 Acceptance Tests based on the acceptance test plan approved by the County in 2020, according to Bekon
- ▶ Rather than accepting the Bekon Acceptance test report, the County proposed to revise the AD Acceptance Test criteria with more onerous criteria that were declined by MSB and Bekon
- ▶ MSB proposed a compliance plan for the one remaining open acceptance test (Residue Test), and the County did not respond to MSB's invitation to schedule the test

Alleged Ground for Termination: Regulatory Violations

- ▶ MSB has had a good relationship with its various regulatory agencies over the past 12 years of permitting, construction and operations
- ▶ When operational issues arose, MSB developed and implemented compliance plans that were approved by the County and the regulatory agencies:
 - ▶ Response to odor issues
 - ▶ MRF biofilter destroyed by Alisal Fire
 - ▶ Drainage infrastructure damaged by historic storms

Other Alleged Grounds for Termination: Missing Facts and Context

- ▶ Dispute over liquidated damages
 - ▶ In *the three of six cases*, the County declined to meet with MSB and did not impose LDs due to a County and regulatory agency approved compliance plan
- ▶ Disputes over payments
 - ▶ Significant investments by MSB in ongoing operations to compensate for lack of Tip Fee increase and proper funding → ***Forced MSB and its subcontractors to absorb \$10 million of operating costs over the past 3 years***
 - ▶ MSB has been communicating the issue of the recyclable revenue downturn and consequences to staff for the past 3 years

Other Alleged Grounds for Termination: Missing Facts and Context

- ▶ Health & Safety Record:
 - ▶ A site visit by Public Works Health & Safety Manager in November declared the ADF and CMU free of any health & safety issues and said the site housekeeping was the best she had seen

Why Termination?

- ▶ Shared Goal = Success of the ReSource Center
- ▶ An Alternative Pathway:
 - ▶ 1) Reject termination
 - ▶ 2) Direct staff to engage in good faith negotiations with MSB + 3rd-party investor, ***with a commitment to operational funding during any interim period***
- ▶ Allows the parties to work cooperatively to optimize ReSource Center operations during an interim period.

Thank you

