

## 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.

Memorandum of Deal Points  
Version 4.3

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

## Memorandum of Deal Points Version 4.3

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.

## Memorandum of Deal Points Version 4.3

- 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.

## Memorandum of Deal Points Version 4.3

- 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

## Memorandum of Deal Points Version 4.3

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

## Memorandum of Deal Points Version 4.3

- \$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

## Memorandum of Deal Points Version 4.3

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 or 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



## Memorandum of Deal Points Version 4.3

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.