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Katherine Douglas *Public Comment - Brownstein Hyatt Farber Schreck*

From: Diaz, Jessica L. <jdiaz@bhfs.com>
Sent: Friday, December 8, 2023 5:28 PM
To: sbcob; Supervisor Das Williams; Laura Capps; Joan Hartmann; Supervisor Nelson; Steve Lavagnino
Cc: Collins, Beth A.; Amber Holderness; Scott McGolpin; Julie Hagen; Marty Wilder; Jeanette Gonzales-Knight
Subject: Letter re Dec. 12, 2023 Item 6 - Termination of MSB Contract
Attachments: Dec. 12 2023 Hearing re MSB Contract Termination_Brownstein letter.pdf

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Dear Honorable Chair and Board of Supervisors:

On behalf of MSB Investors, LLC, please find a letter attached regarding Item No. 6 on the December 12, 2023 agenda, re: Proposed Termination of Agreement for Development and Operation of the Tajiguas ReSource Recovery Project with MSB Investors, LLC.

Our client MSB Investors, LLC also submitted a letter and exhibits earlier this afternoon under separate cover. That submittal can be downloaded here in case it was not already received: <https://bhfs.sharefile.com/d-s5807611f86424a64bf541c94a0efa33c>

Thank you for your time and attention to this important matter.

Sincerely,
 Jessica Diaz

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December 8, 2023

Jessica L. Diaz
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VIA EMAIL

County of Santa Barbara Board of Supervisors
105 E. Anapamu Street, Fourth Floor, Suite 407
Santa Barbara, CA 93101

Re: Proposed Termination of Agreement for Development and Operation of the Tajiguas ReSource Recovery Project with MSB Investors, LLC

Dear Honorable Chair and Board of Supervisors:

Our firm represents MSB Investors, LLC (“MSB”) with respect to the proposed termination of the Agreement for Development and Operation of the Tajiguas ReSource Recovery Project with MSB Investors, LLC, executed by the County on December 13, 2016 and as subsequently amended (the “Agreement”). Our client has submitted a letter (“MSB Response”) dated December 8, 2023 responding to each of the alleged grounds for termination in detail, with accompanying exhibits. As described in the MSB Response, not only are the alleged grounds for termination unfounded in law and fact, but the County’s own conduct, inadequate performance under the Agreement, and lack of good faith in implementing the Agreement made it all but impossible for the public-private partnership to succeed.

From a public policy perspective, this breakdown in the partnership is profoundly disappointing. For the reasons below, it is also unlawful.

- I. The County’s Unilateral Termination of the Agreement Will Expose the County to Significant, Avoidable Liability.**
 - A. Breach of Contract/Breach of the Implied Covenant of Good Faith and Fair Dealing**

As amply demonstrated by the factual history set forth in detail in the MSB Response, the County’s unilateral termination of the Agreement would constitute a breach of contract. Because no material breach by MSB has occurred, there are no grounds for the County’s unilateral termination under Article 14.4.¹ Even assuming in the alternative that a material breach occurred, which MSB strongly

¹¹ All subsequent Article and Section references are to the Agreement.

disputes, any such breach would be excused by the County's own non-performance, including but not limited to:

- 1) Failure to timely pay Cash Flow Assistance in accordance with Article 10.8;
- 2) Failure to timely increase the Processing Charge in accordance with Article 10;
- 3) Failure to provide MSB with the Revenue Requirement to fund the ReSource Center's operating costs in accordance with Article 10.3;
- 4) Failure to reimburse MSB for borrowing costs incurred due to County's failure to timely provide Cash Flow Assistance in accordance with Articles 10.8 and 10.9;
- 5) Failure to timely acknowledge and confirm Limited Operations status in Fall 2021, despite MSB satisfying all County-specified conditions for such in accordance Article 4.9;
- 6) Failure to acknowledge Uncontrollable Circumstances related to the historic storm events in 2023 in accordance with Article 1.138, despite the Governor and the federal government declaring multiple disaster declarations related to such unprecedented storm events;
- 7) Failure to follow the Acceptance Test Protocols set forth in Article 4.8 and Exhibit A;
- 8) Failure to follow the Diversion Guarantee Performance Review procedures set forth in Exhibit R;
- 9) Failure to follow the contractually prescribed requirements for Liquidated Damages notices and levies in accordance with Article 14.9;
- 10) Failure to meet and confer and/or timely meet and confer in accordance with Article 14.9 following MSB's requests following receipt of Liquidated Damages notices;
- 11) A systematic and intentional effort by at least one County employee to deprive MSB of the benefits of the Agreement;
- 12) Failure to follow the procedures of County Requested Scope Changes to Project Operations in accordance with Article 2.11; and
- 13) Interference with MSB's Primary Responsibilities set forth in Article 5.1.C. by directing MSB's employees to perform operational activities that put the health and safety of MSB's employees at risk and put the project at risk of physical damage.

The County's unilateral termination of the Agreement would not only constitute a breach of the Agreement's express terms but would also violate the implied covenant of good faith and fair dealing. The covenant of good faith and fair dealing is implied in every contract in California and governs the conduct of the parties in carrying out their duties under the contract. For the reasons set forth in the MSB Response, the County's termination of the Agreement on the stated grounds is objectively unreasonable and not in good faith.

B. Interference with Economic and/or Contractual Relations

As described in the MSB Response, the County's conduct has interfered with MSB's opportunity to reap the benefits of its extraordinary financial investments in the Tajiguas ReSource Recovery Project ("ReSource Center"). The County's conduct prevented MSB from being able to pursue the sale of its interest in the Agreement and the development of the Renewable Gas ("RNG") project. In particular, the County refused to provide the contractually required Tip Fee increase and failed to exercise reasonable diligence, timeliness or good faith in the budget review process (see MSB Response, § II.12, pp. 33-34). Even more troubling, County staff indicated that the County's conduct had been intentionally designed to maximize MSB's losses, induce MSB to abandon its interest in the Agreement, and create an opportunity for the County to instead negotiate directly with a potential investor/operator purchaser. A sale of MSB's interest in the Agreement would have provided \$31 million in development financing for the RNG project and would have provided more than \$15 million in return on MSB's investment in the ReSource Center.

The County's conduct, coupled with the proposed unilateral termination of the Agreement, would constitute intentional interference with economic relations (or in the alternative, negligent interference with economic relations) and intentional interference with contractual relations.

C. Violation of the Equal Protection Clause/42 U.S.C. § 1983

As noted above and detailed in the MSB Response, there is evidence that the County's conduct was *intentionally* designed to induce MSB to abandon the public-private partnership and abandon its operation of the ReSource Center and that personal animus motivated the County's implementation of the Agreement. (See MSB Response, § II.7, pp. 31-32.) The County's treatment of MSB in failing to implement the Agreement in good faith violated MSB's rights under the equal protection clauses of the U.S. and California Constitutions and gives rise to claims against the County under 42 U.S.C. § 1983.

D. Inadequate Support for Termination

As amply demonstrated from the parties' respective conduct, the proposed termination is wholly unsupported by evidence, would constitute an abuse of discretion, is arbitrary and capricious, and would constitute an unlawful action and exceedance of the County's authority. Such termination

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would be subject to reversal through writ of mandamus under California Code of Civil Procedure section 1085 and/or 1094.5.

In the event the Board of Supervisors approves termination of the Agreement, MSB reserves any and all rights to raise further facts, claims and defenses in the context of any ensuing dispute over performance of the Agreement and remedies available thereunder.

II. There is No Prejudice to the County or the Public From Briefly Pausing the Unilateral Termination Process to Pursue a Mutually Acceptable Resolution.

On behalf of MSB, we urge the Board of Supervisors to reject the termination and consider an alternative course of action: to direct staff to negotiate with MSB in good faith to reach agreement on an orderly, structured plan of operation and resolve any pending disputes over performance under the Agreement. MSB has indicated its interest and commitment to a good faith process to this end. However, a key parameter for such a negotiation is a commitment by Public Works staff to dialogue with MSB in good faith to reach agreement on the ReSource Center's critical operating expenses in the immediate term, a commitment that MSB was unable to secure.

Public Works staff has indicated a willingness to expend significant resources to directly compensate one or more operators through new contracts, while at the same time refusing to compensate MSB to even meet critical operating expenses in accordance with the Agreement. What is the benefit to County from this approach? Resolving these issues through a focused, collaborative process would provide an opportunity for MSB to recoup some of its significant financial investments in the ReSource Center, reduce the County's litigation exposure, allow for the ReSource Center's sustainable, fiscally prudent, and orderly operation, and better serve Santa Barbara County's ratepayers in the process. MSB remains open to pursuing a good-faith mediation to pursue a fair and mutually beneficial outcome that meets the objectives.

Please do not hesitate to contact me at jdiaz@bhfs.com or (805) 882-1416 with any questions about this matter or MSB's position.

Sincerely,



Jessica L. Diaz

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cc: Amber Holderness, County Counsel
Scott McGolpin, Public Works
Julie Hagen, Public Works
Martin Wilder, Public Works
Jeanette Gonzales-Knight, Public Works

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