



BOARD OF SUPERVISORS  
AGENDA LETTER

Agenda Number:

Clerk of the Board of Supervisors  
105 E. Anapamu Street, Suite 407  
Santa Barbara, CA 93101  
(805) 568-2240

**Department Name:** Public Works  
**Department No.:** 054  
**For Agenda Of:** December 12, 2023  
**Placement:** Departmental  
**Estimated Time:** 60 Minutes  
**Continued Item:** Yes  
**If Yes, date from:** November 28, 2023  
**Vote Required:** Majority

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**TO:** Board of Supervisors

**FROM:** Department Scott D. McGolpin, Public Works Director, 805-568-3010  
Director(s)  
Contact Info: Jeanette Gonzales-Knight, P.E., Interim Deputy Director,  
(805) 882-3605

**SUBJECT:** **Hearing to Consider Termination of Contract with MSB Investors, LLC for Development and Operation of the Tajiguas ReSource Recovery Project - Third Supervisorial District**

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**Counsel Concurrence:**

As to form: Yes

Other Concurrence: Risk Management

As to form: Yes

**Auditor-Controller Concurrence:**

As to form: Yes

**Recommended Actions:**

That the Board of Supervisors:

- a) Conduct a hearing to consider terminating the Agreement for Development and Operation of the Tajiguas ReSource Recovery Project with MSB Investors, LLC executed by the County on December 13, 2016 (Agreement); and
- b) Upon conclusion of the hearing:
  - i. Direct the Public Works Director or designee to issue a letter terminating the Agreement (Attachment A);
  - ii. Delegate authority to the Public Works Director or designee to take actions necessary for the wind down of the Agreement and transition to new operator(s) of the ReSource Center, subject to the Board's ability to rescind this delegated authority at any time;
  - iii. Direct staff to work with MSB Investors, LLC to transition operation per the terms of the Agreement;

- iv. Authorize the Public Works Director or designee to notify and exercise application of the direct agreements with MarBorg Recovery, LP, Diani Building Corporation, Van Dyk Baler Corporation, and Bekon Energy Technologies, Inc. approved by the Board on February 14, 2017 as needed for continuity of service at the ReSource Center (Attachment B); and
  - v. Authorize the Public Works Director or designee to enter into an agreement with Bekon Energy Technologies, Inc. for operation of the anaerobic digestion facility and/or compost management unit subject to approval by Auditor Controller, Risk Management, and County Counsel.
- c) Determine that the proposed actions are not a “project” under the California Environmental Quality Act (CEQA) pursuant to CEQA Guidelines Section 15378(b)(2), as they involve administrative and other general policy and procedure making activities that will not result in direct or indirect physical changes to the environment.
- d) Provide other direction to staff.

**Summary Text:**

This item is on the agenda to consider termination of the Agreement with MSB Investors, LLC (MSB) for Development and Operation of the Tajiguas ReSource Recovery Project (also commonly referred to as the ReSource Center) and to consider steps for transition to new operator(s). Termination is recommended at this time based on MSB’s failure to comply with the Agreement including inadequate performance, inability to timely complete the project, and incursion of regulatory violations, as discussed in more detail below. Upon termination, staff recommends additional actions to ensure continuous operation of the ReSource Center facilities including working with MSB for 180 days pursuant to the terms of the agreement for transition services.

**Background:**

The County of Santa Barbara owns and operates the Tajiguas Sanitary Landfill (landfill). As a means to divert waste and preserve the life of the landfill, as well as in consideration of other environmental and regulatory factors such as compliance with SB 1383, the County contracted with MSB Investors, LLC (MSB) on December 13, 2016, to construct and operate several facilities including a materials recycling facility (MRF), an anaerobic digestion facility (ADF), and a compost management unit (CMU). (For a copy of the agreement, see [County of Santa Barbara - File #: 16-00968 \(legistar.com\)](#).) These facilities have been in limited service since fall of 2021, for the purpose of processing municipal solid waste, recyclables, and source separated organic waste into marketable commodities, such as recycled commodities, renewable energy, and compost. To date, MSB has been unable to attain substantial completion of various components, has not passed certain acceptance tests, has incurred violations from the Central Coast Regional Water Quality Control Board (Attachment C), Santa Barbara County Environmental Health Services (Attachment D), and the Santa Barbara County Air Pollution Control District (Attachment E), has not adequately marketed compost material, and has not adequately compensated certain subcontractors (Attachment F).

***Termination.*** As discussed in detail in the attached Notice of Intent to Terminate the Agreement letter, dated November 6, 2023 (Attachment G), staff recommends termination of the Agreement for the following reasons:

1. *MSB's failure to timely complete final acceptance testing for the ReSource Center (Sections 4.3.D and 4.8.D).* MSB's failure to obtain Full Acceptance and Operations of the ReSource Center in a timely manner has resulted in MSB's failure to both divert waste from the landfill and reduce greenhouse gas emissions as per the Agreement, which did not meet the project goals and Performance Guarantees set in the Agreement. In addition to multiple delays with design and construction from 2016 to 2021, the facility failed to receive full acceptance after more than 2 years of failed operation.
2. *MSB's failure to cure material breach of the Agreement (Sections 14.2. B.9, B.10, and B.11).* MSB failed to complete the actions necessary to rectify violations issued by the Central Coast Regional Water Quality Control Board on March 17, 2023 and June 20, 2023 within the permitted time to cure these breaches provided in the Agreement. The County provided a description and written explanation of non-compliance to MSB in letters dated April 25, 2023 and June 21, 2023 (see Attachment G). The County issued MSB a formal notification of the curable breach to the Agreement on June 21, 2023, with a deadline to rectify the violations by July 6, 2023. The County continued to meet with and communicate with MSB to try to resolve the violations and allowed MSB additional days to cure the breach prior to the revised deadline of October 1, 2023 (a total of 102 days). A brief timeline of communication on the matter is also included in Attachment G.

MSB did not cure the breach by the October 1, 2023 revised deadline and continues to operate the CMU in violation of the Waste Discharge Requirements (WDR) for Commercial Composting Operations (Order WQ 2020-0012-DWQ), jeopardizing the ReSource Center's ability to operate and process waste. On October 11, 2023, the County notified MSB of its right to take over the CMU runoff pipe replacement project under Section 14.8 of the Agreement, citing its incomplete status and MSB's inactivity onsite for over 7 days and in order to rectify one of the outstanding Notice of Violation (NOV).

3. *MSB's failure to pay liquidated damages owed (Section 14.9).* In April 2023, the County issued a Notice to Assess Liquidated Damages for failure to pass Acceptance Tests and for Central Coast Regional Water Quality Control Board NOVs (Attachment G). As of November 1, 2023, MSB has incurred approximately \$1.1 million in liquidated damages for failure to complete work on schedule, comply with permit requirements, and not pass acceptance tests. MSB has failed to pay liquidated damages assessed September 23, October 6, and October 13.
4. *MSB's failure to pay subcontractors and regulatory agencies (Section 4.1 A and C).* As of the last reporting from MSB to the County on August 15, 2023, the outstanding payables from MSB to subcontractors as of June 30, 2023 was \$5.4 million, up from \$4.3 million as of April 30, 2023. Staff has also been informed by subcontractors that MSB has not paid subcontractors and vendors in a timely fashion (Attachment F), and owes the Santa Barbara County Air Pollution Control District approximately \$50,000 in data acquisition service and other ReSource Center related fees (Attachment H). The County has been notified by several contractors of their refusal to work to complete outstanding items as well as future work for MSB due to non-payment.

Non-payment to subcontractors has interfered with the ADF's ability to operate reliably since the automation required remains incomplete, and this jeopardizes the ReSource Center's ability to meet Performance Guarantees set forth in the Agreement, and respective permit and energy

production requirements. The lack of automation at the ADF requires manual operation by MSB employees of the digesters, engines, and flare which has led to human errors such as venting of biogas. This venting of biogas being directed away from the ADF engines causes a reduction in revenue earnings via the Power Purchase Agreement with Southern California Edison, and contributes to odors at the ReSource Center.

Pursuant to the terms of the Agreement, the County has met and continues to meet its payment obligations to MSB.

Pursuant to Section 10.2 of the Agreement, the County has compensated MSB for project pre-development and development costs totaling \$15.9 million from December 2018 through August 2023 (Attachment I). The County has also paid \$124 million for project construction and equipment.

Pursuant to Section 10.3.A of the Agreement, the County has compensated MSB for operating fees from processing incoming tons at the ReSource Center facilities totaling \$14.7 million from February 2021 through November 2023 (Attachment I).

Pursuant to Section 10.8 of the Agreement, the County has provided cash flow assistance to MSB for the shortfall of revenue from recyclables totaling \$2.4 million from February 2023 through June 2023 (see Attachment I).

Additionally, the County has paid and/or contracted directly with vendors on behalf of MSB for costs relating to the ReSource Center totaling \$5.6 million to address odor complaints and violations, and non-compliance of wastewater management and operations.

5. *MSB's failure to maintain a safe site for employees and visitors (Section 5.1. C.15, Section 5.7. B.1 through B.7, Section 7.1.K, and Section 11.1.A).* MSB failed to ensure the health and safety of all personnel working at, and persons visiting, the ReSource Center which has resulted in accidents, injuries, or hazardous conditions for employees and visitors (see incident reports included in the Notice of Intent letter provided in Attachment G). On several occasions, vehicular incidents have occurred (e.g. MSB loader struck parked manlift on August 28, 2023, MSB loader backed into refueling truck on September 19, 2023). Despite receiving prior warnings in person, and in bi-weekly Operations/Compliance conference calls, and notices, as well as opportunities to rectify safety deficiencies, MSB has not taken adequate corrective actions in a timely manner to mitigate the risks and ensure a safe working environment.

MSB continues to exhibit poor onsite management at the ADF and CMU and has demonstrated recklessness in ensuring a safe work environment. These inadequate safety measures were the cause of the May 12, 2022 compost fire that started with dry compost left too close to the Dopstadt screener on the CMU deck, which damaged nearby equipment and infrastructure both at the ReSource Center and Tajiguas Landfill. MSB's consistent pattern of disregard of health and safety protocols, poses an ongoing risk to the well-being of employees and visitors at the ReSource Center.

6. *MSB's interference with the County's ability to obtain permits for County projects.* MSB's outstanding violations interfere with the County's ability to obtain and modify permits required for County projects. On September 19, 2023, staff received confirmation from Santa Barbara

County Environmental Health Services that permitting for the proposed Tajiguas Landfill Capacity Increase Project could face delays and non-concurrence from CalRecycle due to ongoing odor violations at the ReSource Center (see Attachment G). The County also rescinded its application to modify the Solid Waste Facility Permit on March 12, 2023 after being notified that CalRecycle would not give concurrence for the proposed Solid Waste Facility Permit modification due to violations issued for the ADF and CMU.

***Continuity of service.*** If the Board approves contract termination, replacement contracts will be developed and brought to the Board for approval at a later date. However, to ensure continued operations of the ReSource Center during the transition period, staff recommends that the Board authorize the Director of Public Works to exercise application of the direct agreements previously approved by the Board on February 14, 2017 (See [County of Santa Barbara - File #: 17-00112 \(legistar.com\) and Attachments A and B](#)) as may be useful for transition. These agreements were established to directly contract with and compensate certain vendors for construction and/or operation of certain ReSource Center facilities. To the extent that the direct agreements are not sufficient, staff is also recommending that the Board approve a limited term agreement with Bekon Energy Technologies, Inc.

Termination would be effective as of the date of this action with a period of 180 days as defined in the agreement for transition services. Transition pursuant to this process provides for the development of new long-term agreements with MarBorg and Bekon during the transition period. Retaining these services without bidding is consistent with Public Contract Code §22002(d)(5) as the services relate to work being performed to keep, operate, and maintain publicly owned water, power, or waste disposal systems.

**Fiscal and Facilities Impacts:**

Budgeted: Yes.

The ReSource Center’s processing fees are budgeted in the Resource Recovery and Waste Management Enterprise Fund and disbursed to the operator monthly. Specific compensation criteria will be specified in the agreements proposed (short-term or long-term).

**Fiscal Analysis:**

Pursuant to Section 10.3 of the Agreement, Contractor’s compensation for all costs of and profits for providing service is largely from a per ton processing rate, which is applied to all tons delivered at the ReSource Center facilities. The per ton processing rate is increased annually by CPI-U and is funded by a portion of the County’s landfill franchise tipping fees. The processing fees are budgeted and disbursed from the Resource Recovery and Waste Management Enterprise Fund. The operators also receive compensation from the recyclable market (processed by the MRF) and gas to energy (generated at the ADF) and Spot Market opportunities. These funding sources opportunities will transition to the new operators.

**Special Instructions:**

Please forward a certified, stamped Minute Order approving this item to:

- 1) Public Works, Resource Recovery & Waste Management Division, 130 East Victoria Street, Suite 100 Santa Barbara, CA 93101 Attention: Dalia Khan, (805) 882-3605.

**Attachments:**

Attachment A – Termination Letter (DRAFT)

Attachment B – Sample Direct Agreement (between the County, MSB Investors, LLC, and MarBorg Recovery, LP) (Note all direct agreements can be viewed on Legistar at [County of Santa Barbara - File #: 17-00112 \(legistar.com\).](#))

Attachment C – Notices of Violation – Central Coast Regional Water Quality Control Board

Attachment D – Notice of Violation – Santa Barbara County Environmental Health Services

Attachment E – Notices of Violation – Santa Barbara County Air Pollution Control District

Attachment F – Letters to MSB regarding failure to pay subcontractors and emails to County from unpaid subcontractors

Attachment G – Notice of Intent to Terminate Agreement between County and MSB Investors, LLC

Attachment H – Outstanding invoices from Santa Barbara County Air Pollution Control District

Attachment I – History of Payments from County to MSB Investors, LLC

**Authored by:**

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