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REPLY TO:
 ROSEVILLE MONTEREY
 ONTARIO

MEMORANDUM
October 19, 2015

TO: Dean Ruffridge, Senior Vice President
John A. Telesio, Governmental Affairs Consultant

FROM: Elizabeth Martyn

RE: Whittier Solid Waste and Recycling Services RFP
Evaluation and Staff Report – Legal Issues with Process

You have asked for an assessment of possible Proposition 218 and other legal issues with the Whittier Solid Waste and Recycling Service RFP Evaluation and Staff Report as presented at Whittier’s October 13, 2015 City Council meeting. At that meeting, the third vote to enter into negotiations with Athens Disposal disqualified herself, leaving a 2-2 vote, which constitutes no action. The meeting has been continued until Tuesday, October 20.

Please note that because that item is on the agenda, the Brown Act requires that public comments (subject to a time limit) must be allowed, however lengthy those comments were on October 13 (and the early morning of October 14). Those comments are subject to time limits.

This analysis identifies legal flaws in an integral section of the evaluation provided by the outside consultant on which the Council relied: The second table on page 8 of the power point, based upon Table 2 in the Evaluation and Scoring of Proposals (the “Evaluation”), erroneously shows over \$7M in franchise fee revenue to the City over the term of the contract which is not available to the City. The effect of correcting that error is not clear – and does not necessarily mean that CR&R will secure the contract - but we urge you to bring the issue to the City’s attention.

Background:

Whittier City staff and Council have been discussing a change in the method of delivery of solid waste services for some time. Right now, the services are a hybrid of those provided by the City through its own Solid Waste Collection Department along with Republic Services and Waste Management. As described in the staff report, some time ago Athens Disposal, in an unsolicited manner, approached the City regarding an exclusive franchise agreement with

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Athens. Thereafter, the City opened the process to other possible providers and hired an outside consultant, Sloan Vasquez (specifically Joe Sloan) to prepare the RFP and evaluate it. (Both Sloan and Vasquez are former Athens employees, a fact no doubt disclosed early on in the process). Notwithstanding the exclusive franchise, the City would continue to control services and rates through the franchise agreement. A required form of franchise agreement is attached to the RFP.

As summarized in the October 13, 2015 Staff Report (“Staff Report”), the RFP was part of a “competitive procurement process” with ten very specific, stated and weighed criteria for bidders, a no-contact provision, a non-collusion affidavit, developed and analyzed by the outside consultant working for the City Attorney. The RFP process has been underway for some time; for example, January, 2014 City Council meeting minutes reflect an open session discussion regarding its contents. The RFP itself is a detailed document resembling a public works bid package.

The RFP includes price (i.e. low rate) as a 30% criteria for award of the contract. However, a complicating factor arose when three of the four responding companies proposed residential collection rates lower than the current rate of \$23.28/month for residential collection. The lowest residential rate proposed is \$19.79/month. (In contrast, the commercial rate revenue will increase because of increases in the rates for 300-gallon roll-off containers). As the Staff Report states, reduced rates exacerbate the reduction in City revenues:

“In every case, proposed rates will reduce franchise fee revenue to the City’s general fund. This revenue reduction would increase the anticipated budget deficit in future years and require cuts in other services and staffing to achieve a balanced budget.... the lowest rates ...would reduce revenue by \$220,000 annually over the term of the contract. It would be fiscally responsible and in the best overall interest of the community to negotiate fees that would maintain existing revenue levels to the general fund, while remaining within currently authorized rate levels. It is recommended that in place of reduced rates, additional enhancements be negotiated with the chosen proposer for the benefit of the City and its rate-payers, such as senior discounts and free roll-out service to residents with disabilities...

In addition to current franchise fees and lease revenues associated with existing citywide solid waste collection services, the general fund is reimbursed \$205,514 annually from Solid Waste Collection through the cost allocation process. With the elimination of the City service, the general fund will no longer have the ability to allocate a portion of these costs to the collection operation.”

The October 13, 2015 presentation by the consultant included a power point of the evaluation criteria as well as the Evaluation and Scoring of Proposals document that was Attachment A to the Staff Report. Tables 2, 3 and 5 of the Staff Report show various scenarios confirming the “loss of revenue” to the City from the lowest rate bid (and the RFP weights “price” at 30% of the RFP points). The first chart on page 8 of the power point shows a loss of

\$709,595 in the first year of the new contract under that scenario, and that is measured against a “benchmark” that is less than current revenues. However the numbers are examined, lowering the rate from \$23.28 to \$19.79 results in a loss of franchise revenue to the City and put bluntly – makes it financially less attractive to take the lowest rate bid despite the weighted criteria in the RFP.

Therefore, it appears that the consultant had to find a way to either explain away the loss in revenue or otherwise make it go away. The result is Table 2 in the Evaluation and Scoring of Proposals, which contains the detail for the second chart on pg. 8 of the power point, the “Summary of Proposed Fees and Service Fee Impacts.” The consultant took the cost of the decrease in the residential rates over the length of the contract at current – not reduced – levels (\$8,546,346), subtract the value of the increased commercial rates, and added that number to the overall value of the contract offered by the otherwise “successful” bidder, Athens. (The same methodology was used for the other contract with far less impact because of the differences in rates proposed). When added together with other financial incentives, the result was to increase artificially the value of the Athens proposal to \$14.37M rather than the \$11.9M shown in Table 4 in the Staff Report. The consultant orally stated that such “value” arose from the City being paid \$7.3M in cash over the term of the franchise agreement because the “City simply can continue to charge the current rates even though the costs provided by Athens are significantly lower.” That statement legally is wrong (as the City Attorney noted in referring to Proposition 218) based upon Proposition 218 as well as the “competitive cost procurement” utilized by the consultant. At least one Council member, Bob Henderson, relied upon the erroneous \$14M number.

Proposition 218:

Rates for the delivery of solid waste services must comply both substantively and procedurally with Proposition 218, adopted by initiative in 1996 as Cal. Const. Article XIII D. Residential trash rates have been determined to be subject to the substantive requirements of Proposition 218 under the California Supreme Court’s reasoning in *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal. 4th 205. That means that the rates charged must be the reasonable cost of the services provided and must be used only for such services. The *Bighorn* case cites with approval *Howard Jarvis Taxpayers Association v. City of Roseville*, which provides in pertinent part:

“Section 6 of article XIII D sets forth the procedures and requirements governing property-related fees and charges. As relevant here, section 6 provides: a fee cannot be charged in excess of the service provided; a fee can only be used for the purpose it was charged; and the fee may not be imposed for general governmental services. (Art. XIII D, § 6, subd. (b)(1), (2) & (5). The theme of these sections is that fee or charge revenues may not exceed what it costs to provide fee or charge services. Of course, what it costs to provide such services includes all the required costs of providing service, short-term and long-term, including operation, maintenance, financial, and capital expenditures. The key is that the revenues derived from the fee or charge are required to provide the service, and may be used only for the service. In short, the section 6(b) fee or charge must reasonably represent the cost of providing service.” (*Howard Jarvis*

Taxpayers Association v. City of Roseville (2002) 97 Cal. App. 4th 637, 647-648) (emphasis added).

A charter city is not exempt from Proposition 218. (See *Howard Jarvis Taxpayers Assn. v. City of Fresno* (2005) 127 Cal. App. 4th 914) Therefore, the City cannot keep or set higher current rates to retain franchise revenue when the actual costs are less. In this case, the costs for three bidders are lower than the current rate and those rates include almost all possible costs (as listed above) plus a 10% residential franchise fee, a 13% commercial franchise fee, 1% management fee to the City and a signing fee. It seems as if it will be difficult for the City to find costs support its increased rate, especially with any cost savings from dissolution of a city operation. (Compare *Moore v. City of Lemon Grove* (June 2, 2015) 237 Cal. App. 4th 363). Similarly, the staff suggestions to increase rates in order to provide senior discounts or roll-out services also fail under Proposition 218, as those suggestions would use property-related fees and charges to subsidize services for others that instead must be provided from general fund revenue or donated by the solid waste provider.

Having looked at Proposition 218, there is another legal problem with the second chart in the power point and corresponding Table 2 in the Evaluation and the misleading addition of the \$8,546,346: it adds a criteria to the evaluation that was not part of the RFP and that was relied upon during discussion by at least one Council member, who repeatedly cited the \$14M benefit to be provided.

The City adopted and must follow its “competitive procurement process” accurately.

The City had discretion to determine how to award a solid waste franchise. The City used that discretion to design and administer a “competitive procedure process” over an approximate 18-month period. That means that all evaluation criteria must be disclosed and applied fairly. (*Eel River Resource and Recovery Inc. v. County of Humboldt* (2013) 221 Cal. App. 4th 209, 238 stating that “the letting of public contracts universally receives close judicial scrutiny” [citation] because deviations from strict adherence to competitive bidding standards may facilitate corruption or extravagance, or affect the amount of bids or the response of potential bidders.”

In *Eel River*, although not required to do so, Humboldt County chose to proceed with an RFP process that looked very similar to that here. For example, the review committee was required to “evaluate the bidders not just on the basis of service rates, but on five other weighted criteria also specified in the RFP (“responsiveness to the RFP, company qualifications and comparable experience, financial creditworthiness, acceptance of franchise terms, and the company’s proposed management plan”) and the RFP states that percentage scores “will reflect the extent to which criteria are fulfilled relative to other proposals.”(*Id.* at 235). The appellate court in *Eel River* determined the process to be a competitive bidding process govern by strict rules and applies those rules to invalidate the award of the contract based upon criteria not articulated in the RFP.

Because the RFP process was intended to be similar to (if not equal to) competitive bidding, the consultant must adhere to the actual evaluation criteria and apply it accurately and equally. Franchise fees were cited in the goals in the first part of the RFP but are not summarized anywhere in the criteria except for the second chart on pg. 8. The consultant cannot add, delete or manipulate criteria to try to mitigate the impact of that franchise fee analysis on any bidder or on the City. However, that is exactly what occurred: the text of the Evaluation preceding Table 2 states without explanation “for this analysis, the revenue reductions were represented as positive amounts and the revenue decrease[s] were representative as negative amounts.” That statement simply isn’t true: a rate decrease means lower fees for the City. Therefore, the numbers portrayed as positive are, in fact, negative, and those shown as negative are positive.

Based on those revisions, the “Total Municipal Benefits of All Combined Fees” (which includes franchise fees and possibly some enhancements) in the second table on page 8 of the power point really should look this:

<u>Athens</u>	<u>Burrtec</u>	<u>CR&R</u>	<u>Republic</u>
\$6,943,670 (not \$14,376,780)	\$6,601,062 (not \$4,731,744)	\$8,659,881 (not \$8,876,015)	\$7,528,931 (unchanged)

Absent this correction, as the Staff Report explains, the City Council is making a determination based on information that not only outside the evaluation criteria shown, but which is patently incorrect. That is unfair to the residents, the Council and staff, as well as to the other companies submitting proposals. As pointed out in the *Eel River* case, failure to follow the “evaluative criteria and process described in the RFP”...turned the process... “into a charade. One need not be Raymond Chandler to see that such a scenario could easily be employed to facilitate favoritism, fraud, corruption and extravagance.” (*Id.* at 237-38).

As also explained in *Eel River, supra*, and for the reasons explained here, the City does not have the option recommended in the staff report of negotiating with the successful bidder to keep current rates or to change the RFP criteria, whether by “negotiating increased rates” or enhancements after the fact or accepting offers of additional funding from any competitor. To do so violates the competitive procurement process by introducing factors not disclosed in the RFP and could lead to a Proposition 218 violation.

Conclusion: As in most difficult situations, the City should do the legally correct thing with the assistance of its City Attorney and staff: The City publicly should correct the inaccuracies in Table 2 of the Evaluation and page 8 of the power point, and then update Table 1 which ranks the proposals to determine the best possible bid for the City based on all criteria. Whatever the City Council decides, it is unfair to them, the ratepayers and the bidders to rely on a fallacy in awarding a franchise. If the highest scoring company ultimately is one which has proposed a rate lower than the current revenues, that is the cost of the elaborate “competitive price procurement process” utilized.