ARCHERNORRIS
A PROFESSIONAL LAW CORPORATION

2033 North Main Street, Suite 800
Walnut Creek, CA 94596-3759
925.930.6600
925.930.6620 (Fax)
www.archernorris.com

DOUGLAS C. STRAUS
dstraus@archernorris.com
925.952.5531

April 18, 2017

VIA E-MAIL RDONOGHUE@MEYERSNAVE.COM

Robin Donoghue, Esq.
Town Attorney
Town of Windsor
Meyers Nave, et al.
555-5th Street, Suite 320
Santa Rosa, CA 95401

Re: Procedural Defects in Town of Windsor Staff Recommendation to Award Collection Services Agreement

Dear Robin:

I am writing this letter on behalf of my client Windsor Refuse and Recycling, Inc. (WR&R) to protest a number of procedural defects that have become apparent as the Town of Windsor undertakes an effort to award a new ten year Collection Services Agreement franchise effective October 1, 2017. With all due respect, given the number and severity of defects identified below, it would be legally improper for the Town to move forward and award a solid waste and recycling franchise at the Wednesday April 19 meeting.

Inadequate Opportunity to Protest Award

The Agenda Report recommending that the Town Council approve a franchise with GreenWaste Recovery, Inc. was not made available until a few minutes before 5:00 PM on Thursday April 13. Since Friday April 14 was a Town holiday, this means interested persons, including WR&R, had no ability before Monday April 17 to review the details of the proposals originally submitted by the five companies who responded to the Town's Request for Proposals ("RFP").

The California Supreme Court requires that disclosure of responses to the RFP be made early enough such that "a reasonable time remains for public input before the Board's final award is made." *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1073. Here, where a ten year franchise is under consideration that the Agenda Report admits will result in "significant increases" in garbage rates charged Town residents, two or three days

is not such a "reasonable time." As the Supreme Court explained, the Town of Windsor must "give the public and all interested parties ample opportunity to scrutinize and protest the proposed award." 38 Cal.4th at 1073-1074. The Town of Windsor's current schedule does not satisfy the Supreme Court's dictates.

The legal requirement commanding that the Town allow adequate time for public input is particularly important here because the process followed by the Town raises very significant concerns that should be fully explored before any franchise is awarded. For example, the Agenda Report overstates the rates proposed by WR&R by 50-100%. Presumably this is due to a misunderstanding between the Town's consultants/Staff and WR&R. However, the rates attributed to WR&R's proposal are so obviously out of line with industry expectations and WR&R's historic rates that it is difficult to understand why the Town did not reach out to WR&R to clarify whether those rates were understood correctly by the Town. But that did not occur--even as the Town spent months negotiating with other proposers.

The Town's failure to comply with California law relating to this RFP process is compounded by the RFP Communication Protocol (Form A of the RFP). That document prohibits WR&R and others from communicating with anyone at the Town (other than Kristina Owens) about the RFP process and the proposed contract until the Collection Services Agreement has been awarded. There is no way for WR&R to exercise its right to "protest the proposed award" if it is barred from speaking up until the contract is actually awarded. We know the Town takes this requirement seriously because on March 16, 2017 Town Manager Linda Kelly sent a letter to all proposers warning them to comply with Form A.[1]

Failure to Comply with Competitive Bidding Ordinance

As the Agenda Report notes, the citizens of Windsor passed the Refuse, Recycling, and Composting Competitive Bid Ordinance by initiative in 1996. That Ordinance requires that any award of a Collection Services Agreement "shall be subject to a competitive bid process." Municipal Code Section 11-1-300(b). The Ordinance allows Town Staff to "establish and publish criteria" to be used "to evaluate **proposals** submitted...in such a competitive bid process." *Ibid*, emphasis added.

Here, the Town has violated the Competitive Bid Ordinance. The Agenda Report describes a process by which the Town evaluated *proposers*, not **proposals**. Most fundamentally, the criteria used by the Town did not evaluate the ***rates*** included in any of the proposals. Nor did Town Staff/Consultants consider whether proposals actually satisfied all the criteria specified in the Town's RFP.

Instead of following the competitive bidding process required by Town Ordinance, Staff selected preferred proposers and then began direct negotiations on contract terms. Thus, the

[1] Technically, my letter violates the Communications Protocol, a fact that underscores the improper nature of the Town's process for the franchise award.

rates and terms included in the proposed Collective Services Agreement being offered by GreenWaste may bear only passing resemblance to the RFP criteria or the original proposal made by GreenWaste. This is the opposite of a "competitive bid process."

Although WR&R obviously has had very little time to review the proposals submitted to the Town in response to the RFP, it is already apparent that competing proposals have significant deficiencies and deviate rather substantially from the Collection Services Agreement now proposed to be awarded. Here are two examples.

The RFP required that proposals submitted to the Town identify the name and owner of each facility "to be used for transfer, Recyclable Material and Organic waste processing, corporation/maintenance yard, customer service, etc" as well as the "permitted capacity of each facility and the ability to accommodate the Town's operations over the term." RFP, Section 4.4.5.2(D). GreenWaste's proposal identifies no such transfer facilities with permitted capacity. In short, its proposal does not meet the RFP criteria.

Moreover, the rates proposed by GreenWaste in many areas of its original proposal are substantially higher than those in the draft Collection Services Agreement. It is unlikely to be a coincidence that wherever GreenWaste's rates proposed rates were much higher than those proposed by WR&R, those rates are reduced to a figure that equals or is slightly lower than the rate proposed by WR&R. Rate payers would probably also be interested in knowing that the City actually allowed GreenWaste to ***increase*** the rates in the draft contract from those in the original proposal in those few areas where GreenWaste's proposed rate was lower than the rate proposed by WR&R.

If the Town had followed the "competitive bid process" voted into existence by its citizens in 1996, GreenWaste would not be the selected franchisee because its proposal demonstrated an absence of necessary facilities and its rates were too high. Town Staff's decision to select its favorite proposer and then rewrite the terms of that favored party's proposal violates the letter and the spirit of the Competitive Bid Ordinance.

Violation of Brown Act

WR&R is also obligated to note that the franchise award process appears to be tainted by a potential violation of the Brown Act (Government Code § 54950, et seq.). The Agenda Report indicates that on March 28 and March 30 of this year Town Staff "met with each Council member individually to discuss the RFP timeline, negotiations, proposed provisions of the Draft CSA, and items of utmost importance to be addressed in the final days of negotiations..." There was no public notice given in connection with these events. Serial meetings, where a majority of a government body are all contacted individually by staff to engage in deliberations without such public notice, is unlawful. Government Code § 54954.2(b); *see Page v. MiraCosta Community College Dist.* 2009) 180 Cal.App.4th 471, 503-504 (it is illegal "to use 'personal intermediaries' to exchange facts so as to reach a 'collective concurrence' outside the public forum"). That seems to be exactly what occurred here.

Staff and, Possibly, Council Violations of RFP Communication Protocol

As mentioned above, the RFP Communication Protocol unconstitutionally bars proposers from contacting Town Council members and others to protest the planned franchise award to GreenWaste. The Communication Protocol also assures WR&R and the other proposers that "[a]ll communications between the Town of Windsor and a participant, along with related responses, will be transmitted simultaneously to all participants..." Form A, RFP. Plainly, the Town of Windsor, while compelling the proposers to comply with the Communication Protocol, has radically deviated from this document itself in negotiating proposal revisions with selected bidders while leaving other bidders in the dark. This approach, again, is the exact opposite of the "competitive bid process" mandated by the Town of Windsor voters.

In addition, WR&R is concerned that one or more proposers may have engaged in lobbying of City Council members that is barred under the RFP process. Can the Town shed light on what prompted Ms. Kelly's March 16, 2017 reminder that both the anti-collusion and anti-lobbying provisions of the RFP were still in force? It seems highly probable that the Town acquired information that resulted in Ms. Kelly's letter. What was that information? Were Town Council members meeting illegally with proposers? Is there evidence of collusion? This information needs to be in the public domain.

Conclusion

Respectfully, for all these reasons, the franchise award process followed by Town Staff and consultants is illegal. There is not adequate notice to the public. There is no competitive bid process. There appear to be Brown Act violations. The Communication Protocol has been disregarded. The only cure for these severe legal defects is to begin a fresh evaluation of the proposals submitted that complies with the Competitive Bid Ordinance and the RFP, allows adequate time for public scrutiny of the outcome of that evaluation and avoids Brown Act violations.

Very truly yours,

ARCHER NORRIS

Douglas C. Straus

DCS:aa

cc: Members, Windsor Town Council