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## MEMORANDUM

DATE: May 18, 2011  
TO: Councilmembers, Rules, Open Government and Intergovernmental Affairs Committee  
FROM: Corinne Wilson, Center on Policy Initiatives  
SUBJECT: Deficiencies and Unanswered Questions in the Landfill Operations Preliminary Statement of Work

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Per Proposition C, which amended the San Diego City Charter to authorize for managed competition, the City must maintain service quality and protect the public interest.

To do this, the City Council approves a Preliminary Statement of Work (PSOW) which documents the service levels based on current status. The service levels, “. . . will be included in the Request for Proposals, ***ensuring that there will be no service degradation as a result of the managed competition effort.***” And that, “The service levels of other services that are known to be impacted as a result of scoping and grouping will also be documented in a separate attachment that is not intended to be included in the SOW”.<sup>1</sup>

***The Preliminary Statement of Work presented to the Rules Committee for review May 18, 2011 falls well short of the full description of current service levels and ignores concerns raised in the Pre-Competition Assessment. The documentation of service levels of other services known to be impacted has also not been provided.***

Miramar Landfill and the related functions described in the PCA are intricate, complex and subject to intense regulatory scrutiny. The costs of failure are significant. Moreover, as a significant revenue stream for the City, increased precautions against mismanagement or fraud must be implemented. The Rules Committee has a duty to ensure that the PSOW for Miramar Landfill clearly and completely protects service levels and the public interest before it is approved.

***The Center on Policy Initiatives recommends that the PSOW be sent back with clear direction to remedy its deficiencies.***

Below are questions we developed after reviewing the 2008 Pre-Competition Assessment (PCA) Reports for Greenery Operations, Landfill Maintenance and Monitoring (LM&M) and Fee Booth Operations, as well as the 2011 PCA for the Environmental Services Department and

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<sup>1</sup> City of San Diego. *Managed Competition Guide*. 2010.

2011 Preliminary Statement of Work (SOW) for Miramar Landfill Operations. The Council and City need to address these questions before moving further with the managed competition process.

### **Main Questions**

1. The 2008 and 2011 PCAs were not overwhelmingly positive for outsourcing any of the proposed Landfill services and identify little potential economic gain will be achieved. Given the concerns raised in 2008 and 2011, why is the City recommending these operations for the managed competition process?
  - a. For instance, the 2008 PCA for Fee Booth operations states that “while the function is eligible for managed competition, it is not an appropriate choice” due to several factors, including that little savings would be realized and potential conflicts of interests exist for private providers.
  - b. Significant risks were also identified for Miramar Greenery Operations if a competitive procurement process was entered. The 2008 PCA for Greenery Operations noted that if a private operator failed to perform it could result in \$977,000 in increased costs for the General Fund. The 2011 PCA states that “[t]he data shows that the Greenery is competitive in its gate fees which may suggest that economic gain is unlikely.”
  - c. Finally, the 2008 PCA for LM&M states that the “likelihood of failure is significant” given the complex nature of the function. The 2011 PCA in describing LM&M states that “economic gain could not be realized considering a majority of the function is already contracted out.”
2. The final paragraph of the PSOW states, “We are describing all current functions, but judgments will be made in the final SOW as to what is “in-scope” vs. “out-of-scope”, based on our market assessment.” What does this mean and why is this not part of the PCA? If the PCA indicates what is inherently governmental and the PSOW captures current service levels, why are some aspects determined to be in-scope or out-of-scope based on market assessment and after the PCA and PSOW processes are completed?
3. The City has worked diligently to extend the life of the Landfill numerous times. Tipping fees are the main source of Landfill revenue. How will the City incentivize the Landfill’s lifespan over the desire for increased revenue?
4. The PCA recommends protecting against significant risks by establishing strict guidelines in the scope of work for many aspects of each function and also contains further recommendations. How and when will these become part of the PSOW?
  - a. For example, if the operator of the Landfill and fee booth operations also own collection services increased monitoring and oversight of assessment of fees must be implemented to protect against the potential for fraud.
5. When and how will the high level of integration that exists between the Landfill functions to be managed and other City services be addressed? The PCA states that these should be addressed:

- a. existing contractual rights related to operations of, under, over or at the Landfill; and
  - b. the rights duties, responsibilities and obligations related to the City's Metro Biosolids Center.
6. When the City provides services to the community such as illegal dumping and community cleanups or refuse disposal after emergencies such as after the 2007 wildfires, how will these potential increases in tipping impact City revenues? How and when will this be addressed in the PCA or included in the PSOW?
7. Will the provider be required to continue to provide services that meet the ISO 14001 certification standard? The ESD Director in 2008 wrote a memo stating that the minimum acceptable industry standard the City should accept from any entity should be ISO 14001. We also agree that the ISO standard should be maintained to avoid environmental degradation and reduced services to citizens.
  - a. If the ISO 14001 standard resulted in efficiency gains, why not make this a stronger component of the SOW or RFP?
  - b. For example, through the ISO 14001 process, the City reduced idling of equipment reduce air pollution, drastically reduced the use of potable water by switching to recycled water, instituted the use of tarps to cover the Landfill face rather than green waste or dirt and developed the Last Chance Recycling program which has increased diversion. The PSOW requires none of these current practices of the City.
8. How are the legally mandated interactions with Local Enforcement Agencies and other state and federal agencies factored into the SOW?
9. Biological Services is included in the PSOW but risks associated with outsourcing the management and monitoring of protected and endangered species at Miramar Landfill were not addressed in the PCA. Why was this omitted? What are the potential liabilities under federal and state regulation? How could mismanagement affect the lease with the Navy?
10. Will the SOW and RFP include specific and detailed language regarding closure funds? If so, how much is the private provider expected to contribute? There must be guarantees provided that a private provider will put sufficient dollars into the closure fund.
11. The description of the scope of work for the function slightly changed between the 2008 PCA and 2011 SOW and 2011 PCA. The 2011 SOW and PCA reclassified some of the regulatory duties described in the 2008 PCA as "control duties." Also, fire control was eliminated from the 2011 SOW and PCA's description of duties.
  - a. Why were regulatory duties reclassified as control duties? Does reclassifying the regulatory duties as control duties eliminate a concern about the duties being inherently governmental?

- b. Who made the decision regarding reclassifying the duties under “Perform general control duties” in the 2011 PCA? Was City Council involved in this decision? Did they need to be?
  - c. Both the 2011 PCA and 2011 SOW list enforcing and assessing penalties as part of the function. Is this legal?
12. The potential risks to competition identified in the 2011 PCA for Hazmat Load Check state that there is a chance that a private provider would be less likely to report illegal disposal of prohibited wastes. Will a private provider be required to have a dedicated inspection program? Requiring the provider to indemnify the City protects the city’s interest, but how will the City protect the health and safety of the public and environment if prohibited wastes are disposed in the Landfill?
  13. In the 2011 PCA, the risk assessment section acknowledges that it is “very difficult to develop a statement of work for an ever-changing operation” and as a result there could be a high number of change orders. Has the city factored in this oversight cost into the contract? Which position(s) in the City will be responsible for this oversight?
  14. The 2011 PCA identifies that there is a high risk level associated with a private contractor managing the bird control program of the Landfill. If this program is not effective the Landfill will be closed. How often will audits of a contractor’s bird program occur? Do any of the potential providers identified in the PCA have experience operating a bird control program?

**Additional Questions**

1. In 2008, Fee Booth Operations, Greenery Operations and LM&M were considered separately for competitive procurement. Will the city accept a provider that can do all five Landfill functions in its current iteration? If so, is this realistic given the complex nature of each function?
2. It appears from the PCAs that a significant amount of work is already contracted out to private providers. If services are outsourced, what will happen to existing subcontracted work? Will a private provider be able to subcontract work? Who will be responsible for monitoring subcontractors?
  - a. The 2008 PCA for LM&M notes that because of the special qualities needed a bidder could use a subcontractor that could increase the costs for their work. Does the likelihood of a private provider subcontracting work increase given the broadening of the responsibilities being outsourced?
3. Do Construction and Demolition operations factor into future plans for the Landfill? A resource recovery park is a function that has been discussed in the past for the Landfill, yet none of the PCAs or SOW discusses this option.
4. The discussion of reuse bins and operations needs to be expanded and elaborated on in the SOW.

5. Will the SOW prohibit organics from being placed in the Landfill? If so, what type of alternates will be used?
  - a. Eliminating organics from the Landfill will reduce environmental contamination. Improving and expanding the Greenery model could accomplish this goal. Are there any plans for such an expansion?

## **Greenery Operations**

1. The 2008 PCA provides that the city is able to use wood chips produced at the Greenery for ground cover. Will this continue or will the City have to pay for this service?
2. Gate fees have been waived for certain entities, including the military, non-profits and city of San Diego residents delivering their own greenery. Will the entities that are not currently paying a gate fee continue to not pay a fee under the new structure?
3. The 2011 PCA states that the Greenery processed 104,000 tons of organic waste, with 1,900 tons being food waste. It is anticipated that waste will increase to 150,000 tons because the Landfill doubled in size to accommodate more feedstock. How will the SOW and/or Request For Proposals (RFP) account for changes in the size and scope of work?
4. The 2008 PCA notes that the Greenery is a key component in maintaining compliance with the State recycling plan and that mandates become more stringent each year. Who will be responsible for ensuring that the provider stays on top of the mandates?
5. The 2008 PCA notes that San Diego has one of the highest per capita waste disposal rates in the state and that the city will need to continue to increase waste diversion efforts. Will the SOW contain requirements as to how much waste needs to be diverted by the provider? Do the goals increase over time?
6. In the 2008 PCA, regulations were being considered that would add more restrictions regarding CO<sub>2</sub> emissions. Will the provider be responsible for ensuring compliance?
7. The 2011 SOW does not mention what will happen with the current equipment. The 2008 PCA notes that the City leases and owns equipment. Will the City supply equipment to a private provider? Who will be responsible for maintenance?
8. The revenue from commodity fees in FY07 was \$344,197 and the 2011 SOW notes that the revenue from commodity sales was \$450,071. The 2008 PCA notes that there were going to be changes to the gate and commodity fees but that an economic incentive to recycle would still remain. Who will be responsible for setting commodity and gate fees? Will the provider be required to maintain/increase revenue? Who will monitor prices?
  - a. The 2008 PCA notes that a policy existed to give City residents free compost product (25%-30% of compost is given away to residents at no cost). Will this policy continue?

9. The 2008 and 2011 PCA identified several potential risks to competition, including the following:
  - a. Focus on short-term profits by private operators. Gate fees are the highest revenue producer and as a result an incentive is created to overuse space. The solution identified in the 2008 PCA was to purchase a large bond to mitigate site cleanup. The proposed solution in the 2011 PCA is to establish strict guidelines and quality control measures, as well as penalties for inadequate performance.
    - i. In addition to the proposed solutions identified in the 2011 PCA, will the City purchase a bond as well?
10. Difficulty of building Research & Development (R&D) into a contract. The lack of R&D could result in expensive change orders or loss of potential increase in diversion. The 2011 PCA lists R&D as part of the scope of work being considered and offers regular and frequent audits as a mitigating solution for this concern. What is meant by regular and frequent audits? Will specific requirements be in the SOW and RFP?
11. Responsibility remains with the City for permits and the Greenery must meet regulatory standards. The solution for any possible violations occurring as identified in the 2008 PCA is to have the service provider conduct regular inspections to ensure standards are met. The 2011 PCA provides that audits should be conducted on a regular and frequent basis.
  - i. Who will be responsible for conducting the audits?
  - ii. If the service provider is responsible for inspections, how does one account for bias?
  - iii. If developments occur in regulations throughout the year, how will the provider be responsible for changing and/or ceasing practices?
  - iv. What will be considered “regular” for inspection purposes? Will the SOW or RFP detail this requirement?
  - b. What are the responsibilities toward MCAS Miramar? Is there a plan for engaging them? Can some of their potential concerns be addressed during the managed competition process? If the MCAS Miramar adds additional tasks or prerequisites for competitive procurement, will the City have to start the process over from the beginning?
  - c. The 2011 PCA identifies the following three additional concerns not present in the 2008 PCA: (1) Operator’s use of City equipment; (2) Use of green waste product as ADC; and (3) Lack of knowledge by an operator could damage the capped portion of the Landfill, LFG well head, or LFG collection lines. These additional risks would all have a high level of impact if realized. Will the SOW and RFP incorporate all of the proposed solutions identified to mitigate these risks, including requiring a provider to provide insurance to indemnify the City for the contractor’s actions?
12. The 2011 PCA provides that “private green waste processing operations that also operate Landfill operations use their green product as Alternate Daily Cover (ADC) at the

Landfill face which could impact tons processed.” Will the SOW and/or RFP include a requirement that providers compost green waste and not use it as ADC?

13. The 2008 PCA notes in the Economic Gain section that one composting facility was reviewed and knocked out of contention because of the smells it generated when turning compost. How will the SOW account for unintended consequences? How will issues with the service provider be addressed?
14. The 2008 PCA notes that if a provider was unable to perform their duties that it could result in up to \$977K per year in increased General Fund costs.
  - a. Given that this function could not impact the General Fund if an economic gain was achieved, but could severely impact an already distressed General Fund if a problem came up – how does the City balance this risk and account for it in the SOW?
15. Also, based on the 2008 PCA, functions that impact regulatory decisions should be classified as inherently governmental. However, there are several functions within the services being considered for competitive management that will have regulatory duties. Are positions that have regulatory duties inherently governmental? If not, why would such a determination change from year to year?

#### **Landfill Maintenance and Monitoring (LM&M)**

1. The 2008 PCA notes that surface maintenance tasks are not included at the West Miramar Landfill. Are these tasks included in the 2011 SOW? If so, why?
2. The SOW and PCAs do not adequately capture the importance and costs associated with managing closed Landfills and burn sites. The costs to monitor and manage these sites are much higher than originally anticipated by the county and the profits associated with these sites are not high.
  - a. Does the city expect the management of these sites to be attractive to private providers? If so, how will the city monitor management of these sites?
3. The 2011 PCA states that LM&M has to ensure compliance with regulations and permit requirements. However, due to low moisture in San Diego, Maintenance and Monitoring can extend 50 years or longer instead of the federally mandated 30 years. How does this extended period of monitoring factor into choosing a provider?
4. The 2008 PCA notes that 838 monitoring points have been installed in 9 disposal sites and are monitored on a daily, weekly, monthly, quarterly or annual basis. The burn ash sites have semi-annual or annual maintenance schedules. How will the City ensure the inspections occur?
5. The 2011 PCA notes that a significant portion of monitoring activities and laboratory analysis of groundwater and gas samples are done under contracts which are overseen and managed by city forces. Will a private provider be able to outsource responsibilities

as the City does now? If so, what checks will be in place to ensure that this contractor is appropriately qualified?

- a. It should be noted that according to the 2008 and 2011 PCA the city has individuals that are responsible for overseeing and managing outside contracts. Who are these individuals and are the plans to continue to utilize them for oversight as part of this new process?
6. The 2008 PCA notes that most of the labor classifications are project management and technically oriented. Will there be minimum standards set for background requirements in the SOW and/or RFP?
  7. The 2011 PCA states that 56% of LMM activities are project management, which includes CIP and regulatory reporting. If these functions are inherently governmental, what economic benefit can exist in outsourcing this function if over half of it is ineligible for managed competition?
  8. According to the 2008 PCA, data collection was lacking for this function. An automated system did not exist that tracked workload; not all of the functions had a formal collection process; no information existed regarding the reliability of the systems and they were unable to project workload. Have improvements regarding data collection and tracking been made for the 2011 SOW? Also, how can the City go forward with this process without having the minimum data requirements met?
    - a. The 2011 PCA notes that workload is tracked using an automated system for all functions being considered for managed competition. When was an automated system developed for this function?
    - b. It is noted in the 2008 PCA that the lack of data is explained by the unpredictability of the work. For example, Regulatory agencies set tight deadlines to take corrective action, some as short as 10 days. What type of accountability is planned? Are there notification procedures that a provider must provide to the city about violations that require corrective action?
  9. The 2008 and 2011 PCAs identify the following risks to competition:
    - a. The 2008 PCA notes that there is a risk to the environment and cost to correct problems are high. The report notes that the department needs to exercise more direct control of the LM&M function. How does the city plan to address this concern in the SOW and/or RFP?
    - b. Both the 2008 and 2011 PCAs cite poor management and oversight as a potential risk because of the possibility of substantial fines for non-compliance. The 2011 PCA proposed solution to mitigate this risk is to conduct frequent and regular audits. How often is meant by “frequent and regular”? Is there a possibility for the provider to indemnify the city as suggested for other functions?

- c. The 2011 PCA also identifies an additional risk regarding training of staff. City staff is cross-functionally trained and a private contractor would not likely have training to perform duties across functions. The suggested solution is to ensure the vendor has such training. How will the City monitor the quality of training and ensure that a provider's staff is able to perform duties? Who will provide the training? Will there be requirements for continuing education?
10. The 2008 PCA in discussing efficiency gain notes that no standards exist under the ISO 14001 protocols regarding the number of probes monitored per hour or number of acres needing to be monitored for Landfill gas emissions. Are there environmental concerns that would make the City want to suggest minimum levels for the number of probes and number of acres of monitored? What are the current levels?
  11. The 2008 PCA discusses the City's use of consultants and contractors and states that consultants or contractors perform most of the routine and predictable monitoring tasks. It further notes that because regulations will only become more onerous it is best to maintain subject matter experts to manage and maintain City cost control on these complex contracts. How does pursuing managed competition affect any of the contracts we are currently in with consultants and contractors?
    - a. Which services are contracted out by the city?
    - b. Will a provision be included in the SOW that requires an expert in the specific subject area for various components of the function?
    - c. Given that so much work is in contract on a private basis, what is there to gain from the managed competition process if no savings will occur?
  12. How does the City respond to the concerns raised in the 2008 PCA for this function? The 2008 PCA provides the following in assessing whether the function should be outsourced:
    - i. 62% of the function is not eligible for competitive procurement;
    - ii. A high potential financial liability exists and the risk cannot be shared, mitigated or assumed;
    - iii. The function is complex and failure is likely without the City providing more direct control; and
    - iv. Any economic gain could not be used for the General Fund.

### **Fee Booth Operations**

1. The 2008 PCA notes that pricing and operational requirements by a private operator at Otay and Sycamore Landfills discouraged self-haul customers resulting in a disproportionate number using Miramar. Does the city want to continue to encourage self-haul at Miramar? If so, will protections be built into the contract that ensures the provider does not make changes that discourage self-haul customers?

2. In describing the breakdown of work, the 2011 SOW adds assessing appropriate tipping fees, screening for illegal material and customer service. Who will monitor the quality of the training received by operators regarding regulatory requirements if outsourced?
3. The 2008 PCA states that the baseline estimate has historically been under-estimated because overtime expenses have not been adequately accounted for in the estimate. Are these costs accounted for in the new estimate?
4. In the 2008 PCA section discussing workload, performance and property data it was noted that not all functions have a formal collection processes and one will need to be developed. It further states that it will need to be determined if the workforce is adequately inputting workload.
  - a. Which functions are not currently tracked? How does this affect the SOW and/or RFP? What steps are in place to ensure that accurate and timely inputting of data is occurring?
5. The following were identified as potential risks to competition in the 2008 and 2011 PCAs:
  - a. Conflicts of interest by the provider could lead to improperly assessed fees. If a private entity had a contract to operate the fee booth and also operated a refuse collection system that used Miramar for disposal there is a chance for fees to be assessed in a favorable way for the provider. The 2011 SOW makes no mention of this risk. How would the final SOW and RFP protect against fraud and conflict of interest?
    - i. A 2008 memo from the Office of the Comptroller states that language should be included in the agreement that would protect against fraud. Is such language present?
    - ii. The 2011 PCA identifies several possible ways to mitigate this risk, including implementing a secret shopper program, installing cameras to monitor fee booth operators and onsite contract management. What, if any, of the suggested solutions are planned to be included in the SOW and/or RFP? Are the increased costs associated with these potential solutions factored into the bid? For instance, who would be responsible for the cost of hiring “secret shoppers” or installing video surveillance equipment?
  - b. Potential exists to compromise the RAD system and would require the creation of a new software package that did not allow the contractor access to the City’s management information systems (MIS). What steps are being taken to protect MIS? How will any increase in costs be offset if the City is required to pay for software changes?
  - c. The 2008 PCA identifies that any service interruption would result in an inability to process the appropriate material for disposal into the Landfill. The city would

be responsible for figuring out a way to fill this gap. Are the costs of hiring a temporary workers or using displaced workers figured into the SOW or PCA?

6. The Comptroller's 2008 memo also identified that in the current structure the fees are assessed in a flexible way but are assessed to the City's best interest. This would not necessarily be the case with an outside contractor and suggests having an un-biased party present on-site to monitor related party transactions or other procedures in place. Is this recommendation a part of the SOW or RFP? Does the SOW account for fees not being assessed in the City's best interest?
7. The 2008 PCA notes that the City discourages non-city waste and diverting recyclables. Also, the fee structure is based on type of vehicle, waste composition and jurisdiction where originated. A private provider as noted in the 2008 PCA might have an incentive to assess a lower fee for their transaction. They propose that strong contract oversight; auditing, performance monitoring and a good SOW could mitigate this issue. How does the city plan to address this oversight issue? Is auditing provided for the in the contract? At whose expense?
8. The 2008 PCA describes potential service providers and said that a bidder's experience should be related to managing fee booth operations at a California solid waste disposal facility and not just a fee booth operator. Will there be a restriction in the SOW and RFP that limit bidders to those with experience at California waste disposal sites and facilities?
9. The 2008 PCA report lists NORCAL as a potential service provider in its evaluation of availability of alternatives. However, earlier in the report it described how NORCAL had issues with corruption in another jurisdiction. What type of due diligence will be done to investigate the background of potential providers? What issues will result in automatic disqualifications?
10. The 2008 PCA notes that minimum regulatory requirements for fee booth operations exist. How will a potential provider demonstrate knowledge of these requirements? What will be the responsibility of the provider to keep up with changes in the regulatory world?
11. The 2008 PCA notes that no significant savings would be gained by the competitive procurement of this function as a stand-alone and that if any economic gain was achieved it could only be applied to the refuse disposal enterprise fund and not the general fund. Is the city willing to contract this function as a stand-alone?
12. In 2008, there didn't appear to be a strong argument or reliable basis to believe the city would save any money outsourcing this function. In fact the recommendation in the 2008 PCA was to not incur the cost of managed competition because only one firm had a lower cost and it was only 5.5% less. What has changed to make managed competition appropriate?

## **Hazmat Landfill Load Check**

1. The 2011 PCA does not include storage and transport costs in the Hazmat Landfill Load Check. Will the SOW include these costs?
2. Will the City have to increase its regulating staff to manage a private provider of Hazmat operations? If so, how is this accounted for in costs?