

BEFORE THE COUNCIL OF THE
METROPOLITAN SERVICE DISTRICT

FOR THE PURPOSE OF AUTHORIZING) RESOLUTION NO. 89-1131A
NEGOTIATIONS WITH TRANS INDUSTRIES)
TO OBTAIN THE METRO EAST STATION) Introduced by Rena Cusma,
Executive Officer

WHEREAS, The Metropolitan Service District (Metro) has been engaged in a methodical process to procure landfill capacity, transportation, transfer station capacity and alternative technology as elements of Metro's implementation of the Regional Solid Waste Management Plan; and

WHEREAS, Metro has entered into or authorized contracts for landfill capacity, transportation of waste, and alternative technology for composting of solid waste; and

WHEREAS, Metro has taken steps to close the St. Johns Landfill by February, 1991 as required by the lease agreement with the City of Portland; and

WHEREAS, A remaining major element of Metro's solid waste system is for a transfer and recycling center (Metro East Station) to be in service by the time of closure of the St. Johns Landfill; and

WHEREAS, RESOLUTION NO. 88-1009 identifies the Metro East Station transfer and recycling center procurement process; and

WHEREAS, RESOLUTION NO. 89-1061B approved the Request for Proposals to solicit private proposals to provide a site and design, construct, own and operate the Metro East Station; and

WHEREAS, RESOLUTION NO. 89-1091 approved the evaluation methodology for proposals for the Metro East Station and approved solicitation of a turnkey proposal; and

WHEREAS, Proposals for the Metro East Station were received from four qualified proposers on the June 13, 1989 deadline for submittal of proposals; and

WHEREAS, Analysis of the Metro East Station proposals has been an ongoing and intensive process involving Metro staff and an Evaluation Committee consisting of representatives from the City of Portland, the Port of Portland, Multnomah County and

Metro; and

WHEREAS, The Evaluation Committee following the evaluation methodology approved by the Council determined that Trans Industries' turnkey proposal has the highest score; and

WHEREAS, Time constraints for commencement of operations at the Metro East Station require that full design work for the facility proceed contemporaneously with negotiation of the final contract with Trans Industries or any designated alternate(s); and

WHEREAS, The Executive Officer concurs with the recommendations of the Evaluation Committee; and

WHEREAS, The Executive Officer concurs with the above; now, therefore,

BE IT RESOLVED,

1. That the Executive Officer is hereby authorized to enter into contract negotiations with Trans Industries for the purpose of procuring the Metro East Station as a Metro owned facility to be operated by Trans Industries under a five year operations contract with Metro.

2. That the Executive Officer is authorized to terminate negotiations with Trans Industries in the event that the Executive Officer determines that a successful negotiation of a contract cannot be procured with Trans Industries.


3. In the event negotiations with Trans Industries are terminated, the Executive Officer shall recommend to the Council which of the proposers who submitted proposals under Resolution No. 89-1061B should be chosen to enter into subsequent negotiations with: 1) Rose City Recovery; 2) RIEDEL/Wastech; 3) Norcal.

4. That the Executive Officer is authorized to provide Trans Industries or alternate(s) authority to proceed with design processes in parallel with the negotiations.

5. That Metro will pay the costs of the design process for Trans Industries or alternate(s) for the actual, verifiable and reasonable costs associated with the design process that occur after the date of authorization by the Executive Officer

in the event that negotiations are terminated with Trans Industries or alternate(s) without bad faith on the part of Trans Industries or alternate(s), PROVIDED HOWEVER, that such design process costs shall not in any event exceed 350,000 dollars (\$350,000).

ADOPTED by the Council of the Metropolitan Service District the 14th day of September, 1989.



Mike Ragsdale, Presiding Officer

PEN:rey
SW891131.RES
9/11/89

Meeting Date: Sept. 14, 1989

RESOLUTION NO. 89-1131, FOR THE PURPOSE OF AUTHORIZING NEGOTIATIONS WITH TRANS INDUSTRIES TO OBTAIN THE METRO EAST STATION

Date: September 11, 1989

Presented by: Councilor Gary Hansen

Committee Recommendation: The Solid Waste Committee voted 4 to 1 to recommend Council adoption of Resolution No. 89-1131 as amended. Voting aye: Councilors Hansen, Buchanan, DeJardin and Ragsdale. Voting nay: Councilor Wyers. This action taken September 7, 1989.

Committee Discussion/Issues: The Solid Waste Committee held a public hearing on September 5, 1989. Several citizens, representatives of recycling organizations and representatives of the four vendors who submitted proposals testified. The main issues raised during the public hearing were as follows:

1. Environmental questions regarding the Trans Industries site, adjacent sites, and potential litigation;
2. Opposition to a "buy-back" operation at the Metro East Station;
3. Traffic concerns, especially on N.W. St. Helens Road; and
4. Scoring of proposals by the Evaluation Committee. Each of the four vendors feel their proposals should have received a higher score.

On September 7, 1989, the Solid Waste Committee held another meeting to consider Resolution No. 89-1131. The Solid Waste Director presented additional information regarding the environmental concerns of the recommended site. The information included a letter from the Department of Environmental Quality (DEQ) which indicates that the "DEQ did not and do not identify activities on the American Steel property which could have contributed to contamination in the area." The DEQ further stated that "the only contamination identified at the site is in areas immediately adjacent to Doane Lake. The contamination is most probably "spill over" from the Gould/NL battery breaking operation."

The Solid Waste Director stated that there is substantial environmental information available regarding the proposed site, and recommends that this information be analyzed while Metro negotiates with Trans Industries.

Regarding the concerns of recycling representatives that there not be a buy-back operation at Metro East Station, the Solid Waste Director indicated that Trans Industries has stated that a buy-back operation could easily be removed from their proposal and it would not affect the proposal cost.

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Committee Report
September 11, 1989
Page 2

Traffic concerns were addressed by the Solid Waste staff. The staff indicated that the recommended vendor and the Solid Waste Department are aware of the areas where highway improvements are necessary and that some of these areas are already under consideration by the City/State. Traffic considerations will be an important item during negotiations.

Regarding the evaluation/scoring of the proposals, the Director of Solid Waste stated that the numbers were correct, but there were some errors in the text. This did not affect the scoring/ranking of the proposals.

General Counsel stated that if the additional traffic information submitted by Norcal were to be accepted as part of their proposal, Metro would have to allow all the other vendors to modify their proposals (Attachment 1).

The Solid Waste Committee asked numerous questions regarding the major issues addressed at the public hearing on September 5, 1989, and at the September 7, 1989, meeting.

The Committee referred to the memorandum from Councilor George Van Bergen (Attachment 2) raising several questions and requesting additional information regarding the Metro East Station, and to the memorandum from Bob Martin (Attachment 3) in response to Councilor Van Bergen's request. There are some key questions raised by Councilor Van Bergen that should be considered further, especially the ones regarding potential liabilities for site clean-up.

The Committee made amendments to Resolution No. 89-1131 as shown on the attached sheets prepared by the committee clerk (Attachment 4).

Before making a motion to recommend Council adoption of Resolution No. 89-1131, the Committee stressed the following:

1. That the vendor be held responsible for any contamination regarding the site;
2. That additional testing of the site be done prior to Metro taking ownership; and
3. That operating test wells be drilled so that testing could continue even after Metro takes ownership of the site.

Councilor Wyers voted against the motion to recommend Council adoption of Resolution No. 89-1131 because of her concerns regarding site and adjacent property contamination and potential litigation. The other committee members support conducting negotiations with Trans Industries while a thorough analysis of the site and adjacent sites is conducted.

GH:RB:pa:A:\RAYB.105



METRO

2000 S.W. First Avenue
Portland, OR 97201-5398
503 221-1646

Memorandum

Council Staff Report
9/11/89
Attachment 1

Date: September 7, 1989
To: Gary Hansen, Chair, Solid Waste Committee
From: Daniel B. Cooper, General Counsel
Regarding: METRO EAST STATION PROPOSALS

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Question Number 1

You have asked that I provide an assessment of several concerns regarding the Metro East Station procurement process. The first concern focuses on the recycling guarantee. The Request for Proposals (RFP) required proposers to complete a series of Forms which were included as part of the RFP. One of the required forms, Form H - PERFORMANCE ASSURANCES, includes the following statement:

"We (proposer) are further prepared to guarantee that the Facility, from Commercial Operation Date and thereafter, will meet each of the Performance Guarantees in Form G."

Unfortunately, Form G was not the correct reference. Form G is the "MATERIALS RECOVERY RATE" form. The required performance guarantees were listed on Form F - PERFORMANCE GUARANTEES.

Two proposers, NORCAL and Riedel/Wastech, executed Form H without changing the reference to Form G. In effect, these proposers could possibly be considered to have provided a material recovery rate guarantee instead of a Performance Guarantee. Rose City Resource Recovery and Trans Industries both modified Form H to show the correct Performance Guarantee form reference, i.e., Form F. The question which has been raised is whether proposers who altered Form H should be declared non-responsive.

Answer

Bid or proposal responsiveness focuses on whether the bid or proposal conforms in all material respects to the clear, unambiguous requirement of the solicitation.

In the present case, the incorrect reference to Form G as the "Performance Guarantees" form created an obvious ambiguity.

Section 7.8.5 of the RFP gives Metro the right to, "...waive any irregularity in any Proposal, except failure to provide the information required for the Facility option(s) selected unless Metro should deem in its best interest to do so."

Section 7.8.7 of the RFP allows proposers to correct errors or omissions in the Proposal which, "...would be in the best interest of both parties if corrected by the Proposer."

Both Section 7.8.5 and 7.8.7 provide a basis for accepting the proposals submitted by Rose City Resource Recovery and Trans Industries notwithstanding their correction of the reference in Form H. Likewise, they give a basis for accepting the proposals of Riedel/Wastech and NORCAL which could be read as not giving a guarantee of Performance Standards contained in Form F.

Given the ambiguity created by the reference to the incorrect form, it is the opinion of this Office that Metro is not required to reject the proposals submitted by Trans Industries and Rose City Resource Recovery as non-responsive for correcting the reference in Form H. Nor is Metro required to reject the proposals of Riedel/Wastech and NORCAL for not giving a guarantee of the Performance Standards. This action constitutes a minor irregularity which Metro, at its discretion, may waive. Finally, it should also be noted that, according to Staff, Riedel/Wastech and NORCAL both submitted revised Materials Recovery Rate information which was utilized in ranking their proposals. As a result, the relative scores and ranking of the proposals were not affected by the problem related to the error in Form H.

Question Number 2

The original RFP required unit price bids for designated waste tonnage categories. RFP Section 7.5.5. Category "A" set a minimum of 15,000 tons/month to a maximum of 35,000 tons/month.

Three of the proposers proposed a minimum category "A" tonnage guarantee greater than the 15,000 tons/month designated by Metro. Rose City Resource Recovery guaranteed a minimum category "A" tonnage of 35,000 tons/month as did Trans Industries. NORCAL guaranteed a minimum category "A" tonnage of 30,000 tons/month. Riedel/Wastech was the only proposal which accepted the category "A" minimum tonnage guarantee of 15,000 tons/month.

In light of the variations in minimum guarantees submitted by the proposers, Staff's analysis to determine Contract Cost assumed a "put or pay" for all months in which the projected waste flow was less than 35,000 tons.

The question which has been raised is whether proposers which did not guarantee a unit price for the full minimum tonnage category range, i.e., 15,000 tons/month to 35,000 tons/month, must be declared non-responsive.

Answer

The RFP, at Section 7.5.5.1, required that unit prices be proposed at the designated tonnages for all categories contained in Form E. As noted above, category "A" included a minimum guarantee of 15,000 tons/month. All of the proposers fulfilled this requirement, i.e., every proposer submitted a unit price for category "A."

The tonnage categories are also set out in the General Conditions at Article 15. Section 7.5.1 of the RFP gave proposers an opportunity to take exception to portions of the General Conditions. The fact that three of the proposers took exception to the 15,000 tons/month minimum designated by Metro does not render their bids non-responsive. In fact, this is totally consistent with what proposers were instructed to do.

Finally, it should be noted that the Contract Cost analysis utilized by Staff had the effect of penalizing those proposers who took exception to the 15,000 tons/month minimum guarantee designated by Metro. By assuming a 35,000 ton "put or pay" obligation for months with projected tonnages less than 35,000, Metro imposed a penalty on those proposers who took exception to the Metro designated minimum guarantee.

Given the fact that 1) the RFP specifically authorized proposers to take exception to portions of the General Conditions which included the 15,000 tons/month minimum guarantee, and 2) those proposers who took exception to the minimum guarantee did not obtain an advantage over the proposer which did accept the minimum guarantee, it is the opinion of this Office that Metro is not required to reject the proposals submitted by Trans Industries, Rose City Resource Recovery and NORCAL as non-responsive for failing to accept the minimum tonnage guarantee in category "A."

Question Number 3

The final question which has been raised focuses on the nature and effect of changes which can be made to a proposal. In its original submission, NORCAL proposed a facility configuration which included access on Hurst Street, a private access requiring PUC approval for transfer station access. Subsequent to its oral

interview, NORCAL submitted additional materials detailing modifications to its proposal to access the site via a to-be-constructed westbound underpass off Columbia Boulevard. More recently, NORCAL has submitted additional materials which propose the following changes to its proposal for the facility:

1. Different access route to the facility
2. Different internal circulation pattern
3. Different queing pattern
4. An additional exit
5. Optional additional picking line
6. Enlarging the site

The proposed changes involve additional costs. NORCAL's apparent position is that the changes, with the exception of the additional picking line, are based on newly obtained information regarding proposed State Highway Division improvements to the road which would provide access to the NORCAL facility.

The specific question is whether NORCAL should be allowed to modify its original proposal, and if so, what effect should be given to these modification vis a vis the scoring and ranking of NORCAL's proposal.

Answer

The threshold issue which must be addressed is whether the information regarding the proposed road improvements is in fact information which could not have been obtained by NORCAL prior to submission of its proposal. It is Staff's understanding from conversations with the City Engineer's Office, that the proposed improvements to the State road have been under discussion for a number of months. The City Engineer's Office further indicated that NORCAL did not contact the Engineer's Office to inquire about the status or plans for the road.

Even if the information regarding improvements to the road is viewed as newly discovered information which impacts NORCAL's proposal and justifies modifications to the proposal, it would be unfair to the other proposers to allow a rescoring of NORCAL's modified proposal at this stage of the procurement process. For this reason, it is the recommendation of this Office that any modified proposal submitted by NORCAL not be rescored. If NORCAL's additional submission is to be utilized in determining

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who is the most responsive proposer the other proposers would be entitled to an equal opportunity to submit modifications and improvements to their original proposals.

DBC/gl



METRO

2000 S.W. First Avenue
Portland, OR 97201-5398
503/221-1646

Memorandum

Council Staff Report
9/11/89
Attachment 2

DATE: August 24, 1989

TO: Metro Council
Executive Officer Rena Cusma

FROM: Councilor George Van Bergen

RE: REQUEST FOR INFORMATION REGARDING THE METRO EAST TRANSFER STATION

The August 22, 1989, detail presentation by the Solid Waste Department staff was such that it foreclosed my opportunity to bring forward questions I had for that evening and accordingly, I make this written request for information regarding the Metro East Transfer Station, some of which is technical and some of which is policy.

1. Under our ordinances and enabling statute, does the contract approval responsibility for this transfer station lie with the Council or with the Executive Officer?
2. How does the proposed site meet the needs for the "east waste shed" and how does it fit in our regional scheme for transfer stations?
 - a. For instance, are we going to continue to pursue a Washington County Transfer Station or stations?
 - b. Will there be a need for an additional east county transfer station?
3. To what extent can the Council, after selecting a vendor, change the transfer station proposals in the contract negotiations? Are there any limitations?
4. I would appreciate a summary review of the reason why the mitigation agreement with Portland is a consideration.
5. What involvement does Trans Industries as a joint venture and the individual companies have with refuse collection in the Metropolitan Service District area? Are there any prohibitions in the Metro Code to these companies providing household or commercial refuse collections service?
6. Who are the present owners of the property at the St. Helens site? If it is not Trans Industries, do we have access to the earnest money agreement or purchase agreement with the conditions thereon?

METRO EAST STATION INFORMATION REQUEST

Councilor Van Bergen

August 24, 1989

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7. The proposed site is next door to a Super Fund site. What are our potential liabilities for cleaning up the Super Fund site? What are our potential costs for cleaning up our own site as a result of any spill over from the Super Fund site?
8. How does this proposal meet the objectives of the public ownership option? When will the District own the facility?
9. What is the impact of this proposed facility (financed through the sale of revenue bonds) along with the composter facility (financed by revenue bonds) on the ability of the District to finance other facilities through the sale of revenue bonds?
10. It appears that Resolution No. 89-1131 gives the Executive Officer authority to terminate negotiations with the successful vendor and start negotiations with the next preferred vendor or vendors. Since the change of vendors also changes potential transfer station sites and costs, shouldn't the Council have a role in deciding to terminate negotiations with the Council's preferred vendor?
11. Will there be a non-assignment clause in the contract which will prohibit the vendor from assigning the contract to another party without our approval?

GVB:RB:pa
A:RAYB.103



METRO

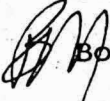
2000 S.W. First Avenue
Portland, OR 97201-5398
503/221-1646

Memorandum

Council Staff Report
9/11/89
Attachment 3

DATE: September 1, 1989

TO: Councilor George Van Bergen

FROM:  Bob Martin, Solid Waste Director

RE: REQUEST FOR INFORMATION REGARDING THE METRO EAST TRANSFER STATION

Your memo of August 24, 1989 provides an excellent summary of the issues to be addressed during the Metro Council evaluation of the Metro East Station. Below are the questions with staff responses. In some cases, complete answers will require more evaluation and discussion at Council meetings.

1. Under our ordinances and enabling statute, does the contract approval responsibility for this transfer station lie with the Council or with the Executive Officer?

Staff RSP: Pursuant to Metro Code Chapter 2.04, the contract for the Metro East Station will require Council approval. This contract clearly fits within the definition of a contract which will be committing the District to the expenditure of resources and appropriations from budgets in future years and, thus, pursuant to Code Section 2.04.033, Council approval is required.

2. How does the proposed site meet the needs for the "east waste shed" and how does it fit in our regional scheme for transfer stations?

Staff RSP: The proposed Trans Industries site meets the locational requirements of the adopted Solid Waste Management (SWMP) plan as it is located within the boundaries of the "east waste shed", as well as the other requirements for the Metro East Station as defined in the SWMP.

- a. For instance, are we going to continue to pursue a Washington County Transfer Station or stations?

Staff RSP: Yes. The Planning & Development Department has developed a set of minimum standards for a West transfer system which has been approved by the Policy Committee. The standards will be forwarded to the Council Solid Waste Committee in the near future. These standards will then be used by haulers, local officials and Metro to determine the size, number, type, and design of a transfer system for the West wasteshed. Until the transfer system for the West

wasteshed can be developed, it is expected that Washington Co. haulers will use Metro East just as they now use St. Johns.

- b. Will there be a need for an additional east county transfer station.

Staff RSP: Certainly not for commercial haulers. The Trans Industries (TI) site combined with the compost plant and Oregon Processing & Recovery, provides a superior level of service for the wasteshed's commercial haulers. An additional facility for public self-haulers may be considered as a future service enhancement, however the proposed TI site provides an acceptable level of service for self-haul.

3. To what extent can the Council, after selecting a vendor, change the transfer station proposals in the contract negotiations? Are there any limitations?

Staff RSP: The vendor for the Metro East Station must be selected based on the merits of its proposal. The evaluation team's scoring of the proposals is an advisory recommendation.

Metro must be careful during negotiations not to allow a vendor to be excused from commitments made in its proposal that substantially and materially contributed to that vendor's proposal being selected as the best proposal. Nonsubstantial deviations from the proposal that would not have affected the rating and selection of the proposer as the best proposal can be negotiated as well as improvements that the vendor is willing to grant to Metro that go beyond commitments made by the vendor in its proposal.

4. I would appreciate a summary review of the reason why the mitigation agreement with Portland is a consideration.

Staff RSP: The mitigation agreement with Portland stipulates that unless the requirements in it are met at a specific site to the City's satisfaction, then the site cannot be used for a transfer station. The alternative to the mitigation agreement approach which involves administrative review by the City, is the conditional use process. In effect the mitigation agreement provided up front information on what the City needed to consider a site acceptable. It helped vendors prepare proposals and it helped Metro evaluate how realistic proposals were.

5. What involvement does Trans Industries as a joint venture and the individual companies have with refuse collection in the Metropolitan Service District area?

Staff RSP: BFI has a medical waste collection and disposal service through BFI Medical Wastes Systems. This is the only involvement of the joint venture or related firms in collection.

Are there any prohibitions in the Metro Code to these companies providing household or commercial refuse collections service?

Staff RSP: Not under the proposed turnkey arrangement in which Metro would own the facility and contract for operations. The question of what, if any, protections against potential vertical integration, is a matter which can be addressed during contract negotiations.

Metro Code, Section 5.01.120, Responsibilities of Franchisees, does not allow a transfer station operator to be in the business of collecting residential, commercial, industrial or demolition refuse within the district. Metro Code Section 5.01.085, Long Term Franchises for Major Disposal System Components, supersedes Section 5.01.120, effectively negating the prohibition upon designation that the facility is a Major Disposal System Component. However, 5.01.085 allows the imposition of new conditions of which the prohibition could be one.

6. Who are the present owners of the property at the St. Helens (NW Portland) site?

Staff RSP: American Industries, Inc., of Oregon.

If it is not Trans Industries, do we have access to the earnest money agreement or purchase agreement with the conditions thereon?

Staff RSP: A copy of the fully executed purchase agreement for the site has been provided to General Counsel. TI has requested that the information remain confidential under ORS provisions.

7. The proposed site is next door to a Super Fund site. What are our potential liabilities for cleaning up the Super Fund site?

Staff RSP: Metro cannot be held liable for the clean up of a site in which it has no ownership or operational interest, unless past activities on a Metro site can be shown to have caused the contamination on adjacent property. Considerable investigation by several consultants have resulted in the conclusion of DEQ that "EPA and DEQ did not and do not identify the activities on the American Steel property which could have contributed to the contamination in the area." (letter from Fred Hansen, DEQ Director).

What are our potential costs for cleaning up our own site as a result of any spill over from the Super Fund site?

Staff RSP: Data available from the extensive testing done on and around the American Steel site shows some lead contamination in soils adjacent to the Gould property and in one well closest to the

Gould site. Some small quantity of soil may have to be removed during the course of remediation of the Gould property. Both federal and state law hold owners of property strictly liable for releases of hazardous substances which occur on their property. However, under certain limited circumstances, an owner may be exempt from liability. Under Section 9607 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), an otherwise liable person may be excused from liability if the release of a hazardous substance is caused by:

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant... 42 U.S.C. §9607

(b) (3)

A party relying on subsection (3) must establish by a preponderance of the evidence that:

(a) it exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and;

(b) took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions. 42 U.S.C. §9607 (b) (3).

Section 9607 (e) limits circumvention of liability through indemnification, hold harmless, and similar provisions. It provides, in part, as follows:

(1) No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

(2) Nothing in this subchapter...shall bar a cause of action than an owner or operator or any other person subject to liability under this section, or a guarantor, has or would have, by reason of subrogation or otherwise against any person.

Oregon law parallels federal law. It contains an acts of God and acts of war exceptions to its general strict liability provision. (See: ORS 466.567 (1)) In addition, Oregon law exempts state and local governments from liability under limited circumstances. If a governmental unit acquires property involuntarily by virtue of its function as sovereign, or through the exercise of eminent domain authority by purchase or condemnation, it is exempt from liability under state law.

ORS 466.567 also exempts an owner or operator from liability if it became the owner or operator after the time of the acts or omissions that resulted in a release, and did not know and reasonably should not have known of the release when it first became the owner or operator. An owner or operator also is exempt if the facility is contaminated by the migration of a hazardous substance from real property not owned or operated by the person. ORS 466.567. Failure to exercise due care and failure to take reasonable precautions against reasonably foreseeable acts or omissions of a third party will preclude an owner or operator from the protections set forth in the exemptions set out in ORS 466.567.

One potential scenario which could occur is an amendment to the boundaries of the existing adjacent Super Fund sites. It is conceivable that the DEQ or EPA could either reevaluate the boundaries of the current Super Fund sites, or could reassess the status of the American Steel site and conclude that hazardous contamination exists on the property. Under these circumstances, if Metro has assumed ownership of the facility under a turn-key contract, Metro would be liable for clean-up costs as the owner of the facility. The "innocent owner/operator" exemption in ORS 466.567 might be available though since the issue of possible contamination of the property has been raised during the contracting process tends to preempt subsequent use of this exemption. Given this fact, it is incumbent upon Metro to take all reasonable precautions to ascertain what, if any, level of contamination exists at any proposed solid waste disposal sites in which it has either an ownership or operational interest.

In the event that contamination migrates from the adjacent Super Fund site, it is more likely than not that Metro would take action to remove the contamination from its site and seek reimbursement from the responsible party.

Finally, it is virtually impossible to predict the actual costs of a clean up action as it would depend on the nature and extent of the contamination which migrates to the property. However, it is our understanding that EPA/DEQ have developed preliminary costs estimates for clean-up of the adjacent Super Fund site.

8. How does this proposal meet the objectives of the public ownership option?

Staff RSP: The turnkey proposal meets the objectives of the public ownership option in many of the same ways as does the approach described in the R.W. Beck report. The turnkey recommendation is one in which Metro will own the facility upon completion of acceptance testing and which will have an operations contract with TI for the first five years, after which operations would be competitively bid. This approach differs from the approach described by the R.W. Beck report in that the station will not be designed and sited by Metro, nor will the first five year contract be competitively bid.

The differences have positive aspects in that during the first five years the facility designer will be responsible for operation and therefore responsible making it work. Also, given the siting problems encountered in the past and the R.W. Beck estimate that a publicly sited facility would be difficult to have online in time, the turnkey approach has been effective. As for design and construction, Metro will be able to control certain aspects during negotiations, through the single RFP instead of the numerous bids/proposals involved in the public procurement process. Also, the mitigation agreement provides control over certain design, site and operational aspects to ensure conformance with public standards. Therefore, if one assumes that the objectives of the public ownership option (as embodied by the approach taken in the R.W. Beck report) are to exert public control over the major aspects of siting, design and operation, the turnkey approach does accomplish these objectives through Metro ownership, an operations contract and mitigation review and approval by the City.

9. What is the impact of this proposed facility (financed through the sale of revenue bonds) along with the compost facility (financed by revenue bonds) on the ability of the District to finance other facilities through the sale of revenue bonds?

Staff RSP: Minimal. The two projects are funded by different types of revenue bonds with different responsible parties. The compost facility is financed through the sale of Private Activities revenue bonds and the responsible parties are Riedel along with the party providing financial assurance. Metro must, however, guarantee the waste to the facility.

Metro East will be financed through the sale of Governmental revenue bonds. Metro is the responsible party for repayment. The ability to sell these bonds are a function of both our debt to operating revenues ratio and the ability to guarantee waste to the facility. The annual amortization costs associated with the sale of bonds for Metro East is approximately \$2.3 million against operating revenues of \$35.7 million. This leaves a substantial revenue base for future sales if needed. Also, it is clear that Metro controls the waste within the District and can therefore guarantee the flow of waste to Metro East as well as other

facilities.

The sale of revenue bonds for non- Solid Waste facilities is not affected by the above projects since the revenue for repayment would be from a source other than solid waste.

10. It appears that Resolution No. 89-1131 gives the Executive Officer authority to terminate negotiations with the successful vendor and start negotiations with the next preferred vendor or vendors. Since the change of vendors also changes potential transfer station sites and costs, shouldn't the Council have a role in deciding to terminate negotiations with the Council's preferred vendor?

Staff RSP: Yes. See revisions to Resolution No. 89-1131.

11. Will there be a non-assignment clause in the contract which will prohibit the vendor from assigning the contract to another party without our approval?

Staff RSP: Yes.

cc: R. Cusma
D. Cooper
R. Phelps
Metro Council

MOTIONS TO AMEND RESOLUTION NO. 89-1131 MADE SEPTEMBER 7, 1989,
BY THE COUNCIL SOLID WASTE COMMITTEE

First Motion to Amend: Councilor Ragsdale moved to amend Resolution No. 89-1131 under BE IT RESOLVED, Section 2, page 2, by deletion of (deletions bracketed) [and commence contract negotiations with Rose City Resource Recovery] to read "That the Executive Officer is authorized to terminate negotiations with Trans Industries in the event that the Executive Officer determines that a successful negotiation of a contract cannot be procured with Trans Industries."

Under the same motion, Councilor Ragsdale moved to amend Resolution No. 89-1131 under BE IT RESOLVED, page 3, with the deletion of Sections 3, 4, and 5.

Under the same motion, Councilor Ragsdale moved to amend Resolution No. 89-1131 by the deletion of on page 2, the second, third and fourth WHEREASES on page 2; and insert a new WHEREAS (additions underlined) WHEREAS, The Executive Officer concurs with the above, now, therefore.

Vote: Councilors Buchanan, DeJardin, Hansen, Wyers and Ragsdale voted aye. The vote was unanimous and the motion passed.

Second Motion to Amend: Councilor Ragsdale moved to amend Resolution No. 89-1131 with the addition of new Section 3, page 3, WHEREAS, In the event negotiations with Trans Industries are terminated, the Executive Officer shall recommend to the Council which of the proposers who submitted proposals under Resolution No. 89-1061B, For the Purpose of Approving a Request for Proposals to Solicit Private Proposals to Design, Construct, Own and Operate the Metro East Station should be chosen to enter into subsequent negotiations (listing of the three proposers).

Vote on Second Motion to Amend: Councilors Buchanan, DeJardin, Hansen, Wyers and Ragsdale voted aye. The vote was unanimous and the motion passed.

Third Motion to Amend: Councilor Ragsdale moved to amend Resolution No. 89-1131 under BE IT RESOLVED, Section 7, "PROVIDED HOWEVER, that such design process costs shall not in any event exceed \$350,000 dollars."

Vote on Third Motion to Amend: Councilors Buchanan, DeJardin, Hansen, Wyers and Ragsdale voted aye. The vote was unanimous and the motion passed.

Main Motion as Amended: Councilor Ragsdale moved to recommend the full Council adopt Resolution No. 89-1131 as amended.

COUNCIL SOLID WASTE COMMITTEE MOTIONS AND VOTES
September 7, 1989
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Vote on Main Motion as Amended: Councilors Buchanan
DeJardin, Hansen and Ragsdale voted aye. Councilor Wyers
voted nay. The motion passed.

/pa
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9/7/89

NORCAL

SOLID WASTE
SYSTEMS INC.

RECEIVED SEP 22 1989

September 21, 1989

MIKE RAGSDALE, PRESIDING OFFICER
METROPOLITAN SERVICE DISTRICT COUNCIL
2000 S.W. First Ave.
Portland, OR 97201

TO: MIKE RAGSDALE, Presiding Officer and Member
of the Metropolitan Service District Council.

FROM: Thomas Brennan, Corporate Project Manager, Norcal
Solid Waste Systems, Inc.

Dear Councilor Ragsdale:

Norcal Solid Waste Systems, Inc., respectfully requests that Metro Council members reconsider the September 7, 1989, opinion presented by Mr. Daniel B. Cooper, General Counsel. Mr. Cooper's opinion would prohibit Metro Council members from receiving or evaluating extremely important traffic mitigation information directly applicable to Norcal's East Transfer Station proposal. Mr. Cooper states in his opinion that his reasons for not allowing this information to be submitted are twofold:

1. The frontage road information had been under discussion for a number of months within the City Traffic Engineer's Office and Norcal failed to obtain the available information.
2. It would be unfair to the other proposers to allow a rescoring of Norcal's modified proposal at this stage of the procurement process.

Mr. Cooper's decision in the first instance is based on Metro staff's understanding from conversations with the City Engineer's Office that Norcal did not contact the Engineer's Office to inquire about the status or plans for the 3,700 foot frontage road containing three P.U.C. approved signalized grade crossings and currently under construction.

Our own investigation of this matter exposed contrary evidence. We believe strongly that Mr. Cooper's findings may require amending in light of this intelligence.

When Norcal made its decision to respond to the R.F.P. it immediately retained the engineering firm of Sweet-Edwards/EMCON, Inc. to do an environmental assessment of the selected site and to make a preliminary traffic study. For the traffic portion of the study Norcal's consultant hired CTAK Associates, a Portland traffic engineering firm. Shortly thereafter Norcal retained CTAK directly with instructions to proceed with a traffic analysis as required to respond to Metro's R.F.P.

Mike Ragsdale
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On May 19, 1989, Mr. Frank R. Charbonneau, CTAK Associates, contacted the office of Mr. John Bustraan, Regional Traffic Engineer for North Portland, in the City of Portland's Office of Transportation. Mr. Bustraan was not available, so Mr. Charbonneau's call was directed to Ms. Evelyn Brown, Engineering Technician, who had been assigned to work as Mr. Bustraan's assistant concerning North Portland traffic matters.

Mr. Charbonneau explained that he was representing Norcal and that he was implementing a traffic study of the North Columbia Blvd. area where Norcal proposed to build Metro's East Transfer Station. During the course of their conversation, Mrs. Brown did not disclose any information which might have alerted Mr. Charbonneau that a frontage road along North Columbia Blvd. was being contemplated. In addition, Mr. Charbonneau was never directed by staff to initiate discussions with the proper chain of command for this project in the City Engineer's Office.

During the week prior to the June 13 deadline for Metro proposals, Mr. Charbonneau again phoned Mr. Bustraan to inform him that CTAK had completed the Traffic Study for the Norcal site. Mr. Bustraan did not provide any information that would suggest that CTAK should investigate the proposed frontage road, nor did he direct Mr. Charbonneau to speak with the properly assigned staff in the City Engineer's Office.

In summary, there were two opportunities for the City Engineer's Office to direct Norcal's consultant to the properly assigned staff and the most current information. On both of these occasions, no comments or directions were ever made by representatives of Portland's Bureau of Traffic Management to CTAK regarding the frontage road nor was CTAK ever directed to the duly assigned staff.

Mr. Cooper's decision also recommends that information applicable to the Columbia Blvd. Project MARRP-9956(18) should not be considered by the Metro Council because improvements to the state road had been under discussion for a number of months. Norcal has obtained information from the Oregon State Highway Division which contradicts that assumption.

There are a total of 53 engineering drawings required to describe the many details necessary for the construction of the frontage road project. Of the total, 29 were prepared by either the City's Office of Transportation or the Bureau of Traffic Management. Completion dates on each of these 29 drawings show that none were off the drawing board until June 1989.

Metro's deadline for submitting transfer station proposals was June 13. The first date that the frontage road became public information was July 6, 1989, when it was advertised for bids in the Daily Journal of Commerce. Bids were opened July 27, by the Oregon Department of Transporta-

Mike Ragsdale
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tion and the contract was signed August 16, the same date that Metro issued its news release announcing the results of the staff evaluation.

It seems clear that public information concerning the proposed safety improvements to Columbia Blvd. immediately adjacent to Norcal's site was not common knowledge at the time Norcal was preparing its proposal. Additionally, Norcal consultants made appropriate inquiries well before the proposal deadline and received incomplete directions from the City of Portland Traffic Engineering Office. Norcal therefore believes that it is entirely appropriate to request that the Metro counsel re-evaluate his position concerning this matter.

We would also like to make the following comments on the second issue raised by Mr. Cooper - fairness. The last sentence in Mr. Cooper's decision states that if Norcal's additional submission is to be utilized in determining who is the most responsive proposer, the other proposers would be entitled to an equal opportunity to submit modifications and improvements to their original proposals.

We fully support this view and would raise no objections to allowing this same opportunity to other proposers especially where it would be in the best interests of the public you serve to make decisions based on the most current information.

We would greatly appreciate a prompt response to this request for reconsideration.

Cordially yours,



Thomas Brennan

cc: All Metro Council Members
Rena Cusma, Executive Director
Dan Cooper, Metro Counsel
Bob Martin, Solid Waste Director
Gwen Ware-Barett, Clerk
Ray Barker, Analyst

Encl



METRO

Memorandum

2000 S.W. First Avenue
Portland, OR 97201-5398
503-221-1646

Date: September 7, 1989
To: Gary Hansen, Chair, Solid Waste Committee
From: Daniel B. Cooper, General Counsel
Regarding: METRO EAST STATION PROPOSALS

=====

Question Number 1

You have asked that I provide an assessment of several concerns regarding the Metro East Station procurement process. The first concern focuses on the recycling guarantee. The Request for Proposals (RFP) required proposers to complete a series of Forms which were included as part of the RFP. One of the required forms, Form H - PERFORMANCE ASSURANCES, includes the following statement:

"We (proposer) are further prepared to guarantee that the Facility, from Commercial Operation Date and thereafter, will meet each of the Performance Guarantees in Form G."

Unfortunately, Form G was not the correct reference. Form G is the "MATERIALS RECOVERY RATE" form. The required performance guarantees were listed on Form F - PERFORMANCE GUARANTEES.

Two proposers, NORCAL and Riedel/Wastech, executed Form H without changing the reference to Form G. In effect, these proposers could possibly be considered to have provided a material recovery rate guarantee instead of a Performance Guarantee. Rose City Resource Recovery and Trans Industries both modified Form H to show the correct Performance Guarantee form reference, i.e., Form F. The question which has been raised is whether proposers who altered Form H should be declared non-responsive.

Answer

Bid or proposal responsiveness focuses on whether the bid or proposal conforms in all material respects to the clear, unambiguous requirement of the solicitation.

In the present case, the incorrect reference to Form G as the "Performance Guarantees" form created an obvious ambiguity.

Section 7.8.5 of the RFP gives Metro the right to, "...waive any irregularity in any Proposal, except failure to provide the information required for the Facility option(s) selected unless Metro should deem in its best interest to do so."

Section 7.8.7 of the RFP allows proposers to correct errors or omissions in the Proposal which, "...would be in the best interest of both parties if corrected by the Proposer."

Both Section 7.8.5 and 7.8.7 provide a basis for accepting the proposals submitted by Rose City Resource Recovery and Trans Industries notwithstanding their correction of the reference in Form H. Likewise, they give a basis for accepting the proposals of Riedel/Wastech and NORCAL which could be read as not giving a guarantee of Performance Standards contained in Form F.

Given the ambiguity created by the reference to the incorrect form, it is the opinion of this Office that Metro is not required to reject the proposals submitted by Trans Industries and Rose City Resource Recovery as non-responsive for correcting the reference in Form H. Nor is Metro required to reject the proposals of Riedel/Wastech and NORCAL for not giving a guarantee of the Performance Standards. This action constitutes a minor irregularity which Metro, at its discretion, may waive. Finally, it should also be noted that, according to Staff, Riedel/Wastech and NORCAL both submitted revised Materials Recovery Rate information which was utilized in ranking their proposals. As a result, the relative scores and ranking of the proposals were not affected by the problem related to the error in Form H.

Question Number 2

The original RFP required unit price bids for designated waste tonnage categories. RFP Section 7.5.5. Category "A" set a minimum of 15,000 tons/month to a maximum of 35,000 tons/month.

Three of the proposers proposed a minimum category "A" tonnage guarantee greater than the 15,000 tons/month designated by Metro. Rose City Resource Recovery guaranteed a minimum category "A" tonnage of 35,000 tons/month as did Trans Industries. NORCAL guaranteed a minimum category "A" tonnage of 30,000 tons/month. Riedel/Wastech was the only proposal which accepted the category "A" minimum tonnage guarantee of 15,000 tons/month.

In light of the variations in minimum guarantees submitted by the proposers, Staff's analysis to determine Contract Cost assumed a "put or pay" for all months in which the projected waste flow was less than 35,000 tons.

The question which has been raised is whether proposers which did not guarantee a unit price for the full minimum tonnage category range, i.e., 15,000 tons/month to 35,000 tons/month, must be declared non-responsive.

Answer

The RFP, at Section 7.5.5.1, required that unit prices be proposed at the designated tonnages for all categories contained in Form E. As noted above, category "A" included a minimum guarantee of 15,000 tons/month. All of the proposers fulfilled this requirement, i.e., every proposer submitted a unit price for category "A."

The tonnage categories are also set out in the General Conditions at Article 15. Section 7.5.1 of the RFP gave proposers an opportunity to take exception to portions of the General Conditions. The fact that three of the proposers took exception to the 15,000 tons/month minimum designated by Metro does not render their bids non-responsive. In fact, this is totally consistent with what proposers were instructed to do.

Finally, it should be noted that the Contract Cost analysis utilized by Staff had the effect of penalizing those proposers who took exception to the 15,000 tons/month minimum guarantee designated by Metro. By assuming a 35,000 ton "put or pay" obligation for months with projected tonnages less than 35,000, Metro imposed a penalty on those proposers who took exception to the Metro designated minimum guarantee.

Given the fact that 1) the RFP specifically authorized proposers to take exception to portions of the General Conditions which included the 15,000 tons/month minimum guarantee, and 2) those proposers who took exception to the minimum guarantee did not obtain an advantage over the proposer which did accept the minimum guarantee, it is the opinion of this Office that Metro is not required to reject the proposals submitted by Trans Industries, Rose City Resource Recovery and NORCAL as non-responsive for failing to accept the minimum tonnage guarantee in category "A."

Question Number 3

The final question which has been raised focuses on the nature and effect of changes which can be made to a proposal. In its original submission, NORCAL proposed a facility configuration which included access on Hurst Street, a private access requiring PUC approval for transfer station access. Subsequent to its oral

interview, NORCAL submitted additional materials detailing modifications to its proposal to access the site via a to-be-constructed westbound underpass off Columbia Boulevard. More recently, NORCAL has submitted additional materials which propose the following changes to its proposal for the facility:

1. Different access route to the facility
2. Different internal circulation pattern
3. Different queuing pattern
4. An additional exit
5. Optional additional picking line
6. Enlarging the site

The proposed changes involve additional costs. NORCAL's apparent position is that the changes, with the exception of the additional picking line, are based on newly obtained information regarding proposed State Highway Division improvements to the road which would provide access to the NORCAL facility.

The specific question is whether NORCAL should be allowed to modify its original proposal, and if so, what effect should be given to these modification vis a vis the scoring and ranking of NORCAL's proposal.

Answer

The threshold issue which must be addressed is whether the information regarding the proposed road improvements is in fact information which could not have been obtained by NORCAL prior to submission of its proposal. It is Staff's understanding from conversations with the City Engineer's Office, that the proposed improvements to the State road have been under discussion for a number of months. The City Engineer's Office further indicated that NORCAL did not contact the Engineer's Office to inquire about the status or plans for the road.

Even if the information regarding improvements to the road is viewed as newly discovered information which impacts NORCAL's proposal and justifies modifications to the proposal, it would be unfair to the other proposers to allow a rescoring of NORCAL's modified proposal at this stage of the procurement process. For this reason, it is the recommendation of this Office that any modified proposal submitted by NORCAL not be rescored. If NORCAL's additional submission is to be utilized in determining

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who is the most responsive proposer the other proposers would be entitled to an equal opportunity to submit modifications and improvements to their original proposals.

DBC/gl