

T-4.1 (formerly T-11)
SWANA TECHNICAL POLICY POSITION

CONTRACTING MUNICIPAL SOLID WASTE MANAGEMENT SERVICES¹

I. INTRODUCTION AND BACKGROUND

Municipal solid waste management is a public service that protects human health and environmental quality. Local agencies are responsible for providing that protection and therefore should plan for, exercise control over, and make the decisions as to how municipal solid waste is managed within their jurisdictions. (T-3.3 SWANA Technical Policy “The Role of the Public Sector in the Management Of Municipal Solid Waste”). However, local agencies need not provide services with municipal employees or municipally owned solid waste management facilities. Any or all solid waste management services can be provided by myriad permutations of public / private ownership arrangements. It is the responsibility of local agencies to determine how - and by whom – municipal solid waste services are provided. (T-3.4 SWANA Technical Policy “Ownership of Municipal Solid Waste Management Systems”).²

II. CONTRACTING AND PROCUREMENT POLICY

If a local agency determines not to provide municipal solid waste management service with its municipal employees but rather by contract with another party (whether private, non-profit or the public sector), then the local agency should solicit proposals and award contracts:

- in a manner that ensures a fair, open and competitive process;
- in accord with state, provincial and local law, and consistent with the local agency's integrated waste management plan or strategy; and
- in substance that protects human health, the environment and the public interest (including public funds).

¹ “Services” includes waste management services provided by private, non-profit, or public sector contractors at their facilities or with their equipment, and operation of publicly owned facilities by private, non-profit or public sector contract operators.

² For a definition of municipal solid waste, see T-0 SWANA Technical Policy “Definitions of Terms Used in SWANA Technical Policies and Solid Waste Management” and for a description of municipal solid wastes systems, see T-3 SWANA Technical Policy “Strategic Planning for Integrated Municipal Solid Waste Management”.

III. CONSIDERATIONS

The following check lists enumerate *suggested considerations* on four aspects of contracting for integrated municipal solid waste management services:

- A. ESTABLISHING CONTRACT PROCUREMENT RULES,
- B. PRESCRIBING PERFORMANCE SPECIFICATIONS AND STANDARDS,
- C. STRUCTURING THE BUSINESS DEAL, and
- D. ADMINISTERING AND ENFORCING THE CONTRACT.

The check list of considerations is not prescriptive, but a menu of options to review, implement or reject, based on local political, economic and legal constraints. Local, state and provincial agencies often are subject to contracting and procurement law and regulation that varies from jurisdiction to jurisdiction. Local agencies should review applicable law and regulation prior to commencing procurement, and before implementing any of these considerations, they should consult with their legal counsel.

A. ESTABLISHING CONTRACT PROCUREMENT PROTOCOLS

Competitive procurement. Where practically possible, local agencies should competitively procure contracts in order to secure the best possible service for the lowest price with the most advantageous contract administration and enforcement provisions.

Procurement team. Depending upon the size and complexity of the procured contract as well as the expertise of the local agencies' staff, consider securing professional technical and legal services from qualified engineers, financial analysts, management consultants and lawyers to assist with the contract procurement process.

Competitive Proposal Process.

1. **Expressions of Interest.** Local agencies that plan to issues RFPs instead of conducting sole source negotiations (for example, to extend or renew existing contracts), may consider first issuing requests for expression of interest. Expressions of interest help local agencies identify who might submit proposals, ascertain whether there will be keen competition, and determine whether to implement the two-step RFQ-RFP process described below.
2. **Requests for Qualifications.** Where many potential proposers express interest in a procurement, local agencies may consider dividing the procurement process into 2 stages: first, a Request for Qualifications (RFQ), followed by a Request for Proposals. However, they should establish clear minimum qualifications in order to reduce grounds for contest by proposers who are disqualified. RFQs enable local agencies to select (or short list) a limited number of firms that meet the minimum qualifications and include only the firms that the local agencies would like to submit proposals.

3. **Request for Proposals.** Although local law may require that services should be competitively bid and awarded to a lowest responsible bidder, if law allows otherwise, local agencies should competitively procure solid waste service contracts through a request for proposal process (RFP). RFPs allow greater flexibility to award contracts based not only on proposed quantitative contractor compensation but also on qualitative factors such as proposer's experience and references; litigation history; environmental records; acceptance or rejection of proposed service contract terms, financial creditworthiness, proposed program implementation, safety record, etc.

Prior to requesting submission of proposals, consider distributing the draft RFP (and contract) to potential proposers and solicit their questions or comments, in writing and/or in meetings. Potential proposers can identify costly service specifications and flag onerous business terms that might prevent them from submitting proposals. Accept or reject comments and finalize the draft final RFP (and contract) that will serve as the basis of proposals.

Requests for Proposals should include the following provisions, at a minimum, although protocols may vary:

- Articulate any **minimum qualifications** of potential contractors that must be met before the local agency will evaluate the proposal. (Examples include minimum experience and financial qualifications.)
- State project goals and describe project approach or implementation needed, including whether there is flexibility for potential contractors to be creative or provide options.
- State objective **evaluation criteria**, which may be listed generally or accorded specified weight, such as price 30%, experience 30%, acceptance or rejection of proposed service agreements 20%, litigation history, environmental record etc. 10%, financial creditworthiness 10%.
- Outline a method for checking proposer **references** and performing due diligence on any proposer to verify the proposer's ability to provide the level of services envisioned by the procurement process. Consider requiring proposer to submit **operations details** (such as labor assumptions, equipment acquisition) in order to corroborate that the proposal price is realistic and will be honored.
- Provide as much service **background data** as possible to enable proposers to more accurately estimate their costs and consequently propose prices with smaller margins of error. For example, with respect to a collection procurement, provide refuse, recyclables and green waste tonnage; number of single family residences, multi-family units, commercial accounts; demographic or socio-economic profiles and population growth projections; waste characterization, special requirements (such as City facility service, carry-out, hilly or narrow streets or alleys), etc.
- **Reserve rights** to clarify or amend the RFP and to reject any or all proposals. Make clear that proposers cannot seek reimbursement for their proposal submission costs from the local agency.
- Consider whether to require a **proposal bond**, and if so, what amount would be appropriate to cover local agency's costs if the proposer does not timely execute an agreement, yet would not discourage potential proposers from submitting proposals. (This may depend on the projected revenue value of the contract.)

- Consider whether to require a mandatory **pre-proposal conference**, which may assure that all potential proposers receive the same information about the procurement process, but which also may inflate proposal prices if proposers see that potential competition did not attend the conference. Regardless, require that all correspondence be written and preferably made through a single designated person.
 - Consider requiring that prices be submitted separately from qualifications.
 - Consider conducting interviews to ask questions about proposals, clarify RFP provisions, evaluate professionalism of key personnel, etc.
 - Consider adopting **contact constraints** that identifies a single person who proposers may contact and provides for **process integrity**.
 - Include the form of **proposed contract** with the RFP in order to fully disclose business risk allocation (such as changes in law, labor disturbances, acts of God etc. that may excuse contractor's breach; indemnification) and performance assurance (such as insurance, performance bonds / letters of credit, and parent guaranties) that may impact price proposals and avoiding lengthy contract negotiations after selection of a proposer. Make acceptance or rejection of contract terms an evaluation criteria.
 - Provide support for **facility designation**, where appropriate or necessary.
 - Some local agencies require contractor reimbursement for consultant or government time to execute the procurement process, although others believe this is not appropriate.
4. **Contract negotiations.** RFPs (as opposed to bids) allow for best-and-final offers and negotiation, including simultaneous negotiations with more than one proposer.

B. PRESCRIBING PERFORMANCE SPECIFICATIONS AND STANDARDS

1. **Customer responsiveness / legal requirements.** Local agencies should ensure that the service specifications and standards meet the needs of the identified waste generators and demands of law. Local agencies may hold public workshops or hearings to solicit customers' (or facility neighbors') concerns and requests.

The considerations below are examples and not exhaustive.

2. **Fundamental contract provisions.** Municipal solid waste contracts should include the following provisions, at a minimum:
- definitions of **terms**, which can reduce ambiguity, avoid argument and resolve disputes.
 - **contractor's responsibilities and rights**
 - **local agency's responsibilities and rights.** Consider that in many contracts, the local agency's only contract obligation is limited to paying compensation from an enterprise fund (although in other instances, compensation is a general fund obligation)
 - **performance specifications and standards**, including in emergencies and catastrophic events
 - **contract administration tools**, such as contractor record keeping and reporting,

- contractor responsiveness standards (see subsection D below)
 - a variety of **enforcement** rights and remedies that allow the local agency to get what it bargained for, short of terminating the contract (see subsection D below)
 - **performance assurance** that is liquid and allows the local agency quick access to money in events of contractor nonperformance and threats to health and safety, such as letters of credit and corporate guaranties.
3. **Collection service specifications: refuse, recyclables, green waste.** These contracts should include provisions such as:
- type of customers (such as residential, commercial, multi-family, institutional, governmental)
 - identification of acceptable materials (such as refuse, types of recyclables, types of green waste of specified dimensions)
 - service days and hours
 - customer container options
 - special services like community cleanup, bulky waste / universal waste pickup (and non-collection rights for excess set-outs), Christmas tree collection, roll-out / push-out service
 - public education program obligations
 - container delivery, exchange timing
 - complaint resolution protocol (including missed pickups)
 - diversion requirements
 - customer billing (if done by the contractor)
 - customer service (including office, staffing, phone protocols)
 - customer service charge structures (such as unit-based charges) / rate regulation
 - collection crew clothing and behavior standards.
4. **Facility-related specifications.** Contracts for services at facilities (such as recyclable or compostable material processing or refuse disposal), or for private operation of publicly owned facilities (such as MRFs, composting facilities, landfills or WTE facilities), should include provisions such as:
- receiving hours
 - vehicle tipping / turnaround guaranties
 - weighing protocols (including scale house operation, fee collection / security)
 - throughput capacity guaranty
 - identification of acceptable materials and hazardous waste load checking protocol (including responsibility / protocol for handling and paying for hazardous wastes and processing residue)
 - utility consumption guaranties (if local agency pays utility charges)
 - routine and extraordinary maintenance, repair and replacement of publicly owned equipment and facility.
5. **Transfer and transport service (and facility operation) specifications:** In addition to facility-related requirements listed in item 2 above, these contracts should include

provisions for truck, rail haul and barge transport variations such as:

- weighing and waste loading protocols for transfer trucks / containers
- container availability and on-site storage limitations
- container checks-and-maintenance
- backup service in event primary mode or route is unavailable.

6. **Recyclables, C&D debris and compostable materials processing and marketing service (and facility operation) specifications.** In addition to facility-related requirements listed in item 2 above, these contracts should include provisions such as:

- waste characterization preconditions and reject limits
- recovery / residue guaranties and residue management
- marketability guaranties
- product specifications
- materials marketing obligations (including market risk allocation)
- performance (recovery) incentive (recovered materials revenue sharing options)
- data collection and reporting
- rebate requirements for materials delivered by haulers to the facility.

7. **Disposal service (and facility operation) specifications:** In addition to facility-related requirements listed in item 2 above, these contracts should include provisions such as:

- landfill compaction guaranties, including measurement protocols, (for publicly owned landfills)
- landfill designated cell disposal
- waste handling requirements in wet weather
- steam / electricity production guaranties for WTE facilities)
- pollution liability (including CERCLA) indemnifications.

8. **Special waste service (and facility operation) specifications:** In addition to facility-related requirements listed in item 2 above, these contracts should include provisions such as:

- recycling obligations
- disposal / incineration designations
- packaging maximization
- household generator / CESQG status verification.

9. **LFG development specifications:** In addition to facility-related requirements listed in item 2 above, these contracts will be specific to landfill and the project. They should include provisions such as:

- milestones for several steps in the development of the project.
 - i. Date of Go/No Go decision
 - ii. Date of utilization facility start-up
- developer's responsibilities and rights
- landfill owner's responsibilities and rights
- royalty on gross sales of energy or payment for LFG sale
- responsibility for measurement of energy sales
- ability to audit measurement of energy sales
- who retains tax credits
- who retains green house gas credits, renewable energy credits or other environmental credits
- ownership of LFG system.
- ownership of unused LFG.
- responsibility for operation, monitoring and maintenance of the LFG collection system
- responsibility for LFG surface emission monitoring, corrections and reporting
- responsibility for LFG migration
- responsibility for adding LFG extraction devices in new fill areas
- responsibility for Title V report costs and preparation for utilization facility
- performance specifications and standards, including in emergencies and catastrophic events
- contract assignment, termination and decommissioning of plant, pipeline, well field.

10. **Facility development agreements (MRFs, composting site, transfer station, landfill, etc.):** Development specifications should include provisions such as:

- preconditions like site acquisition
- acceptable financing
- permitting by specified date
- allocation of development obligations (such as site assessment/mitigation, design, permitting and construction)
- approval of plans-and-specifications and change order protocol
- public bidding and construction management (if required; see Section A2 RFP, above)
- acceptance testing protocol
- liquidated damages for delayed acceptance (buy-down of performance obligations).

C. STRUCTURING THE BUSINESS DEAL

Municipal solid waste service contracts should include the following business provisions, at a minimum:

1. **Term** including extensions rights / obligations, and whether they are unilateral (local agency) or bilateral (mutual) options, or a contractor right that can be earned through performance. Consider also termination rights, such as no-fault termination for convenience, especially in competitive procurements where the buy-out amount can be proposed. Specify obligations that survive the term (such as indemnifications, certain reporting requirements, etc.).
2. **Compensation** and **compensation adjustment** methodologies (such as single index or bundled indices, or cost-based), which may be related to term, and reasons to re-visit rates (such as changes in law, program modifications, changes in passed through costs like disposal tipping fees in a collection contract); performance incentives {for example, base compensation plus up (or down) sharing of market risk; increases/decreases for meeting prescribed recycling diversion levels]
3. Local agency (dis)approval rights with respect to key personnel and contract delegation and **assignment** (including sales, mergers, bankruptcy, transfer of ownership, etc.).

D. ADMINISTERING AND ENFORCING THE CONTRACT

Municipal solid waste service contracts should include the following administration and enforcement provisions, at a minimum:

- Performance and **operational record keeping and reporting**, for ascertaining performance under the contract and effectiveness of programs.
- **Financial record keeping and reporting** (including for related parties or affiliates that provide goods or services) where necessary for cost substantiation / rate adjustment.
- **Contractor response obligations**, such as time to return the local agency's calls, answer the local agency's correspondence, etc.
- Local agency's **access to facility** and inspection protocols.
- **Performance (dis) incentives**, including compensatory and / or liquidated damages that serve as an intermediary remedy short of contract termination.
- **Criminal conduct clause** (**who is a bad actor, what is a bad act and where the bad act must occur**).
- **Breaches** and time-limited cure rights for breaches that can be remedied; itemized **defaults; remedies** (including specific performance / injunction relief for waste delivery requirement); related notice periods.
- **Dispute resolution and enforcement options** (such as judicial, mediation, arbitration and modifications of standard arbitration rules to address public health and safety concerns with respect to putrescible solid waste).
- **Representations and continuing warranties**.

- Choice of **performance assurances** (such as performance bonds or more liquid letters of credit, parent company guaranties).

Approved by the Executive Committee, Silver Spring, Maryland, after due review and comment by all Chapters and members of the IB.

CERTIFIED to be correct and complete statement
of the matters duly approved by the Executive
Committee on.

A handwritten signature in black ink, appearing to read "Sara Bixby". The signature is fluid and cursive, with the first name "Sara" and last name "Bixby" clearly distinguishable.

Sara Bixby, International Secretary

Dated November 28, 2007