

November 29, 2016

Client-Matter: 48655-030

VIA HAND DELIVERY

Hon. Nury Martinez
Chair, Energy and Environmental Committee
Los Angeles City Council
200 N. Spring St., Suite 470
Los Angeles, CA 90012
Email: councilmember.martinez@lacity.org

Re: Athens Services Response to Protest of Proposed Awards of Franchise Agreements for Commercial and Multifamily Solid Waste

Dear Councilmember Martinez:

This firm represents Arakelian Enterprises, Inc. dba Athens Services (“Athens”) in connection to the self-styled “protest” submitted by CR&R Environmental Services (“CR&R”).

CR&R’s protest is frivolous, irresponsible, and would expose the City to valid objections from nearly every qualified proposer.

The protest is *frivolous* because it offers absolutely no substantive basis for overturning the award of any franchise agreement. It simply flails widely against the process. The Bureau administered a procurement involving over a dozen proposers, spent over 16,000 hours reviewing and scoring proposals, and negotiated seven contracts collectively valued at over \$700 million. The fact that only one bidder protested, and one of the worst ranked proposers at that, is a testament to the success and fairness of the Bureau’s process.

The protest is *irresponsible* because, in addition to raising no substantive claim and patently false allegations, it is an overt attempt to mask a clearly inadequate proposal. The Bureau exercised reasonable judgment to award franchise agreements to the highest ranked and most technically competent proposers, and the Bureau is understandably unwilling to subject a franchise territory and its residents to the unsatisfactory service of a disgruntled proposer.

As the CAO has noted in reviewing the proposed agreements at the request of the Mayor, “the seven franchise agreements were negotiated and developed to meet the City’s overall diversion targets taking into consideration each hauler’s commitment to building new infrastructure and facility improvements as well as each hauler’s proposed plans to meet specific diversion targets.” The Franchise System was treated and managed as a single integrated and

interconnected system. CR&R's effort to reassign a particular franchise from one franchisee to another would require the Bureau "to re-examine the overall capacity for recycling, organics, and locations for hauling yards for all the franchise agreements . . . [t]he Board of Public Works would be required to re-approve the agreements," delaying the award of all the franchises.

Finally, the recommendation of the Board is made pursuant to a procurement process and careful set of scoring criteria. Were the City or the Board of Public Works to award the Harbor Zone to CR&R in the absence of a whole new procurement process, nearly every other bidder would have a legitimate legal complaint that CR&R's selection was *arbitrary and capricious*, for nearly every other bidder scored significantly higher than CR&R. As such, CR&R's protest leads the City down a path toward legal error.

The City Council should affirm the Bureau's decision for the following reasons:

- The Bureau sought the most qualified, experienced, and technically capable waste haulers. CR&R received 44.4 points—finishing 9th out of 12 for Large Zone proposers *and* more than 20 points behind the top six. Athens finished 1st overall with 92.2 points.
- CR&R finished 10th out of 12 in Customer Service. Customer Service was the heaviest weighed criteria and deemed to be a "major element" and "critical part" of the Franchise System. *See* RFP at Art. 4.2 (awarding 25 points); RFP at Art. 1.2.3.1(4); RFP at Art. 2.3. By comparison, Athens finished 1st in Customer Service, receiving a near perfect score of 24.8.
- Without any basis, CR&R claims the Bureau acted arbitrarily and capriciously. But, on the contrary, an award to CR&R would itself be an abuse of discretion. The legal standard for overturning a contract award requires CR&R to show that Bureau acted in a manner that was "arbitrary, capricious, entirely lacking in evidentiary support or inconsistent with proper procedure." *See Eel River Resource and Recovery, Inc. v. Humboldt County* (2013) 221 Cal.App. 4th 209, 238 (cited by CR&R in its two protest letters). CR&R has absolutely failed to show that this standard has been met in any respect.
- The RFP established a scoring system and—based on the scoring—gave the Bureau discretion to short-list proposals and enter negotiations. *See* RFP at Art. 6.21. CR&R argues that, like the top scorers, it too should have had an opportunity to negotiate with the Bureau. But there is absolutely no reason, let alone requirement, to negotiate with every bidder, let alone one of the poorest performers, otherwise RFPs and scoring would be meaningless.
- CR&R argues that it should be awarded a contract because it is the only company to propose an anaerobic digester. This is a bizarre argument. Anaerobic digesters were not required. Indeed, many proposers, including Athens, focused on far more than just anaerobic digesters, choosing to commit to substantial infrastructure investments that have the potential to bring more

Hon. Nury Martinez

November 29, 2016

Page 3

jobs to the City and insure clean, sustainable, and environmentally friendly waste diversion. Still, the protest claims that the Bureau did not consider infrastructure and facility investment—but this is entirely wrong. Proposers were asked to discuss infrastructure investments in two separate scoring criteria: (1) “Diversion Plan and Innovative Ideas” and (2) “Service Plan.”¹ CR&R finished in the bottom half of proposers for both criteria.

- With respect to the Harbor Zone in particular, it is telling that CR&R points to no direct or substantial infrastructure investment. Athens is committing a \$10 million infrastructure investment in the Harbor Zone. This comes in addition to the eight (8) existing operating centers and processing facilities Athens operates in Los Angeles County. CR&R cannot match this—and does not even try.

- CR&R argues that pricing should not have been an element of the scoring. But pricing is always important to a public entity, and in this case, provided a basis for understanding how each proposer would address costs moving forward, whether parties could come to terms on an agreement, and a basis to negotiate the lowest possible rates for City residents and businesses. Moreover, the solicitation of price proposals went beyond establishing rates. Material density estimates and vehicle spare ratios in the price proposals “were used to further assess PROPOSER’s understanding of the operational requirements for service delivery” *See* RFP at Art. 3.10.17. Nonetheless, CR&R finished 10th out of 12 in Cost and Fee Proposals—and even in the absence of price evaluation—Athens is the highest scorer and CR&R remains in the bottom half of proposers.

- CR&R argues that the Bureau gave too much weight to vendors with experience within the City. But the RFP established experience as an important criteria early on and scoring on experience was not only obvious, it was well within the Bureau’s discretion. The RFP emphasized experience in the City or with cities of a similar scale. *See* RFP at Article 3.10.8.² CR&R simply had insufficient experience and a lack of understanding for what it takes to serve the City and its customers.

- CR&R has little experience in the City. By comparison, Athens is one of the most experienced haulers in the City. This is important because transitioning to the Franchise

¹ Organics infrastructure could be considered in a bidder’s Diversion Plan. *See* RFP at Art. 2.6.2. However, the RFP also encouraged bidders to “further” the City’s diversion goals by proposing “Innovative Ideas” such as investing in “new facilities.” *See* RFP at Art. 2.8. Diversion Plans and Innovative Ideas were scored together. *See* RFP at Art. 4.2. Additionally, the RFP directed bidders to propose “plans to expand, retrofit or upgrade facilities” and “plans to bring into service additional transfer, disposal or processing facilities (including new facilities)” as part of their Service Plans. *See* RFP at Art. 3.10.15.4. Service Plans were also included in the scoring criteria. *See* RFP at Art. 4.2.

² “Qualifications” was a scoring factor and the RFP specifically asked bidders to describe their “performance of similar services in other jurisdictions including California, and in the CITY” and “[p]revious experience providing similar services at a similar scale.” *See* RFP at Article 3.10.8; RFP at Art. 4.2.

Hon. Nury Martinez

November 29, 2016

Page 4

System—and achieving the City's Zero Waste goals—is much easier with a company (Athens) that already has the dedicated infrastructure to serve local residents and businesses.

- CR&R asks for a delay in awarding a contract for the Harbor Zone. But the Franchise Agreements implement a *comprehensive* waste management system based on interrelated commitments from awardees to build new infrastructure and meet specific diversion targets. If one or more agreements change, there may be ramifications to the entire system such as the need to re-award the franchises zones and re-examine the overall capacity for recycling, organics, and locations of hauling yards for all the franchise agreements. The Board would also be required to approve any new agreements.

- Finally, if the City were ever to award a contract in the Harbor Zone to CR&R under the current process, nearly every other proposer would have a claim that such an award was inconsistent with proper procedure, arbitrary, capricious and wholly lacking in evidentiary support, for nearly every other proposer scored higher than CR&R.

The Bureau ran a fair, balanced and objective procurement. The City should move forward.

Please feel free to contact our office if you have any questions.

Sincerely,



George David Kieffer

GDK

cc: Enrique C. Zaldivar, Director, Bureau of Sanitation (via email)
Los Angeles City Council (via hand delivery)
Los Angeles Board of Public Works (via email)
Mr. Greg Loughnane