



An Eye on Sacramento Report

on

The City's Garbage Contract with BLT Enterprises:

Time for Full Accountability

November 28, 2011

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INTRODUCTION

Forward-looking American cities are finding innovative ways to reduce garbage pouring into local landfills. They are also making smart moves to preserve their flexibility to take maximum advantage of rapidly evolving technologies in recycling and alternative uses of waste streams. Sacramento, by contrast, is poised to give its official blessing to a continuation of an extraordinarily burdensome, 20-year traditional garbage contract, procured by subterfuge by a contractor that is already under the cloud of an ongoing D.A.'s investigation in another California city into possible "contract irregularities" in that city's garbage contract procurement process.

Tomorrow night, the city council will be considering a staff recommendation that the city grant its consent to an assignment of the 20-year BLT Enterprises garbage contract to Waste Management, the world's largest garbage company and, in the process, waive its potential legal claims against BLT for hiding the fact that, at the same time as it was promising the city to dispose of its garbage for 20 years, BLT was involved in secret, undisclosed negotiations to sell the city contract to Waste Management for \$70 million, representing an enormous profit for BLT.

The story of the city's garbage contract with BLT, as recounted in this report, is a 14-year saga of careless city contracting practices, crony capitalism, closed-door government decision-making, weak city council oversight, a steadily revolving door between city management and BLT, poor city staff work, out-classed city negotiators, a secretive city investigation of a possible fraud claim against BLT and, finally, a proposed secret settlement of the city's potential claim against BLT for an inadequate sum of money.

Meanwhile, Eye on Sacramento has recently received reports, from sources it believes to be reliable, claiming that BLT has been in chronic and ongoing noncompliance with the city's Living Wage Ordinance by paying most of its workers less than the wage levels required by the Ordinance. If true, such noncompliance would not only be a violation of law, but a potential breach of its city garbage contract, giving the city the probable right to terminate the contract for cause.

Eye on Sacramento urges the Sacramento City Council to:

- (1) Reject the BLT settlement currently proposed by staff;
- (2) Continue its investigation and ongoing assessment of BLT's liability for failing to disclose its secret negotiations with Waste Management;
- (3) Conduct an investigation into alleged BLT violations of the city's Living Wage Ordinance;

(4) Engage an economics advisory firm to investigate the potential impact on future market competition in the trash hauling business in Sacramento if Waste Management, itself a garbage hauler, were to assume control of the city's garbage disposal facility; and

(5) Defer any action on BLT's request for consent to the sale of its city garbage contract to Waste Management until all of the three investigations noted above are completed and fully evaluated.

Eye on Sacramento asks the Sacramento Civil Grand Jury to investigate and evaluate:

(a) the city's entire administration of its garbage disposal contract with BLT;

(b) the city's ill-advised decision to enter into a highly burdensome amended services agreement with BLT in November 2010;

(c) the city's apparent failure to monitor BLT's compliance with the city's Living Wage Ordinance; and

(d) the city's pending decision to settle its potential fraud claims against BLT for an inadequate sum of money.

OUR ROLE; SCOPE OF REVIEW; OUR USE OF ANONYMOUS SOURCES

Eye on Sacramento is a California nonprofit public benefit corporation which has three principal functions. Its first function is to serve as a diligent watchdog of the actions and policies of local Sacramento government and to help keep Sacramentans informed on such matters. Its other functions are to generate smart policy solutions to challenging municipal problems and to engage in extensive community outreach.

In its work as a civic watchdog, Eye on Sacramento's job is to shed light on the inner workings of local government and to probe deeply into civic matters of significant public importance that have not received adequate public attention.

The city's 20-year contract with BLT Enterprises ("BLT") for disposal of all of the city's residential solid waste is, apart from city labor agreements, perhaps the City of Sacramento's largest and most significant contract, involving a commitment of over \$250,000,000 of ratepayer money. It is a matter deserving of the greatest public scrutiny.

We first took notice of the BLT contract when a media release was issued shortly after the city council's approval of the November 2010 amended services agreement with BLT, which changed the final resting place of the city's garbage from a landfill in northern Nevada to the nearby Kiefer Landfill operated by the County of Sacramento. The city's media release reported that, despite the fact that city trash would now be making a dramatically shorter trip to its final destination, the shift would lead to an *increase* in the monthly garbage bills of Sacramento ratepayers. We couldn't imagine how that was possible.

In late August of this year, we became aware that BLT was seeking the city council's consent to a sale of its city garbage contract to Waste Management, the nation's largest trash hauler, for an astounding purchase price of \$70,000,000. Since BLT's unamortized investment in its transfer facility and vehicles were a small fraction of the \$70 million sales price, we concluded that the 20-year city contract was the component of the transaction with the real value, a clear indicator of an extraordinarily rich and grossly overpriced contract.

When the matter came before the city council on September 21st of this year, we opposed the proposed assignment, primarily on the basis of the deal's potential negative impact on future competition in the trash hauling business in Sacramento as Waste Management, a trash hauler, would, as operator of the central depository for city trash, enjoy an unfair competitive advantage over its trash hauling competitors which could lead to an eventual monopolization of the trash hauling business, harming the interests of city ratepayers.

Following the extraordinary events of the September 21st city council meeting (discussed in Section V below), we began a more detailed examination into the terms and origins of the BLT garbage disposal contract, the rapid changes in the municipal solid

waste business and the actions of both the city and BLT over the course of their 14-year contractual relationship.

In the course of our investigation, we have been contacted by a number of individuals who expressed an interest in sharing information relevant to our inquiry. In several instances, individuals have offered to provide us information only if we treated them as anonymous sources and agreed not to reveal their identities. We have respected their wishes. In preparing this report, we have endeavored to only use information acquired from anonymous sources if we believed the source of the information to be credible and the information (1) could be confirmed through a non-anonymous source; or (2) was supported by a second anonymous that we similarly believed to be credible.

Despite the California Public Records Act and the solemn pledges of politicians to keep government open and transparent, we have found that city governments are not always forthcoming with information to those who seek it, particularly if the information being sought is sensitive or potentially embarrassing.

Eye on Sacramento has neither subpoena power, nor the power of civil discovery. Consequently, we are not infrequently left in a position where our investigations leave us with as many questions as answers. It is our sincere hope that the Sacramento County Civil Grand Jury, possessive of subpoena power and other tools , will help secure answers to many of the serious questions we raise in this report.

Craig K. Powell, President
Eye on Sacramento
November 28, 2011

CAST OF CHARACTERS

BLT Enterprises:

Shawn Guttersen - general manager, BLT Enterprises of Sacramento

Jack Deipenbrock - original attorney for BLT

Bill Edgar - BLT lobbyist, former Sacramento city manager

Bob Thomas - BLT lobbyist, former Sacramento city manager, former county executive of County of Sacramento

Bernard Huberman - chief executive officer, BLT Enterprises, Inc.. and a principal owner of BLT

City of Sacramento:

Ad Hoc City Council BLT Negotiating Committee:

Sandy Sheedy

Steve Cohn

Lauren Hammond

Robbie Waters

City Managers:

Bill Edgar - city manager thru 1998; city manager during the bidding and approval of the 1998 garbage disposal contract with BLT

Bob Thomas - city manager , 1999 thru 2006; county executive until 1999

Gus Vina - interim city manager, February 2010 thru April 2011; city manager when the amended services agreement with BLT was approved in November 2010

Bill Edgar (Reprise) - interim city manager, May 2011 thru August 31, 2011

Department of Utilities:

Marty Hanneman - director, department of utilities, 2008 - August 2011

Edison Hicks - solid waste manager, department of utilities, retired December 2010

City Attorney's Office:

Matthew Ruyak - supervising deputy city attorney

County of Sacramento:

Bob Thomas - county executive, County of Sacramento, thru 1998

I. THE NATURE OF THE MUNICIPAL SOLID WASTE BUSINESS

To appreciate the central role that the BLT garbage disposal contract plays in the disposal of the city's solid waste, one requires a basic understanding of the nature of the municipal solid waste business (or "MSW").

A. The Three Components of the Waste Business: Collection, Disposal and Landfill

The MSW business consists of three major components: (1) the pick-up of trash and recyclables from homes and businesses in a municipality by garbage trucks and the hauling of such matter to a nearby transfer or disposal facility, a component commonly referred to as "Collection;" (2) the operation of a transfer/disposal station at which trash and recyclables are received from garbage trucks, then further sorted to capture additional recyclable materials, and finally long-hauled by truck to a landfill, the component known as "Disposal;" and (3) the operation of a landfill, the final resting place of garbage, which charges a "tipping fee" for the right to "tip" a garbage truck's contents into the landfill (the "Landfill" component).

Private sector profit margins in the collection business have been reported to be in the range of 20%-30%. Profit margins in the disposal business are believed to be in the range of 30%-40%. The landfill business, the most lucrative component of the waste industry, is thought to have profit margins in the range of 40%-50%.

In Sacramento, as in many cities, the collection of solid waste from residential homes is handled exclusively by city trucks operated by city employees employed by the city's department of utilities. Commercial waste is also collected by the city, but unlike residential waste, the city does not have an exclusive right or monopoly to collect commercial waste. Several privately-owned, commercial trash haulers, including Waste Management, operate in Sacramento collecting waste from commercial accounts, such as office, apartment and commercial buildings. BLT is not a commercial trash hauler.

BLT is exclusively in the disposal business. Its 20-year contract with the city grants BLT the exclusive right to receive all of the city's residential solid waste (trash and recyclables) at BLT's disposal facility, located in south Sacramento.

After sorting out recyclables, BLT trucks the city's garbage to a landfill. Since the city first entered into a contract with BLT in 1998, BLT has been long-hauling the city's residential trash in a nightly caravan of more than 20 trucks over the Sierras to a private landfill in Lockwood, Nevada owned by Waste Management. The Lockwood Landfill is located 15 miles outside of Reno and is a roundtrip of nearly 300 miles from Sacramento. Under the terms of an amended services agreement approved in November 2010, BLT is set to begin hauling the city's residential trash to the Kiefer Landfill, beginning in December 2012. Kiefer is operated by the County of Sacramento and is distance of about 21 miles from BLT's disposal facility.

While some municipalities operate their own disposal facilities, it appears that most contract out the Disposal function to private operators like BLT. The term of these contracts often vary with the level of investment a private operator is required to commit under its contract. For example, the original 1998 city/BLT contract required BLT to construct a new disposal facility in south Sacramento. Consequently, the term of the original contract was for 15 years, providing BLT sufficient time to amortize and recover its original investment in the disposal facility. (Inexplicably, the city agreed to a fresh 20-year term for the BLT contract in an amended services agreement in November 2010 even though BLT made no commitment under the amended services amendment to invest in any new facilities or equipment. The November 2010 amended services agreement is discussed in greater detail in Section III below.)

B. Rapid Technological Change in the Waste Business

The world of municipal solid waste has changed dramatically since the BLT contract was first approved by the city council in 1998. There have been major advances in sorting technology which now allow more and more useful material to be extracted from "waste streams." More and more practical uses have been developed for material extracted or "diverted" from waste streams. There have been rapid advances in a number of different technologies that convert "waste-to-energy" that bear little to no resemblance to traditional trash incinerators still in use by some cities, despite adverse environmental impacts.

San Jose has the goal in the next few years of diverting almost all of its waste stream through advanced sorting and the biological breakdown of waste. San Francisco is the national leader in recycling and now extracts close to 77% of its waste for alternative uses. (Some authorities consider a 90% diversion rate to be maximum possible diversion rate). Dallas, Los Angeles, Seattle and other cities are finding innovative and cost-saving ways to reduce the volume of MSW that ends up in nearby landfills. The State of California is imposing new mandates on municipalities to increase the percentage of its solid waste that it must divert from landfills.

The chief executive officer of Waste Management, David Steiner, in an interview earlier this year with Fortune magazine, summarized the new world of waste:

"With the additional trash that Waste Management is able to pull from ordinary household trash over its competitors, one day consumers may just get paid for their waste. If we can extract \$100 to \$200 of value out of a ton of material, we can start paying customers. It's a once-in-a-lifetime opportunity. Four years ago you wouldn't have heard those words come out of my mouth. We could be the Apple iPod to the Sony Walkman" (Earth911.com, "In the Future You Will Get Paid for Your Trash," April 5, 2011).

Because of this rapid and accelerating pace of technological change, forward-looking cities are increasingly entering into short-term contracts or contract renewals for

the disposal of their MSW. This prudent approach affords cities the flexibility to take advantage of changing beneficial trash technologies. Flexibility is diminished if waste streams are committed to long-term disposal contracts. When a municipality locks-up its waste stream via a long-term disposal contract as Sacramento has, the economic beneficiary of improved efficiencies and greater beneficial use of diverted material is the municipality's garbage disposal contractor, not the municipality or its ratepayers.

II. The Contentious Origins of the 1998 BLT Garbage Disposal Contract

A. Closure of City Landfill and Short-Term Use of Kiefer Landfill

Up until 1994, the city disposed of its trash at its own landfill located on 28th Street, just northeast of Midtown. The city's landfill ran out of space and was closed in 1994. From 1994 until 1998, city garbage trucks hauled most of their loads to the Kiefer Landfill in eastern Sacramento County through a series of short-term (and expensive) contracts between the city and the County of Sacramento, then and now the operator of the Kiefer Landfill.

By 1997, the Kiefer Landfill, as it was configured at the time, reportedly had remaining space for only six more years of the city's garbage. While the county had an application pending before the state for a permit to expand Kiefer's capacity, there was no assurance that the state would grant such a permit amid concerns that the Landfill might impact local groundwater (Sacramento Bee, "Council Trash to Nevada? Council to Decide," March 21, 1997).

B. Explanatory Note on the Changing Roles of Bill Edgar and Bob Thomas

When Sacramento was considering its long-term options for solid waste disposal in 1997, Bill Edgar was serving as Sacramento's city manager and Bob Thomas (who was destined to succeed Edgar as Sacramento city manager in 1999) was serving as the county executive for Sacramento County. Following his stint as city manager, Edgar became a paid lobbyist and advisor to BLT and served BLT for almost a decade.

Following Thomas' resignation as Sacramento city manager at the end of 2006, he, too, was hired by BLT as a paid city lobbyist and advisor and continues to represent BLT to this day.

Edgar suspended his representation of BLT when he once again became Sacramento city manager in May of this year, this time serving as interim city manager. He served as interim city manager for four months, stepping down on August 31, 2011.

City employees are barred by the city's "anti-revolving door" ordinance from lobbying the city on any matter over which they had policy control or influence while employed by the city for a period of one year after leaving city employment.

Eye on Sacramento believes that the city's "anti-revolving door" ordinance should be revised to prohibit former city managers from lobbying the city for a period of ten years after they leave city employment. City managers who serve as city lobbyists are trading on longstanding trust relationships between the city manager and council members, who often trust city managers to always act in the city's best interest - even when they are not. Additionally, when city managers lobby city staff, they may very well be lobbying city officials that the city manager personally hired years before. A one-year disqualification period for city managers is woefully inadequate.

C. City and County in 16-Year Disagreement Over City Use of Kiefer Landfill

Despite the obvious logic and clear mutual benefit that the city and county would derive from a deal to deposit city trash at the Kiefer Landfill, the city and county were unable to arrive at a mutually acceptable long-term landfill deal *for a period of 16 years*, 1994 thru 2010. As was reported in 1997, "the city and county talked about a joint site, but those talks fizzled" as so many of their talks have fizzled in the ensuing decade (Sacramento Bee, *ibid*). There were disagreements over tipping fees and the city's potential liability for future landfill leakages. Previous efforts to develop a joint regional site fell apart over ownership disputes and union resistance to consolidation (Sacramento Bee, "Why Spend More for Trash,?" March 25, 1997).

D. Questionable City Bidding Process Gave the Nod to BLT; Edgar Castigates Critics

In March, 1997, city manager Bill Edgar, at the conclusion of an unusual bidding process, recommended that the city council award BLT the exclusive contract to dispose of the city's residential trash. The Sacramento Bee editorial board at the time caustically commented on Edgar's recommendation:

"The firm [BLT] selected by staff [Edgar] doesn't have a permit for its transfer station, didn't submit the low bid and would send the city's garbage across the Sierra Nevada to a landfill in Nevada. That raises a lot of questions, beginning with: You're kidding, right?"

...

"The staff gives BLT extra points over the low bidder for its promise to build a 'showcase' transfer station. It awards BLT more points for sex and race preferences, even though voters tossed them out last year with Proposition 209.

"Equally bizarre, it severely penalizes the low bidder for proposing to dispose of the trash at Potero Hills Landfill in Solano County, a fully licensed, environmentally sound facility, when the chosen contractor [BLT] proposes to send the trash across the mountains to Lockwood Landfill in Sparks, NV" (Sacramento Bee, *ibid*).

When two other bidders complained about the gross unfairness of the bidding process - including passing over the low bidder whose bid was \$5 million lower than BLT's bid - Edgar responded with disdain. "When other companies and people complained, he [Edgar] called them "whiners" whose complaints were merely "nipping on the margins" (Sacramento Bee, "Garbage Wars' Finally Sorting Out," September 15, 1997).

BLT retained Jack Deipenbrock, a well-connected Sacramento attorney, to lobby the city on its behalf. "One company [BLT] has been flying people on its jet to see its transfer station in Oxnard" (Sacramento Bee, *ibid*.). BLT's private jet was to later play a tangential role in the waste disposal contract provisionally awarded to BLT in the city of Oxnard. BLT's Oxnard contract is now the subject of a 15-month Ventura County

District Attorney's criminal investigation into possible procurement corruption (see Section III below).

When complaints from other bidders and members of the public grew fierce, the city, led by then city councilman Darryl Steinberg, rejected the results of the bidding process and called for new bids. When the second competition ended, BLT again won - *but with a bid that was 10% lower than its original bid* (Sacramento Bee, "One Firm Left in Battle for City's Garbage," October 14, 1997). Edgar walked back his earlier harsh criticism of critics of the original bidding process. "To be honest, the product we are getting for the taxpayers is better now," (Sacramento Bee, "Garbage Wars Finally Sorting Out," September 15, 1997).

E. Did the City Miss An Opportunity to Reach a Superior Deal with the County?

On September 15, 1997, the Bee reported that "Sacramento County officials say that they've been jilted by the city, feeling the city should have continued talking with them about a contract for the city to use the county's Kiefer landfill." County Executive Bob Thomas was quoted at the time as saying that "communication between the two sides wasn't good and that the city's decision to go it alone on solid waste disposal makes it more difficult for county officials to take the city's talk of regional cooperation seriously" (Sacramento Bee, *ibid*).

Two years later, the county again approached the city about a deal. In the meantime, the county had won state permission to expand the size of the Kiefer Landfill by 320 acres, which extended its useful life another 35 to 50 years. "We can offer a better rate than before," the county's chief of solid waste management, Rich Owings, stated, "And we've indicated we'd be willing to negotiate a long-term price."

However, by that time the city was locked into a 15-year contract with BLT with penalties for early termination. A city representative, Gary Van Dorst, said "the city had basically chosen its path after a two year-process" (Sacramento Bee, "City Sends its Garbage All the Way to Nevada," June 8, 1999).

Another opportunity for city-county collaboration and cost-savings had been lost and the city settled in for the long haul with BLT as its exclusive garbage disposal contractor.

III. The Road to the November 2010 Amended Service Agreement

Between 1999 and 2007, the price of diesel fuel soared from around \$1.00 per gallon to almost \$3.50 per gallon, making the 282-mile nightly caravan of nearly two dozen BLT trucks over the Donner Summit and back a much more expensive proposition.

In addition, there was a new consciousness about air pollution and, increasingly, the impact of greenhouse gas emissions on global warming. The nightly trek of BLT trucks belched as much pollution into the air as 1,200 ordinary vehicles, according to a 2007 Air Resources Board report compiled for the Sacramento Bee. And Sacramento had aspirations to become "America's Greenest" city.

Thus began a protracted three years of off-again, on-again negotiations between the city, BLT and the county with the goal of shifting the final destination of the city's garbage from Lockwood, Nevada to the Kiefer Landfill, just 20 miles east of the city.

A. The "Plasma Gasification" Diversion

One diversion along the way was the city's year-long flirtation with "plasma gasification," a waste-to-energy technology that entranced city officials and council members as a solution to the city's solid waste challenges. It promised to produce clean fuel, lower emissions of greenhouse gases, no toxic residue and an end to the nightly caravan to Lockwood, NV. City staff and councilwoman Lauren Hammond traveled to Japan to personally observe an operating plant that used the process.

In February, 2008, the city council, partially in reliance upon the reports of supposedly independent experts, voted 8-0 vote to approve the concept and authorized a 90-day exclusive negotiating period with U.S. Science & Technology of Sacramento, the process provider.

As Marty Hanneman, the then director of the city's utilities department acknowledged in an interview with the Sacramento Bee, the process "sounds almost impossible." But, he said, a team of local government and academic experts looking at gasification believes it is workable and advances Sacramento's quest to become the state's "greenest" city. "We want to be on the cutting edge," Hanneman said (Sacramento Bee, "City Sees Green in Garbage Proposal," February 27, 2011).

A major problem with the technology was that no other U.S. city had ever used the process before. When it came to light that some of the experts advising the city were not as independent as originally thought, the project collapsed.

B. Negotiations Heat Up to Keep City's Trash "In-Region"

Once the distraction of plasma gasification was overcome, the parties returned to their three-way negotiations to bring Sacramento's trash "in-region" at the Kiefer Landfill. By the spring of 2010, the parties were getting closer to a deal (Sacramento

Bee, "Sending Garbage to Nevada Never Made Sense and Makes Less Now," April 20, 2010). The city council formed an ad hoc BLT bargaining committee composed of Sandy Sheedy, Steve Cohn, Lauren Hammond and Robbie Waters.

Under the BLT contract at the time, the city was paying \$41.47 per ton to BLT to dispose of city trash. In April 2010, county municipal services administrator Paul Hahn said that the county was offering the city (and BLT) a tipping fee of \$25 per ton (not including BLT charges for taking the city's garbage from its south Sacramento disposal facility to the Kiefer Landfill (Sacramento Bee, *ibid*)).

C. Ventura County D.A.'s Criminal Investigation Stalls BLT's Oxnard Disposal Contract

BLT Enterprises has its corporate offices in Oxnard in Ventura County. Its chief executive officer and one of its two principal owners is Bernard Huberman. Early last year, BLT earned the top ranking to take over the City of Oxnard's trash disposal facility and was slated to be awarded a 10-year contract valued at more than \$50 million.

But the Oxnard contract anticipated by BLT has been stalled by the August 2010 launch by Ventura County District Attorney Greg Totten of a wide-ranging criminal investigation into "possible malfeasance, conflicts of interest and contract irregularities" in the city government of Oxnard, according to a series of stories reported by the Ventura County Star.

In the weeks and months that followed, D.A. investigators and F.B.I. agents searched numerous city offices and those of companies doing business with Oxnard, including the corporate offices of BLT, as well as the home of Bernard Huberman, BLT's CEO. BLT is a private company owned and operated by Huberman, Dan Rosenthal and Shawn Gutteresen, the general manager of BLT's Sacramento disposal facility.

Confidential sources have reported to Eye on Sacramento that BLT's business promotional efforts have included entertaining Oxnard city officials on a private yacht and providing private jet travel to such officials. When BLT was in the running for the Sacramento garbage disposal contract in 1997, the Sacramento Bee reported that BLT had "been flying people on its jet to see its transfer station in Oxnard." (Sacramento Bee, "Garbage Wars' Finally Sorting Out," September 15, 1997). BLT previously held the contract for disposal of Oxnard's trash before losing it several years ago to Republic Services.

There is even a press report that the mayor of Oxnard was flown down to Cabo San Lucas on a BLT jet to officiate at the wedding of BLT CEO Bernard Huberman.

According to press accounts, Oxnard used a selection process in choosing BLT for the garbage disposal contract that was based on "qualifications, rather than "competitive bids" (Ventura County Star, "Oxnard Waste Facility Contract Appears Stuck in Limbo," June 11, 2011). A qualifications-based selection process is, of course,

far more susceptible to the abuses of political cronyism and outright corruption than one based on objectively measurable competitive bids.

The media accounts of the Ventura County D.A.'s investigation include the following stories in the Ventura County Star:

- "Search Warrants Served in Oxnard City Investigation," October 28, 2010
- "Grand Jury Wraps Up Oxnard Hearing, 'Viable Leads' in Investigation, D.A. Says," December 7, 2010
- "Oxnard Waste Facility Contract Appears Stick in Limbo," June 11, 2011
- "Yearlong DA Investigation Dogs Oxnard," August 6, 2011
- "Del Norte Negotiations in Limbo as DA Probe Lingers," November 4, 2011

One cannot help but draw parallels between Oxnard's subjective "qualifications-based" selection process used to select BLT and the flawed and subsequently overturned bidding process (detailed in Section I above) used by Sacramento city staff in 1997 that led city staff to recommend BLT for the city's garbage disposal contract, even though BLT was not the low bidder. In Sacramento, a resolicitation of bids under a reformed bidding process led to the final selection of BLT - but at a bid that was 10% cheaper than what it BLT had bid for the work in the first round of bidding.

D. Impact of Investigation on November 2010 Amended Service Agreement

When Sacramento city officials were privately advised of the existence of the Ventura County D.A.'s investigation of Oxnard and BLT, they could and should have disclosed such information to the public. They failed to do so. They also failed to mention the D.A. investigation during the November 16, 2010 public city council hearing on the proposed amended service agreement, at which the council approved a 20-year extension of the BLT contract. We are unaware of whether city officials informed members of the city council's ad hoc BLT bargaining committee of the D.A. investigation or the council at large. We do know the city most recently elected city council members had not been briefed by city staff on the existence of the Ventura County D.A. investigation as of October 10th of this year

The negotiations for a 3-way deal between the city, BLT and the county to shift the city's garbage from Nevada to Kiefer heated up dramatically in August 2010, which coincided in time with the launch of the Ventura County D.A.'s investigation into Oxnard and BLT. We have received a single report that the city council's ad hoc BLT bargaining committee met five times in the month of August. We have also received a single report that prior to August 2010, BLT was being "really greedy" in negotiations and that the parties were very far apart. In August, however, the parties moved very quickly towards a deal, according to our source. We have no way of knowing if the accelerated pace of negotiations in August 2010 had anything to do with BLT's concerns with the pending Ventura County criminal probe.

Apparently the pending criminal investigation in Ventura County was enough of a concern to city staff that it insisted upon the inclusion in the proposed amended service agreement of a special "corruption out" which grants the city the right to terminate the BLT contract if BLT is found to have "knowingly... used any fraud, wrongful or criminal influence to obtain the city's approval" of the amended service agreement.

There is no indication, however, that city staff were concerned enough about the implications of the pending Ventura County D.A.'s criminal investigation to either initiate its own inquiries into BLT's conduct in Oxnard or to delay entering into a fresh 20-year agreement with BLT pending resolution of the Ventura County D.A.'s investigation, even though BLT was a corporation now at heightened risk of criminal indictment. Instead of openly and transparently dealing with the problem, as they should have, city staff choose to largely ignore the specter and implications of the pending probe and supported the proposal to give a corporation now under a major legal cloud 20 years of exclusive control over the city's solid waste stream.

If city staff had been more open and cautious about the implications of the Ventura County investigation by either conducting its own investigation or postponing any consideration of a new long-term contract with BLT until after the legal cloud over BLT had lifted, the city would not now find itself the apparent victim of double-dealing and subterfuge by BLT, who now admits that it was in negotiations with Waste Management to sell the city contract to Waste Management *at the same time* as it was negotiating a fresh 20-year extension of its contract with the city - an extension the city would never have agreed had it known that BLT was intending to quickly spin the city contract for a massive profit, a profit based almost entirely on the overpriced terms of the BLT's amended services contract.

E. The Inexplicable Terms of the Amended Services Agreement

The city council on November 16, 2010, with no advance notice to interested parties or impacted stakeholders, approved an amended services agreement with BLT. It was late in the evening and the council was in no mood for protracted discussion. With de minimis public comment and little council discussion - and no discussion whatsoever of the financial terms of the deal - the council voted 8-0 to approve the amended services agreement.

Several major changes to the BLT contract implemented by the amended services agreement were simply inexplicable:

(1) There were eight years remaining on the term of the original BLT trash contract and just two years remaining on the term of original BLT recycling contract when both were inexplicably extended to fresh 20-year terms by the amended services agreement.

(2) The new 20-year term extension inexplicably killed any chance of the city putting either city trash disposal or recycling handling out to competitive bidding, locking

the city into rates for trash disposal and recyclables prices that had never been subjected to market-testing and will now be insulated from market-testing for another 20-years.

(3) The new 20-year term cannot be explained by any BLT need for a lengthy amortization period for it to recover the cost of any mandated new investments in plant or equipment. In fact, the amended services agreement requires BLT to make no additional investments of any kind.

(4) The trash disposal rate the city will pay to BLT under the amended services agreement is inexplicably 29% higher than the rate the city was paying BLT under the prior agreement, increasing from \$44.10 per ton to \$56.80 per ton,

(5) The trash disposal rate the city will pay to BLT under the amended services agreement is 29% higher *even though* BLT will now haul city trash just 21 miles to the Kiefer Landfill instead of almost 150 miles to Lockwood, Nevada;

(6) The trash disposal rate is 29% higher *even though* the Kiefer Landfill is charging BLT the lowest tipping fees of any landfill in the region for the acceptance of city trash.

(7) The trash disposal rate charged by BLT is inexplicably 20% higher than the market rates paid by all other cities in the region for similar services.

(8) The price BLT will be paying to the city for recyclables under the amended services agreement is approximately \$19 per ton, inexplicably \$40 per ton less than the \$60 per ton market rate being paid for residential recyclable materials in the area.

(9) Under the original agreement, the city had an option to buy its way out of the BLT contract with the payment of a \$4 million termination fee. Under the amended service agreement, the city's \$4 million termination option was inexplicably stripped out of the agreement and *the city inexplicably agreed, instead, to a termination option that would require the city to pay a \$22.5 million termination fee and the city's option would not even be exercisable for the first 10 years of the new 20-year term.*

(10) The amended services agreement creates a wholly illusory tiered system for trash rates, under which the city's trash rate would start off high but would supposedly fall if the city were able to deliver additional trash volume to the disposal facility. Rates would not appreciably fall under the tier system unless the city was able to deliver at least 250,000 tons of trash to BLT - *a volume target that is greater than the aggregate trash generated in the city from all conceivable sources.*

(11) The amended service agreement's 20-year term forecloses any chance that the city has of availing itself or financially benefitting from future advances in sorting and recycling technologies. Even the supposed right that the city has under the amended services agreement to redirect the city's waste stream to a "waste-to-energy" project of the city's choosing is largely illusory when the benefits of such a diversion are netted

against the additional costs that BLT will be entitled to impose as part of such a diversion.

How much will the amended services agreement cost the city and ratepayers over the course of the next 20 years? According to our calculations, the excessive pricing of trash disposal fees and the under pricing of recyclables will cost the city approximately \$2.5 - 3.0 million annually for the next 20 years, for a total of about \$50 million, representing close to \$500 for each Sacramento ratepayer.

F. Council and City Staff Ignored Repeated Warnings From Stakeholders

When news began to circulate in the fall of 2010 about the likely terms of a proposed amended services agreement with BLT, council members and utilities director Marty Hanneman and solid waste manager Edison Hicks were peppered with pleadings from stakeholders in the business community, including those with long experience in the solid waste and related industries, urging them not to agree to such onerous terms. They sent letters, e-mails and scheduled private meetings with both council members, as well as Hanneman and Hicks, urging them not to make the mistake of agreeing to such burdensome terms.

The pleadings of alert businesses and citizens were to no avail. Late in the evening on November 16, 2010, the city council unanimously approved the amended services agreement. Bill Edgar testified on behalf of his client, BLT, that the amended agreement was a good deal for the city.

Council members and city staff were oblivious that night that BLT was already involved in negotiations with Waste Management to sell to Waste Management the immensely rich city contract for an eventual price of an astounding \$70 million, providing irrefutable market evidence that BLT had thoroughly fleeced the city in contract negotiations, as BLT's expected profits under the city contract formed the primary basis for the \$70 million purchase price that Waste Management was willing to pay.

The city council, focused almost exclusively on how the amended services agreement would reduce greenhouse gas emissions, had trusted its staff to "handle the numbers." The council's four-person ad hoc bargaining committee had been asleep at the switch and did the full council no favors in recommending the amended services agreement for council approval.

V. THE BLT/WASTE MANAGEMENT DEAL FIRST SURFACES

A. The City is Notified of Waste Management's Offer to Purchase the Contract

When the city received notice on May 3, 2011 that BLT had received a purchase offer from Waste Management (WM) for \$70 million, the city council and city management must have known that the city had been taken to the cleaners by BLT in certainly one and probably two ways:

(1) First, the shockingly high purchase price for the city contract and the assorted physical assets that together comprise BLT's waste disposal business could only mean that the 20-year amended service agreement the city entered into with BLT just six months earlier set the city up to significantly overpay trash disposal rates and to receive significantly below market prices on recyclables, creating a bountiful future profit stream for BLT that justified a \$70 million valuation for BLT's one-customer business; and

(2) Second, the fact that such a lucrative and definitive purchase offer had surfaced less than six months after the city inked the amended services agreement meant that it was quite likely that BLT was *already* involved in negotiations to sell the city contract and disposal assets to WM *while the city and BLT were negotiating the terms of the amended services agreement*. The supposed 20-year public-private partnership between the city and BLT increasingly looked like a farce, at least in so far as BLT's intentions were concerned.

Did the city reveal to the public or the media that its largest single contractor had received a \$70 million buy-out offer just six months after inking a 20-year fresh deal with the city? No. It hid the matter from public view out of almost certain embarrassment over having been taken advantage of by BLT.

Ironically, Bill Edgar, who less than six months earlier had lobbied for the deal on BLT's behalf - claiming it was a "good deal" for the city - resumed his old city manager position just days before arrival of the notice of Waste Management's purchase offer.

B. City Council's Secret Deliberations: Whether to Match Waste Management's Offer?

BLT sent the city the Waste Management offer because, under the BLT contract, the city enjoyed a "first right of refusal" to buy out BLT at the same price and on the same terms as Waste Management was offering for BLT. The May 3rd notice started a 60-day clock, during which the city would have to decide whether or not to match the Waste Management offer.

The city asked BLT for a 30-day extension of its 60-day first right period to provide the council with more time to consider the matter. BLT agreed, but on a condition: that should the city decline to exercise its first right of refusal, the city agreed to schedule a city council hearing on the proposed sale no later than September 5, 2011 to consider whether it would "consent" to the proposed sale to Waste Management. Under

the amended services agreement's "assignment clause," no assignment (sale) of the BLT contract could legally occur without the city's consent (this assignment clause would become a matter of some importance a few months later, as discussed in Section V below).

The city reportedly signed a letter agreement memorializing the 30-day extension of the city's first right period and the city's agreement to hold a hearing on the proposed assignment no later than September 5th if the city did not exercise its first right.

The city council, deliberating entirely in closed session, began to consider whether to spend \$70 million to buy out BLT. Remember, before the November 2010 approval of the amended services agreement, the city had the option, exercisable at any time, to buy out BLT for just \$4 million. That option, however, was stripped out of the agreement in November 2010 and replaced with a \$22.5 million buy-out option which was not even exercisable for 10 more years! The city's abandonment of its \$4 million buy-out option had come back to haunt it.

According to our sources, the city engaged an investment banking firm to advise it on the matter, examining how a buy-out of BLT could be financed as the city did not have \$70 million available in its depleted reserves to fund a cash purchase. The city's investment banker and city treasurer concluded that the purchase could be financed, but that the debt that would have to be issued would be so poorly rated as to be the equivalent of high interest "junk bonds." The city council reportedly voted 8-1, again in closed session and outside of the public's eye, to not exercise its first right of refusal.

VI. BLT SEEKS CITY CONSENT TO ASSIGN CONTRACT TO WASTE MANAGEMENT

A. A Delayed Hearing; Concern Over the Impact of the Sale on Future Competition

Despite the city's contractual promise to BLT to consider its request for city consent to the sale to Waste Management no later than September 5th, the city failed to hear the matter until September 21st, immediately putting the city behind a legal eight ball with BLT.

The narrow issue before the council that evening was whether the city should grant its consent to the assignment of the BLT contract to Waste Management. The legal standard was set by the terms of the "assignment clause" of the amended services agreement, which provided that the city's consent could not be "unreasonably withheld," a very common standard in the business and commercial world but an uncommon standard in the world of government contracts. Government, responsible to the public, typically insists upon assignment clauses that reserve unto itself the right to grant or withhold its consent to an assignment in its "sole and absolute discretion." The difference between the two types of assignment clauses would become a matter of importance at the September 21st hearing.

Eye on Sacramento submitted a letter to the city council encouraging it to turn down the requested assignment out of a concern that if Waste Management, which is also in the trash hauling business, acquired control of the trash disposal facility, it could use its control of the "disposal" business to unfairly compete in the trash hauling business, particularly if the city were to subsequently open up the market for the collection of residential trash to commercial haulers, as it is considering doing. Waste Management could use its very substantial profit margins on the disposal side of its business to undercut its competitors' pricing on the collection side of its business, which could lead to a Waste Management monopoly of the trash collection business in the city, harming ratepayer's interests.

We argued that it was perfectly "reasonable" under the assignment clause for the city to deny its consent to the deal based on a legitimate concern that the transfer would damage future market competition, impair the city's ability to reconfigure its solid waste business and potentially harm city ratepayers.

Coincidentally, the city had, 14 years earlier in 1997, downgraded the bidding points of a bidder for the garbage disposal contract because the bidder (Cal Waste Systems) was also in the commercial trash hauling business. City staff expressed a concern that a trash hauler could use the exclusive garbage disposal contract to harm its competitors in the trash hauling business (Sacramento Bee, "Why Spend More for Trash," March 25, 1997).

B. BLT Attorney Admits That BLT Was Conducting Undisclosed Negotiations With Waste Management

While representatives of Eye on Sacramento thought the September 21st council meeting was a straight forward hearing on the pros and cons of an assignment of the BLT contract to Waste Management, the city was aiming for bigger game. It was using the hearing as an opportunity to suss out information from BLT and its representatives on whether BLT had misled the city in November 2010 when it failed to disclose that it was engaged in active negotiations to sell its city contract to Waste Management while it was concurrently negotiating a 20-year extension of its contract with the city.

Councilman Steve Cohn set the trap for BLT's attorney by asking him when BLT began discussions with Waste Management about a buy-out. BLT's attorney answered honestly and admitted that negotiations with Waste Management had occurred prior to November 2010. In a ham-handed effort at damage control, local BLT general manager, Shawn Gutteresen, quickly rose to deny that any such discussions had taken place. A few days later, Gutteresen, in a letter to the city, walked back his earlier denial, and admitted that BLT had received a purchase offer from Waste Management in October 2010, a month before the council approved the amended services agreement.

Cohn also questioned both the BLT attorney and Supervising Deputy City Attorney, Matthew Ruyak, on the wording of the assignment clause in the amended services agreement. The two lawyers revealed that during the negotiations over the amended services agreement, the BLT attorney had asked Ruyak to modify the original existing assignment clause from BLT's original 1998 city contract. The original assignment clause empowered the city to grant or deny consent to an assignment in its "absolute discretion." The BLT attorney asked Ruyak to change the clause's standard so that the city's consent could not be "unreasonably withheld."

For some inexplicable reason, Ruyak agreed to BLT's request to change the assignment clause, making it easier for BLT to sell to Waste Management while making it considerably more difficult for Ruyak's client, the city, to vet any proposed assignment of the city contract. Ruyak also apparently failed to ask the BLT attorney the obvious question: Why does your client want the change? Is your client, BLT, thinking about selling its contract?

In response to such a question, the BLT attorney would have either told the truth to Ruyak about the concurrent negotiations with Waste Management and the city would have almost certainly aborted the negotiations on the amended service agreement or, at the least, radically changed its negotiating posture with BLT.

Alternatively, the BLT attorney could have lied to Ruyak in response to such a question and denied that his client had any intent to assign the city contract. Such a lie would have established an open and shut case of fraudulent misrepresentation of BLT's present intention, which would have, upon subsequent discovery of the BLT/WM

negotiations, given the city the legal right to rescind and terminate the extraordinarily burdensome amended services agreement.

Whether the BLT attorney had either lied or told the truth to Ruyak, his question would have protected the interests of his client, the city, from long-term harm from the subterfuge and overreaching of BLT. All lawyers make mistakes, even very good lawyers like Matthew Ruyak.

VII. CITY'S INVESTIGATION OF POSSIBLE LEGAL CLAIMS AGAINST BLT

We understand that within 24 hours of the September 21st council hearing, the city attorney's office delivered to BLT a demand that BLT not destroy any records relating to its pre-November 16, 2010 discussions with Waste Management concerning sale of the disposal facility and the city contract. Such a "do not destroy evidence" letter signaled that the city was initiating an investigation of the legal consequences of BLT's failure to inform the city of its pre-November 16, 2010 sale discussions. There were two key factual questions that city investigators needed answers to:

BLT's Actual Intention: Did BLT have a secret, undisclosed intent in November 2010 to sell its business or did it intend to operate the disposal facility in accordance with its fresh 20-year promise to handle the city's solid waste?; and

Misrepresentation of Intention: Did BLT or its representatives misrepresent its present intent to the city, either by making a 20-year promise under the contract or by uttering other statements made at or prior to the execution of the amended services agreement that led the city to believe that BLT intended to stick with the contract?

If BLT had a secret, undisclosed intent to sell out and misrepresented its intent to the city, leading the city to believe that BLT intended to stick with the contract, then the city would have an arsenal of legal grounds or causes of action available to it to rescind and terminate the amended services agreement, recover damages from BLT or both. The city's possible causes of action would include:

(1) Making a "false promise" (also known as "promissory fraud"), which is a promise made without any intention of performing it (California Civil Code subsection 1710(4));

(2) Intentional misrepresentation by concealment, which is the suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact (California Civil Code subsection 1710(3)); and/or

(3) "Deceit," which is willfully deceiving another with the intent to induce him to alter his position to his injury or risk (California Civil Code subsection 1209).

One concern we had with the city's investigation of BLT was that it was led, we understand, by Supervising Deputy City Attorney Matt Ruyak of the city attorney's office. While it is not uncommon for the attorney who negotiated a transaction to also conduct an investigation into potential legal claims that arise from the transaction, it can create problems. For example, the attorney himself may be a "percipient witness" to some of the key facts in the case, which would make it virtually impossible for him try the case since he would himself be called as a witness. As a participant in the

transaction, he may also lack the requisite objective perspective to adequately evaluate the case.

Consequently, in cases where the transactional lawyer is also a percipient witness, as Ruyak was in this matter, the investigation of claims is most often referred to other counsel, typically to an outside law firm with experience in litigating such cases.

There is an additional reason why the investigation of BLT's potential liability should be referred out by the city attorney's office to outside counsel. Matt Ruyak made an apparent error in agreeing to weaken the assignment clause of the amended services agreement and in not asking the BLT attorney what his client's intention was with the contract. When a lawyer makes an error on a client matter, the interests of the client and the attorney sometimes no longer perfectly align with one another. The client may have an interest in vigorously pursuing all available remedies while the attorney may just want it all to go away. Given the potential for a divergence and potential conflict of interests, a lawyer in such circumstances is duty bound to refer the client's matter to another lawyer.

Eye on Sacramento has previously advised the city to engage outside counsel to conduct the investigation into BLT's potential liability. We were recently informed that the city has apparently done so.

VIII. BLT's Alleged Chronic Violations of the City's Living Wage Ordinance

We have received reports from sources we believe to be credible that BLT, in its operation of the disposal facility, has been and may still be in chronic noncompliance with the city's Living Wage Ordinance, which requires that all contractors to the city, with certain exceptions, to pay all its employees hourly wages, or a combination of wages and benefits, that meet or exceed the minimum levels established by the Ordinance. We have been informed by our sources that as many as 80% of the workers at BLT's disposal facility are not being compensated in accordance with the provisions of the Living Wage Ordinance and that most are paid at a rate just \$.50 above minimum wage.

We have not conducted an independent evaluation of these allegations.

We encourage the city to immediately initiate an investigation of these allegations, including a review and audit of BLT's required annual certifications of compliance with the Ordinance. If the allegations are found to have merit, we advise the city to consider its remedies under the amended services agreement (including section 15.01 of the agreement).

IX. City's Proposed Settlement With BLT and Consent to Transfer

A. BLT Promises Small Settlement of the City's Claims and Masquerades It as a Gift to Ratepayers

On Wednesday, November 23rd, the day before Thanksgiving Day, city staff released a staff report recommending that the city council on Tuesday, November 29th approve the proposed assignment of the BLT contract to Waste Management and approve a proposed "Assignment and Assumption Agreement" between the city, BLT and Waste Management ("assignment agreement").

The assignment agreement identifies claims that BLT and Waste Management allegedly have against the city (presumably for the city's alleged delay in considering BLT's request for city consent to the assignment of the BLT contract to Waste Management), but the document oddly fails to identify any claims that the city has against BLT.

The assignment agreement also calls upon BLT to make a payment of \$2.1 million to the city, with \$100,000 of the sum designated as reimbursement for the city's expenses in evaluating BLT's request for city consent to the assignment of the BLT contract and \$2.0 million designated as "assignment consideration," given "in consideration for facilitating the expeditious approval of the City's consent to the assignment." The document goes on to provide that the \$2 million will be deposited in the Solid Waste Reserves Fund of the city for the sole purpose of stabilizing and mitigating future rate increase for residential solid waste customers associated with in-region waste disposal."

The staff report, the assignment agreement and a concurrently city media release all grossly mischaracterize the purpose and intent of the \$2 million payment by BLT to the city. BLT is not paying the city money to "expedite" the city's consent, but is doing so to secure a full and general release of the city's potential fraud claims against BLT. The parties to the assignment agreement, including the city, are cynically seeking to bury the truth of the real motivation and purpose of the \$2 million payment, passing it off as a high-minded contribution by BLT to the city to ease the suffering of city ratepayers. City officials responsible for preparing the document were participating in an obvious and cynical charade to hide the true nature of the settlement payment.

Perhaps the settlement payment was mischaracterized so as not draw the attention of the Ventura County D.A. to the controversy surrounding the conduct of BLT in its procurement of the amended services agreement.

B. \$2 million is an Inadequate Settlement of the City's Claims Against BLT

The \$2 million settlement payment to the city represents less than the amount that the city and ratepayers are being overcharged for trash disposal fees and are being underpaid for recyclables materials under the amended services agreement in a single

contract year. We estimate that the city is losing over \$2.5 annually under the terms of the amended services agreement. The settlement payment amounts to only 4% of the estimated \$50 million of total city's and ratepayers losses over the 20-year term of the BLT contract.

We urge the city to reject this inadequate settlement and to continue its investigation and ongoing evaluation of the city's legal claims against BLT for its misconduct.

IX. SUMMARY

We sincerely hope that Sacramento city officials and the Sacramento County Civil Grand Jury, as well as local media, will investigate and further examine the problems and serious issues that have plagued the City of Sacramento's administration of its waste disposal contract over the past 15 years, as identified in this Eye on Sacramento report. It is time for full accountability.

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