

Williamson County Public Policy Coalition (WCPPC)

To: Members of Williamson County Commissioners Court
From: WCPPC
Date: April 26, 2010
Subj: Master Site Plan for the Williamson County Landfill

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Background

On March 9, 2010, Williamson County Commissioners Court “accepted” a hypothetical “report” without approving or disapproving the Master Site Development Plan (MSDP) and Master Recycling Plan (MRP) from Waste Management of Texas (WMTX, or Contractor) submitted for the Williamson County Landfill. Submission of the plans at the end of the first contract year (which began on March 3, 2009) was a requirement of the Landfill Operating Agreement (LOA) approved by commissioners court on March 3, 2009.

Requirements for submission of the MSDP

The LOA contains this requirement for the MSDP in Section 2.16 (Page 21): “Within one (1) year of the Effective Date, Contractor (Waste Management of Texas) shall develop a Master Site Development Plan for the Landfill. Within (12) months of the date of County's approval of the Master Site Development Plan, Contractor shall begin implementation of the Master Site Development Plan for the Landfill in accordance with the agreed upon timelines set forth in the Plan.”

This statement makes it clear that the Contractor is to submit its full and complete plan for review by the county, not a partial or incomplete plan. In addition, there must be “timelines set forth in the Plan.”

Failure to meet requirements for submitting the MSDP

The plan as submitted contains no “timelines”. In addition, Steve Jacobs, the Contractor's representative, admitted in commissioners court on March 9 that the plan is incomplete. Jacobs stated:¹ “We have a lot of other information that may not have made it into the plan simply because it gets too complicated and too hard for me to write it.”

The MSDP cannot properly be evaluated by members of commissioners court or by citizens if it lacks completeness and the required timelines. The LOA

¹ Jacobs' statement was made at elapsed time marker 1:13:48 on the official audiodisc recording of the meeting provided by the county clerk.

makes no provision for submitting a partial or incomplete plan in meeting the specific provision of the LOA. If, as stated by Jacobs, the Contractor is incapable of submitting a complete plan because it “gets too complicated” and is “too hard” to write, then the Contractor obviously cannot perform on the contract. At the very least, such failure to perform is a contract default.

The LOA does not provide for the contractor submitting a partial plan, without timelines. It's more than clear that the LOA requires the Contractor to submit a complete plan, with timelines. By trying to submit an incomplete plan without timelines, the Contractor has failed to disclose its full and good-faith intentions for the long-term development of the landfill. According to the LOA, the Contractor has the obligation to set forth all of its proposals.

In order to comply with the LOA, the Contractor must submit a full and complete plan, with timelines, so that the county and the public can subject that body of work to review. Trying to hold a public forum or meeting with the public to assess an incomplete plan is an insult to the integrity of a forum, which the county has made a commitment to hold.

Failure to meet requirements for submitting the Master Recycling Plan (MRP)

Similarly, Section 4.9 (c) of the LOA requires development of a MRP within one year of the “effective date”, the deadline for which was March 3, 2010.² The LOA requires that the MRP “shall address, at a minimum” nine specific activities set forth in this section of the LOA along with “timelines within the Plan for implementation of those activities”

The MRP does not contain the required specificity and therefore presents the same kinds of problems found in the MSDP along with the same difficulties for taking up its content in a public forum.

The LOA makes no provision for receiving a “Report” in lieu of the two plans

The LOA is clear regarding the required minimum contents for these two plans which must be timely filed. The MSDP must contain “timelines”. The MRP must contain “timelines” as well as addressing nine specific activities. There is no provision within the LOA for the Contractor to file a “Report” in lieu of completed plans containing the above-noted, minimum requirements.

This problem was complicated substantially by the motion which was approved and the accompanying discussion regarding this matter, as per this transcript:³

Morrison: *Mr. President--*

2 As was the case with the MSDP, this deadline also was technically missed.

3 The following transcript begins at elapsed time marker 1:11:43 of the official audiodisc provided by the county clerk.

Birkman: *And Bubba's here too.*

Morrison: *I mean, I'm for, and I'm just going to go ahead and move to further accept the report but not accept the plan, uh, for discussion.*

Unidentified: *Second.*

Gattis: *That's on both plans?*

Birkman: *Twenty-six and twenty-seven.*

Morrison: *Yes.*

Gattis: *Yes. I have a motion from Mr. Morrison to accept the plans as to form, I guess--*

Morrison: *Accept the report.*

Gattis: *The report, and not necessarily adopting a formal plan at this time.*

Morrison: *Yes.*

Gattis: *But they are here on time, that's items 26 and 27.*

In addition to the LOA not allowing or prescribing a “report” as a substitute for the two filed plans in meeting the filing requirements, the plans themselves as filed are not captioned as a “report” or as two individual “reports”.

A further complication is created by the final Motion as found in the official Minutes for the March 9 meeting of commissioners court, as approved by commissioners court on March 16. The Motion reads:

*To accept Waste Management of Texas Inc and Williamson County LOA—
Master Site Development Report.*

No such document exists. If members of commissioners court believe, as they apparently do, that the Contractor filed only a “report”, then the Contractor is in default of the contract by not filing both of the required plans. And, in addition, even this mangled Motion as reflected in the approved Minutes doesn't address either a “report” or a “plan” regarding the MRP, which is a different, required document as distinguished from the MSDP. Even if considered to be a “report”, the MRP was not timely filed based on this Motion as approved and as found in the approved Minutes. And, in the *Attachments* to the Minutes regarding this Motion, the two files attached only pertain to the MSDP and not to the MRP.

Clearly, the MRP was not included in the Motion because the Motion doesn't mention it and the Attachments do not contain it.

As a further problem, based on statements made by Daigh and Gattis, it appears they believe that the requirements of the LOA regarding these filings are met only if they are timely filed, without any other requirements. Daigh characterized the plans “as meeting the contract requirement for submitting the plans—the plans were submitted on time.”⁴ In addition, Gattis stated: “But they are here on time—that's items 26 and 27.”⁵

It's more than obvious that the timely filing of both plans, not a “Report”, is not the *sole criterion* mandated by the LOA. The LOA mandates that the MSDP contain “timelines” and that the MRP contain “timelines” as well as the addressing of nine other issues. Based on the approved Motion in the approved Minutes, neither *plan* has been accepted, even conditionally (as distinguished from being approved). Only accepted was a “Report” which doesn't exist as a standalone document. And even if the “Report” is considered to cover the MSDP, it doesn't cover the MRP, because the Motion doesn't reference it and the *Attachments* don't contain it. One wonders why county staff didn't detect this substantive error before the Minutes were approved, and one wonders why members of commissioners court didn't correct the substantive error before approving the Minutes for March 9 on March 16—assuming it was a substantive error and not the intention of commissioners court to do exactly what was done.

Backchannel secrecy involved in discussing the plan

It is clear that the intent of the LOA is for the Contractor to take its best shot at submitting both plans as a matter of its own initiative and its responsibility under the contract. However, it also is clear from the discussion at commissioners court on March 9 that representatives of commissioners court participated with the Contractor in working on the plan in a secret, non-public process prior to its release.

County Judge Dan Gattis stated: “I want to commend ya'll, and commissioners, for the plan you've come up with.”⁶

While Gattis didn't say which commissioners collaborated secretly with the Contractor to “come up with” the incomplete plans, it is clear he is referring to members of Commissioners Court. However, Commissioner Lisa Birkman shed more light on the secret collaboration when she said, “I want to thank Commissioner Morrison for working on this.”⁷

4 The statement was made at elapsed time marker 1:11:25 of the official audiodisc.

5 See footnote No. 3.

6 Audiodisc elapsed time 1:13:02.

7 Audiodisc elapsed time 1:16:19.

Gattis also admitted that he had an advance look at the plan before its official release: “I’ve spent last week looking at it quite a bit, and I’m, I’m, I feel pretty good. I think there’s some really good ideas there.”⁸

Whatever was involved in the give-and-take of those discussions and advance looks at the plan, those details have not been released to the public. In addition, there also apparently has been private discussion between Commissioner Morrison and representatives of the City of Hutto regarding the financial details involved in restoring the historic Almquist-Johnson house at the landfill. Morrison stated, “Also, the City of Hutto has indicated an interest in participating as well.”⁹

In order for the public to participate in a forum on these important matters, it is mandatory for the full details of these discussions to be made public prior to any such forum. For example, evaluating the scope of the house’s renovation obviously involves cost. Even if finality hasn’t been determined, full disclosure of the available details must be made for a proper discussion to occur.

Therefore, in addition to the Contractor filing incomplete plans which do not meet the LOA’s requirements, it also is clear that the Contractor did not file the plans wholly on its own initiative, a premise of the contract, but held secret discussions with a member of members of commissioners in constructing the plans which were filed.

Proposals involving financial aspects of the plan are absent

The premise within which the MSDP and the MRP will be implemented is driven by financial resources and financial constraints. The LOA does not specify the extent to which the MSDP would rely for funding on the Master Site Plan Development Fund (MSPDF). There are no projections regarding what funds might be available or what their sources might be. A statement by Morrison on March 9 indicated that there are unresolved issues. With regard to the prospective renovation of the Almquist-Johnson house, Morrison said he wants to “see if Waste (Management) would be interested in participating”¹⁰

Neither the public nor commissioners court can be expected to fully evaluate the scope of the MSDP in the absence of greater clarity referable to finances. For that reason, it is mandatory for the Contractor to file its complete plan (including such financial details), as required by the LOA in order for an enlightened dialogue to take place at the public forum.

As the Contractor for the landfill, WMTX has an obligation to implement a plan as accepted by commissioners court. WMTX incurs expenses from its

8 Audiodisc elapsed time 1:13:05.

9 Audiodisc elapsed time 1:15ff.

10 Ibid.

management of the landfill, an enterprise from which it receives some 87 percent of the revenues collected at the landfill. Clearly, implementation of a MSDP approvable by the county should meet proper environmental, land use and public policy criteria which are beneficial to the county, communities within the county, and especially communities and residents proximate to the landfill. Commissioners court should not approve an inferior plan. The scope of a plan which is approvable should not be constrained by only using the MSPDF if the MSPDF is inadequate for implementation of an approvable plan. In the end, however, no judgment by the public nor commissioners court can be made about the viability of a plan in the absence of the financial analysis, which is yet another reason why the Contractor should file a plan which is complete in all details, including financial details, before it can be discussed fully by commissioners court and the public.

Other issues which should be resolved

At the meeting of commissioners court on March 9, Bob Daigh, the county's senior infrastructure director, stated, with regard to the landfill and its development, "There are certain features which are fixed."¹¹

It is not known whether members of commissioners court agree with Daigh's statement, and the public cannot possibly evaluate the statement's accuracy without a complete description of those "features which are fixed." The features should be fully identified and described, if not within a complete and not partial plan filed by the Contractor, then by Daigh himself, inasmuch as he made the statement.

On April 20, in a sidebar conversation at commissioners court, Daigh told Kurt Johnson that the public landfill forum or meeting would be announced and/or occur "in a couple of weeks." When asked by Johnson who would run the forum, Daigh said that he didn't know.

A "waiver" for filing the required plans was the county's only remedy

By the county's acceptance of a "report" (note the singular—not plural) which didn't and doesn't exist, coupled with the failure of both plans to meet the requirements of the LOA, it is clear that the Contractor had worked out a closed-door deal with staff and commissioners court to file plans which did not meet the LOA's requirements but which the county would nonetheless accept. It would have been a risky business strategy for the Contractor to file the incomplete and non-LOA-compliant plans in the absence of some prior arrangement, because otherwise there would have been no guarantee that the county would even accept them as timely filed, in the absence of a back-room understanding of what was to happen. But, as it turned out, there was no risk to the Contractor because of the prior arrangement. At least, that's what the parties apparently presumed.

¹¹ Audiodisc elapsed time 1:11:14

As a remedy for the Contractor not meeting the requirements of the LOA, the county could have issued a “waiver” (though the Contractor didn't request it) for the filing of adequate plans, but taking that step would have serious consequences. It would mean that the contract would have aged almost 14 months from onset and would be almost two months beyond the submittal of plans which comport with the LOA. And it would mean that commissioners court would appear derelict in its management of the landfill. Nonetheless, the matter is a moot point now inasmuch as the deadline for an adequate filing is past.

Summary of key issues

Among the key issues are:

Adequate notice and forum format—The public should have adequate notice regarding the date for the forum together with a full description of the format and its agenda, including who will run the meeting. Unquestionably, the format should be dialogical in nature, including the opportunity for a Q&A exchange with elected members of commissioners court. In response to an e-mail inquiry from Kurt Johnson about the forum, on April 12, Connie Watson, Williamson County PIO, stated:

We are still setting the date and location and working on materials for an open house. I will be sending out a press release when we have all of that information ready and it will be posted on the website.

In the discussion regarding the future public forum which took place at the March 9 meeting of commissioners court, no mention was made of converting the forum to an “open house” which, based on past experience with open houses involving roads, consist of placing a limited number of displays on easels for the public to walk past and review. That format is not a forum.

Consideration of complete and not partial plans—The two plans filed by the Contractor are obviously incomplete and, by the Contractor's own admission, the MSDP has additional content and complexity which have not been disclosed. Full details of both plans should be filed with the county by the Contractor sufficiently in advance of the scheduled forum so that the public has adequate time to review the new material. Watson's reference to “working on materials for an open house” suggests that materials other than those officially filed by the Contractor will be proposed as supplements to the plans (without the opportunity for public review prior to the forum) and which are not necessarily backed by any commitments by the Contractor for implementation. The initial step in a forum should be for members of commissioners court to dialogue with the public regarding the contents of official plans which have been filed by the Contractor, a step which has not yet occurred as of the date of this memo.

The county's responsibility in processing the plans—Members of

commissioners court have a responsibility to go on record regarding their detailed views of the shortcomings within the plans. In dealing with the contents of both plans, members of the public are left in the dark in the absence of knowing the county's detailed response to both plans and the the county's views regarding the plans' inadequacies. Clearly, members of commissioners have a responsibility to explain to the public their responses to these filings so that the public knows where the county stands and what the beginning for discussion really is.

The county's responsibility in the public discussion of the plans—The dialogue regarding the landfill site development plan the and recycling plan should be between the public and members of commissioners court, not the public and the Contractor. The county is the owner, permit holder, and site operator for the landfill. The Contractor is merely the contractor with the responsibility (per the LOA) for filing all of their proposals for both of these plans prior to the open discussion between the public and members of commissioners court. Members of commissioners court hold the ultimate responsibility for the content, approval and implementation of these plans. The focus of the process should not be a “negotiation” between the public and the Contractor but rather an honest dialogue between the public and members of commissioners court about the contents of the complete plans which have been filed and which meet the requirements of the LOA. March 3, 2010 was the first anniversary date for the approval of the LOA. Prior to that point, it was the Contractor's responsibility to file two plans setting forth its commitments and intentions. Once the county and the public know what those commitments and intentions are, then the county and the public can have a dialogue regarding how the Contractor must change those intentions and commitments in order to have the plan approved. Under the rather brief and vague representations for how the county's discussion with the public will be handled, there is a clear opening for the Contractor to add new proposals which lack real commitment and which are speculative in nature. Before the Contractor submits any additional vague or speculative proposals, it should be held accountable to its obligation to file comprehensive plans without the ability to pull its punches on details within a future negotiation.

Conclusion

Members of the WCPPC and other members of the public look forward to the full public discussion to which members of commissioners court have made a commitment regarding these matters.