

Date June 9, 2008

Page 1

ACCEPTING REPORT OF HEARING OFFICER ON APPEAL OF EVALUATION AND  
SELECTION COMMITTEE RECOMMENDATION FOR RFP FOR  
SINGLE-STREAM RECYCLABLES PROCESSING, REJECTING ALL PROPOSALS AND  
DIRECTING THE CITY MANAGER TO EXAMINE AND RECOMMEND A NEW  
COMPETITIVE PROCESS FOR  
SINGLE- STREAM RECYCLABLES PROCESSING

WHEREAS, the Public Works Department provides a number of services, including the curbside collection and processing of recyclable materials; and

WHEREAS, on February 25, 2008, by Roll Call No. 08-317, the City Council authorized the issuance of a Request for Proposals (RFP) for an exclusive recycler to receive, process, and market single-stream recyclable materials collected by the Public Works Department; and

WHEREAS, three proposals were received and the RFP Evaluation and Selection Committee has reviewed and evaluated the proposals submitted and has recommended that the proposal from MidAmerica Recycling, Inc. (Michael Barry, President, 2742 E. Market St., Des Moines, Iowa) be accepted; and

WHEREAS, an appeal of the Evaluation and Selection Committee's recommendation was filed by a proposer who was not recommended, Recycling, Inc.; and

WHEREAS, the Deputy City Manager reviewed such appeal, a hearing was held on the appeal on May 12, 2008, and a report has been made overruling the objections of the appealing proposer, pursuant to the RFP appeal process under Section 2-756 of the Procurement Ordinance and the provisions of the RFP; and

WHEREAS, the Des Moines Metropolitan Waste Authority ("MWA") at its May 21, 2008 meeting approved the issuance of an RFP for single-stream recycling collection; and

WHEREAS, the City Manager's Office review of the RFP Evaluation and Selection Committee process determined that the best interests of the City would be served if all of the proposals were rejected and the RFP process were begun anew, or an alternative competitive process were utilized.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Des Moines, Iowa that the City Council hereby affirms the report of the Deputy City Manager overruling the objections of Recycling, Inc.

BE IT FURTHER RESOLVED that all proposals are rejected and the City Manager is directed to examine alternative competitive processes to solicit a provider for single-stream recyclables processing via automation, with the intent of producing a revenue to the City, including the possibility of a joint RFP with the MWA, and to provide a recommended course of action to the City Council for approval.

★Roll Call Number

Agenda Item Number

78

Date June 9, 2008

: Page 2

(Council Communication No. 08-346)

Moved by \_\_\_\_\_ to adopt.

Approved As To Form:

*Ann DiDonato*

Ann DiDonato  
Assistant City Attorney

COUNCIL ACTION	YEAS	NAYS	PASS	ABSENT
COWNIE				
COLEMAN				
HENSLEY				
MAHAFFEY				
KIERNAN				
MEYER				
VLASSIS				
TOTAL				
MOTION CARRIED		APPROVED		

CERTIFICATE

I, DIANE RAUH, City Clerk of said City hereby certify that at a meeting of the City Council of said City of Des Moines, held on the above date, among other proceedings the above was adopted.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal the day and year first above written.

\_\_\_\_\_  
Mayor

\_\_\_\_\_  
City Clerk

May 22, 2008

**Report to City Council Re: Administrative Hearing on Appeal of Recycling, Inc. from Evaluation and Selection Committee Recommendation as to Selection of Best Proposal for Request for Proposals for Single-Stream Residential Recycling Processing Services (No. V08-069)**

Recycling, Inc., 201 SE 6<sup>th</sup> Street, Des Moines, Iowa, 50309, filed a written appeal, dated April 30, 2008 and timely received by the Procurement Administrator on May 2, 2008, to the Notice of Intent to Award issued by the Procurement administrator informing the proposers of the Evaluation and Selection Committee's ("Committee") recommendation to be made to the City Council to award the single-stream contract to MidAmerica Recycling. In response to this appeal, a notice of hearing was sent to all three proposers and to the Committee members. Deputy City Manager Merrill Stanley was selected by the City Manager to be the hearing officer. The hearing was held on May 12, 2008 at 11:30 am in the City Council Chambers.

This appeal is guided primarily by two sections of the Procurement Ordinance, which are included as sections 13 and 14 in the Standard Provisions and Requirements section of the RFP:

**Sec. 2-755. Evaluation and selection committee; procedure for evaluation and recommendation as to selection of best proposal; submission of recommendation to city council.**

(a) Competing proposals submitted in response to an RFP shall be evaluated by an evaluation and selection committee appointed by the director of the department sponsoring the RFP. The evaluation and selection committee shall evaluate the competing proposals and make a recommendation regarding the best proposal. In conducting the evaluation, the committee shall utilize the evaluation criteria and scoring methodology set forth in the RFP.

(b) Upon completing its evaluation of competing proposals, the committee shall make a written report of its determination and recommendation as to the selection of the best proposal. The report shall be filed with the department director and procurement administrator. The procurement administrator shall send the report and notice of intent to award to all competing proposers by ordinary mail, FAX or e-mail at the address, telephone number or e-mail address shown in their proposals not less than five (5) days prior to the appeal deadline set forth in the notice of intent to award.

(c) It shall be the responsibility of the procurement administrator to determine if all RFP requirements have been met and if all required submittals have been made by proposers, and to thereafter submit the recommendation of the evaluation and selection committee and the roll call approving the recommended proposal to the city council for approval.

**Sec. 2-756. Appeal of evaluation and selection committee recommendation; proposer objections to be submitted in writing; hearing by city manager or hearing officer; resolution of proposer objections; city council consideration of appeal report and of the appealing proposer's objections.**

(a) Opportunity for proposers to appeal evaluation and selection committee recommendation as to selection of best proposal; required submission in support of objection.

A proposer who is aggrieved by the evaluation and selection committee's determination and recommendation as set forth in the committee's report, may appeal such determination and recommendation by filing a written objection thereto with the procurement administrator by the appeal deadline set forth in the notice of intent to award. Such objections may be filed in person or by mail, FAX or e-mail. **In its written objection, the appealing proposer shall set forth all of its objections to the committee's recommendation and all arguments in support thereof, and shall attach thereto all documentation supporting its objections which it intends to rely on in making its appeal.** The appealing proposer may request a hearing on its appeal, but the determination whether to hold a hearing or to determine the appeal on the basis of the record made in the written objection shall be discretionary with the city manager. If the appeal is timely filed, the procurement administrator shall forward the proposer's written objection and all supporting documentation to the city manager.

(b) **Appeal heard by city manager or hearing officer.**

Upon receipt of the proposer's written object, the city manager shall determine if the appeal will be determined by the city manager or if it will be determined by a hearing officer selected by the city manager. The city manager may set for hearing at the same time, date, and place the objections of two or more proposers. All proposers shall be notified of the date, time and place of hearing. The hearing shall be held pursuant to procedures set forth in the RFP or established by the city manager. The award of a contract shall be deferred pending the outcome of the appeal.

(c) **Report of city manager or hearing officer to city council and to appealing proposer.**

Upon completing the review of the appealing proposer's written objection, or upon the conclusion of the hearing, the city manager or the designated hearing officer shall make a written appeal report setting forth the determination of the appeal. All objections made by the appealing proposer shall either be affirmed or overruled. The appeal report shall immediately be forwarded to the appealing proposer.

If an appealing proposer's objection is affirmed, the city manager or hearing officer shall reject the recommendation of the evaluation and selection committee, and shall direct the committee to reconvene to reevaluate the proposals submitted in response to the RFP. In conducting its reevaluation, the committee shall consider all objections affirmed by the city manager or hearing officer. Upon completing its reevaluation, the committee shall make a written report of its determination and recommendation as to the selection of the best proposal, and shall file the report with the city manager and mail same to competing proposers. Such determination and recommendation shall be final as to all proposers.

If the appealing proposer's objection is overruled, the appeal report shall be forwarded to the city council, and the appealing proposer and all competing proposers shall be given written notification of the date of the council meeting at which said report and the recommendation of the evaluation and selection committee will be considered by the city council.

(d) **City council's consideration of city manager's or hearing officer's report; city council's consideration of the appealing proposer's objections.**

When the city manager's or hearing officer's report comes before the city council for consideration, the city council may affirm or overrule the findings and determination of the city manager or hearing officer as set forth in said report. The city council may, in its discretion, hear presentations by the appealing proposer and by competing proposers with respect to the appealing proposer's objections, and with respect to the findings and determination of the city manager or hearing officer.

If the city council votes to affirm the report of the city manager or hearing officer, it shall then take up and consider the recommendation of the evaluation and selection committee. If the city council votes to overrule the report of the city manager or hearing officer, the

recommendation of the evaluation and selection committee shall be considered rejected, and the city council may direct the evaluation and selection committee shall reconvene to reevaluate the proposals submitted in response to the RFP, or the city council may award the contract as it determines appropriate. The city council's decision shall be considered final.

#### Background Facts

On February 28, 2008, the City of Des Moines Procurement Division issued an RFP for Single-Stream Residential Recycling Processing Services (No. V08-069) ("the RFP"). The deadline for proposal submission was March 31, 2008. Three proposals were received: From Recycling, Inc., MidAmerica Recycling, and Weyerhaeuser. The RFP evaluation criteria are as follows:

A. Revenue payable to the City for Recyclable materials (50) points.

B. Operational Plan (25) points

- Quality and effectiveness of processing technology and equipment used to sort incoming material, increase quantity of marketable products and reduce the amount of residuals
- Capacity of proposed facility to process recycling tonnage based on volume and square footage
- Staffing Plan for proposed facility
- Accessibility and convenience of proposed facility's location
- Adequate entrances, exits and unloading area (height and width) to ensure timely and efficient unloading of delivery of recyclable materials
- Hours of operation and ability to meet the City's holiday and overtime schedules

C. Proposer's background and capability to provide the services requested (25) points

- Project personnel, including professional qualifications, and length of time working in Proposer's capacity
- Relevant experience of Proposer, minimum two (2) years' municipal experience required
- Resources available to support this project, including total number of employees, number and location of offices, number and types of equipment available
- Experience in revenue Sharing
- References

D. Local Preference (1 point)

On April 29, 2008, the Procurement Administrator sent a notice to all proposers that the Committee had selected the proposal of MidAmerica Recycling and would make this recommendation to the City Council at the May 5 Council meeting. The proposers also received the Committee's recommendation, or scoring summary sheet. The Committee's scoring sheet indicated that MidAmerica Recycling had received a total of 92 points, including 1 point for local preference and that Recycling, Inc. received a total of 62 points, including one point for local preference.

#### Recycling Inc.'s Grounds for Appeal

Recycling, Inc.'s written appeal asserts bias on the part of Public Works staff members Greg Cloe and Albert Aguilar by their alleged unwillingness to accept a printed version of Recycling, Inc.'s

Power Point containing information concerning their Operational Plan and Background/Capability of their processing facility presented by Recycling, Inc. at the April 22, 2008 interview stage of the RFP evaluation process. This Power Point document was also attached to their written appeal ("Power Point"). Recycling, Inc. also alleges bias on the part of the Committee in "outwardly dismissing" the Power Point because of the "abnormally low" score given by the Committee in the areas of Operational Plan and Background/Capability. Recycling, Inc. argues that the Committee "outwardly dismissed" the information in the Power Point document regarding the Operational Plan and Background/Capability categories in their evaluation process.

During the hearing, Recycling, Inc. enlarged its arguments of bias to include anything "extraneous" to the RFP and proposal documents that was considered by the Committee members.

Recycling, Inc. also alleges in its appeal error on the part of the Committee for awarding one point for local preference by alleging that MidAmerica Recycling is wholly owned by Greenstar North America, whose parent company is NTR. NTR is a European company. The basis for this allegation was a quote from the Greenstar North America website which indicated that MidAmerica Recycling was acquired by Greenstar North America in October 2007.

#### Hearing

The record in the hearing consisted of the RFP, including Addendum No. 1, the three proposals, the Committee's Final Report and Recommendation and individual member scoring sheet, Recycling, Inc.'s April 30, 2008 written appeal, the City's Procurement Ordinance, sections 2-700 through 2-762 of the City of Des Moines Municipal Code.

The following persons were present at the hearing: Anthony Colosimo, Robert Colosimo, Attorney Janet Huston, representing Recycling, Inc, Committee members Greg Cloe, Albert Aguilar, Mel Pins, and Roger Thompson, Michael Barry and Brian Meng from MidAmerica Recycling, Procurement Administrator Mike Valen, Public Works Director William Stowe, Deputy Public Works Director Pat Kozitza, and Assistant City Attorney Ann DiDonato. The fifth Committee member, Greg Dworek, Metro Waste Authority, was not present.

#### **PRELIMINARY PROCEDURAL ISSUES**

Attorneys Janet Huston and J. Marc Ward, on behalf of Recycling, Inc., sent a letter dated May 8, 2008, to the hearing officer bringing a motion to exclude representatives of Recycling, Inc.'s competitors from the hearing, except for periods during which they would be testifying, in order to protect Recycling, Inc. trade secrets. This motion was taken up prior to the start of the hearing. Recycling, Inc.'s attorney modified the motion to request that only Recycling, Inc. and City employees be allowed to be present during opening and closing statements by Recycling, Inc. representatives and on questioning by the Hearing Officer.

#### Decision

All persons in attendance during the hearing, except for City employees and Recycling, Inc. representatives, were removed from the Council Chambers during any statements or testimony from Recycling, Inc. which Recycling, Inc. identified as including trade secrets.

Recycling, Inc. also raised an objection to their appeal being provided to the other two proposers with the notice of appeal. This was argued to be contrary to the Procurement Division's usual procedure that proposals are not normally released until the Evaluation and Selection Committee has issued its recommendation.

### Decision

A major component of Recycling, Inc.'s appeal was the Power Point, which was included with their letter of appeal and had also been given to the City Council at a public Council workshop on April 28, 2008. Nothing in Recycling Inc.'s proposal, their appeal, or the Power Point was marked or designated as "confidential" or as a trade secret at the time that it was provided to the City so there is no reasonable basis on which to find that the Power Point is a trade secret or should not have been treated as a public record after its receipt by the City. I note that Recycling, Inc. requested copies of the other two proposer's proposals on the morning of the hearing and this was provided to them as a public records request. Section 2-756(b) of the Municipal Code requires that all proposers be notified of the hearing. No error was found in providing the content of Recycling, Inc.'s appeal to the other proposers.

## **HEARING**

### Hearing Format

Recycling, Inc. and the Committee were each given 15 minutes to make opening and closing statements. The Hearing Officer questioned Recycling, Inc.'s representative, Anthony Colosimo, the four present Committee members, the Procurement Administrator, and Michael Barry from MidAmerica Recycling. All persons who testified were sworn in prior to questioning by the Hearing Officer. Recycling, Inc. was given the opportunity to ask questions directed to all who testified and did direct questions to the Committee members and Procurement Administrator.

Recycling, Inc. was given ample opportunity to be heard on their appeal and much latitude in designating what they deemed to be "trade secret" information. At their request, the hearing attendees who were not City employees were removed during those portions of the hearing in which Recycling, Inc. provided testimony or statements that it designated as covering trade secret information.

### Opening Statements

Anthony Colosimo identified himself as the vice president of Recycling, Inc. He stated that the RFP was predicated on City of Des Moines tonnage only and the Committee should not have considered Metro Waste Authority ("MWA") tonnage. He questioned whether the Committee understood everything given to them in the RFP process and stated that some of the Committee members "needed more knowledge" of the recycling process and that not all of Recycling, Inc.'s information was considered by the Committee. He pointed out a sentence on page seven of MidAmerica Recycling's proposal that said that the prices quoted were not valid if the MWA tonnage were not included. (The sentence in MidAmerica Recycling's proposal reads "our bid is not valid and will be void if the MWA does not participate and become a part of this contract.")

Greg Cloe stated that he was the chair of the Committee, which had 5 members, and that an April 22, 2008 interview was conducted of all three proposers. He indicated that the Committee's scoring of the proposals was done individually and then the scores were combined. Scoring was based on the criteria laid out in the RFP.

### Bias

Upon questioning by the Hearing Officer, Mr. Anthony Colosimo indicated that he knew all but Committee member Roger Thompson "a little bit" and that he knew Mr. Cloe and Mr. Aguilar through their employment in Public Works. He testified that he did not have any other business dealings, personal or social interaction with any Committee members or their family members, or was involved in

a legal or other dispute with any Committee members. He acknowledged that MidAmerica Recycling has a current contract with the City for recycling services but he was not aware of any personal or social or business connection between the Committee members or MidAmerica Recycling. He alleged bias against the Public Works members of the Committee on the basis that an affiliated company, Artistic Waste, had worked to privatize the solid waste collection system, resulting in bias against Recycling, Inc. by Public Works Director Stowe also, which was the basis for their abnormally low scoring of their proposal. Mr. Colosimo also alleged that Mr. Stowe endorses the Teamsters and the Teamsters have "harassed" Recycling, Inc. because they are a non-union operation. Mr. Colosimo also stated that the members of the Committee said that they were biased against their other companies. He was not able to indicate who had said this or exactly what was said.

He testified that the Power Point presented at the interview stage was missing in the evaluation of their Operation Plan and Background/Capability as shown by the disparity in the scores. Recycling, Inc. also presented evidence it deemed to be a trade secret regarding their operation resources and processes which they felt was not taken into account by the Committee. This information appeared to be almost wholly contained in the Power Point.

Mr. Colosimo and attorney Huston argued that the conditional statement on page 7 of the MidAmerica Recycling proposal, which they stated that they were not aware of until the morning of the hearing, when they made a public records request of the other two proposals and received copies of those proposals, also showed bias since the Committee gave MidAmerica Recycling the highest score in spite of this condition.

Mr. Colosimo acknowledged that Committee member Greg Dworek, from the MWA, had "great knowledge of the topic of the single-stream industry". Mr. Colosimo alleged bias on the part of Mr. Cloe and Mr. Aguilar due to their "lack of knowledge" of the single-stream recycling subject matter. He further testified that Mr. Thompson's alleged zero points given to Recycling, Inc for their location shows lack of knowledge.

Mr. Cloe and Mr. Aguilar testified that they had no business or professional relationship with Recycling, Inc or MidAmerica Recycling, nor did they or any of their family members have a financial interest in the selection of the proposer, with recycling, Inc or with MidAmerica Recycling. They both testified that they had no interests that could be substantially affected by the outcome of the selection process. They both testified that they had no personal or personal business dealings with any of the proposers or a personal relationship with the proposer's families, had never bought or sold anything to the proposers, had not been involved in litigation or any other type of dispute with any of the proposers and did not socialize or go to church with any of the proposers. Recycling, Inc. stipulated that no members of the Committee had a personal, business, social, or financial interest in any of the proposers and was not involved in any dispute with Recycling, Inc.

All four Committee members testified that they were not biased towards any proposer and that their decisions were based on the RFP criteria and the information that they had from the proposals.

Mel Pins testified that he is an employee of Iowa Department of Natural resources and has worked in recycling and waste management with a "fairly extensive knowledge of recycling" including touring recycling facilities throughout the Midwest.

Mr. Cloe and Mr. Aguilar, as well as Mr. Thompson and Mr. Pins, testified that they received and accepted the Power Point from Recycling, Inc at the April 28 interview. All four indicated that they considered this information in their review of their proposal, although Mr. Pins indicated that he used it only for clarification purposes since this information should have been provided with the proposal.

Mr. Thompson testified that he chaired the recycling program at Tone Brothers, was a neighborhood activist, and active in recycling at his home and in his neighborhood.



Mr. Cloe and Mr. Aguilar testified that they had never stated that they were biased against Artistic Waste or any of their affiliated companies.

All Committee members testified that they were not members of a union. Mr. Cloe and Mr. Aguilar testified that they supervise union employees.

Mr. Cloe testified that the condition of the MidAmerica Recycling proposal was discussed at the April 22 interview with them but not resolved. He believed that MWA would "be on board" by contract time or it would be worked out based at least in part on his knowledge of an April 28, 2008 letter of intent from the MWA to Mr. Stowe indicating that they intended to do single-stream recycling. His scoring was based on the RFP criteria. This conditional statement had "very little impact" on his scoring, as MidAmerica Recycling was "very high" in the other categories – experience and capability to perform. Mr. Aguilar testified that this conditional pricing had very little impact on his scoring, he followed the RFP criteria. Mr. Pins testified that he scored, based on the RFP criteria, that the condition of MidAmerica Recycling's proposal had no impact on his scoring, thinking it to be a contract negotiation matter. Mr. Thompson testified that he felt the City Council could work out this issue and he was certain that the MWA would "go along" with single-stream recycling and it did not affect his scoring at all.

Mr. Valen testified that he was not consulted about accepting the Power Point information by Recycling, Inc. at the interview stage, but that if he had been he would have advised them not to consider it, as Operational Plan information was a required part of the proposal and anything after the proposal deadline should not be considered and should be scored as "zero". Later information for clarification purposes is allowable by the Committee to get a fuller understanding of the proposal.

#### Local Preference

Michael Barry testified that he is a MidAmerica Recycling vice president and that the building at 4205 SE 2<sup>nd</sup> Street, Des Moines, Iowa was the corporate headquarters for MidAmerica Recycling. He stated that MidAmerica Recycling is a subsidiary of GreenStar, which is a subsidiary of NTR, but that MidAmerica Recycling is a separate corporate entity employing about 500 employees and that the management, financial, human resources and administrative functions were all at this address. He stated that MidAmerica Recycling had facilities in Nebraska, Oklahoma, Michigan, the Dakotas and Texas and that this Des Moines office was the headquarters for all of these other facilities.

Procurement Administrator Mike Valen testified that he was consulted on the local preference scoring and recommended to the Committee to give MidAmerica Recycling the one point. He based this on a review of their website which showed only one location for MidAmerica Recycling.

#### Closing Statements

Recycling, Inc. argued that bias was shown by the fact that the Procurement Administrator advised the Committee regarding whether MidAmerica Recycling should be given the local preference point, that some of the Committee members "making their own rules" about what to consider in scoring the proposals, that the Committee members gave varying weight to the Power Point, and the Committee did not discount the conditional nature of MidAmerica Recycling's proposal condition, and considered information relating to a letter from MWA to Mr. Stowe, and that the Public Works Committee members worked with unionized City employees.

### Findings and Decision on Bias

In determining this appeal, it must first be decided what are the "objections" and "arguments in support thereof" which may be considered in this appeal. Section 2-756(a) of the Municipal Code provides in relevant part that:

In its written objection, the appealing proposer shall set forth **all of its objections** to the committee's recommendation **and all arguments in support thereof**, and shall attach thereto all documentation supporting its objections which it intends to rely on in making its appeal.

Based on this standard, I find that Recycling, Inc. is limited in its objection of bias to the arguments presented in its written appeal, that bias was shown by the Committee's failure to evaluate and give enough weight to the information presented in the Power Point, as shown by the low scores received by Recycling, Inc. in the RFP evaluation categories of Operational Plan and Background/Capability. The other "arguments in support thereof" presented by Recycling, Inc. during the hearing were not presented as part of their written appeal and do not need to be considered on this appeal.

Recycling, Inc. has the burden of proving its objections by a preponderance of the evidence. Upon review of the written appeal materials, the written record, and hearing evidence including the testimony and arguments presented at the hearing, I hereby overrule the appellant's objection regarding bias.

The determination of bias goes to whether the Committee members can consider all of the proposals impartially and without prejudice, being fair and with an open mind. Bias is traditionally found on the basis of a financial or personal relationship or interest which causes an impartiality. Mere allegations of bias are not enough. Recycling, Inc. had the burden of establishing that the Committee members' views prevented or substantially impaired their performance of their duties to review and evaluate the proposals using the RFP criteria. I find that the preponderance of evidence indicated that allegations of bias involved in the decision of the Evaluation and Selection Committee were not substantiated. I find on the record that Recycling, Inc. has not met their burden of proof that the Committee members were impartial in their consideration of the proposals and in applying the RFP criteria. All Committee members testified that they applied the RFP criteria and had no bias towards Recycling, Inc. While the Committee's application of the criteria may not have been perfect, Recycling, Inc. did not meet its burden of proof of showing bias. The record shows no proof of specific facts that show prejudice against Recycling, Inc. by the Committee members or connection with Recycling, Inc. or MidAmerica Recycling.

After lengthy questioning of three Committee members, Greg Cloe, Albert Aguilar and Mel Pins, Recycling, Inc. stipulated that no members of the Committee had a personal, business, social, or financial interest in any of the proposers and was not involved in any dispute with Recycling, Inc.

Recycling, Inc.'s proposal contained scant information related to the RFP evaluation categories of Operational Plan and Background Capability. Their attempt to provide this information at the interview stage was past the RFP deadline. The RFP clearly states this information was due at the time of proposal submittal, March 31, 2008. The fact that the subsequent information was considered by most members of the Committee, including Greg Cloe and Albert Aguilar, argues against bias and, in fact, provided Recycling, Inc. with an unfair advantage over the other proposers. One Committee member, Mel Pins, according to his testimony, treated the supplemental information properly, by considering only the portions that clarified information included in the initial proposal. The Recycling, Inc. proposal contains no substantive information relating to their Operational Plan, particularly in

relation to the much more detailed plans submitted by the other two proposers. I find it reasonable for the Committee members to have scored Recycling, Inc.'s proposal lower than the other two proposers in this category, particularly in light of the much more detailed plans submitted by the other proposers, even if the Power Point information is included in the review and evaluation of the Recycling, Inc. proposal.

Recycling, Inc. questioned the abilities of individual Committee members to make an unbiased decision because they lacked the knowledge and understanding of recycling, and so were unable to base their decision on facts and sound judgment. Based on the testimonies of individual Committee members, I find this claim to be unfounded. Four of the five members have extensive experience in recycling in their professions.

Even though Dave Dworek did not attend the hearing, the Appellant noted his knowledge of the single-stream recycling industry. I noted that in the individual scoring, Mr. Dworek scored MidAmerica Recycling higher than Recycling, Inc.

#### Additional Arguments Presented At Hearing

Although I have determined that the additional "arguments in support" of Recycling, Inc.'s allegations of bias presented during the hearing should not properly be considered as part of their appeal, I will address those additional arguments and find that they also do not support a finding of bias.

Recycling, Inc. alleged that the Committee members were biased against them because their company is non-union and the Committee members belong to unions, later changing their claim to their supervision of union employees. I find this claim to be unfounded, since no evidence was presented that the Committee members had a bias for or against unions. The allegation as to Mr. Stowe's predilection for unions is not relevant because he was not a Committee member and there is no showing that he acted to influence Committee members in their decision. In addition, I note that the actions of Mr. Stowe at the April 28 Council workshop, which Mr. Colosimo stated was evidence of his claim of a pro-union stance by Mr. Stowe, occurred after the Committee had made its decision. There is nothing in the record establishing that Recycling, Inc. met its burden of proof that the Committee preferred a service provider with union employees over a non-union provider.

Recycling, Inc. argued that the fact that the Committee gave MidAmerica Recycling's proposal the highest score in spite of the page 7 condition included in their proposal ("our bid is not valid and will be void if the MWA does not participate and become a part of this contract") shows that the Committee members were biased. Testimony of the Committee members indicated that they believed the condition to be a minor issue that could be resolved during contract negotiations. I note that Recycling, Inc. could have requested a copy of the MidAmerica Recycling proposal before the appeal deadline and no request was made. Recycling, Inc. did not establish that bias by the Committee was the reason that the Committee chose to leave this issue to resolution by the City Council or for the contract negotiation stage.

Related to the preceding argument, Recycling, Inc. argued that the Committee showed bias by taking into account information from a letter to the Public Works Director from the MWA apparently indicating a desire to participate in single-stream recycling. This letter was not entered into evidence by Recycling, Inc. but I note that it is a public record. I do not find that it is a matter of bias if Committee members considered matters of public record in their evaluation of an RFP. Accepting Recycling, Inc.'s argument that nothing outside of the proposals could be considered could lead to absurd results if an evaluation and selection committee would be unable to exclude consideration of a proposer who files for bankruptcy or whose facilities are destroyed by fire after the proposals are submitted, for instance. If this argument were accepted, Recycling, Inc.'s own argument that its Power Point was relevant

information that merited consideration by the Committee could not be accepted by the Committee because it was offered past the RFP proposal deadline.

No explanation was given as to why this alleged "trade secret" information, presumably part of the Power Point, was not designated as confidential at the time it was provided to the Committee during the April 22 interview and April 28 City Council workshop.

#### **Findings and Determination of Local Preference**

The determination of eligibility is guided by sections 2-705 and 2-706 of the Municipal Code, which state in relevant part:

Sec. 2-705. Preference for local goods and services.

In recognition that businesses may pay higher property taxes due to their location within the corporate limits and that such taxes may increase the cost of providing goods and/or services in comparison to businesses located outside the corporate limits and to encourage businesses to locate and remain in the city, a preference shall be given to local businesses, as defined in section 2-706, in the issuance of purchase orders or the awarding of city contracts governed by this subdivision.... In conducting the procurement of goods and/or services by request for proposals, a local preference equivalent to one percent of all points available to competing proposers under the evaluation criteria adopted for each procurement shall be awarded to each proposer whose business is located within the corporate limits of the city.

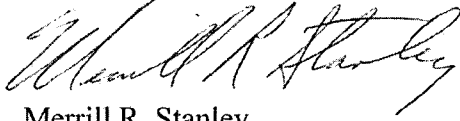
Sec. 2-706. Determination of eligibility for local preference.

For purposes of determining if a business is entitled to a local preference, the business shall be considered to be a local business if its headquarters, or the headquarters of its parent or holding company, is determined to be within the corporate limits of the city, determined by the payment of city property taxes on such headquarters occupied by the business for a period of at least one year prior to award, or by the payment of rent to a landlord paying city property taxes on such headquarters occupied by the business for a period of at least one year prior to award.

Recycling, Inc. has not met their burden of proof that MidAmerica Recycling does not have an office which is its headquarters within the corporate limits of the City of Des Moines. Mr. Colosimo's sole evidence on this issue was his statement about and reference to the GreenStar website news story that MidAmerica Recycling was purchased by a European corporation, NTR. Mr. Barry's testimony regarding the separate corporate existence of MidAmerica Recycling and its management, administrative, financial and human resources operations headquartered in Des Moines was persuasive and undisputed. The preponderance of the evidence shows that MidAmerica Recycling has its headquarters within the Des Moines corporate limits.

This determination shall be forwarded to the City Council at its June 9 meeting along with the Committee's recommendation. The City Council may affirm or overrule the findings and determination in this report.

Respectfully submitted:

A handwritten signature in cursive script, appearing to read "Merrill R. Stanley".

Merrill R. Stanley  
Deputy City Manager

cc: Recycling, Inc.  
MidAmerica Recycling  
Weyerhaeuser  
Attorney Janet Huston  
Richard A. Clark, City Manager  
William Stowe, Public Works Director  
Mike Valen, Procurement Administrator  
Evaluation and Selection Committee Members