

RESOLUTION NO. 6081

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MAYWOOD, CALIFORNIA, TO TERMINATE THE COLLECTION AGREEMENT BETWEEN THE CITY OF MAYWOOD AND COMMERCIAL WASTE SERVICES, INC. AND AUTHORIZE THE CITY MANAGER TO HIRE ON AN EMERGENCY AND INTERIM BASIS ANOTHER WASTE DISPOSAL CONTRACTOR OR OTHER CONTRACTOR TO COLLECT AND DISPOSE OF ALL SOLID WASTE, GREEN WASTE AND RECYCLABLE MATERIALS

WHEREAS, in July 2018, the City entered into an agreement with Waste & Recycling Services, Inc., entitled "Collection Agreement for Comprehensive Solid Waste Services between the City of Maywood and Waste & Recycling Services, Inc.," for the collection of solid waste ("Collection Agreement"), and subsequently approved the "Assignment Agreement between the City of Maywood and Commercial Waste Services, Inc., Dated as of September 6, 2018," which assigned the Collection Agreement to Commercial Waste Services, Inc. (CWS) and contractually bound CWS to fulfill all obligations, responsibilities, and duties accruing solid waste collectors under the Collection Agreement; and

WHEREAS, CWS neither remitted the Utility User Tax for the first quarter (January-March) and the second quarter (April-June) of 2019, nor provided an accounting of these payments, as required by Section 3.1 of the Collection Agreement and Section 3-5.507 of the Maywood Municipal Code; and

WHEREAS, CWS did not pay the Collector Fee for the second quarter (April-June) of 2019, as required by Section 3.2 of the Collection Agreement; and

WHEREAS, on September 30, 2019, the City Manager sent a Notice of Default demanding CWS to make all payments in full, together with all accrued late payment penalties and required accountings, within ten days, as required by Section 9.3 of the Collection Agreement; and

WHEREAS, CWS failed to cure the monetary default as of October 10, 2019, the date on which the ten day cure period expired as provided for in Section 9.3 of the Collection Agreement; and

WHEREAS, pursuant to Section 9.3 of the Collection Agreement, CWS is deemed in default under the Collection Agreement;

WHEREAS, on October 11, 2019, pursuant to Section 9.5 of the Collection Agreement, the City Manager sent a Notice of Termination informing CWS that the City Council would consider whether to terminate the Collection Agreement owing to CWS' failure to provide the required payments and accountings at a public hearing on November 27, 2019; and

WHEREAS, CWS attempted payment on October 15, 2019, and even then attempted only a partial payment through an instrument that the bank subsequently dishonored for insufficient funds; and

WHEREAS, CWS did not submit any evidence to the City Manager for consideration by the City Council at the termination hearing in the time-frame permitted by Section 9.6 of the Collection Agreement; and

WHEREAS, the City Council held a duly noticed public hearing on the termination on November 27, 2019, as required by Section 9.6 of the Collection Agreement, for which hearing CWS failed to submit any evidence for the City Council's consideration.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF MAYWOOD HEREBY DETERMINES, FINDS AND RESOLVES AS FOLLOWS:

Section 1. The recitals set forth in this Resolution are true and correct and incorporated herein as if set forth in full.

Section 2. Following a duly noticed public hearing on termination of the Collection Agreement, Section 9.6 of the Collection Agreement authorizes the City to (i) terminate the Collection Agreement; (ii) determine that CWS is innocent of any default and, accordingly, dismiss the Termination Notice and any charges of default; or (iii) impose conditions upon a finding of default and an additional time to cure, such that CWS' fulfillment of said conditions shall cure any default.

Section 3. Based on the entire record before the City Council, and pursuant to Section 9.6 of the Collection Agreement, the City Council finds that:

A. CWS' has failed to pay the UUT remittances and Collector Fee and late payment penalties required by the Collection Agreement, and has failed to provide required accountings related to those payments, which constitutes a default within the meaning of Section 9.1(v) of the Collection Agreement.

B. CWS' default as described in paragraph A has caused a material breach of the Collection Agreement.

C. CWS' apparent inability to make these required payments, as demonstrated through the return for insufficient funds of CWS' one partial payment attempt, demonstrates a concerning level of financial instability. This calls into question the ability of CWS to fulfill its obligations under the Collection Agreement, including the provision of solid waste removal and disposal services that are critical to the health, safety, and welfare of our residents. The City Council is also cognizant of the fact that the City Manager has issued a Notice of Default and Notice of Termination to CWS for failure to pay the annual program payments required by Section 3.3 of the Collection Agreement that were due September 1, 2019 and for failure to maintain collection bins in good condition required by Section 6.2.5 of the Collection Agreement. The termination hearing on those defaults is scheduled for January 8, 2020.

D. Moreover, CWS has failed to make any payments and has not provided any accountings for the fifty-eight (58) days since the initial Notice of Default, has lead the City Council to conclude that allowing CWS additional time to cure these defaults would be futile and thus is not warranted.

Section 4. Based on the findings set forth above in Section 3 and on all other evidence in the record, both oral and written, the City Council of the City of Maywood hereby terminates the Collection Agreement for cause, provided, however, that the following provisions of the Collection Agreement and obligations of CWS pursuant to the Collection Agreement shall survive termination:

(a) those provisions that require CWS' cooperation with the City following termination;

(b) the rights of the City to pursue any claims, causes of actions, damages or rights or to otherwise initiate or engage in further action or legal proceedings against CWS;

(c) the provisions relating to insurance and indemnification;

(d) the provisions regarding the retention, inspection and/or auditing of all accounts and records maintained by CWS related to the City;

(e) the obligation of CWS to deliver the past due monthly and quarterly diversion reports, and past due quarterly recycling reports; and

(f) the obligation of CWS to pay to City all sums now due, including:

(i) the Utility User Tax for the first quarter (January-March), second quarter (April-June), and third quarter (July-September) of 2019, and all accrued late penalties;

(ii) the Collector Fee for the second quarter (April-June) and third quarter (July-September) of 2019, and all accrued late penalties;

(iii) the AB 939 Program Payment due on September 1, 2019, and all accrued late penalties;

(iv) monies owed to Clean Street and the City for the payment of street sweeping services and all accrued late fees; and

(iv) the Performance Audit Program Payment, and all accrued late penalties.

Section 5. Pursuant to Section 9.12 of the Collection Agreement, after the City has terminated the Collection Agreement for cause, CWS is obligated to fully cooperate with the City and any subsequent contractors to assure a smooth transition of solid waste management services, including but not limited to the provision of any operating records needed to service all properties covered by the Collection Agreement. Additionally, pursuant to Section 9.11 of the Collection Agreement, the City retains the right to lease CWS' equipment for a period not to exceed six (6) months, if the City determines that such lease would facilitate performance of the services required under the Collection Agreement.

Section 6. The City Council finds that the continued collection and disposal of solid waste is in the interest of the public health, safety and welfare, and that Section 6.2.209 of the Maywood Municipal Code authorizes the City to enter into contracts regarding the "collection of garbage, combustible and noncombustible rubbish, miscellaneous debris, and combined rubbish from commercial, business, industrial and residential property." Accordingly, the City Council hereby authorizes the City Manager to take any and all necessary actions, including the entering and execution of any agreement or purchase order to hire a solid waste enterprise (as that term is defined in Public Resources Code Section 40193) to collect solid waste, green waste and recyclables from residential and commercial customers and deliver such materials for processing or disposal, on an emergency and interim basis.

Section 7. The City Council does hereby demand that within 15 days of the adoption of this Resolution, that CWS refund to all customers any and all amounts of prepaid billings for services not yet rendered by CWS under the Collection Agreement, and pay to City the monies specified in Section 4(f) of this Resolution.

Section 8. The City Council hereby demands that within three (3) business days of the adoption of this Resolution that CWS provide to the City all operating records needed to service all properties and accounts under the Collection Agreement, including but not limited to customer lists, invoicing, status of billings and any other documents requested by the City Manager in her sole discretion, which are necessary for the continued provision of solid waste hauling services in the City.

Section 9. Notwithstanding the provisions of this Resolution, the City's termination of the Collection Agreement does not waive any claim, action, right or remedy the City may have against CWS under the Collection Agreement, and in no event shall anything herein be construed as a waiver of the City's right to pursue any legal action, in law or in equity, whether or not provided for in the Collection Agreement, including without limitation the recovery of damages resulting from any and all defaults, regardless of whether such default has herein been identified, or to obtain any other remedy consistent with the purposes of the Collection Agreement, including without limitation recovery of attorney's fees in the event of legal action against or by CWS.

Section 10. This Resolution shall become effective immediately upon its passage and approval.

Section 11. The City Clerk shall certify to the passage and adoption of this Resolution and shall enter it into the book of original resolutions.

PASSED, APPROVED AND ADOPTED this 27th day of November 2019, by the following vote:

AYES: MARQUEZ, ALVAREZ, MEDINA, LARA, DE LA RIVA
NOES:
ABSENT:
ABSTAIN:



EDUARDO DE LA RIVA, MAYOR

ATTEST:



GERARDO MAYAGOITIA, CITY CLERK

APPROVED AS TO FORM:



ROXANNE DIAZ, CITY ATTORNEY

I, Gerardo Mayagoitia, City Clerk of the City of Maywood, do hereby certify that the foregoing Resolution No. 6081 was adopted at a regular meeting of the City Council of the City of Maywood held on the 27th day of November, 2019 by the following vote:

AYES: MARQUEZ, ALVAREZ, MEDINA, LARA, DE LA RIVA
NOES:
ABSTAIN:
ABSENT:



Gerardo Mayagoitia, City Clerk