ADDENDUM 5

February 14, 2018

PART II Project Proposal
and
form of
Supply Agreement
For

Processing and Recovery of Recyclables
and
Transfer, Transport and Disposal of Municipal Solid Waste

for the

Medina County Solid Waste District
Medina County, Ohio

February 14, 2018

Responses Due by:
November 20, 2017; 4:00 PM EDT

Medina County Sanitary Engineer
791 W. Smith Road
Medina, OH 44256
330-723- 9574

The purpose of this Addendum is to disclose communications that have been received by the Medina County Commissioners regarding the current proposal and negotiating process. Attached to this Addendum is a full set of the documents received. The Solid Waste District has not determined the source of the information, but the documents clearly attempt to call into question the integrity of the process, the qualifications of respondents, and the merits of their proposals. The District did not assemble or distribute these materials. We are providing the materials to you to disclose communications relevant to this process that have come to the attention of the District. These documents do not alter the status of the process or the current negotiations. While the District has not established the source of these documents we are concerned that the distribution of these type of materials is designed to influence the decisions to be made by the District decision makers. The Period of Silence is designed to protect the professional integrity of the qualifications process, and ultimately the procurement process, by shielding it from undue influences prior to the recommendation of the top-ranked firms, subsequent Part II Project Proposal(s), and a contract award. We remind all respondents that the period of silence remains in effect and ask all participants to refrain from distributing materials designed to influence the decision to be made by the District outside of the proposal process.

Discussion Points – Medina County Resolution # 18 – January 23, 2018 CPF Operations

Agenda

- Overview of the RFQ Process
- Recommendation by the Medina County Sanitary Engineer and adopted Resolution by the County Commissioners
- Disqualification Criteria
  - Ensortga
  - Rumpke
- Commodities Marketing Concerns for Entsorga
- Flow Control
- Scoring of the Proposals
  - Who scored the Proposals? If multiple parties, then how were the numbers tabulated?
  - Did the Sanitary Engineer use scoring criteria or a rubric in the evaluation?
- Discussion of the legal concept of the "Abuse of Discretionary Power"
- Open Discussion on Actions/Strategies

Resolution Passed by the County Commissioners

- Resolution is in the handout materials

Disqualification Criteria

- RFQ Part I – page 12 and 13, XII, A. Disqualification:
  - See handout
- The Disqualification Criteria is listed on the first page of each scoresheet for both the Part I evaluations and the Part II evaluations
  - Scoresheets are in the handout materials

Entsorga – Grounds for Disqualification

- Failure to include Landfill Disposal Guarantee
  - RFP Part I page 8 "Format for Respondents Qualifications, Section B, 8th bullet point states ***"Contract or other guarantees and identification of landfill(s) proposed for disposal of anticipated volumes of Solid Waste"***
    - Entsorga did not provide a "Contract or other guarantees and identification of landfill(s) proposed for disposal of anticipated volumes of Solid Waste
    - Entsorga score sheet Part I
      - Reviewer name: Amy Lyon Galvin
      - Disqualification Criteria: marked N/A
      - Score sheet item 7 states "no landfill security = County to do"
        - Medina County does not have a 10 year contract for landfill disposal
    - Entsorga scoresheet Part II, cover page, Amy Lyon Galvin writes "Landfill space by others". Entsorga places the end waste TTD in the hands of the County

Entsorga – Grounds for Disqualification (2)

- Failure to disclose litigation history over the past 5 years for cases in excess of $100,000 against the company, any affiliates, officers, etc
  - Part I score sheet – Amy Lyon Galvin states "none greater than $100,000"
    - Entsorga is given a score of 10 out of 10
  - BioHiTech Global
    - BioHiTech Global aka Entsorga USA (listed in the project team for Medina)
    - On or about April 27, 2017, Global Hightech was served with a Summons and Complaint in an action Tusk Ventures LLC vs BioHiTech Global by the Supreme Court of the State of New York in the amount of $250,000 (attached)
  - Quarterly Report – Entsorga – June 2017
    - Report shows the firing of the EPC contractor, General Contractor, and work stoppages for unpaid bills. Shows that the job has been "over-drawn" by a meaningful percentage. Threatened lawsuits may be expected
  - 10-K Report acknowledges current litigation
    - States "We are, and also may be in the future, a defendant in lawsuits brought by parties..."

Entsorga – Grounds for Disqualification (3)

- Failure to provide 100% funding - Entsorga requires capital investment by Medina County
  - The RFQ, Part I, page 36 states "the Respondent must have the ability to fund (or obtain funding for) the design, permitting and construction of the recycling processing system, the working capital required to commission the new processing system, hire the appropriate labor and management fr both the construction and operation of the facility, and provide for any contingencies."
    - Part I Score Sheet – item 4 – Amy Lyon Galvin states "MCSWD balance of equity"
    - Part II Score Sheet – cover – Amy Lyon Galvin states "Alternate pricing strategy – public/private partnership"
    - Part II Score Sheet – section 2g – Amy Lyon Galvin states "propose public – private partnership 20% equity, 80% debt thru unguaranteed bonds..."
    - Part II Score Sheet – section 3 – Amy Lyon Galvin states Equity investment – Entsorga $2.5-$3mil, County $2.5-$3mil
    - Entsorga receives a score of 23 of 25 for section 3 on the scoresheet
  - Entsorga USA (BioHiTech) 10-K report shows the company is and has been operating at a substantial financial loss.
    - Why would Medina County then want to become an equity partner?

Entsorga – Grounds for Disqualification (4)

- Failure to represent that Entsorga will operate the the MPWF and the TTD for the duration of the agreement
  - The RFQ – page 36, bullet point 3 states ***"Finally, the Respondent will be required to operate the MWPF and TTD for the duration of the agreement to meet the District Proposal Requirements. Adequate representations should be made in the RFQ response to this effect."***
  - Entsorga's Part II response states "...once the facility is started up and operating would allow to easily transfer to MCSWD's resources the knowledge, tools, and procedures to independently run the facility with technical support provided from the Entsorga Group."
  - Entsorga's Part II score sheet – item 2b – Amy Lyon Galvin states "can be operated by Entsorga or other contract operator or LLC

Rumpke – Grounds for Disqualification

- Failure to disclose litigation history over the past 5 years for cases in excess of $100,000 against the company, any affiliates, officers, etc
  - Part I score sheet – Amy Lyon Galvin states "none greater than $100,000"
    - Rumpke is given a score of 10 out of 10
  - Rumpke failed to report 2 significant lawsuits
    - Court of Apeals, 12th Appellate District of Ohio, Butler County Racheal Downard vs Rumpke of Ohio, Inc et.al - CV2010-11-4739 – Opinion dated 10/28/2013
      - Rumpke employee falls into tire shredder and is severely injured. Succumbs to his injuries in the hospital 52 days later. Ruling in favor of Downard.
    - Rumpke Landfill Inc vs Colrain Twp. Settled Dec 17, 2015
      - Rumpke was denied zoning by Colrain Twp to expend their landfill. Claimed they were a Public Utility and exempt from zoning. Nine years of lawsuits and appeals. **Law firm of Eastman and Smith files an amicus brief in the case on behalf of Medina County.** Court files in favor or Colrain Twp. Rumpke's settlement was valued by the township at over $5mil.
  - Medina County Sanitary Engineer Amy Lyon Galvin assigns all 10 points out of 10 to Rumpke for Litigation

Rumpke – Grounds for Disqualification (2)

- Non disclosure of litigation or settlements in the past 5 years in excess of $100k in value violates several of the Disqualification Criteria listed in the RFQ
  - Incomplete document/missing significant information requested in the Project
  - Submission of false, inaccurate, or incomplete information[
- The combination of Rumpke and Entsorga as a team violates a criteria established by the Sanitary Engineer in the RFQ
  - RFQ Part 1 – page 8, B, bullet 6
    - "if a team, abilities of various team members to perform in coordination and meet the criteria otherwise stated herein, including documentation that would bind each member of the team to perform."
      - Neither Rumpke or Entsorga submitted information in their RFQ response binding them as a team
      - RFQ seeks a Proposer, not Proposers. Rumpke/Entsorga is not a Respondent

Entsorga – Commodities Marketing Concerns

- Entsorga's principal commodity is Engineered Fuel aka SRF
  - There are no cement kilns near the Medina CPF location (map attached. Note –Wampum, Pa is closed for business)
    - Transportation of EF adds significant costs
  - Entsortga USA/BioHiTech's 10-K report states:
    - "The market for solid recovered fuel (SRF) is not developed"
    - "The company's MBT projects rely on the ability to sell SRF to appropriate industrial users at economically reasonable prices. There is no assurance that the Company will be able to contract either long-term or spot-market with such consumers."
- Part II score sheet section 2c – reviewer Amy Lyon-Galvin states "no commodities marketing history, not yet operating in WV."

Flow Control

- The Kimble proposal includes the use of the CPF building (referred to as South) as well as a building in Brunswick purchased by Kimble (referred to as North) .
- The CPF is owned by Medina County however the "North" building in Brunswick is privately owned by Kimble Cos.
- The proposal is based on the use of the 2 facilities and requires Flow Control for the County to deliver waste
- Can the County provide flow control of solid waste to a privately owned facility?
  - No. United Haulers vs Oneida Herkimer decision
  - If the North facility is for recyclable processing only, then Medina County cannot exercise flow control over recyclables

Scoring Observations - Litigation

- Rumpke fails to report any of their lawsuits or settlements (omission of material information). Interestingly, Medina County's outside counsel – Eastman and Smith filed an amicus brief on behalf of Medina County relating to one of those suits meaning that the Sanitary Engineer had easy access to this due diligence review. Rumpke receives a perfect score of 10 out of 10.
- Entsorga fails to report any of their lawsuits (omission of material information). Entsorga receives a score of 10 out of 10
- Kimble reports 2 civil death lawsuits. Kimble receives a score of 7 out of 10
- Envision reports 3 suits including an explanation of each. One suit involves the Medina County Sanitary Engineer failing to authorize payment to Envision for pass thru costs relating to the contract to operate the CPF. Envision receives a score of 5 out of 10.

Scoring Observations - Safety

- Kimble reports 2 accidents that resulted in wrongful deaths within the last 2 years and 3 additional OSHA safety violations
  - Kimble receives a score of 6 out of 10
- Rumpke fails to disclose the wrongful death lawsuit from the employee who fell in the tire shredder, there is no mention of the death that resulted from an employee killed in a baler, fire at their MRF burning the facility to the ground, 6 fires at their MRF in 2016, or other safety history.
  - Rumpke receives a perfect 10 out of 10 for safety
- Entsorga reports no incidents in the last 5 years "during plant supply and installation". Amy Lyon Galvin reports "not much information on operation. Uncertain safety standards translate to US and absent operation component."
  - Entsorga receives a safety score of 6 out of 10
- Envision has no safety violations in the past 2 years. Envision reports that their safety record is 4.9/100 vs the industry average of 7.5/100 thus significantly better than the industry average
  - Envision receives a safety score of 5 out of 10.

Scoring Observations – Project History and Experience

- Kimble has no operational mixed waste processing experience. Kimble does have landfill and single stream MRF experience. Kimble receives a score of 18 out of 20
- Rumpke has no operational mixed waste processing experience. Rumpke does have single stream MRF and Landfill experience. Rumpke receives a score of 18 out of 20
- Entsorga has no commodity marketing history per Amy Lyon Galvin. Entsorga's WV facility is already 1 year behind schedule and still not open. Entsorga receives a score of 15 out of 20
- Envision has 21 consecutive years of operational experience in mixed waste processing at the Medina CPF. Envision has recyclable marketing experience and includes offtake vendor letters for all materials. Envision receives a score of 11 out of 20

Scoring Observations – Project Team

- Kimble cites the company's years in business and their equipment vendors's years in business. No percentage of contribution (required) is included. No mention of their engineer on the scoresheet. No prior work partherships with the equipment vendor. Kimble receives a score of 8 out of 10
- Rumpke includes the percentages between Rumpke, Vexor, and Machinex. Cites various projects – none of which are mixed waste processing projects. Rumpke receives a score of 9 out of 10
- Entsorga has no US experience, no US commodity marketing experience, Entsorga USA is operating at substantial financial loss, and Entsorga is a year behind schedule for their first US operation. Entsorga receives a score of 6 out of 10
- Envision includes percentages between Envision, AECOM, an CTI. Cites Oppenheimer and Co. for financing and AECOM for engineering. AECOM is the #1 rated engineering firm in the world. Envision receives a score of 5 out of 10.

Abuse of Discretionary Power by the Medina County Sanitary Engineer

Evaluation criteria was altered - The Part I Evaluation Criteria Was Not Followed:

- Part I, Section XII Evaluation of Qualifications, contained 2 parts: A. *Disqualifications* and B. *Evaluation Criteria*
- *Disqualifications* presumes that the Evaluator(s) will consider outside information (e.g. to determine if ex parte communications occurred, to determine if information submitted was false, inaccurate or incomplete, to determine if respondent has insufficient corporate or team capability or respondents had been defaulted, terminated from other public works)
- The information detailed above confirms that the Evaluator(s) did not review outside information in its evaluation of Part I Qualifications.
- The Evaluator(s) altered the evaluation criteria by disregarding and not evaluating and/or rejecting Respondents under *Disqualifications.*

Ignoring the importance and significance of the *Disqualification* may be considered as an abuse of discretion because it changed the manner in which Part I Qualifications was to be evaluated.

Abuse of Discretionary Power by the Medina County Sanitary Engineer (2)

Evaluation criteria was altered: The Sanitary Engineer did not follow the stated evaluation criteria.

- Part I *Evaluation Criteria* stated respondents would be evaluated in accord with "the criteria and descriptions in the following sections." Although the Criteria, and the applicable points were provided, the descriptions of how/what the criteria would be evaluated was not provided.

- Part I, Section XIII stated: "Respondents will be evaluated based on the qualifications and directly applicable experience of the firm and the individuals comprising the project team."

- RFQ Part II, Addendum 1 (11/13/2017), Question 38 stated: Respondents that advanced to the RFQ Part II Project Proposal process *were evaluated relative to each other.*

The Evaluator(s) admitted that they did not evaluate the offerors against the stated evaluation criteria in Part I, Sections XII B and XIII. They evaluated Respondents' Qualifications against one another. When an evaluator alters the evaluation criteria after the proposals have been submitted that may be considered as an abuse of discretion.

Abuse of Discretionary Power by the Medina County Sanitary Engineer (3)

Evaluation criteria was altered: The Sanitary Engineer changed the evaluation protocol.

- Part I, Section XIII detailed that the cumulative score of the 7 criteria allotted with points to determine the top ranked Respondents to submit a proposal for Part II
- The Evaluation Criteria did not advise Respondents that its Part I and Part II evaluation scores would be cumulative and determinative of identifying the Respondent offering the County the best value.
- The Sanitary Engineer was to present a written summary of the evaluation of qualifications for each Respondent but presented only the numerical scores and her recommendation of the top ranked Respondents (Part I, pp. 1, 14)
- *After* the top ranked Respondents were chosen, they received Part II; it advises that the scores from Part I and Part II would be added together for a total comprehensive score for each of them.

- The Sanitary Engineer altered the evaluation criteria after the process had begun. This may be considered as an abuse of discretion.

Abuse of Discretionary Power by the Medina County Sanitary Engineer (4)

Evaluation criteria was altered: The Sanitary Engineer changed the evaluation protocol.

- Combining the scores from Part I and Part II is inconsistent with evaluation process detailed in both RFQs.
  - Part I provides after the District approves those Respondents to participate in Part II, the Sanitary Engineer shall evaluate their proposals, hold discussions to investigate concerns further, rank them and recommend the Respondent "*whose design and pricing proposal the District determines to be the best value under this (Part II) section.*" (Part I at 2.)
  - Part II conveys the same concept: the District may enter into contract negotiations for services with *the Respondent whose design and pricing proposal the District determines to be the best value for both processing of recyclables and the TTD of MSW.*" (Part II at 5.)
  - The evaluation process contemplated that, among those Respondents already determined to be Qualified in Part I, the Respondent with which the District would negotiate would be determined by their design and pricing proposal. (Part I at 2; Part II at 5)
  - The evaluation process described did *not* intend for the scores – from Parts I and II – to be added together. The Evaluation Methodology was changed after Part I.

The Sanitary Engineer altered the evaluation criteria after the process had begun. This may be considered as an abuse of discretion.

Abuse of Discretionary Power by the Medina County Sanitary Engineer (5)

Evaluation criteria was altered: The Part II Evaluation Criteria Was Not Followed

- Part II, Section XV Evaluation of Responses includes A. Disqualifications and B. Evaluation Criteria
  - *Disqualifications,* like in Part I, presumes that the Evaluator(s) will consider outside information (e.g. to determine if ex parte communications occurred, to determine if information submitted was false, inaccurate or incomplete). (Part II at 30.)
  - Part II Background and Process provides for the Sanitary Engineer to investigate Respondents' submission. (Part II at 4.)
  - The information provided in the Q&A (Addendum 1) identified concerns as to the accuracy, falsity or incompleteness of Respondents Rumpke and Entsorga's information but there is no indication that the Evaluator(s) took steps to inquire, vet or consider outside information in its evaluation of Part II Project Proposals.
  - The Evaluator(s) altered the evaluation criteria by disregarding and not evaluating or rejecting Respondents' Proposals under *Disqualifications* under Part I or Part II.

Ignoring the importance and significance of the *Disqualification* may be considered as an abuse of discretion because it changed the manner in which Part II Project Proposal was to be evaluated.

Abuse of Discretionary Power by the Medina County Sanitary Engineer (6)

Evaluation criteria was altered: The Sanitary Engineer changed the evaluation process post facto.

- The Evaluation Process, consistent with ORC 153.693, is a 2 step process – Qualification (Part I) and Project Proposal (Part II) (Resolution 17-0882)
- Part I and Part II describe the process as the Sanitary Engineer recommending the District to enter into contract negotiations for services with the Respondent (singular) whose design and pricing proposal the District determines to be the best value. (Part I at 2; Part II at 5, 32)
- On January 23, 2018, the Sanitary Engineer presented the scoring to the Medina County Board of Commissioners, acting in their capacity as the Board of Directors of the MCSWAD
- The Sanitary Engineer identified two (2) Respondents and offered that their Proposals "if combined" offer the greatest potential and requested the opportunity to negotiate with *both* Rumpke of Ohio and Entsorga USA, Inc.
- The Evaluation process that was designed for this procurement and described in the RFQ Parts I and II does NOT give the Sanitary Engineer the right to pick portions of the Respondents' proposals and "combine" them to achieve the best value.

This change to the evaluation process *post facto* may be considered as an abuse of discretionary power.

Abuse of Discretionary Power by the Medina County Sanitary Engineer (7)

Summation:

The Sanitary Engineer did not comply with the Evaluation Criteria announced as applicable to this procurement:

- Disregarded stated criteria for evaluation
- Did not evaluate in accord with the announced criteria
- Changed the criteria mid-process, contrary to the stated basis of award.
- Violated the evaluation process by choosing to combine two Respondents instead of negotiating with the top ranked Respondent.

Discussion - Actions/Strategies on Moving Forward

Possible Options:

- Withdrawal of Resolution
- Continue with the process and allow the Commissioners to negotiate with the qualified Respondent(s) based on value
- Cancel and enter into a sole source procurement with Respondent who would not be Disqualified
- Other

REGULAR MEETING – TUESDAY, JANUARY 23, 2018

The Board of County Commissioners of Medina County, Ohio, met in regular session on this date with the following members present:

M offered the following resolution and moved the adoption of same which was duly seconded by M

RESOLUTION NO. 18-
AUTHORIZING THE SANITARY ENGINEERING TO ENTER INTO CONTRACT NEGOTIATIOS FOR PROCESSING AND RECOVERY OF RECYCLABLES AND TRANSFER, TRANSPORT AND DISPOSAL OF MUNICIPAL SOLID WASTE FOR THE MEDINA COUNTY SOLID WASTE DISTRICT

WHEREAS, through Resolution No. 17-0882 the Medina County Board of Commissioners, acting in its capacity as the Board of Directors (the Board) of the Medina County Solid Waste Management District (the District), authorized and directed the Sanitary Engineer to solicit Part II Project Proposals from Rumpke of Ohio, Inc., Kimble Company, Entsorga and Envision Waste Services, LLC to design, build and operate a system for the processing and recovery of recyclables and the transfer, transport and disposal of municipal solid waste at the Medina County Solid Waste District Facility, with completed responses due on November 20, 2017; and

WHEREAS, the Sanitary Engineer, having received Part II Project Proposals from each of the companies listed above, conducted a thorough review of each Proposal, conducted interviews with each company and conducted site visits to ascertain the Respondent(s) whose design and pricing proposal the District determines to be the best value for both the processing of recyclables and the transfer, transport and disposal of municipal solid waste, and applying the Evaluation Criteria set forth in the Part II specifications, scored the proposals and aggregated those scores in the chart below, and

Respondent Name	Proposal	RFQ Points (110 available)	Part II Points* (75 available)	Total Score
Rumpke of Ohio, Inc.	Base	98	----	----
	Alternate 1	----	69	167
	Alternate 2	----	----	----
Entsorga	Base	79	72	145
Kimble Company	Base Option 1	----	----	----
	Base Option 2	91	49	140
Envision Waste Services LLC	Base	48	59	107
	Alternate 1	----	----	----
	Alternate 2	----	----	----

*Where respondents submitted multiple proposals, the Sanitary Engineer scored only the proposal that offered the best value to the overall needs of the District.

WHEREAS, the Sanitary Engineer has also determined that Rumpke of Ohio, Inc. and Entsorga, Respondents with the top two (2) Total Scores, presented proposals that if combined, offer the greatest potential to maximize the recovery of recyclables and reduce the total volume of residual municipal waste to be disposed of in landfills in the most cost-effective manner, and

WHEREAS, the Sanitary Engineer recommends the Board accept the scores and the Respondent ranking as identified herein, and authorize and direct the Sanitary Engineer to proceed with contract negotiations with the two highest ranked Respondents.

NOW, THEREFORE, BE IT RESOLVED by the Board of County Commissioners of Medina County, Ohio, acting in its capacity as the Board of Directors for the Medina County Solid Waste Management District that:

1. The scores and rankings assigned to the Respondents and summarized herein are approved.

2. The Sanitary Engineer is authorized and directed to enter into negotiations with Rumpke of Ohio, Inc. and Entsorga and notify them of the intent to negotiate contract(s).

3. The Sanitary Engineer is further directed to report to the Board the progress of the contract negotiations and likelihood of success on February 20, 2018.

Voting AYE thereon:

Adopted:

Prepared by: Sanitary Engineering Department

Responses to this Request for Qualifications shall be sealed in an envelope or box and mailed or delivered to Laura Perkins, Office Manager, Medina County Sanitary Engineer's Office, 791 W. Smith Road, Medina, Ohio 44256, and be labeled as follows:

Response to the Request for Qualifications (RFQ): For Processing and Recovery of Recyclables & Transfer, Transport and Disposal of Municipal Solid Waste for the Medina County Solid Waste District (The District) dated September 7, 2017

RFQ Due: October 10, 2017 at 4:00 p.m.

Submitted by: (Respondent Legal Name and mailing address)

The submittal shall be made no later than 4:00 p.m. (EDT), October 10, 2017.

Late responses will not be accepted and will be returned to the submitting company unopened. The District is not liable for any costs incurred by any person or firm responding to this request.

B. FORMAT FOR RESPONDENTS QUALIFICATIONS:

The Respondents shall provide the information in their Qualifications in sufficient detail to demonstrate that the evaluation criteria have been satisfied as specified in Section XII.

All Qualifications must be arranged in consecutive order as shown below. References to applicable forms are shown in parenthesis for general guidance only and are not all inclusive. Respondents shall refer to Attachment A, contained within this RFQ, for further information related to the qualification content and format.

Respondents must demonstrate competence in the following areas:

- Design, construct, and operate recyclables recovery operations from municipal solid waste and transfer, transport and dispose of non-recovered solid waste materials.
- Ability to achieve recyclables recovery.
- Completion of projects of comparable size and scope, indicating source of funding, adherence to implementation schedules and deadlines, and if applicable ability to consistently meet or exceed the recyclables recovery goals.
- Design, construct, and operate municipal solid waste transfer stations and recyclables recovery operations.
- Design, construct, and operate organics recovery facilities if Respondent anticipates technologies beyond physical, mechanical separation.
- If a team, abilities of various team members to perform in coordination and meet the criteria otherwise stated herein, including documentation that would bind each member of the team to perform.
- The presence of a licensed State of Ohio Professional Engineer (PE) or design professional as a staff or team member through contractual arrangement, for the requisite design, permitting and project oversight.
- Contracts or other guarantees and identification of landfill(s) proposed for disposal of anticipated volumes of Solid Waste.
- Ability to obtain capital equipment prior to service date.

- Incomplete document/missing significant information requested in the RFQ;
- Submission of false, inaccurate or incomplete information;
- Fewer than three (3) years in business providing similar types of services requested in this RFQ.
- Insufficient Corporate or Team Capability as revealed by financial statements, experience or equipment statements as submitted or other factors.
- Insufficient Corporate or Team Capability as shown by past work, judged from the standpoint of RFQ data as submitted.
- Default or early termination on any previous public or governmental contract or failure to perform.

District retains the right to qualify less than three (3) Respondents, if there are three (3) Respondents or less and one (1) or more are disqualified. Qualifications not otherwise disqualified will be submitted for the Evaluation Criteria below.

B. EVALUATION CRITERIA

Respondents not excluded pursuant to section XII-A above will evaluated in accordance with the criteria and descriptions in the following sections. The Sanitary Engineer intends to rank and select at least three respondents who comply with the requirements and score the highest total on the evaluation criteria as they pertain to the overall needs of the District. Failure to adequately represent any of the following criteria may result in disqualification.

Criteria	Points
1. **Project Team**	10
2. **Project History & Experience**	20
3. **Preliminary Technical Approach**	20
4. **Company Financial Resources**	20
5. **Litigation History**	10
6. **Safety History**	10
7. **Overall Quality, Accuracy and Completeness of Qualifications**	20
Total	110

XIII. ADDITIONAL INFORMATION AND SCORING PROCESS

The Sanitary Engineer reserves the right to ask for additional information and clarification from or about any, or all, of the Respondents and their respective qualifications, which must be provided within five (5) days of any such request. Responses will be evaluated based on the qualifications and directly applicable experience of the firm and the individuals comprising the project team.

Transfer Plan

In a circular economy model, It is key to implement solutions that can fit well into the already existing waste infrastructure, providing to the community multiple compatible options and maximizing reuse, recycling, recovery and by minimizing disposal.

Entsorga is proposing to leverage on the existing proven infrastructure and players, and work together with Medina County SWD, the experienced local service providers and the other local stakeholders to confirm the optimal transportation and disposal services setup

With the proposed fee structure we have translated this approach into a reimbursable back to back contractual arrangement, where Medina County SWD would be instrumental in selecting providers and negotiating/confirming terms. While the cost for Transportation and disposal of fines and inerts would be a pass through for the project company operating the revamped processing facility.

ENTSORGA
GREEN TECHNOLOGY REVOLUTION

Medina County PART II Project Proposal Scoring Sheet

Respondent: Entsorga

Reviewer Name: Amy Lyon Galvin

Review Date: Nov. 20, 2017 – Jan 22, 2018

Interview/oral presentation
Nov. 28, 2017 10 am – 11:30 am
- Paolo Carollo
- Bob-Wellert, Wellert Corp
Wellert visits NDA
- Follow up Nov. 29, 2017
- Site visit Dec. 13, 2017
to Martinsburg WV.

Score 4 (-1)
45
23 (-2)
72

Disqualification Criteria:

☐ Incomplete or unsigned forms and required submittals;

Comments: Checklist ✓
Included form B-7D per Addendum 1
No parent guarantee, only letter of intent

☐ Response submitted after deadline in all cases;

Comments: ϕ

☐ Ex parte communications with District or Medina County elected officials, employees, consultants or representatives regarding this Project Description during the period of silence per Section VIII as contained herein;

Comments: ϕ

☐ Incomplete document/missing significant information requested in the Project

Description; Letter of intent to issue parent guarantee
Comments: TTD + marketing recyclables, Landfill space - by others
to maximize ex. contractor operations. by District.
No commodities market history

☐ Submission of false, inaccurate or incomplete information;

Comments:

☐ Equivocal pricing submitted on Pricing Form;

Alternate pricing strategy public/private partnership.

Comments:

Successful Respondents shall provide a qualified project and management team able to undertake this scope with requisite skills to design, permit, construct and operate a new processing system and required building modifications at the MCSWDF. The Contractor will be responsible for all funding, design, permitting, construction and operations of this contractual opportunity, excepting the agreed upon Building Modifications, which are to be designed and permitted by the Contractor and paid for by the District.

- The installed Building Modifications at the Mixed Waste Processing Facility (MWPF) are expected to be permitted, constructed and ready for operations within the proposed schedule in the Respondent's response, while meeting the District's timelines in this RFQ, unless otherwise noted. The District will provide funding for the contractually agreed upon Building Modifications. The Respondent must have the ability carry out the required design, permitting and construction of the proposed Project, working capital required to carry out the construction project subject to District progress payments, hire the appropriate labor and management, and provide for any contingencies. Finally, the respondent will be required to operate the facility for the duration of the agreement. Adequate representations should be made in the RFQ response to this effect.

- The installed modifications and processing equipment at the Mixed Waste Processing Facility (MWPF) will be funded by the Respondent, permitted, constructed and be ready for operations within the proposed schedule, while meeting the District's timelines, unless otherwise noted. The District will provide no capital funding for the Equipment purchase or installation. The Respondent must have the ability to fund (or obtain funding for) the design, permitting and construction of the recycling processing system, the working capital required to commission the new processing system, hire the appropriate labor and management for both the construction and operation of the facility, and provide for any contingencies.

- Finally, the Respondent will be required to operate the MWPF and TTD for the duration of the agreement to meet the District and Proposal requirements. Adequate representations should be made in the RFQ response to this effect.

An important, but not inclusive, description of the required long-term value sought, including District recycling and recovery goals and aspirations, and past MSW management experiences, can be found in the **2016-2030 Solid Waste Plan Update** (District Plan), on the District website:

http://www.recyclemedinacounty.com/pdf/2015_solid_waste_plan_final.pdf

The Solid Waste Plan identifies the District's strategies for managing District facilities and programs and its work toward achieving state recycling and waste-reduction goals. House Bill 592 requires each Solid Waste Management District to meet recycling goals. A description of the current MCSWDF can be found on page. IV-9. All Respondents are expected to become fully familiar with the Plan and all its components, and utilize its contents to understand District intentions for the contract period in answering this request. However, respondents should use their own research, conclusions and judgment on the availability and growth of solid waste and

ENTSORGA

Entsorga USA Inc.
1904 Eastwood Road
Suite 210
Wilmington NC, 28403
Tel.+1 910 679 4944
www.entsorga.it;
info@entsorga.it;

Medina County Sanitary Engineer's Office
Laura Perkins, Office Manager
791 W. Smith Road
Medina
Ohio 44256
U.S.A.

Wilmington, November 15th, 2017

Cover Letter Form B-4

Dear Sirs,

We are pleased to provide our detailed project review and technical specification document, including all the Forms annexed to the "PART II Project Proposal and form of Supply Agreement" for an Advanced Biodrying and Alternative fuel processing system to be located at the existing MCSWD waste processing and transfer facility.

For this project Entsorga is proposing to upgrade the existing Medina County Solid Waste Facility, by adding a new state of the art bio-drying reactor and by modifying the existing building to accommodate equipment for alternative fuel refinement, recycling and logistic operations. The initial and up-scalable nameplate capacity proposed for the integrated plant is 120.000 tpa of incoming material (assuming a minimum of 10,000 tpa of commercial and industrial waste are conferred the facility), with a total expected production of Alternative Fuels of 52,000tpa. This capacity maybe further increased by allowing receiving of suitable commercial and industrial waste bypassing the bioxidation area or as additional option material derived from single stream operations.

The proposed configuration will allow Medina County SWD to achieve a guaranteed 75% of landfill diversion on the incoming streams (or higher if combined with single stream recycling programs), allowing to boost current recycling and recovery programs and providing a long term solutions for the solid waste disposal needs of the local community. As a result of the proposed bio-drying process , the remaining 25% of material that we expect will need to be landfilled (mostly fines and inerts),will be already bio stabilized, reducing substantially the impact in terms of greenhouse gases emissions when compared to the typical unsorted MSW disposed at a landfill.

While we have followed MCSWD guidelines for pricing the processing fees and the transfer and disposal fees as indicated in the RFP phase II document, we would like to propose for the consideration of Medina County SWD a contractual setup similar to a Public Private Partnership, a model widely used internationally, that allows leveraging on the capabilities and expertise of the different players. In this case the proposed Partnershio would allow Medina County (with minimal investment) to generate a healthy revenue stream to support County operations and to better control and coordinate the integration of the proposed revamped facility within the local solid waste management system.

More specifically we are proposing to structure the financing for the revamping of the industrial MCSWDF with the same financing model we successfully used for delivering a similar facility in Martinsburg West Virginia. The project will be based on a project finance structure assuming a mix of equity (20%) and debt (80%) provided through unguaranteed tax exempt bonds underwritten by large financial institution. Please refer to the attached letter from Ziegler Investment Banking for more detail

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sistemi per l'ambiente

(Ziegler successfully structured and marketed the financing for the previously mentioned $31 mil project in early 2016). In the context of the proposed financing structure the combined Entsorga / MCSWD investment in the PPP Company would be of approximately $5 Mil that we propose should be born on an equitable basis by the partners. With an investment cost expected to be lower than even a just a partial refurbishing of the industrial building, Medina County SWD would be able to deploy a long term solution meeting and exceeding the State and local target for diversion.

The Project Finance contractual structure will include between others:

-Lumpsum EPC contract assigned to an acceptable well referenced local construction contractor (we have been working with Wellert Corp to identify suitable candidates). Entsorga Group would provide Engineering, technology licensing and equipment scope as sub of the main contractor or independently.

-Operation & Maintenance agreement (supported by MCSWD and Entsorga resources).

-Long term uptake contract with Medina County SWD for 110,000 tons of MSW, with upsides for single stream recyclable material and commercial and Industrial waste.

-Long term off take contract for the processed fuel produced with an investment grade AF user

The overall headcount for the proposed facility is expected to between 16 and 20 employees including admin services and management. We are assuming that the staffing for the facility could be supported at least in part by local operators already employed at the MCSWDF, complemented by the Entsorga technical team and by new resources.

For services of transportation and disposal of residual fines and inerts (expected to be 30,000tpa), we would propose to leverage on the already existing infrastructure, working with a back to back arrangement with the County at a minimal markup and using existing disposal facilities and current or new service providers jointly selected with the County.

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Sistemi per l'ambiente

We have attached more detail on the expected investment cost for the project, we expect that cost for civil and construction for the refurbishing and addition to the existing building plus the additional value of the use of the existing building and infrastructure, will be similar to the expected cost for the engineering and equipment, allowing the participation shares of MCSWD and the proposer into the PPP Company to be similar. Once the project will reach successful acceptance and commercial operation will be stabilized, if preferred, Entsorga will be happy to scale back its equity participation in the project in favor of MCSWD. The site at the MCSWDF will continue to remain ownership of the MCSWD.

According to our financial projections (based on assumptions already validated by Leidos and the financial markets for the project in WV), this proposed execution strategy would allow Medina County SWD to recover the direct investment in 2 years and to provide upsides for future reduction of the processing fee, while providing long term solution for ambitious recycling and recovery rates.

As a last point, in consideration of possible integration of local programs for source separated organics, we are also providing a quick overview of our two proprietary Organic Waste treatment solutions (enclosed Composting and Anaerobic Digestion), confirming that both solutions can be developed separately or integrated in the same industrial site to efficiently treat both unsorted MSW and Organic waste.

We look forward to hearing back from you and to work together in establishing a proven, state of the art solution that will put Medina County at the forefront of recycling, resource recovery and landfill diversion in US.

Best regards,

Paolo Carollo

Vice President Operations North America

Entsorga USA Inc.

Medina County PART II Project Proposal Scoring Sheet

Respondent: Entsorga

Reviewer Name: Amy Lyon-Galvin

Review Date: Nov. 20, 2017 – Jan 22, 2018

Interview/oral presentation
Nov. 28, 2017 10 am – 11:30 am
- Paolo Carollo
- Bob Wellert, Wellert Corp
- Wellert visits NDA
- Follow up Nov. 29, 2017
- Site visit Dec. 13, 2017 to Martinsburg WV.

Score 4 (-1)
45
23 (-2)
72

Disqualification Criteria:

☐ Incomplete or unsigned forms and required submittals;

Comments: Checklist ✓
Included form B-7D per Addendum 1
No parent guarantee, only letter of intent

☐ Response submitted after deadline in all cases;

Comments: ϕ

☐ Ex parte communications with District or Medina County elected officials, employees, consultants or representatives regarding this Project Description during the period of silence per Section VIII as contained herein;

Comments: ϕ

☐ Incomplete document/missing significant information requested in the Project Description;

Comments: Letter of intent to issue parent guarantee
TTD + marketing recyclables, landfill space – by others
to maximize ex. contractor operations by District.
No commodities market history

☐ Submission of false, inaccurate or incomplete information;

Comments:

☐ Equivocal pricing submitted on Pricing Form;

Comments: Alternate pricing strategy public/private partnership.

Scoring Criteria		Score (0–10)
1. Response Completeness	4/5	

Comments:

checklist ✓

Addenda 1+2 ✓

Electronic version ✓

MSW MWP – yes – Residential ✓

Not impacted by curbside growth.

$ Landfill capacity, use existing relationships.

Different funding strategy 20% equity 80% bond finance

has flow diagram w/ tons.

typically provide technology + training; operation is local

waste agreements with major haulers a must w/o put or pay.

maximizes recycling + recovery

Strong Europe presence. Brokering relationships to build in US

1st US facility to be operational Q2 2018

2. Technical Specifications	45/45	

Comments:

Alternative biodrying + Alternative Fuel processing system.

Assumes 120,000 tons/year w/ min 10,000 tons/yr. commercial/industrial waste

to produce 52,000 tons Alternative Fuels

75% Landfill diversion

25% fines+inerts to be landfilled

25% evaporation

New bldg. for receiving + biooxidation

Ex bldg refinement, additional recycling, logistic operations

organics excluded for now

7,500 tons/yr. steel aluminum PVC

Reception bridge crane 35 tons/hr.

pretreatment bag opener / fast rotary drum.

Bio-Drying – 20 d. bioxidation cure time

claims 73% diversion - 75% but includes water loss

Refinement 25 ton/hr.

biofilter for odor control (negative pressure)

NIR

high speed crane

air separator

} Entsorga Equip. + other Mfg. Equip + Integrate Equip.

opper
wedder
ommel
1 class.
agnets
dy current
IR
EF granulator (shredder) up to 10 t/hr.

52000 + 7500 = 59,500 45,500

÷ 140,000 = 42.5% Landfill ~~80,500~~

÷ 120,000 = 49.6% " ~~60,500~~

Scoring Criteria	Score (0–10)
2g. Transfer Plan	

States present transfer + disposal arrangements are reliable low cost solution as past through.

Propose public - private partnership
20% equity 80% Debt through unguaranteed tax exempt bonds underwritten by large financial institution via Ziegler Investment Banking letter Martinsburg WV model adapted to MC

- Lump sum EPC contract to local construction contractor w/ Entsorga Engineering, technology licensing + equipment
- operation + maint. agreement
- Long term uptake contract w/ District for 110,000 tons/yr MSW = waste agreements
- Long term offtake contract for processed fuel

Financial projections/assumptions validated by Leidos in WV.

3. Proposed Net Cost to the District for Processing & Recovery of Recyclables and TTD Operations	23/25

Comments:

New Equipment $13.9M — 10 yr. note
Rolling Stock $120,000 + lease
MCSWD Building $12M — 30 yr. note
$26,020,000

TTD – $20/ton
recovered ton processing fee $52/ton
Source separated recyclables $35/ton – placemarker, not necessary.
$3.8M revenue before tax 50/50 split w/ county

Entsorga $2.5M - $3M
County $2.5M - $3M
} Equity investment

Could land lease + not use land as collateral.

Successful Respondents shall provide a qualified project and management team able to undertake this scope with requisite skills to design, permit, construct and operate a new processing system and required building modifications at the MCSWDF. The Contractor will be responsible for all funding, design, permitting, construction and operations of this contractual opportunity, excepting the agreed upon Building Modifications, which are to be designed and permitted by the Contractor and paid for by the District.

- The installed Building Modifications at the Mixed Waste Processing Facility (MWPF) are expected to be permitted, constructed and ready for operations within the proposed schedule in the Respondent's response, while meeting the District's timelines in this RFQ, unless otherwise noted. The District will provide funding for the contractually agreed upon Building Modifications. The Respondent must have the ability carry out the required design, permitting and construction of the proposed Project, working capital required to carry out the construction project subject to District progress payments, hire the appropriate labor and management, and provide for any contingencies. Finally, the respondent will be required to operate the facility for the duration of the agreement. Adequate representations should be made in the RFQ response to this effect.

- The installed modifications and processing equipment at the Mixed Waste Processing Facility (MWPF) will be funded by the Respondent, permitted, constructed and be ready for operations within the proposed schedule, while meeting the District's timelines, unless otherwise noted. The District will provide no capital funding for the Equipment purchase or installation. The Respondent must have the ability to fund (or obtain funding for) the design, permitting and construction of the recycling processing system, the working capital required to commission the new processing system, hire the appropriate labor and management for both the construction and operation of the facility, and provide for any contingencies.

- Finally, the Respondent will be required to operate the MWPF and TTD for the duration of the agreement to meet the District and Proposal requirements. Adequate representations should be made in the RFQ response to this effect.

An important, but not inclusive, description of the required long-term value sought, including District recycling and recovery goals and aspirations, and past MSW management experiences, can be found in the **2016-2030 Solid Waste Plan Update** (District Plan), on the District website:

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1 EXECUTIVE SUMMARY

The scope of the present document is to detail further the expected yields and diversion rates, and to describe the operations and maintenance plan for the proposed facility. The data and information provided are based on the available public information as listed in the RFQ and RFP documents as well as years of experience in costructing and operationg similar facilities internationally. The staffing of the facility has been proposed considering three shifts, however the nameplate capacity can be achieved by running the plant with two shifts reducing further the headcount to overall 16 employees/operators. The proposed execution model that leverages on a public private partnersip if desired, once the facility is started up and operating, would allow to easily transfer to MCSWD's resources the knowledge, tools and procedures to independently run the facility with technical support provided from the Entsorga Group.

2 INDEX

Scoring Criteria	Score (0–10)
2a. Construction Plan	

Comments:

MCSWD owns property

Can modularly scale 120,000 to 150,000 tons/yr.

Very detailed construction plan. Models + process sizing

Equipment dimensioned

final Processed Engineered Fuel (PEF) direct discharge to walking floor trucks/trailers or baled for long travel dist.

Fines + rents discharge direct into containers or trailer trucks

Build B M from ex. bldg to minimize interference

Problems w/ interim truck traffic.

Remove pellet bldg Addn.

22 Months.

2b. Operation Plan	

Comments: can be operated by Entsorga or other contract operator, or LLC.

385 tons per day / 312 working days / 6 d/wk

plugged MCSWD's waste characterization into their simulation waste input MATRIX software.

= medium quality processed engineered fuel (PEF)

2 hook lift trucks, 1 front end loader

Refining in ex. bldg area is not all space.

Utilize TTD subcontractor to ex. Landfill 30,000 t/yr.

16-20 employees, guaranteed 20

3 shifts 8/8/4 Employees 4 Mgmt.

11-12 hr d.

w/ 24 hr. biodrying bioxidation

Min. process guarantee? 110,000 tons/yr.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

TUSK VENTURES LLC,	:	**Index No.**
Plaintiff.	:	**SUMMONS**
-against-	:	
BIOHITECH GLOBAL, INC.,	:	
Defendant.	:	

TO THE DEFENDANT IN THE ABOVE-CAPTIONED ACTION:

YOU ARE HEREBY SUMMONED to answer the Complaint in this action and to serve a copy of your answer, or, if the Complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's attorney within twenty (20) days after service of this summons, exclusive of day of service, or within thirty (30) days after the service is complete if this summons is not personally delivered to you within the State of New York. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded hercin.

Date: New York, New York
April 21, 2017

By: Marla Tusk
MARLA B. TUSK, ESQ
General Counsel for Plaintiff
Tusk Ventures LLC
251 Park Avenue South, 8th Floor
New York, NY 10010
(212) 259-0580

TO: BioHiTech Global, Inc.
80 Red Schoolhouse Road
Suite 101
Chestnut Ridge, NY 10977

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

TUSK VENTURES LLC,	:	**Index No.**
	:	
Plaintiff.	:	**COMPLAINT**
	:	
-against-	:	
	:	
BIOHITECH GLOBAL, INC.,	:	
	:	
Defendant.	:	

Plaintiff, Tusk Ventures LLC ("Plaintiff" or "Tusk"), by and through its attorney, Marla B. Tusk Esq., as and for its Complaint, respectfully alleges as follows:

NATURE OF THE ACTION

1. Plaintiff brings this action to obtain relief for breach of contract.

THE PARTIES

2. Plaintiff, a limited liability company organized under the laws of the State of Delaware, is a consulting firm that specializes in providing regulatory advice to companies. Plaintiff's principal place of business is 251 Park Avenue South, 8th Floor, New York, New York 10010.

3. Defendant BioHiTech Global, Inc. ("Defendant" or "BHT"), a public corporation organized under the laws of the State of Delaware, develops and deploys waste management technologies. Defendant's principal place of business is 80 Red Schoolhouse Road, Suite 101, Chestnut Ridge, New York 10977.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this matter pursuant to N.Y. CPLR §§ 301 and 302 because both Plaintiff and Defendant have their primary place of business in New York and conduct business in New York.

5. New York County is the appropriate venue for this action pursuant to N.Y. CPLR § 503 because Plaintiff's principal place of business is located in New York County.

FACTS

6. Tusk and BHT entered into a Consulting Services Agreement (the "Agreement") on July 19, 2016. Tusk's CEO, Bradley Tusk, executed the Agreement on behalf of Plaintiff. BHT's CEO, Frank Celli, executed the Agreement on behalf of Defendant.

7. Under the terms of the Agreement, Tusk would provide consulting services to BHT beginning on August 1, 2016, for a term of one (1) year. The Agreement contained a termination clause that allowed either party to terminate the Agreement early for any reason upon thirty (30) days' notice to the other party (the "Early Termination Clause").

8. Pursuant to the Agreement, BHT agreed to pay Tusk a cash fee of $50,000.00 per month in consideration for the services to be performed under the Agreement.

9. Prior to execution of the Agreement, BHT informed Tusk that BHT was in the process of completing a private placement of $15,000,000, and requested that Tusk allow BHT to defer its first cash payment until the earlier of (x) four (4) months from the date the Agreement was executed or (y) BHT's successful completion of its $15,000,000 private placement. Tusk agreed to BHT's requested payment terms, contingent upon BHT's promise to pay the full amount owed for all services rendered under the Agreement as of the date of the first cash payment.

10. The Parties executed the Agreement on July 19, 2016.

11. Tusk began to provide services to BHT pursuant to the Agreement on August 1, 2016.

12. BHT failed to complete its private placement of $15,000,000 during the life of the Agreement. As such, under the payment terms of the Agreement, BHT was obligated to make its first cash payment to Tusk after four (4) months from the date on which the Agreement was executed. Because the Agreement was executed on July 19, 2016, BHT was required to pay Tusk the full amount owed to-date (which, at that time, was $200,000.00) by November 19, 2016. BHT failed to make any payment to Tusk on November 19, 2016.

13. On December 5, 2016, BHT exercised the Early Termination Clause. Although BHT was required to provide Tusk with thirty (30) days' notice prior to early termination, Tusk agreed to terminate the Agreement as of December 31, 2016.

14. Tusk provided continuous services to BHT from August 1, 2016 through December 31, 2016, for a total of five (5) months. Pursuant to the Agreement, BHT was obligated to pay Tusk a fee of $50,000.00 per month for each month Tusk provided services to BHT, totaling $250,000.00.

15. Tusk sent several invoices and emails to BHT to request payment of the amount owed. To date, BHT has made no cash payment to Tusk for the services rendered.

CAUSE OF ACTION
(Breach of Contract)

16. Plaintiff repeats and realleges the allegations contained in Paragraphs 1 through 15 as though fully set forth herein.

17. At all relevant times, a valid and enforceable contract, defined hereinabove as the "Agreement", existed between Plaintiff and Defendant.

18. Plaintiff timely and satisfactorily performed its obligations pursuant to the Agreement.

19. Defendant materially breached the Agreement by failing to pay Plaintiff the sum owed in exchange for the services performed by Plaintiff pursuant to the Agreement, resulting in pecuniary damages to Plaintiff.

20. By reason of Defendant's material breach of the Agreement, Plaintiff is entitled to damages in the amount of $250,000.00, before addition of prejudgment interest.

WHEREFORE, Plaintiff demands judgment against Defendant in the sum of $250,000.00, plus interest from November 19, 2016, costs and disbursements, together with any other relief the Court finds to be just and proper.

Date: New York, New York
April 21, 2017

By: Marla Tusk

MARLA B. TUSK, ESQ
General Counsel for Plaintiff
Tusk Ventures LLC
251 Park Avenue South, 8th Floor
New York, NY 10010
(212) 259-0580

The Company is the owner of the registered trademark Eco-Safe Digester, and has trademarks on BioHiTech, BioBrain, the BioHiTech Cloud, Cirrus and Alto.

Mechanical Biological Treatment Line of Business

On January 20, 2016, the Company formed E.N.A Renewables LLC, formerly known as Entsorga North America, LLC (" ENA ") as a wholly owned subsidiary. ENA owns a 31% interest in Apple Valley Waste Conversions, LLC (" AVWC "). Frank E. Celli, the Company's CEO also owns a 20.9% interest in AVWC. In March 2017, Mr. Celli assigned his voting rights in AVWC so that, collectively, ENA would have voting control of over 51% of AVWC. AVWC currently holds the exclusive license for the development throughout 11 northeast U.S. states and the District of Columbia of the technology known as High Efficiency Biological Treatment (" HEBioT "), which is owned by Entsorgafin, an Italian company that provides cost effective environmental technologies throughout the world. HEBioT is a proprietary form of Mechanical Biological Treatment (" MBT ") that is used widely throughout Europe. During 2016, the Company's MBT activities have been limited to initial project development.

The HEBioT technology converts mixed municipal and organic waste to a US Environmental Protection Agency (the "US EPA") recognized alternative fuel source. By utilizing a combination of mechanical and biological processes to accelerate the decomposition of the organic fraction of waste, the end product produced, known as solid recovered fuel ("SRF") has a carbon value equivalent to approximately 75-80% of traditional coal and can be used as a replacement and/or supplement to coal. After receipt and processing of waste at the facility, approximately 80% of the incoming waste is reduced, recycled or converted into the approved alternative fuel, with the remaining 20% of the incoming waste being disposed of via traditional methods.

The US EPA has issued a "comfort letter" stating that any fuel produced utilizing the HEBioT technology is deemed an engineered fuel and can be marketed as a commodity.

ENA, as the controlling member of AVWC, will be charged with new project development and marketing throughout 11 northeast U.S. states and the District of Columbia. This project development may consist of construction, ownership and operation of actual facilities or possible sub-licenses to third parties to utilize the technology. ENA may realize revenue's in various ways:

- Construction and operation of actual facilities, in which case ENA would identify an opportunity to develop a plant, facilitate its permitting and construction and ultimately operate the facility. In this case ENA will realize all revenue and costs associated with the development of the project and will pay to AVWC a license fee.

- Charged services to AVWC for projects that it brings to fruition where AVWC receives annual license fees. In this case, along with the charged services, ENA would receive its pro-rata share of the license fees paid to AVWC.

The license agreement between Entsorgafin (technology owner) and AVWC is perpetual in nature, with certain performance standards during the initial five years of the agreement.

The Company believes it will be successful in the development of the ENA plants under one of the two proposed revenue scenarios over the next 24 to 36 months. The deployment of this technology is consistent with the Company's vision of providing disruptive technologies to the traditional waste industry. With the ability to accept up to approximately 20 to 30% of each plant's capacity in the form of pure food waste, the Company adds an option of municipal level solutions in the food waste industry that it does not currently possess.

Entsorga West Virginia Investment

Entsorga West Virginia Plant Under Construction – March 2017

Effective January 1, 2017, the Company signed an agreement to acquire up to approximately 40% of the interests in Entsorga West Virginia LLC ("EWV") from the original investors at the purchase price of $60,000 for each 1% interest in EWV. The Company is required to purchase $1,034,028 of EWV's interests, representing a 17.2% interest, with the remaining 23.1% being at the option of the Company. The agreement and transfer of the interests were subject to the approval of the EWV bond trustee, which was granted on March 20, 2017. On March 21, 2017, the Company completed the required investment acquisition of $1,034,028 for a 17.2% interest. The acquisition by the Company was funded by a short-term advance from the Company's Chief Executive Officer.

EWV, located in Martinsburg, WV, represents the first deployment of the Entsorga HEBioT technology in the United States. EWV has its own intellectual property agreement with Entsorgafin S.p.A. which is not part of the agreement that Apple Valley Waste Conversions, LLC has with Entsorgafin S.p.A. The EWV plant has received its necessary permits and EWV has closed on its financing to construct the facility. The facility will be able to accept up to 110,000 tons per year of municipal solid waste delivered from the surrounding areas. Its facility will consist of a 54,000 square foot industrial building located on approximately 12 acres of leased property. The facility will include a plant which will be equipped with HEBioT technology and will ultimately be able to produce approximately 50,000 tons per year of EPA recognized renewable fuel.

EWV has entered into a 30-year initial term land lease with a municipal authority for industrial property adjacent to its previously closed landfill site. EWV has entered into numerous contracts, including: the engineering, procurement and commissioning of the plant; a 10-year solid waste delivery agreement for the delivery of 70,000 tons per year of municipal solid waste to the plant; a 10-year contract for the sale and delivery of SRF manufactured at the plant, and a 10 year professional services agreement that provides managerial services for general plant oversight, certain logistical services, and financial administration. While EWV will be responsible for its own costs of operations, plant oversight and administration will be performed under the professional services agreement.

EWV held its groundbreaking ceremony in January 2016 and subsequently closed on the issuance of Tax Exempt Industrial Development Bonds issued by the West Virginia Economic Development Authority in the amount of $25,000,000 (the "Bonds"). The facility is currently under construction and is expected to begin commercial operations in the second half of 2017.

This first operational plant utilizing the patented HEBioT technology in the United States will serve as the Company's "showplace" to help expedite future deployments.

The waste services industry is subject to extensive and rapidly-changing government regulation. Changes to one or more of these regulations could cause a decrease in the demand for our digester systems.

We currently have only a single operational waste processing product generating revenues. We believe the demand for our digester product is created directly in response to recent municipal laws and regulation prohibiting certain large, commercial food manufacturers, retailers and catering halls from discarding food wastes to landfills. Our digesters are just one solution for these businesses to comply with these regulations. If there was a change to or elimination of these regulations, the demand for our product would almost certainly be greatly reduced and our income would, as a result, be adversely affected.

Currently, the microorganisms we employ in our digesters are approved for use to reduce food waste and to be poured into conventional sewer systems. However, if it was determined that we could no longer use these microorganisms, there is no guarantee that we could develop a replacement process to assure that we could continue to sell our products. Also, we would likely face claims from current customers were they unable to use our digesters for food waste disposal.

We may also incur the costs of defending against environmental litigation brought by governmental agencies and private parties. We are, and also may be in the future, a defendant in lawsuits brought by parties alleging environmental damage, personal injury, and/or property damage, or which seek to overturn or prevent authorization of our products, all of which may result in us incurring significant liabilities.

We may engage in acquisitions in the future with the goal of complementing or expanding our business, including developing additional disposal products and complementary services. However, we may be unable to complete these transactions and, if executed, these transactions may not improve our business or may pose significant risks and could have a negative effect on our operations.

We may in the future, make acquisitions in order to acquire or develop additional disposal products and complementary services. In addition, from time to time we may acquire businesses that are complementary to our core business strategy. We may not be able to identify suitable acquisition candidates. If we identify suitable acquisition candidates, we may be unable to successfully negotiate acquisitions at a price or on terms and conditions acceptable to us, including as a result of the limitations imposed by our debt obligations. Further, we may be unable to obtain the necessary regulatory approval to complete potential acquisitions.

Our ability to achieve the benefits of any potential future acquisition, including cost savings and operating efficiencies, depends in part on our ability to successfully integrate the operations of such acquired businesses with our operations. The integration of acquired businesses and other assets may require significant management time and resources that would otherwise be available for the ongoing management of our existing operations. In addition, to the extent any future acquisitions are completed, we may be unsuccessful in integrating acquired companies or their operations, or if integration is more difficult than anticipated, we may experience disruptions that could have a material adverse impact on future profitability. Some of the risks that may affect our ability to integrate, or realize any anticipated benefits from, acquisitions include:

- unexpected losses of key employees or customer of the acquired company;
- difficulties integrating the acquired company's standards, processes, procedures and controls;
- difficulties coordinating new product and process development;
- difficulties hiring additional management and other critical personnel;
- difficulties increasing the scope, geographic diversity and complexity of our operations;
- difficulties consolidating facilities, transferring processes and know-how;
- difficulties reducing costs of the acquired company's business;
- diversion of management's attention from our management; and
- adverse impacts on retaining existing business relationships with customers.

The Company is the owner of the registered trademark Eco-Safe Digester, and has trademarks on BioHiTech, BioBrain, the BioHiTech Cloud, Cirrus and Alto.

Mechanical Biological Treatment Line of Business

On January 20, 2016, the Company formed E.N.A Renewables LLC, formerly known as Entsorga North America, LLC (" ENA ") as a wholly owned subsidiary. ENA owns a 31% interest in Apple Valley Waste Conversions, LLC (" AVWC "). Frank E. Celli, the Company's CEO also owns a 20.9% interest in AVWC. In March 2017, Mr. Celli assigned his voting rights in AVWC so that, collectively, ENA would have voting control of over 51% of AVWC. AVWC currently holds the exclusive license for the development throughout 11 northeast U.S. states and the District of Columbia of the technology known as High Efficiency Biological Treatment (" HEBioT "), which is owned by Entsorgafin, an Italian company that provides cost effective environmental technologies throughout the world. HEBioT is a proprietary form of Mechanical Biological Treatment (" MBT ") that is used widely throughout Europe. During 2016, the Company's MBT activities have been limited to initial project development.

The HEBioT technology converts mixed municipal and organic waste to a US Environmental Protection Agency (the "US EPA") recognized alternative fuel source. By utilizing a combination of mechanical and biological processes to accelerate the decomposition of the organic fraction of waste, the end product produced, known as solid recovered fuel ("SRF") has a carbon value equivalent to approximately 75-80% of traditional coal and can be used as a replacement and/or supplement to coal. After receipt and processing of waste at the facility, approximately 80% of the incoming waste is reduced, recycled or converted into the approved alternative fuel, with the remaining 20% of the incoming waste being disposed of via traditional methods.

The US EPA has issued a "comfort letter" stating that any fuel produced utilizing the HEBioT technology is deemed an engineered fuel and can be marketed as a commodity.

ENA, as the controlling member of AVWC, will be charged with new project development and marketing throughout 11 northeast U.S. states and the District of Columbia. This project development may consist of construction, ownership and operation of actual facilities or possible sub-licenses to third parties to utilize the technology. ENA may realize revenue's in various ways:

- Construction and operation of actual facilities, in which case ENA would identify an opportunity to develop a plant, facilitate its permitting and construction and ultimately operate the facility. In this case ENA will realize all revenue and costs associated with the development of the project and will pay to AVWC a license fee.

- Charged services to AVWC for projects that it brings to fruition where AVWC receives annual license fees. In this case, along with the charged services, ENA would receive its pro-rata share of the license fees paid to AVWC.

The license agreement between Entsorgafin (technology owner) and AVWC is perpetual in nature, with certain performance standards during the initial five years of the agreement.

The Company believes it will be successful in the development of the ENA plants under one of the two proposed revenue scenarios over the next 24 to 36 months. The deployment of this technology is consistent with the Company's vision of providing disruptive technologies to the traditional waste industry. With the ability to accept up to approximately 20 to 30% of each plant's capacity in the form of pure food waste, the Company adds an option of municipal level solutions in the food waste industry that it does not currently possess.

Entsorga West Virginia Investment

Entsorga West Virginia Plant Under Construction – March 2017

Effective January 1, 2017, the Company signed an agreement to acquire up to approximately 40% of the interests in Entsorga West Virginia LLC ("EWV") from the original investors at the purchase price of $60,000 for each 1% interest in EWV. The Company is required to purchase $1,034,028 of EWV's interests, representing a 17.2% interest, with the remaining 23.1% being at the option of the Company. The agreement and transfer of the interests were subject to the approval of the EWV bond trustee, which was granted on March 20, 2017. On March 21, 2017, the Company completed the required investment acquisition of $1,034,028 for a 17.2% interest. The acquisition by the Company was funded by a short-term advance from the Company's Chief Executive Officer.

EWV, located in Martinsburg, WV, represents the first deployment of the Entsorga HEBioT technology in the United States. EWV has its own intellectual property agreement with Entsorgafin S.p.A. which is not part of the agreement that Apple Valley Waste Conversions, LLC has with Entsorgafin S.p.A. The EWV plant has received its necessary permits and EWV has closed on its financing to construct the facility. The facility will be able to accept up to 110,000 tons per year of municipal solid waste delivered from the surrounding areas. Its facility will consist of a 54,000 square foot industrial building located on approximately 12 acres of leased property. The facility will include a plant which will be equipped with HEBioT technology and will ultimately be able to produce approximately 50,000 tons per year of EPA recognized renewable fuel.

EWV has entered into a 30-year initial term land lease with a municipal authority for industrial property adjacent to its previously closed landfill site. EWV has entered into numerous contracts, including: the engineering, procurement and commissioning of the plant; a 10-year solid waste delivery agreement for the delivery of 70,000 tons per year of municipal solid waste to the plant; a 10-year contract for the sale and delivery of SRF manufactured at the plant, and a 10 year professional services agreement that provides managerial services for general plant oversight, certain logistical services, and financial administration. While EWV will be responsible for its own costs of operations, plant oversight and administration will be performed under the professional services agreement.

BWV held its groundbreaking ceremony in January 2016 and subsequently closed on the issuance of Tax Exempt Industrial Development Bonds issued by the West Virginia Economic Development Authority in the amount of $25,000,000 (the " Bonds "). The facility is currently under construction and is expected to begin commercial operations in the second half of 2017.

This first operational plant utilizing the patented HEBioT technology in the United States will serve as the Company's "showplace" to help expedite future deployments.

Marketing, Sales and Distribution

Digester Marketing Strategy

The Company markets through two channels, "in-house" direct sales and "reseller" sales. We currently leverage six company-employed sales associates that focus on maintaining and expanding "house accounts". We currently have 21 registered domestic resellers, 8 registered international resellers, 19 independent domestic sales agents, two international independent sales agents and three international sub-distributors. Domestic and international resellers are granted a non-exclusive license to sell and market products and services. The international sub-distributors have been granted exclusive sub-distribution rights in Mexico, Latin America, Singapore, Malaysia and Indonesia. All resellers are required to purchase all products and consumables directly from the Company. In some cases, we also provide annual service to customers of our resellers at an additional charge.

The Company employs one full time marketing professional and contracts with various firms for design and production of our marketing materials. We supply our resellers with any necessary marketing materials.

Our internal team of technology professionals is responsible for research and development, as well as maintenance of existing systems – the BioHiTech Cloud, the Company's website, the BioHiTech Cirrus App and the Alto application. We also employ one full time Director of Science and Research.

As regulations continue to be passed regarding the disposal of food waste, we will leverage both our internal and external marketing sources to communicate to the target market the increasing level of need for our products and services.

Historically, Eco-Safe Digesters were imported from the manufacturer located in Seoul, South Korea and received at the BioHiTech headquarters and warehouse in Chestnut Ridge, New York. During 2016, the Company has transitioned primarily to a United States based manufacturing model. Each product goes through a rigorous quality control process before it is delivered to the customer. At our headquarters facility, each product is equipped with our proprietary hardware and software to enable our BioHiTech Cloud connectivity. International units may be drop shipped directly to resellers. In this event, we ship the necessary hardware and software to our international service agents for installation prior to customer delivery. The new Revolution line of digesters, which will also be manufactured in the United States, is also equipped with our proprietary hardware and software to enable our BioHiTech Cloud connectivity.

MBT Marketing Strategy

The Company has focused our initial marketing efforts of our HEBioT technology within the 11 northeast states and the District of Columbia by identifying potential opportunities based on various criteria including, disposal costs within a region, proximity to end users of alternative fuels, lack of long term disposal alternatives, and access to adequate feedstock.

Disposal Costs: We pursue opportunities where disposal costs within a certain radius of a prospective project are high enough to provide adequate returns on capital. Since "tip fees" received by a facility represent the majority of a facility's revenue, areas with tip fees in excess of $50 per ton are highly attractive markets. This is the case, in the majority of regions covered by the Company's licensing rights.

Within our website's "Investor" section, "SEC Filings" tab, all of our filings with the Commission and all amendments to these reports are available as soon as reasonably practicable after filing.

Website

Our website addresses are www.biohitech.com and www.biohitechglobal.com .

Our Information

Our principal executive offices are located at 80 Red Schoolhouse Road, Suite 101, Chestnut Ridge, NY 10977 and our telephone number is (845) 262-1081. We can be contacted by email at info@biohitech.com.

ITEM 1A. RISK FACTORS

Our business, financial condition, operating results and prospects are subject to the following risks. Additional risks and uncertainties not presently foreseeable to us may also impair our business operations. If any of the following risks actually occurs, our business, financial condition or operating results could be materially adversely affected. In such case, the trading price of our common stock could decline, and our stockholders may lose all or part of their investment in the shares of our common stock.

This Form 10-K contains forward-looking statements that involve risks and uncertainties. These forward-looking statements can be identified by the use of words such as "believes," "estimates," "intends", "plans", "could," "possibly," "probably," anticipates," "projects," "expects," "may," "will," or "should," "designed to," "designed for," or other variations or similar words or language. Actual results could differ materially from those discussed in the forward-looking statements as a result of certain factors, including those set forth below and elsewhere in this Form 10-K.

Risks Specific to Our Business

We have a history of operating losses and there can be no assurance that we can achieve or maintain profitability.

We have a history of operating losses and may not achieve or sustain profitability. We cannot guarantee that we will become profitable. Even if we achieve profitability, given the competitive and evolving nature of the industry in which we operate, we may be unable to sustain or increase profitability and our failure to do so would adversely affect the Company's business, including our ability to raise additional funds.

We face substantial competition in the waste services industry, and if we cannot successfully compete in the marketplace, our business, financial condition and results of operations may be materially adversely affected.

The waste services industry is highly competitive, has undergone a period of consolidation and requires substantial labor and capital resources. Some of the markets in which we compete are served by one or more of large, established companies, that are more well-known and better financed than we are. Intense competition exists not only to provide services to customers, but also to develop new products and services and acquire other businesses within each market. Some of our competitors have significantly greater financial and other resources than we do.

In our waste disposal markets, we also compete with operators of alternative disposal and recycling facilities. We also increasingly compete with companies that seek to use waste as feedstock for alternative uses. Public entities may have financial advantages because of their ability to charge user fees or similar charges, impose tax revenues, access tax-exempt financing and, in some cases, utilize government subsidies.

If our digesters are unable to successfully compete in the marketplace, our business and financial condition could be materially adversely affected.

The waste services industry is subject to extensive and rapidly-changing government regulation. Changes to one or more of these regulations could cause a decrease in the demand for our digester systems.

We currently have only a single operational waste processing product generating revenues. We believe the demand for our digester product is created directly in response to recent municipal laws and regulation prohibiting certain large, commercial food manufacturers, retailers and catering halls from discarding food wastes to landfills. Our digesters are just one solution for these businesses to comply with these regulations. If there was a change to or elimination of these regulations, the demand for our product would almost certainly be greatly reduced and our income would, as a result, be adversely affected.

Currently, the microorganisms we employ in our digesters are approved for use to reduce food waste and to be poured into conventional sewer systems. However, if it was determined that we could no longer use these microorganisms, there is no guarantee that we could develop a replacement process to assure that we could continue to sell our products. Also, we would likely face claims from current customers were they unable to use our digesters for food waste disposal.

We may also incur the costs of defending against environmental litigation brought by governmental agencies and private parties. We are, and also may be in the future, a defendant in lawsuits brought by parties alleging environmental damage, personal injury, and/or property damage, or which seek to overturn or prevent authorization of our products, all of which may result in us incurring significant liabilities.

We may engage in acquisitions in the future with the goal of complementing or expanding our business, including developing additional disposal products and complementary services. However, we may be unable to complete these transactions and, if executed, these transactions may not improve our business or may pose significant risks and could have a negative effect on our operations.

We may in the future, make acquisitions in order to acquire or develop additional disposal products and complementary services. In addition, from time to time we may acquire businesses that are complementary to our core business strategy. We may not be able to identify suitable acquisition candidates. If we identify suitable acquisition candidates, we may be unable to successfully negotiate acquisitions at a price or on terms and conditions acceptable to us, including as a result of the limitations imposed by our debt obligations. Further, we may be unable to obtain the necessary regulatory approval to complete potential acquisitions.

Our ability to achieve the benefits of any potential future acquisition, including cost savings and operating efficiencies, depends in part on our ability to successfully integrate the operations of such acquired businesses with our operations. The integration of acquired businesses and other assets may require significant management time and resources that would otherwise be available for the ongoing management of our existing operations. In addition, to the extent any future acquisitions are completed, we may be unsuccessful in integrating acquired companies or their operations, or if integration is more difficult than anticipated, we may experience disruptions that could have a material adverse impact on future profitability. Some of the risks that may affect our ability to integrate, or realize any anticipated benefits from, acquisitions include:

- unexpected losses of key employees or customer of the acquired company;
- difficulties integrating the acquired company's standards, processes, procedures and controls;
- difficulties coordinating new product and process development;
- difficulties hiring additional management and other critical personnel;
- difficulties increasing the scope, geographic diversity and complexity of our operations;
- difficulties consolidating facilities, transferring processes and know-how;
- difficulties reducing costs of the acquired company's business;
- diversion of management's attention from our management; and
- adverse impacts on retaining existing business relationships with customers.

We have inadequate capital and need additional financing to accomplish our business and strategic plans.

We have very limited funds, and such funds are not adequate to develop our current business plan. Our ultimate success may depend on our ability to raise additional capital. In the absence of additional financing or significant revenues and profits, the Company will have to approach its business plan from a much different and much more restricted direction, attempting to secure additional funding sources to fund its growth, borrowing money from lenders or elsewhere or to take other actions to attempt to provide funding. We cannot guarantee that we will be able to obtain sufficient additional funds when needed, or that such funds, if available, will be obtainable on terms satisfactory to us.

We expect that we will need to raise additional capital to meet our business requirements in the future, and such capital raising may be costly or difficult to obtain and can be expected to dilute current stockholders' ownership interests if converted .

Based upon present strategic investment plans, we expect that we will need to raise additional capital in the future. Such additional capital may not be available on reasonable terms or at all. We may need to raise additional funds through borrowings or public or private debt or equity financings to meet various objectives including, but not limited to:

- accomplish growth through enhanced sales and marketing efforts;
- effect new products and services development;
- complete business acquisitions; and
- build inventory

Our limited operating history does not afford investors a sufficient history on which to base an investment decision.

We are currently in the early stages of developing our businesses. Our operations are subject to all the risks inherent in the establishment of a new business enterprise. The likelihood of success must be considered in light of the problems, expenses, difficulties, complications and delays that are frequently encountered in a newly-formed company. There can be no assurance that at this time that we will operate profitably or will have adequate working capital to meet our obligations as they become due.

Investors must consider the risks and difficulties frequently encountered by early stage companies, particularly in rapidly evolving markets. Such risks include the following:

- increasing awareness of our brand names;
- meeting customer demand and standards;
- attaining customer loyalty;
- developing and upgrading our product and service offerings;
- implementing our advertising and marketing plan;
- maintaining our current strategic relationships and developing new strategic relationships;
- responding effectively to competitive pressures; and
- attracting, retaining and motivating qualified personnel.

We cannot be certain that our business strategy will be successful or that we will successfully address these risks. In the event that we do not successfully address these risks, our business, prospects, financial condition, and results of operations could be materially and adversely affected and we may not have the resources to continue or expand our business operations.

We may not be able to continue as a going concern.

For the years ended December 31, 2016 and 2015, the Company had a net loss of $6,745,386 and $5,001,452, respectively, incurred a consolidated loss from operations of $5,924,667 and $4,545,646, respectively and used net cash in consolidated operating activities of $5,181,400 and $3,170,427, respectively. At December 31, 2016, consolidated stockholders' deficit amounted to $11,458,100 and the Company had a consolidated working capital deficit of $5,096,220. The Company does not yet have a history of financial stability. Historically, the principal source of liquidity has been the issuance of debt and equity securities. These factors raise substantial doubt about the Company's ability to continue as a going concern. Our financial statements do not include any adjustments that might result from the outcome of the uncertainty regarding our ability to continue as a going concern. If the Company cannot continue as a going concern, its stockholders may lose their entire investment.

We rely on highly skilled personnel and, if we are unable to retain or motivate key personnel or hire additional qualified personnel, we may not be able to grow effectively.

Our performance is largely dependent on the talents and efforts of highly skilled individuals. Our future success depends on our continuing ability to identify, hire, develop, motivate, and retain highly skilled personnel for all areas of our organization. Our continued ability to compete effectively depends on our ability to retain and motivate existing employees. Due to our reliance upon its skilled professionals and laborers, the failure to attract, integrate, motivate, and retain current and/or additional key employees could have a material adverse effect on our business, operating results and financial condition. We only maintain key person life insurance for Frank E. Celli and Robert Joyce at this time.

If we fail to manage growth or to prepare for product scalability effectively, it could have an adverse effect on our employee efficiency, product quality, working capital levels and results of operations .

Any significant growth in the market for our products or our entry into new markets may require an expansion of our employee base for managerial, operational, financial, and other purposes. We had 19 full time employees outside of our management team of four. During any period of growth, we may face problems related to our operational and financial systems and controls, including quality control and delivery and service capacities. We would also need to continue to expand, train and manage our employee base. Continued future growth will impose significant added responsibilities upon the members of management to identify, recruit, maintain, integrate, and motivate new employees.

Aside from increased difficulties in the management of human resources, we may continue to encounter working capital issues, as we will need increased liquidity to finance the expansion of our existing business, the development of new products, and the hiring of additional employees. For effective growth management, we will be required to continue improving our operations, management, and financial systems and controls. Our failure to manage growth effectively may lead to operational and financial inefficiencies that will have a negative effect on our profitability. We cannot assure investors that we will be able to timely and effectively meet that demand and maintain the quality standards required by our existing and potential customers.

Our management team may not be able to successfully implement our business strategies.

If our management team is unable to execute on its business strategies, then our development, including the establishment of revenues and our sales and marketing activities, would be materially and adversely affected. In addition, we may encounter difficulties in effectively managing the budgeting, forecasting and other process control issues presented by any future growth. We may seek to augment or replace members of our management team or we may lose key members of our management team, and we may not be able to attract new management talent with sufficient skill and experience.

We may be unsuccessful in our efforts to use digital and other viral marketing to expand consumer awareness of our service.

If we are unable to maintain or increase the efficacy of our digital and other viral marketing strategy or if we otherwise decide to expand the reach of our marketing through use of costlier marketing campaigns, we may experience an increase in marketing expenses that could have an adverse effect on our results of operations. We cannot assure you that we will be successful in maintaining or expanding our customer base and failure to do so would materially reduce our revenue and adversely affect our business, operating results and financial condition.

We may be negatively impacted by permitting and construction risks.

In connection with the MBT line of business the Company will have to acquire specialized permits and regulatory approvals from various state and local regulatory authorities that may delay or prevent the construction or operation of the intended MBT facilities. In addition, there are significant risks related to the construction of a specialized facility. These risks may delay, postpone or cause a negative impact to the anticipated financial performance of the projects.

We may be negatively impacted by other landfills and certain long-term disposal trends.

In connection with the MBT line of business, there will be competition from other landfills, including large, out-of-state landfills to secure MSW feedstock. Such facilities may legally drop prices to maintain market share forcing the Company to compete on price for feedstock delivered by suppliers, which may cause a negative impact to the anticipated financial performance of the projects.

Waste policies may incentivize additional renewable energy plants to be built, in such an event, the MBT facilities would be competing with such future renewable energy plants for feedstock. Furthermore, other zero waste policies, increased local recycling and reuse, augmented by composting and other future waste policies intended to eliminate and/or reduce the waste may mean less MSW will be available for the Company's MBT projects.

The recovered recycled materials market is volatile.

The Company's MBT projects anticipate a minimum return on recycled materials. Should conditions change such that the minimum returns cannot be recovered, they may have a negative impact on the anticipated financial performance of the projects.

The market for solid recovered fuel ("SRF") is not developed.

The Company's MBT projects rely upon the ability to sell SRF to appropriate industrial users at economically reasonable prices. There is no assurance that the Company will be able to contract on either a long-term or spot-market basis with such consumers.

Summary

1 Premise

As in accordance with Section 8.08(c) of the Loan Agreement – Outlined below is the Operating Summary for the trailing twelve months.

2 Relevant dates and documents

- March 9, 2016: Financial Closing
- March 15, 2016: EWV notifies Chemtex International (EPC Contractor) of project Commencement
- March 18, 2016: Notice of assignment of the EPC contract from Chemtex International to Bio-Chemtex SpA (Related party – Italian sister company)
- March 25, 2016: EWV received from US Bank the stand by letter of credit from Bio-Chemtex
- March 31, 2016: EWV issues the initial down payments to Bio-Chemtex for C&I, Equipment and Engineering
- April 4/5, 2016: Kick-off meeting held in Miami with EWV, Bio-Chemtex and Lemartec (sub-contractor)
- May 18, 2016: Meeting with Berkeley County technical authorities
- June 27, 2016: Site work and grading permit received based on revised site grading plan
- July 16, 2016: Amendment to lease approved and executed by BCSWMA
- July 22, 2016: Site work and grading begins
- September 20, 2016: Engineering and construction review meeting held with EWV, Bio-Chemtex and Lemartec.
- September 26, 2016: Lemartec awarded Reception and Under / Over Screen pits to Panhandle Bulders & Excavating. Work began the same week.
- October 15, 2016: Italcementi Group provided formal letter to EWV consenting to assign the Amended and Restated Supply Agreement to Argo Cement.
- October 26, 2016: Foundations Permit issued by Berkeley County
- November 18, 2016: Potomac Edison (Power Supplier) initiated the process of developing a Power Supply Agreement for the delivery of power to the site.
- November 29, 2016: Meeting between Bio-Chemtex and EWV to discuss project status
- December 6, 2016: Berkeley County Emergency Management requested (thru Berkeley County Solid Waste Authority) a road name for 911 response purposes.
- December 12, 2016: Lemartec awarded the building erection and precast materials. Work will begin in January 2017.
- Nov/December 2016: Placement of Rebar and Concrete began
- January 23, 2017: Delivery and initiation of fabricaiton of the Pre-Engineered Metal Building
- March 13, 2017: EPC Contractor stopped work due to payment dispute
- March 30, 2017: Full building permit issued by Berkeley County
- April 5, 2017: EWV notified BioChemtex of numerous breaches of the contract
- April 11, 2017: EWV provides 60-Notice of Termination for Cause to BioChemtex
- May 3, 2017: EWV wired BioChemtex $150K to ensure payment of subcontractors/remobilization
- May 11, 2017: EWV meets BioChemtex in an attempt to resolve ongoing contracting issues
- May 21, 2017: Proposed changes to Argos Offtake Agreement
- June 7, 2017: Work re-commenced for approximately 5 days

- June 19, 2017: EWV submits formal request for draw on stand by letter of credit for approximately $4.5M
- June 30, 2017: 60-Day Cure period expires, EWV was proceeds with EPC termination.

3 Operating Summary

The EPC contractor was terminated as of June 30. 2017, and a Memorandum of Agreement has been provided and entered into with Lemartec (the General Contractor) to continue with engineering and construction of the project. Further contract negotiations are ongoing. The schedule for the completion of the construction and the start-up and commissioning of operations has been moved to Spring 2017.

Since bond closing through June 30, 2017, the company has made payments in the aggregate of $11.1M in deposits, engineering progress payments, equipment delivery payments and other construction related progress. Facility engineering and design remains 92% complete with all material permits issued. The cumulative construction (including delivery of the Pre-Engineered Metal Building and pieces of internal equipment) is approximately 48% completed.

As of June 30, 2017, the following work has been completed:

- Majority of site grading complete
- Preliminary site drainage has been installed
- Majority of building footings have been poured
- Deep pit has been excavated
- Pre-Engineered Metal Building has been delivered with approximately 50% erected
- Approximately 45% of the equipment has been delivered and unloaded at the site

To date there have been various proposed modifications some of which are deemed by the company as justified and others that are covered within the scope of the EPC contract. EWV will continue to evaluate proposed change orders and enforce its contractual rights however, the company does expect various change orders for unforeseen conditions. At this time, EWV has not been presented with change orders by the EPC contractor or by the GC which it deems to potentially have a material adverse effect on the project timeline or execution.

All electro/mechanical design, engineering and procurement are proceeding and any long lead time items required are in the procurement process from the applicable suppliers. There are no delays expected in delivery of the remaining equipment to the site.

On or around March 7, 2017, EWV representatives were made aware of certain payment issues by the EPC Contractor to its sub-contractors including its General Contractor. Based on these issues EWV performed a detailed analysis of project progress as well as payments to its EPC Contractor. The results of said analysis indicated that the EPC Contractor may have misrepresented total project progress as compared to actual progress claimed by its sub-contractors. In addition to the erroneous billing, EWV discovered various other contract breaches by the EPC Contractor. In the interest of the members and lenders of EWV, the company suspended all payments on or around March 9, 2017 with the most recently paid invoice being for work completed in the month of February 2017. This payment freeze led to a temporary work stoppage by Lemartec. EWV has been in constant communication with the EPC Contractor as well as its counsel to resolve the issues at hand. Subsequently, after a reasonable period of time, EWV has issued a notice of termination to Bio-Chemtex based on its continual breach of the EPC Contract. A meeting was held on March 22, 2017 to settle all outstanding issues and mitigate any further delays. The issues could not be settled and as of June 30, 2017, the EPC contractor has been terminated and EWV has drawn on the SBLOC. In addition, EWV will seek the assignment of Lemartec's contract, and the existing performance guarantees of the various contractors. EWV believes the project will continue without additional delays or financial risks. Lemartec is prepared to accelerate construction activities in attempt to minimize any project delays. EWV believes there are adequate performance guarantees in place from Lemartec as well as Entsorga Italia, the projects two main contractors.

Currently, Lemartec continues to complete engineering and construction of the facility under a Memorandum of Understanding with the intent of executing a new contract with EWV in the event a contract assignment is not received in a timely manner.

Colerain Twp. settles landfill suit with Rumpke

Jennie Key, jkey@communitypress.com Published 11:20 a.m. ET Dec. 18, 2015

(Photo: Jennie Key/The Community Press)

After nine years of lawsuits and appeals, Colerain Township and Rumpke have settled their differences.

A settlement approved Dec. 17 clears the way for the landfill to expand and will bring an estimated $98 million to the township over the expected 50-year life of the landfill.

The agreement comes more than a month after a court ruling that allowed the Rumpke Sanitary Landfill to double in size. The township and Rumpke filed appeals, and settlement talks got underway soon after.

Rumpke filed suit against Colerain Township in 2006, after the township rejected its plan to expand to the east, effectively doubling the size of the landfill. In November, Hamilton County Common Pleas Visiting Judge Lee Hildebrandt agreed with Rumpke and ruled in the waste company's favor.

The settlement allows the landfill to have a new, larger footprint. The Rumpke property will stretch from the boundaries of Colerain Avenue to the west, Bank Road to the west and north, Crest Road to the North, Buell Road to the north and east, I-275 to the east and south, and Struble road to the south, allowing Rumpke to expand its operations.

The township will receive money, a lot of it.

Through 2021, the township receives a flat fee so long as the tonnage of solid waste accepted for disposal is at least 1 million tons. Based on the current average of 1.6 million tons of waste disposed of annually, that fee will be $1.25 million annually. The flat fee reduces to $1.1 million in 2022, which is the year after the township expects to retire its bond debt. Once Hughes Road is vacated, Rumpke would pay an additional 25 cents per ton - an additional $400,000. The new payments are set to begin in 2016.

The township also continues to receive the 25 cents per ton provided by state law as a host community and an additional 20 cents per ton it receives under a 2000 consent decree.

The settlement provides for annual adjustments beginning 12 months after the first waste placement in the expansion area. The "per-ton" fees added under the agreement would be adjusted using the Consumer Price Index less food and energy, or by 3 percent, whichever is lower.

The township also gets some control.

The agreement establishes this expansion as the final extent of any expansion of the area of the landfill by Rumpke including its successors, except as by consent of the Colerain Township Board of Trustees alone.

It also limits blasting at the landfill to 9 a.m. to 4 p.m. Mondays through Fridays and prohibits it within 200 feet of any residence district or any right-of-way and within 500 feet of any dwelling unless approved by written consent of the owner of the residence.

Additionally, the agreement says Rumpke will work cooperatively with the township for the development of the Struble Road light industrial corridor for uses including sales and leases to third parties as market conditions allow.

Township law director Larry Barbiere told about 60 residents who came to a public hearing on the settlement that the agreement is good for the township. He said the odds were against the likelihood of the township prevailing in an appeal. Barbiere said on average, only 10 to 15 percent of cases appealed are overturned and the Ohio Supreme Court only agreed to hear 5 percent of the cases that petitioned last year.

Several residents spoke, most urging the board to accept the settlement. One asked that the board keep fighting the expansion.

Trustees voted 2-0 to approve the settlement. Trustee Dennis Deters abstained due to a conflict of interest caused by work the firm where he is employed has done for Rumpke.

Trustee Jeff Ritter said as the only trustee who was on the board when the litigation started, it was one of the most difficult decisions he has had to make personally or professionally. He said in the end, he hopes people remember that it was Judge Hildebrand who sentenced Colerain Township to 50 more years of Rumpke landfill.

He said it was important as a trustee to mitigate risk and make sure the township was fully compensated. He and outgoing Trustee Mindy Rinehart said the case has taken energy, effort, time, resources and focus and it was time to move on.

Rumpke spokeswoman Amanda Pratt agreed it was time to put an end to litigation.

"Nine years is a long time," she said. "This agreement resolves the zoning issues and allows us to begin to move forward. From the beginning, it's always been important to us, as one of the township's largest employers, to make sure we could come up with a plan that best meets the needs the township and its residents and this allows us to do that."

She said Rumpke would continue to operate in a manner compliant with regulations and standards and would seek to be a good neighbor in the community.

A copy of the complete agreement is available on the township's website at coleraintwp.org (http://www.coleraintwp.org).

First settlement not as good

This was the second settlement considered by the board. Trustees rejected a proposed settlement in 2014 that would have allowed Rumpke to expand its landfill operations by about 300 acres and would have resulted in payments of close to $2.5 million annually in payments and tipping fees to the township.

Colerain Township Administrator Jim Rowan said the first offer would have brought about $3 million less than the agreement approved Dec. 17.

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RUMPKE SANITARY LANDFILL, INC., ET AL., APPELLEES, *v.* COLERAIN TOWNSHIP ET AL., APPELLANTS.

[Cite as *Rumpke Sanitary Landfill, Inc. v. Colerain Twp.*, 134 Ohio St.3d 93, 2012-Ohio-3914.]

Zoning—Public utilities' exemption from township zoning—R.C. 519.211—Factors for determining status as public utility.

(No. 2011-0181—Submitted February 7, 2012—Decided September 5, 2012.)

APPEAL from the Court of Appeals for Hamilton County, No. C-090223.

SYLLABUS OF THE COURT

A privately owned sanitary landfill cannot be a common-law public utility exempt from township zoning when there is no public regulation or oversight of its rates and charges, no statutory or regulatory requirement that all solid waste delivered to the landfill be accepted for disposal, and no right of the public to demand and receive its services.

O'CONNOR, C.J.

{¶ 1} In this appeal, we decide whether a private sanitary landfill is a public utility that is exempt from township zoning regulations pursuant to R.C. 519.211. For the reasons set forth below, we hold that a private sanitary landfill is not a public utility and is therefore subject to township zoning regulations. Accordingly, we reverse the judgment of the court of appeals and remand the cause to the trial court for trial.

BACKGROUND

{¶ 2} Appellant Colerain Township is a governmental entity in Hamilton County, Ohio, with all the rights, privileges, and duties imposed upon it by R.C.

Title 5. Appellant Colerain Township Board of Trustees, through the elected trustees Bernard A. Feideldey, Keith N. Corman, and Jeff Ritter, is the legislative administrative body responsible for governing Colerain Township under R.C. Title 5. Colerain Township and the Colerain Township Board of Trustees (collectively, "Colerain Township") adopted a set of zoning regulations for the township, which are embodied in the Colerain Township Zoning Resolution.

{¶ 3} Appellee Rumpke Sanitary Landfill, Inc., and its subsidiaries operate a sanitary landfill in Colerain Township. Rumpke, along with appellees Charles and John Stoeppel as trustees and Claire Stepaniak, are the owners of the disputed property, approximately 350 acres located between Hughes Road, Interstate 275, and Buell Road in Colerain Township.

{¶ 4} The present action is not the parties' first dispute regarding zoning of Rumpke's property. Rumpke also owns adjacent property used for the disposal of household and commercial waste. In 1999, Rumpke and others who are not parties to the present litigation applied for a change in zoning of the adjacent property. The Colerain Township Board of Trustees rejected the recommendation of the Colerain Township Zoning Commission to approve the application. Rumpke filed a lawsuit against Colerain Township contesting the constitutionality of the zoning and claiming damages. The case was settled by an agreed judgment entry and consent decree.

{¶ 5} In March 2006, Rumpke applied to change the existing zoning of the disputed property so that Rumpke could expand its landfill. The Hamilton County Regional Planning Commission recommended the rezoning requested by Rumpke, but the Colerain Township Zoning Commission recommended that the Colerain Township Board of Trustees deny the proposed rezoning. Following public hearings, Colerain Township denied Rumpke's application.

{¶ 6} After Colerain Township denied the application, Rumpke filed a complaint against Colerain Township, the Colerain Township Board of Trustees,

and the individual township trustees for a declaratory judgment, compensation for the unconstitutional taking of property, and mandamus. Rumpke later amended its complaint to request a declaratory judgment that it "is a public utility and under R.C. 519.211, the operation of * * * [its] existing landfill and its proposed expansion * * * are not subject to Colerain Township's zoning authority."

{¶ 7} Both Colerain Township and Rumpke filed motions for summary judgment on the issue of whether Rumpke is a public utility exempt from zoning. The trial court granted summary judgment in favor of Rumpke, holding that "Rumpke Sanitary Landfill is a public utility, not subject to the zoning restrictions of Colerain Township, Ohio."

{¶ 8} On April 1, 2009, Colerain Township appealed to the First District Court of Appeals. Colerain Township argued on appeal that the trial court had improperly granted summary judgment in favor of Rumpke because a privately owned sanitary landfill is not a public utility under R.C. 519.211.

{¶ 9} The First District held:

> "As a general rule, Ohio law provides that townships have no power under the zoning laws to regulate the location, erection, or construction of any buildings or structures of any public utility." [*Symmes Twp. Bd. of Trustees v. Smyth*, 87 Ohio St.3d 549, 551, 721 N.E.2d 1057 (2000).] R.C. 519.211 was "intended to exempt public utilities providers from regulation by township zoning boards and boards of zoning appeals." [*Campanelli v. AT&T Wireless Servs., Inc.*, 85 Ohio St.3d 103, 107, 706 N.E.2d 1267 (1999).] The "exemption ensures that public utilities will be able to construct the facilities required to serve the public interest across the state without undue interference from township zoning resolutions." [*Symmes* at 556.]

Rumpke Sanitary Landfill, Inc. v. Colerain Twp., 1st Dist. No. C-090223, at 3.

{¶ 10} The First District then analyzed whether Rumpke was a public utility. In doing so, it held, " 'To determine "public utility" status for purposes of the R.C. 519.211(A) exemption,' a court must consider the ' "factors related to the 'public service' and 'public concern' characteristics of a public utility." ' " *Id.*, quoting *Trustees of Washington Twp. v. Davis*, 95 Ohio St.3d 274, 2002-Ohio-2123, 767 N.E.2d 261, ¶ 16, quoting *A & B Refuse Disposers, Inc. v. Ravenna Twp. Bd. of Trustees*, 64 Ohio St.3d 385, 596 N.E.2d 423 (1992), syllabus.

{¶ 11} The appellate court then set forth the factors under both the "public service" and "public concern" prongs. It held:

> The factors relating to the public-service requirement include a demonstration that the entity provides "an essential good or service to the general public which has a legal right to demand or receive this good or service." [*A & B Refuse Disposers, Inc. v. Ravenna Twp. Bd. of Trustees*, 64 Ohio St.3d at 387, 596 N.E.2d 423.] The entity must also demonstrate that it provides its service to the public "indiscriminately and reasonably." [*Id.*] And the provider must have an obligation to provide the good or service that cannot be arbitrarily or unreasonably withdrawn.
>
> Next the public utility must "conduct its operations in such a manner as to be a matter of public concern." [*Id.* at 388.] Factors considered in reaching this determination include the nature of the services provided, competition in the local marketplace, and regulation by a government authority.

(Footnotes and citations omitted.) *Id.* at 3-4.

{¶ 12} The First District then analyzed whether Rumpke is a public utility under both prongs and held:

> [N]o genuine issues of material fact remain as to whether (1) Rumpke provides virtually all residents and businesses of Southwest Ohio a vital and essential service—the sanitary disposal of solid wastes in a facility licensed under R.C. Chapter 3734; (2) Rumpke operates in a monopolistic position with no other cost-effective alternative to its services; (3) Rumpke is legally required to dispose of all of the city of Cincinnati's solid waste; (4) Rumpke has pledged, in sworn statements to the Hamilton County Solid Waste Management District and the Ohio Environmental Protection Agency, that it will remain open and will accept any qualifying solid waste so long as it has the capacity to do so; and (5) the disposal of solid waste is an essential public necessity.

Id. at 4. The court of appeals agreed with the trial court and held that "Rumpke was entitled to the trial court's declaration that it is a public utility for purposes of R.C. 519.211." *Id.*

{¶ 13} The First District also addressed Colerain Township's argument that "the trial court erred in denying its motion for summary judgment because the plain language of the amended public-utility statute prohibits a privately owned landfill like Rumpke from benefiting from the regulatory exemptions of a public utility." *Id.* at 5. "Am.Sub.H.B. No. 562, the 2009–2010 biennial budget bill, * * * modified the statutory definition of 'public utility' to exclude 'a person that owns or operates a solid waste facility or a solid waste transfer facility, other than a publicly owned solid waste facility or a publicly owned solid waste transfer

facility.' " *Id.* at 3, quoting R.C. 519.211(A). The appellate court noted that it had previously "declared that the Am.Sub.H.B. No. 562 modifications to R.C. 519.211" "violated the one-subject rule of Section 15(D), Article II, Ohio Constitution" and therefore are "unconstitutional and not enforceable." *Id.* at 3 and 5, citing *Rumpke Sanitary Landfill, Inc. v. State*, 184 Ohio App.3d 135, 2009-Ohio-4888, 919 N.E.2d 826, at ¶18.

{¶ 14} (Colerain Township had appealed that decision to this court, and we accepted discretionary review only of the following proposition of law: "A township is an interested and necessary party to a constitutional challenge brought by a property owner within the township's jurisdiction to a law passed by the General Assembly that directly affects the township's police powers over that owner's property and pending litigation." *Rumpke Sanitary Landfill, Inc. v. State*, 128 Ohio St.3d 41, 2010-Ohio-6037, 941 N.E.2d 1161, ¶ 9. We ultimately held that Colerain Township was "not a necessary party to a constitutional challenge to the bill premised on a violation of the one-subject rule of the Ohio Constitution." *Id.* at ¶ 21. The issue before us was not whether the amendments to R.C. 519.211 violated the one-subject rule.)

{¶ 15} The First District affirmed the judgment of the trial court denying Colerain Township's motion for summary judgment by relying heavily upon the fact that this court had not reversed its holding that the amendments to R.C. 519.211 were unconstitutional and not enforceable. The court of appeals wrote, "Absent reversal by the Ohio Supreme Court, we will apply this decision in each case submitted for our review." But again, the appellate court's holding of procedural unconstitutionality based on the one-subject rule had not been presented to us, and we did not rule on that issue. Our decision in *Rumpke Sanitary Landfill, Inc. v. State* is controlling authority on the issue of whether the township was a necessary party but not on the constitutional issues previously addressed by the First District.

{¶ 16} We accepted the cause as a discretionary appeal. *Rumpke Sanitary Landfill v. Colerain Twp.*, 129 Ohio St.3d 1425, 2011-Ohio-3710, 951 N.E.2d 88. Two propositions of law are before us:

> (1) A private sanitary landfill is not exempt from township zoning regulations under the comprehensive statutory framework of solid waste disposal and township zoning.
>
> (2) A privately owned sanitary landfill cannot be a common law "public utility" exempt from township zoning when there is no public regulation or oversight of its rates and charges, no statutory or regulatory requirement that all solid waste delivered to the landfill be accepted for disposal, and no right of the public to demand and receive its services.

ANALYSIS

The Definition of "Public Utility" Has Been Developed Through Case Law

{¶ 17} R.C. 519.211(A), which sets forth limitations on zoning powers, provides:

> Except as otherwise provided in division (B) or (C) of this section, sections 519.02 to 519.25 of the Revised Code confer no power on any board of township trustees or board of zoning appeals in respect to the location, erection, construction, reconstruction, change, alteration, maintenance, removal, use, or enlargement of any buildings or structures of any public utility or railroad, whether publicly or privately owned, or the use of land by any public utility or railroad, for the operation of its business. As used in this division, "public utility" does not include a person that

> owns or operates a solid waste facility or a solid waste transfer facility, other than a publicly owned solid waste facility or a publicly owned solid waste transfer facility, that has been issued a permit under Chapter 3734. of the Revised Code or a construction and demolition debris facility that has been issued a permit under Chapter 3714. of the Revised Code.

{¶ 18} Although the General Assembly exempted public utilities from zoning restrictions, it did not define "public utility" insofar as it relates to R.C. 519.211. This court's jurisprudence, however, offers guidance as to what constitutes a public utility for purposes of R.C. 519.211. *Marano v. Gibbs*, 45 Ohio St.3d 310, 544 N.E.2d 635 (1989); *A & B Refuse Disposers, Inc. v. Ravenna Twp. Bd. of Trustees*, 64 Ohio St.3d 385, 596 N.E.2d 423 (1992).

{¶ 19} In *Marano v. Gibbs*, we held that "the determination of entities as public utilities is a mixed question of law and fact." *Marano v. Gibbs* at 311. "[I]n determining public utility status" courts must examine "the character of the business in which the entity is engaged." *Id.*, citing *Ohio Power Co. v. Attica*, 23 Ohio St.2d 37, 41, 261 N.E.2d 123 (1970). " 'To constitute a "public utility," the devotion to public use must be of such character that the product and service is available to the public generally and indiscriminately or there must be the acceptance by the utility of public franchises or calling to its aid the police power of the state.' " *Id.*, quoting *S. Ohio Power Co. v. Pub. Util. Comm.*, 110 Ohio St. 246, 143 N.E. 700 (1924).

{¶ 20} We set forth two factors, i.e., public concern and public service, which must be taken into consideration to determine whether an entity is a public utility for purposes of R.C. 519.211. "[A]n entity may be characterized as a public utility if the nature of its operation is a matter of public concern, and membership is indiscriminately and reasonably made available to the general

public," otherwise known as public service. *Marano*, 45 Ohio St.3d at 311, 544 N.E.2d 635.

{¶ 21} We further developed the definition of "public utility" in *A & B Refuse Disposers, Inc. v. Ravenna Twp. Bd. of Trustees*. A & B Refuse Disposers, Inc. operated a landfill in Ravenna Township, Portage County. A & B Refuse acquired a 66-acre parcel of land adjacent to the landfill intending to construct a truck terminal and offices. After discussing the proposed use with township officials, A & B Refuse was advised that the proposed use would probably not be approved for rezoning. A & B Refuse filed a declaratory-judgment action against the Ravenna Township Board of Trustees, asking for a determination of whether its landfill operation was subject to regulation under the township zoning code.

{¶ 22} We were faced with a similar issue to that before us today: "whether the definition of a 'public utility,' as expressed in case law, is applicable to [A & B Refuse's] landfill operation for the purpose of exemption from township zoning restrictions." *A & B Refuse*, 64 Ohio St.3d at 386, 596 N.E.2d 423. To resolve this question, we turned to *Marano* and affirmed the definition of "public utility." We also significantly expanded upon the two factors identified in *Marano*, holding that "the determination of whether a particular entity is a public utility for the purpose of exemption from local zoning restrictions requires a consideration of several factors related to the 'public service' and 'public concern' characteristics of a public utility." *Id.* at 389.

{¶ 23} As for the public-service factor, we held that we must look at whether there

> is a devotion of an essential good or service to the general public which has a legal right to demand or receive this good or service. *S. Ohio Power Co. v. Pub. Util. Comm.* (1924), 110 Ohio St. 246,

> 252, 143 N.E. 700, 701, quoting *Allen v. RR. Comm. of California* (1918), 179 Cal. 68, 175 P. 466; *Freight, Inc. v. Northfield Ctr. Bd. of Twp. Trustees* (1958), 107 Ohio App. 288, 292-293, 8 O.O.2d 212, 215, 158 N.E.2d 537, 540; *Motor Cargo v. Richfield Bd. of Twp. Trustees* (1953), 67 Ohio Law Abs. 315, 318, 52 O.O. 257, 258, 117 N.E.2d 224, 226. See, generally, 2 Anderson, American Law of Zoning (3 Ed.1986) 568, Section 12.32. * * * [T]he entity must * * * provide its good or service to the public indiscriminately and reasonably. *Marano v. Gibbs,* [45 Ohio St.3d] at 311, 544 N.E.2d at 636. * * * Further, this attribute requires an obligation to provide the good or service which cannot be arbitrarily or unreasonably withdrawn.

A & B Refuse, 64 Ohio St.3d at 389, 596 N.E.2d 423. "The fact that a private business provides a good or service associated with the usual subject matter of a public utility does not give rise to a presumption that it is devoted to public service." *Id.*, citing *S. Ohio Power Co. v. Pub. Util. Comm.*, 110 Ohio St. 246, 143 N.E. 700 (1924), paragraph one of the syllabus.

{¶ 24} As for the public-concern factor, we held:

> Normally, a public utility occupies a monopolistic or ogopolistic [sic] position in the marketplace. *Greater Fremont, Inc. v. Fremont* (N.D.Ohio 1968), 302 F.Supp. 652, 664-665. See, also, *Mammina v. Cortlandt Zoning Bd. of Appeals* (1981), 110 Misc.2d 534, 442 N.Y.S.2d 689, 691. This position gives rise to a public concern for the indiscriminate treatment of that portion of the public which needs and pays for the vital good or service offered by the entity. Factors utilized in determining whether an enterprise

> conducts itself in such a way as to become a matter of public concern include the good or service provided, competition in the local marketplace, and regulation by governmental authority. * * * [N]one of these factors is controlling. Nevertheless, in a case where the business enterprise serves such a substantial part of the public that its rates, charges and methods of operation become a public concern, it can be characterized as a public utility. *Indus. Gas Co. v. Pub. Util. Comm., supra*, 135 Ohio St. [408] at 414, 21 N.E.2d [166] at 168 [1939].

(Citations and footnotes omitted.) *Id.* at 388.

{¶ 25} We further held that "the determination of public utility status requires a flexible rule, a rule which often intertwines the factors considered in relation to the concepts of 'public service' and 'public concern.' " *Id.* Furthermore, a simple claim that a business's services are open to the public does not automatically categorize the business as a public utility. *Id.* at 389. Such a holding would incorrectly encompass as public utilities "traditional private business enterprises which are, in various degrees, regulated by diverse public authorities, *e.g.*, dry cleaners, restaurants, and grocery stores." *Id.*

{¶ 26} We also determined that the business claiming public-utility status bears the burden of offering sufficient evidence on these factors. *Id.*

{¶ 27} Applying the principles set forth above, we held that A & B Refuse "failed to present sufficient evidence on those factors essential to a determination of whether an entity can be classified as a public utility." *Id.* at 390. The only evidence that related to the public-utility factors was a single statement that "the landfill is 'open to the residents of Ravenna Township.' " *Id.* Thus, we never reached the question of whether a "privately operated solid waste disposal

facility" could be a public utility pursuant to R.C. 519.211. *Id.* We now turn to that question.

Rumpke, in Its Operation of a Private Sanitary Landfill, Is Not a Public Utility, Because There Is a Lack of Governmental Regulation over the Public-Service and Public-Concern Factors

{¶ 28} The interesting question of whether a *private* sanitary landfill can be a *public* utility answers itself, especially in light of the fact that no governmental body regulates private sanitary landfills on those factors that make an entity a public utility.

{¶ 29} In *A & B Refuse Disposers*, we cautioned owners of sanitary landfills that although achieving public-utility status would exempt the sanitary landfills from local zoning restrictions, obtaining public-utility status also "invites even greater governmental regulation and control than is currently experienced in this industry." *A & B Refuse Disposers, Inc.*, 64 Ohio St.3d at 390, 596 N.E.2d 423. Here, there is no such control, as there is with traditional public utilities.

{¶ 30} As a private sanitary-landfill operator, Rumpke is subject primarily to the regulations of the Ohio Environmental Protection Agency ("OEPA") pursuant to R.C. Chapter 3734 as well as the local solid-waste regulator, the Hamilton County Recycling and Solid Waste District ("HCRSWD") pursuant to R.C. Chapters 3734 and 343. The concerns of the OEPA are related to the "adverse environmental effects related to the collection and disposal of solid waste," and therefore "[t]he rules and regulations promulgated and administered by the Ohio Environmental Protection Agency arise from this public concern and are imposed for the protection of the environment and for human health and safety." *A & B Refuse Disposers*, 64 Ohio St.3d at 389, 596 N.E.2d 423, citing *Families Against Reily/Morgan Sites v. Butler Cty. Bd. of Zoning Appeals*, 56 Ohio App.3d 90, 96, 564 N.E.2d 1113 (12th Dist.1989); *Hulligan v. Columbia Twp. Bd. of Zoning Appeals*, 59 Ohio App.2d 105, 108, 392 N.E.2d 1272 (9th

Dist.1978); *N. Sanitary Landfill, Inc. v. Montgomery Cty. Bd. of Commrs.*, 52 Ohio App.2d 167, 170-171, 369 N.E.2d 17 (2d Dist.1976).

{¶ 31} The HCRSWD has authority over the "[a]cquisition, construction, improvement, enlargement, replacement, maintenance, and operation of solid waste facilities within the district." R.C. 343.011(B)(2). Like the OEPA, the solid-waste-management districts have a major concern for the management of waste. The vision statement of the HCRSWD is as follows: "The District provides ethical environmental leadership to equitably promote the public good through innovative and responsible strategies leading to the management of all waste as a resource that leads to a society that generates zero waste." http://www.hamiltoncountyrecycles.org/index.php?page=vision-statement.

{¶ 32} We have held that "the public concern with environmental regulation is separate and distinct from the public concern involved in the regulation of public utilities." *A & B Refuse Disposers*, 64 Ohio St.3d at 389, 596 N.E.2d 423. Therefore, the public concern of both OEPA and HCRSWD is not the same public concern that is relevant when determining whether an entity is a public utility.

{¶ 33} Still, Rumpke argues that the regulation of its landfill is not limited to environmental protection, but also includes regulations to enjoin, take over, or terminate landfill operations. Rumpke also argues that it is regulated for nuisance and operates under a requirement that the landfill be fully utilized. It asserts that "the General Assembly has provided for regulatory oversight of landfill location, design, operation, permitting, closure and post-closure handling." Although we do not dispute that the landfill is subject to each of the regulations mentioned by Rumpke, none of those are of consequence to our analysis here. Our review is limited to those factors set forth by this court in *A & B Refuse Disposers*.

Public-Service Factor

{¶ 34} Turning to the public-service factor, the lack of governmental regulation means that Rumpke determines to whom it provides its service and how or when that service is provided. The general public has no legal right to demand or receive Rumpke's services. Therefore, there is no assurance or guarantee that Rumpke will provide its services to the public indiscriminately and reasonably, nor is there anything preventing Rumpke from arbitrarily or unreasonably withdrawing its services. Rumpke could lawfully close its doors to the public. Furthermore, as a private company, Rumpke has the ability to set its own rates without any governmental oversight. Thus, Rumpke fails to meet the public-service factor of the public-utility test.

Public-Concern Factor

{¶ 35} As for the public-concern factor, the parties do not dispute that Rumpke occupies a monopolistic position in the marketplace by collecting the majority of the solid waste generated within Hamilton County. Rumpke also provides an essential service by operating its sanitary landfill and collecting and disposing of solid waste. However, no governmental body, including the OEPA and HCRSWD, regulates the rates or methods of Rumpke. That means that Rumpke may treat discriminately and arbitrarily the portion of the public to whom it provides its services. Because Rumpke dominates such a large portion of the market and provides an essential service but does so without any government oversight or regulation, it is not a public concern.

CONCLUSION

{¶ 36} The lack of governmental control over the public-service and public-concern factors in *A & B Refuse Disposers* is critical in determining that Rumpke is not a public utility. Thus, we hold that a privately owned sanitary landfill cannot be a common-law public utility exempt from township zoning when there is no public regulation or oversight of its rates and charges, no

statutory or regulatory requirement that all solid waste delivered to the landfill be accepted for disposal, and no right of the public to demand and receive its services.

{¶ 37} For these reasons, we reverse the appellate court's decision affirming the trial court's declaration that Rumpke is a public utility for purposes of R.C. 519.211. Therefore, we remand the cause to the trial court.

Judgment reversed
and cause remanded.

PFEIFER, LUNDBERG STRATTON, O'DONNELL, LANZINGER, CUPP, and MCGEE BROWN, JJ., concur.

Keating, Muething & Klekamp, P.L.L., Joseph L. Trauth Jr., Thomas M. Tepe Jr., Charles M. Miller, and Barrett P. Tullis, for appellees.

Brahm & Cunningham, L.L.C., Catherine A. Cunningham, Richard C. Brahm, and Aaron M. Glasgow; and James E. Reuter, Law Director, Colerain Township, for appellants.

Michael DeWine, Attorney General, Alexandra T. Schimmer, Solicitor General, and Robert C. Moormann and Nicholas J. Bryan, Assistant Attorneys General, urging reversal for amicus curiae state of Ohio.

Eastman & Smith, Ltd., Dirk P. Plessner, Albin Bauer II, and Rene L. Rimelspach, urging reversal for amici curiae Bokescreek Township, Carroll-Columbiana-Harrison Joint Solid Waste Management District, Erie County, Lake Township, Logan County, Lorain County, Medina County, Miami County, Monroe Township, New Russia Township, North Central Ohio Solid Waste Management District, Ottawa-Sandusky-Seneca Joint Solid Waste Management District, Richland Township, and Stark-Tuscarawas-Wayne Joint Solid Waste Management District.

Matthew J. DeTemple, urging reversal for amici curiae Ohio Township Association and Coalition of Large Ohio Urban Townships.

[Cite as *Downard v. Rumpke of Ohio, Inc.*, 2013-Ohio-4760.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

RACHEAL DOWNARD, Administratrix of the Estate of Scott D. Johnson,	:	CASE NO. CA2012-11-218
Plaintiff-Appellant,	:	OPINION
	:	10/28/2013
- vs -	:	
	:	
RUMPKE OF OHIO, INC., et al.,	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2010-11-4739

Elizabeth Ann Yauch and Traci Combs-Valerio, 240 East State Street, Trenton, Ohio 45067, for plaintiff-appellant

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Sutter O'Connell Co., Lawrence A. Sutter, Christina J. Marshall and James M. Popson, 3600 Erieview Tower, 1301 East 9th Street, Cleveland, Ohio 44114, for defendant-appellee, Rumpke of Ohio, Inc.

Sonnek & Howard, Ltd., Greg A. Goldblatt and Andrew D. Sonnek, 5725 Dragon Way, Suite 215, Cincinnati, Ohio 45227, for defendant, Bureau of Workers' Compensation

S. POWELL, J.

{¶ 1} Plaintiff-appellant, Racheal Downard, Administratrix of the Estate of Scott D. Johnson, appeals from the Butler County Court of Common Pleas decision granting directed verdicts to defendant-appellee, Rumpke of Ohio, Inc., at the end of Downard's case-in-chief and again at the close of all evidence. For the reasons outlined below, we affirm in part, reverse in part and remand for further proceedings.

{¶ 2} At all times relevant, Scott Johnson served as a temporary employee at Rumpke's tire shredding facility located in St. Clair Township, Butler County, Ohio. As a temporary employee, Johnson was assigned to load tires onto a tire shredder's inclined conveyor belt. Once the tires were loaded onto the conveyor belt, the tires would then be dropped into a cutter box that housed the feeder gears and cutting knives that cut the tires into two-by-two inch pieces. It is undisputed that as originally manufactured, the tire shredder at issue had an observation platform, a jib crane, as well as a hinged hood and interlock switch, all of which were removed, bypassed, or somehow modified by Rumpke.

{¶ 3} On the afternoon of April 26, 2007, the overload beacon light on the tire shredder illuminated indicating a possible blockage of the drum discharge chute. Noticing the overload beacon light, Craig Stidham, the foreman at the Rumpke tire shredding facility, stopped what he was doing and approached the tire shredder. Although there is some dispute about what transpired next, all parties agree that Johnson then climbed onto the observation platform where he peered into the cutter box and confirmed that there was a tire blocking the discharge chute. After learning of the blockage, Stidham threw the electrical disconnect switch in order to turn off the tire shredder.

{¶ 4} Upon shutting down the machine, Stidham then turned and began talking with Joseph Retherford, another temporary employee assigned to work at Rumpke's tire shredding facility. While speaking with Stidham, Retherford noticed that Johnson was no

longer on the observation platform. Thinking Johnson may have fallen off the side of the machine, Retherford went around to the side of the tire shredder, but was unable to locate Johnson. Sensing something was amiss, Stidham then climbed onto the inclined conveyor belt up to the edge of the cutter box where he found Johnson entangled within the tire shredder's feeder gears and cutting knives.

{¶ 5} Emergency crews were immediately dispatched to the scene to remove Johnson from the tire shredder, a process which took approximately 50 minutes to complete. During that time, Johnson remained conscious and proclaimed that he had fallen into the cutter box when he tried to unjam a tire from the machine. Johnson later reiterated the same to medical personnel as he was being transported to the hospital. After spending 52 days in the hospital, Johnson succumbed to his devastating injuries that had effectively removed the entire left side of his body. As a result of this incident, Johnson's estate received workers' compensation benefits totaling $387,761.29.

{¶ 6} On November 23, 2010, Racheal Downard, Johnson's niece and administratrix of Johnson's estate, filed suit against Rumpke asserting a claim of employer intentional tort under R.C. 2745.01, Ohio's Employer Intentional Tort statute. As part of her complaint, Downard argued Rumpke had violated R.C. 2745.01 by directing Johnson to operate the tire shredder after it had deliberately removed, bypassed, and modified the machine's safety devices and safety guards.

{¶ 7} After an exhaustive discovery process, this matter went to trial before a jury. The trial court issued a directed verdict for Rumpke at the close of Downard's case-in-chief finding that although the hinged hood on the tire shredder did constitute an "equipment safety guard" under R.C. 2745.01(C), the observation platform, jib crane, and interlock switch did not. The trial court also issued a directed verdict at the close of all evidence finding Rumpke had successfully rebutted the intent to injure presumption contained in R.C. 2745.01(C) as a

matter of law. The matter was then submitted to the jury which returned a verdict in favor of Rumpke on all remaining issues.

{¶ 8} Downard now appeals from the trial court's decisions granting a directed verdict to Rumpke at the close of her case-in-chief and at the close of all evidence, raising two assignments of error for review.

{¶ 9} Assignment of Error No. 1:

{¶ 10} THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT WHEN IT GRANTED DEFENDANT-APPELLEE'S MOTION FOR DIRECTED VERDICT BY FINDING DEFENDANT-APPELLEE SUFFICIENTLY REBUTTED THE PRESUMPTION CONTAINED IN R.C. 2745.01(C).

{¶ 11} Assignment of Error No. 2:

{¶ 12} THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT WHEN IT GRANTED DEFENDANT-APPELLEE'S MOTION FOR DIRECTED VERDICT DETERMINING WHAT WAS NOT AN EQUIPMENT SAFETY GUARD FOR PURPOSES OF THE PRESUMPTION CONTAINED IN R.C. 2745.01(C).

{¶ 13} In her two assignments of error, Downard argues the trial court erred by granting Rumpke a directed verdict at the end of her case-in-chief by finding the tire shredder's jib crane, observation platform, and interlock switch were not "equipment safety guards" as that term is used in R.C. 2745.01(C), Ohio's Employer Intentional Tort statute. Downard also argues the trial court erred by granting Rumpke a directed verdict at the close of all evidence by finding Rumpke had successfully rebutted the intent to injure presumption of R.C. 2745.01(C) as it relates to the deliberate removal of the tire shredder's hinged hood. Because these arguments are interrelated and address a multitude of issues regarding the application of Ohio's Employer Intentional Tort statute, we will address Downard's two assignments of error together.

Civ.R. 50(A)(4) and the Directed Verdict Standard of Review

{¶ 14} The standard for granting a directed verdict is set forth in Civ.R. 50(A)(4), which provides:

> When a motion for directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

{¶ 15} In ruling on a motion for directed verdict, "[t]he trial court need not consider either the weight of the evidence or the credibility of the witnesses[.]" *Collins v. Admr. Bur. Of Workers' Comp.*, 12th Dist. Madison No. CA2006-12-054, 2007-Ohio-5634, ¶ 14; *Wagner v. Roche Laboratories*, 77 Ohio St.3d 116, 119 (1996). In turn, "[w]hen the party opposing a motion for a directed verdict has failed to adduce any evidence on the essential elements of the claim, a directed verdict is appropriate." *Nieman v. Bunnell Hill Development Co, Inc.*, 12th Dist. Butler No. CA2009-04-109, 2010-Ohio-1519, ¶ 25. In other words, "[w]here there is substantial competent evidence favoring the nonmoving party so that reasonable minds might reach different conclusions, it is inappropriate to grant the motion for a directed verdict." *Rockwood v. West Chester Nursing and Rehab. Residence, L.L.C.*, 12th Dist. Butler No. CA2006-10-250, 2007-Ohio-7071, ¶ 9, citing *Ramage v. Cent. Ohio Emergency Serv., Inc.*, 64 Ohio St.3d 97, 109 (1992).

{¶ 16} A trial court's decision to grant a motion for a directed verdict involves a question of law, and therefore, an appellate court's review of that decision is de novo. *White v. Leimbach*, 131 Ohio St.3d 21, 2011-Ohio-6238, ¶ 22, citing *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, ¶ 4. "De novo review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial."

Lasley v. Nguyen, 172 Ohio App.3d 741, 2007-Ohio-4086, ¶ 18 (2d Dist.), citing *Dupler v. Mansfield Journal Co., Inc.*, 64 Ohio St.2d 116, 119-120 (1980). Thus, the trial court's decision to grant a motion for a directed verdict is not granted any deference by the reviewing court. *Moore v. Kettering Mem. Hosp.*, 2d Dist. Montgomery No. 22054, 2008-Ohio-2082, ¶ 19, citing *Brown v. Scioto Cty. Bd. of Commissioners*, 87 Ohio App.3d 704, 711 (4th Dist.1993).

Ohio's Employer Intentional Tort Statute

{¶ 17} Generally, actions for injuries sustained in the course of employment must be addressed within the framework of Ohio's workers' compensation statutes. *Roberts v. RMB Ents., Inc.*, 197 Ohio App.3d 435, 2011-Ohio-6233, ¶ 20 (12th Dist.); *Zuniga v. Norplas Indus. Inc.*, 6th Dist. Wood Nos. WD-11-066 and WD-11-067, 2012-Ohio-3414, ¶ 14. However, in limited circumstances when an employer's conduct is sufficiently egregious to rise to the level of an intentional tort, an employee may institute an intentional tort claim against his employer pursuant to Ohio's Employer Intentional Tort statute codified in R.C. 2745.01. *See Barton v. G.E. Baker Constr., Inc.*, 9th Dist. Lorain No. 10CA009929, 2011-Ohio-5704, ¶ 7; see *also Ferryman v. Conduit Pipe Prods. Co.*, 12th Dist. Madison No. CA2007-02-007, 2007-Ohio-6417, ¶ 6.

{¶ 18} Pursuant to R.C. 2745.01(A):

> In an action brought against an employer by an employee, or by the dependent survivors of a deceased employee, for damages resulting from an intentional tort committed by the employer during the course of employment, the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.

As defined by R.C. 2745.01(B), "substantially certain" means that an "employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death." Acting with the belief that an injury is "substantially certain" to occur is not analogous to

wanton misconduct, nor is it "enough to show that the employer was merely negligent, or even reckless." *Talik v. Fed. Marine Terminals, Inc.*, 117 Ohio St.3d 496, 2008-Ohio-937, ¶ 17; *Weimerskirch v. Coakley*, 10th Dist. Franklin No. 07AP-952, 2008-Ohio-1681, ¶ 8.

{¶ 19} Rather, as noted by the Ohio Supreme Court, one may recover "for employer intentional torts only when an employer acts with specific intent to cause an injury." *Kaminski v. Metal Wire Prods. Co.*, 125 Ohio St.3d 250, 2010-Ohio-1027, ¶ 56; *Houdek v. ThyssenKrupp Materials N.A., Inc.*, 134 Ohio St.3d 491, 2012-Ohio-5685, ¶ 25 (finding "absent a deliberate intent to injure another, an employer is not liable for a claim alleging an employer intentional tort, and the injured employee's exclusive remedy is within the workers' compensation system").

{¶ 20} However, while generally requiring proof of an employer's specific intent to cause an injury, pursuant to R.C. 2745.01(C):

> Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result.

Simply stated, R.C. 2745.01(C) "establishes a rebuttable presumption that the employer intended to injure the worker if the employer deliberately removes a safety guard." *Rivers v. Elevator*, 8th Dist. Cuyahoga No. 99365, 2013-Ohio-3917, ¶ 25.

"Equipment Safety Guard" and R.C. 2745.01(C)

{¶ 21} As noted above, Downard argues the trial court erred by granting Rumpke a directed verdict at the end of her case-in-chief by finding the tire shredder's jib crane, observation platform, and interlock switch were not "equipment safety guards" as that term is used in R.C. 2745.01(C).

{¶ 22} As the plain language of the statute indicates, "[t]he General Assembly did not

make the presumption applicable upon the deliberate removal of any safety-related device, but only of an equipment safety guard[.]" *Fickle v. Conversion Technologies Internatl., Inc.*, 6th Dist. Williams No. WM-10-016, 2011-Ohio-2960, ¶ 42. As recently defined by the Ohio Supreme Court, the term "equipment safety guard" means "a protective device on an implement or apparatus to make it safe and to prevent injury or loss." *Hewitt v. L.E. Myers Co.*, 134 Ohio St.3d 199, 2012-Ohio-5317, ¶ 18. In turn, an "equipment safety guard" for purposes of R.C. 2745.01(C) is "a device designed to shield the operator from exposure to or injury by a dangerous aspect of the equipment." *Id.* at ¶ 26, quoting *Fickle* at ¶ 43; *see also Pixley v. Pro-Pak Industries, Inc.*, 6th Dist. Lucas No. L-12-1177, 2013-Ohio-1358, ¶ 21, *appeal allowed*, *Pixley v. Pro-Pak Industries, Inc.*, 136 Ohio St.3d 1472, 2013-Ohio-3790. In establishing this definition, the Ohio Supreme Court explicitly rejected a broader interpretation by stating that "to include any generic safety-related items ignores not only the meaning of the words used but also the General Assembly's intent to restrict liability for intentional torts." *Hewitt* at ¶ 24.

{¶ 23} Following the Ohio Supreme Court's recent decision in *Hewitt*, which found personal protective items such as rubber gloves and sleeves were not "equipment safety guards," the Ohio Supreme Court also found free standing equipment such as face masks were likewise not "equipment safety guards" under R.C. 2745.01(C). *Beyer v. Rieter Automotive North American, Inc.*, 134 Ohio St.3d 379, 2012-Ohio-5627, ¶ 1. This was in line with its previous decision in *Houdek*, which found "adequate lighting conditions and safety devices such as orange cones, reflective vests, and retractable gates" could also not be considered an "equipment safety guards." *Id.*, 2012-Ohio-5685 at ¶ 27. The Ohio Supreme Court has also remanded a different matter to determine whether a "back-up alarm" would constitute an "equipment safety guard." *See Beary v. Larry Murphy Dump Truck Service, Inc.*, 134 Ohio St.3d 359, 2012-Ohio-5626, ¶ 1.

{¶ 24} Several Ohio appellate courts have also had the opportunity to apply the newly minted "equipment safety guard" definition as provided in *Hewitt*. For example, in *Schiemann v. Foti Contracting, L.L.C.*, 8th Dist. Cuyahoga No. 98662, 2013-Ohio-269, the Eighth District Court of Appeals determined that a safety harness used by masons laying stone on an exterior wall was not an "equipment safety guard" as the safety harness was more akin to the rubber gloves and sleeves at issue in *Hewitt*. *Id.* at ¶ 23. The Eighth District also determined that decisions on when to shut down a public elevator do not fall within the limited definition of an "equipment safety guard." *Rivers*, 2013-Ohio-3917 at ¶ 25.

{¶ 25} In addition, the Third District Court of Appeals determined that a "lockout device" for an auger machine was not an "equipment safety guard" because it was an "item that the employee controls." *Conley v. Endres Processing Ohio, L.L.C.*, 3d Dist. Wyandot No. 16-12-11, 2013-Ohio-419, ¶ 14. However, in *Pixley*, the Sixth District Court of Appeals found a "safety bumper" on a transfer car used in a packaging facility was an "equipment safety guard" by finding it was "clearly designed to protect employees from a dangerous aspect of the equipment." *Id.*, 2013-Ohio-1358 at ¶ 22.

{¶ 26} These decisions, although informative, do not end the discussion of what constitutes an "equipment safety guard" under R.C. 2745.01(C). Prior to the Ohio Supreme Court's decision in *Hewitt*, most courts, including this one, used the definition of "equipment safety guard" as provided by the Sixth District in *Fickle*. This is significant considering the Ohio Supreme Court adopted the definition of "equipment safety guard" provided in *Fickle* when crafting a definition for "equipment safety guard" in *Hewitt*. *See Hewitt*, 2012-Ohio-5317 at ¶ 26. Therefore, *Fickle*, as well as those cases applying *Fickle*, are also significant in determining what constitutes an "equipment safety guard" under R.C. 2745.01(C).

{¶ 27} In *Fickle*, Tara Fickle was injured when her left hand and arm became caught in the pinch point of a roller while working at a coating machine at a Conversion Technologies

facility. *Id.*, 2011-Ohio-2960 at ¶ 2. Prior to her injury, the "jog control switch" and the "emergency stop cable" had been disconnected from the coating machine. *Id.* at ¶ 5-6. Fickle sued her employer alleging an employer intentional tort action under R.C. 2745.01. *Id.* at ¶ 7. The trial court, however, granted Conversion Technologies' motion for summary judgment after finding neither the jog control switch nor the emergency stop cable constituted an "emergency safety guard" pursuant to R.C. 2745.01(C). *Id.* at ¶ 11. Fickle subsequently appealed.

{¶ 28} On appeal, Fickle argued that both the jog control switch and the emergency stop cable were in fact "equipment safety guards" that had been "deliberately removed" from the coating machine prior to her injury. The Sixth District disagreed by finding:

> The jog control and emergency stop cable in this case were not designed to prevent an operator from encountering the pinch point on the rewind roller and, therefore, are not equipment safety guards for purposes of the presumption in R.C. 2745.01(C).

Id. at ¶ 44.

In so holding, the Sixth District explicitly stated:

> In reaching this conclusion, we recognize that those devices are designed or may operate to reduce the seriousness of injury to an operator whose hands or fingers are inadvertently drawn into the in-running rewind roller. We appreciate that these devices could very well mean the difference between a relatively minor and catastrophic injury. The scope of our review, however, does not permit us to inquire as to whether the General Assembly should have provided for a presumption of intent to injure where these types of safety devices or features are deliberately removed by the employer. We are not empowered to override or second-guess the public policy determinations of the General Assembly, but must follow the plain language of the statute.

Id.

{¶ 29} In applying the definition of "equipment safety guard" in *Fickle*, this court found the "tire bead" and "bead taper" on a two-piece, wheel-assembly unit were not "equipment

safety guards" under R.C. 2745.01(C). *Roberts*, 2011-Ohio-6223 at ¶ 24. In addition, the Eight District found safety equipment, such as safety jackets and face masks, were not "equipment safety guards." *Meadows v. Air Craft Wheels, L.L.C.*, 8th Dist. Cuyahoga No. 96782, 2012-Ohio-269, ¶ 10. The Ninth District Court of Appeals also found a "trench box" did not constitute an "equipment safety guard" because "[a] trench is not a piece of equipment and the trench box is not designed to protect the operator from any piece of equipment." *Barton*, 2011-Ohio-5704 at ¶ 11.

{¶ 30} The Sixth District returned to the question of what constitutes an "equipment safety guard" in *Zuniga*. In *Zuniga*, Celerina Zuniga sued her employer alleging an employer intentional tort action after she was injured while working at Norplas Industries' automobile bumper manufacturing plant. *Id.*, 2012-Ohio-3414 at ¶ 4. According to Zuniga, Norplas deliberately removed an equipment safety guard, a ventilation system, thereby giving rise to a presumption that it had deliberate intent to injure her. *Id.* at ¶ 7. In rejecting this claim, the Sixth District stated:

> While the ventilation system may have had the effect of shielding the conveyor nip point, appellant has presented no evidence that it was designed for that purpose. Neither was there any evidence presented that the ventilation system was adopted as a de facto shield for the nip point at any time. Absent such evidence, we must concur with the trial court that the ventilation system was not an 'equipment safety guard' within the meaning of the statute.

Id. at ¶ 24.

{¶ 31} The Sixth District's decision in *Zuniga*, therefore, highlights the fact that to constitute an "equipment safety guard" under R.C. 2745.01(C), the alleged safety guard must have been designed or adopted to shield the operator from exposure to or injury by a dangerous aspect of the equipment.

Trial Court Erred in Finding the Interlock Switch was not an "Equipment Safety Guard"

{¶ 32} Turning to the facts in this case, after a thorough review of the record, we find that neither the jib crane nor the observation platform, two of the alleged "equipment safety guards" at issue here, were designed or adopted to serve as a shield from the dangerous aspects of the tire shredder. Rather, these were merely part of a system of safety devices implemented on the tire shredder. As noted above, the plain language of the statute clearly indicates, "[t]he General Assembly did not make the presumption applicable upon the deliberate removal of any safety-related device, but only of an equipment safety guard[.]" *Fickle*, 2011-Ohio-2960 at ¶ 42.

{¶ 33} This court made a similar distinction in interpreting Ohio's former Employer Intentional Tort statute in *Anders v. Pease Co.*, 12th Dist. Butler No. CA89-11-156, 1990 WL 94240 (July 9, 1990). In *Anders*, a case that will be discussed more fully below, this court addressed the issue of whether the removal of an eight-to-twelve-inch section of "guide bar" on a uni-point radial saw constituted an "equipment safety guard." In questioning whether the trial court correctly found an "equipment safety guard" was deliberately removed, this court stated:

> We question the trial court's finding that Pease deliberately removed an equipment safety guard. The record shows that an eight to twelve inch section of a guide bar was removed to allow multi-directional cutting and to prevent a scissor guard from jamming. According to testimony, the purpose of this bar was to act as a measuring device and to brace the wood stock in order to achieve a straight quality cut. Ohio Adm.Code 4121:1-5.01(B)(69) defines "guard" as "the covering, fencing, railing, or enclosure which shields an object from accidental contact." **Since the purpose of the guide bar was not to prevent accidental contact with the blade, we question whether it can be considered an "equipment safety guard" under R.C. 4121.80(G)(1). Anders' expert, Dr. Ronald Huston, testified that in his opinion the bar was a "safety device." On cross-examination, however, he conceded that a particular feature**

> **could be a safety *device* without being a safety *guard*.** (Emphasis in italics sic, emphasis in bold added, and internal citation omitted.)

Id. 1990 WL 94240 at *2, fn. 2.

{¶ 34} The same rationale can be applied here. For example, the evidence presented in this case indicates the jib crane removed from the tire shredder was merely a tool used to remove jammed tires from the shredder's cutter box. There was no evidence that the jib crane was somehow designed to shield the employee from a dangerous aspect of the tire shredder; namely, the feeder gears or the cutting blades. In fact, an expert provided as part of Downard's case-in-chief, Dr. Bernard Ross, specifically testified the jib crane "could be" considered a "safety device." However, as noted above, an *equipment safety device* is not the same as an "equipment safety guard" under R.C. 2745.01(C). This is again confirmed by the Ohio Supreme Court's decision in *Hewitt* finding the term "equipment safety guard" does not include any and all "generic safety-related items." *Id.*, 2012-Ohio-5317 at ¶ 24.

{¶ 35} In addition, as it relates to the observation platform, the platform merely allowed for the operator of the tire shredder safe access to view the cutter box. According to Daryl Wallace, another expert who testified during Downard's case-in-chief, the observation platform protected employees through "guarding by distance." However, besides providing a place for the employee to stand and look into the cutter box, the platform in no way shielded the employee from making contact with the feeder gears or cutting knives. In turn, while potentially serving as another generic safety-related item, we find the observation platform at issue was not designed or adopted to serve as an "equipment safety guard" as that term is used in R.C. 2745.01(C). To hold otherwise would expand the definition of "equipment safety guard" as provided by the Ohio Supreme Court in *Hewitt*.

{¶ 36} However, as it relates to the interlock switch, the testimony provided as part of Downard's case-in-chief indicates the interlock switch was used to prevent the tire shredder

from operating once the hinged hood covering the feeder gears and cutting knives was removed.[1] Specifically, David Stuhlmiller, an engineering manager with Columbus McKinnon Corporation, the manufacturer of the tire shredder, testified the interlock switch is "placed underneath the [hinged hood] so that if the [hinged hood] is removed the switch is activated and it removes control power from the electrical system on the tire shredder," thereby stopping the machine.

{¶ 37} It is undisputed the trial court found the hinged hood to constitute an "equipment safety guard." Rumpke has not appealed from that decision. The hinged hood, while generally serving to allow for the smooth ingestion and flow of tires into the cutter box, also serves as a shield from the feeder gears and cutting knives. However, as David Stuhlmiller's testimony reveals, the hinged hood not only serves to shield access to the feeder gears and cutting knives, but it also engages the interlock switch allowing the tire shredder to operate. According to Daryl Wallace, the interlock switch was "designed to ensure that the guarding system, specifically the [hinged hood], was properly in place before running so that it would protect the employee from injury." The maintenance manual for the tire shredder also states the interlock switch disengages the machine when the "protective cover of the cutting box," i.e., the hinged hood, "is removed or out of position while the machine is in the normal operating mode."

{¶ 38} Furthermore, and most significantly, Dr. Bernard Ross testified to the importance of the interlock switch. As Dr. Ross testified:

> I think the most salient and damning modification is tying off the interlock. It's called a cam and roller limit switch. Tying that off, that is by bypassing it so that the machine could operate without the [hinged hood], whereas that switch is installed for the specific purpose of ensuring that the [hinged hood] is in place so that the machine can operate safely. So they defeated a very essential

1. The full name for the hinged hood as noted in the tire shredder's maintenance manual is the "hinged hood for operator safety and weather protection."

safety feature by tying off this interlock.

{¶ 39} When taken in its entirety, and when viewed in a light most favorable to Downard as the nonmoving party, this testimony firmly establishes the interlock switch as something more than a minor safety-related device. This is especially true when considering the interplay between the hinged hood, something which the trial court specifically found to be an "equipment safety guard," and the interlock switch. Simply stated, by rigging the tire shredder to bypass the interlock switch and removing the hinged hood, we find this constitutes the deliberate removal of an "equipment safety guard" under R.C. 2745.01(C).

{¶ 40} In so holding, we find it necessary to distinguish the facts in this case from those presented in *Fickle*. As noted above, the Sixth District in *Fickle* found the "jog control switch" and "emergency stop cable" did not constitute "equipment safety guards" under R.C. 2745.01(C) as they "were not designed to prevent an operator from encountering the pinch point on the rewind roller[.]" *Id.*, 2011-Ohio-2960 at ¶ 44. In this case, however, the evidence clearly indicates the interlock switch worked as part of and in conjunction with the hinged hood. Moreover, the uncontroverted testimony presented in Downard's case-in-chief establishes the interlock switch was installed for the direct and specific purpose to ensure the hinged hood was in place so that the tire shredder could operate in its intended manner. The interlock switch, therefore, is not merely another safety device as part of the tire shredder's overall safety system, but instead, an "equipment safety guard" as that term is used in R.C. 2745.01(C).

{¶ 41} Our finding is strengthened by Rumpke's own argument in support of its motion for directed verdict advanced before the trial court at the end of Downard's case-in-chief. As counsel for Rumpke stated:

> I want to address specifically the argument regarding the interlock and trying to treat it, essentially trying to treat it as additional – additional, quote, "guard." If the [hinged hood] is on

> there, running, all right so the removal of the – in other words, if it is alleged that the hopper was removed, **it's the same thing. It won't run with the hopper there. They are trying to add on the tie-down of the [interlock switch] as almost an additional – an additional guard,** and what I want to go back to again, is if you go back and you try to redo this accident with everything in place as they said it would be, the [hinged hood] would be in place and the machine would be running. (Emphasis added.)

Continuing, Rumpke's counsel also stated:

> If the [hinged hood] is in place, like they said we should have had it in place, the switch is closed, the machine is running. So it is – that interlock device, in our view, is not any – for the Court to consider as it relates to guards, is not, quote, an additional guard. **It is the [hinged hood] as one. The interlock and the [hinged hood] go together.** (Emphasis added.)

{¶ 42} Downard also argued that the interlock switch should be considered as a part of the hinged hood. As counsel for Downard stated after the trial court issued its decision finding the interlock switch did not constitute an "equipment safety guard:"

> An integral part of the hood is the interlock which was only to be working with the hood on. And you take the hood off, it was manually tied back by the human conduct of a Rumpke employee per the testimony. **Now, I am having a very difficult time, Your Honor, with the Court's ruling that the interlock is somehow not tied to an in conjunction with, the hood.** Just as much as the lid is a part of the hinged hood for operator safety, and the sides of the hinged hood for operator safety are a part of that hood, that the interlock is, and I'm saying to the Court, **should be likewise consistent because it works in conjunction with, and it was specifically disabled.** (Emphasis added.)

{¶ 43} The trial court found the interlock switch was not an "equipment safety guard," but rather a device that was part of a "safety system." This decision is inconsistent with the evidence presented and the argument advanced by both parties. Simply stated, having found the hinged hood constitutes an "equipment safety guard," this would necessarily include a finding that the interlock switch also constitutes an "equipment safety guard" for purposes of R.C. 2745.01(C). Therefore, while we find no error in the trial court's decision

regarding the jib crane and observation platform, we find the trial court erred in its decision regarding the interlock switch.

Rebutting the Intent to Injure Presumption Under R.C. 2745.01(C)

{¶ 44} Having found the trial court erred in directing a verdict in favor of Rumpke at the end of Downard's case-in-chief regarding the interlock switch, we now turn to Downard's arguments regarding the rebuttable intent to injure presumption found in R.C. 2745.01(C). Specifically, Downard argues the trial court erred by finding Rumpke successfully rebutted the intent to injure presumption as it relates to the removal of the tire shredder's hinged hood. In support of this claim, Downard initially argues the trial court erred by requiring her to prove Rumpke removed the hinged hood with the intent to injure in order to first invoke the presumption. According to Downard, this was in direct contravention of *Fickle*, which stated, albeit in a footnote, the following:

> It is important to note that R.C. 2745.01(C) does not require proof that the employer removed an equipment safety guard with the intent to injure in order for the presumption to arise. The whole point of division (C) is to presume the injurious intent required under divisions (A) and (B). It would be quite anomalous to interpret R.C. 2745.01(C) as requiring proof that the employer acted with the intent to injure in order [to] create a presumption that the employer acted with the intent to injure. Such an interpretation would render division (C) a nullity.

Id., 2011-Ohio-2960 at ¶ 32, fn. 2.

{¶ 45} This same issue was recently addressed by the United States Sixth Circuit Court of Appeals in *Rudisill v. Ford Motor Company*, 709 F.3d 595 (6th Cir.2013). In *Rudisill*, Norman Rudisill sued his employer alleging an intentional tort after he was injured while working at a Ford casting plant. *Id.* at 599-600. The district court, however, granted summary judgment to Ford finding it had successfully rebutted the presumption contained in R.C. 2745.01(C) by introducing evidence showing its lack of intent to injure. *Id.* at 600. Rudisill subsequently appealed.

{¶ 46} On appeal, Rudisill argued the district court erred by concluding Ford had successfully rebutted the intent to injure presumption as a matter of law. *Id.* According to Rudisill, the district court improperly determined that in order to invoke the presumption in the first instance, Rudisill "was required to present proof that the equipment safety guards were removed with the intent to injure," thereby undermining the very purpose of R.C. 2745.01(C). *Id.* at 608. The Sixth Circuit disagreed by finding the following:

> We are not persuaded by Rudisill's interpretation of the district court's ruling. A plaintiff is obviously not required to adduce evidence of an intent to injure in order to invoke the presumption of intent of injure; that is the point of a *presumption*. But once the presumption has been invoked, a defendant may rebut it by marshaling evidence that there was in fact no intent to injure; that is the point of a *rebuttable* presumption. (Emphasis sic.)

Id. Continuing, the Sixth Circuit stated:

> The district court's ruling that Ford had successfully rebutted the intent-to-injure presumption by adducing evidence of a lack of intent to injure does *not* mean that Rudisill was required to present evidence of an intent to injure in order to invoke the presumption in the first place. There is a significant difference between giving the defendant an opportunity to rebut a presumption and a finding that no presumption arose to begin with. Once the rebuttable presumption has been successfully invoked, the burden is on the *defendant* to rebut it by introducing evidence of the lack of an intent to injure; by contrast, in the absence of a presumption, the burden would be on *the plaintiff* in the first instance to introduce evidence of the intent to injure. (Emphasis sic.)

Id.

{¶ 47} In this case, just as in *Rudisill*, the trial court properly applied R.C. 2745.01(C). In fact, as the trial court specifically stated in ruling on Rumpke's motion for a directed verdict at the close of Downard's case-in-chief:

> They get a presumption, unless you say the presumption goes away, that's the whole point. They have a presumption and you have got a duty to rebut it. You cannot just stand pat and say that they didn't present evidence.

We find the trial court's decision regarding the application of R.C. 2745.01(C) in no way indicates the trial court improperly shifted the burden to Downard to first prove Rumpke removed an "equipment safety guard" with the intent to injure. Again, just as in *Rudisill*, the trial court's decision "does *not* mean that [Downard] was required to present evidence of an intent to injure in order to invoke the presumption in the first place." (Emphasis sic.) *Id.*, 709 F.3d at 608.

{¶ 48} Where a presumption is rebuttable, such as the case here, the production of evidence disputing or contrary to the presumption causes the presumption to disappear as if it had never arisen. *See Ayers v. Woodward*, 166 Ohio St. 138, 144 (1957) (stating "when either party introduces substantial credible evidence tending to prove a fact which would otherwise be presumed, the presumption either never arises or it disappears"); *In re Guardianship of Breece*, 173 Ohio St. 542 (1962) (holding "the production of evidence disputing or contrary to the presumption causes the presumption to disappear where such evidence to the contrary either counterbalances the presumption or even when it is only sufficient to leave the case in equipoise"); *see also* 1980 Staff Note, Evid.R. 301 ("once a presumption is met with sufficient countervailing evidence, it falls and the presumption serves no further function. If rebutted, the jury is not instructed that a presumption existed"). Therefore, we find Downard's claim the trial court improperly applied the intent to injure presumption as found in R.C. 2745.01(C) lacks merit as it is not supported by the record.

The Intent to Injure Presumption May be Rebutted as a Matter of Law

{¶ 49} The trial court's finding nevertheless raises the question of whether the intent to injure presumption can be rebutted as a matter of law or whether it is a question of fact for the jury to decide. The Sixth Circuit also addressed this issue in *Rudisill*, wherein the court determined whether the intent to injure presumption was rebutted as a matter of law must be determined on a case-by-case basis dependent upon the evidence properly before the court.

In reaching this decision, the Sixth Circuit in *Rudisill* explicitly disagreed with the Sixth District's decision in *Zuniga*.

{¶ 50} As noted above, in *Zuniga*, Celerina Zuniga sued her employer alleging an employer intentional tort action after she was injured while working at the Norplas International automobile bumper manufacturing plant. According to Zuniga, Norplas deliberately removed an alleged equipment safety guard, a ventilation system, thereby giving rise to a presumption that it had deliberate intent to injure her. *Id.*, 2012-Ohio-3414 at ¶ 7. The trial court, however, granted Norplas' motion for summary judgment. In so holding, the trial court determined that even if the intent to injure presumption had been established, "Norplas had presented sufficient evidence that the reason for the ventilator's removal was that it was ineffective as a dust collection device, thus defeating the statutory presumption," thereby rebutting the presumption as a matter of law. *Id.* at ¶ 8.

{¶ 51} The Sixth District disagreed with the trial court's ruling by finding, in pertinent part, the following:

> Once a statutory presumption of employer intent to injure is established, rebuttal of that presumption necessarily involves some weighing of evidence. This would preclude summary judgment on such an issue because weighing evidence or choosing among reasonable inferences is not permissible in a summary judgment analysis. (Internal citation omitted.)

Id. at ¶ 20.

{¶ 52} In addressing the same issue in *Rudisill*, the Sixth Circuit found the reasoning in *Zuniga* was merely dicta and otherwise unpersuasive. *Id.*, 709 F.3d at 606. Specifically, the Sixth Circuit found "[d]eciding whether the intent-to-injure presumption has been rebutted does not 'necessarily' require the weighing of evidence" as the Sixth District suggests. *Id.* Rather, according to the Sixth Circuit:

> Suppose, for example * * * the evidence is unequivocal and uncontroverted that the safety guard on a piece of equipment

> was removed for repair, that the employee was not required to work with the equipment in such condition, and that there is no evidence that anybody intended any harm. There would be no evidence to weigh under these circumstances. All the evidence would point in one direction and the answer would be clear as a matter of law.
>
> Of course, if the evidence adduced by a defendant to rebut the presumption is weak, or if a plaintiff presents substantial countervailing evidence, then resolution of the issue would require the weighing of evidence that would render summary judgment improper. But that is a big "if." * * * The dictum in *Zuniga* that deciding whether the presumption has been rebutted "necessarily involves some weighing of evidence," is therefore incorrect. Instead, deciding whether a jury question is presented depends on the circumstances of the particular case and the evidence before the court. (Internal citations omitted.)

Id. at 606-607.

{¶ 53} The Sixth Circuit's reasoning in *Rudisill* was based in part on the Fifth District's decision in *Shanklin v. McDonald's USA, LLC*, 5th Dist. Licking No. 2008 CA 00074, 2009-Ohio-251. In *Shanklin*, Demia Shanklin was injured while working as a food preparer at a McDonald's restaurant. The injury occurred as a result of Shanklin making contact with the corner of a microwave oven that contained an exposed inner wire that was connected to a magnetron. *Id.* at ¶ 7. At the time of her injury, the microwave oven was undergoing maintenance and the housing unit covering the microwave had been removed, thereby exposing a strong current of electricity throughout the unit. *Id.*

{¶ 54} Following her injury, Shanklin sued McDonald's alleging an employer intentional tort action. *Id.* at ¶ 9. In support of her claim, Shanklin argued the intent to injure presumption applied since McDonald's had deliberately removed the housing unit from the microwave oven. *Id.* The trial court, however, granted McDonald's motion for summary judgment finding McDonald's had rebutted the intent to injure presumption as a matter of law. *Id.* at ¶ 10. Shanklin then appealed.

{¶ 55} On appeal, Shanklin argued the trial court erred by granting McDonald's motion

for summary judgment. The Fifth District disagreed and stated:

> Assuming *arguendo* that the housing unit of the microwave oven can be considered an equipment safety guard, we find the evidence presented rebuts the presumption that the removal of the housing unit was committed with the intent to injure the employee.
>
> Robertson testified that the microwave oven was not functioning and in order to make the repair, he had to remove the housing unit covering the microwave. Once he made the repair, he activated the microwave oven to make sure it was operational. After the accident, Robertson reattached the housing unit and placed the microwave oven back into operation. During the repair of the microwave oven, [McDonald's] employees did not use the microwave oven for food preparation nor were they required to use the microwave oven for food preparation. Based upon such evidence, we find that Appellant's arguments fail as a matter of law under R.C. 2745.01(C). (Internal citations omitted.)

Id. at ¶ 41-42.

{¶ 56} The Sixth Circuit also relied on the Sixth District's earlier decision in *Dudley v. Powers & Sons, LLC*, 6th Dist. Williams No. WM-10-015, 2011-Ohio-1975, in finding the "intent to injure" presumption can be decided by the court as a matter of law. In *Dudley*, David Dudley was injured on his first day of work at Powers & Sons while operating a hydraulic press. *Id.* at ¶ 11. It was undisputed that Powers & Sons had made certain in-house modifications to the hydraulic press removing a dual actuating button that required the operator of the press to use both hands to activate the ram and replacing it with an optical sensor. *Id.* at ¶ 10. Dudley's left hand was crushed by the press when he reached into the press to clear loose material. *Id.* at ¶ 12.

{¶ 57} Dudley subsequently sued his employer alleging an employer intentional tort action. The trial court, however, granted summary judgment to Powers & Sons. According to the Sixth District, the trial court's reasoning for granting summary judgment to Powers & Sons was as follows:

> [T]he trial court granted Powers' motion for summary judgment,

> ruling that the direct cause of the injury was not the removal of the dual buttons, but the installation of the electronic sensor. As such, the court determined that R.C. 2745.01(C) did not apply and that no statutory rebuttable presumption arose. The court reasoned that without this rebuttable presumption reasonable people could not disagree and Powers was entitled to judgment as a matter of law.

Id. at ¶ 15.

{¶ 58} On appeal, Dudley argued that the removal of the dual actuating button control was a direct cause of his injury entitling him the rebuttable presumption contained in R.C. 2745.01(C). In contrast, Powers & Sons argued the direct cause of the injury was not the removal of the dual actuating button, but the installation of a proximity switch, thereby removing it from the purview of the statute. *Id.* at ¶ 18. In reversing the trial court's decision, the Sixth District found "what the direct cause of the injury is constitutes a factual issue to be determined, not as a matter of law, but by a trier of fact." *Id.* at ¶ 19.

{¶ 59} Although already finding summary judgment was improper, the trial court then addressed the standard of review for rebuttable presumptions by stating the following:

> In an effort to rebut the presumption of intent, Powers has entered an affidavit from its manufacturing engineer that there was no intent by Powers to harm Dudley. The testimony of a Powers employee cannot be weighed so heavily to say that reasonable minds could not disagree on the issue of intent.

Id. at ¶ 21.

{¶ 60} According to the Sixth Circuit in *Rudisill*, the decision in *Dudley* stands for the proposition that:

> [W]here the only evidence presented by the defendant to rebut the intent-to-injure presumption under Ohio Revised Code § 2745.01(C) was an affidavit from its manufacturing engineer attesting that no harm had been intended, the issue of whether the presumption had been rebutted was for the jury to decide.

Rudisill, 709 F.3d at 605. The Sixth Circuit also determined the *Dudley* decision establishes that "self-congratulatory affidavits" standing alone would not be sufficient to rebut the intent

to injure presumption. *Id.* at 608. Based on these findings, the Sixth Circuit determined that "deciding whether a jury question is presented depends on the circumstances of the particular case and the evidence before the court." *Id.* at 607.

{¶ 61} Applying these principles, the Sixth Circuit in *Rudisill* determined Ford had provided sufficient evidence to overcome the intent to injure presumption. In so holding, the Sixth Circuit stated:

> Returning now to the key point that the presumption-rebuttal issue may in some cases be properly decided as a matter of law by the court, the question becomes whether that was the correct decision in the present case. We conclude that it was. As explained above, the district court took stock of the pertinent evidence – the lack of any prior substantially similar incidents despite the hundreds of millions of hours worked at the plant; the lack of any prior citations or complaints involving substantially similar conditions; the admission by Rudisill and other employees involved in the flask-removal process that they did not think the process was dangerous; the fact that Rudisill had routinely engaged in the process hundreds of times without incident; Rudisill's acknowledgment that he would have reported the condition if he had thought the process was dangerous and, as Team Leader, would not have let his coworkers engage in the process; and Rudisill's concession that he had no reason to think that his supervisor at Ford intended to harm him – and concluded that Ford had rebutted the presumption. We find no error in this conclusion.

Id. at 607-608. According to the Sixth Circuit, this was "hard, uncontroverted" evidence supporting the trial court's decision. *Id.* at 608.

{¶ 62} The Sixth Circuit's decision in *Rudisill* comports with case law from the Ohio Supreme Court. As previously stated, where a presumption is rebuttable, such as the case here, the production of evidence disputing or contrary to the presumption causes the presumption to disappear as if it had never arisen. *See Ayers*, 166 Ohio St. at 144. These principles are also contained in the 1980 Staff Note to Evid.R. 301, which again states, "once a presumption is met with sufficient countervailing evidence, it falls and the presumption serves no further function. If rebutted, the jury is not instructed that a presumption existed."

In other words, as recently stated by the Ninth District Court of Appeals in *Hoyle v. DTJ Ents., Inc.*, 9th Dist. Summit Nos. 26579 and 26587, 2013-Ohio-3223:

> A presumption shifts the evidentiary burden of producing evidence, i.e., the burden of going forward, to the party against whom the presumption is directed. However, a rebuttable presumption does not carry forward as evidence once the opposing party has rebutted the presumed fact. Thus, once the presumption is met with sufficient countervailing evidence, it fails and serves no further evidentiary purpose. The case then proceeds as if the presumption had never arisen. (Internal citations omitted.)

Id. at ¶ 18, quoting *Hall v. Kemper Ins. Cos.*, 4th Dist. Pickaway No. 02CA17, 2003-Ohio-5457, ¶ 92.

{¶ 63} The Sixth Circuit's decision in *Rudisill* also comports with the reasoning advanced by this court in addressing the intent to injure presumption contained under Ohio's former Employer Intentional Tort statute. Similar to the current statute, former R.C. 4121.80(G) provided:

> Deliberate removal by the employer of an equipment safety guard * * * is evidence, the presumption of which may be rebutted, of an act committed with the intent to injure another if injury or an occupational disease or condition occurs as a direct result.

{¶ 64} In *Anders*, a case which we briefly addressed above, Ronald Anders alleged an employer intentional tort action against Pease Company after he severed three fingers from his left hand while using a uni-point radial saw. *Id.*, 1990 WL 94240, at *1. After holding a bench trial, the trial court found in favor of Pease Company by concluding it did not act with deliberate intent to cause Anders' injury. *Id.* Anders subsequently appealed.

{¶ 65} On appeal, Anders argued the trial court's decision was against the manifest weight of the evidence because the record did not support the trial court's finding Pease Company overcame the rebuttable intent to injure presumption contained in R.C. 4121.80(G). *Id.* at * 2. This court disagreed by finding:

> The record *sub judice* is devoid of evidence of an intent to injure as contemplated by the statute. The only viable argument available to Anders rests upon the presumption created by the trial court's finding that Pease deliberately removed an equipment safety guard from the saw on which Anders was injured. The trial court further found, however, that Pease overcame the statutory presumption by demonstrating the absence of any intent on its part to injure Anders. Upon reviewing the record, we find no basis for disturbing this finding. Every witness who testified indicated that no one at Pease intended to harm Anders or any other worker. Anders himself testified that he knew of no one who would want him to be injured or harmed. In sum, we find that the evidence overwhelmingly supports the trial court's finding in favor of Pease. The facts of this case simply do not fall within the realm of an intentional tort as defined by R.C. 4121.80(G)(1). (Emphasis sic.)

Id.

{¶ 66} Anders also argued the trial court erred by denying his request for a jury trial. However, this court again disagreed by finding:

> Had the case been tried to a jury, **a directed verdict in favor of Pease would have been warranted because there was no showing of an intent to injure Anders as required by R.C. 4121.80(G)(1).** Thus, any error in denying Anders a jury trial would be harmless. It would be a waste of judicial resources to remand a case such as this for a jury trial only to have it directed out before it ever reaches the jury. (Emphasis added.)

Id.

{¶ 67} Although dealing with Ohio's former Employer Intentional Tort statute, this court's decision in *Anders* demonstrates that the question of whether the intent to injure presumption was rebutted may be decided by the court as a matter of law. *See also Baker v. V.I.P. Contractors*, 12th Dist. Butler No. CA90-08-178, 1991 WL 81870 (May 13, 1991) (finding reasonable minds could differ as to whether the evidence presented was sufficient to warrant the rebuttal of the presumption found under the former employer intentional tort statute). However, as the case law reveals, this requires a showing through hard, uncontroverted evidence that the employer had no intent to harm the employee.

Trial Court Erred by Finding Rumpke Rebutted the Intent to Injure Presumption as a Matter of Law

{¶ 68} Having found the question of whether the rebuttable intent to injure presumption may be determined by the trial court as a matter of law, we must now determine whether the trial court erred in so holding here. In this case, the evidence submitted by Rumpke to rebut the intent to injure presumption came exclusively from Craig Stidham. As noted above, Stidham is a foreman at Rumpke's tire shredding facility, a position he has held since 2005. According to Stidham, the hinged hood and interlock switch were removed and disabled from the tire shredder in order to run a "piggyback" operation at the facility. A "piggyback" operation occurs when precut tire pieces are transferred from one tire shredder and into the tire shredder at issue here. As Stidham testified, this "made it a lot easier on the machine to cut because it was already precut once."

{¶ 69} However, the "piggyback" operation had its own limitations. For instance, although the tire shredder at issue was fed with precut tire pieces, those pieces could sometimes be upwards of six to eight feet long. Due to their length, the precut tire pieces would oftentimes get tangled with the feeder gears dislodging the hinged hood and trip the interlock switch causing the machine to shut down. In fact, according to Stidham's trial testimony, the precut tire pieces hit the original hinged hood with such force that it "physically broke it and pulled it into the machine and through the knives in nice little two-inch pieces."

{¶ 70} Instead of replacing the hinged hood, Stidham testified that Rumpke attempted to manufacture a replacement that would eliminate this problem. However, despite those efforts, the precut tire pieces would continue to wrap around the feeder gears, thereby requiring Rumpke to constantly shut down the machine. As Stidham testified:

> Still same problems, constantly these pieces getting wrapped around the gears, were constantly having to shut the machine off and go up there and reset this hinged hood into place because every time it would get hit, it would lift that limit switch. And it

> would shut the machine down.
>
> So it was actually already shut down, but we would still lock it out, and you would have to go up there and unwrap that and get inside the cutter box and unwrap that piece off the feeder gear. Then you would have to go through the process of restarting the machine, both the diesel engine, which ran a generator, which was how it was powered, and you would have to literally set the amps and volts and what RPMs and how you were going to run it.

{¶ 71} Furthermore, when asked if there was any way to run the "piggyback" operation with the hinged hood in place, Stidham testified:

> No, we tried. We tried many times. But it just – we always ended up having to climb up there. It just never failed that something would get wrapped around the feeder gears. And ultimately as they are spinning this long piece of rubber, then hits this hinged hood, then lifts that limit switch and shuts everything down. And the point of aligning the machines up is to help increase your productivity, and it was very counterproductive.

Stidham later testified he had no intent to injure Johnson in any way through any modifications to the tire shredder. Besides Stidham's testimony, Rumpke did not provide any additional evidence to rebut the intent to injure presumption contained in R.C. 2745.01(C).

{¶ 72} In ruling on Rumpke's motion for directed verdict at the close of all evidence, the trial court stated:

> And so this Court is going to find and will rule that [Rumpke has] put on evidence to the effect that – have put on evidence from, I believe, Mr. Stidham himself that it was not his or fellow employees' intention to hurt Mr. Johnson or anyone else in the removal of the equipment, that there was a basis, there was a rationale, a reason other than a mere whim for the removal of the guard and the shielding. And that is so they could run this other shredder. This other shredder caused that guard and that shielding to become dislodged and to become trapped in the machine itself.

{¶ 73} As can be seen, the evidence presented by Rumpke to rebut the intent to injure presumption is not merely a vague denial that it did not intend to hurt Johnson. *See, e.g., Dudley*, 2011-Ohio-1975, ¶ 21 (merely submitting an affidavit from employers manufacturing

engineer that there was no intent to injure employee was insufficient to rebut the presumption of intent found in R.C. 2745.01(C)). However, contrary to the trial court's finding, the fact that Rumpke's actions had a specific functional purpose does not automatically exempt the process from intentional tort analysis. *See Rudisill*, 709 F.3d at 610. Rather, this serves as merely one factor that can be considered when determining whether the intent to injure presumption was in fact rebutted.

{¶ 74} This is especially true when considering the only evidence submitted to rebut the presumption came exclusively from Stidham's trial testimony. It is well-established "that the trier of fact is vested with the power to judge the credibility of witnesses and to determine the weight to be afforded to the evidence presented." *Coleman v. Hamilton*, 12th Dist. Butler Nos. CA2011-03-049 through CA2011-03-051, 2011-Ohio-4717, ¶ 14; *Seasons Coal Co. v. City of Cleveland*, 10 Ohio St.3d 77, 81 (1984). In turn, the trier of fact is "free to accept or reject" any or all of the testimony of any witness, including testimony of an expert witness. *Weidner v. Blazic*, 98 Ohio App.3d 321, 335 (12th Dist.1994). This is true even where the evidence is undisputed for the trier of fact possesses the inherent right to reject any evidence properly presented. *Coleman* at ¶ 14, citing *Krauss v. Kilgore*, 12th Dist. Butler No. CA97-05-099, 1998 WL 422068 (July 27, 1998).

{¶ 75} By finding Rumpke had successfully rebutted the intent to injure presumption as a matter of law, the trial court stepped beyond its bounds and usurped the power vested with the jury, as the trier of fact, to judge the credibility and weight that should be afforded to Stidham's trial testimony. Unlike *Shanklin* and *Rudisill*, both of which found the intent to injure presumption was rebutted as a matter of law, this is a case where the only evidence submitted to rebut the intent to injure presumption came from Stidham's trial testimony, a foreman currently employed at Rumpke's tire shredding facility. This places the credibility and the weight to be given to Stidham's trial testimony at the forefront of this matter.

{¶ 76} Furthermore, the only evidence presented to rebut the intent to injure presumption indicates the hinged hood and interlock switch were removed or bypassed so that Rumpke could run the "piggyback" operation at the facility, thereby increasing output and productivity. This matter is therefore clearly distinguishable from a case like *Shanklin* where the evidence established the alleged equipment safety guard was removed for maintenance purposes. *Id.* at ¶ 41-42.

{¶ 77} This case is also distinguishable from a case like *Rudisill* where the "hard, uncontroverted" evidence indicated (i) there was a lack of any prior similar incidents despite hundreds of millions of hours worked at the plant; (ii) the lack of any prior citations or complaints regarding the process; (iii) the admission by the plaintiff and other employees that they did not think the process was dangerous; (iv) the fact that the plaintiff had routinely engaged in the process hundreds of times without incident; (v) the plaintiff's own acknowledgement that he would have reported the condition if he thought the process was dangerous; (vi) as well as the fact the plaintiff would not have let his co-workers engage in the process if he believed it was dangerous; (vii) and the fact that the plaintiff conceded he had no reason to think his supervisor had intended to harm him. *Id.*, 709 F.3d at 607-608.

{¶ 78} Again, the fact that Rumpke's actions had a specific functional purpose does not automatically exempt the process from intentional tort analysis. *See Id.* at 610. Therefore, whether Stidham's trial testimony alone was sufficient to rebut the intent to injure presumption was a question for the jury to decide and not by the trial court as a matter of law. Accordingly, we find the trial court erred in directing a verdict at the close of all evidence finding Rumpke had successfully rebutted the intent to injure presumption contained in R.C. 2745.01(C).

Conclusion

{¶ 79} In light of the foregoing, we find no error in the trial court's decision directing a

verdict at the close of Downard's case-in-chief by finding the jib crane and platform were not "equipment safety guards" under R.C. 2745.01(C). However, we find the trial court did err in directing a verdict finding the interlock switch was not an "equipment safety guard." As noted above, the interlock switch was used in conjunction with the hinged hood, something the trial court specifically found to be an "equipment safety guard" as a matter of law. Accordingly, Downard's second assignment of error is sustained as it relates to the interlock switch only.

{¶ 80} Furthermore, we find no error in the trial court's application of the intent to injure presumption for it is clear the trial court did not improperly shift the burden to Downard as she now suggests. Nevertheless, we find the trial court's decision directing a verdict to Rumpke at the close of all evidence finding it had successfully rebutted the intent to injure presumption as a matter of law was in error. Based on the facts and circumstances of this case, whether the intent to injure presumption was successfully rebutted by Rumpke was wholly dependent upon the jury's determination of the credibility and weight to be given to Stidham's trial testimony. Accordingly, Downard's first assignment of error as it relates to whether Rumpke successfully rebutted the intent to injure presumption contained in R.C. 2745.01(C) is sustained.

{¶ 81} Judgment affirmed in part, reversed in part and remanded for further proceedings.

HENDRICKSON, P.J., and RINGLAND, J., concur.

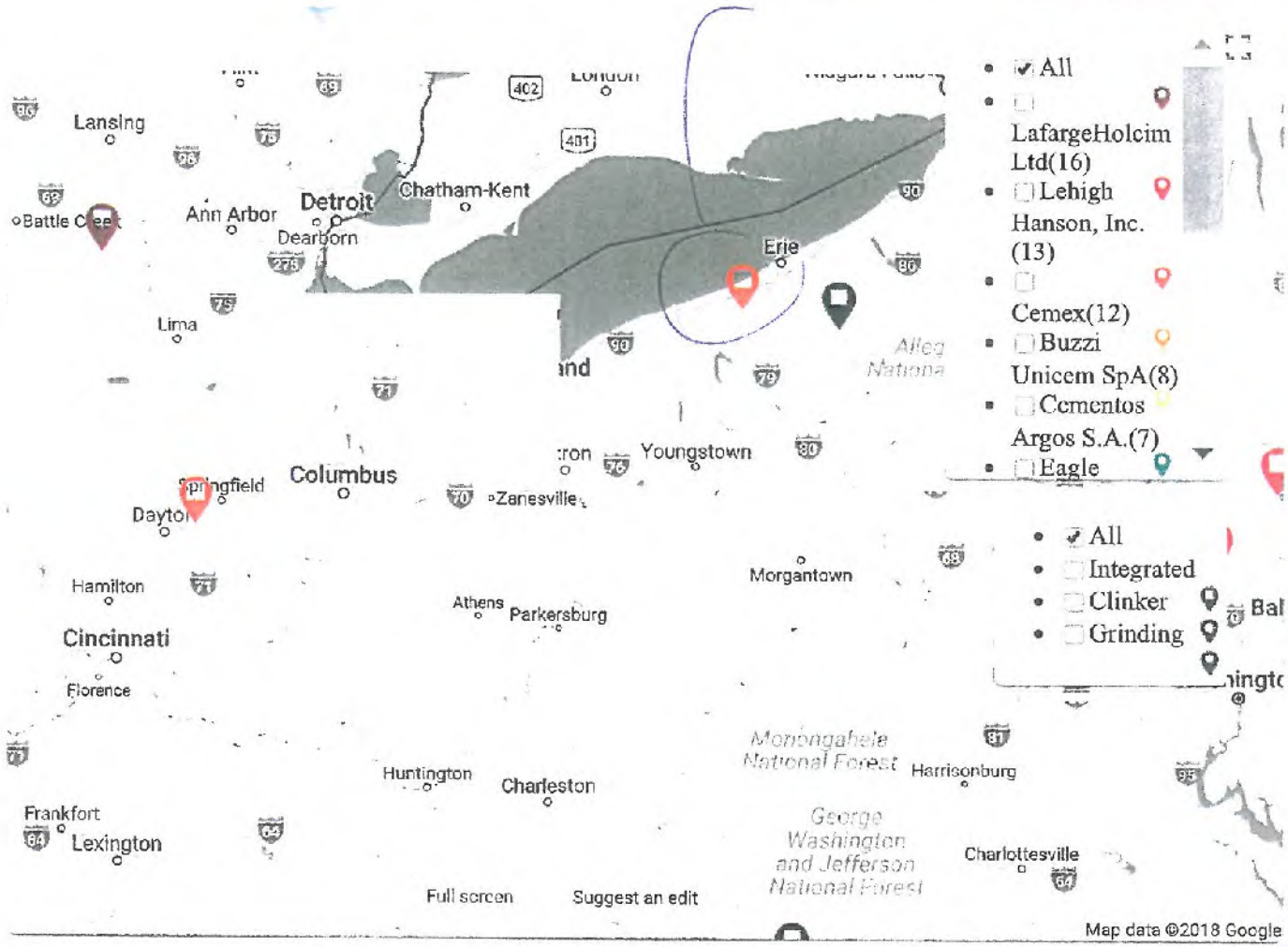
Cement plant locations and information on United States can be found below. For full access to the database, purchase The Global Cement Report™, 12th Edition.

PURCHASE

closed

Summary

Cement capacity (Mt)	
Integrated plants	96
Clinker plants	0
Grinding plants	8



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Search...

Group Name	Company Name	Facility Name	City	Type Of Works	Cement Type
	Armstrong Cement & Supply Corporation	Cabot	Cabot		
	Ash Grove Cement Company	Chanute	Chanute		
	Ash Grove Cement Company	Durkee	Durkee		

Medina County PART II Project Proposal Scoring Sheet

Respondent: Entsorga

Reviewer Name: Amy Lyon-Galvin

Review Date: Nov. 20, 2017 - Jan 22, 2018

Interview/oral presentation
Nov 28, 2017 10 am - 11:30 am
- Paolo Carollo
- Bob Wellert, Wellert Corp
- Wellert visits NDA
- Follow up Nov 29, 2017
- Site visit Dec. 13, 2017 to Martinsburg WV.

Disqualification Criteria:

Score 4 (-1)
45
23 (-2)
72

☐ Incomplete or unsigned forms and required submittals;

Comments: Checklist ✓
Included form B-7D per Addendum 1
No parent guarantee, only letter of intent

☐ Response submitted after deadline in all cases;

Comments: ϕ

☐ Ex parte communications with District or Medina County elected officials, employees, consultants or representatives regarding this Project Description during the period of silence per Section VIII as contained herein;

Comments: ϕ

☐ Incomplete document/missing significant information requested in the Project

Description; Letter of intent to issue parent guarantee

Comments: TTD + marketing recyclables, Landfill space - by others to maximize ex. contractor operations by District.
No commodities market history

☐ Submission of false, inaccurate or incomplete information;

Comments:

☐ Equivocal pricing submitted on Pricing Form;

Comments: Alternate pricing strategy public/private partnership.

if unsuccess. 2 yr-bond (i.e.) to clear site or value of equip.

☐ Failure to submit sureties and required Bonding;

Comments: Bonding to Entsorga Italia SpA w/ McGriff, Seibels + Williams only over 3 yrs. likely due to limited US presence

Presente idea of construction completion bond $ 12 M by constr. contractor

☐ Failure to submit Parent Guarantee or proposing different companies for different parts of the Scope.

Comments: only letter of intent by Entsorga Fin SpA
100% owners of Entsorga USA Inc.
+ Entsorga Italia SpA.

Scoring Criteria		Score (0–10)
1. Response Completeness	4/5	

Comments:

checklist ✓
Addenda 1 + 2 ✓

Electronic version ✓

MSW MWP - yes - Residential ✓
Not impacted by curbside growth.

$ Landfill capacity use existing relationships.

Different funding strategy 20% equity 80% bond finance
has flow diagram w/ tons.
typically provide technology + training ; operation is local
waste agreements with Major haulers a must w/o put or pay.
maximizes recycling + recovery
Strong Europe presence. Brokering relationships to build in US
1st US facility to be operational Q2 2018

2. Technical Specifications	45/45	

Comments:

Alternative biodrying + Alternative Fuel processing system.
Assumes 120,000 tons/year w/ min 10,000 tons/yr. commercial/industrial waste

75% Landfill diversion
25% fines + inerts to be Landfilled

to produce 52,000 tons Alternative Fuels

New bldg. for receiving + biooxidation
Ex bldg refinement, additional recycling, logistic operations
organics excluded for now

25% evaporation

Reception bridge crane 35 tons/hr.
pretreatment bag opener / bast rotary drum.
Bio-Drying - 20 d. bioxidation wet time
Refinement 25 ton/hr.
biofilter for odor control (negative pressure)
NIR
high speed crane
air separator
> Entsorga Equip. + other Mfg. Equip + Integrate Equip.

71500 tons/yr.
steel
aluminum
PVC

claims
73% diversion - 75% but includes water loss

upper
rodder
ommel
, class.
gnets
ty wirent
R
F granulator (shredder) up to 10 t/hr.

52000 + 7500 = 59,500 45,500
÷ 140,000 = 42.5% Landfill ~~80,500~~
÷ 120,000 = 49.6% " ~~60,500~~ 30,000
< 50,000 tons

Scoring Criteria	Score (0–10)
2a. Construction Plan	

Comments:

MCSWD owns property

Can modularly scale 120,000 to 150,000 tons/yr.

Very detailed construction plan. Models + process sizing

Equipment dimensioned

final Processed Engineered Fuel (PEF) direct discharge to walking floor trucks/trailers or baled for long travel dist.

Fines + rents discharge direct into containers or trailer trucks

Build & M from ex. bldg to minimize interference

Problems w/ interim truck traffic.

Remove pellet bldg Addn.

22 Months.

2b. Operation Plan	

Comments: can be operated by Entsorga or other contract operator, or LLC.

385 tons per day / 312 working days / 6 d/wk

plugged MCSWD's waste characterization into their simulation waste input matrix software.

= medium quality processed engineered fuel (PEF)

2 hook lift trucks, 1 front end loader

Refining in ex. bldg area w. not all space.

Utilize TTD subcontractor to ex. Landfill 30,000 t/yr.

16-20 employees, guaranteed 20

3 shifts 8/8/4 Employees 4 Mgmt.

11-12 hr d.

w/ 24 hr. biodrying bioxidation

Min process guarantee? 110,000 tons/yr.

Scoring Criteria	Score (0–10)
2c. Marketing Plan	

Comments:

PEF 52,000 T
Ferrous 3,800 T
Aluminum 2,400 T
Pvc plastics 1,300 T

Recyclables sold @ market value to scrap dealers in WV Apple valley waste is managing it.

No commodities marketing history, not yet operating in WV.
$ for commodities comparable to industry ref.

- 2013 EPA letter for PEF through Hebiot process for martinsburg WV called solid refuse fuel
- 2015 PEF supply agreement w/ Essroc Cement in USA.

Cement industry relationships with Holcim Lafarge, Heidelbergh Lehigh, Buzzi, Argos, Titan
MOU's for more than 200,000 t/yr. PEF
2 plants in region via Great Lakes St. Lawrence Seaway Syst.
Sell commodities 50% - 60% less than market value of new product. or others...
4 cement facilites in the region

2d. Recordkeeping Plan	

Comments:

defined maintenance plan
database + software output
dedicated register
automation/controls = reporting capabilities

Scoring Criteria	Score (0–10)
2e. Saftey Plan	

Comments:

addresses safety during construction and on-going commercial operations
very detailed matrix & comprehensive.

2f. Startup Plan	

Comments:

Commissioning

1. pretreatment
2. overhead cranes
3. bio-drying ventilation
4. PEF refining line
5. biofilters
6. Ancillary units

Completion test up to at least 205 tons/d MSW + 36 tons/d organics

Challenge → Divert waste/traffic from new constr.

Scoring Criteria	Score (0–10)
2g. Transfer Plan	

States present transfer + disposal arrangements are reliable low cost solution as past through.

Propose public-private partnership
20% equity 80% Debt through unguaranteed tax exempt bonds underwritten by large financial institution via Ziegler Investment Banking letter. Martinsburg WV model adapted to MC

- Lump sum EPC contract to local construction contractor w/ Entsorga Engineering, technology licensing + equipment
- operation + Maint. agreement
- Longterm uptake contract w/ District for 110,000 tons/yr MSW ≡ waste agreements
- Longterm offtake contract for processed fuel

Financial projections/assumptions validated by Leidos in WV.

3. Proposed Net Cost to the District for Processing & Recovery of Recyclables and TTD Operations	23/25

Comments:

New Equipment $13.9M 10 yr. note
Rolling Stock $1201000 + lease
MCSWD Building $12M 30 yr. note
$26,020,000

TTD - $20/ton
recovered ton processing fee $52/ton
Source separated recyclables $35/ton - placemarker, not necessary.
$3.8M revenue before tax 50/50 split w/ county
Entsorga $2.5M - $3M
County $2.5M - $3M } Equity investment
Could land lease + not use land as collateral.

Medina County RFQ Scoring Sheet

RFQ Respondent: Entsorga

Reviewer Name: Amy Lyon-Galvin

Review Date: 10.18.17

Disqualification Criteria: – N/A

☐ Incomplete or unsigned forms and required submittals;

Comments:

☐ Qualifications submitted after deadline in all cases;

Comments:

☐ Ex parte communications with District or Medina County elected officials, employees, consultants or representatives regarding this RFQ during the period of silence per Section VII as contained herein;

Comments:

☐ Incomplete document/missing significant information requested in the RFQ;

Comments:

☐ Submission of false, inaccurate or incomplete information;

Comments:

☐ Fewer than three (3) years in business providing similar types of services requested in this RFQ.

Comments:

Scoring Criteria		Score (0–10)
1. Project Team	0-10	6

Comments:

Entsorga + GBB (WV) - sub
Entsorga Fin 30%
Entsorga Italia SPA 60% 1997
Entsorga USA 10%
Crisel Troutmen & Tanner - Structural/civil design - sub

Collection, hauling, Landfill disposal of 15% - 20% Yearly residual volumes

TTD - not included; but suggests District continue this as separate contract (under SOAP)

2. Project History & Experience	0-20	15

Comments: 20 years in europe. 1 similar installation 4 yrs in operation

Entsorga Group on 4 continents
Entsorga USA, Inc. Martinsburg WV.
No design or delivery of transfer stations, same for design, construct + operate organics recovery facilities technologies beyond physical, mechanical separation

Ref 1. Slovenia 30,000 T/yr compost 55,000 T/yr MBT to PEF - Ref 1 (supply & install) 2006 start 2010 comp
Ref 2. Chieti, Italy MBT 270,000 T/yr PEF startup Nov '09 start 12/06 end 10/09
Santina Italy MBT organics - year?
Ref 3. W. Itsure England 2013 MBT 70,000 T/yr removing recyclables + 33,000 T/yr RDF. = MOST similar (Design, supply + install)
★ Martinsburg WV, USA 20,000 T MSW + 20,000 c.y. → fuel pellet open spring 2018 $31M financed thru tax exempt bonds collateral 2 yrs;
Derby, UK - executing contract July 2017 startup.
Crevalcore, Italy - composting plant Cairo, Egypt EF
Peccioli, Italy - composting
Romania - composting
Sardinia, Italy - composting

Scoring Criteria		Score (0–10)
3. Preliminary Technical Approach	0-20	10

Comments:

Advanced mech biological treatment (MBT) - on unsorted (post recycling)
composting
anaerobic digestion
Not in operation in US

→ to reduce water content

→ Then process to refine biodried waste matl to produce engineered fuel
Low calorific material to be landfilled

Bag opener - rotary drum No shredder Reduce water content 15-20% for 30% wt. loss
Refine - hopper, shredder, trommel, air classification, magnets, eddy current, optional NIR to produce fuel, fines + heavies to landfill, ferrous + non-ferrous metals All biofilter = water & ww demands

4. Company Financial Resources	0-20	15

Comments:

MCSWD Balance of equity
Bond market financing

Scoring Criteria		Score (0–10)
5. Litigation History	0-10	10

Comments:

none > $100,000

6. Safety History	0-10 :	6

Comments:

> 300,000 manhours w/o incident in last 5 yrs. "during plant supply and installation"...

not much info on operation

uncertain safety standards translate to US & absent operation component.

Scoring Criteria 0-20	Score (0–10)
7. Overall Quality, Accuracy and Completeness of Qualifications	11

Comments:

No transfer station experience, silent on supply agreement, has one PE

No landfill security = county todo

Relies heavily on evaporation/shrinkage

Less focus on removal of traditional recyclables

primary goal RDF

Could compost or otherwise treat sidestream organics

all forms/narrative in lieu of accomplishes checklist

Acknowledged Addenda 1 & 2

Silent on the District's Plan

No us operation

Wastestream in Europe different.

competing markets w/ WV - perhaps not enough end uses for generated product

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11

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Medina County RFQ Scoring Sheet

RFQ Respondent: Rumpke of Ohio, Inc.

Reviewer Name: Amy Lyon-Galvin

Review Date: 10.18.17

Disqualification Criteria: - N/A

☐ Incomplete or unsigned forms and required submittals;

Comments:

☐ Qualifications submitted after deadline in all cases;

Comments:

☐ Ex parte communications with District or Medina County elected officials, employees, consultants or representatives regarding this RFQ during the period of silence per Section VII as contained herein;

Comments:

☐ Incomplete document/missing significant information requested in the RFQ;

Comments:

☐ Submission of false, inaccurate or incomplete information;

Comments:

☐ Fewer than three (3) years in business providing similar types of services requested in this RFQ.

Comments:

Scoring Criteria		Score (0–10)
1. Project Team	0-10	9

Comments:

Rumpke (privately owned) + Vexor + Machinex + R+J trucking

1932 (10 rec centers) 1999 1980 (builts) for Rumpke 1960

60% 20% 10% 10% = 100%

W/ Machinex since early 1990's - 6 projects

Machinex Exp. - MSW to sort & recover & RDF

Relationship w/ Vexor - 15 yrs.

" " R & J - 5-10 yrs.

have operated plants - Anheiser Busch, Ky Jan'09 - Dec'12 Sold 2013

Hamilton OH transfer since 1994

Girard Transfer since 2011

John Manville Glass since 2004 Limited MSW but Machinex

2. Project History & Experience	0-20	18

Comments: Rumpke - 3000 empl, 12 landfills, 14 transfer, 10 recycling

Cinci MRF 2013 $32M 60T/hr single stream = 600T/d

Columbus MRF 2011 $ 35T/hr 500T/d

Dayton MRF 2014 150T/d

Dayton Glass = big reduction volume by weight

Chillicothe - buyback & scrap recycling - fiber

Louisville MRF 100T/d.

Richland Co - fiber + plastics

Medora, Indiana

Scoring Criteria		Score (0–10)
3. Preliminary Technical Approach	0-20	17

Comments:

Inbound source separated
commercial high % MSW
residential MSW
Energ. Fuel
& potential Northern Ohio Glass Recycling Depot = very interesting

Zone E if for all inbound residential MSW & specific loads of commercial MSW that can't be sorted for recovery due to composition or contamination may be engineered fuel
Need more details on MSW. Know strong single stream, glass

4. Company Financial Resources	0-20	17

Comments:

Strong
Large operation

Scoring Criteria		Score (0–10)
5. Litigation History	0-10	10
Comments:		

No litigation

If any w/ Rumpke transportation (upon request), not part of team, listing R2 J for transportation

6. Safety History	0-10	10
Comments:		

Industry leader in safety programs
Significant development & depth
Zero violations
Better than nat'l rates for lost time accidents

Scoring Criteria 0-20	Score (0–10)
7. Overall Quality, Accuracy and Completeness of Qualifications	17
Comments:	

Includes recyclables + TTD
References Plan & Soap
has Landfill capacity
marketing expertise
Update Scale systems
Addenda 1 & 2
Strong team - depth & experience

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Alt #1 proposal

Medina County PART II Project Proposal Scoring Sheet

Respondent: Rumpke of Ohio

Reviewer Name: Amy Lyon-Galvin

Review Date: Nov. 20, 2017 - Jan. 22, 2018

Interview/oral presentation
Nov. 28, 2017, 2:30 - 4:00 pm

Field trip cinci. MRF & Dayton Glass recycling
12.20.17

Disqualification Criteria:

Score 5
45
19 (-6)
69

☐ Incomplete or unsigned forms and required submittals;

Comments: checklist ✓
included form B-7D per addendum 1
parent guarantee not notarized

☐ Response submitted after deadline in all cases;

Comments: ϕ

prefers to have a complete commercial stream audit before establishing a recovery guarantee
target 50% - 25%
want to recognize increasing source sepr. programs in District plus MSW commercial

☐ Ex parte communications with District or Medina County elected officials, employees, consultants or representatives regarding this Project Description during the period of silence per Section VIII as contained herein;

Comments: ϕ

☐ Incomplete document/missing significant information requested in the Project Description;

Comments: Qual/Exceptions clearly noted
@ 10 yr. purchase req. 4th estm. by 3rd party selected by Rumpke, Rumpke wants refusal rights
CPF must stay only designated facility

☐ Submission of false, inaccurate or incomplete information;

Comments:

☐ Equivocal pricing submitted on Pricing Form;

Comments: Base - Single stream MRF, commercial MSW, Vexor, TTD
Alt 1 - commercial MSW, Vexor, TTD
Alt 2 - TTD

Scoring Criteria	Score (0–10)
1. Response Completeness	5/5

Comments:

Rumpke's Noble Rd. Landfill, Shiloh OH, 35 miles/45 min = Landfill capacity

checklist ✓

Addenda 1+2 ✓

all sections referenced

MSW/MWP? ✓ – for only commercial MSW, Excludes residential

Under Alt. 1 – could install single stream MRF equip upstream

Agrees No put or pay – District to contractually send all tons

Exceptions clearly noted.

Alt. #1 excludes the 25 tphr single stream MRF

Electronic version ✓

	45/45
2. Technical Specifications	

Comments: Machinex hybrid system

35 tons/hr for 200 tons/d. commercial MSW. of 600 t/day inbound

Same sketch as Base minus upstream 25 tph single stream residential

Chain roller
slider bed
Conveyors
Magnet
eddy current
Ram baler
weight scale
trommel
OCC screen separator
Single drum heavy weight separator
dust collector
steel package

to divert high recycling roll off loads for recycling for high BTU fuel to Vexor

Vexor shipping to contracted markets in Ohio & Indiana

VEXOR Engineered Fuel (VEF)

Long term supply agreement w/ Carmeuse Lime + Stone

May 8, 2013 OEPA "comfort letter"

Vexor: primary shredding
trommel screen
air density separation
eddy current separator
electromagnet
finish fuel shredding

Vexor supplement 2500 tons/month

Min processed tons 25,000 T/yr.

Recovery guarantee 5% - 25%.

5% of 140,000 tons = 7000 tons. (to 35,000 T)

↓

133,000 T to landfill stand alone

Scoring Criteria	Score (0–10)
2a. Construction Plan	

Comments:

12 Months

Includes equipment placement + elevation drawings

Alt #1 Estimates $692,900 bldg upgrades plus several items TBD "pending inspection" (Base $1M)

commercial MWP - Machinex/Rumpke in CPF
Separate from Vexor - Vexor in pellet RM

Not occupying full processing floor area

2b. Operation Plan	

Comments:

included process flow diagram w/ narrative + feed rates, not tons occupy 1/2 the bldg, baled storage in balance

Machinex's design shares much of the needed "downline" single stream MRF equipment

Vexor is same proposal whether Base or Alt #1

Vexor conducted their own waste characterization @ Rumpke San. Landfill in Aug 2017 - weeklong commercial audit

Commercial fines < 2" to be evaluated for organic utilization wait + see for Liverpool digester. Grit to ADE not counted in recovery # but gets "tons out of system"

operational hours weekday 7am-6pm, 7-12 sat.

history w/ Machinex. parts in Cincinnati, Dayton, Columbus

They propose a 2 pg. quarterly report

minimum staffing guaranteed 17 TTD 5, commercial MSW 1 shift 9 and Vexor 12-16 w/ 3 empl.

Rumpke/Vexor to operate

Scoring Criteria	Score (0–10)
2c. Marketing Plan	

Comments:

Rumpke - 2 corp. managers selling processed recyclables in US & overseas

Vexor - Carmeuse Lime Plant, Grand River, OH (Fairport Harbor)
owns + operates 30 facilities in US + Canada
Biz growing Gary, Indiana Carmeuse Steel Mfg. Facility nearby, opened 2016.

Carmeuse - 10 year contract for 1000 tons/wk VEF

Rumpke's corporate team, communications, recycling, education + outreach, onsite tours.

No commodities history

have commitment letters, All current dates, Addressed to District + specific to this project.

2d. Recordkeeping Plan	

Comments:

Key operations measures + performance reports
- processed tons per man hour
- direct labor costs per ton
- residue percentage of processed tons

} Monthly production scorecard

maintenance tracking software
online downtime report
quarterly maintenance audits
general housekeeping
in/out scale weights
bale production

TMT = Maintenance tracking + cost review

Scoring Criteria	Score (0–10)
2e. Saftey Plan	

Comments:

training + testing
PPE
Anti. scavenging policy
licenses, certificates + proof of training
safety training records
inspection forms
Robust safety plan (89 pgs)

2f. Startup Plan	

Comments:

No impact on ex. operations
site preparation
licenses + permits
installation
testing
training
startup
commissioning

Scoring Criteria	Score (0–10)
2g. Transfer Plan	

no problem w/ existing operations
Can fund, design, permit + construct

3. Proposed Net Cost to the District for Processing & Recovery of Recyclables and TTD Operations	19/25

Comments:

Alt #1 Equipment $3M
Rolling stock $0.5M + 10,368/yr. lease
Building $0.7M
$4.15M total + 10,368/yr. lease

TTD - $35/ton includes cost for machinex systems
$0/ton recovered processing fee
$30/ton single stream processing fee

total for 160,000 ton scorecard example $5,621,900
÷ 160,000
= $35.16/ton
Avg e

2% CPI

Medina County RFQ Scoring Sheet

RFQ Respondent: Kimble Company

Reviewer Name: Amy Lyon-Galvin

Review Date: 10-18-17

Disqualification Criteria: - N/A

☐ Incomplete or unsigned forms and required submittals;

Comments:

☐ Qualifications submitted after deadline in all cases;

Comments:

☐ Ex parte communications with District or Medina County elected officials, employees, consultants or representatives regarding this RFQ during the period of silence per Section VII as contained herein;

Comments:

☐ Incomplete document/missing significant information requested in the RFQ;

Comments:

☐ Submission of false, inaccurate or incomplete information,

Comments:

☐ Fewer than three (3) years in business providing similar types of services requested in this RFQ.

Comments:

Scoring Criteria		Score (0–10)
1. Project Team	0-10	8

Comments:

privately owned
Kimble + Van Dyk — Equipment supplier, D/B Startup & transition

67 yrs — 30 yrs → recycling, Mixed solid waste, engineered fuel, good spare parts program

Diversified Biz

Both very experienced, capable
Missing % contribution
No prior work partnerships

2. Project History & Experience	0-20	18

Comments: 600 empl.

Canton waste transfer & recycling 1994
Cambridge Waste transfer & recycling 1996
Carrollton transfer & recycling 1992 → Kimble 1994
Twinsburg 2007
Belmont Co. '90-'00
Westlake Transfer '91-'96
CEIV Dover compost '95
Dover Landfill & Recycling 1950

primarily remove
Cardboard
White goods
Wood waste
(COAL, OIL & GAS, clay & limestone)

sanitation

— Van Dyk - clean and dirty MRF's > 3500 recycling systems
17 > 50 tons/hr.
San Antonio, TX MSW 50 t/hr 75000 T/yr
Hanford, CA since 1997 25 t/hr 52,000 T/yr
July '11 - July '14
over 2400 installations in N. America

Scoring Criteria		Score (0–10)
3. Preliminary Technical Approach	0-20	16
Comments: 2D & 3D		

Shredder → trommel → density sepr. Heavies Med Lights
optical fiber separation
manual sort line for plastics + aluminum
Recology, San Fran, 45 t/hr
narrative, but no flow diagram

4. Company Financial Resources	0-20	18
Comments:		

High bonding capacity
annual revenue

Scoring Criteria		Score (0–10)
5. Litigation History	0-10	7
Comments:		

No criminal

2 civil deaths (1 transp. 1 equip)

6. Safety History	0-10	6
Comments:		

3 Safety violations in last 2 yrs.

3/24/17 processing + transfer

5/1/17 ladder

3/2/16 ladder

Scoring Criteria 0-20	Score (0–10)
7. Overall Quality, Accuracy and Completeness of Qualifications	18

Comments:

Referenced the Plan
Includes MSW sort & recover recyclables
Includes TTD
Landfill capacity
Acknowledged Addenda 1 & 2
Need follow up on Kimble references & emails for Vanolyk references

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Medina County PART II Project Proposal Scoring Sheet

Respondent: Kimble Company

Reviewer Name: Amy Lyon Galvin

Review Date: Nov. 20, 2017 - Jan. 22, 2018

Interview/oral presentation
Nov. 28, 2017 12:30pm - 2pm

12.29.17 Email
Kimble North - V.C. tour 1.2.18

Score 3 (-2)
30 (-15)
16 (-9)
49

Disqualification Criteria:

☐ Incomplete or unsigned forms and required submittals;

Comments: checklist ✓
included form B-7D per Addendum 1 but x'd out.

☐ Response submitted after deadline in all cases;

Comments: ϕ

☐ Ex parte communications with District or Medina County elected officials, employees, consultants or representatives regarding this Project Description during the period of silence per Section VIII as contained herein;

Comments: ϕ

☐ Incomplete document/missing significant information requested in the Project

Description; no materials recovery guarantee
Comments: no staffing guarantee
Excluded costs in interview recycling scorecard

☐ Submission of false, inaccurate or incomplete information;

Comments: Refers to North location as "permitted" but isn't yet permitted.
30,000 ton put or pay south.

☐ Equivocal pricing submitted on Pricing Form;

Comments: substitute forms provided by Respondent

☐ Failure to submit sureties and required Bonding;

Comments: Evergreen $2M
$1M

☐ Failure to submit Parent Guarantee or proposing different companies for different parts of the Scope.

Comments: Kimble Company parent guarantee - Notarized ✓

Scoring Criteria	3/5	Score (0–10)
1. Response Completeness		

Comments:

Dover Landfill, 60 Miles, 1 hr.

Checklist ✓

Addenda 1 + 2 ✓

Electronic version ✓

MWP/MSW? ✓ Res/com - yes.

Contingent upon contractual MCSWD "designation" of Kimble's Valley City (North) Location

have process flow diagram (excludes tons/%)

Not viable per Kimble for South (CPF) operation only

Says if recycle more than expected will share 50/50 w/ Co.

Excluded costs in recycling scorecard

no materials recovery guarantee; expect is negotiable

no staffing guarantee

2. Technical Specifications	30/45	

Comments:

1st opportunity w/ VanDyk

Runlin as GC

use ex. CPF bldg "South"

30 ton/hr processing $7.5M, or if phased plan $2.85M initial investment & focus on source separation

North (private) & "selected" commercial MSW
Single stream + source separated recyclables TTD
"clean MRF"

South (CPF) & transport single stream/source sepr. to North.
MWP MSW.
"Dirty MRF"
TTD

drumfeeder
trommel screens
optical
magnet
eddy current
PET
HDPE } manual sort
PP

covid lease North for $1

Option 1
$2.85M
30,000 tons
8% recovery
= 2400 tons
2400/140000
= 1.7%

Option 2
$7.5M capital
90,000 tons
17% recovery
= 15,300 tons ★
15300/140000
= 10.9%

Sub 2" to Landfill

tons to landfill 137,600 124,700

Scoring Criteria	Score (0–10)
2a. Construction Plan	

Comments:

South (CPF) designed to process 90,000 tons/yr.
Bldg addn req'd for 140,000 T/yr
Remove existing MCSWDF bldg interior walls
fuel tank onsite
12 months.

2b. Operation Plan	

Comments:

Kimble to operate
7-10 CNG semi-trucks
1 yard truck, 3 spare trailers on site
2 front end loaders
Skid steer
7 m TTD

15-19 employees
one shift operation
$2.85M 10-12 people
$7.5M 18-20 people

VanDyk parts distribution, Norwalk, CT
$17M spare parts 1 day away, 35 field operators + factory technicians

Requires North & South facilities

Scoring Criteria	Score (0–10)
2c. Marketing Plan	

Comments:

includes market data
matches comparative commodity pricing
market themselves
pricing years 2013 - 2017
Kimble curbside $23.95/month
Twinsburg single stream facility 400 tons/d

2d. Recordkeeping Plan	

Comments:

district scales
throughput
bale counting
shipments
maintenance records - daily, weekly, monthly PM maintenance records
daily maint. reports for trucks

Safety records
training records
O + M

Scoring Criteria	Score (0–10)
2e. Saftey Plan	

Comments:

Includes VanDyk (4p)
& Kimble Safety plans (31p)

monthly, weekly meetings
new hire training
training sign off sheets

2f. Startup Plan	

Comments:

No interruption in TTD for design + construction

Some minor relocate area 7 for current recycle storage + operations (cold transfer floor)

VanDyk installation, commissioning, Startup + training

Scoring Criteria	Score (0–10)
2g. Transfer Plan	

Refer to startup plan

3. Proposed Net Cost to the District for Processing & Recovery of Recyclables and TTD Operations	16/25

Comments:

proposal based on 2 disposal/processing sites "resulting in tremendous transportation+cost savings to constituents"
Estimated $750K annual savings
No way for county to realize. Experience of $61 -> $42/t tipping fee = no reduction in rates by haulers.

North

Kimble's $7.85M upgrade
Single stream MRF
30 tons/hr 88% recovery
Single stream, source separated $35/ton
commercial MSW "select" $45/ton
TTD $26.25/ton
out of co. recyclables to North
pricing to coincide w/ market ↑↓
No host fee

South

New equipment $2.1 M Dirty MRF
Rolling stock $0.5 M
Building upgrades $0.25 M
total 2.85 M, 30,000T, 10 tons/hr, 8% R
Up to 7.5M, 90,000T, 30 tons/hr, 17% R
Single stream/source sepr. $41/t + transport to North
commercial MSW "Select" N/A
unsorted MSW $62.75/ton
TTD $26.25
host fee $0.50/ton out of county MSW controlled by Kimble.

Medina County RFQ Scoring Sheet

RFQ Respondent: Envision Waste Services LLC

Reviewer Name: Amy Lyon-Galvin

Review Date: 10.18.17

Disqualification Criteria: - N/A

☐ Incomplete or unsigned forms and required submittals:

Comments:

☐ Qualifications submitted after deadline in all cases:

Comments:

☐ Ex parte communications with District or Medina County elected officials, employees, consultants or representatives regarding this RFQ during the period of silence per Section VII as contained herein;

Comments:

☐ Incomplete document/missing significant information requested in the RFQ;

Comments:

☐ Submission of false, inaccurate or incomplete information;

Comments:

☐ Fewer than three (3) years in business providing similar types of services requested in this RFQ.

Comments:

Scoring Criteria		Score (0–10)
1. Project Team	0-10	5

Comments:

Envision + AECOM (URS) + Columbia Technology
60% ↓ 40% Finances
Engr. 50%
+ oppenheimer + co (bond finance)

2. Project History & Experience	0-20	11

Comments:

Medina Co MRF 1993 - 2015

FSI Disposal, Clyde OH equipment design + supply
throughput? 10/2012 - Sold
can't disclose info.

Montgomery Co. pilot program 5/09 - 9/11 35 ton/hr
metals + fines → for class I
post curbside consid

Broadview Hts. transfer station

Part of Flagstaff MRF 1998 - 2008

Israel operation construction to begin Q1 2018
"Supplier" that helped thru design + engineering
1000 T/day
"MiniMRF has operated for 5 years" (Ref FSI statement)

None currently in operation

Scoring Criteria		Score (0–10)
3. Preliminary Technical Approach	0-20	8

Comments:

Mini MRF after bulkover sort
+ conveyors + other equip purchased
No apparent equipment integrator. relying on EWS exp.
Organics on Class F. (Gore)
Ballistic Separator, primary shredder, NIR sorter(s)
Secondary shredder → ADC, lumber mulch
& as bulking agent
Vadxx plastics to liquid fuels, Akron facility

4. Company Financial Resources	0-20	5

Comments:

No financial statement provided
Letter from Hugh Byrnes (→ commercial property developer FL), Majority partner of Columbia Technology – co-owned by Steve Viny, Clayton Minder & Paul Yatso. Says personal net worth > $30 Million

Scoring Criteria		Score (0–10)
5. Litigation History	0-10	5

Comments:

2 cases v. Medina County & restraining order for first TTD contract awarded under SOAP for TTD opportunit Jan '15

other lawsuit w/ family

OSHA

several threats over the years

6. Safety History	0-10	5

Comments:

4.9 incidents/100 Empl v. Industry 7.5/100

OSHA citations open since July 2012

No other operational facilities besides CPF to demonstrate consistency, depth of safety standards

Concern about Long haul Component & vehicle maintenance

Scoring Criteria 0-20	Score (0–10)
7. Overall Quality, Accuracy and Completeness of Qualifications	9

Comments:

Says acquainted with the Plan has ohio PE
Includes TTD, but silent as to how - Exp. drivers
Under former CPF operation but didn't own rolling stock
References Addenda 1 & 2
Requires Class I compost, references ADC
Not as experienced
has landfill capacity letters

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Medina County PART II Project Proposal Scoring Sheet

Respondent: Envision

Reviewer Name: Amy Lyon-Galvin

Review Date: Nov. 20, 2017 - Jan. 22, 2018

- Clayton
- Steve

Interview/oral presentation
Nov. 28, 2017, 8-9:30am

12.29.17 Email & miniMRF systems in operation

Vadkx tour 1.9.18
w/ Beth & Steve Viny

11.30.17 to
12.4.17 Request
for add'l info RE: EWS
Scorecard

12.5.17 handdelivered process flow diagram w/ % after commissioners' mtg.

Disqualification Criteria:

☐ Incomplete or unsigned forms and required submittals;

Comments: Checklist ✓
included form B-7D per Addendum 1

☐ Response submitted after deadline in all cases;

Comments: ϕ

Score 3 (-2)
35 (-10)
21 (-4)
59

☐ Ex parte communications with District or Medina County elected officials, employees, consultants or representatives regarding this Project Description during the period of silence per Section VIII as contained herein;

Comments: ϕ

☐ Incomplete document/missing significant information requested in the Project

Description; No startup Plan B-5F, cites premature

Comments: Missing process flow diagram (supplemented 12.5.17)
Incomplete tonnages
• end of 10 yr. contract EWS won't remove equip. at their purchase, contrary to project documents

☐ Submission of false, inaccurate or incomplete information;

Comments: includes Class I volume reduction despite explicit exclusion per project documents

☐ Equivocal pricing submitted on Pricing Form;

Comments: Base
Option 1
Option 2
pricing in question as costs said to be amortized over 20 yrs. Not 10

Instead Expects County to
① extend contract
② payoff loan with prepayment penalty as the purchase price
③ take over the loan

☐ Failure to submit sureties and required Bonding; $2M performance
$1M annual performance thereafter

Comments: Question bondability if written to Columbia Tech, not EWS
Columbia Tech in RFQ as 40% financial partner Scarborough Ins. Bonding Co

☐ Failure to submit Parent Guarantee or proposing different companies for different parts of the Scope.

Comments: Missing parent guarantee. How linking partnerships?
per RFQ: Envision 60%
Columbia Tech 40% as financial partner
AECOM (formerly URS)
Oppenheimer + Co. for bond finance

⇓

RFP now speaks only towards OWDA financing which per 11.28.17 interview Q/A Steve says can be loan to private entity w/ County as conduit.

Columbia Tech owned by Steve Viny, Clayton Minder, Paul Yatso (& during interview SV said also 2 FL folks)

Scoring Criteria	3/5	Score (0–10)
1. Response Completeness		

Comments:

45 Mi, 50 Min

Checklist ✓ Landfill capacity → Republic's countywide Landfill
East Sparta, OH
Stark Co.

Addenda 1 & 2 ✓

All sections referenced.

Amortizes investment over 20 yrs v. proposal req. 10 yrs.

weak on Co. investment reasoning

Process flow diagram absent

cover letter - decades of hands on experience

w/ Medina Co, EWS exp. w/ OWDA loans, county was loan holder
this project would be private OWDA funding w/ Co. as conduit
i.e. Broadview Hts, assigned to EWS, County is Not guarantor

Includes Class I volume reduction in diversion/recycling - Not permitted.

Missing startup plan - cites premature

Electronic version ✓

MSW/MWP ? ✓

2. Technical Specifications	35/45	

Comments: f(commodities)

35 tons/hr mechanical/physical MWP + 10-20 tons/hr single stream and source separated recyclables processing 10-35 tons/hr + plastics to liquid fuel conversion #4-#7 Vadxx, Akron

Recyclables compostables 100 tons/d Class I advanced aerobic composting w/ GORE liner

Terra Select Trommel Screens ★
Steinert Magnets + Eddy Current Separator
EWS air classifier - fab'd by Mayfran ★
Lindner Jupiter - primary shredder
Steinert NIR's 4
Lindner Komet - secondary shredder
Sebright High Density Extruder organics Press
Mayfran conveyors ★ trade secret add ons to Trommel and mods to Mayfran
Macpresse Baler

3rd shift processing #1, #2, #3 on reprogrammed NIRs

Single stream processed on same equipment

using CI to store clean lumber + mfg. color enhanced mulch to se

can process other MRF residues

Claims 28% recycling/diversion, based on anything the OEPA qualifies as recycling diversion and/or recycling credit

min. process guaranteed 87,500 tons

Scoring Criteria	Score (0–10)
2a. Construction Plan	

Comments:

due to missing Co. info.
Items not priced – Exterior site work, building shell, roof, insulation, HVAC, plumbing, fire/sprinkler/smoke detection, new top floor, doors *

Utilize ex. CPF bldg + Class I pad

to fill old conveyor pit, repair worn or structurally impaired conc., security, new office area, sanitary sewer mods., interior masonry wk

* wrote in $1.1M in bid for bldg repairs; to be completed before equip. del

County must vacate original top area, processing area, maintenance room, pellet room + old transfer floor.

12 Months

2b. Operation Plan	

Comments:

EWS to operate office in pellet room

Vadxx not in operation. Seeking investors for next enhancement + prototype gen. $1-42M, May sell.

most consecutive 3M great idea, not yet realized. Expect to be ready in 2019

Staffed 39 employees 5 d/24 hrs + ½ d. Sat.

bucket scales

Minimum staffing guarantee 35

proximity card/ sensor for employe access limited to their shift

"No bulking agent is req'd at Class I"

Interview recycling scorecard 160,000 tons inbound x 70% x 40% = 44,800T
or 160,000 tons x 28% = 44,800 T

Plan to process all Bypass tons and mixed municipal waste

Will import out of Co. #1–#7 mat'l if suitable to Vadxx

Process flow diagram 140,000 tons inbound → 30% bulk to disposal 42000T

1% OCC (1400T) & 69% (96,1600) to MiniMRF Module 1 ....

oversized ferrous 0.5%	700T		Class I vol. red 5% ≡ 7,000T	Landfilled 100,900T
Small ferrous 0.5%	700T			
Ferrous cans 2%	2800T	32,200/140000 = 23%		
aluminum cans 1%	1400T		ADC 11.75% = 16,450	
paper 12.5%	17,500T	If vol. red.		
#4–#7 vadxx 4.5%	6,300T	39,200/140000 = 28%	Heavies to landfill	
#1 plastics 0.5%	700T		10.83	
#2 plastics 0.5%	700T		10.2	30.25% =
	30,800 + 1400 = Recycled 32,200		Waste to disposal	42,350

Scoring Criteria	Score (0–10)
2c. Marketing Plan	

Comments:

What sample mat'l was provided to Vadxx in 2014?

Waste Management Recycle America references proposed Green Acres ATL Energy Park MWP @ Atlanta airport Feb 28th interview

Ferrous metal
non-ferrous metal } FPT 4.12.16
old corrugated cardboard } Caraustar 4.12.16
mixed paper
PET plastic
HDPE plastic } WM Recycle America "from Green Acres ATL energy park MWP@ Atlanta airport
#4 - #7 plastic Vadxx 4.18.16
ADC
Optional #3 plastic
optional - EF
wood mulch

2d. Recordkeeping Plan	

Comments:

Scalehouse inbound/outbound weights
bale production
shipping data by material
product sales records
product quality reports
residual weights + composition

Manager Plus for maintenance recordkeeping

Scoring Criteria	Score (0–10)
2e. Saftey Plan	

Comments:

mandatory monthly safety meetings
" fire suppression training
emergency evacuation training
mandatory drug + alcohol training
PPE
new equip. w/ safety features
SWANA

2f. Startup Plan	

Comments:

No startup plan - unfair + premature
Requires team effort, dialog among interested parties

Scoring Criteria	Score (0–10)
2g. Transfer Plan	

Expects to temporarily relocate transfer operations.
Suggests using Wadsworth's transfer station

Old transfer floor to for vadxx mat'l or storage for later processing

3. Proposed Net Cost to the District for Processing & Recovery of Recyclables and TTD Operations	21/25

Comments:

Base

$10.7 M processing equipment
$4.4 M rolling stock
$1.1 M building upgrades
$16.2 M

TTD = $41.85/ton ☆
Recovered ton processing fee $51.54/recovered t
Source separated recyclables $33/t
3% CPI

Total for scorecard 160,000T/yr example

$7,130,112
÷ 160000
= 44.56/t

Alt/option 1

$16.2 M
TTD $27/ton
Recovered ton processing fee $51.54/t
Source sepr. recyclables $33/t
Debt service pass through $10.39/ton all inbound

$7,081,792
= 44.26/t

Alt/option 2

$16.2M
processing fee on all tons rec'd $44.75/ton

$7,160,000
= 44.75/t