



STAFF REPORT

RESOLUTION APPROVING THE THIRD AMENDMENT TO THE BFI WASTE SYSTEMS OF NORTH AMERICA, INC. FRANCHISE AGREEMENT FOR SOLID WASTE COLLECTION SERVICES TO EXTEND THE TERM TO DECEMBER 31, 2010

Honorable Mayor and Council Members:

Summary

The City Council is requested to approve an amendment to the existing BFI Waste Systems of North America, Inc. (BFI) franchise collection agreement to extend its termination date from December 31, 2006 to December 31, 2010. The South Bayside Waste Management Authority (SBWMA) of which Belmont is a member, recommends this action.

Background

The City of Belmont provides its residents and business solid waste and recycling services through contracts with BFI. The City contracts directly for collection and obtains processing and disposal contract services through membership in the South Bayside Waste Management Authority (SBWMA). In January 2001, the City of Belmont entered a franchise agreement with BFI. This agreement has an initial term ending on December 31, 2006. A copy of the agreement is available in the City Clerks office. It provides for a 3-year extension conditioned on BFI's satisfactory performance and then up to seven one-year extensions to be exercised at the pleasure of the City. These contract provisions and terms are the same for all SBMWA agencies and for the SBWMA transfer station-operating agreement.

In Fall 2004, after extensive negotiation, BFI offered the SBWMA and its member agencies the following proposal:

1. BFI asked SBWMA to extend the transfer station operating agreement four years to December 31, 2010.
2. BFI asked each member agency to extend its franchise collection agreement four years to December 31, 2010.
3. In exchange for the above items, BFI would enter a 15-year agreement with SBWMA for disposal at Ox Mountain landfill at "most favored client" rates. These rates would reduce Belmont's total costs about 7 percent. BFI would also make \$11.6 million cash payments to SBWMA over a period of three years beginning January 1, 2005.

The fifteen-disposal agreement for BFI's Ox Mountain Landfill is desirable for several reasons:

1. Its terms lock in most favored client rates for a long period thus stabilizing this aspect of the member agency total solid waste management costs.
2. The \$11.6 million cash payment provides funds that SBWMA and/or the member agencies can use for capital and program improvements and/or rate stabilization. (SBWMA has not determined the use and allocation of these funds. This is an item on the April 28 Board agenda.)
3. It provides a guaranteed disposal site for fifteen years, which is important because landfill capacity is being depleted throughout the Bay Area.
4. It increases the potential competition from bidders for the transfer station operation and the franchise collection agreements when SBWMA and the member agencies put these out to bid for 2010. Competing firms will not need to obtain a local disposal site, since SBWMA will continue using BFI's Ox Mountain landfill through 2019.

SBWMA evaluated the terms of BFI's proposal and considered other options over the next six months. SBWMA compared the cost and capacity of other Bay Area disposal sites and found none that could offer similar service for as low a cost. It held a performance hearing on November 10, 2004 and found that BFI met criteria for an automatic three-year extension of the transfer station operating agreement and met all but one criterion for automatic three-year extension of each agency's collection agreement. In addition, SBWMA's consultant advised the members that they might need the fourth year of the extended term to complete procurement and mobilization of another contractor.

Despite the terms offered, SBWMA asked its negotiator to determine what kind of agreement could be reached with only a three-year extension. BFI offered significantly less cash payment under this scenario, so SBWMA concluded that accepting BFI's original proposal would result in the best deal for the ratepayers. A separate item on the April 26 agenda deals with a rate increase.

After much deliberation, on April 6, 2005, the SBWMA Board approved a transfer station operating agreement with BFI terminating on December 31, 2010 (a restated agreement equivalent to a four-year extension) and approved the 15-year disposal agreement for BFI's Ox Mountain Landfill retroactive to January 1, 2005. The Board voted to recommend that each member agency extend its franchise collection agreement four-years with a termination date of December 31, 2010. Finally, the Board approved a resolution directing staff to begin working on a Request for Proposal for a new contract operator and hauler upon termination of the existing agreements in 2010, thereby confirming SBWMA's intent to take the contracts out to bid after this extension.

Discussion

The City Council may take one of the following actions regarding the BFI collection agreement:

- The City may decline to extend the agreement, thereby allowing it to terminate on December 31, 2006,
- The City may exercise the first three-year extension, thereby extending it to December 31, 2009,
- The City may exercise the three-year option and an additional one-year option, thereby extending the agreement four years to December 31, 2010.

1. No extension. The City may decline to extend the collection agreement if it finds that BFI's performance has not satisfied conditions specified in the agreement for extension. SBWMA held a contract performance hearing for itself and on behalf of the member agencies on November 10, 2004 and the three city managers on the panel made the following findings concerning BFI's performance:

- BFI met the customer satisfaction goal with 86% of residential customers and 76% of commercial customer finding BFI service to be good or excellent. Data is based on a Fall 2004 customer survey conducted by the consulting firm, Gigantic Idea, on behalf of SBWMA and the member agencies.
- BFI met the rate comparability goal by having costs within the 75th percentile of all Bay Area rates. The 75th percentile criteria was established in acknowledgement that the southeast San Mateo County service area is more difficult than average to service due to narrow hillside roads and unrestricted parking.
- BFI met all transfer station operating goals for diversion, traffic flow, operation of scales, equipment maintenance, and timeliness of payments.
- BFI met all collection agreement goals with the exception of the annual commercial diversion goal in years 2003 and 2004. BFI maintains that failure to meet the commercial goal is excused by the contract as a "force majeure" event resulting from the downturn in the economy.

The final condition gives Belmont grounds for declining to extend the contract. There would be two consequences from this action. BFI has stated that it will litigate and believes it will prevail on the basis of the force majeure argument. The legal outcome is unknown, but costs would likely be substantial and if the City lost, it would have to extend the agreement for three years. If the City prevailed, it would have to procure and mobilize another collection contractor on its own. This would be relatively costly and it could be infeasible to complete before the BFI contract ends. It can take a year or more after contract award for a contractor to purchase and route collection equipment. In addition, BFI will not complete the 15-year disposal agreement with SBWMA meaning that neither Belmont nor any other member agencies will obtain the disposal rate reduction and cash payments.

2. Three-year extension. The City may waive attainment of the commercial recycling goal and agree that BFI otherwise met performance conditions and so extend BFI's agreement three years. A minority of SBWMA member agencies requested that this option be negotiated with BFI. BFI did respond with a counterproposal that had less favorable terms for the disposal agreement. The majority of the member agencies believed that this would result in less cost reduction for the ratepayers and so the SBWMA approved a recommendation that members approve a four-year extension. The City does not need to abide by this recommendation. The consequences would be that BFI will not complete the 15-year disposal agreement with SBWMA and no member agencies will obtain the rate reduction and cash payments.

3. Four-year extension. The City may extend the collection agreement for four years in accordance with the SBWMA recommendation. A four-year extension of the Belmont collection agreement is one of fourteen agreements that must be completed to implement the BFI proposal. All SBWMA agencies are scheduled to take action on the four-year collection agreement in April or May. The agreement package becomes effective on the date on which the last of the following agreements with BFI is completed:
 1. Four-year extension of the transfer operating agreement from December 31, 2006 to December 31, 2010.
 2. Fifteen-year disposal agreement for Ox Mountain Landfill.
 3. All twelve of the member agency four-year franchise collection agreements extensions.

Disposal costs will then be reduced retroactive to January 1, 2005, which will reduce Belmont's total solid waste management costs about seven percent. BFI will also make quarterly cash payments totaling \$11.6 million to SBWMA over the next three years.

The SBWMA approved a resolution ensuring a competitive bidding process for a new contract when this one expires. The fifteen-year disposal agreement guarantees a disposal site for solid waste at a steady rate, eliminating one complexity and uncertainty when going out to bid.

Fiscal Impact

The only impact from extending the collection agreement is that it will also extend the franchise fee. This fee is 10 percent of revenue and provided \$318,376 to the City in 2004.

Public Contact

The agenda describing this action was posted in accordance with the requirements of the Government Code.

Recommendation

It is recommended that Council approve the attached resolution authorizing the Interim City Manager to execute the franchise agreement amendment extending the BFI franchise agreement term from December 31, 2006 to December 31, 2010. Staff believes that, given the vote of recommendation by the SBWMA, as well as the fiscal and administrative implications of not being part of the group, it is in the best interest of the City and its ratepayers to extend the agreement four years.

Alternatives

1. Take no action. All agreements must be completed before any are effective. If Belmont does not extend its collection agreement, it will expire on December 31, 2006 and litigation will likely ensue.
2. Request additional information from staff.
3. Provide alternative direction to staff.

Attachments

A. Resolution

Respectfully submitted,

Kathleen E. Phalen, P.E.
City Engineer

Raymond E. Davis, III, P.E., PTOE
Director of Public Works

Daniel Rich
Interim City Manager

RESOLUTION NO. _____

**RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BELMONT APPROVING
THE THIRD AMENDMENT TO THE BFI WASTE SYSTEMS OF NORTH AMERICA,
INC. FRANCHISE AGREEMENT FOR SOLID WASTE COLLECTION SERVICES TO
EXTEND THE TERM TO DECEMBER 31, 2010**

WHEREAS, the City Council of the City of Belmont did on January 3, 2001, by virtue of Resolution 8651, award a cost-reimbursable franchise agreement to BFI Waste Systems of North America, Inc. for solid waste, recyclable materials, and plant materials collection services; and,

WHEREAS, the parties contemplated that the Agreement should be extended from December 31, 2006 to December 31, 2009, conditioned on the City's affirmative evaluation of the Contractor's performance in certain areas; and,

WHEREAS the City has found that Contractor's performance has been reviewed and determined to be satisfactory; and,

WHEREAS, the Agreement contemplated that the City may wish to extend the term of the Agreement beyond the December 31, 2009 termination date of the initial contract extension, for a period of one to seven years in increments of at least 12 months; and,

WHEREAS, the City has determined that the benefits offered by the Contractor in exchange for granting its request are in the best interest of the City and its residents and businesses.

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Belmont

1. The term of the Agreement shall be extended from December 31, 2006 to December 31, 2009, in accordance with Section 2.04 of the Agreement, in recognition of the Contractor's satisfactory performance with certain exceptions, namely: not having achieved the diversion program guarantees described in Section 4.05.A.1 of the Agreement and City has agreed to waive Contractor's failure to perform to the above standard established in the Agreement.
2. The term of the Agreement shall be extended an additional 12 months, from December 31, 2009 to December 31, 2010, through the exercise of the City's right under Section 2.05 of the Agreement. Any extension of the Agreement thereafter shall be at the sole discretion of the City.
3. This agreement shall be effective on the date on which the last of the following agreements is executed.

- a. All Amendments to the Franchise Agreement between the SBWMA Member Agencies and BFI waste Systems of North America, Inc. for solid waste, recyclable materials and plant material collection services extending those agreements to December 31, 2010; and,
- b. Fifteen-year Agreement between the South Bayside Waste Management Authority and Browning-Ferris Industries of California, Inc. for Solid Waste Disposal Services at most-favored disposal rates and with payments by Contractor to the Authority.

4. In all other respects the Agreement shall remain the same.

5. The Interim City Manager is authorized to execute the third franchise agreement amendment extending the BFI franchise agreement term from December 31, 2006 to December 31, 2010.

* * * * *

I hereby certify that the foregoing Resolution was duly and regularly passed and adopted by the City Council of the City of Belmont at a regular meeting thereof held on April 26, 2005 by the following vote:

AYES, COUNCILMEMBERS: _____

NOES, COUNCILMEMBERS: _____

ABSTAIN, COUNCILMEMBERS: _____

ABSENT, COUNCILMEMBERS: _____

CLERK of the City of Belmont

APPROVED:

MAYOR of the City of Belmont