

# MINUTES OF THE METRO COUNCIL MEETING

July 3, 1997

Council Chamber

Councilors Present: Jon Kvistad (Presiding Officer) Ruth McFarland, Susan McLain, Patricia McCaig, Ed Washington, Lisa Naito, Don Morissette

Councilors Absent:

**Presiding Officer Jon Kvistad** called the meeting to order at 2:00 p.m.

## 1. INTRODUCTIONS

**Presiding Officer Kvistad** announced that the Council would be having on new semi-permanent guest, the Tualatin Valley Cable Access. They had begun today their bi-monthly taping and participation in the Metro Council meetings. He welcomed the cable company. There would be a rebroadcast schedule for the first and third Thursday Council meetings of the month on Fridays from 2:00 p.m. to 5:00 p.m. on Channel 11 and Sundays and Wednesdays at 7:00 p.m. on Channel 21 and 30.

## 2. CITIZEN COMMUNICATION

**Ms. Aleta Woodruff**, MCCI member, asked for a little leeway for MCCI members who attended the Council and other Metro meetings during the day. She asked for a permanent parking permit to be placed on the windshields so they were not obligated to have a parking ticket stamped every time they came. It was her hope this would be available to all 27 MCCI members.

She noted an article in the July/August 1997 Audobon National magazine concerning the Wild in the City, all about Metro's Forest Park. She requested it be copied for the Council. She also noted that it did not mention Metro at all but it was a wonderful article.

**Mr. Art Lewellyn**, 2308 SW 8th #7, Portland, Oregon, was a supporter of the light rail investment. He considered the light rail phenomena to be one of the most valuable things that we should be doing in our planning for the region. He thought that Metro was right in carry forward this effort and time in planning for the South/North. He was not in favor of the South/North alignment as were many not in favor. His latest design of the LOTI, which was a trackless trolley on the mall. It now included running that trackless trolley directly up to OHSU instead of the streetcar because any kind of an incline needed the traction that a tired vehicle would give. That was verifiable with the Associated Oregon Rail and Transit Advocacy group who agreed. The climb was not the best way to go up to OHSU. In addition he had the trackless trolley extending north up Interstate and had a facility in the Albina district which he had been saying all along had terrific potential for development. He did not agree with going through north Portland. The latest version now included streetcar lines that totaled about 8 miles in addition to what had been planned, about \$170 million. This meant that what the Council saw here before them was an electric rail transportation system that could be built or they could build the bridge across the

river and run the light rail up to the mall. There would be that mile of light rail and a very expensive bridge or a streetcar network which was much broader. His work in its theory meant that when planning light rail, it would have to include planning streetcar connections. He wanted to see this idea go forward. He believed that the region's chance to really control mobility would not be met with the South/North Light Rail. The east bank alignment for the South/North Light rail should be on the east side of the river. There was only one park on the east side. He did not want to take no for an answer.

**Councilor Washington** requested that there automatically be an overhead project at every Council meeting for guests who wished to present materials with audiovisual equipment.

### 3. EXECUTIVE OFFICER COMMUNICATIONS

**Mr. Mike Burton, Executive Officer**, reviewed the Zoo Oregon Project. Phase One was proceeding, building the return loop and beginning the classrooms. Phase Two would begin with the demolition of the old Children's Petting Zoo in early August, which would include the beginning design for the entry area, both the exhibit and visitor facilities. They were on target with the plans. There would be a number of activities planned for the future for the Council's involvement.

He noted a item that would come before the Council concerning a building proposal on a portion of the St. John's Landfill site. Metro had been in joint discussion with the City of Portland Police Chief on a joint maintenance of an office facility for Metro and the City of Portland city police staff for a paved area in the 17 acre parcel A. The City would like to develop this area as a drivers training facility. There were some negotiations going on there. He would be back to the Council sometime in August for that proposal. The city owned the parcel, Parcel A, and Metro was leasing a portion to provide space for Metro's office on site at the facility. This was a way to get a facility put in place for personnel without costing anything and avoiding some of the lease cost.

Mr. Burton said he had just spoken with Mr. Higbee. He indicated that the Legislature would like to leave. The current status on the transportation measure was that the house package included to 2 plus 2 plus 2 and a \$20 registration increase and an access fee which would come out of the income tax receipts. The question was whether there was enough votes for the Senate to pass. Mr. Burton's prognosis was it was definitely up in the air.

**Councilor Naito** asked if Mr. Burton had gotten any information about the Ballot Measure 50 implementation.

**Mr. Burton** responded that there was a 500 page document which went out to the members today, requesting passage before there was an engrossed version. There was some concern about the implementation bill being as large as it was. The portion that would have effected Metro in regards to the Gresham amendment was not in the bill and would not be put in the bill. He said that several cities including Gresham structured their general fund, all of their property taxes against their public safety costs. In the case of Gresham, all of their levied portion went against that. It would have had a negative effect. They would have lost more under Measure 50 than Measure 47. They introduced specific legislation to relieve them of that which would have spread that cost, which they would have to have singly absorbed into all of the cities within Multnomah County or any taxing bodies within Multnomah County which included Metro. That was not going anywhere. Mr. Higbee was asked what the effect would be on Metro. He informed the legislature as to what the amount would be without taking a position because the Council had not had a chance to talk about it. Multnomah County pursued a vigorous effort against that because it

would have cost everybody quite a bit of money. Senator Baker killed it. He thought Tualatin was also effected by that.

#### 4. SOLV-IT THANK YOU AWARD

**Mr. Mike Burton** called Jack McGowen and Ilene Freemont up to the dais. Solv-It was the April Earth Day, the largest of its type in the nation, the eighth annual Solv-It clean up event. Metro's was a major sponsor of this event. Metro's support this year included \$3000 contract to support the clean up of the neighborhoods with about \$4800 of disposal vouchers. Metro employees walked their talk, the weather was terrible. It was a great project. It had been so good for the region, for KINK radio, and the Solv's Executive Director, Jack McGowen and Ilene Freemont, the KINK account executive.

**Mr. Jack McGowen** said that they came to the Council twice a year once for support and once for thanks and to tell of the success. He asked to take his Solv hat off for a moment and talk to the Council as a citizen of Oregon. Personally he was sick to death of the nay sayers and the people who criticized government and elected officials. There were people who were working very, very hard, men and women of all strips and colors, of all backgrounds and they were doing it because they steadfastly believed not only in the system that they embraced but also in the State. With all of the nay saying, every once in a while, there needed to be someone who raised up a positive flag and said job well done, State employees, Metro employees, elected officials. "We couldn't do without you. You are up there, you believe in what you are doing, you put in long hours, and every once in a while you need a complement." On behalf of the citizens he thanked the Council and Metro for a job well done. Metro really represented what government was about. He was one of Metro's first employees in 1978 as the Zoo's public relations director. Metro, as a Tri-County government which was a remarkable experiment on how to do things correctly, and then coming back to Metro years later and seeing Metro's willingness from the start, Metro was the first ones on board, the ones that broke the ice. An now here they were finishing the eighth annual Solv It, the largest Earth Day clean up in the United States with over 4000 volunteers, working hand in hand with the citizens at 93 sites, from the Mount Hood National Forest, to the summit of the coast range, to the Columbia Gorge National Scenic Monument, throughout every neighborhood in Portland, the Metro area. The final figures were incredible, those 4000 people picked up more than 1,300,000 pounds of solid waste and flood related debris. That was a remarkable testament to not only the love of the people in this region but also for the leadership of Metro not only helping Solv but then Solv using that as credibility to go to the other industries around, private firms, individuals. Metro was the very first partner in the modern day history of Solv that came on board and said we believe in it. For eight years running Metro has lead the way bringing on these other corporations to assist. He thanked Metro, the Council for a job well done. He felt this was a great testament to what government was really about.

**Ilene Freemont**, KINK account manager, worked as the liaison with KINK and Solv and Metro in coordinating all of the logistics. She thanked Metro and the Council. They appreciated Metro's involvement in the event. It could not be done without Metro.

**Mr. McGowen** presented a small memento to the Executive Officer, the Presiding Officer, the Metro Council and the employees of Metro. The award said, "with thanks, Solv It 1997, presented to Metro."

**Presiding Officer Kvistad** thanked Mr. McGowen and Ms. Freemont for all of their hard work. He asked Mr. Burton to accept the award for the agency.

## 5. POTENTIAL ISSUES REGARDING STATE LEGISLATION

**Councilor Naito** updated the HB 3638, Egge bill. The Attorney General's office had a problem with one of the provision but Metro's legal counsel went down and there was a reconsideration, the provisions were added, everyone worked it out, the Senate reconsidered, it was repassed and went to the House to concur. She assumed it was squared away. She thanked the Legal Counsel for their work on that bill.

The Boundary Commission bill was on the governor's desk with a recommendation for signature.

**Councilor McCaig** commented on the transportation bill which was distinctly different than the package we all thought when we went down there. In reality, people called it the pot hole package because that was all it did, fill holes in the system. It removed any urgency that Metro had to look at a larger solution. The flexible part of it the bill was \$5 million for the region. This was very minimal. She thought that by supporting a package like this we were not getting any where down the road.

**Mr. Burton** said he would concur with Councilor McCaig. You lose a penny a year in inflationary cost off the tax. For every cent you raise you have eaten that up within a year for the cost because of auto efficiency and inflationary costs that come with road construction or repair. A two cent increase was good for about a year to maintain the current system without any modernization. Because of current package, the Oregon Trucking Association would recommend referral. It does do nothing to relieve weight mile. They felt that they were on the high end of this anyway.

**Presiding Officer Kvistad** said this was the one that was most difficult, but this transportation package was so important. That State had 3 billion dollars in need and only few 100 million dollars to cover them. The Council was there to be in partnership, to help find a solution. He agreed Councilor McCaig, he was very worried about it taking care of the needs of the region and the State.

**Councilor Naito** said part of the problem with the passage of a tax in a low amount was that it would just take care of some of the back log of repair work but not get into some of the congestion issues. With more density coming, people's expectation is that problems will be solved within an increase in the tax. From that perspective maybe it is better to do nothing. She had some real concerned about it as well.

## 6. CONSENT AGENDA

6.1 Consideration of Minutes of the June 5, 1997 and June 26, 1997 Metro Council Regular Meeting minutes.

**Motion:** **Councilor Morissette** moved the adoption of the June 5, 1997 and June 26, 1997 Metro Council Regular Meeting minutes.

**Seconded:** **Councilor McLain** seconded the motion.

**Vote:** The vote was 7 aye/ 0 nay/ 0 abstain. The motion passed unanimously.

**Presiding Officer Kvistad** announced the recess of the Metro Council and the convening of the Metro Council Contract Review Board to consider an appeal by Waste Management of Oregon.

## 7. CONTRACT REVIEW BOARD

7.1 Appeal by Waste Management of Oregon of Executive Officer's rejection of appeal of award of contract for operation of Metro South and Metro Central Transfer Stations to Browning-Ferris Industries of Oregon, Inc.

**Presiding Officer Kvistad** announced that the Executive Officer had rejected an appeal by Waste Management of Oregon. They had a right to appeal to the Metro Council. The following procedures would be the way in which today's presentations would be handled; first, there would be a presentation of the appeal by the appellants, then there would be a Metro staff response from both the Regional Environmental Management and General Counsel staff, then the Council would take open testimony from interested parties and the general public. He asked that for those who had not filled out a card and wanted to participate to fill out a card. Then the appellant would have the ability to come forward and close on their appeal and then Councilor questions would follow. The Council would not take a final vote on this item today. They would recess the Contract Review Board, allowing one week to consider the matter. Final action would occur by reconvening the Contract Review Board at the July 10, 1997 Metro Council Meeting.

**Mr. Kevin Kiely**, Legal Counsel for Waste Management of Oregon, 1001 SW 5th Ave., Portland, Oregon 97068 introduced himself.

**Mr. Gary Penning**, General Manager and Division President of Waste Management of Oregon Inc., 5330 NW Sky Port Way, Portland, Oregon 97218 also introduced himself for the record.

**Mr. Kiely** said, "the Executive Officer's proposed award of the transfer station's contract violates the law in two important ways. First, the proposed award violates Oregon's public contracting and bidding law. Second, the proposed award violates the Oregon's public contract law which is codified in Chapter 279 of the Oregon Revised Statutes. The general rule of that law is that all public contracts are to be based on competitive bidding with the award to be given to the lowest responsible bidder whose bid is fully responsive to applicable law and the proposal. That general rule is designed to guarantee to the public that as few of its dollars as possible are spent on any given proposal and to ensure that no hint of favoritism or impropriety is present in the public contract process. By statute this general rule of public contracting law applies to all public contracts unless the bidding or proposal process is specifically exempted by the particular agency involved. By statute in order for this or any other Oregon public agency to exempt a public contract from competitive bidding requirements, the agency must adopt written findings which state first, that the proposed process will not encourage favoritism, second, that the proposed process will not substantially diminish competition and third, that the proposed process will result in substantial cost savings over the generally applicable low bidder rule. There was no dispute here that the no exemption for the proposed transfer station's contract has ever been adopted by this board or by Metro."

"At the first level of our appeal to the Executive Officer in response (contained in the record), the Executive Officer said first that, and it was his opinion, the exemption process did not apply here and therefore no exemption was necessary. And second, even if an exemption process was necessary, that it could be done at any time even ex post facto, after the proposal had been issued, after the bids are received and evaluated, even up to presumably the moment before the contract would be actually signed. The first ground for rejection of Waste Management's appeal has apparently been abandoned by the Executive Officer. And I say apparently because I noticed that an item originally scheduled for the agenda today and now rescheduled for next week is in fact a

resolution to exempt this proposal from Oregon's Public Bidding Competitive requirements. As to the second, with all due respect, the Executive Officer is wrong. An ex post facto exemption of the competitive bidding requirements would be analogous to the referees changing the rules of the football game late in the fourth quarter. Indeed, the rule change would be such that it would change the outcome of the game after it had already been played. Consider the dilemma that any proposed bidder or interested person is put in if this ex post facto exemption process were proper. When the RFP was issued here by the agency, a bidder looking at it wouldn't know if you were ever going to exempt it from competitive bidding requirements or not. So the bidder would have to presumably draw up a series of alternative bids, one of which would be focused on prices and compliance with the low bidder rule and one or more additional alternative proposals would have to be drawn up where the bidder would guess as to what other factors you might consider to be important if you exempted it from public bidding requirements later on."

"The Attorney General in his Public Contracting manual cautioned public agencies some years ago that any exemption process required by statute should be utilized by agencies before the request for proposal process ever starts. If you do that you avoid the very kind of uncertainty and in deed illegality that we currently have. The fallacy of an ex post facto exemption is further shown by what this agency would have to do to adopt exemptions in the time frame in which we current sit. As I said, this agency would have to make a written finding to the public that the process wouldn't encourage favoritism and that it wouldn't diminish competition. But most important this agency would have to certified to the public that this request for proposal process exempting from competitive bidding requirements would result in substantial savings to this jurisdiction over the low bidder rule. We know that the proposed award will not result in substantial savings over application of the low bidder rule, it is not the lowest bid. So you would have to ignore that inescapable fact if you were to adopt such a finding now. The purpose of the exemption requirement is to ensure the public that the selection process itself is the most fair and cost effective one available. Neither this agency or any other public agency can do that realistically if it attempts to utilized an ex post facto process. As we currently stand, Metro has two options. The first option is to throw out all of the bids and start over. The second option is to apply the law. That is to award the contract to the lowest responsible bidder whose bid is fully responsive to applicable law. The applicable law that you must apply and that we submit was not applied by the evaluation team and the Executive Officer is the law as set forth in this Council's own Regional Solid Waste Management Plan passed by you in November 1995 and approved in January 1996 by the EQC."

**Mr. Gary Penning**, General Manager and Division President of Waste Management of Oregon Inc., 5330 NW Sky Port Way, Portland, Oregon 97218 thanked the Council for allowing them to speak today. He said, "when Metro first set about issuing the RFP for the transfer stations, I found myself lying awake at night and thinking about how can we respond in a manner that will take into consideration all of the issues facing not only Metro but the various jurisdictions also in the region. Having attended numerous meetings at Metro, municipalities, workshops that dealt with solid waste and recycling, the common theme or thread through all of those meetings were how are we going to reach the recycling goals set out by the 1991 Oregon Recycling Act. Metro needed to reach 53%, Portland has a 60% goal, the other municipalities had their own percentage goals that they have set up for themselves, all those combined to meet the state recycling goal of 50% by 2005. Having been to so many meetings and having so much information I was struggling on how do I put all of this into a proposal."

"Then it came to me, Metro had done the work for me, Metro had devised the blue print for me to get there. That blue print is Metro's own Regional Solid Waste Management Plan. With that in mind, he thought he would go to the plan and look through it and see how we could apply the

plan to the transfer station RFP to meet those recycling goals. In the opening letter from Presiding Officer Kvistad he talked about the 53% goal by the year 2005. They talked about launching an organics recovery program to remove 117,000 tons annually of organics from the waste stream. Going further into the plan, they talked about modifying the transfer stations if necessary to allow for co-collection. Let me elaborate on that a little bit. Right now we have one truck goes down the street and picks up solid waste, we have another truck goes down the street and picks up yard debris, we have a third truck goes down the street and picks up recyclables. The co-collection technology allows one truck with multiple compartments to go down and pick and solid waste and yard debris together or solid waste and curb side recycling together. So the plan tried to address those and how would they modify the transfer stations to achieve that in the future. Another point in the plan was, with the recent emergence of material recovery facilities, there was concern in the recycling community that because of the 45% recovery level or restriction put on these facilities that there was a portion of that dry waste stream that wasn't being recovered."

"With those things in mind, I set about writing our plan, our response to the RFP. As far as the organics was concerned, we took a conservative innovative approach where we said we would remove 15,000 tons a year of organics out of the waste stream, a little over that 10% of the 117,000 tons mentioned in Presiding Officer Kvistad's letter. We are your only vendor working with the pilot program on organics and with just one customer Safeway, in the month of May, we removed 158 tons of organics from the waste stream. You take that on an annual basis, that's over 1500 tons a year, 10% of that 15,000 tons that we said we do in our proposal. We have also worked with Gillam County to develop markets for that end product, for that organic material, whether that is for soil enhancement or it comes back to the Metro area to be used in the fruit or gardening industry and we have also talked to Gillam County about being innovative and seeing if we can't use that material for cattle feed which is in high demand in Gillam County. In March the Portland Bureau of Environmental Services had a workshop with their Council where they reported their goals and where they were at and one of the comments they made was in order to reach their 60% by the year 2005 they would need a commercial organics in place by the year 2000 otherwise they would not succeed. The year 2000 is only 2 and a half years from now. It is getting closer all of the time. As far as co-collection goes, our price in the RFP was \$19.42 per ton. The next price was \$30 per ton. With the \$19.42 a ton, we are competitive with the local yard debris processors so that the collectors could now bring this material to the transfer station and not have an adverse economic effect on their profitability. This would allow them to invest in the new technology, in the new equipment so that they could collect solid waste and yard debris at the same time. Also in the Regional Solid Waste Management Plan, you talk about having pilot programs for collecting organics from households and that the only way that could be achieved is if a commercial organics program was already in place. This co-collection technology combined with organics processing would allow organic material collected at the households to be put in with the yard debris and delivered to the transfer stations. Now you have one truck collecting three materials curb side instead of three trucks and you have just accessed the organic component of the household that has been inaccessible so far. Our composting site at Arlington Ridge can accept all of these materials for composting whether its meat, dairy, cheese before the consumer eats it or post consumer, what comes off the plates in the restaurants. You would have your one stop dumping as stated in your plan. The last aspect of our proposal was enhancing the recovery from the dry waste stream. We were going to invest close to \$1 million dollars with capital improvements and repairs of those five years to put in a dry waste sort line. This would allow Metro to recover from that waste stream that isn't being recovered now through the material recovery facilities because of the 45% recovery limitations imposed on them."

"To summarize all of this the evaluation committee erred in not considering Metro's own blue print, the Regional Solid Waste Management Plan. They did not recognize the innovative

organics recovery approach, the end markets that we had worked on for those organics compost, the ability to partnership with Waste Management to work towards source separated organics collection, the ability to do co-collection on route, cutting down the number of trucks that drive down the street, and also adding the possibility of collecting organics from households or enhancing the recovery from the dry waste stream presently going on in the region. The Regional Solid Waste Management Plan also asks and requires that all governments, private parties, companies and individuals participate in the plan. That is exactly what we are trying to do with our response to the RFP, participate in organics, in co-collection and in higher recoveries from the dry waste stream. Not only were we going to participate in that but we were offering it at a lower price today without any added costs in the future and we are so convinced that we can do that we are willing to guarantee it. All of this helps Metro get to its goal of 53% recycling in 2005. You as a Council, as elected officials, can set that into motion today by accepting Waste Management's appeal and contracting with Waste Management for the operations of the transfer stations and set those recovery policies and practices in place. Thank you for your time."

**Mr. Kiely** said he should add that in the section reserved for their closing statement Mr. Art Dudzinski was here, he was the president of Waste Management's northwest region and he would offer concluding remarks.

**Presiding Officer Kvistad** asked for technical questions, general questions would occur later. If Councilors had technical questions for the presenters, this would be the time to ask, if not, the time for general questions and answers would be at the end of the presentations.

**Councilor Naito** asked Mr. Kiely, "in your statement that there were basically two options, I did not understand the rationale that if the process in and of itself violates the competitive bidding requirements of state law then how could we use, what you are saying is an illegal process, to then grant you, your company the bid. To me, we have only one option, if we accept your argument on that and that would be to start under a different process."

**Mr. Kiely** responded that the process itself was not what violates state law, it was the Executive Officer's notice to proposed award in violation of the law. The distinction was that by default the lowest bidder rule applies. The default was operative here. The lowest bidder rule was what applied to this proposal. When Metro issued the request for proposal and no exemptions were issued, Metro were entitled to do that but the law said that having done that you must abide by the low bidder rule. So, the process itself as it started was not flawed, that was an option you were entitled to elect but now that the notice of proposed award has been proposed by the Executive Officer and it violated the low bidder rule, accepting it would be a violation of the law.

**Councilor McCaig** asked if the lowest bidder rule did apply, why wouldn't Metro then under the table 2 in the RFP allocate or grant the proposals one to BFI and one to Waste Management of Oregon which in fact did come in as the lowest cost.

**Mr. Kiely** said that was the lowest option and in their brief they said that was something the Council could do.

**Councilor McCaig** said that was not what Mr. Kiely was recommending?

**Mr. Kiely** said that Metro had a variety of choices available to them.

**Councilor McCaig** said OK as long as that was on the table, that yours was not the lowest. If they were talking about the lowest there was in fact another one.



**Mr. Kiely** said in combination, it was the lowest essentially to preserve the status quo.

**Councilor McCaig** said and if you go further with that then cost took on a different meaning and it in fact possible to evaluate where Waste Management's might not be the lowest cost.

**Mr. Kiely** said he was not sure he understood Councilor McCaig's point.

**Councilor McCaig** said that in fact by some of Waste Management's personnel items, reducing personnel and maintenance that there may be additional costs that the agency or the government may bear because of changes Waste Management had made in their proposals. So that cost could be broader than simply the dollar amount.

**Mr. Kiely** responded that was not the law.

**Councilor McCaig** said if it was the law and it was simply the dollar amount then she would understand why the first answer should be that it should go back, BFI and Waste Management, under their argument would be the appropriate response. Her second question was, given that Waste Management participated and she was on the subcommittee that dealt with the RFP and it was an interesting issue, the competitive bid issue, and she was more than willing to let the lawyers work that out, no one ever raised it. No one ever raised it anywhere during that process that she recalled. So just out of curiosity, why now and why weren't they dealing with some of the other substantive issues that resulted in Waste Management being rated or ranked lower than their competitors?

**Mr. Kiely** said it was a good question and perhaps something should have been said but the fact was that the law was the law regardless of whether somebody spoke up or not.

**Councilor McCaig** said that made sense to her too. The last question she had was just out of curiosity could Mr. Kiely give her a couple of examples where when they had been in this place in the process anywhere on the west coast that Waste Management had not appealed?

**Mr. Kiely** said no he could not.

**Councilor McLain** said she had one question, it was on the first question dealing with the lower bid rule, it sounded to her in the answer that Waste Management gave to one of the other councilors that they had limited now their scope of their argument and they were not saying that the process wasn't correct, they were not saying that there was any indication that the process itself was not doable or lawful. But what they were saying was that the lower bidder rule kicked in at a different time then when Metro's lawyer said it kicked in.

**Mr. Kiely** said what he was saying was that this agency and all public agencies in the State of Oregon were free to award contracts as long as they either a) apply the low bidder rule or b) issue specific written findings of exemption. The request for proposal as issued did not before hand have exemption process as part of that so the low bidder rule applied. That was legitimate, that was legal. However the requirement that followed, that was in evaluating the bids, one must award to the low bid. So it wasn't the process from the outset that was illegal, it was violating the rule that applied in awarding the contract.

**Councilor McLain** said following that up, Mr. Kiely also indicated that in the findings there was a spectrum of possibility there that would describe why the findings might verify that the lowest

bid rule was not in fact the lowest bid because of some of the other conditions that one of the other councilors just indicated, the cost to the government or other costs dealing with the system.

**Mr. Kiely** said that was right, that was part of the exemption process.

**Presiding Officer Kvistad** said with that they would move to the Metro staff response from the Regional Environmental Management, Mr. Terry Peterson and from the Office of General Counsel, Mr. Marv Fjordbeck.

**Mr. Terry Peterson**, Manager of the Metro Transfer Station was also a member of the evaluation team that evaluated the proposals. He would like to make the presentation on behalf of Bruce Warner. Mr. Warner couldn't be here today because he had a death in the family yesterday. Waste Management made five claims in their written appeals, the first two appeared to be largely legal issues that Waste Management had been talking about dealing with contracting law. The last three appeared to be claims about the scoring that the evaluation committee did. He would like to defer the first two issues to Metro's Legal Counsel and have him respond to those issues and then he would follow up to the last three claims that were in the written appeal.

**Presiding Officer Kvistad** asked Mr. Fjordbeck, if all of the Council members were presented with these forms to show the discussion on the points that he would be bringing up?

**Mr. Marvin Fjordbeck**, Senior Assistant Counsel, said he thought that staff prepared that sheet for the Presiding Officer's use.

**Presiding Officer Kvistad** said that this form was just to allow him to track the presentation.

**Mr. Fjordbeck** said that was his understanding. Those were the cliff notes. Mr. Fjordbeck expressed his condolences to Mr. Warner and his family on the loss of his mother. The legal arguments that the Council had heard Mr. Kiely argue simply represented a disagreement. Metro believed that that State statute didn't speak to when any of the findings that Mr. Kiely was talking about needed be made and that they could be made at the time that the transfer station contract was considered. It was important to note that when Metro released the RFP, not only was there no confusion about the process, but the resolution which authorized its release approved that proposals would be accepted, brought back in and evaluated and allowed for the top ranked firm to enter into negotiations. At that time that proposals could be brought back for Council, and in fact resolution 97-2515 was pending before the Council. So at that time the Council would be free either to accept or reject that contract and make any additional findings concerning competitive bidding that they sought.

With regard to the second point, he had read closely the presentation from Waste Management and its lawyers and Mr. Kiely's presentation today, Mr. Fjordbeck referred to this as the conversion argument and he said that there was nothing in Oregon law that supported the notion that improperly performed request for proposal was converted to a competitive bid process. He believed that if the RFP process was improperly performed the proper remedy would be to restart not to convert it into a competitive bid process. The third pieces in the second half of the Waste Management's presentation were why he suspected the Council sought an evaluation team to go through the difficult and complicated job of evaluating complex proposals from major national solid waste service providers. He believed that was probably the reason why the Council chose and the Metro Code referred to not having the scoring teams evaluation as subject to review because there was no end to the back and forth. So, Mr. Fjordbeck believed that the Executive Officer was correct when he dealt with the appeal of Waste Management initially in saying these

appeared to be simple disputes with the scoring of the evaluation team. Mr. Fjordbeck noted with interest the argument of Waste Management of the violation of the Solid Waste Management Plan. There was no evidence to suggest that the evaluation team failed to consider the impact of the proposals with regard to the Solid Waste Management Plan. In short, rather than simply failing to consider the Waste Management proposal, it appeared that the review team simply didn't reach the same conclusions which Waste Management wished that it had. Those last three points were points that were of interest to the Council and he believed that Mr. Peterson was in a position to address them.

**Mr. Peterson** said claim number of three in Waste Management's appeal stated that the evaluation team failed to consider the Waste Management proposed the most innovative and efficient materials recovery program. More specifically, they made the statement that the evaluation team failed to consider a selective bidder that offered the highest materials recovery rate. He pointed out that Waste Management was not the bidder with the highest estimated recovery rate at both transfer stations. BFI estimated a 4% recovery rate at Metro South and Waste Management estimated that they would recover about 3%. Regardless of those estimated percentages, however, this claim suggested that Metro should accept the companies estimates of recovery rates without doing any analysis of their feasibility. And instead of that approach the evaluation team followed what was in the RFP that stated that an assessment of the feasibility of obtaining the proposed results would be made. The proposers estimates were not accepted at face value, they were not the basis for awarding points. What was the basis for awarding points was the assessment of the feasibility of their proposed recovery plans and BFI simply received more points when that assessment was done for the Waste Reduction Plan. He added that a full 50 pages of the evaluation report addressed Waste Management's Waste Reduction Plan. He certainly did not believe that there was any basis for the claim that the evaluation committee did not consider their waste reduction proposal. The second statement in the claim was that Waste Management guaranteed the highest materials recovery rate at Metro Central. The appeal failed to point out that this guarantee was offered after the evaluation was done, after the point were awarded, so it was impossible for the evaluation team to even consider a guarantee. They did not ask for a guarantee, guarantees were not ask for in the RFP for several reasons. Metro's Solid Waste Advisory Committee and all of the reviewers of the draft RFP clearly recommended that they not ask for guarantees. They understood that guarantees were likely to increase the cost and they would be extremely difficult to enforce. So they did not ask for guarantees, either in the RFP or during the evaluation process. In fact Mr. Peterson believed that Waste Management specifically endorsed not asking for guarantees in their testimony before the Solid Waste Advisory Committee when that committee was discussing the idea of guarantees. In fact he believed that Waste Management recognized the difficulty in enforcing guarantees with waste recovery because they had included with their guarantee the statement 'under current operating conditions'. Of course the waste stream was constantly changing and that would make it very difficult to enforce any kind of guarantee.

Another point made in claim #3 was that the evaluation team also failed to consider Waste Management's innovative organics recovery program. This was simply not true. The evaluation team probably spent more time considering Waste Management's organics program proposal than any other aspect of any other waste reduction proposals by any of the other companies that submitted us proposals. Mr. Peterson pointed out that Waste Management's proposal to Metro included recovery of organic waste from mixed waste, it was not the kind of source separated organic waste that Mr. Penning mentioned here today. The Department was very supportive of co-collection, very supportive of trying to find out a way that Metro could use the transfer stations to reload source separated organic waste. That was quite different than what was in Waste Management's proposal of recovering organic waste from mixed garbage. The evaluation

committee did not think it was feasible to do that kind of recovery. We based that on several things, first, was the failure of Waste Management to clearly explain to the team how they would deal with contamination when asked, Waste Management's lack of experience in doing this kind of organics recovery anywhere else, and Waste Management's inability to point to any other place that was doing organics recovery from mixed waste as they proposed. And fourth, Metro's own experience in trying to recover organics waste from mixed waste would suggest that it was highly unlikely that it would recover the kinds of tonnage that Waste Management was proposing. So again, he did not believe it was true that the evaluation committee did not consider Waste Management's organics recovery program. This was brought up again in claim #4 in their written appeal which stated that because Waste Management submitted the only proposal to address organics recovery they had the only proposal responsive to the Regional Solid Waste Management Plan. Mr. Peterson pointed out first that the Regional Solid Waste Management Plan did not recommend recovering organics from mixed waste. It did recommend separation at the source and recovery through that method. Mr. Penning mentioned that Waste Management was working with Metro on a pilot project source separated, Metro thanked Waste Management for their participation in that. Again, they were very supportive of those kinds of recovery options. It was the department's belief that it should not matter who operated the transfer station, they should be able to continue with that kind of recovery program. And again, the department might be able to turn this argument around and say because Waste Management was proposing organics recovery from mixed waste, they were in fact the only proposal that was inconsistent with the Regional Solid Waste Management Plan.

Finally, claim #5 in the written appeal stated that the evaluation team failed to consider Waste Management's excellent past performance as the operator of the Metro South Transfer Station. Again, Mr. Peterson pointed out that the evaluation team did not just consider performance at the two Metro transfer stations. They also did a reference check and found that in general BFI received better references than did Waste Management. Waste Management had done a good job for Metro at Metro South. Metro had congratulated them on numerous occasions for doing a good job. One that stood out was the response to the 1996 flood. Mr. Penning and Waste Management staff did an excellent job of responding to that incident at Metro South. Unfortunately, there had been incidents over the past two years, Metro had had to notify Waste Management in writing of things where they needed to improve their performance, that included safety, adequate staffing and customer services. He had made Council aware of those in a memo that he sent to Councilor McLain dated May 28, 1997. While BFI's record at Metro Central wasn't spotless, they had had incidents at Metro Central that they would like BFI to improve on, Metro had not had to give them in writing notice of contract non-compliance. That was important to the evaluation committee and based on that, the evaluation committee gave more points to BFI for past performance. In addition to that the entire scores awarded for operation and maintenance weren't just based on past performance, they certainly were also based on the written proposals. BFI proposed more dedicated maintenance staff, a better traffic control plan, a waste recovery plan that would not interfere with traffic on site, so put all of that together and the evaluation committee gave more points to BFI for operation and maintenance. These operations and maintenance factors were the kinds of things that could increase the cost to Metro and to the rate payers and customers beyond just the per ton prices that were in the proposal. He thought that was something the Council might want to consider when the total cost of the proposal was considered.

Mr. Peterson closed by saying, as Legal Counsel had pointed out, both the RFP and the Metro Code said that the evaluation team scoring could not be the basis for appeal, that alone might be enough reason for rejecting Waste Management's appeal, however, with the other reasons that he had laid out, the department did not believe that there was grounds for the appeal.

**Councilor McCaig** said, the Attorney's General's manual recommending that in order to do an exemption for competitive bid process that it be done early, that exemptions be stated. She asked if there was anything in state statute which required at a specific time when those findings were done?

**Mr. Fjordbeck** said, nothing.

**Councilor McCaig** responded, that this helped. Her second question had to do with operations and maintenance. One of the things that concerned her in reading Waste Management's appeal was that they had quotes out of letters where in their performance review they were given pretty high marks for what they had done. Then when later in the document there were a series of letters that she understood were what resulted in the reduction of their overall rating for their operations and maintenance. She asked why those two things didn't jive? In their performance review were they given those letters and was that part of their record.

**Mr. Peterson** responded, of course the evaluation team had to look at the total package of all of the correspondence, all of the work Metro had done with Waste Management, when they evaluated their past performance. The report that Councilor McCaig was referring to was a specific inspection that they did of the equipment on the facility once every year. The intent of that inspection was not to address issues like safety, they had a separate inspection that they did for safety, so that was only one of many inspections, many types of reports and correspondence that they had with Waste Management.

**Councilor McCaig** clarified, so in their document which was on page 14 where they talked about the draft inspection for 1997, that was what Mr. Peterson was referring to, that it was the specific item, it wasn't a general review of their performance.

**Mr. Peterson** responded, that was correct. Maybe the way he would phrase that was that it was one piece.

**Councilor McCaig** further clarified, all of the RFPs were evaluated on three separate elements, cost, materials and recovery, and operations and maintenance. On one element, which was cost, Waste Management actually came in a little bit better, about a point better, than BFI but on the other two elements, operations and maintenance as well as materials and recovery, BFI came in more than half better than Waste Management.

**Mr. Peterson** said, that was correct. Councilor McCaig in general he did not have the specific points in front of him but she was correct, in general.

**Councilor McCaig** said it was not a point or two, there actually was a larger discrepancy.

**Mr. Peterson** responded, you are right.

**Councilor Naito** asked if there were any cost implication with respect to safety, operations and maintenance and material and recovery. She asked what kind of costs there were in terms of operations and maintenance and safety. She stated that hazardous materials and safety could have huge costs to society in the event of a spill or if something is improperly handled. There could be costs to workers if there is not an appropriate operation in place. She asked, what kind of costs might be there with a lesser recycling rate?

**Mr. Peterson** responded, he classified those costs into direct cost to Metro and then indirect cost to Metro that would eventually get passed back to the rate payers. Certainly there were direct cost of the way that the facility was operated that may not be included in the per ton prices. Equipment maintenance in the best example, if the operator did a poor job of equipment maintenance they would have higher costs that Metro would have to cover. Safety was another one mentioned, if the operator did not do a good job of spotting hazardous waste and controlling hazardous waste before it was mixed with the rest of the waste they could have spills, considerable costs, the potential of injuring employees and customers, that was a very serious issue. Again, that was not reflected just in the per ton bid prices. Some of the indirect costs, perhaps the biggest ones were the cost to the customers when they, depending upon how they were served at the facility. Anything that caused an increase in wait time for commercial haulers was going to increase their costs and those costs would get passed back to the rate payers in collection rates. Metro's operator was responsible for traffic control on site. If there were inadequate personnel on site to control the traffic that was going to contribute to longer lines and a higher cost to our customers. BFI proposed a waste reduction plan at Metro South where they would be doing the sorting of material after hours rather than trying to do it during the middle of the operation. That was very attractive to us because that meant that the waste reduction proposal was not going to have any impact on the long lines that they had down at Metro South and the traffic problems that they had down there and not further increase the cost associated with those wait times. Those were some of the things that stood out in his mind.

**Councilor Naito** said that in reading some of the materials there was a consideration given to BFI with respect to hiring of Metro South employees. She asked about cost issues or what that issue was about, she didn't fully understand it.

**Mr. Peterson** said that was just BFI's commitment if they were to be awarded the contract, to give the employees that were at the facility an opportunity to continue working.

**Councilor Naito** asked if the other bidders provided that same commitment?

**Mr. Peterson** said that he knew that Waste Management did, he believed that all the other bidders did.

**Ms. Susan Robinson**, BFI, 1533 120th Ave NE, Bellevue, WA 98005. BFI had been an active and responsible player in Metro's solid waste industry for the past five plus years. They were a committed player in the industry here and they were looking forward to the next five years and beyond. During this time BFI had been an active member of Metro's Solid Waste Advisory Committee. As a member of SWAC, they had been an observer and participant in the transfer station contract selection process. She drew the Council's attention to the board. As part of the SWAC process there were many meetings devoted to the discussion of this process and Metro chose an RFP process because of the ability to capitalize on the experience of Metro staff and proposers beyond just price. Because SWAC and the Metro Council wanted the ability to consider the feasibility of diversion proposals, quality of maintenance, and customer service issues which were key to Metro. Because the RFP evaluation process provided for comprehensive review of cost, diversion feasibility and maintenance and service were other issues why an RFP process was recommended. Metro took great care in obtaining public input to the RFP process and ensuring that the stakeholders agreed upon and then followed the process. She showed a timeline. This timeline showed over a year's worth of work and where they were today. The green boxes on the left showed where there was opportunity for public input. There were many SWAC meetings devoted to this discussion and that SWAC group was a very representative body made up of all of the proposers in this project. On the right she highlighted, there was an

evaluation process, an evaluation committee as well as outside consultants who reviewed the proposals. Unfortunately, Waste Management had chosen to object to elements of this process after the fact, after having agreed to and participating in the process. Because of this, they had asked BFI's legal counsel, Steve Schell to review the appeal. On behalf of BFI of Oregon, she asked the Council to deny Waste Management's appeal and to support Metro's staff and the integrity of Metro's RFP and evaluation process.

**Mr. Steve Schell**, BFI, 707 SW Washington, Portland, OR 97205 said he was here talking about BFI's move to intervene in this process. There were some key facts that needed to be kept in mind. A very simple fact, first of all, no contract had been issued in this case. Second, the RFP process was duly conducted. The admission that Waste Management just made was a significant one. There was no question about the RFP process being duly conducted. Furthermore, Waste Management were participants throughout the whole process, had every opportunity to participate in that process. Third, the scoring was done by professionals selected by Metro in this process. The key law provisions were also very simple. First, 279.015, the Oregon provision regarding public contract said that the Council could exempt from any public contract the requirements for lowest bid if Metro made certain findings. It did not say it had to be done before the RFP process started, it didn't say anything else. It just said that it had to be done before the public contract was let. Therefore, there was no ex post facto type of proceeding going on at this time. Ex post facto was an improper term applied in this context. Second, any bid was to go to the lowest responsible bidder ORS 279.029, to the lowest responsible bidder. What was a responsible bidder? It didn't necessarily mean the lowest price. It meant the lowest responsible bidder.

Third, the point made by staff, mainly you didn't look behind the numbers, that was what the process said. It said basically there was no basis for appeal based on what the determination as to the numbers that were applied in terms of the ratings that Metro's professionals made in evaluating the various proposals. The evaluation process was an extensive one and it was looked at carefully and walked through carefully by the professionals.

Two simple issues, one, must the findings be made before the notice of award which was what the issue was now, and two, who was the lowest responsible bidder. With regard to the first issue, there was nothing in the statute that indicated that there was any requirement to make that before the contract was let. There was no ordinance provision that was on the books that required that, there was no rule or case law that required that. In fact, there was a provision in the general conditions that said minor irregularities would be waived by Metro. The Council had reserved the right to waive minor irregularities, assuming there was even an irregularity. Finally, if the Council thought about this process it made a lot of sense to do it now. It made significant sense, the Council knew who the competitor was. The Council knew whether or not there was any favoritism involved. They know what the situation was with regard to cost savings and the Council had heard testimony today and had seen the process that examined those questions. Therefore, making those findings could be done much better now before this contract was awarded than it could have been at any other time in the process. The question was what did lowest responsible bidder mean? Responsible was defined as noted by a case in the information provided to Council that indicated that responsible bidder didn't just mean dollars. What were the facts here? The evaluation showed clearly a BFI win, there was a 1 and 2/10ths point difference on the dollars between BFI and Waste Management on the question of dollars in the evaluation. A very small point. There were reasons why he was talking points, Metro's regulation said don't go behind the points. Going behind the points was not a basis for appeal. Talking about the points, 1.2 points different. Second, the cost itself was not very great. It was a few hundred thousand dollars. Over the five year contract sure, there was a dollar difference. It was not trivial but it was not very significant. That was why the point difference was so small. If you get beyond

that, if you look at the difference in bids the evaluation showed that BFI got 89 points, Waste Management got 78 points. Out of 100 points possible, that was a significant difference. Second, if the Council looked at the lowest bid possible and at this point it has already been made in the questions that had been asked, if you looked at the lowest bid possible, it was not Waste Management, it was a combination of BFI and Waste Management on this situation. So the lowest bid if looking at just dollars didn't give the right to this contract. Finally, if one looked at the key elements which really made the difference, materials recovery, the difference was BFI got 16 points and Waste Management gets 7.5, it was not half, it was double. Waste Management got half of what BFI got. BFI got double what Waste Management had. The same was true with operations and maintenance, BFI got 12.5 points and Waste Management got 6 points. Again, double, that was where the difference was, that was why the difference in distinction. That was why BFI was the lowest responsible bidder under the statute.

First, the last three points as Mr. Fjordbeck and Mr. Peterson indicated, the last three appeals basis were irrelevant. They were not subject to this appeal by Metro's very ordinance. Metro's ordinance in essence prohibited appeals on those lines. They needed to be rejected outright. Second, if the Council determined some how this was invalid, Waste Management didn't get the contract, there was nothing in statute that indicated that they should, there was no basis for that. Metro simply had to start over again. If the Council did this or even on the terms they were proposing they were not going to get the contract, it would be a split contract. But regardless of that, that was not a proper solution here. The ability to correct this existed in the Council's hands. The Council had reserved that right for themselves in the general conditions by serving as a review board next week, adopting the resolution that would be put before them. The Council corrected whatever possible irregularity that might exist before the contract was ever approved. That took care of the problem. The Council had sustained their process, it was a worthwhile process, worth sustaining.

**Councilor Naito** said she was still interested in the ORS 279 issue. She asked whether ORS 279.015 covered the lowest responsible bidder and whether that was under the competitive bidding process? She asked if he was suggesting that analogy.

**Mr. Schell** responded, yes.

**Councilor Naito** asked that if that did not apply and if they in fact proceeded with this, she felt they were mixing apples and oranges. She wanted to be sure she was clear on the difference.

**Councilor McCaig** asked Mr. Fjordbeck, could he give her an example of what was appealable. She understood what was not appealable, the numbers and what was behind the numbers. She asked to give her an examples of something in this contract that would fit the category of appropriately appealable.

**Mr. Fjordbeck** responded, the type of irregularity might arise from fraud. Those were the types of items that might be available. The first ground of appeal from Waste Management on the process was also susceptible. The Council had heard the opinion of general council that Waste Management position was wrong, but it was not wrong because it was a possible ground of appeal.

**Councilor Naito** said that it was through Metro's own policies that Metro had in the actual proposal specified the grounds for appeal. But in fact on the first issue of violating state law, it wouldn't be until in fact Metro had proceeded, if in fact it did with a contract and then present the findings as to why it was exempt from the competitive bidding provisions of state law. It would



only be at that time that an actual appeal under the state law provisions would truly be appropriate to the court system. They were appealing to the Council so that the Council was on notice that this was an issue and that the Council as a Council had the ability to make some decisions on that basis if they chose to.

**Mr. Fjordbeck** responded, that was largely correct. The grounds for appeal here did appear to be process oriented. The opinion of general counsel was that the government hadn't violated any process yet. He believed that it was his job to make sure that did not happen.

**Mr. Bruce Walker**, Residential Manager of the City of Portland Solid Waste and Recycling Program, 1120 SW 5th Rm. 400, Portland, OR 97204. He said that they had submitted a letter to Bruce Warner in April 1997 regarding a certain aspect of this process of awarding the transfer station contracts. He was here to amplify what their concerns were. He was not here to advocate for either one of the parties that had just made presentations. He did want to raise an issue in terms of the aggressive recycling goals of the region that they fully support the recycling goals that our city council established to reach the 60% recycling rate by 2005. They believed it was essential to have an organics recovery component. In any of the analysis they had done and they had worked closely with the Metro staff, they didn't believe it was going to be able to happen without a very substantial organics recovery program. Part of that could apply and hopefully would work out in the transfer station. That was what they wanted to assure that happened. Certainly there were the pilot projects that were already going on. They were working to identify some of the businesses that could have that type of waste being diverted and work with the haulers to get that material out of the waste stream. Another component was part of the Bureau of Environmental Services most of what the bureau did was work in treating waste water and working to get clean rivers for Portland's part of the region. Now one of the elements they had to be working on, and already were working on was trying to divert some of that organic material that went down garbage disposals, somewhat at residences but significantly at restaurants. They were going to be identifying that and trying to get it out of the sewer system. So that was going to switch it over to the solid waste system and hopefully over the recycling portion of that. They were really looking to give those businesses and residences some option to work with. They thought a component at the transfer stations to deal with greater organics recovery than was presently in place, was very important and they looked forward to working with Metro, haulers throughout the region, and the transfer station operators to get those higher recovery rates.

**Councilor McLain** thanked Mr. Walker for his testimony. She said that they had heard here today from both staff and the council. They also supported an organics program and were working diligently to try to make sure that was going to come forward. One of the elements that the Council also heard today was that there was a difference in organics programs and possibilities in recovery rate between separated waste and then mixed waste streams. Her question to Mr. Walker was did he have any reports that they had not been privy to that talked about the success of programs with mixed waste streams and organics programs that had come without that type of disposal of that type of organic mass?

**Mr. Walker** said no they did not have any reports in terms of diverting from the mixed portion of the waste stream. They certainly wouldn't, if presented with a proposal, wouldn't rule that out in terms of further diversion.

**Councilor McLain** clarified, Mr. Walker's answer was no, he didn't have any studies about successful mixed waste stream diversion. Two, but Mr. Walker would consider it without knowing the success rate of those types of programs.

**Mr. Walker** said he understood the gray area he was getting into. So, he should limit his answer to no he did not have any reports.

**Councilor McFarland** said in her experience there has been many times where someone had said no they couldn't do that and the answer was, no they hadn't read the books that told them they could not do that so they went ahead and did it anyway. She got seriously concerned when somebody said that they can do something or they can accomplish a goal but there were others who had read those books and made the decision that it couldn't be done. In light of Mr. Walker's experience or framework would he out of hand reject a proposal by somebody that told him that they believed that they could do some of this organic recycling under the conditions that were extant here?

**Mr. Walker** clarified the question, would he reject something out of hand? He would not reject something out of hand. It was his understanding that it wasn't in the current evaluation, they had a high degree of respect for the Metro staff. he was not trying to get in and second guess that.

**Councilor McFarland** said she was not implying that she didn't have a high degree of respect for the Metro staff, but she could tell him more than once she had ended up doing the things which those people for whom she had a lot of respect had told her couldn't be done. What they were telling her under those circumstances, they felt they couldn't do them. But that limitation didn't necessarily apply to her. That was what she was asking Mr. Walker. His answer was, no he wouldn't reject that out of hand.

**Mr. David White**, Regional Representative for the Oregon Refuse and Recycling Association and Chair of the Tri-County Council, 1739 NW 156th Ave, Beaverton, OR 97006. He said that the Tri-County Council met earlier this week and discussed this hearing that was held today and what their position would be on that. It was not their intention to comment on the merits of Waste Management's appeal or the selection of BFI's proposal. He was here to talk about the two issues that they raised to the surface, the cost and material/recovery aspects of the RFP process. The question that was being discussed in that area was, should the contract go to the proposal with the lowest cost and the highest predicted material recovery. He sat on the Metro SWAC as did 3 other haulers and so did Waste Management and BFI. He would suggest the process that they went through on the SWAC dealt with that issue pretty completely. They discussed this RFP process at three meetings, both June, July and September. He had stewed over those meetings, these comments were based on the minutes not on his personal notes. At the June meeting, they had the first opportunity to look at the original draft of the RFP. They discussed three large policy issues, one, vertical integration, was that a factor in this process that should be taken into consideration, incentives and mandatory rates for material recovery and then wages and benefits, having to do with should the RFP specific certain wages or benefit packages that everyone had to meet or else they could cut their cost by lowering wages. At the July meeting they had a lengthy discussion about proposed recovery rates. There was a lot of concern expressed by SWAC members that a proposer would set a high recovery rate, get the points for it and have no realistically way of achieving it. They discussed that at length. He thought Councilor McFarland noted that this had happened in the past. Metro had awarded a contract to a company, they couldn't perform it. SWAC agreed amongst themselves that they would rely on the expertise of Metro staff, the evaluation committee members and the consultant that was going to be hired. To him that said that they were not going to take these proposals at face value but the committee was going to look at those number and evaluate them based on looking beyond face value. In that same meeting they had a lengthy discussion about the evaluation criteria itself. Staff originally came in and recommended that there should be 70 points awarded for cost. Many SWAC members disagreed with that and felt that that put too much criteria on cost at the expense of both material recovery

and maintenance and operation. SWAC said 70 points was too high. At the September meeting Mike Burton came to that meeting and was quite concerned that SWAC seemed to be disagreeing with staff. He was the acting director at REM at the time. He had his staff make a long presentation to SWAC about that criteria and how those points were being divided. At that meeting SWAC recommended that 65 points be awarded to cost. That told the Council that cost was not the deciding factor here at least in the process that SWAC had envisioned. A quote from the minutes, "considerable discussion continue with a concerned raised to the weighing of the evaluation criteria. Councilor McFarland said the RFP would be presented to Council that afternoon at 1:30 p.m. in the Council chambers. Any comments with regard to the RFP would be heard at that time and anyone interested was welcome to participate." It seemed to him that the process afforded was complete, open, fair, and was an opportunity for input. He knew the Tri-County Council felt that they were heard. He was not involved in the evaluation process and that was where he stepped aside and did not have a comment on that. He had read the report, it was extensive. It seemed, in his reading of it, it applied the criteria that they had developed and that it was fair and objective but he wasn't there and he did not sit in on all of the meetings. Lastly, he thought there was a real reason to comment on organics processing. The Tri-County Council supported the concepts of organics recovery. They agreed that it was one of the programs that should be considered in order to reach the waste diversion goals established in the RSWAMP. The region's haulers were prepared to help in meeting the challenges presented by organics composting and processing. In addition to the environmental benefit there was an economic benefit that they would realize because they could usually get rid of, dispose tiff organics at a cheaper rate than garbage. That would create a savings to the hauler that would be passed along to their customers through the rate setting process. He knew that there were many people that were interested in that. However, he sat through months of really interesting meetings with DEQ when they developed their composting rules and regulations. They were concerned about feed stock contamination, odor, cost, quality of the end use product. They had an extensive document prepared to deal with all of that. So while they were very interested in organics composting they felt that there was still work to be done in that area. At one of his first SWAC meetings he thought that this organics thing was so easy to solve, at least in the residential home, why not just send it all down the waste disposal. He realized that that was a mistake. The sewer didn't want it, it was expensive, it had to be dealt with, there was a better way to do it. So in his early career he made a mistake also. This was a complicated issue on organics. They did need to deal with it and the Tri-County Council would be there when they had a plan.

**Councilor McFarland** responded to what Mr. White said. What we talked about at those three meeting and ultimately at the end of that third meeting when we finally came up with a process that we thought would work, there were still people in that very sophisticated group who represented most of the solid waste industry in the area who felt all the way that they weighted it too much, that they should have this and not an RFP but an RFB based solely on cost and set the levels of recycling to be done and penalties to be put upon if they were not done. She was certainly in favor of this. At the time they struggled with this but there was not a lot of unanimity. She thought what finally happened was people said OK they would back away from this and they would go forward with this but there was at least one person who said all along they told her the way to go was with a straight forward bid and require the maintenance and all of the other things to happen. So the implication that this was a totally unanimous decision by the solid waste industry was not true. Now maybe in their wisdom they picked the best one. When they positioned Central Station where it was, it was based on a piece in the bid that never, never was realized. So there always was the potential for that.

**Presiding Officer Kvistad** closed the public hearing.

**Mr. Kiely** said he had a couple of brief comments on the legal process issue. First, the purpose of the exemption procedure outlined in the statute that Mr. Schell talked about was to protect the contract selection process itself. He submitted that one could not ensure the fairness and cost effectiveness of that process to the public after the fact. Mr. Fjordbeck was correct that there was no specific statement in the statute one way or another which definitively answered the question. When may these exemptions be issued? But, ORS 279.019 was the procedure that was alluded to by Councilor Naito in her question to Mr. Fjordbeck as to the right of interested persons including Waste Management to challenge the validity and timeliness of the exemption procedure. Under that statute no interested person had a right to do that, to make such a legal challenge in a court until the exemptions were adopted. He thought if you read it, it clearly implied that should be done before hand. Otherwise if the Council adopted the exemptions and signed the contract at the same time, where was the realistic opportunity for anyone to challenge the propriety of the exemption process. Metro for BFI alluded to a case decided in the mid-sixties that he cited in his written materials. It was an interesting case but unfortunately what was controlling here on the low bidder rule and in particular what was the lowest responsible bidder was clearly defined in the statute. The statute defined that term now. It said the lowest responsible bidder, "means the lowest bidder who has substantially complied with all of prescribed public bidding procedures and requirements". There was another provision that was not applicable here. But that was it. It didn't say look behind this, look behind that, figure whether they were going to have to spend \$.10 an hour more on oversight, it said the low bidder. And that was the rule that applied unless one properly engage in the exemption process. And they submitted you can't close the barn after horse was already out.

**Mr. Penning** said he would like to send his condolences to Mr. Warner for his loss. He would like to respond to some of the issues that were brought up since they testified. He agreed with Mr. Peterson that the Regional Solid Waste Management Plan did not consider co-mingled recovery of organics and the transfer station. Waste Management's approach was the fact that their knowledge of the waste stream and they discussed this and used this as an example during the interview with the evaluation committee. An example would be a 12 mile disposal that serviced the east Multnomah County area in the summer months services the fruit and vegetable farm. They brought in truck loads of vegetative matter that got dumped into the pit and went into the compactor and went straight to the landfill. It was Waste Management's basis that they would work with those haulers and the knowledge of the waste stream they would target those kind of high percentage loads of organics that they recovered those 15,000 tons over the course of a year. That would be the basis that they would start from and from that basis then partnering with Metro and the jurisdictions that they could work to educate the public to bring in source separated materials and maybe provide a monetary incentive to get those haulers and producers of that materials to separate it at the origin. But it was to start with those high grade sort of loads that they would start with to build the base to work on. As far as the past performance issues, he agreed they had some performance issues with Metro and when they were contacted they responded to those and they had worked through those issues and they would continue to do that.

A contract was a living working breathing document and the situation changed. Metro South wasn't exempted from that process. When Waste Management took the contract over in 1990 they almost had double the amount of vehicle traffic into that site than they did at the time that they started and they had tried to work through those issues and provide good customer service and still do it in the safest manner possible. They had worked with Metro on safety issues, in fact, at the last operations meeting they recommended that not only Waste Management as a vendor but the other vendors at the sites of the transfer stations be included in those Metro safety meetings. To this point they had not been. They got their evaluations and their recommendations and acted upon them. They thought it would be a better process if they were involved in those

inspections and those safety meetings so if there was a safety issue Waste Management could respond immediately. And they would do that, that was the kind of working relationship that they had. The wait times went back to the configuration of the station, the physical ability to get vehicles in and out of it and the number of spots there were to dump and Metro was addressing that through their capital improvement plan. Waste Management had been working with Metro to work through some of these construction phases that they would have coming up this summer. Unfortunately there were some types of waste that the public was allowed to dump into the waste stream that had no consequences, i.e. pool chemical. Terry brought up this point in a meeting, for someone to dump pool chemical from a residence was perfectly legal. It was not against the law. That went to the transfer station, got mixed with water, chlorine gas was released. They needed to evacuate the public and the facility. That problem was not only at Metro South but at Metro Central. Metro was trying to address those issues, not only operationally but at the legislative level. The organics, Mr. White testified to the fact that DEQ had a long list of issue for organics and contamination and the final material and would it be worthwhile to use as soil amendments. The Arlington site was the template for what DEQ was going to come up with. Waste Management had been working with DEQ ever since they started that program so they could meet those requirements. Lastly, cost, cost kept coming up and who paid for repairs, who didn't pay for repairs. He guessed the issue was for cost, that could be vague and that was something to be determined down the road. The issue the Council needed to think about, if Metro wanted to do the organics program later on with a different vendor, what was going to be the additional cost to do that. That cost was in their proposal today.

**Mr. Art Dudzinski**, Waste Management's pacific northwest region president, 13225 NE 126th Place, Kirkland, WA 98034. He said earlier today a question was asked, was there a contract Waste Management hadn't appealed on the west coast. Yes there was; Lake Stevens Washington garbage contract, City of Bellevue recycling contract, Vancouver Washington recycling contract, City of Bellingham disposal contract, Port of Seattle special waste contract, Naval Base in Bremerton special waste contract. There were many, many of them. One of the reasons they were sitting here today was something that was addressed a little bit earlier by their competitor. Waste Management got half of the points for operations and maintenance, half the points for recycling, why were they still here? Why were they still doing the job? He could see a differential, but half the points. Gary addressed some of the issues, certainly Waste Management had issues. There were issues as you go through a contract, it's a living breathing document. They were going to have disagreements. But in the evaluation they did a good job, the annual report said Waste Management did an excellent job. It did not say they had better improve. It did not say they were not being paid for recycling at the South Transfer Station. It was a small transfer station, the traffic doubled. So it was a little different situation. That was why they were sitting here appealing this, it was their reputation. If it was very close they would have probably walked away, it wasn't close. And they wanted to know why it wasn't close. Historically, in the mid-eighties Waste Management stepped to the forefront, they were the only vendor that addressed the problem that Metro had, spent the money and took the risk and built a landfill. They had kept their promise. They had taken their waste for seven years. They had kept the promise that they would do that and had done it under the contract. They had kept a promise with Gillam County as a host community. They had done everything they had said they were going to do. They continued to do it. Waste Management ran the Metro South Transfer Station, they kept their promise. He did write a letter guaranteeing the 14% recycling. He didn't think he had to. In their RFP they made a promise and they would keep that promise. There may be some problems along the way but they would work them out. In talking about odor, that was why they had Columbia Ridge Landfill. It was a perfect place to go through this thing. They had worked with the community, they knew what was happening. They were very aware of these things. It was a farm community. They worked with Waste Management. So Waste Management was providing all of

these things for Metro and the citizens here. They felt they were providing it at a very good price. And they felt they were stepping beyond. They could sit back and say they would do the same old things but they would do just a little bit more of them. They had taken one step beyond. This may cost money to do this. But they were willing to do it. He thought they were part of the community, they had worked with the community. So he thought if the Council took a look at the choices and he thought that Mr. Kiely had pretty well laid them out, if it was the lowest bidder and that was the only appeal that they had got, it probably was status quo. Same vendors at both transfer stations. He thought if the Council wanted something better, it may be to re-bid. He would certainly love to say, give it to him now but he was not sure he could say that under the scenario. But status quo was the same as it was now. If the Council wanted to go a little bit further and wanted to take a look at some innovative things it probably was a rebid.

**Councilor McFarland** asked Mr. Dudzinski, would he believe that in an effort to deal with this fairly and some of the questions that had come up, if the Council went back and went out for a bid, would he feel that this would meet some of his concerns?

**Mr. Dudzinski** said yes it would. He thought a proposal would work to be laid out properly with the exemptions up front. He would like to see a bid put together that would have all of the aspects of recycling. He thought it was a very difficult thing to do but yes they would be very happy to do that.

**Councilor McCaig** thanked Mr. Dudzinski for his comments and said, she would actually be interested in looking at some of those cases where Waste Management didn't appeal because it would be helpful. With all due respect, there were 12 applicants and Waste Management came in second. They didn't fall off the map. Waste Management actually came very close. From a government perspective, their responsibility was to judge on those items which were appealable, whether they had met the standards they had established. And what she heard Mr. Dudzinski just say was that where he had the greatest problem was on the rating in the evaluation of the two items, the maintenance and operations and the resource recovery which what he was fundamentally doing was challenging the evaluation and the scoring and those were the items that they had all agreed and they were very clear in the RFP were not appealable. And so as a result it felt as if the competitive bid process was secondary, that that had come to the forefront as a result of having a real issue with the outcome on those two other areas which had been ranked lower and which in fact had been what resulted in Waste Management coming in second place. She was sympathetic but she didn't feel that the argument was compelling given the restraints that had been applied to the process. But that was why Waste Management was appealing.

**Mr. Dudzinski** said he would never have mentioned that if it wasn't mentioned by his competitor. He brought up the point that Waste Management was one half in maintenance and operations and one half in recycling. He was responding to that saying that was something that really kind of got to them as to their reputation.

**Councilor McCaig** said for the record, in her review of the materials and understanding what was appealable, that was the part that stood out for her. In those two areas, Waste Management was not ranked as high as their competitor and that was their basis for that ranking from the view point of the evaluation team and the staff and the criteria that was set up. From her understanding of it, the answer was yes and in fact that element of it was not appealable from their position.

**Mr. Dudzinski** responded, understand that they were appealing it under the law.

**Councilor McLain** asked the Legal Counsel, one of the issues had been this term lowest responsible bidder and that was debated between the two folks. In her mind the actual language and the term substantial which was what was read by Waste Management last, that there was some interpretation of that. In her mind the interpretations that Metro set on was to provide adequate service, reasonable recovery of material, adequate staffing and safety, and good maintenance and operation. That was all part of being a reasonable lowest bidder. The word substantial was what was in the legal line that was read to the Council. Could Mr. Fjordbeck give the Council a comment on that issue, that definition and how they laid it out with the RFP?

**Mr. Fjordbeck** said, first, the lowest responsible bidder was a term that was not applicable in a request for proposal process and so the reason that it came up was because of the argument which Waste Management had raised that by default they ended up in a lowest responsible bidder scenario. That argument, in his opinion, was also incorrect because the fix, if one was required for an impaired RFP, was not to convert it into a competitive bid but to restart that process. So one only got to that question if one went through those two steps.

**Councilor McLain** said that answered her question. That was exactly what she wanted to have repeated because that was her understanding of what was said first. First of all she wanted to thank Metro staff, both legal and solid waste department staff, Waste Management, and she also want to thank BFI for the excellent material and effort and energy and involvement that they had all given the Council to help them make this difficult but important decision. She was going to simply say that she thought it was important for the Council to take this week to review again the staff report, the committee review report and the material that had been given to the Council by both sides. She didn't feel that it was a difficult decision from her perspective of the review up to this point. She thought that it was a very difficult industry to try and give this type of review to this type of a contract. She thought the state law and the Metro Code helped the Council do that quite adequately. She appreciated their effort and she looked forward to voting on this on July 10th.

**Councilor Morissette** said as REM Committee Chair, when Bruce Warner first came into his office and presented him with the findings that they had without very much research at that point because it had been a process that the Committee wasn't involved in once they had set it up. The first thing that struck him and he thought Councilor McFarland talked to it briefly, was that there was a group of people that were regulating, saying to an entrepreneur, that they couldn't accomplish this. For a feisty little red head, his whole life people have told him that he wasn't going to accomplish something. He had this funny way of thinking that when people were willing to put their name and their word behind putting something together they usually had some ability to do that. He had found that to be the case in many surprising events that he wouldn't have thought other people or himself would have been able to accomplish. But perseverance and effort and integrity helped lead one to that. With that he started getting worried about this process that Metro had set up because it did seem punitive. He did believe the staff tried very hard but when one looked at the numbers, Waste Management got knocked down like crazy in their proposals. He read some of the comments where it was noted that Waste Management had a little problem here but they were doing a great job over here. So he got pretty concerned so he then fell back to the cost and looked at which would be the best way for the rate payers to move forward with this kind of proposal. To him, Waste Management had the lowest bid. Combining that with the fact that he believed that the staff with good intentions and good effort didn't acknowledge the entrepreneurial spirit of a vendor's ability to accomplish things like he would have had he been one of those people doing that and he lost a little bit of faith in the process. He had checked with legal staff clearly, the Council did have the right to do what ever the Council chose to do here. The Council was not barred by any answer they may come up with. He was not here to propose

an answer here today but as a feisty little guy he would be very upset if a bunch of people told him he could not accomplish something. Every time someone had told him he couldn't do something, he had figured a way to do it. So he would just implore the Council over the next week to consider those comments as they went forth. He could show the Council the literature that he had Mr. Houser do for him, it was clear Waste Management was the lower bidder. It was actually clear that if Waste was the operator of their current facility and Browning Ferris was the operator of their current facility that was the lowest of lowest, \$400,000 whether it was 1.2% or 1.5% was still a lot of money to tax payers so that did matter. He did believe Waste Management had done a good job of their operations maybe not as good as some would think they could have but they had some challenges the other facility didn't have, such as transportation. He would be happy to share this with the Council and get into a dialogue during the next week that any of them wanted to.

**Councilor Naito** thanked all of the participants. She had been listening on a couple of different tracks. The first track was with respect to the process itself and she was really looking for some flaws in the execution of the process and any kind of bias of the members of the committee that evaluated the proposals and recognized that the committee was comprised of people who were far more expert than her in terms of operation, management, safety to the public and recycling. She did not find those kind of things and said she would review all of her notes again prior to making a final decision. She really was not interested in second guessing the scoring process of the committee. On the other issue of the exemption from state law, she didn't believe that if in fact the Council could not proceed with an exemption on this process, they could substitute one bid for the other and that Metro would in fact have to start over. She wasn't here in 1996 when this process was started. She didn't think the timeliness of the findings or the timing of the findings are an issue either. It was the substance of the findings that were the relevant factor. She would be looking and reviewing her own opinion of whether state law could be met in terms of where they were today. That was what she would be doing in the next week. That was her position.

**Councilor McCaig** commented to Councilor Morissette, she thought that the Council had as a Council this extraordinary responsibility to strike that balance, to offer people incentives, to push forward agendas and goals and at the same time the accountability that the Council had to the public that the things they set in place they deliver and they had confidence that they could deliver. What she was confident about was that they put a process in place that would provide a result that she could stand behind, that that was the reason that they went through the laborious process they did with the RFP and the outside consultants and the evaluation criteria. She was no expert but she did know that when they went through the RFP process they were pretty clear about setting some goals and reducing the cost, increasing materials and resource recovery. They set some policy objective there and then they established a process by which she was hopeful that they would get proposals that could be evaluated that they could defend. She believed that the proposal that was being recommended to the Council was not the status quo. It was in fact a step forward to doing things differently and doing things better and that the people who reviewed it had confidence that it was doable which was important to her. It was something that they would actually be able to stand behind. Secondly, when one looked at the RFP they did take into consideration on the two areas that Waste Management was rated lower, they did take into consideration the uniqueness of the two facilities and they assigned different points as a result of those two facilities, the age of one, the transportation issues, so those things were included in the calculation which ultimately resulted in the proposal that came forward with Waste Management being rated low. They tried not to do apples and oranges. They actually did attempt to make the review standard. She felt confident that with the RFP process they set in place that they were moving forward and not actually just reinforcing the status quo. Hopefully, the Council would be able to get through the next stage of this with a lot of grace.



**Councilor Morissette** responded to Councilor McCaig, the only thing he would say was that the sheet he was looking at, Waste Management operating both facilities got 6 out of 15 if they were chosen, BFI if they were chosen got 13 out of 15. How do you get good letters of recommendation and some bad ones? That was a pretty big swing, out of 15 total points, they only got 6 points in the rating system. He was not here to second guess the people that rated it either but when one read that Waste Management did a great job and had some bad ones too, how did the committee rate one at 13 and one at 6? That to him was a little tough to swallow and it was a glaring number difference. It went beyond the difference between the two facilities it went to the overall ability to perform. He would think that if out of 15 points what he thought he had heard was a good partner, got 6, he would say they were a pretty lousy partner. And the other partner would be a stellar partner if they got 13. That was an important point. The recommendation of 17% recycling, they got 7.5% out of operating of both of the facilities. The other was 10 and 14. So there was a lot less faith based on what that group of people did and in what Waste Management had been doing. He didn't think that they had been doing that bad of a job. He had only been chair for 8 months but both companies seemed to be doing a good job.

**Councilor McCaig** said she would think it was possible to get a little more objective review of the materials which resulted in the evaluation that their performance was mediocre and to do a comparison because from reading the document, they did check references and the Council did have before them the ability to look at the level of complaints, the nature of them and to evaluate them on their intensity and frequency. Her understanding was in looking at them that there was a distinctive difference in the intensity and frequency of kinds of maintenance problems between Waste Management and its management of South and BFI and its management of Central. Concerning the whole low cost bidder piece, and Councilor Morissette mentioned that they were simply the lowest cost, that whether you believe in the competitive bid process or whether it applies or not, that the state was pretty clear in saying that competition existed not only in prices but in the technical competence of the suppliers and their ability to make timely deliveries and the quality and performance of their products and services and that a balance must exist between performance competition and price competition. That was part of the lowest responsible bidder. That was an element of the competitive bid process. From her perspective, it couldn't be just simply the cost, it had got to be those other characteristics as well.

**Councilor Washington** commented, he was not going into the details of what he had heard today. He wanted to thank those who came in today to provide additional information to help the Council make their decision. He would be looking at this again.

**Presiding Officer Kvistad** said the Council would hold this item over for one week. We would make a final determination of this item on July 10th. The Metro Council would have before them all of the documents including the testimony from today. He would like to thank those who testified today.

**Councilor McCaig** asked if the Council could get the draft findings before hand?

**Presiding Officer Kvistad** responded yes, they would have staff give them to the Council as soon as possible. He then recessed Contract Review Board and called the Metro Council back to order.

## 8. COUNCILOR COMMUNICATION

**Councilor McLain** reminded the Council that on July 16, 1997 there was a JPACT, MPAC, Metro Transportation Committee Joint Meeting. That would be at 5:00 p.m. in the Council Chambers. They would be talking about the Regional Transportation Plan update status and schedule. She encouraged the Councilors to go to this. It was very important for the Council to talk to the rest of the regional partners about how this related to 2040 and to the finishing of the update on the Regional Transportation Plan. She added that MILT, the Metro Information on Long Range Transportation Bus, which Metro was doing in partnership with Fred Meyers, INTEL, PGE and Community Newspapers as well as TriMet were putting together an opening kickoff for this information bus that will be traveling the region to many of the Fred Meyers' stores and to our Washington and Clackamas County fairs. She encouraged the Councilors to attend the fairs, this would give the citizens of the region the opportunity to find out more about transportation and some of the possibilities for improving that transportation in the future.

**Councilor Washington** informed the Council that several weekends ago, he was invited to participate in a bike race. He took a bad tumble, really hurt himself, he had a helmet but it cracked the helmet. He encouraged all of those who ride bikes, to put their helmet on.

There are several opportunities concerning transportation issues that would be coming up in the near future for Councilors to participate in, particularly in the area of public affairs. There was quite a list of transportation opportunities. The two year Traffic Release Option Study commenced in July 1996. It was now entering its second year with work completion by July 1998. The decision that was being made at this point was beginning to attract more media and public attention. He noted a call that he received concerning the Traffic Release Option Study. Councilor Washington encouraged the Council to stay apprised of the transportation issues so that no Council got caught unaware. The goal of the study which was headed up by a task force of 13 businesses and community leaders which was appointed by this Council. The goal of the study was to evaluate the desirability of peak pricing as a congestion management tool in the Portland Metropolitan region only (it is a study), to increase public awareness and understanding of the concept and if at the end of the study the concept was found to be have merit then they would probably have some recommendation from the committee. There was no recommendation regarding congestion pricing as of yet, it was a study.

Finally, during the budget process the Council debated the issue of disparity done by Human Resources regarding two Council employees, Mr. Stone and Ms. Billington. At that time the Council took action regarding Ms. Billington's disparity but not Mr. Stone's disparity. There was a disparity study with regards to those two individuals in comparison to others in the agency. He noted that when he asked the Presiding Officer where they were in the process of looking at Mr. Stone's disparity, the Presiding Officer indicated nothing had been done to date and he felt that there should be a recommendation from the Council. There were two things that happened at the Budget hearing, discussion about changing Mr. Stone's job description which was tabled but the Council never took action on the issue of the disparity study which recommended a pay increase of some sort for Mr. Stone. Councilor Washington felt that the first thing that needed to be done was to take care of this issue. The Council had not taken care of this so he had put a letter together per the Presiding Officer's request with a minimum of four councilor's signature to support the disparity remedy. He also went to Mr. Cooper to verify what the process should be. Mr. Cooper indicated that the Presiding Officer did have the authority to grant raises or reclassify anyone in this department. This had been in effect since 1994. He read his letter into the record which supported the Presiding Officer exercising his authority to reclassify the Assistant to the Presiding Officer.

**Presiding Officer Kvistad** indicated that there had been a discussion at the Budget meeting concerning this disparity. He had said at the time that due to the difference in this position versus others in the agency he had asked that other members of the Council request this change.

**Councilor McCaig** said she was surprised about this. She reconstructed what happened at the Budget meeting because she had a different understanding of the proposal that was before the committee and an different understanding of what the assistant does. If the Assistant to the Presiding Officer deserved a raise, that had never been discussed and she felt that was entirely appropriate and within the Presiding Officer's flexibility to do. That was not the issue. The issue as she understood it was that it was not part of the disparity study that the proposal that came forward were with new duties and new assignments. The review that was conducted by Human Resources had to do with a title called Chief of Staff and new responsibilities. If that title and those responsibilities were in place there would be a different salary. She objected at the time that the Council had not had a discussion about that reclassification and those job duties. In fact, her recollection from the previous years were that the Council did not want to go in that direction. If that were the issue, the Council should set aside time to talk about whether they wanted to reclass the position into Chief of Staff. Her understanding was that Mr. Stone was not paid out of step with other staff that were performing like duties within the agency which was what the disparity issue was with Chris. In a review of her duties compared to other people in the agency she was not being paid adequately which is why the Council went ahead and moved. Her current job description as being reviewed and compared to others in the agency, she was being underpaid. If you review Mr. Stone's current job duties and others within the agency, he is within the steps. The Presiding Officer could initiate a raise, that was entirely within his purview. The issue was whether we wanted to reclass the position and permanently move it up to a different notch within the Council and the agency.

**Councilor Washington** said his understanding was the opposite of that. He asked Ms. Judy Gregory, Human Resource Director, to come forward. Those two jobs, regardless of a job classification in terms of title.

**Ms. Judy Gregory**, Human Resource Director, said when we reviewed the position descriptions of the two positions in question we reviewed them based on the duties that were in those position descriptions. We assumed that when we get something that it describes the current job. She thought there was an issue as to whether the duties as written had at that time been formally assigned or not. Based on what Human Resources were told and what the Presiding Officer signed off on, based on those duties, Human Resources said they were out of alignment with similar jobs in Metro. If Council wanted to have some alignment between Council positions and the rest of Metro, here was their recommendation.

**Councilor McCaig** said that was where they got thrown off. The document that the Council had for the disparity study had on it, Chief of Staff and duties that had not been agreed to by the Council collectively. It was a new and different description. If it were in place, yes it would have a different salary. But it had not been the collective understanding of the Council that those were the on going duties and responsibilities as the Council had discussed a year ago. She was more than willing to talk about moving it toward that direction. She did not believe it was a fairness issue when it came to Mr. Stone's job classification because the job description that he had was not the one that the Council had agreed to originally. If the Council consider the job description which had been sent to Human Resources, Mr. Stone would have needed a raise.

**Councilor Morissette** said Councilor Washington had spoken to him prior to the meeting. He was one that did not sign it. It was no reflection on the wonderful job the Jeff Stone was doing.

To be honest, the reason he didn't sign it was exactly what Councilor McCaig talked about. The Council had not had that discussion which drove the disparity study because the description was different than what he believed was currently in place. He thought the proper thing to do would be to talk about whether or not the Council wanted that kind of job title and classification for Mr. Stone or for the Presiding Officer just to do it. This process was embarrassing and sadden him greatly for Mr. Stone to have to hear. He felt that Mr. Stone did a great job. He welcomed now or in the future having that discussion. Once that was done, the Council could make a recommendation.

**Councilor McLain** said that the only thing the letter said was that the Council thought that they should get back to this issue. Secondly, there were two issues that had been defined and described, the first was a disparity study and the Council did need to know if that disparity study was status quo which meant the job being done at this time without reclassification or not. The second issue, in the letter that was put forward today, we again have two issues to deal with. I am not interested right now in talking about reclassification of this position. We put that aside because we wanted to do the whole office. She wanted to do that in a separate package. Did the disparity study talk about this position salary with present duties or not? And then looking at that disparity number if we need to make an adjustment. Her signature on that letter said that if this was not in line with the rest of the people with that same job description in this agency, then please make it so.

**Councilor Naito** said her intention in signing the letter was that in light of the disparity study and in light of other similar management staff positions at Metro as well as other branches in government she felt that Mr. Stone was substantially underpaid. She wanted to give that kind of ability and flexibility to the Presiding Officer. It was brought to her attention that the letter itself does on its face call for a reclassification of the position and that ability was given to the Presiding Officer. Upon reflection and discussion, she was willing to give that direction to the Presiding Officer. If he comes up with something that the Council did not like, four votes can rescind it. She did think that his title should be commensurate with his responsibilities. She felt that he had always been responsive to her individual needs, her committee chair needs, and did an outstanding job with the Smithsonian.

**Councilor McCaig** said that personally if she really believed that the disparity study had indicated that someone was being unfairly treated, she would not let it drop through the cracks. She believed that she had been above board in reference to the treatment of personnel issues. For the record, it was never her understanding that this was a fairness issue, if it were a fairness issue she would have acted at the same time as was done with Chris Billington's position. Her understanding if it was that, there was unusualness to it, she had no difficulty with doing a review. When she saw the letter it did say it was a reclassification which is a different issue. As Councilor Morissette said if it was a reclassification issue or the Council wanted to have a discussion or give Councilor Kvistad the authority to do that then she was OK with that but it was not a fairness issue.

**Councilor Washington** asked Mr. Cooper about the reclassification notation in the letter.

**Mr. Cooper** responded that the resolution that the Council adopted gave very strong authority to the Presiding Officer to determine all sorts of these issues. Whatever the policy agreements among the Councilors over what was expected of the Presiding Officer with or without the vote of the Council was between themselves. The way the resolution stood now, whether there was a Chief of Staff was something the Presiding Officer had the authority to do. Whether he wanted to this or not without discussing it with Council was between the Council and the Presiding Officer.

The letter that Councilor Washington was referring was in his understanding based on the duties currently being performed.

**Councilor Washington** said he did not bring this issue up to try and show where someone did or not do something. He felt that it had been left on the table with one of the two being taken care of. This is the Presiding Officer's responsibility and Councilor Washington requested that this be done.

**Presiding Officer Kvistad** said this was a bit different than any other position in the Council office. If they had not had the discussion that had taken place in the Budget Committee. He knew he had the authority under the Metro Code to initiate raises and reclassifications. But before he did this he wanted to make sure that in this particular case, due to the job description as well as the unique position that this represented within the Council staff, before he made those decision he wanted to have those questions answered. He did have some very strong feelings, he did intend to bring forward a package for reclassification. He did believe that the job being done currently by the individual in that position already met with most of the requirements for a change in that salary level and he intended to do that. He wanted to do this in conjunction with the request by a majority of the Council. That request had been made to do a review not simply as a direction for reclassification and he would come back to the Government Affairs Committee with a final action to be reviewed by the committee. He would then move forward with an action.

**Councilor McCaig** thanked the Presiding Officer for the review. She thought that was helpful. She took it pretty strongly that the letter said that it was a result of a disparity issue. The job title did say Chief of Staff, when Human Resources received that they assume that it was the current duties which was why that the recommendation came back that the dollar amount be increased. She as more than happy that a recommendation would come from the Presiding Officer regarding that position and whether you recommend a reclassification. She felt it was important for the world to know that the Council had adequately and fairly treated the employees that the Council had currently working for them and that their salaries had represented the jobs they were currently doing.

**Presiding Officer Kvistad** said this was where there may be disagreement. The position was current doing most of the jobs that were within there. Therefore, there needed to be a reclassification. He felt that there was a disparity and there was an issue of fairness based on the workload being done by this particular individual.

**Councilor McCaig** said that had not been addressed and therefore it should be. That was great, she was with the Presiding Officer on this.

**Councilor Naito** said that it had come to her attention in going through some of the process issues here that often times the Executive would bring matters before the Council, it went to staff and then on a Monday or Tuesday it had to be put on the agenda for the committee meetings following. She was not personally comfortable with that kind of a time frame in terms of her own familiarity or her own interest in moving on certain resolutions or ordinances. She wanted to put the Council and staff on notice that absent of someone coming to her and informing her that there was an emergency or some reason why something had to be moved forward within a week, she would be holding everything over to the meeting following. It would not summarily be put onto an agenda, she would first want to be accepting that it was a policy she wished to move forward with.

**Councilor Washington** closed by thanking the Council for indulging him on this issue. It was important to him how everyone in the Council Office was paid and compensated. He knew that this type of discussion did not take place when there was reclassification or were pay raises for other departments. He also thanked Mr. Cooper and Ms. Gregory. He particularly thanked Jeff Stone.

**Presiding Officer Kvistad** said he was very proud to have Mr. Stone on his staff. He also thanked Metro's new partners at Tualatin Valley Cable Access for being with the Council today.

## 9. ADJOURN

There being no further business to come before the Metro Council, Presiding Officer Kvistad adjourned the meeting at 4:25 p.m.

Prepared by,

Chris Billington  
Clerk of the Council

DOCUMENT NUMBER	DOCUMENT DATE	DOCUMENT TITLE	TO/FROM
070397c-01	7/1/97	Memo: Presiding Officer Authority to Reclassify Positions	Jon Kvistad/Dan Cooper
070397c-02	4/8/97	Memo: compensation ranges	/Mohammad Taqieddin
070397c-03	7/1/97	Memo: process for handling he waste management transfer station contract appeal	John Kvistad/Councilors & interested parties
070397c-04	7/1/97	Packet re: Waste Management of OR appeal to Metro Contract Review Board	/Michael Prince
070397c-05	July 1997	Motion to intervene	/Michael Prince
070397c-06		Summary of Waste Management's appeal	
070397c-07	7/3/97	Executive Communication	/Mike Burton
070397c-08	5/30/97	Letter re: Notice of appeal of contractor selection for RFP 96R-31-REM	/Fred Kahut
070397c-09	6/10/97	Letter re: above	/Fred Kahut
070397c-10	6/3/97	Letter re: above	/Tamara Townsend
070397c-11	6/17/97	Letter re: above	/G. Kevin Kiely