

BEFORE THE METRO CONTRACT REVIEW BOARD

FOR THE PURPOSE OF APPROVING ) RESOLUTION NO 07-3828  
CHANGE ORDER NO. 9 TO THE WASTE )  
DISPOSAL SERVICES CONTRACT ) Introduced by Chief Operating Officer Michael J.  
 ) Jordan, with the concurrence of Council President  
 ) David Bragdon

WHEREAS, as described in the accompanying staff report, Metro and the Contractor wish to amend certain terms and payment provisions, and to resolve other differences concerning the current Waste Disposal Services Contract; and

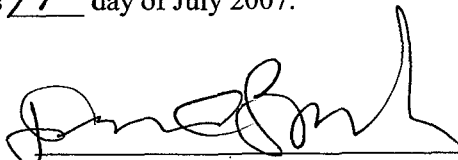
WHEREAS, Metro will incur substantial financial savings over the life of the Contract, should Change Order No. 9 be executed; and

WHEREAS, The Chief Operating Officer, having considered the matter, has forwarded it to the Council for approval; now, therefore,

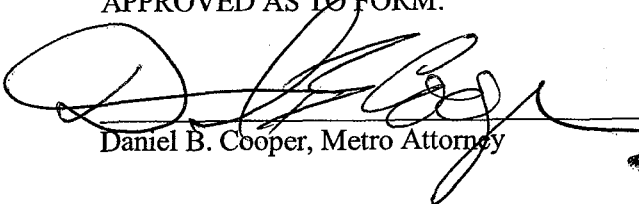
BE IT RESOLVED:

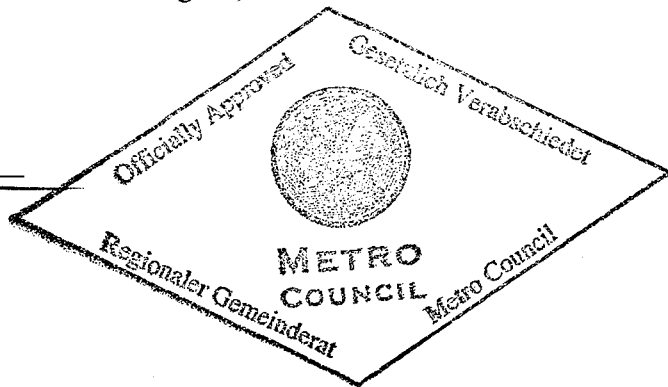
That the Metro Council, sitting as the Metro Contract Review Board, authorizes the Chief Operating Officer to execute Contract Change Order No. 9 to the Waste Disposal Services Contract in a form substantially similar to that of attached Exhibit "A."

ADOPTED by the Metro Council this 19<sup>th</sup> day of July 2007.

  
David Bragdon, Council President

APPROVED AS TO FORM:

  
Daniel B. Cooper, Metro Attorney



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MODIFICATION TO THE CONTRACT BETWEEN METRO AND WASTE  
MANAGEMENT DISPOSAL SERVICES OF OREGON, INC.  
(dba OREGON WASTE SYSTEMS, INC.)  
ENTITLED  
“WASTE DISPOSAL SERVICES”

This Contract Change Order No. 9, dated as of the last signature date below, hereby amends Metro Contract No. 900607, entitled “Waste Disposal Services,” dated April 11, 1988, including all prior amendments or change orders.

RECITALS

1. Metro and Waste Management Disposal Services Of Oregon, Inc. (“WMDS”) are parties to Metro Contract Number 900607, and other amendments or change orders (“the Waste Disposal Services Agreement” or “Agreement”).
2. On or about April 27, 1999, Metro and WMDS entered into Change Order No. 8 (“CO8”) amending certain terms and conditions contained in the Agreement. CO8 provides in Paragraph 2.b the rates WMDS shall charge for its services under the Agreement. Paragraph 4b of CO8 provided that Metro would undertake an independent study of rates in the Pacific Northwest to determine the “Market Rate” (as defined in Paragraph 4.a.ii of CO8). Section 4.b provided that if the Market Rate as of December 31, 2004, was equal to or greater than 10 percent less than the Metro Rate (as defined in Paragraph 4.a.i. of CO8), then effective July 1, 2005, the Base Rate (as defined in Paragraph 4.a.iii of CO8) would be reduced to 90 percent of the Metro Rate in effect as of December 31, 2004, and the term of the Agreement would be extended to 2019.
3. A question has arisen whether a contract between Kitsap County and an affiliate of WMDS (the “Kitsap Contract”) should be considered as a comparable contract for the purpose of determining the Market Rate under CO8.
4. In exchange for the promises and other consideration set forth in the Waste Disposal Services Agreement and in this Contract Change Order No. 9, and in order to resolve the question, and fully reserving all other rights which the parties may have under the Waste Disposal Services Agreement, the parties hereby agree as follows:

**A. Purpose**

The purpose of this Contract Change Order No. 9 is to amend certain terms, conditions and payment provisions of the Waste Disposal Services Agreement and to incorporate therein other mutually agreed provisions.

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**B. Provisions of Contract Change Order**

1. Extension of Agreement Term until December 31, 2019

The term of the Agreement is extended until December 31, 2019. To facilitate the extension this Contract Change Order No. 9 makes the following amendments: The provisions of the Contract Forms document entitled “Contract” made and entered into by and between Metro and Oregon Waste Systems, Inc., dated April 11, 1988, are amended to delete the date “December 31, 2009” and replace it with the date “December 31, 2019.” In addition, the provisions contained in the Proposal of Oregon Waste Systems, Inc. dated December 21, 1987, under the heading “Start of Disposal Operation and Contract Completion Time (the provisions of which having been incorporated into the Waste Disposal Services Agreement under Article 1B.(4) of the General Conditions of the Contract Documents), are deleted and superseded by this Contract Change Order No. 9. In addition, the provisions contained in the second paragraph, beginning at the fourth sentence and following to the end of the paragraph in the Contract Document entitled “Invitation to Bid” are deleted and superseded by this Contract Change Order No. 9. Finally, Section B(1) of CO8 is amended to delete the date “December 31, 2014” and replace it with the date December 31, 2019.

Paragraph 4 (e) of CO 8 is amended to delete the phrase “[i]n the event that, as a result of the rate comparisons made by Metro under this Contract Change Order, the term of this Waste Disposal Services Agreement is extended to December 31, 2019, then” from the first sentence of the paragraph. Paragraph 4(e) shall now read:

“On or about January 10, 2015 Metro shall undertake to perform a final comparison of the Metro Rate in effect as of December 31, 2014 with the Market Rate in effect as of that same date.”

2. No Rate Comparison in 2010

Paragraph 4(c) and (d) of CO8 shall be deleted in their entirety. Metro shall not be entitled to perform a comparison of the Metro Rate in effect as of December 31, 2009 with the Market Rate in effect as of December 31, 2009.

3. Putrescible Waste

Paragraph 4(a)(ii) of CO8 is amended to provide as follows:

“The term ‘Market Rate’ shall mean the lowest per ton putrescible solid waste disposal rate, exclusive of any applicable regulatory fees, charged to any public body, including but not limited to any state, county, city, district, solid waste authority or other similar

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unit of government, that delivers or causes to be delivered for disposal during each of calendar year 2012, 2013 and 2014 at least 200,000 tons of putrescible solid waste under a contract containing a term of at least 10 years in any landfill in Oregon, Washington or Idaho that is owned or controlled by Contractor, Waste Management Holdings Incorporated, Waste Management Incorporated, Waste Management of North America, Inc. or any of their respective corporate parents or corporate subsidiaries whether in existence at the time of this Contract Change Order or later created. In calculating the Market Rate under this section, only putrescible waste generated within the contracting public body's jurisdiction shall count towards the requirement that a comparable contract be with a public body that delivers for disposal at least 200,000 tons of putrescible solid waste per year under a contract containing a term of at least 10 years. In the event that any such public body has entered into an agreement for landfill disposal which combines the costs of such disposal with any cost not related to such disposal, including but not limited to the collection, transfer or transportation of such solid waste, the Contractor shall demonstrate the amount of the public body's actual per ton costs for disposal of such waste.

Paragraph 4(a)(iv) shall be added to CO8 providing the following definition of putrescible solid waste:

“The term ‘putrescible solid waste’ shall be defined as waste containing rapidly decomposable material by microorganisms, which may give rise to foul smelling, offensive products during such decomposition or which is capable of attracting or providing food for birds and potential disease vectors such as rodents and flies. A load of waste shall be considered putrescible solid waste in its entirety if it contains more than a trivial amount of putrescible solid waste. “Special Waste” as defined in Section 14 of the Specifications of the Agreement is excluded from this definition of putrescible solid waste. Notwithstanding any other definitions, for the purposes of the Agreement and all Change Orders and amendments to the Agreement, any putrescible solid waste that remains after processing at a solid waste facility, including but not limited to processing for the removal of re-useable or recyclable materials, shall be included in this definition of putrescible solid waste.

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4. Kitsap Contract Not to be considered for future Rate Comparisons

The Kitsap County, Washington contract (“Kitsap Contract”) shall not be considered for the 2014 Final Rate Comparison provided in Section 4(e) of CO8, or any other rate comparison if the Agreement is extended beyond December 31, 2019.

5. Amendment of Payment Provisions

Paragraph 2(b) of CO8 is deleted and replaced with the following:

Effective July 1, 2007, for each ton of Metro Solid Waste Tonnage which Metro delivers, or authorizes to be delivered directly quarterly to Contractor, Metro shall pay Contractor an amount equivalent to the per ton price produced by applying the following declining incremental price schedule to the total quarterly Regional Solid Waste Tonnage:

<u>If Quarterly Regional Solid Waste Tonnage is:</u>	<u>The Price per Ton for the Metro Solid Waste Tonnage Included in such Tonnage shall be:</u>
0 to 137,500 tons	\$24.84 per ton
137,501 to 148,125 tons	\$11.28 per ton
148,126 to 158,750 tons	\$10.69 per ton
158,751 to 169,375 tons	\$10.11 per ton
169,376 to 180,000 tons	\$9.53 per ton
180,001 to 190,625 tons	\$8.94 per ton
Above 190,625 tons	\$8.34 per ton

These rates shall be subject to adjustment under Paragraph 3 of CO8 and Article 19B of the Agreement, as amended, for the Contract Price Adjustments occurring on July 1, 2008 and July 1, 2009.

Metro shall receive an additional rate reduction, calculated by subtracting ninety three cents (\$0.93) per ton from each rate tier in effect as of July 1, 2009. The rates thus established shall be effective July 1, 2010, and shall be subject to adjustment under Paragraph 3 of CO8 and Article 19B of the Agreement, as amended, beginning with the Contract Price Adjustment occurring on July 1, 2011 and continuing through the Contract Price Adjustments on each July 1 thereafter.

Except as otherwise provided in this section, Metro agrees to release and discharge WMDS from any claim, liability or further rate reduction arising from or under the Initial Rate Comparison provision in Paragraph 4 (b) of CO8.

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5A. Correction of CO8 Inflation Provisions

The Inflation Adjustment formula set forth in Paragraph 3b of CO 8 is corrected and amended to read as follows:

“AI = (((CI<sub>X</sub> – CI<sub>B</sub>) / CI<sub>B</sub>) x 0.7) – 0.005), with the terms of the formula modified so that CI<sub>X</sub> represents the amount of the Consumer Price Index for the calendar year ending each December 31, and CI<sub>B</sub> represents the Consumer Price Index for the calendar year which precedes the year used to calculate CI<sub>X</sub>”

The Inflation Adjustment formula set forth in Paragraph 3c of CO 8 is corrected and amended to read as follows:

“AI = (((CI<sub>X</sub> – CI<sub>B</sub>) / CI<sub>B</sub>) x 0.9) – 0.005), with the terms of the formula modified so that CI<sub>X</sub> represents the amount of the Consumer Price Index for the calendar year ending each December 31, and CI<sub>B</sub> represents the Consumer Price Index for the calendar year which precedes the year used to calculate CI<sub>X</sub>”

6. Comparable Contracts for Rate Review

WMDS shall provide to Metro a list of all putrescible solid waste disposal contracts between a public body and WMDS and any affiliated companies in the states of Oregon, Washington, and Idaho for the 2014 Final Rate Comparison and any subsequent rate review if the Agreement is extended beyond December 31, 2019.

7. Ninety Percent Guarantee

Paragraph 5(a) of CO8 shall be amended to delete the term “acceptable waste”, which is replaced with the term “putrescible solid waste” so it shall read:

“Each calendar year, Metro agrees to deliver to Contractor’s disposal site or to landfills owned or operated by Contractor, Waste Management Holdings, Incorporated, Waste Management Incorporated, Waste Management of North America, Inc. or any of their respective corporate parents or corporate subsidiaries, whether in existence at the time of this Change Order or later created, a minimum of 90 percent of the total tons of putrescible solid waste that Metro delivers to any general purpose landfill during the calendar year.”

The following definitions shall apply to Paragraph 5(a) of CO8.

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The phrase "Metro delivers" shall mean the disposition of putrescible solid waste that Metro delivers or causes to be delivered from solid waste facilities owned by Metro, or that Metro directs to be delivered to any General Purpose Landfill under its licensing, franchising or flow control authority.

"Putrescible Solid Waste" shall have the meaning set forth in Paragraph 3 to this Change Order No. 9.

8. Release From Damages For Any Default Under 90 Percent Guarantee

WMDS agrees to release and forever discharge Metro from any damages accruing before June 30, 2007, for any default under the 90 percent guarantee provided for in Section 5(a) of CO8.

9. No Other Modifications

Except as modified herein, all other terms and conditions of the original Agreement and all other previous amendments or change orders shall remain in full force and effect. Any material conflict between the provisions of the original Agreement, and other previous amendments or change orders, on the one hand, and this Contract Change Order No. 9 on the other hand, shall be resolved by reference to and reliance upon this Contract Change Order No. 9.

WASTE MANAGEMENT DISPOSAL  
SERVICES OF OREGON, INC.

METRO

By: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

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## STAFF REPORT

### IN CONSIDERATION OF RESOLUTION NO. 07-3828 FOR THE PURPOSE OF APPROVING CHANGE ORDER NO. 9 TO THE WASTE DISPOSAL SERVICES CONTRACT

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Date: July 19, 2007

Prepared by: Douglas Anderson

#### PROPOSED ACTION

Adopt Resolution No. 07-3828 authorizing the Chief Operating Officer to execute Change Order No. 9 to the Waste Disposal Services Contract between Metro and Waste Management Disposal Services (doing business as Oregon Waste Systems, Inc.).

#### BACKGROUND

Metro's waste disposal contract includes provisions to ensure that Metro's disposal rates will remain competitive over the life of the contract. The contract defines the "market rate" to be *the lowest per-ton disposal price charged to any public body under a comparable contract at any landfill owned by Waste Management in Oregon, Washington or Idaho.*

The contract establishes a procedure for determining whether Metro's rates remain at market. In broad outline, that procedure involves a "Market Rate Comparison" every five years—in 2004, 2009, and 2014—in which Metro (a) identifies the public contracts that qualify for comparison, and then (b) compares the terms of each qualifying contract with Metro's prevailing rate.

The contract specifies that Metro will receive certain rate reductions if any qualifying contract rate is 5 percent or more below Metro's rate. The contract further stipulates that Waste Management will receive a 5-year contract extension if the rate reduction is 10 percent. (Waste Management is eligible for only one five-year extension, however.)

After the 2004 market rate comparison, a question arose between Metro and Waste Management whether a certain contract with another public body qualified for inclusion in the Market Rate Comparison. The parties resolved this question, together with other ancillary issues, in a mediated settlement that is formalized by Change Order No. 9.

#### The Elements of Change Order No. 9

1. Effective July 1, 2007, Metro will receive a reduction of 45¢ per ton from the rate that would otherwise have been charged for disposal at Columbia Ridge Landfill.
2. In lieu of the Market Rate Comparison of 2009, Metro will receive an additional reduction of 93¢ per ton, effective July 1, 2010. In addition, Waste Management will forego the annual inflation adjustment that would normally have taken effect on July 1, 2010.
3. Metro releases and discharges Waste Management from any claim, liability or further rate reductions arising from the 2004 Market Rate Comparison.
4. The contract is extended five years, to December 31, 2019.
5. The public contract that triggered the present contract question will not be considered in the 2014 Market Rate Comparison.



6. The contract language that led to the present question is amended for clarity in future Market Rate Comparisons.
7. Contract language that defines Metro's waste flow guarantee is aligned with the amendments to the Market Rate Comparison language for clarity, and to avoid future disputes over the type of solid waste that is subject to the flow guarantee.
8. Waste Management releases and discharges Metro from any damages that might have arisen from questions over compliance with the flow guarantee in the past.

## **INFORMATION/ANALYSIS**

1. **Known Opposition.** There is no known opposition.
2. **Legal Antecedents.** Any major change to a significant contract, such as Change Order No. 9 to the Waste Disposal Services contract, requires an authorizing resolution of the Council.
3. **Anticipated Effects:** Change Order No. 9 will result in savings of approximately \$260,000 per year from costs that would otherwise have been charged for disposal at Columbia Ridge Landfill through FY 2009-10. The savings beyond FY 2009-10 depend on assumptions about tonnage, market rates, the results of future Market Rate Comparisons, and the conditions for extending the contract to 2019, absent approval of Change Order No. 9. Staff has estimated the savings during the last decade of the contract to average an additional \$80,000 per year over the \$260,000 already realized, for a total savings of approximately \$4 million from July 1, 2007 through December 2019.
4. **Budget Impacts.** Unless the Metro Council adopts a mid-year rate adjustment and/or amends the FY 2007-08 Solid Waste & Recycling budget, the cost savings during the next fiscal year will accrue to the Solid Waste Fund balance. After FY 2007-08, the savings will result in lower disposal charges at the Metro transfer stations—although, of course, the Council will retain the budgetary discretion to increase other expenditures that offset the disposal savings and leave the tip fee unchanged, all else equal.

## **RECOMMENDATION**

The Chief Operating Officer recommends adoption of Resolution No. 07-3828.