

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF ENTERING INTO AN  
EXCLUSIVE DISTRIBUTORSHIP AGREEMENT  
WITH MILLER PAINT

) RESOLUTION NO. 09-4073

) Introduced by Chief Operating Officer  
Michael Jordan with the concurrence of  
Council President David Bragdon

WHEREAS, Metro has sold recycled latex paint, called MetroPaint, which is manufactured from paint collected at Metro's household hazardous waste facilities, since August 1999; and

WHEREAS, in Fiscal Year 2008-2009, Metro sold more than 112,000 gallons of MetroPaint and collected nearly \$1 million in revenue from the sales; and

WHEREAS, notwithstanding the success of the MetroPaint sales program, Metro donates or disposes a significant volume of the paint collected at Metro's household hazardous waste facilities because of lack of demand for MetroPaint; and

WHEREAS, to increase sales of MetroPaint in the Metro region, Metro developed a strategy to pilot a local distribution network of resellers;

WHEREAS, Miller Paint, a Portland-based employee-owned company in business since 1890, wishes to enter into a distributorship agreement with Metro for the sale of MetroPaint; and

WHEREAS, the distributorship agreement provides that Miller Paint will purchase a minimum volume of MetroPaint in exchange for becoming Metro's exclusive distributor of MetroPaint in Oregon and Washington; and

WHEREAS, entering into an exclusive distributorship agreement with Miller Paint will result in additional revenue to Metro, now therefore

BE IT RESOLVED that the Metro Council finds that entering into an exclusive distributorship agreement with Miller Paint for the sale of MetroPaint, in a form substantially similar to the document attached to this resolution as exhibit A, will promote the economic development of the agency.

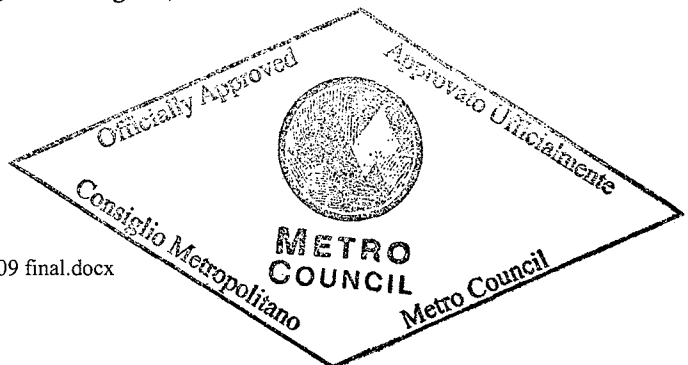
ADOPTED by the Metro Council this 10th day of September, 2009.

  
David Bragdon, Council President

Approved as to Form:

  
Daniel B. Cooper, Metro Attorney

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# Distribution Agreement

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Contract # \_\_\_\_\_

THIS AGREEMENT is between Metro (“Metro”), a metropolitan service district organized under the laws of the State of Oregon and the Metro Charter, located at 600 N.E. Grand Avenue, Portland, Oregon 97232-2736, and Miller Paint Co., Inc. (“Distributor”), an Oregon-based manufacturing-retailer whose Corporate Offices are located at 12812 NE Whitaker Way, Portland, Oregon 97230.

In exchange for the promises and other consideration set forth below, the parties agree as follows:

1. Duration. This agreement shall be effective August 1, 2009, and shall remain in effect until and including July 31, 2012, (hereinafter “Term”) unless terminated or extended as provided in this Agreement. Upon mutual agreement, this Agreement may be extended for additional periods. The parties will not unreasonably withhold approval of such extensions.
2. Definitions. In this Agreement the following terms shall have the following meanings:
  - (a) “Architectural Paint” – paint intended for use on interior or exterior surfaces of buildings.
  - (b) “Existing Resellers” – established as of August 1, 2009 and as listed in Attachment B.
  - (c) “Product”- recycled latex paint manufactured by Metro.
  - (d) “Territory” – the states of Oregon and Washington.
3. Grant of Distributorship. Metro appoints Distributor as its sole and exclusive distributor in the Territory for the sale of Product for resale, with the following exceptions:
  - (a) Existing Resellers.
  - (b) Oregon or Washington-based resellers that will sell the Product only to customers outside of the Territory.
  - (c) Oregon or Washington-based companies that incorporate the paint into a product other than Architectural Paint and will not resell the Product in the Territory.
4. Distributor’s General Obligations. Distributor shall:
  - (a) Provide pickup of Product purchased from Metro at the MetroPaint production facility, Swan Island, 4825 N. Basin Ave., Portland, Oregon 97217.
  - (b) Devote its best efforts to promoting and selling the Product purchased from Metro to customers within the Territory.
  - (c) Use its best efforts to enact and carry out a merchandising policy designed to preserve the good will that is associated with the name and reputation of Metro and the Product.
  - (d) Conduct any and all sales activities in connection with the Product in a lawful manner, consistent with the highest standards of fair trade, fair competition and business ethics. Distributor shall

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keep the interior and exterior of its business premises in a state of good repair and in a clean and orderly manner; all Product shall be neatly and properly displayed to the retail public.

- (e) Use its best efforts to diligently and faithfully develop demand for the Product and to solicit purchases thereof, so as to maintain a substantial and increasing volume of sales of the Product. Distributor further agrees that, at all times hereunder, it will maintain adequate working capital, inventory, facilities and personnel to accomplish this purpose.
- (f) Allow Metro to review and provide input on all marketing materials Distributor develops for the Product.

5. Metro's General Obligations. Metro shall:

- (a) Provide Product to Distributor for which Distributor places orders promptly, when Product is available. When determining availability, Metro may make reasonable consideration of the immediate needs of Existing Resellers. Metro's failure to supply Product ordered by Distributor does not constitute a breach of this Agreement.
- (b) Refrain from selling any Product to any person in the Territory for purposes of resale within the Territory, other than Distributor or Existing Resellers as listed in Attachment B of this agreement, so long as Distributor is not in breach of any term of this Agreement.
- (c) Provide marketing support to Distributor, including: referring callers to Metro's Recycling Information Hotline to Distributor's stores; providing technical information about MetroPaint to Distributor; and providing MetroPaint-related graphic files to Distributor for production of brochures and other marketing materials.

6. Minimum Purchase Obligation. To maintain its exclusivity in the Territory, Distributor shall submit purchase orders to Metro that meet or exceed 30,000 gallons per year for each of the three years of the Term of the Agreement.

7. Prices and Terms of Payment

- (a) For calendar year 2009 Metro shall charge Distributor unit pricing for the Product as set forth in Attachment A.
- (b) Metro will provide pricing to Distributor for subsequent calendar years by December 1 of the previous year.
- (c) Metro may make one mid-year change to pricing annually.
- (d) Metro will provide all price changes to Distributor at least 30 days before new prices become effective.
- (e) By mutual agreement, pricing for additional sizes and varieties of the Product may be added at any time by amending Attachment A.
- (f) The prices Metro charges Distributor for its Product at any time during the Term of this Agreement, including those set forth on the Current Product List (Attachment A), shall be no

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greater than the lowest prices Metro charges any of its other Existing Resellers, as listed in Attachment B, anywhere in the Territory for the same Product at the same time.

- (g) Distributor may pay Metro for Product prior to shipment, or may pay Metro for Product according to the terms of a credit agreement signed by Distributor. If Distributor does not maintain a credit account in good standing, Distributor shall provide payment prior to shipment.
8. Trademarks and Copyrights. Distributor hereby acknowledges Metro's exclusive right, title and interest in and to any and all trademarks and trade names (hereinafter such trademarks and trade names shall be collectively referred to as the "Trademarks") and copyrights ("Copyrights") which Metro may have at any time adopted, used, registered or been issued in the United States or in any other location, and Distributor agrees that it shall not do, nor cause to be done, any acts or things contesting or in any way impairing or tending to impair any portion of Metro's right, title and interest in and to the Trademarks and Copyrights. Distributor further acknowledges that, in connection with any reference to the Trademarks and Copyrights, Distributor shall not in any manner represent that it possesses any ownership interest in the Trademarks and Copyrights or the registration thereof, nor shall any action taken by Distributor or on Distributor's behalf create in Distributor's favor any right, title or interest in and to the Trademarks and Copyrights.
9. Warranties.
- (a) For each Product sold by Metro to Distributor, Metro shall provide Distributor with the same limited warranty for the Product which Metro provides its own customers.
- (b) Distributor shall provide such Metro's warranty to all persons who purchase any Product from it, without varying any of its terms or provisions.
- (c) Metro shall in Metro's sole and unfettered discretion promptly replace any Product which is defective, and which is covered under the warranty, whether such Product is owned at the time of the malfunction by Distributor or a customer of Distributor.
10. Indemnity. Distributor shall indemnify Metro and hold Metro harmless from and against, and shall defend against, any and all claims and damages of every kind for injury to or death of any person or persons and for damage to or loss of property, arising out of or attributed, directly or indirectly, to the conduct, operations or performance of Distributor under this Agreement.
- Subject to the limits of the Oregon Tort Claims Act and the Oregon Constitution, Metro shall indemnify Distributor and hold Distributor harmless from and against, and shall defend against, any and all claims and damages of every kind for injury to or death of any person or persons and for damage to or loss of property, arising out of or attributed, directly or indirectly, to the conduct, operations or performance of Metro.
11. Insurance. Distributor shall maintain the following types of insurance, covering the Distributor, its employees, and agents, and agrees to provide documentation of coverage upon Metro's request:
- (a) Broad form commercial general liability insurance covering bodily injury and property damage, with automatic coverage for premises, operations, and product liability, shall be a minimum of \$1,000,000 per occurrence. The policy must be endorsed with contractual liability coverage; and



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- (b) Automobile bodily injury and property damage liability insurance coverage shall be a minimum of 1,000,000 per occurrence.
  - (c) Distributor, its subcontractors utilized in the performance of this Agreement, if any, and all employers working under this Agreement that are subject employers under the Oregon Workers' Compensation Law shall comply with ORS 656.017, which requires them to provide Workers' Compensation coverage for all their subject workers.
12. Consequential Damages Excluded. Metro will use its best efforts to satisfy and fill orders placed by Distributor. Because lead time will vary according to manufacturing and other conditions, and delivery dates communicated by Metro are only estimates, under no circumstances shall Metro on account of late delivery or non-delivery be liable to Distributor, its agents, sub-distributors, customers or any other persons for any special or consequential damages, whether based upon lost goodwill, lost resale profits, work stoppage, impairment of other goods, breach of contract, negligence or such other actions as may be deemed or alleged to be the cause of loss or damage to such a person.
13. Assignment and Subcontracts. This Agreement shall not be assigned or subcontracted by the Distributor without the prior written consent of Metro.
14. Independent Distributor Relationship. Distributor agrees that, with respect to all matters relating to this Agreement, Distributor shall be deemed to be an independent Distributor and shall bear all its own expenses in connection with this Agreement. Distributor shall have no authority, whether express or implied, to assume or create any obligation on behalf of Metro nor shall Distributor issue or cause to be issued any quotations or draft any letters or documents over the name of Metro, but rather shall use its own name for such purposes. This Agreement is not intended to be, nor shall it be construed as a joint venture, partnership or other formal business organization, and neither party shall have the right or obligation to share any of the profits, or bear any losses, risks or liabilities of the other party by virtue of this Agreement. Neither party is authorized to legally bind or enter into agreements, verbal or written, on behalf of the other party.
15. Termination.
- (a) **Termination of Exclusivity and of the Agreement.** If Distributor fails to place or pay for orders with Metro as contemplated and required in Section 6 and Section 7 of this Agreement and if such failure is not cured within thirty (30) days of demand by Metro, then Metro shall be entitled, in Metro's sole and unfettered and absolute discretion, to forthwith terminate Distributor's exclusivity within the Territory by terminating this Agreement, all without prejudice to any other remedy to which Metro may be entitled at law, in equity or otherwise under this Agreement.
- In the event Distributor's exclusivity is terminated in accordance with the provisions of this Section, and as long as Distributor is not in default of any other provision of this Agreement, then this Agreement shall continue in full effect, modified only as follows: Distributor shall not be exclusive within the Territory, and Metro shall be relieved of its obligations set forth in Sections 5(b) and 5(c) hereinabove. The provisions of this Section 15(a) in respect of termination of this Agreement shall continue and apply subsequent to and notwithstanding any waiver or any termination of exclusivity by Metro and any such waiver or termination shall not be construed as being a continuing waiver in respect of a subsequent or continuing breach of the terms of Section 15(a).

## Distribution Agreement

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**(b) Termination of the Agreement by Metro.**

- (i) Termination for Convenience. Metro may terminate this Agreement upon giving Distributor 90 days' written notice. If Metro terminates the Agreement under this clause, Metro agrees not to sell Product to any person or reseller in the Territory for their purposes of resale within the Territory, for the duration of the remaining term of this Agreement, other than the Existing Reseller exceptions listed in Attachment B.
- (ii) Immediate Termination. At all times, except during a case as described below under Title 11 of the United States Code, Metro may terminate this Agreement without prejudice to any other remedy to which it may be entitled at law, in equity, or otherwise under this Agreement, immediately upon notice from Metro if Distributor becomes insolvent, has a receiver of its assets or property appointed, or makes an assignment for the benefit of creditors.

If Distributor files for bankruptcy or has an involuntary case filed against it, at any time before the closing of Distributor's case, under Title 11 of the United States Code, Metro shall be entitled to relief from any automatic stay imposed by Section 362 of that Title as amended, or otherwise, on or against the exercise of the rights and remedies otherwise available to Distributor.

- (iii) Termination for Non-appropriation of Funds. Metro certifies at the time of this Agreement that funding is available and approved for this program. Future appropriation of funds for this program is subject to the annual budget approval process by the Metro Council. In the event that Metro's Paint Collection Program or Recycled Latex Paint program is not funded in future fiscal years, Metro reserves the right to terminate this Agreement without penalty due to non-appropriation of funds.

- (c) Termination of the Agreement by Distributor.** Termination for Convenience. Distributor may terminate this Agreement upon giving Distributor 90 days' written notice. If Distributor terminates the Agreement under this clause, Distributor agrees not to purchase other recycled Product for their purposes of resale, for the duration of the remaining Term of this Agreement.

16. General Conditions.

- (a) A waiver of any term or condition of this Agreement must be in writing, signed by Metro if Metro is making the waiver, or by the Distributor if the Distributor is making the waiver. Waiver of a term or condition of this Agreement by either party shall neither waive nor prejudice that party's right otherwise to require performance of the same term or condition or any other term or condition.
- (b) This Agreement shall be construed, applied, and enforced in accordance with the laws of the State of Oregon. The site of this Agreement is Portland, Oregon.
- (c) If any provision of this Agreement shall be invalid, illegal, or unenforceable in any respect, the validity of the remaining provisions contained in this Agreement shall not be affected.
- (d) If any deadline required to be computed under any provision of this Agreement falls on a Saturday, Sunday, or legal holiday, then the deadline shall be the next day which is not a

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Saturday, Sunday, or legal holiday. As used in this subsection, "legal holiday" means legal holiday as defined in Oregon Revised Statutes 187.010 and 187.020, as amended.

- (e) This Agreement is the entire agreement between the Parties.
- (f) All notices under this Agreement shall be in writing, and may be delivered by hand or sent by facsimile transmission or registered mail, return receipt requested. Notices sent by mail shall be deemed received on the date of receipt indicated by the return verification provided by the U.S. postal service. Notices delivered by hand or facsimile transaction shall be effective upon receipt. Notices shall be given or sent to the parties at the following addresses:

To Metro: Metro  
600 NE Grand Ave.  
Portland, Oregon 97232  
Fax No. (503)797-1791  
Attn.: Procurement Manager

To Distributor: Miller Paint Co. Inc.  
12812 NE Whitaker Way  
Portland, Oregon 97230  
Fax No.(503) 255-0192  
Attn: Stephen L. Dearborn, President and CEO

With copy to: Scarborough, McNeese, O'Brien & Kilkenny, P.C.  
5410 SW Macadam Avenue, Suite 100  
Portland, Oregon 97239-3824  
Fax No. (503) 241-7342  
Attn: Christian M. Oelke, Esq

Miller Paint Co., Inc.

METRO

By \_\_\_\_\_  
Stephen L. Dearborn

By \_\_\_\_\_

Title: CEO & President

Title \_\_\_\_\_

Date \_\_\_\_\_

Date \_\_\_\_\_

**METRO**

600 NE Grand Ave.  
Portland, OR 97232-2736  
(503) 797-1700

## Attachment A

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Metro Contract No. \_\_\_\_\_

Pricing for Calendar Year 2009

All pricing is for Certified MetroPaint

Colors:	<i>1 gallon cans</i>	<i>5 gallon pails</i>
Mountain Snow (white) Seashell (cream) Fawn (light brown) Desert (khaki)	<b>\$5.25</b>	<b>\$25.00</b>
Espresso (dark brown) Misty (light gray) Barn Red (dark red)	<b>\$4.75</b>	<b>\$22.00</b>
Forest (Dark Green)	<b>\$4.25</b>	<b>\$19.00</b>





**METRO**

600 NE Grand Ave.  
Portland, OR 97232-2736  
(503) 797-1700

## Attachment B

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Metro Contract No. \_\_\_\_\_

### Existing Resellers

#### OREGON

##### "Factory Outlet" in Portland

**MetroPaint**  
4825 N. Basin Ave.  
Portland, OR 97045  
(503) 234-3000  
[www.oregonmetro.gov/paint](http://www.oregonmetro.gov/paint)

##### Salem area

**Rick's Bargain Center**  
2973 12th St SE  
Salem, OR 97302  
(503) 363-9070

##### Eugene area

**Bring Recycling**  
4446 Franklin Blvd  
Glenwood, OR 97403  
(541) 746-3023  
[www.bringrecycling.org](http://www.bringrecycling.org)

##### Medford area

**Builders Bargain Center**  
8215 15th St  
White City, OR 97503  
(541) 830-8118  
[www.buildersbargaincenterinc.net](http://www.buildersbargaincenterinc.net)

#### WASHINGTON

##### Vancouver

**Interstate Tile & Design**  
801 West Fourth Plain Blvd  
Vancouver, WA 98660  
(360) 696-2200  
[www.interstatetileanddesign.com](http://www.interstatetileanddesign.com)

##### Kelso-Longview

**Fistolera Paint Co.**  
1626 Westside Hwy  
Kelso, WA 98626  
360/425-9781

##### Olympia area

**BJs' Paint 'N Place**  
6528 Capitol Blvd S  
Tumwater, WA 98501  
(360) 943-3232  
[www.bjspaint.com](http://www.bjspaint.com)

##### Seattle

**Second Use Building Materials**  
7953 2nd Ave S  
Seattle, WA 98108  
(206) 763-6929  
[www.seconduse.com](http://www.seconduse.com)

##### Spokane

**Eco Depot**  
1326 E Sprague Ave  
Spokane, WA 99202  
(866) 378-0344  
[www.ecodepotinc.com](http://www.ecodepotinc.com)

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## **STAFF REPORT**

### **IN CONSIDERATION OF RESOLUTION NO. 09-4073, FOR THE PURPOSE OF ENTERING INTO AN EXCLUSIVE DISTRIBUTORSHIP AGREEMENT WITH MILLER PAINT**

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Date: September 10, 2009

Prepared by: Jim Quinn, ext. 1662

## **BACKGROUND**

Metro has been manufacturing and selling MetroPaint, the recycled latex paint made from leftover paint collected in Metro's hazardous waste program, for ten years as of August 2009. In FY08-09 more than 112,000 gallons of MetroPaint was sold, bringing in nearly \$1 million in revenue. More than 900,000 gallons have been sold since 1999. However there is still a significant volume of the collected paint that could be made into MetroPaint but is instead disposed or donated, due to the lack of a market.

Over the years Metro staff have undertaken a number of initiatives to increase sales of MetroPaint. In mid-2008 a marketing plan for FY08-09 was completed. When the plan was written the only retail location in the Metro region where MetroPaint was available was the MetroPaint "factory outlet" on Swan Island (several resellers carry MetroPaint outside of the Metro region, including locations in the Salem, Eugene and Medford areas in Oregon, and the Vancouver, Olympia, Seattle and Spokane areas in Washington). As a way to increase sales in the Metro region the marketing plan included the following strategy element: "Pilot a local distribution network of resellers". To implement this element of the plan Metro staff contacted a few potential resellers in the area to assess the level of interest. The only company among those contacted that showed interest was Miller Paint, a Portland-based employee-owned company in business since 1890.

In June 2009 Miller Paint placed an initial order for about 5,200 gallons of MetroPaint paint, and now carries it in all 20 of their Portland-area stores. They have expressed a desire to carry the paint in all 33 of their stores around Oregon and Washington, and have indicated that they can sell about 30,000 gallons a year initially, ramping up to as much as 100,000 gallons per year eventually.

However Miller has requested that Metro engage in an exclusive distributorship agreement with them. They believe that marketing MetroPaint will require a significant level of effort on their part, and to justify this effort they want to ensure that their competitors do not have the opportunity to carry MetroPaint in their stores.

Metro staff have developed a proposed agreement with Miller Paint, included as exhibit A to the resolution. Key provisions include:

- As long as Miller Paint places orders for at least 30,000 gallons per year, Metro will refrain from selling MetroPaint to any other party for the purposes of resale within Oregon or Washington
- Existing resellers, including the MetroPaint store on Swan Island, are grandfathered in
- The agreement is in effect for three years, with a provision for extending it for additional time

## **ANALYSIS/INFORMATION**

1. **Known Opposition:** None
2. **Legal Antecedents:** ORS 279A.185(2) provides that notwithstanding the requirements of ORS 279B and 279C, a contracting agency may negotiate with private parties to establish contracts for the disposition of personal property owned by the agency. Before approving such a contract, the agency's governing body must make a finding that the contract promotes the economic development of (1) the agency; (2) the geographic area where the agency is located; or (c) other public bodies that perform similar functions. See also Metro Code Section 2.04.064(b).
3. **Anticipated Effects:** With this agreement in place Miller Paint will ramp up their marketing efforts to maximize sales of MetroPaint through their stores.
4. **Budget Impacts:** Miller Paint purchasing the anticipated 30,000 gallons of MetroPaint annually will bring in about \$142,000 in revenue to Metro each year, totaling \$426,00 over three years, with the possibility of more revenue if Miller Paint is able to sell greater quantities.

## **RECOMMENDED ACTION**

Metro Council approve resolution 09-4073, finding that the proposed exclusive distributorship agreement with Miller Paint promotes the economic development of the agency, and authorizing execution of the agreement.