



CITY OF SANTA BARBARA

COUNCIL AGENDA REPORT

AGENDA DATE: February 28, 2012

TO: Mayor and Councilmembers

FROM: Environmental Services, Finance Department

SUBJECT: Exclusive Right To Negotiate Agreement With MarBorg Industries

RECOMMENDATION:

That Council approve a 180 day Exclusive Right to Negotiate Agreement between the City and MarBorg Industries for a possible Citywide Solid Waste Franchise.

DISCUSSION:

Agreement

Since 2003, the City has had two “zones” for solid waste collection and disposal in the business, multi-family residential, and single family residential sectors, each zone representing approximately half of the City. These are the two largest contracts the City has with a private company. Collectively, these contracts are worth almost \$16 million per year to the hauler(s). The cost of these services is funded entirely through the solid waste rates that the City charges to its residents and businesses.

The current hauler for both zones is MarBorg Industries (“MarBorg”). The contracts for both zones expire in June 2013, however MarBorg has two 5-year options in the contract for Zone Two that will allow it to continue to provide service in Zone Two until June 2023.

On December 13, 2011, Council authorized the Finance Director to enter into exclusive negotiations with MarBorg Industries for a new Citywide Solid Waste Franchise Agreement contingent on MarBorg’s written agreement, in a form acceptable to the City attorney, to do the following:

1. Provide the City with an option to extend the term of the current franchise agreement for an additional year should agreement not be reached before June 30, 2012;

2. Provide a deposit to cover the City's costs for HF&H's consultant services related to the franchise renewal process, up to a maximum of \$120,200; and
3. Provide City staff with access to all available financial information about the City's franchise zones, including, but not limited to, MarBorg's operations, revenues, costs, and profits.

The Exclusive Right to Negotiate Agreement presented for approval here, signed by MarBorg, includes the terms outlined by the City Council. As part of the Exclusive Right to Negotiate Agreement, MarBorg has agreed up front that a new agreement will include many covenants, such as restrictions transfer and sale of MarBorg's C&D facility, that were secured from MarBorg in 2003 in consideration for the two 5-year options included in its current franchise agreement for Zone Two.

Negotiations

Although HF&H and staff believe that the proposal received from MarBorg can and should be improved upon through further negotiations, the MarBorg proposal will provide a starting point to begin those negotiations. Some key issues for negotiation follow:

- **Overall Hauler Compensation:** Competitive procurements generally lead to a "sharpening of the pencil;" yet, according to HF&H, MarBorg's proposal would actually slightly increase hauler revenues. Staff will seek overall compensation payable to MarBorg that better reflects the following: cost efficiencies achieved through the consolidation of the two City zones under one hauler and through MarBorg's increased regional presence; potential hauler cost reductions from customer migration to curbside service; a hauler profit margin reasonably similar to what might be achieved in a competitive procurement process; and an adjustment to reflect the lingering effect of the economic downturn on the business sector, which led to a negotiated concession from MarBorg and Allied Waste in Fiscal Year 2012.
- **Rate Structure:** *[Note: This is a separate issue from the overall hauler compensation, since equivalent levels of hauler compensation can be achieved whether using the current rate structure, the proposed rate structure, or some alternative.]* The rate restructuring proposed by MarBorg would reduce many of the financial incentives for diversion in the business and multi-family residential sectors. It would also provide single family residential rate reductions by increasing overall rates to the other sectors, primarily businesses. Staff will explore this proposal further with MarBorg. However, absent convincing evidence of the need for such restructuring, and enforceable assurances that City diversion rates would not be negatively affected, staff will renegotiate the rate structure to maintain current diversion incentives and current proportional revenue across the business and residential sectors.

- **City Fees and Compensation**: The proposal did not accurately reflect City imposed fees included in rates, so these will need to be resolved. The solid waste fund would lose approximately \$406,000 per year that is needed for operations under the initial proposal. Staff will endeavor to maintain existing City fee levels and funding for Looking Good Santa Barbara and public education. Staff will also endeavor to maintain or improve current levels of hauler service to City facilities.
- **Diversion Commitments**: Under best industry practices, we would expect to see increasing diversion commitments and diversion guarantees to help the City keep pace with increasing State Mandates. Staff will work to ensure these commitments from MarBorg.

The Exclusive Right to Negotiate Agreement contains a list of specific negotiations points, some of which are related to the key issues listed above.

Next Steps

Assuming an agreement is reached, staff would return to Council with a resolution of intent to award the franchise to MarBorg which would include the full terms of the proposed agreement. No sooner than 20 days later, as required by Article XIV of the City Charter, Council would need to hold a public hearing on the proposed franchise award. This would allow the public to weigh in on any changes. It would also provide any other interested hauler the opportunity to comment and express interest in presenting a competing proposal. Following the public hearing, the Council could approve the proposed franchise agreement or decide to pursue the other alternatives.

ATTACHMENT: Exclusive Right to Negotiate

PREPARED BY: Kristy Schmidt, Employee Relations Manager
Matt Fore, Environmental Services Manager

SUBMITTED BY: Robert Samario, Finance Director

APPROVED BY: City Administrator's Office

ATTACHMENT

**MEMORANDUM OF UNDERSTANDING BY AND
BETWEEN THE CITY OF SANTA BARBARA AND
MARBORG INDUSTRIES, INC., CONCERNING THE
NEGOTIATION OF A MUNICIPAL SOLID WASTE
FRANCHISE FOR THE CITY OF SANTA BARBARA.**

FEBRUARY 2012

THIS MEMORANDUM OF UNDERSTANDING is made as of this 28th day of February 2012 by and between the City of Santa Barbara (hereinafter the “City”) a charter city municipal corporation created and authorized by Article XI, Section 5 of the California Constitution, having its office at 735 Anacapa Street, Santa Barbara, California and the MarBorg Industries, Inc., of Santa Barbara County, a California corporation, hereinafter referred to as “MarBorg ”, located at 728 Yanonali Street Santa Barbara, California.

City and MarBorg understand and acknowledge the following information and facts form the basis of this Memorandum of Understanding (“MOU”) and the premises upon which this MOU is entered into and upon which negotiations between the City and MarBorg will occur:

BACKGROUND AND RECITALS

1. Since 2003, the City has had two geographic “zones” for franchising the collection and proper disposal of municipal solid waste (hereinafter “MSW”) in the business, multi-family residential, and single family residential sectors of the city of Santa Barbara. The cost of this franchise service is funded entirely through the solid waste rates which the City charges to its residents and businesses.

2. On November 23, 2010, City staff recommended to the City Council that the City initiate a competitive Request for Proposal process (“RFP”) for a franchise covering the MSW collection services in Zone One because the City’s franchise contract with Allied Waste Services of North America, LLC (“Allied”) was set to expire on June 7, 2013. Only Zone One was to be included in this process because MarBorg, the franchise hauler for MSW Zone Two, has an existing franchise which allows it the option to continue Zone Two services until June 2023.

3. Subsequently, Allied agreed to assign its Santa Barbara Zone One MSW franchise to MarBorg. On July 12, 2011, Council approved the assignment of the Zone One agreement to MarBorg, consolidating the City’s solid waste operations under one franchise MSW hauler.

4. The City Council authorized a professional services contract to HF&H Consultants, LLC (HF&H) to provide assistance to City staff and the Council during the Zone One franchise renewal process. The City Council initially delegated responsibility to the Sustainability Committee to assist City staff and HF&H in the franchise renewal process, and later formed a Zone One Solid Waste Franchise Ad Hoc Subcommittee of the Council to assume this function.

5. At the time the City approved the assignment of the Zone One franchise to MarBorg in July 2011, the City Council also invited MarBorg to submit a preliminary proposal to the City for new franchise agreement applicable to Zone One. The objective of the evaluation was to determine whether or not the City should continue to move forward with an open competitive RFP process for Zone One or suspend that process and enter into a period of exclusive negotiations with MarBorg to continue to provide service to both zones.

6. MarBorg’s proposal (the “proposal”) was received by the City on September 12, 2011 and following an evaluation of the proposal by the Council subcommittee, the City Environmental Services staff and HF&H, staff determined that the MarBorg proposal represented an appropriate starting point from which to begin negotiations with MarBorg for a possible Citywide franchise agreement (i.e., covering both Zone One and Zone Two of the City). On December 13, 2011, at the

recommendation of staff, the Council directed that Zone One RFP process be suspended and that the City enter into a period of exclusive negotiations with MarBorg for a possible Citywide franchise agreement, subject to certain pre-set conditions, with the goal of achieving the best franchise terms possible for City residents and businesses.

7. As a result, the reason for this MOU is to document an agreement between the City and MarBorg to enter into a period of exclusive negotiations over the terms of a possible long-term City MSW franchise between MarBorg and the City covering the collection and disposal of MSW within the entire City of Santa Barbara. In addition, this MOU is to assist the City and MarBorg by summarizing the general terms being offered by MarBorg for such a franchise and to identify any questions, franchise terms or other matters which either MarBorg or the City believes should be discussed, addressed and possibly resolved during this period of exclusive negotiations.

IT IS MUTUALLY UNDERSTOOD BETWEEN MARBORG AND THE CITY AS FOLLOWS:

I. PURPOSE OF THE MEMORANDUM.

The purpose of this memorandum is to assist the City and MarBorg in establishing a period of exclusive negotiations between the City and MarBorg to meet and consider the drafting, review and due consideration of a possible City and MarBorg franchise for the collection and disposal of Municipal Solid Waste within the City of Santa Barbara all in accordance with the needs of the City and the MarBorg proposal for such a franchise as received by the City on September 12, 2011 and as summarized in Section III (C) and (D) hereof.

II. INTERPRETATION OF MEMORANDUM.

- A.** This Memorandum has been prepared only to aid the City and MarBorg in understanding certain aspects of a September 2011 MarBorg franchise proposal such that the City and MarBorg may determine whether those aspects of the proposal are consistent with the long-term needs of the City for the collection and disposal of MSW. It is also intended to allow the City and MarBorg to address those issues, business terms, and other concerns which have manifested themselves to date concerning a possible long-term City MSW franchise and which should be discussed and resolved, if possible, prior to the time City staff submits a formal franchise agreement to the City Council and before the City and MarBorg execute a binding MSW franchise under Article 14 of the City charter.
- B.** This Memorandum has been prepared and reviewed by the City Finance and Environmental Services staff and by the Santa Barbara City Attorney and by MarBorg staff and their representatives and legal counsel so that it accurately sets forth the underlying and contingent components of the proposed MSW franchise between the City and MarBorg.
- C.** Except as otherwise specifically and expressly indicated herein with respect to MarBorg and the City entering into a 180 day period of exclusive negotiations over the terms of an MSW franchise covering the entire City, this MOU is not intended to be contractual in nature and, thus, is not intended to bind the parties. It is intended only to form the basis upon which the City and MarBorg will regularly meet to negotiate with each other over the written terms of a City-wide MSW franchise. The fact that any particular component of a possible franchise

is not addressed in this Memorandum does not infer its deletion as a subject of negotiation with respect to the proposed future franchise.

- D. The Memorandum is also intended to represent a good faith best effort by both the City staff and MarBorg staff to establish the basis upon which they will conduct these franchise negotiations and to provide the necessary information with respect to the proposed franchise. Its purpose, if possible, is to ultimately lead to the negotiation of a mutually beneficial and acceptable franchise and related agreements which will legally bind the City and MarBorg, in accordance with the franchising requirements of the City charter, or to the determination by either the City or MarBorg that further negotiations towards that end will not be appropriate or warranted.
- E. In any case, except as provided in Sections IV, V, and VI hereof, City and MarBorg expressly acknowledge that neither party will be contractually bound to any specific element of the MarBorg September 2011 franchise proposal or with respect to franchise terms proposed by City staff unless and until the final negotiation, public review and approval, and execution of a franchise agreement by the legally authorized representatives of MarBorg and by the City Council of the City of Santa Barbara in the manner required by the City charter.

III. AGREEMENT TO NEGOTIATE A POSSIBLE MSW FRANCHISE FOR POSSIBLE APPROVAL BY THE CITY COUNCIL AND BY MARBORG.

- A. **Period of Exclusive Negotiations.** The City (acting by and through its Finance and Environmental Services staff and City Attorney's office) and MarBorg agree that, for a period of One Hundred Eighty (180) days after the date of the execution of this MOU and the City's receipt of the deposit required by Section IV(A) hereof, representatives of MarBorg and the City will regularly meet and negotiate as part of a good faith effort to prepare a draft MSW franchise agreement between the City and MarBorg regarding the collection and proper disposal of municipal solid waste within the City. This is in anticipation that such a proposed franchise agreement will be presented to the Santa Barbara City Council for its approval as required by the City Charter, state law, and the governing rules and regulations and the practices of the City. The franchise, if duly approved and executed, is intended to be a contractual instrument governing the rights and obligations between the City and MarBorg and, if duly approved by both MarBorg and the City, it will expressly supersede this Memorandum.
- B. **Designation of Members of the City and MarBorg Negotiation Teams.** Within 10 days of the execution of this MOU, both the City Administrator and the chief executive officer of MarBorg agree to advise each other in writing regarding those persons who are authorized to meet and negotiate the terms of a possible MSW franchise between the City and MarBorg. At least 48 hours notice will be provided to the other party before bringing substitute negotiators or other outside parties to negotiations meetings. Both the City and MarBorg agree that all communications initiated with the other party with respect to these franchise negotiation shall occur between the members of the designated negotiation teams exclusively, unless the City or MarBorg specifically authorizes direct communication with its other representatives.

C. Base for Negotiations. The parties agree that the following existing assurances and covenants from MarBorg provided in consideration of the grant of the two five-year options to extend the term of the agreement between the City and MarBorg for Zone Two of the City (Agreement No. 20433.2, dated as of September 30, 2004) shall be included in the new franchise agreement, with appropriate updates of monetary amounts: 1. Section 3.17 Construction and Operation of the MarBorg Recycling Facility; 2. Section 12.12 “Rates not to Exceed Comparable Localities;” 3. Section 14.01 “Restrictions on Assignment;” and 4. Section 14.02 “Binding on Successors.”

The following terms, based on MarBorg’s Proposal dated September 12, 2011, are generally acceptable to the City and will be assumed to be incorporated into the new franchise agreement in a manner substantially consistent with MarBorg’s Proposal, subject to the parties reaching consensus on an overall package of Franchise terms:

- Both Zone One and Zone Two will be included in single franchise;
- The term of the Agreement will be ten years from the date MarBorg commences services under the new Franchise, or June 7, 2023, whichever is later;
- There will be no CPI increase to rates and hauler compensation in July 2012;
- All collection Citywide will initially be provided on a semi-automated basis;
- If the City chooses to designate MarBorg to assume customer billing responsibility during the term of the agreement, MarBorg will cease paying the City the 5% billing fee, and there will be a resulting 5% reduction in the City’s MSW rates;
- There will be unlimited recycling, increased greenwaste capacity, and increased frequency of bulky item and white goods collection under the basic service rate in the single family residential sector;
- There will unlimited white goods collection for the basic service rate in the multi-family residential sector;
- Single family and multi-family residential service will include household battery and cell phone collection;
- Single family residential and multi-family residential service will include a medical sharps (syringe) mail-in disposal program;
- There will be extra material collection for single family and multi-family accounts during the two weeks following Christmas;
- MarBorg may limit bulky item collection to Wednesdays;
- MarBorg may collect trash, recyclables, food waste and greenwaste on the same day of the week;
- MarBorg will convert its entire fleet to compressed natural gas (CNG) by 2015;
- MarBorg will provide color coded trash containers for all cart and can customers within the first year;
- City departments will receive food waste service at 70 events per year;
- Single family residential rates will no longer include a premium for slope or roll-over distance;
- Multi-family residential dumpster rental will be included in the service rates and not charged separately;
- Businesses will no longer receive a discount for providing their own dumpsters.

D. Basic Franchise Terms to Be Negotiated and Incorporated into a Written Franchise Agreement. The City and MarBorg shall endeavor to reach a potentially binding and written consensus with respect to the following terms for incorporation of such a consensus into a proposed franchise agreement to be submitted to the City Council.

- Compensation to MarBorg under the franchise;
- City fees and the basis of calculation of such fees;
- Proposed changes to the existing division of total revenue between the single family, multi-family, and business sectors;
- Proposed changes to rate incentives for diversion (discounts as compared to trash) in the business and multi-family residential sectors;
- Other changes proposed by MarBorg to the existing rate structure;
- MarBorg's funding for the Looking Good Santa Barbara program;
- MarBorg's funding for the City's Public Education programs;
- Level of discount for curbside service in the single family residential sector;
- Number of bulky item collections per multi-unit family residential account, and the process for scheduling collection;
- Process for scheduling multi-unit family residential account white goods collection;
- Franchise diversion guarantees from MarBorg and liquidated damages;
- Sorting franchise loads at MarBorg's C&D facility;
- Revenues from the sale of comingled recyclables;
- Process and rates for future implementation of a foodscraps program in multi-family and single family residential sectors;
- Implementation of fully automated service within the City and associated rate reductions;
- Types of containers used for semi-automated collection;
- Process for MarBorg or the City to request free or discounted service for customers;
- Annex Yard pick up by hauler and Annex Yard drop off service to C&D Facility;
- Updating the following terms of the existing agreement: Insurance coverage requirements;
- Setting a limit on the volume of trash for a SFR account;
- Revising the existing single family residential billing methodology to assign a rate to each container;
- Low income service rates;
- Reopener on issues related to conversion technology facility;
- Updating contractual dollar amount (performance bond and insurance requirements, liquidated damages, assignment fees, etc.)

Additionally, administrative changes will be made to the base agreement to make it consistent with current law and established practice, remove or update expired or outdated provision, and to improve the comprehensibility of the agreement. Attachments and Exhibits will be updated with current information.

This list is intended to be non-binding, providing a basis to begin negotiations.

- A. EXTENSION OF ZONE ONE FRANCHISE TERM.** If the City and MarBorg are not able to reach agreement during the period of exclusive negotiations established herein, MarBorg expressly agrees that it will continue to provide services to Zone One under the terms of the existing 2003-2013 Zone One Franchise Agreement for up to one additional year after the currently established Franchise termination date while City pursues a Request for Proposals and procurement process for the issuance of a new Franchise. If the City pursues a Request for Proposals and procurement process the City may, at its sole option and upon ninety (90) days written notice to MarBorg, extend the term of the Zone One Franchise Agreement by one year in order to ensure collection services are provided to its residents until the City completes the procurement process.
- B. PAYMENT OF CONSULTANT COSTS.** MarBorg expressly agrees to pay the City's costs for consultant expenses already incurred in connection with preparation for the franchise renewal process and evaluation of MarBorg's September 2011 proposal, and those consultant expenses that have been and will be incurred in the negotiation of the terms of a possible franchise agreement pursuant to the MOU. MarBorg's obligation in this respect shall cease upon the expiration or termination of this MOU, or when MarBorg commences services under a new Franchise, and shall be limited to a maximum of \$120,200. MarBorg shall post a deposit in this amount as provided herein.
- C. PROVISION.** MarBorg shall provide City with any and all information deemed necessary by staff to pursue negotiations, including but not limited all available information about costs and profits from the City's franchise zones.

IV. GENERAL MATTERS

- A. EFFECTIVE DATE OF MOU; POSTING OF DEPOSIT.** This MOU shall not take effect and shall not be binding on the City or MarBorg until MarBorg deposits the amount of \$120,200 with the City as the amount of reimbursement due to the City for consultant expenses incurred in connection with preparation for franchise renewal and evaluation of MarBorg's proposal already incurred, and for the negotiation of the terms of a possible franchise agreement. This deposit shall be non-refundable and is expressly not contingent on the City Council's approval of a proposed franchise agreement between the City and MarBorg. However, to the extent the City does not expend any portion of the deposit to reimburse the City for consultant costs actually incurred with the franchise negotiation process, such amounts shall be returned to MarBorg within ten (10) days of the termination of this MOU.
- B. POSTPONEMENT OF JULY 2012 CPI INCREASE:** MarBorg's proposal for a new franchise agreement includes a waiver of the July 2012 CPI adjustment for collection services provided for under the existing 2003-2013 Franchise Agreements for Zone One and Zone Two. Pending agreement between the parties on a new franchise agreement adopting this waiver, the City will notice the rate increase to customers, consistent with the requirements of law and City policy, with a notice that implementation of the increase may be affected by ongoing negotiations with MarBorg. No CPI rate increase will be implemented unless the City and MarBorg are not able to reach a new franchise agreement during the period of exclusive negotiations established herein.

If negotiations terminate on or before the 20th of June, 2012, the CPI increase will be effective on July 1, 2012. Thereafter, if negotiations terminate before the 20th of the month, the CPI increase will become on the first day of the first month following the termination of negotiations under this MOU and if negotiations terminate after the 20th of the month, the CPI increase will become effective the first day of the second month following the termination of negotiations.

V. TERMINATION.

Either City or MarBorg may elect to terminate further negotiations with respect to a MarBorg franchise at any time prior to the approval of a binding franchise agreement, if, in their sole discretion, they determine it advisable to do so and such a termination shall be without further obligation to the non-terminating party.

IN WITNESS WHEREOF, City and MARBORG have executed this MOU as of the day and year set above the signature of City

Date: _____, 2012

THE CITY OF SANTA BARBARA

APPROVED AS TO FORM
CITY ATTORNEY

By: _____
City Administrator

By: _____
Stephen P. Wiley

ATTEST:
CITY SECRETARY (seal)

By: _____
Deputy City Clerk

APPROVED AS TO CONTENT

By: _____
Finance Director

MARBORG IN SANTA BARBARA
COUNTY "MARBORG"

By: _____
Executive Director

By: _____
Secretary