

CITY OF OAKLAND

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OFFICE OF THE CITY CLERK
OAKLAND

2016 OCT -6 PM 5:29

AGENDA REPORT

TO: Sabrina B. Landreth
City Administrator

FROM: Brooke A. Levin
Director, Public Works

SUBJECT: Response to Grand Jury on Zero Waste

DATE: September 8, 2016

City Administrator Approval

Date:

10/6/16

RECOMMENDATION

Staff Recommends That The City Council Receive the Draft Informational Response Prepared by the City Administration and Authorize the City Council President to Co-Sign with the Mayor a Response to the 2015-2016 Alameda County Grand Jury Final Report Titled "City of Oakland's Costly Pursuit of Zero Waste Franchise Contracts."

EXECUTIVE SUMMARY

The Alameda County Grand Jury published a report on June 21, 2016 entitled "City of Oakland's Costly Pursuit of Zero Waste Franchise Contracts." This report was the outcome of the Grand Jury's investigation of the City's solicitation of Zero Waste services in 2013-14, and the City Council's award of the Zero Waste contracts in 2015. The investigation was prompted by citizen complaints to the Grand Jury regarding award of those contracts, and the associated franchise fees that are paid by the awarded contractors to the City. The Grand Jury Report contains eight findings and six recommendations. This agenda report delivers draft responses to those findings and recommendations in **Attachment A**. The City is required to provide its responses to these questions by October 26, 2016.

BACKGROUND/LEGISLATIVE HISTORY

In 2012, the City Administration issued a Request for Proposals (RFP) for Zero Waste Collection Services, released in two parts: the solicitation of proposals for disposal services issued in August, and the solicitations of proposals residential recycling collection services (RR Contract), and mixed materials and organics collection services (MM&O Contract) released in September. Issuance of the RFP was consistent with direction provided by City Council, through resolution and motion, from January to June 2012, and in alignment with the City Council's Zero Waste goal and Zero Waste Strategic Plan, which were adopted in 2006.

In January 2013, the City received responsive proposals only from the then-incumbent service providers. Waste Management of Alameda County (WMAC) and California Waste Solutions (CWS) each proposed on the RR and MM&O contracts. WMAC submitted the sole proposal for

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disposal. In June 2013, the City Council authorized staff to negotiate with the two proposers. In May 2014, staff presented a recommendation for contract awards that City Council did not approve. In May 2014, City Council directed staff to solicit best and final offers from CWS and WMAC on all three contracts. In July 2014, City Council did not approve staff's recommendation to award all three contracts to WMAC. In August 2014, City Council awarded all three contracts to CWS.

Following award of the contracts, WMAC initiated a referendum signature drive to reverse Council's award of the three contracts to CWS, and filed a lawsuit against the City. In September 2014, CWS and WMAC negotiated an agreement between them that with Council approval would award the recycling collection contract to CWS, and the disposal and mixed materials and organics collection contracts to WMAC. Council approved award of the contracts, as described in the agreement to WMAC and CWS in September 2014. WMAC did not file the referendum and withdrew its lawsuit.

ANALYSIS AND POLICY ALTERNATIVES

A draft response to the Grand Jury's findings and recommendations is provided in **Attachment A**.

FISCAL IMPACT

No fiscal impacts are associated with this report.

PUBLIC OUTREACH/INTEREST

No public outreach was conducted in the preparation of this report.

COORDINATION

Staff has coordinated with the Office of the City Attorney in preparing this report.

SUSTAINABLE OPPORTUNITIES

Economic: Response to the Alameda County Grand Jury will provide information to businesses that operate or seek to operate in Oakland, or to engage in business with the City of Oakland, regarding the City's policies and processes regarding long-term franchises.

Environmental: Response to the Alameda County Grand Jury supports the City's leadership in providing long-term solutions to waste diversion and disposal, which represent significant reductions to greenhouse gas emissions.

Social Equity: Response to the Alameda County Grand Jury supports equitable rate-based services across the entire residential and business community.

ACTION REQUESTED OF THE CITY COUNCIL

Staff Recommends That The City Council Receive the Draft Informational Response Prepared by the City Administration and Authorize the City Council President to Co-Sign with the Mayor a Response to the 2015-2016 Alameda County Grand Jury Final Report Titled "City of Oakland's Costly Pursuit of Zero Waste Franchise Contracts."

For questions regarding this report, please contact Becky Dowdakin, Environmental Services Manager, 238-6981.

Respectfully submitted,



BROOKE A. LEVIN
Director, Oakland Public Works

Reviewed by:
Susan Kattchee, Assistant Director

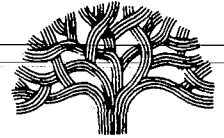
Prepared by:
Becky Dowdakin, Environmental Services
Manager

Attachment (1):

A: Draft Response to Alameda County Grand Jury Regarding Zero Waste

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October 19, 2016

Honorable Morris D. Jacobson
Alameda County Superior Court
1225 Fallon Street, Department One
Oakland, CA 94612

Dear Honorable Judge Jacobson:

Thank you for the opportunity to respond to the 2015-2016 Alameda County Grand Jury Final Report which included findings and recommendations regarding the City of Oakland's (City) procurement of zero waste services franchise contracts (beginning on page 31 of the report). We appreciate the Grand Jury's work to investigate citizen complaints of increases to garbage and composting collection rates, the award of the garbage and recycling contracts, and the franchise fees associated with those agreements.

The City's procurement process ended with the award of a 10-year contract for the collection of mixed materials and organic materials, a 20-year contract for the collection of residential recyclables, and a 20-year contract for the landfill disposal of solid waste. In Oakland, while the recycling contract previously had been put out to competitive bid, the garbage contract had not until the procurement discussed herein. In addition, in the field of solid waste and recycling, long-term contracts are the norm, which has the corollary impact of providing little opportunity for city staff to gain experience in such procurements. Therefore, it is typical, as Oakland did, for cities to employ the services of consultants to assist in the development, solicitation, evaluation, and negotiation of contracts, where competitive solicitation of the services is pursued.

The City's Charter allows the Council to grant franchises, and the City grants a franchise for solid waste services to protect the public health. Under California Public Resources Code section 40059(a)(2), "[t]he authority to provide solid waste handling services may be granted under terms and conditions prescribed by the governing body of the local governmental agency by resolution or ordinance," and "either with or without competitive bidding."

The City conducted a competitive procurement process to grant the franchises that would provide critical services, and to ensure that the City's programs would be implemented at cost competitive rates. The result of the procurement process is that rates for base services increased within predicted parameters. However, rates for some specialized optional services, and for certain service types and sectors, increased more steeply than others, giving rise to ratepayer objections. Finally, the amount of the franchise fees the franchisees paid the City did not increase with implementation of the new contracts.

Responses to Specific Grand Jury Findings and Recommendations

In accordance with the Grand Jury’s findings, with which the City generally disagrees, the City will nonetheless analyze and consider implementing each of the recommendations. The City’s responses to the Grand Jury’s findings and recommendations are summarized in the following tables.

**RESPONSES REQUIRED from Mayor, City of Oakland
 Findings 16-6 through 16-13**

| Number | Grand Jury Finding | Administration Response | Status of Implementation |
|--------|--|-------------------------|--|
| 16-6 | Financial analysis of numerous contract provisions providing for economic benefits to the city was insufficient. Little or no analysis of the ultimate financial impact to ratepayers was performed. | <i>Disagree</i> | <i>Analysis of the base rates was provided to the City Council and the public in several forms. The single area where this was not the case was for commercial organics collection services, where service had been provided to businesses without local regulation of rates or terms of service. The rates of those existing services, which were determined solely by agreement between the service providers and their commercial clients, were unknown to the City, so rate comparisons could not be made. Attachment A to the 6/30/14 Agenda Report to City Council provided cost impacts of several policy options then under City Council consideration, the costs of including services that would be provided by EBMUD and Civicorps, options for collection of multifamily organics, and the location of the Waste Management call center.</i> |
| 16-7 | The City of Oakland’s contracting process failed to achieve a competitive bidding environment. | <i>Disagree</i> | <i>The City implemented several measures to encourage competition: protocol for process integrity, early outreach, clarification of City’s policy regarding Arizona-based business, extension of initial proposal deadline, and following StopWaste Franchise Task Force guidance on franchise goals and standards. In addition, the City incorporated several measures in its structure of the RFP to encourage</i> |

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| | | | <p><i>competition: separating rather than bundling contracts to qualify a broader spectrum of proposers, using a refuse rate index for annual rate adjustment, soliciting rather than specifying vehicles and other equipment, allowing proposers to recommend changes to the contract and RFP during question period, allowing proposers to take exceptions to contract and RFP with proposal submittal, and reducing minimum reference requirements to allow new and small firms or joint ventures to propose. The following external factors may have suppressed participation: limited number of firms in the marketplace, market timing, cost of the labor market in Alameda County, Alameda County Measure D 15-mile rule on direct haul to disposal facilities, and Measure D fees. The RFP process qualified six companies as eligible proposers. These represented all of the service providers in the region who could reasonably be expected to have the capacity to provide the services described in the RFP to a city the size of Oakland. Two of those proposers, both of whom had current experience providing similar services to large cities in the region and state, withdrew from the process shortly before the submittal due date. The two incumbents developed their proposals over several months in competition with all the qualified proposers, including the two who withdrew.</i></p> |
| <p>16-8</p> | <p>The City drafted RFP provisions that favored the incumbents and suppressed competition.</p> | <p><i>Disagree</i></p> | <p><i>Incumbents' experiences providing the services, and their investments in facilities located in Oakland and nearby are a common condition in many markets, including this one, with which competitors are well accustomed. The non-incumbent competitors were well aware of the end-dates of the previous contracts and the City's interest in soliciting competitive proposals. The non-incumbent providers had the opportunity to develop cost-</i></p> |

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| | | | <i>effective proposals that were responsive to the RFP.</i> |
| 16-9 | The City’s official contracting process was abandoned and replaced by the contractors’ closed-door negotiations. | <i>Disagree</i> | <i>The phrase “abandoned and replaced” is inaccurate. The official contracting process was interrupted and superseded by the WMAC lawsuit and the resulting negotiations and settlement.</i> |
| 16-10 | Public transparency was undermined by the contractors’ closed-door negotiations. | <i>Agree, subject to the stated clarification</i> | <i>The contractors’ settlement negotiations were not as open to the public as the official contracting process.</i> |
| 16-11 | There was little to no public debate before the City council concerning disproportionately high franchise fees. | <i>Disagree</i> | <i>The amounts of the franchise fees and their allocation were presented by staff to the City Council in its public meetings (see Agenda Reports dated 7/21/14 and 9/22/14, and Adopted Resolutions Nos. 13253, 13254, and 13258), and the City Council and the public discussed the franchise fees. Discussion at the meetings did not include the amounts charged by other municipalities. As stated in response to Finding No. 16-13, the franchise fees in the current contracts are not disproportionately higher than those charged by other jurisdictions.</i> |
| 16-12 | Collection rates paid by Oakland businesses and multi-family residences were markedly higher than those in surrounding communities. | <i>Agree</i> | <i>It is commonplace that the highest rates in a region are those in communities with the most recently signed contracts, which are the most up-to-date with current market costs. As other communities sign new contracts, their rates will likely adjust for new programs or for annual cost of living increases.</i> |
| 16-13 | Franchise fees paid by the City’s garbage collection contractor, passed on to Oakland ratepayers, are disproportionately higher than franchise fees paid to other Bay Area municipalities and special districts. | <i>Disagree</i> | <i>The Grand Jury did not provide the City with the data on which it based this finding. The City is aware that franchise fees paid to certain other municipalities range from zero to more than 20% of total revenues. The franchise fees under the City’s current contracts total approximately \$25 million to both contractors, not \$30 million to WMAC alone as stated in the Grand Jury report, and those fees constitute approximately 20% of total revenues under the contracts, not 30% as stated in the Grand Jury</i> |

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Recommendations 16-4 through 16-9

| Number | Grand Jury Recommendation | Administration Response | Status of Implementation |
|--------|--|-------------------------|---|
| 16-4 | Given the complexity and enormous financial impact of the existing franchise contracts, the City of Oakland should start planning and preparing to solicit competitive bids for contracts to be in place sufficiently in advance of the expiration of the existing agreements. | <i>Further Analysis</i> | <i>The MMO contract expires 6/30/25. Planning for the 5-year extension provided by contract, or solicitation or negotiation of a new contract, according to City Charter as allowed by state law, would begin in 2020, pending further analysis. The RR and Disposal contracts expire in 2035, and planning related to procurement of replacement contracts would begin in 2028, pending further analysis.</i> |
| 16-5 | The City of Oakland should ensure, when available, that the RFP processes be flexible enough to allow potential vendors to propose alternative, innovative responses. | <i>Further Analysis</i> | <i>The purpose of an RFP process is to solicit proposals for different means and methods that deliver the described services, and allow for fair evaluation of proposals that are comparable, and serve the City's adopted goals. In preparing for successor franchise agreements per the schedule noted in City's response to Recommendation 16-4, the City will consider the best ways to allow for innovative and alternative proposals with an eye on transparency, fairness, and responsiveness to City goals.</i> |
| 16-6 | The City of Oakland must ensure that subsequent agreements are solicited and awarded with complete transparency to the ratepayers, the parties whom ultimately bear the cost of the services. Rates charged should be reasonably related to the cost of the services provided. | <i>Agreed</i> | <i>The City believes that the RFP process as developed and initially implemented was transparent. Should the City exercise its prerogative under its Charter to award successor franchises through competitive procurement processes, this will be done consistent with the goals of transparency and rate parity, in addition to environmental goals including waste diversion, as established by the City at that time.</i> |

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| 16-7 | To ensure transparency, the City of Oakland must publicly report on and have public discussion regarding franchise fees (and how those fees are to be used) in any city contract. | <i>Implemented</i> | <i>Franchise fees apply only to franchises and not to public works construction or professional services contracts. The City will continue to provide information to the public on the amount of such fees and their designated uses.</i> |
| 16-8 | The Oakland City Council must ensure adequate resources to validate the completeness and accuracy of contract proposals. This may require the support of an independent financial analysis. | <i>Further Analysis</i> | <i>The City Administrator may retain the services of qualified consultants to validate contract proposals, including one qualified to perform independent financial analysis, per the schedule noted in the City's response to Recommendation 16-4. Additional resources for future Zero Waste procurements will be considered.</i> |
| 16-9 | The City of Oakland should immediately begin to consider a long term strategy to correction of the short-comings of the current contract, including: a) Specific timelines and milestones required to assure a truly competitive process is developed; b) Evaluation of innovations such as a city-owned transfer station; c) Regular financial review and assessment focused on the actual cost of services provided and ratepayer impact; and d) Involvement of impacted communities and public transparency. | <i>Further Analysis</i> | <i>The City does not agree that the Grand Jury report identifies shortcomings needing correction in any of the three franchises that the City executed at the end of this RFP process. a) Timelines and milestones may be developed according to the schedule noted in the City's response to Recommendation 16-4, should the City elect to engage in a competitive process. b) As the City did in its preparation for the subject RFP, consideration may be given in the next procurement process to innovations that meet the then-current marketplace and the City's goals. c) The City may perform the financial reviews described in its current contracts. d) Transparency of the process to the public, including discussion at public meetings will be part of the process.</i> |

We appreciate the efforts of the Grand Jury and its recommendations to improve the transparency and outcomes of procurement of zero waste or related franchised services, should the City elect to obtain them through a competitive process when the current contracts expire in 2025 and 2035.