

<b>REQUEST FOR COUNCIL ACTION</b> CITY OF SAN DIEGO	CERTIFICATE NUMBER (FOR COMPTROLLER'S USE ONLY)
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TO: CITY COUNCIL	FROM (ORIGINATING DEPARTMENT): Environmental Services	DATE: 11/04/2013
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SUBJECT: Daily Disposal Services, Inc., Non-Exclusive Solid Waste Collection Franchise Amendment

PRIMARY CONTACT (NAME, PHONE): Samuel Merrill, (858) 573-1253	SECONDARY CONTACT (NAME, PHONE): Rochelle Monroe, (858) 573-1298
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**COMPLETE FOR ACCOUNTING PURPOSES**

FUND					
FUNCTIONAL AREA					
COST CENTER					
GENERAL LEDGER ACCT					
WBS OR INTERNAL ORDER					
CAPITAL PROJECT No.					
AMOUNT	0.00	0.00	0.00	0.00	0.00

FUND					
FUNCTIONAL AREA					
COST CENTER					
GENERAL LEDGER ACCT					
WBS OR INTERNAL ORDER					
CAPITAL PROJECT No.					
AMOUNT	0.00	0.00	0.00	0.00	0.00

**COST SUMMARY (IF APPLICABLE):**

**ROUTING AND APPROVALS**

CONTRIBUTORS/REVIEWERS:	APPROVING AUTHORITY	APPROVAL SIGNATURE	DATE SIGNED
Financial Management	ORIG DEPT.	Sierra, Mario	11/19/2013
Environmental Analysis	CFO		
Liaison Office	DEPUTY CHIEF		
Equal Opportunity Contracting	COO		
Comptroller	CITY ATTORNEY	Lowenberg, Grace	
	COUNCIL PRESIDENTS OFFICE		

PREPARATION OF:     RESOLUTIONS     ORDINANCE(S)     AGREEMENT(S)     DEED(S)

Authorizing execution of the Fourth Amendment to the Class I Non-Exclusive Franchise Agreement for Solid Waste Management Services between the City and Daily Disposal Services, Inc.

STAFF RECOMMENDATIONS:  
Approve Requested Actions

**SPECIAL CONDITIONS (REFER TO A.R. 3.20 FOR INFORMATION ON COMPLETING THIS SECTION)**

COUNCIL DISTRICT(S):    ALL

COMMUNITY AREA(S):	ALL
ENVIRONMENTAL IMPACT:	This activity is not a "project" and therefore is exempt from CEQA pursuant to State CEQA guidelines section 15060(c)(3).
CITY CLERK INSTRUCTIONS:	This item is subject to Charter Section 103 - Granting of Franchise requirements (approval by Ordinance and 6 votes required).

**COUNCIL ACTION  
EXECUTIVE SUMMARY SHEET  
CITY OF SAN DIEGO**

DATE: 11/04/2013

ORIGINATING DEPARTMENT: Environmental Services

SUBJECT: Daily Disposal Services, Inc., Non-Exclusive Solid Waste Collection Franchise Amendment

COUNCIL DISTRICT(S): ALL

CONTACT/PHONE NUMBER: Samuel Merrill/(858) 573-1253

**DESCRIPTIVE SUMMARY OF ITEM:**

This action is to adopt an ordinance authorizing execution of the Fourth Amendment to the Class I Non-Exclusive Franchise Agreement for Solid Waste Management Services between the City and Daily Disposal Services, Inc.(Daily). This amendment will extend the term of the franchise and amend certain franchise provisions.

**STAFF RECOMMENDATION:**

Approve Requested Actions

**EXECUTIVE SUMMARY OF ITEM BACKGROUND:** The City Council recently approved a settlement of the City's claim against Daily for underpayment of franchise and AB 939 fees. That agreement contemplated that after execution of the settlement agreement and payment of initial sums due under the settlement, the Environmental Services Department (ESD) would recommend approval of amendments to Daily's franchise agreement consistent with those that had been granted to the City's other Class I franchised haulers over the last three fiscal years. This action recommends approval of the franchise amendment attached hereto as Exhibit A. The proposed amendment includes extending the term of the franchise to June 30, 2020, and amending certain franchise provisions, all to mirror those contained in the other Class I franchise agreements.

**DISCUSSION**

During the fourth quarter of 2011 and the first half of 2012, the Office of the City Treasurer conducted audits of the franchise fees and AB 939 fees that Daily was required to pay to the City pursuant to the franchise agreement, the City Charter, the San Diego Municipal Code, and applicable City ordinances and resolutions. The audits revealed a significant underpayment of franchise and AB 939 fees over several years. Based upon the audit findings, the City claimed Daily owed the City \$2,216,037.69 in underpaid fees. Daily disputed the basis for, and amount of, the City's claim; however, Daily was interested in negotiating a resolution of the City's claim. The City and Daily entered into negotiations, which ultimately led to a settlement agreement between the parties approved by the City Council in July 2013.

Typically, franchise agreements are considered for a one-year extension on an annual basis. However, during the period that the City's claim against Daily remained unresolved, the City did not annually extend Daily's grant of franchise or the term of the franchise agreement, in accordance with that agreement. Now that the City's claim has been settled and Daily has made its initial payments under the settlement agreement, the City and Daily wish to amend Daily's franchise agreement, as called for in the settlement agreement. The settlement agreement

contemplated that after execution of the settlement agreement and Daily's payment of initial sums due under the settlement, the Environmental Services Department would recommend approval of amendments to Daily's franchise agreement consistent with those that had been granted to the City's other franchised haulers over the last three fiscal years.

Pursuant to San Diego City Charter Section 103, the Council has the power to grant franchises and all renewals, extensions and amendments thereof, for the use of any public property under the jurisdiction of the City. Such grants require approval by ordinance adopted by a vote of two-thirds (2/3) of the members of the Council upon recommendation of the Mayor. The proposed amendment includes extending the term of Daily's franchise to June 30, 2020, and amending certain franchise provisions, all to mirror those contained in the other Class I franchise agreements.

FISCAL CONSIDERATIONS: This action does not have any impact on franchise fees.

EQUAL OPPORTUNITY CONTRACTING INFORMATION (IF APPLICABLE): This agreement is subject to the City's Equal Opportunity (San Diego Ordinance No. 18173, Section 22.2701) and Non-Discrimination in Contracting Ordinance (San Diego Municipal Code Sections 22.3501 through 22.3517)

PREVIOUS COUNCIL and/or COMMITTEE ACTION (describe any changes made to the item from what was presented at committee): Ordinance to adopt last franchise amendment for Daily Disposal, Inc. occurred in July, 2010. The settlement agreement was presented to the San Diego City Council and approved in closed session on July 23, 2013.

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS: ESD has informed Daily of the proposal to extend its franchise agreement to June 30, 2020, as well as to include revisions to language regarding franchise audits, residential private road collection, and collection standards, all as previously included in franchise amendments between the City and its other Class I franchised haulers. Proposed amendments to franchise agreements will be distributed to Franchisee and applicable stakeholders.

KEY STAKEHOLDERS AND PROJECTED IMPACTS: The key stakeholders associated with this item include Daily Disposal Services, Inc., the City's Non-Exclusive Franchised Solid Waste Haulers, the San Diego County Disposal Association, and the City residents and businesses serviced by the franchised haulers.

Sierra, Mario  
Originating Department

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Deputy Chief/Chief Operating Officer

**CITY OF SAN DIEGO  
ENVIRONMENTAL SERVICES DEPARTMENT**

**FOURTH AMENDMENT TO  
CLASS I NON-EXCLUSIVE FRANCHISE AGREEMENT  
FOR SOLID WASTE MANAGEMENT SERVICES**

This FOURTH AMENDMENT TO THE CLASS I NON-EXCLUSIVE FRANCHISE AGREEMENT FOR SOLID WASTE MANAGEMENT SERVICES [Fourth Amendment] is entered into by and between the City of San Diego [City] and Daily Disposal Services, Inc. [Franchisee].

**RECITALS**

WHEREAS, on September 18, 2000, the City and the Franchisee entered into the Class I Non-Exclusive Franchise Agreement For Solid Waste Management Services [Agreement], which is on file in the Office of the City Clerk as Document No. OO-18849-2; and

WHEREAS, the City and the Franchisee subsequently entered into three amendments to the Agreement which were approved by the City Council by ordinance; and

WHEREAS, during the fourth quarter of 2011 and the first half of 2012, the Office of the City Treasurer conducted audits of franchise fees and AB 939 fees that the Franchisee was required to pay to the City pursuant to the Agreement, as amended, the City Charter, the San Diego Municipal Code, and applicable City ordinances and resolutions (collectively “the Franchise”); and

WHEREAS, based upon the audit findings, the City claimed the Franchisee owed the City \$2,216,037.69 in underpaid fees;

WHEREAS, the Franchisee disputed the basis for, and amount of, the City’s claim; and

WHEREAS, the City and the Franchisee entered into negotiations in an attempt to resolve the City’s claim short of litigation, which negotiations ultimately led to a settlement agreement between the parties which was approved by the City Council; and

WHEREAS, pursuant to the Agreement, the City did not annually extend the Franchisee’s franchise or the term of the Agreement during the period the City’s claim remained unresolved; and

WHEREAS, now that the City’s claim has been resolved, and pursuant to the settlement agreement, the City and the Franchisee desire to amend the Agreement as reflected herein; and

WHEREAS, the execution and delivery of this Fourth Amendment to the Agreement by the Franchisee was duly authorized by Resolution of its Board of Directors on \_\_\_\_\_, 2013:

NOW THEREFORE, the City and the Franchisee, in consideration of the premises above stated and the terms, conditions, covenants, and agreements contained herein, do hereby agree to amend the Agreement as follows:

Section 3.2 – Effective Date of Agreement and Term of Franchise:

From: The effective date of this Agreement shall be July 1, 2010 [**Effective Date**]. The term of this Franchise granted to Franchisee shall be for seven (7) years beginning with the Effective Date of July 1, 2010, through June 30, 2017, inclusive. The term of this Agreement shall coincide with the term of the Franchise granted to Franchisee. Any separate agreements between Franchisee and its customers shall automatically terminate upon the termination of this Agreement

To: The term of this Franchise granted to Franchisee shall begin from the effective date of this Fourth Amendment to the Agreement and continue through June 30, 2020, inclusive. The term of this Agreement shall coincide with the term of the Franchise granted to Franchisee. Any separate agreements between Franchisee and its customers shall automatically terminate upon the termination of this Agreement.

Section 3.5 – Limitations to Scope, subsection B:

From: Residential refuse collected on private streets for which there is a valid hold harmless agreement to provide such service, as described in Municipal Code section 66.0127.

To: *Reserved.*

Section 5.3 – Residential Private Road Service:

From: Franchisee may collect residential solid waste from residences which are located exclusively on private streets. The grant of authority to collect residential solid waste is limited by San Diego Municipal Code Section 66.0127 which requires the City to collect residential solid waste from residences located exclusively on private streets where a valid hold harmless agreement was in effect prior to November 7, 1986.

To: Franchisee may collect residential solid waste from residences which are located exclusively on private streets. The grant of authority to collect residential solid waste is regulated by San Diego Municipal Code Section 66.0127.

Section 5.5 – Collection Standards, subsection B:

From: *Noise.* All Solid Waste collection operations shall be conducted as quietly as possible and shall conform to applicable Federal, State, County and City noise level regulations. Solid Waste collection operations shall not be conducted in or adjacent to residential areas prior to 6:30 AM or after 7:00 PM. Solid waste collection operations may be conducted in commercial and industrial areas during

hours permitted by the San Diego Municipal Code or in mixed use areas during times authorized in a variance granted by the City's Noise Administrator.

To: *Noise*. All Solid Waste collection operations shall be conducted as quietly as possible and shall conform to applicable Federal, State, County and City noise level regulations. Solid Waste collection operations shall not be conducted in or adjacent to residential areas prior to 6:00 AM or after 7:00 PM. Notwithstanding the foregoing, Franchisees shall maintain the same collection operations start times as City Collection Forces. Solid waste collection operations may be conducted in commercial and industrial areas during hours permitted by the San Diego Municipal Code or in mixed use areas during times authorized in a variance granted by the City's Noise Administrator.

#### Section 7.2 – Audit and Inspection by City:

From: At a mutually agreed upon time during normal business hours, but within five (5) working days of the initial request, Franchisee shall make available to the City for examination at reasonable locations within the City/County of San Diego only the Franchisee's data and records with respect to the matters covered by this Agreement. Franchisee will permit the City Auditor to audit, examine, and make excerpts or transcripts from such data and records, and make audits of all data relating to all matters covered by this Agreement. Franchisee shall maintain such data and records in an accessible location and condition for a period of not less than three years following the City's receipt of final payment under this Agreement unless the City agrees in writing to an earlier disposition.

In the event a City audit discloses that the Franchise Fee for the audited period(s) has been underpaid in excess of five percent (5%) of the total required fee, then Franchisee shall pay the City the cost of the audit. Failure to permit the City Auditor with access to the records required to conduct audits under this agreement are a breach subject to revocation of this franchise.

To: At a mutually agreed upon time during normal business hours, but within five (5) working days of the initial request, Franchisee shall make available to the City for examination at reasonable locations within the City/County of San Diego only the Franchisee's data and records with respect to the matters covered by this Agreement. Franchisee will permit the City Treasurer to audit, examine, and make excerpts or transcripts from such data and records, and make audits of all data relating to all matters covered by this Agreement. Franchisee shall maintain such data and records in an accessible location and condition for a period of not less than three years following the City's receipt of final payment under this Agreement unless the City agrees in writing to an earlier disposition.

In the event a City audit discloses that the Franchise Fee for the audited period(s) has been underpaid in excess of five percent (5%) of the total required fee, then Franchisee shall pay the City the cost of the audit. Failure to provide the City Treasurer with access to the records required to conduct audits under this Agreement are a breach of this Agreement subject to revocation of this Franchise.

This Fourth Amendment to the Agreement shall affect only the terms and/or conditions referred to herein. All other terms and conditions of the Agreement as amended shall remain in full force and effect. This Fourth Amendment to the Agreement shall be effective on the date executed by the last party to sign it and approved by the City Attorney.

**IN WITNESS WHEREOF**, the parties have caused this Fourth Amendment to the Agreement to be executed by their duly authorized officers or representatives.

CITY OF SAN DIEGO

DAILY DISPOSAL SERVICES, INC.

By: \_\_\_\_\_  
Scott Chadwick  
Assistant Chief Operating Officer  
CITY OF SAN DIEGO

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

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

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

**I HEREBY APPROVE** the form and legality of the foregoing Fourth Amendment to the Agreement this \_\_\_\_ day of \_\_\_\_ 201\_.

JAN GOLDSMITH, City Attorney

By: \_\_\_\_\_  
Grace C. Lowenberg  
Deputy City Attorney

**EQUAL OPPORTUNITY CONTRACTING PROGRAM EVALUATION**

SUBJECT: Daily Disposal Services, Inc, Non-Exclusive Solid Waste Collection Franchise Amendment

**GENERAL CONTRACT INFORMATION**

Recommended Contractor: N/A

Amount of this Action: \$ 0.00

Funding Source: N/A

Goal: N/A

**SUBCONTRACTOR PARTICIPATION**

There is no subcontractor participation associated with this action.

**EQUAL EMPLOYMENT OPPORTUNITY COMPLIANCE**

Equal Opportunity: Required

This action will be subject to the City's Equal Opportunity Contracting (San Diego Ordinance No. 18173, Section 22.2701 through 22.2708) and will be subject to the City's Non-Discrimination in Contracting Ordinance (San Diego Municipal Code Sections 22.3501 through 22.3517).

**ADDITIONAL COMMENTS**

The City and Daily entered into negotiations, which ultimately led to a settlement agreement between the parties approved by the City Council in July 2013. Document No. OO-18849-2

Environmental Services Department has informed Daily of the proposal to extend its franchise agreement to June 30, 2020.

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