



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Richard Doyle
City Attorney

SUBJECT: Settlement Agreement with BFI

DATE: October 16, 2008

RECOMMENDATION

Adopt a resolution authorizing the City Attorney to execute the Settlement Agreement and Release that provides for the payment to the City of \$958,834.07 of franchise fees and AB939 fees, and \$27,928.46 of AB939 fees to San Jose Unified School District, by Browning-Ferris Industries of North America Inc. and Allied Waste Services of North America, LLC (BFI) arising out of solid waste collection services to public school districts in San Jose in exchange for the City's release of all obligations for franchise fees due on BFI's service to these school districts prior to December 31, 2007, as authorized by the City Council in Closed Session on September 30, 2008.

OUTCOME

To settle a dispute between the City of San Jose and BFI which will result in BFI remitting funds collected from various school districts and release BFI from liability from franchise fees due prior to December 31, 2007.

BACKGROUND

In November 2005, the City issued BFI a demand letter seeking payment of unpaid franchise and AB939 fees associated with solid waste collection service to school districts in San Jose for the period from July 2001 through June 2004. All commercial solid waste haulers with a franchise from the City are required to pay a franchise fee to collect, transport or dispose of commercial solid waste and recyclables. AB939 fees, however, are fees collected by the haulers but imposed on the waste generator to pay for the cost incurred by the City to meet state diversion requirements. The City and BFI entered into a Tolling Agreement effective March 2006 to suspend the statute of limitations while discussing possible settlement of this dispute.

In 2007, Council authorized the City Manager to negotiate and execute Waste Reduction and Recycling Cooperation Agreements with public school districts, San Jose and Evergreen Community College Districts, and San Jose State University. The agreements are for an initial term from July 1, 2007 to June 30, 2009 with up to three one-year extensions. Moreover, Council set the AB939 fees, after July 1, 2007, at zero for the schools who entered into a Waste Reduction Agreement with the City. These

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agreements would require the schools to adopt waste diversion policies, promote environmental stewardship in schools, and report on their recycling programs. In exchange for schools' waste diversion efforts, the City would provide funds to the schools proportional to the franchise fees remitted by their haulers.

Beginning December 2005 or later until December 31, 2007, BFI has collected and is now holding a total of \$986,762.53 in franchise fees and AB939 fees from five school districts. Of this amount, \$27,928.46 is from AB939 fees collected from the San Jose Unified School District from July 2007 to December 2007. In September 2008, the City Auditor released "An Audit of Commercial Solid Waste Franchise and AB939 Fees Collection Program." One of the Auditor's recommendations is to urge the expeditious resolution of this dispute.

ANALYSIS

The Settlement Agreement would require BFI to remit \$958,834.07 to the City and \$27,928.46 to San Jose Unified School District. In exchange, BFI would be released from all liability for franchise fees pertaining to collection from school districts prior to December 31, 2007. BFI has also agreed, beginning January 1, 2008, to pay franchise fees for services to schools and to remit any AB939 fees collected from schools.

The Administration will be bringing to Council follow-up action to implement distribution of all or a portion of these funds to the schools.

COORDINATION

This memo and the Settlement Agreement have also been coordinated with the Department of Environmental Services, and the City Manager's Budget Office.

CEQA

Not a project.

RICHARD DOYLE
City Attorney

By *Rosa Tsongtaatarii*
Rosa Tsongtaatarii
Deputy City Attorney

cc: Debra Figone

For questions please contact Rosa Tsongtaatarii, Deputy City Attorney, at (408) 535-1985.