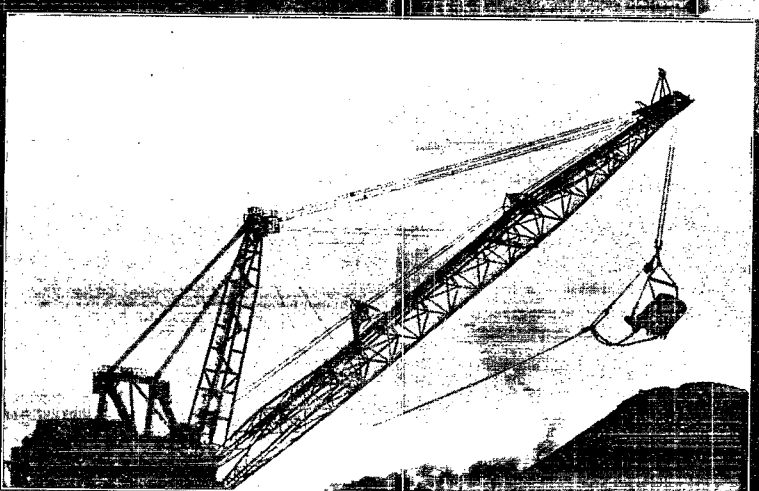
United States
Environmental Protection
Agency

Office of
Administration and Resource
Management

220-B-92-004
May 1992

EPA

Solid Waste Contract Negotiation Handbook



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Purpose of this Handbook

This handbook is designed to give local officials information they need to develop effective solid waste contracts. Specifically, the guide assists local government officials in:

- Understanding issues that must be addressed in developing contracts for solid waste programs and facilities;
- Preparing and negotiating contracts that safeguard the public interest; and
- Developing contractual arrangements that will reflect major trends in the solid waste field, including integrated solid waste management practices, regional facilities and partnerships, and compliance with new environmental and public health protection standards.

Who Should Read this Document

- Local governmental officials (e.g., mayors, city managers, department heads, and city council members) who are interested in developing public-private partnerships or intergovernmental agreements;
- Leaders in federal and state government, business, finance, banking, and industry who want to understand more about what goes into developing an effective contract with the private sector.

Prepared for:

U.S. Environmental Protection Agency
by
Bureau of Governmental Research
University of Oregon

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Foreword

A Message from the Acting Assistant Administrator and Regional Administrator

The economic realities of the nineties suggest that public resources will not keep up with environmental needs. The cost of environmental protection will continue to grow significantly in coming years. This is especially true in the area of solid waste management. According to EPA's Cost of Clean Report, solid waste management costs are expected to increase by more than 50% by the year 2000, from 24.8 billion in 1990 to 38.1 billion in the year 2000.

The Environmental Protection Agency's Public-Private Partnership Program was set up in 1989 to help state and local governments develop new ways to manage and finance required environmental improvements. Through this program we have fostered public-private partnerships in communities around the nation and created how-to publications to help local officials manage and finance their environmental programs. This publication is one of the products of this effort.

State and local officials are under pressure to improve solid waste services as a result of Federal and state regulations and citizen concerns for a cleaner environment. Contracting with the private sector and developing regional agreements with other government units are effective models that communities can use to finance and manage their solid waste services. This handbook will help local officials to develop these contracts and agreements.

The handbook is based on information derived from a survey of 160 local communities and interviews with local and state officials. It provides guidelines for developing agreements as well as actual model contract provisions.

The Bureau of Governmental Research and Service, University of Oregon, prepared this document with the Seattle, Washington Region 10 EPA under an EPA P^3 demonstration grant. We at EPA and the Bureau appreciate the cooperation of all the federal, state and local officials, and solid waste managers who assisted in the project.

Through public and private cooperation, we can develop effective ways to meet the challenge of financing environmental protection. This handbook will help you meet this challenge.

Christian R. Holmes
Assistant Administrator

Dana A. Rasmussen
Regional Administrator

Executive Summary

Overview

The Environmental Protection Agency has estimated that the United States generated 164 million tons of municipal solid waste in 1986, and that the amount is increasing at a rate of more than 1 percent annually. Landfills are reaching capacity and closing. The cost of disposing of waste is growing and local officials are concerned about how they will meet the challenge of managing solid waste.

Local governments are forming public-private partnerships and intergovernmental agreements as part of their efforts to solve solid waste problems. The formation of effective partnerships will require that local officials become knowledgeable in the area of contracting.

This handbook is handbook is designed to help local officials develop contracts with private companies and other governmental units that will protect the interests of the citizens in their communities. This handbook is based on information and analysis derived from a questionnaire survey of 160 local governments located in EPA Region X, plus selected other states; review and analysis of sample provisions from actual solid waste contracts and agreements; follow-up interviews with solid waste managers in several of the states and with responding local governments; and a review of the literature as well as state federal statutes and regulations.

Sample provisions of solid waste contracts and agreements are shown in bold type of the handbook. Some of these samples are identical to actual contract or agreement provisions and others have been modified from the original language, but they are all presented as "examples" rather than "models." Persons using the handbook should review these provisions carefully for legal adequacy and substantive suitability for any particular jurisdiction. Following is a summary of the contents of the handbook.

Meeting the Solid Waste Challenge Through Contracting

The challenges of dealing with solid waste have led local governments to seek new ways to meet their responsibilities. Two trends are noticeable: increasing private sector involvement and more intergovernmental arrangements. Turning to the private sector and to other governments offers advantages such as:

- access to new technology;
- reduced costs via large-scale operations;
- management expertise;
- risk sharing; and
- greater operational flexibility.

The Contracting Decision

To decide whether to perform services in-house, contract out, or develop an intergovernmental agreement, information must be gathered about:

- existing activities;
- needed activities;
- level of service for each activity;
- costs associated with each activity;
- jurisdiction for each activity;
- legal and policy constraints; and
- advantages/disadvantages contracting.

Public-Private Contracting

If a community decides to work with the private sector, a contract must be developed. Solid waste contracts between local governments and the private sector are common. They range from simple purchase-of-service agreements (e.g., a contract with a private firm to haul waste to a disposal site) to complex arrangements involving several activities and many private vendors.

Contracts with private firms are governed by state public contracting laws. These laws vary widely in detail, but usually require competitive bidding. State laws also regulate the competitive bidding process and set requirements for contract awards and contract management.

Intergovernmental Contracting

Intergovernmental contracts involve more than one authority, and may involve the purchase of services. Intergovernmental contracts are used for a variety of purposes, including:

- cooperative planning across jurisdictions;
- joint ownership of facilities;
- joint responsibility for operation of facilities; and
- joint agreements on exporting and importing waste.

Intergovernmental agreements operate under state joint exercise of powers laws. These statutes set forth procedures, time limits, and recording and content requirements.

Intergovernmental agreements stress cooperation. They allow local governments to do jointly or cooperatively anything they do individually. They may be voluntary or result from state laws requiring plans and facilities to cover state-defined districts.

There are two main types of intergovernmental agreements, service contracts and joint/cooperative agreements. In a service contract a community sells services to another. Joint/cooperative arrangements are used when two or more governmental units jointly own facilities or accept joint responsibility for operations.

Competitive Bidding Alternatives

Most states require communities that contract out to follow competitive bidding procedures. This usually involves Requests for Proposals (RFPs) or Invitations for Bid (IFBs).

Both IFBs and RFPs seek to maximize competition and assure the selection of the best contractor. However, the RFP process is often viewed as an exception to competitive bidding requirements, to be used when IFBs are not practical or advantageous.

Invitation for Bid

An Invitation for Bid (IFB) requires private companies to submit a bid price. The community outlines specifications for the project and awards the contract to the lowest responsible bidder.

The first and most important step in developing a contract under the IFB process is for the community to draft specifications for the work. These should be very clear, but not so detailed as to discourage innovation or unduly constrain the contractor's professional and technical judgment. Once specifications are drafted, remaining activities in the process include: drafting the call for bids; advertising; opening the bids; evaluating the bids; and awarding the contract.

Request for Proposal

A Request for Proposal (RFP) is needed when the work to be done cannot be described up front in enough detail to estimate the cost. RFPs are also appropriate when aspects of a contract require negotiation. For example, allocation of liability or responsibility for compliance with federal and state regulations may need to be negotiated. Circumstances favoring the use of RFPs could include development of a landfill, development of future markets for recycled materials, or use of new technologies.

The Contract

Whether a public-private or an intergovernmental arrangement is involved, the agreements of the parties are incorporated in a written contract. Common contract elements are:

- Background/purpose, legal authorities and terms;
- Specifications, scope of work, or statement of undertakings;
- Regulatory compliance responsibilities;
- Permit responsibilities;
- Financing and compensation;
- Contract duration;
- Performance monitoring system;

- Disputes resolution procedures;
- Renegotiation provisions.
- Termination provisions;

Contract Management

After the contract is signed and work begins, the contractor and the public agency must continue to exchange information. The plans and specifications describing the work to be done are never perfect and, over time, changing conditions may require that contract adjustments be considered.

Regulatory Compliance

Federal, state and local regulations all may need to be addressed through the contract. While the contractor generally assumes the risks related to regulatory compliance, a public agency is not necessarily relieved from responsibility for compliance.

The Resource Conservation and Recovery Act (RCRA) of 1976 is the most significant recent congressional act giving EPA regulatory authority and technical assistance responsibilities for solid waste management. It is important that local officials know the basics of RCRA Subtitle D.

Solid wastes that pose a potential hazard to human health or the environmental when improperly managed are referred to as hazardous wastes. Hazardous waste possesses at least one of four characteristics — ignitability, corrosivity, reactivity or toxicity. If your waste reflects any of these characteristics, you should follow RCRA Subtitle C regulations.

In addition to identifying the regulations to be observed, compliance depends on monitoring. If the contractor is the state permittee, compliance monitoring is the state's responsibility and no explicit provision for it is needed in the local contract. If the local jurisdiction imposes requirements beyond those of the state, or if the public agency rather than the contractor holds the state permit, a contract provision to that effect is appropriate.

Obtaining state and local permits for siting, construction, and operating facilities may be the responsibility of either the governing public agency or the contractor. If a facility is owned by a public agency, that agency usually obtains the needed state and local government permits. If a contractor is involved in a public-private or intergovernmental contract, the contractor is likely to be responsible for obtaining permits.

Compensation

Compensation in money or some other form is an essential contract element. Fair compensation for services or facilities is necessary for satisfactory contract performance. Money may flow either way under a public agency contract, or even both ways. The three main sources of compensation in solid waste contracts are taxes, service charges, and sales of materials. Operations such as waste-to-energy plants and recycling or composting programs may bring in all three sources of revenue.

Liability

Liability, or financial responsibility, should be placed on each party to the contract, and be commensurate with the risks, responsibilities and compensation of each of the parties. The two major types of liability are contractual and tort.

Contractual liability entails defective performance by a contractor and is usually covered in the contract. This can be done using performance bonds, third party guarantees that specified work will be performed. Under certain circumstances, payments due the contractor may be withheld for defective performance.

Tort liability involves a wrongful act, damage, or injury done willfully, negligently, or in cases involving strict liability. It does not involve a breach of contract for which a civil suit can be brought. A prime example of a tort is the creation of a nuisance.

The generation and management of solid waste present many opportunities for torts. They may result directly or indirectly from the conduct of a party to a contract. The contractor usually has the risk of tort liability. However, a public agency may have indirect liability for negligent actions of the contractor. The public agency can protect itself through indemnification provisions and by requiring the contractor to carry special insurance that protects both the contractor and the agency.

Even if the contract places the burden on the contractor, the public agency may not be entirely free of risk. If the contract language is not specific and impacts are discovered after work is under way, the public agency may have the responsibility to overcome the problem.

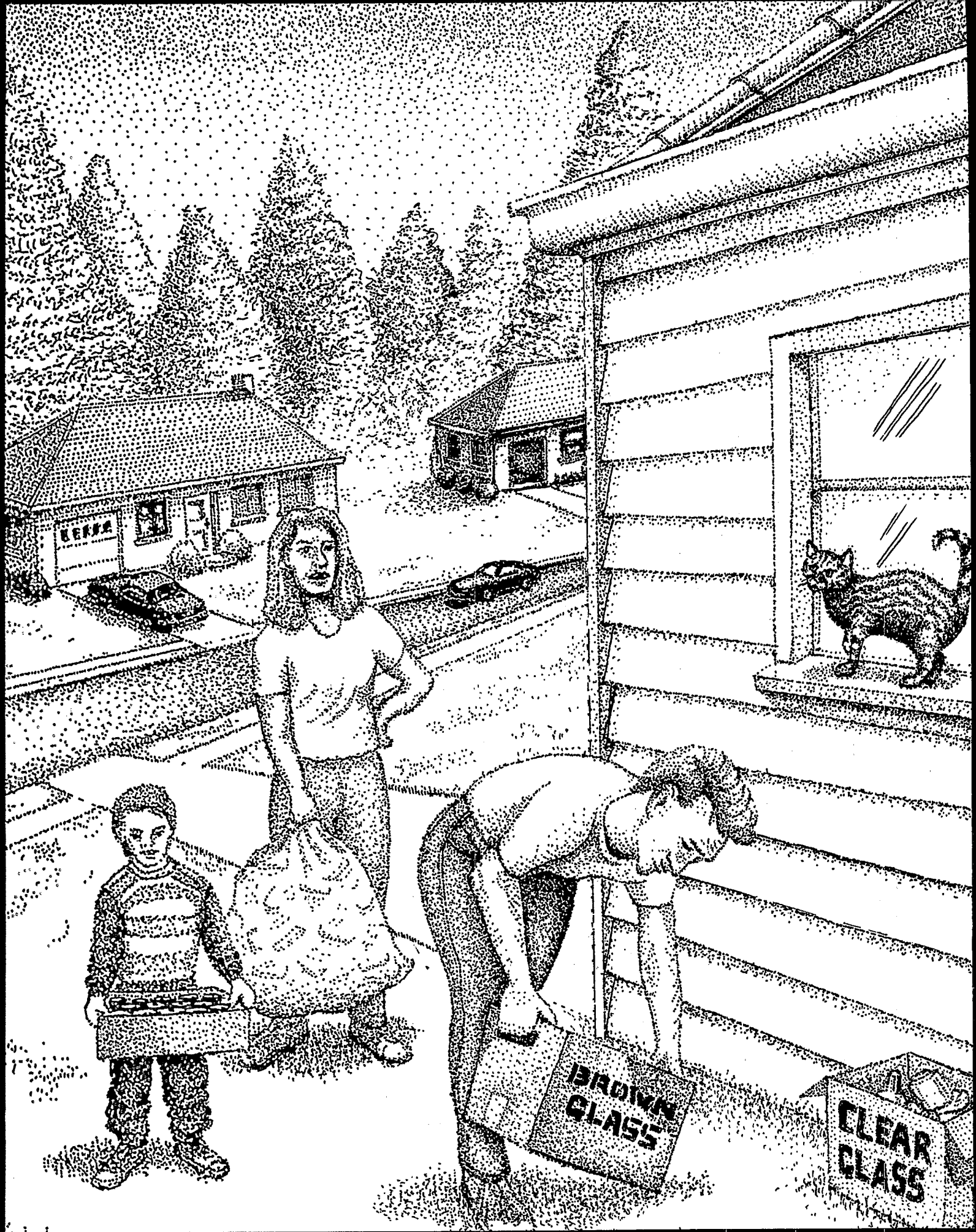
Landfills and waste-to-energy plant operations have the greatest risks of claims of damage because of pollution, contamina-tion or chemical release. Transport activities carry the greatest risk of vehicle accidents and of waste spillage.

Contracts for facilities owned by a public agency normally leave more liability risk with the public agency. Franchised activities or other contracts involving private ownership and operation allocate less risk to the public agency.

Conclusion

Local governments can meet the new solid waste challenges of the 1990s through alternative forms of service delivery, including intergovernmental arrangements and contracting with the private sector. Contract arrangements require that local governments carefully analyze their solid waste functions, establish objective standards for their performance, and consider both the legal policy factors as well as practical considerations that bear on the decisions to perform a solid waste activity by contracting.

Whether contracting with the private sector or with other governments, a public agency must maintain close contact with the contractor and carefully monitor the progress of the work. Contracts should include provisions addressing regulatory compliance, compensation, and liability. Public agencies should expect problems and disputes during contract performance and should be prepared to deal with them in a variety of ways, including the use of both informal and mediated negotiation.


BROWN GLASS
CLEAR GLASS

Chapter 1: Challenges To Solid Waste Management

The growing complexity of local government responsibilities is nowhere better illustrated than in solid waste management. In the past, when there were fewer people, when people produced less refuse, when more open land was available, and when the health and environmental impacts of waste disposal were less fully recognized, garbage was taken to local public dumps or burned in backyard barrels or apartment building incinerators.

Dumps were gradually replaced by "sanitary" landfills, and local governments' solid waste activities increased because waste had to be collected, taken to the landfill, compacted, and covered. Impermeable clay liners were added to some landfills. When landfills were filled to capacity, they were covered with additional dirt and usually planted with grass or other plants. Some were converted to other uses.

In most of the United States, these simple and inexpensive solid waste management methods have vanished. Their disappearance was caused by two major factors:

- steadily increasing quantities of waste, with resulting decreases in landfill capacity; and
- widespread awareness of the public health and environmental risks of past disposal practices.

These factors have forced local governments to become more sophisticated in their solid waste management plans and strategies, and these plans and strategies increasingly involve contractual arrangements with private firms and other governments.

Increasing Quantity of Waste

The Environmental Protection Agency has estimated that the United States generated 164 million tons of municipal solid waste in 1986, and that the amount is increasing at a rate of more than 1 percent annually.[1] One direct impact of the substantial increase in solid waste has been the closure of many landfills that have reached capacity.

Another impact is the difficulty and growing cost of waste disposal. These impacts, plus recognition that portions of the waste stream possess economic value, have produced new management activities related to waste reduction, re-use, and recycling.

Health and Environmental Risks

The second major solid waste management challenge of the 1990s are the potential and actual risks to human health and the environment that are inherent in solid waste facilities and programs. Uncontained leachate from landfills has contaminated ground and surface water, and unvented gases have infiltrated inhabited areas. Municipal landfills account for about 20 percent of the federal Superfund sites contained in the National Priority List. Incinerators and waste-to-energy facilities lacking refined controls have produced air pollution and toxic ash. These and other facilities such as transfer stations, recycling centers, and material recovery plants have generated noise, odors, traffic congestion, and visual appearances that are unacceptable to the public.

Health and environmental concerns have intensified the difficulties of coping with a growing waste stream. Local landfills are closing, not only because they are full, but also because they do not meet new federal and state regulations, and bringing them up to standard is too expensive.

Changing Regulatory Environment

As the problems of coping with solid waste increased, so did the roles and responsibilities of federal, state, and local governments. These roles include planning, research, technical assistance, regulation, financial support, and program implementation.

The federal response to the growing solid waste problem began in 1965 with enactment of the Solid Waste Disposal Act, which authorized programs of research

and technical assistance to local governments. This legislation was succeeded by the Resource Recovery Act of 1970, which expanded grant-in-aid programs with conditions aimed at upgrading state and local solid waste planning activities. The 1970 legislation, in turn, was succeeded by the Resource Conservation and Recovery Act of 1976, which further expanded the federal role and authorized new programs, including direct federal regulation of hazardous wastes.[2]

Although federal grants for state and local solid waste programs were phased out during the 1980s, state governments have continued and indeed expanded their solid waste activities. State laws generally provide for adoption of statewide solid waste plans, state regulation and permitting of landfills and other major facilities, and state oversight of local government solid waste activities. Many states are currently expanding their laws and programs to include such matters as establishing recycling goals, developing markets for recycled materials, regulating packaging, composting and other source reduction measures, etc.

Local governments, primarily cities and counties, have responded to these developments by modernizing their solid waste programs and operating them within the framework of growing federal and state regulation. City and county land use planning and regulation also affect many solid waste activities, as do additional local regulations with respect to such matters as noise, visual appearance, and traffic.

The changing regulatory environment of solid waste management presents many uncertainties for long-range planning, as well as for program implementation. These uncertainties require special attention in discussing the subject of contracting for solid waste facilities and services.

Meeting Solid Waste Challenges through Contracting

The challenge of dealing with increased quantities of waste while addressing health and environmental risks and complying with increasingly complex federal and state regulations has led local governments to seek new ways to meet their responsibilities. Two trends are noticeable in the solid waste field: increasing involvement of the private sector; and more use of joint and cooperative intergovernmental arrangements. Turning to the private sector and to cooperation with other governments offers local governments several advantages. Local governments may

- gain access to new technology in implementing solid waste programs;
- reduce costs through larger-scale operations;
- coordinate planning and development of facilities and programs throughout substate regions extensive enough to comprise "wastesheds" appropriate for integrated solid waste management;[3] and
- attain other benefits, including management expertise, risk sharing, and policy and operational flexibility.

The legal and administrative vehicle by which most public-private and intergovernmental arrangements are established is the contract. Black's Law Dictionary defines "contract" as "An agreement, upon sufficient consideration, to do or not to do a particular thing." That definition is broad enough to cover a multitude of types of arrangements between the public and private sectors and among governments.

Public-Private Contracts

Local government solid waste contracting with the private sector is already common. A 1982 survey sponsored by the International City Management Association found that 34 percent of the responding cities and counties contract for residential solid waste collection, 41 percent for commercial collection, and 26 percent for disposal.[4] The contracts range from simple, short-range purchase-of-service agreements (e.g., a county contracts with a private firm to haul waste from a transfer site to a disposal site) to complex arrangements involving a variety of activities with a large number of private vendors. For example, the Portland, Oregon, Metropolitan Service District (METRO) has at least four different types of contract arrangements for its various solid waste facilities and activities:

- Four privately owned and operated landfills and a reload facility operate under agreements to accept waste from METRO, but without "franchises" from METRO.
- Two privately owned and operated recycling/recovery centers, one transfer station, and one composting facility operate under METRO franchises, some with rates set by the operator and others with rates set in accordance with franchise provisions.
- One landfill is owned by the city of Portland, managed by METRO, and operated by a private firm under a contract with METRO.
- Two transfer stations are owned by METRO, but operated by private firms under contract.[5]

Public-private contracts are generally governed by state public contracting laws. These laws require competitive bidding, with certain exceptions, for public agency purchases of goods and services; regulate the competitive bidding process, set requirements for contract awards and contract management, and otherwise regulate the public contracting process. State laws vary widely in detail, but for purposes of this handbook, provisions comparable to the American Bar Association's *Model Procurement Act* have been assumed.[6]

Intergovernmental Contracts

Like public-private contracts, intergovernmental contracts may involve the purchase and sale of services, but they also are used for a variety of other purposes, including

- cooperative and joint planning and policy making for solid waste throughout a region that includes several local government jurisdictions;
- joint ownership and/or operation of solid waste facilities and services; and
- establishing arrangements for exporting and importing waste among jurisdictions.

Intergovernmental agreements[7] operate under state joint exercise of powers laws, rather than the public contracting laws that regulate public-private contracting. The joint exercise of powers laws generally provide that two or more governmental units or agencies may enter into agreements for the joint or cooperative exercise of any powers or functions they are individually authorized to exercise. These statutes usually set forth some procedures, prescribe some content requirements for intergovernmental agreements, and may stipulate time limits, recording requirements, and other matters related to the process. In addition to the general joint exercise of powers laws, state statutes contain numerous specific authorizations for intergovernmental agreements relating to specific functions or activities. As in the case of state public contracting laws, provisions of state joint exercise of powers acts vary widely. In discussing intergovernmental agreements, this handbook assumes provisions comparable to the U.S. Advisory Commission on Intergovern-mental Relations' model joint exercise of powers act.[8]

Using Public-Private and Intergovernmental Contracts

Today, public agencies that have solid waste responsibilities are increasingly likely to become involved in a combination of public-private and intergovernmental contracting, rather than in just one or the other of the two types of arrangement. Often, the preparation of solid waste management plans takes place under an intergovernmental agreement among several adjoining and/or overlapping jurisdictions, while actual conduct of solid waste management activities and operation of facilities is carried on under both public-private and intergovernmental contract arrangements, as well as by "force account" or in-house administration. As examples of these mixed arrangements:

- County "X" may own a landfill site, contract with a private firm for operating it, and accept waste under intergovernmental agreements with one or more neighboring counties or cities.
- Two or more local governments may jointly contract with the same private firm for design, construction and/or operation of a major waste-to-energy or resource recovery facility.

The Portland METRO arrangements mentioned above and the Benton County landfill agreements described in appendix A provide examples of mixed arrangements.

Given the popularity of both intergovernmental and public-private contracting, it is clear that solid waste managers need to be familiar with the contracting process and to acquire the special skills in negotiation and contract management that are needed to protect the interests of their jurisdictions. This handbook provides a starting point to help local officials and managers gain a better understanding of solid waste contracting.

City-County Facility Contract

Spokane and Spokane County (population 358,000) have an intergovernmental agreement for managing a regional, mass-burn, resource-recovery, steam and electricity generating facility. Although the city owns the facility and contracts with a private firm for its operation, the county requires that waste generated in the unincorporated area be processed through the city facility. Major decisions concerning the system, such as expansion of its service territory or contract changes that cause significant additional costs, must be agreed to by both the city and county governing bodies. A policy liaison board, consisting of two city and two county representatives, functions as an oversight board for all matters concerning the facility and its management.

City-County Planning Contracts

In 1988, King County (Seattle) Washington entered into 40-year intergovernmental agreements with all but two of its incorporated cities and towns for cooperative management of solid waste, with particular emphasis on waste reduction and recycling. Under the agreement, each city authorizes King County to prepare a plan for the city's solid waste management to be included in the comprehensive county plan. The agreement establishes an organizational structure that represents the participating local governments and sets forth procedures by which the comprehensive plan will be reviewed, approved, and adopted.

Seven southwestern Washington counties are also participating in an intergovernmental planning consortium. These counties (Pacific, Cowlitz, Grays Harbor, Lewis, Mason, Thurston, and Wahkaikum), with a combined population of 420,000, are members of the Southwest Washington Inter-County Solid Waste Advisory Board (SWIC SWAB). The intergovernmental agreement commits them to review and compare the solid waste planning activities of each county, assess the feasibility and desirability of combining their waste streams, and consider development of a sample bid call document to implement cooperative services and facilities. Funding for the joint planning effort comes from the participating counties and the state Department of Ecology.

Combinations of Intergovernmental and Public-Private Contracting

In 1990, Columbia and Yamhill counties (Oregon) and a private firm that owns and operates a landfill under a franchise from Yamhill County entered into a three-way agreement governing export of waste from Columbia County to the landfill in Yamhill County. The agreement sets a maximum tonnage to be accepted from Columbia County during the first twelve months and provides for negotiation of future tonnage, recognizing the potential impact of future recycling programs.

Also in Oregon, the Portland Metropolitan Service District (METRO) has an agreement with Marion County (about 50 miles south of Portland) under which METRO disposes of up to 40,000 tons of waste annually at the privately owned and operated Marion County Waste-to-Energy Facility. Marion County contracted with the private firm for construction and operation of the facility and has agreed to provide 145,000 tons of acceptable solid waste annually (including the 40,000 from METRO). The METRO-Marion County agreement includes a schedule that provides for most of METRO's waste to be delivered during the facility's low-flow winter period, but allows METRO to deliver extra waste if its access to the Gilliam County Landfill is disrupted because of weather or other uncontrollable circumstances.

Contracts Compared with Other Arrangements

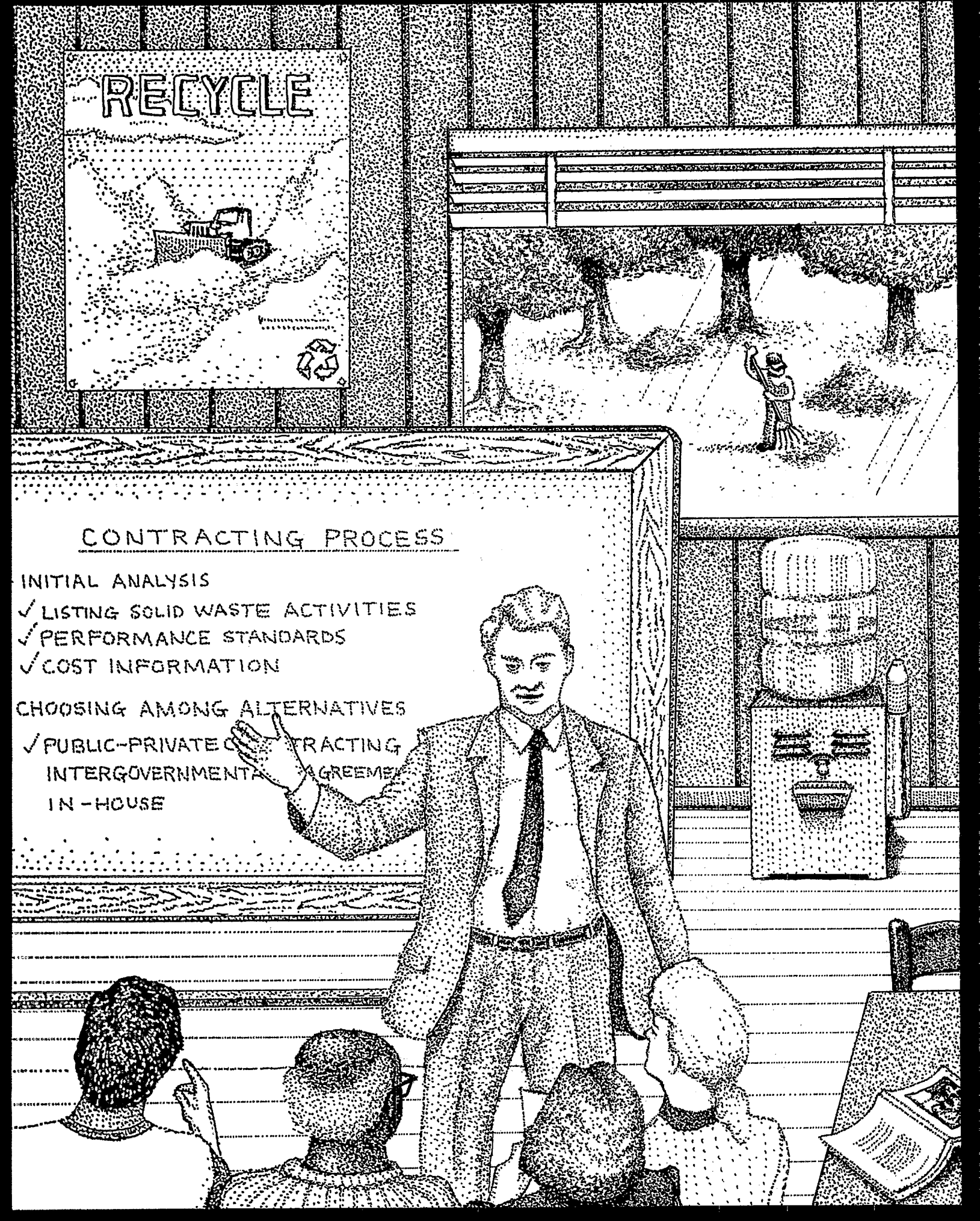
While both public-private contracts and intergovernmental agreements clearly qualify as "contracts," a number of other arrangements between and among governments and private firms are similar to, but distinguishable from, contracts.

These other arrangements, all of which may be used in the context of solid waste management, are franchises, licenses and permits:

- A *franchise* is a device by which a governmental unit may confer a privilege (e.g., using public streets to engage in the solid waste collection business). The privilege may be granted exclusively (e.g., to engage in the business within a given geographical area) or nonexclusively. If the franchising governmental unit imposes conditions on the privilege, which is almost always the case, the resulting arrangement is almost indistinguishable from a contract. Often the conditions imposed include payment of a franchise fee based on the private firm's gross receipts or another basis.

- A *license* authorizes a private company to conduct a service (e.g., solid waste collection) that would not be permissible under local laws without the license. The purpose of the license is usually to provide an enforcement method (i.e., threat of revocation) for certain regulations imposed upon the type of business regulated, although licenses are sometimes required merely for the purpose of identifying firms that do business in the jurisdiction. Licenses are nonexclusive and do not create a contractual relationship with the public agency.

- A *permit* may be required in addition to, and in conjunction with, a business conducted under a contract, franchise or license. State and local permits for landfills, for example, impose conditions under which the facility must operate. To that extent, a form of contractual relationship arises between the governmental unit and the permittee, but the legal consequences of noncompliance differ from those that would arise from a breach of contract.


RECYCLE
CONTRACTING PROCESS
INITIAL ANALYSIS
✓ LISTING SOLID WASTE ACTIVITIES
✓ PERFORMANCE STANDARDS
✓ COST INFORMATION
CHOOSING AMONG ALTERNATIVES
✓ PUBLIC-PRIVATE
INTERGOVERNMENTA
IN-HOUSE

Chapter 2: The Contracting Process

The Contracting Decision

The Initial Analysis

Listing Solid Waste Activities. Local governments facing new solid waste challenges of the 1990s need to systematically review their solid waste programs and activities and consider alternative forms of service delivery, including intergovernmental arrangements and contracting with the private sector. Such an analysis may begin with a simple listing of existing and potential solid waste activities, such as the example in Exhibit 1.

Once such a list is developed, a description may be developed for each existing or proposed activity. The description might include:

- a brief descriptor of the activity (e.g., "operate and provide the materials, supplies, tools, equipment, labor and other goods for operation of the county landfill");
- indicators of the size or volume of activity (e.g., "accept [___] tons of waste annually until 19 ___");
- indicators of the level of service (e.g., "waste covered with six inches of fill at end of each working day," "salvaged materials removed at least weekly" etc.);
- personnel and equipment used to conduct the activity;
- budgeted and/or actual expenditures for recent fiscal years; and
- citation of state and/or local laws and regulations that apply to the activity.

Performance Standards. The most important part of this analysis is identifying indicators of the level or quality of service expected in each activity. Even if the activity is conducted in-house by the public agency, such indicators are important, and they are even more important if the public agency is going to provide them through a public-private or intergovernmental contract. These indicators or performance standards should be stated so that they are objectively measurable and, to the greatest possible extent, they should measure outputs or end results rather than inputs. Some examples for activities other than landfills might include:

Transfer station:

- Haul waste away frequently enough so that the station remains capable of receiving all waste delivered to it.
- All waste to be put into transfer boxes or trailers by the end of each working day.

Recycling operation:

- Pick up materials placed at the curbside on the scheduled day of collection for recyclables.
- Collect recyclables from at least (number of) commercial establishments by (date).
- Submit monthly reports reporting tonnages of materials recovered and sold, by material, and household participation rates.

Waste-to-energy facility:

- The (public agency) will deliver (a guaranteed tonnage) of waste to the facility during each billing period.
- The facility must be capable of processing (number of) tons of waste at a specified energy content stated in BTUs per pound.
- The facility must produce no more than (a given level) of particulate emissions.
- Waste residues are to contain no more than a specified percent of moisture and putrescible matter.

Cost Information. As a final step in the initial analysis, a public agency might identify the costs associated with each existing activity and the estimated costs for potential activities. Guidelines for calculating costs include:

Exhibit 1

Sample Listing of Existing and Potential Solid Waste Management Activities

Planning and Organizing

- Conducting studies and analyses
- Conducting public information and education programs
- Agreeing on amounts and conditions of waste to be transported among jurisdictions
- Establishing intergovernmental organizations

Transporting

- Residential collection
- Commercial and industrial collection
- Transporting between processing and disposal sites

Transfer Station or Waste Processing Plant

- Construction
- Operation
- Providing services to the plant operation
- Conducting a materials recovery operation

Waste-to-Energy Plant or Other Incinerator

- "Turnkey" construction
- Conducting an incineration/energy production operation
- Providing refuse derived fuel
- Disposing of ash residues

Composting

- Providing services to a composting operation
- Shredding waste materials
- Marketing compost
- Conducting a complete composting program

Recycling

- Curbside or other source collection of recyclable materials
- Operating collection stations for recyclable materials drop-off
- Recovering recyclable items at the tipping floor
- Processing recyclable items for shipment
- Marketing recycled materials
- Conducting a complete recycling program

Landfill

- Preparing a landfill site
- Operating a landfill site
- Providing services to a landfill operation
  - Equipment maintenance
  - Supplying cover material
  - Leachate testing
- Closing a landfill site
- Monitoring the site area after closure

- Costs for existing activities may be based on actual budgets or expenditure reports, but the analysis should include not only the direct costs likely to appear in those documents but also indirect (overhead) costs. Many, if not most, agencies have developed formulas that express indirect costs as a percent of direct costs.

- In addition, the costs of physical facilities such as landfills and transfer stations should be calculated on a "life cycle" basis, taking into account projected maintenance and replacement expenditures as well as current operating costs. For some activities, it is possible to calculate unit costs (costs per ton, per mile of haul, per residential unit, etc.). Unit cost information is valuable both for in-house budgeting and management and to establish a basis for evaluating the cost of contracted services.[9]

- The cost of solid waste activities not previously conducted by an agency can be estimated by soliciting informal quotations from potential contractors. The activity descriptions compiled as suggested above can provide a good basis for making preliminary contractor inquiries. Any request for quotations should make clear the informal nature of the inquiry, so that there will be no misunderstandings when the agency decides either to conduct the activity in-house or to call for bids.[10]

Choosing Among Alternatives

Having compiled information about each solid waste activity and its costs, it's time to make some choices among the three main service delivery alternatives: conducting activities in-house (force account), conducting them through intergovernmental agreements, conducting them through public-private contracts, or a combination of two or all three approaches. This involves at least three types of considerations: possible intergovernmental arrangements required to establish jurisdiction over the logical service area for each activity; advantages and disadvantages of contracting with the private sector for each activity; and legal and policy constraints that may affect the choice among alternative service delivery modes.

Area and Jurisdiction Considerations. Achieving the scale of operations required to make effective use of modern solid waste technology, including resource recovery and waste-to-energy processing, often requires that neighboring counties or other local jurisdictions band together in joint and cooperative arrangements of various types. Larger volumes of waste increase the feasibility of recycling centers, composting operations, and other programs which, in turn, decrease the amount of generated waste that requires disposal. Acting together, local jurisdictions can also reduce duplication of efforts in writing regulations, developing contracts, and negotiating with private companies. Finally, since air pollution, ground and surface water contamination, and unsafe hazardous waste practices know no jurisdictional boundaries, environmental protection can be enhanced when local governments act regionally.

Determining the combination of governmental units that would constitute a logical grouping for any particular solid waste activity involves considerations of both economic and political feasibility. While no easily applied guidelines are available, the U.S. Advisory Commission on Intergovernmental Relations has offered the following general functional assignment criteria which may be helpful in analyzing issues of area and jurisdiction.

- **Economic efficiency:** maximize economies of scale (theoretically, when no expansion or contraction of the service unit will produce further cost savings) without foreclosing "consumer-voter" choice options;

- **Equity:** among similarly situated local jurisdictions and individuals, minimize financing disparities and externalities (i.e., insofar as possible, contain all the costs and all the benefits from the activity within the service area);

- **Accountability:** ensure that citizens have adequate access and control over policies governing the conduct of the activity; and

- **Administrative effectiveness:** ensure that there is legal, financial and managerial capacity equal to the requirements of conducting the activity.[11]

These criteria are not easy to apply to specific cases, and they are not even internally consistent (e.g., achieving economies of scale may require larger service units than would be consistent with citizen access and control). However, they do give leads to some of the tradeoffs and at least provide a framework for discussion of area-function relations.

Public-Private Contracting Considerations. The most frequently cited advantage of contracting as compared with in-house service delivery is the expected cost savings. In addition to the impact of competition on pricing, cost savings through contracting may reflect a contractor's lower personnel costs because of compensation and fringe benefit differentials, specialized equipment, and labor force skills not available to the public agency, and possibly greater management efficiency. If a new activity is being considered for contracting, avoidance of startup costs (new equipment, personnel training, etc.) may also be a factor.

The apparent cost advantages must be balanced against some increased costs to a public agency that delivers a service through contracting. These include the costs of preparing specifications and other contract documents, the time and expense of negotiating contracts, and, most important, the cost of monitoring contract performance, which can amount to 5 to 10 percent of total project costs.[12] In calculating contracting cost comparisons, it is important to distinguish between "avoidable" and "unavoidable" costs — some supervision, overhead, and sunk costs cannot be avoided under contract arrangements because they will still be required in connection with other agency functions and activities.[13]

Several factors relevant to the decision to contract for service delivery either do not relate to costs or affect costs only indirectly. These include:

- **Flexibility:** Contracting may be considered a useful alternative or supplement to in-house service delivery if a service is subject to peaking or other fluctuations over time. Contracting makes it possible for a public agency to avoid long-term personnel commitments and capital outlay that may not be used efficiently at certain times. On the other hand, by contracting a public agency loses some flexibility in the potential cross-assignment of personnel among other agency activities.

- **Control and Accountability:** Public agencies sometimes resist contracting out for service delivery for fear of losing control over performance and accountability to policy-level officials. Proponents of contracting point out, however, that the service specifications and performance standards that are part of a properly drawn contract provide the tools by which an agency may assure even greater responsiveness to program policies than may occur with in-house service delivery.

- **Risk Spreading:** In providing a service such as solid waste, which involves serious risk of health and environmental damage, contracting may be a way to spread exposure to liability. In evaluating this factor, however, the public agency should consider any protection against liability the agency may enjoy because of its governmental status and specific limits provided by state law. Any risks assumed by a contractor, of course, are reflected in the contract price.

- **Other:** Numerous additional considerations enter into decisions about intergovernmental or public-private contracting. Possible contractor labor problems or financial instability could produce interruptions. The agency might anticipate policy changes (e.g., new federal or state regulations) that could be more difficult to implement under a contract arrangement. On the other hand, contracting can provide a "yardstick" by which an agency may measure the efficiency and effectiveness of its own operations. Another advantage sometimes cited by proponents of contracting is that it allows the public agency to concentrate on policy rather than operations. John Rehfuss, author of an important book on public service contracting, underscores this point by observing that, "After all, cities do not exist to provide services .... Cities exist to meet the needs and desires of their residents."[14]

Legal and Policy Constraints. Tentative conclusions from an agency's analysis of intergovernmental (regionalization) factors and of advantages and disadvantages of contracting with the private sector must be

weighed against various legal and policy constraints. As pointed out in Chapter 1, statutes in most if not all states bear significantly on both intergovernmental and public-private contracting. The intergovernmental options may be constrained to some extent by state joint exercise of powers acts that in some cases identify functions that may or may not be undertaken jointly or cooperatively by two or more local governments, and in all cases lay down certain procedures to follow in developing intergovernmental arrangements. State public contracting laws typically require competitive bidding for capital projects costing more than a specified amount and prescribe in detail both the policies and procedures to be followed in contracting with the private sector. Home rule cities and counties should also check their charters for further legal requirements and constraints on intergovernmental or public-private contracting.

Collective bargaining agreements may make decisions to contract out a mandatory bargaining subject, may require consultation with bargaining unit representatives, and may impose other constraints on an agency's options in considering public-private contracts. Although the subject of employee relations in making contract v. in-house decisions is beyond the scope of this handbook, it is extensively covered in the literature, which contains many suggestions for addressing this problem.[15]

Finally, a public agency's governing body (e.g., city council or board of county commissioners) may have definite policy preferences that must be taken into account while making contracting decisions. For example, governing bodies may require local preference where authorized by law, or they may have policy preferences for or against in-house service delivery. The extent to which authority to enter into contracts has been delegated to agency heads or the jurisdiction's chief executive officer varies among governmental units, and in smaller units the governing body itself is likely to exercise approval authority on individual contracts.

Public-Private Contracting

Securing the Benefits of Competition

It is widely considered to be good public policy (other things being equal) to deliver public services, including solid waste services, through contracting with private firms. Underlying the widespread preference for contracting is a general belief that competition among private firms is the best assurance that public services will be delivered with maximum economy and efficiency.

This philosophy is expressed in state laws relating to public contracts, which generally require that, with certain exceptions, public agency purchases, capital projects, and services over a certain amount be contracted under competitive bidding procedures. As a corollary of the policy that supports competition, the laws include numerous requirements intended to promote fair play in contracting, including such matters as advertising, use of sealed bids, public opening of bids, maintenance of certain records, etc.

IFBs v. RFPs

Most solid waste contracts are developed under one of two major variations of competitive bidding: invitations for bid (IFBs) and requests for proposals (RFPs). Based on review of contracts surveyed for this handbook, there appears to be increasing use of the RFP process in the solid waste field.

Although both IFBs and RFPs seek to maximize competition and to assure selection of the best possible product or service provider, use of the RFP process is generally regarded as an "exception" to competitive bidding requirements, to be used when IFBs are not "practicable" or "advantageous."[16] Under many state and local laws and regulations, use of RFPs must be specifically justified and/or approved by a special contracting authority.

Major differences between the IFB and RFP procedures are:

- Specifications for IFBs must be more complete and more detailed than for RFPs. Indeed, the major

distinguishing feature between the two procedures is that with an IFB, submission and acceptance of a bid price results in a binding contract. While RFP specifications (or "scope of work" statements) should be complete enough to clearly express the agency's objectives, RFP responses are essentially starting points for subsequent negotiations that fill in the details.

- The award of a contract under IFB procedures is to the "lowest responsible bidder" (or equivalent terminology).[17] Under RFP procedures the bid price may be the major award criterion, but the agency may also consider the relative merits of alternative work tasks, methods, etc., submitted by respondents. The IFB focuses competition on costs, while the RFP focuses competition on the nature of the services as related to cost concerns. (In both procedures the qualifications of bidders and respondents is a relevant factor.)
- As noted above, under IFB procedures, contract elements are complete when a bid is submitted and accepted, although formal contract documents may be prepared and signed later. Under RFP procedures, contracts are negotiated with the offerors whose initial proposals are determined to be in the competitive range. The government selection official selects the most advantageous negotiated contract. The selected contract is executed when it is signed by the government contracting officer.

Invitation for Bid Process

Preparing Specifications. The first and most important step in developing a contract under the IFB procedure is to draft plans and/or specifications for the work to be contracted. IFB specifications have been defined as "Written directions governing the procedure to be followed in the performance of the work, the quantities and qualities of materials to be used and the method of measurement of work."[18]

The initial analysis suggested earlier in this chapter should be the starting point for developing specifications for a solid waste contract. To the greatest possible extent, as noted above, the kinds, amounts, timing, and methods of contracted work should be described using outputs or end products that can be measured objectively, although work inputs (personnel qualifications, required equipment, hours of operation, etc.) usually are required either to supplement or substitute for outputs. This is particularly true where end results cannot be guaranteed (e.g., recycling a certain percent of waste tonnage).

In solid waste contracts, some matters that might otherwise be covered in the contract specifications are addressed in state or local permits. For example, state landfill permits may be based on a previously approved landfill operations plan and contain numerous specifications as to cover, kinds of waste to be accepted or rejected, required controls for leachate and vectors, etc. Local conditional use permits also may spell out terms and conditions that would otherwise be covered in a contract: for example, a 1990 Klickitat County (WA) conditional use permit for a regional landfill contained a lengthy list of conditions, including paying a substantial annual fee for impact mitigation, conducting numerous specified monitoring activities, providing specified employee training, and specifying operating standards and requirements relating to air, water and soil pollution, unacceptable waste, litter, vectors, fire, accidents, noise, appearance, transportation, public services and utilities.

In general, contract specifications should be as clear and complete as possible, although not so detailed as to discourage innovation or to unduly constrain the contractor's professional and technical judgment. It is helpful to not only describe the work or facilities to be produced under the contract, but also to explain how the contract relates to the agency's broad policy goals.[19]

Other IFB Steps. Once specifications have been drafted and approved at an agency's appropriate executive and policy levels, the rest of the IFB process can go forward. Major steps in this process include:

- **Drafting the call for bids:** This requires drafting of all contract elements, including provisions covering such matters as inspection, complaints, reports, performance bonding and insurance requirements, change orders, contract payments, liability indemnification, penalties and damages for defective performance, affirmative action, prevailing wage requirements and contract duration, renewal and termination. The bid call also provides information about the bidding process, including submittal directions, bid bonds or deposits, pre-bid conference plans, if any,

requirements for bidder qualification, etc. Also, the bid call usually reserves the agency's right to reject any and all bids.

- **Advertising:** Since the major purpose of the IFB approach is to secure maximum competition, bid calls should be advertised in media most likely to reach potential bidders — often in specialized daily or weekly commercial publications used to publicize bid calls. Advertisements include a brief indication of the work to be contracted, the name of the agency, place where bids are to be submitted, time and place of bid opening, and the place where detailed specifications and bid documents can be obtained.
- **Opening, Evaluation and Award:** Bid openings are conducted in public at a previously announced time and place, and apparent low bidders are identified. However, before an award is made, the apparent winning bid must be evaluated. For this purpose, agencies commonly establish a team of agency personnel including representatives of the operating unit responsible for the service or facility, as well as agency finance and legal staff members. This team makes a recommendation to the chief executive, governing body or other contracting authority after determining that the apparent low bidder has the experience, financial responsibility, and resources necessary to perform under the contract, and that the bid as submitted is responsive to the requirements stipulated in the bid call. It is important that the evaluation be documented in writing, including any justification for not selecting the lowest bid. Should the awarding agency decide to re-open the bid process, a written explanation also should be provided.

Request for Proposals Process

Requests for proposals are more appropriate than invitations for bids when the kinds, amounts, timing, and/or methods of doing the work or building the improvement cannot be stipulated fully in advance at the level of detail that would permit a prospective contractor to respond with merely a bid price. RFPs also may be appropriate when other aspects of a contract require negotiation, such as the allocation of liability or responsibility for compliance with federal and state regulations.

Circumstances favoring the use of RFPs in solid waste contracts might include the complexity of proposed new major landfills, uncertainty about future markets for recycled materials, and use of new technologies (for example, composting operations). Contracts negotiated under the RFP process might result in better solutions to problems such as liability, financial responsibility, and impact mitigation, which protect the public and also protect the contractor from unreasonable risks.

Because RFPs are generally regarded as exceptions to the general policy favoring competitive bidding, a public agency planning to use the process may be required to obtain prior approval (e.g., from a central purchasing office, public contract review board, the chief executive or the governing body). Some state public contracting laws establish specific requirements for the use of RFPs (as does the ABA model law).[20]

Several steps in the RFP process differ from those used in the IFB process.

- **Project team:** While the IFB process often involves establishing a team of agency staff to evaluate the qualifications of apparent low bidders, the RFP process generally requires creation of a project team early in the process. The greater judgment and discretion associated with preparing the RFP and with evaluating the substantive aspects of proposals received makes it desirable to involve both technical and policy-level agency personnel, as well as legal and financial staff, throughout the process.
- **Drafting the RFP:**
  - The RFP counterpart to specifications under the IFB is the "scope of work." It is even more important in the RFP to state clearly and completely what the agency hopes to accomplish under the contract. The description of the work itself obviously need not be as detailed with respect to specific outputs and inputs, and indeed one of the agency's major purposes may be to elicit ideas from responders as to alternative work elements.

Exhibit 2

RFP Evaluation Factors for Rural Recycling Collection Services
Lane County, Oregon
1988

BASIS FOR SELECTION

The successful Contractor shall be the most responsible proposer for the requested services, i.e., the proposer with the highest level of experience in providing the requested services, the most thorough and intensive collection schedule, the most efficient fleet of collection equipment and inventory of collection containers, the highest level of services offered, and the lowest price requested for the services.

A point system will be used to rate and compare each proposal. An evaluation team composed of Waste Management Division Staff will be formed to evaluate the proposals. The Waste Management Division reserves the right to contact any and all proposers to supply any additional information it feels necessary to clarify any bid.

Points will be awarded on the following basis:

Contract Price:	50 Points
Experience:	25 Points
Collection Schedule:	25 Points
Collection Equipment:	25 Points
Services Offered:	15 Points
Total Possible Points	140 Points

(The RFP goes on to explain that the lowest bidder will receive 50 points for the contract price, and points will be deducted from 50 for higher bids in accordance with a specified sliding scale reflecting the amount of difference. A similar method of assigning points was used for the other factors, with points deducted in increments of five by rank order, with best proposals receiving the maximum points).

— The contract price is one of the items to be negotiated, but the RFP may appropriately state a target amount, or perhaps a range. Prospective offerors will find it hard to develop their proposals without some general guidance as to the amount the agency expects to spend.

— An essential part of the RFP is the description of factors that will be used to evaluate the responses. Some kind of point system is customarily used for this purpose, as indicated in Exhibit 2.

— A statement should be included to the effect that the RFP is not an "offer" (in the legal sense) and that the final contract will be negotiated with the contractor to whom the award is made.

— Other portions of the RFP include various contract terms and conditions similar to those suggested above for IFBs, including submission instructions, a person to contact for further information, etc. It also includes similar disclaimers, such as the right to reject all proposals and the right to negotiate with more than one proposer. If the agency plans to interview several responders prior to making an award, that fact should be stated in the RFP.

- **Publicizing the RFP:** The RFP should be advertised in the same manner as for IFBs, and, since one aim of the process is to generate suggestions for alternative ways to do the work, agencies using RFPs should make even greater efforts to publicize the request than they do for IFBs.

- **Responding to Inquiries:** Since the RFP scope of work is less complete and detailed than IFB specifications, it is appropriate to invite and respond to inquiries from prospective proposers. Records of all inquiries and the response provided should be kept and made available to other prospective proposers.

- **Interviewing proposers:** It is common for the project team to conduct interviews with at least the top two or three proposers, both to clarify points in the response and to assess the probable compatibility between the agency and the prospective contractor. Practices vary with respect to confidentiality in these interviews, but if proprietary information is involved, competing proposers must be interviewed separately.

- **Making the award:** After evaluating the proposals (and conducting interviews, if required), a tentative award may be made, subject to successful contract negotiations. Some state laws establish policy for making the award that is similar in purpose to the "lowest responsible bidder" concept for IFBs. The ABA model statute, for example, provides that the "Award shall be made to the responsible offeror whose proposal is determined in writing to be the most advantageous to the [agency] taking into consideration price and the evaluation factors set forth in the Request for Proposals. No other factors or criteria shall be used in the evaluation. The contract file shall contain the basis on which the award is made."[21]

Unlike the IFB process, much of the work in developing a contract under the RFP process takes place following a tentative award. At that point, serious negotiations begin with respect to the dollar amount of the contract, the scope of work, and other contract terms and conditions. Indeed, some negotiation may already have begun, at least informally, during the interviews with prospective contractors.

For purposes of negotiating the contract, each potential party should select one or two negotiators. The scope of the negotiators' authority and duties should be specified in writing. Negotiations should be carried out at specified times in locations that are appropriate to conducting public business. An accurate record of proceedings should be available to the entire team at each phase of negotiation.

In this process, the negotiators for each party focus on reaching what they perceive to be practical performance standards and on minimizing the risks for their respective parties. The style of negotiation during these efforts to develop the contract is likely to be competitive, if not adversarial, in contrast to the "collaborative" negotiations that are most effective during the

implementation of a finalized contract. Appendix C contains further discussion of these contrasting styles of negotiation, but it should be noted here that the fairness of the contract for all parties and the reasonableness of the assignment of risks largely will determine the success of the resulting contractual relation.

Before completing negotiations, a draft contract may be prepared to clarify general goals and specific terms and conditions. Participation by legal experts is essential during this phase. The contracting body examines the draft, makes suggestions for change, then approves it for submittal to an authorized contracting officer with a concise report of negotiation activities to date. The authorized contracting officer provides the final form and arranges for signing by all.

Intergovernmental Contracting

Securing the Benefits of Cooperation

In contrast to public-private contracting, which seeks to secure the benefits of competition in providing public services, arrangements between and among governmental units (intergovernmental contracts) stress the theme of cooperation. This theme is expressed, for example, in the "purpose" section of the model joint exercise of powers statute published by the U.S. Advisory Commission on Intergovernmental Relations:

It is the purpose of this act to permit local governmental units to make the most efficient use of their powers by enabling them to cooperate with other localities on a basis of mutual advantage and thereby to provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population, and other factors influencing the needs and development of local communities.

Most if not all states have joint exercise of powers acts that often contain similar statements of purpose. In general, these statutes authorize local governments to do jointly or cooperatively anything that they can do as individual units, and many of them extend to local government cooperation with state and federal agencies, as well as with other local governments. Typically, the state laws address such matters as the activities that may be conducted, matters to be addressed in intergovernmental agreements, limitations on the duration of agreements, and other matters such as special approval requirements, records to be maintained, etc.

Types of Agreements

At least three types of intergovernmental arrangements can be identified. First and probably most common is the "ad hoc" arrangement, under which two or more governments agree to do something cooperatively but do not enter into a written agreement. In the solid waste field there are likely many such arrangements covering such matters as emergency or other temporary use of landfills by adjacent local governments, arrangements for cleaning and maintaining landfill access roads, mutual consultation on licensing or franchising solid waste activities, and other activities.

Intergovernmental written agreements, which are the main subject of this handbook, are of two main types: service contracts, and joint/cooperative agreements. In a service contract, one unit of government undertakes to sell services to another, and the resulting arrangement is quite similar to a public-private contract. Joint and cooperative arrangements are used when two or more governmental units agree to establish joint ownership of certain facilities or equipment or to accept joint responsibility for the operation or administration of programs and activities.

Developing Intergovernmental Contracts

Initiating intergovernmental arrangements differs from initiating public-private contracts in that there is no profit incentive to enter into an intergovernmental contract. It may be more difficult, therefore, to establish communications, awareness of mutual interest, consensus on approaches to problem solutions, and the degree of trust that may be necessary to overcome the natural resistance to change.

At least two general approaches that may facilitate the development of intergovernmental arrangements may be identified. First, voluntary efforts may be stimulated by third parties. For example, a council of governments (COG) may stimulate intergovernmental efforts in implementing its general mission to further cooperation among its member units; or a private firm may bring adjoining government units together in situations where joint or cooperative arrangements are necessary to justify major investments in solid waste facilities, such as waste-to-energy facilities.

Another type of intervention may come about from state laws or regulations that require solid waste plans and facilities to relate to state-defined wastesheds or substate districts. State landfill permits, for example, might be conditioned upon developing intergovernmental agreements concerning use of the facility.

Service Contracts. Except for the greater difficulty in inaugurating proposals, intergovernmental service contracts are essentially similar to public-private service contracts and must address most of the same matters discussed in the previous section. Intergovernmental service contracts must, for example,

- Specify and describe the work to be done, in terms of measurable work outputs. Because the unit that provides a service is politically accountable to its own constituents, however, it is common in intergovernmental service contracts to establish priority in use of personnel and facilities for its own jurisdiction and to limit the work provided under the contract to "available" resources. An obvious limitation that might be found in solid waste contracts would be on the tonnage to be accepted from a contracting jurisdiction.
- Specify the compensation for contract services at an appropriate level of detail, including identification of cost elements, time and method of billing for services, provision for automatic or negotiated adjustments in compensation, etc. Intergovernmental service contracts between overlapping units (such as a county and a city within the county) may adjust service pricing under a contract to reflect taxes that residents of one unit pay to the other.
- Include contract elements such as provision for monitoring contract performance, required records and reports, changes in the type or amount of work required under the contract, insurance and liability matters, procedure for dispute resolution, and provision for contract renewal and termination.

Joint Agreements. Intergovernmental arrangements for joint ownership, operation, or administration of facilities and services must address most of the above matters, plus additional items including:

- Assignment of responsibility for developing and implementing policies for the contracted activity. Some joint agreements make one of the contracting jurisdictions responsible for day-to-day operation of jointly owned facilities, with significant policy matters referred to the policy levels of each participating government for concurrent decision making. In that case, personnel and equipment used in the joint operation may be those of the responsible jurisdiction. Another approach is to provide for joint appointment of a board or commission that exercises delegated authority over the management of the contracted facility or activity. In that case, the joint program may still utilize personnel and equipment of one of the participating jurisdictions, or the joint program might instead employ its own staff and develop its own real and personal property resources.
- If the joint program or activity does acquire property on its own behalf, provision must be made for its disposition upon termination of the intergovernmental contract. Some state laws and some intergovernmental agreements provide for third parties (courts or arbitrators) to assist with property disposition, if necessary in such cases.

The Final Contract

Whether a public-private or an intergovernmental arrangement is involved, the ultimate agreement of the parties is incorporated into a written contract. A model contract providing for operation of a sanitary

landfill and a sample intergovernmental agreement relating to planning for solid waste management are presented in Appendix B of this handbook.

Elements common to both types of contract include:

- **Preliminaries** such as identification of the parties (including named agents), recitations of the background and purposes of the contract, citation of legal authority, and definition of terms used in the contract.
- **Specifications, scope of work, or statement of the undertakings of the parties,** including provisions for change orders or other alterations during the life of the contract. Details of work to be undertaken are often set forth in a separate document that is incorporated into the main contract by reference. This technique is used in the sample intergovernmental agreement presented in Appendix B. As noted above, state permits (e.g., for landfill operations) usually include specific performance standards that should also be incorporated by reference into the contract.
- **Regulation compliance,** which is covered in detail in Chapter 3 of this handbook.
- **Financing,** including methods of calculating charges under the contract, timing of required payments, billing documentation, provision for adjusting rates or charges, etc. This subject also is addressed in greater detail in Chapter 3.
- **Dispute resolution,** including provisions for mediated negotiation and arbitration as discussed later in this chapter.
- **Duration,** including provisions for renewal, renegotiation, and termination of the contract.
- **Miscellaneous contract terms and conditions,** including maintaining records, submitting reports, handling complaints, employee relations, mutual or unilateral indemnification against liability, insurance and bonding requirements, and "legal boiler plate" dealing with acts of God, merger of agreements, severability of contract provisions, etc.

Public-private contracts may have types of provisions not found in intergovernmental contracts, such as anti-kickback and anti-collusion certifications and state statutory requirements made specifically applicable to public-private contracts, such as payment of prevailing wages. Conversely, intergovernmental contracts may have special provisions related to joint policy boards or provisions requiring review and approval by state agencies.

Contract Management

After work begins under a contract, the contractor and the public agency need to continue to exchange information. The plans and specifications describing the work to be done are never perfect and, over time, changing conditions may require that contract adjustments be considered. Thus, it is important to establish within the contract a system for monitoring performance, a process for working out details of the agreement, a method for renegotiating parts of the contract, and procedures for dealing with violations.

Monitoring Performance

Parties to the contract must agree on a workable system to ensure compliance with the provisions of the contract, and the system should be described in the contract itself. The provisions should identify who is responsible for the monitoring function, and describe the process for responding to concerns or violations. In intergovernmental joint service agreements, monitoring may be a joint or mutual responsibility.

Effective monitoring of contract performance can be difficult as well as costly.[22] Monitoring may involve several techniques, including:

- **Developing some kind of matrix of tasks against the contract time schedule:** Several techniques are used for this purpose, including Gantt charts, Milestone charts, and Pert networks.[23]
- **Periodic conferences:** Depending on the nature of the contract, daily, weekly, monthly, quarterly, or other periodic conferences may be scheduled for general discussion of progress under the contract or agreement.
- **Submission of reports:** Periodic written reports from the private contractor (or, in the case of multiple-party intergovernmental arrangements, perhaps the agency most directly in charge of the

work) should cover such matters as task completion in comparison to the agreed time schedule, costs incurred, and problems encountered in carrying on the work.

- **On-site inspection:** Direct observation of work underway or completed may include on-site inspection, analysis of samples of recycled materials or incinerator residues, etc. On-site inspection may also reveal information about contractor work methods, type and condition of equipment, compliance with safety regulations, and other indications of compliance with the contract or agreement.
- **Other direct checks on contract compliance:** Contract compliance may also be monitored by external checks to see that required permits have been obtained, required prevailing wages paid, etc. Receipts and other documentation for contractor invoices may also be checked.
- **Complaint processing:** A specific procedure should be established to assure prompt response and communication among contract parties with respect to citizen complaints.
- **User surveys:** Public agencies may conduct either informal or formal surveys of citizen perceptions regarding contract services.

While many of these monitoring techniques must be employed whether work is done in-house or under a contract, the context is different in the contract situation, and the skills required to monitor contracts differ somewhat from those required to manage and supervise in-house projects.[24] Among other things, monitoring contracts requires skills in communication and negotiation that line managers of in-house work may or may not possess. This subject is discussed in the next section.

Dispute Resolution

Questions or concerns that arise in contract management often can be resolved through day-to-day communication between the contractor's job supervisor and the public agency's representative. Simple, informal negotiation can occur during this routine clarification process.

When the description of work is found to be incomplete or a better approach is discovered, interpretations and changes often can be made under procedures set out in the contract for change orders. These procedures enable the public agency to order changes that are generally within the scope of work covered by the contract, even though they have not been spelled out in the contract document, the specifications, or the scope of work. The contractor must comply with change orders, and the added costs are usually reimbursed on a cost-plus basis.

However, the contractor may object to a change order, either on grounds of feasibility or on grounds that the reimbursement approved by the public agency is inadequate. Such disputes, as well as other more serious disputes over the interpretation or application of contract terms and conditions, require some type of dispute resolution process.

There are four ways to deal with contract questions and disputes. The four are not mutually exclusive, and their use depends on provisions of the contract:

- Administrative decisions
- Negotiated agreement
- Arbitration
- Litigation

Administrative Decisions. At the lowest level, the public agency's contract manager should be delegated express authority to make interpretations or decisions, as noted in the sample contract provision below:

Correcting Deficiencies. A deficiency in the contractor's work that is noted by the [public agency] shall immediately be corrected to the satisfaction of the contract manager. The contract manager's interpretation or decision is binding on the contractor, subject to the dispute resolution provisions of this contract.

Any disagreement that remains after such an administrative decision can be resolved by negotiation, arbitration, or litigation.

Negotiated Agreement. Issues that do not require immediate decisions or that involve basic changes in the contract may benefit from a negotiation procedure.

Negotiation may not always be productive, and its use does not prevent parties from arbitrating or litigating unresolved issues or problems. However, contract language that anticipates the need for negotiation and specifically provides for negotiations is becoming more common. A simple example of such language follows.

Negotiation. The parties shall, in good faith, attempt to negotiate resolutions to all disputes arising out of this contract. Subject to the conditions and limitations of this section, any controversy or claim arising out of, or related to, this contract that remains unresolved after negotiations shall be exclusively settled by arbitration under [section(s) relating to arbitration**].**

A somewhat lengthier but perhaps more suitable example is:

Dispute Resolution.

(a) *Initiation of Proceeding.* To help bring about a quick and efficient resolution of disputes that may arise under this contract at the lowest possible cost, the parties do hereby establish this procedure to be in existence and available for use during the term of this contract.

(b) *Negotiation.* In the event any claim, controversy, or dispute arises between the parties, the parties shall undertake in good faith to resolve the dispute. The parties may attempt to negotiate a mutually acceptable agreement during a two-week period after written notice requesting such procedure is provided by one party to the other. If the parties cannot reach agreement within the two-week period, the parties may elect to obtain the assistance of a mediator. If after a two-week period of assisted negotiation, the parties fail to reach an agreement, exclusive of any other remedy subject to [state**] statute, either party may by written notice to the other party hereto, bring the dispute to arbitration.**

As suggested above, collaborative negotiations that involve "integrative" bargaining techniques are preferred when resolving disputes regarding performance and/or compliance with the terms of an existing contract. The assumption is that the parties to an existing contract both (or all) have mutual interests in successful contract execution that can serve as a common ground for negotiations. Although collaborative negotiations can and do take place between or among the parties themselves, there is growing use of experienced facilitators and mediators who can help the parties reach agreement.

Appendix C extends this discussion of negotiating styles, and offers a step-by-step description of the collaborative negotiation process.

Arbitration and Litigation. Dispute resolution by negotiation between or among the parties, whether or not assisted by a mediator or facilitator, is advantageous in that it results in a voluntary agreement that is "owned" by the parties themselves. If administrative decisions and negotiations have failed to resolve a dispute that arises under a contract, however, resort may be taken to traditional third-party dispute resolution procedures: arbitration and litigation. A sample contract provision for arbitration follows.

Arbitration. All claims that have not been resolved by dispute resolution under [section numbers**] of this contract shall be settled by binding arbitration in accordance with the then applicable [**Commercial Arbitration Rules or Construction Industry Arbitration Rules**] of the American Arbitration Association. Judgment on the award rendered by arbitration may be entered in any court having jurisdiction thereof. The parties acknowledge that this contract affects interstate commerce and that this agreement to arbitrate is subject to, and enforceable in accordance with, the Federal Arbitration Act, 9 U.S.C. 1 et seq.**

As an alternative to arbitration, any party to a contract may seek to resolve a contract dispute by filing a suit in court. No contract provision is necessary to establish this right, which is available to any party as a matter of law.

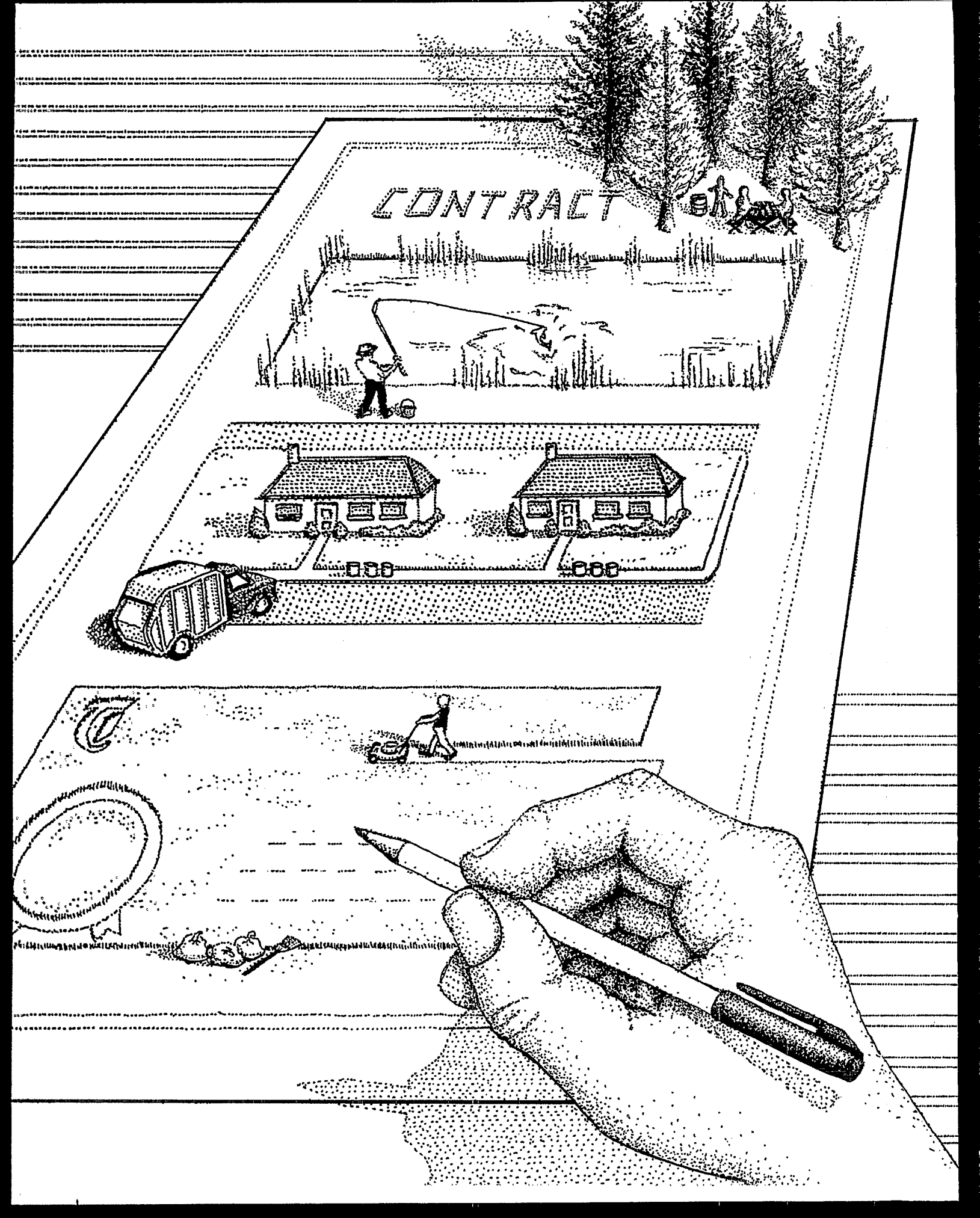
Summary

Local governments face new challenges in solid waste and need to consider alternative ways of meeting them. Trends such as changing technology, the obsolescence of existing disposal methods and facilities, and the increasing regionalization of solid waste programs make it necessary to consider both greater involvement of the private sector and cooperative or joint arrangements among governments.

Both public-private and intergovernmental arrangements are likely to be implemented through contracting. Implementing solid waste management programs through contract arrangements requires that local governments carefully analyze their solid waste functions, establish objective standards for their performance, and consider both the legal and policy factors as well as practical considerations that bear on the decision to perform a solid waste activity by contracting.

The public-private contracting process is regulated through state laws that promote competition and fair dealing. Generally these laws favor the use of "invitation for bid" contracting formats but they also make provision for solid waste activities. The state "joint exercise of powers" laws that govern intergovernmental contracts do not require competition but may establish requirements relating to the purposes and processes for intergovernmental contracts.

Whether contracting with the private sector or with other governments, it is essential that a public agency maintain close contact with the contractor and carefully monitor the progress of the work. Public agencies should expect problems and disputes to arise during contract performance and be prepared to deal with them in a variety of ways, including the use of both informal and mediated negotiation.


CONTRACT

Chapter 3: Solid Waste Contract Issues: Sample Contract Provisions

Introduction

Three cross-cutting issues of special concern in solid waste contracting are

- structuring contracts to assure implementation of federal, state, and local government solid waste policies and *compliance* with solid waste regulations;
- providing for flexibility in *compensation* to accommodate the long-term cost recovery and regulatory and market uncertainties associated with some solid waste contracts; and
- allocating both tort and contract *liability* and/or financial responsibility among public agencies and private contractors to match the distribution of exposures in different kinds of solid waste contracts.

This chapter defines and discusses each of these issues and offers sample contract provisions that may be used to address a variety of local needs and circumstances. All of these issues influence long-term contracts for major solid waste facilities such as landfills and incinerators. Contracts for other solid waste activities may involve only one or two of these issues.

Policy Implementation and Regulatory Compliance

The Solid Waste Policy/ Regulatory System

As the problems of coping with solid waste have increased, so have the roles and responsibilities of federal, state, and local governments. These roles include research, technical assistance, financial support, regulation, and program implementation. The federal role centers around imposition of standards and regulations to protect human health and the environment. Planning, enforcement, and implementation roles remain with state and local governments.

At all three levels of government there is significant activity and debate with respect to municipal solid waste policy. Among other things, this activity involves the concepts of "integrated waste management" and "materials management." Both concepts aim at reducing the amount of waste that must be disposed of by incineration or landfilling.

These concepts have been defined and to some extent promoted by two federal agencies — the Environmental Protection Agency and the congressional Office of Technology Assessment.[25] According to EPA, "'Integrated waste management' refers to the complementary use of a variety of waste management practices. An integrated waste management system will contain some or all of the following elements:

- Source reduction (includes reuse of products)
- Recycling of materials (including composting)
- Waste combustion (with energy recovery)
- Landfilling

For a given community, waste management practices are matched to the nature of the waste generated and the environmental, economic, and institutional needs of the locality."

OTA concurs with the need for a coordinated system involving these elements, but wants more emphasis placed on waste prevention through a national system of "materials management" that would provide incentives and requirements to influence the decisions of both manufacturers and consumers to "reduce the toxicity or quantity of products before they are purchased."[26]

Governmental policies and regulations affecting solid waste may be expected to evolve in these directions over the next few years.

Federal Policies and Regulations. The Resource Conservation and Recovery Act of 1976 is the most significant recent congressional act giving EPA regulatory authority and technical assistance responsibilities for solid waste management. Regulations adopted under

RCRA in 1979, referred to as the "Criteria for the Classification of Solid Waste Disposal Facilities and Practices" (40 CFR Part 257), developed the existing federal framework for solid waste management regulation. The criteria defined environmental performance standards for floodplains, endangered species, surface and ground water, land application, disease, air, and safety. EPA has recently revised the criteria to impose stricter regulations for municipal waste disposal methods, with new standards (i.e., Federal Revised Minimum Criteria for Municipal Solid Waste Landfills, part 258, subtitle D) expected to take effect in 1991. They establish new minimum national standards for location, design, operation, cleanup, and closure of new and existing municipal landfills. EPA is also developing additional standards for operation of incinerators and other combustors.

The new criteria restrict the siting options for, and increase the costs of, constructing and operating landfills. In addition, more extensive closure plans are required to further reduce the risk that leachate and gases will be formed or released during the post-closure period. A post-closure care period, with the first phase expected to last at least 30 years, is now necessary to maintain the landfill cover and monitor groundwater and gas. The landfill owner or operator is required to provide financial assurance for conducting closure and post-closure care, including any necessary corrective actions. No federal financing is expected to assist state and local governments in complying with the new subtitle D standards.

State Policies and Regulations. The states have taken more leadership and initiative in solid waste policy and regulation in recent years as federal funding declined and virtually disappeared in the 1980s and as long delays occurred in reauthorizing the RCRA and in adopting new subtitle D regulations. State regulatory programs still tend to focus on landfill management and other subtitle D concerns, although there is considerable recent expansion in state programs aimed at source reduction, recycling, and other strategies that reflect "integrated waste management" and/or "materials management" approaches.

The states vary widely with respect not only to the content and scope of their programs, but also with respect to administrative responsibility and to the state-local relationship. A 1986 EPA survey reported that only 15 states assign solid waste regulatory responsibility to a single agency, while in the other 39, responsibility is divided among from two to eight state agencies. In most states there is significant involvement by both state and local government, but a few have made either state or local governments primarily responsible for planning and regulating solid waste activities.[27]

Exhibit 3 presents a brief overview of state solid waste programs in Washington and Oregon as examples of some of the different approaches.

Local Policies and Regulation. Cities and counties, and sometimes special purpose districts, are the leading actors in dealing with the solid waste volume generated by their residents and businesses. In addition to complying with federal and state standards, cities and counties often set additional or more stringent standards because of specific local conditions or concerns. They also regulate solid waste activities through land use plans. Local governments may address undesirable impacts inherent in solid waste operations not covered by federal or state standards: noise, visual appearance, traffic, emergency closure, and perceived harm to neighboring property values. The important role of local regulations in some solid waste programs is illustrated by the Benton County case study in appendix A.

Establishing Responsibility for Obtaining Permits

Obtaining state and local permits for siting, constructing, and operating solid waste management facilities may be the responsibility of the governing public agency or that of the contractor. This determination depends on local circumstances of facility ownership or jurisdiction. Preferably, necessary permits should be obtained or committed prior to entering into a contract to perform such activities, but in some cases contract provisions may be needed to fix responsibility for obtaining permits after the contract is signed.

Public Agency Responsibility. If a solid waste management facility to be operated under contract is owned by a public agency, that agency usually obtains the necessary state and local government permits.

Exhibit 3
Examples of State Regulatory Programs

Washington

Washington state law requires counties to develop comprehensive solid waste management plans that must include waste reduction and recycling components. The statute requires cities to choose one of three solid waste management plan alternatives: to develop a plan separately from the county; develop a plan concurrently with the county; or have the county develop a plan for the city. All county and city plans are subject to approval by the state Department of Ecology (DOE).

The DOE examines the reduction and recycling components of these plans in light of a statutory mandate to reach an overall 50 percent recycling rate by 1994-95. (Washington currently recycles about 27 percent of its total waste). The DOE's authority includes developing appropriate regulations and overseeing compliance with standards for solid waste management. The DOE works closely with the state Health Department, which retains primary authority to enforce solid waste management standards as they relate to water and air quality.

A 1989 amendment requires counties to update their solid waste plans at least every five years, and whenever requested by DOE. DOE would make such a request when the establishment of a regional facility or other major event changes the local solid waste management environment. This amendment also establishes a schedule with target dates for each county to complete the first round of required revisions.

A Solid Waste Advisory Committee composed of lay citizens and representatives from various interest groups, regulatory bodies, counties, and cities counsels the DOE Director. While the Committee has no formal authority, its members review county and city solid waste management plans and make recommendations to improve solid waste management practices and policies throughout the state.

Washington encourages local governments to use the expertise of the private sector to the fullest extent possible to carry out solid waste recovery and recycling programs and provides additional technical and financial assistance to plan for this cooperation. At the present time, the legislature is particularly concerned with handling discarded vehicle tires, and the state also is actively promoting market development for recyclable materials.

Exhibit 3 (continued)

Oregon

Oregon law directs the state Department of Environmental Quality (DEQ) to adopt and enforce "minimum performance standards" relating to the collection, transportation, and disposal of solid waste, the location of disposal sites and facilities, closure and post-closure of landfills, and other aspects of solid waste management. Oregon has so far not established specific recycling or waste reduction goals, but it does require that every person in Oregon have the "opportunity to recycle."

The state has responsibility for regulating the design, management, and operation of landfills, transfer stations, incinerators, and other disposal facilities, primarily through a state permit system, and makes local governments responsible for developing solid waste management plans. The state also assists local governments to establish landfill sites where these plans identify the need. DEQ also provides technical and planning advice, as well as training, to those in either the public or the private sector who implement solid waste management programs. State administrative rules require submission of detailed plans and specifications for construction and operation of landfills and other disposal facilities.

Counties must appoint local citizen advisory committees when they submit applications for disposal site permits. The committees include local residents, property owners, site employees, and interested organizations. The committees advise the counties regarding site selection, facility operations, and closure activities and provide a forum for public concerns about solid waste management.

Oregon imposes special requirements on the handling of a variety of wastes. Infectious waste must be segregated from other waste at the point of generation and be dealt with under Health Division regulations. Household hazardous waste, lead-acid batteries, and tires must be disposed of through authorized dealers or at specific depots established by the government. Containers for most carbonated beverages sold in Oregon must have a refund value and are returnable to dealers, who may not refuse to accept empty containers.

Site closure is closely monitored by the state through a rigorous procedure. At least five years before a proposed closure, the owner must supply financial assurance to close and secure the site, to maintain protective environmental systems around the site, and to comply with any other requirements. The state may require the owner to stay open longer than five years in order to raise additional revenues to be used for these purposes.

Public Agency to Obtain Permits. The [public agency**] shall obtain any [**insert name of state agency**] or [**insert name of any local government permitting agency**] permits or approvals for operations under this contract, which shall be in the [**public agency's**] name.**

Contractor Responsibility. If a contractor-owned facility is involved in a public-private or intergovernmental contract, the contractor is likely to be responsible for obtaining any permits.

Contractor to Obtain Permits. The contractor shall secure permits required by law to conduct activities undertaken by the contractor.

Other contractual provisions may cite the specific laws, rules, and regulations that apply to the contract. In general, other permits are likely to be required in addition to those exclusively related to solid waste operations, such as building and land use permits.

Allocating Responsibility for Implementation and Compliance

Solid waste activities must be conducted in compliance with federal, state, and local regulations, whether or not this is explicitly stated in a contract.

A public agency is not necessarily relieved from responsibility for compliance with state or federal regulations by contracting with someone to perform according to standards. The question to be addressed in developing contracts is whether the public agency or the contractor is responsible for compliance. It is especially important to fix responsibility for state permit compliance; if the contractor is made responsible for obtaining a permit, the public agency may wish to have contract language that prevents it from becoming an enforcement intermediary between the state agency and the contractor.

Allocating compliance responsibility in a contract depends in part on the historic status of local policies and practices related to solid waste management activities. For example, when these policies and practices are of long standing, the amount of risk is generally clear and may be assigned to the contractor without difficulty. When related standards by a higher authority are evolving, uncertainty increases, and contract provisions to renegotiate or to change compensation requirements may be inserted to provide for adjustment. This section illustrates four contract provisions, each focusing on the assignment of various degrees of responsibility for implementation and compliance to the contractor.

Contractor Has General Responsibility. Under this provision, the contractor must keep informed of all pertinent legal requirements regarding its solid waste management activities. This provision simply states the contractor's responsibility to comply with such laws, without enumerating specific codes.

Compliance With Laws. The contractor shall comply with laws, rules, and regulations that apply under this contract and shall secure permits required by law to conduct activities undertaken by the contractor.

Contractor Has General Responsibility With Partial Enumeration. This example illustrates a more specific identification of the applicable regulations.

Compliance With Federal, State, and Local Requirements. The contractor agrees to comply with federal, state, and local regulations in effect on the date of this contract, including, but not limited to, the following:

This provision is followed by a list of state and local regulations that apply. In addition to those dealing specifically with solid waste, others might include labor laws, motor vehicle and transportation regulations, fire regulations, and health regulations. This list reduces ambiguity, but leaves the contractor with the obligation to know about other laws that could apply.

Contractor is Responsible Only for Specific Laws and Future Amendments. A significant feature of the next provision is the contractor's obligation to observe future amendments to state requirements. Prior examples limit contract obligations to requirements in effect on the date the contract is signed. The "future

amendments" feature can be added to any of these provisions, but its suitability depends on the nature of the specific contract.

Compliance With Cited State Laws. The contractor shall comply with the standards, levels of service, and other requirements contained in [insert applicable citations to state laws**] and [**insert applicable citations to state administrative rules**], and future amendments to these laws and rules.**

An obligation to comply with future amendments of laws places an uncertainty risk on the contractor, which is commonly offset by higher charges or a provision to allow for adjustments in charges when the laws change. Change adjustments are illustrated in the discussion of compensation (p. 31).

Contractor is Responsible Only for Existing Laws. This provision assumes that state laws provide for compliance with federal requirements and the local public agency does not have supplemental laws that need to be identified in the contract. The consequences of a breach of contract must be addressed in another provision, which usually gives the governing body the right to rescind the contract, receive damages, or both.

Permit Compliance. The contractor shall comply with the conditions set forth in the [insert title of state agency**] [**disposal site**] permit and shall be subject to other state laws that apply at the time of execution of this contract. A violation of these requirements, if found to be substantial and material to the interest of the [**public agency**], may be deemed by the governing body to be a breach of this contract.**

Additional provisions are needed to address compliance with changes in state permit requirements. If a contract is for a relatively short period or allows termination after reasonable notice, concern with potential permit changes is less important.

Compliance Monitoring: State v. Local Responsibility

If a contractor is the state permittee, compliance monitoring is the state agency's responsibility and no explicit provision for monitoring is needed in the local contract. However, if the local jurisdiction has imposed requirements beyond those enforced by the state, or if the public agency rather than the contractor holds the state permit, the following provision may be appropriate:

Monitoring By Public Agency. The [public agency**] shall assume full responsibility for installation of equipment and facilities to monitor the facilities required to be monitored under [**insert reference to state law**]. The [**public agency**] shall collect and provide for the appropriate analysis of monitoring samples at the [**public agency's**] expense.**

Escape Hatch for Contracts

Occasionally, there is a substantial, and very likely uncertain, time lapse between the date of entering into the contract and the date when work, other than preparation steps, begins. The next provision provides a very broad (some may feel too broad) opportunity for either party to terminate the contract prior to the beginning of actual work.

Obtaining Authorizations. Applicable environmental and other governmental permits, licenses, and authorizations that are necessary for the [design, construction, startup, conduct of acceptance tests and operation**] of the facility, shall have been obtained before the closing date, which is the date on which [**actual construction is authorized**]. After the date of signing of this contract and on or before the closing date the rights, obligations, and liabilities of the parties to this contract may be terminated by either party to the contract if any of the following shall occur:**

(a) There is a change in, addition to, or deletion of, a provision of an applicable federal, state or local law, or an applicable federal, state, or local regulation under the law or an interpretation of the law or regulation by an applicable regulatory authority.

(b) A bill has been introduced in either house of the United States Congress or the state legislature of any relevant state, that would, if effective, make the

execution of this contract, compliance with its terms and conditions, or the consummation of the transactions contemplated under the contract a violation of a law or regulation, or materially and adversely affect the economic benefits to be derived from consummation of the transactions contemplated by this contract.

(c) An action, suit, proceeding, or official investigation has been overtly threatened, publicly announced, or commenced by a federal, state, or local government authority or agency, in a federal, state or local court, that seeks to enjoin, assess civil or criminal penalties against, assess civil damages against or obtain a judgement, order or consent decree with respect to a party to this contract as a result of the party's negotiation, execution, delivery, or performance under the contract or its participation or intended participation in any transaction contemplated thereby.

(d) An action, suit, proceeding, or official investigation has been overtly threatened, publicly announced, or commenced by a federal, state, or local government authority or agency, in any federal, state, or local court, that affects the validity of any permit, license, or other governmental or legislative authorization necessary for the construction or operation of the facility.

These provisions to ensure compliance with regulations illustrate common elements that may be needed in a contract. Each local solid waste management situation has unique conditions that may affect these broad-based provisions. In addition, each public agency may have other specific concerns related to the nature of the facility or operation involved, which might also be protected in the contract.

Compensation

Compensation as Essential Element of Contract

Compensation in money or in some other form is an essential legal element of a contract, and fair compensation for services or facilities provided under the contract is essential to satisfactory contract performance. Money may flow either way under a public agency contract: from the agency to the contractor for services performed, from the contractor to the agency for sharing of contract revenues or for other purposes, or both.

Sources of Revenue for Solid Waste Functions and Activities. The three main sources of compensation in solid waste contracts are taxes, service charges, and sale of materials. If user fees provide the revenue, the funds may come directly from charges applied at the waste source (collection fees) or from charges applied where the waste is deposited (tipping fees). Either fee may be collected by the public agency, which then pays the contractor. Or, the contractor may collect the fee and distribute some agreed portion to the public agency.

Operations such as a waste-to-energy plant or a recycling or composting program may also bring in revenue from sale of products. However, because these product revenues generally are less than operation costs, contracts provide additional compensation to contractors providing these services. (Many recycling operations have been community service activities where costs are low because of the use of volunteers. The move toward more extensive recycling efforts involving higher volumes and more equipment is shifting this activity away from volunteerism.)

Money Flows from Agency to Contractor

Provisions for payments to contractors vary so widely, depending on the nature of the contract, that only a few examples can be presented here. The first example illustrates a simple provision for payment under a short-term contract with a firm that has undertaken to receive waste, recover recyclable materials, and haul

the remainder to a landfill. The more recoverable material the contractor separates from the mixed waste received, the more money the contractor keeps.

Payment to Contractor. For performance under this contract the contractor shall be paid [$_] per ton [of waste received at the transfer station] **from which the** [public agency] **will withhold [$] per ton tipping fees for each ton hauled to the** [landfill].

More elaborate provisions are required for longer-term contract commitments. In the following example, a public agency has contracted the operation of its publicly owned landfill to a private firm for a period long enough to allow the firm to amortize its initial investment and to assure its ability to obtain financing for the operation:

Payments. The contractor agrees to accept as full payment for services under this contract [over a 20 year period] **the lump sum of [$] and a unit price of [$_] per ton with payments and adjustments as specified in this contract. The contractor agrees that the lump sum and unit price represent a true measure of the labor and materials required to complete the contract, including allowances for profit and costs such as taxes and overhead.**

(1) The contractor will be paid the lump sum price in [240] **equal monthly installments over a** [20] **year period. It is expressly understood by the contractor that payment of the lump sum price by the** [public agency] **ensures waste capacity in the disposal site for a total of [___] tons. Even if this capacity is not fully utilized within the** [20] **years, the** [public agency] **is under no obligation to continue monthly payments beyond the** [20] **years. The estimates of annual amounts of solid waste used to assist in selecting the low-cost bidder do not place an obligation on the** [public agency] **to provide a specific amount of waste in any year.**

(2) For work under this contract the [public agency] **will make monthly payments to the contractor according to the established rates. On or about the** [eighth] **day of each month, the contractor will submit to the** [public agency] **a billing that indicates the quantity of waste disposed of, including a separate quantity for the calendar month just past. By the** [25th] **day of the month the** [public agency] **will pay the contractor** [95] **percent of the estimated value of the unit price work and the lump sum amount due less any previous payments.**

Money Flows from Contractor to Agency

A contractor may collect revenue directly from users or from a public agency other than the one with which it has contracted. In either case, the contractor may be required to pay part of these revenues to the contracting public agency. The contract must specify the amount and method of this flow. Other circumstances may also require a contractor to pay the public agency: for example, when the agency incurs extra costs, such as monitoring or administration, specific to the contract.

The following provision might be used when the contractor bills and collects revenue from users or other public agencies:

Payment to Public Agency. The contractor shall pay a [quarterly] **fee to the** [public agency] **of [__] percent of the gross cash receipts from revenues collected by the contractor. The contractor shall keep complete and accurate books which shall reflect the gross receipts from services rendered inside the** [county outside city boundaries/city]. **These books shall be balanced at least annually. A statement showing the basis for payments shall be furnished the** [public agency] **on each payment date. The** [public agency] **has the right to inspect the books and records of the contractor at all reasonable times and places, and the contractor shall render reasonable assistance to the** [public agency], **its officers, agents and employees when the** [public agency] **desires to audit or inspect the books and records.**

The next provision would apply when the contractor collects charges (such as a tipping fee) from users, and the public agency incurs specific costs because of the contractor's activities:

Cost to Public Agency. The contractor shall pay to the [public agency] an [annual] fee of [$_] for the cost of monitoring the contractor's activities under the contract.

Adjusting Provisions for Compensation

Almost any contract needs to provide for contingencies that require some adjustment in the contractor's or public agency's compensation. Provisions for adjusting compensation during the life of thecontract reduce the contractor's uncertainty and should result in lower bid prices.

This is especially true for contracts that extend for long periods of time — an increasingly common circumstance in the solid waste field due to regionalization, newer and more expensive technologies, and, especially, new post-closure monitoring requirements for landfills.

Compensation adjustment provisions are of two main types: automatic and negotiated.

Automatic Adjustment. The most popular form of automatic adjustment uses the Consumer Price Index. An example of such a provision that might be used with the 20-year landfill contract illustrated above might be

(1) Automatic Payment Adjustment. The unit price shall be adjusted upward or downward annually, starting in [19_], by [100] percent of the change in the Consumer Price Index. The price adjustment change at the beginning of a year shall be in a percentage amount equal to the change in the index between the previous year and the immediate past year times [100] percent. The index will be a 12-month average for the immediate past year minus a 12-month average for the previous year divided by the previous year's average using the index described below.

(a) The Consumer Price Index will be based on the index entitled ["West-A"] from the U.S. Department of Labor, Bureau of Labor Statistics, publication entitled: "Consumer Price Indexes, Pacific Cities and U.S. City Average." Percent changes in the index shall be calculated with the base year of [December 1977] until the Bureau of Labor Statistics (BLS) publishes data on a new base period. Calculations shall be made from data on the new base from that time forward.

(b) If the BLS series specified in subsection (a) above is discontinued but BLS designates an index with a new title, code number or table number as being the continuation of the index cited in subsection (a) above, the new index will be used. If the specific index ["West-A"] is discontinued but the "U.S. City Average" remains, this latter index will be used. If discontinuation does not provide one of these alternatives, the contracting parties shall agree upon a substitute series within [two] months of the beginning of the new year.

Negotiated Adjustment. Some contracts need to include provisions for compensation adjustment that cannot be based solely on some objective criterion such as the cost of living index. This is true even for short-term contracts that anticipate a need for change orders, such as the following example:

Pay for Additional Work. If the contractor performs additional authorized or required work that is not specified under the original contract or any contract amendments, it shall be performed and paid for according to this section. However, this section shall not apply to work required to comply with changes in a law, or required permit.

(a) Within [14] calendar days after the contractor has received a request from the [public agency] for additional work, the contractor shall submit an itemized proposal stating the actual costs to the contractor for performing the work and the effect, if any, on the contractor's performance of the

existing contract work by reason of the additional work. The contractor's proposal shall be based on the least costly method of performing the additional work in accordance with all provisions of the contract. Upon receipt of the contractor's proposal the [public agency**] shall have authority to order the contractor to perform the relevant additional work, whether or not the [**public agency**] accepts the contractor's proposal, and the contractor shall comply with the order. However, no request for a proposal by the [**public agency**] under this subsection shall be construed as authorization for the contractor to perform the additional work covered by the request. To obtain authorization to perform any additional work, the contractor must be notified in writing by the [**public agency**] that the contractor is ordered to proceed with the work. If the [**public agency**] does not order the contractor to perform additional work, the contractor shall not be entitled to any reimbursement for the work in the contractor's proposal.**

(b) Payments or credits for additional work shall be no greater than the contractor's actual costs for performing the work plus [15**] percent of the actual costs. The contractor shall keep and maintain accurate records of the actual costs of the additional work in the same manner as other cost records are kept under this contract. The contractor acknowledges that the payment formula in this subsection for additional work includes all payment for the interruption of schedules, extended overhead, delay or other impacts, claim or ripple effect, and the contractor specifically waives any reservation or claim for additional compensation for any additional work. In the event that the [**public agency**] orders the contractor to perform relevant additional work but refuses to pay the amount which the contractor proposes for the work, the contractor shall promptly proceed with performance of the work in accordance with the order. If the contractor and the [**public agency**] cannot agree on the amount of payment for the additional work performed, the matter shall be submitted to arbitration under [**the arbitration provisions of the contract**].**

Somewhat longer-term contracts may require broader provisions for adjusting compensation. For example, a contract for collection and/or transportation of waste for a five-year period might include a provision along the following lines:

Price Adjustment. Except as noted in this section, the contractor will not be allowed an adjustment in contract prices, since the contractor should have established the prices in the contract bid based on the contractor's estimate of the contractor's costs over the [five-year**] life of the contract. For a change in the con-tractor's bid price to be approved, the contractor must submit clear documentation to the [**public agency**] showing the change in costs. If the change in costs is clearly shown, the [**public agency**] will adjust the bid price accordingly. A change will be allowed only if one of the following conditions exist:**

(a) These contract specifications are modified.

(b) A state or federal ruling modifies the existing regulations affecting the contractor's operations.

(c) The owner of the [landfill**] changes the amount of the tipping fee to be collected from the contractor.**

(d) The location of the solid waste disposal site is changed from the [present landfill**] to another site.**

(e) The contractor's price for fuel changes by more than [twenty**] percent. The price of fuel shall be the [**average "Dealer Buying Price" as established in the Lundberg Newsletter**].**

(f) The [fuel taxes, PUC rates or weight-mile tax rates**] paid by the contractor change.**

(g) The tonnage delivered to the contractor changes by more than [15] percent, in which case, the [public agency] will request the contractor to submit cost documentation and shall adjust the bid price accordingly. For purposes of this contract, an initial rate of [ ] tons per year is assumed.

Another contingency that must be faced in longer-term solid waste contracts is the probability that applicable federal and state laws and regulations will change during the contract period. Many contractors, aware of regulatory uncertainties, will insist on protection against unanticipated costs stemming from these kinds of changes. The following example illustrates one response to this situation.

Payment Upon Change in Law. Upon petition of the contractor and approval by the [public agency] under the limitations, conditions and procedures of this section, the [public agency] shall pay 100 percent of the contractor's reasonable, actual increased costs of performing the contract if the increased costs result from a change in law or permit requirements and the change was adopted after the deadline for submission of bids leading to this contract, providing the costs result from applying the least costly means of ensuring full compliance with the relevant change. The contractor must fully demonstrate and document the need for the requested reimbursement to the [public agency's] satisfaction and approval.

(a) The [public agency] shall reimburse the contractor for increased costs due to a change in [local or county] laws or permit requirements only if the change also applies to businesses outside the waste management industry in the relevant [local or county] jurisdiction. No compensation will be paid for any increased costs due to a change in [local or county] laws or permit requirements that apply only to the contractor, the contractor's activities under this contract, or to persons or entities engaged in the waste management industry.

(b) The [public agency] shall reimburse the contractor for increased costs due to an increase in the rates of [federal or state] taxes, fees, or surcharges only if the increase does not also apply generally to businesses other than the waste management industry.

(c) No reimbursement for cost increases shall be allowed for any cost increases that are in any way attributable to the contractor's property, to conditions, structures, operations, or activities at the contractor's property, or to conditions, structures, operations, or activities caused by the contractor or the contractor's subcontractor, employe, agent, or servant, or which are otherwise within the contractor's control.

(d) The contractor shall keep the [public agency] informed as to whether any payment obligation resulting from a petition under this section remains necessary. Upon the [public agency's] request, the contractor shall immediately provide the [public agency] with all documents or information or other evidence in the contractor's possession or control that the [public agency] requests to determine whether there is a continuing need for reimbursement under this section. Upon determination by the [public agency] that the need for payment under this section has expired or that payment was made in error, the [public agency] may terminate reimbursement under this section and the contractor shall remit to the [public agency] any overpayment within [30] days of service upon the contractor of the [public agency's] determination.

(e) The [public agency] shall determine, subject to its accounting and budget limitations, the method and manner of any payment under this section. The method may include installment payments over an extended period of time, even extending beyond the termination or completion date of

Exhibit 4

Franchise Rate Adjustments

(1) Reasonable Compensation. The franchisee may charge and collect reasonable compensation from persons to whom it furnishes services, and according to its published rate schedule as contained in a certified copy provided to the [public agency]**. The term "reasonable compensation" may be defined by the governing body after a study and consideration of the following.**

(a) Rates for similar service under similar conditions in other areas.

(b) The effect of local conditions on costs.

(c) An amount which allows the contractor to earn a reasonable rate of return.

An alternative to section (1) might be

(1) Grounds For Rate Change. The governing body shall support a decision to revise rates with findings of fact. In making its findings, the governing body may consider rates charged by other persons performing the same or similar service, and the factors that were relevant to those rates, and shall consider the following.

(a) Current and projected revenue and expense.
(b) Actual and overhead expense.
(c) The cost of acquiring and replacing equipment.
(d) Management costs.
(e) The cost of providing future added or different service.
(f) Promoting and providing source-separation services.
(g) A reasonable return to the contractor for doing business.
(h) Research and development.
(i) Systems to avoid or recover the costs of bad debts.
(j) Interest payments.
(k) Other factors the contractor can demonstrate affect the cost of providing the service.

(2) Rate Examination. The governing body reserves the right to examine the rate structure of the contractor at any time during the period of the contract and to make rate changes that, in the discretion of the governing body, are required.

Exhibit 4 (continued)

An alternative to section (2) might be

(2) Schedule For Rate Changes. The rates at the time this contract takes effect shall be subject to review and change only one time in a calendar year, with the following exceptions.

(a) Upon application by the franchisee and without prior notice, the governing body may grant an interim or emergency rate for new or special service. The governing body may specify the duration of the rate or continue it until final determination by the governing body on the next overall rate adjustment.

(b) In addition to an [annual] **rate adjustment, a supplemental rate adjustment may be requested by the franchisee when the cost of service is increased because of compliance with governmental regulations, or when there is a substantial increase in a single expense that was not anticipated at the time of the last rate adjustment, or when the total cost of service exceeds projected costs by** [five] **percent or more.**

(3) Rate Change Proposal. The franchisee shall file with the [public agency] **a new or revised rate schedule at least** [90] **days prior to any contemplated change.**

(a) The schedule shall be examined by the governing body in a public hearing. The governing body may either approve or deny the proposed rate change, or may request additional information from the franchisee. A decision by the governing body on a new or revised rate schedule shall be made [30] **days before the effective date of the contemplated change, unless the delay is caused by failure of the governing body to meet or obtain a quorum to conduct business. Notification of the decision of the governing body shall be made to the franchisee by certified mail, return receipt requested.**

(b) In the event of disapproval, the franchisee shall not put the new rate schedule into effect, but may file with the [public agency] **further information to justify the rate schedule changes. Upon receipt of the new information, the governing body shall determine whether it will rehear the request.**

(4) Access to Records. The governing body may require annual statements and other records to be furnished to the [public agency] **to carry out the intentions of this section.**

(5) Adjusting An Advance Payment Agreement. An approved rate schedule revision shall not apply to persons and groups who have an advance-payment agreement with the franchisee until the normal expiration of the advance-payment agreement.

the contract. The determination with regard to payments shall take into consideration the contractor's reasonable and actual financing costs.

Regulatory change could conceivably reduce as well as increase costs. The same would be true for other types of compensation adjustments illustrated above (e.g., change orders could delete as well as add work). Appropriate provisions should be included to reduce compensation under such circumstances.

Franchise Rate Adjustment. Many solid waste activities, including solid waste collection and landfill operations, are carried on under franchises rather than contract arrangements. As is the case with longer-term contracts, franchises that include rate regulation by the public agency should provide for rate adjustment over time. Illustrative rate adjustment provisions of franchise ordinances are presented in Exhibit 4.

Liability

Contracts should attempt to fix liability and/or financial responsibility commensurate with relative contract responsibilities of agency and contractor. The three major kinds of liability are criminal, contractual, and tort. This section examines the latter two. Possible agency liabilities from issuance of a permit or license are not reviewed.

Contract Liability

The contractor's liability in contract for defective performance is usually covered by requirements for performance bonds and for withholding payments under certain circumstances.

Performance Bond Requirement. A performance bond is "a guarantee by a third party (surety) that the entity to be bonded (principal) will perform the work specified. The surety decides whether or not to bond the principal after reviewing the technical capability of the company and its credit worthiness. If the surety is ever called on to pay, he or she will subsequently proceed against the principal to recover such payment. Therefore, a bond provides no protection to the company that is bonded, but rather to the owner (obligee) of the project."[28]

The following provision provides for a performance bond to assure the contractor's performance under the contract.

Performance Bond. Within [10] **days of notice of award of this contract, the contractor shall secure and deliver to the** [public agency] **a performance bond acceptable to the** [public agency] **in the same amount as the amount of the contract. The bond shall be provided by a surety company authorized to transact business in the** [state] **and shall have the surety's seal and be signed by the surety company's attorney-in-fact. Power of attorney for the attorney-in-fact shall be attached to the bond.**

Retainage. Contracts commonly provide for retaining portions of payments estimated as due the contractor, as illustrated below.

Retainage. The [public agency] **shall retain** [5] **percent of the value of completed work except as otherwise authorized below. Upon written request of the contractor, the** [public agency] **will deposit amounts withheld as retainage in an interest bearing account in a bank, savings bank, trust company, or savings association for the benefit of the contractor and with interest earned accruing to the contractor.**

(a) When the contract work is [50] **percent completed, the** [public agency] **may reduce or eliminate the retainage on the progress payments for the remaining work accomplished.**

(b) When the contract work is [97-1/2] **percent completed, the engineer may reduce the retained amount to 100 percent of the value of the contract work remaining.**

Withholding Payments. Under appropriate circumstances the public agency must also be able to withhold progress payments. This may include reducing amounts held in retainage. The following provision illustrates this option.

Withholding Payments. The [public agency] shall have the right to withhold from payments due the contractor and to withdraw from funds retained by the [public agency] such sums as necessary, in the [public agency's] sole and exclusive opinion, for the purposes listed below in this section. The right to withhold payments under this section is in addition to the right to retain [5] percent of contract payments under [section]. Action taken under this section shall not affect other rights or remedies of the [public agency] granted by other provisions of this contract or by law and does not relieve the contractor from the consequences or liabilities arising from the contractor's acts or omissions.

(a) To protect the [public agency] against any loss or damage that may result from the events listed in this section and any other negligence or unsatisfactory work by the contractor.

(b) Failure of the contractor to perform or abide by an obligation under the contract, including, but not limited to, failure to maintain satisfactory progress.

(c) Claims against the contractor or the [public agency] relating to the contractor's performance of work.

(d) Damages by the contractor to others not adjusted.

(e) Failure of the contractor to make proper payment to the contrac-tor's employees material suppliers or subcontractors.

(f) Probable filing of a claim against the [public agency] or the contractor.

Alternative Provisions. The public agency and the contractor may both prefer to allow for the replacement of performance bonds with retainage over time. If the contractor finds it more economical to avoid the cost of maintaining surety bonds and the public agency needs the continued protection, the following provision may prove useful. It varies from the more typical surety bond and retainage required in many contracts by incremental replacement of the surety with the cash retainer. This provision may be appropriate for some long-term contracts.

Performance Bonds. Within [10] days of notice of award of this contract, the contractor shall secure and deliver to the [public agency] irrevocable letters of credit or performance and materials bonds on the forms provided by the [public agency] which shall secure the full, faithful and complete performance of the contract in the initial amount of [$_] and prompt payment of persons supplying labor or materials for performance of the contract in the initial amount of [$]. Not later than [ninety] days prior to each contract anniversary date the contractor may deliver a reduced letter or bond, to be effective on the anniversary date. The amount of the reduction shall be no more than the amount of contract payments that the [public agency] has retained by the anniversary date. Except as provided in subsection (a), no further bonds or letters of credit shall be due after the [public agency] has retained payment from the contractor equal to the initial amounts specified above.

(a) The total amount of funds retained by the [public agency] may reach the initial amounts specified above and then fall below that amount, or the amount of retainage may fall below [5] percent of the total contract obligations to pay the contractor, due to the [public agency's] exercise of its right to deduct funds from retainage. If either of these events occur, the [public agency] shall have the right to require the contractor to secure and deliver new letters of credit or bonds in proper form within [90] days of service of written notice of the requirement from the [public agency]. The amount of the new letters or bonds shall be not less than the initial required amounts less the amount of any existing retainage and shall be continued, but may

be adjusted on subsequent contract anniversary dates in the same manner as provided for adjustment of the initial documents, until the retainage is again equal to the initial bond amounts.

(b) Failure to deliver required letters of credit or bonds to the [public agency**] within the time specified shall constitute a default under the terms of the contract and under the terms of any letter of credit or bond then in effect. In addition to other remedies for default, to remedy this default, the [**public agency**] shall have the right to retain payments due the contractor under this contract until the total amount of retainage is restored to the initial bond amounts but not to exceed the permissible retainage amount of [**5**] percent of total contract payment obligations.**

(c) The surety or banking institution furnishing the bonds or letters of credit shall deliver the appropriate bonds or letters to the [public agency**] within [**10**] days of award of the contract. The surety or banking institution shall have a sound financial standing and a record of service satisfactory to the [**public agency**] and shall have a rating of at least A and the appropriate class for the relevant bond amounts under Best's Rating System and shall be authorized to do business in the state of [__]. The attorney-in-fact (resident agent) who executes these bonds on behalf of the surety must attach a notarized copy of his/her power of attorney as evidence of his/her authority to bind the surety on the date of execution of each bond.**

(d) The contractor shall from time to time take additional action and furnish the [public agency**] additional documents and instruments that the [**public agency**] reasonably requests to secure performance of the contractor's obligations under this contract. No requirement of this section is intended to, nor shall, limit or qualify the liabilities and obligations assumed by the contractor under this contract.**

Tort Liability

Generation and management of solid waste present considerable opportunities for torts such as nuisances. Tort liability for a party to a contract may result directly from that party's conduct, or it may result vicariously. A public agency may have vicarious liability for negligent actions of the contractor and should, therefore, protect itself through provisions for indemnification and by requiring the contractor to carry certain insurance.

The contractor generally has the risk of tort liability, but is required to demonstrate financial responsibility by maintaining insurance under policies that also protect the public agency. Ordinary risks, such as vehicle collision and property damage, are not difficult to address, but solid waste operations can have features that standard insurance policies do not cover. For example, environmental impairment may not be insurable.[29] Again, even if the contract places the burden on the contractor, the public agency may not be entirely free of risk. If the contract language is silent and impacts are discovered after work is under way, the public agency may have the responsibility to overcome the problem.

Landfills and waste-to-energy plant operations have the greatest risks of claims of damage because of pollution, contamination, or chemical release. Transport activities carry the greatest risk of vehicle accidents and also have risks of waste spillage. Contracts that relate to facilities owned by the public agency normally leave more liability risk with the public agency. Franchised activities or other contracts that leave ownership and operation with a private company leave less risk with the public agency.

General Indemnification of Public Agency. The first two provisions below place liability responsibility on the contractor. The insurance policy amount required of the contractor depends on the nature of the operation and on state laws. An indemnity agreement minimizes the public agency's risks that may exist because of actions of the contractor.

Indemnity Agreement. The contractor agrees to hold harmless and indemnify the [public agency**] from and against any claim or**

award for damages to any person or property caused as a result of any act of the contractor under this contract.

(1) The contractor shall be liable for all damages or injuries to persons or property caused by the negligence or mismanagement of the contractor or any of its employees while engaged under the terms of the contract. Should the [public agency**] or any of its officers, agents, or employees in the scope of their employment be sued for damages caused wholly or in part by the operations of the contractor under the contract, the contractor shall be notified in writing of the suit and it shall be the contractor's duty to defend or settle the suit. Should a judgement go against the [**public agency**] or its officers, agents, or employees, the contractor shall further indemnify the [**public agency**] for costs and attorney's fees. The record of judgement against the [**public agency**] or any of its officers, agents, or employees in such a case shall conclusively entitle the [**public agency**], its officers, agents, and employees to recover against the contractor.**

(2) The contractor shall purchase an indemnity insurance policy with a company licensed to do business in the state with limits of liability as specified in the contract, which policy shall name the [public agency**], its officers, agents, and employees as the additional insured.**

The alternative language below achieves results similar to those above, and expressly addresses the selection of legal counsel to represent the public agency. Other points of special concern can be detailed in a similar manner.

Indemnity Obligation. The contractor shall defend, save harmless, and exempt the [public agency**], its elected officials, officers, and employees from and against suits, actions, legal proceedings, claims, demands, damages, costs, expenses, and attorney's fees resulting from injury to persons or damages to property out of work done in performance of this contract. The [**public agency**] reserves the right to retain counsel of its own choice at its own expense or, in the alternative, approve counsel obtained by the contractor. The insurance coverage required by this contract in no way lessens or limits the liability of the contractor under this contract, and the contractor may, at its own expense, procure additional insurance.**

Reciprocal Indemnity Provisions. In the next provision, each party to the contract acknowledges a responsibility. This arrangement is particularly appropriate when the contractor is operating only part of the public agency's program and both parties are active at the same physical site.

Reciprocal Indemnity Agreement. The contractor agrees to and does assume all risks of loss or injury to . . . persons coming upon the [disposal site**] and shall indemnify, save harmless, and defend the [**public agency**] for and from civil penalties, claims, damages, suits, judgements, costs, or expenses arising out of any activity of the contractor on the [**disposal site**]. The [**public agency**] agrees to and does assume all risks of loss or injury to people, or persons, agents, employees, customers, or other persons coming upon the [**disposal site**] and shall indemnify, save harmless, and defend the contractor for and from civil penalties, claims, damages, suits, judgements, costs, or expenses arising out of any negligent activity of the [**public agency**] on the [**disposal site**]. The contractor shall have in effect during the term of the contract, general liability insurance in the amount of not less than [$_] and shall have the [**public agency**] as an additional insured. If the cost of the insurance increases more than [_] percent due to no fault of the contractor, over the cost incurred by the contractor at the time this contract is executed, the contractor may request the [**public agency**] to increase the service fee by the amount of the increased cost.**

Required Insurance Coverage. The last provision lists the insurance the contractor must carry.

Insurance Required. The contractor shall obtain and maintain the following insurance, as approved by the [public agency**], and the [**public agency**] shall be named as an additional insured as respects this contract. The insurance carried by the contractor shall be primary over any insurance carried by the [**public agency**].**

Then list the required insurance and the minimum amounts acceptable. Coverage may include the following:

- workers' compensation coverage required by the state or evidence of state-approved self-insurance;
- comprehensive general liability coverage, with the deletion of specified common exclusions if appropriate;
- comprehensive automobile liability coverage;
- umbrella liability coverage.

Summary

The sample contract provisions in this chapter have addressed the issues of regulatory compliance, compensation and liability. These are issues that warrant special attention in preparing contracts related to solid waste management.

Regulations that originate at the federal, state and local level all may need to be addressed through contract provisions. In addition to identifying the regulations to be observed, compliance depends in part on some system of monitoring. This may be by the contracting local public agency but also might be left to the state. The local public agency's liability risk is among the considerations evaluated in determining the scope and nature of the compliance monitoring system.

Cost to the citizens is always of concern to a local public agency, whether paid directly by the users or indirectly through the public agency. Of course, costs under the contract will be related to compliance requirements and can also be affected by liability risk to the contractor. The appropriate mix of contract provisions calling for regulatory compliance, a compensation system, and a sharing of liability risk depends upon decisions unique to each contract proposal. The sample contract provisions are intended to identify some approaches, but do not necessarily provide exact language suitable to individual contracts.

Endnotes

[1] U.S. Congress, Office of Technology Assessment, *Facing America's Trash: What Next for Municipal Solid Waste?* (Washington, D.C.: USGPO, 1989), p. 4.

[2] The RCRA expired in 1988, but its provisions have remained in force by virtue of language in annual EPA appropriations acts since that time. RCRA reauthorization is being given high priority in the current (1991) session of Congress.

[3] See R.C. Beck and Associates et al., *An Analysis of the Potential for Regionalization of Solid Waste Management and Facilities*, Issue Paper No. 8, Washington State Solid Waste Management Plan, June 15, 1990.

[4] Martha A. Shulman, "Alternative Approaches for Delivering Public Services," *Urban Data Service Reports* v. 14 no. 10 (Washington, D.C.: International City Management Association, 1982).

[5] Portland Metropolitan Service District, *Solid Waste Information System Report* (Portland, Oregon, 1990), pp. 9-10.

[6] American Bar Association, *The Model Procurement Code for State and Local Governments* (Washington, D.C., 1981). For the four states in EPA Region X, the citations to state public contracting laws are Oregon, ORS 279.011 et seq.; Alaska, AS 36.30 et seq.; Idaho, IC 50-341 et seq.; and Washington, RCW 39.34.010 et seq.

[7] Intergovernmental contractual arrangements must be distinguished from arrangements that create entirely new governmental entities to perform public services such as solid waste management. Independent units of government (including special districts and authorities) are usually created by state statutes, or by local action pursuant to general state enabling legislation, while intergovernmental entities (such as joint boards that set policy and oversee joint and cooperative activities) are creatures of contract that exist at the pleasure of the contracting parties. Regional authorities or districts that are independent units rather than creatures of contract are increasingly found in the solid waste field today.

[8] U.S. Advisory Commission on Intergovernmental Relations, ACIR State Legislative Program (Washington, D.C.: USGPO, 1969). Citations to the joint exercise of powers laws of states in EPA Region X are Alaska, AS 36.30.700 et seq.; Idaho, IC 67-2326 et seq.; Oregon; ORS 190.003 et seq.; and Washington, RCW 39.34 et seq.

[9] See H. Edward Wesemann, *Contracting for City Services* (Pittsburgh: Innovations Press, 1981), pp. 35-47, for a step-by-step method of calculating the cost of public services and activities.

[10] Wesemann 1981, pp. 45-46. See also John Rehfuss, *Contracting Out in Government* (San Francisco: Jossey-Bass, 1989), pp. 68-69. Rehfuss suggests that informal quotations be solicited "in such a way that (1) it is clear that no promises of a contract are made, (2) no hint of improprieties is possible or can be raised, (3) no favoritism toward any contractor over another exists or can legitimately be raised, and (4) every contractor asked to quote prices has complete information on the service to be provided in order to obtain accurate estimates."

[11] U.S. Advisory Commission on Intergovernmental Relations, *Governmental Functions and Processes: Local and Areawide* (Washington, D.C., 1974), pp. 79-106.

[12] Rehfuss, *Contracting Out*, pp. 95-96

[13] Marlin, John P., *Contracting Municipal Services: A Guide for Purchase from the Private Sector* (New York: John Wiley and Sons, 1984), p. 18.

[14] Rehfuss, *Contracting Out*, p. 55.

[15] For examples, see Marlin, *Contracting*, pp. 33-39; Rehfuss, *Contracting Out*, pp. 200-216; and Wesemann, *Contracting for City Services*, pp. 85-107.

[16] For definitions and discussion of these terms, see American Bar Association, *The Model Procurement Code for State and Local Governments* (Washington, D.C., 1981), pp. 37-39.

[17] See Marlin, *Contracting*, pp. 53-55, for state-by-state summary of criteria for evaluating bids and awarding contracts.

[18] Marlin, *Contracting*, p. 41.

[19] Marlin, *Contracting*, pp. 41-50.

[20] American Bar Association, *Model*, section 3-203 et seq.

[21] American Bar Association, *Model*, p. 37.

[22] Rehfuss, *Contracting Out*, pp. 84-105.

[23] See Marlin, *Contracting*, pp. 79-81.

[24] Rehfuss, *Contracting Out*, p. 86.

[25] The House Subcommittee on Transportation and Hazardous Materials received presentations on both these concepts at hearings in 1989. See U.S. House of Representatives, Committee on Energy and Commerce, Subcommittee on Transportation and Hazardous Materials, *Municipal Solid Waste Disposal Crisis* (Hearings on H.R. 2099 and H.R. 2723, June 22, 1989), pp. 27-83. EPA's publication, *Agenda for Action* and OTA's publication, *Facing America's Trash* provide further detail.

[26] Howard Levenson, Testimony to House Committee on Transportation and Hazardous Materials, p. 35.

[27] OTA, *Facing America's Trash*, pp. 304-305.

[28] Clyde W. Fritz, "Special Insurance Covers Special Needs," Waste Age, April 1990, p. 142.

[29] The cost of comprehensive general liability policies that cover most types of personal injury and property damage may be prohibitive unless the insured accepts a "pollution exclusion" clause. Such a clause states that the policy will not be applicable "to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water . . . ." For further discussion of the legal status of these clauses in general liability policies, see E. David Hoskins, "Striking a Balance: A Proposal for Interpreting the Pollution Exclusion Clause in Comprehensive General Liability Insurance Policies," 19 *Environmental Law Reporter* 10351 (August, 1989).

Appendix A: Case Studies

The case studies in this appendix illustrate some of the diversity in solid waste agreements. The information for the case studies is almost entirely from contract documents received from cooperating jurisdictions. The following are included:

Benton County, Oregon. The County has issued a long-term franchise to the owner-operator of a landfill that serves the county and several other counties.

Pierce County, Washington. Similar to Benton County, Oregon, Pierce County, Washington, has had long-term dealings with a private landfill operator. Special attention was given to tort liability matters in 1987 amendments, leading to a new contract document.

Dade County, Florida. The county has a contract with a private firm for collection of recyclable material.

Benton and Tillamook Counties, Oregon: Joint Use of Franchised Landfill

This "franchising" case study illustrates an arrangement that provides a minimum of public agency involvement in the actual solid waste operation. A landfill located in Benton County is controlled through a franchise between the county and a private party who owns the site and operates the landfill. Tillamook County uses the landfill under an intergovernmental agreement with Benton County and a contract with the landfill owner.

Most of the controls exercised by Benton County result from the land use approval process and a county regulatory ordinance. The private company bears all responsibility for capital investment and compliance with state and local laws and regulations, including landfill closure and post-closure monitoring. The county enforces local landfill regulations and approves tipping fee charges. Although the county can act to enforce state permit requirements, the state Department of Environmental Quality has primary responsibility for monitoring compliance with state regulations and the state permit conditions.

The operations agreement involves a series of documents, including the following.

A. An order of the Benton Board of County Commissioners granting the franchise

B. A franchise between the county and the landfill operator

C. Operator's application for the franchise, with attachments

D. Benton County ordinance regulating solid waste

E. A state landfill permit

F. Benton County-Tillamook County intergovernmental agreement

G. Contract between Tillamook County and landfill operator

H. Rates for dumping at the landfill

The documents evolved over a period of years, and this review does not identify some earlier provisions that have been modified. In addition, it does not provide background on earlier negotiations (for example, the original multicounty service area was the result of a multicounty planning process). The program described is an extension of a prior landfill operations agreement with the same party.

A. County Order

A 1981 county order granted a franchise renewal to Valley Landfills, Inc., to operate the Coffin Butte landfill. The following seven conditions to the grant are listed in the order:

1. Requires compliance with the county's solid waste ordinance and agreements contained in the operator's application for a franchise

2. Establishes a franchise duration of 25 years, but allows for modifications

3. Requires compliance with state disposal-site permit requirements

4. Waives requirements for a performance bond because the operator is experienced

5. Calls for payment of $500 per year to the county to cover county costs of monitoring the landfill and authorizes the county to review the fee annually

6. Encourages the operator to promote waste reduction

7. Conditions the order's effectiveness on execution of the franchise

B. Franchise Between County and Operator

The agreement was executed on the same date as the order and sets out the following four "mutual promises and covenants."

1. Requires franchisee to provide the landfill service at the designated site according to the conditions stated in the order

2. Requires franchisee to comply with agreements contained in the application for the franchise

3. Requires franchisee to comply with the county's solid waste ordinance

4. Protects the county in case there is a claim or award of damages to anyone due to an act of the franchisee

C. Application for Franchise

The franchisee's application was submitted in 1974. It was a proposal to enlarge an existing landfill site to serve portions of three counties. Records of deliberations that are part of the application approval are attached to the application.

D. Conditional Use Permit

In order to approve the application, the county's land use plan required adjustment to designate the enlarged landfill area as a regional landfill site, and the specific operation required a conditional use permit. Conditions to approval of the conditional use permit proposed by the county planning commission March 5, 1974, included the following.

1. Described the area to be served by the landfill

2. Assigned certain monitoring duties to the county sanitarian

3. Required leachate management and wells to monitor for seepage from the site

4. Required reclamation of filled areas and screening along the public road

5. Limited the approval to operation of a sanitary landfill until plans for resource recovery were submitted by July 1, 1976

Two additional conditions were added following an appeal to the county governing body.

6. Limited the acreage to be used as a landfill at any one time and required completed fill areas to be returned to farm use or another permitted use

7. Called for efforts to encourage voluntary separation of recoverable materials

E. Solid Waste Ordinance

The county's solid waste ordinance requires a county franchise or permit before solid waste services can be conducted in county area outside cities. (section 23.105 of county code.) The ordinance relates to a franchise agreement in a manner somewhat similar to the relations between a set of specifications and a contract. It provides information on requirements prior to an applicant's preparation of a franchise request.

F. State Permit

Application for a state permit to expand the landfill, together with relevant plans, was submitted in October 1977. The permit was approved by the state Department of Environmental Quality on March 16, 1978, with conditions and limitations.

G. Tillamook County Use of Landfill

At the end of 1987, the county governing body of Tillamook County submitted a request for permission to dispose of solid waste from that county at the landfill under Benton County's control. The request was reviewed by the Benton County Solid Waste Advisory Council, which recommended approval subject to certain conditions. The Benton County governing body approved it and the resulting intergovernmental agreement has the following three conditions:

1. The operator of the landfill is to maintain at least a 40-year life expectancy.

2. Tillamook County is to maintain a recycling program.

3. Tillamook County shall comply with requirements for the region dealing with hazardous materials.

The agreement sets a disposal rate for Tillamook County at $25 per ton, with the funds allocated as follows:

County Fee	10%
Closure Fund Contribution	24%
Leachate Treatment & Landfill Cap	24%
Volume Reduction Expenditures	24%
Additional Operating Costs	2%
Income Taxes	6%
Franchisee's Net Receipts	9%

H. Tillamook County's Contract

With the approval of Benton County, the landfill operator and Tillamook County entered into a contract for the period January 1, 1989, through December 31, 1993, with provisions for renewal. All waste will be delivered by Tillamook County's transfer station contractor. In addition to the $25 per ton rate, Tillamook County is to reimburse for any fees or increases in fees that may be imposed during the agreement by the state or county and is responsible for providing weigh tickets for the waste delivered.

In October 1988, Tillamook County entered into a five-year contract with a private firm for operation of a transfer station and recycling depot and transport of waste from the transfer station to the landfill in Benton County. The county had prepared an invitation to bid and specifications. The contract bid price is fixed for the term of the contract, except for adjustments for specific conditions described in the contract documents. The successful bidder set a price of $58.33 per ton, which includes the $25 per ton Benton County charge. The transfer station investment by the county was estimated at $147,000 and equipment to be supplied by the contractor at $102,000.

I. Rate Increase Authorizations

The Benton County governing body approved rate increases in November 1978, which increases public dumping fees from $1 minimum for up to a cubic yard and $0.50 for each additional cubic yard to $2 and $0.75. Rates for commercial haulers were increased from $0.80 per compacted cubic yard and $0.50 per loose cubic yard to $0.90 and $0.55. Three subsequent rate adjustments were made, the most recent in 1989.

	Prior Rates	1989 Proposed Rates
Loose from Collectors:		
Per Yard	$1.02	$2.45
Per Ton	6.80	16.32
Compacted from Collectors:		
Per Yard	1.70	5.92
Per Ton	4.69	16.32
Public:		
Per Yard	2.61	14.00
Per Ton	17.11	26.70

Five reasons were given for the 1989 increase.

1. Permanent closure within the next three years of the landfill cell that had been in use for about 15 years, with closure in conformance with federal requirements

2. Operating costs associated with a new shredding program designed to reduce the volume going to the landfill by 20 to 25 percent

3. A $0.50 per ton state-agency fee

4. Creation of a pollution trust fund as self-insurance against environmental impairment or pollution and to comply with a state-required financial assurance plan related to closure

5. Increased operating costs and profit

After reviewing an analysis by the county's finance staff and comments from the public, the Solid Waste Advisory Council approved the per-yard rates, but only for a period of two and one-half years. Since there are no scales at the landfill, tonnage rates were considered without meaning. Comments in the report seemed to indicate some uncertainty regarding how to evaluate the need for rate increases. The report noted that "there are no standards in the solid waste disposal industry which address reasonable return."

Excerpts From Documents

Order of County Governing Body Dated September 30, 1981

1) *The franchisee shall comply with all applicable provisions of the "Benton County Solid Waste Management Ordinance" and all agreements contained in the application for service.*

2) *The duration of the franchise shall be for twenty-five (25) years subject to renewal pursuant to the "Benton County Solid Waste Management Ordinance". In the event the service area for the Coffin Butte landfill is altered or the methods of disposal are substantially changed, the Board shall, upon written notice to the franchisee, reevaluate the term of the franchise.*

3) *The franchisee shall comply with all conditions set forth in the Department of Environmental Quality's disposal site permit.*

4) *The franchisee is found to have adequate experience and a performance bond is hereby waived.*

5) *The franchisee shall pay to Benton County a five hundred dollar ($500.) annual fee for the cost of monitoring the franchised site. Such fee shall be reviewed annually or at the discretion of the Board.*

6) *Benton County encourages the franchisee in the promotion of waste reduction activities.*

7) *The granting of a franchise is further conditioned upon the applicant executing a written agreement which shall be attached to this Order marked "Exhibit A" and by this reference is hereby incorporated herein.*

Agreement Dated September 30, 1981

1) *Franchisee shall provide the solid waste services at Coffin Butte as applied for subject to the conditions stated in Board Order dated 30 September, 1981.*

2) *Franchisee shall comply with all agreements contained in the application for service, an executed copy of which is attached hereto, marked "Exhibit B" and by this reference is hereby incorporated herein.*

3) *Franchisee shall comply with all provisions of the "Benton County Solid Waste Management Ordinance."*

4) *Franchisee agrees to hold harmless and indemnify Benton County from and against any claim or award for damages to any person or property caused as a result of any act of franchisee pursuant to this agreement.*

Excerpts from Agreements in Application

- *Wherever feasible, the scars that erode the face of Coffin Butte, when plans meet DEQ approval, shall be filled and compacted to a condition permitting re-seeding and eventual visual reclamation of the area and including screening with natural vegetation that portion of the subject property abutting the county road.*

- *That by July 1, 1976, a plan including detailed elements on design, location, management, and financing of a solid waste resource recovery system be prepared and submitted to the Planning Commission for further consideration. Until such plan is completed, the conditional use approval shall be limited to only the sanitary landfill method of waste disposal.*

- *The landfill operation shall be phased so that only a small acreage is used for fill at one time and then this acreage shall be returned to grazing, another farm-type operation or other permitted use as approved by the Planning Commission and the Board of County Commissioners.*

- *That efforts be made to encourage voluntary separation of recoverable materials such as tin, aluminum, paper, glass, etc. to reduce the amount of landfill materials.*

Excerpts from County's Solid Waste Ordinance

- *An applicant . . . shall demonstrate to the satisfaction of the Board that the applicant: . . . .*

  (d) Has in force, or intends to provide for, public liability insurance in the amount of not less than $100,000.00 for injury to a single person, or $300,000.00 for injury to a group of persons and property damage insurance in the amount of not less than $50,000.00, which shall be evidenced by a certificate of insurance or a letter of intent. Upon award of a franchise, any applicant providing only a letter of intent with the application shall provide a copy of a certificate of insurance prior to the effective date of the franchise. The certificate shall name Benton County as an additional insured. The Board may, by order, increase the minimum amount of required insurance to meet inflationary costs;

- *That the applicant [for a disposal site franchise] has sufficient experience to insure compliance with BCC Chapter 23.*

  (a) If the applicant does not have sufficient experience, the Board may either deny the application or require the applicant to submit a corporate surety bond, in the maximum amount of $300,000.00, which guarantees full and faithful performance by the applicant of the duties and obligations of a franchise holder under provisions of Chapter 23, guarantees compliance with applicable laws and holds Benton County harmless.

  (b) In determining whether or not a bond is required and the amount necessary, the Board shall give due consideration to the size and type of the site, the solid waste handling methods proposed, the population or type of customers to be served, alternative sites, availability of the bond, cost to customers served, adjacent or nearby land uses, the potential danger of failure of service and such other factors as the Board deems relevant.

- *(1) The privileges granted to a holder are upon the express condition that the holder shall be liable for all damages or injuries to persons or property caused by the negligence or mismanagement of the holder or any of its employees while engaged in the business under the terms of the franchise or permit. Should Benton County, or any of its officers, agents or employees in the scope of their employment be sued for damages caused wholly or in part by the operations of a holder under the terms of the franchise or permit, the holder shall be notified in writing of such suit and it shall be the holder's duty to defend or settle the suit. Should a judgement go against Benton County, its officers, agents or employees, the holder shall further indemnify the County for costs and attorney's fees. The record of judgement against Benton County, or any of its officers, agents or employees, in such a case shall conclusively entitle Benton County, its officers, agents or employees to recover against the holder.*

(2) *The holder shall covenant to purchase an indemnity insurance policy with a company licensed to do business in the State of Oregon with limits of liability specified in BCC 23.210(d) which policy shall name Benton County, its officers, agents and employees as* the additional insured.

- *A disposal site franchise holder shall supply disposal services covered by its permit to those persons who contract for disposal, handling, or recovery of solid wastes collected under a franchise, license or permit; to those local government units and public agencies located within Benton County for wastes generated by activities of such units or agencies; and, subject to limitation by the Board, members of the general public hauling wastes generated by such person and not collected from other persons.*

- *All service under a franchise or permit shall be subject to applicable laws and regulations, and to permit conditions and decisions of administrative, legislative and judicial agencies having jurisdiction.*

- *A disposal site franchise holder shall not discontinue required service without ninety (90) days written notice to the Board and to any collection franchise or permit holders having a contract to use the site.*

- *No holder is required to store, collect, transport, dispose of or resource recover any hazardous waste. A holder may engage in one or more of those activities apart from BCC Chapter 23 as long as such activity is in compliance with all applicable local, state, and federal laws.*

- *Each holder shall agree in writing and it shall be a condition of the franchise or permit that whenever the Board determines that the failure of service, or threatened failure of service, would result in creation of an immediate and serious health hazard or serious public nuisance, the Board may, after a minimum of twenty-four (24) hours written notice to the holder authorize County personnel or other persons to temporarily provide the service or to use and operate the land, facilities or equipment of the holder. The Board may authorize whatever expenses are necessary to operate such land, facilities or equipment consistent with BCC Chapter 23. The Board shall return any seized property and business upon the abatement of the actual or threatened interruption of service.*

- *A disposal site franchise holder shall pay an annual franchise fee. The fee shall be adopted by Order of the Board pursuant to the rate change procedure contained in BCC 23.510.*

- *An annual disposal site franchise fee or a permit fee shall be payable to the Board on December 31 or each year. Where reasonably required by the Board, the holder of a disposal site franchise or a permit shall maintain books and records disclosing gross receipts at the disposal site or under the permit, which books and records shall be available at reasonable times and places for audit by authorized personnel of Benton County.*

- *Subject to the requirements of the local budget law and other applicable laws, fees collected under this section shall be used for the administration of BCC Chapter 23, for solid waste nuisance abatement, or for promotion or provision of source reduction, recycling, reuse or resource recovery, or for other solid waste management expenses of Benton County.*

- *A holder may charge and collect reasonable compensation from persons to whom it furnishes services. The term "reasonable compensation" may be defined by the Board after a study and consideration of rates for similar service under similar conditions in other areas, and as affected by local conditions, and which allows a holder to earn a reasonable rate of return.*

- *Benton County reserves the right to examine the rate structure of a holder at any time during the period of a franchise/permit and to make rate changes which, in the discretion of the Board, are reasonably required.*

- *A holder shall provide the Board with a certified copy of its published rate schedule, setting out the rates for all its operations. A holder shall file with the Board a new or revised rate schedule at least ninety (90) days prior to any contemplated change.*

- *The schedule shall be examined by the Board in a public hearing. The Board may either approve or deny the rate change, or may request additional information from the holder. It shall be approved by the Board thirty (30) days before the effective date, unless the delay is caused by failure of the Board to meet or obtain a quorum to conduct business.*

- *Notification of the decision of the Board shall be made to the holder by registered mail.*

- *In the event of disapproval, a holder shall not put the new rate schedule into effect, but may file with the Board further information to justify the rate schedule changes. Upon the receipt of the new information, the Board shall determine whether it will rehear the request.*

- *The Board may require annual statements and other records to be furnished to the Board to carry out the intentions of this section.*

- *In the event of approval of a revised rate schedule, the revised rate schedule shall not apply to persons and groups who have an advance payment agreement with the franchisee or permittee until the normal expiration of the advance payment agreement.*

- *The maximum rates in effect at the time this ordinance takes effect shall be subject to review and change only one time in a calendar year beginning* January 1st; provided:

  (a) *Upon application and without prior notice, the Board may, by order, grant an interim or emergency rate for new, special or different service. The Board may specify the duration of the rate or continue it until final determination by the Board on the next overall rate adjustment.*

  (b) *In addition to an annual rate adjustment, a supplemental rate adjustment may be requested when the cost of service is increased due to compliance with governmental regulations; or when there is substantial increase in a single expense that was not anticipated at the time of the last rate adjustment; or when the total cost of service exceeds projected costs by five (5) percent or more.*

The Board shall support a decision to revise rates with findings of fact. In making its findings, the Board may consider rates charged by other persons performing the same or similar service. The Board shall give due consideration to current and projected revenue and expense; actual and overhead expenses; the cost of acquiring and replacing equipment; management costs; the cost of providing for future added or different service; promotion and provisions of source separation services; a reasonable return to the holder for doing business; research and development; systems to avoid or recover the costs of bad debts; interest payments; and such other factors as the Board deems relevant.

- *The holder shall keep a complete and accurate set of books which shall reflect the gross receipts from services rendered inside Benton County outside the boundaries of incorporated cities. These books shall be balanced at least annually. A statement showing the basis for the quarterly fee payment shall be furnished to Benton County on each payment date. Benton County shall have the right to inspect the books and records of a holder at all reasonable times and places, and a holder shall render all reasonable assistance to Benton County, its officers, agents and employees when Benton County desires to audit or inspect the books and records.*

- *If the holder fails to promptly comply with any duty imposed, then Benton County may, after written notice to the holder and a reasonable opportunity to comply, proceed to perform the duty at the cost of the holder, which shall immediately become liable to Benton County for all expenses incurred by Benton County in fulfilling the obligation.*

- *The Board reserves the right to make further regulations as deemed necessary to protect the welfare of the public.*

Pierce County, Washington: Sharing Risk or Liability

This case study illustrates an arrangement that provides a division of financial responsibility for potential liabilities between a private landfill operator and a county. The private company bears most risk while operating the landfill, and the county bears most post-closure risk with the assistance of assets in a self-insurance fund that increases during the contract period.

In August 1977, Pierce County, Washington, entered into a contract with Land Recovery, Inc. (LRI), for operation of county solid waste disposal facilities. The agreement included provisions for the contractor to establish a new major landfill expected to serve a minimum of 20 years. The existing county facilities consisted of drop-box stations and landfills.

The contract had no specified termination date, but permitted either party to terminate the contract six months after giving notice. In addition, either party could initiate an amendment to the contract and, unless the other party agreed to the amendment, the matter would be settled by arbitration. Compensation was provided through tipping fees to be paid by users of the facilities. The contract established the initial fees and provided for periodic rate adjustments through analysis of costs and other factors.

The contract was amended in March 1987, in response to 1985 additions to state requirements, by replacing it with a new contract document. The major reasons for the amended contract were related to liability risk. The risks and responsibilities were recognized as being shared. The county had conducted landfill operations prior to the 1977 contract, and the extent to which responsibilities since then were with the contractor was not fully definable. Insurance was not necessarily available to cover all risks, and the state was now requiring accumulation of funds to assure the financial ability to close landfills and provide post-closure care.

Protection from Liability Risk

The 1987 contract required the contractor to carry comprehensive public liability and property damage liability insurance and comprehensive automobile liability insurance, naming the county as an additional insured, as had the 1977 contract. However, the following was added to section 4, the insurance section:

> *The parties acknowledged that environmental impairment insurance is not currently available but agree to explore the feasibility of obtaining other or additional insurance as the County may determine is necessary or advisable.*

In addition, the indemnity section (sec. 5) of the contract was substantially expanded, and provisions for a self-insurance fund were added to the contract (sec. 6). Under the new provisions, the operator indemnifies the cou nty fully for general liability and partly (up to the amount available from the self insurance fund) for claims related to pollution, contamination, or chemical release. These sections are reproduced below.

5. *Indemnity.*

a. With respect to claims by third parties which do not relate to pollution, contamination or release of chemicals, and which arise from the operation of any facilities subject to the 1977 Agreement or the modification, LRI shall defend, indemnify and hold the County free and harmless from liability from any and all claims, demands, losses of death, injury or disability from any person and/or damage to any property or business occurring directly or indirectly, out of or suffered by any person by reason of or in connection with any actions or omissions of the Company, its agents, employees or subcontractors. In the event of a suit against the County, LRI agrees to appear and defend the same, provided LRI is notified in a timely manner of the suit. In the event judgment is rendered against the County, LRI will cause the same to be paid or set aside within ninety (90) days after a final determination thereof, including a final determination of any appeals.

Such indemnity shall not include claims arising as a result of the sole negligence or intentional acts of the County, its employees and agents, but shall include but not be limited to any liability as may arise or occur from concurrent, contributing or joint actions or omissions of LRI and the County to the maximum extent such indemnity is allowed by law.

b. LRI hereby agrees to defend, indemnify and hold harmless the County, and its appointed and elected officers and employees, from and against all loss or expense, including attorneys' fees and costs, incurred as a result of claims by third parties regarding personal injury, property damage or other loss related to pollution, contamination, or chemical release arising from operation of any of the facilities subject to this agreement; provided, that such agreement to indemnify and hold harmless shall be limited to the amount available to LRI from the self-insurance fund created pursuant to paragraph 6.

c. The County agrees to indemnify, hold harmless and defend LRI and its shareholders, officers, employees, and agents from and against all loss or expense, including attorneys' fees, in excess of the amount made available to LRI from the self-insurance fund created pursuant to Paragraph 6, incurred as a result of claims by third parties regarding personal injury, property damage or other loss related to pollution, contamination or chemical release arising from operation of any of the facilities subject to this agreement. This provision shall not apply to future acts which are an intentional and knowing violation of any law or wanton or reckless disregard for human health or the environment. . . .

f. It is agreed between the County and the Company, that the indemnity provisions set forth in paragraphs 5(a) of this agreement shall not apply to any acts of the County, its agents or employees which were committed prior to the execution of the 1977 Agreement, nor to any contractual liability or obligation incurred by reason of any use made by the County of any solid waste disposal site, or transfer station prior to the time the Company assumed operation of such facility.

6. Self-Insurance Fund.

a. The County shall establish an interest bearing self-insurance account to cover costs and expenses, including judgments or settlements, relating to claims by third parties for pollution, contamination or chemical release related damages. Except as provided in paragraph 8 below, facility revenues shall be allocated to this fund at the rate of $17544.00 per month to the fund, beginning on July 1, 1987, and monthly thereafter until two million dollars has been contributed. Beginning July 1, 1987, the parties shall meet every six months for the purpose of discussing and authorizing projected expenditures from the fund for the succeeding six month period. Expenditures from the fund shall be made in accordance with this preauthorization procedure, unless unanticipated expenditures become necessary which will then require specific County prior approval except in the case of an emergency. Payments from such fund shall be made only upon the signature of a designated representative of the County and made only for costs and expenses, including attorney fees, incurred subsequent to June 1, 1986 as a result of third party claims regarding pollution, contamination, or chemical release. No expenditures shall be made from such fund without a request for payment including written supporting documentation which shall be submitted to the County Executive. If the County Executive objects in writing to use of the fund for the purpose or amount requested within a thirty day period, either party may submit the use of the fund to arbitration pursuant to Paragraph 14 of this agreement. The results of any such arbitration shall be binding upon the parties. The County Executive's failure to object in writing within thirty days of the request for payment shall constitute approval of requested payment, and the County's authorized representative shall promptly pay the requested amount.

b. For purposes of this paragraph, actions taken by LRI solely to operate the facilities in accordance with state or local statutes, regulations or requirements shall not constitute costs or expenses incurred as a result of claims by third parties. However, costs and expenses associated with remedial actions undertaken to eliminate or reduce impacts or injuries to public or private resources such as ground water or property owned by others, are subject to this paragraph if not otherwise required to operate the facility in accordance with state or local statutes, regulations or requirements.

c. If any monies remain in the self-insurance fund after post-closure care of the facilities is completed and approved by the Washington Department of Ecology, all such monies shall be retained by Pierce County for it to use in its discretion for solid waste related activities. After completion of post-closure care, the County shall, however, remain liable for its obligations pursuant to Paragraph 5(c) above.

Terminating the Contract.

Because of liability risk issues and responsibilities for landfill closure and post-closure, the former ability of either party to terminate the contract with six months' notice was considered unsuitable. It was replaced in the new contract with a prescribed term for the contract plus a modified ability for either party to terminate which described residual responsibilities in case of termination. These provisions follow.

7. Term of Agreement.

Unless this contract is terminated in accordance with Paragraph 8 hereof, the term of this agreement shall be at least until the Hidden Valley and Purdy landfills are closed. Obligations of the parties pursuant to Paragraphs 4, 5 and 10 of this agreement cannot be terminated except by mutual agreement of the parties.

8. Termination or Closure.

a. Either party hereto may without cause terminate this agreement by giving written notice of its intention to terminate to the other party by certified mail return receipt requested. Such termination shall, thereafter, be effective six (6) months following the date of the written notice during which period of time the terms and conditions of this agreement shall remain in full force and effect.

b. In the event the agreement between the parties is terminated by the County pursuant to this Paragraph, terminated by LRI and LRI ceases to operate the facilities, or the Hidden Valley and Purdy landfills are closed prior to January 1, 1997:

(1) LRI's obligation to contribute to a self-insurance fund pursuant to Paragraph 6 of this agreement shall cease but the County's obligation to indemnify LRI pursuant to Paragraph 5(c) hereof shall remain in full force and effect.

(2) LRI's obligations to contribute to the post-closure funds pursuant to Paragraph 12 hereof shall cease as of the date of termination or closure. The County will remain liable for all necessary post-closure costs and expenses in excess of the amount contained in the fund on the date of termination or closure and for compliance with any state or local statutes, rules or ordinances relating to such funds.

(3) LRI's obligations to fund closure at the facilities shall be limited to the closure actions completed as of the date of termination. The County will be liable to fund all additional necessary closure activities.

c. In the event the agreement between the parties is terminated by LRI and LRI chooses to continue operation of Hidden Valley:

(1) LRI's obligation to contribute to the self-insurance fund pursuant to Paragraph 6 of this agreement shall remain in *effect as shall the County's indemnification obligations under Paragraph 5, except that, if the parties are unable to agree, the County may submit to arbitration pursuant to Paragraph 14 the question of necessary increases in the funding thereof.*

(2) LRI's obligations to contribute to the Hidden Valley post-closure fund pursuant to Paragraphs 10 and 12 shall remain in effect as shall the County's obligation to provide post-closure care, except that, if the parties are unable to agree, the County may submit to arbitration pursuant to Paragraph 14 the question of necessary increases in the funding thereof. LRI's obligations to contribute to the Purdy post-closure fund shall cease if the County uses Purdy as a landfill site but shall otherwise remain in effect.

(3) LRI's obligations to fund closure at the facilities shall continue. . . .

Dade County, Florida: Contracting for Collection and Marketing of Recylclable Materials

In 1988, the Florida legislature enacted the Solid Waste Management Act. The Act mandated a 30 percent reduction in the volume of disposable solid waste by 1994 and required every county to initiate a recycling program. In January 1990, Dade County contracted with Industrial Waste Service, Inc., for curbside collection of recyclable material.

The Dade County contract provides for a system of weekly recyclable collection in the county service area on the day other solid waste is collected. Residents in the service area are issued two containers for separating newspaper from glass, plastic, and ferrous and aluminum cans. Containers must be left at curbside, except that backyard or special types of collection are provided for disabled participants. The contractor's duties include collecting, transporting, and marketing recyclable materials.

This case study illustrates how a contract for recycling services deals with the three principal solid waste issues identified in chapter 3 — regulation compliance, compensation, and liability.

Regulation Compliance. A contract for solid waste services must provide requirements for mitigating environmental impacts. A common provision of solid waste contracts requires the contractor to obtain permits and obey applicable laws.

> *Article 16: Contractor shall obtain, keep current, and pay for all licenses, permits and inspections required for this Agreement, and shall comply with all applicable laws, ordinances, and regulations. Damages, penalties, and/or fines imposed on or incurred by the County or the Contractor for failure to obtain and keep current required licenses or permits, or to comply with laws, ordinances, regulations or special conditions applicable to this Agreement shall be borne by the Contractor.*

The contract includes provision to mitigate public health and environmental impacts during collection.

> Article 3(A)(2)(c)(6): The cleanup of any spillage caused by Contractor during collection shall be the responsibility of the contractor.
>
> *Article 3 (A)(3)(d)(3)(A): Contractor must ensure that recycling collection vehicles are kept in a clean and sanitary condition. County may require Contractor to clean any recycling collection vehicle. Article 3 (A)(3)(d)(3)(B): Contractor's specialized curbside collection and recycling transport vehicles, including any support vehicles, shall be covered in a fashion that will not permit Recyclable Material to be contaminated or to allow loss of Recyclable Material.*

One impact-mitigation standard calls for action by the county.

> *Article 5 (A): County agrees to take such steps as may reasonably be necessary to protect Contractor's ownership of all Recyclable Materials placed at the curbside for collection by Contractor under terms of this Agreement, including preparation and submission of an anti-scavenging ordinance for the County. The County staff shall submit to the Board within a reasonable time, a proposed anti-scavenging ordinance that has been approved by the Contractor.*

The contract allows the contractor to dispose of recyclable or residue material under certain conditions.

> *Article 3(a)(3)(c): Contractor shall be prohibited from disposal of Recyclable Material at any solid waste management or disposal facility unless Contractor is unable to sell the Recyclable Material. The Contractor will dispose of the non-marketable Recyclable Material at County disposal sites and will pay the County the current disposal fee up to a maximum of $500,000. Above $500,000 the County, at its sole option, can either assume the cost of disposal or instruct the Contractor to discontinue collecting the non-marketable Recyclable Material. If the collection is discontinued, the monthly fee will be reduced by the actual savings from discontinuing pickup of the non-marketable Recyclable Material. Residue picked up on the recycling routes may be disposed of at the County landfill free of charge, provided this amount does not exceed 5 percent of the total Recyclable Material and Residue collected monthly. Any amount over this percentage shall be charged at the present County landfill disposal rate.*

Standards also are provided for operation of the contractor's processing facility.

Compensation. The compensation schedule in article 7 calls for an initial lump-sum payment by the county to the contractor to defray start-up costs, including provision of special collection vehicles and support vehicles.

> *Article 7 (A): County shall, within 10 days of execution of this Agreement, make a lump sum payment to Contractor of eight hundred thousand dollars ($800,000) to defray the costs of initiating the curbside recycling program. Seventy-five (75) percent of this amount shall be spent for capital items and twenty-five (25) percent shall be spent for public information activities.*

The fee schedule sets rates per individual unit, with different amounts for residential and multi-family units.

> *Article 7 (B): The Contractor's Monthly Fee shall be $1.53 per Residential Property from the date of this Agreement through September 30, 1991.*

> *Article 7 (C): The Contractor's Monthly Fee shall be $1.24 per Multi-family Unit from the date of service implementation through September 30, 1991.*

These fees are locked in for the first twenty months of the contract and are then adjusted according to changes in the Consumer Price Index.

> *Article 7 (D): Contractor's Monthly Fee shall not change until October 1, 1991. On that date, and annually thereafter, the Monthly Fee shall be adjusted by 95 percent of the change in the Miami Consumer Price Index for All Urban Consumers for the previous July through June.*

Provisions are made for fee increases if the county adds "mixed wastepaper" to the list of recyclable materials.

> *Article 7 (E): If at any time during the term of this Agreement, either the Contractor or the County can obtain a contract for the purchase of Mixed Wastepaper for the remaining term of the Agreement at a floor price of at least $0.00 per ton, F.O.B. Contractor's Processing Facility, the County may add Mixed Wastepaper to the list of Recyclable Materials to be collected, processed and marketed by the Contractor at a cost of the Monthly Fee plus an additional 9 cents per Residential Property and/or Multi-family Unit per month plus any annual adjustments for the period from execution of this Agreement to the addition of Mixed Wastepaper such adjustments to be described in Section D above.*

Because the market for recyclable material is unstable, article 7 provides a floor value for the contractor's revenue from the sale of recyclable material.

> *Article 8: The compensation set forth in Article 7, 'Compensation for Services', is based on the assumption that contractor will receive recyclable Material Revenue from the sale of Recyclable Materials collected by the Contractor under this Agreement, equal to the Recyclable Material Revenue Floor. If the Recyclable Material revenue received by Contractor during a quarterly period differs from the Recyclable Material Revenue Floor, County's payment to Contractor shall be adjusted as follows:*
>
> *A. If actual amount of Recyclable Material Revenue received in a quarter is less than the Recyclable Material Revenue Floor for that quarter, County shall pay Contractor one-fourth (1/4) of the deficit not later than thirty (30) days from receipt of the Quarterly Recyclable Material Revenue statement from Contractor provided, however, that County will not reimburse the Contractor for more than 12.5 cents per month per Residential Property and Multi-Family Unit.*
>
> *B. If actual amount of Recyclable Material Revenue received in a quarter is greater than the calculated Recyclable Material Revenue Floor for that quarter, County shall receive a credit towards the next payment to Contractor in the amount of one-quarter (1/4) of the Recyclable Material Revenue in excess of the Recyclable Material Revenue Floor.*

Article 9 covers breach of performance by the contractor.

> *Article 9: The following acts or omissions shall be considered a breach of contract, and for the purpose of computing damages under the provisions of this section, County may deduct from payments due or to become due to contractor, the following amounts as liquidated damages:*

- Residential collection prior to 7:00 A.M. or after 7:00 P.M.: $100.00 per route,
- Failure to collect missed Containers within twenty-four (24) hours after a make-up order is given to the Contractor: $25.00 per Residential Property,
- Failure to provide within 24 hours the level of services required in Article 3 after notification to correct deficiencies: $20.00 per occurrence,
- For each failure to respond to a customer complaint within 24 hours from County notification to Contractor: $50.00 per occurrence,
- *For each working day, any quarterly or annual report is submitted late: $25.00.*

> *Liquidated damages shall be based on verified citizen complaints and/or Contractor reports, unless liquidated damages are levied for late reports. Liquidated damages shall be subject to appeal in the manner described in Article III, Section F, subsection (e) of this Agreement, except that the Contractor may appeal the decision to levy liquidated damages only if such damages exceed either $1,000 for any given day, or $10,000 for any month, or $25,000 for any year. Liquidated damages shall not be applicable to a particular Recycling Route for the first 6 weeks after a that [sic] particular Recycling Route has been added to the program.*

Liability. The contract assigns responsibility for potential tort liabilities. It contain a broad clause in which the contractor agrees to indemnify the county for liability resulting from of its performance.

> *Article 20: Contractor shall indemnify and hold harmless the County and its officers from any and all liability losses or damages, including attorneys' fees and costs of defense, which the County may suffer as a result of claims, demands, suits, actions or proceedings of any kind or nature, including Worker's Compensation claims, in any way resulting from or arising out of Contractor's or employees', agents', servants', partners', and principals' performance within the scope of this Agreement...*

The contract also requires the contractor to obtain a performance bond.

> *Article 12: Within ten (10) days from the execution of this Agreement by all parties, Contractor shall provide the County with a performance bond in the amount of two million dollars ($2,000,000.00), to guarantee the faithful performance by Contractor of the requirements of this Agreement. The surety company issuing said bond shall be Treasury-rated, and the form of the bond itself and surety company shall be subject to approval by County. Failure to provide such performance bond will be considered material default by the Contractor, and will result in termination of this Agreement. Posting the performance bond shall in no way limit or relieve the Contractor of its liability for damages pursuant to this Agreement.*

Specific procedures are provided for damage to customers' property.

> *Article 3 (F)(a): Property Damage Reports. The Contractor shall be responsible for any damage to property caused by the Contractor's crew and/or equipment. Contractor shall be responsible for monitoring complaints from customers involving property damage. A foreman will be sent by Contractor to the address to inspect the damage and will fill out a damage assessment form to be signed by the resident. The contractor shall be responsible for resolving, and, if warranted, for providing payment of the claim within sixty (60) days. If Residential Property owner is not satisfied with the decision of the Contractor, that property owner may pursue other available remedies or may waive all other remedies except as provided herein, and the County shall serve as final arbiter of claims for damages less than $250 for a single incident. If damages claimed exceed $250, either party may appeal the decision in the manner described hereinbelow. Property owners acceptance of the procedure shall be in writing in a form approved by the County.*

The above clause also details the appeal procedure. An appeal is made to the county manager, who makes a ruling after receiving recommendations from a departmental committee. Further appeal is to the courts.

Finally, the contract describes insurance coverage the contractor must obtain, including (1) worker's compensation insurance for all employees of the contractor; (2) comprehensive public liability insurance of not less than $500,000 combined single limit per occurrence for bodily injury and property damage; and (3) automobile liability insurance for noncollection vehicles used in connection with the recycling program (Section 21).

Appendix B: Sample Contracts

Chapters 2 and 3 present many examples of individual contract provisions. This appendix presents samples of two complete contracts.

The first is a public-private landfill operations contract prepared for use under the IFB process. It is reproduced from a 1971 publication of the U.S. Environmental Protection Agency entitled *Recommended Standards for Sanitary Landfill Design, Construction, and Evaluation & Model Sanitary Landfill Operation Agreement*. Even though standards for operating landfills have changed greatly since 1971, the model is still useful because it merely incorporates applicable requirements by reference.

The second sample contract is an actual intergovernmental agreement that is in effect in southwestern Washington. It establishes a multi-county planning program, and includes as an attachment a scope of work drafted to be used as part of a request for proposals for the actual planning studies to be conducted under the program.

EPA Model Landfill Operation Contract

Instructions to Bidders
Suggested Provisions to be Included in Instructions to Prospective Bidders

1. ***Intent and Purpose.*** It is the intent and purpose of this contract on which bids are sought to assure the healthful and aesthetic operation of a sanitary landfill, at one or more sites, where solid wastes originating within the City, or for which the City has accepted responsibility, will be disposed of.

2. ***Qualifications of Bidders.*** All bidders hereunder must furnish satisfactory evidence to the City that they have operated or are presently operating a sanitary landfill of the type and capacity involved here. (A description of the solid wastes, including expected daily quantities and a detailed plan of the sanitary landfill site must be included for all the bidders.) The bidders must also show that they have successfully operated a sanitary landfill in a manner required by the attached ordinances for a long enough period of time that they will be able to operate under varied weather conditions prevailing in this area. (The City must develop ordinances or standards similar to those included in this publication to define the site and operational requirements to assure performance and protection of the environment.) They must list all sanitary landfill sites they have completed or are now operating; all operating sites may be inspected by city personnel to determine the bidder's eligibility.

Bidders without the experience outlined above but with sufficient experience in a comparable field, such as excavating or grading, should show an association with (a) consultant(s) and/or operator(s) qualified to assist in engineering, planning, supervising, and operating the project in accordance with the attached recommendations or ordinances. The name(s) and experience of the consultant(s) and/or operator(s) shall be contained in an attachment to the bid.

All bidders shall include as an attachment to the bid a listing with qualifications of personnel who have agreed to serve as employees, etc. of the bidder in the operation of this contract.

All bidders shall supply detailed inventories of their equipment, showing each type by model, year of manufacture, anticipated remaining useful life, and all accessories for each piece so listed. All leased equipment shall be separately listed and show the time remaining on each leased machine and any options of renewal. All new equipment to be acquired in fulfillment of this contract must be available on the effective date when operations start. Delivery guarantees by manufacturers shall be attached to the bid document.

All bidders shall be required to demonstrate to the satisfaction of the City that they have adequate financial resources, experienced personnel, and expertise to perform the services required by the specifications.

All bidders shall be held to comply with all pertinent legislation, including the Solid Waste Disposal Act of the State of _____, the rules and regulations promulgated thereunder, the applicable/ attached ordinances, rules and regulations of the City, and the ordinances, rules and regulations of the County(ies) of _____. The bidder selected shall meet all the requirements of the above, including any changes, copies of which will be supplied to him by the City.

3. ***Compensation.*** Payment will be by ton, cubic yard, or load, of solid waste collected by the city or (its designated agents) delivered and received for disposal as set forth in a schedule attached to the agreement. While exact quantities of solid waste per contract year cannot be specified, a minimum contract year compensation will be paid in the sum of $_____ based on an estimated weight (volume), (number), of _____ tons (cubic yards) (loads) Adjustments in fees due to changing costs of doing business must be provided for in the contract document.

4. ***Inspection of Site.*** All bidders shall visit the site of the proposed landfill and familiarize themselves with the project, including all requirements of the plan. Submission of a bid shall be deemed conclusive by the City that a site visit has been made, and it shall constitute a waiver of all claims of error in bid, withdrawal of bid, or payment of extras, or any combination thereof under the executed contract or any revision thereof.

5. *Bonds.*

a. Performance Bond. A performance bond shall be required of the successful bidder. It shall be executed yearly by a surety company licensed to do business in this State and be in an amount equal to 50 percent of the sum shown in paragraph 3 for the first year or in the case of renewal, 50 percent of the total compensation paid in the past year for each succeeding year. Said bond shall be obtained within ten (10) days of the execution of the initial contract and each renewal thereof.

b. Payment Bond. A payment bond will be required of the successful bidder. It shall be executed by a surety company licensed to do business in this State and be in an amount to be determined by the City. It shall be conditioned to guarantee the payment of all wages and costs of materials, supplies, and insurance premiums incurred by the contractor in fulfilling the terms of the contract and will need to be delivered to the City within ten (10) days of the signing of the agreement. Insurance premiums include, but are not limited to, workmen's compensation, liability insurance, and bonds. It is estimated that the payment bond will not exceed the sum expended for wages, materials, supplies, and insurance premiums in one quarter of operation.

c. Bid Bond. Every bidder shall furnish a bid bond executed by a surety company licensed to do business in this State. He binds himself to indemnify the City against any loss, not to exceed the sum of the bond, it incurs should he fail to execute the signed agreement. Said bid bond shall equal 10 percent of the sum shown in paragraph 3.

A certified check, payable to the City, or other personal property acceptable to the City, may be deposited in lieu of a bid bond. Following determination of the bids, the three low bidders' security will be held until the execution of the agreement, at which time said security shall be returned to the respective owners.

6. ***Indemnity Clause.*** An indemnity clause, or alternatively, liability insurance, will be required of the successful bidder, in which he will be required to hold harmless and indemnify the City from all claims, legal or equitable (including court costs and reasonable attorney's fees), arising out of his operations.

7. ***Insurance.*** Motor vehicle minimums for property damage and personal injury may be set by the City. Proof of all required insurance and policy limits must be shown by certificates of required insurance provided to the City by the respective bidders, and each policy shall have a minimum cancellation period of not less than 30 days to become effective after delivery, in writing, to the City at the address shown in the agreement. While no minimum policy period will be required by the City, it is expected that the contractor will utilize long-term policies in order to obtain lower premiums.

8. ***List of Officers and Stockholders.*** Bidders shall submit a list of all officers and stockholders who own over 10 percent of their respective companies.

9. ***Contractor's Operational Plan.*** The contractor shall submit as an attachment to his bid a detailed plan of operation that conforms with the attached ordinances and specifications. It shall also give details followed in case of equipment failure brought regarding alternate procedures that will be on by severe weather.

Model Sanitary Landfill Operation Agreement

This agreement made and entered into this _____ day of 19___, by and between _____ (a City, Village, County, etc.) organized under the laws of the State of _____, hereinafter referred to as the City (Village, etc) and _____ (a Corporation or a Partnership, Proprietorship, etc.) organized under the laws of the State of _____ and having its principal place of business at _____, hereinafter referred to as the Contractor.

Witnesseth:

Whereas, the Contractor is qualified to operate a sanitary landfill for the disposal of solid waste in accordance with the attached ordinances, specifications, and Instructions to Bidders; and

Whereas, the City desires the Contractor to operate the site(s) designated to be used for a sanitary landfill operation;

Now Therefore, in consideration of the mutual covenants and agreements contained herein, and of the consideration to be paid by the City to the Contractor, as hereinafter set forth, the City and the Contractor hereby agree as follows:

1. *Disposal Site.* All solid wastes shall be disposed of at the location(s) specified herein, same being the property under the control of the City (or Contractor), and more specifically described as follows:

(Insert Legal Description)

2. *Materials to be Disposed of.* The Contractor shall accept, upon payment of fees as scheduled, all solid waste created within the jurisdiction of the City or for which the City has accepted responsibility. Toxic, volatile, and other hazardous materials must be clearly identified to allow for special handling during the disposal operation. (Note: A definition of the solid wastes to be disposed of under the provisions of the contract should be included here In addition, clarification of who shall be allowed to deliver solid waste to the site must be provided.)

3. *Operation of Site(s).* The Contractor shall have the exclusive right and responsibility to operate the disposal site(s) in accordance with the provisions of this Agreement and the attached ordinances and specifications for the term of this Agreement and any extension thereof.

4. *Compliance with Laws.* The Contractor shall operate the disposal site(s) in compliance with all applicable laws, ordinances, specifications and regulations, including the applicable solid waste disposal act of the State of _____, the rules and regulations of the State Board of Health and the City and/or County Board of Health, and the ordinances of the City and/or County; copies of each are attached hereto and are hereby made a part of this Agreement. Copies of all such laws, ordinances and regulations shall be furnished to the Contractor by the City and shall include new legislation as well as amendments.

(In the event that there are no statutes or ordinances regulating the disposal of wastes, then the City may utilize the concepts contained in the first section of this publication to develop its own ordinances and standards.)

5. *Labor and Equipment.* The Contractor shall furnish all labor, tools, and equipment necessary to operate the site(s) and shall be responsible for all required maintenance thereof. Supervision by an experienced and qualified person shall be provided at all times when the sanitary landfill is open for use or operation.

6. *Service Facilities.* The Contractor shall construct and maintain at his expense any facilities, improvements, and buildings within the site necessary for the operation of the site.

(To be included if the site is City property: The use of such land within the site shall be made available to the Contractor free of charge for the period of this Agreement or any extension thereof. At the expiration of this Agreement all permanent structures and improvements thereon shall become the property of the City or shall be removed by the Contractor, at the option of the City. [If permanent structures and improvements become the property of the City, there should be some provision for compensation to the Contractor, such as book value or fair market value. If the Contractor is required to remove such structures and improvements, he should be paid for doing so.])

7. ***Offsite Improvements.*** The City agrees to provide, at its expense, all required offsite improvements including any required to be made to public streets or roads, drainage facilities, etc.; it shall also provide to the site all required utilities, including adequate power and water supplies. (If any of this work is to be performed by the Contractor, it should be included in a separate contract with detailed engineering plans.)

8. ***Charges for Utilities.*** The Contractor agrees to pay normal and standard charges for all water, electrical power, natural gas, and phone service utilized at the site. (If any of these services are to be-provided free of charge by the City, this section should be modified accordingly.)

9. ***Salvage.*** Neither scavenging nor salvage operations shall be permitted at the operating face of the sanitary landfill. Salvage operations, if any, shall be conducted at a location separate from the operating face of the landfill by persons licensed by the City so as not to interfere with the Contractor's operation.

10. ***Title to Waste.*** Title to waste shall vest, as it is deposited, in the owner of the fee simple estate.

11. ***Completion of the Site.*** Upon completion of disposal operations, the site shall be contoured and finished in accordance with the Approved Final Plan, which is attached hereto and is hereby made a part of this Agreement. Any changes of the Approved Final Plan must be agreed to by both the City and the Contractor. The liability of the Contractor under this Agreement shall cease upon acceptance of the site by the City.

12. ***Compensation.*** Compensation shall be paid pursuant to the attached schedule. (A schedule should be attached and provide for payment by weight, volume, or load. A minimum charge should be set out. Hazardous materials should be handled on a mandatory basis with fees paid by type and quantity. Experience should soon establish fees for such materials.)

(If materials are to be accepted from users other than those paid for and designated by the City, a similar schedule of prices which the Contractor can charge these users should be established. There should be clear provisions regarding the distribution of such fees to the Contractor and/or the City.)

13. ***Changes in Regulations.*** In the event that compliance with subsequent statutes, ordinances and/or rules and regulations changes operating costs, the parties hereto agree to renegotiate this Agreement so that the compensation shown herein shall reflect such changes.

14. ***Change in Sanitary Landflll Site.*** In the event that the parties hereto mutually agree to transfer said sanitary landfill operations to another site or additional sites, this Agreement shall be renegotiated to reflect any changes required; they shall include but not be limited to increased compensation due to higher operating costs.

15. ***Change in Cost of Doing Business.*** The fees and/or compensation payable to the Contractor for the second and subsequent years of the term hereof shall be adjusted to reflect changes in the cost of doing business, as measured by fluctuations in the Consumer Price Index (CPI) published by the U.S. Department of Labor, Bureau of Labor Statistics, for the _____ area. At the start of the second year and every six (6) months thereafter, the fees and/or compensation to the Contractor shall be altered in a percentage amount equal to the net percentage change in the said CPI as follows:

Compensation made for the first six months of the second year shall reflect the change, if any, that has occurred in the said CPI during the first year of this Agreement.

Beginning with the seventh month of the second year of this Agreement and every six months thereafter, the net change in compensation shall be the change in the CPI over the preceding six-month period.

16. *Term.* The initial term of this Agreement shall be for the _____-year period beginning _____, 19____, and ending _____, 19____. The initial _____-year term of this Agreement shall be extended for successive additional _____-year terms, unless one party notifies the other that it intends to terminate this Agreement. This intent must be conveyed in writing not less than ninety (90) days prior to the expiration of the initial _____-year term or of any _____-year extension thereof.

17. *Performance Bond.*. The Contractor shall furnish a Performance Bond for the faithful performance of this Agreement. Said bond shall be executed by a surety company licensed to do business in this State and to be in a penal sum equal to 50 percent of the minimum compensation to be paid to the Contractor by the City for the first year of this Agreement. For each year thereafter it shall be in the penal sum of 50 percent of the total compensation paid by the City to the Contractor for the last preceding year. Said Performance Bond shall be furnished annually by the Contractor within ten (10) days of the execution of this Agreement or any extension thereof. It shall indemnify the City against any loss resulting from any failure of performance by the Contractor, not exceeding, however, the penal sum of the bond.

18. *Payment Bond.* The Contractor shall within ten (10) days of the execution of this agreement, deliver or cause to be delivered to the City a bond in the amount of $_____ executed by a surety company licensed to do business in this State. It shall guarantee payment of wages to all employees of the Contractor at the site or sites and the cost of all supplies, materials, and insurance premiums required to fulfill this Agreement.

19. *Indemnity.* The Contractor hereby binds himself to indemnify and hold harmless the City from all claims, demands and/or actions, legal and/or equitable, arising from the Contractor's operation of all disposal sites herein above described.

(Liability insurance policies approved by the City as to type and coverage may be required as a part of the indemnity provisions of this Agreement. If such policies as automobile liability, general liability, or owner's protective liability are required, the type and amount of coverage should be clearly spelled out in this section. Minimum motor vehicle liability limits set by State financial responsibility laws are seldom adequate.)

Proof of all insurance shall be furnished by the Contractor to the City by certificates of insurance. They shall have a minimum cancellation time of thirty (30) days, said time to commence after delivery of said notice to the City at the address shown above.

20. *Workmen's Compensation.* The Contractor shall carry in a company authorized to transact business in the State of _____, a policy of insurance fulfilling all requirements of the Workmen's Compensation Act of said State, including all legal requirements for occupational diseases. (Would not apply in monopoly States.)

21. *Standard of Performance.* The City may move to act if the Contractor fails to dispose of the solid waste herein provided for a period in excess of five (5) consecutive working days or fails to operate the site in accordance with the attached ordinances and specifications for a similar period. (He shall not be held liable if such failure is due to war, insurrection, riot, Act of God, or any other cause or causes beyond his control.) The City may, at its option, after sending written notice to the Contractor as provided hereinafter take over and operate any or all of the equipment he uses in

carrying out this Agreement, and it may provide for such operation until such matter is resolved and the Contractor is again able to operate. Any and all operating expenses incurred by the City in so doing may be deducted by it from compensation paid to the Contractor hereunder.

During such period, the liability of the City to the Contractor for loss or damage to such equipment so used shall be that of a bailee for hire; ordinary wear and tear is specifically exempt from such liability. The liability of the Contractor to third persons shall cease and all claims or demands arising out of the operation and/or control of the site or sites shall be directed solely to the City.

Provided however; if the Contractor is unable for any cause to resume performance at the end of thirty (30) working days, all liability of the City under this contract shall cease and the City shall be free to negotiate with other contractors regarding the operation of said site or sites. If Agreement with another contractor is reached, this shall not release the Contractor herein of his liability to the City for breach of this Agreement.

22. ***Arbitration.***. Any controversy or claim arising out of or related to this Agreement, or breach thereof, shall be settled by arbitration in accordance with the Rules of The American Arbitration Association, and the judgment rendered may be entered in any court having jurisdiction thereof. Such controversy or claim shall be submitted to one arbitrator selected from the National Panel of The American Arbitration Association.

23. ***Landfill Inspection.*** To ensure that the detailed ordinances, specifications, regulations, and laws for the operation of a sanitary landfill are complied with, a representative of the City shall inspect the landfill site and operation at least once a month during the term of this Agreement. The City may make inspections of the sanitary landfill site accompanied by designated personnel during business hours.

24. ***Contractor's Personnel.***

a. The Contractor shall assign a qualified person or persons to be in charge of his operations in the City and shall inform it of said person or persons' identity with a description of his experience, etc.

b. The Contractor's employees may be required to wear clean uniforms that bear the company's name.

c. The City has the right to request the dismissal of any employee of the Contractor who violates any provision hereof, or who is wanton, negligent, or discourteous in the performance of his duties.

d. The Contractor should provide suitable operating and safety training for all his personnel. The site should be staffed at all times with at least one employee who is trained in first aid and has a first aid kit.

e. Wages of all employees of the Contractor shall equal or exceed the minimum scales prevailing for similar work in the locality of the project. The wages for each classification of employee shall be provided to the City as an attachment to the bid document.

f. No person shall be denied employment by the Contractor by reason of race, creed, or religion.

g. Employees of the Contractor shall have the right to organize and affiliate with recognized labor unions and shall have the right to collective bargaining.

25. ***Assignment.*** No assignment of this Agreement or any right occurring under it shall be made in whole or part by the Contractor without the express written consent of the City; in the event of any assignment, the assignee shall assume the liability of the Contractor.

26. *Books and Records.* The Contractor shall keep daily records of wastes received, and the City shall have the right to inspect the same insofar as they pertain to the operation of the sanitary landfill site(s). The records shall show: the type, weight, and volume of solid waste received; the portion of the landfill used, as determined by cross section and survey; any deviations made from the plan of operation; equipment maintenance; and cost records. The Contractor shall submit a proposed record and accounting system for approval. All information so obtained shall be confidential and shall not be released by the City unless expressly authorized in writing by the Contractor. (A recommended set of cost accounting records is in "An Accounting System for Solid Waste Collection" developed by the Federal solid waste management program.)

27. *Bankruptcy.* This Contract shall terminate in the case of bankruptcy, voluntary or involuntary, or insolvency of the Contractor. In the case of bankruptcy, such termination shall take effect on the day and at the time the bankruptcy is filed.

28. *Number of Copies.* This Agreement may be executed in any number of counterparts, all of which shall have the full force and effect of an original for all purposes.

29. *Law to Govern.* This Agreement shall be governed by the laws of the State of _____, both as to interpretation and performance.

30. *Modification.* This Agreement constitutes the entire Agreement and understanding between the parties hereto, and it shall not be considered modified, altered, changed, or amended in any respect unless in writing and signed by the parties hereto.

31. *Right to Require Performance.* The failure of the City at any time to require performance by the Contractor of any provisions hereof shall in no way affect the right of the City thereafter to enforce same. Nor shall waiver by the City of any breach of any provisions hereof be taken or held to be a waiver of any succeeding breach of such provisions or as a waiver of any provision itself.

32. *Point of Contact.* All dealings, contacts, etc. between the Contractor and the City shall be directed by the Contractor to

(Some duly designated official of the City must be identified to serve as the contact point for the Contractor. A similar clause could designate a contact point with the Contractor.)

33. *Illegal Provisions.* If any provision of this Agreement shall be declared illegal, void, or unenforceable, the other provisions shall not be affected and shall remain in full force and effect.

34. *Notice.* A letter addressed and sent by certified United States mail to either party at its business address shown hereinabove shall be sufficient notice whenever required for any purpose in this Agreement.

35. *Effective Date.* This contract shall become effective and the City or its designated agents and citizens shall begin delivery of the solid waste to the Contractor _____ days after the date of execution hereof.

City:

_____

_____

_____

Contractor:

_____

_____

_____

IN WITNESS WHEREOF, the City and Contractor have executed this Agreement as of the day and year first above written.

Approved as to Form _____
City Attorney

City of _____
A municipal corporation of the State of _____

By _____
By _____

(Name of Contractor)

By _____
By _____

(Sealed, witnessed, and/or notarized as required by the laws of applicable State.)

Fee Schedule
(Alternate methods of charge)

1. $ _____ per ton of solid waste
2. $ _____ per yard of compacted solid waste
3. $ _____ per yard of uncompacted solid waste
4. $ _____ minimum fee per load
5. $ _____ per ton of solid waste consisting solely of material such as bricks, concrete, dirt, etc.

6. The City shall pay to the contractor a minimum fee of $ _____ for each year or yearly extension of this agreement.

Toxic, volatile, or other hazardous materials requiring special handling shall be clearly marked by the City and, upon payment of mutually agreed upon fees, shall be disposed of by the Contractor pursuant to the terms of Item 2 of the contract.

The Contractor shall submit billings to the City at the close of business at the end of each month for all other waste placed in the sanitary landfill and the City shall pay the Contractor on or before the tenth day of the following month; payments shall be mailed to the Contractor at the address shown above.

Agreement Creating Southwest Washington Inter-County Solid Waste Advisory Board

An agreement made this 3rd day of April, 1990 by and among the counties of Pacific, Cowlitz, Grays Harbor, Lewis, Mason, Thurston and Wahkiakum, all political subdivisions of the state of Washington and municipal corporations.

Section One, Purpose: The purpose of this agreement is to provide for funding and an organizational structure to conduct the necessary research and development to review and compare the solid waste planning activities of each county; to determine the feasibility and desirability of combining the waste streams of some or all of the signatory counties in search of regional solutions to solid waste disposal issues; and to explore the feasibility of drafting a sample bid call document combining the waste stream of some or all of the signatory counties.

Section Two, Authority: Each county has authority pursuant to Chapter 36.58 RCW to establish a system of solid waste handling and each county has authority pursuant to Chapter 39.34 to enter into agreements with other municipal corporations to achieve governmental purposes. Each county has authority pursuant to Chapter 70.95 RCW to prepare comprehensive solid waste management plans; to apply to the Department of Ecology for financial aid for the preparation of such plans; and to adopt regulations governing solid waste handling.

Section Three, Organization: There is hereby created a Southwest Washington Inter-County Solid Waste Advisory Board (SWICSWAB) composed of a representative from each of the signatories to this agreement.

Section Four, Duration: This agreement is for the purpose of developing plans only and shall be subject to review at the end of task three (3) of the Scope of Work as set forth in Attachment A to this agreement. Any signatory to this agreement may withdraw from the Southwest Washington Inter-County Solid Waste Advisory Board after the completion of task three (3) by given written notice to the other signatories within thirty (30) days following the completion of task three (3). With respect to signatories who decide to continue in this planning process after the completion of task three in Attachment A, this agreement shall terminate when: (l) the plans contemplated to be developed have been completed to the satisfaction of a majority of signatories or, (2) if such a majority has determined it is no longer useful to continue. In no event shall this agreement remain in effect longer than fourteen (14) months from the date of adoption of this agreement by all parties.

Section Five, Funding: Funds to conduct the legitimate activities of this board shall be raised by payments from the members. The percentage of payment from each member jurisdiction will be in proportion to the waste stream generated by each member jurisdiction. Any monies remaining in accounts at dissolution will be distributed to the signatories in proportion to their respective contribution. Any debts at the time of dissolution shall continue to be a liability to each organization as established by an accounting of each organization's unpaid balance.

Funds necessary for administration purposes and any contracts entered into by the joint agencies shall be deposited with the treasurer of Lewis County and designated "Operating Fund of the Southwest Washington Inter county Solid Waste Advisory Board".

Section Six, Administrator: The board shall appoint an administrator from the county identified in section five of this agreement who shall be responsible for coordinating the activities of the board.

Section Seven, Records: The administrator shall have authority to keep records of the activities of the board; to prepare and negotiate contracts subject to approval by the board; and do all things necessary to accomplish the purposes of the advisory board.

Section Eight, Property: No real or personal property shall be jointly acquired or jointly held between the parties to this agreement.

Attachment A
Draft
Scope of Services

A. Purpose

An intergovernmental association of seven Southwest Washington Counties has been formed for the purpose of evaluating the feasibility of developing and implementing a "regional" solid waste handling and disposal system to serve the area The need for this effort is driven by several factors including rapidly diminishing landfill space, the problems associated with siting new landfills, and ever increasing federal, state, and local rules and regulations and the associated costs. Recognizing that each individual county is currently involved in solid waste planning at the local level, this study will focus on the feasibility of "regional" solid waste handling and disposal for incorporation into local plans. A "regional" approach to waste reduction and recycling issues/programs that may be integrated with alternatives for handling and disposal will also be identified and evaluated, but only to the extent as they may relate to the "regional" concept. The "regional" project will not provide a disincentive for meeting the state's priorities for solid waste handling.

B. Scope of Work

The main objective of the project is to assist the Counties in identifying and evaluating available options for a "regional" approach to solid waste management. The anticipated result is to design, select, and implement a system, responsive to the public, complying with all applicable Federal, State, and local regulations, and consistent with local planning documents. The project is divided into two phases and includes the following tasks:

Phase I Existing Systems/Existing and Future Needs

l) Review and summarize the existing solid waste management systems for each of the participating counties. Document the existing municipal solid waste stream and identify future impacts such as growth, waste reduction, and recycling programs.

2) Review the existing and future needs of each of the participating counties and establish common goals wherein a regional system(s) can be developed. Document existing disposal system capacity and timelines of each county. Review existing transfer/transportation systems and needs.

3) Following completion of tasks 1 and 2, a summary report will be prepared identifying the needs and opportunities common to the participating Counties. The report will be evaluated by each participating County and a determination made as to continued participation in the project.

Phase 2 Alternatives and Feasibility

4) Identify alternative "regional" solid waste management systems for analysis. Potential systems or combination of for review may include the following:

a) Regional Sanitary Landfill Facilities
b) Regional Solid Waste Transfer Facilities
c) Regional Energy Recovery Facilities
d) Regional Waste Reduction Programs
e) Regional Recycling Programs/Opportunities

5) Feasibility Analysis: Prepare a feasibility analysis of "regional" solid waste management alternatives. The analysis shall include an evaluation of the environmental, technical, and economic issues/concerns of each of the alternatives.

6) Implementation Analysis: Provide a discussion of implementation issues regarding each alternative. The discussion should include: legal, operational, organizational, procurement, and other issues surrounding the implementation of each alternative.

7) Final Report: Prepare a final report including the selection of a preferred long range "regional" solid waste handling and disposal system. The Final Report shall include a summary of the findings and recommendations, estimated operating and capital expenditures, and an implementation plan for each element of the preferred system. The implementation plan will include a schedule that identifies key implementation dates to assure the effectiveness of the recommended system. The implementation plan will also include: the process for each of the participating Counties to evaluate and consider participation in implementing the recommended system; an interlocal agreement for participation and timelines for commitment to implementing the recommended system; a financing/funding plan; and, the method by which each participating County may incorporate the report into their local SWMP.

8) Project Schedule: Phase 1 Summary Report to be completed within 90 days of "notice to proceed." Final report to be completed within 180 days of start of tasks 4, 5, and 6.

9) Public Involvement program: Develop and implement a public awareness program regarding the project including newsletters and press releases. Each County will be responsible for distribution of information to the media and other appropriate parties within its jurisdiction. The program will be started in Phase 1 and continue throughout the project.

revised 4/4/90

Appendix C: Adversarial v. Collaborative Negotiations

Negotiation may be either adversarial or collaborative. Adversarial negotiation is probably still regarded as the "traditional" style, but there is a growing awareness and use of collaborative styles of negotiation.

In an adversarial environment, participants see the negotiation effort as a matter of winning or losing, with achievement of one party's objectives being possible only at the expense of the other party. This does not necessarily mean that the parties are antagonists — indeed, if negotiations take place in a climate of mutual trust, they can, in the end, produce benefits and satisfactions for both or all parties. Traditional labor-management negotiations are an example, as are some forms of court litigation.

Following are some of the basic characteristics of adversarial negotiations:

- the parties may initially take extreme positions (i.e., make excessive demands or paltry first offers);
- the parties are reluctant to make concessions, and when they do, the concessions are small;
- the parties do not share information that might reveal their real interests and needs; and
- the parties may use emotional tactics such as anger, veiled threats, or walking out of the negotiations.

The drawbacks of adversarial negotiating styles include

- they tend to focus only on the narrow issues in dispute and do not always address the main interests of the parties;
- they tend to strain relations between the parties, making resolution of future disputes even more difficult; and
- for those reasons, they may fail to solve problems and have little legitimacy in the eyes of the parties.

Collaborative processes, on the other hand, are joint problem-solving efforts. These processes are voluntary, informal, and consensual, and best suited for resolving disputes concerning contract compliance or contract amendments.

All collaborative processes involve negotiation between the affected parties. The kind of negotiation that collaboration emphasizes has been called "principled" or "interest-based" negotiation.[1] It can be summarized in four basic points.

1. Separate the people from the problem.
2. Focus on interests, not positions.
3. Invent options for mutual gain.
4. Insist on using objective criteria.

[1] Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In.* (Boston: Houghton Mifflin Company, 1988).

Gerald Cormick, president of the Mediation Institute in Seattle, has identified the following advantages of using collaborative processes:[2]

Reducing Uncertainty. Predictability is achieved through translating total opposition into self-interested cooperation.

Achieving Closure. Exhausting all appeals on one issue using traditional processes may result in a challenge on another issue. In contrast, collaborative processes can bring closure to a conflict. An agreement belongs to the parties; they have a selfish interest in ensuring that it is implemented correctly.

Improved Planning and Better Decisions. Collaborative processes can provide a context in which parties discuss their underlying interests and jointly explore possible solutions. Such a process can result in creative solutions that none of the parties would discover independently.

Better Use of Technical Expertise. In traditional processes, technical experts are often placed in competition to substantiate or discredit one another. Part of many collaborative processes is joint fact-finding, in which the parties mutually agree on what information is needed and what methods are acceptable for obtaining it. Thus, when the information is received, all parties are more likely to accept it.

Advantages to an Organization. In some traditional processes, particularly judicial proceedings, the parties tend to defer to an expert (e.g., an attorney). This can result in selection of tactics that may be effective in a particular case, but are detrimental to an organization's long-term goals. The direct involvement of the parties in collaborative processes helps to ensure that the broadest interests of the organization are served.

Steps in the Collaborative Process

As mentioned earlier, negotiation is at the heart of collaborative processes. Successful negotiations usually follow a pattern involving the same sequence of steps. In some situations, the parties can handle all aspects of the process themselves. In other instances, the parties need the assistance of a mediator.

Prenegotiation Phase

Prenegotiation is an important, but also very delicate, part of a collaborative process. It includes the first interactions between the parties, which may involve a period of testing and "feeling out" to determine the parties' motivations and operating styles. This phase can be frustrating to those who would like to move quickly. It is crucial, however, to complete these steps successfully before substantive negotiations begin. It may be necessary to "go slow" through this phase in order to "go fast" through the negotiation phase of the process.

Step 1. Getting Started. The key tasks involved in this step are (l) helping the primary disputants decide if such a process is in their best interest, and (2) initiating contact between the parties.

The reason for negotiating is to produce a better outcome than could be obtained without negotiating. Therefore, a party should first analyze what results can be obtained through negotiation versus other conflict resolution processes. The costs involved in pursuing alternative approaches should be considered, as well as the concerns and objectives of other parties. This helps determine whether all parties are likely to agree to negotiate and what tradeoffs they may be willing to accept.

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[2]See Gerald W. Cormick, "How and When Would You Mediate Natural Resource Disputes?" Paper presented to Alternatives to Litigation Seminar, Washington State Bar Association, Seattle, Washington, July 16, 1985.

If a collaborative process seems to be in the best interest of all parties, someone has to initiate the process. It should be stressed that negotiations are voluntary, and any party can stop the discussions at any time to pursue other courses of action.

Step 2. Representation. There are two parts to this step: deciding which groups should be represented in the negotiations (if it is more than a two-party conflict) and finding a representative who can legitimately speak for each group.

Step 3. Ground Rules and Agenda. Before the parties begin substantive negotiations, they should agree on two points: the procedure for working together, and the specific items they will discuss. Ground rules should be established and agreed on by all parties before beginning even the simplest of negotiations. Ground rules should include a procedure for changing the rules later in the process, if necessary. There is no "correct" set of ground rules; each group of negotiators should adopt rules that will work best for them.

All parties should agree on the agenda, and it should be established before negotiations begin. All concerns of the parties shall be included as potential agenda items. A group session to identify the concerns can be helpful, not only in creating the agenda, but in helping each party clarify its primary interests.

Step 4. Joint Fact Finding. This step involves determining what information the parties have regarding the issues; identifying information that is accepted as accurate by all the parties; determining what additional information, if any, is needed to negotiate effectively; and deciding the process that will be used to obtain those additional facts.

Negotiation Phase

Step 5. Inventing Options for Mutual Gain. At this step, it is important for the parties to approach the negotiations **not** as a contest to be won, but as a problem to be solved. These two approaches to negotiation are sometimes called "zero-sum" and "positive-sum" approaches. The zero-sum, or distributional, approach assumes that only limited gains are available; whatever one party gains, the other party loses. In the positive-sum, or integrative, approach, the parties work cooperatively to find a mutually acceptable solution to their common problem. They focus on each other's interests to determine if there are items they value differently and can trade with mutual benefits. They produce as many ideas as possible for solving the problem.

Step 6. Packaging Agreements. After the parties feel they have created enough options, they must decide which ones to include in the contract. The parties should remain aware of each other's interests while working through this step. Each negotiator should look for solutions that will leave all parties satisfied.

The key is to look for options that satisfy mutual interests or that each party values differently. One strategy that may help in arriving at agreement is for one party to propose several agreements, all of which are equally acceptable to him or her. This step will not always result in an agreement that is completely acceptable to all parties. They may resolve some issues, or they may be unable to resolve any of the issues in dispute. If no agreement can be reached, the participants still can pursue other dispute resolution processes such as arbitration or other traditional approaches.

Step 7. Binding Parties to Their Commitments. An important part of an agreement consists of provisions to ensure that the parties will honor the terms of the agreement. If the agreement will not be implemented completely by legal means, then it is necessary to make its other provisions self-enforcing. This generally requires careful sequencing of required actions and performance measures. It may be helpful to include contingencies in the contract to cover unforeseen circumstances or failure by one party to uphold his or her end of the agreement.

Negotiators

Negotiators need to be flexible. They also need to be personable, to communicate with others easily, to clarify the interests they represent, and to dissolve tensions that often develop during negotiations. They need effective communication skills such as active listening, perception checking, and the ability to discuss complex matters in clear, concise terms. They must deal with peoples' natural tendencies to take stands that can obscure shared interests. They need to communicate equally well with elected officials, who may provide them with general fiscal and general policy guidelines, and with the negotiator for the selected service provider.

Effective negotiators need to keep sight of overall interests while discussing and negotiating agreement over specifics. They also need to convey to others that they believe what they are saying. This is the ability to communicate that "I will do exactly what I say, when I say I will do it, and if I change my mind, I will tell you well in advance so it will not harm you." This will contribute to a confidence in the negotiating process and encourage commitment to working out agreements that are mutually satisfactory.

The negotiator also must thoroughly understand the solid waste service or activity that is being negotiated, have the ability to articulate specific performance standards, and be able to anticipate where snags in contractual relationships are likely to occur and how these may be minimized. An understanding of federal, state, and local regulations related to solid waste contracting also is essential.

Sometimes all these abilities will not be found in one individual negotiator, or the contract is so complex that a team approach will be used. In using a team, each member must be aware of his or her assigned role and responsibilities and of how individual actions affect group results.

Finally, the negotiator needs to realize that contract negotiations tend to develop a fixation on price to the exclusions of other important related issues. Obviously, costs are a primary concern and are frequently the primary context for negotiation. Still, negotiators need to be aware that long-term costs can be affected by the fairness of the returns to the service provider. A provider receiving a minimal return may not have an incentive to do more than meet minimum contract requirements or may not make an effort to work with the public agency in a cooperative manner if problems arise. A fixation on price or on any one single interest limits the ability of the negotiators to reach mutual satisfaction.

All these considerations should be kept in mind when selecting a negotiator, forming a negotiation team, formulating a strategy, and developing a negotiation process.