

## **Solid Waste Exclusive Contracts and Franchise Fees After the 80<sup>th</sup> Legislature**

**by Brian L. Sledge**

In order to protect public health, municipalities provide solid waste services to their constituencies. These services include the collection, transportation, and disposal of solid waste. Municipalities may provide these services themselves or often enter into exclusive contracts with private companies to do so. Municipalities may also require private companies desiring to provide solid waste collection and transportation services within the city to obtain a franchise from and pay franchise fees to the municipality as a condition for doing business on the public streets, alleys, and rights of way.

The provisions in the Texas Health and Safety Code that govern this area of the law have been amended several times during recent legislative sessions, which has created some confusion regarding municipal authority. This confusion was compounded significantly during the recent regular session of the 80<sup>th</sup> Texas Legislature with the passage of House Bill 1251, which some have construed to impact a municipality's solid waste authority.

House Bill 1251 was a bill that focused primarily on "liquid wastes" by amending Section 364.034 of the Texas Health and Safety Code to provide that a municipality "may not restrict the right of an entity to contract with a licensed waste hauler for the collection and removal of domestic septage or of grease trap waste, grit trap waste, lint trap waste, or sand trap waste."

However, a number of other provisions were added to the bill late in the legislative process that are worded in a confusing manner and have left many municipalities in Texas scratching their heads concerning the exact meaning of the measure. In particular, many municipalities have questions concerning the language in new Subsection (h), which provides that Section 364.034 does not apply to "a private entity that contracts to provide temporary solid waste disposal services to a construction project." Some concerns of municipalities are driven in part by opinions of some private interests that the bill was intended to exclude temporary construction projects from an exclusive municipal contract or franchise agreement.

Section 364.034, Health and Safety Code, specifically addresses the ability of a public agency, which includes a municipality, regional planning commission, district, and certain other political subdivisions, to provide and charge fees for solid waste services and compel residents in its territory to use those services. For municipalities, it is largely a restatement of powers they possess at common law under the proper exercise of their police power. Additionally, Section 364.034 expressly allows certain contracts between counties and another utility to collect fees and assist with enforcement. Section 364.034 is by no means the legal cornerstone of a municipality's ability to enter into exclusive contracts or franchises with private entities to provide such solid waste services, which authority instead derives from other statutory, common law, and constitutional sources.

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Visit [www.swana.org](http://www.swana.org) for a membership application.

# Message from the President

*By Mary Nix*

Our Chapter officially started the “new year,” fiscally speaking, on September 1, 2007. So, Happy New Year to all. And here’s what’s going on with your Board ....

- 1) **Board Elections:** We’re starting the year with newly-elected Directors to the Board ... including eight who are returning to their positions via re-election ... and two who are “new.”

**Lonnie Banks**, from the City of Garland: Let’s welcome Lonnie who has served on the Board for many years – and is returning after a hiatus of several years away.

**Harry Hayes**, from the City of Houston: Harry is Houston’s newly appointed Director of Solid Waste Management and is serving his first term with the TxSWANA Board. Glad to have you with us, Harry !

- 2) **New Committee assignments** – With election and re-elections complete, we now have new Committee chairs – as designated below. Please take a look at the committee names – and contact the chair of any committees for which you’d like to participate. One simple email is all it takes to join in with Board Activity.



<u>Committee Name</u>	<u>Chair</u>	<u>Email</u>
Nominating	Mary Nix	<a href="mailto:mary.nix@dallascityhall.com">mary.nix@dallascityhall.com</a>
By-Laws	Ellen Smyth	<a href="mailto:smythea@elpasotexas.gov">smythea@elpasotexas.gov</a>
Audit	Jeff Kaplan	<a href="mailto:jeffk@cctexas.com">jeffk@cctexas.com</a>
Scholarship	Holly Holder	<a href="mailto:hholder@team-psc.com">hholder@team-psc.com</a>
Legislative/Regulatory	Vance Kemler	<a href="mailto:vance.kemler@cityofdenton.com">vance.kemler@cityofdenton.com</a>
Membership	Ron Smith	<a href="mailto:ron.smith@dallascityhall.com">ron.smith@dallascityhall.com</a>
ROAD-E-O	Pete Caler	<a href="mailto:pcaler@cstx.gov">pcaler@cstx.gov</a>
Programs (Regional Mtgs)	Ron Smith	<a href="mailto:ron.smith@dallascityhall.com">ron.smith@dallascityhall.com</a>
Newsletter/ Communications	Michael Rice	<a href="mailto:michael.rice@ci.amarillo.tx.us">michael.rice@ci.amarillo.tx.us</a>
Technical Subcommittee	Bill Hindman	<a href="mailto:bhindman@cpyi.com">bhindman@cpyi.com</a>
Training & Licensing	Richard McHale	<a href="mailto:richard.mchale@ci.austin.tx.us">richard.mchale@ci.austin.tx.us</a>
Conference Committee	Oscar Medina	<a href="mailto:omedina@ci.laredo.tx.us">omedina@ci.laredo.tx.us</a>
SMART Committee	Victoria Hodge	<a href="mailto:victoria.hodge@cityofdenton.com">victoria.hodge@cityofdenton.com</a>

- 3) **Regional meetings:** Several areas of the state have conducted and want to continue having local meetings that support and nurture professionalism in the solid waste community. Houston, West Texas (via El Paso), and the DFW area are all holding meetings periodically – discussing regulatory concerns, hearing about new waste equipment, sharing ideas on safety and performance ... and many other issues. **Do you want to support or add to these regional meetings?** Email Ron Smith – he’s lining up meetings for 2008.

- 4) **Finances:** Our chapter resources are looking fairly flush ! Thanks to you membership dues, to the terrific Road-e-o in College Station (contributing over \$10K to our coffers) and to the outstanding Annual Conference in Austin (netting over \$46K – wow, way to go Austin !), our financial position is quite good.

And as a result of our healthy finances, we were able to issue 6 scholarship awards this past summer, support a pretty darn good newsletter and website, and consistently represent your interests in regulatory and legislative matters – at both state and federal level.

Keep this in mind as you plan the year ahead – and encourage additional memberships, join in with our annual Road-e-o and Conference, and participate in our Board activities and committees.

- 5) **Upcoming Meetings:** ... are posted on our website ([www.txswana.org](http://www.txswana.org)) – and are open to all. Please come to any and all that you wish.
- 6) **City of Laredo** – The host of the 2008 Annual TXSWANA Conference has info about the dates and events coming your way in spring 2008 ... read on for more info !

## Meet our Newest Members of the Board of Directors



**LONNIE BANKS**

Lonnie R. Banks is currently the Managing Director of the City of Garland's Environmental Waste Services Department. He oversees the management of solid waste and recycling collection, transfer station and landfill disposal operations. Under his leadership, the Garland Environmental Waste Services Department was the first recipient of the Garland Award for Performance Excellence in 2001.

He began working for the City of Garland as Assistant Director of Solid Waste and Recycling Services in July 1989 after serving in a number of past management positions including Superintendent Sanitation, Fleet Services, and Service Center Departments for the City of Longview, Texas and Utility Billing Office Manager for the City of Marshall, Texas. In 2004, Banks was presented a Key to the City of Indore, India by Mayor Kailash Vijayvargiya in appreciation for providing solid waste management consulting services to this city in conjunction with ICMA (International City Manager Association) Resource Cities Partnership Program. He is a Past President of TxSWANA. Banks is a 1979 graduate of Wiley College in Marshall, Texas.

He is a member of the American Society of Quality and serves as the chairman of the Garland United Way Leadership in Giving Program.



**HARRY J. HAYES**

In August 2007, Mayor Bill White and City Council unanimously confirmed North Operations Deputy Director, Harry J. Hayes, as the new director of Houston's Solid Waste Management Department. As Director, Hayes oversees a

\$72.4 million budget and is responsible for solid waste services to approximately 458,400 households, of which 398,900 homes are directly serviced by the City of Houston Solid Waste Management Department. In addition to garbage collection services, Hayes has oversight for yard trimmings recycling, heavy trash collection, dead animal collection, the operation of neighborhood depository sites for heavy trash drop-off, as well as a variety of recycling opportunities, 3 transfer stations and a fleet of 430 pieces of heavy equipment and 100 light vehicles.

Hayes is a 14-year City employee, including a stint as special assistant to former City Council Member Rodney Ellis. He is a 1988 graduate of Texas Southern University and a 1985 Connaissance de la France graduate of the Universit  de Bordeaux in Talence, France. Hayes served as both an enlisted member and an officer in the U.S. Army Reserves, where his work assignments included human resources, operations and supply management. He has also served as Director of the Bureau of Human Resources for Sedgwick County Kansas.

Harry Hayes is married and has 3 children.

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Subsections (e), (f), and (h) of Section 364.034, which were amended or added by House Bill 1251, are noteworthy and provide as follows (with *emphasis* added to certain provisions):

(e) Except as provided by Subsections (f), (g), and (h), this section does not apply to a person who provides the public or private entity, public agency, or county with written documentation that the person is receiving solid waste disposal services from another entity. *Nothing in this section shall limit the authority of a public agency, including a county or a municipality, to enforce its grant of a franchise or contract for solid waste collection and transportation services within its territory. Except as provided by Subsection (f), the governing body of a municipality may provide that a franchise it grants or a contract it enters into for solid waste collection and transportation services under this subchapter or under other law supersedes inside of the municipality's boundaries any other franchise granted or contract entered into under this subchapter.*

(f) *Notwithstanding the other provisions of this section, a political subdivision, including a county or a municipality, may not restrict the right of an entity to contract with a licensed waste hauler for the collection and removal of domestic septage or of grease trap waste, grit trap waste, lint trap waste, or sand trap waste.*

(g) Except as provided by this subsection, a person is exempt from the application of a requirement adopted by a public agency or county under Subsection (a) if the person, on the date the requirement is adopted, is receiving under a contract in effect on that date solid waste disposal services at a level that is the same as or higher than the level of services that otherwise would be required. *The exception provided by this subsection does not apply to a requirement adopted under this section by a municipality.* To qualify for the exemption provided by this subsection, the person must provide to the public agency or county written documentation acceptable to the public agency or county not later than the 30th day before the date the otherwise required services are scheduled to begin. The person who provides solid waste disposal services to a person who qualifies for the exemption shall notify the public agency or county that the services under the contract have stopped not later than the 15th day after the date those services are stopped for any reason.

(h) *This section does not apply to a private entity that contracts to provide temporary solid waste disposal services to a construction project.*

TxSWANA has thoroughly evaluated these provisions in light of the changes made by House Bill 1251 and other law, and offers the following advice to cities in interpreting this difficult-to-digest piece of legislation.

### **Liquid Wastes**

With regard to the collection and removal of domestic septage or of grease trap waste, grit trap waste, lint trap waste, or sand trap waste, a city can no longer grant an exclusive contract or exclusive franchise to one company. House Bill 1251 specifically prohibits a city from restricting "the right of an entity to contract with a licensed waste hauler for the collection and removal" of those specific liquid wastes.

However, this legislation should not be construed to affect a municipality's ability to grant non-exclusive franchises and obtain franchise fees from companies desiring to use a city's public streets, alleys, and rights of way for the collection and removal of these liquid wastes. House Bill 1251 only amends Section 364.034, Health and Safety Code, which is not the source of a municipality's legal authority to obtain franchise fees from businesses desiring to use city streets to carry out a commercial enterprise involving the collection and transportation of solid waste.

### **Temporary Construction Projects**

With regard to the provision of "temporary solid waste disposal services to a construction project," the new law should be construed to provide that a municipality continues to have the ability to enter into exclusive contracts or franchises for the collection and transportation of solid waste at a construction project. Several sections of the Health and Safety Code other than Section 364.034 authorize a municipality to enter into contracts with private entities for solid waste services. The discretion given to municipalities in creating these contracts under these other sections of the statutes, as well a municipality's exercise of its police power under the common law, should allow cities to continue to grant exclusivity on construction project and all other non-liquid waste contracts. Because Subsection (h) of House Bill 1251 simply provides that "[Section 364.034] does not apply to a private entity that contracts to provide temporary solid waste disposal services to a construction project" and does not amend these other statutory provisions, they remain valid and will not be affected by this legislation. Thus, the stronger legal argument is that a municipality continues to have the ability to enter into exclusive contracts for the collec-

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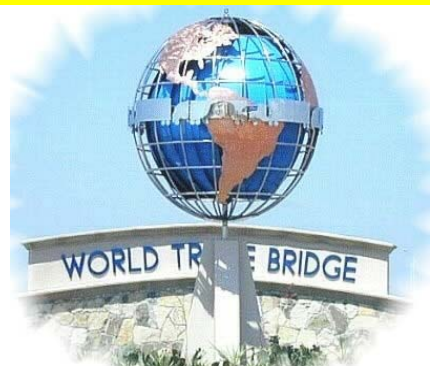
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## Fall Safety Matters

by Ellen Jensen, Austin, TX

Have you ever thought about why so much emphasis is placed on training employees safe work practices? I'd like to think it is because we value each and every employee and want them to go home each day in the same condition they arrived at work so they can continue to live a long and productive work and home life. The cost of injuries versus the cost of training is also a large factor why training employees to work safely is important to every employer.

On average there are more than 11,000 nonfatal workplace injuries each day in the United States. More than 3,000 of these injuries result in lost work days. The National Council on Workers' Compensation Insurance states that the average cost of a typical workplace



What does this mean to the Solid Waste industry? There are good reasons that we are spending so much time and money on safety training.

### **Safety training prevents injuries and collisions.**

Well trained employees and supervisors understand workplace hazards and the precautions that must be taken to prevent incidents from happening. They know the proper procedures for every task. They know how to use equipment safely. They know how to prevent injuries and collisions. They know what PPE is required for each task and how to use it correctly. They know how to respond to an emergency. They are aware, alert, and proactive as they work.

### **Safety training helps maintain productivity.**

Employees with work related injuries and illnesses miss work days. BLS statistics show that one fourth of nonfatal work injuries involve days away from work. When workers are off the job, productivity suffers. Temps or replacements may be needed and it takes time to find and train the right people. In the meantime, production goes down or a lot of money is spent on overtime.

### **Safety training improves compliance with regulations and procedures.**

Employees and supervisors who are trained to understand federal, state, and city safety requirements help ensure we are in compliance. Inspectors could show up at any time unannounced and see employees following procedures. Costly fines and bad publicity are avoided.

### **Safety training reduces costs and increases profits.**

Employee injuries and collisions not only cost employees in pain and suffering, they also cost money. Estimations of injuries alone in the US are \$150 billion annually.

Number of Fatal Work Injuries 2006		
Year	United States	Texas
2005	5,734	495
2006	5,703	486

incident with a physical injury is in the vicinity of \$10,000. Safety Training normally costs \$2000 or less for each session and well trained employees know how to avoid workplace collisions and injuries.

The Texas Department of Insurance and the Bureau of Labor Statistics (BLS) recently released their fatality data for 2006. Both national and state fatalities were slightly down from 2005.

Transportation and material moving industries led work related fatalities nationally and in Texas with 41% of Texas fatalities caused by transportation incidents. Nationally, the occupation with the 5<sup>th</sup> highest fatality rate is refuse and recyclable material collectors.



Workers' Compensation costs are up 50% nationwide in recent years. OSHA and state fines for violations total \$150 million per year.

When a new employee arrives at Solid Waste Services in Austin, they attend New Employee Orientation (NEO) to become acquainted with department HR policies and procedures (1<sup>st</sup> day) as well as being issued personal protective equipment (PPE) and



taught the safe working requirements that will be expected of them and when to use the PPE (2<sup>nd</sup> day). Field employees are then given 3 days of hands-on training to learn to prepare for work, to follow the safest and most efficient ways to work, and to care for the equipment they will be expected to use in the field.

Topics for those three days include the following.

### NEO HANDS-ON TRAINING TOPICS

Stretch 'N' Go  
Pre-trip/Post-trip  
Working in all kinds of weather conditions  
Entering/exiting/3-point contact  
Riding on rear/body  
Working Attitudes  
Road rules  
Carts and bins—Recycling/Garbage  
Yard Trimmings/Brush/Bulky  
Lifting/loading/unloading  
Packer Controls  
Tipper Controls  
Dump Cycles  
Customer service  
Hazards-pinch points/Unseen hazards  
Hydraulics systems and possible spills  
Backing/hand signals/blind spots  
Stopping distances  
Recordkeeping forms  
Communications- horns  
Radio (classroom)  
Maps/Routes  
Air systems/breakdowns  
MRF dump scales  
Alcohol & Drug Testing Program

## JIMMY HUFF SAFETY AWARD PROGRAM

The TXSWANA Jimmy Huff Safety Award program attempts to identify private and public firms throughout the state which achieve and maintain exceptional safety records. The program is designed to stimulate interest in accident prevention and to promote safety in the workplace by providing an incentive to employers and employees to maintain a safe and healthful working environment.

In order to qualify for the annual TXSWANA Jimmy Huff Safety Award, an organization must meet the criteria established by the TXSWANA SMART committee. The criteria includes:

- The applicant organization must be a current member of TXSWANA.
- The organization must be actively involved in solid waste operations.
- The organization must be Fatality Free during the fiscal year.
- The organization must have a reduction in lost workday cases from the previous year.

**Note: Lost workday cases are cases of work related injury or illness which involve days away from work and/or days of restricted work activity. The formula that will be used is printed on the application form along with an explanation of data required to compute the incident rate for the organization.**

The Jimmy Huff Safety Award recipient will be recognized in March at the TXSWANA State Conference in Laredo.

Applications must be received by **January 8, 2008**. Applications should be mailed to:

**City of Austin  
Attn: Ellen Jensen  
Occupational Safety and Health Manager  
P.O. Box 1088  
Austin, TX 78767**

For additional information or to obtain an application form, please visit the TXSWANA web site at **www.txswana.org**, or contact SMART Chairperson Victoria Hodge at 940-349-8019.

**CRAIGHEAD COUNTY SOLID WASTE AUTHORITY**  
1620 STRAWFLOOR ROAD  
PO Box 1997  
JONESBORO, AR 72403  
(870) 972-6353



The Craighead County Solid Waste Disposal Authority is looking for an Executive Director for its modern facility in Jonesboro, Arkansas. Interested candidates should be visionary, analytical, results-oriented, have sound financial management skills, astute on waste management regulations, be a long-term strategic planner, and have a Type 1-Level C License. Four-year degree and 5+ years of experience preferred. Please send your resume and salary requirements to CCSWDA, P.O. Box 17111, Jonesboro, Arkansas 72403, ATTN: Jim Corter, SPHR.

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tion and transportation of solid waste at a construction project.

Moreover, a municipality can continue to require a solid waste hauler at a construction project to be franchised to conduct a commercial business on city streets, and to pay the city franchise fees pursuant to that franchise. Once again, the authority of a municipality to require a franchise for the use of city rights of way to carry out a commercial enterprise comes from areas of the law other than Section 364.034 of the Health and Safety Code.

#### **Other Solid Waste**

With regard to solid waste that does not fall under the descriptions above of "liquid wastes" or waste at construction projects, the recent changes in the law do not impact a municipality's ability to enter into exclusive contracts, or exclusive or non-exclusive franchises, with a private entity for collection, transportation, or disposal services involving such solid waste. Furthermore, it does not impact a municipality's ability to collect franchise fees from private entities providing such solid waste services with the municipality.

All municipalities are encouraged, however, to conduct a legal review of their relevant solid waste / franchising ordinances in light of these recent legislative changes to make sure they are structured appropriately to account for the many changes in this area of the law over the last several years.

*This article was prepared by Brian Sledge of the Austin-based law firm of Lloyd Gosselink Blevins Rochelle & Townsend, P.C. The summary above is intended only as a short overview of the topic for the convenience of the reader and should not be relied upon as legal advice. If you have any questions or would like additional information concerning this issue, or a legal evaluation of your municipal ordinance, please contact Brian at (512) 322-5839 or bsledge@lglawfirm.com.*

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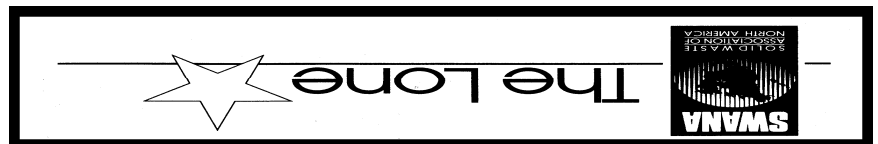
## *Membership*

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### **We Welcome the Following New Members (Through October 25, 2007)**

Marcia Brown-Trident Insurance Services  
Steve Carr-Allied Waste, Southwest Region  
Jaime Coy-City of Lubbock  
Rick Elgueseba-Republic Services Inc.  
Palutis Jeffrey-HDR  
Keith Leach-City of Austin, TX  
Kimon Lymberry-Cargill

Rachel Osgood-City of Georgetown  
Jeffrey Pslutis-HDR  
Jenny Parker-Heart of Texas Council of  
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