

TO: James L. App, City Manager
FROM: Mike Compton, Director of Administrative Services
SUBJECT: Pacific Waste Services Agreement Amendment
DATE: April 5, 2005

Needs:

For the City Council to approve an amendment to the agreement with Pacific Waste Services for operating the municipal landfill.

Facts:

1. The Council approved a “turn-key” operations agreement with Pacific Waste Services on April 4, 2000.
2. The agreement has a term of 20 years, starting August 1, 2000 and expiring July 31, 2020.
3. Due to an accidental liner breach and changing regulatory environment, the City has been negotiating changes to the contract that would meet the following objectives:
 - a. Require Pacific Waste Services to be financially responsible for all costs of repairing said liner breach; and
 - b. Require Pacific Waste Services to be financially responsible for all costs, both current and future, for monitoring the breach area as required by the regulatory agencies; and
 - c. Require Pacific Waste Services to be liable for remediation of any and all contamination that might arise out of the liner breach; and
 - d. Remove “day to day” operational engineering responsibility from Pacific Waste Services and adjust their compensation accordingly; and
 - e. Require Pacific Waste Services to be financially responsible for all future possessory interest property taxes on landfill operations.
4. The proposed amendment satisfies these objectives and is acceptable to both the City and Pacific Waste Services.

Analysis
and

Conclusion: The proposed amendments would accomplish the following:

Section 1 – Revise paragraphs (b), (e) and (g) of Section 2 to transfer all landfill related engineering services to an independent third-party chosen and hired by the City as of July 1, 2005 except that Pacific Waste Services would continue to perform these services until such time as the independent third-party has been hired by the City if the City has not hired said independent third-party engineer by July 1st.

Section 2 – Adds new paragraphs (h) and (i) to Section requiring Pacific Waste Services to fully cooperate with the independent third-party engineer hired by the City and puts the responsibility for payment of possessory interest taxes on Pacific Waste Services.

Section 3 – Adds language to the end of paragraph (a) of Section 5 that prohibits Pacific Waste Services from receiving a revenue adjustment to cover any increased costs arising out of any of changes to the agreement by this amendment.

Section 4 - Adds language to the end of paragraph (c) of Section 6 that modifies the “Contractor’s Additional Share” for the annual period ending July 31, 2004. Both parties agree that the amount shall be \$153, 636.93.

Section 5 – Adds new paragraphs (e) and (f) to Section 6 which requires Pacific Waste Services to reimburse the City for all independent third-party engineering expenses from the “Contractor’s Additional Share”. Should the “Contractor’s Additional Share” be insufficient to cover the City’s expenses, Pacific Waste Services’ “Retention” would be reduced in ten equal monthly amounts totaling the amount of the deficiency. In the case of (f), it requires Pacific Waste Services to reimburse all City expenses for monitoring and mitigation of the liner breach beginning January 1, 2005.

Section 6 – Adds new paragraph © to Section 17 requiring Pacific Waste Services to forevermore protect, hold harmless, indemnify and defend the City from any and all liabilities and claims, etc. arising out of the liner breach.

Fiscal Impact: None

Options: For the City Council to:

- a. Adopt Resolution No. 05-xx amending the current agreement with Pacific Waste Services for the remaining term of the agreement; or
- b. Amend, modify, or reject the above option.

RESOLUTION NO. 05-

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF PASO ROBLES
APPROVING AN AMENDMENT TO THE AGREEMENT WITH PACIFIC WASTE SERVICES
FOR OPERATING THE MUNICIPAL LANDFILL

WHEREAS, the City and Pacific Waste Services entered into a landfill operations agreement beginning August 1, 2000; and

WHEREAS, the agreement was intended to provide a “turn-key” relationship between the City and Pacific Waste Services wherein all costs including engineering would be provided by Pacific Waste Services; and

WHEREAS, the City now desires to remove all engineering services from said agreement and hire an independent third-party engineer to undertake said function; and

WHEREAS, Pacific Waste Services has agreed to assume responsibility for any and all costs associated with the monitoring and mitigation of a liner breach, as well as to indemnify the City for any claims arising out of said liner breach; and

WHEREAS, the parties agree that Pacific Waste Services shall be responsible for payment of all future possessory interest taxes.

THEREFORE BE IT RESOLVED, by the City Council of the City of El Paso de Robles approves the “First Amendment to Agreement” in substantially the form attached hereto and incorporated herein by reference, subject to any minor technical or clarifying changes approved by the City Manager and City Attorney.

ADOPTED by the City Council of the City of El Paso de Robles at a regular meeting of said Council held on the 5th day of April 2005 by the following vote:

AYES:
NOES:
ABSTAIN:
ABSENT:

Frank R. Mecham, Mayor

ATTEST:

Sharilyn M. Ryan, Deputy City Clerk

**FIRST AMENDMENT TO AGREEMENT
FOR OPERATION OF SOLID WASTE LANDFILL
PASO ROBLES MUNICIPAL LANDFILL**

THIS FIRST AMENDMENT (the "Amendment") is made and entered into this ____ day of _____, 2005, by and between the CITY OF EL PASO DE ROBLES, a municipal corporation, ("City") and PACIFIC WASTE SERVICES, INC., a California corporation ("Contractor").

Recitals

A. The City and PWS have entered into an Agreement for Operation of Solid Waste Landfill, Paso Robles Municipal Landfill, dated August 23, 2000, providing for the terms and conditions for the operation of the City's landfill (the "Landfill") by Contractor.

B. In March 2000, there was a breach of the leachate liner (the "Liner Breach") at Module 2B of the Landfill. Although Contractor performed work to repair the tear, the liner tear was not reported to the City or any of the regulatory agencies in a timely fashion. City has received approval from the California Regional Water Quality Control Board ("RWQCB") of a workplan (the "Approved Workplan") prepared by Todd Engineers and dated July 2004 to install a well and take other measures to monitor the area around the area of the liner tear for a period of time. The parties desire to set forth certain understandings regarding the implementation of the Approved Workplan.

C. In addition, the parties wish to clarify the provisions of the Agreement regarding the payment of possessory interest taxes and to amend certain other provisions of the Agreement.

D. The parties have agreed to compromise and settle their differences over the costs incurred by City in connection with the investigation of the Liner Breach and the responsibility for the payment of outstanding possessory interest taxes. This Agreement resolves all outstanding disputes on those matters.

Agreements

Section 1. Paragraphs (b), (e) and (g) of Section (2) of the Agreement are hereby revised to read as follows:

"(b) Contractor shall be fully responsible for all permit compliance and engineering requirements including development of landfill design plans and permit documents, groundwater and surface water monitoring and reporting, landfill gas monitoring and reporting, construction management and regulatory agency liaison and reporting. Commencing July 1, 2005 and continuing through the Term of this Agreement, this work shall be performed by an independent third-party (the "Independent Party") selected by the City."

“(e) Contractor shall be fully responsible for development of new waste disposal cells, including but not limited to engineering design, permitting, surveying, installation, construction and quality assurance documentation. Commencing July 1, 2005 and continuing through the Term of this Agreement, the Independent Party shall be responsible for the engineering design, permitting, surveying, and quality assurance documentation associated with the development of new waste disposal cells. Contractor shall install and construct any new waste disposal cells in accordance with all documentation approved by the applicable regulatory agencies.”

“(g) Contractor, in addition to the specific duties contained herein, shall be responsible for all other duties and activities as included in Exhibit B, most particularly, the “Technical Element” section, provided, however, that any engineering, environmental monitoring and permit compliance work will be the responsibility of the Independent Party commencing July 1, 2005 and continuing through the Term of this Agreement. Notwithstanding anything to the contrary in this First Amendment, in the event City has not hired an Independent Party to all the services specified herein by July 1, 2005, Contractor agrees that it shall continue performing these services until such time as an Independent Party has been hired by City”

Section 2. New paragraphs (h) and (i) are hereby added to Section (2) of the Agreement as follows:

“(h) City shall notify Contractor of the identity of the Independent Party selected by City to perform the work specified in this Agreement. Contractor agrees that it shall fully cooperate with the Independent Party and promptly provide Independent Party with any information requested by Independent Party to perform such work. In the event there is any uncertainty as to whether Contractor or Independent Party is responsible for certain work, Contractor shall promptly notify City, which shall make such determination in its sole discretion and shall so notify both Contractor and Independent Party

“(i) This Agreement creates a possessory interest subject to property taxation by the San Luis Obispo County Tax Collector, pursuant to California Revenue and Taxation Code section 107.6. Contractor agrees that it shall be responsible for paying any and all amounts attributable to possessory interest tax, including any accrued interest and/or penalties arising out of Contractor’s operations at the Landfill under this Agreement. Contractor agrees that within ten (10) days of receipt of the Contractor’s Additional Share for fiscal year 2003-04, as set forth in Section (6)(c) of the Agreement, Contractor shall pay all amounts due and owing to the San Luis Obispo County Tax Collector for such possessory interest, and thereafter throughout the term of this Agreement, shall make all payments of possessory interest tax.”

Section 3. The following provision is hereby added to the end of paragraph (a) of Section (5) as follows:

“Notwithstanding any of the foregoing, in the event Contractor submits a request to adjust the distribution of revenues to compensate Contractor for increased costs pursuant to this section, such request shall not be based on, nor shall Contractor be entitled to any adjustment based on, any increased costs attributable to or arising out of the provisions of this Amendment. Contractor shall submit evidence reasonably satisfactory to City of any such increased costs upon which the request is based.”

Section 4. The following language is hereby added to the end of paragraph (c) of Section (6) of the Agreement as follows:

“The parties agree that the Contractor’s Additional Share to be paid by City to Contractor for the period of August 1, 2003 to July 31, 2004 shall be One Hundred Fifty-Three Thousand Six Hundred Thirty-Six Dollars and Ninety-Three Cents (\$153,636.93). City shall pay Contractor within ten (10) days after this Amendment is executed by City.”

Section 5. New paragraphs (e), and (f) are hereby added to Section (6) of the Agreement as follows:

“(e) Beginning with fiscal year 2005-06 and every subsequent fiscal year thereafter through the Term of this Agreement, the amount of the annual Contractor’s Additional Share shall be reduced by the actual costs incurred by City in the such fiscal year for all of the work performed by the Independent Party, as set forth in this Agreement. City shall provide evidence of all such Independent Party costs if requested by Contractor. In the event the actual Independent Party costs exceed the amount of the annual Contractor’s Additional Share in any fiscal year, the excess amount shall be reimbursed to City in ten (10) equal installments by reducing the amount of the next ten (10) Monthly Contractor Retention(s) by the amount of each installment owed.

“By way of example only, if the amount of the Contractor’s Additional Share to be paid on August 31, 2007, as calculated in Section (6)(c) of the Agreement was \$200,000, and the Independent Party costs incurred and paid by City in fiscal year 2006-07 was \$65,000, then the amount to be paid to Contractor on August 31, 2007 would be One Hundred Thirty-Five Thousand Dollars (\$200,000 - \$65,000).

“By way of further example only, if the amount of the Contractor’s Additional Share to be paid on August 31, 2007, as calculated in Section (6)(c) of the Agreement was \$200,000, and the Independent Party costs incurred and paid by City in fiscal year 2006-07 was \$220,000, then there would be no payment of Contractor’s Additional Share. In addition, the amount of the Monthly Contractor Retention would be reduced by \$2,000 for each of the next ten (10) months.”

“(f) Contractor agrees that it shall reimburse City for all actual costs incurred and paid to third parties after January 1, 2005 for the monitoring and mitigation measures required by any regulatory agency as a result of the Liner Breach, including, but not limited to, the implementation of the Approved Workplan. City has provided Contractor with a copy of

the Approved Workplan. Concurrently with a written request for reimbursement, City shall provide Contractor with evidence reasonably satisfactory to Contractor of such actual costs. Contractor agrees that it shall reimburse City for such costs within sixty (60) days of receipt of City's request for reimbursement."

Section 6. New paragraph (c) is hereby added to Section (17) of the Agreement as follows:

"(c) With respect to the March 2000 Liner Breach, Contractor and its successors and assigns hereby specifically agree to protect, hold harmless, indemnify and defend City and its officers, employees, board members, agents and assigns from and against any and all liabilities, claims, demands, causes of action, suits, judgments, (including but not limited to, causes of action arising under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. §9601 *et seq.*, the California Hazardous Substance Account Act, California Health & Safety Code §25300 *et seq.*, the Porter-Cologne Water Quality Control Act of 1970, California Water Code §13000 *et seq.*, or any other federal, state or local environmental health or safety law, regulation or judicial or administrative order), losses, damages (including consequential damages), costs, injuries, penalties, enforcement actions, fines, taxes, remedial actions, removal and disposal costs, expenses (including without limitation reasonable attorneys' fees and litigation and/or administrative proceeding costs, experts' and consultants' fees and laboratory costs) and sums paid in settlement of claims (collectively "Liabilities"), whether such Liabilities are direct, indirect, known or unknown, and which Liabilities arise out of, relate in any way to, result from, or are in connection with, in whole or in part, the tear of the Landfill liner that occurred in March 2000. Should any extraordinary measures be required at the time of the Landfill closure, beyond normally required monitoring and maintenance, as a result of the Liner Breach, Contractor shall bear all costs of such measures and requirements."

Section 7. All of the above recitals are true and correct and are made a part of this Amendment.

Section 8. Except as modified by this Amendment, all other terms and provisions of the Agreement shall remain in full force and effect.

This Amendment shall be effective as of the date hereinabove written.

CITY OF EL PASO DE ROBLES,
A municipal corporation

By: _____
James L. App, City Manager

Attest:

Sharilyn M. Ryan
Deputy City Clerk

Approved as to Form:

By: _____
Iris P. Yang, City Attorney

“CITY”

PACIFIC WASTE SERVICES, INC.
a California corporation

By: _____
James A. Wyse, President

“CONTRACTOR”