

OFFICE OF THE COUNCIL AUDITOR
 Suite 200, St. James Building



MEMORANDUM

Date: April 15, 2010

To: City Council Members

From: Kirk A. Sherman, Council Auditor

Subject: Ordinance 2010-217, Proposed Landfill Settlement Agreement

My staff has completed its review of Ordinance 2010-217 and the proposed landfill settlement agreement between the City and Trail Ridge Landfill, Inc. (TRL). The ordinance authorizes the execution of the proposed Settlement Agreement and waives the competitive bidding requirements of Ordinance Code Chapter 126 in order to enter into the Agreement. We have estimated the costs associated with the existing and withdrawn contracts, a city run landfill, and the cost of the proposed settlement. The term of the proposed settlement agreement starts on July 1, 2010 and ends 19 years after the earlier of (i) receipt at the landfill of the number of tons equal to the 2010 capacity or (ii) June 30, 2020. We estimated the cost to the City of all scenarios for this period of time. This review does not represent an audit or attestation conducted pursuant to Government Auditing Standards.

Existing Contract	Withdrawn Contract	City Run Landfill	Competitive Bid Award *	Proposed Settlement
Estimated Expenses of the Existing Contract for 26 years**	Estimated Expenses of the Withdrawn Contract (2008-538-W) for 26 years**	Estimated Expenses of the Existing Contract for 7 years, with the City operating the landfill for 19 years thereafter**	Estimated Expenses of the Existing Contract for 7 years, with a new operations contract for 19 years thereafter**	Estimated Expenses of the Proposed Settlement (2010-217) for 26 years**
Years 1-7 *** \$93,719,589	Years 1-7 *** \$79,350,846	Years 1-7 *** \$94,368,072	Years 1-7 *** \$93,719,589	Years 1-7 *** \$89,689,706
Years 8-26 \$394,466,842	Years 8-26 \$342,598,181	Years 8-26 \$310,792,323	Years 8-26 Unknown	Years 8-26 \$369,553,668
Total Cost **** \$488,186,431	Total Cost **** \$421,949,027	Total Cost **** \$405,160,395	Total Cost **** Unknown	Total Cost **** \$459,243,375
Net Present Value of Cost @ 4.75% \$254,178,137	Net Present Value of Cost @ 4.75% \$218,839,754	Net Present Value of Cost @ 4.75% \$216,941,481	Net Present Value of Cost @ 4.75% Unknown	Net Present Value of Cost @ 4.75% \$239,920,041

Notes to Schedule

* Other environmental services companies have expressed interest in bidding on the future operation of the landfill.

** The 2010 contract cost estimates for all scenarios have decreased from the 2009 contract cost estimates for several reasons. Total tons have decreased due to the economy and due to a shorter contract term (26 years vs. 33 years). The number of acres required to be closed has decreased from 376 acres to 299 acres. The cost estimates for years 1-7 for the existing contract, a City run landfill, and a competitive bid award have further decreased because ash contaminated soil can now be used for landfill cover at no charge to the City per the new landfill operating permit.

*** Years 1-7 are broken out separately because the City is under contract to let TRL operate the landfill until the current landfill cell is full, which is estimated to take another 7 years.

******Does not include the construction cost of expanding the landfill for which the City is responsible under any scenario.**

As seen in the schedule on page one, the proposed settlement (2010-217) could save the City an estimated \$28,943,056 over the existing contract (net present value savings of \$14,258,096), but the proposed settlement could cost the City an additional \$37,294,348 over the withdrawn contract (2008-538-W) (net present value of \$21,080,287).

The schedule also shows that a City run landfill could be less expensive than both the existing contract and the proposed settlement.

Regarding the competitive bid award scenario, it is not possible to estimate this cost without actually bidding it.

I want to emphasize that all the numbers in the schedule are estimates calculated from complicated spreadsheets which are based on numerous assumptions. Changes in any of the assumptions would change the estimated cost numbers shown.

The City's options with regard to the future operation of its Trail Ridge landfill are as follows: The City can reject or accept the proposed settlement. If the City rejects the proposed settlement and loses in court, then the City continues under the existing contract. If the City rejects the proposed settlement and wins in court, the City could pursue the in-house operation of the landfill or bid the landfill contract.

1. **The City could pursue the in-house operation of Trail Ridge landfill.** The City has operated its own landfills in the past and it could do so again, either as an enterprise fund or as an authority. It must be noted that any savings associated with a City run landfill would not begin until after expiration of the current contract with TRL, which could last another seven years.
2. **The City could bid the landfill operation contract as required by the Municipal Code and as intended by Florida Statute 287.001 which states, "Legislative intent.--The Legislature recognizes that fair and open competition is a basic tenet of public procurement; that such competition reduces the appearance and opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically; and that documentation of the acts taken and effective monitoring mechanisms are important means of curbing any improprieties and establishing public confidence in the process by which commodities and contractual services are procured."**

Bidding the contract would allow the City to draft the contract terms that it actually wants, rather than accepting a contract with the terms it was able to negotiate. It must be noted that any savings associated with bidding the landfill operation contract would not begin until after expiration of the current contract with TRL, which could last another seven years.

3. The City could accept the Proposed Settlement Agreement. Based on our review of the Proposed Settlement Agreement, we have the following concerns, observations, and recommendations.

- A.** Important definitions in the contract are unclear and almost circular in reference. “Facility” means the landfill or landfills to be operated pursuant to this agreement. “Landfill” or “Sanitary Landfill” means the solid waste disposal facility described on Exhibit 2010-1, and as expanded pursuant to this Agreement from time to time. “Site” means the area designated on Figure 2010-1 attached hereto and by this reference made a part hereof. We recommend that the contract and exhibit be modified to make it perfectly clear as to the specific areas where TRL has rights to operate and the areas where TRL has no rights to operate.
- B.** There is no cap on annual CPI adjustments in the contract. The contract changes the rates paid by COJ by 70% of the CPI each year. The highest rate in the past 20 years for the index used in the proposed contract was 4.9%. Seventy percent of 4.9 is 3.43. Therefore, we recommend a cap of 3.43% on the annual CPI adjustment. This is a fair and logical amount which protects the City in the event of a wild variation in inflation that would cause the City to pay increased rates for every year thereafter. The City has a similar cap in its garbage hauling contracts.
- C.** There is no periodic rate review required. The City reviews the contract garbage haulers’ audited financials every three years and is able to adjust rates if it appears that haulers are making an unreasonably high rate of return. We recommend that a provision be included in the contract which would allow the City to periodically examine the Contractor’s audited financial records (perhaps every 5 years) and adjust the rates if the Contractor’s rate of return is viewed as excessive.
- D.** All of the insurance requirements in the proposed settlement contract are the same as in the existing contract which has been in effect since 1991. We recommend modifying the insurance requirements (requiring additional coverage and higher amounts of coverage).
- E.** Section 2.1.1 of Exhibit 2010-3 states that the City and TRL shall each have the right to suspend or terminate disposal privileges of those persons who deliver or attempt to deliver to the Facility unacceptable wastes or environmentally sensitive waste without prior written approval. We recommend that TRL have the right and/or responsibility to recommend suspensions and terminations of disposal privileges, but the City have the responsibility to act on those recommendations. We recommend that only the City have the right to suspend or terminate the disposal privileges of its customers.
- F.** Within Exhibit 2010-5, there is no cap on the number of rolloff pulls for which the City can be charged. We recommend capping the number of pulls at 708, which is the average number of pulls per year for the last five years.

- G.** Section 5.6 requires TRL and the City to use reasonable efforts to enter into an agreement for the establishment of an operation at the Site to recover materials from the current waste stream being delivered to TRL. It also states that TRL shall have the exclusive right to operate any such new technology requested by the City at the “Site” and for which the City shall provide the capital required to acquire and implement such technology, provided that TRL secures the lawful rights to do so.

Our concern is that this language gives away the City’s right to operate new technology itself or to bid out the operation of new technology. We recommend deleting this language. If this language is not deleted, we recommend that this section include language clearly limiting TRL’s rights to a portion of the “Site” and limiting the term of the recycling agreement so that it will not exceed the term of the overall agreement discussed in Section 4.2.

- H.** Section 6.1 limits the City’s claims for alternative disposal costs to \$5 million. This limit is too low and does not adequately protect the City. Claims by the City for alternative disposal costs would arise if, for example, Trailridge Landfill was prohibited from accepting waste due to the fault or negligence of TRL. There should be no cap on City claims for alternative disposal costs. We recommend that TRL and its parent companies indemnify the City for all additional disposals costs incurred due to the fault or negligence of TRL.
- I.** In Section 5.1, it states that “the City hereby assigns its rights to obtain payment from persons and entities illegally disposing of waste tires in excess of the 30,000 annual allotment to TRL, and TRL shall be entitled to keep 95% of the gross proceeds from such collection and TRL is to return 5% to the City”. We recommend that the City continue to perform the billing, rather than allow a contractor to bill the City’s customers.
- J.** In Section 6.3, the performance and payment bond amounts are the same as in the original agreement even though the estimated tons per year has increased. We recommend increasing the number of tons in the calculations of the bond amounts from the 558,000 in the existing contract to 772,200 to agree with the Trail Ridge Landfill – Phase II Site Life Analysis.

Benefits to City of Proposed Settlement Agreement over Existing Contract

1. The City receives a reduction in the rate it pays TRL for regular tons from \$10.67 per ton to \$10.58 per ton. Based on the average yearly tons received of 752,764, this could save the City \$67,749 annually.
2. Existing contract charges for tarp removal and tarp replacement are eliminated resulting in estimated annual savings of \$200,000.
3. TRL agrees to accept the first 30,000 non-bulk tires each year at no additional cost, a potential annual savings of up to \$410,700 per year to the City since the City currently pays TRL \$13.69 (adjusted annually for CPI) for each tire received.
4. TRL agrees to provide the labor and machinery to operate the City’s borrow pit and transport cover dirt from the borrow pit to the landfill. This represents an annual savings of up to \$203,246.
5. The proposed settlement establishes a maximum airspace usage of 1,428 cubic yards per 1,000 tons of solid waste. The existing contract has no maximum limit on airspace usage. A limit on airspace usage maximizes landfill life and has the potential to reduce closure costs on a per ton basis.

Benefits to TRL of Proposed Settlement Agreement over Existing Contract

1. TRL gets a guaranteed 19 year extension to the contract after the existing Phase 1 Landfill is full.
2. TRL and the City agree to use reasonable efforts to enter into an agreement for the establishment of an operation to recover recyclable materials from the waste stream.
3. The City agrees to pay TRL \$1,000,000 for landfill gas field capital improvements that were performed without TRL obtaining the required City authorization.
4. The City agrees to pay TRL a net settlement amount of \$625,000 to settle disputes relating to commercial hauling noise violations, commingling residential and commercial waste, liquidated damages, and civil penalties against unpaid charges for residential hauling services and fuel surcharge adjustments.

Please contact me if I can answer questions or be of further assistance.

Cc: Kerri Stewart, Chief Administrative Officer
Cindy Laquidara, Chief Deputy General Counsel
Ebenezer Gujjarlapudi, Director of Environmental & Compliance
Chris Pearson, Environmental & Compliance
Fred Forbes, Chief of Solid Waste Division