

THE BOARD OF SUPERVISORS OF THE COUNTY OF STANISLAUS
BOARD ACTION SUMMARY

DEPT: Environmental Resources

BOARD AGENDA #: *B-11

AGENDA DATE: June 27, 2017

SUBJECT:

Approval of the First Amendment to the 2012 Amended and Restated Service Agreement with Covanta Stanislaus, Inc., for the Operation of the Waste-to-Energy Facility

BOARD ACTION AS FOLLOWS:

No. 2017-349

On motion of Supervisor Withrow, Seconded by Supervisor Olsen
and approved by the following vote,

Ayes: Supervisors: Olsen, Withrow, Monteith, DeMartini, and Chairman Chiesa

Noes: Supervisors: None

Excused or Absent: Supervisors: None

Abstaining: Supervisor: None

1) Approved as recommended

2) Denied

3) Approved as amended

4) Other:

MOTION:

ATTEST: Elizabeth A. King
ELIZABETH A. KING, Clerk of the Board of Supervisors

File No.

**THE BOARD OF SUPERVISORS OF THE COUNTY OF STANISLAUS
AGENDA ITEM**

DEPT: Environmental Resources
Urgent Routine

BOARD AGENDA #: *B-11

AGENDA DATE: June 27, 2017

CEO CONCURRENCE: *phx*

4/5 Vote Required: Yes No

mm

SUBJECT:

Approval of the First Amendment to the 2012 Amended and Restated Service Agreement with Covanta Stanislaus, Inc., for the Operation of the Waste-to-Energy Facility

STAFF RECOMMENDATIONS:

1. Approve the first Amendment to 2012 Amended and Restated Service Agreement for the Supply and Acceptance of Solid Waste with Covanta, Stanislaus, Inc., in substantially the form set forth in Attachment 1.
2. Authorize the Chief Executive Officer to sign the Agreement.

DISCUSSION:

On June 26, 2012, the Board of Supervisors approved the Amended and Restated Agreement for the Supply and Acceptance of Solid Waste with Covanta Stanislaus, Inc. (Service Agreement). At that time, several changes were made to the Agreement, one of which was that Covanta Stanislaus could increase their procurement of Special Waste from 7,300 tons annually to 12,200 tons beginning on January 2, 2016. Special Waste is generally referred to as waste that requires special handling or certification of destruction such as confidential records, firearms, confiscated drugs, etc., for a higher tipping fee. In 2016, Covanta Stanislaus contacted the Department of Environmental Resources with a request to increase Special Waste tonnage through an amendment of the Service Agreement. During early discussions, the Contracting Communities (Stanislaus County and the City of Modesto collectively) sought to reduce the risk of financial exposure due to Unforeseen Circumstances, such as a Change in Law that could "materially adversely affect the rights or the obligations of the parties under this Agreement."

In the current Service Agreement, Covanta Stanislaus is responsible for 75% of the Unforeseen Circumstance costs and the Contracting Communities are responsible for 25% of the Unforeseen Circumstance costs. To protect the Contracting Communities against future financial risk exposure under the current Service Agreement due to the 25% share of Unforeseen Circumstances cost, \$3,750,000 is maintained in a Resource Recovery Account for this purpose.

As part of the proposed amendment changes, the Contracting Communities desire to reduce the risk of this exposure from 25% down to zero percent and in exchange Covanta Stanislaus desires to increase their procurement of Special Waste from 12,200 tons to 30,000 tons per

Approval of the First Amendment to the 2012 Amended and Restated Service Agreement with Covanta Stanislaus, Inc., for the Operation of the Waste-to-Energy Facility

contract year. This proposal will not change the Contracting Communities current minimum delivery of 243,300 tons per contract year and the procurement of 30,000 tons of Special Waste per contract year can only be attained if capacity is available. This increase in Special Waste tonnage will displace tonnage the Contracting Communities previously delivered above the 243,300 tons.

On June 15, 2017, the Solid Waste to Energy Executive Committee approved the proposed amendment. City staff will take a similar agenda item before the Modesto City Council for the Council's consideration for approval of the proposed Amended Service Agreement and related actions.

POLICY ISSUE:

This first Amendment to the current 2012 Amended and Restated Service Agreement requires the Board of Supervisors' approval. As required by Government Code 23005, "A county may exercise its powers only through the board of supervisors or through agents and officers acting under the authority of the board or authority conferred by law."

FISCAL IMPACT:

Jointly, the Contracting Communities have a reserve account in the amount of \$3.75 million to absorb Unforeseen Circumstance costs. Approval of this Amendment will preserve these funds in the Resource Recovery Account by reducing the risk of exposure to 0%. There will, however, be a corresponding loss of revenue to the County from the tip fee surcharge which will not be collected on this Special Waste as follows: Assembly Bill 939 Program - \$3 per ton, Household Hazardous Waste Program - \$3 per ton, Fink Road Landfill administrative services - \$.50 per ton, and Environmental Resources administrative services - \$.25 per ton. Collectively, this estimated revenue loss to the Department is estimated to be \$70,748 annually.

BOARD OF SUPERVISORS' PRIORITY:

The recommended action is consistent with the Board's priorities of A Well-Planned Infrastructure System and the Efficient Delivery of Public Services by eliminating the County's Unforeseen Circumstance risk exposure in the Service Agreement.

STAFFING IMPACT:

Existing staff will continue to oversee the administration of the Amended Service Agreement.

CONTACT PERSON:

Jami Aggers, Director of Environmental Resources	Telephone: 209-525-6770
Merry Mayhew, Assistant Director of Environmental Resources	Telephone: 209-525-6760

ATTACHMENT(S):

1. Amended Agreement

Attachment 1

FIRST AMENDMENT TO
AMENDED AND RESTATED SERVICE AGREEMENT
FOR THE SUPPLY AND ACCEPTANCE
OF SOLID WASTE

This First Amendment to Amended and Restated Service Agreement for the Supply and Acceptance of Solid Waste (this "*Amendment*") is entered into as of July 5, 2017 (the "*Effective Date*"), by and among the County of Stanislaus, a political subdivision of the State of California, acting by and through its Board of Supervisors (the "*County*"), the City of Modesto, a municipal corporation, acting by and through its City Council (the "*City*"), and Covanta Stanislaus, Inc., a California corporation (the "*Company*"). The County and City are collectively referred to herein as the "*Contracting Communities*."

Recitals

- A. The Contracting Communities and the Company are parties to that certain Amended and Restated Service Agreement for the Supply and Acceptance of Solid Waste dated as of July 1, 2012 (the "*Service Agreement*"); capitalized terms used but not defined in this Amendment shall have the meanings given them in the Service Agreement;
- B. The Contracting Communities and the Company wish to amend the Service Agreement as provided in this Amendment.

Agreement

NOW, THEREFORE, for and in consideration of the mutual covenants in this Amendment, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the parties, and intending to be legally bound, the Contracting Communities and the Company hereby agree as follows:

1. **Special Waste.** (a) Section 4.03(d)(ii) of the Service Agreement is hereby deleted in its entirety and replaced with the following:

"(ii) From July 5, 2017 until the expiration or termination of this Agreement, up to 30,000 Tons per Contract Year of Special Waste arranged by the Company shall have priority over Contracting Communities Excess Waste. Contracting Communities will incur no liability if Company accepts Excess Waste from Contracting Communities that effectively limits Company's ability to reach 30,000 tons per Contract Year of Special Waste.

Special Waste deliveries to the Facility arranged by the Company shall in no event exceed the amounts set forth in Section 4.03(d)(i) and (ii) above for the periods set forth therein."

(b) Section 4.03(c) of the Service Agreement is hereby deleted in its entirety and replaced with the following:

"(c) Fees from Excess Waste and Special Waste. If the Company is procuring for the Facility from third parties Excess Waste that constitutes the first 30,000 Tons per Contract Year of Special Waste, then the Company shall retain for its own account the entire Third Party Tipping Fee for that Special Waste. For all other Excess Waste so procured (including Special Waste in excess of 30,000 Tons per Contract Year), (i) the Company shall retain for its own account the portion of the Third Party Tipping Fee for such Excess Waste up to the then applicable Excess Waste Tipping Fee, and (ii) the portion of such Third Party Tipping Fee in excess of the then applicable Excess Waste Tipping Fee shall be split 60% to the Company and 40% to Contracting Communities. The Company agrees that the Contracting Communities may dispose at the Facility, free of charge, Special Waste arising out of governmental activities occurring within Stanislaus County, such as illegal drugs confiscated by law enforcement agencies"

(c) The following sentence is hereby added to the end of Section 4.01(a) of the Service Agreement:

"From July 5, 2017 until the expiration or termination of this Agreement, the Company and the Contracting Communities, by mutual written agreement, may agree to reduce the Guaranteed Tonnage on such terms and conditions as they may agree, in each party's sole individual discretion."

2. Unforeseen Circumstances. (a) Section 6.05(c)(3) of the Service Agreement is hereby deleted in its entirety and replaced with the following:

"From July 5, 2017 until the expiration or termination of this Agreement:

(i) The Company shall bear 100% of Unforeseen Circumstance Costs and the Contracting Communities shall bear 0% of Unforeseen Circumstance Costs.

(ii) If upon expiration or termination of this Agreement on or after January 2, 2016 there is any balance of Excess Electric Revenues remaining, then such balance shall be for the account of the Company."

(iii) As of the date of execution of this agreement, Unforeseen Circumstances Costs attributable to Contracting Communities are \$0.00.

(b) Section 6.05(d) of the Service Agreement is hereby deleted in its entirety and replaced with the following:

*“(d) Unforeseen Circumstance Cost Limit. If the cumulative total of Unforeseen Circumstance Costs incurred from and after the Service Commencement Date by the Company exceeds \$15,000,000, excluding Excess Electric Revenues applied pursuant to Section 6.05(c)(3)(ii) above (such net amount being the “**Initial UCC Termination Threshold**”), then the Company shall have the right to terminate this Agreement without payment of any termination fee (a “**UCC Termination**”) by providing written notice of termination to the Contracting Communities within 90 days after having provided to the Contracting Communities written notice that such Initial UCC Termination Threshold has been reached. The Contracting Communities, acting jointly, shall have the right to avoid the UCC Termination by agreeing in writing to pay, and paying to the Company, within 30 days after receipt of the termination notice as to amounts already then incurred by the Company (and when and as incurred as to amounts incurred thereafter), the amount incurred by the Company in excess of the Initial UCC Termination Threshold (the “**Termination Avoidance Amount**”). If the Company does not exercise an applicable UCC Termination or if the Contracting Communities avoid the UCC Termination pursuant to the immediately preceding sentence, then this Agreement shall continue uninterrupted and in full force and effect, unless and until additional Unforeseen Circumstance Costs, in excess of the Initial UCC Termination Threshold, incurred by the Company exceed a cumulative total of \$1,500,000 (a “**Subsequent UCC Termination Threshold**”), at which time a UCC Termination right shall arise for the Company again in accordance with the foregoing provisions of this Section 6.05(d), based on a Subsequent UCC Termination Threshold amount of \$1,500,000 (rather than the Initial UCC Termination Threshold) and including the termination avoidance provisions. If the Company does not timely exercise the UCC Termination when the Subsequent UCC Termination Threshold is reached, or if the Contracting Communities avoid the UCC Termination pursuant to the immediately preceding sentence, then this same process shall apply each time a new Subsequent UCC Termination Threshold is reached during the Service Term.”*

(c) Section 6.05(e) of the Service Agreement is hereby deleted in its entirety and replaced with the following:

*“(e) Constructive Total Loss. If the Second UCC Notice states that the Unforeseen Circumstance is expected to result in aggregate Capital Costs together with net increases in operation and maintenance costs of the Facility, over the remainder of the Service Term in each case (“**Restoration Costs**”) in excess of \$22 million (the “**Loss Termination Threshold**”), the Company shall include clear and convincing evidence of such Restoration Costs in the Second UCC Notice. The Contracting Communities will state in their response notice, to be delivered within 20 days of receipt of the Second UCC Notice, whether they agree or disagree that the Restoration Costs will exceed the Loss Termination Threshold. If the Contracting Communities do not so agree, then such disagreement will be subject to dispute resolution pursuant to Section 9.20. If the Contracting Communities state in their response notice that they agree that the Restoration Costs will be greater than the Loss Termination Threshold, or the decision delivered in the arbitration so determines, as applicable (either being a “**Restoration***

Cost Substantiation”), then the Company shall have the right to terminate this Agreement without paying any termination fee by providing to the Contracting Communities no less than 180 days and no more than 240 days written notice of termination (a “Termination Notice”). Such Termination Notice shall be delivered within 30 days after Restoration Cost Substantiation. Upon the effective date of the termination, the Facility Site Lease Agreement shall terminate, Section 7.04 of the Facility Site Lease Agreement will apply and neither the Contracting Communities nor the Company shall have any further rights or obligations under this Agreement, except for any rights or obligations which expressly survive termination of this Agreement.”


3. Ratification. Except as otherwise provided in this Amendment, the Service Agreement remains in full force and effect, and the Company and the Contracting Communities hereby ratify and confirm the Service Agreement, as amended by this Amendment.

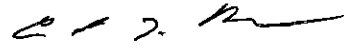
[Signatures appear next page]

EXECUTED as of the Effective Date

COUNTY OF STANISLAUS
Department of Environmental Resources

Covanta Stanislaus, Inc.

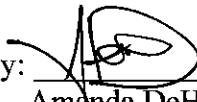
By: 
Stan Risen, Chief Executive Officer


By: Christopher J. Baker
Title: Vice President

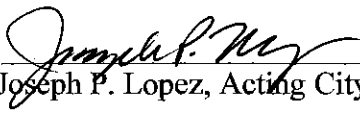
"County"

"Covanta"

APPROVED AS TO FORM:
John D. Doering, County Counsel

By: 
Amanda DeHart, Deputy County Counsel

CITY OF MODESTO


By: 
Joseph P. Lopez, Acting City Manager

"City"

CITY OF MODESTO

By: 
Adam U. Lindgren, City Attorney

"City"

Attest: 
By: Stephanie Lopez, City Clerk