



# Memorandum

**TO:** HONORABLE MAYOR  
AND CITY COUNCIL

**SUBJECT:** ACTIONS RELATED TO  
COMMERCIAL SOLID  
WASTE AGREEMENTS

**FROM:** Kerrie Romanow

**DATE:** February 14, 2020

Approved

*D. D. SyL*

Date

*2/14/2020*

## **RECOMMENDATION**

(a) Adopt a resolution authorizing the City Manager to:

- (1) Negotiate and execute an Amended and Restated agreement with Allied Waste Services of North America, LLC, dba Allied Waste Services of Santa Clara County to modify the terms for collecting and processing commercial solid waste, recyclables and organic materials and to extend services through June 30, 2032, with an anticipated effective date of March 1, 2020; and
- (2) Negotiate and execute an amended and restated agreement with Zero Waste Energy Development Company to modify the terms for processing commercial solid waste, recyclables and organic materials and to extend organic processing services through June 30, 2032, with an anticipated effective date of March 1, 2020.

(b) Approve a settlement agreement to resolve a potential legal dispute between the City, Allied Waste Services of North America, LLC, dba Allied Waste Services of Santa Clara County, International Disposal Corp of California, GreenWaste Recovery, Inc., and Zero Waste Energy Development Company and authorize the City Attorney to execute a Settlement Agreement to resolve the dispute.

## **OUTCOME**

Approval of this recommendation will settle a dispute between the City, Allied Waste Services of North America, LLC, and Zero Waste Energy Development Company related to performance under the existing agreements, with a full mutual release of all claims among the parties.

As part of this settlement, the terms of the contracts with the City's commercial solid waste contractors, Allied Waste Services of North America, LLC, dba Allied Waste Services of Santa Clara County (Allied) and Zero Waste Energy Development Company (ZWED), for collecting

and processing commercial solid waste, recyclables, organic materials and will be modified and the agreement extended with each contractor by five years.

The proposed contract amendments will shift organic processing from Allied's Materials Recovery Facility (MRF) to ZWED's enclosed, indoor facility, thus reducing odor issues, and will utilize Allied's specialization of collection services with more traditional sorting of recyclables. It will also reconcile four amendments with Allied into a single amended and restated agreement.

Extending the agreement with ZWED by five years will result in sustained organics processing capacity necessary to meet the demand for upcoming Senate Bill (SB) 1383 state regulations requiring local entities to process organic waste.

## **BACKGROUND**

The Environmental Services Department provides recycling and garbage services to all businesses in the City of San José through exclusive franchise agreements with Allied. Allied's collection vehicles and the MRF use the business name Republic Services. Allied's wet/dry commercial solid waste collection program, which serves approximately 8,200 business sites citywide, was designed and is required to ensure all collected waste is processed and recycled to its highest and best use with no material going directly to landfill.

In 2009, when the City redesigned its commercial solid waste system, staff recommended that the city be divided into two separate districts with each district having an exclusive franchisee to collect and process commercial solid waste, recyclables and organic materials. This structure was proposed so that one contractor would collect and process all materials in each district and to avoid disputes between contractors.

Allied proposed the innovative wet/dry system for the commercial system during the RFP process. Council approved Allied as the collection and processing hauler for both districts and approved an agreement with ZWED to provide the organics processing component for the City. Through this system, Allied is to collect all material from commercial businesses and then process recyclable materials and "pre-process" organic material to reduce contamination for use in ZWED's anaerobic digestion facility. Allied also provides collection and customer billing services for this system. Through its contract with the City, ZWED has exclusive rights to all organic waste in the commercial system.

Under the current system, Allied is responsible for pre-processing all solid waste material: wet, dry, and customized. They are also responsible for providing outreach about this unique system to all businesses in San José. This system gives the businesses the flexibility to select from a wet, dry, or customized bin, or combination thereof, based on the type of waste generated by that business ("one-bin plus" system). Thirty-eight percent of businesses have only one bin under this system. Education is a key component of this system to maintain clean waste streams prior to

being processed at the MRF. Allied has four outreach coordinators who are required by the contract to provide education to businesses to ensure proper separation and lower contamination levels in the bins. Since the coordinators are mainly focused on setting up new accounts and responding to complaints, they are unable to reach all 8,200 businesses in the City. Due to lack of continued education for this unique system, material streams are not as clean as intended when the system was originally proposed.

The pre-processed wet (organic) material is delivered to ZWED for further processing. ZWED is an anaerobic digestion facility which produces renewable energy and compost feedstock from the wet material. The quality of the wet material delivered to ZWED depends on the efforts of Allied to process materials in the MRF and to provide education to businesses with their outreach. Despite ZWED's reliance on Allied to "pre-process" material to a certain specification, these two companies are not in contract with each other. The City manages the two agreements independently, which puts the City in the middle of any disputes between the two parties.

Allied's agreement has been amended four times since being entered into in 2012, including the Cooperative Agreement and Fourth Amendment resolving the dispute about the applicability of the City's Living Wage Policy. The City and ZWED also entered into a settlement agreement in 2016 for excessive residue generated by ZWED and cost associated with disposal of this residue. There are also additional ongoing disputes between Allied, ZWED, and the City on issues of contract interpretation related to the exclusivity of certain materials, glass contaminated residual, higher contamination of organic (wet) stream, and the amount of wet material delivered to ZWED. On July 17, 2018, ZWED issued a Notice of Breach to the City for not causing Allied to deliver all organic material to ZWED. ZWED also alleged upwards of \$12 million in damages for the City's alleged nonperformance. The City denied any breach in response to ZWED's Notice of Breach.

On February 4, 2019, the City issued a Notice of Breach to Allied for allegedly landfilling San José organic material without processing it through their MRF as required. Allied denied any breach in response to the City's Notice of Breach. The City has assessed Allied liquidated damages in excess of \$2 million in response to performance deficiencies, primarily related to processing organic material. For the past five years these have been unpaid.

Allied Liquidated Damages	PAID	UNPAID	UNPAID	UNPAID	UNPAID	UNLEVIED
	2013	2014	2015	2016	2017	2018
Customer Service	\$7,500	\$29,400	\$100,200	\$141,200	\$182,100	\$ 79,500
Transition Milestones		\$100,000				
Organics and Recyclables Processing		\$109,370	\$216,454	\$238,866	\$369,683	\$317,664
Diversion	\$112,250	\$25,000	\$111,000	\$141,750	\$25,000	\$25,000
Allowance for compensation paid to ZWED	(\$77,599)	(\$14,025)	(\$35,784)	(\$120,038)	(\$25,000)	(\$25,000)
<b>TOTAL</b>	<b>\$42,151</b>	<b>\$249,745</b>	<b>\$391,870</b>	<b>\$401,778</b>	<b>\$551,783</b>	<b>\$559,864</b>

City staff has attempted to find solutions and maintain a working relationship with all parties. These attempts included regular meetings, site visits and observations of the processes at both facilities. City staff have continually looked for improvements within the constraints of the current agreements, but due to fundamental disagreements between the contractors, staff struggled to resolve these issues.

To find a resolution, the parties worked with a third-party mediator to find a balance and improve the current system with no impact to the rate payers, and a successful path forward was found (discussed below), but specific details are still being negotiated. City staff expects these details to be resolved prior to the anticipated effective date of March 1, 2020.

### **ANALYSIS**

The parties proposed terms, outlined below, are expected to lead to long-term solutions for the City's commercial solid waste system. Due to material changes in how the system currently operates, amendments to each agreement are necessary and the parties seek to implement these amendments through an amended and restated agreement as follows:

- Both Agreements will be extended by five years through June 30, 2032. The extension helps ensure organics processing capacity needed for SB 1383, a state law requiring all jurisdictions in the state to reduce 75% of organics disposal from the 2014 level by 2025. It avoids longer haul routes to alternate sites. The extension also delays an expensive RFP process and allows a window for longer-term solutions as recycling markets stabilize.
- Allied will collect all wet material as usual and, instead of pre-processing it, will deliver said material directly to ZWED. ZWED will process the material for anaerobic digestion and extract recyclables. This provides clear accountability to each party and eliminates ZWED's dependency on Allied for quality of the material.
- For processing, ZWED will receive a flat service fee and will accept a maximum of 105,000 tons annually. This requires Allied to deliver all wet material (estimated 95,000 tons annually) and some dry material (estimated 10,000 tons annually) to meet the maximum allowable tonnage. In the current system, ZWED is paid by Allied based on tons of organic material delivered, which was inconsistent in the past.
- ZWED is required to pay living wage under the current agreement to all employees. With increased tonnage of material needed to be processed at the facility, ZWED plans to add additional sorters who would be paid the City's living wage.
- The new structure eliminates complicated and controversial details of the current agreements, such as classification of materials into organic streams based on levels of contamination, organics not delivered payments, and glass contaminated residual payments which were intended to ensure ZWED either received all organic materials or

received compensation for all organic materials. Now, ZWED will receive all organics through the delivery of all “wet” material and will be responsible for processing this material to generate the appropriate feedstock for its anaerobic digestors.

- This new arrangement minimizes rate payer impact in the short term since costs are shifted and adjusted between the parties. ZWED will receive an increased annual flat payment for processing additional material and the Allied MRF reduces their pre-processing operation by closing the wet line and adjusting staffing on the dry line for processing less material. Future market changes and SB 1383 implementation, however, may impact the ratepayers.
- All collected wet and source-separated recyclable material continues to be processed to extract recyclables and to produce energy, compost and other approved products to the best reasonable efforts of the contractors.
- Both Allied and ZWED are held responsible to provide diversion through the new agreements with compliance incentives by residue disposal costs. The higher the residue to the landfill, the lower the diversion rate. ZWED has agreed to pay residue costs above 41.43% of actual tons delivered, incentivizing them to maintain lower than 41.43% residue. Allied will cover the majority of the initial cost, incentivizing them to provide effective outreach to businesses to increase compliance and the City will contribute a share through a deduction of the Source Reduction and Recycling (AB 939) Fee for Commercial Solid Waste collected by the exclusive franchisee, Allied.
- The Settlement Agreement will resolve all prior claims, known and unknown, that each party may have related to the performance of each agreement. Settled claims include the liquidated damages the City assessed to Allied, ZWED’s Notice of Breach and claim for damages issued to City, and the City’s Notice of Breach to Allied. Additionally, it resolves a claim that International Disposal Corp. of California has alleged against the City and Greenwaste Recovery, Inc., related to disposal of Residue from the Recycle Plus program.

The parties, however, are still negotiating specific details related to implementing the above terms, including Allied’s proposal to start landfilling one-fifth of the total collected commercial waste. This is in direct conflict with the City’s Zero Waste goals. Currently, all commercial solid waste is processed to recover recyclable materials. Allied proposes processing only half of the collected dry material with high recyclable content and sending the remaining dry, lower-recyclable content material directly to landfill (54,000 tons annually). Allied proposes increased outreach and education to our business community over the course of 24 months to adjust service levels and increase clean recyclables to achieve better diversion of the material that is processed. However, Allied has no plan to resume processing all of the material.

One of the key challenges with the current wet-dry system is the ability to routinely reach all the businesses to educate and enforce the system. Proper separation of materials and types of bins available at businesses is key to the success of the program. Additional outreach is needed to

affect behavior change, implement effective source separation, and minimize contamination in the bins. To meet this goal, as part of the 2020-2021 budget process, the Department intends to request additional staff for the City's commercial program to work closely with businesses and identify efficient and effective ways to implement the wet-dry system.

## **CONCLUSION**

The new agreements will alleviate disputes between Allied, ZWED, and the City while providing improved services to the businesses at no additional cost. The resolution also settles potential legal disputes and avoids litigation among the parties.

## **EVALUATION AND FOLLOW-UP**

As part of the rate setting process, it is anticipated that staff will return to council in May 2020.

## **CLIMATE SMART SAN JOSE**

The recommendation in this memo aligns with one or more Climate Smart San José energy, water, or mobility goals.

## **POLICY ALTERNATIVES**

If the recommendations are not approved by City Council, the current system will continue and the disputes stemming from this system will not be resolved. Litigation may occur considering the ongoing disputes between the parties.

## **PUBLIC OUTREACH**

This memorandum will be posted on the City's Council Agenda website for the February 25, 2020 Council Meeting.

## **COORDINATION**

This memorandum was coordinated with the City Attorney's Office, Department of Public Works, Department of Planning, Building, and Code Enforcement, and the City Manager's Budget Office.

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### **COMMISSION RECOMMENDATION/INPUT**

No commission recommendation or input is associated with this action.

### **COST SUMMARY/IMPLICATIONS**

This new arrangement minimizes rate payer impact in the short term since costs are shifted and adjusted between the parties. As part of the rate setting process, it is anticipated that staff will return to council in May 2020. As part of the 2020-2021 budget process, the Department intends to request additional staff for the City's commercial program to work closely with businesses and identify efficient and effective ways to implement the wet-dry system.

### **CEQA**

Determination of Consistency with the Envision San José 2040 General Plan Final  
Environmental Impact Report and Supplemental Program Environmental Impact Report, File  
No. ER19-084.

/s/

KERRIE ROMANOW  
Director, Environmental Services

For questions, please contact Valerie Osmond, Deputy Director, Integrated Waste Management, Environmental Services at (408) 535-8557.