



Project title: Biosolids Tolling Agreement, Authorization to Sign

City Council Agenda Item Cover Sheet

Council Bill #

Agenda dates requested:

7/8/20

Briefing

Proposed action

Consent XXX

Action

Ordinance

Public hearing

Yes ☒ No

Budget amendment:

Yes ☒ No

PowerPoint presentation:

Yes ☒ No

Attachments:

Agreement

Department(s) involved:

Public Works & Legal

Contact person:

Jim Miller

Phone number:

425-257-8880

Email:

jmillier@everettwa.gov

Initialed by:

Department head

Administration


Council President

Project: Biosolids Tolling Agreement

Partner/Supplier : Everett's three wholesale sewer customers

Location: Marshland area just south of the Snohomish River

Preceding action: None

Fund: 401-Biosolids Management

Fiscal summary statement:

Agreement would result in the City Utility Fund receiving \$148,967.24 within 30-days of full execution.

Project summary statement:

In 2019, the City's sewer utility purchased land from City's general fund for \$1.24 million in the Marshland area. This was for the purpose of application of biosolids generated by the City's sewer utility. This is anticipated to generate cost savings for the utility over time.

The City's three wholesale sewage customers are Alderwood Water and Wastewater District , Mukilteo Water and Wastewater District and Silver Lake Water and Sewer District.

The City and the Districts have a dispute regarding the Districts' reimbursement obligations to the City utility for the Marshland purchase under their wholesale sewage disposal contracts. The City claims the reimbursement obligation of all three Districts combined is \$297,934. The Districts claim it is less than that.

The tolling agreement attached: (1) provides two years for negotiation on the reimbursement issue and for biosolids disposal cost data to accumulate, (2) requires the Districts to pay under protest half of the disputed amount within 30 days after signature, and (3) sets up an arbitration process if the parties cannot reach resolution within two years.

Recommendation (exact action requested of Council):

Authorize the Mayor to sign the attached Biosolids Tolling Agreement.

CITY

BIOSOLIDS TOLLING AGREEMENT

RECITALS

WHEREAS, the City of Everett, a municipal corporation of the State of Washington (the "City"), and the Districts; Silver Lake Water and Sewer District (SLWSD), Alderwood Water and Wastewater District (AWWD), and Mukilteo Water and Wastewater District (MWWD), all municipal corporations of the State of Washington, (collectively, the "Districts") have entered into the following agreements regarding sewage disposal (collectively, the "Contracts");

<u>District</u>	<u>Date of Agreement</u>
Alderwood Water and Wastewater District	December 30, 1981
Mukilteo Water and Wastewater District	May 4, 1983
Silver Lake Water and Sewer District	March 31, 2015

WHEREAS, the City and the Districts have a dispute regarding the Districts' reimbursement obligations to the City regarding the purchase of certain agricultural property for biosolids disposal (the "Agricultural Property"); and

WHEREAS, the Districts' position is they are not contractually responsible for the costs associated with the purchase of Agricultural Property for biosolid disposal since, according to the Districts, contractually and historically, reimbursement to the City for biosolid disposal has been paid as a maintenance and operations charge pursuant to the respective agreements; and

WHEREAS, the City's position includes, but is not limited to, that the purchase of the Agricultural Property is a capital expense subject to cost sharing pursuant to the Contracts; and

WHEREAS, the City and Districts agree to execute a Biosolids Tolling Agreement in which the Districts will pay half of their respective shared cost under protest, during which over a two year period the City will gather data on City biosolids disposal costs and the parties will continue to negotiate.

NOW, THEREFORE, the City and the Districts (each, a "Party" and, collectively, the "Parties") enter into this agreement ("Tolling Agreement"), and, intending to be bound thereby, make the following promises, which are acknowledged by the Parties as mutual and adequate consideration:

AGREEMENT

1. Incorporation of Recitals. The Recitals are incorporated by reference into this Tolling Agreement.
2. Effective and Expiration Dates. The effective date ("Effective Date") of this Tolling Agreement shall be 12:00 a.m. (Pacific Time) on July 1, 2020, regardless of the date this Tolling Agreement is signed by the Parties. This Tolling Agreement shall expire at 11:59 p.m. (Pacific Time) on June 30, 2022 ("Expiration Date"); provided, however, that any party may terminate the Tolling Agreement prior to the Expiration Date upon sixty (60) days' advance written notice. The 60-day notice period shall begin on the date the Party sent the written notice as provided by Section 7, below. In the case of a termination by written notice, the "Expiration Date" shall be the expiration date of the 60-day notice period.
3. Continue to Negotiate. During the two-year period, the parties will continue to negotiate. The City will document City costs when utilizing the Agricultural Property for the disposal of biosolids. The City will also gather City historical biosolids disposal cost data. The City will share this data with the Districts as it becomes available so as to inform the negotiations.
4. Tolling of Statutes of Limitation. To the extent permitted by Washington law, the Parties hereby agree that in any litigation between or among them relating to or arising out of the property reimbursement dispute described in the Recitals above, no Party, in asserting any affirmative defense based on any limitations period, including, without limitation, statutes of repose and limitation, laches, or bar to action for failure to timely make demand or to timely file (collectively, "Statutes of Limitation"), shall in its computation of time for such defense include any time which elapses between and including the Effective Date and the Expiration Date (the "Tolling Period"). Notwithstanding the foregoing, each Party hereby expressly reserves its right to assert a defense (a) based upon the expiration of any of the Statutes of Limitation prior to the Effective Date or (b) which is otherwise available to such Party and not based upon the expiration of any of the Statutes of Limitation prior to the Effective Date.
5. Payment Under Protest. No later than 30 days after full execution of this Tolling Agreement, the Districts will pay under protest a total amount equal to \$148,967.24, which is one half of the amount under dispute. The individual payments shall be: AWWD = 22,927.57; MWWD = \$24,786.56; SLWSD = \$101,253.11.
6. Effect on Prejudgment Interest. If any Party obtains a judgment against the other with respect to the Contract, the prevailing Party shall exclude the Tolling Period in the computation of any prejudgment interest. The provisions of this paragraph 5 shall survive the Expiration Date.
7. No Admission of Fault. No Party admits any breach, fault, or liability of any kind, and no Party waives or concedes any claim or defense, relating to or arising out of the Contracts or otherwise related to the dispute described above.

8. Fees and Costs. The rights of any prevailing Party to recover attorneys' fees and costs incurred in enforcing the Contract pursuant to the terms thereof, if any, is unmodified by this Tolling Agreement.

9. Notice. Formal notice under and official communications between the Parties regarding this Tolling Agreement shall be sent by first class mail as follows:

To the City:
Mayor
City of Everett
2930 Wetmore Avenue
Everett WA 98201

To AWWD:
General Manager
Alderwood Water and Wastewater District
3626 156th St. SW
Lynnwood, WA 98087

To SLWSD:
General Manager
Silver Lake Water and Sewer District
15205 41st Ave SE
Bothell, WA 98012

To MWWD:
General Manager
Mukilteo Water and Wastewater District
7824 Mukilteo Speedway
Mukilteo, WA 98275

10. Justifiable Reliance. The City acknowledges and agrees that the District is justifiably and reasonably relying upon the terms and conditions set forth in this Tolling Agreement, that the Statutes of Limitation are subject to being tolled, and that this Tolling Agreement is enforceable in accordance with its terms.

11. Arbitration

A. Arbitration Notice. If the dispute described above is not resolved by June 30, 2022 and any Party desires arbitration, the Party shall provide notice to the other Parties no earlier than July 1, 2022 and no later than September 30, 2022. Any notice delivered outside of such notice period is ineffective.

B. Arbitration Panel. The arbitration will be conducted by a three-member panel. The City shall each select one panel member, and the Districts will select one panel member. Those two panel members will select the third panel member. Each side shall pay the costs of its chosen arbitrator, with all other arbitration costs split evenly between the City and the Districts. The arbitration panel's authority is limited to determining the Districts' reimbursement obligation, if any, to the City under the Contracts for the City's purchase of the Agricultural Property. For example, the arbitration panel may decide to require that the Districts pay the City the entire unpaid reimbursement amount claimed by the City, or the panel could decide to require the City to repay to the Districts the Districts' one-half payment made under protest. The arbitration panel will determine the relevance, and weight to be given to, any biosolids disposal cost data or financial analysis relating to the Agricultural Property that may be offered by a party at the hearing.

C. Arbitration Decision. The arbitration panel shall promptly issue a decision. The arbitration decision is binding on the Parties.

12. Authority. Each Party represents that this Tolling Agreement has been duly and validly authorized, executed and delivered by such Party and no other action is requisite to the valid and binding execution, delivery and performance of this Tolling Agreement by such Party.

13. Counterparts. This Tolling Agreement may be executed in counterparts and delivered via facsimile or other means of electronic image transmission, all of which counterparts, together, shall constitute one and the same instrument, be deemed an original for all purposes and be binding on the Parties as if all signatures were affixed to a single document.

IN WITNESS WHEREOF, the Parties have caused this Tolling Agreement to be executed by their proper Officers on the dates listed below.

CITY OF EVERETT

Dated: _____

Cassie Franklin, Mayor

ATTEST

City Clerk

APPROVED AS TO FORM

City Attorney

SILVER LAKE WATER AND SEWER
DISTRICT

Dated: _____

By: _____

Position: _____

ATTEST

ALDERWOOD WATER AND
WASTEWATER DISTRICT

Dated: _____

By: _____

Position: _____

ATTEST

MUKILTEO WATER AND WASTEWATER
DISTRICT

Dated: _____

By: _____

Position: _____

ATTEST
