

ORIGINAL

06-0103

**AGREEMENT**

**BETWEEN THE CITY OF FREMONT**

**AND**

**BLT ENTERPRISES OF FREMONT, LLC**

**FOR**

**CURBSIDE RECYCLABLE MATERIALS AND CURBSIDE  
ORGANIC WASTE SERVICES**

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**EXHIBITS:**

- Exhibit A Curbside Recycling and Curbside Organic Waste Fees**
- Exhibit B Insurance Requirements**
- Exhibit C Waste Characterization Protocols**
- Exhibit D Financial Guaranty Agreement**
- Exhibit E Load Checking Policy**
- Exhibit F Lender’s Rights**

This Agreement is entered into and Executed as of this \_\_\_\_ day of May, 2006, by and between the City of Fremont (the "City"), a political subdivision of the State of California, and BLT Enterprises of Fremont, Inc. ("the Contractor"), a California Corporation.

*LLC GLOBL*  
*CH*

**RECITALS**

WHEREAS, the State of California (the "State") through enactment of the California Integrated Waste Management Act of 1989, has directed all local agencies to promote recycling and to maximize the use of feasible source reduction, recycling and composting options in order to reduce the amount of municipal solid waste that must be disposed of by land disposal; and

WHEREAS, on November 26, 2002 the City Council, pursuant to a competitive procurement process, approved the selection of the Contractor; and

WHEREAS, commencing on June 1, 2006, the City, through its contracts with its Collection Contractor(s) and/or in any other manner consistent with Applicable Law, shall cause all Curbside Recyclable and Curbside Organic Materials collected within the City in connection with the City's recycling programs to be delivered to the Facility, and upon such delivery, the City shall sell and the Contractor shall purchase all such Curbside Recyclable Materials; and

WHEREAS, the Contractor shall operate and maintain the Facility, process all Curbside Recyclable Materials, Market Recovered Materials, and Accept and Transfer all Curbside Organic Materials, all in accordance with the terms and conditions of this Agreement.

**AGREEMENT**

NOW, THEREFORE, in consideration of the mutual promises, covenants, guaranties and conditions contained in this Agreement and for other goods and valuable consideration, the City and Contractor agree as follows:

**ARTICLE 1. DEFINITIONS**

Unless a term is otherwise defined in this Agreement, definitions of terms used in this Agreement will be the same as those found in Division 30, commencing with Section 40000, Part 1 Chapter 2 of the California Public Resources Code, the definitions in the Public Resources Code as presently defined, and as they may be amended in the future, and the Fremont Municipal Code. In the event of conflict between the definition of a term as found in the California Public Resources Code or in City ordinances and this Agreement, the definition in this Agreement shall supersede the definition found in the Public Resources Code or in City ordinances. Any terms not defined in this Agreement shall have the meaning ascribed to them in the Transfer Station Agreement, if there is any conflict between the definitions in the two agreements, the definition in the Transfer Station Agreement shall prevail.

**Accept** (or **Acceptance** or other variations thereof) is the transfer of Ownership of materials to Contractor from the party Delivering the materials. Materials will be deemed Accepted unless Contractor rejects the materials within the same calendar day of receipt.

**Act** means the California Integrated Waste Management Act of 1989 (Division 30, commencing with Section 40000 of the California Public Resources Code), as amended, supplemented, superseded and replaced from time to time.

**Agreement** means this Agreement, including all Exhibits which are incorporated herein by reference. This Agreement may be amended and supplemented by an agreement in writing signed by both Parties.

**Applicable Law** means all statutes, rules, regulations, Permits, orders, or requirements of the United States, State, County, City and local government authorities and agencies having applicable jurisdiction, that apply to or govern the Facility, the Site or the performance of the Parties' respective Obligations hereunder in effect as of the Execution Date and as amended and/or enacted hereinafter.

**Base Term** means the twenty (20) year period beginning on the Commencement Date.

**Change in Law** means the occurrence of any event or change in Applicable Law as follows:

(1) the adoption, promulgation, amendment, modification, rescission, revision or revocation of any Applicable Law or change in judicial or administrative interpretation thereof occurring after the date hereof; or

(2) any order or judgment of any Federal, State or local court, administrative agency or governmental body issued after the date hereof if:

(a) such order or judgment is not also the result of the willful misconduct or negligent action or inaction of the Party relying thereon or of any third party for whom the Party relying thereon is directly responsible; and

(b) the Party relying thereon, unless excused in writing from so doing by the other Party, shall make or have made, or shall cause or have caused to be made, Reasonable Business Efforts in good faith to contest such order or judgment (it being understood that the contesting in good faith of such an order or judgment shall not constitute or be construed as a willful misconduct or negligent action of such Party); or

(3) the imposition by a governmental authority or agency of any new or different material conditions in connection with the issuance, renewal, or modification of any Permit after the Execution Date; or

(4) the failure of a governmental authority or agency to issue, or the suspension or termination of, any Permit after the date hereof.

**City** means the City of Fremont, State of California.



**City Vehicle(s)** means vehicles Owned and operated by City.

**City's Obligations** means each and every obligation and liability of the City specified in this Agreement.

**Collection Contractor(s)** means the entity or entities that, separate from this Agreement, are contracted, licensed, permitted, or otherwise designated by the City to collect Curbside Recyclable Materials and Curbside Organic Waste. In the event the City shall take over collection responsibilities for any reason, then the City shall be deemed to be the "Collection Contractor" for purposes of this Agreement.

**Commencement Date** means the date when Contractor begins to Accept One Hundred Percent (100%) of the City's Curbside Recyclable Materials and Curbside Organic Waste

**Contamination** means Municipal Solid Waste contained in Curbside Recyclable Materials

**Contamination Limitation** means the Municipal Solid Waste content in Curbside Recyclable Materials Delivered to the Facility not to exceed 12%

**Contractor** means BLT Enterprises of Fremont, LLC, a California Corporation.

**Contractor Default** means Contractor's failure to meet one or more of Contractor's Obligations.

**Contractor's Obligations** means each and every obligation and liability of Contractor specified within this Agreement.

**County** means the County of Alameda, State of California.

**CPI** means the All Urban Consumers San Francisco - Oakland - San Jose Metropolitan Area Index (All Urban Consumers; where 1982-84 = 100) compiled and published by the United States Department of Labor, Bureau of Labor Statistics. If such index is no longer published, such other index published by the Department of Labor, Bureau of Labor Statistics or its successor agency, for the geographic area corresponding to Alameda County generally or the City specifically, shall be the CPI subject to City approval.

**Curbside Organic Waste** is a type of residential Permitted Material that is comprised primarily of leaves, cut grass, tree trimmings or other organic debris such as food scraps that are segregated in a separate container prior to collection; and are Delivered separately to the Facility from other Permitted Material

**Curbside Organic Waste Transfer Fee** is the Per-Ton Fee paid by City on Curbside Organic Waste volume that is consolidated at the Facility and Transferred to the Organic Waste Processing Facility as identified and adjusted in Exhibit A.

**Curbside Recyclable Materials** are a type of residential Permitted Materials that are commingled and/or presorted. Curbside Recyclable Materials include high grade paper, glass, metal, plastic, aluminum, newspaper, corrugated paper or other materials having a potential for

reuse or reprocessing, that are segregated in a separate container prior to collection; and are Delivered separately to the Facility from other Permitted Materials.

**Curbside Recyclable Materials Payment** is the Per-Ton Fee paid to the City for Curbside Recyclable Materials volume as identified and adjusted in Exhibit A.

**Delivery (Deliver or Delivered or other variations thereof)** means arrival of Curbside Recyclable Materials and Curbside Organic Waste at the Site during Facility Receiving Hours for the purposes of Acceptance.

**Designated Disposal Facility** means the facility to be used by Contractor for Disposal of Residue from Curbside Recyclable Materials.

**Designated Organics Processing Facility** means the facility to be used by Contractor for Transfer to and Processing of Curbside Organic Materials.

**Direct Costs** shall have the meaning as defined in the Transfer Station Agreement.

**Disposal** means depositing of Residue at the Designated Disposal Facility and Acceptance of Residue by the Disposal Facility Contractor.

**Disposal Facility Contractor** is the Party which enters into an agreement with the City for Disposal capacity at the Designated Disposal Facility.

**Disposal Facility Receiving Hours** means the hours when the Disposal Contractor must Accept Permitted Materials from City's Transfer Station and Material Recovery Facility as defined in the contract between the City and Waste Management for Disposal at Tri-Cities or Altamont Landfill.

**Disposition** means to provide safe and lawful handling and removal of Hazardous Waste from the Site including, but not limited to treatment, processing, recycling, destruction, transportation, and disposal of such materials.

**Disposition Costs** are the Contractor's Direct Costs for Disposition including cost of transportation, disposal, and packing supplies such as drums and lab packs.

**Diversion** shall have the meaning as defined in the Transfer Station Agreement.

**Effective Date** means the date on which this Agreement is executed by all parties.

**Execution (or Execute or other variations of)** means to perform what is required or provided by, or to complete.

**Exhibit(s)** means any or all of the attachments to this Agreement as of the Execution Date or as amended or added at any time during the Term.

**Extension (or Extend)** means to cause the end date of this Agreement to be beyond the twentieth (20th) anniversary of the commencement date of the Base Term through an amendment of this Agreement.

**Facility** means the Contractor's transfer station and materials recovery facility constructed to fulfill Contractor's Obligations hereunder and includes Site improvements, utility interconnections, the scalehouse, buy-back recycling center, Household Hazardous Waste facility, a building for Transfer and materials Recovery and Processing areas, and Visitors Education Center, together with administrative offices and ancillary support facilities, furnishings and equipment, and any and all other physical structures and improvements to the Site.

**Facility Operation** means all Contractor's Obligations, including operation and maintenance of the Facility in accordance with the provisions hereof and Applicable Law, together with Acceptance of Permitted Material for Transfer and/or Recovery, Processing, Transferring Residue for Disposal, Marketing, Transferring Recovered Materials to Market, and procuring and maintaining insurance and bonds.

**Facility Receiving Hours** are hours when Contractor must Accept Permitted Material.

**Financial Guaranty Agreement** is the agreement attached as Exhibit D executed by a party other than the Contractor guaranteeing the timely and full performance of Contractor's Obligations.

**Force Majeure** events include and are limited to floods, earthquakes, other extraordinary acts of nature, war or insurrection, riots, or other similar catastrophic events, not caused or maintained by Contractor, which event is not reasonably within the ability of Contractor to intervene in or control, to the extent that such event has a material adverse effect on the ability of Contractor to perform Contractor's Obligations. No event, the effects of which could have been prevented by reasonable precautions, including compliance with Applicable Laws and Standard Industry Practices shall be a Force Majeure event. No failure of performance by any subcontractor of Contractor shall be a Force Majeure event unless such failure is itself caused by a Force Majeure event as to the subcontractor.

**Guarantor** means BLT Enterprises, a California Corporation.

**Hazardous Waste** means Unpermitted Materials that are hazardous, including:

(1) "Hazardous Waste" pursuant to Section 40141 of the California Public Resources Code; all substances defined as Hazardous Waste, acutely Hazardous Waste, or extremely Hazardous Waste by Sections 25110.02, 25115, and 25117 of the California Health and Safety Code (the California Hazardous Waste Control Act), California Health and Safety Code Section 25100 et seq., and future amendments to or recodification of such statutes or regulations promulgated thereunder, including 23 California Code of Regulations Sections 2521 and 2522; and

(2) materials regulated under the Resource Conservation and Recovery Act, 42 U.S.C. Section 6901 et seq., as amended (including, but not limited to, amendments thereto

made by the Solid Waste Disposal Act Amendments of 1980), and related Federal, State and local laws and regulations;

(3) materials regulated under the Toxic Substance Control Act, 15 U.S.C. Section 2601 et seq., as amended, and related Federal, State of California, and local laws and regulations, including the California Toxic Substances Account Act, California Health and Safety Code Section 25300 et seq.;

(4) materials regulated under the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC 9601, et seq., as amended, and regulations promulgated thereunder; and

(5) materials regulated under any future additional or substitute Federal, State or local laws and regulations pertaining to the identification, transportation, treatment, storage or disposal of toxic substances or Hazardous Waste.

If two or more governmental agencies having concurrent or overlapping jurisdiction over Hazardous Waste adopt conflicting definitions of "Hazardous Waste", for purposes of collection, transportation, processing and/or disposal, the more restrictive definition shall be employed for purposes of this Agreement.

**Holidays** are defined as New Year's Day, Labor Day, Thanksgiving Day, and Christmas Day.

**Household Hazardous Waste** are those wastes resulting from products used by the general public for household purposes which, because of their quantity, concentration, or physical, or chemical characteristics, may pose a substantial known or potential hazard to human health or the environment when improperly treated, disposed, or otherwise managed.

**Labor Action** means labor unrest, including strike, work stoppage, slowdown, sick-out, picketing and any other concerted job action.

**Lender(s)** is party to which Contractor has a Financing Obligation(s) with regard to Facility Development and/or Operations.

**Marketing** (or **Market** or other variations thereof) means all Obligations of Contractor hereunder with respect to selling or giving away Recovered Materials, including Market promotion, storage, insurance, packaging, transportation, sales, weighing, and maintaining records with respect thereto.

**Notice** (or **Notify** or other variation thereof) means written Notice given by one Party to the other Party in relation to the execution of the various Obligations of both Parties under this Agreement.

**Operation** (or **Operate** or **Operating** or other variation thereof) means all activities and responsibilities of Contractor.

**Organic Waste Processing Facility** means the operation designated by the City for the receipt, Processing and Marketing of Curbside Organic Waste collected under agreement with the City.

**Ownership** (or **Own** or other variations thereof) means Ownership as defined in the constructive Ownership provisions of Section 318(a) of the Internal Revenue Code of 1986, as in effect on the date here, and Section 318(a)(5)(C) shall be disregarded. For purposes of determining Ownership under this paragraph and constructive or indirect Ownership under Section 318(a), Ownership interest of less than ten (10) percent shall be disregarded and percentage interests shall be determined on the basis of the percentage of voting interest of value which the Ownership interest represents, whichever is greater.

**Party** and **Parties** refers to the City and Contractor, individually and together.

**Permits** means all Federal, State and local, statutory or regulatory approvals, or other measures or mechanisms necessary for Contractor to be in full legal compliance in the performance of all Contractor's Obligations, as renewed or amended from time to time.

**Permitted Materials** means wastes or other materials that the Facility may Accept under its Permits and Applicable Law, including Curbside Recyclable Materials, and Curbside Organic Waste and other materials that Contractor Accepts, Processes, Recovers, or Disposes.

**Person** includes any individual, firm, association, organization, partnership, corporation, trust, joint venture, the United States, the State, a county, a municipality or special purpose district, or any other entity whatsoever.

**Prevailing Wage** means wages and benefits to be paid as determined by the Department of Industrial Relations (DIR). In the absence of a prevailing wage determination by the DIR, the initial prevailing wage will be determined as follows for the following categories of workers: equipment operator and baler operator. In such circumstances the prevailing wage shall be the single hourly rate and benefit package being paid to the greatest number of workers engaged in that job category in a transfer station/material recovery facility located within Alameda County. In the future if the employees elect to unionize, consistent with Applicable Law, the Prevailing Wage may also be the wage and benefit rates agreed upon pursuant to a collective bargaining agreement between Contractor and a recognized union representing Contractor's employees.

**Prime Rate** means that rate of interest published from time to time in *The Wall Street Journal*, on the date hereof being the base rate on corporate loans posted by at least seventy-five percent (75%) of the nation's largest banks. With respect to interest payable hereunder at the Prime Rate, any change in the Prime Rate during the period in which such interest is accruing shall be effective as of the date of such change.

**Process** (or **Processing** or any other variation thereof) means baling, crushing, shredding, chipping, grinding, extracting, mechanical or hand classification, and any other method of handling Permitted Materials by Contractor at the Facility after Acceptance and before Marketing. **Process** (or **Processing**) shall also mean the treatment of the Curbside Organic Waste at the Designated Organic Waste Processing Facility.

**Reasonable Business Efforts** means those efforts a reasonably prudent business Person would expend under the same or similar circumstances in the exercise of such Person's business

judgment, intending in good faith to take steps calculated to satisfy the obligation that such Person has undertaken to satisfy.

**Recovered Materials** means recyclable materials Recovered at the Facility from Permitted Materials.

**Recovery** (or **Recover, Recovered or other variations thereof**) means the picking, pulling, sorting, separating, classifying and recovery of recyclable materials from Permitted Material, whether by manual or mechanical means, by Contractor at the Facility, after Acceptance of Permitted Materials and before Marketing of Recovered Materials Accepted by Contractor.

**Replacement Operator** is a third party designated by the City to Operate the Facility in the event of Contractor breach or default or due to an Uncontrollable Circumstance.

**Residue** (or **Residual** or a variation thereof) means Permitted Material remaining after Acceptance, Recovery, and Processing thereof that require Disposal. Residue does not include Recovered Materials.

**Rolling Stock** means the mobile equipment used at the Facility and on the highway to meet Contractor's Obligations.

**Site** means the parcel(s) of land on which the Facility will be situated.

**Standard Industry Practice(s)** means reasonable diligence and prudence on part of Contractor in employing, at a minimum, the then-current development, operations, management, and business practices and standards of the California solid waste management industry in meeting Contractor's Obligations.

**State** means the State of California.

**Term** of this Agreement means the Base Term and any Extensions granted beyond the Base Term.

**Ton** means a unit of measure for weight equivalent to two thousand (2,000) standard pounds (where each pound contains 16 ounces).

**Transfer** (or **Transferring** or other variations thereof) means loading Residue or Curbside Organic Waste at the Facility, transporting Residue, Curbside Organic Waste or other Permitted Materials to the Designated Disposal or Processing Facility.

**Transfer Station Agreement** means the Agreement Between the City of Fremont and BLT Enterprises, Inc. for Recyclables Diversion and Transfer Services dated April 20, 2004, as amended.

**Uncontrollable Circumstance** means any act, event or condition outside either Party's control and not the result of willful or negligent action or inaction on the part of such Party, whether

affecting the Facility or either Party, which materially and adversely affects the ability of either Party to perform any of its Obligations.

**Unpermitted Materials** mean wastes or other materials that the Facility may not Accept under its Permits, including:

- (1) unpermitted landfill wastes, including all materials that the Designated Disposal Facility is not permitted to Accept excluding White Goods with chlorinated fluorocarbons and capacitors removed, and other materials that Contractor Accepts and safely handles, recycles, or disposes;
- (2) asbestos, including friable materials that can be crumbled with pressure and are therefore likely to emit fibers, being a naturally occurring family of carcinogenic fibrous mineral substances, which may be a Hazardous Waste if it contains more than one percent (1%) asbestos;
- (3) Ash residue from the incineration of solid wastes, including municipal waste, infectious waste described in item (8) below, wood waste, sludge, and agricultural wastes;
- (4) Auto shredder "fluff" consisting of upholstery, paint, plastics, and other non-metallic substances, which remains after the shredding of automobiles;
- (5) Large dead animals;
- (6) Hazardous Wastes;
- (7) Industrial solid or semi-solid wastes that pose a danger to the Operation of the Facility, including cement kiln dust, or process residues;
- (8) Infectious wastes that have disease transmission potential and are classified as Hazardous Wastes by the State Department Health Services, including pathological and surgical wastes, medical clinic wastes, wastes from biological laboratories, syringes, needles, blades, tubing, bottles, drugs, patient care items such as linen or personal or food service items from contaminated areas, chemicals, personal hygiene wastes, and carcasses used for medical purposes or with known infectious diseases;
- (9) Liquid wastes that are not spadeable, usually containing less than fifty percent (50%) solids, including cannery and food processing wastes, landfill leachate and gas condensate, boiler blowdown water, grease trap pumpings, oil and geothermal field wastes, septic tank pumpings, rendering plant byproducts, sewage sludge, and those liquid wastes that may be Hazardous Wastes;
- (10) Radioactive wastes under Chapter 7.6 (commencing with Section 25800) of Division 20 of the State Health and Safety Code, and any waste that contains a radioactive material, the storage or disposal of which is subject to any other State or Federal regulation and/or;

(11) Sewage sludge comprised of human (not industrial) residue, excluding grit or screenings, removed from a wastewater treatment Facility or septic tank, whether in a dry or semi-dry form.

Upon receipt of Permits, the Parties shall promptly modify this definition of “Unpermitted Material” as necessary to meet the provisions of Permits. The Parties shall during the Term promptly amend this definition of “Unpermitted Material” to reflect any applicable changes in Permits or Applicable Law.

**Vehicle Turnaround Guarantee** means a guarantee to Operate Facility in such a manner that the City and its Collection Contractor(s) are able to Deliver to and unload Curbside Recyclable Materials and Curbside Organic Waste at the Facility in a timely manner

**Working Days** mean days during which City offices are open to do business with the public.

## **ARTICLE 2. REPRESENTATIONS AND WARRANTIES**

**2.01 Of Contractor.** Contractor represents and warrants as of the date hereof:

**a. Status.** Contractor is a limited liability company duly organized, validly existing and in good standing under the laws of California, and is qualified to do business in the State.

**b. Authority and Authorization.** Contractor has full legal right, power and authority to Execute and deliver this Agreement and perform Contractor’s Obligations hereunder. This Agreement has been duly Executed and delivered by Contractor and constitutes a legal, valid and binding obligation of Contractor enforceable against Contractor in accordance with its terms.

**c. Verification of Statements and Information in Proposal.** Contractor’s Proposal, on which City has relied upon in entering into this Agreement, is correct and complete in all material respects at the time originally submitted to the City.

**d. No Conflicts.** Neither the Execution or delivery by Contractor of this Agreement, the performance by Contractor of Contractor’s Obligations, nor the fulfillment by Contractor of the terms and conditions hereof: (1) conflicts with, violates or results in a breach of any Applicable Law; or (2) conflicts with, violates or results in a breach of any term or condition of any judgment, order or decree of any court, administrative agency or other governmental authority, or any agreement or instrument to which Contractor is a Party or by which Contractor or any of its properties or assets are bound, or constitutes a default thereunder; or (3) will result in the creation or imposition of any lien, charge or encumbrance of any nature whatsoever upon any of the properties or assets of the Contractor, other than as specifically permitted hereunder.

**e. No Approvals.** No approval, authorization, license, Permit, order or consent of, or declaration, registration or filing with any governmental or administrative authority, commission, board, agency or instrumentality is required for the valid Execution and delivery of this Agreement by Contractor, except such as have been duly obtained from its Board of Directors. Contractor has or will have in due time all licenses, Permits, City



business license, qualifications and approvals of whatsoever nature which are legally required for Contractor to provide services hereunder and meet Contractor's Obligations, and Contractor further warrants that it shall, at its sole cost and expense, keep in effect or obtain at all times during the Term all licenses, Permits, and approvals which are legally required for Contractor to provide such services and meet Contractor's Obligations.

**f. No Litigation.** There is no action, suit, proceeding or investigation, at law or in equity, before or by any court or governmental authority, commission, board, agency or instrumentality pending to the best of Contractor's knowledge, threatened, against Contractor wherein an unfavorable decision, ruling or finding, in any single case or in the aggregate, would materially adversely affect the performance by Contractor of Contractor's Obligations hereunder or in connection with the transactions contemplated hereby, or which, in any way, would adversely affect the validity of, or the ability to enforce this Agreement or any other agreement or instrument entered into by Contractor in connection with the transactions contemplated hereby.

**g. Patents, Trademarks, Licenses.** The Contractor shall hold or possess a right to use all proprietary property including patents, rights to patents, trademarks, copyrights, and licenses, as the case may be of any equipment or software necessary for the performance by the Contractor of Contractor's Obligations and the transactions contemplated by this Agreement. As of the date hereof, Contractor represents that it does not know any material conflict with the rights of other parties regarding proprietary property. Contractor acknowledges and agrees that such representation is material.

**h. Contractor Investigation.** Contractor has made an independent investigation to its satisfaction of matters, conditions and circumstances relating to its Execution and delivery of this Agreement and Contractor's Obligations hereunder, including the nature and amount of the Permitted Material generated within the City and the recycling and source reduction programs now in effect or currently planned to be put into effect in the City.

**2.02 Of the City.** The City represents and warrants as of the date hereof:

**a. Status.** The City is a political subdivision of the State, duly organized and validly existing under the Constitution and laws of the State.

**b. Authority and Authorization.** The City has full legal right, power and authority to Execute and deliver this Agreement, and perform City's Obligations hereunder. This Agreement has been duly Executed and delivered by the City and upon Execution constitutes a legal, valid and binding Obligation of the City enforceable against the City in accordance with its terms. The City has complied with Applicable Law in entering into this Agreement.

**c. No Warranty.** City makes no warranties with respect to waste quantity or characterization data contained in its request for proposal, or subsequently distributed to Contractor. The City expressly disclaims any warranties, either express or implied, as to the quantity or composition for any particular purpose of Permitted Material Delivered to the Facility.

**d. No Conflicts.** Neither the Execution or delivery by the City of this Agreement, the performance by the City of City's Obligations hereunder, nor the fulfillment by the City of the terms and conditions hereof: (1) conflicts with, violates or results in a breach of Applicable Law; or (2) conflicts with, violates or results in a breach of any term or condition of any judgment, order or decree of any court, administrative agency or other governmental authority, or any agreement or instrument to which the City is a Party or by which the City or any of its properties or assets are bound, or constitutes a default thereunder.

**e. No Approvals.** No approval, authorization, license, permit, order or consent of, or declaration, registration or filing with any governmental or administrative authority, commission, board, agency or instrumentality is required for the valid Execution and delivery of this Agreement by the City, except such as have been duly obtained from the City Council.

**f. No Litigation.** There is no action, suit, proceeding or investigation, at law or in equity, before or by any court or governmental authority, commission, board, agency or instrumentality pending or, to the best of the City's knowledge, threatened against the City wherein an unfavorable decision, ruling or finding, in any single case or in the aggregate, would materially adversely affect the performance by the City of City's Obligations hereunder or in connection with the transactions contemplated hereby, or which, in any way, would adversely affect the validity of, or the ability to enforce this Agreement or any other agreement or instrument entered into by the City in connection with the transactions contemplated hereby.

**g. Public Works.** The services provided by Contractor do not constitute a "public work" and are not subject to any of the provisions of the Public Works law, Labor Code Sections 1720-1901, nor of the regulations promulgated thereunder.

### **ARTICLE 3. THE PARTIES**

**3.01 Contractor Is Independent Contractor.** The Parties intend that Contractor shall perform Contractor's Obligations as an independent contractor engaged by the City and not as an officer or employee of the City nor as a partner of or joint venturer with the City. No employee or agent of Contractor shall be deemed to be an employee of the City, nor an agent of the City. Contractor shall have the exclusive control over, and sole responsibility for the manner and means of performing Facility Operations, except as otherwise provided in this Agreement. Neither Contractor nor its officers, employees, subcontractors and agents shall obtain any rights to retirement benefits, workers compensation benefits, or any other benefits which accrue to City employees.

No agents, employees, contractors, subcontractors, consultants, licensees or invitees of Contractor shall be deemed to be an employee or agent of the City. Such Persons shall be entirely and exclusively under the direction, supervision, and control of Contractor. All terms of employment, including hours, wages, working conditions, discipline, hiring, and discharging or any other terms of employment or requirements of Applicable Law, shall be determined by

Contractor. Contractor shall issue W-2 or 1099 Forms for income and employment tax purposes for all such Persons.

Except as City may specify in writing, Contractor and Contractor's personnel shall have no authority, express or implied, to act on behalf of City in any capacity whatsoever as an agent. Contractor and Contractor's personnel shall have no authority, express or implied, to bind City to any obligation whatsoever.

To the extent that Contractor obtains permission to, and does use City facilities, space, equipment or support services in the performance hereof, this use shall be at the Contractor's sole discretion based on Contractor's determination that such use will promote Contractor's efficiency and effectiveness. The City does not require that Contractor use any City facilities, equipment or support services in the performance hereof.

**3.02 Parties in Interest.** Subject to the provisions in Section 10.10 and Exhibit F relating to Lender's rights (to the extent such rights are specified herein), nothing in this Agreement, whether express or implied, is intended to confer any rights on any Persons other than the Parties and their representatives, successors and permitted assigns.

**3.03 Binding on Successors.** The provisions of this Agreement shall inure to the benefit of and be binding on the successors and permitted assigns of the Parties.

**3.04 Further Assurances.** Each Party agrees to execute and deliver any instruments and to perform any acts as may be necessary or reasonably requested by the other in order to give full effect to this Agreement.

**3.05 Actions of the City in Its Governmental Capacity.** Nothing herein shall be interpreted as limiting the rights and obligations of the City in its governmental or regulatory capacity, including land use and permitting actions.

**3.06 Contractor's Obligations Performed at Its Sole Expense.** Contractor shall perform Contractor's Obligations at its sole cost or expense and shall not be entitled to any adjustment in compensation for Facility Operation, or any other compensation from the City as a result thereof, except as provided for herein.

**3.07 Exercise of Options.** The Parties' exercise of any approval, disapproval, option, discretion, election or choice hereunder shall be in each respective Party's independent, sole, exclusive and absolute control and judgment.

**3.08 Compliance with Applicable Law and Permits** Contractor shall perform all of Contractor's Obligations hereunder, and shall cause its subcontractors to perform Contractor's Obligations hereunder, in accordance with Applicable Law and Permits. Contractor will apply for, and obtain all Federal, State, City, and any other governmental unit, permits, orders, licenses and approvals required by Applicable Law, including a City of Fremont business license. In applying for and obtaining all Permits, Contractor is responsible for ensuring that it can meet all of Contractors' Obligations while complying with any and all Permit conditions and mitigation measures arising from the CEQA process. Contractor shall show proof

of such permits, licenses or approvals and shall demonstrate compliance with the terms and conditions of such permits, licenses or approvals upon the request of City.

Contractor shall comply, at its expense, fully and faithfully with all provisions of this Agreement, City Legislation (including but not limited to Chapter 2 of the Fremont Municipal Code, which is incorporated herein by this reference), and all other Applicable Laws, as they may from time to time be amended, including, but not limited to the Act, CERCLA, and RCRA. Contractor shall observe and comply with the operating rules and regulations established by the applicable county and the State regarding the facilities where Curbside Recyclable Materials, and Curbside Organic Waste are delivered pursuant to this Agreement, including without limitation those governing Delivery procedures, receiving hours, vehicle and waste inspection, Hazardous Waste screening, litter control and safety measures.

**3.09 Confidentiality of Contractor Information.** Contractor acknowledges and agrees that information submitted to the City pursuant to this Agreement may be subject to compulsory disclosure by the City upon request from a member of the public under the California Public Records Act, Government Code Section 6250 *et seq.* The City recognizes and agrees that certain information that may be disclosed by Contractor or that Contractor may be required to submit pursuant to the Agreement may be considered confidential and proprietary by Contractor. The City agrees to protect the confidentiality of materials submitted to it to the extent permitted by the Public Records Act, in accordance with the procedures, and subject to the limitations described in this Section. Contractor shall specifically and clearly designate as "CONFIDENTIAL" all materials that it wishes the City to treat in confidence and withhold from public disclosure. The City agrees not to voluntarily disclose any materials so designated to persons other than officers, attorneys, employees and consultants of the City involved in financing, overseeing and operating the Facility.

If the City receives a request from a third party to review and/or copy material designated confidential, it will inform Contractor and will permit Contractor to present arguments and facts to the City in support of the position that the material is entitled to an exemption from disclosure under the Public Records Act and should not be released. If the City determines that the material is not entitled to an exemption and that it must be released, the City will advise Contractor of such determination prior to releasing the material so that Contractor may seek a court order enjoining its release. If the City determines that the material is entitled to an exemption, and the person who requested the information files a legal action seeking its release, the City will advise Contractor and will not oppose a motion by Contractor to intervene in the action. Contractor must either intervene or agree to pay the City's legal expenses in defending the action; otherwise the City will have no obligation to affirmatively defend the action and may release the information sought without any liability whatsoever to the City.

Without intervening to limit the remedies available to each Party due to any breach of this provision, each Party agrees the damages at law for any such breach would be an insufficient remedy to the other and that the non-breaching Party shall be entitled to injunctive relief or other equitable remedies in the event of any such breach.

**3.10 Sole Responsibility.** Each Party shall be solely responsible for the acts and omissions of its officers, employees, subcontractors and agents.

**3.11 Subcontractors.** No substantive part of Contractor's Obligations with regard to Processing at the Facility shall be subcontracted unless City approval has been obtained. City shall not unreasonably withhold its approval of subcontractors. In an emergency, upon immediate telephonic or other oral Notice to the City, followed promptly by written Notice, Contractor may engage additional or substitute subcontractors for up to seven (7) calendar days, provided that at the expiration of such seven (7) calendar days, engagement of such additional or substitute subcontractors may be continued only if the City consents in writing thereto, which consent shall not be unreasonably withheld.

All subcontractors shall be licensed as required under Applicable Law to perform their subcontracted work. Contractor shall remain liable for the full and complete performance of Contractor's Obligations hereunder. Any reference to Contractor's Obligations hereunder shall be deemed to include any subcontractor performing such Obligations, whether or not the language hereof provides that Contractor shall perform, or cause to be performed, such Obligations. References to Contractor causing performance of any Contractor's Obligation by a subcontractor or another Person shall not create the inference that Contractor is not primarily obligated to City to meet such Obligations. This Section does not apply to vendors and materials suppliers whose work and role does not materially affect Facility Operations.

**3.12 Cooperation.** The Parties recognize and agree that unforeseen developments and circumstances may occur during the Term that materially modify or otherwise affect one or both Parties' respective Obligations. The Parties further agree that in such event each Party will cooperate in a professional manner and negotiate with the other in good faith to address and resolve such unforeseen developments.

## **ARTICLE 4. TERM OF AGREEMENT**

**4.01 Base Term.** This Agreement shall become effective on the Effective Date hereof and the Base Term shall commence on June 1, 2006 and continue in effect for twenty (20) years from the Commencement Date unless terminated earlier in accordance with Article 12.

### **4.02 Term Extensions**

**a. City Right of Renewal.** The City may, at its sole discretion, Extend the Base Term beyond twenty (20) years for up to two (2) periods of up to five (5) years each. The City shall Notify the Contractor of its intention to exercise this Extension provision no later than six (6) months prior to the end of the Base Term or the then-current Extension.

**b. Conditions for Term Extension.** City may require the Contractor to certify that no material change, financial or otherwise has occurred, that would adversely affect the ability of the Guarantor to perform Guarantor's obligations under the Financial Guaranty Agreement or the ability of Contractor to perform Contractor's Obligations hereunder or its obligations under any other agreement, contract or instrument entered into or to be entered into by the Contractor in connection with Facility Operation, Contractor's Obligations, the services hereunder and the transactions contemplated hereby.

**c. Agreement in Full Effect.** All provisions of this Agreement shall remain in effect during any Extension, including the Contractor's Obligations and all provisions related to Contractor compensation.

**4.03 Survival of Certain Provisions.** All indemnifications for obligations which arise from acts, omissions or errors of Contractor during the term of this Agreement or extension thereof provided for herein and any other rights and obligations of the Parties expressly stated to survive the termination of this Agreement, shall survive such termination including, but not limited to, the following provisions: Article 6 (Record Keeping), and Article 9 (Indemnification, Bonds and Insurance.)

## **ARTICLE 5. FACILITY OPERATIONS**

### **5.01 General Operations**

Contractor agrees to perform the following services for the Acceptance, Processing and Recovery of Curbside Recyclable Materials generated within the City. The Contractor shall Accept Curbside Recyclable Materials whether collected by the City or by others under contract or franchise with the City. Contractor further agrees to provide the following services for the Acceptance, and Transfer of City's Curbside Organic Waste to the Designated Organic Waste Processing Facility as set forth in Section 5.07 below. The City, through its contracts with its Collection Contractor (s) and/or in any other manner consistent with Applicable Law, shall cause all Curbside Recyclable Materials and Curbside Organic Waste collected within the City to be Delivered to the Facility.

**5.02 Receiving Hours.** Receiving and operating hours of the Facility for Curbside Recyclable Materials Processing and Curbside Organic Materials Operations are as follows:

**a. Daily Facility Requirements.** Contractor shall Accept Permitted Material from City at the Facility from 5:00 a.m. to 5:00 p.m., Monday through Friday and Saturday 8:00 a.m. to 5:00 p.m., or at such other times as City and Contractor may reasonably agree ("Facility Receiving Hours"). Contractor may, but is not obligated to, maintain Facility Receiving Hours on Holidays. Upon ten (10) Working Days written Notice to Contractor, the City may modify Facility Receiving Hours and Contractor may request reimbursement for any associated costs for such modification in accordance with Article 8 (Compensation.)

**b. Extended Facility Receiving Hours.** Upon request of the City or its Collection Contractor(s) no less than one (1) Working Day in advance or any other mutually agreed time period, or in event of emergencies, as soon as possible using Reasonable Business Efforts, Contractor shall Accept Permitted Materials at times other than Facility Receiving Hours. Contractor may charge City, or City Collection Contractor(s) if directed by City, for extended Facility Receiving Hours. This provision is intended to address temporary extension of Facility Receiving Hours that may be needed from time to time to accommodate special circumstances.

**5.03 Scale Installation, Maintenance and Operation.** Contractor shall install and maintain at least three (3) State certified motor vehicle scales in accordance with Applicable Law and in a

manner that allows for Collection Contractor(s)'s Delivery vehicles with stored tare weights to bypass the weighing operation when exiting the Facility after unloading Permitted Materials. All scales shall be linked to a centralized computer recording and billing system which shall be compatible with Contractor's systems and accounts for tracking all incoming and outgoing materials. Upon request, Contractor shall provide City, in a useful electronic form, scale house information and billing information related to City. Contractor shall operate such scales during Facility Receiving Hours, provided that Contractor shall provide City with visual access to weighing information at all times and copies thereof.

**a. Testing.** Contractor shall test and calibrate all scales in accordance with Applicable Law, but at least every twelve (12) months. Upon City request, Contractor shall provide the City with copies of test results. Contractor shall further test and calibrate any or all scales upon written request therefore by the City, within three (3) Working Days of such request. If such test results indicate that the scale or scales complied with Applicable Law, the City will reimburse Contractor the Direct Costs of such tests. If such test results indicate that the scale or scales did not comply with Applicable Law, Contractor will bear the costs thereof and Contractor shall at its own cost adjust and correct the scales and consistent with the results of such test, all weight measurements recorded and Fees calculated, charged and paid, as the case may be, from the date of such request.

**b. Vehicle Tare Weights.** When additional or replacement vehicles are placed into service by Collection Contractor(s), the Contractor shall promptly weigh such additional and replacement vehicles and provide the tare weight(s) to Collection Contractor and City. Contractor shall have the right to request re-taring of vehicles as reasonably required to ensure accuracy but no more than two (2) times per year.

**c. Substitute Scales.** To the extent practicable, if any scales are inoperable, being tested or otherwise unavailable, all such vehicles shall be weighed on the remaining operating scales. To the extent that all the scales are inoperable, being tested, or otherwise unavailable, Contractor shall substitute portable scales until the permanent scales are replaced or repaired. Contractor shall arrange for any inoperable scale to be repaired as soon as possible, and in any event, within seventy-two (72) hours (excluding Holidays) of the failure of the permanent scale. Contractor shall arrange to immediately obtain a temporary substitute scale(s) should the repair of the permanent scale require more than seventy-two (72) hours. All weighing shall be conducted by Contractor or its agents by a licensed weigh master.

**d. Estimates.** Pending substitution of portable scales or during power outages, Contractor shall estimate the quantity of Permitted Material Delivered to the Facility and Residue Transferred from the Facility, on the basis of Delivery vehicle and Transfer trailer volumes, tare weight, Designated Disposal Facility and/or Processing Facility weight records, and brokers' weight records, and data obtained through historical information from the Facility and purchasers of Recovered Materials. These estimates shall take the place of actual weighing and shall be the basis for records while scales are inoperable.

**e. Receiving Operations.** A scalehouse attendant shall generate scale tickets for each incoming or outbound load. Scale tickets shall record vehicle identification number, scale weight, tare weight if available, type of transaction (Collection Contractor or City Vehicle) city or jurisdiction of waste origin, payment information, weight and destination of outbound Transfer or Recovered Materials loads, and date and time of receipt. The scalehouse operator will collect Service Fees and, if appropriate, give the driver a receipt, and request the driver to stop at the outbound scale prior to exiting to weigh and settle the transaction.

#### **5.04 Delivery and Unloading of Permitted Material**

Collection Contractor shall be directed to appropriate unloading areas, where Contractor staff will direct and supervise unloading, visually inspect loads for Unpermitted Materials, and direct drivers to return to the scalehouse. Contractor shall diligently visually inspect loads and periodically shall manually characterize loads to confirm that materials Accepted as Curbside Recyclable Materials conform to the definition provided for such materials particularly with regard to verification that the loads meet Contamination Limitations. Either party has the right to periodically conduct studies at the Site to confirm loads of Curbside Recyclable Materials Accepted by Contractor comply with the definition of such materials and meet the Contamination Limitations. All waste inspections or studies for waste characterization purposes required by this Section shall be performed in accordance with Exhibit C hereof. City shall use Reasonable Business Efforts to cause (either through the City or the Collection Contractor) to institute and maintain education, inspection and other programs reasonably calculated to allow it to meet its obligation to deliver loads to the Facility which do not exceed the Contamination Limitation.

**a. Rejection of Unpermitted Material.** Contractor shall use Reasonable Business Efforts and Standard Industry Practices to detect and discover Unpermitted Material and shall not knowingly Accept Unpermitted Material. Contractor shall institute the inspection procedure contained in the Operations and Maintenance Manual, which includes a Hazardous Waste exclusion program. Contractor shall promptly modify such procedure to reflect any changes in Permits or Applicable Law.

**b. Unpermitted Materials Handling Costs.** Contractor is solely responsible for handling and arranging transport and Disposition of any Unpermitted Material that is contained in or with Delivered Permitted Materials Accepted by the Contractor, and for all related costs. Contractor has the right to pursue any remedies against the Person(s) generating or Delivering the Unpermitted Materials to the Facility provided that in no case shall that Person be the City, except in the event that the Unpermitted Material originated directly from a facility Owned and operated by City. Notwithstanding the provisions of this subsection b) the Contractor shall have no responsibility for any such costs related to Curbside Organics and shall have the remedies as specified in 5.04 c).

**c. Remedies for Rejected Materials.** If Contractor rejects material Delivered to the Facility at the time of Delivery because it contains Unpermitted Material including Hazardous Waste, Contractor shall direct the Person(s) who Delivered the Unpermitted Material to cause removal and Disposal of it in a safe and lawful manner, at the sole expense of the Person(s). In the event that Unpermitted Material is Delivered to the Facility or Site, Contractor shall be entitled to pursue whatever remedies, if any, it may



have against Person(s) bringing such Unpermitted Material to the Facility provided that in no case shall the City be considered the Person bringing such Unpermitted Material to the Facility, unless such Unpermitted Material is delivered directly from a Facility Owned and operated by the City. In the event the City's Collection Contractor Delivers Unpermitted Materials on a frequent or continuous basis and the Collection Contractor refuses to provide for the proper handling and Disposition of such Unpermitted Material, the Contractor shall provide written Notice to the City of such refusal by Collection Contractor. Contractor may request and City shall provide reasonable assistance from the City in resolving any disputes with Collection Contractor. If City and Contractor are unable to resolve the dispute within thirty (30) days after Contractor's Notice, then City and Contractor shall pursue the Dispute Resolution procedures in Article 13. Nothing herein shall excuse the Contractor from the responsibility of handling such Unpermitted Materials in a lawful manner, including rejecting such materials as provided in this Section, and to arrange for the proper Disposition of such materials.

**d. Notification.** Should the Contractor not Accept any Delivered materials due to the presence or strong suspicion of Unpermitted Materials, Contractor shall immediately Notify the City verbally and then follow verbal notification with written Notice and the Notice shall identify Contractor's reasonable reason for rejection of the Delivered material and identify the Party which Delivered such material if the Party was identified.

**e. Hazardous Materials.** Contractor shall be solely responsible for handling and arranging the transport and Disposition of all Hazardous Waste and Unacceptable Waste that is Accepted by Contractor. Contractor shall segregate for Disposition any Hazardous Waste or Unacceptable Waste which is identified after it has been Accepted, and shall not further Process or transport such Hazardous Waste or Unacceptable Waste except in accordance with the Load Checking Policy attached as Exhibit E.

## 5.05 Other Provisions

**a. Agreement with Collection Contractor.** Contractor shall negotiate in good faith an agreement with City's Collection Contractor containing the terms and conditions under which the City's Collection Contractor shall Deliver all Curbside Recyclable Materials and all Curbside Organic Waste to the Facility ("User Agreement"). The "User Agreement" will contain terms and conditions normal and customary in such agreements including but not limited to, payment of tipping fees, late fees and security for payment in the event of repeated late payments, compliance with rules and regulations of the Facility, prohibition against Delivery of Unpermitted Waste and Deliveries which exceed the Contamination Limitation, indemnifications and insurance requirements. The City shall have the right to review and approve the User Agreement for the purpose of assuring itself the User Agreement is consistent with this Agreement and the City's Collection Agreement.

**b. Transfer Routes.** Contractor shall select routes from Facility to the Disposal Facility and Designated Organic Waste Processing Facility which reasonably minimize inconvenience and disturbance to the public and comply with Permits and Applicable Law. Contractor shall provide City with prompt Notice of such selection and any change

in regular routes that affect area(s) within the City limits within a two (2) mile radius of the Facility.

**c. Highway Rolling Stock Loading Standard.** Contractor shall load Residue and Curbside Organic Waste into the highway Rolling Stock in a manner which minimizes vehicle waiting time and maximizes the weight of Residue or Curbside Organic Waste in each vehicle, without exceeding legal limits. Each vehicle shall be efficiently loaded by combining materials of varying densities, distributing with respect to axle weights and tamping down, compacting, or by other suitable means.

**d. Litter Prevention.** Contractor shall not spill or scatter Curbside Organic Waste, Residue or Recovered Materials during Transfer. Contractor shall enclose or cover all vehicles Transferring from the Facility in a manner approved by the City. If any Curbside Organic Waste, Residue or Recovered Materials are spilled or scattered, whether on private or public property, Contractor shall immediately clean them up.

**e. Vehicle Parking, Fueling and Maintenance.** Contractor may park, fuel, maintain, and repair vehicles for Transfer at designated areas of the Facility; provided Contractor shall ensure that such vehicles do not interfere with or pose any hazard to the Delivery of Permitted Materials to the Facility.

**f. Vehicle Turnaround Guarantee.** Contractor guarantees that the average time required for City Vehicles and Collection Contractor vehicles Delivering Curbside Recyclable Materials and Curbside Organic Waste are able to unload and exit the Facility is thirty (30) minutes commencing from the time the vehicle arrives at the entrance to the receiving weigh scales absent vehicle breakdown, driver negligence, lack of cooperation, or driver parking to use restrooms or telephone or other such driver caused delays not caused by or under the control of the Contractor, where the average time shall be calculated on a thirty (30) calendar day basis as the sum of the vehicle turnaround time for each load Delivered by a Facility User during the month divided by the number of loads Accepted during the thirty (30) calendar day period.

**g. Security.** Contractor shall maintain adequate security at the Site during the Term.

**h. Personnel**

(1) Wages. The Contractor or its subcontractors shall pay wages and benefits that are consistent with Prevailing Wages.

(2) Local and Alternative Workforce. Contractor shall use Reasonable Business Efforts to hire employees from neighborhoods surrounding the Facility, other areas of the City, and alternative workforces (i.e., welfare-to-work programs, Urban League, etc.)

(3) Equal Employment Opportunity. During Performance of Contractor's Obligations hereunder, Contractor agrees, for itself, its assignees and successor in interest, as follows:

(a) Compliance with Regulations: Contractor shall comply with the Executive Order 11246 entitled “Equal Opportunity in Federal Employment”, as amended by Executive Orders 11375 and 12086 and as supplemented in Department of Labor regulations (41 CFR Chapter 60) (“Regulations”).

(b) Nondiscrimination: Contractor hereby certifies that it will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, marital status, or national origin. Contractor agrees to insure that applicants are employed and employees are treated during employment without regard to their race, color, religion, sex, sexual orientation, marital status, or national origin. This shall include, but not limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; designated representatives. In addition, Contractor shall not exclude from participation in, deny the benefits of, or subject to discrimination under this Agreement any employee or applicant for employment on the basis of age under the Age Discrimination Act of 1975, or with respect to an otherwise qualified disabled individual as provided in Section 504 of the Rehabilitation Act of 1973 and/or the Americans with Disabilities Act; or religion except that any exemption for such prohibition against discrimination on the basis of religion as provided in the Civil Rights Act of 1964, or Title VIII of April 11, 1968 as amended shall also apply.

(c) Solicitations for Subcontractors, Including Procurements of Materials and Equipment: In all solicitations made by Contractor for work to be performed under any subcontract, including procurements of materials or equipment, each potential subcontractor or supplier shall be notified by Contractor of Contractor’s Obligation under the Regulations relative to nondiscrimination on the ground of race, color, religion, sex, national origin, age, marital status, physical handicap or sexual orientation.

(d) Information and Reports: Contractor shall provide all information and reports required by the Regulations, or by any orders or by any order or instructions issued pursuant thereto, and will permit access to its books, records, accounts, other sources of information and the Facility as may be determined by the City to be pertinent to ascertain compliance with such Regulations, orders and instructions. Where any information required of Contractor is in the exclusive possession of another who fails or refuses to furnish this information, Contractor shall so certify to the City, and shall set forth what efforts it has made to obtain the information.

(e) Incorporation of Provisions: Contractor shall include the provisions of paragraphs (a) and (b) of Section 5.05.h(3) above in every subcontract, including procurements of materials and leases of equipment, unless exempted by the Regulations or by any order or instructions issued pursuant thereto. Contractor shall take such action with respect to any

subcontract or procurement as the City may reasonably direct as a means of enforcing such provisions, including sanctions for noncompliance; provided that if Contractor becomes involved in, or is threatened with, litigation with a subcontractor or supplier as a result of such direction, Contractor may request City to enter such litigation to protect the interests of City.

## **5.06 Curbside Recyclable Materials Processing and Marketing**

Without limiting Contractor's obligations under the Transfer Station Agreement, the Recyclables, Processing and Marketing services performed by Contractor shall include at minimum, the following:

- (1) the Acceptance, Processing and Recovery of all Curbside Recyclable Materials delivered to Contractor's Facility under this Agreement;
- (2) the provision, Operation and maintenance of a Recyclables Processing Facility, including guaranteed Processing capacity sufficient to Process all Curbside Recyclable Materials and adequate storage capacity for the Acceptance and Recovery of Curbside Recyclable Materials, recycled products and Processing Residues;
- (3) the coordination of Curbside Recyclable Materials and Processing methodologies and technologies using Reasonable Business Efforts in order to maximize the efficiency and cost effectiveness of Curbside Recyclable Materials Diversion;
- (4) the Marketing of Curbside Recyclable Materials products, proceeds or deficits from the sale of these products are solely assumed by Contractor.

**a. City Not Responsible for Markets, End-Use.** City shall have no responsibility for the availability of markets for Curbside Recyclable Materials, nor shall it have any liability associated with or resulting from the markets for or end-uses of Curbside Recyclable Materials, and Contractor shall indemnify and hold City harmless from same.

**b. Residue, Transfer and Disposal Costs.** Contractor is solely responsible for the proper and lawful Disposal of all Processing Residue. Contractor shall Transfer all Residue to the Designated Disposal Facility(ies) for Disposal during the receiving hours of the Designated Disposal Facility(ies). The date, time, vehicle identification number, and weight of all vehicles Transferring Residue shall be recorded when the vehicle leaves the Site. Contractor shall Transfer Residue in accordance with the protocol included in the Operations and Maintenance Manual, Facility Permits and Applicable Law. Contractor shall Transfer Residue with sufficient regularity and frequency to minimize storage of Residue at the Facility, avoid creation of nuisance, and create a safe, efficient Operating environment in the Facility.

**c. Inability to Process Curbside Recyclable Materials.** If for any reason Contractor becomes unable to Accept and/or Process Curbside Recyclable Materials at this Facility, Contractor shall notify City immediately. In no event shall Contractor Transfer Curbside Recyclable Materials to any other facility without this Notice and the prior written consent of City. Any failure or inability to Process Curbside Recyclable Materials at this Facility shall be subject to the provisions of this Agreement, including provisions for events of Force Majeure.

## **5.07 Curbside Organic Waste Acceptance and Transfer**

**a.** Contractor shall provide the following Curbside Acceptance and Transfer services:

(1) the Acceptance and Transfer of all Curbside Organic Waste to the Organic Waste Processing Facility.

**b. Curbside Organic Waste Transfer.** Contractor shall Transfer all Curbside Organic Waste to the Designated Processing Facility during the receiving hours of the Designated Organic Waste Processing Facility. The date, time, vehicle identification number, and weight of all vehicles Transferring Curbside Organic Waste shall be recorded when the vehicle leaves the Site. Contractor shall Transfer Curbside Organic Waste in accordance with the protocol included in the Operations and Maintenance Manual, Facility Permits and Applicable Law. Contractor shall Transfer Curbside Organic Waste with sufficient regularity and frequency to minimize storage of Curbside Organic Waste at the Facility, avoid creation of nuisance, and create a safe, efficient Operating environment in the Facility. Other than as required by its permits or Applicable Law, Contractor shall not be responsible for any consequences resulting from Unpermitted Waste or other contaminants found in materials delivered by the Curbside Organic Waste Contractor except for consequences directly resulting from those materials which it negligently or willfully adds to the Curbside Organic Waste delivered to the Facility by the Curbside Organic Waste Contractor or other negligence or willful misconduct of Contractor and the Contractor's obligation under Article 9 of this Agreement or the Transfer Station Agreement shall be limited to its willful acts or negligence as described above with respect to Curbside Organic Waste.

**c. Inability to Accept or Transfer Curbside Organic Waste.** If for any reason Contractor becomes unable to Accept and/or Transfer Curbside Organic Waste at the Facility, Contractor shall notify City immediately. In no event shall Contractor direct the Curbside Organic Waste to any other facility without this notification and the prior written consent of City. Any failure or inability to Accept or Transfer Curbside Organic Waste at this Facility shall be subject to the provisions of this Agreement, including provisions for events of Force Majeure.

**d. Commingling of Curbside Organic Waste.** Contractor is prohibited from commingling Curbside Organic Waste at the Facility with any food or organic waste from other communities, or any commercial organic material. However, commingling may be permitted during the Term of this Agreement if City, Contractor and the Organic Waste Processing Facility contractor all agree in writing to such commingling. In the

event these parties are unable to agree to permit such commingling by July 1, 2007, City and Contractor agree that the self haul rates will be adjusted in the next biennial rate cycle based on Contractor's documented costs subject to City's review and approval, such adjustment to be effective January 1, 2008. This adjusted rate will compensate Contractor for the additional costs of Processing and Transfer of self haul Organic Waste.

**e. Qualifications and Performance.** Contractor shall engage and train qualified and competent employees, including managerial, supervisory, clerical, maintenance, and operating personnel, in numbers necessary and sufficient for Facility Operation and to perform Contractor's Obligations. Contractor shall train such staff to perform their work in a safe and efficient manner in accordance with the health and safety plan in the Operation and Maintenance Manual and shall ensure that each staff person treats City employees and its representatives, and other members of the public with courtesy.

## **5.08 Facility and Equipment**

**General.** Contractor shall purchase, lease, or otherwise procure, operate, and maintain the Rolling Stock, equipment, and materials necessary for Facility Operations, Residue Transfer, and Recovered Materials Marketing while meeting all Permit requirements. Contractor shall maintain the Facility, Processing equipment, Rolling Stock, and the Site in good working order and repair. Contractor shall maintain a spare parts inventory and perform periodic maintenance in accordance with the Operations and Maintenance Manual. If such activities must be performed during Facility Receiving Hours the maintenance and repair activities shall be performed in a manner that does not impede the Contractor's ability to fulfill Contractor's Obligations and does not jeopardize safety of employees. Contractor shall maintain the aesthetic appearance of the Facility and Site in a clean and neat manner with due regard for reasonable control of odors, dust and noise.

**a. Rolling Stock.** Tractors and Transfer trailers shall be kept clean, shall be thoroughly washed on the exterior at least once every month unless more often as needed for appearance and shall be thoroughly cleaned with pressurized hot water at least once per year. They shall be repainted and/or refurbished so that they present a reasonably acceptable appearance to the City. The Contractor's name and truck identification number shall be clearly marked on all vehicles that travel off Contractor's Site. All Transfer vehicles shall be inspected by the driver prior to leaving the Facility at the start of the day. The driver shall use a standard inspection checklist designed by Contractor. Each driver is required to maintain a Driver's Daily Log.

**b. Condition of Facility** Building office areas shall be kept clean and orderly. Work areas within buildings and structures shall be routinely swept or vacuumed and washed or dusted. The building loadout areas, tipping floor areas, and access ramps shall be cleaned and swept at the end of each operating day. The tipping floor shall be swept monthly and the interior walls of the transfer station/material recovery Facility building shall be thoroughly cleaned with pressurized hot water at least once per year.

**c. Exterior Surfaces.** Surfaces of exterior buildings and structures shall be repainted or refurbished as needed by Contractor so that they present an acceptable appearance. The

type of paint, color, and method of application shall match existing and be of equal quality and shall conform to the conditions, covenants and restrictions for the Site.

**d. Safe Condition and Repair.** Contractor shall maintain in good condition the roofs, structural portions and exterior walls (including plate glass, glass windows, window frames, doors and door frames), paved exterior areas and scales. Contractor shall keep and maintain in good, safe condition and repair the Facility, appurtenances and every part thereof, including without limitation the stationary equipment; plumbing and sewage facilities; mechanical, electrical, lighting, heating, ventilating and air conditioning systems; fire and dust suppression systems; fuel storage and dispensing facilities; and all personal property furnished by Contractor including vehicles.

**e. Traffic Flow.** Contractor shall direct traffic upon entry to the Site so that vehicles travel, queue, unload and exit in a safe manner. Contractor shall ensure that no vehicles queue on public streets in the normal course of business.

**f. Signage.** Contractor shall post easily readable signs approved by the City at the entrance to the Facility detailing the regulations that must be followed by vehicles entering the Site; indicating the Facility Receiving Hours; the types of Permitted Materials and recyclable materials; and a local telephone number to call for information and assistance in case of emergency. All signage shall, at a minimum, be provided in English and shall be consistent with conditional use permit requirements

**g. Accommodating Collection Contractor's Drivers.** Contractor shall provide a parking area for City or Collection Vehicles where Contractor will permit City or Collection Contractor's drivers to park City or Collection Vehicles and use bathroom facilities or make local telephone calls on telephones which Contractor shall make available to City or Collection Contractor's drivers. Contractor shall allow drivers to call their supervisors without charge.

**h. Fire Protection.** Contractor shall provide and maintain all necessary and appropriate fire control equipment, as provided in the Operations and Maintenance Manual and in accordance with the City fire inspection team requirements.

**i. Safety Training.** Contractor shall perform regular safety training for all Facility employees and safety training for its subcontractors as appropriate.

**j. Litter and Vectors.** Contractor shall maintain the Facility and Site in a neat and orderly condition that minimizes the potential for birds, rodents and insects, and shall, on a daily basis, remove litter and debris on Site and litter and debris along major access roads as specified in the conditional use permit. In the event of apparent vector activity, Contractor shall implement reasonable additional vector control measures within twenty-four (24) hours. Contractor shall implement and maintain a litter control program and shall diligently monitor and enforce the vehicle tarp requirements for all vehicles.

**k. Updated Operations and Maintenance Manual.** On or before December 1 of each year following the Commencement Date, Contractor shall review the Operations and Maintenance Manual, revise it to reflect any changes in Facility Operation procedures

during the previous calendar year, describe anticipated changes and Scheduled Facility Downtime during the upcoming calendar year, and submit a copy of the updated Manual and written information regarding Scheduled Facility Downtime to the City. The City may, but need not comment on such annual update. Neither the annual review nor comment upon, nor the failure of the City to comment upon the Operations and Maintenance Manual shall (1) relieve Contractor of any of Contractor's Obligations and responsibilities hereunder or impose any liability upon the City, nor (2) be deemed to be a representation by the City that Contractor's Facility Operation is in accordance with the Operations and Maintenance Manual or signifies that Contractor has complied with all Contractor's Obligations with respect to Facility Operation or with Applicable Law.

### **5.09 Facility Operation Complaints**

Contractor shall take all reasonable steps to minimize complaints. All complaints about the Operation and maintenance of the Facility shall be directed to the person designated as general manager by Contractor. Contractor shall promptly and politely respond to complaints, including complaints from City Collection Contractor's drivers, City staff and its representatives, and the public at large, related to Contractor's performance or nonperformance of Contractor's Obligations. Contractor shall use Reasonable Business Efforts to resolve such complaints within thirty (30) calendar days of receipt thereof. Such complaints shall not be directed by Contractor to the City with the exception of those that pertain to the City's Obligations. The station manager shall compile a log of all complaints brought to the attention of Contractor in a form that can be readily audited, and that indicates the date and time the complaint was received; the name, address and telephone number of the Person making the complaint; the corrective action taken in response to the complaint; and the date the corrective action was taken.

**a. Complaint Log.** Each month Contractor shall send the City a copy of the complaint log for the previous month.

**b. Litter Complaints.** If Contractor receives a complaint regarding litter problems on Site or along major access roads as specified in the conditional use permit, Contractor shall promptly clean up litter within the same Working Day if complaint was received before noon and before noon of the following Working Day if the complaint was received after noon.

## **ARTICLE 6. RECORD KEEPING, INSPECTIONS, AND REPORTING**

### **6.01 Databases**

Contractor shall create and maintain databases to provide adequate billing and service information to Customers, monthly reports to City. All records shall be maintained on a computerized database formatted and accessible to City via modem. Contractor shall provide a backup system as a precaution against primary system failure. City may require in its reasonable discretion the maintenance of additional records. Contractor shall preserve all such records for a period no less than seven (7) years including retention of records beyond the expiration date of the Term in order to comply with the seven (7) year record holding requirement with the exception of video records that need to be preserved for no more than ninety (90) calendar days.



## **6.02 Records.**

**a.** Contractor shall create and maintain during the Term of this Agreement the following records:

- (1) Billing and financial records, customer service records, and records pertaining to Hazardous Waste;
- (2) Records of the quantity of Curbside Recyclable Materials and Curbside Organic Waste collected by day, including the number of accounts serviced daily;
- (3) Records of the types and quantities of Curbside Recyclable Materials and Curbside Organic Waste Accepted for Processing daily;
- (4) Curbside Recyclables and Curbside Organic Waste inventories showing types of materials and balances at the beginning of each month, tons Accepted during each month, tons of products sold during each month and the balances at the end of each month;
- (5) Sales statements for Curbside Recyclable Materials and Curbside Organic Waste showing volumes of finished products sold, name of purchaser, date of sale/transaction, terms of sale/transaction, quantity purchased and net receipt;
- (6) Records of the quantities of Curbside Recyclable Materials and Curbside Organic Waste by month Processed but ultimately Transferred to Disposal facilities due to market conditions or other contingencies;
- (7) Records of the quantities of Curbside Organic Waste Transferred to the Organic Waste Processing Facility by day, itemized by vehicle and facility; and supporting documentation for reports required by this Agreement.

**b.** Contractor shall submit monthly and annual reports to City documenting Curbside Recyclable Materials, Curbside Organic Waste and Residue by customer source, e.g. Single Family Dwellings, Multi-Family Dwellings, and Commercial. Notwithstanding the preceding sentence, the Contractor may not be able to determine the customer source of such materials unless the City imposes on its Collection Contractor the requirement that it provide same to Contractor. If Contractor cannot reasonably determine the customer source, it shall not be obligated to submit information relating to such sources to the City. The monthly reports shall include year to date totals, as well as the totals for the month. Contractor shall format such reports in accordance with the then current requirements of the California Integrated Waste Management Board ("CIWMB") or other agency(ies) subsequently authorized to administer federal, state or local law governing integrated waste management. City, in its reasonable discretion may request additional information in, or modifications to the formatting of, such reports. All data generated for and contained in reports prepared under this Section shall be the property of City.

## **6.03 Inspection and Access**

**a. City Rights to Access Records and Facility.** City shall be granted access on demand to all records and reports maintained or submitted by Contractor under this Agreement, including all computerized records maintained by Contractor, and shall be granted access on demand to hard copies of such records at Contractor's facilities. City shall be granted access on demand to inspect Contractor's facilities, including but not limited to receiving, weighing and Processing areas.

b. City and its designated representative(s) shall have the right to: enter, observe and inspect the Facility at any time during Facility Operations; conduct studies or surveys of the Facility; meet with the Facility manager or his or her representatives at any time; and meet with other employees upon request, which request shall not be unreasonably denied by Contractor, provided that the City and its representatives comply with Contractor's reasonable safety and security rules and shall not interfere with the work of the Contractor or its subcontractors. Upon City request, Contractor shall make personnel available to accompany City employees on inspections. Contractor shall ensure that its employees cooperate with the City and respond to the City's reasonable inquiries. Contractor shall make Operational and business records required to be kept pursuant to Sections 6.01 and 6.02, available to the City or its agent during Facility Receiving Hours upon City request, and shall provide the City copies of such records at the City's request.

## **ARTICLE 7. DESIGNATED DISPOSAL AND PROCESSING FACILITIES**

**7.01 Designated Disposal Facility.** City shall identify the Designated Disposal Facility which shall either be the Tri-Cities Landfill and Disposal Facility or the Altamont Landfill, located in Alameda County, California, as identified in the Transfer Station Agreement between Contractor and City. Contractor shall Deliver all Residue to the Designated Disposal Facility for Disposal during Disposal Facility Receiving Hours. The City may designate a change in the Designated Disposal Facility effective upon One Hundred Fifty (150) calendar days Notice to Contractor, provided however in cases of emergency, the City may immediately change the Designated Disposal Facility and shall provide such Notice to Contractor. In the event that Contractor is denied access to, or access becomes impossible to, the Designated Disposal Facility, Contractor shall notify City immediately, and City shall direct Delivery or Transfer of the affected materials to a City selected Alternate Facility.

**7.02 Designated Organic Waste Processing Facility.** City and Contractor agree that the Newby Island Recyclery (1601 Dixon Landing Road, Milpitas, California) shall be the Designated Organic Waste Processing Facility. Curbside Organic Waste Processing shall not be performed at any other facility without written consent from City. In the event that Contractor is denied access to, or access becomes impossible to, the Designated Organic Waste Processing Facility, Contractor shall notify City immediately, and City shall direct Transfer of the affected materials to a City selected Alternate Facility. If the City fails to direct Contractor within a reasonable period of time, then Contractor shall have the right to Transfer the affected materials to an alternative lawful Organic Waste Processing Facility.

**7.03 Disposal Facility Permitted Materials.** Permits for the Designated Disposal Facility identify materials permitted for Disposal and materials prohibited from Disposal. Contractor shall observe and comply with such Permit requirements and conduct load checking procedures at its Facility to prevent materials which are prohibited from Disposal at the Designated Disposal Facility from being Transferred and Disposed at the Designated Disposal Facility. Contractor acknowledges that the list of materials permitted and prohibited for Disposal at the Designated Disposal Facility may change from time to time and Contractor must conform to any changes. City and Contractor shall negotiate any changes necessary to this Agreement caused thereby,

including, without limitation, provisions to compensate Contractor for any increased costs resulting from any of the changes described herein.

**7.04 Disposal Capacity.** City shall be responsible for securing daily and long-term Disposal capacity at the Designated Disposal Facilities and ensuring receiving hours.

**7.05 Professionalism.** Contractor, its employees, subcontractors, or other agents shall act in a professional and courteous manner at all times when on the property of the Designated Disposal Facility and shall follow all operating procedures established by the Disposal Facility Contractor including those related to health and safety, traffic, gate house, Residue unloading, and load checking Operations.

**7.06 Cooperation and Disputes.** Contractor shall fully comply with its obligations and cooperate to its fullest extent with the Disposal Facility Contractor. In the event of disputes between Contractor and Disposal Facility Contractor, Contractor shall attempt to resolve the dispute directly with the Disposal Facility Contractor. As a last resort, Contractor may request assistance from the City in resolving the dispute. In the event of a dispute, Contractor shall continue performance of Contractor's Obligations under this Agreement and shall attempt to continue to resolve such dispute in a cooperative manner, including but not limited to negotiating in good faith.

**7.07 Indemnity.** Contractor shall not be required to use a Substitute Disposal Facility unless Contractor receives from said Disposal facilities or from the City, indemnification provisions substantially similar to those provided in Article 10 of the Disposal Contract, the adequacy of which shall be determined in the exercise of Contractor's reasonable judgment.

**7.08 Disposal Fee Payment.** The Disposal Facility Contractor shall invoice Contractor for Residue Disposed at the Designated Disposal Facility on or before the twentieth (20) day of each month for payment due which shall equal the Tonnage Disposed by Contractor during the previous month multiplied by the per-Ton Disposal fee in accordance with Disposal fees specified in the Designated Disposal Facility Agreement and regulated by the City. Within thirty (30) calendar days of receipt of invoice, Contractor is responsible for directly paying the Designated Disposal Facility Contractor via wire transfer for all Disposal fees incurred from Disposal of Facility Residue. Contractor shall be responsible for Disposal of Residue from Processing of City recyclables, and Contractor shall pay all costs for the Disposal of such residue. However, in the event that the Residue exceeds the Contamination Limitations, the provisions of Section 8.02 shall apply. In the event Contractor fails to pay Disposal Facility Contractor in accordance with payment terms specified in this Section, Contractor will be in breach subject to conditions of Article 13.

**7.09 Changes in Transfer or Disposal Costs.** In the event that City changes the Designated Disposal Facilities or Organic Waste Processing Facility or designates an Alternate Facility or Facilities due to the unavailability of the Disposal Facilities and/or Organic Waste Processing Facility, Contractor shall be entitled to an equitable adjustment of costs, either increased or decreased, for Transfer and Disposal through an appropriate modification of the compensation and payment sections of this Agreement, or in the City's discretion through an alternate payment mechanism.

## **ARTICLE 8. COMPENSATION**

**8.01 Collection of Fees.** The Contractor is responsible for all Processing Fees. The City, through its contract(s) with City Collection Contractor(s) shall set and maintain residential and other relevant collection rates levied by Collection Contractor(s) at levels and at appropriate times to adequately allow the Contractor to pay the Fees under this Agreement. However, nothing herein shall limit City's discretion in using other appropriate funds to fulfill its obligations with Contractor under this Agreement in lieu of raising collection rates. Contractor shall invoice City for the Curbside Organic Waste Transfer Fee for Curbside Organic Waste Deliveries. In each invoice Contractor shall credit the City for the Curbside Recyclable Materials Fee within 30 days of the end of each calendar month for such materials Accepted from City during such month. Such amounts shall be credited against Contractor's invoice to City for the Curbside Organic Waste Transfer Fee. All debits and credits shall be detailed in such monthly invoices. Nothing in this paragraph shall limit rights of Contractor or City to pursue all legal, financial, and equitable remedies available under Applicable Law. Interest on amounts past due may be assessed at the maximum rate permitted by law.

**8.02 Contamination Limit Assumptions.** The pricing identified in Exhibit A is based on the assumption that the Municipal Solid Waste content of the Curbside Recyclable Materials Delivered to the Facility will not exceed the Contamination Limitation of 12%. If this assumption proves to be incorrect on a repeated basis, the Contractor shall notify City in writing and the City shall perform an initial waste characterization study with methodology agreed upon by City and Contractor. This Initial Study shall be completed within 30 days after agreement by the Parties on methodology.

If the study shows Contamination levels above 12%, City shall have the opportunity to reduce the amount of Contamination through the efforts of City or its Collection Contractor. However, City shall compensate Contractor for the contaminated tonnage above the 12% at the Mixed Municipal Waste Service Fee identified in the Transfer Station Agreement retroactively to the date of Contractor's Notice to City. City shall reimburse Contractor for these costs until such time as the Contamination levels return to 12% or less, as shown through a subsequent waste characterization study.

In the event City is unable to reduce the Contamination level to 12% or less within six months after completion of the Initial Study, City and Contractor shall meet and negotiate in good faith appropriate changes to the Curbside Recyclable Materials Fee as set forth in Exhibit A. In the event of any dispute as to the amount of such adjustment, provisions of Article 13 shall apply.

### **8.03 Compensation**

**a. Curbside Recyclable Material Payment** Contractor shall make a Curbside Recyclable Materials Payment specified in Exhibit A to the City for each ton of material delivered to the Facility. All payments to the City shall be based on weight, net of waste residuals. Biennially the per ton payment to the City shall be adjusted to reflect the 24 month change in the Official Board Market Index (OBM) available, using the San Francisco High-side pricing from June to June. The OBM adjusted payment will be

effective on January 1, of each even numbered year. Adjustments will be applied according to the weighted average commodity percentage detailed in Exhibit A. Each time the figures are modified, the revised figures become the basis for subsequent adjustments. The floor price curbside recyclable material payment shall be no less than \$10.00/ton.

**b. California Redemption Value, Curbside Collector's Payment.** City shall relinquish its rights to the California Redemption Value (CRV) and the Supplemental Curbside Collectors Payment (SCCP) Program or any similar programs, fees or payments receivable by the City with respect to the Processing of curbside recyclables and pass-through from the Department of Conservation (DOC) or any other agency providing such payments, with the exception of DOC grants or other funds specifically sought by City not resulting directly from Contractor's Processing of CRV materials. City shall obtain a City Curbside Collector's identification number from the DOC for Contractor. Contractor shall report to the DOC on behalf of City using this identification number. City currently does not receive any CRV payments directly from DOC. However, in the event these procedures change and the City does receive payments from the DOC based on Contractor's reports, City will deposit said payments and within thirty days thereafter make an equal payment to Contractor. City and Contractor will cooperate with each other to process and produce all necessary documents, reports, and other things required to cause Contractor to receive such payments.

**c. Curbside Organic Waste Transfer Fee.** City shall pay Contractor a Curbside Organic Waste Transfer Fee for each ton of Curbside Organic Waste delivered to the Facility as specified in Exhibit A. The Curbside Organic Waste Transfer Fee shall be adjusted biennially to reflect 24 months of changes in the Consumer Price Index. Each time the figures are modified, the revised figures become the basis for subsequent adjustments. The CPI adjusted fee will be effective on January 1, of each even numbered year. Adjustments will be calculated using the most recent June index available. CPI adjustments will be applied universally to the Organic Waste Transfer Fee for the purposes of adjusting the fee as illustrated in Exhibit A.

**d. Extraordinary Review.** Either party shall have the right to request an Extraordinary Review of the Curbside Recyclable Material Payment and/or the Curbside Organic Waste Transfer Fee under the same conditions and in the same manner as adjustments to the Mixed Municipal Waste Service Fee or Maximum Self Haul Service Fees may be requested as provided in Article 11 of the Transfer Station Agreement, with the following change. Section 11.04, Items Ineligible for an Extraordinary Review, subsection (g) shall be added as follows: (g) Variations or fluctuations in the market value or prices of Curbside Recyclables. Upon resolution of the Extraordinary Review in the manner described in said Article 11, the Curbside Recyclable Material Payment and/or the Curbside Organic Waste Transfer Fee shall be adjusted accordingly.

**8.04 City is Most Favored Customer.** Contractor represents and warrants that the City is a most favored customer and, unless otherwise approved in writing by the City, Contractor shall not pay or credit any other user of the Facility (with similar contract terms, services and obligations for similar quantities and qualities of material and fixed priced guarantees in such

contracts as long or longer than those provided to the City hereunder) more for any recyclable materials than Contractor pays or credits the City for Curbside Recyclable Materials.

**8.05 Payment of Pass-Through Charges.** Contractor shall pay, when and as due, all Pass-Through Costs to the appropriate Federal, State, regional, and/or local governmental entities which levied the assessment(s) and shall provide City with proof of such payments promptly upon request. Contractor agrees to defend with counsel acceptable to City, indemnify, and hold City harmless for any claims, losses, costs, fees, liabilities, damages or injuries suffered by City arising out of Contractor's failure to fulfill any such payment obligation. Upon request of either party, the payments and revenues determined pursuant to this Agreement shall be adjusted to reflect any material increase or decrease in Pass-Through Costs after the execution of this Agreement during the biennial review process.

**8.06 Payment of Taxes.** Contractor shall pay, when and as due, any and all Federal, State, and local fees, assessments, or taxes incurred as a result of Contractor's compensation hereunder, including estimated taxes, and shall provide City with proof of such payments promptly upon request. Contractor agrees to indemnify City for any claims, losses, costs, fees, liabilities, damages or injuries suffered by City arising out of Contractor's failure to fulfill this tax payment obligation.

## **ARTICLE 9. INSURANCE, INDEMNITY, BONDS, FURTHER ASSURANCES**

**9.01 Insurance.** Contractor shall secure and maintain in full force and effect during the Term adequate insurance that shall be no less than the types and amounts of insurance coverage listed in Exhibit B. Contractor shall be responsible for payment of all premiums for its policies and shall pay such deductibles upon occurrence of an insured loss under their respective policies. Insurers must provide the City and Contractor with sixty (60) calendar days' Notice of any cancellation, change or other modification and name the City as an additional insured, with exception of cancellation due to non-payment of premium for which insurers must provide thirty (30) calendar days Notice. Contractor shall supply a certificate of insurance and additional insured endorsement to the City showing compliance with this Article and Exhibit B or at the City's request, Contractor shall supply a certified copy of the insurance policies to the City. The terms and obligations of this section shall survive termination of this Agreement.

**9.02 Indemnification and Defense.** The Contractor shall defend, with counsel reasonably acceptable to City, indemnify, and hold harmless the City, its officers, agents, and employees as their respective interests may appear, from and against any and all liabilities, attorneys' fees and expenses at trial and on appeal, including damages, claims, demands, judgments, losses, costs, expenses and actions, arising out of, or resulting from any act, error or omission of Contractor, its officers, employees, agents or subcontractors in connection with the performance of this Agreement, excepting only the gross negligence or willful misconduct of the City, and which may cause but is not limited to the following:

- a. personal injuries including, but not limited to, wrongful death and property damage of any kind, nature or sort resulting from Facility Development or Operations,
- b. penalties, fines, and charges arising from Contractor's violation of Applicable Law(s) in connection with Facility Development or Operations or,

- c. any condition of the Facility relating to the presence of Hazardous Waste, Household Hazardous Waste, petroleum or petroleum products from the Start-Up Date through the Term and subsequent migration off-Site or on-Site remediation thereof,
- d. any allegation of infringement, violation or conversion of any patent, licenses, proprietary right, trade secret or other similar interest, in connection with Facility Development or Operation,
- e. any claims or liability related to vector-caused damages or illness, biohazard, damage to the environment or health of the community in the vicinity of the Facility,
- f. any claims or other liabilities directly or indirectly related to Facility Development or Operations,
- g. any claims or other liabilities directly or indirectly related to the provisions of the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC 9601 et seq., during or subsequent the period in which this Agreement is in effect,
- h. any claims that may be made against City based on any contention by any of Contractor's employees or by any third party, including any State or Federal agency and employees making workers compensation claims, that an employer-employee relationship or a substitute therefore exists for any purpose whatsoever by reason of this Agreement or by reason of the nature and/or performance of Contractor's Obligations,
- i. for damages in connection with any claims made by, or payments made to, purchasers or users of Recovered Materials.

If there is an event which may result in potential litigation, damage, or liability, Contractor agrees to immediately notify the City in order for the City to retain the ability to participate in the defense. The terms and obligations of this Section shall survive termination of this Agreement.

**9.03 Hazardous Substances Indemnification.** The Contractor shall defend with counsel reasonably acceptable to the City, indemnify, protect and hold harmless the City, its officers, officials, employees, agents, assigns and any successor or successors to the City's interest from and against all claims, damages (including but not limited to special, consequential, natural resources and punitive damages), injuries, response mediation and removal costs, losses, demands, debts, liens, liabilities, causes of action, suits, legal or administrative proceedings, interest, fines, charges, penalties, attorney's fees for the adverse party and expenses (including but not limited to attorneys' and expert witness fees and costs incurred in connection with defending against any of the forgoing or in enforcing this indemnity) of any kind whatsoever paid, incurred or suffered by, or asserted against, the City or its officers, officials, employees, agents, assigns, or contractors arising from or attributable to willful or negligent acts, errors, omissions including but not limited to any repair, cleanup, disposal or detoxification, or preparation and implementation of any removal, remedial, response, or other plan (regardless of whether undertaken due to governmental action) concerning any hazardous substance, Hazardous Wastes, or Household Hazardous Waste at the Facility or any place where the Contractor stores or Transfers Mixed Municipal Waste pursuant to this Agreement. In the event

that there are uninsured costs arising from a release of Hazardous Wastes as described in this Section which are not due to the failure by the Contractor to comply with its Hazardous Waste identification and treatment procedures, negligence, or willful misconduct of Contractor, the City shall be responsible for payment of up to thirty-five thousand dollars (\$35,000) of such costs annually on a cumulative basis and the Contractor shall pay all such costs above that amount.

The terms and obligations of this Section shall survive termination of this Agreement.

**9.04 Performance Bonds.** Prior to May 1, 2006, and for the first six months from that date, until October 31, 2006, Contractor shall furnish and maintain a performance bond, (in a form reasonably acceptable to the City and commercially available), and/or comparable instrument(s) approved by the City, or any combination thereof, (the "Surety Instruments") in the principal sum of Two Million Five Hundred Thousand (\$2,500,000) dollars. Beginning on November 1, 2006, the principal sum of that performance bond shall be increased to Five Million (\$5,000,000) dollars and shall be maintained throughout the Term of this Agreement. If the performance bond described herein is not commercially available, the parties shall meet and negotiate in good faith a substitute method of securing Contractor's performance. Contractor may fulfill its obligation under this Section with the Performance Bond provided under the Transfer Station Agreement, provided the conditions in that bond cover all of the obligations under this Agreement as well as the Transfer Station Agreement. The bond conditions shall be subject to the written approval of the City Attorney.

All bonds or other Surety Instruments shall be executed by a corporation authorized to issue such Surety Instruments in the State, subject to regulation by the California Insurance Commissioner, rated not less than "(A-VII)" by A.M. Best Company, Inc. as applicable, and having a financial condition and record of service reasonably satisfactory to the City. The company(ies) executing such Surety Instruments shall be financially and organizationally independent of, and in no manner an affiliate of the Contractor.

The term of each Surety Instrument shall be issued for a three (3) year period if commercially available to Contractor, but not less than one (1) year or the remaining period in the Term hereof, whichever is less. Not less than ninety (90) calendar days before the expiration of each such Surety Instrument, Contractor shall either extend such Surety Instrument as evidenced by a continuation certificate in a form reasonably acceptable to the City, or furnish a replacement Surety Instrument in the principal sum in the table above. The terms and obligations of this Section shall survive termination of this Agreement, if such termination is due to Contractor Default.

**9.05 Financial Guaranty Agreement.** Execution by Guarantor of a legally valid, binding and enforceable Financial Guaranty Agreement attached hereto as Exhibit D together with an opinion of counsel in a form satisfactory to the City Attorney that the Financial Guaranty Agreement has been duly executed and delivered by the Guarantor and constitutes a legal, valid, and binding obligation of the Guarantor enforceable against the Guarantor in accordance with its terms. All of the terms and obligations of this Section shall survive termination of this Agreement, if such termination is due to Contractor Default. The terms and obligations related to insurance and indemnification shall survive the expiration of this Agreement and any Extensions.

## **ARTICLE 10 BREACHES AND DEFAULTS**



**10.01 Breaches By Contractor** A breach is a material failure to perform any of Contractor's Obligations in accordance with the provisions of this Agreement. In addition, the following events shall constitute a breach by the Contractor:

**a. Seizure or Attachment of Equipment.** Any equipment Owned by Contractor essential in Facility Development or Operations is lawfully seized, attached or levied upon resulting in Contractor's failure to meet Contractor's Obligations.

**b. Failure to Fulfill Contractor Obligations.** Contractor fails to meet any of Contractor's Obligations. However, Contractor shall not be in breach where the failure to meet Contractor's Obligations is due to an act or omission of Contractor which caused damage or destruction of all or part of the Facility, provided all of the following conditions are met:

(1) Contractor shall certify in writing to City that insurance proceeds or other funds are available to repair or reconstruct the Facility, and City to its reasonable satisfaction is in agreement with such certification.

(2) Contractor shall diligently pursue such repair or reconstruction.

(3) Contractor shall again be able to meet all Contractor Obligations within a reasonable time but in no event longer than the date no more than nine (9) months following the original breach causing damage or destruction.

**c. Labor, Fiscal or Legal Difficulties.** Contractor is:

(1) the subject of any Labor Action (including work stoppage or slowdown, sick-out, picketing, lock-out or other concerted job action) in excess of sixty (60) calendar days to the extent such Labor Action causes a breach of Contractor's Obligations; however, Contractor shall not be in breach of this Agreement for a period of ninety (90) calendar days if Contractor continues all of its Obligations except for the Vehicle Turnaround Guarantee; or

(2) fails to regularly pay its bills, including payment to the Disposal Facility Contractor(s), as they become due, and credit to the City for Curbside Recyclable Materials, including non-payment of bills over sixty (60) calendar days; or

(3) the subject of a civil or criminal judgment or order entered by a Federal, State, regional or local agency for violation on an environmental or tax law, for which any uninsured portion of the judgment is in excess of two hundred fifty thousand dollars (\$250,000), and the City believes in good faith that Contractor's ability to timely and fully perform Contractor's Obligations has thereby been placed in substantial jeopardy, the City may, at its option and in addition to all other remedies it may have, demand from Contractor reasonable assurances of timely and fully performance hereunder. If Contractor fails or refuses to provide such reasonable assurances by the date required by the City such failure or refusal shall constitute a Contractor Default.

**d. Misrepresentation or False Warranty.** Any material written representation, disclosure, assurance, or warranty made to the City by the Contractor in connection with, or as an inducement to entering into or performing this Agreement or any future amendment to this Agreement, is a condition to the effectiveness of the Agreement, that proves to be false or misleading in any material respect as of the time the representation, disclosure, assurance, or warranty is made, whether or not any such representation or disclosure is contained in, or referenced in, the Agreement.

**e. Bankruptcy, Insolvency, Liquidation**

Voluntary Proceeding. Contractor or Guarantor files a voluntary claim for debt relief under any applicable bankruptcy, insolvency, debtor relief or other similar law now or hereafter in effect, or shall consent to the appointment of or taking of possession by a receiver, liquidator, assignee, trustee, custodian, administrator (or similar official) of Contractor or Guarantor for any part of Contractor's or Guarantor's operating assets or any substantial part of Contractor's or Guarantor's property, or shall make any general assignment for the benefit of Contractor's or Guarantor's creditors, or shall take any action in furtherance of any of the foregoing; provided that Contractor may propose to City that City substitute Guarantor as provided in Exhibit D, in which event the City may, at its sole discretion, effect such substitution, in which event it shall not terminate this Agreement in accordance with this paragraph.

Involuntary Proceeding. With respect to Contractor, a court having jurisdiction, without Contractor's consent or where Contractor fails to oppose the proceeding: (a) enters a decree or order for relief in respect of the Agreement, in any involuntary case brought under any bankruptcy, insolvency, debtor relief or similar law, now or hereinafter in effect, or (b) any such court enters a decree or order appointing a receiver, liquidator, assignee, custodian, trustee, sequestrator (or similar official) of Contractor, or for any part of Contractor's operating equipment or assets, or (c) orders the winding up or liquidation of the affairs of the Contractor and any such decree or order is not vacated within forty-five (45) days of its issuance.

**f. Failure to Maintain Performance Bond or other Financial Requirement.** The Contractor fails to maintain the Performance Bond or any other financial assurance requirement required under this Agreement or is declared by the Lender to be in material default under any provisions, terms, or conditions of the Financing Documents after giving effect to any applicable cure periods.

**g. Failure to Notice City.** The Contractor fails to Notice the City in a timely manner of any receipt of Notice of violation or official communication from any regulatory body having jurisdiction over the Contractor's Obligation under this Agreement which significantly affects the Contractor's ability to perform Contractor's Obligations.

**h. Regulatory Violation.** The Contractor violates any Permits, orders, or filings of any regulatory body having jurisdiction over the Contractor relative to this Agreement in such a manner as to materially interfere with Contractor's present or future ability to perform Contractor's Obligations, provided the Contractor may contest any such Permits, orders,

or filings by appropriate proceedings conducted in good faith, in which case no breach or default of this Agreement shall be deemed to have occurred.

**i. Failure to Meet Payment or Reporting Requirements.** The Contractor fails to make any payment required under this Agreement to City, Disposal Facility Contractor, or Federal, State, regional, and local entity or refuses to provide City with required information, reports, and/or records in a timely manner as provided for in this Agreement.

**10.02 Breaches By City.** A breach is a material failure to perform any of City's Obligations in accordance with the provisions of this Agreement. In addition, the following shall constitute events of breach by the City:

**a. Failure to set Rates.** A failure to set and maintain rates or compensate Contractor through other payment mechanisms as required by Section 8.01 hereof.

**b. Material Failure of Representations and Warranties.** Material failure of the City with respect to its representations and warranties.

**c. Failure to Deliver Curbside Recyclable Materials or Curbside Organic Waste.** City's failure to direct the City's Collection Contractor(s) to Deliver to the Facility all Curbside Recyclable Materials and Curbside Organic Waste collected by the Collection Contractor(s) under its contracts with the City.

**d. Bankruptcy, Insolvency, Liquidation**

**Voluntary Proceeding.** City files a voluntary claim for debt relief under any applicable bankruptcy, insolvency, debtor relief or other similar law now or hereafter in effect, or shall consent to the appointment of or taking of possession by a receiver, liquidator, assignee, custodian, administrator (or similar official) of City for any part of City's operating assets or any substantial part of City's property, or shall take any action in furtherance of any of the foregoing; or

**Involuntary Proceedings.** With respect to City, a court having jurisdiction, without City's consent, or where City fails to oppose the proceeding; (a) enters a decree or order for relief in respect of the Agreement, in any involuntary case brought under any bankruptcy, insolvency, debtor relief or similar law, now or hereinafter in effect, or (b) any such court enters a decree or order appointing a receiver, liquidator, assignee, custodian, trustee, sequestrator (or similar official) of City, or for any material part of City's assets, or (c) orders the winding up or liquidation of the affairs of the City and any such order or decree is not vacated within forty-five (45) days of its issuance; and (d) Contractor believes in good faith that City's ability to timely and fully perform City's Obligation has thereby been placed in substantial jeopardy, the Contractor may, at its option and in addition to all other remedies it may have, demand from City reasonable assurances of timely and full performance hereunder. If City fails or refuses to provide such reasonable assurances by the date required by the City such failure or refusal shall constitute a City default.

**10.03 Notice of Breach.** Either Party shall promptly Notice the other Party regarding the occurrence of a breach as soon as such breach becomes known to the Noticing Party. Such Notice shall be given verbally followed immediately by written Notice.

**10.04 Cure of Breach.** City and Contractor shall begin cure of any breach as soon as possible after it becomes aware of its breach. Upon giving or receiving verbal Notice of a breach, City or Contractor shall proceed to cure such breach as follows:

(1) Immediately, if the breach is such that in the sole determination of the City, the health, welfare or safety of the public is endangered thereby, unless immediate cure is impossible in which event the Contractor shall Notify the City and the provisions of Section 10.09 shall apply; or

(2) Immediately, if the breach is a City breach as described in Section 10.02 (a)

(3) For any breach not described in (1) or (2) above, within thirty (30) calendar days of giving or receiving Notice of the breach; provided that if the nature of the breach is such that it will reasonably require more than thirty (30) calendar days to cure, City or Contractor shall not be in default so long as City or Contractor promptly commences to cure its breach, secures written agreement from the other Party to extend the thirty (30) calendar day cure period, and provides the other Party, no less than weekly, written status of progress in curing such breach, and diligently proceeds to complete same.

**10.05 Remedy of Breach, Monetary Damages.** Upon delivery of Notice thereof to Contractor, the City may exercise any one or more of the following remedies, or the remedies provided in Section 10.08(d) to which it may be entitled, according to proof, and including but not limited to:

**a. Compensatory Damages.** Any applicable damages to the City or the City's Collection Contractor(s) directly resulting from any breach including but not limited to the following:

(1) Incremental Direct Haul or Transfer Costs: The incrementally greater Direct Costs for direct haul or Transfer of any Permitted Material to an alternative Transfer, Processing or Disposal Facility, as compared to the City's then-current direct haul or Transfer costs to the Facility.

(2) Incremental Facility Operations Costs: The incrementally greater Direct Costs of replacing one or more aspects of Facility Operations, including, but not limited to Acceptance, Transfer, Recovery, Processing, Diversion, Marketing, of Recovered Materials to Market, and procuring and maintaining insurance and bonds.

(3) Incremental Disposal Costs: The incrementally greater Direct Costs for Disposal of Residue at a Disposal Facility other than the Designated Disposal Facility, as compared to the then-current Disposal fee at the Designated Disposal Facility.

(4) Incremental or Additional Processing Costs (or loss of Revenue): The additional costs or loss of revenue for the Acceptance, Processing or Transfer of Curbside Recyclable Materials or Curbside Organic Waste.

5) Consequential Fines: Any consequential fines and penalties assessed on the City, including by the California Integrated Waste Management board, directly resulting from Contractor's failure to meet all Contractor's Obligations. In the event of any administrative proceeding before the California Integrated Waste Management Board, the City will Notice the Contractor of the date and time of such proceeding, and provide Contractor the opportunity to attend and make a presentation.

**b. Administrative Costs:** Any documented administrative costs incurred by the City including, but not limited to, City staff time, legal, and consultant expenses.

**10.06 Other City Remedies.** In addition to the monetary damages specified in Section 10.05, City shall be entitled to all available equitable remedies, including specific performance and injunctive relief.

**10.07 Other Contractor Remedies.** In addition to legal relief including compensatory damages, Contractor shall be entitled to all available equitable remedies, including specific performance and injunctive relief.

#### **10.08 Default**

**a. Events of Contractor Default.** Each of the following shall constitute an event of default by Contractor.

(1) **Uncured Breach of Agreement.** Contractor fails to cure any breach as specified in Section 10.04.

(2) **Repeated Pattern of Breaches.** Contractor has, in the sole but reasonable determination of the City, incurred a pattern of successive breaches, or related events of breach, that cumulatively indicates Contractor unwillingness or inability to timely, fully, and consistently perform Contractor Obligations throughout the Term.

(3) **Failure to Remedy Effects of Uncontrollable Circumstance.** The Contractor fails to remedy effects of an Uncontrollable Circumstance in accordance with Section 11.03.

**b. Notice of Default.** Contractor shall be in default from the date of receipt of a Notice from the City identifying such default.

**c. Cure of Default.** The Contractor upon receipt of a Notice of Default shall affect a cure of such default, as follows:

(1) Immediately, if the default is such that in the sole determination of the City, the health, welfare or safety of the public is endangered thereby unless immediate cure is impossible in which event the Contractor shall Notify the City and the provisions of Section 10.09 shall apply; or

(2) Within ten (10) Working Days of receiving Notice of default; provided that if the nature of the default is such that it will reasonably require more than ten (10) Working Days to cure, the Contractor shall have such additional time as is reasonably needed to expeditiously complete a cure, and only as mutually agreed by the Parties. During any default cure period, the Contractor shall provide the City, no less than weekly, written status of progress in curing such default.

**d. City Remedies in the Event of Contractor Default.** Upon failure to cure a Contractor Default pursuant to Section 10.08(c), the City shall, in addition to its right to collect monetary damages as specified in Section 10.05, have the following rights:

(1) **Waive Default.** To, at its sole discretion, waive the Contractor Default.

(2) **Termination.** Terminate the Agreement in accordance with Article 12. The City shall have given written Notice to Contractor of its decision to terminate the Agreement, and any such termination shall be subject to the Lender's Rights described in Exhibit F

(3) **All Other Available Remedies.** In addition to, or in lieu of termination, to exercise all of its remedies in accordance with this Article and any other remedies at law and in equity, to which the City shall be entitled, according to proof.

(4) **Damages Survive.** If the Contractor owes any damages upon City's termination of the Agreement, Contractor's liability under this Section 10.08 shall survive termination.

(5) **Other City Rights.** In the event the City does not exercise its right to terminate, the City shall have the right to:

(a) Seek performance by the surety under any performance bond,

(b) Make a claim on any insurance policy or policies.

**e. Events of City Default.** The following shall constitute an event of default by City.

(1) **Uncured Breach of Agreement.** City fails to cure any breach as specified in Section 10.04.

**f. Notice of Default.** City shall be in default from the date of receipt of a Notice from the Contractor identifying such default.

**g. Cure of Default.** The City upon receipt of a Notice of default shall affect a cure of such default, as follows:

Within ten (10) Working Days of receiving Notice of default; provided that if the nature of the default is such that it will reasonably require more than ten (10) Working Days to cure, the City shall have such additional time as is reasonably needed to expeditiously complete a cure, and only as mutually agreed by the Parties.

**h. Contractor Remedies in the Event of City Default.** Upon failure to cure a City Default pursuant to Section 10.08(g), the Contractor shall, in addition to its right to collect monetary damages, have the following rights:

(1) **Waive Default.** To, at its sole discretion, waive the City default.

(2) **Termination.** Terminate the Agreement in accordance with Article 12, provided that no termination shall be effective until the Contractor shall have given written Notice to City of its decision to terminate the Agreement and any such termination shall be subject to the Lender's Rights described in Exhibit F.

(3) **All Other Available Remedies.** In addition to, or in lieu of termination, to exercise all of its remedies in accordance with this Article and any other remedies at law and in equity, to which the Contractor shall be entitled, according to proof.

(4) **Damages Survive.** If the City owes any damages upon Contractor's termination of the Agreement, City's liability under this Section 10.08 shall survive termination.

#### **10.09 Substitute Services**

**a. City Rights.** In addition to exercising any or all remedies specified in Article 10 or, with regard to an event of Contractor breach or default, respectively, or due to an Uncontrollable Circumstance as defined in Article 11 hereof, the City may at its sole discretion take any of the actions specified below with regard to provision of substitute services. City has no obligation to secure or to continue to secure, or to require the Contractor to secure or continue to secure substitute services. If the Contractor is, for any reason whatsoever including Uncontrollable Circumstances, and in the reasonable determination of the City, unable to Accept Permitted Material in substantial conformance with the Contractor's Obligations, City may exercise its rights as specified in this Section 10.09.

**b. Notice.** City may give Contractor oral Notice followed within twenty-four (24) hours by written Notice, that City is exercising its right to secure substitute services. Such oral Notice shall be immediately effective. City's immediate right to continue to secure substitute services under this Section, exercised due to a specific instance(s) of breach, default, or Uncontrollable Circumstance, shall cease within five (5) Working Days of receipt of Notice from Contractor that the latter is ready, willing, and able to resume timely and full performance of Contractor's Obligations.

**c. City Provision of Substitute Service.** The City may make its own arrangements to provide substitute services for the City and City's Collection Contractor(s) substantially

and reasonably similar to the services the Contractor is Obligated to provide hereunder and using a facility other than the Facility. Any costs, expenses, or damages incurred by the City in providing or contracting for such substitute services as should have been part of the performance of Contractor's Obligations which are a result of Contractor's breach or Contractor Default shall be paid by Contractor to the City provided that if the Contractor is not receiving the fees provided hereunder during the period in which substitute services are being used, it shall be responsible only for the amount by which the City's costs, expenses or damages exceed the amount of the fees which otherwise would have been paid to Contractor .

**d. Contractor Provision of Substitute Service.** City may require Contractor to secure and pay for substitute services substantially similar to the services it is obligated to provide hereunder and using a facility other than the Facility satisfactory to the City. During the period in which Contractor provides and pays for substitute service, Contractor will continue to receive the fees otherwise due hereunder, minus any credits for Curbside Recyclables, for handling Permitted Materials Delivered by City Vehicles and Collection Contractor vehicles. If the costs of substitute services provided under this paragraph exceed the amount of the fees received by Contractor, and the need for substitute services is a result of Contractor's breach or default, then Contractor shall pay any such excess costs.

**e. Contractor Request to Provide Substitute Service.** Should City decide to provide for substitute services as provided in Section 10.09(c), Contractor may submit to the City a proposal to provide the substantially equivalent service. City may, at its sole discretion direct Contractor to proceed with provision of substitute services as provided in Section 10.09(d). Should Contractor later proceed to secure and pay for substitute services Contractor shall be responsible for reimbursing City for any costs City may have incurred in having earlier arranged for substitute services.

**10.10 Lender's Rights.** The Lender's rights in the event of Contractor's breach and default are described in Exhibit F which is hereby incorporated into this Agreement.

**10.11 Dispute Resolution Procedures.** Neither Party shall have any right to invoke or avail itself of any remedy set forth in this Article, including the instituting of any court proceedings, without first complying with the dispute resolution procedures set forth in Article 13.

**10.12 Waiver.** A waiver by the City of any breach or default by Contractor shall not be deemed to be waiver of any other breach or default by Contractor, including ones with respect to the same Obligations hereunder, and including new incidents of the same breach or default. The subsequent acceptance by the City of any damages or other money paid by Contractor hereunder shall not be deemed to be a waiver by the City of any pre-existing or concurrent breach, or default by Contractor.

**10.13 Cure of Breach or Default.** Upon request of either Party, an event of breach or default shall be considered remedied or cured upon signature by both Parties of a written agreement specifying the event and stating that remedy and/or cure of such event has been completed.



**10.14 Criminal Activity of Contractor.** Contractor shall be considered to have performed criminal activity should Contractor or any of its officers or directors be "found guilty" of felonious conduct relating to Contractor's Obligations under this Agreement, or other felonious conduct by the Contractor, its officers, directors, or management or fiscal employees (where "management employee" means an employee with general responsibility, direction and control over the Contractor's activities and "fiscal employee" means an employee with direct responsibility and control duties relating to the fees and payments due hereunder and financial matters generally) or its Guarantor, its officers or directors, arising under this Agreement or relating to the Operation of the Facility. The term "found guilty" shall be deemed to include any judicial determination that Contractor or any of Contractor's officers, directors or management or fiscal employees is guilty, and any admission of guilt by Contractor, or any of Contractor's officers, directors or management or fiscal employees including, but not limited to, the pleas of "guilty", "nolo contendere", "no contest" or "guilty to a lesser felony" entered as part of any plea bargain. Such felonious conduct includes, but is not limited to: (i) price fixing, (ii) illegal transport or disposal of Hazardous Waste, Household Hazardous Waste, or toxic materials, (iii) bribery of public officials, or (iv) fraud or tampering. In the event Contractor conducted criminal activity, the City reserves the right to exercise one or more of the remedies specified below in Sections 10.14 (a), 10.14 (b), 10.14 (c) and 10.14 (d). Such action shall be taken after Contractor has been given Notice and an opportunity to present evidence in mitigation. If the City does not terminate this Agreement, Contractor shall dismiss or remove officers, directors or employees found guilty of felonious behavior and take all action necessary and appropriate to remedy any breach of Contractor's Obligations. The City shall have the right to one or more of the following remedies:

**a. Unilateral Termination.** To unilaterally terminate this Agreement in accordance with Article 12 in which event the parties shall have no further obligations to each other. However, if the Contractor is in Breach or Default of any of its Obligations hereunder other than the Criminal Activity of Contractor described in this Section 10.14, City shall be entitled to pursue any other remedies it may have pursuant to hereof for breach of such other Obligation, notwithstanding the termination of this Agreement pursuant to this Subsection (a).

**b. Exercise Remedies.** If the City does not terminate this Agreement, Contractor shall dismiss or remove officers, directors or employees found guilty of felonious behavior as described in this section and take all action necessary and appropriate to remedy the breach of Contractor's Obligations pursuant to Section 10.04. Contractor's failure to cure any breach in accordance with Section 10.04 shall be a Contractor Default under Section 10.08 and City shall have the right to all other remedies specified therein including, without limitation, the right to terminate this Agreement pursuant to Section 10.08d(2).

**c. Impose Sanctions.** If the City does not terminate this Agreement, the City may impose sanctions, which may include financial sanctions or any other condition deemed appropriate. However, the City may not impose sanctions with which, despite Contractor's use of Reasonable Business Efforts, Contractor cannot comply or which would likely cause a material adverse affect on the Contractor's ability to comply with its Obligations hereunder or pursuant to the Financing Documents. Any dispute as to whether a proposed sanction violates the provisions of this Section 10.14.c shall be resolved in accordance with Dispute Resolution, Article 13.

**d. Payment of Service Fee Held in Abeyance.** While an uncured breach and/or Contractor Default is in progress which interrupts the ability of Contractor to Accept Permitted Materials, City may postpone or cause its Collection Contractor to postpone any scheduled payment or adjustment pursuant to Article 8 until such breach or default is cured.

## **ARTICLE 11. UNCONTROLLABLE CIRCUMSTANCES**

**11.01 Uncontrollable Circumstance(s) Definition.** Uncontrollable Circumstance(s) means any act, event, or condition outside either Party's control and not the result of willful or negligent action or inaction on the part of such Party, whether affecting the Facility or either Party, which materially and adversely affects the ability of either Party to perform any of its Obligations hereunder, including, without limitation:

- a.** the failure of any appropriate Federal, State, City, or local public agency or private utility having operational jurisdiction in the area in which the Facility is located, to provide and maintain utilities, services, water, sewer or power transmission lines to the Facility which are required for Facility Development or Operation;
- b.** A Change in Law other than Changes in Law excluded in Section 11.02.a.
- c.** The suspension or interruption of Facility Development or Operations as a result of any release, spill, contamination, migration or presence of any Hazardous Waste, petroleum and petroleum products or as a result of any release, spill, contamination, or migration of Household Hazardous Waste at the Facility or the Site;
- d.** A Force Majeure event that temporarily or permanently interrupts Facility Development or Operations.

**11.02 Exclusions.** The following are excluded from Uncontrollable Circumstances, unless caused by an Uncontrollable Circumstance listed above:

- a.** Adverse changes in the financial condition of either Party or any Change in Law with respect to any taxes based on or measured by net income, or any unincorporated business, payroll, franchise or employment taxes;
- b.** The consequences of errors in Facility Operation on the part of Contractor, its employees, agents, subcontractor or affiliates, including errors in Plans and Specifications that should reasonably have been identified by Contractor under the provisions of, or the Operations and Maintenance Manual or failure to comply therewith;
- c.** The failure of Contractor to secure patents, technical licenses, trademarks, and the like necessary for Facility Development or Operation;
- d.** The lack of fitness for use, or the failure to comply with the Plans and Specifications of the Facility description of any materials, equipment or parts constituting any portion of the Facility.

e. Labor Actions of Contractor's employees or subcontractors including, but not limited to, strikes, lockouts, and industrial disturbances.

**11.03 Performance Excused.** Neither Party shall be in breach of its Obligations hereunder in the event, and for so long as, it is impossible or extremely impracticable for it to perform such Obligations due to an Uncontrollable Circumstance if such Party exerted Reasonable Business Efforts to prevent such Uncontrollable Circumstance, and such Party expeditiously takes all actions within its control to end, or to ameliorate the effects of such Uncontrollable Circumstance as soon as possible.

Contractor shall, as specified in Article 9 and Exhibit B, carry and keep in force such insurance as is needed to mitigate the financial effects of Uncontrollable Circumstances to which the Facility or Contractor may be subject. All insurance proceeds available from policies covering any Uncontrollable Circumstance act or event shall be used to mitigate any damages caused by insurable events, including, to the extent funds are available therefore, prompt reimbursement in full of any Service Fee or Direct Cost payments made by the City and/or its Collection Contractor to the Contractor for services which were not rendered during any Uncontrollable Circumstance affecting the Facility or Contractor.

**11.04 Notice.** The Party claiming excuse from performance of its Obligations based on an Uncontrollable Circumstance shall Notify the other Party as soon as is reasonably possible after the occurrence of the event constituting the Uncontrollable Circumstance. The Notice shall include a description of the event, the nature of the Obligations for which the Party claiming Uncontrollable Circumstance seeks excuse from performance, the expected duration of the inability to perform, proposed mitigation measures, and, in the event of an Uncontrollable Circumstance involving damage or destruction of the Facility, the estimated cost and time necessary to repair or rebuild the Facility. In the case of the latter, if such cost and time are not known at the time of the initial Notice of the event, that information shall be submitted as soon as possible thereafter in an additional Notice.

**11.05 Events Not Causing Facility Damage or Destruction.** If an Uncontrollable Circumstance does not cause damage or destruction of the Facility, and Contractor is unable to fulfill Contractor's Obligations for longer than thirty (30) calendar days, the Party claiming excuse shall diligently exercise Reasonable Business Efforts to develop and pursue a course of action designed to allow it to again perform all of its Obligations as soon as is reasonably practicable, and provided it does so, shall be given such additional time as is reasonably necessary until it is able to resume performance of its Obligations hereunder. If the Contractor, despite its Reasonable Business Efforts, shall be unable to resume performance of Contractor's Obligations within the nine (9) month period following the date of the Notice provided in 11.04, then the City may terminate this Agreement and the Parties shall thereafter have no further Obligations to the other.

**11.06 Events Causing Facility Damage or Destruction.** If an Uncontrollable Circumstance causes damage or destruction of the Facility, and the cost to repair or rebuild is expected to be funded entirely from the proceeds of insurance policies maintained by the Contractor then the Contractor shall as soon as is practicable, commence the repair or reconstruction activities and shall be excused from those of its Obligations hereunder which it cannot perform due to the

Uncontrollable Circumstance for a period of up to one (1) year from the date of the additional Notice described in 11.04. If the Contractor has maintained insurance as required hereby and despite such maintenance, proceeds are not expected to fully cover such reconstruction or repair, unless the Contractor shall have, in its sole discretion, agreed to repair or rebuild, the lack of insurance proceeds notwithstanding, the following shall apply:

a. If the uninsured costs are expected to be less than or equal to one hundred thousand dollars (\$100,000), then the Contractor shall nevertheless proceed to repair or reconstruct and the Contractor shall be responsible for payment of such excess costs up to that amount.

b. If the uninsured costs are expected to exceed one hundred thousand dollars (\$100,000), then the Contractor shall nevertheless proceed to repair or reconstruct the Facility and shall be able to recover the costs in excess of one hundred thousand dollars (\$100,000) through an increase in the Service Fees or in any other manner proposed by the City provided that cost recovery occurs over a reasonable time period. City and Contractor shall meet and negotiate in good faith to determine the cost recovery mechanism and time frame for cost recovery.

c) Notwithstanding any other provision of this Section, in the event that the Contractor cannot complete repair or reconstruction so as to again assume performance of its Obligations hereunder within one (1) year from the date of additional Notice described in 11.04, then the City may, upon written Notice to Contractor, Terminate this Agreement in which event the Parties shall have no further Obligations to each other.

## ARTICLE 12. TERMINATION

**12.01 City's Right to Suspend.** City shall have the right to suspend this Agreement, in whole in or in part, upon the occurrence of a Contractor Default regarding a failure to perform Contractor's Obligations and such occurrence endangers public health, welfare or safety; provided such suspension is for no longer than forty-five (45) calendar days, during which period the Contractor shall have the opportunity to demonstrate to the reasonable satisfaction of the City the Contractor can once again fully perform Contractor Obligations in which case City may waive such default and Contractor shall continue to perform Contractor's Obligations. If City is not so satisfied, it may exercise any or all remedies, including those under Section 10.08. In the event of Contractor suspension, and provided that Contractor is also suspended from operating the Facility pursuant to the Transfer Station Agreement, City shall have the right to use the Facility and designate a Replacement Operator to perform some or all Facility Operations.

**12.02 City's Right to Terminate.** In addition to any other remedy available to the City in law or under the terms of this Agreement, City shall have the right to terminate this Agreement if one or more of the following events occur:

a. **Contractor Default.** Occurrence of a Contractor Default, which is not cured within the time frame specified in Section 10.08(c).

b. **Criminal Activity of Contractor.** Contractor is found guilty of felonious conduct in accordance with Section 10.14.

**c. Facility Damage or Destruction.** In the event the Facility is totally destroyed or is materially damaged and Contractor fails to reconstruct or repair the Facility, in accordance with Section 11.06, City shall give Contractor Notice of Termination. Such Notice shall be effective thirty (30) calendar days thereafter; provided that such Notice shall be effective immediately if the public health or welfare is threatened.

### **12.03 Contractor's Responsibilities and Obligations Upon Termination or Contract Expiration**

**a. Outstanding Damages.** Contractor shall pay City any compensatory damages accrued and payable during the then-current calendar year or portion thereof which would have otherwise become payable. Contractor's liability for such payments shall survive the termination of this Agreement.

**b. Outstanding Pass-Through Costs and Taxes.** Contractor shall pay all Pass-Through Costs and taxes due to appropriate parties including, but not limited to, State, county, and local agencies.

**c. Records.** Upon City request, Contractor shall promptly provide City with any or all records kept in accordance with Article 6. Contractor's obligation to provide such records shall survive the termination of this Agreement.

**12.04 Lender's Rights and Responsibilities.** The rights and responsibilities of the Lender in the event of suspension or termination are stipulated and attested to in Exhibit F hereof which is hereby incorporated into this Agreement.

## **ARTICLE 13. DISPUTE RESOLUTION**

**13.01 Dispute Resolution Procedures.** In the event that any dispute arises between the Parties concerning the interpretation, enforcement or any other matter related to or in connection with this Agreement, the Parties shall comply with the procedures in this Article in an attempt to resolve such dispute and shall exert Reasonable Business Efforts to comply with their respective Obligations pending resolution.

The dispute resolution procedure may be initiated by either Party upon providing Notice to the other specifying the matter in dispute. Upon receipt of such Notice, both Parties shall, within five (5) Working Days of receipt of such Notice, meet and confer in good faith to resolve such dispute. Each Party shall, in good faith and in writing, promptly provide to the other Party any and all information and documentation reasonably related to the dispute requested by the other Party. If Parties are unable to satisfactorily resolve the dispute within thirty (30) calendar days then the City and Contractor agree that such disputes shall first be submitted to mediation, prior to filing litigation by either party.

**13.02 Continue Performance.** Except for an event of Contractor Default, in the event of any dispute arising under this Agreement, the City and Contractor shall continue performance of their

respective Obligations under this Agreement and shall attempt to resolve such dispute in a cooperative manner, including but not limited to negotiating in good faith.

## **ARTICLE 14. ASSIGNMENT**

**14.01 Definition.** For purposes of this Article, "assignment" shall include, but not be limited to (i) a sale, exchange or other transfer of substantially all of the Contractor's assets dedicated to service under this Agreement to a third party; (ii) a sale, exchange or other transfer of fifty percent (50%) or more of the outstanding common stock of the Contractor; (iii) any reorganization, consolidation, merger recapitalization, stock issuance or re-issuance, voting trust, pooling Agreement, escrow arrangement, liquidation or other transaction to which the Contractor or any of its shareholders is a party which results in a change of Ownership or control of fifty percent (50%) or more of the value or voting rights in the stock of the Contractor; and (iv) any combination of the foregoing (whether or not in related or contemporaneous transactions) which has the effect of any such transfer or change of Ownership. If the Contractor is not a corporation, an assignment shall also include, among other things, any transfer or reorganization that has an effect similar to the situations described in foregoing sentence for corporations. For purposes of this Article, the term "proposed assignee" shall refer to the proposed transferee(s) or other successor(s) in interest pursuant to the assignment. If the Contractor is a subsidiary of another corporation or business entity, any "assignment," as defined above, by the parent company or corporation shall be considered an assignment by the Contractor. Change in Ownership of Contractor's assets or stocks which occur for interfamilial planning purposes only and do not involve a change in the management of the Facility shall not be considered an assignment for the purposes of Article 14.

**14.02 City Assignment.** The City may assign its rights and responsibilities under this Agreement to any other governmental entity or agency as long as any such proposed assignee under this Section shall (i) have the legal authority and financial capacity sufficient to assume and perform all of the City's Obligations, and (ii) shall agree in writing to do so.

### **14.03 Contractor Assignment**

**a. Limitations.** The Contractor acknowledges that this Agreement involves rendering a vital service to the City's residents and businesses, and that the City has relied upon the Contractor's representation of its experience and financial resources in qualifying the Contractor to perform the services under this Agreement. Except as provided in this Article, the Contractor shall not assign its rights or delegate, subcontract, or otherwise transfer its Obligations hereunder to any other Person without the prior consent of the City. Any such assignment made without the consent of the City shall be void. Under no circumstances shall the City be required to consider any proposed assignment if the Contractor is in default at any time during the period of consideration except as may be provided in Exhibit F relating to Lender's Rights. Contractor may assign this Agreement to a Lender pursuant to Exhibit F hereof.

**b. Determination.** The Contractor shall submit its request for City consent to the City together with documentation and information concerning the financial capability and solid waste management experience of the proposed assignee. Any such proposed

assignee under this Section shall have the legal authority sufficient to assume and perform all of Contractor's Obligations, and shall agree in writing to do so.

In making its determination to consent to the assignment the City may require and consider, and the Contractor shall cause to be provided such items as the following:

- (1) audited financial statement of the proposed assignee for the immediately preceding five (5) operating years, indicating that the proposed assignee's financial status is sufficient to perform all Contractor's Obligations.
- (2) satisfactory proof that the proposed assignee has at least ten (10) years of municipal solid waste materials Recovery and Transfer experience on a scale equal to or exceeding the scale of Operations conducted by the Contractor; and that the proposed Assignee will be able to satisfactorily maintain the same residue and Diversion levels.
- (3) satisfactory proof that in the last five (5) years, the proposed assignee has not suffered any citation or other censure from any Federal, State or local agency having jurisdiction over its waste management operations due to any Significant failure to comply with State, Federal or local waste management law, which citation or censure has not been timely cured to the satisfaction of such agency, or is not now in the process of a cure; and if it has suffered any citation or other censure, that the assignee has provided the City with a complete list thereof;
- (4) evidence the proposed assignee conducts its Operations in accordance with Standard Industry Practices and in full compliance with all Federal, State and local laws regulating the materials Recovery, Transfer and Disposal of Municipal Solid Waste including Hazardous Waste and Household Hazardous Waste;
- (5) letters of credit, lines of credit, or other financial assurances confirm the assignee's financial ability to perform the Agreement and if in the opinion of the City that the assignee's or its Guarantor's financial ability does not meet that standard, then City may reasonably increase the amount of performance bond requirements as a requirement of assignment; and
- (6) any other information reasonably required by the City to ensure the proposed assignee can fulfill the terms hereof, including the payment of damages, in a timely, safe and effective manner.
- (7) a Financial Guaranty Agreement has been provided by the proposed assignee that is satisfactory to the City and is binding and enforceable upon the Guarantor.

**c. Application and Transfer Fee.** Any application for a transfer of this Agreement shall be governed by the following conditions:

- (1) Any application for a transfer shall be made in a manner prescribed by the City representative. The application shall include a transfer fee in an amount to

be set by resolution of the City Council to cover the cost of all direct and indirect administrative expenses including consultants and attorneys, necessary to adequately analyze the application and to reimburse the City for all direct and indirect expenses.

(2) The Contractor shall reimburse the City for any and all additional costs related to the assignment requested and not covered by the transfer fee, including attorney's fees and investigation costs related to investigation of the suitability of any proposed assignee, and to review and finalize any documentation required as a condition for approving any such assignment. Bills shall be supported with evidence of the expense or cost incurred. The Contractor shall be responsible for ensuring the payment of such bills within thirty (30) calendar days of receipt.

**d. Transition.** If the City consents to an assignment, at the point of transition the Contractor shall cooperate with the City and subsequent Contractor(s) or subcontractor(s) to assist in an orderly transition which shall include the Contractor providing all Operating information requested by subsequent Contractor including scale house records, vehicle tare weights, and billing information.

## **ARTICLE 15. OTHER PROVISIONS**

**15.01 Notices.** All demands, orders, requests, proposals, comments, acknowledgments, approvals, consents, certifications and other communications made hereunder shall be in writing and shall either be personally delivered to a representative of the Parties at the address below or be deposited in the United States mail, first class postage prepaid (certified mail, return receipt requested), addressed as follows:

If to City:

City Manager  
City of Fremont  
3300 Capitol Ave  
Fremont, California 94537-5006  
Telephone: (510) 284-4002  
Fax: (510) 284-4001

cc: Fremont City Clerk, Environmental Services Manager and City Attorney

If to Contractor:

BLT Enterprises of Fremont, LLC  
501 Spectrum Circle  
Oxnard, California 93030  
Attn: President, Shawn Guttersen  
Fax Telephone: (805) 278-8221  
Telephone: (805) 278-8220

cc: Vice President, Steve Perry



The address to which communications may be delivered may be changed from time to time by a Notice given in accordance with this Section. Any Notice of other communication hereunder shall be effective as of the date received, or if earlier, as of the date upon which such Notice or communication is first sent by telex and confirmed by the receiving Party, facsimile transmission, or other means of rapid or instantaneous communication, and simultaneously confirmed by mail in the manner specified above.

#### **15.02 Authorized Representatives**

**a. City.** For purposes of this Agreement, the City's authorized representative shall be the City Manager or her/his designee, who shall have the authority to make Operational decisions and financial decisions in accordance with Applicable Law and City policy with respect to this Agreement which are binding on the City.

**b. Contractor.** For purposes of this Agreement, Contractor's authorized representative shall be Mr. Shawn Gutteresen and Mr. Steve Perry, who shall have the authority to make decisions in accordance with Applicable Law and Contractor's articles of incorporation, bylaws and policy. Contractor shall the right to change the designated authorized representatives by providing written Notice to City.

**15.03 Conflicting Provisions.** In the event the provisions of the Articles herein conflict with those of the Exhibits hereto, the Articles shall prevail.

**15.04 Governing Law.** This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State.

**15.05 Amendments.** The Parties may change, modify, supplement, or amend this Agreement only upon mutual written agreement duly authorized and executed by both Parties.

**15.06 Venue.** The venue for any legal proceedings initiated by Contractor related to this Agreement shall be exclusively the County of Alameda or, in case of federal jurisdiction, Federal District Court, Northern Division.

#### **ARTICLE 16. SEVERABILITY**

If any term or provision of this Agreement shall be found to be illegal or unenforceable, then, notwithstanding, this Agreement shall remain in full force and effect and such term or provision shall be deemed stricken.

#### **ARTICLE 17. ENTIRE AGREEMENT**

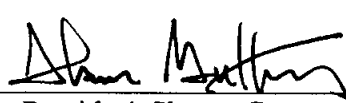
This Agreement and the Transfer Station Agreement executed on April 20, 2004, and amended April, 2006 contain the entire Agreement between the Parties with respect to the transactions contemplated hereby. All Exhibits are hereby incorporated into this Agreement by reference.

IN WITNESS WHEREOF, the PARTIES hereto have Executed this Agreement on the date first above written.

City of Fremont (City)

BLT Enterprises of Fremont, LLC  
(Contractor)





City Manager


Vice President Shawn Gutteresen

Dated: **CHRISTINE S. DANIEL**  
**DEPUTY CITY MANAGER**

Dated: 9/18/2006

Dated: 10-4-06

APPROVED AS TO FORM

  
Harvey E. Levine, City Attorney

Dated: 9/27/06

**EXHIBIT A**

**COMPENSATION  
2006 & 2007**

**CURBSIDE RECYABLE MATERIAL PAYMENT**

A Curbside Recyclable Material Payment for each ton of curbside recyclables delivered to the Facility (net of waste residuals) will be paid to the City in accordance with Article 8.03. The 2006 and 2007 payment per ton is **\$15.00**

**BIENNIAL ADJUSTMENT TO CURBSIDE RECYCLABLE MATERIAL PAYMENT**

The Curbside Recyclable Materials Payment shall be adjusted biennially in accordance with Article 8.03a with a minimum of \$10.00. A sample calculation is shown below.

**Official Board Market (OBM) Price Adjustment**

*24 Month Index Calculation*

Paper Grades	2005 Base OBM	June 2007 OBM	Change	Weighted Average %	Index Change	Percent Change
Newsprint #8	\$85.00	\$100.00	\$15.00	60.00%	\$9.00	10.59%
Mixed Paper	\$60.00	\$75.00	\$15.00	25.00%	\$3.75	6.25%
OCC	\$75.00	\$95.00	\$20.00	15.00%	\$3.00	4.00%
<b>Percent Change</b>						<b>6.95%</b>
<b>2006 &amp; 2007 Curbside Recyclable Material Payment</b>						<b>\$15.00</b>
<b>Price adjustment based upon 24 month index</b>						<b>\$1.04</b>
<b>Revised Curbside Recyclable Material Payment</b>						<b>\$16.04</b>

CURBSIDE ORGANIC WASTE TRANSFER FEE

A Curbside Organic Waste Transfer Fee will be charged to the City for each ton of Curbside Organic Waste delivered to the Facility. The 2006 and 2007 fee per ton is **\$13.34.**

BIENNIAL ADJUSTMENT TO CURBSIDE ORGANIC WASTE TRANSFER FEE

The Curbside Organic Waste Transfer Fee shall be adjusted biennially in accordance with Article 8.03(c). The adjustment formula is as follows:

Revised Curbside Organic Waste Transfer Fee = Current Curbside Organic Waste Transfer Fee X Current CPI Index / Prior CPI Index

**EXHIBIT B**  
**INSURANCE REQUIREMENTS**

The Contractor shall procure and maintain for the duration of the Agreement insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the work hereunder by the Contractor, his agents, representatives, employees or subcontractors. With respect to General Liability, Errors & Omissions and Pollution and/or Environmental Impairment Liability coverage should be maintained through expiration or termination of the Agreement.

A. Minimum Scope of Insurance. Coverage shall be at least as broad as:

- i. Insurance Services Office Commercial General Liability coverage (“occurrence” form CG 0001.).
- ii. Insurance Services Office form number CA 0001 (Ed. 1/78), covering Automobile Liability, code 1 (any auto) and endorsement CA 0025.
- iii. Workers’ Compensation Insurance as required by the State of California and Employer’s Liability Insurance.
- iv. Pollution and/or Environmental Impairment Liability.
- v. Errors & Omissions.

B. Minimum Limits of Insurance. The Contractor shall maintain limits no less than:

- i. General Liability: \$10,000,000 combined single limit per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit. The policy shall stipulate this insurance is primary and no other insurance carried by the City will be called upon to contribute to a loss suffered by the Contractor hereunder and waive subrogation against the City and other additional insureds.
- ii. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage.

- iii. Workers' Compensation and Employer's Liability: \$1,000,000 each accident, \$1,000,000 policy limit bodily injury or disease, \$1,000,000 each employee bodily injury by disease.
- iv. Pollution and/or Environmental Impairment Liability: \$3,000,000 each occurrence/\$10,000,000 policy aggregate covering liability arising from the release of waste materials and/or irritants, contaminants or pollutants. Such coverage shall, if commercially available, without involvement of the City, automatically broaden in its form of coverage to include legislated changes in the definition of waste materials and/or irritants, contaminants or pollutants. The policy shall stipulate this insurance is primary and no other insurance carried by the City will be called upon to contribute to a loss suffered by the Contractor hereunder and waive subrogation against the City and other additional insureds.
- v. Errors and Omissions: \$3,000,000 each occurrence/\$10,000,000 policy aggregate covering liability arising from the release of waste materials and/or irritants, contaminants or pollutants. Such coverage shall, if commercially available, without involvement of the City, automatically broaden in its form of coverage to include legislated changes in the definition of waste materials and/or irritants, contaminants or pollutants. The policy shall stipulate this insurance is primary and no other insurance carried by the City will be called upon to contribute to a loss suffered by the Contractor hereunder and waive subrogation against the City and other additional insureds.

C. Deductible and Self-Insured Retentions. Any deductibles or self-insured retentions must be declared to and approved in writing by the City. At the option of the City, either (i) the Insurer shall reduce or eliminate such deductibles or self-insured retentions with regard to the City, its officers, officials, employees and volunteers; or (ii) the Contractor shall provide evidence satisfactory to the City guaranteeing payment of losses and related investigations, claim administration and defense expenses. Notwithstanding the foregoing, the City may elect not to accept any deductibles or self-insured retentions offered by the Contractor.

D. Other Insurance Provisions.

- i. The policies are to contain, or be endorsed to contain, the following provisions:
  - (1) The City, its officers, officials, employees and volunteers are to be covered as additional insureds with respect to liability arising out of automobiles owned, leased,

hired or borrowed by or on behalf of the Contractor; and with respect to liability arising out of work or operations performed by or on behalf of the Contractor including materials, parts or equipment furnished in connection with such work or operations.

- (2) The Contractor's insurance coverage shall be primary insurance with regard to the City, its officers, officials, employees, agents and volunteers. Any insurance or self-insurance maintained by the City, its officers, officials, employees, agents or volunteers shall be excess of the Contractor's insurance and shall not contribute with it.
  - (3) The Contractor's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
- ii. The Automobile Liability policy shall be endorsed to delete the Pollution and/or the Asbestos exclusion and add the Motor Carrier Act endorsement (MCS-90), TL 1005, TL 1007 and/or other endorsements required by federal or State authorities.
  - iii. Workers' Compensation and Employers Liability Coverage. The Insurer shall agree to waive all rights of subrogation against the City, its officers, officials, employees and volunteers for losses arising from work performed by the Contractor for the City.
  - iv. All Coverages. Each insurance policy required by this clause shall be occurrence-based or an alternate form as approved by the City and endorsed to state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the City.

E. Acceptability of Insurers. Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A:VII if admitted. If pollution and/or Environmental Impairment and/or errors and omissions coverages are not available from an "Admitted" Insurer, the coverage may be written with the City's permission, by a Non-admitted insurance company. A Non-admitted company should have an A.M. Best's rating of A:X or higher.

F. Verification of Coverage. As provided in Article 13 the Contractor shall furnish the City with insurance certificates and endorsements effecting coverage required by this clause. The endorsements are to be signed by a person authorized by that Insurer to bind coverage on its behalf. All certificates and endorsements are to be received and approved by the City's Risk Manager before

work commences. The Contractor's Insurer may provide complete copies of all required insurance policies, including endorsements effecting the coverage required by these specifications.

G. Subcontractors. The Contractor shall include all subcontractors as insureds under its policies or shall furnish separate certificates and endorsements for each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated herein.

H. Other Provisions

- i. Any failure to comply with reporting or other provisions of the policies including breaches of warranties shall not affect coverage provided to the City, its officers, officials, agents, employees and volunteers.



## Exhibit C

### Commingled Curbside Recyclables Characterization Methodology for The City of Fremont

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- I. Loads will be selected at random from the City's Commingled Recycling routes. Upon request, the Fremont Recycling & Transfer Station (Facility) will photograph random curbside loads and these photos will be provided to customer or kept on file for review at the facility. All curbside recyclables are delivered to recycling side of the facility that is separate from the transfer station. This will ensure that the loads and curbside material is tipped in the correct area of the facility and separated from other loads to avoid cross contamination.
- II. The Facility or the City will schedule a characterization day to process a representative sample from the Residential Curbside routes one or two times per year. City staff will be notified days in advance of waste characterization and allowed to observe characterization procedure. Seasonal characterizations are recommended, one winter and one summer characterization per year. The dates chosen for characterization will include a representational mix of all Curbside routes.
- III. The Facility will weigh and process curbside recyclables weighing a minimum of 50 tons up to 75 tons from the curbside program on the normal recycling sort lines. In the event of a special test load characterization, either party may schedule a day to process a minimum of 20 tons for the specific material. The parties agree to meet and negotiate a price for any special characterizations requested by the City.
- IV. All Curbside Recyclables are recorded in the computer system upon receipt at the inbound scales. The driver will notify the scalehouse operators of a Curbside Recycle Load; the operators will input the material default as – City of Fremont Curbside Material.
- V. The floor spotter will direct the truck to tip in the designated area provided next to a push wall near the in-feed conveyor to the curbside recyclables processing line.
- VI. After the curbside material is pre-sorted for bulky items, it is then fed onto the in-feed conveyor to the first processing line (i.e. presort table, disc screen). On the presort table, sorters are pulling trash and cardboard (OCC) prior to the material entering the disc screens. The residual items may include but are not limited to: film plastic, bags of trash, wood, green waste, patio furniture, contaminated recyclables and other bulky items that are not considered curbside recyclables. The trash residuals drop through onto the ground floor bunker and are pushed by a wheel loader onto the tipping floor for photo documentation and visual inspection

by City staff or a Facility Supervisor prior to being weighed and then shipped to the Landfill. Upon request by the City, a waste characterization of trash residuals will be conducted up to two times per year. The OCC is sorted into a separate floor bunker and stored until it is baled.

- VII. The remaining recyclables are processed through a set of disc screens that separates the newspaper, mixed paper, and rigid containers. After going through the star screens, the ONP (Old News Paper) goes through a final quality sort prior to falling onto the ONP bunker for storage prior to baling.
- VIII. The broken glass and fines are separated by a disc screen then a smaller fines screen and/or an air classifier. The screen separates the 2-inch minus glass and fines and they are conveyed and stored in a floor bunker on the tipping floor. The fines are recorded as Alternative Daily Cover (ADC) and sent to the Landfill for ADC or Disposal, subject to LEA approval. The glass is stored in a bunker and shipped as mixed glass for further processing.
- IX. The mixed paper and rigid containers are transferred over a conveyor line with sorters classifying the materials into bunkers below the sorting belt for storage prior to baling. These materials will include the following.
- Mixed Paper, PET #1, HDPE #2, (Natural & Colored), Plastic  
Narrow Neck Bottles #1 - #7 Aluminum cans, Three Color Glass,  
Tin Cans, and residual trash
- X. On the last sorting belt metal and aluminum cans will be separated and removed with an electric magnet. The mixed paper then will receive a final screening over a two inch minus steel disc screen before entering into the storage bunker. The fines generated in the screening process will be sent to a landfill as residue.
- XI. After processing the representative curbside material, the Facility will weigh each commodity sorted by classification. Therefore, each bin or bale will receive an exact weight and or the bale counts over two bales will receive a weighted average, with a minimum of three bales weighed. The results will be presented in the format attached – Form 1. Over time, the format may change by adding or subtracting commodities.



Exhibit C – Form 1

**Fremont Recycling & Transfer Station**  
**Commingled Curbside Material Characterization**  
**Form**

City of Fremont

Total Inbound Tons	0.0	100.00%
Waste Oil	0.0	0.00%
<b>Net Tons for Processing-</b>	<b>0.0</b>	<b>00.00%</b>

Recovered Materials: Bale Avg.	Bins/Bales	lbs.	tons	% of Total
Newspaper #6	0	-	0.00	0.00%
Mixed Paper-	0	-	0.00	0.00%
OCC-	0	-	0.00	0.00%
Flint Glass-	0	-	0.00	0.00%
Amber Glass-	0	-	0.00	0.00%
Green Glass-	0	-	0.00	0.00%
Mixed Glass-	0	-	0.00	0.00%
Aluminum-	0	-	0.00	0.00%
HDPE Color-	0	-	0.00	0.00%
HDPE Natural-	0	-	0.00	0.00%
PET-	0	-	0.00	0.00%
Other Plastic	0	-	0.00	0.00%
Tin Cans-	0	-	0.00	0.00%
<b>Total-</b>			<b>0.00</b>	<b>0.00%</b>
<b>MSW</b>	0		<b>0.00</b>	<b>0.00%</b>
<b>Trash</b>	0		<b>0.00</b>	<b>0.00%</b>
<b>ADC</b>	0	-	<b>0.00</b>	<b>0.00%</b>
<b>Unaccounted Shrink</b>	0	-	<b>0.00</b>	<b>0.00%</b>
<b>Total Residual</b>			<b>0.00</b>	<b>0.00%</b>

**Diversion Percentage-** **2.00%**

**EXHIBIT D**  
**FINANCIAL GUARANTY AGREEMENT**

This Guaranty, made as of the date of the Agreement (as defined below) by BLT Enterprises Inc., a California corporation duly organized and existing in good standing under the laws of the State of California and having its principal place of business in Oxnard, California (**Guarantor**), to and for the benefit of the City of Fremont (**City**), a municipal corporation of the State of California (the **State**).

WITNESSETH

WHEREAS, BLT Enterprises of Fremont, LLC, a California limited liability company (the **Contractor**), an affiliate of the Guarantor, and the City have negotiated that certain Agreement between the City of Fremont and BLT Enterprises of Fremont, LLC for Curbside Recyclable Materials and Curbside Organic Waste Services dated as of the later of the date of execution thereof by the City or the Contractor, as may be supplemented and amended from time to time in accordance with the terms thereof (**Agreement**), which Agreement is incorporated herein by reference and hereby made part hereof;

WHEREAS, it is in the interest of Guarantor that the Contractor enter into the Agreement with the City;

WHEREAS, the City is willing to enter into the Agreement only upon the condition that the Guarantor execute this Guaranty;

WHEREAS, it is a condition precedent to the City to enter into the Agreement, the Guarantor agrees as follows:

Capitalized terms used herein and not otherwise defined herein, shall have the meaning assigned to them in the Agreement.

(1) **Guaranty of Contractor's Obligations to City.** Guarantor hereby directly, unconditionally, irrevocably, and absolutely guaranties the timely and full performance of Contractor's obligations under the Agreement in accordance with the terms and conditions contained therein. Notwithstanding the unconditional nature of the Guarantor's payment obligations set forth herein, the Guarantor shall have the right to assert the defenses provided in the paragraph entitled **Defenses** under Section 8 hereof, against claims made hereunder.

**(2) Governing law; consent to jurisdiction; service of process.** This Guaranty shall be governed by the laws of the State. The Guarantor hereby agrees to the service of process in the State for any claim or controversy arising out of this Guaranty or relating to any breach. The Guarantor hereby agrees that the courts of the State, and to the extent permitted by law, courts of the County in the State shall have the exclusive jurisdiction of all suits, actions, and other proceedings involving itself and to which the City may be party for the adjudication of any claim or controversy arising out of this Guaranty or relating to any breach hereof, waives any objections that it might otherwise have to the venue of any such Court for the trial of any such suit, action, or proceeding by prepaid registered mail, return receipt requested.

**(3) Enforceability; no assignment.** This Guaranty shall be binding upon and enforceable against Guarantor, its successors, assigns, and legal representatives. It is for the benefit of the City, its successors and assigns. The Guarantor may not assign or delegate the performance of this Guaranty without prior written consent of the City. Any such assignment made without the consent of City shall be void. Guarantor shall submit its request for City consent to the City together with the following documentation and any other documentation the City may request:

- (i) audited financial statement for the immediately preceding three (3) operating years; indicating that in the opinion of the City the proposed assignee's financial status is equal to or greater than Guarantor's.
- (ii) satisfactory proof that in the last five (5) years, the proposed assignee has not suffered any citations or other censure from any federal, state or local agency having jurisdiction over its waste management operations due to any significant failure to comply with state, federal or local waste management law and that the assignee has provided City with a complete list of such citations and censures;
- (iii) satisfactory proof that the proposed assignee has at all times conducted any solid waste management operations in an environmentally safe and conscientious fashion;
- (iv) satisfactory proof that the proposed assignee conducts its municipal solid waste management practices in accordance with sound waste management practices in full compliance with all federal, state and local laws regulating the collection and disposal of waste, including hazardous waste as identified in Title 22 of the California Code of Regulations;

- (v) of any other information required by City to ensure the proposed assignee can fulfill the terms hereof, including the payment of damages, in a timely, safe and effective manner.

Guarantor shall undertake to pay City its reasonable expenses for attorneys' fees and investigation costs necessary to investigate the suitability of any proposed assignee, and to review and finalize any documentation required as a condition for approving any such assignment.

**Assign.** For the purpose of this Section, **assign** includes;

- (a) to sell, exchange or otherwise transfer to a third party all or substantially all of Guarantor's assets.
- (b) issuing new stock or selling, exchanging or otherwise transferring thirty percent or more of the then outstanding common stock of Guarantor to a Person other than the shareholders owning said stock as of the date hereof.

**(4) Guaranty absolute and unconditional.** The undertakings of Guarantor set forth herein are absolute and unconditional, and the City shall be entitled to enforce any or all of said undertakings against Guarantor without being first required to enforce any remedies or to seek to compel the Contractor to perform its obligations under the Agreement or to seek, or obtain recourse against any other party or parties, including but not limited to the Contractor or any assignee of the Contractor, who are, or may be, liable therefor in whole or in part, irrespective of any cause or state of facts whatsoever. Without limiting the generality of the foregoing, the Guarantor expressly agrees that its obligations hereunder shall not be affected, limited, modified or impaired by any state of facts or the happening from time to time of an event, other than the payment of monetary obligations by the Contractor to City under the Agreement in accordance with the terms of the Agreement, including, without limitation, any of the following, each of which is hereby expressly waived as a defense to its liability hereunder, except to the extent such defenses would be available to the Contractor and release, discharge or otherwise offset Contractor's obligations under the Agreement:

- (a) the invalidity, irregularity, illegality or unenforceability, of or any defect in or objections to the Agreement;
- (b) any modification or amendment or compromise of or waiver of compliance with or consent to variation from any of the provisions of the Agreement by the Contractor;
- (c) any release of any collateral or lien thereof, including, without limitation, any performance bond;

- (d) any defense based upon the election of any remedies against the Guarantor of the Contractor, or both, including without limitation, any consequential loss by the Guarantor of its rights to recover any deficiency, by way of subrogation or other, from the Contractor or any other person or entity;
- (e) the recovery of any judgment against the Contractor to enforce any such collateral or performance bond;
- (f) the City or its assigns taking or omitting to take any of the actions which it or any such assign is required to take under the Agreement; any failure, omission or delay on the part of the City or its assignees to enforce, assert or exercise any right, power or remedy conferred on it or its assigns by the Agreement, except to the extent such failure, omission or delay gives rise to an applicable statute of limitations defense by the Contractor with respect to a specific obligation;
- (g) the default or failure of the Guarantor to fully perform any of its obligations set forth in this Guaranty;
- (h) the bankruptcy, insolvency, or similar proceeding involving or pertaining to the Contractor or the City, or any order or decree of a court, trustee or receiver in any such proceeding;
- (i) in addition to those circumstances described in item (h), any other circumstance which might otherwise constitute a legal or equitable discharge of a guarantor or limit the recourse of the City to the Guarantor;
- (j) the existence or absence of any action to enforce the Agreement;
- (k) subject to the provisions of the Agreement relating to Uncontrollable Circumstances, any present or future law or order of any government or of any agency thereof, purporting to reduce, amend or otherwise affect the Agreement or to vary any terms of payment or performance under the Agreement;

provided that, notwithstanding the foregoing, Guarantor shall not be required to pay any monetary obligation of Contractor to City from which Contractor would be discharged, released or otherwise excused under the provisions of the Agreement.

**(5) Waivers.** Guarantor hereby waives:

- (a) notice of acceptance of this Guaranty and of the creation, renewal, extension and accrual of the limited financial obligations Guaranteed hereunder;
- (b) notice that any person has relied on this Guaranty;
- (c) diligence, demand of payment and notice of default or nonpayment under this Guaranty or the Agreement, and any and all other notices required under the Agreement;
- (d) filing of claims with a court in the event of reorganization, insolvency, or bankruptcy of the Contractor;
- (e) any right to require a proceeding first against the Contractor or with respect to any collateral or lien, including, without limitation, any performance bond, or any other requirement that the City exercise any remedy or take any other action against the Contractor or any other person, or in respect of any collateral or lien, before proceeding hereunder;
- (f) (i) any demand for performance or observance of, or (ii) any enforcement of any provision of, or (iii) any pursuit or exhaustion of remedies with respect to, any security (including, with imitation, any performance bond) for the obligations of the Contractor under the Agreement; any pursuit of exhaustion of remedies against the Contractor or any other obligor or guarantor of the obligations; and any requirement of promptness or diligence on the part of any person in connection therewith;
- (g) to the extent that it lawfully may do so, any and all demands or notices of every kind and description with respect to the foregoing or which may be required to be given by any statute or rule of law, and any defense of any kind which it may now or hereafter have with respect to this Guaranty or the obligations of the Contractor under the Agreement, except any Notice to the Contractor required pursuant to the Agreement or Applicable Law which Notice preconditions the Contractor's obligation or the defenses listed in Section (8) below.

To the extent that it may lawfully do so, the Guarantor hereby further agrees to waive, and does hereby absolutely and irrevocably waive and relinquish, the benefit and advantage of, and does hereby covenant not to assert, any appraisal, valuation, stay, extension, redemption or similar laws, now or at any time hereafter in force, which might delay, prevent or otherwise impede the due



performance or proper enforcement of this Guaranty, the Agreement, or the obligations of the Contractor under the Agreement, and hereby expressly agrees that the right of the City hereunder may be enforced notwithstanding any partial performance by the Contractor or the Guarantor, or the foreclosure upon any security (including, with limitation, any performance bond) given by the Contractor for its performance of any of Contractor's obligations under the Agreement.

**(6) Agreements between City and Contractor; Waivers by City.** The Guarantor agrees that, without the necessity for any additional endorsement or Guaranty by or any reservation of rights against Guarantor and without any further assent by Guarantor, by mutual agreement between the City and Contractor, the City and Contractor may, from time to time:

- (a) renew, modify or compromise the liability of the Contractor for or upon any of the obligations hereby Guaranteed; or
- (b) consent to any amendment or change of any terms of the Agreement; or
- (c) accept, release, or surrender any security (including, without limitation, any performance bond), or
- (d) grant any extensions or renewal of the obligations of the Contractor under the Agreement, and any other indulgence with respect thereto, and to effect any release, compromise or settlement with respect thereto, all without releasing or discharging the liability of Guarantor hereunder.

The Guarantor further agrees that the City or any of its assigns shall have and may exercise full power in its uncontrolled discretion, without in any way affecting the liability of the Guarantor under this Guaranty, to waive compliance with and any default of the Contractor under, the Agreement.

**(7) Continuing Guaranty.** This Guaranty is a continuing Guaranty and shall continue to be effective or be reinstated, as applicable, if at any time any payment of any of the obligations hereby Guaranteed is rescinded or is otherwise required to be returned upon reorganization, insolvency or bankruptcy of the Contractor or Guarantor or otherwise, all as though such payment had not been made.

**(8) Defenses.** The Guarantor may exercise or assert any and all legal or equitable rights, defenses, counter claims or affirmative defenses under the Agreement or Applicable Law which the Contractor could assert against any party seeking to enforce the Agreement against the Contractor, except for

any defenses Guarantor waives under Section (4) (a) - (k), and nothing in this Guaranty shall constitute a waiver thereof by the Guarantor.

**(9) Payment of costs of enforcing Guaranty.** Guarantor agrees to pay all costs, expenses and fees, including all reasonable attorney's fees, which may be incurred by the City in enforcing this Guaranty following the default on the part of the Guarantor hereunder whether the same shall be enforced by suit or otherwise

**(10) Enforcement.** The terms of this Guaranty may be enforced as to any one or more breaches either separately or cumulatively.

**(11) Remedies cumulative.** No remedy herein conferred upon or reserved to the City hereunder is intended to be exclusive of any other available remedy or remedies, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Guaranty and the Agreement or hereinafter existing at law or in equity or by statute.

**(12) Severability.** The invalidity or unenforceability of any one or more phrases, sentences or clauses in this Guaranty contained shall not effect the validity or enforceability of the remaining portions of this Guaranty, or any part thereof.

**(13) Amendments.** No amendment, change, modification or termination of this Guaranty shall be made except upon the written consent of Guarantor and the City.

**(14) Term.** The obligations of the Guarantor under this Guaranty shall remain in full force and effect until (i) all monetary obligations of the Contractor under the Agreement shall have been fully performed or provided for in accordance with the Agreement, or (ii) the discharge, release or other excuse of said obligations in accordance with the terms of the Agreement.

**(15) No set-offs, etc.**

**By Guarantor.** The obligation of Guarantor under this Guaranty shall not be affected by any set-off, counterclaim, recoupment, defense or other right that Guarantor may have against the City on account of any claim of the Guarantor against the City; provided that Guarantor reserves the right to bring independent claims not arising from the Agreement against the City so long as any such claims shall not be used to set-off or deduct from any claims which the City may have against the Guarantor arising from this Guaranty.

**By Contractor.** The obligation of Guarantor under this Guaranty shall be subject to any set-off, counterclaim, recoupment, defense or other right that the Contractor may assert pursuant to the Agreement, if any, but the obligation of Guarantor under this Guaranty shall not be subject to any set-off, counterclaim, recoupment, defense or other right that the Contractor may assert independently of and outside the Agreement.

**(16) Warranties and representations.** The Guarantor warrants and represents that as of date of execution of the Guaranty:

- (a) The Guarantor has the power, authority and legal right to enter into this Guaranty and to perform its obligations and undertakings hereunder, and the execution, delivery and performance of this Guaranty by the Guarantor (i) have been duly authorized by all necessary corporate and shareholder action of the part of the Guarantor, (ii) have the requisite approval of all federal, State and local governing bodies having jurisdiction or authority with respect thereto, if any (iii) do not violate any judgement, order, law or regulation applicable to the Guarantor; (iv) do not conflict with or constitute a default under any agreement or instrument to which the Guarantor is a party or by which the Guarantor or its assets may be bound or affected; and (v) do not violate any provision of the Guarantor's articles or certificate of incorporation or by-laws.
- (b) This Guaranty has been duly executed and delivered by the Guarantor and constitutes the legal, valid and binding obligation of the Guarantor, enforceable against the Guarantor in accordance with its terms; and
- (c) There are no pending or, to the knowledge of the Guarantor, threatened actions or proceeding before any court or administrative agency which would have a material adverse effect on the financial condition of the Guarantor, or the ability of the Guarantor to perform its obligations or undertakings under this Guaranty.

Guarantor acknowledges and agrees that such representations and warranties are material.

**(17) No merger; no conveyance of assets.** Guarantor agrees that during the term hereof in accordance with Section (14) Guarantor shall not consolidate with or merge into any other corporation where the shareholders of the Guarantor yield control of the Guarantor, or a majority interest in the Guarantor, to the newly formed corporation, or convey, transfer or lease all or substantially all of its properties and assets to any person, firm, joint venture, corporation and other entity (**Person**), unless the City consents thereto in accordance with Section (3) above.

**(18) Counterparts.** This Guaranty may be executed in any number of counterparts, some of which may not bear the signatures of all parties hereto. Each such counterpart, when so executed and delivered, shall be deemed to be an original and all of such counterparts, taken together, shall constitute one and the same instrument; provided, however, that in pleading or proving this Guaranty, it shall not be necessary to produce more than one copy (or sets of copies) bearing the signature of the Guarantor.

**(19) Notices.** All notices, instructions and other communications required or permitted to be given to or made upon any party hereto shall be in writing, and shall be given in the manner and to the addresses provided in the Agreement. Notices shall be delivered to the following address:

BLT Enterprises of Fremont, LLC.  
511 Spectrum Circle  
Oxnard, California 93030  
Attn: President, Shawn Guttersen

Fax Telephone: (805) 278-8221  
Telephone: (805) 278-8220

cc: Vice President, Steve Perry

**(20) Separate suits.** Each and every payment default by Contractor under the Agreement shall give rise to a separate cause of action under this Guaranty, and separate suits may be brought hereunder by the City or its assigns as each cause of action arises.


**(21) Headings.** The Section headings appearing herein are for convenience only and shall not govern, limit, modify or in any manner affect the scope, meaning or intent of the provisions of this Guaranty.

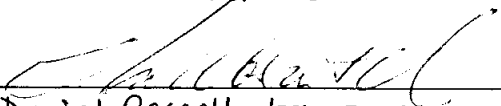
**(22) Entire Agreement.** This Guaranty constitutes the entire agreement between the parties hereto with respect to the transactions contemplated by this Guaranty. Nothing in this Guaranty is intended to confer on any person other than the Guarantor, the City and their permitted successors and assigns hereunder any rights of remedies under or by reason of this Guaranty.

**(23) Personal Liability.** It is understood and agreed to by the City that nothing contained herein shall create any obligation or right to look to any director, officer, employee or stockholder of the Guarantor (or any affiliate thereof) for the satisfaction of any obligations hereunder, and no judgment, order or execution with respect to or in connection with this Guaranty shall be taken against any such director, officer employee or stockholder.

IN WITNESS WHEREOF, Guarantor has executed this instrument the day and year first above written.

**BLT Enterprises, Inc. a California corporation**

By:   
\_\_\_\_\_  
Bernard Huberman President

  
\_\_\_\_\_  
Daniel Rosenthal Vice President

September 19, 2006  
\_\_\_\_\_  
Date of Signature

**EXHIBIT E**  
**LOAD CHECKING AND TARPING POLICY**

**LOAD CHECKING PROGRAM**

**I. Random Selection of Vehicles**

- A. Select a minimum of two (2) vehicles per day.
- B. Select them at different times during the day (Randomize selections each day for example, Monday at 1:00 p.m. and Tuesday at 9:00 a.m.)
- C. Select an equal share of roll-off and packer trucks.
- D. Record date and time of selection of load checking form.

**II. Dumping Procedure**

- A. Dump selected trucks apart from the other haulers in clean area of the station.
- B. Dumping area must be separated from the other site operations by traffic cones.

**III. Sorting Procedure**

- A. Each load will be visually inspected by a trained spotter.
- B. Loads will be spread out and particular items such as drums, 5 gallon containers, wastes with DOT or other descriptive labels, sludges and liquids, soils and rags, unidentifiable wastes suspected of being hazardous will be inspected and evaluated to determine whether the item is hazardous.
- C. All containers large enough to contain other objects must be opened.

**IV. Handling Suspected Hazardous Waste**

- A. If hazardous waste is found:
  - 1. If the transporter is still on the premises:
    - a. Contain material and obtain driver's license number, vehicle license number, vehicle identification number, and bin number if roll-off.
    - b. Notify:
      - i. The County of Alameda Department of Environmental Health at (510) 567-6700.
      - ii. The City of Fremont Certified Unified Program Agency (CUPA) at (510) 494-4279.
      - iii. The City of Fremont Environmental Services Department at (510) 494-4570.
  - 2. If transporter is identified, but has already left the facility:
    - a. Transporter's company should be contacted and notified of findings.

b. Transport trucks from that company may be subject to regular inspections.

3. If transporter is not identified:

The Fremont Recycling and Transfer Station is liable for disposal (becomes the generator).

B. Procedure for Handling Hazardous Waste

1. Any type of hazardous waste situation should be handled by the Fremont Hazardous Response Team, consisting of one or more employees trained in the handling of hazardous waste. Personal Protective Equipment must be worn for hazardous waste clean ups. Any acutely hazardous waste, should be isolated and handled as an emergency.

2. If emergency, such as spills, fires, or explosions immediately call:

a. 911

b. City of Fremont Fire Department Hazardous Waste Division /CUPA  
at (510) 494-4279.

c. Office of Emergency Services at (800) 852-7550.

d. The City of Fremont Environmental Services Department at (510)  
494-4570.

3. For non-emergencies:

a. If waste can be easily moved to storage area, temporarily set aside identifiable materials according to the following categories:

- flammable and combustible
- oxidizers
- poisons
- poisons containing heavy metals
- corrosives (acids)
- corrosives (bases)

b. If waste is not easily moved:

1) Barricade and isolate area with rope or cones, so it will not interfere with transfer operations. Supervisor will determine

severity of spill.

- 2) For non-emergencies the Fremont Hazardous Response Team will wear appropriate Personal Protective Equipment and will clean-up and move the hazardous waste.
- 3) If the supervisor classifies the spill as an emergency, 911 will be called (Fremont Fire Department Hazardous Waste Division/CUPA), the State Office of Emergency Services (800) 857-7550 and the City of Fremont Environmental Services Department at (510) 494-4570..

c. Leaking containers must be placed in an overpack drum and taken to the storage area immediately.

4. If material is unidentifiable, it will be segregated and stored pursuant to applicable requirements. It will be transported off-site by an EPA-Approved hazardous waste transportation company.
5. Any hazardous material remaining on site overnight, must be stored in the hazardous waste storage area.

C. Notification

Every hazardous waste incident should be documented.

D. Regulating agencies to contact with questions:

1. Fremont Fire Department Hazardous Waste Division/CUPA at (415) 494-4279
2. The City of Fremont Environmental Services Department at (510) 494-4570.

V. **Packaging Procedures**

- A. Small containers of the same hazardous class can be packed in the same drum (lab packs).
- B. All lab packs must contain enough absorbent material (Vermiculite or similarly approved packing material) to contain liquids if there is a spill and prevent breakage.
- C. Steps
  1. Pack a few inches of absorbent material at bottom of drum.
  2. Pack more absorbent around each small container placed in the drum.
  3. Drums for corrosive acid storage to be protected with plastic liner prior to adding absorbent and waste.
  4. Each drum is to be assigned a number which is clearly marked on the drum body and lid.



5. Log sheet should be taped to the lid and should be marked with facility location, drum number, and hazard category.
  6. Hazardous waste label should be filled out and affixed to drum.
  7. Affix proper hazard category label.
- D. Packing compatibility:
1. Only chemically compatible materials can be packaged together. DON'T MIX: ACIDS AND BASES, CYANIDE COMPOUNDS AND ACIDS, OXIDIZERS AND FLAMMABLE (bleach is an oxidizer, though often marked poison).
  2. If there is any doubt as to hazard class, call Department of Health Services or CUPA/Hazardous Materials Division.

## VI. Labeling and Record Keeping

- A. Log Sheet: Enter the following information on a log sheet - to be used later to prepare manifest:
1. waste category,
  2. list as much information about the chemical as possible (including the brand name),
  3. number of containers, and
  4. volume or weight of each container.
- B. Manifest: Must be prepared if wastes are to be transported (manifest forms available from the Department of Health Services or Hazardous Waste Hauler).
- C. Training Records: Including Health and Safety Certifications.
- D. Inspection Reports.
- E. Spill or emergency incident reports.

## VII. Storage Procedures

- A. Lab packed drums are to be stored in rear storage area (must be stored on pavement).
- B. Drums containing flammable, poisons, corrosives (bases) must be separated from drums with corrosives, acids and oxidizers.
- C. Containers must be closed except when being packed.
- D. Hazardous waste area to be fenced and secured.
- E. Signs in English and Spanish (if required) posted around storage area(s) reading:

DANGER: HAZARDOUS WASTE STORAGE AREA.  
ALL UNAUTHORIZED PERSONS KEEP OUT.  
KEEP LOCKED WHEN NOT IN USE.

### **VIII. Disposal Procedures**

- A. Each lab pack must be inspected by a site supervisor experienced in waste identification and categorization before it is sealed.
- B. Each sealed drum must be labeled as to hazard class (according to CFR 40 and 49).
- C. Hazardous waste cannot accumulate for more than 90 days, otherwise we must secure a permit.
- D. Obtain an EPA ID# from the CUPA/California EPA.
- E. Manifest must be prepared if wastes are to be transported.
  1. Manifest forms are available from the CUPA.
  2. Prepare five copies:
    - Fremont Recycling and Transfer Station keeps two (2).
    - One (1) copy to hazardous waste transporter.
    - Legible copy to City of Fremont CUPA Program within 30 days of each shipment.
  3. Within 35 days of shipment, Fremont Recycling and Transfer must receive copies of manifest signed by the operator of the disposal facility. If not, Fremont Recycling and Transfer Station must contact the facility (if not received within 45 days, an exception report of the pertinent manifest and cover letter describing efforts made to locate shipment, must be submitted to the City of Fremont CUPA).
  4. The Fremont Recycling and Transfer Station will keep copies of manifests for three (3) years at a minimum.
  5. Transporter - Only EPA-permitted facilities can transport hazardous wastes.

### **HAZARDOUS WASTE LOAD CHECKING TRAINING PROGRAMS**

- I. Training Personnel
  - A. Pickers: Only those trained in the use of personal protective equipment, emergency response, identification of hazardous materials and proper handling and procedures are allowed to sort refuse.
  - B. Training is required at the time of the employee's initial assignment and whenever a new hazard is introduced into the work place.
  - C. Supervisors will train regarding specific aspects of the load checking program.
  - D. Training is to be reinforced once a year.

## II. Personal Protective Equipment

### A. Respiratory Protection:

- training required before worker is allowed to wear respirators,
- site manager is responsible for insuring all site workers are respirator certified, and
- certificates must be kept up to date/renewed annually, and copies must be kept available for inspection.

### B. Eye Protection:

- safety glasses or goggles must be worn when handling hazardous wastes, and
- packers must wear full face shield.

### C. Body Protection:

- disposable coveralls or Tyvec sleeve, Nitril gloves, neoprene aprons, and steel toed boots.

### D. Dust Masks:

- must be provided and additional protection must be available upon request.

## **TARPING AND LITTER CONTROL PROGRAM**

### **PURPOSE**

The Fremont Recycling and Transfer Station promotes a clean environment through a Litter Control Program which encourages all vehicles to properly cover (or tarp) their loads while traveling to and from the Fremont Facility. The Fremont Facility has set a positive example by insuring that all self-haul, commercial and transfer vehicle loads are properly covered to minimize the potential of litter on and around the property.

### **Program Components**

The four components of the Litter Control Program for the Fremont Recycling and Transfer Station are as follows:

1. Tarping Requirement
2. Containment Of Litter
3. Site And Facility Clean-Up
4. Monitoring And Recording

### **Tarping Requirement**

All loads entering the facility must be tarped or otherwise covered to control litter or other materials from escaping along any of the identified collection truck routes leading to the site. The following measures are implemented:

- A sign is posted at the entrance at each scalehouse which states that all refuse loads (inbound and outbound) must be covered.
- All haulers/customers are initially given a copy of a printed notice stating the requirements of the Litter Control Program.
- Each incident of an uncovered load is logged by date, the customer's name and vehicle license numbers are documented.
- Repeat violators may be refused entry.

### **Containment Of Litter**

Litter can be generated by activities at the Fremont facility (receipt and processing of wastes and recyclables) or from vehicles using the facility.

#### Facility Containment

Litter is controlled primarily by restricting waste unloading and processing operations to inside the building. If litter blows out of the building, an six foot high fence surrounds the facility, providing a secondary barrier and preventing any litter from blowing off site. Baled recyclables are stored inside the building and hauled to market on a regular basis.

#### Vehicle Containment

##### *Transfer Vehicles*

Each transfer trailer has screen coverings to prevent refuse from escaping the trailer while traveling to or from the landfill. After the transfer vehicles are loaded, they move forward from the loading area. The vehicle driver will then properly place the covers over the load and remove any extraneous refuse from the vehicle which might blow off while traveling. The driver will again inspect the truck for loose refuse before leaving the landfill.

##### *Collection Vehicles*

All vehicles arriving at the Fremont Facility with uncovered loads are logged by date, their company name and vehicle license numbers in the Litter Control Reporting Log. Repeat offenders may be restricted from the facility.

##### *Transport Vehicles*

Vehicles removing recyclable materials, wood, and yard waste will be visually inspected as they leave the station. Drivers of the vehicles having uncovered loads will be informed that they must cover their load before leaving the station. Violators will be documented in the Litter Control Reporting Log. Repeat offenders may be restricted from entering the facility.

### **Site And Facility Clean-Up**

The facility and surrounding areas are cleaned daily by an automated sweeper. Tipping areas, driveways, internal roads, yard area, and the immediate perimeter of the facility are swept daily, or as needed.

**Monitoring And Recording**

Scalehouse employees are trained in monitoring vehicles to ensure the loads are properly covered. Any loaded transfer, commercial or self-haul vehicle entering or exiting the facility without proper covering will be asked to cover their load and the company name and vehicle numbers will be documented in the Litter Control Reporting Log. Repeat offenders may be restricted from entering the facility.

All records are stored in the administrative office and available for inspection by an authorized inspector upon request. The appropriate agencies will be notified of all vehicles that have been refused permission to use the station.



**EXHIBIT F**  
**LENDERS RIGHTS AND RESPONSIBILITIES**

**I. Special Rights of Lenders Upon Contractor Default.** The Contractor's Lender is not a party to this Agreement, nor is it a beneficiary hereof except as specifically provided herein. Compliance by the parties with the terms hereof relating to acts or omissions by either party may affect the ability to maintain the financing for the Project, and, therefore, each party agrees to be bound by the terms hereof relating to duties owed the Lender. Nothing in this Section shall be construed so as to require any payments by the City during the pendency of any cure period created hereby other than as specifically required by this Agreement. Notwithstanding any other provisions of this Agreement, the Lender shall have the rights enumerated in this Exhibit F.

**II. Lender Defined.** A Lender is the financial institution or institutions to which Contractor has a debt comprising the Financing Obligations.

**III. Change in Lender.** The name, address, contact person, and phone and fax numbers of the initial Lender are listed at the end of this Exhibit. The Contractor shall inform the City within ten days of a change in the identity of Lender or, if there is more than one Lender, of any new Lender acting as agent for the lending group, together with the contact information listed above. The Contractor shall inform any such new Lender of the terms of this Exhibit.

**IV. Notices to the Lender.** No notice, demand, election, or other communication required or permitted to be given under this Agreement (collectively, notices and individually, a notice) by the City to Contractor shall bind or affect the Lender unless and until a copy of said notice is given to the Lender. All notices to the Lender shall be given in the manner set forth in this Agreement for notices to Contractor, and shall be given to the Lender at the address listed below or, for a new Lender, at the address contained in the notice to the City described in subsection III above.

**V. Assignment to Lender.** As provided in Section 14.03.a hereof, the Contractor may assign this Agreement to the Lender for the purposes of securing the Lender's repayment of the Financing Obligations. The City hereby consents to such assignment. The City agrees to execute a consent to assignment and such other documentation of the assignment of the Agreement to the Lender and the creation of a security interest therein reasonably requested by the Lender.

**VI. Lender Rights and Responsibilities.** The Lender shall have the following rights and responsibilities in the event of Breach or Default by Contractor:

**A. Right to Cure.** The Lender shall have the right, but not the obligation, to perform any term, covenant, condition or agreement of Contractor under this Agreement and to remedy any Breach or Default by Contractor hereunder, and the City shall accept performance by the Lender with the same force and effect as if furnished by Contractor.

**B. Termination, Notice.** If a Breach or Event of Default by Contractor occurs under this Agreement and, after notice by the City to Contractor, is not remedied within the periods specified in Section 10.04 or 10.08.c hereof, and the City, by the terms of this Agreement, by statute or otherwise, becomes entitled or elects to terminate or give a notice of election to terminate this Agreement, the City shall give the Lender written notice of its intent to terminate and, subject to the provisions of Subsections VI.C, VI.D and VI.E of this Exhibit F, shall allow the Lender an additional thirty days following receipt of such notice within which to cure the Default.

**C. Cure of Defaults Requiring Additional Time to Cure.** In case of a Default by Contractor which cannot practicably be cured by the Lender within the thirty day period allowed by subsection VI.C above, the Lender shall (if it elects to cure the default), commence to cure the Default within said thirty day period, shall diligently prosecute the cure, and shall in any event promptly complete the cure within a reasonable time. During such period, the Lender shall pay any compensatory and liquidated damages as and when they become due hereunder and shall comply, to the extent reasonably practical, in all respects with the terms and conditions of this Agreement in the same manner as Contractor is obligated to do.

**D. Cure of Defaults requiring possession of the Facility.** In case of a Default by Contractor which cannot practicably be cured by the Lender without taking possession of the Facility, or in the case of a Default by Contractor that cannot, as a practical matter, be cured by the Lender, City shall not take action to terminate this Agreement so long as: (a) the Lender delivers to City prior to the expiration of the thirty day notice provided in subsection VI.C above, an agreement approved as to form by the City Attorney to cure such Defaults as are curable by the Lender; (b) the Lender proceeds to obtain possession of the Facility, as mortgagee (through the appointment of a receiver or otherwise), diligently pursues judicial or non-judicial foreclosure proceedings or assignment in lieu of foreclosure, as appropriate, and upon obtaining possession, promptly commences and diligently prosecutes to completion such action as may be necessary to cure such Default, if such Default is curable; and (c) the Lender pays and continues to pay all compensatory and liquidated damages payable under this Agreement throughout the entire period during which the Lender is attempting to effect a cure and/or obtain possession of the Facility.

**E. Lender's right to cease cure.** The Lender shall not be required to continue to attempt to effect a cure; provided, however, that if such Lender shall have commenced to cure or attempt to cure the Contractor Default, the Lender shall give Notice to City of any decision to cease to cure or attempt to cure such Contractor Default, and shall pay all compensatory and liquidated damages through the date of such Notice; and fulfill all rights or obligations whatsoever hereunder.

**F. Lender not obligated to continue to obtain possession.** Once the Lender has cured the Contractor Default, the Lender shall not be required to continue to proceed to obtain possession or to continue in possession as mortgagee of the Facility pursuant to subsection VI.F. above, or to continue to prosecute foreclosure proceedings pursuant thereto.



**G. Lender's assignment rights.** If the Lender, its nominee or a purchaser at a foreclosure sale acquires title to Contractor's estate, continues to keep current any payments due the City in respect of compensatory or liquidated damages pursuant to this Agreement and causes to be cured all defaults by Contractor under this Agreement which are capable of being cured by said person or others retained by such person, then the previous Defaults thereunder which cannot be cured by said persons shall no longer be deemed to be Defaults under this Agreement. If the Lender acquired title to Contractor's interest in this Agreement, the Lender shall have the right to assign its rights under this Agreement to a third party, reasonably satisfactory to the City, subject to Article 14 of this Agreement. Upon approval by City of the assignment pursuant to Article 14, Lender shall from the effective date of the assignment be relieved of all liability under this Agreement, provided that Lender shall have paid all compensatory and liquidated damages, and otherwise shall have complied with the terms and conditions of this Agreement to the extent reasonably practical, through such effective date.

**H. Lender's right to a new agreement.** In addition to the rights of the Lender set forth above, if this Agreement terminates for any reason, including, without limitation, a Default by Contractor hereunder or rejection of this Agreement in any bankruptcy proceeding, and within thirty (30) days after the notice to the Lender of such termination described in subsection VI.B of this Exhibit F, the Lender, by Notice, requests City to enter into a new Agreement, then City shall enter into a new Agreement with the Lender (or its nominee subject to approval of the City) within thirty (30) days after the giving of said Notice by the Lender, subject to the requirement that the Lender continue to keep current all compensatory and liquidated damages under this Agreement up to and including the effective date of such assignment. Unless the parties otherwise agree, such new Agreement shall continue for the period which would have constituted the remainder of the term of this Agreement including, without limitation, any option periods if exercised by the Lender or its nominee pursuant hereto, and shall otherwise have the exact same terms, conditions and language as this Agreement.

In the event that this Agreement terminates and the Lender requests the City to enter into a new Agreement with the Lender or its nominee, simultaneously with said Notice, the Lender shall deliver to the City a written agreement to cure all defaults of Contractor under this Agreement (other than defaults which the Lender cannot cure or cause to be cured). Said new Agreement shall commence, and obligations of the new contractor under the new Agreement shall accrue as of the date of termination of the new Agreement, pay to the City, (i) all sums of money due under this Agreement on the date of termination of this Agreement and remaining unpaid, plus (ii) all sums of money due under the new Agreement for the period from the date of commencement of the term thereof to the date of delivery of the new Agreement.

**I. Termination of Lender's right to a new agreement.** If the Lender exercises its right to obtain a new agreement pursuant to subsection VI.I above, but fails to execute such new Agreement when tendered by the City, or fails to comply in a timely manner with the other provisions of subsection VI.I above, then the Lender shall have no further rights to a new Agreement or any other rights under said subsection. However, if the Lender executes a new Agreement, then the Lender

shall be entitled to assign such new Agreement to a third party reasonably satisfactory to the City, subject to Article 14.

**VII. Rights and remedies not exclusive.** The Lender rights and remedies pursuant to this Exhibit are cumulative and not exclusive. Contractor may delegate irrevocably to the Lender the authority to exercise any and all of Contractor's right under this Agreement in the event of a default by Contractor hereunder. Any provision of this Agreement that gives to the Lender the privilege of exercising a particular right of Contractor hereunder on the condition that Contractor shall have failed to exercise such right shall not be deemed to diminish any privilege that the Lender may have, by virtue of a delegation of authority from Contractor, to exercise such right without regard to whether or not Contractor has failed to exercise such right.

**VIII. No Service fee increase to Lender.** Notwithstanding any other provision of this Agreement, in the event of the exercise of the Lender's rights pursuant to the provisions of this section, City shall not be required to set Facility Gate Fees in excess of those otherwise required hereunder, to increase the Contractor's Mixed Waste Service Fee or Maximum Allowable Self Haul Service Fees, nor shall the Lender have the right to increase the Facility Gate Fees beyond the level at which they would have been set pursuant to this Agreement in the absence of such exercise of such Lender's rights.

**IX. Substitute Services.** In the event the City exercises its rights regarding use of the Facility as provided in Section 13.04 of the Transfer Station Agreement, any Replacement Operator (as that term is defined in Section 13.04 of the Transfer Station Agreement) chosen by the City shall be reasonably acceptable to the Lender and have operating experience Operating facilities similar to the Facility. Once provided Notice of a Replacement Operator, the Lender shall have fifteen (15) Working Days upon receipt of Notice to comment upon the City's choice of Replacement Operator. Should the Lender object to the City's choice of a Replacement Operator, the Lender shall detail in writing the reason(s) for its objection, and provide the names of two alternative operators it believes are willing, able and qualified to operate the Facility in compliance with the Contractor's Obligations. Lack of comment within the specified time periods shall be deemed acceptance of the Temporary Operator or Replacement Operator. Upon selection of any such Replacement Operator pursuant to this subsection, or if the City shall decide to operate the Facility itself, the City and Lender shall cooperate and negotiate in good faith a lease providing for use of the Facility as provided in Section 13.04 of the Transfer Station Agreement. Said lease shall include, without limitation, terms providing for the preservation of the Lender's rights hereunder and its collateral which consists of the Facility and equipment used therein and indemnification of the Lender by the Replacement Operator or the City (if it shall decide to operate the Facility itself) with terms at least equal in effect to those provided herein by the Contractor to the City and in the Financing Documents by the Contractor to the Lender. Neither the City nor the Replacement Operator shall have any rights

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to use the Facility until such lease is approved by the Lender, which approval shall not be unreasonably withheld, and executed by the parties thereto.

Name of Lender \_\_\_\_\_

Address of Lender \_\_\_\_\_

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\_\_\_\_\_

\_\_\_\_\_

Phone # \_\_\_\_\_

Fax # \_\_\_\_\_