

COPY

**AGREEMENT**

**BETWEEN THE CITY OF FREMONT**

**AND**

**BLT ENTERPRISES OF FREMONT, INC.**

**FOR**

**RECYCLABLES DIVERSION AND TRANSFER SERVICES**

**APRIL 20, 2004**

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## **Exhibits**

- Exhibit 1      Mixed Municipal Waste Service Fee
- Exhibit 2      Maximum Self Haul Service Fees
- Exhibit 3      Insurance Requirements
- Exhibit 4      Lender's Rights and Responsibilities
- Exhibit 5      Permits and Approvals
- Exhibit 6      Facility Requirements
- Exhibit 7      Facility Development Schedule
- Exhibit 8      Financial Guaranty Agreement
- Exhibit 9      Load Checking and Tarping Policy
- Exhibit 10     Liquidated Damages
- Exhibit 11     Operating Throughput Guarantee Adjustment
- Exhibit 12     Measurement of Diversion Guarantee



## AGREEMENT FOR RECYCLABLES DIVERSION AND TRANSFER SERVICES

This Agreement is entered into and Executed as of this 20<sup>th</sup> day of April, 2004, 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.

### 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, the City needs a Facility to serve as a point to Accept, Process, Recover, and Transfer Mixed Municipal Waste and Residue remaining following Diversion activities to the City's Designated Disposal Facility; and

WHEREAS, the City reviewed Contractor's proposal to Develop and Operate a transfer station/material recovery Facility, (the "**Facility**") to Process, Recover, and Divert Recyclable Materials from the City's Mixed Municipal Waste, Market the Recovered Materials and Transfer the Residue to the Designated Disposal Facility for Disposal; and

WHEREAS, the City determined that Contractor has proposed to Develop and Operate the Facility in a manner and on terms which are in the best interest of the City and its residents and businesses, taking into account the qualifications and experience of Contractor, and the cost of providing such services; and

WHEREAS, the City wishes to engage Contractor to Develop and Operate the Facility, which includes: acquisition of the Site; designing the Facility; securing the necessary governmental Permits and approvals for the Development and Operation of the Facility; assisting as needed to modify or supplement the review of the Facility conducted by the City to meet the requirements of the California Environmental Quality Act ("CEQA"); providing financing; constructing and Owning the Site and Facility;

Operating and maintaining the Facility; Marketing Recovered Materials; providing Rolling Stock and processing equipment, and Transferring Residue for Disposal, all in accordance with the terms and conditions of this Agreement; and

## **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.

**Accept** (or **Acceptance** or other variations thereof) is the transfer of Ownership of materials to Contractor from the party Delivering the materials, as provided in Section 8.05. 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 and attachments which are incorporated herein by reference. This Agreement may be amended and supplemented pursuant to Section 17.05.

**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.

**Approved Users** are public and/or private haulers approved by the City to Deliver Mixed Municipal Waste to the Facility. As of the Execution Date of this Agreement, Approved Users include City Vehicles, City Collection Contractor(s) and Self Haulers Delivering Mixed Municipal Waste generated in the Tri-Cities.

**Base Term** means the twenty (20) year period commencing from Limited Operations Date or Full Operations Date whichever date shall occur earlier.

**Brown Goods** mean electronic equipment and other small appliances including, but not limited to, audio equipment, televisions, computers, and microwave ovens.

**Bulky Goods** mean discarded materials that require special handling due to their size including, but are not limited to, White Goods, Brown Goods, furniture, tires, carpets, mattresses, fencing, cabinetry, household fixtures, tree trunks, and similar large items discarded as refuse excluding automobiles.

**CEQA** means the California Environmental Quality Act, Section 21000 et seq. of the California Public Resources Code and its implementing regulations and guidelines, including future amendments to or recodification thereof.

**CEQA Completion Date** is the date the CEQA environmental review process is complete as defined in Section 7.02.

**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.

**Change in Scope** means the change in Facility Development or Operation directed by City or requested by Contractor, and approved by the City, in accordance with Article 11.

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

**City Imposed Fee(s)** means the per-Ton fee(s) the Contractor shall pay the City for each Ton of Mixed Municipal Waste generated outside the City that is Accepted at the Facility from Approved Users.

**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 Mixed Municipal Waste within the City.

**Construction and Demolition Waste**, as included in Permitted Material, means building materials including brick, mortar, concrete, plaster, scrap wood, scrap metal, sheet rock, packaging, rubble and other such wastes resulting from

construction, remodeling, repair and demolition operations on pavements, houses, commercial buildings, and other structures.

**Construction Completion Date** means the date when Facility Construction is substantially finished as defined in **Section 7.10**.

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

**Contractor Default** means Contractor's failure to meet one or more of Contractor's Obligations as defined in Article 13.

**Contractor's Proposal** means the proposal to provide Long-Term Materials Recovery and Transfer Services, submitted to the City by Contractor including any additions, deletions and/or modifications agreed to by the Parties prior to the Execution Date of this Agreement.

**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.

**Delivery (Deliver or Delivered or other variations thereof)** means arrival of Materials from Approved and Other Allowable Users' vehicles at the Site entrance during Facility Receiving Hours for the purposes of Acceptance.

**Design Throughput Guarantee** means the minimum Tonnage of Mixed Municipal Waste that Contractor guarantees the Facility is capable of Accepting, Processing, and loading out for Transfer at the Facility and Transferring to the Designated Disposal Facility in accordance with the Performance Test requirements as defined in Section 7.13

**Designated Disposal Facility** means the Facility to be used by Contractor for Disposal of Residue in accordance with Article 9.

**Development** (or **Develop** or other variations thereof) means all activities detailed in Article 7 and conducted by Contractor or the City prior to Full Operations Date including, but not limited to, Site acquisition, design, Permitting, construction, equipment procurement and installation, and Facility Start-Up and Performance Testing.

**Development Costs** are all Contractor costs associated with all Development activities as provided in Article 7.

**Direct Costs** means costs directly related to the implementation of this Agreement and all Obligations that include any and all of the following:

(1) payroll costs directly related to the performance, or management or supervision of any Obligation pursuant to the provisions hereof, comprised of compensation and fringe benefits, including vacation, sick leave, holidays, retirement, Workers' Compensation Insurance, Federal and State unemployment taxes and all medical and health insurance benefits, plus

(2) the costs of materials, services, direct rental costs and supplies, plus

(3) travel and subsistence costs, plus

(4) the reasonable costs of any payments to subcontractors necessary to and in connection with the performance hereunder; plus

(5) any other cost or expense which is directly or normally associated with the task performed; which Direct Costs are substantiated by:

(a) a certificate signed by the principal financial officer of Contractor setting forth the amount of such cost and the reason why such cost is properly chargeable to the City, as the case may be, and stating that such cost is an arm's length and competitive price, if there are competitive prices, for the service or materials supplied; and

(b) if the City requests such additional back-up documentation as may be available to reasonably

substantiate any such Direct Cost, including invoices from suppliers and subcontractors.

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

**Disposal Component** is that portion of the Service Fee comprised of Disposal Costs that is adjusted as provided in Article 10.

**Disposal Facility Contractor** is the Party which enters into 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 Altamont, which are currently 8am to 6pm Monday through Saturday and which may be changed at any time with Contractor's prior consent.

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

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

**Diversions Guarantee** means the requirement of Contractor to Recover and Divert the equivalent of a specific percentage by weight of the Mixed Municipal Waste generated in the City and Delivered to the Facility as specified in Section 8.03 and measured in accordance with Exhibit 12.

**Divert (or Diversion)** means to prevent Recyclable Materials from Disposal at landfill or transformation facilities, (including facilities using incineration, pyrolysis, distillation, gasification or biological conversion methods except as provided in 8.07 (b)) through source reduction, reuse, recycling and composting, as provided in Section 41780-41786 of the Act, as such Act may be hereafter amended or superseded. Diversion is a broad concept that is to be inclusive of material handling and processing changes that may occur over the Term including, but

not limited to, changes in Standard Industry Practice or implementation of innovative (but not necessarily fully proven) techniques or technology that reduce Disposal risk, decrease costs and/or are for other reasons deemed desirable by the City.

**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 as provided for in Section 4.02.

**Extraordinary Review** means a review of Contractor's Obligations and compensation for purposes of adjustment conducted in accordance with the provisions of Article 11 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 as described in Exhibit 6.

**Facility Development** means all activities detailed in Article 7 and conducted by Contractor or the City prior to Full Operations Date including, but not limited to, Site acquisition, design, Permitting, construction, equipment procurement and installation, and Facility Start-Up and Performance Testing.

**Facility Development Schedule** is the time line for performing all activities of Facility Development identifying dates or time frames for completion of Development activities. The Facility Development Schedule is described in Section 7.01 and provided in Exhibit 7.



**Facility Operating Guarantee** means the ongoing ability of Contractor to meet the Operating Throughput Guarantee, Diversion Guarantee, and Vehicle Turnaround Guarantee during the Term as specified in Section 8.03.

**Facility Operation** means all Contractor's Obligations specified in Article 8 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, transporting Recovered Materials to Market, and procuring and maintaining insurance and bonds.

**Facility Operations Period** means the period of time beginning on the Limited Operations Date or Full Operations Date whichever date shall occur earlier and ending upon the expiration or termination of this Agreement.

**Facility Receiving Hours** are hours when Contractor must Accept Permitted Material from Approved Users and Other Allowable Users at the Facility as defined in Section 8.04.a.

**Financial Guaranty Agreement** is the Agreement attached as Exhibit 8 executed by a party other than the Contractor guaranteeing the timely and full performance of Contractor's Obligations.

**Financing Documents** means those documents evidencing and securing the loan or loans used by Contractor for construction, improvement, reconstruction, repair and equipping of the Facility including, without limitation, any loan or reimbursement agreements between a Lender and the Contractor, any trust indenture and other documents relating to the sale of bonds to provide funds for construction, improvements, reconstruction, repair and equipping of the Facility; the deed of trust to be made by Contractor in favor of a Lender encumbering the Contractor's interest in the Site; and any collateral documents thereto that create security interests in property of the Contractor or bonds and the loan of proceeds to the Contractor for the purposes contemplated by this Agreement.

**Financing Obligations** means those obligations for the payment of money owed by Contractor pursuant to the Financing Documents including, without limitation, payment of principal and interest on any loan used for construction, improvement, reconstruction, repair and equipping of the Facility or on the bonds used to finance such construction, improvement, reconstruction, repair, and equipping, other fees and charges owed to the Lender

including costs of appraisal, environmental review, consultants or counsel, letter of credit fees and fees of a bond trustee and counsel and other fees relating to the bonds sold for the purposes cited in this definition. Financing Obligations shall include obligations for the payment of money described in this definition incurred by the Contractor at any time during the Term of this Agreement provided that the use of funds derived from the incurrence of the obligations is consistent with this definition. Obligations that provide for cash payment to Contractor which cash will not be used in a manner consistent with this definition shall not be Financing Obligations for the purposes of this Agreement.

**Fixed Component** means that portion of the Service Fee that is not adjusted over the Term.

**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.

**Full Operations** means performance of all Contractor's Obligations specified for Facility Operations in Article 8 including Operation and maintenance of the Facility in accordance with the provisions hereof and Applicable Law, together with Acceptance of Permitted Materials for Recovery, Processing, Diversion, and Marketing of Recovered Materials, Transfer and Disposal at the Designated Disposal Facility, and procuring and maintaining insurance and bonds.

**Full Operations Date** means the date no later than the date specified in the Facility Development Schedule in Exhibit 7 unless an extension of time has been granted by the City and in such case shall follow written Notice from the Contractor to the City that the Facility is ready for Full Operations on which Contractor shall commence Facility Operations including Transfer and materials Processing and Recovery activities.

**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; with the exception that Hazardous Waste, for the purpose of this Agreement, shall specifically exclude Household 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.

**Holding Fee** means the fee the City shall pay Contractor in the event the City suspends Development or delays Construction after issuance of Notice to Proceed with Initial Development Activities as defined in Section 7.15.

**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.

**Independent Engineer** is the engineer selected in accordance with Section 15.03 to resolve specific types of disputes between the Parties.

**Initial Development Activity** shall mean all preconstruction activity including but not limited to permit acquisition, financing and design.

**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 Operations as defined in Exhibit 4.

**Limited Operations** means performance of all Contractor's Obligations specified for Facility Operations in Article 8 to be performed on and after the Limited Operations Date, including Operation and maintenance of the Facility in accordance with the provisions hereof and Applicable Law, together with Acceptance of Permitted Materials for Transfer and Disposal at the Designated Disposal Facility, and procuring and maintaining insurance and bonds with the exception of the performance of Contractor's Obligations related to Recovery, Processing, Diversion, and Marketing of Recovered Materials.

**Limited Operations Date** means the date no later than the date specified in the Facility Development Schedule in Exhibit 7 unless an extension of time has been granted by the City and in

such case the date shall be not later than ten (10) Working Days after receipt of written Notice from the City that the Facility has passed the Performance Test Guarantee and is deemed ready for Limited Operations, on which Contractor shall commence Limited 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.

**Maximum Self Haul Service Fee** is the maximum fee due to Contractor from Small Self Haulers for Mixed Municipal Waste, Source Separated Recyclable Materials, Source Separated Yard Waste, Recyclable Rich Materials, and Construction and Demolition Waste Delivered to the Facility Delivered by Small Self Haul customers.

**Mixed Municipal Waste** means all "municipal solid waste" including putrescible and nonputrescible solid, semisolid, and liquid wastes, including garbage, trash, refuse, paper, rubbish, ashes, industrial wastes, street sweepings and catch basin residue, discarded Bulky Goods, discarded Brown Goods, dewatered, treated or chemically fixed sewage sludge which is not Hazardous Waste, Household Hazardous Waste, manure, vegetable or animal solid and semisolid wastes, Residues from recycling, composting, and similar processes, and other discarded wastes and any other materials defined in Section 40191 of the California Public Resources Code, as may be amended from time to time. Mixed Municipal Waste does not include abandoned vehicles, Hazardous Waste, residential generated Source Separated Recyclable Materials, residential generated Source Separated Yard Waste, or Unpermitted Waste.

**Mixed Municipal Waste Service Fee** is per-Ton compensation due to the Contractor from Approved Users for Accepting Mixed Municipal Waste at the Facility. The Mixed Municipal Waste Service Fee is comprised in total of the Fixed Component, Variable Component, Disposal Component, and Pass-Through Component.

**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.

**Notice to Proceed with Construction** means the City's written Notice to Contractor to commence Facility construction as specified in Section 7.07.

**Notice to Proceed with Initial Development Activities** means the City's written Notice to Contractor to commence Initial Development activities up to but not including construction and Start-Up and Performance Test activities as specified in Section 7.03.

**Notice to Proceed with Operations** means the City's written Notice to Contractor to commence Facility Operations as specified in Section 7.14.

**Operation** (or **Operate** or **Operating** or other variation thereof) means all activities and responsibilities of Contractor specified in Article 8 of this Agreement.

**Operating Throughput Guarantee** means the minimum Tonnage of Mixed Municipal Waste that Contractor commits to Accept, Process, and loadout for Transfer at the Facility during Facility Operations as specified for each contract year in Exhibit 11. The requirements of the Operating Throughput Guarantee do not in any way obligate or guarantee the City to Deliver or cause to be Delivered a minimum amount of Mixed Municipal Waste or Permitted Materials to the Facility during the Term.

**Operations and Maintenance Manual** is a document created by Contractor detailing all procedures associated with Facility Start-Up, Performance Testing, and Operations as defined in Section 7.16.

**OPIS (Oil Price Information Service) Diesel Fuel Index** - The diesel fuel rack pricing index for Northern California including San Jose, Stockton, San Francisco and Sacramento.

**Other Allowable Users** means any private and public entity that Deliver Source Separated Recyclable Materials, Source Separated Yard Waste, or Recyclable Rich Materials to the Facility.

**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.

**Pass-Through Component** is that portion of the Service Fee comprised of Pass-Through Costs which are applicable on or before the Execution Date as well as new costs incurred during the Term adjusted as provided in Article 10.

**Pass-Through Cost(s)** means governmental and regulatory fees, surcharges, and other costs, that are directly assessed against the Contractor by governmental entities, that Contractor remits to such entities. The Pass-Through Costs are limited to City-approved costs incurred by the Contractor as a direct result of mandatory Federal, State, regional and local governmental and/or regulatory fees, surcharges, assessments or other governmental payments related to Facility Operations except costs related to judgments, settlements, fines, or liquidated damages.

**Performance Test** means the various tests of Facility capacity and reliability that Contractor must conduct and complete as specified in Article 7 to demonstrate the Facility's capabilities and compliance with the Performance Test Guarantee.

**Performance Test Guarantee** includes the following:

- (1) Design Throughput Guarantee; and
- (2) Vehicle Turnaround Guarantee.

**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 defined in Section 7.05 and included those listed in Exhibit 5, as renewed or amended from time to time.

**Permitted Materials** means wastes or other materials that the Facility may receive under its Permits and Applicable Law, including nonhazardous solid wastes consisting of Mixed Municipal Waste, Source Separated Recyclable Materials, Recyclable Rich Materials, Construction and Demolition Waste, and Source Separated Yard Waste and Household Hazardous Waste, and other

materials that Contractor Accepts, handles, recycles, 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 City or any other entity whatsoever.

**Plans and Specifications** means the Plans and Specifications developed by Contractor and as specified in Article 7.

**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: commercial transfer driver, sorter and floor sorter/raker/spotter. 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 Recovered Materials by Contractor at the Facility after Acceptance and before Marketing of Recovered Materials thereof.

**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.

**Recyclable Materials** means materials having a potential for reuse or reprocessing or other materials having value.

**Recyclable Rich Materials** are a type of Permitted Materials that are comprised primarily of Recyclable Materials, Construction and Demolition Waste, leaves, cut grass, tree trimmings, and other organic debris such that loads Delivered to the Facility are composed of less than thirty (30) percent Residue but more than ten (10) percent residue by weight.

**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 as described in Section 13.04.

**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.

**Scheduled Facility Downtime** means the time (measured in days or hours) that the Facility is closed in accordance with the schedule provided by Contractor to the City as part of Contractor's updated Operations and Maintenance Manual in accordance with Section 8.04.

**Self Haulers** (or **Self Haul** or other variations thereof) means Persons who Deliver Permitted Material, on their own behalf, and not as a commercial enterprise collecting mixed municipal waste for third parties or on behalf of a municipality.

**Service Fee(s)** include the Mixed Municipal Waste Service Fee, Maximum Self Haul Service Fees, and Household Hazardous Waste Fee, which are compensation to be provided to the Contractor for

services provided under this Agreement, as specified in Article 10.

**Significant (cost or event)** means that the cumulative annual financial impact to the City or Contractor exceeds twenty thousand (\$20,000) as Significant. Such amount shall be adjusted to reflect CPI changes over the Term in the same manner that Liquidated Damages are adjusted in accordance with Section 10.07.

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

**Small Self Haul (or Small Self Haulers)** means Self Haulers arriving in passenger cars, pick-up trucks with beds less than or equal to eight (8) feet in length, and vehicles hauling trailers with beds less than or equal to eight (8) feet in length.

**Source Separated Recyclable Materials** are a type of Permitted Materials that are commingled and/or presorted Recyclable Materials including high grade paper, glass, metal, plastic, aluminum, newspaper, corrugated paper or other Recyclable Materials that are segregated prior to collection from other materials collected as Mixed Municipal Wastes; are designated by the generator for the purposes of Diversion; are Delivered separately to the Facility from other Permitted Material; and are Delivered in loads composed of less than ten (10) percent Residue by weight.

**Source Separated Yard Waste** is a type of Permitted Material that is comprised primarily of leaves, cut grass, tree trimmings or other organic debris that are segregated prior to collection from other materials collected as Mixed Municipal Wastes; are designated by the generator for the purposes of Diversion; are Delivered separately to the Facility from other Permitted Material; and are Delivered in loads composed of less than ten (10) percent Residue by weight.

**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.

**Start-Up** means the period of Facility Development following the Construction Completion Date before the commencement of Performance Testing as described in Section 7.13.

**Start-Up Date** means the date on which Contractor commences Start-Up activities associated with Facility Development as described in Section 7.13.

**State** means the State of California.

**Term** of this Agreement means the Base Term and any Extensions granted beyond the Base Term in accordance with provisions of Article 4.

**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 at the Facility, transporting Residue or other Permitted Materials to the Designated Disposal Facility for the purposes of unloading the transported materials at the Designated Disposal Facility in an area directed by the Disposal Facility Contractor for the purpose of Disposal, as provided in Articles 8 and 9.

**Tri-Cities** means the state of California cities of Fremont, Newark, and Union City.

**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 as defined in Section 13.10.

**Unpermitted Materials** mean wastes or other materials that the Facility may not receive 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.

**Variable Component** means that portion of the Service Fee that is biennially adjusted throughout the Term by CPI.

**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 Waste at the Facility in a timely manner as defined in Sections 7.13 and 8.03.

**Visitors Education Facility** is a designated area at the Facility where a group of fifty (50) visitors can convene to learn about and view Facility Operations and is described in Exhibit 6.

**White Goods** mean used appliances including, but not limited to, refrigerators, freezers, dishwashers, washers and dryers, and hot water heaters.

**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 corporation 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 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 except for City of Newark v. City of Fremont, Case No. HG04136882 or, 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 except for City of Newark v. City of Fremont, Case No. HG04136882 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 Development and 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 of 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 uses any City facilities, equipment or support services in the performance hereof.

**3.02 Parties in Interest.** Subject to the provisions in Section 13.05 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 Development or 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.** 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, subject to Change in Law handled in accordance with Extraordinary Review procedures in Article 11.

**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 Facility Operations shall be subcontracted, including, but not limited to, scale house, Acceptance, Transfer, Processing, Recovery, Household Hazardous Waste Facility, and Marketing activities 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 Development or 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 the Limited Operations Date or the Full Operations Date whichever date shall occur earlier and continue in effect for twenty (20) years from the date of commencement unless terminated earlier in accordance with Article 14.

#### **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 four (4) 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 end of the Base Term or the then-current Extension. In the event the Base Term is Extended, the Mixed Municipal Waste Service Fee will be reduced in accordance with provisions in Section 10.12.

**b. Conditions for Term Extension.** City requires the Contractor to certify, at City's request that since the date hereof, there shall not have occurred any material change, financial or otherwise, 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: Section 8.11.a (record keeping), and Article 12 Indemnification, Bonds and Insurance.

## **ARTICLE 5. ARTICLE INTENTIONALLY DELETED**

## **ARTICLE 6. FACILITY USERS**

**6.01 Facility Users.** Facility users include Approved Users and Other Allowable Users.

**6.02 Approved Users.** As of the Effective Date of this Agreement, Approved Users include City Vehicles, City Collection Contractor(s), and Self Haulers Delivering Mixed Municipal Waste generated in the Tri-Cities to the Facility.

At any time during the Term, City may designate additional Approved Users with Contractor consent, or Contractor may designate additional users with City consent, with the exception that Contractor consent shall not be required for inclusion of Union City and Newark or collection contractors serving those

cities. Prior to adding additional Approved Users, City may request Contractor to provide a written description of the Contractor's proposed methods for tracking compliance with Diversion Guarantee and other Contractor's Obligations separately from Mixed Municipal Waste Delivered by additional Approved User(s), and proposed per-Ton price adjustment to the City's Mixed Municipal Waste Service Fee to reflect the benefit of sharing fixed capital costs with the additional Approved User(s). The City will review the Contractor's written description. In considering the inclusion of an additional Approved User, the City will take into account factors that include, but are not limited to, the proposed disposal Facility if other than the Designated Disposal Facility, ability to clearly monitor and measure compliance with Diversion Guarantee and Contractor's Obligations, traffic impacts, and other factors.

If the City decides to include an additional Approved User(s), a contract amendment shall be prepared and attached to the Agreement to amend the definition of Approved Users to encompass the additional Approved User(s), to adjust the Mixed Municipal Waste Service Fee, and to modify other provisions of the Agreement as necessary.

**6.03 Permitting Requirements for Additional Approved User(s).**

Mixed Municipal Waste may only be Accepted from the additional Approved User(s) if the Facility Permits allow for such. The City's amendment to the Agreement to Accept Mixed Municipal Waste from additional Approved User(s) does not warrant that the Contractor will be capable of obtaining necessary approvals and Permit modifications to Accept Mixed Municipal Waste from additional Approved User(s). Contractor will be responsible for applying for and use Reasonable Business Efforts to secure the necessary regulatory approvals and Permit revisions, including an amended Conditional Use Permit, allowing for additional Approved User(s). The review process for the Conditional Use Permit amendment will be conducted in accordance with procedures of the City Planning Department.

**6.04 Contractor Compensation for Additional Approved Users.**

Contractor's sole compensation for Acceptance of Mixed Municipal Waste from additional Approved User(s) will be through contractual arrangements between Contractor and such parties and/or collection of Facility Service Fees directly from such parties.

**6.05 City Compensation for Approved Users** Contractor shall be required to pay any City per-Ton City Imposed Fees for each Ton

of Mixed Municipal Waste generated outside the City that is Accepted at the Facility from Approved Users.

**6.06 Other Allowable Users.** Other Allowable Users means any private and public person or entity(ies) that Deliver Source Separated Recyclable Materials, Source Separated Yard Waste, or Recyclable Rich Materials to the Facility. Other allowable Users are hereby permitted to use the Facility. Contractor's compensation for Acceptance of Source Separated Recyclable Materials, Source Separated Yard Waste, or Recyclable Rich Materials Delivered by Other Allowable Users shall be such payment as Contractor determines and collects directly from such Persons. The City shall in no way be responsible for compensating Contractor for Source Separated Recyclable Materials, Source Separated Yard Waste, or Recyclable Rich Materials Delivered to the Facility by Other Allowable Users and no fees pursuant to 6.05 shall be paid to City for these materials.

**6.07 City Right to Review Contracts.** City reserves the right to review and approve the terms of contract(s) with all Approved Users including any amendments to such contracts, such approval to not be unreasonably withheld as long as the proposed contract is consistent with this Agreement. The City reserves the right to review the terms of the contract(s) with Other Allowable Users that relate to the computation of Diversion Guarantee and Contractor's Obligation, the calculation of Residue as a percentage of Permitted Materials Accepted from Other Allowable Users, and the method of tracking, allocating, and reporting Permitted Materials and Recovered Materials.

## **ARTICLE 7. FACILITY DEVELOPMENT**

### **7.01 Development Costs and Schedule**

**a. Development Costs.** Contractor is solely responsible for all Development costs with the exception of a Holding Fee which the City shall pay in the event the City causes delay to the Facility Development Schedule as described in Section 7.15. All Development costs for which the Contractor has assumed a Financing Obligation for may be considered for reimbursement through the Holding Fee including, but not limited to, Site acquisition, construction, Rolling Stock, and equipment costs.

**b. Facility Development Schedule.** In order to ensure that the Facility is fully Operational when needed by the City,

it is essential that Facility Development activities be conducted in a timely manner. The Facility Development Schedule, provided in Exhibit 7, includes the City's anticipated dates for major Development milestone events including, but not limited to, the Notice to Proceed with Initial Development Activities, Notice to Proceed with Construction, Facility Start-Up Date, Limited Operations Date, and Full Operations Date.

Contractor shall achieve or cause to be achieved the Facility Development activities on or before the expiration of the corresponding time periods listed in Exhibit 7. Those time periods shall commence after City provides Contractor written Notice to Proceed with Initial Development Activities.

Contractor recognizes that City may need to accelerate the Facility Development schedule. Accordingly Contractor agrees to use its Reasonable Business Efforts to accommodate a schedule acceleration upon request by City. In this event, if Contractor incurs development expenses and the City subsequently decides not to issue the Notice to Proceed or if this Agreement is terminated by the City prior to such Notice to Proceed then Contractor will be reimbursed for actual documented expenses for such acceleration.

**c. Monthly Progress Reports.** On the first day of every month following issuance of Notice to Proceed with Initial Development Activities and every month thereafter until the month of the Full Operations Date and at other times within ten (10) Working Days of City request, Contractor shall provide a written progress report describing commenced, ongoing, and completed Facility Development activities since any previous report; and compare such progress with such schedule. Upon City request, Contractor shall meet with City to discuss Facility Development status.

## **7.02 CEQA Review**

**a. General.** Parties acknowledge and agree that the City shall act as lead agency as defined by CEQA. The City will prepare necessary CEQA reports and documentation, and additional supporting documentation, as necessary and appropriate; distribute such documentation to responsible agencies and others; hold required public hearing(s) and consider public comments thereon; and certify such report and other documentation through a City Council resolution,



all in accordance with CEQA. Contractor shall review all CEQA or CEQA-related documentation developed, if applicable, subsequent to Execution of this Agreement and related to the Facility; including but not limited to the initial study, negative declaration, and/or draft and final environmental impact report, including the mitigation/monitoring program and other pertinent environmental documentation for Site and Facility Development and Operation. Contractor shall cooperate to the fullest extent possible with the CEQA process by providing technical and operational information with respect to the Facility as needed to conduct the CEQA process.

Contractor shall pay for CEQA review associated with permitting the Facility prior to Development and any additional CEQA review for Facility modifications that may be required from time to time during the Term for Contractor to meet Contractor's Obligations.

**b. Significant Impacts.** If significant environmental impacts are identified in such environmental review process, City may do any one or more of the following:

1) City may refuse to adopt and approve the Facility Development; in which instance the Parties shall be released from any liabilities and Obligations hereunder upon Notice of either Party to the other Party;

(2) City may make appropriate findings and adopt a statement of overriding considerations, and approve the Facility Development as proposed;

(3) As a condition of Facility Development, City may require mitigation measures which reduce the significant environmental impacts of the Facility. Contractor shall incorporate mitigation measures into Facility design and Operations and Maintenance Manual. Contractor shall bear costs of such mitigation at its sole expense. However, if such mitigation measures are likely to result in material cost increases to the Contractor, the City and the Contractor shall negotiate in good faith the cost of such mitigation measures and the method for the Contractor to recover such costs including, without limitation, an increase in the Service Fee. In the event that the Parties cannot agree on such method within thirty (30) days of the imposition of such mitigation measures, then the

dispute shall be resolved in accordance with the dispute resolution procedures in Article 15, however Contractor shall not be required to perform such mitigation measures until the method of cost recovery is resolved.

### **7.03 Notice to Proceed with Initial Development Activities**

**a. Issuance of Notice.** The City shall issue a written Notice to Proceed with Initial Development Activities authorizing Contractor to proceed with Facility Development activities, up to but not including, Facility construction activities and Facility Start-Up and Performance Testing, upon satisfaction of the following preconditions:

(1) **CEQA Completion.** The CEQA process has been completed as signified by the later date of either: a) the end of applicable appeals period following the date the environmental impact report required by Applicable Law, including CEQA, is certified, if no appeal is filed; or, b) the date of final settlement of any appeal or action by a third party challenging the CEQA process or certification, as such periods may be extended to reflect Uncontrollable Circumstances (the "**CEQA Completion Date**"). In the event that the CEQA Completion Date shall not have occurred by the first (1st) anniversary of the date of filing of an appeal or action challenging the CEQA certification, then either Party may terminate this Agreement unless the Parties have agreed to extend the time period. The City may, in its discretion, waive this condition.

(2) **Council Approval.** City Council approval is obtained.

(3) **Confirmation of Contractor's Representations and Warranties.** The representations and warranties made by Contractor in Section 2.01 shall be true and correct in all material respects on and as of the issuance date of the Notice to Proceed with Initial Development Activities as if made on such Date, as certified in writing by an authorized officer of the Contractor, in form and substance satisfactory to the City.

(4) **Adverse Changes in Guarantor or Contractor.** Since the Execution Date, there shall not have occurred any material change, financial or otherwise, that would

adversely affect the ability of the Guarantor to perform its 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 Development and Operation, Contractor's Obligations, the services hereunder and the transactions contemplated hereby.

If precondition (1) and (2) above is fulfilled and preconditions (3) and (4) are not fulfilled due to the fault of the Contractor, the Contractor shall be in breach of the Agreement which are subject to the provisions of Article 13.

If precondition (1) and (2) are not satisfied or waived on or before the scheduled date for issuance of the Notice to Proceed with Initial Development Activities as provided in Exhibit 7, unless extended by the City, the City, at its sole discretion, may release the Parties from further liabilities and Obligations hereunder upon Notice and the Agreement shall be terminated in accordance with provisions of Article 14, except for the obligations in Section 7.15 (b) (Holding Fee) which shall survive the termination. Any actions taken by either Party prior to Notice to Proceed with Initial Development Activities shall be done at their respective sole option, risk, and expense, and the Parties acknowledge that City's Execution hereof is not and shall not be considered approval of the project contemplated hereby for purposes of CEQA.

**b. Contractor warranty.** In the event Contractor commences with any Facility Development activities prior to Notice to Proceed with Initial Development Activities, and through no fault of Contractor (and assuming Contractor is not in default hereunder) the Notice to Proceed with Initial Development Activities is not issued due to a CEQA challenge or action or by action of the City Council, Contractor will bear all costs for any Development activities performed before the Notice to Proceed with Initial Development Activities and acknowledges that Contractor shall not be entitled to reimbursement from City for any costs related to Facility Development.

**7.04 Site Acquisition.** Contractor shall acquire Ownership of the Site, which shall be selected by the City based on CEQA findings and City Council direction, giving Contractor right to use and possess the Site to meet Contractor's Obligations for the Term, satisfactory to City and evidenced by a copy of the recorded deed therefor certified as a true copy by the County Recorder, in accordance with the time line of the Facility Development Schedule presented in Exhibit 7.

Notwithstanding the foregoing, it is acknowledged by the parties that the use of one or more of the sites identified by Contractor may, during the CEQA process, become commercially unavailable due to City planning decisions and other causes not the fault of Contractor, then Contractor will use Reasonable Business Efforts to find an alternate site. In the event no site can be secured after exploring all legal remedies and alternatives, then the Contractor may, upon written notification to City, terminate this agreement.

**7.05 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 for Facility Development, Facility Operation, and Residue hauling (the "**Permits**"), including, but not limited to, those Permits listed in Exhibit 5. 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. The City will provide Contractor assistance in applying for and obtaining local Permits when appropriate and practical.

**7.06 Design, Plans and Specifications.** Contractor shall be responsible for designing the Facility and preparing all Plans and Specifications required for Facility construction. The City and/or its agents shall timely review Contractor's Plans and Specifications in the draft, final and "as built" stages to verify that Facility design meets the Facility Requirements in Exhibit 6 and Household Hazardous Waste Facility requirements in Exhibit 13. The City shall timely review and approve all design changes that substantially alter the site plan and processing equipment diagrams included in Exhibit 6 provided that the City shall not unreasonably withhold its approval. The City and/or its agents shall, at the sole discretion of the City, upon prior verbal notification to Contractor, attend and participate in any meetings that may include, but not be limited to, representatives of Contractor, the Facility designer/engineer, and the building contractor. Upon completion of the final Plans and

Specifications, Contractor shall certify that the Facility is built substantially in accordance with the final Plans and Specifications, and that Contractor can Operate the Facility in such a way as to meet all of the Contractor's Obligations contained in this Agreement.

#### **7.07 Notice to Proceed with Construction**

**a. Issuance of Notice.** The City shall issue a written Notice to Proceed with Construction authorizing Contractor to proceed with Facility construction and Start-Up and Performance Testing upon Contractor's demonstration or warranty that Contractor satisfies the following preconditions:

(1) **Site Permits and approvals.** Compliance with Applicable Law with respect to any and all Permits required for the Initial Phase of Construction and environmental impact documentation required prior to commencement of Facility construction, including CEQA.

(2) **Initial Development Activities.** City issued Notice to Proceed with Initial Development Activities and Contractor has substantially completed such activities.

(3) **Site acquisition.** Contractor secured title to the Site satisfactory to City.

(4) **Financing.** Contractor is responsible for securing a source of debt and/or equity funds from a bank or other financial source in sufficient amounts and at times necessary to finance Facility Development, to meet the Facility Development Schedule provided in Exhibit 7, and to fulfill all Contractor's Obligations. The terms and conditions of Contractor's proposed financing shall be substantially similar to that used by Contractor and other developers of similar facilities taking into consideration any differences caused by changes in financial markets.

If the financing terms and conditions that relate to the principal amount of the Facility debt require a prepayment penalty after the tenth (10th) year of the Agreement, the City shall have the right to review and approve the provisions of the Financing Documents related to the prepayment terms and conditions provided that the City may not unreasonably withhold such

approval. With regard to any subsequent financing including caps and collars or other interest rate hedging device, Parties agree that in the event the City assumes Financing Obligations, the City shall pay up to three hundred twenty five thousand dollars (\$325,000) in prepayment penalties and Contractor shall pay any prepayment penalties in excess of three hundred twenty five thousand dollars (\$325,000).

(5) **Financial Guaranty.** Execution of Guarantor of a legally valid, binding and enforceable Financial Guaranty Agreement attached hereto as Exhibit 8, 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.

(6) **Confirmation of Contractor's Representations and Warranties.** Representations and warranties made by Contractor in Section 2.01 are true and correct in all material respects, there have been no substantial changes in the financial position of the Contractor, and there have been no significant deviations from the Facility Requirements in Exhibit 6.

(7) **Adverse Changes in Guarantor or Contractor.** Since the Execution Date, there shall not have occurred any material change, financial or otherwise, that would adversely affect the ability of the Guarantor to perform its 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 Development and Operation, Contractor's Obligations, the services hereunder and the transactions contemplated hereby.

(8) **Conditional Use Permit.** City issued conditional use permit for the Facility

b. **Contractor Warranty.** In the event Contractor commences with any Facility construction activities prior to Notice to Proceed with Construction, and through no fault of Contractor (and assuming Contractor is not in default

hereunder) the Notice to Proceed with Construction is not issued due to a CEQA challenge or action, Contractor will bear all costs for any construction activities performed and acknowledges that Contractor shall not be entitled to reimbursement from City for any costs related to Facility construction.

**7.08 Facility Requirements.** Contractor shall design and construct the Facility as required to fulfill Contractor's Obligations including requirements in Exhibit 6. Contractor is solely responsible for the adequacy, safety, and suitability of its Facility. Contractor shall Develop the Facility in accordance with Applicable Law and shall use Standard Industry Practices.

**7.09 Facility Construction and Equipping.** Contractor has sole responsibility for constructing and equipping the Facility. This sole responsibility includes overseeing all aspects of construction including bidding for construction; selecting construction firm(s); all aspects of managing construction including Site activity, budget and schedule management; financing Facility Development and construction, ensuring that the Facility is constructed according to, and is fully Operational substantially in accordance with the final Plans and Specifications, Facility Requirements (in Exhibit 6), and all Applicable Law.

City shall have the right, but not the obligation, to observe and inspect construction and equipping activities at the Facility. In connection therewith, City and its representatives shall have the right to enter the Site and Facility upon one (1) Working Day's Notice and speak to any of Contractor's employees, subcontractors, or other Persons providing construction and equipping services; provided that City and its representatives shall comply with the 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 ensure that its employees, subcontractors, and such other Persons cooperate with the City and respond to the City's inquiries.

#### **7.10 Construction Completion Date**

**a. Definition.** The Construction Completion Date will be the date of the later of the following events:

(1) Issuance date of a temporary certificate of occupancy of the Facility,

(2) Installation of electrical power sufficient to run the Facility's equipment in accordance with the equipment manufacturer's specifications,

(3) Upon receipt of such other certification as the City may require.

**b. Schedule.** The Construction Completion Date shall occur on or before the date or within the time frame specified in the Facility Development Schedule provided in Exhibit 7.

**7.11 Establishment of Vehicle Tare Weights.** Within the time frame specified in the Facility Development Schedule provided in Exhibit 7, Contractor shall weigh Collection Contractor(s) Delivery vehicles to determine unloaded weight ("tare") weight of each vehicle. Contractor shall record tare weight, contractor name, and vehicle identification number for each Collection Contractor Delivery vehicle and within ten (10) Working Days of weighing Contractor shall provide the City and each Collection Contractor(s) a report listing vehicle tare weight information.

**7.12 Contractor Certification of Preparedness.** On or after the Construction Completion Date and prior to Contractor commencing Start-Up and Performance Testing, Contractor shall certify to the City that the Facility has been constructed and equipped as required to fulfill Contractor's Obligations and in such manner that Contractor can conduct Facility Start-Up and Performance Testing.

### **7.13 Start-Up and Performance Testing**

**a. General.** During Facility Start-Up and Performance Testing period Contractor shall Accept, receive, Process and Transfer all of the City's Mixed Municipal Waste in accordance with this Article and the Operating procedures in Article 8. Contractor shall provide all staff and equipment necessary for conducting Start-Up and Performance Testing to fulfill all of Contractor's Obligations.

**b. Performance Test Guarantee.** The Performance Test is intended to demonstrate that Facility capacity and reliability is sufficient and that the Contractor can achieve the Performance Test Guarantee in a manner that complies with Applicable Law. The Performance Test



Guarantee includes two guarantees: Design Throughput Guarantee and Vehicle Turnaround Guarantee. The Performance Test requirements related to the Performance Test Guarantee are described below.

(1) **Design Throughput Guarantee test.** The Design Throughput Guarantee test must demonstrate the Facility has the capability to:

(a) Weigh, receive, unload and Transfer to the Designated Disposal Facility 700 Tons of Mixed Municipal Waste from Collection Contractor(s)' vehicles and simulate weighing, receiving, and unloading of 120 Tons of Mixed Municipal Waste from Self Haulers per day for a minimum of two (2) consecutive Working Days.

(b) Weigh, receive, unload and Transfer to the Designated Disposal Facility 2,190 Tons of Mixed Municipal Waste per day (where 1,890 Tons is assumed to be Delivered by Collection Contractor(s) and 300 Tons by Self Haulers) for a minimum of one (1) Working Day. The test shall be designed to demonstrate that the Facility has a throughput capacity sufficient to receive, process, and Transfer waste generated by from Collection Contractor(s) and Self Haulers in the Tri-Cities in contract year 2021. Because sufficient waste quantities will not be available for the test at the tonnage levels anticipated for the Tri-Cities level of operation, the test shall be designed to use waste quantities available (700 Tons of Mixed Municipal Waste from Collection Contractor(s) vehicles). Contractor's proposed testing method may include adjustments to Facility Receiving Hours for the purposes of conducting the test and procedures to demonstrate that the higher throughput capacity is available.

If loads of Mixed Municipal Waste from Self Haulers cannot be arranged by Contractor for Performance Testing purposes, such loads can be simulated using private vehicles (without waste) arranged by Contractor for testing purposes. If simulated Self Haul loads are used for testing, Contractor shall assume the average Self Haul load weighs 1.5 tons and shall arrange for the number

of simulated loads accordingly. For all simulated Self Haul loads, Contractor shall have the private vehicles wait fifteen (15) minutes on the tipping floor to simulate Self Haul unloading operations.

(2) **Vehicle Turnaround Test.** The Vehicle Turnaround Test shall demonstrate that each incoming City Vehicle and Collection Contractor vehicle Delivering Mixed Municipal Waste to the Facility is able to check in at the receiving weigh scale, unload, and stop at the outbound scale to record departure time within twenty (20) minutes of departing the receiving weigh scales. Testing procedures shall include recording the real time each vehicle arrives at the incoming scale and the time the vehicle departs the outbound scale. Testing data shall be accompanied with a notation by a test monitor indicating the reason for delay for any vehicles with actual turnaround time greater than twenty (20) minutes.

This test may be conducted concurrently with the Design Throughput Guarantee Test.

#### **c. Performance Test Plan**

(1) **Contractor to Prepare Performance Test Plan.** Contractor shall prepare a Performance Test plan which generally describes the Contractor's intended Start-Up activities and presents the Contractor's proposed detailed procedures and schedules for conducting the Start-Up and Performance Tests. The Performance Test plan shall include a description and schedule of intended Start-Up period activities (including volumes and types of Mixed Municipal Waste required during Start-Up period). In addition, the Performance Test plan shall include at a minimum a detailed description of the volumes and types of Mixed Municipal Waste required, test schedule, operating staff, test crew, test procedures, data to be collected, monitoring procedures, and basis for determining test results that demonstrate the fulfillment of the two elements of the Performance Test Guarantee: Design Throughput Guarantee Test and Vehicle Turnaround Guarantee Test.

(2) **Schedule for Test Plan.** Contractor shall provide the City and its agents with its proposed Performance Test plan in accordance with the time line of the

Facility Development Schedule. The City shall review the Performance Test Plan, test methodologies, and schedule to determine whether the plan is capable of demonstrating the Contractor's ability to fulfill the Performance Test Guarantee and adequately reflects Contractor's Obligations. City shall approve or disapprove the Performance Test plan and provide comments within fifteen (15) calendar days of receipt thereof. Contractor shall then incorporate City's comments, finalize the Performance Test plan, and resubmit the Performance Test plan for City approval no later than seven (7) calendar days after City provides Contractor with comments on the Start-Up and Performance Test Requirements. If Contractor disagrees with the City's comments and Contractor and the City cannot reach agreement during such seven (7) calendar day period or a mutually agreed upon time extension, the Parties shall handle the matter in accordance with the Dispute Resolution Procedures in Article 15. Upon the Parties' reaching agreement on the Performance Test plan and schedule, the City shall Notify the Collection Contractor(s) of the volume of Mixed Municipal Waste needed for Facility Start-Up and Performance Test, and the related schedule for Delivery of such Mixed Municipal Waste.

**d. Start-Up Period.** During the Start-Up period, the Contractor shall train personnel, test equipment, and prepare to test the capabilities of the Facility in accordance with the Performance Test requirements. Contractor, at its sole discretion, shall determine the types and extent of Start-Up activities. During the Facility Start-Up period Contractor may test the ability of the Facility to receive, Recover and Process Recyclable Materials from Mixed Municipal Waste, Transfer Residue for Disposal at the Designated Disposal Facility, and Market and transport Recovered Materials to Market conditioned upon the City's making available the specified amount of Mixed Municipal Waste during a period not to exceed five (5) Working Days. In the event the Tri-Cities Recycling and Disposal Facility becomes unavailable and the City has a health and safety concern the City may request, and Contractor will use Reasonable Business Efforts to immediately commence to Transfer the Mixed Municipal Waste to the Designated Disposal Facility.

The Contractor shall Notify the City in advance of date Contractor will commence Start-Up ("**Start-Up Date**") within the time frame specified in the Facility Development Schedule. Start-Up Date shall occur on or before the date or within the time frame specified in the Facility Development Schedule in Exhibit 7.

**e. Performance Testing Requirements**

(1) **Notification.** After completion of the Start-Up period, Contractor shall demonstrate during a period of not more than five (5) consecutive Working Days that the Facility Operates in accordance with the Performance Test plan and meets the Performance Test Guarantee. The Contractor shall Notify the City in advance of date Contractor shall commence Performance Testing ("**Performance Test Date**") in accordance with the Facility Development Schedule. The Performance Test Date shall occur on or before the date or within the time frame specified in the Facility Development Schedule in Exhibit 7. At the conclusion of the test period, Contractor shall give the City prompt written Notice of completion of the Performance Test.

(2) **General Operating Requirements.** During the Performance Test Contractor shall utilize the same staffing levels, job tasks, Operating procedures and equipment as set forth in the Performance Test plan and Operations and Maintenance Manual for the amount of Mixed Municipal Waste received and Transferred.

(3) **Receiving Operations.** A scalehouse attendant shall generate scale tickets for each incoming or outbound load. Scale tickets shall record vehicle identification number, scale weight, type of transaction (Collection Contractor, City Vehicle, or Self Haul), 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, 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.

(4) **Unloading.** Collection Contractor and Self Haul vehicles 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.

(5) **Transfer Loadout and Transfer.** Contractor shall load Transfer trailers, monitor weights to assure legal load limits are not exceeded, and record date, loaded vehicle weight, driver and time for each Transfer vehicle exiting the Facility to deliver waste to the Designated Disposal Facility. Arrival time and load information shall be recorded for each Transfer load leaving the Facility.

**f. City Representation.** The City or its agent shall have the right to, at the City's discretion, observe the Start-Up activities and Performance Test. Contractor shall provide the City, including its representatives, with access to the Facility during Performance Testing to observe and monitor the Performance Test and make independent tests during the Performance Test period, so long as such independent tests do not materially interfere with the Start Up Activities and Performance Test.

**g. Performance Test Reports**

(1) **Contractor Submittal.** Following the completion of the Performance Test and within the time frame specified in the Facility Development Schedule, Contractor shall submit to the City three (3) copies of a written report certifying that the Facility has operated in accordance with Plans and Specifications and Performance Test plan; providing all raw data generated during the test, calculations made to support test results, and test results; and concluding, in the judgment of Contractor, whether the Facility passed or failed the Performance Test. If in the judgment of Contractor the Facility passes the Performance Test, Contractor shall certify such to City, and Contractor shall further warrant to City that the Facility has been completed in accordance with Facility Design Requirements and in such manner that Contractor can comply with all Contractor's Obligations and fulfilled the Performance Test Guarantee, which warranty Contractor acknowledges and agrees is material.

(2) **City Review.** The City and/or its agent(s) shall review Contractor's report to determine, among other things, whether the City agrees with Contractor's certification and conclusion. The City shall agree or disagree within ten (10) Working Days of receiving Contractor's report. If the City concurs with the Contractor's certification and conclusion, City shall Notice Contractor that Contractor has successfully completed the Performance Test. If the City does not respond within such time, the Limited Operations Date and Full Operations Date stated in the Facility Development Schedule shall be extended by one Working Day for each Working Day the City does not respond following such ten (10) Working Days. If the City determines Contractor has not demonstrated fulfillment of the Performance Test Guarantee and Contractor and City cannot reach agreement within thirty (30) calendar days of City receipt of the Contractor Performance Test report, the Parties shall follow Dispute Resolution procedures in Article 15 to resolve the matter.

(3) **Failure to Pass Performance Test.** In the event the Facility does not pass the Performance Test, the Contractor will take actions necessary to pass such Performance Test, including adding additional supervisors, sorting crews and equipment; providing increased training to employees; and/or following the reasonable and practical recommendations of the City's agent(s). Contractor shall pay the costs of such actions without adjustment of the Service Fees therefor.

**h. Compensation During Start-Up and Performance Testing.** Contractor shall charge for all Delivered Mixed Municipal Waste Accepted, Transferred, and Disposed during Start-Up and Performance Testing in accordance with the Mixed Municipal Waste Service Fee defined in Article 10. No other compensation shall be provided by City to Contractor during Start-Up and Performance Testing.

#### **7.14 Commencement of Facility Operations**

**General.** City shall issue Notice to Proceed with Operations to Contractor specifying the date on which City will commence Delivery of Mixed Municipal Waste to the Facility and indicating Contractor's obligation to conduct Limited Operations or Full Operations on date Delivery of Mixed Municipal Waste commences.

Notice to Proceed with Operations shall provide Contractor with a minimum of fourteen (14) calendar days advance Notice of date on which Operations shall commence. Commencement of Facility Operations shall be contingent upon Contractor's successful completion of Performance Test as determined by City and issuance of City's Notice that Facility is ready for Limited Operations for first day of Delivery of Mixed Municipal Waste. Full Operations shall commence on or after the Limited Operations Date upon Notice of Contractor by City a minimum of fourteen (14) calendar days in advance of date on which Full Operations shall commence and shall occur after Contractor has successfully completed the Performance Test described in Section 7.13 and Contractor has Noticed the City of its preparedness to commence Full Operations and fulfill its Diversion Guarantee. The Full Operations Date shall occur within one year of the Limited Operations Date unless extended in writing by the City. Failure to meet the Full Operations Date will result in payment of Liquidated Damages by Contractor as described in Exhibit 10, unless modified or waived in writing by City. The imposition of Liquidated Damages shall be for a period no longer than six months, at which time Contractor will be in breach of this Agreement pursuant to Article 13.

#### **7.15 Holding Fee.**

a. After issuance of the Notice to Proceed with Initial Development Activities, the City shall have the right to suspend Facility Development or delay commencement of Operations at any time excluding the period between the issuance of the Notice to Proceed with Construction and the Construction Completion Date, (except as provided in Section 14.04 c.) provided the City pays a Holding Fee to the Contractor. If City is interested in suspending Development or delaying commencement of Operations, the City shall request a proposal from Contractor that identifies a not-to-exceed Holding Fee to be paid by City to Contractor for the holding period specified by the City. The Contractor's proposal of the maximum not-to-exceed Holding Fee shall be supported with detailed estimates of all unavoidable costs that may be incurred during the holding period. Such costs may include Financing Obligations and other Operating expenses that can not be eliminated during the holding period. City shall review and approve Contractor's Holding Fee proposal prior to issuing a Notice to suspend Development or delay commencement of Operations. In the event there is a dispute, the dispute shall be resolved by the Independent Engineer in accordance with provisions of Section 15.03. City shall pay Contractor for actual City-

approved costs incurred during the holding period up to but not exceeding the Holding Fee proposed by Contractor and approved by the City. Contractor shall invoice City on a monthly basis for payment of actual costs and shall include documentation of actual costs incurred.

b. City and Contractor have agreed on a lump sum payment of \$2,492,744.00 for a full and complete settlement of a holding fee claim for the period up through execution of this Agreement. Such settlement includes a complete waiver by Contractor of any and all claims for costs and damages related to delay in the project schedule including claims which may arise in the future on the north parcel of the project site, APN No 531-0165-044. This amount will be paid within fifteen (15) days after City Council approval of this Agreement.

Contractor hereby releases and discharges the City from all rights, claims and demands Contractor may have for additional compensation for holding fees through the date of execution of this Agreement; however for any potential holding costs for the period from March 1, 2004 through the date of Issuance of Notice To Proceed, Contractor may include these costs in the Initial Development expenses subject to reimbursement in the event the project is suspended or terminated. Contractor acknowledges that they may hereinafter discover facts or law different from, or in addition to that which they now believe to be true with respect to their release of claims for the Holding Fee as set forth in this Agreement, and understands that by executing this Agreement, it is waiving any rights of claims for any damages to which it may be entitled which are not specifically exempted herein.

#### **7.16 Operations and Maintenance Manual**

a. **Draft Operations and Maintenance Manual.** On or before the date or within the time frame specified in the Facility Development Schedule provided in Exhibit 7, Contractor shall submit to the City a draft Operations and Maintenance Manual detailing procedures for Facility Operation, including procedures during peak Facility usage and emergencies. The Manual shall contain sufficient detail to allow a third party reasonably experienced in Mixed Municipal Waste Transfer, Processing and material Recovery Operations to Operate and maintain the Facility and to perform emergency



shut-downs of the Facility. In particular, the Operations and Maintenance Manual shall include, but not be limited to, the information as specified in Facility Operations, standards and procedure requirements stated in Article 8 and Exhibit 6. The City shall review and provide comments within thirty (30) calendar days of receipt of the draft Operations and Maintenance Manual. If Contractor does not receive comments within this period, Contractor may proceed to finalize the Operations and Maintenance Manual pending completion of the Performance Test.

**b. Final Operations and Maintenance Manual.** No later than thirty (30) calendar days after receipt of City's comments on draft Operations and Maintenance Manual, Contractor shall submit to the City a final version of the Operations and Maintenance Manual incorporating City comments provided on the draft Manual.

#### **7.17 Failure to Meet Development Dates**

**a. Failure to Meet Major Milestone Events.** Provided that conditions precedent to the issuance by the City of the Notice to Proceed with Initial Development Activities as described in Sections 7.03.a(1), 7.03.a(2), and 7.03.a(3) have been met by the City, Contractor shall be in breach of this Agreement and subject to breach procedures of Article 13 if Contractor fails to meet the completion dates, as defined by the Facility Development Schedule, for the following milestone events: (1) meet all preconditions required for issuance of Notice to Proceed with Initial Development Activities, (2) acquire Site, subject to the provisions of Section 7.04, (3) meet all preconditions required for issuance of Notice to Proceed with Construction, and (4) commence Limited Operations.

**b. Extensions of dates in Facility Development Schedule.** Contractor may request an extension of the Facility Development time periods or dates for any or all of the milestones listed in the Facility Development Schedule provided in Exhibit 7. The Contractor's request for an extension shall be submitted in writing and shall clearly describe what function(s) of the Development or Operations cannot be accomplished in accordance with the Facility Development Schedule. The City shall review Contractor's request for an extension and, at its sole discretion, may approve requested extensions. If approved, City shall amend the Facility Development Schedule to reflect agreed upon

extension and new milestone dates. If City grants an extension and Contractor fails to meet Development Dates on or before the expiration of said period of extension, the Contractor shall be in breach of the Agreement and subject to provisions in Article 13 unless City has given written consent to an additional extension.

**c. City's Remedies.** If any event itemized in Sections 7.02 through 7.16 does not occur on or before the times provided therein, as extended in accordance with Section 7.17(b), City may exercise any remedies in accordance with Articles 13 and 14, including seeking specific performance of the Contractor's Facility Development Obligations in accordance with Article 13, and/or terminating this Agreement in accordance with Article 14.

## **ARTICLE 8. FACILITY OPERATION**

**8.01 Operations and Maintenance Standards.** Beginning on the commencement of the Start-Up and Performance testing period, Contractor shall receive and Transfer to the Designated Disposal Site all of the City's Mixed Municipal Waste. Beginning on the Limited Operations date Contractor warrants to comply with the Operating Throughput Guarantee and Vehicle Turnaround Guarantee, specifically Section 8.03. Further, Contractor warrants to comply with the Diversion Guarantee on the commencement of full operations. On the Full Operations Date, Contractor warrants to comply with the Facility Operating Guarantee throughout the Term and to perform Contractor's Obligations with respect to Facility Operations hereunder in accordance with sound management and Operations practice, its Operations and Maintenance Manual, the Facility Requirements in Exhibit 6, regulatory and Permit requirements, its plans and specifications, Applicable Law, Standard Industry Practices, the provisions hereof, and covenants, conditions and restrictions pertaining to the Site.

**8.02 Commencement of Facility Operations.** Facility Operations shall commence on the Limited Operations Date or Full Operations Date whichever date shall occur earlier. In the event Facility Operations commence with Limited Operations, the Full Operation Date shall commence in accordance with Section 7.14.

### **8.03 Facility Operating Guarantee**

**a. Operating Throughput Guarantee.** Beginning on the Limited Operations Date and throughout the Limited Operations period, Contractor shall guarantee its ability to Accept,

Transfer, and Dispose, as the case may be, up to one thousand eight hundred seventy five (1,875) Tons per weekday of Mixed Municipal Waste Delivered by Collection Contractor(s) and Self Haulers and up to three hundred seventy-five (375) Tons per Saturday (as specified in Exhibit 11) of Mixed Municipal Waste Delivered Collection Contractor(s) and Self Haulers, and all other Permitted Materials Delivered by Self Haulers, subject to the maximum permitted capacity of the Facility and Contractor's Obligation to Accept City Mixed Municipal Waste. On the Full Operations Date, the tonnage level of Operating Throughput Guarantee will not change; however, the Contractor shall guarantee to Accept, Transfer, and Dispose of the Mixed Municipal Waste and to Recover and Process such Permitted Materials to meet the Diversion Guarantee.

**b. Diversion Guarantee.** Beginning on the Full Operations Date, Contractor shall annually Divert the equivalent of twelve (12) percent by weight of the City's Delivered Mixed Municipal Waste as determined in accordance with Measurement Diversion Guarantee procedures in Exhibit 12. Contractor is not obligated to meet the Diversion Guarantee during Limited Operations, provided that the Limited Operations period shall not exceed twelve (12) months. During the Full Operations Period if the Diversion Guarantee is not met for the twelve month period, then Contractor shall notify the City of the failure to achieve such Diversion Guarantee. The Parties agree to first meet in good faith to analyze the incoming waste stream, including waste diversion studies, to determine the reason for the failure to meet the Diversion Guarantee. Contractor shall provide a plan to City within 60 days outlining the options to achieve the Diversion Guarantee to the contractually required levels, as well as identifying any potential associated reasonable cost impacts. Contractor shall also provide, upon City request, a plan for alternative diversion rates. If the plan and any reasonable costs, or an alternative diversion rate are approved by the City, then Contractor shall thereafter be obligated to meet the Diversion Guarantee as approved by the City. In the event the plan for Diversion and any reasonable costs are not approved by the City, then the City may declare the Contractor in breach of the Diversion Guarantee and the provisions of Section 13.01 a (2) shall apply. City shall not declare the Contractor in breach of this Agreement unless and until the process in the subsection (b) has been completed. Notwithstanding the above, City shall not declare Contractor in breach of this Agreement if Contractor has

used Reasonable Business Efforts to achieve the Diversion Guarantee.

**c. Vehicle Turnaround Guarantee.** Contractor guarantees that the average time required for City Vehicles and Collection Contractor vehicles Delivering Mixed Municipal Waste on behalf of an Approved User are able to unload and exit the Facility is twenty (20) 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 received during the thirty (30) calendar day period. Contractor shall manage the Permitted Materials receiving and unloading area in order to facilitate the access and unloading of Approved Users and Self Haul vehicles. Contractor shall use Reasonable Business Efforts to meet the Vehicle Turnaround Guarantee and avoid significantly delaying Self Haulers' ability to use the Facility.

#### **8.04 General Operations**

**a. Receiving Hours.** Receiving and operating hours of the Facility are as follows:

(1) **Daily Facility Requirements.** Contractor shall Accept Permitted Material from Approved Users and Other Allowable Users 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 based on and landfill availability ("Facility Receiving Hours"). Contractor acknowledges that Collection Contractor(s) typically do not Deliver a significant quantity of Mixed Municipal Waste on Saturdays with the exception of any Saturday which is the first Saturday following a Holiday that requires Collection Contractor(s) to engage in a special Saturday collection and on such Saturdays, Contractor shall be prepared to Accept the increased Tonnage of Mixed Municipal Waste Delivered by Collection Contractor(s). 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. In the event the City requests a modification to Facility Receiving Hours, Contractor may initiate an Extraordinary Review under provisions of Section 11.03.c if additional costs are incurred as a result of the changes in the Facility Receiving Hours.

(2) **Visitor Education Facility.** Beginning on the Facility Full Operations Date, Contractor shall make the Visitor Education Facility available for use by the City and Collection Contractor(s), within three (3) Working Days of Notice requesting use, and such availability shall be at a minimum, from 8:00 a.m. to 1:00 p.m., Tuesday through Saturday, except for Holidays, or at any other times upon mutual agreement. Upon request of the City or any Approved User no less than three (3) Working Days in advance, Contractor shall deliver visitor presentations, including an educational brochure, printed on recycled-content paper, on source reduction, recycling and solid waste management, approved by the City, and provide tours of the Facility unless impractical due to safety concerns.

(3) **Continuous Operations.** Beginning on the Limited Operations Date or Full Operations Date whichever shall occur earlier and throughout the Term, Contractor shall keep open and operate the Facility continuously and uninterruptedly during Facility Receiving Hours for the Term hereof, except when Contractor is prevented from doing so by any Uncontrollable Circumstance.

(4) **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 in accordance with Section 10.13. This provision is intended to address temporary extension of Facility Receiving Hours that may be needed from time to time to accommodate special circumstances.

#### **b. Scale Operation**

(1) **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 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 and Approved Users. 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 on the next Working Day on which the scalehouse is open. All weighing shall be conducted by Contractor or its agents by a licensed weigh master.

(2) **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 using the same method described in Section 7.11. Contractor shall have the right to request re-taring of vehicles as reasonably required to ensure accuracy but no less than two(2) times per year.

(3) **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.

(4) **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. If the City and Contractor cannot agree on the estimated quantities, the Parties shall handle the matter in accordance with the Independent Engineer dispute resolution procedures in Section 15.03.

(5) **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, consistent with the results of such test, all weight measurements recorded and Service Fees calculated, charged and paid, as the case may be, from the date of such request.

(6) **Weighing Requirements.** Contractor shall weigh and record inbound weights of all Approved Users' vehicles and Other Allowable Users' vehicles including Self Haul vehicles, and Contractor shall weigh and record outbound weights of vehicles for which Contractor does not maintain tare weight information.

(7) **Records.** In accordance with Section 8.11, Contractor shall maintain scale records that provide information such as, but not limited to, inbound and outbound weights of vehicles, vehicle identification

number, jurisdiction of origin of Permitted Materials Received, type of material, hauler identification and/or classification, type, weight, and destination of outbound materials.

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

**d. Personnel**

(1) **Initial Hiring Practices.** Contractor shall use Reasonable Business Efforts to include, where relevant, such skill and knowledge among criteria for employment at the Facility. Contractor agrees to inform and offer employment to the employees presently employed at the Tri-Cities Recycling and Disposal Facility who may become unemployed as a result of the City's commitment to Deliver Mixed Municipal Waste to the Facility, for as many positions as Contractor has available at the Facility provided that such persons file an application for said jobs and meet all performance criteria required of other candidates for the same position.

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

(3) **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.)

(4) **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 (i) through (iv) of this Exhibit 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) **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 Approved Users and Other Allowable Users, City employees and its representatives, and other members of the public with courtesy.

**e. Equipment, Repair, and Maintenance**

(1) **General.** Contractor shall purchase, lease, or otherwise procure, operate, and maintain the Rolling Stock, equipment, and materials necessary for Facility Start-Up, 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 and Exhibit 6. 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 Approved Users and Other Allowable Users or employees. Contractor shall maintain the aesthetic appearance of the Facility and Site in a clean and neat manner in accordance with the Plans and Specifications with due regard for reasonable control of odors, dust and noise.

(2) **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.

(3) **Offices.** 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.

(4) **Transfer/materials Recovery Facility Building.** The building loadout areas, tipping floor areas, and access ramps shall be cleaned and swept at the end of each operating day.

(5) **Interior Surfaces.** 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.

(6) **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.

(7) **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.

(8) **Periodic Maintenance.** Contractor shall perform periodic maintenance on all equipment and Rolling Stock as specified in the Operations and Maintenance Manual.

(9) **Repair of Damage.** Contractor shall also repair any damage to the Facility caused by the actions of its employees, subcontractors, or other Contractor agents.

#### **f. Safety**

(1) **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.

(2) **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.

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

**g. 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 as described in Exhibit 9 and shall diligently monitor and enforce the vehicle tarp requirements included in Exhibit 9 for all vehicles including Self Haul vehicles.

**h. Updated Operations and Maintenance Manual.** On or before December 1 of each year following the Full Operations 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 updated Manual shall conform to the requirements of Exhibit 6. 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.

**i. Quarterly Meetings.** The City and Contractor shall meet no less than quarterly to discuss Facility Operation and any related matters raised by either Party.

**j. Complaints about Operation of Facility**

(1) **General.** 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)'s drivers, other Approved Users, other Allowable Users, 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 an 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.

(2) **Complaint Log.** Each month Contractor shall send the City a copy of the complaint log for the previous month in accordance with Section 8.11.b. In the event more than fifty (50) complaints were received during a given month from a reasonable number of unrelated complainants, Contractor shall pay Liquidated Damages in accordance with Exhibit 10.

(3) **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. Contractor shall be subject to Liquidated Damages specified in Exhibit 10 for failure to clean up litter within the time frames specified in this Section.

**k. 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 Accepted from Self Haulers; rates charged to Self Haulers; 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.

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

## **8.05 Delivery of Permitted Material**

### **a. Acceptance**

(1) **Commencement of Mixed Municipal Waste Delivery.** The City shall issue Contractor Notice to Proceed with Operations specifying the date on which the City will commence Delivery of Mixed Municipal Waste to the Facility. Delivery of Mixed Municipal Waste shall commence no later than the Limited Operations Date.

(2) **Acceptance of Mixed Municipal Waste from Approved Users.** Subject to Permit limitations, during Start-Up, Limited Operations, and Full Operations, except during periods of an Uncontrollable Circumstance that prevent Contractor from Accepting Mixed Municipal Waste, and actions or inactions of the City that prevent Contractor from Accepting Mixed Municipal Waste, Contractor shall Accept all Mixed Municipal Waste Delivered by the Approved Users during Facility Receiving Hours. If Contractor refuses or is unable to Accept such Mixed Municipal Waste during any portion of the Term Contractor shall be liable to the City for any damages payable and remedies available under Articles 10, 13, and 14. As specified in Article 8, Contractor shall not Accept Mixed Municipal Waste from any Party other than Approved Users without prior written approval of City.

(3) **Acceptance of Source Separated Materials and Recyclable Rich Materials from Other Allowable Users.** Subject to Permit limitations, during Facility Operations, except during periods of an Uncontrollable Circumstance that prevent Contractor from Accepting Permitted Material and actions or inactions of the City that prevent Contractor from Accepting Permitted Material, Contractor may Accept Source Separated Recyclable Materials, Source Separated Yard Waste, and Recyclable Rich Materials Delivered by Other Allowable Users during Facility Receiving Hours. Contractor shall diligently visually inspect loads and periodically shall manually characterize loads to confirm that materials Accepted as Source Separated Recyclable Materials, Source Separated Yard Waste, and Recyclable Rich Materials conform to the definition provided in Article 1 for such materials particularly with regard to verification that the loads meet Residue limitations. City has the right to periodically conduct studies at the Site to confirm loads of Source Separated Recyclable, Source Separated Yard Waste, and Recyclable Rich Materials Accepted by Contractor comply with the definition of such materials and meet the Residue limitations. In the event the Contractor Accepts Source Separated Recyclable Materials, Source Separated Yard Waste, and Recyclable Rich Materials loads that originate from outside the Tri-Cities area and are composed of more Residue by weight than specified in Article 1 definitions, Contractor will be subjected to Liquidated Damages for each Ton Accepted as described in Section 10.07 and Exhibit 10.

(4) **City Responsibility Prior to Limited Operations Date.**

The City is under no obligation prior to **Limited Operations Date** to Deliver any Mixed Municipal Waste, except for during Facility Start Up and Performance Testing Period, as defined in Article 7.13.

(5) **City Responsibility Commencing on Limited Operations Date.**

The City, through its contracts with its Collection Contractor(s) and/or in any other manner consistent with Applicable Law, shall cause all Mixed Municipal Waste generated within the City (including, without



limitation, Mixed Municipal Waste collected by the City if the City should choose to provide collection services in addition to, or in lieu of using a Collection Contractor at some future date) to be Delivered to the Facility commencing no later than June 1, 2005. However, nothing in this Agreement shall be construed to mean that the City makes any guarantee regarding the fitness, quality, constituency, or quantity of Mixed Municipal Waste Delivered to the Facility. Notwithstanding this subsection (5) or any other provision of this Agreement, nothing in this Agreement shall be construed so as to prevent the Contractor from collecting or causing the collection of non-residential Source Separated Recyclable Materials or non-residential Source Separated Yard Waste generated from within the City (except for Source Separated Recyclable Materials or Source Separated Yard Waste that are collected from residential generators by the City or pursuant to a contract between the City and a Collection Contractor) and Contractor has the right to charge the generator a fee for the collection of such materials. Contractor shall negotiate in good faith an agreement with City Collection Contractor containing the terms and conditions under which the City's Collection Contractor shall Deliver Permitted Materials 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, 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. Contractor's obligation to negotiate a User Agreement and the results of any such negotiation shall not be construed so as to modify or release the City from its obligation to cause all Mixed Municipal Waste generated within the City to be delivered to the Facility as provided in this subsection (5).

**(6) City Responsibility Relating to Recyclables and Green Waste.**

On November 26, 2002 the City Council, pursuant to a competitive procurement process, approved the selection of the Contractor. Therefore, commencing on July 1, 2005, the City, through its contracts with its Collection Contractor(s) and/or in any other manner consistent with Applicable Law, shall cause all Source Separated Recyclable 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 Source Separated Recyclable Materials. Commencing on July 1, 2005, the City, through its contracts with its Collection Contractor(s) and/or in any other manner consistent with Applicable Law, shall cause all Source Separated Yard Waste collected within the City to be delivered to the Facility. Upon such delivery, the Contractor shall prepare the material, transfer and transport it to a location designated by the City. The City and the Contractor agree to negotiate in good faith in a timely manner a separate agreement containing the terms of delivery, sale and purchase of Source Separate Recyclable Materials and the transfer and transport of Source Separated Green Waste and all other terms necessary to make effective this Section 8.05.a.(6).

(7) **No Representation.** The City makes no representation, and is under no obligation, regarding the quantity and/or composition of the Permitted Materials Delivered to the Facility by Approved Users or Other Allowable Users or Residue.

**b. Rejection of Unpermitted Material**

(1) **Inspection.** 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 and in accordance with Exhibit 9. Contractor shall promptly modify such procedure to reflect any changes in Permits or Applicable Law.

(2) **Handling Inadvertently Accepted Unpermitted Materials.** If Contractor inadvertently Accepts Delivery of Unpermitted Material which the Household Hazardous Waste Facility is permitted to Accept and handle, Contractor shall deliver such Unpermitted Material to the Household Hazardous Waste Facility for classification, treatment or disposal, or recycling, by Contractor.

(3) **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.

(4) **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 for 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 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. 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 15. 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.

(5) **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.

## **8.06 Materials Recovery and Diversion**

**a. Diversion Guarantee.** Contractor recognizes and acknowledges that the City is required by Applicable Law to Divert at least fifty (50) percent of its municipal solid waste from Disposal by 2000 and the City has a goal to Divert seventy-five (75) percent by 2010. Contractor's Diversion Guarantee is stated in Section 8.03. Contractor further acknowledges that the composition and characteristics of Mixed Municipal Waste will vary over time and assumes the risk of fulfilling its Diversion Guarantee with this understanding. Contractor shall not seek amendment of the Diversion Guarantee, excuse from noncompliance therewith, or adjustment of the Service Fees for failure to meet such Diversion Guarantee due to the composition of Mixed Municipal Waste except as provided in Section 8.03 (b) and Section 11.03 (f).

**b. Recovery and Processing Protocol.** Contractor shall Recover and/or Process Mixed Municipal Waste, Source Separated Recyclable Materials, Source Separated Yard Waste, and Recyclable Rich Materials; and shall use Reasonable Business Efforts to Recover and Process Brown Goods, White Goods, Construction and Demolition Waste, and yard waste Delivered to the Facility using methods and procedures described in Exhibit 6 in a manner sufficient to meet or exceed the Diversion Guarantee.

**c. Measurement of Diversion Guarantee.** Contractor will calculate and measure the Diversion Guarantee on a monthly basis in accordance with Exhibit 12 and shall report thereon in accordance with reporting requirements in Section 8.11. Contractor may take into account the aggregate Tons of Mixed Municipal Waste disposed of at transformation facilities to the extent allowed in accordance with Section 8.07(b).

**d. White Goods.** Contractor shall Accept Delivered White Goods. Contractor shall handle, Recover, Process, and Market such White Goods in accordance with Applicable Law and the Recovery and Processing protocol in Exhibit 6. Contractor may seek reimbursement from the Approved Users and Other Allowable Users Delivering White Goods at a Maximum Self Haul Service Fee specified in the Service Fee schedule included in Exhibit 2.

**e. Brown Goods.** Contractor shall use Reasonable Business Efforts to Recover Brown Goods from City Mixed Municipal Waste, and Process and Market the Recovered Brown Goods.

**f. Other Recyclable Materials.** Contractor shall use Reasonable Business Efforts to Operate the Facility for Recovery and Processing of additional materials such as Bulky Goods and Construction and Demolition Waste as new recycling Markets, processes, and technologies develop.

#### **8.07 Recovered Materials Marketing**

**a. General.** Contractor shall Market Recovered Materials; provided, however, that as long as Contractor is in compliance with its Diversion Guarantee hereunder, it shall only be required to use Reasonable Business Efforts to Market additional Recovered Material.

**b. End Use Certificate.** To the extent practicable, Contractor shall obtain a certification of end use from the purchaser of Recovered Materials establishing that the Recovered Materials have been, in fact, recycled, re-used or otherwise diverted from Disposal. Contractor shall not permit Recovered Materials to be incinerated, pyrolyzed, distilled, gasified, biologically converted other than being composted, or otherwise subjected to transformation as defined in the Act except to the extent permitted by Applicable Law and with City's prior written consent and reasonable approval.

**c. Marketing Records.** Contractor shall maintain complete, accurate, and detailed Marketing records, including Tonnage of material Marketed, purchaser, and end use in accordance with Section 8.11.

Contractor shall supply the City with additional information and documentation within fifteen (15) calendar days of the City's request, describing the information requested with reasonable specificity.

**d. Recovered Materials Revenues.** Contractor shall retain all Recovered Materials Revenues.

**e. Avoided Disposal Costs.** As an incentive to exceed its Diversion Guarantee, Contractor shall solely accrue any benefits of Disposal costs which are avoided through

Contractor's Recovery, Processing, Marketing, and Diversion of Recovered Materials.

#### **8.08 Residue Transfer**

**a. Transfer of Residue.** Contractor shall Transfer all Residue to the Designated Disposal Facility(ies) for Disposal as specified in Article 9 during the receiving hours of the Designated Disposal Facility(ies). The date, time, vehicle identification number, and weight of all vehicles transporting Residue shall be recorded when the vehicle leaves the Site. In the ordinary course, Contractor agrees to move all Residue off the Facility tipping floor at the close of each day's Operations, off-Site within forty-eight (48) hours of receipt thereof, and in accordance with Facility Permits and Applicable Law. Contractor shall Transfer Residue in accordance with the protocol included in the Operations and Maintenance Manual. Contractor shall transport Residue with sufficient regularity and frequency to minimize storage of Mixed Municipal Waste and Residue at the Facility, avoid creation of nuisance, and to minimize the amount of Mixed Municipal Waste and Residue stored in the Facility to create a safe, efficient Operating environment in the Facility.

**b. Transfer Equipment.** Contractor shall be responsible for acquisition, supply, Operation, repair, and replacement of all Rolling Stock, Residue storage and/or transport containers, loading equipment, and other necessary equipment for Transfer.

**c. Initial Modes of Transfer.** The initial mode of Residue Transfer shall be by large volume highway Transfer truck and trailer.

**d. Alternative Modes of Transfer.** During the Term the use of rail haul or another alternative mode of Transfer may be of potential interest to the City or Contractor. Alternative modes of Transfer may be considered a change in Contractor's Obligation and addressed as an Extraordinary Review under provisions of Article 11.

The Parties agree that as of the Effective Date of this Agreement it is not possible to specify the exact means by which an alternative method of Transfer may be developed. The means of development depends on the roles of the City,

Contractor, and the Disposal Facility Contractor. Thus, Contractor agrees:

(1) **Good Faith Participation.** To be a willing and active participant in assisting the City in determining whether an alternative Transfer method is advantageous to the City.

(2) **Alternative Use of Transfer Rolling Stock.** To make a good faith effort to minimize or eliminate costs to the City by reallocating the use of any Transfer Rolling Stock that is no longer needed for Residue Transfer, to Contractor Operations other than those covered under this Agreement.

(3) **Resolution of Disputes.** Any dispute regarding compliance with this Section will be resolved according to the Dispute Resolution provisions of Article 15.

**e. Prohibition of Disposal of Recovered Materials.** Contractor shall not Transfer Recovered Materials, Source Separated Recyclable Materials, Source Separated Yard Waste, or Recyclable Rich Materials, (except for the Residue therefrom) which has been included in the Contractor's calculation to document compliance with its Diversion Guarantee, to the Designated Disposal Facility or any other disposal Facility for the purpose of Disposal, without the prior consent of the City.

**f. Transfer Routes.** Contractor shall select routes from Facility to Designated Disposal Facility which 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.

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

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

**i. Vehicle Parking, Fueling and Maintenance.** Contractor may park, fuel, maintain, and repair vehicles for Transfer of Residue or transportation of Recovered Materials at designated area of the Facility; provided Contractor shall ensure that such vehicles do not interfere with or pose any hazard to the Approved Users and Other Allowable Users Delivering Permitted Materials to the Facility.

**j. Transport Permit.** Contractor shall secure and maintain all Permits required for transporting Residue and Recovered Materials by Applicable Law. Contractor shall supply the City with copies of any such Permits (including prior Permits, current Permits, or renewals thereof) promptly upon request.

**8.09 Household Hazardous Waste Facility.** The City and the contractor agree to negotiate in good faith in a timely manner a separate agreement containing the terms of a Household Hazardous Waste Facility.

**8.10 Drop-off/Buy-Back Recycling Center.** Contractor shall be responsible for development, Operation, and maintenance of a drop-off/buy-back recycling center on Site that Accepts Source Separated Recyclable Materials from Self Haulers for Recycling. Requirements of the drop-off/buy-back recycling center are provided in Exhibit 6. If Market conditions for Recyclable Materials changes over the Term, Contractor may petition City to discontinue Operation of the drop-off/buy-back recycling center. The City reserves the right to impose restriction on the Operations of the drop-off/buy-back recycling center if Operations of the center are creating off-Site environmental, health or safety impacts. Cost impacts, if any, from such service changes would be addressed through the Extraordinary Review process.

### **8.11 Records and Reports**

**a. Record Keeping.** Contractor shall keep daily accurate and complete records of Facility Operations using paper,



electronic, magnetic or other media, and videotape recordings of Facility Operations (including weighing and tipping Operations), in sufficient detail to allow the City to calculate Service Fees, any liquidated damages or other damages levied under this Agreement, and to determine compliance with all provisions of this Agreement. Contractor shall maintain records so as to be available to the City during Office Hours and upon City request, and shall promptly provide the City copies of such records at the City's request. 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.

**b. Reporting Requirements**

(1) **Monthly Reports.** By the fifteenth (15th) day of each month, Contractor shall submit to the City written reports summarizing, at a minimum; (1) inspections, Notices, citations or other correspondence or interactions with regulatory agencies; (2) staffing levels; (3) daily Tonnage of Permitted Materials Accepted, Recyclables Recovered, Residue Transferred, and percent Diverted for each jurisdiction separately listing Collection Contractor(s), Self Haulers, and Other Allowable Users for the month as well as year-to-date cumulative Tonnage totals, and (4) a copy of the complaint log for the previous month as required in Section 8.04(j). Contractor shall provide reports requested herein in a form and of content that is satisfactory to the City. Liquidated damages for the failure to provide such reports will not be imposed by the City unless City has provided notice to the Contractor of such failure and has allowed Contractor fifteen (15) days after such notice to provide such reports.

(2) **Annual Reports.** No later than February 1st of each year, Contractor shall submit an annual report for the previous calendar year that summarizes its Financing Obligation by listing each Financing Obligation and the amount of the obligation; provides documentation of its Financing Obligations; and provides a statement of Contractor's compliance with or failure to comply with the Facility Operating Guarantee. If Contractor has at

any time during the previous year failed to comply with the Facility Operating Guarantee the annual report shall also include the amount of any Liquidated Damage calculated pursuant to Article 10 and Exhibit 10 and previously paid to the City, or owed by Contractor to the City. Furthermore, as part of the annual reporting process, Contractor shall also provide a list identifying the end-uses and end-users of all Recovered Materials. The annual report shall indicate the principal sum of the Performance Bond to be maintained for the following calendar year and include supporting documentation of how the principal sum was determined to meet requirements of Section 12.04.

(3) **Other Reports.** At any time during the Term, but no later than fourteen (14) calendar days after Financing Obligations have increased two hundred fifty thousand dollars (\$250,000) or more, Contractor shall provide City a report that describes the cause for the increase in its Financing Obligations, summarizes its Financing Obligation by listing each Financing Obligation and the amount of the obligation, and provides documentation of its Financing Obligations.

The City reserves the right to request Contractor to supply other reports at any time during the Term. In the event annual third-party costs associated with preparation of such additional reports requested by City exceeds the report preparation cost in Exhibit 1, provided that such amount is adjusted on the same calendar basis as the Mixed Municipal Waste Service Fee to reflect the change in CPI, Contractor may apply for reimbursement under the Extraordinary Review provisions of Section 11.03(c).

(4) **Failure to Provide Reports.** If Contractor fails to provide reports herein, Contractor shall pay Liquidated Damages in accordance with Exhibit 10.

**8.12 Provision of Emergency Services.** Contractor shall provide emergency services at the City's request in the event of major accidents, disruptions, or natural calamities. Contractor shall be capable of providing emergency services within twenty (24) hours of notification by the City or as soon thereafter as is reasonably practical in light of the circumstances. Emergency services which exceed the Contractor's Obligations under this

Agreement shall be compensated through Extraordinary Review in accordance with Article 11.

**8.13 City Rights to Access Facility.** 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 Section 8.11, 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 9. DESIGNATED DISPOSAL FACILITY**

**9.01 Designated Disposal Facility.** As of the Limited Operations Date, the Designated Disposal Facility shall be Altamont Landfill, located in Alameda County, California. Contractor shall Deliver all Residue to the Designated Disposal Facility for Disposal during Disposal Facility Receiving Hours. The City may designate a new Designated Disposal Facility effective upon ninety (90) 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. The Contractor's Service Fees will be adjusted as provided in Article 11 to reflect any increase or decrease in the cost of Transferring Residue to a new Designated Disposal Facility and the disposal fee charged by the Disposal Facility Contractor.

**9.02 Disposal Fee Payment.** 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's sole compensation for Disposal fees shall be through collection of its Service Fees, which shall be adjusted to reflect changes in the Designated Disposal Facility fees as specified in Sections 10.03 and 10.04. 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 and will be required to pay Disposal Facility Contractor in accordance with the terms of the Disposal agreement, if any.

**9.03 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.

**9.04 Disposal Capacity.** City shall be responsible for securing daily and long-term Disposal capacity at the Designated Disposal Facility and ensuring receiving hours as substantially set forth in 9.01(b).

**9.05 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.

**9.06 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.

**9.07 Alternative Disposal Facility.** For the purposes of this Agreement, Tri-Cities Landfill Facility in Fremont and Kirby Canyon landfill in Santa Clara County are designated as the preferred alternative Disposal Facilities and Guadalupe Rubbish Disposal Company's landfill in Santa Clara County is designated as the backup alternative disposal Facility. In the event Disposal Facility Contractor is in default or breach or an Uncontrollable Circumstance prevents use of the Designated Disposal Facility, City shall Notify Contractor to commence use the alternative disposal Facility(ies) and shall adjust Contractor's Service Fees in accordance with Article 11. In the event substitute disposal sites are unavailable, Contractor shall choose an alternative site.

**9.08 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.

## **ARTICLE 10. COMPENSATION**

**10.01 Service Fees.** Service Fees are the per-Ton charges or per-item charges Approved Users and Other Allowable Users pay Contractor for Delivery of Permitted Materials to the Facility.

**a. City-Regulated Service Fees.** Through the conditions set forth in this Section, the City shall regulate and periodically adjust the Mixed Municipal Waste Service Fee charged to the City and its Collection Contractor(s) for Delivery of Mixed Municipal Waste and Maximum Self Haul Service Fees for Permitted Materials Delivered by Small Self Haulers. The City, through its contract(s) with City Collection Contractor(s), shall set and maintain residential, commercial, and other relevant collection rates levied by Collection Contractor(s) at levels and at appropriate times to adequately allow the Collection Contractor(s) to pay Contractor Mixed Municipal Waste Services Fees set by this Agreement. The City's obligation to set and maintain Service Fees described in this Section shall also apply in the event that the City, at some future date, should decide to perform collection services itself

for all or part of the Mixed Municipal Waste generated within the City so as to allow the City to pay the Service Fees set hereunder.

**b. Contractor-Regulated Service Fees.** Contractor shall be solely responsible for setting, periodically adjusting, and regulating Service Fees for Mixed Municipal Waste Delivered by Approved Users other than the City and its Collection Contractor(s) provided that such Service Fees are set in accordance with Article 6 and Section 10.06. Contractor shall be solely responsible for setting, periodically adjusting, and regulating Service Fees for Source Separated Recyclable Materials, Source Separated Yard Waste, Recyclable Rich Materials, White Goods, and Bulky Goods Delivered by Approved Users and Other Allowable Users and for Mixed Municipal Waste Delivered by Self Haulers, provided that all Service Fees include the City Imposed Fees at the request of City, and provided that Service Fees charged for Delivery of Permitted Materials by Small Self Haulers do not exceed Maximum Self Haul Service Fees in Exhibit 2 which are adjusted periodically.

**c. Collection of Service Fees.** The Contractor is responsible for collecting all Service Fees. Service Fees may be collected from Approved Users, Other Allowable Users, and Self Haulers at the time of Delivery of Permitted Materials to the Facility scale house or Contractor may submit monthly invoices to Approved Users and Other Allowable Users requesting payment for Service Fees due on Tonnage of Permitted Materials Delivered to the Facility, as provided in Section 10.08. Contractor shall take responsibility for all delinquent payments and bad debt. Contractor may charge late fees.

Contractor shall invoice City's Collection Contractor(s). A copy of each invoice submitted by Contractor to City's Collection Contractor(s) shall be sent to the City. If the City's Collection Contractor fails to perform its contractual obligations by refusing to pay Contractor for Deliveries of Mixed Municipal Waste within thirty (30) days of Contractor's invoice date, then Contractor shall have the right to refuse further Deliveries from the City's Collection Contractor. However, Contractor may not refuse any Deliveries of Mixed Municipal Waste until Contractor has given written Notice to the City of Collection Contractor's failure to pay and allows the City thirty (30) calendar days to pay or cause to be paid Collection Contractor's

outstanding financial obligations. Nothing in this paragraph shall limit rights of Contractor or City to pursue all legal, financial, and equitable remedies available under Applicable Law.

## **10.02 Contractor Compensation**

**a. Service Fee for Mixed Municipal Waste.** Exhibit 1 provides the Mixed Municipal Waste Service Fee that is the compensation to the Contractor for Acceptance of Mixed Municipal Waste Delivered by the City and its Collection Contractor(s) subject to adjustments in accordance with Section 10.03. In the event Contractor Accepts Mixed Municipal Waste from the City and Union City or Newark, the adjusted Mixed Municipal Waste Service Fee in Exhibit 1 for Fremont shall be applied to such City Tonnage. The Mixed Municipal Waste Service Fee has eight components: the Equipment Component- Transfer, the Fixed Component- Other, the Variable Component- Transfer, the Variable Component- Other, the Variable Component- Workers Compensation Insurance, the Fuel Component, the Disposal Component, and the Pass-Through Component. The eight components are described below.

(1) **Equipment Component-Transfer** is that portion of the Mixed Municipal Waste Service Fee comprised of the Contractor's equipment costs that are related to Transfer of Residue to the Designated Disposal Site. The Fixed Component-Transfer, as specified in the Contractor's Proposal or as subsequently modified during negotiations with the City prior to the Execution Date, is provided in Exhibit 1. The Equipment Component- Transfer shall be adjusted biennially to reflect the change in the CPI.

(2) **Fixed Component-Other** is that portion of the Mixed Municipal Waste Service Fee comprised of the Contractor's fixed costs for the Facility that are not related to Transfer of Residue to the Designated Disposal Site. The Fixed Component-Other, as specified in the Contractor's Proposal or as subsequently modified during negotiations with the City prior to the Execution Date, is provided in Exhibit 1. The Fixed Component- Other is not subject to the periodic adjustment process specified in this Article, and may be adjusted only as the result of an Extraordinary Review as provided in Article 11.

(3) **Variable Component- Transfer** is that portion of the Mixed Municipal Waste Service Fee comprised of the Contractor's variable costs related to Transfer of Residue to the Designated Disposal Site. The Variable Component- Transfer, as specified in the Contractor's Proposal or as subsequently modified during negotiations with the City prior to the Execution Date, is provided in Exhibit 1. The Variable Component shall be adjusted biennially over the Term to reflect the change in the CPI as specified in Section 10.03, but will not otherwise be adjusted except as the result of an Extraordinary Review as provided in Article 11.

(4) **Variable Component- Other** is that portion of the Mixed Municipal Waste Service Fee comprised of the Contractor's variable costs that are not related to Transfer of Residue to the Designated Disposal Site nor the cost of providing Workers Compensation Insurance for Contractor's employees. The Variable Component- Other, as specified in the Contractor's Proposal or as subsequently modified during negotiations with the City prior to the Execution Date, is provided in Exhibit 1. The Variable Component shall be adjusted biennially over the Term to reflect the change in the CPI as specified in Section 10.03, but will not otherwise be adjusted except as the result of an Extraordinary Review as provided in Article 11.

(5) **Variable Component- Workers Compensation Insurance** is that portion of the Mixed Municipal Waste Service Fee comprised of the Contractor's variable costs that are related to the cost of providing Workers Compensation Insurance for Contractor's employees. The Variable Component- Workers Compensation Insurance, as specified in the Contractor's Proposal or as subsequently modified during negotiations with the City prior to the Execution Date, is provided in Exhibit 1. The Variable Component- Workers Compensation Insurance shall be adjusted biennially over the Term to reflect the change in the CPI as specified in Section 10.03. In addition, the workers' compensation insurance portion of this Variable Component is eligible for Extraordinary Rate review only in years seven(7), thirteen (13) and nineteen(19) of the Agreement.



(6) **Fuel Component.** The Fuel Component is that portion of the Mixed Municipal Waste Service Fee comprised of the Contractor's Fuel costs. The Fuel Component is provided in Exhibit 1. The Fuel Component shall be adjusted biennially over the Term to reflect the change in the 12 month average OPIS Diesel Fuel Index as specified in Section 10.03. Annually in the month of January, Contractor shall provide the calculation of the OPIS Index for the previous twelve months, and if the change in the Index is greater than ten (10) percent upward or downward, and that year is not the year for the biennial adjustment, that change shall be subject to the Extraordinary Review process as provided in Article 11.

(7) **Disposal Component.** The Disposal Component is provided in Exhibit 1. The Disposal Component is subject to adjustment only as necessary to reflect changes in the per-ton Disposal fee charged by the Designated Disposal Facility Contractor, which shall typically be adjusted biennially over the Term to reflect the biennial change in the per-ton Disposal fee, as specified in Section 10.03. If adjustments are made to Disposal Component at times other than the biennial adjustment time, the City shall adjust the Mixed Municipal Waste Service Fee as of the date of imposition of the increased per-ton Disposal fee by adjusting the Disposal Component of the Mixed Municipal Waste Service Fee in effect on the date immediately preceding the imposition of the new per-ton Disposal fee pursuant to this Article, unless the City compensates Contractor through an alternative compensation mechanism approved by the Contractor, which approval shall not be unreasonably withheld.

(8) **Pass-Through Component.** The Pass-Through Component is that portion of the Mixed Municipal Waste Service Fee comprised of the Contractor's Pass-Through Costs. The Pass-Through Component, as specified in the Contractor's Proposal or as subsequently modified during negotiations with the City prior to the Execution Date, is provided in Exhibit 1. The Pass-Through Component is subject to adjustment only as necessary to reflect changes in Pass-Through Costs required by third parties as provided in Section 10.03, or as the result of a Change in Law as provided in Article 11. City shall adjust the Pass-Through

Component at a time other than during a biennial adjustment period if the adjustment to the Pass-Through Component would result in a Significant adjustment to the Mixed Municipal Waste Service Fee Pass-Through Component. If adjustments are made to Pass-Through Component at times other than the biennial adjustment time and the amount thereof is Significant, City shall adjust the Mixed Municipal Waste Service Fee as of the date of imposition of the increased Pass-Through Component (by adjusting the Pass-Through Component of the Mixed Municipal Waste Service Fee in effect on the date immediately preceding the imposition of the new Pass-Through Cost pursuant to this Article) unless the City compensates Contractor through an alternative compensation mechanism approved by the Contractor, which approval shall not be unreasonably withheld.

**b. Service Fee for Small Self Haulers.** Contractor acknowledges that in entering into this Agreement the City intends to provide inexpensive and low-cost Disposal option for Small Self Haulers for reasons including discouraging illegal dumping. In accordance with such acknowledgment and understanding, Contractor agrees to charge Small Self Haulers no more than reasonable fees in the amounts described in Exhibit 2, which shall be adjusted in accordance with Section 10.04. Small Self Haulers shall be charged by weight for the Permitted Materials Delivered to the Facility based on an inbound vehicle weight and outbound vehicle weight measured at the scale house with the exception of White Goods, Tires, Bulky Goods, and other similar items that will be charged on a per-item basis. Contractor agrees that the Facility will not accept self hauled Municipal Solid Waste from outside the Tri-Cities without City's written consent and approval, but Contractor agrees to use best efforts to avoid turning away materials so as to avoid illegal dumping and creating risks in the surrounding area.

Exhibit 2 provides the Maximum Self Haul Service Fees Contractor may be compensated for Accepting Permitted Materials Delivered by Small Self Haulers. Contractor may establish Self Haul Service Fees less than or equal to the Maximum Self Haul Service Fees at its own discretion and may establish Service Fees for Permitted Materials which do not appear on the list of Maximum Self Haul Service Fees.

**c. Other Service Fees.** Contractor shall establish and collect Service Fees for Acceptance of Source Separated Recyclable Materials, Source Separated Yard Waste, and Recyclable Rich Materials Delivered by Approved Users.

**d. Only Compensation.** The Mixed Municipal Waste Service Fees collected from the City and City Collection Contractor(s) are the only compensation due the Contractor from the City and City Collection Contractor(s) for service provided under this Agreement unless otherwise provided in this Agreement or agreed to by the Parties.

### **10.03 Adjustment of Mixed Municipal Waste Service Fee**

**a. Initial Rate.** The initial municipal waste service fee reflected in Exhibit 1 will be in effect from January 1, 2004 through December 31, 2005.

**b. Biennial Adjustment.** The intent of this Agreement is to provide for a biennial adjustment to the Mixed Municipal Waste Service Fee every other year during even numbered years. The first biennial increase will be effective January 1, 2006. The biennial increase will reflect changes in the CPI and their affect on the three Variable Components, change in the twelve month average OPIS Index and its effect on the Fuel Cost Component, change in the per-Ton Disposal fee and its affect on the Disposal Component, and changes in Pass-Through Costs that have occurred since the prior adjustment. The biennial change to the Variable Component will be calculated using the most recently published CPI (most recent CPI) and the CPI for the month which is twenty-four (24) months prior to the most recently published CPI (previous 24-month CPI). The biennial change to the Fuel Cost Component shall be calculated using the average of the most recent 12 months OPIS Diesel Fuel Index compared to the same average twelve month index used the prior adjustment period. The then-current Disposal Component shall be calculated as the product of the then-current per-Ton Disposal fee charged by the Disposal Facility Contractor times 0.88. The adjustments shall be rounded to the nearest cent per Ton. The specific biennial adjustments shall be made as follows:

Adjusted Mixed Municipal Waste Service Fee  
=(Fixed Component-Other in Exhibit 1 + (Variable  
Component-Transfer + Variable Component- Other +  
Variable Component- Workers Compensation

Insurance) x (most recent CPI / previous 24-month CPI) + Fuel Cost Component x (most recent 12 months OPIS Index average/OPIS Index average used initially or for the prior adjustment) + Equipment Component -Transfer x (most recent CPI/previous 24 months CPI) + Then-current Disposal Component + Then-current Pass-Through Component provided that the then-current Pass-Through Costs shall be verified in accordance with procedures described in Section 10.03.c.

For example, assume:

1. Date of biennial adjustment is January 1, 2006
2. Fixed Component- Transportation per Exhibit 1 is \$1.63 per Ton
3. Fixed Component- Other per Exhibit 1 is \$13.26 per Ton
4. The Variable Component- Transfer is \$5.56 per Ton
5. The Variable Component- Other is \$6.67 per Ton
6. The Variable Component- Workers Compensation Insurance is \$5.88 per Ton
7. Fuel Component is \$0.63 per Ton
8. Then-current Disposal Component is \$23.05 per Ton
6. Then-current Pass-Through Component = \$4.50 per Ton
7. Most recent CPI (October 2005) = 200.3
8. Previous 24-month CPI (October 2003) = 193.2
9. OPIS Index average January 2003 to December 2003 = \$0.81
10. OPIS Index average January 2005 to December 2005 = \$0.92
11. Most recent CPI (October 2005) = 156.1
12. Previous 24 month CPI (October 2003) = 148.7

The Adjusted Service Fee is calculated as follows:

$$\begin{aligned} \text{Adjusted Service Fee} = & \$1.63 \times \\ & (156.1/148.7) + \$13.26 + (\$5.56 + \$6.67 + \\ & \$5.88) \times (200.3/193.2) + \$0.63 \times \\ & (\$0.92/\$0.81) + \$23.05 + \$4.50 \end{aligned}$$

$$\text{Adjusted Service Fee} = \$62.01$$

**c. Verification of Pass-Through Costs.** The following steps shall be used to determine if an adjustment in the Mixed Municipal Waste Service Fee should include any adjustment in the Pass-Through Component:

(1) No later than thirty (30) calendar days prior to the City's determining a biennial adjustment to the Service Fees, the Contractor shall provide written verification and documentation of the specific costs (listed separately) comprising the then-current Pass-Through Component, and indicate if they have increased, decreased, or remained the same.

(2) Based on the information submitted by the Contractor, and any additional information the City may reasonably request and/or separately collect for its independent verification, the City shall adjust the Pass-Through Component to reflect any verified increases or decreases in Pass-Through Costs, as provided in Section 10.03(a) and 10.03(b).

(3) The biennial adjustment provided for in this Section shall not occur until the City has to its satisfaction verified current Pass-Through Costs, except that the City shall not unreasonably delay an adjustment of the Service Fee.

**d. Limitation.** If during any biennial adjustment period, the CPI change for the biennial period exceeds twelve and thirty-six hundredths (12.36) percent, the City will adjust the Variable Component of the Mixed Municipal Waste Service Fee in excess of twelve and thirty-six hundredths (12.36) percent only to the extent that the Contractor provides documentation demonstrating that the Contractor's actual Direct Costs for the period being adjusted increased in excess of twelve and thirty-six hundredths (12.36) percent. If during any adjustment period other than a biennial adjustment period, the average monthly CPI change during the adjustment period exceeds one half (0.5) percent, the City will adjust the Variable Component of the Mixed Municipal Waste Service Fee in excess of an average of one half (0.5) percent only to the extent that the Contractor provides documentation demonstrating that the Contractor's actual Direct Costs for the adjustment period being adjusted increased in excess of one half (0.5) percent per month. The City may, at its sole discretion, review and approve some, all or none of the Direct Costs submitted by the

Contractor. In making a determination with regard to this subsection, the City may request that the Contractor develop and provide, at its own cost, any reasonably necessary financial, cost or technical data, or other documentation needed in reaching a decision.

**e. Notice of New Mixed Municipal Waste Service Fee.** The City shall give Notice to the Contractor of any change in the Mixed Municipal Waste Service Fee no later than thirty (30) calendar days prior to the effective date of the new Mixed Municipal Waste Service Fee.

#### **10.04 Adjustment of Maximum Self Haul Service Fees**

**a. Adjustments.** The Maximum Self Haul Service Fees will be adjusted on the same calendar schedule as the Mixed Municipal Waste Service Fees. The Maximum Self Haul Service Fees will be adjusted by the percentage change the Mixed Municipal Waste Service Fees were adjusted for the same adjustment period. The adjustments shall be rounded to the nearest cent per Service Fee.

Thus, Adjusted Maximum Self Haul Service Fee = current Maximum Self Haul Service Fee x (Adjusted Mixed Municipal Waste Service Fee/prior Mixed Municipal Waste Service Fee)

For example, assume:

1. Prior Mixed Municipal Waste Service Fee = \$57.76 per Ton
2. Adjusted Mixed Municipal Waste Service Fee = \$62.01 per Ton
3. Current Maximum Self Haul Service Fee = \$3.00 per tire

The Adjusted Maximum Self Haul Service Fee is calculated as follows:

Adjusted Maximum Self Haul Service Fee =  
 $\$3.00 \times (\$62.01/\$57.76)$

Adjusted Maximum Self Haul Service Fee =  
\$3.22 per tire

**b. Notice of New Maximum Self Haul Service Fee.** The City shall give Notice to the Contractor of any change in the

Maximum Self Haul Service Fee no later than thirty (30) calendar days prior to the Effective Date of the new Maximum Self Haul Service Fee. Contractor shall publish Notice to its customers twenty-one (21) calendar days prior to a change in the Self Haul Service Fees.

#### **10.05 INTENTIONALLY LEFT BLANK**

**10.06 City is Most Favored Customer.** Contractor represents and warrants that the City is a most favored customer and, unless otherwise approved by the City, Contractor shall not charge any Approved User for services substantially similar to the City's relating to Mixed Municipal Waste Acceptance, Processing, Recovery, and Transfer, which are less than the City's Mixed Municipal Waste Service Fee regardless of the duration of contract and waste quantities associated with the other Approved Users. Contractor acknowledges and agrees that such representation and warranty is material.

If at any time during the Term, the City's then-current Mixed Municipal Waste Service Fee is adjusted to match a lower per-Ton comparative service fee(s) Contractor charged one or more other Approved Users for Delivery of Mixed Municipal Waste, the City shall reduce the Variable and Fixed Components of the Mixed Municipal Waste Service Fee on a proportionate basis. The Pass-Through Component shall only be adjusted to reflect changes required by third parties and Change in Law as provided in Section 11.03. The Fuel Component shall only be adjusted to reflect changes in the OPIS Index.

Contractor shall by September 1 of each year after the date Mixed Municipal Waste Delivery commences Delivery Date provide the City written verification that the then-current Mixed Municipal Waste Service Fee is the lowest of the comparative service fees that the Contractor is then providing to all other Approved Users using the Facility. If the then-current Mixed Municipal Waste Service Fee is not the lowest of the comparative service fees, it shall be adjusted accordingly as provided in this Section. If an adjustment to the Mixed Municipal Waste Service Fee is made to reflect comparative service fees on a date other than January 1 of a regularly scheduled biennial adjustment, the adjustment to the Variable Component or Fuel Component of the Mixed Municipal Waste Service Fee in the following biennial adjustment period shall reflect the change in CPI that occurred between the date the Mixed Municipal Waste Service Fee was adjusted to reflect the

comparative service fee and the date of the following biennial adjustment. Upon the termination of Deliveries of Mixed Municipal Waste by the Approved User other than the City with a lower per-Ton comparative service fee(s) which resulted in an adjustment pursuant to this section, the Mixed Municipal Waste Service Fee shall revert to that which would have been in effect in the absence of such Deliveries and adjustment.

#### **10.07 Liquidated Damages**

**a. General.** The Liquidated Damage payments for events in which Contractor fails to meet its Facility Operating Guarantee and other Obligations are presented in Exhibit 10.

**b. Initial Amounts.** The Liquidated Damage amounts specified in Exhibit 10 which will be in effect January 1, 2004 through December 31, 2005.

**c. Biennial Adjustment to Liquidated Damages.** The amount of liquidated damages specified in Exhibit 10 for specific events of Contractor nonperformance shall be adjusted on a biennial basis at the same time the Mixed Municipal Waste Service Fee is adjusted. The first biennial increase will be effective January 1, 2006.

Liquidated damage amounts will be adjusted biennially to reflect one hundred (100) percent of the change in CPI using the method presented below:

Adjusted liquidated damage amount = Then-current  
liquidated damage amount x (most recent CPI/previous  
24-month CPI)

For example, assume:

1. Date of biennial adjustment is January 1, 2006
2. Then-current Liquidated Damage Amount = \$50.00
3. Most recent CPI (October 2005) = 200.3
4. Previous 24-month CPI (October 2003) = 193.2

The adjusted liquidated damage amount is calculated as follows:

Adjusted liquidated damage amount = \$50.00 x (200.3/  
193.2)



Adjusted liquidated damage amount = \$51.84

**d. Limitation.** If during any biennial adjustment period, the CPI change for the biennial period exceeds twelve and thirty-six hundredths (12.36) percent, the City will adjust the amounts of liquidated damages a maximum of twelve and thirty-six hundredths (12.36) percent.

**e. Payment of Liquidated Damages.** On or before the fifteenth (15th) day of each month, and beginning with the month immediately following the month in which City Notices Contractor that Liquidated Damages are due, the Contractor shall submit payment to the City via wire transfer for any Liquidated Damages assessed pursuant to the Agreement and Exhibit 10. If Contractor disputes any amount of Liquidated Damages pursuant hereto, it shall nevertheless pay the undisputed amount and the dispute shall be submitted to the Independent Engineer for resolution as described in Section 15.03.

**10.08** Intentionally left blank

**10.09 City Imposed Fees.** City may from time to time during the Term include City Imposed Fees on any Mixed Municipal Waste Service Fees collected from Approved Users, which shall be treated as Pass-Through Costs, to the Service Fees charged at the Facility and Contractor shall remit fees to the City on a monthly basis. As of the Execution Date, the City Imposed Fees shall be as specified in Exhibit 1. In such event, City shall give Notice to the Contractor of any change in the Service Fees no later than fifteen (15) Working Days prior to the Effective Date of the new Service Fees. In the event that the cumulative impact of the City Imposed Fees exceeds fifteen (15) percent of the then-current Mixed Municipal Waste Service Fee, and such imposition is the primary cause for an Approved User Delivering Mixed Municipal Waste generated outside the City to terminate its agreement with the Contractor, then the City shall pay Contractor the Contractor's unavoidable Direct Costs incurred by Contractor from the date of termination of such agreement for deliveries of Mixed Municipal Waste from outside the City until the date of termination of such agreement in the absence of the effect of the City Imposed Fees plus an additional Ten (10) percent as Contractor's profit on such costs for the loss of such agreement as determined by the Independent Engineer in accordance with Section 15.03.

**10.10 INTENTIONALLY LEFT BLANK**

**10.11 Contractor Remittance to City.** Contractor shall remit to the City on or before the last Working Day of each month via wire transfer all monies due to the City for the previous month including City Imposed Fees and liquidated damages. The remittance shall be accompanied by a report itemizing the City Imposed Fees and Delivered Tonnage associated with each fee and the number and nature of liquidated damages. In the event Contractor fails to pay the City in a timely manner, Contractor will be required to pay a late payment for each day the payment is due in the amount of two tenths percent (0.2%) of the amount due.

**10.12 Extension of Base Term.** Parties acknowledge that at the end of the Base Term, it is expected that a significant portion of the Financing Obligations for the Facility will expire and it is the intention of the Parties to adjust the Fixed Component of the Mixed Municipal Waste Service Fee to reflect any reduction in such Financing Obligations. Therefore, in the event the Base Term is Extended, the Fixed Component of the Mixed Municipal Waste Service Fee shall be reduced by a per-Ton amount calculated to reflect the difference between the amount of the Financing Obligations due in the first year of this Agreement and the amount of Financing Obligations due during the first year of each Base Term Extension which are allowed pursuant to this Agreement. The per-Ton amount shall be an amount equal to: a) the scheduled initial annual payment of principal, letter of credit and other fees and costs in respect of the Financing Obligations including, without limitation those of the bond trustee, and any remarketing agent, together with scheduled interest if such interest payments in respect of the Financing Obligations are fixed, or an amount equal to interest on outstanding principal calculated at the then in effect "reference" or "prime" rate published periodically by the Lender if the interest rate on the Financing Obligations is set at a variable rate divided by: b) the number of Tons of Mixed Municipal Waste Accepted at the Facility for the twelve (12) month period ending three (3) months prior to the end of the Base Term; LESS an amount equal to c) the scheduled payment of principal, letter of credit and other fees and costs in respect of the Financing Obligations properly incurred pursuant to this Agreement and due within one year of the day after the end of the Base Term including, without limitation those of the bond trustee, and any remarketing agent, together with scheduled interest if such interest payments in respect of the Financing Obligations are fixed, or an amount equal to interest on outstanding principal calculated at the then in effect "reference" or "prime" rate published periodically by the

Lender if the interest rate on the Financing Obligations is set at a variable rate divided by d) the number of Tons of Mixed Municipal Waste Accepted at the Facility for the twelve (12) month period ending three (3) months prior to the end of the Base Term.

**10.13 Extended Facility Receiving Hours.** In the event City or its Collection Contractor(s) request Contractor to extend Facility Receiving Hours on a temporary basis, Contractor shall be compensated by the City or its Collection Contractor the per-hour fee specified in Exhibit 1 in addition to the compensation it will receive for Permitted Materials Accepted during the extended Facility Receiving Hours. The cost per hour compensation shall be adjusted in the same manner as the Maximum Self Haul Service Fees in Section 10.04.

**10.14 Recovered Materials Revenue.** As provided in Section 8.07(d), Contractor shall retain all Recovered Materials Revenues.

**10.15 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.

**10.16 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.

**10.17 Retroactive Increases.** In the event that adjustments to Contractor's compensation occur after the date Contractor experiences such changes in its costs, Contractor shall be repaid retroactively for past due compensation in a one (1) year period if such increases do not exceed five hundred thousand dollars (\$500,000) and in the event the increase exceeds five hundred thousand dollars (\$500,000), then Parties may agree to the time period for repayment, but in no event shall the period be longer

than three (3) years from the date Contractor experiences such changes in costs, unless the Contractor shall have otherwise agreed.

## **ARTICLE 11. EXTRAORDINARY REVIEW OF COMPENSATION**

**11.01 Limitation.** Other than as provided in Article 10, any adjustments to the Mixed Municipal Waste Service Fee or the Maximum Self Haul Service Fees, under the terms of this Agreement shall be the result of an Extraordinary Review as provided in this Article.

**11.02 Definition.** An Extraordinary Review is the review of a specified change in circumstances with relation to Facility Development or Operations that may result in a change in the Mixed Municipal Waste Service Fee, Maximum Self Haul Service Fees, a change in Contractor's Obligations, or a Change of Scope. An Extraordinary Review may result in an upward or downward adjustment of the Mixed Municipal Waste Service Fee, Maximum Self Haul Service Fees, or Household Hazardous Waste Fee. An Extraordinary Review can be initiated by either Party.

**11.03 Conditions for an Extraordinary Review.** Other than as provided elsewhere in this Agreement, the following are the only conditions under which the Mixed Municipal Waste Service Fee or Maximum Self Haul Service Fees will be modified or an alternative form of increased or decreased compensation as provided in Section 11.05 shall be specified.

**a. Change in Designated Disposal Facility.** Significant increased or decreased Direct Costs of Transfer or Disposal directly incurred by the Contractor due to City change in Designated Disposal Facility.

**b. Change in Approved Users.** Significant increased or decreased Direct Costs due to additions to the list of Approved Users other than the Tri-Cities provided that such increase or decrease in Direct Costs, if any, are disclosed to the City prior to the City's approval of a change in Approved Users.

**c. Change in Contractor's Obligations.** Significant increased or decreased Direct Costs that result from a specific change in Contractor's Obligations as directed by, or approved by the City, including but not limited to

changes in Facility Receiving Hours, in the Diversion Guarantee, Recovered Materials Processing requirements, and provision of emergency services in the event of major accidents, disruptions, or natural calamities.

**d. Change in Law.** A Change in Law such that:

(1) A Significant change in third-party Pass-Through Costs occurs as a result of a Change in Law which results in a Significant prorated increase or decrease in the Pass-Through Component, or

(2) A Significant increase or decrease Operating and/or capital costs occurs as a result of a Change in Law which results in changes to the Variable and/or Fixed Components as justified based on Direct Cost Impacts.

**e. Uncontrollable Circumstances.** An Uncontrollable Circumstance provided that such Uncontrollable Circumstance results in a significant increase or decrease in Contractor's Direct Costs.

**f. Changes to Collection Contractor(s) services.** City makes a change to the collection services provided by the Collection Contractor(s) (or the City if it shall have taken over collection activities in whole or in part from the Collection Contractor(s)) which result in a major impact to the quality or characterization of the City's Mixed Municipal Waste and the ability of Contractor to meet Contractor's Obligations.

**g. Unionization.** In the event Contractor's employees are organized pursuant to a collective bargaining agreement, Contractor may apply for an extraordinary rate review, subject to all of the following:

(1) The combined wage and benefit package of all employees who are members of the Union, increases Contractor's wage and benefit cost beyond the CPI adjustment which is part of this Agreement,

(2) The wage and benefit contract between the Contractor and the Union(s) is considered by the City to be fair and reasonable,

(3) Contractor may only request an extraordinary rate review due to Unionization during the seventh, thirteenth and nineteenth years of this Agreement, and

(4) Any rate adjustment granted by the City for this purpose shall be for future labor cost impacts only, and shall not include any compensation to Contractor for labor cost increases in excess of CPI incurred by Contractor, prior to the City's granting of a rate adjustment under this section.

**h. Workers Compensation Insurance** City or Contractor may only request an Extraordinary Rate Review due to changes in workers compensation insurance costs during the (7) seventh, (13)thirteenth and (19)nineteenth years of this Agreement. However, any increases in workers compensation insurance costs which are due to changes in Contractor's safety and claims record (mod rate) will not be eligible for an Extraordinary Review, and shall not exceed the difference between the actual documented workers compensation insurance costs and the cumulative increase in CPI attributable to the biennial adjustment to the Variable Cost (Other).

**i. Fuel Costs** City or Contractor may only request an Extraordinary Rate review in the years which are not biennial review years to the extent that there is a change in the OPIS Index as specified in Section 10.02 a. (6).

**11.04 Items Ineligible for an Extraordinary Review.** Items that are not eligible for an Extraordinary Review include:

**a. Variations in Permitted Materials.** Variations or fluctuations in the weight, volume or composition of Permitted Materials Delivered to the Facility unless such variation or fluctuation is caused by a change to Collection Contractor(s) services as provided in Section 11.03(f).

**b. Labor Action.** Labor Actions experienced by or directly affecting the Contractor, except as defined in Section 11.03g.

**c. Errors and Omissions.** Errors and omissions on the part of the Contractor in preparing Contractor's Proposal or this Agreement, unless an error or omission deemed by the City to

be insignificant is waived by the City at its sole discretion.

**d. Contractor Error.** Equipment failure or failure to Accept Permitted Materials due to Contractor error(s) in planning, failure to maintain proper Permits; regulatory actions against Contractor that prohibit or curtail Facility Operations; underestimation of Facility Development and Operating costs; other Operating problems; and/or problems related to internal company Operations of the Contractor, its subcontractors, its vendors, or its agents.

**e. Contractor's Costs.** Costs incurred by the Contractor in fulfillment of Contractor's Obligations for fines, judgments, and settlements levied against Contractor by third parties.

**f. Loss(es) Covered by Insurance.** Costs incurred by Contractor which Contractor can recover from any insurers or from another party.

**11.05 Extraordinary Review Process.** A request for an Extraordinary Review shall be conducted as provided in this Section. Contractor is obligated to meet requirements of this Section whether process is City-initiated or Contractor-initiated.

**a. Notice of Extraordinary Review.** The Party initiating an Extraordinary Review shall Notice the other Party, citing the applicable provisions of this Article and providing a complete written summary of the reason for the Extraordinary Review, and its impact on Contractor's Obligations, the Mixed Municipal Waste Service Fee, Maximum Self Haul Service Fee, or the Household Hazardous Waste Fee.

**b. City's Request for Proposal.** If a Notice of Extraordinary Review is issued by the City or Contractor, City may request a proposal from the Contractor in accordance with the Proposal Format specified in Section 11.05(d). As soon as possible, but in any event within twenty (20) Working Days of receiving the City's request for proposal, the Contractor shall submit the proposal. Such proposal shall be deemed the Contractor's offer with regard to changes in Contractor's compensation, Contractor's Obligations, and/or Change in Scope pertaining to the extraordinary circumstances under review, as appropriate, in

accordance with the terms of such proposal, and shall be binding for one hundred and eighty (180) calendar days.

**c. Form of Compensation.** The City may, at its sole discretion, require that the Contractor propose a change in compensation under this Article in the form of an adjustment to the Mixed Municipal Waste Service Fee, Maximum Self Haul Service Fee, or Household Hazardous Waste Fee, including specific changes to the various components of the Mixed Municipal Waste Service Fee. As an alternative the City may require that the Contractor propose compensation in a form of a lump-sum fixed price; a reimbursement of documented Direct Costs; or other form(s) of compensation to be determined.

**d. Proposal Format.** For any proposal submitted under this Section Contractor shall:

(1) Describe the circumstance warranting an Extraordinary Review.

(2) Describe the impact of the circumstance under Extraordinary Review on Contractor's compensation, Contractor's Obligations, or the need for a Change in Scope.

(3) Submit work plan for implementing a change in Contractor's Obligations or a Change of Scope if applicable, identifying physical changes to the Facility and Site, changes in Operating methods and labor needs, and implementation schedule.

(4) Identify the capital and/or operating cost of modifying the Contractor's Obligations and/or implementing any Change in Scope if applicable to support any requested change in Contractor compensation. The Contractor shall include detailed documentation supporting its cost proposal, including cost substantiation required with respect to Direct Costs. Contractor covenants that it will not propose a cost in excess of the fair Market price for such change in Contractor's Obligations or Change of Scope, whether it implements such changes itself or through a subcontractor.

(5) Propose a change in compensation, as necessary, as a change in per-ton Service Fees, or in an alternate



form as directed by the City pursuant to Section 11.05(c).

(6) Provide draft language changes to the provisions of this Agreement, as Contractor deems appropriate and necessary to affect any change in Contractor's compensation, Contractor's Obligations, and/or Change in Scope.

**e. City's Review.** Within ninety (90) Working Days of receiving the Contractor's proposal, the City shall review and comment on, and approve or disapprove such Extraordinary Review request. The City and Contractor may mutually agree to extend the time periods for review due to complexity of the specific Extraordinary Review request, the time needed for review or approval, or for other reasonable reasons.

The City may request the assistance of an independent third party to review the proposal. The first \$17,500 of reasonable costs shall be paid by the Contractor if the Extraordinary Review is initiated by the Contractor or by the City if the Extraordinary Review is initiated by City. Any additional costs above \$17,500 shall be shared equally by City and Contractor. The cost of such review shall be estimated in advance of the work, and provided to the Contractor for comment and agreement to pay. Contractor refusal to pay its share of the reasonable cost of review of a Contractor-initiated proposal shall be grounds for City rejection of such proposal.

The City may request from the Contractor Operating and business records reasonable required to verify the reasonableness and accuracy of the impacts associated with an Extraordinary Review. Contractor shall fully cooperate with the City's request and provide City and its agent(s) copies of or access to Contractor's records.

**f. Approval of Extraordinary Review.** Upon City approval or determination, City will issue a Notice approving the Extraordinary Review and documenting any change to the Mixed Municipal Waste Service Fee, the Maximum Self Haul Service Fee, and the Household Hazardous Waste Fee, an approved change in Contractor's Obligations, or an approved Change in Scope. The Notice, with appropriate language will become an amendment to the Agreement. No adjustment in Contractor compensation, change in Contractor's Obligations, or Change

in Scope shall become effective absent such City approval or determination.

**g. Resolution of Disputes.** Any dispute regarding compliance with this Section or the validity of the grounds for Extraordinary Review or the amount of any change in Fees due the Contractor will be resolved according to provisions of Article 15.

**h. Withdrawal of Notice for Extraordinary Review.** The Party that initiated the Extraordinary Review may withdraw its Notice and its request for Extraordinary Review at any time.

**11.06 Contractor's Implementation of Change in Scope.** Upon approval of a Change in Scope pursuant to Section 11.05(f), the Contractor shall diligently perform such work in accordance with the approved work plan, schedule, and cost proposal. If the City has agreed to pay for such work, the Contractor shall submit invoices for such implementation in accordance with the schedule contained in the proposal and shall provide full documentation of Direct Costs incurred.

**11.07 Change in Service Fees.** Upon City approval or determination of a change in the Mixed Municipal Waste Service Fee, Maximum Self Haul Service Fee, or Household Hazardous Waste Fee pursuant to this Section, such change in compensation shall be implemented as provided in Article 10, including provision for advance Notice to Approved Users.

**11.08 Insurance and Other Third Party Payments.** To the extent that any costs resulting from an Extraordinary Review are incurred by City and/or Contractor pursuant to this Article, and can be recovered by the Contractor or the City from any insurance provider or from another third party, the Contractor and the City shall exercise with due diligence such rights as either Party may have to effect such recovery. Either Party shall give prompt Notice to the other Party of the receipt of any such recovery which shall be applied as appropriate to the restoration or reconstruction of the Facility after the date of this Agreement. Contractor shall provide the City with copies of all documentation, and shall afford the City a reasonable opportunity to participate in all conferences, negotiations and litigation, regarding insurance claims which materially affect the City's interest under this Agreement. All applicable insurance recoveries shall be applied to reducing the cost of restoration or reconstruction.

**11.09 Limitations to Change in Compensation.** Contractor shall be entitled to an Extraordinary Rate Review scheduled only in conjunction with the biennial rate review for any cost increase eligible pursuant to this Article 11, whether or not such cost increase is Significant.

**ARTICLE 12. INSURANCE, INDEMNITY, BONDS, FURTHER ASSURANCES**

**12.01 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 3. 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 3 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.

**12.02 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.

**12.03 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.

**12.04 Performance Bonds.** On and after the Start-Up Date, and throughout the Term, 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 five million (\$5,000,000) dollars. 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.

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.

**12.05 Financial Guaranty Agreement.** Execution by Guarantor of a legally valid, binding and enforceable Financial Guaranty Agreement attached hereto as Exhibit 8, 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 the Agreement and any Extensions.

## **ARTICLE 13. BREACHES AND DEFAULTS**

### **13.01 Breaches**

**a. Definition of Contractor Breaches.** 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:

- (1) **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.

(2) **Failure to Fulfill Contractor Obligations.** Contractor fails to meet any of Contractor's Obligations, excluding the Diversion Guarantee for more than four (4) consecutive days or an aggregate of fifteen (15) days in any twelve (12) month period from the Full Operations Date. The Contractor shall also be in breach if Contractor fails to meet the Diversion Guarantee for a period equal to any twelve (12) month period after the Full Operations Date plus a period of twelve months, but only as described in 8.03 b. 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:

(a) 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.

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

(c) Contractor shall pay compensatory or Liquidated Damages pursuant to Section 13.01(d).

(d) 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.

(3) **Labor, Fiscal or Legal Difficulties.** Contractor is:

(a) 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 Diversion Guarantee, and Vehicle Turnaround Guarantee; or

(b) fails to regularly pay its bills, including payment to the Disposal Facility Contractor(s), as they become due, including non-payment of bills over sixty (60) calendar days; or

(c) 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 Collector fails or refuses to provide such reasonable assurances by the date required by the City such failure or refusal shall constitute a Contractor default.

**(4) 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.

**(5) Bankruptcy, Insolvency, Liquidation**

(a) 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 8, 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.

(b) 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 thirty days of its issuance.

**(6) Failure to Maintain Performance Bond or other Financial Requirement.** The Contractor fails to maintain the Performance Bond as specified in Section 12.04 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.

**(7) 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.

(8) **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.

(9) **Failure to Meet Payment or Reporting Requirements.** The Contractor fails to make any payment required under this Agreement to City, Disposal Facility Site 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 the Agreement.

**b. Definition of 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:

(1) **Material Failure of Representations and Warranties.** Material failure of the City with respect to its representations and warranties described in Section 2.02.

(2) **Failure to Regulate Services Fees.** City fails to set and adjust Services Fees pursuant to this Agreement.

(3) **Failure to Deliver Mixed Municipal Waste.** City's failure to direct the City's Collection Contractor(s) to Deliver to the Facility all Mixed Municipal Waste collected by the Collection Contractor(s) under its contracts with the City or to Deliver all Mixed Municipal Waste as provided in this Agreement.

(4) **Bankruptcy, Insolvency, Liquidation**

(a) **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, notice, 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

**(b) 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 thirty days of its issuance; and

**(c)** 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 for 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.

**c. 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.

**d. 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 13.03 shall apply; or

(2) Immediately, if the breach is a City breach as described in Sections 13.01(b)(2) and 13.01(b)(3) hereof.

(3) 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.

**e. Remedy of Breach, Specified 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 13.01(f) to which it may be entitled, according to proof, and including but not limited to:

(1) **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:

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

(b) 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, transport of Recovered Materials to Market, and procuring and maintaining insurance and bonds, as compared in aggregate to the then-current Mixed Municipal Waste Service Fee.

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

(d) 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.

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

(2) **Liquidated Damages.** Exhibit 10 contains specific circumstances that constitute a breach of contract, with an associated payment to be paid by Contractor to City. The purpose of the payments contained in Exhibit 10 is to provide a clear and expeditious means for remedying the specified breaches occurring during Facility Operations, without incurring the time and cost necessary to determine proof of actual damage. The breaches contained in Exhibit 10 are not intended to be inclusive of all events of breach, but rather are circumstances for which a specific payment has been assessed with the agreement of the Parties. Therefore, the Parties agree that the Liquidated Damages specified in Exhibit 10 constitute a reasonable estimate of the damages incurred in each instance, considering all of the circumstances existing on the Effective Date, including the relationship of the payments to the range of harm that reasonably could be anticipated. In signing this Agreement, each Party specifically

confirms the accuracy of this Section 13.01(d)(2) and of Exhibit 10, and the fact that each Party had ample opportunity to consult with legal counsel and to obtain an explanation of these provisions. In the event City seeks Liquidated Damages for Contractor's failure to meet one or more of Contractor's Obligations, City shall not be entitled to compensatory damages for same Contractor failure.

**f. Remedy of Breach, Other City Remedies.** In addition to the monetary damages specified in Section 13.01(d), City shall be entitled to all available equitable remedies, including specific performance and injunctive relief.

**g. Remedy of Breach, Contractor Remedies.** In addition to compensatory damages, Contractor shall be entitled to all available equitable remedies, including specific performance and injunctive relief.

## **13.02 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 13.01(d).

(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 13.10.

**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.** Unless otherwise specified in Section 13.02(a), the Contractor upon receipt of a Notice of default shall effect 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 13.03 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 13.02(c), the City shall, in addition to its right to collect monetary damages as specified in Section 13.01(e), have the following rights:

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

(2) **Termination.** Terminate the Agreement in accordance with 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 4.

(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 13.02 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 13.01(d).

**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 effect 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 13.02(c), 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 14, 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 4.



(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 13.02 shall survive termination.

### **13.03 Substitute Services**

**a. City Rights.** In addition to exercising any or all remedies specified in Section 13.01, Section 13.02, or Exhibit 10, or, with regard to an event of Contractor breach or default, respectively, or due to an Uncontrollable Circumstance as defined in Section 13.10, 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 require the Contractor 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.

**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 Service 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 Service 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 for the City and City's Collection Contractor(s) 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 its Service Fee 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 Service Fee 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. If, however, the need for substitute services is due to Uncontrollable Circumstances or City default, then Contractor shall be entitled to recover any such excess costs through an Extraordinary Increase in the Service Fee.

**e. Contractor Request to Provide Substitute Service.** Should City decide to provide for substitute services as provided in 13.03(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 13.03(d). Should Contractor later proceed to secure and pay for substitute services as provided in Section 13.03(d), Contractor shall be responsible for reimbursing City for any costs it may have incurred in having earlier arranged for substitute services pursuant to Section 13.03(c).

#### **13.04 City Use of Facility**

**a. City Rights.** In the event of Contractor Default which results in Contractor failure to Operate the Facility and

Transfer and Dispose Residue, City may, upon request, lease the Facility, and the Contractor shall lease to the City the Facility and all of the Contractor's equipment and Rolling Stock required for the Operation for such time as the Contractor can again resume timely and full performance of Contractor's Obligations hereunder, or the Facility is sold or the Agreement is terminated pursuant to Article 14 hereof and a new operator put in place. Contractor agrees to negotiate in good faith to determine lease provisions that, at maximum, compensate the Contractor for its fixed costs of maintaining the Facility in an Operating condition including, without limitation, the pro rata costs of the Financing Obligations. City may designate a third party ("**Replacement Operator**") to operate the Facility during the period of any such lease. The City shall retain all Service Fees received at the Facility during the period of the lease described herein.

**b. Contractor Obligations.** In the event City decides to select a Replacement Operator pursuant to this Section, Contractor shall provide the following to City or Replacement Operator in a timely manner to permit the continued Operation of the Facility:

- (1) A nonexclusive sublicense to any patents, trademarks, copyrights and trade secrets and "shop rights" as necessary for, and limited to, the Operation of the Facility;
- (2) Any proprietary components needed for continuing the Operation of the Facility;
- (3) Initial training of personnel as may be reasonably necessary to enable the assignee to continue with Operation of the Facility;
- (4) Provide non-technical and technical design, construction and Operation information, whether or not proprietary, including technical specifications and as-built plans of the Facility and assign or provide any other license or consent which is necessary for the Operation, maintenance and repair of the Facility;

**13.05 Lender's Rights.** The Lender's rights in the event of Contractor's breach and default are described in Exhibit 4 which is hereby incorporated into this Agreement.

**13.06 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 15.

**13.07 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.

**13.08 Determination of Remedy or 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.

**13.09 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 Service Fees, Disposal fees, 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 employees is guilty, and any admission of guilt by Contractor, or any of Contractor's officers, directors or 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 13.10(a), 13.10(b), or

13.10(c). 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 14 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 13.09, City shall be entitled to pursue any other remedies it may have pursuant to Sections 13.01 and 13.02 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 and take all action necessary and appropriate to remedy and breach of Contractor's Obligations pursuant to Section 13.01. Contractor's failure to cure any breach in accordance with Section 13.01 shall be a Contractor Default under Section 13.02 and City shall have the right to all other remedies specified therein including, without limitation, the right to terminate the Agreement pursuant to Section 14.

**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 13.09(c) shall be resolved in accordance with Dispute Resolution, Article 15.

### **13.10 Uncontrollable Circumstances**

**a. "Uncontrollable Circumstance(s)".** "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:

(1) 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;

(2) A Change in Law other than Changes in Law excluded in Section 13.10(b)(1);

(3) 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; (This section is re-inserted per Andy's memo)

(4) A Force Majeure event that temporarily or permanently interrupts Facility Development or Operations.

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

(1) 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;

(2) The consequences of errors in Facility Development or 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

Section 7.06, or the Operations and Maintenance Manual or failure to comply therewith;

(3) The failure of Contractor to secure patents, technical licenses, trademarks, and the like necessary for Facility Development or Operation;

(4) 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.

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

**c. 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 12, 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 therefor, 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 an Uncontrollable Circumstances affecting the Facility or Contractor.

**d. 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.

**e. 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 subsection (d) above, then the City may terminate this Agreement and the Parties shall thereafter have no further Obligations to the other.

**f. 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 subsection d above. 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:

- (1) 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.

(2) 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. In the event of dispute, the matter shall be submitted to the Independent Engineer in accordance with Section 15.03. However, in the event that the uninsured costs are expected to result in an increase of the Mixed Municipal Waste Service Fee in excess of Ten (10) percent over a Twenty-Four (24) month cost recovery period, then the City shall have the right to terminate the Agreement.

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 subsection (d) above, 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.

**13.11 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 Mixed Municipal Waste, City may postpone or cause its Collection Contractor to postpone any scheduled payment or adjustment pursuant to Article 10 until such breach or default is cured and a determination of such issued as provided in Section 13.08.

## **ARTICLE 14. TERMINATION**

### **14.01 City's Right to Suspend or Terminate**

**a. Suspension.** City shall have the right to suspend this Agreement, in whole in or in part, upon the occurrence of a

Contractor default under Section 13.02 regarding a failure to perform Contractor's Obligations and such occurrence that 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 14.01(b). In the event of Contractor suspension, City shall have the right to use the Facility and designate a Replacement Operator to perform some or all Facility Operations as provided in Section 13.04.

**b. Termination for Reasons Other than Convenience.** 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:

(1) **Contractor Default.** Occurrence of a Contractor default which is not cured within the time frame specified in Section 13.02(c).

(2) **Criminal Activity of Contractor.** Contractor is found guilty of felonious conduct in accordance with Section 13.09.

(3) **City Elects not to Issue Notice to Proceed with Initial Development Activities or Construction.** The City elects not to issue Notice to Proceed with Initial Development Activities or Notice to Proceed with Construction because Contractor failed to meet the conditions precedent for issuance of such Notice(s) in accordance with Sections 7.03 or 7.07.

(4) **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 Sections 13.10(e) and 13.10(f).

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.

**c. Termination for Convenience.** The City may terminate this Agreement for convenience at any time provided that the effective date of termination occurs no earlier than the tenth (10th) anniversary of the Limited Operations Date and prior to the expiration of the Base Term; provided that the City Notices Contractor one (1) year prior to effective date of such termination; and provided that no later than ninety (90) calendar days following the effective termination date of such termination the City makes payments to Contractor as follows:

**(1) Convenience termination payment if City does not purchase Site and Facility.** Payment shall include:

(a) A payment equal to the City's proportional share of any amounts outstanding and owed to Contractor's Lender(s) as of the effective date of such termination for convenience in respect to the Financing Obligations including, without limitation principal and accrued interest on any construction or term loan or bonds, prepayment penalties, and other fees of the Lender(s) where the City's proportional share shall be calculated as the tonnage of Mixed Municipal Waste Delivered by the City and its Collection Contractor(s) to the Facility over the preceding eighteen (18) month period divided by the total tonnage of Permitted Materials Delivered to the Facility over the preceding eighteen (18) month period,

(b) A payment of six million dollars (\$6,000,000) if City exercises this right during the five year period commencing on the tenth (10th) year anniversary of the Limited Operations Date, or of four million five hundred dollars (\$4,500,000) if City exercises this right during the five year period commencing on the fifteenth (15th) year anniversary of the Limited Operations Date.

**(2) Convenience termination payment if City purchases the Site and Facility.** Payment shall include the following amount:

(a) A payment equal to Actual documented costs for Site acquisition and Facility Construction including fixtures and stationary equipment, provided in Exhibit 1, adjusted to reflect changes in CPI provided that the change in CPI shall in no case exceed 12.36 percent for any two consecutive years. The CPI adjustment for the purchase price shall be performed in the same manner as the CPI adjustment for liquidated damages as described in Section 10.07 , and

(b) A payment of nine million dollars (\$9,000,000) if City exercises this right during the five year period commencing on the tenth (10th) year anniversary of the Limited Operations Date, or of seven million two hundred fifty thousand dollars (\$7,250,000) if City exercises this right during the five year period commencing on the fifteenth (15th) year anniversary of the Limited Operations Date.

**(3) Payment if City purchases the Site and Facility and Contractor continues as operator.** In the event that City decides to purchase the Site and Facility, and continues to have Contractor operate the Facility pursuant to the Agreement, the purchase price would be as follows:

(a) City's right to purchase commences in year eleven (11) of this Agreement. The purchase price will be adjusted to reflect changes in CPI, provided that the change in CPI shall in no case be less than three (3) percent or more than five (5) percent, calculated on an annual basis.

(b) The purchase price shall include the following amounts:

A payment equal to actual documented costs for Site acquisition and Facility Construction including fixtures and stationary equipment, provided in Exhibit 1, plus applicable CPI, plus the following:

Year 11 = \$8,000,000

Year 12 = \$7,111,112

Year 13 = \$6,222,224

Year 14 = \$5,333,336  
Year 15 = \$4,444,448  
Year 16 = \$3,555,560  
Year 17 = \$2,666,672  
Year 18 = \$1,777,784  
Year 19 = \$ 888,896  
Year 20 = \$ 0

(c) At the end of year 20 of the Agreement, the City may acquire the Site and Facility for an additional twenty (20) percent reduction, off its then current purchase price, for an extension of the Agreement of 10 years or more.

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

**a. Outstanding Damages.** Contractor shall pay City any compensatory damages or liquidated damages, in accordance with Sections 13.01 and 13.02, 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 Fees.** Contractor shall pay City any City Imposed Fees levied by City and collected by Contractor as part of the Service Fees which are due to the City.

**c. 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.

**d. Records.** Upon City request, Contractor shall promptly provide City with any or all records kept in accordance with Article 8. Contractor's obligation to provide such records shall survive the termination of this Agreement.

**14.03 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 4.

**14.04 Reimbursement Upon Termination Prior to Operation**

**a. Termination Prior to Notice to Proceed with Initial Development Activities.** In the event that the City

terminates this Agreement prior to the issuance of the Notice to Proceed with Initial Development Activities, the City shall not owe Contractor any payment or recompense.

**b. Termination During the Development Period.** In the event of termination following the Notice to Proceed with Initial Development Activities but prior to the Notice to Proceed with Facility Construction, the City shall compensate Contractor for documented Direct Costs excluding Contractor staff time and costs spent from the date of Notice to Proceed with Initial Development Activities to the date of Notice of termination up to but not exceeding four hundred thousand dollars (\$400,000), not including Holding Fee payments otherwise due pursuant to Section 7.15 hereof, plus 1) actual payments for permit fees paid to regulating agencies and 2) reasonable costs directly related to ceasing Development activities as approved in advance and in writing by the City. The City shall within thirty (30) calendar days of receiving Contractor's invoice documenting Development Costs prior to the date of Notice of termination and costs of ceasing Development activities, Notice Contractor of City action regarding the invoice. If City is in agreement with such invoice, the invoice shall be paid within thirty (30) calendar days. Any dispute between the Parties regarding City disagreement with the provided cost documentation and/or the costs provided in the invoice shall be resolved through the Independent Engineer in accordance with Section 15.03.

**c. Termination After Notice to Proceed with Facility Construction.** In the event that a court of competent jurisdiction enjoins or otherwise delays or prevents actual commencement of construction or continuation thereof at any time after the Notice to Proceed with Facility Construction or if the City determines that construction should not be commenced or continued due to concerns about CEQA or other litigation issues, the City shall notify Contractor in writing to either suspend construction or permanently discontinue it. In the case of a suspension, the Contractor shall be entitled to a Holding Fee determined in the same manner as specified in Section 7.15 hereof which is intended to compensate Contractor for its holding costs during the period of suspension of construction activities. In the event construction is terminated in accordance with the provisions of this Section, it shall compensate Contractor for documented Direct Costs excluding Contractor staff time and costs incurred from the date of the Notice to Proceed

with Facility Construction to the date of Notice of Termination described in this subsection, (excluding any costs related to Contractor's purchase of site and buildings) in addition to any Holding Fee payments due under Section 7.15 of this section (if a termination follows a suspension, for example) provided that the Contractor shall use Reasonable Business Efforts to mitigate all such costs by taking measures including, without limitation, canceling equipment orders and selling equipment already delivered. The City shall, within thirty (30) calendar days of receiving Contractor's invoice documenting Development and construction costs prior to the date of notice of termination described in this subsection provide written notice to Contractor of City's determination regarding the invoice. If City is in agreement with such invoice, the invoice shall be paid within one hundred twenty (120) calendar days. Any dispute between the Parties regarding City disagreement with the provided cost documentation and/or the costs provided in the invoice shall be resolved through the Independent Engineer in accordance with Section 15.03.

#### **14.05 City Option to Purchase Site and Facility**

**a. Purchase in the event of Termination for Contractor Default.** In the event of Contractor Default, the City has the right, at its sole discretion, but not the obligation, to acquire Ownership of the Site and Facility from Contractor, Guarantor, or Lender subject to good faith negotiations among Contractor, City and Lender.

**b. Purchase at Expiration of the Term.** At expiration of the Term, City has the right, at its sole discretion, but not the obligation, to acquire Ownership of the Facility and the Site from the Contractor or Guarantor at a purchase price equal to actual documented costs for Site acquisition and Facility Construction including fixtures and stationary equipment, provided in Exhibit 1, adjusted to reflect changes in CPI provided that the change in CPI shall in no case exceed 12.36 percent biennially. The CPI adjustment for the purchase price shall be performed in the same manner as the CPI adjustment for liquidated damages as described in Section 10.07.

**c. Purchase in the event of Assignment.** In the event Contractor proposes to transfer Ownership of Site or Facility to the proposed assignee, the City shall have the right of first refusal at any time during the Term, but not the obligation, to acquire the Site or Facility at the purchase price offered by proposed assignee.

**d. Contractor Vacation of Site and Facility Upon City Purchase.** Upon City acquisition of Site and Facility, Contractor shall:

(1) Vacate the Site and Facility and deliver possession of Site and Facility, and equipment and Rolling Stock financed with Financing Obligations at the City's request to City or to Replacement Operator, as directed by City.

(2) Transfer to the City or at the City's request to the Replacement Operator, the rights to use any and all patents, licenses, trade secrets, or other intellectual property necessary for Facility Operation.

(3) Transfer to the City or at the City's request to the Replacement Operator, any and all maintenance and supply contracts and Recovered Materials sales contracts which are specific to the Facility.

(4) Deliver possession of any proprietary components needed for Facility Operation to the City or at the City's request to the Replacement Operator.

(5) Provide thirty (30) days of training of such personnel designated by the City as may reasonably be necessary to enable the City or Replacement Operator to continue with Facility Operation.

(6) Provide the City or at the City's request to the Replacement Operator, non-technical and technical design, construction and Operation information, whether or not proprietary, including the Operations and Maintenance Manual, technical specifications, and as-built plans of the Facility and assign or provide any other license or consent which is necessary for the Operation, maintenance and repair of the Site and Facility.



**14.06 Lender's Rights in the Event of Termination.** Notwithstanding any provision hereof to the contrary, the City's right to terminate this Agreement otherwise provided for herein shall in all cases be subject to the Rights of the Lender specified in Exhibit 4.

**ARTICLE 15. DISPUTE RESOLUTION**

**15.01 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 be submitted to mediation unless such dispute is of a type specified herein to be resolved by the Independent Engineer as provided in Section 15.03 in which event it shall be immediately submitted to the Independent Engineer.

**15.02 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.

**15.03 Independent Engineer.** Disputes between the Parties relating to Article 10 and Article 11, and Sections 7.13.c. (2), 7.13.g.(2), 7.15 and 13.09.c. (or any other dispute where resolution by the Independent Engineer is specified herein or where both Parties agree to resolution by the Independent Engineer) that cannot be resolved informally shall be resolved by an Independent Engineer if the amount of compensation under dispute is not in excess of one million dollars (\$1,000,000) annually or on a lump sum basis. If amount under dispute exceeds

one million dollars (\$1,000,000) annually or on a lump sum basis, then the Parties shall mutually agree to pursue dispute resolution through processes such as, but not limited to, litigation or mediation.

**a. Qualifications of Independent Engineer.** The Independent Engineer shall have a minimum of five (5) years of experience in the solid waste transfer and recycling industry in California; its management employees (or any other employees who will be directly or indirectly involved in the services to be provided hereunder) shall not have been employed by either the City or the Contractor; and the Independent Engineer shall not have been employed as an outside contractor by either Party for a period of three (3) years prior to appointment as Independent Engineer. As a condition of selection, the Independent Engineer shall irrevocably agree not to Accept employment from either Party for a period of three (3) years from such selection other than as Independent Engineer pursuant hereto.

**b. Selection of Independent Engineer.** Each Party shall identify up to three (3) Acceptable, qualified Independent Engineers to form a list of up to six (6) proposed Independent Engineers. Parties shall conduct a coin toss to identify a winning Party for the purposes of proceeding with the selection process. The winning Party shall be the first Party to eliminate an Independent Engineer from the list of proposed Independent Engineers. Each Party shall take turns eliminating an Independent Engineer from the list until one (1) Independent Engineer remains. The last remaining Independent Engineer shall be the Independent Engineer selected for the dispute resolution.

**c. Independent Engineer's Determination.** The Independent Engineer shall provide a written description of its determination regarding the dispute and such written determination shall be binding and conclusive on the Parties.

**d. Payment.** Payment to the Independent Engineer for its services shall be pursuant to a budget agreed upon by the Independent Engineer and the Parties, depending on the nature of the dispute which is to be resolved. Such payment shall be made by the non-prevailing Party, with the prevailing Party being defined as the Party whose solution or position is not materially different from the decision of the Independent Engineer. In the event that the Independent

Engineer resolves the dispute in a manner that is materially different from the solution or position of both Parties, then the payment of the Independent Engineer's services shall be split evenly between the Parties.

**e. Information and Organization.** Upon selection of the Independent Engineer, the Independent Engineer shall immediately meet with the Parties to identify the information to be provided by each Party and the schedule for submittal of such information, establish a schedule of meetings, and set the date for a preliminary determination by the Independent Engineer. The agreements made between the Parties and Independent Engineer regarding information to be provided and the schedule of events shall be binding upon the Parties. The Independent Engineer shall impose reasonable dates for such activities in the event the Parties do not agree thereon. The Independent Engineer shall also Notify the Parties as to a date for its preliminary and final determination as to the matter submitted. At any time during the Independent Engineer process, including, without limitation, upon receipt of the Independent Engineer's preliminary determination, if any, the Parties may agree upon a resolution in writing and terminate the dispute resolution process.

**f. Standards to be Applied by Independent Engineer.** In reaching a decision and forming its determination, the Independent Engineer shall apply the following standards as appropriate given the nature of the dispute under consideration:

(1) **Circumstances Prevailing.** Circumstances prevailing at the time of the acts or omissions which are the subject of the review, without reference to subsequent events.

(2) **Reasonableness.** Reasonableness of and justification for an expenditure made by the Contractor at the time that it was made and in accordance with the terms of this Agreement at the time that it was made, given the then prevailing circumstances.

(3) **Standard Industry Practices.** Standard Industry Practices were applied when the event which causes the increased cost is not unique to the Facility, its Operation, and Markets; by referencing changes in cost or activities of other companies to the extent that

they provide similar services and are of similar size and capability.

**g. Schedule for the Resolution by the Independent Engineer.**

Unless otherwise determined by the Independent Engineer or required under the terms of this Agreement, the resolution by the Independent Engineer shall be completed within sixty (60) Days of Notice of the end of the informal Dispute Resolution procedure unless such time period is extended upon mutual agreement of the Parties.

**h. Burden of Proof.** Except as specifically provided herein, in any resolution by the Independent Engineer, the burden of proof shall be on the Party requesting the Dispute Resolution and the standard of proof shall be a preponderance of the evidence.

**ARTICLE 16. ASSIGNMENT**

**16.01 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 (50) percent 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 (50) percent 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 16.

**16.02 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.

**16.03 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 4 relating to Lender's Rights. Contractor may assign this Agreement to a Lender pursuant to Exhibit 4 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;

(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.

(8) letter of commitment that the Diversion Guarantee will be adjusted to reflect the historical Diversion level Contractor accomplished for the City's Mixed Municipal Waste. In the event Contractor requests

assignment during the first five (5) years of the Term, the Diversion Guarantee shall be adjusted to equal the average Diversion level accomplished by the Contractor for the period from the Full Operations Date to the month prior to Contractor's request for assignment. In the event Contractor requests assignment after the fifth (5th) year of the Term, the Diversion Guarantee shall be adjusted to equal the average Diversion level for the most recent five (5) year period calculated by excluding the two (2) years in such period with the lowest Diversion level and the highest Diversion level.

**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 17. OTHER PROVISIONS**

**17.01 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, Inc.  
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.

#### **17.02 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 Guttersen 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.

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

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

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

**17.06 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 18. 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 19. ENTIRE AGREEMENT**

This Agreement contains the entire Agreement between the Parties with respect to the transactions contemplated hereby. All Exhibits 1 through 14 are hereby incorporated into this Agreement by reference. This Agreement shall completely and fully supersede all prior understandings and Agreements between the Parties with respect to such transactions. However, nothing in this paragraph


///


shall supercede or diminish the representations and warranties as contained in Article 2.

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


City of Fremont (City)

BLT Enterprises of Fremont, Inc.  
(Contractor)

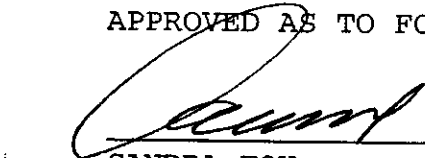
  
\_\_\_\_\_  
City Manager Jan Perkins  
Dated: 4/28/04

  
\_\_\_\_\_  
Vice President Shawn Gutteresen  
Dated: April 20, 2004

ATTEST:

  
for Lynn Macy  
City Clerk, Lynn Macy  
Dated: 4/27/04

APPROVED AS TO FORM:

  
\_\_\_\_\_  
SANDRA FOX  
Assistant City Attorney  
Dated: April 22, 2004

\_\_\_\_\_  
\_\_\_\_\_

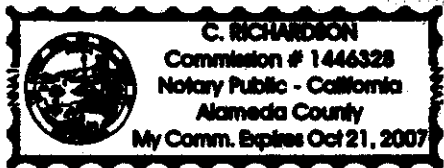
STATE OF CALIFORNIA )  
 ) SS.  
COUNTY OF Alameda )

On April 20, 2004 before me, C. Richardson, a Notary Public in and for said County and State, personally appeared

Shawn Guttersen  
personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal

Signature C. Richardson



STATE OF CALIFORNIA )  
 ) SS.  
COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_, 2004 before me, C. Richardson, a Notary Public in and for said County and State, personally appeared

\_\_\_\_\_ personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal

Signature \_\_\_\_\_

**EXHIBIT 1**

**CITY OF FREMONT  
MIXED MUNICIPAL WASTE SERVICE FEE  
JANUARY 2004 – DECEMBER 31, 2005**

The Mixed Municipal Waste Service Fee and its components are presented in this Exhibit for four service fee scenarios related to the City of Fremont's Mixed Municipal Waste delivered to the Facility. All Mixed Municipal Waste Service Fee information shall be adjusted periodically in accordance with Section 10.03 of the Agreement.

Service Fee Component	City of Fremont's Mixed Municipal Waste Facility Fee			
	Fremont Only	Fremont and Newark	Fremont and Union City	Tri-Cities
Equipment component – transfer	1.63	1.63	1.63	\$1.63
Fixed component –other	13.26	13.11	11.83	11.68
Variable component – transfer	5.56	5.55	5.54	5.51
Variable component –other	6.67	5.04	4.72	4.20
Variable component – worker's compensation insurance	5.88	5.73	5.71	5.69
Fuel Component	.63	.63	.63	.63
Disposal Component*	20.09	20.06	20.06	20.03
Alameda County LEA inspection Fee	.09	.09	.09	.09
ACWMA Facility Operator's Fee	1.50	1.50	1.50	1.50
AC Household Hazardous Waste Fee	2.15	2.15	2.15	2.15
Fuel Tax – transfer	.30	.30	.30	.30
Proposed City Imposed Fee	n/a	n/a	n/a	n/a
Total Pass Through Component	4.04	4.04	4.04	4.04
<b>Total Service Fee/ Ton</b>	<b>\$57.76</b>	<b>\$55.79</b>	<b>\$54.16</b>	<b>\$53.41</b>

\*88% of negotiated disposal rate

Contractor compensation for extended Facility Receiving Hours*	\$ 292.90 per hour
Amount regarded as Significant *	\$ 17,503.30
Report preparation costs considered in Section 8.11.b.3. *	\$ 5,857.92

\*Adjusted by CPI

**EXHIBIT 2**  
**MAXIMUM SELF-HAUL SERVICE FEES**  
**JANUARY 1, 2004 – DECEMBER 31, 2005**

The maximum Self Haul Service Fees are presented in this Exhibit. The service Fee information is presented in January 1, 2004 dollars and shall be adjusted periodically in accordance with Section 10.04 of the Agreement.

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Type of Permitted Material	Unit	Maximum Self Haul Service Fee
Garbage (minimum charge)	Load	\$ 27.65
Garbage	Ton	\$ 62.46
Green Waste/Wood Waste	Ton	\$ 61.22
Soil	Ton	\$ 61.22
Material for alternative daily cover (ADC)	Ton	\$ 61.22
Asphalt	Ton	\$ 61.22
Concrete	Ton	\$ 61.22
Concrete with Rebar	Ton	\$ 61.22
Demolition Debris	Ton	\$ 61.22
Tires (16 in or less)	Item	\$ 5.75
(>16 in. & <21 in)	Item	\$ 11.50
(Tractor/off road)	Item	\$ 19.15
(Bulk load)	Item	\$ 11.50
White Goods	Item	\$ 6.91 plus an additional \$ 20.74 if Freon removal is necessary.
Compacted loads of Mixed Municipal Waste	Ton	\$ 62.46
Tree Stumps and Poles	Ton	\$ 61.22
Certificate of Destruction (documents)	Ton	\$ 61.54
Certificate of Destruction (condemned)	Ton	\$ 61.54

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Certificate of Destruction (condemned)	Ton	\$ 61.54

**EXHIBIT 3**  
**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 certificate 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 4**  
**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 4.

**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 16.03.e 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 13.01 or 13.02 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 simultaneously with the notice required to be given to Contractor pursuant to Section 13.02.d.(2) and, subject to the provisions of Subsections VI.C, VI.D and VI.E of this Exhibit 4, 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 16 of this Agreement. Upon approval by City of the assignment pursuant to Article 16, 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 4, 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 16.

**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, any Replacement Operator (as that term is defined in Section 13.04) 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 hereof. 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 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 \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

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

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

**EXHIBIT 5**  
**PERMITS AND APPROVALS**

Contractor is solely responsible for securing all Permits required for Facility Development and Operations, including, but are not limited to, the following:

<b>Permit or Regulatory Review</b>	<b>Reviewing Agency</b>
<b>Federal</b>	
Consultation on Endangered Species and Grant Authorization of Biological Assessments (if needed)	U.S. Department of Fish and Wildlife
Hazardous Materials Registration	United States Department of Transportation
<b>State and Regional</b>	
Solid Waste Facility Permit including CIWMB/CoSWMP conformance and Report of Station Information	California Integrated Waste Management Board (CIWMB) and Alameda County Environmental Health Department (Local Enforced Agency)
Authority to Construct	Bay Area Air Quality Management District (BAAQMD)
National Pollution Discharge Elimination System (NPDES)	State Water Quality Control Board
Permit to Operate	BAAQMD
Permit by Rule Notification	City of Fremont Certified Unified Program Agency (CUPA)
Title 22 Activities: Generator Status	State Department of Toxic Substance Control (DTSC)
<b>Local</b>	
Conditional Use Permit	City of Fremont
Grading and Erosion Permit	City of Fremont
Sewer Use Permit	City of Fremont
Building Permit	City of Fremont
Uniform Fire Code Compliance	City of Fremont
Storm Drain Encroachment Permit	Local Flood Control District



## **EXHIBIT 6**

### **FACILITY REQUIREMENTS**

The Facility will include the following features:

- A Materials Recovery Facility (MRF) capable of processing materials generated from traditional sources (e.g., residential, commercial, and industrial customers), as well as non-traditional and emerging sectors (e.g., construction and demolition debris, Self Haulers, landscapers).
- A transfer station capable of receiving Mixed Municipal Waste, Processing and Recovering Recyclable Materials and Hazardous Waste, and Transferring Residue.
- A large tipping floor that provides a separate monitored area for City Vehicles and Collection Contractor vehicles.
- A separate monitored tipping area for Self Haul vehicles.
- A separate area to receive and purchase Recyclable Materials and receive Household Hazardous Waste from Self Haulers.
- An optional diversion/composting program for select organic materials.
- Several seventy (70) foot electronic scales and an enclosed scalehouse.
- An office and visitor learning center.

The Facility will provide a myriad of non-Disposal options for a diverse selection of materials (e.g., green wastes, wood waste, construction and demolition debris). These materials, Recovered at the MRF or on the transfer station's tipping floor, can be loaded out and hauled cost-effectively via transfer trucks to compost facilities, construction and demolition reuse facilities, or re-use centers.

Development of the project will be visually compatible with surrounding commercial and industrial land uses and will not create significant aesthetic impacts. Design features include landscaping, screening of outside storage areas, and use of techniques to reduce light and glare impacts such as opaque glass instead of reflective glass, and earth-toned building materials in high visibility areas.

## **Technology**

The Facility will utilize simple and flexible technology that combines mechanical and manual sorting of commingled Recyclable Material, Recyclable Rich Materials, and selected loads of Mixed Municipal Waste generated by commercial sources. The technology for the Facility will be similar to that of Sacramento Recycling and Transfer Station (Sacramento Facility) in the City of Sacramento. This technology will include elevated conveyors manned by sorters, in conjunction with finger screens, magnets, walking floor bunkers, and a baling line. A detailed description of the Facility processing is provided below.

## **Facility Layout**

The Facility will include the following major components:

1. Visitors learning center
2. Administrative offices
3. Transfer/main tipping area/tunnel
4. Material recovery facility
5. Separate Self Haul area
6. Buy-back/Household Hazardous Waste facility
7. Scalehouse and scales.

The Facility will be designed to accept and process a variety of Mixed Municipal waste types from numerous sources. Collection Contractor vehicles, City Vehicles, and Self Hauler vehicles will Deliver Mixed Municipal Waste for Processing, Recovery, and Transfer of Residue to the Designated Disposal Facility. Mixed Municipal Waste generated by residential sources, which will receive the least amount of Processing, will be visually screened for Recyclable Materials before being loaded for Transfer. Loads of Mixed Municipal Waste generated by commercial and industrial sources will be tipped in specified areas, depending on material type. Loads will be sorted to recover valuable material such as paper, glass, plastics, metals, inerts and wood. Residue will be top-loaded

into transfer trucks with the option to compactor load rail-haul containers in the future. Residue will then be transported to the Designated Disposal Facility for Disposal.

### **Main Tipping Area and Waste Transfer**

Collection Contractor vehicles and City Vehicles will enter the Facility and weigh-in on the 70-foot electronic scales. If a vehicle is carrying Mixed Municipal Waste from residential sources or Mixed Municipal Waste from commercial sources with relatively small quantities of Recyclable Materials, the scalehouse operator will direct the driver to unload near the load out ports in the Main Tipping Area. Traffic directors will guide vehicles to the proper unloading area. The tipping floor will be sufficient in size to store material awaiting Transfer. After tipping, vehicles will exit the Facility. Most vehicle tare weights will be recorded in the scalehouse computer system so that repeat customers will not have to weigh-out when exiting the Facility. For safety purposes, Self Haul vehicles will be directed to a tipping area separate from the collection Contractor Vehicles and City Vehicles; and will be required to weigh-out.

After unloading, floor sorters will salvage Recyclable Materials and Bulky Goods and load such materials into roll-off boxes stationed along the edge of the tipping floor. Residue will be pushed by a loader through Transfer ports into Transfer trailers stationed on axle scales in a below-grade Transfer tunnel. An electronic display board suspended above each loading port will inform the loader operators when the trailer has reached its legal load weight of approximately 23 tons. Upon exiting the tunnel, the Transfer truck driver will pause at the exit, place a cover over the load to prevent litter, and exit the Facility.

Mixed Municipal Waste and Residue will be Transferred on a "first-in, first-out" basis whenever possible. Mixed Municipal Waste and Residue will be stored adjacent to the Transfer ports and distant from other site activities. Under normal operating conditions all Residue will be Transferred by the end of each Operating day, usually within twenty four (24) hours of receipt. Unusual circumstances may require Mixed Municipal Waste and Residue to be stored for a longer time;

however, no Mixed Municipal Waste or Residue will be stored at the Facility for more than forty-eight (48) hours, in accordance with State law.

### **Material Recovery Area**

If a Collection Contractor vehicle is carrying Mixed Municipal Waste generated by commercial sources that contains a significant quantity of Recyclable Materials, the scalehouse operator will direct the driver to unload the materials at the material recovery tipping area, located at one end of the Main Tipping Floor. Traffic directors will guide trucks to the proper unloading area. After tipping, trucks will leave the building and exit the Facility. Most truck tare weights (the vehicle weight when empty) will be recorded in the scalehouse computer system so that repeat customers will not have to weigh-out when they exit. All roll-off trucks will be required to weigh-out.

After unloading, floor sorters will Recover Bulky Goods from the floor and load such materials into roll-off boxes stationed along the edge of the tipping floor. The remaining material is then pushed onto conveyors which feed the Processing system and elevated sorting platforms. The material is sorted by type by technicians and dropped through the platform into bunkers below. The Recovered Materials are pushed or conveyed out of the bunkers to a baler conveyor line if appropriate. Recovered Material is baled and stored in the bale storage area.

Containers (PET, HDPE, and aluminum and tin cans) are removed from the sorting platform and placed on a secondary conveyor leading to a sorting line. Containers are separated by type on that sorting line. Glass containers are color-sorted and conveyed to roll-off boxes. Residue from the sorting operations is conveyed to the Main Tipping Floor via a conveyor belt running perpendicular to the end of the sorting belts.

In the future, and if applicable, curbside collection vehicles can enter the Facility and weigh in on one of the 70-foot electronic scales. Trucks enter the building and unload in a separate area adjacent to the MRF. The Processing system for curbside material will be designed according to the type of

collection (i.e. single stream commingled, paper and container streams separate). Alternatively, an existing commercial sorting line may be used.

### **Materials Recovery**

The Facility will initially divert a minimum of twelve (12) percent of the incoming Mixed Municipal Waste. Depending on the type and quantity of the materials in the Mixed Municipal Waste, the Facility may achieve higher diversion rates. The quantities Recovered of each type of material is difficult to project at this time, and will depend on the types of Mixed Municipal Waste and Recyclables Materials Delivered, market conditions, and other variables.

### **Self Haul Area**

Self Haul vehicles loaded with industrial, agricultural, construction and demolition debris, Yard Waste, wood waste or other Mixed Municipal Waste will enter the Facility and weigh-in on one of the 70-foot electronic scales located near the Facility entrance. After weighing-in, the Self Haulers will proceed to the Self Haul Area where the vehicles will enter the building and deposit its material on the tipping floor.

After unloading, Recyclable Materials such as wood, scrap metals, and inerts will be separated using loaders and/or floor sorters. Recovered Materials will be placed in roll-off boxes stationed along the perimeter of the Self Haul Area.

Non-repeat customers, primarily residents, will be encourage to utilize the Facility in the afternoon hours and weekends, when Collection Contractor vehicle and City Vehicle traffic is lowest. These vehicles will be directed to tip in the Self Haul Area during the weekdays and may also be given access to the Main Tipping Floor during the afternoon and on weekends (off-peak hours).

Source Separated Yard Waste and source separated wood waste, if received, will be pushed by loader through a Transfer port into Transfer trucks staged in the Transfer tunnel. The Transfer trucks will haul the material to compost markets or wood-burning power plants.

### **Storage of Recyclables**

Recovered Materials will be stored in several locations inside the facility, primarily near the loading dock. All storage of Recovered Materials will occur under roof. Typically, the following materials will be baled and stored at the Facility: all grades of paper, plastics, scrap metals, and textiles.

A stockpile and materials management plan will be implemented at the Facility to ensure that bale stacking procedures are performed in a safe manner. The plan will include:

1. Bale storage of combustible fibers will be in accordance with the Uniform Fire Code.
2. Piles will be separated from adjacent storage by aisles not less than five (5) feet wide.
3. A clearance of not less than three (3) feet will be maintained between sprinkler heads and the tops of piles.

Recovered Materials will also be stored in roll-off boxes scattered throughout the inside of the Facility. In the Main Tipping Area, roll-off boxes may be stationed along the wall of the Facility to store scrap metals, Bulky Goods, wood, and cardboard Recovered from the tipping floor. The same type of storage will also be found in the Self Haul Area and in the Material Recovery Area. Buy-back center materials may be stored in the buy-back area or in the Bale Storage Area.

## **Buy-Back Center**

The Facility will be equipped with a buy-back center accepting Recyclable Materials from the Self Haulers, including, but not limited to: aluminum cans, glass bottles, plastic containers, newspaper, cardboard, magazines, tin cans, phone books, white and colored ledger, and scrap metals. Access and parking will be separated from other traffic at the Facility for safety reasons.

Recyclable Materials will be weighed on a platform scale and customers will be reimbursed according to a posted schedule of prices. Material purchased at the buy-back center will be temporarily stored in bins at the buy-back center. At the end of each day, the Recyclable Materials will be taken to the Material Recovery Area and baled or otherwise be prepared for market.

## **Household Hazardous Waste Facility**

The Facility includes a Permanent Household Hazardous Waste facility for acceptance of a wide variety of Household Hazardous Wastes including A.B.O.P. (antifreeze, batteries, oil, and paint) materials which will operate as a drop-off location for Self Haulers. The Household Hazardous Waste facility will be located adjacent to the Facility. Access and parking will be separated from other traffic at the Facility for safety reasons. Storage of materials will not exceed ninety (90) days. Additional requirements of the Household Hazardous Waste facility are provided in Exhibit 13.

## **Facility Flexibility and Reliability**

The Facility has been designed to allow for future expansion of the building and equipment to increase recovery levels. In addition, the Facility is designed so that in the future, Transfer operations could accommodate rail-haul capabilities. The facility's expansion may include the compacting of Residue into intermodal shipping containers for rail haul. Once loaded with approximately thirty (30) Tons of Residue, the rail haul containers will be transported by shuttle truck to an intermodal station for double-stacking on a rail car. The number of rail cars and shuttle trucks will vary depending upon the volume of Residue.

In addition, the layout for the Processing and Recovery equipment includes several Processing lines: one for commingled material, one for clean commercial loads, and one for Mixed Municipal Waste from commercial and industrial sources. These lines provide redundancy so the Facility can continue Processing materials and Recovering Recyclables Materials even if one or two lines are inoperable. The fact that the sorting system is simple and relies on manual picking provides the flexibility required to adapt to shifting composition of the Mixed Municipal Waste and fluctuations in market conditions for Recovered Materials.



**EXHIBIT 7  
FACILITY DEVELOPMENT SCHEDULE**

The following table lists the majority of key events that are to occur during Facility Development and the schedule for completing the events. Completion dates may only be extended as provided in Section 7.17. Contractor shall be in breach of the Agreement for failure to meet schedule for major milestone events as specified in Section 13.01(a). The Facility Development events and Schedule are discussed in Article 7.

<b>No.</b>	<b>Milestone Event</b>	<b>Responsible Party</b>	<b>Required Completion Timeline</b>	<b>Elapsed Calendar Days</b>	<b>Completion Date</b>
1	Issuance of Notice to Proceed with Initial Development Activities	City	Per Section 7.03.a.	-0-	4/21/2004
2	Meet conditions required for issuance of Notice to Proceed with Construction	Contractor	No later than one hundred thirty-two (132) calendar days after the date of Notice to Proceed with Initial Development Activities	132	8/31/2004
3	Issue Notice to Proceed with Construction * (Grading/Tunnel Plan no later than August 1, 2004)	City	No later than one hundred thirty-nine (139) calendar days after the date of Notice to Proceed with Initial Development Activities and in no event later than seven days after early completion of conditions by Contractor.	139	9/7/2004
4	Provide Contractor with Comments On Start-Up Performance Test Requirements	City	No later than two hundred thirty-six (236) calendar days after the Notice to Proceed with Construction.	375	5/1/2005
5	Construction Completion Date (Temporary Certificate of Occupancy issued)	Contractor	No later than two hundred sixty-six (266) calendar days after the date of Notice to proceed with Construction	405	5/31/2005
6	Obtain all Permits required for initial Facility operations	Contractor	No later than two hundred sixty-six (266) calendar days after the date of Notice to Proceed with Construction	405	5/31/2005

\*Requires phased building permits from City

**EXHIBIT 7  
FACILITY DEVELOPMENT SCHEDULE**

7	Finalize Start-Up and Performance Test Requirements	Contractor	No later than thirty (30) calendar days after City provides Contractor with comments on Start-Up and Performance Test Requirements	405	5/31/2005
8	Submit Contractor Certification of Preparedness	Contractor	Prior to Facility Start-Up Date	406	6/01/2005
9	Commence Start-Up Period	Contractor	On or before two hundred sixty-seven (267) calendar days after the date of Notice to Proceed with Construction	406	6/01/2005
10	Notice City of expected commencement date of Performance Testing for Limited Operations	Contractor	No later than one hundred four (104) calendar days after Commencement of Start-Up Period	510	9/12/2005
11	Commencement Performance Testing for Limited Operations	Contractor	No later than one hundred seven (107) calendar days after Commencement of Start-Up period	513	9/15/2005
12	Complete Performance Testing for Limited Operations	Contractor	No later than five (5) calendar days after commencement of Performance Testing	518	9/20/2005
13	Submit Performance Test report for Limited Operations	Contractor	No later than seven (7) calendar days after completion of Performance Testing	525	9/27/2005
14	Complete review of Performance Test report	City	No later than seven (7) calendar days after receipt of Contractor's written Report of Performance Testing and Conclusions	532	10/04/2005

\*Requires phased building permits from City

**EXHIBIT 7  
FACILITY DEVELOPMENT SCHEDULE**

15	Issues Notice to Proceed with Limited Operations	City	No later than fourteen (14) calendar days after receipt of Contractor's written Report of Performance Testing and Conclusions	539	10/11/2005
16	Commence Limited Operations	Contractor	No later than one hundred thirty-three (133) calendar days of date of Commencement of Start-Up Period	539	10/04/2005
17	Commence Full Operations	Contractor	No later than three hundred sixty-five (365) calendar days after date of Commencement of Limited Operations	904	10/04/2006

\*Requires phased building permits from City

**EXHIBIT 8**  
**FINANCIAL GUARANTY AGREEMENT**

This Guaranty, made as of the date of the Agreement (as defined below) by BLT Enterprises, 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, Inc., a California corporation (the “**Contractor**”), an affiliate of the Guarantor, and the City have negotiated a Service Agreement for Development and Operation of a Recyclables Diversion and Transfer Station, 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 A “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 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;

- (x) to sell, exchange or otherwise transfer to a third party all or substantially all of Guarantor's assets.
- (y) 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 therefore 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 judgments 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 of 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 appraisalment, 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 obligation 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 judgment, 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:

Bernard Huberman, President  
Dan Rosenthal, Secretary  
BLT Enterprises  
501 Spectrum Circle  
Oxnard, CA 93030  
(805) 278-8220  
(805) 278-8221 (fax)

(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.

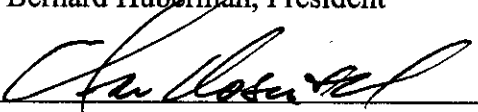
(23) **Personal Liability.** It is understood and agreed to by the City that nothing contained herein shall create any obligation or right to look to any director, officer, employee or stockholder of the Guarantor (or any affiliate thereof) for the satisfaction of any obligations hereunder, and no judgment,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

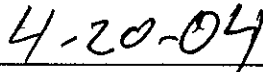
IN WITNESS WHEREOF, Guarantor has executed this instrument the day and year first above written.

**BLT Enterprises, a California corporation**

By: \_\_\_\_\_

  
Bernard Huberman, President

  
Dan Rosenthal, Secretary



\_\_\_\_\_  
Date of Signature

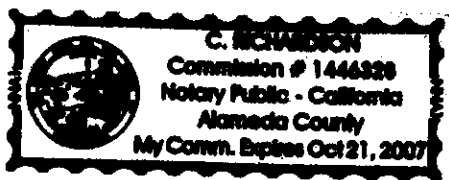
STATE OF CALIFORNIA )  
 ) SS.  
COUNTY OF Alameda )

On April 20, 2004 before me, C. Richardson, a Notary Public in and for said County and State, personally appeared

BERNARD HUBERMAN  
~~personally known to me~~ (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal

Signature C. Richardson



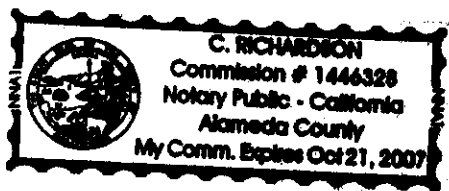
STATE OF CALIFORNIA )  
 ) SS.  
COUNTY OF Alameda )

On April 20, 2004 before me, C. Richardson, a Notary Public in and for said County and State, personally appeared

DAN ROSENTHAL  
personally known to me ( or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal

Signature C. Richardson



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## EXHIBIT 9

### 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) 494-4279.
      - ii. The City of Fremont Certified Unified Program Agency (CUPA) at (510) 494-4279.
      - iii. The City of Fremont Environmental Services Department at (510) 494-4740.
  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) 494-4740.
- 3. For non-emergencies:
  - a. If waste can be easily moved to storage area, temporarily set aside identifiable materials according to the following categories:
    - A flammable and combustible
    - A oxidizers
    - A poisons
    - A poisons containing heavy metals
    - A corrosives (acids)
    - A 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) 494-4740.
- 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) 494-4740.

## 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: ACID 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:
  - A training required before worker is allowed to wear respirators,
  - A site manager is responsible for insuring all site workers are respirator

- certified, and
- A certificates must be kept up to date/renewed annually, and copies must be kept available for inspection.
- B. Eye Protection:
  - A safety glasses or goggles must be worn when handling hazardous wastes, and
  - A packers must wear full face shield.
- C. Body Protection:
  - A disposable coveralls or Tyvec sleeve, Nitril gloves, neoprene aprons, and steel toed boots.
- D. Dust Masks:
  - A 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, a 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. Violator's 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.





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**EXHIBIT 10**  
**LIQUIDATED DAMAGES**

The following liquidated damages shall be levied for Contractor's failure to meet specific Contractor's Obligations due to Contractor's fault during Facility Operations. The amounts for liquidated damages will be adjusted biennially to reflect changes in CPI in the manner described in Article 10.

The Parties acknowledge that consistent, efficient Facility Operation is of utmost importance to the Collection Contractor(s) and the City; that failure to Operate the Facility in accordance with Obligations in the Agreement and failure to allow for Vehicles to efficiently unload at the Facility increase the City's and/or its Collection Contractor(s)' costs; and the City has considered and relied on Contractor's representations as to its quality of service commitment in entering into this Agreement. The Parties further recognize that quantified standards of performance are necessary and appropriate to ensure consistent and reliable service. The Parties further recognize that if the Contractor fails to fulfill Contractor's Obligations, the City and its residents and businesses will suffer damages and that it is and will be impracticable and extremely difficult to ascertain and determine the exact amount of such damages. Therefore, the Parties agree that the following liquidated damages represent a reasonable estimate of the amount of such damages, considering all of the circumstances existing on the date hereto, including the relationship of the sums to the range of harm to the City, Collection Contractor(s), or Disposal Facility Contractor, that reasonably could be anticipated and anticipation that proof of actual damages would be costly or inconvenient. The Contractor agrees to pay (as liquidated damages and not as a penalty) the amounts listed in the table below for failure to perform the specified events of failure listed in the table due to the Contractor's fault.

In signing this Agreement, the Contractor specifically confirms the accuracy of the statements made in this Exhibit with respect to liquidated damages for all events of failure listed below and the fact that it had ample opportunity to consult with legal counsel and obtain an explanation of such liquidated damage provisions at the time that this Agreement was made.

Event	Liquidated Damage
Failure to request approval from City to use of Subcontractor in accordance with Section 3.11 of Contractor's Obligations as defined in Section 3.11 without consent of City	\$1,000 per incident
Failure to make records available upon request	\$500 per request
Failure to submit reports	\$50 per report per day
Failure to Operate during Facility Receiving Hours	\$250 per hour
Failure to meet Vehicle Turnaround Guaranty <ul style="list-style-type: none"> <li>a. If delay less than 0.5 hours</li> <li>b. If delay less than 1 hour</li> <li>c. If delay more equal to or more than 1 hour</li> </ul>	\$32.50 per event \$65 per event \$65 per event
After initial waste characterization, acceptance of Source Separated Recyclable Materials, Source Separated Yard Waste, or Recyclable Rich Materials that contain higher quantities of Residue by weight than allowed by the definition in Article 1 for such material	\$50 per ton of excess residue
Charging greater than Maximum Self Haul Service Fees for Small Self Haul Customers	\$50 per incident per customer
Failure to remedy litter problem following a complaint within time frame included in Article 8	\$250 per incident
Receipt of complaint(s) in a given month in excess of 50 total complaints from unrelated complaints for the given month	\$50 for every complaint received above 50 complaints
Failure to maintain complaint log	\$150 per event

**EXHIBIT 11**  
**OPERATING THROUGHPUT GUARANTEE ADJUSTMENT**

Contract Year	Mixed Municipal Waste Daily Throughput Guarantee (Tons)	
	Weekdays (Mondays through Fridays)	Saturdays
2005	1,875	375
2006	1,910	380
2007	1,950	390
2008	1,990	400
2009	2,030	410
2010	2,070	420
2011	2,110	430
2012	2,150	440
2013	2,190	450
2014	2,190	450
2015	2,190	450
2016	2,190	450
2017	2,190	450
2018	2,190	450
2019	2,190	450
2020	2,190	450
2021	2,190	450
2022	2,190	450
2023	2,190	450
2024	2,190	450
2025	2,190	450
2026	2,190	450

Notes: (1) Throughput levels are designed to accommodate peak days; average daily Tonnage deliveries are anticipated to be less than listed above.  
(2) If Base Term is extended, City shall have the right to reexamine and redefine Operating Throughput Guaranty for periods beyond the twentieth (20th) anniversary of the Limited Operations Date.

**EXHIBIT 12**

**ALLOCATION METHODOLOGY FOR THE FREMONT RECYCLING  
AND TRANSFER STATION**

After a waste characterization has been performed on the specific waste stream (e.g., Fremont Construction and Demolition waste, etc.), the results (i.e., the specific amount of residue and the amount of diversion of the specific waste stream) are applied to that specific waste stream's total inbound tonnage.

**EXAMPLE**

*(Totals for May 2005)*

<b>Waste Stream</b>	<b>Monthly Inbound Tons<sup>1</sup></b>	<b>Diversion<sup>2</sup> (%)</b>	<b>Diversion<sup>3</sup> (Tons)</b>	<b>Residue<sup>2</sup> (%)</b>	<b>Residue<sup>3</sup> (Tons)</b>
Fremont Construction and Demolition Waste	1,500	30%	450	70%	1,050
Fremont Household Hazardous Waste	50	100%	50	0%	0
Fremont Recyclable Rich Materials	1,000	75%	750	25%	250
Fremont non-residential Source Separated Recyclable Materials	1,500	92%	1,380	8%	120
Fremont non-residential Source Separated Yard Waste	200	95%	190	5%	10
Fremont Mixed Municipal Waste	19,950	14% <sup>4</sup>	2,820	86%	17,130
Fremont Permitted Materials	24,600	39%	7,110	74%	17,490
Non-Fremont Permitted Materials	1,500	80%	1,200	20%	300
Total Facility	26,100	32%	8,310	68%	17,790

## Notes:

- 1 These monthly inbound tonnage numbers are for discussion purposes only and are not intended to reflect actual conditions.
- 2 These specific percentages are for discussion purposes only and not intended to reflect actual conditions. Under the proposed methodology, these percentages (diversion and residue) are determined by performing a waste characterization of the specific waste stream (e.g., Fremont Construction and Demolition waste, Fremont Household Hazardous Waste, etc.) as outlined in the Waste Characterization Methodology for the City of Fremont.
- 3 These specific tons are for discussion purposes only and not intended to reflect actual conditions. Under the proposed methodology, these tons (diversion and residue) are determined by taking the monthly inbound tons of the specific waste stream multiplied by the diversion percentage to get diverted tons or by the residue percentage to get the residue tons.
- 4 These specific percentages are for discussion purposes only and not intended to reflect actual conditions. Under the proposed methodology, these percentages are determined by adding the various waste stream's diverted/residue tons and dividing that number by the Mixed Municipal Waste/Permitted Materials tons of the jurisdiction (i.e., City of Fremont)

Under this example, the Fremont Recycling and Transfer Station (Fremont Facility) received a total of 1,500 tons of material in May 2005 from the City of Fremont's Construction and Demolition Waste. Based on a waste characterization (using the Waste Characterization Methodology outlined) it was determined the Fremont Facility was diverting 30 percent of the materials from this specific waste stream (conversely, 70 percent is being disposed at a landfill as residue). Therefore, the City of Fremont would be credited with 450 tons of diversion from this specific waste stream. This task would be repeated for each of the specific waste streams. These volumes would be added to determine the total amount of volume diverted by the Fremont Facility from the City of Fremont's Mixed Municipal Waste. Under this example, the Fremont Facility would divert 14 percent of the City's Mixed Municipal Waste during May 2005. This would also be performed for Non-Fremont Permitted Materials and allocated to the appropriate jurisdiction (e.g., Newark and/or Union City). Under this example the Fremont Facility would divert 32 percent of the entire inbound tonnage during May 2005.

