

**7.5 On-Site Sampling.** Contractor shall make available to the City or to the authorized agent of the City all resources, including but not limited to access to stored Processing Residue in all forms, space within Contractor's facilities, weight documents, and nominal assistance from Contractor, necessary for the City or its authorized agent to conduct, at the City's expense, periodic sampling and sorting of Processing Residue that is the by-product of the Processing of all materials from all suppliers, programs and jurisdictions, and from all of Contractor's Oakland facilities, for the purpose of characterizing Processing Residue.

The City and Contractor agree to cooperatively develop the sampling methodology, evaluate data collected from the sampling of Processing Residue, and to make mutually agreed upon changes to the Program as deemed appropriate.

#### **ARTICLE 8.00 -- FLOW CONTROL OF PROCESSED MATERIAL**

The City shall retain the right to redirect processed material to specific markets or end-users located within the City or the boundaries of Oakland/Berkeley's Recycling Market Development Zone (RMDZ). Contractor shall redirect materials subject to all the following conditions:

- a. The City shall give at least ninety (90) days prior written notice of any material redirection;
- b. The redirected material may represent up to one hundred percent (100%), by processed weight, of each commodity collected;
- c. The material redirection shall continue until Agreement termination or until the City gives at least thirty (30) days prior written notice of discontinuation;
- d. Contractor shall not enter into any agreements for the supply of materials collected in the Program that would preclude the City's ability to redirect said material unless otherwise authorized by the Director.

Sale pricing, terms, product quality and specifications are to be mutually agreed upon by Contractor and buyer of redirected materials prior to sale, and be consistent with market and industry standards. Any sales or quality claims shall be handled in a manner consistent with market and industry standards.

## **ARTICLE 9.00 – CONTRACTOR’S PUBLIC EDUCATION REQUIREMENTS**

For the purposes of this article, “Public Education” shall mean any information (whether written or otherwise) directed by Contractor to recipients or potential recipients of Residential Recycling Services regarding the programs and services provided under this Agreement and shall be subject to the prior review and approval of the City. The City shall be financially responsible for the preparation and the content of Public Education materials used city-wide to promote Single Family Dwelling, Multi-Family Dwelling, Small Business, City Facilities recycling and single stream recycling. Contractor shall provide input on the preparation of Public Education materials specific to its Service Area and its implementation plan. The number and type of materials prepared by the City for distribution by Contractor, and the expenditures to produce such materials, shall be within the sole discretion of the City.

Contractor’s public awareness campaign shall encourage the maximum level of citizen recycling, Program participation, and waste reduction. Public awareness campaign activities must emphasize all materials to be collected and directions for preparation of materials. At a minimum, the following Public Education activities are required of Contractor:

**9.1 Public Education Budget.** Contractor shall be required to allocate or spend \$30,000 per calendar year on Program-related Public Education activities that have received prior written approval from the City. The City and Contractor may mutually agree to perform joint Public Education activities using all or some of the annual Public Education budget. Any unspent funds at the end of the calendar year shall be deducted from Contractor’s monthly payment pursuant to Article 12.00. Upon request by Contractor, the City may, at its option, authorize Contractor to carryforward up to \$15,000 of unspent funds to the following calendar year.

### **9.2 Public Education Activity Requirements.**

- a. By September 1st of each year, commencing 2005, Contractor must supply a Public Education plan for the following year. The City shall review and respond to the proposal within 45 days. Implementation of the plan would begin on January 1st of each year.
- b. Contractor shall not perform any work on Public Education without prior written approval from the City. All materials shall be submitted in writing for review and approval. Written authorization by the City is required prior to final production of any Public Education materials.
- c. All Public Education materials must be printed on 100% recycled paper with at least 50% post consumer recycled content with soy based (or other non-toxic) inks.

- d. All Public Education materials must include the City's Oakland Recycles logo and the City's recycling hotline phone number.
- e. All trucks must include the City's Oakland Recycles logo and Contractor's customer service phone number.
- f. All Public Education materials must include four languages whenever possible and/or needed (the City will make determination) and materials must be made accessible to those with disabilities, in accordance with all applicable federal, state, and local laws and regulations, at Contractor's sole cost and expense.
- g. All new collection vehicles shall include space for outdoor poster advertising to be utilized by the City.
- h. The City shall oversee all press activities including press releases, press conferences, press kits, press packets and general press inquiries regarding the Program.
- i. Public relations activities cannot be applied to the Public Education budget.
- j. All public relations, press and public outreach activities that involve the Program must have prior approval from the City whether or not they are being paid for from the Public Education budget.
- k. Contractor shall execute appropriate documents to assign to the City the copyright to works created pursuant to this Agreement if so requested by the City.

***Examples of Public Education activities that may be funded from the Public Education budget:***

- ☐ *Materials developed to respond and correct any sector or neighborhood specific Public Education problems (i.e. collection day confusion);*
- ☐ *Container flyer distribution for all Single Family Dwellings up to twice per year with the distribution to last for two consecutive weeks;*
- ☐ *Posting of up to one poster per year at each Multi-Family recycling container location;*
- ☐ *Multi-Family instructional information distributed to property owners/managers to be included with Multi-Family Dwelling rental agreements; and*

- ☐ *Contribution to schools or other non-profit recycling Public Education projects.*

***Activities that shall not qualify as Public Education expenditures:***

- ☐ *All activities associated with operational needs such as but not limited to, uniforms, uniform maintenance, database management, recycling container delivery, customer support;*
- ☐ *All activities which are solely self promotion such as signage promoting only Contractor's name; and*
- ☐ *Tags for incorrect setouts.*

**9.3 Multi-Family Dwelling Outreach Program.** The outreach program shall be sufficient to maximize participation by buildings residents. At a minimum, the following is required of Contractor:

- a. Written notification of the availability of the service mailed to the building owner/s and managers of all non-participating dwellings annually and at least one follow-up phone or person-to-person contact. Contractor shall complete initial notification by April 1, 2005.
- b. Annually, Contractor shall be responsible for the distribution of the City provided public outreach Program materials at the central collection location with information relating to, but not limited to, minimization of material Contaminants, minimization of scavenging, and other information to maximize material diversion.

**ARTICLE 10.00 -- PUBLIC ACCESS TO CONTRACTOR**

**10.1 Office Facilities.** Contractor shall establish and maintain a principal office in Oakland. Regular office hours shall be, at a minimum, from 8:00 a.m. to 5:00 p.m. Monday through Friday, except holidays. If Contractor is required to provide regular collection service on Saturday because of a holiday during the week, Contractor shall maintain regular weekday office hours. During the implementation period of this Agreement, Contractor shall keep the office open until 6:00 p.m. Contractor may provide Saturday or extended office hours beyond 6:00 p.m. at its option. A representative of Contractor shall be available during the stated office hours for communication with the City's Director and other City officials.

**10.2 Telephone Access.** Contractor shall provide and maintain a customer service/complaint telephone system of sufficient capacity with multi-lingual capability. Contractor shall ensure sufficient staffing of a customer service/complaint telephone system during the regular office hours set forth in Section 10.1. Contractor shall maintain a record of all customer service inquiries/complaints as described in Section 11.1.

Contractor shall make available an answering machine or answering service for customer service/complaint calls outside of normal office hours. All such calls shall be responded to and logged on the following workday.

**10.3 Saturday Service.** All collection related problems, including but not limited to complaints, spills, or failure to replace empty containers, reported to Contractor before the close of business on Friday, shall be responded to and resolved by Contractor by 5:00 p.m. on Saturday. All Friday missed collections reported to Contractor by 9:00 a.m. on Saturday shall be picked up, or resolved to the customer's satisfaction by 5:00 p.m. on Saturday. Contractor may resolve all non-collection related calls received after close of business on Friday, and all collection related call received after 9:00 a.m. on Saturday on the next business day.

### **ARTICLE 11.00 -- REPORTING REQUIREMENTS**

Contractor shall maintain in its Oakland office full and complete records and submit reports requested by the City to comply with the reporting requirements of this Agreement. The reports shall be submitted in an electronic format prescribed by the Director, similar to the sample set forth in Attachment H. Contractor shall also provide the City a hard copy of all electronically delivered reports. The Director may revise the formatting of the reports, and the information requested, upon thirty (30) days notice to Contractor.

All data related to the weight of all materials collected through the Program and provided to the City by Contractor per this Article shall be auditable down to the State certified weight document. All weighing instruments, as defined by Business and Professional Code of California, Chapter 5 Section 12500 (a): "Weighing instrument" means any devise, contrivance, apparatus, or instrument used, or designed to be used, for ascertaining weight and includes any tool, appliance, or accessory used or connected therein," used by Contractor associated with the various weighing systems and processes shall comply with the Business and Professional Code of California, Chapter 5, and with the California Code of Regulations Title 4, Division 9. In addition to maintaining State Certification of all devices and associated processes, including but not limited to truck scales, scale heads, computers and software, weight tickets, weigh master certification, and predetermined individual vehicle tare weights, Contractor shall be required to perform or have performed routine scheduled maintenance to truck scales by a State approved service provider to ensure compliance with Title 4 Division 9 between periodic inspections by the regulating agency, and to make documentation of said performance of maintenance services available to the City upon request. The City shall perform all monitoring and statistical evaluation of the Program with the cooperation of Contractor. The City may, at any time, undertake inspections of Contractor's Oakland facilities.

**11.1 Monthly Program Status Report.** Contractor shall submit Monthly Program Status Reports for the duration of this Agreement commencing the first month of collection. These reports shall be due on or before the 20th day of each subsequent

month. The Monthly Program Status Reports shall include but not be limited to the following:

- a. Detail report of tonnages of all materials collected, except for used motor oil, which shall be measured by volume, for all materials collected through the Program, that shall include the following data fields for each individual load collected:
  1. Date
  2. Time
  3. Facility
  4. Truck number
  5. Route number
  6. Single-family or multi-family
  7. Weight document number (unique, non-repeating number)
  8. Gross weight
  9. Tare weight
  10. Net weight
- b. Summary report of tonnages of all materials shipped for sale, or for disposal, by material, from all suppliers, programs and jurisdictions, from all of Contractor's Oakland facilities. Data will be used by City staff to estimate the portions of total materials shipped that can be attributed to Oakland Program materials collected, by allocation. Report shall include the following data fields:
  1. Commodity name
  2. Total weight in tons, by commodity
- c. Detail report of all loads of Processing Residue shipped from Contractor's Oakland facilities for disposal. Data will be used by the City to report disposal tons to the State of California. The report shall include the following data fields for each load shipped:
  1. Date
  2. Name of disposal facility load was shipped to
  3. Gross weight
  4. Tare weight
  5. Net weight
  6. Jurisdiction of origin reported to disposal facility at time of delivery
- d. Detail report of Multi-Family Dwellings shall include the following data fields:
  1. Address
  2. Name and phone number of contact person
  3. Date of most recent confirmation of name and phone number of contact person
  4. Number of units
  5. Service day
  6. Route number
  7. Date of delivery of containers and public education material

8. Number of containers by type
  9. Container collection location:
    - i. Backyard
    - ii. Curb
    - iii. Key access
  10. Date container collection location most recently established
- e. Summary of Multi-Family Dwellings which were contacted but declined the service, including contact person, telephone number, time and date of call, and reason for declination of service;
  - f. Detail report of Small Business accounts that shall include the following data fields:
    1. Name of business
    2. Address
    3. Name and phone number of contact person
    4. Account number
    5. Start service date
    6. Route number
    7. Date of most recent payment
  - g. Detail report of Small Business accounts that were contacted by Contractor but declined service that shall include the following data fields:
    1. Name of business
    2. Address
    3. Name and phone number of contact person
    4. Reason service was declined
  - h. Detail report of replacement recycling containers and requests for replacement containers that shall include the following data fields:
    1. Addresses of eligible Customers who request replacement container(s)
    2. The date of request for replacement
    3. The date of replacement for each request
    4. Number of business days from request to replacement
    5. The quantity of containers requested
    6. A summary report of 1 through 5
  - i. Detail report of missed collection that shall include the following data fields:
    1. Addresses of eligible Customers who reported missed collection
    2. Date of report
    3. Date of recovery of missed collection
    4. Number of collection days from date of report to date of recovery
    5. Number of collection days from scheduled service to recovery
    6. Route number
  - j. Detail report of refused collection that shall include the following data fields:

1. Addresses of eligible Customers whose collection was refused
  2. Date of refusal
  3. Non-collection notice number (unique, non-repeating number)
  4. Reason for collection refusal
- k. Detail report of telephone calls received, and Contractor response made, that shall include the following data fields:
1. Date of call
  2. Service address of caller
  3. Reason for call:
  4. Missed collection
  5. Complaints
  6. Service calls
  7. Recycling container replacement
  8. Recycling program information
  9. Other
  10. Date caller's issue is resolved
- l. Detail of all public awareness campaign activities and related expenditures including copies of all invoices.

**11.2 Quarterly Program Status Report.** Contractor shall submit Quarterly Program Status Reports (using calendar quarters) due on or before the 20th day of each subsequent quarter. The Quarterly Program Status Reports shall include but not be limited to the following:

- a. Summary of tonnages recovered by route, except for used motor oil, which shall be measured by volume, for both Single Family and Multi-Family Dwellings;
- b. Summary of container replacement information;
- c. Summary of missed or refused collection information;
- d. Discussion of problems encountered and noteworthy experiences in Program operation, including recommendations for Program modification;
- e. Discussion of public awareness campaign efforts and impacts of said efforts and public education budget expenditures including copies of all invoices; and
- f. List of vehicles in service including the following information for each vehicle:
  1. Contractor truck number
  2. DMV license plate number
  3. DMV vehicle registration expiration date
  4. Body:  
Vehicle Identification Number  
Make



- Model Year
- 5. Chassis:
  - Vehicle Identification Number
  - Make
  - Model Year
- 6. Predetermined individual vehicle tare weight
- 7. Date of predetermined individual vehicle tare weight

**11.3 Annual Program Status Report.** Contractor shall submit Annual Program Status Reports due on or before the 20th day of each subsequent calendar year being reported. The Annual Program Status Report shall include but not be limited to the following:

- a. A discussion of public awareness campaign activities and their impact on participation and recovered volumes;
- b. A summary of public education expenditures;
- c. A summary of the quantity of recycling containers delivered and remaining in stock;
- d. Notification of any route changes made during the reporting period;
- e. Dates and locations of all Small Business events attended;
- f. A correction and listing of any errors or omissions in Contractor's monthly and/or quarterly reports; and
- g. Recommendations for modifications and/or improvements to the Program.

**11.4 Other Reports or Information.** The City may, from time to time, request additional reports or information reasonably related to the Program from Contractor, including but not limited to: route maps; route information; and access to commodity sales revenue information. Such requests shall be subject to the provisions of Article 17.28. Contractor shall comply with requests for information within two weeks of request or at a mutually agreed upon time. Failure to comply with requests shall result in the withholding of all compensation until requests are fulfilled or, at the discretion of the City, the termination of the Agreement pursuant to the provisions of Article 13.00. Access to, and release of information shall be subject to the California Public Records Act and other applicable law governing such access and/or release.

## **ARTICLE 12.00 -- PAYMENT TO CONTRACTOR**

**12.1 Monthly Payment to Contractor.** Monthly payments by the City to Contractor shall be based on the following:

- a. Contractor's monthly Household Rate times the number of occupied Single Family Dwellings within the Service Area. The City and Contractor agree that the number of occupied Single Family Dwellings at the Effective Date of this Agreement is xx,xxx and that this number has been provided by the holder of the City's Solid Waste Franchise Agreement. The number of Single Family Dwellings may be adjusted each month based on evidence acceptable to the City that the dwelling(s) in question is (i) newly constructed, and (ii) occupied. Evidence which is acceptable to the City is (i) a Temporary Certificate of Occupancy or a Certificate of Occupancy as issued by the City's Community and Economic Development Agency or (ii) confirmation of commencement of Single Family Solid Waste collection service by the holder of the City's Solid Waste Franchise Agreement. Compensation shall be prorated for all new Single Family Dwellings receiving service for less than a full month.
- b. Contractor's monthly Household Rate times the number of multi-family units served during the preceding month. The City and Contractor agree that Contractor shall be reimbursed for 27,500 multi-family units commencing with the Effective Date of this Agreement. Contractor shall continue to receive payment for the base number of multi-family units until such time that:
  - 1. Contractor provides documentation satisfactory to the City that more than 27,500 units are being serviced;
  - 2. The City notifies Contractor, pursuant to Section 4.4.8.2, of the removal of Multi-Family Dwellings from the multi-family billing/service list. The City agrees to not invoke this provision until the end of the implementation period of this Agreement, or January 1, 2007, whichever is earlier. Any affected dwellings may be reinstated subject to the provisions and limitations of Section 4.4.8.1.

Compensation shall be prorated for all multi-family units receiving service for less than a full month. Receipt of collection service shall be demonstrated by the placement and service of recycling containers for Targeted Recyclable Materials in designated areas within the proper confines of the Multi-Family building and consistent with the agreement of building ownership or management. Distribution of applicable Program outreach materials must occur prior to or concurrent to the delivery of recycling containers.

- c. The windfall profit sharing payment to be calculated in January and deducted from Contractor's payment in the month following the calculation, or from Contractor's last payment in the final year of this Agreement.
- d. Deductions for the assessment of any liquidated damages.

- e. Small Business rate subsidy, if any, times the number of Small Business customers. The number of Small Business customers shall be prorated to a weekly basis if said service is provided for less than a full month.
- f. The number of oil filters collected times a per-filter rate agreed upon by the City and Contractor.
- g. Premium Backyard Service fee equal to 1/3<sup>rd</sup> of the amount received by the holder of the City's Solid Waste Franchise Agreement for said service from Customers who do not qualify for special handling service as set forth in Section 4.3.3.
- h. Deduction of unspent Public Education funds referenced in Section 9.1 at the end of the calendar year. The deduction is to be made from Contractor's January payment or from Contractor's last payment in the final year of this Agreement.
- i. Reimbursement for additional recycling containers required pursuant to Section 4.3.6.

Contractor shall receive payment from the City within thirty (30) calendar days after receipt of the invoice. The City shall contact Contractor within ten (10) business days of invoice receipt if the City disputes any portion of the amounts set forth in Contractor's monthly billing invoice. The City shall pay those amounts not in dispute, while requesting either clarification or back-up information for those amounts in dispute. Once the dispute is resolved, the City shall pay the mutually agreed upon disputed amount within ten (10) business days.

**12.2 Monthly Household Rate.** Commencing year one of the Agreement, Contractor shall receive \$\_.\_\_ each month for each Single Family Dwelling and each unit in a Multi-Family Dwelling as provided by Section 12.1.

**12.3 Annual Adjustments to Contractor's Household Rate..** Contractor's monthly Household Rate shall be adjusted upward or downward on January 1 of each year of the Agreement beginning January 1, 2006 as provided in this Section.

- a. The monthly Household Rate shall be annually adjusted by a percentage change determined by the following calculation:
  - Eighty percent (80%) of the percentage change in the Consumer Price Index between the Annual Average (January-December) index in the year immediately preceding the year in which rates are being changed and the Annual Average index twelve (12) months earlier. Any decreases in the index shall be reflected as a negative adjustment.

The annual net CPI percentage change (NetCPI) shall be calculated by the following formula:

$$\text{NetCPI} = (((\text{CPI}_{(i)} - \text{CPI}_{(i-1)}) / \text{CPI}_{(i-1)}) * 80\%)$$

Where

$\text{CPI}_{(i)}$  = Index value of the Annual Average (January-December) index immediately preceding the January in which the adjustment occurs; and,

$\text{CPI}_{(i-1)}$  = Index value of the Annual Average (January-December) index of the year immediately preceding the year used for  $\text{CPI}_{(i)}$ .

The monthly Household Rate paid to Contractor shall be adjusted by the percentage as calculated above and the new rates paid shall remain in effect until the next annual adjustment.

- c. Adjustments to Contractor's monthly Household Rate will be effective January 1, 2006 through the end of the Service Term or Extended Term.
- d. Adjustment to the payments shall be rounded to the nearest one-tenth of one percent, i.e., 0.001.
- e. The annual increase or decrease to Contractor's per unit rate shall not exceed, in any event, five percent (5%) in any one year. Increases or decreases above five percent (5%) may not be applied to future periods.

#### **12.4 Other Adjustments to Contractor's Payment.**

- a. If Contractor's scope of service is modified as a result of changes in Federal and/or State laws and regulations with respect to the termination of used motor oil collection, Contractor's per unit payment will be reduced equal to the amount of the incremental cost of providing said service, adjusted for inflation in accordance with Section 12.3, or at a mutually agreed upon amount.
- b. Should Contractor receive payment from the State of California (pursuant to the Public Resources Code 14549.6 (a) or other incentive payments made through the California Beverage Container Recycling and Litter Reduction Act), said funds shall be provided to the City for public education and Program outreach activities or for other activities mutually agreeable to the City and Contractor.

**12.5 Windfall Profit Sharing.** Contractor shall share with the City revenues from the sale of scrap paper commodities including but not limited to old news paper (ONP#6 and ONP#8), old corrugated containers (OCC) and mixed paper (MP), when the scrap paper markets meet the windfall profit conditions described in this Article. Windfall profit sharing shall be calculated on an annual basis.

- a. For the purpose of this Article per ton market pricing for scrap paper commodities shall be measured using the weekly publication *Official Board Markets* (OBM) for the San Francisco area using the high OBM price for each commodity, as published in the second weekly edition OBM each month. Contractor's actual sales revenues will not be considered for the purpose of windfall profit sharing.
- b. Annually contractor shall share windfall profits from sales revenues for the designated commodities as follows: When high OBM for a commodity for a minimum of 13 consecutive weeks exceeds 175% of the monthly average of high OBM for the sixty month period immediately preceding the year for which windfall profit sharing is being calculated, then Contractor shall share with the City 50% of the per ton difference between the sixty month average and high OBM for the same period:

A = High OBM

B = Monthly average of High OBM for the sixty month period immediately preceding the year for which windfall profit sharing is being calculated

When  $A > (B \times 175\%)$  for  $\geq 13$ -consecutive weeks then Contractor shall pay the City  $(A - B) \times 50\%$

Example: If the monthly average of high OMB for ONP#8 in the sixty months (January 2000 – December 2004) preceding the first year of the Agreement (2005) is \$72, and if and when high OBM for ONP#8 sustains equal to or greater than \$126 for a minimum of 13 consecutive weeks in 2005, then Contractor shall pay the City \$0.50 of each \$1.00 above \$126 for the calculated tonnage, per Article 13.4.c, of ONP#8 shipped during the period for which high OBM sustains equal to or greater than \$126.

- c. The method for calculating tonnages subject to windfall profit sharing shall be by allocation. Allocation shall be determined by calculating a percentage of all tons shipped for sale by Contractor as follows: Average monthly total tons of all materials collected through the Program in the period the windfall profit sharing is applied, divided by the average monthly total tons of the designated commodities shipped for sale by Contractor in the same period. Data for these calculations shall be taken from the reports per Articles 11.1.a. and 11.1.b. of this Agreement:

W = Average monthly total tons collected through Program in period  
X = Average monthly total tons shipped for sale by Contractor in period  
Y = W divided by X  
Z = Total tons of a commodity subject to windfall profit sharing shipped for sale by Contractor in period

$Y * Z$  = number of tons of commodity subject to windfall profit sharing

Example: If during a 13 week period in which windfall profit sharing is applied the total tons of materials Contractor collects through the Program equals 3000 (W), and Contractor ships for sale from it's Oakland facilities during the same period a total of 15,000 tons (X), then  $(W/X=Y)$  equals 0.2, and if Contractor ships 4,000 tons (Z) of ONP#8 in the same period, then the tons of ONP#8 windfall profit sharing shall be applied to shall be 800 ( $Y*Z$ ).

- d. Windfall profit sharing payments shall be calculated annually in January for the proceeding calendar year and deducted from Contractor's payment in the month following the calculation, or from Contractor's last payment in the final year of this Agreement. Average high OMB for the prior sixty months will also be determined each January for the current year windfall profit sharing calculation. Example: sixty month average January 2002 – December 2006 will be determined in January 2007 for 2007 windfall profit sharing to be calculated in January 2008.

**12.6 City/Contractor Meetings.** City and Contractor shall each designate a Contract Manager to meet at least monthly during the first year of this Agreement and at least quarterly thereafter. If necessary for the successful performance of this Agreement, City may request more frequent meetings. The City shall provide Contractor a copy of a draft agenda for such meeting at least four (4) business days before the scheduled date of the meeting. The City's Contract Manager may request the attendance of the Contractor's customer services manager and/or the operations manager at such meeting. If said personnel are unavailable, Contractor shall notify the City and arrange to reschedule the meeting within five business days at which time said employees shall be present. City at its option may opt to meet with Contractor at the time and place of the originally scheduled meeting.

### **ARTICLE 13.00 -- DEFAULTS AND REMEDIES**

**13.1 Events of Default.** Each of the following shall constitute an event of default hereunder:

- a. Contractor fails to perform its obligations under this Agreement or future modifications of this Agreement and the failure or refusal of Contractor to perform as required by this Agreement is not cured within two (2) business days after receiving notice from the City specifying the breach, provided that where Contractor demonstrates to the City's reasonable

satisfaction that such breach cannot be cured within such two (2) day period, Contractor shall not be in default of this Agreement if Contractor shall have commenced action required to cure the particular breach promptly in light of the circumstances, but in any event within two (2) days after such notice and it continues such action diligently until completed;

- b. Any written representation or disclosure made to the City by Contractor in connection with or as an inducement to entering into this Agreement or any modification to this Agreement proves to be false or misleading in any material respect as of the time such representation or disclosure is made, whether or not any such representation or disclosure appears as part of this Agreement;
- c. There is a seizure or attachment (other than a pre-judgment attachment) of, or levy affecting possession on, the operating equipment of Contractor, including without limitation its vehicles, maintenance or office facilities, or Processing Facilities or any part thereof, of such proportion as to substantially impair Contractor's ability to perform under this Agreement, and which cannot be released, bonded or otherwise lifted within forty-eight (48) hours excluding weekend and holidays;
- d. Contractor files a voluntary petition for debt relief under any applicable bankruptcy, insolvency, debtor relief or other similar law now or hereafter in effect, or consents to the appointment or taking of possession by a receiver, liquidator, assignee (other than as part of a transfer of equipment no longer useful to Contractor or necessary for this Agreement), trustee (other than as security for an obligation under a deed of trust), custodian, sequestrator or similar official of Contractor for any part of Contractor's operating assets or any substantial part of Contractor's property, or shall make any general assignment for the benefit of Contractor's creditors, or shall fail generally to pay Contractor's debts as they become due, or shall take any action in furtherance of any of the foregoing;
- e. A court having jurisdiction shall enter a decree or order for relief in respect of Contractor, in any involuntary case brought under any bankruptcy, insolvency, debtor relief or similar law now or hereafter in effect, or Contractor shall consent to or shall fail to oppose any such proceeding, or any such court shall enter 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 orders the winding up or liquidation of the affairs of Contractor;
- f. Contractor fails to provide reasonable assurances of performance as required under this Article 13.00 of this Agreement;

- g. Contractor fails to substantially adhere to the implementation plan approved by the City under Section 3.4.1.5; and
- h. Contractor or any permitted subcontractor fails to comply with the nondiscrimination clause of this Agreement set forth in Section 17.3.

Paragraph (g) and (h) are subject to the same notice and cure provisions as set forth in paragraph (a) above.

## **13.2 Remedies.**

**13.2.1 Termination.** Upon an event of Default as defined in Section 13.1, the City shall have the right to terminate this Agreement upon a notice of not less than five (5) days, provided such termination shall be authorized by the City Council or a designee authorized by the City Council, but without the need for any hearing, suit or legal action.

**13.2.2 Possession of Property Upon Default.** In the event of Contractor's default, the City shall have the right to take possession of any and all of Contractor's land, equipment, facilities and other property reasonably necessary for the provision of services hereunder and the billing and collection of fees for those services. The City shall have the right to retain the possession of such property until other suitable arrangements can be made for the provision of services, which may include the award of an agreement to another service provider. If the City retains possession thereof after the period of time for which Contractor has already been paid by means of bills issued in advance of providing service for the class of service involved, Contractor shall be entitled to the reasonable rental value of such property, which shall be offset against the damages due the City for Contractor's default. Contractor agrees that it will fully cooperate with the City to effect the transfer of possession of property for the City's use. If the City so requests, Contractor shall keep in good repair all such property, provide all motor vehicles with fuel, oil and other service, and provide such other service as may be necessary to maintain property in operational condition. The City may immediately engage all or any personnel necessary for the provision of services, including if the City so desires employees previously employed by Contractor. Contractor further agrees, if the City so requests, to assist the City in securing the services of any or all management or office personnel employed by Contractor whose skills are reasonably necessary for the continuation of services. The City agrees that it assumes complete responsibility for the proper, normal use of such equipment and facilities while in its possession. Contractor covenants that it shall not create or impose any lien, charge or encumbrance on its facilities or equipment during the term of this Agreement that will prevent the City's exercise of rights under this Section 13.2.2. Contractor agrees that the City's exercise of its rights under this section: (i) does not constitute a taking of private property for which compensation must be paid; (ii) will not create any liability on the part of the City to Contractor other than the payment of reasonable rental value as provided for in this subsection; (iii) does not exempt Contractor from the indemnity provisions of Article



16.00 which are meant to extend to circumstances arising under this Section. The City has no obligation to maintain possession of Contractor's property for continued use for any period of time and may at any time at its sole discretion relinquish possession to Contractor.

**13.2.3 Direct and Consequential Damages.** Contractor shall be liable to the City for all direct and consequential damages arising out of Contractor's default.

**13.2.4 Liquidated Damages.**

**13.2.4.1 General.** The City finds, and Contractor agrees, that as of the time of the execution of this Agreement, it is impractical, if not impossible, to reasonably ascertain the extent of damages which shall be incurred by the City as a result of a breach by Contractor of its obligations under this Agreement. The factors relating to the impracticality of ascertaining damages include, but are not limited to, the fact that: (i) substantial damage results to members of the public who are denied services or denied quality or reliable service; (ii) such breaches cause inconvenience, anxiety, frustration, and deprivation of the benefits of the Agreement to individual members of the general public for whose benefit this Agreement exists, in subjective ways and in varying degrees of intensity which are incapable of measurement in precise monetary terms; (iii) that the City contracted services might be available at substantially lower costs than alternative services and the monetary loss resulting from denial of services or denial of quality or reliable services is impossible to calculate in precise monetary terms; and (iv) the termination of this Agreement for such breaches, and other remedies are, at best, a means of future correction and not remedies which make the public whole for past breaches.

**13.2.4.2 Service Performance Standards; Liquidated Damages for Failure to Meet Standards.** The parties further acknowledge that consistent, reliable Residential Recycling Services including collection, Processing and marketing are of utmost importance to the City and that the City has considered and relied on Contractor's representations as to its quality of service commitment in awarding the Agreement to it. The parties further recognize that some quantified standards of performance are necessary and appropriate to ensure consistent and reliable service and performance. The parties further recognize that if Contractor fails to achieve the performance standards, or fails to submit required documents in a timely manner, the City and its Customers will suffer damages and that it is and will be impractical and extremely difficult to ascertain and determine the exact amount of damages that the City will suffer. Therefore, without prejudice to the City's right to treat such non-performance as an event of default under this Article 13.00, the parties agree that the liquidated damage amounts set

forth in Attachment I represent a reasonable estimate of the amount of such damages considering all of the circumstances existing on the date of this Agreement, including the relationship of the sums to the range of harm to the City that reasonably could be anticipated and the anticipation that proof of actual damages would be costly or impractical. The parties further agree that during the start up of services contemplated by this Agreement, situations may occur which are best dealt with in a manner different than herein provided. Between the Effective Date and April 1, 2005, the City and Contractor agree to meet and resolve problems associated with the implementation of services. In consideration of Contractor's agreement to this provision, the City agrees to not assess liquidated damages during this implementation period. If in the future there shall be a similar implementation period required to commence a new level or type of service, the City and Contractor agree to discuss the suspension of liquidated damages for a specified period of time. In placing their initials at the places provided, each party specifically confirms the accuracy of the statements made above and the fact that each party has had ample opportunity to consult with legal counsel and obtain an explanation of the liquidated damage provisions at the time that the Agreement was made.

Contractor Initial Here\_\_\_\_ City Initial Here\_\_\_\_\_

The City may assess Liquidated Damages for a material violation of any contract requirement not specifically cited in Attachment I or elsewhere in this Agreement by the following process:

- a. In the event that a contract violation that has been identified to the company in writing is not timely addressed to the City's satisfaction, the City shall send Contractor, by certified mail, a written Notice to Correct. The Notice shall identify a date after which Liquidated Damages shall apply if the contract violation has not been corrected.
- b. In the event that the contract violation identified in the Notice to Correct has not been corrected by the date specified in the Notice, the City shall assess Liquidated Damages of not less than \$50 per business day, per occurrence.

The Director will not capriciously impose additional financial penalties and will not impose penalties for any given month exceeding ten (10) percent of Contractor's monthly compensation for the month in which the penalties were assessed. Any penalties and fines imposed pursuant to this Section shall be in addition to any other remedies available to the City.

**13.2.5 Deduction from Payments because of Contractor's Failure to Make Collections.** In addition to the penalties and fines, in the event Contractor, for any reason, fails to perform the collections called for in the Agreement for any period, with the result that any portion of the scheduled collection is not

completed by 6 p.m. on Saturday (or Sunday when Friday collection delayed due to a non-collection holiday), Contractor shall not be paid for the work not performed. Whenever such failure occurs, the Director shall deduct, for such non-performance, a reasonable amount from Contractor's next monthly payment(s), which amount shall be based on, among other factors, the number of residences from which collections have not been made, the duration of such failure of collection, the additive and deductive adjustments that would have been applied to such prices had the collections been made, and special costs including administrative expenses incurred by the City as a consequence of such failure. Contractor may provide mitigating information for the City to consider in determining the reasonableness of any deduction from Contractor's monthly payment for failure to make collections.

**13.2.5.1 Notice to Contractor.** The City may determine the occurrence of events giving rise to liquidated damages through the observation of its own employees or representative or investigation of Customer complaints. Prior to assessing liquidated damages, the City shall give Contractor notice of its intention to do so. The notice will include a brief description of the incident(s)/non-performance. Contractor may review (and make copies at its own expense) all information in the possession of the City relating to incident(s)/non-performance. Contractor may, within ten (10) days after receiving the notice, request a meeting with the Director. Contractor may present evidence in writing and through testimony of its employees and others relevant to the incidents(s)/non-performance. The Director will provide Contractor with a written explanation of his/her determination on each incident(s)/non-performance prior to authorizing the assessment of liquidated damages. The decision of the Director shall be final unless appealed in writing to the City Administrator within ten (10) calendar days with an explanation of the basis for appeal and submittal of a non-refundable Five Hundred Dollar (\$500) appeal fee.

**13.2.5.2 Amount.** The City may assess liquidated damages for each business day or event, as appropriate, that Contractor is determined to be liable in accordance with this Agreement.

**13.2.6 Specific Performance.** By virtue of the nature of this Agreement, the urgency of timely, continuous and high quality service, and the lead time required to effect alternative service, if the remedy of damages for a breach hereof by Contractor is inadequate, the City shall be entitled to injunctive relief compelling the specific performance of Contractor's obligation hereunder.

**13.2.7 Right to Demand Assurances of Performance.** If Contractor (i) is the subject of any labor unrest including work stoppage or slow down, sick out,

picketing or other concerted job actions; (ii) appears in the reasonable judgment of the City to be unable to regularly pay bills as they become due; or (iii) is the subject of a civil or criminal judgment or order entered for violations of environmental laws, and the City believes in good faith that Contractor's ability to perform has been placed in substantial jeopardy, the City may at its option, in addition to all of the remedies that it may have, demand from Contractor reasonable assurances of timely and proper performance of this Agreement, in such form and substance that the City believes is reasonably necessary in the circumstances.

**13.2.8 City's Remedies Cumulative.** The City's right to terminate this Agreement, the City's right to take possession of Contractor's properties, the City's right to impose liquidated damages on Contractor, and all other remedies of this Article are cumulative, not exclusive, and the City's termination of this Agreement or exercise of one or more rights shall not constitute an election of remedies. All remedies provided in this Article shall be in addition to any and all other legal and equitable rights and remedies which the City may have.

### **13.3 Excuse from Performance.**

**13.3.1 Force Majeure.** Neither Contractor nor the City shall be excused from the performance of its obligation under this Agreement except where a party's failure to perform is due to an event of Force Majeure, as defined in this Agreement.

**13.3.2 Obligation to Restore Ability to Perform.** Any suspension of performance by a party pursuant to this Section shall be only to the extent, and for a period of no longer duration than, required by the nature of the event, and the party claiming excuse from obligation shall use its best efforts in an expeditious and commercially reasonable manner to remedy its inability to perform, and mitigate damages that may occur as result of the event.

**13.3.3 Notice.** The party claiming excuse shall deliver to the other party a written notice of intent to claim excuse from performance under this Agreement by reason of an event of Force Majeure. Notice required by this Section shall be given promptly in light of the circumstances but in any event not later than five (5) calendar days after the occurrence of the event of Force Majeure. Such notice shall describe in detail the event of Force Majeure claimed, the services impacted by the claimed event of Force Majeure, the expected length of time that the party expects to be prevented from performing, the steps which the party intends to take to restore its ability to perform; and such other information as the other party reasonably requests.

**13.3.4 City's Right in the Event of Force Majeure.** The partial or complete interruption or discontinuance of Contractor's service caused by an event of Force Majeure shall not constitute an event of default under this

Agreement. Notwithstanding the foregoing: (i) the City shall have the right to assume possession of Contractor's facilities and equipment in accordance with Section 13.2.2 of this Agreement in the event of non-performance excused by Force Majeure; (ii) if Contractor's excuse from performance for reason of Force Majeure continues for a period of thirty (30) days or more, the City shall have the right in its sole discretion to immediately terminate this Agreement provided that a third party is ready, willing and able to commence performance, in which case the City still shall have the right to assume possession of Contractor's property in accordance with Section 13.2.2.

**13.4 City's Right in the Event of Change in Law.** In the event of a material change in federal or state law which substantially alters the City's duties to provide for the services set forth in this Agreement, the City shall have the right to modify this Agreement to curtail or increase the services affected by the change in law, or to terminate this Agreement entirely. The City's right to terminate this Agreement shall be limited to circumstances under which a material change in federal or state law obviates the City's right to provide the services hereunder.

**13.5 Dispute Resolution.** The City and Contractor agree that the only issues to be mediated pursuant to this Section shall be (i) a determination of adjustment to the Household Rate due to Contractor for changes in the scope of work to be performed under this Agreement in accordance with Section 4.7; and (ii) failure of the City to adequately adjust the Household Rate pursuant to Article 12.00 of this Agreement.

**13.5.1 Meet and Confer.** In the event of disputes described in Section 13.5, the parties agree that they promptly will meet and confer to attempt to resolve the matter between themselves.

**13.5.2 Mediation.** In the event that a dispute specified in Section 13.5 cannot be resolved satisfactorily between the parties, the City and Contractor agree that such disputes shall be submitted to mandatory, non-binding mediation by a mutually agreed upon independent third party. If the dispute is not promptly and satisfactorily resolved through mediation, the parties may pursue available legal remedies. The cost of mediation shall be shared equally between the parties.

## **ARTICLE 14.00 -- PERFORMANCE BOND**

**14.1 Performance Bond or Alternative Security.** By December 16, 2004, Contractor shall provide the City with a fully prepaid Performance Bond payable to the City substantially in the form of Attachment C, in the amount of \$XXX,XXX executed as surety by a corporation authorized to issue surety bonds in the State of California, which corporation is acceptable to the City; and/or by providing as Alternative Security (i) a fully prepaid irrevocable letter of credit in form and substance satisfactory to the City and issued by a financial institution acceptable to the City; (ii) a certificate of deposit in the name of the City with a financial institution acceptable to the City; or (iii) an alternate instrument securing Contractor's performance which is acceptable to the City at its sole discretion; provided that in all events the Performance Bond or Alternative Security, alone or in combination, secure an amount at least equal to Contractor's cost to provide services for three (3) months as of the Effective Date of this Agreement. Such Performance Bond or Alternative Security shall be either (i) expressly provided for the full term of the Agreement, or (ii) provided for consecutive annual terms, in which case Contractor shall deliver to the City an annual Performance Bond or Alternative Security in a form acceptable to the City no less than fifteen (15) calendar days prior to the expiration of the preceding Performance Bond or Alternative Security. Nothing in this subsection shall in any way obligate the City to accept a letter of credit, certificate of deposit or other form of Alternative Security in lieu of the Performance Bond. Failure to maintain a Performance Bond or Alternative Security at all times shall subject Contractor to liquidated damages as set forth in Section 13.2.4.

**14.2 City's Right to Draw Against Performance Bond.** The City shall have the right to draw against the Performance Bond for an event of default as set forth in Article 13.00 if Contractor has not cured the event of default after expiration of any applicable cure period.

**14.2.1 Contractor's Obligation to Replenish Performance Bond.** Contractor covenants that it shall not dispute with its bonding company the City's right to draw upon the Performance Bond if Contractor has not cured an event of default set forth in Section 13.1 after expiration of any applicable cure period. Within five (5) working days of receipt of notice from the City, Contractor shall renew or replace such sums as needed to replenish the Performance Bond, or, if applicable, the Alternative Security.

**14.3 Termination of Performance Bond.** Under no circumstances shall Contractor change, or allow the expiration of, the Performance Bond provided under this Agreement without written notice to the City and written authorization from the City to allow such change or expiration. If Contractor shall fully perform the covenants, promises, undertakings and obligations contracted by Contractor to be performed under this Agreement, then the City shall not draw against the Performance Bond. Contractor's obligation to maintain the Performance Bond shall terminate and be canceled upon the completion of all of Contractor's obligations under this Agreement. In the event of Contractor's default, the Performance Bond shall remain in effect until the City or its

designated agent has completed all of Contractor's obligations under this Agreement. The City shall execute and deliver to Contractor or Contractor's surety promptly upon the completion of all of Contractor's obligations under this Agreement, such certificates or other documents as either of them may reasonably request for the purpose of terminating and canceling the Performance Bond. Absent such certificates or documents executed by the City, the Performance Bond shall not be terminated or canceled.

#### **ARTICLE 15.00 -- INSURANCE**

**15.1 Contractor's Agreement to Provide Insurance.** On or before the Effective Date, Contractor shall procure and keep in force for the Service Term or any Extended Term, or as otherwise specified below, the insurance coverage set forth below, with insurers with at least a Best rating of AA, or better, and at least class eight (8) or larger, or their equivalent thereof, and under forms of policies satisfactory in all respects to the City. Contractor shall furnish the City with certificates of insurance and with original endorsements effecting coverage required by this Article. The certificate holder is to be the Director and certificates shall be sent to the address shown in Section 17.15. Failure to maintain the insurance coverage specified in Article 15.00 at all times shall subject Contractor to liquidated damages as set forth in Section 13.2.4. If Contractor is able to provide proof of continuing coverage within fifteen (15) calendar days of the expiration, cancellation, termination or material reduction of insurance coverage required in Article 15.00, said liquidated damages shall not be enforced by the City.

**15.2 Comprehensive General Liability Insurance.** Contractor, at its own expense, shall maintain Commercial General Liability Insurance (or its equivalent), on an occurrence basis, including but not limited to, Bodily Injury, Broad Form Property Damage, Contractual Liability and Products and Completed Operations Coverage. The policy shall contain a severability of interest clause or cross liability clause or the equivalent thereof. The policy shall be endorsed to include the following:

- a. All coverage shall be primary insurance with regard to the work performed hereunder and each policy shall be endorsed to waive subrogation against the City and all other additional insureds.
- b. Limits of liability:  
\$1,000,000 each occurrence, annual aggregate and  
\$2,000,000 annual aggregate for products-completed operations.
- c. Contractor shall immediately notify the City when asserted Claims are greater than \$500,000. If requested by the City, Contractor shall immediately purchase additional umbrella coverage to restore coverage limits specified above.

**15.3 Automobile Liability Insurance.** Contractor, at its own expense, shall maintain automobile liability insurance for the period covered by this Agreement, including any extensions thereto, in the amount of One Million Dollars (\$1,000,000) per occurrence combined single limit coverage for personal and bodily injury and property

damage. Such coverage shall include, but shall not be limited to, the use of owned, non-owned and hired vehicles and equipment used by Contractor in the performance of its activities contemplated under this Agreement.

**15.4 Workers' Compensation Insurance.** Contractor, at its own expense, shall carry and maintain full Workers' Compensation Insurance, as required by the California Labor Code, and Employer's Liability Insurance with limits not less than Two Million Dollars (\$2,000,000) per accident. Contractor certifies that it is aware of the provisions of Section 3700 of the California Labor Code, which requires every employer to be insured against liability for Workers' Compensation or to undertake self-insurance in accordance with the provisions of the Code. Contractor shall comply with the provisions of Section 3700 of the Labor Code before commencing the performance of the work under this Agreement and thereafter as required by that code. The City will accept the State Compensation Insurance Fund as an acceptable insurer for the purposes of Workers' Compensation coverage.

**15.5 Environmental Impairment Liability Insurance.** Contractor, at its own expense, shall carry and maintain environmental impairment liability insurance for the Service Term or any Extended Term, including any extensions thereto, in the amount of One Million Dollars (\$1,000,000) per loss and in annual 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 that this insurance is primary insurance and that no other insurance carried by the City will be called upon to contribute to a loss suffered by Contractor hereunder and waive subrogation against the City and other additional insureds.

**15.6 Additional Insureds.** The City, its officers, directors, employees, appointed and elected officials, agents and volunteers (collectively "Insured Parties") shall be named as additional insureds for all liability arising out of: activities performed by or on behalf of Contractor; products and completed operations of Contractor; premises owned, occupied or used by Contractor; and vehicles and equipment owned, occupied, leased, hired or borrowed by Contractor. The coverage shall contain no special limitations on the scope of protection afforded to the Insured Parties. Any failure to comply with reporting or other provisions of the policies including breaches of warranties by Contractor, shall not affect coverage provided to the Insured Parties. If Contractor submits the ACORD Insurance Certificate, the additional insured endorsement must be set forth on a CG20 10 11 85 form (or more recent) and/or CA 20 48, or equivalent, subject to the City's approval.

**15.7 Deductibles and Self-Insured Retentions.** In the event Contractor is self-insured as to Workers' Compensation, it shall furnish a Certificate of Permission to Self-Insure signed by the California Department of Industrial Relations, Administration of Self Insurance.



**15.8 City's Right to Cure.** If Contractor fails to procure and maintain any insurance required by this Agreement, the City may procure and maintain, at Contractor's expense, such insurance as it may deem proper up to the policy limits referenced above and deduct the cost thereof from any monies due Contractor or recover the cost thereof from Contractor. The City will provide Contractor with concurrent notice of its intent to purchase substitute insurance. Alternatively, the City may, at its option, terminate this Agreement effective on the date of such lapse of insurance if Contractor has not cured the event of default after expiration of any applicable cure period.

**15.9 Annual Aggregate Limit.** Should any of the required insurance to be provided according to Sections 15.2 through 15.5 change to or be provided under a form of coverage that includes a general annual aggregate limit, and provides that claims investigation or legal defense costs be included in such general annual aggregate limit, such general annual aggregate limit shall be double the occurrence limits specified above.

**15.10 Cancellation and Duration of Coverage.** Each policy shall be endorsed to provide that the City shall be given at least sixty (60) days prior written notice of cancellation, termination or material reduction of such insurance coverage. The above coverage shall be maintained during the Service Term or any Extended Term.

**15.11 Interpretation.** All endorsements, certificates, forms, coverage and limits of liability referred to herein shall have the meaning given such terms by the Insurance Services Office as of the date of this Agreement.

**15.12 Companies.** Each company providing insurance shall be an "admitted insurer" or "approved non-admitted insurer" subject to the jurisdiction of the California Insurance Commissioner.

## **ARTICLE 16.00 -- INDEMNITY**

**16.1 Contractor's Duty to Indemnify City.** Contractor shall defend with counsel approved by the City, indemnify and hold harmless the City and the City's officers, agents, employees, council members, appointed and elected officials, successors, and assigns (collectively "Indemnitees") from any and all claims, demands, damages, costs, expenses (including without limitation consultants, expert witnesses and attorney services/fees), special and consequential damages, natural resource damages, punitive damages, fines, penalties, suits or actions, causes of action, legal or administrative proceedings, demands, debts, liens (collectively referred to herein as "Claims") and other expenses of any kind and description including but not limited to, injury to or death of any and all persons (including but not limited to Contractor, its agents, employees, subcontractors and their successors and assigns as well as the City or the City's agents, and all third parties), and/or on account of all property damage of any kind, whether tangible or intangible, including loss of use resulting therefrom, arising in connection with the work performed pursuant to this Agreement or caused or occasioned in whole or in part by reason of the presence of Contractor, subcontractor, agents, employees, or their proximity to the property of the City, or any other property upon which Contractor, its subcontractors, agents, employees are performing any work called for in connection with this Agreement. Contractor's duty to defend, indemnify and hold harmless the Indemnitees arising during the Service Term, and as it may be extended, shall survive the expiration or earlier termination of this Agreement.

Without limiting the generality of the foregoing, Contractor's indemnification shall include personal injury, death or damage to property (including contamination); product liability; violation of federal, state or local law; or any other Claim whatsoever connected with the activities of Contractor, its subcontractors, agents, and/or employees under this Agreement or on account of the performance or character of the work performed hereunder, including unforeseen difficulties, accidents, occurrences or omissions, including but not limited to, any failure to exclude Hazardous Waste from collection or processing; any Claim Contractor, or its agents, subcontractors, directors, officers, employees or representatives, has breached an express or implied warranty of merchantability or fitness for particular use or any other warranty relating to any materials marketed pursuant to this Agreement; or any Claim that any of them has violated any license, copyright, or other limitation on Contractor's use of computer software in connection with Contractor's performance of services under this Agreement; any Claim that the Indemnitees have awarded Contractor an Agreement which allegedly violates state or federal law under then current judicial precedent; and any Claim arising from the City's performance under this Agreement.

**16.2 City to Provide Notice of Claims.** The City shall provide Contractor with prompt notice of any Claims received by it, and Contractor may assume the defense of any Claim, with counsel approved by the City, and Contractor shall have authority to settle any Claim provided such settlement fully releases and extinguishes Indemnitees' alleged liability under the Claim and such settlement is approved by the City. Where a conflict of interest exists between the Indemnitees and Contractor with respect to a Claim

that is covered by Section 16.1, Contractor shall provide the Indemnitees with independent legal counsel of the Indemnitees' choice, at Contractor's expense.

**16.3 Hazardous Waste Indemnification.** Contractor shall indemnify, defend with Counsel approved by the City, protect and hold harmless the Indemnitees against all Claims, of any kind whatsoever paid, incurred or suffered by, or asserted against Indemnitees arising from or attributable to any repair, cleanup or detoxification, or preparation and implementation of any removal, remedial, response, closure or other plan (regardless of whether undertaken due to governmental action) concerning any Hazardous Waste at any place where Contractor stores or disposes materials pursuant to this Agreement. The foregoing indemnity is intended to operate as an agreement pursuant to Section 107(e) of the Comprehensive Environmental Response, Compensation and Liability Act, (ACERCLA@), 42 U.S.C. Section 9607(e), and California Health and Safety Code Section 25364, to defend, protect, hold harmless and indemnify Indemnitees from liability. The City and Contractor desire to leave no doubts as to their respective roles, and that by entering into this Agreement, the City is not thereby becoming a "generator": or an "arranger" as those terms are used in CERCLA Section 107 (a) (3), and that it is Contractor, not the City, which is "arranging for" the collection from residents and others in the City, and the transport, processing and marketing of Targeted Recyclable Material which may contain hazardous substances. The City and Contractor agree that it is Contractor, and not the City, which will select the transfer station, disposal facility, material recovery facility or processing facility destination of the non-Recyclable waste which Contractor may have collected, that the City has not, and, by this Agreement does not, instruct Contractor on its collection methods, nor supervise the collection and disposal of such waste, and nothing in this Agreement, or other action of the City shall be construed to place title to such waste in Contractor, the parties recognizing that whatever, if any, title Contractor may gain to such waste is by operation of law, and is not the result of this Agreement.

**16.4 AB 939 Indemnification.** Contractor agrees to defend, with Counsel approved by the City, indemnify and hold harmless the Indemnitees against all fines and/or penalties imposed by the California Integrated Waste Management Board, if Contractor fails or refuses to provide information specified in Attachment H and prevents the City from submitting reports required by AB 939 in a timely manner.

## **ARTICLE 17.00 -- GENERAL PROVISIONS**

**17.1 Subcontracting.** Contractor shall not engage any subcontractors to perform any of the services required of it under this Agreement without the prior written approval of the City. Contractor shall notify the City no later than ninety (90) days prior to the date on which it proposes to enter into a subcontract, providing the City with all information it requests with respect to the proposed subcontractor. The City may approve or reject any proposed subcontract and/or subcontractor in its sole discretion if the proposed subcontract replaces essential services to be performed by Contractor pursuant to Sections 4.3 through 4.6 and Article 7.00 of this Agreement. The City's consent to a subcontract and/or subcontractor shall not be unreasonably withheld as to other aspects of this Agreement which are not deemed to involve essential services to the City.

**17.2 Coordination with Other City Services.** The City will assist Contractor in coordinating routing and scheduling matters with other City services, such as Solid Waste and yard waste collection and street sweeping. Contractor is responsible for all costs associated with implementing and maintaining day-of-service route changes should the Solid Waste collection routes be changed by the holder of the City's Solid Waste Franchise Agreement. The City shall request the holder of the City's Solid Waste Franchise Agreement to provide Contractor with five months prior notification of any Solid Waste and yard waste collection route changes contemplated during the implementation period of this Agreement.

### **17.3 Nondiscrimination.**

**17.3.1 Equal Employment Practices.** Contractor shall not discriminate or permit discrimination against any person or group of persons in any manner prohibited by federal, state or local laws. During the term of this Agreement, Contractor agrees as follows:

- a. Contractor and any permitted subcontractors shall not discriminate against any employee or applicant for employment because of age, marital status, religion, gender, sexual preference, race, creed, color, national origin, Acquired-Immune Deficiency Syndrome (AIDS), AIDS-Related Complex (ARC) or disability. Contractor and Contractor's subcontractors shall take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their age, marital status, religion, gender, sexual preference, race, creed, color, national origin, AIDS, ARC, or disability. Such action shall include, but not be limited to, the following: employment, upgrading, failure to promote, demotion or transfer, recruitment advertising, layoffs or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. Contractor agrees to post, in conspicuous places, available to employees and applicants for employment, notices setting forth the provision of this nondiscrimination clause.

**17.6.2 No Entitlement to Benefits.** Neither Contractor nor its officers, employees, agents, subagents, contractors or subcontractors shall be entitled to any retirement benefits, Workers' Compensation benefits, or any other benefits that accrue to any City employees, and Contractor expressly waives any claim it may have or acquire to such benefits.

**17.6.3 Non-Exclusive Relationship.** Contractor may perform services for, and contract with, as many additional clients, persons or companies as Contractor, in his or her sole discretion, sees fit.

**17.7 Wages.**

**17.7.1 Living Wage Requirements.** This Agreement is subject to the Living Wage Ordinance of Chapter 2.28 of the Oakland Municipal Code and its implementing regulations. The Ordinance requires among other things, submission of the Declaration of Compliance attached and incorporated herein as Attachment Q and made part of this Agreement, and unless specific exemptions apply or a waiver is granted, that Contractor provide the following to its employees who perform services under or related to this Agreement. All of the provisions of Section 17.7.1, or any part hereof, may be waived in a bona fide collective bargaining agreement, but only if the waiver is explicitly set forth in such agreement in clear and unambiguous terms.

**17.7.1.1 Minimum Compensation.** Said employees shall be paid an initial hourly wage rate of \$9.66 with health benefits or \$11.11 without health benefits. These initial rates shall be upwardly adjusted each year no later than April 1 in proportion to the increase at the immediately preceding December 31 over the year earlier level of the Bay Region Consumer Price Index as published by the Bureau of Labor Statistics, U.S. Department of Labor.

**17.7.1.2 Health Benefits.** Said full-time and part-time employees paid at the lower living wage rate shall be provided health benefits of at least \$1.25 per hour. Contractor shall provide proof that health benefits are in effect for those employees no later than 30 days after execution of the contract or receipt of City financial assistance.

**17.7.1.3 Compensated Days Off.** Said employees shall be entitled to twelve compensated days off per year for sick leave, vacation or personal necessity at the employee's request, and ten uncompensated days off per year for sick leave. Employees shall accrue one compensated day off per month of full time employment. Part-time employees shall accrue compensated days off in increments proportional to that accrued by full-time employees. The employees shall be eligible to use accrued days off after the first six months of employment or consistent with company policy, whichever is sooner. Paid holidays, consistent with established employer policy, may be counted toward provision of the required 12

compensated days off. Ten uncompensated days off shall be made available, as needed, for personal or immediate family illness after the employee has exhausted his or her accrued compensated days off for that year.

**17.7.1.4 Federal Earned Income Credit (EIC).** Contractor shall inform said employees who earn less than \$12.00 per hour that he or she may be eligible for EIC and shall provide forms to apply for advance EIC payments to eligible employees.

**17.7.1.5 Notice to Employees.** Contractor shall provide to all employees and to the City's Office of Contract Compliance, written notice of its obligation to eligible employees under the City's Living Wage requirements. Said notice shall be posted prominently in communal areas of the work site(s) and shall include the above-referenced information. Contractor shall provide all written notices and forms required above in English, Spanish or other languages spoken by a significant number of employees within 30 days of employment under this Agreement.

**17.7.1.6 Reporting.** Contractor shall maintain a listing of the name, address, hire date, occupation classification, rate of pay and benefits for each of its employees. Contractor shall provide a copy of said list to the City's Office of Contract Compliance, on a quarterly basis (using calendar quarters), due on or before the 20<sup>th</sup> day of each subsequent quarter for the applicable compliance period. Failure to provide said list within five days of the due date will result in liquidated damages of five hundred dollars (\$500.00) for each day that the list remains outstanding. Contractor shall maintain employee payroll and related records for a period of four (4) years after expiration of the compliance period.

**17.7.1.7 Subcontractor Obligations.** Contractor shall require subcontractors that provide services under or related to this Agreement to comply with the above Living Wage provisions. Contractor shall include the above-referenced sections in its subcontracts. Copies of said subcontracts shall be submitted to the City's Office of Contract Compliance.

**17.7.2 Payment of Income Taxes.** Contractor is responsible for paying, when due, all income taxes, including estimated taxes, incurred as a result of the compensation paid by the City to Contractor for services under this Agreement. On request, Contractor shall provide the City with proof of timely payment. Contractor agrees to indemnify the City for any claims, costs, losses, fees, penalties, interest or damages suffered by the City resulting from Contractor's failure to comply with this provision.

**17.8 Religious Prohibition.** There shall be no religious worship, instruction, or proselytization as part of, or in connection with, the performance of this Agreement.

**17.9 Political Prohibition/Campaign Contributions.** Monies paid by the City pursuant to this Agreement shall not be used for political purposes, sponsoring or conducting candidate's meetings, engaging in voter registration activity, nor for publicity or propaganda purposes designed to support or defeat legislation pending before federal, state or local government. This Agreement is subject to the City of Oakland Campaign Reform Act of Chapter 3.12 of the Oakland Municipal Code and its implementing regulations. The Campaign Reform Act prohibits contractors that are doing business or seeking to do business with the City from making campaign contributions to Oakland candidates between commencement of negotiations and either 180 days after completion of, or termination of, contract negotiations. Contractor must sign and date an Acknowledgment of Campaign Contribution Limits Form attached hereto and incorporated herein as Attachment R.

**17.10 Business Tax Certificate.** Contractor shall obtain and provide proof of a valid City business tax certificate. Said business tax certificate must remain valid during the duration of this Agreement.

**17.11 Equal Benefits Ordinance.** This Agreement is subject to the Equal Benefits Ordinance of Chapter 2.232.010 of the Oakland Municipal Code and its implementing regulations. Entities which enter into a "contract" with the City for an amount of twenty-five thousand dollars (\$25,000.00) or more for public works or improvements to be performed, or for goods or services to be purchased or grants to be provided at the expense of the City or to be paid out of moneys deposited in the treasury or out of trust moneys under the control of or collected by the City; and Entities which enter into a "property contract" pursuant to Section 2.32.020(D) with the City in an amount of twenty-five thousand dollars (\$25,000.00) or more for the exclusive use of or occupancy (1) of real property owned or controlled by the City or (2) of real property owned by others for the City's use or occupancy, for a term exceeding twenty-nine (29) days in any calendar year.

The Ordinance shall only apply to those portions of Contractor's operations that occur (1) within the City; (2) on real property outside Oakland if the property is owned by the City or if the City has a right to occupy the property, and if Contractor's presence at that location is connected to a contract with the City; and (3) elsewhere in the United States where work related to a City contract is being performed. The requirements of this chapter shall not apply to subcontracts or subcontractors of any contract or contractor. The equal Benefits Ordinance requires among other things, submission of Attachment S, the Equal Benefits-Declaration of Nondiscrimination, incorporated herein.

**17.12 Nuclear Free Zone Disclosure.** Contractor represents, pursuant to Attachment T ("Nuclear Free Zone Disclosure Form"), that Contractor is in compliance with the City's restrictions on doing business with service providers considered nuclear

weapons makers. Prior to execution of this agreement, Contractor shall complete Attachment T, attached hereto.

**17.13 Conflict of Interest/Agents/Brokers.** The following protections against conflict of interest will be upheld:

- a. Contractor certifies that no member of, or delegate to, the Congress of the United States shall be permitted to share or take part in this Agreement or in any benefit arising therefrom.
- b. Contractor certifies that no member of, or delegate to, the State of California legislature or the California Integrated Waste Management Board shall be permitted to share or take part in this Agreement or in any benefit arising therefrom.
- c. Contractor certifies that no member, officer, or employee of the City or its designees or agents and no other public official of the City who, in his/her official capacity, exercises any functions or responsibilities with respect to the services to be provided by this Agreement, shall have any interest, direct or indirect in this Agreement, or in its proceeds during his/her tenure or for one year thereafter.
- d. Contractor warrants and represents, to the best of its knowledge, that no public official or employee of the City who has been involved in the making of this Agreement, or who is a member of a City board or commission which has been involved in the making of this Agreement whether in an advisory or decision-making capacity, has or will receive a direct or indirect financial interest in this Agreement in violation of the rules contained in California Government Code Section 1090 et seq., pertaining to conflicts of interest in public contracting. Contractor shall exercise due diligence to ensure that no such official will receive such an interest.
- e. Contractor further warrants and represents, to the best of its present knowledge and excepting any written disclosures as to these matter already made by Contractor to the City, that (1) no public official of the City who has participated in decision-making concerning this Agreement or has used his or her official position to influence decisions regarding this Agreement, has an economic interest in Contractor or this Agreement, and (2) this Agreement will not have a direct or indirect financial effect on said official, the official's spouse or dependent children, or any of the official's economic interests. For purposes of this paragraph, an official is deemed to have an "economic interest" in any (a) for-profit business entity in which the official has a direct or indirect investment worth \$1,000 or more, (b) any real property in which the official has a direct or indirect interest worth \$1,000 or more, (c) any for-profit business entity in which



the official is a director, officer, partner, trustee, employee or manager, or (d) any source of income or donors of gifts to the official (including nonprofit entities) if the income or value of the gift totaled more than \$250 the previous year. Contractor agrees to promptly disclose to the City in writing any information it may receive concerning any such potential conflict of interest. Contractor's attention is directed to the conflict of interest rules applicable to governmental decision-making contained in the Political Reform Act (California Government Code Section 87100 et seq.) and its implementing regulations (California Code of Regulations, Title 2, Section 18700 et seq.).

- f. Contractor understands that in some cases Contractor or persons associated with Contractor may be deemed a "city officer" or "public official" for purposes of the conflict of interest provisions of Government Code Section 1090 and/or the Political Reform Act. Contractor further understands that, as a public officer or official, Contractor or persons associated with Contractor may be disqualified from future City contracts to the extent that Contractor is involved in any aspect of the making of that future contract (including preparing plans and specifications or performing design work or feasibility studies for that contract) through its work under this Agreement.
- g. Contractor warrants that Contractor has not employed or retained any subcontractor, agent, company or person other than bona fide, full-time employees of Contractor working solely for Contractor, to solicit or secure this Agreement, and that Contractor has not paid or agreed to pay any subcontractor, agent, company or persons other than bona fide employees any fee, commission, percentage, gifts or any other consideration, contingent upon or resulting from the award of this Agreement. For breach or violation of this warranty, the City shall have the right to rescind this Agreement without liability or, in its discretion, to deduct from the Agreement price or consideration, or otherwise recover, the full amount of such fee, commission, percentage or gift.
- h. Contractor shall incorporate, or cause to be incorporated, in all subcontracts for work to be performed under this Agreement a provision prohibiting such interests pursuant to the purposes of this Section.
- i. Nothing herein is intended to waive any applicable federal, state or local conflict of interest law or regulation.
- j. In addition to the rights and remedies otherwise available to the City under this Agreement and under federal, state and local law, Contractor understands and agrees that, if the City reasonably determines that Contractor has failed to make a good faith effort to avoid an improper conflict of interest situation or is responsible for the conflict situation, the

City may (1) suspend payments under this Agreement, (2) terminate this Agreement, (3) require reimbursement by Contractor to the City of any amounts disbursed under this Agreement. In addition, the City may suspend payments or terminate this Agreement whether or not Contractor is responsible for the conflict of interest situation.

**17.14 Attorney's Fees.** In any dispute between the parties, whether or not resulting in litigation or any appeal therefrom, the prevailing party shall be entitled to recover from the other party all reasonable costs, including, without limitation, reasonable attorneys' fees. "Prevailing Parties" shall include without limitation (i) a party who dismisses an action in exchange for sums allegedly due such party; (ii) the party which received performance from the other party of an alleged breach of a covenant or a desired remedy where such performance is substantially equal to the relief sought in an action; or (iii) the party determined to be the prevailing party by a court of law.

**17.15 Notices.** All notices, demands, requests, approvals, disapprovals, proposals, consents or other communications whatsoever which this Agreement contemplates or authorizes, or requires or permits either party to give to the other, shall be in writing and shall be personally delivered or sent by registered or certified mail, postage prepaid, return receipt requested, or facsimile followed by telephone or written confirmation of receipt, addressed to the respective party. If to the City, address the original letter to the Director, Public Works Agency with courtesy copies to the City Administrator and City Attorney.

Director  
Public Works Agency  
City of Oakland  
250 Frank H. Ogawa Plaza, 4<sup>th</sup> Floor  
Oakland, California 94612  
Telephone: (510) 238-3961  
Facsimile: (510) 238-2233

City Administrator  
Office of the City Administrator  
City of Oakland  
1 City Hall Plaza, 3rd Floor  
Oakland, California 94612  
Telephone: (510) 238-3301  
Facsimile: (510) 238-2223

City Attorney  
Office of the City Attorney  
City of Oakland  
1 City Hall Plaza, 6th Floor  
Oakland, California 94612  
Telephone: (510) 238-3601  
Facsimile: (510) 238-6500

If to Contractor, address to:  
California Waste Solutions  
1820 10th Street  
Oakland, California 94607  
Telephone: (510) 832-8111  
Facsimile: (510) 832-8206

Either party may designate a different mailing address or a different telephone or facsimile number by providing written notice to the other party as provided in this Section. Notice by the City to Contractor of a missed pick-up or a service recipient problem or complaint may be given to Contractor orally; by telephone at Contractor's local office; or with written notice via mail, fax, electronic mail, or other means.

**17.16 Waiver.** Waiver of any term or condition contained in this Agreement by any party to the Agreement shall be in writing and shall not be construed as a waiver of a subsequent breach or failure of the same term or condition or a waiver of any other term or condition contained in the Agreement. The subsequent acceptance by the City of any fee, or any other monies that become due from Contractor to the City shall not be deemed to be a waiver by the City of any breach or violation of any term, covenant or condition of this Agreement.

**17.17 Assignment.** Except as expressly provided for in this Agreement, neither party shall assign its rights, nor delegate, subcontract or otherwise transfer its obligations under this Agreement to any other person without the prior written consent of the other party. Any such assignment made without the consent of the other party shall be void and the attempted assignment shall constitute a material breach of this Agreement. Under no circumstances shall the City be obligated to consider any proposed assignment by Contractor if Contractor is in default at any time during the period of consideration.

**17.17.1 Events Considered to be Assignments.** For purposes of this Section when used in reference to Contractor, "assignment" shall include, but not be limited to (i) a sale, exchange or other transfer of substantially all of Contractor's assets dedicated to service under this Agreement to a third party; (ii) a sale, exchange or other transfer of outstanding common stock of Contractor to a third party provided said sale, exchange or transfer may result in a change of control of Contractor; (iii) any dissolution, reorganization, consolidation, merger, re-capitalization, stock issuance or re-issuance, voting trust, pooling agreement, escrow arrangement, liquidation or other transaction which results in a change of ownership or control of Contractor; (iv) any assignment by operation of law, including insolvency or bankruptcy, making assignment for the benefit of creditors, writ of attachment for an execution being levied against this Agreement, appointment of a receiver taking possession of Contractor's property, or transfer occurring in the event of a probate proceeding; and (v) 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, or change of control of Contractor.

**17.17.2 Provision of Vital Services.** Contractor acknowledges that this Agreement involves rendering a vital service to the City's residents and businesses, and that the City has selected Contractor to perform the services specified herein based on (i) Contractor's experience, skill and reputation for conducting its Residential Recycling Services operations in a safe, effective and

responsible fashion, at all times in keeping with applicable environmental laws, regulations and best management practices, and (ii) Contractor's financial resources to maintain the required equipment and to support its indemnity obligations to the City under this Agreement. The City has relied on each of these factors, among others, in choosing Contractor to perform the services to be rendered by Contractor under this Agreement.

**17.17.3 City's Consent to Assignment.** If Contractor requests the City's consideration of and consent to an assignment, the City may deny or approve such request in its complete discretion. No request by Contractor for consent to an assignment need be considered by the City unless and until Contractor has met the following requirements:

a. Contractor shall undertake to pay the City its reasonable expenses for attorney's 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;

b. If requested, Contractor shall furnish the City with audited or reviewed financial statements of the proposed assignee's operations for the immediately preceding three (3) operating years; and

c. If requested by the City, Contractor shall furnish information about any or all of the following items: (i) proof that the proposed assignee has at least three (3) years of residential recycling collection, Processing, and marketing management experience on a scale equal to or exceeding the scale of operations conducted by Contractor under the Agreement; (ii) proof that in the last five (5) years, the proposed assignee has not suffered any significant citations or other censure from any federal, state or local agency having jurisdiction over its recycling or other operations due to any significant failure to comply with state, federal or local environmental laws and that the assignee has provided the City with a complete list of such citations and censures; (iii) proof that the proposed assignee has at all times conducted its operations in an environmentally safe and conscientious fashion; (iv) proof that the proposed assignee conducts its recycling operations in accordance with sound management practices in full compliance with all federal, state and local laws regulating such operations including the handling and disposal of Hazardous Wastes which may be collected; and (v) proof of any other information required by the City to ensure the proposed assignee can fulfill the terms of this Agreement in a timely, safe and effective manner.

**17.17.4 Worker Retention.** In the event of an assignment as set forth in Section 17.16.1 Contractor acknowledges that workers who perform services under this Agreement may be displaced from their employment. Contractor shall require the proposed assignee to offer employment to all qualified non-management or non-supervisory displaced workers who have been employed by Contractor for at least one hundred twenty (120) calendar days prior to Contractor's request to assign this Agreement. The City and Contractor agree that this provision shall apply to no less than XX collection route drivers, XX mechanics and XX sorters as of the Effective Date of this Agreement. Such non-management or non-supervisory workers shall be considered qualified displaced workers subject to these worker retention requirements. The proposed assignee shall not discharge qualified workers for at least ninety (90) calendar days after the date of assignment, except for cause. Thereafter, the continued employment of qualified displaced workers shall be under the terms and conditions established for all of the proposed assignee's workers in the particular classification. The proposed assignee shall not be required (i) to displace any of its current employees, (ii) to modify its current job performance requirements or employee selection standards, (iii) to alter its current wage and employment conditions, or (iv) to offer employment to more of the displaced workers than are needed to perform the services assigned.

**17.18 Defense of Agreement Rights.** The City will make reasonable good faith efforts to prevent infringement by third parties of the rights granted to Contractor under this Agreement that Contractor brings to the attention of the City and when the City determines in its sole discretion that there are infringements; provided however, that Contractor shall, with counsel reasonably acceptable to the City, assume the prosecution (including all related costs and attorney fees) of any lawsuit or administrative proceeding necessary to enforce such rights, and, shall defend, with counsel approved by Indemnitees, indemnify and hold harmless the Indemnitees against any and all Claims arising out of City's performance under this Section 17.18. The City will reasonably cooperate with Contractor in prosecuting and defending its rights. Contractor shall reimburse the City, within thirty (30) days of receipt of a City invoice, for all actual, reasonable costs associated with defense of Agreement rights (including but not limited to City staff and City Attorney time, including applicable City overhead allocations, and outside consultants, including attorney fees and costs). Notwithstanding anything to the contrary contained in this Agreement, Contractor shall defend with counsel approved by the Indemnitees, indemnify and hold harmless the Indemnitees against any and all Claims to challenge, annul, void, set-aside or invalidate the City's award of this Agreement or its performance thereunder.

**17.19 Captions.** The captions appearing in this Agreement are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope and intent of this Agreement or any of the provision hereof.

**17.20 Interpretations.** Each party, and counsel for each party, has reviewed and been provided the opportunity to revise this Agreement. Accordingly, the normal rule of construction to the effect of any ambiguities being resolved against the drafting party shall not be employed in the interpretation of this Agreement or any amendment thereto.

**17.21 References to Laws.** All references in this Agreement to laws and regulations shall be understood to include such laws and regulations as they may be subsequently amended or recodified, unless otherwise specifically provided. In addition, references to specific governmental agencies shall be understood to include agencies that succeed to or assume the functions they are currently performing.

**17.22 Governing Law.** This Agreement shall be governed by the laws of the State of California.

**17.23 Validity of Contracts.** The Oakland City Council must approve all agreements greater than \$15,000. This Agreement shall not be binding or of any force or effect until signed by the City Administrator or his or her designee and approved as to form and legality by the City Attorney or his or her designee.

**17.24 Amendment.** No modification, amendment or supplement to this Agreement will be binding on the parties unless it is made in writing, duly authorized by Contractor and the City, and signed by both parties.

**17.25 Jurisdiction.** Any lawsuits between the parties arising out of this Agreement shall be brought and concluded in the courts of the State of California, which shall have exclusive jurisdiction over such lawsuits. With respect to venue, the parties agree that this Agreement is made in and will be performed in Alameda County.

**17.26 Severability.** If any term or provision of this Agreement, or the application of any term or provision of this Agreement to a particular situation, shall be found to be void, invalid, illegal or unenforceable by a court of competent jurisdiction, then notwithstanding, such term or provision shall remain in force and effect to the extent allowed by such ruling and all other terms and provisions of this Agreement or the application of this Agreement to other situations shall remain in full force and effect.

Notwithstanding the foregoing, if any material term or provision of this Agreement or the application of such material term or condition to a particular situation is be found to void, invalid, illegal or unenforceable by a court of competent jurisdiction, then the parties hereto agree to work in good faith and fully cooperate with each other to amend this Agreement, subject to the provisions in Section 3.5.

**17.27 Cooperation with Subsequent Providers.** At the expiration of the Agreement Term provided for hereunder, or in the event of termination under Article 13.00 of this Agreement, Contractor, at its own expense, shall cooperate fully with the City, as necessary, to ensure an orderly transition to any and all new service providers,

and the City shall have no continuing obligations to Contractor other than those expressly provided for under this Agreement.

#### **17.28 Access to and Disclosure of Records.**

**17.28.1 Access to Records.** Contractor shall permit access to its records and its records of employment, employment advertisements, application forms, and other pertinent data or records relating to Contractor's obligation under Sections 17.3, 17.4, 17.5, 17.7 and 17.8 of this Agreement, by the California Fair Employment Practices Commission, the City or any appropriate employee, department, or agent designated by the California Fair Employment Practices Commission or by the City respectively, for the purpose of investigating Contractor's compliance with the California Fair Employment Practices Act or Sections 17.3, 17.4, 17.5, 17.7 and 17.8 of this Agreement. Should Contractor be required to provide reports to the City concerning its obligations under this Section, said reports may be in summary form (with private or identifying information about specific employees omitted) which set forth the relevant information in a statistical way.

**17.28.2 Confidential Information.** Contractor maintains that certain information provided is confidential and proprietary information ("Confidential Information"), including but not limited to reported commodities sales prices, personnel employment information, and trade secrets. The City will not disclose the Confidential Information (or any version or permutation thereof) to any third party, including without limitation Contractor's competitors and Customers.

**17.28.3 Permitted Release of Information.** Confidential or proprietary information shall not be subject to this Agreement if such information (i) at the time of disclosure or thereafter, is generally available to and known by the public (other than as a result of its disclosure by the City or its representatives), (ii) was available to the City on a non-confidential basis prior to disclosure by Contractor, or (iii) becomes available to the City on a non-confidential basis from a person who is not otherwise bound by a confidentiality agreement with or other contractual, legal or fiduciary obligation of confidentiality to Contractor or its representatives or any other person, or is not otherwise prohibited from transmitting the information to the City.

**17.28.4 Required Release of Confidential Information.** If the City or any of its representatives are requested or required in legal proceedings, subpoena, civil investigative demand, Public Records Act request or other similar process to disclose all or any part of the confidential or proprietary information, the City shall immediately notify Contractor in writing of the existence, terms and circumstances surrounding such a request or requirement so that Contractor may seek a protective order or other appropriate remedy and/or waive compliance with the provisions of this Agreement. If, in the absence of a protective order or other

remedy of the receipt of a waiver by Contractor, in the opinion of counsel for the City, disclosure of information by the City or any of its representatives is nonetheless legally required, the City or its representatives may, without liability hereunder disclose only that portion of the information which such counsel advises is legally required to be disclosed, and exercise its best efforts to preserve the confidentiality of the information, including, without limitation, by cooperating with Contractor to obtain an appropriate protective order or other reliable assurance that confidential treatment will be accorded to the information so furnished.

**17.29 Parties in Interest.** Nothing in this Agreement, whether expressed or implied, is intended to confer any rights on any persons other than the parties to it and their representatives, successors and permitted assigns.

**17.30 Compliance with Law.** Contractor shall comply, at its sole expense, fully and faithfully with all local, state and federal laws, ordinances, regulations and permit requirements, including City Legislation, as they may be amended from time to time, applicable to its performance under this Agreement, or in any way related to Contractor's performance of the services required under this Agreement; including, but not limited to, local, state and federal laws, ordinances and regulations relating to protection of the public's health, safety and welfare or contamination of the environment specifically including, but not limited to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. Sections 9601 et seq., the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. Sections 6901 et seq., the California Integrated Waste Management Act of 1989, and all other applicable laws of the State of California, the County of Alameda, ordinances of the City, the requirements of Local Enforcement Agencies and other agencies with jurisdiction. Without limiting the generality of the foregoing, Contractor shall, at its sole expense, prepare and complete, or arrange for the preparation and completion of, any environmental impact report or other environmental review required under applicable local, state and federal law for the construction, modification or operation of physical plants, if any, necessary to perform the services described in this Agreement.

**17.31 Permits, Authorizations, Licenses.** Contractor shall obtain, and shall maintain throughout the term of this Agreement, at Contractor's sole expense, in addition to the permits required pursuant to Section 7.1, all other necessary permits, licenses, inspections and approvals required for Contractor to perform all the work and services agreed to be performed by Contractor pursuant to this Agreement. Contractor shall show proof of such permits, licenses or approvals and shall demonstrate compliance with the terms and conditions of such permits, licenses or approvals upon the request of the City.

**17.32 Permits for Use of Facilities.** Contractor shall keep in force and comply with the terms and conditions of all existing permits and approvals from governmental authorities necessary for the use of the material recovery facility or Processing facilities (collectively "Facilities") throughout the Service Term or any Extended Term to adequately process all Targeted Recyclable Material delivered to the Facilities pursuant



to this Agreement. Contractor shall keep the City fully informed of its progress in securing renewals of all such permits which occur during the Service Term or any Extended Term and which may affect the ability of Contractor to perform pursuant to this Agreement. Upon request, Contractor shall provide the City with copies of all relevant correspondence with permitting agencies and all other relevant material correspondence related to the permitting process with third parties, but not including internal memoranda or correspondence between Contractor and its agents, consultants or attorneys. Upon request, Contractor shall also provide the City with a status report on applications for renewals of existing permits or any new permits which may be required to continue operations at the Facilities within existing permitted areas. Contractor shall give the City immediate notice of any proposed amendment to or alteration of such permits, or any new permits that may be required. Contractor shall use all reasonable efforts to resist any amendments or alterations to permits, the terms of which would prevent or materially interfere with the performance of its obligations under this Agreement, through all available administrative procedures. In the event that such permit amendments occur despite Contractor's reasonable efforts to resist them, Contractor shall not be in breach of this Agreement if Contractor complies with such permit amendments. A summary list of all current permits held by Contractor for operation of the Facilities, showing both the permit number and date of expiration, is attached to this Agreement as Attachment X and incorporated by reference herein.

**17.33 Audit.** Contractor shall maintain in its office full and complete accounting records, prepared in accordance with generally accepted accounting principles, reflecting Contractor's work on the Program. The City may at any time require an audit of Contractor's books and records or an audit of operations/management at any reasonable time. The cost of all required audits shall be the responsibility of the City. The City or any of its duly authorized representatives shall have access, on reasonable notice, to such books, records, documents, and other evidence related to the Program for the purpose of inspection, audit and copying. Information obtained by the City shall be subject to the provisions of Article 17.28. Contractor shall provide proper facilities for such inspection, audit, and copying.

These records shall be kept, at a minimum, for four years after the end or termination of the Agreement. In addition, those records which relate to any "dispute" appeal, or litigation, or the settlement of claims, or where an audit exception has been taken, shall be maintained and made available until four years after the resolution of such appeal, litigation, claims or exception. Such audit shall be conducted by City personnel or by an independent firm with experience in auditing public service companies. Audit information shall be kept confidential, except as may be required by public disclosure laws.

Contractor shall furnish the City with a copy of its annual financial statement that fairly reflects the results of all operations and Contractor's financial condition within one hundred twenty (120) calendar days after the close of Contractor's fiscal year. Contractor shall provide a separate schedule that fairly reflects the results of operations pursuant to this Agreement. The financial statement shall be prepared in accordance with Generally

Accepted Accounting Principles by a Certified Public Accountant (CPA) licensed (in good standing) to practice public accounting in the State of California as determined by the State of California Department of Consumer Affairs Board of Accountancy.

**17.34 Inspection of Facilities and Operational Records.** The City shall have the right, but not the obligation, to observe and inspect all of Contractor's Facilities and operations under this Agreement. In connection therewith, the City shall have the right to enter the Facilities upon reasonable notice to Contractor and during operating hours, speak to any of Contractor's employees and receive cooperation from such employees in response to inquiries. In addition, upon reasonable notice and without interference with Contractor's operations, the City may review and copy, at its expense, any of Contractor's operational records related to this Agreement. If the City so requests, Contractor shall make specified personnel available to accompany the City Representatives on inspections.

**17.35 Entire Agreement; Attachments Included.** This Agreement is executed in four (4) originals each of which is deemed to be an original. This Agreement consists of 70 pages and Attachments A through V attached hereto and constitutes the entire understanding and agreement of the City and Contractor with respect to the services to be provided under this Agreement. This Agreement supersedes any and all agreements, either oral or written, between the parties with respect to the rendering of services by Contractor for the City and contains all of the representations, covenants and agreements between the parties with respect to the rendering of those services. Each party to this Agreement acknowledges that no representations, inducements, promises or agreements, orally or otherwise, have been made by any party, or anyone acting on behalf of any party, which are not contained in this Agreement, and that no other agreement, statement or promise not contained in this Agreement will be valid or binding.

**17.36 Inconsistency.** If there is any inconsistency between the main Agreement and the attachments, the text of the main Agreement shall prevail.

**17.37 Recitals.** The foregoing recitals are true and correct and are an integral part of this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the first date indicated above.

City of Oakland,  
a municipal corporation

\_\_\_\_\_  
Contractor

\_\_\_\_\_  
(City Administrator's Office)

\_\_\_\_\_  
(Date) (Signature)

\_\_\_\_\_  
(Date)

Public Works Agency

(Date)

Business Tax Certificate No.

Approved as to form and legality:

\_\_\_\_\_  
Resolution Number

\_\_\_\_\_  
(City Attorney's Office)

(Date)

\_\_\_\_\_  
Accounting Number

**Attachment B**  
**Non-Targeted Recyclable Materials**

job title or function and the methodology used by Contractor to hire and/or contract with the individual or entity in question.

**17.4.3 Recruitment of Subcontractors.** In the recruitment of subcontractors, the City requires all Contractors to undertake nondiscriminatory and equal outreach efforts, which include outreach to minorities and women-owned businesses as well as other segments of Oakland's business community. The City Administrator will track the City's MBE/WBE utilization to ensure the absence of unlawful discrimination on the basis of age, marital status, religion, gender, sexual preference, race, creed, color, national origin, Acquired-Immune Deficiency Syndrome (AIDS), AIDS-Related Complex (ARC) or disability. In the use of such recruitment, hiring and retention of employees or subcontractors, the City requires all contractors to undertake nondiscriminatory and equal outreach efforts which include outreach to minorities and women as well as other segments of Oakland's business community.

**17.4.4 Sale of Recyclables for LBE/SLBE Credit.** For the purposes of determining LBE and SLBE participation, the City will calculate participation based on a "value added" approach for the sale of Recyclables. Specifically, if Contractor desires to receive credit for the sale of Recyclables to a LBE and/or SLBE processor, Contractor will be credited 20% of the sale amount of Targeted Recyclable Materials, as follows: The dollar amount of credit toward LBE and/or SLBE participation will be calculated as  $(0.20) \times (\$S)$ , where \$S is the sell price that Contractor receives for selling Targeted Recyclable Materials to a LBE and/or SLBE processor.

**17.6 Contractor An Independent Contractor.** It is expressly agreed that in the performance of the services under this Agreement, Contractor shall be, and is, an independent contractor, and is not an agent or employee of the City. Contractor has and shall retain the right to exercise full control and supervision of the services and full control over the employment, direction, compensation and discharge of all persons assisting Contractor in the performance of Contractor's services hereunder. Contractor shall be solely responsible for all matters relating to the payment of its employees, including compliance with social security, withholding and all other regulations governing such matters, and shall be solely responsible for Contractor's own acts and those of Contractor's subordinates and employees. Contractor shall determine the method, details and means of performing the services described in this Agreement unless such determination is specifically assigned to the City or other party. Contractor has completed the Independent Contractor Questionnaire attached as Attachment P.

**17.6.1 No Partnership or Joint Venture Created.** Nothing in this Agreement shall be construed as creating a partnership or joint venture between the City and Contractor, or as giving the City a duty to supervise or control the acts or omissions of any person performing services or work under the Agreement.

- b. Contractor and any permitted subcontractors shall, in all solicitations or advertisements for employees placed by or on behalf of Contractor, state that all qualified applicants shall receive consideration for employment without regard to age, marital status, religion, gender, sexual preference, race, creed, color, national origin, Acquired-Immune Deficiency Syndrome (AIDS), AIDS-Related Complex (ARC) or disability.
- c. If applicable, Contractor shall send to each labor union or representative of workers with whom Contractor has a collective bargaining agreement or contract or understanding, a notice advising the labor union or workers' representative of Contractor's commitments under this nondiscrimination clause and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
- d. Contractor shall make its goods, services, and facilities accessible to people with disabilities and shall verify compliance with the Americans with Disabilities Act by executing Attachment J ("Declaration of Compliance with the Americans with Disabilities Act") attached hereto and incorporated herein.

**17.3.2 Treatment of Customers.** In performing this Agreement, Contractor shall not discriminate against Customers or potential Customers because of sex, sexual preference, race, creed, color, national origin, Acquired-Immune Deficiency Syndrome (AIDS), AIDS-Related Complex (ARC) or physical handicap.

**17.4 Compliance with the City's LBE and SLBE Programs.** Contractors utilizing subcontractors shall comply with the Local and Small Local Business Enterprise Program (LBE/SLBE) goals attached and incorporated herein as Attachment K. Additionally, opportunities for training and employment shall be given to residents of Oakland.

**17.4.1 Ownership and Workforce Composition.** Contractor shall submit information concerning the ownership and workforce composition of Contractor's firm as well as its subcontractors and suppliers, by completing Attachment L ("Professional Services Questionnaire"), Attachment M ("Project Consultant Team"), and Attachment N ("Employment Questionnaire"), attached and incorporated herein and made a part of this Agreement.

**17.4.2 Affirmative Action Efforts.** All affirmative action efforts of Contractor are subject to tracking by the City. This information or data shall be used for statistical purposes only. All contractors are required to provide data regarding the make-up of their subcontractors and agents who will perform City contracts, including the race and gender of each employee and/or contractor and his or her

Attachment F  
Small Business Subscription Rates

Attachment G  
Processing Facility's Relationship to Neighborhood



Attachment I  
Liquidated Damages

<i>Incident</i>	<i>Liquidated Damage</i>
1. Commencement of residential collection prior to 6:00 a.m. (without authorization by Director)	\$25.00 per incident
2. Failure to collect missed Recyclables within twenty four (24) hours, or by 6 p.m. on next business day (including Saturday), after a missed pick-up order is given to Contractor	\$25.00 per incident and \$100.00 per incident if within 10 business days of prior incident occurring at same Single or Multi-Family Dwelling, City Facility, or Small Business.
3. Two (2) consecutive failures to collect Recyclables at a dwelling with qualifying special handling services per Section 4.3.3	\$100.00 per incident and \$250.00 per incident if within 20 business days of prior incident occurring at same dwelling.
4. Collection from Single Family Dwellings on any day other than the previously specified collection day (Except for missed pick-up collections and/or except when authorized by Director)	\$10.00 each dwelling.
5. Failure to correct performance deficiency, after being notified by City, of factors such as non-replacement of recycling containers to designated locations, spilling, not closing gates, crossing or damaging planted areas, or similar violations. The quality of performance standard required to be met by Contractor will be delineated by City upon providing notice of said service deficiency.	\$25.00 per incident and \$100.00 per incident if within ten (10) business days occurring at same Single or Multi-Family Dwelling, City Facility, or Small Business.
6. Failure to keep collection vehicles clean	\$25.00 per incident and \$100.00 per incident if within five (5) business days of prior incident.
7. Driver or driver's helper not in uniform	\$25.00 per incident and \$100.00 per incident if within five (5) business days of prior incident.
8. Failure to provide by 5:00 p.m. on due date required reports. Any report shall be considered late until such time as the complete report is received by City.	\$25.00 per report per business day.
9. Disposing of Recyclable Material without authorization from the Director	\$1,000.00 per incident.

10. Failure to return Customer phone calls within twenty four (24) hours, or next business day, after a Customer leaves a message or City leaves a message (including via fax; computerized work order system)	\$25.00 per incident and \$100.00 per incident if within 10 business days of prior incident occurring at same Single or Multi-Family Dwelling, City Facility, or Small Business.
11. Failure to deliver recycling container within ten (10) business days of request	\$25.00 per incident.
12. Failure to implement or maintain the vector control management program specified in Attachment K	\$25.00 per day.
13. Failure to collect Recyclables at an eligible Single Family Dwelling unit on a scheduled collection day, when number of reported &/or documented failures is: 3-6% of units scheduled for that day greater than 6% of units scheduled for that day	\$15.00 per missed pick-up \$25.00 per missed pick-up
14. Failure to maintain proof of continual compliance with Agreement's insurance and performance bond requirements	\$100.00 per coverage requirement per calendar day
15. Failure for collection and transport vehicles to use designated truck routes when leaving and returning to Contractor's facilities.	\$25.00 per incident and \$100.00 per incident if within ten (10) business days the same vehicle is again in violation
16. Failure to maintain current DMV registration for any vehicle used for in performance of this Agreement	\$100.00 per vehicle per calendar day
17. Multi-family collection service audit shows that greater than 5% of multi-family accounts sampled are not being provided with Multi-Family Collection Service	One-time assessment of 1 percent of total monthly payment to Contractor for Multi Family Dwellings* for EACH percentage point above 5%  * based on most recent monthly invoice received by City prior to date of assessment
18. Failure to leave empty oil jugs after collection of full containers within twenty four (24) hours, or by 6 p.m. on next business day (including Saturday), after a missed jug replacement order is given to Contractor	\$25.00 per incident

Attachment J  
Declaration of Compliance with the Americans with Disabilities Act

Attachment K  
Local and Small Local Business Enterprise Program

Attachment L  
Professional Services Questionnaire

Attachment M  
Project Consultant Team

Attachment N  
Employment Questionnaire

Attachment O  
Local Employment Program



Attachment P  
Independent Contractor Questionnaire

Attachment Q  
Living Wage Ordinance Declaration of Compliance

Attachment R  
Acknowledgment of Campaign Contribution Limits Form

**Attachment S**  
**Equal Benefits Declaration of Nondiscrimination**

**Attachment T**  
**Nuclear Free Zone Disclosure Form**

Attachment U  
List of all Current Permits held by Contractor for Operation of Facilities

Attachment V  
Small Business Service Area

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MAY 4 2004