

FIRST AMENDMENT TO AGREEMENT

THIS FIRST AMENDMENT is made as of this 30th day of April, 2013, by and between the CITY OF SUNNYVALE, a municipal corporation (hereinafter referred to as the "City") and BAY COUNTIES WASTE SERVICES, INC., a California corporation (hereinafter referred to as "Contractor").

WHEREAS, the City and Contractor have entered into an Agreement for the Operation of the Sunnyvale Materials Recovery and Transfer Station for the period January 1, 2008 through December 31, 2014, and dated February 13, 2007 ("Agreement").

WHEREAS, the Agreement sets a minimum Recycling Level, and provides for a sliding scale of revenue sharing between City and Contractor based on the Recycling Level achieved by the Contractor; and

WHEREAS, the Agreement defines "Recycling Level", as the percentage of the Municipal Solid Waste (including Publicly Hauled Waste) entering the Station which is diverted from land disposal by Contractor's operations and thereafter recycled calculated as shown on Exhibit S to the Agreement; and

WHEREAS, Contractor's ability to divert recyclable materials from Municipal Solid Waste is dependent upon, among other things, the characteristics and capabilities of the materials recovery facility (hereinafter referred to as "MRF") equipment provided by the City at the SMaRT Station, and

WHEREAS, the City and Contractor entered into the Agreement following a competitive request for proposals process conducted prior to the construction of the current MRF equipment, based on preliminary drawings and flow diagrams prepared by City of the now-completed new MRF, and

WHEREAS, in preparing the Basic Annual Payment (the fixed portion of the Contractor's compensation as defined in the Agreement) portion of its proposal, Contractor and other proposer(s) made Recycling Level assumptions and expense/revenue projections based on those preliminary drawings and flow diagrams and on City provided data regarding the capabilities and accomplishments of the old MRF that was being replaced, and

WHEREAS, in preparing the Basic Annual Payment portion of its proposal, Contractor reasonably assumed that the new MRF would capture a minus 2-inch material high in organic content (referred to as “fines” hereafter) which was similar in quantity and character to the fines produced by the old facility, and that all of these fines could be marketed for composting similar to the fines from the old system, and

WHEREAS, on July 1, 2012 the City declared the MRF completed and operable and Contractor thereafter would be entitled to retain a percentage of recycling revenues pursuant to Section 5.06, and Exhibit P of the Agreement, and

WHEREAS Contractor and City agree that the new MRF allows Contractor to effectively remove recyclable materials from Municipal Solid Waste, and

WHEREAS, although the new MRF captures more fines than the old MRF, the fines from the new MRF include more broken glass and rocks (“inerts”), that make it more difficult to market the fines for composting, and Contractor now finds that a reduced portion of the fines from the new MRF system can be marketed for composting, thus reducing the overall recycling rate and substantially reducing its share of overall SMaRT Station recycling revenues, and

WHEREAS, Contractor and City relied on drawings, flow diagrams and data which led both Parties to assume higher Recycling Levels and recycling revenues, and upon which Contractor proposed a Basic Annual Payment lower that it would have made had the Parties known the actual quantities of marketable fines the new MRF would produce, and Contractor contends that it will thus suffer financial hardship as a result, and

WHEREAS, the City and Contractor understand that processing of the fines material to enable it to meet current compost market specifications is likely to reduce the gross amount of available fines to a smaller net amount suitable for marketing as compost feedstock, and

WHEREAS, the City and Contractor are currently researching and working to resolve issues of the marketability of the fines, and

WHEREAS, the City and Contractor entered into good-faith negotiations to determine an interim equitable adjustment to the revenue sharing provisions in the Agreement, and

WHEREAS, the City and Contractor wish to make certain temporary changes to the Agreement, including Exhibit "P" attached hereto as Exhibit "A", to equitably adjust the minimum Recycling Level and the sliding scale of Recycling Level and revenue share as shown in Interim Exhibit "P" attached hereto as Exhibit "B", until a final solution to marketing the fines is agreed upon, and

WHEREAS the City has paid Contractor recycling revenues in accordance with the existing Exhibit "P" attached hereto as Exhibit "A" to date.

NOW, THEREFORE, THE PARTIES AGREE AS FOLLOWS:

1. **First Amendment:** The Agreement is hereby amended on the terms herein. Capitalized terms used but not defined in this First Amendment shall have the respective meanings assigned in the Agreement. Within fifteen (15) days after the date of this First Amendment, the City will pay Contractor the amount of recycling revenues to which Contractor is entitled under the Interim Exhibit P (as defined below) since July 1, 2012, less the 10% retention on such amount as described in Section 7 below, which is estimated to be \$600,000. This sum shall be subject to the reconciliation process described in Section 8 below.

2. **Termination:** This First Amendment shall apply to the period beginning July 1, 2012 through the Termination Date (the "Effective Period"). The Termination Date is defined as the earlier of (a) such time that the Director of Environmental Services and the Contractor agree that the fines are marketable for beneficial use and those fines are diverted from land disposal, or (b) December 31, 2014, the expiration date of the Agreement (the "Expiration Date"). If termination occurs pursuant to (a), then for Recycling Level and revenue sharing calculation purposes, the Effective Period will end on the last day of the calendar month immediately prior to the Termination Date.

3. **Processing and Marketing Efforts:** The Contractor shall use good faith efforts to market the fines for diversion from land disposal, including working diligently and promptly with City to resolve issues regarding processing of the fines to

make them marketable. Contractor shall not delay marketing and diversion of the fines. Any and all costs for new equipment and/or modifications to existing equipment that the City and Contractor agree are needed to make the fines marketable will be paid by the City at City's discretion. City may request evidence of good faith efforts to market the fines from third parties and Contractor shall assist the City to provide this evidence.

4. **Progress Meetings:** City and Contractor shall meet not less than monthly to discuss the status and progress towards the necessary improvements to the MRF and/or the marketing of the fines. City and Contractor will promptly share all waste characterization studies conducted with respect to the fines.

5. **Interim Recycling Level and Allocation of Revenues:** The attached "Exhibit P – Interim Recycling Level and Allocation of Revenues from Sale of Recycled Materials" (attached hereto as Exhibit "B", referred to as "Interim Exhibit P") will be used to determine the revenue shares of the City and Contractor under Sections 5 and 6 of the Agreement throughout the Effective Period. Interim Exhibit "P" shall expire when this First Amendment terminates.

6. **Minimum Recycling Level:** Minimum Recycling Level in Article 3, Section 3.05.B of the Agreement shall be thirteen percent (13%) during the Effective Period.

7. **Retention of Monthly Revenues:** In addition to the City's share of net revenues from the sale of recyclable materials under the Agreement as modified by this First Amendment, City will retain ten percent (10%) of such net monthly revenues due Contractor during the Effective Period as an incentive for Contractor to use good faith efforts to market the fines, including working diligently and promptly with City to resolve issues regarding processing of the fines to make them marketable. Notwithstanding any other provision in this First Amendment, within fifteen (15) days after the Termination Date, the City shall pay Contractor all of the amounts so retained without deduction or offset.

8. **Reconciliations:** The parties shall perform reconciliations of the Recycling Level and allocation of recycling revenues during the Effective Period in accordance with Section 6.07 as modified by this Section 8. Recycling Level shall be

calculated per the Agreement as shown in Exhibit S attached hereto. The corresponding revenue allocation shall be determined based on Interim Exhibit "P", and applying those percentages to the total amount of revenue earned during the Effective Period. The resulting dollar amounts will be compared with the sum of the monthly payments to the City and any adjustment made by means of a separate payment from Contractor to the City or from the City to Contractor made within thirty (30) days after the amount of the adjustment is determined.

8.1 **Reconciliation Upon Signed Amendment:** The parties shall perform a reconciliation of the monthly Recycling Level and allocation of recycling revenues beginning with the month of July 2012 through the most recent month invoice submitted at the time this Amendment is executed. Within 15 days after the date of this Amendment, City will pay Contractor the difference in the amount of recycling revenues to which Contractor is entitled calculated under the Interim Exhibit P, less the 10% retention on such amount described in Section 7, and the actual amounts of recycling revenues paid to (or retained by) Contractor for the same period.

8.2 **Reconciliations During the Effective Period:** The parties shall perform reconciliation(s) of the Recycling Level and allocation of recycling revenues at intervals as described herein, but not less than annually beginning July 1, 2013, and as of the Termination Date as described in Section 2 above.

8.3 **If the Termination Date occurs on or before June 30, 2013:** The parties shall perform a reconciliation of the Recycling Level and allocation of recycling revenues for the period beginning July 1, 2012 and ending on the Termination Date.

8.4 **If the Termination Date occurs after June 30, 2013:** The parties shall perform a reconciliation of the Recycling Level and allocation of recycling revenues for the period beginning July 1, 2012 and ending June 30, 2013, and subsequent reconciliations will be performed 1) as of the Termination Date, and 2) following the close of each of the City's Fiscal Years (June 30) before the Termination Date.

9. **No Other Change:** Except as expressly modified by this First Amendment, all of the terms and conditions of the Agreement shall remain in effect.

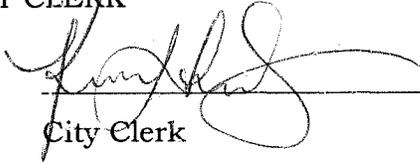
IN WITNESS WHEREOF, the parties have executed this First Amendment as of the day and year first above written.

ATTEST:

CITY OF SUNNYVALE

CITY CLERK

By:



City Clerk

By:



City Manager

APPROVED AS TO FORM:

BAY COUNTIES WASTE SERVICES, INC.



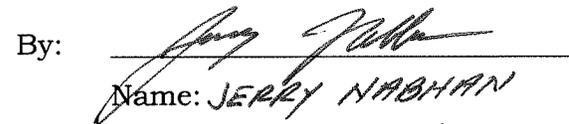
City Attorney

By:



Name: ROBERT MOLINARO
Title: PRESIDENT

By:



Name: JERRY NABHAN
Title: SECRETARY

(seal)

EXHIBIT P

**Recycling Level and Allocation of Revenues
from Sale of Recycled Materials**

Contractor's Revenue Share	City's Revenue Share	Recycling Level Achieved
50.0%	50.0%	25.0-25+%
50.0%	50.0%	24.5-24.9%
47.0%	53.0%	24.0-24.4%
45.0%	55.0%	23.5-23.9%
40.0%	60.0%	23.0-23.4%
35.0%	65.0%	22.5-22.9%
30.0%	70.0%	22.0-22.4%
26.0%	74.0%	21.5-21.9%
26.0%	74.0%	21.0-21.4%
26.0%	74.0%	20.5-20.9%
26.0%	74.0%	20.0-20.4%
22.0%	78.0%	19.5-19.9%
18.0%	82.0%	19.0-19.4%
15.0%	85.0%	18.5-18.9%
12.0%	88.0%	18.0-18.4%
9.0%	91.0%	17.5-17.9%
6.0%	94.0%	17.0-17.4%
3.0%	97.0%	16.5-16.9%
0.0%	100.0%	Below 16.5%

Interim Exhibit P
Interim Recycling Level and Allocation of Revenues
from Sale of Recycled Materials

Recycling Level Achieved	Contractor's Revenue Share	Cities Revenue Share
18.5-19.0%	50%	50%
18.0-18.4%	50%	50%
17.5-17.9%	45%	55%
17.0-17.4%	40%	60%
16.5-16.9%	37%	63%
16.0-16.4%	33%	67%
15.5-15.9%	30%	70%
15.0-15.4%	28%	72%
14.5-14.9%	26%	74%
14.0-14.4%	24%	76%
13.5-13.9%	22%	78%
13.0-13.4%	22%	78%
Below 13.0%	0%	100%

Exhibit S
Method for Calculating Recycling Percentage

The recycling level achieved by the Contractor will be calculated as shown below:

A = Tons of Municipal Solid Waste coming into the SMaRT Station for the month.
(*Note: Municipal Solid Waste does not include source separated yard trimmings, source separated curbside and public haul materials and materials delivered to the Buyback/Drop off Center. - See definition of Municipal Solid Waste in Exhibit A.)

B = Tons of Municipal Solid Waste placed in transfer trucks and hauled to the Kirby Canyon Landfill for disposal during the month.

C = Percent of incoming Municipal Solid Waste recovered during the month.

$$A-B/A = C$$

The following example shows how this formula will be used to calculate the recycling level achieved:

A = 200,000 tons

B = 145,000 tons

$$200,000 \text{ tons} - 145,000 \text{ tons} / 200,000 \text{ tons} = 27.5\% \text{ Recycled}$$

