

## **CONTRACT TERMS**

**THE SECOND AMENDMENT RECINDS THE PROVISIONS OF THE FIRST AMENDMENT, WHICH WAS SIGNED APRIL 27, 1993. LANGUAGE NEEDS TO BE ADDED TO THE RESTATED AGREEMENT THAT RECINDS THE FIRST AMENDMENT.**

### **ARTICLE 1**

#### **Definitions**

For the purposes of this Contract and the Contract Documents, the following terms shall have the following meanings:

1.1 Addenda means written or graphic documents issued by the City before Proposals were due that clarify, correct or change the Request for Qualifications/Proposals.

1.2 Ash means all residues from the combustion process, including unburned combustible matter, ash siftings, bottom ash, fly ash, scrubber residue and unspent reactant.

1.3 Bypass Waste means mixed municipal solid waste which is suitable for combustion but is not burned at the Facility because it is in excess of the Facility's capacity, either because of seasonal peaks in generation of waste or because the Facility is either shut down or operating at a reduced throughput due to maintenance or other reasons. Bypass Waste does not include recyclable materials (such as metals, glass, papers, etc.) that are removed from the waste stream for recycling purposes prior to the Bypass Waste being Loaded into Containers, and are identified as recyclable materials pursuant to the local comprehensive solid waste management plan.

1.4 City means the City of Spokane, Washington, a municipal corporation of the State of Washington, its successors or assigns.

1.5 Comprehensive Solid Waste Management Plan means the Spokane County Comprehensive Solid Waste Management Plan adopted in accordance with Chapter 70.95 RCW, as periodically updated.

1.6 Consumer Price Index or CPI means the consumer price index for all urban consumers (CPI-U), U.S. city average, all items, as published by the U.S. Department of Labor, Bureau of Labor Statistics.

1.7 Container means a receptacle that conforms to Proposal Requirements. The term includes, but is not limited to, Intermodal shipping containers.

1.8 Contract and Contract Documents are synonymous and mean the combination of all of the following:

- (a) this Contract;
- (b) the Contractor's Proposal;
- (c) any and all Addenda provided by the City unless designated for informational or Proposal evaluation purposes only;
- (d) the Request for Qualifications/Proposals;
- (e) the performance bonds, letters of credit or other financial guarantees required under Section 6.4; and
- (f) any and all appendices, attachments, amendments, change orders, or modifications of the foregoing documents agreed to by the parties in the manner prescribed by the Contract unless otherwise designated for informational or proposal evaluation purposes only.

1.9 Contractor means Regional Disposal Company, a wholly owned subsidiary of Rabanco, Ltd., selected by the City to provide Ash Transportation and Ash and Solid Waste Disposal services in accordance with this Contract, its successors or assigns and, as applicable, the Contractor's officers, employees and agents.

1.10 County means Spokane County, a political subdivision of the State of Washington, its successors, or assigns.

1.11 Dispose or Disposal means all work, services or operations performed by the Contractor pursuant to this Contract on or after the time that Waste enters the boundaries of a Disposal Site pursuant to this Contract.

1.12 Disposal Site means the Roosevelt Regional Landfill in Klickitat County, Washington, or other disposal site or facility used by the Contractor for the final treatment, utilization, processing, or deposition of any waste received under this Contract.

1.13 Facility means Spokane's mass-burn, resource recovery, electric generating Facility, together with appurtenant structures and equipment,

constructed and operated by Wheelabrator Spokane Inc., at a site located at the Spokane International Airport business park.

1.14 Hazardous Waste means waste which is hazardous, as defined in the Resource Conservation and Recovery Act, 42 USC Section 6901, et seq., as amended, and regulations implementing same; or, as hazardous or extremely hazardous in the state Hazardous Waste Management Act, as amended, and regulations implementing same. Special incinerator ash, as defined by WAC 173-306, is not Hazardous Waste.

1.15 Load or Loaded means the process by which and status of a Container after Waste is discharged into that container at the Facility.

1.16 Long-Haul Transport or Long-Haul Transportation means, but is not limited to, the storage, handling and transportation of Waste from the Facility to a Disposal Site.

1.17 Non-processible Waste means solid waste which is not suitable for combustion at the Facility, consisting of, among other things, refrigerators, clothes dryers, washing machines, air conditioners, hot water heaters and other major home appliances of similar size, large automobile parts, plus unreasonable amounts of mattresses or tires, and trees and lumber in excess of six (6) feet long and/or eight (8) inches in diameter. Non-processible Waste does not include recyclable materials (such as metals, glass, papers, etc.) that are removed from the waste stream for recycling purposes prior to the combustion process, and are identified as recyclable materials pursuant to the local comprehensive solid waste management plan.

1.18 Payment means any payment made to the Contractor by the City pursuant to this Contract.

1.19 Person or Persons means, without limitation, any individual, firm, corporation, association, partnership, consortium, joint venture, entity, government agency, or unit of local government.

1.20 Project means any and all items that the Contract requires to be done, kept, performed and furnished by the Contractor and by the City, respectively, for the Transportation and Disposal of Waste.

1.21 Proposal means the Contractor's response to the RFQ/P.

1.22 Proposal Requirements means all terms, conditions and requirements found in the Request for Qualifications/Proposals issued for this Project.

1.23 RCW means Revised Code of Washington.

1.24 Recycling/Transfer Station means a City-owned and operated facility at which Waste is received and loaded into vehicles.

1.25 Representative means, depending upon the context, the authorized representative of the City or the Contractor designated in accordance with Article 5.

1.26 Request for Qualifications/Proposals (RFO/P) means the City's Request for Qualifications/Proposals, issued to secure services for the Transportation and Disposal of Ash, Bypass Waste and Non-processible Waste, dated February 21, 1990.

1.27 Service Fee means the per-ton fee paid by the City to the Contractor for Waste accepted by the Contractor, calculated as the sum of the Long-Haul Transportation and Disposal Tipping Fee components, all as set forth in Article 8.

1.28 Special Waste means any waste that requires special handling under federal, state, or local laws or regulations.

1.29 State/Local Solid Waste Handling Fee means a governmentally-imposed fee, tax, surcharge, or similar charge on solid waste handling services, including but not limited to, Transportation and Disposal services. The term does not include federally-imposed fees, taxes, surcharges, or other charges levied equally on solid waste handling in all states.

1.30 Surety means the Person approved by the City to provide a cash bond, performance bond, letter of credit, or other financial guarantee required under Section 6.4 guaranteeing or providing the funds to guarantee, performance of the Contractor's obligations under this Contract; the surety must be licensed to conduct business in the state(s) where the Project is located and be included on the current list of Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies, as published in Circular 570, as amended, by the Audit Staff Bureau of Accounts, United States Treasury Department.

1.31 Term or Term of Contract means the term of this Contract determined in accordance with Article 20 and including any extensions thereof.

1.32 Tractor means a vehicle used to move Containers.

1.33 Transfer Trailer means a Tractor-drawn trailer that

conforms to the Proposal Requirements.

1.34 Transport or Transportation means, but is not limited to, the storage, handling, loading, unloading and transportation of containers under this Contract.

1.35 Uncontrollable Circumstances means only the following and no other events: riots, wars, civil disturbances, insurrections, acts of terrorism, epidemics, landslides, volcanic eruptions, earthquakes, explosion, floods, fire, collapse, underground damage, or lightning at or near any of the Disposal Sites that directly affect the operation of a Disposal Site; strikes, lockouts, or other labor disturbances that affect the entire solid waste handling industry; an increase in or imposition of State/Local Solid Waste Handling Fees that, in total, exceed fifteen percent (15%) of the Service Fee, not including those State/Local Solid Waste Handling Fees; or a change in law, as that term is defined in Section 8.2(a)(2), that makes performance under this Contract impossible.

1.36 USC means the United States Code.

1.37 Vehicle means a Tractor, Container, Transfer Trailer, or other piece of equipment used to Transport Waste.

1.38 WAC means the Washington Administrative Code.

1.39 Waste means any Bypass Waste, Non-processible Waste, or Ash.

## **ARTICLE 2**

### **General Provisions**

2.1 Applicable Law. This Contract is made in and shall be construed under the laws of the State of Washington.

2.2 Law Incorporated by Reference. Chapter 70.95 RCW and RCW 35.21.156, as amended or superseded, including the latest additions and revisions and including regulations promulgated thereunder, and the applicable provisions of the Spokane Municipal Code and the Spokane County Code, as amended or superseded, are incorporated by reference in the Contract Documents.

2.3 Complementary Contract Documents. The Contract Documents are complementary and shall be interpreted so that what is required by one

shall be as binding as if required by all. The Contractor immediately shall bring to the City's attention, for decision and mutual revision, any observed conflicts between or duplications of any Contract provisions or any material omission from the Contract. The Contractor shall obtain written instructions from the City's Representative before proceeding with services affected by omissions or discrepancies in the Contract Documents. In the event of a conflict between or among the Contract Documents, the following priority of documents shall govern:

- (a) this Contract;
- (b) Proposal from Rabanco;
- (c) letter from Rabanco, dated 5/22/90, attached;
- (d) letter to Rabanco, dated 5/18/90, attached;
- (e) RFQ/P;
- (f) RFQ/P Addendum #2, dated 4/19/90;
- (g) RFQ/P Addendum #1, dated 4/5/90; and
- (h) letter from Rabanco, dated 4/18/91, attached.

2.4 Severability. If any Contract provision is held void, invalid, or unenforceable under any applicable law, the remaining provisions of the Contract shall remain in effect and bind the parties; however, the parties shall negotiate in good faith to amend the Contract to effectuate the intent of any void, invalid, or unenforceable provision, if permissible under applicable law.

2.5 Time of the Essence. Time is of the essence of this Contract. The City's or Contractor's failure to object to a breach of any Contract provision is not and shall not be construed as a waiver of that provision. The payment or acceptance of compensation subsequent to any breach is not and shall not be deemed an acceptance of that breach. Any waiver must be in writing and supported by consideration.

2.6 Construction of Terms. Unless otherwise specified in the Contract, words describing material or work that have a well-known technical or trade meaning shall be construed in accordance with the well-known meaning generally recognized by solid waste professionals, engineers and trades.

2.7 Access. The City shall have the right and unlimited access to inspect any or all of the Contractor's and subcontractor's operations, Vehicles, Disposal Sites, or records related to this Contract; however, the City's access to records under this Section shall be subject to the confidentiality provisions of Section 6.6. The City shall have access to operations, Vehicles and Disposal Sites under this Section at any and all times during normal business hours or when there is activity of any kind at those operations or sites.

2.8 No Third Party Beneficiaries. This contract is entered into by the City in its governmental capacity and is not intended to create nor does it create any third party beneficiary or rights in any private Person. This Contract does create certain rights in the City with respect to the Contractor but those rights may be exercised only by and through the City.

2.9 Personal Liability. This Contract is not intended to create or result in any personal liability for any public official or City employee or agent, nor shall the Contract be construed to create that liability.

2.10 Comprehensive Contract. All services that are necessary to complete and carry out the Project as described in the Contract Documents shall be considered part of the Project and the Contractor shall perform or provide for the services without extra compensation unless otherwise expressly stated in the Contract Documents.

2.11 Subsidiary Contracts. No contract between the Contractor and its subcontractors, officers, employees, or agents, including all contracts relating to the use, lease, operation, or ownership of the Disposal Site or Vehicles, shall prevent, expressly or in effect, the Contractor from performing its obligations under this Contract.

2.12 Notices. Any written notice under the Contract shall be deemed served when delivered in person to the Person to whom it was intended, or if sent by certified mail or other carrier, return receipt requested, when mailed to that Person at the Person's last known business address. The date or time of service shall be the date or time the relevant document was sent to or personally delivered at that address. The Contractor shall address all notices and correspondence for the City to the City's Representative. The City shall address all notices and correspondence for the Contractor to the Contractor's Representative.

2.13 Article, Section and Subsection References. Any Articles, Sections, or subsections mentioned in this Contract by number only, without reference to another document refer to those Articles, Sections, or subsections contained in this Contract.

### **ARTICLE 3**

#### **Independent Contractor**

3.1 Contractor as Independent Contractor. The Contractor shall perform all work under this Contract as an independent contractor. The Contractor is not and shall not be considered an employee, agent, subagent, or

servant of the City for this Contract or otherwise; the Contractor's subcontractors, employees, or agents are not and shall not be considered employees, agents, subagents, or servants of the City for this Contract or otherwise.

## **ARTICLE 4**

### **Subcontractors**

4.1 Approval of Suppliers and Subcontractors. The Contractor shall submit to the City the names and addresses of all proposed suppliers or subcontractors for Project items and/or services that equal or exceed five percent (5%) of the estimated revenues to be paid by the City to the Contractor for the first year of operations under the Contract or, if operations have commenced under this Contract, those Project items and/or services that equal or exceed five percent (5%) of the total revenues paid by the City to the Contractor under this Contract for the previous year of operations. The City must approve, in writing, the suppliers and subcontractors identified under this Section, which approval shall not be unreasonably withheld.

4.2 Assignment of Subcontracts. All contracts between the Contractor and its subcontractors for services and work under this Contract shall contain a clause that if the Contractor defaults in performance of the Contract and the City accepts assignment of the subcontract under Article 18, the subcontractor shall recognize the City or its assignee as the Contractor and the City or its assignee shall have all the rights, remedies and responsibilities of the Contractor under that subcontract. The Contractor shall be responsible to the City for the acts and omissions of its subcontractors and suppliers and the subcontractors' suppliers, employees, agents, or servants.

## **ARTICLE 5**

### **Contractor and City Representatives**

5.1 Representatives. The Contractor and the City shall, respectively, designate and provide for the Term of this Contract the services of a competent representative for each party.

5.2 Contractor Representative. The Contractor's Representative shall be the Contractor's agent and shall represent the Contractor for all purposes of this Contract. All written or oral directions, instructions, or notices given by the City to that Representative and related to the subject matter of the Contract shall bind the Contractor as if delivered to the Contractor personally.

The Contractor's Representative shall be in charge of the Project at all times and shall have authority to act on behalf of the contractor; the Contractor's Representative's statements, representations, actions and commitments shall fully bind the Contractor.

The Contractor's Representative is:

Mark Wolken  
Senior Vice President  
200 – 112<sup>th</sup> Avenue NE, Suite 300  
Bellevue, Washington 98004

5.3 City Representative. Unless otherwise provided, the City's Representative shall be the City's representative for all purposes of this Contract and that Representative's statements, representations, actions and commitments shall fully bind the City to the extent permitted by applicable law.

The City's Representative is:

Damon Taam, Director  
Spokane Regional Solid Waste Disposal Project  
West 808 Spokane Falls Boulevard  
Spokane, Washington 99201

5.4 Change in Representative. The parties shall promptly notify each other in writing of any change in the Person designated as the Contractor's or the City's Representative.

## **ARTICLE 6**

### **Contractor Responsibilities**

6.1 General. The Contractor's responsibilities under this Contract include, but are not limited to:

(a) acceptance, storage, handling, unloading, Transportation and Disposal of all Ash delivered to the Contractor by the City or received by the Contractor at the Facility;

(b) acceptance, storage, handling, unloading, Transportation and Disposal of all of the City's Bypass and Non-processible Waste, delivered to the Contractor by the City or received by the Contractor at the Facility;

(c) ownership, operation and/or leasing of Disposal Sites and Vehicles necessary to perform its obligations under this Contract;

(d) procurement and maintenance of performance bonds, letters of credit, or other financial guarantees in accordance with Section 6.4;

(e) compliance with all applicable laws in accordance with Section 6.6; obtaining any permit, license, certificate, or governmental approval required for the Project in accordance with Section 6.7; and the payment of all applicable taxes and fees in accordance with Section 6.8;

(f) procurement and maintenance of insurance in accordance with Article 12; and

(g) maintenance of a closure and post-closure trust fund in accordance with Section 6.10.

6.2 Service and Commencement of Service. Service will commence upon the issuance by the City of notice to proceed. Contractor will be given a minimum of sixty (60) days lead time to commence service.

6.3 Equipment; Replacement or Repair.

(a) Equipment; Assignment; Equipment Lease. The Contractor shall construct, lease, or otherwise provide, maintain, or operate in a quantity sufficient to perform the services under this Contract in a timely manner throughout the Term of the Contract, the following:

- (1) Vehicles;
- (2) Disposal Site; and
- (3) Alternate disposal sites, when necessary.

The Vehicles and Disposal Site provided by the Contractor shall meet or exceed the requirements in the Proposal Requirements. The Contractor shall not purchase or otherwise obtain Vehicles to satisfy its obligations under this Contract, under a conditional sales contract, or any other contract or agreement in which a right is reserved in or accrues to any Person other than the City to remove or repossess the Vehicles unless that Person retains a purchase money security interest in the Vehicles. All contracts and agreements relating to the Contractor's acquisition and/or use of those Vehicles under this Contract shall include: (i) a requirement that if the Contractor defaults under that contract or agreement, the owner and/or lessor of the Vehicles agrees to accept the City as an assignee of the Contractor's

right, title and interest in the Vehicles under that instrument; and (ii) a provision that permits the Contractor to lease the Vehicles to the City in accordance with the Contract under terms and conditions substantially similar to the Equipment Lease identified herein in Section 6.3(c). {There is no Section 6.3(c)}

(b) Replacement or Repair. The Contractor, at its sole expense, shall keep all Vehicles and Disposal Sites in good working order and repair. The Contractor shall be liable for all costs reasonably incurred by the City to repair or replace the Vehicles and Disposal Sites owned, operated and/or used by the Contractor under this Contract, including, but not limited to, the Containers, Tractors, Transfer Trailers, storage or processing facilities, Ash transfer stations and Disposal Site Facilities; however, the City shall be liable for the repair or replacement of Vehicles and Disposal Sites to the extent such is necessary because of the negligence of the City.

#### 6.4 Contract Performance Bond.

(a) Contract Performance Bond. The Contractor shall provide and maintain for the Term of the Contract: (1) a contract performance bond substantially in the form of Form 4-7; or (2) a standby letter of credit from a financial institution whose long-term debt is rated in one of the three highest categories by a nationally recognized rating agency (e.g., Standard & Poor's rating of AAA, AA or A); or (3) any other financial guarantee or type of bond or letter of credit that is approved by the City. The amount of the bond or other financial guarantee initially provided under this subsection shall be Five Million and No/100 Dollars (\$5,000,000.00) in 1991 dollars. For each subsequent year under the Contract, the Contractor shall maintain the performance bond in an amount equal to fifty percent (50%) of the total revenues paid by the City to the Contractor under this Contract for the previous year of operations. The Contractor shall provide a new bond, or evidence satisfactory to the City of the bond's renewability, at least ninety (90) days before the bond then in effect expires.

(b) General Conditions. The Contractor shall provide to the City the bond described in Section 6.4(a), above, within thirty (30) days of executing this Contract. Any bond under this Section shall automatically terminate on the expiration of the initial ten-year period of the Contract, ten years from the date Waste is first accepted by the Contractor, and, if the City elects to extend the Contract, on the date the additional five-year periods terminate. However, the Contractor shall provide a new bond meeting the requirements in Section 6.4 in accordance with Article 20. Notwithstanding the termination of the bond provided under section 6.4, at any time within two years after the date any bond terminates, the City may make a claim against the bond because of the Contractor's failure to perform its obligations under the Contract. For

purposes of this Article, the word, “bond,” shall mean any bond, letter of credit, or other financial guarantee referred to in this Article and provided to guarantee or provide the funds to guarantee the performance of the Contractor’s obligations under this Contract.

All bonds given under this Article that are signed by the Surety’s agent must be accompanied by a certified copy of that agent’s authority to act for the Surety at the time the bond is signed. The City must approve, in writing, the Surety provided and the form and substance of all bonds. The Contractor may satisfy the bond obligations under this Article by providing bonds from one or more bonding companies meeting the qualifications set forth in this Article.

6.5 Alternate Transportation and Disposal Facilities. In the event the Contractor’s Transportation or Disposal Facilities are inadequate or unavailable to provide service under this Contract, the Contractor shall provide to the City alternate facilities.

6.6 Compliance with Law; Documentation; Confidential Business Records. The Contractor, its officers, employees, agents and subcontractors shall comply with every applicable federal, state, or local law, statute, rule, regulation, or ordinance, including those of agencies having jurisdiction over the Project, in performing obligations under this Contract. The City shall have the right to inspect copies of all correspondence or any other documents sent to or received from the Contractor or its subcontractors related to the Contractor’s compliance with the law under this Contract.

All Contract Documents will be subject to public review and copying as a public record pursuant to the Washington State Public Records Act. In the event a Contractor delivers to the City confidential and proprietary technical or financial information that would otherwise not be publicly disclosed, and which it believes is exempt from such disclosure or other provisions of state law, then such information shall be submitted in a separate sealed envelope, entitled, “Confidential Information for Project Review Only.” Such information shall be treated as confidential by the Project to the extent allowed by law.

In the event of a written request for disclosure pursuant to Washington State law, the Project shall review the confidential information and advise the requesting party and the Contractor, in writing, of the Project’s determination as to disclosure. If the Project determines to disclose the information, the Project shall allow the Contractor no more than five (5) days from receipt of such notice to take such legal action to enjoin disclosure as may be deemed necessary by the Contractor to protect the confidentiality of the information as provided by Washington State law.

All agreements between the Contractor and Persons employed for this Contract shall contain this Section's requirements. The requirements of this Section shall survive the termination or expiration of the Contract.

6.7 Permits, Licenses, etc. The Contractor shall obtain, maintain and pay for, at Contractor's sole expense, all permits required by law for its operations and activities under this Contract. For purposes of this Section, the term, "permits," means any temporary and/or permanent permits, approvals, license, certificates, inspection fees, surcharges and other approvals required for the performance of the Project. The Contractor shall provide to the City a list of all permits required for the Project designating the issuing agency and the dates of issuance and expiration of those permits, a copy of all current permits and the Contractor's schedule for obtaining or renewing all permits required during the term of the Contract.

The Contractor shall be liable for all fines or civil penalties that may be imposed by any regulatory agency for Contractor-caused violations of permits, laws, or regulations; the City shall not be liable for and shall not reimburse Contractor for payment of those fines or civil penalties. The Contractor reserves the right to contest any fine in an administrative proceeding or in court prior to its payment.

6.8 Taxes and Fees. Only as between the City and the Contractor, the Contractor shall be responsible and liable for payment of all federal, state and local taxes and fees, and surcharges of every form, that apply to any and all Persons, property, income, equipment, materials, supplies, structures, or activities that are involved in the performance of this Contract, including but not limited to, any income taxes, real property, excise, sales and use taxes, business and occupation taxes and fees that arise in connection with the Contract; however, the Contractor shall not be responsible or liable for payment of any tax or fee for which the City is ordinarily responsible without regard to the services provided by the Contractor under this Contract. The extent to which the Contractor is permitted to adjust the Service Fee(s) for cost increases in the rates of taxes, fees, or surcharges, if at all, is set forth in Articles 8 and 9.

6.9 Property; Covenant; Title Insurance. The Contractor has or will acquire sufficient property rights to the Disposal Site to satisfy its obligations herein. The Contractor agrees to remove or have removed promptly any liens or encumbrances that, because of any act or default of Contractor, its officers, employees, or agents, or of Contractor's subcontractors or sub-subcontractors, or material suppliers, or Facility owners are filed against a Disposal Site or any real or personal property required to fully perform under this Contract.

Subject to the provisions of Section 15.8, the Contractor shall provide to the City a covenant from the owner of any Disposal Site that, among other things:

(a) owner grants to the City a covenant that touches and concerns the property which covenants that owner's real property is designated by Contractor's Proposal for use in performing the Contract; and

(b) owner covenants that the property is and shall be kept free of all liens, mortgages, encumbrances and other interests that could interfere with the performance of the Contract or with any of the City's remedies against Contractor or Surety for any Contract default; and

(c) owner covenants that the claim or right of any Person, lienor, the Contractor, or Surety created by the transfer of any interest in the property shall be subordinate to the City's rights under the Contract; and

(d) the covenant is intended to run with the real property. The Contractor shall record each covenant, or a memorandum of that covenant, in the county in which the property is located. Each covenant shall have a term equivalent to or longer than this Contract and shall be in a form approved by the City attorney. A memorandum of this Contract shall be attached to each covenant and incorporated by reference therein.

Within thirty (30) days of executing this Contract, and within ten (10) days of Contractor's acquisition of property rights for Disposal Sites not yet acquired at the time the Contract is executed, the Contractor shall provide the City with certified copies of current title insurance policies. The title insurance policies shall be acceptable to the City and guarantee that the Contractor, or other owner of real property on which any of the Disposal Sites are located, has good title to the real property and that no liens or encumbrances against the property exist that would prevent the Contractor from using it for the purposes of this Contract. Within ten (10) days of providing to the City the executed Contract, and within ten (10) days of Contractor's acquisition of property rights for Disposal Sites on locations not yet acquired, the Contractor shall record a memorandum of this Contract in the county in which the property is located.

6.10 Closure and Post-closure Fund. The Contractor shall be responsible for all closure and post-closure costs relating to the Disposal Site. The Contractor shall establish and maintain at its sole expense any closure and post-closure trust fund now or hereafter required under any applicable federal, state, or local law or regulation.

The Contractor shall use the money in the trust fund, including interest earnings thereon, to guarantee proper closure activities and to provide for the

mitigation of environmental effects of the Disposal Site. Money in the trust fund shall be spent in accordance with laws and regulations of the State of Washington or other applicable law. Contractor shall provide an annual report to the City detailing the status of the trust fund, including the amount of the fund and the name and address of the trustee of the fund.

6.11 Records; Monthly Report. The Contractor shall keep accurate records of all transactions connected with this Contract including, but not limited to, all correspondence and invoices, transaction tickets, or receipts issued at a Disposal Site. The Contractor shall at all times maintain an accounting system that uses generally accepted accounting principles for all services rendered and materials supplied, including additional and deleted work, in connection with this Contract.

The Contractor shall provide to the City, by the fifteenth day of each month, a report for the preceding month summarizing routine and extraordinary activities during the prior month and plans and schedules for future activities. The monthly report shall include, but not be limited to:

- (a) the tonnage accepted from the Facility;
- (b) Container, Tractor and/or Transfer Trailer maintenance reports as required.
- (c) any complaints submitted to the Contractor and the Contractor's response, if any;
- (d) any extraordinary occurrences affecting the Contractor's performance, including but not limited to, occurrences affecting the Disposal Sites and Vehicles;
- (e) copies of the transaction tickets, invoices and/or receipts for the month;
- (f) changes in the status and readiness of alternate Disposal Sites and emergency Disposal Sites; and
- (g) documentation regarding Hazardous Waste, if any, gathered, produced and/or retained as required in Article 10.

6.12 Accidents; Complaints. The Contractor shall be responsible for all injuries, accidents and other mishaps associated with its operations that are not caused by the negligence of the City. The Contractor shall report any accidents resulting from the performance of this Contract to the City as soon as practicable by telephone or messenger. For purposes of this Section,

“accident” shall include the death of any person, any personal injury resulting in in-patient hospitalization or out-patient treatment by a physician, or damage to any real or personal property exceeding \$5,000. The Contractor shall report, in writing, to the City, within seven (7) days of that accident, complete details of the accident, including witness statements.

The Contractor shall respond in a reasonable manner to complaints, charges and allegations related to Contractor’s performance under the Contract within thirty (30) days of receipt of that complaint, charge, or allegation, including but not limited to, those complaints made or actions brought by citizens, citizen groups and public agencies. The Contractor shall deliver to the City a report of all significant complaints submitted that shall include but not be limited to the name and address of the complainant, the substance of the complaint, including the activity or service at issue, the action, if any, the Contractor has taken to investigate or remedy the problem or an explanation of why no action has been taken.

6.13 Payment of Subcontractors and Agents. Unless a reasonable dispute exists concerning payment, the Contractor shall promptly pay all subcontractors, materialmen, suppliers, or laborers engaged for purposes of this Contract in accordance with the contract or agreement between that Person and the Contractor.

6.14 Non-discrimination in Employment. The Contractor shall not discriminate against any employee or applicant for employment because of race, religion, creed, color, sex, marital status, national origin or the presence of any sensory, mental, or physical handicap, unless based upon a bona fide occupational qualification. The Contractor shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their creed, religion, race, color, sex, marital status, national origin, or the presence of any sensory, mental, or physical handicap. The Contractor’s action under this Section shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation and selection for training, including apprenticeship. The Contractor agrees to post, in conspicuous places, available to employees and other applicants for employment, notices setting forth the provisions of this non-discrimination Section.

6.15 Labor and Procurement Requirements. The Contractor and all subcontractors of the Contractor shall conform to the labor laws of the State of Washington and all other laws, ordinances and legal requirements affecting the work in Spokane County, Washington. The Contractor shall endeavor to use local firms and labor and purchase materials, supplies and equipment from

business located within and near the City and County whenever possible and practical and in conformance with law.

The Contractor shall provide for full and fair usage of minority/women business enterprise and shall use its best efforts to ensure that minority/women business enterprises have an equitable opportunity to compete for subcontract work.

6.16 Scheduling; Management; Quality of Performance. The Contractor shall coordinate, schedule in an orderly manner and manage all work done by Contractor's officers, employees, and subcontractors. Contractor, Contractor's officers, employees, and subcontractors shall perform every act or service under this Contract in a skillful and competent manner in accordance with the highest standards of the solid waste transportation and disposal industries. The Contractor shall be responsible to the City for any errors, deficiencies, or failures to perform under this Contact. All workers and subcontractors shall be skilled in their trades. All operators shall be licensed or otherwise qualified as required by law. The Contractor shall furnish evidence of the skill and licenses of its officers, employees, subcontractors and agents on the request of the City. The Contractor shall, at all times, enforce strict discipline and good order among its employees and all subcontractors.

6.17 Contractor Liability. The Contractor shall be liable to and shall indemnify the City in accordance with Article 11.

6.18 Subsidiary Use of Facilities. The Contractor may use the Vehicles for its own purposes during the Transportation of empty Containers or Transfer Trailers from the Disposal Site to the Facility if used in accordance with all applicable federal, state and local laws and regulations. If the Vehicles are used in that manner, the Contractor shall be solely responsible for all losses, damages, costs, charges, expenses, judgments, or any liabilities whatsoever resulting from that use.

## **ARTICLE 7**

### **City's Responsibilities**

7.1 General. The City's responsibilities under this Contract include, but are not limited to:

- (a) payment to the Contractor in accordance with this Contract;
- (b) delivery of all of the City's Ash, Bypass Waste and Non-processible Waste stream requiring disposal to the Contractor;

(c) preparation of estimates for the succeeding four quarters of the Contract of the range of Waste the City expects to deliver during these quarters; and

(d) preparation and maintenance of an ash generator management plan as required by RCW Ch. 70.138.

7.2 No "Put or Pay". The City shall pay for only the tonnage actually delivered to the Disposal Site, even if that tonnage is lower than the amounts forecast for any given year. The tonnages listed in the Request for Qualifications/Proposals are estimates of maximum amounts based upon the information available to the City. The City does not guarantee either the quantities indicated herein or any actual amounts of Ash, Bypass Waste and Non-processible Waste to be landfilled; however, the City will deliver all Ash, Bypass Waste and Non-processible Waste requiring Disposal.

7.3 Cooperation with Contractor. The City shall use its best efforts to cooperate with the Contractor and to respond to the Contractor's reasonable requests for information and assistance, consistent with the provisions of this Contract.

7.4 Disputes. All disputes under this Article shall be resolved in accordance with Article 16.

7.5 Rejection of Vehicles. The City may reject a Vehicle, including but not limited to, Containers, Tractors, or Transfer Trailers that it reasonably believes are not roadworthy or otherwise do not conform to the Proposal Requirements.

7.6 Days and Hours of Operation. The City, at its own discretion, may adjust the operating hours and days of operation per year of the Facility or any Recycling/Transfer Station. The City shall reimburse the Contractor for all reasonable actual cost increases incurred by the Contractor if the City adjusts the daily operating hours of the Facility greater than one hour, except for hour adjustments or day closures on general City holidays.

7.7 Loading and Transport of Containers. The City or its agent will Load and Transport Ash in Transfer Trailers and Containers supplied by Contractor to a site designated by Contractor, within fifteen (15) road miles of the Facility. The City will make reasonable efforts to assure that said Containers are filled to achieve maximum legal payloads.

7.8 Average Container Weight. The City shall make all reasonable efforts to ensure that the annual minimum average weight per Container delivered to the Contractor shall be as follows:

Ash ..... 27.5 tons  
Bypass and Non-processible Waste..... 23.5 tons

The City shall load the Containers such that they comply with applicable road weight limits.

## **ARTICLE 8**

### **Service Fees and Contractor Compensation**

#### 8.1 Calculation of Service Fee.

(a) Base Service Fee. The City shall pay the Contractor a Service Fee to include all costs incurred in providing services under this Contract, including but not limited to, the cost of applicable taxes, governmental permits (as that term is defined in Section 6.7), labor expenses, equipment, materials, supplies, utility expenses, environmental protection, landfill depletion and pre-funded closure and post-closure expenses and all other costs associated with the services provided under this Contract.

Effective February 1, 1998, the Service Fee shall be equal to the sum of the appropriate Service Fee components as shown:

Long-Haul Transport of Ash ..... \$18.82/ton  
Disposal of Ash ..... \$19.00/ton

Long-Haul Transport and Disposal of Bypass and Non-processible Waste:

0 to 10,000 tons per year ..... \$39.77/ton  
10,000 and above..... \$37.77/ton

In determining tons per year, the time period shall commence on January 1<sup>st</sup> and end on December 31<sup>st</sup> each year.

Long-Haul Transport and Disposal of asbestos containing materials per twenty foot (20') shipping Container:

Long-Haul Transport of Asbestos.....\$510.00/load  
Disposal of Asbestos..... \$39.50/ton

The Contractor shall provide a twenty foot (20') Container and trailer for asbestos-containing materials, and shall deliver it and pick it up from the City-operated Sullivan Road Recycling/Transfer Station. Asbestos placed within the Containers by the City shall be double-bagged and meet all federal and state asbestos handling regulations.

(b) CPI Adjustment for Service Fee Components. The price escalation adjustment for each Service Fee component shall be as follows:

(1) The price escalation adjustment effective for calendar year 1992 for each Service Fee component shall be as follows:

The CPI for January 1991 will be compared with the CPI for September 1991, to calculate the fractional change in CPI over this nine (9) month period. The fractional change will be multiplied by 0.80 to calculate the contract adjustment factor. The 1991 Service Fee components will then be adjusted using the same mathematical formula set out below, in Article 8.1(b)2.

(2) The annual price escalation adjustment effective for calendar year 1993 and each subsequent year through 1998 shall be as follows:

The CPI for the September preceding the beginning of each calendar year will be compared with the CPI for the previous September, to calculate the fractional change in CPI over twelve (12) months. This fractional change will be multiplied by 0.80 to calculate the Contract Adjustment. The previous year's Service Fee Components will then be increased by the Contract Adjustment percentage. These calculations are mathematically as follows:

Let N be the year for which the Service Fee is being calculated.

Let  $CPI_{(N-1)}$  be the CPI for the September prior to year N.

Let  $CPI_{(N-2)}$  be the CPI for the September two years prior to year N.

Fractional CPI Change =  $(CPI_{(N-1)} - CPI_{(N-2)}) / CPI_{(N-2)}$

Contract Adjustment = Fractional CPI Change X 0.80

Service fee Component(N) =  $(1 + \text{Contract Adjustment}) \times$   
Service Fee Component $_{(N-1)}$

In the event of a correction to a CPI, the adjusted Service Fee components shall be recalculated using the corrected CPI; however, there will be no recalculation of adjusted Service Fee components for corrections to CPI

that occur after the period during which the annual adjustment based upon CPI is in effect. The difference between the payments calculated on the basis of CPI and the payments calculated on the basis of the corrected CPI shall be reimbursed to the appropriate party as follows:

(A) If CPI is increased, the City shall pay the Contractor the difference in twelve (12) equal monthly installments; or

(B) If CPI is decreased, the City shall deduct the difference in equal monthly amounts from Payments made to the Contractor during the next twelve (12) months.

In the event that the standard reference base period of the CPI is changed, the annual adjustment shall reflect the new base period in the first calendar year the new base period is available. Any unresolved dispute regarding any other change in the definition or calculation of the CPI that materially affects the Service Fee under this Article shall be resolved by arbitration in accordance with Article 16 of the Contract.

(3) The annual price escalation adjustment effective for calendar year 1999 and each subsequent year shall be as follows:

The CPI for the September preceding the beginning of each calendar year will be compared with the CPI for the previous September, to calculate the fractional change in CPI over twelve (12) months. This fractional change will be multiplied by .80 to calculate the Contract Adjustment. The previous year's Service Fee Components will then be increased by the Contract Adjustment percentage. These calculations are mathematically as follows:

Let N be the year for which the Service Fee is being calculated.

Let  $CPI_{(N-1)}$  be the CPI for the September prior to year N.

Let  $CPI_{(N-2)}$  be the CPI for the September two years prior to year N.

Fractional CPI Change =  $(CPI_{(N-1)} - CPI_{(N-2)}) / CPI_{(N-2)}$

Contract Adjustment = Fractional CPI Change \* .80

Service Fee Component  $_{(N)}$  =  $(1 + \text{Contract Adjustment}) * \text{Service Fee Component}_{(N-1)}$

In the event of a correction to a CPI, the adjusted Service Fee components shall be recalculated using the corrected CPI; however, there will be no recalculation of the adjusted Service Fee components for corrections to

the CPI that occur after the period during which the annual adjustment based upon the CPI is in effect. The difference between the payments calculated on the basis of the CPI and the payments calculated on the basis of the corrected CPI shall be reimbursed to the appropriate party as follows:

(A) If the CPI is increased, the City shall pay the Contractor the difference in twelve (12) equal monthly installments; or

(B) If the CPI is decreased, the City shall deduct the difference in equal monthly amounts from Payments made to the Contractor during the next twelve (12) months.

In the event that the standard reference base period of the CPI is changed, the annual adjustment shall reflect the new base period in the first calendar year the new base period is available. Any unresolved dispute regarding any other change in the definition or calculation of the CPI that materially affects the Service Fee under this Article shall be resolved by arbitration in accordance with Article 16 of the Contract.

## 8.2 Service Fee Increases.

(a) Acceptable Increases. The Contractor may, after obtaining the City's approval, which approval may not be unreasonably withheld, increase Service Fees by one hundred percent (100%) of the Contractor's reasonable actual increased costs of performing the Project due to the events described below:

(1) Uncontrollable Circumstances. Service Fee components shall be increased for Uncontrollable Circumstances only to the extent permitted under Article 9.

(2) Change in Certain Laws. Service Fee components shall be increased to reflect the reasonable actual cost of Contractor's compliance with changes in federal and state laws, changes in city or county laws mandated by a change in federal or state law or changes in county or city laws applicable to all businesses in the relevant county or city. Except as provided in subsection 8.2(a)(3), below, no increase is permitted to reflect the cost of Contractor's compliance with changes in county (except Spokane County) or city (except the City of Spokane) law applicable only to the Contractor, Contractor's performance under this Contract, or to the solid waste management industry. For purposes of this Article, a change in law means the enactment, adoption, promulgation, modification, or change in interpretation of any federal, state, county, city, or other local law, ordinance, code, rule, requirement, regulation or similar legislation.

(3) Change in Certain Taxes, Fees, or Surcharges.

Subject to the limitations and conditions of Article 9, Service Fee components may be increased for the imposition of or increases in the rates of federal, state, county, or city taxes, fees (including State/Local Solid Waste Handling Fees) or surcharges applicable to all businesses or to Persons engaged in the solid waste management industry; however, Service Fee components may not be increased for the imposition of or increase in county (except Spokane County) or city (except City of Spokane) taxes, fees (including State/Local Solid Waste Handling Fees) or surcharges imposed by any county or city in which a Disposal Site is located.

(4) Additional Work. Service Fee components may be increased for additional work performed in accordance with Article 14.

(b) General Conditions and Limitations on Service Fee Increases. The Contractor may increase Service Fees under Section 8.2(a)(1), (2) and (3) only for costs incurred that are the least costly means of remedying the effects of an Uncontrollable Circumstance in accordance with Article 9, or for ensuring full compliance with a relevant change in law, including changes in taxes, fees, or surcharges. No Service Fee increases shall be allowed for any cost increases that are in any way attributable to conditions, structures, operations, or activities at the Facilities caused by the Contractor or its subcontractors, employees, agents, or servants, or are otherwise within Contractor's control. It is recognized that the United States Environmental Protection Agency (USEPA) has proposed new regulations applicable to solid waste landfills under the Resource Conservation and Recovery Act (RCRA) ("EPA Proposed Regulations to Review RCRA Criteria for Municipal Solid Waste Disposal Facilities and Practices 53 FR 33314; August 30, 1988"). If these regulations are adopted, the Disposal Site must also meet these regulations as adopted. To the degree that the final regulations are no more stringent than the draft regulations, the Proposal Requirements were that the cost of meeting these regulations was to be included in the Contractor's Proposal price, and shall not give rise to a claim for additional compensation. Any further requirements mandated by law which are no more stringent than the Proposal Requirements shall not form a basis for additional compensation.

The Contractor must fully demonstrate and document the need for the requested Service Fee increase to the City's satisfaction and approval as a condition precedent to the Contractor's right to the Service Fee increase under this Section.

(c) Cancellation of Service Fees Increases. On the City's request, Contractor shall immediately provide the City with all documents, information, or other evidence in the Contractor's possession or control that the city requests to determine whether there is a continuing need for the

Service Fee increase. The City may at any time cancel any Service Fee increase made under this Article. The Contractor shall reduce the Service Fee accordingly within thirty (30) days of the date the City notifies the Contractor of the City's determination that the need for the increase has expired or that the original increase was made in error. The Contractor shall at all times keep the City informed as to whether any increase remains necessary.

(d) Provision for Existing Circumstances. At the request of the Contractor, the City agrees that the following two actions which have occurred subsequent to the submittal of Contractor's Proposal may prevent the Contractor from accepting Ash at the Disposal Site on or after July 15, 1991, therefore qualifying the Contractor for a Service Fee increase under Article 8.2(a):

(1) The decision of the superior court in Skamania County, as set forth in the memorandum opinion issues by Judge Robert L. Harris, dated July 12, 1990, and Judge Harris' Findings of Fact, Judgment and Order, dated September 14, 1990, under Cause No. 89-2-00095-6, which invalidated the 1989 Klickitat County Solid Waste Management Plan Update and placed an injunction on the development of an Ash monocell and the delivery of Ash from Spokane County to the RRLC landfill in Klickitat County; and

(2) The adoption of Resolution No. 17090 by the Klickitat County Board of County Commissioners, on December 12, 1990, which amended the Klickitat County Solid Waste Management Plan and the Klickitat County Comprehensive Plan to require the issuance of a conditional use permit for the construction and operation of an Ash monocell landfill. Prior to this amendment, an Ash monocell was a permitted use in an approved landfill.

If the City authorizes the Contractor in writing to utilize an alternate Disposal Site, as provided for in Contractor's proposal, the City agrees to pay Contractor a fixed disposal fee for Ash of \$32.10 per ton, plus any State of Oregon surcharge which may be imposed on the importation of out-of-state Ash, in lieu of the disposal fee for Ash provided for in Article 8.1, for a minimum total of 60,000 tons of Ash over a period of time not exceeding twenty-four (24) months. Contractor shall have sixty (60) days from the date written notice is provided authorizing Contractor to utilize an alternate Disposal Site to commence Transportation to and Disposal of Ash at the alternate Disposal Site. Once written authorization to utilize an alternate Disposal Site is given by the City, such authorization and the increased Ash Disposal fee may not be cancelled until such time as the City has delivered to Contractor not less than 60,000 tons of Ash in a time period not exceeding twenty-four (24) months. Contractor shall be given not less than sixty (60) days' notice of City's intent to no longer utilize the alternate Disposal Site. The

parties agree to use their best efforts and all good faith to avoid use of alternate Disposal Sites. The parties agree that, upon receipt of 60,000 tons of Ash for Disposal at the alternate Disposal Site, Disposal of Ash shall immediately revert to Contractor's Disposal Site in Klickitat County, provided that Uncontrollable Circumstances do not exist which necessarily and unavoidably prevent disposal at the Klickitat County site. The determination as to whether an Uncontrollable Circumstance exists shall be governed by the provisions of Section 9.3.

### 8.3 Service Fee Decreases.

(a) Acceptable Reductions; Notice. Subject to the provisions of this Article, the Contractor shall reduce the Service Fee one hundred percent (100%) of the reduced costs of Contractor's performance under the Contract if the reduced costs are attributable to a condition or event for which Contractor is entitled to reimbursement of increased costs under this Article. The City shall serve the Contractor with notice and explanation of the City's request that the Contractor reduce Service Fees. Within thirty (30) days of service of that notice, the Contractor shall respond, in writing, to the City. The written response shall state whether or not the Contractor believes that any reduction in the Service Fee is justified by the change in law and shall itemize the reduction in cost of performing the Contract due to the relevant change in law. The Contractor shall fully document and otherwise support its response to the City's notice under this Section.

Upon petition of the Contractor, the City may at any time cancel reductions made under this Section if the City determines that the need for the reduction has expired or that a reduction was made in error. The Contractor shall at all times keep the City informed as to when any reduction due to change in law is appropriate and when any reduction is no longer appropriate.

(b) Most Favored Customer. The Contractor may dispose of Ash of a substantially similar character to the City's Ash from any other customer. However, if after the day this Contract is executed, the Contractor provides Ash disposal service to another customer, the fee charged to the other customer for disposal of Ash may not be lower than the Disposal of Ash component of the Service Fee charged to the City as adjusted in accordance with the Contract. It shall be the duty of the Contractor to notify City of any additional Ash disposal contracts with other customers and the fees agreed to therein. If the disposal of Ash component of the service fee charged to that customer is lower, the Ash Disposal component of the Service Fee charged to the City under the Contract shall be reduced as follows:

(1) If the amount of Ash handled or to be handled for that other customer is more than twenty-five percent (25%) of the most recent

annual total amount of waste received under this Contract, the Service Fee shall be reduced so that the Disposal of Ash component of the Service Fee for which the Contractor is charging the other customer a lower rate will be equal to the rates charged to that other customer for that service and shall be effective and retroactive to the date service is initiated for the other customer.

(2) If the amount of Ash handled for that other customer is less than twenty-five percent (25%) of the most recent annual total amount of Waste received under this Contract, the Disposal of Ash component of the Service Fee shall be reduced so that:

$$TFC = \frac{(V_1 * R_1) + (V_2 * R_2)}{V_1 + V_2}$$

TFC = the adjusted per ton amount of the City's Disposal of Ash component of the Service Fee

V<sub>1</sub> = the number of tons of Ash to be handled for the other customer

V<sub>2</sub> = the number of tons of Ash to be handled for the City in excess of V<sub>1</sub>

R<sub>1</sub> = the per ton service fee for the disposal of Ash component charged to the other customer

R<sub>2</sub> = the per ton Service Fee for the Disposal of Ash component charged to the City

#### 8.4 Other Service Fee Adjustments or Charges.

(a) The City may withhold Payment due under this Contract to pay any lien filed against Vehicles or Disposal Sites, or any real or personal property required to fully perform the Contract including, without limitation, any federal or state tax lien, creditor's lien, mechanic's, or materialmen's lien.

(b) The City shall reimburse the Contractor in accordance with Section 10.4 for the cost of testing, inspecting, handling and/or Disposing of Hazardous Waste.

#### 8.5 Payment.

(a) The Contractor shall provide to the City, by the fifteenth day of each month, an invoice in a format acceptable to the City and accompanied by supporting documentation as required by the City for services performed by the Contractor under this Contract in the preceding month. The City shall pay the Contractor by check, draft, or warrant for the previous month's service within thirty (30) days of the date of the Contractor's invoice. If any amount is disputed, the City may withhold payment of that disputed amount. In the

event that the City does not pay any undisputed amounts to the Contractor within the time limits established herein, or, in the event that a disputed amount is awarded to the Contractor following arbitration, the Contractor shall be entitled to interest on the unpaid amount at an annual rate of prime plus two percent (prime + 2%), based on the prime rate of Seafirst Bank, compounded daily.

(b) All unresolved disputes concerning the calculation of or adjustment to payments based upon Service Fees or Service Fee components shall be resolved by arbitration in accordance with Article 16. However, the undisputed portion of the adjustment shall be made effective promptly; further adjustment shall be made effective upon the resolution of the dispute under Article 16. In addition to any portion of the disputed adjustment ultimately awarded, the arbitrator may also award to the Contractor interest on the disputed amount from the date the Service Fee or Payment adjustment was effective. The interest rate shall be determined by the arbitrator and interest award paid within a period determined by the arbitrator, but in no event later than twelve (12) months from the effective date of the Service Fee or Payment adjustment. The interest award may be made by means of a further increase or decrease in the Payment made to the Contractor.

## **ARTICLE 9**

### **Allocation of Risk; Uncontrollable Circumstances**

9.1 Contractor Reliance. The Contractor warrants that prior to submitting its response to the Request for Qualifications/ Proposals, it has examined carefully and acquainted itself with:

- (a) all Contract Documents;
- (b) Request for Qualifications/Proposals;
- (c) the Project;
- (d) the Facility;
- (e) the difficulties that may be encountered in performing the Project; and
- (f) all applicable federal, state and local laws, regulations, ordinances, codes and rules, including USEPA and Washington State Department of Ecology Draft Regulations relating to Ash Handling.

9.2 City Disclaimer. The City does not warrant or admit the correctness of any investigation, interpretation, deduction, or conclusion by the Contractor relative to the condition or conditions of the Disposal Site or the Facility. The Contractor has made and shall make its own deductions and conclusions as to any and all problems that may arise from Facility site conditions and shall accept full legal responsibility and liability for those conditions.

9.3 Uncontrollable Circumstances.

(a) Uncontrollable Circumstances Limited. The Contractor's obligations to provide Transportation and Disposal services and the City's obligation to pay Service Fees under the contract are subject to Uncontrollable Circumstances that necessarily and unavoidably prevent performance of the Project. No other events, including but not limited to, local strikes, lockouts, or other labor disturbances that are restricted to the Contractor's operations under this Contract, vandalism, equipment, or Vehicle malfunction or breakage shall excuse nonperformance of the obligations of the parties.

(b) Notification; Reconstruction; Service Fee Increases. Within forty-eight (48) hours of the occurrence of an Uncontrollable Circumstance, the knowledgeable party shall notify the other of the event. If the occurrence of the Uncontrollable Circumstance damages, destroys, or otherwise incapacitates the Vehicles or Disposal Site, the Contractor shall, at the earliest practicable time, activate a plan for correcting, repairing, or reconstructing the affected Vehicles or Disposal Site. The Contractor shall submit to the City, as soon as practicable, the plan for correcting, repairing, or reconstructing the affected Vehicles or Disposal Site. The City, at its sole discretion, may require the Contractor to replace, repair, or reconstruct the same. If the City directs the Contractor in writing to so act, the Contractor may increase Service Fees in accordance with Section 8.2(a) by one hundred percent (100%) of the Contractor's reasonable actual increased costs of correcting, repairing, or reconstructing the affected Vehicles or Disposal Site.

(c) Obligation to Provide Alternate Facilities. If the Contractor on the occurrence of an Uncontrollable Circumstance, cannot, or fails to provide services under this Contract with the primary Vehicles and Disposal Sites, the Contractor shall make available to the City alternate Transportation and/or Disposal Sites. Subject to the conditions and limitations of Article 8, Service Fee components may be increased to reflect additional Transportation and/or Disposal costs incurred because an alternate Disposal Site must be used due to an Uncontrollable Circumstance.

(d) Alternative Remedies. If the reasonable actual increased cost of remedying the effects of any Uncontrollable Circumstance will or is

estimated to increase the Service Fee more than fifteen percent (15%), or, in the event of an increase in or imposition of a State/Local Solid Waste Handling Fee that exceeds fifteen percent (15%) of the Service Fee, not including the State/Local Solid Waste Handling Fee, the City may, in its sole discretion and as an alternative to a Service Fee component increase for the correction, repair, or reconstruction of affected Vehicles and Disposal Sites under subsection 9.3(b), or the use of alternate Vehicles and Disposal Sites under subsection 9.3(c), do the following:

(1) Purchase the Vehicles, except rail and/or marine facilities, at a price equal to the fair market value of those Vehicles before the occurrence of the Uncontrollable Circumstance; and

(2) continue service at the Disposal Site at the then-current disposal rate or charge; or

(3) Procure Waste disposal services at any other solid waste Disposal Site.

(e) Disputes. Unresolved disputes concerning the calculation of the cost of remedying the effects of an Uncontrollable Circumstance or the fair market value of Vehicles under this Section shall be resolved by arbitration in accordance with Article 16.

9.4 Insurable Uncontrollable Circumstances. If any of the Vehicles or Disposal Sites are damaged or destroyed due to explosion, floods, fire, or other events for which the Contractor is obligated to carry insurance, the Contractor shall act diligently to promptly collect and apply insurance proceeds to the correction or reconstruction of those Vehicles or Disposal Sites.

## **ARTICLE 10**

### **Ownership; Inspection of Waste; Hazardous Waste**

10.1 Ownership. Subject to the limitations and conditions of this Article, title to Ash that is Loaded into a Container or Transfer Trailer shall pass to the Contractor at the gate of the Facility.

10.2 Facility Inspection Program. The City shall establish and maintain a program of operating and monitoring procedures for the Facility to prevent the Loading of Hazardous Waste into the Containers or Transfer Trailers. Operators at the Facility and City Recycling/Transfer Stations shall be instructed and trained to implement the program.

10.3 Waste Inspection at Disposal Site; Handling of Suspected Hazardous Waste. The Contractor may inspect the contents of all Containers or Transfer Trailers delivered to the Disposal Site under this Contract. The City may be present to observe any inspection conducted under this Article and may, at its sole discretion and cost, inspect any Waste delivered to the Disposal Site under this Contract.

If the Contractor discovers Hazardous Waste which does not qualify as special incinerator ash under WAC 173-306 or Waste that the Contractor suspects is Hazardous Waste (hereinafter referred to as "Hazardous Waste") in a Loaded Container or Transfer Trailer, the Contractor shall:

(a) notify the City of the discovery within one hour of that discovery, unless that discovery occurs after 4:00 P.M., in which event notification shall be given by 9:00 A.M. of the next day the Solid Waste Disposal Project is open for business;

(b) gather, preserve, maintain and make available to the City all evidence demonstrating that the Hazardous Waste was delivered to the Contractor pursuant to this contract, including without limitation, origin of that Container or Transfer Trailer, the time the Container or Transfer Trailer was delivered to the Disposal Site, any photographs of the Hazardous Waste taken that might establish that the waste is Hazardous Waste and/or was delivered pursuant to this Contract, samples of Waste from the Container or Transfer Trailer that may demonstrate that they were delivered to the Disposal Site under this Contract and/or may demonstrate the origin of the Hazardous Waste, laboratory results (if any), any statements or documentation provided by federal, state, or local authorities and any other material the City reasonably believes is relevant;

(c) test or arrange to have tested, at the Contractor's own expense, the Hazardous Waste to ascertain whether that waste is Hazardous Waste;

(d) permit the City to inspect that Hazardous Waste within seventy-two (72) hours of notice by the Contractor to the City of the existence of that Hazardous Waste, test the Hazardous Waste within a reasonable period of time and examine all other evidence gathered by the Contractor under Section 10.3(b), above, at any time after the discovery of that Hazardous Waste; for purposes of any inspection conducted pursuant to this Section, the City shall have unrestricted access to the Disposal Site and/or any other site or facility at which the Hazardous Waste is located; and

(e) dispose of the Hazardous Waste and seek reimbursement from the City for the actual reasonable cost of that disposal in accordance with Section 10.4.

10.4 Liability for Testing, Inspecting, Handling and/or Disposing of Hazardous Waste. If, after inspecting and/or testing the Waste the Contractor discovers no Hazardous Waste, or discovers that the Hazardous Waste was not delivered to the Disposal Site under this Contract, the Contractor shall dispose of that Waste at no additional cost to the City and shall reimburse the City for the City costs, if any, of inspecting and/or testing that Waste, including but not limited to laboratory fees, transportation and handling costs and the inspector's food, transportation, lodging and labor costs.

If Hazardous Waste is discovered at the Disposal Site and there is proof satisfactory to the City (acting reasonably) that the Hazardous Waste was delivered to the Disposal Site under this Contract, the City shall pay or reimburse the Contractor for, subject to the limitations and conditions of this Article, the actual reasonable cost of the inspection, testing, identification, handling and disposal of that Hazardous Waste. Payment or reimbursement by the City will only be made if the Contractor:

(a) complies with the requirements of this Article including, but not limited to, subsections 10.3(a) through (e), above;

(b) assists the-City to the extent possible in ascertaining the Person previously owning or responsible for the delivery of the Hazardous Waste to the Recycling/Transfer Station or Facility; and

(c) documents its actual costs, the reasonableness of those costs and that the costs represent the least costly method of inspecting, testing, identifying, handling and/or disposing of the Hazardous Waste in compliance with applicable federal, state, or local law.

Any payment or reimbursement made by the City to the Contractor under this Section shall be paid in four (4) consecutive monthly installments or a single lump sum payment at the City's sole discretion. The first installment or the lump sum payment shall be paid thirty (30) days after the Hazardous Waste was discovered at the Disposal Site pursuant to this Article. The City shall also pay to the Contractor interest accruing on any payment due under this Article from the date the costs are incurred to handle and Dispose of the Hazardous Waste to the date payment for that handling and Disposal is made. Any unresolved disputes arising under this Article relating to the Contractor's actual reasonable costs shall be resolved by arbitration in accordance with Article 17.

10.5 Recycle or Re-use of Waste. The Contractor shall have the right to recycle or re-use any Waste to which it receives title under this Contract if Contractor receives prior written approval from City, and to retain any payments its receives for the sale of recycled or re-used materials.

## **ARTICLE 11**

### **Indemnification**

11.1 Indemnification of City. The Contractor shall at all times indemnify, hold harmless and defend the City and Spokane County, their elected officials, officers, employees, agents and representatives, from and against any and all losses, damages, costs, charges, expenses, judgments, liabilities (except those resulting solely from the City's or County's negligence) and attorney's fees (including those fees to establish the right to indemnification) (collectively, the "losses"), directly or indirectly resulting from, arising out of, or related to one or more claims described in this Section. The term, "claims," as used in this Article shall mean all claims, lawsuits, causes of action, demands, damages, penalties, charges, judgments, losses, liabilities of any character or kind, and other legal actions and proceedings of whatever nature, including, but not limited to, claims, lawsuits, causes of action, and other legal actions and proceedings involving bodily or personal injury or death of any person or damage to any property (including, but not limited to persons employed by the City, the Contractor or any other person and all property owned or claimed by the City, the Contractor, any affiliate of the Contractor, or any other person), in any way connected with:

(a) the performance or nonperformance of any provision or requirement of this Contract, including, but not limited to, Transportation and Disposal services by Contractor, its officers, employees, subcontractors, agents, or servants;

(b) any act or omission of Contractor, its officers, employees, subcontractors, agents, or servants at the Disposal Site, or in proceeding to or from the Disposal Site;

(c) the failure of Contractor, its officers, employees, subcontractors, agents, or servants to comply in any respect with the provisions and requirements of all applicable permits, licenses, laws, statutes, regulations, ordinances, codes, orders and all other legal requirements of federal, state, regional, county and local government authorities and agencies having jurisdiction over the relevant activities of the Contractor;

(d) any release(s) or emissions(s), or threatened release(s) or emission(s) of Waste, Hazardous Waste, or any dangerous substance by any Person(s) at, onto, into, above, under, through, or from any of the Vehicles or Disposal Sites subject to the limitations and conditions in Section 11.2, below; or

(e) defects in or damage to the Vehicles or Disposal Sites caused by the Contractor, its employees', agents', or subcontractors' negligence or failure to maintain the Vehicles in accordance with the manufacturer's instructions or schedules.

11.2 Hazardous Waste Liability. Notwithstanding Section 11.1, above, the City shall be liable for losses incurred during Long-Haul Transportation caused solely by the presence of Hazardous Waste in a Container or Transfer Trailer and all losses related to the handling and disposal of such Hazardous Waste after the Contractor has properly notified the City of the discovery of the Hazardous Waste and otherwise complied with Article 10.

11.3 Comprehensive Indemnification. The obligations of the Contractor under this Article shall apply to all losses and/or claims related to the Project whether the losses and/or claims are or are not asserted in a judicial forum; however, the Contractor shall not be liable for losses that arise from the negligence of the City or the County, their agents, or employees to the degree those losses are caused by that negligence. The City and County shall not be liable to the Contractor for, and the Contractor hereby releases the City and County from all liability for any injuries, damages, or destruction to all or a part of property owned or claimed by the Contractor that directly or indirectly results from, arises out of or relates to the Project, unless that liability arises from the negligence of the City or County, their agents, or employees and, in that event, the City and County shall be liable only to the extent of that negligence. Except as expressly provided in the Contract Documents, the City and County shall have no duty to reimburse the Contractor for, nor hold the Contractor harmless or indemnify or defend it against claims related to any negligent act or omission of the Contractor for the Project.

11.4 Notice to Contractor; Legal Defense. In the event an action is brought against the City for which indemnity may be sought against the Contractor, the City shall promptly notify the Contractor in writing. The Contractor shall have the right to assume and control the investigation and defense, including the employment of counsel and the payment of all expenses of claims against which it must provide indemnity under this Article. On demand of the City, the Contractor shall at its own cost and expense, defend and provide qualified attorneys acceptable to the city under service contracts acceptable to the City to defend the City, its officers, employees, agents and servants against all claims.

The City, at its own discretion, may employ separate counsel and participate in the investigation and defense but the City shall pay the fees and expenses of that counsel unless the Contractor has agreed otherwise.

11.5 Applicability of RCW 4.24.115. If a court of competent jurisdiction determines that this Contract is subject to RCW 4.24.115, then the Contractor's liability to indemnify the City for liability for damages arising out of bodily injury to persons or damage to property caused by or resulting from concurrent negligence of the Contractor and the City shall be limited to the Contractor's negligence.

11.6 Waiver of Industrial Insurance Immunity. It is further specifically and expressly understood that the indemnification provided in this Article constitutes the contractor's waiver of immunity under industrial insurance and Title 51 RCW solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties.

11.7 Royalties; Licenses Fees; Patents. The Contractor shall pay all royalties and license fees, shall defend all suits or claims for patent infringements that may occur in the performance of this Contract and shall hold the City harmless from any loss on account thereof.

11.8 No Waiver. Except as otherwise expressly stated herein, the parties do not under this Article waive or surrender indemnity available under any federal, state, regional, or local law. This Article shall survive termination or expiration of the Contract.

## **ARTICLE 12**

### **Insurance**

12.1 General. The Contractor shall provide, maintain and pay for the insurance coverage designated in this Article from an insurance company or companies approved by the City and licensed in the State of Washington at all times during the Term of the Contract. The insurance must fully protect the City from any and all claims, risks and losses in connection with any activity performed by Contractor under this Contract, except Uncontrollable Circumstances unless otherwise designated as insurable events under Section 9.4. The Contractor shall give the City forty-five (45) calendar days prior written notice of any cancellation, reduction, or modification of the insurance required under this Article.

12.2 Replacement Insurance. In the event the Contractor breaches any provision of this Article, the City, at its sole discretion, may procure and maintain, at the Contractor's sole expense, insurance to the extent the City deems proper. The City may offset the cost of that insurance against the Payment due under this Contract.

12.3 Change in Law. The Contractor immediately shall increase the amounts of insurance required to reflect any changes in Washington State law, federal law, or other applicable law to ensure that the insurance provided shall cover, at a minimum and in addition to the designated insurance requirements listed in this Article, the maximum limits under any applicable tort claims act. The coverage limits set forth in this Article shall increase or decrease annually to reflect one hundred percent (100%) of the increase or decrease in the CPI for the previous year.

12.4 Failure to Provide Insurance. The Contractor's failure to fully comply with any provision of this Article shall be considered a Class C Default of this Contract.

12.5 Insurance. Prior to initiation of the service under this Contract and throughout the Term of the Contract, the Contractor shall obtain and maintain the following insurance coverages which may be modified from time to time by mutual agreement between the City and Contractor:

- (a) Worker's Compensation Insurance as required by law;
- (b) Employer's Liability Insurance with a minimum limit of \$100,000 each accident;
- (c) Comprehensive or Commercial General Liability insurance, including products/completed operations, blanket contractual and personal injury liability insurance with limits of \$5,000,000 each occurrence, combined bodily injury and property damage; \$5,000,000 aggregate; and
- (d) Comprehensive (Business) Automobile Liability Insurance covering all owned, non-owned and hired vehicles with limits of liability of \$5,000,000 each occurrence, combined bodily injury and property damage.

The City and County will be named as an additional insured with respect to claims arising out of the operations of the Contractor under the above liability insurance policies, The City and County will be furnished annually with Certificates of Insurance in a form satisfactory to the City and county, and all policies shall provide for sixty (60) days advance written notice of material change, cancellation, or non-renewal.

If General Liability Insurance is provided by the Contractor on a “claims-made” basis:

(e) any “prior acts” or “retroactive” date shall not be subsequent to the first date of such claims-made coverage; and

(f) in the event of coverage termination or limitation, the Contractor shall purchase all available “tail” coverage at no cost to the City or County.

## **ARTICLE 13**

### **Coordination Meetings**

13.1 Initial Coordination Meeting. Prior to the commencement of services under this Contract, the Contractor, City, principal subcontractors and others requested by either party shall meet to discuss scheduling, processes, materials, change orders, personnel and any other matters the parties deem appropriate.

13.2 Periodic Coordination Meetings and Reports. The City and the Contractor shall hold periodic coordination meetings no less than once every three (3) months to review the progress of the work and to discuss operations, problems and/or complaints made by third parties. Either the City or the Contractor may organize, call and notify the other party of that meeting.

## **ARTICLE 14**

### **Additional or Deleted Work**

14.1 Payment or Credit for Additional Services. All requests for payment for services or work under this Contract, in addition to the services or work described in the Contract Documents, shall be made only under the conditions and procedures of this Article. For purposes of this Article, the term, “additional work,” means work that is in addition to the Project or other work required to be performed under the Contract Documents or any amendments thereof, but does not include any work required to comply with any changes in law, statutes, rules, regulations, ordinances, permit(s), permit conditions, or regulatory provisions. Nothing in this Article is intended to negate or lessen any other precondition or procedure for payment or reimbursement provided in this Contract.

14.2 Additional Work. The City shall submit to the Contractor a written request to perform any work or services additional to those performed under this Contract. Within twenty-one (21) days of that request, the Contractor shall submit to the City an itemized proposal stating the Contractor's actual costs for performing the additional work or services, a schedule and the impact the performance of that additional work or services will have on the Contractor's performance under this Contract. The Contractor's Proposal shall be based upon the least costly method for performing the additional work or services.

Upon receipt of the Contractor's Proposal, the City shall have authority to order Contractor to perform the relevant additional work or services whether or not the City accepts the Contractor's proposal, for an increase in Service Fees equal to the Contractor's actual reasonable costs of performing that work or services, plus five percent (5%) of those costs; the Contractor shall comply with that order. If the City approves the Contractor's written request for additional work or services and proposal, the City shall notify the Contractor in writing and order the Contractor to proceed. Unless the Contractor proceeds to remedy what a reasonable person would recognize as an emergency, the Contractor shall not be entitled to Service Fee increases for the additional work or services performed unless the City orders the Contractor to perform the work or services in accordance with this Article.

Unresolved disputes concerning the calculation of or adjustments to Service Fees under this Section shall be resolved by arbitration in accordance with Article 16.

## **ARTICLE 15**

### **Defaults in Performance of the Contract**

15.1 Contractor Default. There shall be four classes of defaults by the Contractor in its performance under this Contract:

(a) A Class A Default is the Contractor's failure to commence Waste Transportation and Disposal service with Vehicles and Disposal Sites properly permitted by law and in substantial and material compliance with the Proposal Requirements, on the date designated by the City.

(b) A Class B Default includes, on the commencement of services under this Contract, the Contractor's:

(1) failure to substantially perform the basic Transportation and/or Disposal services under this Contract on three (3) or more occasions of three (3) days duration in any given year; or

(2) change of control or transfer of controlling interest in the beneficial ownership of the Contractor without City consent as provided in Section 17.3.

(c) A Class C default includes the Contractor's:

(1) failure to procure and/or maintain a Contract performance Bond and/or other financial guarantee under Section 6.4; or

(2) failure to procure and maintain insurance under Article 12.

(d) A Class D default includes a delay of operations as described in the Proposal Requirements or any other failure by the Contractor to perform its obligations under this Contract.

## 15.2 Consequences of Contractor Defaults.

(a) Class A Default. In the event of a Class A default, the Contractor or Surety shall be permitted to remedy the default within ninety (90) days from notice by the City and shall pay to the City, from the date of that notice to the date the default is remedied, liquidated damages in the amount of \$50,000 per day. If the Class A default is not remedied within ninety (90) days of that notice, the City may, at its sole option:

(1) be released from its obligations under this Contract and use any other method or Person to transport and/or dispose of Waste and may sue for actual damages;

(2) exercise its right to take possession of and lease Vehicles in accordance with the Equipment Lease;

(3) within sixty (60) additional days, give the Contractor and the Surety notice that the City will purchase any or all of the Vehicles (other than rail or marine facilities) from the Contractor at a price equal to the Contractor's actual costs to the date of the notice, which purchase shall be consummated within one hundred twelve (112) days of the notice, or, as applicable, assume the lease under which the Contractor is operating any such Vehicles;

(4) seek judicial remedy of specific performance;

(5) pursue any combination of the foregoing or any other remedy provided under this Contract; or

(6) foreclose on the performance bond required by Section 6.4.

(b) Class B Default. In the event of a Class B default, the Contractor or Surety shall be permitted to remedy the default within ten (10) days from notice by the City and shall pay to the City the City's actual damages and costs for providing alternative Long-Haul Transportation and/or Disposal of Waste or otherwise operating after the change in ownership under Section 18.3. If the City disposes of the Waste at a City-owned and/or operated landfill, the Contractor shall pay to the City the difference between the cost of that disposal and the Disposal Site Service Fee component calculated under Article 8, plus ten percent (10%) of the disposal fee at that City-owned and/or operated landfill.

If the Class B default is not remedied within ten (10) days, the City may, at its sole option:

(1) be released from its obligations under this Contract and use any other method or Person to Transport and/or Dispose of Waste and may sue for damages;

(2) exercise its right to take possession of and lease certain Vehicles in accordance with the Equipment Lease;

(3) within sixty (60) additional days, give the Contractor and the Surety notice that the City will purchase any or all of the Vehicles (other than any rail/marine Vehicles) from the contractor at a price equal to the fair market of those Facilities, which purchase shall be consummated within one hundred twenty-two (122) days of the notice, or, as applicable, assume the lease under which the Contractor is operating any vehicles;

(4) seek the appointment of a receiver for the Vehicles in the Superior Court of Spokane County, such receiver to continue operation of those Vehicles under the direction of that court;

(5) seek judicial remedy of specific performance; or

(6) pursue any combination of the foregoing or any other remedy provided under this Contract.

(c) Class C Default. In the event of a Class C default, the Contractor or the Surety shall be permitted to remedy the default within fifteen (15) days from notice by the City and from the date of that notice to the date the default is remedied shall pay to the City liquidated damages in the following amounts:

(1) failure to procure and/or maintain insurance of the types and in the amounts required by Article 12: a per-day fee equal to twice the annual cost of obtaining that insurance on the day of the default divided by 365 (i.e., twice the daily cost of the insurance); and

(2) failure to procure and/or maintain the bond or other financial guarantee required in Section 6.4: \$5,000 per day.

If a Class C default is not remedied within fifteen (15) days, the City may, at its sole option, exercise any of the remedies set forth for remedy of a Class B default under this section.

(d) Class D Default. In the event of a Class D default, other than a delay of operations, the Contractor or the Surety shall be permitted to remedy the default within thirty (30) days from written notice by the City and, if the default is not remedied within that thirty (30) days, shall thereafter pay to the City liquidated damages in the amount of \$1,000 per day until the date the default is remedied, plus the City's actual damages. In the event of a delay of operations, the Contractor shall pay to the City \$1,000 for each day operations are delayed. If a Class D default occurs on a chronic basis, is material to the operations under the Contract and is not remedied, the City may, at its sole option, terminate the Contract. Any unresolved dispute concerning whether a Class D default is material for purposes of terminating the Contract, shall be resolved by arbitration in accordance with Article 17.

### 15.3 Default Procedure.

(a) Notice. To initiate default proceedings under this Article, the City's Representative shall give not less than thirty (30) days notice to the Contractor's Representative and its Surety of the City's intention to declare the Contractor in default. Unless the Contractor promptly shows cause to the City's satisfaction why it should not be declared in default under the Contract, the City shall declare the Contractor in default.

(b) Performance by Surety. In the event that the City orders the Contractor to discontinue further performance under the Contract and transfers the Contractor's obligation to perform to the Surety, the Surety shall, within twenty-four (24) hours, assume performance of the Contract and, as soon thereafter as possible, but no later than seventy-two (72) hours after the City transfers the Contractor's obligations to the Surety, take possession of all Vehicles and Disposal Sites necessary to perform under the Contract, employ those Persons needed to perform the work and purchase, lease, or otherwise provide any necessary Vehicles or Disposal Sites. The Surety's action under this Section shall not relieve it of its obligations under the Contract and the bond. If the City transfers performance to the Surety, the City shall make payments to the Surety or its agent for all work performed under the Contract subsequent to that transfer in an amount equal to the amount due the Contractor had it performed in the manner and to the extent of Surety's performance.

(c) Failure by the Surety; City Substitution. If the Surety fails to effectively and competently assume or continue performance within ten (10) days of its receipt of notice from the City, the City may exercise its rights to foreclose on the performance bond and also to exercise its right under the Equipment Lease; the Contractor shall, at the City's request, lease, sublease, or otherwise license the City to use all, or a part of, the Vehicles necessary under this Contract. The Contractor shall not require the City to execute any document to lease, sublease or license or to post any bond, pledge, deposit, or other security for those Vehicles. The City shall pay a fair market rental value for the Vehicles actually used for that Transportation and/or Disposal. The fair market rental value shall not exceed, as applicable, the Contractor's monthly lease payment, purchase contract installment payment or other payment made for the use of those Vehicles. The City shall not be liable as a result of its use of the Vehicles for arrearages, balloon payments, accrued interest, accelerated payments in the event of default or other extraordinary payments; the satisfaction of those payments shall not be a condition of the City's interim use of the Vehicles; and, as applicable, the lease, sublease, or license shall be suspended on the date the Surety or its agent accepts the transfer of performance under this Section.

If the City secures performance of the services described in this Contract at a cost less than the Service Fees established in accordance with Article 8, as adjusted in accordance with this Contract, then the City shall retain that difference. However, if the cost to the City is greater, the Contractor and/or Surety shall be liable for and pay the excess amount to the City.

(d) General. Any amount due the Contractor under this Contract at the time of default shall be reduced by the damages suffered and expenses incurred by the City due to the default.

A delay or interruption in the performance of all or any part of the Contract resulting from Uncontrollable Circumstances shall not be deemed a default under this Section.

15.4 City Default. For each and every event of default by the City under Article 7, within ten (10) days of notice by the Contractor, except as provided in subsection (d) below, and after the City has failed to cure the default or give Contractor reasonable assurances that the default or threatened default will be promptly cured, the Contractor shall have the right to all of the following remedies to the extent provided by law:

(a) Judicial Remedy of Specific Performance. For each and every default, the Contractor shall be entitled to a judicial remedy of specific performance or mandamus requiring the City to specifically perform the City's responsibilities as provided in Article 7; it being agreed that in the case of a default by the City, Contractor's remedies at law will be inadequate.

(b) Injunctive Relief. For each and every default, the Contractor shall be entitled to the remedy of a permanent or temporary injunction, either in mandatory or prohibitory form, it being agreed that, in the case of a default, the Contractor's remedy at law is inadequate. If a court of competent jurisdiction finds that Contractor is entitled to injunctive relief by virtue of a default by the City, the City and Contractor agree that Contractor shall not be required to post a bond in excess of \$1,000. If the governing body of the City places as an agenda item before its deliberative body any proposed ordinance, rule, or other regulation that threatens, on its effective date, to precipitate a default of the City's responsibilities under Article 7, the Contractor may seek an injunction from a court of competent jurisdiction enjoining the City's deliberative body from enacting that ordinance, rule, or regulation. If a court of competent jurisdiction grants Contractor a prepassage injunction, it is agreed between the City and the Contractor that Contractor shall not be required to post a bond in excess of \$1,000.

(c) Actual Damages. For each and every default, in its discretion, the Contractor shall be entitled to recover its actual damages.

(d) Termination or Suspension of Contractor's Performance of the Contract. For each and every default, Contractor shall be entitled to terminate or suspend Contractor's performance of the Contract if the City has not remedied the default within one hundred twenty (120) days of notice.

15.5 Contractor's Bankruptcy/Receivership. If, during the term of this Contract, the Contractor becomes insolvent, is dissolved, files a petition under any bankruptcy statute, is the debtor in any involuntary bankruptcy case that is not dismissed within sixty (60) days after the petition commencing that case is filed, makes a general assignment for the benefit of creditors, or if a receiver is appointed for the benefit of its creditors or an account of its insolvency, that event could impair or frustrate the Contractor's performance of this Contract. Therefore, it is agreed that on the occurrence of any one or more of those events, the City shall be entitled to request of Contractor or its successor-in-interest, adequate assurance of future performance in accordance with the terms and conditions of this Contract. Failure of Contractor and Surety to comply with that request within ten (10) calendar days of service upon both Contractor and Surety of a written request from the City for that assurance, shall entitle the City to terminate or suspend Contractor's performance of the contract. The City shall not be bound to the Contract by any trustee or receiver appointed to take possession of any of the Vehicles, Disposal Sites, or the Contractor's business.

15.6 No Waiver by City. Nothing in this Article, and no actions taken pursuant to this Article shall constitute a waiver or surrender of any rights, remedies, claims, or causes of action the City may have against the Contractor or its Surety under any other provision of this Contract or any provision of law.

15.7 Intercreditor Agreement. The parties understand that several other municipal corporation and customers of the Disposal Site desire to have a security interest in the real and personal property assets of the Contractor and that a priority security interest cannot be granted to all such customers, of which the City is one. Said customers, including the City, are now in the process of drafting an intercreditor agreement, which will define the rights and obligations among Contractor's creditors. If an intercreditor agreement covering Contractor's property is executed by the City, any conflicts with other sections of this Contract will be governed by the terms of the intercreditor agreement, except that in no event will the terms of the intercreditor agreement supplant any non-contradictory terms of this Contract or any other remedies available to the parties.

If the City does not enter into an intercreditor agreement, the City and Contractor will engage in good faith negotiations to reach a separate agreement which addresses the City's security interest in Contractor's equipment and

Disposal Site. Such separate agreement will take precedence over the terms of this Contract to the extent there is a conflict. If the parties are unable to reach a separate agreement, then the city may terminate this Contract upon one hundred eighty (180) days notice, in writing, to the Contractor, but the Contractor shall, with or without a separate agreement with the City, perform its obligations under this contract for a period of three (3) years from the date Waste is first received by Contractor. This shall be the City's only remedy and the City shall have no right to damages or claim against Contractor's bond or any other assets of the Contractor.

## **ARTICLE 16**

### **Arbitration, Judicial Venue and Governing Law**

16.1 Arbitration for Calculations. Subject to the conditions and limitations of this Article, controversies or claims arising out of or relating to the Service Fee, Payment, or other calculations under Articles 6, 7, 8 and 15 of this Contract and any other unresolved disputes designated for arbitration in the Contract, shall be exclusively settled by arbitration under the laws of the State of Washington, in accordance with the Commercial Arbitration Rules of the American Arbitration Association. All other controversies and claims shall be decided exclusively by the Superior Court of the State of Washington, in Spokane County, Washington. The decision of the arbitrator shall be final and binding on both parties and the Surety.

16.2 One Arbitrator. All arbitrated disputes shall be heard and decided by one arbitrator.

16.3 Limited Consolidation. There shall be no consolidation of any arbitration between the City and the Contractor with any other arbitration not involving, arising from, or relating to this Project.

16.4 Expedited Procedure. In the event that the City determines, in its sole opinion, that the public interest requires a speedy resolution of any arbitrable controversy or claim regardless of the amount, the City shall have the option of electing resolution of the controversy or claim by the Expedited Procedures of the Commercial Arbitration Rules of the American Arbitration Association (Rules 54 through 58).

16.5 Jurisdiction; Venue. Each party to the Contract and the Surety accept jurisdiction of the courts of the State of Washington for the purposes of commencing, conducting and enforcing arbitration proceedings and agree to accept written notice of the arbitration proceedings sent by certified letter addressed to the party of intention. The parties agree that proper venue for

any judicial proceeding to enforce any decision or award made by an arbitrator under this Article shall be exclusively in Spokane County, in the State of Washington.

16.6 Nonarbitrable Disputes. The parties agree that the proper venue for any judicial proceeding brought under this Contract or any subcontract made pursuant to this Contract that is not subject to resolution by arbitration under this Article shall be the Superior Court of the State of Washington, in Spokane County.

16.7 Arbitrator's Fees; Attorney's Fees. The parties shall share the cost of any arbitration conducted under this Article. In the event suit or action or arbitration is instituted to enforce any right granted herein, each party shall be responsible for payment of its own attorney's fees unless otherwise indicated in this Contract.

16.8 Standing. Only the City and the Contractor shall have standing to bring or become a party to arbitration claims or legal actions under this Contract.

## **ARTICLE 17**

### **Successors; Assignment**

17.1 Contractor Delegation. The City executes this Contract with the Contractor as a qualified party to accomplish the Project. The Contractor's delegation of any Contract duties shall require the prior written consent of the City. Any delegation of duties shall not relieve the contractor or the Surety of any liability and/or obligation to perform.

17.2 Assignment. The Contractor shall not assign any rights or obligations under or arising from this Contract without the prior written consent of the City unless otherwise permitted under Section 17.3. The Contractor shall not assign any amounts due or to become due under this Contract without prior written notice to the City.

17.3 Change in Control or Ownership. Pursuant to the Proposal Requirements, the Contractor agrees to maintain, throughout the term of this Contract, a company net worth of at least Ten Million Dollars (\$10,000,000), as demonstrated by its most recent financial report. This net worth will be maintained despite any change in control or transfer of a controlling interest in the beneficial ownership of the Contractor. Any change in control or the transfer of a controlling interest in the beneficial ownership of the Contractor shall constitute a Class B default under the terms of this Contract, unless the

City consents to that transfer. “The Transfer of a controlling interest of Contractor” shall include, but is not limited to, the transfer or assignment of ten percent (10%) or more of the beneficial ownership of Contractor to or from a single entity, unless the City consents to that transfer or assignment.

Notwithstanding the foregoing, the City may, in its sole discretion, determine that new ownership can adequately and faithfully render the service called for in this Contract for the remaining term of the Contract and also maintain the Ten Million Dollar net worth requirement, and the City may then elect to execute a novation, allowing new ownership to assume the rights and duties of this Contract and releasing the previous ownership of all obligations and liability. The new ownership would then be solely liable for any work and/or claims related to this Contract.

17.4 Binding Effect. This Contract shall be binding on any and all successors or assignees in accordance with this Article.

## **ARTICLE 18**

### **Guarantees and Warranties**

18.1 Guarantees and Warranties Recruited by Contract. The Contractor shall provide to the City any and all warranties and guarantees specifically or implicitly required by any of the Contract Documents.

18.2 Other Guarantees and Warranties. The Contractor shall provide warranties and guarantees not already specifically required by the Contract Documents that may be reasonably necessary to ensure the viability of the City’s rights and remedies under this Contract.

18.3 City as Beneficiary. All warranties or guarantees for equipment, services, or materials furnished to Contractor or subcontractors by any supplier shall be deemed to run to the benefit of the City. If any supplier of any equipment, services, or material furnishes a guarantee or warranty for a period in excess of one (1) year from the date of acceptance, Contractor’s guarantee, as provided in this Article, shall be deemed to extend for a like period as to, that equipment, service, or material.

18.4 Contractor Compliance with Warranties. The Contractor shall fulfill the conditions of any manufacturer’s warranty for material or equipment.

18.5 Contractor Repair of Defects. Within a reasonable time after receiving written notice, the Contractor shall correct any defects in workmanship that exist prior to or during the period of any guarantee and any

damage caused by those defects or the repairing of those defects, at its own expense and without cost to the City or interruption of the Project.

18.6 Independent Guarantees and Warranties. The guarantees and warranties described in this Article shall not be construed to modify, limit, or lessen in any way, any rights or remedies that the City may otherwise have against the Contractor or the Surety.

## **ARTICLE 19**

### **Dissolution of the City and Successor to the City**

19.1 In the event that the City is dissolved or its solid waste functions and power relative to this Contract are taken from the City by legislative act, or by referendum of the people, or by agreement, all of the duties, rights and remedies of the City under the Contract, including, but not limited to, all bonds executed for this Contract, shall remain in full force and effect and shall be transferred to either: (1) the successor to the City as specified by the legislative act or referendum by which the City is dissolved; or (2) if no successor to the City is specified by the relevant legislation or referendum, the State of Washington, which shall be deemed to be the successor to the City under this Contract.

## **ARTICLE 20**

### **Term**

20.1 The Term of the Contract shall begin on its execution and end on October 21, 2011. The City shall have the right to extend the Contract for one (1) additional five-year period under the same provisions and for the same Service Fees calculated in accordance with Article 8 of the Contract, as may be amended from time to time. The City shall give the Contractor nine (9) months written notice of its intention to exercise its option to extend the Contract. In the event the City elects to extend the Contract, the Contractor must provide to the City, at least one hundred eighty (180) days before the expiration of the current period, a new bond or bonds satisfying the requirements of Section 6.4.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

CITY OF SPOKANE

By: \_\_\_\_\_  
City Manager

Attest: \_\_\_\_\_  
City Clerk

RABANCO REGIONAL LANDFILL CO.

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

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

Approved as to form:

\_\_\_\_\_  
Assistant City Attorney

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