

**RESTATED AGREEMENT BETWEEN  
THE CITY OF SUNNYVALE  
AND  
BAY COUNTIES WASTE SERVICES, INC.  
FOR COLLECTION OF SOLID WASTE**

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**TABLE OF CONTENTS**

		page
	RECITALS	1
ARTICLE 1	DEFINITIONS	3
1.01	Agreement	3
1.02	Cannery Waste	3
1.03	City	3
1.04	Collection	3
1.05	Consent and First Amendment	3
1.06	Contractor	4
1.07	Construction Debris	4
1.08	Delivery	4
1.09	Demolition Debris	4
1.10	Designated Waste	4
1.11	Disposal Site(s)	4
1.12	Effective Date of Consent and First Amendment	4
1.13	Environmental Laws	5
1.14	Garbage	5
1.15	Hazardous Waste	5
1.16	Household Hazardous Waste	5
1.17	Infectious Waste	5
1.18	Junk Dealer	6
1.19	MultiUnit Residential Premises	6
1.20	Owner	6
1.21	Person	6
1.22	Premises	6
1.23	Recycling	6
1.24	Recyclable Materials	7
1.25	Rubbish	7
1.26	Solid Waste	7
1.27	Source Separation	7
1.28	Sunnyvale Recycling Center	7
1.29	Sunnyvale Sanitary Landfill	7
1.30	Term	7
1.31	“Toters”	8
1.32	Transfer Station	8
1.33	Urban Wage Earners Index	8
1.34	Waste	8
1.35	Waste Generator	8
1.36	Yardwaste	8

ARTICLE 2	REPRESENTATIONS AND WARRANTIES OF THE CONTRACTOR	8
2.01	Corporate Status	8
2.02	Corporate Authorization	8
ARTICLE 3	GRANT AND ACCEPTANCE OF FRANCHISE	9
3.01	Grant of Franchise	9
3.02	Scope of Franchise; Exclusions	9
3.03	Term of Franchise	10
3.04	Acceptance of Franchise	10
ARTICLE 4	TERM OF AGREEMENT	10
4.01	Effective Date	11
4.02	Term	11
ARTICLE 5	WASTE COLLECTION SERVICES	11
5.01	General	11
5.02	Implementation Plan	11
5.03	Contingency Plan	12
5.07	Recycling Programs	13
5.08	Yardwaste Program	18
5.09	Other Solid Waste Collection Services	20
5.10	Hours of Collection	21
5.12	Litter Abatement	21
5.13	Transportation and Disposal of Solid Waste	22
5.14	Vehicles	23
5.16	Personnel	27
5.19	Demonstration Project	28
ARTICLE 6	OTHER COLLECTION RELATED SERVICES, STANDARDS AND AGREEMENTS	29
6.01	Billing	29
6.02	Reports by Contractor of Billings	29
6.03	Records and Reports: Waste Collection Operations	30
6.04	Inspection by City	30
6.05	Public/Customer Service and Accessibility	31
6.06	Service Complaints	32
6.07	Service Standards: Liquidated Damages for Failure to Meet Standards	32
6.08	City's Right to Direct Termination of Service to Premises	35
6.09	City's Right To Change Scope of Work; Pilot Programs	36
6.11	NonDiscrimination	37
6.12	Affirmative Action Program	37
6.14	Transition to Next Contractor	37
6.15	Report of Accumulation of Solid Waste: Unauthorized Dumping	37
6.16	Audit of City Billings	38
6.17	Prevailing Wages	38
6.18	Lease of Collection Vehicles	39
6.19	Operations Audits	39

ARTICLE 7	FRANCHISE FEE	39
7.01	Amount	39
7.02	Time and Method of Payment	40
ARTICLE 8	COMPENSATION	40
8.01	General	40
8.02	Contractor's Payment Initial Period	41
8.03	Contractor's Payment Subsequent Periods	41
8.04	Time of Payment	51
8.05	Offsets to Contractor's Payment	51
8.06	Adjustments for Changes	51
8.07	Maintenance of Financial Records	52
ARTICLE 9	INDEMNITY, INSURANCE, BOND	55
9.01	Indemnification	55
9.02	Insurance	56
9.03	Faithful Performance Bond	59
ARTICLE 10	CITY'S RIGHT TO PERFORM SERVICE	59
10.01	General	59
10.02	Temporary Possession for Service Interruptions Caused by Events Beyond the Contractors Control	60
10.03	Temporary Possession for Service Interruptions Caused by Other Events	60
10.04	Duration of City's Possession	61
ARTICLE 11	DEFAULT AND REMEDIES	61
11.01	Events of Default	61
11.02	Right to Terminate Upon Default	62
11.03	Possession of Property Upon Termination	62
11.04	City's Remedies Cumulative; Specific Performance	63
11.05	Excuse From Performance	63
11.06	Relationship of Liquidated Damages to Right to Terminate	64
11.07	Right to Demand Assurances of Performance	64
ARTICLE 12	OTHER AGREEMENTS OF THE PARTIES	64
12.01	Relationship of Parties	64
12.02	Compliance with Law	65
12.03	Governing Law	65
12.05	Assignment	65
12.06	Subcontracting	67
12.07	Binding on Successors	68
12.08	Parties in Interest	68
12.09	Waiver	68
12.10	Contractor's Investigation	68
12.11	Condemnation	68
12.12	Notice	69
12.13	Representatives of the Parties	70

ARTICLE 13	MISCELLANEOUS AGREEMENTS	70
13.01	Exhibits	70
13.02	Entire Agreement	70
13.03	Section Headings	70
13.04	References to Laws	70
13.05	Interpretation	71
13.06	Amendment	71
13.07	Severability	71
13.08	Counterparts	71

- 1 Added as Section 1.05.03 of Exhibit A to the Agreement.
- 2 Supersedes Section 1.04.10 of Exhibit A to the Agreement
- 3 For budget assumption purposes only. Does not imply there will be no 64 gallon carts distributed.

**RESTATED AGREEMENT BETWEEN  
THE CITY OF SUNNYVALE  
AND  
BAY COUNTIES WASTE SERVICES, INC.  
FOR COLLECTION OF SOLID WASTE**

THIS AGREEMENT is made and entered into as of the \_\_\_\_ day of \_\_\_\_\_, 1997 by and between the City of Sunnyvale, a municipal corporation of the State of California (hereinafter "the City") and Bay Counties Waste Services, Inc., a California corporation, formerly named Specialty Solid Waste and Recycling, Inc. and Specialty Garbage and Refuse Service, Inc. (hereinafter "Contractor").

**RECITALS**

This Agreement is entered into with reference to the following facts and circumstances which are found and declared by the City:

- A. The provision of adequate and reliable solid waste collection and disposal is essential to the health, safety and well-being of residents of the City.
- B. The State of California has found and declared that the rapidly increasing volume of solid waste resulting from population growth, industrial expansion and other factors requires an organized and comprehensive approach to solid waste management.
- C. As an essential part of the State of California's comprehensive program for solid waste management, the State has declared that it is in the public interest for local governmental agencies to make adequate provision for solid waste handling, including the promotion of recycling and reuse of materials which would otherwise be disposed of in landfills.
- D. The City Council concurs in the aforementioned findings and declarations of the State of California, which it finds to be applicable to the conditions prevailing within the City.
- E. The State of California has recognized in Public Resources Code Section 40059 that the City may determine all aspects of solid waste handling which are of local concern, including frequency of collection, methods of collection and transportation, level of services, charges and fees, and has declared that the City may determine whether any such services are to be provided by means of exclusive or non-exclusive franchises, contracts, licenses, permits or other means, and that

the City may grant to others authorization to provide solid waste handling services under such terms and conditions as the City may prescribe.

- F. The Charter of the City, Article XVI, authorizes the City Council to grant by ordinance a franchise for furnishing the City and its inhabitants garbage, waste and refuse removal and Section 8.16.070 of the Sunnyvale Municipal Code requires the City Council to provide for the collection of garbage, waste and refuse within the City by the issuance of one or more franchises or licenses to disposal service operators upon terms and conditions to be established in the applicable franchise or license.
- G. The city desires that a thorough, competent and qualified solid waste handling company provide the highest quality of solid waste collection for the residents and businesses of the City. To that end, the City has solicited proposals from solid waste handling companies to provide solid waste collection services of the type described in this Agreement pursuant to a franchise which is exclusive to the extent provided herein.
- H. The City Council has determined that an exclusive franchise for the collection of solid waste, the scope of which is described in this Agreement, is an appropriate means of providing for the efficient and orderly collection of solid waste. The City Council has evaluated all proposals submitted and has determined that the Contractor has proposed to provide such services in a manner and on the terms which are in the best interest of the City and its residents, taking into account the qualifications and experience of the Contractor in the collection of solid waste and the cost of providing such services.
- I. In furtherance of the foregoing, the City entered into an agreement with Specialty Garbage and Refuse Service, Inc., dated July 24, 1990, for the Collection of Solid Waste (the "Franchise Agreement"). The City consented to the assignment of the Franchise Agreement to Contractor in December 1992, at which time the Franchise Agreement was amended. The Franchise Agreement has been subsequently further amended by a Second Amendment dated as of January 11, 1994, a Third Amendment dated as of November 9, 1994, a Fourth Amendment dated as of December 19, 1995, a Fifth Amendment dated as of April 23, 1996, and a Sixth Amendment dated as of June 19, 1996.
- J. The City and Contractor desire to restate and consolidate into one document the Franchise Agreement and the previous six amendments, so that following such restatement and consolidation, the Franchise Agreement, as previously amended, shall read in its entirety as hereinafter set forth.

K. Nothing herein is intended to constitute a waiver or modification of the rights or obligations of either party as they may exist under the Franchise Agreement as previously amended. No substantive change of the rights and obligations under the Franchise Agreement as previously amended is intended by this Agreement.

NOW, THEREFORE, in consideration of the award of the franchise and the mutual covenants and agreements contained herein, the parties agree as follows:

## **ARTICLE 1 DEFINITIONS**

For purposes of this Agreement, unless a different meaning is clearly required, the following terms shall have the following meanings:

### **1.01 Agreement**

"Agreement" means the Restated Agreement between the City of Sunnyvale and Bay Counties Waste Services, Inc. for Collection of Solid Waste dated as of \_\_\_\_\_, 1996, including all exhibits and attachments, and any amendments thereto.

### **1.02 Cannery Waste**

"Cannery Waste" means solid waste generated by bulk food processors, including, but not limited to, canneries and frozen food processors.

### **1.03 City**

"City" means the City of Sunnyvale, a municipal corporation, and all of the territory lying within the municipal boundaries of the City as presently existing or as such boundaries may be modified during the Term. For purposes of the areas to be served by Contractor under this Agreement, "City" also includes unincorporated areas completely surrounded by the City of Sunnyvale all of which are now provided solid waste collection services by a contractor operating under a franchise granted by the City.

### **1.04 Collection**

"Collection" means (1) collection of solid waste and its transportation to the Disposal Site; and (2) collection and disposition (other than by disposal) of Recyclable Materials, as the context requires.

### **1.05 Consent and First Amendment**



"Consent and First Amendment" means that Consent to Assignment and First Amendment to Agreement between the City of Sunnyvale and Specialty Garbage and Refuse Service, Inc. for the Collection of Solid Waste dated as of the 17th day of December, 1992 by and among the City, Specialty Garbage and Refuse Service, Inc. and Bay.

**1.06 Contractor**

"Contractor" means Bay Counties Waste Services, Inc.

**1.07 Construction Debris**

"Construction Debris" means used or discarded construction materials removed from a premises during the construction or renovation of a structure.

**1.08 Delivery**

"Delivery" of solid waste by a Waste Generator shall be deemed to occur when solid waste is deposited in a receptacle or at a location that is designated for collection pursuant to the City's Municipal Code, or is otherwise discarded.

**1.09 Demolition Debris**

"Demolition Debris" means used construction materials removed from a premises during the razing or renovation of a structure by a licensed demolition contractor (C-21 license).

**1.10 Designated Waste**

"Designated Waste" means non-hazardous waste which may pose special disposal problems because of its potential to contaminate the environment and which may be disposed of only in Class II disposal sites, or Class III disposal sites pursuant to a variance issued by the California Department of Health Services. Designated Waste consists of those substances classified as designated waste by the State of California, in 23 California Code of Regulations Section 2522.

**1.11 Disposal Site(s)**

"Disposal Site(s)" means the solid waste handling facility or facilities designated by the City for the ultimate disposal (by Contractor) of solid waste collected by the Contractor, which may include, but are not limited to, the Sunnyvale Sanitary Landfill, the Transfer Station and the Raisch concrete and asphalt recycling facility located at the Sunnyvale Sanitary Landfill.

**1.12 Effective Date of Consent and First Amendment**

"Effective Date of Consent and First Amendment" shall mean the date of Closing of the Consent and First Amendment, which was January 29, 1993.

### **1.13 Environmental Laws**

"Environmental Laws" means all federal and state statutes, county and city ordinances concerning public health, safety and the environment including, by way of example and not limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §9601 et seq.; the Resource Conservation and Recovery Act, 42 U.S.C. §6901 et seq.; the Federal Clean Water Act, 33 USC §1251 et seq.; the Toxic Substances Control Act, 15 USC §2601 et seq.; the Emergency Planning and Community Right to Know Act, 42 USC §1101 et seq.; the Occupational Safety and Health Act, 29 USC §651 et seq.; the California Hazardous Waste Control Act, California Health and Safety Code §25100 et seq.; the California Toxic Substances Account Act, California Health and Safety Code §25300 et seq.; the Porter-Cologne Water Quality Control Act, Cal. Water Code §13000 et seq.; the Safe Drinking Water and Toxic Enforcement Act, Cal. Health & Safety Code §25249.5 et seq.; as currently in force or as hereafter amended, and all rules and regulations promulgated thereunder.

### **1.14 Garbage**

"Garbage" means putrescible animal, fish, food, fowl, fruit or vegetable matter, or any thereof, resulting from the preparation, storage, handling or consumption of such substances.

### **1.15 Hazardous Waste**

"Hazardous Waste" means all substances defined as hazardous waste, acutely hazardous waste, or extremely hazardous waste by the State of California in Health and Safety Code Sections 25110.02, 25115, and 25117 or in future amendments to or recodifications of such statutes, or identified and listed as hazardous waste by the U.S. Environmental Protection Agency, pursuant to the Federal Resource Conservation and Recovery Act (42 USC Section 6901 et seq.), and all future amendments thereto.

### **1.16 Household Hazardous Waste**

"Household Hazardous Waste" means hazardous waste generated at residential premises within the City and delivered by the Owner or occupant of such premises to a drop-off site, to be operated by the City.

### **1.17 Infectious Waste**

"Infectious Waste" means biomedical waste generated at hospitals, public or private medical clinics, dental offices, research laboratories, pharmaceutical industries, blood banks, mortuaries, veterinary facilities and other similar establishments which are identified in Health and Safety Code Section 25117.5.

**1.18 Junk Dealer**

"Junk Dealer" means a person who lawfully, and in accordance with all City ordinances, collects (without charge to the Waste Generator) or purchases used articles for purposes of restoration and/or resale and includes antique dealers, used building supply dealers, and automobile salvagers. Junk Dealer does not include a person who collects or accepts solid waste for recycling after source separation.

**1.19 Multi-Unit Residential Premises**

"Multi-Unit Residential Premises" means all Residential Premises, including apartments and condominiums, which contain four or more Residential Units, other than free-standing and/or ground level townhomes, which are considered single family residential premises for purposes of this Agreement. Mobile home parks are not Multi-unit Residential Premises.

**1.20 Owner**

"Owner" means the person holding the legal title to the real property constituting the Premises to which solid waste collection service is to be provided under this Agreement.

**1.21 Person**

"Person" means any individual, firm, association, organization, partnership, corporation, business trust, joint venture, the United States, the State of California, the County of Santa Clara, and special purpose districts.

**1.22 Premises**

"Premises" means any land or building in the City where solid waste is generated or accumulated.

**1.23 Recycling**

"Recycling" means the process of collecting, sorting, cleansing, treating and reconstituting materials which would otherwise become solid waste and returning them to the economic mainstream in the form of raw materials for new, reused or reconstituted products. The collection, transportation or disposal of solid waste not intended for, or capable of, reuse is not

Recycling. Recycling does not include use of solid waste for conversion to energy.

#### **1.24 Recyclable Materials**

"Recyclable Materials" means domestic, commercial or industrial by-products of some potential economic value, set aside, handled, packaged or offered for collection in a manner different from garbage or waste, and specifically includes, without limitation, glass, paper, plastic, metal and yardwaste. "Recyclable Materials" includes mixed recyclables.

#### **1.25 Rubbish**

"Rubbish" means all waste wood, wood products, printed materials, paper, pasteboard, rags, straw, used and discarded clothing, packaging materials, ashes, floor sweepings, glass, and other waste materials not included in the definition of Garbage, Hazardous Waste, or Yard Waste.

#### **1.26 Solid Waste**

"Solid Waste" means all putrescible and non-putrescible solid, semi-solid and liquid waste accumulated or delivered for collection and disposal or recycling within the City and includes Garbage, Rubbish and Yard Waste. Solid Waste does not include Hazardous Waste or Household Hazardous Waste, Infectious Waste, sewage, or abandoned automobiles.

#### **1.27 Source Separation**

"Source Separation" means the segregation into separate containers by the Waste Generator prior to delivery of individual components of Solid Waste, such as glass bottles, metal cans, newspapers, plastic containers, etc., for the sole purpose of Recycling.

#### **1.28 Sunnyvale Recycling Center**

"Sunnyvale Recycling Center" shall mean the recycling facility located within the boundaries of the Sunnyvale Sanitary Landfill.

#### **1.29 Sunnyvale Sanitary Landfill**

"Sunnyvale Sanitary Landfill" means the closed Class III landfill owned by the City, located at the intersection of Caribbean Drive and Borregas Avenue in the City.

#### **1.30 Term**

"Term" means the term of this Agreement.

**1.31 "Toters"**

"Toters" is a trade name for a specific brand of portable wheeled solid waste collection carts. As used herein, the term means the carts made by that manufacturer or any substantially similar type of wheeled plastic cart.

**1.32 Transfer Station**

"Transfer Station" means the Sunnyvale Materials Recovery and Transfer Station, located at 301 Carl Road, Sunnyvale, California.

**1.33 Urban Wage Earners Index**

"Urban Wage Earners Index" means the San Francisco-Oakland-San Jose Metropolitan Area Consumer Price Index (Urban Wage Earners and Clerical Workers 1982=100) published by the Bureau of Labor Statistics, U.S. Department of Labor.

**1.34 Waste**

"Waste" means the useless, unused, unwanted or discarded material and debris resulting from normal community and business activity or materials which by their presence may injuriously affect the health, safety and comfort of persons or depreciate property values in the vicinity thereof.

**1.35 Waste Generator**

"Waste Generator" means the owner or occupant of premises, including businesses, which initially produce Solid Waste.

**1.36 Yardwaste**

"Yardwaste" means tree trimmings, grass cuttings, dead plants, leaves, branches and dead trees (not more than six (6) inches in diameter) and similar materials generated at Premises.

**ARTICLE 2 REPRESENTATIONS AND WARRANTIES OF THE CONTRACTOR**

**2.01 Corporate Status**

Contractor is a corporation duly organized, validly existing and in good standing under the laws of the State of California. It is qualified to transact business in the State of California and has the corporate power to own its properties and to carry on its business as now owned and operated and as required by this Agreement.

**2.02 Corporate Authorization**

Contractor has the authority to enter into and perform its obligations under this Agreement. The Board of Directors of Contractor (or the shareholders if necessary) have taken all actions required by law, its articles of incorporation, its bylaws or otherwise to authorize the execution of this Agreement. The persons signing this Agreement on behalf of Contractor have authority to do so.

### **ARTICLE 3 GRANT AND ACCEPTANCE OF FRANCHISE**

#### **3.01 Grant of Franchise**

City hereby grants to Contractor the exclusive franchise, right and privilege to engage in the business of collecting and transporting solid waste generated within the City and to use the City streets for such purposes for the Term and within the scope set forth in this Agreement.

#### **3.02 Scope of Franchise; Exclusions**

The franchise granted to Contractor shall be exclusive except as to the following categories of Solid Waste listed in subsections a. through l. in this Section. The granting of this franchise shall not preclude the categories of Solid Waste listed in subsections a. through l. from being delivered to and collected and transported by others, provided that nothing in this Agreement is intended to or shall be construed to excuse any person from obtaining any authorization from City which is otherwise required by law:

- a. Recyclable Materials (including Yard waste which has been source-separated);
- b. Yard Waste removed from a Premises by a gardening, landscaping, or tree trimming contractor as an incidental part of a total service offered by that contractor rather than as a hauling service and tree trimmings, clippings, and all similar materials generated at parks, golf courses and other City maintained premises, which are collected and transported by City to the Disposal Site;
- c. Construction Debris or Demolition Debris removed from a Premises by a licensed construction contractor or demolition contractor as an incidental part of a total service offered by that contractor rather than as a hauling service;
- d. Non-putrescible Solid Waste separated by the Waste Generator for collection and transportation by a Junk Dealer, but not as a hauling service;

- e. Animal waste and remains from slaughterhouses or butcher shops for use as tallow;
- f. Hazardous Waste, including Household Hazardous Waste;
- g. Designated Waste;
- h. Solid Waste which is generated at any residential Premises and which is transported-personally by the owner or occupant of such Premises to a licensed public solid waste disposal facility in a manner consistent with the City Municipal Code and other applicable laws;
- i. Cannery Waste;
- j. Infectious Waste;
- k. By-products of sewage treatment, including sludge, grit and screenings.
- l. Waste generated at facilities owned or operated by the United States Government.

Contractor acknowledges and agrees that City may permit other persons besides Contractor to collect any or all of the types of solid waste listed above, including Recyclable Materials, without seeking or obtaining approval of Contractor under this Agreement.

To the extent that the franchise, right and privilege is exclusive, it shall remain so only so long as the Contractor is ready, willing and able to collect, transport and dispose of all solid waste which it is required to collect by this Agreement, in accordance with the provisions of this Agreement.

### **3.03 Term of Franchise**

The term of the franchise, as distinct from the Term of this Agreement, shall be twenty (20) years, commencing at 12:01 a.m. on July 1, 1991 and expiring at midnight June 30, 2011.

If this Agreement is terminated earlier than its expiration, the Franchise shall also terminate concurrently therewith.

### **3.04 Acceptance of Franchise**

Contractor hereby accepts the franchise on the terms and conditions set forth in this Agreement.

## **ARTICLE 4 TERM OF AGREEMENT**

#### **4.01 Effective Date**

The effective date of this Agreement shall be December 1, 1990 ("Effective Date"); provided that the parties may mutually agree to establish an earlier date.

#### **4.02 Term**

The Term of this Agreement shall begin on the Effective Date and shall end at midnight June 30, 2011.

### **ARTICLE 5 WASTE COLLECTION SERVICES**

#### **5.01 General**

The work to be done by Contractor pursuant to this Agreement shall include the furnishing of all labor, supervision, equipment, materials, supplies, and all other items necessary to perform the services required. The enumeration of, and specification of requirements for, particular items of labor or equipment shall not relieve Contractor of the duty to furnish all others, as may be required, whether enumerated or not.

The work to be done by Contractor pursuant to this Agreement shall be accomplished in a thorough and workmanlike manner so that the residents and businesses within the City are provided reliable, courteous and high-quality solid waste collection at all times. The enumeration of, and specification of requirements for, particular aspects of service quality shall not relieve Contractor of the duty of accomplishing all other aspects in the manner provided in this Section, whether such other aspects are enumerated elsewhere in the Agreement or not.

Contractor shall perform all work in accordance with Exhibit A, all sections of which are incorporated herein whether or not such sections are specifically referred to in any other section of this Agreement.

#### **5.02 Implementation Plan**

The parties recognized that substantial planning would be required in order to assure an orderly initiation of Solid Waste collection services on July 1, 1991 and initiation of the contemplated demonstration projects in December 1990. To that end the City required Contractor to submit, as a part of its Proposal, a detailed implementation plan addressing, among other things, the steps Contractor would take and the schedule on which it would take them, to prepare for such an orderly initiation of service and demonstration projects. The implementation plan, covering the Contractor's schedule for acquiring necessary equipment, personnel, storage and maintenance facilities, administrative offices, customer relations materials (including



collection schedules, route maps, billing forms, complaint forms, service request forms and so forth), in the form accepted by City, is attached as Exhibit B. Contractor agreed to adhere strictly to the implementation plan, to submit written status reports to the City on a weekly basis, commencing August 15, 1990 and to meet with the City periodically, upon City's request, to review progress on implementation. Contractor also agreed to adhere to the transition schedule attached as Exhibit B-1.

Failure to adhere to the implementation schedule was to constitute a breach of this Agreement and, if uncured, an event of default under Section 11.01.

### **5.03 Contingency Plan**

Contractor shall submit to City on or before March 15, 1991, a written contingency plan demonstrating Contractor's arrangements to provide vehicles and personnel and to maintain uninterrupted service during mechanical breakdowns, strikes, work stoppages and other concerted job actions, and other similar events.

### **5.04 Residential Solid Waste Collection Services**

- A. Regular Collection Services. Contractor shall collect all Solid Waste generated at Residential Premises within the City and delivered for collection. Solid Waste shall be collected from such Premises at the frequencies and in the manner described in Exhibit A, Sections 1.04 (Single-Unit dwellings) and 1.05 (Multiple-Unit Dwellings).
- B. Special Collections. Contractor shall collect all Solid Waste generated at single family, duplex, triplex and mobile home park Residential Premises (and at freestanding and/or ground level townhomes subscribing to can service) and delivered for collection at the curbside by Residential Waste Generators during three (3) special collection events to be held at intervals directed by the City. Special collection events will be of sufficient duration that each Residential Premises described above-will be served at least eleven (11) times per year. The special collections will be conducted in accordance with additional requirements, and subject to the limitations, set forth in Exhibit A, Section 1.04.04.

### **5.05 Commercial/Industrial Collection**

Contractor shall collect all Solid Waste generated at Commercial and Industrial Premises within the City and delivered for collection. Solid Waste shall be collected from such Premises at the frequencies and in the manner described in Exhibit A, Section 1.06 (Commercial/Industrial Collections-Bin Service and Drop Boxes).

## **5.06 City Facilities Collection**

Contractor shall collect all Solid Waste generated at Premises owned and/or operated by the City, at no charge to the City other than as part of the Contractor's Payment. Contractor shall make such collections Monday through Saturday, and in cases of emergency, if requested by City, on Sunday. The facilities to be provided service initially, together with the type and frequency of service, are listed on Attachment 1 to Exhibit A, which Attachment may be modified or expanded by City.

Contractor shall provide additional waste collection and consulting services entailing:

- collection of Solid Waste from all City-owned sidewalk litter containers;
- collection of beverage containers and other Recyclable Materials from special events;
- collection of Recyclable Materials from facilities owned and operated by the City, other governmental agencies and community service organizations identified in Exhibit A, Attachment 2.
- collection of Solid Waste from litter containers in City parks, if requested by City;
- Review of plans for new development with regard to Solid Waste service issues; all in accordance with the standards and requirements set out in Exhibit A, Section 1.07 (City Facilities).

## **5.07 Recycling Programs**

**A. Residential "Curbside" Recycling.** The Contractor will collect Recyclable Materials generated on single family, duplex, triplex and mobile home park Residential Premises, at freestanding and/or ground level townhomes subscribing to can service, and at a limited number of Multi-unit Residential Premises currently participating in curbside recycling, source separated and delivered for collection in authorized containers (to be provided by Contractor) at the curbside. Contractor will also collect Recyclable Materials generated on Residential Premises, source separated and delivered for collection at backyard or sideyard locations by occupants who are eligible for backyard or sideyard collection of Solid Waste as elderly or handicapped under rules and regulations adopted by City from time to time.

The Recyclable Materials to be collected are newspapers, glass, metal cans, motor oil, oil filters, plastic polyethylene terephthalate ("PET") containers, and cardboard. The City may expand or limit the types of materials to be collected.

Contractor will transport and deliver all Recyclable Materials collected to the Sunnyvale Recycling Center (or to the Sunnyvale Materials Recovery and Transfer Station at such time as that facility becomes operational) for subsequent processing and marketing by the City. No charge will be made to the City for delivery of the collected materials, nor will Contractor receive any portion of the proceeds received by City from sale of the collected Recyclable Materials.

Recyclable Materials will be collected from Residential Premises at the frequencies and in the manner described in Exhibit A, Section 1.04.09.

Contractor will take all steps necessary to ensure that the Residential Recycling Program achieves at least the same level of participation as that achieved by City in 1990, i.e., at least 4,306 tons of Recyclable Materials will be collected each year and the average level of household participation in each collection event shall be at least 22.4 percent; provided that the City does not award a contract or franchise for a competing residential recycling program to be operated by a third party.

**B. Commercial/Industrial Recycling.** Contractor will collect corrugated cardboard from Commercial and/or Industrial Premises without charge to the Waste Generator utilizing at least one waste collection vehicle dedicated full time (i.e., five days per week, eight (8) hours per day) and one waste collection vehicle dedicated four days per week, eight (8) hours per day, to the collection of corrugated cardboard from Commercial and Industrial Premises.

Contractor shall arrange for the sale or other disposition of the corrugated cardboard so collected, but not its disposal in a sanitary landfill, and for the revenues from such sales to be paid directly to the City by the purchaser. At such time as the recycling section of the Transfer Station becomes fully operational, Recyclable Materials collected pursuant to this section shall be delivered to the Transfer Station.

The collection of corrugated cardboard shall be performed in accordance with additional standards and requirements set forth in Exhibit A, Section 1.06.05.

**C. Multi-Unit Recycling**

1. Operation of Multi-Unit Residential Recycling Program

Commencing October 1, 1996, Contractor will separately collect Recyclable Materials from all Multi-Unit Residential Premises in the City.

The collection and delivery of Recyclable Materials from Multi-Unit Residential Premises will be carried out by Contractor in accordance with Section 1.05.03 of Exhibit A to the Agreement.

2. Schedule

The Contractor will implement the Multi-Unit Residential recycling program in accordance with Schedule 1(Sec. 1.05.03) of Exhibit A hereto.

3. Compensation

**a. General.** Contractor's Payment for the Sixth Year and Seventh Year of the Term will be increased as provided in Section 3.b below over and above the amount that would be due pursuant to the calculations called for in Sections 8.03.B and 8.03.C of the Agreement. Commencing with the Eighth Year of the Term (i.e., July 1, 1998 through June 30, 1999), Contractor's compensation for the Multi-Unit Residential recycling program will be fully integrated with the determination of Contractor's Payment as set forth in Section 8.03.D of the Agreement. Thus, the Actual Costs for Year Six (see Section 8.03.D.b.1.A), which are used to calculate the Contractor's Payment for Year Eight, will include the actual costs incurred in operating the Multi-Unit Residential recycling program during FY 1996-97, less the one-time start-up costs described in Section 3.b below, annualized as described in that section.

**b. Annual Payment for Multi-Unit Residential Recycling Program in Sixth and Seventh Years of the Term.** Contractor's Payment for the Multi-Unit Residential recycling program will be as follows:

- For FY 1996-97 (nine months) \$339,368  
The foregoing amount does not include \$41,152 for one-time start-up costs for a management consultant, three temporary employees for three months, telephone, postage and supplies. These costs will be paid to Contractor in a lump sum during August 1996.

In addition, if the Multi-Unit Residential Program does begin on schedule, the Actual Costs for it for Year Six, for

purposes of calculating the Contractor's Payment for Year Eight, will be annualized by multiplying the actual costs incurred (not including the one-time start-up costs) by  $(365 / 273)$

- For FY 1997-98      \$455,844

**c. Adjustments to Annual Payment.**

1. The foregoing amounts are based on the budgets set forth on Schedule 2(Sec. 1.05.03) and Schedule 3(Sec. 1.05.03) of Exhibit A hereto, which in turn are based on the scope of work described in Section 1.05.03 of Exhibit A hereto and the budget assumptions described in Schedule 4(Sec. 10.05.03) of Exhibit A hereto.

If the commencement of the Multi-Unit Residential program is delayed such that it is in operation less than a full nine (9) months during FY 1996-97, then (1) the payment to Contractor during Year Six will be calculated by prorating \$339,368 by multiplying it by a fraction, the numerator of which is the number of days of actual operation and the denominator of which is 273, and (2) the Actual Costs attributable to the Multi-Unit Residential program for purposes of calculating the Contractor's Payment for Year Eight will be annualized on the basis of the costs actually incurred during the period of operation, which will not include the one-time start-up costs described above, multiplied by  $(365 \div \text{number of days of operation})$ .

2. Both parties believe that the budgets are realistic. Subject to Subparagraph 3, below, the Contractor shall retain any income from actual costs (during either of the two years for which fixed payments have been established) being less than those projected for that year in the budget. Similarly, subject to subparagraphs 3 and 4 below, the Contractor shall not receive additional compensation if actual costs for either of such years are greater than those projected for that year in the budget.
3. Notwithstanding Subparagraph 2, the parties do wish to make adjustments to take into account the effect of extraordinary, uncontrollable changes in the cost of performance. To that end, and in the limited circumstances described in this Subparagraph 3, the Contractor's Payment for Multi-Unit Residential recycling may be adjusted to reflect changes in cost between those contained in Schedule 2(Sec. 1.05.03) of Exhibit A hereto and those actually incurred. Contractor's Payment for Multi-Unit Residential recycling in the Sixth and Seventh Years of the Term shall be increased or

decreased to the extent that a specific cost, over which Contractor could not have exerted control, differs from the projected cost and the net aggregate of all such increases and/or decreases equals or exceeds five percent (5%) of the Contractor's Payment for Multi-Unit Residential recycling for that year as set out above in Section 3.b. Such adjustment shall be made promptly in the year following the year in which the difference occurred. The full amount of the difference will be accounted for if the five percent (5%) aggregate threshold is reached.

4. In addition to the adjustment described in subparagraph 3, the parties recognize that the number of routes, and the associated costs budgeted, are based on the assumption that participation during Year Six and Year Seven will not exceed eighty five percent (85%) of the eligible multi-unit residential units, i.e., that the number of multi-unit complexes participating will not require a number of individual collection points in excess of 1,205. If the number of participating premises increases beyond this level, such that the Contractor cannot serve them effectively with two routes (notwithstanding its use of its reasonable best efforts to do so), then the Contractor may request an increase in compensation pursuant to the procedure set forth in Section 8.06 of the Agreement.

**d. Changes in Scope - Adjustments to Payment.** If, during either of the years for which the Contractor's Payment for Multi-Unit Residential recycling is fixed, the City directs a change in the scope of work for the Multi-Unit Residential recycling program set forth in this Agreement, and either party believes that the change will increase or decrease the cost of providing service by more than two percent (2%) of the Contractor's Payment for Multi-Unit Residential recycling, then that party may invoke the procedure for adjustment in compensation set forth in Section 8.06 of the Agreement.

**e. Savings in Waste Collection Costs.** If, as a direct result of the initiation of the Multi-Unit Residential recycling program, the Contractor experiences a reduction in costs for performance of the scope of work required by this Agreement below the amounts included in determining the Contractor's Payment for Years Six and Seven, City shall not be entitled to reduce the Contractor's Payment for such Years to reflect such cost reductions. However, these reduced actual costs during Year Six will be used to determine Contractor's Payment commencing in Year Eight of the Term, when the compensation for the Multi-Unit Residential recycling program is integrated with the overall Contractor's Payment process. Similarly, actual costs during Year Seven will be used to determine the Contractor's Payment for Year Nine of the Term.

The parties acknowledge that Contractor will most likely experience such a cost savings initially since (1) there are some Multi-Unit Residential Premises already receiving curbside recycling service, the cost for which will now be compensated under this Fifth Amendment, and (2) not all eligible Multi-Unit Residential Premises will elect to participate. This has been taken into account by the parties in agreeing that Multi-Unit Residential Premises constructed between the commencement of the program and June 30, 1998 will be included in the recycling program without an increase in the Contractor's Payment, unless and until the number of collection points exceeds 1,205.

## **5.08 Yardwaste Program**

### **A. Yardwaste Recycling Program**

Commencing July 1, 1994, Contractor will separately collect Yardwaste from all single family, duplex and triplex Residential Premises (including freestanding and/or ground level townhomes) in the City. In addition, if and when directed by City, Contractor will collect Yardwaste from mobile home parks.

Yardwaste separately collected will be delivered to the Transfer Station for processing.

The collection and delivery of Yardwaste will be carried out by Contractor in accordance with Section 1.04.10 of Exhibit A to the Agreement.

### **B. Schedule**

The Contractor will implement the Yardwaste program in accordance with Schedule 1 (Sec. 1.04.10) of Exhibit A hereto.

### **C. Compensation**

1. General. Contractor will be paid the amounts set forth below for conducting the Yardwaste program, in addition to the amounts set forth in Sections 8.03.B and 8.03.C of the Agreement for the Fourth and Fifth Years of the Term (i.e., from the commencement of Yardwaste program operations through June 30, 1996). Commencing with the Sixth Year of the Term (i.e., July 1, 1996-June 30, 1997), Contractor's compensation for the Yardwaste program will be integrated with the determination of Contractor's Payment as set forth in Section 8.03.D of the Agreement. Thus, the Actual Costs for Year Four (see Section 8.03.D.b.1.A), which are used to calculate the Contractor's Payment for Year Six, will include the actual costs incurred in operating the Yardwaste program during FY 1994-95.

If the commencement of the Yardwaste program is delayed such that it is in operation less than a full twelve (12) months during FY 1994-95, then (1) the payment to Contractor during Year Four will be calculated by prorating \$1,432,297 on the basis of the number of days of operation divided by 365, and (2) the Actual Costs attributable to the Yardwaste program for purposes of calculating the Contractor's Payment for Year Six will be annualized on the basis of the costs actually incurred during the period of operation multiplied by (365 ÷ number of days of operation).

**2. Annual Payment for Yardwaste Program in Fourth and Fifth Years of the Term.** Contractor's payment for the Yardwaste program will be as follows:

- For FY 1994-95 \$1,432,297.00
- For FY 1995-96 \$1,448,298.00

**3. Adjustments to Annual Payment.**

- a. The foregoing amounts are based on the budgets set forth on Schedule 2(Sec. 1.04.10) of Exhibit A hereto, which in turn are based on the scope of work described in Section 1.04.10 of Exhibit A and the budget assumptions described in Schedule 3(Sec. 1.04.10) of Exhibit A hereto.
- b. Both parties believe that the budgets are realistic. Subject to Subparagraph C, below, the Contractor shall retain any income from actual costs (during any of the two years for which fixed payments have been established) being less than those projected for that year in the budget. Similarly, the Contractor shall not receive additional compensation if actual costs for any of such years are greater than those projected for that year in the budget.
- c. Notwithstanding Subparagraph b, the parties do wish to make adjustments to take into account the effect of extraordinary, uncontrollable changes in the cost of performance. To that end, and in the limited circumstances described in this Subparagraph c, the Contractor's Payment for Yardwaste may be adjusted to reflect changes in cost between those contained in Schedule 2(Sec. 1.04.10) of Exhibit A hereto and those actually incurred. Contractor's Payment for Yardwaste in the Fourth and Fifth Years of the Term shall be increased or decreased to the extent that a specific cost, over which Contractor could not have exerted control, differs from the projected cost and the net



aggregate of all such increases and/or decreases equals or exceeds five percent (5%) of the Contractor's Payment for Yardwaste for that year set out above. Such adjustment shall be made promptly in the year following the year in which the difference occurred. The full amount of the difference will be accounted for if the five percent (5%) aggregate threshold is reached.

- 4. Changes in Scope - Adjustments to Payment.** If, during any of the years for which the Contractor's Payment for Yardwaste is fixed, the City directs a change in the scope of work for the Yardwaste program set forth in this Second Amendment to Agreement, and either party believes that the change will increase or decrease the cost of providing service by more than two percent (2%) of the Contractor's Payment for Yardwaste in that year, then that party may invoke the procedure for adjustment in compensation set forth in Section 8.06 of the Agreement.

Notwithstanding the foregoing, if City directs that Contractor expand the Yardwaste program to one or more mobile home parks, Contractor's additional compensation will be One Dollar and Seventy Cents (\$1.70) per month per mobile home residential unit for FY 1994-95, which includes the purchase and delivery of a Yardwaste cart to the residential unit. That price will be increased in FY 1995-96 by the percentage change in the San Francisco-Oakland-San Jose Metropolitan Area Index (Urban Wage Earners and Clerical Workers, 1982-84=100) published by the U.S. Department of Labor, Bureau of Labor Statistics, between the Index as of September 1993 and the Index for July 1995. Commencing with FY 1996-97, the cost will be integrated with the determination of the Contractor's Payment as set forth in Section 8.03.D of the Agreement.

- 5. Savings in Waste Collection Costs.** If, as a direct result of the initiation of the Yardwaste program, the Contractor experiences a reduction in costs for performance of the scope of work required by the Agreement below the amounts included in determining the Contractor's Payment for Years Four and Five as provided in Section 8.03.B and C, City shall not be entitled to reduce the Contractor's Payment for such Years to reflect such cost reductions. However, these reduced actual costs during Year Four will be used to determine Contractor's Payment commencing in the Sixth Year of the Term, when the compensation for the Yardwaste program is integrated with the overall Contractor's Payment process. Similarly, actual costs during Year Five will be used to determine the Contractor's Payment for the Seventh Year of the Term.

#### **5.09 Other Solid Waste Collection Services**

Contractor shall provide other collection services as requested by Waste Generators in the City on an on-call basis, including but not limited to, drop box service, special pick-ups of bulky waste, etc.

#### **5.10 Hours of Collection**

Collection of Solid Waste, including Recyclable Materials, may occur only within hours authorized by the City. Contractor may not collect Solid Waste in Residential Areas earlier than 7:00 a.m. or later than 8:00 p.m., and may not collect Solid Waste in other areas earlier than 7:00 a.m. or later than 8:00 p.m.

If the City amends its Municipal Code to further limit hours of operation, then the more restrictive requirement (i.e., the later start time and the earlier time after which operations shall cease) shall control.

#### **5.11 Collection Standards.**

**A. Care of Private Property.** Contractor shall use due care when handling solid waste containers provided by Waste Generators. Containers shall not be thrown from trucks, roughly handled, damaged or broken. Containers shall be returned to the collection point upright, with lids properly secured.

Contractor shall ensure that its employees close all gates opened by them in making collections, unless otherwise directed by the Waste Generator, and avoid crossing landscaped areas and climbing or jumping over hedges and fences.

City shall refer complaints about damage to private property to Contractor. Contractor shall repair all damage to private property caused by its employees.

**B. Noise.** All refuse collection operations shall be conducted as quietly as possible and shall conform to any federal, State, County and City noise level regulations, including the requirement that the noise level during the stationary compaction process not exceed 75 decibels at a distance of 25 feet from the collection vehicle. The City may conduct random checks of noise emission levels to ensure such compliance.

#### **5.12 Litter Abatement**

**A. Minimization of Spills.** Contractor shall use due care to prevent solid waste from being spilled or scattered during the collection or transportation process. If any solid waste is spilled, the Contractor shall promptly clean up all spilled materials. Each collection vehicle shall carry a broom and shovel at all times for this purpose.

Contractor shall not transfer loads from one vehicle to another on any public street, unless it is necessary to do so because of mechanical failure or accidental damage to a vehicle.

**B. Clean Up.** The Contractor shall clean up litter in the immediate vicinity of any solid waste storage area (including the areas where collection bins and debris boxes are delivered for collection) whether or not Contractor has caused the litter. The Contractor shall discuss instances of repeated spillage not caused by it directly with the Waste Generator responsible and will report such instances to City. City will attempt to rectify such situations with the Waste Generator if Contractor has already attempted to do so without success.

**C. Clean Up of Illegal Dumping.** Contractor shall respond to all calls from City regarding spilled or illegally dumped solid waste, including bulky materials, during regular work hours and, in emergencies, at night and on weekends. Contractor shall collect and deliver such solid waste to the Disposal Site, provided it does not exceed in volume the amount which can be collected by a two-person crew in a large pick up truck or collection vehicle.

**D. Covering of Loads.** Contractor shall place tarps on all open debris boxes during transport to the Disposal Site. Loads not properly covered are subject to assessment of a fee by the operator of the Disposal Site and Contractor shall be responsible for all such fees. Alternatively, the facility operator may require Contractor to purchase a tarp for the boxes on the vehicle.

### **5.13 Transportation and Disposal of Solid Waste**

Contractor shall transport and deliver all Solid Waste collected under Sections 5.04, 5.05, 5.06, 5.08 and 5.09 to the Disposal Site designated by the City.

Contractor shall transport and deliver all Recyclable Materials collected under Section 5.07A to the Sunnyvale Recycling Center until the recycling section of the Transfer Station is fully operational, at which time these materials shall be transported and delivered to the Transfer Station.

Contractor may transport and deliver all Recyclable Materials collected under Section 5.07B to any suitable buyback center or other purchaser until the Transfer Station is operational. After the recycling section of the Transfer Station is fully operational, Contractor shall transport and deliver all Recyclable Materials collected under Section 5.07B to the

Transfer Station. Contractor shall transport and deliver Recyclable Materials collected under Section 5.08 as provided in that section.

City will pay all transfer and disposal fees and charges imposed by the operator of the Disposal Site on Solid Waste collected by Contractor under this Agreement. Contractor shall maintain accurate records of the quantities of Solid Waste and Recyclable Materials delivered to the Disposal Site, Recycling Center and Transfer Station and will cooperate with City in any audits or investigations of such deliveries.

Contractor shall cooperate with the operator of the Disposal Site (whether the Sunnyvale Sanitary Landfill or the Transfer station) with regard to operations therein, including, for example, complying with directions from the operator to unload collection vehicles in designated areas, accommodating maintenance operations and construction of new facilities, cooperating with its Hazardous Waste Exclusion Program (HWEP), and so forth. Cooperation with the HWEP may entail inspection of up to one truckload per day, randomly selected. Costs incurred due to inspection of more than one truck per day will be allowable costs under Section 8.03, and will be reimbursed in addition to the Contractor's Payment provided for in Section 8.02.

In order to mitigate traffic circulation impacts and localized air quality impacts the Contractor shall stagger the entry of collection vehicles into the City each day over time or over a number of different intersections. In order to reduce impacts on intersections near the Disposal Site, the Contractor shall disperse collection vehicle traffic to and from the Disposal Site among Mathilda, Fair Oaks and Lawrence Expressway between 6:45 - 8:15 a.m. and 3:30 - 6:15 p.m.

#### **5.14 Vehicles**

**A. General.** Contractor shall provide a fleet of collection vehicles sufficient in number and capacity to efficiently perform the work required by the Agreement in strict accordance with its terms. Contractor shall have available between 7:00 a.m. and 8:00 p.m. on collection days at least one back up vehicle for each type of collection vehicle used (i.e., residential, commercial and roll off) to respond to complaints and emergencies.

**B. Specifications.** All vehicles used by Contractor in providing Solid Waste collection services shall be registered with the California Department of Motor Vehicles. All such vehicles shall have water-tight bodies designed to prevent leakage, spillage or overflow. All such vehicles shall comply with U.S. Environmental Protection Agency noise emission

regulations, currently codified at 40 CFR Part 205, other applicable noise control regulations, and shall incorporate noise control features throughout the entire vehicle. All vehicles shall be uniformly painted in a color approved by City. The specifications for all vehicles shall be submitted to City for approval prior to their use. Ten (10) of Contractor's existing vehicles will be fitted with tippers to provide for semiautomated collection during the first year of the Franchise Term (i.e., FY1991-92).

**C. Vehicle Identification.** Contractor's name, local telephone number, and a unique vehicle identification number designated by Contractor for each vehicle shall be prominently displayed on all vehicles, in letters and numbers no less than three (3) inches high. Contractor shall not place the City's logo on its vehicles.

**D. Cleaning and Maintenance**

1. General. Contractor shall maintain all of its properties, facilities, and equipment used in providing service under this Agreement in a safe, neat, clean and operable condition at all times.
2. Cleaning. Vehicles used in the collection of Solid Waste shall be thoroughly washed at least once every working day and thoroughly steam cleaned at least once every week. City may inspect vehicles at any time to determine compliance with sanitation requirements. Contractor shall make vehicles available to the Santa Clara County Health Department for inspection, at any frequency it requests.
3. Painting. All vehicles used in collection of Solid Waste shall be repainted at least once every year, unless (1) the City determines that repainting specific vehicles at that frequency is not necessary because the vehicles' appearance is satisfactory, in which event they shall be repainted the following year or at such time as the City determines that repainting is necessary to ensure that the vehicles give the appearance of having been repainted within 12 months, or (2) the City determines that repainting specific vehicles at a shorter frequency is necessary to ensure that such vehicles give the appearance of having been repainted within 12 months, in which event, they shall be repainted within 30 days' notice from City directing repainting.
4. Maintenance. Contractor shall (i) inspect each vehicle daily to insure that all equipment is operating properly. Vehicles which are not operating properly shall be taken out of service until they are repaired and do operate properly; and (ii) perform all scheduled maintenance functions in accordance with the manufacturer's specifications and schedule.

Contractor shall keep accurate records of all vehicle maintenance, recorded according to date and mileage and shall make such records available to the City upon request.

5. Repairs. Contractor shall repair, or arrange for the repair of, all of its vehicles and equipment for which repairs are needed because of accident, breakdown or any other cause so as to maintain all equipment in a safe and operable condition. If an item of repair is covered by a warranty, Contractor shall obtain warranty performance. Contractor shall maintain accurate records of repair, which shall include the date/mileage, nature of repair and the signature of a maintenance supervisor that the repair has been properly performed.
6. Inventory. Contractor shall furnish sufficient equipment to provide all service required under this Agreement, including backup collection vehicles. Contractor shall furnish the City a written inventory of all vehicles, including collection vehicles, used in providing service, and shall update the inventory annually. The inventory shall list all vehicles by manufacturer, ID number, date of acquisition, type, capacity and decibel rating.
7. Storage. Contractor shall arrange to store all vehicles and other equipment in safe and secure location(s).

**E. Operation.** Vehicles shall be operated in compliance with the California Vehicle Code, and all applicable safety and local ordinances. Contractor shall not load vehicles in excess of the manufacturer's recommendations or limitations imposed by state or local weight restrictions on vehicles.

**F. Use of City Recycling Vehicles.** City will allow Contractor to use, without charge, the four trucks currently used by the City for curbside recycling during the first year of the Franchise (i.e., FY 1991-92). The trucks will be operated by Contractor to perform curbside residential recycling during that year. The trucks are provided on an "as is" basis and City makes no representations or warranties as to their condition. Contractor may inspect these trucks prior to placing them into operation, on reasonable notice to City, at any time on weekends or during non-operating hours on weekdays, provided they are returned to City in sufficient time so as to not interfere with their use in recycling operations conducted by City. Contractor shall operate and maintain the trucks in accordance with the provisions of this Section 5.14 D and E, shall insure them under Section 9.02, and shall return them to City on July 1, 1992 in the same condition as when provided, normal wear and tear excepted.

### **5.15 Refuse Containers**

**A. General.** Contractor shall furnish, without cost to the Waste Generator, all containers for storage of Solid Waste and Recyclable Materials by Residential, Multi-Unit Residential, Commercial/Industrial, and all other Premises (except to certain multi-unit residential premises which currently furnish their own containers and which continue to do so, to certain commercial customers who provide their own cans, and to residential customers who elect baseline service or who prefer to continue to use 32 gallon cans). Containers for Residential Premises shall be 64, 96, or 105-gallon plastic "toter" carts. Contractor will conduct a survey of residential customers during October 1990 and will provide customers with their preferred size cart prior to June 30, 1991. Containers for yardwaste recycling shall be 96-gallon plastic "toter" carts. Containers for residential curbside recycling shall be 14-gallon plastic containers, plastic "zip-lock" bags for oil filters, and plastic jugs for waste oil. Containers for commercial recycling shall be available in various sizes. Other containers shall be available in sizes ranging from 1 to 30 cubic yards; the type, size and number of containers furnished to particular Waste Generators shall be as determined by the Waste Generator to best meet its needs. The 64, 96 or 105-gallon carts shall be furnished to all single family, duplex, triplex and mobile home Residential Premises (and at freestanding and/or ground level townhomes subscribing to can service) in a timely fashion to allow efficient transition to a semi-automated method of collection, and as specified on Exhibit B.

**B. Specifications.** Containers provided by Contractor for storage of solid waste shall be metal or plastic, with plastic lids. They shall be designed and constructed to be water tight and prevent the leakage of liquids. All containers with a capacity of one cubic yard or more shall meet applicable federal regulations on refuse bin safety. All containers shall be painted the Contractor's standard color (except yardwaste containers) and shall prominently display the name and telephone number of the Contractor.

**C. Cleaning, Painting, Maintenance.** Contractor shall steam clean and repaint all Contractor-owned metal containers at least once a year, unless (1) the City determines that repainting specific containers at that frequency is not necessary because the containers' appearance is satisfactory, in which event they shall be repainted the following year or at such time as the City determines that repainting is necessary to ensure that the containers give the appearance of having been repainted within 12 months, or (2) the City determines that repainting specific containers at a shorter frequency is necessary to ensure that such containers give the appearance of having been repainted within 12 months, in which event, they shall be repainted within 30 days' notice from City directing repainting. All containers shall be maintained in a functional condition and so as to

present an attractive appearance and shall be refurbished as directed by City.

**D. Repair and Replacement.** Contractor shall repair or replace all containers, including the 64, 96 and 105-gallon carts and containers furnished to residential and commercial premises for storage of Recyclable Materials, damaged by collection operations.

#### **5.16 Personnel**

**A. General.** Contractor shall furnish such qualified drivers, mechanical, supervisory, clerical and other personnel as may be necessary to provide the services required by this Agreement in a safe and efficient manner.

**B. Driver Qualifications.** All drivers shall be trained and qualified in the operation of waste collection vehicles and must have in effect a valid license, of the appropriate class, issued by the California Department of Motor Vehicles.

**C. Uniforms.** Contractor shall require its drivers, and all other employees who come into contact with the public, to wear clean, standardized uniforms bearing the Contractor's name, and an identification badge or other means of identifying the employee, all as approved by City.

**D. Safety Training.** Contractor shall provide suitable operational and safety training for all of its employees who utilize or operate vehicles or equipment for collection of Solid Waste or who are otherwise directly involved in such collection. Contractor shall train its employees involved in Solid Waste collection to identify, and not to collect, Hazardous Waste or Infectious Waste.

**E. No Gratuities.** Contractor shall not permit its employees to demand, solicit or accept, directly or indirectly, any additional compensation or gratuity from members of the public for the collection of Solid Waste under this Agreement.

**F. Employee Conduct and Courtesy.** Contractor shall use its best efforts to assure that all employees present a neat appearance and conduct themselves in a courteous manner. Contractor shall regularly train its employees in customer courtesy, shall prohibit the use of loud or profane language, and shall instruct collection crews to perform the work as quietly as possible. If any employee is found not to be courteous or not to be performing services in the manner required by this Agreement, Contractor shall take all necessary corrective measures, including, but not limited to, transfer, discipline or termination.



If City has notified Contractor of a complaint related to discourteous behavior, Contractor shall, upon request of City, reassign the employee to duties not entailing contact with the public while the Contractor is pursuing its investigation or disciplinary process.

**G. Provision of Field Supervision.** Contractor shall designate one qualified employee as supervisor of field operations. The field supervisor will devote at least fifty percent (50%) of his or her time in the field checking on collection operations, including responding to complaints.

**H. Roster of Employees.** Contractor shall furnish to City, on January 1 and on July 1 of each year of the Term, a complete roster of all employees providing service under this Agreement. The roster shall contain the name, social security number, job classification, wage rate, and such other information as City may require.

### **5.19 Demonstration Project**

No later than December 1, 1990, Contractor commenced a demonstration project to allow the City to compare the technical, financial and other aspects of performance of two different vehicles in the collection of Solid Waste and Recyclable Materials from Residential Premises. The two vehicles to be operated in the demonstration project were (1) a one-person front loader with a bin attached to the forks and a tipper unit; and (2) a two-person rear loader fitted with a Western Curbside Collector (MAY) unit. The demonstration project was to be conducted in accordance with the provisions of Exhibit A, Section 1.04.11 (Collection Vehicles) and in conformance with methodology and protocols specifying the time, location and other details of the demonstration.

Contractor was to provide the rear loader at its cost. City was to pay the cost of the front loader and the labor and operating costs for both vehicles. The Contractor's Payment for FY 1991-92 set forth in Section 8.02 included the City's share of these costs to be incurred after July 1, 1991.

After the results of the demonstration project were evaluated by City, City was to determine, in its sole discretion, which type of vehicle is to be used for collection of Solid Waste and Recyclable Materials from Residential Premises for the remaining nine (9) years of the Franchise Term. The City was also to select, consistent with the results of the demonstration project, the number of such vehicles and the number of routes to be operated.

Following completion of the demonstration project, the City selected the number of vehicles and the number of routes to be operated and these are specified in Exhibit F-1. Contractor's Payment specified in Section 8.03 for the Third Year of the Term

(July 1, 1993-June 30, 1994) incorporates such decisions of the City as to the vehicles and numbers of routes as are specified in Exhibit F-1. If there is any subsequent change in the number of routes or vehicles from those set forth in Exhibit F-1, then the increase or decrease shall be considered as a change under Section 6.09 and the Contractor's Payment for the year of change shall be appropriately revised, utilizing the Chart of Accounts and the same methodology used to determine the Contractor's Payment in Article 8.

Following the Effective Date of Consent and First Amendment, Contractor may, after consultation with and receipt of approval of the City, select the type of vehicles to be used, or change the type of vehicles previously selected, for collection of Solid Waste and Recyclable Materials from Residential Premises for the remainder of the Franchise Term. When making recommendations, Contractor shall seriously consider the advise of the City and shall propose vehicles that will help to promote efficiency, maintain a high level of service, reduce costs consistent with the level of service to be provided, and that will be reasonable and necessary in light of the scope of service.

## **ARTICLE 6 OTHER COLLECTION RELATED SERVICES, STANDARDS AND AGREEMENTS**

### **6.01 Billing**

**A. By City.** The City shall prepare, mail and collect bills for solid waste collection services provided by Contractor under Sections 5.04 and 5.05, as a part of the municipal utility billing system. All sums collected by City shall be retained by City and Contractor shall have no claim to them.

**B. By Contractor.** Contractor shall prepare, mail and collect bills for all specialized, on-call collection services provided by it under Section 5.09 and for any other collection services which are not programmed into the City's municipal utility billing system.

Contractor shall either prepare and issue formal billings for such services or shall issue written receipts for services paid for in cash.

If the City has established by ordinance or resolution rates for the types of service provided, Contractor shall bill and collect at those rates.

### **6.02 Reports by Contractor of Billings**

Contractor shall submit to the City three (3) copies of a written report, in a form acceptable to and approved by the City,

listing by date and amount all bills and cash receipts issued under Section 6.01B. The report shall be submitted on or before the fifth day of each month, commencing with August 1991, and shall cover the immediately preceding month.

It is the intent of this Section and Section 8.05 that the City receive full credit, against the Contractor's Payment due under Article 8, for all services performed by Contractor under authority of the Franchise and this Agreement, which are not billed by the City. The credit shall be based on invoices billed and the credit risk shall be for account of Contractor which shall be solely responsible for taking necessary steps to collect such bills and City shall have no liability or responsibility for nonpayment thereof by Waste Generators. Contractor may require prepayment, or a deposit towards payment, from customers billed by Contractor.

### **6.03 Records and Reports: Waste Collection Operations**

Contractor shall compile, on a daily basis, records of its waste collection operations covering those aspects of its operations and in such detail as the City may prescribe. Such records may include, but are not limited to:

- quantities of solid waste collected
- composition of solid waste collected
- number of participants in the various recycling programs
- number and type of accounts served by each route
- labor allocation information (e.g., amount of time spent on route and off-route by employee)
- production data (e.g., tons of waste collected per route or per worker-hour)
- customer complaints and similar information which the City may demand in order to evaluate the effectiveness and efficiency of the solid waste collection and disposal program.

Contractor shall submit a report, giving the information required by City, in the format specified by City, each month and shall prepare such other expanded or detailed reports utilizing the information it is required to compile, which the City may require from time to time.

### **6.04 Inspection by City**

The City shall have the right, but not the obligation, to observe and inspect all of the Contractor's operations involved

in providing services under this Agreement. In connection therewith, the City shall have the right to enter any of Contractor's facilities, speak to any of Contractor's employees and receive a response to any inquiries directed to such employees, and review and make copies of (at City's expense) all of Contractor's operational and business records related to this Agreement. If City so requests, Contractor shall make specified personnel available to accompany City employees on inspections.

#### **6.05 Public/Customer Service and Accessibility**

**A. Office.** Contractor shall establish and maintain a business office for purposes of carrying out its obligations under this Agreement.

**B. Office Hours.** Contractor's office shall be open to the public from 8 a.m. to 5 p.m. Monday through Friday; 9:00 a.m. to noon on Saturdays. The office may be closed on Sundays and those holidays listed on Exhibit A, Section 1.02.

**C. Availability of Representatives.** A representative of the Contractor shall be available during office hours to communicate with the public in person and by telephone.

**D. Telephone.** Contractor shall maintain a telephone in operation at its office during business hours. Contractor shall install telephone equipment sufficient to handle the volume of calls typically experienced on the busiest days. Contractor shall also maintain an emergency telephone number for use during other than normal business hours. Contractor shall have a representative, or an answering service to contact such representative, available at the emergency telephone number during hours when the office is closed. Contractor shall arrange for both the regular and emergency telephone numbers to be listed in all telephone directories generally distributed in the City and on all Contractor's bills and invoices.

If the office is located outside of the City, Contractor must ensure that telephone calls to it from locations within the City are billed as "local calls" by all telephone companies.

Contractor shall establish a direct tie line between the City and its office to allow the City to transfer service calls received by it directly to the Contractor.

If City receives complaints that Waste Generators are unable to reach Contractor's office by phone, or are subject to excessive waiting time "on hold" prior to reaching a customer service representative, City may require that Contractor install additional telephone lines.

**E. Maps, Schedules, Consumer Information.** Contractor shall furnish the City with maps and schedules of all collection and disposal routes and shall update such maps and schedules no less than once every three (3) months or whenever a significant change occurs. If no change to routes has occurred such that the maps and schedules do not need to be updated, Contractor shall so advise City at three (3) month intervals. Contractor shall have such maps and schedules available for inspection by the public at its business office.

In addition, Contractor shall prepare information cards containing information about the amounts of waste which will be collected, times for special collection events, curbside recycling and household hazardous waste drop off programs, collection schedules, rates and complaint procedures. Contractor shall distribute such information cards to the occupants of all Residential and Commercial Premises prior to June 15, 1991. Information Cards shall be revised and distributed if there is any material change in the information and, in any event, at least once each year of the Term, prior to January 1. Information Cards shall also be mailed to City residents upon request and shall be provided to the Sunnyvale Chamber of Commerce in quantities required by the Chamber.

Contractor will submit proofs of the Information Cards to City prior to distribution and will incorporate City's comments in the final version distributed to the public.

#### **6.06 Service Complaints**

Contractor shall be responsible for the prompt and courteous attention to, and prompt and reasonable resolution of, all Waste Generator complaints relating to service and billing for those services billed by Contractor. Contractor shall record in a separate log all complaints, noting the name and address of complainant, date and time of complaint, nature of complaint, and nature and date of resolution. This complaint log shall be available for inspection by City. In addition, Contractor shall compile a summary statistical table of the complaint log and submit the table to City each month.

Contractor shall respond to all complaints from Waste Generators within eight (8) working hours of its receipt of notice of the complaint. In particular, if a complaint involves a failure to collect solid waste from a Premises, required by this Agreement, Contractor shall collect the solid waste in question within such eight (8) hours period, provided it has been delivered for collection in accordance with the City's Municipal Code.

#### **6.07 Service Standards: Liquidated Damages for Failure to Meet Standards**

The parties acknowledge that consistent, reliable solid waste collection service is of utmost importance to City and that City has considered and relied on Contractor's representations as to its quality of service commitment in awarding the franchise to it. The parties further recognize that quantified standards of performance are necessary and appropriate to ensure consistent and reliable service. The parties further recognize that if Contractor fails to achieve the performance standards, or fails to submit required documents in a timely manner, the City and its residents will suffer damages and that it is and will be impracticable and extremely difficult to ascertain and determine the exact amount of damages which the City will suffer. Therefore, without prejudice to the City's right to treat such non-performance as an event of default under Section 11.01, the parties agree that the following liquidated damage amounts represent a reasonable estimate of the amount of such damages considering all of the circumstances existing on the date of this Agreement, including the relationship of the sums to the range of harm to City that reasonably could be anticipated and the anticipation that proof of actual damages would be costly or inconvenient. In placing their initials at the places provided, each party specifically confirms the accuracy of the statements made above and the fact that each party had ample opportunity to consult with legal counsel and obtain an explanation of this liquidated damage provision at the time that this Agreement was made.

Contractor

City

Initial Here \_\_\_\_\_

Initial Here \_\_\_\_\_

Contractor agrees to pay (as liquidated damages and not as a penalty) the amount set forth below and further agrees that these amounts may be deducted by City from Contractor's Payment:

**Collection Reliability**

- For each failure over five (5) annually to commence service to a new customer account within seven (7) days after order received by Contractor: \$ 300.00
- For each failure to collect solid waste, which has been properly delivered for collection, from an established customer account on the scheduled collection day: \$ 300.00
- For each failure to collect solid waste, which has been properly delivered for collection, from the same customer on two consecutive scheduled pickup days: \$ 300.00

**Collection Quality**

- For each occurrence over five (5) annually of damage to private property: \$1,000.00
- For each occurrence over fifteen (15) annually of failure to return emptied refuse cans to the curb and place upright with lids secured or to retrieve carts moved by others which have been reported to Contractor by the customer or the City: \$ 300.00
- For each occurrence of excessive noise: \$ 1,000.00
- For each occurrence of discourteous behavior: \$ 1,000.00
- For each failure over ten (10) annually to clean up solid waste spilled from solid waste containers (cans, carts, bins or debris boxes): \$ 300.00
- For each occurrence over five (5) annually of collecting waste outside authorized hours: \$ 500.00

**Customer Responsiveness**

- For each failure to respond to a customer complaint within eight (8) working hours of receipt by Contractor: \$ 100.00
- For each failure to report customer complaints to City as required by Section 6.06: \$ 500.00

**Timeliness of Submissions to City**

- For each failure to submit the report on the monthly audit of billings required by Section 6.16, on the date required: \$ 500.00 for each day the report is late
- For each failure to submit the annual application for adjustment of compensation required by Section 8.03, on the date required: \$ 500.00 for each day the application is late

Neither the imposition nor the payment of such liquidated damages shall limit the City's right to treat the Contractor's failure to meet the performance standards as an Event of Default under Section 11.01.

The City may determine the occurrence of events giving rise to liquidated damages through the observations of its own employees or investigation of customer complaints.

Prior to assessing liquidated damages, City shall give Contractor notice of its intention to do so. The notice will be accompanied by a list of each incident giving the date and a brief description. Contractor may review (and make copies at its own expense) all information in the possession of the City relating to incidents on the list. Contractor may, within ten (10) days after receiving the notice and list request a meeting with the City. If a meeting is requested it shall be held by the Director of Public Works. The Contractor may present evidence in writing and through testimony of its employees and others relevant to the incidents on the list. The Director of Public Works will provide Contractor with a written explanation of his or her determination on each incident prior to authorizing the City's Finance Department to deduct liquidated damages from payments subsequently due to Contractor.

The parties recognize that Owners of Premises may allege that damage to their pavement is attributable to passing of collection vehicles over it in the ordinary course of performing services under this Agreement. The City acknowledges that such allegations have in the past frequently proved inaccurate upon investigation, in that the pavement was found to have been built to inadequate thickness, did not meet current building code requirements, or had simply exhausted its useful life. The City does not intend to assess liquidated damages for instances of "damage" to private property of this type.

The parties also recognize that the 64, 96 and 105 gallon carts which Contractor will provide to Residential Premises are designed to be mobile and easily moved. From time to time they may be moved by children from their proper locations. The City does not intend to assess liquidated damages for instances in which carts are properly placed by Contractor's employees but subsequently moved by others. Contractor agrees that upon receiving notice of this occurring from the owner or occupant of Premises or from the City, and/or upon its drivers' noticing this having occurred, it will promptly retrieve the carts and redistribute them back to the proper locations in front of the Premises to which they are assigned.

#### **6.08 City's Right to Direct Termination of Service to Premises**

The City may direct the Contractor to suspend or terminate waste collection services from any Premises if the Owner or occupant thereof (or other party responsible for payment of City's utility bills) is delinquent in payment of such bills. City shall indemnify and hold Contractor harmless from any liability



or costs associated with Contractor's suspending or terminating pursuant to directions of the City under this Section.

Contractor will promptly implement City directions to suspend or terminate service.

**6.09 City's Right To Change Scope of Work; Pilot Programs**

City may, without amending this Agreement, direct Contractor to cease performing one or more of the types of waste collection service described in Article 5, may direct Contractor to modify the scope of one or more of such services, or may direct Contractor to perform additional solid waste collection service. Contractor shall promptly and cooperatively comply with such directions.

Pilot programs and innovative services which may entail new collection methods, different types of services and/or new requirements for waste generators are included among the type of changes which City may direct.

If such changes cause an increase or decrease in the cost of performing the services, an equitable adjustment in the Contractor's Payment shall be made. The method for determining the amount of such an adjustment shall be as set forth in Section 8.06. Contractor will continue to perform the new or changed service while the appropriate adjustment in compensation is being determined.

**6.10 Title to Solid Waste**

**A. General.** Solid waste collected by the Contractor shall be the property of Contractor from the time it is placed into Contractor's collection vehicle until it has been properly delivered to the Sunnyvale Disposal Site or Transfer Station, at which time it shall become the property of the owner or operator of the Disposal Site/Transfer Station.

**B. Commercial Recycling.** Material collected from Commercial/Industrial Waste Generators shall be and remain the property of Contractor from the time it is placed in Contractor's collection vehicle until it is sold or properly delivered to a recycling operation, including the Transfer Station.

**C. Residential and Yardwaste Recycling.** Recyclable material collected as a part of these programs shall be and remain the property of Contractor (subject to City's interest in the revenues to be received from their sale) from the time it is placed in Contractor's collection vehicle until it is sold or properly delivered to a recycling operation, including the Transfer Station.

**6.11 Non-Discrimination**

Contractor shall not discriminate in the provision of service or the employment of persons engaged in performance of this Agreement on account of race, color, religion, sex, age, physical handicap or medical condition in violation of any applicable federal or state law.

**6.12 Affirmative Action Program**

Contractor shall comply with the City's Affirmative Action Program, the requirements of which are described in the Affirmative Action Certificate signed by the Contractor and submitted with its Proposal, a copy of which is attached hereto as Exhibit C. Contractor shall require that all subcontractors which employ fifty (50) or more persons, or whose total compensation under the subcontract will exceed Fifty Thousand Dollars (\$50,000), also sign the Affirmative Action Certificate.

**6.13 Change in Collection Schedule**

Contractor shall obtain written approval from City prior to any change in collection operations which results in a change in the day on which solid waste collection occurs at Residential Premises. Such approval will not be withheld unreasonably. Contractor will comply with the requirements in Exhibit A regarding notice to customers of changes in operations.

**6.14 Transition to Next Contractor**

In the event that Contractor is not awarded a franchise to continue to provide solid waste collection services, Contractor shall cooperate fully with City and the subsequent contractors to assure an orderly and effective transition. Such cooperation shall include, but not be limited to, agreeing to sell collection bins and containers to the next contractor at their fair market value and providing route maps, route lists and other similar information.

In connection therewith, Contractor acknowledges that the provisions of Public Resources Code Sections 49520-49523 have no application to this Agreement and agrees, to the extent such sections may have application, to waive whatever rights they may afford.

**6.15 Report of Accumulation of Solid Waste: Unauthorized Dumping**

Contractor shall direct its drivers to note (1) the addresses of any Premises at which they observe that solid waste is accumulating and is not being delivered for collection and (2) the address, or other location description, at which solid waste

has been dumped in an apparently unauthorized manner. Contractor shall deliver the address or description to City within eight (8) working days of such observation.

**6.16 Audit of City Billings**

Contractor shall audit City's billings to Waste Generators under Section 6.01A. The purpose of the audits is to determine that the amount which the City is billing each Waste Generator is correct in terms of the level of service (i.e., frequency of collection, size of container, location of container) being provided to such Waste Generator by Contractor. The Contractor shall audit one sixth (1/6th) of the customer accounts each month and submit to City a written report on that audit by the 15th day of the following month, commencing September 15, 1991. The intent of this section is for the City to receive reports on a monthly basis which will cover the entire list of customers twice each year.

**6.17 Prevailing Wages**

The parties acknowledge that the services provided by Contractor do not constitute a "public work" and are not subject to any of the provisions of the Public Works law, Labor Code Sections 1720-1901, nor of the regulations promulgated thereunder. However, until and unless otherwise directed by City, Contractor shall pay its field and shop employees wages and benefits equivalent to the general prevailing rate of wages applicable to the work to be done, as determined by the Director of the California Department of Industrial Relations. Contractor may provide any combination of wages and benefits so long as the hourly cash equivalent of such combination equals the corresponding prevailing wage rate. Rates in effect in 1990 for applicable job classifications are set forth on Exhibit D. Future determinations of prevailing wages in relevant job classifications will be obtained from the Department by the City and provided to the Contractor from time to time. The Contractor's Payment specified in Section 8.03.A for the Third Year of the Term (July 1, 1993-June 30, 1994) reflects the prevailing wages in the relevant job classifications for that period, and Contractor shall not contend that the prevailing wages for such period is higher than those reflected in the agreed upon Contractor's Payment. The Contract between Sanitary Truck Drivers and Helpers Union Local 350 and Bay effective at the Effective Date of the Consent and First Amendment for the period January 1993 through December 31, 1995 reflected the prevailing wage for that period.

Wage rates paid by the Contractor in excess of the prevailing wages determined by the Department of Industrial Relations may be presumed by the City to be unreasonable for purposes of Section 8.03, to the extent of the excess.

Contractor shall have the right to present evidence demonstrating that such wages are reasonable notwithstanding their being in excess of prevailing wage rates.

**6.18 Lease of Collection Vehicles**

Concurrently with execution of this Agreement, Contractor and City shall execute a lease from Contractor to City of the collection vehicles in the form attached hereto as Exhibit E.

**6.19 Operations Audits**

In addition to City's rights under Sections 6.03 and 6.04, City may conduct, at its expense, detailed audits of Contractor's operations utilizing either or both its own employees and independent consultants.

Contractor shall cooperate with City and its consultants in such audits. If such cooperation entails efforts by Contractor beyond those which are required under Sections 6.03 and 6.04, Contractor shall notify City and City shall reimburse Contractor for the reasonable cost of such additional efforts.

**ARTICLE 7 FRANCHISE FEE**

**7.01 Amount**

A. For the 12-month period commencing July 1, 1991 and ending June 30, 1992, Contractor paid to the City, as partial consideration for the rights and privileges accorded by the franchise granted to it by the City, a Franchise Fee equal to Five Hundred Thousand Dollars (\$500,000.00). For Fiscal Year 1992-1993, the Franchise Fee was Five Hundred Fifteen Thousand Six Hundred Twenty-five Dollars (\$515,625.00), which reflected a cost of living adjustment from the preceding year. In addition, for Fiscal Year 1992-1993, the City elected to increase the Franchise Fee by an additional \$524,375 under an election then available to it. Effective for Fiscal Year 1993-1994, the two components of the Franchise Fee described in the preceding two sentences were combined into a single Franchise Fee. As a result, for Fiscal Year 1993-1994, the Franchise Fee was \$1,081,600. For Fiscal Year 1994-1995 and Fiscal Years thereafter, Contractor shall pay to the City a Franchise Fee in the amount of \$1,081,600, adjusted as set forth below.

B. The City may, in its sole discretion, increase the Franchise Fee to an amount larger than that provided for in the preceding paragraph. If the City elects to increase the Franchise Fee, the increase shall become effective on the immediately following July 1, and the Contractor's Payment will be adjusted accordingly.

- C. For Fiscal Year 1994-1995 and thereafter, the Franchise Fee, as adjusted in the manner described in the preceding paragraph, was and will be adjusted annually in the manner set forth below to reflect changes in the San Francisco-Oakland-San Jose Metropolitan Area Consumer Price Index (Urban Wage Earners and Clerical Workers; 1982-84 = 100) compiled and published by the United States Department of Labor, Bureau of Labor Statistics (the "Index"). The Franchise Fee shall be adjusted by one hundred percent plus the percentage increase in the Index level as of the May immediately preceding the commencement of the fiscal year over the Index as of the prior May. The Index as of May 1993 was 144.8. The Franchise Fee for FY 1994-95 was adjusted by multiplying the Franchise Fee for Fiscal Year 1993-94 by one hundred percent plus the percentage change in the Index from May 1993 to May 1994. Likewise, the Franchise Fee for FY 1995-96 was adjusted by multiplying the Franchise Fee for Fiscal Year 1994-95 by one hundred percent plus the percentage change in the Index between May 1994 and May 1995. The Franchise Fee shall be adjusted in a similar manner for subsequent years.
- D. Effective for FY 1993-1994 and following years, the full amount of the Franchise Fee shall be treated as an operating expense in computing the Contractor's Payment for that year in the manner specified in Section 8.03, but the Franchise Fee will be subtracted from the Projected Annual Cost of Operations in order to determine profit under Section 8.03.D.b.2

## **7.02 Time and Method of Payment**

The Franchise Fee shall be paid in the following manner. City shall deduct one-twelfth (1/12th) of the annual Franchise Fee from the monetary payments otherwise due to Contractor from the City under Section 8.02 or 8.03, provided that the City is billing substantially all Waste Generators as contemplated by Section 6.01 and provided further that Contractor is providing waste collection service.

If Contractor is not providing waste collection service, and City has had to undertake other arrangements for such service pursuant to Article 10, the Franchise Fee shall be paid by Contractor in equal monthly installments of 1/12th of the annual Franchise Fee, in cash, on the first day of each month that it is not providing waste collection services.

## **ARTICLE 8 COMPENSATION**

### **8.01 General**

The "Contractor's Payment" provided for by this Article shall be the full, entire and complete compensation due to Contractor from City for furnishing all labor, equipment,

materials and supplies and other things necessary to perform all the services required by this Agreement in the manner and at the times prescribed. The Contractor's Payment shall include all costs for the items mentioned above and also for all taxes, insurance, bonds, overhead, profit and all other costs necessary to perform the services in accordance with this Agreement.

### **8.02 Contractor's Payment Initial Period**

[See previous version of Franchise Agreement for relevant provisions]

### **8.03 Contractor's Payment Subsequent Periods**

The Contractor's compensation for subsequent years of the Franchise, commencing with the year beginning July 1, 1993, shall be adjusted upward or downward as described below.

#### **A. Determination of Contractor's Payment for the Third Year (July 1, 1993-June 30, 1994)**

The Contractor's Payment for the Third Year of the Term will be Eight Million Five Hundred Seventeen Thousand Dollars (\$8,517,000). The preceding amount includes payment for the third recycling bin, the higher cost recycling bins and the fifth recycling route.

#### **B. Determination of Contractor's Payment for the Fourth Year (July 1, 1994-June 30, 1995)**

The Contractor's Payment for the Fourth Year of the Term will be Eight Million Five Hundred Seventeen Thousand Dollars (\$8,517,000) multiplied by 100% plus the percentage change in the Urban Wage Earners Index between the index for the period ended May 1993 and the index for the period ended May 1994.

#### **C. Determination of Contractor's Payment for the Fifth Year (July 1, 1995-June 30, 1996)**

The Contractor's Payment for the Fifth Year of the Term will be equal to the amount of the Contractor's Payment for the Fourth Year of the Term as determined under Subparagraph B above multiplied by 100% plus the percentage change in the Urban Wage Earners Index between the index for the period ended May 1994 and the index for the period ended May 1995.

#### **D. Determination of Contractor's Payment for Sixth Year (July 1, 1996-June 30, 1997) and Subsequent Periods**

The Contractor's Payment for subsequent years of the Franchise, commencing with the Sixth Year of the Term that begins on July 1, 1996, will be determined as follows:

**a. General.** On or before January 31, 1996, and on or before each January 31 of each succeeding calendar year of the Term, the Contractor shall submit a Request for Calculation of Contractor's Payment. This request will cover the following one year of the Term. For example, in January 1996, the Contractor will submit a request covering Year Six that begins on July 1, 1996. This request shall be based on the audited financial statement submitted under Section 8.07.F for the preceding fiscal year, shall be in the format specified by the City and be organized so as to facilitate the calculations required by this Section, shall follow the chart of accounts attached as Exhibit F-1, and shall be accompanied by (1) such supporting schedules as deemed necessary by the City and (2) a statement signed by the President or Vice President, if available (and if neither is available by the Administrative Officer) and the Chief Financial Officer of Contractor that the financial information submitted is complete and correct to the best of their knowledge and belief.

**b. Determination of Contractor's Payment for the Sixth Year of the Term.** The Contractor's Payment for Year Six shall consist of the "Projected Annual Cost of Operations for Year Six" (PAC06) calculated as set forth in Section 8.03.D.b.1 plus profit for Year Six (P6) calculated as set forth in Section 8.03.D.b.2. Each of these amounts shall be calculated as follows:

**1. Projected Annual Cost of Operations.** Projected Annual Cost of Operations for Year Six consists of the sum of:

- Projected Labor-Related Costs (PL6);
- Projected Vehicle-Related Costs (PV6);
- Projected Other Costs (P06); and
- Projected Net Interest Expense and Depreciation Expense (NID6)

Each of these sums shall be determined as follows:

**A. Determination of Actual Costs.** Contractor's financial statement will be reviewed to determine Contractor's costs for each of the foregoing categories during Year Four. City will determine that costs have actually been incurred and have been assigned to the appropriate category. Costs actually reasonably and necessarily incurred by Contractor in FY 1995-96 as a result of implementing the expanded recycling programs contemplated by the Fourth Amendment to the Agreement shall be considered allowable costs in determining the Contractor's Payment for FY 1997-98, all as provided in Section 8.03D.

**B. Adjustment of Actual Costs.** The City may adjust the actual costs in two ways: (1) to exclude any non-allowable costs, set out below, and (2) to exclude and/or reduce any costs which were not reasonably and necessarily incurred in the performance of the services, in accordance with this Agreement (for example, labor and equipment costs associated with the addition of routes beyond those described assumed in the Chart of Accounts which are not caused by increases in the number of Waste Generators or the volume of waste collected) unless agreed to in advance in writing by the City.

Costs which are non-allowable consist of the following:

1. Payments to directors and/or owners of the Contractor unless paid as reasonable compensation for services actually rendered. Compensation paid consistent with that shown on Exhibit D-1 will be deemed reasonable.
2. Promotional, entertainment and travel expenses, unless authorized in advance by City.
3. Payments to repair damage to property of third parties or the City for which Contractor is legally liable.
4. Fines or penalties of any nature.
5. Liquidated damages assessed under Section 6.07 of this Agreement.
6. Federal or state income taxes.
7. Charitable or political donations.
8. Rental or lease charges for collection vehicles unless specifically required by this Agreement and authorized in advance by City.
9. Attorneys fees and other expenses incurred by Contractor in any court proceeding in which City and Contractor are adverse parties, unless Contractor is the prevailing party in such proceeding.
10. Costs relating to the acquisition of Contractor and the subsequent liquidation, dissolution or merger of



Contractor and/or Bay or any affiliate, as defined below, and the assignment of this Agreement, including, without limitation, additional depreciation that results from the revaluation of Contractor's assets for financial or tax accounting purposes, goodwill associated with the acquisition, and acquisition costs.

11. Payments that relate to the termination of employment of any employee or agent, including, without limitation, expenditures for expenses, claims, judgments, settlements, contract buyout payments and severance payments in excess of four weeks' normal compensation.

The costs resulting from these two adjustments are:

- Adjusted Allowed Labor-Related Costs (AAL4);
- Adjusted Allowed Vehicle-Related Costs (AAV4);
- Adjusted Allowed Other Costs (AA04);
- Adjusted Allowed Net Interest and Depreciation (AANID4)

**C. Escalation of Costs.** Adjusted allowed costs of operation in Year Four will be multiplied by the change in appropriate indices compiled and published by the United States Department of Labor, Bureau of Labor Statistics.

Labor-Related Costs will be escalated for Year Six by multiplying the Adjusted Allowed Labor-Related Costs for Year Four by 100% plus the percentage change in the Urban Wage Earners Index between the index most recently published prior to submission of the Request for Calculation of Contractor's Payment and the corresponding index published 12 months earlier. The result is "Projected Labor-Related Costs for Year Five" (PL5). PL5 is then multiplied by 100% plus the percentage change in the Urban Wage Earners Index between the index most recently published prior to submission of the Request for Calculation of Contractor's Payment and the corresponding index published 12 months earlier. The result is the "Projected Labor-Related Costs for Year Six" (PL6).

Vehicle-related costs will be projected for Year Six as follows:

- (1) The cost of diesel fuel, gasoline, and oil will be projected for Year Six as follows: The Adjusted Allowed Costs for these materials from Year Four will be multiplied by 100% plus the percentage change in the national "Diesel Fuel to Consumer Customers Index" between the index most recently published prior to submission of the Request for Calculation of Contractor's Payment and the corresponding index published 12 months earlier. The result is the diesel fuel, gasoline and oil cost projected for Year Five. The result for Year Five is then multiplied by 100% plus the percentage change in the national "Diesel Fuel to Consumer Customers Index" between the index most recently published prior to submission of the Request for Calculation of Contractor's Payment and the corresponding index published 12 months earlier, and the result is the cost of fuel, gasoline and oil for Year Six.
  
- (2) All other vehicle-related costs will be projected for Year Six as follows: The Adjusted Allowed Costs in this category from Year Four will be multiplied by 100% plus the percentage change in the national "Producer Price Index Industrial Commodities" between the index most recently published prior to the submission of the Request for Calculation of Contractor's Payment and the corresponding index published 12 months earlier. The result is the projected all other vehicle-related costs for Year Five. The result for Year Five is then multiplied by 100% plus the percentage change in the national "Producer Price Index Industrial Commodities" between the index most recently published prior to the submission of the Request for Calculation of Contractor's Payment and the corresponding index published 12 months earlier. The result is the projected all other vehicle-related costs for Year Six.

The sum of the costs in steps (1) and (2) is "Projected Vehicle-Related Costs for Year Six" (PV6).

Other Costs (with the exception of insurance) will be projected for Year Six as follows: Adjusted Allowed Other Costs from year Four will be multiplied by 100% plus the percentage change in the national "Producer Price Index Industrial Commodities" between the index most recently published prior to submission of the Request for Calculation of Contractor's Payment and the corresponding index published 12 months earlier. The result will be the Other Costs projected for Year Five. The result for Year Five will be multiplied by 100% plus the percentage change in the national "Producer Price Index Industrial Commodities" between the index most recently published prior to submission of the Request for Calculation of Contractor's Payment and the corresponding index published 12 months earlier. The result will be the Other Costs projected for Year Six. Projected insurance costs for Year Six will be based upon quotations, or other statements, from the Contractor's insurance broker, of the

premiums for Year Six. The quotations or statement of insurance premiums shall be added to the calculation of other projected costs. The result (plus the Franchise Fee payable under Section 7.01C) is "Projected Other Costs for Year Six" (P06).

Net Interest Expense will be projected for Year Six based on current debt amortization schedules as they exist at the time of submission of the Request for Calculation of Contractor's Payment plus projected interest expense on new acquisitions during Years Five and Six. Depreciation Expense will be calculated for Year Six by dividing the actual purchase price of the assets by the useful operating life of each such asset, listed on the Contractor's fixed assets schedule at the time of submission of the request plus projected depreciation expense on new acquisitions during Year Five and Six. For purposes of this calculation, assets acquired after the Closing shall be deemed to have the following useful lives:

Asset	Useful Life
office equipment (including computers); repair equipment bins, toters, containers	five years
rolling stock	seven years
real property and improvements	thirty years

The sum of projected Net Interest Expense and Projected Depreciation for Year Six is "Projected Net Interest and Depreciation for Year Six (PNID6).

The sum of Projected Labor-Related Costs, Projected Vehicle-Related Costs, Projected Other Costs and Projected Net Interest and Depreciation shall equal "Projected Annual Costs of Operations for Year Six" (PAC06).

**2. Profit.** Profit for Year Six shall be calculated as follows:

The Franchise Fee payable under Section 7.01C shall be subtracted from the Projected Annual Costs of Operations for Year Six (PAC06), and the difference shall be the "Net Cost for Year Six" ("NC6"). Profit for Year Six shall equal the quotient of NC6 divided by nine hundred and fifteen one-thousandths (0.915), less NC6. That is,

$$\text{Profit Year Six} = \frac{(\text{PAC06-Fr. Fee Yr 6})}{0.915} - (\text{PAC06-Fr.Fee Yr 6})$$

**E. Determination of Contractor's Payment for Seventh and Following Years.** The Contractor's Payment for the Seventh Year of the Term and each year of the term thereafter shall be determined following the same procedure as described in Section 8.03.D.b, except that references to Year Six shall refer to the year for which the Contractor's Payment is being calculated and references to Years Four and Five shall refer to the two years of the Term that immediately precede the year for which the Contractor's Payment is being calculated.

**F. Variances from Projections.**

1. Subject to Subparagraph 2 below and Section 8.03.G below, the Contractor shall retain any income from actual costs during any year being less than those projected for that year when establishing the Contractor's Payment for that year. Similarly, the Contractor shall not be compensated for actual costs during any year being greater than those projected for that year when establishing the Contractor's Payment for that year. In addition, calculations of Contractor's Payments for future years shall not attempt to adjust for past variances of actual costs from those which had been projected. Nothing in this section shall prevent the City from reducing payments to the Contractor to recoup prior overpayments due to subsequently discovered fraud or misrepresentation in financial data submitted by it to the City.
2. Notwithstanding Subparagraph 1, the parties do wish to make adjustments to take into account the effect of extraordinary, uncontrollable changes in the cost of performance. To that end, and in the limited circumstances described in this Subparagraph 2, the Contractor's Payment may be adjusted to reflect changes in cost between those projected in calculating the Contractor's Payment and those actually incurred.

Contractor's Payment shall be increased or decreased to the extent that a specific cost, incurred in the prior year, over which the Contractor could not have exerted control, differs from the projected change in the amount of the cost by twice the projected change in the cost and the aggregate of all such increases and/or decreases equals or exceeds 5% of the Contractor's Payment in the prior year. Such adjustment shall be made in the year following the year in which the difference occurred. The full amount of the difference will be accounted for if the 5% threshold is reached.

3. The adjustments contemplated by Subsection F are entirely distinct from the cost control incentive program described in Section 8.03.G.

**G. Incentive Program.** Commencing with Year Six of the Term and for each year thereafter, the Incentive Program described in this Subparagraph G shall be applicable. As described in this subparagraph, the Incentive Program is intended to induce Contractor to institute unusual or extraordinary measures that will save costs for a year over those that might otherwise be expected to occur and that would otherwise be included in reimbursable costs for Contractor. As described below, if Contractor presents a cost savings program that is approved by the City and if the program in fact results in net cost savings, Contractor shall receive annually throughout the remainder of the Term of the Contract, but only so long as such cost savings persists, 50% of the savings resulting from such program. This subparagraph shall not be applicable to the additional cost reimbursements to Contractor or remission of payments from Contractor to the City that are described in the preceding Section 8.03F Variances from Projections above. Following is a detailed description of the operation of the Incentive Program.

**1. Determination of Incentive Payment Measured by Year Four Operations.**

- a. Qualification for Incentive Program.** At any time during Year Four of the Term, Contractor may present to the City in writing a cost savings program or proposal that it claims will result in savings of the allowable operating expenses for the year compared to the amount of such expenses from Year Four that are escalated to determine the Projected Annual Cost of Operations for Year Six (PCO6) (the "Incentive Proposal"). The Incentive Proposal shall specifically identify:
1. The measures to be taken that will directly lead to the expected savings;
  2. The manner in which such measures will differ from the manner in which the activities would likely be conducted but for the program;
  3. The savings to occur (including reference to the items within the chart of accounts attached hereto as **Exhibit F-1** in which such savings are expected to occur);
  4. The estimated amount of such expected savings (which amount must be at least \$10,000 per year); and
  5. The period or periods during which the savings are likely to occur and whether the savings are expected to be recurring or nonrecurring.

Following its review, the City may, in the reasonable exercise of its discretion, either approve or disapprove the Incentive

Proposal as being within the scope of the Incentive Program. If approved as part of the Incentive Program, Contractor shall be eligible to share in savings, if any, realized from implementation of the Incentive Proposal.

**b. Calculation and Payment of Incentive Payments.** Following completion of Year Four and delivery of the audited financial statement of Contractor for that year, Contractor shall submit to the City in writing a Request for Incentive Payment. The request shall specifically identify the savings it claims resulted from implementation of the Incentive Program, the manner in which they arose and whether they will be recurring or nonrecurring. Contractor shall supply the City with such additional information that the City reasonably requests for purposes of analyzing whether the claimed savings did in fact result from implementation of the Incentive Proposal. Within ninety (90) days following the day on which the City has been supplied with all such information, the City will notify Contractor as to whether it agrees with Contractor's claim that the payment claimed in the Request for Incentive Payment did result from a cost savings included in the Incentive Proposal that was approved for inclusion in the Incentive Program, or it shall state the manner in which it disagrees. If the City disagrees with any part of the claimed payment, the parties shall expeditiously seek to resolve their differences in the manner described in Section 8.06 hereof for resolution of disputes concerning additional costs. If the Incentive Proposal results in a reduction in Contractor's operating costs for Year Four in performing its obligations under this Agreement that would otherwise have been allowed as operating costs in computing the amount of the Contractor's Payment for Year Six, Contractor shall be entitled to the following:

1. Recurring Savings. If the cost savings is permanent, Contractor shall be entitled to an additional payment of profit in Year Six and for every year thereafter during the term of fifty percent (50%) of the net cost reduction in Year Four resulting from implementation of the Incentive Proposal. Year Six is the first year for which the operations of Year Four serve as the basis of computing the Contractor's Payment under Section 8.03D.b. above, but such payment shall continue only so long as such cost savings continues. If the Incentive Proposal is implemented for only a portion of Year Four, the cost savings with respect to which the 50% payment is measured shall be annualized for purposes of calculating the incentive payment for years after Year Six. The incentive payment shall be paid in twelve equal installments during the year as an offset to the monthly Franchise Fee Contractor is obligated to pay the City under Section 7.01C hereof. Contractor shall be entitled to receive the incentive payment arising with respect to operations in Year Four only so long as the cost savings program described in the Incentive

Program continues to produce cost savings in the year that is two years before the year of payment over the costs that would have been incurred in that year had the program not been implemented. Contractor shall annually, and at such other times as may be demanded by the City, demonstrate to the City's reasonable satisfaction that such savings do continue as a condition to Contractor's continued receipt of such payments. The Incentive Payment made hereunder shall have no effect upon the Calculation of the Contractor's Payment under Sections 8.03.D and E above.

2. Nonrecurring Savings. If the cost savings are not expected to continue in future years of the Term, then Contractor shall be entitled to the payment described in the immediately preceding subparagraph 1, but such payment shall be made only in Year Six and not in future years.

**3. Determination of Incentive Payment Measured by Year Five and Subsequent Years.**

The Incentive Program shall operate with respect to each year of the Term following Year Four in the same manner as described in Section 8.03.G.1 above for Year Four, except that references to Year Four shall be to the year with respect for which an Incentive Proposal is accepted for the Incentive Program, references to Year Six shall be to the year of the Term that is two years after the year with respect to which the Incentive Payment is calculated, and references to years after Year Six shall be to years of the Term that follow such second year.

4. Termination of Certain Incentive Payments. Contractor will be receiving Incentive Payments under the Incentive Program during the July 1, 1996-June 30, 1997 year that are payable with respect to cost savings programs implemented in prior years that resulted and will result in savings in (i) residential refuse collection labor (the "Residential Refuse Collection Incentive Payment") and (ii) workers' compensation insurance (the "Workers' Compensation Incentive Payment"). Notwithstanding any other provision of Section 8.03.G, but without prejudice to Contractor's right to receive other Incentive Payments (to the extent applicable under Section 8.03.G) beyond June 30, 2004, the Residential Collection Incentive Payment and the Workers' Compensation Incentive Payment shall terminate no later than June 30, 2004.

**H. Schedule.** The Contractor shall submit its Request for Calculation of Contractor's Payment on or before the January 31 that immediately precedes the commencement of the year with respect to which the calculation is to be performed. The City shall use its best efforts to make the adjustment effective by July 1 of the same year. However, the City shall not make any retroactive adjustment to compensate for any delay in calculating the Contractor's Payment which results from the failure of the Contractor to respond promptly and completely to requests of the

City for information related to any of the calculations required by this Section.

#### **8.04 Time of Payment**

The Contractor's Payment, established under Section 8.02 or 8.03, modified by the offsets under Section 8.05, (and adjusted, if appropriate, under Section 8.06) shall be paid by the City in monthly installments on the 25th day of each month, for service rendered the preceding month, commencing with the 25th day of August, 1991.

#### **8.05 Offsets to Contractor's Payment**

The Contractor's Payment made each month shall be reduced by the sum of the following:

- One twelfth (1/12th) of the Franchise Fee due to City under Section 7.01.
- The billings issued and cash received for services provided by Contractor under Section 6.01B and billed directly by Contractor during the preceding month.
- Liquidated Damages, if any, due under Section 6.07 for failure to achieve the performance standards during the preceding month.

#### **8.06 Adjustments for Changes**

If the City has directed a change in scope of work under Section 6.09 and either party believes that such change will increase or decrease the costs of providing service, the party which believes the Contractor's Payment should be adjusted shall within 30 calendar days submit to the other party a proposed adjustment and the parties shall thereafter meet and discuss the matter. Contractor shall promptly provide all relevant schedules, supporting documentation and other financial information requested by the City to evaluate the necessity for an adjustment and the amount thereof. The City's Director of Public Works shall participate in key meetings regarding those adjustments.

Within 90 days of the submission of the Proposed Adjustment, the City (pursuant to a recommendation from the Director of Public Works) will determine the amount of the adjustment, if any, and shall thereafter adjust the Contractor's Payment accordingly. Any adjustments will be made effective as of the date the change in service is implemented.

If Contractor is dissatisfied with the recommendation of the Director or Public Works it may appeal that decision to the City



Manager. If an appeal is to be taken, Contractor shall promptly (any in any case within 15 days of its receipt of the Director of Public Works decision) submit a full written statement of

- 1) each item with which it disagrees;
- 2) the reasons for its disagreement;
- 3) the amount which it believes the Contractor's Payment should be adjusted for each such item and shall submit copies of all financial and operational data on which it relies.

The City Manager shall meet with Contractor to review the appeal and shall issue his or her decision (increasing or decreasing the amount of the recommended adjustments) within 30 days after receipt of Contractor's complete appeal.

If Contractor is dissatisfied with the City Manager's decision, it may appeal that decision to the City Council. If an appeal is to be taken, Contractor shall promptly (and in any case within 15 days of its receipt of the City Manager's decision) submit to the City Clerk (with a copy to the City Manager and the City Attorney) a full written statement in the same form as prescribed above. The City Council will consider the appeal at a public meeting held within 60 days after the filing of the Contractor's appeal.

#### **8.07 Maintenance of Financial Records**

**A. General.** In order to effectuate the periodic reviews of the Contractor's Payment contemplated by Section 8.03 and the occasional reviews of adjustments under Section 8.06 due to changes directed by the City, which reviews may not coincide with the periodic reviews under Section 8.03, it is necessary for Contractor to maintain accurate, detailed financial information in a consistent format and to make such information available to City in a timely fashion. It is also necessary, in order to assure the public of the accuracy of the review processes, for the Contractor's financial records to be confirmed by an audit conducted by an independent certified public accountant whose report thereon is forwarded to the City on a regular basis. This section is intended to effectuate these requirements.

**B. Contractor's Accounting Records.** Contractor shall maintain in its office accurate and complete accounting records containing the underlying financial and operational data relating to, and the bases for computation of, all costs associated with providing service under this Agreement. The accounting records shall be prepared on an accrual basis, in accordance with Generally Accepted Accounting Principles consistently applied. The Contractor will adhere throughout the Term to "Generally Accepted Accounting Principles" then in effect, published by the American Institute of Certified Public Accountants.

The operating year for both accounting and all other record keeping purposes shall be the fiscal year commencing July 1 and ending June 30.

**C. Inspection of Records.** City, and auditors and other agents selected by City, shall have the right, during regular business hours, to conduct onsite inspections of the records and accounting systems of Contractor and to make copies of any documents relevant to this Agreement.

**D. Retention of Records.** Contractor shall retain all records and data required to be maintained under this Agreement for a period of at least three (3) years following the close of each of Contractor's fiscal years, and for such further time as may be designated by City to enable it to complete any review or audit commenced during such three (3) year period.

**E. Delivery of Financial Reports to City.** Contractor shall deliver to City the financial reports, in the format and at the time required by Section 8.03.

In addition, Contractor shall provide City with financial information in such format, and at such times, as City may reasonably require to monitor Contractor's financial activities and conduct the compensation review processes described in this article.

**F. Delivery of Financial Statements, Other Documents, and Auditor's Report.** Within 120 days after the close of each fiscal year (i.e., by October 28) Contractor shall deliver to City ten (10) copies of its audited financial statements for the preceding fiscal year together with such other documents as may be required by City which shall show in detail the financial condition of the Contractor and the results of its operations under this Agreement. These statements shall have been examined by and shall be accompanied by the report of an independent certified public accountant containing such accountant's representation that it has examined the Contractor's financial statements in accordance with Generally Accepted Auditing Standards and the accountant's unqualified opinion that such statements have been prepared in accordance with Generally Accepted Accounting Principles consistently applied and fairly reflect the results of operations and the Contractor's financial condition.

At the same time as the foregoing materials are delivered, Contractor shall also deliver:

- audited consolidated financial statements of Contractor's ultimate parent company (if any) for such fiscal year, together with the related opinion of the independent certified public accountant who examined such financial statements.
- a statement disclosing whether any of Contractor's subcontractors or suppliers are subsidiaries, or

otherwise affiliates, of Contractor or Contractor's parent company or companies.

The City may prescribe the contents of supplemental schedules to be included with the financial statements required.

**G. Affiliated Companies.** Contractor's accounting records shall be maintained on a basis showing the results of Contractor's operations under this Agreement separately from operations in other locations, as if Contractor were an independent entity providing service only to City. The costs and revenues associated with providing service to City shall not be combined, consolidated or in any other way incorporated with those of other operations conducted by Contractor in other locations, or with those of "affiliated companies", as defined below.

Whether or not there are such contractual or extra-contractual relationships between Contractor and affiliates, if Contractor is owned or controlled by another corporation, then the financial reports and auditor's opinions required of such Contractor shall also be required of such "parent company" which shall constitute an "affiliate."

**H. Definition of "Affiliate".** For purposes of this Agreement, all businesses, (including corporations, limited and general partnerships and sole proprietorships) which are directly or indirectly related to Contractor by virtue of direct or indirect ownership interests or common management shall be deemed to be "affiliated with" Contractor and included within the term "affiliates" as used herein. An affiliate shall include a business in which Contractor owns a direct or indirect ownership interest, a business which has a direct or indirect ownership interest in Contractor and/or a business which is also owned, controlled or managed by any business or individual which has a direct or indirect ownership interest in Contractor. For purposes of determining whether an indirect ownership interest exists, the constructive ownership provisions of Section 318(a) of the Internal Revenue Code of 1986, as in effect on the date of this Agreement, shall apply; provided, however, that (i) "10 percent" shall be substituted for "50 percent" in Section 318(a)(2)(C) and in Section 318(a)(3)(C) thereof; and (ii) Section 318(a)(5)(C) shall be disregarded. For purposes of determining ownership under this paragraph and constructive or indirect ownership under Section 318(a), ownership interests of less than 10 percent shall be disregarded and percentage interests shall be determined on the basis of the percentage of voting interest or value which the ownership interest represents, whichever is greater.

**I. Review of Audited Financial Statement.** City may with its own employees or by means of a consultant review the

audit plan and workpapers of any of the independent certified public accountants whose opinions on the audited financial statements are to be furnished pursuant to Section 8.07.F. and G. If such review gives rise to any questions, or differences of opinion regarding Contractor's compliance with the Agreement, Contractor and its accountant(s) shall meet with City, and its consultant if any, to discuss the issues involved.

## **ARTICLE 9 INDEMNITY, INSURANCE, BOND**

### **9.01 Indemnification**

Contractor shall indemnify and hold harmless the City, its officers, employees and agents, from and against any and all loss, liability, penalty, forfeiture, claim, demand, action proceeding or suit, of any and every kind and description (including, but not limited to, injury to and death of any person and damage to property or for contribution or indemnity claimed by third parties) arising or resulting from and in any way connected with (1) the negligence or willful misconduct of Contractor, its officers, employees, agents and/or subcontractors in performing services under this Agreement; (2) the failure of the Contractor, its officers, employees, agents and/or subcontractors to comply in all respects with the provisions of this Agreement, applicable laws (including, without limitation, the Environmental Laws) and regulations, and/or applicable permits and licenses; and/or (3) the acts of Contractor its officers, employees, agents and/or subcontractors in performing services under this Agreement for which strict liability is imposed by law (including, without limitation, the Environmental Laws). The foregoing indemnity shall apply regardless of whether such loss, liability, penalty, forfeiture, claim, demand, action, proceeding, suit, injury, death or damage is also caused in part by the negligence of others, including that of any of the indemnitees; provided, however, that this indemnity does not apply if the loss or damage to a third party resulted from an act or omission of Contractor, its officers, employees and agents, which act or omission is solely the result of its or their following a negligent, express direction or order of an officer, employee or agent of the City.

Contractor further agrees to and shall, upon demand of City, at Contractor's sole cost and expense, defend (with attorneys acceptable to the City) City, its officers, employees, and agents against any claims, actions, suits or other proceedings, whether judicial, quasi-judicial or administrative in nature, arising or resulting from any events described in the immediately preceding paragraph.

The Contractor's duty to indemnify and defend shall survive the expiration or earlier termination of this Agreement.

## 9.02 Insurance

**A. Types and Amounts of Coverage.** Contractor, at Contractor's sole cost and expense, shall procure and maintain in force at all times during the Term the following types and amounts of insurance.

1. Workers' Compensation and Employer's Liability. Contractor shall maintain workers' compensation insurance covering its employees in statutory amounts and otherwise in compliance with the laws of the State of California. Contractor shall maintain Employer's Liability insurance in an amount not less than One Million Dollars (\$1,000,000) per accident or disease.

2. Public Liability. Contractor shall maintain comprehensive general liability insurance with a combined single limit of not less than Ten Million Dollars (\$10,000,000) per occurrence and Ten Million Dollars (\$10,000,000) aggregate covering all claims and all legal liability for personal injury, bodily injury, death, and property damage, including the loss of use thereof, arising out of, or occasioned in any way by Contractor's performance of, or its failure to perform, services under this Agreement.

The insurance required by this subsection shall include:

- a. Premises Operations;
- b. Independent Contractor's Protective;
- c. Products and Completed Operations;
- d. Personal Injury Liability with Employment Exclusion deleted;
- e. Broad Form Blanket Contractual, including Contractor's Obligation under Section 9.01;
- f. Owned, Non-Owned, and Hired Motor Vehicles;
- g. Broad Form Property Damage, including Completed Operations.

3. Physical Damage. Contractor shall maintain comprehensive (fire, theft and collision) physical damage insurance covering the vehicles and equipment used in providing service to the City under this Agreement, with a deductible or

self-insured retention not greater than One Thousand Dollars (\$1,000.00).

The insurance policies required by this Section shall be issued by an insurance company or companies authorized to do business in the State of California with a rating in the most recent edition of Best's Insurance Reports of size category XV or larger and a rating classification of A+ or better, except that Workers' Compensation insurance may be provided by a carrier with a size category of VIII or larger.

## **B. Required Endorsements**

1. The Workers' Compensation policy shall contain an endorsement in substantially the following form:

"Thirty (30) days prior written notice shall be given to the City of Sunnyvale in the event of cancellation reduction in coverage, or non-renewal of this policy. Such notice shall be sent to:

City Manager  
City of Sunnyvale  
456 W. Olive Avenue  
Sunnyvale, CA 94086"

2. The Public Liability policy shall contain endorsements in substantially the following form:

- (a) "Thirty (30) days prior written notice shall be given to the City of Sunnyvale in the event of cancellation, reduction of coverage, or non-renewal of this policy. Such notice shall be sent to:

City Manager  
City of Sunnyvale  
456 W. Olive Avenue  
Sunnyvale, CA 94086

- (b) "The City of Sunnyvale, its officers, employees, and agents are additional insureds on this policy."

- (c) "This policy shall be considered primary insurance as respects any other valid and collectible insurance maintained by the City of Sunnyvale, including any self-insured retention or program of self-insurance, and any other such

insurance shall be considered excess insurance only."

- (d) "Inclusion of the City of Sunnyvale as an insured shall not affect the City's rights as respects any claim, demand, suit or judgment brought or recovered against the Contractor. This policy shall protect Contractor and the City in the same manner as though a separate policy had been issued to each, but this shall not operate to increase the company's liability as set forth in the policy beyond the amount shown or to which the company would have been liable if only one party had been named as an insured."

**C. Delivery of Proof of Coverage.** No later than November 16, 1990, Contractor shall furnish the City certificates of each policy of insurance required hereunder, in form and substance satisfactory to City. Such certificates shall show the type and amount of coverage, effective dates and dates of expiration of policies and shall have all required endorsements. If the City requests, copies of each policy, together with all endorsements, shall also be promptly delivered to City.

Renewal certificates will be furnished periodically to City to demonstrate maintenance of the required coverages throughout the Term.

#### **D. Other Insurance Requirements**

1. In the event any services are delegated to a subcontractor, the Contractor shall require such subcontractor to provide statutory workers' compensation insurance and employer's liability insurance for all of the subcontractor's employees engaged in the work. The liability insurance required by subsection 9.02.A.2 shall cover all subcontractors or the subcontractor must furnish evidence of insurance provided by it meeting all of the requirements of this Section 9.02.
2. The Contractor shall comply with all requirements of the insurers issuing policies. The carrying of insurance shall not relieve Contractor from any obligation under this Agreement. If any claim is made by any third person against the Contractor or any subcontractor on account of any occurrence related to this Agreement, the Contractor shall promptly report the facts in writing to the insurance carrier and to the City.

If Contractor fails to procure and maintain any insurance required by this Agreement, the City may take out and maintain, at the Contractor's expense, such insurance as it may

deem proper and deduct the cost thereof from any monies due the Contractor.

The Public Liability insurance required by Section 9.02.A.2 shall be written on an "occurrence," rather than a "claims made" basis, if such coverage is obtainable. If it is not obtainable, Contractor must arrange for "tail coverage" to protect the City from claims filed after the expiration or termination of this Agreement relating to incidents which occurred prior to such expiration or termination.

### **9.03 Faithful Performance Bond**

Throughout the Term of this Agreement, Contractor shall have filed with the City, and shall continue to maintain for the benefit of the City, a bond securing the Contractor's faithful performance of its obligations under this Agreement. The principal sum of the bond shall be Three-Million Dollars (\$3,000,000). The form of the bond shall be as set out in Exhibit H. The bond shall be executed as surety by a corporation authorized to issue surety bonds in the State of California, with a financial condition and record of service satisfactory to the City.

Contractor shall, if requested by City, procure and file a replacement performance bond in the same form as Exhibit H, in the sixth year of the Term. The amount of such bond, if required, shall be Three Million Dollars multiplied by a fraction, the numerator of which is the Contractor's payment in the fifth year of the Term and the denominator of which is the Contractor's Payment in the first year of the Term. Prior to requesting an increase in the Three-Million Dollar performance bond, the City will discuss the request with Contractor, recognizing that bond markets have a tendency to change with respect to accessibility and cost.

## **ARTICLE 10 CITY'S RIGHT TO PERFORM SERVICE**

### **10.01 General**

In the event that the Contractor, for any reason whatsoever, fails, refuses or is unable to collect and transport any or all Solid Waste which it is required by this Agreement to collect and transport, at the time and in the manner provided in this Agreement, for a period of more than forty eight (48) hours, then the City shall have the right, but not the obligation, upon notice to Contractor, (1) to perform, or cause to be performed, such services itself with its own or other personnel without liability to Contractor and/or (2) to take possession for use of any or all of Contractor's land, equipment and other property used or useful in the collection and transportation of Solid Waste, and to use



such property to collect and transport any Solid Waste generated within the City.

Notice of the Contractor's failure, refusal or neglect to collect and transport Solid Waste may be given orally by telephone to the Contractor at its principal office and shall be effective immediately. Written confirmation of such oral notification shall be sent to Contractor within twenty-four (24) hours of the oral notification.

#### **10.02 Temporary Possession for Service Interruptions Caused by Events Beyond the Contractors Control**

If the interruption or discontinuance in service is caused by any of the reasons listed in Section 11.05, the City shall pay to Contractor the reasonable rental value of the equipment, as specified in Exhibit E, and facilities, possession of which is taken by the City, for the period of the City's possession, but the City is excused from any other obligation to pay Contractor monies under this Agreement for such period.

#### **10.03 Temporary Possession for Service Interruptions Caused by Other Events**

If the interruption or discontinuance of service is caused by any event other than those listed in Section 11.05 (including interruptions and discontinuances due to strikes, lockouts, and other labor disturbances), the City may take possession of and use all of the Contractor's property described above without paying Contractor or any other person any rental, or any other charge or compensation whatsoever, other than as specified in Exhibit E.

Contractor further agrees that in such event:

- (1) It will fully cooperate with City to effect the transfer of possession of property to the City for City's use.
- (2) It will, if City so requests, keep in good repair and condition all of such property, provide all motor vehicles with fuel, oil and other service, and provide such other service as may be necessary to maintain said property in operational condition.
- (3) City may immediately engage all or any personnel necessary or useful for the collection and transportation of Solid Waste, including, if City so desires, employees previously or then employed by Contractor. Contractor further agrees, if City so requests, to furnish City the services of any or all management or office personnel employed by Contractor whose services are necessary or useful for Solid Waste collection and transportation operations.

The City's exercise of its rights under this Article 10 (1) does not constitute a taking of private property for which compensation must be paid, (2) will not create any liability on the part of City to Contractor, and (3) does not exempt Contractor from the indemnity provisions of Section 9.01, which are meant to extend to circumstances arising under this Section, provided that Contractor is not required to indemnify City against claims and damages arising from the sole negligence of City officers, employees and agents in the operation of collection vehicles during the time the City has taken possession of such vehicles.

#### **10.04 Duration of City's Possession**

City has no obligation to maintain possession of Contractor's property and/or continue its use in collecting and transporting Solid Waste for any period of time and may at any time, in its sole discretion, relinquish possession to the Contractor.

The City's right to retain temporary possession of Contractor's property, and to provide Solid Waste collection services, shall continue until Contractor can demonstrate to the City's satisfaction that it is ready, willing and able to resume such services.

### **ARTICLE 11 DEFAULT AND REMEDIES**

#### **11.01 Events of Default**

All provisions of the Franchise and this Agreement to be performed by the Contractor are considered material. Each of the following shall constitute an event of default ("Event of Default") hereunder:

- A. Contractor fails to perform its obligations under this Agreement, or any present or future supplement or amendment to this Agreement, and fails to cure such breach within two (2) days of receiving notice from the City specifying the breach;
- B. Any representation or disclosure made to City by Contractor in connection with or as an inducement to entering into this Agreement or any future amendment to this Agreement, which proves to be false or misleading in any material respect as of the time such representation or disclosure is made, whether or not any such representation or disclosure appears as part of this Agreement;
- C. There is a seizure or attachment of, or levy on, the operating equipment of Contractor, including without limit its vehicles, maintenance or office facilities, or any part thereof;

- D. There is any termination or suspension of the transaction of business by Contractor, including without limit, due to labor unrest including strike, work stoppage or slowdown, sickout, picketing, or other concerted job action lasting more than two (2) days;
- E. Contractor files a voluntary petition for debt relief under any applicable bankruptcy, insolvency, debtor relief, or other similar law now or hereafter in effect, or shall consent to the appointment of or taking of possession by a receiver, liquidator, assignee, trustee, custodian, sequestrator (or similar official) of the Contractor for any part of Contractor's operating assets or any substantial part of Contractor's property, or shall make any general assignment for the benefit of Contractor's creditors, or shall fail generally to pay Contractor's debts as they become due or shall take any action in furtherance of any of the foregoing;
- F. A court having jurisdiction shall enter a decree or order for relief in respect of the Contractor, in any involuntary case brought under any bankruptcy, insolvency, debtor relief, or similar law now or hereafter in effect, or Contractor shall consent to or shall fail to oppose any such proceeding, or any such court shall enter a decree or order appointing a receiver, liquidator, assignee, custodian, trustee, sequestrator (or similar official) of the Contractor or for any part of the Contractor's operating equipment or assets, or orders the winding up or liquidation of the affairs of Contractor;
- G. Contractor fails to provide reasonable assurances of performance as required under Section 11.07.
- H. Contractor or Bay incurs an Event of Default as defined in the Consent and First Amendment.

#### **11.02 Right to Terminate Upon Default**

Upon an Event of Default by Contractor, the City shall have the right to terminate the Franchise and this Agreement upon a further ten (10) days notice, but without the need for any hearing, suit or legal action"

#### **11.03 Possession of Property Upon Termination**

In the event of termination for default, the City shall have the right to take possession of any and all of Contractor's land, equipment, and other property used or useful in the collection and transportation of Solid Waste and to use such property to collect and transport any Solid Waste generated within the City. The City shall have the right to retain the possession of such property until other suitable arrangements can be made for the provision of Solid Waste collection services, which may include

the grant of a Franchise to another waste hauling company. The Contractor shall be entitled to the reasonable rental value of such property, which shall be offset against any damages due the City for the Contractor's default.

Contractor shall furnish the City with immediate access to all of its business records related to its billing of accounts for services that are not billed by the City under Section 6.01(A).

#### **11.04 City's Remedies Cumulative; Specific Performance**

The City's right to terminate the Contract under Section 11.02 and to take possession of the Contractor's properties under Section 11.03 are not exclusive, and the City's termination of the Contract shall not constitute an election of remedies. Instead, they shall be in addition to any and all other legal and equitable rights and remedies which the City may have.

By virtue of the nature of this Agreement, the urgency of timely, continuous and high quality service, the lead time required to effect alternative service, and the rights granted by City to the Contractor, the remedy of damages for a breach hereof by Contractor is inadequate and City shall be entitled to injunctive relief.

#### **11.05 Excuse From Performance**

The parties shall be excused from performing their respective obligations hereunder in the event they are prevented from so performing by reason of floods, earthquakes, other "acts of God," war, civil insurrection, riots, acts of any government (including judicial action), and other similar catastrophic events which are beyond the control of and not the fault of the party claiming excuse from performance hereunder. Labor unrest, including but not limited to strike, work stoppage or slowdown, sickout, picketing, or other concerted job action is not an excuse from performance and Contractor shall be obligated to continue to provide service notwithstanding the occurrence of any or all of such events.

The party claiming excuse from performance shall, within two (2) days after such party has notice of such cause, give the other party notice of the facts constituting such cause and asserting its claim to excuse under this Section.

In the event that either party validly exercises its rights under this Section, the parties hereby waive any claim against each other for any damages sustained thereby.

The partial or complete interruption or discontinuance of Contractor's services caused by one or more of the events

described in this Section shall not constitute a default by Contractor under this Agreement.

Notwithstanding the foregoing, however, (1) the existence of an excuse from performance will not affect the City's rights under Sections 10.01 and 10.02, and (2) if Contractor is excused from performing its obligations hereunder for any of the causes listed in this Section for a period of fourteen (14) days or more, the City shall nevertheless have the right, in its sole discretion, to terminate this Agreement by giving ten (10) days notice, in which case the provisions of Section 11.03 will apply.

#### **11.06 Relationship of Liquidated Damages to Right to Terminate**

The City's right to recover liquidated damages under Section 6.07 for Contractor's failure to meet the service performance standards shall not preclude the City from obtaining equitable relief for persistent failures to meet such standards nor from terminating the Agreement for such failures.

#### **11.07 Right to Demand Assurances of Performance**

If Contractor (1) suffers the imposition of liquidated damages under Section 6.07; (2) is the subject of any labor unrest including work stoppage or slowdown, sickout, picketing or other concerted job action; (3) appears in the reasonable judgment of City to be unable to regularly pay its bills as they become due; or (4) is the subject of a civil or criminal proceeding brought by a federal, state, regional or local agency for violation of an Environmental Law, the City may, at its option and in addition to all other remedies it may have, demand from Contractor reasonable assurances of timely and proper performance of this Agreement, in such form and substance as the City may require. If Contractor fails or refuses to provide satisfactory assurances of timely and proper performance in the form and by the date required by City, such failure or refusal shall be an event of default for purposes of Section 11.01.

### **ARTICLE 12 OTHER AGREEMENTS OF THE PARTIES**

#### **12.01 Relationship of Parties**

The parties intend that Contractor shall perform the services required by this Agreement as an independent contractor engaged by City and not as an officer or employee of the City nor as a partner or joint venturer with the City. No employee or agent of Contractor shall be or shall be deemed to be an employee or agent of the City. Except as expressly provided herein, Contractor shall have the exclusive control over the manner and means of conducting the solid waste collection services performed under this Agreement, and all persons performing such services. Contractor shall be solely responsible for the acts and omissions

of its officers, employees, subcontractors and agents. Neither Contractor nor its officers, employees, subcontractors and agents shall obtain any rights to retirement benefits, workers' compensation benefits, or any other benefits which accrue to City employees by virtue of their employment with the City.

#### **12.02 Compliance with Law**

In providing the services required under this Agreement, Contractor shall at all times, at its sole cost, comply with all applicable laws of the United States, the State of California and the City and with all applicable regulations promulgated by federal, state, regional or local administrative and regulatory agencies, now in force and as they may be enacted, issued or amended during the Term.

In the event the Contractor is determined, in a final decision by the National Labor Relations Board or a court, to have engaged in unfair labor practices in violation of the National Labor Relations Act, as amended, 29 U.S.C. ?158, et seq., which have occurred during the Term of this Agreement, the City shall have the right to terminate the Franchise and this Agreement upon ten (10) days' notice, but without the need for any hearing, suit, or legal action.

The enumeration of the City's right to terminate in the immediately preceding paragraph is not in derogation of the City's right to treat the Contractor's violation of other laws as an Event of Default under Section 11.01, for purposes of Section 11.02.

#### **12.03 Governing Law**

This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of California.

#### **12.04 Jurisdiction**

Any lawsuits between the parties arising out of this Agreement shall be brought and concluded in the courts of the State of California, which shall have exclusive jurisdiction over such lawsuits.

With respect to venue, the parties agree that this Agreement is made in and will be performed in Santa Clara County.

#### **12.05 Assignment**

Except as provided in Section 12.06, neither party shall assign its rights nor delegate or otherwise transfer its obligations under this Agreement to any other person without the prior written consent of the other party. Any such assignment

made without the consent of the other party shall be void and the attempted assignment shall constitute a material breach of this Agreement.

For purposes of this Section, "assignment" shall include, but not be limited to, (1) a sale, exchange or other transfer of substantially all of Contractor's assets dedicated to service under this Agreement to a third party; (ii) a sale, exchange or other transfer of 10% or more of the outstanding common stock of Contractor to a person other than the shareholder(s) disclosed in Contractor's Proposal (sales, exchanges and/or other transfers between such shareholders not being assignments); (iii) any reorganization, consolidation, merger, recapitalization, stock issuance or reissuance, voting trust, pooling agreement, escrow arrangement, liquidation or other transaction to which Contractor or any of its shareholders is a party which results in a change of ownership or control of 10% or more of the value or voting rights in the stock of Contractor (provided that changes in ownership or control between the shareholders disclosed in Contractor's Proposal shall not constitute assignments); and (iv) any combination of the foregoing (whether or not in related or contemporaneous transactions) which has the effect of any such transfer or change of ownership. For purposes of this Section, the term "proposed assignee" shall refer to the proposed transferee(s) or other successor(s) in interest pursuant to the assignment.

Notwithstanding the foregoing, the term "assignment" shall not include any transfer of stock or other ownership interest in Contractor: (i) to the transferor or to the transferor and his or her spouse, as trustee(s) of a revocable trust for the benefit of such transferor and spouse; (ii) to a child or other issue of the transferor by reason of the death or disability of the transferor where it is established to the satisfaction of City that the transferee has been active in the business on a substantially full-time basis prior to such transfer; (iii) to a personal representative of the transferor by reason of the death or incapacity of the transferor but only for such period as is reasonably necessary to arrange for the disposition of such interest, which disposition, however, shall constitute an "assignment" hereunder, except as provided under clause (ii) of this sentence.

Contractor acknowledges that this Agreement involves rendering a vital service to City's residents and businesses, and that City has selected Contractor to perform the services specified herein based on (1) Contractor's experience, skill and reputation for conducting its solid waste management operations in a safe, effective and responsible fashion, at all times in keeping with applicable waste management laws, regulations and good waste management practices, and (2) Contractor's financial resources to maintain the required equipment and to support its

indemnity obligations to City under this Agreement. City has relied on each of these factors, among others, in choosing Contractor to perform the services to be rendered by Contractor under this Agreement.

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

- (a) Contractor shall undertake to pay City its reasonable expenses for attorney's fees and investigation costs necessary to investigate the suitability of any proposed assignee, and to review and finalize any documentation required as a condition for approving any such assignment;
- (b) Contractor shall furnish City with audited financial statements of the proposed assignee's operations for the immediately preceding three (3) operating years;
- (c) Contractor shall furnish City with satisfactory proof: (i) that the proposed assignee has at least ten (10) years of solid waste management experience on a scale equal to or exceeding the scale of operations conducted by Contractor; (ii) that in the last five (5) years, the proposed assignee has not suffered any citations or other censure from any federal, state or local agency having jurisdiction over its waste management operations due to any significant failure to comply with state, federal or local waste management laws and that the assignee has provided the City with a complete list of such citations and censures; (iii) that the proposed assignee has at all times conducted its operations in an environmentally safe and conscientious fashion; (iv) that the proposed assignee conducts its solid waste management practices in accordance with sound waste management practices in full compliance with all federal, state and local laws regulating the collection and disposal of waste, including hazardous waste as identified in Title 22 of the California Code of Regulations; (v) of any other information required by City to ensure the proposed assignee can fulfill the terms of this Agreement in a timely, safe and effective manner. Under no circumstances shall any proposed assignment be considered by City if Contractor is in default at any time during the period of consideration.

#### **12.06 Subcontracting**

Contractor shall not engage any subcontractors without the prior written consent of the City, except for those whom Contractor has identified in writing to the City prior to engaging their services. Contractor may engage a subcontractor that is affiliated (as defined below) with Contractor only if



Contractor has first solicited bids in good faith from three unaffiliated subcontractors, and Contractor's affiliate submits the lowest bid for substantially the same services as covered by the competitive bids.

#### **12.07 Binding on Successors**

The provisions of this Agreement shall inure to the benefit of and be binding on the successors and permitted assigns of the parties.

#### **12.08 Parties in Interest**

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

#### **12.09 Waiver**

The waiver by either party of any breach or violation of any provisions of this Agreement shall not be deemed to be a waiver of any breach or violation of any other provision nor of any subsequent breach or violation of the same or any other provision. The subsequent acceptance by either party of any monies which become due hereunder shall not be deemed to be a waiver of any pre-existing or concurrent breach or violation by the other party of any provision of this Agreement.

#### **12.10 Contractor's Investigation**

The Contractor has made an independent investigation (satisfactory to it) of the conditions and circumstances surrounding the Agreement and the work to be performed by it, including the number and type of Waste Generators in the City, the nature of the Solid Waste generated, and the number and location of litter containers to be serviced under Section 5.06. Contractor recognizes that the information provided by the City in the Request for Proposals and in Addenda Nos. 1, 2, and 3 to the Request for Proposals, all of which have been carefully reviewed by Contractor, was provided for the convenience of prospective contractors and, while the City believes it to be correct, the City has made and makes no representations or warranties of any kind with respect to its accuracy or completeness.

#### **12.11 Condemnation**

Contractor acknowledges that this Agreement implements the grant of a franchise pursuant to Article XVI of the Sunnyvale City Charter and Section 8.16.090 of the Sunnyvale Municipal Code. The City fully reserves the rights to acquire the Contractor's

property utilized in the performance of this Agreement, by purchase or through the exercise of the right of eminent domain, in accordance with the procedure described in Section 1605 of the City Charter. Contractor agrees that, pursuant to Section 1605 of the City Charter, in fixing the price to be paid, the court shall value the property to be acquired at its fair market value, except that no allowance shall be made for franchise value, good will, going concern, earning power, or increased value of right of way.

## **12.12 Notice**

All notices, demands, requests, proposals, approvals, consents and other communications which this Agreement requires, authorizes or contemplates shall, except as provided in Section 10.01, be in writing and shall either be personally delivered to a representative of the parties at the address below or be deposited in the United States mail, first class postage prepaid, addressed as follows:

If to City:           City Manager  
                          City of Sunnyvale  
                          456 West Olive Avenue  
                          Sunnyvale, California 94086

with a copy to:

                          City Attorney  
                          City of Sunnyvale  
                          456 West Olive Avenue  
                          Sunnyvale, California 94086

If to Contractor:   Bay Counties Waste Services, Inc.  
                          3355 Thomas Road  
                          Santa Clara, CA 95054  
                          Attention: President

with a copy to:

                          David Cohen, Esq.  
                          Cohen & Ostler  
                          525 University Avenue, Suite 410  
                          Palo Alto, CA 94301

The address to which communications may be delivered may be changed from time to time by a notice given in accordance with this Section.

Notice shall be deemed given on the day it is personally delivered or, if mailed, three days from the date it is deposited in the mail.

### **12.13 Representatives of the Parties**

References in this Agreement to the "City" shall mean the City Council and all actions to be taken by the City shall be taken by the City Council except as provided below. The City Council may delegate, in writing, authority to the City Manager, the Director of the Department of Public Works and/or to other City officials and may permit such officials, in turn, to delegate in writing some or all of such authority to subordinate officers. The Contractor may rely upon actions taken by such delegates if they are within the scope of the authority properly delegated to them.

The Contractor shall, by the Effective Date, designate in writing a responsible officer who shall serve as the representative of the Contractor in all matters related to the Agreement and shall inform the City in writing of such designation and of any limitations upon his or her authority to bind the Contractor. The City may rely upon action taken by such designated representative as actions of the Contractor unless they are outside the scope of the authority delegated to him/her by the Contractor as communicated to City.

## **ARTICLE 13 MISCELLANEOUS AGREEMENTS**

### **13.01 Exhibits**

Each of the Exhibits, identified as Exhibits "A" through "H," and Exhibits B-1, D-1, and F-1 is attached hereto and incorporated herein and made a part hereof by this reference.

### **13.02 Entire Agreement**

This Agreement, including the Exhibits, represents the full and entire Agreement between the parties with respect to the matters covered herein.

### **13.03 Section Headings**

The article headings and section headings in this Agreement are for convenience of reference only and are not intended to be used in the construction of this Agreement nor to alter or affect any of its provisions.

### **13.04 References to Laws**

All references in this Agreement to laws shall be understood to include such laws as they may be subsequently amended or recodified, unless otherwise specifically provided.

### **13.05 Interpretation**

This Agreement shall be interpreted and construed reasonably and neither for nor against either party, regardless of the degree to which either party participated in its drafting.

**13.06 Amendment**

This Agreement may not be modified or amended in any respect except by a writing signed by the parties.

**13.07 Severability**

If any non-material provision of this Agreement is for any reason deemed to be invalid and unenforceable, the invalidity or unenforceability of such provision shall not affect any of the remaining provisions of this Agreement which shall be enforced as if such invalid or unenforceable provision had not been contained herein.

**13.08 Counterparts**

This Agreement may be executed in counterparts each of which shall be considered an original.

IN WITNESS WHEREOF, City and Contractor have executed this Agreement as of the day and year first above written.

ATTEST:

CITY CLERK

CITY OF SUNNYVALE ("City"), by

By \_\_\_\_\_  
Deputy City Clerk

\_\_\_\_\_  
Mayor

APPROVED AS TO FORM

BAY COUNTIES WASTE SERVICES, INC.

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

By: \_\_\_\_\_  
Name:  
Title: Vice President

## **LIST OF EXHIBITS**

EXHIBIT A -Detailed Scope of Services

EXHIBIT B -Implementation Plan

EXHIBIT B-1 - Transition Schedule

EXHIBIT C -Affirmative Action Certificate (as signed by Contractor)

EXHIBIT D -Prevailing Wage Schedule

EXHIBIT D-1 - Prevailing Wages Schedule

EXHIBIT E -Lease of Collection Vehicles

EXHIBIT F -Chart of Accounts

EXHIBIT F-1 - Chart of Accounts

EXHIBIT G -[Illustration of determination of Contractor's Payment. Required by Section 28 of Exhibit A to Consent and First Amendment]

EXHIBIT H -Performance Bond Form

### **1.05.03 MULTI-UNIT RESIDENTIAL RECYCLING PROGRAM 1**

#### **1. Collection of Recyclable Materials**

Contractor will collect Recyclable Materials from all Multi-Unit Residential Premises (i.e., residential structures with four or more units) within the City on a weekly basis. Contractor shall collect the following materials: newspaper, glass, tin cans, aluminum cans, bi-metal cans, PET plastic, HDPE plastic, used motor oil, and oil filters. Contractor shall make recycling services available to every resident of the City, either through this Multi-Unit program or through the existing Residential curbside collection program.

#### **2. Frequency of Collection**

Contractor will collect Recyclable Materials between the hours of 7 a.m. and 7 p.m. daily, five days a week, Monday through Friday, so that Recyclable Materials are collected from each Multi-Unit Residential Premises once a week. For weeks containing Holidays, the Recyclable Materials collection will occur as provided in Section 1.02 of Exhibit A to the Agreement.

**ADDITIONAL SERVICE:** If a Multi-Unit Residential Premises consistently has more Recyclable Materials than can be accommodated by the number of carts initially distributed, additional service will be arranged. Contractor will distribute additional carts and/or increase the frequency of collection as needed without charge.

**SPECIAL COLLECTION:** If a Multi-Unit Residential Premises occasionally has a need for an extra collection, Contractor will provide pickup within 48 hours from the first two such requests in a calendar year. Contractor shall not be required to provide a special collection upon receipt of a third such request. However, Contractor shall thereafter provide additional service (e.g., by supplying more carts in sufficient numbers) at no extra cost.

#### **3. Equipment**

Contractor shall furnish all equipment necessary for collection of Recyclable Materials from all Multi-Unit Residential Premises.

**A. Collection Carts.** Contractor shall provide each Multi-Unit Residential Premises with 96 gallon capacity, wheeled carts with lids. The carts will be compatible with side load collection vehicles and manufactured by Otto Industries, Inc. (Model No. Otto 95) or Toter, Inc. (Model No. 60001). The carts will be imprinted with the recycling logo and the type of material to be placed in each cart

(e.g., "newspaper"). Labels describing the desired contents of each cart (e.g., "Newspapers" or "Bottles and Cans") will also be affixed to each cart. The cart color(s), imprints and labels shall be subject to City approval. Carts will be distributed during the month immediately preceding the start of collection. Lost carts and damaged carts which cannot be repaired will be promptly replaced. Contractor shall clean carts at a frequency sufficient to maintain them in a clean and attractive condition.

- B. Used Motor Oil Jugs and Containers. Contractor shall contact the owner or manager of each Multi-Unit Residential complex to determine whether they wish to participate in the collection of used motor oil. For each complex which elects to participate, Contractor shall deliver a secondary containment storage container and four to six empty plastic screw-top one-gallon jugs. The jugs shall be labeled to indicate their recycling purpose, handling procedures and Contractor's telephone number. The content and appearance of the label shall be subject to City approval. Contractor shall also deliver four to six heavy duty zipper lock plastic bags with the oil jugs, to be used for the collection of used oil filters. The bags will be labeled to indicate their recycling purpose, handling procedures and Contractor's telephone number. The content and appearance of the label shall be subject to City approval.

The jugs and plastic bags will be placed in the storage container which will act as secondary containment. A total of 3,000 one-gallon jugs, 3,000 oil filter bags, and 350 storage containers will be purchased for program start-up. Unused jugs, bags and containers will be used to replace lost or damaged jugs/bags/containers or to accommodate growth in participation.

Contractor shall collect used motor oil and filters weekly and shall leave clean, empty plastic jugs and bags to replace those collected. Contractor shall clean storage containers at least one time per year and shall maintain storage containers so that they are clean and in compliance with applicable regulations at all times.

- C. Trucks. Contractor shall collect the Recyclable Materials using two (2) one-person semi-automated side load vehicles. The specifications of the trucks will be:

Chassis

Crane Carrier LET 40A chassis, Cummings 250 HP engine, Allison MT 653 5-speed automatic transmission.

Body

Dempster side-loading split body, 40 cubic yard capacity.

Compartments

Two compartments, divided as follows:

- a. 16-22 cubic yard compartment, with compactor, for newspaper;
- b. 15-21 cubic yard compartment, with compactor, for commingled materials.

Racks for plastic crates that hold and provide secondary containment for used oil jugs and oil filters.

#### 4. Number of Routes

Contractor will operate two (2) routes to collect Recyclable Materials. As additional Multi-Unit Residential Premises are constructed and occupied, Contractor shall update the route maps and route lists.

#### 5. Personnel

Contractor shall provide properly trained personnel as necessary to perform all tasks required for collection of Recyclable Materials.

#### 6. Delivery of Recyclable Materials

It is anticipated that the Sunnyvale Materials Recovery and Transfer ("SMaRT") Station will be able to accept commingled recyclable materials within nine months of program start-up. During this interim period (i.e., October 1, 1996 to June 30, 1997), Contractor may haul all used motor oil and oil filters to the Recycling Center at 301 Carl Road, Sunnyvale. Other recyclables will be hauled to BFI's Recyclery located in San Jose, to the Transfer Station in Pleasanton, to Peninsula Sanitary Services at Stanford, Mission Trail Waste Systems in Santa Clara, Smurfit Recycling Co. in San Jose, or the Blueline Transfer Station in South San Francisco, as directed by the City.

Ownership of all recyclable materials collected will reside with the City, and any net revenues resulting from the sale of these materials will belong to the City.

Upon notification by the City that the SMaRT Station is ready to accept commingled recyclable materials, Contractor shall deliver all recyclable materials collected, including used motor oil and used oil filters collected, to the SMaRT Station.

#### 7. Recordkeeping and Reporting

Contractor shall collect the following data: program participation, weights of materials collected by route and day, frequency of collection, missed pick ups and complaints. This information shall be summarized and submitted to the City on a monthly basis, in a format approved by the City.

#### 8. Public Education

Public education is important to encourage participation in the Multi-Unit Recycling Program by multi-unit residents, to encourage cooperation by multi-unit property owners and managers, and to minimize contamination of collected materials. Ordinary public education media are not fully effective



in contacting multi-unit owners, managers and residents. Therefore, Contractor will need to use, in a creative fashion, both ordinary and alternative media to initiate and maintain information channels with this multi-unit community. Contractor will conduct, at a minimum, the following public education program:

- A. Prior to startup, contact each multi-unit owner or manager, in person or by telephone to explain the purpose of the program, the advantages of reducing refuse volumes, and the startup procedures; and to determine the optimal number and location of toters to be placed at each complex.
- B. Prior to startup, prepare and distribute to all multi-unit owners and managers posters describing the multi-unit recycling program objectives and procedures and encouraging participation. These posters are to be placed on multi-unit complex bulletin and notice boards, in laundry rooms, in recreation rooms, and in other common locations. These posters will be replaced as needed to update for programs changes (and at least annually).
- C. Prior to startup, prepare a pamphlet for all multi-unit residents, explaining the multi-unit recycling program, and the startup procedures. This pamphlet will be in the form of a doorhanger, to be placed at each resident's door only after carts have been delivered. A supply of these program pamphlets will be given to property owners, property managers and homeowners' associations, sufficient for distribution to residents expected to move in during the next year. Contractor will provide a supplemental supply of these pamphlets annually.
- D. Prior to startup, and semi-annually thereafter, Contractor will provide text to City staff for posting of informational notices on cable television government access channels.
- E. Contractor will prepare and place at least three (3) 1/4-page display advertisements in a local daily newspaper of general circulation summarizing the most important points for multi-unit residents to know about the new program. The advertisements will be submitted for review and prior approval by the City and will be published approximately two (2) weeks before the scheduled start of collection.
- F. If the program startup is delayed or changed after the advertisements have appeared, not due to any fault of or change directed by the City, Contractor will promptly contact all affected residents by the most appropriate means in order to minimize confusion and insure an orderly commencement of the program.
- G. Contractor will, on a semi-annual basis (i.e., every six (6) months), prepare and mail to all residents a pamphlet with an update on the program, reminders of acceptable materials, a list of sources of recycling information, source reduction information, and related information. The first of these

mailers will be sent to participating complexes no later than two (2) weeks prior to the start of the multi-unit collection.

H. All printed materials distributed for promotion and public education will be submitted for review and approval by City staff at least four (4) weeks prior to its scheduled publication or distribution.

**SCHEDULE 1 (SEC. 1.05.03)**

**SCHEDULE FOR IMPLEMENTATION**

Step	Date
1 Order New Recycling Trucks	April, 1996
2 Order New Collection Carts	April, 1996
3 Perform Survey of Complex Owners, Managers	May/June, 1996
4 Distribute Program Information to Owners, Managers and Homeowners Associations	August/Sept., 1996
5 Distribute Program Doorhangers to Residents	September, 1996
6 Deliver New Collection Carts, Oil Jugs and Oil Filter Containers	(No sooner than one week prior to first collection)September, 1996
7 Publish Advertisements	September, 1996
8 Start of Recycling Collection	(No later than one week following delivery of carts/oil containers) October, 1996

**SUMMARY OF PROGRAM COSTS**

Description	Time of Payment	Payment Amount
Program Startup Costs	August 1996	\$ 41,152
Contractor Payment	November 1996	Initial Year (9 months) through July 1997 \$339,368
Contractor Payment	Second Year FY 1997-98	\$455,844
Contractor Payment	Following Years	(Incorporated in Rate Review Process)

**1.04.10 RESIDENTIAL YARDWASTE RECYCLING PROGRAM2**

### **13.0.1 Amount of Yardwaste to be Collected**

Contractor will collect unlimited quantities of Yardwaste which has been separated and delivered for collection

- (1) in the 64 or 96 gallon cart to be provided to each residence by Contractor,
- (2) in separate containers up to 32 gallons in capacity (including paper bags greater than 20 gallons in capacity) identified by color, signage or proximity to the Yardwaste cart as containing Yardwaste, and
- (3) in tied bundles not exceeding four (4) feet in length and one (1) foot in diameter.

Yardwaste contained in plastic bags shall be considered solid waste and will be picked up by Contractor's refuse collection trucks, unless otherwise directed in writing by City.

### **13.0.2 Location of Yardwaste to be Collected**

Contractor will collect Yardwaste which has been separated and delivered for collection at the curbside, or at backyard and sideyard locations by occupants who are eligible for backyard or sideyard collection of solid waste, as elderly or handicapped, under rules and regulations adopted by the City from time to time, as contemplated by Section 1.04.02 of Exhibit A to the Franchise Agreement.

### **13.0.3 Frequency of Collection**

Collection of Yardwaste shall take place Monday through Friday on the same day as solid waste collection, so that Yardwaste is collected weekly from each Residential Premises. For weeks containing Holidays, the Yardwaste collection will occur as provided in Section 1.02 of Exhibit A to the Agreement.

### **13.0.4 New Refuse Carts**

Contractor shall provide each Residential Premises with a 96 gallon or 64 gallon wheeled cart for refuse. The carts will be a "universal" type, which can be used in both a semi-automated and/or fully automated refuse collection system. The refuse carts will be of a color and design acceptable to City. Contractor will deliver one cart to each single family, duplex, and triplex Residential Premises (including freestanding and/or ground level townhomes) in the City. Distribution will be commenced one month prior to the start of the Yardwaste collection program and will be completed at least one week before Yardwaste collection is scheduled to commence.

### **13.0.5 Conversion of Existing Carts to Yardwaste Carts and Collection of "Excess Carts"**

Contractor shall arrange for the existing gray carts now used for refuse to be clearly marked for "Yardwaste" with decals or other signage approved by City, prior to the start of Yardwaste collection.

Contractor shall pick up excess existing gray refuse carts from Residential Premises whose occupants decline to participate in the Yardwaste recycling program.

### **13.0.6 Trucks**

Contractor shall collect the Yardwaste using six (6) one-person semi-automated front load vehicles. The specifications of the trucks will be:

Chassis

GMC White, dual drive, low entry chassis, Cummings engine, Allison transmission, 7.5 ton payload, 1 cart tipper mounted on work box.

Body

Heil or Leach front load 40 cubic yard capacity.

### **13.0.7 Number of Routes**

Contractor will operate six (6) routes to collect Yardwaste, which it believes is sufficient to provide the public with a quality program.

### **13.0.8 Public Education**

Public education is important to encourage participation in the Yardwaste recycling program, to help increase route efficiency by having Yardwaste clearly identifiable, and to minimize contamination.

Contractor will conduct the following public education program:

1. Prepare and mail a pamphlet to all City residents eligible to participate in the Yardwaste program. The pamphlet will include a description of the Yardwaste program, an explanation of the carts to be used for refuse and Yardwaste, the goals the City hopes to achieve, the materials that are acceptable, and a questionnaire to be mailed back to Contractor stating the customer's preferred size of new refuse cart (i.e., 64 or 96 gallons). If the questionnaire is not returned, the customer will be provided the 96 gallon capacity refuse cart if he/she is presently using a 96 or 105 gallon cart, or a 64 gallon capacity refuse cart if he/she is presently using a 64 gallon cart. The pamphlet will be submitted for review and prior approval by City and mailed to all residents at least twelve (12) weeks before the scheduled start of collection.
2. Contractor will prepare and place at least three (3) 1/4-page display advertisements in a local daily newspaper of general circulation summarizing the most important points for residents to know about the new program. The advertisements will be submitted for review and prior approval by City and will be published approximately two (2) weeks before the scheduled start of collection.

3. If the program is delayed or changed after the advertisements have appeared, not due to any fault of or change directed the City, Contractor will promptly contact all affected residents by the most appropriate means in order to minimize confusion and insure an orderly commencement of the program.
4. Contractor will, on a semi-annual basis (i.e., every six (6) months), prepare and mail to all residents a pamphlet with an update on the Yardwaste program, reminders of acceptable materials, a list of sources of information on Yardwaste available to residents, and related information. The pamphlet will be submitted to City for review and approval prior to distribution. The first of these mailers will be sent to participating residents no later than two (2) weeks prior to the start of Yardwaste collection.

**SCHEDULE 1(SEC. 1.04.10)**

**SCHEDULE FOR IMPLEMENTATION**

Step	Date
1 Order Yardwaste Trucks	January 12, 1994
2 Order New Refuse Carts (Initial Order)	February 1994
3 Distribute Survey/Questionnaire	March 1994
4 Order Balance of New Refuse Carts	April 1994
5 Distribute Public Information Mailer	May 1994
6 Deliver New Refuse Carts	June 1994
7 Publish Advertisements	June 1994
8 Pick Up Excess Gray Carts from Residents Not Participating in Yardwaste Program	July 1, 1994
9 Start of Yardwaste Collection Using Gray Carts and Customer Cans, Bags and Bundles	July 1, 1994
10 Start of Refuse Collection Using New "Universal" Carts	July 1, 1994

**SCHEDULE 2 (SEC. 1.04.10)**

**BUDGETS**

FY 1994-95 FY 1995-96

SEE ATTACHED

**SCHEDULE 3 (SEC. 1.04.10)**

**BUDGET ASSUMPTIONS**

Vehicles

Number of Trucks:	6
Type of Trucks:	Per Exhibit A
Depreciation based on:	7 years useful life
Price per Truck:	\$165,000.00
Method of Depreciation:	Straight Line

Vehicle Costs

Inflation Rate: 5%

Carts

Number of Carts:

64 Gallon: 03

96 Gallon: 22,000

Price per Cart:

64 Gallon: \$47.00

96 Gallon: \$49.00

Depreciation based on: 5 years useful life

Method of Depreciation: Straight Line

Drivers

Number of Drivers: 6

Hourly Rate: \$17.78 (in 1993-94)

Interest on Toters

Interest Expense:

Principal Borrowed: \$970,200.00

Interest Rate: 9%

Amortization Period: 60 months

Interest on Vehicles/Equipment

Principal Borrowed: \$934,920.00

Interest Rate: 9%

Amortization Period: 84 months

Location of Contractor's Base

The budgets on Schedule 2 (Sec. 1.04.10) assume that the Contractor's base of operations has been relocated to Santa Clara. The costs are valid whether the base is in Sunnyvale or Santa Clara.