

FIRST AMENDMENT TO SERVICE AGREEMENT

THIS FIRST AMENDMENT TO AGREEMENT (this "Amendment") made and entered into as of this ____ day of _____, 20__, amends the Service Agreement entered into between the CITY OF FRESNO, a municipal corporation (the "City"), and Kochergen Farms Composting, Inc., a California corporation (hereinafter referred to as the "Service Provider"). This Amendment and its provisions shall be effective commencing on _____, 20__, unless otherwise specified herein.

RECITALS

WHEREAS, the City and the Service Provider entered into that certain Service Agreement, dated May 1, 2016, for the processing of Green Waste materials generated in the City (the "Agreement"); and

WHEREAS, the City and the Service Provider now desire to modify the terms of the Agreement by executing this Amendment, in order to comply with Senate Bill 1383 titled "Reducing Short-Lived Climate Pollutants in California", signed into law in 2016 (SB 1383), and to adjust for changing and existing conditions in performance of services; and

WHEREAS, this Agreement will be administered for the City by its Director of Public Utilities (hereinafter referred to as "Administrator") or his/her designee.

AGREEMENT

NOW, THEREFORE, in consideration of the above recitals, the mutual promises herein contained, and for other good and valuable consideration hereby acknowledged, the parties agree as follows:

1. Section 1(b), the definition of "Business Days" is deleted.
2. Section 1(d), the definition of "**Green Waste Materials**", is deleted and replaced with a new definition of "**Organic Materials**" which shall read as follows:

"Organic Material(s) - means those discarded materials that will decompose and/or putrefy including green waste material and food scraps such as, but not limited to, green trimmings, grass, weeds, leaves, prunings, branches, dead plants, brush, tree trimmings, dead trees, small wood pieces, other types of organic yard waste, vegetable waste, fruit waste, grain waste, dairy waste, meat waste, fish waste, carpets, paper contaminated with food scraps, pieces of unpainted and untreated wood, and pieces of unpainted and untreated wallboard generated by, and as collected by the City, from City of Fresno Solid Waste Division Green Waste Material residential customers. No discarded material shall be considered to be Organic Materials unless such material is "source separated organic waste," as defined in 14 CCR Section 18982(a)(69)."

All instances of the former defined term “**Green Waste Material(s)**” shall be replaced with the new defined term “**Organic Material(s)**”.

3. Section 1(e), the definition of “**Holiday(s)**”, shall be amended to read as follows:

“Holiday(s) – shall mean Memorial Day, Labor Day, Thanksgiving Day, Christmas Day, and New Year’s Day.”

4. Section 1(g), the definition of “**Process or Processing**”, shall be amended to read as follows:

“Process or Processing - shall mean the controlled separation, Recovery, volume reduction, conversion, or recycling of Organic Materials for the purpose of Recovery, including but not limited to composting, anaerobic digestion, or other methods defined in 14 CCR Section 17402(a)(20).”

5. Section 1(h), the definition of “**Processing Facility**”, shall be amended to read as follows:

“Processing Facility - shall mean the primary location where the Service Provider receives, stores, transfers, or Processes the collected/delivered Organic Materials prior to storage, shipment, and/or the sale as Compost, or any other approved Processing, Recovery, conversion, volume reduction, or recycling program for the respective material. The Processing Facility location for purposes of this Agreement shall be at the Service Provider’s facility located at: *33915 Avenal Cutoff Rd, Avenal, CA 93204*. The primary phone number of the Processing Facility is: *(559) 498-0900*.”

6. Section 1(l), the definition of “**Working Days**”, shall be amended to read as follows:

“Working Day(s) – shall include all days the Service Provider is open for normal operations – i.e., Monday through Friday from 6:00 am to 5:30 pm and Saturday 6:00 am to 4:30 pm but excluding Holidays, and from 6:00 am to 3:00 pm with limited staff on Independence Day, Christmas Eve and New Year’s Eve. The Service Provider can petition the City to modify these working hours to meet conditions of the Service Provider’s permit; however, the City shall be under no obligation to agree to any additional compensation for any modification.”

7. The definition of “**Recover**” or “**Recovery**” is added as Section 1(m) and shall read as follows:

“Recover” or “Recovery” means any Organic Waste recovery activity, as defined in 14 CCR Section 18982(a)(49), including facilities or operations deemed to constitute a reduction of landfill disposal described in 14 CCR Section 18983.1(b), including but not limited to, composting, use as a soil amendment, and/or land application.”

8. The definition of “**Non-organic Materials**” is added as Section 1(n) and shall read as follows:

“Non-organic Materials” means all waste that is not Organic Materials, including non-putrescible or non-hazardous recyclable wastes, painted or treated wallboard, painted or treated wood, drywall and other construction and demolition materials.”

9. The first paragraph of Section 4, “**Term of Agreement and Time for Performance**”, shall be amended to read as follows:

“The expiration date of this Agreement will be extended from June 30, 2026 to June 30, 2031 and this Agreement shall be effective from the date first set forth above (“Effective Date”) and shall continue in full force and effect through June 30, 2031, subject to any earlier termination in accordance with this Agreement (the “Term”). Prior to expiration of this Agreement on June 30, 2031, both parties may agree to extend the Term of this Agreement for an additional five years until June 30, 2036. Any such extension shall not become effective unless both parties agree to the extension, in writing, at least ninety calendar days prior to expiration of the then-current Term. Under no circumstances will either party be obligated to extend the Term beyond June 30, 2031.”

10. Section 6(a), “**Compensation**”, shall be amended to read as follows:

“The Service Provider’s compensation for satisfactory performance of all services required or rendered pursuant to this Agreement shall be a per ton amount based on the volume of Organic Materials Processed (the “Service Fee”). The Service Fee includes all expenses incurred by the Service Provider in the performance of the services, except as provided in Section 9(b) below. The Service Fee amounts beginning December 1, 2023 through June 30, 2028 shall be as follows:

Date	Service Fee Amount
December 1, 2023 – June 20, 2024	\$22.50 per ton
July 1, 2024 – June 20, 2025	\$27.00 per ton
July 1, 2025 – June 30, 2026	\$30.00 per ton
July 1, 2026 – June 30, 2027	\$31.50 per ton
July 1, 2027 – June 30, 2028	\$32.50 per ton

For the Service Fee amount effective July 1, 2028, a full detailed rate analysis will be conducted, completed and presented to the City Council for review and approval, by the Service Provider, by April 1, 2028. Such detailed rate analysis will examine the revenues and expenses of the Service Provider for the 2027 calendar year (including expenses incurred to satisfy the SB 1383 regulations) and will assure profit based on an operating ratio of 90%. The detailed rate analysis will be based on the Service Provider’s Compiled Financial Statements for the 2027 calendar year. All revenue from the City (i.e., Service Fees and fees for Compost procured by the City) will be examined against the expenses of the Service Provider allocated to the City based on the City’s tonnage of Organic Materials Processed by the Service Provider, as a percentage of total the total tonnage of Organic Materials Processed by the Service Provider. The City’s tonnage of Organic Materials Processed currently represents approximately 13% of all tonnage Processed

by the Service Provider. A 90% operating ratio will be applied to the total expenses allocated to the City to determine the new Service Fee. For all subsequent years, the Service Fee will be adjusted every July 1st during the Term or extended Term of this Agreement by the annual percentage change in the Consumer Price Index (CPI), as defined in the next sentence. The annual percentage change shall be calculated by taking the value of the Consumer Price Index for All Urban Consumers for Pacific Cities and U.S. City Average, West compiled and published by the Bureau of Labor Statistics, United States Department of Labor or its successor agency, for the most recent month of December over the same index for the month of December of the previous year, rounded to the nearest hundredth of a percent. If the annual CPI adjustment calculation results in a negative annual percentage change, no adjustment shall be made and the Service Fee from the previous rate period will remain effective. If the adjustment index has increased over the base index by more than three percent (3%), the Service Fee adjustment shall be three percent (3%) and any excess percentage beyond the 3% cap will be added to the subsequent years' adjustments, provided that in any index-based adjustment year, the total Service Fee adjustment shall not exceed 3%.

All other fixed fees and charges provided for in this Agreement shall be adjusted annually every July 1st during the Term or extended Term of this Agreement in accordance with the CPI adjustment described above.”

11. Section 6(d) shall be amended to read as follows:

“Notwithstanding subsection (a) or (c) above, the Service Provider may submit to the Administrator a request for a Service Fee adjustment, along with documentation supporting the request, if any of the following occur:

- (i) A material change in law (for example, minimum wage, zero emission vehicle (ZEV) or other regulatory requirement) affects the net cost to perform the services herein by a margin of at least 10 percent (based upon cost at the commencement of the Agreement);
- (ii) A material change in inflationary costs (for example fuel increases) causes one of the operating costs of the Service Provider to negatively affect the operating ratio by 2% on a stand-alone basis;
- (iii) Costs to Service Provider in performance of Processing or Recovery activities increase at least 10% due to the presence of Non-organic Materials, non-compostable materials, or other contaminants in materials delivered by the City to the Processing Facility.”

12. Section 7(a), “**Termination, Remedies and Force Majeure**” shall be amended to read as follows:

“This Agreement will terminate without any liability of the City to the Service Provider upon the earliest of: (i) the City's non-appropriation of funds sufficient to meet its obligations

hereunder during any City fiscal year of this Agreement, or insufficient funding for the Project; (ii) any material change to the Service Provider which affects the Service Provider's obligations to the City; (iii) six (6) months' prior written notice with or without cause by the City to the Service Provider; or (iv) expiration of this Agreement. The City's obligations to pay the Service Provider are subject to availability of revenue from utility fees levied on the City's customers, and this obligation is subordinate to the pledge of these revenues to any and all bonded indebtedness of the City. In no event is the City pledging or obligating under this Agreement any other revenues, including the City's General Fund, or any real and personal property taxes, sales taxes or any other tax revenues."

13. Section 7(b)(i) is amended to read as follows:

"If the Service Provider shall fail to complete delivery, within the time or times specified herein, of all or any part of the services to be provided under this Agreement, the City Manager of the City or his/her designee, acting for and on behalf of the City, may at any time after the expiration of the time for cure as set forth in Section 7(b)(ii), terminate this Agreement as to the whole thereof, or in the event partial delivery has been made and accepted, as to such of the services to be furnished which have not been delivered or accepted prior to such termination."

14. Section 8(e), "**Receiving Green Waste Materials**" shall be amended to read as follows:

"In the event that the Service Provider determines that a load of Organic Materials delivered by the City or one of its agents or haulers pursuant to this Agreement contains "hazardous material" as defined in Division 4.5 of Title 22 of California Code of Regulations, then the Service Provider may reject such load and return it to the City or have the City retrieve it at the City's sole expense, provided that the Service Provider provides to the City clear evidence that the load rejected by the Service Provider (i) was originally delivered by the City or one of its agents or haulers pursuant to this Agreement, and (ii) that the load contained materials that constituted "hazardous material" as defined in Division 4.5 of Title 22 of California Code of Regulations."

15. Section 8(f), "**Receiving Green Waste Materials**" shall be amended to read as follows:

"The Service Provider shall provide weight tickets from a State of California registered and certified scale on a monthly basis. Weight tickets are to be signed by an employee of the City or its agent or hauler delivering the Organic Materials. The Service Provider shall electronically transmit data of all weight tickets to the City for each Working Day, with the monthly statement. The Service Provider shall provide hard copies to the delivery vehicle driver to transport to the City office. The electronic format is to be compatible with Access, Dbase, FoxPro, Excel, or ASCII. The Service Provider shall develop a format and electronic transfer process satisfactory to the City with assistance of the City's information systems specialist. If the City or any of its agents or haulers delivers any Organic Materials without receiving a weight ticket, or outside of operating

hours during Working Days, such loads will either be returned to the City at the City's sole expense or processed by the Service Provider at the usual Service Fee plus a penalty of \$500 per load, such choice to be in the Service Provider's sole discretion.

The Service Provider shall prepare each weight ticket by assigning each a unique ticket number, identifying thereon the Receiving Facility by name, and including thereon the following printed information: Inbound Date and Time, Weighmaster Outbound Date and Time, Weighmaster City, agent or hauler Truck Number, Description of material, Gross Weight in pounds, Gross Truck Tare Weight in pounds, Net Weight in pounds, Driver Signature."

16. Section 9(a), "**Processing Green Waste Materials**" shall be amended to read as follows:

"The Service Provider shall be responsible for transporting all Organic Materials from the Receiving Facility to the Processing Facility and for the storage, Processing, transfer, sale and final disposition of the City's Organic Materials at the Processing Facility in a manner ensuring compliance with permits issued by federal, state or local governmental bodies or agencies for the sites of both the Receiving Facility and the Processing Facility. Final end-use of Processed Organic Materials shall conform to California Integrated Waste Management Board ("CIWMB"), now "CalRecycle," Assembly Bill 939 ("AB 939") requirements to enable the City to receive maximum diversion credits. Processing of Organic Materials shall conform to Senate Bill 1383 ("SB 1383") in a manner which constitutes a reduction in landfill disposal pursuant to Title 14, Division 7, Chapter 12 of the California Code of Regulations. The Service Provider shall use commercially reasonable efforts to comply with the provisions of the Source Reduction and Recycling Element ("SRRE") plan adopted by CalRecycle for the City to meet such AB 939 requirements (e.g., end-use for materials thereunder may include Compost, Mulch, anaerobic digestion, biomass fuel, etc.). The Service Provider shall comply with AB 939 and SB 1383 requirements for final disposition of the City's Organic Materials."

17. Section 9(b), "**Processing Green Waste Materials**" shall be amended to read as follows:

"The City shall be responsible for all tip fee costs related to disposal of Residuals, as set forth in Exhibit A."

18. Section 9(d), "**Processing Green Waste Materials**" shall be added to read as follows:

"The parties to this Agreement acknowledge the mutual benefits to be derived from having the Service Provider act as a direct service provider to assist the City in attempting to meet its SB 1383 required procurement target. These requirements include the required product requirements, standards, and procurement records (14 CCR Section 18993). Toward this commitment, upon request, The Service Provider shall offer compost products for purchase to the City at a market price. In the event that the Service Provider, through performance of its obligations under this Agreement, becomes able to further

assist the City in meeting its procurement target under SB 1383 (including but not limited to large scale compost sales for use within the City, or use of SB 1383 eligible fuels such as RNG), the parties agree to meet and confer to discuss contributing such activities toward the City's SB 1383 procurement target."

19. Section 12, "**Indemnification**" shall be amended to read as follows:

"To the furthest extent allowed by law, the Service Provider shall indemnify, hold harmless and defend the City and each of its officers, officials, employees, agents and volunteers from any and all loss, liability, fines, penalties, forfeitures, costs and damages (whether in contract, tort or strict liability, including, but not limited to, personal injury, death and property damage), and from any and all claims, demands and actions in law or equity (including reasonable attorney's fees, litigation expenses, and costs to enforce this Agreement) that arise out, pertain to, or relate to the negligence, recklessness, or willful misconduct of the Service Provider, its principals, officers, employees, agents or volunteers in the performance of this Agreement, except to the extent caused by the negligence or willful misconduct of the City or any of its officers, officials, employees, agents or volunteers.

This Section 12 shall survive termination or expiration of this Agreement."

20. Section 16(b), "**Audits**" shall be amended to read as follows:

"Records of the Service Provider's expenses pertaining to this Agreement shall be kept on a generally accepted accounting principles basis and shall be available to the City or its authorized representatives upon request during regular business hours throughout the term of this Agreement and for a period of three years after final payment or, if longer, for any period required by law. In addition, all books, documents, papers, and records of the Service Provider pertaining to this Agreement shall be available for the purpose of making audits, Service Fee adjustments, examinations, excerpts, and transcriptions for the same period of time. If any litigation, claim, negotiations, audit, or other action is commenced before the expiration of said time period, all records shall be retained and made available to the City until such action is resolved, or until the end of said time period whichever shall later occur. This Section 16(b) shall survive expiration or termination of this Agreement."

21. The first paragraph of Exhibit A, "**Scope of Services**" shall be amended to read as follows:

"The Service Provider shall provide to the City services related to Organic Materials and Processing as follows:

1. The Service Provider will receive, Process, recycle, Recover and/or reuse Organic Materials (excluding manure, biosolids, and wallboard) collected by the City of Fresno or its assigned agents and delivered to the Service Provider in accordance with the terms of this Agreement. The City acknowledges that while manure, biosolids, and certain types of wallboard are included in the definition of Organic Materials as of the Effective Date, those materials are unable to be received under the Service Provider's

permits, and as such are outside the scope of this Agreement. The City understands that to the extent any wallboard and/or other C&D materials are delivered to the Receiving Facility, that such materials shall be removed at the City's expense. In the event that the Service Provider becomes able to accept and Process such materials during the Term of this Agreement at the Processing Facility, the City and the Service Provider will meet and confer regarding inclusion of such materials in the scope of this Agreement.

2. The Service Provider will be expected to charge the City on a per ton basis for all Organic Materials delivered to the Receiving Facility, as set forth in the terms of this Agreement.
3. The Service Provider will deliver all Residuals that cannot be Recovered or recycled to the American Avenue Landfill, located at 18950 W. American Avenue, Kerman, CA 93630, which is owned and operated by Fresno County. The City shall be responsible for all tip fee costs associated with the disposal of Residuals.
4. The Service Provider shall be required to submit monthly tonnage reports for Organic Materials delivered to the Receiving Facility by the City and its agents and haulers, and the tonnage reports shall include the method of Processing of the Materials, as well as the quantities of Residuals delivered to the American Avenue Landfill.

The City makes no guarantee on the quantity or quality of Organic Materials to be delivered to the Receiving Facility in the future.”

[SIGNATURES FOLLOW ON NEXT PAGE.]

IN WITNESS WHEREOF, the parties have executed this Agreement at Fresno, California, on the day and year first above written.

CITY OF FRESNO,
A California municipal corporation

Kochergen Farms Composting, Inc.,
A California corporation

By: _____
Brock D. Buche, PE, PLS, Director
Department of Public Utilities

DocuSigned by:
By: Mike J. Kochergen 10/27/2023
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Name: Mike J. Kochergen

APPROVED AS TO FORM:
ANDREW JANZ

Title: President
(If corporation or LLC, Board Chair, Pres.
or Vice Pres.)

City Attorney
DocuSigned by:
By: Angela M. Karst 10/31/2023
0A8F88F889DD447...
Angela M. Karst Date
Senior Deputy City Attorney

By: _____

Name: _____

ATTEST:
TODD STERMER, CMC
City Clerk

Title: _____
(If corporation or LLC, CFO, Treasurer,
Secretary or Assistant Secretary)

By: _____ Date
Deputy Clerk Attesting

REVIEWED BY:
DocuSigned by:
Lorenzo Nadora 10/26/2023
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Lorenzo Nadora

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