

FIRST AMENDMENT TO FRANCHISE AGREEMENT

THIS FIRST AMENDMENT TO AGREEMENT (Amendment) made and entered into as of this ___ day of _____, 2018, amends the Franchise Agreement entered into between the CITY OF FRESNO, a municipal corporation (City), and Mid-Valley Disposal, a California corporation (Contractor). This Amendment and its provisions shall be effective commencing on January 1, 2019, unless otherwise specified herein.

RECITALS

WHEREAS, City and Contractor entered into a Franchise Agreement, dated November 1, 2011, for the collection of solid waste, recyclable materials, and organic materials generated by multi-family and commercial premises (Agreement); and

WHEREAS, City and Contractor now desire to modify the terms of the Agreement with this Amendment, to allow Contractor to reflect certain unforeseeable changes in law and economic conditions and improve efficiencies in implementing the Agreement.

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. The Definition of “**Customer**” in the Agreement shall be amended to read as follows:

“Customer” shall be defined as “the Occupant or Owner of the Premises, provided that the Owner of the Premises shall be responsible for payment of Collection services if an Occupant of a Premises, which is identified as the Customer of Owner's Premises, fails to make such payment.”

2. Section 3.3, “**Term**,” shall be amended to read as follows:

“The Term of this Agreement shall continue in full force and effect for a period of ten years from the expiration of the initial term to midnight of November 30, 2031, unless the Agreement is terminated in accordance with Section 13.2.”

3. Section 3.4, “**Option to Extend Term**,” is deleted in its entirety.

4. The third paragraph of Section 7.1., “**Public Education**,” is amended to read as follows:

“In conjunction with the City, Contractor shall develop, implement, and maintain a public education program to educate the community and promote source reduction, reuse, Recycling, Composting, and other services required by this Agreement. Contractor's public education program shall focus on providing information to Customers in accordance with the specific requirements described in Exhibit G, including any future modification to the requirements set forth therein. The parties shall periodically assess the effectiveness of the Exhibit G requirements. If the parties jointly determine that there are other, equally effective and more appropriate or efficient methods to achieve the City's public education objectives, they agree to modify the requirements accordingly, and shall document those changes in writing. Contractor may implement the new or modified requirements in reliance on the written approval of the City Contract

Manager. Educational media shall include, but not be limited to, newsletters, bill inserts, flyers, door hangers, notification tags, and direct contact, which may include electronic media or the use of public service announcements (PSAs). Information shall be provided for the initial start of new services, to solicit feedback about the service and suggested improvements/changes, and to educate Customers about source reduction, reuse, and Recycling opportunities. Written materials shall be printed on paper containing the highest levels of recycled content material as is reasonably practical with a minimum requirement of thirty percent (30%) post-consumer content based on Federal standards. City contract manager may request waste audits in response to complaints or problems with accounts failing to comply with mandatory recycling ordinance's and state law."

5. Section 10.1, **Franchise Fee**, is amended as follows:

"In consideration of the exclusive rights provided Contractor herein, Contractor shall pay Franchise Fees to the City each month equal to 14.1% of actual gross receipts remitted by Customers for Collection services provided in Service Area No. 2.

Commencing January of 2019, the Franchise Fees may be increased administratively by the City Manager to no greater than 19.5% over a five-year period, subject to the limitation in Section 10.3.

6. Section 10.2(B), **"Recyclable Materials Payment,"** is amended to read as follows:

"The Contractor shall pay the City a Recyclable Materials Payment equal to \$0 per ton of Recyclable Materials Collected and delivered to the Approved Recyclable Materials Processing Site.

7. Section 10.3, **Adjustment to Fees**, is amended as follows:

"City reserves the right to unilaterally adjust the fees established in this Article at any time during the Term of this Agreement, subject to City's obligation to ~~adjust~~ approve Rates in accordance with Section 11.8, provided that the Franchise Fee shall not be increased by more than 1.5% in any twelve-month period."

8. Section 11.2, **"Rate Adjustment Process,"** subsection (C), Annual Adjustment Process, is amended to read as follows:

"The Maximum Permissible Rates in Exhibit ___, which shall be effective on January 1, 2019, shall be adjusted effective as of July 1, 2019, using the adjustment formulas in revised Section 11.3 below. Thereafter, effective July 1, 2020, and July 1 of each of the following years during the Term of this Agreement including any extension periods, Contractor's rates shall be adjusted using the 12-month change in the applicable indexes using formulas set forth in revised Section 11.3 set forth below.

The adjustments to the Maximum Permissible Rates shall be determined using an index-based adjustment. The index-based adjustment, which is described in Section 11.3, involves use of various cost adjustment factors (such as the percentage change in the consumer price index and the current Disposal Site tipping fee) to calculate adjusted Rates."

9. Section 11.3, **"Index-Based Adjustment of Rates,"** is amended as follows:

A. Annual Adjustment. Subject to the terms herein, the Contractor shall be entitled to an annual adjustment of all Rates. Each Rate, excluding Special Charges, includes an Operating Component, Disposal Component, Processing Component, and Fee Component, which are annually adjusted. Maximum Permissible Rates shall be submitted to the City for review by May 1 of each year, and upon approval of the Contract Manager such rates shall be effective on each subsequent July 1. Each Rate is annually adjusted as specified in Section 11.3.B through 11.3.F, with the exception of Special Charges adjusted in accordance with Section 11.3.G.

B. Adjustment of the Operating Component. The Operating Component of each Rate shall be adjusted annually by the Operating Cost Factor (the “OCF”) using the following methodology. The OCF shall not exceed five percent (5%) during any Rate Period. However, in the event the OCF would have been greater than five percent (5%), in any given year, the unused percentage increase may be carried over until such time as it may be applied without violating the provisions of this subsection. Upon conclusion of the Agreement, no unused adjustment carried over would be realized or compensable.

Step 1. Calculate the Labor-Related Factor of the OCF by calculating the 12-month percentage change in the most-recently published Employment Cost Index (“ECI”) compiled and published by the U.S. Department of Labor, Bureau of Labor Statistics (the “DOL”) or its successor agency, using the following Bureau of Labor Statistics’ parameters:

- Compensation – Total Compensation
- Ownership – Private Industry
- Periodicity – Index Number
- Area - Los Angeles-Long Beach-Riverside
- Not Seasonally Adjusted

For example, assuming:

1. Most-recently published ECI (third quarter 2011) = 163.5 (2011 Qtr 2) = 1.9

Labor-Related Factor = 1.9%

The factor shall be rounded to the nearest tenth (10th) percent.

Step 2. Calculate the Fuel Factor of the OCF by calculating the percentage change in the average annual per gallon fuel cost. The average annual per gallon fuel cost shall be calculated by dividing the total fuel cost for the preceding twelve months by the number of gallons purchased during the preceding twelve months. The most recent average annual per gallon fuel cost shall be compared to the prior twelve month’s average annual per gallon fuel cost to determine the percentage change. For the purposes of this calculation, only liquefied natural gas (LNG)

purchased at the City-owned LNG fueling station shall be considered. For the purposes of the first rate adjustment, the initial per gallon fuel cost shall be one dollar and fifteen cents (\$1.15). Neither the initial per gallon fuel cost nor the average annual per gallon fuel cost shall include state or federal fuel sales taxes for the purposes of this calculation.

For example:

1. Most-recent twelve month average annual per gallon fuel cost = \$135,000 (total fuel cost for preceding twelve months) / 100,000 (total gallons of fuel purchased during preceding twelve months) = \$1.35
2. Prior twelve month average annual per gallon fuel cost = \$1.15

$$\text{Fuel Factor} = ((1.35 - 1.15) / 1.15) = 0.1739 = 17.4\%$$

The factor shall be rounded to the nearest tenth (10th) percent.

In the event that the average annual per gallon fuel cost increases by more than twenty cents per gallon in any adjustment calculation, the City shall permit the adjustment of the Fuel Factor to result in an increase of the OCF to exceed the 5.0% limit described in Section 11.3.B. For the purposes of such an adjustment resulting from the increase in the Fuel Factor, the actual calculated Fuel Factor shall be used and the Labor-Related Factor and Other Factor of the OCF shall be set to the lesser of the 5.0% limit and, the calculated percentage change.

For example, assuming:

1. Prior Rate Period average annual per gallon fuel cost = \$1.15
2. Most-recent twelve month average annual per gallon fuel cost = \$145,000 (total fuel cost for preceding twelve months) / 100,000 (total gallons of fuel purchased during preceding twelve months) = \$1.45
3. Labor-Related Factor (from Step 1) = 6.1% (not to exceed 5% as described in Section 11.3.B.)
4. Other Factor (from Step 3) = 1.4%

$$\text{Fuel Factor} = ((1.45 - 1.15) / 1.15) = 0.2609 = 26.1\%$$

$$\text{OCF (as calculated in Step 4 below)} = (30.0\% \times 5.0\%) + (13.0\% \times 26.1\%) + (57.0\% \times 1.4\%) = 0.0569 = 5.7\%$$

Should Contractor convert the majority of its collection fleet to an alternative clean fuel other than LNG, the City and Contractor shall meet and confer on an adjustment to this Step 2 to reflect any difference in Contractor's fuel costs resulting from such conversion.

Step 3. Calculate the Other Factor of the OCF by calculating the 12-month percentage change in the most-recently published Consumer Price Index – All Urban Consumers (CPI-U) compiled and published by the DOL or its successor agency, using the following Bureau of Labor Statistics' parameters:

- Not Seasonally Adjusted
- Area – Los Angeles-Long Beach ~~Riverside-Orange County~~ Anaheim, CA
- Item – All Items
- Base Period – 1982-84=100

For example, assuming:

1. Most-recently published CPI-U (November 2011) = 193.2
2. CPI-U published 12 months prior (November 2010) = 190.6

$$\text{Other Factor} = ((193.2 - 190.6) / 190.6) = 0.0136 = 1.4\%$$

The factor shall be rounded to the nearest tenth (10th) percent.

Step 4. Calculate the OCF as follows:

The OCF shall be the Sum of:

1. 30.0% x Labor-Related Factor (as calculated in the example in Step 1)
2. 13.0% x Fuel Factor (as calculated in the example in Step 2)
3. 57.0% x Other Factor (as calculated in the example in Step 3)

For Example:

$$\text{OCF} = (30.0\% \times 3.1\%) + (13.0\% \times 17.4\%) + (57.0\% \times 1.4\%) = 0.0399 = 4.0\%$$

The OCF shall be rounded to the nearest tenth (10th) percent.

Step 5. Calculate Adjusted Operating Component for each Rate as follows:

$$\begin{array}{l} \text{Adjusted} \\ \text{Operating} \\ \text{Cost} \\ \text{Component} \end{array} = \text{Then-current Operating Component} \times (1 + \text{OCF})$$

For example, assuming:

1. Then-current Operating Component = \$50.00

2. Operating Cost Factor = 4.0% (as calculated in Step 5 above)

$$\text{Adjusted Operating Component} = \$50.00 \times (1 + 0.040) = \$52.00$$

The Adjusted Operating Component shall be rounded to the nearest cent.

C. Adjustment of the Disposal Component. The Disposal Component of each Rate will be adjusted to reflect any percentage change in the per-Ton tipping fee charge at the Designated Disposal Location. The adjustment shall equal:

$$\begin{array}{lcl} \text{Adjusted} & = & \text{Then-current Disposal Component} \times \\ \text{Disposal} & & (\text{Current Designated Disposal Location Disposal} \\ \text{Component} & & \text{Fee} / \text{Prior Designated Disposal Location Disposal} \\ & & \text{Fee}) \end{array}$$

For example, assuming:

1. Then-current Disposal Component = \$20.00
2. Current Designated Disposal Location Disposal Fee = \$30.00 per Ton
3. Prior Designated Disposal Location Disposal Fee = \$28.80 per Ton

$$\text{Adjusted Disposal Component} = \$20.00 \times (\$30.00 / \$28.80) = \$20.83$$

The Adjusted Disposal Component shall be rounded to the nearest cent.

The Prior Designated Disposal Location Disposal Fee is the fee last used to set Rates. The initial Designated Disposal Location Disposal Fee in this Agreement is \$29.27 per Ton; this fee shall be used as the prior Designated Disposal Location Disposal Fee for the first adjustment of the Disposal Component. The Parties acknowledge that the timing of changes to the Designated Disposal Location Disposal Fee may not align with the review and adjustment of Maximum Permissible Rates under this Agreement. In the event that the Contractor begins to pay a new Disposal Fee at the Designated Disposal Location prior to the adjustment of Maximum Permissible Rates under this Agreement, the adjustment to the Disposal Component shall consider that period. Alternatively, the City reserves the right to adjust Maximum Permissible Rates at any time during the year in order to address the Disposal Component alone without adjusting any other component of rates.

D. Adjustment of the Processing Component. The Processing Component of each Rate shall be adjusted as follows:

1. **Solid Waste Collection Rates.** For Solid Waste Collection Rates, the Processing Component shall equal \$0.00; therefore, no adjustment to the Processing Component shall be made.

2. **Recyclable Materials Collection Rates.** For Recyclable Materials Collection Rates, the Processing Component shall equal \$0.00; therefore, no adjustment to the Processing Component shall be made.
3. **Organic Materials Collection Rates.** If adjusting Organic Materials Collection Rates, the Processing Component shall be adjusted by the 12-month percentage change in the most-recently published Consumer Price Index – All Urban Consumers (CPI-U) compiled and published by the DOL or its successor agency, using the following Bureau of Labor Statistics' parameters:
 - Not Seasonally Adjusted
 - Area – Los Angeles-Long Beach-Anaheim, CA
 - Item – All Items
 - Base Period – 1982-84=100

The adjustment shall be as follows:

$$\text{Adjusted Processing Component} = \text{Current Processing Component} \times (1 + \text{percent change in CPI-U})$$

For example, assuming:

1. Current Processing Component = \$2.00
2. Most-recently published CPI-U (November 2011) = 193.2
3. CPI-U published 12 months prior to most-recently published CPI index(November 2010) = 190.6

$$\text{Adjusted Processing Component} = \$2.00 \times [1 + ((193.2 - 190.6) / 190.6)] = \$2.03$$

The Adjusted Processing Component shall be rounded to the nearest cent.

E. Adjustment of the Fee Component. The adjusted Fee Component of each Rate shall be calculated as follows:

$$\text{Adjusted Fee Component} = ((\text{Adjusted Operating Component} + \text{Adjusted Disposal Component} + \text{Adjusted Processing Component}) / (1 - 14.6\%) - (\text{Adjusted Operating Component} + \text{Adjusted Disposal Component} + \text{Adjusted Processing Component}))$$

For example, assuming:

1. The Rate being adjusted is a Solid Waste Collection Rate
2. Adjusted Operating Component = \$52.00 (as calculated in Step 5 of Section 11.3.B)
3. Adjusted Disposal Component = \$20.83 (as calculated in Section 11.3.C)

4. Adjusted Processing Component = \$0.00 (as calculated in Section 11.3.D.1)

$$\text{Adjusted Fee Component} = ((\$52.00 + \$20.83 + \$0.00) / (1 - 0.146)) - (\$52.00 + \$20.83 + \$0.00) = \$12.45$$

The Adjusted Fee Component shall be rounded to the nearest cent.

F. Calculation of Adjusted Rate. Adjusted Rates shall be calculated as follows:

$$\begin{array}{lcl} \text{Adjusted} & = & \text{Adjusted Operating Component} + \text{Adjusted Disposal} \\ \text{Rate} & & \text{Component} + \text{Adjusted Processing Component} + \text{Adjusted} \\ & & \text{Fee Component} \end{array}$$

For example, assuming:

1. The Rate being adjusted is a Solid Waste Collection Rate
2. Adjusted Operating Component = \$52.00 (as calculated in Step 5 of Section 11.3.B)
3. Adjusted Disposal Component = \$20.83 (as calculated in Section 11.3.C)
4. Adjusted Processing Component = \$0.00 (as calculated in Section 11.3.D.1)
5. Adjusted Fee Component = \$12.45 (as calculated in Section 11.3.E)

$$\text{Adjusted Collection Rate} = \$52.00 + \$20.83 + \$0.00 + \$12.45 = \$85.28$$

G. Adjustment of Special Charges. Special Charges shall be adjusted annually on the first day of the Rate Period by the same amount as calculated in accordance with Step 5 of Section 11.3.B.

For example:

1. Then-Current Special Charge Amount = \$50.00
2. Operating Cost Factor = 4.0% (as calculated in Step 5 of Section 11.3.B)

$$\text{Adjusted Special Charge Amount} = \$50.00 \times (1 + 0.040) = \$52.00$$

The adjustment shall be rounded to the nearest cent.

H. Change in the ECI, PPI, or CPI-U. If the ECI, PPI, or CPI-U is discontinued or revised during the Term by the DOL, such other government index or computation with which it is replaced shall be used in order to obtain substantially the same result as would be obtained if the ECI, PPI, or CPI-U had not been discontinued or revised.

10. Section 11.4(A)(2), “**Cost-Based Adjustment Methodology**,” is deleted in its entirety.

11. Section 11.4(B), “**City Review of Application**,” is amended to read as follows:

“City Review of Application. The Contractor's Rate application shall be reviewed by the City Contract Manager. The Contract Manager shall approve Maximum Permissible Rates to reflect the adjustments made in accordance with Section 11.3, Indexed-Based Adjustment of Rates. The Contract Manager shall act in good faith to approve such Maximum Permissible Rates by the commencement date of the Rate Period. The adjusted Rates shall not take effect until the Contract Manager has approved such Rates.”

12. The second paragraph of Section 11.4(C), “**Failure to Adjust Rates by January 1**,” is amended to read as follows:

“If the Contractor does not submit the application on or before the Rate application date identified in Section 11.2, Rates may not be adjusted by July 1. In such case, all Rates shall be adjusted as soon as practical following approval by the City. If the Contractor does not submit the application by the Rate application date identified in Section 11.2, no retroactive adjustment will be made to allow the Contractor to recover revenues that it would have collected, had the Rate adjustment been implemented in accordance with the prescribed schedule.”

13. Section 11.5, **Special Rate Review**, Subparagraph A, Eligible Items, part 4, is amended to read as follows:

“4. Change in the recyclables or organic materials markets that results in a material increase in Contractor's cost of providing services required by this Agreement.”

14. Article 11, “**Contractor's Compensation And Rates**,” is amended to include a new subparagraph 11.8 to read as follows:

“11.8 Rates for Changes in Fees

In the event City elects, pursuant to Section 10.3, to initiate an increase in the amount of the Franchise Fee, or the Contract Management and Enforcement Fee, or to establish or increase any other City-imposed fee at any time during the Term hereof, the full amount of such fee or fee increase shall be automatically “passed through” to Contractor's Customers in the form of an immediate corresponding Rate adjustment, so as to enable Contractor to fully recover said cost and not incur or absorb any portion thereof. It shall be the obligation of Contractor to furnish the City Contract Manager with data supporting the cost impacts of the fee or fee increase.”

15. The text of item 31 in **Exhibit H**, “**Schedule for Liquidated Damages**,” is amended to read as follows:

“Failure to conduct Customer outreach and waste audits as required by Section 7.1.”

16. **Exhibit P** to the Agreement is deleted in its entirety.

17. Contractor hereby assigns and transfers to Mid Valley Disposal, LLC (hereinafter “Assignee”), a California limited liability corporation, all of Contractor's rights and interest in the Agreement, including all of Contractor's obligations thereunder, from and after the effective date of this First Amendment, Assignee agrees to assume all of the same, and City hereby approves and consents to such assignment and assumption.

- 18.** All remaining terms of the Agreement remain in full force and effect.
- 19.** This First Amendment shall remain effective through the term of the Agreement.

[SIGNATURE PAGE TO FOLLOW]

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

CITY OF FRESNO,
a California municipal corporation

Mid-Valley Disposal,
a California corporation

By: _____
WILMA QUAN-SCHecter
City Manager

By: _____

Title: _____

APPROVED AS TO FORM:
DOUGLAS T. SLOAN
City Attorney

By: _____

By: _____
AMANDA B. FREEMAN
Senior Deputy City Attorney

Title: _____

ATTEST:
YVONNE SPENCE, MMC
City Clerk

Assignee:
Mid Valley Disposal, LLC.
a California limited liability corporation

By: _____
Deputy Date

By: _____

Title: _____

Addresses:
CITY:
City of Fresno
Attn: Jerry Schuber
1325 El Dorado St.
Fresno, CA 93706

CONTRACTOR:
Mid Valley Disposal
Attn: Joseph Kalpakoff
15300 W. Jensen Ave.
Kerman, CA 93630

Attachments:

Exhibit A – Text Revisions in the First Amendment to Franchise Agreement Between
City of Fresno and Mid-Valley Disposal

EXHIBIT A

Text Revisions in the First Amendment to Franchise Agreement Between City of Fresno and Mid-Valley Disposal

1. The Definition of “**Customer**” in the Agreement shall be amended to read as follows:

“~~Customer~~” means ~~the Person to whom Contractor submits billing invoices and from whom Contractor collects payment for Collection services provided to a Premises. The Customer may be the Occupant or Owner of the Premises,~~ **[shall be defined as “the Occupant or Owner of the Premises”]**, provided that the Owner of the Premises shall be responsible for payment of Collection services if an Occupant of a Premises, which is identified as the Customer of Owner's Premises, fails to make such payment.”

2. Section 3.3, “**Term**,” shall be amended to read as follows:

“The Term of this Agreement shall continue in full force **[and effect]** for a period of ten ~~(10)~~ years from ~~12:01 a.m. on the Commencement Date to the expiration of the initial term to midnight of November 30, 2021~~**[31]** unless the Agreement is ~~extended by City Council pursuant to Section 3.4 or terminated in accordance with Section 13.2.~~”

3. Section 3.4, **Option to Extend Term**, is deleted in its entirety.

4. The third paragraph of Section 7.1., “**Public Education**,” is amended to read as follows:

“In conjunction with the City, Contractor shall develop, implement, and maintain a public education program to educate the community and promote source reduction, reuse, Recycling, Composting, and other services required by this Agreement. Contractor’s public education program shall focus on providing information to Customers in accordance with the specific requirements described in Exhibit G**[, including any future modification to the requirements set forth therein. The parties shall periodically assess the effectiveness of the Exhibit G requirements. If the parties jointly determine that there are other, equally effective and more appropriate or efficient methods to achieve the City’s public education objectives, they agree to modify the requirements accordingly, and shall document those changes in writing. Contractor may implement the new or modified requirements in reliance on the written approval of the City Contract Manager]**. Educational media shall include, but not be limited to, newsletters, bill inserts, flyers, door hangers, notification tags, and direct contact**[, which may include electronic media or the use of public service announcements (PSAs).]** Information shall be provided for the initial start of new services, to solicit feedback about the service and suggested improvements/changes, and to educate Customers about source reduction, reuse, and Recycling opportunities. **[Written]** materials shall be printed on paper containing the highest levels of recycled content material as is reasonably practical with a minimum requirement of thirty percent (30%) post-consumer content based on Federal standards. **[City contract manager may request waste audits in response to complaints or problems with accounts failing to comply with mandatory recycling ordinance’s and state law.]**”

5. Section 10.1, **Franchise Fee**, is amended as follows:

"In consideration of the exclusive rights provided Contractor herein, Contractor shall pay Franchise Fees to the City each month equal to 14.1% of actual gross receipts remitted by Customers for Collection services provided in Service Area No. 2.

[Commencing January of 2019, the Franchise Fees may be increased administratively by the City Manager to no greater than 19.5% over a five-year period, subject to the limitation in Section 10.3.]

6. Section 10.2(B), "**Recyclable Materials Payment**," is amended to read as follows:

"The Contractor shall pay the City a Recyclable Materials Payment each quarter equal to ~~eight dollars (\$8)~~ for each **[\$0]** per ton of Recyclable Materials Collected by Contractor in Service area No. 2 and delivered to the Approved Recyclable Materials Processing Site during the preceding quarter.

7. Section 10.3, **Adjustment to Fees**, is amended as follows:

"City reserves the right to unilaterally adjust the fees established in this Article at any time during the Term of this Agreement, subject to City's obligation to adjust approve Rates in accordance with Section 11.5**[8, provided that the Franchise Fee shall not be increased by more than 1.5% in any twelve-month period].**"

8. Section 11.2, "**Rate Adjustment Process**," subsection (C), Annual Adjustment Process, is amended to read as follows:

"The Maximum Permissible Rates **in Exhibit __, which shall be effective on January 1, 2019**, shall be adjusted annually, commencing with Rate Period 2 through the remaining Term of this Agreement including any extension periods. **effective as of July 1, 2019, using the adjustment formulas in revised Section 11.3 below. Thereafter, effective July 1, 2020, and July 1 of each of the following years during the Term of this Agreement including any extension periods, Contractor's rates shall be adjusted using the 12-month change in the applicable indexes using formulas set forth in revised Section 11.3 set forth below.**

The adjustments to the Maximum Permissible Rates shall be determined using ~~one of two methodologies: (1) an index-based adjustment, or (2) cost-based adjustment.~~ The index-based adjustment, which is described in Section 11.3, involves use of various cost adjustment factors (such as the percentage change in the consumer price index and the current Disposal Site tipping fee) to calculate adjusted Rates." ~~The cost-based adjustment, which is described in Exhibit P, involves a detailed review of the Contractor's actual costs of service and determination of adjusted Rates to reflect Contractor's actual costs; provided however, the Operating Component portion of the Rate adjustment does not exceed three percent (3%) for the Rate Period 3 adjustment and six percent (6%) for any other Rate Period. Below is a table that specifies when the two Rate adjustment methods shall be used. In the event that the City elects to extend the Term of this Agreement for less than five (5) years per extension, City may require a cost-based review during each extension regardless of the dates described in the table below.~~

9. Section 11.3, “**Index-Based Adjustment of Rates,**” is amended as follows:

A. Annual Adjustment. Subject to the terms herein, the Contractor shall be entitled to an annual adjustment of all Rates. Each Rate, excluding Special Charges, includes an Operating Component, Disposal Component, Processing Component, and Fee Component, which are annually adjusted. ~~The City Council shall make a good faith effort to approve Maximum Permissible Rates by November 1 of each year, and such Rates shall be effective on each subsequent January 1. If the Rates are not adjusted by November 1, then prior Rates remain in effect until such adjustment is made.~~ **[shall be submitted to the City for review by May 1 of each year, and upon approval of the Contract Manager such rates shall be effective on each subsequent July 1.]** ~~The first adjustment is scheduled to take effect January 1, 2012 subject to City Council approval. Each Rate is annually adjusted as specified in Section 11.3.B through 11.3.F, with the exception of Special Charges adjusted in accordance with Section 11.3.G.~~

B. Adjustment of the Operating Component. The Operating Component of each Rate shall be adjusted annually by the Operating Cost Factor (the “OCF”) using the following methodology. ~~The OCF shall not exceed two and one half percent (2.5%) during Rate periods 1 through 4. The OCF shall not exceed five percent (5%) during any Rate Period after Rate Period 4.~~ **[However, in the event the OCF would have been greater than five percent (5%), in any given year, the unused percentage increase may be carried over until such time as it may be applied without violating the provisions of this subsection. Upon conclusion of the Agreement, no unused adjustment carried over would be realized or compensable.]**

Step 1. Calculate the Labor-Related Factor of the OCF by calculating the 12-month percentage change in the most-recently published Employment Cost Index (“ECI”) compiled and published by the U.S. Department of Labor, Bureau of Labor Statistics (the “DOL”) or its successor agency, using the following Bureau of Labor Statistics’ parameters:

- Compensation – Total Compensation
- Ownership – Private Industry
- Periodicity – ~~Percentage Change~~ **[Index Number]**
- ~~Group – 210 – Service-Producing Industries~~
- **[Area - Los Angeles-Long Beach-Riverside]**
- **[Not]** Seasonally Adjusted

For example, assuming:

1. Most-recently published ECI (third quarter 2011) = 163.5 **[(2011 Qtr 2) = 1.9]**

Labor-Related Factor = **[1.9%]** ~~((163.5-158.6)/158.6) = 0.0309=3.1%~~

The factor shall be rounded to the nearest tenth (10th) percent.

Step 2. Calculate the Fuel Factor of the OCF by calculating the percentage change in the average annual per gallon fuel cost. The average annual per gallon fuel cost shall be calculated by dividing the total fuel cost for the preceding twelve months by the number of gallons purchased during the preceding twelve months. The most recent average annual per gallon fuel cost shall be compared to the prior twelve month's average annual per gallon fuel cost to determine the percentage change. For the purposes of this calculation, only liquefied natural gas (LNG) purchased at the City-owned LNG fueling station shall be considered. For the purposes of the first rate adjustment, the initial per gallon fuel cost shall be one dollar and fifteen cents (\$1.15). Neither the initial per gallon fuel cost nor the average annual per gallon fuel cost shall include state or federal fuel sales taxes for the purposes of this calculation.

For example:

1. Most-recent twelve month average annual per gallon fuel cost = \$135,000 (total fuel cost for preceding twelve months) / 100,000 (total gallons of fuel purchased during preceding twelve months) = \$1.35
2. Prior twelve month average annual per gallon fuel cost = \$1.15

$$\text{Fuel Factor} = ((1.35 - 1.15) / 1.15) = 0.1739 = 17.4\%$$

The factor shall be rounded to the nearest tenth (10th) percent.

In the event that the average annual per gallon fuel cost increases by more than twenty cents per gallon in any adjustment calculation, the City shall permit the adjustment of the Fuel Factor to result in an increase of the OCF to exceed the ~~2.5% (Rate Periods 1 through 4)~~ and 5.0% ~~(Rate Periods 5 and beyond)~~ limits described in Section 11.3.B. For the purposes of such an adjustment resulting from the increase in the Fuel Factor, the actual calculated Fuel Factor shall be used and the Labor-Related Factor and Other Factor of the OCF shall be set to the lesser of the ~~2.5% or 5.0%~~ limit, ~~as determined by the Rate Period;~~ and, 2) the calculated percentage change.

For example, assuming:

1. Prior Rate Period average annual per gallon fuel cost = \$1.15
2. Most-recent twelve month average annual per gallon fuel cost = \$145,000 (total fuel cost for preceding twelve months) / 100,000 (total gallons of fuel purchased during preceding twelve months) = \$1.45

3. Labor-Related Factor (from Step 1) = 36.1% (not to exceed 2.5% as described in Section 11.3.B.)

4. Other Factor (from Step 3) = 1.4%

Fuel Factor = $((1.45-1.15)/1.15) = 0.2609 = 26.1\%$

OCF (as calculated in Step 4 below) = $(30.0\% \times 5.0\%) + (13.0\% \times 26.1\%) + (57.0\% \times 1.4\%) = 0.0569 = 5.7\%$

[Should Contractor convert the majority of its collection fleet to an alternative clean fuel other than LNG, the City and Contractor shall meet and confer on an adjustment to this Step 2 to reflect any difference in Contractor's fuel costs resulting from such conversion.]

Step 3. Calculate the Other Factor of the OCF by calculating the 12-month percentage change in the most-recently published Consumer Price Index – All Urban Consumers (CPI-U) compiled and published by the DOL or its successor agency, using the following Bureau of Labor Statistics' parameters:

- Not Seasonally Adjusted
- Area – Los Angeles-Long Beach ~~Riverside-Orange County~~ Anaheim, CA
- Item – All Items
- Base Period – 1982-84=100

For example, assuming:

3. Most-recently published CPI-U (November 2011) = 193.2

4. CPI-U published 12 months prior (November 2010) = 190.6

Other Factor = $((193.2-190.6)/190.6) = 0.0136 = 1.4\%$

The factor shall be rounded to the nearest tenth (10th) percent.

Step 4. Calculate the OCF as follows:

The OCF shall be the Sum of:

4. 30.0% x Labor-Related Factor (as calculated in the example in Step 1)
5. 13.0% x Fuel Factor (as calculated in the example in Step 2)
6. 57.0% x Other Factor (as calculated in the example in Step 3)

For Example:

$$\text{OCF} = (30.0\% \times 3.1\%) + (13.0\% \times 17.4\%) + (57.0\% \times 1.4\%) = 0.0399 \\ = 4.0\%$$

The OCF shall be rounded to the nearest tenth (10th) percent.

Step 5. Calculate Adjusted Operating Component for each Rate as follows:

$$\begin{array}{l} \text{Adjusted} \\ \text{Operating} \\ \text{Cost} \\ \text{Component} \end{array} = \text{Then-current Operating Component} \times (1 + \text{OCF})$$

For example, assuming:

3. Then-current Operating Component = \$50.00
4. Operating Cost Factor = 4.0% (as calculated in Step 5 above)

$$\text{Adjusted Operating Component} = \$50.00 \times (1 + 0.040) = \$52.00$$

The Adjusted Operating Component shall be rounded to the nearest cent.

C. Adjustment of the Disposal Component. The Disposal Component of each Rate will be adjusted to reflect any percentage change in the per-Ton tipping fee charge at the Designated Disposal Location. The adjustment shall equal:

$$\begin{array}{l} \text{Adjusted} \\ \text{Disposal} \\ \text{Component} \end{array} = \text{Then-current Disposal Component} \times \left(\frac{\text{Current Designated Disposal Location Disposal Fee}}{\text{Prior Designated Disposal Location Disposal Fee}} \right)$$

For example, assuming:

4. Then-current Disposal Component = \$20.00
5. Current Designated Disposal Location Disposal Fee = \$30.00 per Ton
6. Prior Designated Disposal Location Disposal Fee = \$28.80 per Ton

$$\text{Adjusted Disposal Component} = \$20.00 \times (\$30.00 / \$28.80) = \$20.83$$

The Adjusted Disposal Component shall be rounded to the nearest cent.

The Prior Designated Disposal Location Disposal Fee is the fee last used to set Rates. The initial Designated Disposal Location Disposal Fee in this Agreement is \$29.27 per Ton; this fee shall be used as the prior Designated Disposal Location Disposal Fee for the first adjustment of the Disposal Component. The Parties acknowledge that the timing of changes to the Designated Disposal Location Disposal Fee may not align with the review and adjustment of Maximum Permissible Rates under this

Agreement. In the event that the Contractor begins to pay a new Disposal Fee at the Designated Disposal Location prior to the adjustment of Maximum Permissible Rates under this Agreement, the adjustment to the Disposal Component shall consider that period. Alternatively, the City reserves the right to adjust Maximum Permissible Rates at any time during the year in order to address the Disposal Component alone without adjusting any other component of rates.

D. Adjustment of the Processing Component. The Processing Component of each Rate shall be adjusted as follows:

- 1. Solid Waste Collection Rates.** For Solid Waste Collection Rates, the Processing Component shall equal \$0.00; therefore, no adjustment to the Processing Component shall be made.
- 2. Recyclable Materials Collection Rates.** For Recyclable Materials Collection Rates, the Processing Component shall equal \$0.00; therefore, no adjustment to the Processing Component shall be made.
- 3. Organic Materials Collection Rates.** If adjusting Organic Materials Collection Rates, the Processing Component shall be adjusted by the 12-month percentage change in the most-recently published Consumer Price Index – All Urban Consumers (CPI-U) compiled and published by the DOL or its successor agency, using the following Bureau of Labor Statistics' parameters:
 - Not Seasonally Adjusted
 - Area – Los Angeles-Long Beach-Anaheim, CA
 - Item – All Items
 - Base Period – 1982-84=100

The adjustment shall be as follows:

$$\begin{array}{lcl} \text{Adjusted} & & \\ \text{Processing} & = & \text{Current Processing Component} \times (1 + \text{percent change in} \\ \text{Component} & & \text{CPI-U}) \end{array}$$

For example, assuming:

4. Current Processing Component = \$2.00
5. Most-recently published CPI-U (November 2011) = 193.2
6. CPI-U published 12 months prior to most-recently published CPI index(November 2010) = 190.6

$$\text{Adjusted Processing Component} = \$2.00 \times [1 + ((193.2 - 190.6) / 190.6)] = \$2.03$$

The Adjusted Processing Component shall be rounded to the nearest cent.

E. Adjustment of the Fee Component. The adjusted Fee Component of each Rate shall be calculated as follows:

$$\begin{array}{lcl} \text{Adjusted} & = & ((\text{Adjusted Operating Component} + \text{Adjusted Disposal} \\ \text{Fee} & & \text{Component} + \text{Adjusted Processing Component}) / (1 - \\ \text{Component} & & 14.6\%) - (\text{Adjusted Operating Component} + \text{Adjusted} \\ & & \text{Disposal Component} + \text{Adjusted Processing Component}) \end{array}$$

For example, assuming:

5. The Rate being adjusted is a Solid Waste Collection Rate
6. Adjusted Operating Component = \$52.00 (as calculated in Step 5 of Section 11.3.B)
7. Adjusted Disposal Component = \$20.83 (as calculated in Section 11.3.C)
8. Adjusted Processing Component = \$0.00 (as calculated in Section 11.3.D.1)

$$\begin{array}{lcl} \text{Adjusted Fee Component} & = & ((\$52.00 + \$20.83 + \$0.00) / (1 - \\ & & 0.146)) - (\$52.00 + \$20.83 + \$0.00) = \$12.45 \end{array}$$

The Adjusted Fee Component shall be rounded to the nearest cent.

F. Calculation of Adjusted Rate. Adjusted Rates shall be calculated as follows:

$$\begin{array}{lcl} \text{Adjusted} & = & \text{Adjusted Operating Component} + \text{Adjusted Disposal} \\ \text{Rate} & & \text{Component} + \text{Adjusted Processing Component} + \text{Adjusted} \\ & & \text{Fee Component} \end{array}$$

For example, assuming:

6. The Rate being adjusted is a Solid Waste Collection Rate
7. Adjusted Operating Component = \$52.00 (as calculated in Step 5 of Section 11.3.B)
8. Adjusted Disposal Component = \$20.83 (as calculated in Section 11.3.C)
9. Adjusted Processing Component = \$0.00 (as calculated in Section 11.3.D.1)
10. Adjusted Fee Component = \$12.45 (as calculated in Section 11.3.E)

$$\begin{array}{lcl} \text{Adjusted Collection Rate} & = & \$52.00 + \$20.83 + \$0.00 + \$12.45 = \\ & & \$85.28 \end{array}$$

G. Adjustment of Special Charges. Special Charges shall be adjusted annually on the first day of the Rate Period by the same amount as calculated in accordance with Step 5 of Section 11.3.B.

For example:

3. Then-Current Special Charge Amount = \$50.00
4. Operating Cost Factor = 4.0% (as calculated in Step 5 of Section 11.3.B)

Adjusted Special Charge Amount = \$50.00 x (1 + 0.040) = \$52.00

The adjustment shall be rounded to the nearest cent.

H. Change in the ECI, PPI, or CPI-U. If the ECI, PPI, or CPI-U is discontinued or revised during the Term by the DOL, such other government index or computation with which it is replaced shall be used in order to obtain substantially the same result as would be obtained if the ECI, PPI, or CPI-U had not been discontinued or revised.

10. Section 11.4(A)(2), “**Cost-Based Adjustment Methodology**,” is deleted in its entirety.

11. Section 11.4(B), “**City Review of Application**,” is amended to read as follows:

“City Review of Application. The Contractor's Rate application shall be reviewed by the City Contract Manager. The City Council [Contract Manager] shall approve Maximum Permissible Rates to reflect the adjustments made in accordance with ~~Exhibit P~~ [Section 11.3, Indexed-Based Adjustment of Rates], for the Rate Periods during which that process is used. The City Council [Contract Manager] shall act in good faith to approve such Maximum Permissible Rates by the commencement date of the Rate Period. The adjusted Rates shall not take effect until the City Council [Contract Manager] has approved such Rates.”

12. The second paragraph of Section 11.4(C), “**Failure to Adjust Rates by January 1**,” is amended to read as follows:

~~“If the Contractor submits its Rate application on or before the Rate application date identified in Section 11.2, and the City does not adjust the Rates to be effective on or before January 1 of a Rate Period, the City shall include a surcharge on the Rates that shall be effective for the remainder of the Rate Period to recover revenues lost by the Contractor, if any. To determine the amount of lost revenues, if any, the City and Contractor shall meet and confer to determine the effect the delay in adjusting Rates has on the Contractor's revenue. The assessment of the revenue impact shall consider the Contractor's billing cycle (e.g., impact to Customers billed in advance and to Customers billed in arrears), the ability of Contractor to delay issuance of bills, the payment cycle of Customers, and other variables. does not submit the application on or before the Rate application date identified in Section 11.2, Rates may not be adjusted by January [July] 1. In such case, all Rates shall be adjusted as soon as practical following approval by the City Council. If the Contractor does not submit the application by the Rate application date identified in Section 11.2, no retroactive adjustment will be made to allow the Contractor to recover revenues that it would have collected, had the Rate adjustment been implemented in accordance with the prescribed schedule.”~~

13. Section 11.5, **Special Rate Review**, Subparagraph A, Eligible Items, part 4, is amended to read as follows:

~~“4. City-initiated changes to the amount of Franchise Fees or other fees in accordance~~

~~with Article 10.~~ **[Change in the recyclables or organic materials markets that results in a material increase in Contractor's cost of providing services required by this Agreement.]"**

14. Article 11, "Contractor's Compensation And Rates," is amended to include a new subparagraph 11.8 to read as follows:

"[11.8 Rates for Changes in Fees

In the event City elects, pursuant to Section 10.3, to initiate an increase in the amount of the Franchise Fee, or the Contract Management and Enforcement Fee, or to establish or increase any other City-imposed fee at any time during the Term hereof, the full amount of such fee or fee increase shall be automatically "passed through" to Contractor's Customers in the form of an immediate corresponding Rate adjustment, so as to enable Contractor to fully recover said cost and not incur or absorb any portion thereof. It shall be the obligation of Contractor to furnish the City Contract Manager with data supporting the cost impacts of the fee or fee increase.]"

15. The text of item 31 in Exhibit H, "Schedule for Liquidated Damages," is amended to read as follows:

~~"Failure to conduct on-site Customer outreach and waste audits as required by Section 7.1." twice per year for each Multi-Family Customer and once per year for each Commercial Customer.~~

16. Exhibit P to the Agreement is deleted in its entirety.