

# ATTACHMENT 5

AMENDED AND RESTATED  
FRANCHISE AGREEMENT BETWEEN  
CITY OF PALM BAY, FLORIDA  
AND  
HARRIS SANITATION, INC.  
FOR SOLID WASTE COLLECTION

THIS AMENDED AND RESTATED AGREEMENT, made this 11<sup>th</sup> day of JUNE 2010, by and between the City of Palm Bay, a municipal corporation existing under the laws of the State of Florida, hereinafter referred to as the "City" and, Harris Sanitation, Inc., hereinafter referred to as the "Provider";

WHEREAS, the parties entered into that certain agreement dated April 13, 1990 for the provision of solid waste and recyclable materials collection and disposal (the "Agreement"); and

WHEREAS, the Agreement, as modified, is current and effective; and

WHEREAS, the parties desire to amend and restate the Agreement with the modifications and changes set forth herein.

NOW, THEREFORE, the City and the Provider, in consideration of the mutual covenants and conditions contained herein and for other good and valuable consideration, the receipt and sufficiency is hereby acknowledged, agree as follows:

**Section 1.** The Provider is hereby granted an exclusive franchise to operate upon, over and across the streets, alleys, bridges and other public thoroughfares of the City for the purpose of collecting, removing and disposing of refuse and solid waste materials, and shall also include recyclable material collection from businesses, residences and multifamily sites within the City, subject to the terms, conditions, and expectations of this Agreement.

**Section 2.** All owners and/or tenants, agents, lessors, lessees of residential units and multifamily units within the City and all owners and operators of commercial property within the City shall subscribe to and pay for the solid waste collection services provided for in accordance with Chapter 150 of the Code of Ordinances of the City of Palm Bay ("the City Code").

**Section 3.** For the purpose of this Agreement, the following terms, phrases, words and their derivations shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number, and words in the singular number include the plural number. The word "shall" is always mandatory and not merely directory.

*Agreement* shall mean this agreement covering the performance of the work described herein, including the executed agreement, performance bond, and

supplementary agreements which may be entered into, all of which documents are to be treated as one (1) instrument whether or not set forth at length herein.

*Bulky wastes* shall mean large discarded items placed for disposal such as large boxes, barrels, crates and large furniture, but not including garden and yard trash and special waste items.

*CART* shall mean a container of either sixty-four or ninety-six gallon capacity which shall be provided by the City and shall be of impervious material, provided with a tight-fitting cover suitable to protect the contents from flies, insects, rats and other animals, fitted in such manner that it may be lifted by an mechanical means and which shall not have any inside structures such as inside bands or reinforcing angles or anything within that would prevent the free discharge of the contents.

*City* shall mean the City of Palm Bay, a Florida municipal corporation, acting through the City Council or City Manager or City representative, as the case may be.

*City Manager* shall mean the City Manager or employee(s) designated in writing by the City Manager to represent the City in the administration and supervision of this Agreement.

*Collectable* shall mean any waste material not specified or specifically excluded herein.

*Commercial trash* shall mean any and all accumulations of paper, rags, excelsior, wooden, paper or cardboard boxes or containers, sweepings, furniture, appliances, and other accumulations not included under the definition of garbage, generated by the operation of stores, offices, public buildings and other business places. Commercial trash shall also include all trash placed in public receptacles in public places for collection as provided by this Agreement.

*Commercial units* shall be identified as, but not limited to, all businesses, office buildings, stores, filling stations, motels, laundries, hotels, public buildings, food service, lodging establishments, service establishments, light industry, heavy industry, schools, churches, clubs, hospitals and nursing homes.

*Construction trash* shall mean any and all accumulation of wood, concrete, wallboard, roofing materials, wire, metal and other construction-related trash generated by contractors at construction or demolition sites that have City issued permits.

*Curbside* shall mean that area abutting the known edge of the road on improved lots.

*Disposal costs* shall mean the "tipping fees" or landfill costs charged to the Provider by others for disposal of the garbage, trash and industrial wastes collected by the Provider.

*Effective Date* shall mean October 1, 2010.

*Garbage* shall mean any and all accumulations of household trash, animal, fruit or vegetable matter that attends the preparation, use, cooking, and dealing in, or storage of, meats, fish, fowl, fruit, vegetables, and any other matter, or any nature whatsoever which is subject to decay, putrefaction and the generation of noxious and offensive gases or odors, or which, during and after decay may serve as breeding or feeding material for flies and/or to the germ-carrying insects, bottles, cans, or other food containers which due to their ability to retain water may serve as a breeding place for mosquitoes or other water breeding insects.

*Garden and yard trash* shall mean any and all accumulations of grass, palm fronds, leaves, branches, shrubs, vines, and other similar items generated by the maintenance of lawns, shrubs, gardens and trees.

*Hazardous Materials (HAZMAT)* shall mean any solid, liquid, or gaseous material that is toxic, flammable, radioactive, corrosive, chemically reactive, or unstable upon prolonged storage in quantities that could pose a threat to life, property, or the environment defined in Section 101(14) of Comprehensive Environmental Response, Compensation and Liability Act of 1980 and in 40 CFR 300.6). Also defined by 49 CFR 171.8 as a substance or material designated by the Secretary of Transportation to be capable of posing an unreasonable risk to health, safety, and property when transported in commerce and which has been so designated. See definition of hazardous substance.

*Hazardous Substance* shall mean as defined by Section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act; any substance designated pursuant to Section 311(b) (2) (A) of the Clean Water Act; any element, compound, mixture, solution or substance designated pursuant to Section 102 identified under or listed pursuant to Section 3001 of the Solid Waste Disposal Act (but not including any waste listed under Section 307(a) of the Clean Water Act); any hazardous air pollutant listed under Section 112 of the Clean Air Act; and any imminently hazardous chemical substance or mixture pursuant to Section 7 of the Toxic Substances Control Act. The term does not include petroleum, including crude oil or any fraction thereof, which is not otherwise specifically listed or designated as a hazardous substance in the first sentence of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

*Hazardous Waste* shall mean those solid wastes designated by OSHA in accordance with 40 CFR 261 due to the properties of ignitability, corrosivity, reactivity, or toxicity. Any material that is subject to the Hazardous Waste Manifest requirements of the EPA specified in 40 CFR Part 262.

*Household trash* shall mean any unused or abandoned tangible item such as furniture, discarded carpet, stoves, hot water heaters, refrigerators or similar appliances not having a useful purpose to the owner. For the purposes of this ordinance, the term "household trash" shall not include abandoned or junk automobiles and parts thereof, with the exception of four (4) tires maximum, not to exceed sixteen (16) inches in the wheel, as long as the Brevard County policy permits four (4) tires per household; materials that accumulate as a result of building or building alterations such as brick, block, stone, sand, siding or roofing; or that trash generated as a result of clearing vacant lots. Residential debris will be acceptable.

*Industrial wastes* shall mean any and all debris and waste products generated by canning, manufacturing, food processing (except restaurants), land clearing, building construction or alteration (except residential do-it-yourself projects) and public-works-type construction projects whether performed by a governmental unit or by contract. The collection of industrial wastes is included under the terms and scope of this Agreement.

*Mechanical container* shall mean containers for the deposit of refuse that may be emptied by mechanical means.

*Multiple dwelling units* shall mean any building containing three (3) or more permanent dwelling units, not including motels or hotels.

*Nonresidential unit* shall mean any business or commercial or other unit occupied for other than residential purposes. In reference to this Agreement, nonresidential does not include schools, public buildings and swim clubs.

*Parkway* shall mean that portion of the street right-of-way paralleling any public thoroughfare between the curbline and abutting property line. If ditching bisects the property and thoroughfare, the term "parkway" includes the roadside of the ditch.

*Performance bond* shall mean the form of security approved by the City and furnished by the Provider as required by this Agreement as a guarantee that the Provider will execute the work in accordance with the terms of the Agreement and will pay all lawful claims.

*Project* shall mean the entire work to be performed under the Agreement.

*Provider* shall mean Harris Sanitation, Inc., the corporation that agrees to perform the work or service as set forth in the Agreement.

*Recyclable material* shall mean material which can be removed from the solid waste stream and reused in manufacturing, agriculture, power production or other processes and which for the purposes of this Agreement are defined as:

- (1) All Cans - including empty aerosol spray cans.

- (2) Glass - food and beverage bottles and jars only - any color excluding ceramics, dishes, window glass, mirrors or light bulbs.
- (3) Newspaper - Shiny inserts, magazines, junk mail, catalogs, phone books, paper, cardboard cereal boxes, excluding corrugated cardboard.
- (4) Plastic - beverage, shampoo, laundry detergent or bleach bottles excluding auto products (motor oil or anti-freeze), pool chemicals, pesticides or fertilizers.

*Recycling container* shall mean a CART provided by the City designated as a receptacle for recyclable material.

*Refuse* shall mean garbage, garden and yard trash, household trash and commercial trash, but does not include hazardous waste, industrial waste, special waste, or recyclable materials that are separated as required herein.

*Residential unit* shall mean any structure, shelter, trailer, or any part of a multifamily building with fewer than four (4) units used or constructed for use as a residence for one (1) family.

*Roll-off container* shall mean any container used for the collection and storage of construction demolition debris, and refuse that can be picked up and transported on a specially equipped truck to the disposal site.

*Special waste* shall mean items listed on Exhibit "A".

*Surety* shall mean the corporate body, which is bound with and for the Provider, and which engages to be responsible for his payment of all debts and obligations pertaining to and for his acceptable performance of the project.

*Trash receptacle* shall mean a container of not greater than thirty-gallon capacity, which shall be free of jagged or sharp edges fitted with two (2) handles or a bail by which it may be lifted and which shall not have any inside structures such as inside bands or reinforcing angles or anything within that would prevent the free discharge of the contents.

**Section 4.** It is the intent of this Agreement to provide for the total, exclusive collection by the Provider of all refuse, industrial waste, construction trash, special waste, and recyclable materials in the City with the exception of the exclusions specifically listed.

Collection shall be by Provider provided labor, materials and equipment in accordance with the following:

(A) *Residential units.*

(1) The Provider shall collect garbage and household trash from residential units not less than one (1) time per week.

(2) The Provider shall be required to pick up all garbage and household trash generated by a residential unit, which can be accepted at the Brevard County landfill.

(3) Collections shall be made from the curbside or adjacent service alley at the residential unit (rear yard or side yard pickup at residences of qualifying disabled individuals shall be provided by the Provider at no additional cost to the City). Bulk items such as furniture, appliances, yard toys, and building materials from "do-it-yourself" projects, not to exceed three (3) cubic yards per project, shall be placed at the curbside or adjacent service alley

(4) The Provider shall make collections with a minimum of noise and disturbance to the household. CARTS shall be handled carefully by the Provider and shall be thoroughly emptied and placed back in the location they were found, in an upright position to prevent them from rolling. CARTS shall not be placed in such a manner as to block driveways or roadways. Any refuse spilled by the Provider shall be picked up immediately by the Provider's employees. In the event that the Provider does not collect refuse in a sanitary manner, the City shall have the right to hire an independent contractor to collect any refuse spilled by the collector and the cost shall be back-charged to the Provider.

(5) The Provider shall not be obligated to collect refuse which was generated off the premises or which results from a business/commercial activity not located on the premises.

(6) In the event that the Provider does not pick up refuse from a residential unit in a timely manner, the City shall have the right to utilize City staff (cost and overhead plus 10%) or hire an independent contractor to make the pickup and the cost shall be back-charged to the Provider. The City shall notify the Provider at least one (1) business day in advance of this need to hire an independent contractor unless deemed a public nuisance, hazard, or emergency by the City Manager or designee.

(7) The City shall have the right to divert residential waste streams to other processes that the City feels are in the best interest to the City and that have an economic/environmental benefit to the City. In the event that the diversion of residential waste impacts the methods, means, efficiencies or costs of collection or disposal, Provider shall have the right to negotiate an appropriate modification of its rates.

(B) *Garden and yard trash.*

(1) The Provider shall collect garden and yard trash from residential units not less often than one (1) time per week.

(2) The Provider shall be required to pick up all garden and yard trash generated by a residential unit. The Provider shall inform the owners of residential units that items such as brush, tree limbs, tree trunks, and palm fronds shall be cut in lengths of no greater than four (4) feet if the item's

diameter is less than six (6) inches; and shall be cut in lengths no greater than two (2) feet, if the item's diameter is six (6) inches or greater, not to exceed fifty (50) pounds in weight per item.

(3) Garden and yard trash shall be collected from any point along the front of the premises near the street (or curbside), in such a manner that equipment used shall not damage or destroy existing sod, pavement or other ground cover or material. If there is a vacant lot adjacent to or across from an improved lot, any properly prepared garden and yard trash that has been placed in the public right-of-way at the front of that lot, close to the occupied lot, shall also be collected.

(4) The Provider shall make collections with as little disturbance as possible, and in a sanitary manner. Any refuse spilled by the collector shall be picked up immediately by the Provider's employees. Trash receptacles shall be handled carefully by the Provider and shall be thoroughly emptied and placed back in the location they originated, in an upright position to prevent them from rolling. Trash receptacles should not be placed in such a manner as to block driveways or roadways. In the event that the Provider does not collect trash in a sanitary manner, the City shall have the right to utilize City staff (cost and overhead plus 10%) or hire an independent contractor to collect any refuse spilled by the collector and the cost shall be back-charged to the Provider.

(5) The City shall have the right to divert garden and yard trash waste streams to other processes that the City feels are in the best interest to the City and that have an economic/environmental benefit to the City. In the event that the diversion of garden and yard trash waste impacts the methods, means, efficiencies or costs of collection or disposal, Provider shall have the right to negotiate an appropriate modification of its rates.

*(C) Multiple dwelling units and mobile home parks; containers emptied by mechanical means.*

(1) Refuse shall be collected from multiple dwelling units and mobile home parks not less than twice per week and at a greater frequency if required to protect the public's health. Collection service for customers using mechanical containers will be available from two (2) days to six (6) days per week, and the frequency of service will be mutually agreed upon by the customer and the Provider.

(2) It is the duty of the owners/operators of multiple dwelling units and mobile home parks to accumulate refuse in locations mutually agreed upon by the owners/operators and the Provider, and which are convenient for collection by the Provider. Where mutual agreement is not reached, the City Manager shall designate the location.

(3) The Provider shall make collections with as little disturbance as possible to the customer. The work shall be done in a sanitary manner and any refuse spilled by the Provider shall be picked up immediately by the Provider's

employees. In the event that the Provider does not collect refuse in a sanitary manner, the City shall have the right to utilize City staff (cost and overhead plus 10%) or hire an independent contractor to collect any refuse spilled by the collector and the cost shall be back-charged to the Provider.

(4) Multiple dwelling units shall be required to use mechanical containers. Residential units and mobile home parks with less than sixteen (16) units, may use mechanical containers or CARTs at the City's discretion.

(5) Maintenance of mechanical containers shall be as set forth in the City Code; however, the Provider shall be responsible for maintaining mechanical containers in an operable condition at all times and shall clean and paint such containers as necessary to maintain them in a clean and slightly condition. The Provider shall not impose any separate or additional charge to customers for the rental or routine/regular maintenance of front end mechanical containers.

(D) *Commercial units.*

(1) Refuse shall be collected from commercial units not less than twice per week and at a greater frequency if required to protect the public's health. Collection service for customers using mechanical containers will be available from two (2) days to six (6) days per week, and the frequency of service will be mutually agreed upon by the customer and the Provider. If refuse is collected more than once per day, the Provider may charge the customer for the extra collection.

(2) It is the duty of the owners/operators of commercial units to accumulate refuse in locations mutually agreed upon by the owners/operators and the Provider, and which are convenient for collection by the Provider. Where mutual agreement is not reached, the City Manager shall designate the location.

(3) The Provider shall make collections with as little disturbance as possible to the customer. The work shall be done in a sanitary manner and any refuse spilled by the Provider shall be picked up immediately by the Provider's employees. In the event that the Provider does not collect refuse in a sanitary manner, the City shall have the right to utilize City staff (cost and overhead plus 10%) or hire an independent contractor to collect any refuse spilled by the collector and the cost shall be back-charged to the Provider.

(4) Commercial units must be mechanical containers for accumulation of refuse. The Provider shall provide mechanical containers as required to maintain satisfactory service for all commercial units.

(5) Maintenance of mechanical containers shall be as set forth in the City Code; however, the Provider shall be responsible for maintaining mechanical containers in an operable condition at all times and shall clean and paint such containers as necessary to maintain them in a clean and slightly condition. The

Provider shall not impose any separate or additional charge to customers for the rental or routine/regular maintenance of front end mechanical containers.

(E) *Recyclable materials collection (Recycle Palm Bay Program)*. The Provider shall provide all residential, commercial and industrial recyclable material collection in the City.

(1) The Provider shall collect all recyclable materials from the curbside once per week from each residential unit. Rear or side yard pickup at residences of handicapped persons shall be provided at no additional charge. The Provider shall make collection with a minimum of noise and disturbance to the customer. CARTs shall be handled carefully by the Provider and shall be thoroughly emptied and left where they were found. This work shall be done in a sanitary manner. Any spillage including broken glass from the CARTs shall be picked up immediately by Provider's employees. In the event that the Provider does not collect trash in a sanitary manner, the City shall have the right to utilize City staff (cost and overhead plus 10%) or hire an independent contractor to collect any refuse spilled by the collector and the cost shall be back-charged to the Provider.

(2) Recyclable material placed at curbside in CARTs for collection shall become the property of the Provider. The Provider shall pay the City \$0.20 per residential unit per month including multifamily units in consideration of the recyclable materials collected.

(3) The Provider shall accurately account for the quantity (in tons) of recyclable material collected within the City pursuant to this Agreement. Quantities (in tons) of recyclable material collected shall be made available to the City on a monthly basis and upon request when needed for grant applications or auditing purposes. The City shall retain the right to make periodic inspections of the Provider's facilities and equipment in order to verify quantities of recyclable material collected.

(4) The Provider will promote the recycling program. The Provider will design promotional events and educational programs and prepare promotional materials such as letters and/or flyers for public distribution with the CARTs. The Provider will distribute written information to the residential participants on a periodic basis. The Provider further agrees to conduct presentations for schools, civic groups, homeowners associations and other appropriate citizens groups.

(5) No later than three years after the Effective Date of this Agreement the Provider shall establish for the residential customers of the City a recycling rewards program which measures the amount of recyclable material each residential customer recycles and then provides reward incentives based upon the amount of recyclable material recycled.

(F) *Exclusions: hazardous waste and special waste.*

(1) The Provider may refuse to collect refuse from a customer if the Provider believes that such refuse contains hazardous material, hazardous substances and/or hazardous waste.

(2) The Provider shall collect special waste, as defined in Exhibit A, only after the execution of a special waste agreement with a customer which provides for charges and management appropriate for the customer's special waste.

(G) *Parks, picnic areas, golf courses, schools, property owned, leased, rented, and controlled by the city.* The Provider shall empty all refuse containers used by the general public in any of the areas or places named in the above caption. If the City places containers for recyclables at these areas, these materials will become property of the City to own and sell. The City shall have the right to use regular commercial type trash containers or garbage receptacles, with covers. Servicing of these facilities shall be performed at no cost to the City and the Provider shall provide containers at these sites at no cost to the City. The size and type of containers and the frequency of service shall be mutually agreed by the parties. Further, within six (6) months of the Effective Date of this Agreement, the Provider, shall, at the Provider's sole cost, furnish, service and maintain one (1) solar powered compactor at each park operated by the City.

## **Section 5. Schedules and Routes.**

(A) *In general.* The Provider shall notify the City of its routes and schedules. The City reserves the right to deny the Provider's vehicles access to certain streets, alleys, and public ways inside the City where the City determines that it is in the interest of the general public to do so because of the conditions of the streets or bridges. However, the Provider shall not interrupt the regular schedule and quality of service because of such street closures.

Customers served under this Agreement shall be notified by the Provider of the schedules provided by the provider. Any and all route and schedule changes shall be approved by the City Manager. Notices of changes in collection schedule shall be prominently provided to each affected customer by individually notifying same in writing at least seven (7) days prior to change in schedules or routes.

The Provider acknowledges and expressly accepts the fact that at times during the year the quantity of refuse to be disposed of is materially increased by fluctuations in the amount of garden and yard trash and seasonal residents which may cause additional workload. Both parties expressly agree that the Provider must maintain the required collection schedules and routes even when there is any additional workload due to seasonal residents and the seasonal increase in garden and yard trash.

(B) *Storms.* In the event an excessive amount of debris or refuse has accumulated by reason of any severe storm (such as a hurricane) or freeze, natural disaster, riot or other calamity (each a "Disaster Event"); the Provider shall collect such debris or refuse. The City agrees that it shall pay the Provider for such additional service in an amount mutually agreed upon by the City and the Provider, provided the City has authorized such work in advance. Nothing in this Agreement shall exclude the City from using its own workforce and equipment, or other contractors, for removal of debris or refuse after such Disaster Event. The Provider shall not be responsible for nor have an obligation to collect, transport or dispose of debris or other waste material from a Disaster Event unless the City enters into a written agreement with Provider specifying the terms and compensation for such services..

(C) *Hours and holidays.* Except for unusual circumstances, and with the express permission of the City's representative, the Provider shall not begin collections prior to 6:00 a.m. or after 7:00 p.m. At all times collections shall be made with as little disturbance to residents as possible. All changes in schedules and routes must be approved by the City Manager in advance of such change taking place. The Provider shall have the option to not provide residential collection service on the following holidays: Memorial Day, Fourth of July, Labor Day, Veteran's Day, Thanksgiving Day and Christmas. If the regular residential collection falls on any of the aforementioned holidays, the Provider shall collect the solid waste and/or recyclables on the following Saturday.

In the event that Brevard County may increase the number of holidays that the Brevard County landfill will be closed, the Provider will not be required to collect and that the holiday chosen by Brevard County will be included and if the regular residential collection falls on any of the aforementioned holidays, the Provider shall collect the solid waste and/or recyclables on the following Saturday.

(D) *City not liable for delays.* It is expressly agreed that in no event shall the City be liable or responsible to the Provider or to any other person on account of any stoppage or delay in the work provided for herein, by injunction or other legal or equitable proceedings brought against the Provider, or from or on account of any delay from any cause over which the City has no control.

(E) *Litter and dangerous animals.* The Provider shall not be responsible for scattered refuse unless the same has been caused by his acts or those of any of his employees, in which case, all such scattered refuse shall be picked up immediately by the Provider. Employees of the Provider shall not be required to expose themselves to the danger of being bitten by vicious dogs in order to accomplish refuse collection in any case where the owner of tenants have such animals at large. The Provider shall immediately notify them, in writing, with a copy to the City Manager, of such conditions and of the Provider's inability to make collection because of such condition.

(F) *Report of service.* From time to time, the City Manager may require reports from the provider; for example, weight of refuse collected for a given

period, etc. The Provider agrees to provide such information, when required in writing by the City Manager relating to the Provider's operations in the City. The Provider and the City agree that the Provider may be reimbursed for any unusual expenses incurred in the preparation of specific reports which the City may request.

(G) *Special haul service.* For items requiring disposal which are not covered under the definition of "refuse" contained herein, the charges are to be negotiated between the Provider and customer prior to collection. If agreement cannot be reached, the matter may be submitted to the City Manager, and the City Manager's decision shall be binding. The Provider shall collect all items requiring special haul services no later than the third regular pickup day following agreement with the customer.

## Section 6. Provider's Relation To City.

(A) *Provider as independent contractor.* It is expressly agreed and understood that the Provider is in all respects, an independent contractor as to the work notwithstanding in certain respects the Provider is bound to follow the direction of the City Manager, and that the Provider is in no respect an agent, servant, or employee of the City. The Agreement specifies the work to be done by the Provider, but the method to be employed to accomplish this work shall be the responsibility of the Provider, unless otherwise provided in the Agreement.

(B) *Subletting contract.* The Agreement, or any portion thereof, shall not be sublet except with the prior written consent of the City Council. No such consent will be construed as making the City a party of or to such subcontract, or subjecting the City to liability of any kind to any subcontractor. No subcontract, shall, under any circumstances, relieve the Provider of his liability and obligation under this Agreement, and despite any such subletting, the City shall deal through the Provider. Subcontractors will be dealt with as workmen and representatives of the Provider, and as such, will be subject to the same requirements as to character and competence as are other employees of the Provider.

(C) *Supervision of contract performance.* The Provider's performance of this Agreement shall be supervised by the City Manager and the Provider shall be so notified in writing by the City Manager if, at any time during the life of the Agreement, performance satisfactory to the City Manager shall not have been made. The Provider upon notification by the City Manager shall increase the force, tools and equipment as needed to properly perform this Agreement. The failure of the City Manager to give such notification shall not relieve the Provider of his obligation to perform the work at the time and in the manner specified by this Agreement.

(D) *City Manager of Palm Bay.* To prevent misunderstanding and litigation, the City Manager or his designated representative, shall reasonably decide any and all questions which may arise concerning the quality and acceptability of

the work and services performed; the sufficiency of performance, the interpretation of the provisions of this Agreement, and the acceptable fulfillment of the Agreement on the part of the Provider; the City Manager will reasonably determine whether or not the amount, quantity, character and quality of the work performed is reasonably satisfactory, and the City Manager shall arbitrate any disputes between the Provider and customer over service, price, the acceptability of waste and other matters that may arise. In the event of any dispute between the City and the Provider, the Provider shall not raise the defenses of unlawful delegation of a legislative duty.

(E) *Inspection of work.* The Provider shall furnish the City Manager with every reasonable opportunity for ascertaining whether or not the work as performed, is in accordance with the requirements of the Agreement. The Provider shall designate, in writing, the person to serve as agent and liaison between his organization and the City. The City Manager inspect the Provider's operations and equipment at any reasonable time, and the Provider shall admit the City Manager, members of the City Council and other authorized representatives of the City to make such inspection at any reasonable time and place.

(F) *Disagreements.* It is recognized that disagreements may arise between the City and the Provider with regard to the collection of certain items due to interpretation of the specific language of the Agreement. In the event a disagreement arises and refuse needs to be collected and disposed of, the City Manager may notify the Provider of the location of refuse which has not been collected due to disagreement between the City and the Provider; and it shall be the duty of the Provider to remove all such refuse within three (3) days of notice. Should the Provider fail to remove the refuse, the City will remove, or hire an independent contractor, to remove the refuse and the cost (cost and overhead plus 10%) shall be back-charged to the Provider..

## **Section 7. No Estoppel.**

The City of Palm Bay shall not, nor shall any department or officer thereof be precluded or estopped by acceptance of the work that the work and materials or any part thereof do not in fact conform to the specifications or were not furnished properly or the price charged for same was as required or permitted by this Agreement.

## **Section 8. Quality of Work.**

(A) *Character of workmen.* The direction and supervision of refuse collection and disposal and recycling operations shall be by competent, qualified and sober personnel, and the Provider shall devote sufficient personnel, time and attention to the direction of the operation to assure performance satisfactory to the City. All subcontractors, superintendents, foremen and workmen employed by the Provider shall be careful and competent. Any employee of the Provider who misconducts himself or is incompetent or negligent in the due and proper performance of this duty, or is

disorderly, dishonest, drunk or grossly discourteous, shall be discharged or disciplined by the Provider. The City shall specify reasons for their request. The Provider shall see to it that his employees service the public in a courteous, helpful and impartial manner, and if requested, furnish the City with a current roster of employees every thirty (30) days. Provider's employee collecting refuse will be required to follow the regular walk for pedestrians while on private property. No employee shall meddle with property that does not concern him. Care shall be taken to prevent damage to the property, including shrubs, flowers and other plants.

(B) *Cooperation of Provider required.* The Provider shall cooperate with authorized representatives of the city in every reasonable way in order to facilitate the progress of the work contemplated under this Agreement. The Provider shall have at all times a competent representative available who will be authorized to receive orders and to act for the Provider.

(C) *Handling complaints.* The Provider shall perform a service of high quality and keep the number of legitimate complaints to a minimum. The Provider shall maintain a telephone listing in the name in which he is doing business as a Provider and provide an answering service for those customers needing to contact him. In order that the City may be informed of the quality of service, the Provider agrees to maintain for a period of six (6) months a record of all complaints for inspection by the City. The Provider agrees to furnish a monthly report of all complaints, listing the name and address of the person complaining, the nature of the complaint, and the disposition of each complaint. All complaints, whether received in person, by mail or telephone, shall be recorded in triplicate; one (1) copy to go to the City Manager and two (2) copies to be retained by the Provider. Complaints received before 12:00 noon each day shall be serviced before 5:00 p.m. that day. Complaints received after 12:00 noon, shall be serviced before 12:00 noon the following calendar day. For each month in which the number of unserved legitimate complaints reaches twenty (20) or more, the City shall be entitled to claim liquidated damages of ten dollars (\$10.00) per complaint. Each complaint shall be considered legitimate unless satisfactory disposition of the claim is furnished. The decision of the City Manager shall be final. With respect to residential customers, the City's Public Works and Finance Customer Service Divisions will accept calls related to the services furnished by Provider under this Agreement and will work with Provider to establish a process for the transfer of calls for service and handling by Provider pursuant to this Section.

## **Section 9. Storage and Garage Facilities.**

It shall be the sole responsibility of the Provider to provide, at no cost to the City, essential facilities for storage and maintenance of equipment (except for CARTs) necessary to perform services required by this Agreement. In addition, the Provider will be responsible for providing adequate office space and telephone service, at no cost to the City.

## Section 10. Equipment.

(A) *Type.* The Provider shall use only vehicles with bodies which are watertight to a depth of not less than eighteen (18) inches, with solid sides, using pneumatic tires.

(B) *Amount.* The Provider shall provide sufficient equipment, in proper operating condition, so regular schedules and routes of collection can be maintained.

(C) *Condition.* Equipment is to be maintained in a reasonable, safe, working condition and shall be identified with the number of the vehicle printed in letters not less than three (3) inches high, on each side of the vehicle, and vehicles shall be numbered and a record kept of the vehicle to which each number is assigned. No advertising shall be permitted on vehicles. The Provider is required to keep collection vehicles and containers emptied by mechanical means, cleaned and painted to present a pleasing appearance. The Provider at the request of the customer or the City, will exchange mechanical containers that become offensive with odor, rusted out, damaged, or a danger to the public within seventy-two (72) hours.

(D) *Vehicles.* Vehicles used for the collection of garage, commercial and industrial trash shall be of the compactor type. The use of open vehicles will be permitted only for the collection of household, yard and garden trash. Open and construction vehicles shall not be overloaded so as to scatter refuse; however, if refuse is scattered from the Provider's vehicle for any reason, it shall be picked up immediately. Each vehicle shall be equipped with a fork, broom and shovel for this purpose. The Provider's vehicles are not to interfere unduly with vehicular or pedestrian traffic, and vehicles are not to be left standing on streets unattended except as made necessary by loading operations.

(E) *CARTs.* The Provider shall be responsible for delivering to and removing CARTs from residential customer locations at the direction of the City and at no additional cost to the City. CARTs shall be stored at a facility maintained by the City. The Provider shall have access to the City-maintained facility during the hours from 7:00 am to 3:00 pm, Monday through Friday, excluding legal holidays observed by the City.

## Section 11. Rates and Billing.

The rates for Provider's services hereunder are as follows:

(A) *Residential unit refuse collection.* Refuse collection per residential unit collected single-family, duplex, and triplex, \$9.01 per month.

(B) *Multi-dwelling collection.* Refuse collection per residential unit collected, \$10.52 per month.

(C) *Commercial units.* All commercial units to be charged on a per cubic yard basis and based upon weekly frequency of pick-up. All mechanical containers shall be at no additional cost to the customer.

	1/week	2/week	3/week	4/week	5/week	6/week
2 cy	\$52.58/mo	\$104.50/mo	\$156.78/mo	\$209.06/mo	\$261.28/mo	\$313.56/mo
3 cy	\$78.39/mo	\$156.78/mo	\$235.17/mo	\$313.56/mo	\$391.56/mo	\$470.34/mo
4 cy	\$104.50/mo	\$209.06/mo	\$313.56/mo	\$418.06/mo	\$522.62/mo	\$627.12/mo
6 cy	\$156.78/mo	\$313.56/mo	\$470.34/mo	\$627.12/mo	\$783.90/mo	\$940.68/mo
8 cy	\$209.06/mo	\$418.06/mo	\$627.12/mo	\$836.18/mo	\$1,045.18/mo	\$1,254.24/mo

(1) Containerized, rate per cubic yard \$6.03

(2) Loose pickup, rate per cubic yard \$8.65

(3) Roll Off Open Top Ceiling Rates

	Rate	Monthly Maintenance Fee
15 cy Open Top Container	\$180.00 per load	\$104.00
20 cy Open Top Container	\$240.00 per load	\$104.00
30 cy Open Top Container	\$290.00 per load	\$104.00
40 cy Open Top Container	\$310.00 per load	\$104.00

(4) Roll Off Compactor Ceiling Rates

	Rate
15 cy Compactor	\$190.00 per load
20 cy Compactor	\$250.00 per load
30 cy Compactor	\$300.00 per load
40 cy Compactor	\$320.00 per load

(5) Front End Load Compactors, rate per cubic yard \$18.00

(6) Items (3) through (5) do not include disposal charges. The Provider shall be entitled to charge disposal costs in addition to rates charged for items (3) through (5) above.

(7) Provider will service Bagster© containers at a charge of \$99.00 per haul and \$29.99 per bag.

(D) *Franchise fee.* A ten percent (10%) franchise fee on collected revenues of items (B) through (C) shall be paid to the City by the Provider. A franchise fee shall not be collected on revenues received by the Provider for commercial recovered material services pursuant to Section 403.7046, Florida Statutes.

(E) *Deposits.* The Provider may collect a deposit on all new or reinstated delinquent on residential accounts in an amount of equivalent to one (1) month's collection fee. The deposit may be applied to any account not paid within thirty (30) days; or, upon request of a customer terminating service, the deposit may be applied to the customer's final billing.

(F) *Delinquent accounts: commercial and roll-off.*

(1) *Termination of service.* In the event any account is not fully paid within fifty (50) days from the billing date, the Provider may deem the account delinquent. The customer shall be sent a written notice of such delinquency by the Provider. If any delinquent account is not paid in full within ten (10) days after sending such notice, collection service may cease.

(2) *Delinquent charge.* A delinquent charge of five percent (5%) may be charged on the balance of any account remaining unpaid after sixty (60) days from the billing date.

(3) *Reinstatement of delinquent accounts.* Any delinquent account may be reinstated upon payment of the past due balance, any delinquent fee and the necessary deposit. Service to such reinstated accounts shall resume upon the next scheduled collection day after such reinstatement.

(G) *Billing.* Billing of service charges, deposits and delinquent amounts shall be accomplished as follows:

(1) *Commercial.* Multi-dwelling and business unit accounts shall be billed monthly in advance by the contractor.

## Section 12. Payments

(A) The Provider shall invoice the City no more often than once per month all charges due to Provider pursuant to this Agreement. Invoices shall be mailed to City – Attention – Finance Director, 120 Malabar Road SE, Palm Bay, FL 32907.

(B) The City may, at the City's sole option, remit payment of invoices to the Provider through the City's P-Card program.

(C) Payment to the Provider shall be made in accordance with the Florida Prompt Payment Act, as amended.

(D) The Provider shall pay to the City at least once per month any fees or other funds due to City pursuant to this Agreement or the City Code. Remittance shall be mailed to City – Attention – Finance Director, 120 Malabar Road SE, Palm Bay, FL 32907.

### Section 13. Bonds and Insurance.

(A) *Bonds.* The Provider shall furnish a Performance Bond meeting the approval of the City, each in the amount of five million dollars (\$5,000,000.00) as security for the faithful performance and payment of all the Provider's obligations under the Agreement. The Performance Bond shall remain in effect one (1) year after the date of termination of this Agreement, except as otherwise provided by law. The Performance Bond shall be furnished and provided by the surety and be executed by such sureties as (i) are licensed to conduct business in the State of Florida, and (ii) are named in the current list of Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies as published in Circular 570 (as amended) by the Audit Staff Bureau of Accounts, U.S. Treasury Department and (iii) otherwise meet the requirements of the City and as set forth herein that apply to sureties. The Performance Bond and other documents signed by an agent must be accompanied by a certified copy of the authority to act on behalf of the surety.

If the Surety on the Performance Bond furnished by the Provider is declared bankrupt or becomes insolvent or its right to conduct business in the State of Florida is terminated or it ceases to meet the requirements of clauses (i) and (ii) of paragraph above, the Provider shall within five (5) days thereafter substitute another Performance Bond and surety, both of which shall be acceptable to the City.

(B) *Liability Insurance.* The Provider shall purchase and maintain such comprehensive general liability and other insurance as will provide protection from claims set forth below which may arise out of or result from the Provider's performance of the work and the Provider's other obligations under this Agreement, whether such performance is by the Provider, by any subcontractor, by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable.

- Claims under workers' or workmen compensation, disability benefits and other similar employee benefit acts;
- Claims for damages because of bodily injury, occupational sickness or disease, or death of the Provider's employee;
- Claims for damages because of bodily injury, sickness or disease, or death of any person other than the Provider's employee;
- Claims for damages insured by personal injury liability coverage which are sustained (i) by any person as a result of an offense directly or indirectly related to the employment of such person by the Provider, or (ii) by any other person for any other reason;
- Claims for damages, other than to the work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom; and
- Claims for damages because of bodily injury or death of any person or property damage arising out of the ownership, maintenance or use of any motor vehicle.

- Claims for losses arising out of the indemnification and hold harmless clauses of the Agreement.

The insurance required by this paragraph shall include the specific coverage set forth herein and be written for not less than the limits of liability and coverage provided in Paragraph 13(D), or required by law, whichever is greater. The comprehensive general liability insurance shall include completed operations insurance. All such insurance shall contain a provision that the coverage afforded cannot be canceled, materially changed or renewal refused until at least thirty (30) days prior written notice has been given to the City. All such insurance shall remain in effect during the term of this Agreement. In addition, the Provider shall maintain such completed operations insurance for at least one (1) year after termination of this Agreement and furnish City with evidence of continuation of such insurance at final payment and one (1) year thereafter.

(C) *Contractual Liability Insurance.* The comprehensive general liability insurance required by Paragraph 13(B) will include contractual liability insurance applicable to the Provider's obligations under Paragraph 13(D). All insurance required by this Section will name the City as additional insured.

(D) Minimum insurance coverage, with limits and provisions, are as follows:

- Commercial General Liability: The Provider shall provide minimum limits of \$1,000,000.00 each occurrence, \$1,000,000.00 annual aggregate combined single limit for bodily injury and property damage liability. This shall include premises/operations, independent contractors, products, completed operations, broad form property damage, personal and advertising injury and contractual liability. This policy of insurance shall be considered primary to and not contributing with any insurance maintained by the City. The policy of insurance shall be written on an "occurrence" form.
- Automobile: The Provider shall provide minimum limits of liability of \$1,000,000.00 each accident, combined single limit for bodily injury and property damage. This shall include coverage for:
  - Owned Automobiles
  - Hired Automobiles
  - Non-Owned Automobiles
- Umbrella/Excess Liability: The Provider shall provide umbrella/excess coverage with limits of no less than \$1,000,000.00 excess of Commercial General Liability, Automobile Liability and Employers' Liability.
- Workers' Compensation: The Provider shall provide and maintain workers' compensation insurance for all employees in the full amount required by statute and full compliance with the applicable laws of the State of Florida. The policy must include Employers' Liability insurance with limits of no less than:

○ Each Accident	\$100,000.00
○ Disease – Policy Limit	\$500,000.00
○ Disease – Each Employee	\$100,000.00

The Provider shall further insure that all of its sub-contractors maintain appropriate levels of workers' compensation insurance.

(E) Other Insurance Provisions: The City is to be specifically included on all Certificates of Insurance (with exception to Workers Compensation) as additional insured. All certificates must be received prior to commencement of the work. In the event the insurance coverage expires prior to the completion of this Agreement, a renewal certificate shall be issued thirty (30) days prior to the expiration date. The certificate shall provide a thirty (30) day notification clause in the event of cancellation or modification to the policy.

(F) Deductible Clause: The Provider shall declare all self-insured retention and deductible amounts.

(G) All insurance carriers shall be rated A or better by the most recently published A.M. Best Rating Guide. Unless otherwise specified, it shall be the responsibility of the Provider to insure that all subcontractors comply with the same insurance requirements spelled out above. The City may request a copy of the insurance policy. The City reserves the right to accept or reject the insurance carrier.

(H) All Certificates of Insurance shall be approved by the City's Risk Manager prior to the commencement of any work.

#### Section 14. Indemnification

(A) *Disclaimer of Liability.* The City shall not at any time, be liable for injury or damage occurring to any person or property from any cause, whatsoever, arising out of Provider's fulfillment of this Agreement.

(B) *Indemnification.* For other and additional good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Provider agrees as follows:

The Provider shall, at its sole cost and expense to the extent of its negligence, omissions, misconduct, breach of contract or violation of applicable laws, indemnify and hold harmless the City, including but not limited to its officers, agents, contractors and subcontractors, representatives, employees, volunteers and elected and appointed officials, successors and assigns (hereinafter the "City") from or on account of all claims, damages, losses, liabilities and expenses, direct, indirect or consequential including but not limited to fees and charges of engineers, architects, attorneys, experts, consultants and other professionals and court costs arising out of or in consequence of the performance of this Agreement, by the Provider, at all trial and appellate levels. As limited above, indemnification shall specifically include but not be limited to

claims, damages, losses, liabilities and expenses arising out of or from (a) any negligence, recklessness or intentional, wrongful misconduct of the Provider, including but not limited to its agents, officers, servants, representatives and employees as well as its subcontractors and their agents, officers, servants, representatives and employees (hereafter the Provider); (b) any and all bodily injury, sickness, disease or death caused by any negligent recklessness or intentional wrongful conduct on the part of the Provider's failure to act; (c) injury to or destruction of property, including any resulting loss of use; (d) other such damages, liabilities, or losses received or sustained by any person or persons during or on account of any operations connected with the construction of this Agreement; (e) the use of any improper materials; (f) failure to timely complete the work ; (g) the violation of any federal, state, county or City laws, ordinances or regulations by Provider, its subcontractors, agents, servants, independent contractors or employees; (h) the breach or alleged breach by Provider of any term of the Agreement, including the breach or alleged breach of any guarantee. It is further understood that Provider's obligations to defend, hold harmless and indemnify shall not apply to the extent that the City is negligent, engages in willful misconduct, breaches this Agreement or violates applicable law.

Provider agrees to indemnify, defend, save and hold the City harmless from any type whatsoever, including but not limited to damages, liabilities, losses, claims, fines, costs, expenses and fees, and from any and all suits and causes of actions of every name, or description that may be brought against City, on account of any claims, fees, royalties, or costs for any invention or patent and/or for the infringement of any and all copyrights or patent rights claimed by any person, firm, or corporation.

Provider shall pay all claims, losses, liens, settlements or judgments of any nature in connection with the foregoing indemnifications including, but not limited to, reasonable attorney's fees and suit costs for trials and appeals.

Additionally, until such time as such lien or claim is satisfied, removed or discharged by Provider, all monies due to Provider, or that become due to Provider before the lien or claim is satisfied, removed or otherwise discharged, shall be held by City as security for the satisfaction, removal and discharge of such lien and any expense that may be incurred while obtaining the discharge. If Provider shall fail to do so, City shall have the right, in addition to all other rights and remedies provided by this Agreement or by law, to satisfy, remove, or discharge such lien or claim by whatever means City chooses at the entire and sole cost and expense of Provider which costs and expenses shall, without limitation, include attorney's fees, litigation costs, fees and expenses and all court costs and assessments, and which shall be deducted from any amount owing to Provider. In the event the amount due Provider is less than the amount required to satisfy Provider's obligation under this, or any other article, paragraph or section of this Agreement, the Provider shall be liable for the deficiency due the City.

## Section 15. Environmental.

The Provider and all entities claiming by, through or under the Provider, releases and discharges the City from any claim, demand, or cause of action arising out of or relating to the Provider's use, handling, storage, release, discharge, treatment, removal, transport, decontamination, cleanup, disposal and/or presence of any hazardous substances, resulting from the Provider's performance under this Agreement.

The Provider shall immediately deliver to the City Manager complete copies of all notices, demands, or other communications received by the Provider from any governmental or quasi-governmental authority or any insurance company or board of fire underwriters or like or similar entities regarding, in any manner, alleged violations or potential violations of any Environmental Law or otherwise asserting the existence or potential existence of any condition or activity resulting from the Provider's performance under this Agreement which is or could be dangerous to life, limb, property, or the environment.

For other and additional consideration, the Provider hereby agrees, at its sole cost and expense, to indemnify and protect, defend, and hold harmless, the City, including but not limited to its respective employees, agents, officials, officers, representatives, contractors and subcontractors, successors, and assigns (hereafter the "City") from and against any and all claims, demands, losses, damages, costs, expenses, including but not limited to mitigation, restoration, and natural restoration expenses, liabilities, assessments, fines, penalties, charges, administrative and judicial proceedings and orders, judgments, causes of action, in law or in equity, remedial action requirements and/or enforcement actions of any kind, including, without limitation, attorneys' fees, expert fees and suit costs for trials and appeals directly or indirectly arising out of or attributable to, in whole or in part, the Provider's use, handling, storage, release, threatened release, discharge, treatment, removal, transport, decontamination, cleanup, disposal and/or presence of a Hazardous Substance resulting from the Provider's performance under this Agreement or any of its employees, agents, invitees, contractors or subcontractors, or any other activity carried on or undertaken as a result of performance under this Agreement by or on behalf of the Provider in connection with the use, handling, storage, release, threatened release, discharge, treatment, mitigation, natural resource restoration, removal, transport, decontamination, cleanup, disposal and/or presence or any Hazardous Substance including asbestos located, transported, as a result of performance under this Agreement. This indemnity is intended to be operable under Florida law as well as under 42 U.S.C. 9607, as amended, and any successor law.

The scope of the Provider's indemnity obligations includes, but is not limited to: (a) all consequential damages; (b) the cost of any required or necessary repair, cleanup, or detoxification of the applicable real estate and the preparation and implementation of any closure, remedial or other required plan, including without limitation; (i) the costs of removal or remedial action incurred by the United States government or the State of Florida or response costs incurred by any other person, or damages from injury to, destruction of, or loss of, natural

resources, including the cost of assessing such injury, destruction, or loss, incurred pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, as amended; (ii) the clean-up costs, fines, damages, or penalties incurred pursuant to any applicable provisions of Florida law; and (iii) the cost and expenses of abatement, correction or cleanup, fines, damages, response costs, or penalties which arise from the provisions of any other statute, law, regulation, code, ordinance, or legal requirement, state or federal; and (c) liability for personal injury or property damage arising under any statutory or common law tort theory, including damages assessed for the maintenance of a public private nuisance, response costs, or for the carrying on of an abnormally dangerous activity. It is understood and agreed that the Provider shall have no obligation pursuant to this Section 15 for any obligations relating to disposal of waste at any disposal facility to which Provider is directed by the City to dispose of the City's waste

#### **Section 16. Termination and Suspension of Agreement.**

(A) *Suspension of Agreement.* The City may, for cause, suspend the work or any portion of the work for a period of not more than ninety (90) days by notice in writing to the Provider which shall fix the date on which work shall be resumed. The Provider shall resume the work on the date fixed.

(B) *Termination of Agreement.* The City retains the right to terminate this Agreement if after fifteen (15) days written notice of a breach and the failure of Provider to cure any one or more of the following events:

- If the Provider commences a voluntary bankruptcy action or a bankruptcy petition is filed against the Provider under any chapter of any Bankruptcy Code, or if the Provider takes any equivalent or similar action by filing a petition under any federal or state law relating to the bankruptcy or insolvency.
- If the Provider makes a general assignment of its assets or receivable for the benefit of creditors.
- If a trustee, receiver, custodian or agent of the Provider is appointed under applicable law or under contract, whose appointment or authority to take charge of property of the Provider is for the purpose of enforcing a lien against such property or for the purpose of general administration of such property for the benefit of the Provider's creditors.
- If the Provider persistently fails to perform the work in accordance with the Agreement, including but not limited to, failure to supply sufficient skilled workers or suitable materials or equipment or failure to adhere to the progress schedule as same may be revised from time to time.
- If the Provider repeatedly fails to make prompt payments to subcontractors or for labor, material or equipment.

- If the Provider repeatedly disregards proper safety procedures.
- If the Provider disregards any local, state or federal laws or regulations.
- If the Provider otherwise violates any provisions of this Agreement.

(C) If the Provider commits a default due to its insolvency or bankruptcy, the following shall apply:

(1) Should this Agreement be entered into and fully executed by the parties, and funds have been released to the Provider by the City, and the Provider (Debtor) files for bankruptcy, the following shall occur:

(a) In the event the Provider files a voluntary petition under 11 U.S.C. 301 or 302, or an order for relief is entered under 11 U.S.C. 303, the Provider shall acknowledge the extent, validity, and priority of the lien recorded in favor of the City. The Provider further agrees that in the event of this default, the City shall, at its option, be entitled to seek relief from the automatic stay provisions in effect pursuant to 11 U.S.C. 362. The City shall be entitled to relief from the automatic stay pursuant to 11 U.S.C. 362(d)(1) or (d)(2), and the Provider agrees to waive the notice provisions in effect pursuant to 11 U.S.C. 362 and any applicable Local Rules of the United States Bankruptcy Court. The Provider acknowledges that such waiver is done knowingly and voluntarily.

(b) Alternatively, in the event the City does not seek stay relief, or if stay relief is denied, the City shall be entitled to monthly adequate protection payments within the meaning of 11 U.S.C. 361. The monthly adequate protection payments shall each be in an amount determined in accordance with the Note and Mortgage executed by the Provider in favor of the City.

(c) In the event the Provider files for bankruptcy under Chapter 13 of Title 11, United States Code, in addition to the foregoing provisions, the Provider agrees to cure any amounts in arrears over a period not to exceed twenty-four (24) months from the date of the confirmation order, and such payments shall be made in addition to the regular monthly payments required by the Note and Mortgage. Additionally, the Provider shall agree that the City is over secured and, therefore, entitled to interest and attorneys fees pursuant to 11 U.S.C. 506(b). Such fees shall be allowed and payable as an administrative expense. Further, in the event the Provider has less than five (5) years of payments remaining on the Note, the Provider agrees that the treatment afforded to the claim of the City under any confirmed plan of reorganization shall provide that the remaining payments shall be satisfied in accordance with the Note, and that the remaining

payments or claim shall not be extended or amortized over a longer period than the time remaining under the Note.

- (2) Should this Agreement be entered into and fully executed by the parties, and the funds have not been forwarded to Provider, the following shall occur:

In the event the Provider files a voluntary petition pursuant to 11 U.S.C. 301 or 302, or an order for relief is entered under 11 U.S.C. 303, the Provider acknowledges that the commencement of a bankruptcy proceeding constitutes an event of default under the terms of this Agreement. Further, the Provider acknowledges that this Agreement constitutes an executory contract within the meaning of 11 U.S.C. 365. The Provider acknowledges that this Agreement is not capable of being assumed pursuant to 11 U.S.C. 365(c)(2), unless the City expressly consents in writing to the assumption. In the event the City consents to the assumption, the Provider agrees to file a motion to assume this Agreement within ten (10) days after receipt of written consent from the City, regardless of whether the bankruptcy proceeding is pending under Chapter 7, 11, or 13 of Title 11 of the United States Code. The Provider further acknowledges that this Agreement is not capable of being assigned pursuant to 11 U.S.C. 365(b)(1).

(D) Should the Provider's services be terminated by the City, the termination shall not affect any rights of the City against the Provider then existing or which may thereafter accrue. Any retention or payment of moneys due the Provider by the City will not release the Provider from liability.

(E) The Provider has no right, authority or ability to terminate the work except for wrongful withholding of any payments due the Provider from the City.

#### **Section 17. Breach of Contract.**

It shall be the duty of the City Manager and any officials of the City which he may designate, to observe closely the refuse collection, disposal and recycling operations and if in the opinion of the City Manager, there has been a breach of this Contract, the City Manager shall so notify the Provider, in writing, specifying the manner in which there has been a breach. If within a period of fifteen (15) days the Provider has not eliminated, or taken reasonable steps to eliminate the conditions considered to be a breach of contract, the City Manager shall so notify the City Council and a hearing shall be set for a date within ten (10) days of such notice. At that time, the City Council shall hear the Provider and the City Representatives and shall make a reasonable determination as to whether or not there has been a breach of contract, and shall direct what further action shall be taken by the City, as hereinafter provided.

The Provider and the City recognize that it is of paramount importance that the Contract be performed and the individual customers receive service. If the

Provider fails to begin work at the time specified, or fails to perform the work with sufficient number of workmen and sufficient and adequate equipment to insure the proper and substantial performance of said refuse collection work, or performs the work unsuitably, or discontinues the execution of the work or any portion thereof, or for any other cause whatsoever, excepting only acts of God, does not carry on the work as aforesaid, or if the Provider becomes insolvent or declares bankruptcy or commits any act of bankruptcy or insolvency, or allows any final judgment for the payment of money to stand against him unsatisfied, and if the City through the City Manager gives notice of such default, and the Provider or his surety fails to cure such default within fifteen (15) days after giving of such notice by the City, then the City may thereupon by action of the City Council, declare the contract cancelled. Upon such declaration of cancellation, the City may, without cost to the City or compensation to the Provider, take over the work and take possession, without further notice to the Provider and without judicial proceedings, of any and all equipment of the Provider and operate the same in the performance of the work and services described in this contract for the unexpired term of the Agreement, or for a period of three (3) months, whichever is shorter, and the Provider agrees to surrender peacefully said equipment and to assist the City in taking such possession, or the City may enter into an agreement with others for the performance of the work and services herein contracted for. In the event the City elects to take over Provider's equipment the City shall reasonably maintain such equipment and shall add Provider as an additional insured under its automobile and general liability policies. Such cancellation of the Agreement shall not relieve the Provider or the surety of liability for failure to faithfully perform this Agreement, and in case the expense incurred by the City in performing or causing to be performed, the work and services provided for in this Agreement, then the Provider (and the surety to the extent of its obligation) shall be liable to the City for said amount. Provider's surety or security will not be released until such time as the term of this Agreement would otherwise have expired.

#### **Section 18. Operation During Dispute.**

In the event the City has not cancelled the Contract in accordance with the terms provided above, and there remains a dispute between the Provider and the City, the Provider agrees to continue to operate and perform under the terms of this contract while said dispute is pending, and agrees that in the event a suit is filed for injunction or other relief to continue to operate the system until the final adjudication of the court.

#### **Section 19. Increase in County Fees.**

Refuse collected by the Provider shall be hauled to the closest disposal facility owned and operated by Brevard County. The City will assume no charges made by Brevard County for allowing the Provider to use the facility. The City, upon approval of the City Council, may authorize the Provider to increase charges in an amount not to exceed the exact amount imposed by the County as a result of the change of location of disposal sites by Brevard County.

## **Section 20. Compliance with Laws and Regulations.**

The Provider hereby agrees to abide with all applicable Federal, State, County and City laws and regulations including those falling under the National Pollutant Discharge Elimination System (NPDES). The Provider and his surety shall indemnify and save harmless the City, all of its officers, representatives, agents and employees against any claim or liability arising from, or based on violation of any such laws, ordinances, regulations, order or other decree, whether by himself, his employee or his subcontractor. This clause shall apply not only during the term of this agreement, but also as to any claim, liability or damages which are based on the Provider's conduct during the terms of this agreement and in the event the City is charged with the responsibility, jointly or severally, for the aforesaid conduct, as a successor to the Provider.

## **Section 21. Liquidated Damages.**

Should the Provider fail to perform in accordance with the provisions of this contract and/or refuses to pay liquidated damages upon receipt of invoice from the City, the City shall, in addition to the amounts provided in other provisions of this Agreement, be entitled to claim against either the Provider or the performance bond of the Provider as provided in the following amounts not as a penalty, but as liquidated damages for such breach of agreement.

- (1) Legitimate complaints (over twenty (20) per month), \$10.00/each complaint
- (2) Failure to clean up spillage from vehicles or after having emptied containers, whether on private or public streets, alleys, etc., \$25.00/each case
- (3) Failure to clean vehicles or change containers, \$25.00/each vehicle or container
- (4) Failure to keep vehicles closed or covered, \$25.00/each vehicle
- (5) Loaded vehicles left standing on the street unnecessarily, \$25.00/each vehicle
- (6) Failure to maintain schedules established and given as a requirement of this contract, in writing, to the public and to the City, \$250.00/per violation of route schedule.

Prior to claiming liquidated damages, the City shall notify Provider in writing as to the specific complaint(s) for which liquidated damages are claimed. Such notice must be provided no later than ten (10) days after the end of the month in which the complaint occurred. Provider may contest the imposition of liquidated damages by notifying the City of its intent to do so. The City Manager shall meet with Provider and reasonably resolve such protest based on available evidence.

## **Section 22. City Ordinances.**

Nothing contained in any ordinance of the City now in effect, or hereafter adopted, pertaining to the collection of refuse and trash shall in any way be construed to affect, change or nullify or otherwise alter the duties, responsibilities and operation of the Provider in the performance of the terms of this Agreement. It is the intention hereof that the Provider be required to perform strictly the terms of this Agreement, regardless of the effect or interpretation of any municipal ordinances which in any way relate to refuse.

## **Section 23. Amendments; Review.**

Amendments which are consistent with the purposes of this Agreement may be made with the mutual consent, in writing, of the parties and in accordance with the City Charter and other applicable laws and ordinances. The provisions of this contract shall be reviewed annually to determine if any amendments or additions are necessary to carry out the intent of the City and the Provider. This provision shall not apply to rates.

## **Section 24. Legal Fees.**

In the event suit is filed in a court arising out of this Agreement, and the City is the prevailing party, the Provider agrees to pay a reasonable fee to the City's attorney, together with all costs incurred in connection with said case.

## **Section 25. Limitation of Liability**

The City desires to enter into this Agreement only if in so doing the City can place a limit on the City's liability for any cause of action arising out of this Agreement, so that the City's liability for any breach never exceeds the sum of \$100.00. For other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Provider expresses its willingness to enter into this Agreement with the knowledge that the Provider's recovery from the City to any action or claim arising from the Agreement is limited to a maximum amount of \$100.00 less the amount of all funds actually paid by the City to the Provider pursuant to this Agreement. Accordingly, and notwithstanding any other term or condition of this Agreement that may suggest otherwise, the Provider agrees that the City shall not be liable to the Provider for damages in an amount in excess of \$100.00, which amount shall be reduced by the amount actually paid by the City to the Provider pursuant to this Agreement, for any action or claim arising out of this Agreement. Nothing contained in this paragraph or elsewhere in this Agreement is in any manner intended either to be a waiver of the limitation placed upon the City's liability as set forth in Section 768.28, Florida Statutes, or to extend the City's liability beyond the limits established in said Section 768.28; and no claim or award against the City shall include attorney's fees, investigative costs, extended damages, expert fees, suit costs or pre-judgment interest. Notwithstanding the foregoing, the parties agree and understand that the provisions of this Section 25 do not apply

to monies owed, if any, for services rendered to Provider by the City under the provisions of this Agreement.

#### **Section 26. Notice.**

All notices required by any of the Contract Documents shall be in writing and shall be deemed delivered upon mailing by certified mail, return receipt requested to the following:

To the City:

City Manager  
City of Palm Bay  
120 Malabar Road, SE  
Palm Bay, Florida 32907

To the Provider:

David McConnell  
Vice President  
Waste Management  
6501 Greenland Road  
Jacksonville, FL

Copy to:

Legal Department  
Waste Management  
2700 Wiles Road  
Pompano Beach, FL 33073

#### **Section 27. Force Majeure**

No Party shall hold the other responsible for damages or for delays in performance caused by force majeure, acts of God, or other acts or circumstances beyond the control of either party or that could not have been reasonably foreseen and prevented. For this purpose, such acts or circumstances shall include, but not be limited to, hurricanes, tropical storms and weather conditions affecting performance, floods, epidemics, war, riots, strikes, lockouts, or other industrial disturbances, or protest demonstrations. Should such acts or circumstances occur, the parties shall use their best efforts to overcome the difficulties arising therefrom and to resume the work as soon as reasonably possible with the normal pursuit of the work.

The acts or omissions of subcontractors, third-party contractors, materialmen, suppliers or their subcontractors, shall not be considered acts of force majeure.

No Party shall be liable for its failure to carry out its obligations under the Agreement during a period when such Party is rendered unable by force majeure to carry out its obligation, but the obligation of the Party or Parties

relying on such force majeure shall be suspended only during the continuance of the inability and for no longer period than the force majeure event.

The Provider further agrees and stipulates that its right to excuse its failure to perform by reason of force majeure shall be conditioned upon giving written notice of its assertion that a Force Majeure delay has commenced within 96 hours after such an occurrence. The Provider shall use its reasonable efforts to minimize such delays. The Provider shall promptly provide an estimate as to the resumption of work.

#### **Section 28. Severability.**

If any article or section of this Agreement or of any supplements or riders thereto, should be held invalid by operation of law or by any tribunal of competent jurisdiction, or if compliance with or enforcement of any article or section should be restrained by such tribunal pending a final determination as to its validity, the remainder of this agreement and any supplements or riders thereto, or the application of such article or section to persons or circumstances other than those to which it has been held invalid or as to which compliance with or enforcement of has been restrained, shall not be affected thereby.

#### **Section 29. Annual Rate Adjustments.**

(A) Adjustments to the rate schedule – The fees payable to the Provider, beginning on October 1, 2011 shall be adjusted upward or downward to reflect changes in the cost of doing business as measured by fluctuations in the Consumer Price Index, Bureau of Labor and Statistics, National Index All Items (CPI), and the average price of fuel for the Lower Atlantic No. 2 Diesel Retail Sales (Diesel Index) by All Sellers (reported by the Energy Information Association as series DDROIZ). In the event either indicator is discontinued, a new index mutually agreed upon by the City and the Provider may be utilized.

(B) CPI – On October 1, 2011 and every twelve (12) month interval thereafter, ninety percent (90%) of the monthly collection fees or compensation to the Provider shall be increased or decreased in a percentage amount equal to one hundred percent (100%) of the net percentage change in the said CPI. The net percentage change in the above CPI will be calculated as the percentage change in the CPI for the average of the twelve (12) month period ending June 30th, 2011 and every June 30th thereafter, compared to the average of the previous twelve (12) month period.

Example of CPI Calculation: (The example below is intended for demonstration purposes only, and should not be interpreted as Actual CPI Values)

Average CPI value for the combined 12 months from July 1<sup>st</sup> 2009 through June 30<sup>th</sup> 2010 = 657.99

Average CPI value for the combined 12 months from July 1<sup>st</sup> 2010 through June 30<sup>th</sup> 2011 = 646.15

$$=657.99-646.15 = 11.84 =11.84/646.15 = 1.8\%$$

(C) Diesel Index - On October 1, 2011 and every twelve (12) month interval thereafter, ten percent (10%) of the monthly collection fees or compensation to the Provider shall be increased or decreased in a percentage amount equal to one hundred percent (100%) of the net percentage change in the said Diesel Index. The net percentage change in the above Diesel Index will be calculated as the percentage change in the Diesel Index for the twelve (12) month period ending June 30th, 2011 and every June 30th thereafter, compared to the average of the previous twelve (12) month period.

Example of Diesel Index Calculation: (The example below is intended for demonstration purposes only, and should not be interpreted as Actual Diesel Collection Values)

Average Diesel Index value for the combined 12 months from July 1st 2009 through June 30th 2010 = 260.43

Average Diesel Index value for the combined 12 months from July 1<sup>st</sup> 2010 through June 30<sup>th</sup> 2011 = 254.28

$$=260.43 - 254.28 = 6.15 =6.15/254.28 = 2.4\%$$

Collection Rate Adjustment Example: (The table below is intended for demonstration purposes only, and should not be interpreted as Actual Collection Rates)

Collection Rate Component	Weight	Weight applied to collection rate	Source	Twelve Month Avg. Change in Index	Adjusted rate	Change Effective
Other than Fuel and Oil	90%	\$ 8.11	CPI	1.8%	\$ 8.26	October 1st
Fuel and Oil	10%	\$ .90	Diesel Index	2.4%	\$ .92	October 1st
Current Rate Total		\$ 9.01		New Rate Total	\$ 9.18	October 1st

### Section 30. Change in Law.

The Provider may petition the City Council for rate adjustments at on the basis of unusual and extraordinary changes in the Provider's cost of doing business due to revised laws, ordinances or regulations. Any such request shall be supported by full documentation establishing the increase in operating costs and the reasons therefor. The City shall be entitled to audit the Provider's financial and operational records directly related to the Provider's request in order to verify the increase in costs and the reasons therefor. The City Council may grant the request in whole or in part or may deny the request in its entirety. The City Council may impose reasonable conditions on any relief granted. The City Council's decision shall be final.

### **Section 31. Term of Contract.**

The term of this Agreement shall be for a period commencing on October 1, 2010, and continuing through September 30, 2020. This Agreement shall be automatically renewed for additional five (5) year periods unless either party shall give written notice of nonrenewal at least one hundred twenty (120) days prior to the end of the initial term of one (1) of the five (5) year renewal terms.

### **Section 32. Patent Fees and Royalties.**

The Provider shall pay all license fees and royalties and assume all costs incident to the use in the performance of the work or the incorporation into the work, or any invention, design, process, product or device which is the subject of patent rights or copyrights held by others.

### **Section 33. Permits.**

The Provider shall obtain and pay for all permits and licenses. The Provider shall pay all government charges which are applicable at the time of opening of proposals. It shall be the responsibility of the Provider to secure and pay for all necessary licenses and permits of a permanent or temporary nature necessary for the prosecution and completion of the work.

### **Section 34. Taxes.**

The Provider shall pay all sales, consumer, use and other similar taxes required to be paid by him in accordance with all laws.

### **Section 35. Governing Law; Venue; Waiver of Jury Trial**

The rights of the Parties hereto shall be construed and subject to the jurisdiction in accordance with the laws of the State of Florida. The Parties hereby waive the right to a trial by jury in any action, proceeding or counterclaim brought or filed by either of them against the other. Venue for any suit filed arising out of this Agreement shall be in Brevard County, Florida.

### **Section 36. Miscellaneous Provisions.**

(A) The duties and obligations imposed by this Agreement and the rights and remedies available to the parties and, in particular but without limitation, the warranties, guaranties and obligations imposed upon the Provider and all of the rights and remedies available to the City, are in addition to, and are not to be construed in any manner as a limitation of any rights and remedies available to any or all of them that are otherwise imposed or available by laws or regulations, by special warranty or guarantee or by other provisions of the

Contract Documents. The provisions of this Paragraph will survive final payment and termination or completion of this Agreement.

(B) The Provider shall not assign or transfer this Agreement or its rights, title or interests. The obligations undertaken by the Provider pursuant to this Agreement shall not be delegated or assigned to any other person or firm. Violation of the terms of this Paragraph shall constitute a material breach of Agreement by the Provider and the City may, at its discretion, cancel this Agreement and all rights, title and interest of the Provider which shall immediately cease and terminate.

(C) The Provider and its employees, agents, representatives, officers, volunteers and agents shall be and remain an independent contractors and not agents or employees of the City with respect to all of the acts and services performed by and under the terms of this Agreement. This Agreement shall not in any manner be construed to create a partnership, association or any other kind of joint undertaking or venture between the Parties.

(D) The Provider's employees are required to obtain, at no charge, from the City's Human Resources Department, a security identification badge prior to performance of its awarded contract. This law is established by the City Council through the City Ordinance Number 2007-48, Public Protection Act, as amended by City Ordinance Number 2007-96, with an effective date of November 15, 2007.

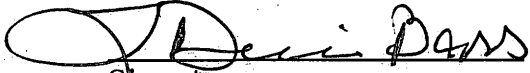
(E) The City reserves the right to audit the records of the Provider relating in any way to the work to be performed pursuant to this Agreement at any time during the performance and term of this Agreement and for a period of three (3) years after completion and acceptance by the City. If required by the City, the Provider agrees to submit to an audit by an independent certified public accountant selected by the City. The Provider shall allow the City to inspect, examine and review the records of the Provider at any and all times during normal business hours during the term of this Agreement.

(F) The remedies expressly provided in this Agreement to the City shall not be deemed to be exclusive but shall be cumulative and in addition to all other remedies in favor of the City now or later existing at law or in equity.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed as follows:

WITNESSES:


COMPANY NAME

  
Signature

  
Signature, Authorized Agent

L. Derive Doss  
Printed/Typed Name


R D M Connell  
Printed/Typed Name


  
Signature

Mi-lim Chun  
Printed/Typed Name

ATTEST:

CITY OF PALM BAY, FLORIDA

  
City Clerk  
6.4.10

  
Lee R. Feldman  
City Manager

APPROVED AS TO FORM:

City Attorney 

Dated: 6/9/2010