

City and County of San Francisco
Office of Contract Administration
Purchasing Division
City Hall, Room 430
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4685

Memorandum of Understanding
For
Refuse Collection
Between the
City and County of San Francisco and Recology Sunset Scavenger Company, Recology
Golden Gate and Recology San Francisco

This Agreement is made this 1st day of July, 2013, in the City and County of San Francisco, State of California, by and between: Recology Sunset Scavenger Company, Recology Golden Gate and Recology San Francisco, hereinafter referred to collectively as the "Companies" or the "Contractors" and each a "Company" or "Contractor" and the City and County of San Francisco, a municipal corporation, hereinafter referred to as the "City" or the "Purchaser," acting by and through its Director of the Office of Contract Administration (the "Director") or the Director's designated agent, hereinafter referred to as "Purchasing." The City and the Companies are collectively referred to herein as the "Parties" and each a "Party".

Recitals

WHEREAS, the City wishes to obtain refuse collection services for the City Departments; and,

WHEREAS, the Companies jointly and severally represent and warrant that they are qualified to perform the services required by the City as set forth under this Contract; and,

Now, THEREFORE, the parties agree as follows:

1. Certification of Funds; Budget and Fiscal Provisions; Termination in the Event of Non-Appropriation. This Agreement is subject to the budget and fiscal provisions of the City's Charter. Charges will accrue only after prior written authorization certified by the Controller, and the amount of City's obligation hereunder shall not at any time exceed the amount certified for the purpose and period stated in such advance authorization. This Agreement will terminate without penalty, liability or expense of any kind to City at the end of any fiscal year if funds are not appropriated for the next succeeding fiscal year. If funds are appropriated for a portion of the fiscal year, this Agreement will terminate, without penalty, liability or expense of any kind at the end of the term for which funds are appropriated. City has no obligation to make appropriations for this Agreement in lieu of appropriations for new or other agreements. City budget decisions are subject to the discretion of the Mayor and the Board of Supervisors. Each Contractor's

assumption of risk of possible non-appropriation is part of the consideration for this Agreement. Notwithstanding the provisions of this paragraph, following the termination of this Agreement pursuant to the provisions of this Section 1, the City shall remain obligated to pay the Companies for any Services performed by the Companies or other liabilities incurred by the City prior to the termination of this Agreement except to the extent that such obligations are otherwise specifically limited by the provisions of this Agreement.

Nothing in this Section 1 or elsewhere in this Agreement shall affect the obligations of the City and the Companies as may otherwise be provided by law, ordinance or agreement except as to matters specifically governed by this Agreement.

THIS SECTION CONTROLS AGAINST ANY AND ALL OTHER PROVISIONS OF THIS AGREEMENT.

2. Term of the Agreement. Subject to Section 1, the term of this Agreement shall be from July 1, 2013 to June 30, 2014.

3. Effective Date of Agreement. This Agreement shall become effective when the Controller has certified to the availability of funds and the Contractors have been notified in writing.

4. Services Contractor Agrees to Perform.

a. Services. The Companies jointly and severally agree to perform the services as provided for in Appendix A (hereinafter referred to as "Services") attached hereto and incorporated by reference as though fully set forth herein. Notwithstanding any other provision of this Agreement, the Companies shall not be required to perform any Services unless the City has appropriated funds for the provision of such Services. The Services as set forth in Appendix A may be modified from time to time as agreed to in writing by the Parties. Except as specifically provided in this Agreement, the Contractors shall secure, provide, supply and maintain all labor, materials, supplies and equipment necessary to perform the Services, including without limitation, containers and trucks.

b. Other Agreements. This Agreement shall supersede all other outstanding contracts between the Companies and any City Department with regard to the provision of the Services, except for (i) the 1988 Facilitation Agreement between the City and Sanitary Fill Company (now SF Recycling & Disposal Company, Inc.), (ii) the 1987 Waste Disposal Agreement among the Oakland Scavenger Company, the City and Sanitary Fill Company and (iii) the Agreement between the Treasure Island Development Authority ("Treasure Island") and Golden Gate Disposal & Recycling Company (the "TI Development Agreement") as it relates to services that are provided for the City. Notwithstanding the preceding, if the Treasure Island Development Authority is assumed by the City and TI Development Agreement is terminated, the Contractor may provide services to the Treasure Island Development Authority under the terms of this Agreement.

5. Compensation.

- a. Timing of Payments: Limit. Compensation shall be made in monthly payments on or before the last day of each month for Services, as set forth in Section 4 of this Agreement, that have been performed as of the last day of the immediately preceding month. In no event shall the amount of this Agreement exceed six million dollars and no cents (\$6,000,000).
- b. Rates and Discounts. The initial Service rates associated with this Agreement appear in Appendix A1 (the "Rate Books") attached hereto and incorporated by reference as though fully set forth herein. The services charges for each account are calculated using the container charges in the Rate Books. Ninety five percent of the charges for container service are eligible for a recycling and composting volume discount. Premium services (e.g. key, distance and elevation) are not subject to a discount. The recycling and composting volume discount is equal to the percentage of recyclables and compostables service volume relative to total service volume up to a maximum discount of 75%.
- c. Provision of Services. No charges shall be incurred under this Agreement nor shall any payments become due to any Contractor until the services to which such payments relate are received from such Contractor and the related billings are approved by the City Department head as being in accordance with this Agreement. Upon prior written notice to the applicable Company setting forth the nature of Company's failure under this Agreement, a City Department may withhold payment to Contractor in any instance in which such Contractor has failed or refused to satisfy any material obligation provided for under this Agreement in connection with such City Department.
- d. Liability for Late Payment. In no event shall City be liable for interest or late charges for any late payments.

6. Guaranteed Maximum Costs. The City's obligation hereunder shall not at any time exceed the amount certified by the Controller for the purpose and period stated in such certification. Except as may be provided by laws governing emergency procedures, officers and employees of the City are not authorized to request, and the City is not required to reimburse any of the Contractors for Services beyond the agreed upon contract scope unless the changed scope is authorized by amendment and approved as required by law. Officers and employees of the City are not authorized to offer or promise, nor is the City required to honor, any offered or promised additional funding in excess of the maximum amount of funding for which the contract is certified without certification of the additional amount by the Controller. The Controller is not authorized to make payments on any contract for which funds have not been certified as available in the budget or by supplemental appropriation.

Notwithstanding any other provision of this Section 6, the City agrees to pay the Companies for any Services specifically requested by any City Department or City agency, including variable services, extension of services, unforeseen services and any new services agreed to be provided to the City by the Companies; provided: (1) that, this Agreement has been modified in accordance with Section 49 to cover such Services and, (2) the Controller has certified the amount of funds for the purpose and period covered by the modification.

7. Payment; Invoice Format.

- a. Invoices furnished by each Contractor under this Agreement must be in a form acceptable to the Controller, and must include a unique invoice number. If feasible, a single blanket Purchase Order will be used for all of the Services and

the Contractors will bill Services to the individual City Departments (e.g. Department of Public Works, Public Utilities Commission, Parks and Recreation, Port of San Francisco) under the blanket Purchase Order. The Contractors shall invoice individual City Departments and include the following information in a manner specified by the Purchaser:

- i) Frequency of collection (collection day(s))
- ii) Size of each collection container
- iii) Type (recyclables, compostable or trash)
- iv) Quantity of each collection container type
- v) Charges associated with container service each
- vi) Any premium services (e.g. key, heavy, distance) and associated charges
- vii) The individual service volume of trash, recyclables and compostables and the resulting diversion rate and discount by volume
- viii) For roll-off containers (compactors and debris boxes), the Companies shall include the number of times each roll-off container was collected in the reporting period (pulled) and associated charges

- b. All amounts paid by City to the Companies shall be subject to audit by City. The City is exempt from federal taxes except for articles for resale. The Contractor will enter state and local sales or use taxes and other excise taxes, if applicable, on invoices; provided that, the City shall pay no more than the amounts set forth in Section 6 and provided further that any such taxes charged to the City shall be included in the guaranteed maximum cost under Section 6. Payment shall be made by City to each Contractor at the address specified in the Section 26 entitled "Notices to the Parties" or to such other addresses as shall be specified by the applicable Contractor upon written notice to the City.

8. Submitting False Claims; Monetary Penalties. Pursuant to San Francisco Administrative Code §21.35, any contractor, subcontractor or consultant who submits a false claim shall be liable to the City for the statutory penalties set forth in that section. The text of Section 21.35, along with the entire San Francisco Administrative Code is available on the web at http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:sanfrancisco_ca. A contractor, subcontractor or consultant will be deemed to have submitted a false claim to the City if the contractor, subcontractor or consultant: (a) knowingly presents or causes to be presented to an officer or employee of the City a false claim or request for payment or approval; (b) knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the City; (c) conspires to defraud the City by getting a false claim allowed or paid by the City; (d) knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the City; or (e) is a beneficiary of an inadvertent submission of a false claim to the City, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the City within a reasonable time after discovery of the false claim.

9. Omitted.

10. Taxes

a. Payment of any taxes, including possessory interest taxes and California sales and use taxes, levied upon or as a result of this Agreement, or the services delivered pursuant hereto, shall be the obligation of Contractor; provided, however, that in the event that a sales or similar tax is levied on a provision of any Service by the Contractor, the Contractor may collect from the City the amount of any such sales or similar tax.

b. Contractor recognizes and understands that this Agreement may create a "possessory interest" for property tax purposes. Generally, such a possessory interest is not created unless the Agreement entitles the Contractor to possession, occupancy, or use of City property for private gain. If such a possessory interest is created, then the following shall apply:

1) Contractor, on behalf of itself and any permitted successors and assigns, recognizes and understands that Contractor, and any permitted successors and assigns, may be subject to real property tax assessments on the possessory interest;

2) Contractor, on behalf of itself and any permitted successors and assigns, recognizes and understands that the creation, extension, renewal, or assignment of this Agreement may result in a "change in ownership" for purposes of real property taxes, and therefore may result in a revaluation of any possessory interest created by this Agreement. Contractor accordingly agrees on behalf of itself and its permitted successors and assigns to report on behalf of the City to the County Assessor the information required by Revenue and Taxation Code section 480.5, as amended from time to time, and any successor provision.

3) Contractor, on behalf of itself and any permitted successors and assigns, recognizes and understands that other events also may cause a change of ownership of the possessory interest and result in the revaluation of the possessory interest. (see, e.g., Rev. & Tax. Code section 64, as amended from time to time). Contractor accordingly agrees on behalf of itself and its permitted successors and assigns to report any change in ownership to the County Assessor, the State Board of Equalization or other public agency as required by law.

4) Contractor further agrees to provide such other information as may be requested by the City to enable the City to comply with any reporting requirements for possessory interests that are imposed by applicable law.

11. Payment Does Not Imply Acceptance of Work. The granting of any payment by City, or the receipt thereof by any of the Contractors, shall in no way lessen the liability of each Contractor to replace unsatisfactory work, equipment, or materials, although the unsatisfactory character of such work, equipment or materials may not have been apparent or detected at the time such payment was made. Materials, equipment, components, or workmanship that do not conform to the requirements of this Agreement may be rejected by City and in such case must be replaced by Contractor without delay.

12. Qualified Personnel. Work under this Agreement shall be performed only by competent personnel under the supervision of and in the employment of Contractor. Contractor will comply with City's reasonable requests regarding assignment of personnel, but all personnel, including those assigned at City's request, must be supervised by Contractor. Contractor shall commit adequate resources to complete the project within the project schedule specified in this Agreement. Each Contractor shall, at all times, adhere to all applicable local, state and federal health and safety requirements concerning workers in its employ.

13. Responsibility for Equipment. City shall not be responsible for any damage to persons or property as a result of the use, misuse or failure of any equipment used by Contractor, or by any of its employees, even though such equipment be furnished, rented or loaned to Contractor by City. Upon written notification from the City, each Contractor shall promptly repair, at no cost to the City, any damage that the City and the Contractor reasonable determine that the Contractor has caused to property of the City. Nothing in this Section 13 shall limit the Contractor's obligations under Section 16.

14. Independent Contractor; Payment of Taxes and Other Expenses

a. **Independent Contractor.** Each Contractor or any agent or employee of each Contractor shall be deemed at all times to be an independent contractor and is wholly responsible for the manner in which it performs the services and work requested by City under this Agreement. Each Contractor or any agent or employee of each Contractor shall not have employee status with City, nor be entitled to participate in any plans, arrangements, or distributions by City pertaining to or in connection with any retirement, health or other benefits that City may offer its employees. Each Contractor or any agent or employee of each Contractor is liable for the acts and omissions of itself, its employees and its agents. Each Contractor shall be responsible for all obligations and payments, whether imposed by federal, state or local law, including, but not limited to, FICA, income tax withholdings, unemployment compensation, insurance, and other similar responsibilities related to Contractor's performing services and work, or any agent or employee of each Contractor providing same. Nothing in this Agreement shall be construed as creating an employment or agency relationship between City and any Contractor or any agent or employee of Contractor. Any terms in this Agreement referring to direction from City shall be construed as providing for direction as to policy and the result of each Contractor's work only, and not as to the means by which such a result is obtained. City does not retain the right to control the means or the method by which any Contractor performs work under this Agreement.

b. **Payment of Taxes and Other Expenses.** Should City, in its discretion, or a relevant taxing authority such as the Internal Revenue Service or the State Employment Development Division, or both, determine that any Contractor is an employee for purposes of collection of any employment taxes, the amounts payable under this Agreement shall be reduced by amounts equal to both the employee and employer portions of the tax due (and offsetting any credits for amounts already paid by that Contractor which can be applied against this liability). City shall then forward those amounts to the relevant taxing authority. Should a relevant taxing authority determine a liability for past services performed by any Contractor for City, upon notification of such fact by City, Contractor shall promptly remit such amount due or arrange with City to have the amount due withheld from future payments to such Contractor under this Agreement (again, offsetting any amounts already paid by such Contractor which can be applied as a credit against such liability). A determination of employment status pursuant to the preceding two paragraphs shall be solely for the purposes of the particular tax in question, and for all other purposes of this Agreement, none of the Contractors shall be considered an employee of City. Notwithstanding the foregoing, should any court, arbitrator, or administrative authority determine that such Contractor is an employee for any other purpose, then such Contractor agrees to a reduction in City's financial liability so that City's total expenses under this Agreement are not greater than they would have been had the court, arbitrator, or administrative authority determined that such Contractor was not an employee.